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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 2013

MARCH 5 THROUGH JUNE 4, 2014

TOGETHER WITH OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

CHRISTINE LUCHOK FALLON

REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

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SUPREME COURT OF THE UNITED STATES

Allotment of Justices

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

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

For the First Circuit, Stephen Breyer, Associate Justice.

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

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

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

For the Fifth Circuit, Antonin Scalia, Associate Justice.

For the Sixth Circuit, Elena Kagan, Associate Justice.

For the Seventh Circuit, Elena Kagan, Associate Justice.

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

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

For the Tenth Circuit, Sonia Sotomayor, Associate Justice.

For the Eleventh Circuit, Clarence Thomas, Associate Justice.

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

September 28, 2010.

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

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2013

LOZANO *v.* MONTOYA ALVAREZ

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

No. 12–820. Argued December 11, 2013—Decided March 5, 2014

When one parent abducts a child and flees to another country, the other parent may file a petition in that country for the return of the child pursuant to the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention or Convention). If the parent files a petition within one year of the child's removal, a court "shall order the return of the child forthwith." But when the petition is filed after the 1-year period expires, the court "shall . . . order the return of the child, unless it is demonstrated that the child is now settled in its new environment."

Respondent Montoya Alvarez and petitioner Lozano resided with their daughter in London until November 2008, when Montoya Alvarez left with the child for a women's shelter. In July 2009, Montoya Alvarez and the child left the United Kingdom and ultimately settled in New York. Lozano did not locate Montoya Alvarez and the child until November 2010, more than 16 months after Montoya Alvarez and the child had left the United Kingdom. At that point, Lozano filed a Petition for Return of Child pursuant to the Hague Convention in the Southern District of New York. Finding that the petition was filed more than one year after removal, the court denied the petition on the basis that the child was now settled in New York. It also held that the 1-year period could not be extended by equitable tolling. The Second Circuit affirmed.

Syllabus

Held: Article 12's 1-year period is not subject to equitable tolling. Pp. 10–18.

(a) The doctrine of equitable tolling, as applied to federal statutes of limitations, extends an otherwise discrete limitations period set by Congress. Thus, whether tolling is available is fundamentally a question of statutory intent. Because Congress "legislate[s] against a background of common-law adjudicatory principles," *Astoria Fed. Sav. & Loan Assn.* v. *Solimino*, 501 U. S. 104, 108, including equitable tolling, see *Holmberg* v. *Armbrecht*, 327 U. S. 392, 397, equitable tolling is presumed to apply if the period in question is a statute of limitations and if tolling is consistent with the statute, *Young* v. *United States*, 535 U. S. 43, 49–50. Pp. 10–11.

(b) In assessing whether equitable tolling applies to treaties, which are "'compact[s] between independent nations,'" *Medellín* v. *Texas*, 552 U. S. 491, 505, this Court's "duty [i]s to ascertain the intent of the parties" by looking to the document's text and context, *United States* v. *Choctaw Nation*, 179 U. S. 494, 535. The parties to the Hague Convention did not intend equitable tolling to apply to Article 12's 1-year period. Pp. 11–18.

(1) There is no general presumption that equitable tolling applies to treaties. Though part of the established backdrop of American law, equitable tolling has no proper role in the interpretation of treaties unless that principle is shared by the parties to the "agreement among sovereign powers," *Zicherman* v. *Korean Air Lines Co.*, 516 U. S. 217, 226. Lozano has identified no such shared principle among the Convention signatories, and the courts of several signatories have explicitly rejected equitable tolling of the Convention. Thus, the American presumption does not apply to this multilateral treaty. The International Child Abduction Remedies Act, 42 U. S. C. §§ 11601–11610, which Congress enacted to implement the Convention, neither addresses the availability of equitable tolling nor purports to alter the Convention, and therefore does not affect this conclusion. Pp. 11–13.

(2) Even if the Convention were subject to a presumption that statutes of limitations may be tolled, Article 12's 1-year period is not a statute of limitations. Statutes of limitations embody a "policy of repose, designed to protect defendants," *Burnett* v. *New York Central R. Co.*, 380 U. S. 424, 428, and foster the "elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities," *Rotella* v. *Wood*, 528 U. S. 549, 555. Here, the remedy the Convention affords the left-behind parent—return of the child—continues to be available after one year, thus preserving the possibility of relief for that parent and preventing repose for the abducting parent. The period's expiration also does not establish certainty about the par-

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ties' respective rights. Instead, it opens the door to consideration of a third party's interests, *i. e.*, the child's interest in settlement. Because that is not the sort of interest addressed by a statute of limitations, the 1-year period should not be treated as a statute of limitations. *Young*, *supra*, at 47, distinguished. Pp. 13–15.

(3) Without a presumption of equitable tolling, the Convention does not support extending the 1-year period during concealment. Article 12 explicitly provides for the period to commence on "the date of the wrongful removal or retention" and makes no provision for an extension. Because the drafters did not choose to delay the period's commencement until discovery of the child's location—the obvious alternative to the date of wrongful removal—the natural implication is that they did not intend to commence the period on that later date. Lozano contends that equitable tolling is nonetheless consistent with the Convention's goal of deterring child abductions, but the Convention does not pursue that goal at any cost, having recognized that the return remedy may be overcome by, *e. g.*, the child's interest in settlement. And the abducting parent does not necessarily profit by running out the clock, since both American courts and other Convention signatories have considered concealment as a factor in determining whether a child is settled. Equitable tolling is therefore neither required by the Convention nor the only available means to advance its objectives. Pp. 15–17.

(4) Lozano contends that there is room for United States courts to apply equitable tolling because the Convention recognizes that other sources of law may permit signatory states to return abducted children even when return is not available or required by the Convention. But this contention mistakes the nature of equitable tolling, which may be applied to the Hague Convention only if the treaty drafters so intended. For the foregoing reason, they did not. Pp. 17–18.

697 F. 3d 41, affirmed.

THOMAS, J., delivered the opinion for a unanimous Court. ALITO, J., filed a concurring opinion, in which BREYER and SOTOMAYOR, JJ., joined, *post*, p. 18.

Shawn Patrick Regan argued the cause for petitioner. With him on the briefs were *John R. Hein*, *Michael B. Kruse*, and *Ryan A. Shores.*

Lauren A. Moskowitz argued the cause for respondent. With her on the brief were *Rachel G. Skaistis* and *Carrie R. Bierman.*

Ann O'Connell argued the cause for the United States as *amicus curiae* urging affirmance. With her on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Delery*, *Deputy Solicitor General Kneedler*, and *Mark B. Stern.**

JUSTICE THOMAS delivered the opinion of the Court.

When a parent abducts a child and flees to another country, the Hague Convention on the Civil Aspects of International Child Abduction generally requires that country to return the child immediately if the other parent requests return within one year. The question in this case is whether that 1-year period is subject to equitable tolling when the abducting parent conceals the child's location from the other parent. We hold that equitable tolling is not available.

I

To address "the problem of international child abductions during domestic disputes," *Abbott* v. *Abbott*, 560 U. S. 1, 8 (2010), in 1980 the Hague Conference on Private International Law adopted the Convention on the Civil Aspects of International Child Abduction (Hague Convention or Convention), Oct. 25, 1980, T. I. A. S. No. 11670, S. Treaty Doc. No. 99–11 (Treaty Doc.). The Convention states two primary objectives: "to secure the prompt return of children wrongfully removed to or retained in any Contracting

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*Briefs of *amici curiae* urging reversal were filed for A Child Is Missing, Inc., et al. by *Joseph J. Saltarelli*; for the International Academy of Matrimonial Lawyers by *Cheryl Hepfer* and *Gerald L. Nissenbaum*; for the Mexican Association for Abducted and Missing Children by *Victor Mordey*; and for the National Center for Missing and Exploited Children by *Douglas Hallward-Driemeier* and *Preston Findlay.*

Brian R. Matsui and *Joan S. Meier* filed a brief for the Domestic Violence Legal Empowerment & Appeals Project et al. as *amici curiae* urging affirmance.

Stephen J. Cullen and *Kelly A. Powers* filed a brief for Reunite International Child Abduction Centre as *amicus curiae.*

State," and "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." Art. 1, *id.*, at 7.

To those ends, the Convention's "central operating feature" is the return of the child. *Abbott*, 560 U. S., at 9. That remedy, in effect, lays venue for the ultimate custody determination in the child's country of habitual residence rather than the country to which the child is abducted. See *id.*, at 20 ("The Convention is based on the principle that the best interests of the child are well served when decisions regarding custody rights are made in the country of habitual residence").

The return remedy is not absolute. Article 13 excuses return where, for example, the left-behind parent was not "actually exercising" custody rights when the abducting parent removed the child, or where there is a "grave risk" that return would "place the child in an intolerable situation." Hague Convention, Arts. 13(a)–(b), Treaty Doc., at 10. A state may also refuse to return the child if doing so would contravene "fundamental principles . . . relating to the protection of human rights and fundamental freedoms." Art. 20, *id.*, at 11.

This case concerns another exception to the return remedy. Article 12 of the Convention states the general rule that when a court receives a petition for return within one year after the child's wrongful removal, the court "shall order the return of the child forthwith." *Id.*, at 9. Article 12 further provides that the court,

> "where the proceedings have been commenced after the expiration of the period of one year [from the date of the wrongful removal], shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment." *Ibid.*

Thus, at least in some cases, failure to file a petition for return within one year renders the return remedy unavailable.

The United States ratified the Hague Convention in 1988, and Congress implemented the Convention that same year through the International Child Abduction Remedies Act (ICARA). 102 Stat. 437, 42 U. S. C. §§ 11601–11610. That statute instructs courts to "decide the case in accordance with the Convention." § 11603(d). Echoing the Convention, ICARA further provides that "[c]hildren who are wrongfully removed . . . are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies." § 11601(a)(4). Finally, ICARA requires the abducting parent to establish by a preponderance of the evidence that Article 12's exception to return applies. § 11603(e)(2)(B).

II

Diana Lucia Montoya Alvarez and Manuel Jose Lozano are the parents of the girl at the center of this dispute.[1] Montoya Alvarez and Lozano met and began dating in London in early 2004. Montoya Alvarez gave birth to a daughter in October 2005.

Montoya Alvarez and Lozano describe their relationship in starkly different terms. Lozano stated that they were "'very happy together,'" albeit with "normal couple problems." *In re Lozano*, 809 F. Supp. 2d 197, 204 (SDNY 2011). Montoya Alvarez described a pattern of physical and emotional abuse that included multiple incidents of rape and battery. The District Court found insufficient evidence to make specific findings about domestic violence but determined that Lozano's claim that he never mistreated Montoya Alvarez was "not credible." *Id.*, at 206.

The parties also differ as to the child's well-being during the first three years of her life. Lozano stated that he and the child had a very good relationship, and that the child was

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[1] Except where otherwise noted, the facts are taken from the District Court's findings. Like the courts below, we refer to Montoya Alvarez and Lozano's daughter as "the child" to protect her identity.

generally happy. Montoya Alvarez believed otherwise. In October 2008, Montoya Alvarez reported to the child's doctor that she refused to speak at the nursery she attended, cried often, and wet the bed. Montoya Alvarez also stated that the child refused to speak when Lozano was present. The child's nursery manager wrote that the girl was "'very withdrawn,'" and noted that the home "'environment obviously had a negative effect'" on her. *Id.*, at 207. The District Court found insufficient evidence that Lozano had physically abused the child, but did conclude that the child had seen and heard her parents arguing at home.

In November 2008, when the child was just over three years old, Montoya Alvarez went to New York to visit her sister Maria. During that time, the child remained in London with Lozano and his visiting mother. When Montoya Alvarez returned on November 18, she became acutely concerned about the child's fearful behavior around Lozano. The next day, Montoya Alvarez left with the child and never returned.

Montoya Alvarez and the child lived at a women's shelter for the next seven months. After Montoya Alvarez was unable to find suitable long-term accommodations in the United Kingdom, she and the child left for France on July 3, 2009, and then for the United States, arriving five days later. Since their arrival, Montoya Alvarez and the child have lived with Montoya Alvarez' sister Maria and her family in New York.

When they arrived in New York, Montoya Alvarez and the child began seeing a therapist at a family medical clinic. The therapist testified that, at first, the child was withdrawn and would wet herself. The therapist diagnosed her with posttraumatic stress disorder. Within six months, however, the therapist described her as "'a completely different child,'" who had stopped wetting herself, was excited to play with friends, and was able to speak freely about her emotions. *Id.*, at 212. When Montoya Alvarez and the child

returned to the therapist after Lozano filed a petition for the child's return, the therapist noted that the child was doing well but did not wish to see her father.

In the meantime, Lozano attempted to find Montoya Alvarez and the child. Shortly after Montoya Alvarez left in November 2008, he called her sister Gloria in London, but eventually received legal advice not to speak with Montoya Alvarez' family. A mediation service also sent several letters to Montoya Alvarez on Lozano's behalf without receiving a response. In July 2009, Lozano filed an application for a court order in the United Kingdom "'to ensure that he obtains regular contact with his [child] and plays an active role in [her] life.'" *Id.*, at 210. He also sought court orders to compel Montoya Alvarez' sisters and legal counsel, the child's doctor and nursery, and various government offices in London to disclose the child's whereabouts.

On March 15, 2010, after determining that the child was not in the United Kingdom (and suspecting that the child was in New York), Lozano filed a form with the Hague Convention Central Authority for England and Wales seeking to have the child returned.[2] The United States Central Authority—the Office of Children's Issues in the Department of State, see 22 CFR §94.2 (2013)—received the application on March 23, 2010. After the Office of Children's Issues confirmed that Montoya Alvarez had entered the United States, Lozano located Montoya Alvarez' address in New York. On November 10, 2010, more than 16 months after Montoya Alvarez and the child left the United Kingdom, Lozano filed a Petition for Return of Child pursuant to the Hague Convention and ICARA, 42 U. S. C. §11603, in the United States District Court for the Southern District of New York.

After a 2-day evidentiary hearing, the District Court denied Lozano's petition. 809 F. Supp. 2d 197. The District

[2] Article 6 of the Hague Convention requires each Contracting State to "designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities." Treaty Doc., at 8.

Court concluded that Lozano had stated a prima facie case of wrongful removal under the Hague Convention. *Id.*, at 219–220. Prior to her removal, the child was a habitual resident of the United Kingdom, see Hague Convention, Art. 4, and Lozano had custody rights that he was actually exercising at the time of removal, see Arts. 3(a)–(b).

Because the petition was filed more than one year after the child's wrongful removal, however, the District Court denied the petition on the basis that the child was now settled in New York. *Id.*, at 230, 234. "Viewing the totality of the circumstances," the court found sufficient indicia of "stability in her family, educational, social, and most importantly, home life," *id.*, at 233, to conclude that the child was settled in her current environment and that repatriation would be "extremely disruptive," *id.*, at 234. Lozano argued that the child should be returned forthwith because the 1-year period in Article 12 should be equitably tolled during the period that Montoya Alvarez concealed the child. The court rejected that argument, holding that the 1-year period could not be extended by equitable tolling.[3] *Id.*, at 228–229.

On appeal, the Second Circuit affirmed. 697 F. 3d 41 (2012). The Court of Appeals agreed that the 1-year period in Article 12 is not subject to equitable tolling. According to the court, unlike a statute of limitations that would prohibit the filing of a return petition after one year, the 1-year

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[3] The District Court held in the alternative that even if equitable tolling could apply, it would not be warranted in this case because Lozano had contact information for Montoya Alvarez' sister Maria in New York. Lozano's solicitors did not attempt to contact Maria to determine if Montoya Alvarez and the child were there. 809 F. Supp. 2d, at 229–230.

Consistent with Second Circuit precedent, see *Blondin* v. *Dubois*, 238 F. 3d 153, 164 (2001), the District Court also considered "whether to exercise its discretion and repatriate the child even though she is now settled in New York." 809 F. Supp. 2d, at 234. The court declined to exercise that discretion because the "strong evidence that the child is quite settled in New York" outweighed Lozano's "fairly diligent" search efforts and Montoya Alvarez' conduct. *Ibid.*

period in Article 12 merely permits courts, after that period has run, to consider the interests of the child in settlement. *Id.*, at 52. The Second Circuit concluded that allowing equitable tolling to delay consideration of the child's interests would undermine the purpose of the Hague Convention. *Id.*, at 54.

We granted certiorari to decide whether Article 12's 1-year period is subject to equitable tolling. 570 U. S. 916 (2013). Compare 697 F. 3d, at 50–55 (equitable tolling not available); and *Yaman* v. *Yaman*, 730 F. 3d 1, 12–16 (CA1 2013) (same), with *Duarte* v. *Bardales*, 526 F. 3d 563, 568–570 (CA9 2008) (equitable tolling available); and *Furnes* v. *Reeves*, 362 F. 3d 702, 723–724 (CA11 2004) (same). We hold that equitable tolling is not available, and therefore affirm.

III

Although this case concerns the application of equitable tolling to a treaty, we begin with a more familiar context: equitable tolling of federal statutes of limitations. As a general matter, equitable tolling pauses the running of, or "tolls," a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action. See, *e. g.*, *Pace* v. *DiGuglielmo*, 544 U. S. 408, 418 (2005). Because the doctrine effectively extends an otherwise discrete limitations period set by Congress, whether equitable tolling is available is fundamentally a question of statutory intent. See, *e. g.*, *Irwin* v. *Department of Veterans Affairs*, 498 U. S. 89, 95 (1990); *Bowen* v. *City of New York*, 476 U. S. 467, 479–480 (1986); *Honda* v. *Clark*, 386 U. S. 484, 501 (1967).

As applied to federal statutes of limitations, the inquiry begins with the understanding that Congress "legislate[s] against a background of common-law adjudicatory principles." *Astoria Fed. Sav. & Loan Assn.* v. *Solimino*, 501 U. S. 104, 108 (1991). Equitable tolling, a long-established feature of American jurisprudence derived from "the old

chancery rule," *Holmberg* v. *Armbrecht*, 327 U. S. 392, 397 (1946), is just such a principle. See *Young* v. *United States*, 535 U. S. 43, 49–50 (2002) ("Congress must be presumed to draft limitations periods in light of this background principle"); *Bailey* v. *Glover*, 21 Wall. 342, 349–350 (1875). We therefore presume that equitable tolling applies if the period in question is a statute of limitations and if tolling is consistent with the statute. *Young*, *supra*, at 49–50 ("It is hornbook law that limitations periods are 'customarily subject to "equitable tolling,"' unless tolling would be 'inconsistent with the text of the relevant statute'" (citation omitted)).

IV

The Hague Convention, of course, is a treaty, not a federal statute. For treaties, which are primarily "'compact[s] between independent nations,'" *Medellín* v. *Texas*, 552 U. S. 491, 505 (2008), our "duty [i]s to ascertain the intent of the parties" by looking to the document's text and context, *United States* v. *Choctaw Nation*, 179 U. S. 494, 535 (1900); see also *BG Group plc* v. *Republic of Argentina*, *post*, at 37.

We conclude that the parties to the Hague Convention did not intend equitable tolling to apply to the 1-year period in Article 12. Unlike federal statutes of limitations, the Convention was not adopted against a shared background of equitable tolling. Even if the Convention were subject to a presumption that statutes of limitations may be tolled, the 1-year period in Article 12 is not a statute of limitations. And absent a presumption in favor of equitable tolling, nothing in the Convention warrants tolling the 1-year period.

A

First, there is no general presumption that equitable tolling applies to treaties. Congress is presumed to incorporate equitable tolling into federal statutes of limitations because equitable tolling is part of the established backdrop of American law. *Rotella* v. *Wood*, 528 U. S. 549, 560 (2000) ("[F]ed-

eral statutes of limitations are generally subject to equitable principles of tolling"). It does not follow, however, that we can export such background principles of United States law to contexts outside their jurisprudential home.

It is particularly inappropriate to deploy this background principle of American law automatically when interpreting a treaty. "A treaty is in its nature a contract between . . . nations, not a legislative act." *Foster* v. *Neilson*, 2 Pet. 253, 314 (1829) (Marshall, C. J., for the Court); see also 2 Debates on the Federal Constitution 506 (J. Elliot 2d ed. 1863) (James Wilson) ("[I]n their nature treaties originate differently from laws. They are made by equal parties, and each side has half of the bargain to make . . . "). That distinction has been reflected in the way we interpret treaties. It is our "responsibility to read the treaty in a manner 'consistent with the *shared* expectations of the contracting parties.'" *Olympic Airways* v. *Husain*, 540 U. S. 644, 650 (2004) (quoting *Air France* v. *Saks*, 470 U. S. 392, 399 (1985); emphasis added). Even if a background principle is relevant to the interpretation of federal statutes, it has no proper role in the interpretation of treaties unless that principle is shared by the parties to "an agreement among sovereign powers," *Zicherman* v. *Korean Air Lines Co.*, 516 U. S. 217, 226 (1996).

Lozano has not identified a background principle of equitable tolling that is shared by the signatories to the Hague Convention. To the contrary, Lozano concedes that in the context of the Convention, "foreign courts have failed to adopt equitable tolling . . . because they lac[k] the presumption that we [have]." Tr. of Oral Arg. 19–20. While no signatory state's court of last resort has resolved the question, intermediate courts of appeals in several states have rejected equitable tolling. See *Cannon* v. *Cannon*, [2004] EWCA (Civ.) 1330, [2005] 1 W. L. R. 32, ¶51 (Eng.) (rejecting the "tolling rule" as "too crude an approach" for the Convention); *Kubera* v. *Kubera*, 3 B. C. L. R. (5th) 121, ¶64, 317 D. L. R. (4th) 307, ¶64 (2010) (Can.) (equitable tolling "has not

been adopted in other jurisdictions, including Canada"); see also *HJ* v. *Secretary for Justice*, [2006] NZFLR 1005, ¶53 (CA), appeal dism'd on other grounds, [2007] 2 NZLR 289; *A. C.* v. *P. C.*, [2005] HKEC 839, 2005 WL 836263, ¶55 (Hong Kong Ct. 1st Instance).[4] The American presumption that federal statutes of limitations can be equitably tolled therefore does not apply to this multilateral treaty. Cf. *Eastern Airlines, Inc.* v. *Floyd*, 499 U. S. 530, 544–545, and n. 10 (1991) (declining to adopt liability for psychic injury under the Warsaw Convention because "the unavailability of compensation for purely psychic injury in many common and civil law countries at the time of the Warsaw Conference persuades us that the signatories had no specific intent to include such a remedy in the Convention" (footnote omitted)).

It does not matter to this conclusion that Congress enacted a statute to implement the Hague Convention. See ICARA, 42 U. S. C. §§ 11601–11610. ICARA does not address the availability of equitable tolling. Nor does it purport to alter the Convention. See § 11601(b)(2) ("The provisions of [ICARA] are in addition to and not in lieu of the provisions of the Convention"). In fact, Congress explicitly recognized "the need for uniform international interpretation of the Convention." § 11601(b)(3)(B). Congress' mere enactment of implementing legislation did not somehow import background principles of American law into the treaty interpretation process, thereby altering our understanding of the treaty itself.

B

Even if the presumption in favor of equitable tolling had force outside of domestic law, we have only applied that pre-

[4] Lozano contends that a single-judge decision by an English family court adopted equitable tolling without referring to it by name. See *In re H*, [2000] 2 F. L. R. 51, [2000] 3 F. C. R. 404 (Eng.). It is unclear whether the logic of that decision survived the decision of the Court of Appeals for England and Wales in *Cannon*.

sumption to statutes of limitations. See *Hallstrom* v. *Tillamook County*, 493 U. S. 20, 27 (1989) (no equitable tolling of a 60-day presuit notice requirement that does not operate as a statute of limitations). The 1-year period in Article 12 is not a statute of limitations.

As a general matter, "[s]tatutes of limitations establish the period of time within which a claimant must bring an action." *Heimeshoff* v. *Hartford Life & Accident Ins. Co.*, 571 U. S. 99, 105 (2013). They characteristically embody a "policy of repose, designed to protect defendants." *Burnett* v. *New York Central R. Co.*, 380 U. S. 424, 428 (1965). And they foster the "elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella*, 528 U. S., at 555.

In *Young*, 535 U. S. 43, we evaluated whether those characteristics of statutes of limitations were present in the "three-year lookback period" for tax liabilities in bankruptcy proceedings. The Bankruptcy Code favors tax claims less than three years old in two respects: Such claims cannot be discharged, and they have priority over certain others in bankruptcy proceedings. See 11 U. S. C. §§ 507(a)(8)(A)(i), 523(a)(1)(A). If the Internal Revenue Service "sleeps on its rights" by failing to prosecute those claims within three years, however, then those mechanisms for enforcing claims against bankrupt taxpayers are eliminated. *Young*, 535 U. S., at 47. We concluded that the lookback period "serves the same 'basic policies [furthered by] all limitations provisions,'" *ibid.* (quoting *Rotella*, *supra*, at 555), *i. e.*, certainty and repose. We accordingly held that it was a limitations period presumptively subject to equitable tolling. 535 U. S., at 47.

Unlike the 3-year lookback period in *Young*, expiration of the 1-year period in Article 12 does not eliminate the remedy the Convention affords the left-behind parent—namely, the return of the child. Before one year has elapsed, Article 12 provides that the court "shall order the return of the child

forthwith." Treaty Doc., at 9. But even after that period has expired, the court "shall also order the return of the child, unless it is demonstrated that the child is now settled." *Ibid.* The continued availability of the return remedy after one year preserves the possibility of relief for the left-behind parent and prevents repose for the abducting parent.[5] Rather than establishing any certainty about the respective rights of the parties, the expiration of the 1-year period opens the door to consideration of a third party's interests, *i. e.*, the child's interest in settlement. Because that is not the sort of interest addressed by a statute of limitations, we decline to treat the 1-year period as a statute of limitations.[6]

C

Without a presumption of equitable tolling, the Convention does not support extending the 1-year period during concealment. Article 12 explicitly provides that the 1-year period

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[5] In the State Department's view, the Hague Convention confers equitable discretion on courts to order the return of a child even if the court determines that the child is "settled" within the meaning of Article 12. See Brief for United States as *Amicus Curiae* 19–25. If accurate, that interpretation would reinforce that Article 12 is not meant to provide repose to the abducting parent, and it would underscore that the 1-year period is not a statute of limitations. But we do not decide whether, and under what circumstances, a court may exercise discretion to order return notwithstanding the child's subsequent settlement. In the Court of Appeals, Lozano failed to challenge the District Court's decision not to exercise its discretion to order the return of the settled child, see n. 3, *supra*, and that issue is beyond the scope of the question presented before this Court.

[6] Lozano argues that the United States delegation referred to the 1-year period as a "statute of limitations" at various points during and after the drafting process. Brief for Petitioner 27–28. Because the determination whether the 1-year period is a statute of limitations depends on its functional characteristics, it is not significant that the delegation used that label. In any event, we doubt that the remarks of a single delegation are sufficient under these circumstances to establish the "'shared expectations of the contracting parties.'" *Olympic Airways* v. *Husain*, 540 U. S. 644, 651 (2004) (quoting *Air France* v. *Saks*, 470 U. S. 392, 399 (1985)).

commences on "the date of the wrongful removal or retention," and makes no provision for an extension of that period. *Ibid.* Further, the practical effect of the tolling that Lozano requests would be to delay the commencement of the 1-year period until the left-behind parent discovers the child's location. Commencing the 1-year period upon discovery is the obvious alternative to the commencement date the drafters actually adopted because the subject of the Hague Convention, child abduction, is naturally associated with the sort of concealment that might justify equitable tolling under other circumstances. See 697 F. 3d, at 51, n. 8 ("It would have been a simple matter, if the state parties to the Convention wished to take account of the possibility that an abducting parent might make it difficult for the petitioning parent to discover the child's whereabouts, to run the period 'from the date that the petitioning parent learned [or, could reasonably have learned] of the child's whereabouts'" (alterations in original)). Given that the drafters did not adopt that alternative, the natural implication is that they did not intend the 1-year period to commence on that later date. Cf. *Sebelius* v. *Auburn Regional Medical Center*, 568 U. S. 145, 157 (2013). We cannot revisit that choice.

Lozano contends that equitable tolling is nevertheless consistent with the purpose of the Hague Convention because it is necessary to deter child abductions. In his view, "absent equitable tolling, concealment 'probably will' result in nonreturn," which will in turn encourage abduction. Reply Brief 14–15; see also *Duarte*, 526 F. 3d, at 570.

We agree, of course, that the Convention reflects a design to discourage child abduction. But the Convention does not pursue that goal at any cost. The child's interest in choosing to remain, Art. 13, or in avoiding physical or psychological harm, Art. 13(b), may overcome the return remedy. The same is true of the child's interest in settlement. See *supra*, at 5; see also *In re M*, [2008] 1 A. C. 1288, 1310 (Eng. 2007) (opinion of Baroness Hale of Richmond) ("These children should not be made to suffer for the sake of general deter-

rence of the evil of child abduction world wide"). We are unwilling to apply equitable tolling principles that would, in practice, rewrite the treaty. See *Chan* v. *Korean Air Lines, Ltd.*, 490 U. S. 122, 134–135 (1989) ("'[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be . . . to make, and not to construe a treaty'" (quoting *The Amiable Isabella*, 6 Wheat. 1, 71 (1821) (Story, J., for the Court))).

Nor is it true that an abducting parent who conceals a child's whereabouts will necessarily profit by running out the clock on the 1-year period. American courts have found as a factual matter that steps taken to promote concealment can also prevent the stable attachments that make a child "settled." See, *e. g.*, *Mendez Lynch* v. *Mendez Lynch*, 220 F. Supp. 2d 1347, 1363–1364 (MD Fla. 2002) (children not settled when they "lived in seven different locations" in 18 months); *Wigley* v. *Hares*, 82 So. 3d 932, 942 (Fla. App. 2011) ("The mother purposely kept him out of all community activities, sports, and even church to avoid detection by the father"); *In re Coffield*, 96 Ohio App. 3d 52, 58, 644 N. E. 2d 662, 666 (1994) (child not settled when the abducting parent "was attempting to hide [child's] identity" by withholding child from school and other organized activities). Other signatories to the Hague Convention have likewise recognized that concealment may be taken into account in the factual determination whether the child is settled. See, *e. g.*, *Cannon*, [2005] 1 W. L. R., ¶¶52–61. See also *Kubera*, 3 B. C. L. R. (5th), ¶47, 317 D. L. R. (4th), ¶47; *A. C.* v. *P. C.*, [2005] HKEC 839, ¶39, 2005 WL 836263, ¶39. Equitable tolling is therefore neither required by the Convention nor the only available means to advance its objectives.

D

Finally, Lozano contends that the Hague Convention leaves room for United States courts to apply their own "common law doctrine of equitable tolling" to the 1-year period in Article 12 without regard to whether the drafters of

the Convention intended equitable tolling to apply. Brief for Petitioner 25. Specifically, Lozano contends that the Convention recognizes additional sources of law that permit signatory states to return abducted children even when return is not available or required pursuant to the Convention. Article 34 of the Convention provides that "for the purpos[e] of obtaining the return of a child," the Convention "shall not restrict the application of an international instrument in force between the State of origin and the State addressed" or the application of "other law of the State addressed." Treaty Doc., at 13; see also Art. 18, *id.*, at 11 ("The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time"). In Lozano's view, equitable tolling principles constitute "other law" that should apply here.

That contention mistakes the nature of equitable tolling as this Court has applied it. We do not apply equitable tolling as a matter of some independent authority to reconsider the fairness of legislative judgments balancing the needs for relief and repose. See *supra*, at 10–11. To the contrary, we may apply equitable tolling to the Hague Convention only if we determine that the treaty drafters so intended. See *Choctaw Nation*, 179 U. S., at 535. For the foregoing reasons, we conclude that they did not.

V

The Court of Appeals correctly concluded that the 1-year period in Article 12 of the Hague Convention is not subject to equitable tolling. We therefore affirm that court's judgment.

It is so ordered.

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

I concur fully in the opinion of the Court. I write separately to explain why courts have equitable discretion under the Hague Convention to order a child's return even after

the child has become settled, and how that discretion prevents abuses that petitioner claims will follow from holding that Article 12's 1-year period may not be equitably tolled.

The Convention is designed to protect the interests of children and their parents. Much of the Convention can be understood as an attempt to balance the various interests of children and nonabducting parents when a parent abducts a child from the child's country of habitual residence.

When a child has been absent from the country of habitual residence for less than a year, the Convention conclusively presumes that the child's nascent attachment to the new country is outweighed by the nonabducting parent's interest in prompt return and the child's own interest in returning to the country from which he or she was removed just a few months previously. This is why Article 12 requires return "forthwith" if the petition for return is brought within a year of abduction, unless one of the narrow exceptions set forth in Article 13 or 20 applies. Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention or Convention), Oct. 25, 1980, T. I. A. S. No. 11670, S. Treaty Doc. No. 99–11 (Treaty Doc.), p. 9. But, as the Convention recognizes, at some point the child will become accustomed to the new environment, making Article 12's conclusive presumption inappropriate. Thus, if the petition for return is brought after a year has elapsed, the court must determine whether the child has become "settled" in the new country; and if this has occurred, the court need not order return. *Ibid.* As the majority recognizes, this provision of the Convention "opens the door to consideration of . . . the child's interest in settlement." *Ante*, at 15.

But opening the door to consideration of the child's attachment to the new country does not mean closing the door to evaluating all other interests of the child and the nonabducting parent. The fact that, after one year, a child's need for stability requires a court to take into account the child's attachment to the new country does not mean that such at-

tachment becomes the *only* factor worth considering when evaluating a petition for return.

Nothing in Article 12 prohibits courts from taking other factors into account. To the contrary, the Convention explicitly permits them to do so. Article 18 provides that "[t]he provisions of this Chapter [including Article 12] do not limit the power of a judicial or administrative authority to order the return of the child at any time." Hague Convention, Treaty Doc., at 11. A court thus has power to order the child's return in the exercise of its sound discretion even where Article 12's obligation to order such return no longer applies.

This provision makes eminent sense. Even after a year has elapsed and the child has become settled in the new environment, a variety of factors may outweigh the child's interest in remaining in the new country, such as the child's interest in returning to his or her original country of residence (with which he or she may still have close ties, despite having become settled in the new country); the child's need for contact with the nonabducting parent, who was exercising custody when the abduction occurred; the nonabducting parent's interest in exercising the custody to which he or she is legally entitled; the need to discourage inequitable conduct (such as concealment) by abducting parents; and the need to deter international abductions generally.

Article 12 places no limit on Article 18's grant of discretionary power to order return. Article 18 expressly states as much. See *ibid.* (Article 12 "do[es] not limit the power of a judicial or administrative authority to order the return of the child"). Even without Article 18's express language, it would be clear that Article 12 merely tells a court when it *must* order return, without telling it when it *may* do so. Article 12 states that, after the 1-year period has elapsed, a court "shall . . . order the return of the child, unless it is demonstrated that the child is now settled in its new environment." *Id.*, at 9. The final clause indicates when the

obligation imposed earlier in the sentence terminates; it does not substitute for that obligation a prohibition on ordering return. When a mother tells her child, "Come straight home from school, unless one of your friends invites you to a movie," the mother has not prohibited her child from coming home immediately after school even if a friend proposes a film. Cf. *Department of Commerce* v. *United States House of Representatives*, 525 U. S. 316, 339 (1999) (explaining that the meaning of a similar sentence structure in 13 U. S. C. § 195 "depends primarily on the broader context in which that structure appears"). Thus, nothing in Article 12 calls into question the discretionary power of courts to order return after the 1-year period has expired and the child has become settled.

Reading the Convention to impose a prohibition on return would be highly anomalous, given that the "Convention is based on the principle that the best interests of the child are well served when decisions regarding custody rights are made in the country of habitual residence." *Abbott* v. *Abbott*, 560 U. S. 1, 20 (2010). Such a prohibition would run counter to other provisions of the Convention. For instance, Article 13(b) gives a court discretion to return or decline to return a child who has not become settled if "there is a grave risk that . . . return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." Hague Convention, Treaty Doc., at 10. If a court has discretion to order return even where such return poses "a grave risk" of harm or threatens to place the child in an "intolerable situation," surely it has discretion to order return when faced with the lesser risk attendant on removing a child from the child's present environment (especially given that the child will generally be returning to a known environment: her country of habitual residence).

The State Department has adopted the view that the Convention empowers a court, in its equitable discretion, to return a child who has become settled. In the analysis that it

provided to the Senate in connection with the ratification process, the Department made clear that, even when a year has elapsed and the child has become settled, a court may still consider such factors as "evidence . . . concerning the child's contacts with and ties to his or her State of habitual residence," "[t]he reason for the passage of time," and any concealment by the abducting parent in determining whether to order return. Hague International Child Abduction Convention; Text and Legal Analysis (State Legal Analysis), 51 Fed. Reg. 10494, 10509 (1986). The Department continues to endorse this view today. See Brief for United States as *Amicus Curiae* 19. As this Court has previously explained (in the context of the Convention, in fact), the State Department's interpretation of treaties "'is entitled to great weight.'" *Abbott*, *supra*, at 15 (quoting *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U. S. 176, 185 (1982)).

So, too, is the interpretation of the courts of our sister signatories. See *Abbott*, *supra*, at 16. The United Kingdom's House of Lords (at the time that nation's highest court) has held that "a settled child might nevertheless be returned" by a court in the exercise of its discretion—a conclusion driven in part by acknowledgment of the inequity of rewarding concealment. *In re M*, [2008] 1 A. C. 1288, 1304, ¶31 (Eng. 2007) (opinion of Baroness Hale of Richmond). Likewise, the Supreme Court of Ireland has concluded that courts have equitable discretion to order return of a child who has become settled. See *P.* v. *B.* (No. 2), [1999] 4 I. R. 185. I am unaware of any high courts of states signatory that have concluded to the contrary.

Given the foregoing, it is perhaps unsurprising that the Courts of Appeals to have considered the question have found that a court possesses equitable discretion to order return of a child despite the child's having become settled in the new country. See *Yaman* v. *Yaman*, 730 F. 3d 1, 21 (CA1 2013); *Blondin* v. *Dubois*, 238 F. 3d 153, 164 (CA2 2001).

And other Courts of Appeals have found more generally that none of the Convention's exceptions prohibit return. See, *e. g.*, *Asvesta* v. *Petroutsas*, 580 F. 3d 1000, 1004 (CA9 2009); *Miller* v. *Miller*, 240 F. 3d 392, 402 (CA4 2001).

Equitable discretion to order return of a settled child is particularly important in light of the fact that the Convention, as the Court correctly holds today, does not provide for equitable tolling of Article 12's 1-year period. Petitioner predicts dire consequences from the Court's holding. He argues that, as a result of our decision, the United States will become an abduction haven, with parents concealing their children here until Article 12's 1-year period has run and then claiming their children have become settled and hence ineligible for return. But such inequitable conduct would weigh heavily in favor of returning a child even if she has become settled. See, *e. g.*, State Legal Analysis, 51 Fed. Reg. 10509 ("If the alleged wrongdoer concealed the child's whereabouts from the custodian necessitating a long search for the child and thereby delayed the commencement of a return proceeding by the applicant, it is highly questionable whether the respondent should be permitted to benefit from such conduct absent strong countervailing considerations"); *In re M*, *supra*, at 1310, ¶31 (recognizing that a court may take concealment into account in considering whether to return a settled child). Given the courts' discretion to order return in response to concealment, I do not believe the Court's decision today risks incentivizing parents to flee with their children to this country and conceal them.

Equitable discretion is also a far better tool than equitable tolling with which to address the dangers of concealment. Equitable tolling would require return *every* time the abducting parent conceals the child and thereby prevents the nonabducting parent from filing a return petition within a year, regardless of how settled in the new country the child has become. Thus, on petitioner's view, a court would be bound to return a 14-year-old child who was brought to the

United States shortly after birth and had been concealed here ever since. By contrast, when a court exercises its equitable discretion, it may consider other factors in addition to concealment. While concealment is a significant factor and should weigh heavily in a court's analysis, in appropriate cases it can be overcome by circumstances such as the extended length of the child's residence in this country, any strong ties the child has formed here, and the child's attenuated connections to his or her former country.

In short, I believe the power of a court, in the exercise of its sound discretion, to return even a settled child prevents the inapplicability of equitable tolling to Article 12's 1-year limit from encouraging parents to flee to the United States and conceal their children here. In light of this understanding, I have no difficulty joining the opinion of the Court.

Syllabus

BG GROUP PLC *v.* REPUBLIC OF ARGENTINA

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

No. 12–138. Argued December 2, 2013—Decided March 5, 2014

An investment treaty (Treaty) between the United Kingdom and Argentina authorizes a party to submit a dispute "to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made," *i. e.*, a local court, Art. 8(1); and permits arbitration, as relevant here, "where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to [that] tribunal . . . , the said tribunal has not given its final decision," Art. 8(2)(a)(i).

Petitioner BG Group plc, a British firm, belonged to a consortium with a majority interest in MetroGAS, an Argentine entity awarded an exclusive license to distribute natural gas in Buenos Aires. At the time of BG Group's investment, Argentine law provided that gas "tariffs" would be calculated in U. S. dollars and would be set at levels sufficient to assure gas distribution firms a reasonable return. But Argentina later amended the law, changing (among other things) the calculation basis to pesos. MetroGAS' profits soon became losses. Invoking Article 8, BG Group sought arbitration, which the parties sited in Washington, D. C. BG Group claimed that Argentina's new laws and practices violated the Treaty, which forbids the "expropriation" of investments and requires each nation to give "fair and equitable treatment" to investors from the other. Argentina denied those claims, but also argued that the arbitrators lacked "jurisdiction" to hear the dispute because, as relevant here, BG Group had not complied with Article 8's local litigation requirement. The arbitration panel concluded that it had jurisdiction, finding, among other things, that Argentina's conduct (such as also enacting new laws that hindered recourse to its judiciary by firms in BG Group's situation) had excused BG Group's failure to comply with Article 8's requirement. On the merits, the panel found that Argentina had not expropriated BG Group's investment but had denied BG Group "fair and equitable treatment." It awarded damages to BG Group. Both sides sought review in federal district court: BG Group to confirm the award under the New York Convention and the Federal Arbitration Act (FAA), and Argentina to vacate the award, in part on the ground that the arbitrators lacked jurisdiction under the FAA. The District Court confirmed the award, but the Court of Appeals for the District of Columbia Circuit vacated. It found that the interpretation and applica-

tion of Article 8's requirement were matters for courts to decide *de novo*, *i. e.*, without deference to the arbitrators' views; that the circumstances did not excuse BG Group's failure to comply with the requirement; and that BG Group had to commence a lawsuit in Argentina's courts and wait 18 months before seeking arbitration. Thus, the court held, the arbitrators lacked authority to decide the dispute.

Held:

1. A court of the United States, in reviewing an arbitration award made under the Treaty, should interpret and apply "threshold" provisions concerning arbitration using the framework developed for interpreting similar provisions in ordinary contracts. Under that framework, the local litigation requirement is a matter for arbitrators primarily to interpret and apply. Courts should review their interpretation with deference. Pp. 32–43.

(a) Were the Treaty an ordinary contract, it would call for arbitrators primarily to interpret and to apply the local litigation provision. In an ordinary contract, the parties determine whether a particular matter is primarily for arbitrators or for courts to decide. See, *e. g.*, *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 582. If the contract is silent on the matter of who is to decide a "threshold" question about arbitration, courts determine the parties' intent using presumptions. That is, courts presume that the parties intended courts to decide disputes about "arbitrability," *e. g.*, *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U. S. 79, 84, and arbitrators to decide disputes about the meaning and application of procedural preconditions for the use of arbitration, see *id.*, at 86, including, *e. g.*, claims of "waiver, delay, or a like defense to arbitrability," *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U. S. 1, 25, and the satisfaction of, *e. g.*, "'time limits, notice, laches, [or] estoppel,'" *Howsam*, 537 U. S., at 85. The provision at issue is of the procedural variety. As its text and structure make clear, it determines *when* the contractual duty to arbitrate arises, not *whether* there is a contractual duty to arbitrate at all. Neither its language nor other language in Article 8 gives substantive weight to the local court's determinations on the matters at issue between the parties. The litigation provision is thus a claims-processing rule. It is analogous to other procedural provisions found to be for arbitrators primarily to interpret and apply, see, *e. g.*, *ibid.*, and there is nothing in Article 8 or the Treaty to overcome the ordinary assumption. Pp. 33–36.

(b) The fact that the document at issue is a treaty does not make a critical difference to this analysis. A treaty is a contract between nations, and its interpretation normally is a matter of determining the parties' intent. *Air France* v. *Saks*, 470 U. S. 392, 399. Where, as here, a federal court is asked to interpret that intent pursuant to a motion to

vacate or confirm an award made under the FAA, it should normally apply the presumptions supplied by American law. The presence of a condition on "consent" to arbitration in a treaty likely does not warrant abandoning, or increasing the complexity of, the ordinary intent-determining framework. See, *e. g.*, *Howsam*, *supra*, at 83–85. But because this Treaty does *not* state that the local litigation requirement is a condition on consent, the Court need not resolve what the effect of any such language would be. The Court need not go beyond holding that in the absence of language in a treaty demonstrating that the parties intended a different delegation of authority, the ordinary interpretive framework applies. Pp. 36–39.

(c) The Treaty contains no evidence showing that the parties had an intent contrary to the ordinary presumptions about who should decide threshold arbitration issues. The text and structure of Article 8's litigation requirement make clear that it is a procedural condition precedent to arbitration. Because the ordinary presumption applies and is not overcome, the interpretation and application of the provision are primarily for the arbitrators, and courts must review their decision with considerable deference. Pp. 40–43.

2. While Argentina is entitled to court review (under a properly deferential standard) of the arbitrators' decision to excuse BG Group's noncompliance with the litigation requirement, that review shows that the arbitrators' determinations were lawful. Their conclusion that the litigation provision cannot be construed as an absolute impediment to arbitration, in all cases, lies well within their interpretative authority. Their factual findings that Argentina passed laws hindering recourse to the local judiciary by firms similar to BG Group are undisputed by Argentina and are accepted as valid. And their conclusion that Argentina's actions made it "absurd and unreasonable" to read Article 8 to require an investor in BG Group's position to bring its grievance in a domestic court, before arbitrating, is not barred by the Treaty. Pp. 44–45.

665 F. 3d 1363, reversed.

BREYER, J., delivered the opinion of the Court, in which SCALIA, THOMAS, GINSBURG, ALITO, and KAGAN, JJ., joined, and in which SOTOMAYOR, J., joined except as to Part IV–A–1. SOTOMAYOR, J., filed an opinion concurring in part, *post*, p. 45. ROBERTS, C. J., filed a dissenting opinion, in which KENNEDY, J., joined, *post*, p. 49.

Thomas C. Goldstein argued the cause for petitioner. With him on the briefs were *Kevin K. Russell*, *Tejinder Singh*, *Alexander A. Yanos*, and *Elliot Friedman*.

Ginger D. Anders argued the cause for the United States as *amicus curiae* urging vacatur and remand. With her on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Delery*, *Deputy Solicitor General Kneedler*, *Mark B. Stern*, *Sharon Swingle*, and *Jeffrey E. Sandberg.*

Jonathan I. Blackman argued the cause for respondent. With him on the brief were *Matthew D. Slater*, *Teale Toweill*, and *Carmine D. Boccuzzi, Jr.**

JUSTICE BREYER delivered the opinion of the Court.

Article 8 of an investment treaty between the United Kingdom and Argentina contains a dispute-resolution provision, applicable to disputes between one of those nations and an investor from the other. See Agreement for the Promotion and Protection of Investments, Art. 8(2), Dec. 11, 1990, 1765 U. N. T. S. 38 (hereinafter Treaty). The provision authorizes either party to submit a dispute "to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made," *i. e.*, a local court. Art. 8(1). And it provides for arbitration

> "(i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal . . . , the said tribunal has not given its final decision; [or]
>
> "(ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute." Art. 8(2)(a).

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*Briefs of *amici curiae* urging reversal were filed for the American Arbitration Association by *Eric P. Tuchmann*, *Paul Friedland*, and *Hansel T. Pham*; for Professors and Practitioners of Arbitration by *John M. Townsend*, *pro se*, *James H. Boykin*, and *George A. Bermann*, *pro se*; and for the United States Council for International Business by *John P. Elwood*, *Allen B. Green*, *William T. O'Brien*, and *Elisabeth L. Shu.*

Briefs of *amici curiae* urging affirmance were filed for Practitioners and Professors of International Arbitration by *Martin Domb* and *Carlos E. Méndez-Peñate*; and for the Republic of Ecuador by *Mark N. Bravin*, *Gene C. Schaerr*, and *Eric M. Goldstein.*

The Treaty also entitles the parties to agree to proceed directly to arbitration. Art. 8(2)(b).

This case concerns the Treaty's arbitration clause, and specifically the local court litigation requirement set forth in Article 8(2)(a). The question before us is whether a court of the United States, in reviewing an arbitration award made under the Treaty, should interpret and apply the local litigation requirement *de novo*, or with the deference that courts ordinarily owe arbitration decisions. That is to say, who—court or arbitrator—bears primary responsibility for interpreting and applying the local litigation requirement to an underlying controversy? In our view, the matter is for the arbitrators, and courts must review their determinations with deference.

I

A

In the early 1990's, the petitioner, BG Group plc, a British firm, belonged to a consortium that bought a majority interest in an Argentine entity called MetroGAS. MetroGAS was a gas distribution company created by Argentine law in 1992, as a result of the government's privatization of its state-owned gas utility. Argentina distributed the utility's assets to new, private companies, one of which was MetroGAS. It awarded MetroGAS a 35-year exclusive license to distribute natural gas in Buenos Aires, and it submitted a controlling interest in the company to international public tender. BG Group's consortium was the successful bidder.

At about the same time, Argentina enacted statutes providing that its regulators would calculate gas "tariffs" in U. S. dollars, and that those tariffs would be set at levels sufficient to assure gas distribution firms, such as MetroGAS, a reasonable return.

In 2001 and 2002, Argentina, faced with an economic crisis, enacted new laws. Those laws changed the basis for calculating gas tariffs from dollars to pesos, at a rate of one peso per dollar. The exchange rate at the time was roughly three

pesos to the dollar. The result was that MetroGAS' profits were quickly transformed into losses. BG Group believed that these changes (and several others) violated the Treaty; Argentina believed the contrary.

B

In 2003, BG Group, invoking Article 8 of the Treaty, sought arbitration. The parties appointed arbitrators; they agreed to site the arbitration in Washington, D. C.; and between 2004 and 2006, the arbitrators decided motions, received evidence, and conducted hearings. BG Group essentially claimed that Argentina's new laws and regulatory practices violated provisions in the Treaty forbidding the "expropriation" of investments and requiring that each nation give "fair and equitable treatment" to investors from the other. Argentina denied these claims, while also arguing that the arbitration tribunal lacked "jurisdiction" to hear the dispute. App. to Pet. for Cert. 143a–144a, 214a–218a, 224a–232a. According to Argentina, the arbitrators lacked jurisdiction because: (1) BG Group was not a Treaty-protected "investor"; (2) BG Group's interest in MetroGAS was not a Treaty-protected "investment"; and (3) BG Group initiated arbitration without first litigating its claims in Argentina's courts, despite Article 8's requirement. *Id.*, at 143a–171a. In Argentina's view, "failure by BG to bring its grievance to Argentine courts for 18 months renders its claims in this arbitration inadmissible." *Id.*, at 162a.

In late December 2007, the arbitration panel reached a final decision. It began by determining that it had "jurisdiction" to consider the merits of the dispute. In support of that determination, the tribunal concluded that BG Group was an "investor," that its interest in MetroGAS amounted to a Treaty-protected "investment," and that Argentina's own conduct had waived, or excused, BG Group's failure to comply with Article 8's local litigation requirement. *Id.*, at 99a, 145a, 161a, 171a. The panel pointed out that in 2002, the President of Argentina had issued a decree staying for

180 days the execution of its courts' final judgments (and injunctions) in suits claiming harm as a result of the new economic measures. *Id.*, at 166a–167a. In addition, Argentina had established a "renegotiation process" for public service contracts, such as its contract with MetroGAS, to alleviate the negative impact of the new economic measures. *Id.*, at 129a, 131a. But Argentina had simultaneously barred from participation in that "process" firms that were litigating against Argentina in court or in arbitration. *Id.*, at 168a–171a. These measures, while not making litigation in Argentina's courts literally impossible, nonetheless "hindered" recourse "to the domestic judiciary" to the point where the Treaty implicitly excused compliance with the local litigation requirement. *Id.*, at 165a. Requiring a private party in such circumstances to seek relief in Argentina's courts for 18 months, the panel concluded, would lead to "absurd and unreasonable result[s]." *Id.*, at 166a.

On the merits, the arbitration panel agreed with Argentina that it had not "expropriate[d]" BG Group's investment, but also found that Argentina had denied BG Group "fair and equitable treatment." *Id.*, at 222a–223a, 240a–242a. It awarded BG Group $185 million in damages. *Id.*, at 297a.

C

In March 2008, both sides filed petitions for review in the District Court for the District of Columbia. BG Group sought to confirm the award under the New York Convention and the Federal Arbitration Act. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. IV, June 10, 1958, 21 U. S. T. 2519, T. I. A. S. No. 6997 (hereinafter New York Convention) (providing that a party may apply "for recognition and enforcement" of an arbitral award subject to the New York Convention); 9 U. S. C. §§ 204, 207 (providing that a party may move "for an order confirming [an arbitral] award" in a federal court of the "place designated in the agreement as the place of arbitration if such place is within the United States"). Argentina

sought to vacate the award in part on the ground that the arbitrators lacked jurisdiction. See § 10(a)(4) (a federal court may vacate an arbitral award "where the arbitrators exceeded their powers").

The District Court denied Argentina's claims and confirmed the award. 764 F. Supp. 2d 21 (DC 2011); 715 F. Supp. 2d 108 (DC 2010). But the Court of Appeals for the District of Columbia Circuit reversed. 665 F. 3d 1363 (2012). In the appeals court's view, the interpretation and application of Article 8's local litigation requirement was a matter for courts to decide *de novo*, *i. e.*, without deference to the views of the arbitrators. The Court of Appeals then went on to hold that the circumstances did not excuse BG Group's failure to comply with the requirement. Rather, BG Group must "commence a lawsuit in Argentina's courts and wait eighteen months before filing for arbitration." *Id.*, at 1373. Because BG Group had not done so, the arbitrators lacked authority to decide the dispute. And the appeals court ordered the award vacated. *Ibid.*

BG Group filed a petition for certiorari. Given the importance of the matter for international commercial arbitration, we granted the petition. See, *e. g.*, K. Vandevelde, Bilateral Investment Treaties: History, Policy & Interpretation 430–432 (2010) (explaining that dispute-resolution mechanisms allowing for arbitration are a "critical element" of modern day bilateral investment treaties); C. Dugan, D. Wallace, N. Rubins, & B. Sabahi, Investor-State Arbitration 51–52, 117–120 (2008) (referring to the large number of investment treaties that provide for arbitration, and explaining that some also impose prearbitration requirements such as waiting periods, amicable negotiations, or exhaustion of local remedies).

II

As we have said, the question before us is who—court or arbitrator—bears primary responsibility for interpreting and applying Article 8's local court litigation provision. Put

in terms of standards of judicial review, should a United States court review the arbitrators' interpretation and application of the provision *de novo*, or with the deference that courts ordinarily show arbitral decisions on matters the parties have committed to arbitration? Compare, *e. g.*, *First Options of Chicago, Inc.* v. *Kaplan*, 514 U. S. 938, 942 (1995) (example where a "court makes up its mind about [an issue] independently" because the parties did not agree it should be arbitrated), with *Oxford Health Plans LLC* v. *Sutter*, 569 U. S. 564, 569 (2013) (example where a court defers to arbitrators because the parties " 'bargained for' " arbitral resolution of the question (quoting *Eastern Associated Coal Corp.* v. *Mine Workers*, 531 U. S. 57, 62 (2000))). See also *Hall Street Associates, L. L. C.* v. *Mattel, Inc.*, 552 U. S. 576, 588 (2008) (on matters committed to arbitration, the Federal Arbitration Act provides for "just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway" and to prevent it from becoming "merely a prelude to a more cumbersome and time-consuming judicial review process" (internal quotation marks omitted)); *Eastern Associated Coal Corp.*, *supra*, at 62 (where parties send a matter to arbitration, a court will set aside the "arbitrator's interpretation of what their agreement means only in rare instances").

In answering the question, we shall initially treat the document before us as if it were an ordinary contract between private parties. Were that so, we conclude, the matter would be for the arbitrators. We then ask whether the fact that the document in question is a treaty makes a critical difference. We conclude that it does not.

III

Where ordinary contracts are at issue, it is up to the parties to determine whether a particular matter is primarily for arbitrators or for courts to decide. See, *e. g.*, *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 582 (1960)

("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit"). If the contract is silent on the matter of who primarily is to decide "threshold" questions about arbitration, courts determine the parties' intent with the help of presumptions.

On the one hand, courts presume that the parties intend courts, not arbitrators, to decide what we have called disputes about "arbitrability." These include questions such as "whether the parties are bound by a given arbitration clause" or "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy." *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U. S. 79, 84 (2002); accord, *Granite Rock Co.* v. *Teamsters*, 561 U. S. 287, 299–300 (2010) (disputes over "formation of the parties' arbitration agreement" and "its enforceability or applicability to the dispute" at issue are "matters . . . the court must resolve" (internal quotation marks omitted)). See *First Options*, *supra*, at 941, 943–947 (court should decide whether an arbitration clause applied to a party who "had not personally signed" the document containing it); *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U. S. 643, 651 (1986) (court should decide whether a particular labor-management layoff dispute fell within the arbitration clause of a collective-bargaining contract); *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543, 546–548 (1964) (court should decide whether an arbitration provision survived a corporate merger). See generally *AT&T Technologies*, *supra*, at 649 ("Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator").

On the other hand, courts presume that the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration. See *Howsam*, *supra*, at 86 (courts assume parties "normally expect a forum-based decisionmaker

to decide forum-specific *procedural* gateway matters" (emphasis added)). These procedural matters include claims of "waiver, delay, or a like defense to arbitrability." *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U. S. 1, 25 (1983). And they include the satisfaction of " 'prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate.' " *Howsam*, *supra*, at 85 (quoting the Revised Uniform Arbitration Act of 2000 § 6, Comment 2, 7 U. L. A. 13 (Supp. 2002); emphasis deleted). See also § 6(c) ("An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled"); § 6, Comment 2 (explaining that this rule reflects "the holdings of the vast majority of state courts" and collecting cases).

The provision before us is of the latter, procedural, variety. The text and structure of the provision make clear that it operates as a procedural condition precedent to arbitration. It says that a dispute "shall be submitted to international arbitration" if "one of the Parties so requests," as long as "a period of eighteen months has elapsed" since the dispute was "submitted" to a local tribunal and the tribunal "has not given its final decision." Art. 8(2). It determines *when* the contractual duty to arbitrate arises, not *whether* there is a contractual duty to arbitrate at all. Cf. 13 R. Lord, Williston on Contracts § 38:7, pp. 435, 437; § 38:4, p. 422 (4th ed. 2013) (a "condition precedent" determines what must happen before "a contractual duty arises" but does not "make the *validity* of the contract depend on its happening" (emphasis added)). Neither does this language or other language in Article 8 give substantive weight to the local court's determinations on the matters at issue between the parties. To the contrary, Article 8 provides that *only* the "arbitration decision shall be final and binding on both Parties." Art. 8(4). The litigation provision is consequently a purely procedural requirement—a claims-processing rule that governs when the arbitration may begin, but not whether it may

occur or what its substantive outcome will be on the issues in dispute.

Moreover, the local litigation requirement is highly analogous to procedural provisions that both this Court and others have found are for arbitrators, not courts, primarily to interpret and to apply. See *Howsam*, *supra*, at 85 (whether a party filed a notice of arbitration within the time limit provided by the rules of the chosen arbitral forum "is a matter presumptively for the arbitrator, not for the judge"); *John Wiley*, *supra*, at 555–557 (same, in respect to a mandatory prearbitration grievance procedure that involved holding two conferences). See also *Dialysis Access Center, LLC* v. *RMS Lifeline, Inc.*, 638 F. 3d 367, 383 (CA1 2011) (same, in respect to a prearbitration "good faith negotiations" requirement); *Lumbermens Mut. Cas. Co.* v. *Broadspire Management Servs., Inc.*, 623 F. 3d 476, 481 (CA7 2010) (same, in respect to a prearbitration filing of a "Disagreement Notice").

Finally, as we later discuss in more detail, see *infra*, at 40–41, we can find nothing in Article 8 or elsewhere in the Treaty that might overcome the ordinary assumption. It nowhere demonstrates a contrary intent as to the delegation of decisional authority between judges and arbitrators. Thus, were the document an ordinary contract, it would call for arbitrators primarily to interpret and to apply the local litigation provision.

IV

A

We now relax our ordinary contract assumption and ask whether the fact that the document before us is a treaty makes a critical difference to our analysis. The Solicitor General argues that it should. He says that the local litigation provision may be "a condition on the State's consent to enter into an arbitration agreement." Brief for United States as *Amicus Curiae* 25. He adds that courts should

"review de novo the arbitral tribunal's resolution of objections based on an investor's non-compliance" with such a condition. *Ibid.* And he recommends that we remand this case to the Court of Appeals to determine whether the court-exhaustion provision is such a condition. *Id.*, at 31–33.

1

We do not accept the Solicitor General's view as applied to the treaty before us. As a general matter, a treaty is a contract, though between nations. Its interpretation normally is, like a contract's interpretation, a matter of determining the parties' intent. *Air France* v. *Saks*, 470 U. S. 392, 399 (1985) (courts must give "the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties"); *Sullivan* v. *Kidd*, 254 U. S. 433, 439 (1921) ("[T]reaties are to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals, and are to be executed in the utmost good faith, with a view to making effective the purposes of the high contracting parties"); *Wright* v. *Henkel*, 190 U. S. 40, 57 (1903) ("Treaties must receive a fair interpretation, according to the intention of the contracting parties"). And where, as here, a federal court is asked to interpret that intent pursuant to a motion to vacate or confirm an award made in the United States under the Federal Arbitration Act, it should normally apply the presumptions supplied by American law. See New York Convention, Art. V(1)(e) (award may be "set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made"); Vandevelde, Bilateral Investment Treaties, at 446 (arbitral awards pursuant to treaties are "subject to review under the arbitration law of the state where the arbitration takes place"); Dugan, Investor-State Arbitration, at 636 ("[T]he national courts and the law of the legal situs of arbitration control a losing party's attempt to set aside [an] award").

The Solicitor General does not deny that the presumption discussed in Part III, *supra* (namely, the presumption that parties intend procedural preconditions to arbitration to be resolved primarily by arbitrators), applies both to ordinary contracts and to similar provisions in treaties when those provisions are not also "conditions on consent." Brief for United States as *Amicus Curiae* 25–27. And, while we respect the Government's views about the proper interpretation of treaties, *e. g.*, *Abbott* v. *Abbott*, 560 U. S. 1, 15 (2010), we have been unable to find any other authority or precedent suggesting that the use of the "consent" label in a treaty should make a critical difference in discerning the parties' intent about whether courts or arbitrators should interpret and apply the relevant provision.

We are willing to assume with the Solicitor General that the appearance of this label in a treaty can show that the parties, or one of them, thought the designated matter quite important. But that is unlikely to be conclusive. For parties often submit important matters to arbitration. And the word "consent" could be attached to a highly procedural precondition to arbitration, such as a waiting period of several months, which the parties are unlikely to have intended that courts apply without saying so. See, *e. g.*, Agreement on Encouragement and Reciprocal Protection of Investments, Art. 9, Netherlands-Slovenia, Sept. 24, 1996, Netherlands T. S. No. 296 ("Each Contracting Party hereby consents to submit any dispute . . . which they can not [*sic*] solve amicably within three months . . . to the International Center for Settlement of Disputes for settlement by conciliation or arbitration"), online at www.rijksoverheid.nl/documenten-en-publicaties/besluiten/2006/10/17/slovenia.html (all Internet materials as visited on Feb. 28, 2014, and available in Clerk of Court's case file); Agreement for the Promotion and Protection of Investments, Art. 8(1), United Kingdom-Egypt, June 11, 1975, 14 I. L. M. 1472 ("Each Contracting Party hereby consents to submit" a dispute to arbitration if "agree-

ment cannot be reached within three months between the parties"). While we leave the matter open for future argument, we do not now see why the presence of the term "consent" in a treaty warrants abandoning, or increasing the complexity of, our ordinary intent-determining framework. See *Howsam*, 537 U. S., at 83–85; *First Options*, 514 U. S., at 942–945; *John Wiley*, 376 U. S., at 546–549, 555–559.

2

In any event, the treaty before us does *not* state that the local litigation requirement is a "condition on consent" to arbitration. Thus, we need not, and do not, go beyond holding that, in the absence of explicit language in a treaty demonstrating that the parties intended a different delegation of authority, our ordinary interpretive framework applies. We leave for another day the question of interpreting treaties that refer to "conditions on consent" explicitly. See, *e. g.*, United States-Korea Free Trade Agreement, Art. 11.18, Feb. 10, 2011 (provision entitled "Conditions and Limitations on Consent of Each Party" and providing that "[n]o claim may be submitted to arbitration under this Section" unless the claimant waives in writing "any right" to press his claim before an "administrative tribunal or court"), online at www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text; North American Free Trade Agreement, Arts. 1121–1122, Dec. 17, 1992, 32 I. L. M. 643–644 (providing that each party's "[c]onsent to [a]rbitration" is conditioned on fulfillment of certain "procedures," one of which is a waiver by an investor of his right to litigate the claim being arbitrated). See also 2012 U. S. Model Bilateral Investment Treaty, Art. 26 (entitled "Conditions and limitations on Consent of Each Party"), online at www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf. And we apply our ordinary presumption that the interpretation and application of procedural provisions such as the provision before us are primarily for the arbitrators.

B

A treaty may contain evidence that shows the parties had an intent contrary to our ordinary presumptions about who should decide threshold issues related to arbitration. But the treaty before us does not show any such contrary intention. We concede that the local litigation requirement appears in ¶(1) of Article 8, while the Article does not mention arbitration until the subsequent paragraph, ¶(2). Moreover, a requirement that a party exhaust its remedies in a country's domestic courts before seeking to arbitrate may seem particularly important to a country offering protections to foreign investors. And the placing of an important matter prior to any mention of arbitration at least arguably suggests an intent by Argentina, the United Kingdom, or both, to have courts rather than arbitrators apply the litigation requirement.

These considerations, however, are outweighed by others. As discussed *supra*, at 35–36, the text and structure of the litigation requirement set forth in Article 8 make clear that it is a procedural condition precedent to arbitration—a sequential step that a party must follow before giving notice of arbitration. The Treaty nowhere says that the provision is to operate as a substantive condition on the formation of the arbitration contract, or that it is a matter of such elevated importance that it is to be decided by courts. International arbitrators are likely more familiar than are judges with the expectations of foreign investors and recipient nations regarding the operation of the provision. See *Howsam*, *supra*, at 85 (comparative institutional expertise a factor in determining parties' likely intent). And the Treaty itself authorizes the use of international arbitration associations, the rules of which provide that arbitrators shall have the authority to interpret provisions of this kind. Art. 8(3) (providing that the parties may refer a dispute to the International Centre for the Settlement of Investment Disputes (ICSID) or to arbitrators appointed pursuant to the arbitra-

tion rules of the United Nations Commission on International Trade Law (UNCITRAL)); accord, UNCITRAL Arbitration Rules, Art. 23(1) (rev. 2010 ed.) ("[A]rbitral tribunal shall have the power to rule on its own jurisdiction"); ICSID Convention, Regulations and Rules, Art. 41(1) (2006 ed.) ("Tribunal shall be the judge of its own competence"). Cf. *Howsam*, *supra*, at 85 (giving weight to the parties' incorporation of the National Association of Securities Dealers' Code of Arbitration into their contract, which provided for similar arbitral authority, as evidence that they intended arbitrators to "interpret and apply the NASD time limit rule").

The upshot is that our ordinary presumption applies and it is not overcome. The interpretation and application of the local litigation provision is primarily for the arbitrators. Reviewing courts cannot review their decision *de novo*. Rather, they must do so with considerable deference.

C

The dissent interprets Article 8's local litigation provision differently. In its view, the provision sets forth not a condition precedent to arbitration in an already-binding arbitration contract (normally a matter for arbitrators to interpret), but a substantive condition on Argentina's consent to arbitration and thus on the contract's formation in the first place (normally something for courts to interpret). It reads the whole of Article 8 as a "unilateral standing offer" to arbitrate that Argentina and the United Kingdom each extends to investors of the other country. *Post*, at 56 (opinion of ROBERTS, C. J.). And it says that the local litigation requirement is one of the essential "'terms in which the offer was made.'" *Post*, at 53 (quoting *Eliason* v. *Henshaw*, 4 Wheat. 225, 228 (1819); emphasis deleted).

While it is possible to read the provision in this way, doing so is not consistent with our case law interpreting similar provisions appearing in ordinary arbitration contracts. See Part III, *supra*. Consequently, interpreting the provision

in such a manner would require us to treat treaties as warranting a different kind of analysis. And the dissent does so without supplying any different set of general principles that might guide that analysis. That is a matter of some concern in a world where foreign investment and related arbitration treaties increasingly matter.

Even were we to ignore our ordinary contract principles, however, we would not take the dissent's view. As we have explained, the local litigation provision on its face concerns arbitration's timing, not the Treaty's effective date; or whom its arbitration clause binds; or whether that arbitration clause covers a certain kind of dispute. Cf. *Granite Rock*, 561 U. S., at 296–303 (ratification date); *First Options*, 514 U. S., at 941, 943–947 (parties); *AT&T Technologies*, 475 U. S., at 651 (kind of dispute). The dissent points out that Article 8(2)(a) "does not simply require the parties to wait for 18 months before proceeding to arbitration," but instructs them to *do* something—to "submit their claims for adjudication." *Post*, at 56. That is correct. But the something they must do has no direct impact on the resolution of their dispute, for as we previously pointed out, Article 8 provides that only the decision of the arbitrators (who need not give weight to the local court's decision) will be "final and binding." Art. 8(4). The provision, at base, is a claims-processing rule. And the dissent's efforts to imbue it with greater significance fall short.

The treatises to which the dissent refers also fail to support its position. *Post*, at 51, 54. Those authorities primarily describe how an offer to arbitrate in an investment treaty can be accepted, such as through an investor's filing of a notice of arbitration. See J. Salacuse, The Law of Investment Treaties 381 (2010); Schreuer, Consent to Arbitration, in The Oxford Handbook of International Investment Law 830, 836–837 (P. Muchlinski, F. Ortino, & C. Schreuer eds. 2008); Dugan, Investor-State Arbitration, at 221–222. They do not

endorse the dissent's reading of the local litigation provision or of provisions like it.

To the contrary, the bulk of international authority supports our view that the provision functions as a purely procedural precondition to arbitrate. See 1 G. Born, International Commercial Arbitration 842 (2009) ("A substantial body of arbitral authority from investor-state disputes concludes that compliance with procedural mechanisms in an arbitration agreement (or bilateral investment treaty) is not ordinarily a jurisdictional prerequisite"); Brief for Professors and Practitioners of Arbitration Law as *Amici Curiae* 12–16 (to assume the parties intended *de novo* review of the provision by a court "is likely to set United States courts on a collision course with the international regime embodied in thousands of [bilateral investment treaties]"). See also Schreuer, Consent to Arbitration, *supra*, at 846–848 ("[c]lauses of this kind . . . creat[e] a considerable burden to the party seeking arbitration with little chance of advancing the settlement of the dispute," and "the most likely effect of a clause of this kind is delay and additional cost").

In sum, we agree with the dissent that a sovereign's consent to arbitration is important. We also agree that sovereigns can condition their consent to arbitrate by writing various terms into their bilateral investment treaties. *Post*, at 57. But that is not the issue. The question is whether the parties intended to give courts or arbitrators primary authority to interpret and apply a threshold provision in an arbitration contract—when the contract is silent as to the delegation of authority. We have already explained why we believe that where, as here, the provision resembles a claims-processing requirement and is not a requirement that affects the arbitration contract's validity or scope, we presume that the parties (even if they are sovereigns) intended to give that authority to the arbitrators. See Parts III, IV–A, and IV–B, *supra*.

V

Argentina correctly argues that it is nonetheless entitled to court review of the arbitrators' decision to excuse BG Group's noncompliance with the litigation requirement, and to take jurisdiction over the dispute. It asks us to provide that review, and it argues that even if the proper standard is "a [h]ighly [d]eferential" one, it should still prevail. Brief for Respondent 50. Having the relevant materials before us, we shall provide that review. But we cannot agree with Argentina that the arbitrators "'exceeded their powers'" in concluding they had jurisdiction. *Ibid.* (quoting 9 U. S. C. § 10(a)(4)).

The arbitration panel made three relevant determinations:

(1) "As a matter of treaty interpretation," the local litigation provision "cannot be construed as an absolute impediment to arbitration," App. to Pet. for Cert. 165a;

(2) Argentina enacted laws that "hindered" "recourse to the domestic judiciary" by those "whose rights were allegedly affected by the emergency measures," *id.*, at 165a–166a; that sought "to prevent any judicial interference with the emergency legislation," *id.*, at 169a; and that "excluded from the renegotiation process" for public service contracts "any licensee seeking judicial redress," *ibid.*;

(3) under these circumstances, it would be "absurd and unreasonable" to read Article 8 as requiring an investor to bring its grievance to a domestic court before arbitrating, *id.*, at 166a.

The first determination lies well within the arbitrators' interpretive authority. Construing the local litigation provision as an "absolute" requirement would mean Argentina could avoid arbitration by, say, passing a law that closed down its court system indefinitely or that prohibited investors from using its courts. Such an interpretation runs contrary to a basic objective of the investment treaty. Nor does Argentina argue for an absolute interpretation.

As to the second determination, Argentina does not argue that the facts set forth by the arbitrators are incorrect. Thus, we accept them as valid.

The third determination is more controversial. Argentina argues that neither the 180-day suspension of courts' issuances of final judgments nor its refusal to allow litigants (and those in arbitration) to use its contract renegotiation process, taken separately or together, warrants suspending or waiving the local litigation requirement. We would not necessarily characterize these actions as rendering a domestic court-exhaustion requirement "absurd and unreasonable," but at the same time we cannot say that the arbitrators' conclusions are barred by the Treaty. The arbitrators did not "'stra[y] from interpretation and application of the agreement'" or otherwise "'effectively "dispens[e]"'" their "'own brand of . . . justice.'" *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U. S. 662, 671 (2010) (providing that it is only when an arbitrator engages in such activity that "'his decision may be unenforceable'" (quoting *Major League Baseball Players Assn.* v. *Garvey*, 532 U. S. 504, 509 (2001) (*per curiam*))).

Consequently, we conclude that the arbitrators' jurisdictional determinations are lawful. The judgment of the Court of Appeals to the contrary is reversed.

It is so ordered.

JUSTICE SOTOMAYOR, concurring in part.

I agree with the Court that the local litigation requirement at issue in this case is a procedural precondition to arbitration (which the arbitrators are to interpret), not a condition on Argentina's consent to arbitrate (which a court would review *de novo*). *Ante*, at 35, 41. Importantly, in reaching this conclusion, the Court acknowledges that "the treaty before us does *not* state that the local litigation requirement is a 'condition on consent' to arbitration." *Ante*, at 39. The

Court thus wisely "leave[s] for another day the question of interpreting treaties that refer to 'conditions on consent' explicitly." *Ibid.* I join the Court's opinion on the understanding that it does not, in fact, decide this issue.

I write separately because, in the absence of this express reservation, the opinion might be construed otherwise. The Court appears to suggest in dictum that a decision by treaty parties to describe a condition as one on their consent to arbitrate "is unlikely to be conclusive" in deciding whether the parties intended for the condition to be resolved by a court. *Ante*, at 38. Because this suggestion is unnecessary to decide the case and is in tension with the Court's explicit reservation of the issue, I join the opinion of the Court with the exception of Part IV–A–1.

The Court's dictum on this point is not only unnecessary; it may also be incorrect. It is far from clear that a treaty's express use of the term "consent" to describe a precondition to arbitration should not be conclusive in the analysis. We have held, for instance, that "a gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide." *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U. S. 79, 84 (2002). And a party plainly cannot be bound by an arbitration clause to which it does not consent. See *Granite Rock Co.* v. *Teamsters*, 561 U. S. 287, 299 (2010) ("Arbitration is strictly 'a matter of consent' " (quoting *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 479 (1989))).

Consent is especially salient in the context of a bilateral investment treaty, where the treaty is not an already agreed-upon arbitration provision between known parties, but rather a nation-state's standing offer to arbitrate with an amorphous class of private investors. In this setting, a nation-state might reasonably wish to condition its consent to arbitrate with a previously unspecified investor counterparty on the investor's compliance with a requirement that

might be deemed "purely procedural" in the ordinary commercial context, *ante*, at 35. Moreover, as THE CHIEF JUSTICE notes, "[i]t is no trifling matter" for a sovereign nation to "subject itself to international arbitration" proceedings, so we should "not presume that any country . . . takes that step lightly." *Post*, at 57 (dissenting opinion).

Consider, for example, the United States-Korea Free Trade Agreement, which as the Court recognizes, *ante*, at 39, includes a provision explicitly entitled "Conditions and Limitations on Consent of Each Party." Art. 11.18, Feb. 10, 2011. That provision declares that "[n]o claim may be submitted to arbitration" unless a claimant first waives its "right to initiate or continue before any administrative tribunal or court . . . any proceeding with respect to any measure alleged to constitute a breach" under another provision of the treaty. *Ibid.* If this waiver condition were to appear without the "consent" label in a binding arbitration agreement between two commercial parties, one might characterize it as the kind of procedural " 'condition precedent to arbitrability' " that we presume parties intend for arbitrators to decide. *Howsam*, 537 U. S., at 85. But where the waiver requirement is expressly denominated a "condition on consent" in an international investment treaty, the label could well be critical in determining whether the states party to the treaty intended the condition to be reviewed by a court. After all, a dispute as to consent is "the starkest form of the question whether the parties have agreed to arbitrate." *Post*, at 61. And we ordinarily presume that parties intend for courts to decide such questions because otherwise arbitrators might "force unwilling parties to arbitrate a matter they reasonably would have thought a judge . . . would decide." *First Options of Chicago, Inc.* v. *Kaplan*, 514 U. S. 938, 945 (1995).

Accordingly, if the local litigation requirement at issue here were labeled a condition on the treaty parties' "consent" to arbitrate, that would in my view change the analysis as

to whether the parties intended the requirement to be interpreted by a court or an arbitrator. As it is, however, all parties agree that the local litigation requirement is not so denominated. See Agreement for the Promotion and Protection of Investments, Art. 8(2), Dec. 11, 1990, 1765 U. N. T. S. 38. Nor is there compelling reason to suppose the parties silently intended to make it a condition on their consent to arbitrate, given that a local court's decision is of no legal significance under the treaty, *ante*, at 35, and given that the entire purpose of bilateral investment agreements is to "reliev[e] investors of any concern that the courts of host countries will be unable or unwilling to provide justice in a dispute between a foreigner and their own government," Brief for Professors and Practitioners of Arbitration Law as *Amici Curiae* 6. Moreover, Argentina's conduct confirms that the local litigation requirement is not a condition on consent, for rather than objecting to arbitration on the ground that there was no binding arbitration agreement to begin with, Argentina actively participated in the constitution of the arbitral panel and in the proceedings that followed. See *Eastern Airlines, Inc.* v. *Floyd*, 499 U. S. 530, 546 (1991) (treaty interpretation can be informed by parties' postenactment conduct).*

*The dissent discounts the significance of Argentina's conduct on the ground that Argentina "object[ed] to the [arbitral] tribunal's jurisdiction to hear the dispute." *Post*, at 63, n. 2. But there is a difference between arguing that a party has failed to comply with a procedural condition in a binding arbitration agreement and arguing that noncompliance with the condition negates the existence of consent to arbitrate in the first place. Argentina points to no evidence that its objection was of the consent variety. This omission is notable because Argentina knew how to phrase its arguments before the arbitrators in terms of consent; it argued separately that it had not consented to arbitration with BG Group on the ground that BG was not a party to the license underlying the dispute. See App. to Pet. for Cert. 182a–186a. *First Options of Chicago, Inc.* v. *Kaplan*, 514 U. S. 938 (1995), is not to the contrary, as that case held that "arguing the arbitrability issue to an arbitrator" did not constitute "clea[r] and unmistakabl[e]" evidence sufficient to override an indisputably applicable pre-

In light of these many indicators that Argentina and the United Kingdom did not intend the local litigation requirement to be a condition on their consent to arbitrate, and on the understanding that the Court does not pass on the weight courts should attach to a treaty's use of the term "consent," I concur in the Court's opinion.

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

The Court begins by deciding a different case, "initially treat[ing] the document before us as if it were an ordinary contract between private parties." *Ante*, at 33. The "document before us," of course, is nothing of the sort. It is instead a treaty between two sovereign nations: the United Kingdom and Argentina. No investor is a party to the agreement. Having elided this rather important fact for much of its analysis, the majority finally "relax[es] [its] ordinary contract assumption and ask[s] whether the fact that the document before us is a treaty makes a critical difference to [its] analysis." *Ante*, at 36. It should come as no surprise that, after starting down the wrong road, the majority ends up at the wrong place.

I would start with the document that *is* before us and take it on its own terms. That document is a bilateral investment treaty between the United Kingdom and Argentina, in which Argentina agreed to take steps to encourage U. K. investors to invest within its borders (and the United Kingdom agreed to do the same with respect to Argentine investors). Agreement for the Promotion and Protection of Investments,

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sumption that a court was to decide whether the parties had agreed to arbitration. *Id.*, at 944, 946. The question here, by contrast, is whether that presumption attaches to begin with—that is, whether the local litigation requirement was a condition on Argentina's consent to arbitrate (which would trigger the presumption) or a procedural condition in an already binding arbitration agreement (which would not). That Argentina apparently took the latter position in arbitration is surely relevant evidence that the condition was, in fact, not one on its consent.

Dec. 11, 1990, 1765 U. N. T. S. 33 (Treaty). The Treaty does indeed contain a completed agreement for arbitration—between the signatory countries. Art. 9. The Treaty also includes, in Article 8, certain provisions for resolving any disputes that might arise between a signatory country and an investor, who is not a party to the agreement.

One such provision—completely ignored by the Court in its analysis—specifies that disputes may be resolved by arbitration when the host country and an investor "have so agreed." Art. 8(2)(b), 1765 U. N. T. S. 38. No one doubts that, as is the normal rule, whether there was such an agreement is for a court, not an arbitrator, to decide. See *First Options of Chicago, Inc.* v. *Kaplan*, 514 U. S. 938, 943–945 (1995).

When there is no express agreement between the host country and an investor, they must form an agreement in another way, before an obligation to arbitrate arises. The Treaty by itself cannot constitute an agreement to arbitrate with an investor. How could it? No investor is a party to that Treaty. Something else must happen to *create* an agreement where there was none before. Article 8(2)(a) makes clear what that something is: An investor must submit his dispute to the courts of the host country. After 18 months, or an unsatisfactory decision, the investor may then request arbitration.

Submitting the dispute to the courts is thus a condition to the formation of an agreement, not simply a matter of performing an existing agreement. Article 8(2)(a) constitutes in effect a unilateral *offer* to arbitrate, which an investor may accept by complying with its terms. To be sure, the local litigation requirement might not be absolute. In particular, an investor might argue that it was an implicit aspect of the unilateral offer that he be afforded a reasonable opportunity to submit his dispute to the local courts. Even then, however, the question would remain whether the investor has managed to form an arbitration agreement with the host country pursuant to Article 8(2)(a). That question

under Article 8(2)(a) is—like the same question under Article 8(2)(b)—for a court, not an arbitrator, to decide. I respectfully dissent from the Court's contrary conclusion.

I

The majority acknowledges—but fails to heed—"the first principle that underscores all of our arbitration decisions: Arbitration is strictly 'a matter of consent.' " *Granite Rock Co.* v. *Teamsters*, 561 U. S. 287, 299 (2010) (quoting *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 479 (1989)); see *ante*, at 33–34. We have accordingly held that arbitration "is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." *First Options of Chicago, Inc.*, *supra*, at 943. The same "first principle" underlies arbitration pursuant to bilateral investment treaties. See C. Dugan, D. Wallace, N. Rubins, & B. Sabahi, Investor-State Arbitration 219 (2008) (Dugan); J. Salacuse, The Law of Investment Treaties 385 (2010) (Salacuse); K. Vandevelde, Bilateral Investment Treaties: History, Policy, and Interpretation 433 (2010). So only if Argentina agreed with BG Group to have an arbitrator resolve their dispute did the arbitrator in this case have any authority over the parties.

The majority opinion nowhere explains when and how Argentina agreed *with BG Group* to submit to arbitration. Instead, the majority seems to assume that, in agreeing with the United Kingdom to adopt Article 8 along with the rest of the Treaty, Argentina thereby formed an agreement with all potential U. K. investors (including BG Group) to submit all investment-related disputes to arbitration. That misunderstands Article 8 and trivializes the significance to a sovereign nation of subjecting itself to arbitration anywhere in the world, solely at the option of private parties.

A

The majority focuses throughout its opinion on what it calls the Treaty's "arbitration clause," *ante*, at 29, but that

provision does not stand alone. Rather, it is only part—and a subordinate part at that—of a broader dispute resolution provision. Article 8 is thus entitled "Settlement of Disputes Between an Investor and the Host State," and it opens without so much as mentioning arbitration. 1765 U. N. T. S. 37. Instead it initially directs any disputing investor and signatory country (what the Treaty calls a "Contracting Party") to court. When "an investor of one Contracting Party and the other Contracting Party" have an investment-related dispute that has "not been amicably settled," the Treaty commands that the dispute "*shall be submitted*, at the request of one of the Parties to the dispute, to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made." Art. 8(1), *id.*, at 37–38 (emphasis added). This provision could not be clearer: Before taking any other steps, an aggrieved investor must submit its dispute with a Contracting Party to that Contracting Party's own courts.

There are two routes to arbitration in Article 8(2)(a), and each passes through a Contracting Party's domestic courts. That is, the Treaty's arbitration provisions in Article 8(2)(a) presuppose that the parties have complied with the local litigation provision in Article 8(1). Specifically, a party may request arbitration only (1) "after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made" and "the said tribunal has not given its final decision," Art. 8(2)(a)(i), *id.*, at 38, or (2) "where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute," Art. 8(2)(a)(ii), *ibid.* Either way, the obligation to arbitrate does not arise until the Contracting Party's courts have had a first crack at the dispute.

Article 8 provides a third route to arbitration in paragraph 8(2)(b)—namely, "where the Contracting Party and the investor of the other Contracting Party have so agreed."

Ibid. In contrast to the two routes in Article 8(2)(a), this one does not refer to the local litigation provision. That omission is significant. It makes clear that an investor can bypass local litigation only by obtaining the Contracting Party's explicit agreement to proceed directly to arbitration. Short of that, an investor has no choice but to litigate in the Contracting Party's courts for at least some period.

The structure of Article 8 confirms that the routes to arbitration in paragraph (2)(a) are just as much about eliciting a Contracting Party's consent to arbitrate as the route in paragraph 8(2)(b). Under Article 8(2)(b), the requisite consent is demonstrated by a specific agreement. Under Article 8(2)(a), the requisite consent is demonstrated by compliance with the requirement to resort to a country's local courts.

Whereas Article 8(2)(a) is part of a completed *agreement* between Argentina and the United Kingdom, it constitutes only a unilateral standing *offer* by Argentina with respect to U. K. investors—an offer to submit to arbitration where certain conditions are met. That is how scholars understand arbitration provisions in bilateral investment treaties in general. See Dugan 221; Salacuse 381; Brief for Practitioners and Professors of International Arbitration Law as *Amici Curiae* 4. And it is how BG Group itself describes this investment treaty in particular. See Brief for Petitioner 43 (the Treaty is a "standing offer" by Argentina "to arbitrate"); Reply Brief 9 (same).

An offer must be accepted for a legally binding contract to be formed. And it is an "undeniable principle of the law of contracts, that an offer . . . by one person to another, imposes no obligation upon the former, until it is accepted by the latter, *according to the terms in which the offer was made.* Any qualification of, or departure from, those terms, invalidates the offer." *Eliason* v. *Henshaw*, 4 Wheat. 225, 228 (1819) (emphasis added). This principle applies to international arbitration agreements just as it does to domestic

commercial contracts. See Dugan 221–222; Salacuse 381; Schreuer, Consent to Arbitration, in The Oxford Handbook of International Investment Law 830, 836–837 (P. Muchlinski, F. Ortino, & C. Schreuer eds. 2008).

By incorporating the local litigation provision in Article 8(1), paragraph 8(2)(a) establishes that provision as a term of Argentina's unilateral offer to arbitrate. To accept Argentina's offer, an investor must therefore first litigate its dispute in Argentina's courts—either to a "final decision" or for 18 months, whichever comes first. Unless the investor does so (or, perhaps, establishes a valid excuse for failing to do so, as discussed below, see *infra*, at 64), it has not accepted the terms of Argentina's offer to arbitrate, and thus has not formed an arbitration agreement with Argentina.[1]

Although the majority suggests that the local litigation requirement would not be a "condition on consent" even if the Treaty explicitly called it one, the Court's holding is limited to treaties that contain no such clear statement. See *ante*, at 38–39. But there is no reason to think that such a clear statement should be required, for we generally do not require "talismanic words" in treaties. *Medellín* v. *Texas*, 552 U. S. 491, 521 (2008). Indeed, another arbitral tribunal concluded that the local litigation requirement was a condition on Argentina's consent to arbitrate despite the absence of the sort of clear statement apparently contemplated by the majority. See *ICS Inspection & Control Servs. Ltd.* v. *Argentine Republic*, PCA Case No. 2010–9, Award on Jurisdiction, ¶262 (Feb. 10, 2012). Still other tribunals have reached the same conclusion with regard to similar litigation requirements in other Argentine bilateral investment treaties. See *Daimler Financial Servs. AG* v. *Argentine Republic*, ICSID

[1] To be clear, the only question is whether BG Group formed an *arbitration* agreement with Argentina. To say that BG Group never formed such an agreement is not to call into question the validity of its various commercial agreements with Argentina.

Case No. ARB/05/1, Award, ¶¶193, 194 (Aug. 22, 2012); *Wintershall Aktiengesellschaft* v. *Argentine Republic*, ICSID Case No. ARB/04/14, Award, ¶116 (Dec. 8, 2008).

In the face of this authority, the majority quotes a treatise for the proposition that "'[a] substantial body of arbitral authority from investor-state disputes concludes that compliance with procedural mechanisms in an arbitration agreement (or bilateral investment treaty) is not ordinarily a jurisdictional prerequisite.'" *Ante*, at 43 (quoting 1 G. Born, International Commercial Arbitration 842 (2009) (Born)). But that simply restates the question. The whole issue is whether the local litigation requirement is a mere "procedural mechanism" or instead a condition on Argentina's consent to arbitrate.

BG Group concedes that other terms of Article 8(1) constitute conditions on Argentina's consent to arbitrate, even though they are not expressly labeled as such. See Tr. of Oral Arg. 57 ("You have to be a U. K. investor, you have to have a treaty claim, you have to be suing another party to the treaty. And if those aren't true, *then there is no arbitration agreement*" (emphasis added)). The Court does not explain why the *only other term*—the litigation requirement—should be viewed differently.

Nor does the majority's reading accord with ordinary contract law, which treats language such as the word "after" in Article 8(2)(a)(i) as creating conditions, even though such language may not constitute a "clear statement." See 13 R. Lord, Williston on Contracts §38:16 (4th ed. 2013) (Lord). The majority seems to regard the local litigation requirement as a condition precedent to *performance* of the contract, rather than a condition precedent to *formation* of the contract. *Ante*, at 35; see 13 Lord §§38:4, 38:7. But that cannot be. Prior to the fulfillment of the local litigation requirement, there was no contract between Argentina *and BG Group* to be performed. The Treaty is not such an

agreement, since BG Group is of course not a party to the Treaty. Neither the majority nor BG Group contends that the agreement is under Article 8(2)(b), the provision that applies "where the Contracting Party and the investor of the other Contracting Party have so agreed." An arbitration agreement must be *formed*, and Article 8(2)(a) spells out how an investor may do that: by submitting the dispute to local courts for 18 months or until a decision is rendered.

Moreover, the Treaty's local litigation requirement certainly does not resemble "time limits, notice, laches, estoppel," or the other kinds of provisions that are typically treated as conditions on the performance of an arbitration agreement, rather than prerequisites to formation. Revised Uniform Arbitration Act of 2000 § 6(c), Comment 2, 7 U. L. A. 26 (2009). Unlike a time limit for submitting a claim to arbitration, see *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U. S. 79, 85 (2002), the litigation requirement does not simply regulate the timing of arbitration. As the majority recognizes, *ante*, at 42, the provision does not simply require the parties to wait for 18 months before proceeding to arbitration, but instead requires them to submit their claims for adjudication during that period. And unlike a mandatory prearbitration grievance procedure, see *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543, 556–559 (1964), the litigation requirement sends the parties to court—and not just any court, but a court of the host country.

The law of international arbitration and domestic contract law lead to the same conclusion: Because paragraph (2)(a) of Article 8 constitutes only a unilateral standing offer by the Contracting Parties to each other's investors to submit to arbitration under certain conditions, an investor cannot form an arbitration agreement with a Contracting Party under the Treaty until the investor accepts the actual terms of the Contracting Party's offer. Absent a valid excuse, that means litigating its dispute in the Contracting Party's courts to a "final decision" or, barring that, for at least 18 months.

B

The nature of the obligations a sovereign incurs in agreeing to arbitrate with a private party confirms that the local litigation requirement is a condition on a signatory country's consent to arbitrate, and not merely a condition on performance of a pre-existing arbitration agreement. There are good reasons for any sovereign to condition its consent to arbitrate disputes on investors' first litigating their claims in the country's own courts for a specified period. It is no trifling matter for a sovereign nation to subject itself to suit by private parties; we do not presume that any country—including our own—takes that step lightly. Cf. *United States* v. *Bormes*, 568 U. S. 6, 9–10 (2012) (Congress must "unequivocally express[ ]" its intent to waive the sovereign immunity of the United States (quoting *United States* v. *Nordic Village, Inc.*, 503 U. S. 30, 33 (1992); internal quotation marks omitted)). But even where a sovereign nation has subjected itself to suit in its own courts, it is quite another thing for it to subject itself to international arbitration. Indeed, "[g]ranting a private party the right to bring an action against a sovereign state in an international tribunal regarding an investment dispute is a revolutionary innovation" whose "uniqueness and power should not be overlooked." Salacuse 137. That is so because of both the procedure and substance of investor-state arbitration.

Procedurally, paragraph (3) of Article 8 designates the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) as the default rules governing the arbitration. Those rules authorize the Secretary-General of the Permanent Court of Arbitration at The Hague to designate an "appointing authority" who—absent agreement by the parties—can select the sole arbitrator (or, in the case of a three-member tribunal, the presiding arbitrator, where the arbitrators nominated by each of the parties cannot agree on a presiding arbitrator).

UNCITRAL Arbitration Rules, Arts. 6, 8–9 (rev. 2010 ed.). The arbitrators, in turn, select the site of the arbitration (again, absent an agreement by the parties) and enjoy broad discretion in conducting the proceedings. Arts. 18, 17(1).

Substantively, by acquiescing to arbitration, a state permits private adjudicators to review its public policies and effectively annul the authoritative acts of its legislature, executive, and judiciary. See Salacuse 355; G. Van Harten, Investment Treaty Arbitration and Public Law 65–67 (2007). Consider the dispute that gave rise to this case: Before the arbitral tribunal, BG Group challenged multiple sovereign acts of the Argentine Government taken after the Argentine economy collapsed in 2001—in particular, Emergency Law 25,561, which converted dollar-denominated tariffs into peso-denominated tariffs at a rate of one Argentine peso to one U. S. dollar; Resolution 308/02 and Decree 1090/02, which established a renegotiation process for public service contracts; and Decree 214/02, which stayed for 180 days injunctions and the execution of final judgments in lawsuits challenging the effects of the Emergency Law. Indeed, in awarding damages to BG Group, the tribunal held that the first three of these enactments violated Article 2 of the Treaty. See App. to Pet. for Cert. 241a–242a, 305a.

Perhaps they did, but that is not the issue. Under Article 8, a Contracting Party grants to private adjudicators not necessarily of its own choosing, who can meet literally anywhere in the world, a power it typically reserves to its own courts, if it grants it at all: the power to sit in judgment on its sovereign acts. Given these stakes, one would expect the United Kingdom and Argentina to have taken particular care in specifying the limited circumstances in which foreign investors can trigger the Treaty's arbitration process. And that is precisely what they did in Article 8(2)(a), requiring investors to afford a country's own courts an initial opportunity to review the country's enactments and assess the country's compliance with its international obligations. Contrast

this with Article 9, which provides for arbitration between the signatory countries of disputes under the Treaty without any preconditions. Argentina and the United Kingdom considered arbitration with particular foreign investors to be different in kind and to require special limitations on its use.

The majority regards the local litigation requirement as toothless simply because the Treaty does not require an arbitrator to "give substantive weight to the local court's determinations on the matters at issue between the parties," *ante*, at 35; see also *ante*, at 42, but instead provides that "[t]he arbitration decision shall be final and binding on both Parties," Art. 8(4), 1765 U. N. T. S. 38. While it is true that an arbitrator need not defer to an Argentine court's judgment in an investor dispute, that does not deprive the litigation requirement of practical import. Most significant, the Treaty provides that an "arbitral tribunal shall decide the dispute in accordance with . . . the laws of the Contracting Party involved in the dispute." Art. 8(4), *ibid.* I doubt that a tribunal would give no weight to an Argentine court's authoritative construction of Argentine law, rendered in the same dispute, just because it might not be formally bound to adopt that interpretation.

The local litigation requirement can also help to narrow the range of issues that remain in controversy by the time a dispute reaches arbitration. It might even induce the parties to settle along the way. And of course the investor might prevail, which could likewise obviate the need for arbitration. Cf. *McKart* v. *United States*, 395 U. S. 185, 195 (1969).

None of this should be interpreted as defending Argentina's history when it comes to international investment. That history may prompt doubt that requiring an investor to resort to that country's courts in the first instance will be of any use. But that is not the question. Argentina and the United Kingdom reached agreement on the term at issue. The question can therefore be rephrased as whether it makes

sense for either Contracting Party to insist on resort to its courts before being compelled to arbitrate anywhere in the world before arbitrators not of its choosing. The foregoing reasons may seem more compelling when viewed apart from the particular episode before us.

II

Given that the Treaty's local litigation requirement is a condition on consent to arbitrate, it follows that whether an investor has complied with that requirement is a question a court must decide *de novo*, rather than an issue for the arbitrator to decide subject only to the most deferential judicial review. See, *e. g.*, *Adams* v. *Suozzi*, 433 F. 3d 220, 226–228 (CA2 2005) (holding that compliance with a condition on formation of an arbitration agreement is for a court, rather than an arbitrator, to determine). The logic is simple: Because an arbitrator's authority depends on the consent of the parties, the arbitrator should not as a rule be able to decide for himself whether the parties have in fact consented. Where the consent of the parties is in question, "reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate." *Howsam*, 537 U. S., at 83–84.

This principle is at the core of our arbitration precedents. See *Granite Rock Co.*, 561 U. S., at 299 (questions concerning "the formation of the parties' arbitration agreement" are for a court to decide *de novo*). The same principle is also embedded in the law of international commercial arbitration. 2 Born 2792 ("[W]here one party denies ever having made an arbitration agreement or challenges the validity of any such agreement, . . . the possibility of de novo judicial review of any jurisdictional award in an annulment action is logically necessary"). See also Restatement (Third) of U. S. Law of International Commercial Arbitration § 4–12(d)(1) (Tent. Draft No. 2, Apr. 16, 2012) ("a court determines de novo . . . the existence of the arbitration agreement").

Indeed, the question in this case—whether BG Group accepted the terms of Argentina's offer to arbitrate—presents an issue of contract formation, which is the starkest form of the question whether the parties have agreed to arbitrate. In *Howsam* v. *Dean Witter Reynolds, Inc.*, we gave two examples of questions going to consent, which are for courts to decide: "whether the parties are bound by a given arbitration clause" and "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy." 537 U. S., at 84. In both examples, there is at least a putative arbitration agreement between *the parties to the dispute*. The only question is whether the agreement is truly binding or whether it covers the specific dispute. Here, by contrast, the question is whether the arbitration clause in the Treaty between the United Kingdom and Argentina gives rise to an arbitration agreement between Argentina *and BG Group* at all. Cf. *ante*, at 46 (SOTOMAYOR, J., concurring in part) ("Consent is especially salient in the context of a bilateral investment treaty, where the treaty is not an already agreed-upon arbitration provision between known parties").

The majority never even starts down this path. Instead, it preempts the whole inquiry by concluding that the local litigation requirement is the kind of "procedural precondition" that parties typically expect an arbitrator to enforce. *Ante*, at 34–36. But as explained, the local litigation requirement does not resemble the requirements we have previously deemed presumptively procedural. See *supra*, at 56. It does not merely regulate the timing of arbitration. Nor does it send the parties to non-judicial forms of dispute resolution.

More importantly, all of the cases cited by the majority as examples of procedural provisions involve commercial contracts between two private parties. See *ante*, at 36. None of them—not a single one—involves an agreement between sovereigns or an agreement to which the person seeking to

compel arbitration is not even a party. The Treaty, of course, is both of those things.

The majority suggests that I am applying "a different kind of analysis" from that governing private commercial contracts, just because what is at issue is a treaty. *Ante*, at 42. That is not so: The key point, which the majority never addresses, is that there is no completed agreement whatsoever between Argentina and BG Group. An agreement must be formed, and whether that has happened is—as it is in the private commercial contract context—an issue for a court to decide. See *supra*, at 60–61.

The distinction between questions concerning consent to arbitrate and mere procedural requirements under an existing arbitration agreement can at times seem elusive. Even the most mundane procedural requirement can be recast as a condition on consent as a matter of technical logic. But it should be clear by now that the Treaty's local litigation requirement is not a mere formality—not in Buenos Aires, not in London. And while it is true that "parties often submit important matters to arbitration," *ante*, at 38, our precedents presume that parties do not submit to arbitration the most important matter of all: whether they are subject to an agreement to arbitrate in the first place.

Nor has the majority pointed to evidence that would rebut this presumption by showing that Argentina "'clearly and unmistakably'" intended to have an arbitrator enforce the litigation requirement. *Howsam*, *supra*, at 83 (quoting *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U. S. 643, 649 (1986)). As the majority notes, *ante*, at 40–41, the Treaty incorporates certain arbitration rules that, in turn, authorize arbitrators to determine their own jurisdiction over a dispute. See Art. 8(3). But those rules do not operate until a dispute is properly before an arbitral tribunal, and of course the whole question in this case is whether the dispute between BG Group and Argentina was before the arbitrators, given BG Group's failure to comply with the 18-month local litigation requirement. As a leading treatise

has explained, "[i]f the parties have not validly agreed to any arbitration agreement at all, then they also have necessarily not agreed to institutional arbitration rules." 1 Born 870. "In these circumstances, provisions in institutional rules cannot confer any [such] authority upon an arbitral tribunal." *Ibid.*

I also see no reason to think that arbitrators enjoy comparative expertise in construing the local litigation requirement. *Ante*, at 40. It would be one thing if that provision involved the application of the arbitrators' own rules, cf. *Howsam*, *supra*, at 85, or if it were "intertwined" with the merits of the underlying dispute, *John Wiley & Sons*, 376 U. S., at 557. Neither is true of the litigation requirement. A court can assess compliance with the requirement at least as well as an arbitrator can. Given the structure of Article 8 and the important interests that the litigation requirement protects, it seems clear that the United Kingdom and Argentina thought the same.[2]

III

Although the Court of Appeals got there by a slightly different route, it correctly concluded that a court must decide

[2] JUSTICE SOTOMAYOR contends that "Argentina's conduct confirms that the local litigation requirement is not a condition on consent, for rather than objecting to arbitration on the ground that there was no binding arbitration agreement to begin with, Argentina actively participated in the constitution of the arbitral panel and in the proceedings that followed." *Ante*, at 48 (opinion concurring in part). But as the arbitral tribunal itself recognized, Argentina *did* object to the tribunal's jurisdiction to hear the dispute. App. to Pet. for Cert. 99a, 134a, 143a, 161a–163a. And we have held that "merely arguing the arbitrability issue to an arbitrator"—say, by "filing with the arbitrators a written memorandum objecting to the arbitrators' jurisdiction"—"does not indicate a clear willingness to arbitrate that issue, *i. e.*, a willingness to be effectively bound by the arbitrator's decision on that point." *First Options of Chicago, Inc.* v. *Kaplan*, 514 U. S. 938, 946 (1995). The concurrence contends that Argentina "apparently" argued its jurisdictional objection in terms of procedure rather than consent, *ante*, at 49, n., but the one piece of evidence cited—a negative inference from the *arbitrator's* characterization of Argentina's argument on a subsidiary issue—hardly suffices to distinguish *First Options*.

questions concerning the interpretation and application of the local litigation requirement *de novo*. 665 F. 3d 1363, 1371–1373 (CADC 2012). At the same time, however, the court seems to have simply taken it for granted that, because BG Group did not submit its dispute to the local courts, the arbitral award in BG Group's favor was invalid. Indeed, the court addressed the issue in a perfunctory paragraph at the end of its opinion and saw "'only one possible outcome'": "that BG Group was required to commence a lawsuit in Argentina's courts and wait eighteen months before filing for arbitration." *Id.*, at 1373 (quoting *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U. S. 662, 677 (2010)).

That conclusion is not obvious. A leading treatise has indicated that "[i]t is a necessary implication from [a unilateral] offer that the offeror, in addition, makes a subsidiary offer by which he or she promises to accept a tender of performance." 1 Lord § 5:14, at 1005. On this understanding, an offeree's failure to comply with an essential condition of the unilateral offer "will not bar an action, if failure to comply with the condition is due to the offeror's own fault." *Id.*, at 1005–1006.

It would be open to BG Group to argue before the Court of Appeals that this principle was incorporated into Article 8(2)(a) as an implicit aspect of Argentina's unilateral offer to arbitrate. Such an argument would find some support in the background principle of customary international law that a foreign individual injured by a host country must ordinarily exhaust local remedies—unless doing so would be "futile." See Dugan 347–357. In any event, the issue would be analyzed as one of contract formation, and therefore would be for the court to decide. I would accordingly vacate the decision of the Court of Appeals and remand the case for such an inquiry.

I respectfully dissent.

Syllabus

ROSEMOND *v.* UNITED STATES

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

No. 12–895. Argued November 12, 2013—Decided March 5, 2014

Petitioner Justus Rosemond took part in a drug deal in which either he or one of his confederates fired a gun. Because the shooter's identity was disputed, the Government charged Rosemond with violating 18 U. S. C. § 924(c) by using or carrying a gun in connection with a drug trafficking crime, or, in the alternative, aiding and abetting that offense under 18 U. S. C. § 2. The trial judge instructed the jury that Rosemond was guilty of aiding and abetting the § 924(c) offense if he (1) "knew his cohort used a firearm in the drug trafficking crime" and (2) "knowingly and actively participated in the drug trafficking crime." This deviated from Rosemond's proposed instruction that the jury must find that he acted intentionally "to facilitate or encourage" the firearm's use, as opposed to merely the predicate drug offense. Rosemond was convicted, and the Tenth Circuit affirmed, rejecting his argument that the District Court's aiding and abetting instructions were erroneous.

Held:

1. The Government establishes that a defendant aided and abetted a § 924(c) violation by proving that the defendant actively participated in the underlying drug trafficking or violent crime with advance knowledge that a confederate would use or carry a gun during the crime's commission. Pp. 70–81.

(a) The federal aiding and abetting statute, which derives from common-law standards for accomplice liability, has two components. A person is liable under § 2 only if he (1) takes an affirmative act in furtherance of the underlying offense (2) with the intent to facilitate that offense's commission. Pp. 70–71.

(b) The first question is whether Rosemond's conduct was sufficient to satisfy the affirmative-act requirement of aiding and abetting. Section 924(c) has two elements: a drug deal or violent crime, and using or carrying a firearm in connection with that crime. The instructions permitted the jury to convict Rosemond of aiding and abetting even if he facilitated only the drug element, and not the gun element, of the § 924(c) offense. Those instructions were correct. The common law imposed aiding and abetting liability on a person who facilitated any element of a criminal offense, even if he did not facilitate all elements.

Syllabus

That principle continues to govern § 2. See, *e. g.*, *United States* v. *Johnson*, 319 U. S. 503, 515. Pp. 71–76.

(c) In addition to conduct extending to some part of the crime, aiding and abetting requires intent extending to the whole crime. The defendant must not just associate himself with the venture, but also participate in it as something that he wishes to bring about and seek by his actions to make it succeed. *Nye & Nissen* v. *United States*, 336 U. S. 613, 619. That requirement is satisfied when a person actively participates in a criminal venture with full knowledge of the circumstances constituting the charged offense. See *Pereira* v. *United States*, 347 U. S. 1, 12. An active participant in a drug transaction has the intent needed to aid and abet a § 924(c) violation when he knows that one of his confederates will carry a gun. This must be advance knowledge—meaning, knowledge at a time when the accomplice has a reasonable opportunity to walk away. Pp. 76–81.

2. The trial court's jury instructions were erroneous because they failed to require that Rosemond knew in advance that one of his cohorts would be armed. In telling the jury to consider merely whether Rosemond "knew his cohort used a firearm," the court did not direct the jury to determine when Rosemond obtained the requisite knowledge—*i. e.*, to decide whether Rosemond knew about the gun in sufficient time to withdraw from the crime. The case is remanded to permit the Tenth Circuit to address whether this objection was properly preserved and whether any error was harmless. Pp. 81–83.

695 F. 3d 1151, vacated and remanded.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined, and in which SCALIA, J., joined as to all but footnotes 7 and 8. ALITO, J., filed an opinion concurring in part and dissenting in part, in which THOMAS, J., joined, *post*, p. 84.

John P. Elwood argued the cause for petitioner. With him on the briefs were *Daniel R. Ortiz*, *Robert J. Gorence*, and *David T. Goldberg*.

John F. Bash argued the cause for the United States. With him on the brief were *Solicitor General Verrilli*, *Acting Assistant Attorney General Raman*, *Deputy Solicitor General Dreeben*, and *Joel M. Gershowitz*.*

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*Briefs of *amici curiae* urging reversal were filed for the Gun Owners Foundation et al. by *Herbert W. Titus*, *William J. Olson*, *John S. Miles*, *Jeremiah L. Morgan*, and *Michael Connelly*; and for the National Associa-

JUSTICE KAGAN delivered the opinion of the Court.†

A federal criminal statute, § 924(c) of Title 18, prohibits "us[ing] or carr[ying]" a firearm "during and in relation to any crime of violence or drug trafficking crime." In this case, we consider what the Government must show when it accuses a defendant of aiding or abetting that offense. We hold that the Government makes its case by proving that the defendant actively participated in the underlying drug trafficking or violent crime with advance knowledge that a confederate would use or carry a gun during the crime's commission. We also conclude that the jury instructions given below were erroneous because they failed to require that the defendant knew in advance that one of his cohorts would be armed.

I

This case arises from a drug deal gone bad. Vashti Perez arranged to sell a pound of marijuana to Ricardo Gonzales and Coby Painter. She drove to a local park to make the exchange, accompanied by two confederates, Ronald Joseph and petitioner Justus Rosemond. One of those men apparently took the front passenger seat and the other sat in the back, but witnesses dispute who was where. At the designated meeting place, Gonzales climbed into the car's backseat while Painter waited outside. The backseat passenger allowed Gonzales to inspect the marijuana. But rather than handing over money, Gonzales punched that man in the face and fled with the drugs. As Gonzales and Painter ran away, one of the male passengers—but again, which one is contested—exited the car and fired several shots from a semiautomatic handgun. The shooter then re-entered the vehicle, and all three would-be drug dealers gave chase after the buyers-turned-robbers. But before the three could catch

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tion of Criminal Defense Lawyers by *Dan Himmelfarb* and *Barbara E. Bergman*.

†JUSTICE SCALIA joins all but footnotes 7 and 8 of this opinion.

their quarry, a police officer, responding to a dispatcher's alert, pulled their car over. This federal prosecution of Rosemond followed.[1]

The Government charged Rosemond with, *inter alia*, violating § 924(c) by using a gun in connection with a drug trafficking crime, or aiding and abetting that offense under § 2 of Title 18. Section 924(c) provides that "any person who, during and in relation to any crime of violence or drug trafficking crime[,] . . . uses or carries a firearm," shall receive a five-year mandatory-minimum sentence, with seven- and ten-year minimums applicable, respectively, if the firearm is also brandished or discharged. 18 U. S. C. § 924(c)(1)(A). Section 2, for its part, is the federal aiding and abetting statute: It provides that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal."

Consistent with the indictment, the Government prosecuted the § 924(c) charge on two alternative theories. The Government's primary contention was that Rosemond himself used the firearm during the aborted drug transaction. But recognizing that the identity of the shooter was disputed, the Government also offered a back-up argument: Even if it was Joseph who fired the gun as the drug deal fell apart, Rosemond aided and abetted the § 924(c) violation.

The District Judge accordingly instructed the jury on aiding and abetting law. He first explained, in a way challenged by neither party, the rudiments of § 2. Under that statute, the judge stated, "[a] person who aids or abets another to commit an offense is just as guilty of that offense as if he committed it himself." App. 195. And in order to aid or abet, the defendant must "willfully and knowingly associate[ ] himself in some way with the crime, and . . . seek[ ] by some act to help make the crime succeed." *Id.*, at 196. The

[1] The Government agreed not to bring charges against the other four participants in the narcotics deal in exchange for their giving truthful testimony against Rosemond. See 2 Record 245, 272, 295–296, 318.

judge then turned to applying those general principles to § 924(c)—and there, he deviated from an instruction Rosemond had proposed. According to Rosemond, a defendant could be found guilty of aiding or abetting a § 924(c) violation only if he "intentionally took some action to facilitate or encourage the use of the firearm," as opposed to the predicate drug offense. *Id.*, at 14. But the District Judge disagreed, instead telling the jury that it could convict if "(1) the defendant knew his cohort used a firearm in the drug trafficking crime, and (2) the defendant knowingly and actively participated in the drug trafficking crime." *Id.*, at 196. In closing argument, the prosecutor contended that Rosemond easily satisfied that standard, so that even if he had not "fired the gun, he's still guilty of the crime." *Id.*, at 158. After all, the prosecutor stated, Rosemond "certainly knew [of] and actively participated in" the drug transaction. *Ibid.* "And with regards to the other element," the prosecutor urged, "the fact is a person cannot be present and active at a drug deal when shots are fired and not know their cohort is using a gun. You simply can't do it." *Ibid.*

The jury convicted Rosemond of violating § 924(c) (as well as all other offenses charged). The verdict form was general: It did not reveal whether the jury found that Rosemond himself had used the gun or instead had aided and abetted a confederate's use during the marijuana deal. As required by § 924(c), the trial court imposed a consecutive sentence of 120 months of imprisonment for the statute's violation.

The Tenth Circuit affirmed, rejecting Rosemond's argument that the District Court's aiding and abetting instructions were erroneous.[2] The Court of Appeals acknowledged

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[2] The Court of Appeals stated that it had to address that argument even if the jury could have found that Rosemond himself fired the gun, because "a conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one." 695 F. 3d 1151, 1154 (2012) (quoting *Hedgpeth* v. *Pulido*, 555 U. S. 57, 58 (2008) (*per curiam*); alteration omitted).

that some other Circuits agreed with Rosemond that a defendant aids and abets a § 924(c) offense only if he intentionally takes "some action to facilitate or encourage his cohort's use of the firearm." 695 F. 3d 1151, 1155 (2012).[3] But the Tenth Circuit had already adopted a different standard, which it thought consonant with the District Court's instructions. See, *e. g.*, *United States* v. *Wiseman*, 172 F. 3d 1196, 1217 (1999) (requiring that the defendant "actively participated in the" underlying crime and "knew [his confederate] was carrying [a] firearm"). And the Court of Appeals held that Rosemond had presented no sufficient reason for departing from that precedent. See 695 F. 3d, at 1156.

We granted certiorari, 569 U. S. 1003 (2013), to resolve the Circuit conflict over what it takes to aid and abet a § 924(c) offense. Although we disagree with Rosemond's principal arguments, we find that the trial court erred in instructing the jury. We therefore vacate the judgment below.

II

The federal aiding and abetting statute, 18 U. S. C. § 2, states that a person who furthers—more specifically, who "aids, abets, counsels, commands, induces or procures"—the commission of a federal offense "is punishable as a principal." That provision derives from (though simplifies) common-law standards for accomplice liability. See, *e. g.*, *Standefer* v. *United States*, 447 U. S. 10, 14–19 (1980); *United States* v. *Peoni*, 100 F. 2d 401, 402 (CA2 1938) (L. Hand, J.) ("The substance of [§ 2's] formula goes back a long way"). And in so doing, § 2 reflects a centuries-old view of culpability: that a person may be responsible for a crime he has not personally carried out if he helps another to complete its commission. See J. Hawley & M. McGregor, Criminal Law 81 (1899).

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[3] See, *e. g.*, *United States* v. *Rolon-Ramos*, 502 F. 3d 750, 758–759 (CA8 2007); *United States* v. *Medina-Roman*, 376 F. 3d 1, 6 (CA1 2004); *United States* v. *Bancalari*, 110 F. 3d 1425, 1429–1430 (CA9 1997).

We have previously held that under § 2 "those who provide knowing aid to persons committing federal crimes, with the intent to facilitate the crime, are themselves committing a crime." *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164, 181 (1994). Both parties here embrace that formulation, and agree as well that it has two components. See Brief for Petitioner 28; Brief for United States 14. As at common law, a person is liable under § 2 for aiding and abetting a crime if (and only if) he (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission. See 2 W. LaFave, Substantive Criminal Law § 13.2, p. 337 (2003) (hereinafter LaFave) (an accomplice is liable as a principal when he gives "assistance or encouragement . . . with the intent thereby to promote or facilitate commission of the crime"); *Hicks* v. *United States*, 150 U. S. 442, 449 (1893) (an accomplice is liable when his acts of assistance are done "with the intention of encouraging and abetting" the crime).

The questions that the parties dispute, and we here address, concern how those two requirements—affirmative act and intent—apply in a prosecution for aiding and abetting a § 924(c) offense. Those questions arise from the compound nature of that provision. Recall that § 924(c) forbids "us[ing] or carr[ying] a firearm" when engaged in a "crime of violence or drug trafficking crime." See *supra*, at 67. The prosecutor must show the use or carriage of a gun; so too he must prove the commission of a predicate (violent or drug trafficking) offense. See *Smith* v. *United States*, 508 U. S. 223, 228 (1993). For purposes of ascertaining aiding and abetting liability, we therefore must consider: When does a person act to further this double-barreled crime? And when does he intend to facilitate its commission? We address each issue in turn.

A

Consider first Rosemond's account of his conduct (divorced from any issues of intent). Rosemond actively participated

in a drug transaction, accompanying two others to a site where money was to be exchanged for a pound of marijuana. But as he tells it, he took no action with respect to any firearm. He did not buy or borrow a gun to facilitate the narcotics deal; he did not carry a gun to the scene; he did not use a gun during the subsequent events constituting this criminal misadventure. His acts thus advanced one part (the drug part) of a two-part incident—or to speak a bit more technically, one element (the drug element) of a two-element crime. Is that enough to satisfy the conduct requirement of this aiding and abetting charge, or must Rosemond, as he claims, have taken some act to assist the commission of the other (firearm) component of § 924(c)?

The common law imposed aiding and abetting liability on a person (possessing the requisite intent) who facilitated any part—even though not every part—of a criminal venture. As a leading treatise, published around the time of § 2's enactment, put the point: Accomplice liability attached upon proof of "*[a]ny* participation in a general felonious plan" carried out by confederates. 1 F. Wharton, Criminal Law § 251, p. 322 (11th ed. 1912) (hereinafter Wharton) (emphasis added). Or in the words of another standard reference: If a person was "present abetting while *any* act necessary to constitute the offense [was] being performed through another," he could be charged as a principal—even "though [that act was] *not the whole thing necessary.*" 1 J. Bishop, Commentaries on the Criminal Law § 649, p. 392 (7th ed. 1882) (emphasis added). And so "[w]here several acts constitute[d] together one crime, if each [was] separately performed by a different individual[,] . . . all [were] principals as to the whole." *Id.*, § 650, at 392.[4] Indeed, as yet a third

[4] The Wharton treatise gave the following example of how multiple confederates could perform different roles in carrying out a crime. Assume, Wharton hypothesized, that several persons "act in concert to steal a man's goods." Wharton § 251, at 322. The victim is "induced by fraud to trust one of them[,] in the presence of [the] others[,] with the [goods']

treatise underscored, a person's involvement in the crime could be not merely partial but minimal too: "The quantity [of assistance was] immaterial," so long as the accomplice did "*something*" to aid the crime. R. Desty, A Compendium of American Criminal Law § 37a, p. 106 (1882) (emphasis added). After all, the common law maintained, every little bit helps—and a contribution to some part of a crime aids the whole.

That principle continues to govern aiding and abetting law under § 2: As almost every court of appeals has held, "[a] defendant can be convicted as an aider and abettor without proof that he participated in each and every element of the offense." *United States* v. *Sigalow*, 812 F. 2d 783, 785 (CA2 1987).[5] In proscribing aiding and abetting, Congress used language that "comprehends all assistance rendered by words, acts, encouragement, support, or presence," *Reves* v. *Ernst & Young*, 507 U. S. 170, 178 (1993)—even if that aid relates to only one (or some) of a crime's phases or elements. So, for example, in upholding convictions for abetting a tax evasion scheme, this Court found "irrelevant" the defendants' "non-participation" in filing a false return; we thought they had amply facilitated the illegal scheme by helping a confederate conceal his assets. *United States* v. *Johnson*, 319 U. S. 503, 515, 518 (1943). "[A]ll who shared in [the overall crime's] execution," we explained, "have equal responsi-

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possession." *Ibid.* Afterward, "another of the party entice[s] the owner away so that he who has the goods may carry them off." *Id.*, at 322–323. Wharton concludes: "[A]ll are guilty as principals." *Id.*, at 323.

[5] See also *United States* v. *Ali*, 718 F. 3d 929, 939 (CADC 2013) ("[P]roving a defendant guilty of aiding and abetting does not ordinarily require the government to establish participation in each . . . element of the underlying offense"); *United States* v. *Arias-Izquierdo*, 449 F. 3d 1168, 1176 (CA11 2006) ("The government was not required to prove that [the defendant] participated in each element of the substantive offense in order to hold him liable as an aider and abettor"); *United States* v. *Woods*, 148 F. 3d 843, 850 (CA7 1998) ("[T]he government need not prove assistance related to every element of the underlying offense"). And so forth and so on.

bility before the law, whatever may have been [their] different roles." *Id.*, at 515. And similarly, we approved a conviction for abetting mail fraud even though the defendant had played no part in mailing the fraudulent documents; it was enough to satisfy the law's conduct requirement that he had in other ways aided the deception. See *Pereira* v. *United States*, 347 U. S. 1, 8–11 (1954). The division of labor between two (or more) confederates thus has no significance: A strategy of "you take that element, I'll take this one" would free neither party from liability.[6]

Under that established approach, Rosemond's participation in the drug deal here satisfies the affirmative-act requirement for aiding and abetting a § 924(c) violation. As we have previously described, the commission of a drug trafficking (or violent) crime is—no less than the use of a firearm—an "essential conduct element of the § 924(c) offense." *United States* v. *Rodriguez-Moreno*, 526 U. S. 275, 280 (1999); see *supra*, at 71. In enacting the statute, "Congress proscribed both the use of the firearm *and* the commission of acts that constitute" a drug trafficking crime. *Rodriguez-Moreno*, 526 U. S., at 281. Rosemond therefore could assist in § 924(c)'s violation by facilitating either the drug transaction or the firearm use (or of course both). In helping to bring about one part of the offense (whether trafficking drugs or using a gun), he necessarily helped to complete the whole. And that ends the analysis as to his conduct. It is inconsequential, as courts applying both the common law and § 2 have held, that his acts did not advance

[6] Consider a hypothetical similar to *Johnson* and *Pereira* (and a modern variant of the Wharton treatise's, see n. 4, *supra*). Suppose that as part of a kidnapping scheme, one accomplice lures the victim into a car under false pretenses; another drives the vehicle; a third allows the use of her house to hold the victim captive; and still a fourth keeps watch outside to divert potential witnesses. None would have personally completed, or even assisted with, all elements of the offense. See, *e. g.*, *United States* v. *Cervantes-Blanco*, 504 F. 3d 576, 580 (CA5 2007) (listing elements). But (if they had the requisite intent) all would be liable under § 2.

each element of the offense; all that matters is that they facilitated one component.

Rosemond argues, to the contrary, that the requisite act here "must be directed at the use of the firearm," because that element is § 924(c)'s most essential feature. Brief for Petitioner 33 (arguing that "it is the firearm crime" he was really charged with aiding and abetting, "not the drug trafficking crime"). But Rosemond can provide no authority for demanding that an affirmative act go toward an element considered peculiarly significant; rather, as just noted, courts have never thought relevant the importance of the aid rendered. See *supra*, at 72–73. And in any event, we reject Rosemond's premise that § 924(c) is somehow more about using guns than selling narcotics. It is true enough, as Rosemond says in support of that theory, that § 924(c) "establishes a separate, freestanding offense that is 'distinct from the underlying [drug trafficking crime].'" Brief for Petitioner 32 (quoting *Simpson* v. *United States*, 435 U. S. 6, 10 (1978)). But it is just as true that § 924(c) establishes a freestanding offense distinct from any that might apply just to using a gun—say, for discharging a firearm in a public park. That is because § 924(c) is, to coin a term, a combination crime. It punishes the temporal and relational conjunction of two separate acts, on the ground that together they pose an extreme risk of harm. See *Muscarello* v. *United States*, 524 U. S. 125, 132 (1998) (noting that § 924(c)'s "basic purpose" was "to combat the dangerous combination of drugs and guns"). And so, an act relating to drugs, just as much as an act relating to guns, facilitates a § 924(c) violation.

Rosemond's related argument that our approach would conflate two distinct offenses—allowing a conviction for abetting a § 924(c) violation whenever the prosecution shows that the defendant abetted the underlying drug trafficking crime—fares no better. See Brief for Petitioner 38. That is because, as we will describe, an aiding and abetting conviction requires not just an act facilitating one or another ele-

ment, but also a state of mind extending to the entire crime. See *infra* this page and 77. And under that rule, a defendant may be convicted of abetting a § 924(c) violation only if his intent reaches beyond a simple drug sale, to an armed one. Aiding and abetting law's intent component—to which we now turn—thus preserves the distinction between assisting the predicate drug trafficking crime and assisting the broader § 924(c) offense.

B

Begin with (or return to) some basics about aiding and abetting law's intent requirement, which no party here disputes. As previously explained, a person aids and abets a crime when (in addition to taking the requisite act) he intends to facilitate that offense's commission. See *supra*, at 71. An intent to advance some different or lesser offense is not, or at least not usually, sufficient: Instead, the intent must go to the specific and entire crime charged—so here, to the full scope (predicate crime plus gun use) of § 924(c). See, *e. g.*, 2 LaFave § 13.2(c); W. Clark & W. Marshall, Law of Crimes, § 187, pp. 251–253 (2d ed. 1905); ALI, Model Penal Code § 2.06, Comment, p. 306 (1985).[7] And the canonical formulation of that needed state of mind—later appropriated by this Court and oft-quoted in both parties' briefs—is Judge Learned Hand's: To aid and abet a crime, a defendant must not just "in some sort associate himself with the venture," but also "participate in it as in something that he wishes to bring about" and "seek by his action to make it succeed." *Nye & Nissen* v. *United States*, 336 U. S. 613, 619 (1949)

[7] Some authorities suggest an exception to the general rule when another crime is the "natural and probable consequence" of the crime the defendant intended to abet. See, *e. g.*, 2 LaFave § 13.3(b), at 356 (citing cases); but see *id.*, § 13.3 ("Under the better view, one is not an accomplice to a crime merely because . . . that crime was a natural and probable consequence of another offense as to which he is an accomplice"). That question is not implicated here, because no one contends that a § 924(c) violation is a natural and probable consequence of simple drug trafficking. We therefore express no view on the issue.

(quoting *Peoni*, 100 F. 2d, at 402); see Brief for Petitioner 20, 28, 41; Brief for United States 14, 51.

We have previously found that intent requirement satisfied when a person actively participates in a criminal venture with full knowledge of the circumstances constituting the charged offense. In *Pereira*, the mail fraud case discussed above, we found the requisite intent for aiding and abetting because the defendant took part in a fraud "know[ing]" that his confederate would take care of the mailing. 347 U. S., at 12; see *supra*, at 74. Likewise, in *Bozza* v. *United States*, 330 U. S. 160, 165 (1947), we upheld a conviction for aiding and abetting the evasion of liquor taxes because the defendant helped operate a clandestine distillery "know[ing]" the business was set up "to violate Government revenue laws." And several Courts of Appeals have similarly held—addressing a fact pattern much like this one—that the unarmed driver of a getaway car had the requisite intent to aid and abet armed bank robbery if he "knew" that his confederates would use weapons in carrying out the crime. See, *e. g.*, *United States* v. *Akiti*, 701 F. 3d 883, 887 (CA8 2012); *United States* v. *Easter*, 66 F. 3d 1018, 1024 (CA9 1995). So for purposes of aiding and abetting law, a person who actively participates in a criminal scheme knowing its extent and character intends that scheme's commission.[8]

The same principle holds here: An active participant in a drug transaction has the intent needed to aid and abet a § 924(c) violation when he knows that one of his confederates will carry a gun. In such a case, the accomplice has decided to join in the criminal venture, and share in its benefits, with full awareness of its scope—that the plan calls not just for a

[8] We did not deal in these cases, nor do we here, with defendants who incidentally facilitate a criminal venture rather than actively participate in it. A hypothetical case is the owner of a gun store who sells a firearm to a criminal, knowing but not caring how the gun will be used. We express no view about what sort of facts, if any, would suffice to show that such a third party has the intent necessary to be convicted of aiding and abetting.

drug sale, but for an armed one. In so doing, he has chosen (like the abettors in *Pereira* and *Bozza* or the driver in an armed robbery) to align himself with the illegal scheme in its entirety—including its use of a firearm. And he has determined (again like those other abettors) to do what he can to "make [that scheme] succeed." *Nye & Nissen*, 336 U. S., at 619. He thus becomes responsible, in the typical way of aiders and abettors, for the conduct of others. He may not have brought the gun to the drug deal himself, but because he took part in that deal knowing a confederate would do so, he intended the commission of a § 924(c) offense—*i. e.*, an armed drug sale.

For all that to be true, though, the § 924(c) defendant's knowledge of a firearm must be advance knowledge—or otherwise said, knowledge that enables him to make the relevant legal (and indeed, moral) choice. When an accomplice knows beforehand of a confederate's design to carry a gun, he can attempt to alter that plan or, if unsuccessful, withdraw from the enterprise; it is deciding instead to go ahead with his role in the venture that shows his intent to aid an *armed* offense. But when an accomplice knows nothing of a gun until it appears at the scene, he may already have completed his acts of assistance; or even if not, he may at that late point have no realistic opportunity to quit the crime. And when that is so, the defendant has not shown the requisite intent to assist a crime involving a gun. As even the Government concedes, an unarmed accomplice cannot aid and abet a § 924(c) violation unless he has "foreknowledge that his confederate will commit the offense with a firearm." Brief for United States 38; see also *infra*, at 80–83. For the reasons just given, we think that means knowledge at a time the accomplice can do something with it—most notably, opt to walk away.[9]

[9] Of course, if a defendant continues to participate in a crime after a gun was displayed or used by a confederate, the jury can permissibly infer from his failure to object or withdraw that he had such knowledge. In

Both parties here find something to dislike in our view of this issue. Rosemond argues that a participant in a drug deal intends to assist a § 924(c) violation only if he affirmatively desires one of his confederates to use a gun. See Reply Brief 8–11. The jury, Rosemond concedes, could infer that state of mind from the defendant's advance knowledge that the plan included a firearm. See Tr. of Oral Arg. 5. But according to Rosemond, the instructions must also permit the jury to draw the opposite conclusion—that although the defendant participated in a drug deal knowing a gun would be involved, he did not specifically want its carriage or use. That higher standard, Rosemond claims, is necessary to avoid subjecting persons of different culpability to the same punishment. Rosemond offers as an example an unarmed driver assisting in the heist of a store: If that person spent the drive "trying to persuade [his confederate] to leave [the] gun behind," then he should be convicted of abetting shoplifting, but not armed robbery. Reply Brief 9.

We think not. What matters for purposes of gauging intent, and so what jury instructions should convey, is that the defendant has chosen, with full knowledge, to participate in the illegal scheme—not that, if all had been left to him, he would have planned the identical crime. Consider a variant of Rosemond's example: The driver of a getaway car wants to help rob a convenience store (and argues passionately for that plan), but eventually accedes when his confederates decide instead to hold up a national bank. Whatever his original misgivings, he has the requisite intent to aid and abet *bank* robbery; after all, he put aside those doubts and knowingly took part in that more dangerous crime. The same is true of an accomplice who knowingly joins in an armed drug transaction—regardless whether he was formerly indifferent or even resistant to using firearms. The law does not, nor

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any criminal case, after all, the factfinder can draw inferences about a defendant's intent based on all the facts and circumstances of a crime's commission.

should it, care whether he participates with a happy heart or a sense of foreboding. Either way he has the same culpability, because either way he has knowingly elected to aid in the commission of a peculiarly risky form of offense.

A final, metaphorical way of making the point: By virtue of § 924(c), using a firearm at a drug deal ups the ante. A would-be accomplice might decide to play at those perilous stakes. Or he might grasp that the better course is to fold his hand. What he should not expect is the capacity to hedge his bets, joining in a dangerous criminal scheme but evading its penalties by leaving use of the gun to someone else. Aiding and abetting law prevents that outcome, so long as the player knew the heightened stakes when he decided to stay in the game.

The Government, for its part, thinks we take too strict a view of when a defendant charged with abetting a § 924(c) violation must acquire that knowledge. As noted above, the Government recognizes that the accused accomplice must have "foreknowledge" of a gun's presence. Brief for United States 38; see *supra,* at 78. But the Government views that standard as met whenever the accomplice, having learned of the firearm, continues any act of assisting the drug transaction. See Brief for United States 48. According to the Government, the jury should convict such a defendant even if he became aware of the gun only after he realistically could have opted out of the crime.

But that approach, we think, would diminish too far the requirement that a defendant in a § 924(c) prosecution must intend to further an *armed* drug deal. Assume, for example, that an accomplice agrees to participate in a drug sale on the express condition that no one brings a gun to the place of exchange. But just as the parties are making the trade, the accomplice notices that one of his confederates has a (poorly) concealed firearm in his jacket. The Government would convict the accomplice of aiding and abetting a § 924(c) offense if he assists in completing the deal without incident,

rather than running away or otherwise aborting the sale. See Tr. of Oral Arg. 40. But behaving as the Government suggests might increase the risk of gun violence—to the accomplice himself, other participants, or bystanders; and conversely, finishing the sale might be the best or only way to avoid that danger. In such a circumstance, a jury is entitled to find that the defendant intended only a drug sale—that he never intended to facilitate, and so does not bear responsibility for, a drug deal carried out with a gun. A defendant manifests that greater intent, and incurs the greater liability of § 924(c), when he chooses to participate in a drug transaction knowing it will involve a firearm; but he makes no such choice when that knowledge comes too late for him to be reasonably able to act upon it.[10]

III

Under these principles, the District Court erred in instructing the jury, because it did not explain that Rosemond needed advance knowledge of a firearm's presence. Recall

[10] Contrary to the dissent's view, see *post*, at 85–87, nothing in this holding changes the way the defenses of duress and necessity operate. Neither does our decision remotely deny that the "intent to undertake some act is . . . perfectly consistent with the motive of avoiding adverse consequences which would otherwise occur." *Post*, at 88. Our holding is grounded in the distinctive intent standard for aiding and abetting someone else's act—in the words of Judge Hand, that a defendant must not just "in some sort associate himself with the venture" (as seems to be good enough for the dissent), but also "participate in it as in something that he wishes to bring about" and "seek by his action to make it succeed." *Nye & Nissen* v. *United States*, 336 U. S. 613, 619 (1949) (quoting *United States* v. *Peoni*, 100 F. 2d 401, 402 (CA2 1938)). For the reasons just given, see *supra*, at 78, 80 and this page, we think that intent standard cannot be satisfied if a defendant charged with aiding and abetting a § 924(c) offense learns of a gun only after he can realistically walk away—*i. e.*, when he has no opportunity to decide whether "he wishes to bring about" (or make succeed) an *armed* drug transaction, rather than a simple drug crime. And because a defendant's prior knowledge is part of the intent required to aid and abet a § 924(c) offense, the burden to prove it resides with the Government.

that the court stated that Rosemond was guilty of aiding and abetting if "(1) [he] knew his cohort used a firearm in the drug trafficking crime, and (2) [he] knowingly and actively participated in the drug trafficking crime." App. 196. We agree with that instruction's second half: As we have explained, active participation in a drug sale is sufficient for § 924(c) liability (even if the conduct does not extend to the firearm), so long as the defendant had prior knowledge of the gun's involvement. See *supra*, at 74–75, 77–78. The problem with the court's instruction came in its description of that knowledge requirement. In telling the jury to consider merely whether Rosemond "knew his cohort used a firearm," the court did not direct the jury to determine *when* Rosemond obtained the requisite knowledge. So, for example, the jury could have convicted even if Rosemond first learned of the gun when it was fired and he took no further action to advance the crime. For that reason, the Government itself describes the instruction's first half as "potentially misleading," candidly explaining that "it would have been clearer to say" that Rosemond had to know that his confederate "'would use' [a firearm] or something . . . that makes absolutely clear that you [need] foreknowledge." Tr. of Oral Arg. 48–49. We agree with that view, and then some: The court's statement failed to convey that Rosemond had to have advance knowledge, of the kind we have described, that a confederate would be armed. See *supra*, at 78, 80–81.

The Government contends that this problematic instruction looks more accurate when viewed in context. In particular, the Government points to the District Court's prefatory "umbrella instruction" that to aid or abet a crime, a defendant must "willfully and knowingly seek[ ] by some act to help make the crime succeed." App. 196; Brief for United States 49. That statement, the Government rightly notes, "mirrors" Judge Hand's classic formulation. Tr. of Oral Arg. 33; see *supra*, at 76–77. But the statement is also pitched at a high level of generality. Immediately afterward, the District

Court provided the jury with the two-pronged test noted above—thus indicating how the broad principle should apply to the specific charge of abetting a § 924(c) offense. We therefore do not see how the "umbrella" statement could have cured the court's error. Indeed, a different contextual feature of the case would only have amplified that mistake. As earlier described, the prosecutor asserted in closing argument that the court's test was easily satisfied because "a person cannot be present and active at a drug deal when shots are fired and not know their cohort is using a gun." App. 158; see *supra*, at 69. The prosecutor thus invited the jury to convict Rosemond even if he first learned of the gun as it was discharged, and no matter what he did afterward. Once again, then, the message to the jury was that it need not find advance knowledge—exactly what we (and for that matter the Government) have said is required.

We send this case back to the Tenth Circuit to consider the appropriate consequence, if any, of the District Court's error. The Government makes two arguments relevant to that inquiry. First, it contends that Rosemond failed to object specifically to the part of the trial court's instructions we have found wanting; thus, the Government asserts, a plain-error standard should apply to his claim. See Fed. Rule Crim. Proc. 52(b); *Johnson* v. *United States*, 520 U. S. 461, 465–467 (1997). Second, the Government argues that any error in the court's aiding and abetting instruction was harmless, because the jury must have found (based on another part of its verdict, not discussed here) that Rosemond himself fired the gun. Those claims were not raised or addressed below, and we see no special reason to decide them in the first instance. See *Travelers Casualty & Surety Co. of America* v. *Pacific Gas & Elec. Co.*, 549 U. S. 443, 455 (2007). Accordingly, we vacate the judgment below and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE ALITO, with whom JUSTICE THOMAS joins, concurring in part and dissenting in part.

I largely agree with the analysis in the first 12 pages of the opinion of the Court, but I strongly disagree with the discussion that comes after that point. Specifically, I reject the Court's conclusion that a conviction for aiding and abetting a violation of 18 U. S. C. § 924(c) demands proof that the alleged aider and abettor had what the Court terms a "realistic opportunity" to refrain from engaging in the conduct at issue.[1] *Ante*, at 78. This rule represents an important and, as far as I am aware, unprecedented alteration of the law of aiding and abetting and of the law of intentionality generally.

To explain my disagreement with the Court's analysis, I begin with our case law on the *mens rea* required to establish aiding and abetting. There is some tension in our cases on this point. Specifically, some of our cases suggest that an aider and abettor must act purposefully or with intent. Prominent among these cases is *Nye & Nissen* v. *United States*, 336 U. S. 613 (1949), which the Court quotes. See *ante*, at 81, n. 10. In that case, the Court, quoting Judge Learned Hand's formulation in *United States* v. *Peoni*, 100 F. 2d 401 (CA2 1938), said that an aider and abettor must "'participate in [the crime] as in something that he wishes to bring about, [and] seek by his action to make it succeed.'" 336 U. S., at 619.

On the other hand, there are cases to which the Court also refers, *ante*, at 77, that appear to hold that the requisite

[1] I am also concerned that the Court's use, without clarification, of the phrase "advance knowledge" will lead readers astray. *E. g.*, *ante*, at 67. Viewed by itself, the phrase most naturally means knowledge acquired in advance of the commission of the drug trafficking offense, but this is not what the Court means. Rather, "advance knowledge," as used by the Court, may include knowledge acquired while the drug trafficking offense is in progress. Specifically, a defendant has such knowledge, the Court says, if he or she first learns of the gun while the drug offense is in progress and at that time "realistically could have opted out of the crime." *Ante*, at 80.

mens rea is simply knowledge. See *Pereira* v. *United States*, 347 U. S. 1, 12 (1954); *Bozza* v. *United States*, 330 U. S. 160, 164–165 (1947). The Court refers interchangeably to both of these tests and thus leaves our case law in the same, somewhat conflicted state that previously existed. But because the difference between acting purposefully (when that concept is properly understood) and acting knowingly is slight, this is not a matter of great concern.

Beginning on page 78, however, the Court veers off in a new and, to my mind, most unfortunate direction. The Court imagines the following situation:

> "[A]n accomplice agrees to participate in a drug sale on the express condition that no one brings a gun to the place of exchange. But just as the parties are making the trade, the accomplice notices that one of his confederates has a (poorly) concealed firearm in his jacket." *Ante*, at 80.

If the accomplice, despite spotting the gun, continues to assist in the completion of the drug sale, has the accomplice aided and abetted the commission of a violation of § 924(c)?

The Court's answer is "it depends." Walking away, the Court observes, "might increase the risk of gun violence—to the accomplice himself, other participants, or bystanders; and conversely, finishing the sale might be the best or only way to avoid the danger." *Ante*, at 81. Moreover—and this is where the seriously misguided step occurs—the Court says that if the risk of walking away exceeds (by some unspecified degree) the risk created by completing the sale and if the alleged aider and abettor chooses to continue for that reason, the alleged aider and abettor lacks the *mens rea* required for conviction. See *ante*, at 81, n. 10.

What the Court has done is to convert what has up to now been an affirmative defense into a part of the required *mens rea*, and this step has very important conceptual and practical consequences. It fundamentally alters the prior under-

standing of mental states that form the foundation of substantive criminal law, and it places a strange and difficult burden on the prosecution.

That the Court has taken a radical step can be seen by comparing what the Court now holds with the traditional defense of necessity. That defense excuses a violation of law if "the harm which will result from compliance with the law is greater than that which will result from violation of it." 2 W. LaFave, Substantive Criminal Law § 10.1, p. 116 (2003) (hereinafter LaFave).[2] This is almost exactly the balance-of-risks calculus adopted by the Court, but under the traditional approach necessity is an affirmative defense. See, *e. g.*, *United States* v. *Bailey*, 444 U. S. 394, 416 (1980). Necessity and the closely related defense of duress are affirmative defenses because they almost invariably do not negate the *mens rea* necessary to incur criminal liability. See 2 LaFave § 10.1(a), at 118 ("The rationale of the necessity defense is not that a person, when faced with the pressure of circumstances of nature, lacks the mental element which the crime in question requires"); *id.*, § 9.7(a), at 73 (same for duress).

This Court has made clear that, except in narrow circumstances, necessity and duress do not negate the *mens rea* required for conviction. In *Dixon* v. *United States*, 548 U. S. 1 (2006), the defendant was charged with "knowingly" and "willfully" committing certain criminal acts, but she claimed that she committed the acts only because her boyfriend had threatened to kill her or hurt her daughters if she did not do so. *Id.*, at 4. She contended that she could not "have

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[2] Traditionally, the defense of necessity was employed when natural forces created the situation justifying noncompliance; when the situation was the product of human action, duress was the appropriate defense. 2 LaFave § 10.1(a), at 116. But "[m]odern cases have tended to blur the distinction between" these two defenses, *United States* v. *Bailey*, 444 U. S. 394, 410 (1980), and "it would doubtless be possible to treat [duress] as a branch of the law of necessity," 2 LaFave § 10.1(b), at 121.

formed the necessary *mens rea* for these crimes because she did not freely choose to commit the acts in question," but we rejected that argument, explaining that "[t]he duress defense, like the defense of necessity . . . , may excuse conduct that would otherwise be punishable, but the existence of duress normally does not controvert any of the elements of the offense itself." *Id.*, at 6. In a footnote, we suggested one situation in which the prosecution might be required to disprove duress, namely, where a particular crime demands proof that the accused acted "maliciously," which is to say "without justification or excuse." *Ibid.*, n. 4 (internal quotation marks omitted).

The Court justifies its holding on the ground that the *mens rea* standard articulated in *Nye & Nissen* also falls within an exception to the general rule that proof of necessity or duress does not negate *mens rea*. *Ante*, at 81, n. 10. But the Court, having refrained on pages 76–77 of its opinion from deciding whether aiding and abetting requires purposeful, as opposed to knowing, conduct, quickly and without explanation jettisons the "knowing" standard and concludes that purposeful conduct is needed. This is a critical move because if it is enough for an alleged aider and abettor simply to know that his confederate is carrying a gun, then the alleged aider and abettor in the Court's hypothetical case (who spots the gun on the confederate's person) unquestionably had the *mens rea* needed for conviction.

But even accepting the *Nye & Nissen* standard as the exclusive means of proving the required *mens rea*, the Court's analysis is still quite wrong. Under the *Nye & Nissen* standard, the Government must simply prove that a defendant had as his conscious object that the hypothetical drug sale (which, as the defendant knew, included the carrying of a gun by one of the participants) go forward to completion. See *Nye & Nissen*, 336 U. S., at 619. Such intent is perfectly consistent with facts supporting a necessity or duress defense. A person can certainly intend the success of a crimi-

nal enterprise that he aids on the belief that doing so will give rise to a lesser evil than his refusal to participate would bring about.

The Court confuses two fundamentally distinct concepts: intent and motive. It seems to assume that, if a defendant's *motive* in aiding a criminal venture is to avoid some greater evil, he does not have the *intent* that the venture succeed. But the intent to undertake some act is of course perfectly consistent with the motive of avoiding adverse consequences which would otherwise occur. We can all testify to this from our daily experience. People wake up, go to work, balance their checkbooks, shop for groceries—and yes, commit crimes—because they believe something bad will happen if they do not do these things, not because the deepest desire of their heart is to do them. A person may only go to work in the morning to keep his or her family from destitution; that does not mean he or she does not intend to put in a full day's work. In the same way, the fact that a defendant carries out a crime because he feels he must do so on pain of terrible consequences does not mean he does not intend to carry out the crime. When Jean Valjean stole a loaf of bread to feed his starving family, he certainly intended to commit theft; the fact that, had he been living in America today, he may have pleaded necessity as a defense does not change that fact. See V. Hugo, Les Misérables 54 (Fall River Press ed. 2012).

Common-law commentators recognized this elementary distinction between intent and motive. As Sir James Fitz-James Stephen explains, if "A puts a loaded pistol to B's temple and shoots B through the head deliberately, . . . [i]t is obvious that in every such case the intention of A must be to kill B." 2 A History of the Criminal Law of England 110–111 (1883). This fact "throws no light whatever on A's motives for killing B. They may have been infinitely various. . . . The motive may have been a desire for revenge, or a desire for plunder, or a wish on A's part to defend himself

against an attack by B, . . . or to put a man already mortally wounded out of his agony." *Id.*, at 111. "In all these cases the intention is the same, but the motives are different, and in all the intention may remain unchanged from first to last whilst the motives may vary from moment to moment." *Ibid.*

Unsurprisingly, our cases have recognized that a lawful motive (such as necessity, duress, or self-defense) is consistent with the *mens rea* necessary to satisfy a requirement of intent. In *Martin* v. *Ohio*, 480 U. S. 228 (1987), we considered whether due process permitted the State of Ohio to place the burden of proving self-defense on a defendant charged with aggravated murder. Under the Ohio statute, aggravated murder consisted of "purposely, and with prior calculation and design, caus[ing] the death of another." *Id.*, at 230 (alteration in original; internal quotation marks omitted). Martin pleaded self-defense, which required her to prove that (1) she was "not at fault in creating the situation giving rise to the argument" with the victim, (2) she "had an honest belief that she was in imminent danger of death or great bodily harm, and that her only means of escape from such danger was in the use of . . . force," and (3) she "did not violate any duty to retreat or avoid danger." *Ibid.* Martin argued that due process did not permit the State to impose the burden of proving self-defense on her, because proving self-defense would necessarily negate the elements of aggravated murder, which the State was required to prove beyond a reasonable doubt. We disagreed, explaining that the elements which the State was required to prove to convict Martin were not the same as the elements which Martin was required to prove to prevail on her self-defense theory. *Id.*, at 233. By so holding, we recognized that a defendant's purpose to kill another is not incompatible with that defendant's "honest belief that she was in imminent danger of death or great bodily harm" and that her use of force was necessary to preserve her life. *Id.*, at 230. In other words, the fact

that a defendant intends to kill another only to avert mortal peril does not mean that the defendant does not intend to kill.

That principle plays out in a wide variety of cases. *United States* v. *Leal-Cruz*, 431 F. 3d 667 (CA9 2005), provides a good example. There, the Ninth Circuit had to decide whether a defendant could constitutionally be required to bear the burden of proving duress as a defense to conviction under 8 U. S. C. § 1326 for attempted illegal reentry into the United States. Leal-Cruz pleaded duress, testifying that he entered the United States only to escape the deadly threat posed by abusive Mexican police officers who were chasing him. 431 F. 3d, at 669. The Ninth Circuit had earlier held that the *mens rea* required for conviction for attempted illegal reentry was "purpose, i. e., conscious desire, to reenter the United States." *Id.*, at 671. The Court of Appeals nevertheless found that the Constitution permitted imposition of the burden of proving duress on Leal-Cruz, because proving duress did not require him to prove that he had not purposely entered the United States. As the Ninth Circuit explained, duress and the *mens rea* requirement of intent did not overlap because Leal-Cruz "had the 'conscious desire' to enter the country, even if the act of crossing the border was done to escape harm." *Id.*, at 673.

Thus, it seems inarguable to me that the existence of the purpose or intent to carry out a crime is perfectly compatible with facts giving rise to a necessity or duress defense. Once that proposition is established, the Court's error is readily apparent. The Court requires the Government to prove that a defendant in Rosemond's situation could have walked away without risking harm greater than he would cause by continuing with the crime—circumstances that traditionally would support a necessity or duress defense. It imposes this requirement on the Government despite the fact that such dangerous circumstances simply do not bear on whether the defendant intends the § 924(c) offense to succeed, as (on

the Court's reading) is required for aiding and abetting liability.

The usual rule that a defendant bears the burden of proving affirmative defenses is justified by a compelling, commonsense intuition: "[W]here the facts with regard to an issue lie peculiarly in the knowledge of a party, that party is best situated to bear the burden of proof." *Smith* v. *United States*, 568 U. S. 106, 112 (2013) (quoting *Dixon*, 548 U. S., at 9; alteration in original; internal quotation marks omitted). By abandoning that rule in cases involving aiding and abetting of § 924(c) offenses, the Court creates a perverse arrangement whereby the prosecution must prove something that is peculiarly within the knowledge of the defendant. Imagine that A aids B in committing a § 924(c) offense and claims that he only learned of the gun once the crime had begun. If A had the burden of proof, he might testify that B was a hothead who had previously shot others who had crossed him. But under the Court's rule, the prosecution, in order to show the intent needed to convict A as an aider and abettor, presumably has the burden of proving that B was not such a person and that A did not believe him to be. How is the prosecution to do this? By offering testimony by B's friends and associates regarding his peaceful and easygoing nature? By introducing entries from A's diary in which he reflects on the sense of safety he feels when carrying out criminal enterprises in B's company? Furthermore, even if B were a hothead and A knew him to be such, A would presumably only be entitled to escape liability if he continued with the offense *because of* his fear of B's reaction if he walked away. Under the Court's rule, it is up to the Government to prove that A's continued participation was not on account of his fear of B—but how? By introducing footage of a convenient security camera demonstrating that A's eyes were not wide with fear, nor his breathing rapid?

The Court's rule breaks with the common-law tradition and our case law. It also makes no sense. I respectfully

dissent from that portion of the Court's opinion which places on the Government the burden of proving that the alleged aider and abettor of a § 924(c) offense had what the Court terms "a realistic opportunity" to refrain from engaging in the conduct at issue.

Syllabus

MARVIN M. BRANDT REVOCABLE TRUST ET AL. *v.* UNITED STATES

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

No. 12–1173. Argued January 14, 2014—Decided March 10, 2014

Congress passed the General Railroad Right-of-Way Act of 1875 to provide railroad companies "right[s] of way through the public lands of the United States," 43 U. S. C. § 934. One such right of way, obtained by a railroad in 1908, crosses land that the United States conveyed to the Brandt family in a 1976 land patent. That patent stated, as relevant here, that the land was granted subject to the railroad's rights in the 1875 Act right of way, but it did not specify what would occur if the railroad later relinquished those rights. Years later, a successor railroad abandoned the right of way with federal approval. The Government then sought a judicial declaration of abandonment and an order quieting title in the United States to the abandoned right of way, including the stretch that crossed the land conveyed in the Brandt patent. Petitioners contested the claim, asserting that the right of way was a mere easement that was extinguished when the railroad abandoned it, so that Brandt now enjoys full title to his land without the burden of the easement. The Government countered that the 1875 Act granted the railroad something more than a mere easement, and that the United States retained a reversionary interest in that land once the railroad abandoned it. The District Court granted summary judgment to the Government and quieted title in the United States to the right of way. The Tenth Circuit affirmed.

Held: The right of way was an easement that was terminated by the railroad's abandonment, leaving Brandt's land unburdened. Pp. 102–110.

(a) The Government loses this case in large part because it won when it argued the opposite in *Great Northern R. Co.* v. *United States*, 315 U. S. 262. There, the Government contended that the 1875 Act (unlike pre-1871 statutes granting rights of way) granted nothing more than an easement, and that the railroad in that case therefore had no interest in the resources beneath the surface of its right of way. This Court adopted the Government's position in full. It found the 1875 Act's text "wholly inconsistent" with the grant of a fee interest, *id.*, at 271; agreed with the Government that cases describing the nature of rights of way granted prior to 1871 were "not controlling" because of a major shift in congressional policy concerning land grants to railroads after that year, *id.*, at

278; and held that the 1875 Act "clearly grants only an easement," *id.*, at 271. Under well-established common law property principles, an easement disappears when abandoned by its beneficiary, leaving the owner of the underlying land to resume a full and unencumbered interest in the land. See *Smith* v. *Townsend*, 148 U. S. 490, 499. Pp. 102–106.

(b) The Government asks this Court to limit *Great Northern*'s characterization of 1875 Act rights of way as easements to the question of who owns the oil and minerals beneath a right of way. But nothing in the 1875 Act's text supports that reading, and the Government's reliance on the similarity of the language in the 1875 Act and pre-1871 statutes directly contravenes the very premise of *Great Northern*: that the 1875 Act granted a fundamentally different interest than did its predecessor statutes. Nor do this Court's decisions in *Stalker* v. *Oregon Short Line R. Co.*, 225 U. S. 142, and *Great Northern R. Co.* v. *Steinke*, 261 U. S. 119, support the Government's position. The dispute in each of those cases was framed in terms of competing claims to acquire and develop a particular tract of land, and it does not appear that the Court considered—much less rejected—an argument that the railroad had only an easement in the contested land. But to the extent that those cases could be read to imply that the interest was something more, any such implication would not have survived this Court's unequivocal statement to the contrary in *Great Northern*. Finally, later enacted statutes, see 43 U. S. C. §§ 912, 940; 16 U. S. C. § 1248(c), do not define or shed light on the nature of the interest Congress granted to railroads in their rights of way in 1875. They instead purport only to dispose of interests (if any) the United States already possesses. Pp. 106–110.

496 Fed. Appx. 822, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, GINSBURG, BREYER, ALITO, and KAGAN, JJ., joined. SOTOMAYOR, J., filed a dissenting opinion, *post*, p. 111.

Steven J. Lechner argued the cause and filed briefs for petitioners.

Anthony A. Yang argued the cause for the United States. With him on the brief were *Solicitor General Verrilli*, *Acting Assistant Attorney General Dreher*, *Deputy Solicitor General Kneedler*, *William B. Lazarus*, *John L. Smeltzer*, and *Katherine J. Barton.**

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*Briefs of *amici curiae* urging reversal were filed for the Cato Institute et al. by *Ilya Shapiro* and *Mark F. (Thor) Hearne II*; for the National Association of Reversionary Property Owners by *Cecilia Fex*; for the New

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

In the mid-19th century, Congress began granting private railroad companies rights of way over public lands to encourage the settlement and development of the West. Many of those same public lands were later conveyed by the Government to homesteaders and other settlers, with the lands continuing to be subject to the railroads' rights of way. The settlers and their successors remained, but many of the railroads did not. This case presents the question of what happens to a railroad's right of way granted under a particular statute—the General Railroad Right-of-Way Act of 1875—when the railroad abandons it: Does it go to the Government, or to the private party who acquired the land underlying the right of way?

I

A

In the early to mid-19th century, America looked west. The period from the Louisiana Purchase in 1803 to the Gadsden Purchase in 1853 saw the acquisition of the western lands that filled out what is now the contiguous United States.

England Legal Foundation by *John Pagliaro* and *Martin J. Newhouse*; for the Northwest Legal Foundation by *Lynn Boughey*; for the Owners' Counsel of America et al. by *Robert H. Thomas*, *Mark M. Murakami*, *Bethany C. K. Ace*, and *Karen R. Harned*; and for the Pacific Legal Foundation et al. by *Brian T. Hodges* and *James S. Burling*.

Briefs of *amici curiae* urging affirmance were filed for the State of Washington et al. by *Robert W. Ferguson*, Attorney General of Washington, *Darwin P. Roberts*, Deputy Attorney General, *James R. Schwartz*, Assistant Attorney General, and *Alan D. Copsey*, Deputy Solicitor General, and by the Attorneys General for their respective States as follows: *Gary King* of New Mexico and *Ellen Rosenblum* of Oregon; for the National Conference of State Legislatures et al. by *Charles H. Montange* and *Lisa Soronen*; and for the Rails to Trails Conservancy et al. by *Andrea C. Ferster*.

The young country had numerous reasons to encourage settlement and development of this vast new expanse. What it needed was a fast and reliable way to transport people and property to those frontier lands. New technology provided the answer: the railroad. The Civil War spurred the effort to develop a transcontinental railroad, as the Federal Government saw the need to protect its citizens and secure its possessions in the West. *Leo Sheep Co.* v. *United States*, 440 U. S. 668, 674–676 (1979). The construction of such a railroad would "furnish a cheap and expeditious mode for the transportation of troops and supplies," help develop "the agricultural and mineral resources of this territory," and foster settlement. *United States* v. *Union Pacific R. Co.*, 91 U. S. 72, 80 (1875).

The substantial benefits a transcontinental railroad could bring were clear, but building it was no simple matter. The risks were great and the costs were staggering. Popular sentiment grew for the Government to play a role in supporting the massive project. Indeed, in 1860, President Lincoln's winning platform proclaimed: "That a railroad to the Pacific Ocean is imperatively demanded by the interests of the whole country; that the Federal Government ought to render immediate and efficient aid in its construction." J. Ely, Railroads and American Law 51 (2001). But how to do it? Sufficient funds were not at hand (especially with a Civil War to fight), and there were serious reservations about the legal authority for direct financing. "The policy of the country, to say nothing of the supposed want of constitutional power, stood in the way of the United States taking the work into its own hands." *Union Pacific R. Co.*, *supra*, at 81.

What the country did have, however, was land—lots of it. It could give away vast swaths of public land—which at the time possessed little value without reliable transportation—in hopes that such grants would increase the appeal of a transcontinental railroad to private investors. Ely, *supra*, at 52–53. In the early 1860s, Congress began granting to railroad companies rights of way through the public domain,

accompanied by outright grants of land along those rights of way. P. Gates, History of Public Land Law Development 362–368 (1968). The land was conveyed in checkerboard blocks. For example, under the Union Pacific Act of 1862, odd-numbered lots of one square mile apiece were granted to the railroad, while even-numbered lots were retained by the United States. *Leo Sheep Co.*, *supra*, at 672–673, 686, n. 23. Railroads could then either develop their lots or sell them, to finance construction of rail lines and encourage the settlement of future customers. Indeed, railroads became the largest secondary dispenser of public lands, after the States. Gates, *supra*, at 379.

But public resentment against such generous land grants to railroads began to grow in the late 1860s. Western settlers, initially some of the staunchest supporters of governmental railroad subsidization, complained that the railroads moved too slowly in placing their lands on the market and into the hands of farmers and settlers. Citizens and Members of Congress argued that the grants conflicted with the goal of the Homestead Act of 1862 to encourage individual citizens to settle and develop the frontier lands. By the 1870s, legislators across the political spectrum had embraced a policy of reserving public lands for settlers rather than granting them to railroads. *Id.*, at 380, 454–456.

A House resolution adopted in 1872 summed up the change in national policy, stating:

> "That in the judgment of this House the policy of granting subsidies in public lands to railroads and other corporations ought to be discontinued, and that every consideration of public policy and equal justice to the whole people requires that the public lands should be held for the purpose of securing homesteads to actual settlers, and for educational purposes, as may be provided by law." Cong. Globe, 42d Cong., 2d Sess., 1585.

Congress enacted the last checkerboard land-grant statute for railroads in 1871. Gates, *supra*, at 380. Still wishing to

encourage railroad construction, however, Congress passed at least 15 special Acts between 1871 and 1875 granting to designated railroads "the right of way" through public lands, without any accompanying land subsidy. *Great Northern R. Co.* v. *United States*, 315 U. S. 262, 274, and n. 9 (1942).

Rather than continue to enact special legislation for each such right of way, Congress passed the General Railroad Right-of-Way Act of 1875, 18 Stat. 482, 43 U. S. C. §§ 934–939. The 1875 Act provided that "[t]he right of way through the public lands of the United States is granted to any railroad company" meeting certain requirements, "to the extent of one hundred feet on each side of the central line of said road." § 934. A railroad company could obtain a right of way by the "actual construction of its road" or "in advance of construction by filing a map as provided in section four" of the Act. *Jamestown & Northern R. Co.* v. *Jones*, 177 U. S. 125, 130–131 (1900). Section 4 in turn provided that a company could "secure" its right of way by filing a proposed map of its rail corridor with a local Department of the Interior office within 12 months after survey or location of the road. § 937. Upon approval by the Interior Department, the right of way would be noted on the land plats held at the local office, and from that day forward "all such lands over which such right of way shall pass shall be disposed of subject to the right of way." *Ibid.*

The 1875 Act remained in effect until 1976, when its provisions governing the issuance of new rights of way were repealed by the Federal Land Policy and Management Act, § 706(a), 90 Stat. 2793. This case requires us to define the nature of the interest granted by the 1875 Act, in order to determine what happens when a railroad abandons its right of way.

B

Melvin M. Brandt began working at a sawmill in Fox Park, Wyoming, in 1939. He later purchased the sawmill and, in 1946, moved his family to Fox Park. Melvin's son Marvin

started working at the sawmill in 1958 and came to own and operate it in 1976 until it closed, 15 years later.

In 1976, the United States patented an 83-acre parcel of land in Fox Park, surrounded by the Medicine Bow-Routt National Forest, to Melvin and Lulu Brandt. (A land patent is an official document reflecting a grant by a sovereign that is made public, or "patent.") The patent conveyed to the Brandts fee simple title to the land "with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto said claimants, their successors and assigns, forever." App. to Pet. for Cert. 76. But the patent did include limited exceptions and reservations. For example, the patent "except[s] and reserv[es] to the United States from the land granted a right-of-way thereon for ditches or canals constructed by the authority of the United States"; "reserv[es] to the United States . . . a right-of-way for the existing Platte Access Road No. 512"; and "reserv[es] to the United States . . . a right-of-way for the existing Dry Park Road No. 517." *Id.*, at 76–77 (capitalization omitted). But if those roads cease to be used by the United States or its assigns for a period of five years, the patent provides that "the easement traversed thereby shall terminate." *Id.*, at 78.

Most relevant to this case, the patent concludes by stating that the land was granted "subject to those rights for railroad purposes as have been granted to the Laramie[,] Hahn's Peak & Pacific Railway Company, its successors or assigns." *Ibid.* (capitalization omitted). The patent did not specify what would occur if the railroad abandoned this right of way.

The right of way referred to in the patent was obtained by the Laramie, Hahn's Peak & Pacific Railroad (LHP&P) in 1908, pursuant to the 1875 Act.[1] The right of way is 66

[1] Locals at the time translated the acronym LHP&P as "Lord Help Push and Pull" or "Late, Hard Pressed, and Panicky." S. Thybony, R. Rosenberg, & E. Rosenberg, The Medicine Bows: Wyoming's Mountain Country 136 (1985).

miles long and 200 feet wide, and it meanders south from Laramie, Wyoming, through the Medicine Bow-Routt National Forest, to the Wyoming-Colorado border. Nearly a half-mile stretch of the right of way crosses Brandt's land in Fox Park, covering ten acres of that parcel.

In 1911, the LHP&P completed construction of its railway over the right of way, from Laramie to Coalmont, Colorado. Its proprietors had rosy expectations, proclaiming that it would become "one of the most important railroad systems in this country." Laramie, Hahns Peak and Pacific Railway System: The Direct Gateway to Southern Wyoming, Northern Colorado, and Eastern Utah 24 (1910). But the railroad ultimately fell short of that goal. Rather than shipping coal and other valuable ores as originally hoped, the LHP&P was used primarily to transport timber and cattle. R. King, Trails to Rails: A History of Wyoming's Railroads 90 (2003). Largely because of high operating costs during Wyoming winters, the LHP&P never quite achieved financial stability. It changed hands numerous times from 1914 until 1935, when it was acquired by the Union Pacific Railroad at the urging of the Interstate Commerce Commission. *Ibid.*; S. Thybony, R. Rosenberg, & E. Rosenberg, The Medicine Bows: Wyoming's Mountain Country 136–138 (1985); F. Hollenback, The Laramie Plains Line 47–49 (1960).

In 1987, the Union Pacific sold the rail line, including the right of way, to the Wyoming and Colorado Railroad, which planned to use it as a tourist attraction. King, *supra*, at 90. That did not prove profitable either, and in 1996 the Wyoming and Colorado notified the Surface Transportation Board of its intent to abandon the right of way. The railroad tore up the tracks and ties and, after receiving Board approval, completed abandonment in 2004. In 2006, the United States initiated this action seeking a judicial declaration of abandonment and an order quieting title in the United States to the abandoned right of way. In addition to the

railroad, the Government named as defendants the owners of 31 parcels of land crossed by the abandoned right of way.

The Government settled with or obtained a default judgment against all but one of those landowners—Marvin Brandt. He contested the Government's claim and filed a counterclaim on behalf of a family trust that now owns the Fox Park parcel, and himself as trustee.[2] Brandt asserted that the stretch of the right of way crossing his family's land was a mere easement that was extinguished upon abandonment by the railroad, so that, under common law property rules, he enjoyed full title to the land without the burden of the easement. The Government countered that it had all along retained a reversionary interest in the railroad right of way—that is, a future estate that would be restored to the United States if the railroad abandoned or forfeited its interest.

The District Court granted summary judgment to the Government and quieted title in the United States to the right of way over Brandt's land. 2008 WL 7185272 (D Wyo., Apr. 8, 2008).[3] The Court of Appeals affirmed. *United States* v. *Brandt*, 496 Fed. Appx. 822 (CA10 2012) (*per curiam*). The court acknowledged division among lower courts regarding the nature of the Government's interest (if any) in abandoned 1875 Act rights of way. But it concluded based on Circuit precedent that the United States had retained an "implied reversionary interest" in the right of way,

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[2] The other landowners had a potential interest in much smaller acreages: No other party could claim an interest in more than three acres of the right of way, and only 6 of the 31 potential claims amounted to more than one acre. See Amended Complaint in No. 06–CV–0184J etc. (D Wyo.), ¶¶6–10.

[3] The District Court dismissed without prejudice Brandt's separate counterclaim for just compensation. Brandt then filed a takings claim in the Court of Federal Claims. That case has been stayed pending the disposition of this one.

which then vested in the United States when the right of way was relinquished. *Id.*, at 824.

We granted certiorari. 570 U. S. 947 (2013).

II

This dispute turns on the nature of the interest the United States conveyed to the LHP&P in 1908 pursuant to the 1875 Act. Brandt contends that the right of way granted under the 1875 Act was an easement, so that when the railroad abandoned it, the underlying land (Brandt's Fox Park parcel) simply became unburdened of the easement. The Government does not dispute that easements normally work this way, but maintains that the 1875 Act granted the railroads something more than an easement, reserving an implied reversionary interest in that something more to the United States. The Government loses that argument today, in large part because it won when it argued the opposite before this Court more than 70 years ago, in the case of *Great Northern R. Co.* v. *United States*, 315 U. S. 262 (1942).

In 1907, Great Northern succeeded to an 1875 Act right of way that ran through public lands in Glacier County, Montana. Oil was later discovered in the area, and Great Northern wanted to drill beneath its right of way. But the Government sued to enjoin the railroad from doing so, claiming that the railroad had only an easement, so that the United States retained all interests beneath the surface.

This Court had indeed previously held that the pre-1871 statutes, granting rights of way accompanied by checkerboard land subsidies, conveyed to the railroads "a limited fee, made on an implied condition of reverter." See, *e. g.*, *Northern Pacific R. Co.* v. *Townsend*, 190 U. S. 267, 271 (1903). Great Northern relied on those cases to contend that it owned a "fee" interest in the right of way, which included the right to drill for minerals beneath the surface.

The Government disagreed. It argued that "the 1875 Act granted an easement and nothing more," and that the railroad accordingly could claim no interest in the resources beneath the surface. Brief for United States in *Great Northern R. Co.* v. *United States*, O. T. 1941, No. 149, p. 29. "The year 1871 marks the end of one era and the beginning of a new in American land-grant history," the Government contended; thus, cases construing the pre-1871 statutes were inapplicable in construing the 1875 Act, *id.*, at 15, 29–30. Instead, the Government argued, the text, background, and subsequent administrative and congressional construction of the 1875 Act all made clear that, unlike rights of way granted under pre-1871 land-grant statutes, those granted under the 1875 Act were mere easements.

The Court adopted the United States' position in full, holding that the 1875 Act "clearly grants only an easement, and not a fee." *Great Northern*, 315 U. S., at 271. The Court found Section 4 of the Act "especially persuasive," because it provided that "all such lands *over* which such right of way shall pass shall be disposed of *subject to* such right of way." *Ibid.* Calling this language "wholly inconsistent" with the grant of a fee interest, the Court endorsed the lower court's statement that "[a]pter words to indicate the intent to convey an easement would be difficult to find." *Ibid.*

That interpretation was confirmed, the Court explained, by the historical background against which the 1875 Act was passed and by subsequent administrative and congressional interpretation. The Court accepted the Government's position that prior cases describing the nature of pre-1871 rights of way—including *Townsend*, *supra*, at 271—were "not controlling," because of the shift in congressional policy after that year. *Great Northern*, *supra*, at 277–278, and n. 18. The Court also specifically disavowed the characterization of an 1875 Act right of way in *Rio Grande Western R. Co.* v. *Stringham*, 239 U. S. 44 (1915), as "'a limited fee, made on

an implied condition of reverter.'" *Great Northern*, *supra*, at 278–279 (quoting *Stringham*, *supra*, at 47). The Court noted that in *Stringham* "it does not appear that Congress' change of policy after 1871 was brought to the Court's attention," given that "[n]o brief was filed by the defendant or the United States" in that case. *Great Northern, supra*, at 279, and n. 20.

The dissent is wrong to conclude that *Great Northern* merely held that "the right of way did not confer one particular attribute of fee title." *Post*, at 113 (opinion of SOTOMAYOR, J.). To the contrary, the Court specifically rejected the notion that the right of way conferred even a "limited fee." 315 U. S., at 279; see also *id.*, at 277–278 (declining to follow cases describing a right of way as a "limited," "base," or "qualified" fee). Instead, the Court concluded, it was "clear from the language of the Act, its legislative history, its early administrative interpretation and the construction placed upon it by Congress in subsequent enactments" that the railroad had obtained "only an easement in its rights of way acquired under the Act of 1875." *Id.*, at 277; see *United States* v. *Union Pacific R. Co.*, 353 U. S. 112, 119 (1957) (noting the conclusion in *Great Northern* that, in the period after 1871, "only an easement for railroad purposes was granted"); 353 U. S., at 128 (Frankfurter, J., dissenting) (observing that the Court "conclude[d] in the *Great Northern* case that a right of way granted by the 1875 Act was an easement and not a limited fee").

When the United States patented the Fox Park parcel to Brandt's parents in 1976, it conveyed fee simple title to that land, "subject to those rights for railroad purposes" that had been granted to the LHP&P. The United States did not reserve to itself any interest in the right of way in that patent. Under *Great Northern*, the railroad thus had an easement in its right of way over land owned by the Brandts.

The essential features of easements—including, most important here, what happens when they cease to be used—

are well settled as a matter of property law. An easement is a "nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement." Restatement (Third) of Property: Servitudes § 1.2(1) (1998). "Unlike most possessory estates, easements . . . may be unilaterally terminated by abandonment, leaving the servient owner with a possessory estate unencumbered by the servitude." *Id.*, § 1.2, Comment *d*; *id.*, § 7.4, Comments *a*, *f*. In other words, if the beneficiary of the easement abandons it, the easement disappears, and the landowner resumes his full and unencumbered interest in the land. See *Smith* v. *Townsend*, 148 U. S. 490, 499 (1893) ("[W]hoever obtained title from the government to any . . . land through which ran this right of way would acquire a fee to the whole tract subject to the easement of the company, and if ever the use of that right of way was abandoned by the railroad company the easement would cease, and the full title to that right of way would vest in the patentee of the land"); 16 Op. Atty. Gen. 250, 254 (1879) ("the purchasers or grantees of the United States took the fee of the lands patented to them subject to the easement created by the act of 1824; but on a discontinuance or abandonment of that right of way the entire and exclusive property, and right of enjoyment thereto, vested in the proprietors of the soil").[4]

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[4] Because granting an easement merely gives the grantee the right to enter and use the grantor's land for a certain purpose, but does not give the grantee any possessory interest in the land, it does not make sense under common law property principles to speak of the grantor of an easement having retained a "reversionary interest." A reversionary interest is "any future interest left in a transferor or his successor in interest." Restatement (First) of Property § 154(1) (1936). It arises when the grantor "transfers less than his entire interest" in a piece of land, and it is either certain or possible that he will retake the transferred interest at a future date. *Id.*, Comment *a*. Because the grantor of an easement has not transferred his estate or possessory interest, he has not retained a reversionary interest. He retains all his ownership interest, subject to

Those basic common law principles resolve this case. When the Wyoming and Colorado Railroad abandoned the right of way in 2004, the easement referred to in the Brandt patent terminated. Brandt's land became unburdened of the easement, conferring on him the same full rights over the right of way as he enjoyed over the rest of the Fox Park parcel.

III

Contrary to that straightforward conclusion, the Government now tells us that *Great Northern* did not really mean what it said. Emphasizing that *Great Northern* involved only the question of who owned the oil and minerals beneath a right of way, the Government asks the Court to limit its characterization of 1875 Act rights of way as "easements" to that context. Even if the right of way has some features of an easement—such as granting only a surface interest to the railroad when the Government wants the subsurface oil and minerals—the Government asks us to hold that the right of way is not an easement for purposes of what happens when the railroad stops using it. But nothing in the text of the 1875 Act supports such an improbable (and self-serving) reading.

The Government argues that the similarity in the language of the 1875 Act and the pre-1871 statutes shows that Congress intended to reserve a reversionary interest in the lands granted under the 1875 Act, just as it did in the pre-1871 statutes. See Brief for United States 17–18. But that is directly contrary to the very premise of this Court's decision (and the Government's argument) in *Great Northern*: that the 1875 Act granted a fundamentally different interest in the rights of way than did the predecessor statutes. 315 U. S., at 277–278; see U. S. *Great Northern* Brief 30 ("[Great Northern's] argument . . . fails because it disregards the es-

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an easement. See *Preseault* v. *United States*, 100 F. 3d 1525, 1533–1534 (CA Fed. 1996) (en banc).

sential differences between the 1875 Act and its predecessors."). Contrary to the Government's position now—but consistent with the Government's position in 1942—*Great Northern* stands for the proposition that the pre-1871 statutes (and this Court's decisions construing them) have little relevance to the question of what interest the 1875 Act conveyed to railroads.

The Government next contends that this Court's decisions in *Stalker* v. *Oregon Short Line R. Co.*, 225 U. S. 142 (1912), and *Great Northern R. Co.* v. *Steinke*, 261 U. S. 119 (1923), support its position that the United States retains an implied reversionary interest in 1875 Act rights of way. Brief for United States 28–32. According to the Government, both *Stalker* and *Steinke* demonstrate that those rights of way cannot be bare common law easements, because those cases concluded that patents purporting to convey the land underlying a right of way were "inoperative to pass title." Brief for United States 31 (quoting *Steinke*, *supra*, at 131); see also Tr. of Oral Arg. 28–30, 33, 40–41, 44–45. If the right of way were a mere easement, the argument goes, the patent would have passed title to the underlying land subject to the railroad's right of way, rather than failing to pass title altogether. But that is a substantial overreading of those cases.

In both *Stalker* and *Steinke*, a railroad that had already obtained an 1875 Act right of way thereafter claimed adjacent land for station grounds under the Act, as it was permitted to do because of its right of way. A homesteader subsequently filed a claim to the same land, unaware of the station grounds. The question in each case was whether the railroad could build on the station grounds, notwithstanding a subsequent patent to the homesteader. The homesteader claimed priority because the railroad's station grounds map had not been recorded in the local land office at the time the homesteader filed his claim. This Court construed the 1875 Act to give the railroad priority because it had submitted its proposed map to the Department of the Interior before the

homesteader filed his claim. See *Stalker*, *supra*, at 148–154; *Steinke*, *supra*, at 125–129.

The dispute in each case was framed in terms of competing claims to the right to acquire and develop the same tract of land. The Court ruled for the railroad, but did not purport to define the precise nature of the interest granted under the 1875 Act. Indeed, it does not appear that the Court in either case considered—much less rejected—an argument that the railroad had obtained only an easement in the contested land, so that the patent could still convey title to the homesteader. In any event, to the extent that *Stalker* and *Steinke* could be read to imply that the railroads had been granted something more than an easement, any such implication would not have survived this Court's unequivocal statement in *Great Northern* that the 1875 Act "clearly grants only an easement, and not a fee." 315 U. S., at 271.

Finally, the Government relies on a number of later enacted statutes that it says demonstrate that Congress believed the United States had retained a reversionary interest in the 1875 Act rights of way. Brief for United States 34–42. But each of those statutes purported only to dispose of interests the United States already possessed, not to create or modify any such interests in the first place. First, in 1906 and 1909, Congress declared forfeited any right of way on which a railroad had not been constructed in the five years after the location of the road. 43 U. S. C. § 940. The United States would "resume[ ] the full title to the lands covered thereby free and discharged of such easement," but the forfeited right of way would immediately "inure to the benefit of any owner or owners of land conveyed by the United States prior to such date." *Ibid.*

Then, in 1922, Congress provided that whenever a railroad forfeited or officially abandoned its right of way, "all right, title, interest, and estate of the United States in said lands" (other than land that had been converted to a public highway) would immediately be transferred to either the munici-

pality in which it was located, or else to the person who owned the underlying land. 43 U. S. C. § 912. Finally, as part of the National Trails System Improvements Act of 1988, Congress changed course and sought to retain title to abandoned or forfeited railroad rights of way, specifying that "any and all right, title, interest, and estate of the United States" in such rights of way "shall remain in the United States" upon abandonment or forfeiture. 16 U. S. C. § 1248(c).

The Government argues that these statutes prove that Congress intended to retain (or at least believed it had retained) a reversionary interest in 1875 Act rights of way. Otherwise, the argument goes, these later statutes providing for the disposition of the abandoned or forfeited strips of land would have been meaningless. That is wrong. This case turns on what kind of interest Congress granted to railroads in their rights of way in 1875. Cf. *Leo Sheep Co.*, 440 U. S., at 681 ("The pertinent inquiry in this case is the intent of Congress when it granted land to the Union Pacific in 1862."). *Great Northern* answered that question: an easement. The statutes the Government cites do not purport to define (or redefine) the nature of the interest conveyed under the 1875 Act. Nor do they shed light on what kind of property interest Congress intended to convey to railroads in 1875. See *United States* v. *Price*, 361 U. S. 304, 313 (1960) ("the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one").

In other words, these statutes do not tell us whether the United States has an interest in any particular right of way; they simply tell us how any interest the United States might have should be disposed of. For pre-1871 rights of way in which the United States retained an implied reversionary interest, or for rights of way crossing public lands, these statutes might make a difference in what happens to a forfeited or abandoned right of way. But if there is no "right, title, interest, [or] estate of the United States" in the right of way, 43 U. S. C. § 912, then the statutes simply do not apply.

We cannot overlook the irony in the Government's argument based on Sections 912 and 940. Those provisions plainly evince Congress's intent to divest the United States of any title or interest it had retained to railroad rights of way, and to vest that interest in individuals to whom the underlying land had been patented—in other words, people just like the Brandts. It was not until 1988—12 years after the United States patented the Fox Park parcel to the Brandts—that Congress did an about-face and attempted to reserve the rights of way to the United States. That policy shift cannot operate to create an interest in land that the Government had already given away.[5]

* * *

More than 70 years ago, the Government argued before this Court that a right of way granted under the 1875 Act was a simple easement. The Court was persuaded, and so ruled. Now the Government argues that such a right of way is tantamount to a limited fee with an implied reversionary interest. We decline to endorse such a stark change in position, especially given "the special need for certainty and predictability where land titles are concerned." *Leo Sheep Co.*, *supra*, at 687.

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

It is so ordered.

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[5] The dissent invokes the principle that "any ambiguity in land grants 'is to be resolved favorably to a sovereign grantor,'" *post*, at 111 (quoting *Great Northern R. Co.* v. *United States*, 315 U. S. 262, 272 (1942)), but the Solicitor General does not—for a very good reason. The Government's argument here is that it gave away *more* in the land grant than an easement, so that more should revert to it now. A principle that ambiguous grants should be construed in favor of the sovereign hurts rather than helps that argument. The dissent's quotation is indeed from *Great Northern*, where the principle was cited in support of the Government's argument that its 1875 Act grant conveyed "only an easement, and not a fee." *Id.*, at 271.

JUSTICE SOTOMAYOR, dissenting.

The Court bases today's holding almost entirely on *Great Northern R. Co.* v. *United States*, 315 U. S. 262, 271 (1942), and its conclusion that the General Railroad Right-of-Way Act of 1875 granted "only an easement, and not a fee," to a railroad possessing a right of way. The Court errs, however, in two ways. First, it does not meaningfully grapple with prior cases—*Northern Pacific R. Co.* v. *Townsend*, 190 U. S. 267, 271 (1903), and *Rio Grande Western R. Co.* v. *Stringham*, 239 U. S. 44, 47 (1915)—that expressly concluded that the United States retained a reversionary interest in railroad rights of way. To the extent the Court regards *Great Northern* as having abrogated these precedents, it places on *Great Northern* more weight than that case will bear. Second, the Court relies on "basic common law principles," *ante*, at 106, without recognizing that courts have long treated railroad rights of way as *sui generis* property rights not governed by the ordinary common-law regime. Because *Townsend* and *Stringham* largely dictate the conclusion that the Government retained a reversionary interest when it granted the right of way at issue, and because any ambiguity in land grants "is to be resolved favorably to a sovereign grantor," *Great Northern*, 315 U. S., at 272, I respectfully dissent.

I

Over a century ago, this Court held that a right of way granted to a railroad by a pre-1871 Act of Congress included "an implied condition of reverter" to the Government if the right of way ceased to be used "for the purpose for which it was granted." *Townsend*, 190 U. S., at 271. The question in *Townsend* was whether individual homesteaders could acquire title by adverse possession to land granted by the United States as a railroad right of way. The Court held that they could not, because "the land forming the right of way was not granted with the intent that it might be absolutely disposed of at the volition of the company." *Ibid.*

"On the contrary," the Court held, "the grant was explicitly stated to be for a designated purpose, one which negated the existence of the power to voluntarily alienate the right of way or any portion thereof." *Ibid.* Hence the "implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted." *Ibid.* In essence, the Court held, "the grant was of a limited fee," *ibid.*—commonly known as a defeasible fee, see Restatement (First) of Property § 16 (1936)—rather than fee simple. Thus, if the railroad were to abandon its use of the right of way, the property would revert to the United States.

The Court later confirmed in *Stringham*, 239 U. S., at 47, that this rule applies not just to pre-1871 land grants to railroads, but also to rights of way granted under the General Railroad Right-of-Way Act—the Act under which the United States granted the right of way at issue in this case. That case stated that rights of way granted under the 1875 Act are "made on an implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted." *Ibid.* Indeed, *Stringham* sustained the validity of the reverter where, as here, the United States patented the adjacent land "subject to [the] right of way." *Id.*, at 46. If *Townsend* and *Stringham* remain good law on that point, then this case should be resolved in the Government's favor.

II

A

This case therefore turns on whether, as the majority asserts, *Great Northern* "disavowed" *Townsend* and *Stringham* as to the question whether the United States retained a reversionary interest in the right of way. *Ante*, at 103–104. *Great Northern* did no such thing. Nor could it have, for the Court did not have occasion to consider that question.

In *Great Northern*, a railroad sought to drill for oil beneath the surface of a right of way granted under the 1875 Act. We held that the railroad had no right to drill, because the United States did not convey the underlying oil and minerals when it granted the railroad a right of way. In language on which the Court relies heavily, *Great Northern* opined that the 1875 Act granted the railroad "only an easement, and not a fee." 315 U. S., at 271.

But that language does not logically lead to the place at which the majority ultimately arrives. All that *Great Northern* held—all, at least, that was necessary to its ruling—was that the right of way did not confer one particular attribute of fee title. Specifically, the Court held, the right of way did not confer the right to exploit subterranean resources, because the 1875 Act could not have made clearer that the right of way extended only to surface lands: It provided that after the recordation of a right of way, "all . . . lands *over* which such right of way shall pass shall be disposed of subject to such right of way." *Ibid.* (second emphasis and internal quotation marks omitted). But the Court did not hold that the right of way failed to confer any sticks in the proverbial bundle of rights generally associated with fee title. Cf. B. Cardozo, The Paradoxes of Legal Science 129 (1928) (reprint 2000); *United States* v. *Craft*, 535 U. S. 274, 278 (2002). And this case concerns an attribute of fee title—defeasibility—that no party contends was at issue in *Great Northern*.

The majority places heavy emphasis on *Great Northern*'s characterization of rights of way under the 1875 Act as "easements," rather than "limited fees." When an easement is abandoned, the majority reasons, it is extinguished; in effect, it reverts to the owner of the underlying estate, rather than to its original grantor. *Ante*, at 104–105. For that reason, the majority concludes, "basic common law principles" require us to retreat from our prior holdings that railroad rights of way entail an implied possibility of reverter

to the original grantor—the United States—should the right of way cease to be used by a railroad for its intended purpose. *Ante*, at 106.

But federal and state decisions in this area have not historically depended on "basic common law principles." To the contrary, this Court and others have long recognized that in the context of railroad rights of way, traditional property terms like "fee" and "easement" do not neatly track common-law definitions. In *Stringham*, the Court articulated ways in which rights of ways bear attributes both of easements and fees, explaining that "[t]he right of way granted by [the 1875 Act] and similar acts is neither a mere easement, nor a fee simple absolute." 239 U. S., at 47. In *New Mexico* v. *United States Trust Co.*, 172 U. S. 171, 182–183 (1898), the Court further observed that even if a particular right of way granted by the United States was an "easement," then it was "surely more than an ordinary easement" because it had "attributes of the fee" like exclusive use and possession. See also *Western Union Telegraph Co.* v. *Pennsylvania R. Co.*, 195 U. S. 540, 569–570 (1904) (reaffirming this view). Earlier, in 1854, the Massachusetts Supreme Judicial Court had explained that although the right acquired by a railroad was "technically an easement," it "require[d] for its enjoyment a use of the land permanent in its nature and practically exclusive." *Hazen* v. *Boston & Maine R. Co.*, 68 Mass. 574, 580 (1854). And the Iowa Supreme Court, in a late-19th-century opinion, observed that "[t]he easement" in question "is not that spoken of in the old law books, but is peculiar to the use of a railroad." *Smith* v. *Hall*, 103 Iowa 95, 96, 72 N. W. 427, 428 (1897).

Today's opinion dispenses with these teachings. Although the majority canvasses the special role railroads played in the development of our Nation, it concludes that we are bound by the common-law definitions that apply to more typical property. In doing so, it ignores the *sui generis* nature of railroad rights of way. That *Great Northern*

referred to a right of way granted under the 1875 Act as an "easement" does not derail the Court's previous unequivocal pronouncements that rights of way under the Act are "made on an implied condition of reverter." *Stringham*, 239 U. S., at 47.

B

Not only does *Great Northern* fail to support the majority's conclusion; significant aspects of *Great Northern*'s reasoning actually support the contrary view. In that case, the Court relied heavily on Congress' policy shift in the early 1870's away from bestowing extravagant "'subsidies in public lands to railroads and other corporations.'" 315 U. S., at 273–274 (quoting Cong. Globe, 42d Cong., 2d Sess., 1585 (1872)). That history similarly weighs in the Government's favor here. Just as the post-1871 Congress did not likely mean to confer subsurface mineral rights on railroads, as held in *Great Northern*, it did not likely mean to grant railroads an indefeasible property interest in rights of way—a kind of interest more generous than that which it gave in our cases concerning pre-1871 grants.

As in *Great Northern*, moreover, the purpose of the 1875 Act supports the Government. Congress passed the Act, we noted, "to permit the construction of railroads through public lands" and thus to "enhance their value and hasten their settlement." 315 U. S., at 272. In *Great Northern*, we held, that purpose did not require granting to the railroad any right to that which lay beneath the surface. The same is true here. As we recognized in *Townsend* and *Stringham*, the United States granted rights of way to railroads subject to "an implied condition of reverter in the event that the" railroads "cease[d] to use or retain the land for the purposes for which it is granted." *Stringham*, 239 U. S., at 47. Nothing about the purpose of the 1875 Act suggests Congress ever meant to abandon that sensible limitation.

Further, *Great Northern* relied on the conventional rule that "a grant is to be resolved favorably to a sovereign

grantor," 315 U. S., at 272, and that "'nothing passes but what is conveyed in clear and explicit language,'" *ibid.* (quoting *Caldwell* v. *United States*, 250 U. S. 14, 20 (1919)). "Nothing in the [1875] Act," we observed, "may be characterized as a 'clear and explicit' conveyance of the . . . oil and minerals" underlying a right of way. 315 U. S., at 272. Just so here, as nothing in the 1875 Act clearly evinces Congress' intent not to make the rights of way conveyed under the Act defeasible, in the manner described by *Townsend* and *Stringham*. In fact, the presumption in favor of sovereign grantors applies doubly here, where the United States was the sovereign grantor both of the right of way and of the ultimate patent.

III

The majority notes that in *Great Northern*, the United States took the position that rights of way granted to railroads are easements. *Ante*, at 103. In the majority's view, because the *Great Northern* Court adopted that position "in full," it is unfair for the Government to backtrack on that position now. *Ante*, at 103.

Even assuming that it is an injustice for the Government to change positions on an issue over a 70-year period, it is not clear that such a change in position happened here. Yes, the Government argued in *Great Northern* that a right of way was an "easement." It proposed, however, that the right of way may well have had "some of the attributes of a fee." Brief for United States in *Great Northern R. Co.* v. *United States*, O. T. 1941, No. 149, pp. 36–37. The Government contended that it is "'not important whether the interest or estate passed be considered an easement or a limited fee,'" observing that an easement "may be held in fee determinable." *Id.*, at 35–36 (quoting *United States* v. *Big Horn Land & Cattle Co.*, 17 F. 2d 357, 365 (CA8 1927)). Indeed, the Government expressly reserved the possibility that it retained a reversionary interest in the right of way, even if the surrounding land was patented to others. Brief for

United States in *Great Northern* 10, n. 4. The Court is right to criticize the Government when it takes "self-serving" and contradictory positions, *ante*, at 106, but such critique is misplaced here.

* * *

Since 1903, this Court has held that rights of way were granted to railroads with an implied possibility of reverter to the United States. Regardless of whether these rights of way are labeled "easements" or "fees," nothing in *Great Northern* overruled that conclusion. By changing course today, the Court undermines the legality of thousands of miles of former rights of way that the public now enjoys as means of transportation and recreation. And lawsuits challenging the conversion of former rails to recreational trails alone may well cost American taxpayers hundreds of millions of dollars.* I do not believe the law requires this result, and I respectfully dissent.

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*Dept. of Justice, Environment and Natural Resources Div., FY2014 Performance Budget, Congressional Submission, p. 7, http://www.justice.gov/jmd/2014justification/pdf/enrd-justification.pdf (visited Mar. 7, 2014, and available in Clerk of Court's case file).

Syllabus

LEXMARK INTERNATIONAL, INC. *v.* STATIC CONTROL COMPONENTS, INC.

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

No. 12–873. Argued December 3, 2013—Decided March 25, 2014

Petitioner Lexmark sells the only style of toner cartridges that work with the company's laser printers, but "remanufacturers" acquire and refurbish used Lexmark cartridges to sell in competition with Lexmark's own new and refurbished ones. Lexmark's "Prebate" program gives customers a discount on new cartridges if they agree to return empty cartridges to the company. Each Prebate cartridge has a microchip that disables the empty cartridge unless Lexmark replaces the chip. Respondent Static Control, a maker and seller of components for the remanufacture of Lexmark cartridges, developed a microchip that mimicked Lexmark's. Lexmark sued for copyright infringement, but Static Control counterclaimed, alleging that Lexmark engaged in false or misleading advertising in violation of § 43(a) of the Lanham Act, 15 U. S. C. § 1125(a), and that its misrepresentations had caused Static Control lost sales and damage to its business reputation. The District Court held that Static Control lacked "prudential standing" to bring the Lanham Act claim, applying a multifactor balancing test the court attributed to *Associated Gen. Contractors of Cal., Inc.* v. *Carpenters*, 459 U. S. 519. In reversing, the Sixth Circuit relied on the Second Circuit's "reasonable interest" test.

Held: Static Control has adequately pleaded the elements of a Lanham Act cause of action for false advertising. Pp. 125–140.

(a) The question here is whether Static Control falls within the class of plaintiffs that Congress authorized to sue under § 1125(a). To decide that question, this Court must determine the provision's meaning, using traditional principles of statutory interpretation. It is misleading to label this a "prudential standing" question. Lexmark bases its "prudential standing" arguments on *Associated General Contractors*, but that case rested on statutory considerations: The Court sought to "ascertain," as a statutory-interpretation matter, the "scope of the private remedy created by" Congress in § 4 of the Clayton Act, and the "class of persons who [could] maintain a private damages action under" that legislatively conferred cause of action, 459 U. S., at 529, 532. And while this Court may have placed the "zone of interests" test that Static Control relies on under the "prudential" rubric in the past, see, *e. g.*, *Elk*

Grove Unified School Dist. v. *Newdow*, 542 U. S. 1, 12, it does not belong there any more than *Associated General Contractors* does. Rather, whether a plaintiff comes within the zone of interests requires the Court to determine, using traditional statutory-interpretation tools, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim. See, *e. g.*, *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 97, and n. 2. Pp. 125–128.

(b) The § 1125(a) cause of action extends to plaintiffs who fall within the zone of interests protected by that statute and whose injury was proximately caused by a violation of that statute. Pp. 129–137.

(1) A statutory cause of action is presumed to extend only to plaintiffs whose interests "fall within the zone of interests protected by the law invoked." *Allen* v. *Wright*, 468 U. S. 737, 751. "[T]he breadth of [that] zone . . . varies according to the provisions of law at issue." *Bennett* v. *Spear*, 520 U. S. 154, 163. The Lanham Act includes a detailed statement of its purposes, including, as relevant here, "protect[ing] persons engaged in [commerce within the control of Congress] against unfair competition," 15 U. S. C. § 1127; and "unfair competition" was understood at common law to be concerned with injuries to business reputation and present and future sales. Thus, to come within the zone of interests in a § 1125(a) false-advertising suit, a plaintiff must allege an injury to a commercial interest in reputation or sales. Pp. 129–132.

(2) A statutory cause of action is also presumed to be limited to plaintiffs whose injuries are proximately caused by violations of the statute. See, *e. g.*, *Holmes* v. *Securities Investor Protection Corporation*, 503 U. S. 258, 268–270. This requirement generally bars suits for alleged harm that is "too remote" from the defendant's unlawful conduct, such as when the harm is purely derivative of "misfortunes visited upon a third person by the defendant's acts." *Id.*, at 268–269. In a sense, all commercial injuries from false advertising are derivative of those suffered by consumers deceived by the advertising. But since the Lanham Act authorizes suit only for commercial injuries, the intervening consumer-deception step is not fatal to the proximate-cause showing the statute requires. Cf. *Bridge* v. *Phoenix Bond & Indemnity Co.*, 553 U. S. 639, 656. Thus, a plaintiff suing under § 1125(a) ordinarily must show that its economic or reputational injury flows directly from the deception wrought by the defendant's advertising; and that occurs when deception of consumers causes them to withhold trade from the plaintiff. Pp. 132–134.

(3) Direct application of the zone-of-interests test and the proximate-cause requirement supplies the relevant limits on who may sue under § 1125(a). These principles provide better guidance than the multifactor balancing test urged by Lexmark, the direct-competitor

test, or the reasonable-interest test applied by the Sixth Circuit. Pp. 134–137.

(c) Under these principles, Static Control comes within the class of plaintiffs authorized to sue under § 1125(a). Its alleged injuries—lost sales and damage to its business reputation—fall within the zone of interests protected by the Act, and Static Control sufficiently alleged that its injuries were proximately caused by Lexmark's misrepresentations. Pp. 137–140.

697 F. 3d 387, affirmed.

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

Steven B. Loy argued the cause for petitioner. With him on the briefs were *Anthony J. Phelps*, *Christopher L. Thacker*, *Monica H. Braun*, *Neal Katyal*, *Dominic F. Perella*, *Timothy C. Meece*, *Matthew P. Becker*, and *Robert J. Patton*.

Jameson R. Jones argued the cause for respondent. With him on the brief were *Seth D. Greenstein*, *Joseph C. Smith, Jr.*, *M. Miller Baker*, *Stefan M. Meisner*, and *William L. London III*.*

JUSTICE SCALIA delivered the opinion of the Court.

This case requires us to decide whether respondent, Static Control Components, Inc., may sue petitioner, Lexmark International, Inc., for false advertising under the Lanham Act, 15 U. S. C. § 1125(a).

I. Background

Lexmark manufactures and sells laser printers. It also sells toner cartridges for those printers (toner being the

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**Mary Massaron Ross* and *Josephine A. DeLorenzo* filed a brief for DRI–The Voice of the Defense Bar as *amicus curiae* urging reversal.

Briefs of *amici curiae* were filed for the American Antitrust Institute by *Randy M. Stutz*, *Albert A. Foer*, and *Richard M. Brunell*; for the American Intellectual Property Law Association by *Paul M. Smith*, *Marc A. Goldman*, and *Jeffrey I. D. Lewis*; for the International Trademark Association by *Anthony J. Dreyer*, *Jordan A. Fierman*, *Ethan Horwitz*, and *Vijay Toke*; and for Law Professors by *Angela Campbell*.

powdery ink that laser printers use to create images on paper). Lexmark designs its printers to work only with its own style of cartridges, and it therefore dominates the market for cartridges compatible with its printers. That market, however, is not devoid of competitors. Other businesses, called "remanufacturers," acquire used Lexmark toner cartridges, refurbish them, and sell them in competition with new and refurbished cartridges sold by Lexmark.

Lexmark would prefer that its customers return their empty cartridges to it for refurbishment and resale, rather than sell those cartridges to a remanufacturer. So Lexmark introduced what it called a "Prebate" program, which enabled customers to purchase new toner cartridges at a 20-percent discount if they would agree to return the cartridge to Lexmark once it was empty. Those terms were communicated to consumers through notices printed on the toner-cartridge boxes, which advised the consumer that opening the box would indicate assent to the terms—a practice commonly known as "shrinkwrap licensing," see, *e. g.*, *ProCD, Inc.* v. *Zeidenberg*, 86 F. 3d 1447, 1449 (CA7 1996). To enforce the Prebate terms, Lexmark included a microchip in each Prebate cartridge that would disable the cartridge after it ran out of toner; for the cartridge to be used again, the microchip would have to be replaced by Lexmark.

Static Control is not itself a manufacturer or remanufacturer of toner cartridges. It is, rather, "the market leader [in] making and selling the components necessary to remanufacture Lexmark cartridges." 697 F. 3d 387, 396 (CA6 2012) (case below). In addition to supplying remanufacturers with toner and various replacement parts, Static Control developed a microchip that could mimic the microchip in Lexmark's Prebate cartridges. By purchasing Static Control's microchips and using them to replace the Lexmark microchip, remanufacturers were able to refurbish and resell used Prebate cartridges.

Lexmark did not take kindly to that development. In 2002, it sued Static Control, alleging that Static Control's microchips violated both the Copyright Act of 1976, 17 U. S. C. § 101 *et seq.*, and the Digital Millennium Copyright Act, 17 U. S. C. § 1201 *et seq.* Static Control counterclaimed, alleging, among other things, violations of § 43(a) of the Lanham Act, 60 Stat. 441, codified at 15 U. S. C. § 1125(a). Section 1125(a) provides:

> "(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—
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> "(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
>
> "(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
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> "shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act."

Section 1125(a) thus creates two distinct bases of liability: false association, § 1125(a)(1)(A), and false advertising, § 1125(a)(1)(B). See *Waits* v. *Frito-Lay, Inc.*, 978 F. 2d 1093, 1108 (CA9 1992). Static Control alleged only false advertising.

As relevant to its Lanham Act claim, Static Control alleged two types of false or misleading conduct by Lexmark. First, it alleged that through its Prebate program Lexmark "purposefully misleads end-users" to believe that they are

legally bound by the Prebate terms and are thus required to return the Prebate-labeled cartridge to Lexmark after a single use. App. 31, ¶39. Second, it alleged that upon introducing the Prebate program, Lexmark "sent letters to most of the companies in the toner cartridge remanufacturing business" falsely advising those companies that it was illegal to sell refurbished Prebate cartridges and, in particular, that it was illegal to use Static Control's products to refurbish those cartridges. *Id.*, at 29, ¶35. Static Control asserted that by those statements, Lexmark had materially misrepresented "the nature, characteristics, and qualities" of both its own products and Static Control's products. *Id.*, at 43–44, ¶85. It further maintained that Lexmark's misrepresentations had "proximately caused and [we]re likely to cause injury to [Static Control] by diverting sales from [Static Control] to Lexmark," and had "substantially injured [its] business reputation" by "leading consumers and others in the trade to believe that [Static Control] is engaged in illegal conduct." *Id.*, at 44, ¶88. Static Control sought treble damages, attorney's fees and costs, and injunctive relief.[1]

The District Court granted Lexmark's motion to dismiss Static Control's Lanham Act claim. It held that Static Control lacked "prudential standing" to bring that claim, App. to Pet. for Cert. 83, relying on a multifactor balancing test it attributed to *Associated Gen. Contractors of Cal., Inc.* v. *Carpenters*, 459 U. S. 519 (1983). The court emphasized that there were "more direct plaintiffs in the form of remanufacturers of Lexmark's cartridges"; that Static Control's injury was "remot[e]" because it was a mere "byproduct of the supposed manipulation of consumers' relationships with remanufacturers"; and that Lexmark's "alleged intent [was] to dry

[1] Lexmark contends that Static Control's allegations failed to describe "commercial advertising or promotion" within the meaning of 15 U. S. C. § 1125(a)(1)(B). That question is not before us, and we express no view on it. We assume without deciding that the communications alleged by Static Control qualify as commercial advertising or promotion.

up spent cartridge supplies at the remanufacturing level, rather than at [Static Control]'s supply level, making remanufacturers Lexmark's alleged intended target." App. to Pet. for Cert. 83.

The Sixth Circuit reversed the dismissal of Static Control's Lanham Act claim. 697 F. 3d, at 423. Taking the lay of the land, it identified three competing approaches to determining whether a plaintiff has standing to sue under the Lanham Act. It observed that the Third, Fifth, Eighth, and Eleventh Circuits all refer to "antitrust standing or the [*Associated General Contractors*] factors in deciding Lanham Act standing," as the District Court had done. *Id.*, at 410 (citing *Conte Bros. Automotive, Inc.* v. *Quaker State-Slick 50, Inc.*, 165 F. 3d 221, 233–234 (CA3 1998); *Procter & Gamble Co.* v. *Amway Corp.*, 242 F. 3d 539, 562–563 (CA5 2001); *Gilbert/Robinson, Inc.* v. *Carrie Beverage-Missouri, Inc.*, 989 F. 2d 985, 990–991 (CA8 1993); *Phoenix of Broward, Inc.* v. *McDonald's Corp.*, 489 F. 3d 1156, 1162–1164 (CA11 2007)). By contrast, "[t]he Seventh, Ninth, and Tenth [Circuits] use a categorical test, permitting Lanham Act suits only by an actual competitor." 697 F. 3d, at 410 (citing *L. S. Heath & Son, Inc.* v. *AT&T Information Systems, Inc.*, 9 F. 3d 561, 575 (CA7 1993); *Waits*, *supra*, at 1108–1109; *Stanfield* v. *Osborne Industries, Inc.*, 52 F. 3d 867, 873 (CA10 1995)). And the Second Circuit applies a "'reasonable interest' approach," under which a Lanham Act plaintiff "has standing if the claimant can demonstrate '(1) a reasonable interest to be protected against the alleged false advertising and (2) a reasonable basis for believing that the interest is likely to be damaged by the alleged false advertising.'" 697 F. 3d, at 410 (quoting *Famous Horse, Inc.* v. *5th Avenue Photo Inc.*, 624 F. 3d 106, 113 (CA2 2010)). The Sixth Circuit applied the Second Circuit's reasonable-interest test and concluded that Static Control had standing because it "alleged a cognizable interest in its business reputation and sales to remanufacturers and sufficiently alleged that th[o]se interests were

harmed by Lexmark's statements to the remanufacturers that Static Control was engaging in illegal conduct." 697 F. 3d, at 411.

We granted certiorari to decide "the appropriate analytical framework for determining a party's standing to maintain an action for false advertising under the Lanham Act." Pet. for Cert. i; 569 U. S. 1017 (2013).[2]

II. "Prudential Standing"

The parties' briefs treat the question on which we granted certiorari as one of "prudential standing." Because we think that label misleading, we begin by clarifying the nature of the question at issue in this case.

From Article III's limitation of the judicial power to resolving "Cases" and "Controversies," and the separation-of-powers principles underlying that limitation, we have deduced a set of requirements that together make up the "irreducible constitutional minimum of standing." *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560 (1992). The plaintiff must have suffered or be imminently threatened with a concrete and particularized "injury in fact" that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision. *Ibid.* Lexmark does not deny that Static Control's allegations of lost sales and damage to its business reputation give it standing under Article III to press its false-advertising claim, and we are satisfied that they do.

Although Static Control's claim thus presents a case or controversy that is properly within federal courts' Article III jurisdiction, Lexmark urges that we should decline to adjudicate Static Control's claim on grounds that are "pru-

[2] Other aspects of the parties' sprawling litigation, including Lexmark's claims under federal copyright and patent law and Static Control's claims under federal antitrust and North Carolina unfair-competition law, are not before us. Our review pertains only to Static Control's Lanham Act claim.

dential," rather than constitutional. That request is in some tension with our recent reaffirmation of the principle that "a federal court's 'obligation' to hear and decide" cases within its jurisdiction "is 'virtually unflagging.'" *Sprint Communications, Inc.* v. *Jacobs*, 571 U. S. 69, 77 (2013) (quoting *Colorado River Water Conservation Dist.* v. *United States*, 424 U. S. 800, 817 (1976)). In recent decades, however, we have adverted to a "prudential" branch of standing, a doctrine not derived from Article III and "not exhaustively defined" but encompassing (we have said) at least three broad principles: "'the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.'" *Elk Grove Unified School Dist.* v. *Newdow*, 542 U. S. 1, 12 (2004) (quoting *Allen* v. *Wright*, 468 U. S. 737, 751 (1984)).

Lexmark bases its "prudential standing" arguments chiefly on *Associated General Contractors*, but we did not describe our analysis in that case in those terms. Rather, we sought to "ascertain," as a matter of statutory interpretation, the "scope of the private remedy created by" Congress in § 4 of the Clayton Act, and the "class of persons who [could] maintain a private damages action under" that legislatively conferred cause of action. 459 U. S., at 529, 532. We held that the statute limited the class to plaintiffs whose injuries were proximately caused by a defendant's antitrust violations. *Id.*, at 532–533. Later decisions confirm that *Associated General Contractors* rested on statutory, not "prudential," considerations. See, *e. g.*, *Holmes* v. *Securities Investor Protection Corporation*, 503 U. S. 258, 265–268 (1992) (relying on *Associated General Contractors* in finding a proximate-cause requirement in the cause of action created by the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. § 1964(c)); *Anza* v. *Ideal Steel Supply*

Corp., 547 U. S. 451, 456 (2006) (affirming that *Holmes* "relied on a careful interpretation of § 1964(c)"). Lexmark's arguments thus do not deserve the "prudential" label.

Static Control, on the other hand, argues that we should measure its "prudential standing" by using the zone-of-interests test. Although we admittedly have placed that test under the "prudential" rubric in the past, see, *e. g.*, *Elk Grove*, *supra*, at 12, it does not belong there any more than *Associated General Contractors* does. Whether a plaintiff comes within "the 'zone of interests'" is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim. See *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 97, and n. 2 (1998); *Clarke* v. *Securities Industry Assn.*, 479 U. S. 388, 394–395 (1987); *Holmes*, *supra*, at 288 (SCALIA, J., concurring in judgment). As Judge Silberman of the D. C. Circuit recently observed, "'prudential standing' is a misnomer" as applied to the zone-of-interests analysis, which asks whether "this particular class of persons ha[s] a right to sue under this substantive statute." *Association of Battery Recyclers, Inc.* v. *EPA*, 716 F. 3d 667, 675–676 (2013) (concurring opinion).[3]

[3] The zone-of-interests test is not the only concept that we have previously classified as an aspect of "prudential standing" but for which, upon closer inspection, we have found that label inapt. Take, for example, our reluctance to entertain generalized grievances—*i. e.*, suits "claiming only harm to [the plaintiff's] and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large." *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 573–574 (1992). While we have at times grounded our reluctance to entertain such suits in the "counsels of prudence" (albeit counsels "close[ly] relat[ed] to the policies reflected in" Article III), *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 475 (1982), we have since held that such suits do not present constitutional "cases" or "controversies." See, *e. g.*, *Lance* v. *Coffman*, 549 U. S. 437, 439 (2007) (*per curiam*); *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S. 332, 344–346 (2006); *Defenders*

In sum, the question this case presents is whether Static Control falls within the class of plaintiffs whom Congress has authorized to sue under § 1125(a). In other words, we ask whether Static Control has a cause of action under the statute.[4] That question requires us to determine the meaning of the congressionally enacted provision creating a cause of action. In doing so, we apply traditional principles of statutory interpretation. We do not ask whether in our judgment Congress *should* have authorized Static Control's suit, but whether Congress in fact did so. Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, see *Alexander* v. *Sandoval*, 532 U. S. 275, 286–287 (2001), it cannot limit a cause of action that Congress has created merely because "prudence" dictates.

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of Wildlife, *supra*, at 573–574. They are barred for constitutional reasons, not "prudential" ones. The limitations on third-party standing are harder to classify; we have observed that third-party standing is "'closely related to the question whether a person in the litigant's position would have a right of action on the claim,'" *Department of Labor* v. *Triplett*, 494 U. S. 715, 721, n. ** (1990) (quoting *Warth* v. *Seldin*, 422 U. S. 490, 500, n. 12 (1975)), but most of our cases have not framed the inquiry in that way. See, *e. g.*, *Kowalski* v. *Tesmer*, 543 U. S. 125, 128–129 (2004) (suggesting it is an element of "prudential standing"). This case does not present any issue of third-party standing, and consideration of that doctrine's proper place in the standing firmament can await another day.

[4] We have on occasion referred to this inquiry as "statutory standing" and treated it as effectively jurisdictional. See, *e. g.*, *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 97, and n. 2 (1998); cases cited *id.*, at 114–117 (Stevens, J., concurring in judgment). That label is an improvement over the language of "prudential standing," since it correctly places the focus on the statute. But it, too, is misleading, since "'the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i. e.*, the court's statutory or constitutional *power* to adjudicate the case.'" *Verizon Md. Inc.* v. *Public Serv. Comm'n of Md.*, 535 U. S. 635, 642–643 (2002) (quoting *Steel Co.*, *supra*, at 89); see also *Grocery Mfrs. Assn.* v. *EPA*, 693 F. 3d 169, 183–185 (CADC 2012) (Kavanaugh, J., dissenting), and cases cited therein; Pathak, Statutory Standing and the Tyranny of Labels, 62 Okla. L. Rev. 89, 106 (2009).

III. Static Control's Right To Sue Under § 1125(a)

Thus, this case presents a straightforward question of statutory interpretation: Does the cause of action in § 1125(a) extend to plaintiffs like Static Control? The statute authorizes suit by "any person who believes that he or she is likely to be damaged" by a defendant's false advertising. § 1125(a)(1). Read literally, that broad language might suggest that an action is available to anyone who can satisfy the minimum requirements of Article III. No party makes that argument, however, and the "unlikelihood that Congress meant to allow all factually injured plaintiffs to recover persuades us that [§ 1125(a)] should not get such an expansive reading." *Holmes*, 503 U. S., at 266 (footnote omitted). We reach that conclusion in light of two relevant background principles already mentioned: zone of interests and proximate causality.

A. Zone of Interests

First, we presume that a statutory cause of action extends only to plaintiffs whose interests "fall within the zone of interests protected by the law invoked." *Allen*, 468 U. S., at 751. The modern "zone of interests" formulation originated in *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U. S. 150 (1970), as a limitation on the cause of action for judicial review conferred by the Administrative Procedure Act (APA). We have since made clear, however, that it applies to all statutorily created causes of action; that it is a "requiremen[t] of general application"; and that Congress is presumed to "legislat[e] against the background of" the zone-of-interests limitation, "which applies unless it is expressly negated." *Bennett* v. *Spear*, 520 U. S. 154, 163 (1997); see also *Holmes*, *supra*, at 287–288 (SCALIA, J., concurring in judgment). It is "perhaps more accurat[e]," though not very different as a practical matter, to say that the limitation *always* applies and is never negated, but that our analysis of certain statutes will show that they protect

a more-than-usually "expan[sive]" range of interests. *Bennett*, *supra*, at 164. The zone-of-interests test is therefore an appropriate tool for determining who may invoke the cause of action in § 1125(a).[5]

We have said, in the APA context, that the test is not "'especially demanding,'" *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 567 U. S. 209, 225 (2012). In that context we have often "conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff," and have said that the test "forecloses suit only when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that'" Congress authorized that plaintiff to sue. *Ibid.* That lenient approach is an appropriate means of preserving the flexibility of the APA's omnibus judicial-review provision, which permits suit for violations of numerous statutes of varying character that do not themselves include causes of action for judicial review. "We have made clear, however, that the breadth of the zone of interests varies according to the provisions of law at issue, so that what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the '"generous review provisions"' of the APA may not do so for other purposes." *Bennett*, *supra*, at 163 (quoting *Clarke*, 479

[5] Although we announced the modern zone-of-interests test in 1971, its roots lie in the common-law rule that a plaintiff may not recover under the law of negligence for injuries caused by violation of a statute unless the statute "is interpreted as designed to protect the class of persons in which the plaintiff is included, against the risk of the type of harm which has in fact occurred as a result of its violation." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 36, pp. 229–230 (5th ed. 1984); see cases cited *id.*, at 222–227; *Gorris* v. *Scott*, [1874] 9 L. R. Exch. 125 (Eng.). Statutory causes of action are regularly interpreted to incorporate standard common-law limitations on civil liability—the zone-of-interests test no less than the requirement of proximate causation, see Part III–B, *infra*.

U. S., at 400, n. 16, in turn quoting *Data Processing*, *supra*, at 156).

Identifying the interests protected by the Lanham Act, however, requires no guesswork, since the Act includes an "unusual, and extraordinarily helpful," detailed statement of the statute's purposes. *H. B. Halicki Productions* v. *United Artists Communications, Inc.*, 812 F. 2d 1213, 1214 (CA9 1987). Section 45 of the Act, codified at 15 U. S. C. § 1127, provides:

> "The intent of this chapter is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation; to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks; and to provide rights and remedies stipulated by treaties and conventions respecting trademarks, trade names, and unfair competition entered into between the United States and foreign nations."

Most of the enumerated purposes are relevant to false-association cases; a typical false-advertising case will implicate only the Act's goal of "protect[ing] persons engaged in [commerce within the control of Congress] against unfair competition." Although "unfair competition" was a "plastic" concept at common law, *Ely-Norris Safe Co.* v. *Mosler Safe Co.*, 7 F. 2d 603, 604 (CA2 1925) (L. Hand, J.), it was understood to be concerned with injuries to business reputation and present and future sales. See Rogers, Book Review, 39 Yale L. J. 297, 299 (1929); see generally 3 Restatement of Torts, ch. 35, Introductory Note, pp. 536–537 (1938).

We thus hold that to come within the zone of interests in a suit for false advertising under § 1125(a), a plaintiff must

allege an injury to a commercial interest in reputation or sales. A consumer who is hoodwinked into purchasing a disappointing product may well have an injury-in-fact cognizable under Article III, but he cannot invoke the protection of the Lanham Act—a conclusion reached by every Circuit to consider the question. See *Colligan* v. *Activities Club of N. Y., Ltd.*, 442 F. 2d 686, 691–692 (CA2 1971); *Serbin* v. *Ziebart Int'l Corp.*, 11 F. 3d 1163, 1177 (CA3 1993); *Made in the USA Foundation* v. *Phillips Foods, Inc.*, 365 F. 3d 278, 281 (CA4 2004); *Procter & Gamble Co.*, 242 F. 3d, at 563–564; *Barrus* v. *Sylvania*, 55 F. 3d 468, 470 (CA9 1995); *Phoenix of Broward*, 489 F. 3d, at 1170. Even a business misled by a supplier into purchasing an inferior product is, like consumers generally, not under the Act's aegis.

B. Proximate Cause

Second, we generally presume that a statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the statute. For centuries, it has been "a well established principle of [the common] law, that in all cases of loss, we are to attribute it to the proximate cause, and not to any remote cause." *Waters* v. *Merchants' Louisville Ins. Co.*, 11 Pet. 213, 223 (1837); see *Holmes*, 503 U. S., at 287 (SCALIA, J., concurring in judgment). That venerable principle reflects the reality that "the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing." *Associated Gen. Contractors*, 459 U. S., at 536. Congress, we assume, is familiar with the common-law rule and does not mean to displace it *sub silentio*. We have thus construed federal causes of action in a variety of contexts to incorporate a requirement of proximate causation. See, *e. g.*, *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U. S. 336, 346 (2005) (securities fraud); *Holmes*, *supra*, at 268–270 (RICO); *Associated Gen. Contractors*, *supra*, at 529–535 (Clayton Act). No party disputes that it is proper to read § 1125(a) as containing such a requirement, its broad language notwithstanding.

The proximate-cause inquiry is not easy to define, and over the years it has taken various forms; but courts have a great deal of experience applying it, and there is a wealth of precedent for them to draw upon in doing so. See *Exxon Co., U. S. A.* v. *Sofec, Inc.*, 517 U. S. 830, 838–839 (1996); *Pacific Operators Offshore, LLP* v. *Valladolid*, 565 U. S. 207, 224–225 (2012) (SCALIA, J., concurring in part and concurring in judgment). Proximate-cause analysis is controlled by the nature of the statutory cause of action. The question it presents is whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits.

Put differently, the proximate-cause requirement generally bars suits for alleged harm that is "too remote" from the defendant's unlawful conduct. That is ordinarily the case if the harm is purely derivative of "misfortunes visited upon a third person by the defendant's acts." *Holmes*, *supra*, at 268–269; see, *e. g.*, *Hemi Group, LLC* v. *City of New York*, 559 U. S. 1, 10–11 (2010). In a sense, of course, all commercial injuries from false advertising are derivative of those suffered by consumers who are deceived by the advertising; but since the Lanham Act authorizes suit only for commercial injuries, the intervening step of consumer deception is not fatal to the showing of proximate causation required by the statute. See *Harold H. Huggins Realty, Inc.* v. *FNC, Inc.*, 634 F. 3d 787, 800–801 (CA5 2011). That is consistent with our recognition that under common-law principles, a plaintiff can be directly injured by a misrepresentation even where "a third party, and not the plaintiff, . . . relied on" it. *Bridge* v. *Phoenix Bond & Indemnity Co.*, 553 U. S. 639, 656 (2008).

We thus hold that a plaintiff suing under § 1125(a) ordinarily must show economic or reputational injury flowing directly from the deception wrought by the defendant's advertising; and that that occurs when deception of consumers causes them to withhold trade from the plaintiff. That showing is generally not made when the deception produces injuries to a fellow commercial actor that in turn affect the

plaintiff. For example, while a competitor who is forced out of business by a defendant's false advertising generally will be able to sue for its losses, the same is not true of the competitor's landlord, its electric company, and other commercial parties who suffer merely as a result of the competitor's "inability to meet [its] financial obligations." *Anza*, 547 U. S., at 458.[6]

C. Proposed Tests

At oral argument, Lexmark agreed that the zone of interests and proximate causation supply the relevant background limitations on suit under § 1125(a). See Tr. of Oral Arg. 4–5, 11–12, 17–18. But it urges us to adopt, as the optimal formulation of those principles, a multifactor balancing test derived from *Associated General Contractors*. In the alternative, it asks that we adopt a categorical test permitting only direct competitors to sue for false advertising. And although neither party urges adoption of the "reasonable interest" test applied below, several *amici* do so. While none of those tests is wholly without merit, we decline to adopt any of them. We hold instead that a direct application of the zone-of-interests test and the proximate-cause requirement supplies the relevant limits on who may sue.

The balancing test Lexmark advocates was first articulated by the Third Circuit in *Conte Bros.* and later adopted

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[6] Proximate causation is not a requirement of Article III standing, which requires only that the plaintiff's injury be fairly traceable to the defendant's conduct. Like the zone-of-interests test, see *supra*, at 127–128, and nn. 3–4, it is an element of the cause of action under the statute, and so is subject to the rule that "the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction." *Steel Co.*, 523 U. S., at 89. But like any other element of a cause of action, it must be adequately alleged at the pleading stage in order for the case to proceed. See *Ashcroft* v. *Iqbal*, 556 U. S. 662, 678–679 (2009). If a plaintiff's allegations, taken as true, are insufficient to establish proximate causation, then the complaint must be dismissed; if they are sufficient, then the plaintiff is entitled to an opportunity to prove them.

by several other Circuits. *Conte Bros.* identified five relevant considerations:

> "(1) The nature of the plaintiff's alleged injury: Is the injury of a type that Congress sought to redress in providing a private remedy for violations of the [Lanham Act]?
>
> "(2) The directness or indirectness of the asserted injury.
>
> "(3) The proximity or remoteness of the party to the alleged injurious conduct.
>
> "(4) The speculativeness of the damages claim.
>
> "(5) The risk of duplicative damages or complexity in apportioning damages." 165 F. 3d, at 233 (citations and internal quotation marks omitted).

This approach reflects a commendable effort to give content to an otherwise nebulous inquiry, but we think it slightly off the mark. The first factor can be read as requiring that the plaintiff's injury be within the relevant zone of interests and the second and third as requiring (somewhat redundantly) proximate causation; but it is not correct to treat those requirements, which must be met in every case, as mere factors to be weighed in a balance. And the fourth and fifth factors are themselves problematic. "[T]he difficulty that can arise when a court attempts to ascertain the damages caused by some remote action" is a "motivating principle" behind the proximate-cause requirement, *Anza*, *supra*, at 457–458; but potential difficulty in ascertaining and apportioning damages is not, as *Conte Bros.* might suggest, an *independent* basis for denying standing where it is adequately alleged that a defendant's conduct has proximately injured an interest of the plaintiff's that the statute protects. Even when a plaintiff cannot quantify its losses with sufficient certainty to recover damages, it may still be entitled to injunctive relief under § 1116(a) (assuming it can prove a likelihood of future injury) or disgorgement of the defendant's ill-gotten

profits under § 1117(a). See *TrafficSchool.com, Inc.* v. *Edriver Inc.*, 653 F. 3d 820, 831 (CA9 2011); *Johnson & Johnson* v. *Carter-Wallace, Inc.*, 631 F. 2d 186, 190 (CA2 1980). Finally, experience has shown that the *Conte Bros.* approach, like other open-ended balancing tests, can yield unpredictable and at times arbitrary results. See, *e. g.*, Tushnet, Running the Gamut from A to B: Federal Trademark and False Advertising Law, 159 U. Pa. L. Rev. 1305, 1376–1379 (2011).

In contrast to the multifactor balancing approach, the direct-competitor test provides a bright-line rule; but it does so at the expense of distorting the statutory language. To be sure, a plaintiff who does not compete with the defendant will often have a harder time establishing proximate causation. But a rule categorically prohibiting all suits by noncompetitors would read too much into the Act's reference to "unfair competition" in § 1127. By the time the Lanham Act was adopted, the common-law tort of unfair competition was understood not to be limited to actions between competitors. One leading authority in the field wrote that "there need be no competition in unfair competition," just as "[t]here is no soda in soda water, no grapes in grape fruit, no bread in bread fruit, and a clothes horse is not a horse but is good enough to hang things on." Rogers, 39 Yale L. J., at 299; accord, *Vogue Co.* v. *Thompson-Hudson Co.*, 300 F. 509, 512 (CA6 1924); 1 H. Nims, The Law of Unfair Competition and Trade-Marks, p. vi (4th ed. 1947); 2 *id.*, at 1194–1205. It is thus a mistake to infer that because the Lanham Act treats false advertising as a form of unfair competition, it can protect *only* the false-advertiser's direct competitors.

Finally, there is the "reasonable interest" test applied by the Sixth Circuit in this case. As typically formulated, it requires a commercial plaintiff to "demonstrate '(1) a reasonable interest to be protected against the alleged false advertising and (2) a reasonable basis for believing that the interest is likely to be damaged by the alleged false advertising.'" 697 F. 3d, at 410 (quoting *Famous Horse*, 624 F. 3d, at 113).

A purely practical objection to the test is that it lends itself to widely divergent application. Indeed, its vague language can be understood as requiring only the bare minimum of Article III standing. The popularity of the multifactor balancing test reflects its appeal to courts tired of "grappl[ing] with defining" the "'reasonable interest'" test "with greater precision." *Conte Bros.*, 165 F. 3d, at 231. The theoretical difficulties with the test are even more substantial: The relevant question is not whether the plaintiff's interest is "reasonable," but whether it is one the Lanham Act protects; and not whether there is a "reasonable basis" for the plaintiff's claim of harm, but whether the harm alleged is proximately tied to the defendant's conduct. In short, we think the principles set forth above will provide clearer and more accurate guidance than the "reasonable interest" test.

IV. Application

Applying those principles to Static Control's false-advertising claim, we conclude that Static Control comes within the class of plaintiffs whom Congress authorized to sue under § 1125(a).

To begin, Static Control's alleged injuries—lost sales and damage to its business reputation—are injuries to precisely the sorts of commercial interests the Act protects. Static Control is suing not as a deceived consumer, but as a "perso[n] engaged in" "commerce within the control of Congress" whose position in the marketplace has been damaged by Lexmark's false advertising. § 1127. There is no doubt that it is within the zone of interests protected by the statute.

Static Control also sufficiently alleged that its injuries were proximately caused by Lexmark's misrepresentations. This case, it is true, does not present the "classic Lanham Act false-advertising claim" in which "'one competito[r] directly injur[es] another by making false statements about his own goods [or the competitor's goods] and thus inducing customers to switch.'" *Harold H. Huggins Realty*, 634 F. 3d, at

799, n. 24. But although diversion of sales to a direct competitor may be the paradigmatic direct injury from false advertising, it is not the only type of injury cognizable under § 1125(a). For at least two reasons, Static Control's allegations satisfy the requirement of proximate causation.

First, Static Control alleged that Lexmark disparaged its business and products by asserting that Static Control's business was illegal. See 697 F. 3d, at 411, n. 10 (noting allegation that Lexmark "directly target[ed] Static Control" when it "falsely advertised that Static Control infringed Lexmark's patents"). When a defendant harms a plaintiff's reputation by casting aspersions on its business, the plaintiff's injury flows directly from the audience's belief in the disparaging statements. Courts have therefore afforded relief under § 1125(a) not only where a defendant denigrates a plaintiff's product by name, see, *e. g.*, *McNeilab, Inc.* v. *American Home Prods. Corp.*, 848 F. 2d 34, 38 (CA2 1988), but also where the defendant damages the product's reputation by, for example, equating it with an inferior product, see, *e. g.*, *Camel Hair and Cashmere Inst. of Am., Inc.* v. *Associated Dry Goods Corp.*, 799 F. 2d 6, 7–8, 11–12 (CA1 1986); *PPX Enterprises, Inc.* v. *Audiofidelity, Inc.*, 746 F. 2d 120, 122, 125 (CA2 1984). Traditional proximate-causation principles support those results: As we have observed, a defendant who "'seeks to promote his own interests by telling a known falsehood to *or about* the plaintiff or his product'" may be said to have proximately caused the plaintiff's harm. *Bridge*, 553 U. S., at 657 (quoting Restatement (Second) of Torts § 870, Comment *h* (1977); emphasis added in *Bridge*).

The District Court emphasized that Lexmark and Static Control are not direct competitors. But when a party claims reputational injury from disparagement, competition is not required for proximate cause; and that is true even if the defendant's aim was to harm its immediate competitors, and the plaintiff merely suffered collateral damage. Consider two rival carmakers who purchase airbags for their

cars from different third-party manufacturers. If the first carmaker, hoping to divert sales from the second, falsely proclaims that the airbags used by the second carmaker are defective, both the second carmaker and its airbag supplier may suffer reputational injury, and their sales may decline as a result. In those circumstances, there is no reason to regard either party's injury as derivative of the other's; each is directly and independently harmed by the attack on its merchandise.

In addition, Static Control adequately alleged proximate causation by alleging that it designed, manufactured, and sold microchips that both (1) were necessary for, and (2) had no other use than, refurbishing Lexmark toner cartridges. See App. 13, ¶31; *id.*, at 37, ¶54.[7] It follows from that allegation that any false advertising that reduced the remanufacturers' business necessarily injured Static Control as well. Taking Static Control's assertions at face value, there is likely to be something very close to a 1:1 relationship between the number of refurbished Prebate cartridges sold (or not sold) by the remanufacturers and the number of Prebate microchips sold (or not sold) by Static Control. "Where the injury alleged is so integral an aspect of the [violation] alleged, there can be no question" that proximate cause is satisfied. *Blue Shield of Va.* v. *McCready*, 457 U. S. 465, 479 (1982).

To be sure, on this view, the causal chain linking Static Control's injuries to consumer confusion is not direct, but includes the intervening link of injury to the remanufacturers. Static Control's allegations therefore might not support standing under a strict application of the "'"general tendency"'" not to stretch proximate causation "'"beyond the first step."'" *Holmes*, 503 U. S., at 271. But the reason

[7] We understand this to be the thrust of both sides' allegations concerning Static Control's design and sale of specialized microchips for the specific purpose of enabling the remanufacture of Lexmark's Prebate cartridges.

for that general tendency is that there ordinarily is a "discontinuity" between the injury to the direct victim and the injury to the indirect victim, so that the latter is not surely attributable to the former (and thus also to the defendant's conduct), but might instead have resulted from "any number of [other] reasons." *Anza*, 547 U. S., at 458–459. That is not the case here. Static Control's allegations suggest that if the remanufacturers sold 10,000 fewer refurbished cartridges because of Lexmark's false advertising, then it would follow more or less automatically that Static Control sold 10,000 fewer microchips for the same reason, without the need for any "speculative . . . proceedings" or "intricate, uncertain inquiries." *Id.*, at 459–460. In these relatively unique circumstances, the remanufacturers are not "more immediate victim[s]" than Static Control. *Bridge*, *supra*, at 658.

Although we conclude that Static Control has *alleged* an adequate basis to proceed under § 1125(a), it cannot obtain relief without *evidence* of injury proximately caused by Lexmark's alleged misrepresentations. We hold only that Static Control is entitled to a chance to prove its case.

* * *

To invoke the Lanham Act's cause of action for false advertising, a plaintiff must plead (and ultimately prove) an injury to a commercial interest in sales or business reputation proximately caused by the defendant's misrepresentations. Static Control has adequately pleaded both elements. The judgment of the Court of Appeals is affirmed.

It is so ordered.

Syllabus

UNITED STATES *v.* QUALITY STORES, INC., ET AL.

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

No. 12–1408. Argued January 14, 2014—Decided March 25, 2014

Respondent Quality Stores, Inc., and its affiliates (collectively Quality Stores) made severance payments to employees who were involuntarily terminated as part of Quality Stores' Chapter 11 bankruptcy. Payments—which were made pursuant to plans that did not tie payments to the receipt of state unemployment insurance—varied based on job seniority and time served. Quality Stores paid and withheld, *inter alia*, taxes required under the Federal Insurance Contributions Act (FICA), 26 U. S. C. § 3101 *et seq.* Later believing that the payments should not have been taxed as wages under FICA, Quality Stores sought a refund on behalf of itself and about 1,850 former employees. When the Internal Revenue Service (IRS) did not allow or deny the refund, Quality Stores initiated proceedings in the Bankruptcy Court, which granted summary judgment in its favor. The District Court and Sixth Circuit affirmed, concluding that severance payments are not wages under FICA.

Held: The severance payments at issue are taxable wages for FICA purposes. Pp. 145–156.

(a) FICA defines "wages" broadly as "all remuneration for employment." § 3121(a). As a matter of plain meaning, severance payments fit this definition: They are a form of remuneration made only to employees in consideration for employment. "Employment" is "any service . . . performed . . . by an employee" for an employer. § 3121(b). By varying according to a terminated employee's function and seniority, the severance payments at issue confirm the principle that "service" "mea[ns] not only work actually done but the entire employer-employee relationship for which compensation is paid." *Social Security Bd.* v. *Nierotko*, 327 U. S. 358, 365–366. This broad definition is reinforced by the specificity of FICA's lengthy list of exemptions. The exemption for severance payments made "because of . . . retirement for disability," § 3121(a)(13)(A), would be unnecessary were severance payments generally not considered wages. FICA's statutory history sheds further light on the definition. FICA originally contained definitions of "wages" and "employment" identical in substance to the current ones, but in 1939, Congress excepted from "wages" "[d]ismissal payments" not legally required by the employer, 53 Stat. 1384. Since that excep-

tion was repealed in 1950, FICA has contained no general exception for severance payments. Pp. 145–149.

(b) The Internal Revenue Code chapter governing income-tax withholding does not limit the meaning of "wages" for FICA purposes. Like FICA's definitional section, § 3401(a) has a broad definition of "wages" and contains a series of specific exemptions. Section 3402(*o*) instructs that "supplemental unemployment compensation benefits" or SUBs, which include severance payments, be treated "as if" they were wages. Contrary to Quality Stores' reading, this "as if" instruction does not mean that severance payments fall outside the definition of "wages" for income-tax withholding purposes and, in turn, are not covered by FICA's definition. Nor can Quality Stores rely on § 3402(*o*)'s heading, which refers to "certain payments other than wages." To the extent statutory headings are useful in resolving ambiguity, see *FTC* v. *Mandel Brothers, Inc.*, 359 U. S. 385, 388–389, § 3402(*o*)'s heading falls short of declaring that all the payments listed in § 3402(*o*) are "other than wages." Instead, § 3402(*o*) must be understood in terms of the regulatory background against which it was enacted. In the 1950's and 1960's, because some States provided unemployment benefits only to terminated employees not earning wages, IRS Rulings took the position that severance payments tied to the receipt of state benefits were not wages. To address the problem that severance payments were still considered taxable income, which could lead to large year-end tax liability for terminated workers, Congress enacted § 3402(*o*), which treats both SUBs and severance payments the IRS considered wages "as if" they were wages subject to withholding. By extending this treatment to all SUBs, Congress avoided the practical problems that might arise if the IRS later determined that SUBs besides severance payments linked to state benefits should be exempt from withholding. Considering this regulatory background, the assumption that Congress meant to exclude all SUBs from the definition of "wages" is unsustainable. That § 3402(*o*) does not narrow FICA's "wages" definition is also consistent with the major principle of *Rowan Cos.* v. *United States*, 452 U. S. 247: that simplicity of administration and consistency of statutory interpretation instruct that the meaning of "wages" should be in general the same for income-tax withholding and for FICA calculations. Pp. 149–156.

693 F. 3d 605, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which all other Members joined, except KAGAN, J., who took no part in the consideration or decision of the case.

Eric J. Feigin argued the cause for the United States. With him on the briefs were *Solicitor General Verrilli*, *Assistant Attorney General Keneally*, *Deputy Solicitor General Stewart*, *Kenneth L. Greene*, and *Francesa Ugolini.*

Robert S. Hertzberg argued the cause for respondents. With him on the brief were *Michael H. Reed* and *Deborah Kovsky-Apap.**

JUSTICE KENNEDY delivered the opinion of the Court.

This case presents the question whether severance payments made to employees terminated against their will are taxable wages under the Federal Insurance Contributions Act (FICA), 26 U. S. C. § 3101 *et seq.*

The Court of Appeals for the Sixth Circuit held that the payments are not wages taxed by FICA. To reach its holding, the Court of Appeals relied not on FICA's definition of wages but on § 3402(*o*) of the Internal Revenue Code, a provision governing income-tax withholding. That conclusion, for the reasons to be discussed, was incorrect.

FICA's broad definition of wages includes the severance payments made here. And § 3402(*o*) does not alter that definition. Section 3402(*o*) instructs that any severance payment "shall be treated as if it were a payment of wages." According to the Court of Appeals, § 3402(*o*) suggests that the definition of wages for income-tax withholding does not extend to severance payments; and so, the argument continues, severance payments also must be beyond the terms of FICA's similar definition. But § 3402(*o*) is entirely compatible with the proposition that some or all payments do fall

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*Briefs of *amici curiae* urging affirmance were filed for the American Benefits Council by *Patrick J. Smith*; for the American Payroll Association by *Allyson N. Ho* and *Mary B. Hevener*; and for the ERISA Industry Committee by *Robert A. Long, Jr.*, and *Emin Toro.*

A brief of *amicus curiae* was filed for Kristin E. Hickman by *Ms. Hickman, pro se.*

within the broad definition of the term wages. Section 3402(*o*) was enacted in response to a narrow, specific problem regarding income-tax withholding. In addition, were the Court to rule that the severance payments made here are exempt from FICA taxation but not from withholding under § 3402 for income-tax purposes, it would contravene the holding in *Rowan Cos.* v. *United States*, 452 U. S. 247 (1981), which held there should be congruence in the rules for FICA and income-tax withholding.

I

Quality Stores, Inc., an agricultural-specialty retailer, entered bankruptcy proceedings in 2001. Before and following the filing of an involuntary Chapter 11 bankruptcy petition, respondents Quality Stores and affiliated companies, all referred to here as Quality Stores, terminated thousands of employees. The employees received severance payments, which all parties to this case stipulate were the result of a reduction in work force or discontinuance of a plant or operation. The payments were made pursuant to one of two different termination plans. (For reasons later to be explained, it should be noted that neither termination plan tied severance payments to the receipt of state unemployment compensation.)

Under the first plan, terminated employees received severance pay based on job grade and management level. The president and chief executive officer received 18 months of severance pay, senior managers received 12 months of severance pay, and other employees received one week of severance pay for each year of service.

The second plan was designed to facilitate Quality Stores' postbankruptcy operations and encourage employees to put off their job searches. To receive severance pay, employees had to complete their last day of service as determined by the employer. Officers received between 6 and 12 months of severance pay, and full-time employees and employees paid by the hour received one week of severance pay for

every year of service if the employees had been employed for at least two years, up to a stated maximum of severance pay. Workers who had been employed for less than two years received a week of severance pay.

Quality Stores reported the severance payments as wages on W–2 tax forms, paid the employer's required share of FICA taxes, and withheld employees' share of FICA taxes. Then Quality Stores asked 3,100 former employees to allow it to file FICA tax refund claims for them. About 1,850 former employees agreed to allow Quality Stores to pursue FICA refunds. On its own behalf and on behalf of the former employees, Quality Stores filed for a refund of $1,000,125 in FICA taxes. The Internal Revenue Service (IRS) neither allowed nor denied the claim.

Quality Stores initiated a proceeding in the Bankruptcy Court seeking a refund of the disputed amount. The Bankruptcy Court granted summary judgment in its favor. The District Court and Court of Appeals for the Sixth Circuit affirmed, concluding that severance payments are not "wages" under FICA. See *In re Quality Stores, Inc.*, 693 F. 3d 605 (2012). Other Courts of Appeals, however, have concluded that at least some severance payments do constitute wages subject to FICA tax. See, *e. g.*, *CSX Corp.* v. *United States*, 518 F. 3d 1328 (CA Fed. 2008); *University of Pittsburgh* v. *United States*, 507 F. 3d 165 (CA3 2007); *North Dakota State Univ.* v. *United States*, 255 F. 3d 599 (CA8 2001). The United States, claiming that the FICA taxes must be withheld, sought review here; and certiorari was granted, 570 U. S. 948 (2013).

II

A

The first question is whether FICA's definition of "wages" encompasses severance payments. The beginning point is the relevant statutory text. *Mississippi ex rel. Hood* v. *AU Optronics Corp.*, 571 U. S. 161, 168 (2014).

To fund benefits provided by the Social Security Act and Medicare, FICA taxes "wages" paid by an employer or received by an employee "with respect to employment." 26 U. S. C. §§ 3101(a), (b), 3111(a), (b). Congress chose to define wages under FICA "broadly." *Mayo Foundation for Medical Ed. and Research* v. *United States*, 562 U. S. 44, 48 (2011). FICA defines "wages" as "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash." § 3121(a). The term "employment" encompasses "any service, of whatever nature, performed . . . by an employee for the person employing him." § 3121(b).

Under this definition, and as a matter of plain meaning, severance payments made to terminated employees are "remuneration for employment." Severance payments are, of course, "remuneration," and common sense dictates that employees receive the payments "for employment." Severance payments are made to employees only. It would be contrary to common usage to describe as a severance payment remuneration provided to someone who has not worked for the employer. Severance payments are made in consideration for employment—for a "service . . . performed" by "an employee for the person employing him," per FICA's definition of the term "employment." *Ibid.*

In *Social Security Bd.* v. *Nierotko*, 327 U. S. 358 (1946), the Court interpreted the term "wages" in the Social Security statutory context to have substantial breadth. In that case a worker, who had been wrongfully terminated, sought to have his backpay counted as taxable wages for the purpose of obtaining credits under the Social Security system. The Court stated that the term "service," used with respect to Social Security, "means not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer." *Id.*, at 365–366.

As confirmation of that principle, severance payments often vary, as they did here, according to the function and seniority of the particular employee who is terminated. For example, under both termination plans, Quality Stores employees were given severance payments based on job grade and management level. And under the second termination plan, nonofficer employees who had served at least two years with their company received more in severance pay than nonofficer employees who had not—a standard example of a company policy to reward employees for a greater length of good service and loyalty.

In this respect severance payments are like many other benefits employers offer to employees above and beyond salary payments. Like health and retirement benefits, stock options, or merit-based bonuses, a competitive severance payment package can help attract talented employees. Here, the terminations leading to the severance payments were triggered by the employer's involuntary bankruptcy proceeding, a prospect against which employees may wish to protect themselves in an economy that is always subject to changing conditions.

Severance payments, moreover, can be desirable from the perspective of the employer as an alternative or supplemental form of remuneration. In situations in which Chapter 11 bankruptcy reorganization is necessary, an employer may seek to retain goodwill by paying its terminated employees well, thus reinforcing its reputation as a worthy employer. Employers who downsize in a period of slow business may wish to retain the ability to rehire employees who have been terminated.

A specific exemption under FICA for certain termination-related payments reinforces the conclusion that the payments in question are well within the definition of wages. Section 3121(a)(13)(A) exempts from taxable wages any severance payments made "because of . . . retirement for disabil-

ity." That exemption would be unnecessary were severance payments in general not within FICA's definition of "wages." Cf. *American Bank & Trust Co.* v. *Dallas County*, 463 U. S. 855, 864 (1983) (declining to read a statute in a manner that would cause "specific exemptions" to be "superfluous"). FICA's definitional section, moreover, provides a lengthy list of specific exemptions from the definition of wages. For example, FICA exempts from wages payments on account of disability caused by sickness or accident, cash payments made for domestic service in a private home under a certain amount, and cash tips less than a certain amount. See §§ 3121(a)(2)(A), (7)(B), (12)(B). The specificity of these exemptions reinforces the broad nature of FICA's definition of wages.

FICA's statutory history sheds further light on the text of § 3121, which defines the term "wages." FICA was originally enacted in Title VIII of the Social Security Act, 49 Stat. 636. (In 1939, Title VIII was transferred to the Internal Revenue Code and became FICA. 53 Stat. 1387.) Title VIII contained, in substance, definitions of "wages" and "employment" identical to those FICA now provides. See § 811(a), 49 Stat. 639; § 811(b), *ibid.* With respect to the Social Security Act, in 1936 the Treasury Department promulgated a regulation stating that the statutory definition of "wages" included "dismissal pay." Bureau of Internal Revenue, Employees' Tax and the Employers' Tax Under Title VIII of the Social Security Act, 1 Fed. Reg. 1764, 1769 (1936). Congress responded a few years later, in 1939, by creating an exception from "wages" for "[d]ismissal payments which the employer is not legally required to make." Social Security Act Amendments of 1939, § 606, 53 Stat. 1384 (codified at 26 U. S. C. § 1426(a)(4) (1940 ed.)).

In 1950, however, Congress repealed that exception. Social Security Act Amendments, § 203(a), 64 Stat. 525–527. "When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect."

Stone v. *INS*, 514 U. S. 386, 397 (1995). Congress has not revisited its 1950 amendment; and since that time, FICA has contained no exception for severance payments.

B

The next question is whether § 3402(*o*) of the Internal Revenue Code relating to income-tax withholding is a limitation on the meaning of "wages" for FICA purposes. Section 3402 provides:

> "**(*o*) Extension of withholding to certain payments other than wages**
>
> "**(1) General rule**
>
> "For purposes of this chapter (and so much of subtitle F as relates to this chapter)—
>
> "(A) any supplemental unemployment compensation benefit paid to an individual,
>
> . . . . .
>
> "shall be treated as if it were a payment of wages by an employer to an employee for a payroll period."

(Pursuant to stipulations by the parties, the Court of Appeals determined that the severance payments constitute "supplemental unemployment compensation benefits," or SUBs. See § 3402(*o*)(2)(A). The Court assumes, for purposes of this case, that this premise is correct.)

Quality Stores argues that § 3402(*o*)'s instruction that SUBs be treated "as if" they were wages for purposes of income-tax withholding is an indirect means of stating that the definition of wages for income-tax withholding does not cover severance payments. It contends, further, that if the definition of wages for purposes of income-tax withholding does not encompass severance payments, then severance payments are not covered by FICA's similar definition of wages.

The Court disagrees that § 3402(*o*) should be read as Quality Stores suggests. The chapter governing income-tax

withholding has a broad definition of the term "wages": "all remuneration . . . for services performed by an employee for his employer, including the cash value of all remuneration (including benefits) paid in any medium other than cash." § 3401(a). The definitional section for income-tax withholding, like the definitional section for FICA, contains a series of specific exemptions that reinforce the broad scope of its definition of wages. The provision exempts from wages, for example, any remuneration paid for domestic service in a private home, for services rendered to a foreign government, and for services performed by a minister of a church in the course of his duties. §§ 3401(a)(3), (5), (9). Severance payments are not exempted, and they squarely fall within the broad textual definition of wages for purposes of income-tax withholding under § 3401(a), for the same reasons outlined above with respect to FICA's similar definition of wages.

Quality Stores contends that, the broad wording of the definition in § 3401(a) aside, severance payments must fall outside the definition of wages for income-tax withholding. Otherwise, it argues, § 3402(*o*) would be superfluous. But, as the Government points out, § 3402(*o*)'s command that all severance payments be treated "as if" they were wages for income-tax withholding is in all respects consistent with the proposition that at least some severance payments are wages. As the Federal Circuit explained when construing § 3402(*o*), the statement that "all men shall be treated as if they were six feet tall does not imply that no men are six feet tall." *CSX Corp.*, 518 F. 3d, at 1342.

In the last of its textual arguments, Quality Stores draws attention to the boldface heading of § 3402(*o*), which states, "Extension of withholding to certain payments other than wages." It contends the heading declares that the payments enumerated within § 3402(*o*) are "other than wages." Captions, of course, can be "a useful aid in resolving" a statutory text's "ambiguity." *FTC* v. *Mandel Brothers, Inc.*, 359

U. S. 385, 388–389 (1959). But Quality Stores cannot rely on the statutory heading to support its argument that § 3402(*o*), without ambiguity, excludes all severance payments from the definition of wages. The heading states that withholding is extended to "certain payments." This falls short of a declaration that all the payments listed in § 3402(*o*) are not wages.

Next, the regulatory background against which § 3402(*o*) was enacted illustrates the limited nature of the problem the provision was enacted to address. For this purpose, it is instructive to concentrate on the statutory term "supplemental unemployment benefits," which defines the scope of § 3402(*o*)'s income-tax withholding mandate.

The concept of SUBs originated in labor demands for a guaranteed annual wage. When it became clear this was "impractical in their industries, unions such as the Steelworkers and the United Auto Workers transformed their guaranteed annual wage demands into proposals to supplement existing unemployment compensation programs." *Coffy* v. *Republic Steel Corp.*, 447 U. S. 191, 200 (1980). A SUB plan, as originally conceived, offered "second-level protection against layoff" by supplementing unemployment benefits offered by the States. *Ibid.*

In the 1950's, major American employers such as Ford Motor Company adopted SUB plans of this type, agreeing to fund trusts that would provide SUBs to terminated employees. For example, Ford's contract with employees defined the concept of SUBs as the receipt of "both a state system unemployment benefit and a Weekly Supplemental Benefit . . . without reduction of the state system unemployment benefit because of the payment of the Weekly Supplemental Benefit." Note, Effect of Receiving Supplemental Unemployment Benefits on Eligibility for State Benefits, 69 Harv. L. Rev. 362, 364, n. 11 (1955); see J. Becker, Guaranteed Income for the Unemployed: The Story of SUB (1968). Employer plans that provided SUBs sought "to provide economic security for regular employees" and "to assure a

stable work force through periods of short-term layoffs." *Coffy*, *supra*, at 200.

But an obstacle arose. For these plans to work, it was necessary to avoid having the SUBs defined under federal law as "wages." That was because some States only provided unemployment benefits if terminated employees were not earning "wages" from their employers. See Brief for United States 29; *CSX Corp.*, *supra*, at 1334–1335; Note, 69 Harv. L. Rev., at 366 ("The typical state unemployment compensation statute provides that 'an individual shall be deemed unemployed in any week *with respect to* which no *wages* are payable to him and during which he performs no *services* . . . ' " (ellipsis and emphasis in original)); *id.*, at 367 ("[S]tates tend to treat as 'wages' those items which the federal government treats as 'wages' ").

The inability of terminated employees to receive state unemployment benefits, of course, would render SUBs far less useful to them and their employers. Employers, as a consequence, undertook to ensure that the Federal Government did not construe benefits paid out by SUB plans as "wages." *CSX Corp.*, *supra*, at 1334–1335.

In at least partial response to the prospect of differential treatment of SUBs based on the vagaries of state law, the IRS promulgated a series of Revenue Rulings in the 1950's and 1960's that took the position that SUB payments were not "wages" under FICA as well as for purposes of income-tax withholding. Rev. Rul. 56–249, 1956–1 Cum. Bull. 488; see Rev. Rul. 58–128, 1958–1 Cum. Bull. 89; Rev. Rul. 60–330, 1960–2 Cum. Bull. 46; see also IRS Technical Advice Memorandum 9416003, 1993 WL 642695 (Apr. 22, 1994) (hereinafter TAM 9416003).

Although the IRS exempted SUBs paid to terminated employees from withholding for income-tax purposes, the payments still were considered taxable income. Rev. Rul. 56–249, 1956–1 Cum. Bull. 488. As a result, terminated employees faced significant tax liability at the end of the year.

The Treasury Department suggested Congress authorize the agency to promulgate regulations allowing voluntary withholding. Statements and Recommendations of the Department of the Treasury: Hearings on H. R. 13270 before the Senate Committee on Finance, 91st Cong., 1st Sess., 905–906 (1969).

In 1969, Congress chose instead to address the withholding problem by enacting § 3402(*o*). It provides that all severance payments—that is, both SUBs as well as severance payments that the IRS considered wages—shall be "treated as if" they were wages for purposes of income-tax withholding. It is apparent that the definition Congress adopted in § 3402(*o*) is not limited to the SUBs that the IRS had deemed exempt from wages under FICA. See § 3402(*o*)(2)(A). It must be presumed that Congress was aware that § 3402(*o*) covered more than the severance payments that were excluded from income-tax withholding. Not all severance payment plans were tied to state unemployment benefits; and, before § 3402(*o*)'s 1969 enactment, the IRS ruled that severance payments not linked to state unemployment benefits were wages for purposes of income-tax withholding. See Rev. Rul. 65–251, 1965–2 Cum. Bull. 395; see also TAM 9416003 (the IRS' original 1956 exception for SUBs provided "a limited exception from the definition of wages for . . . federal income tax withholding . . . only if the payments are designed to supplement the receipt of state unemployment compensation and are actually tied to state unemployment benefits"); *ibid.* ("SUB-pay plans must be designed to supplement unemployment benefits . . . ").

Once this background is understood, the Court of Appeals' interpretation of § 3402(*o*) as standing for some broad definitional principle is shown to be incorrect. Although Congress need not have agreed with the Revenue Rulings to enact § 3402(*o*), its purpose to eliminate the withholding problem caused by the differential treatment of severance payments is the necessary background to understand the

meaning and purpose of the provision. The problem Congress sought to resolve was the prospect that terminated employees would owe large payments in taxes at the end of the year as a result of the IRS' exemption of certain SUBs from withholding. It remained possible that the IRS would determine that other forms of SUB plans, perhaps linked differently to state unemployment benefits, should be exempt from withholding. If Congress had only incorporated the Revenue Rulings already in effect, that response may have risked the withholding problem arising once again. On the other hand, by drawing a withholding requirement that was broader than then-current IRS exemptions, Congress avoided these practical problems. A requirement that a form of remuneration already included as wages be treated "as if" it were wages created no administrative difficulties.

The Court of Appeals understood Congress' decision to include within § 3402(*o*) a larger set of SUBs than was already exempt from withholding under IRS Revenue Rulings to mean that all SUBs were excluded from the definition of wages. But that assumption, although in the abstract not necessarily an illogical inference, is unsustainable, considering the regulatory background against which § 3402(*o*) was enacted. Congress interpreted the Revenue Rulings not at all as a definitive gloss on the meaning of the term "wages" in § 3401. The better reading is that Congress determined that, whatever position the IRS took with respect to certain categories of severance payments, the problem with withholding should be solved by treating all severance payments as wages requiring withholding.

The necessary conclusion is that § 3402(*o*) does not narrow the term "wages" under FICA to exempt all severance payments. This reasoning is consistent with *Rowan*, a previous decision interpreting FICA. In *Rowan*, the Court held that Treasury Regulations interpreting "wages" under FICA to include the value of meals and lodging were invalid. The Government conceded, for income-tax purposes, that the tax-

payer in *Rowan* was correct to exempt the value of the meals and lodging in computing the wages properly withheld under § 3402. 452 U. S., at 250–251. But it argued, nevertheless, that the value of the meals and lodging was taxable as wages under FICA, pursuant to Treasury Regulations. The *Rowan* Court observed that the definition of wages under FICA was in substance the same as for purposes of withholding. *Id.*, at 255. The Court read that similarity to be "strong evidence that Congress intended 'wages' to mean the same thing under FICA . . . and income-tax withholding." *Ibid.* To support that conclusion, the Court noted a "congressional concern for 'the interest of simplicity and ease of administration.'" *Ibid.* (quoting S. Rep. No. 1631, 77th Cong., 2d Sess., 165 (1942)). Because "Congress intended . . . to coordinate the income-tax withholding system with FICA" in order "to promote simplicity and ease of administration," the Court held that it would be "extraordinary" for Congress to intend the definitions of "wages" to vary between FICA and income-tax withholding. 452 U. S., at 257.

The specific holding of *Rowan*—that regulations governing meals and lodging were invalid—has little or no bearing on the issue confronting us here. What is of importance is the major principle recognized in *Rowan*: that simplicity of administration and consistency of statutory interpretation instruct that the meaning of "wages" should be in general the same for income-tax withholding and for FICA calculations.

Quality Stores contends that, under the mandate of § 3402(*o*), severance payments are not subject to FICA taxation but are to be deemed wages for purposes of income-tax withholding. It justifies this differential treatment in the name of uniformity. But that so-called uniformity as to the definitions of wages (*i. e.*, that severance payments are not wages) is not consistent with the broad textual definitions of wages under FICA and income-tax withholding. Nor is it

consistent with this Court's holding that administrative reasons justify treating severance payments as taxable for both FICA and income-tax purposes. To read Congress' command to withhold severance payments as an implicit overruling of the broad definition of wages in FICA would disserve the statutory text and the congressional interest in administrative simplicity deemed controlling in *Rowan*.

In concluding, the Court notes that the IRS still provides that severance payments tied to the receipt of state unemployment benefits are exempt not only from income-tax withholding but also from FICA taxation. See, *e. g.*, Rev. Rul. 90–72, 1990–2 Cum. Bull. 211. Those Revenue Rulings are not at issue here. Because the severance payments here were not linked to state unemployment benefits, the Court does not reach the question whether the IRS' current exemption is consistent with the broad definition of wages under FICA.

* * *

The severance payments here were made to employees terminated against their will, were varied based on job seniority and time served, and were not linked to the receipt of state unemployment benefits. Under FICA's broad definition, these severance payments constitute taxable wages. The judgment of the Court of Appeals for the Sixth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

Syllabus

UNITED STATES *v.* CASTLEMAN

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

No. 12–1371. Argued January 15, 2014—Decided March 26, 2014

Respondent Castleman moved to dismiss his indictment under 18 U. S. C. § 922(g)(9), which forbids the possession of firearms by anyone convicted of a "misdemeanor crime of domestic violence." He argued that his previous conviction for "intentionally or knowingly caus[ing] bodily injury to" the mother of his child, App. 27, did not qualify as a "misdemeanor crime of domestic violence" because it did not involve "the use or attempted use of physical force," 18 U. S. C. § 921(a)(33)(A)(ii). The District Court agreed, reasoning that "physical force" must entail violent contact and that one can cause bodily injury without violent contact, *e. g.*, by poisoning. The Sixth Circuit affirmed on a different rationale. It held that the degree of physical force required for a conviction to constitute a "misdemeanor crime of domestic violence" is the same as that required for a "violent felony" under the Armed Career Criminal Act (ACCA), § 924(e)(2)(B)(i)—namely, violent force—and that Castleman could have been convicted for causing slight injury by nonviolent conduct.

Held: Castleman's conviction qualifies as a "misdemeanor crime of domestic violence." Pp. 162–173.

(a) Section 922(g)(9)'s "physical force" requirement is satisfied by the degree of force that supports a common-law battery conviction—namely, offensive touching. Congress presumably intends to incorporate the common-law meaning of terms that it uses, and nothing suggests Congress intended otherwise here. The Sixth Circuit relied upon *Johnson* v. *United States*, 559 U. S. 133, in which the common-law meaning of "force" was found to be a "comical misfit," *id.*, at 145, when read into ACCA's "violent felony" definition. But *Johnson* resolves this case in the Government's favor: The very reasons for rejecting the common-law meaning in *Johnson* are reasons to embrace it here. First, whereas it was "unlikely" that Congress meant to incorporate in ACCA's "violent felony" definition "a phrase that the common law gave peculiar meaning only in its definition of a misdemeanor," *id.*, at 141, it is likely that Congress meant to incorporate the misdemeanor-specific meaning of "force" in defining a "misdemeanor crime of domestic violence." Second, whereas the word "violent" or "violence" standing alone "connotes a

substantial degree of force," *id.*, at 140, that is not true of "domestic violence," which is a term of art encompassing acts that one might not characterize as "violent" in a nondomestic context. Third, whereas this Court has hesitated to apply ACCA to "crimes which, though dangerous, are not typically committed by those whom one normally labels 'armed career criminals,'" *Begay* v. *United States*, 553 U. S. 137, 146, there is no anomaly in grouping domestic abusers convicted of generic assault or battery offenses together with others whom § 922(g) disqualifies from gun ownership. In addition, a contrary reading would have made § 922(g)(9) inoperative in at least 10 States when it was enacted. Pp. 162–168.

(b) Under this definition of "physical force," Castleman's conviction qualifies as a "misdemeanor crime of domestic violence." The application of the modified categorical approach—consulting Castleman's state indictment to determine whether his conviction entailed the elements necessary to constitute the generic federal offense—is straightforward. Castleman pleaded guilty to "intentionally or knowingly caus[ing] bodily injury to" the mother of his child, and the knowing or intentional causation of bodily injury necessarily involves the use of physical force. First, a "bodily injury" must result from "physical force." The common-law concept of "force" encompasses even its indirect application, making it impossible to cause bodily injury without applying force in the common-law sense. Second, the knowing or intentional application of force is a "use" of force. *Leocal* v. *Ashcroft*, 543 U. S. 1, distinguished. Pp. 168–171.

(c) Castleman claims that legislative history, the rule of lenity, and the canon of constitutional avoidance weigh against this Court's interpretation of § 922(g)(9), but his arguments are unpersuasive. Pp. 171–173.

695 F. 3d 582, reversed and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, and KAGAN, JJ., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 173. ALITO, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined, *post*, p. 183.

Melissa Arbus Sherry argued the cause for the United States. With her on the briefs were *Solicitor General Verrilli*, *Acting Assistant Attorney General Raman*, *Deputy Solicitor General Dreeben*, and *Joseph C. Wyderko*.

Charles A. Rothfeld argued the cause for respondent. With him on the brief were *Andrew J. Pincus*, *Paul W. Hughes*, *Michael B. Kimberly*, *Steven L. West*, and *Eugene R. Fidell*.*

JUSTICE SOTOMAYOR delivered the opinion of the Court.

Recognizing that "[f]irearms and domestic strife are a potentially deadly combination," *United States* v. *Hayes*, 555 U. S. 415, 427 (2009), Congress forbade the possession of firearms by anyone convicted of "a misdemeanor crime of domestic violence." 18 U. S. C. § 922(g)(9). The respondent, James Alvin Castleman, pleaded guilty to the misdemeanor offense of having "intentionally or knowingly cause[d] bodily injury to" the mother of his child. App. 27. The question before us is whether this conviction qualifies as "a misdemeanor crime of domestic violence." We hold that it does.

I

A

This country witnesses more than a million acts of domestic violence, and hundreds of deaths from domestic violence,

*Briefs of *amici curiae* urging reversal were filed for the Brady Center to Prevent Gun Violence et al. by *Mitchell F. Dolin* and *Jonathan E. Lowy*; for the Children's Defense Fund et al. by *Catherine E. Stetson*; for the Major Cities Chiefs Association et al. by *Gregory G. Little*, *Joshua D. Weedman*, and *Luisa H. Cetina*; for Mayors Against Illegal Guns by *H. Rodgin Cohen*, *Garrard R. Beeney*, and *Mimi M. D. Marziani*; for the National Network to End Domestic Violence et al. by *Helen Gerostathos Guyton*, *Roberta Valente*, *Joan S. Meier*, and *Lisalyn R. Jacobs*; and for the New York State Association of Chiefs of Police by *Raymond Brescia* and *Sarah Rogerson*.

Briefs of *amici curiae* urging affirmance were filed for ASISTA Immigration Assistance et al. by *Ira J. Kurzban* and *Gail Pendleton*; for the Gun Owners Foundation et al. by *Herbert W. Titus*, *William J. Olson*, *John S. Miles*, *Jeremiah L. Morgan*, and *Michael Connelly*; and for the National Association of Criminal Defense Lawyers by *Jeffrey T. Green* and *David M. Porter*.

each year.[1] See *Georgia* v. *Randolph*, 547 U. S. 103, 117–118 (2006). Domestic violence often escalates in severity over time, see Brief for Major Cities Chiefs Association et al. as *Amici Curiae* 13–15; Brief for National Network to End Domestic Violence et al. as *Amici Curiae* 9–12, and the presence of a firearm increases the likelihood that it will escalate to homicide, see *id.*, at 14–15; Campbell et al., Assessing Risk Factors for Intimate Partner Homicide, DOJ, Nat. Institute of Justice J., No. 250, p. 16 (Nov. 2003) ("When a gun was in the house, an abused woman was 6 times more likely than other abused women to be killed"). "[A]ll too often," as one Senator noted during the debate over § 922(g)(9), "the only difference between a battered woman and a dead woman is the presence of a gun." 142 Cong. Rec. 22986 (1996) (statement of Sen. Wellstone).

Congress enacted § 922(g)(9), in light of these sobering facts, to "'close [a] dangerous loophole'" in the gun control laws: While felons had long been barred from possessing guns, many perpetrators of domestic violence are convicted only of misdemeanors. *Hayes*, 555 U. S., at 418, 426. Section 922(g)(9) provides, as relevant, that any person "who has been convicted . . . of a misdemeanor crime of domestic violence" may not "possess in or affecting commerc[e] any firearm or ammunition." With exceptions that do not apply here, the statute defines a "misdemeanor crime of domestic violence" as

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[1] See Dept. of Justice (DOJ), Bureau of Justice Statistics (BJS), J. Truman, L. Langton, & M. Planty, Criminal Victimization 2012 (Oct. 2013) (Table 1) (1,259,390 incidents of domestic violence in 2012), online at http://www.bjs.gov/content/pub/pdf/cv12.pdf (all Internet materials as visited Mar. 19, 2014, and available in Clerk of Court's case file); DOJ, BJS, C. Rennison, Crime Data Brief, Intimate Partner Violence, 1993–2001, p. 1 (Feb. 2003) (violence among intimate partners caused deaths of 1,247 women and 440 men in 2000), online at http://www.bjs.gov/content/pub/pdf/ipv01.pdf.

> "an offense that . . . (i) is a misdemeanor under Federal, State, or Tribal law; and (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim." § 921(a)(33)(A).

This case concerns the meaning of one phrase in this definition: "the use . . . of physical force."

B

In 2001, Castleman was charged in a Tennessee court with having "intentionally or knowingly cause[d] bodily injury to" the mother of his child, in violation of Tenn. Code Ann. § 39–13–111(b) (Supp. 2002). App. 27. He pleaded guilty. *Id.*, at 29.

In 2008, federal authorities learned that Castleman was selling firearms on the black market. A grand jury in the Western District of Tennessee indicted him on two counts of violating § 922(g)(9) and on other charges not relevant here. *Id.*, at 13–16.

Castleman moved to dismiss the § 922(g)(9) charges, arguing that his Tennessee conviction did not qualify as a "misdemeanor crime of domestic violence" because it did not "ha[ve], as an element, the use . . . of physical force," § 921(a)(33)(A)(ii). The District Court agreed, on the theory that "the 'use of physical force' for § 922(g)(9) purposes" must entail "violent contact with the victim." App. to Pet. for Cert. 40a. The court held that a conviction under the relevant Tennessee statute cannot qualify as a "misdemeanor crime of domestic violence" because one can cause bodily injury without "violent contact"—for example, by "deceiv-

ing [the victim] into drinking a poisoned beverage." *Id.*, at 41a.

A divided panel of the U. S. Court of Appeals for the Sixth Circuit affirmed, by different reasoning. 695 F. 3d 582 (2012). The majority held that the degree of physical force required by § 921(a)(33)(A)(ii) is the same as required by § 924(e)(2)(B)(i), which defines "violent felony." *Id.*, at 587. Applying our decision in *Johnson* v. *United States*, 559 U. S. 133 (2010), which held that § 924(e)(2)(B)(i) requires "*violent* force," *id.*, at 140, the majority held that Castleman's conviction did not qualify as a "misdemeanor crime of domestic violence" because Castleman could have been convicted for "caus[ing] a slight, nonserious physical injury with conduct that cannot be described as violent." 695 F. 3d, at 590. Judge McKeague dissented, arguing both that the majority erred in extending *Johnson*'s definition of a "violent felony" to the context of a "misdemeanor crime of domestic violence" and that, in any event, Castleman's conviction satisfied the *Johnson* standard. *Id.*, at 593–597.

The Sixth Circuit's decision deepened a split of authority among the Courts of Appeals. Compare, *e. g.*, *United States* v. *Nason*, 269 F. 3d 10, 18 (CA1 2001) (§ 922(g)(9) "encompass[es] crimes characterized by the application of *any* physical force"), with *United States* v. *Belless*, 338 F. 3d 1063, 1068 (CA9 2003) (§ 922(g)(9) covers only "the violent use of force"). We granted certiorari to resolve this split, 570 U. S. 948 (2013), and now reverse the Sixth Circuit's judgment.

II

A

"It is a settled principle of interpretation that, absent other indication, 'Congress intends to incorporate the well-settled meaning of the common-law terms it uses.'" *Sekhar* v. *United States*, 570 U. S. 729, 732 (2013). Seeing no "other indication" here, we hold that Congress incorporated the common-law meaning of "force"—namely, offensive touch-

ing—in § 921(a)(33)(A)'s definition of a "misdemeanor crime of domestic violence."

Johnson resolves this case in the Government's favor—not, as the Sixth Circuit held, in Castleman's. In *Johnson*, we considered whether a battery conviction was a "violent felony" under the Armed Career Criminal Act (ACCA), § 924(e)(1). As here, ACCA defines such a crime as one that "has as an element the use . . . of physical force," § 924(e)(2)(B)(i). We began by observing that at common law, the element of force in the crime of battery was "satisfied by even the slightest offensive touching." 559 U. S., at 139 (citing 3 W. Blackstone, Commentaries on the Laws of England 120 (1768)).[2] And we recognized the general rule that "a common-law term of art should be given its established common-law meaning," except "where that meaning does not fit." 559 U. S., at 139. We declined to read the common-law meaning of "force" into ACCA's definition of a "violent felony," because we found it a "comical misfit with the defined term." *Id.*, at 145; see *United States* v. *Stevens*, 559 U. S. 460, 474 (2010) ("[A]n unclear definitional phrase may take meaning from the term to be defined"). In defining a "'*violent* felony,'" we held, "the phrase 'physical force'" must "mea[n] *violent* force." *Johnson*, 559 U. S., at 140. But here, the common-law meaning of "force" fits perfectly: The very reasons we gave for rejecting that meaning in defining a "violent felony" are reasons to embrace it in defining a "misdemeanor crime of domestic violence."[3]

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[2] We explained that the word "physical" did not add much to the word "force," except to distinguish "force exerted by and through concrete bodies . . . from, for example, intellectual force or emotional force." *Johnson*, 559 U. S., at 138.

[3] *Johnson* specifically reserved the question whether our definition of "physical force" would extend to 18 U. S. C. § 922(g)(9). 559 U. S., at 143–144. And these reasons for declining to extend *Johnson*'s definition to § 922(g)(9) serve equally to rebut the "presumption of consistent usage" on which JUSTICE SCALIA's concurrence heavily relies, *post*, at 174, 176.

First, because perpetrators of domestic violence are "routinely prosecuted under generally applicable assault or battery laws," *Hayes*, 555 U. S., at 427, it makes sense for Congress to have classified as a "misdemeanor crime of domestic violence" the type of conduct that supports a common-law battery conviction. Whereas it was "unlikely" that Congress meant to incorporate in the definition of a "'violent felony' a phrase that the common law gave peculiar meaning only in its definition of a misdemeanor," *Johnson*, 559 U. S., at 141, it is likely that Congress meant to incorporate that misdemeanor-specific meaning of "force" in defining a "misdemeanor crime of domestic violence."

Second, whereas the word "violent" or "violence" standing alone "connotes a substantial degree of force," *id.*, at 140,[4]

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[4] This portion of *Johnson*'s analysis relied heavily on *Leocal* v. *Ashcroft*, 543 U. S. 1 (2004), in which we interpreted the meaning of a "crime of violence" under 18 U. S. C. § 16. As in *Johnson* and here, the statute defines a "crime of violence" in part as one "that has as an element the use . . . of physical force," § 16(a). In support of our holding in *Johnson*, we quoted *Leocal*'s observation that "'[t]he ordinary meaning of [a "crime of violence"] . . . suggests a category of violent, active crimes.'" 559 U. S., at 140 (quoting 543 U. S., at 11).

The Courts of Appeals have generally held that mere offensive touching cannot constitute the "physical force" necessary to a "crime of violence," just as we held in *Johnson* that it could not constitute the "physical force" necessary to a "violent felony." See *Karimi* v. *Holder*, 715 F. 3d 561, 566–568 (CA4 2013); *Singh* v. *Ashcroft*, 386 F. 3d 1228, 1233 (CA9 2004); *Flores* v. *Ashcroft*, 350 F. 3d 666, 672 (CA7 2003); *United States* v. *Venegas-Ornelas*, 348 F. 3d 1273, 1275 (CA10 2003); *United States* v. *Landeros-Gonzales*, 262 F. 3d 424, 426 (CA5 2001); see also *United States* v. *Rede-Mendez*, 680 F. 3d 552, 558 (CA6 2012) (commenting generally that "[i]n the crime of violence context, 'the phrase "physical force" means *violent* force'"); *United States* v. *Haileselassie*, 668 F. 3d 1033, 1035 (CA8 2012) (dicta). But see *Hernandez* v. *United States Attorney General*, 513 F. 3d 1336, 1340, n. 3 (CA11 2008) (*per curiam*). The Board of Immigration Appeals has similarly extended *Johnson*'s requirement of violent force to the context of a "crime of violence" under § 16. *Matter of Velasquez*, 25 I. & N. Dec. 278, 282 (2010). Nothing in today's opinion casts doubt on these holdings, because—as we explain—"domestic violence" en-

that is not true of "domestic violence." "Domestic violence" is not merely a type of "violence"; it is a term of art encompassing acts that one might not characterize as "violent" in a nondomestic context. See Brief for National Network to End Domestic Violence et al. as *Amici Curiae* 4–9; DOJ, Office on Violence Against Women, Domestic Violence (defining physical forms of domestic violence to include "[h]itting, slapping, shoving, grabbing, pinching, biting, [and] hair pulling"), online at http://www.ovw.usdoj.gov/domviolence.htm.[5] Indeed, "most physical assaults committed against women and men by intimates are relatively minor and consist of pushing, grabbing, shoving, slapping, and hitting." DOJ, P. Tjaden & N. Thoennes, Extent, Nature and Consequences of Intimate Partner Violence 11 (2000).

Minor uses of force may not constitute "violence" in the generic sense. For example, in an opinion that we cited with approval in *Johnson*, the Seventh Circuit noted that it

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compasses a range of force broader than that which constitutes "violence" *simpliciter*.

We note, as does JUSTICE SCALIA's concurrence, *post*, at 180, and n. 7, that federal law elsewhere defines "domestic violence" in more limited terms: For example, a provision of the Immigration and Nationality Act defines a "'crime of domestic violence'" as "any crime of violence (as defined by [18 U. S. C. §16])" committed against a qualifying relation. 8 U. S. C. §1227(a)(2)(E)(i). Our view that "domestic violence" encompasses acts that might not constitute "violence" in a nondomestic context does not extend to a provision like this, which specifically defines "domestic violence" by reference to a generic "crime of violence."

[5] See also A. Ganley, Understanding Domestic Violence, in Improving the Health Care Response to Domestic Violence: A Resource Manual for Health Care Providers 18 (2d ed. 1996), online at http://www.futureswithoutviolence.org/userfiles/file/HealthCare/improving_healthcare_manual_1.pdf (physical forms of domestic violence "may include spitting, scratching, biting, grabbing, shaking, shoving, pushing, restraining, throwing, twisting, [or] slapping"); M. McCue, Domestic Violence: A Reference Handbook 6 (1995) (noting that physical forms of domestic violence "may begin with relatively minor assaults such as painful pinching or squeezing").

was "hard to describe . . . as 'violence'" "a squeeze of the arm [that] causes a bruise." *Flores* v. *Ashcroft*, 350 F. 3d 666, 670 (2003). But an act of this nature is easy to describe as "domestic violence," when the accumulation of such acts over time can subject one intimate partner to the other's control. If a seemingly minor act like this draws the attention of authorities and leads to a successful prosecution for a misdemeanor offense, it does not offend common sense or the English language to characterize the resulting conviction as a "misdemeanor crime of domestic violence."

JUSTICE SCALIA's concurrence discounts our reference to social-science definitions of "domestic violence," including those used by the organizations most directly engaged with the problem and thus most aware of its dimensions. See *post*, at 180–183. It is important to keep in mind, however, that the operative phrase we are construing is not "domestic violence"; it is "physical force." § 921(a)(33)(A). "Physical force" has a presumptive common-law meaning, and the question is simply whether that presumptive meaning makes sense in defining a "misdemeanor crime of domestic violence."[6]

A third reason for distinguishing *Johnson*'s definition of "physical force" is that unlike in *Johnson*—where a determination that the defendant's crime was a "violent felony" would have classified him as an "armed career criminal"—the statute here groups those convicted of "misdemeanor crimes of domestic violence" with others whose conduct does not warrant such a designation. Section 922(g) bars gun possession by anyone "addicted to any controlled substance,"

[6] The concurrence's reliance on definitions of "domestic violence" in other statutory provisions, see *post*, at 180, and n. 7, is similarly unpersuasive. These other provisions show that when Congress wished to define "domestic violence" as a type of "violence" *simpliciter*, it knew how to do so. That it did not do so here suggests, if anything, that it did not mean to. See, *e. g.*, *Custis* v. *United States*, 511 U. S. 485, 492 (1994). This also answers the concurrence's suggestion, *post*, at 182, that our holding will somehow make it difficult for Congress to define "domestic violence"—where it wants to—as requiring violent force.

§ 922(g)(3); by most people who have "been admitted to the United States under a nonimmigrant visa," § 922(g)(5)(B); by anyone who has renounced United States citizenship, § 922(g)(7); and by anyone subject to a domestic restraining order, § 922(g)(8). Whereas we have hesitated (as in *Johnson*) to apply ACCA to "crimes which, though dangerous, are not typically committed by those whom one normally labels 'armed career criminals,'" *Begay* v. *United States*, 553 U. S. 137, 146 (2008), we see no anomaly in grouping domestic abusers convicted of generic assault or battery offenses together with the others whom § 922(g) disqualifies from gun ownership.

An additional reason to read the statute as we do is that a contrary reading would have rendered § 922(g)(9) inoperative in many States at the time of its enactment. The "assault or battery laws" under which "domestic abusers were . . . routinely prosecuted" when Congress enacted § 922(g)(9), and under which many are still prosecuted today, *Hayes*, 555 U. S., at 427, fall generally into two categories: those that prohibit both offensive touching and the causation of bodily injury, and those that prohibit only the latter. See Brief for United States 36–38. Whether or not the causation of bodily injury necessarily entails violent force—a question we do not reach—mere offensive touching does not. See *Johnson*, 559 U. S., at 139–140. So if offensive touching did not constitute "force" under § 921(a)(33)(A), then § 922(g)(9) would have been ineffectual in at least 10 States—home to nearly 30 percent of the Nation's population[7]—at the time of its enactment. See *post*, at 178, and n. 5 (SCALIA, J., concurring in part and concurring in judgment) (acknowledging that § 922(g)(9) would have been inapplicable in California and nine other States if it did not encompass offensive touching); App. to Brief for United States 10a–16a (listing statutes

[7] See U. S. Census Bureau, Time Series of Intercensal State Population Estimates: April 1, 1990 to April 1, 2000, online at http://www.census.gov/popest/data/intercensal/st-co/files/CO-EST2001-12-00.pdf (estimating state and national populations as of July 1, 1996).

prohibiting both offensive touching and the causation of bodily injury, only some of which are divisible); cf. *Hayes*, 555 U. S., at 427 (rejecting an interpretation under which "§ 922(g)(9) would have been 'a dead letter' in some two-thirds of the States from the very moment of its enactment").

In sum, *Johnson* requires that we attribute the common-law meaning of "force" to § 921(a)(33)(A)'s definition of a "misdemeanor crime of domestic violence" as an offense that "has, as an element, the use or attempted use of physical force." We therefore hold that the requirement of "physical force" is satisfied, for purposes of § 922(g)(9), by the degree of force that supports a common-law battery conviction.

B

Applying this definition of "physical force," we conclude that Castleman's conviction qualifies as a "misdemeanor crime of domestic violence." In doing so, we follow the analytic approach of *Taylor* v. *United States*, 495 U. S. 575 (1990), and *Shepard* v. *United States*, 544 U. S. 13 (2005). We begin with *Taylor*'s categorical approach, under which we look to the statute of Castleman's conviction to determine whether that conviction necessarily "ha[d], as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon," § 921(a)(33)(A).

The Tennessee statute under which Castleman was convicted made it a crime to "commi[t] an assault . . . against" a "family or household member"—in Castleman's case, the mother of his child. Tenn. Code Ann. § 39–13–111(b). A provision incorporated by reference, § 39–13–101, defined three types of assault: "(1) [i]ntentionally, knowingly or recklessly caus[ing] bodily injury to another; (2) [i]ntentionally or knowingly caus[ing] another to reasonably fear imminent bodily injury; or (3) [i]ntentionally or knowingly caus[ing] physical contact with another" in a manner that a "reasonable person would regard . . . as extremely offensive or provocative." § 39–13–101(a).

It does not appear that every type of assault defined by § 39–13–101 necessarily involves "the use or attempted use of physical force, or the threatened use of a deadly weapon," § 921(a)(33)(A). A threat under § 39–13–101(2) may not necessarily involve a deadly weapon, and the merely reckless causation of bodily injury under § 39–13–101(1) may not be a "use" of force.[8]

But we need not decide whether a domestic assault conviction in Tennessee categorically constitutes a "misdemeanor crime of domestic violence," because the parties do not contest that § 39–13–101 is a "'divisible statute,'" *Descamps* v. *United States*, 570 U. S. 254, 257 (2013). We may accordingly apply the modified categorical approach, consulting the indictment to which Castleman pleaded guilty in order to determine whether his conviction did entail the elements necessary to constitute the generic federal offense. *Ibid.*; see *Shepard*, 544 U. S., at 26. Here, that analysis is straightforward: Castleman pleaded guilty to having "intentionally or knowingly cause[d] bodily injury" to the mother of his child, App. 27, and the knowing or intentional causation of bodily injury necessarily involves the use of physical force.

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[8] We held in *Leocal* that "'use' requires active employment," rather "than negligent or merely accidental conduct." 543 U. S., at 9. Although *Leocal* reserved the question whether a reckless application of force could constitute a "use" of force, *id.*, at 13, the Courts of Appeals have almost uniformly held that recklessness is not sufficient. See *United States* v. *Palomino Garcia*, 606 F. 3d 1317, 1335–1336 (CA11 2010); *Jimenez-Gonzalez* v. *Mukasey*, 548 F. 3d 557, 560 (CA7 2008); *United States* v. *Zuniga-Soto*, 527 F. 3d 1110, 1124 (CA10 2008); *United States* v. *Torres-Villalobos*, 487 F. 3d 607, 615–616 (CA8 2007); *United States* v. *Portela*, 469 F. 3d 496, 499 (CA6 2006); *Fernandez-Ruiz* v. *Gonzales*, 466 F. 3d 1121, 1127–1132 (CA9 2006) (en banc); *Garcia* v. *Gonzales*, 455 F. 3d 465, 468–469 (CA4 2006); *Oyebanji* v. *Gonzales*, 418 F. 3d 260, 263–265 (CA3 2005) (Alito, J.); *Jobson* v. *Ashcroft*, 326 F. 3d 367, 373 (CA2 2003); *United States* v. *Chapa-Garza*, 243 F. 3d 921, 926 (CA5 2001). But see *United States* v. *Booker*, 644 F. 3d 12, 19–20 (CA1 2011) (noting that the First Circuit had not resolved the recklessness issue under *Leocal*, but declining to extend *Leocal*'s analysis to § 922(g)(9)).

First, a "bodily injury" must result from "physical force." Under Tennessee law, "bodily injury" is a broad term: It "includes a cut, abrasion, bruise, burn or disfigurement; physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty." Tenn. Code Ann. § 39–11–106(a)(2) (1997). JUSTICE SCALIA's concurrence suggests that these forms of injury necessitate violent force, under *Johnson*'s definition of that phrase. *Post*, at 175. But whether or not that is so—a question we do not decide—these forms of injury do necessitate force in the common-law sense.

The District Court thought otherwise, reasoning that one can cause bodily injury "without the 'use of physical force' "—for example, by "deceiving [the victim] into drinking a poisoned beverage, without making contact of any kind." App. to Pet. for Cert. 41a. But as we explained in *Johnson*, "physical force" is simply "force exerted by and through concrete bodies," as opposed to "intellectual force or emotional force." 559 U. S., at 138. And the common-law concept of "force" encompasses even its indirect application. "Force" in this sense "describ[es] one of the elements of the common-law crime of battery," *id.*, at 139, and "[t]he force used" in battery "need not be applied directly to the body of the victim," 2 W. LaFave, Substantive Criminal Law § 16.2(b) (2d ed. 2003). "[A] battery may be committed by administering a poison or by infecting with a disease, or even by resort to some intangible substance," such as a laser beam. *Ibid.* (footnote omitted) (citing *State* v. *Monroe*, 121 N. C. 677, 28 S. E. 547 (1897) (poison); *State* v. *Lankford*, 29 Del. 594, 102 A. 63 (1917) (disease); *Adams* v. *Commonwealth*, 33 Va. App. 463, 534 S. E. 2d 347 (2000) (laser beam)). It is impossible to cause bodily injury without applying force in the common-law sense.

Second, the knowing or intentional application of force is a "use" of force. Castleman is correct that under *Leocal* v. *Ashcroft*, 543 U. S. 1 (2004), the word "use" "conveys the idea

that the thing used (here, 'physical force') has been made the user's instrument." Brief for Respondent 37. But he errs in arguing that although "[p]oison may have 'forceful physical properties' as a matter of organic chemistry, . . . no one would say that a poisoner 'employs' force or 'carries out a purpose by means of force' when he or she sprinkles poison in a victim's drink," *ibid.* The "use of force" in Castleman's example is not the act of "sprinkl[ing]" the poison; it is the act of employing poison knowingly as a device to cause physical harm. That the harm occurs indirectly, rather than directly (as with a kick or punch), does not matter. Under Castleman's logic, after all, one could say that pulling the trigger on a gun is not a "use of force" because it is the bullet, not the trigger, that actually strikes the victim. *Leocal* held that the "use" of force must entail "a higher degree of intent than negligent or merely accidental conduct," 543 U. S., at 9; it did not hold that the word "use" somehow alters the meaning of "force."

Because Castleman's indictment makes clear that the use of physical force was an element of his conviction, that conviction qualifies as a "misdemeanor crime of domestic violence."

III

We are not persuaded by Castleman's nontextual arguments against our interpretation of § 922(g)(9).

A

First, Castleman invokes § 922(g)(9)'s legislative history to suggest that Congress could not have intended for the provision to apply to acts involving minimal force. But to the extent that legislative history can aid in the interpretation of this statute, Castleman's reliance on it is unpersuasive.

Castleman begins by observing that during the debate over § 922(g)(9), several Senators argued that the provision would help to prevent gun violence by perpetrators of severe domestic abuse. Senator Lautenberg referred to "serious

spousal or child abuse" and to "violent individuals"; Senator Hutchison to "'people who batter their wives'"; Senator Wellstone to people who "brutalize" their wives or children; and Senator Feinstein to "severe and recurring domestic violence." 142 Cong. Rec. 22985–22986, 22988. But as we noted above, see *supra*, at 160, the impetus of § 922(g)(9) was that even perpetrators of severe domestic violence are often convicted "under generally applicable assault or battery laws," *Hayes*, 555 U. S., at 427. So nothing about these Senators' isolated references to severe domestic violence suggests that they would not have wanted § 922(g)(9) to apply to a misdemeanor assault conviction like Castleman's.

Castleman next observes that § 922(g)(9) is the product of a legislative compromise. The provision originally barred gun possession for any "crime of domestic violence," defined as any "felony or misdemeanor crime of violence, regardless of length, term, or manner of punishment." 142 Cong. Rec. 5840. Congress rewrote the provision to require the use of physical force in response to the concern "that the term crime of violence was too broad, and could be interpreted to include an act such as cutting up a credit card with a pair of scissors," *id.*, at 26675. See *Hayes*, 555 U. S., at 428. Castleman would have us conclude that Congress thus meant "to narrow the scope of the statute to convictions based on especially severe conduct." Brief for Respondent 24. But all Congress meant to do was address the fear that § 922(g)(9) might be triggered by offenses in which no force at all was directed at a person. As Senator Lautenberg noted, the revised text was not only "more precise" than the original but also "probably broader." 142 Cong. Rec. 26675.

B

We are similarly unmoved by Castleman's invocation of the rule of lenity. Castleman is correct that our "construction of a criminal statute must be guided by the need for fair warning." *Crandon* v. *United States*, 494 U. S. 152, 160 (1990). But "the rule of lenity only applies if, after consider-

ing text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended." *Barber* v. *Thomas*, 560 U. S. 474, 488 (2010) (citation and internal quotation marks omitted). That is not the case here.

C

Finally, Castleman suggests—in a single paragraph—that we should read § 922(g)(9) narrowly because it implicates his constitutional right to keep and bear arms. But Castleman has not challenged the constitutionality of § 922(g)(9), either on its face or as applied to him, and the meaning of the statute is sufficiently clear that we need not indulge Castleman's cursory nod to constitutional avoidance concerns.

* * *

Castleman's conviction for having "intentionally or knowingly cause[d] bodily injury to" the mother of his child qualifies as a "misdemeanor crime of domestic violence." The judgment of the United States Court of Appeals for the Sixth Circuit is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

I agree with the Court that intentionally or knowingly causing bodily injury to a family member "has, as an element, the use . . . of physical force," 18 U. S. C. § 921(a)(33)(A)(ii), and thus constitutes a "misdemeanor crime of domestic violence," § 922(g)(9). I write separately, however, because I reach that conclusion on narrower grounds.

I

Our decision in *Johnson* v. *United States*, 559 U. S. 133 (2010), is the natural place to begin. *Johnson* is significant

here because it concluded that "the phrase 'physical force' means *violent* force—that is, *force capable of causing physical pain or injury to another person*." *Id.*, at 140 (second emphasis added). This is an easy case if the phrase "physical force" has the same meaning in § 921(a)(33)(A)(ii), the provision that defines "misdemeanor crime of domestic violence" for purposes of § 922(g)(9), as it does in § 924(e)(2)(B)(ii), the provision interpreted in *Johnson*, since it is impossible to cause bodily injury without using force "capable of" producing that result.

There are good reasons to give the phrase *Johnson*'s interpretation. One is the presumption of consistent usage—the rule of thumb that a term generally means the same thing each time it is used. Although the presumption is most commonly applied to terms appearing in the same enactment, *e. g.*, *IBP, Inc.* v. *Alvarez*, 546 U. S. 21, 33–34 (2005), it is equally relevant "when Congress uses the same language in two statutes having similar purposes," *Smith* v. *City of Jackson*, 544 U. S. 228, 233 (2005) (plurality opinion); see also *Northcross* v. *Board of Ed. of Memphis City Schools*, 412 U. S. 427, 428 (1973) (*per curiam*). This case is a textbook candidate for application of the *Smith-Northcross* branch of the rule. The "physical force" clauses at issue here and in *Johnson* are worded in nearly identical fashion: The former defines a "misdemeanor crime of domestic violence" as an offense that "has, as an element, the use or attempted use of physical force," § 921(a)(33)(A)(ii), while the latter defines a "violent felony" as an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another," § 924(e)(2)(B)(i). And both statutes are designed to promote public safety by deterring a class of criminals from possessing firearms.

Respondent's arguments fail to overcome the presumption of consistent usage. In respondent's view, "physical force" cannot mean "*any* force that produces *any* pain or bodily injury," Brief for Respondent 25, because § 921(a)(33)(A)(ii)

defines a *violent* crime and one can inflict all sorts of minor injuries—bruises, paper cuts, etc.—by engaging in *nonviolent* behavior. Respondent therefore reasons that § 921(a)(33)(A)(ii) requires force capable of inflicting "serious" bodily injury. That requirement is more demanding than both of the plausible meanings of "physical force" we identified in *Johnson*: common-law offensive touching (which *Johnson* rejected) and force capable of causing physical pain or injury, serious or otherwise. See 559 U. S., at 138–140. It would be surpassing strange to read a statute defining a "*misdemeanor* crime of domestic violence" as requiring greater force than the similarly worded statute in *Johnson*, which defined a "violent *felony*," and respondent does not make a convincing case for taking that extraordinary step.

For these reasons, I would give "physical force" the same meaning in § 921(a)(33)(A)(ii) as in *Johnson*. The rest of the analysis is straightforward. Because "intentionally or knowingly caus[ing] bodily injury," App. 27, categorically involves the use of "force capable of causing physical pain or injury to another person," 559 U. S., at 140, respondent's 2001 domestic-assault conviction qualifies as a "misdemeanor crime of domestic violence" under § 922(g)(9).[1] I would reverse the judgment below on that basis and remand for further proceedings.

II

Unfortunately, the Court bypasses that narrower interpretation of § 921(a)(33)(A)(ii) in favor of a much broader one that treats any offensive touching, no matter how slight, as sufficient. That expansive common-law definition cannot be squared with relevant precedent or statutory text.

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[1] Respondent argues at length that Tenn. Code Ann. § 39–13–111(b) (2013 Supp.) does not require the "use" of physical force, since it is possible to cause bodily injury through deceit or other nonviolent means. Brief for Respondent 30–42. The argument fails for the reasons given by the Court. See *ante*, at 170–171.

We have twice addressed the meaning of "physical force" in the context of provisions that define a class of violent crimes. Both times, we concluded that "physical force" means violent force. In *Johnson*, we thought it "clear that in the context of a statutory definition of '*violent* felony,' the phrase 'physical force' means *violent* force." *Id.*, at 140. And we held that common-law offensive touching—the same type of force the Court today holds *does* constitute "physical force"—is *not* sufficiently violent to satisfy the Armed Career Criminal Act's "physical force" requirement. See *id.*, at 140–144. Our analysis in *Johnson* was premised in large part on our earlier interpretation of the generic federal "crime of violence" statute, 18 U. S. C. § 16. In *Leocal* v. *Ashcroft*, 543 U. S. 1, 11 (2004), we observed that § 16(a)—which defines a "crime of violence" as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another"—comprehends "a category of violent, active crimes." The textual similarity between § 921(a)(33)(A)(ii)'s "physical force" clause and the clauses at issue in *Johnson* and *Leocal* thus raises the question: Why should the same meaning not apply here?

The Court gives four responses that merit discussion, none of which withstands scrutiny. First, the Court invokes the "'settled principle of interpretation that, absent other indication, "Congress intends to incorporate the well-settled meaning of the common-law terms it uses."'" *Ante*, at 162 (quoting *Sekhar* v. *United States*, 570 U. S. 729, 732 (2013)). That principle is of limited relevance, since the presumption of consistent statutory meaning is precisely "other indication" that § 921(a)(33)(A)(ii) does not incorporate the common-law meaning. Anyway, a more accurate formulation of the principle cited by the Court is that when "'a word is obviously transplanted from another legal source, whether the common law *or other legislation*, it brings the old soil with it.'"

Sekhar, *supra*, at 733 (quoting Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 537 (1947); emphasis added). Section 921(a)(33)(A)(ii) was enacted after the statutes involved in *Johnson* and *Leocal*,[2] and its "physical force" clause is quite obviously modeled on theirs.

Second, the Court asserts that any interpretation of "physical force" that excludes offensive touching "would have rendered § 922(g)(9) inoperative in many States at the time of its enactment." *Ante*, at 167. But there is no interpretive principle to the effect that statutes must be given their broadest possible application, and § 922(g)(9) without offensive touching would have had application in four-fifths of the States. Although domestic violence was "routinely prosecuted" under misdemeanor assault or battery statutes when Congress enacted § 922(g)(9), *United States* v. *Hayes*, 555 U. S. 415, 427 (2009), and such statutes generally prohibited "both offensive touching and the causation of bodily injury" or "only the latter," *ante*, at 167, it does not follow that interpreting "physical force" to mean violent force would have rendered § 922(g)(9) a practical nullity. To the contrary, § 922(g)(9) would have worked perfectly well in 38 of the 48 States that had misdemeanor assault or battery statutes at the time of § 922(g)(9)'s enactment. At that point, 19 States had statutes that covered infliction of bodily injury but not offensive touching,[3] and 19 more had statutes that prohibited

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[2] Section 921(a)(33)(A)(ii) was enacted in 1996. See § 658, 110 Stat. 3009–371. The Armed Career Criminal Act provision interpreted in *Johnson* was enacted in 1986, see § 1402, 100 Stat. 3207–39, and the "crime of violence" statute discussed in *Leocal* was enacted in 1984, see § 1001, 98 Stat. 2136.

[3] See Ala. Code § 13A–6–22 (1995); Alaska Stat. § 11.41.230 (1996); Ark. Code Ann. § 5–13–203 (1993); Colo. Rev. Stat. Ann. § 18–3–204 (Westlaw 1996); Conn. Gen. Stat. § 53a–61 (1996); Haw. Rev. Stat. Ann. § 707–712 (1994); Ky. Rev. Stat. Ann. § 508.030 (Michie 1990); Minn. Stat. § 609.224 (Westlaw 1995); Miss. Code Ann. § 97–3–7 (Westlaw 1995); Neb. Rev. Stat. § 28–310 (1995); N. J. Stat. Ann. § 2C:12–1 (West 1995); N. Y. Penal Law

both types of conduct, but did so in a divisible manner—thus making it possible to identify the basis for a conviction by inspecting charging documents and similar materials, see *Descamps* v. *United States*, 570 U. S. 254, 261 (2013).[4] That leaves only 10 States whose misdemeanor assault or battery statutes (1) prohibited offensive touching, and (2) were framed in such a way that offensive touching was indivisible from physical violence.[5] The fact that § 922(g)(9) would not have applied immediately in 10 States is hardly enough to trigger the presumption against ineffectiveness—the idea that Congress presumably does not enact useless laws. Compare *Hayes*, *supra*, at 427 (rejecting an interpretation that supposedly would have rendered § 922(g)(9) " 'a dead letter' in some two-thirds of the States"). I think it far more plausible that Congress enacted a statute that covered

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Ann. § 120.00 (Westlaw 1995); N. D. Cent. Code Ann. § 12.1–17–01 (Westlaw 1995); Ohio Rev. Code Ann. § 2903.13 (Lexis 1993); Ore. Rev. Stat. § 163.160 (1991); 18 Pa. Cons. Stat. Ann. § 2701 (Westlaw 1995); S. D. Codified Laws § 22–18–1 (1988); Vt. Stat. Ann., Tit. 13, § 1023 (1995); Wis. Stat. Ann. § 940.19 (West Cum. Supp. 1995).

[4] See Ariz. Rev. Stat. Ann. § 13–1203 (Westlaw 1995); Del. Code Ann., Tit. 11, §§ 601, 611 (1995); Fla. Stat. § 784.03 (Westlaw 1995); Ga. Code Ann. § 16–5–23 (1996); Idaho Code § 18–903 (Westlaw 1996); Ill. Comp. Stat., ch. 720, § 5/12–3 (West 1994); Ind. Code § 35–42–2–1 (Michie 1994); Iowa Code § 708.1 (Westlaw 1996); Kan. Stat. Ann. § 21–3142 (1995); Me. Rev. Stat. Ann., Tit. 17–A, § 207 (Westlaw 1996); Mo. Rev. Stat. § 565.070 (Westlaw 1996); Mont. Code Ann. § 45–5–201 (1995); N. H. Rev. Stat. Ann. § 631:2–a (West 1996); N. M. Stat. Ann. §§ 30–3–4, 30–3–5 (Westlaw 1996); Tenn. Code Ann. § 39–13–101 (1991); Tex. Penal Code Ann. § 22.01 (Westlaw 1996); Utah Code Ann. § 76–5–102 (Lexis 1995); W. Va. Code Ann. § 61–2–9 (Lexis 1992); Wyo. Stat. Ann. § 6–2–501 (1996).

[5] See Cal. Penal Code Ann. § 242 (Westlaw 1996); La. Rev. Stat. Ann. § 14:33 (Westlaw 1996); Mass. Gen. Laws, ch. 265, § 13A (West 1994); Mich. Comp. Laws § 750.81 (1991); Nev. Rev. Stat. Ann. § 200.481 (West Cum. Supp. 1995); N. C. Gen. Stat. Ann. § 14–33 (Lexis 1993); Okla. Stat., Tit. 21, § 642 (West 1991); R. I. Gen. Laws § 11–5–3 (Michie 1994); Va. Code Ann. § 18.2–57 (Michie 1996); Wash. Rev. Code Ann. § 9A.36.041 (Michie 1994).

domestic-violence convictions in four-fifths of the States, and left it to the handful of nonconforming States to change their laws (as some have), than that Congress adopted a meaning of "domestic violence" that included the slightest unwanted touching.

Third, the Court seizes on the one and only meaningful distinction between § 921(a)(33)(A)(ii) and the other provisions referred to above: that it defines a violent "misdemeanor" rather than a "violent felony" or an undifferentiated "crime of violence." *Ante*, at 164. We properly take account of the term being defined when interpreting "an unclear definitional phrase." *United States* v. *Stevens*, 559 U. S. 460, 474 (2010); but see *Babbitt* v. *Sweet Home Chapter, Communities for Great Ore.*, 515 U. S. 687, 717–719 (1995) (SCALIA, J., dissenting). But when we do so, we consider *the entire* term being defined, not just part of it. Here, the term being defined is "*misdemeanor* crime of domestic *violence*." Applying the term-to-be-defined canon thus yields the unremarkable conclusion that "physical force" in § 921(a)(33)(A)(ii) refers to the type of force involved in violent misdemeanors (such as bodily-injury offenses) rather than nonviolent ones (such as offensive touching).

Fourth, and finally, the Court seeks to evade *Johnson* and *Leocal* on the ground that "'domestic violence' encompasses a range of force broader than that which constitutes 'violence' *simpliciter*." *Ante*, at 164, n. 4. That is to say, an act need not be violent to qualify as "domestic violence." That absurdity is not only at war with the English language, it is flatly inconsistent with definitions of "domestic violence" from the period surrounding § 921(a)(33)(A)(ii)'s enactment. At the time, dictionaries defined "domestic violence" as, for instance, "[v]iolence between members of a household, usu. spouses; an assault or other violent act committed by one member of a household against another," Black's Law Dictionary 1564 (7th ed. 1999), and "[v]iolence toward or physical

abuse of one's spouse or domestic partner," American Heritage Dictionary 534 (4th ed. 2000).[6] Those definitions, combined with the absence of "domestic violence" entries in earlier dictionaries, see, *e. g.*, Black's Law Dictionary 484 (6th ed. 1990); American Heritage Dictionary 550 (3d ed. 1992), make it utterly implausible that Congress adopted a "term of art" definition "encompassing acts that one might not characterize as 'violent' in a nondomestic context," *ante*, at 165.

The Court's inventive, nonviolent definition fares no better when judged against other accepted sources of meaning. Current dictionaries give "domestic violence" the same meaning as above: ordinary violence that occurs in a domestic context. See, *e. g.*, American Heritage Dictionary 533 (5th ed. 2011) ("[p]hysical abuse of a household member, especially one's spouse or domestic partner"). The same goes for definitions of "domestic violence" found in other federal statutes.[7] Indeed, Congress defined "crime of domestic violence" as a "crime of violence" in another section of the same bill that enacted § 921(a)(33)(A)(ii). See § 350(a), 110 Stat. 3009–639, codified at 8 U. S. C. § 1227(a)(2)(E)(i).

The Court ignores these authorities and instead bases its definition on an *amicus* brief filed by the National Network

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[6] Definitions of "physical force" from the same period are also at odds with the Court's nonviolent interpretation of that phrase. See Black's Law Dictionary 656 (7th ed. 1999) ("[f]orce consisting in a physical act, esp. a violent act directed against a robbery victim"); *id.*, at 1147 (6th ed. 1990) ("[f]orce applied to the body; actual violence").

[7] See, *e. g.*, 18 U. S. C. § 2261(a)(1) (defining as "[i]nterstate domestic violence" certain "crime[s] of violence"); § 3561(b) ("The term 'domestic violence crime' means a crime of violence . . . in which the victim or intended victim is the [defendant's] spouse" or other qualifying relation); 25 U. S. C. § 1304(a)(2) (2012 ed., Supp. II) ("The term 'domestic violence' means violence committed by a current or former spouse or" other qualifying relation); 42 U. S. C. § 13925(a)(8) ("The term 'domestic violence' includes felony or misdemeanor crimes of violence committed by a current or former spouse" or other qualifying relation).

to End Domestic Violence and other private organizations,[8] and two publications issued by the Department of Justice's Office on Violence Against Women. The *amicus* brief provides a series of definitions—drawn from law-review articles, foreign-government bureaus, and similar sources—that include such a wide range of nonviolent and even *nonphysical* conduct that they cannot possibly be relevant to the meaning of a statute requiring "physical force," or to the legal meaning of "domestic violence" (as opposed to the meaning desired by private and governmental advocacy groups). For example, *amici*'s definitions describe as "domestic violence" acts that "humiliate, isolate, frighten, . . . [and] blame . . . someone"; "acts of omission"; "excessive monitoring of a woman's behavior, repeated accusations of infidelity, and controlling with whom she has contact." Brief for National Network to End Domestic Violence et al. as *Amici Curiae* 5–8, and nn. 7, 11. The offerings of the Department of Justice's Office on Violence Against Women are equally capacious and (to put it mildly) unconventional. Its publications define "domestic violence" as "a pattern of abusive behavior . . . used by one partner to gain or maintain power and control over another," including "[u]ndermining an individual's sense of self-worth," "name-calling," and "damaging one's relationship with his or her children." See, *e. g.*, Domestic Violence, online at http://www.ovw.usdoj.gov/domviolence.htm (all Internet materials as visited Mar. 21, 2014, and available in Clerk of Court's case file).[9]

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[8] The other organizations on the brief are the National Domestic Violence Hotline, the Domestic Violence Legal Empowerment and Appeals Project, Legal Momentum, and innumerable state organizations against domestic violence.

[9] The Court refers in a footnote to two additional social-science definitions, neither of which aids the Court's cause. See *ante*, at 165, n. 5. The first is drawn from a health-care manual that provides "a behavioral definition of domestic violence . . . *rather than a legal definition*, since a behavioral definition is more comprehensive and more relevant to the health care setting." A. Ganley, Understanding Domestic Violence, in Improv-

Of course these private organizations and the Department of Justice's (nonprosecuting) Office are entitled to define "domestic violence" any way they want for their own purposes—purposes that can include (quite literally) giving all domestic behavior harmful to women a bad name. (What is more abhorrent than *violence* against women?) But when they (and the Court) impose their all-embracing definition on the rest of us, they not only distort the law, they impoverish the language. When everything is domestic violence, nothing is. Congress will have to come up with a new word (I cannot imagine what it would be) to denote actual domestic *violence*.

Although the Justice Department's definitions ought to be deemed unreliable *in toto* on the basis of their extravagant extensions alone (*falsus in uno, falsus in omnibus*), the Court chooses to focus only upon the physical actions that they include, viz., "[h]itting, slapping, shoving, grabbing, pinching, biting, [and] hair pulling." *Ibid.* None of those actions bears any real resemblance to mere offensive touching, and all of them are capable of causing physical pain or injury. Cf. *Johnson*, 559 U. S., at 143 (identifying "a slap in the face" as conduct that might rise to the level of violent force). And in any event, the Department of Justice thankfully receives no deference in our interpretation of the criminal laws whose claimed violation the Department of Justice prosecutes. See *Gonzales* v. *Oregon*, 546 U. S. 243, 264

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ing the Health Care Response to Domestic Violence: A Resource Manual for Health Care Providers 18 (2d ed. 1996) (emphasis added), online at http://www.futureswithoutviolence.org/userfiles/file/HealthCare/improving_healthcare_manual_1.pdf. Here, of course, we are concerned with the *less* comprehensive legal definition. The second definition referred to in the footnote equates domestic violence with "overt violence," which in its least serious form consists of "*painful* pinching or squeezing." M. McCue, Domestic Violence: A Reference Handbook 6 (1995) (emphasis added). That meaning is consistent with *Johnson*'s definition of "physical force," but it plainly does not include harmless offensive touching.

(2006) (citing *Crandon* v. *United States*, 494 U. S. 152, 177 (1990) (SCALIA, J., concurring in judgment)). The same ought to be said of advocacy organizations, such as *amici*, that (unlike dictionary publishers) have a vested interest in expanding the definition of "domestic violence" in order to broaden the base of individuals eligible for support services.[10]

* * *

This is a straightforward statutory-interpretation case that the parties and the Court have needlessly complicated. Precedent, text, and common sense all dictate that the term "physical force," when used to define a "misdemeanor crime of domestic violence," requires force capable of causing physical pain or bodily injury.

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

The decision in this case turns on the meaning of the phrase "has, as an element, the use . . . of physical force." 18 U. S. C. § 921(a)(33)(A)(ii). In *Johnson* v. *United States*, 559 U. S. 133 (2010), the Court interpreted the very same language and held that "physical force" means "violent force." *Id.*, at 140. I disagreed and concluded that the phrase incorporated the well-established meaning of "force" under the common law of battery, which did not require violent force. See *id.*, at 146 (dissenting opinion).

The Court of Appeals in the present case understandably followed the reasoning of *Johnson*, but now this Court holds that *Johnson* actually dictates that the identical statutory

[10] See, *e. g.,* National Network to End Domestic Violence, Reauthorize The Family Violence Prevention and Services Act 1 (Sept. 22, 2010) (advocating the expansion of a program assisting victims of domestic violence to include victims of "dating violence" and thereby "ensure that all victims in danger can access services"), online at http://nnedv.org/downloads/Policy/FVPSA_fact_sheet_9-22-10.pdf.

language be interpreted in exactly the same way that the *Johnson* majority rejected. See *ante*, at 163.

In my view, the meaning of the contested statutory language is the same now as it was four years ago in *Johnson*, and therefore, for the reasons set out in my *Johnson* dissent, I would not extend the reasoning of *Johnson* to the question presented here, on which the *Johnson* Court specifically reserved judgment. 559 U. S., at 143–144.

Syllabus

McCUTCHEON ET AL. *v.* FEDERAL ELECTION COMMISSION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 12–536. Argued October 8, 2013—Decided April 2, 2014

The right to participate in democracy through political contributions is protected by the First Amendment, but that right is not absolute. Congress may regulate campaign contributions to protect against corruption or the appearance of corruption. See, *e. g.*, *Buckley* v. *Valeo*, 424 U. S. 1, 26–27. It may not, however, regulate contributions simply to reduce the amount of money in politics, or to restrict the political participation of some in order to enhance the relative influence of others. See, *e. g.*, *Arizona Free Enterprise Club's Freedom Club PAC* v. *Bennett*, 564 U. S. 721, 749–750.

The Federal Election Campaign Act of 1971 (FECA), as amended by the Bipartisan Campaign Reform Act of 2002 (BCRA), imposes two types of limits on campaign contributions. Base limits restrict how much money a donor may contribute to a particular candidate or committee while aggregate limits restrict how much money a donor may contribute in total to all candidates or committees. 2 U. S. C. § 441a.

In the 2011–2012 election cycle, appellant McCutcheon contributed to 16 different federal candidates, complying with the base limits applicable to each. He alleges that the aggregate limits prevented him from contributing to 12 additional candidates and to a number of noncandidate political committees. He also alleges that he wishes to make similar contributions in the future, all within the base limits. McCutcheon and appellant Republican National Committee filed a complaint before a three-judge District Court, asserting that the aggregate limits were unconstitutional under the First Amendment. The District Court denied their motion for a preliminary injunction and granted the Government's motion to dismiss. Assuming that the base limits appropriately served the Government's anticorruption interest, the District Court concluded that the aggregate limits survived First Amendment scrutiny because they prevented evasion of the base limits.

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

893 F. Supp. 2d 133, reversed and remanded.

CHIEF JUSTICE ROBERTS, joined by JUSTICE SCALIA, JUSTICE KENNEDY, and JUSTICE ALITO, concluded that the aggregate limits are invalid under the First Amendment. Pp. 196–227.

Syllabus

(a) Appellants' substantial First Amendment challenge to the current system of aggregate limits merits plenary consideration. Pp. 196–203.

(1) In *Buckley,* this Court evaluated the constitutionality of the original contribution and expenditure limits in FECA. *Buckley* distinguished the two types of limits based on the degree to which each encroaches upon protected First Amendment interests. It subjected expenditure limits to "the exacting scrutiny applicable to limitations on core First Amendment rights of political expression." 424 U. S., at 44–45. But it concluded that contribution limits impose a lesser restraint on political speech and thus applied a lesser but still "rigorous standard of review," *id.*, at 29, under which such limits "may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms," *id.*, at 25. Because the Court found that the primary purpose of FECA—preventing *quid pro quo* corruption and its appearance—was a "sufficiently important" governmental interest, *id.*, at 26–27, it upheld the base limit under the "closely drawn" test, *id.*, at 29. After doing so, the Court devoted only one paragraph of its 139-page opinion to the aggregate limit then in place under FECA, noting that the provision "ha[d] not been separately addressed at length by the parties." *Id.*, at 38. It concluded that the aggregate limit served to prevent circumvention of the base limit and was "no more than a corollary" of that limit. *Ibid.* Pp. 196–199.

(2) There is no need in this case to revisit *Buckley*'s distinction between contributions and expenditures and the corresponding distinction in standards of review. Regardless whether strict scrutiny or the "closely drawn" test applies, the analysis turns on the fit between the stated governmental objective and the means selected to achieve that objective. Here, given the substantial mismatch between the Government's stated objective and the means selected to achieve it, the aggregate limits fail even under the "closely drawn" test.

Buckley's ultimate conclusion about the constitutionality of the aggregate limit in place under FECA does not control here. *Buckley* spent just three sentences analyzing that limit, which had not been separately addressed by the parties. Appellants here, by contrast, have directly challenged the aggregate limits in place under BCRA, a different statutory regime whose limits operate against a distinct legal backdrop. Most notably, statutory safeguards against circumvention have been considerably strengthened since *Buckley.* The 1976 FECA Amendments added another layer of base limits—capping contributions from individuals to political committees—and an antiproliferation rule prohibiting donors from creating or controlling multiple affiliated political committees. Since *Buckley,* the Federal Election Commission has

also enacted an intricate regulatory scheme that further limits the opportunities for circumvention of the base limits through "unearmarked contributions to political committees likely to contribute" to a particular candidate. 424 U. S., at 38. In addition to accounting for such statutory and regulatory changes, appellants raise distinct legal arguments not considered in *Buckley*, including an overbreadth challenge to the aggregate limit. Pp. 199–203.

(b) Significant First Amendment interests are implicated here. Contributing money to a candidate is an exercise of an individual's right to participate in the electoral process through both political expression and political association. A restriction on how many candidates and committees an individual may support is hardly a "modest restraint" on those rights. The Government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse. In its simplest terms, the aggregate limits prohibit an individual from fully contributing to the primary and general election campaigns of ten or more candidates, even if all contributions fall within the base limits. And it is no response to say that the individual can simply contribute less than the base limits permit: To require one person to contribute at lower levels because he wants to support more candidates or causes is to penalize that individual for "robustly exercis[ing]" his First Amendment rights. *Davis* v. *Federal Election Comm'n*, 554 U. S. 724, 739.

In assessing the First Amendment interests at stake, the proper focus is on an individual's right to engage in political speech, not a collective conception of the public good. The whole point of the First Amendment is to protect individual speech that the majority might prefer to restrict, or that legislators or judges might not view as useful to the democratic process. Pp. 203–206.

(c) The aggregate limits do not further the permissible governmental interest in preventing *quid pro quo* corruption or its appearance. Pp. 206–224.

(1) This Court has identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption. See *Davis*, *supra*, at 741. Moreover, the only type of corruption that Congress may target is *quid pro quo* corruption. Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to *quid pro quo* corruption. Nor does the possibility that an individual who spends large sums may garner "influence over or access to" elected officials or political parties. *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 359. The line between *quid pro quo* corruption and general influence must be

respected in order to safeguard basic First Amendment rights, and the Court must "err on the side of protecting political speech rather than suppressing it." *Federal Election Comm'n* v. *Wisconsin Right to Life*, 551 U. S. 449, 457 (opinion of ROBERTS, C. J.). Pp. 206–209.

(2) The Government argues that the aggregate limits further the permissible objective of preventing *quid pro quo* corruption. The difficulty is that once the aggregate limits kick in, they ban all contributions of *any* amount, even though Congress's selection of a base limit indicates its belief that contributions beneath that amount do not create a cognizable risk of corruption. The Government must thus defend the aggregate limits by demonstrating that they prevent circumvention of the base limits, a function they do not serve in any meaningful way. Given the statutes and regulations currently in effect, *Buckley*'s fear that an individual might "contribute massive amounts of money to a particular candidate through . . . unearmarked contributions" to entities likely to support the candidate, 424 U. S., at 38, is far too speculative. Even accepting *Buckley*'s circumvention theory, it is hard to see how a candidate today could receive "massive amounts of money" that could be traced back to a particular donor uninhibited by the aggregate limits. The Government's scenarios offered in support of that possibility are either illegal under current campaign finance laws or implausible. Pp. 210–218.

(3) The aggregate limits also violate the First Amendment because they are not "closely drawn to avoid unnecessary abridgment of associational freedoms." *Buckley*, *supra*, at 25. The Government argues that the aggregate limits prevent an individual from giving to too many initial recipients who might then recontribute a donation, but experience suggests that the vast majority of contributions are retained and spent by their recipients. And the Government has provided no reason to believe that candidates or party committees would dramatically shift their priorities if the aggregate limits were lifted. The indiscriminate ban on all contributions above the aggregate limits is thus disproportionate to the Government's interest in preventing circumvention.

Importantly, there are multiple alternatives available to Congress that would serve the Government's interest in preventing circumvention while avoiding "unnecessary abridgment" of First Amendment rights. *Buckley*, *supra*, at 25. Such alternatives might include targeted restrictions on transfers among candidates and political committees, or tighter earmarking rules. Transfers, after all, are the key to the Government's concern about circumvention, but they can be addressed without such a direct and broad interference with First Amendment rights. Pp. 218–223.

Syllabus

(4) Disclosure of contributions also reduces the potential for abuse of the campaign finance system. Disclosure requirements, which are justified by "a governmental interest in 'provid[ing] the electorate with information' about the sources of election-related spending," *Citizens United*, *supra*, at 367, may deter corruption "by exposing large contributions and expenditures to the light of publicity," *Buckley*, *supra* at 67. Disclosure requirements may burden speech, but they often represent a less restrictive alternative to flat bans on certain types or quantities of speech. Particularly with modern technology, disclosure now offers more robust protections against corruption than it did when *Buckley* was decided. Pp. 223–224.

(d) The Government offers an additional rationale for the aggregate limits, arguing that the opportunity for corruption exists whenever a legislator is given a large check, even if the check consists of contributions within the base limits to be divided among numerous candidates or committees. That rationale dangerously broadens the circumscribed definition of *quid pro quo* corruption articulated in prior cases. *Buckley* confined its analysis to the possibility that "massive amounts of money" could be funneled to a particular candidate in excess of the base limits. 424 U. S., at 38. Recasting as corruption a donor's widely distributed support for a political party would dramatically expand government regulation of the political process. And though the Government suggests that *solicitation* of large contributions poses the corruption danger, the aggregate limits are not limited to any direct solicitation by an officeholder or candidate. Pp. 224–226.

JUSTICE THOMAS agreed that the aggregate limits are invalid under the First Amendment, but would overrule *Buckley* v. *Valeo*, 424 U. S. 1, and subject the Bipartisan Campaign Reform Act of 2002's aggregate limits to strict scrutiny, which they would surely fail. *Buckley*'s "analytic foundation . . . was tenuous from the very beginning and has only continued to erode in the intervening years." *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 412 (THOMAS, J., dissenting). Contributions and expenditures are simply "two sides of the same First Amendment coin," and this Court's efforts to distinguish the two have produced mere "word games" rather than any cognizable constitutional law principle. *Buckley*, *supra*, at 241, 244 (Burger, C. J., concurring in part and dissenting in part). Pp. 228–232.

ROBERTS, C. J., announced the judgment of the Court and delivered an opinion, in which SCALIA, KENNEDY, and ALITO, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment, *post*, p. 228. BREYER, J., filed a dissenting opinion, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 232.

Counsel

Erin E. Murphy argued the cause for appellants. On the briefs for appellant Shaun McCuthcheon were *Michael T. Morley*, *Dan Backer*, and *Jerad Wayne Najvar*. *James Bopp, Jr.*, *Richard E. Coleson*, and *Stephen M. Hoersting* filed briefs for appellant Republican National Committee.

Bobby R. Burchfield argued the cause and filed a brief for Senator Mitch McConnell as *amicus curiae* in support of appellants.

Solicitor General Verrilli argued the cause for appellee. With him on the brief were *Deputy Solicitor General Stewart*, *Eric J. Feigin*, *Kevin Deeley*, *Adav Noti*, and *Charles Kitcher*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Rights Union by *Peter J. Ferrara*; for the Cato Institute by *Ilya Shapiro*; for the Cause of Action Institute by *Barnaby W. Zall*; for the Center for Competitive Politics by *Allen Dickerson*; for the Committee for Justice by *Sarah M. Shalf* and *Curt A. Levey*; for the Downsize DC Foundation et al. by *William J. Olson*, *Herbert W. Titus*, *Jeremiah L. Morgan*, and *John S. Miles*; for the National Republican Senatorial Committee et al. by *Jason Torchinsky* and *Thomas J. Josefiak*; for the Tea Party Leadership Fund et al. by *Paul D. Kamenar*; for the Thomas Jefferson Center for the Protection of Free Expression et al. by *J. Joshua Wheeler*; and for the Wisconsin Institute for Law & Liberty by *Richard M. Esenberg*.

Briefs of *amici curiae* urging affirmance were filed for the Americans for Campaign Reform by *Charles Fried*, *Robert J. Dwyer*, and *Alanna C. Rutherford*; for the Brennan Center for Justice at N. Y. U. School of Law by *Daniel F. Kolb* and *J. Adam Skaggs*; for the Campaign Legal Center et al. by *Trevor Potter*, *J. Gerald Hebert*, *Tara Malloy*, and *Paul S. Ryan*; for the Communications Workers of America et al. by *Brenda Wright*; for Democratic Members of the United States House of Representatives by *Paul M. Smith* and *Jessica Ring Amunson*; for the National Education Association et al. by *Alice O'Brien*, *Jason Walta*, *Lisa Powell*, *Lynn K. Rhinehart*, *Laurence E. Gold*, *William Lurye*, *Judith A. Scott*, and *Mark Schneider*; for Lawrence Lessig by *Douglas T. Kendall*, *Elizabeth B. Wydra*, and *David H. Gans*; and for Rep. Chris Van Hollen et al. by *Seth P. Waxman*, *Randolph D. Moss*, *Roger M. Witten*, *Scott L. Nelson*, *Fred Wertheimer*, and *Donald J. Simon*.

William H. Mellor and *Paul M. Sherman* filed a brief for the Institute for Justice as *amicus curiae*.

Chief Justice Roberts announced the judgment of the Court and delivered an opinion, in which Justice Scalia, Justice Kennedy, and Justice Alito join.

There is no right more basic in our democracy than the right to participate in electing our political leaders. Citizens can exercise that right in a variety of ways: They can run for office themselves, vote, urge others to vote for a particular candidate, volunteer to work on a campaign, and contribute to a candidate's campaign. This case is about the last of those options.

The right to participate in democracy through political contributions is protected by the First Amendment, but that right is not absolute. Our cases have held that Congress may regulate campaign contributions to protect against corruption or the appearance of corruption. See, *e. g.*, *Buckley* v. *Valeo*, 424 U. S. 1, 26–27 (1976) (*per curiam*). At the same time, we have made clear that Congress may not regulate contributions simply to reduce the amount of money in politics, or to restrict the political participation of some in order to enhance the relative influence of others. See, *e. g.*, *Arizona Free Enterprise Club's Freedom Club PAC* v. *Bennett*, 564 U. S. 721, 749–750 (2011).

Many people might find those latter objectives attractive: They would be delighted to see fewer television commercials touting a candidate's accomplishments or disparaging an opponent's character. Money in politics may at times seem repugnant to some, but so too does much of what the First Amendment vigorously protects. If the First Amendment protects flag burning, funeral protests, and Nazi parades—despite the profound offense such spectacles cause—it surely protects political campaign speech despite popular opposition. See *Texas* v. *Johnson*, 491 U. S. 397 (1989); *Snyder* v. *Phelps*, 562 U. S. 443 (2011); *National Socialist Party of America* v. *Skokie*, 432 U. S. 43 (1977) (*per curiam*). Indeed, as we have emphasized, the First Amendment "has its fullest and most urgent application precisely to the conduct

of campaigns for political office." *Monitor Patriot Co.* v. *Roy*, 401 U. S. 265, 272 (1971).

In a series of cases over the past 40 years, we have spelled out how to draw the constitutional line between the permissible goal of avoiding corruption in the political process and the impermissible desire simply to limit political speech. We have said that government regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford. "Ingratiation and access . . . are not corruption." *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 360 (2010). They embody a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns.

Any regulation must instead target what we have called "*quid pro quo*" corruption or its appearance. See *id.*, at 359. That Latin phrase captures the notion of a direct exchange of an official act for money. See *McCormick* v. *United States*, 500 U. S. 257, 266 (1991). "The hallmark of corruption is the financial *quid pro quo*: dollars for political favors." *Federal Election Comm'n* v. *National Conservative Political Action Comm.*, 470 U. S. 480, 497 (1985). Campaign finance restrictions that pursue other objectives, we have explained, impermissibly inject the Government "into the debate over who should govern." *Bennett*, *supra*, at 750. And those who govern should be the *last* people to help decide who *should* govern.

The statute at issue in this case imposes two types of limits on campaign contributions. The first, called base limits, restricts how much money a donor may contribute to a particular candidate or committee. 2 U. S. C. § 441a(a)(1). The second, called aggregate limits, restricts how much money a donor may contribute in total to all candidates or committees. § 441a(a)(3).

This case does not involve any challenge to the base limits, which we have previously upheld as serving the permissible

objective of combating corruption. The Government contends that the aggregate limits also serve that objective, by preventing circumvention of the base limits. We conclude, however, that the aggregate limits do little, if anything, to address that concern, while seriously restricting participation in the democratic process. The aggregate limits are therefore invalid under the First Amendment.

I

A

For the 2013–2014 election cycle, the base limits in the Federal Election Campaign Act of 1971 (FECA), as amended by the Bipartisan Campaign Reform Act of 2002 (BCRA), permit an individual to contribute up to $2,600 per election to a candidate ($5,200 total for the primary and general elections); $32,400 per year to a national party committee;[1] $10,000 per year to a state or local party committee; and $5,000 per year to a political action committee, or "PAC." 2 U. S. C. § 441a(a)(1); 78 Fed. Reg. 8532 (2013).[2] A national committee, state or local party committee, or multicandidate PAC may in turn contribute up to $5,000 per election to a candidate. § 441a(a)(2).[3]

[1] There are six authorized national party committees: the Republican National Committee, the Democratic National Committee, the National Republican Senatorial Committee, the Democratic Senatorial Campaign Committee, the National Republican Congressional Committee, and the Democratic Congressional Campaign Committee. See 2 U. S. C. § 431(14).

[2] A PAC is a business, labor, or interest group that raises or spends money in connection with a federal election, in some cases by contributing to candidates. A so-called "Super PAC" is a PAC that makes only independent expenditures and cannot contribute to candidates. The base and aggregate limits govern contributions to traditional PACs, but not to independent expenditure PACs. See *SpeechNow.org* v. *Federal Election Comm'n*, 599 F. 3d 686, 695–696 (CADC 2010) (en banc).

[3] A multicandidate PAC is a PAC with more than 50 contributors that has been registered for at least six months and has made contributions to five or more candidates for federal office. 11 CFR § 100.5(e)(3) (2012). PACs that do not qualify as multicandidate PACs must abide by the base limit applicable to individual contributions.

The base limits apply with equal force to contributions that are "in any way earmarked or otherwise directed-through an intermediary or conduit" to a candidate. § 441a(a)(8). If, for example, a donor gives money to a party committee but directs the party committee to pass the contribution along to a particular candidate, then the transaction is treated as a contribution from the original donor to the specified candidate.

For the 2013–2014 election cycle, the aggregate limits in BCRA permit an individual to contribute a total of $48,600 to federal candidates and a total of $74,600 to other political committees. Of that $74,600, only $48,600 may be contributed to state or local party committees and PACs, as opposed to national party committees. § 441a(a)(3); 78 Fed. Reg. 8532. All told, an individual may contribute up to $123,200 to candidate and noncandidate committees during each two-year election cycle.

The base limits thus restrict how much money a donor may contribute to any particular candidate or committee; the aggregate limits have the effect of restricting how many candidates or committees the donor may support, to the extent permitted by the base limits.

B

In the 2011–2012 election cycle, appellant Shaun McCutcheon contributed a total of $33,088 to 16 different federal candidates, in compliance with the base limits applicable to each. He alleges that he wished to contribute $1,776 to each of 12 additional candidates but was prevented from doing so by the aggregate limit on contributions to candidates. McCutcheon also contributed a total of $27,328 to several noncandidate political committees, in compliance with the base limits applicable to each. He alleges that he wished to contribute to various other political committees, including $25,000 to each of the three Republican national party committees, but was prevented from doing so by the aggregate

limit on contributions to political committees. McCutcheon further alleges that he plans to make similar contributions in the future. In the 2013–2014 election cycle, he again wishes to contribute at least $60,000 to various candidates and $75,000 to noncandidate political committees. Brief for Appellant McCutcheon 11–12.

Appellant Republican National Committee is a national political party committee charged with the general management of the Republican Party. The RNC wishes to receive the contributions that McCutcheon and similarly situated individuals would like to make—contributions otherwise permissible under the base limits for national party committees but foreclosed by the aggregate limit on contributions to political committees.

In June 2012, McCutcheon and the RNC filed a complaint before a three-judge panel of the U. S. District Court for the District of Columbia. See BCRA § 403(a), 116 Stat. 113–114. McCutcheon and the RNC asserted that the aggregate limits on contributions to candidates and to noncandidate political committees were unconstitutional under the First Amendment. They moved for a preliminary injunction against enforcement of the challenged provisions, and the Government moved to dismiss the case.

The three-judge District Court denied appellants' motion for a preliminary injunction and granted the Government's motion to dismiss. Assuming that the base limits appropriately served the Government's anticorruption interest, the District Court concluded that the aggregate limits survived First Amendment scrutiny because they prevented evasion of the base limits. 893 F. Supp. 2d 133, 140 (2012).

In particular, the District Court imagined a hypothetical scenario that might occur in a world without aggregate limits. A single donor might contribute the maximum amount under the base limits to nearly 50 separate committees, each of which might then transfer the money to the same single committee. *Ibid.* That committee, in turn, might use all

the transferred money for coordinated expenditures on behalf of a particular candidate, allowing the single donor to circumvent the base limit on the amount he may contribute to that candidate. *Ibid.* The District Court acknowledged that "it may seem unlikely that so many separate entities would willingly serve as conduits" for the single donor's interests, but it concluded that such a scenario "is not hard to imagine." *Ibid.* It thus rejected a constitutional challenge to the aggregate limits, characterizing the base limits and the aggregate limits "as a coherent system rather than merely a collection of individual limits stacking prophylaxis upon prophylaxis." *Ibid.*

McCutcheon and the RNC appealed directly to this Court, as authorized by law. 28 U. S. C. § 1253. In such a case, "we ha[ve] no discretion to refuse adjudication of the case on its merits," *Hicks* v. *Miranda*, 422 U. S. 332, 344 (1975), and accordingly we noted probable jurisdiction. 568 U. S. 1156 (2013).

II

A

Buckley v. *Valeo*, 424 U. S. 1, presented this Court with its first opportunity to evaluate the constitutionality of the original contribution and expenditure limits set forth in FECA. FECA imposed a $1,000 per election base limit on contributions from an individual to a federal candidate. It also imposed a $25,000 per year aggregate limit on all contributions from an individual to candidates or political committees. 18 U. S. C. §§ 608(b)(1), 608(b)(3) (1970 ed., Supp. IV). On the expenditures side, FECA imposed limits on both independent expenditures and candidates' overall campaign expenditures. §§ 608(e)(1), 608(c).

Buckley recognized that "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities." 424 U. S., at 14. But it distinguished expenditure limits from contribution limits based on

the degree to which each encroaches upon protected First Amendment interests. Expenditure limits, the Court explained, "necessarily reduce[ ] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.*, at 19. The Court thus subjected expenditure limits to "the exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Id.*, at 44–45. Under exacting scrutiny, the Government may regulate protected speech only if such regulation promotes a compelling interest and is the least restrictive means to further the articulated interest. See *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115, 126 (1989).

By contrast, the Court concluded that contribution limits impose a lesser restraint on political speech because they "permit[ ] the symbolic expression of support evidenced by a contribution but do[ ] not in any way infringe the contributor's freedom to discuss candidates and issues." *Buckley*, 424 U. S., at 21. As a result, the Court focused on the effect of the contribution limits on the freedom of political association and applied a lesser but still "rigorous standard of review." *Id.*, at 29. Under that standard, "[e]ven a '"significant interference" with protected rights of political association' may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.*, at 25 (quoting *Cousins* v. *Wigoda*, 419 U. S. 477, 488 (1975)).

The primary purpose of FECA was to limit *quid pro quo* corruption and its appearance; that purpose satisfied the requirement of a "sufficiently important" governmental interest. 424 U. S., at 26–27. As for the "closely drawn" component, *Buckley* concluded that the $1,000 base limit "focuses precisely on the problem of large campaign contributions . . . while leaving persons free to engage in independent political expression, to associate actively through volunteer-

ing their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources." *Id.*, at 28. The Court therefore upheld the $1,000 base limit under the "closely drawn" test. *Id.*, at 29.

The Court next separately considered an overbreadth challenge to the base limit. See *id.*, at 29–30. The challengers argued that the base limit was fatally overbroad because most large donors do not seek improper influence over legislators' actions. Although the Court accepted that premise, it nevertheless rejected the overbreadth challenge for two reasons: First, it was too "difficult to isolate suspect contributions" based on a contributor's subjective intent. *Id.*, at 30. Second, "Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated." *Ibid.*

Finally, in one paragraph of its 139-page opinion, the Court turned to the $25,000 aggregate limit under FECA. As a preliminary matter, it noted that the constitutionality of the aggregate limit "ha[d] not been separately addressed at length by the parties." *Id.*, at 38. Then, in three sentences, the Court disposed of any constitutional objections to the aggregate limit that the challengers might have had:

> "The overall $25,000 ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support. But this quite modest restraint upon protected political activity serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge

contributions to the candidate's political party. The limited, additional restriction on associational freedom imposed by the overall ceiling is thus no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid." *Ibid.*

B

1

The parties and *amici curiae* spend significant energy debating whether the line that *Buckley* drew between contributions and expenditures should remain the law. Notwithstanding the robust debate, we see no need in this case to revisit *Buckley*'s distinction between contributions and expenditures and the corollary distinction in the applicable standards of review. *Buckley* held that the Government's interest in preventing *quid pro quo* corruption or its appearance was "sufficiently important," *id.*, at 26–27; we have elsewhere stated that the same interest may properly be labeled "compelling," see *National Conservative Political Action Comm.*, 470 U. S., at 496–497, so that the interest would satisfy even strict scrutiny. Moreover, regardless whether we apply strict scrutiny or *Buckley*'s "closely drawn" test, we must assess the fit between the stated governmental objective and the means selected to achieve that objective. See, *e. g.*, *National Conservative Political Action Comm.*, *supra*, at 496–501; *Randall* v. *Sorrell*, 548 U. S. 230, 253–262 (2006) (opinion of BREYER, J.). Or to put it another way, if a law that restricts political speech does not "avoid unnecessary abridgment" of First Amendment rights, *Buckley*, 424 U. S., at 25, it cannot survive "rigorous" review.

Because we find a substantial mismatch between the Government's stated objective and the means selected to achieve it, the aggregate limits fail even under the "closely drawn" test. We therefore need not parse the differences between the two standards in this case.

2

Buckley treated the constitutionality of the $25,000 aggregate limit as contingent upon that limit's ability to prevent circumvention of the $1,000 base limit, describing the aggregate limit as "no more than a corollary" of the base limit. *Id.*, at 38. The Court determined that circumvention could occur when an individual legally contributes "massive amounts of money to a particular candidate through the use of unearmarked contributions" to entities that are themselves likely to contribute to the candidate. *Ibid.* For that reason, the Court upheld the $25,000 aggregate limit.

Although *Buckley* provides some guidance, we think that its ultimate conclusion about the constitutionality of the aggregate limit in place under FECA does not control here. *Buckley* spent a total of three sentences analyzing that limit; in fact, the opinion pointed out that the constitutionality of the aggregate limit "ha[d] not been separately addressed at length by the parties." *Ibid.* We are now asked to address appellants' direct challenge to the aggregate limits in place under BCRA. BCRA is a different statutory regime, and the aggregate limits it imposes operate against a distinct legal backdrop.

Most notably, statutory safeguards against circumvention have been considerably strengthened since *Buckley* was decided, through both statutory additions and the introduction of a comprehensive regulatory scheme. With more targeted anticircumvention measures in place today, the indiscriminate aggregate limits under BCRA appear particularly heavy-handed.

The 1976 FECA Amendments, for example, added another layer of base contribution limits. The 1974 version of FECA had already capped contributions *from* political committees to candidates, but the 1976 version added limits on contributions *to* political committees. This change was enacted at least "in part to prevent circumvention of the very limitations on contributions that this Court upheld in

Buckley." *California Medical Assn.* v. *Federal Election Comm'n*, 453 U. S. 182, 197–198 (1981) (plurality opinion); see also *id.*, at 203 (Blackmun, J., concurring in part and concurring in judgment). Because a donor's contributions to a political committee are now limited, a donor cannot flood the committee with "huge" amounts of money so that each contribution the committee makes is perceived as a contribution from him. *Buckley*, *supra*, at 38. Rather, the donor may contribute only $5,000 to the committee, which hardly raises the specter of abuse that concerned the Court in *Buckley*. Limits on contributions to political committees consequently create an additional hurdle for a donor who seeks both to channel a large amount of money to a particular candidate and to ensure that he gets the credit for doing so.

The 1976 Amendments also added an antiproliferation rule prohibiting donors from creating or controlling multiple affiliated political committees. See 2 U. S. C. § 441a(a)(5); 11 CFR § 100.5(g)(4). The Government acknowledges that this antiproliferation rule "forecloses what would otherwise be a particularly easy and effective means of circumventing the limits on contributions to any particular political committee." Brief for Appellee 46. In effect, the rule eliminates a donor's ability to create and use his own political committees to direct funds in excess of the individual base limits. It thus blocks a straightforward method of achieving the circumvention that was the underlying concern in *Buckley*.

The intricate regulatory scheme that the Federal Election Commission has enacted since *Buckley* further limits the opportunities for circumvention of the base limits via "unearmarked contributions to political committees likely to contribute" to a particular candidate. 424 U. S., at 38. Although the earmarking provision, 2 U. S. C. § 441a(a)(8), was in place when *Buckley* was decided, the FEC has since added regulations that define earmarking broadly. For example, the regulations construe earmarking to include any designation, "whether direct or indirect, express or implied, oral or

written." 11 CFR § 110.6(b)(1). The regulations specify that an individual who has contributed to a particular candidate may not also contribute to a single-candidate committee for that candidate. § 110.1(h)(1). Nor may an individual who has contributed to a candidate also contribute to a political committee that has supported or anticipates supporting the same candidate, if the individual knows that "a substantial portion [of his contribution] will be contributed to, or expended on behalf of," that candidate. § 110.1(h)(2).

In addition to accounting for statutory and regulatory changes in the campaign finance arena, appellants' challenge raises distinct legal arguments that *Buckley* did not consider. For example, presumably because of its cursory treatment of the $25,000 aggregate limit, *Buckley* did not separately address an overbreadth challenge with respect to that provision. The Court rejected such a challenge to the *base* limits because of the difficulty of isolating suspect contributions. The propriety of large contributions to individual candidates turned on the subjective intent of donors, and the Court concluded that there was no way to tell which donors sought improper influence over legislators' actions. See 424 U. S., at 30. The aggregate limit, on the other hand, was upheld as an anticircumvention measure, without considering whether it was possible to discern which donations might be used to circumvent the base limits. See *id.*, at 38. The Court never addressed overbreadth in the specific context of aggregate limits, where such an argument has far more force.

Given the foregoing, this case cannot be resolved merely by pointing to three sentences in *Buckley* that were written without the benefit of full briefing or argument on the issue. See *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118, 139–140 (1941) (departing from "[l]oose language and a sporadic, ill-considered decision" when asked to resolve a question "with our eyes wide open and in the light of full consideration"); *Hohn* v. *United States*, 524 U. S. 236, 251 (1998) (departing from a prior decision where it "was rendered without full

briefing or argument"). We are confronted with a different statute and different legal arguments, at a different point in the development of campaign finance regulation. Appellants' substantial First Amendment challenge to the system of aggregate limits currently in place thus merits our plenary consideration.[4]

III

The First Amendment "is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *Cohen* v. *California*, 403 U. S. 15, 24 (1971). As relevant here, the First Amendment safeguards an individual's right to participate in the public debate through political expression and political association. See *Buckley*, 424 U. S., at 15. When an individual contributes money to a candidate, he exercises both of those rights: The contribution "serves as a general expression of support for the candidate and his views" and "serves to affiliate a person with a candidate." *Id.*, at 21–22.

Those First Amendment rights are important regardless whether the individual is, on the one hand, a "lone pamphleteer[ ] or street corner orator[ ] in the Tom Paine mold," or is, on the other, someone who spends "substantial amounts of money in order to communicate [his] political ideas through sophisticated" means. *National Conservative Political Action Comm.*, 470 U. S., at 493. Either way, he is participating in an electoral debate that we have recognized

[4] The dissent contends that we should remand for development of an evidentiary record before answering the question with which we were presented. See *post*, at 258–260 (opinion of BREYER, J). But the parties have treated the question as a purely legal one, and the Government has insisted that the aggregate limits can be upheld under the existing record alone. See Tr. of Oral Arg. 43, 55–56. We take the case as it comes to us.

is "integral to the operation of the system of government established by our Constitution." *Buckley*, *supra*, at 14.

Buckley acknowledged that aggregate limits at least diminish an individual's right of political association. As the Court explained, the "overall $25,000 ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support." 424 U. S., at 38. But the Court characterized that restriction as a "quite modest restraint upon protected political activity." *Ibid.* We cannot agree with that characterization. An aggregate limit on *how many* candidates and committees an individual may support through contributions is not a "modest restraint" at all. The Government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse.

To put it in the simplest terms, the aggregate limits prohibit an individual from fully contributing to the primary and general election campaigns of ten or more candidates, even if all contributions fall within the base limits Congress views as adequate to protect against corruption. The individual may give up to $5,200 each to nine candidates, but the aggregate limits constitute an outright ban on further contributions to any other candidate (beyond the additional $1,800 that may be spent before reaching the $48,600 aggregate limit). At that point, the limits deny the individual all ability to exercise his expressive and associational rights by contributing to someone who will advocate for his policy preferences. A donor must limit the number of candidates he supports, and may have to choose which of several policy concerns he will advance—clear First Amendment harms that the dissent never acknowledges.

It is no answer to say that the individual can simply contribute less money to more people. To require one person to contribute at lower levels than others because he wants to support more candidates or causes is to impose a spe-

cial burden on broader participation in the democratic process. And as we have recently admonished, the Government may not penalize an individual for "robustly exercis[ing]" his First Amendment rights. *Davis* v. *Federal Election Comm'n*, 554 U. S. 724, 739 (2008).

The First Amendment burden is especially great for individuals who do not have ready access to alternative avenues for supporting their preferred politicians and policies. In the context of base contribution limits, *Buckley* observed that a supporter could vindicate his associational interests by personally volunteering his time and energy on behalf of a candidate. See 424 U. S., at 22, 28. Such personal volunteering is not a realistic alternative for those who wish to support a wide variety of candidates or causes. Other effective methods of supporting preferred candidates or causes without contributing money are reserved for a select few, such as entertainers capable of raising hundreds of thousands of dollars in a single evening. Cf. *Davis*, *supra*, at 742.[5]

The dissent faults this focus on "the individual's right to engage in political speech," saying that it fails to take into account "the public's interest" in "collective speech." *Post*, at 237 (opinion of BREYER, J). This "collective" interest is said to promote "a government where laws reflect the very thoughts, views, ideas, and sentiments, the expression of which the First Amendment protects." *Post*, at 238.

But there are compelling reasons not to define the boundaries of the First Amendment by reference to such a generalized conception of the public good. First, the dissent's "collective speech" reflected in laws is of course the will of the majority, and plainly can include laws that restrict free

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[5] See, *e. g.*, Felsenthal, Obama Attends Fundraiser Hosted by Jay-Z, Beyonce, Reuters, Sept. 18, 2012; Coleman, Kid Rock Supports Paul Ryan at Campaign Fundraiser, Rolling Stone, Aug. 25, 2012; Mason, Robert Duvall to Host Romney Fundraiser, L. A. Times, July 25, 2012; Piazza, Hillary Lands 2.5M with Rocket Man, N. Y. Daily News, Apr. 10, 2008, p. 2.

speech. The whole point of the First Amendment is to afford individuals protection against such infringements. The First Amendment does not protect the government, even when the government purports to act through legislation reflecting "collective speech." Cf. *United States* v. *Alvarez*, 567 U. S. 709 (2012); *Wooley* v. *Maynard*, 430 U. S. 705 (1977); *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943).

Second, the degree to which speech is protected cannot turn on a legislative or judicial determination that particular speech is useful to the democratic process. The First Amendment does not contemplate such "ad hoc balancing of relative social costs and benefits." *United States* v. *Stevens*, 559 U. S. 460, 470 (2010); see also *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 818 (2000) ("What the Constitution says is that" value judgments "are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority").

Third, our established First Amendment analysis already takes account of any "collective" interest that may justify restrictions on individual speech. Under that accepted analysis, such restrictions are measured against the asserted public interest (usually framed as an important or compelling governmental interest). As explained below, we do not doubt the compelling nature of the "collective" interest in preventing corruption in the electoral process. But we permit Congress to pursue that interest only so long as it does not unnecessarily infringe an individual's right to freedom of speech; we do not truncate this tailoring test at the outset.

IV

A

With the significant First Amendment costs for individual citizens in mind, we turn to the governmental interests asserted in this case. This Court has identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corrup-

tion. See *Davis, supra*, at 741; *National Conservative Political Action Comm.*, 470 U. S., at 496–497. We have consistently rejected attempts to suppress campaign speech based on other legislative objectives. No matter how desirable it may seem, it is not an acceptable governmental objective to "level the playing field," or to "level electoral opportunities," or to "equaliz[e] the financial resources of candidates." *Bennett*, 564 U. S., at 748–750; *Davis*, *supra*, at 741–742; *Buckley*, *supra*, at 56. The First Amendment prohibits such legislative attempts to "fine-tun[e]" the electoral process, no matter how well intentioned. *Bennett*, *supra*, at 747.

As we framed the relevant principle in *Buckley*, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." 424 U. S., at 48–49. The dissent's suggestion that *Buckley* supports the opposite proposition, see *post*, at 237, simply ignores what *Buckley* actually said on the matter. See also *Citizens Against Rent Control/Coalition for Fair Housing* v. *Berkeley*, 454 U. S. 290, 295 (1981) ("*Buckley* . . . made clear that contributors cannot be protected from the possibility that others will make larger contributions").

Moreover, while preventing corruption or its appearance is a legitimate objective, Congress may target only a specific type of corruption—"*quid pro quo*" corruption. As *Buckley* explained, Congress may permissibly seek to rein in "large contributions [that] are given to secure a political *quid pro quo* from current and potential office holders." 424 U. S., at 26. In addition to "actual *quid pro quo* arrangements," Congress may permissibly limit "the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions" to particular candidates. *Id.*, at 27; see also *Citizens United*, 558 U. S., at 359 ("When *Buckley* identified a sufficiently important governmental interest in preventing

corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption").

Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to such *quid pro quo* corruption. Nor does the possibility that an individual who spends large sums may garner "influence over or access to" elected officials or political parties. *Id.*, at 359; see *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93, 297 (2003) (KENNEDY, J., concurring in judgment in part and dissenting in part). And because the Government's interest in preventing the appearance of corruption is equally confined to the appearance of *quid pro quo* corruption, the Government may not seek to limit the appearance of mere influence or access. See *Citizens United*, 558 U. S., at 360.

The dissent advocates a broader conception of corruption, and would apply the label to any individual contributions above limits deemed necessary to protect "collective speech." Thus, under the dissent's view, it is perfectly fine to contribute $5,200 to nine candidates but somehow corrupt to give the same amount to a tenth.

It is fair to say, as Justice Stevens has, "that we have not always spoken about corruption in a clear or consistent voice." *Id.*, at 447 (opinion concurring in part and dissenting in part). The definition of corruption that we apply today, however, has firm roots in *Buckley* itself. The Court in that case upheld base contribution limits because they targeted "the danger of actual *quid pro quo* arrangements" and "the impact of the appearance of corruption stemming from public awareness" of such a system of unchecked direct contributions. 424 U. S., at 27. *Buckley* simultaneously rejected limits on spending that was less likely to "be given as a *quid pro quo* for improper commitments from the candidate." *Id.*, at 47. In any event, this case is not the first in which the debate over the proper breadth of the Government's anticorruption interest has been engaged. Compare *Citi-*

zens United, 558 U. S., at 356–361 (majority opinion), with *id.*, at 447–460 (opinion of Stevens, J.).

The line between *quid pro quo* corruption and general influence may seem vague at times, but the distinction must be respected in order to safeguard basic First Amendment rights. In addition, "[i]n drawing that line, the First Amendment requires us to err on the side of protecting political speech rather than suppressing it." *Federal Election Comm'n* v. *Wisconsin Right to Life*, 551 U. S. 449, 457 (2007) (opinion of ROBERTS, C. J.).

The dissent laments that our opinion leaves only remnants of FECA and BCRA that are inadequate to combat corruption. See *post*, at 233. Such rhetoric ignores the fact that we leave the base limits undisturbed.[6] Those base limits remain the primary means of regulating campaign contributions—the obvious explanation for why the aggregate limits received a scant few sentences of attention in *Buckley*.[7]

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[6] The fact that this opinion does not address the base limits also belies the dissent's concern that we have silently overruled the Court's holding in *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93 (2003). See *post*, at 243–244. At issue in *McConnell* was BCRA's extension of the base limits to so-called "soft money"—previously unregulated contributions to national party committees. See 540 U. S., at 142; see also *post*, at 261–268 (appendix A to opinion of BREYER, J.) (excerpts from *McConnell* record discussing unregulated "soft money"). Our holding about the constitutionality of the aggregate limits clearly does not overrule *McConnell*'s holding about "soft money."

[7] It would be especially odd to regard aggregate limits as essential to enforce base limits when state campaign finance schemes typically include base limits but not aggregate limits. Just eight of the 38 States that have imposed base limits on contributions from individuals to candidates have also imposed aggregate limits (excluding restrictions on a specific subset of donors). See Conn. Gen. Stat. § 9–611(c) (2013); Me. Rev. Stat. Ann., Tit. 21–A, § 1015(3) (Supp. 2013); Md. Elec. Law Code Ann. § 13–226(b) (Lexis Supp. 2013); Mass. Gen. Laws, ch. 55, § 7A(a)(5) (West 2012); N. Y. Elec. Law Ann. § 14–114(8) (West Cum. Supp. 2013); R. I. Gen. Laws § 17–25–10.1(a)(1) (Lexis 2013); Wis. Stat. § 11.26(4) (2007–2008); Wyo. Stat. Ann. § 22–25–102(c)(ii) (2013). The Government presents no evidence con-

B

"When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S., at 816. Here, the Government seeks to carry that burden by arguing that the aggregate limits further the permissible objective of preventing *quid pro quo* corruption.

The difficulty is that once the aggregate limits kick in, they ban all contributions of *any* amount. But Congress's selection of a $5,200 base limit indicates its belief that contributions of that amount or less do not create a cognizable risk of corruption. If there is no corruption concern in giving nine candidates up to $5,200 each, it is difficult to understand how a tenth candidate can be regarded as corruptible if given $1,801, and all others corruptible if given a dime. And if there is no risk that additional candidates will be corrupted by donations of up to $5,200, then the Government must defend the aggregate limits by demonstrating that they prevent circumvention of the base limits.

The problem is that they do not serve that function in any meaningful way. In light of the various statutes and regulations currently in effect, *Buckley*'s fear that an individual might "contribute massive amounts of money to a particular candidate through the use of unearmarked contributions" to entities likely to support the candidate, 424 U. S., at 38, is far too speculative. And—importantly—we "have never accepted mere conjecture as adequate to carry a First Amendment burden." *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 392 (2000).

As an initial matter, there is not the same risk of *quid pro quo* corruption or its appearance when money flows through independent actors to a candidate, as when a donor contributes to a candidate directly. When an individual contributes

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cerning the circumvention of base limits from the 30 States with base limits but no aggregate limits.

to a candidate, a party committee, or a PAC, the individual must by law cede control over the funds. See 2 U. S. C. § 441a(a)(8); 11 CFR § 110.6. The Government admits that if the funds are subsequently rerouted to a particular candidate, such action occurs at the initial recipient's discretion—not the donor's. See Brief for Appellee 37. As a consequence, the chain of attribution grows longer, and any credit must be shared among the various actors along the way. For those reasons, the risk of *quid pro quo* corruption is generally applicable only to "the narrow category of money gifts that are directed, in some manner, to a candidate or officeholder." *McConnell*, 540 U. S., at 310 (opinion of KENNEDY, J.).

Buckley nonetheless focused on the possibility that "unearmarked contributions" could eventually find their way to a candidate's coffers. 424 U. S., at 38. Even accepting the validity of *Buckley*'s circumvention theory, it is hard to see how a candidate today could receive a "massive amount[ ] of money" that could be traced back to a particular contributor uninhibited by the aggregate limits. *Ibid.* The Government offers a series of scenarios in support of that possibility. But each is sufficiently implausible that the Government has not carried its burden of demonstrating that the aggregate limits further its anticircumvention interest.

The primary example of circumvention, in one form or another, envisions an individual donor who contributes the maximum amount under the base limits to a particular candidate, say, Representative Smith. Then the donor also channels "massive amounts of money" to Smith through a series of contributions to PACs that have stated their intention to support Smith. See, *e. g.*, Brief for Appellee 35–37; Tr. of Oral Arg. 4, 6.

Various earmarking and antiproliferation rules disarm this example. Importantly, the donor may not contribute to the most obvious PACs: those that support only Smith. See 11 CFR § 110.1(h)(1); see also § 102.14(a). Nor may the donor

contribute to the slightly less obvious PACs that he knows will route "a substantial portion" of his contribution to Smith. § 110.1(h)(2).

The donor must instead turn to other PACs that are likely to give to Smith. When he does so, however, he discovers that his contribution will be significantly diluted by all the contributions from others to the same PACs. After all, the donor cannot give more than $5,000 to a PAC and so cannot dominate the PAC's total receipts, as he could when *Buckley* was decided. 2 U. S. C. § 441a(a)(1)(C). He cannot retain control over his contribution, 11 CFR § 110.1(h)(3), direct his money "in any way" to Smith, 2 U. S. C. § 441a(a)(8), or even *imply* that he would like his money to be recontributed to Smith, 11 CFR § 110.6(b)(1). His salience as a Smith supporter has been diminished, and with it the potential for corruption.

It is not clear how many candidates a PAC must support before our dedicated donor can avoid being tagged with the impermissible knowledge that "a substantial portion" of his contribution will go to Smith. But imagine that the donor is one of ten equal donors to a PAC that gives the highest possible contribution to Smith.[8] The PAC may give no more than $2,600 per election to Smith. Of that sum, just $260 will be attributable to the donor intent on circumventing the base limits. Thus far he has hardly succeeded in funneling "massive amounts of money" to Smith. *Buckley*, *supra*, at 38.

But what if this donor does the same thing via, say, 100 different PACs? His $260 contribution will balloon to $26,000, ten times what he may contribute directly to Smith in any given election.

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[8] Even those premises are generous because they assume that the donor contributes to non-multicandidate PACs, which are relatively rare. Multicandidate PACs, by contrast, must have more than 50 contributors. 11 CFR § 100.5(e)(3). The more contributors, of course, the more the donor's share in any eventual contribution to Smith is diluted.

This 100-PAC scenario is highly implausible. In the first instance, it is not true that the individual donor will necessarily have access to a sufficient number of PACs to effectuate such a scheme. There are many PACs, but they are not limitless. For the 2012 election cycle, the FEC reported about 2,700 nonconnected PACs (excluding PACs that finance independent expenditures only). And not every PAC that supports Smith will work in this scheme: For our donor's pro rata share of a PAC's contribution to Smith to remain meaningful, the PAC must be funded by only a small handful of donors. The antiproliferation rules, which were not in effect when *Buckley* was decided, prohibit our donor from creating 100 pro-Smith PACs of his own, or collaborating with the nine other donors to do so. See 2 U. S. C. § 441a(a)(5) ("all contributions made by political committees established or financed or maintained or controlled by . . . any other person, or by any group of such persons, shall be considered to have been made by a single political committee").

Moreover, if 100 PACs were to contribute to Smith and few other candidates, and if specific individuals like our ardent Smith supporter were to contribute to each, the FEC could weigh those "circumstantial factors" to determine whether to deem the PACs affiliated. 11 CFR § 100.5(g)(4)(ii). The FEC's analysis could take account of a "common or overlapping membership" and "similar patterns of contributions or contributors," among other considerations. §§ 100.5(g)(4)(ii)(D), (J). The FEC has in the past initiated enforcement proceedings against contributors with such suspicious patterns of PAC donations. See, *e. g.*, Conciliation Agreement, *In re Riley*, Matters Under Review 4568, 4633, 4634, 4736 (Dec. 19, 2001).

On a more basic level, it is hard to believe that a rational actor would engage in such machinations. In the example described, a dedicated donor spent $500,000—donating the full $5,000 to 100 different PACs—to add just $26,000 to

Smith's campaign coffers. That same donor, meanwhile, could have spent unlimited funds on independent expenditures on behalf of Smith. See *Buckley*, 424 U. S., at 44–51. Indeed, he could have spent his entire $500,000 advocating for Smith, without the risk that his selected PACs would choose not to give to Smith, or that he would have to share credit with other contributors to the PACs.

We have said in the context of independent expenditures that "'[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent . . . undermines the value of the expenditure to the candidate.'" *Citizens United*, 558 U. S., at 357 (quoting *Buckley*, *supra*, at 47). But probably not by 95%. And at least from the *donor's* point of view, it strikes us as far more likely that he will want to see his full $500,000 spent on behalf of his favored candidate—even if it must be spent independently—rather than see it diluted to a small fraction so that it can be contributed directly by someone else.[9]

Another circumvention example is the one that apparently motivated the District Court. As the District Court crafted the example, a donor gives a $500,000 check to a joint fundraising committee composed of a candidate, a national party committee, and "most of the party's state party committees" (actually, 47 of the 50). 893 F. Supp. 2d, at 140. The committees divide up the money so that each one receives the maximum contribution permissible under the base limits, but then each transfers its allocated portion to the same single

[9] The Justice Department agrees. As Acting Assistant Attorney General Mythili Raman recently testified before Congress: "We anticipate seeing fewer cases of conduit contributions directly to campaign committees or parties, because individuals or corporations who wish to influence elections or officials will no longer need to attempt to do so through conduit contribution schemes that can be criminally prosecuted. Instead, they are likely to simply make unlimited contributions to Super PACs or 501(c)s." Hearing on Current Issues in Campaign Finance Law Enforcement before the Subcommittee on Crime and Terrorism of the Senate Committee on the Judiciary, 113th Cong., 1st Sess., 3 (2013).

committee. That committee uses the money for coordinated expenditures on behalf of a particular candidate. If that scenario "seem[s] unlikely," the District Court thought so, too. *Ibid.* But because the District Court could "imagine" that chain of events, it held that the example substantiated the Government's circumvention concerns. *Ibid.*

One problem, however, is that the District Court's speculation relies on illegal earmarking. Lest there be any confusion, a joint fundraising committee is simply a mechanism for individual committees to raise funds collectively, not to circumvent base limits or earmarking rules. See 11 CFR § 102.17(c)(5). Under no circumstances may a contribution to a joint fundraising committee result in an allocation that exceeds the contribution limits applicable to its constituent parts; the committee is in fact required to return any excess funds to the contributor. See § 102.17(c)(6)(i).

The District Court assumed compliance with the specific allocation rules governing joint fundraising committees, but it expressly based its example on the premise that the donor would telegraph his desire to support one candidate and that "many separate entities would willingly serve as conduits for a single contributor's interests." 893 F. Supp. 2d, at 140. Regardless whether so many distinct entities would cooperate as a practical matter, the earmarking provision prohibits an individual from directing funds "through an intermediary or conduit" to a particular candidate. 2 U. S. C. § 441a(a)(8). Even the "implicit[ ]" agreement imagined by the District Court, 893 F. Supp. 2d, at 140, would trigger the earmarking provision. See 11 CFR § 110.6(b)(1). So this circumvention scenario could not succeed without assuming that nearly 50 separate party committees would engage in a transparent violation of the earmarking rules (and that they would not be caught if they did).

Moreover, the District Court failed to acknowledge that its $500,000 example cannot apply to most candidates. It crafted the example around a presidential candidate, for

whom donations in the thousands of dollars may not seem remarkable—especially in comparison to the nearly $1.4 billion spent by the 2012 presidential candidates. The same example cannot, however, be extrapolated to most House and Senate candidates. Like contributions, coordinated expenditures are limited by statute, with different limits based on the State and the office. See 2 U. S. C. § 441a(d)(3). The 2013 coordinated expenditure limit for most House races is $46,600, well below the $500,000 in coordinated expenditures envisioned by the District Court. The limit for Senate races varies significantly based on state population. See 78 Fed. Reg. 8531 (2013). A scheme of the magnitude imagined by the District Court would be possible even in theory for *no* House candidates and the Senate candidates from just the 12 most populous States. *Ibid.*

Further, to the extent that the law does not foreclose the scenario described by the District Court, experience and common sense do. The Government provides no reason to believe that many state parties would willingly participate in a scheme to funnel money to another State's candidates. A review of FEC data of Republican and Democratic state party committees for the 2012 election cycle reveals just 12 total instances in which a state party committee contributed to a House or Senate candidate in another State. No surprise there. The Iowa Democratic Party, for example, has little reason to transfer money to the California Democratic Party, especially when the Iowa Democratic Party would be barred for the remainder of the election cycle from receiving another contribution for its own activities from the particular donor.

These scenarios, along with others that have been suggested, are either illegal under current campaign finance laws or divorced from reality. The three examples posed by the dissent are no exception. The dissent does not explain how the large sums it postulates can be legally rerouted to a particular candidate, why most state committees would

participate in a plan to redirect their donations to a candidate in another State, or how a donor or group of donors can avoid regulations prohibiting contributions to a committee "with the knowledge that a substantial portion" of the contribution will support a candidate to whom the donor has already contributed, 11 CFR § 110.1(h)(2).

The dissent argues that such knowledge may be difficult to prove, pointing to eight FEC cases that did not proceed because of insufficient evidence of a donor's incriminating knowledge. See *post*, at 254–255. It might be that such guilty knowledge could not be shown because the donors were not guilty—a possibility that the dissent does not entertain. In any event, the donors described in those eight cases were typically alleged to have exceeded the base limits by $5,000 or less. The FEC's failure to find the requisite knowledge in those cases hardly means that the agency will be equally powerless to prevent a scheme in which a donor routes *millions of dollars* in excess of the base limits to a particular candidate, as in the dissent's "Example Two." And if an FEC official cannot establish knowledge of circumvention (or establish affiliation) when the same ten donors contribute $10,000 each to 200 newly created PACs, and each PAC writes a $10,000 check to the same ten candidates—the dissent's "Example Three"—then that official has not a heart but a head of stone. See *post*, at 249–250, 255.

The dissent concludes by citing three briefs for the proposition that, even with the aggregate limits in place, individuals "have transferred large sums of money to specific candidates" in excess of the base limits. *Post*, at 256. But the cited sources do not provide any real-world examples of circumvention of the base limits along the lines of the various hypotheticals. The dearth of FEC prosecutions, according to the dissent, proves only that people are getting away with it. And the violations that surely must be out there elude detection "because in the real world, the methods of achieving circumvention are more subtle and more complex"

than the hypothetical examples. *Post*, at 257. This sort of speculation, however, cannot justify the substantial intrusion on First Amendment rights at issue in this case.

Buckley upheld aggregate limits only on the ground that they prevented channeling money to candidates beyond the base limits. The absence of such a prospect today belies the Government's asserted objective of preventing corruption or its appearance. The improbability of circumvention indicates that the aggregate limits instead further the impermissible objective of simply limiting the amount of money in political campaigns.

C

Quite apart from the foregoing, the aggregate limits violate the First Amendment because they are not "closely drawn to avoid unnecessary abridgment of associational freedoms." *Buckley*, 424 U. S., at 25. In the First Amendment context, fit matters. Even when the Court is not applying strict scrutiny, we still require "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective." *Board of Trustees of State Univ. of N. Y.* v. *Fox*, 492 U. S. 469, 480 (1989) (quoting *In re R. M. J.*, 455 U. S. 191, 203 (1982)). Here, because the statute is poorly tailored to the Government's interest in preventing circumvention of the base limits, it impermissibly restricts participation in the political process.

1

The Government argues that the aggregate limits are justified because they prevent an individual from giving to too many initial recipients who might subsequently recontribute a donation. After all, only recontributed funds can conceivably give rise to circumvention of the base limits. Yet all

indications are that many types of recipients have scant interest in regifting donations they receive.

Some figures might be useful to put the risk of circumvention in perspective. We recognize that no data can be marshaled to capture perfectly the counterfactual world in which aggregate limits do not exist. But, as we have noted elsewhere, we can nonetheless ask "whether experience under the present law confirms a serious threat of abuse." *Federal Election Comm'n* v. *Colorado Republican Federal Campaign Comm.*, 533 U. S. 431, 457 (2001). It does not. Experience suggests that the vast majority of contributions made in excess of the aggregate limits are likely to be retained and spent by their recipients rather than rerouted to candidates.

In the 2012 election cycle, federal candidates, political parties, and PACs spent a total of $7 billion, according to the FEC. In particular, each national political party's spending ran in the hundreds of millions of dollars. The National Republican Senatorial Committee (NRSC), National Republican Congressional Committee (NRCC), Democratic Senatorial Campaign Committee (DSCC), and Democratic Congressional Campaign Committee (DCCC), however, spent less than $1 million each on direct candidate contributions and less than $10 million each on coordinated expenditures. Brief for NRSC et al. as *Amici Curiae* 23, 25 (NRSC Brief). Including both coordinated expenditures and direct candidate contributions, the NRSC and DSCC spent just 7% of their total funds on contributions to candidates and the NRCC and DCCC spent just 3%.

Likewise, as explained previously, state parties rarely contribute to candidates in other States. In the 2012 election cycle, the Republican and Democratic state party committees in all 50 States (and the District of Columbia) contributed a paltry $17,750 to House and Senate candidates in other States. The state party committees spent over half a billion dollars over the same time period, of which the $17,750

in contributions to other States' candidates constituted just 0.003%.

As with national and state party committees, candidates contribute only a small fraction of their campaign funds to other candidates. Authorized candidate committees may support other candidates up to a $2,000 base limit. 2 U. S. C. § 432(e)(3)(B). In the 2012 election, House candidates spent a total of $1.1 billion. Candidate-to-candidate contributions among House candidates totaled $3.65 million, making up just 0.3% of candidates' overall spending. NRSC Brief 29. The most that any one individual candidate received from all other candidates was around $100,000. Brief for Appellee 39. The fact is that candidates who receive campaign contributions spend most of the money on themselves, rather than passing along donations to other candidates. In this arena at least, charity begins at home.[10]

Based on what we can discern from experience, the indiscriminate ban on all contributions above the aggregate limits is disproportionate to the Government's interest in preventing circumvention. The Government has not given us any reason to believe that parties or candidates would dramatically shift their priorities if the aggregate limits were lifted. Absent such a showing, we cannot conclude that the sweeping aggregate limits are appropriately tailored to guard against any contributions that might implicate the Government's anticircumvention interest.

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[10] In addition, the percentage of contributions above the aggregate limits that even *could* be used for circumvention is limited by the fact that many of the modes of potential circumvention can be used only once each election. For example, if one donor gives $2,600 to 100 candidates with safe House seats in the hopes that each candidate will reroute $2,000 to Representative Smith, a candidate in a contested district, no other donor can do the same, because the candidates in the safe seats will have exhausted their permissible contributions to Smith. So there is no risk that the circumvention scheme will repeat itself with multiple other would-be donors to Smith.

A final point: It is worth keeping in mind that the *base limits* themselves are a prophylactic measure. As we have explained, "restrictions on direct contributions are preventative, because few if any contributions to candidates will involve *quid pro quo* arrangements." *Citizens United*, 558 U. S., at 357. The aggregate limits are then layered on top, ostensibly to prevent circumvention of the base limits. This "prophylaxis-upon-prophylaxis approach" requires that we be particularly diligent in scrutinizing the law's fit. *Wisconsin Right to Life*, 551 U. S., at 479 (opinion of ROBERTS, C. J.); see *McConnell*, 540 U. S., at 268–269 (opinion of THOMAS, J.).

2

Importantly, there are multiple alternatives available to Congress that would serve the Government's anticircumvention interest, while avoiding "unnecessary abridgment" of First Amendment rights. *Buckley*, 424 U. S., at 25.

The most obvious might involve targeted restrictions on transfers among candidates and political committees. There are currently no such limits on transfers among party committees and from candidates to party committees. See 2 U. S. C. § 441a(a)(4); 11 CFR § 113.2(c). Perhaps for that reason, a central concern of the District Court, the Government, multiple *amici curiae*, and the dissent has been the ability of party committees to transfer money freely. If Congress agrees that this is problematic, it might tighten its permissive transfer rules. Doing so would impose a lesser burden on First Amendment rights, as compared to aggregate limits that flatly ban contributions beyond certain levels. And while the Government has not conceded that transfer restrictions would be a perfect substitute for the aggregate limits, it has recognized that they would mitigate the risk of circumvention. See Tr. of Oral Arg. 29.

One possible option for restricting transfers would be to require contributions above the current aggregate limits to be deposited into segregated, nontransferable accounts and

spent only by their recipients. Such a solution would address the same circumvention possibilities as the current aggregate limits, while not completely barring contributions beyond the aggregate levels. In addition (or as an alternative), if Congress believes that circumvention is especially likely to occur through creation of a joint fundraising committee, it could require that funds received through those committees be spent by their recipients (or perhaps it could simply limit the size of joint fundraising committees). Such alternatives to the aggregate limits properly refocus the inquiry on the delinquent actor: the recipient of a contribution within the base limits, who then routes the money in a manner that undermines those limits. See *Citizens United*, *supra*, at 360–361; cf. *Bartnicki* v. *Vopper*, 532 U. S. 514, 529–530 (2001).

Indeed, Congress has adopted transfer restrictions, and the Court has upheld them, in the context of state party spending. See 2 U. S. C. § 441i(b). So-called "Levin funds" are donations permissible under state law that may be spent on certain federal election activity—namely, voter registration and identification, get-out-the-vote efforts, or generic campaign activities. Levin funds are raised directly by the state or local party committee that ultimately spends them. § 441i(b)(2)(B)(iv). That means that other party committees may not transfer Levin funds, solicit Levin funds on behalf of the particular state or local committee, or engage in joint fundraising of Levin funds. See *McConnell*, 540 U. S., at 171–173. *McConnell* upheld those transfer restrictions as "justifiable anticircumvention measures," though it acknowledged that they posed some associational burdens. *Id.*, at 171. Here, a narrow transfer restriction on contributions that could otherwise be recontributed in excess of the base limits could rely on a similar justification.

Other alternatives might focus on earmarking. Many of the scenarios that the Government and the dissent hypothesize involve at least implicit agreements to circumvent the

base limits—agreements that are already prohibited by the earmarking rules. See 11 CFR § 110.6. The FEC might strengthen those rules further by, for example, defining how many candidates a PAC must support in order to ensure that "a substantial portion" of a donor's contribution is not rerouted to a certain candidate. § 110.1(h)(2). Congress might also consider a modified version of the aggregate limits, such as one that prohibits donors who have contributed the current maximum sums from further contributing to political committees that have indicated they will support candidates to whom the donor has already contributed. To be sure, the existing earmarking provision does not define "the outer limit of acceptable tailoring." *Colorado Republican Federal Campaign Comm.*, 533 U. S., at 462. But tighter rules could have a significant effect, especially when adopted in concert with other measures.

We do not mean to opine on the validity of any particular proposal. The point is that there are numerous alternative approaches available to Congress to prevent circumvention of the base limits.

D

Finally, disclosure of contributions minimizes the potential for abuse of the campaign finance system. Disclosure requirements are in part "justified based on a governmental interest in 'provid[ing] the electorate with information' about the sources of election-related spending." *Citizens United*, 558 U. S., at 367 (quoting *Buckley*, 424 U. S., at 66). They may also "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Id.*, at 67. Disclosure requirements burden speech, but—unlike the aggregate limits—they do not impose a ceiling on speech. *Citizens United*, *supra*, at 366; but see *McConnell*, *supra*, at 275–277 (opinion of THOMAS, J.). For that reason, disclosure often represents a less restrictive alternative to flat bans on certain types or quantities of speech. See, *e. g.*, *Federal Elec-*

tion Comm'n v. *Massachusetts Citizens for Life, Inc.*, 479 U. S. 238, 262 (1986).

With modern technology, disclosure now offers a particularly effective means of arming the voting public with information. In 1976, the Court observed that Congress could regard disclosure as "only a partial measure." *Buckley*, *supra*, at 28. That perception was understandable in a world in which information about campaign contributions was filed at FEC offices and was therefore virtually inaccessible to the average member of the public. See Brief for Cause of Action Institute as *Amicus Curiae* 15–16. Today, given the Internet, disclosure offers much more robust protections against corruption. See *Citizens United*, *supra*, at 370–371. Reports and databases are available on the FEC's Web site almost immediately after they are filed, supplemented by private entities such as OpenSecrets.org and FollowThe Money.org. Because massive quantities of information can be accessed at the click of a mouse, disclosure is effective to a degree not possible at the time *Buckley*, or even *McConnell*, was decided.

The existing aggregate limits may in fact encourage the movement of money away from entities subject to disclosure. Because individuals' direct contributions are limited, would-be donors may turn to other avenues for political speech. See *Citizens United*, *supra*, at 364. Individuals can, for example, contribute unlimited amounts to 501(c) organizations, which are not required to publicly disclose their donors. See 26 U. S. C. § 6104(d)(3). Such organizations spent some $300 million on independent expenditures in the 2012 election cycle.

V

At oral argument, the Government shifted its focus from *Buckley*'s anticircumvention rationale to an argument that the aggregate limits deter corruption regardless of their ability to prevent circumvention of the base limits. See Tr. of Oral Arg. 29–30, 50–52. The Government argued that there is an opportunity for corruption whenever a large check is

given to a legislator, even if the check consists of contributions within the base limits to be appropriately divided among numerous candidates and committees. The aggregate limits, the argument goes, ensure that the check amount does not become too large. That new rationale for the aggregate limits—embraced by the dissent, see *post*, at 245–248—does not wash. It dangerously broadens the circumscribed definition of *quid pro quo* corruption articulated in our prior cases, and targets as corruption the general, broad-based support of a political party.

In analyzing the base limits, *Buckley* made clear that the risk of corruption arises when an individual makes large contributions to the candidate or officeholder himself. See 424 U. S., at 26–27. *Buckley*'s analysis of the aggregate limit under FECA was similarly confined. The Court noted that the aggregate limit guarded against an individual's funneling—through circumvention—"massive amounts of money to *a particular candidate*." *Id.*, at 38 (emphasis added). We have reiterated that understanding several times. See, *e. g.*, *National Conservative Political Action Comm.*, 470 U. S., at 497 (*quid pro quo* corruption occurs when "[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to *themselves* or infusions of money into *their* campaigns" (emphasis added)); *Citizens Against Rent Control/Coalition for Fair Housing*, 454 U. S., at 297 (*Buckley*'s holding that contribution limits are permissible "relates to the perception of undue influence of large contributors to a *candidate*"); *McConnell*, 540 U. S., at 296 (opinion of KENNEDY, J.) (*quid pro quo* corruption in *Buckley* involved "contributions that flowed to *a particular candidate's* benefit" (emphasis added)).

Of course a candidate would be pleased with a donor who contributed not only to the candidate himself, but also to other candidates from the same party, to party committees, and to PACs supporting the party. But there is a clear, administrable line between money beyond the base limits funneled in an identifiable way to a candidate—for which the

candidate feels obligated—and money within the base limits given widely to a candidate's party—for which the candidate, like all other members of the party, feels grateful.

When donors furnish widely distributed support within all applicable base limits, all members of the party or supporters of the cause may benefit, and the leaders of the party or cause may feel particular gratitude. That gratitude stems from the basic nature of the party system, in which party members join together to further common political beliefs, and citizens can choose to support a party because they share some, most, or all of those beliefs. See *Tashjian* v. *Republican Party of Conn.*, 479 U. S. 208, 214–216 (1986). To recast such shared interest, standing alone, as an opportunity for *quid pro quo* corruption would dramatically expand government regulation of the political process. Cf. *California Democratic Party* v. *Jones*, 530 U. S. 567, 572–573 (2000) (recognizing the Government's "role to play in structuring and monitoring the election process," but rejecting "the proposition that party affairs are public affairs, free of First Amendment protections").

The Government suggests that it is the *solicitation* of large contributions that poses the danger of corruption, see Tr. of Oral Arg. 29–30, 38–39, 50–51; see also *post*, at 246–247, 251, but the aggregate limits are not limited to any direct solicitation by an officeholder or candidate. Cf. *McConnell*, *supra*, at 298–299, 308 (opinion of KENNEDY, J.) (rejecting a ban on "soft money" contributions to national parties, but approving a ban on the solicitation of such contributions as "a direct and necessary regulation of federal candidates' and officeholders' receipt of *quids*"). We have no occasion to consider a law that would specifically ban candidates from soliciting donations—within the base limits—that would go to many other candidates, and would add up to a large sum. For our purposes here, it is enough that the aggregate limits at issue are not directed specifically to candidate behavior.

* * *

For the past 40 years, our campaign finance jurisprudence has focused on the need to preserve authority for the Government to combat corruption, without at the same time compromising the political responsiveness at the heart of the democratic process, or allowing the Government to favor some participants in that process over others. As Edmund Burke explained in his famous speech to the electors of Bristol, a representative owes constituents the exercise of his "mature judgment," but judgment informed by "the strictest union, the closest correspondence, and the most unreserved communication with his constituents." The Speeches of the Right Hon. Edmund Burke 129–130 (J. Burke ed. 1867). Constituents have the right to support candidates who share their views and concerns. Representatives are not to follow constituent orders, but can be expected to be cognizant of and responsive to those concerns. Such responsiveness is key to the very concept of self-governance through elected officials.

The Government has a strong interest, no less critical to our democratic system, in combating corruption and its appearance. We have, however, held that this interest must be limited to a specific kind of corruption—*quid pro quo* corruption—in order to ensure that the Government's efforts do not have the effect of restricting the First Amendment right of citizens to choose who shall govern them. For the reasons set forth, we conclude that the aggregate limits on contributions do not further the only governmental interest this Court accepted as legitimate in *Buckley*. They instead intrude without justification on a citizen's ability to exercise "the most fundamental First Amendment activities." *Buckley*, 424 U. S., at 14.

The judgment of the District Court is reversed, and the case is remanded for further proceedings.

It is so ordered.

JUSTICE THOMAS, concurring in the judgment.

I adhere to the view that this Court's decision in *Buckley* v. *Valeo*, 424 U. S. 1 (1976) (*per curiam*), denigrates core First Amendment speech and should be overruled. See *Randall* v. *Sorrell*, 548 U. S. 230, 265–267 (2006) (THOMAS, J., concurring in judgment); *Federal Election Comm'n* v. *Beaumont*, 539 U. S. 146, 164–165 (2003) (THOMAS, J., dissenting); *Federal Election Comm'n* v. *Colorado Republican Federal Campaign Comm.*, 533 U. S. 431, 465–466 (2001) (*Colorado II*) (THOMAS, J., dissenting); *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 412–420 (2000) (THOMAS, J., dissenting); *Colorado Republican Federal Campaign Comm.* v. *Federal Election Comm'n*, 518 U. S. 604, 635–640 (1996) (*Colorado I*) (THOMAS, J., concurring in judgment and dissenting in part).

Political speech is "'the primary object of First Amendment protection'" and "the lifeblood of a self-governing people." *Colorado II*, *supra*, at 465–466 (THOMAS, J., dissenting). Contributions to political campaigns, no less than direct expenditures, "generate essential political speech" by fostering discussion of public issues and candidate qualifications. *Shrink Missouri*, 528 U. S., at 412 (THOMAS, J., dissenting); see also *id.*, at 410–411. *Buckley* itself recognized that both contribution and expenditure limits "operate in an area of the most fundamental First Amendment activities" and "implicate fundamental First Amendment interests." 424 U. S., at 14, 23. But instead of treating political giving and political spending alike, *Buckley* distinguished the two, embracing a bifurcated standard of review under which contribution limits receive less rigorous scrutiny. *Id.*, at 25.

As I have explained before, "[t]he analytic foundation of *Buckley* . . . was tenuous from the very beginning and has only continued to erode in the intervening years." *Shrink Missouri*, *supra*, at 412 (THOMAS, J., dissenting). To justify a lesser standard of review for contribution limits, *Buckley* relied on the premise that contributions are different in kind

from direct expenditures. None of the Court's bases for that premise withstands careful review. The linchpin of the Court's analysis was its assertion that "[w]hile contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor." 424 U. S., at 21. But that "'speech by proxy'" rationale quickly breaks down, given that "[e]ven in the case of a direct expenditure, there is usually some go-between that facilitates the dissemination of the spender's message—for instance, an advertising agency or a television station." *Colorado I*, *supra*, at 638–639 (opinion of THOMAS, J.). Moreover, we have since rejected the "'proxy speech'" approach as affording insufficient First Amendment protection to "the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources." *Federal Election Comm'n* v. *National Conservative Political Action Comm.*, 470 U. S. 480, 495 (1985); see *Shrink Missouri*, *supra*, at 413–414 (THOMAS, J., dissenting).

The remaining justifications *Buckley* provided are also flawed. For example, *Buckley* claimed that contribution limits entail only a "marginal" speech restriction because "[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." 424 U. S., at 20, 21. But this Court has never required a speaker to explain the reasons for his position in order to obtain full First Amendment protection. Instead, we have consistently held that speech is protected even "when the underlying basis for a position is not given." *Shrink Missouri*, *supra*, at 415, n. 3 (THOMAS, J., dissenting); see, *e. g.*, *City of Ladue* v. *Gilleo*, 512 U. S. 43, 46 (1994) (sign reading "'For Peace in the Gulf'"); *Texas* v. *Johnson*, 491 U. S. 397, 415–416 (1989) (flag burning); *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 510–511 (1969) (black armband

signifying opposition to Vietnam War); see also *Colorado I*, *supra*, at 640 (opinion of THOMAS, J.) ("Even a pure message of support, unadorned with reasons, is valuable to the democratic process")

Equally unpersuasive is *Buckley*'s suggestion that contribution limits warrant less stringent review because "[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution," and "[a]t most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate." 424 U. S., at 21. Contributions do increase the quantity of communication by "amplifying the voice of the candidate" and "help[ing] to ensure the dissemination of the messages that the contributor wishes to convey." *Shrink Missouri*, *supra*, at 415 (THOMAS, J., dissenting). They also serve as a quantifiable metric of the intensity of a particular contributor's support, as demonstrated by the frequent practice of giving different amounts to different candidates. *Buckley* simply failed to recognize that "we have accorded full First Amendment protection to expressions of intensity." 528 U. S., at 415, n. 3; see also *Cohen* v. *California*, 403 U. S. 15, 25–26 (1971) (protecting the use of an obscenity for emphasis).

Although today's decision represents a faithful application of our precedents, the plurality's discussion of *Buckley* omits any reference to these discarded rationales. Instead, the plurality alludes only to *Buckley*'s last remaining reason for devaluing political contributions relative to expenditures. See *ante*, at 197 (quoting *Buckley*, 424 U. S., at 21). The relevant sentence from *Buckley* reads as follows:

> "A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the

> contributor's freedom to discuss candidates and issues." *Ibid.*

That proposition, read in full, cannot be squared with a key premise of today's decision.

Among the Government's justifications for the aggregate limits set forth in the Bipartisan Campaign Reform Act of 2002 (BCRA) is that "an individual can engage in the 'symbolic act of contributing' to as many entities as he wishes." Brief for Appellee 20. That is, the Government contends that aggregate limits are constitutional as long as an individual can still contribute some token amount (a dime, for example) to each of his preferred candidates. The plurality, quite correctly, rejects that argument, noting that "[i]t is no answer to say that the individual can simply contribute less money to more people." *Ante*, at 204. That is so because "[t]o require one person to contribute at lower levels than others because he wants to support more candidates or causes is to impose a special burden on broader participation in the democratic process." *Ante*, at 204–205.

What the plurality does not recognize is that the same logic also defeats the reasoning from *Buckley* on which the plurality purports to rely. Under the plurality's analysis, limiting the amount of money a person may give to a candidate *does* impose a direct restraint on his political communication; if it did not, the aggregate limits at issue here would not create "a special burden on broader participation in the democratic process." *Ante*, at 204–205. I am wholly in agreement with the plurality's conclusion on this point: "[T]he Government may not penalize an individual for 'robustly exercis[ing]' his First Amendment rights." *Ante*, at 205 (quoting *Davis* v. *Federal Election Comm'n*, 554 U. S. 724, 739 (2008)). I regret only that the plurality does not acknowledge that today's decision, although purporting not to overrule *Buckley*, continues to chip away at its footings.

In sum, what remains of *Buckley* is a rule without a rationale. Contributions and expenditures are simply "two

sides of the same First Amendment coin," and our efforts to distinguish the two have produced mere "word games" rather than any cognizable principle of constitutional law. 424 U. S., at 241, 244 (Burger, C. J., concurring in part and dissenting in part). For that reason, I would overrule *Buckley* and subject the aggregate limits in BCRA to strict scrutiny, which they would surely fail. See *Colorado I*, 518 U. S., at 640–641 (opinion of THOMAS, J.) ("I am convinced that under traditional strict scrutiny, broad prophylactic caps on both spending and giving in the political process . . . are unconstitutional").

This case represents yet another missed opportunity to right the course of our campaign finance jurisprudence by restoring a standard that is faithful to the First Amendment. Until we undertake that reexamination, we remain in a "halfway house" of our own design. *Shrink Missouri*, 528 U. S., at 410 (KENNEDY, J., dissenting). For these reasons, I concur only in the judgment.

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

Nearly 40 years ago in *Buckley* v. *Valeo*, 424 U. S. 1 (1976) (*per curiam*), this Court considered the constitutionality of laws that imposed limits upon the overall amount a single person can contribute to all federal candidates, political parties, and committees taken together. The Court held that those limits did not violate the Constitution. *Id.*, at 38; accord, *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93, 138, n. 40, 152–153, n. 48 (2003) (citing with approval *Buckley*'s aggregate limits holding).

The *Buckley* Court focused upon the same problem that concerns the Court today, and it wrote:

> "The overall $25,000 ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support. But this quite modest re-

> straint upon protected political activity serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party. The limited, additional restriction on associational freedom imposed by the overall ceiling is thus no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid." 424 U. S., at 38.

Today a majority of the Court overrules this holding. It is wrong to do so. Its conclusion rests upon its own, not a record-based, view of the facts. Its legal analysis is faulty: It misconstrues the nature of the competing constitutional interests at stake. It understates the importance of protecting the political integrity of our governmental institutions. It creates a loophole that will allow a single individual to contribute millions of dollars to a political party or to a candidate's campaign. Taken together with *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310 (2010), today's decision eviscerates our Nation's campaign finance laws, leaving a remnant incapable of dealing with the grave problems of democratic legitimacy that those laws were intended to resolve.

I

The plurality concludes that the aggregate contribution limits " 'unnecessar[ily] abridg[e]' " First Amendment rights. *Ante*, at 197, 218 (quoting *Buckley*, *supra*, at 25). It notes that some individuals will wish to "spen[d] 'substantial amounts of money in order to communicate [their] political ideas through sophisticated' means." *Ante*, at 203 (quoting *Federal Election Comm'n* v. *National Conservative Political Action Comm.*, 470 U. S. 480, 493 (1985) (*NCPAC*)). Ag-

gregate contribution ceilings limit an individual's ability to engage in such "broader participation in the democratic process," while insufficiently advancing any legitimate governmental objective. *Ante*, at 205, 210–218. Hence, the plurality finds, they violate the Constitution.

The plurality's conclusion rests upon three separate but related claims. Each is fatally flawed. First, the plurality says that given the base limits on contributions to candidates and political committees, aggregate limits do not further any independent governmental objective worthy of protection. And that is because, given the base limits, "[s]pending large sums of money in connection with elections" does not "give rise to . . . corruption." *Ante*, at 208. In making this argument, the plurality relies heavily upon a narrow definition of "corruption" that excludes efforts to obtain " 'influence over or access to' elected officials or political parties." *Ibid.* (quoting *Citizens United*, *supra*, at 359); accord, *ante*, at 206–217.

Second, the plurality assesses the instrumental objective of the aggregate limits, namely, safeguarding the base limits. It finds that they "do not serve that function in any meaningful way." *Ante*, at 210. That is because, even without the aggregate limits, the possibilities for circumventing the base limits are "implausible" and "divorced from reality." *Ante*, at 211, 213, 216.

Third, the plurality says the aggregate limits are not a " 'reasonable' " policy tool. Rather, they are "poorly tailored to the Government's interest in preventing circumvention of the base limits." *Ante*, at 218 (quoting *Board of Trustees of State Univ. of N. Y.* v. *Fox*, 492 U. S. 469, 480 (1989)). The plurality imagines several alternative regulations that it says might just as effectively thwart circumvention. Accordingly, it finds, the aggregate caps are out of " 'proportion to the [anticorruption] interest served.' " *Ante*, at 218 (quoting *Fox*, *supra*, at 480).

II

The plurality's first claim—that large aggregate contributions do not "give rise" to "corruption"—is plausible only because the plurality defines "corruption" too narrowly. The plurality describes the constitutionally permissible objective of campaign finance regulation as follows: "Congress may target only a specific type of corruption—'*quid pro quo*' corruption." *Ante*, at 207. It then defines *quid pro quo* corruption to mean no more than "a direct exchange of an official act for money"—an act akin to bribery. *Ante*, at 192. It adds specifically that corruption does *not* include efforts to "garner 'influence over or access to' elected officials or political parties." *Ante*, at 208 (quoting *Citizens United*, *supra*, at 359). Moreover, the Government's efforts to prevent the "appearance of corruption" are "equally confined to the appearance of *quid pro quo* corruption," as narrowly defined. *Ante*, at 208. In the plurality's view, a federal statute could not prevent an individual from writing a million dollar check to a political party (by donating to its various committees), because the rationale for any limit would "dangerously broade[n] the circumscribed definition of *quid pro quo* corruption articulated in our prior cases." *Ante*, at 225.

This critically important definition of "corruption" is inconsistent with the Court's prior case law (with the possible exception of *Citizens United*, as I will explain below). It is virtually impossible to reconcile with this Court's decision in *McConnell*, upholding the Bipartisan Campaign Reform Act of 2002 (BCRA). And it misunderstands the constitutional importance of the interests at stake. In fact, constitutional interests—indeed, First Amendment interests—lie on both sides of the legal equation.

A

In reality, as the history of campaign finance reform shows and as our earlier cases on the subject have recognized, the

anticorruption interest that drives Congress to regulate campaign contributions is a far broader, more important interest than the plurality acknowledges. It is an interest in maintaining the integrity of our public governmental institutions. And it is an interest rooted in the Constitution and in the First Amendment itself.

Consider at least one reason why the First Amendment protects political speech. Speech does not exist in a vacuum. Rather, political communication seeks to secure government action. A politically oriented "marketplace of ideas" seeks to form a public opinion that can and will influence elected representatives.

This is not a new idea. Eighty-seven years ago, Justice Brandeis wrote that the First Amendment's protection of speech was "essential to effective democracy." *Whitney* v. *California*, 274 U. S. 357, 377 (1927) (concurring opinion). Chief Justice Hughes reiterated the same idea shortly thereafter: "[A] fundamental principle of our constitutional system" is the "maintenance of the opportunity for free political discussion *to the end* that government may be responsive to the will of the people." *Stromberg* v. *California*, 283 U. S. 359, 369 (1931) (majority opinion) (emphasis added). In *Citizens United*, the Court stated that "[s]peech is an essential mechanism of democracy, for it is *the means* to hold officials accountable to the people." 558 U. S., at 339 (emphasis added).

The Framers had good reason to emphasize this same connection between political speech and governmental action. An influential 18th-century continental philosopher had argued that in a representative democracy, the people lose control of their representatives between elections, during which interim periods they were "in chains." J. Rousseau, An Inquiry Into the Nature of the Social Contract 265–266 (transl. 1791).

The Framers responded to this criticism both by requiring frequent elections to federal office, and by enacting a First Amendment that would facilitate a "chain of communication

between the people, and those, to whom they have committed the exercise of the powers of government." J. Wilson & T. McKean, Commentaries on the Constitution of the United States of America 30–31 (1792). This "chain" would establish the necessary "communion of interests and sympathy of sentiments" between the people and their representatives, so that public opinion could be channeled into effective governmental action. The Federalist No. 57, p. 386 (J. Cooke ed. 1961) (J. Madison); accord, 1 T. Benton, Abridgement of the Debates of Congress, from 1789 to 1856, p. 141 (1857) (explaining that the First Amendment will strengthen American democracy by giving "'the people'" a right to "'publicly address their representatives,'" "'privately advise them,'" or "'declare their sentiments by petition to the whole body'" (quoting James Madison)). Accordingly, the First Amendment advances not only the individual's right to engage in political speech, but also the public's interest in preserving a democratic order in which collective speech *matters*.

What has this to do with corruption? It has everything to do with corruption. Corruption breaks the constitutionally necessary "chain of communication" between the people and their representatives. It derails the essential speech-to-government-action tie. Where enough money calls the tune, the general public will not be heard. Insofar as corruption cuts the link between political thought and political action, a free marketplace of political ideas loses its point. That is one reason why the Court has stressed the constitutional importance of Congress' concern that a few large donations not drown out the voices of the many. See, *e. g.*, *Buckley*, 424 U. S., at 26–27.

That is also why the Court has used the phrase "subversion of the political process" to describe circumstances in which "[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns."

NCPAC, 470 U. S., at 497. See also *Federal Election Comm'n* v. *National Right to Work Comm.*, 459 U. S. 197, 208 (1982) (the Government's interests in preventing corruption "directly implicate the integrity of our electoral process" (internal quotation marks omitted)). See generally R. Post, Citizens Divided: Campaign Finance Reform and the Constitution 60–66 (2014) (arguing that the efficacy of American democracy depends on "electoral integrity" and the responsiveness of public officials to public opinion).

The "appearance of corruption" can make matters worse. It can lead the public to believe that its efforts to communicate with its representatives or to help sway public opinion have little purpose. And a cynical public can lose interest in political participation altogether. See *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 390 (2000) ("[T]he cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance"). Democracy, the Court has often said, cannot work unless "the people have faith in those who govern." *United States* v. *Mississippi Valley Generating Co.*, 364 U. S. 520, 562 (1961).

The upshot is that the interests the Court has long described as preventing "corruption" or the "appearance of corruption" are more than ordinary factors to be weighed against the constitutional right to political speech. Rather, they are interests rooted in the First Amendment itself. They are rooted in the constitutional effort to create a democracy responsive to the people—a government where laws reflect the very thoughts, views, ideas, and sentiments, the expression of which the First Amendment protects. Given that end, we can and should understand campaign finance laws as resting upon a broader and more significant constitutional rationale than the plurality's limited definition of "corruption" suggests. We should see these laws as seeking in significant part to strengthen, rather than weaken, the First Amendment. To say this is not to deny the potential for

conflict between (1) the need to permit contributions that pay for the diffusion of ideas and (2) the need to limit payments in order to help maintain the integrity of the electoral process. But that conflict takes place within, not outside, the First Amendment's boundaries.

B

Since the kinds of corruption that can destroy the link between public opinion and governmental action extend well beyond those the plurality describes, the plurality's notion of corruption is flatly inconsistent with the basic constitutional rationale I have just described. Thus, it should surprise no one that this Court's case law (*Citizens United* excepted) insists upon a considerably broader definition.

In *Buckley*, for instance, the Court said explicitly that aggregate limits were constitutional because they helped "prevent evasion . . . [through] huge contributions to the candidate's political party," 424 U. S., at 38 (the contrary to what the plurality today seems to believe, see *ante*, at 224–226). Moreover, *Buckley* upheld the base limits in significant part because they helped thwart "the appearance of corruption stemming from public awareness of the opportunities for abuse *inherent in a regime of large individual financial contributions*." 424 U. S., at 27 (emphasis added). And it said that Congress could reasonably conclude that criminal laws forbidding "the giving and taking of bribes" did *not* adequately "deal with the reality or appearance of corruption." *Id.*, at 28. Bribery laws, the Court recognized, address "only the most blatant and specific attempts of those with money to influence governmental action." *Ibid.* The concern with corruption extends further.

Other cases put the matter yet more strongly. In *Federal Election Comm'n* v. *Beaumont*, 539 U. S. 146 (2003), for example, the Court found constitutional a ban on direct contributions by corporations because of the need to prevent corruption, properly "understood not only as *quid pro quo*

agreements, but also as undue influence on an officeholder's judgment." *Id.*, at 155–156. In *Federal Election Comm'n* v. *Colorado Republican Federal Campaign Comm.*, 533 U. S. 431, 441, 457–460 (2001) (*Colorado II*), the Court upheld limits imposed upon coordinated expenditures among parties and candidates because it found they thwarted corruption and its appearance, again understood as including "undue influence" by wealthy donors. In *Shrink Missouri*, the Court upheld limitations imposed by the Missouri Legislature upon contributions to state political candidates, not only because of the need to prevent bribery, but also because of "the broader threat from politicians too compliant with the wishes of large contributors." 528 U. S., at 389.

C

Most important, in *McConnell*, this Court considered the constitutionality of BCRA, an Act that set new limits on "soft money" contributions to political parties. "Soft money" referred to funds that, prior to BCRA, were freely donated to parties for activities other than directly helping elect a federal candidate—activities such as voter registration, "get-out-the-vote" drives, and advertising that did not expressly advocate a federal candidate's election or defeat. 540 U. S., at 122–124. BCRA imposed a new ban on soft money contributions to national party committees, and greatly curtailed them in respect to state and local parties. *Id.*, at 133–134, 161–164.

The Court in *McConnell* upheld these new contribution restrictions under the First Amendment for the very reason the plurality today discounts or ignores. Namely, the Court found they thwarted a significant risk of corruption—understood not as *quid pro quo* bribery, but as privileged access to and pernicious influence upon elected representatives.

In reaching its conclusion in *McConnell*, the Court relied upon a vast record compiled in the District Court. That rec-

ord consisted of over 100,000 pages of material and included testimony from more than 200 witnesses. See 251 F. Supp. 2d 176, 209 (DC 2003) (*per curiam*). What it showed, in detail, was the web of relationships and understandings among parties, candidates, and large donors that underlies privileged access and influence. See *McConnell*, *supra*, at 146–152, 154–157, 167–171, 182–184. The District Judges in *McConnell* made clear that the record did "*not* contain any evidence of bribery or vote buying in exchange for donations of nonfederal money." 251 F. Supp. 2d, at 481 (opinion of Kollar-Kotelly, J.) (emphasis added). Indeed, no one had identified a "single discrete instance of *quid pro quo* corruption" due to soft money. *Id.*, at 395 (opinion of Henderson, J.). But what the record did demonstrate was that enormous soft money contributions, ranging between $1 million and $5 million among the largest donors, enabled wealthy contributors to gain disproportionate "access to federal lawmakers" and the ability to "influenc[e] legislation." *Id.*, at 481 (opinion of Kollar-Kotelly, J.). There was an indisputable link between generous political donations and opportunity after opportunity to make one's case directly to a Member of Congress.

Testimony by elected officials supported this conclusion. See, *e. g.*, *ibid.* ("'Large donors of both hard and soft money receive special treatment'" (Sen. Simpson)); *id.*, at 482 ("'Donations, including soft money donations to political parties, do affect how Congress operates. It's only natural, and happens all too often, that a busy Senator with 10 minutes to spare will spend those minutes returning the call of a large soft money donor'" (Sen. Boren)); *id.*, at 496 ("'At a minimum, large soft money donations purchase an opportunity for the donors to make their case to elected officials . . . '" (Sen. McCain)). Furthermore, testimony from party operatives showed that national political parties had created "major donor programs," through which they openly "of-

fer[ed] greater access to federal office holders as the donations gr[e]w larger." *Id.*, at 502. I have placed in Appendix A more examples of the kind of evidence that filled the District Court record in *McConnell*.

This Court upheld BCRA's limitations on soft money contributions by relying on just the kind of evidence I have described. We wrote:

> "The evidence in the record shows that candidates and donors alike have in fact exploited the soft-money loophole, the former to increase their prospects of election and the latter to create debt on the part of officeholders . . . . Plaintiffs argue that without concrete evidence of an instance in which a federal officeholder has actually switched a vote [in exchange for soft money] . . . , Congress has not shown that there exists real or apparent corruption. . . . *[P]laintiffs conceive of corruption too narrowly.* Our cases have firmly established that Congress' legitimate interest extends beyond preventing simple cash-for-votes corruption to curbing 'undue influence on an officeholder's judgment, and the appearance of such influence.'" 540 U. S., at 146, 149–150 (quoting *Colorado II*, *supra*, at 441; emphasis added; paragraphs and paragraph breaks omitted).

We specifically rejected efforts to define "corruption" in ways similar to those the plurality today accepts. We added:

> "Just as troubling to a functioning democracy as classic *quid pro quo* corruption is the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder." 540 U. S., at 153.

Insofar as today's decision sets forth a significantly narrower definition of "corruption," and hence of the public's interest in political integrity, it is flatly inconsistent with *McConnell*.

D

One case, however, contains language that offers the plurality support. That case is *Citizens United*. There, as the plurality points out, *ante*, at 207–208, the Court said that "[w]hen *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption." 558 U. S., at 359. Further, the Court said that *quid pro quo* corruption does not include "influence over or access to elected officials," because " 'generic favoritism or influence theory . . . is at odds with standard First Amendment analyses.' " *Ibid.* (quoting *McConnell*, *supra*, at 296 (KENNEDY, J., concurring in judgment in part and dissenting in part)).

How should we treat these statements from *Citizens United* now? They are not essential to the Court's holding in the case—at least insofar as it can be read to require federal law to treat corporations and trade unions like individuals when they independently pay for, *e. g.*, television advertising during the last 60 days of a federal election. *Citizens United*, *supra*, at 365. Taken literally, the statements cited simply refer to and characterize still-earlier Court cases. They do not require the more absolute reading that the plurality here gives them.

More than that. Read as the plurality reads them today, the statements from *Citizens United* about the proper contours of the corruption rationale conflict not just with language in the *McConnell* opinion, but with *McConnell*'s very holding. See *supra*, at 240–242. Did the Court in *Citizens United* intend to overrule *McConnell*? I doubt it, for if it did, the Court or certainly the dissent would have said something about it. The total silence of all opinions in *Citizens United* with respect to this matter argues strongly in favor of treating the language quoted above as dictum, as an overstatement, or as limited to the context in which it appears. *Citizens United* itself contains language that supports the last mentioned reading, for it says that "[*Buckley*] did not

extend this rationale [about the reality or appearance of corruption] to *independent* expenditures, and the Court does not do so here." 558 U. S., at 357 (emphasis added). And it adds that, while "[t]he BCRA record establishes that certain donations to political parties, called 'soft money,' were made to gain access to elected officials," "*[t]his case, however, is about independent expenditures, not soft money.*" *Id.*, at 360–361 (emphasis added).

The plurality's use of *Citizens United*'s narrow definition of corruption here, however, is a different matter. That use does not come accompanied with a limiting context (independent expenditures by corporations and unions) or limiting language. It applies to the whole of campaign finance regulation. And, as I have pointed out, it is flatly inconsistent with the broader definition of corruption upon which *McConnell*'s holding depends.

So: Does the Court intend today to overrule *McConnell*? Or does it intend to leave *McConnell* and BCRA in place? The plurality says the latter. *Ante*, at 209, n. 6 ("Our holding about the constitutionality of the aggregate limits clearly does not overrule *McConnell*'s holding about 'soft money' "). But how does the plurality explain its rejection of the broader definition of corruption, upon which *McConnell*'s holding depends? Compare *ante*, at 206–209, with *McConnell*, *supra*, at 146, 149–153.

III

The plurality invalidates the aggregate contribution limits for a second reason. It believes they are no longer needed to prevent contributors from circumventing federal limits on direct contributions to individuals, political parties, and political action committees. *Ante*, at 210–218. Cf. *Buckley*, 424 U. S., at 38 (aggregate limits "prevent evasion" of base contribution limits). Other "campaign finance laws," combined with "experience" and "common sense," foreclose the various

circumvention scenarios that the Government hypothesizes. *Ante*, at 216. Accordingly, the plurality concludes, the aggregate limits provide no added benefit.

The plurality is wrong. Here, as in *Buckley*, in the absence of limits on aggregate political contributions, donors can, and likely will, find ways to channel millions of dollars to parties and to individual candidates, producing precisely the kind of "corruption" or "appearance of corruption" that previously led the Court to hold aggregate limits constitutional. Those opportunities for circumvention will also produce the type of corruption that concerns the plurality today. The methods for using today's opinion to evade the law's individual contribution limits are complex, but they are well known, or will become well known, to party fundraisers. I shall describe three.

A

Example One: Gifts for the Benefit of the Party. Campaign finance law permits each individual to give $64,800 over two years to a national party committee. 2 U. S. C. § 441a(a)(1)(B); 78 Fed. Reg. 8532 (2013). The two major political parties each have three national committees. *Ante*, at 193, n. 1. Federal law also entitles an individual to give $20,000 to a state party committee over two years. § 441a(a)(1)(D). Each major political party has 50 such committees. Those individual limits mean that, in the absence of any aggregate limit, an individual could legally give to the Republican Party or to the Democratic Party about $1.2 million over two years. See Appendix B, Table 1, *infra*, at 268. To make it easier for contributors to give gifts of this size, each party could create a "Joint Party Committee," comprising all of its national and state party committees. The titular heads could be the Speaker of the House of Representatives and the Minority Leader of the House. A contributor could then write a single check to the Joint Party Committee—and its staff would divide the funds so that each

constituent unit receives no more than it could obtain from the contributor directly ($64,800 for a national committee over two years, $20,000 for a state committee over the same). Before today's decision, the total size of Rich Donor's check to the Joint Party Committee was capped at $74,600—the aggregate limit for donations to political parties over a 2-year election cycle. See § 441a(a)(3)(B); 78 Fed. Reg. 8532. After today's decision, Rich Donor can write a single check to the Joint Party Committee in an amount of about $1.2 million.

Will political parties seek these large checks? Why not? The recipient national and state committees can spend the money to buy generic party advertisements, say, television commercials or bumper stickers saying "Support Republicans," "Support Democrats," or the like. They also can transfer the money to party committees in battleground States to increase the chances of winning hotly contested seats. See § 441a(a)(4) (permitting national or state political committees to make unlimited "transfers" to other committees "of the same political party").

Will party officials and candidates solicit these large contributions from wealthy donors? Absolutely. Such contributions will help increase the party's power, as well as the candidate's standing among his colleagues.

Will elected officials be particularly grateful to the large donor, feeling obliged to provide him special access and influence, and perhaps even a *quid pro quo* legislative favor? That is what we have previously believed. See *McConnell*, 540 U. S., at 182 ("Large soft-money donations at a candidate's or officeholder's behest give rise to all of the same corruption concerns posed by contributions made directly to the candidate or officeholder"); *id.*, at 308 (opinion of KENNEDY, J.) ("The making of a solicited gift is a *quid* both to the recipient of the money and to the one who solicits the payment"); *Colorado II*, 533 U. S., at 460, n. 23 (explaining how a candidate can "become a player [in his party] beyond

his own race" by "directing donations to the party and making sure that the party knows who raised the money," and that "the donor's influence is multiplied" in such instances). And, as the statements collected in Appendix A, *infra*, make clear, we have believed this with good reason.

Example Two: Donations to Individual Candidates (The $3.6 Million Check). The first example significantly *understates* the problem. That is because federal election law also allows a single contributor to give $5,200 to each party candidate over a 2-year election cycle (assuming the candidate is running in both a primary and a general election). § 441a(a)(1)(A); 78 Fed. Reg. 8532. There are 435 party candidates for House seats and 33 party candidates for Senate seats in any given election year. That makes an additional $2.4 million in allowable contributions. Thus, without an aggregate limit, the law will permit a wealthy individual to write a check, over a 2-year election cycle, for $3.6 million—all to benefit his political party and its candidates. See Appendix B, Table 2(a), *infra*, at 268.

To make it easier for a wealthy donor to make a contribution of this size, the parties can simply enlarge the composition of the Joint Party Committee described in *Example One*, so that it now includes party candidates. And a party can proliferate such joint entities, perhaps calling the first the "Smith Victory Committee," the second the "Jones Victory Committee," and the like. See 11 CFR § 102.17(c)(5) (2012). (I say "perhaps" because too transparent a name might call into play certain earmarking rules. But the Federal Election Commission's (FEC) database of joint fundraising committees in 2012 shows similarly named entities, *e. g.*, "Landrieu Wyden Victory Fund," etc.)

As I have just said, without any aggregate limit, the law will allow Rich Donor to write a single check to, say, the Smith Victory Committee, for up to $3.6 million. This check represents "the total amount that the contributor could contribute to all of the participants" in the committee over a

2-year cycle. § 102.17(c)(5). The committee would operate under an agreement that provides a "formula for the allocation of fundraising proceeds" among its constituent units. § 102.17(c)(1). And that "formula" would divide the proceeds so that no committee or candidate receives more than it could have received from Rich Donor directly—$64,800, $20,000, or $5,200. See § 102.17(c)(6).

So what is wrong with that? The check is considerably larger than *Example One*'s check. But is there anything else wrong? The answer is yes, absolutely. The law will also permit a party and its candidates to shift most of Rich Donor's contributions to a *single* candidate, say, Smith. Here is how:

The law permits each candidate and each party committee in the Smith Victory Committee to write Candidate Smith a check directly. For his primary and general elections combined, they can write checks of up to $4,000 (from each candidate's authorized campaign committee) and $10,000 (from each state and national committee). 2 U. S. C. §§ 432(e)(3)(B), 441a(a)(2)(A); 11 CFR § 110.3(b). This yields a potential $1,872,000 (from candidates) plus $530,000 (from party committees). Thus, the law permits the candidates and party entities to redirect $2.37 million of Rich Donor's $3.6 million check to Candidate Smith. It also permits state and national committees to contribute to Smith's general election campaign through making coordinated expenditures—in amounts that range from $46,600 to $2.68 million for a general election (depending upon the size of Smith's State and whether he is running for a House or Senate seat). 78 Fed. Reg. 8530–8532. See Appendix B, Table 2(b), *infra*, at 269.

The upshot is that Candidate Smith can receive at least $2.37 million and possibly the full $3.6 million contributed by Rich Donor to the Smith Victory Committee, even though the funds must first be divided up among the constituent units before they can be rerouted to Smith. Nothing re-

quires the Smith Victory Committee to explain in advance to Rich Donor all of the various transfers that will take place, and nothing prevents the entities in the committee from informing the donor and the receiving candidate after the fact what has transpired. Accordingly, the money can be donated and rerouted to Candidate Smith without the donor having violated the base limits or any other FEC regulation. And the evidence in the *McConnell* record reprinted in Appendix A, *infra*—with respect to soft money contributions—makes clear that Candidate Smith will almost certainly come to learn from whom he has received this money.

The parties can apply the same procedure to other large donations, channeling money from Rich Donor Two to Candidate Jones. If 10 or 20 candidates face particularly tight races, party committees and party candidates may work together to channel Rich Donor One's multimillion dollar contribution to the most embattled candidate (*e. g.*, Candidate Smith), Rich Donor Two's multimillion dollar contribution to the second most embattled candidate (*e. g.*, Candidate Jones), and so on down the line. If this does not count as evasion of the base limits, what does? Present aggregate limits confine the size of any individual gift to $123,200. Today's opinion creates a loophole measured in the millions.

Example Three: Proliferating Political Action Committees (PACs). Campaign finance law prohibits an individual from contributing (1) more than $5,200 to any candidate in a federal election cycle and (2) more than $5,000 to a PAC in a calendar year. 2 U. S. C. §§ 441a(a)(1)(A), (C); 78 Fed. Reg. 8532. It also prohibits (3) any PAC from contributing more than $10,000 to any candidate in an election cycle. § 441a(a)(2)(A). But the law does not prohibit an individual from contributing (within the current $123,200 biannual aggregate limit) $5,000 to each of an unlimited total number of PACs. And there, so to speak, lies the rub.

Here is how, without any aggregate limits, a party will be able to channel $2 million from each of 10 rich donors to each

of 10 embattled candidates. Groups of party supporters—individuals, corporations, or trade unions—create 200 PACs. Each PAC claims it will use the funds it raises to support several candidates from the party, though it will favor those who are most endangered. (Each PAC qualifies for "multicandidate" status because it has received contributions from more than 50 persons and has made contributions to five federal candidates at some point previously. § 441a(a)(4); 11 CFR § 100.5(e)(3).) Over a 2-year election cycle, Rich Donor One gives $10,000 to each PAC ($5,000 per year)—yielding $2 million total. Rich Donor Two does the same. So, too, do the other eight rich donors. This brings their total donations to $20 million, disbursed among the 200 PACs. Each PAC will have collected $100,000, and each can use its money to write 10 checks of $10,000—to each of the 10 most embattled candidates in the party (over two years). See Appendix B, Table 3, *infra*, at 270. Every embattled candidate, receiving a $10,000 check from 200 PACs, will have collected $2 million.

The upshot is that 10 rich donors will have contributed $2 million each, and 10 embattled candidates will have collected $2 million each. In this example, unlike *Example Two*, the recipient candidates may not know which of the 10 rich donors is personally responsible for the $2 million he or she receives. But the recipient candidate is highly likely to know who the 10 rich donors are, and to feel appropriately grateful. Moreover, the ability of a small group of donors to contribute this kind of money to threatened candidates is not insignificant. In the example above—with 10 rich donors giving $2 million each, and 10 embattled candidates receiving $2 million each—the contributions would have been enough to finance a considerable portion of, and perhaps all of, the candidates' races in the 2012 elections. See Appendix C, Table 1, *infra*, at 271 (showing that in 2012, the average winning House candidate spent $1.6 million and the average winning Senate candidate spent $11.5 million).

B

The plurality believes that the three scenarios I have just depicted either pose no threat or cannot or will not take place. It does not believe the scenario depicted in *Example One* is any cause for concern, because it involves only "general, broad-based support of a political party." *Ante*, at 225. Not so. A candidate who solicits a multimillion dollar check for his party will be deeply grateful to the checkwriter and surely could reward him with a *quid pro quo* favor. The plurality discounts the scenarios depicted in *Example Two* and *Example Three* because it finds such circumvention tactics "illegal under current campaign finance laws," "implausible," or "divorced from reality." *Ante*, at 211, 213, 216. But they are not.

The plurality's view depends in large part upon its claim that since this Court decided *Buckley* in 1976, changes in either statutory law or applicable regulations have come to make it difficult, if not impossible, for these circumvention scenarios to arise. Hence, it concludes, there is no longer a need for aggregate contribution limits. See *ante*, at 200–202, 210–218. But a closer examination of the five legal changes to which the plurality points makes clear that those changes cannot effectively stop the abuses that I have depicted.

First, the plurality points out that in 1976 (a few months after this Court decided *Buckley*) Congress "added limits on contributions *to* political committees," *i. e.*, to PACs. *Ante*, at 200; accord, 90 Stat. 487 (codified at 2 U. S. C. § 441a(a)(1)(C)). But *Example Three*, the here-relevant example, takes account of those limits, namely, $5,000 to a PAC in any given year. And it shows that the per-PAC limit does not matter much when it comes to the potential for circumvention, as long as party supporters can create dozens or hundreds of PACs. Federal law places no upper limit on the number of PACs supporting a party or a group of party candidates that can be established. And creating a PAC is pri-

marily a matter of paperwork, a knowledgeable staff person, and a little time.

Second, the plurality points out that in 1976, Congress "also added an antiproliferation rule prohibiting donors from creating or controlling multiple affiliated political committees." *Ante*, at 201. The rule provides that "all contributions made by political committees established or financed or maintained or controlled" by the same corporation, labor organization, person, or group of persons "shall be considered to have been made by a single political committee." § 441a(a)(5). But different supporters can create different PACs. Indeed, there were roughly 2,700 "nonconnected" PACs (*i. e.*, PACs not connected to a specific corporation or labor union) operating during the 2012 elections. *Ante*, at 213. In a future without aggregate contribution limits, far more nonconnected PACs will likely appear. The plurality also notes that the FEC can examine certain "'circumstantial factors,'" such as "'common or overlapping membership'" or "'similar patterns of contributions,'" to determine whether a group of PACs are affiliated. *Ibid.* (quoting 11 CFR § 100.5(g)(4)(ii)). But the ultimate question in the affiliation inquiry is whether "one committee or organization [has] been established, financed, maintained or controlled by another committee or sponsoring organization." § 100.5(g)(4)(ii). Just because a group of multicandidate PACs all support the same party and all decide to donate funds to a group of endangered candidates in that party does not mean they will qualify as "affiliated" under the relevant definition. This rule appears inadequate to stop the sort of circumvention depicted in *Example Three*.

Third, the plurality says that a post-*Buckley* regulation has strengthened the statute's earmarking provision. *Ante*, at 201–202. Namely, the plurality points to a rule promulgated by the FEC in 1976, specifying that earmarking includes any "designation 'whether direct or indirect, express or implied, oral or written.'" *Ibid.* (quoting 11 CFR

§ 110.6(b)); accord, 41 Fed. Reg. 35950 (1976). This means that if Rich Donor were to give $5,000 to a PAC while "designat[ing]" (in any way) that the money go to Candidate Smith, those funds must count toward Rich Donor's total allowable contributions to Smith—$5,200 per election cycle. But the virtually identical earmarking provision in effect when this Court decided *Buckley* would have required the same thing. That provision also counted, when applying the base contribution limits, "all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to a candidate." 88 Stat. 1264; accord, 2 U. S. C. § 441a(a)(8). What is the difference?

Fourth, the plurality points out that the FEC's regulations "specify that an individual who has contributed to a particular candidate committee may not also contribute to a *single*-candidate committee for that candidate." *Ante*, at 202 (citing 11 CFR § 110.1(h)(1); emphasis added). The regulations, however, do not prevent a person who has contributed to a candidate from also contributing to *multi*-candidate committees that support the candidate. Indeed, the rules specifically authorize such contributions. See § 110.1(h) ("A person *may contribute* to a candidate . . . and *also contribute* to a political committee which has supported, or anticipates supporting, the same candidate in the same election," as long as the political committee is "not the candidate's principal campaign committee" or a "single candidate committee" (emphasis added)). *Example Three* illustrates the latter kind of contribution. And briefs before us make clear that the possibility for circumventing the base limits through making such contributions is a realistic, not an illusory, one. See Brief for Appellee 36 (demonstrating that many PACs today explain in their public materials just what fairly small group of candidates they intend to support); Brief for Americans for Campaign Reform as *Amicus Curiae* 14–15 (similar).

Fifth, the plurality points to another FEC regulation (also added in 1976), which says that "an individual who has contributed to a candidate" may not "also contribute to a political committee that has supported or anticipates supporting the same candidate if the individual knows that 'a substantial portion [of his contribution] will be contributed to, or expended on behalf of,' that candidate." *Ante*, at 202 (quoting 11 CFR § 110.1(h)(2); brackets in original); accord, 41 Fed. Reg. 35948. This regulation is important, for in principle, the FEC might use it to prevent the circumstances that *Examples Two* and *Three* set forth from arising. And it is not surprising that the plurality relies upon the existence of this rule when it describes those circumstances as "implausible," "illegal," or "divorced from reality." *Ante*, at 211, 213, 216.

In fact, however, this regulation is not the strong anti-circumvention weapon that the plurality imagines. Despite the plurality's assurances, it does not "disarm" the possibilities for circumvention. *Ante*, at 211. That is because the regulation requires a showing that donors have "*knowledge* that a substantial portion" of their contributions will be used by a PAC to support a candidate to whom they have already contributed. § 110.1(h)(2) (emphasis added). And "knowledge" is hard to prove.

I have found nine FEC cases decided since the year 2000 that refer to this regulation. In all but one, the FEC failed to find the requisite "knowledge"—despite the presence of *Example Two* or *Example Three* circumstances. See Factual and Legal Analysis, *In re: Transfund PAC*, Matter Under Review (MUR) 6221, p. 11 (FEC, June 7, 2010) (although the donor "might reasonably infer that some portion of his contribution" to a candidate's Leadership PAC would be used to support the candidate, "such an inference alone does not suggest that [he] had 'actual knowledge' " of such); Factual and Legal Analysis, *In re: John Shadegg's Friends*, MUR 5968, pp. 3, 6–7 (FEC, Nov. 10, 2008) ("[T]here is no basis on which to conclude that [the donors] knew that the

funds they contributed to LEAD PAC would be used to support the Shadegg Committee" even though Congressman Shadegg solicited the donations and LEAD PAC was Congressman Shadegg's Leadership PAC); Factual and Legal Analysis, *In re: Walberg for Congress*, MUR 5881, pp. 6, 9–11 (FEC, Aug. 15, 2007) (finding seven contributors, who gave to a candidate and to a PAC that provided 86% of the candidate's financing, had not shown "knowledge"); Factual and Legal Analysis, *In re: Matt Brown for Senate*, MUR 5732, p. 11 (FEC, Apr. 4, 2007) ("Though it may be reasonable to infer that the individual donors solicited by Brown gave to the State Parties under the assumption that some portion of their contribution might then be donated to the Brown Committee, such an inference alone is insufficient to find reason to believe 11 CFR § 110.1(h) has been violated"); First General Counsel's Report, *In re: Liffrig for Senate*, MUR 5678, pp. 8–9 (FEC, Nov. 27, 2006) (similar); First General Counsel's Report, *In re: Nesbitt*, MUR 5445, pp. 11–12 (FEC, Feb. 2, 2005) (similar); First General Counsel's Report, *In re: Keystone Corp.*, MUR 5019, pp. 23–29 (FEC, Feb. 5, 2001) (similar); General Counsel's Report #2, *In re: Boston Capital Corp.*, MUR 4538, pp. 17–18 (FEC, Mar. 10, 2000) (recommending the FEC take no action with respect to the § 110.1(h) issue). Given this record of FEC (in)activity, my reaction to the plurality's reliance upon agency enforcement of this rule (as an adequate substitute for Congress' aggregate limits) is like Oscar Wilde's after reading Dickens' account of the death of Little Nell: "One must have a heart of stone," said Wilde, "to read [it] without laughing." Oxford Dictionary of Humorous Quotations 86 (N. Sherrin 2d ed. 2001).

I have found one contrary example—the single example to which the plurality refers. *Ante*, at 213 (citing Conciliation Agreement, *In re Riley*, MURs 4568, 4633, 4634, 4736 (FEC, Dec. 19, 2001)). In that case, the FEC found probable cause to believe that three individual contributors to several PACs

had the requisite "knowledge" that the PACs would use a "substantial portion" of their contributions to support a candidate to whom they had already contributed—Sam Brownback, a candidate for the Senate (for two of the contributors), and Robert Riley, a candidate for the House (for the third). The individuals had made donations to several PACs operating as a network, under the direction of a single political consulting firm. The two contributors to Sam Brownback were his parents-in-law, and the FEC believed they might be using the PAC network to channel extra support to him. The contributor to Robert Riley was his son, and the FEC believed he might be doing the same. The facts in this case are unusual, for individual contributors are not typically relatives of the candidates they are seeking to support, and ordinary PACs do not tend to work in coordination under the direction of a consulting firm. In any event, this single swallow cannot make the plurality's summer.

Thus, it is not surprising that throughout the many years this FEC regulation has been in effect, political parties and candidates have established ever more joint fundraising committees (numbering over 500 in the last federal elections); candidates have established ever more "Leadership PACs" (numbering over 450 in the last elections); and party supporters have established ever more multicandidate PACs (numbering over 3,000 in the last elections). See Appendix C, Tables 2–3, *infra*, at 271–272; FEC, 2014 Committee Summary (reporting the number of "qualified" (or multicandidate) PACs in 2012), online at http://www.fec.gov/data/CommitteeSummary.do (all Internet materials as visited Mar. 28, 2014, and available in Clerk of Court's case file).

Using these entities, candidates, parties, and party supporters can transfer and, we are told, have transferred large sums of money to specific candidates, thereby avoiding the base contribution limits in ways that *Examples Two* and *Three* help demonstrate. See Brief for Appellee 38–39, 53–54; Brief for Campaign Legal Center et al. as *Amici Curiae*

12–15; Brief for Democratic Members of the United States House of Representatives as *Amici Curiae* 28–29. They have done so without drawing FEC prosecution—at least not according to my (and apparently the plurality's) search of publicly available records. That is likely because in the real world, the methods of achieving circumvention are more subtle and more complex than our stylized *Examples Two* and *Three* depict. And persons have used these entities to channel money to candidates without any individual breaching the current aggregate $123,200 limit. The plurality now removes that limit, thereby permitting wealthy donors to make aggregate contributions not of $123,200, but of several millions of dollars. If the FEC regulation has failed to plug a small hole, how can it possibly plug a large one?

IV

The plurality concludes that even if circumvention were a threat, the aggregate limits are "poorly tailored" to address it. *Ante*, at 218. The First Amendment requires " 'a fit that is . . . reasonable,' " and there is no such "fit" here because there are several alternative ways Congress could prevent evasion of the base limits. *Ibid.* (quoting *Fox*, 492 U. S., at 480). For instance, the plurality posits, Congress (or the FEC) could "tighten . . . transfer rules"; it could require "contributions above the current aggregate limits to be deposited into segregated, nontransferable accounts and spent only by their recipients"; it could define "how many candidates a PAC must support in order to ensure that 'a substantial portion' of a donor's contribution is not rerouted to a certain candidate"; or it could prohibit "donors who have contributed the current maximum sums from further contributing to political committees that have indicated they will support candidates to whom the donor has already contributed." *Ante*, at 221–223 (quoting 11 CFR § 110.1(h)(2)).

The plurality, however, does not show, or try to show, that these hypothetical alternatives could effectively replace ag-

gregate contribution limits. Indeed, it does not even "opine on the validity of any particular proposal," *ante*, at 223—presumably because these proposals themselves could be subject to constitutional challenges. For the most part, the alternatives the plurality mentions were similarly available at the time of *Buckley*. Their hypothetical presence did not prevent the Court from upholding aggregate limits in 1976. How can their continued hypothetical presence lead the plurality now to conclude that aggregate limits are "poorly tailored"? See *ante*, at 218. How can their continued hypothetical presence lead the Court to overrule *Buckley* now?

In sum, the explanation of why aggregate limits are needed is complicated, as is the explanation of why other methods will not work. But the conclusion is simple: There is no "substantial mismatch" between Congress' legitimate objective and the "means selected to achieve it." *Ante*, at 199. The Court, as in *Buckley*, should hold that aggregate contribution limits are constitutional.

V

The District Court in this case, holding that *Buckley* foreclosed McCutcheon's constitutional challenge to the aggregate limits, granted the Government's motion to dismiss the complaint prior to a full evidentiary hearing. See 893 F. Supp. 2d 133, 140–141 (DC 2012). If the plurality now believes the District Court was wrong, then why does it not return the case for the further evidentiary development which has not yet taken place?

In the past, when evaluating the constitutionality of campaign finance restrictions, we have typically relied upon an evidentiary record amassed below to determine whether the law served a compelling governmental objective. And, typically, that record contained testimony from Members of Congress (or state legislators) explaining why Congress (or the legislature) acted as it did. See, *e. g.*, *McConnell*, 540 U. S., at 147–154 (upholding federal restrictions on soft money by

drawing on an extensive District Court record that contained declarations from current and former Members of Congress); *Colorado II*, 533 U. S., at 457–465 (upholding federal limits on coordinated expenditures between parties and candidates on the basis of a summary judgment record that contained declarations from party operatives, fundraisers, and Members of Congress); *Shrink Missouri*, 528 U. S., at 393 (upholding Missouri's contribution limits on the basis of the lower court record, which contained similar declarations). If we are to overturn an Act of Congress here, we should do so on the basis of a similar record.

For one thing, an evidentiary record can help us determine whether or the extent to which we should defer to Congress' own judgments, particularly those reflecting a balance of the countervailing First Amendment interests I have described. Determining whether anticorruption objectives justify a particular set of contribution limits requires answering empirically based questions and applying significant discretion and judgment. To what extent will unrestricted giving lead to corruption or its appearance? What forms will any such corruption take? To what extent will a lack of regulation undermine public confidence in the democratic system? To what extent can regulation restore it?

These kinds of questions, while not easily answered, are questions that Congress is far better suited to resolve than are judges. Thus, while court review of contribution limits has been and should be "rigorous," *Buckley*, 424 U. S., at 29, we have also recognized that "deference to legislative choice is warranted," *Beaumont*, 539 U. S., at 155. And that deference has taken account of facts and circumstances set forth in an evidentiary record.

For another thing, a comparison of the plurality's opinion with this dissent reveals important differences of opinion on fact-related matters. We disagree, for example, on the possibilities for circumvention of the base limits in the absence of aggregate limits. We disagree about how effectively the

plurality's "alternatives" could prevent evasion. An evidentiary proceeding would permit the parties to explore these matters, and it would permit the courts to reach a more accurate judgment. The plurality rationalizes its haste to forgo an evidentiary record by noting that "the parties have treated the question as a purely legal one." *Ante*, at 203, n. 4. But without a doubt, the legal question—whether the aggregate limits are closely drawn to further a compelling governmental interest—turns on factual questions about whether corruption, in the absence of such limits, is a realistic threat to our democracy. The plurality itself spends pages citing figures about campaign spending to defend its "legal" conclusion. *Ante*, at 213–214, 215–216, 219–220. The problem with such reasoning is that this Court's expertise does not lie in marshaling facts in the primary instance. That is why in the past, when answering similar questions about the constitutionality of restrictions on campaign contributions, we have relied on an extensive evidentiary record produced below to inform our decision.

Without further development of the record, however, I fail to see how the plurality can now find grounds for overturning *Buckley*. The justification for aggregate contribution restrictions is strongly rooted in the need to ensure political integrity and ultimately in the First Amendment itself. Part II, *supra*. The threat to that integrity posed by the risk of special access and influence remains real. Part III, *supra*. Even taking the plurality on its own terms and considering solely the threat of *quid pro quo* corruption (*i. e.*, money-for-votes exchanges), the aggregate limits are a necessary tool to stop circumvention. Part III, *supra*. And there is no basis for finding a lack of "fit" between the threat and the means used to combat it, namely, the aggregate limits. Part IV, *supra*.

The plurality reaches the opposite conclusion. The result, as I said at the outset, is a decision that substitutes judges' understandings of how the political process works for the

understanding of Congress; that fails to recognize the difference between influence resting upon public opinion and influence bought by money alone; that overturns key precedent; that creates huge loopholes in the law; and that undermines, perhaps devastates, what remains of campaign finance reform.

With respect, I dissent.

APPENDIXES

A

Existence of Large Donations

Expert Report: "During the 1996 election cycle, the top 50 nonfederal money donors made contributions ranging from $530,000 to $3,287,175. . . . [S]oft money financing of party campaigning exploded in the 2000 election cycle. Soft money spending by the national parties reached $498 million, now 42% of their total spending. Raising a half billion dollars in soft money [in 2000] took a major effort by the national parties and elected officials, but they had the advantage of focusing their efforts on large donors. . . . The top 50 soft money donors . . . each contributed between $955,695 and $5,949,000." 251 F. Supp. 2d, at 440 (opinion of Kollar-Kotelly, J.) (citing T. Mann Expert Report, pp. 22, 24–25).

Candidate Solicitation of Large Donations

Judicial Finding of Fact: "It is a common practice for Members of Congress to be involved in raising both federal and nonfederal dollars for the national party committees, sometimes at the parties' request. The personal involvement of high-ranking Members of Congress is a major component of raising federal and nonfederal funds." 251 F. Supp. 2d, at 471.

Senator Paul Simon: "'While I was in Congress, the DCCC [(Democratic Congressional Campaign Committee)] and the

DSCC [(Democratic Senatorial Campaign Committee)] would ask Members to make phone calls seeking contributions to the party. They would assign me a list of names, people I had not known previously, and I would just go down the list. I am certain they did this because they found it more effective to have Members make calls.' " *Ibid.* (quoting Simon Decl. ¶7).

Senator John McCain: " '[T]he parties encourage Members of Congress to raise large amounts of soft money to benefit their own and others' re-election. At one recent caucus meeting, a Member of Congress was praised for raising $1.3 million dollars for the party. James Greenwood, a Republican Congressman from Pennsylvania, recently told the New York Times that House leaders consider soft money fundraising prowess in assigning chairmanships and other sought-after jobs. . . . I share Mr. Greenwood's concerns.' " 251 F. Supp. 2d, at 476 (quoting McCain Decl. ¶7).

Representative Christopher Shays: " 'Soft money is raised directly by federal candidates, officeholders, and national political party leaders. National party officials often raise these funds by promising donors access to elected officials. The national parties and national congressional campaign committees also request that Members of Congress make the calls to soft money donors to solicit more funds.' " 251 F. Supp. 2d, at 471 (quoting Shays Decl. ¶18).

Representative Marty Meehan: " 'Members of Congress raise money for the national party committees, and I have been involved in such fund-raising for the Democratic Party. At the request of the Party Members of Congress go to the [DCCC] and call prospective donors from lists provided by the Party to ask them to participate in Party events, such as DCCC dinners or [Democratic National Committee (DNC)] dinners. These lists typically consist of persons who have contributed to the Democratic Party in the past.' " 251 F. Supp. 2d, at 471 (quoting Meehan Decl. in *Republican National Committee* v. *FEC*, No. 98–CV–1207 (DDC), ¶6).

Lobbyist: "'Even though soft money contributions often go to political parties, the money is given so that the contributors can be close to, and recognized by, Members, Presidents, and Administration officials who have power. Members, not party staffers or party chairs, raise much of the large soft money contributions.'" 251 F. Supp. 2d, at 472 (quoting Robert Rozen Decl. ¶15, a partner in a lobbying firm).

Senator Fred Thompson: "'We have gone from basically a small donor system . . . where the average person believed they had a stake, believed they had a voice, to one of extremely large amounts of money, where you are not a player unless you are in the $100,000 or $200,000 range [or more] . . . .'" 251 F. Supp. 2d, at 433 (quoting 147 Cong. Rec. 4622 (2001)).

Former DNC official: "Former DNC and DSCC official and current lobbyist Robert Hickmott testifies that even incumbents with safe seats have incentives to raise money for the parties. He explains: 'Incumbents who were not raising money for themselves because they were not up for reelection would sometimes raise money for other Senators, or for challengers. They would send $20,000 to the DSCC and ask that it be entered on another candidate's tally. They might do this, for example, if they were planning to run for a leadership position and wanted to obtain support from the Senators they assisted. This would personally benefit them, in addition to doing their part to help retain Democratic control of the Senate, which would preserve the legislative power of all Democratic senators.'" 251 F. Supp. 2d, at 475–476 (quoting Hickmott Decl., Exh. A, ¶18).

Judicial Finding of Fact: "The DSCC maintains a 'credit' program that credits nonfederal money raised by a Senator or candidate to that Senator or candidate's state party. Amounts credited to a state party can reflect that the Senator or candidate solicited the donation, or can serve as a do-

nor's sign of tacit support for the state party or the Senate candidate." 251 F. Supp. 2d, at 477 (citations omitted).

Judicial Finding of Fact: "Federal candidates also raise nonfederal money through joint fundraising committees formed with national committees. One common method of joint fundraising is for a national congressional committee to form a separate joint fundraising committee with a federal candidate committee. . . . Two experts characterize the joint fundraising system as one 'in which Senate candidates in effect raise[ ] soft money for use in their own races.'" *Id.*, at 478 (quoting J. Krasno and F. Sorauf Expert Report, p. 13; citation omitted).

Donor Access and Influence

Judicial Finding of Fact: "The fact that Members of Congress are intimately involved in the raising of money for the political parties, particularly unlimited nonfederal money donations, creates opportunities for corruption. The record does not contain any evidence of bribery or vote buying in exchange for donations of nonfederal money; however, the evidence presented in this case convincingly demonstrates that large contributions, particularly those nonfederal contributions surpassing the federal limits, provide donors access to federal lawmakers which is a critical ingredient for influencing legislation, and which the Supreme Court has determined constitutes corruption." 251 F. Supp. 2d, at 481.

Judicial Finding of Fact: "Individual donors testify that contributions provide access to influence federal officeholders on issue of concern to them." *Id.*, at 498.

Political donor: "'I've been involved in political fundraising long enough to remember when soft money had little value to federal candidates. . . . [I]n recent election cycles, Members and national committees have asked soft money donors to write soft money checks to state and national parties solely in order to assist federal campaigns. Most soft money

donors don't ask and don't care why the money is going to a particular state party, a party with which they may have no connection. What matters is that the donor has done what the Member asked.'" *Id.*, at 472 (quoting Wade Randlett, Chief Executive Officer, Dashboard Technology, Decl. ¶¶6–9).

Political donor: "'[A]s a result of my $500,000 soft money donation to the DNC, I was offered the chance to attend events with the President, including events at the White House, a number of times. I was offered special access . . . .'" 251 F. Supp. 2d, at 499 (quoting Arnold Hiatt Decl. ¶9).

Senator Alan Simpson: "'Too often, Members' first thought is not what is right or what they believe, but how will it affect fundraising. Who, after all, can seriously contend that a $100,000 donation does not alter the way one thinks about—and quite possibly votes on—an issue? . . . When you don't pay the piper that finances your campaigns, you will never get any more money from that piper. Since money is the mother's milk of politics, you never want to be in that situation.'" 251 F. Supp. 2d, at 481 (quoting Simpson Decl. ¶10).

Senator Alan Simpson: "'Large donors of both hard and soft money receive special treatment. No matter how busy a politician may be during the day, he or she will always make time to see donors who gave large amounts of money. Staffers who work for Members know who the big donors are, and those people always get their phone calls returned first and are allowed to see the Member when others are not.'" 251 F. Supp. 2d, at 481–482 (quoting Simpson Decl. ¶9).

Senator David Boren: "'Donations, including soft money donations to political parties, do affect how Congress operates. It's only natural, and happens all too often, that a busy Senator with 10 minutes to spare will spend those minutes returning the call of a large soft money donor rather than the

call of any other constituent. . . . I know from my first-hand experience and from my interactions with other Senators that they did feel beholden to large donors.'" 251 F. Supp. 2d, at 482 (quoting Boren Decl. ¶¶7–8).

Senator Dale Bumpers: "[Senator Bumpers] had 'heard that some Members even keep lists of big donors in their offices,' and [stated] that 'you cannot be a good Democratic or good Republican Member and not be aware of who gave money to the party.'" 251 F. Supp. 2d, at 487 (quoting Bumpers Decl. ¶¶18, 20).

Representative Christopher Shays: "'The candidates know who makes these huge contributions and what these donors expect. Candidates not only solicit these funds themselves, they meet with big donors who have important issues pending before the government; and sometimes, the candidates' or the party's position appear to change after such meetings.'" 251 F. Supp. 2d, at 487 (quoting 148 Cong. Rec. 1305 (2002)).

Senator Warren Rudman: "'Large soft money contributions in fact distort the legislative process. They affect what gets done and how it gets done. They affect whom Senators and House members see, whom they spend their time with, what input they get . . . .'" 251 F. Supp. 2d, at 496 (quoting Rudman Decl. ¶¶7, 9).

Senator Paul Simon: "'While I realize some argue donors don't buy favors, they buy access. That access is the abuse and it affects all of us. . . . You feel a sense of gratitude for their support. . . . Because few people can afford to give over $20,000 or $25,000 to a party committee, those people who can will receive substantially better access to elected federal leaders than people who can only afford smaller contributions or can not afford to make any contributions. When you increase the amount that people are allowed to give, or let people give without limit to the parties, you in-

crease the danger of unfair access.'" 251 F. Supp. 2d, at 496 (quoting Simon Decl. ¶16).

Senator John McCain: "'At a minimum, large soft money donations purchase an opportunity for the donors to make their case to elected officials . . . in a way average citizens cannot.'" 251 F. Supp. 2d, at 496 (quoting McCain Decl. ¶6).

Senator Warren Rudman: "'I understand that those who opposed passage of the Bipartisan Campaign Reform Act, and those who now challenge its constitutionality in Court, dare elected officials to point to specific [instances of vote buying]. I think this misses the point altogether. [The access and influence accorded large donors] is inherently, endemically, and hopelessly corrupting. You can't swim in the ocean without getting wet; you can't be part of this system without getting dirty.'" 251 F. Supp. 2d, at 481 (quoting Rudman Decl. ¶10).

Judicial Finding of Fact: "Lobbyists state that their clients make donations to political parties to achieve access." 251 F. Supp. 2d, at 489.

Letter from Republican National Committee (RNC) staffer: "'As you know, [this executive] has been very generous to the RNC. If there is any way you can assist [in obtaining an appointment with an important Senator], it would be greatly appreciated.'" *Id.*, at 501 (quoting Memorandum from Tim Barnes, RNC, to Royal Roth).

Letter from RNC: "[The] letter from RNC to Senator Hagel staffer [asks] Senator Hagel to meet with a donor for four 'key' reasons including: . . . '[h]e just contributed $100,000 to the RNC.'" 251 F. Supp. 2d, at 501 (quoting a letter in the judicial record).

Judicial Finding of Fact: "The political parties have structured their donation programs so that donors are encouraged to contribute larger amounts in order to get access to more exclusive and intimate events at which Members of Congress are present. The evidence also shows that the parties use

the enticement of access to secure larger donations." *Id.*, at 502 (quoting a document in the judicial record).

B

Table 1: Donations To Support the Party

	Base Limit (per year)	Number (committees)	Years	Total Contributions (per 2-year cycle)
National Party Committees	$32,400	3	2	$194,400
State Party Committees	$10,000	50	2	$1,000,000
Total				**$1,194,400**

Source: See 2 U. S. C. §§ 441a(a)(1)(B), (D); 78 Fed. Reg. 8532.

Table 2(a): The $3.6 Million Check

	Base Limit (per year/ election)	Number (committees/ candidates)	Years or Elections	Total Contributions (per 2-year cycle)
National Party Committees	$32,400	3	2	$194,400
State Party Committees	$10,000	50	2	$1,000,000
Candidates (Senate)	$2,600	33	2	$171,600
Candidates (House)	$2,600	435	2	$2,262,000
Total				**$3,628,000**

Source: See 2 U. S. C. §§ 441a(a)(1)(A), (B), (D); 78 Fed. Reg. 8532.

Table 2(b): Circumvention of the $3.6 Million Check

	Direct Contributions to Candidate (per election)	**Number (committees/ candidates)**	**Elections**	**Total Direct Contributions (per 2-year cycle)**
National Party Committees	$5,000	3	2	$30,000[1]
State Party Committees	$5,000	50	2	$500,000
Candidates (Senate)	$2,000	33	2	$132,000
Candidates (House)	$2,000	435	2	$1,740,000
Total Direct Contributions				**$2,402,000**
	Independent Expenditures (IEs) (per general election)		**Elections**	**Total IEs (per general election)**
	House Candidate	Senate Candidate		
National Party Committees	$46,600 (min)[2]	$93,100 (min)[3]	1	$46,600–$93,100 (min)
State Party Committees	$46,600 (min)[2]	$93,100 (min)[3]	1	$46,600–$93,100 (min)
Total IEs	**$46,600 (min)[2]**	**$93,100 (min)[3]**		**$46,600–$93,100 (min)**

Source: See 2 U. S. C. §§ 432(e)(3)(B), 441a(a)(2)(A); 11 CFR § 110.3(b); 78 Fed. Reg. 8530–8532.

[1] $45,400 for a Senate candidate. § 441a(h); 78 Fed. Reg. 8532.

[2] If the State has more than one House seat, this figure is $46,600. If it has one House seat, this figure is $93,100. *Id.*, at 8531.

[3] This figure ranges from $93,100 (Del.) to $2.68 million (Cal.), depending on the State's population. *Ibid.*

Appendix B to opinion of BREYER, J.

Table 3: Proliferating PACs

	Base Limit (per year)	**Number (PACs)**	**Years**	**Total Contributions (per 2-year cycle)**
Rich Donor One	$5,000	200	2	$2,000,000
Rich Donor Two	$5,000	200	2	$2,000,000
Rich Donor Three	$5,000	200	2	$2,000,000
Rich Donor Four	$5,000	200	2	$2,000,000
Rich Donor Five	$5,000	200	2	$2,000,000
Rich Donor Six	$5,000	200	2	$2,000,000
Rich Donor Seven	$5,000	200	2	$2,000,000
Rich Donor Eight	$5,000	200	2	$2,000,000
Rich Donor Nine	$5,000	200	2	$2,000,000
Rich Donor Ten	$5,000	200	2	$2,000,000
Total Contributions to PACs (by 10 Donors)				**$20,000,000**
Total Contributions by Each Donor				**$2,000,000**
	Base Limit (per election)	**Number (candidates)**	**Elections**	
PAC One	$5,000	10	2	$100,000
PAC Two	$5,000	10	2	$100,000
PAC Three	$5,000	10	2	$100,000
. . .	etc.	etc.	etc.	etc.
PAC 200	$5,000	10	2	$100,000
Total Contributions by PACs (to 10 Candidates)				**$20,000,000**
Total Contributions to Each Candidate				**$2,000,000**

Source: 2 U. S. C. §§ 441a(a)(1)(C), (2)(A).

Appendix C to opinion of BREYER, J.

C

Table 1: Costs of a Federal Seat

	2012 Elections
House	
Average House Winner Spent	$1,567,293
Average House Loser Spent	$496,637
Average Winner's Receipts from PACs	$665,728
Senate	
Average Senate Winner Spent	$11,474,077
Average Senate Loser Spent	$7,435,446
Average Winner's Receipts from PACs	$2,185,650

Source: Center for Responsive Politics, Election Stats, online at http://www.opensecrets.org/bigpicture/elec_stats.php.

Table 2: Leadership PACs

	Number of Leadership PACs (contributing to federal candidates)	Total Contributed (to federal candidates)
2000 Elections	175	$17,000,000
2002 Elections	228	$25,000,000
2004 Elections	274	$30,700,000
2006 Elections	336	$44,700,000
2008 Elections	378	$40,600,000
2010 Elections	396	$44,000,000
2012 Elections	456	$46,400,000

Source: Center for Responsive Politics, Leadership PACs, online at http://www.opensecrets.org/pacs.

Appendix C to opinion of BREYER, J.

Table 3: Joint Fundraising Committees

	Number of Joint Fundraising Committees	"Senate" Related	"House" Related
2008 Elections	269	31	34
2010 Elections	367	37	60
2012 Elections	508	67	89

Source: Federal Election Commission, online at http://www.fec.gov/data/CommitteeSummary.do.

Syllabus

NORTHWEST, INC., ET AL. *v.* GINSBERG

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

No. 12–462. Argued December 3, 2013—Decided April 2, 2014

Petitioner Northwest, Inc., terminated respondent's membership in its frequent flyer program, apparently based on a provision in the frequent flyer agreement that gave Northwest sole discretion to determine whether a participant had abused the program. Respondent filed suit, asserting, as relevant here, that Northwest had breached its contract by revoking his membership status without valid cause and had violated the duty of good faith and fair dealing because it terminated his membership in a way that contravened his reasonable expectations. The District Court found that the Airline Deregulation Act of 1978 (ADA) pre-empted the breach of the duty of good faith and fair dealing claim and dismissed the breach-of-contract claim without prejudice. Respondent appealed only the dismissal of his breach of the duty of good faith and fair dealing claim. The Ninth Circuit reversed, finding that claim "'too tenuously connected to airline regulation to trigger'" ADA pre-emption.

Held:

1. The ADA pre-empts a state-law claim for breach of the implied covenant of good faith and fair dealing if it seeks to enlarge the contractual obligations that the parties voluntarily adopt. Pp. 279–285.

(a) Before the ADA was enacted, air carriers' routes, rates, and services were regulated under the Federal Aviation Act of 1958. And because that Act contained a saving provision preserving pre-existing statutory and common-law remedies, air carriers were also regulated by the States. The ADA did not repeal that saving provision, but it did include a pre-emption provision to prohibit States from "enact[ing] or enforc[ing] a law, regulation, or other provision having the force and effect of law related to [an air carrier's] price, route, or service," 49 U. S. C. § 41713(b)(1), thus ensuring that "States would not undo federal deregulation with regulation of their own," *Morales* v. *Trans World Airlines, Inc.*, 504 U. S. 374, 378. In *Morales*, the Court recognized that the key phrase "related to" expresses a "broad pre-emptive purpose," *id.*, at 383, and held that the ADA pre-empted the use of state consumer protection laws to regulate airline advertising, concluding that "relat[es] to" means "ha[s] a connection with, or reference to, airline 'rates, routes, or services,'" *id.*, at 384. And in *American Airlines, Inc.*

v. *Wolens*, 513 U. S. 219, the Court found that the ADA pre-empted the use of an Illinois consumer law to challenge an airline's devaluation of frequent flyer earned miles. But it did not pre-empt breach-of-contract claims because "terms and conditions airlines offer and passengers accept are privately ordered obligations" not " 'a State's "enact[ment] or enforce[ment] [of] any law, rule, regulation, standard, or other provision having the force and effect of law" within the [pre-emption provision's] meaning.' " *Id.*, at 228–229. Pp. 279–281.

(b) The phrase "other provision having the force and effect of law" includes state common-law rules like the implied covenant at issue. Common-law rules are routinely called "provisions," see, *e. g.*, *Madsen* v. *Women's Health Center, Inc.*, 512 U. S. 753, 765, n. 3, and they clearly have "the force and effect of law." The pre-emption provision's original language confirms this understanding. As first enacted, the provision also applied to "rule[s]" and "standard[s]," a formulation encompassing common-law rules. See *CSX Transp., Inc.* v. *Easterwood*, 507 U. S. 658, 664. And Congress made clear that the deletion of those terms as part of Title 49's wholesale recodification effected no "substantive change." § 1(a), 108 Stat. 745.

Respondent's reliance on *Sprietsma* v. *Mercury Marine*, 537 U. S. 51, is misplaced. There, the Court held that the Federal Boat Safety Act of 1971 did not pre-empt a common-law tort claim, but that Act's pre-emption provision is more narrowly worded than the ADA provision. The Boat Safety Act's saving and pre-emption provisions were also enacted at the same time, while the Federal Aviation Act's general remedies saving clause is "a relic of the pre-ADA/no pre-emption regime," *Morales*, 504 U. S., at 385, that "cannot be allowed to supersede the specific substantive pre-emption provision," *ibid.*

Exempting common-law claims would also disserve the ADA's central purpose, which was to eliminate federal regulation of rates, routes, and services so they could be set by market forces. Finally, if *all* state common-law rules fell outside the pre-emption provision's ambit, *Wolens* would not have singled out a subcategory, for common-law claims based on the parties' voluntary undertaking, as falling outside that provision's coverage. Pp. 281–284.

(c) Respondent's claim "relates to" "rates, routes, or services." It clearly has "a connection with or reference to airline" prices, routes, or services, *Morales*, *supra*, at 384. As in *Wolens*, Northwest's program connects to the airline's "rates" by awarding mileage credits redeemable for tickets and upgrades, thus eliminating or reducing ticket prices. It also connects to "services," *i. e.*, access to flights and higher service categories. Respondent's counterarguments are unpersuasive. His claim that he is contesting his termination, not access to flights or upgrades,

ignores his reason for seeking reinstatement: to obtain reduced rates and enhanced services. Although respondent and *amici* claim there have been fundamental changes in the way that frequent flyer miles are earned since *Wolens* was decided, that does not matter here where respondent did not assert that he earned miles from any activity but taking flights or that he attempted to redeem miles for anything but tickets and upgrades. Pp. 284–285.

2. Because respondent's implied covenant claim seeks to enlarge his contractual agreement with petitioners, it is pre-empted by § 41713(b)(1). Under Minnesota law, which controls here, the implied covenant must be regarded as a state-imposed obligation. Minnesota law does not permit parties to contract out of the covenant. And when a State's law does not authorize parties to free themselves from the covenant, a breach of covenant claim is pre-empted under *Wolens*. As an independent basis for this conclusion, if, as Minnesota law provides, the implied covenant applies to "every contract" except employment contracts for "policy reasons," then the decision not to exempt other types of contracts must likewise be based on a policy determination, namely, that the policy reason for the employment contract rule does not apply in other contexts.

Petitioners claim that the refusal to pre-empt all implied covenant claims, regardless of state law, will lead to a patchwork of rules that will frustrate the ADA's deregulatory aim. But airlines can avoid such a result if they contract out of covenants where permitted by state law. Nor are participants in frequent flyer programs left without protection. They can avoid an airline with a poor reputation and possibly enroll in a more favorable rival program. Moreover, the Department of Transportation has the authority to investigate complaints about frequent flyer programs. Finally, respondent might have been able to vindicate his claim of ill treatment by Northwest had he appealed his breach-of-contract claim. Pp. 285–290.

695 F. 3d 873, reversed and remanded.

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

Paul D. Clement argued the cause for petitioners. With him on the briefs was *George W. Hicks, Jr.*

Lewis S. Yelin argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Verrilli, Acting Assistant Attorney General Delery, Deputy Solicitor General Kneedler, Michael S.*

Raab, *Christine N. Kohl*, *Kathryn B. Thomson*, *Paul M. Geier*, *Peter J. Plocki*, and *Joy K. Park*.

Adina H. Rosenbaum argued the cause for respondent. With her on the brief was *Michael T. Kirkpatrick*.*

JUSTICE ALITO delivered the opinion of the Court.

We must decide in this case whether the Airline Deregulation Act pre-empts a state-law claim for breach of the implied covenant of good faith and fair dealing. Following our interpretation of the Act in *American Airlines, Inc.* v. *Wolens*, 513 U. S. 219 (1995), we hold that such a claim is pre-empted if it seeks to enlarge the contractual obligations that the parties voluntarily adopt. And because the doctrine is invoked in the present case in an attempt to expand those obligations, we reverse the judgment of the Court of Appeals.

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*Briefs of *amici curiae* urging reversal were filed for Airlines for America et al. by *Seth P. Waxman*, *Daniel S. Volchok*, *David A. Berg*, *Richard Pianka*, and *Prasad Sharma*; for the Cargo Airline Association by *Robert K. Spotswood*, *Emily J. Tidmore*, and *Stephen A. Alterman*; for the Chamber of Commerce of the United States of America by *Deanne E. Maynard*, *Brian R. Matsui*, *Kate Comerford Todd*, *Tyler R. Green*, *Paul T. Friedman*, and *Ruth N. Borenstein*; and for the International Air Transport Association by *Warren L. Dean, Jr.*, and *C. Jonathan Benner*.

A brief of *amici curiae* urging affirmance was filed for the State of California et al. by *Kamala D. Harris*, Attorney General of California, *Susan Duncan Lee*, Acting State Solicitor General, *Frances T. Grunder*, Senior Assistant Attorney General, *Karin S. Schwartz*, Supervising Deputy Attorney General, and *Charles Antonen* and *Craig Konnoth*, Deputy Attorneys General, and by the Attorneys General for their respective States as follows: *David M. Louie* of Hawaii, *Lisa Madigan* of Illinois, *Gregory F. Zoeller* of Indiana, *Tom Miller* of Iowa, *Janet T. Mills* of Maine, *Douglas F. Gansler* of Maryland, *Jim Hood* of Mississippi, *Catherine Cortez Masto* of Nevada, *Joseph A. Foster* of New Hampshire, *Gary K. King* of New Mexico, *Eric T. Schneiderman* of New York, *Peter F. Kilmartin* of Rhode Island, *Robert E. Cooper, Jr.*, of Tennessee, *William H. Sorrell* of Vermont, and *Peter K. Michael* of Wyoming.

Briefs of *amici curiae* were filed for Jobs with Justice et al. by *Shannon Liss-Riordan*; and for Steven J. Burton by *Jason L. Lichtman* and *Jonathan D. Selbin*.

I

A

Like many airlines, petitioner Northwest, Inc. (Northwest), established a frequent flyer program, its WorldPerks Airline Partners Program, to attract loyal customers. Under this program, members are able to earn "miles" by taking flights operated by Northwest and other "partner" airlines. Members can then redeem these miles for tickets and service upgrades with Northwest or its airline partners.

Respondent became a member of Northwest's WorldPerks program in 1999, and as a result of extensive travel on Northwest flights, he achieved "Platinum Elite" status (the highest level available) in 2005.

In 2008, however, Northwest terminated respondent's membership, apparently in reliance on a provision of the WorldPerks agreement that provided that "[a]buse of the . . . program (including . . . improper conduct as determined by [Northwest] in its sole judgment[ )] . . . may result in cancellation of the member's account." App. 64–65. According to respondent, a Northwest representative telephoned him in June 2008 and informed him that his "Platinum Elite" status was being revoked because he had "'abused'" the program. *Id.*, at 35. In a letter sent about two weeks later, Northwest wrote:

> "[Y]ou have contacted our office 24 times since December 3, 2007 regarding travel problems, including 9 incidents of your bag arriving late at the luggage carousel. . . .
>
> . . . . . .
>
> "Since December 3, 2007, you have continually asked for compensation over and above our guidelines. We have awarded you $1,925.00 in travel credit vouchers, 78,500 WorldPerks bonus miles, a voucher extension for your son, and $491.00 in cash reimbursements. . . .

> "Due to our past generosity, we must respectfully advise that we will no longer be awarding you compensation each time you contact us." *Id.*, at 58–59.

Respondent requested clarification of his status, but a Northwest representative sent him an e-mail stating that "[a]fter numerous conversations with not only the Legal Department, but with members of the WorldPerks department, I believe your status with the program should be very clear." *Id.*, at 60.

B

Alleging that Northwest had ended his membership as a cost-cutting measure tied to Northwest's merger with Delta Air Lines, respondent filed a class action in the United States District Court for the Southern District of California on behalf of himself and all other similarly situated WorldPerks members.[1] Respondent's complaint asserted four separate claims. First, his complaint alleged that Northwest had breached its contract by revoking his "Platinum Elite" status without valid cause. Second, the complaint claimed that Northwest violated the duty of good faith and fair dealing because it terminated his membership in a way that contravened his reasonable expectations with respect to the manner in which Northwest would exercise its discretion. Third, the complaint asserted a claim for negligent misrepresentation, and fourth, the complaint alleged intentional misrepresentation. Respondent sought damages in excess of $5 million, as well as injunctive relief requiring Northwest to restore the class members' WorldPerks status and prohibiting Northwest from future revocations of membership.

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[1] Applying California choice-of-law rules, the District Court held that Minnesota law applies because respondent was "a resident of Minneapolis, appears to fly in and out of Minnesota, and . . . Northwest's principal place of business is Minnesota." App. to Pet. for Cert. 70. That determination was not challenged on appeal.

The District Court held that respondent's claims for breach of the covenant of good faith and fair dealing, negligent misrepresentation, and intentional misrepresentation were pre-empted by the Airline Deregulation Act of 1978 (ADA or Act), as amended, 49 U. S. C. § 41713. These claims, the court concluded, were "relate[d] to" Northwest's rates and services and thus fell within the ADA's express pre-emption clause. App. to Pet. for Cert. 69. Respondent's remaining claim—for breach of contract—was dismissed without prejudice under Federal Rule of Civil Procedure 12(b)(6). The court held that respondent had failed to identify any material breach because the frequent flyer agreement gave Northwest sole discretion to determine whether a participant had abused the program. Respondent appealed the dismissal of his breach of the duty of good faith and fair dealing claim but not the other claims that the court had dismissed.

The Ninth Circuit reversed. 695 F. 3d 873 (2012). Relying on pre-*Wolens* Circuit precedent, the Ninth Circuit first held that a breach of implied covenant claim is "'too tenuously connected to airline regulation to trigger preemption under the ADA.'" 695 F. 3d, at 879. Such a claim, the Ninth Circuit wrote, "does not interfere with the [Act's] deregulatory mandate" and does not "'force the Airlines to adopt or change their prices, routes or services—the prerequisite for . . . preemption.'" *Id.*, at 880. In addition, the court held that the covenant of good faith and fair dealing does not fall within the terms of the Act's pre-emption provision because it does not have a "direct effect" on either "prices" or "services." *Id.*, at 877, 881.

We granted certiorari. 569 U. S. 993 (2013).

II

A

Before the enactment of the ADA, the Federal Aviation Act of 1958 empowered the Civil Aeronautics Board to regu-

late the interstate airline industry. Pursuant to this authority, the Board closely regulated air carriers, controlling, among other things, routes, rates, and services. See, *e. g.*, *Western Air Lines, Inc.* v. *CAB*, 347 U. S. 67 (1954); Federal Aviation Act of 1958, 72 Stat. 731. And since the Federal Aviation Act contained a saving provision preserving pre-existing statutory and common-law remedies, § 1106, *id.*, at 798, air carriers were also regulated by the States. See *Morales* v. *Trans World Airlines, Inc.*, 504 U. S. 374, 378 (1992).

In 1978, however, Congress enacted the ADA, which sought to promote "efficiency, innovation, and low prices" in the airline industry through "maximum reliance on competitive market forces and on actual and potential competition." 49 U. S. C. §§ 40101(a)(6), (12)(A). While the ADA did not repeal the predecessor law's saving provision, it included a pre-emption provision in order to "ensure that the States would not undo federal deregulation with regulation of their own." *Morales*, *supra*, at 378. In its current form, this provision states that "a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart." § 41713(b)(1).

We have had two occasions to consider the ADA's pre-emptive reach. In *Morales*, we held that the ADA pre-empted the use of state consumer protection laws to regulate airline advertising. We recognized that the key phrase "related to" expresses a "broad pre-emptive purpose." 504 U. S., at 383. Noting our interpretation of similar language in the pre-emption provision of the Employee Retirement Income Security Act of 1974, 29 U. S. C. § 1144(a), we held that a claim "relat[es] to rates, routes, or services," within the meaning of the ADA, if the claim "ha[s] a connection with, or reference to, airline 'rates, routes, or services.' "

504 U. S., at 384. The older saving provision, we concluded, did not undermine this conclusion. *Id.*, at 384–385.

Subsequently, in *Wolens*, 513 U. S. 219, we considered the application of the ADA pre-emption provision to two types of claims concerning an airline's frequent flyer program: first, claims under the Illinois Consumer Fraud and Deceptive Business Practices Act challenging an airline's devaluation of earned miles (chiefly as the result of the imposition of "blackout dates" and limits on the number of seats available for customers wishing to obtain tickets by using those miles) and, second, breach-of-contract claims. We reaffirmed *Morales*' broad interpretation of the ADA pre-emption provision and held that this provision barred the claims based on the Illinois statute but not the breach-of-contract claims. "[T]erms and conditions airlines offer and passengers accept," we wrote, "are privately ordered obligations and thus do not amount to a State's 'enact[ment] or enforce[ment] [of] any law, rule, regulation, standard, or other provision having the force and effect of law' within the meaning of [the ADA pre-emption provision]." 513 U. S., at 228–229 (some internal quotation marks omitted).

With this background in mind, we turn to the question whether the ADA pre-empts respondent's claim for breach of the implied covenant of good faith and fair dealing.

B

The first question we address is whether, as respondent now maintains, the ADA's pre-emption provision applies only to legislation enacted by a state legislature and regulations issued by a state administrative agency but not to a common-law rule like the implied covenant of good faith and fair dealing. We have little difficulty rejecting this argument.

To begin, state common-law rules fall comfortably within the language of the ADA pre-emption provision. As noted above, the current version of this provision applies to state "law[s], regulation[s], or other provision[s] having the force

and effect of law," 49 U. S. C. § 41713(b)(1). It is routine to call common-law rules "provisions." See, *e. g.*, *Madsen* v. *Women's Health Center, Inc.*, 512 U. S. 753, 765, n. 3 (1994); *United States* v. *Barnett*, 376 U. S. 681, 689–700 (1964); *Brown* v. *United Airlines, Inc.*, 720 F. 3d 60, 68 (CA1 2013) ("[W]hen read in context, the word 'provision' in the ADA preemption provision can most appropriately be construed to include common law"). And a common-law rule clearly has "the force and effect of law." In *Wolens*, we noted that this phrase is most naturally read to "'refe[r] to binding standards of conduct that operate irrespective of any private agreement,'" 513 U. S., at 229, n. 5, and we see no basis for holding that such standards must be based on a statute or regulation as opposed to the common law.

This understanding becomes even clearer when the original wording of the pre-emption provision is taken into account. When first enacted in 1978, this provision also applied to "rule[s]" and "standard[s]," and there surely can be no doubt that this formulation encompassed common-law rules. Indeed, we held in *CSX Transp., Inc.* v. *Easterwood*, 507 U. S. 658, 664 (1993), that virtually identical language in the Federal Railroad Safety Act of 1970 includes "[l]egal duties imposed . . . by the common law." See also *Riegel* v. *Medtronic, Inc.*, 552 U. S. 312, 324 (2008) (holding that a State's "'requirements'" "includ[e] [the state's] common-law duties").

While "rule[s]" and "standard[s]" are not mentioned in the current version of the statute, this omission is the result of a recodification that was not meant to affect the provision's meaning. Those additional terms were deleted as part of a wholesale recodification of Title 49 in 1994, but Congress made it clear that this recodification did not effect any "substantive change." § 1(a), 108 Stat. 745.

In arguing that common-law rules fall outside the scope of the ADA pre-emption provision, respondent relies on our decision in *Sprietsma* v. *Mercury Marine*, 537 U. S. 51

(2002), which held that the Federal Boat Safety Act of 1971 did not pre-empt a common-law tort claim, but there are critical differences between the pre-emption provisions in the Boat Safety Act and the ADA. The Boat Safety Act provision applies only to "a law or regulation," 46 U. S. C. § 4306, whereas the ADA provision, as just explained, is much more broadly worded.

In addition, the relationship between the ADA's pre-emption provision and the saving provision carried over from the prior law is also quite different. The *Sprietsma* decision placed substantial weight on the Boat Safety Act's saving provision, which was enacted at the same time as the pre-emption provision, but we have described the Federal Aviation Act saving clause as "a relic of the pre-ADA/no pre-emption regime." *Morales*, 504 U. S., at 385. That provision applies to the entire, sprawling Federal Aviation Act, and not just to the ADA, and as we held in *Morales*, this "general 'remedies' saving clause cannot be allowed to supersede the specific substantive pre-emption provision." *Ibid.* See also *Wolens*, *supra*, at 245 (O'Connor, J., concurring in judgment in part and dissenting in part). For these reasons, respondent's interpretation of the ADA pre-emption provision cannot be squared with the provision's terms.

Exempting common-law claims would also disserve the central purpose of the ADA. The Act eliminated federal regulation of rates, routes, and services in order to allow those aspects of air transportation to be set by market forces, and the pre-emption provision was included to prevent the States from undoing what the Act was meant to accomplish. *Morales*, *supra*, at 378. What is important, therefore, is the effect of a state law, regulation, or provision, not its form, and the ADA's deregulatory aim can be undermined just as surely by a state common-law rule as it can by a state statute or regulation. See *Medtronic, Inc.*, *supra*, at 325 (recognizing that state tort law that imposes certain requirements would "disrup[t] the federal scheme no less

than state regulatory law to the same effect"). As the First Circuit has recognized, "[i]t defies logic to think that Congress would disregard real-world consequences and give dispositive effect to the form of a clear intrusion into a federally regulated industry." *Brown*, *supra*, at 66–67.

Finally, if *all* state common-law rules fell outside the ambit of the ADA's pre-emption provision, we would have had no need in *Wolens* to single out a subcategory of common-law claims, *i. e.*, those based on the parties' voluntary undertaking, as falling outside that provision's coverage.

Accordingly, we conclude that the phrase "other provision having the force and effect of law" includes common-law claims.

C

We must next determine whether respondent's breach of implied covenant claim "relates to" "rates, routes, or services." A claim satisfies this requirement if it has "a connection with, or reference to, airline" prices, routes, or services, *Morales*, *supra*, at 384, and the claim at issue here clearly has such a connection. That claim seeks respondent's reinstatement in Northwest's frequent flyer program so that he can access the program's "valuable . . . benefits," including "flight upgrades, accumulated mileage, loyalty program status or benefits on other airlines, and other advantages." App. 49–50.

Like the frequent flyer program in *Wolens*, the Northwest program is connected to the airline's "rates" because the program awards mileage credits that can be redeemed for tickets and upgrades. See 513 U. S., at 226. When miles are used in this way, the rate that a customer pays, *i. e.*, the price of a particular ticket, is either eliminated or reduced. The program is also connected to "services," *i. e.*, access to flights and to higher service categories. *Ibid.*

Respondent argues that his claim differs from the claims in *Wolens* because he "does not challenge access to flights and upgrades or the number of miles needed to obtain air

tickets" but instead contests "the termination of his World-Perks elite membership," Brief for Respondent 12, but this argument ignores respondent's reason for seeking reinstatement of his membership, *i. e.*, to obtain reduced rates and enhanced services. Respondent's proffered distinction has no substance.

Respondent and *amici* suggest that *Wolens* is not controlling because frequent flyer programs have fundamentally changed since the time of that decision. We are told that "most miles [are now] earned without consuming airline services" and are "spent without consuming airline services." Brief for State of California et al. 18 (emphasis deleted). But whether or not this alleged change might have some impact in a future case, it is not implicated here. In this case, respondent did not assert that he earned his miles from any activity other than taking flights or that he attempted to redeem miles for anything other than tickets and upgrades. See Tr. of Oral Arg. 47–48.

III

With these preliminary issues behind us, we turn to the central issue in this case, *i. e.*, whether respondent's implied covenant claim is based on a state-imposed obligation or simply one that the parties voluntarily undertook. Petitioners urge us to hold that implied covenant claims are always pre-empted, and respondent suggests that such claims are generally not pre-empted, but the reasoning of *Wolens* neither dooms nor spares all such claims.

While most States recognize some form of the good faith and fair dealing doctrine, it does not appear that there is any uniform understanding of the doctrine's precise meaning. "[T]he concept of good faith in the performance of contracts 'is a phrase without general meaning (or meanings) of its own.'" *Tymshare, Inc.* v. *Covell*, 727 F. 2d 1145, 1152 (CADC 1984) (Scalia, J.) (quoting Summers, "Good Faith" in General Contract Law and the Sales Provisions of the Uni-

form Commercial Code, 54 Va. L. Rev. 195, 201 (1968)); see also Burton, Breach of Contract and the Common Law Duty To Perform in Good Faith, 94 Harv. L. Rev. 369, 371 (1980). Of particular importance here, while some States are said to use the doctrine "to effectuate the intentions of parties, or to protect their reasonable expectations," *ibid.*, other States clearly employ the doctrine to ensure that a party does not "'violate community standards of decency, fairness, or reasonableness,'" *Universal Drilling Co., LLC* v. *R & R Rig Service, LLC*, 2012 WY 31, ¶37, 271 P. 3d 987, 999; *DDP Roofing Services, Inc.* v. *Indian River School Dist.*, 2010 WL 4657161, *3 (Del. Super. Ct., Nov. 16, 2010); *Allworth* v. *Howard Univ.*, 890 A. 2d 194, 201–202 (D. C. 2006); *Brunswick Hills Racquet Club, Inc.* v. *Route 18 Shopping Center Assocs.*, 182 N. J. 210, 224, 864 A. 2d 387, 395–396 (2005); *Harper* v. *Healthsource New Hampshire, Inc.*, 140 N. H. 770, 776, 674 A. 2d 962, 965–966 (1996); *Borys* v. *Josada Builders, Inc.*, 110 Ill. App. 3d 29, 32–33, 441 N. E. 2d 1263, 1265–1266 (1982); Restatement (Second) of Contracts §205, Comment *a* (1979). See also Summers, The General Duty of Good Faith—Its Recognition and Conceptualization, 67 Cornell L. Rev. 810, 812 (1982).

Whatever may be the case under the law of other jurisdictions, it seems clear that under Minnesota law, which is controlling here, see n. 1, *supra*, the implied covenant must be regarded as a state-imposed obligation.[2] Respondent con-

[2] Like Minnesota, some other States preclude a party from waiving the obligations of good faith and fair dealing. *Hunter* v. *Wilshire Credit Corp.*, 927 So. 2d 810, 813, n. 5 (Ala. 2005); *Smith* v. *Anchorage School Dist.*, 240 P. 3d 834, 844 (Alaska 2010); *Wells Fargo Bank* v. *Arizona Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 491, 38 P. 3d 12, 29 (2002); *Habetz* v. *Condon*, 224 Conn. 231, 238, 618 A. 2d 501, 505 (1992); *Dunlap* v. *State Farm Fire & Cas. Co.*, 878 A. 2d 434, 442 (Del. 2005); *Hill* v. *Medlantic Health Care Group*, 933 A. 2d 314, 333 (D. C. 2007); *Chase Manhattan Bank, N. A.* v. *Keystone Distributers, Inc.*, 873 F. Supp. 808, 815 (SDNY 1994); *Magruder Quarry & Co., LLC* v. *Briscoe*, 83 S. W. 3d 647, 652 (Mo. App. 2002) ("When terms are

cedes that under Minnesota law parties cannot contract out of the covenant. See Tr. of Oral Arg. 33–34; see also *In re Hennepin Cty. 1986 Recycling Bond Litigation*, 540 N. W. 2d 494, 502 (Minn. 1995); *Sterling Capital Advisors, Inc.* v. *Herzog*, 575 N. W. 2d 121, 125 (Minn. App. 1998); *Minnwest Bank Central* v. *Flagship Properties LLC*, 689 N. W. 2d 295, 303 (Minn. App. 2004). And as a leading commentator has explained, a State's "unwillingness to allow people to disclaim the obligation of good faith . . . shows that the obligation cannot be implied, but is law imposed." 3A A. Corbin, Corbin on Contracts § 654A, p. 88 (L. Cunningham & A. Jacobsen eds. Supp. 1994). When the law of a State does not authorize parties to free themselves from the covenant, a breach of covenant claim is pre-empted under the reasoning of *Wolens*.

Another feature of Minnesota law provides an additional, independent basis for our conclusion. Minnesota law holds that the implied covenant applies to "every contract," *In re Hennepin Cty., supra*, at 502, with the notable exception of employment contracts. *Hunt* v. *IBM Mid America Employees Fed. Credit Union*, 384 N. W. 2d 853, 857–858 (Minn. 1986). The exception for employment contracts is based, in significant part, on "policy reasons," *id.*, at 858, and therefore the decision not to exempt other types of contracts must be based on a policy determination, namely, that the "policy rea-

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present that directly nullify the implied covenants of good faith and reasonable efforts, . . . the contract is void for lack of mutuality"); *Gillette* v. *Hladky Constr., Inc.*, 2008 WY 134, ¶31, 196 P. 3d 184, 196.

But other States permit a party to contract out of the duties imposed by the implied covenant. *Steiner* v. *Thexton*, 48 Cal. 4th 411, 419–420, 226 P. 3d 359, 365 (2010) ("'"The general rule [regarding the covenant of good faith] is plainly subject to the exception that the parties may, by express provisions of the contract, grant the right to engage in the very acts and conduct which would otherwise have been forbidden by an implied covenant of good faith and fair dealing"'"); *Shawver* v. *Huckleberry Estates, L. L. C.*, 140 Idaho 354, 362, 93 P. 3d 685, 693 (2004); *Farm Credit Servs. of Am.* v. *Dougan*, 2005 S.D. 94, ¶10, 704 N. W. 2d 24, 28.

sons" that support the rule for employment contracts do not apply (at least with the same force) in other contexts. When the application of the implied covenant depends on state policy, a breach of implied covenant claim cannot be viewed as simply an attempt to vindicate the parties' implicit understanding of the contract.

For these reasons, the breach of implied covenant claim in this case cannot stand, but petitioners exhort us to go further and hold that all such claims, no matter the content of the law of the relevant jurisdiction, are pre-empted. If pre-emption depends on state law, petitioners warn, airlines will be faced with a baffling patchwork of rules, and the deregulatory aim of the ADA will be frustrated. But the airlines have means to avoid such a result. A State's implied covenant rules will escape pre-emption only if the law of the relevant State permits an airline to contract around those rules in its frequent flyer program agreement, and if an airline's agreement is governed by the law of such a State, the airline can specify that the agreement does not incorporate the covenant. While the inclusion of such a provision may impose transaction costs and presumably would not enhance the attractiveness of the program, an airline can decide whether the benefits of such a provision are worth the potential costs.

Our holding also does not leave participants in frequent flyer programs without protection. The ADA is based on the view that the best interests of airline passengers are most effectively promoted, in the main, by allowing the free market to operate. If an airline acquires a reputation for mistreating the participants in its frequent flyer program (who are generally the airline's most loyal and valuable customers), customers can avoid that program and may be able to enroll in a more favorable rival program.

Federal law also provides protection for frequent flyer program participants. Congress has given the Department of Transportation (DOT) the general authority to prohibit and

punish unfair and deceptive practices in air transportation and in the sale of air transportation, 49 U. S. C. § 41712(a), and Congress has specifically authorized the DOT to investigate complaints relating to frequent flyer programs. See FAA Modernization and Reform Act of 2012, § 408(6), 126 Stat. 87. Pursuant to these provisions, the DOT regularly entertains and acts on such complaints.[3]

We note, finally, that respondent's claim of ill treatment by Northwest might have been vindicated if he had pursued his breach-of-contract claim after its dismissal by the District Court. Respondent argues that, contrary to the holding of the District Court, the frequent flyer agreement did not actually give Northwest unfettered discretion to terminate his membership in the program, see Brief for Respondent 20–21, and the United States makes a related argument, namely, that even if the agreement gave Northwest complete discretion with respect to a determination regarding abuse of the program, the agreement did not necessarily bar a claim asserting that membership was ended for an ulterior reason, such as an effort to cut costs. If respondent had appealed the dismissal of his breach-of-contract claim, he could have presented these arguments to the Court of Appeals, but he chose not to press that claim. He voluntarily dismissed the breach-of-contract claim and instead appealed only the breach of implied covenant claim, which we hold to be pre-empted.

* * *

Because respondent's implied covenant of good faith and fair dealing claim seeks to enlarge his contractual agreement with petitioners, we hold that 49 U. S. C. § 41713(b)(1) pre-empts the claim. The judgment of the Court of Appeals for

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[3] See DOT, Air Travel Consumer Report 44 (Feb. 2014), online at http://www.dot.gov/sites/dot.dev/files/docs/2014_February_ATCR.pdf (as visited Mar. 31, 2014, and available in Clerk of Court's case file).

the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

SCHUETTE, ATTORNEY GENERAL OF MICHIGAN *v.* COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN) ET AL.

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

No. 12–682. Argued October 15, 2013—Decided April 22, 2014

After this Court decided that the University of Michigan's undergraduate admissions plan's use of race-based preferences violated the Equal Protection Clause, *Gratz* v. *Bollinger*, 539 U. S. 244, 270, but that the law school admission plan's more limited use did not, *Grutter* v. *Bollinger*, 539 U. S. 306, 343, Michigan voters adopted Proposal 2, now Article I, § 26, of the State Constitution, which, as relevant here, prohibits the use of race-based preferences as part of the admissions process for state universities. In consolidated challenges, the District Court granted summary judgment to Michigan, thus upholding Proposal 2, but the Sixth Circuit reversed, concluding that the proposal violated the principles of *Washington* v. *Seattle School Dist. No. 1*, 458 U. S. 457.

Held: The judgment is reversed.

701 F. 3d 466, reversed.

JUSTICE KENNEDY, joined by THE CHIEF JUSTICE and JUSTICE ALITO, concluded that there is no authority in the Federal Constitution or in this Court's precedents for the Judiciary to set aside Michigan laws that commit to the voters the determination whether racial preferences may be considered in governmental decisions, in particular with respect to school admissions. Pp. 300–315.

(a) This case is not about the constitutionality, or the merits, of race-conscious admissions policies in higher education. Here, the principle that the consideration of race in admissions is permissible when certain conditions are met is not being challenged. Rather, the question concerns whether, and in what manner, voters in the States may choose to prohibit the consideration of such racial preferences. Where States have prohibited race-conscious admissions policies, universities have responded by experimenting "with a wide variety of alternative approaches." *Grutter*, *supra*, at 342. The decision by Michigan voters reflects the ongoing national dialogue about such practices. Pp. 300–302.

(b) The Sixth Circuit's determination that *Seattle* controlled here extends *Seattle*'s holding in a case presenting quite different issues to reach a mistaken conclusion. Pp. 302–314.

(1) It is necessary to consider first the relevant cases preceding *Seattle* and the background against which *Seattle* arose. Both *Reitman* v. *Mulkey*, 387 U. S. 369, and *Hunter* v. *Erickson*, 393 U. S. 385, involved demonstrated injuries on the basis of race that, by reasons of state encouragement or participation, became more aggravated. In *Mulkey*, a voter-enacted amendment to the California Constitution prohibiting state legislative interference with an owner's prerogative to decline to sell or rent residential property on any basis barred the challenging parties, on account of race, from invoking the protection of California's statutes, thus preventing them from leasing residential property. In *Hunter*, voters overturned an Akron ordinance that was enacted to address widespread racial discrimination in housing sales and rentals that had forced many to live in "'unhealthful, unsafe, unsanitary and overcrowded'" segregated housing, 393 U. S., at 391. In *Seattle*, after the school board adopted a mandatory busing program to alleviate racial isolation of minority students in local schools, voters passed a state initiative that barred busing to desegregate. This Court found that the state initiative had the "practical effect" of removing "the authority to address a racial problem . . . from the existing decisionmaking body, in such a way as to burden minority interests" of busing advocates who must now "seek relief from the state legislature, or from the statewide electorate." 458 U. S., at 474. Pp. 302–305.

(2) *Seattle* is best understood as a case in which the state action had the serious risk, if not purpose, of causing specific injuries on account of race as had been the case in *Mulkey* and *Hunter*. While there had been no judicial finding of *de jure* segregation with respect to Seattle's school district, a finding that would be required today, see *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701, 720–721, *Seattle* must be understood as *Seattle* understood itself, as a case in which neither the State nor the United States "challenge[d] the propriety of race-conscious student assignments for the purpose of achieving integration, even absent a finding of prior *de jure* segregation." 458 U. S., at 472, n. 15.

Seattle's broad language, however, went well beyond the analysis needed to resolve the case. Seizing upon the statement in Justice Harlan's concurrence in *Hunter* that the procedural change in that case had "the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest," 393 U. S., at 395, the *Seattle* Court established a new and far-reaching rationale: Where a government policy "inures primarily to the benefit of the mi-

nority" and "minorities . . . consider" the policy to be "'in their interest,'" then any state action that "place[s] effective decisionmaking authority over" that policy "at a different level of government" is subject to strict scrutiny. 458 U. S., at 472, 474. Pp. 305–307.

(3) To the extent *Seattle* is read to require the Court to determine and declare which political policies serve the "interest" of a group defined in racial terms, that rationale was unnecessary to the decision in *Seattle*; it has no support in precedent; and it raises serious equal protection concerns. In cautioning against "impermissible racial stereotypes," this Court has rejected the assumption that all individuals of the same race think alike, see *Shaw* v. *Reno*, 509 U. S. 630, 647, but that proposition would be a necessary beginning point were the *Seattle* formulation to control. And if it were deemed necessary to probe how some races define their own interest in political matters, still another beginning point would be to define individuals according to race. Such a venture would be undertaken with no clear legal standards or accepted sources to guide judicial decision. It would also result in, or impose a high risk of, inquiries and categories dependent upon demeaning stereotypes, classifications of questionable constitutionality on their own terms. Assuming these steps could be taken, the court would next be required to determine the policy realms in which groups defined by race had a political interest. That undertaking, again without guidance from accepted legal standards, would risk the creation of incentives for those who support or oppose certain policies to cast the debate in terms of racial advantage or disadvantage. Adoption of the *Seattle* formulation could affect any number of laws or decisions, involving, *e. g.*, tax policy or housing subsidies. And racial division would be validated, not discouraged.

It can be argued that objections to the larger consequences of the *Seattle* formulation need not be confronted here, for race was an undoubted subject of the ballot issue. But other problems raised by *Seattle*, such as racial definitions, still apply. And the principal flaw in the Sixth Circuit's decision remains: Here there was no infliction of a specific injury of the kind at issue in *Mulkey* and *Hunter* and in the history of the Seattle schools, and there is no precedent for extending these cases to restrict the right of Michigan voters to determine that race-based preferences granted by state entities should be ended. The Sixth Circuit's judgment also calls into question other States' long-settled rulings on policies similar to Michigan's.

Unlike the injuries in *Mulkey*, *Hunter*, and *Seattle*, the question here is not how to address or prevent injury caused on account of race but whether voters may determine whether a policy of race-based preferences should be continued. By approving Proposal 2 and thereby add-

ing § 26 to their State Constitution, Michigan voters exercised their privilege to enact laws as a basic exercise of their democratic power, bypassing public officials they deemed not responsive to their concerns about a policy of granting race-based preferences. The mandate for segregated schools, *Brown* v. *Board of Education*, 347 U. S. 483, and scores of other examples teach that individual liberty has constitutional protection. But this Nation's constitutional system also embraces the right of citizens to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process, as Michigan voters have done here. These precepts are not inconsistent with the well-established principle that when hurt or injury is inflicted on racial minorities by the encouragement or command of laws or other state action, the Constitution requires redress by the courts. Such circumstances were present in *Mulkey*, *Hunter*, and *Seattle*, but they are not present here. Pp. 307–314.

JUSTICE SCALIA, joined by JUSTICE THOMAS, agreed that § 26 rightly stands, though not because it passes muster under the political-process doctrine. It likely does not, but the cases establishing that doctrine should be overruled. They are patently atextual, unadministrable, and contrary to this Court's traditional equal-protection jurisprudence. The question here, as in every case in which neutral state action is said to deny equal protection on account of race, is whether the challenged action reflects a racially discriminatory purpose. It plainly does not. Pp. 316–332.

(a) The Court of Appeals for the Sixth Circuit held § 26 unconstitutional under the so-called political-process doctrine, derived from *Washington* v. *Seattle School Dist. No. 1*, 458 U. S. 457, and *Hunter* v. *Erickson*, 393 U. S. 385. In those cases, one level of government exercised borrowed authority over an apparently "racial issue" until a higher level of government called the loan. This Court deemed each revocation an equal-protection violation, without regard to whether there was evidence of an invidious purpose to discriminate. The relentless, radical logic of *Hunter* and *Seattle* would point to a similar conclusion here, as in so many other cases. Pp. 318–322.

(b) The problems with the political-process doctrine begin with its triggering prong, which assigns to a court the task of determining whether a law that reallocates policymaking authority concerns a "racial issue," *Seattle*, 458 U. S., at 473, *i. e.*, whether adopting one position on the question would "at bottom inur[e] primarily to the benefit of the minority, and is designed for that purpose," *id.*, at 472. Such free-form judicial musing into ethnic and racial "interests" involves judges in the dirty business of dividing the Nation "into racial blocs," *Metro Broadcasting, Inc.* v. *FCC*, 497 U. S. 547, 603, 610 (O'Connor, J., dissent-

ing), and promotes racial stereotyping, see *Shaw* v. *Reno*, 509 U. S. 630, 647. More fundamentally, the analysis misreads the Equal Protection Clause to protect particular groups, a construction that has been repudiated in a "long line of cases understanding equal protection as a personal right." *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 224, 230. Pp. 322–327.

(c) The second part of the *Hunter-Seattle* analysis directs a court to determine whether the challenged act "place[s] effective decisionmaking authority over [the] racial issue at a different level of government," *Seattle*, *supra*, at 474; but, in another line of cases, the Court has emphasized the near-limitless sovereignty of each State to design its governing structure as it sees fit, see, *e. g.*, *Holt Civic Club* v. *Tuscaloosa*, 439 U. S. 60, 71. Taken to the limits of its logic, *Hunter-Seattle* is the gaping exception that nearly swallows the rule of structural state sovereignty, which would seem to permit a State to give certain powers to cities, later assign the same powers to counties, and even reclaim them for itself. Pp. 327–329.

(d) *Hunter* and *Seattle* also endorse a version of the proposition that a facially neutral law may deny equal protection solely because it has a disparate racial impact. That equal-protection theory has been squarely and soundly rejected by an "unwavering line of cases" holding "that a violation of the Equal Protection Clause requires state action motivated by discriminatory intent," *Hernandez* v. *New York*, 500 U. S. 352, 372–373 (O'Connor, J., concurring in judgment), and that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact," *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 264–265. Respondents cannot prove that the action here reflects a racially discriminatory purpose, for any law expressly requiring state actors to afford all persons equal protection of the laws does not—*cannot*—deny "to any person . . . equal protection of the laws," U. S. Const., Amdt. 14, § 1. Pp. 329–332.

JUSTICE BREYER agreed that the amendment is consistent with the Equal Protection Clause, but for different reasons. First, this case addresses the amendment only as it applies to, and forbids, race-conscious admissions programs that consider race solely in order to obtain the educational benefits of a diverse student body. Second, the Constitution permits, but does not require, the use of the kind of race-conscious programs now barred by the Michigan Constitution. It foresees the ballot box, not the courts, as the normal instrument for resolving debates about the merits of these programs. Third, *Hunter* v. *Erickson*, 393 U. S. 385, and *Washington* v. *Seattle School Dist. No. 1*, 458 U. S. 457, which reflect the important principle that an individual's ability to participate meaningfully in the political process should be independent

Syllabus

of his race, do not apply here. Those cases involved a restructuring of the political process that changed the political level at which policies were enacted, while this case involves an amendment that took decisionmaking authority away from unelected actors and placed it in the hands of the voters. Hence, this case does not involve a diminution of the minority's ability to participate in the political process. Extending the holding of *Hunter* and *Seattle* to situations where decisionmaking authority is moved from an administrative body to a political one would also create significant difficulties, given the nature of the administrative process. Furthermore, the principle underlying *Hunter* and *Seattle* runs up against a competing principle favoring decisionmaking through the democratic process. Pp. 332–337.

KENNEDY, J., announced the judgment of the Court and delivered an opinion, in which ROBERTS, C. J., and ALITO, J., joined. ROBERTS, C. J., filed a concurring opinion, *post*, p. 315. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined, *post*, p. 316. BREYER, J., filed an opinion concurring in the judgment, *post*, p. 332. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 337. KAGAN, J., took no part in the consideration or decision of the case.

John J. Bursch, Solicitor General of Michigan, argued the cause for petitioner. With him on the briefs were *Bill Schuette*, Attorney General, *pro se*, *B. Eric Restuccia*, Deputy Solicitor General, and *Aaron D. Lindstrom*, Assistant Solicitor General. *Charles J. Cooper*, *David H. Thompson*, *Howard C. Nielson, Jr.*, *Michael E. Rosman*, and *Alan K. Palmer* filed a brief for respondent Russell in support of petitioner.

Mark D. Rosenbaum argued the cause for respondents Cantrell et al. With him on the brief were *David B. Sapp*, *Karin A. DeMasi*, *Laurence H. Tribe*, *Joshua I. Civin*, *Erwin Chemerinsky*, *Damon T. Hewitt*, *Steven R. Shapiro*, *Dennis D. Parker*, *Melvin Butch Hollowell, Jr.*, *Kary L. Moss*, *Michael J. Steinberg*, and *Daniel P. Tokaji*. *Shanta Driver* argued the cause for respondents Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN) et al. With her on the brief were *George B. Washington*, *Eileen R. Scheff*, *Winifred Kao*, and *Doyle G. O'Connor*. *Leonard M. Niehoff* filed a brief for respondents Regents of the Univer-

sity of Michigan et al. *Stephanie R. Setterington* filed a brief for respondents Board of Governors of Wayne State University et al.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Arizona et al. by *Thomas C. Horne*, Attorney General of Arizona, *Robert L. Ellman*, Solicitor General, and *Paula S. Bickett*, and by the Attorneys General for their respective States as follows: *Luther Strange* of Alabama, *Sam Olens* of Georgia, *E. Scott Pruitt* of Oklahoma, and *Patrick Morrisey* of West Virginia; for the American Civil Rights Union et al. by *Peter J. Ferrara* and *D. John Sauer*; for the Asian American Legal Foundation by *Gordon M. Fauth, Jr.*; for the California Association of Scholars et al. by *John C. Eastman*, *Anthony T. Caso*, *Edwin Meese III*, *Gail Heriot*, and *Manuel S. Klausner*; for Former Attorneys of the Department of Justice Civil Rights Division by *Michael F. Smith*; for the Judicial Education Project by *Carrie Severino*; for Judicial Watch, Inc., et al. by *Chris Fedeli* and *Julie Axelrod*; for the Mountain States Legal Foundation by *Steven J. Lechner*; for the Pacific Legal Foundation et al. by *Meriem L. Hubbard*, *Ralph W. Kasarda*, and *Joshua P. Thompson*; for the XIV Foundation et al. by *Robert N. Driscoll*; for David Boyle by *Mr. Boyle*, *pro se*; for Carl Cohen et al. by *Joel C. Mandelman*; and for Richard Sander by *Stuart Taylor, Jr.*

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *Kamala D. Harris*, Attorney General of California, *Antonette Benita Cordero*, Deputy Attorney General, *Susan Duncan Lee*, Acting State Solicitor General, and *Mark Breckler*, Chief Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Irvin B. Nathan* of the District of Columbia, *David M. Louie* of Hawaii, *Lisa Madigan* of Illinois, *Thomas J. Miller* of Iowa, *Gary K. King* of New Mexico, and *Ellen F. Rosenblum* of Oregon; for the American Council on Education et al. by *Martin Michaelson*, *Ada Meloy*, and *Alexander E. Dreier*; for the Anti-Defamation League by *Howard W. Goldstein*, *Samuel P. Groner*, and *Steven M. Freeman*; for the Civil Rights Project/Proyecto Derechos Civiles by *Liliana M. Garces*; for the Committee of Law Professors by *Wilson R. Huhn*; for Constitutional and Local Government Law Scholars by *Pamela S. Karlan*, *Jeffrey L. Fisher*, and *Kevin K. Russell*; for the Leadership Conference on Civil and Human Rights et al. by *Mark E. Haddad*, *Quin M. Sorenson*, *Wade Henderson*, and *Lisa M. Bornstein*; for the National Education Association et al. by *Alice O'Brien*, *Jason Walta*, and *Judith A. Scott*; for the National School Boards Association et al. by *Francisco M. Negrón, Jr.*, and *Patricia J. Whitten*; for the President and Chancellors of the University of California by *Bradley S. Phillips*, *Michael J. Mongan*, and *Christopher M. Patti*; for

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

The Court in this case must determine whether an amendment to the Constitution of the State of Michigan, approved and enacted by its voters, is invalid under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

In 2003, the Court reviewed the constitutionality of two admissions systems at the University of Michigan, one for its undergraduate class and one for its law school. The undergraduate admissions plan was addressed in *Gratz* v. *Bollinger*, 539 U. S. 244. The law school admissions plan was addressed in *Grutter* v. *Bollinger*, 539 U. S. 306. Each admissions process permitted the explicit consideration of an applicant's race. In *Gratz*, the Court invalidated the undergraduate plan as a violation of the Equal Protection Clause. 539 U. S., at 270. In *Grutter*, the Court found no constitutional flaw in the law school admissions plan's more limited use of race-based preferences. 539 U. S., at 343.

In response to the Court's decision in *Gratz*, the university revised its undergraduate admissions process, but the revision still allowed limited use of race-based preferences. After a statewide debate on the question of racial preferences in the context of governmental decisionmaking, the voters, in 2006, adopted an amendment to the State Constitu-

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the San Francisco Bay Area Rapid Transit District by *Matthew H. Burrows*, *Thomas C. Lee*, and *Joseph A. Hearst*; for the San Francisco Unified School District et al. by *G. Scott Emblidge*; for the Society of American Law Teachers by *David D. Cross*; for Donald R. Kinder et al. by *Catherine M. A. Carroll*, *Joshua M. Salzman*, and *Stuart D. Allen*; for Paul Finkleman et al. by *Andrew J. Pincus*; and for Gary Segura et al. by *Derek T. Ho* and *Alexander S. Edelson*.

Briefs of *amici curiae* were filed for California Social Science Researchers et al. by *Elizabeth Ann Lawrence*; and for the Michigan Civil Rights Commission by *Daniel M. Levy*.

tion prohibiting state and other governmental entities in Michigan from granting certain preferences, including race-based preferences, in a wide range of actions and decisions. Under the terms of the amendment, race-based preferences cannot be part of the admissions process for state universities. That particular prohibition is central to the instant case.

The ballot proposal was called Proposal 2 and, after it passed by a margin of 58 percent to 42 percent, the resulting enactment became Article I, § 26, of the Michigan Constitution. As noted, the amendment is in broad terms. Section 26 states, in relevant part, as follows:

> "(1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
>
> "(2) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
>
> "(3) For the purposes of this section 'state' includes, but is not necessarily limited to, the state itself, any city, county, any public college, university, or community college, school district, or other political subdivision or governmental instrumentality of or within the State of Michigan not included in sub-section 1."

Section 26 was challenged in two cases. Among the plaintiffs in the suits were the Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN); students; fac-

ulty; and prospective applicants to Michigan public universities. The named defendants included then-Governor Jennifer Granholm, the Board of Regents of the University of Michigan, the Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University. The Michigan attorney general was granted leave to intervene as a defendant. The United States District Court for the Eastern District of Michigan consolidated the cases.

In 2008, the District Court granted summary judgment to Michigan, thus upholding Proposal 2. *BAMN* v. *Regents of Univ. of Mich.*, 539 F. Supp. 2d 924. The District Court denied a motion to reconsider the grant of summary judgment. 592 F. Supp. 2d 948. A panel of the United States Court of Appeals for the Sixth Circuit reversed the grant of summary judgment. 652 F. 3d 607 (2011). Judge Gibbons dissented from that holding. *Id.*, at 633–646. The panel majority held that Proposal 2 had violated the principles elaborated by this Court in *Washington* v. *Seattle School Dist. No. 1*, 458 U. S. 457 (1982), and in the cases that *Seattle* relied upon.

The Court of Appeals, sitting en banc, agreed with the panel decision. 701 F. 3d 466 (CA6 2012). The majority opinion determined that *Seattle* "mirrors the [case] before us." *Id.*, at 475. Seven judges dissented in a number of opinions. The Court granted certiorari. 568 U. S. 1249 (2013).

Before the Court addresses the question presented, it is important to note what this case is not about. It is not about the constitutionality, or the merits, of race-conscious admissions policies in higher education. The consideration of race in admissions presents complex questions, in part addressed last Term in *Fisher* v. *University of Tex. at Austin*, 570 U. S. 297 (2013). In *Fisher*, the Court did not disturb the principle that the consideration of race in admissions is permissible, provided that certain conditions are met. In this case, as in *Fisher*, that principle is not challenged. The question here concerns not the permissibility

of race-conscious admissions policies under the Constitution but whether, and in what manner, voters in the States may choose to prohibit the consideration of racial preferences in governmental decisions, in particular with respect to school admissions.

This Court has noted that some States have decided to prohibit race-conscious admissions policies. In *Grutter*, the Court noted: "Universities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaged in experimenting with a wide variety of alternative approaches. Universities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop." 539 U. S., at 342 (citing *United States* v. *Lopez*, 514 U. S. 549, 581 (1995) (KENNEDY, J., concurring) ("[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear")). In this way, *Grutter* acknowledged the significance of a dialogue regarding this contested and complex policy question among and within States. There was recognition that our federal structure "permits 'innovation and experimentation'" and "enables greater citizen 'involvement in democratic processes.'" *Bond* v. *United States*, 564 U. S. 211, 221 (2011) (quoting *Gregory* v. *Ashcroft*, 501 U. S. 452, 458 (1991)). While this case arises in Michigan, the decision by the State's voters reflects in part the national dialogue regarding the wisdom and practicality of race-conscious admissions policies in higher education. See, *e. g.*, *Coalition for Economic Equity* v. *Wilson*, 122 F. 3d 692 (CA9 1997).

In Michigan, the State Constitution invests independent boards of trustees with plenary authority over public universities, including admissions policies. Mich. Const., Art. VIII, § 5; see also *Federated Publications, Inc.* v. *Board of Trustees of Mich. State Univ.*, 460 Mich. 75, 86–87, 594 N. W. 2d 491, 497 (1999). Although the members of the boards are elected, some evidence in the record suggests they delegated

authority over admissions policy to the faculty. But whether the boards or the faculty set the specific policy, Michigan's public universities did consider race as a factor in admissions decisions before 2006.

In holding § 26 invalid in the context of student admissions at state universities, the Court of Appeals relied in primary part on *Seattle*, *supra*, which it deemed to control the case. But that determination extends *Seattle*'s holding in a case presenting quite different issues to reach a conclusion that is mistaken here. Before explaining this further, it is necessary to consider the relevant cases that preceded *Seattle* and the background against which *Seattle* itself arose.

Though it has not been prominent in the arguments of the parties, this Court's decision in *Reitman* v. *Mulkey*, 387 U. S. 369 (1967), is a proper beginning point for discussing the controlling decisions. In *Mulkey*, voters amended the California Constitution to prohibit any state legislative interference with an owner's prerogative to decline to sell or rent residential property on any basis. Two different cases gave rise to *Mulkey*. In one a couple could not rent an apartment, and in the other a couple were evicted from their apartment. Those adverse actions were on account of race. In both cases the complaining parties were barred, on account of race, from invoking the protection of California's statutes; and, as a result, they were unable to lease residential property. This Court concluded that the state constitutional provision was a denial of equal protection. The Court agreed with the California Supreme Court that the amendment operated to insinuate the State into the decision to discriminate by encouraging that practice. The Court noted the "immediate design and intent" of the amendment was to "establis[h] a purported constitutional right to privately discriminate." *Id.*, at 374 (internal quotation marks omitted; emphasis deleted). The Court agreed that the amendment "expressly authorized and constitutionalized the private right to discriminate." *Id.*, at 376. The effect of the

state constitutional amendment was to "significantly encourage and involve the State in private racial discriminations." *Id.*, at 381. In a dissent joined by three other Justices, Justice Harlan disagreed with the majority's holding. *Id.*, at 387. The dissent reasoned that California, by the action of its voters, simply wanted the State to remain neutral in this area, so that the State was not a party to discrimination. *Id.*, at 389. That dissenting voice did not prevail against the majority's conclusion that the state action in question encouraged discrimination, causing real and specific injury.

The next precedent of relevance, *Hunter* v. *Erickson*, 393 U. S. 385 (1969), is central to the arguments the respondents make in the instant case. In *Hunter*, the Court for the first time elaborated what the Court of Appeals here styled the "political process" doctrine. There, the Akron City Council found that the citizens of Akron consisted of "'people of different race[s], . . . many of whom live in circumscribed and segregated areas, under sub-standard unhealthful, unsafe, unsanitary and overcrowded conditions, because of discrimination in the sale, lease, rental and financing of housing.'" *Id.*, at 391. To address the problem, Akron enacted a fair housing ordinance to prohibit that sort of discrimination. In response, voters amended the city charter to overturn the ordinance and to require that any additional antidiscrimination housing ordinance be approved by referendum. But most other ordinances "regulating the real property market" were not subject to those threshold requirements. *Id.*, at 390. The plaintiff, a black woman in Akron, Ohio, alleged that her real estate agent could not show her certain residences because the owners had specified they would not sell to black persons.

Central to the Court's reasoning in *Hunter* was that the charter amendment was enacted in circumstances where widespread racial discrimination in the sale and rental of housing led to segregated housing, forcing many to live in "'unhealthful, unsafe, unsanitary and overcrowded condi-

tions.'" *Id.*, at 391. The Court stated: "It is against this background that the referendum required by [the charter amendment] must be assessed." *Ibid.* Akron attempted to characterize the charter amendment "simply as a public decision to move slowly in the delicate area of race relations" and as a means "to allow the people of Akron to participate" in the decision. *Id.*, at 392. The Court rejected Akron's flawed "justifications for its discrimination," justifications that by their own terms had the effect of acknowledging the targeted nature of the charter amendment. *Ibid.* The Court noted, furthermore, that the charter amendment was unnecessary as a general means of public control over the city council; for the people of Akron already were empowered to overturn ordinances by referendum. *Id.*, at 390, n. 6. The Court found that the city charter amendment, by singling out antidiscrimination ordinances, "places special burdens on racial minorities within the governmental process," thus becoming as impermissible as any other government action taken with the invidious intent to injure a racial minority. *Id.*, at 391. Justice Harlan filed a concurrence. He argued the city charter amendment "has the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest." *Id.*, at 395. But without regard to the sentence just quoted, *Hunter* rests on the unremarkable principle that the State may not alter the procedures of government to target racial minorities. The facts in *Hunter* established that invidious discrimination would be the necessary result of the procedural restructuring. Thus, in *Mulkey* and *Hunter*, there was a demonstrated injury on the basis of race that, by reasons of state encouragement or participation, became more aggravated.

Seattle is the third case of principal relevance here. There, the school board adopted a mandatory busing program to alleviate racial isolation of minority students in local schools. Voters who opposed the school board's busing plan

passed a state initiative that barred busing to desegregate. The Court first determined that, although "white as well as Negro children benefit from" diversity, the school board's plan "inures primarily to the benefit of the minority." 458 U. S., at 472. The Court next found that "the practical effect" of the state initiative was to "remov[e] the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body, in such a way as to burden minority interests" because advocates of busing "now must seek relief from the state legislature, or from the statewide electorate." *Id.*, at 474. The Court therefore found that the initiative had "explicitly us[ed] the racial nature of a decision to determine the decisionmaking process." *Id.*, at 470 (emphasis deleted).

Seattle is best understood as a case in which the state action in question (the bar on busing enacted by the State's voters) had the serious risk, if not purpose, of causing specific injuries on account of race, just as had been the case in *Mulkey* and *Hunter*. Although there had been no judicial finding of *de jure* segregation with respect to Seattle's school district, it appears as though school segregation in the district in the 1940's and 1950's may have been the partial result of school board policies that "permitted white students to transfer out of black schools while restricting the transfer of black students into white schools." *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701, 807–808 (2007) (BREYER, J., dissenting). In 1977, the National Association for the Advancement of Colored People (NAACP) filed a complaint with the Office for Civil Rights, a federal agency. The NAACP alleged that the school board had maintained a system of *de jure* segregation. Specifically, the complaint alleged "that the Seattle School Board had created or perpetuated unlawful racial segregation through, *e. g.*, certain school-transfer criteria, a construction program that needlessly built new schools in white areas, district line-drawing criteria, the maintenance of inferior

facilities at black schools, the use of explicit racial criteria in the assignment of teachers and other staff, and a general pattern of delay in respect to the implementation of promised desegregation efforts." *Id.*, at 810. As part of a settlement with the Office for Civil Rights, the school board implemented the "Seattle Plan," which used busing and mandatory reassignments between elementary schools to reduce racial imbalance and which was the subject of the state initiative at issue in *Seattle*. See 551 U. S., at 807–812.

As this Court held in *Parents Involved*, the school board's purported remedial action would not be permissible today absent a showing of *de jure* segregation. *Id.*, at 720–721. That holding prompted JUSTICE BREYER to observe in dissent, as noted above, that one permissible reading of the record was that the school board had maintained policies to perpetuate racial segregation in the schools. In all events we must understand *Seattle* as *Seattle* understood itself, as a case in which neither the State nor the United States "challenge[d] the propriety of race-conscious student assignments for the purpose of achieving integration, even absent a finding of prior *de jure* segregation." 458 U. S., at 472, n. 15. In other words the legitimacy and constitutionality of the remedy in question (busing for desegregation) was assumed, and *Seattle* must be understood on that basis. *Ibid.* *Seattle* involved a state initiative that "was carefully tailored to interfere only with desegregative busing." *Id.*, at 471. The *Seattle* Court, accepting the validity of the school board's busing remedy as a predicate to its analysis of the constitutional question, found that the State's disapproval of the school board's busing remedy was an aggravation of the very racial injury in which the State itself was complicit.

The broad language used in *Seattle*, however, went well beyond the analysis needed to resolve the case. The Court there seized upon the statement in Justice Harlan's concurrence in *Hunter* that the procedural change in that case had "the clear purpose of making it more difficult for certain ra-

cial and religious minorities to achieve legislation that is in their interest." 393 U. S., at 395. That language, taken in the context of the facts in *Hunter*, is best read simply to describe the necessity for finding an equal protection violation where specific injuries from hostile discrimination were at issue. The *Seattle* Court, however, used the language from the *Hunter* concurrence to establish a new and far-reaching rationale. *Seattle* stated that where a government policy "inures primarily to the benefit of the minority" and "minorities . . . consider" the policy to be "'in their interest,'" then any state action that "place[s] effective decision-making authority over" that policy "at a different level of government" must be reviewed under strict scrutiny. 458 U. S., at 472, 474. In essence, according to the broad reading of *Seattle*, any state action with a "racial focus" that makes it "more difficult for certain racial minorities than for other groups" to "achieve legislation that is in their interest" is subject to strict scrutiny. It is this reading of *Seattle* that the Court of Appeals found to be controlling here. And that reading must be rejected.

The broad rationale that the Court of Appeals adopted goes beyond the necessary holding and the meaning of the precedents said to support it; and in the instant case neither the formulation of the general rule just set forth nor the precedents cited to authenticate it suffice to invalidate Proposal 2. The expansive reading of *Seattle* has no principled limitation and raises serious questions of compatibility with the Court's settled equal protection jurisprudence. To the extent *Seattle* is read to require the Court to determine and declare which political policies serve the "interest" of a group defined in racial terms, that rationale was unnecessary to the decision in *Seattle*; it has no support in precedent; and it raises serious constitutional concerns. That expansive language does not provide a proper guide for decisions and should not be deemed authoritative or controlling. The rule that the Court of Appeals elaborated and the respondents

seek to establish here would contradict central equal protection principles.

In cautioning against "impermissible racial stereotypes," this Court has rejected the assumption that "members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw* v. *Reno*, 509 U. S. 630, 647 (1993); see also *Metro Broadcasting, Inc.* v. *FCC*, 497 U. S. 547, 636 (1990) (KENNEDY, J., dissenting) (rejecting the "demeaning notion that members of . . . defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens"). It cannot be entertained as a serious proposition that all individuals of the same race think alike. Yet that proposition would be a necessary beginning point were the *Seattle* formulation to control, as the Court of Appeals held it did in this case. And if it were deemed necessary to probe how some races define their own interest in political matters, still another beginning point would be to define individuals according to race. But in a society in which those lines are becoming more blurred, the attempt to define race-based categories also raises serious questions of its own. Government action that classifies individuals on the basis of race is inherently suspect and carries the danger of perpetuating the very racial divisions the polity seeks to transcend. Cf. *Ho* v. *San Francisco Unified School Dist.*, 147 F. 3d 854, 858 (CA9 1998) (school district delineating 13 racial categories for purposes of racial balancing). Were courts to embark upon this venture not only would it be undertaken with no clear legal standards or accepted sources to guide judicial decision but also it would result in, or at least impose a high risk of, inquiries and categories dependent upon demeaning stereotypes, classifications of questionable constitutionality on their own terms.

Even assuming these initial steps could be taken in a manner consistent with a sound analytic and judicial framework,

the court would next be required to determine the policy realms in which certain groups—groups defined by race—have a political interest. That undertaking, again without guidance from any accepted legal standards, would risk, in turn, the creation of incentives for those who support or oppose certain policies to cast the debate in terms of racial advantage or disadvantage. Thus could racial antagonisms and conflict tend to arise in the context of judicial decisions as courts undertook to announce what particular issues of public policy should be classified as advantageous to some group defined by race. This risk is inherent in adopting the *Seattle* formulation.

There would be no apparent limiting standards defining what public policies should be included in what *Seattle* called policies that "inur[e] primarily to the benefit of the minority" and that "minorities . . . consider" to be "'in their interest.'" 458 U. S., at 472, 474. Those who seek to represent the interests of particular racial groups could attempt to advance those aims by demanding an equal protection ruling that any number of matters be foreclosed from voter review or participation. In a nation in which governmental policies are wide ranging, those who seek to limit voter participation might be tempted, were this Court to adopt the *Seattle* formulation, to urge that a group they choose to define by race or racial stereotypes are advantaged or disadvantaged by any number of laws or decisions. Tax policy, housing subsidies, wage regulations, and even the naming of public schools, highways, and monuments are just a few examples of what could become a list of subjects that some organizations could insist should be beyond the power of voters to decide, or beyond the power of a legislature to decide when enacting limits on the power of local authorities or other governmental entities to address certain subjects. Racial division would be validated, not discouraged, were the *Seattle* formulation, and the reasoning of the Court of Appeals in this case, to remain in force.

Perhaps, when enacting policies as an exercise of democratic self-government, voters will determine that race-based preferences should be adopted. The constitutional validity of some of those choices regarding racial preferences is not at issue here. The holding in the instant case is simply that the courts may not disempower the voters from choosing which path to follow. In the realm of policy discussions the regular give-and-take of debate ought to be a context in which rancor or discord based on race is avoided, not invited. And if these factors are to be interjected, surely it ought not to be at the invitation or insistence of the courts.

One response to these concerns may be that objections to the larger consequences of the *Seattle* formulation need not be confronted in this case, for here race was an undoubted subject of the ballot issue. But a number of problems raised by *Seattle*, such as racial definitions, still apply. And this principal flaw in the ruling of the Court of Appeals does remain: Here there was no infliction of a specific injury of the kind at issue in *Mulkey* and *Hunter* and in the history of the Seattle schools. Here there is no precedent for extending these cases to restrict the right of Michigan voters to determine that race-based preferences granted by Michigan governmental entities should be ended.

It should also be noted that the judgment of the Court of Appeals in this case of necessity calls into question other long-settled rulings on similar state policies. The California Supreme Court has held that a California constitutional amendment prohibiting racial preferences in public contracting does not violate the rule set down by *Seattle*. *Coral Constr., Inc.* v. *City and County of San Francisco*, 50 Cal. 4th 315, 235 P. 3d 947 (2010). The Court of Appeals for the Ninth Circuit has held that the same amendment, which also barred racial preferences in public education, does not violate the Equal Protection Clause. *Wilson*, 122 F. 3d 692. If the Court were to affirm the essential rationale of the Court of Appeals in the instant case, those holdings

would be invalidated, or at least would be put in serious question. The Court, by affirming the judgment now before it, in essence would announce a finding that the past 15 years of state public debate on this issue have been improper. And were the argument made that *Coral* might still stand because it involved racial preferences in public contracting while this case concerns racial preferences in university admissions, the implication would be that the constitutionality of laws forbidding racial preferences depends on the policy interest at stake, the concern that, as already explained, the voters deem it wise to avoid because of its divisive potential. The instant case presents the question involved in *Coral* and *Wilson* but not involved in *Mulkey*, *Hunter*, and *Seattle*. That question is not how to address or prevent injury caused on account of race but whether voters may determine whether a policy of race-based preferences should be continued.

By approving Proposal 2 and thereby adding § 26 to their State Constitution, the Michigan voters exercised their privilege to enact laws as a basic exercise of their democratic power. In the federal system States "respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times." *Bond*, 564 U. S., at 221. Michigan voters used the initiative system to bypass public officials who were deemed not responsive to the concerns of a majority of the voters with respect to a policy of granting race-based preferences that raises difficult and delicate issues.

The freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power. The mandate for segregated schools, *Brown* v. *Board of Education*, 347 U. S. 483 (1954); a wrongful invasion of the home, *Silverman* v. *United States*, 365 U. S. 505 (1961); or punishing a protester whose views offend others, *Texas* v. *Johnson*, 491 U. S. 397 (1989); and scores of other

examples teach that individual liberty has constitutional protection, and that liberty's full extent and meaning may remain yet to be discovered and affirmed. Yet freedom does not stop with individual rights. Our constitutional system embraces, too, the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times and the course of a Nation that must strive always to make freedom ever greater and more secure. Here Michigan voters acted in concert and statewide to seek consensus and adopt a policy on a difficult subject against a historical background of race in America that has been a source of tragedy and persisting injustice. That history demands that we continue to learn, to listen, and to remain open to new approaches if we are to aspire always to a constitutional order in which all persons are treated with fairness and equal dignity. Were the Court to rule that the question addressed by Michigan voters is too sensitive or complex to be within the grasp of the electorate; or that the policies at issue remain too delicate to be resolved save by university officials or faculties, acting at some remove from immediate public scrutiny and control; or that these matters are so arcane that the electorate's power must be limited because the people cannot prudently exercise that power even after a full debate, that holding would be an unprecedented restriction on the exercise of a fundamental right held not just by one person but by all in common. It is the right to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process.

The respondents in this case insist that a difficult question of public policy must be taken from the reach of the voters, and thus removed from the realm of public discussion, dialogue, and debate in an election campaign. Quite in addition to the serious First Amendment implications of that position with respect to any particular election, it is inconsistent with the underlying premises of a responsible, functioning democ-

racy. One of those premises is that a democracy has the capacity—and the duty—to learn from its past mistakes; to discover and confront persisting biases; and by respectful, rational deliberation to rise above those flaws and injustices. That process is impeded, not advanced, by court decrees based on the proposition that the public cannot have the requisite repose to discuss certain issues. It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds. The process of public discourse and political debate should not be foreclosed even if there is a risk that during a public campaign there will be those, on both sides, who seek to use racial division and discord to their own political advantage. An informed public can, and must, rise above this. The idea of democracy is that it can, and must, mature. Freedom embraces the right, indeed the duty, to engage in a rational, civic discourse in order to determine how best to form a consensus to shape the destiny of the Nation and its people. These First Amendment dynamics would be disserved if this Court were to say that the question here at issue is beyond the capacity of the voters to debate and then to determine.

These precepts are not inconsistent with the well-established principle that when hurt or injury is inflicted on racial minorities by the encouragement or command of laws or other state action, the Constitution requires redress by the courts. Cf. *Johnson* v. *California*, 543 U. S. 499, 511–512 (2005) ("[S]earching judicial review . . . is necessary to guard against invidious discrimination"); *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614, 619 (1991) ("Racial discrimination" is "invidious in all contexts"). As already noted, those were the circumstances that the Court found present in *Mulkey*, *Hunter*, and *Seattle*. But those circumstances are not present here.

For reasons already discussed, *Mulkey*, *Hunter*, and *Seattle* are not precedents that stand for the conclusion that

Michigan's voters must be disempowered from acting. Those cases were ones in which the political restriction in question was designed to be used, or was likely to be used, to encourage infliction of injury by reason of race. What is at stake here is not whether injury will be inflicted but whether government can be instructed not to follow a course that entails, first, the definition of racial categories and, second, the grant of favored status to persons in some racial categories and not others. The electorate's instruction to governmental entities not to embark upon the course of race-defined and race-based preferences was adopted, we must assume, because the voters deemed a preference system to be unwise, on account of what voters may deem its latent potential to become itself a source of the very resentments and hostilities based on race that this Nation seeks to put behind it. Whether those adverse results would follow is, and should be, the subject of debate. Voters might likewise consider, after debate and reflection, that programs designed to increase diversity—consistent with the Constitution—are a necessary part of progress to transcend the stigma of past racism.

This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it. There is no authority in the Constitution of the United States or in this Court's precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters. See *Sailors* v. *Board of Ed. of County of Kent*, 387 U. S. 105, 109 (1967) ("Save and unless the state, county, or municipal government runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs"). Deliberative debate on sensitive issues such as racial preferences all too often may shade into rancor. But that does not justify removing certain court-determined issues from the voters' reach. Democracy does not presume that some subjects are either too divisive or too profound for public debate.

The judgment of the Court of Appeals for the Sixth Circuit is reversed.

It is so ordered.

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

CHIEF JUSTICE ROBERTS, concurring.

The dissent devotes 11 pages to expounding its own policy preferences in favor of taking race into account in college admissions, while nonetheless concluding that it "do[es] not mean to suggest that the virtues of adopting race-sensitive admissions policies should inform the legal question before the Court." *Post*, at 391 (opinion of SOTOMAYOR, J.). The dissent concedes that the governing boards of the State's various universities could have implemented a policy making it illegal to "discriminate against, or grant preferential treatment to," any individual on the basis of race. See *post*, at 339–340, 370. On the dissent's view, if the governing boards conclude that drawing racial distinctions in university admissions is undesirable or counterproductive, they are permissibly exercising their policymaking authority. But others who might reach the same conclusion are failing to take race seriously.

The dissent states that "[t]he way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race." *Post*, at 381. And it urges that "[r]ace matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: 'I do not belong here.'" *Ibid.* But it is not "out of touch with reality" to conclude that racial preferences may themselves have the debilitating effect of reinforcing precisely that doubt, and—if so—that the preferences do more harm than good. *Post*, at 380. To disagree with the dissent's views on the costs and benefits of racial preferences is not to "wish away, rather than confront," racial inequality. *Post*, at 381. People can

disagree in good faith on this issue, but it similarly does more harm than good to question the openness and candor of those on either side of the debate.*

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

It has come to this. Called upon to explore the jurisprudential twilight zone between two errant lines of precedent, we confront a frighteningly bizarre question: Does the Equal Protection Clause of the Fourteenth Amendment *forbid* what its text plainly *requires*? Needless to say (except that this case obliges us to say it), the question answers itself. "The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception." *Grutter* v. *Bollinger*, 539 U. S. 306, 349 (2003) (SCALIA, J., concurring in part and dissenting in part). It is precisely this understanding—the correct understanding—of the federal Equal Protection Clause that the people of the State of Michigan have adopted for their own fundamental law. By adopting it, they did not simultaneously *offend* it.

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*JUSTICE SCALIA and JUSTICE SOTOMAYOR question the relationship between *Washington* v. *Seattle School Dist. No. 1*, 458 U. S. 457 (1982), and *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701 (2007). See *post*, at 321, n. 2 (SCALIA, J., concurring in judgment); *post*, at 359, n. 9 (SOTOMAYOR, J., dissenting). The plurality today addresses that issue, explaining that the race-conscious action in *Parents Involved* was unconstitutional given the absence of a showing of prior *de jure* segregation. *Parents Involved*, *supra*, at 720–721 (majority opinion), 736 (plurality opinion); see *ante*, at 306. Today's plurality notes that the Court in *Seattle* "assumed" the constitutionality of the busing remedy at issue there, "'even absent a finding of prior *de jure* segregation.'" *Ante*, at 306 (quoting *Seattle*, *supra*, at 472, n. 15). The assumption on which *Seattle* proceeded did not constitute a finding sufficient to justify the race-conscious action in *Parents Involved*, though it is doubtless pertinent in analyzing *Seattle*. "As this Court held in *Parents Involved*, the [Seattle] school board's purported remedial action would not be permissible today absent a *showing* of *de jure* segregation," but "we must understand *Seattle* as *Seattle* understood itself." *Ante*, at 306 (emphasis added).

Even taking this Court's sorry line of race-based admissions cases as a given, I find the question presented only slightly less strange: Does the Equal Protection Clause forbid a State from banning a practice that the Clause barely—and only provisionally—permits? Reacting to those race-based admissions decisions, some States—whether deterred by the prospect of costly litigation; aware that *Grutter*'s bell may soon toll, see 539 U. S., at 343; or simply opposed in principle to the notion of "benign" racial discrimination—have gotten out of the racial-preferences business altogether. And with our express encouragement: "Universities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaging in experimenting with a wide variety of alternative approaches. Universities in other States can *and should* draw on the most promising aspects of these race-neutral alternatives as they develop." *Id.*, at 342 (emphasis added). Respondents seem to think this admonition was merely in jest.[1] The experiment, they maintain, is not only over; it never rightly began. Neither the people of the States nor their legislatures ever had the option of directing subordinate public-university officials to cease considering the race of applicants, since that would deny members of those minority groups the option of enacting a policy designed to further their interest, thus denying them the equal protection of the laws. Never mind that it is hotly disputed whether the practice of race-based admissions is *ever* in a racial minority's interest. Cf. *id.*, at 371–373 (THOMAS, J., concurring in part and dissenting in part). And never mind that, were a public university to stake its defense of a race-based admissions policy on the ground that it was *designed* to benefit primarily minorities (as opposed to all students, regardless of color, by enhancing diversity), *we would hold the policy unconstitutional*. See *id.*, at 322–325.

[1] For simplicity's sake, I use "respondent" or "respondents" throughout the opinion to describe only those parties who are adverse to petitioner, not Eric Russell, a respondent who supports petitioner.

But the battleground for this case is not the constitutionality of race-based admissions—at least, not quite. Rather, it is the so-called political-process doctrine, derived from this Court's opinions in *Washington* v. *Seattle School Dist. No. 1*, 458 U. S. 457 (1982), and *Hunter* v. *Erickson*, 393 U. S. 385 (1969). I agree with those parts of the plurality opinion that repudiate this doctrine. But I do not agree with its reinterpretation of *Seattle* and *Hunter*, which makes them stand in part for the cloudy and doctrinally anomalous proposition that whenever state action poses "the serious risk . . . of causing specific injuries on account of race," it denies equal protection. *Ante*, at 305. I would instead reaffirm that the "ordinary principles of our law [and] of our democratic heritage" require "plaintiffs alleging equal protection violations" stemming from facially neutral acts to "prove intent and causation and not merely the existence of racial disparity." *Freeman* v. *Pitts*, 503 U. S. 467, 506 (1992) (SCALIA, J., concurring) (citing *Washington* v. *Davis*, 426 U. S. 229 (1976)). I would further hold that a law directing state actors to provide equal protection is (to say the least) facially neutral, and cannot violate the Constitution. Section 26 of the Michigan Constitution (formerly Proposal 2) rightly stands.

I

A

The political-process doctrine has its roots in two of our cases. The first is *Hunter*. In 1964, the Akron City Council passed a fair-housing ordinance "'assur[ing] equal opportunity to all persons to live in decent housing facilities regardless of race, color, religion, ancestry or national origin.'" 393 U. S., at 386. Soon after, the city's voters passed an amendment to the Akron City Charter stating that any ordinance enacted by the council that "'regulates'" commercial transactions in real property "'on the basis of race, color, religion, national origin or ancestry'"—including the already enacted 1964 ordinance—"must first be approved by a major-

ity of the electors voting on the question" at a later referendum. *Id.*, at 387. The question was whether the charter amendment denied equal protection. Answering yes, the Court explained that "although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination." *Id.*, at 391. By placing a "special burden on racial minorities within the governmental processes," the amendment "disadvantage[d]" a racial minority "by making it more difficult to enact legislation in its behalf." *Id.*, at 391, 393.

The reasoning in *Seattle* is of a piece. Resolving to "eliminate all [racial] imbalance from the Seattle public schools," the city school board passed a mandatory busing and pupil-reassignment plan of the sort typically imposed on districts guilty of *de jure* segregation. 458 U. S., at 460–461. A year later, the citizens of the State of Washington passed Initiative 350, which directed (with exceptions) that "'no school . . . shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence . . . and which offers the course of study pursued by such student,'" permitting only court-ordered race-based busing. *Id.*, at 462. The lower courts held Initiative 350 unconstitutional, and we affirmed, announcing in the prelude of our analysis—as though it were beyond debate—that the Equal Protection Clause forbade laws that "subtly distor[t] governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." *Id.*, at 467.

The first question in *Seattle* was whether the subject matter of Initiative 350 was a "'racial' issue," triggering *Hunter* and its process doctrine. 458 U. S., at 471–472. It was "undoubtedly . . . true" that whites and blacks were "counted among both the supporters and the opponents of Initiative 350." *Id.*, at 472. It was "equally clear" that both white

and black children benefited from desegregated schools. *Ibid.* Nonetheless, we concluded that desegregation "inures *primarily* to the benefit of the minority, and is designed for that purpose." *Ibid.* (emphasis added). In any event, it was "enough that minorities may consider busing for integration to be 'legislation that is in their interest.'" *Id.*, at 474 (quoting *Hunter*, *supra*, at 395 (Harlan, J., concurring)).

So we proceeded to the heart of the political-process analysis. We held Initiative 350 unconstitutional, since it removed "the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body, in such a way as to burden minority interests." *Seattle*, 458 U. S., at 474. Although school boards in Washington retained authority over *other* student-assignment issues and over most matters of educational policy generally, under Initiative 350, minorities favoring race-based busing would have to "surmount a considerably higher hurdle" than the mere petitioning of a local assembly: They "now must seek relief from the state legislature, or from the statewide electorate," a "different level of government." *Ibid.*

The relentless logic of *Hunter* and *Seattle* would point to a similar conclusion in this case. In those cases, one level of government exercised borrowed authority over an apparently "racial issue," until a higher level of government called the loan. So too here. In those cases, we deemed the revocation an equal-protection violation *regardless* of whether it facially classified according to race or reflected an invidious purpose to discriminate. Here, the Court of Appeals did the same.

The plurality sees it differently. Though it, too, disavows the political-process-doctrine basis on which *Hunter* and *Seattle* were decided, *ante*, at 306–311, it does not take the next step of overruling those cases. Rather, it reinterprets them beyond recognition. *Hunter*, the plurality suggests, was a case in which the challenged act had "target[ed] racial minorities." *Ante*, at 304. Maybe, but the *Hunter* Court

neither found that to be so nor considered it relevant, bypassing the question of intent entirely, satisfied that its newly minted political-process theory sufficed to invalidate the charter amendment.

As for *Seattle*, what was *really* going on, according to the plurality, was that Initiative 350 had the consequence (if not the purpose) of preserving the harms effected by prior *de jure* segregation. Thus, "the political restriction in question was designed to be used, or was likely to be used, to encourage infliction of injury by reason of race." *Ante*, at 314. That conclusion is derived not from the opinion but from recently discovered evidence that the city of Seattle had been a cause of its schools' racial imbalance all along: "Although there had been no judicial finding of *de jure* segregation with respect to Seattle's school district, it appears as though school segregation in the district in the 1940's and 1950's may have been the partial result of school board policies." *Ante*, at 305.[2] That the district's effort to end racial imbalance had been stymied by Initiative 350 meant that the people, by passing it, somehow had become complicit in Seattle's equal-protection-denying status quo, whether they knew it or not. Hence, there was in *Seattle* a government-furthered "infliction of a specific"—and, presumably, constitutional—"injury." *Ante*, at 310.

Once again this describes what our opinion in *Seattle* might have been, but assuredly not what it was. The opinion assumes throughout that Seattle's schools suffered at most from *de facto* segregation, see, *e. g.*, 458 U. S., at 474,

[2] The plurality cites evidence from JUSTICE BREYER's dissent in *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701 (2007), to suggest that the city had been a "partial" cause of its segregation problem. *Ante*, at 305. The plurality in *Parents Involved* criticized that dissent for relying on irrelevant evidence, for "elid[ing the] distinction between *de jure* and *de facto* segregation," and for "casually intimat[ing] that Seattle's school attendance patterns reflect[ed] illegal segregation." 551 U. S., at 736–737, and n. 15. Today's plurality sides with the dissent and repeats its errors.

475—that is, segregation not the "product . . . of state action but of private choices," having no "constitutional implications," *Freeman*, 503 U. S., at 495–496. Nor did it anywhere state that the current racial imbalance was the (judicially remediable) effect of prior *de jure* segregation. Absence of *de jure* segregation or the effects of *de jure* segregation was a necessary premise of the *Seattle* opinion. That is what made the issue of busing and pupil reassignment a matter of political choice rather than judicial mandate.[3] And precisely *because* it was a question for the political branches to decide, the manner—which is to say, the *process*—of its resolution implicated the Court's new process theory. The opinion itself says this: "[I]n the absence of a constitutional violation, the desirability and efficacy of school desegregation are matters to be resolved through the political process. For present purposes, it is enough [to hold reallocation of that political decision to a higher level unconstitutional] that minorities may consider busing for integration to be legislation that is in their interest." 458 U. S., at 474 (internal quotation marks omitted).

B

Patently atextual, unadministrable, and contrary to our traditional equal-protection jurisprudence, *Hunter* and *Seattle* should be overruled.

The problems with the political-process doctrine begin with its triggering prong, which assigns to a court the task of determining whether a law that reallocates policymaking authority concerns a "racial issue." *Seattle*, 458 U. S., at 473. *Seattle* takes a couple of dissatisfying cracks at defining this crucial term. It suggests that an issue is racial if adopting one position on the question would "at bottom

[3] Or so the Court assumed. See 458 U. S., at 472, n. 15 ("Appellants and the United States do not challenge the propriety of race-conscious student assignments for the purpose of achieving integration, even absent a finding of prior *de jure* segregation. We therefore do not specifically pass on that issue").

inur[e] primarily to the benefit of the minority, and is designed for that purpose." *Id.*, at 472. It is irrelevant that, as in *Hunter* and *Seattle*, 458 U. S., at 472, both the racial minority and the racial majority benefit from the policy in question, and members of both groups favor it. Judges should instead focus their guesswork on their own juridical sense of what is primarily for the benefit of minorities. Cf. *ibid.* (regarding as dispositive what "our cases" suggest is beneficial to minorities). On second thought, maybe judges need only ask this question: Is it possible "that minorities may consider" the policy in question to be "in their interest"? *Id.*, at 474. If so, you can be sure that you are dealing with a "racial issue."[4]

No good can come of such random judicial musing. The plurality gives two convincing reasons why. For one thing, it involves judges in the dirty business of dividing the Nation "into racial blocs," *Metro Broadcasting, Inc.* v. *FCC*, 497 U. S. 547, 603, 610 (1990) (O'Connor, J., dissenting); *ante*, at 308–309. That task is as difficult as it is unappealing. (Does

[4] The dissent's version of this test is just as scattershot. Since, according to the dissent, the doctrine forbids "reconfigur[ing] the political process in a manner that *burdens* only a racial minority," *post*, at 341 (opinion of SOTOMAYOR, J.) (emphasis added), it must be that the reason the underlying issue (that is, the issue concerning which the process has been reconfigured) is "racial" is that the policy in question *benefits* only a racial minority (if it also benefited persons not belonging to a racial majority, then the political-process reconfiguration would burden them as well). On second thought: The issue is "racial" if the policy benefits *primarily* a racial minority and "'[is] designed for that purpose,'" *post*, at 379. This is the standard *Seattle* purported to apply. But under that standard, §26 does not affect a "racial issue," because under *Grutter* v. *Bollinger*, 539 U. S. 306 (2003), race-based admissions policies may not constitutionally be "designed for [the] purpose," *Seattle*, *supra*, at 472, of benefiting primarily racial minorities, but must be designed for the purpose of achieving educational benefits for students of all races, *Grutter*, *supra*, at 322–325. So the dissent must mean that an issue is "racial" so long as the policy in question has the incidental effect (an effect not flowing from its design) of benefiting primarily racial minorities.

a half-Latino, half-American Indian have Latino interests, American-Indian interests, both, half of both?[5]) What is worse, the exercise promotes the noxious fiction that, knowing only a person's color or ethnicity, we can be sure that he has a predetermined set of policy "interests," thus "reinforc-[ing] the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, [and] share the same political interests."[6] *Shaw* v. *Reno*, 509 U. S. 630, 647 (1993). Whether done by a judge or a school board, such "racial stereotyping [is] at odds with equal protection mandates." *Miller* v. *Johnson*, 515 U. S. 900, 920 (1995).

But that is not the "racial issue" prong's only defect. More fundamentally, it misreads the Equal Protection Clause to protect "particular group[s]," a construction that we have tirelessly repudiated in a "long line of cases understanding equal protection as a personal right." *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 224, 230 (1995). It is a "basic principle that the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*." *Id.*, at 227; *Metro Broadcasting*, *supra*, at 636 (KENNEDY, J., dissenting).[7] Yet *Seattle* insists that only those political-

[5] And how many members of a particular racial group must take the same position on an issue before we suppose that the position is in the *entire group's* interest? Not *every* member, the dissent suggests, *post*, at 379. Beyond that, who knows? Five percent? Eighty-five percent?

[6] The dissent proves my point. After asserting—without citation, though I and many others of all races deny it—that it is "commonsense reality" that affirmative action benefits racial minorities, *post*, at 352, the dissent suggests throughout, *e. g.*, *post*, at 366, that that view of "reality" is so necessarily shared by members of racial minorities that they *must* favor affirmative action.

[7] The dissent contends, *post*, at 374, that this point "ignores the obvious: Discrimination against an individual occurs because of that individual's membership in a particular group." No, I do not ignore the obvious; it is the dissent that misses the point. Of course discrimination against a group constitutes discrimination against each member of that group. But since it is persons and not groups that are protected, one cannot say, as

process alterations that burden racial *minorities* deny equal protection. "The majority," after all, "needs no protection against discrimination." 458 U. S., at 468 (quoting *Hunter*, 393 U. S., at 391). In the years since *Seattle*, we have repeatedly rejected "a reading of the guarantee of equal protection under which the level of scrutiny varies according to the ability of different groups to defend their interests in the representative process." *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 495 (1989). Meant to obliterate rather than endorse the practice of racial classifications, the Fourteenth Amendment's guarantees "obtai[n] with equal force regardless of 'the race of those burdened or benefited.'" *Miller*, *supra*, at 904 (quoting *Croson*, *supra*, at 494 (plurality opinion)); *Adarand*, *supra*, at 223, 227. The Equal Protection Clause "cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection it is not equal." *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 289–290 (1978) (opinion of Powell, J.).

The dissent trots out the old saw, derived from dictum in a footnote, that legislation motivated by "'prejudice against discrete and insular minorities'" merits "'more exacting judicial scrutiny.'" *Post*, at 367 (quoting *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152–153, n. 4 (1938)). I say derived from that dictum (expressed by the four-Justice majority of a seven-Justice Court) because the dictum itself merely said "*[n]or need we enquire* . . . whether prejudice against discrete and insular minorities may be a special condition," *id.*, at 153, n. 4 (emphasis added). The dissent does not argue, of course, that such "prejudice" produced §26. Nor does it explain why certain racial minorities in Michigan qualify as "'insular,'" meaning that "other groups will not form coalitions with them—and, critically, not because of lack of common interests but because of 'prejudice.'" Strauss,

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the dissent would, that the Constitution prohibits discrimination against minority groups, but not against majority groups.

Is *Carolene Products* Obsolete? 2010 U. Ill. L. Rev. 1251, 1257. Nor does it even make the case that a group's "discreteness" and "insularity" are political *liabilities* rather than political *strengths*[8]—a serious question that alone demonstrates the prudence of the *Carolene Products* dictumizers in leaving the "enquir[y]" for another day. As for the question whether "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation . . . is to be subjected to more exacting judicial scrutiny," the *Carolene Products* Court found it "unnecessary to consider [that] now." 304 U. S., at 152, n. 4. If the dissent thinks that worth considering today, it should explain why the election of a university's governing board is a "political process which can ordinarily be expected to bring about repeal of undesirable legislation," but Michigan voters' ability to amend their Constitution is not. It seems to me quite the opposite. Amending the Constitution requires the approval of only "a majority of the electors voting on the question." Mich. Const., Art. XII, §2. By contrast, voting in a favorable board (each of which has eight members) at the three major public universities requires electing by majority vote at least 15 different candidates, several of whom would be running during different election cycles. See *BAMN* v. *Regents of Univ. of Mich.*, 701 F. 3d 466, 508 (CA6 2012) (Sutton, J., dissenting). So if Michigan voters, instead of amending their Constitution, had pursued the dissent's preferred path of electing board members promising to "abolish race-sensitive admissions policies," *post*, at

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[8] Cf., *e. g.*, Ackerman, Beyond *Carolene Products*, 98 Harv. L. Rev. 713, 723–724 (1985) ("Other things being equal, 'discreteness and insularity' will normally be a source of enormous bargaining advantage, not disadvantage, for a group engaged in pluralist American politics. Except for special cases, the concerns that underlie *Carolene* should lead judges to protect groups that possess the opposite characteristic from the ones *Carolene* emphasizes—groups that are 'anonymous and diffuse' rather than 'discrete and insular' ").

340, it would have been *harder*, not easier, for racial minorities favoring affirmative action to overturn that decision. But the more important point is that we should not design our jurisprudence to conform to dictum in a footnote in a four-Justice opinion.

C

Moving from the appalling to the absurd, I turn now to the second part of the *Hunter-Seattle* analysis—which is apparently no more administrable than the first, compare *post*, at 335 (BREYER, J., concurring in judgment) ("This case . . . does not involve a reordering of the *political* process"), with *post*, at 360–365 (SOTOMAYOR, J., dissenting) (yes, it does). This part of the inquiry directs a court to determine whether the challenged act "place[s] effective decisionmaking authority over [the] racial issue at a different level of government." *Seattle*, 458 U. S., at 474. The laws in both *Hunter* and *Seattle* were thought to fail this test. In both cases, "the effect of the challenged action was to redraw decisionmaking authority over racial matters—and only over racial matters—in such a way as to place comparative burdens on minorities." 458 U. S., at 475, n. 17. This, we said, a State may not do.

By contrast, in another line of cases, we have emphasized the near-limitless sovereignty of each State to design its governing structure as it sees fit. Generally, "a State is afforded wide leeway when experimenting with the appropriate allocation of state legislative power" and may create "political subdivisions such as cities and counties . . . 'as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them.'" *Holt Civic Club* v. *Tuscaloosa*, 439 U. S. 60, 71 (1978) (quoting *Hunter* v. *Pittsburgh*, 207 U. S. 161, 178 (1907)). Accordingly, States have "absolute discretion" to determine the "number, nature and duration of the powers conferred upon [municipal] corporations and the territory over which they shall be exercised." *Holt Civic Club*, *supra*, at 71. So it would seem to go without saying that a State may give

certain powers to cities, later assign the same powers to counties, and even reclaim them for itself.

Taken to the limits of its logic, *Hunter-Seattle* is the gaping exception that nearly swallows the rule of structural state sovereignty. If indeed the Fourteenth Amendment forbids States to "place effective decisionmaking authority over" racial issues at "different level[s] of government," then it must be true that the Amendment's ratification in 1868 worked a partial ossification of each State's governing structure, rendering basically irrevocable the power of any subordinate state official who, the day *before* the Fourteenth Amendment's passage, happened to enjoy legislatively conferred authority over a "racial issue." Under the Fourteenth Amendment, that subordinate entity (suppose it is a city council) could itself take action on the issue, action either favorable or unfavorable to minorities. It could even reverse itself later. What it could not do, however, is redelegate its power to an even lower level of state government (such as a city-council committee) without forfeiting it, since the necessary effect of wresting it back would be to put an additional obstacle in the path of minorities. Likewise, no entity or official higher up the state chain (*e. g.*, a county board) could exercise authority over the issue. Nor, even, could the state legislature, or the people by constitutional amendment, revoke the legislative conferral of power to the subordinate, whether the city council, its subcommittee, or the county board. *Seattle*'s logic would create affirmative-action safe havens wherever subordinate officials in public universities (1) traditionally have enjoyed "effective decisionmaking authority" over admissions policy but (2) have not yet used that authority to prohibit race-conscious admissions decisions. The mere existence of a subordinate's discretion over the matter would work a kind of reverse preemption. It is "a strange notion—alien to our system—that local governmental bodies can forever pre-empt the ability of a State—the sovereign power—to address a matter of

compelling concern to the State." 458 U. S., at 495 (Powell, J., dissenting). But that is precisely what the political-process doctrine contemplates.

Perhaps the spirit of *Seattle* is especially disquieted by enactments of constitutional amendments. That appears to be the dissent's position. The problem with § 26, it suggests, is that amending Michigan's Constitution is simply not a part of that State's "existing" political process. *E. g.*, *post*, at 340, 376. What a peculiar notion: that a revision of a State's fundamental law, made in precisely the manner that law prescribes, by the very people who are the source of that law's authority, is not part of the "political process" which, but for those people and that law, would not exist. This will surely come as news to the people of Michigan, who, since 1914, have amended their Constitution 20 times. Brief for Gary Segura et al. as *Amici Curiae* 12. Even so, the dissent concludes that the amendment attacked here worked an illicit "chang[ing] [of] the basic rules of the political process in that State" in "the middle of the game." *Post*, at 338, 340. Why, one might ask, is not the amendment provision of the Michigan Constitution one (perhaps the most basic one) of the rules of the State's political process? And why does democratic invocation of that provision not qualify as working through the "existing political process," *post*, at 376?[9]

II

I part ways with *Hunter*, *Seattle*, and (I think) the plurality for an additional reason: Each endorses a version of the

[9] The dissent thinks I do not understand its argument. Only when amending Michigan's Constitution violates *Hunter-Seattle*, it says, is that constitutionally prescribed activity necessarily not part of the State's existing political process. *Post*, at 357, n. 7. I understand the argument quite well; and see quite well that it begs the question. Why is Michigan's action here unconstitutional? Because it violates *Hunter-Seattle*. And why does it violate *Hunter-Seattle*? Because it is not part of the State's existing political process. And why is it not part of the State's existing political process? Because it violates *Hunter-Seattle*.

proposition that a facially neutral law may deny equal protection solely because it has a disparate racial impact. Few equal-protection theories have been so squarely and soundly rejected. "An unwavering line of cases from this Court holds that a violation of the Equal Protection Clause requires state action motivated by discriminatory intent," *Hernandez* v. *New York*, 500 U. S. 352, 372–373 (1991) (O'Connor, J., concurring in judgment), and that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact," *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 264–265 (1977). Indeed, we affirmed this principle the same day we decided *Seattle*: "[E]ven when a neutral law has a disproportionately adverse effect on a racial minority, the Fourteenth Amendment is violated only if a discriminatory purpose can be shown." *Crawford* v. *Board of Ed. of Los Angeles*, 458 U. S. 527, 537–538 (1982).

Notwithstanding our dozens of cases confirming the exception-less nature of the *Washington* v. *Davis* rule, the plurality opinion leaves ajar an effects-test escape hatch modeled after *Hunter* and *Seattle*, suggesting that state action denies equal protection when it "ha[s] the *serious risk*, if not purpose, of causing specific injuries on account of race," or is either "designed to be used, or . . . *likely to be used*, to encourage infliction of injury by reason of race." *Ante*, at 305, 314 (emphasis added). Since these formulations enable a determination of an equal-protection violation where there is no discriminatory intent, they are inconsistent with the long *Washington* v. *Davis* line of cases.[10]

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[10] According to the dissent, *Hunter-Seattle* fills an important doctrinal gap left open by *Washington* v. *Davis*, since *Hunter-Seattle*'s rule—unique among equal-protection principles—makes clear that "the majority" may not alter a political process with the goal of "prevent[ing] minority groups from partaking in that process on equal footing." *Post*, at 369. Nonsense. There is no gap. To "manipulate the ground rules" or to "ri[g] the contest," *post*, at 370, in order to harm persons because of their race is to deny equal protection under *Washington* v. *Davis*.

Respondents argue that we need not bother with the discriminatory-purpose test, since § 26 may be struck more straightforwardly as a racial "classification." Admitting (as they must) that § 26 does not on its face "distribut[e] burdens or benefits on the basis of individual racial classifications," *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701, 720 (2007), respondents rely on *Seattle*'s statement that "when the political process or the decisionmaking mechanism used to address racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment," then that "singling out" is a racial classification. 458 U. S., at 485, 486, n. 30. But this is just the political-process theory bedecked in different doctrinal dress. A law that "neither says nor implies that persons are to be treated differently on account of their race" is not a racial classification. *Crawford*, *supra*, at 537. That is particularly true of statutes mandating equal treatment. "[A] law that prohibits the State from classifying individuals by race . . . *a fortiori* does not classify individuals by race." *Coalition for Economic Equity* v. *Wilson*, 122 F. 3d 692, 702 (CA9 1997) (O'Scannlain, J.).

Thus, the question in this case, as in every case in which neutral state action is said to deny equal protection on account of race, is whether the action reflects a racially discriminatory purpose. *Seattle* stresses that "singling out the political processes affecting racial issues for uniquely disadvantageous treatment inevitably raises dangers of impermissible motivation." 458 U. S., at 486, n. 30. True enough, but that motivation must be proved. And respondents do not have a prayer of proving it here. The District Court noted that, under "conventional equal protection" doctrine, the suit was "doom[ed]." 539 F. Supp. 2d 924, 951 (ED Mich. 2008). Though the Court of Appeals did not opine on this question, I would not leave it for them on remand. In my view, any law expressly requiring state actors to afford all persons equal protection of the laws (such as Initiative 350

in *Seattle*, though not the charter amendment in *Hunter*) does not—*cannot*—deny "to any person . . . equal protection of the laws," U. S. Const., Amdt. 14, § 1, regardless of whatever evidence of seemingly foul purposes plaintiffs may cook up in the trial court.

* * *

As Justice Harlan observed over a century ago, "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy* v. *Ferguson*, 163 U. S. 537, 559 (1896) (dissenting opinion). The people of Michigan wish the same for their governing charter. It would be shameful for us to stand in their way.[11]

JUSTICE BREYER, concurring in the judgment.

Michigan has amended its Constitution to forbid state universities and colleges to "discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Mich. Const., Art. I, § 26. We here focus on the prohibition of "grant[ing] . . . preferential treatment . . . on the basis of race . . . in . . . public education." I agree with the plurality that the amendment is consistent with the Federal Equal Protection Clause. U. S. Const., Amdt. 14. But I believe this for different reasons.

First, we do not address the amendment insofar as it forbids the use of race-conscious admissions programs designed to remedy past exclusionary racial discrimination or the direct effects of that discrimination. Application of the amendment in that context would present different questions which may demand different answers. Rather, we here address the amendment only as it applies to, and forbids, programs that, as in *Grutter* v. *Bollinger*, 539 U. S. 306 (2003),

[11] And doubly shameful to equate "the majority" behind § 26 with "the majority" responsible for Jim Crow. *Post*, at 337–338 (SOTOMAYOR, J., dissenting).

rest upon "one justification": using "race in the admissions process" solely in order to "obtai[n] the educational benefits that flow from a diverse student body," *id.*, at 328 (internal quotation marks omitted).

Second, dissenting in *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701 (2007), I explained why I believe race-conscious programs of this kind are constitutional, whether implemented by law schools, universities, high schools, or elementary schools. I concluded that the Constitution does not "authorize judges" either to forbid or to require the adoption of diversity-seeking race-conscious "solutions" (of the kind at issue here) to such serious problems as "how best to administer America's schools" to help "create a society that includes all Americans." *Id.*, at 862.

I continue to believe that the Constitution permits, though it does not require, the use of the kind of race-conscious programs that are now barred by the Michigan Constitution. The serious educational problems that faced Americans at the time this Court decided *Grutter* endure. See, *e. g.*, I. Mullis, M. Martin, P. Foy, & K. Drucker, Progress in International Reading Literacy Study, 2011 International Results in Reading 38, Exh. 1.1 (2012) (elementary school students in numerous other countries outperform their counterparts in the United States in reading); I. Mullis, M. Martin, P. Foy, & A. Arora, Trends in International Mathematics and Science Study (TIMSS), 2011 International Results in Mathematics 40, Exh. 1.1 (2012) (same in mathematics); M. Martin, I. Mullis, P. Foy, & G. Stanco, TIMSS, 2011 International Results in Science 38, Exh. 1.1 (2012) (same in science); Organisation of Economic Co-operation Development (OECD), Education at a Glance 2013: OECD Indicators 50 (Table A2.1a) (secondary school graduation rate lower in the United States than in numerous other countries); McKinsey & Co., The Economic Impact of the Achievement Gap in America's Schools 8 (Apr. 2009) (same; United States ranks 18th of 24

industrialized nations). And low educational achievement continues to be correlated with income and race. See, *e. g.*, National Center for Education Statistics, Digest of Education Statistics, Advance Release of Selected 2013 Digest Tables (Table 104.20) (White Americans more likely to have completed high school than African-Americans or Hispanic-Americans), online at http://nces.ed.gov/programs/digest (as visited Apr. 15, 2014, and available in Clerk of Court's case file); *id.*, Table 219.75 (Americans in bottom quartile of income most likely to drop out of high school); *id.*, Table 302.60 (White Americans more likely to enroll in college than African-Americans or Hispanic-Americans); *id.*, Table 302.30 (middle- and high-income Americans more likely to enroll in college than low-income Americans).

The Constitution allows local, state, and national communities to adopt narrowly tailored race-conscious programs designed to bring about greater inclusion and diversity. But the Constitution foresees the ballot box, not the courts, as the normal instrument for resolving differences and debates about the merits of these programs. Compare *Parents Involved*, 551 U. S., at 839 (BREYER, J., dissenting) (identifying studies showing the benefits of racially integrated education), with *id.*, at 761–763 (THOMAS, J., concurring) (identifying studies suggesting racially integrated schools may not confer educational benefits). In short, the "Constitution creates a democratic political system through which the people themselves must together find answers" to disagreements of this kind. *Id.*, at 862 (BREYER, J., dissenting).

Third, cases such as *Hunter* v. *Erickson*, 393 U. S. 385 (1969), and *Washington* v. *Seattle School Dist. No. 1*, 458 U. S. 457 (1982), reflect an important principle, namely, that an individual's ability to participate meaningfully in the political process should be independent of his race. Although racial minorities, like other political minorities, will not always succeed at the polls, they must have the same opportunity as others to secure through the ballot box policies that

reflect their preferences. In my view, however, neither *Hunter* nor *Seattle* applies here. And the parties do not here suggest that the amendment violates the Equal Protection Clause if not under the *Hunter*-*Seattle* doctrine.

Hunter and *Seattle* involved efforts to manipulate the political process in a way not here at issue. Both cases involved a restructuring of the political process that changed the political level at which policies were enacted. In *Hunter*, decisionmaking was moved from the elected city council to the local electorate at large. 393 U. S., at 389–390. And in *Seattle*, decisionmaking by an elected school board was replaced with decisionmaking by the state legislature and electorate at large. 458 U. S., at 466.

This case, in contrast, does not involve a reordering of the *political* process; it does not in fact involve the movement of decisionmaking from one political level to another. Rather, here, Michigan law delegated broad policymaking authority to elected university boards, see Mich. Const., Art. VIII, § 5, but those boards delegated admissions-related decisionmaking authority to unelected university faculty members and administrators, see, *e. g.*, Bylaws of Univ. of Mich. Bd. of Regents § 8.01; Mich. State Univ. Bylaws of Bd. of Trustees, Preamble; Mich. State Univ. Bylaws for Academic Governance § 4.4.3; Wayne State Univ. Stat. §§ 2–34–09, 2–34–12. Although the boards unquestionably retained the *power* to set policy regarding race-conscious admissions, see *post*, at 360–364 (SOTOMAYOR, J., dissenting), in *fact* faculty members and administrators set the race-conscious admissions policies in question. (It is often true that elected bodies—including, for example, school boards, city councils, and state legislatures—have the power to enact policies, but in fact delegate that power to administrators.) Although at limited times the university boards were advised of the content of their race-conscious admissions policies, see 701 F. 3d 466, 481–482 (CA6 2012), to my knowledge no board voted to accept or reject any of those policies. Thus, unelected faculty mem-

bers and administrators, not voters or their elected representatives, adopted the race-conscious admissions programs affected by Michigan's constitutional amendment. The amendment took decisionmaking authority away from these unelected actors and placed it in the hands of the voters.

Why does this matter? For one thing, considered conceptually, the doctrine set forth in *Hunter* and *Seattle* does not easily fit this case. In those cases minorities had participated in the political process and they had won. The majority's subsequent reordering of the political process repealed the minority's successes and made it more difficult for the minority to succeed in the future. The majority thereby diminished the minority's ability to participate meaningfully in the electoral process. But one cannot as easily characterize the movement of the decisionmaking mechanism at issue here—from an administrative process to an electoral process—as diminishing the minority's ability to participate meaningfully in the *political* process. There is no prior electoral process in which the minority participated.

For another thing, to extend the holding of *Hunter* and *Seattle* to reach situations in which decisionmaking authority is moved from an administrative body to a political one would pose significant difficulties. The administrative process encompasses vast numbers of decisionmakers answering numerous policy questions in hosts of different fields. See *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 520–521 (2010) (BREYER, J., dissenting). Administrative bodies modify programs in detail, and decisionmaking authority within the administrative process frequently moves around—due to amendments to statutes, new administrative rules, and evolving agency practice. It is thus particularly difficult in this context for judges to determine when a change in the locus of decisionmaking authority places a comparative structural burden on a racial minority. And to apply *Hunter* and *Seattle* to the administrative process would, by tending to hinder change, risk dis-

couraging experimentation, interfering with efforts to see when and how race-conscious policies work.

Finally, the principle that underlies *Hunter* and *Seattle* runs up against a competing principle, discussed above. This competing principle favors decisionmaking through the democratic process. Just as this principle strongly supports the right of the people, or their elected representatives, to adopt race-conscious policies for reasons of inclusion, so must it give them the right to vote not to do so.

As I have said, my discussion here is limited to circumstances in which decisionmaking is moved from an unelected administrative body to a politically responsive one, and in which the targeted race-conscious admissions programs consider race solely in order to obtain the educational benefits of a diverse student body. We need now decide no more than whether the Federal Constitution permits Michigan to apply its constitutional amendment in those circumstances. I would hold that it does. Therefore, I concur in the judgment of the Court.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

We are fortunate to live in a democratic society. But without checks, democratically approved legislation can oppress minority groups. For that reason, our Constitution places limits on what a majority of the people may do. This case implicates one such limit: the guarantee of equal protection of the laws. Although that guarantee is traditionally understood to prohibit intentional discrimination under existing laws, equal protection does not end there. Another fundamental strand of our equal protection jurisprudence focuses on process, securing to all citizens the right to participate meaningfully and equally in self-government. That right is the bedrock of our democracy, for it preserves all other rights.

Yet to know the history of our Nation is to understand its long and lamentable record of stymieing the right of racial

minorities to participate in the political process. At first, the majority acted with an open, invidious purpose. Notwithstanding the command of the Fifteenth Amendment, certain States shut racial minorities out of the political process altogether by withholding the right to vote. This Court intervened to preserve that right. The majority tried again, replacing outright bans on voting with literacy tests, good character requirements, poll taxes, and gerrymandering. The Court was not fooled; it invalidated those measures, too. The majority persisted. This time, although it allowed the minority access to the political process, the majority changed the ground rules of the process so as to make it more difficult for the minority, and the minority alone, to obtain policies designed to foster racial integration. Although these political restructurings may not have been discriminatory in purpose, the Court reaffirmed the right of minority members of our society to participate meaningfully and equally in the political process.

This case involves this last chapter of discrimination: A majority of the Michigan electorate changed the basic rules of the political process in that State in a manner that uniquely disadvantaged racial minorities.[1] Prior to the enactment of the constitutional initiative at issue here, all of the admissions policies of Michigan's public colleges and universities—including race-sensitive admissions policies[2]—

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[1] I of course do not mean to suggest that Michigan's voters acted with anything like the invidious intent, see n. 8, *infra*, of those who historically stymied the rights of racial minorities. Contra, *ante*, at 332, n. 11 (SCALIA, J., concurring in judgment). But like earlier chapters of political restructuring, the Michigan amendment at issue in this case changed the rules of the political process to the disadvantage of minority members of our society.

[2] Although the term "affirmative action" is commonly used to describe colleges' and universities' use of race in crafting admissions policies, I instead use the term "race-sensitive admissions policies." Some comprehend the term "affirmative action" as connoting intentional preferential treatment based on race alone—for example, the use of a quota system,

were in the hands of each institution's governing board. The members of those boards are nominated by political parties and elected by the citizenry in statewide elections. After over a century of being shut out of Michigan's institutions of higher education, racial minorities in Michigan had succeeded in persuading the elected board representatives to adopt admissions policies that took into account the benefits of racial diversity. And this Court twice blessed such efforts—first in *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265 (1978), and again in *Grutter* v. *Bollinger*, 539 U. S. 306 (2003), a case that itself concerned a Michigan admissions policy.

In the wake of *Grutter*, some voters in Michigan set out to eliminate the use of race-sensitive admissions policies. Those voters were of course free to pursue this end in any number of ways. For example, they could have persuaded existing board members to change their minds through individual or grassroots lobbying efforts, or through general public awareness campaigns. Or they could have mobilized efforts to vote uncooperative board members out of office, replacing them with members who would share their desire

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whereby a certain proportion of seats in an institution's incoming class must be set aside for racial minorities; the use of a "points" system, whereby an institution accords a fixed numerical advantage to an applicant because of her race; or the admission of otherwise unqualified students to an institution solely on account of their race. None of this is an accurate description of the practices that public universities are permitted to adopt after this Court's decision in *Grutter* v. *Bollinger*, 539 U. S. 306 (2003). There, we instructed that institutions of higher education could consider race in admissions in only a very limited way in an effort to create a diverse student body. To comport with *Grutter*, colleges and universities must use race flexibly, *id.*, at 334, and must not maintain a quota, *ibid.* And even this limited sensitivity to race must be limited in time, *id.*, at 341–343, and must be employed only after "serious, good faith consideration of workable race-neutral alternatives," *id.*, at 339. *Grutter*-compliant admissions plans, like the ones in place at Michigan's institutions, are thus a far cry from affirmative action plans that confer preferential treatment intentionally and solely on the basis of race.

to abolish race-sensitive admissions policies. When this Court holds that the Constitution permits a particular policy, nothing prevents a majority of a State's voters from choosing not to adopt that policy. Our system of government encourages—and indeed, depends on—that type of democratic action.

But instead, the majority of Michigan voters changed the rules in the middle of the game, reconfiguring the existing political process in Michigan in a manner that burdened racial minorities. They did so in the 2006 election by amending the Michigan Constitution to enact Article I, § 26, which provides in relevant part that Michigan's public universities "shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."

As a result of § 26, there are now two very different processes through which a Michigan citizen is permitted to influence the admissions policies of the State's universities: one for persons interested in race-sensitive admissions policies and one for everyone else. A citizen who is a University of Michigan alumnus, for instance, can advocate for an admissions policy that considers an applicant's legacy status by meeting individually with members of the Board of Regents to convince them of her views, by joining with other legacy parents to lobby the Board, or by voting for and supporting Board candidates who share her position. The same options are available to a citizen who wants the Board to adopt admissions policies that consider athleticism, geography, area of study, and so on. The one and only policy a Michigan citizen may not seek through this long-established process is a race-sensitive admissions policy that considers race in an individualized manner when it is clear that race-neutral alternatives are not adequate to achieve diversity. For that

policy alone, the citizens of Michigan must undertake the daunting task of amending the State Constitution.

Our precedents do not permit political restructurings that create one process for racial minorities and a separate, less burdensome process for everyone else. This Court has held that the Fourteenth Amendment does not tolerate "a political structure that treats all individuals as equals, yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." *Washington* v. *Seattle School Dist. No. 1*, 458 U. S. 457, 467 (1982) (internal quotation marks omitted). Such restructuring, the Court explained, "is no more permissible than denying [the minority] the [right to] vote, on an equal basis with others." *Hunter* v. *Erickson*, 393 U. S. 385, 391 (1969). In those cases—*Hunter* and *Seattle*—the Court recognized what is now known as the "political-process doctrine": When the majority reconfigures the political process in a manner that burdens only a racial minority, that alteration triggers strict judicial scrutiny.

Today, disregarding *stare decisis*, a majority of the Court effectively discards those precedents. The plurality does so, it tells us, because the freedom actually secured by the Constitution is the freedom of self-government—because the majority of Michigan citizens "exercised their privilege to enact laws as a basic exercise of their democratic power." *Ante*, at 311. It would be "demeaning to the democratic process," the plurality concludes, to disturb that decision in any way. *Ante*, at 313. This logic embraces majority rule without an important constitutional limit.

The plurality's decision fundamentally misunderstands the nature of the injustice worked by §26. This case is not, as the plurality imagines, about "who may resolve" the debate over the use of race in higher education admissions. *Ante*, at 314. I agree wholeheartedly that nothing vests the resolu-

tion of that debate exclusively in the courts or requires that we remove it from the reach of the electorate. Rather, this case is about *how* the debate over the use of race-sensitive admissions policies may be resolved, contra, *ibid.*—that is, it must be resolved in constitutionally permissible ways. While our Constitution does not guarantee minority groups victory in the political process, it does guarantee them meaningful and equal access to that process. It guarantees that the majority may not win by stacking the political process against minority groups permanently, forcing the minority alone to surmount unique obstacles in pursuit of its goals—here, educational diversity that cannot reasonably be accomplished through race-neutral measures. Today, by permitting a majority of the voters in Michigan to do what our Constitution forbids, the Court ends the debate over race-sensitive admissions policies in Michigan in a manner that contravenes constitutional protections long recognized in our precedents.

Like the plurality, I have faith that our citizenry will continue to learn from this Nation's regrettable history; that it will strive to move beyond those injustices toward a future of equality. And I, too, believe in the importance of public discourse on matters of public policy. But I part ways with the plurality when it suggests that judicial intervention in this case "impede[s]" rather than "advance[s]" the democratic process and the ultimate hope of equality. *Ante,* at 313. I firmly believe that our role as judges includes policing the process of self-government and stepping in when necessary to secure the constitutional guarantee of equal protection. Because I would do so here, I respectfully dissent.

I

For much of its history, our Nation has denied to many of its citizens the right to participate meaningfully and equally in its politics. This is a history we strive to put behind us. But it is a history that still informs the society we live in,

and so it is one we must address with candor. Because the political-process doctrine is best understood against the backdrop of this history, I will briefly trace its course.

The Fifteenth Amendment, ratified after the Civil War, promised to racial minorities the right to vote. But many States ignored this promise. In addition to outright tactics of fraud, intimidation, and violence, there are countless examples of States categorically denying to racial minorities access to the political process. Consider Texas: There, a 1923 statute prevented racial minorities from participating in primary elections. After this Court declared that statute unconstitutional, *Nixon* v. *Herndon*, 273 U. S. 536, 540–541 (1927), Texas responded by changing the rules. It enacted a new statute that gave political parties themselves the right to determine who could participate in their primaries. Predictably, the Democratic Party specified that only white Democrats could participate in its primaries. *Nixon* v. *Condon*, 286 U. S. 73, 81–82 (1932). The Court invalidated that scheme, too. *Id.*, at 89; see also *Smith* v. *Allwright*, 321 U. S. 649 (1944); *Terry* v. *Adams*, 345 U. S. 461 (1953).

Some States were less direct. Oklahoma was one of many that required all voters to pass a literacy test. But the test did not apply equally to all voters. Under a "grandfather clause," voters were exempt if their grandfathers had been voters or had served as soldiers before 1866. This meant, of course, that black voters had to pass the test, but many white voters did not. The Court held the scheme unconstitutional. *Guinn* v. *United States*, 238 U. S. 347 (1915). In response, Oklahoma changed the rules. It enacted a new statute under which all voters who were qualified to vote in 1914 (under the unconstitutional grandfather clause) remained qualified, and the remaining voters had to apply for registration within a 12-day period. *Lane* v. *Wilson*, 307 U. S. 268, 270–271 (1939). The Court struck down that statute as well. *Id.*, at 275.

Racial minorities were occasionally able to surmount the hurdles to their political participation. Indeed, in some States, minority citizens were even able to win elective office. But just as many States responded to the Fifteenth Amendment by subverting minorities' access to the polls, many States responded to the prospect of elected minority officials by undermining the ability of minorities to win and hold elective office. Some States blatantly removed black officials from local offices. See, *e. g.*, H. Rabinowitz, Race Relations in the Urban South, 1865–1890, pp. 267, 269–270 (1978) (describing events in Tennessee and Virginia). Others changed the processes by which local officials were elected. See, *e. g.*, Extension of the Voting Rights Act, Hearings before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 97th Cong., 1st Sess., pt. 1, pp. 2016–2017 (1981) (hereinafter 1981 Hearings) (statement of Professor J. Morgan Kousser) (after a black judge refused to resign in Alabama, the legislature abolished the court on which he served and replaced it with one whose judges were appointed by the Governor); Rabinowitz, *supra*, at 269–270 (the North Carolina Legislature divested voters of the right to elect justices of the peace and county commissioners, then arrogated to itself the authority to select justices of the peace and gave them the power to select commissioners).

This Court did not stand idly by. In Alabama, for example, the legislature responded to increased black voter registration in the city of Tuskegee by amending the State Constitution to authorize legislative abolition of the county in which Tuskegee was located, Ala. Const., Amdt. 132 (1957), repealed by Ala. Const., Amdt. 406 (1982), and by redrawing the city's boundaries to remove all the black voters "while not removing a single white voter," *Gomillion* v. *Lightfoot*, 364 U. S. 339, 341 (1960). The Court intervened, finding it "inconceivable that guaranties embedded in the Constitu-

tion" could be "manipulated out of existence" by being "cloaked in the garb of [political] realignment." *Id.*, at 345 (internal quotation marks omitted).

This Court's landmark ruling in *Brown* v. *Board of Education*, 347 U. S. 483 (1954), triggered a new era of political restructuring, this time in the context of education. In Virginia, the General Assembly transferred control of student assignment from local school districts to a State Pupil Placement Board. See B. Muse, Virginia's Massive Resistance 34, 74 (1961). And when the legislature learned that the Arlington County School Board had prepared a desegregation plan, the General Assembly "swiftly retaliated" by stripping the county of its right to elect its school board by popular vote and instead making the board an appointed body. *Id.*, at 24; see also B. Smith, They Closed Their Schools 142–143 (1965).

Other States similarly disregarded this Court's mandate by changing their political process. See, *e. g.*, *Bush* v. *Orleans Parish School Bd.*, 187 F. Supp. 42, 44–45 (ED La. 1960) (the Louisiana Legislature gave the Governor the authority to supersede any school board's decision to integrate); Extension of the Voting Rights Act, Hearings on H. R. 4249 et al. before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 1st Sess., 146–149 (1969) (statement of Thomas E. Harris, Assoc. Gen. Counsel, American Federation of Labor and Congress of Industrial Organizations) (the Mississippi Legislature removed from the people the right to elect superintendents of education in 11 counties and instead made those positions appointive).

The Court remained true to its command in *Brown*. In Arkansas, for example, it enforced a desegregation order against the Little Rock School Board. *Cooper* v. *Aaron*, 358 U. S. 1, 5 (1958). On the very day the Court announced that ruling, the Arkansas Legislature responded by changing the rules. It enacted a law permitting the Governor to close

any public school in the State, and stripping local school districts of their decisionmaking authority so long as the Governor determined that local officials could not maintain "'a general, suitable, and efficient educational system.'" *Aaron* v. *Cooper*, 261 F. 2d 97, 99 (CA8 1958) (*per curiam*) (quoting Arkansas statute). The then-Governor immediately closed all of Little Rock's high schools. *Id.*, at 99–100; see also S. Breyer, Making Our Democracy Work 49–67 (2010) (discussing the events in Little Rock).

The States' political restructuring efforts in the 1960's and 1970's went beyond the context of education. Many States tried to suppress the political voice of racial minorities more generally by reconfiguring the manner in which they filled vacancies in local offices, often transferring authority from the electorate (where minority citizens had a voice at the local level) to the States' executive branch (where minorities wielded little if any influence). See, *e. g.*, 1981 Hearings, pt. 1, at 815 (report of J. Cox & A. Turner) (the Alabama Legislature changed all municipal judgeships from elective to appointive offices); *id.*, at 1955 (report of R. Hudlin & K. Brimah, Voter Educ. Project, Inc.) (the Georgia Legislature eliminated some elective offices and made others appointive when it appeared that a minority candidate would be victorious); *id.*, at 501 (statement of Frank R. Parker, Director, Lawyers' Comm. for Civil Rights Under Law) (the Mississippi Legislature changed the manner of filling vacancies for various public offices from election to appointment).

II

It was in this historical context that the Court intervened in *Hunter* v. *Erickson*, 393 U. S. 385 (1969), and *Washington* v. *Seattle School Dist. No. 1*, 458 U. S. 457 (1982). Together, *Hunter* and *Seattle* recognized a fundamental strand of this Court's equal protection jurisprudence: the political-process doctrine. To understand that doctrine fully, it is necessary

to set forth in detail precisely what the Court had before it, and precisely what it said. For to understand *Hunter* and *Seattle* is to understand why those cases straightforwardly resolve this one.

A

In *Hunter*, the City Council of Akron, Ohio, enacted a fair housing ordinance to "assure equal opportunity to all persons to live in decent housing facilities regardless of race, color, religion, ancestry, or national origin." 393 U. S., at 386 (internal quotation marks omitted). A majority of the citizens of Akron disagreed with the ordinance and overturned it. But the majority did not stop there; it also amended the city charter to prevent the City Council from implementing any future ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of the majority of the Akron electorate. *Ibid.* That amendment changed the rules of the political process in Akron. The Court described the result of the change as follows:

> "[T]o enact an ordinance barring housing discrimination on the basis of race or religion, proponents had to obtain the approval of the City Council and of a majority of the voters citywide. To enact an ordinance preventing housing discrimination on other grounds, or to enact any other type of housing ordinance, proponents needed the support of only the City Council." *Seattle*, 458 U. S., at 468 (describing *Hunter*; emphasis deleted).

The Court invalidated the Akron charter amendment under the Equal Protection Clause. It concluded that the amendment unjustifiably "place[d] special burdens on racial minorities within the governmental process," thus effecting "a real, substantial, and invidious denial of the equal protection of the laws." *Hunter*, 393 U. S., at 391, 393. The Court characterized the amendment as "no more permissible" than denying racial minorities the right to vote on an

equal basis with the majority. *Id.*, at 391. For a "State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Id.*, at 392–393. The vehicle for the change—a popular referendum—did not move the Court: "The sovereignty of the people," it explained, "is itself subject to . . . constitutional limitations." *Id.*, at 392.

Justice Harlan, joined by Justice Stewart, wrote in his concurrence that although a State can normally allocate political power according to any general principle, it bears a "far heavier burden of justification" when it reallocates political power based on race, because the selective reallocation necessarily makes it far more difficult for racial minorities to "achieve legislation that is in their interest." *Id.*, at 395 (internal quotation marks omitted).

In *Seattle*, a case that mirrors the one before us, the Court applied *Hunter* to invalidate a statute, enacted by a majority of Washington State's citizens, that prohibited racially integrative busing in the wake of *Brown*. As early as 1963, Seattle's School District No. 1 began taking steps to cure the *de facto* racial segregation in its schools. 458 U. S., at 460–461. Among other measures, it enacted a desegregation plan that made extensive use of busing and mandatory assignments. *Id.*, at 461. The district was under no obligation to adopt the plan; *Brown* charged school boards with a duty to integrate schools that were segregated because of *de jure* racial discrimination, but there had been no finding that the *de facto* segregation in Seattle's schools was the product of *de jure* discrimination. 458 U. S., at 472, n. 15. Several residents who opposed the desegregation efforts formed a committee and sued to enjoin implementation of the plan. *Id.*, at 461. When these efforts failed, the committee sought to change the rules of the political process. It drafted a state-

wide initiative "designed to terminate the use of mandatory busing for purposes of racial integration." *Id.*, at 462. A majority of the State's citizens approved the initiative. *Id.*, at 463–464.

The Court invalidated the initiative under the Equal Protection Clause. It began by observing that equal protection of the laws "guarantees racial minorities the right to full participation in the political life of the community." *Id.*, at 467. "It is beyond dispute," the Court explained, "that given racial or ethnic groups may not be denied the franchise, or precluded from entering into the political process in a reliable and meaningful manner." *Ibid.* But the Equal Protection Clause reaches further, the Court stated, reaffirming the principle espoused in *Hunter*—that while "laws structuring political institutions or allocating political power according to neutral principles" do not violate the Constitution, "a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decision-making process." 458 U. S., at 470. That kind of state action, it observed, "places *special* burdens on racial minorities within the governmental process," by making it "*more* difficult for certain racial and religious minorities" than for other members of the community "to achieve legislation . . . in their interest." *Ibid.*

Rejecting the argument that the initiative had no racial focus, the Court found that the desegregation of public schools, like the Akron housing ordinance, "inure[d] primarily to the benefit of the minority, and [was] designed for that purpose." *Id.*, at 472. Because minorities had good reason to "consider busing for integration to be 'legislation that is in their interest,'" the Court concluded that the "racial focus of [the initiative] . . . suffice[d] to trigger application of the *Hunter* doctrine." *Id.*, at 474 (quoting *Hunter*, 393 U. S., at 395) (Harlan, J. concurring)).

The Court next concluded that "the practical effect of [the initiative was] to work a reallocation of power of the kind condemned in *Hunter*." *Seattle*, 458 U. S., at 474. It explained: "Those favoring the elimination of *de facto* school segregation now must seek relief from the state legislature, or from the statewide electorate. Yet authority over all other student assignment decisions, as well as over most other areas of educational policy, remains vested in the local school board." *Ibid.* Thus, the initiative required those in favor of racial integration in public schools to "surmount a considerably higher hurdle than persons seeking comparable legislative action" in different contexts. *Ibid.*

The Court reaffirmed that the "'simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification.'" *Id.*, at 483 (quoting *Crawford* v. *Board of Ed. of Los Angeles*, 458 U. S. 527, 539 (1982)). But because the initiative burdened future attempts to integrate by lodging the decisionmaking authority at a "new and remote level of government," it was more than a "mere repeal"; it was an unconstitutionally discriminatory change to the political process.[3] *Seattle*, 458 U. S., at 483–484.

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[3] In *Crawford*, the Court confronted an amendment to the California Constitution prohibiting state courts from mandating pupil assignments unless a federal court would be required to do so under the Equal Protection Clause. We upheld the amendment as nothing more than a repeal of existing legislation: The standard previously required by California went beyond what was federally required; the amendment merely moved the standard back to the federal baseline. The Court distinguished the amendment from the one in *Seattle* because it left the rules of the political game unchanged. Racial minorities in *Crawford*, unlike racial minorities in *Seattle*, could still appeal to their local school districts for relief.

The *Crawford* Court distinguished *Hunter* v. *Erickson*, 393 U. S. 385 (1969), by clarifying that the charter amendment in *Hunter* was "something more than a mere repeal" because it altered the framework of the political process. 458 U. S., at 540. And the *Seattle* Court drew the same distinction when it held that the initiative "work[ed] something more than

B

Hunter and *Seattle* vindicated a principle that is as elementary to our equal protection jurisprudence as it is essential: The majority may not suppress the minority's right to participate on equal terms in the political process. Under this doctrine, governmental action deprives minority groups of equal protection when it (1) has a racial focus, targeting a policy or program that "inures primarily to the benefit of the minority," *Seattle*, 458 U. S., at 472; and (2) alters the political process in a manner that uniquely burdens racial minorities' ability to achieve their goals through that process. A faithful application of the doctrine resoundingly resolves this case in respondents' favor.

1

Section 26 has a "racial focus." *Id.*, at 474. That is clear from its text, which prohibits Michigan's public colleges and universities from "grant[ing] preferential treatment to any individual or group on the basis of race." Mich. Const., Art. I, § 26. Like desegregation of public schools, race-sensitive admissions policies "inur[e] primarily to the benefit of the minority," 458 U. S., at 472, as they are designed to increase minorities' access to institutions of higher education.[4]

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the 'mere repeal' of a desegregation law by the political entity that created it." 458 U. S., at 483.

[4] JUSTICE SCALIA accuses me of crafting my own version (or versions) of the racial-focus prong. See *ante*, at 323, n. 4. I do not. I simply apply the test announced in *Seattle*: whether the policy in question "inures primarily to the benefit of the minority." 458 U. S., at 472. JUSTICE SCALIA ignores this analysis, see Part II–B–1, *supra*, and instead purports to identify three versions of the test that he thinks my opinion advances. The first—whether "the policy in question *benefits* only a racial minority," *ante*, at 323, n. 4—misunderstands the doctrine and misconstrues my opinion. The racial-focus prong has never required a policy to benefit *only* a minority group. I make the altogether different point that the political-process doctrine is obviously not implicated in the first place by a restructuring that burdens members of society equally. This is the second prong of the political-process doctrine. See *supra*, at 341 (explaining that the

Petitioner argues that race-sensitive admissions policies cannot "inur[e] primarily to the benefit of the minority," *ibid.*, as the Court has upheld such policies only insofar as they further "the educational benefits that flow from a diverse student body," *Grutter*, 539 U. S., at 343. But there is no conflict between this Court's pronouncement in *Grutter* and the commonsense reality that race-sensitive admissions policies benefit minorities. Rather, race-sensitive admissions policies further a compelling state interest in achieving a diverse student body precisely because they increase minority enrollment, which necessarily benefits minority groups. In other words, constitutionally permissible race-sensitive admissions policies can both serve the compelling interest of obtaining the educational benefits that flow from a diverse student body, and inure to the benefit of racial minorities. There is nothing mutually exclusive about the two. Cf. *Seattle*, 458 U. S., at 472 (concluding that the desegregation plan had a racial focus even though "white as well as Negro children benefit from exposure to 'ethnic and racial diversity in the classroom'").

It is worth emphasizing, moreover, that §26 is relevant only to admissions policies that have survived strict scrutiny under *Grutter*; other policies, under this Court's rulings, would be forbidden with or without §26. A *Grutter*-compliant admissions policy must use race flexibly, not maintain a quota; must be limited in time; and must be employed only after "serious, good faith consideration of workable race-neutral alternatives," 539 U. S., at 339. The policies

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political-process doctrine is implicated "[w]hen the majority reconfigures the political process in a manner that burdens only a racial minority"). The second version—which asks whether a policy "benefits *primarily* a racial minority," *ante*, at 323, n. 4—is the one articulated by the *Seattle* Court and, as I explain, see *infra* this page, it is easily met in this case. And the third—whether the policy has "the incidental effect . . . of benefiting primarily racial minorities," *ante*, at 323, n. 4—is not a test I advance at all.

banned by § 26 meet all these requirements and thus already constitute the least restrictive ways to advance Michigan's compelling interest in diversity in higher education.

2

Section 26 restructures the political process in Michigan in a manner that places unique burdens on racial minorities. It establishes a distinct and more burdensome political process for the enactment of admissions plans that consider racial diversity.

Long before the enactment of § 26, the Michigan Constitution granted plenary authority over all matters relating to Michigan's public universities, including admissions criteria, to each university's eight-member governing board. See Mich. Const., Art. VIII, § 5 (establishing the Board of Regents of the University of Michigan, the Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University). The boards have the "power to enact ordinances, by-laws and regulations for the government of the university." Mich. Comp. Laws Ann. § 390.5 (West 2010); see also § 390.3 ("The government of the university is vested in the board of regents"). They are " 'constitutional corporation[s] of independent authority, which, within the scope of [their] functions, [are] co-ordinate with and equal to . . . the legislature.' " *Federated Publications, Inc.* v. *Board of Trustees of Mich. State Univ.*, 460 Mich. 75, 84, n. 8, 594 N. W. 2d 491, 496, n. 8 (1999).

The boards are indisputably a part of the political process in Michigan. Each political party nominates two candidates for membership to each board, and board members are elected to 8-year terms in the general statewide election. See Mich. Comp. Laws Ann. §§ 168.282, 168.286 (West 2008); Mich. Const., Art. VIII, § 5. Prior to § 26, board candidates frequently included their views on race-sensitive admissions in their campaigns. For example, in 2005, one can-

didate pledged to "work to end so-called 'Affirmative-Action,' a racist, degrading system." See League of Women Voters, 2005 General Election Voter Guide, online at http://www.lwvka.org/guide04/regents.html (all Internet materials as visited Apr. 18, 2014, and available in Clerk of Court's case file); see also George, U-M Regents Race Tests Policy, Detroit Free Press, Oct. 26, 2000, p. 2B (noting that one candidate "opposes affirmative action admissions policies" because they " 'basically sa[y] minority students are not qualified' ").

Before the enactment of § 26, Michigan's political structure permitted both supporters and opponents of race-sensitive admissions policies to vote for their candidates of choice and to lobby the elected and politically accountable boards. Section 26 reconfigured that structure. After § 26, the boards retain plenary authority over all admissions criteria *except* for race-sensitive admissions policies.[5] To change admissions policies on this one issue, a Michigan citizen must instead amend the Michigan Constitution. That is no small task. To place a proposed constitutional amendment on the ballot requires either the support of two-thirds of both Houses of the Michigan Legislature or a vast number of signatures from Michigan voters—10 percent of the total number of votes cast in the preceding gubernatorial election. See Mich. Const., Art. XII, §§ 1, 2. Since more than 3.2 million votes were cast in the 2010 election for Governor, more than 320,000 signatures are currently needed to win a ballot spot. See Brief for Gary Segura et al. as *Amici Curiae* 9 (hereinafter Segura Brief). Moreover, "[t]o account for invalid and duplicative signatures, initiative sponsors 'need to

[5] By stripping the governing boards of the authority to decide whether to adopt race-sensitive admissions policies, the majority removed the decision from bodies well suited to make that decision: boards engaged in the arguments on both sides of a matter, which deliberate and then make and refine "considered judgment[s]" about racial diversity and admissions policies, see *Grutter*, 539 U. S., at 387 (KENNEDY, J., dissenting).

obtain substantially more than the actual required number of signatures, typically by a 25% to 50% margin.'" *Id.*, at 10 (quoting Tolbert, Lowenstein, & Donovan, Election Law and Rules for Using Initiatives, in Citizens as Legislators: Direct Democracy in the United States 27, 37 (S. Bowler, T. Donovan, & C. Tolbert eds. 1998)).

And the costs of qualifying an amendment are significant. For example, "[t]he vast majority of petition efforts . . . require initiative sponsors to hire paid petition circulators, at significant expense." Segura Brief 10; see also T. Donovan, C. Mooney, & D. Smith, State and Local Politics: Institutions and Reform 96 (2012) (hereinafter Donovan) ("In many states, it is difficult to place a measure on the ballot unless professional petition firms are paid to collect some or all the signatures required for qualification"); Tolbert, *supra*, at 35 ("'Qualifying an initiative for the statewide ballot is . . . no longer so much a measure of general citizen interest as it is a test of fundraising ability'"). In addition to the cost of collecting signatures, campaigning for a majority of votes is an expensive endeavor, and "organizations advocating on behalf of marginalized groups remain . . . outmoneyed by corporate, business, and professional organizations." Strolovitch & Forrest, Social and Economic Justice Movements and Organizations, in The Oxford Handbook of American Political Parties and Interest Groups 468, 471 (L. Maisel & J. Berry eds. 2010). In 2008, for instance, over $800 million was spent nationally on state-level initiative and referendum campaigns, nearly $300 million more than was spent in the 2006 cycle. Donovan 98. "In several states, more money [is] spent on ballot initiative campaigns than for all other races for political office combined." *Ibid.* Indeed, the amount spent on state-level initiative and referendum campaigns in 2008 eclipsed the $740.6 million spent by President Obama in his 2008 presidential campaign, Salant, Spending Doubled as Obama Led Billion-Dollar Campaign, Bloomberg

News, Dec. 27, 2008, online at http://www.bloomberg.com/apps/news?pid=newsarchive&sid=anLDS9WWPQW8.

Michigan's Constitution has only rarely been amended through the initiative process. Between 1914 and 2000, voters have placed only 60 statewide initiatives on the Michigan ballot, of which only 20 have passed. See Segura Brief 12. Minority groups face an especially uphill battle. See Donovan 106 ("[O]n issues dealing with racial and ethnic matters, studies show that racial and ethnic minorities do end up more on the losing side of the popular vote"). In fact, "[i]t is difficult to find even a single statewide initiative in any State in which voters approved policies that explicitly favor racial or ethnic minority groups."[6] Segura Brief 13.

This is the onerous task that § 26 forces a Michigan citizen to complete in order to change the admissions policies of Michigan's public colleges and universities with respect to racial sensitivity. While substantially less grueling paths remain open to those advocating for any other admissions policies, a constitutional amendment is the only avenue by which race-sensitive admissions policies may be obtained. The effect of § 26 is that a white graduate of a public Michigan university who wishes to pass his historical privilege on to his children may freely lobby the board of that university

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[6] In the face of this overwhelming evidence, JUSTICE SCALIA claims that it is actually easier, not harder, for minorities to effectuate change at the constitutional amendment level than at the board level. See *ante*, at 326 ("[V]oting in a favorable board (each of which has eight members) at the three major public universities requires electing by majority vote at least 15 different candidates, several of whom would be running during different election cycles"). This claim minimizes just how difficult it is to amend the State Constitution. See *supra*, at 354–357. It is also incorrect in its premise that minorities must elect an entirely new slate of board members in order to effectuate change at the board level. JUSTICE SCALIA overlooks the fact that minorities need not elect any new board members in order to effect change; they may instead seek to persuade existing board members to adopt changes in their interests.

in favor of an expanded legacy admissions policy, whereas a black Michigander who was denied the opportunity to attend that very university cannot lobby the board in favor of a policy that might give his children a chance that he never had and that they might never have absent that policy.

Such reordering of the political process contravenes *Hunter* and *Seattle*.[7] See *Seattle*, 458 U. S., at 467 (the Equal Protection Clause prohibits " 'a political structure that treats all individuals as equals,' yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation" (citation omitted)). Where, as here, the majority alters the political process to the detriment of a racial minority, the governmental action is subject to strict scrutiny. See *id.*, at 485, n. 28. Michigan does not assert that § 26 satisfies a compelling state interest. That should settle the matter.

C

1

The plurality sees it differently. Disregarding the language used in *Hunter*, the plurality asks us to contort that case into one that "rests on the unremarkable principle that the State may not alter the procedures of government to target racial minorities." *Ante*, at 304. And the plurality

[7] I do not take the position, as JUSTICE SCALIA asserts, that the process of amending the Michigan Constitution is not a part of Michigan's existing political process. See *ante*, at 329. It clearly is. The problem with § 26 is not that "amending Michigan's Constitution is simply not a part of that State's 'existing' political process." *Ante*, at 329. It is that § 26 reconfigured the political process in Michigan such that it is now more difficult for racial minorities, and racial minorities alone, to achieve legislation in their interest. Section 26 elevated the issue of race-sensitive admissions policies, and not any other kinds of admissions policies, to a higher plane of the existing political process in Michigan: that of a constitutional amendment.

recasts *Seattle* "as a case in which the state action in question . . . had the serious risk, if not purpose, of causing specific injuries on account of race." *Ante*, at 305. According to the plurality, the *Hunter* and *Seattle* Courts were not concerned with efforts to reconfigure the political process to the detriment of racial minorities; rather, those cases invalidated governmental actions merely because they reflected an invidious purpose to discriminate. This is not a tenable reading of those cases.

The plurality identifies "invidious discrimination" as the "necessary result" of the restructuring in *Hunter*. *Ante*, at 304. It is impossible to assess whether the housing amendment in *Hunter* was motivated by discriminatory purpose, for the opinion does not discuss the question of intent.[8] What is obvious, however, is that the possibility of invidious discrimination played no role in the Court's reasoning. We ordinarily understand our precedents to mean what they actually say, not what we later think they could or should have said. The *Hunter* Court was clear about why it invalidated the Akron charter amendment: It was impermissible as a restructuring of the political process, not as an action motivated by discriminatory intent. See 393 U. S., at 391 (striking down the Akron charter amendment because it "places a special burden on racial minorities within the governmental process").

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[8] It certainly is fair to assume that some voters may have supported the *Hunter* amendment because of discriminatory animus. But others may have been motivated by their strong beliefs in the freedom of contract or the freedom to alienate property. Similarly, here, although some Michiganders may have voted for § 26 out of racial animus, some may have been acting on a personal belief, like that of some of my colleagues today, that using race-sensitive admissions policies in higher education is unwise. The presence (or absence) of invidious discrimination has no place in the current analysis. That is the very purpose of the political-process doctrine; it operates irrespective of discriminatory intent, for it protects a process-based right.

Similarly, the plurality disregards what *Seattle* actually says and instead opines that "the political restriction in question was designed to be used, or was likely to be used, to encourage infliction of injury by reason of race." *Ante*, at 314. Here, the plurality derives its conclusion not from *Seattle* itself, but from evidence unearthed more than a quarter-century later in *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701 (2007): "Although there had been no judicial finding of *de jure* segregation with respect to Seattle's school district, it appears as though school segregation in the district in the 1940's and 1950's *may have been* the partial result of school board policies that 'permitted white students to transfer out of black schools while restricting the transfer of black students into white schools.'"[9] *Ante*, at 305 (quoting *Parents Involved*, 551 U. S., at 807–808 (BREYER, J., dissenting); emphasis added). It follows, according to the plurality, that Seattle's desegregation plan was constitutionally required, so that the initiative halting the plan was an instance of invidious discrimination aimed at inflicting a racial injury.

Again, the plurality might prefer that the *Seattle* Court had said that, but it plainly did not. Not once did the Court suggest the presence of *de jure* segregation in Seattle. Quite the opposite: The opinion explicitly suggested the desegregation plan was adopted to remedy *de facto* rather than *de jure* segregation. See 458 U. S., at 472, n. 15 (referring to the "absen[ce]" of "a finding of prior *de jure* segregation"). The Court, moreover, assumed that no "constitutional violation" through *de jure* segregation had occurred. *Id.*, at 474.

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[9] The plurality relies on JUSTICE BREYER's dissent in *Parents Involved* to conclude that "one permissible reading of the record was that the school board had maintained policies to perpetuate racial segregation in the schools." *Ante*, at 306. Remarkably, some Members of today's plurality criticized JUSTICE BREYER's reading of the record in *Parents Involved* itself. See 551 U. S., at 736.

And it unmistakably rested its decision on *Hunter*, holding Seattle's initiative invalid because it "use[d] the racial nature of an issue to define the governmental decisionmaking structure, and thus impose[d] substantial and unique burdens on racial minorities." 458 U. S., at 470.

It is nothing short of baffling, then, for the plurality to insist—in the face of clear language in *Hunter* and *Seattle* saying otherwise—that those cases were about nothing more than the intentional and invidious infliction of a racial injury. *Ante*, at 304 (describing the injury in *Hunter* as "a demonstrated injury on the basis of race"); *ante*, at 305 (describing the injury in *Seattle* as an "injur[y] on account of race"). The plurality's attempt to rewrite *Hunter* and *Seattle* so as to cast aside the political-process doctrine *sub silentio* is impermissible as a matter of *stare decisis*. Under the doctrine of *stare decisis*, we usually stand by our decisions, even if we disagree with them, because people rely on what we say, and they believe they can take us at our word.

And what now of the political-process doctrine? After the plurality's revision of *Hunter* and *Seattle*, it is unclear what is left. The plurality certainly does not tell us. On this point, and this point only, I agree with JUSTICE SCALIA that the plurality has rewritten those precedents beyond recognition. See *ante*, at 320–322 (opinion concurring in judgment).

2

JUSTICE BREYER concludes that *Hunter* and *Seattle* do not apply. Section 26, he reasons, did not move the relevant decisionmaking authority from one political level to another; rather, it removed that authority from "unelected actors and placed it in the hands of the voters." *Ante*, at 336 (opinion concurring in judgment). He bases this conclusion on the premise that Michigan's elected boards "delegated admissions-related decisionmaking authority to unelected

university faculty members and administrators." *Ante*, at 335. But this premise is simply incorrect.

For one thing, it is undeniable that prior to §26, board candidates often pledged to end or carry on the use of race-sensitive admissions policies at Michigan's public universities. See *supra*, at 353–354. Surely those were not empty promises. Indeed, the issue of race-sensitive admissions policies often dominated board elections. See, *e. g.*, George, Detroit Free Press, at 2B (observing that "[t]he race for the University of Michigan Board of Regents could determine . . . the future of [the university's] affirmative action policies"); Kosseff, UM Policy May Hang on Election, Crain's Detroit Business, Sept. 18, 2000, p. 1 (noting that an upcoming election could determine whether the university would continue to defend its affirmative action policies); University of Michigan's Admissions Policy Still an Issue for Regents' Election, Black Issues in Higher Education, Oct. 21, 2004, p. 17 (commenting that although "the Supreme Court struck down the University of Michigan's undergraduate admissions policy as too formulaic," the issue "remains an important [one] to several people running" in an upcoming election for the Board of Regents).

Moreover, a careful examination of the boards and their governing structure reveals that they remain actively involved in setting admissions policies and procedures. Take Wayne State University, for example. Its Board of Governors has enacted university statutes that govern the day-to-day running of the institution. See Wayne State Univ. Stat., online at http://bog.wayne.edu/code. A number of those statutes establish general admissions procedures, see §2.34.09 (establishing undergraduate admissions procedures); §2.34.12 (establishing graduate admissions procedures), and some set out more specific instructions for university officials, see, *e. g.*, §2.34.09.030 ("Admissions decisions will be based on a full evaluation of each student's academic

record, and on empirical data reflecting the characteristics of students who have successfully graduated from [the university] within the four years prior to the year in which the student applies"); §§ 2.34.12.080, 2.34.12.090 (setting the requisite grade point average for graduate applicants).

The Board of Governors does give primary responsibility over day-to-day admissions matters to the university's President. § 2.34.09.080. But the President is "elected by and answerable to the Board." Brief for Respondents Board of Governors of Wayne State University et al. 15. And while university officials and faculty members "serv[e] an important advisory role in recommending educational policy," *id.*, at 14, the Board alone ultimately controls educational policy and decides whether to adopt (or reject) program-specific admissions recommendations. For example, the Board has voted on recommendations "to revise guidelines for establishment of honors curricula, including admissions criteria"; "to modify the honor point criteria for graduate admission"; and "to modify the maximum number of transfer credits that the university would allow in certain cases where articulation agreements rendered modification appropriate." *Id.*, at 17; see also *id.*, at 18–20 (providing examples of the Board's "review[ing] and pass[ing] upon admissions requirements in the course of voting on broader issues, such as the implementation of new academic programs"). The Board also "engages in robust and regular review of administrative actions involving admissions policy and related matters." *Id.*, at 16.

Other public universities more clearly entrust admissions policy to university officials. The Board of Regents of the University of Michigan, for example, gives primary responsibility for admissions to the Associate Vice Provost, Executive Director of Undergraduate Admissions, and Directors of Admissions. Bylaws § 8.01, online at http://www.regents.umich.edu/bylaws. And the Board of Trustees of Michigan State

University relies on the President to make recommendations regarding admissions policies. Bylaws, Art. 8, online at http://www.trustees.msu.edu/bylaws. But the bylaws of the Board of Regents and the Board of Trustees "make clear that all university operations remain subject to their control." Brief for Respondents Regents of the University of Michigan, the Board of Trustees of Michigan State University et al. 13–14.

The boards retain ultimate authority to adopt or reject admissions policies in at least three ways. First, they routinely meet with university officials to review admissions policies, including race-sensitive admissions policies. For example, shortly after this Court's decisions in *Gratz* v. *Bollinger*, 539 U. S. 244 (2003), and *Grutter*, 539 U. S., at 306, the President of the University of Michigan appeared before the University's Board of Regents to discuss the impact of those decisions on the University. See Proceedings 2003–2004, pp. 10–12 (July 2003), online at http://name.umdl.umich.edu/ACW7513.2003.001. Six members of the Board voiced strong support for the University's use of race as a factor in admissions. *Id.*, at 11–12. In June 2004, the President again appeared before the Board to discuss changes to undergraduate admissions policies. *Id.*, at 301. And in March 2007, the University's Provost appeared before the Board of Regents to present strategies to increase diversity in light of the passage of Proposal 2. Proceedings 2006–2007, pp. 264–265, online at http://name.umdl.umich.edu/ACW7513.2006.001.

Second, the boards may enact bylaws with respect to specific admissions policies and may alter any admissions policies set by university officials. The Board of Regents may amend any bylaw "at any regular meeting of the board, or at any special meeting, provided notice is given to each regent one week in advance." Bylaws § 14.03. And Michigan State University's Board of Trustees may, "[u]pon the recom-

mendation of the President[,] . . . determine and establish the qualifications of students for admissions at any level." Bylaws, Art. 8. The boards may also permanently remove certain admissions decisions from university officials.[10] This authority is not merely theoretical. Between 2008 and 2012, the University of Michigan's Board of Regents "revised more than two dozen of its bylaws, two of which fall within Chapter VIII, the section regulating admissions practices." App. to Pet. for Cert. 30a.

Finally, the boards may appoint university officials who share their admissions goals, and they may remove those officials if the officials' goals diverge from those of the boards. The University of Michigan's Board of Regents "directly appoints [the University's] Associate Vice Provost and Executive Director of Undergraduate Admissions," and Michigan State University's Board of Trustees elects that institution's President. Brief for Respondents Regents of the University of Michigan, the Board of Trustees of Michigan State University et al. 14.

The salient point is this: Although the elected and politically accountable boards may well entrust university officials with certain day-to-day admissions responsibilities, they often weigh in on admissions policies themselves and, at all times, they retain complete supervisory authority over university officials and over all admissions decisions.

There is no question, then, that the elected boards in Michigan had the power to eliminate or adopt race-sensitive admissions policies prior to § 26. There is also no question that § 26 worked an impermissible reordering of the political process; it removed that power from the elected boards and

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[10] Under the bylaws of the University of Michigan's Board of Regents, "[a]ny and all delegations of authority made at any time and from time to time by the board to any member of the university staff, or to any unit of the university may be revoked by the board at any time, and notice of such revocation shall be given in writing." Bylaws § 14.04, online at http://www.regents.umich.edu/bylaws.

placed it instead at a higher level of the political process in Michigan. See *supra*, at 353–358. This case is no different from *Hunter* and *Seattle* in that respect. Just as in *Hunter* and *Seattle*, minorities in Michigan "participated in the political process and . . . won." *Ante*, at 336 (BREYER, J., concurring in judgment). And just as in *Hunter* and *Seattle*, "[t]he majority's subsequent reordering of the political process repealed the minority's successes and made it more difficult for the minority to succeed in the future," thereby "diminish[ing] the minority's ability to participate meaningfully in the electoral process." *Ante*, at 336 (opinion of BREYER, J.). There is therefore no need to consider "extend[ing] the holding of *Hunter* and *Seattle* to reach situations in which decisionmaking authority is moved from an administrative body to a political one," *ibid.* Such a scenario is not before us.

III

The political-process doctrine not only resolves this case as a matter of *stare decisis*; it is correct as a matter of first principles.

A

Under our Constitution, majority rule is not without limit. Our system of government is predicated on an equilibrium between the notion that a majority of citizens may determine governmental policy through legislation enacted by their elected representatives and the overriding principle that there are nonetheless some things the Constitution forbids even a majority of citizens to do. The political-process doctrine, grounded in the Fourteenth Amendment, is a central check on majority rule.

The Fourteenth Amendment instructs that all who act for the government may not "deny to any person . . . the equal protection of the laws." We often think of equal protection as a guarantee that the government will apply the law in an equal fashion—that it will not intentionally discriminate

against minority groups. But equal protection of the laws means more than that; it also secures the right of all citizens to participate meaningfully and equally in the process through which laws are created.

Few rights are as fundamental as the right to participate meaningfully and equally in the process of government. See *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370 (1886) (political rights are "fundamental" because they are "preservative of all rights"). That right is the bedrock of our democracy, recognized from its very inception. See J. Ely, Democracy and Distrust 87 (1980) (the Constitution "is overwhelmingly concerned, on the one hand, with procedural fairness in the resolution of individual disputes," and on the other, "with ensuring broad participation in the processes and distributions of government").

This should come as no surprise. The political process is the channel of change. *Id.*, at 103 (describing the importance of the judiciary in policing the "channels of political change"). It is the means by which citizens may both obtain desirable legislation and repeal undesirable legislation. Of course, we do not expect minority members of our society to obtain every single result they seek through the political process—not, at least, when their views conflict with those of the majority. The minority plainly does not have a right to prevail over majority groups in any given political contest. But the minority does have a right to play by the same rules as the majority. It is this right that *Hunter* and *Seattle* so boldly vindicated.

This right was hardly novel at the time of *Hunter* and *Seattle*. For example, this Court focused on the vital importance of safeguarding minority groups' access to the political process in *United States* v. *Carolene Products Co.*, 304 U. S. 144 (1938), a case that predated *Hunter* by 30 years. In a now-famous footnote, the Court explained that while ordinary social and economic legislation carries a presumption of

constitutionality, the same may not be true of legislation that offends fundamental rights or targets minority groups. Citing cases involving restrictions on the right to vote, restraints on the dissemination of information, interferences with political organizations, and prohibition of peaceable assembly, the Court recognized that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" could be worthy of "more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation." 304 U. S., at 152, n. 4; see also Ely, *supra*, at 76 (explaining that "[p]aragraph two [of *Carolene Products* footnote 4] suggests that it is an appropriate function of the Court to keep the machinery of democratic government running as it should, to make sure the channels of political participation and communication are kept open"). The Court also noted that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *Carolene Products*, 304 U. S., at 153, n. 4, see also Ely, *supra*, at 76 (explaining that "[p]aragraph three [of *Carolene Products* footnote 4] suggests that the Court should also concern itself with what majorities do to minorities, particularly mentioning laws 'directed at' religious, national and racial minorities and those infected by prejudice against them").

The values identified in *Carolene Products* lie at the heart of the political-process doctrine. Indeed, *Seattle* explicitly relied on *Carolene Products*. See 458 U. S., at 486 ("[W]hen the State's allocation of power places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the 'special condition' of prejudice, the governmental action seriously 'curtail[s] the operation of

those political processes ordinarily to be relied upon to protect minorities'" (quoting *Carolene Products*, 304 U. S., at 153, n. 4)). These values are central tenets of our equal protection jurisprudence.

Our cases recognize at least three features of the right to meaningful participation in the political process. Two of them, thankfully, are uncontroversial. First, every eligible citizen has a right to vote. See *Shaw* v. *Reno*, 509 U. S. 630, 639 (1993). This, woefully, has not always been the case. But it is a right no one would take issue with today. Second, the majority may not make it more difficult for the minority to exercise the right to vote. This, too, is widely accepted. After all, the Court has invalidated grandfather clauses, good character requirements, poll taxes, and gerrymandering provisions.[11] The third feature, the one the plurality dismantles today, is that a majority may not reconfigure the existing political process in a manner that creates a two-tiered system of political change, subjecting laws designed to protect or benefit discrete and insular minorities to a more burdensome political process than all other laws. This is the political-process doctrine of *Hunter* and *Seattle*.

My colleagues would stop at the second. The plurality embraces the freedom of "self-government" without limits. See *ante*, at 310. And JUSTICE SCALIA values a "near-limitless" notion of state sovereignty. See *ante*, at 327. The wrong sought to be corrected by the political-process

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[11] Attempts by the majority to make it more difficult for the minority to exercise its right to vote are, sadly, not a thing of the past. See *Shelby County* v. *Holder*, 570 U. S. 529, 573–575 (2013) (GINSBURG, J., dissenting) (describing recent examples of discriminatory changes to state voting laws, including a 1995 dual voter registration system in Mississippi to disfranchise black voters, a 2000 redistricting plan in Georgia to decrease black voting strength, and a 2003 proposal to change the voting mechanism for school board elections in South Carolina). Until this Court's decision last Term in *Shelby County*, the preclearance requirement of § 5 of the Voting Rights Act of 1965 blocked those and many other discriminatory changes to voting procedures.

doctrine, they say, is not one that should concern us and is in any event beyond the reach of the Fourteenth Amendment. As they see it, the Court's role in protecting the political process ends once we have removed certain barriers to the minority's participation in that process. Then, they say, we must sit back and let the majority rule without the key constitutional limit recognized in *Hunter* and *Seattle*.

That view drains the Fourteenth Amendment of one of its core teachings. Contrary to today's decision, protecting the right to meaningful participation in the political process must mean more than simply removing barriers to participation. It must mean vigilantly policing the political process to ensure that the majority does not use other methods to prevent minority groups from partaking in that process on equal footing. Why? For the same reason we guard the right of every citizen to vote. If "[e]fforts to reduce the impact of minority votes, in contrast to direct attempts to block access to the ballot," were "'second-generation barriers'" to minority voting, *Shelby County* v. *Holder*, 570 U. S. 529, 563 (2013) (GINSBURG, J., dissenting), efforts to reconfigure the political process in ways that uniquely disadvantage minority groups who have already long been disadvantaged are third-generation barriers. For as the Court recognized in *Seattle*, "minorities are no less powerless with the vote than without it when a racial criterion is used to assign governmental power in such a way as to exclude particular racial groups 'from effective participation in the political proces[s].'"[12] 458 U. S., at 486.

[12] Preserving the right to participate meaningfully and equally in the process of government is especially important with respect to education policy. I do not mean to suggest that "the constitutionality of laws forbidding racial preferences depends on the policy interest at stake." *Ante*, at 311 (plurality opinion). I note only that we have long recognized that "'education . . . is the very foundation of good citizenship.'" *Grutter*, 539 U. S., at 331 (quoting *Brown* v. *Board of Education*, 347 U. S. 483, 493 (1954)). Our Nation's colleges and universities "represent the training ground for a large number of our Nation's leaders," and so there is special reason to safeguard the guarantee "'that public institutions are open and

To accept the first two features of the right to meaningful participation in the political process, while renouncing the third, paves the way for the majority to do what it has done time and again throughout our Nation's history: afford the minority the opportunity to participate, yet manipulate the ground rules so as to ensure the minority's defeat. This is entirely at odds with our idea of equality under the law.

To reiterate, none of this is to say that the political-process doctrine prohibits the exercise of democratic self-government. Nothing prevents a majority of citizens from pursuing or obtaining its preferred outcome in a political contest. Here, for instance, I agree with the plurality that Michiganders who were unhappy with *Grutter* were free to pursue an end to race-sensitive admissions policies in their State. See *ante*, at 312–313. They were free to elect governing boards that opposed race-sensitive admissions policies or, through public discourse and dialogue, to lobby the existing boards toward that end. They were also free to remove from the boards the authority to make any decisions with respect to admissions policies, as opposed to only decisions concerning race-sensitive admissions policies. But what the majority could not do, consistent with the Constitution, is change the ground rules of the political process in a manner that makes it more difficult for racial minorities alone to achieve their goals. In doing so, the majority effectively rigs the contest to guarantee a particular outcome. That is the very wrong the political-process doctrine seeks to remedy. The doctrine "hews to the unremarkable notion that when two competitors are running a race, one may not require the other to run twice as far or to scale obstacles not present in the first runner's course." *BAMN* v. *Regents of Univ. of Michigan*, 701 F. 3d 466, 474 (CA6 2012).

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available to all segments of American society, including people of all races and ethnicities.'" 539 U. S., at 331–332.

B

The political-process doctrine also follows from the rest of our equal protection jurisprudence—in particular, our reapportionment and vote dilution cases. In those cases, the Court described the right to vote as "'the essence of a democratic society.'" *Shaw*, 509 U. S., at 639. It rejected States' use of ostensibly race-neutral measures to prevent minorities from exercising their political rights. See *id.*, at 639–640. And it invalidated practices such as at-large electoral systems that reduce or nullify a minority group's ability to vote as a cohesive unit, when those practices were adopted with a discriminatory purpose. *Id.*, at 641. These cases, like the political-process doctrine, all sought to preserve the political rights of the minority.

Two more recent cases involving discriminatory restructurings of the political process are also worthy of mention: *Romer* v. *Evans*, 517 U. S. 620 (1996), and *League of United Latin American Citizens* v. *Perry*, 548 U. S. 399 (2006) (*LULAC*).

Romer involved a Colorado constitutional amendment that removed from the local political process an issue primarily affecting gay and lesbian citizens. The amendment, enacted in response to a number of local ordinances prohibiting discrimination against gay citizens, repealed these ordinances and effectively prohibited the adoption of similar ordinances in the future without another amendment to the State Constitution. 517 U. S., at 623–624. Although the Court did not apply the political-process doctrine in *Romer*,[13] the case resonates with the principles undergirding the political-

[13] The Court invalidated Amendment 2 on the basis that it lacked any rational relationship to a legitimate end. It concluded that the amendment "impose[d] a broad and undifferentiated disability on a single named group," and was "so discontinuous with the reasons offered for it that [it] seem[ed] inexplicable by anything but animus toward the class it affect[ed]." *Romer*, 517 U. S., at 632.

process doctrine. The Court rejected an attempt by the majority to transfer decisionmaking authority from localities (where the targeted minority group could influence the process) to state government (where it had less ability to participate effectively). See *id.*, at 632 (describing this type of political restructuring as a "disability" on the minority group). Rather than being able to appeal to municipalities for policy changes, the Court commented, the minority was forced to "enlis[t] the citizenry of Colorado to amend the State Constitution," *id.*, at 631—just as in this case.

LULAC, a Voting Rights Act case, involved an enactment by the Texas Legislature that redrew district lines for a number of Texas seats in the House of Representatives. 548 U. S., at 409 (plurality opinion). In striking down the enactment, the Court acknowledged the "'long, well-documented history of discrimination'" in Texas that "'touched upon the rights of . . . Hispanics to register, to vote, or to participate otherwise in the electoral process,'" *id.*, at 439, and it observed that the "'political, social, and economic legacy of past discrimination' . . . may well [have] 'hinder[ed] their ability to participate effectively in the political process,'" *id.*, at 440. Against this backdrop, the Court found that just as "Latino voters were poised to elect their candidate of choice," *id.*, at 438, the State's enactment "took away [their] opportunity because [they] were about to exercise it," *id.*, at 440. The Court refused to sustain "the resulting vote dilution of a group that was beginning to achieve [the] goal of overcoming prior electoral discrimination." *Id.*, at 442.

As in *Romer*, the *LULAC* Court—while using a different analytic framework—applied the core teaching of *Hunter* and *Seattle*: The political process cannot be restructured in a manner that makes it more difficult for a traditionally excluded group to work through the existing process to seek beneficial policies. And the events giving rise to *LULAC* are strikingly similar to those here. Just as redistricting

prevented Latinos in Texas from attaining a benefit they had fought for and were poised to enjoy, § 26 prevents racial minorities in Michigan from enjoying a last-resort benefit that they, too, had fought for through the existing political processes.

IV

My colleagues claim that the political-process doctrine is unadministrable and contrary to our more recent equal protection precedents. See *ante*, at 307–311 (plurality opinion); *ante*, at 322–332 (opinion of SCALIA, J.). It is only by not acknowledging certain strands of our jurisprudence that they can reach such a conclusion.

A

Start with the claim that *Hunter* and *Seattle* are no longer viable because of the cases that have come after them. I note that in the view of many, it is those precedents that have departed from the mandate of the Equal Protection Clause in the first place, by applying strict scrutiny to actions designed to benefit rather than burden the minority. See *Gratz*, 539 U. S., at 301 (GINSBURG, J., dissenting) ("[A]s I see it, government decisionmakers may properly distinguish between policies of exclusion and inclusion. Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated" (citation omitted)); *id.*, at 282 (BREYER, J., concurring in judgment) ("I agree . . . that, in implementing the Constitution's equality instruction, government decisionmakers may properly distinguish between policies of inclusion and exclusion, for the former are more likely to prove consistent with the basic constitutional obligation that the law respect each individual equally" (citation omitted)); *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 243 (1995) (Stevens, J., dissenting) ("There is no moral or

constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society"); *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267, 301 (1986) (Marshall, J., dissenting) (when dealing with an action to eliminate "pernicious vestiges of past discrimination," a "less exacting standard of review is appropriate"); *Fullilove* v. *Klutznick*, 448 U. S. 448, 518–519 (1980) (Marshall, J., concurring in judgment) (race-based governmental action designed to "remed[y] the continuing effects of past racial discrimination . . . should not be subjected to conventional 'strict scrutiny'"); *Bakke*, 438 U. S., at 359 (Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part) ("[R]acial classifications designed to further remedial purposes" should be subjected only to intermediate scrutiny).

But even assuming that strict scrutiny should apply to policies designed to benefit racial minorities, that view is not inconsistent with *Hunter* and *Seattle*. For nothing the Court has said in the last 32 years undermines the principles announced in those cases.

1

JUSTICE SCALIA first argues that the political-process doctrine "misreads the Equal Protection Clause to protect 'particular group[s],'" running counter to a line of cases that treat "'equal protection as a personal right.'" *Ante*, at 324 (quoting *Adarand*, 515 U. S., at 230). Equal protection, he says, protects "'*persons*, not *groups*.'" *Ante*, at 324 (quoting *Adarand*, 515 U. S., at 227). This criticism ignores the obvious: Discrimination against an individual occurs because of that individual's membership in a particular group. Yes, equal protection is a personal right, but there can be no equal

protection violation unless the injured individual is a member of a protected group or a class of individuals. It is membership in the group—here the racial minority—that gives rise to an equal protection violation.

Relatedly, JUSTICE SCALIA argues that the political-process doctrine is inconsistent with our precedents because it protects only the minority from political restructurings. This aspect of the doctrine, he says, cannot be tolerated because our precedents have rejected "'a reading of the guarantee of equal protection under which the level of scrutiny varies according to the ability of different groups to defend their interests in the representative process.'" *Ante*, at 325 (quoting *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 495 (1989) (plurality opinion)). Equal protection, he continues, "'cannot mean one thing when applied to one individual and something else when applied to a person of another color.'" *Ante*, at 325 (quoting *Bakke*, 438 U. S., at 289–290 (opinion of Powell, J.)).

JUSTICE SCALIA is troubled that the political-process doctrine has not been applied to trigger strict scrutiny for political restructurings that burden the majority. But the doctrine is inapplicable to the majority. The minority cannot achieve such restructurings against the majority, for the majority is, well, the majority. As the *Seattle* Court explained, "'[t]he majority needs no protection against discriminat[ory restructurings], and if it did, a referendum, [for instance], might be bothersome but no more than that.'" 458 U. S., at 468. Stated differently, the doctrine protects only the minority because it implicates a problem that affects only the minority. Nothing in my opinion suggests, as JUSTICE SCALIA says, that under the political-process doctrine, "the Constitution prohibits discrimination against minority groups, but not against majority groups." *Ante*, at 325, n. 7. If the minority somehow managed to effectuate a political restructuring that burdened only the majority, we could de-

cide then whether to apply the political-process doctrine to safeguard the political right of the majority. But such a restructuring is not before us, and I cannot fathom how it could be achieved.

2

JUSTICE SCALIA next invokes state sovereignty, arguing that "we have emphasized the near-limitless sovereignty of each State to design its governing structure as it sees fit." *Ante*, at 327. But state sovereignty is not absolute; it is subject to constitutional limits. The Court surely did not offend state sovereignty by barring States from changing their voting procedures to exclude racial minorities. So why does the political-process doctrine offend state sovereignty? The doctrine takes nothing away from state sovereignty that the Equal Protection Clause does not require. All it says is that a State may not reconfigure its existing political processes in a manner that establishes a distinct and more burdensome process for minority members of our society alone to obtain legislation in their interests.

More broadly, JUSTICE SCALIA is troubled that the political-process doctrine would create supposed "affirmative-action safe havens" in places where the ordinary political process has thus far produced race-sensitive admissions policies. *Ante*, at 328. It would not. As explained previously, the voters in Michigan who opposed race-sensitive admissions policies had any number of options available to them to challenge those policies. See *supra*, at 370. And in States where decisions regarding race-sensitive admissions policies are not subject to the political process in the first place, voters are entirely free to eliminate such policies via a constitutional amendment because that action would not reallocate power in the manner condemned in *Hunter* and *Seattle* (and, of course, present here). The *Seattle* Court recognized this careful balance between state sovereignty and constitutional protections:

> "[W]e do not undervalue the magnitude of the State's interest in its system of education. Washington could have reserved to state officials the right to make all decisions in the areas of education and student assignment. It has chosen, however, to use a more elaborate system; having done so, the State is obligated to operate that system within the confines of the Fourteenth Amendment." 458 U. S., at 487.

The same is true of Michigan.

3

Finally, JUSTICE SCALIA disagrees with "the proposition that a facially neutral law may deny equal protection solely because it has a disparate racial impact." *Ante*, at 329–330. He would acknowledge, however, that an act that draws racial distinctions or makes racial classifications triggers strict scrutiny regardless of whether discriminatory intent is shown. See *Adarand*, 515 U. S., at 213. That should settle the matter: Section 26 draws a racial distinction. As the *Seattle* Court explained, "when the political process or the decisionmaking mechanism used to *address* racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment, the governmental action plainly rests on 'distinctions based on race.'" 458 U. S., at 485 (some internal quotation marks omitted); see also *id.*, at 470 (noting that although a State may "'allocate governmental power on the basis of any general principle,'" it may not use racial considerations "to define the governmental decisionmaking structure").

But in JUSTICE SCALIA's view, cases like *Washington* v. *Davis*, 426 U. S. 229 (1976), and *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252 (1977), call *Seattle* into question. It is odd to suggest that prior precedents call into question a later one. *Seattle* (decided

in 1982) postdated both *Washington* v. *Davis* (1976) and *Arlington Heights* (1977). JUSTICE SCALIA's suggestion that *Seattle* runs afoul of the principles established in *Washington* v. *Davis* and *Arlington Heights* would come as a surprise to Justice Blackmun, who joined the majority opinions in all three cases. Indeed, the *Seattle* Court explicitly rejected the argument that *Hunter* had been effectively overruled by *Washington* v. *Davis* and *Arlington Heights*:

> "There is one immediate and crucial difference between *Hunter* and [those cases]. While decisions such as *Washington* v. *Davis* and *Arlington Heights* considered classifications facially unrelated to race, the charter amendment at issue in *Hunter* dealt in explicitly racial terms with legislation designed to benefit minorities 'as minorities,' not legislation intended to benefit some larger group of underprivileged citizens among whom minorities were disproportionately represented." 458 U. S., at 485.

And it concluded that both the *Hunter* amendment and the *Seattle* initiative rested on distinctions based on race. 458 U. S., at 485. So does § 26.[14]

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[14] The plurality raises another concern with respect to precedent. It points to decisions by the California Supreme Court and the United States Court of Appeals for the Ninth Circuit upholding as constitutional Proposition 209, a California constitutional amendment identical in substance to § 26. *Ante*, at 310–311. The plurality notes that if we were to affirm the lower court's decision in this case, "those holdings would be invalidated . . . ." *Ibid.* I fail to see the significance. We routinely resolve conflicts between lower courts; the necessary result, of course, is that decisions of courts on one side of the debate are invalidated or called into question. I am unaware of a single instance where that (inevitable) fact influenced the Court's decision one way or the other. Had the lower courts proceeded in opposite fashion—had the California Supreme Court and Ninth Circuit invalidated Proposition 209 and the Sixth Circuit upheld § 26—would the plurality come out the other way?

B

My colleagues also attack the first prong of the doctrine as "rais[ing] serious constitutional concerns," *ante*, at 307 (plurality opinion), and being "unadministrable," *ante*, at 322 (opinion of SCALIA, J.). JUSTICE SCALIA wonders whether judges are equipped to weigh in on what constitutes a "racial issue." See *ibid.* The plurality, too, thinks courts would be "with no clear legal standards or accepted sources to guide judicial decision." *Ante*, at 308. Yet as JUSTICE SCALIA recognizes, *Hunter* and *Seattle* provide a standard: Does the public policy at issue "inur[e] primarily to the benefit of the minority, and [was it] designed for that purpose"? *Seattle*, 458 U. S., at 472; see *ante*, at 323. Surely this is the kind of factual inquiry that judges are capable of making. JUSTICE SCALIA, for instance, accepts the standard announced in *Washington* v. *Davis*, which requires judges to determine whether discrimination is intentional or whether it merely has a discriminatory effect. Such an inquiry is at least as difficult for judges as the one called for by *Hunter* and *Seattle*. In any event, it is clear that the constitutional amendment in this case has a racial focus; it is facially race based and, by operation of law, disadvantages only minorities. See *supra*, at 351–353.

"No good can come" from these inquiries, JUSTICE SCALIA responds, because they divide the Nation along racial lines and perpetuate racial stereotypes. *Ante*, at 323. The plurality shares that view; it tells us that we must not assume all individuals of the same race think alike. See *ante*, at 308. The same could have been said about desegregation: Not all members of a racial minority in *Seattle* necessarily regarded the integration of public schools as good policy. Yet the *Seattle* Court had little difficulty saying that school integration as a general matter "inure[d] . . . to the benefit of" the minority. 458 U. S., at 472.

My colleagues are of the view that we should leave race out of the picture entirely and let the voters sort it out. See *ante*, at 309 (plurality opinion) ("Racial division would be validated, not discouraged, were the *Seattle* formulation . . . to remain in force"); *ante*, at 324 (opinion of SCALIA, J.) ("'[R]acial stereotyping [is] at odds with equal protection mandates'"). We have seen this reasoning before. See *Parents Involved*, 551 U. S., at 748 ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race"). It is a sentiment out of touch with reality, one not required by our Constitution, and one that has properly been rejected as "not sufficient" to resolve cases of this nature. *Id.*, at 788 (KENNEDY, J., concurring in part and concurring in judgment). While "[t]he enduring hope is that race should not matter[,] the reality is that too often it does." *Id.*, at 787. "[R]acial discrimination . . . [is] not ancient history." *Bartlett* v. *Strickland*, 556 U. S. 1, 25 (2009) (plurality opinion).

Race matters. Race matters in part because of the long history of racial minorities' being denied access to the political process. See Part I, *supra*; see also *South Carolina* v. *Katzenbach*, 383 U. S. 301, 309 (1966) (describing racial discrimination in voting as "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution"). And although we have made great strides, "voting discrimination still exists; no one doubts that." *Shelby County*, 570 U. S., at 536.

Race also matters because of persistent racial inequality in society—inequality that cannot be ignored and that has produced stark socioeconomic disparities. See *Gratz*, 539 U. S., at 298–300 (GINSBURG, J., dissenting) (cataloging the many ways in which "the effects of centuries of law-sanctioned inequality remain painfully evident in our communities and schools," in areas like employment, poverty, access to health care, housing, consumer transactions, and

education); *Adarand*, 515 U. S., at 273 (GINSBURG, J., dissenting) (recognizing that the "lingering effects" of discrimination, "reflective of a system of racial caste only recently ended, are evident in our workplaces, markets, and neighborhoods").

And race matters for reasons that really are only skin deep, that cannot be discussed any other way, and that cannot be wished away. Race matters to a young man's view of society when he spends his teenage years watching others tense up as he passes, no matter the neighborhood where he grew up. Race matters to a young woman's sense of self when she states her hometown, and then is pressed, "No, where are you *really* from?," regardless of how many generations her family has been in the country. Race matters to a young person addressed by a stranger in a foreign language, which he does not understand because only English was spoken at home. Race matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: "I do not belong here."

In my colleagues' view, examining the racial impact of legislation only perpetuates racial discrimination. This refusal to accept the stark reality that race matters is regrettable. The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination. As members of the judiciary tasked with intervening to carry out the guarantee of equal protection, we ought not sit back and wish away, rather than confront, the racial inequality that exists in our society. It is this view that works harm, by perpetuating the facile notion that what makes race matter is acknowledging the simple truth that race *does* matter.

V

Although the only constitutional rights at stake in this case are process-based rights, the substantive policy at issue is undeniably of some relevance to my colleagues. See *ante*, at 314

(plurality opinion) (suggesting that race-sensitive admissions policies have the "potential to become . . . a source of the very resentments and hostilities based on race that this Nation seeks to put behind it"). I will therefore speak in response.

A

For over a century, racial minorities in Michigan fought to bring diversity to their State's public colleges and universities. Before the advent of race-sensitive admissions policies, those institutions, like others around the country, were essentially segregated. In 1868, two black students were admitted to the University of Michigan, the first of their race. See Expert Report of James D. Anderson 4, in *Gratz* v. *Bollinger*, No. 97–75231 (ED Mich.) (Anderson). In 1935, over six decades later, there were still only 35 black students at the University. *Ibid.* By 1954, this number had risen to slightly below 200. *Ibid.* And by 1966, to around 400, among a total student population of roughly 32,500—barely over 1 percent. *Ibid.* The numbers at the University of Michigan Law School are even more telling. During the 1960's, the Law School produced 9 black graduates among a total of 3,041—less than three-tenths of 1 percent. See App. in *Grutter* v. *Bollinger*, O. T. 2002, No. 02–241, p. 204.

The housing and extracurricular policies at these institutions also perpetuated open segregation. For instance, incoming students were permitted to opt out of rooming with black students. Anderson 7–8. And some fraternities and sororities excluded black students from membership. *Id.*, at 6–7.

In 1966, the Defense Department conducted an investigation into the University's compliance with Title VI of the Civil Rights Act, and made 25 recommendations for increasing opportunities for minority students. *Id.*, at 9. In 1970, a student group launched a number of protests, including a strike, demanding that the University increase its minority

enrollment. *Id.*, at 16–23. The University's Board of Regents responded, adopting a goal of 10 percent black admissions by the fall of 1973. *Id.*, at 23.

During the 1970's, the University continued to improve its admissions policies,[15] encouraged by this Court's 1978 decision in *Bakke*. In that case, the Court told our Nation's colleges and universities that they could consider race in admissions as part of a broader goal to create a diverse student body, in which students of different backgrounds would learn together, and thereby learn to live together. A little more than a decade ago, in *Grutter*, the Court reaffirmed this understanding. In upholding the admissions policy of the Law School, the Court laid to rest any doubt whether student body diversity is a compelling interest that may justify the use of race.

Race-sensitive admissions policies are now a thing of the past in Michigan after § 26, even though—as experts agree and as research shows—those policies were making a difference in achieving educational diversity. In *Grutter*, Michigan's Law School spoke candidly about the strides the institution had taken successfully because of race-sensitive admissions. One expert retained by the Law School opined that a race-blind admissions system would have a "very dramatic, negative effect on underrepresented minority admissions." *Grutter*, 539 U. S., at 320 (internal quotation marks omitted). He testified that the school had admitted 35 percent of underrepresented minority students who had applied in 2000, as opposed to only 10 percent who would have been admitted had race not been considered. *Ibid.* Underrepre-

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[15] In 1973, the Law School graduated 41 black students (out of a class of 446) and the first Latino student in its history. App. in *Grutter* v. *Bollinger*, O. T. 2002, No. 02–241, p. 204. In 1976, it graduated its first Native American student. *Ibid.* On the whole, during the 1970's, the Law School graduated 262 black students, compared to 9 in the previous decade, along with 41 Latino students. *Ibid.*

sented minority students would thus have constituted 4 percent, as opposed to the actual 14.5 percent, of the class that entered in 2000. *Ibid.*

Michigan's public colleges and universities tell us the same today. The Board of Regents of the University of Michigan and the Board of Trustees of Michigan State University inform us that those institutions cannot achieve the benefits of a diverse student body without race-sensitive admissions plans. See Brief for Respondents Regents of the University of Michigan, the Board of Trustees of Michigan State University et al. 18–25. During proceedings before the lower courts, several university officials testified that §26 would depress minority enrollment at Michigan's public universities. The Director of Undergraduate Admissions at the University of Michigan "expressed doubts over the ability to maintain minority enrollment through the use of a proxy, like socioeconomic status." Supp. App. to Pet. for Cert. 285a. He explained that university officials in States with laws similar to §26 had not "'achieve[d] the same sort of racial and ethnic diversity that they had prior to such measures . . . without considering race.'" *Ibid.* Similarly, the Law School's Dean of Admissions testified that she expected "a decline in minority admissions because, in her view, it is impossible 'to get a critical mass of underrepresented minorities . . . without considering race.'" *Ibid.* And the Dean of Wayne State University Law School stated that "although some creative approaches might mitigate the effects of [§26], he 'did not think that any one of these proposals or any combination of these proposals was reasonably likely to result in the admission of a class that had the same or similar or higher numbers of African Americans, Latinos and Native Americans as the prior policy.'" *Ibid.*

Michigan tells a different story. It asserts that although the statistics are difficult to track, "the number of underrepresented minorities . . . [in] the entering freshman class at

Michigan as a percentage changed very little" after § 26. Tr. of Oral Arg. 15. It also claims that "the statistics in California across the 17 campuses in the University of California system show that today the underrepresented minority percentage is better on 16 out of those 17 campuses"—all except Berkeley—than before California's equivalent initiative took effect. *Id.*, at 16. As it turns out, these statistics were not "'even good enough to be wrong.'" Reference Manual on Scientific Evidence 4 (2d ed. 2000) (Introduction by Stephen G. Breyer (quoting Wolfgang Pauli)).

Section 26 has already led to decreased minority enrollment at Michigan's public colleges and universities. In 2006 (before § 26 took effect), underrepresented minorities made up 12.15 percent of the University of Michigan's freshman class, compared to 9.54 percent in 2012—a roughly 25 percent decline. See University of Michigan—New Freshman Enrollment Overview, Office of the Registrar, online at http://www.ro.umich.edu/report/10enrolloverview.pdf and http://www.ro.umich.edu/report/12enrollmentsummary.pdf.[16] Moreover, the total number of college-aged underrepresented minorities in Michigan has *increased* even as the number of underrepresented minorities admitted to the University has *decreased*. For example, between 2006 and 2011, the proportion of black freshmen among those enrolled at the University of Michigan declined from 7 percent to 5 percent, even though the proportion of black college-aged persons in Michigan increased from 16 to 19 percent. See Fessenden and Keller, How Minorities Have Fared in States With Affirmative Action Bans, N. Y. Times, June 24, 2013, online at http://www.nytimes.com/interactive/2013/06/24/us/affirmative-action-bans.html.

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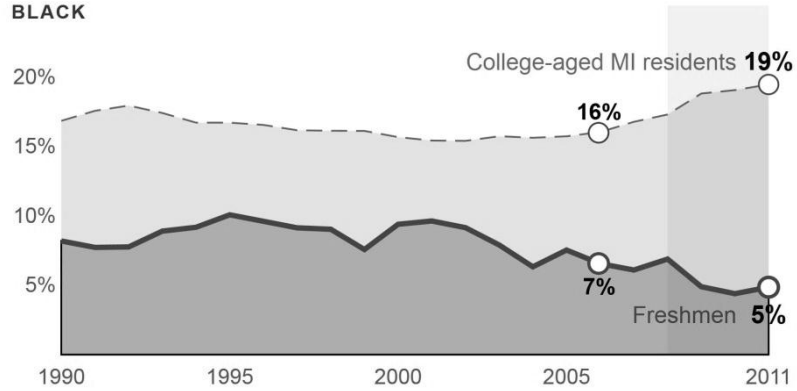
[16] These percentages include enrollment statistics for black students, Hispanic students, Native American students, and students who identify as members of two or more underrepresented minority groups.

UNIVERSITY OF MICHIGAN
Black Students[17]



A recent study also confirms that § 26 has decreased minority degree attainment in Michigan. The University of Michigan's graduating class of 2012, the first admitted after § 26 took effect, is quite different from previous classes. The proportion of black students among those attaining bachelor's degrees was 4.4 percent, the lowest since 1991; the proportion of black students among those attaining master's degrees was 5.1 percent, the lowest since 1989; the proportion of black students among those attaining doctoral degrees was 3.9 percent, the lowest since 1993; and the proportion of black students among those attaining professional school degrees was 3.5 percent, the lowest since the mid-1970's. See Kidder, Restructuring Higher Education Opportunity?: African American Degree Attainment After Michigan's Ban on Affirmative Action, p. 1 (Aug. 2013), online at http://papers.ssrn.com/sol3/abstract=2318523.

The President and Chancellors of the University of California (which has 10 campuses, not 17) inform us that "[t]he abandonment of race-conscious admissions policies resulted in an immediate and precipitous decline in the rates at which

[17] This chart is reproduced from Fessenden and Keller, How Minorities Have Fared in States With Affirmative Action Bans, N. Y. Times, June 24, 2013, online at http://www.nytimes.com/interactive/2013/06/24/us/affirmative-action-bans.html.

underrepresented-minority students applied to, were admitted to, and enrolled at" the university. Brief for President and Chancellors of the University of California as *Amici Curiae* 10 (hereinafter President and Chancellors Brief). At the University of California, Los Angeles (UCLA), for example, admissions rates for underrepresented minorities plummeted from 52.4 percent in 1995 (before California's ban took effect) to 24 percent in 1998. *Id.*, at 12. As a result, the percentage of underrepresented minorities fell by more than half: from 30.1 percent of the entering class in 1995 to 14.3 percent in 1998. *Ibid.* The admissions rate for underrepresented minorities at UCLA reached a new low of 13.6 percent in 2012. See Brief for California Social Science Researchers et al. as *Amici Curiae* 28.

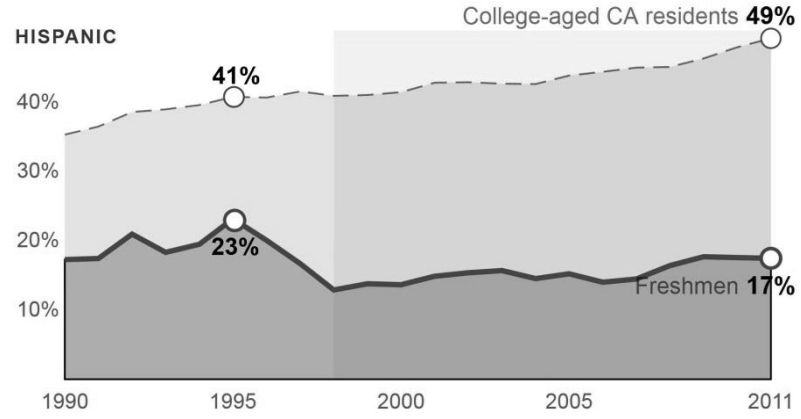
The elimination of race-sensitive admissions policies in California has been especially harmful to black students. In 2006, for example, there were fewer than 100 black students in UCLA's incoming class of roughly 5,000, the lowest number since at least 1973. See *id.*, at 24.

The University of California also saw declines in minority representation at its graduate programs and professional schools. In 2005, underrepresented minorities made up 17 percent of the university's new medical students, which is actually a lower rate than the 17.4 percent reported in 1975, three years before *Bakke*. President and Chancellors Brief 13. The numbers at the law schools are even more alarming. In 2005, underrepresented minorities made up 12 percent of entering law students, well below the 20.1 percent in 1975. *Id.*, at 14.

As in Michigan, the declines in minority representation at the University of California have come even as the minority population in California has increased. At UCLA, for example, the proportion of Hispanic freshmen among those enrolled declined from 23 percent in 1995 to 17 percent in 2011, even though the proportion of Hispanic college-aged persons in California increased from 41 percent to 49 percent during that same period. See Fessenden and Keller.

UCLA

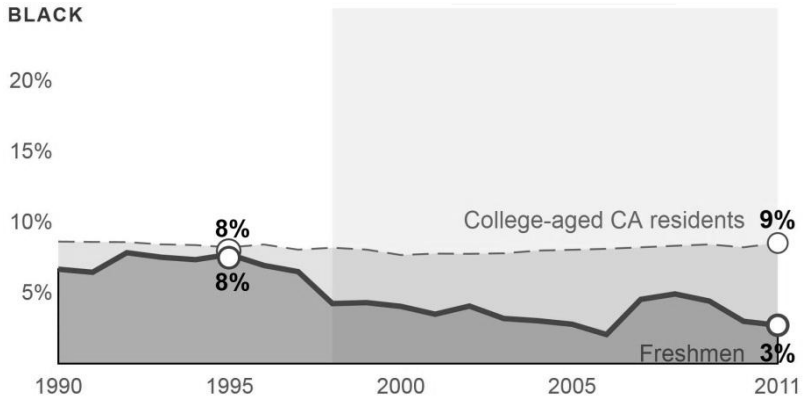
Hispanic Students[18]



And the proportion of black freshmen among those enrolled at UCLA declined from 8 percent in 1995 to 3 percent in 2011, even though the proportion of black college-aged persons in California increased from 8 percent to 9 percent during that same period. See *ibid.*

UCLA

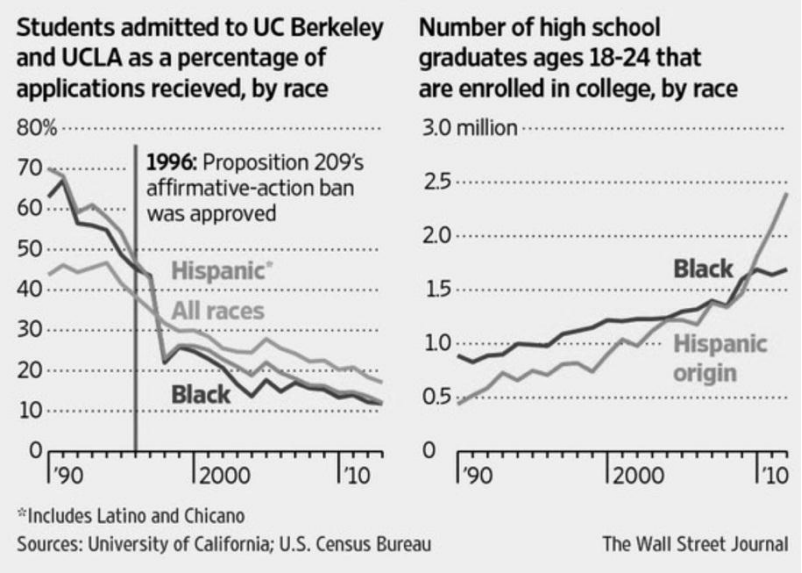
Black Students[19]



[18] *Ibid.*
[19] *Ibid.*

While the minority admissions rates at UCLA and Berkeley have decreased, the number of minorities enrolled at colleges across the country has increased. See Phillips, Colleges Straining To Restore Diversity: Bans on Race-Conscious Admissions Upend Racial Makeup at California Schools, Wall Street Journal, Mar. 7, 2014, p. A3 (Phillips).

BERKELEY AND UCLA[20]



The President and Chancellors assure us that they have tried. They tell us that notwithstanding the university's efforts for the past 15 years "to increase diversity on [the University of California's] campuses through the use of race-neutral initiatives," enrollment rates have "not rebounded . . . [or] kept pace with the demographic changes among California's graduating high-school population." President and

[20] This chart is reproduced from Phillips, Colleges Straining To Restore Diversity: Bans on Race-Conscious Admissions Upend Racial Makeup at California Schools, Wall Street Journal, Mar. 7, 2014, p. A3.

Chancellors Brief 14. Since Proposition 209 took effect, the university has spent over a half-billion dollars on programs and policies designed to increase diversity. Phillips A3. Still, it has been unable to meet its diversity goals. *Ibid.* Proposition 209, it says, has "'completely changed the character' of the university." *Ibid.* (quoting the Associate President and Chief Policy Advisor of the University of California).

B

These statistics may not influence the views of some of my colleagues, as they question the wisdom of adopting race-sensitive admissions policies and would prefer if our Nation's colleges and universities were to discard those policies altogether. See *ante*, at 315 (ROBERTS, C. J., concurring) (suggesting that race-sensitive admissions policies might "do more harm than good"); *ante*, at 324, n. 6 (opinion of SCALIA, J.); *Grutter*, 539 U. S., at 371–373 (THOMAS, J., concurring in part and dissenting in part); *id.*, at 347–348 (SCALIA, J., concurring in part and dissenting in part). That view is at odds with our recognition in *Grutter*, and more recently in *Fisher* v. *University of Tex. at Austin*, 570 U. S. 297 (2013), that race-sensitive admissions policies are necessary to achieve a diverse student body when race-neutral alternatives have failed. More fundamentally, it ignores the importance of diversity in institutions of higher education and reveals how little my colleagues understand about the reality of race in America.

This Court has recognized that diversity in education is paramount. With good reason. Diversity ensures that the next generation moves beyond the stereotypes, the assumptions, and the superficial perceptions that students coming from less-heterogeneous communities may harbor, consciously or not, about people who do not look like them. Recognizing the need for diversity acknowledges that, "[j]ust as growing up in a particular region or having partic-

ular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters." *Grutter*, 539 U. S., at 333. And it acknowledges that "to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Id.*, at 332.

Colleges and universities must be free to prioritize the goal of diversity. They must be free to immerse their students in a multiracial environment that fosters frequent and meaningful interactions with students of other races, and thereby pushes such students to transcend any assumptions they may hold on the basis of skin color. Without race-sensitive admissions policies, this might well be impossible. The statistics I have described make that fact glaringly obvious. We should not turn a blind eye to something we cannot help but see.

To be clear, I do not mean to suggest that the virtues of adopting race-sensitive admissions policies should inform the legal question before the Court today regarding the constitutionality of §26. But I cannot ignore the unfortunate outcome of today's decision: Short of amending the State Constitution, a Herculean task, racial minorities in Michigan are deprived of even an opportunity to convince Michigan's public colleges and universities to consider race in their admissions plans when other attempts to achieve racial diversity have proved unworkable, and those institutions are unnecessarily hobbled in their pursuit of a diverse student body.

* * *

The Constitution does not protect racial minorities from political defeat. But neither does it give the majority free rein to erect selective barriers against racial minorities. The political-process doctrine polices the channels of change

to ensure that the majority, when it wins, does so without rigging the rules of the game to ensure its success. Today, the Court discards that doctrine without good reason.

In doing so, it permits the decision of a majority of the voters in Michigan to strip Michigan's elected university boards of their authority to make decisions with respect to constitutionally permissible race-sensitive admissions policies, while preserving the boards' plenary authority to make all other educational decisions. "In a most direct sense, this implicates the judiciary's special role in safeguarding the interests of those groups that are relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Seattle*, 458 U. S., at 486 (internal quotation marks omitted). The Court abdicates that role, permitting the majority to use its numerical advantage to change the rules mid-contest and forever stack the deck against racial minorities in Michigan. The result is that Michigan's public colleges and universities are less equipped to do their part in ensuring that students of all races are "better prepare[d] . . . for an increasingly diverse workforce and society . . . ." *Grutter*, 539 U. S., at 330 (internal quotation marks omitted).

Today's decision eviscerates an important strand of our equal protection jurisprudence. For members of historically marginalized groups, which rely on the federal courts to protect their constitutional rights, the decision can hardly bolster hope for a vision of democracy that preserves for all the right to participate meaningfully and equally in self-government.

I respectfully dissent.

Syllabus

PRADO NAVARETTE ET AL. *v.* CALIFORNIA

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

No. 12–9490. Argued January 21, 2014—Decided April 22, 2014

A California Highway Patrol officer stopped the pickup truck occupied by petitioners because it matched the description of a vehicle that a 911 caller had recently reported as having run her off the road. As he and a second officer approached the truck, they smelled marijuana. They searched the truck's bed, found 30 pounds of marijuana, and arrested petitioners. Petitioners moved to suppress the evidence, arguing that the traffic stop violated the Fourth Amendment. Their motion was denied, and they pleaded guilty to transporting marijuana. The California Court of Appeal affirmed, concluding that the officer had reasonable suspicion to conduct an investigative stop.

Held: The traffic stop complied with the Fourth Amendment because, under the totality of the circumstances, the officer had reasonable suspicion that the truck's driver was intoxicated. Pp. 396–404.

(a) The Fourth Amendment permits brief investigative stops when an officer has "a particularized and objective basis for suspecting the particular person stopped of . . . criminal activity." *United States* v. *Cortez*, 449 U. S. 411, 417–418. Reasonable suspicion takes into account "the totality of the circumstances," *id.*, at 417, and depends "upon both the content of information possessed by police and its degree of reliability," *Alabama* v. *White*, 496 U. S. 325, 330. An anonymous tip alone seldom demonstrates sufficient reliability, *id.*, at 329, but may do so under appropriate circumstances, *id.*, at 327. Pp. 396–398.

(b) The 911 call in this case bore adequate indicia of reliability for the officer to credit the caller's account. By reporting that she had been run off the road by a specific vehicle, the caller necessarily claimed an eyewitness basis of knowledge. The apparently short time between the reported incident and the 911 call suggests that the caller had little time to fabricate the report. And a reasonable officer could conclude that a false tipster would think twice before using the 911 system, which has several technological and regulatory features that safeguard against making false reports with immunity. Pp. 398–401.

(c) Not only was the tip here reliable, but it also created reasonable suspicion of drunk driving. Running another car off the road suggests the sort of impairment that characterizes drunk driving. While that conduct might be explained by another cause such as driver distraction,

Syllabus

reasonable suspicion "need not rule out the possibility of innocent conduct." *United States* v. *Arvizu*, 534 U. S. 266, 277. Finally, the officer's failure to observe additional suspicious conduct during the short period that he followed the truck did not dispel the reasonable suspicion of drunk driving, and the officer was not required to surveil the truck for a longer period. Pp. 401–404.

Affirmed.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, BREYER, and ALITO, JJ., joined. SCALIA, J., filed a dissenting opinion, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 404.

Paul Kleven, by appointment of the Court, 571 U. S. 988, argued the cause and filed briefs for petitioners.

Jeffrey M. Laurence, Supervising Deputy Attorney General of California, argued the cause for respondent. With him on the brief were *Kamala D. Harris*, Attorney General, *Dane R. Gillette*, Chief Assistant Attorney General, *Gerald A. Engler*, Senior Assistant Attorney General, *Donald E. de Nicola*, Deputy State Solicitor General, and *Seth K. Schalit*, Supervising Deputy Attorney General.

Rachel P. Kovner argued the cause for the United States as *amicus curiae* urging affirmance. With her on the brief were *Solicitor General Verrilli*, *Acting Assistant Attorney General Raman*, *Deputy Solicitor General Dreeben*, and *Scott A. C. Meisler.**

**Daniel R. Ortiz*, *Jeffrey L. Fisher*, *John P. Elwood*, *Sarah S. Gannett*, *Daniel Kaplan*, *David Lewis*, and *Barbara Mandel* filed a brief for the National Association of Criminal Defense Lawyers et al. urging reversal.

A brief of *amici curiae* urging affirmance was filed for the State of Florida et al. by *Pamela Jo Bondi*, Attorney General of Florida, *Allen Winsor*, Solicitor General, and *Diane G. DeWolf*, Deputy Solicitor General, by *Brian L. Tarbet*, Acting Attorney General of Utah, and by the Attorneys General for their respective jurisdictions as follows: *Luther Strange* of Alabama, *Michael C. Geraghty* of Alaska, *Tom Horne* of Arizona, *Dustin McDaniel* of Arkansas, *John W. Suthers* of Colorado, *Joseph R. Biden III* of Delaware, *Irvin B. Nathan* of the District of Columbia, *David M. Louie* of Hawaii, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Gregory F. Zoeller* of Indiana, *Tom Miller* of Iowa, *Derek Schmidt* of Kan-

JUSTICE THOMAS delivered the opinion of the Court.

After a 911 caller reported that a vehicle had run her off the road, a police officer located the vehicle she identified during the call and executed a traffic stop. We hold that the stop complied with the Fourth Amendment because, under the totality of the circumstances, the officer had reasonable suspicion that the driver was intoxicated.

I

On August 23, 2008, a Mendocino County 911 dispatch team for the California Highway Patrol (CHP) received a call from another CHP dispatcher in neighboring Humboldt County. The Humboldt County dispatcher relayed a tip from a 911 caller, which the Mendocino County team recorded as follows: "'Showing southbound Highway 1 at mile marker 88, Silver Ford 150 pickup. Plate of 8-David-94925. Ran the reporting party off the roadway and was last seen approximately five [minutes] ago.'" App. 36a. The Mendocino County team then broadcast that information to CHP officers at 3:47 p.m.

A CHP officer heading northbound toward the reported vehicle responded to the broadcast. At 4 p.m., the officer passed the truck near mile marker 69. At about 4:05 p.m., after making a U-turn, he pulled the truck over. A second officer, who had separately responded to the broadcast, also arrived on the scene. As the two officers approached the truck, they smelled marijuana. A search of the truck bed revealed 30 pounds of marijuana. The officers arrested the

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sas, *Jack Conway* of Kentucky, *Douglas F. Gansler* of Maryland, *Bill Schuette* of Michigan, *Timothy C. Fox* of Montana, *Jon Bruning* of Nebraska, *Catherine Cortez Masto* of Nevada, *Gary K. King* of New Mexico, *Joseph A. Foster* of New Hampshire, *Wayne Stenehjem* of North Dakota, *Michael DeWine* of Ohio, *E. Scott Pruitt* of Oklahoma, *Ellen F. Rosenblum* of Oregon, *Peter F. Kilmartin* of Rhode Island, *Marty Jackley* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *Robert W. Ferguson* of Washington, *J. B. Van Hollen* of Wisconsin, and *Peter K. Michael* of Wyoming.

driver, petitioner Lorenzo Prado Navarette, and the passenger, petitioner José Prado Navarette.

Petitioners moved to suppress the evidence, arguing that the traffic stop violated the Fourth Amendment because the officer lacked reasonable suspicion of criminal activity. Both the Magistrate who presided over the suppression hearing and the Superior Court disagreed.[1] Petitioners pleaded guilty to transporting marijuana and were sentenced to 90 days in jail plus three years of probation.

The California Court of Appeal affirmed, concluding that the officer had reasonable suspicion to conduct an investigative stop. 2012 WL 4842651 (Oct. 12, 2012). The court reasoned that the content of the tip indicated that it came from an eyewitness victim of reckless driving, and that the officer's corroboration of the truck's description, location, and direction established that the tip was reliable enough to justify a traffic stop. *Id.*, at *7. Finally, the court concluded that the caller reported driving that was sufficiently dangerous to merit an investigative stop without waiting for the officer to observe additional reckless driving himself. *Id.*, at *9. The California Supreme Court denied review. We granted certiorari, 570 U. S. 948 (2013), and now affirm.

II

The Fourth Amendment permits brief investigative stops—such as the traffic stop in this case—when a law enforcement officer has "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States* v. *Cortez*, 449 U. S. 411, 417–418

[1] At the suppression hearing, counsel for petitioners did not dispute that the reporting party identified herself by name in the 911 call recording. Because neither the caller nor the Humboldt County dispatcher who received the call was present at the hearing, however, the prosecution did not introduce the recording into evidence. The prosecution proceeded to treat the tip as anonymous, and the lower courts followed suit. See 2012 WL 4842651, *6 (Cal. Ct. App., Oct. 12, 2012).

(1981); see also *Terry* v. *Ohio*, 392 U. S. 1, 21–22 (1968). The "reasonable suspicion" necessary to justify such a stop "is dependent upon both the content of information possessed by police and its degree of reliability." *Alabama* v. *White*, 496 U. S. 325, 330 (1990). The standard takes into account "the totality of the circumstances—the whole picture." *Cortez*, *supra*, at 417. Although a mere "'hunch'" does not create reasonable suspicion, *Terry*, *supra*, at 27, the level of suspicion the standard requires is "considerably less than proof of wrongdoing by a preponderance of the evidence," and "obviously less" than is necessary for probable cause, *United States* v. *Sokolow*, 490 U. S. 1, 7 (1989).

A

These principles apply with full force to investigative stops based on information from anonymous tips. We have firmly rejected the argument "that reasonable cause for a[n investigative stop] can only be based on the officer's personal observation, rather than on information supplied by another person." *Adams* v. *Williams*, 407 U. S. 143, 147 (1972). Of course, "an anonymous tip *alone* seldom demonstrates the informant's basis of knowledge or veracity." *White*, 496 U. S., at 329 (emphasis added). That is because "ordinary citizens generally do not provide extensive recitations of the basis of their everyday observations," and an anonymous tipster's veracity is "'by hypothesis largely unknown, and unknowable.'" *Ibid.* But under appropriate circumstances, an anonymous tip can demonstrate "sufficient indicia of reliability to provide reasonable suspicion to make [an] investigatory stop." *Id.*, at 327.

Our decisions in *Alabama* v. *White*, *supra*, and *Florida* v. *J. L.*, 529 U. S. 266 (2000), are useful guides. In *White*, an anonymous tipster told the police that a woman would drive from a particular apartment building to a particular motel in a brown Plymouth station wagon with a broken right tail light. The tipster further asserted that the woman would

be transporting cocaine. 496 U. S., at 327. After confirming the innocent details, officers stopped the station wagon as it neared the motel and found cocaine in the vehicle. *Id.*, at 331. We held that the officers' corroboration of certain details made the anonymous tip sufficiently reliable to create reasonable suspicion of criminal activity. By accurately predicting future behavior, the tipster demonstrated "a special familiarity with respondent's affairs," which in turn implied that the tipster had "access to reliable information about that individual's illegal activities." *Id.*, at 332. We also recognized that an informant who is proved to tell the truth about some things is more likely to tell the truth about other things, "including the claim that the object of the tip is engaged in criminal activity." *Id.*, at 331 (citing *Illinois* v. *Gates*, 462 U. S. 213, 244 (1983)).

In *J. L.*, by contrast, we determined that no reasonable suspicion arose from a barebones tip that a young black male in a plaid shirt standing at a bus stop was carrying a gun. 529 U. S., at 268. The tipster did not explain how he knew about the gun, nor did he suggest that he had any special familiarity with the young man's affairs. *Id.*, at 271. As a result, police had no basis for believing "that the tipster ha[d] knowledge of concealed criminal activity." *Id.*, at 272. Furthermore, the tip included no predictions of future behavior that could be corroborated to assess the tipster's credibility. *Id.*, at 271. We accordingly concluded that the tip was insufficiently reliable to justify a stop and frisk.

B

The initial question in this case is whether the 911 call was sufficiently reliable to credit the allegation that petitioners' truck "ran the [caller] off the roadway." Even assuming for present purposes that the 911 call was anonymous, see n. 1, *supra*, we conclude that the call bore adequate indicia of reliability for the officer to credit the caller's account. The officer was therefore justified in proceeding from the premise

that the truck had, in fact, caused the caller's car to be dangerously diverted from the highway.

By reporting that she had been run off the road by a specific vehicle—a silver Ford F–150 pickup, license plate 8D94925—the caller necessarily claimed eyewitness knowledge of the alleged dangerous driving. That basis of knowledge lends significant support to the tip's reliability. See *Gates*, *supra*, at 234 ("[An informant's] explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case"); *Spinelli* v. *United States*, 393 U. S. 410, 416 (1969) (a tip of illegal gambling is less reliable when "it is not alleged that the informant personally observed [the defendant] at work or that he had ever placed a bet with him"). This is in contrast to *J. L.*, where the tip provided no basis for concluding that the tipster had actually seen the gun. 529 U. S., at 271. Even in *White*, where we upheld the stop, there was scant evidence that the tipster had actually observed cocaine in the station wagon. We called *White* a "'close case'" because "[k]nowledge about a person's future movements indicates some familiarity with that person's affairs, but having such knowledge does not necessarily imply that the informant knows, in particular, whether that person is carrying hidden contraband." 529 U. S., at 271. A driver's claim that another vehicle ran her off the road, however, necessarily implies that the informant knows the other car was driven dangerously.

There is also reason to think that the 911 caller in this case was telling the truth. Police confirmed the truck's location near mile marker 69 (roughly 19 highway miles south of the location reported in the 911 call) at 4 p.m. (roughly 18 minutes after the 911 call). That timeline of events suggests that the caller reported the incident soon after she was run off the road. That sort of contemporaneous report has long been treated as especially reliable. In evidence law, we gen-

erally credit the proposition that statements about an event and made soon after perceiving that event are especially trustworthy because "substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation." Advisory Committee's Notes on Fed. Rule Evid. 803(1), 28 U. S. C. App., p. 371 (describing the rationale for the hearsay exception for "present sense impression[s]"). A similar rationale applies to a "statement relating to a startling event"—such as getting run off the road—"made while the declarant was under the stress of excitement that it caused." Fed. Rule Evid. 803(2) (hearsay exception for "excited utterances"). Unsurprisingly, 911 calls that would otherwise be inadmissible hearsay have often been admitted on those grounds. See D. Binder, Hearsay Handbook § 8.1, pp. 257–259 (4th ed. 2013–2014) (citing cases admitting 911 calls as present sense impressions); *id.*, § 9.1, at 274–275 (911 calls admitted as excited utterances). There was no indication that the tip in *J. L.* (or even in *White*) was contemporaneous with the observation of criminal activity or made under the stress of excitement caused by a startling event, but those considerations weigh in favor of the caller's veracity here.

Another indicator of veracity is the caller's use of the 911 emergency system. See Brief for Respondent 40–41, 44; Brief for United States as *Amicus Curiae* 16–18. A 911 call has some features that allow for identifying and tracing callers, and thus provide some safeguards against making false reports with immunity. See *J. L.*, *supra*, at 276 (KENNEDY, J., concurring). As this case illustrates, see n. 1, *supra*, 911 calls can be recorded, which provides victims with an opportunity to identify the false tipster's voice and subject him to prosecution, see, *e. g.*, Cal. Penal Code Ann. § 653x (West 2010) (makes "telephon[ing] the 911 emergency line with the intent to annoy or harass" punishable by imprisonment and fine); see also § 148.3 (2014 West Cum. Supp.) (prohibits falsely reporting "that an 'emergency' exists");

§ 148.5 (prohibits falsely reporting "that a felony or misdemeanor has been committed"). The 911 system also permits law enforcement to verify important information about the caller. In 1998, the Federal Communications Commission (FCC) began to require cellular carriers to relay the caller's phone number to 911 dispatchers. 47 CFR § 20.18(d)(1) (2013) (FCC's "Phase I enhanced 911 services" requirements). Beginning in 2001, carriers have been required to identify the caller's geographic location with increasing specificity. §§ 20.18(e)–(h) ("Phase II enhanced 911 service" requirements). And although callers may ordinarily block call recipients from obtaining their identifying information, FCC regulations exempt 911 calls from that privilege. §§ 64.1601(b), (d)(4)(ii) ("911 emergency services" exemption from rule that, when a caller so requests, "a carrier may not reveal that caller's number or name"). None of this is to suggest that tips in 911 calls are *per se* reliable. Given the foregoing technological and regulatory developments, however, a reasonable officer could conclude that a false tipster would think twice before using such a system. The caller's use of the 911 system is therefore one of the relevant circumstances that, taken together, justified the officer's reliance on the information reported in the 911 call.

C

Even a reliable tip will justify an investigative stop only if it creates reasonable suspicion that "criminal activity may be afoot." *Terry*, 392 U. S., at 30. We must therefore determine whether the 911 caller's report of being run off the roadway created reasonable suspicion of an ongoing crime such as drunk driving as opposed to an isolated episode of past recklessness. See *Cortez*, 449 U. S., at 417 ("An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity"). We conclude that the behavior alleged

by the 911 caller, "viewed from the standpoint of an objectively reasonable police officer, amount[s] to reasonable suspicion" of drunk driving. *Ornelas* v. *United States*, 517 U. S. 690, 696 (1996). The stop was therefore proper.[2]

Reasonable suspicion depends on "'"the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."'" *Id.*, at 695. Under that commonsense approach, we can appropriately recognize certain driving behaviors as sound indicia of drunk driving. See, *e. g.*, *People* v. *Wells*, 38 Cal. 4th 1078, 1081, 136 P. 3d 810, 811 (2006) ("'weaving all over the roadway'"); *State* v. *Prendergast*, 103 Haw. 451, 452–453, 83 P. 3d 714, 715–716 (2004) ("cross[ing] over the center line" on a highway and "almost caus[ing] several head-on collisions"); *State* v. *Golotta*, 178 N. J. 205, 209, 837 A. 2d 359, 361 (2003) (driving "'all over the road'" and "'weaving back and forth'"); *State* v. *Walshire*, 634 N. W. 2d 625, 626 (Iowa 2001) ("driving in the median"). Indeed, the accumulated experience of thousands of officers suggests that these sorts of erratic behaviors are strongly correlated with drunk driving. See Nat. Highway Traffic Safety Admin., The Visual Detection of DWI Motorists 4–5 (Mar. 2010), online at http://nhtsa.gov/staticfiles/nti/pdf/808677.pdf (as visited Apr. 18, 2014, and available in Clerk of Court's case file). Of course, not all traffic infractions imply intoxication. Unconfirmed reports of driving without a seatbelt or slightly over the speed limit, for example, are so tenuously connected to drunk driving that a stop on those grounds alone would be constitutionally suspect. But a reliable tip alleging the dangerous behaviors discussed above generally would justify a traffic stop on suspicion of drunk driving.

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[2] Because we conclude that the 911 call created reasonable suspicion of an ongoing crime, we need not address under what circumstances a stop is justified by the need to investigate completed criminal activity. Cf. *United States* v. *Hensley*, 469 U. S. 221, 229 (1985).

The 911 caller in this case reported more than a minor traffic infraction and more than a conclusory allegation of drunk or reckless driving. Instead, she alleged a specific and dangerous result of the driver's conduct: running another car off the highway. That conduct bears too great a resemblance to paradigmatic manifestations of drunk driving to be dismissed as an isolated example of recklessness. Running another vehicle off the road suggests lane-positioning problems, decreased vigilance, impaired judgment, or some combination of those recognized drunk driving cues. See Visual Detection of DWI Motorists 4–5. And the experience of many officers suggests that a driver who almost strikes a vehicle or another object—the exact scenario that ordinarily causes "running [another vehicle] off the roadway"—is likely intoxicated. See *id.*, at 5, 8. As a result, we cannot say that the officer acted unreasonably under these circumstances in stopping a driver whose alleged conduct was a significant indicator of drunk driving.

Petitioners' attempts to second-guess the officer's reasonable suspicion of drunk driving are unavailing. It is true that the reported behavior might also be explained by, for example, a driver responding to "an unruly child or other distraction." Brief for Petitioners 21. But we have consistently recognized that reasonable suspicion "need not rule out the possibility of innocent conduct." *United States* v. *Arvizu*, 534 U. S. 266, 277 (2002).

Nor did the absence of additional suspicious conduct, after the vehicle was first spotted by an officer, dispel the reasonable suspicion of drunk driving. Brief for Petitioners 23–24. It is hardly surprising that the appearance of a marked police car would inspire more careful driving for a time. Cf. *Arvizu*, *supra*, at 275 ("'Slowing down after spotting a law enforcement vehicle'" does not dispel reasonable suspicion of criminal activity). Extended observation of an allegedly drunk driver might eventually dispel a reasonable suspicion of intoxication, but the 5-minute period in this case hardly

sufficed in that regard. Of course, an officer who already has such a reasonable suspicion need not surveil a vehicle at length in order to personally observe suspicious driving. See *Adams* v. *Williams*, 407 U. S., at 147 (repudiating the argument that "reasonable cause for a[n investigative stop] can only be based on the officer's personal observation"). Once reasonable suspicion of drunk driving arises, "[t]he reasonableness of the officer's decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques." *Sokolow*, 490 U. S., at 11. This would be a particularly inappropriate context to depart from that settled rule, because allowing a drunk driver a second chance for dangerous conduct could have disastrous consequences.

III

Like *White*, this is a "close case." 496 U. S., at 332. As in that case, the indicia of the 911 caller's reliability here are stronger than those in *J. L.*, where we held that a barebones tip was unreliable. 529 U. S., at 271. Although the indicia present here are different from those we found sufficient in *White*, there is more than one way to demonstrate "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Cortez*, 499 U. S., at 417–418. Under the totality of the circumstances, we find the indicia of reliability in this case sufficient to provide the officer with reasonable suspicion that the driver of the reported vehicle had run another vehicle off the road. That made it reasonable under the circumstances for the officer to execute a traffic stop. We accordingly affirm.

It is so ordered.

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

The California Court of Appeal in this case relied on jurisprudence from the California Supreme Court (adopted as well by other courts) to the effect that "an anonymous and

uncorroborated tip regarding a possibly intoxicated highway driver" provides without more the reasonable suspicion necessary to justify a stop. *People* v. *Wells*, 38 Cal. 4th 1078, 1082, 136 P. 3d 810, 812 (2006). See also, *e. g.*, *United States* v. *Wheat*, 278 F. 3d 722, 729–730 (CA8 2001); *State* v. *Walshire*, 634 N. W. 2d 625, 626–627, 630 (Iowa 2001). Today's opinion does not explicitly adopt such a departure from our normal Fourth Amendment requirement that anonymous tips must be corroborated; it purports to adhere to our prior cases, such as *Florida* v. *J. L.*, 529 U. S. 266 (2000), and *Alabama* v. *White*, 496 U. S. 325 (1990). Be not deceived.

Law enforcement agencies follow closely our judgments on matters such as this, and they will identify at once our new rule: So long as the caller identifies where the car is, anonymous claims of a single instance of possibly careless or reckless driving, called in to 911, will support a traffic stop. This is not my concept, and I am sure would not be the Framers', of a people secure from unreasonable searches and seizures. I would reverse the judgment of the Court of Appeal of California.

I

The California Highway Patrol in this case knew nothing about the tipster on whose word—and that alone—they seized Lorenzo and José Prado Navarette. They did not know her name.[1] They did not know her phone number or address. They did not even know where she called from (she may have dialed in from a neighboring county, App. 33a–34a).

The tipster said the truck had "[run her] off the roadway," *id.*, at 36a, but the police had no reason to credit that charge and many reasons to doubt it, beginning with the peculiar fact that the accusation was anonymous. "[E]liminating ac-

[1] There was some indication below that the tipster was a woman. See App. 18a. Beyond that detail, we must, as the Court notes, *ante*, at 396, n. 1, assume that the identity of the tipster was unknown.

countability . . . is ordinarily the very purpose of anonymity." *McIntyre* v. *Ohio Elections Comm'n*, 514 U. S. 334, 385 (1995) (SCALIA, J., dissenting). The unnamed tipster "can lie with impunity," *J. L.*, *supra*, at 275 (KENNEDY, J., concurring). Anonymity is especially suspicious with respect to the call that is the subject of the present case. When does a victim complain to the police about an arguably criminal act (running the victim off the road) without giving his identity, so that he can accuse and testify when the culprit is caught?

The question before us, the Court agrees, *ante*, at 401, is whether the "content of information possessed by police and its degree of reliability," *White*, 496 U. S., at 330, gave the officers reasonable suspicion that the driver of the truck (Lorenzo) was committing an ongoing crime. When the only source of the government's information is an informant's tip, we ask whether the tip bears sufficient " 'indicia of reliability,' " *id.*, at 328, to establish "a particularized and objective basis for suspecting the particular person stopped of criminal activity," *United States* v. *Cortez*, 449 U. S. 411, 417–418 (1981).

The most extreme case, before this one, in which an anonymous tip was found to meet this standard was *White*, *supra.* There the reliability of the tip was established by the fact that it predicted the target's behavior in the finest detail—a detail that could be known only by someone familiar with the target's business: She would, the tipster said, leave a particular apartment building, get into a brown Plymouth station wagon with a broken right tail light, and drive immediately to a particular motel. *Id.*, at 327. Very few persons would have such intimate knowledge, and hence knowledge of the unobservable fact that the woman was carrying unlawful drugs was plausible. *Id.*, at 332. Here the Court makes a big deal of the fact that the tipster was dead right about the fact that a silver Ford F–150 truck (license plate 8D94925) was traveling south on Highway 1 somewhere near mile

marker 88. But everyone in the world who saw the car would have that knowledge, and anyone who wanted the car stopped would have to provide that information. Unlike the situation in *White*, that generally available knowledge in no way makes it plausible that the tipster saw the car run someone off the road.

The Court says, *ante*, at 399, that "[b]y reporting that she had been run off the road by a specific vehicle . . . the caller necessarily claimed eyewitness knowledge." So what? The issue is not how she claimed to know, but whether what she claimed to know was true. The claim to "eyewitness knowledge" of being run off the road supports *not at all* its veracity; nor does the amazing, mystifying prediction (so far short of what existed in *White*) that the petitioners' truck *would be heading south on Highway 1*.

The Court finds "reason to think" that the informant "was telling the truth" in the fact that police observation confirmed that the truck had been driving near the spot at which, and at the approximate time at which, the tipster alleged she had been run off the road. *Ante*, at 399. According to the Court, the statement therefore qualifies as a "'present sense impression'" or "'excited utterance,'" kinds of hearsay that the law deems categorically admissible given their low likelihood of reflecting "'deliberate or conscious misrepresentation.'" *Ante*, at 400 (quoting Advisory Committee's Notes on Fed. Rules Evid. 803(1), (2), 28 U. S. C. App., p. 371). So, the Court says, we can fairly suppose that the accusation was true.

No, we cannot. To begin with, it is questionable whether either the "present sense impression" or the "excited utterance" exception to the hearsay rule applies here. The classic "present sense impression" is the recounting of an event that is occurring before the declarant's eyes, as the declarant is speaking ("I am watching the Hindenburg explode!"). See 2 K. Broun, McCormick on Evidence 362 (7th ed. 2013) (hereinafter McCormick). And the classic "excited utter-

ance" is a statement elicited, almost involuntarily, by the shock of what the declarant is immediately witnessing ("My God, those people will be killed!"). See *id.*, at 368–369. It is the immediacy that gives the statement some credibility; the declarant has not had time to dissemble or embellish. There is no such immediacy here. The declarant had time to observe the license number of the offending vehicle, 8D94925 (a difficult task if she was forced off the road and the vehicle was speeding away), to bring her car to a halt, to copy down the observed license number (presumably), and (if she was using her own cell phone) to dial a call to the police from the stopped car. Plenty of time to dissemble or embellish.

Moreover, even assuming that less than true immediacy will suffice for these hearsay exceptions to apply, the tipster's statement would run into additional barriers to admissibility and acceptance. According to the very Advisory Committee's Notes from which the Court quotes, cases addressing an unidentified declarant's present sense impression "indicate hesitancy in upholding the statement alone as sufficient" proof of the reported event. 28 U. S. C. App., at 371; see also 7 M. Graham, Handbook of Federal Evidence 19–20 (7th ed. 2012). For excited utterances as well, the "knotty theoretical" question of statement-alone admissibility persists—seemingly even when the declarant is known. 2 McCormick 368. "Some courts . . . have taken the position that an excited utterance is admissible only if other proof is presented which supports a finding of fact that the exciting event did occur. The issue has not yet been resolved under the Federal Rules." *Id.*, at 367–368 (footnote omitted). It is even unsettled whether excited utterances of an unknown declarant are *ever* admissible. A leading treatise reports that "the courts have been reluctant to admit such statements, principally because of uncertainty that foundational requirements, including the impact of the event on the declarant, have been satisfied." *Id.*, at 372. In sum, it is un-

likely that the law of evidence would deem the mystery caller in this case "especially trustworthy," *ante*, at 400.

Finally, and least tenably, the Court says that another "indicator of veracity" is the anonymous tipster's mere "use of the 911 emergency system," *ibid.* Because, you see, recent "technological and regulatory developments" suggest that the identities of unnamed 911 callers are increasingly less likely to remain unknown. *Ibid.* Indeed, the systems are able to identify "the caller's geographic location with increasing specificity." *Ibid.* *Amici* disagree with this, see Brief for National Association of Criminal Defense Lawyers et al. 8–12, and the present case surely suggests that *amici* are right—since we know neither the identity of the tipster nor even the county from which the call was made. But assuming the Court is right about the ease of identifying 911 callers, it proves absolutely nothing in the present case unless the anonymous caller was *aware* of that fact. "It is the tipster's *belief* in anonymity, not its *reality*, that will control his behavior." *Id.*, at 10 (emphasis added). There is no reason to believe that your average anonymous 911 tipster is aware that 911 callers are readily identifiable.[2]

II

All that has been said up to now assumes that the anonymous caller made, at least in effect, an accusation of drunken driving. But in fact she did not. She said that the petitioners' truck "'[r]an [me] off the roadway.'" App. 36a. That neither asserts that the driver was drunk nor even raises the *likelihood* that the driver was drunk. The most it conveys is that the truck did some apparently nontypical thing that forced the tipster off the roadway, whether partly or

[2] The Court's discussion of reliable 911 traceability has so little relevance to the present case that one must surmise it has been included merely to assure officers in the future that anonymous 911 accusations—even untraced ones—are not as suspect (and hence as unreliable) as other anonymous accusations. That is unfortunate.

fully, temporarily or permanently. Who really knows what (if anything) happened? The truck might have swerved to avoid an animal, a pothole, or a jaywalking pedestrian.

But let us assume the worst of the many possibilities: that it was a careless, reckless, or even intentional maneuver that forced the tipster off the road. Lorenzo might have been distracted by his use of a hands-free cell phone, see Strayer, Drews, & Crouch, A Comparison of the Cell Phone Driver and the Drunk Driver, 48 Human Factors 381, 388 (2006), or distracted by an intense sports argument with José, see D. Strayer et al., AAA Foundation for Traffic Safety, Measuring Cognitive Distraction in the Automobile 28 (June 2013), online at https://www.aaafoundation.org/sites/default/files/MeasuringCognitiveDistractions.pdf (as visited Apr. 17, 2014, and available in Clerk of Court's case file). Or, indeed, he might have intentionally forced the tipster off the road because of some personal animus, or hostility to her "Make Love, Not War" bumper sticker. I fail to see how reasonable suspicion of a *discrete instance* of irregular or hazardous driving generates a reasonable suspicion of *ongoing intoxicated driving*. What proportion of the hundreds of thousands—perhaps millions—of careless, reckless, or intentional traffic violations committed each day is attributable to drunken drivers? I say 0.1 percent. I have no basis for that except my own guesswork. But unless the Court has some basis in reality to believe that the proportion is many orders of magnitude above that—say 1 in 10 or at least 1 in 20—it has no grounds for its unsupported assertion that the tipster's report in this case gave rise to a *reasonable suspicion* of drunken driving.

Bear in mind that that is the only basis for the stop that has been asserted in this litigation.[3] The stop required sus-

[3] The circumstances that may justify a stop under *Terry* v. *Ohio*, 392 U. S. 1 (1968), to investigate past criminal activity are far from clear, see *United States* v. *Hensley*, 469 U. S. 221, 229 (1985), and have not been discussed in this litigation. Hence, the Court says it "need not address"

picion of an ongoing crime, not merely suspicion of having run someone off the road earlier. And driving while being a careless or reckless person, unlike driving while being a drunk person, is not an ongoing crime. In other words, in order to stop the petitioners the officers here not only had to assume without basis the accuracy of the anonymous accusation but also had to posit an unlikely reason (drunkenness) for the accused behavior.

In sum, at the moment the police spotted the truck, it was more than merely "*possib[le]*" that the petitioners were not committing an ongoing traffic crime. *United States* v. *Arvizu*, 534 U. S. 266, 277 (2002) (emphasis added). It was overwhelmingly likely that they were not.

III

It gets worse. Not only, it turns out, did the police have no good reason *at first* to believe that Lorenzo was driving drunk; they had very good reason *at last* to know that he was not. The Court concludes that the tip, plus confirmation of the truck's location, produced reasonable suspicion that the truck not only had been *but still was* barreling dangerously and drunkenly down Highway 1. *Ante*, at 401–404. In fact, alas, it was not, and the officers knew it. They followed the truck for five minutes, presumably to see if it was being operated recklessly. And *that* was good police work. While the anonymous tip was not enough to support a stop for drunken driving under *Terry* v. *Ohio*, 392 U. S. 1 (1968), it was surely enough to counsel observation of the truck to see if it was driven by a drunken driver. But the pesky little detail left out of the Court's reasonable-suspicion equation is that, for the five minutes that the truck was being followed (five minutes is a *long* time), Lorenzo's driving was irreproachable. Had the officers witnessed the petitioners vio-

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that question. *Ante*, at 402, n. 2. I need not either. This case has been litigated on the assumption that only suspicion of ongoing intoxicated or reckless driving could have supported this stop.

late a single traffic law, they would have had cause to stop the truck, *Whren* v. *United States*, 517 U. S. 806, 810 (1996), and this case would not be before us. And not only was the driving *irreproachable*, but the State offers no evidence to suggest that the petitioners even did anything *suspicious*, such as suddenly slowing down, pulling off to the side of the road, or turning somewhere to see whether they were being followed. Cf. *Arvizu*, *supra*, at 270–271, 277 (concluding that an officer's suspicion of criminality was enhanced when the driver, upon seeing that he was being followed, "slowed dramatically," "appeared stiff," and "seemed to be trying to pretend" that the patrol car was not there). Consequently, the tip's suggestion of ongoing drunken driving (if it could be deemed to suggest that) not only went uncorroborated; it was affirmatively undermined.

A hypothetical variation on the facts of this case illustrates the point. Suppose an anonymous tipster reports that, while following near mile marker 88 a silver Ford F–150, license plate 8D94925, traveling southbound on Highway 1, she saw in the truck's open cab several five-foot-tall stacks of what was unmistakably baled cannabis. Two minutes later, a highway patrolman spots the truck exactly where the tip suggested it would be, begins following it, but sees nothing in the truck's cab. It is not enough to say that the officer's observation merely failed to corroborate the tipster's accusation. It is more precise to say that the officer's observation *discredited* the informant's accusation: The crime was supposedly occurring (and would continue to occur) in plain view, but the police saw nothing. Similarly, here, the crime supposedly suggested by the tip was ongoing intoxicated driving, the hallmarks of which are many, readily identifiable, and difficult to conceal. That the officers witnessed nary a minor traffic violation nor any other "sound indici[um] of drunk driving," *ante*, at 402, strongly suggests that the suspected crime was *not* occurring after all. The tip's impli-

cation of continuing criminality, already weak, grew even weaker.

Resisting this line of reasoning, the Court curiously asserts that, since drunk drivers who see marked squad cars in their rearview mirrors may evade detection simply by driving "more careful[ly]," the "absence of additional suspicious conduct" is "hardly surprising" and thus largely irrelevant. *Ante*, at 403. Whether a drunk driver drives drunkenly, the Court seems to think, is up to him. That is not how I understand the influence of alcohol. I subscribe to the more traditional view that the dangers of intoxicated driving are the intoxicant's impairing effects on the body—effects that no mere act of the will can resist. See, *e. g.*, A. Dasgupta, The Science of Drinking: How Alcohol Affects Your Body and Mind 39 (explaining that the physiological effect of a blood alcohol content between 0.08 and 0.109, for example, is "sever[e] impair[ment]" of "[b]alance, speech, hearing, and reaction time," as well as one's general "ability to drive a motor vehicle"). Consistent with this view, I take it as a fundamental premise of our intoxicated-driving laws that a driver soused enough to swerve once can be expected to swerve again—and soon. If he does not, and if the only evidence of his first episode of irregular driving is a mere inference from an uncorroborated, vague, and nameless tip, then the Fourth Amendment requires that he be left alone.

* * *

The Court's opinion serves up a freedom-destroying cocktail consisting of two parts patent falsity: (1) that anonymous 911 reports of traffic violations are reliable so long as they correctly identify a car and its location, and (2) that a single instance of careless or reckless driving necessarily supports a reasonable suspicion of drunkenness. All the malevolent 911 caller need do is assert a traffic violation, and the targeted car will be stopped, forcibly if necessary, by the police.

If the driver turns out not to be drunk (which will almost always be the case), the caller need fear no consequences, even if 911 knows his identity. After all, he never alleged drunkenness, but merely called in a traffic violation—and on that point his word is as good as his victim's.

Drunken driving is a serious matter, but so is the loss of our freedom to come and go as we please without police interference. To prevent and detect murder we do not allow searches without probable cause or targeted *Terry* stops without reasonable suspicion. We should not do so for drunken driving either. After today's opinion all of us on the road, and not just drug dealers, are at risk of having our freedom of movement curtailed on suspicion of drunkenness, based upon a phone tip, true or false, of a single instance of careless driving. I respectfully dissent.

Syllabus

WHITE, WARDEN *v.* WOODALL

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

No. 12–794. Argued December 11, 2013—Decided April 23, 2014

Respondent pleaded guilty to capital murder, capital kidnaping, and first-degree rape, the statutory aggravating circumstance for the murder. He was sentenced to death after the trial court denied defense counsel's request to instruct the jury not to draw any adverse inference from respondent's decision not to testify at the penalty phase. The Kentucky Supreme Court affirmed, finding that the Fifth Amendment's requirement of a no-adverse-inference instruction to protect a nontestifying defendant at the guilt phase, see *Carter* v. *Kentucky*, 450 U. S. 288, is not required at the penalty phase. Subsequently, the Federal District Court granted respondent habeas relief, holding that the trial court's refusal to give the requested instruction violated respondent's privilege against self-incrimination. The Sixth Circuit affirmed.

Held: Because the Kentucky Supreme Court's rejection of respondent's Fifth Amendment claim was not objectively unreasonable, the Sixth Circuit erred in granting the writ. Pp. 419–427.

(a) The difficult-to-meet standard of 28 U. S. C. § 2254(d) permits a court to grant federal habeas relief on a claim already "adjudicated on the merits in State court" only if that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by [this] Court." "'[C]learly established Federal law'" includes only "'the holdings . . . of this Court's decisions,'" *Howes* v. *Fields*, 565 U. S. 499, 505; and an "unreasonable application of" those holdings must be "'objectively unreasonable,'" *Lockyer* v. *Andrade*, 538 U. S. 63, 75–76. The state-court ruling must rest on "an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington* v. *Richter*, 562 U. S. 86, 103.

Here, the Kentucky Supreme Court's conclusion was not "contrary to" the Court's holdings in *Carter*, *supra*, which required a no-adverse-inference instruction at the *guilt* phase; in *Estelle* v. *Smith*, 451 U. S. 454, which concerned the introduction at the penalty phase of the results of an involuntary, un-Mirandized pretrial psychiatric examination; or in *Mitchell* v. *United States*, 526 U. S. 314, 327–330, which disapproved a trial judge's drawing of an adverse inference from the defendant's silence at sentencing "with regard to factual determinations respecting

the circumstances and details of the crime." Nor was the Kentucky Supreme Court's conclusion an unreasonable application of the holdings in those cases. This Court need not decide whether a no-adverse-inference instruction is required in these circumstances, for the issue before the Kentucky Supreme Court was, at a minimum, not "beyond any possibility for fairminded disagreement," *Harrington*, *supra*, at 103. *Mitchell* in particular leaves open the possibility that some inferences might permissibly be drawn from a defendant's penalty-phase silence. Thus, it cannot be read to require the type of blanket no-adverse-inference instruction requested and denied here. Moreover, because respondent's own admissions of guilt had established every relevant fact on which Kentucky bore the burden of proof, *Mitchell*'s narrow holding, which implied that it was limited to inferences pertaining to the facts of the crime, does not apply. Pp. 419–424.

(b) Respondent contends that the state court was unreasonable in refusing to extend a governing legal principle to a context in which it should have controlled, but this Court has never adopted such a rule. Section 2254(d)(1) provides a remedy for instances in which a state court unreasonably *applies* this Court's precedent; it does not require state courts to *extend* that precedent or license federal courts to treat the failure to do so as error. The appropriate time to consider, as a matter of first impression, whether *Carter*, *Estelle*, and *Mitchell* require a penalty-phase no-adverse-inference instruction would be on direct review, not in a habeas case governed by § 2254(d). Pp. 424–427.

685 F. 3d 574, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, ALITO, and KAGAN, JJ., joined. BREYER, J., filed a dissenting opinion, in which GINSBURG and SOTOMAYOR, JJ., joined, *post*, p. 428.

Susan Roncarti Lenz, Assistant Attorney General of Kentucky, argued the cause for petitioner. With her on the briefs were *Jack Conway*, Attorney General, and *Ian G. Sonego*, Special Assistant Attorney General.

Laurence E. Komp, by appointment of the Court, 571 U. S. 809, argued the cause for respondent. With him on the brief were *Heather E. Williams*, *David H. Harshaw III*, and *Dennis J. Burke*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Arizona et al. by *Thomas C. Horne*, Attorney General of Arizona, and *Robert L. Ellman*, Solicitor General, and by the Attorneys General for their re-

JUSTICE SCALIA delivered the opinion of the Court.

Respondent brutally raped, slashed with a box cutter, and drowned a 16-year-old high-school student. After pleading guilty to murder, rape, and kidnaping, he was sentenced to death. The Kentucky Supreme Court affirmed the sentence, and we denied certiorari. Ten years later, the Court of Appeals for the Sixth Circuit granted respondent's petition for a writ of habeas corpus on his Fifth Amendment claim. In so doing, it disregarded the limitations of 28 U. S. C. §2254(d)—a provision of law that some federal judges find too confining, but that all federal judges must obey. We reverse.

I

On the evening of January 25, 1997, Sarah Hansen drove to a convenience store to rent a movie. When she failed to return home several hours later, her family called the police. Officers eventually found the vehicle Hansen had been driving a short distance from the convenience store. They followed a 400- to 500-foot trail of blood from the van to a nearby lake, where Hansen's unclothed, dead body was found floating in the water. Hansen's "throat had been slashed twice with each cut approximately 3.5 to 4 inches long," and "[h]er windpipe was totally severed." *Woodall* v. *Commonwealth*, 63 S. W. 3d 104, 114 (Ky. 2002).

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spective States as follows: *Luther Strange* of Alabama, *John W. Suthers* of Colorado, *Samuel S. Olens* of Georgia, *Lawrence G. Wasden* of Idaho, *Derek Schmidt* of Kansas, *Timothy C. Fox* of Montana, *Catherine Cortez Masto* of Nevada, *Gary K. King* of New Mexico, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *Robert W. Ferguson* of Washington, and *Peter K. Michael* of Wyoming; for the State of Texas by *Greg Abbott*, Attorney General, *Jonathan F. Mitchell*, Solicitor General, *Daniel T. Hodge*, First Assistant Attorney General, and *James P. Sullivan*, Assistant Solicitor General; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger*.

Briefs of *amici curiae* urging affirmance were filed for the Los Angeles County Public Defender's Office by *Albert J. Menaster*; and for the National Association of Criminal Defense Lawyers by *Justin F. Marceau*, *Lee Kovarsky*, and *Barbara Bergman*.

Authorities questioned respondent when they learned that he had been in the convenience store on the night of the murder. Respondent gave conflicting statements regarding his whereabouts that evening. Further investigation revealed that respondent's "fingerprints were on the van the victim was driving," "[b]lood was found on [respondent's] front door," "[b]lood on his clothing and sweatshirt was consistent with the blood of the victim," and "DNA on . . . vaginal swabs" taken from the victim "was consistent with" respondent's. *Ibid.*

Faced with overwhelming evidence of his guilt, respondent pleaded guilty to capital murder. He also pleaded guilty to capital kidnaping and first-degree rape, the statutory aggravating circumstance for the murder. See App. 78; Ky. Rev. Stat. Ann. § 532.025(2)(a) (West Supp. 2012). At the ensuing penalty-phase trial, respondent called character witnesses but declined to testify himself. Defense counsel asked the trial judge to instruct the jury that "[a] defendant is not compelled to testify and the fact that the defendant did not testify should not prejudice him in any way." App. 31. The trial judge denied the request, and the Kentucky Supreme Court affirmed that denial. *Woodall* v. *Commonwealth*, *supra*, at 115. While recognizing that the Fifth Amendment requires a no-adverse-inference instruction to protect a nontestifying defendant at the guilt phase, see *Carter* v. *Kentucky*, 450 U. S. 288 (1981), the court held that *Carter* and our subsequent cases did not require such an instruction here. *Woodall* v. *Commonwealth*, *supra*, at 115. We denied respondent's petition for a writ of certiorari from that direct appeal. *Woodall* v. *Kentucky*, 537 U. S. 835 (2002).

In 2006, respondent filed this petition for habeas corpus in Federal District Court. The District Court granted relief, holding, as relevant here, that the trial court's refusal to issue a no-adverse-inference instruction at the penalty phase violated respondent's Fifth Amendment privilege against

self-incrimination. *Woodall* v. *Simpson*, No. 5:06CV–P216–R (WD Ky., Feb. 24, 2009), App. to Pet. for Cert. 58a–61a, 2009 WL 464939, *12. The Court of Appeals affirmed and ordered Kentucky to either resentence respondent within 180 days or release him. *Woodall* v. *Simpson*, 685 F. 3d 574, 581 (CA6 2012).[1] Judge Cook dissented.

We granted certiorari. 570 U. S. 930 (2013).

II

A

Section 2254(d) of Title 28 provides that "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." "This standard," we recently reminded the Sixth Circuit, "is 'difficult to meet.'" *Metrish* v. *Lancaster*, 569 U. S. 351, 357–358 (2013). "'[C]learly established Federal law'" for purposes of § 2254(d)(1) includes only "'the holdings, as opposed to the dicta, of this Court's decisions.'" *Howes* v. *Fields*, 565 U. S. 499, 505 (2012) (quoting *Williams* v. *Taylor*, 529 U. S. 362, 412 (2000)). And an "unreasonable application of" those holdings must be "'objectively unreasonable,'" not merely wrong; even "clear error" will not suffice. *Lockyer* v. *Andrade*, 538 U. S. 63, 75–76 (2003). Rather, "[a]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court

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[1] The Court of Appeals did not reach the alternative ground for the District Court's decision: respondent's claim based on *Batson* v. *Kentucky*, 476 U. S. 79 (1986). See 685 F. 3d, at 577–578. That claim is not before us here.

was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington* v. *Richter*, 562 U. S. 86, 103 (2011).

Both the Kentucky Supreme Court and the Court of Appeals identified as the relevant precedents in this area our decisions in *Carter*, *Estelle* v. *Smith*, 451 U. S. 454 (1981), and *Mitchell* v. *United States*, 526 U. S. 314 (1999). *Carter* held that a no-adverse-inference instruction is required at the *guilt* phase. 450 U. S., at 294–295, 300. *Estelle* concerned the introduction at the penalty phase of the results of an involuntary, un-Mirandized pretrial psychiatric examination. 451 U. S., at 456–457, and n. 1; *id.*, at 461. And *Mitchell* disapproved a trial judge's drawing of an adverse inference from the defendant's silence at sentencing "with regard to factual determinations respecting the circumstances and details of the crime." 526 U. S., at 327–330.

It is clear that the Kentucky Supreme Court's conclusion is not "contrary to" the actual holding of any of these cases. 28 U. S. C. § 2254(d)(1). The Court of Appeals held, however, that the "Kentucky Supreme Court's denial of this constitutional claim was an unreasonable application of" those cases. 685 F. 3d, at 579. In its view, "reading *Carter*, *Estelle*, and *Mitchell* together, the only reasonable conclusion is that" a no-adverse-inference instruction was required at the penalty phase. *Ibid.*[2]

We need not decide here, and express no view on, whether the conclusion that a no-adverse-inference instruction was

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[2] The Court of Appeals also based its conclusion that respondent "was entitled to receive a no adverse inference instruction" on one of its own cases, *Finney* v. *Rothgerber*, 751 F. 2d 858, 863–864 (CA6 1985). 685 F. 3d, at 579 (internal quotation marks omitted). That was improper. As we cautioned the Sixth Circuit two Terms ago, a lower court may not "consul[t] its own precedents, rather than those of this Court, in assessing" a habeas claim governed by § 2254. *Parker* v. *Matthews*, 567 U. S. 37, 48 (2012) (*per curiam*).

required would be correct in a case not reviewed through the lens of § 2254(d)(1). For we are satisfied that the issue was, at a minimum, not "beyond any possibility for fair-minded disagreement." *Harrington*, *supra*, at 103.

We have, it is true, held that the privilege against self-incrimination applies to the penalty phase. See *Estelle*, *supra*, at 463; *Mitchell*, *supra*, at 328–329. But it is not uncommon for a constitutional rule to apply somewhat differently at the penalty phase than it does at the guilt phase. See, *e. g.*, *Bobby* v. *Mitts*, 563 U. S. 395, 398–399 (2011) (*per curiam*). We have "never directly held that *Carter* applies at a sentencing phase where the Fifth Amendment interests of the defendant are different." *United States* v. *Whitten*, 623 F. 3d 125, 131–132, n. 4 (CA2 2010) (Livingston, J., dissenting from denial of rehearing en banc).

Indeed, *Mitchell* itself leaves open the possibility that some inferences might permissibly be drawn from a defendant's penalty-phase silence. In that case, the District Judge had actually *drawn* from the defendant's silence an adverse inference about the drug quantity attributable to the defendant. See 526 U. S., at 317–319. We held that this ran afoul of the defendant's "right to remain silent at sentencing." *Id.*, at 325, 327–328 (citing *Griffin* v. *California*, 380 U. S. 609, 614 (1965)). But we framed our holding narrowly, in terms implying that it was limited to inferences pertaining to the facts of the crime: "We decline to adopt an exception for the sentencing phase of a criminal case *with regard to factual determinations respecting the circumstances and details of the crime.*" *Mitchell*, 526 U. S., at 328 (emphasis added). "The Government retains," we said, "*the burden of proving facts relevant to the crime* . . . and cannot enlist the defendant in this process at the expense of the self-incrimination privilege." *Id.*, at 330 (emphasis added). And *Mitchell* included an express reservation of direct relevance here: "Whether silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility for

purposes of the downward adjustment provided in § 3E1.1 of the United States Sentencing Guidelines (1998), is a separate question. It is not before us, and we express no view on it." *Ibid.*[3]

Mitchell's reservation is relevant here for two reasons. First, if *Mitchell* suggests that *some* actual inferences might be permissible at the penalty phase, it certainly cannot be read to require a *blanket* no-adverse-inference instruction at every penalty-phase trial. And it was a blanket instruction that was requested and denied in this case; respondent's requested instruction would have informed the jury that "[a] defendant is not compelled to testify and the fact that the defendant did not testify should not prejudice him *in any way*." App. 31 (emphasis added). Counsel for respondent

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[3] The Courts of Appeals have recognized that *Mitchell* left this unresolved; their diverging approaches to the question illustrate the possibility of fairminded disagreement. Compare *United States* v. *Caro*, 597 F. 3d 608, 629–630 (CA4 2010) (direct appeal) (noting that *Mitchell* "reserved the question of whether silence bears upon lack of remorse," but reasoning that "*Estelle* and *Mitchell* together suggest that the Fifth Amendment may well prohibit considering a defendant's silence regarding the nonstatutory aggravating factor of lack of remorse"), with *Burr* v. *Pollard*, 546 F. 3d 828, 832 (CA7 2008) (habeas) (while the right to remain silent persists at sentencing, "silence can be consistent not only with exercising one's constitutional right, but also with a lack of remorse," which "is properly considered at sentencing" (citing *Mitchell*, 526 U. S., at 326–327)); *Lee* v. *Crouse*, 451 F. 3d 598, 605, n. 3 (CA10 2006) (habeas) ("[T]he circuit courts have readily confined *Mitchell* to its stated holding, and have allowed sentencing courts to rely on, or draw inferences from, a defendant's exercise of his Fifth Amendment rights for purposes other than determining the facts of the offense of conviction").

Indeed, the Sixth Circuit itself has previously recognized that *Mitchell* "explicitly limited its holding regarding inferences drawn from a defendant's silence to facts about the substantive offense and did not address other inferences that may be drawn from a defendant's silence." *United States* v. *Kennedy*, 499 F. 3d 547, 552 (2007) (direct appeal). *Kennedy* upheld under *Mitchell* a sentencing judge's consideration of the defendant's refusal to complete a court-ordered psychosexual examination. 499 F. 3d, at 551–552.

conceded at oral argument that remorse was at issue during the penalty-phase trial, see Tr. of Oral Arg. 39; see also Brief for Respondent 18, yet the proposed instruction would have precluded the jury from considering respondent's silence as indicative of his lack of remorse. Indeed, the trial judge declined to give the no-adverse-inference instruction precisely because he was "aware of no case law that precludes the jury from considering the defendant's lack of expression of remorse . . . in sentencing." App. 36. This alone suffices to establish that the Kentucky Supreme Court's conclusion was not "objectively unreasonable." *Andrade*, 538 U. S., at 76.

Second, regardless of the scope of respondent's proposed instruction, any inferences that could have been drawn from respondent's silence would arguably fall within the class of inferences as to which *Mitchell* leaves the door open. Respondent pleaded guilty to all of the charges he faced, including the applicable aggravating circumstances. Thus, Kentucky could not have shifted to respondent its "burden of proving facts relevant to the crime," 526 U. S., at 330: Respondent's own admissions had already established every relevant fact on which Kentucky bore the burden of proof. There are reasonable arguments that the logic of *Mitchell* does not apply to such cases. See, *e. g.*, *United States* v. *Ronquillo*, 508 F. 3d 744, 749 (CA5 2007) ("*Mitchell* is inapplicable to the sentencing decision in this case because 'the facts of the offense' were based entirely on Ronquillo's admissions, not on any adverse inference . . . . Ronquillo, unlike the defendant in *Mitchell*, admitted all the predicate facts of his offenses").

The dissent insists that *Mitchell* is irrelevant because it merely declined to create an exception to the "normal rule," supposedly established by *Estelle*, "that a defendant is entitled to a requested no-adverse-inference instruction" at sentencing. *Post*, at 432 (opinion of BREYER, J.). That argument disregards perfectly reasonable interpretations of *Estelle* and *Mitchell* and hence contravenes § 2254(d)'s defer-

ential standard of review. *Estelle* did not involve an adverse inference based on the defendant's silence or a corresponding jury instruction. See 451 U. S., at 461–469. Thus, whatever *Estelle* said about the Fifth Amendment, its holding[4]—the only aspect of the decision relevant here—does not "requir[e]" the categorical rule the dissent ascribes to it. *Carey* v. *Musladin*, 549 U. S. 70, 76 (2006). Likewise, fair-minded jurists could conclude that *Mitchell*'s reservation regarding remorse and acceptance of responsibility would have served no meaningful purpose if *Estelle* had created an across-the-board rule against adverse inferences; we are, after all, hardly in the habit of reserving "separate question[s]," *Mitchell*, *supra*, at 330, that have already been definitively answered. In these circumstances, where the "'precise contours'" of the right remain "'unclear,'" state courts enjoy "broad discretion" in their adjudication of a prisoner's claims. *Andrade*, 538 U. S., at 76 (quoting *Harmelin* v. *Michigan*, 501 U. S. 957, 998 (1991) (KENNEDY, J., concurring in part and concurring in judgment)).

B

In arguing for a contrary result, respondent leans heavily on the notion that a state-court "'determination may be set

[4] The dissent says *Estelle* "held that 'so far as the protection of the Fifth Amendment is concerned,' it could 'discern no basis to distinguish between the guilt and penalty phases' of a defendant's 'capital murder trial.'" *Post*, at 428 (quoting *Estelle*, 451 U. S., at 462–463). Of course, it did not "hold" that. Rather, it held that the defendant's Fifth Amendment "rights were abridged by the State's introduction of" a pretrial psychiatric evaluation that was administered without the preliminary warning required by *Miranda* v. *Arizona*, 384 U. S. 436 (1966). 451 U. S., at 473. In any event, even *Estelle*'s dictum did not assume an entitlement to a blanket no-adverse-inference instruction. The quoted language is reasonably read as referring to the *availability* of the Fifth Amendment privilege at sentencing rather than the precise *scope* of that privilege when applied in the sentencing context. Indeed, it appears in a passage responding to the State's argument that the defendant "was not entitled to the protection of the Fifth Amendment" in the first place. *Id.*, at 462.

aside . . . if, under clearly established federal law, the state court was unreasonable in refusing to extend the governing legal principle to a context in which the principle should have controlled.'" Brief for Respondent 21 (quoting *Ramdass* v. *Angelone*, 530 U. S. 156, 166 (2000) (plurality opinion)). The Court of Appeals and District Court relied on the same proposition in sustaining respondent's Fifth Amendment claim. See 685 F. 3d, at 579; App. to Pet. for Cert. 37a–39a, 2009 WL 464939, *4.

The unreasonable-refusal-to-extend concept originated in a Fourth Circuit opinion we discussed at length in *Williams*, our first in-depth analysis of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). See 529 U. S., at 407–409 (citing *Green* v. *French*, 143 F. 3d 865, 869–870 (1998)). We described the Fourth Circuit's interpretation of § 2254(d)(1)'s "unreasonable application" clause as "generally correct," 529 U. S., at 407, and approved its conclusion that "a state-court decision involves an unreasonable application of this Court's precedent if the state court identifies the correct governing legal rule . . . but unreasonably applies it to the facts of the particular state prisoner's case," *id.*, at 407–408 (citing *Green*, *supra*, at 869–870). But we took no position on the Fourth Circuit's further conclusion that a state court commits AEDPA error if it "unreasonably refuse[s] to extend a legal principle to a new context where it should apply." 529 U. S., at 408–409 (citing *Green*, *supra*, at 869–870). We chose not "to decide how such 'extension of legal principle' cases should be treated under § 2254(d)(1)" because the Fourth Circuit's proposed rule for resolving them presented several "problems of precision." 529 U. S., at 408–409.

Two months later, a plurality paraphrased and applied the unreasonable-refusal-to-extend concept in *Ramdass*. See 530 U. S., at 166–170. It did not, however, grant the habeas petitioner relief on that basis, finding that there was no unreasonable refusal to extend. Moreover, Justice O'Connor,

whose vote was necessary to form a majority, cited *Williams* and made no mention of the unreasonable-refusal-to-extend concept in her separate opinion concurring in the judgment. See 530 U. S., at 178–181. *Ramdass* therefore did not alter the interpretation of § 2254(d)(1) set forth in *Williams*. Aside from one opinion *criticizing* the unreasonable-refusal-to-extend doctrine, see *Yarborough* v. *Alvarado*, 541 U. S. 652, 666 (2004), we have not revisited the issue since *Williams* and *Ramdass*. During that same 14-year stretch, however, we have repeatedly restated our "hold[ing]" in *Williams*, *supra*, at 409, that a state-court decision is an unreasonable application of our clearly established precedent if it correctly identifies the governing legal rule but applies that rule unreasonably to the facts of a particular prisoner's case, see, *e. g.*, *Cullen* v. *Pinholster*, 563 U. S. 170, 182 (2011); *Rompilla* v. *Beard*, 545 U. S. 374, 380 (2005); *Yarborough*, *supra*, at 663; *Penry* v. *Johnson*, 532 U. S. 782, 792 (2001).

Thus, this Court has never adopted the unreasonable-refusal-to-extend rule on which respondent relies. It has not been so much as endorsed in a majority opinion, let alone relied on as a basis for granting habeas relief. To the extent the unreasonable-refusal-to-extend rule differs from the one embraced in *Williams* and reiterated many times since, we reject it. Section 2254(d)(1) provides a remedy for instances in which a state court unreasonably *applies* this Court's precedent; it does not require state courts to *extend* that precedent or license federal courts to treat the failure to do so as error. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 949 (1998). Thus, "if a habeas court must extend a rationale before it can apply to the facts at hand," then by definition the rationale was not "clearly established at the time of the state-court decision." *Yarborough*, 541 U. S., at 666. AEDPA's carefully constructed framework "would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law." *Ibid.*

This is not to say that § 2254(d)(1) requires an "'identical factual pattern before a legal rule must be applied.'" *Panetti* v. *Quarterman*, 551 U. S. 930, 953 (2007). To the contrary, state courts must reasonably apply the rules "squarely established" by this Court's holdings to the facts of each case. *Knowles* v. *Mirzayance*, 556 U. S. 111, 122 (2009). "[T]he difference between applying a rule and extending it is not always clear," but "[c]ertain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt." *Yarborough*, *supra*, at 666. The critical point is that relief is available under § 2254(d)(1)'s unreasonable-application clause if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no "fair-minded disagreement" on the question, *Harrington*, 562 U. S., at 103.

Perhaps the logical next step from *Carter*, *Estelle*, and *Mitchell* would be to hold that the Fifth Amendment requires a penalty-phase no-adverse-inference instruction in a case like this one; perhaps not. Either way, we have not yet taken that step, and there are reasonable arguments on both sides—which is all Kentucky needs to prevail in this AEDPA case. The appropriate time to consider the question as a matter of first impression would be on direct review, not in a habeas case governed by § 2254(d)(1).

* * *

Because the Kentucky Supreme Court's rejection of respondent's Fifth Amendment claim was not objectively unreasonable, the Sixth Circuit erred in granting the writ. We therefore need not reach its further holding that the trial court's putative error was not harmless. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

During the penalty phase of his capital murder trial, respondent Robert Woodall asked the court to instruct the jury not to draw any adverse inferences from his failure to testify. The court refused, and the Kentucky Supreme Court agreed that no instruction was warranted. The question before us is whether the Kentucky courts unreasonably applied clearly established Supreme Court law in concluding that the Fifth Amendment did not entitle Woodall to a no-adverse-inference instruction. See 28 U. S. C. § 2254(d)(1). In my view, the answer is yes.

I

This Court's decisions in *Carter* v. *Kentucky*, 450 U. S. 288 (1981), and *Estelle* v. *Smith*, 451 U. S. 454 (1981), clearly establish that a criminal defendant is entitled to a requested no-adverse-inference instruction in the penalty phase of a capital trial. First consider *Carter*. The Court held that a trial judge "has the constitutional obligation, upon proper request," to give a requested no-adverse-inference instruction in order "to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify." 450 U. S., at 305. This is because when "the jury is left to roam at large with only its untutored instincts to guide it," it may "draw from the defendant's silence broad inferences of guilt." *Id.*, at 301. A trial court's refusal to give a requested no-adverse-inference instruction thus "exacts an impermissible toll on the full and free exercise of the [Fifth Amendment] privilege." *Id.*, at 305.

Now consider *Estelle*. The Court held that "so far as the protection of the Fifth Amendment privilege is concerned," it could "discern no basis to distinguish between the guilt and penalty phases" of a defendant's "capital murder trial." 451 U. S., at 462–463. The State had introduced at the penalty phase the defendant's compelled statements to a psychiatrist, in order to show the defendant's future danger-

ousness. Defending the admission of those statements, the State argued that the defendant "was not entitled to the protection of the Fifth Amendment because [his statements were] used only to determine punishment after conviction, not to establish guilt." *Id.*, at 462. This Court rejected the State's argument on the ground that the Fifth Amendment applies equally to the penalty phase and the guilt phase of a capital trial. *Id.*, at 462–463.

What is unclear about the resulting law? If the Court holds in Case A that the First Amendment prohibits Congress from discriminating based on viewpoint, and then holds in Case B that the Fourteenth Amendment incorporates the First Amendment as to the States, then it is clear that the First Amendment prohibits the States from discriminating based on viewpoint. By the same logic, because the Court held in *Carter* that the Fifth Amendment requires a trial judge to give a requested no-adverse-inference instruction during the guilt phase of a trial, and held in *Estelle* that there is no basis for distinguishing between the guilt and punishment phases of a capital trial for purposes of the Fifth Amendment, it is clear that the Fifth Amendment requires a judge to provide a requested no-adverse-inference instruction during the penalty phase of a capital trial.

II

The Court avoids this logic by reading *Estelle* too narrowly. First, it contends that *Estelle*'s holding that the Fifth Amendment applies equally to the guilt and penalty phases was mere dictum. *Ante*, at 424, and n. 4. But this rule was essential to the resolution of the case, so it is binding precedent, not dictum.

Second, apparently in the alternative, the majority acknowledges that *Estelle* "held that the privilege against self-incrimination *applies* to the penalty phase," but it concludes that *Estelle* said nothing about the *content* of the privilege in the penalty phase. *Ante*, at 421 (emphasis added). This interpretation of *Estelle* ignores its rationale. The rea-

son that *Estelle* concluded that the Fifth Amendment applies to the penalty phase of a capital trial is that the Court saw "no basis to distinguish between the guilt and penalty phases of [a defendant's] capital murder trial so far as the protection of the Fifth Amendment privilege is concerned." 451 U. S., at 462–463. And as there is no basis to distinguish between the two contexts for Fifth Amendment purposes, there is no basis for varying either the application or the content of the Fifth Amendment privilege in the two contexts.

The majority also reads our decision in *Mitchell* v. *United States*, 526 U. S. 314 (1999), to change the legal landscape where it expressly declined to do so. In *Mitchell*, the Court considered whether to create an exception to the "normal rule in a criminal case . . . that no negative inference from the defendant's failure to testify is permitted." *Id.*, at 328. We refused: "We decline to adopt an exception for the sentencing phase of a criminal case with regard to factual determinations respecting the circumstances and details of the crime." *Ibid.* *Mitchell* thus reiterated what *Carter* and *Estelle* had already established. The "normal rule" is that Fifth Amendment protections apply during trial and sentencing. Because the Court refused "to adopt an *exception*" to this default rule, 526 U. S., at 328 (emphasis added), the law before and after *Mitchell* remained the same.

The majority seizes upon the limited nature of *Mitchell*'s holding, concluding that by refusing to adopt an exception to the normal rule for *certain* "factual determinations," *Mitchell* suggested that inferences about *other* matters might be permissible at the penalty phase. *Ante,* at 421–423. The majority seems to believe that *Mitchell* somehow casts doubt upon whether *Estelle*'s Fifth Amendment rule applies to matters unrelated to the "circumstances and details of the crime," such as remorse, or as to which the State does not bear the burden of proof.

As an initial matter, *Mitchell* would have had to overrule—or at least substantially limit—*Estelle* to create an ex-

ception for matters unrelated to the circumstances and details of the crime or for matters on which the defendant bears the burden of proof. Sentencing proceedings, particularly capital sentencing proceedings, often focus on factual matters that do not directly concern facts of the crime. Was the defendant subject to flagrant abuse in his growing-up years? Is he suffering from a severe physical or mental impairment? Was he supportive of his family? Is he remorseful? *Estelle* itself involved compelled statements introduced to establish the defendant's future dangerousness—another fact often unrelated to the circumstances or details of a defendant's crime. 451 U. S., at 456. In addition, States typically place the burden to prove mitigating factors at the penalty phase on the defendant. A reasonable jurist would not believe that *Mitchell*, by refusing to create an exception to *Estelle*, intended to undermine the very case it reaffirmed.

Mitchell held, simply and only, that the normal rule of *Estelle* applied in the circumstances of the particular case before the Court. That holding does not destabilize settled law beyond its reach. We frequently resist reaching beyond the facts of a case before us, and we often say so. That does not mean that we throw cases involving all other factual circumstances into a shadowland of legal doubt.

The majority also places undue weight on dictum in *Mitchell* reserving judgment as to whether to create additional exceptions to the normal rule of *Estelle* and *Carter*. We noted: "Whether silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility for purposes of the downward adjustment provided in § 3E1.1 of the United States Sentencing Guidelines (1998), is a separate question. It is not before us, and we express no view on it." 526 U. S., at 330. This dictum, says the majority, suggests that some inferences, including about remorse (which was at issue in Woodall's case), may be permissible. *Ante*, at 422–423.

When the Court merely reserves a question that is "not before us" for a future case, we do not cast doubt on legal principles that are already clearly established. The Court often identifies questions that it is *not* answering in order to clarify the question it *is* answering. In so doing—that is, in "express[ing] no view" on questions that are not squarely before us—we do not create a state of uncertainty as to those questions. And in respect to *Mitchell*, where the Court reserved the question whether to create an exception to the normal rule, this is doubly true. The normal rule that a defendant is entitled to a requested no-adverse-inference instruction at the penalty phase as well as the guilt phase remained clearly established after *Mitchell*.

III

In holding that the Kentucky courts did not unreasonably apply clearly established law, the majority declares that if a court must "extend" the rationale of a case in order to apply it, the rationale is not clearly established. *Ante*, at 426. I read this to mean simply that if there may be "fairminded disagreement" about whether a rationale applies to a certain set of facts, a state court will not unreasonably apply the law by failing to apply that rationale, and I agree. See *Harrington* v. *Richter*, 562 U. S. 86 (2011). I do not understand the majority to suggest that reading two legal principles together would necessarily "extend" the law, which would be a proposition entirely inconsistent with our case law. As long as fairminded jurists would conclude that two (or more) legal rules considered together would dictate a particular outcome, a state court unreasonably applies the law when it holds otherwise. *Ibid.*

That is the error the Kentucky Supreme Court committed here. Failing to consider together the legal principles established by *Carter* and *Estelle*, the state court confined those cases to their facts. It held that *Carter* did not apply because Woodall had already pleaded guilty—that is, because

Woodall requested a no-adverse-inference instruction at the penalty phase rather than the guilt phase of his trial. *Woodall* v. *Commonwealth*, 63 S. W. 3d 104, 115 (2001). And it concluded that *Estelle* did not apply because *Estelle* was not a "jury instruction case." 63 S. W. 3d, at 115. The Kentucky Supreme Court unreasonably failed to recognize that together *Carter* and *Estelle* compel a requested no-adverse-inference instruction at the penalty phase of a capital trial. And reading *Mitchell* to rein in the law in contemplation of never-before-recognized exceptions to this normal rule would be an unreasonable *retraction* of clearly established law, not a proper failure to "extend" it. Because the Sixth Circuit correctly applied clearly established law in granting Woodall's habeas petition, I would affirm.

With respect I dissent from the Court's contrary conclusion.

Syllabus

PAROLINE *v.* UNITED STATES ET AL.

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

No. 12–8561. Argued January 22, 2014—Decided April 23, 2014

The respondent victim in this case was sexually abused as a young girl in order to produce child pornography. When she was 17, she learned that images of her abuse were being trafficked on the Internet, in effect repeating the original wrongs, for she knew that her humiliation and hurt would be renewed well into the future as thousands of additional wrongdoers witnessed those crimes. Petitioner Paroline pleaded guilty in federal court to possessing images of child pornography, which included two of the victim, in violation of 18 U. S. C. § 2252. The victim then sought restitution under § 2259, requesting nearly $3 million in lost income and about $500,000 in future treatment and counseling costs. The District Court declined to award restitution, concluding that the Government had not met its burden of proving what losses, if any, were proximately caused by Paroline's offense. The victim sought a writ of mandamus, asking the Fifth Circuit to direct the District Court to order Paroline to pay restitution. Granting the writ on rehearing en banc, the Fifth Circuit held, *inter alia*, that § 2259 did not limit restitution to losses proximately caused by the defendant, and that each defendant who possessed the victim's images should be made liable for the victim's entire losses from the trade in her images.

Held:

1. Restitution is proper under § 2259 only to the extent the defendant's offense proximately caused a victim's losses. This provision has a broad restitutionary purpose, stating that a district court "shall order restitution for any offense" under Chapter 110 of Title 18, such as Paroline's possession offense; requiring district courts to order defendants "to pay the victim . . . the full amount of the victim's losses as determined by the court," § 2259(b)(1); and expressly making "issuance of a restitution order . . . mandatory," § 2259(b)(4)(A). The Government has the "burden of demonstrating the amount of the [victim's] loss." § 3664(e).

To say one event proximately caused another means, first, that the former event caused the latter, *i. e.*, actual cause or cause in fact; and second, that it is a proximate cause, *i. e.*, it has a sufficient connection to the result. The concept of proximate causation is applicable in both criminal and tort law, and the analysis is parallel in many instances. Section 2259(c) defines a victim as "the individual harmed as a result of

a commission of a crime under this chapter." The words "as a result of" plainly suggest causation, and the referent of "a crime" is the offense of conviction. The "full amount of the victim's losses," § 2259(b)(1), includes "any costs incurred by the victim" for six enumerated categories of expense, § 2259(b)(3). The reference to "costs incurred by the victim" is most naturally understood as costs arising "as a result of" the offense of conviction, *i. e.*, the defendant's conduct. And the last of the six enumerated categories—for "other losses suffered . . . as a proximate result of the offense," § 2259(b)(3)(F)—clearly states that the causal requirement is one of proximate cause. This reading is supported by the canon of construction that, "[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Porto Rico Railway, Light & Power Co.* v. *Mor*, 253 U. S. 345, 348. The reading also presents a commonsense way to impose sensible limitations on claims for attenuated costs. Pp. 443–448.

2. Applying the statute's causation requirements in this case, victims should be compensated and defendants should be held to account for the impact of their conduct on those victims, but defendants should only be made liable for the consequences and gravity of their own conduct, not the conduct of others. Pp. 449–463.

(a) A somewhat atypical causal process underlies the losses here. It may be simple to prove aggregate losses, *i. e.*, "general losses," stemming from the ongoing traffic in the victim's images, but the question for § 2259 purposes is how much of these general losses were the "proximate result" of an individual defendant's offense. Here, the victim's costs of treatment and lost income resulting from the trauma of knowing that images of her abuse are being viewed over and over are direct and foreseeable results of child-pornography crimes, provided the prerequisite of factual causation is satisfied. The primary problem, then, is the proper standard of causation in fact. P. 449.

(b) A showing of but-for causation is not the proper standard here, for it is not possible to prove that the victim's losses would be less but for one possessor's individual role in the large, loosely connected network through which her images circulate. The victim and the Government urge the Court to read § 2259 to require a less restrictive causation standard in child-pornography cases like this. They endorse the theory of "aggregate causation," one formulation of which finds factual causation satisfied where a wrongdoer's conduct, though alone "insufficient . . . to cause the plaintiff's harm," is, "when combined with conduct by other persons," "more than sufficient to cause the harm." 1 Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 27,

Comment *f*. Tort law teaches that such alternative causal tests, though a kind of legal fiction, may be necessary to vindicate the law's purposes, for it would be anomalous to turn away a person harmed by the combined acts of many wrongdoers simply because none of those wrongdoers alone caused the harm, and nonsensical to adopt a rule whereby individuals hurt by the combined wrongful acts of many would have no redress, while those hurt by the acts of one person alone would. These are sound principles. Taken too far, however, such alternative causal standards would treat each possessor as the cause in fact of all the trauma and attendant losses incurred as a result of all the ongoing traffic in the victim's images. Aggregate causation logic should not be adopted in an incautious manner in the context of criminal restitution, which differs from tort law in numerous respects. Paroline's contribution to the causal process underlying the victim's losses was very minor, both compared to the combined acts of all other relevant offenders and compared to the contributions of other individual offenders, particularly distributors and the initial producer of the child pornography. Congress gave no indication that it intended the statute to be applied in an expansive manner so starkly contrary to the principle that restitution should reflect the consequences of the defendant's own conduct. The victim claims that holding each possessor liable for her entire losses would be fair and practical in part because offenders can seek contribution from one another, but there is no general federal right to contribution and no specific statutory authorization for contribution here. Her severe approach could also raise questions under the Excessive Fines Clause of the Eighth Amendment. Pp. 449–456.

(c) While the victim's expansive reading must be rejected, that does not mean the broader principles underlying aggregate causation theories are irrelevant to determining the proper outcome in cases like this. The cause of the victim's general losses is the trade in her images, and Paroline is a part of that cause. Just as it undermines the purposes of tort law to turn away plaintiffs harmed by several wrongdoers, it would undermine § 2259's purposes to turn away victims in cases like this. With respect to the statute's remedial purpose, there is no question that it would produce anomalous results to say that no restitution is appropriate in these circumstances, for harms of the kind the victim endured here are a major reason why child pornography is outlawed. The unlawful conduct of everyone who reproduces, distributes, or possesses images of the victim's abuse—including Paroline—plays a part in sustaining and aggravating this tragedy. And there is no doubt Congress wanted restitution for such victims. Denying restitution would also be at odds with § 2259's penological purposes, which include the need to impress upon offenders that their conduct produces concrete

and devastating harms for real, identifiable victims. Thus, where it can be shown both that a defendant possessed a victim's images and that a victim has outstanding losses caused by the continuing traffic in her images but where it is impossible to trace a particular amount of those losses to the individual defendant utilizing a more traditional causal inquiry, a court should order restitution in an amount that comports with the defendant's relative role in the causal process underlying the victim's general losses.

District courts should use discretion and sound judgment in determining the proper amount of restitution. A variety of factors may serve as guideposts. Courts might, as a start, determine the amount of the victim's losses caused by the continuing traffic in the victim's images, and then base an award on factors bearing on the relative causal significance of the defendant's conduct in producing those losses. The victim finds this approach untenable because her losses are "indivisible," but the Court is required to define a causal standard that effects the statute's purposes, not to apply tort-law concepts in a mechanical way in the criminal restitution context. She also argues she will be consigned to "piecemeal" restitution that may never lead to full recovery, but Congress has not promised victims full and swift restitution at the cost of holding a defendant liable for an amount drastically out of proportion to his individual causal relation to those losses. Furthermore, this approach better effects the need to impress upon defendants that their acts are not irrelevant or victimless. Pp. 456–462.

(d) Though this approach is not without difficulties, courts can only do their best to apply the statute as written in a workable manner, faithful to the competing principles at stake: that victims should be compensated and that defendants should be held to account for the impact of their own conduct, not the conduct of others. District courts, which routinely exercise wide discretion both in sentencing generally and in fashioning restitution orders, should be able to apply the causal standard defined here without further detailed guidance. P. 462.

701 F. 3d 749, vacated and remanded.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, ALITO, and KAGAN, JJ., joined. ROBERTS, C. J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined, *post*, p. 463. SOTOMAYOR, J., filed a dissenting opinion, *post*, p. 472.

Stanley G. Schneider argued the cause for petitioner. With him on the briefs were *Thomas D. Moran*, *F. R. "Buck" Files, Jr.*, *Jeffrey T. Green*, *Sarah O'Rouke Schrup,* and

Counsel

Casie L. Gotro. *Robin E. Schulberg* and *Virginia Laughlin Schlueter* filed a brief for Michael Wright as respondent under this Court's Rule 12.6, in support of petitioner.

Deputy Solicitor General Dreeben argued the cause for the United States. With him on the brief were *Attorney General Verrilli*, *Acting Assistant Attorney General Raman*, *Melissa Arbus Sherry*, and *Sonja M. Ralston*.

Paul G. Cassell argued the cause for respondent Amy Unknown. With him on the brief were *James R. Marsh* and *Michael J. Teter*.*

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*Briefs of *amici curiae* urging affirmance were filed for the State of Washington et al. by *Robert W. Ferguson*, Attorney General of Washington, and *Anne E. Egeler*, Deputy Solicitor General, and by the Attorneys General for their respective jurisdictions as follows: *Luther Strange* of Alabama, *Michael C. Geraghty* of Alaska, *John W. Suthers* of Colorado, *Joseph R. Biden III* of Delaware, *Pamela Jo Bondi* of Florida, *Sam Olens* of Georgia, *David M. Louie* of Hawaii, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Gregory F. Zoeller* of Indiana, *Tom Miller* of Iowa, *Derek Schmidt* of Kansas, *Jack Conway* of Kentucky, *Martha Coakley* of Massachusetts, *Bill Schuette* of Michigan, *Lori Swanson* of Minnesota, *Jim Hood* of Mississippi, *Chris Koster* of Missouri, *Timothy C. Fox* of Montana, *Jon Bruning* of Nebraska, *Catherine Cortez Masto* of Nevada, *Gary K. King* of New Mexico, *Wayne Stenehjem* of North Dakota, *Michael DeWine* of Ohio, *E. Scott Pruitt* of Oklahoma, *Ellen F. Rosenblum* of Oregon, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *John Swallow* of Utah, *William Sorrell* of Vermont, *Vincent F. Frazer* of the Virgin Islands, *Patrick Morrisey* of West Virginia, *J. B. Van Hollen* of Wisconsin, and *Peter K. Michael* of Wyoming; for the Dutch National Rapporteur on Trafficking in Human Beings and Sexual Violence Against Children by *W. Warren H. Binford* and *Paul J. De Muniz*; for ECPAT International by *Fernando L. Aenlle-Rocha*, *Lauren C. Fujiu*, *Tania N. Khan*, *Aya Kobori*, and *Daniel C. Moon*; for the National Center for Missing and Exploited Children by *Douglas Hallward-Driemeier*, *Yiota Souras*, and *Preston Findlay*; for the National Crime Victim Bar Association et al. by *Erin K. Olson*, *Antonio R. Sarabia II*, and *Rebecca J. Roe*; for the National Crime Victim Law Institute et al. by *Paul R. Q. Wolfson*, *Shirley Cassin Woodward*, and *Daniel P. Kearney, Jr.*; for the National District Attorneys Association by *Sasha N. Rutizer*; for the Women's and Children's Advocacy Project et al. by *Wendy J. Murphy*; for Senator Orrin

JUSTICE KENNEDY delivered the opinion of the Court.

This case presents the question of how to determine the amount of restitution a possessor of child pornography must pay to the victim whose childhood abuse appears in the pornographic materials possessed. The relevant statutory provisions are set forth at 18 U. S. C. § 2259. Enacted as a component of the Violence Against Women Act of 1994, § 2259 requires district courts to award restitution for certain federal criminal offenses, including child-pornography possession.

Petitioner Doyle Randall Paroline pleaded guilty to such an offense. He admitted to possessing between 150 and 300 images of child pornography, which included two that depicted the sexual exploitation of a young girl, now a young woman, who goes by the pseudonym "Amy" for this litigation. The question is what causal relationship must be established between the defendant's conduct and a victim's losses for purposes of determining the right to, and the amount of, restitution under § 2259.

I

Three decades ago, this Court observed that "the exploitive use of children in the production of pornography has become a serious national problem." *New York* v. *Ferber*, 458 U. S. 747, 749 (1982). The demand for child pornography harms children in part because it drives production, which

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Briefs of *amici curiae* were filed for the American Professional Society on the Abuse of Children by *Marci A. Hamilton*; for the Domestic Violence Legal Empowerment and Appeals Project et al. by *Margaret Garvin* and *Alison Wilkinson*; for the National Association to Protect Children by *Russell E. McGuire*; for Mothers Against Drunk Driving by *Steven J. Kelly, Steven D. Silverman,* and *Andrew G. Slutkin*; and for Adam Lamparello et al. by *James J. Berles.*

involves child abuse. The harms caused by child pornography, however, are still more extensive because child pornography is "a permanent record" of the depicted child's abuse, and "the harm to the child is exacerbated by [its] circulation." *Id.*, at 759. Because child pornography is now traded with ease on the Internet, "the number of still images and videos memorializing the sexual assault and other sexual exploitation of children, many very young in age, has grown exponentially." United States Sentencing Comm'n, P. Saris et al., Federal Child Pornography Offenses 3 (2012) (hereinafter Sentencing Comm'n Report).

One person whose story illustrates the devastating harm caused by child pornography is the respondent victim in this case. When she was eight and nine years old, she was sexually abused by her uncle in order to produce child pornography. Her uncle was prosecuted, required to pay about $6,000 in restitution, and sentenced to a lengthy prison term. The victim underwent an initial course of therapy beginning in 1998 and continuing into 1999. By the end of this period, her therapist's notes reported that she was "'back to normal'"; her involvement in dance and other age-appropriate activities, and the support of her family, justified an optimistic assessment. App. 70–71. Her functioning appeared to decline in her teenage years, however; and a major blow to her recovery came when, at the age of 17, she learned that images of her abuse were being trafficked on the Internet. *Id.*, at 71. The digital images were available nationwide and no doubt worldwide. Though the exact scale of the trade in her images is unknown, the possessors to date easily number in the thousands. The knowledge that her images were circulated far and wide renewed the victim's trauma and made it difficult for her to recover from her abuse. As she explained in a victim impact statement submitted to the District Court in this case:

> "Every day of my life I live in constant fear that someone will see my pictures and recognize me and that I

> will be humiliated all over again. It hurts me to know someone is looking at them—at me—when I was just a little girl being abused for the camera. I did not choose to be there, but now I am there forever in pictures that people are using to do sick things. I want it all erased. I want it all stopped. But I am powerless to stop it just like I was powerless to stop my uncle. . . . My life and my feelings are worse now because the crime has never really stopped and will never really stop. . . . It's like I am being abused over and over and over again." *Id.*, at 60–61.

The victim says in her statement that her fear and trauma make it difficult for her to trust others or to feel that she has control over what happens to her. *Id.*, at 63.

The full extent of this victim's suffering is hard to grasp. Her abuser took away her childhood, her self-conception of her innocence, and her freedom from the kind of nightmares and memories that most others will never know. These crimes were compounded by the distribution of images of her abuser's horrific acts, which meant the wrongs inflicted upon her were in effect repeated; for she knew her humiliation and hurt were and would be renewed into the future as an ever-increasing number of wrongdoers witnessed the crimes committed against her.

Petitioner Paroline is one of the individuals who possessed this victim's images. In 2009, he pleaded guilty in federal court to one count of possession of material involving the sexual exploitation of children in violation of 18 U. S. C. § 2252. 672 F. Supp. 2d 781, 783 (ED Tex. 2009). Paroline admitted to knowing possession of between 150 and 300 images of child pornography, two of which depicted the respondent victim. *Ibid.* The victim sought restitution under § 2259, asking for close to $3.4 million, consisting of nearly $3 million in lost income and about $500,000 in future treatment and counseling costs. App. 52, 104. She also sought attorney's fees and costs. 672 F. Supp. 2d, at 783.

The parties submitted competing expert reports. They stipulated that the victim did not know who Paroline was and that none of her claimed losses flowed from any specific knowledge about him or his offense conduct. *Id.*, at 792, and n. 11; App. 230.

After briefing and hearings, the District Court declined to award restitution. 672 F. Supp. 2d, at 793. The District Court observed that "everyone involved with child pornography—from the abusers and producers to the end-users and possessors—contribute[s] to [the victim's] ongoing harm." *Id.*, at 792. But it concluded that the Government had the burden of proving the amount of the victim's losses "directly produced by Paroline that would not have occurred without his possession of her images." *Id.*, at 791. The District Court found that, under this standard, the Government had failed to meet its burden of proving what losses, if any, were proximately caused by Paroline's offense. It thus held that "an award of restitution is not appropriate in this case." *Id.*, at 793.

The victim sought a writ of mandamus, asking the United States Court of Appeals for the Fifth Circuit to direct the District Court to order Paroline to pay restitution in the amount requested. *In re Amy*, 591 F. 3d 792, 793 (2009). The Court of Appeals denied relief. *Id.*, at 795. The victim sought rehearing. Her rehearing request was granted, as was her petition for a writ of mandamus. *In re Amy Unknown*, 636 F. 3d 190, 201 (2011).

The Fifth Circuit reheard the case en banc along with another case, in which the defendant, Michael Wright, had raised similar issues in appealing an order of restitution under § 2259, see *United States* v. *Wright*, 639 F. 3d 679, 681 (2011) (*per curiam*). As relevant, the Court of Appeals set out to determine the level of proof required to award restitution to victims in cases like this. It held that § 2259 did not limit restitution to losses proximately caused by the defendant, and each defendant who possessed the victim's images

should be made liable for the victim's entire losses from the trade in her images, even though other offenders played a role in causing those losses. *In re Amy Unknown*, 701 F. 3d 749, 772–774 (2012) (en banc).

Paroline sought review here. Certiorari was granted to resolve a conflict in the Courts of Appeals over the proper causation inquiry for purposes of determining the entitlement to and amount of restitution under § 2259. 570 U. S. 931 (2013). For the reasons set forth, the decision of the Court of Appeals is vacated.

II

Title 18 U. S. C. § 2259(a) provides that a district court "shall order restitution for any offense" under Chapter 110 of Title 18, which covers a number of offenses involving the sexual exploitation of children and child pornography in particular. Paroline was convicted of knowingly possessing child pornography under § 2252, a Chapter 110 offense.

Section 2259 states a broad restitutionary purpose: It requires district courts to order defendants "to pay the victim . . . the full amount of the victim's losses as determined by the court," § 2259(b)(1), and expressly states that "[t]he issuance of a restitution order under this section is mandatory," § 2259(b)(4)(A). Section 2259(b)(2) provides that "[a]n order of restitution under this section shall be issued and enforced in accordance with section 3664," which in turn provides in relevant part that "[t]he burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government," § 3664(e).

The threshold question the Court faces is whether § 2259 limits restitution to those losses proximately caused by the defendant's offense conduct. The Fifth Circuit held that it does not, contrary to the holdings of other Courts of Appeals to have addressed the question. Compare, *e. g.*, 701 F. 3d, at 752 (no general proximate-cause requirement applies under § 2259), with *United States* v. *Rogers*, 714 F. 3d 82, 89 (CA1

2013) (general proximate-cause requirement applies under § 2259); *United States* v. *Benoit*, 713 F. 3d 1, 20 (CA10 2013) (same); *United States* v. *Fast*, 709 F. 3d 712, 721–722 (CA8 2013) (same); *United States* v. *Laraneta*, 700 F. 3d 983, 989–990 (CA7 2012) (same); *United States* v. *Burgess*, 684 F. 3d 445, 456–457 (CA4 2012) (same); *United States* v. *Evers*, 669 F. 3d 645, 659 (CA6 2012) (same); *United States* v. *Aumais*, 656 F. 3d 147, 153 (CA2 2011) (same); *United States* v. *Kennedy*, 643 F. 3d 1251, 1261 (CA9 2011) (same); *United States* v. *Monzel*, 641 F. 3d 528, 535 (CADC 2011) (same); *United States* v. *McDaniel*, 631 F. 3d 1204, 1208–1209 (CA11 2011) (same).

As a general matter, to say one event proximately caused another is a way of making two separate but related assertions. First, it means the former event caused the latter. This is known as actual cause or cause in fact. The concept of actual cause "is not a metaphysical one but an ordinary, matter-of-fact inquiry into the existence . . . of a causal relation as laypeople would view it." 4 F. Harper, F. James, & O. Gray, Torts § 20.2, p. 100 (3d ed. 2007).

Every event has many causes, however, see *ibid.*, and only some of them are proximate, as the law uses that term. So to say that one event was a proximate cause of another means that it was not just any cause, but one with a sufficient connection to the result. The idea of proximate cause, as distinct from actual cause or cause in fact, defies easy summary. It is "a flexible concept," *Bridge* v. *Phoenix Bond & Indemnity Co.*, 553 U. S. 639, 654 (2008), that generally "refers to the basic requirement that . . . there must be 'some direct relation between the injury asserted and the injurious conduct alleged,'" *CSX Transp., Inc.* v. *McBride*, 564 U. S. 685, 707 (2011) (ROBERTS, C. J., dissenting) (quoting *Holmes* v. *Securities Investor Protection Corporation*, 503 U. S. 258, 268 (1992)). The concept of proximate causation is applicable in both criminal and tort law, and the analysis is parallel in many instances. 1 W. LaFave, Substantive Criminal Law

§ 6.4(c), p. 471 (2d ed. 2003) (hereinafter LaFave). Proximate cause is often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct. See, *e. g.*, *ibid.*; 1 Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 29, p. 493 (2005) (hereinafter Restatement). A requirement of proximate cause thus serves, *inter alia*, to preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity. *Exxon Co., U. S. A.* v. *Sofec, Inc.*, 517 U. S. 830, 838–839 (1996).

All parties agree § 2259 imposes some causation requirement. The statute defines a victim as "the individual harmed as a result of a commission of a crime under this chapter." § 2259(c). The words "as a result of" plainly suggest causation. See *Pacific Operators Offshore, LLP* v. *Valladolid*, 565 U. S. 207, 221 (2012); see also *Burrage* v. *United States*, 571 U. S. 204, 210 (2014). And a straightforward reading of § 2259(c) indicates that the term "a crime" refers to the offense of conviction. Cf. *Hughey* v. *United States*, 495 U. S. 411, 416 (1990). So if the defendant's offense conduct did not cause harm to an individual, that individual is by definition not a "victim" entitled to restitution under § 2259.

As noted above, § 2259 requires a court to order restitution for "the full amount of the victim's losses," § 2259(b)(1), which the statute defines to include "any costs incurred by the victim" for six enumerated categories of expense, § 2259(b)(3). The reference to "costs incurred by the victim" is most naturally understood as costs stemming from the source that qualifies an individual as a "victim" in the first place—namely, ones arising "as a result of" the offense. Thus, as is typically the case with criminal restitution, § 2259 is intended to compensate victims for losses caused by the offense of conviction. See *id.*, at 416. This is an important point, for it means the central concern of the causal inquiry must be the conduct of the particular defendant from whom restitution is sought.

But there is a further question whether restitution under § 2259 is limited to losses proximately caused by the offense. As noted, a requirement of proximate cause is more restrictive than a requirement of factual cause alone. Even if § 2259 made no express reference to proximate causation, the Court might well hold that a showing of proximate cause was required. Proximate cause is a standard aspect of causation in criminal law and the law of torts. See 1 LaFave § 6.4(a), at 464–466; W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 41, p. 263 (5th ed. 1984) (hereinafter Prosser and Keeton). Given proximate cause's traditional role in causation analysis, this Court has more than once found a proximate-cause requirement built into a statute that did not expressly impose one. See *Holmes*, *supra*, at 265–268; *Associated Gen. Contractors of Cal., Inc.* v. *Carpenters*, 459 U. S. 519, 529–536 (1983); see also *CSX Transp., Inc.*, *supra*, at 708 (ROBERTS, C. J., dissenting) ("We have applied the standard requirement of proximate cause to actions under federal statutes where the text did not expressly provide for it"); *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, *ante*, at 132.

Here, however, the interpretive task is easier, for the requirement of proximate cause is in the statute's text. The statute enumerates six categories of covered losses. § 2259(b)(3). These include certain medical services, § 2259(b)(3)(A); physical and occupational therapy, § 2259(b)(3)(B); transportation, temporary housing, and child care, § 2259(b)(3)(C); lost income, § 2259(b)(3)(D); attorney's fees and costs, § 2259(b)(3)(E); and a final catchall category for "any other losses suffered by the victim as a proximate result of the offense," § 2259(b)(3)(F).

The victim argues that because the "proximate result" language appears only in the final, catchall category of losses set forth at § 2259(b)(3)(F), the statute has no proximate-cause requirement for losses falling within the prior enumerated categories. She justifies this reading of § 2259(b) in part on

the grammatical rule of the last antecedent, "according to which a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Barnhart* v. *Thomas*, 540 U. S. 20, 26 (2003). But that rule is "not an absolute and can assuredly be overcome by other indicia of meaning." *Ibid.* The Court has not applied it in a mechanical way where it would require accepting "unlikely premises." *United States* v. *Hayes*, 555 U. S. 415, 425 (2009).

Other canons of statutory construction, moreover, work against the reading the victim suggests. "When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Porto Rico Railway, Light & Power Co.* v. *Mor*, 253 U. S. 345, 348 (1920). Furthermore, "[i]t is . . . a familiar canon of statutory construction that [catchall] clauses are to be read as bringing within a statute categories similar in type to those specifically enumerated." *Federal Maritime Comm'n* v. *Seatrain Lines, Inc.*, 411 U. S. 726, 734 (1973). Here, § 2259(b)(3)(F) defines a broad, final category of "other losses suffered . . . as a proximate result of the offense." That category is most naturally understood as a summary of the type of losses covered—*i. e.*, losses suffered as a proximate result of the offense.

The victim says that if Congress had wanted to limit the losses recoverable under § 2259 to those proximately caused by the offense, it could have written the statute the same way it wrote § 2327, which provides for restitution to victims of telemarketing fraud. Section 2327, which is written and structured much like § 2259, simply defines the term "full amount of the victim's losses" as "all losses suffered by the victim as a proximate result of the offense." § 2327(b)(3). In essence the victim argues that the first five categories of losses enumerated in § 2259(b)(3) would be superfluous if all were governed by a proximate-cause requirement. That,

however, is unpersuasive. The first five categories provide guidance to district courts as to the specific types of losses Congress thought would often be the proximate result of a Chapter 110 offense and could as a general matter be included in an award of restitution.

Reading the statute to impose a general proximate-cause limitation accords with common sense. As noted above, proximate cause forecloses liability in situations where the causal link between conduct and result is so attenuated that the so-called consequence is more akin to mere fortuity. For example, suppose the traumatized victim of a Chapter 110 offender needed therapy and had a car accident on the way to her therapist's office. The resulting medical costs, in a literal sense, would be a factual result of the offense. But it would be strange indeed to make a defendant pay restitution for these costs. The victim herself concedes Congress did not intend costs like these to be recoverable under § 2259. Brief for Respondent Amy Unknown 45 (hereinafter Brief for Respondent Amy). But she claims that it is unnecessary to "read . . . into" § 2259 a proximate-cause limitation in order to exclude costs of that sort. *Id.*, at 45. She says the statute "contextually and inferentially require[s] a nexus for why" the losses were sustained—*i. e.*, a sufficient connection to child pornography. *Id.*, at 46.

The victim may be right that the concept of proximate cause is not necessary to impose sensible limitations on restitution for remote consequences. But one very effective way, and perhaps the most obvious way, of excluding costs like those arising from the hypothetical car accident described above would be to incorporate a proximate-cause limitation into the statute. Congress did so, and for reasons given above the proximate-cause requirement applies to all the losses described in § 2259. Restitution is therefore proper under § 2259 only to the extent the defendant's offense proximately caused a victim's losses.

III

There remains the difficult question of how to apply the statute's causation requirements in this case. The problem stems from the somewhat atypical causal process underlying the losses the victim claims here. It is perhaps simple enough for the victim to prove the aggregate losses, including the costs of psychiatric treatment and lost income, that stem from the ongoing traffic in her images as a whole. (Complications may arise in disaggregating losses sustained as a result of the initial physical abuse, but those questions may be set aside for present purposes.) These losses may be called, for convenience's sake, a victim's "general losses." The difficulty is in determining the "full amount" of those general losses, if any, that are the proximate result of the offense conduct of a particular defendant who is one of thousands who have possessed, and will in the future possess, the victim's images but who has no other connection to the victim.

In determining the amount of general losses a defendant must pay under § 2259 the ultimate question is how much of these losses were the "proximate result," § 2259(b)(3)(F), of that individual's offense. But the most difficult aspect of this inquiry concerns the threshold requirement of causation in fact. To be sure, the requirement of proximate causation, as distinct from mere causation in fact, would prevent holding any possessor liable for losses caused in only a remote sense. But the victim's costs of treatment and lost income resulting from the trauma of knowing that images of her abuse are being viewed over and over are direct and foreseeable results of child-pornography crimes, including possession, assuming the prerequisite of factual causation is satisfied. The primary problem, then, is the proper standard of causation in fact.

A

The traditional way to prove that one event was a factual cause of another is to show that the latter would not have

occurred "but for" the former. This approach is a familiar part of our legal tradition, see 1 LaFave § 6.4(b), at 467–468; Prosser and Keeton § 41, at 266, and no party disputes that a showing of but-for causation would satisfy § 2259's factual-causation requirement. Sometimes that showing could be made with little difficulty. For example, but-for causation could be shown with ease in many cases involving producers of child pornography, see § 2251(a); parents who permit their children to be used for child-pornography production, see § 2251(b); individuals who sell children for such purposes, see § 2251A; or the initial distributor of the pornographic images of a child, see § 2252.

In this case, however, a showing of but-for causation cannot be made. The District Court found that the Government failed to prove specific losses caused by Paroline in a but-for sense and recognized that it would be "incredibly difficult" to do so in a case like this. 672 F. Supp. 2d, at 791–793. That finding has a solid foundation in the record, and it is all but unchallenged in this Court. See Brief for Respondent Amy 63; Brief for United States 19, 25. But see Supp. Brief for United States 8–10. From the victim's perspective, Paroline was just one of thousands of anonymous possessors. To be sure, the victim's precise degree of trauma likely bears a relation to the total number of offenders; it would probably be less if only 10 rather than thousands had seen her images. But it is not possible to prove that her losses would be less (and by how much) but for one possessor's individual role in the large, loosely connected network through which her images circulate. See Sentencing Comm'n Report, at ii, xx. Even without Paroline's offense, thousands would have viewed and would in the future view the victim's images, so it cannot be shown that her trauma and attendant losses would have been any different but for Paroline's offense. That is especially so given the parties' stipulation that the victim had no knowledge of Paroline. See *supra*, at 442.

Recognizing that losses cannot be substantiated under a but-for approach where the defendant is an anonymous possessor of images in wide circulation on the Internet, the victim and the Government urge the Court to read § 2259 to require a less restrictive causation standard, at least in this and similar child-pornography cases. They are correct to note that courts have departed from the but-for standard where circumstances warrant, especially where the combined conduct of multiple wrongdoers produces a bad outcome. See *Burrage*, 571 U. S., at 214 (acknowledging "the undoubted reality that courts have not *always* required strict but-for causality, even where criminal liability is at issue").

The victim and the Government look to the literature on criminal and tort law for alternatives to the but-for test. The Court has noted that the "most common" exception to the but-for causation requirement is applied where "multiple sufficient causes independently . . . produce a result," *ibid.*; see also 1 LaFave § 6.4(b), at 467–469; 1 Restatement § 27, at 376. This exception is an ill fit here, as all parties seem to recognize. Paroline's possession of two images of the victim was surely not sufficient to cause her entire losses from the ongoing trade in her images. Nor is there a practical way to isolate some subset of the victim's general losses that Paroline's conduct alone would have been sufficient to cause. See Brief for United States 26, n. 11.

Understandably, the victim and the Government thus concentrate on a handful of less demanding causation tests endorsed by authorities on tort law. One prominent treatise suggests that "[w]hen the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them, the conduct of each is a cause in fact of the event." Prosser and Keeton § 41, at 268. The Restatement adopts a similar exception for "[m]ultiple sufficient causal sets." 1

Restatement §27, Comment *f*, at 380–381. This is where a wrongdoer's conduct, though alone "insufficient . . . to cause the plaintiff's harm," is, "when combined with conduct by other persons," "more than sufficient to cause the harm." *Ibid.* The Restatement offers as an example a case in which three people independently but simultaneously lean on a car, creating enough combined force to roll it off a cliff. *Ibid.* Even if each exerted too little force to move the car, and the force exerted by any two was sufficient to move the car, each individual is a factual cause of the car's destruction. *Ibid.* The Government argues that these authorities "provide ample support for an 'aggregate' causation theory," Brief for United States 18, and that such a theory would best effectuate congressional intent in cases like this, *id.*, at 18–19. The victim says much the same. Brief for Respondent Amy 42–43.

These alternative causal tests are a kind of legal fiction or construct. If the conduct of a wrongdoer is neither necessary nor sufficient to produce an outcome, that conduct cannot in a strict sense be said to have caused the outcome. Nonetheless, tort law teaches that alternative and less demanding causal standards are necessary in certain circumstances to vindicate the law's purposes. It would be anomalous to turn away a person harmed by the combined acts of many wrongdoers simply because none of those wrongdoers alone caused the harm. And it would be nonsensical to adopt a rule whereby individuals hurt by the combined wrongful acts of many (and thus in many instances hurt more badly than otherwise) would have no redress, whereas individuals hurt by the acts of one person alone would have a remedy. Those are the principles that underlie the various aggregate causation tests the victim and the Government cite, and they are sound principles.

These alternative causal standards, though salutary when applied in a judicious manner, also can be taken too far. That is illustrated by the victim's suggested approach to

applying § 2259 in cases like this. The victim says that under the strict logic of these alternative causal tests, each possessor of her images is a part of a causal set sufficient to produce her ongoing trauma, so each possessor should be treated as a cause in fact of all the trauma and all the attendant losses incurred as a result of the entire ongoing traffic in her images. *Id.*, at 43. And she argues that if this premise is accepted the further requirement of proximate causation poses no barrier, for she seeks restitution only for those losses that are the direct and foreseeable result of child-pornography offenses. Because the statute requires restitution for the "full amount of the victim's losses," including "any . . . losses suffered by the victim as a proximate result of the offense," § 2259(b), she argues that restitution is required for the entire aggregately caused amount.

The striking outcome of this reasoning—that each possessor of the victim's images would bear the consequences of the acts of the many thousands who possessed those images—illustrates why the Court has been reluctant to adopt aggregate causation logic in an incautious manner, especially in interpreting criminal statutes where there is no language expressly suggesting Congress intended that approach. See *Burrage*, *supra*, at 216. Even if one were to refer just to the law of torts, it would be a major step to say there is a sufficient causal link between the injury and the wrong so that all the victim's general losses were "suffered . . . as a proximate result of [Paroline's] offense," § 2259(b)(3)(F).

And there is special reason not to do so in the context of criminal restitution. Aside from the manifest procedural differences between criminal sentencing and civil tort lawsuits, restitution serves purposes that differ from (though they overlap with) the purposes of tort law. See, *e. g.*, *Kelly* v. *Robinson*, 479 U. S. 36, 49, n. 10 (1986) (noting that restitution is, *inter alia*, "an effective rehabilitative penalty"). Legal fictions developed in the law of torts can-

not be imported into criminal restitution and applied to their utmost limits without due consideration of these differences.

Contrary to the victim's suggestion, this is not akin to a case in which a "gang of ruffians" collectively beats a person, or in which a woman is "gang raped by five men on one night or by five men on five sequential nights." Brief for Respondent Amy 55. First, this case does not involve a set of wrongdoers acting in concert, see Prosser and Keeton § 52, at 346 (discussing full liability for a joint enterprise); for Paroline had no contact with the overwhelming majority of the offenders for whose actions the victim would hold him accountable. Second, adopting the victim's approach would make an individual possessor liable for the combined consequences of the acts of not just 2, 5, or even 100 independently acting offenders; but instead, a number that may reach into the tens of thousands. See Brief for Respondent Amy 65.

It is unclear whether it could ever be sensible to embrace the fiction that this victim's entire losses were the "proximate result," § 2259(b)(3)(F), of a single possessor's offense. Paroline's contribution to the causal process underlying the victim's losses was very minor, both compared to the combined acts of all other relevant offenders, and in comparison to the contributions of other individual offenders, particularly distributors (who may have caused hundreds or thousands of further viewings) and the initial producer of the child pornography. See 1 Restatement § 36, and Comment *a*, at 597–598 (recognizing a rule excluding from liability individuals whose contribution to a causal set that factually caused the outcome "pales by comparison to the other contributions to that causal set"). But see *id.*, § 27, Reporters' Note, Comment *i*, at 395 ("The conclusion that none of" two dozen small contributions to a sufficient causal set was a cause of the outcome "is obviously untenable"). Congress gave no indication that it intended its statute to be applied in the expansive manner the victim suggests, a manner

contrary to the bedrock principle that restitution should reflect the consequences of the defendant's own conduct, see *Hughey*, 495 U. S., at 416, not the conduct of thousands of geographically and temporally distant offenders acting independently, and with whom the defendant had no contact.

The victim argues that holding each possessor liable for her entire losses would be fair and practical, in part because offenders may seek contribution from one another. Brief for Respondent Amy 58. If that were so, it might mitigate to some degree the concerns her approach presents. But there is scant authority for her contention that offenders convicted in different proceedings in different jurisdictions and ordered to pay restitution to the same victim may seek contribution from one another. There is no general federal right to contribution. *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U. S. 77, 96–97 (1981). Nor does the victim point to any clear statutory basis for a right to contribution in these circumstances. She thus suggests that this Court should imply a cause of action. Brief for Respondent Amy 58. But that is a rare step in any circumstance. See, *e. g.*, *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U. S. 148, 164–165 (2008); *Musick, Peeler & Garrett* v. *Employers Ins. of Wausau*, 508 U. S. 286, 291 (1993) (noting that this Court's precedents "teach that the creation of new rights ought to be left to legislatures, not courts"). And it would do little to address the practical problems offenders would face in seeking contribution in any event, see Brief for United States 45–46, problems with which the victim fails to grapple.

The reality is that the victim's suggested approach would amount to holding each possessor of her images liable for the conduct of thousands of other independently acting possessors and distributors, with no legal or practical avenue for seeking contribution. That approach is so severe it might raise questions under the Excessive Fines Clause of the Eighth Amendment. To be sure, this Court has said that

"the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government." *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257, 268 (1989). But while restitution under § 2259 is paid to a victim, it is imposed by the Government "at the culmination of a criminal proceeding and requires conviction of an underlying" crime, *United States* v. *Bajakajian*, 524 U. S. 321, 328 (1998). Thus, despite the differences between restitution and a traditional fine, restitution still implicates "the prosecutorial powers of government," *Browning-Ferris*, *supra*, at 275. The primary goal of restitution is remedial or compensatory, cf. *Bajakajian*, *supra*, at 329, but it also serves punitive purposes, see *Pasquantino* v. *United States*, 544 U. S. 349, 365 (2005) ("The purpose of awarding restitution" under 18 U. S. C. § 3663A "is . . . to mete out appropriate criminal punishment"); *Kelly*, 479 U. S., at 49, n. 10. That may be "sufficient to bring [it] within the purview of the Excessive Fines Clause," *Bajakajian*, *supra*, at 329, n. 4. And there is a real question whether holding a single possessor liable for millions of dollars in losses collectively caused by thousands of independent actors might be excessive and disproportionate in these circumstances. These concerns offer further reason not to interpret the statute the way the victim suggests.

B

The contention that the victim's entire losses from the ongoing trade in her images were "suffered . . . as a proximate result" of Paroline's offense for purposes of § 2259 must be rejected. But that does not mean the broader principles underlying the aggregate causation theories the Government and the victim cite are irrelevant to determining the proper outcome in cases like this. The cause of the victim's general losses is the trade in her images. And Paroline is a part of that cause, for he is one of those who viewed her images. While it is not possible to identify a discrete, readily defin-

able incremental loss he caused, it is indisputable that he was a part of the overall phenomenon that caused her general losses. Just as it undermines the purposes of tort law to turn away plaintiffs harmed by several wrongdoers, it would undermine the remedial and penological purposes of § 2259 to turn away victims in cases like this.

With respect to the statute's remedial purpose, there can be no question that it would produce anomalous results to say that no restitution is appropriate in these circumstances. It is common ground that the victim suffers continuing and grievous harm as a result of her knowledge that a large, indeterminate number of individuals have viewed and will in the future view images of the sexual abuse she endured. Brief for Petitioner 50; Brief for Respondent Wright 4; Brief for United States 23; Brief for Respondent Amy 60. Harms of this sort are a major reason why child pornography is outlawed. See *Ferber*, 458 U. S., at 759. The unlawful conduct of everyone who reproduces, distributes, or possesses the images of the victim's abuse—including Paroline—plays a part in sustaining and aggravating this tragedy. And there can be no doubt Congress wanted victims to receive restitution for harms like this. The law makes restitution "mandatory," § 2259(b)(4), for child-pornography offenses under Chapter 110, language that indicates Congress' clear intent that victims of child pornography be compensated by the perpetrators who contributed to their anguish. It would undermine this intent to apply the statute in a way that would render it a dead letter in child-pornography prosecutions of this type.

Denying restitution in cases like this would also be at odds with the penological purposes of § 2259's mandatory restitution scheme. In a sense, every viewing of child pornography is a repetition of the victim's abuse. One reason to make restitution mandatory for crimes like this is to impress upon offenders that their conduct produces concrete and devastating harms for real, identifiable victims. See *Kelly*,

supra, at 49, n. 10 ("Restitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused"). It would be inconsistent with this purpose to apply the statute in a way that leaves offenders with the mistaken impression that child-pornography possession (at least where the images are in wide circulation) is a victimless crime.

If the statute by its terms required a showing of strict but-for causation, these purposes would be beside the point. But the text of the statute is not so limited. Although Congress limited restitution to losses that are the "proximate result" of the defendant's offense, such unelaborated causal language by no means requires but-for causation by its terms. See *Burrage*, 571 U. S., at 212 (courts need not read phrases like "results from" to require but-for causality where there is "textual or contextual" reason to conclude otherwise). As the authorities the Government and the victim cite show, the availability of alternative causal standards where circumstances warrant is, no less than the but-for test itself as a default, part of the background legal tradition against which Congress has legislated, cf. *id.*, at 214. It would be unacceptable to adopt a causal standard so strict that it would undermine congressional intent where neither the plain text of the statute nor legal tradition demands such an approach.

In this special context, where it can be shown both that a defendant possessed a victim's images and that a victim has outstanding losses caused by the continuing traffic in those images but where it is impossible to trace a particular amount of those losses to the individual defendant by recourse to a more traditional causal inquiry, a court applying § 2259 should order restitution in an amount that comports with the defendant's relative role in the causal process that underlies the victim's general losses. The amount would not be severe in a case like this, given the nature of the causal connection between the conduct of a possessor like Paroline

and the entirety of the victim's general losses from the trade in her images, which are the product of the acts of thousands of offenders. It would not, however, be a token or nominal amount. The required restitution would be a reasonable and circumscribed award imposed in recognition of the indisputable role of the offender in the causal process underlying the victim's losses and suited to the relative size of that causal role. This would serve the twin goals of helping the victim achieve eventual restitution for all her child-pornography losses and impressing upon offenders the fact that child-pornography crimes, even simple possession, affect real victims.

There remains the question of how district courts should go about determining the proper amount of restitution. At a general level of abstraction, a court must assess as best it can from available evidence the significance of the individual defendant's conduct in light of the broader causal process that produced the victim's losses. This cannot be a precise mathematical inquiry and involves the use of discretion and sound judgment. But that is neither unusual nor novel, either in the wider context of criminal sentencing or in the more specific domain of restitution. It is well recognized that district courts by necessity "exercise . . . discretion in fashioning a restitution order." § 3664(a). Indeed, a district court is expressly authorized to conduct a similar inquiry where multiple defendants who have "contributed to the loss of a victim" appear before it. § 3664(h). In that case it may "apportion liability among the defendants to reflect the level of contribution to the victim's loss . . . of each defendant." *Ibid.* Assessing an individual defendant's role in the causal process behind a child-pornography victim's losses does not involve a substantially different or greater exercise of discretion.

There are a variety of factors district courts might consider in determining a proper amount of restitution, and it is neither necessary nor appropriate to prescribe a precise

algorithm for determining the proper restitution amount at this point in the law's development. Doing so would unduly constrain the decisionmakers closest to the facts of any given case. But district courts might, as a starting point, determine the amount of the victim's losses caused by the continuing traffic in the victim's images (excluding, of course, any remote losses like the hypothetical car accident described above, see *supra*, at 448), then set an award of restitution in consideration of factors that bear on the relative causal significance of the defendant's conduct in producing those losses. These could include the number of past criminal defendants found to have contributed to the victim's general losses; reasonable predictions of the number of future offenders likely to be caught and convicted for crimes contributing to the victim's general losses; any available and reasonably reliable estimate of the broader number of offenders involved (most of whom will, of course, never be caught or convicted); whether the defendant reproduced or distributed images of the victim; whether the defendant had any connection to the initial production of the images; how many images of the victim the defendant possessed; and other facts relevant to the defendant's relative causal role. See Brief for United States 49.

These factors need not be converted into a rigid formula, especially if doing so would result in trivial restitution orders. They should rather serve as rough guideposts for determining an amount that fits the offense. The resulting amount fixed by the court would be deemed the amount of the victim's general losses that were the "proximate result of the offense" for purposes of § 2259, and thus the "full amount" of such losses that should be awarded. The court could then set an appropriate payment schedule in consideration of the defendant's financial means. See § 3664(f)(2).

The victim says this approach is untenable because her losses are "indivisible" in the sense that term is used by tort law, *i. e.*, that there is no "reasonable basis for the factfinder

to determine . . . the amount of damages separately caused by" any one offender's conduct. Restatement (Third) of Torts: Apportionment of Liability § 26, p. 320 (1999). The premise of her argument is that because it is in a sense a fiction to say Paroline caused $1,000 in losses, $10,000 in losses, or any other lesser amount, it is necessary to embrace the much greater fiction that Paroline caused all the victim's losses from the ongoing trade in her images. But that is a non sequitur. The Court is required to define a causal standard that effects the statute's purposes, not to apply tort-law concepts in a mechanical way in the criminal restitution context. Even if the victim's losses are fully "indivisible" in this sense (which is debatable), treating Paroline as a proximate cause of all the victim's losses—especially in the absence of a workable system of contribution—stretches the fiction of aggregate causation to its breaking point. Treating him as a cause of a smaller amount of the victim's general losses, taking account of his role in the overall causal process behind those losses, effects the statute's purposes; avoids the nonsensical result of turning away victims emptyhanded; and does so without sacrificing the need for proportionality in sentencing.

The victim also argues that this approach would consign her to "piecemeal" restitution and leave her to face "decades of litigation that might never lead to full recovery," Brief for Respondent Amy 57, which "would convert Congress's promise to child pornography victims into an empty gesture," *id.*, at 66. But Congress has not promised victims full and swift restitution at all costs. To be sure, the statute states a strong restitutionary purpose; but that purpose cannot be twisted into a license to hold a defendant liable for an amount drastically out of proportion to his own individual causal relation to the victim's losses.

Furthermore, an approach of this sort better effects the need to impress upon defendants that their acts are not irrelevant or victimless. As the Government observes, Reply

Brief for United States 18, it would undermine this important purpose of criminal restitution if the victim simply collected her full losses from a handful of wealthy possessors and left the remainder to pay nothing because she had already fully collected. Of course the victim should someday collect restitution for all her child-pornography losses, but it makes sense to spread payment among a larger number of offenders in amounts more closely in proportion to their respective causal roles and their own circumstances so that more are made aware, through the concrete mechanism of restitution, of the impact of child-pornography possession on victims.

C

This approach is not without its difficulties. Restitution orders should represent "an application of law," not "a decisionmaker's caprice," *Philip Morris USA* v. *Williams*, 549 U. S. 346, 352 (2007) (internal quotation marks omitted), and the approach articulated above involves discretion and estimation. But courts can only do their best to apply the statute as written in a workable manner, faithful to the competing principles at stake: that victims should be compensated and that defendants should be held to account for the impact of their conduct on those victims, but also that defendants should be made liable for the consequences and gravity of their own conduct, not the conduct of others. District courts routinely exercise wide discretion both in sentencing as a general matter and more specifically in fashioning restitution orders. There is no reason to believe they cannot apply the causal standard defined above in a reasonable manner without further detailed guidance at this stage in the law's elaboration. Based on its experience in prior cases of this kind, the Government—which, as noted above, see *supra*, at 443, bears the burden of proving the amount of the victim's losses, § 3664(e)—could also inform district courts of restitution sought and ordered in other cases.

* * *

The Fifth Circuit's interpretation of the requirements of § 2259 was incorrect. The District Court likewise erred in requiring a strict showing of but-for causation. The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

I certainly agree with the Court that Amy deserves restitution, and that Congress—by making restitution mandatory for victims of child pornography—meant that she have it. Unfortunately, the restitution statute that Congress wrote for child pornography offenses makes it impossible to award that relief to Amy in this case. Instead of tailoring the statute to the unique harms caused by child pornography, Congress borrowed a generic restitution standard that makes restitution contingent on the Government's ability to prove, "by the preponderance of the evidence," "the amount of the loss sustained by a victim as a result of" the defendant's crime. 18 U. S. C. § 3664(e). When it comes to Paroline's crime—possession of two of Amy's images—it is not possible to do anything more than pick an arbitrary number for that "amount." And arbitrary is not good enough for the criminal law.

The Court attempts to design a more coherent restitution system, focusing on "the defendant's relative role in the causal process that underlies the victim's general losses." *Ante*, at 458. But this inquiry, sensible as it may be, is not the one Congress adopted. After undertaking the inquiry that Congress *did* require, the District Court in this case concluded that the Government could not meet its statutory burden of proof. Before this Court, the Government all but concedes the point. See Brief for United States 25 ("it is

practically impossible to know whether [Amy's] losses would have been slightly lower if one were to subtract one defendant, or ten, or fifty"). I must regretfully dissent.

I

Section 2259(a) of Title 18 directs that a district court "shall order restitution for any offense under this chapter," which includes Paroline's offense of knowingly possessing child pornography in violation of section 2252. In case Congress's purpose were not clear from its use of "shall," section 2259(b)(4) then emphasizes that "[t]he issuance of a restitution order under this section is mandatory."

Section 2259(b)(1) spells out who may receive restitution, and for what. It provides that "[t]he order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim's losses as determined by the court pursuant to [section 2259(b)(2)]." The term " 'victim' " is defined as "the individual harmed as a result of a commission of a crime under this chapter." § 2259(c). And the term " 'full amount of the victim's losses' includes any costs incurred by the victim for . . . medical services relating to physical, psychiatric, or psychological care"; "lost income"; and "any other losses suffered by the victim as a proximate result of the offense." §§ 2259(b)(3)(A), (D), (F).

Section 2259(b)(2) then describes *how* the district court must calculate restitution. It provides that "[a]n order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A." Unlike section 2259, sections 3663A and 3664 were not designed specifically for child pornography offenses; they are part of the Mandatory Victims Restitution Act of 1996 and supply general restitution guidelines for many federal offenses. Most relevant here, section 3664(e) provides that "[a]ny dispute as to the proper amount or type of restitution shall be resolved by the court by the

preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government."

A

As the Court explains, the statute allows restitution only for those losses that were the "proximate result" of Paroline's offense. See *ante*, at 446 (citing § 2259(b)(3)). Contrary to Paroline's argument, the proximate cause requirement is easily satisfied in this case. It was readily foreseeable that Paroline's crime could cause Amy to suffer precisely the types of losses that she claims: future lost wages, costs for treatment and counseling, and attorney's fees and costs, all of which are eligible losses enumerated in section 2259(b)(3). There is a "direct relation" between those types of injuries and Paroline's "injurious conduct." *Holmes* v. *Securities Investor Protection Corporation*, 503 U. S. 258, 268 (1992). I therefore agree with the Court that if Paroline *actually* caused those losses, he also *proximately* caused them. See *ante*, at 449.

The more pressing problem is the statutory requirement of actual causation. See *Burrage* v. *United States*, 571 U. S. 204, 210 (2014) (the ordinary meaning of the term "results from" requires proof that the defendant's conduct was the "actual cause" of the injury). Here too the Court correctly holds that the statute precludes the restitution award sought by Amy and preferred by JUSTICE SOTOMAYOR's dissent, which would hold Paroline responsible for Amy's *entire* loss. See *ante*, at 453–456; contra, *post*, at 473. Congress has authorized restitution only for "the amount of the loss sustained by a victim as a result of the offense." § 3664(e). We have interpreted virtually identical language, in the predecessor statute to section 3664, to require "restitution to be tied to the loss caused *by the offense of conviction*." *Hughey* v. *United States*, 495 U. S. 411, 418 (1990) (citing 18 U. S. C. § 3580(a) (1982 ed.); emphasis added). That is, resti-

tution may not be imposed for losses caused by any other crime or any other defendant.[1]

JUSTICE SOTOMAYOR's dissent dismisses section 3664(e), which is Congress's direct answer to the very question presented by this case, namely, how to resolve a "dispute as to the proper amount . . . of restitution." JUSTICE SOTOMAYOR thinks the answer to that question begins and ends with the statement in section 2259(b)(1) that the defendant must pay "the full amount of the victim's losses." See *post*, at 472, 473, 480, 485. But losses from what? The answer is found in the rest of that sentence: "the full amount of the victim's losses *as determined by the court pursuant to paragraph 2*." § 2259(b)(1) (emphasis added). "[P]aragraph 2," of course, instructs that "[a]n order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A." § 2259(b)(2). And it is section 3664 that provides the statute's burden of proof and specifies that the defendant pay for those losses sustained "as a result of *the* offense"—that is, his offense. § 3664(e).

The offense of conviction here was Paroline's possession of two of Amy's images. No one suggests Paroline's crime actually caused Amy to suffer millions of dollars in losses, so the statute does not allow a court to award millions of dollars in restitution. Determining what amount the statute does allow—the amount of Amy's losses that Paroline's offense caused—is the real difficulty of this case. See *ante*, at 449.

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[1] In a case "where the loss is the product of the combined conduct of multiple offenders," *post*, at 477 (SOTOMAYOR, J., dissenting), section 3664(h) provides that a court may "make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant." As the Court notes, however, this provision applies only when multiple defendants are sentenced in the same proceeding, or charged under the same indictment. *Ante*, at 459; see also Brief for United States 43.

B

Regrettably, Congress provided no mechanism for answering that question. If actual causation is to be determined using the traditional, but-for standard, then the Court acknowledges that "a showing of but-for causation cannot be made" in this case. *Ante*, at 450. Amy would have incurred all of her lost wages and counseling costs even if Paroline had not viewed her images. The Government and Amy respond by offering an "aggregate" causation theory borrowed from tort law. But even if we apply this "legal fiction," *ante*, at 452, and assume, for purposes of argument, that Paroline's crime contributed something to Amy's total losses, that suffices only to establish causation in fact. It is not sufficient to award restitution under the statute, which requires a further determination of the *amount* that Paroline must pay. He must pay "the full amount of the victim's losses," yes, but "as determined by" section 3664—that is, the full amount of the losses *he* caused. The Government has the burden to establish *that* amount, and no one has suggested a plausible means for the Government to carry that burden.[2]

The problem stems from the nature of Amy's injury. As explained, section 3664 is a general statute designed to provide restitution for more common crimes, such as fraud and assault. The section 3664(e) standard will work just fine for most crime victims, because it will usually not be difficult to identify the harm caused by the defendant's offense. The dispute will usually just be over the amount of the victim's loss—for example, the value of lost assets or the cost of a night in the hospital.

Amy has a qualitatively different injury. Her loss, while undoubtedly genuine, is a result of the collective actions of a

[2] The correct amount is not the one favored by JUSTICE SOTOMAYOR's dissent, which would hold Paroline liable for losses that he certainly *did not* cause, without any right to seek contribution from others who harmed Amy.

huge number of people—beginning with her uncle who abused her and put her images on the Internet, to the distributors who make those images more widely available, to the possessors such as Paroline who view her images. The harm to Amy was produced over time, gradually, by tens of thousands of persons acting independently from one another.[3] She suffers in particular from her knowledge that her images are being viewed online by an unknown number of people, and from her fear that any person she meets might recognize her from having witnessed her abuse. App. 59–66. But Amy does not know who Paroline is. *Id.*, at 295, n. 11. Nothing in the record comes close to establishing that Amy would have suffered less if Paroline had not possessed her images, let alone how much less. See Brief for United States 25. Amy's injury is indivisible, which means that Paroline's particular share of her losses is unknowable. And yet it is proof of Paroline's particular share that the statute requires.

By simply importing the generic restitution statute without accounting for the diffuse harm suffered by victims of child pornography, Congress set up a restitution system sure to fail in cases like this one. Perhaps a case with different facts, say, a single distributor and only a handful of possessors, would be susceptible of the proof the statute requires. But when tens of thousands of copies (or more) of Amy's images have changed hands all across the world for more than a decade, a demand for the Government to prove "the amount of the loss sustained by a victim as a result of *the* offense"—the offense before the court in any particular case—is a demand for the impossible. § 3664(e) (emphasis

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[3] The gang assaults discussed by JUSTICE SOTOMAYOR, *post*, at 479, are not a fair analogy. The gang members in those cases acted together, with a common plan, each one aiding and abetting the others in inflicting harm. But Paroline has never met or interacted with any, or virtually any, of the other persons who contributed to Amy's injury, and his possession offense did not aid or abet anyone.

added). When Congress conditioned restitution on the Government's meeting that burden of proof, it effectively precluded restitution in most cases involving possession or distribution of child pornography.

II

The District Court in Paroline's case found that the Government could not meet its statutory burden of proof. The Government does not really contest that holding here; it instead asks to be held to a less demanding standard. Having litigated this issue for years now in virtually every Circuit, the best the Government has come up with is to tell courts awarding restitution to look at what other courts have done. But that is not a workable guide, not least because courts have taken vastly different approaches to materially indistinguishable cases. According to the Government's lodging in this case, District Courts awarding less than Amy's full losses have imposed restitution orders varying from $50 to $530,000.[4] Restitution Awards for Amy Through December 11, 2013, Lodging of United States. How is a court supposed to use those figures as any sort of guidance? Pick the median figure? The mean? Something else?

More to the point, the Government's submission lacks any basis in law. That the first District Courts confronted with Amy's case awarded $1,000, or $5,000, or $530,000, for no articulable reason, is not a legal basis for awarding one of those figures in Paroline's case. The statute requires proof of *this defendant's* harm done, not the going rate. And of course, as the Government acknowledges, its approach "doesn't work very well" in the first case brought by a particular victim. Tr. of Oral Arg. 24.

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[4] Amy's uncle—the initial source of *all* of her injuries—was ordered to pay $6,325 in restitution, which only underscores how arbitrary the statute is when applied to most child pornography offenses.

The majority's proposal is to have a district court "assess as best it can from available evidence the significance of the individual defendant's conduct in light of the broader causal process that produced the victim's losses." *Ante*, at 459. Even if that were a plausible way to design a restitution system for Amy's complex injury, there is no way around the fact that it is not the system that Congress created. The statute requires restitution to be based exclusively on *the losses that resulted from the defendant's crime*—not on the defendant's relative culpability. The majority's plan to situate Paroline along a spectrum of offenders who have contributed to Amy's harm will not assist a district court in calculating *the amount* of Amy's losses—the amount of her lost wages and counseling costs—that was caused by Paroline's crime (or that of any other defendant).

The Court is correct, of course, that awarding Amy no restitution would be contrary to Congress's remedial and penological purposes. See *ante*, at 457–458. But we have previously refused to allow "policy considerations"—including an "expansive declaration of purpose" and the need to "compensate victims for the full losses they suffered"—to deter us from reading virtually identical statutory language to require proof of the harm caused solely by the defendant's particular offense. *Hughey*, 495 U. S., at 420–421.

Moreover, even the Court's "relative role in the causal process" approach to the statute, *ante*, at 458, is unlikely to make Amy whole. To the extent that district courts do form a sort of consensus on how much to award, experience shows that the amount in any particular case will be quite small—the significant majority of defendants have been ordered to pay Amy $5,000 or less. Lodging of United States. This means that Amy will be stuck litigating for years to come. The Court acknowledges that Amy may end up with "piecemeal" restitution, yet responds simply that "Congress has not promised victims full and swift restitution at all costs." *Ante*, at 461.

Amy will fare no better if district courts consider the other factors suggested by the majority, including the number of defendants convicted of possessing Amy's images, a rough estimate of those likely to be convicted in the future, and an even rougher estimate of the total number of persons involved in her harm. *Ante*, at 460. In the first place, only the last figure is relevant, because Paroline's relative significance can logically be measured only in light of everyone who contributed to Amy's injury—not just those who have been, or will be, caught and convicted. Even worse, to the extent it is possible to project the total number of persons who have viewed Amy's images, that number is tragically large, which means that restitution awards tied to it will lead to a pitiful recovery in every case. See Brief for Respondent Amy Unknown 65 (estimating Paroline's "'market share'" of Amy's harm at 1/71,000, or $47). The majority says that courts should not impose "trivial restitution orders," *ante*, at 460, but it is hard to see how a court fairly assessing this defendant's relative contribution could do anything else.

Nor can confidence in judicial discretion save the statute from arbitrary application. See *ante*, at 459, 462. It is true that district courts exercise substantial discretion in awarding restitution and imposing sentences in general. But they do not do so by mere instinct. Courts are instead guided by statutory standards: in the restitution context, a fair determination of the losses caused by the individual defendant under section 3664(e); in sentencing more generally, the detailed factors in section 3553(a). A contrary approach—one that asks district judges to impose restitution or other criminal punishment guided solely by their own intuitions regarding comparative fault—would undermine the requirement that every criminal defendant receive due process of law.

* * *

The Court's decision today means that Amy will not go home with nothing. But it would be a mistake for that salu-

tary outcome to lead readers to conclude that Amy has prevailed or that Congress has done justice for victims of child pornography. The statute as written allows no recovery; we ought to say so, and give Congress a chance to fix it.

I respectfully dissent.

JUSTICE SOTOMAYOR, dissenting.

This Court has long recognized the grave "physiological, emotional, and mental" injuries suffered by victims of child pornography. *New York* v. *Ferber*, 458 U. S. 747, 758 (1982). The traffic in images depicting a child's sexual abuse, we have observed, "'poses an even greater threat to the child victim than does sexual abuse or prostitution'" because the victim must "'go through life knowing that the recording is circulating within the mass distribution system for child pornography.'" *Id.*, at 759, n. 10. As we emphasized in a later case, the images cause "continuing harm by haunting the chil[d] in years to come." *Osborne* v. *Ohio*, 495 U. S. 103, 111 (1990).

Congress enacted 18 U. S. C. § 2259 against this backdrop. The statute imposes a "mandatory" duty on courts to order restitution to victims of federal offenses involving the sexual abuse of children, including the possession of child pornography. § 2259(b)(4). And it commands that for any such offense, a court "shall direct the defendant to pay the victim . . . the full amount of the victim's losses." § 2259(b)(1).

The Court interprets this statute to require restitution in a "circumscribed" amount less than the "entirety of the victim's . . . losses," a total it instructs courts to estimate based on the defendant's "relative role" in the victim's harm. *Ante*, at 458–459. That amount, the Court holds, should be neither "nominal" nor "severe." *Ibid.*

I appreciate the Court's effort to achieve what it perceives to be a just result. It declines to require restitution for a victim's full losses, a result that might seem incongruent to an individual possessor's partial role in a harm in which

countless others have participated. And it rejects the position advanced by Paroline and the dissenting opinion of THE CHIEF JUSTICE, which would result in no restitution in cases like this for the perverse reason that a child has been victimized by too many.

The Court's approach, however, cannot be reconciled with the law that Congress enacted. Congress mandated restitution for the "full amount of the victim's losses," § 2259(b)(1), and did so within the framework of settled tort law principles that treat defendants like Paroline jointly and severally liable for the indivisible consequences of their intentional, concerted conduct. And to the extent an award for the full amount of a victim's losses may lead to fears of unfair treatment for particular defendants, Congress provided a mechanism to accommodate those concerns: Courts are to order "partial payments" on a periodic schedule if the defendant's financial circumstances or other "interest[s] of justice" so require. §§ 3664(f)(3), 3572(d)(1). I would accordingly affirm the Fifth Circuit's holding that the District Court "must enter a restitution order reflecting the 'full amount of [Amy's] losses,' " *In re Amy Unknown*, 701 F. 3d 749, 774 (2012), and instruct the court to consider a periodic payment schedule on remand.

I

A

There are two distinct but related questions in this case: first, whether Paroline's conduct bears a sufficient causal nexus to Amy's harm, and second, if such a nexus exists, how much restitution Paroline should be required to pay. Beginning with causation, I agree with the majority that proximate causation is beyond dispute because the medical and economic losses suffered by Amy are "direct and foreseeable results of child-pornography crimes." *Ante*, at 449; accord, *ante*, at 465 (ROBERTS, C. J., dissenting). The real issue, then, is "the proper standard of causation in fact." *Ante*, at 449 (majority opinion).

The majority and I share common ground on much of this issue. We agree that the ordinary way to prove cause-in-fact is to show that a result would not have occurred "but for" the defendant's conduct. *Burrage* v. *United States*, 571 U. S. 204, 211 (2014). We also agree that "'strict but-for causality'" is "'not *always* required,'" and that alternative standards of factual causation are appropriate "where there is 'textual or contextual' reason to conclude" as much. *Ante*, at 451, 458 (quoting *Burrage*, 571 U. S., at 212, 214). And most importantly, we agree that there are ample reasons to reject a strict but-for causality requirement in § 2259. See *ante*, at 458.

Starting with the text, § 2259 declares that a court "shall order restitution for any offense under this chapter." The possession of child pornography, § 2252, is an offense under the relevant chapter, and the term "shall" creates "an obligation impervious to judicial discretion," *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U. S. 26, 35 (1998). So the text could not be clearer: A court must order restitution against a person convicted of possessing child pornography. Section 2259(b)(4) underscores this directive by declaring that "[t]he issuance of a restitution order under this section is mandatory." And the statute's title—"mandatory restitution"—reinforces it further still.

Interpreting § 2259 to require but-for causality would flout these simple textual commands. That is because "a showing of but-for causation cannot be made" in this case and many like it. *Ante*, at 450. Even without Paroline's offense, it is a regrettable fact that "thousands would have viewed and would in the future view [Amy's] images," such that "it cannot be shown that her trauma and attendant losses would have been any different but for Parolin[e]." *Ibid.* A but-for requirement would thus make restitution under § 2259 the opposite of "mandatory"; it would preclude restitution to the victim of the typical child pornography offense for the nonsensical reason that the child has been victimized by too many.

Such an approach would transform § 2259 into something unrecognizable to the Congress that wrote it. When Congress passed § 2259 in 1994, it was common knowledge that child pornography victims suffer harm at the hands of numerous offenders who possess their images in common, whether in print, film, or electronic form. See, *e. g.*, Shouvlin, Preventing the Sexual Exploitation of Children: A Model Act, 17 Wake Forest L. Rev. 535, 544 (1981) (describing the "enormous number of magazines" and "hundreds of films" produced each year depicting the sexual abuse of children, which were circulated to untold numbers of offenders through a "well-organized distribution system [that] ensures that even the small towns have access to [the] material"); Doyle, FBI Probing Child Porn on Computers, San Francisco Chronicle, Dec. 5, 1991, p. A23 (describing complaint that "child pornographic photographs" were circulating via the "America On-Line computer service"). Congress was also acutely aware of the severe injuries that victims of child pornography suffer at the hands of criminals who possess and view the recorded images of their sexual abuse. Congress found, for example, that the "continued existence" and circulation of child pornography images "causes the child victims of sexual abuse continuing harm by haunting those children in future years." Child Pornography Prevention Act of 1996, § 121, 110 Stat. 3009–26, Congressional Findings (2), notes following 18 U. S. C. § 2251 (hereinafter § 2251 Findings). It is inconceivable that Congress would have imposed a mandatory restitution obligation on the possessors who contribute to these "continuing harm[s]," *ibid.*, only to direct courts to apply a but-for cause requirement that would prevent victims from actually obtaining any recovery.

There is, of course, an alternative standard for determining cause-in-fact that would be consistent with the text of § 2259 and the context in which it was enacted: aggregate causation. As the majority points out, aggregate causation was, "no less than the but-for test itself," a "part of the back-

ground legal tradition against which Congress" legislated. *Ante*, at 458. And under this standard, "'[w]hen the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them, the conduct of each is a cause in fact of the event.'" *Ante*, at 451 (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 41, p. 268 (5th ed. 1984) (hereinafter Prosser and Keeton)).[1] Paroline and his fellow offenders plainly qualify as factual causes under this approach because Amy's losses would not have occurred but for their combined conduct, and because applying the but-for rule would excuse them all.

There is every reason to think Congress intended § 2259 to incorporate aggregate causation. Whereas a but-for requirement would set § 2259's "mandatory" restitution command on a collision course with itself, the aggregate causation standard follows directly from the statute. Section 2259 is unequivocal; it offers no safety-in-numbers exception for defendants who possess images of a child's abuse in common with other offenders. And the aggregate causation standard exists to avoid exactly that kind of exception. See Prosser and Keeton § 41, at 268–269 (aggregate causation applies where multiple defendants "bea[r] a like relationship" to a victim's injury, and where "[e]ach seeks to escape liability for a reason that, if recognized, would likewise protect each other defendant in the group, thus leaving the [victim] without a remedy in the face of the fact that had none of

[1] The Fifth Circuit recognized this standard more than 60 years ago when it observed that "'[a]ccording to the great weight of authority where the concurrent or successive acts or omissions of two or more persons, although acting independently of each other, are in combination, the direct or proximate cause of a single injury,'" any of them may be held liable "'even though his act alone might not have caused the entire injury, or the same damage might have resulted from the act of the other tortfeasor[s].'" *Phillips Petroleum Co.* v. *Hardee*, 189 F. 2d 205, 212 (1951) (quoting 38 Am. Jur. Negligence § 257, p. 946 (1941)).

them acted improperly the [victim] would not have suffered the harm"); Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 27, Comment *f*, p. 380 (2005) (similar).

At bottom, Congress did not intend § 2259 to create a safe harbor for those who inflict upon their victims the proverbial death by a thousand cuts. Given the very nature of the child pornography market—in which a large class of offenders contribute jointly to their victims' harm by trading in their images—a but-for causation requirement would swallow § 2259's "mandatory" restitution command, leaving victims with little hope of recovery. That is all the "textual [and] contextual" reason necessary to conclude that Congress incorporated aggregate causation into § 2259. *Burrage*, 571 U. S., at 212.

B

The dissent of THE CHIEF JUSTICE suggests that a contrary conclusion is compelled by our decision in *Hughey* v. *United States*, 495 U. S. 411 (1990). *Hughey* involved a defendant who had been convicted of a single count of unauthorized credit card use, which resulted in $10,412 in losses. *Id.*, at 414. The Government nonetheless requested restitution for additional losses based on different counts in the indictment that the Government had agreed to dismiss. *Id.*, at 413. We declined the Government's request, reasoning that restitution was to be tied to the offense of conviction. *Id.*, at 418.

That commonsense holding, of course, casts no doubt on the ordinary practice of requiring restitution for losses caused by an offense for which a defendant *is* convicted, where the loss is the product of the combined conduct of multiple offenders. What troubles my colleagues in this case, then, is not the concept of restitution in cases involving losses caused by more than one offender. Their objection is instead to restitution in cases where the victim's losses are caused by *too many* offenders. As THE CHIEF JUSTICE

puts it, Congress wrote a law that would enable Amy to recover if only her images had been circulated by "a single distributor" to just a "handful of possessors." *Ante,* at 468. But because she has been victimized by numerous distributors and thousands of possessors, she gets nothing. It goes without saying that Congress did not intend that result.

My colleagues in dissent next assert that no restitution may be awarded because of § 3664(e), which describes the Government's burden of showing the "loss sustained by a victim as a result of the offense." But that provision is nothing close to a "direct answer" to this case. *Ante*, at 465–466. It simply restates the question: What should a court do when the losses sustained by a victim *are* the "result of the [defendant's] offense," § 3664(e), but that result is produced in combination with the offenses of others? One answer is that the defendant's offense is a cause-in-fact only of losses for which it was a but-for cause. A second is that the offense is a cause-in-fact of losses for which it was part of the aggregate cause. The former would preclude restitution in cases like this; the latter would allow it. Given Congress' "mandatory" command that courts "shall order restitution for any offense," §§ 2259(a), (b)(4), it is beyond clear which answer Congress chose.[2]

THE CHIEF JUSTICE's dissent also fails to contend with the ramifications of the suggestion that § 3664(e) forecloses entry of restitution in cases where a victim suffers indivisible

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[2] THE CHIEF JUSTICE's dissent elides the distinction between aggregate and but-for causation. Despite "assum[ing], for purposes of argument," that § 2259 incorporates aggregate causation, the dissent nevertheless applies but-for causation to determine the "full amount" of losses Paroline must pay. See *ante*, at 467, and n. 2 (arguing that Paroline can only be asked to pay "the full amount of the losses *he* caused," not losses that he and others combined to cause). My dissenting colleagues cannot have it both ways. Either § 2259 incorporates aggregate causation (in which case the full amount of Amy's losses is all of the losses aggregately caused by Paroline and like offenders), or it requires but-for causation (in which case Amy gets nothing).

losses as a result of the aggregate conduct of numerous offenders. It claims that this reading of § 3664(e) "will work just fine" for "common crimes" such as assault. *Ante*, at 467. But what about a victim of a vicious gang assault, where a single offender's conduct cannot be labeled a but-for cause of any discrete injury? Such offenses are, unfortunately, all too common. See, *e. g.*, *Wheelock* v. *United States*, 2013 WL 2318145, *2 (ED Wis., May 28, 2013) (defendant convicted for his participation in a gang rape of a 13-year-old victim in which he "and several other individuals had provided alcohol to the girl and, after she became intoxicated and unconscious, sexually assaulted her"); *United States* v. *Homer B.*, 1990 WL 79705 (CA9, June 14, 1990) (similar). I would have thought it beyond refute that the victim of such a tragic offense would be entitled to restitution even though none of her losses may be attributed solely to any individual defendant. If the opinion of THE CHIEF JUSTICE is in agreement, it does not explain why the result should be any different for victims like Amy, who have suffered heart wrenching losses at the hands of thousands of offenders rather than a few.[3]

II

The majority accepts aggregate causation at least to an extent, ruling that § 2259 requires possessors to pay some amount of restitution even though "it is impossible" to say

[3] THE CHIEF JUSTICE objects that gang assaults are not a "fair analogy" because they involve a group of individuals acting "together, with a common plan." *Ante*, at 468, n. 3. But individuals need not act together to trigger joint and several liability; such liability applies equally to multiple actors who independently commit intentional torts that combine to produce an indivisible injury. *Infra*, at 482–484. And in any event, the offenders at issue in this case *do* act together, with the common end of trafficking in the market for images of child sexual abuse. See *infra*, at 483. While these offenders may not be physically in the same room when they commit their crimes, there is no reason to read § 2259(b)(4)'s "mandatory" restitution command out of the statute for child abusers who hide behind the anonymity of a computer screen.

that they caused "a particular amount of [a victim's] losses . . . by recourse to a more traditional [but-for] causal inquiry." *Ante*, at 458. But the majority resists the "strict logic" of aggregate causation for fear that doing so would produce the "striking outcome" of an award against an individual possessor "for the entire aggregately caused amount." *Ante*, at 453. The majority accordingly holds that "a court applying § 2259 should order restitution in an amount that comports with the defendant's relative" contribution to "the victim's general losses." *Ante*, at 458.

The majority's apportionment approach appears to be a sensible one. It would, for instance, further the goal of "proportionality in sentencing," avoid "turning away victims emptyhanded," and "spread payment among" offenders. *Ante*, at 461–462. But it suffers from a far more fundamental problem: It contravenes the language Congress actually used. Section 2259 directs courts to enter restitution not for a "proportional" or "relative" amount, but for the "full amount of the victim's losses." § 2259(b)(1). That command is unequivocal, and it is buttressed by the tort law tradition of joint and several liability within which Congress legislated.

A

Once a defendant is found to bear a sufficient causal nexus to a victim's harm, § 2259 provides a straightforward instruction on how much restitution a court is to order: "The order of restitution under this section shall direct the defendant to pay the victim . . . the full amount of the victim's losses." § 2259(b)(1). Because the word "shall" imposes a "discretionless obligatio[n]," *Lopez* v. *Davis*, 531 U. S. 230, 241 (2001), a court considering a § 2259 restitution request has no license to deviate from the statute's command. It must enter an order for the "full amount of the victim's losses," regardless of whether other defendants may have contributed to the same victim's harm.

If there were any doubt on the matter, Congress eliminated it in § 2259(b)(4)(B)(ii), which bars a court from "declin-[ing] to issue [a restitution] order under this section" on the ground that a victim "is entitled to receive compensation for his or her injuries from the proceeds of insurance or any other source." One "other source" from which a victim would be "entitled to receive compensation" is, of course, other offenders who possess images of her sexual abuse. It is unthinkable that Congress would have expressly forbidden courts to award victims *no* restitution because their harms have been aggregately caused by many offenders, only to permit restitution orders for a single penny for the same reason.

B

As the majority recognizes, Congress did not draft § 2259 in a vacuum; it did so in the context of settled tort law traditions. See *ante*, at 458; see also *Meyer* v. *Holley*, 537 U. S. 280, 285 (2003) (Congress "legislates against a legal background of ordinary tort-related" principles). Section 2259 functions as a tort statute, one designed to ensure that victims will recover compensatory damages in an efficient manner concurrent with criminal proceedings. See Restatement of Torts § 901, p. 537 (1939) (the purposes of tort law include "to give compensation, indemnity, or restitution for harms" and "to punish wrongdoers"); *Dolan* v. *United States*, 560 U. S. 605, 612 (2010) (the "substantive purpose" of the related Mandatory Victims Restitution Act of 1996, § 3664, is "to ensure that victims of a crime receive full restitution"). And the nature of the child pornography industry and the indivisible quality of the injuries suffered by its victims make this a paradigmatic situation in which traditional tort law principles would require joint and several liability. By requiring restitution for the "full amount of the victim's losses," § 2259(b)(1), Congress did not depart from these principles; it embraced them.

First, the injuries caused by child pornography possessors are impossible to apportion in any practical sense. It cannot be said, for example, that Paroline's offense alone required Amy to attend five additional minutes of therapy, or that it caused some discrete portion of her lost income. The majority overlooks this fact, ordering courts to surmise some "circumscribed" amount of loss based on a list of factors. *Ante*, at 458–460; see also *ante*, at 470–471 (ROBERTS, C. J., dissenting). Section 2259's full restitution requirement dispenses with this guesswork, however, and in doing so it harmonizes with the settled tort law tradition concerning indivisible injuries. As this Court explained this rule in *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U. S. 256 (1979), unless a plaintiff's "injury is divisible and the causation of each part can be separately assigned to each tortfeasor," the rule is that a "tortfeasor is not relieved of liability for the entire harm he caused just because another's negligence was also a factor in effecting the injury." *Id.*, at 260, n. 8; see also Prosser and Keeton § 52, at 347 (joint and several liability applies to injuries that "are obviously incapable of any reasonable or practical division"); *Feneff* v. *Boston & Maine R. Co.*, 196 Mass. 575, 580, 82 N. E. 705, 707 (1907) (similar).

Second, Congress adopted § 2259 against the backdrop of the rule governing concerted action by joint tortfeasors, which specifies that "[w]here two or more [tortfeasors] act in concert, it is well settled . . . that each will be liable for the entire result." Prosser and Keeton § 52, at 346. The degree of concerted action required by the rule is not inordinate; "if one person acts to produce injury with full knowledge that others are acting in a similar manner and that his conduct will contribute to produce a single harm, a joint tort has been consummated even when there is no prearranged plan." 1 F. Harper, F. James, & O. Gray, The Law of Torts § 10.1, p. 699 (1st ed. 1956); see also, *e. g.*, *Troop* v. *Dew*, 150 Ark. 560, 565, 234 S. W. 992, 994 (1921) (defendants jointly

liable for uncoordinated acts where they were "working to a common purpose").

Child pornography possessors are jointly liable under this standard, for they act in concert as part of a global network of possessors, distributors, and producers who pursue the common purpose of trafficking in images of child sexual abuse. As Congress itself recognized, "possessors of such material" are an integral part of the "market for the sexual exploitative use of children." § 2251 Findings (12). Moreover, although possessors like Paroline may not be familiar with every last participant in the market for child sexual abuse images, there is little doubt that they act with knowledge of the inevitable harms caused by their combined conduct. Paroline himself admitted to possessing between 150 and 300 images of minors engaged in sexually explicit conduct, which he downloaded from other offenders on the Internet. See 672 F. Supp. 2d 781, 783 (ED Tex. 2009); App. 146. By communally browsing and downloading Internet child pornography, offenders like Paroline "fuel the process" that allows the industry to flourish. O'Connell, Paedophiles Networking on the Internet, in Child Abuse on the Internet: Ending the Silence 77 (C. Arnaldo ed. 2001). Indeed, one expert describes Internet child pornography networks as "an example of a complex criminal conspiracy," *ibid.*—the quintessential concerted action to which joint and several liability attaches.

Lastly, § 2259's full restitution requirement conforms to what Congress would have understood to be the uniform rule governing joint and several liability for intentional torts. Under that rule, "[e]ach person who commits a tort that requires intent is jointly and severally liable for any indivisible injury legally caused by the tortious conduct." Restatement (Third) of Torts: Apportionment of Liability § 12, p. 110 (2007). There is little doubt that the possession of images of a child being sexually abused would amount to an intentional invasion of privacy tort—and an extreme one at that. See

Restatement (Second) of Torts § 652B, p. 378 (1976) ("One who intentionally intrudes, physically or otherwise, upon [another's] private affairs or concerns, is subject to liability . . . if the intrusion would be highly offensive to a reasonable person").[4]

Section 2259's imposition of joint and several liability makes particular sense when viewed in light of this intentional tort rule. For at the end of the day, the question of how to allocate losses among defendants is really a choice between placing the risk of loss on the defendants (since one who is caught first may be required to pay more than his fair share) or the victim (since an apportionment regime would risk preventing her from obtaining full recovery). Whatever the merits of placing the risk of loss on a victim in the context of a negligence-based offense, Congress evidently struck the balance quite differently in this context, placing the risk on the morally culpable possessors of child pornography and not their innocent child victims.

C

Notwithstanding § 2259's text and the longstanding tort law traditions that support it, the majority adopts an apportionment approach based on its concern that joint and several liability might lead to unfairness as applied to individual defendants. See *ante,* at 452–459. The majority finds this approach necessary because § 2259 does not provide individual defendants with the ability to seek contribution from

[4] Possession of child pornography under § 2252 constitutes an intentional tort notwithstanding that the offense requires a *mens rea* of knowledge. See § 2252(a)(3)(B) (punishing one who "knowingly sells or possesses" child pornography). One is "said to act knowingly if he is aware '"that [a] result is practically certain to follow from his conduct."'" *United States* v. *Bailey,* 444 U. S. 394, 404 (1980). That definition is, if anything, more exacting than the kind of "intent" required for an intentional tort under the Restatement, which defines "intent" to include situations where an actor "believes that . . . consequences are substantially certain to result from [his act]." Restatement (Second) of Torts § 8A, p. 15 (1965).

other offenders. *Ante,* at 455. I agree that the statute does not create a cause of action for contribution, but unlike the majority I do not think the absence of contribution suggests that Congress intended the phrase "full amount of the victim's losses" to mean something less than that. For instead of expending judicial resources on disputes between intentional tortfeasors, Congress crafted a different mechanism for preventing inequitable treatment of individual defendants—the use of periodic payment schedules.

Section 2259(b)(2) directs that "[a]n order of restitution under this section shall be issued and enforced in accordance with section 3664." Section 3664(f)(1)(A) in turn reiterates § 2259's command that courts "shall order restitution to each victim in the full amount of each victim's losses." But § 3664 goes on to distinguish between the *amount* of restitution ordered and the *schedule* on which payments are to be made. Thus, § 3664(f)(2) states that a court "shall . . . specify in the restitution order . . . the schedule according to whic[h] the restitution is to be paid," and § 3664(f)(3)(A) provides that "[a] restitution order may direct the defendant to make a single, lump sum payment" or "partial payments at specified intervals." Critically, in choosing between lump-sum and partial payments, courts "shall" consider "the financial resources and other assets of the defendant," along with "any financial obligations of the defendant, including obligations to dependents." §§ 3664(f)(2)(A), (C).

Applying these factors to set an appropriate payment schedule in light of any individual child pornography possessor's financial circumstances would not be difficult; indeed, there is already a robust body of case law clarifying how payment schedules are to be set under § 3664(f). For example, Courts of Appeals have uniformly found it an abuse of discretion to require defendants to make immediate lump-sum payments for the full amount of a restitution award when they do not have the ability to do so. In such cases, Congress has instead required courts to impose periodic pay-

ment schedules. See, *e. g.*, *United States* v. *McGlothlin*, 249 F. 3d 783, 784 (CA8 2001) (reversing lump-sum payment order where defendant "had no ability to pay the restitution immediately," and requiring District Court to set a periodic payment schedule); *United States* v. *Myers*, 198 F. 3d 160, 168–169 (CA5 1999) (same). The existing body of law also provides guidance as to proper payment schedules. Compare, *e. g.*, *United States* v. *Calbat*, 266 F. 3d 358, 366 (CA5 2001) (annual payment of $41,000 an abuse of discretion where defendant had a net worth of $6,400 and yearly income of $39,000), with *United States* v. *Harris*, 60 F. Supp. 2d 169, 180 (SDNY 1999) (setting payment schedule for the greater of $35 per month or 10% of defendant's gross income).

Section 3664's provision for partial periodic payments thus alleviates any concerns of unfairness for the vast number of child pornography defendants who have modest financial resources. A more difficult challenge is presented, however, by the case of a wealthy defendant who would be able to satisfy a large restitution judgment in an immediate lump-sum payment. But the statute is fully capable of ensuring just results for these defendants, too. For in addition to an offender's financial circumstances, § 3664 permits courts to consider other factors "in the interest of justice" when deciding whether to impose a payment schedule. See § 3664(f)(2) (district court shall specify payment schedule "pursuant to section 3572"); § 3572(d)(1) (restitution order shall be payable in periodic installments if "in the interest of justice").

Accordingly, in the context of a restitution order against a wealthy child pornography possessor, it would likely be in the interest of justice for a district court to set a payment schedule requiring the defendant to pay restitution in amounts equal to the periodic losses that the district court finds will actually be "incurred by the victim," § 2259(b)(3), in the given timeframe. In this case, for example, Amy's expert estimates that she will suffer approximately $3.4 million in losses from medical costs and lost income over the

next 60 years of her life, or approximately $56,000 per year. If that estimate is deemed accurate, a court would enter a restitution order against a wealthy defendant for the full $3.4 million amount of Amy's losses, and could make it payable on an annual schedule of $56,000 per year. Doing so would serve the interest of justice because the periodic payment schedule would allow the individual wealthy defendant's ultimate burden to be substantially offset by payments made by other offenders,[5] while the entry of the full restitution award would provide certainty to Amy that she will be made whole for her losses.

* * *

Although I ultimately reach a different conclusion as to the proper interpretation of the statutory scheme, I do appreciate the caution with which the Court has announced its approach. For example, the Court expressly rejects the possibility of district courts entering restitution orders for "token or nominal amount[s]." *Ante*, at 459. That point is important because, if taken out of context, aspects of the Court's opinion might be construed otherwise. For instance, the Court states that in estimating a restitution amount, a district court may consider "the broader number of offenders involved (most of whom will, of course, never be caught or convicted)." *Ante*, at 460. If that factor is given

[5] As the facts of this case show, the offset would be significant. Between June 2009 and December 11, 2013, Amy obtained restitution awards from 182 persons, 161 of whom were ordered to pay an amount between $1,000 and $530,000. See Restitution Awards for Amy Through December 11, 2013, Lodging of United States. If these offenders (and new offenders caught each month) were instead ordered to pay the full amount of restitution in periodic amounts according to their financial means, a wealthy defendant's annual obligation would terminate long before he would be required to pay anything close to the full $3.4 million. For once a victim receives the full amount of restitution, all outstanding obligations expire because § 2259 does not displace the settled joint and several liability rule forbidding double recovery. See Restatement (Second) of Torts § 885(3) (1979), see also, *e. g.*, *United States* v. *Nucci*, 364 F. 3d 419, 423 (CA2 2004).

too much weight, it could lead to exactly the type of trivial restitution awards the Court disclaims. Amy's counsel has noted, for instance, that in light of the large number of persons who possess her images, a truly proportional approach to restitution would lead to an award of just $47 against any individual defendant. Brief for Respondent Amy Unknown 65. Congress obviously did not intend that outcome, and the Court wisely refuses to permit it.[6]

In the end, of course, it is Congress that will have the final say. If Congress wishes to recodify its full restitution command, it can do so in language perhaps even more clear than § 2259's "mandatory" directive to order restitution for the "full amount of the victim's losses." Congress might amend the statute, for example, to include the term "aggregate causation." Alternatively, to avoid the uncertainty in the Court's apportionment approach, Congress might wish to enact fixed minimum restitution amounts. See, *e. g.*, § 2255 (statutorily imposed $150,000 minimum civil remedy). In the meanwhile, it is my hope that the Court's approach will not unduly undermine the ability of victims like Amy to recover for—and from—the unfathomable harms they have sustained.

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[6] The Court mentions that Amy received roughly $6,000 from her uncle, the person responsible for abusing her as a child. *Ante*, at 440. Care must be taken in considering the amount of the award against Amy's uncle, however, *ante*, at 460, because as Amy's expert explained, Amy was "back to normal" by the end of her treatment for the initial offense, App. 70. It was chiefly after discovering, eight years later, that images of her sexual abuse had spread on the Internet that Amy suffered additional losses due to the realization that possessors like Paroline were viewing them and that "the sexual abuse of her has never really ended." *Id.*, at 71.

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ENVIRONMENTAL PROTECTION AGENCY ET AL. *v.* EME HOMER CITY GENERATION, L. P., ET AL.

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

No. 12–1182. Argued December 10, 2013—Decided April 29, 2014*

Congress and the Environmental Protection Agency (EPA or Agency) have, over the course of several decades, made many efforts to deal with the complex challenge of curtailing air pollution emitted in upwind States, but causing harm in other, downwind States. As relevant here, the Clean Air Act (CAA or Act) directs EPA to establish national ambient air quality standards (NAAQS) for pollutants at levels that will protect public health. 42 U. S. C. §§ 7408, 7409. Once EPA settles on a NAAQS, the Agency must designate "nonattainment" areas, *i. e.*, locations where the concentration of a regulated pollutant exceeds the NAAQS. § 7407(d). Each State must submit a State Implementation Plan, or SIP, to EPA within three years of any new or revised NAAQS. § 7410(a)(1). From the date EPA determines that a SIP is inadequate, the Agency has two years to promulgate a Federal Implementation Plan, or FIP. § 7410(c)(1). Among other components, the CAA mandates SIP compliance with the Good Neighbor Provision, which requires SIPs to "contain adequate provisions . . . prohibiting . . . any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any . . . [NAAQS]." § 7410(a)(2)(D)(i).

Several times over the past two decades, EPA has attempted to delineate the Good Neighbor Provision's scope by identifying when upwind States "contribute significantly" to nonattainment downwind. The D. C. Circuit found fault with the Agency's 2005 attempt, the Clean Air Interstate Rule, or CAIR, which regulated both nitrogen oxide (NO_x) and sulfur dioxide (SO_2) emissions, the gases at issue here. The D. C. Circuit nevertheless left CAIR temporarily in place, while encouraging EPA to act with dispatch in dealing with problems the court had identified.

EPA's response to that decision is the Cross-State Air Pollution Rule (Transport Rule), which curbs NO_x and SO_2 emissions in 27 upwind

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*Together with No. 12–1183, *American Lung Association et al.* v. *EME Homer City Generation, L. P., et al.*, also on certiorari to the same court.

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States to achieve downwind attainment of three NAAQS. Under the Transport Rule, an upwind State "contribute[d] significantly" to downwind nonattainment to the extent its exported pollution both (1) produced one percent or more of a NAAQS in at least one downwind State and (2) could be eliminated cost effectively, as determined by EPA. Upwind States are obliged to eliminate only emissions meeting both of these criteria. Through complex modeling, EPA created an annual emissions "budget" for each regulated State upwind, representing the total quantity of pollution an upwind State could produce in a given year under the Transport Rule. Having earlier determined each regulated State's SIP to be inadequate, EPA, contemporaneous with the Transport Rule, promulgated FIPs allocating each State's emissions budgets among its in-state pollution sources.

A group of state and local governments (State respondents), joined by industry and labor groups (Industry respondents), petitioned for review of the Transport Rule in the D. C. Circuit. The court vacated the rule in its entirety, holding that EPA's actions exceeded the Agency's statutory authority in two respects. Acknowledging that EPA's FIP authority is generally triggered when the Agency disapproves a SIP, the court was nevertheless concerned that States would be incapable of fulfilling the Good Neighbor Provision without prior EPA guidance. The court thus concluded that EPA must give States a reasonable opportunity to allocate their emission budgets before issuing FIPs. The court also found the Agency's two-part interpretation of the Good Neighbor Provision unreasonable, concluding that EPA must disregard costs and consider exclusively each upwind State's physically proportionate responsibility for air quality problems downwind.

Held:

1. The CAA does not command that States be given a second opportunity to file a SIP after EPA has quantified the State's interstate pollution obligations. Pp. 506–511.

(a) The State respondents do not challenge EPA's disapproval of any particular SIP. Instead, they argue that, notwithstanding these disapprovals, the Agency was still obliged to grant upwind States an additional opportunity to promulgate adequate SIPs after EPA had set the State's emission budget. This claim does not turn on the validity of the prior SIP disapprovals, but on whether the CAA requires EPA do more than disapprove a SIP to trigger the Agency's authority to issue a FIP. Pp. 506–507.

(b) The CAA's plain text supports the Agency: Disapproval of a SIP, without more, triggers EPA's obligation to issue a FIP. The statute sets precise deadlines for the States and EPA. Once EPA issues

any new or revised NAAQS, a State "shall" propose a SIP within three years, 42 U. S. C. § 7410(a)(1), and that SIP "shall" include, *inter alia*, provisions adequate to satisfy the Good Neighbor Provision, § 7410(a)(2). If the EPA finds a SIP inadequate, the Agency has a statutory duty to issue a FIP "at any time" within two years. § 7410(c)(1). However sensible the D. C. Circuit's exception to this strict time prescription may be, a reviewing court's "task is to apply the text [of the statute], not to improve upon it." *Pavelic & LeFlore* v. *Marvel Entertainment Group, Div. of Cadence Industries Corp.*, 493 U. S. 120, 126. Nothing in the Act differentiates the Good Neighbor Provision from the several other matters a State must address in its SIP. Nor does the Act condition the duty to promulgate a FIP on EPA's having first quantified an upwind State's good neighbor obligations. By altering Congress' SIP and FIP schedule, the D. C. Circuit allowed a delay Congress did not order and placed an information submission obligation on EPA Congress did not impose. Pp. 507–510.

(c) The fact that EPA had previously accorded upwind States a chance to allocate emission budgets among their in-state sources does not show that the Agency acted arbitrarily by refraining to do so here. EPA retained discretion to alter its course provided it gave a reasonable explanation for doing so. *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 42. Here, the Agency had been admonished by the D. C. Circuit to act with dispatch in amending or replacing CAIR. Endeavoring to satisfy that directive, EPA acted speedily, issuing FIPs and the Transport Rule contemporaneously. Pp. 510–511.

2. EPA's cost-effective allocation of emission reductions among upwind States is a permissible, workable, and equitable interpretation of the Good Neighbor Provision. Pp. 511–524.

(a) Respondents' attack on EPA's interpretation of the Good Neighbor Provision is not foreclosed by § 7607(d)(7)(B), which provides that "[o]nly an objection to a rule . . . raised with reasonable specificity during the period for public comment . . . may be raised during judicial review." Even assuming that respondents failed to object to the Transport Rule with "reasonable specificity," that lapse is not jurisdictional. Section 7607(d)(7)(B) is a "mandatory," but not "jurisdictional," rule, see *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 510, which speaks to a party's procedural obligations, not a court's authority, see *Kontrick* v. *Ryan*, 540 U. S. 443, 455. Because EPA did not press this argument unequivocally before the D. C. Circuit, it does not pose an impassable hindrance to this Court's review. Pp. 511–512.

(b) This Court routinely accords dispositive effect to an agency's reasonable interpretation of ambiguous statutory language. The Good

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Neighbor Provision delegates authority to EPA at least as certainly as the CAA provisions involved in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837. EPA's authority to reduce upwind pollution extends only to those "amounts" of pollution that "contribute significantly to nonattainment" in downwind States. § 7410(a)(2)(D)(i). Because a downwind State's excess pollution is often caused by multiple upwind States, however, EPA must address how to allocate responsibility among multiple contributors. The Good Neighbor Provision does not dictate a method of apportionment. Nothing in the provision, for example, directs the proportional-allocation method advanced by the D. C. Circuit, a method that works neither mathematically nor in practical application. Under *Chevron*, Congress' silence effectively delegates authority to EPA to select from among reasonable options. See *United States* v. *Mead Corp.*, 533 U. S. 218, 229.

EPA's chosen allocation method is a "permissible construction of the statute." *Chevron*, 467 U. S., at 843. The Agency, tasked with choosing which among equal "amounts" to eliminate, has chosen sensibly to reduce the amount easier, *i. e.*, less costly, to eradicate. The Industry respondents argue that the final calculation cannot rely on costs, but nothing in the Good Neighbor Provision's text precludes that choice. And using costs in the Transport Rule calculus is an efficient and equitable solution to the allocation problem the Good Neighbor Provision compels the Agency to address. Efficient because EPA can achieve the same levels of attainment, *i. e.*, of emission reductions, the proportional approach aims to achieve, but at a much lower overall cost. Equitable because, by imposing uniform cost thresholds on regulated States, EPA's rule subjects to stricter regulation those States that have done less in the past to control their pollution. Pp. 512–520.

(c) Wholesale invalidation of the Transport Rule is not justified by either of the D. C. Circuit's remaining objections: that the Transport Rule leaves open the possibility that a State might be compelled to reduce emissions beyond the point at which every affected downwind State is in attainment, so-called "over-control"; and that EPA's use of costs does not foreclose the possibility that an upwind State would be required to reduce its emissions by so much that the State would be placed below the one-percent mark EPA set as the initial threshold of "significan[ce]." First, instances of "over-control" in particular downwind locations may be incidental to reductions necessary to ensure attainment elsewhere. As the Good Neighbor Provision seeks attainment in *every* downwind State, however, exceeding attainment in one State cannot rank as "over-control" unless unnecessary to achieving attainment in *any* downwind State. Second, EPA must have leeway in fulfilling its statutory mandate to balance the possibilities of over-control and "under-control," *i. e.*, to maximize achievement of

attainment downwind. Finally, in a voluminous record, involving thousands of upwind-to-downwind linkages, respondents point to only a few instances of "unnecessary" emission reductions, and even those are contested by EPA. Pp. 521–524.

696 F. 3d 7, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 525. ALITO, J., took no part in the consideration or decision of the cases.

Deputy Solicitor General Stewart argued the cause for petitioners in both cases. With him on the briefs for petitioners in No. 12–1182 were *Solicitor General Verrilli*, *Acting Assistant Attorney General Dreher*, *Joseph R. Palmore*, *Jon M. Lipshultz*, *Norman L. Rave, Jr.*, and *Sonja Rodman*. *Sean H. Donahue*, *David T. Goldberg*, *Pamela A. Campos*, *Vickie L. Patton*, *Howard I. Fox*, *David S. Baron*, *George E. Hays*, *Joshua Stebbins*, and *David Marshall* filed briefs for petitioners in No. 12–1183. *Eric T. Schneiderman*, Attorney General of New York, filed briefs in both cases for the State of New York et al. as respondents in support of petitioners. With him on the briefs were *Barbara D. Underwood*, Solicitor General, *Steven C. Wu*, Deputy Solicitor General, *Claude S. Platton* and *Bethany A. Davis Noll*, Assistant Solicitors General, *Michael J. Myers*, *Andrew G. Frank*, *George A. Nilson*, *Michael A. Cardozo*, and the Attorneys General for their respective jurisdictions as follows: *George Jepsen* of Connecticut, *Joseph R. Biden III* of Delaware, *Irvin B. Nathan* of the District of Columbia, *Lisa Madigan* of Illinois, *Douglas F. Gansler* of Maryland, *Martha Coakley* of Massachusetts, *Roy Cooper* of North Carolina, *Peter F. Kilmartin* of Rhode Island, and *William H. Sorrell* of Vermont. *Brendan K. Collins*, *Robert B. McKinstry, Jr.*, *Lorene L. Boudreau*, and *James W. Rubin* filed briefs in both cases for respondents Calpine Corp. et al. as respondents in support of petitioners.

Jonathan F. Mitchell, Solicitor General of Texas, argued the cause for the state and local respondents in both cases.

With him on the brief were *Greg Abbott*, Attorney General, *Andrew S. Oldham*, Deputy Solicitor General, *Daniel T. Hodge*, First Assistant Attorney General, *Bill Davis*, *Evan S. Greene*, and *Richard B. Farrer*, Assistant Solicitors General, *Leslie Sue Ritts*, *Herman Robinson*, *David Richard Taggart*, *Harold Edward Pizzetta III*, *Henry V. Nickel*, and the Attorneys General for their respective States as follows: *Luther J. Strange III* of Alabama, *Pamela Jo Bondi* of Florida, *Samuel S. Olens* of Georgia, *Gregory F. Zoeller* of Indiana, *Derek Schmidt* of Kansas, *James D. "Buddy" Caldwell* of Louisiana, *Bill Schuette* of Michigan, *Jon Bruning* of Nebraska, *Mike DeWine* of Ohio, *Scott Pruitt* of Oklahoma, *Alan Wilson* of South Carolina, *Kenneth T. Cuccinelli II* of Virginia, and *J. B. Van Hollen* of Wisconsin.

Peter D. Keisler argued the cause for the industry and labor respondents in both cases. With him on the brief were *C. Frederick Beckner III*, *Eric D. McArthur*, *F. William Brownell*, *P. Stephen Gidiere III*, *Bart E. Cassidy*, *Katherine L. Vaccaro*, *Claudia M. O'Brien*, *Lori Alvino McGill*, *Jessica E. Phillips*, *Katherine I. Twomey*, *Jeffrey L. Landsman*, *Joshua B. Frank*, *Megan H. Berge*, *Dennis Lane*, *Robert J. Alessi*, and *David R. Tripp*.

Norman W. Fichthorn, *Andrea Bear Field*, *Margaret Claiborne Campbell*, *Byron W. Kirkpatrick*, *Steven G. McKinney*, *Robert A. Manning*, *Karl R. Moor*, *Joseph A. Brown*, *Mohammad O. Jazil*, *David M. Flannery*, *Peter S. Glaser*, and *William L. Wehrum* filed a brief for respondents Utility Air Regulatory Group et al. in both cases.†

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†Briefs of *amici curiae* urging reversal in both cases were filed for the American Thoracic Society by *Hope M. Babcock*; for Atmospheric Scientists et al. by *Elizabeth J. Hubertz*; for the Constitutional Accountability Center by *Douglas T. Kendall* and *Elizabeth B. Wydra*; for the Institute for Policy Integrity at New York University School of Law by *Richard L. Revesz*; for Law Professors by *Sanne H. Knudsen* and *Amy J. Wildermuth*; and for Benjamin F. Hobbs et al. by *Deborah A. Sivas*.

Briefs of *amici curiae* urging affirmance in both cases were filed for the State of West Virginia et al. by *Patrick Morrisey*, Attorney General of

JUSTICE GINSBURG delivered the opinion of the Court.

These cases concern the efforts of Congress and the Environmental Protection Agency (EPA or Agency) to cope with a complex problem: air pollution emitted in one State, but causing harm in other States. Left unregulated, the emitting or upwind State reaps the benefits of the economic activity causing the pollution without bearing all the costs. See Revesz, Federalism and Interstate Environmental Externalities, 144 U. Pa. L. Rev. 2341, 2343 (1996). Conversely, downwind States to which the pollution travels are unable to achieve clean air because of the influx of out-of-state pollution they lack authority to control. See S. Rep. No. 101–228, p. 49 (1989). To tackle the problem, Congress included a Good Neighbor Provision in the Clean Air Act (Act or CAA). That provision, in its current phrasing, instructs States to prohibit in-state sources "from emitting any air pollutant in amounts which will . . . contribute significantly" to downwind States' "nonattainment . . . , or interfere with maintenance," of any EPA-promulgated national air quality standard. 42 U. S. C. § 7410(a)(2)(D)(i).

Interpreting the Good Neighbor Provision, EPA adopted the Cross-State Air Pollution Rule (commonly and hereinafter called the Transport Rule). The rule calls for consideration of costs, among other factors, when determining the emission reductions an upwind State must make to improve air quality in polluted downwind areas. The Court of Ap-

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West Virginia, *Elbert Lin*, Solicitor General, and *Julie Marie Blake* and *J. Zak Ritchie*, Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *Thomas C. Horne* of Arizona, *Dustin McDaniel* of Arkansas, *Jack Conway* of Kentucky, *Chris Koster* of Missouri, *Timothy C. Fox* of Montana, *Wayne Stenehjem* of North Dakota, *Marty J. Jackley* of South Dakota, and *Peter K. Michael* of Wyoming; and for the Chamber of Commerce of the United States of America by *Jeffrey A. Lamken*, *Robert K. Kry*, *Rachel L. Brand*, and *Sheldon Gilbert*.

Lawrence J. Joseph filed a brief in both cases for APA Watch as *amicus curiae*.

peals for the D. C. Circuit vacated the rule in its entirety. It held, two to one, that the Good Neighbor Provision requires EPA to consider only each upwind State's physically proportionate responsibility for each downwind State's air quality problem. That reading is demanded, according to the D. C. Circuit, so that no State will be required to decrease its emissions by more than its ratable share of downwind-state pollution.

In *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), we reversed a D. C. Circuit decision that failed to accord deference to EPA's reasonable interpretation of an ambiguous CAA provision. Satisfied that the Good Neighbor Provision does not command the Court of Appeals' cost-blind construction, and that EPA reasonably interpreted the provision, we reverse the D. C. Circuit's judgment.

I

A

Air pollution is transient, heedless of state boundaries. Pollutants generated by upwind sources are often transported by air currents, sometimes over hundreds of miles, to downwind States. As the pollution travels out of State, upwind States are relieved of the associated costs. Those costs are borne instead by the downwind States, whose ability to achieve and maintain satisfactory air quality is hampered by the steady stream of infiltrating pollution.

For several reasons, curtailing interstate air pollution poses a complex challenge for environmental regulators. First, identifying the upwind origin of downwind air pollution is no easy endeavor. Most upwind States propel pollutants to more than one downwind State, many downwind States receive pollution from multiple upwind States, and some States qualify as both upwind and downwind. See Brief for Federal Petitioners 6. The overlapping and inter-

woven linkages between upwind and downwind States with which EPA had to contend number in the thousands.[1]

Further complicating the problem, pollutants do not emerge from the smokestacks of an upwind State and uniformly migrate downwind. Some pollutants stay within upwind States' borders, the wind carries others to downwind States, and some subset of that group drifts to States without air quality problems. "The wind bloweth where it listeth, and thou hearest the sound thereof, but canst not tell whence it cometh, and whither it goeth." The Holy Bible, John 3:8 (King James Version). In crafting a solution to the problem of interstate air pollution, regulators must account for the vagaries of the wind.

Finally, upwind pollutants that find their way downwind are not left unaltered by the journey. Rather, as the gases emitted by upwind polluters are carried downwind, they are transformed, through various chemical processes, into altogether different pollutants. The offending gases at issue in these cases—nitrogen oxide (NO_X) and sulfur dioxide (SO_2)—often develop into ozone and fine particulate matter ($PM_{2.5}$) by the time they reach the atmospheres of downwind States. See 76 Fed. Reg. 48222–48223 (2011). See also 69 Fed. Reg. 4575–4576 (2004) (describing the components of ozone and $PM_{2.5}$). Downwind air quality must therefore be measured for ozone and $PM_{2.5}$ concentrations. EPA's chore is to quantify the amount of upwind gases (NO_X and SO_2) that must be reduced to enable downwind States to keep their levels of ozone and $PM_{2.5}$ in check.

B

Over the past 50 years, Congress has addressed interstate air pollution several times and with increasing rigor. In 1963, Congress directed federal authorities to "encourage co-

[1] For the rule challenged here, EPA evaluated 2,479 separate linkages between downwind and upwind States. Brief for Federal Petitioners 6.

operative activities by the States and local governments for the prevention and control of air pollution." 77 Stat. 393, 42 U. S. C. § 1857a (1964 ed.). In 1970, Congress made this instruction more concrete, introducing features still key to the Act. For the first time, Congress directed EPA to establish national ambient air quality standards (NAAQS) for pollutants at levels that will protect public health. See 84 Stat. 1679–1680, as amended, 42 U. S. C. §§ 7408, 7409 (2006 ed.). Once EPA settles on a NAAQS, the Act requires the Agency to designate "nonattainment" areas, *i. e.*, locations where the concentration of a regulated pollutant exceeds the NAAQS. § 7407(d).

The Act then shifts the burden to States to propose plans adequate for compliance with the NAAQS. Each State must submit a State Implementation Plan, or SIP, to EPA within three years of any new or revised NAAQS. § 7410(a)(1). If EPA determines that a State has failed to submit an adequate SIP, either in whole or in part, the Act requires the Agency to promulgate a Federal Implementation Plan, or FIP, within two years of EPA's determination, "unless the State corrects the deficiency" before a FIP is issued. § 7410(c)(1).[2]

The Act lists the matters a SIP must cover. Among SIP components, the 1970 version of the Act required SIPs to include "adequate provisions for intergovernmental cooperation" concerning interstate air pollution. § 110(a)(2)(E), 84 Stat. 1681, 42 U. S. C. § 1857c–5(a)(2)(E). This statutory requirement, with its text altered over time, has come to be called the Good Neighbor Provision.

In 1977, Congress amended the Good Neighbor Provision to require more than "cooperation." It directed States to submit SIPs that included provisions "adequate" to "prohibi[t] any stationary source within the State from emitting

[2] FIPs and SIPs were introduced in the 1970 version of the Act; the particular deadlines discussed here were added in 1990. See 104 Stat. 2409, 2422–2423, 42 U. S. C. §§ 7401(a)(1), 7410(c) (2006 ed.).

any air pollutant in amounts which will . . . prevent attainment or maintenance [of air quality standards] by any other State." § 108(a)(4), 91 Stat. 693, 42 U. S. C. § 7410(a)(2)(E) (1976 ed., Supp. II). The amended provision thus explicitly instructed upwind States to reduce emissions to account for pollution exported beyond their borders. As then written, however, the provision regulated only individual sources that, considered alone, emitted enough pollution to cause nonattainment in a downwind State. Because it is often "impossible to say that any single source or group of sources is the one which actually prevents attainment" downwind, S. Rep. No. 101–228, p. 21 (1989), the 1977 version of the Good Neighbor Provision proved ineffective, see *ibid.* (noting the provision's inability to curb the collective "emissions [of] multiple sources").

Congress most recently amended the Good Neighbor Provision in 1990. The statute, in its current form, requires SIPs to "contain adequate provisions . . . prohibiting . . . any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any . . . [NAAQS]." 42 U. S. C. § 7410(a)(2)(D)(i) (2006 ed.). The controversy before us centers on EPA's most recent attempt to construe this provision.

C

Three times over the past two decades, EPA has attempted to delineate the Good Neighbor Provision's scope by identifying when upwind States "contribute significantly" to nonattainment downwind. In 1998, EPA issued a rule known as the "NO_X SIP Call." That regulation limited NO_X emissions in 23 upwind States to the extent such emissions contributed to nonattainment of ozone standards in downwind States. See 63 Fed. Reg. 57356, 57358. In *Michigan* v. *EPA*, 213 F. 3d 663 (2000), the D. C. Circuit upheld the NO_X SIP Call, specifically affirming EPA's use of costs

to determine when an upwind State's contribution was "significan[t]" within the meaning of the statute. *Id.*, at 674–679.

In 2005, EPA issued the Clean Air Interstate Rule, or CAIR. 70 Fed. Reg. 25162. CAIR regulated both NO_X and SO_2 emissions, insofar as such emissions contributed to downwind nonattainment of two NAAQS, both set in 1997, one concerning the permissible annual measure of $PM_{2.5}$, and another capping the average ozone level gauged over an eight-hour period. See *id.*, at 25171. The D. C. Circuit initially vacated CAIR as arbitrary and capricious. See *North Carolina* v. *EPA*, 531 F. 3d 896, 921 (2008) (*per curiam*). On rehearing, the court decided to leave the rule in place, while encouraging EPA to act with dispatch in dealing with problems the court had identified. See *North Carolina* v. *EPA*, 550 F. 3d 1176, 1178 (2008) (*per curiam*).

The rule challenged here—the Transport Rule—is EPA's response to the D. C. Circuit's *North Carolina* decision. Finalized in August 2011, the Transport Rule curtails NO_X and SO_2 emissions of 27 upwind States to achieve downwind attainment of three different NAAQS: the two 1997 NAAQS previously addressed by CAIR, and the 2006 NAAQS for $PM_{2.5}$ levels measured on a daily basis. See 76 Fed. Reg. 48208–48209.

Under the Transport Rule, EPA employed a "two-step approach" to determine when upwind States "contribute[d] significantly to nonattainment," *id.*, at 48254, and therefore in "amounts" that had to be eliminated. At step one, called the "screening" analysis, the Agency excluded as *de minimis* any upwind State that contributed less than one percent of the three NAAQS[3] to any downwind State "receptor," a location at which EPA measures air quality. See *id.*, at

[3] With respect to each NAAQS addressed by the rule, the one-percent threshold corresponded to levels of 0.15 micrograms per cubic meter (μg/m^3) for annual $PM_{2.5}$, 0.35 μg/m^3 for daily $PM_{2.5}$, and 0.8 parts per billion (ppb) for eight-hour ozone. See 76 Fed. Reg. 48236–48237.

48236–48237.[4] If all of an upwind State's contributions fell below the one-percent threshold, that State would be considered not to have "contribute[d] significantly" to the nonattainment of any downwind State. *Id.*, at 48236. States in that category were screened out and exempted from regulation under the rule.

The remaining States were subjected to a second inquiry, which EPA called the "control" analysis. At this stage, the Agency sought to generate a cost-effective allocation of emission reductions among those upwind States "screened in" at step one.

The control analysis proceeded this way. EPA first calculated, for each upwind State, the quantity of emissions the State could eliminate at each of several cost thresholds. See *id.*, at 48248–48249. Cost for these purposes is measured as cost per ton of emissions prevented, for instance, by installing scrubbers on powerplant smokestacks.[5] EPA estimated, for example, the amount each upwind State's NO_X emissions would fall if all pollution sources within each State employed every control measure available at a cost of $500 per ton or less. See *id.*, at 48249–48251. The Agency then repeated that analysis at ascending cost thresholds. See *ibid.*[6]

Armed with this information, EPA conducted complex modeling to establish the combined effect the upwind reductions projected at each cost threshold would have on air quality in downwind States. See *id.*, at 48249. The Agency then identified "significant cost threshold[s]," points in its model where a "noticeable change occurred in downwind air

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[4] If, for example, the NAAQS for ozone were 100 ppb, a contribution of less than 1 ppb to any downwind location would fall outside EPA's criteria for significance.

[5] To illustrate, a technology priced at $5,000 and capable of eliminating two tons of pollution would be stated to "cost" $2,500 per ton.

[6] For SO_2, EPA modeled reductions that would be achieved at cost levels of $500, $1,600, $2,300, $2,800, $3,300, and $10,000 per ton eliminated. See *id.*, at 48251–48253.

quality, such as . . . where large upwind emission reductions become available because a certain type of emissions control strategy becomes cost-effective." *Ibid.* For example, reductions of NO_X sufficient to resolve or significantly curb downwind air quality problems could be achieved, EPA determined, at a cost threshold of $500 per ton (applied uniformly to all regulated upwind States). "[M]oving beyond the $500 cost threshold," EPA concluded, "would result in only minimal additional . . . reductions [in emissions]." *Id.*, at 48256.[7]

Finally, EPA translated the cost thresholds it had selected into amounts of emissions upwind States would be required to eliminate. For each regulated upwind State, EPA created an annual emissions "budget." These budgets represented the quantity of pollution an upwind State would produce in a given year if its in-state sources implemented all pollution controls available at the chosen cost thresholds. See *id.*, at 48249.[8] If EPA's projected improvements to downwind air quality were to be realized, an upwind State's emissions could not exceed the level this budget allocated to it, subject to certain adjustments not relevant here.

Taken together, the screening and control inquiries defined EPA's understanding of which upwind emissions were within the Good Neighbor Provision's ambit. In short, under the Transport Rule, an upwind State "contribute[d] significantly" to downwind nonattainment to the extent its exported pollution both (1) produced one percent or more of a NAAQS in at least one downwind State (step one) and (2)

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[7] For SO_2, EPA determined that, for one group of upwind States, all downwind air quality problems would be resolved at the $500 per ton threshold. See *id.*, at 48257. For another group of States, however, this level of controls would not suffice. For those States, EPA found that pollution controls costing $2,300 per ton were necessary. See *id.*, at 48259.

[8] In 2014, for example, pollution sources within Texas would be permitted to emit no more than 243,954 tons of SO_2, subject to variations specified by EPA. See *id.*, at 48269 (Table VI.F–1).

could be eliminated cost effectively, as determined by EPA (step two). See *id.*, at 48254. Upwind States would be obliged to eliminate all and only emissions meeting both of these criteria.[9]

For each State regulated by the Transport Rule, EPA contemporaneously promulgated a FIP allocating that State's emission budget among its in-state sources. See *id.*, at 48271, 48284–48287.[10] For each of these States, EPA had determined that the State had failed to submit a SIP adequate for compliance with the Good Neighbor Provision. These determinations regarding SIPs became final after 60 days, see 42 U. S. C. § 7607(b)(1) (2006 ed., Supp. V), and many went unchallenged.[11] EPA views the SIP determinations as having triggered its statutory obligation to promulgate a FIP within two years, see § 7410(c), a view contested by respondents, see Part II, *infra*.

D

A group of state and local governments (State respondents), joined by industry and labor groups (Industry respondents), petitioned for review of the Transport Rule in the U. S.

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[9] Similarly, upwind States EPA independently determined to be "interfer[ing] with [the] maintenance" of NAAQS downwind were required to eliminate pollution only to the extent their emissions satisfied both of these criteria. See *id.*, at 48254.

[10] These FIPs specified the maximum amount of pollution each in-state pollution source could emit. Sources below this ceiling could sell unused "allocations" to sources that could not reduce emissions to the necessary level as cheaply. See *id.*, at 48271–48272. This type of "cap-and-trade" system cuts costs while still reducing pollution to target levels.

[11] Three States did challenge EPA's determinations. See Pet. for Review in *Ohio* v. *EPA*, No. 11–3988 (CA6); Pet. for Review in *Kansas* v. *EPA*, No. 12–1019 (CADC); Notice in *Georgia* v. *EPA*, No. 11–1427 (CADC). Those challenges were not consolidated with this proceeding, and they remain pending (held in abeyance for these cases) in the Sixth and D. C. Circuits. See Twelfth Joint Status Report in *Ohio* v. *EPA*, No. 11–3988 (CA6); Order in *Kansas* v. *EPA*, No. 11–1333 (CADC, May 10, 2013); Order in *Georgia* v. *EPA*, No. 11–1427 (CADC, May 10, 2013).

Court of Appeals for the D. C. Circuit. Over the dissent of Judge Rogers, the Court of Appeals vacated the rule in its entirety. See 696 F. 3d 7, 37 (2012).

EPA's actions, the appeals court held, exceeded the Agency's statutory authority in two respects. By promulgating FIPs before giving States a meaningful opportunity to adopt their own implementation plans, EPA had, in the court's view, upset the CAA's division of responsibility between the States and the Federal Government. In the main, the Court of Appeals acknowledged, EPA's FIP authority is triggered at the moment the Agency disapproves a SIP. See *id.*, at 30. Thus, when a State proposes a SIP inadequate to achieve a NAAQS, EPA could promulgate a FIP immediately after disapproving that SIP. See *id.*, at 32.

But the Court of Appeals ruled that a different regime applies to a State's failure to meet its obligations under the Good Neighbor Provision. While a NAAQS was a "clear numerical target," a State's good neighbor obligation remained "nebulous and unknown," the court observed, until EPA calculated the State's emission budget. *Ibid.* Without these budgets, the Court of Appeals said, upwind States would be compelled to take a "stab in the dark" at calculating their own significant contribution to interstate air pollution. *Id.*, at 35. The D. C. Circuit read the Act to avoid putting States in this position: EPA had an implicit statutory duty, the court held, to give upwind States a reasonable opportunity to allocate their emission budgets among in-state sources before the Agency's authority to issue FIPs could be triggered. *Id.*, at 37.

The D. C. Circuit also held that the Agency's two-part interpretation of the Good Neighbor Provision ignored three "red lines . . . cabin[ing the] EPA's authority." *Id.*, at 19. First, the D. C. Circuit interpreted the Good Neighbor Provision to require upwind States to reduce emissions in "a manner proportional to their contributio[n]" to pollution in down-

wind States. *Id.*, at 21. The Transport Rule, however, treated all regulated upwind States alike, regardless of their relative contribution to the overall problem. See *id.*, at 23. It required all upwind States "screened in" at step one to reduce emissions in accord with the uniform cost thresholds set during the step two control analysis. Imposing these uniform cost thresholds, the Court of Appeals observed, could force some upwind States to reduce emissions by more than their "fair share." *Id.*, at 27.

According to the Court of Appeals, EPA had also failed to ensure that the Transport Rule did not mandate upwind States to reduce pollution unnecessarily. The Good Neighbor Provision, the D. C. Circuit noted, "targets [only] those emissions from upwind States that 'contribute significantly *to nonattainment*' " of a NAAQS in downwind States. *Id.*, at 22. Pollution reduction beyond that goal was "unnecessary over-control," outside the purview of the Agency's statutory mandate. *Ibid.* Because the emission budgets were calculated by reference to cost alone, the court concluded that EPA had done nothing to guard against, or even measure, the "over-control" potentially imposed by the Transport Rule. See *ibid.*

Finally, by deciding, at the screening analysis, that upwind contributions below the one-percent threshold were insignificant, EPA had established a "floor" on the Agency's authority to act. See *id.*, at 20, and n. 13. Again pointing to the rule's reliance on costs, the Court of Appeals held that EPA had failed to ensure that upwind States were not being forced to reduce emissions below the one-percent threshold. See *ibid.*

In dissent, Judge Rogers criticized the majority for deciding two questions that were not, in her view, properly before the court. See *id.*, at 40–46, 51–58. First, she addressed the majority's insistence that FIPs abide a State's opportunity to allocate its emission budget among in-state sources. She regarded respondents' plea to that effect as an untimely

attack on EPA's previous SIP disapprovals. See *id.*, at 40–46. Second, in Judge Rogers' assessment, respondents had failed to raise their substantive objections to the Transport Rule with the specificity necessary to preserve them for review. See *id.*, at 51–58. On the merits, Judge Rogers found nothing in the Act to require, or even suggest, that EPA must quantify a State's good neighbor obligations before it promulgated a FIP. See *id.*, at 46–51. She also disagreed with the court's conclusion that the Transport Rule unreasonably interpreted the Act. See *id.*, at 58–60.

We granted certiorari to decide whether the D. C. Circuit had accurately construed the limits the CAA places on EPA's authority. See 570 U. S. 916 (2013).

II

A

Once EPA has calculated emission budgets, the D. C. Circuit held, the Agency must give upwind States the opportunity to propose SIPs allocating those budgets among in-state sources before issuing a FIP. 696 F. 3d, at 37. As the State respondents put it, a FIP allocating a State's emission budget "must issue *after* EPA has quantified the States' good-neighbor obligations [in an emission budget] and given the States a reasonable opportunity to meet those obligations in SIPs." Brief for State Respondents 20.

Before reaching the merits of this argument, we first reject EPA's threshold objection that the claim is untimely. According to the Agency, this argument—and the D. C. Circuit's opinion accepting it—rank as improper collateral attacks on EPA's prior SIP disapprovals. As earlier recounted, see *supra,* at 503, EPA, by the time it issued the Transport Rule, had determined that each regulated upwind State had failed to submit a SIP adequate to satisfy the Good Neighbor Provision. Many of those determinations, because unchallenged, became final after 60 days, see 42 U. S. C. § 7607(b)(1), and did so before the petitions here at issue were filed. EPA argues that the Court cannot question exercise

of the Agency's FIP authority without subjecting these final SIP disapprovals to untimely review.

We disagree. The gravamen of the State respondents' challenge is not that EPA's disapproval of any particular SIP was erroneous. Rather, respondents urge that, notwithstanding these disapprovals, the Agency was obliged to grant an upwind State a second opportunity to promulgate adequate SIPs once EPA set the State's emission budget. This claim does not depend on the validity of the prior SIP disapprovals. Even assuming the legitimacy of those disapprovals, the question remains whether EPA was required to do more than disapprove a SIP, as the State respondents urge, to trigger the Agency's statutory authority to issue a FIP.[12]

B

Turning to the merits, we hold that the text of the statute supports EPA's position. As earlier noted, see *supra*, at 498, the CAA sets a series of precise deadlines to which the States and EPA must adhere. Once EPA issues any new or revised NAAQS, a State has three years to adopt a SIP adequate for compliance with the Act's requirements. See 42 U. S. C. § 7410(a)(1). Among those requirements is the Act's mandate that SIPs "shall" include provisions sufficient to satisfy the Good Neighbor Provision. § 7410(a)(2).

If EPA determines a SIP to be inadequate, the Agency's mandate to replace it with a FIP is no less absolute:

> "[EPA] shall promulgate a [FIP] at any time within 2 years after the [Agency]

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[12] The State respondents make a second argument we do not reach. They urge that EPA could not impose FIPs on several upwind States whose SIPs had been previously approved by the Agency under CAIR. EPA changed those approvals to disapprovals when it issued the Transport Rule, see 76 Fed. Reg. 48220, and the States assert that the process by which EPA did so was improper. That argument was not passed on by the D. C. Circuit, see 696 F. 3d 7, 31, n. 29 (2012), and we leave it for the Court of Appeals to consider in the first instance on remand.

> "(A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum [relevant] criteria . . . , or
>
> "(B) disapproves a [SIP] in whole or in part,
>
> "unless the State corrects the deficiency, and [EPA] approves the plan or plan revision, before the [Agency] promulgates such [FIP]." § 7410(c)(1).

In other words, once EPA has found a SIP inadequate, the Agency has a statutory duty to issue a FIP "at any time" within two years (unless the State first "corrects the deficiency," which no one contends occurred here).

The D. C. Circuit, however, found an unwritten exception to this strict time prescription for SIPs aimed at implementing the Good Neighbor Provision. Expecting any one State to develop a "comprehensive solution" to the "collective problem" of interstate air pollution without first receiving EPA's guidance was, in the Court of Appeals' assessment, "set[ting] the States up to fail." 696 F. 3d, at 36–37. The D. C. Circuit therefore required EPA, after promulgating each State's emission budget, to give the State a "reasonable" period of time to propose SIPs implementing its budget. See *id.*, at 37.

However sensible (or not) the Court of Appeals' position,[13] a reviewing court's "task is to apply the text [of the statute],

[13] On this point, the dissent argues that it is "beyond responsible debate that the States cannot possibly design FIP-proof SIPs without knowing the EPA-prescribed targets at which they must aim." *Post*, at 541. Many of the State respondents thought otherwise, however, when litigating the matter in *Michigan* v. *EPA*, 213 F. 3d 663 (CADC 2000). See Final Brief for Petitioning States in No. 98–1497 (CADC), p. 34 ("EPA has the responsibility to establish NAAQS," but without further intervention by EPA, "States [have] the duty and right to develop . . . SIPs . . . to meet those NAAQS."). See also *id.*, at 37 ("EPA's role is to determine whether the SIP submitted is 'adequate' . . . not to dictate contents of the submittal in the first instance. . . . [E]ach State has the right and the obligation to write a SIP that complies with § [74]10(a)(2), including the 'good neighbor' provision.").

not to improve upon it." *Pavelic & LeFlore* v. *Marvel Entertainment Group, Div. of Cadence Industries Corp.*, 493 U. S. 120, 126 (1989). Nothing in the Act differentiates the Good Neighbor Provision from the several other matters a State must address in its SIP. Rather, the statute speaks without reservation: Once a NAAQS has been issued, a State "shall" propose a SIP within three years, § 7410(a)(1), and that SIP "shall" include, among other components, provisions adequate to satisfy the Good Neighbor Provision, § 7410(a)(2).

Nor does the Act condition the duty to promulgate a FIP on EPA's having first quantified an upwind State's good neighbor obligations. As Judge Rogers observed in her dissent from the D. C. Circuit's decision, the Act does not require EPA to furnish upwind States with information of any kind about their good neighbor obligations before a FIP issues. See 696 F. 3d, at 47. Instead, a SIP's failure to satisfy the Good Neighbor Provision, without more, triggers EPA's obligation to issue a federal plan within two years. § 7410(c). After EPA has disapproved a SIP, the Agency can wait up to two years to issue a FIP, during which time the State can "correc[t] the deficiency" on its own. *Id.*, at 47. But EPA is not obliged to wait two years or postpone its action even a single day: The Act empowers the Agency to promulgate a FIP "at any time" within the two-year limit. *Ibid.* Carving out an exception to the Act's precise deadlines, as the D. C. Circuit did, "rewrites a decades-old statute whose plain text and structure establish a clear chronology of federal and State responsibilities." *Ibid.*

The practical difficulties cited by the Court of Appeals do not justify departure from the Act's plain text. See *Barnhart* v. *Sigmon Coal Co.*, 534 U. S. 438, 461–462 (2002) (We "must presume that a legislature says in a statute what it means and means in a statute what it says there." (internal quotation marks omitted)). When Congress elected to make EPA's input a prerequisite to state action under the Act, it did so expressly. States developing vehicle inspection

and maintenance programs under the CAA, for example, must await EPA guidance before issuing SIPs. 42 U. S. C. § 7511a(c)(3)(B). A State's obligation to adopt a SIP, moreover, arises only after EPA has first set the NAAQS the State must meet. § 7410(a)(1). Had Congress intended similarly to defer States' discharge of their obligations under the Good Neighbor Provision, Congress, we take it, would have included a similar direction in that section. See *Jama* v. *Immigration and Customs Enforcement*, 543 U. S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.").

In short, nothing in the statute places EPA under an obligation to provide specific metrics to States before they undertake to fulfill their good neighbor obligations. By altering the schedule Congress provided for SIPs and FIPs, the D. C. Circuit stretched out the process. It allowed a delay Congress did not order and placed an information submission obligation on EPA Congress did not impose. The D. C. Circuit, we hold, had no warrant thus to revise the CAA's action-ordering prescriptions.

C

At oral argument, the State respondents emphasized EPA's previous decisions, in the NO_X SIP Call and CAIR, to quantify the emission reductions required of upwind States before the window to propose a SIP closed. See Tr. of Oral Arg. 37–39, 42–43, 45–46. In their view, by failing to accord States a similar grace period after issuing States' emission budgets, EPA acted arbitrarily. See *ibid.*

Whatever pattern the Agency followed in its NO_X SIP Call and CAIR proceedings, EPA retained discretion to alter its course provided it gave a reasonable explanation for doing so. *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State*

Farm Mut. Automobile Ins. Co., 463 U. S. 29, 42 (1983). The Agency presented such an explanation in the Transport Rule. As noted, see *supra*, at 500, the D. C. Circuit's *North Carolina* decision admonished EPA to act with dispatch in amending or replacing CAIR, the Transport Rule's predecessor. See 550 F. 3d, at 1178 (warning EPA that the stay of the court's decision to vacate CAIR would not persist "indefinite[ly]"). Given *North Carolina*'s stress on expeditious action to cure the infirmities the court identified in CAIR, EPA thought it "[in]appropriate to establish [the] lengthy transition period" entailed in allowing States time to propose new or amended SIPs implementing the Transport Rule emission budgets. See 76 Fed. Reg. 48220 (citing *North Carolina*, 550 F. 3d 1176). Endeavoring to satisfy the D. C. Circuit's directive, EPA acted speedily, issuing FIPs contemporaneously with the Transport Rule. In light of the firm deadlines imposed by the Act, which we hold the D. C. Circuit lacked authority to alter, we cannot condemn EPA's decision as arbitrary or capricious.[14]

III

A

The D. C. Circuit also held that the Transport Rule's two-step interpretation of the Good Neighbor Provision conflicts with the Act. Before addressing this holding, we take up a jurisdictional objection raised by EPA.

The CAA directs that "[o]nly an objection to a rule . . . raised with reasonable specificity during the period for pub-

[14] In light of the CAA's "core principle" of cooperative federalism, the dissent believes EPA abused its discretion by failing to give States an additional opportunity to submit SIPs in satisfaction of the Good Neighbor Provision. *Post*, at 542. But nothing in the statute so restricts EPA. To the contrary, as earlier observed, see *supra*, at 509, the plain text of the CAA grants EPA plenary authority to issue a FIP "at *any* time" within the two-year period that begins the moment EPA determines a SIP to be inadequate, § 7410(c)(1) (emphasis added).

lic comment . . . may be raised during judicial review." 42 U. S. C. § 7607(d)(7)(B). Respondents failed to state their objections to the Transport Rule during the comment period with the "specificity" required for preservation, EPA argues. See Brief for Federal Petitioners 34–42. This failure at the administrative level, EPA urges, forecloses judicial review. *Id.*, at 34.

Assuming, without deciding, that respondents did not meet the Act's "reasonable specificity" requirement during the comment period, we do not regard that lapse as "jurisdictional." This Court has cautioned against "profligate use" of the label "jurisdictional." *Sebelius* v. *Auburn Regional Medical Center*, 568 U. S. 145, 153 (2013). A rule may be "mandatory," yet not "jurisdictional," we have explained. See *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 510 (2006). Section 7607(d)(7)(B), we hold, is of that character. It does not speak to a court's authority, but only to a party's procedural obligations. See *Kontrick* v. *Ryan*, 540 U. S. 443, 455 (2004). Had EPA pursued the "reasonable specificity" argument vigorously before the D. C. Circuit, we would be obligated to address the merits of the argument. See *Gonzalez* v. *Thaler*, 565 U. S. 134, 146 (2012). But EPA did not press the argument unequivocally. Before the D. C. Circuit, it indicated only that the "reasonable specificity" prescription might bar judicial review. Brief for Respondent EPA et al. in No. 11–1302 (CADC), p. 30. See also *id.*, at 32. We therefore do not count the prescription an impassable hindrance to our adjudication of respondents' attack on EPA's interpretation of the Transport Rule. We turn to that attack mindful of the importance of the issues respondents raise to the ongoing implementation of the Good Neighbor Provision.

B

We routinely accord dispositive effect to an agency's reasonable interpretation of ambiguous statutory language. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council*,

Inc., 467 U. S. 837 (1984), is the pathmarking decision, and it bears a notable resemblance to the cases before us. *Chevron* concerned EPA's definition of the term "source," as used in the 1977 amendments to the CAA. *Id.*, at 840, n. 1. Those amendments placed additional restrictions on companies' liberty to add new pollution "sources" to their factories. See *id.*, at 840. Although "source" might have been interpreted to refer to an individual smokestack, EPA construed the term to refer to an entire plant, thereby "treat[ing] all of the pollution-emitting devices within the [plant] as though they were encased within a single 'bubble.'" *Ibid.* Under the Agency's interpretation, a new pollution-emitting device would not subject a plant to the additional restrictions if the "alteration [did] not increase the total emissions [produced by] the plant." *Ibid.*

This Court held EPA's interpretation of "source" a reasonable construction of an ambiguous statutory term. When "Congress has not directly addressed the precise [interpretative] question at issue," we cautioned, a reviewing court cannot "simply impose its own construction o[f] the statute." *Id.*, at 843. Rather, the agency is charged with filling the "gap left open" by the ambiguity. *Id.*, at 866. Because "'a full understanding of the force of the statutory policy . . . depend[s] upon more than ordinary knowledge'" of the situation, the administering agency's construction is to be accorded "controlling weight unless . . . arbitrary, capricious, or manifestly contrary to the statute." *Id.*, at 844 (quoting *United States* v. *Shimer*, 367 U. S. 374, 382 (1961)). Determining that none of those terms fit EPA's interpretation of "source," the Court deferred to the Agency's judgment.

We conclude that the Good Neighbor Provision delegates authority to EPA at least as certainly as the CAA provisions involved in *Chevron*. The statute requires States to eliminate those "amounts" of pollution that "contribute significantly to *nonattainment*" in downwind States. 42 U. S. C.

§ 7410(a)(2)(D)(i) (emphasis added). Thus, EPA's task[15] is to reduce upwind pollution, but only in "amounts" that push a downwind State's pollution concentrations above the relevant NAAQS. As noted earlier, however, the nonattainment of downwind States results from the collective and interwoven contributions of multiple upwind States. See *supra*, at 496–497. The statute therefore calls upon the Agency to address a thorny causation problem: How should EPA allocate among multiple contributing upwind States responsibility for a downwind State's excess pollution?

A simplified example illustrates the puzzle EPA faced. Suppose the Agency sets a NAAQS, with respect to a particular pollutant, at 100 parts per billion (ppb), and that the level of the pollutant in the atmosphere of downwind State A is 130 ppb. Suppose further that EPA has determined that each of three upwind States—X, Y, and Z—contributes the equivalent of 30 ppb of the relevant pollutant to State A's airspace. The Good Neighbor Provision, as just observed, prohibits only upwind emissions that contribute significantly to downwind *nonattainment*. EPA's authority under the provision is therefore limited to eliminating a *total* of 30 ppb,[16] *i. e.*, the overage caused by the collective contribution of States X, Y, and Z.[17]

How is EPA to divide responsibility among the three States? Should the Agency allocate reductions proportionally (10 ppb each), on a per capita basis, on the basis of the cost of abatement, or by some other metric? See Brief for Federal Petitioners 50 (noting EPA's consideration of differ-

[15] Though we speak here of "EPA's task," the Good Neighbor Provision is initially directed to upwind States. As earlier explained, see Part II–B, *supra*, only after a State has failed to propose a SIP adequate for compliance with the provision is EPA called upon to act.

[16] Because of the uncertainties inherent in measuring interstate air pollution, see *supra*, at 496–497, reductions of *exactly* 30 ppb likely are unattainable. See *infra*, at 523.

[17] For simplicity's sake, the hypothetical assumes that EPA has not required any emission reductions by the downwind State itself.

ent approaches). The Good Neighbor Provision does not answer that question for EPA. Cf. *Chevron*, 467 U. S., at 860 ("[T]he language of [the CAA] simply does not compel any given interpretation of the term 'source.' "). Under *Chevron*, we read Congress' silence as a delegation of authority to EPA to select from among reasonable options. See *United States* v. *Mead Corp.*, 533 U. S. 218, 229 (2001).[18]

Yet the Court of Appeals believed that the Act speaks clearly, requiring EPA to allocate responsibility for reducing emissions in "a manner proportional to" each State's "contributio[n]" to the problem. 696 F. 3d, at 21. Nothing in the text of the Good Neighbor Provision propels EPA down this path. Understandably so, for as EPA notes, the D. C. Circuit's proportionality approach could scarcely be satisfied in practice. See App. in No. 11–1302 etc. (CADC), p. 2312 ("[W]hile it is possible to determine an emission reduction percentage if there is a single downwind [receptor], most upwind states contribute to multiple downwind [receptors] (in multiple states) and would have a different reduction percentage for each one.").

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[18] The statutory gap identified also exists in the Good Neighbor Provision's second instruction. That instruction requires EPA to eliminate amounts of upwind pollution that "interfere with maintenance" of a NAAQS by a downwind State. § 7410(a)(2)(D)(i). This mandate contains no qualifier analogous to "significantly," and yet it entails a delegation of administrative authority of the same character as the one discussed above. Just as EPA is constrained, under the first part of the Good Neighbor Provision, to eliminate only those amounts that "contribute . . . to *nonattainment*," EPA is limited, by the second part of the provision, to reduce only by "amounts" that "interfere with *maintenance*," *i. e.*, by just enough to permit an already-attaining State to maintain satisfactory air quality. (Emphasis added.) With multiple upwind States contributing to the maintenance problem, however, EPA confronts the same challenge that the "contribute significantly" mandate creates: How should EPA allocate reductions among multiple upwind States, many of which contribute in amounts sufficient to impede downwind maintenance? Nothing in *either* clause of the Good Neighbor Provision provides the criteria by which EPA is meant to apportion responsibility.

To illustrate, consider a variation on the example set out above. Imagine that States X and Y now contribute air pollution to State A in a ratio of one to five, *i. e.*, State Y contributes five times the amount of pollution to State A than does State X. If State A were the only downwind State to which the two upwind States contributed, the D. C. Circuit's proportionality requirement would be easy to meet: EPA could require State Y to reduce its emissions by five times the amount demanded of State X.

The realities of interstate air pollution, however, are not so simple. Most upwind States contribute pollution to multiple downwind States in varying amounts. See 76 Fed. Reg. 48239–48246. See also Brief for Respondent Calpine Corp. et al. in Support of Petitioners 48–49 (offering examples). Suppose then that States X and Y also contribute pollutants to a second downwind State (State B), this time in a ratio of seven to one. Though State Y contributed a relatively larger share of pollution to State A, with respect to State B, State X is the greater offender. Following the proportionality approach with respect to State B would demand that State X reduce its emissions by seven times as much as State Y. Recall, however, that State Y, as just hypothesized, had to effect five times as large a reduction with respect to State A. The Court of Appeals' proportionality edict with respect to *both* State A and State B appears to work neither mathematically nor in practical application. Proportionality as to one downwind State will not achieve proportionality as to others. Quite the opposite. And where, as is generally true, upwind States contribute pollution to more than two downwind receptors, proportionality becomes all the more elusive.

Neither the D. C. Circuit nor respondents face up to this problem. The dissent, for its part, strains to give meaning to the D. C. Circuit's proportionality constraint as applied to a world in which multiple upwind States contribute emissions to multiple downwind locations. In the dissent's view,

upwind States must eliminate emissions by "whatever minimum amount reduces" their share of the overage in each and every one of the downwind States to which they are linked. See *post*, at 532. In practical terms, this means each upwind State will be required to reduce emissions by the amount necessary to eliminate that State's largest downwind contribution. The dissent's formulation, however, does not account for the combined and cumulative effect of each upwind State's reductions on attainment in multiple downwind locations. See *post*, at 531–532 ("Under a proportional-reduction approach, State X would be required to eliminate emissions of that pollutant by whatever minimum amount reduces *both* State A's level by 0.2 unit and State B's by 0.7 unit." (emphasis added)). The result would be costly over-regulation unnecessary to, indeed in conflict with, the Good Neighbor Provision's goal of attainment.[19]

[19] To see why, one need only slightly complicate the world envisioned by the dissent. Assume the world is made up of only four States—two upwind (States X and Y) and two downwind (States A and B). Suppose also, as the dissent allows, see *post*, at 532, that the reductions State X must make to eliminate its share of the amount by which State A is in nonattainment are more than necessary for State X to eliminate its share of State B's nonattainment. As later explained, see *infra*, at 522, this kind of "over-control," we agree with the dissent, is acceptable under the statute. Suppose, however, that State Y also contributes to pollution in both State A and State B such that the reductions it must make to eliminate its proportion of State B's overage exceed the reductions it must make to bring State A into attainment. In this case, the dissent would have State X reduce by just enough to eliminate its share of State A's nonattainment and more than enough to eliminate its share of State B's overage. The converse will be true as to State Y: Under the dissent's approach, State Y would have to reduce by the "minimum" necessary to eliminate its proportional share of State B's nonattainment and more than enough to eliminate its proportion of State A's overage. The result is that the total amount by which both States X and Y are required to reduce will exceed what is necessary for attainment *in all downwind States involved* (*i. e.*, in both State A and State B). Over-control thus unnecessary to achieving attainment in all involved States is impermissible under the Good Neighbor Provision. See *infra*, at 522–523, n. 23. The problem

In response, the dissent asserts that EPA will "simply be required to make allowance for" the overregulation caused by its "proportional-reduction" approach. *Post*, at 534. What criterion should EPA employ to determine which States will have to make those "allowance[s]" and by how much? The dissent admits there are "multiple ways" EPA might answer those questions. *Ibid.* But proportionality cannot be one of those ways, for the proportional-reduction approach is what led to the overregulation in the first place. And if a nonproportional approach can play a role in setting the final allocation of reduction obligations, then it is hardly apparent why EPA, free to depart from proportionality at the back end, cannot do so at the outset.

Persuaded that the Good Neighbor Provision does not dictate the particular allocation of emissions among contributing States advanced by the D. C. Circuit, we must next decide whether the allocation method chosen by EPA is a "permissible construction of the statute." *Chevron*, 467 U. S., at 843. As EPA interprets the statute, upwind emissions rank as "amounts [that] . . . contribute significantly to nonattainment" if they (1) constitute one percent or more of a relevant NAAQS in a nonattaining downwind State and (2) can be eliminated under the cost threshold set by the Agency. See 76 Fed. Reg. 48254. In other words, to identify which emissions were to be eliminated, EPA considered both the magnitude of upwind States' contributions and the cost associated with eliminating them.

The Industry respondents argue that, however EPA ultimately divides responsibility among upwind States, the final calculation cannot rely on costs. The Good Neighbor Provision, respondents and the dissent emphasize, "requires each State to prohibit only those '*amounts*' of air pollution emitted within the State that 'contribute significantly' to another

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would worsen were the hypothetical altered to include more than two downwind States and two upwind States, the very real circumstances EPA must address.

State's nonattainment." Brief for Industry Respondents 23 (emphasis added). See also *post*, at 529. The cost of preventing emissions, they urge, is wholly unrelated to the actual "amoun[t]" of air pollution an upwind State contributes. Brief for Industry Respondents 23. Because the Transport Rule considers costs, respondents argue, "States that contribute identical 'amounts' . . . may be deemed [by EPA] to have [made] substantially *different*" contributions. *Id.*, at 30.

But, as just explained, see *supra*, at 514–515, the Agency cannot avoid the task of choosing which among equal "amounts" to eliminate. The Agency has chosen, sensibly in our view, to reduce the amount easier, *i. e.*, less costly, to eradicate, and nothing in the text of the Good Neighbor Provision precludes that choice.

Using costs in the Transport Rule calculus, we agree with EPA, also makes good sense. Eliminating those amounts that can cost effectively be reduced is an efficient and equitable solution to the allocation problem the Good Neighbor Provision requires the Agency to address. Efficient because EPA can achieve the levels of attainment, *i. e.*, of emission reductions, the proportional approach aims to achieve, but at a much lower overall cost. Equitable because, by imposing uniform cost thresholds on regulated States, EPA's rule subjects to stricter regulation those States that have done relatively less in the past to control their pollution. Upwind States that have not yet implemented pollution controls of the same stringency as their neighbors will be stopped from free riding on their neighbors' efforts to reduce pollution. They will have to bring down their emissions by installing devices of the kind in which neighboring States have already invested.

Suppose, for example, that the industries of upwind State A have expended considerable resources installing modern pollution-control devices on their plants. Factories in upwind State B, by contrast, continue to run old, dirty plants.

Yet, perhaps because State A is more populous and therefore generates a larger sum of pollution overall, the two States' emissions have equal effects on downwind attainment. If State A and State B are required to eliminate emissions proportionally (*i. e.*, equally), sources in State A will be compelled to spend far more per ton of reductions because they have already utilized lower cost pollution controls. State A's sources will also have to achieve greater reductions than would have been required had they not made the cost-effective reductions in the first place. State A, in other words, will be tolled for having done more to reduce pollution in the past.[20] EPA's cost-based allocation avoids these anomalies.

Obligated to require the elimination of only those "amounts" of pollutants that contribute to the nonattainment of NAAQS in downwind States, EPA must decide how to differentiate among the otherwise like contributions of multiple upwind States. EPA found decisive the difficulty of eliminating each "amount," *i. e.*, the cost incurred in doing so. Lacking a dispositive statutory instruction to guide it, EPA's decision, we conclude, is a "reasonable" way of filling the "gap left open by Congress." *Chevron*, 467 U. S., at 866.[21]

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[20] The dissent's approach is similarly infirm. It, too, would toll those upwind States that have already invested heavily in means to reduce the pollution their industries cause, while lightening the burden on States that have done relatively less to control pollution emanating from local enterprises.

[21] The dissent, see *post*, at 535–536, relies heavily on our decision in *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457 (2001). In *Whitman*, we held that the relevant text of the CAA "unambiguously bars" EPA from considering costs when determining a NAAQS. *Id.*, at 471. Section 7409(b)(1) commands EPA to set NAAQS at levels "requisite to protect the public health" with "an adequate margin of safety." This mandate, we observed in *Whitman*, was "absolute," and precluded any other consideration (*e. g.*, cost) in the NAAQS calculation. *Id.*, at 465 (internal quotation marks omitted). Not so of the Good Neighbor Provision, which grants EPA discretion to eliminate "amounts [of pollution that] . . . contribute significantly to nonattainment" downwind. On the particular

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The D. C. Circuit stated two further objections to EPA's cost-based method of defining an upwind State's contribution. Once a State was screened in at step one of EPA's analysis, its emission budget was calculated solely with reference to the uniform cost thresholds the Agency selected at step two. The Transport Rule thus left open the possibility that a State might be compelled to reduce emissions beyond the point at which every affected downwind State is in attainment, a phenomenon the Court of Appeals termed "over-control." 696 F. 3d, at 22; see *supra*, at 505. Second, EPA's focus on costs did not foreclose, as the D. C. Circuit accurately observed, the possibility that an upwind State would be required to reduce its emissions by so much that the State no longer contributed one percent or more of a relevant NAAQS to any downwind State. This would place the State below the mark EPA had set, during the screening phase, as the initial threshold of "significan[ce]." See 696 F. 3d, at 20, and n. 13.

We agree with the Court of Appeals to this extent: EPA cannot require a State to reduce its output of pollution by more than is necessary to achieve attainment in every downwind State or at odds with the one-percent threshold the Agency has set. If EPA requires an upwind State to reduce emissions by more than the amount necessary to achieve attainment in *every* downwind State to which it is linked, the Agency will have overstepped its authority, under the Good Neighbor Provision, to eliminate those "amounts [that] contribute . . . to nonattainment." Nor can EPA demand reductions that would drive an upwind State's contribution to every downwind State to which it is linked below one per-

"amounts" that should qualify for elimination, the statute is silent. Unlike the provision at issue in *Whitman*, which provides express criteria by which EPA is to set NAAQS, the Good Neighbor Provision, as earlier explained, fails to provide *any* metric by which EPA can differentiate among the contributions of multiple upwind States. See *supra*, at 514–515.

cent of the relevant NAAQS. Doing so would be counter to step one of the Agency's interpretation of the Good Neighbor Provision. See 76 Fed. Reg. 48236 ("[S]tates whose contributions are below th[e] thresholds do not significantly contribute to nonattainment . . . of the relevant NAAQS.").

Neither possibility, however, justifies wholesale invalidation of the Transport Rule. First, instances of "over-control" in particular downwind locations, the D. C. Circuit acknowledged, see 696 F. 3d, at 22, may be incidental to reductions necessary to ensure attainment elsewhere. Because individual upwind States often "contribute significantly" to nonattainment in multiple downwind locations, the emissions reduction required to bring one linked downwind State into attainment may well be large enough to push other linked downwind States over the attainment line.[22] As the Good Neighbor Provision seeks attainment in *every* downwind State, however, exceeding attainment in one State cannot rank as "over-control" unless unnecessary to achieving attainment in *any* downwind State. Only reductions unnecessary to downwind attainment *anywhere* fall outside the Agency's statutory authority.[23]

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[22] The following example, based on the record, is offered in Brief for Respondent Calpine Corp. et al. in Support of Petitioners 52–54. Ohio, West Virginia, Pennsylvania, and Indiana each contribute in varying amounts to five different nonattainment areas in three downwind States. *Id.*, at 52. Implementation of the Transport Rule, EPA modeling demonstrates, will bring three of these five areas into attainment by a comfortable margin, and a fourth only barely. See *id.*, at 53, fig. 2. The fifth downwind receptor, however, will still fall short of attainment despite the reductions the rule requires. See *ibid.* But if EPA were to lower the emission reductions required of the upwind States to reduce over-attainment in the first three areas, the area barely achieving attainment would no longer do so, and the area still in nonattainment would fall even further behind. Thus, "over-control" of the first three downwind receptors is essential to the attainment achieved by the fourth and to the fifth's progress toward that goal.

[23] The dissent suggests that our qualification of the term "over-control" is tantamount to an admission that "nothing stands in the way of [a] proportional-reduction approach." *Post*, at 532. Not so. Permitting

Second, while EPA has a statutory duty to avoid over-control, the Agency also has a statutory obligation to avoid "under-control," *i. e.*, to maximize achievement of attainment downwind. For reasons earlier explained, see *supra*, at 496–497, a degree of imprecision is inevitable in tackling the problem of interstate air pollution. Slight changes in wind patterns or energy consumption, for example, may vary downwind air quality in ways EPA might not have anticipated. The Good Neighbor Provision requires EPA to seek downwind attainment of NAAQS notwithstanding the uncertainties. Hence, some amount of over-control, *i. e.*, emission budgets that turn out to be more demanding than necessary, would not be surprising. Required to balance the possibilities of under-control and over-control, EPA must have leeway in fulfilling its statutory mandate.

Finally, in a voluminous record, involving thousands of upwind-to-downwind linkages, respondents point to only a few instances of "unnecessary" emission reductions, and even those are contested by EPA. Compare Brief for Industry Respondents 19 with Reply Brief for Federal Petitioners 21–22. EPA, for its part, offers data, contested by respondents, purporting to show that few (if any) upwind States have been required to limit emissions below the one-percent threshold of significance. Compare Brief for Federal Petitioners 37, 54–55, with Brief for Industry Respondents 40.

If any upwind State concludes it has been forced to regulate emissions below the one-percent threshold or beyond the point necessary to bring all downwind States into attain-

"over-control" as to one State for the purpose of achieving attainment in another furthers the stated goal of the Good Neighbor Provision, *i. e.*, attainment of NAAQS. By contrast, a proportional-reduction scheme is neither necessary to achieve downwind attainment nor mandated by the terms of the statute, as earlier discussed, see *supra*, at 513–518. Permitting "over-control" for the purpose of achieving proportionality would thus contravene the clear limits the statute places on EPA's good neighbor authority, *i. e.*, to eliminate only those "amounts" of upwind pollutants essential to achieving attainment downwind.

ment, that State may bring a particularized, as-applied challenge to the Transport Rule, along with any other as-applied challenges it may have. Cf. *Babbitt* v. *Sweet Home Chapter, Communities for Great Ore.*, 515 U. S. 687, 699–700 (1995) (approving agency's reasonable interpretation of statute despite possibility of improper applications); *American Hospital Assn.* v. *NLRB*, 499 U. S. 606, 619 (1991) (rejecting facial challenge to National Labor Relations Board rule despite possible arbitrary applications). Satisfied that EPA's cost-based methodology, on its face, is not "arbitrary, capricious, or manifestly contrary to the statute," *Chevron*, 467 U. S., at 844, we uphold the Transport Rule. The possibility that the rule, in uncommon particular applications, might exceed EPA's statutory authority does not warrant judicial condemnation of the rule in its entirety.

In sum, we hold that the CAA does not command that States be given a second opportunity to file a SIP after EPA has quantified the State's interstate pollution obligations. We further conclude that the Good Neighbor Provision does not require EPA to disregard costs and consider exclusively each upwind State's physically proportionate responsibility for each downwind air quality problem. EPA's cost-effective allocation of emission reductions among upwind States, we hold, is a permissible, workable, and equitable interpretation of the Good Neighbor Provision.

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For the reasons stated, the judgment of the United States Court of Appeals for the D. C. Circuit is reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE ALITO took no part in the consideration or decision of these cases.

Justice Scalia, with whom Justice Thomas joins, dissenting.

Too many important decisions of the Federal Government are made nowadays by unelected agency officials exercising broad lawmaking authority, rather than by the people's representatives in Congress. With the statute involved in the present cases, however, Congress did it right. It specified quite precisely the responsibility of an upwind State under the Good Neighbor Provision: to eliminate those *amounts of pollutants* that it contributes to downwind problem areas. But the Environmental Protection Agency was unsatisfied with this system. Agency personnel, perhaps correctly, thought it more efficient to require reductions not in proportion to the *amounts of pollutants* for which each upwind State is responsible, but on the basis of how *cost-effectively* each can decrease emissions.

Today, the majority approves that undemocratic revision of the Clean Air Act. The Agency came forward with a textual justification for its action, relying on a farfetched meaning of the word "significantly" in the statutory text. That justification is so feeble that today's majority does not even recite it, much less defend it. The majority reaches its result ("Look Ma, no hands!") without benefit of text, claiming to have identified a remarkable "gap" in the statute, which it proceeds to fill (contrary to the plain logic of the statute) with cost-benefit analysis—and then, with no pretended textual justification at all, simply extends cost-benefit analysis beyond the scope of the alleged gap.

Additionally, the majority relieves EPA of any obligation to announce novel interpretations of the Good Neighbor Provision before the States must submit plans that are required to comply with those interpretations. By according the States primacy in deciding how to attain the governing air-quality standards, the Clean Air Act is pregnant with an obligation for the Agency to set those standards before

the States can be expected to achieve them. The majority nonetheless approves EPA's promulgation of federal plans implementing good-neighbor benchmarks before the States could conceivably have met those benchmarks on their own.

I would affirm the judgment of the D. C. Circuit that EPA violated the law both in crafting the Transport Rule and in implementing it.[1]

I. The Transport Rule

"It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen* v. *Georgetown Univ. Hospital*, 488 U. S. 204, 208 (1988). Yet today the majority treats the text of the Clean Air Act not as the source and ceiling of EPA's authority to regulate interstate air pollution, but rather as a difficulty to be overcome in pursuit of the Agency's responsibility to "craf[t] a solution to the problem of interstate air pollution." *Ante*, at 497. In reality, Congress itself has crafted the solution. The Good Neighbor Provision requires each State to eliminate whatever "amounts" of "air pollutant[s]" "contribute significantly to nonattainment" or "interfere with maintenance" of national ambient air-quality standards (NAAQS) in other States. 42 U. S. C. § 7410(a)(2)(D)(i)(I). The statute addresses solely the environmental consequences of emissions, *not* the facility of reducing them; and it requires States to shoulder burdens in proportion to the size of their contributions, *not* in proportion to the ease of bearing them. EPA's utterly fanciful "from each according to its ability" construction sacrifices democratically adopted text to bureaucratically favored policy. It deserves no deference under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984).

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[1] I agree with the majority's analysis turning aside EPA's threshold objections to judicial review. See *ante*, at 506–507, 511–512.

A. Alleged Textual Support: "Significantly"

In the Government's argument here, the asserted textual support for the efficient-reduction approach adopted by EPA in the Transport Rule is the ambiguity of the word "significantly" in the statutory requirement that each State eliminate those "amounts" of pollutants that "contribute *significantly* to nonattainment" in downwind States. § 7410(a)(2)(D)(i)(I) (emphasis added). As described in the Government's briefing:

> "[T]he term 'significantly' . . . is ambiguous, and . . . EPA may permissibly determine the amount of a State's 'significant' contribution by reference to the amount of emissions reductions achievable through application of highly cost-effective controls." Reply Brief for Federal Petitioners 15–16 (emphasis added; some internal quotation marks omitted).

And as the Government stated at oral argument:

> "[I]n terms of the language, 'contribute significantly,' . . . EPA reasonably construed that term to include a component of difficulty of achievement [*i. e.*, cost]; that is, in common parlance, we might say that dunking a basketball is a more *significant* achievement for somebody who is 5 feet 10 than for somebody who is 6 feet 10." Tr. of Oral Arg. 9 (emphasis added).

But of course the statute does not focus on whether the upwind State has "achieved significantly"; it asks whether the State has "contributed significantly" to downwind pollution. The provision addresses the physical effects of physical causes, and it is only the magnitude of the relationship sufficient to trigger regulation that admits of some vagueness. Stated differently, the statute is ambiguous as to *how much* of a contribution to downwind pollution is "significant," but it is not at all ambiguous as to whether factors unrelated to the *amounts of pollutants* that make up a con-

tribution affect the analysis. Just as "[i]t does not matter whether the word 'yellow' is ambiguous when the agency has interpreted it to mean 'purple,'" *United States* v. *Home Concrete & Supply, LLC*, 566 U. S. 478, 493, n. 1 (2012) (SCALIA, J., concurring in part and concurring in judgment), it does not matter whether the phrase "amounts which . . . contribute significantly [to downwind NAAQS nonattainment]" is ambiguous when EPA has interpreted it to mean "amounts which are inexpensive to eliminate."

It would be extraordinary for Congress, by use of the single word "significantly," to transmogrify a statute that assigns responsibility on the basis of amounts of pollutants emitted into a statute authorizing EPA to reduce interstate pollution in the manner that it believes most efficient. We have repeatedly said that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001) (citing *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U. S. 218, 231 (1994); *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 159–160 (2000)).

The statute's history demonstrates that "significantly" is not code for "feel free to consider compliance costs." The previous version of the Good Neighbor Provision required each State to prohibit emissions that would "*prevent* attainment or maintenance by any other State of any [NAAQS]." 91 Stat. 693 (emphasis added). It is evident that the current reformulation (targeting "any air pollutant in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any [NAAQS]") was meant simply to eliminate any implication that the polluting State had to be a but-for rather than merely a contributing cause of the downwind nonattainment or maintenance problem—not to allow cost concerns to creep in through the back door.

In another respect also EPA's reliance upon the word "significantly" is plainly mistaken. The Good Neighbor Provision targets for elimination not only those emissions that "contribute significantly to nonattainment [of NAAQS] in . . . any other State," but also those that "interfere with maintenance [of NAAQS] by . . . any other State." § 7410(a)(2)(D)(i)(I). The wiggle-word "significantly" is absent from the latter phrase. EPA does not—cannot—provide any textual justification for the conclusion that, when the same amounts of a pollutant travel downwind from States X and Y to a single area in State A, the emissions from X but not Y can be said to "interfere with maintenance" of the NAAQS in A just because they are cheaper to eliminate. Yet EPA proposes to use the "from each according to its ability" approach for nonattainment areas *and* maintenance areas.

To its credit, the majority does not allude to, much less try to defend, the Government's "significantly" argument. But there is a serious downside to this. The sky-hook of "significantly" was called into service to counter the criterion of upwind-state responsibility plainly provided in the statute's text: *amounts of pollutants* contributed to downwind problem areas. See Brief for Federal Petitioners 42–45. Having forsworn reliance on "significantly" to convert responsibility for amounts of pollutants into responsibility for easy reduction of pollutants, the majority is impaled upon the statutory text.

B. The Alleged "Gap"

To fill the void created by its abandonment of EPA's "significantly" argument, the majority identifies a supposed gap in the text, which EPA must fill: While the text says that each upwind State must be responsible for its own contribution to downwind pollution, it does not say how responsibility is to be divided among multiple States when the total of their combined contribution to downwind pollution in a particular area exceeds the reduction that the relevant NAAQS requires. In the example given by the majority, *ante*, at 514–

515, when each of three upwind States contributes 30 units of a pollutant to a downwind State but the reduction required for that State to comply with the NAAQS is only 30 units, how will responsibility for that 30 units be apportioned? Wow, that's a hard one—almost the equivalent of asking who is buried in Grant's Tomb. If the criterion of responsibility is *amounts of pollutants*, then surely shared responsibility must be based upon *relative amounts of pollutants*—in the majority's example, 10 units for each State. The statute makes no sense otherwise. The Good Neighbor Provision contains a gap only for those who blind themselves to the obvious in order to pursue a preferred policy.

But not only does the majority bring in cost-benefit analysis to fill a gap that does not really exist. Having filled that "gap," it then extends the efficiency-based principle to situations *beyond the imaginary gap*—that is, situations *where no apportionment is required.* Even where only a *single* upwind State contributes pollutants to a downwind State, its annual emissions "budget" will be based not upon the amounts of pollutants it contributes, but upon what "pollution controls [are] available at the chosen cost thresholds." *Ante*, at 502. EPA's justification was its implausible (and only half-applicable) notion that "significantly" imports cost concerns into the provision. The majority, having abandoned that absurdity, is left to deal with the no-apportionment situation with no defense—not even an imaginary gap—against a crystal-clear statutory text.

C. The Majority's Criticisms of Proportional Reduction

1. Impossibility

The majority contends that a proportional-reduction approach "could scarcely be satisfied in practice" and "appears to work neither mathematically nor in practical application," *ante*, at 515–516—in essence, that the approach is impossible of application. If that were true, I know of no legal author-

ity and no democratic principle that would derive from it the consequence that EPA could rewrite the statute, rather than the consequence that the statute would be inoperative. "There are sometimes statutes which no rule or canon of interpretation can make effective or applicable to the situations of fact which they purport to govern. In such cases the statute must simply fail." 3 R. Pound, Jurisprudence 493 (1959) (footnote omitted). In other words, the impossibility argument has no independent force: It is relevant only if the majority's textual interpretation is permissible. But in any event, the argument is wrong.

The impossibility theorem rests upon the following scenario: "Imagine that States X and Y . . . contribute air pollution to State A in a ratio of one to five . . . ." *Ante*, at 516. And suppose that "States X and Y also contribute pollutants to a second downwind State (State B), this time in a ratio of seven to one." *Ibid.* The majority concludes that "[t]he Court of Appeals' proportionality edict with respect to *both* State A and State B appears to work neither mathematically nor in practical application." *Ibid.* But why not? The majority's model relies on two faulty premises—one an oversimplification and the other a misapprehension.

First, the majority's formulation suggests that EPA measures the comparative downwind drift of pollutants in free-floating proportions between States. In reality, however, EPA assesses quantities (in physical units), not proportions. So, the majority's illustration of a 1-to-5 ratio describing the relative contributions of States X and Y to State A's pollution might mean (for example) that X is responsible for 0.2 unit of some pollutant above the NAAQS in A and that Y is responsible for 1 unit. And the second example, assuming a 7-to-1 ratio underlying State X's and Y's contributions to State B's pollution, might mean that State X supplies 0.7 unit of the same pollutant above the NAAQS and State Y, 0.1 unit. Under a proportional-reduction approach, State X would be required to eliminate emissions of that pollutant by

whatever minimum amount reduces both State A's level by 0.2 unit and State B's by 0.7 unit. State Y, in turn, would be required to curtail its emissions by whatever minimum amount decreases both State A's measure by 1 unit and State B's by 0.1 unit.

But, the majority objects, the reductions that State X must make to help bring State B into compliance may be more than those necessary for it to help bring State A into compliance, resulting in "over-control" of X with respect to A. See *ante*, at 516–517, and n. 19. This objection discloses the second flaw in the impossibility theorem. Echoing EPA, see Brief for Federal Petitioners 47–48, the majority believes that the D. C. Circuit's interpretation of the Good Neighbor Provision forbids over-control with respect to even a single downwind receptor. That is the only way in which the proportional-reduction approach could be deemed "to work neither mathematically nor in practical application" on its face. *Ante*, at 516. But the premise is incorrect. Although some of the D. C. Circuit's simplified examples might support that conclusion, its opinion explicitly acknowledged that the complexity of real-world conditions demands the contrary: "To be sure, . . . there may be some truly unavoidable over-control in some downwind States that occurs as a byproduct of the necessity of reducing upwind States' emissions enough to meet the NAAQS in other downwind States." 696 F. 3d 7, 22 (2012). Moreover, the majority itself recognizes that the Good Neighbor Provision does not categorically prohibit over-control. "As the Good Neighbor Provision seeks attainment in *every* downwind State, . . . exceeding attainment in one State cannot rank as 'over-control' unless unnecessary to achieving attainment in *any* downwind State." *Ante*, at 522. The majority apparently fails to appreciate that, having cleared up that potential point of confusion, nothing stands in the way of the proportional-reduction approach.

The majority relies on an EPA document preceding the Transport Rule to establish the Agency's supposed belief that the proportional-reduction approach "could scarcely be satisfied in practice." *Ante*, at 515. But the document says no such thing. Rather, it shows that the Agency rejected a proportion-based, "air[-]quality-only" methodology not because it was impossible of application, but because it failed to account for costs. See App. in No. 11–1302 etc. (CADC), pp. 2311–2312. The document labels as a "technical difficulty" (not an impossibility) the fact that "most upwind states contribute to multiple downwind [receptors] (in multiple states) and would have a different reduction percentage for each one." *Id.*, at 2312. The Clean Air Act is full of technical difficulties, and this one is overcome by requiring each State to make the greatest reduction necessary with respect to any downwind area.

2. Over-Control

Apparently conceding that the proportional-reduction approach may not be impossible of application after all, the majority alternatively asserts that it would cause "costly overregulation unnecessary to, indeed in conflict with, the Good Neighbor Provision's goal of attainment." *Ante*, at 517. This assertion of massive overregulation assumes that a vast number of downwind States will be the accidental beneficiaries of collateral pollution reductions—that is, nontargeted reductions that occur as a consequence of required reductions targeted at neighboring downwind States. (Collateral pollution reduction is the opposite of collateral damage, so to speak.) The majority contends that the collateral pollution reductions enjoyed by a downwind State will cause the required upwind reductions actually targeting that State to exceed the level necessary to assure attainment or maintenance, thus producing unnecessary over-control. I have no reason to believe that the problem of over-control is as exten-

sive and thus "costly" as the majority alleges, and the majority provides none.

But never mind that. It suffices to say that over-control is no more likely to occur when the required reductions are apportioned among upwind States on the basis of *amounts of pollutants* contributed than when they are apportioned on the basis of *cost*. There is no conceivable reason why the efficient-reduction States that bear the brunt of the majority's (and EPA's) approach are less likely to be over-controlled than the major-pollution-causing States that would bear the brunt of my (and the statute's) approach. Indeed, EPA never attempted to establish that the Transport Rule did not produce gross over-control. See 696 F. 3d, at 27. What causes the problem of over-control is not the *manner of apportioning* the required reductions, but the *composite volume* of the required reductions in each downwind State. If the majority's approach reduces over-control (it admittedly does not entirely eliminate it), that is only because EPA applies its cost-effectiveness principle not just to determining the proportions of required reductions that each upwind State must bear, but to determining the volume of those required reductions. See *supra*, at 530.

In any case, the solution to over-control under a proportional-reduction system is not difficult to discern. In calculating good-neighbor responsibilities, EPA would simply be required to make allowance for what I have called collateral pollution reductions. The Agency would set upwind States' obligations at levels that, after taking into account those reductions, suffice to produce attainment in all downwind States. Doubtless, there are multiple ways for the Agency to accomplish that task in accordance with the statute's amounts-based, proportional focus.[2] The majority

[2] The majority insists that "proportionality cannot be one of those ways." *Ante*, at 518. But it is easy to imagine precluding unnecessary over-control by reducing in a percent-based manner the burdens of each

itself invokes an unexplained device to prevent over-control "in uncommon particular applications" of its scheme. *Ante*, at 524. Whatever that device is, it can serve just as well to prevent over-control under the approach I have outlined.

I fully acknowledge that the proportional-reduction approach will demand some complicated computations where one upwind State is linked to multiple downwind States and vice versa. I am confident, however, that EPA's skilled number-crunchers can adhere to the statute's *quantitative* (rather than efficiency) mandate by crafting *quantitative* solutions. Indeed, those calculations can be performed at the desk, whereas the "from each according to its ability" approach requires the unwieldy field examination of many pollution-producing sources with many sorts of equipment.

D. Our Precedent

The majority agrees with EPA's assessment that "[u]sing costs in the Transport Rule calculus . . . makes good sense." *Ante*, at 519. Its opinion declares that "[e]liminating those amounts that can cost effectively be reduced is an efficient and equitable solution to the allocation problem the Good Neighbor Provision requires the Agency to address." *Ibid.* Efficient, probably. Equitable? Perhaps so, but perhaps not. See Brief for Industry Respondents 35–36. But the point is that whether efficiency should have a dominant or subordinate role is for Congress, not this Court, to determine.

This is not the first time parties have sought to convert the Clean Air Act into a mandate for cost-effective regulation. *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457 (2001), confronted the contention that EPA should consider costs in setting NAAQS. The provision at issue there, like this one, did not expressly bar cost-based decisionmaking—

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upwind State linked to a given downwind area, which would retain the proportionality produced by my approach.

and unlike this one, it even contained words that were arguably ambiguous in the relevant respect. Specifically, § 7409(b)(1) instructed EPA to set primary NAAQS "the attainment and maintenance of which . . . are requisite to protect the public health" with "an adequate margin of safety." One could hardly overstate the capaciousness of the word "adequate," and the phrase "public health" was at least equally susceptible (indeed, much more susceptible) of permitting cost-benefit analysis as the word "significantly" is here. As the respondents in *American Trucking* argued, setting NAAQS without considering costs may bring about failing industries and fewer jobs, which in turn may produce poorer and less healthy citizens. See *id.*, at 466. But we concluded that "in the context of" the entire provision, that interpretation "ma[de] no sense." *Ibid.* As quoted earlier, we said that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not . . . hide elephants in mouseholes." *Id.*, at 468.

In *American Trucking*, the Court "refused to find implicit in ambiguous sections of the [Clean Air Act] an authorization to consider costs that has elsewhere, and so often, been expressly granted," *id.*, at 467, citing a tradition dating back to *Union Elec. Co.* v. *EPA*, 427 U. S. 246, 257, and n. 5 (1976). There are, indeed, numerous Clean Air Act provisions explicitly permitting costs to be taken into account. See, *e. g.*, § 7404(a)(1); § 7521(a)(2); § 7545(c)(2); § 7547(a)(3); § 7554(b)(2); § 7571(b); § 7651c(f)(1)(A). *American Trucking* thus demanded "a textual commitment of authority to the EPA to consider costs," 531 U. S., at 468—a hurdle that the Good Neighbor Provision comes nowhere close to clearing. Today's opinion turns its back upon that case and is incompatible with that opinion.[3]

[3] The majority shrugs off *American Trucking* in a footnote, reasoning that because it characterized the provision there in question as "absolute," it has nothing to say about the Good Neighbor Provision, which is not abso-

II. Imposition of Federal Implementation Plans

The D. C. Circuit vacated the Transport Rule for the additional reason that EPA took the reins in allocating emissions budgets among pollution-producing sources through Federal Implementation Plans (FIPs) without first providing the States a meaningful opportunity to perform that task through State Implementation Plans (SIPs). The majority rejects that ruling on the ground that "the Act does not require EPA to furnish upwind States with information of any kind about their good neighbor obligations before a FIP issues." *Ante*, at 509. "[N]othing in the statute," the majority says, "places EPA under an obligation to provide specific metrics to States before they undertake to fulfill their good neighbor obligations." *Ante*, at 510. This remarkably expansive reasoning makes a hash of the Clean Air Act, transforming it from a program based on cooperative federalism to one of centralized federal control. Nothing in the Good Neighbor Provision suggests such a stark departure from the Act's fundamental structure.

A. Implications of State Regulatory Primacy

Down to its very core, the Clean Air Act sets forth a federalism-focused regulatory strategy. The Act begins by declaring that "air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is *the primary responsibility of States and local governments*." § 7401(a)(3) (emphasis added). State primacy permeates Title I, which addresses the promulgation and implementation of NAAQS, in particu-

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lute. See *ante*, at 520–521, n. 21. This is a textbook example of begging the question: Since the Good Neighbor Provision is not absolute (the very point at issue here), *American Trucking*, which dealt with a provision that is absolute, is irrelevant. To the contrary, *American Trucking* is right on point. As described in text, the provision at issue here is even more categorical ("absolute") than the provision at issue in *American Trucking*.

lar. Under § 7409(a), EPA must promulgate NAAQS for each pollutant for which air-quality criteria have been issued pursuant to § 7408. Section 7410(a)(1), in turn, requires each State, usually within three years of each new or revised NAAQS, to submit a SIP providing for its "implementation, maintenance, and enforcement." EPA may step in to take over that responsibility if, and only if, a State discharges it inadequately. Specifically, if the Agency finds that a State has failed to make a required or complete submission or disapproves a SIP, it "shall promulgate a [FIP] at any time within 2 years . . . , unless the State corrects the deficiency, and [EPA] approves the [SIP] or [SIP] revision." § 7410(c)(1).

To describe the effect of this statutory scheme in simple terms: After EPA sets numerical air-quality benchmarks, "Congress plainly left with the States . . . the power to determine which sources would be burdened by regulation and to what extent." *Union Elec. Co.*, 427 U. S., at 269. The States are to present their chosen means of achieving EPA's benchmarks in SIPs, and only if a SIP fails to meet those goals may the Agency commandeer a State's authority by promulgating a FIP. "[S]o long as the ultimate effect of a State's choice of emission limitations is compliance with the [NAAQS], the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *Train* v. *Natural Resources Defense Council, Inc.*, 421 U. S. 60, 79 (1975). EPA, we have emphasized, "is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the [NAAQS] are to be met." *Ibid.*

The Good Neighbor Provision is one of the requirements with which SIPs must comply. § 7410(a)(2)(D)(i)(I). The statutory structure described above plainly demands that EPA afford States a meaningful opportunity to allocate reduction responsibilities among the sources within their borders. But the majority holds that EPA may in effect force

the States to guess at what those responsibilities might be by requiring them to submit SIPs before learning what the Agency regards as a "significan[t]" contribution—with the consequence of losing their regulatory primacy if they guess wrong. EPA asserts that the D. C. Circuit "was wrong as a factual matter" in reasoning that States cannot feasibly implement the Good Neighbor Provision without knowing what the Agency considers their obligations to be. Brief for Federal Petitioners 29. That is literally unbelievable. The only support that EPA can muster are the assertions that "States routinely undertake technically complex air quality determinations" and that "emissions information from all States is publicly available." *Ibid.* As respondents rightly state: "All the scientific knowledge in the world is useless if the States are left to guess the way in which EPA might ultimately quantify 'significan[ce].'" Brief for State Respondents 50.

Call it "punish[ing] the States for failing to meet a standard that EPA had not yet announced and [they] did not yet know," 696 F. 3d, at 28; asking them "to hit the target . . . *before* EPA defines [it]," *id.*, at 32; requiring them "to take [a] stab in the dark," *id.*, at 35; or "set[ting] the States up to fail," *id.*, at 37. Call it "hid[ing] the ball," Brief for State Respondents 20; or a "shell game," *id.*, at 54. Call it "pin the tail on the donkey." Tr. of Oral Arg. 24. As we have recently explained:

> "It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time . . . and demands deference." *Christopher* v. *SmithKline Beecham Corp.*, 567 U. S. 142, 158–159 (2012).

That principle applies *a fortiori* to a regulatory regime that rests on principles of cooperative federalism.

B. Past EPA Practice

EPA itself has long acknowledged the proposition that it is nonsensical to expect States to comply with the Good Neighbor Provision absent direction about what constitutes a "significan[t]" contribution to interstate pollution.

The Agency consistently adopted that position prior to the Transport Rule. In 1998, when it issued the NO_X SIP Call under § 7410(k)(5), EPA acknowledged that "[w]ithout determining an acceptable level of NO_X reductions, the upwind State would not have guidance as to what is an acceptable submission." 63 Fed. Reg. 57370. EPA deemed it "most efficient—indeed necessary—for the Federal government to establish the overall emissions levels for the various States." *Ibid.* Accordingly, the Agency quantified good-neighbor responsibilities and then allowed States a year to submit SIPs to implement them. *Id.*, at 57450–57451.

Similarly, when EPA issued the Clean Air Interstate Rule (CAIR) in 2005 under § 7410(c), it explicitly "recognize[d] that States would face great difficulties in developing transport SIPs to meet the requirements of today's action without th[e] data and policies" provided by the Rule, including "judgments from EPA concerning the appropriate criteria for determining whether upwind sources contribute significantly to downwind nonattainment under [§ 74]10(a)(2)(D)." 70 *id.*, at 25268–25269. The Agency thus gave the States 18 months to submit SIPs implementing their new good-neighbor responsibilities. See *id.*, at 25166–25167, 25176. Although EPA published FIPs before that window closed, it specified that they were meant to serve only as a "Federal backstop" and would not become effective unless necessary "a year after the CAIR SIP submission deadline." 71 *id.*, at 25330–25331 (2006).

Even since promulgating the Transport Rule, EPA has repeatedly reaffirmed that States cannot be expected to read the Agency's mind. In other proceedings, EPA has time and again stated that although "[s]ome of the elements of [the

SIP-submission process] are relatively straightforward, . . . others clearly require interpretation by EPA through rulemaking, or recommendations through guidance, in order to give specific meaning for a particular NAAQS." 76 *id.*, at 58751 (2011). As an example of the latter, the Agency has remarked that the Good Neighbor Provision "contains numerous terms that require substantial rulemaking by EPA in order to determine such basic points as what constitutes significant contribution," citing CAIR. *Ibid.*, n. 6. In fact, EPA repeated those precise statements not once, not twice, but *30 times* following promulgation of the Transport Rule.[4]

Notwithstanding what parties may have argued in other litigation many years ago, it is beyond responsible debate that the States cannot possibly design FIP-proof SIPs without knowing the EPA-prescribed targets at which they must aim. EPA insists that it enjoys significant discretion—indeed, that it can consider essentially whatever factors it wishes—to determine what constitutes a "significan[t]" contribution to interstate pollution; and it simultaneously asserts that the States ought to know what quantities it will choose. The Agency—and the majority—cannot have it both ways.

C. Abuse of Discretion

The majority attempts to place the blame for hollowing out the core of the Clean Air Act on "the Act's plain text." *Ante*, at 509. The first textual element to which it refers is

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[4] In addition to the citations in text, see 77 Fed. Reg. 50654, and n. 7 (2012); *id.*, at 47577, and n. 7; *id.*, at 46363, and n. 7; *id.*, at 46356, and n. 9; *id.*, at 45323, and n. 7; *id.*, at 43199, and n. 7; *id.*, at 38241, and n. 6; *id.*, at 35912, and n. 7; *id.*, at 34909, and n. 7; *id.*, at 34901, and n. 8; *id.*, at 34310, and n. 7; *id.*, at 34291, and n. 8; *id.*, at 33384, and n. 7; *id.*, at 33375, and n. 7; *id.*, at 23184, and n. 7; *id.*, at 22543, and n. 4; *id.*, at 22536, and n. 7; *id.*, at 22253, and n. 8; *id.*, at 21915, and n. 7; *id.*, at 21706, and n. 6; *id.*, at 16788, and n. 4; *id.*, at 13241, and n. 5; *id.*, at 6715, and n. 7; *id.*, at 6047, and n. 4; *id.*, at 3216, and n. 7; 76 *id.*, at 77955, and n. 7 (2011); *id.*, at 75852, and n. 7; *id.*, at 70943, and n. 6; *id.*, at 62636, and n. 3.

§ 7410(c)'s requirement that after EPA has disapproved a SIP, it "shall promulgate a [FIP] at any time within 2 years." That is to say, the Agency has discretion whether to act at once or to defer action until some later point during the 2-year period. But it also has discretion to work within the prescribed timetable to respect the rightful role of States in the statutory scheme by delaying the issuance or enforcement of FIPs pending the resubmission and approval of SIPs—as EPA's conduct surrounding CAIR clearly demonstrates. And all of this assumes that the Agency insists on disapproving SIPs before promulgating the applicable good-neighbor standards—though in fact EPA has discretion to publicize those metrics before the window to submit SIPs closes in the first place.

The majority states that the Agency "retained discretion to alter its course" from the one pursued in the NO_X SIP Call and CAIR, *ante*, at 510, but that misses the point. The point is that EPA has discretion to arrange things so as to preserve the Clean Air Act's core principle of state primacy—and that it is an *abuse of discretion* to refuse to do so. See § 7607(d)(9)(A); see also 5 U. S. C. § 706(2)(A) (identical text in the Administrative Procedure Act). Indeed, the proviso in § 7410(c)(1) that the Agency's authority to promulgate a FIP within the 2-year period terminates if "the State corrects the deficiency, and [EPA] approves the [SIP] or [SIP] revision" explicitly contemplates just such an arrangement.[5]

The majority's conception of administrative discretion is so sprawling that it would allow EPA to subvert state primacy

[5] I am unimpressed, by the way, with the explanation that the majority accepts for EPA's about-face: that the D. C. Circuit admonished it to "act with dispatch in amending or replacing CAIR." *Ante*, at 511 (citing *North Carolina* v. *EPA*, 550 F. 3d 1176, 1178 (2008) (*per curiam*)). Courts of Appeals' raised eyebrows and wagging fingers are not law, least so when they urge an agency to take ultra vires action. Nor can the encouragement to act illegally qualify as a "good reaso[n]" for an agency's alteration of course under *FCC* v. *Fox Television Stations, Inc.*, 556 U. S. 502, 515 (2009).

not only with respect to the interstate-pollution concerns of the Good Neighbor Provision, but with respect to the much broader concerns of the NAAQS program more generally. States must submit SIPs "within 3 years" of each new or revised NAAQS "*or such shorter period as [EPA] may prescribe.*" § 7410(a)(1) (emphasis added). Because there is no principled reason to read that scheduling provision in a less malleable manner than the one at issue here, under the majority's view EPA could demand that States submit SIPs within a matter of days—or even hours—after a NAAQS publication or else face the immediate imposition of FIPs.

The second element of "plain text" on which the majority relies is small beer indeed. The Good Neighbor Provision does not expressly state that EPA must publish target quantities before the States are required to submit SIPs—even though the Clean Air Act does so for NAAQS more generally and for vehicle inspection and maintenance programs, see § 7511a(c)(3)(B). From that premise, the majority reasons that "[h]ad Congress intended similarly to defer States' discharge of their obligations under the Good Neighbor Provision, Congress . . . would have included a similar direction in that section." *Ante*, at 510. Perhaps so. But EPA itself read the statute differently when it declared in the NO_X SIP Call that "[d]etermining the overall level of air pollutants allowed to be emitted in a State *is comparable to determining [NAAQS]*, which the courts have recognized as EPA's responsibility, and is distinguishable from determining the particular mix of controls among individual sources to attain those standards, which the caselaw identifies as a State responsibility." 63 Fed. Reg. 57369 (emphasis added).

The negative implication suggested by a statute's failure to use consistent terminology can be a helpful guide to determining meaning, especially when all the provisions in question were enacted at the same time (which is not the case here). But because that interpretive canon, like others, is just one clue to aid construction, it can be overcome by more

powerful indications of meaning elsewhere in the statute. It is, we have said, "no more than a rule of thumb that can tip the scales when a statute could be read in multiple ways." *Sebelius* v. *Auburn Regional Medical Center*, 568 U. S. 145, 156 (2013) (internal quotation marks and brackets omitted). The Clean Air Act simply cannot be read to make EPA the primary regulator in this context. The negative-implication canon is easily overcome by the statute's state-respecting structure—not to mention the sheer impossibility of submitting a sensible SIP without EPA guidance. Negative implication is the tiniest mousehole in which the majority discovers the elephant of federal control.

* * *

Addressing the problem of interstate pollution in the manner Congress has prescribed—or in any other manner, for that matter—is a complex and difficult enterprise. But "[r]egardless of how serious the problem an administrative agency seeks to address, . . . it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'" *Brown & Williamson*, 529 U. S., at 125 (quoting *ETSI Pipeline Project* v. *Missouri*, 484 U. S. 495, 517 (1988)). The majority's approval of EPA's approach to the Clean Air Act violates this foundational principle of popular government.

I dissent.

Syllabus

OCTANE FITNESS, LLC *v.* ICON HEALTH & FITNESS, INC.

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

No. 12–1184. Argued February 26, 2014—Decided April 29, 2014

The Patent Act's fee-shifting provision authorizes district courts to award attorney's fees to prevailing parties in "exceptional cases." 35 U. S. C. § 285. In *Brooks Furniture Mfg., Inc.* v. *Dutailier Int'l, Inc.*, 393 F. 3d 1378, 1381, the Federal Circuit defined an "exceptional case" as one which either involves "material inappropriate conduct" or is both "objectively baseless" and "brought in subjective bad faith." *Brooks Furniture* also requires that parties establish the "exceptional" nature of a case by "clear and convincing evidence." *Id.*, at 1382.

Respondent ICON Health & Fitness, Inc., sued petitioner Octane Fitness, LLC, for patent infringement. The District Court granted summary judgment to Octane. Octane then moved for attorney's fees under § 285. The District Court denied the motion under the *Brooks Furniture* framework, finding ICON's claim to be neither objectively baseless nor brought in subjective bad faith. The Federal Circuit affirmed.

Held: The *Brooks Furniture* framework is unduly rigid and impermissibly encumbers the statutory grant of discretion to district courts. Pp. 553–558.

(a) Section 285 imposes one and only one constraint on district courts' discretion to award attorney's fees: The power is reserved for "exceptional" cases. Because the Patent Act does not define "exceptional," the term is construed "in accordance with [its] ordinary meaning." *Sebelius* v. *Cloer*, 569 U. S. 369, 376. In 1952, when Congress used the word in § 285 (and today, for that matter), "[e]xceptional" meant "uncommon," "rare," or "not ordinary." Webster's New International Dictionary 889 (2d ed. 1934). An "exceptional" case, then, is simply one that stands out from others with respect to the substantive strength of a party's litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated. District courts may determine whether a case is "exceptional" in the case-by-case exercise of their discretion, considering the totality of the circumstances. Cf. *Fogerty* v. *Fantasy, Inc.*, 510 U. S. 517. Pp. 553–554.

Syllabus

(b) The *Brooks Furniture* framework superimposes an inflexible framework onto statutory text that is inherently flexible. Pp. 554–558.

(1) *Brooks Furniture* is too restrictive in defining the two categories of cases in which fee awards are allowed. The first category—cases involving litigation or certain other misconduct—appears to extend largely to independently sanctionable conduct. But that is not the appropriate benchmark. A district court may award fees in the rare case in which a party's unreasonable, though not independently sanctionable, conduct is so "exceptional" as to justify an award. For litigation to fall within the second category, a district court must determine that the litigation is both objectively baseless and brought in subjective bad faith. But a case presenting either subjective bad faith or exceptionally meritless claims may sufficiently set itself apart from mine-run cases to be "exceptional." The Federal Circuit imported this second category from *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U. S. 49, but that case's standard finds no roots in § 285's text and makes little sense in the context of the exceptional-case determination. Pp. 554–557.

(2) *Brooks Furniture* is so demanding that it would appear to render § 285 largely superfluous. Because courts already possess the inherent power to award fees in cases involving misconduct or bad faith, see *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240, 258–259, this Court has declined to construe fee-shifting provisions narrowly so as to avoid rendering them superfluous. See, *e. g.*, *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412, 419. P. 557.

(3) *Brooks Furniture*'s requirement that proof of entitlement to fees be made by clear and convincing evidence is not justified by § 285, which imposes no specific evidentiary burden. Nor has this Court interpreted comparable fee-shifting statutes to require such a burden of proof. See, *e. g.*, *Fogerty*, 510 U. S., at 519. Pp. 557–558.

496 Fed. Appx. 57, reversed and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, GINSBURG, BREYER, ALITO, and KAGAN, JJ., joined, and in which SCALIA, J., joined except as to footnotes 1–3.

Rudolph A. Telscher, Jr., argued the cause for petitioner. With him on the briefs were *Kara R. Fussner*, *Steven E. Holtshouser*, and *Daisy Manning*.

Roman Martinez argued the cause for the United States as *amicus curiae* urging vacatur. With him on the brief were *Solicitor General Verrilli*, *Assistant Attorney General*

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Delery, *Deputy Solicitor General Stewart*, *Scott R. McIntosh*, and *Mark R. Freeman*.

Carter G. Phillips argued the cause for respondent. With him on the brief were *Ryan C. Morris*, *Larry R. Laycock*, *David R. Wright*, *Jared J. Braithwaite*, and *Constantine L. Trela, Jr.**

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*Briefs of *amici curiae* urging reversal were filed for BSA|The Software Alliance by *Andrew J. Pincus*, *Paul W. Hughes*, and *James F. Tierney*; for the Food Marketing Institute by *David A. Balto* and *Erik Lieberman*; for the Intellectual Property Owners Association by *Paul H. Berghoff*, *Richard F. Phillips*, and *Kevin H. Rhodes*; for Yahoo! Inc. et al. by *Jeffrey A. Lamken*, *Martin V. Totaro*, *John M. Whealan*, and *Kevin T. Kramer*; and for 3M Co. et al. by *Pratik A. Shah*, *Ruthanne M. Deutsch*, *Bradford A. Berenson*, *Richard Rainey*, *Stephen Shackelford, Jr.*, and *Kevin H. Rhodes*.

Briefs of *amici curiae* were filed for the State of Vermont et al. by *William H. Sorrell*, Attorney General of Vermont, *Bridget Asay* and *Naomi Sheffield*, Assistant Attorneys General, *Jon Bruning*, Attorney General of Nebraska, and *Katherine J. Spohn*, Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Luther Strange* of Alabama, *Michael C. Geraghty* of Alaska, *Thomas C. Horne* of Arizona, *Dustin McDaniel* of Arkansas, *Pamela Jo Bondi* of Florida, *Samuel S. Olens* of Georgia, *David M. Louie* of Hawaii, *Tom Miller* of Iowa, *Gregory F. Zoeller* of Indiana, *Derek Schmidt* of Kansas, *James D. "Buddy" Caldwell* of Louisiana, *Janet T. Mills* of Maine, *Martha Coakley* of Massachusetts, *Douglas F. Gansler* of Maryland, *Bill Schuette* of Michigan, *Jim Hood* of Mississippi, *Chris Koster* of Missouri, *Timothy C. Fox* of Montana, *Wayne Stenehjem* of North Dakota, *Michael Dewine* of Ohio, *Ellen F. Rosenblum* of Oregon, *Kathleen G. Kane* of Pennsylvania, *Marty J. Jackley* of South Dakota, *Brian L. Tarbet* of Utah, *Robert W. Ferguson* of Washington, and *Peter K. Michael* of Wyoming; for the American Intellectual Property Law Association by *Barbara A. Fiacco* and *Donald R. Ware*; for Apple Inc. by *Mark S. Davies* and *E. Joshua Rosenkranz*; for the Computer & Communications Industry Association et al. by *Mark A. Lemley*; for the Electronic Frontier Foundation et al. by *Julie P. Samuels* and *Daniel Nazer*; for Google Inc. by *Paul D. Clement*; for the Intellectual Property Law Association of Chicago by *John M. Augustyn*, *Jeffrey B. Burgan*, and *Charles W. Shifley*; for the New York Intellectual Property Owners Association by *Anthony F. Lo Cicero*, *Charles R. Macedo*, and *Robert M. Isackson*; and for Robin Feldman et al. by *Mr. Feldman, pro se.*

JUSTICE SOTOMAYOR delivered the opinion of the Court.*

Section 285 of the Patent Act authorizes a district court to award attorney's fees in patent litigation. It provides, in its entirety, that "[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party." 35 U. S. C. § 285. In *Brooks Furniture Mfg., Inc.* v. *Dutailier Int'l, Inc.*, 393 F. 3d 1378 (2005), the United States Court of Appeals for the Federal Circuit held that "[a] case may be deemed exceptional" under § 285 only in two limited circumstances: "when there has been some material inappropriate conduct," or when the litigation is both "brought in subjective bad faith" and "objectively baseless." *Id.*, at 1381. The question before us is whether the *Brooks Furniture* framework is consistent with the statutory text. We hold that it is not.

I

A

Prior to 1946, the Patent Act did not authorize the awarding of attorney's fees to the prevailing party in patent litigation. Rather, the "American Rule" governed: "'[E]ach litigant pa[id] his own attorney's fees, win or lose . . . .'" *Marx* v. *General Revenue Corp.*, 568 U. S. 371, 382 (2013). In 1946, Congress amended the Patent Act to add a discretionary fee-shifting provision, then codified in § 70, which stated that a court "may in its discretion award reasonable attorney's fees to the prevailing party upon the entry of judgment in any patent case." 35 U. S. C. § 70 (1946 ed.).[1]

Courts did not award fees under § 70 as a matter of course. They viewed the award of fees not "as a penalty for failure to win a patent infringement suit," but as appropriate "only in extraordinary circumstances." *Park-In-Theatres, Inc.* v.

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*JUSTICE SCALIA joins this opinion except as to footnotes 1–3.

[1] This provision did "not contemplat[e] that the recovery of attorney's fees [would] become an ordinary thing in patent suits . . . ." S. Rep. No. 79–1503, p. 2 (1946).

Perkins, 190 F. 2d 137, 142 (CA9 1951). The provision enabled them to address "unfairness or bad faith in the conduct of the losing party, or some other equitable consideration of similar force," which made a case so unusual as to warrant fee shifting. *Ibid.*; see also *Pennsylvania Crusher Co.* v. *Bethlehem Steel Co.*, 193 F. 2d 445, 451 (CA3 1951) (listing as "adequate justification[s]" for fee awards "fraud practiced on the Patent Office or vexatious or unjustified litigation").

Six years later, Congress amended the fee-shifting provision and recodified it as § 285. Whereas § 70 had specified that a district court could "in its discretion award reasonable attorney's fees to the prevailing party," the revised language of § 285 (which remains in force today) provides that "[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party." We have observed, in interpreting the damages provision of the Patent Act, that the addition of the phrase "exceptional cases" to § 285 was "for purposes of clarification only."[2] *General Motors Corp.* v. *Devex Corp.*, 461 U. S. 648, 653, n. 8 (1983); see also *id.*, at 652, n. 6. And the parties agree that the recodification did not substantively alter the meaning of the statute.[3]

For three decades after the enactment of § 285, courts applied it—as they had applied § 70—in a discretionary manner, assessing various factors to determine whether a given case

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[2] The Senate Report similarly explained that the new provision was "substantially the same as" § 70, and that the "'exceptional cases'" language was added simply to "expres[s] the intention of the [1946] statute as shown by its legislative history and as interpreted by the courts." S. Rep. No. 82–1979, p. 30 (1952).

[3] See Brief for Petitioner 35 ("[T]his amendment was not intended to create a stricter standard for fee awards, but instead was intended to clarify and endorse the already-existing statutory standard"); Brief for Respondent 17 ("When it enacted § 285, as the historical notes to this provision make clear, Congress adopted the standards applied by courts interpreting that statute's predecessor, § 70 of the 1946 statute. Congress explained that § 285 'is substantially the same as the corresponding provision in' § 70").

was sufficiently "exceptional" to warrant a fee award. See, *e. g.*, *True Temper Corp.* v. *CF&I Steel Corp.*, 601 F. 2d 495, 508–509 (CA10 1979); *Kearney & Trecker Corp.* v. *Giddings & Lewis, Inc.*, 452 F. 2d 579, 597 (CA7 1971); *Siebring* v. *Hansen*, 346 F. 2d 474, 480–481 (CA8 1965).

In 1982, Congress created the Federal Circuit and vested it with exclusive appellate jurisdiction in patent cases. 28 U. S. C. § 1295. In the two decades that followed, the Federal Circuit, like the regional circuits before it, instructed district courts to consider the totality of the circumstances when making fee determinations under § 285. See, *e. g.*, *Rohm & Haas Co.* v. *Crystal Chemical Co.*, 736 F. 2d 688, 691 (1984) ("Cases decided under § 285 have noted that 'the substitution of the phrase "in exceptional cases" has not done away with the discretionary feature' "); *Yamanouchi Pharmaceutical Co., Ltd.* v. *Danbury Pharmacal, Inc.*, 231 F. 3d 1339, 1347 (2000) ("In assessing whether a case qualifies as exceptional, the district court must look at the totality of the circumstances").

In 2005, however, the Federal Circuit abandoned that holistic, equitable approach in favor of a more rigid and mechanical formulation. In *Brooks Furniture Mfg., Inc.* v. *Dutailier Int'l, Inc.*, 393 F. 3d 1378 (2005), the court held that a case is "exceptional" under § 285 only "when there has been some material inappropriate conduct related to the matter in litigation, such as willful infringement, fraud or inequitable conduct in procuring the patent, misconduct during litigation, vexatious or unjustified litigation, conduct that violates Fed. R. Civ. P. 11, or like infractions." *Id.*, at 1381. "Absent misconduct in conduct of the litigation or in securing the patent," the Federal Circuit continued, fees "may be imposed against the patentee only if both (1) the litigation is brought in subjective bad faith, and (2) the litigation is objectively baseless." *Ibid.* The Federal Circuit subsequently clarified that litigation is objectively baseless only if it is "so unreasonable that no reasonable litigant could believe it would

succeed," *iLOR, LLC* v. *Google, Inc.*, 631 F. 3d 1372, 1378 (2011), and that litigation is brought in subjective bad faith only if the plaintiff "actually know[s]" that it is objectively baseless, *id.*, at 1377.[4]

Finally, *Brooks Furniture* held that because "[t]here is a presumption that the assertion of infringement of a duly granted patent is made in good faith[,] . . . the underlying improper conduct and the characterization of the case as exceptional must be established by clear and convincing evidence." 393 F. 3d, at 1382.

B

The parties to this litigation are manufacturers of exercise equipment. Respondent, ICON Health & Fitness, Inc., owns U. S. Patent No. 6,019,710 ('710 patent), which discloses an elliptical exercise machine that allows for adjustments to fit the individual stride paths of users. ICON is a major manufacturer of exercise equipment, but it has never commercially sold the machine disclosed in the '710 patent. Petitioner, Octane Fitness, LLC, also manufactures exercise equipment, including elliptical machines known as the Q45 and Q47.

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[4] In *Kilopass Technology, Inc.* v. *Sidense Corp.*, 738 F. 3d 1302 (CA Fed. 2013)—decided after our grant of certiorari but before we heard oral argument in this case—the Federal Circuit appeared to cut back on the "subjective bad faith" inquiry, holding that the language in *iLOR* was dictum and that "actual knowledge of baselessness is not required." 738 F. 3d, at 1310. Rather, the court held, "a defendant need only prove reckless conduct to satisfy the subjective component of the § 285 analysis," *ibid.*, and courts may "dra[w] an inference of bad faith from circumstantial evidence thereof when a patentee pursues claims that are devoid of merit," *id.*, at 1311. Most importantly, the Federal Circuit stated that "[o]bjective baselessness alone can create a sufficient inference of bad faith to establish exceptionality under § 285, unless the circumstances as a whole show a lack of recklessness on the patentee's part." *Id.*, at 1314. Chief Judge Rader wrote a concurring opinion that sharply criticized *Brooks Furniture*, 738 F. 3d, at 1318–1320; the court, he said, "should have remained true to its original reading of" § 285, *id.*, at 1320.

ICON sued Octane, alleging that the Q45 and Q47 infringed several claims of the '710 patent. The District Court granted Octane's motion for summary judgment, concluding that Octane's machines did not infringe ICON's patent. 2011 WL 2457914 (D Minn., June 17, 2011). Octane then moved for attorney's fees under § 285. Applying the *Brooks Furniture* standard, the District Court denied Octane's motion. 2011 WL 3900975 (D Minn., Sept. 6, 2011). It determined that Octane could show neither that ICON's claim was objectively baseless nor that ICON had brought it in subjective bad faith. As to objective baselessness, the District Court rejected Octane's argument that the judgment of noninfringement "should have been a foregone conclusion to anyone who visually inspected" Octane's machines. *Id.*, at *2. The court explained that although it had rejected ICON's infringement arguments, they were neither "frivolous" nor "objectively baseless." *Id.*, at *2–*3. The court also found no subjective bad faith on ICON's part, dismissing as insufficient both "the fact that [ICON] is a bigger company which never commercialized the '710 patent" and an e-mail exchange between two ICON sales executives, which Octane had offered as evidence that ICON had brought the infringement action "as a matter of commercial strategy."[5] *Id.*, at *4.

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[5] One e-mail, sent from ICON's Vice President of Global Sales to two employees, read: "'We are suing Octane. Not only are we coming out with a great product to go after them, but throwing a lawsuit on top of that.'" 2011 WL 3900975, *4. One of the recipients then forwarded that e-mail to a third party, along with the accompanying message: "'Just clearing the way and making sure you guys have all your guns loaded!'" *Ibid.* More than a year later, that same employee sent an e-mail to the Vice President of Global Sales with the subject, "'I heard we are suing Octane!'" *Ibid.* The executive responded as follows: "'Yes—old patent we had for a long time that was sitting on the shelf. They are just looking for royalties.'" *Ibid.* The District Court wrote that "in the light most favorable to Octane, these remarks are stray comments by employees with no demonstrated connection to the lawsuit." *Ibid.*

ICON appealed the judgment of noninfringement, and Octane cross-appealed the denial of attorney's fees. The Federal Circuit affirmed both orders. 496 Fed. Appx. 57 (2012). In upholding the denial of attorney's fees, it rejected Octane's argument that the District Court had "applied an overly restrictive standard in refusing to find the case exceptional under § 285." *Id.*, at 65. The Federal Circuit declined to "revisit the settled standard for exceptionality." *Ibid.*

We granted certiorari, 570 U. S. 948 (2013), and now reverse.

II

The framework established by the Federal Circuit in *Brooks Furniture* is unduly rigid, and it impermissibly encumbers the statutory grant of discretion to district courts.

A

Our analysis begins and ends with the text of § 285: "The court in exceptional cases may award reasonable attorney fees to the prevailing party." This text is patently clear. It imposes one and only one constraint on district courts' discretion to award attorney's fees in patent litigation: The power is reserved for "exceptional" cases.

The Patent Act does not define "exceptional," so we construe it "'in accordance with [its] ordinary meaning.'" *Sebelius* v. *Cloer*, 569 U. S. 369, 376 (2013); see also *Bilski* v. *Kappos*, 561 U. S. 593, 603 (2010) ("In patent law, as in all statutory construction, '[u]nless otherwise defined, "words will be interpreted as taking their ordinary, contemporary, common meaning"'"). In 1952, when Congress used the word in § 285 (and today, for that matter), "[e]xceptional" meant "uncommon," "rare," or "not ordinary." Webster's New International Dictionary 889 (2d ed. 1934); see also 3 Oxford English Dictionary 374 (1933) (defining "exceptional" as "out of the ordinary course," "unusual," or "special"); Merriam-Webster's Collegiate Dictionary 435 (11th ed. 2008)

(defining "exceptional" as "rare"); *Noxell Corp.* v. *Firehouse No. 1 Bar-B-Que Restaurant*, 771 F. 2d 521, 526 (CADC 1985) (R. B. Ginsburg, J., joined by Scalia, J.) (interpreting the term "exceptional" in the Lanham Act's identical fee-shifting provision, 15 U. S. C. § 1117(a), to mean "uncommon" or "not run-of-the-mill").

We hold, then, that an "exceptional" case is simply one that stands out from others with respect to the substantive strength of a party's litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated. District courts may determine whether a case is "exceptional" in the case-by-case exercise of their discretion, considering the totality of the circumstances.[6] As in the comparable context of the Copyright Act, "'[t]here is no precise rule or formula for making these determinations,' but instead equitable discretion should be exercised 'in light of the considerations we have identified.'" *Fogerty* v. *Fantasy, Inc.*, 510 U. S. 517, 534 (1994).

B

1

The Federal Circuit's formulation is overly rigid. Under the standard crafted in *Brooks Furniture*, a case is "exceptional" only if a district court either finds litigation-related misconduct of an independently sanctionable magnitude or determines that the litigation was both "brought in subjective bad faith" and "objectively baseless." 393 F. 3d, at

[6] In *Fogerty* v. *Fantasy, Inc.*, 510 U. S. 517 (1994), for example, we explained that in determining whether to award fees under a similar provision in the Copyright Act, district courts could consider a "nonexclusive" list of "factors," including "frivolousness, motivation, objective unreasonableness (both in the factual and legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence." *Id.*, at 534, n. 19 (internal quotation marks omitted).

1381. This formulation superimposes an inflexible framework onto statutory text that is inherently flexible.

For one thing, the first category of cases in which the Federal Circuit allows fee awards—those involving litigation misconduct or certain other misconduct—appears to extend largely to independently sanctionable conduct. See *ibid.* (defining litigation-related misconduct to include "willful infringement, fraud or inequitable conduct in procuring the patent, misconduct during litigation, vexatious or unjustified litigation, conduct that violates Fed. R. Civ. P. 11, or like infractions"). But sanctionable conduct is not the appropriate benchmark. Under the standard announced today, a district court may award fees in the rare case in which a party's unreasonable conduct—while not necessarily independently sanctionable—is nonetheless so "exceptional" as to justify an award of fees.

The second category of cases in which the Federal Circuit allows fee awards is also too restrictive. In order for a case to fall within this second category, a district court must determine *both* that the litigation is objectively baseless *and* that the plaintiff brought it in subjective bad faith. But a case presenting either subjective bad faith or exceptionally meritless claims may sufficiently set itself apart from mine-run cases to warrant a fee award. Cf. *Noxell*, 771 F. 2d, at 526 ("[W]e think it fair to assume that Congress did not intend rigidly to limit recovery of fees by a [Lanham Act] defendant to the rare case in which a court finds that the plaintiff 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons' . . . . Something less than 'bad faith,' we believe, suffices to mark a case as 'exceptional' ").

ICON argues that the dual requirement of "subjective bad faith" and "objective baselessness" follows from this Court's decision in *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U. S. 49 (1993) (*PRE*), which involved an exception to the *Noerr-Pennington* doctrine of antitrust law. It does not. Under the *Noerr-*

Pennington doctrine—established by *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127 (1961), and *Mine Workers* v. *Pennington*, 381 U. S. 657 (1965)—defendants are immune from antitrust liability for engaging in conduct (including litigation) aimed at influencing decisionmaking by the government. *PRE*, 508 U. S., at 56. But under a "sham exception" to this doctrine, "activity 'ostensibly directed toward influencing governmental action' does not qualify for *Noerr* immunity if it 'is a mere sham to cover . . . an attempt to interfere directly with the business relationships of a competitor.'" *Id.*, at 51. In *PRE*, we held that to qualify as a "sham," a "lawsuit must be objectively baseless" and must "concea[l] 'an attempt to interfere directly with the business relationships of a competitor . . . .'" *Id.*, at 60–61 (emphasis deleted). In other words, the plaintiff must have brought baseless claims in an attempt to thwart competition (*i. e.*, in bad faith).

In *Brooks Furniture*, the Federal Circuit imported the *PRE* standard into § 285. See 393 F. 3d, at 1381. But the *PRE* standard finds no roots in the text of § 285, and it makes little sense in the context of determining whether a case is so "exceptional" as to justify an award of attorney's fees in patent litigation. We crafted the *Noerr-Pennington* doctrine—and carved out only a narrow exception for "sham" litigation—to avoid chilling the exercise of the First Amendment right to petition the government for the redress of grievances. See *PRE*, 508 U. S., at 56 ("Those who petition government for redress are generally immune from antitrust liability"). But to the extent that patent suits are similarly protected as acts of petitioning, it is not clear why the shifting of fees in an "exceptional" case would diminish that right. The threat of antitrust liability (and the attendant treble damages, 15 U. S. C. § 15) far more significantly chills the exercise of the right to petition than does the mere shifting of attorney's fees. In the *Noerr-Pennington* context, defendants seek immunity from a judicial declaration that their fil-

ing of a lawsuit was actually unlawful; here, they seek immunity from a far less onerous declaration that they should bear the costs of that lawsuit in exceptional cases.

2

We reject *Brooks Furniture* for another reason: It is so demanding that it would appear to render § 285 largely superfluous. We have long recognized a common-law exception to the general "American rule" against fee shifting—an exception, "inherent" in the "power [of] the courts" that applies for "'willful disobedience of a court order'" or "when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . . .'" *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240, 258–259 (1975). We have twice declined to construe fee-shifting provisions narrowly on the basis that doing so would render them superfluous, given the background exception to the American rule, see *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412, 419 (1978); *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402, n. 4 (1968) (*per curiam*), and we again decline to do so here.

3

Finally, we reject the Federal Circuit's requirement that patent litigants establish their entitlement to fees under § 285 by "clear and convincing evidence," *Brooks Furniture*, 393 F. 3d, at 1382. We have not interpreted comparable fee-shifting statutes to require proof of entitlement to fees by clear and convincing evidence. See, *e. g.*, *Fogerty*, 510 U. S., at 519; *Cooter & Gell* v. *Hartmarx Corp.*, 496 U. S. 384 (1990); *Pierce* v. *Underwood*, 487 U. S. 552, 558 (1988). And nothing in § 285 justifies such a high standard of proof. Section 285 demands a simple discretionary inquiry; it imposes no specific evidentiary burden, much less such a high one. Indeed, patent-infringement litigation has always been governed by a preponderance of the evidence standard, see, *e. g.*, *Béné* v.

Jeantet, 129 U. S. 683, 688 (1889), and that is the "standard generally applicable in civil actions," because it "allows both parties to 'share the risk of error in roughly equal fashion,'" *Herman & MacLean* v. *Huddleston*, 459 U. S. 375, 390 (1983).

* * *

For the foregoing reasons, the judgment of the United States Court of Appeals for the Federal Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

HIGHMARK INC. *v.* ALLCARE HEALTH MANAGEMENT SYSTEM, INC.

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

No. 12–1163. Argued February 26, 2014—Decided April 29, 2014

Petitioner Highmark Inc. moved for fees under the Patent Act's fee-shifting provision, which authorizes a district court to award attorney's fees to the prevailing party in "exceptional cases." 35 U. S. C. § 285. The District Court found the case "exceptional" and granted Highmark's motion. The Federal Circuit, reviewing the District Court's determination *de novo*, reversed in part.

Held: All aspects of a district court's exceptional-case determination under § 285 should be reviewed for abuse of discretion. Prior to *Octane Fitness, LLC* v. *ICON Health & Fitness, Inc.*, *ante*, p. 545, this determination was governed by the framework established by the Federal Circuit in *Brooks Furniture Mfg., Inc.* v. *Dutailier Int'l, Inc.*, 393 F. 3d 1378. *Octane* rejects the *Brooks Furniture* framework as unduly rigid and holds that district courts may make the exceptional-case determination under § 285 in the exercise of their discretion. The holding in *Octane* settles this case. Decisions on "matters of discretion" are traditionally "reviewable for 'abuse of discretion,'" *Pierce* v. *Underwood*, 487 U. S. 552, 558, and this Court previously has held that to be the proper standard of review in cases involving similar determinations, see, *e. g.*, *id.*, at 559; *Cooter & Gell* v. *Hartmarx Corp.*, 496 U. S. 384, 405. The exceptional-case determination is based on statutory text that "emphasizes the fact that the determination is for the district court," *Pierce*, 487 U. S., at 559; that court "is better positioned" to make the determination, *id.*, at 560; and the determination is "multifarious and novel," not susceptible to "useful generalization" of the sort that *de novo* review provides, and "likely to profit from the experience that an abuse-of-discretion rule will permit to develop," *id.*, at 562. Pp. 563–564.

687 F. 3d 1300, vacated and remanded.

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

Neal Kumar Katyal argued the cause for petitioner. With him on the briefs were *Dominic F. Perella*, *Cynthia E. Kernick*, *James C. Martin*, and *Thomas M. Pohl.*

Brian H. Fletcher argued the cause for the United States as *amicus curiae* urging vacatur. With him on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Delery*, *Deputy Solicitor General Stewart*, *Roman Martinez*, *Scott R. McIntosh*, and *Michael E. Robinson*.

Donald R. Dunner argued the cause for respondent. With him on the brief were *Don O. Burley*, *Jason W. Melvin*, and *Erik R. Puknys*.*

JUSTICE SOTOMAYOR delivered the opinion of the Court.

Section 285 of the Patent Act provides: "The court in exceptional cases may award reasonable attorney fees to the prevailing party." 35 U. S. C. § 285. In *Brooks Furniture Mfg., Inc.* v. *Dutailier Int'l, Inc.*, 393 F. 3d 1378 (2005), the United States Court of Appeals for the Federal Circuit interpreted § 285 as authorizing fee awards only in two circumstances. It held that "[a] case may be deemed exceptional" under § 285 "when there has been some material inappropriate conduct," or when it is both "brought in subjective bad faith" and "objectively baseless." *Id.*, at 1381. We granted certiorari to determine whether an appellate court should accord deference to a district court's determination that litigation is "objectively baseless." On the basis of our opinion

*Briefs of *amici curiae* urging reversal were filed for the Blue Cross Blue Shield Association by *Brian H. Pandya*, *James H. Wallace, Jr.*, *John B. Wyss*, *Thomas R. McCarthy*, and *Roger G. Wilson*; and for Yahoo! Inc. et al. by *Jeffrey A. Lamken*, *Martin V. Totaro*, *John M. Whealan*, and *Kevin T. Kramer*.

Briefs of *amici curiae* urging affirmance were filed for BSA|The Software Alliance by *Andrew J. Pincus*, *Paul W. Hughes*, and *James F. Tierney*; and for the Intellectual Property Owners Association by *Paul H. Berghoff*, *Philip S. Johnson*, and *Kevin H. Rhodes*.

Briefs of *amici curiae* were filed for the American Intellectual Property Law Association by *Barbara A. Fiacco* and *Donald R. Ware*; for Apple Inc. by *Mark S. Davies* and *E. Joshua Rosenkranz*; for the Boston Patent Law Association by *Erik Paul Belt*; for Google Inc. et al. by *Paul D. Clement*; and for the New York Intellectual Property Law Association by *Anthony F. Lo Cicero*, *Charles R. Macedo*, and *Robert M. Isackson*.

in *Octane Fitness, LLC* v. *ICON Health & Fitness, Inc.*, *ante*, p. 545, argued together with this case and also issued today, we hold that an appellate court should review all aspects of a district court's § 285 determination for abuse of discretion.

I

Allcare Health Management System, Inc., owns U. S. Patent No. 5,301,105 ('105 patent), which covers "utilization review" in "'managed health care systems.'"[1] 687 F. 3d 1300, 1306 (CA Fed. 2012). Highmark Inc., a health insurance company, sued Allcare seeking a declaratory judgment that the '105 patent was invalid and unenforceable and that, to the extent it was valid, Highmark's actions were not infringing it. Allcare counterclaimed for patent infringement. Both parties filed motions for summary judgment, and the District Court entered a final judgment of noninfringement in favor of Highmark. The Federal Circuit affirmed. 329 Fed. Appx. 280 (2009) (*per curiam*).

Highmark then moved for fees under § 285. The District Court granted Highmark's motion. 706 F. Supp. 2d 713 (ND Tex. 2010). The court reasoned that Allcare had engaged in a pattern of "vexatious" and "deceitful" conduct throughout the litigation. *Id.*, at 737. Specifically, it found that Allcare had "pursued this suit as part of a bigger plan to identify companies potentially infringing the '105 patent under the guise of an informational survey, and then to force those companies to purchase a license of the '105 patent under threat of litigation." *Id.*, at 736–737. And it found that Allcare had "maintained infringement claims [against Highmark] well after such claims had been shown by its own experts to be without merit" and had "asserted defenses it and its attorneys knew to be frivolous." *Id.*, at 737. In a subsequent opinion, the District Court fixed the amount of

[1] "'Utilization review' is the process of determining whether a health insurer should approve a particular treatment for a patient." 687 F. 3d, at 1306.

the award at $4,694,727.40 in attorney's fees and $209,626.56 in expenses, in addition to $375,400.05 in expert fees. 2010 WL 6432945, *7 (ND Tex., Nov. 5, 2010).

The Federal Circuit affirmed in part and reversed in part. 687 F. 3d 1300. It affirmed the District Court's exceptional-case determination with respect to the allegations that Highmark's system infringed one claim of the '105 patent, *id.*, at 1311–1313, but reversed the determination with respect to another claim of the patent, *id.*, at 1313–1315. In reversing the exceptional-case determination as to one claim, the court reviewed it *de novo*. The court held that because the question whether litigation is "objectively baseless" under *Brooks Furniture* "'is a question of law based on underlying mixed questions of law and fact,'" an objective-baselessness determination is reviewed on appeal "'*de novo*'" and "without deference." 687 F. 3d, at 1309; see also *ibid.*, n. 1. It then determined, contrary to the judgment of the District Court, that "Allcare's argument" as to claim construction "was not 'so unreasonable that no reasonable litigant could believe it would succeed.'" *Id.*, at 1315. The court further found that none of Allcare's conduct warranted an award of fees under the litigation-misconduct prong of *Brooks Furniture*. 687 F. 3d, at 1315–1319.

Judge Mayer dissented in part, disagreeing with the view "that no deference is owed to a district court's finding that the infringement claims asserted by a litigant at trial were objectively unreasonable." *Id.*, at 1319. He would have held that "reasonableness is a finding of fact which may be set aside only for clear error." *Ibid.* The Federal Circuit denied rehearing en banc, over the dissent of five judges. 701 F. 3d 1351 (2012). The dissenting judges criticized the court's decision to adopt a *de novo* standard of review for the "objectively baseless" determination as an impermissible invasion of the province of the district court. *Id.*, at 1357.

We granted certiorari, 570 U. S. 947 (2013), and now vacate and remand.

II

Our opinion in *Octane Fitness, LLC* v. *ICON Health & Fitness, Inc.*, rejects the *Brooks Furniture* framework as unduly rigid and inconsistent with the text of § 285. It holds, instead, that the word "exceptional" in § 285 should be interpreted in accordance with its ordinary meaning. *Ante*, at 553. An "exceptional" case, it explains, "is simply one that stands out from others with respect to the substantive strength of a party's litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated." *Ante*, at 554. And it instructs that "[d]istrict courts may determine whether a case is 'exceptional' in the case-by-case exercise of their discretion, considering the totality of the circumstances." *Ibid.* Our holding in *Octane* settles this case: Because § 285 commits the determination whether a case is "exceptional" to the discretion of the district court, that decision is to be reviewed on appeal for abuse of discretion.

Traditionally, decisions on "questions of law" are "reviewable *de novo*," decisions on "questions of fact" are "reviewable for clear error," and decisions on "matters of discretion" are "reviewable for 'abuse of discretion.'" *Pierce* v. *Underwood*, 487 U. S. 552, 558 (1988). For reasons we explain in *Octane*, the determination whether a case is "exceptional" under § 285 is a matter of discretion. And as in our prior cases involving similar determinations, the exceptional-case determination is to be reviewed only for abuse of discretion.[2] See *Pierce*, 487 U. S., at 559 (determinations whether a litigating position is "substantially justified" for purposes of fee shifting under the Equal Access to Justice Act are to be re-

[2] The abuse-of-discretion standard does not preclude an appellate court's correction of a district court's legal or factual error: "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell* v. *Hartmarx Corp.*, 496 U. S. 384, 405 (1990).

viewed for abuse of discretion); *Cooter & Gell* v. *Hartmarx Corp.*, 496 U. S. 384, 405 (1990) (sanctions under Federal Rule of Civil Procedure 11 are to be reviewed for abuse of discretion).

As in *Pierce*, the text of the statute "emphasizes the fact that the determination is for the district court," which "suggests some deference to the district court upon appeal," 487 U. S., at 559. As in *Pierce*, "as a matter of the sound administration of justice," the district court "is better positioned" to decide whether a case is exceptional, *id.*, at 559–560, because it lives with the case over a prolonged period of time. And as in *Pierce*, the question is "multifarious and novel," not susceptible to "useful generalization" of the sort that *de novo* review provides, and "likely to profit from the experience that an abuse-of-discretion rule will permit to develop," *id.*, at 562.

We therefore hold that an appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's § 285 determination. Although questions of law may in some cases be relevant to the § 285 inquiry, that inquiry generally is, at heart, "rooted in factual determinations," *Cooter*, 496 U. S., at 401.

* * *

The judgment of the United States Court of Appeals for the Federal Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

TOWN OF GREECE, NEW YORK *v.* GALLOWAY ET AL.

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

No. 12–696. Argued November 6, 2013—Decided May 5, 2014

Since 1999, the monthly town board meetings in Greece, New York, have opened with a roll call, a recitation of the Pledge of Allegiance, and a prayer given by clergy selected from the congregations listed in a local directory. While the prayer program is open to all creeds, nearly all of the local congregations are Christian; thus, nearly all of the participating prayer givers have been too. Respondents, citizens who attend meetings to speak on local issues, filed suit, alleging that the town violated the First Amendment's Establishment Clause by preferring Christians over other prayer givers and by sponsoring sectarian prayers. They sought to limit the town to "inclusive and ecumenical" prayers that referred only to a "generic God." The District Court upheld the prayer practice on summary judgment, finding no impermissible preference for Christianity; concluding that the Christian identity of most of the prayer givers reflected the predominantly Christian character of the town's congregations, not an official policy or practice of discriminating against minority faiths; finding that the First Amendment did not require Greece to invite clergy from congregations beyond its borders to achieve religious diversity; and rejecting the theory that legislative prayer must be nonsectarian. The Second Circuit reversed, holding that some aspects of the prayer program, viewed in their totality by a reasonable observer, conveyed the message that Greece was endorsing Christianity.

Held: The judgment is reversed.

681 F. 3d 20, reversed.

JUSTICE KENNEDY delivered the opinion of the Court, except as to Part II–B, concluding that the town's prayer practice does not violate the Establishment Clause. Pp. 575–586.

(a) Legislative prayer, while religious in nature, has long been understood as compatible with the Establishment Clause. *Marsh* v. *Chambers*, 463 U. S. 783, 792. In *Marsh*, the Court concluded that it was not necessary to define the Establishment Clause's precise boundary in order to uphold Nebraska's practice of employing a legislative chaplain because history supported the conclusion that the specific practice was permitted. The First Congress voted to appoint and pay official chaplains shortly after approving language for the First Amendment, and both Houses have maintained the office virtually uninterrupted since

then. See *id.*, at 787–789, and n. 10. A majority of the States have also had a consistent practice of legislative prayer. *Id.*, at 788–790, and n. 11. There is historical precedent for the practice of opening local legislative meetings with prayer as well. *Marsh* teaches that the Establishment Clause must be interpreted "by reference to historical practices and understandings." *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 670 (opinion of KENNEDY, J.). Thus, any test must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change. The Court's inquiry, then, must be to determine whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures. Pp. 575–578.

(b) Respondents' insistence on nonsectarian prayer is not consistent with this tradition. The prayers in *Marsh* were consistent with the First Amendment not because they espoused only a generic theism but because the Nation's history and tradition have shown that prayer in this limited context could "coexis[t] with the principles of disestablishment and religious freedom." 463 U. S., at 786. Dictum in *County of Allegheny* suggesting that *Marsh* permitted only prayer with no overtly Christian references is irreconcilable with the facts, holding, and reasoning of *Marsh*, which instructed that the "content of the prayer is not of concern to judges," provided "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." 463 U. S., at 794–795. To hold that invocations must be nonsectarian would force the legislatures sponsoring prayers and the courts deciding these cases to act as supervisors and censors of religious speech, thus involving government in religious matters to a far greater degree than is the case under the town's current practice of neither editing nor approving prayers in advance nor criticizing their content after the fact. Respondents' contrary arguments are unpersuasive. It is doubtful that consensus could be reached as to what qualifies as a generic or nonsectarian prayer. It would also be unwise to conclude that only those religious words acceptable to the majority are permissible, for the First Amendment is not a majority rule and government may not seek to define permissible categories of religious speech. In rejecting the suggestion that legislative prayer must be nonsectarian, the Court does not imply that no constraints remain on its content. The relevant constraint derives from the prayer's place at the opening of legislative sessions, where it is meant to lend gravity to the occasion and reflect values long part of the Nation's heritage. From the Nation's earliest days, invocations have been addressed to assemblies comprising many different creeds, striving for the idea that people of many faiths may be united in a community of tolerance and devotion,

even if they disagree as to religious doctrine. The prayers delivered in Greece do not fall outside this tradition. They may have invoked, *e. g.*, the name of Jesus, but they also invoked universal themes, *e. g.*, by calling for a "spirit of cooperation." Absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a particular prayer will not likely establish a constitutional violation. See *ibid.* Finally, so long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing. Pp. 578–586.

JUSTICE KENNEDY, joined by THE CHIEF JUSTICE and JUSTICE ALITO, concluded in Part II–B that a fact-sensitive inquiry that considers both the setting in which the prayer arises and the audience to whom it is directed shows that the town is not coercing its citizens to engage in a religious observance. The prayer opportunity is evaluated against the backdrop of a historical practice showing that prayer has become part of the Nation's heritage and tradition. It is presumed that the reasonable observer is acquainted with this tradition and understands that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens. Furthermore, the principal audience for these invocations is not the public, but the lawmakers themselves. And those lawmakers did not direct the public to participate, single out dissidents for opprobrium, or indicate that their decisions might be influenced by a person's acquiescence in the prayer opportunity. Respondents claim that the prayers gave them offense and made them feel excluded and disrespected, but offense does not equate to coercion. In contrast to *Lee* v. *Weisman*, 505 U. S. 577, where the Court found coercive a religious invocation at a high school graduation, *id.*, at 592–594, the record here does not suggest that citizens are dissuaded from leaving the meeting room during the prayer, arriving late, or making a later protest. That the prayer in Greece is delivered during the opening ceremonial portion of the town's meeting, not the policymaking portion, also suggests that its purpose and effect are to acknowledge religious leaders and their institutions, not to exclude or coerce nonbelievers. Pp. 586–591.

JUSTICE THOMAS, joined by JUSTICE SCALIA as to Part II, agreed that the town's prayer practice does not violate the Establishment Clause, but concluded that, even if the Establishment Clause were properly incorporated against the States through the Fourteenth Amendment, the Clause is not violated by the kind of subtle pressures respondents allegedly suffered, which do not amount to actual legal coercion. The municipal prayers in this case bear no resemblance to the coercive state establishments that existed at the founding, which exercised gov-

Syllabus

ernment power in order to exact financial support of the church, compel religious observance, or control religious doctrine. Pp. 604–610.

KENNEDY, J., delivered the opinion of the Court, except as to Part II–B. ROBERTS, C. J., and ALITO, J., joined the opinion in full, and SCALIA and THOMAS, JJ., joined except as to Part II–B. ALITO, J., filed a concurring opinion, in which SCALIA, J., joined, *post*, p. 592. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, in which SCALIA, J., joined as to Part II, *post*, p. 604. BREYER, J., filed a dissenting opinion, *post*, p. 610. KAGAN, J., filed a dissenting opinion, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined, *post*, p. 615.

Thomas G. Hungar argued the cause for petitioner. With him on the briefs were *David A. Cortman*, *Brett B. Harvey*, and *Kevin Theriot*.

Deputy Solicitor General Gershengorn argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Solicitor General Verrilli*, *Acting Assistant Attorney General Delery*, *Deputy Solicitor General Kneedler*, *Sarah E. Harrington*, *Matthew M. Collette*, and *Lowell V. Sturgill, Jr.*

Douglas Laycock argued the cause for respondents. With him on the brief were *Ayesha N. Khan*, *Gregory M. Lipper*, *Charles A. Rothfeld*, and *Richard B. Katskee*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Indiana et al. by *Gregory F. Zoeller*, Attorney General of Indiana, *Thomas M. Fisher*, Solicitor General, *Heather Hagan McVeigh*, Deputy Attorney General, *Greg Abbott*, Attorney General of Texas, *Daniel T. Hodge*, First Assistant Attorney General, *Jonathan F. Mitchell*, Solicitor General, and *Adam W. Aston*, Deputy Solicitor General, and by the Attorneys General for their respective States as follows: *Luther Strange* of Alabama, *Michael C. Geraghty* of Alaska, *Dustin McDaniel* of Arkansas, *John W. Suthers* of Colorado, *Pamela Jo Bondi* of Florida, *Samuel S. Olens* of Georgia, *Lawrence G. Wasden* of Idaho, *Derek Schmidt* of Kansas, *Jack Conway* of Kentucky, *James D. "Buddy" Caldwell* of Louisiana, *Bill Schuette* of Michigan, *Jim Hood* of Mississippi, *Timothy C. Fox* of Montana, *Jon Bruning* of Nebraska, *Michael DeWine* of Ohio, *E. Scott Pruitt* of Oklahoma, *Marty J. Jackley* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *John E. Swallow* of Utah, *Kenneth T. Cuccinelli II* of Virginia, and *Patrick Morrisey* of West Virginia; for the State of South Carolina by *Alan Wilson*,

JUSTICE KENNEDY delivered the opinion of the Court, except as to Part II–B.†

The Court must decide whether the town of Greece, New York, imposes an impermissible establishment of religion by

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Attorney General, *Robert D. Cook*, Solicitor General, *J. Emory Smith, Jr.*, Deputy Solicitor General, *Brendan McDonald*, Assistant Attorney General, and *Tracey C. Green*; for the American Center for Law and Justice by *Jay Alan Sekulow*, *Stuart J. Roth*, *Colby M. May*, and *Walter M. Weber*; for the American Civil Rights Union by *Peter J. Ferrara*; for the Center for Constitutional Jurisprudence by *John Eastman*, *Anthony T. Caso*, and *Edwin Meese III*; for the Chaplain Alliance for Religious Liberty by *William C. Wood, Jr.*, *Jay T. Thompson*, and *Miles E. Coleman*; for the Foundation for Moral Law by *John A. Eidsmoe*; for the Justice and Freedom Fund by *James L. Hirsen* and *Deborah J. Dewart*; for the League of California Cities by *Allison E. Burns* and *Joseph M. Adams*; for Liberty Counsel by *Mathew D. Staver*, *Anita L. Staver*, *Horatio G. Mihet*, *Stephen M. Crampton*, and *Mary E. McAlister*; for Seven Prayer-Givers by *Barry A. Bostrom*; for the Southeastern Legal Foundation by *Shannon Lee Goessling*; for the Southern Baptist Convention Ethics & Religious Liberty Commission by *Michael K. Whitehead* and *Jonathan R. Whitehead*; for the Virginia Christian Alliance et al. by *Rita M. Dunaway*; for WallBuilders, Inc., by *Steven W. Fitschen*; for Daniel L. Akin et al. by *Kelly J. Shackelford*, *Jeffrey C. Mateer*, and *Hiram S. Sasser III*; for Nathan Lewin by *Mr. Lewin*, *pro se*, *Alyza D. Lewin*, and *Dennis Rapps*; for Robert E. Palmer by *Evan A. Young*, *Aaron M. Streett*, and *Julie Marie Blake*; for Senator Marco Rubio et al. by *Steffen N. Johnson*, *Gene C. Schaerr*, *Elizabeth P. Papez*, *Andrew C. Nichols*, *Linda T. Coberly*, and *William P. Ferranti*; and for 85 Members of Congress by *Kenneth A. Klukowski*.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Daniel Mach*, *Heather L. Weaver*, *Steven R. Shapiro*, and *Arthur N. Eisenberg*; for the American Jewish Committee et al. by *Eric A. Tirschwell*, *Marc D. Stern*, and *Craig L. Siegel*; for the Center for Inquiry et al. by *Lisa S. Blatt* and *Daniel S. Pariser*; for the Freedom From Religion Foundation by *Richard L. Bolton*; for Law Professors by *Christopher C. Lund*; for 12 Members of Congress by *John S. Moot* and *Kathryn Kavanagh Baran*; for Political Scientists by *Paul M. Smith* and *Marc A. Goldman*; for the Unitarian Universalist Association of Congregations et al. by *Deanne E. Maynard* and *Marc A. Hearron*; for

[Footnote † is on page 570]

opening its monthly board meetings with a prayer. It must be concluded, consistent with the Court's opinion in *Marsh* v. *Chambers*, 463 U. S. 783 (1983), that no violation of the Constitution has been shown.

I

Greece, a town with a population of 94,000, is in upstate New York. For some years, it began its monthly town board meetings with a moment of silence. In 1999, the newly elected town supervisor, John Auberger, decided to replicate the prayer practice he had found meaningful while serving in the county legislature. Following the roll call and recitation of the Pledge of Allegiance, Auberger would invite a local clergyman to the front of the room to deliver an invocation. After the prayer, Auberger would thank the minister for serving as the board's "chaplain for the month" and present him with a commemorative plaque. The prayer was intended to place town board members in a solemn and deliberative frame of mind, invoke divine guidance in town affairs, and follow a tradition practiced by Congress and dozens of state legislatures. App. 22a–25a.

Erwin Chemerinsky et al. by *Beth Heifetz*; and for Paul Finkelman et al. by *Seth P. Waxman*.

Briefs of *amici curiae* were filed for the Baptist Joint Committee for Religious Liberty et al. by *Mark W. Mosier* and *K. Hollyn Hollman*; for the Becket Fund for Religious Liberty by *Eric C. Rassbach*, *Luke W. Goodrich*, *Diana M. Verm*, and *Daniel Blomberg*; for the Board of Commissioners for Carroll County, Maryland, et al. by *David C. Gibbs III*, *Barbara J. Weller*, and *Scott W. Gaylord*; for Brevard County, Florida, by *Scott L. Knox*; for the Faith and Action Networks by *Bernard P. Reese*; for the Jewish Social Policy Action Network by *Jeffrey Ivan Pasek*, *Theodore R. Mann*, and *Seth F. Kreimer*; for the National Conference for Community and Justice by *Stephen G. Harvey*; for The Rutherford Institute by *John W. Whitehead* and *James J. Knicely*; and for Gerard V. Bradley et al. by *Stephen B. Kinnaird* and *Christopher H. McGrath*.

†The Chief Justice and Justice Alito join this opinion in full. Justice Scalia and Justice Thomas join this opinion except as to Part II–B.

The town followed an informal method for selecting prayer givers, all of whom were unpaid volunteers. A town employee would call the congregations listed in a local directory until she found a minister available for that month's meeting. The town eventually compiled a list of willing "board chaplains" who had accepted invitations and agreed to return in the future. The town at no point excluded or denied an opportunity to a would-be prayer giver. Its leaders maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation. But nearly all of the congregations in town were Christian; and from 1999 to 2007, all of the participating ministers were too.

Greece neither reviewed the prayers in advance of the meetings nor provided guidance as to their tone or content, in the belief that exercising any degree of control over the prayers would infringe both the free exercise and speech rights of the ministers. *Id.*, at 22a. The town instead left the guest clergy free to compose their own devotions. The resulting prayers often sounded both civic and religious themes. Typical were invocations that asked the divinity to abide at the meeting and bestow blessings on the community:

> "Lord we ask you to send your spirit of servanthood upon all of us gathered here this evening to do your work for the benefit of all in our community. We ask you to bless our elected and appointed officials so they may deliberate with wisdom and act with courage. Bless the members of our community who come here to speak before the board so they may state their cause with honesty and humility. . . . Lord we ask you to bless us all, that everything we do here tonight will move you to welcome us one day into your kingdom as good and faithful servants. We ask this in the name of our brother Jesus. Amen." *Id.*, at 45a.

Some of the ministers spoke in a distinctly Christian idiom; and a minority invoked religious holidays, scripture, or doctrine, as in the following prayer:

> "Lord, God of all creation, we give you thanks and praise for your presence and action in the world. We look with anticipation to the celebration of Holy Week and Easter. It is in the solemn events of next week that we find the very heart and center of our Christian faith. We acknowledge the saving sacrifice of Jesus Christ on the cross. We draw strength, vitality, and confidence from his resurrection at Easter. . . . We pray for peace in the world, an end to terrorism, violence, conflict, and war. We pray for stability, democracy, and good government in those countries in which our armed forces are now serving, especially in Iraq and Afghanistan. . . . Praise and glory be yours, O Lord, now and forever more. Amen." *Id.*, at 88a–89a.

Respondents Susan Galloway and Linda Stephens attended town board meetings to speak about issues of local concern, and they objected that the prayers violated their religious or philosophical views. At one meeting, Galloway admonished board members that she found the prayers "offensive," "intolerable," and an affront to a "diverse community." Complaint in No. 08–cv–6088 (WDNY), ¶66. After respondents complained that Christian themes pervaded the prayers, to the exclusion of citizens who did not share those beliefs, the town invited a Jewish layman and the chairman of the local Baha'i temple to deliver prayers. A Wiccan priestess who had read press reports about the prayer controversy requested, and was granted, an opportunity to give the invocation.

Galloway and Stephens brought suit in the United States District Court for the Western District of New York. They alleged that the town violated the First Amendment's Establishment Clause by preferring Christians over other prayer givers and by sponsoring sectarian prayers, such as those given "in Jesus' name." 732 F. Supp. 2d 195, 203 (2010). They did not seek an end to the prayer practice, but rather requested an injunction that would limit the town to "inclu-

sive and ecumenical" prayers that referred only to a "generic God" and would not associate the government with any one faith or belief. *Id.*, at 210, 241.

The District Court on summary judgment upheld the prayer practice as consistent with the First Amendment. It found no impermissible preference for Christianity, noting that the town had opened the prayer program to all creeds and excluded none. Although most of the prayer givers were Christian, this fact reflected only the predominantly Christian identity of the town's congregations, rather than an official policy or practice of discriminating against minority faiths. The District Court found no authority for the proposition that the First Amendment required Greece to invite clergy from congregations beyond its borders in order to achieve a minimum level of religious diversity.

The District Court also rejected the theory that legislative prayer must be nonsectarian. The court began its inquiry with the opinion in *Marsh* v. *Chambers*, 463 U. S. 783, which permitted prayer in state legislatures by a chaplain paid from the public purse, so long as the prayer opportunity was not "exploited to proselytize or advance any one, or to disparage any other, faith or belief," *id.*, at 794–795. With respect to the prayer in Greece, the District Court concluded that references to Jesus, and the occasional request that the audience stand for the prayer, did not amount to impermissible proselytizing. It located in *Marsh* no additional requirement that the prayers be purged of sectarian content. In this regard the court quoted recent invocations offered in the U. S. House of Representatives "in the name of our Lord Jesus Christ," *e. g.*, 156 Cong. Rec. 12399 (2010), and situated prayer in this context as part of a long tradition. Finally, the trial court noted this Court's statement in *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 603 (1989), that the prayers in *Marsh* did not offend the Establishment Clause "because the particular chaplain had 'removed all references to

Christ.'" But the District Court did not read that statement to mandate that legislative prayer be nonsectarian, at least in circumstances where the town permitted clergy from a variety of faiths to give invocations. By welcoming many viewpoints, the District Court concluded, the town would be unlikely to give the impression that it was affiliating itself with any one religion.

The Court of Appeals for the Second Circuit reversed. 681 F. 3d 20, 34 (2012). It held that some aspects of the prayer program, viewed in their totality by a reasonable observer, conveyed the message that Greece was endorsing Christianity. The town's failure to promote the prayer opportunity to the public, or to invite ministers from congregations outside the town limits, all but "ensured a Christian viewpoint." *Id.*, at 30–31. Although the court found no inherent problem in the sectarian content of the prayers, it concluded that the "steady drumbeat" of Christian prayer, unbroken by invocations from other faith traditions, tended to affiliate the town with Christianity. *Id.*, at 32. Finally, the court found it relevant that guest clergy sometimes spoke on behalf of all present at the meeting, as by saying "let us pray," or by asking audience members to stand and bow their heads: "The invitation . . . to participate in the prayer . . . placed audience members who are nonreligious or adherents of non-Christian religion in the awkward position of either participating in prayers invoking beliefs they did not share or appearing to show disrespect for the invocation." *Ibid.* That board members bowed their heads or made the sign of the cross further conveyed the message that the town endorsed Christianity. The Court of Appeals emphasized that it was the "interaction of the facts present in this case," rather than any single element, that rendered the prayer unconstitutional. *Id.*, at 33.

Having granted certiorari to decide whether the town's prayer practice violates the Establishment Clause, 569 U. S.

993 (2013), the Court now reverses the judgment of the Court of Appeals.

II

In *Marsh* v. *Chambers*, *supra*, the Court found no First Amendment violation in the Nebraska Legislature's practice of opening its sessions with a prayer delivered by a chaplain paid from state funds. The decision concluded that legislative prayer, while religious in nature, has long been understood as compatible with the Establishment Clause. As practiced by Congress since the framing of the Constitution, legislative prayer lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society. See *Lynch* v. *Donnelly*, 465 U. S. 668, 693 (1984) (O'Connor, J., concurring); cf. A. Adams & C. Emmerich, A Nation Dedicated to Religious Liberty 83 (1990). The Court has considered this symbolic expression to be a "tolerable acknowledgement of beliefs widely held," *Marsh*, 463 U. S., at 792, rather than a first, treacherous step toward establishment of a state church.

Marsh is sometimes described as "carving out an exception" to the Court's Establishment Clause jurisprudence, because it sustained legislative prayer without subjecting the practice to "any of the formal 'tests' that have traditionally structured" this inquiry. *Id.*, at 796, 813 (Brennan, J., dissenting). The Court in *Marsh* found those tests unnecessary because history supported the conclusion that legislative invocations are compatible with the Establishment Clause. The First Congress made it an early item of business to appoint and pay official chaplains, and both the House and Senate have maintained the office virtually uninterrupted since that time. See *id.*, at 787–789, and n. 10; N. Feldman, Divided by God 109 (2005). But see *Marsh*, *supra*, at 791–792, and n. 12 (noting dissenting views among the Framers); Madison, "Detached Memoranda," 3 Wm. & Mary

Quarterly 534, 558–559 (1946) (hereinafter Madison's Detached Memoranda). When *Marsh* was decided, in 1983, legislative prayer had persisted in the Nebraska Legislature for more than a century, and the majority of the other States also had the same, consistent practice. 463 U. S., at 788–790, and n. 11. Although no information has been cited by the parties to indicate how many local legislative bodies open their meetings with prayer, this practice too has historical precedent. See Reports of Proceedings of the City Council of Boston for the Year Commencing Jan. 1, 1909, and Ending Feb. 5, 1910, pp. 1–2 (1910) (Rev. Arthur Little) ("And now we desire to invoke Thy presence, Thy blessing and Thy guidance upon those who are gathered here this morning . . . "). "In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with a prayer has become part of the fabric of our society." *Marsh*, *supra*, at 792.

Yet *Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation. The case teaches instead that the Establishment Clause must be interpreted "by reference to historical practices and understandings." *County of Allegheny*, 492 U. S., at 670 (KENNEDY, J., concurring in judgment in part and dissenting in part). That the First Congress provided for the appointment of chaplains only days after approving language for the First Amendment demonstrates that the Framers considered legislative prayer a benign acknowledgment of religion's role in society. D. Currie, The Constitution in Congress: The Federalist Period 1789–1801, pp. 12–13 (1997). In the 1850's, the Judiciary Committees in both the House and Senate reevaluated the practice of official chaplaincies after receiving petitions to abolish the office. The Committees concluded that the office posed no threat of an establishment because lawmakers were not compelled to attend the daily prayer, S. Rep. No. 376, 32d Cong., 2d Sess., 2 (1853); no faith was excluded by law, nor any favored, *id.*,

at 3; and the cost of the chaplain's salary imposed a vanishingly small burden on taxpayers, H. R. Rep. No. 124, 33d Cong., 1st Sess., 6 (1854). *Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted. Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change. *County of Allegheny*, *supra*, at 670 (opinion of KENNEDY, J.); see also *School Dist. of Abington Township* v. *Schempp*, 374 U. S. 203, 294 (1963) (Brennan, J., concurring) ("[T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers"). A test that would sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent. See *Van Orden* v. *Perry*, 545 U. S. 677, 702–704 (2005) (BREYER, J., concurring in judgment).

The Court's inquiry, then, must be to determine whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures. Respondents assert that the town's prayer exercise falls outside that tradition and transgresses the Establishment Clause for two independent but mutually reinforcing reasons. First, they argue that *Marsh* did not approve prayers containing sectarian language or themes, such as the prayers offered in Greece that referred to the "death, resurrection, and ascension of the Savior Jesus Christ," App. 129a, and the "saving sacrifice of Jesus Christ on the cross," *id.*, at 88a. Second, they argue that the setting and conduct of the town board meetings create social pressures that force nonadherents to remain in the room or even feign participation in order to avoid offending the representatives who sponsor the prayer and will vote on matters citizens bring before the board. The sectarian content of the prayers compounds the

subtle coercive pressures, they argue, because the nonbeliever who might tolerate ecumenical prayer is forced to do the same for prayer that might be inimical to his or her beliefs.

A

Respondents maintain that prayer must be nonsectarian, or not identifiable with any one religion; and they fault the town for permitting guest chaplains to deliver prayers that "use overtly Christian terms" or "invoke specifics of Christian theology." Brief for Respondents 20. A prayer is fitting for the public sphere, in their view, only if it contains the "'most general, nonsectarian reference to God,'" *id.*, at 33 (quoting M. Meyerson, Endowed by Our Creator: The Birth of Religious Freedom in America 11–12 (2012)), and eschews mention of doctrines associated with any one faith, Brief for Respondents 32–33. They argue that prayer which contemplates "the workings of the Holy Spirit, the events of Pentecost, and the belief that God 'has raised up the Lord Jesus' and 'will raise us, in our turn, and put us by His side'" would be impermissible, as would any prayer that reflects dogma particular to a single faith tradition. *Id.*, at 34 (quoting App. 89a and citing *id.*, at 56a, 123a, 134a).

An insistence on nonsectarian or ecumenical prayer as a single, fixed standard is not consistent with the tradition of legislative prayer outlined in the Court's cases. The Court found the prayers in *Marsh* consistent with the First Amendment not because they espoused only a generic theism but because our history and tradition have shown that prayer in this limited context could "coexis[t] with the principles of disestablishment and religious freedom." 463 U. S., at 786. The Congress that drafted the First Amendment would have been accustomed to invocations containing explicitly religious themes of the sort respondents find objectionable. One of the Senate's first chaplains, the Rev. William White, gave prayers in a series that included the Lord's Prayer, the Collect for Ash Wednesday, prayers for peace

and grace, a general thanksgiving, St. Chrysostom's Prayer, and a prayer seeking "the grace of our Lord Jesus Christ, &c." Letter from W. White to H. Jones (Dec. 29, 1830), in B. Wilson, Memoir of the Life of the Right Reverend William White, D. D., Bishop of the Protestant Episcopal Church in the State of Pennsylvania 322 (1839); see also New Hampshire Patriot & State Gazette, Dec. 15, 1823, p. 1 (describing a Senate prayer addressing the "Throne of Grace"); Cong. Globe, 37th Cong., 1st Sess., 2 (1861) (reciting the Lord's Prayer). The decidedly Christian nature of these prayers must not be dismissed as the relic of a time when our Nation was less pluralistic than it is today. Congress continues to permit its appointed and visiting chaplains to express themselves in a religious idiom. It acknowledges our growing diversity not by proscribing sectarian content but by welcoming ministers of many creeds. See, *e. g.*, 160 Cong. Rec. 3853 (2014) (Dalai Lama) ("I am a Buddhist monk—a simple Buddhist monk—so we pray to Buddha and all other Gods"); 159 Cong. Rec. 16967 (2013) (Rabbi Joshua Gruenberg) ("Our God and God of our ancestors, Everlasting Spirit of the Universe . . . "); *id.*, at 7902 (Satguru Bodhinatha Veylanswami) ("Hindu scripture declares, without equivocation, that the highest of high ideals is to never knowingly harm anyone"); 158 Cong. Rec. 13189 (2012) (Imam Nayyar Imam) ("The final prophet of God, Muhammad, peace be upon him, stated: 'The leaders of a people are a representation of their deeds' ").

The contention that legislative prayer must be generic or nonsectarian derives from dictum in *County of Allegheny*, 492 U. S. 573, that was disputed when written and has been repudiated by later cases. There the Court held that a crèche placed on the steps of a county courthouse to celebrate the Christmas season violated the Establishment Clause because it had "the effect of endorsing a patently Christian message." *Id.*, at 601. Four dissenting Justices disputed that endorsement could be the proper test, as it

likely would condemn a host of traditional practices that recognize the role religion plays in our society, among them legislative prayer and the "forthrightly religious" Thanksgiving proclamations issued by nearly every President since Washington. *Id.*, at 670–671. The Court sought to counter this criticism by recasting *Marsh* to permit only prayer that contained no overtly Christian references:

> "However history may affect the constitutionality of nonsectarian references to religion by the government, history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed . . . . The legislative prayers involved in *Marsh* did not violate this principle because the particular chaplain had 'removed all references to Christ.'" 492 U. S., at 603 (quoting *Marsh*, *supra*, at 793, n. 14; footnote omitted).

This proposition is irreconcilable with the facts of *Marsh* and with its holding and reasoning. *Marsh* nowhere suggested that the constitutionality of legislative prayer turns on the neutrality of its content. The opinion noted that Nebraska's chaplain, the Rev. Robert E. Palmer, modulated the "explicitly Christian" nature of his prayer and "removed all references to Christ" after a Jewish lawmaker complained. 463 U. S., at 793, n. 14. With this footnote, the Court did no more than observe the practical demands placed on a minister who holds a permanent, appointed position in a legislature and chooses to write his or her prayers to appeal to more members, or at least to give less offense to those who object. See Mallory, "An Officer of the House Which Chooses Him, and Nothing More": How Should *Marsh* v. *Chambers* Apply to Rotating Chaplains? 73 U. Chi. L. Rev. 1421, 1445 (2006). *Marsh* did not suggest that Nebraska's prayer practice would have failed had the chaplain not acceded to the legislator's request. Nor did the Court imply the rule that prayer violates the Establishment Clause any time it is given in the name of a figure deified by only one

faith or creed. See *Van Orden*, 545 U. S., at 688, n. 8 (recognizing that the prayers in *Marsh* were "often explicitly Christian" and rejecting the view that this gave rise to an establishment violation). To the contrary, the Court instructed that the "content of the prayer is not of concern to judges," provided "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." 463 U. S., at 794–795.

To hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town's current practice of neither editing or approving prayers in advance nor criticizing their content after the fact. Cf. *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. 171, 188–189 (2012). Our government is prohibited from prescribing prayers to be recited in our public institutions in order to promote a preferred system of belief or code of moral behavior. *Engel* v. *Vitale*, 370 U. S. 421, 430 (1962). It would be but a few steps removed from that prohibition for legislatures to require chaplains to redact the religious content from their message in order to make it acceptable for the public sphere. Government may not mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy. See *Lee* v. *Weisman*, 505 U. S. 577, 590 (1992) ("The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted"); *Schempp*, 374 U. S., at 306 (Goldberg, J., concurring) (arguing that "untutored devotion to the concept of neutrality" must not lead to "a brooding and pervasive devotion to the secular").

Respondents argue, in effect, that legislative prayer may be addressed only to a generic God. The law and the Court could not draw this line for each specific prayer or seek to require ministers to set aside their nuanced and deeply personal beliefs for vague and artificial ones. There is doubt, in any event, that consensus might be reached as to what qualifies as generic or nonsectarian. Honorifics like "Lord of Lords" or "King of Kings" might strike a Christian audience as ecumenical, yet these titles may have no place in the vocabulary of other faith traditions. The difficulty, indeed the futility, of sifting sectarian from nonsectarian speech is illustrated by a letter that a lawyer for the respondents sent the town in the early stages of this litigation. The letter opined that references to "Father, God, Lord God, and the Almighty" would be acceptable in public prayer, but that references to "Jesus Christ, the Holy Spirit, and the Holy Trinity" would not. App. 21a. Perhaps the writer believed the former grouping would be acceptable to monotheists. Yet even seemingly general references to God or the Father might alienate nonbelievers or polytheists. *McCreary County* v. *American Civil Liberties Union of Ky.*, 545 U. S. 844, 893 (2005) (SCALIA, J., dissenting). Because it is unlikely that prayer will be inclusive beyond dispute, it would be unwise to adopt what respondents think is the next-best option: permitting those religious words, and only those words, that are acceptable to the majority, even if they will exclude some. *Torcaso* v. *Watkins*, 367 U. S. 488, 495 (1961). The First Amendment is not a majority rule, and government may not seek to define permissible categories of religious speech. Once it invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian.

In rejecting the suggestion that legislative prayer must be nonsectarian, the Court does not imply that no constraints remain on its content. The relevant constraint derives from

its place at the opening of legislative sessions, where it is meant to lend gravity to the occasion and reflect values long part of the Nation's heritage. Prayer that is solemn and respectful in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing, serves that legitimate function. If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort. That circumstance would present a different case than the one presently before the Court.

The tradition reflected in *Marsh* permits chaplains to ask their own God for blessings of peace, justice, and freedom that find appreciation among people of all faiths. That a prayer is given in the name of Jesus, Allah, or Jehovah, or that it makes passing reference to religious doctrines, does not remove it from that tradition. These religious themes provide particular means to universal ends. Prayer that reflects beliefs specific to only some creeds can still serve to solemnize the occasion, so long as the practice over time is not "exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U. S., at 794–795.

It is thus possible to discern in the prayers offered to Congress a commonality of theme and tone. While these prayers vary in their degree of religiosity, they often seek peace for the Nation, wisdom for its lawmakers, and justice for its people, values that count as universal and that are embodied not only in religious traditions, but in our founding documents and laws. The first prayer delivered to the Continental Congress by the Rev. Jacob Duché on Sept. 7, 1774, provides an example:

> "Be Thou present O God of Wisdom and direct the counsel of this Honorable Assembly; enable them to settle all things on the best and surest foundations; that

> the scene of blood may be speedily closed; that Order, Harmony and Peace be effectually restored, and the Truth and Justice, Religion and Piety, prevail and flourish among the people.
>
> "Preserve the health of their bodies, and the vigor of their minds, shower down on them, and the millions they here represent, such temporal Blessings as Thou seest expedient for them in this world, and crown them with everlasting Glory in the world to come. All this we ask in the name and through the merits of Jesus Christ, Thy Son and our Saviour, Amen." W. Federer, America's God and Country 137 (2000).

From the earliest days of the Nation, these invocations have been addressed to assemblies comprising many different creeds. These ceremonial prayers strive for the idea that people of many faiths may be united in a community of tolerance and devotion. Even those who disagree as to religious doctrine may find common ground in the desire to show respect for the divine in all aspects of their lives and being. Our tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith. See Letter from John Adams to Abigail Adams (Sept. 16, 1774), in C. Adams, Familiar Letters of John Adams and His Wife Abigail Adams, During the Revolution 37–38 (1876).

The prayers delivered in the town of Greece do not fall outside the tradition this Court has recognized. A number of the prayers did invoke the name of Jesus, the Heavenly Father, or the Holy Spirit, but they also invoked universal themes, as by celebrating the changing of the seasons or calling for a "spirit of cooperation" among town leaders. App. 31a, 38a. Among numerous examples of such prayer in the record is the invocation given by the Rev. Richard Barbour at the September 2006 board meeting:

> "Gracious God, you have richly blessed our nation and this community. Help us to remember your generosity

> and give thanks for your goodness. Bless the elected leaders of the Greece Town Board as they conduct the business of our town this evening. Give them wisdom, courage, discernment and a single-minded desire to serve the common good. We ask your blessing on all public servants, and especially on our police force, firefighters and emergency medical personnel. . . . Respectful of every religious tradition, I offer this prayer in the name of God's only son Jesus Christ, the Lord, amen." *Id.*, at 98a–99a.

Respondents point to other invocations that disparaged those who did not accept the town's prayer practice. One guest minister characterized objectors as a "minority" who are "ignorant of the history of our country," *id.*, at 108a, while another lamented that other towns did not have "God-fearing" leaders, *id.*, at 79a. Although these two remarks strayed from the rationale set out in *Marsh*, they do not despoil a practice that on the whole reflects and embraces our tradition. Absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation. *Marsh*, indeed, requires an inquiry into the prayer opportunity as a whole, rather than into the contents of a single prayer. 463 U. S., at 794–795.

Finally, the Court disagrees with the view taken by the Court of Appeals that the town of Greece contravened the Establishment Clause by inviting a predominantly Christian set of ministers to lead the prayer. The town made reasonable efforts to identify all of the congregations located within its borders and represented that it would welcome a prayer by any minister or layman who wished to give one. That nearly all of the congregations in town turned out to be Christian does not reflect an aversion or bias on the part of town leaders against minority faiths. So long as the town maintains a policy of nondiscrimination, the Constitution

does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing. The quest to promote "a 'diversity' of religious views" would require the town "to make wholly inappropriate judgments about the number of religions [it] should sponsor and the relative frequency with which it should sponsor each," *Lee*, 505 U. S., at 617 (Souter, J., concurring), a form of government entanglement with religion that is far more troublesome than the current approach.

B

Respondents further seek to distinguish the town's prayer practice from the tradition upheld in *Marsh* on the ground that it coerces participation by nonadherents. They and some *amici* contend that prayer conducted in the intimate setting of a town board meeting differs in fundamental ways from the invocations delivered in Congress and state legislatures, where the public remains segregated from legislative activity and may not address the body except by occasional invitation. Citizens attend town meetings, on the other hand, to accept awards; speak on matters of local importance; and petition the board for action that may affect their economic interests, such as the granting of permits, business licenses, and zoning variances. Respondents argue that the public may feel subtle pressure to participate in prayers that violate their beliefs in order to please the board members from whom they are about to seek a favorable ruling. In their view the fact that board members in small towns know many of their constituents by name only increases the pressure to conform.

It is an elemental First Amendment principle that government may not coerce its citizens "to support or participate in any religion or its exercise." *County of Allegheny*, 492 U. S., at 659 (KENNEDY, J., concurring in judgment in part and dissenting in part); see also *Van Orden*, 545 U. S., at 683 (plurality opinion) (recognizing that our "institutions must

not press religious observances upon their citizens"). On the record in this case the Court is not persuaded that the town of Greece, through the act of offering a brief, solemn, and respectful prayer to open its monthly meetings, compelled its citizens to engage in a religious observance. The inquiry remains a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed.

The prayer opportunity in this case must be evaluated against the backdrop of historical practice. As a practice that has long endured, legislative prayer has become part of our heritage and tradition, part of our expressive idiom, similar to the Pledge of Allegiance, inaugural prayer, or the recitation of "God save the United States and this honorable Court" at the opening of this Court's sessions. See *Lynch*, 465 U. S., at 693 (O'Connor, J., concurring). It is presumed that the reasonable observer is acquainted with this tradition and understands that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens, not to afford government an opportunity to proselytize or force truant constituents into the pews. See *Salazar* v. *Buono*, 559 U. S. 700, 720–721 (2010) (plurality opinion); *Santa Fe Independent School Dist.* v. *Doe*, 530 U. S. 290, 308 (2000). That many appreciate these acknowledgments of the divine in our public institutions does not suggest that those who disagree are compelled to join the expression or approve its content. *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 642 (1943).

The principal audience for these invocations is not, indeed, the public but lawmakers themselves, who may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing. The District Court in *Marsh* described the prayer exercise as "an internal act" directed at the Nebraska Legislature's "own members," *Chambers* v. *Marsh*, 504 F. Supp. 585, 588

(Neb. 1980), rather than an effort to promote religious observance among the public. See also *Lee*, *supra*, at 630, n. 8 (Souter, J., concurring) (describing *Marsh* as a case "in which government officials invoke[d] spiritual inspiration entirely for their own benefit"); *Atheists of Fla., Inc.* v. *Lakeland*, 713 F. 3d 577, 583 (CA11 2013) (quoting a city resolution providing for prayer "for the benefit and blessing of" elected leaders); Madison's Detached Memoranda 558 (characterizing prayer in Congress as "religious worship for national representatives"); Brief for U. S. Senator Marco Rubio et al. as *Amici Curiae* 30–33; Brief for 12 Members of Congress as *Amici Curiae* 6. To be sure, many members of the public find these prayers meaningful and wish to join them. But their purpose is largely to accommodate the spiritual needs of lawmakers and connect them to a tradition dating to the time of the Framers. For members of town boards and commissions, who often serve part time and as volunteers, ceremonial prayer may also reflect the values they hold as private citizens. The prayer is an opportunity for them to show who and what they are without denying the right to dissent by those who disagree.

The analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity. No such thing occurred in the town of Greece. Although board members themselves stood, bowed their heads, or made the sign of the cross during the prayer, they at no point solicited similar gestures by the public. Respondents point to several occasions where audience members were asked to rise for the prayer. These requests, however, came not from town leaders but from the guest ministers, who presumably are accustomed to directing their congregations in this way and might have done so thinking the action was inclusive, not coercive. See App. 69a ("Would you bow your heads with me as we invite the Lord's presence

here tonight?"); *id.*, at 93a ("Let us join our hearts and minds together in prayer"); *id.*, at 102a ("Would you join me in a moment of prayer?"); *id.*, at 110a ("Those who are willing may join me now in prayer"). Respondents suggest that constituents might feel pressure to join the prayers to avoid irritating the officials who would be ruling on their petitions, but this argument has no evidentiary support. Nothing in the record indicates that town leaders allocated benefits and burdens based on participation in the prayer, or that citizens were received differently depending on whether they joined the invocation or quietly declined. In no instance did town leaders signal disfavor toward nonparticipants or suggest that their stature in the community was in any way diminished. A practice that classified citizens based on their religious views would violate the Constitution, but that is not the case before this Court.

In their declarations in the trial court, respondents stated that the prayers gave them offense and made them feel excluded and disrespected. Offense, however, does not equate to coercion. Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum, especially where, as here, any member of the public is welcome in turn to offer an invocation reflecting his or her own convictions. See *Elk Grove Unified School Dist.* v. *Newdow*, 542 U. S. 1, 44 (2004) (O'Connor, J., concurring in judgment) ("The compulsion of which Justice Jackson was concerned . . . was of the direct sort—the Constitution does not guarantee citizens a right entirely to avoid ideas with which they disagree"). If circumstances arise in which the pattern and practice of ceremonial, legislative prayer is alleged to be a means to coerce or intimidate others, the objection can be addressed in the regular course. But the showing has not been made here, where the prayers neither chastised dissenters nor attempted lengthy disquisition on

religious dogma. Courts remain free to review the pattern of prayers over time to determine whether they comport with the tradition of solemn, respectful prayer approved in *Marsh*, or whether coercion is a real and substantial likelihood. But in the general course legislative bodies do not engage in impermissible coercion merely by exposing constituents to prayer they would rather not hear and in which they need not participate. See *County of Allegheny*, 492 U. S., at 670 (KENNEDY, J., concurring in judgment in part and dissenting in part).

This case can be distinguished from the conclusions and holding of *Lee* v. *Weisman*, 505 U. S. 577. There the Court found that, in the context of a graduation where school authorities maintained close supervision over the conduct of the students and the substance of the ceremony, a religious invocation was coercive as to an objecting student. *Id.*, at 592–594; see also *Santa Fe Independent School Dist.*, 530 U. S., at 312. Four Justices dissented in *Lee*, but the circumstances the Court confronted there are not present in this case and do not control its outcome. Nothing in the record suggests that members of the public are dissuaded from leaving the meeting room during the prayer, arriving late, or even, as happened here, making a later protest. In this case, as in *Marsh*, board members and constituents are "free to enter and leave with little comment and for any number of reasons." *Lee*, *supra*, at 597. Should nonbelievers choose to exit the room during a prayer they find distasteful, their absence will not stand out as disrespectful or even noteworthy. And should they remain, their quiet acquiescence will not, in light of our traditions, be interpreted as an agreement with the words or ideas expressed. Neither choice represents an unconstitutional imposition as to mature adults, who "presumably" are "not readily susceptible to religious indoctrination or peer pressure." *Marsh*, 463 U. S., at 792 (internal quotation marks and citations omitted).

In the town of Greece, the prayer is delivered during the ceremonial portion of the town's meeting. Board members are not engaged in policymaking at this time, but in more general functions, such as swearing in new police officers, inducting high school athletes into the town hall of fame, and presenting proclamations to volunteers, civic groups, and senior citizens. It is a moment for town leaders to recognize the achievements of their constituents and the aspects of community life that are worth celebrating. By inviting ministers to serve as chaplain for the month, and welcoming them to the front of the room alongside civic leaders, the town is acknowledging the central place that religion, and religious institutions, hold in the lives of those present. Indeed, some congregations are not simply spiritual homes for town residents but also the provider of social services for citizens regardless of their beliefs. See App. 31a (thanking a pastor for his "community involvement"); *id.*, at 44a (thanking a deacon "for the job that you have done on behalf of our community"). The inclusion of a brief, ceremonial prayer as part of a larger exercise in civic recognition suggests that its purpose and effect are to acknowledge religious leaders and the institutions they represent rather than to exclude or coerce nonbelievers.

Ceremonial prayer is but a recognition that, since this Nation was founded and until the present day, many Americans deem that their own existence must be understood by precepts far beyond the authority of government to alter or define and that willing participation in civic affairs can be consistent with a brief acknowledgment of their belief in a higher power, always with due respect for those who adhere to other beliefs. The prayer in this case has a permissible ceremonial purpose. It is not an unconstitutional establishment of religion.

* * *

The town of Greece does not violate the First Amendment by opening its meetings with prayer that comports with our

tradition and does not coerce participation by nonadherents. The judgment of the U. S. Court of Appeals for the Second Circuit is reversed.

It is so ordered.

JUSTICE ALITO, with whom JUSTICE SCALIA joins, concurring.

I write separately to respond to the principal dissent, which really consists of two very different but intertwined opinions. One is quite narrow; the other is sweeping. I will address both.

I

First, however, since the principal dissent accuses the Court of being blind to the facts of this case, *post*, at 633 (opinion of KAGAN, J.), I recount facts that I find particularly salient.

The town of Greece is a municipality in upstate New York that borders the city of Rochester. The town decided to emulate a practice long established in Congress and state legislatures by having a brief prayer before sessions of the town board. The task of lining up clergy members willing to provide such a prayer was given to the town's office of constituent services. 732 F. Supp. 2d 195, 197–198 (WDNY 2010). For the first four years of the practice, a clerical employee in the office would randomly call religious organizations listed in the Greece "Community Guide," a local directory published by the Greece Chamber of Commerce, until she was able to find somebody willing to give the invocation. *Id.*, at 198. This employee eventually began keeping a list of individuals who had agreed to give the invocation, and when a second clerical employee took over the task of finding prayer givers, the first employee gave that list to the second. *Id.*, at 198, 199. The second employee then randomly called organizations on that list—and possibly others in the Community Guide—until she found someone who agreed to provide the prayer. *Id.*, at 199.

Apparently, all the houses of worship listed in the local Community Guide were Christian churches. *Id.*, at 198–200, 203. That is unsurprising given the small number of non-Christians in the area. Although statistics for the town of Greece alone do not seem to be available, statistics have been compiled for Monroe County, which includes both the town of Greece and the city of Rochester. According to these statistics, of the county residents who have a religious affiliation, about 3% are Jewish, and for other non-Christian faiths, the percentages are smaller.[1] There are no synagogues within the borders of the town of Greece, *id.*, at 203, but there are several not far away across the Rochester border. Presumably, Jewish residents of the town worship at one or more of those synagogues, but because these synagogues fall outside the town's borders, they were not listed in the town's local directory, and the responsible town employee did not include them on her list. *Ibid.* Nor did she include any other non-Christian house of worship. *Id.*, at 198–200.[2]

As a result of this procedure, for some time all the prayers at the beginning of town board meetings were offered by Christian clergy, and many of these prayers were distinctively Christian. But respondents do not claim that the list was attributable to religious bias or favoritism, and the Court of Appeals acknowledged that the town had "no religious animus." 681 F. 3d 20, 32 (CA2 2012).

For some time, the town's practice does not appear to have elicited any criticism, but when complaints were received,

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[1] See Assn. of Statisticians of Am. Religious Bodies, C. Grammich et al., 2010 U. S. Religion Census: Religious Congregations & Membership Study 400–401 (2012).

[2] It appears that there is one non-Christian house of worship, a Buddhist temple, within the town's borders, but it was not listed in the town directory. 732 F. Supp. 2d, at 203. Although located within the town's borders, the temple has a Rochester mailing address. And while respondents "each lived in the Town more than thirty years, neither was personally familiar with any mosques, synagogues, temples, or other non-Christian places of worship within the Town." *Id.*, at 197.

the town made it clear that it would permit any interested residents, including nonbelievers, to provide an invocation, and the town has never refused a request to offer an invocation. *Id.*, at 23, 25; 732 F. Supp. 2d, at 197. The most recent list in the record of persons available to provide an invocation includes representatives of many non-Christian faiths. App. in No. 10–3635 (CA2), pp. A1053–A1055 (hereinafter CA2 App.).

Meetings of the Greece Town Board appear to have been similar to most other town council meetings across the country. The prayer took place at the beginning of the meetings. The board then conducted what might be termed the "legislative" portion of its agenda, during which residents were permitted to address the board. After this portion of the meeting, a separate stage of the meetings was devoted to such matters as formal requests for variances. See Brief for Respondents 5–6; CA2 App. A929–A930; *e. g.*, *id.*, at A1058, A1060.

No prayer occurred before this second part of the proceedings, and therefore I do not understand this case to involve the constitutionality of a prayer prior to what may be characterized as an adjudicatory proceeding. The prayer preceded only the portion of the town board meeting that I view as essentially legislative. While it is true that the matters considered by the board during this initial part of the meeting might involve very specific questions, such as the installation of a traffic light or stop sign at a particular intersection, that does not transform the nature of this part of the meeting.

II

I turn now to the narrow aspect of the principal dissent, and what we find here is that the principal dissent's objection, in the end, is really quite niggling. According to the principal dissent, the town could have avoided any constitutional problem in either of two ways.

A

First, the principal dissent writes, "[i]f the Town Board had let its chaplains know that they should speak in nonsectarian terms, common to diverse religious groups, then no one would have valid grounds for complaint." *Post*, at 632. "Priests and ministers, rabbis and imams," the principal dissent continues, "give such invocations all the time" without any great difficulty. *Ibid.*

Both Houses of Congress now advise guest chaplains that they should keep in mind that they are addressing members from a variety of faith traditions, and as a matter of policy, this advice has much to recommend it. But any argument that nonsectarian prayer is constitutionally required runs headlong into a long history of contrary congressional practice. From the beginning, as the Court notes, many Christian prayers were offered in the House and Senate, see *ante*, at 575–576, and when rabbis and other non-Christian clergy have served as guest chaplains, their prayers have often been couched in terms particular to their faith traditions.[3]

Not only is there no historical support for the proposition that only generic prayer is allowed, but as our country has become more diverse, composing a prayer that is acceptable to all members of the community who hold religious beliefs has become harder and harder. It was one thing to compose a prayer that is acceptable to both Christians and Jews; it is much harder to compose a prayer that is also acceptable to followers of Eastern religions that are now well represented

[3] For example, when a rabbi first delivered a prayer at a session of the House of Representatives in 1860, he appeared "in full rabbinic dress, 'piously bedecked in a white tallit and a large velvet skullcap,'" and his prayer "invoked several uniquely Jewish themes and repeated the Biblical priestly blessing in Hebrew." Brief for Nathan Lewin as *Amicus Curiae* 9. Many other rabbis have given distinctively Jewish prayers, *id.*, at 10, and n. 3, and distinctively Islamic, Buddhist, and Hindu prayers have also been delivered, see *ante*, at 579.

in this country. Many local clergy may find the project daunting, if not impossible, and some may feel that they cannot in good faith deliver such a vague prayer.

In addition, if a town attempts to go beyond simply *recommending* that a guest chaplain deliver a prayer that is broadly acceptable to all members of a particular community (and the groups represented in different communities will vary), the town will inevitably encounter sensitive problems. Must a town screen and, if necessary, edit prayers before they are given? If prescreening is not required, must the town review prayers after they are delivered in order to determine if they were sufficiently generic? And if a guest chaplain crosses the line, what must the town do? Must the chaplain be corrected on the spot? Must the town strike this chaplain (and perhaps his or her house of worship) from the approved list?

B

If a town wants to avoid the problems associated with this first option, the principal dissent argues, it has another choice: It may "invit[e] clergy of many faiths." *Post*, at 632. "When one month a clergy member refers to Jesus, and the next to Allah or Jehovah," the principal dissent explains, "the government does not identify itself with one religion or align itself with that faith's citizens, and the effect of even sectarian prayer is transformed." *Ibid.*

If, as the principal dissent appears to concede, such a rotating system would obviate any constitutional problems, then despite all its high rhetoric, the principal dissent's quarrel with the town of Greece really boils down to this: The town's clerical employees did a bad job in compiling the list of potential guest chaplains. For that is really the only difference between what the town did and what the principal dissent is willing to accept. The Greece clerical employee drew up her list using the town directory instead of a directory covering the entire greater Rochester area. If the task of putting together the list had been handled in a more so-

phisticated way, the employee in charge would have realized that the town's Jewish residents attended synagogues on the Rochester side of the border and would have added one or more synagogues to the list. But the mistake was at worst careless, and it was not done with a discriminatory intent. (I would view this case very differently if the omission of these synagogues were intentional.)

The informal, imprecise way in which the town lined up guest chaplains is typical of the way in which many things are done in small and medium-sized units of local government. In such places, the members of the governing body almost always have day jobs that occupy much of their time. The town almost never has a legal office and instead relies for legal advice on a local attorney whose practice is likely to center on such things as land-use regulation, contracts, and torts. When a municipality like the town of Greece seeks in good faith to emulate the congressional practice on which our holding in *Marsh* v. *Chambers*, 463 U. S. 783 (1983), was largely based, that municipality should not be held to have violated the Constitution simply because its method of recruiting guest chaplains lacks the demographic exactitude that might be regarded as optimal.

The effect of requiring such exactitude would be to pressure towns to forswear altogether the practice of having a prayer before meetings of the town council. Many local officials, puzzled by our often puzzling Establishment Clause jurisprudence and terrified of the legal fees that may result from a lawsuit claiming a constitutional violation, already think that the safest course is to ensure that local government is a religion-free zone. Indeed, the Court of Appeals' opinion in this case advised towns that constitutional difficulties "may well prompt municipalities to pause and think carefully before adopting legislative prayer." 681 F. 3d, at 34. But if, as precedent and historic practice make clear (and the principal dissent concedes), prayer before a legislative session is not inherently inconsistent with the First Amend-

ment, then a unit of local government should not be held to have violated the First Amendment simply because its procedure for lining up guest chaplains does not comply in all respects with what might be termed a "best practices" standard.

III

While the principal dissent, in the end, would demand no more than a small modification in the procedure that the town of Greece initially followed, much of the rhetoric in that opinion sweeps more broadly. Indeed, the logical thrust of many of its arguments is that prayer is *never* permissible prior to meetings of local government legislative bodies. At Greece Town Board meetings, the principal dissent pointedly notes, ordinary citizens (and even children!) are often present. *Post*, at 624. The guest chaplains stand in front of the room facing the public. "[T]he setting is intimate," and ordinary citizens are permitted to speak and to ask the board to address problems that have a direct effect on their lives. *Ibid.* The meetings are "occasions for ordinary citizens to engage with and petition their government, often on highly individualized matters." *Post*, at 622. Before a session of this sort, the principal dissent argues, any prayer that is not acceptable to all in attendance is out of bounds.

The features of Greece meetings that the principal dissent highlights are by no means unusual.[4] It is common for residents to attend such meetings, either to speak on matters on the agenda or to request that the town address other issues

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[4] See, *e. g.*, prayer practice of Saginaw City Council in Michigan, described in Letter from Freedom from Religion Foundation to City Manager, Saginaw City Council (Jan. 31, 2014), online at http://media.mlive.com/saginawnews_impact/other/Saginaw%20prayer%20at%20meetings%20letter.pdf (all Internet materials as visited May 2, 2014, and available in Clerk of Court's case file); prayer practice of Cobb County commissions in Georgia, described in *Pelphrey* v. *Cobb County*, 410 F. Supp. 2d 1324 (ND Ga. 2006).

that are important to them. Nor is there anything unusual about the occasional attendance of students, and when a prayer is given at the beginning of such a meeting, I expect that the chaplain generally stands at the front of the room and faces the public. To do otherwise would probably be seen by many as rude. Finally, although the principal dissent, *post*, at 627, attaches importance to the fact that guest chaplains in the town of Greece often began with the words "Let us pray," that is also commonplace and for many clergy, I suspect, almost reflexive.[5] In short, I see nothing out of the ordinary about any of the features that the principal dissent notes. Therefore, if prayer is not allowed at meetings with those characteristics, local government legislative bodies, unlike their national and state counterparts, cannot begin their meetings with a prayer. I see no sound basis for drawing such a distinction.

IV

The principal dissent claims to accept the Court's decision in *Marsh* v. *Chambers*, which upheld the constitutionality of the Nebraska Legislature's practice of prayer at the beginning of legislative sessions, but the principal dissent's acceptance of *Marsh* appears to be predicated on the view that the prayer at issue in that case was little more than a formality to which the legislators paid scant attention. The principal dissent describes this scene: A session of the state legislature begins with or without most members present; a strictly nonsectarian prayer is recited while some legislators remain seated; and few members of the public are exposed to the experience. *Post*, at 623–624. This sort of perfunctory and hidden-away prayer, the principal dissent implies, is all that *Marsh* and the First Amendment can tolerate.

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[5] For example, at the most recent Presidential inauguration, a minister faced the assembly of onlookers on the National Mall and began with those very words. 159 Cong. Rec. 462, 465 (2013).

It is questionable whether the principal dissent accurately describes the Nebraska practice at issue in *Marsh*,[6] but what is important is not so much what happened in Nebraska in the years prior to *Marsh*, but what happened before congressional sessions during the period leading up to the adoption of the First Amendment. By that time, prayer before legislative sessions already had an impressive pedigree, and it is important to recall that history and the events that led to the adoption of the practice.

The principal dissent paints a picture of "morning in Nebraska" circa 1983, see *post*, at 623, but it is more instructive to consider "morning in Philadelphia," September 1774. The First Continental Congress convened in Philadelphia, and the need for the 13 Colonies to unite was imperative. But "[m]any things set colony apart from colony," and prominent among these sources of division was religion.[7] "Purely as a practical matter," however, the project of bringing the Colonies together required that these divisions be overcome.[8]

Samuel Adams sought to bridge these differences by prodding a fellow Massachusetts delegate to move to open the session with a prayer.[9] As John Adams later recounted, this motion was opposed on the ground that the delegates were "so divided in religious sentiments, some Episcopalians,

[6] See generally Brief for Robert E. Palmer as *Amicus Curiae* (Nebraska Legislature chaplain at issue in *Marsh*); *e. g.*, *id.*, at 11 (describing his prayers as routinely referring "to Christ, the Bible, [and] holy days"). See also *Chambers* v. *Marsh*, 504 F. Supp. 585, 590, n. 12 (Neb. 1980) ("A rule of the Nebraska Legislature requires that 'every member shall be present within the Legislative Chamber during the meetings of the Legislature . . . unless excused . . . .' Unless the excuse for nonattendance is deemed sufficient by the legislature, the 'presence of any member may be compelled, if necessary, by sending the Sergeant at Arms'" (alterations in original)).

[7] G. Wills, Inventing America: Jefferson's Declaration of Independence 46 (1978).

[8] N. Cousins, In God We Trust: The Religious Beliefs and Ideas of the American Founding Fathers 4–5, 13 (1958).

[9] M. Puls, Samuel Adams: Father of the American Revolution 160 (2006).

some Quakers, some Anabaptists, some Presbyterians, and some Congregationalists, that [they] could not join in the same act of worship."[10] In response, Samuel Adams proclaimed that "he was no bigot, and could hear a prayer from a gentleman of piety and virtue, who was at the same time a friend to his country."[11] Putting aside his personal prejudices,[12] he moved to invite a local Anglican minister, Jacob Duché, to lead the first prayer.[13]

The following morning, Duché appeared in full "pontificals" and delivered both the Anglican prayers for the day and an extemporaneous prayer.[14] For many of the delegates—members of religious groups that had come to America to escape persecution in Britain—listening to a distinctively Anglican prayer by a minister of the Church of England represented an act of notable ecumenism. But Duché's prayer met with wide approval—John Adams wrote that it "filled the bosom of every man" in attendance[15]—and the practice was continued. This first congressional prayer was emphatically Christian, and it was neither an empty formality nor strictly nondenominational.[16] But one of its purposes, and presumably one of its effects, was not to divide, but to unite.

It is no wonder, then, that the practice of beginning congressional sessions with a prayer was continued after the

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[10] Letter to Abigail Adams (Sept. 16, 1774), in C. Adams, Familiar Letters of John Adams and His Wife Abigail Adams, During the Revolution 37 (1876).

[11] *Ibid.*

[12] See Wills, *supra*, at 46; J. Miller, Sam Adams 85, 87 (1936); I. Stoll, Samuel Adams: A Life 7, 134–135 (2008).

[13] C. Adams, Familiar Letters, at 37.

[14] *Ibid.*

[15] *Ibid.*; see W. Wells, 2 The Life and Public Services of Samuel Adams 222–223 (1865); Miller, *supra,* at 320; E. Burnett, The Continental Congress 40 (1941); Puls, *supra*, at 161.

[16] First Prayer of the Continental Congress, 1774, online at http://chaplain.house.gov/archive/continental.html.

Revolution ended and the new Constitution was adopted. One of the first actions taken by the new Congress when it convened in 1789 was to appoint chaplains for both Houses. The first Senate chaplain, an Episcopalian, was appointed on April 25, 1789, and the first House chaplain, a Presbyterian, was appointed on May 1.[17] Three days later, Madison announced that he planned to introduce proposed constitutional amendments to protect individual rights; on June 8, 1789, those amendments were introduced; and on September 26, 1789, the amendments were approved to be sent to the States for ratification.[18] In the years since the adoption of the First Amendment, the practice of prayer before sessions of the House and Senate has continued, and opening prayers from a great variety of faith traditions have been offered. This Court has often noted that actions taken by the First Congress are presumptively consistent with the Bill of Rights, see, *e. g.*, *Harmelin* v. *Michigan*, 501 U. S. 957, 980 (1991) (opinion of SCALIA, J.); *Carroll* v. *United States*, 267 U. S. 132, 150–152 (1925), and this principle has special force when it comes to the interpretation of the Establishment Clause. This Court has always purported to base its Establishment Clause decisions on the original meaning of that provision. Thus, in *Marsh*, when the Court was called upon to decide whether prayer prior to sessions of a state legislature was consistent with the Establishment Clause, we relied heavily on the history of prayer before sessions of Congress and held that a state legislature may follow a similar practice. See 463 U. S., at 786–792.

There can be little doubt that the decision in *Marsh* reflected the original understanding of the First Amendment. It is virtually inconceivable that the First Congress, having

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[17] 1 Annals of Cong. 24–25 (1789); R. Cord, Separation of Church and State: Historical Fact and Current Fiction 23 (1982).

[18] 1 Annals of Cong. 247, 424; R. Labunski, James Madison and the Struggle for the Bill of Rights 240–241 (2006).

appointed chaplains whose responsibilities prominently included the delivery of prayers at the beginning of each daily session, thought that this practice was inconsistent with the Establishment Clause. And since this practice was well established and undoubtedly well known, it seems equally clear that the state legislatures that ratified the First Amendment had the same understanding. In the case before us, the Court of Appeals appeared to base its decision on one of the Establishment Clause "tests" set out in the opinions of this Court, see 681 F. 3d, at 26, 30, but if there is any inconsistency between any of those tests and the historic practice of legislative prayer, the inconsistency calls into question the validity of the test, not the historic practice.

V

This brings me to my final point. I am troubled by the message that some readers may take from the principal dissent's rhetoric and its highly imaginative hypotheticals. For example, the principal dissent conjures up the image of a litigant awaiting trial who is asked by the presiding judge to rise for a Christian prayer, of an official at a polling place who conveys the expectation that citizens wishing to vote make the sign of the cross before casting their ballots, and of an immigrant seeking naturalization who is asked to bow her head and recite a Christian prayer. Although I do not suggest that the implication is intentional, I am concerned that at least some readers will take these hypotheticals as a warning that this is where today's decision leads—to a country in which religious minorities are denied the equal benefits of citizenship.

Nothing could be further from the truth. All that the Court does today is to allow a town to follow a practice that we have previously held is permissible for Congress and state legislatures. In seeming to suggest otherwise, the principal dissent goes far astray.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins as to Part II, concurring in part and concurring in the judgment.

Except for Part II–B, I join the opinion of the Court, which faithfully applies *Marsh* v. *Chambers*, 463 U. S. 783 (1983). I write separately to reiterate my view that the Establishment Clause is "best understood as a federalism provision," *Elk Grove Unified School Dist.* v. *Newdow*, 542 U. S. 1, 50 (2004) (THOMAS, J., concurring in judgment), and to state my understanding of the proper "coercion" analysis.

I

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U. S. Const., Amdt. 1. As I have explained before, the text and history of the Clause "resis[t] incorporation" against the States. *Newdow*, *supra*, at 45–46; see also *Van Orden* v. *Perry*, 545 U. S. 677, 692–693 (2005) (concurring opinion); *Zelman* v. *Simmons-Harris*, 536 U. S. 639, 677–680 (2002) (same). If the Establishment Clause is not incorporated, then it has no application here, where only municipal action is at issue.

As an initial matter, the Clause probably prohibits Congress from establishing a national religion. Cf. D. Drakeman, Church, State, and Original Intent 260–262 (2010). The text of the Clause also suggests that Congress "could not interfere with state establishments, notwithstanding any argument that could be made based on Congress' power under the Necessary and Proper Clause." *Newdow*, *supra*, at 50 (opinion of THOMAS, J.). The language of the First Amendment ("Congress shall make no law") "precisely tracked and inverted the exact wording" of the Necessary and Proper Clause ("Congress shall have power . . . to make all laws which shall be necessary and proper . . . "), which was the subject of fierce criticism by Anti-Federalists at the time of ratification. A. Amar, The Bill of Rights 39 (1998) (hereinafter Amar); see also Natelson, The Framing and Adoption of the Necessary

and Proper Clause, in The Origins of the Necessary and Proper Clause 84, 94–96 (G. Lawson, G. Miller, R. Natelson, & G. Seidman eds. 2010) (summarizing Anti-Federalist claims that the Necessary and Proper Clause would aggrandize the powers of the Federal Government). That choice of language—"Congress shall make no law"—effectively denied Congress any power to regulate state establishments.

Construing the Establishment Clause as a federalism provision accords with the variety of church-state arrangements that existed at the founding. At least six States had established churches in 1789. Amar 32–33. New England States like Massachusetts, Connecticut, and New Hampshire maintained local-rule establishments whereby the majority in each town could select the minister and religious denomination (usually Congregationalism, or "Puritanism"). McConnell, Establishment and Disestablishment at the Founding, Part I: Establishment of Religion, 44 Wm. & Mary L. Rev. 2105, 2110 (2003); see also L. Levy, The Establishment Clause: Religion and the First Amendment 29–51 (1994) (hereinafter Levy). In the South, Maryland, South Carolina, and Georgia eliminated their exclusive Anglican establishments following the American Revolution and adopted general establishments, which permitted taxation in support of all Christian churches (or, as in South Carolina, all Protestant churches). See *id.*, at 52–58; Amar 32–33. Virginia, by contrast, had recently abolished its official state establishment and ended direct government funding of clergy after a legislative battle led by James Madison. See T. Buckley, Church and State in Revolutionary Virginia, 1776–1787, pp. 155–164 (1977). Other States—principally Rhode Island, Pennsylvania, and Delaware, which were founded by religious dissenters—had no history of formal establishments at all, although they still maintained religious tests for office. See McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1425–1426, 1430 (1990).

The import of this history is that the relationship between church and state in the fledgling Republic was far from settled at the time of ratification. See Muñoz, The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation, 8 U. Pa. J. Constitutional L. 585, 605 (2006). Although the remaining state establishments were ultimately dismantled—Massachusetts, the last State to disestablish, would do so in 1833, see Levy 42—that outcome was far from assured when the Bill of Rights was ratified in 1791. That lack of consensus suggests that the First Amendment was simply agnostic on the subject of state establishments; the decision to establish or disestablish religion was reserved to the States. Amar 41.

The Federalist logic of the original Establishment Clause poses a special barrier to its mechanical incorporation against the States through the Fourteenth Amendment. See *id.*, at 33. Unlike the Free Exercise Clause, which "plainly protects individuals against congressional interference with the right to exercise their religion," the Establishment Clause "does not purport to protect individual rights." *Newdow*, 542 U. S., at 50 (opinion of THOMAS, J.). Instead, the States are the particular beneficiaries of the Clause. Incorporation therefore gives rise to a paradoxical result: Applying the Clause against the States eliminates their right to establish a religion free from federal interference, thereby "prohibit[ing] exactly what the Establishment Clause protected." *Id.*, at 51; see Amar 33–34.

Put differently, the structural reasons that counsel against incorporating the Tenth Amendment also apply to the Establishment Clause. *Id.*, at 34. To my knowledge, no court has ever suggested that the Tenth Amendment, which "reserve[s] to the States" powers not delegated to the Federal Government, could or should be applied against the States. To incorporate that limitation would be to divest the States of all powers not specifically delegated to them, thereby inverting the original import of the Amendment. Incor-

porating the Establishment Clause has precisely the same effect.

The most cogent argument in favor of incorporation may be that, by the time of Reconstruction, the framers of the Fourteenth Amendment had come to reinterpret the Establishment Clause (notwithstanding its Federalist origins) as expressing an individual right. On this question, historical evidence from the 1860's is mixed. Congressmen who cataloged the personal rights protected by the First Amendment commonly referred to speech, press, petition, and assembly, but not to a personal right of nonestablishment; instead, they spoke only of "'free exercise'" or "'freedom of conscience.'" Amar 253, 385, n. 91 (collecting sources). There may be reason to think these lists were abbreviated, and silence on the issue is not dispositive. See Lash, The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle, 27 Ariz. St. L. J. 1085, 1141–1145 (1995); but cf. S. Smith, Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom 50–52 (1995). Given the textual and logical difficulties posed by incorporation, however, there is no warrant for transforming the meaning of the Establishment Clause without a firm historical foundation. See *Newdow*, *supra*, at 51 (opinion of THOMAS, J.). The burden of persuasion therefore rests with those who claim that the Clause assumed a different meaning upon adoption of the Fourteenth Amendment.[1]

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[1] This Court has never squarely addressed these barriers to the incorporation of the Establishment Clause. When the issue was first presented in *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1 (1947), the Court casually asserted that "the Fourteenth Amendment [has been] interpreted to make the prohibitions of the First applicable to state action abridging religious freedom. There is every reason to give the same application and broad interpretation to the 'establishment of religion' clause." *Id.*, at 15 (footnote omitted). The cases the Court cited in support of that proposition involved the Free Exercise Clause—which had been incorporated seven years earlier, in *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940)—not the Establishment Clause. 330 U. S., at 15, n. 22 (collecting cases). Thus, in the space of a single paragraph and a nonresponsive string citation, the

II

Even if the Establishment Clause were properly incorporated against the States, the municipal prayers at issue in this case bear no resemblance to the coercive state establishments that existed at the founding. "The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." *Lee* v. *Weisman*, 505 U. S. 577, 640 (1992) (SCALIA, J., dissenting); see also *Perry*, 545 U. S., at 693–694 (THOMAS, J., concurring); *Cutter* v. *Wilkinson*, 544 U. S. 709, 729 (2005) (THOMAS, J., concurring); *Newdow*, *supra*, at 52 (opinion of THOMAS, J.). In a typical case, attendance at the established church was mandatory, and taxes were levied to generate church revenue. McConnell, 44 Wm. & Mary L. Rev., at 2144–2146, 2152–2159. Dissenting ministers were barred from preaching, and political participation was limited to members of the established church. *Id.*, at 2161–2168, 2176–2180.

This is not to say that the state establishments in existence when the Bill of Rights was ratified were uniform. As previously noted, establishments in the South were typically governed through the state legislature or State Constitution, while establishments in New England were administered at the municipal level. See *supra*, at 605. Notwithstanding these variations, both state and local forms of establishment involved "actual legal coercion," *Newdow*, *supra*, at 52 (opinion of THOMAS, J.): They exercised government power in order to exact financial support of the church, compel religious observance, or control religious doctrine.

Everson Court glibly effected a sea change in constitutional law. The Court's inattention to these doctrinal questions might be explained, although not excused, by the rise of popular conceptions about "separation of church and state" as an "American" constitutional right. See generally P. Hamburger, Separation of Church and State 454–463 (2002); see also *id.*, at 391–454 (discussing the role of nativist sentiment in the campaign for "separation" as an American ideal).

None of these founding-era state establishments remained at the time of Reconstruction. But even assuming that the framers of the Fourteenth Amendment reconceived the nature of the Establishment Clause as a constraint on the States, nothing in the history of the intervening period suggests a fundamental transformation in their understanding of *what constituted an establishment*. At a minimum, there is no support for the proposition that the framers of the Fourteenth Amendment embraced wholly modern notions that the Establishment Clause is violated whenever the "reasonable observer" feels "subtle pressure," *ante*, at 586, 587, or perceives governmental "endors[ement]," *ante*, at 574. For example, of the 37 States in existence when the Fourteenth Amendment was ratified, 27 State Constitutions "contained an explicit reference to God in their preambles." Calabresi & Agudo, Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition? 87 Texas L. Rev. 7, 12, 37 (2008). In addition to the preamble references, 30 State Constitutions contained other references to the divine, using such phrases as "'Almighty God,'" "'[O]ur Creator,'" and "'Sovereign Ruler of the Universe.'" *Id.*, at 37, 38, 39, n. 104. Moreover, the state constitutional provisions that prohibited religious "comp[ulsion]" made clear that the relevant sort of compulsion was legal in nature, of the same type that had characterized founding-era establishments.[2] These provisions

[2] See, *e. g.*, Del. Const., Art. I, § 1 (1831) ("[N]o man shall, or ought to be compelled to attend any religious worship, to contribute to the erection or support of any place of worship, or to the maintenance of any ministry, against his own free will and consent"); Me. Const., Art. I, § 3 (1820) ("[N]o one shall be hurt, molested or restrained in his person, liberty or estate, for worshiping God in the manner and season most agreeable to the dictates of his own conscience"); Mo. Const., Art. I, § 10 (1865) ("[N]o person can be compelled to erect, support, or attend any place of worship, or maintain any minister of the Gospel or teacher of religion"); R. I. Const., Art. I, § 3 (1842) ("[N]o man shall be compelled to frequent or to support

strongly suggest that, whatever nonestablishment principles existed in 1868, they included no concern for the finer sensibilities of the "reasonable observer."

Thus, to the extent coercion is relevant to the Establishment Clause analysis, it is actual legal coercion that counts—not the "subtle coercive pressures" allegedly felt by respondents in this case, *ante*, at 578. The plurality properly concludes that "[o]ffense . . . does not equate to coercion," since "[a]dults often encounter speech they find disagreeable[,] and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum." *Ante*, at 589. I would simply add, in light of the foregoing history of the Establishment Clause, that "[p]eer pressure, unpleasant as it may be, is not coercion" either. *Newdow*, 542 U. S., at 49 (opinion of THOMAS, J.).

JUSTICE BREYER, dissenting.

As we all recognize, this is a "fact-sensitive" case. *Ante*, at 587 (opinion of KENNEDY, J.); see also *post*, at 633 (KAGAN, J., dissenting); 681 F. 3d 20, 34 (CA2 2012) (explaining that the Court of Appeals' holding follows from the "totality of the circumstances"). The Court of Appeals did not believe that the Constitution forbids legislative prayers that incorporate content associated with a particular denomination. *Id.*, at 28. Rather, the court's holding took that content into account simply because it indicated that the town had not followed a sufficiently inclusive "prayer-giver selection process." *Id.*, at 30. It also took into account related "actions (and inactions) of prayer-givers and town officials." *Ibid.* Those actions and inactions included (1) a selection process

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any religious worship, place or ministry whatever, except in fulfillment of his own voluntary contract"); Vt. Const., Ch. I, §3 (1777) ("[N]o man ought, or of right can be compelled to attend any religious worship, or erect, or support any place of worship, or maintain any minister, contrary to the dictates of his conscience").

that led to the selection of "clergy almost exclusively from places of worship located within the town's borders," despite the likelihood that significant numbers of town residents were members of congregations that gather just outside those borders; (2) a failure to "infor[m] members of the general public that volunteers" would be acceptable prayer givers; and (3) a failure to "infor[m] prayer-givers that invocations were not to be exploited as an effort to convert others to the particular faith of the invocational speaker, nor to disparage any faith or belief different than that of the invocational speaker." *Id.*, at 31–32 (internal quotation marks omitted).

The Court of Appeals further emphasized what it was not holding. It did not hold that "the town may not open its public meetings with a prayer," or that "any prayers offered in this context must be blandly 'nonsectarian.' " *Id.*, at 33. In essence, the Court of Appeals merely held that the town must do more than it had previously done to try to make its prayer practices inclusive of other faiths. And it did not prescribe a single constitutionally required method for doing so.

In my view, the Court of Appeals' conclusion and its reasoning are convincing. JUSTICE KAGAN's dissent is consistent with that view, and I join it. I also here emphasize several factors that I believe underlie the conclusion that, on the particular facts of this case, the town's prayer practice violated the Establishment Clause.

First, Greece is a predominantly Christian town, but it is not exclusively so. A map of the town's houses of worship introduced in the District Court shows many Christian churches within the town's limits. It also shows a Buddhist temple within the town and several Jewish synagogues just outside its borders, in the adjacent city of Rochester, New York. *Id.*, at 24. Yet during the more than 120 monthly meetings at which prayers were delivered during the record period (from 1999 to 2010), only four prayers were delivered

by non-Christians. And all of these occurred in 2008, shortly after the plaintiffs began complaining about the town's Christian prayer practice and nearly a decade after that practice had commenced. See *post*, at 628, 634–635.

To be precise: During 2008, two prayers were delivered by a Jewish layman, one by the chairman of a Baha'i congregation, and one by a Wiccan priestess. The Jewish and Wiccan prayer givers were invited only after they reached out to the town to inquire about giving an invocation. The town apparently invited the Baha'i chairman on its own initiative. The inclusivity of the 2008 meetings, which contrasts starkly with the exclusively single-denomination prayers every year before and after, is commendable. But the Court of Appeals reasonably decided not to give controlling weight to that inclusivity, for it arose only in response to the complaints that presaged this litigation, and it did not continue into the following years.

Second, the town made no significant effort to inform the area's non-Christian houses of worship about the possibility of delivering an opening prayer. See *post*, at 634–635. Beginning in 1999, when it instituted its practice of opening its monthly board meetings with prayer, Greece selected prayer givers as follows: Initially, the town's employees invited clergy from each religious organization listed in a "Community Guide" published by the Greece Chamber of Commerce. After that, the town kept a list of clergy who had accepted invitations and reinvited those clergy to give prayers at future meetings. From time to time, the town supplemented this list in response to requests from citizens and to new additions to the Community Guide and a town newspaper called the Greece Post.

The plaintiffs do not argue that the town intentionally discriminated against non-Christians when choosing whom to invite, 681 F. 3d, at 26, and the town claims, plausibly, that it would have allowed anyone who asked to give an invoca-

tion to do so. Rather, the evident reasons why the town consistently chose Christian prayer givers are that the Buddhist and Jewish temples mentioned above were not listed in the Community Guide or the Greece Post and that the town limited its list of clergy almost exclusively to representatives of houses of worship situated within Greece's town limits (again, the Buddhist temple on the map was within those limits, but the synagogues were just outside them). *Id.*, at 24, 31.

Third, in this context, the fact that nearly all of the prayers given reflected a single denomination takes on significance. That significance would have been the same had all the prayers been Jewish, or Hindu, or Buddhist, or of any other denomination. The significance is that, in a context where religious minorities exist and where more could easily have been done to include their participation, the town chose to do nothing. It could, for example, have posted its policy of permitting anyone to give an invocation on its Website, greeceny.gov, which provides dates and times of upcoming town board meetings along with minutes of prior meetings. It could have announced inclusive policies at the beginning of its board meetings, just before introducing the month's prayer giver. It could have provided information to those houses of worship of all faiths that lie just outside its borders and include citizens of Greece among their members. Given that the town could easily have made these or similar efforts but chose not to, the fact that all of the prayers (aside from the 2008 outliers) were given by adherents of a single religion reflects a lack of effort to include others. And that is what I take to be a major point of JUSTICE KAGAN's related discussion. See *post*, at 616–618, 622–623, 627–629, 634–636.

Fourth, the fact that the board meeting audience included citizens with business to conduct also contributes to the importance of making more of an effort to include members of other denominations. It does not, however, automatically

change the nature of the meeting from one where an opening prayer is permissible under the Establishment Clause to one where it is not. Cf. *post*, at 622–627, 629–631, 633.

Fifth, it is not normally government's place to rewrite, to parse, or to critique the language of particular prayers. And it is always possible that members of one religious group will find that prayers of other groups (or perhaps even a moment of silence) are not compatible with their faith. Despite this risk, the Constitution does not forbid opening prayers. But neither does the Constitution forbid efforts to explain to those who give the prayers the nature of the occasion and the audience.

The U. S. House of Representatives, for example, provides its guest chaplains with the following guidelines, which are designed to encourage the sorts of prayer that are consistent with the purpose of an invocation for a government body in a religiously pluralistic Nation:

> "The guest chaplain should keep in mind that the House of Representatives is comprised of Members of many different faith traditions.
>
> "The length of the prayer should not exceed 150 words.
>
> "The prayer must be free from personal political views or partisan politics, from sectarian controversies, and from any intimations pertaining to foreign or domestic policy." App. to Brief for Respondents 2a.

The town made no effort to promote a similarly inclusive prayer practice here. See *post*, at 634–635.

As both the Court and JUSTICE KAGAN point out, we are a Nation of many religions. *Ante*, at 579; *post*, at 615–616, 631–632. And the Constitution's Religion Clauses seek to "protec[t] the Nation's social fabric from religious conflict." *Zelman* v. *Simmons-Harris*, 536 U. S. 639, 717 (2002) (BREYER, J., dissenting). The question in this case is whether the prayer practice of the town of Greece, by doing too little to reflect the religious diversity of its citizens, did

too much, even if unintentionally, to promote the "political division along religious lines" that "was one of the principal evils against which the First Amendment was intended to protect." *Lemon* v. *Kurtzman*, 403 U. S. 602, 622 (1971).

In seeking an answer to that fact-sensitive question, "I see no test-related substitute for the exercise of legal judgment." *Van Orden* v. *Perry*, 545 U. S. 677, 700 (2005) (BREYER, J., concurring in judgment). Having applied my legal judgment to the relevant facts, I conclude, like JUSTICE KAGAN, that the town of Greece failed to make reasonable efforts to include prayer givers of minority faiths, with the result that, although it is a community of several faiths, its prayer givers were almost exclusively persons of a single faith. Under these circumstances, I would affirm the judgment of the Court of Appeals that Greece's prayer practice violated the Establishment Clause.

I dissent from the Court's decision to the contrary.

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

For centuries now, people have come to this country from every corner of the world to share in the blessing of religious freedom. Our Constitution promises that they may worship in their own way, without fear of penalty or danger, and that in itself is a momentous offering. Yet our Constitution makes a commitment still more remarkable—that however those individuals worship, they will count as full and equal American citizens. A Christian, a Jew, a Muslim (and so forth)—each stands in the same relationship with her country, with her state and local communities, and with every level and body of government. So that when each person performs the duties or seeks the benefits of citizenship, she does so not as an adherent to one or another religion, but simply as an American.

I respectfully dissent from the Court's opinion because I think the Town of Greece's prayer practices violate that

norm of religious equality—the breathtakingly generous constitutional idea that our public institutions belong no less to the Buddhist or Hindu than to the Methodist or Episcopalian. I do not contend that principle translates here into a bright separationist line. To the contrary, I agree with the Court's decision in *Marsh* v. *Chambers*, 463 U. S. 783 (1983), upholding the Nebraska Legislature's tradition of beginning each session with a chaplain's prayer. And I believe that pluralism and inclusion in a town hall can satisfy the constitutional requirement of neutrality; such a forum need not become a religion-free zone. But still, the Town of Greece should lose this case. The practice at issue here differs from the one sustained in *Marsh* because Greece's town meetings involve participation by ordinary citizens, and the invocations given—directly to those citizens—were predominantly sectarian in content. Still more, Greece's Board did nothing to recognize religious diversity: In arranging for clergy members to open each meeting, the Town never sought (except briefly when this suit was filed) to involve, accommodate, or in any way reach out to adherents of non-Christian religions. So month in and month out for over a decade, prayers steeped in only one faith, addressed toward members of the public, commenced meetings to discuss local affairs and distribute government benefits. In my view, that practice does not square with the First Amendment's promise that every citizen, irrespective of her religion, owns an equal share in her government.

I

To begin to see what has gone wrong in the Town of Greece, consider several hypothetical scenarios in which sectarian prayer—taken straight from this case's record—infuses governmental activities. None involves, as this case does, a proceeding that could be characterized as a legislative session, but they are useful to elaborate some general principles. In each instance, assume (as was true in Greece) that the invocation is given pursuant to government policy

and is representative of the prayers generally offered in the designated setting:

- You are a party in a case going to trial; let's say you have filed suit against the government for violating one of your legal rights. The judge bangs his gavel to call the court to order, asks a minister to come to the front of the room, and instructs the 10 or so individuals present to rise for an opening prayer. The clergyman faces those in attendance and says: "Lord, God of all creation, ... We acknowledge the saving sacrifice of Jesus Christ on the cross. We draw strength . . . from his resurrection at Easter. Jesus Christ, who took away the sins of the world, destroyed our death, through his dying and in his rising, he has restored our life. Blessed are you, who has raised up the Lord Jesus, you who will raise us, in our turn, and put us by His side. . . . Amen." App. 88a–89a. The judge then asks your lawyer to begin the trial.
- It's election day, and you head over to your local polling place to vote. As you and others wait to give your names and receive your ballots, an election official asks everyone there to join him in prayer. He says: "We pray this [day] for the guidance of the Holy Spirit as [we vote] . . . . Let's just say the Our Father together. Our Father who art in Heaven, hallowed be thy name, thy kingdom come, thy will be done, on Earth as it is in Heaven. . . . " *Id.*, at 56a. And after he concludes, he makes the sign of the cross, and appears to wait expectantly for you and the other prospective voters to do so too.
- You are an immigrant attending a naturalization ceremony to finally become a citizen. The presiding official tells you and your fellow applicants that before administering the oath of allegiance, he would like a minister to pray for you and with you. The pastor steps to the front of the room, asks everyone to bow their heads, and recites: "[F]ather, son, and Holy Spirit—it is with a due

> sense of reverence and awe that we come before you [today] seeking your blessing . . . . You are . . . a wise God, oh Lord, . . . as evidenced even in the plan of redemption that is fulfilled in Jesus Christ. We ask that you would give freely and abundantly wisdom to one and to all . . . in the name of the Lord and Savior Jesus Christ, who lives with you and the Holy Spirit, one God for ever and ever. Amen." *Id.*, at 99a–100a.

I would hold that the government officials responsible for the above practices—that is, for prayer repeatedly invoking a single religion's beliefs in these settings—crossed a constitutional line. I have every confidence the Court would agree. See *ante*, at 603 (ALITO, J., concurring). And even Greece's attorney conceded that something like the first hypothetical (he was not asked about the others) would violate the First Amendment. See Tr. of Oral Arg. 3–4. Why?

The reason, of course, has nothing to do with Christianity as such. This opinion is full of Christian prayers, because those were the only invocations offered in the Town of Greece. But if my hypotheticals involved the prayer of some other religion, the outcome would be exactly the same. Suppose, for example, that government officials in a predominantly Jewish community asked a rabbi to begin all public functions with a chanting of the Sh'ma and V'ahavta. ("Hear O Israel! The Lord our God, the Lord is One. . . . Bind [these words] as a sign upon your hand; let them be a symbol before your eyes; inscribe them on the doorposts of your house, and on your gates.") Or assume officials in a mostly Muslim town requested a muezzin to commence such functions, over and over again, with a recitation of the Adhan. ("God is greatest, God is greatest. I bear witness that there is no deity but God. I bear witness that Muhammed is the Messenger of God.") In any instance, the question would be why such government-sponsored prayer of a single religion goes beyond the constitutional pale.

One glaring problem is that the government in all these hypotheticals has aligned itself with, and placed its imprimatur on, a particular religious creed. "The clearest command of the Establishment Clause," this Court has held, "is that one religious denomination cannot be officially preferred over another." *Larson* v. *Valente*, 456 U. S. 228, 244 (1982). Justices have often differed about a further issue: whether and how the Clause applies to governmental policies favoring religion (of all kinds) over non-religion. Compare, *e. g.*, *McCreary County* v. *American Civil Liberties Union of Ky.*, 545 U. S. 844, 860 (2005) ("[T]he First Amendment mandates governmental neutrality between . . . religion and nonreligion"), with, *e. g.*, *id.*, at 885 (SCALIA, J., dissenting) ("[T]he Court's oft repeated assertion that the government cannot favor religious practice [generally] is false"). But no one has disagreed with this much:

> "[O]ur constitutional tradition, from the Declaration of Independence and the first inaugural address of Washington . . . down to the present day, has . . . ruled out of order government-sponsored endorsement of religion . . . where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ)." *Lee* v. *Weisman*, 505 U. S. 577, 641 (1992) (SCALIA, J., dissenting).

See also *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 605 (1989) ("Whatever else the Establishment Clause may mean[,] . . . [it] means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions)").[1] By

[1] That principle meant as much to the founders as it does today. The demand for neutrality among religions is not a product of 21st century "political correctness," but of the 18th century view—rendered no less

authorizing and overseeing prayers associated with a single religion—to the exclusion of all others—the government officials in my hypothetical cases (whether federal, state, or local does not matter) have violated that foundational principle. They have embarked on a course of religious favoritism anathema to the First Amendment.

And making matters still worse: They have done so in a place where individuals come to interact with, and participate in, the institutions and processes of their government. A person goes to court, to the polls, to a naturalization ceremony—and a government official or his hand-picked minister asks her, as the first order of official business, to stand and pray with others in a way conflicting with her own religious beliefs. Perhaps she feels sufficient pressure to go along—to rise, bow her head, and join in whatever others are saying: After all, she wants, very badly, what the judge or poll worker or immigration official has to offer. Or perhaps she

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wise by time—that, in George Washington's words, "[r]eligious controversies are always productive of more acrimony and irreconcilable hatreds than those which spring from any other cause." Letter to Edward Newenham (June 22, 1792), in 10 Papers of George Washington: Presidential Series 493 (R. Haggard & M. Mastromarino eds. 2002) (hereinafter PGW). In an age when almost no one in this country was not a Christian of one kind or another, Washington consistently declined to use language or imagery associated only with that religion. See Brief for Paul Finkelman et al. as *Amici Curiae* 15–19 (noting, for example, that in revising his first inaugural address, Washington deleted the phrase "the blessed Religion revealed in the word of God" because it was understood to denote only Christianity). Thomas Jefferson, who followed the same practice throughout his life, explained that he omitted any reference to Jesus Christ in Virginia's Bill for Establishing Religious Freedom (a precursor to the Establishment Clause) in order "to comprehend, within the mantle of [the law's] protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and infidel of every denomination." 1 Writings of Thomas Jefferson 62 (P. Ford ed. 1892). And James Madison, who again used only nonsectarian language in his writings and addresses, warned that religious proclamations might, "if not strictly guarded," express only "the creed of the majority and a single sect." Madison's "Detached Memoranda," 3 Wm. & Mary Quarterly 534, 561 (1946).

is made of stronger mettle, and she opts not to participate in what she does not believe—indeed, what would, for her, be something like blasphemy. She then must make known her dissent from the common religious view, and place herself apart from other citizens, as well as from the officials responsible for the invocations. And so a civic function of some kind brings religious differences to the fore: That public proceeding becomes (whether intentionally or not) an instrument for dividing her from adherents to the community's majority religion, and for altering the very nature of her relationship with her government.

That is not the country we are, because that is not what our Constitution permits. Here, when a citizen stands before her government, whether to perform a service or request a benefit, her religious beliefs do not enter into the picture. See Thomas Jefferson, Virginia Act for Establishing Religious Freedom (Oct. 31, 1785), in 5 The Founders' Constitution 85 (P. Kurland & R. Lerner eds. 1987) ("[O]pinion[s] in matters of religion . . . shall in no wise diminish, enlarge, or affect [our] civil capacities"). The government she faces favors no particular religion, either by word or by deed. And that government, in its various processes and proceedings, imposes no religious tests on its citizens, sorts none of them by faith, and permits no exclusion based on belief. When a person goes to court, a polling place, or an immigration proceeding—I could go on: to a zoning agency, a parole board hearing, or the DMV—government officials do not engage in sectarian worship, nor do they ask her to do likewise. They all participate in the business of government not as Christians, Jews, Muslims (and more), but only as Americans—none of them different from any other for that civic purpose. Why not, then, at a town meeting?

II

In both Greece's and the majority's view, everything I have discussed is irrelevant here because this case involves

"the tradition of legislative prayer outlined" in *Marsh* v. *Chambers*, 463 U. S. 783. *Ante*, at 578. And before I dispute the Town and Court, I want to give them their due: They are right that, under *Marsh*, legislative prayer has a distinctive constitutional warrant by virtue of tradition. As the Court today describes, a long history, stretching back to the first session of Congress (when chaplains began to give prayers in both Chambers), "ha[s] shown that prayer in this limited context could 'coexis[t] with the principles of disestablishment and religious freedom.'" *Ante*, at 578 (quoting *Marsh*, 463 U. S., at 786). Relying on that "unbroken" national tradition, *Marsh* upheld (I think correctly) the Nebraska Legislature's practice of opening each day with a chaplain's prayer as "a tolerable acknowledgment of beliefs widely held among the people of this country." *Id.*, at 792. And so I agree with the majority that the issue here is "whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures." *Ante*, at 577.

Where I depart from the majority is in my reply to that question. The town hall here is a kind of hybrid. Greece's Board indeed has legislative functions, as Congress and state assemblies do—and that means some opening prayers are allowed there. But much as in my hypotheticals, the Board's meetings are also occasions for ordinary citizens to engage with and petition their government, often on highly individualized matters. That feature calls for Board members to exercise special care to ensure that the prayers offered are inclusive—that they respect each and every member of the community as an equal citizen.[2] But the Board,

[2] Because JUSTICE ALITO questions this point, it bears repeating. I do not remotely contend that "prayer is not allowed" at participatory meetings of "local government legislative bodies"; nor is that the "logical thrust" of any argument I make. *Ante*, at 598–599 (concurring opinion). Rather, what I say throughout this opinion is that in this citizen-centered venue, government officials must take steps to ensure—as none of Greece's Board members ever did—that opening prayers are inclusive of different faiths, rather than always identified with a single religion.

and the clergy members it selected, made no such effort. Instead, the prayers given in Greece, addressed directly to the Town's citizenry, were *more* sectarian, and *less* inclusive, than anything this Court sustained in *Marsh*. For those reasons, the prayer in Greece departs from the legislative tradition that the majority takes as its benchmark.

A

Start by comparing two pictures, drawn precisely from reality. The first is of Nebraska's (unicameral) Legislature, as this Court and the state senators themselves described it. The second is of town council meetings in Greece, as revealed in this case's record.

It is morning in Nebraska, and senators are beginning to gather in the State's legislative chamber: It is the beginning of the official workday, although senators may not yet need to be on the floor. See *Chambers* v. *Marsh*, 504 F. Supp. 585, 590, and n. 12 (Neb. 1980); *Lee*, 505 U. S., at 597. The chaplain rises to give the daily invocation. That prayer, as the senators emphasized when their case came to this Court, is "directed only at the legislative membership, not at the public at large." Brief for Petitioners in *Marsh* 30. Any members of the public who happen to be in attendance—not very many at this early hour—watch only from the upstairs visitors' gallery. See App. 72 in *Marsh* (senator's testimony that "as a practical matter the public usually is not there" during the prayer).

The longtime chaplain says something like the following (the excerpt is from his own *amicus* brief supporting Greece in this case): "*O God*, who has given all persons talents and varying capacities, Thou dost only require of us that we utilize Thy gifts to a maximum. In this Legislature to which Thou has entrusted special abilities and opportunities, may each recognize his stewardship for the people of the State." Brief for Robert E. Palmer 9. The chaplain is a Presbyterian minister, and "some of his earlier prayers" explicitly invoked Christian beliefs, but he "removed all references to

Christ" after a single legislator complained. *Marsh*, 463 U. S., at 793, n. 14; Brief for Petitioners in *Marsh* 12. The chaplain also previously invited other clergy members to give the invocation, including local rabbis. See *ibid.*

Now change the channel: It is evening in Greece, New York, and the Supervisor of the Town Board calls its monthly public meeting to order. Those meetings (so says the Board itself) are "the most important part of Town government." See Town of Greece, Town Board, online at http://greeceny.gov/planning/townboard (as visited May 2, 2014 and available in Clerk of Court's case file). They serve assorted functions, almost all actively involving members of the public. The Board may swear in new Town employees and hand out awards for civic accomplishments; it always provides an opportunity (called a Public Forum) for citizens to address local issues and ask for improved services or new policies (for example, better accommodations for the disabled or actions to ameliorate traffic congestion, see Pl. Exhs. 718, 755, in No. 6:08–cv–6088 (WDNY)); and it usually hears debate on individual applications from residents and local businesses to obtain special land-use permits, zoning variances, or other licenses.

The Town Supervisor, Town Clerk, Chief of Police, and four Board members sit at the front of the meeting room on a raised dais. But the setting is intimate: There are likely to be only 10 or so citizens in attendance. A few may be children or teenagers, present to receive an award or fulfill a high school civics requirement.

As the first order of business, the Town Supervisor introduces a local Christian clergy member—denominated the chaplain of the month—to lead the assembled persons in prayer. The pastor steps up to a lectern (emblazoned with the Town's seal) at the front of the dais, and with his back to the Town officials, he faces the citizens present. He asks them all to stand and to "pray as we begin this evening's

town meeting." App. 134a. (He does not suggest that anyone should feel free not to participate.) And he says:

> "The beauties of spring . . . are an expressive symbol of the new life of the risen Christ. The Holy Spirit was sent to the apostles at Pentecost so that they would be courageous witnesses of the Good News to different regions of the Mediterranean world and beyond. The Holy Spirit continues to be the inspiration and the source of strength and virtue, which we all need in the world of today. And so . . . [w]e pray this evening for the guidance of the Holy Spirit as the Greece Town Board meets." *Ibid.*

After the pastor concludes, Town officials behind him make the sign of the cross, as do some members of the audience, and everyone says "Amen." See 681 F. 3d 20, 24 (CA2 2012). The Supervisor then announces the start of the Public Forum, and a citizen stands up to complain about the Town's contract with a cable company. See App. in No. 10–3635 (CA2), p. A574.

B

Let's count the ways in which these pictures diverge. First, the governmental proceedings at which the prayers occur differ significantly in nature and purpose. The Nebraska Legislature's floor sessions—like those of the U. S. Congress and other state assemblies—are of, by, and for elected lawmakers. Members of the public take no part in those proceedings; any few who attend are spectators only, watching from a high-up visitors' gallery. (In that respect, note that neither the Nebraska Legislature nor the Congress calls for prayer when citizens themselves participate in a hearing—say, by giving testimony relevant to a bill or nomination.) Greece's town meetings, by contrast, revolve around ordinary members of the community. Each and every aspect of those sessions provides opportunities for

Town residents to interact with public officials. And the most important parts enable those citizens to petition their government. In the Public Forum, they urge (or oppose) changes in the Board's policies and priorities; and then, in what are essentially adjudicatory hearings, they request the Board to grant (or deny) applications for various permits, licenses, and zoning variances. So the meetings, both by design and in operation, allow citizens to actively participate in the Town's governance—sharing concerns, airing grievances, and both shaping the community's policies and seeking their benefits.

Second (and following from what I just said), the prayers in these two settings have different audiences. In the Nebraska Legislature, the chaplain spoke to, and only to, the elected representatives. Nebraska's senators were adamant on that point in briefing *Marsh*, and the facts fully supported them: As the senators stated, "[t]he activity is a matter of internal daily procedure directed only at the legislative membership, not at [members of] the public." Brief for Petitioners in *Marsh* 30; see Reply Brief for Petitioners in *Marsh* 8 ("The [prayer] practice involves no function or power of government vis-à-vis the Nebraska citizenry, but merely concerns an internal decision of the Nebraska Legislature as to the daily procedure by which it conducts its own affairs"). The same is true in the U. S. Congress and, I suspect, in every other state legislature. See Brief for 12 Members of Congress as *Amici Curiae* 6 ("Consistent with the fact that attending citizens are mere passive observers, prayers in the House are delivered for the Representatives themselves, not those citizens"). As several Justices later noted (and the majority today agrees, see *ante*, at 587–589),[3] *Marsh* involved "government officials invok[ing] spiritual inspira-

[3] For ease of reference and to avoid confusion, I refer to JUSTICE KENNEDY's opinion as "the majority." But the language I cite that appears in Part II–B of that opinion is, in fact, only attributable to a plurality of the Court.

tion entirely for their own benefit without directing any religious message at the citizens they lead." *Lee*, 505 U. S., at 630, n. 8 (Souter, J., concurring).

The very opposite is true in Greece: Contrary to the majority's characterization, see *ante*, at 587–588, the prayers there are directed squarely at the citizens. Remember that the chaplain of the month stands with his back to the Town Board; his real audience is the group he is facing—the 10 or so members of the public, perhaps including children. See *supra*, at 624. And he typically addresses those people, as even the majority observes, as though he is "directing [his] congregation." *Ante*, at 588. He almost always begins with some version of "Let us all pray together." See, *e. g.*, App. 75a, 93a, 106a, 109a. Often, he calls on everyone to stand and bow their heads, and he may ask them to recite a common prayer with him. See, *e. g.*, *id.*, at 28a, 42a, 43a, 56a, 77a. He refers, constantly, to a collective "we"—to "our" savior, for example, to the presence of the Holy Spirit in "our" lives, or to "our brother the Lord Jesus Christ." See, *e. g.*, *id.*, at 32a, 45a, 47a, 69a, 71a. In essence, the chaplain leads, as the first part of a town meeting, a highly intimate (albeit relatively brief) prayer service, with the public serving as his congregation.

And third, the prayers themselves differ in their content and character. *Marsh* characterized the prayers in the Nebraska Legislature as "in the Judeo-Christian tradition," and stated, as a relevant (even if not dispositive) part of its analysis, that the chaplain had removed all explicitly Christian references at a senator's request. 463 U. S., at 793, and n. 14. And as the majority acknowledges, see *ante*, at 581, *Marsh* hinged on the view "that the prayer opportunity ha[d] [not] been exploited to proselytize or advance any one . . . faith or belief"; had it been otherwise, the Court would have reached a different decision. 463 U. S., at 794–795.

But no one can fairly read the prayers from Greece's town meetings as anything other than explicitly Christian—con-

stantly and exclusively so. From the time Greece established its prayer practice in 1999 until litigation loomed nine years later, all of its monthly chaplains were Christian clergy. And after a brief spell surrounding the filing of this suit (when a Jewish layman, a Wiccan priestess, and a Baha'i minister appeared at meetings), the Town resumed its practice of inviting only clergy from neighboring Protestant and Catholic churches. See App. 129a–143a. About two-thirds of the prayers given over this decade or so invoked "Jesus," "Christ," "Your Son," or "the Holy Spirit"; in the 18 months before the record closed, 85% included those references. See generally *id.*, at 27a–143a. Many prayers contained elaborations of Christian doctrine or recitations of scripture. See, *e. g.*, *id.*, at 129a ("And in the life and death, resurrection and ascension of the Savior Jesus Christ, the full extent of your kindness shown to the unworthy is forever demonstrated"); *id.*, at 94a ("For unto us a child is born; unto us a son is given. And the government shall be upon his shoulder . . . "). And the prayers usually close with phrases like "in the name of Jesus Christ" or "in the name of Your son." See, *e. g.*, *id.*, at 55a, 65a, 73a, 85a.

Still more, the prayers betray no understanding that the American community is today, as it long has been, a rich mosaic of religious faiths. See *Braunfeld* v. *Brown*, 366 U. S. 599, 606 (1961) (plurality opinion) (recognizing even half a century ago that "we are a cosmopolitan nation made up of people of almost every conceivable religious preference"). The monthly chaplains appear almost always to assume that everyone in the room is Christian (and of a kind who has no objection to government-sponsored worship[4]). The Town

[4] Leaders of several Baptist and other Christian congregations have explained to the Court that "many Christians believe . . . that their freedom of conscience is violated when they are pressured to participate in government prayer, because such acts of worship should only be performed voluntarily." Brief for Baptist Joint Committee for Religious Liberty et al. as *Amici Curiae* 18.

itself has never urged its chaplains to reach out to members of other faiths, or even to recall that they might be present. And accordingly, few chaplains have made any effort to be inclusive; none has thought even to assure attending members of the public that they need not participate in the prayer session. Indeed, as the majority forthrightly recognizes, see *ante*, at 585, when the plaintiffs here began to voice concern over prayers that excluded some Town residents, one pastor pointedly thanked the Board "[o]n behalf of all God-fearing people" for holding fast, and another declared the objectors "in the minority and . . . ignorant of the history of our country." App. 137a, 108a.

C

Those three differences, taken together, remove this case from the protective ambit of *Marsh* and the history on which it relied. To recap: *Marsh* upheld prayer addressed to legislators alone, in a proceeding in which citizens had no role—and even then, only when it did not "proselytize or advance" any single religion. 463 U. S., at 794. It was that legislative prayer practice (not every prayer in a body exercising any legislative function) that the Court found constitutional given its "unambiguous and unbroken history." *Id.*, at 792. But that approved practice, as I have shown, is not Greece's. None of the history *Marsh* cited—and none the majority details today—supports calling on citizens to pray, in a manner consonant with only a single religion's beliefs, at a participatory public proceeding, having both legislative and adjudicative components. Or to use the majority's phrase, no "history shows that th[is] specific practice is permitted." *Ante*, at 577. And so, contra the majority, Greece's prayers cannot simply ride on the constitutional coattails of the legislative tradition *Marsh* described. The Board's practice must, in its own particulars, meet constitutional requirements.

And the guideposts for addressing that inquiry include the principles of religious neutrality I discussed earlier. See

supra, at 618–621. The government (whether federal, state, or local) may not favor, or align itself with, any particular creed. And that is nowhere more true than when officials and citizens come face to face in their shared institutions of governance. In performing civic functions and seeking civic benefits, each person of this nation must experience a government that belongs to one and all, irrespective of belief. And for its part, each government must ensure that its participatory processes will not classify those citizens by faith, or make relevant their religious differences.

To decide how Greece fares on that score, think again about how its prayer practice works, meeting after meeting. The case, I think, has a fair bit in common with my earlier hypotheticals. See *supra*, at 616–618, 620–621. Let's say that a Muslim citizen of Greece goes before the Board to share her views on policy or request some permit. Maybe she wants the Board to put up a traffic light at a dangerous intersection; or maybe she needs a zoning variance to build an addition on her home. But just before she gets to say her piece, a minister deputized by the Town asks her to pray "in the name of God's only son Jesus Christ." App. 99a. She must think—it is hardly paranoia, but only the truth—that Christian worship has become entwined with local governance. And now she faces a choice—to pray alongside the majority as one of that group or somehow to register her deeply felt difference. She is a strong person, but that is no easy call—especially given that the room is small and her every action (or inaction) will be noticed. She does not wish to be rude to her neighbors, nor does she wish to aggravate the Board members whom she will soon be trying to persuade. And yet she does not want to acknowledge Christ's divinity, any more than many of her neighbors would want to deny that tenet. So assume she declines to participate with the others in the first act of the meeting—or even, as the majority proposes, that she stands up and leaves the room altogether, see *ante*, at 590. At the least, she becomes a different kind of

citizen, one who will not join in the religious practice that the Town Board has chosen as reflecting its own and the community's most cherished beliefs. And she thus stands at a remove, based solely on religion, from her fellow citizens and her elected representatives.

Everything about that situation, I think, infringes the First Amendment. (And of course, as I noted earlier, it would do so no less if the Town's clergy always used the liturgy of some other religion. See *supra*, at 618.) That the Town Board selects, month after month and year after year, prayergivers who will reliably speak in the voice of Christianity, and so places itself behind a single creed. That in offering those sectarian prayers, the Board's chosen clergy members repeatedly call on individuals, prior to participating in local governance, to join in a form of worship that may be at odds with their own beliefs. That the clergy thus put some residents to the unenviable choice of either pretending to pray like the majority or declining to join its communal activity, at the very moment of petitioning their elected leaders. That the practice thus divides the citizenry, creating one class that shares the Board's own evident religious beliefs and another (far smaller) class that does not. And that the practice also alters a dissenting citizen's relationship with her government, making her religious difference salient when she seeks only to engage her elected representatives as would any other citizen.

None of this means that Greece's town hall must be religion- or prayer-free. "[W]e are a religious people," *Marsh* observed, 463 U. S., at 792, and prayer draws some warrant from tradition in a town hall, as well as in Congress or a state legislature, see *supra*, at 621–623. What the circumstances here demand is the recognition that we are a pluralistic people too. When citizens of all faiths come to speak to each other and their elected representatives in a legislative session, the government must take especial care to ensure that the prayers they hear will seek to include, rather than

serve to divide. No more is required—but that much is crucial—to treat every citizen, of whatever religion, as an equal participant in her government.

And contrary to the majority's (and JUSTICE ALITO's) view, see *ante*, at 582; *ante*, at 594–598, that is not difficult to do. If the Town Board had let its chaplains know that they should speak in nonsectarian terms, common to diverse religious groups, then no one would have valid grounds for complaint. See *Joyner* v. *Forsyth County*, 653 F. 3d 341, 347 (CA4 2011) (Wilkinson, J.) (Such prayers show that "those of different creeds are in the end kindred spirits, united by a respect paid higher providence and by a belief in the importance of religious faith"). Priests and ministers, rabbis and imams give such invocations all the time; there is no great mystery to the project. (And providing that guidance would hardly have caused the Board to run afoul of the idea that "[t]he First Amendment is not a majority rule," as the Court (headspinningly) suggests, *ante*, at 582; what does that is the Board's *refusal* to reach out to members of minority religious groups.) Or if the Board preferred, it might have invited clergy of many faiths to serve as chaplains, as the majority notes that Congress does. See *ante*, at 579. When one month a clergy member refers to Jesus, and the next to Allah or Jehovah—as the majority hopefully though counterfactually suggests happened here, see *ante*, at 579, 583—the government does not identify itself with one religion or align itself with that faith's citizens, and the effect of even sectarian prayer is transformed. So Greece had multiple ways of incorporating prayer into its town meetings—reflecting all the ways that prayer (as most of us know from daily life) can forge common bonds, rather than divide. See also *ante*, at 613 (BREYER, J., dissenting).

But Greece could not do what it did: infuse a participatory government body with one (and only one) faith, so that month in and month out, the citizens appearing before it become partly defined by their creed—as those who share, and

those who do not, the community's majority religious belief. In this country, when citizens go before the government, they go not as Christians or Muslims or Jews (or what have you), but just as Americans (or here, as Grecians). That is what it means to be an equal citizen, irrespective of religion. And that is what the Town of Greece precluded by so identifying itself with a single faith.

III

How, then, does the majority go so far astray, allowing the Town of Greece to turn its assemblies for citizens into a forum for Christian prayer? The answer does not lie in first principles: I have no doubt that every Member of this Court believes as firmly as I that our institutions of government belong equally to all, regardless of faith. Rather, the error reflects two kinds of blindness. First, the majority misapprehends the facts of this case, as distinct from those characterizing traditional legislative prayer. And second, the majority misjudges the essential meaning of the religious worship in Greece's town hall, along with its capacity to exclude and divide.

The facts here matter to the constitutional issue; indeed, the majority itself acknowledges that the requisite inquiry—a "fact-sensitive" one—turns on "the setting in which the prayer arises and the audience to whom it is directed." *Ante*, at 587. But then the majority glides right over those considerations—at least as they relate to the Town of Greece. When the majority analyzes the "setting" and "audience" for prayer, it focuses almost exclusively on Congress and the Nebraska Legislature, see *ante*, at 575–579, 583–584, 587–588; it does not stop to analyze how far those factors differ in Greece's meetings. The majority thus gives short shrift to the gap—more like, the chasm—between a legislative floor session involving only elected officials and a town hall revolving around ordinary citizens. And similarly the majority neglects to consider how the prayers in Greece are mostly

addressed to members of the public, rather than (as in the forums it discusses) to the lawmakers. "The District Court in *Marsh*," the majority expounds, "described the prayer exercise as 'an internal act' directed at the Nebraska Legislature's 'own members.'" *Ante*, at 587 (quoting *Chambers* v. *Marsh*, 504 F. Supp., at 588); see *ante*, at 588 (similarly noting that Nebraska senators "invoke[d] spiritual inspiration entirely for their own benefit" and that prayer in Congress is "religious worship for national representatives" only). Well, yes, so it is in Lincoln, and on Capitol Hill. But not in Greece, where as I have described, the chaplain faces the Town's residents—with the Board watching from on high—and calls on them to pray together. See *supra*, at 624–625.

And of course—as the majority sidesteps as well—to pray in the name of Jesus Christ. In addressing the sectarian content of these prayers, the majority again changes the subject, preferring to explain what happens in *other* government bodies. The majority notes, for example, that Congress "welcom[es] ministers of many creeds," who commonly speak of "values that count as universal," *ante*, at 579, 583; and in that context, the majority opines, the fact "[t]hat a prayer is given in the name of Jesus, Allah, or Jehovah . . . does not remove it from" *Marsh*'s protection, see *ante*, at 583. But that case is not this one, as I have shown, because in Greece only Christian clergy members speak, and then mostly in the voice of their own religion; no Allah or Jehovah ever is mentioned. See *supra*, at 627–629. So all the majority can point to in the Town's practice is that the Board "maintains a policy of nondiscrimination," and "represent[s] that it would welcome a prayer by any minister or layman who wishe[s] to give one." *Ante*, at 585. But that representation has never been publicized; nor has the Board (except for a few months surrounding this suit's filing) offered the chaplain's role to any non-Christian clergy or layman, in either Greece or its environs; nor has the Board ever provided its chaplains with guidance about reaching out to members of other faiths,

as most state legislatures and Congress do. See 732 F. Supp. 2d 195, 197–203 (WDNY 2010); National Conference of State Legislatures, Inside the Legislative Process: Prayer Practices 5–145, 5–146 (2002); *ante*, at 614 (BREYER, J., dissenting). The majority thus errs in assimilating the Board's prayer practice to that of Congress or the Nebraska Legislature. Unlike those models, the Board is determinedly—and relentlessly—noninclusive.[5]

And the month in, month out sectarianism the Board chose for its meetings belies the majority's refrain that the prayers in Greece were "ceremonial" in nature. *Ante*, at 584, 588, 589, 591. Ceremonial references to the divine surely abound: The majority is right that "the Pledge of Allegiance, inaugural prayer, or the recitation of 'God save the United States and this honorable Court' " each fits the bill. *Ante*, at 587. But prayers evoking "the saving sacrifice of Jesus Christ on the cross," "the plan of redemption that is fulfilled in Jesus Christ," "the life and death, resurrection and ascension of the Savior Jesus Christ," the workings of the Holy Spirit, the events of Pentecost, and the belief that God "has raised up the Lord Jesus" and "will raise us, in our turn, and put us by His side"? See App. 56a, 88a–89a, 99a, 123a, 129a, 134a. No. These are statements of profound belief and deep meaning, subscribed to by many, denied by some. They "speak of the depths of [one's] life, of the source of

[5] JUSTICE ALITO similarly falters in attempting to excuse the Town Board's constant sectarianism. His concurring opinion takes great pains to show that the problem arose from a sort of bureaucratic glitch: The Town's clerks, he writes, merely "did a bad job in compiling the list" of chaplains. *Ante*, at 596; see *ante*, at 592–593. Now I suppose one question that account raises is why, in over a decade, no member of the Board noticed that the clerk's list was producing prayers of only one kind. But put that aside. Honest oversight or not, the problem remains: Every month for more than a decade, the Board aligned itself, through its prayer practices, with a single religion. That the concurring opinion thinks my objection to that is "really quite niggling," *ante*, at 594, says all there is to say about the difference between our respective views.

[one's] being, of [one's] ultimate concern, of what [one] take[s] seriously without any reservation." P. Tillich, The Shaking of the Foundations 57 (1948). If they (and the central tenets of other religions) ever become mere ceremony, this country will be a fundamentally different—and, I think, poorer—place to live.

But just for that reason, the not-so-implicit message of the majority's opinion—"What's the big deal, anyway?"—is mistaken. The content of Greece's prayers *is* a big deal, to Christians and non-Christians alike. A person's response to the doctrine, language, and imagery contained in those invocations reveals a core aspect of identity—who that person is and how she faces the world. And the responses of different individuals, in Greece and across this country, of course vary. Contrary to the majority's apparent view, such sectarian prayers are not "part of our expressive idiom" or "part of our heritage and tradition," assuming the word "our" refers to all Americans. *Ante*, at 587. They express beliefs that are fundamental to some, foreign to others—and because that is so they carry the ever-present potential to both exclude and divide. The majority, I think, assesses too lightly the significance of these religious differences, and so fears too little the "religiously based divisiveness that the Establishment Clause seeks to avoid." *Van Orden* v. *Perry*, 545 U. S. 677, 704 (2005) (BREYER, J., concurring in judgment). I would treat more seriously the multiplicity of Americans' religious commitments, along with the challenge they can pose to the project—the distinctively American project—of creating one from the many, and governing all as united.

IV

In 1790, George Washington traveled to Newport, Rhode Island, a longtime bastion of religious liberty and the home of one of the first communities of American Jews. Among the citizens he met there was Moses Seixas, one of that congregation's lay officials. The ensuing exchange between the

two conveys, as well as anything I know, the promise this country makes to members of every religion.

Seixas wrote first, welcoming Washington to Newport. He spoke of "a deep sense of gratitude" for the new American Government—"a Government, which to bigotry gives no sanction, to persecution no assistance—but generously affording to All liberty of conscience, and immunities of Citizenship: deeming every one, of whatever Nation, tongue, or language, equal parts of the great governmental Machine." Address from Newport Hebrew Congregation (Aug. 17, 1790), in 6 PGW 286, n. 1 (M. Mastromarino ed. 1996). The first phrase there is the more poetic: a government that to "bigotry gives no sanction, to persecution no assistance." But the second is actually the more startling and transformative: a government that, beyond not aiding persecution, grants "immunities of citizenship" to the Christian and the Jew alike, and makes them "equal parts" of the whole country.

Washington responded the very next day. Like any successful politician, he appreciated a great line when he saw one—and knew to borrow it too. And so he repeated, word for word, Seixas's phrase about neither sanctioning bigotry nor assisting persecution. But he no less embraced the point Seixas had made about equality of citizenship. "It is now no more," Washington said, "that toleration is spoken of, as if it was by the indulgence of one class of people" to another, lesser one. For "[a]ll possess alike . . . immunities of citizenship." Letter to Newport Hebrew Congregation (Aug. 18, 1790), in 6 PGW 285. That is America's promise in the First Amendment: full and equal membership in the polity for members of every religious group, assuming only that they, like anyone "who live[s] under [the Government's] protection[,] should demean themselves as good citizens." *Ibid.*

For me, that remarkable guarantee means at least this much: When the citizens of this country approach their gov-

ernment, they do so only as Americans, not as members of one faith or another. And that means that even in a partly legislative body, they should not confront government-sponsored worship that divides them along religious lines. I believe, for all the reasons I have given, that the Town of Greece betrayed that promise. I therefore respectfully dissent from the Court's decision.

Syllabus

ROBERS *v.* UNITED STATES

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

No. 12–9012. Argued February 25, 2014—Decided May 5, 2014

Petitioner Robers was convicted of a federal crime for submitting fraudulent mortgage loan applications to two banks. On appeal, he argued that the District Court had miscalculated his restitution obligation under the Mandatory Victims Restitution Act of 1996, 18 U. S. C. §§ 3663A–3664, a provision of which requires property crime offenders to pay "an amount equal to . . . the value of the property" less "the value (as of the date the property is returned) of any part of the property that is returned," § 3663A(b)(1)(B). The District Court had ordered Robers to pay the difference between the amount lent to him and the amount the banks received in selling the houses that had served as collateral for the loans. Robers claimed that the District Court should have instead reduced the restitution amount by the value of the houses on the date the banks took title to them since that was when "part of the property" was "returned." The Seventh Circuit rejected Robers' argument.

Held: The phrase "any part of the property . . . returned" refers to the property the banks lost, namely, the money they lent to Robers, and not to the collateral the banks received, namely, the houses. Read naturally, the words "the property," which appear seven times in § 3663A(b)(1), refer to the property that was lost as a result of the crime, here, the money. Because "[g]enerally, 'identical words used in different parts of the same statute are . . . presumed to have the same meaning,'" *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U. S. 71, 86 (quoting *IBP, Inc.* v. *Alvarez*, 546 U. S. 21, 34), "the property . . . returned" must also be the property lost as a result of the crime. Any awkwardness or redundancy that comes from substituting an amount of money for the words "the property" is the linguistic price paid for having a single statutory provision that covers different kinds of property. Since valuing money is easier than valuing other types of property, the natural reading also facilitates the statute's administration.

Robers' contrary arguments are unconvincing. First, other provisions of the statute, see, *e. g.*, §§ 3664(f)(2), (3)(A), (4), seem to give courts adequate authority to avoid Robers' false dichotomy of having to choose between refusing to award restitution and requiring the offender to pay the full amount lent where a victim has not sold the collateral by the time of sentencing. Second, for purposes of the statute's proximate

cause requirement, see §§ 3663A(a)(2), 3664(e), normal market fluctuations do not break the causal chain between the offender's fraud and the losses incurred by the victim. Third, even assuming that the return of collateral compensates lenders for their losses under state mortgage law, the issue here is whether the statutory provision, which does not purport to track state mortgage law, requires that collateral received be valued at the time the victim received it. Finally, the rule of lenity does not apply here. See *Muscarello* v. *United States*, 524 U. S. 125, 139. Pp. 642–647.

698 F. 3d 937, affirmed.

BREYER, J., delivered the opinion for a unanimous Court. SOTOMAYOR, J., filed a concurring opinion, in which GINSBURG, J., joined, *post*, p. 647.

Jeffrey T. Green argued the cause for petitioner. With him on the briefs were *Christopher Donovan*, *Jacqueline G. Cooper*, *David R. Kuney*, *Jonathan E. Hawley*, *Daniel T. Hansmeier*, and *Sarah O'Rourke Schrup*.

Sarah E. Harrington argued the cause for the United States. With her on the brief were *Solicitor General Verrilli*, *Acting Assistant Attorney General Raman*, *Deputy Solicitor General Dreeben*, and *Kirby A. Heller*.

JUSTICE BREYER delivered the opinion of the Court.

The Mandatory Victims Restitution Act of 1996 requires certain offenders to restore property lost by their victims as a result of the crime. 18 U. S. C. § 3663A. A provision in the statute says that, when return of the property lost by the victim is "impossible, impracticable, or inadequate," the offender must pay the victim "an amount equal to . . . the value of the property" less "the value (as of the date the property is returned) of any part of the property that is returned." § 3663A(b)(1)(B). The question before us is whether "any part of the property" is "returned" when a victim takes title to collateral securing a loan that an offender fraudulently obtained from the victim.

We hold that it is not. In our view, the statutory phrase "any part of the property" refers only to the specific prop-

erty lost by a victim, which, in the case of a fraudulently obtained loan, is the money lent. Therefore, no "part of the property" is "returned" to the victim until the collateral is sold and the victim receives money from the sale. The import of our holding is that a sentencing court must reduce the restitution amount by the amount of money the victim received in selling the collateral, not the value of the collateral when the victim received it.

I

The relevant facts, as simplified, are the following: In 2005 petitioner Benjamin Robers, acting as a straw buyer, submitted fraudulent loan applications to two banks. The banks lent Robers about $470,000 for the purchase of two houses, upon which the banks took mortgages. When Robers failed to make loan payments, the banks foreclosed on the mortgages. In 2006 they took title to the two houses. In 2007 they sold one house for about $120,000. And in 2008 they sold the other house for about $160,000. The sales took place in a falling real estate market.

In 2010 Robers was convicted in federal court of conspiracy to commit wire fraud. See §§ 371, 1343. He was sentenced to three years of probation. And the court ordered him to pay restitution of about $220,000, roughly the $470,000 the banks lent to Robers less the $280,000 the banks received from the sale of the two houses (minus certain expenses incurred in selling them).

On appeal Robers argued that the sentencing court had miscalculated his restitution obligation. In his view, "part of the property" was "returned" to the banks when they took title to the houses. And, since the statute says that "returned" property shall be valued "as of the date the property is returned," the sentencing court should have reduced the restitution amount by more than $280,000: $280,000 was what the banks received from the sale of the houses, but since the banks sold the houses in a falling real estate market, the

houses had been worth more when the banks took title to them.

The Court of Appeals rejected Robers' argument. 698 F. 3d 937 (CA7 2012). And, because different Circuits have come to different conclusions about this kind of matter, we granted Robers' petition for certiorari. Compare *id.*, at 942 (case below) (restitution obligation reduced by money received from sale of collateral), with *United States* v. *Yeung*, 672 F. 3d 594, 604 (CA9 2012) (restitution obligation reduced by value of collateral at time lender took title).

II

In our view, the phrase "any part of the property . . . returned" refers to the property the banks lost, namely, the money they lent to Robers, and not to the collateral the banks received, namely, the two houses. For one thing, that is what the statute says. The phrase is part of a long sentence that reads as follows:

> "(b) The order of restitution shall require that [the] defendant—
>
> "(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—
>
> "(A) return *the property* to the owner of *the property* . . . ; or
>
> "(B) if return of *the property* under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to—
>
> "(i) the greater of—
>
> "(I) the value of *the property* on the date of the damage, loss, or destruction; or
>
> "(II) the value of *the property* on the date of sentencing, less
>
> "(ii) the value (as of the date *the property* is returned) of any part of *the property* that is returned . . . ." § 3663A (emphasis added).

The words "the property" appear seven times in this sentence. If read naturally, they refer to the "property" that was "damage[d]," "los[t]," or "destr[oyed]" as a result of the crime. §3663A(b)(1). "Generally, 'identical words used in different parts of the same statute are . . . presumed to have the same meaning.'" *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U. S. 71, 86 (2006) (quoting *IBP, Inc.* v. *Alvarez*, 546 U. S. 21, 34 (2005)). And, if the "property" that was "damage[d]," "los[t]," or "destr[oyed]" was the money, then "the property . . . returned" must also be the money. Money being fungible, however, see, *e. g.*, *Ransom* v. *FIA Card Services, N. A.*, 562 U. S. 61, 79 (2011); *Sabri* v. *United States*, 541 U. S. 600, 606 (2004), "the property . . . returned" need not be the very same bills or checks.

We concede that substituting an amount of money, say, $1,000, for the words "the property" will sometimes seem awkward or unnecessary as, for example:

> "[I]f return of [$1,000] . . . is impossible, . . . pay an amount equal to . . . the greater of . . . the value of [$1,000] on the date of the . . . loss . . . or . . . the value of [$1,000] on the date of sentencing . . . ." §3663A(b)(1)(B).

But any such awkwardness or redundancy is the linguistic price paid for having a single statutory provision that covers property of many different kinds. The provision is not awkward as applied to, say, a swindler who obtains jewelry, is unable to return all of the jewelry, and must then instead pay an amount equal to the value of all of the jewelry obtained less the value (as of the date of the return) of any of the jewelry that he did return. It directs the court to value the returned jewelry as of the date it was returned and subtract that amount from the value of all of the jewelry the swindler obtained. As applied to money, the provision is in part unnecessary but reading the statute similarly does no harm. And the law does not require legislators to write

extra language specifically exempting, phrase by phrase, applications in respect to which a portion of a phrase is not needed.

The natural reading also facilitates the statute's administration. Many victims who lose money but subsequently receive other property (*e. g.*, collateral securing a loan) will sell that other property and receive money from the sale. And often that sale will take place fairly soon after the victim receives the property. Valuing the money from the sale is easy. But valuing other property as of the time it was received may provoke argument, requiring time, expense, and expert testimony to resolve.

We are not convinced by Robers' arguments to the contrary. First, Robers says that, when a victim has not sold the collateral by the time of sentencing, our interpretation will lead to unfair results. A sentencing court will have only two choices, both undesirable. The court will either have to refuse to award restitution, thereby undercompensating the victim, or have to require the offender to pay the full amount lent to him, thereby giving the victim a windfall.

In our view, however, the dilemma is a false one. Other provisions of the statute allow the court to avoid an undercompensation or a windfall. Where, for example, a sale of the collateral is foreseen but has not yet taken place, the court may postpone determination of the restitution amount for two to three months after sentencing, thereby providing the victim with additional time to sell. See § 3664(d)(5). Where a victim receives, say, collateral, but does not intend to sell it, other provisions of the statute may come into play. Section 3664(f)(2) provides that upon

> "determination of the amount of restitution owed to each victim, the court shall . . . specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid."

Section 3664(f)(3)(A) says that a

> "restitution order may direct the defendant to make a single, lump-sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments."

And § 3664(f)(4) defines "in-kind payment" as including "replacement of property." These provisions would seem to give a court adequate authority to count, as part of the restitution paid, the value of collateral previously received but not sold. Regardless, Robers has not pointed us to any case suggesting an unfairness problem. And the Government has conceded that the statute (whether through these or other provisions) provides room for "credit[s]" against an offender's restitution obligation "to prevent double recovery to the victim." Brief for United States 30 (emphasis deleted).

Robers also points out, correctly, that the statute has a proximate cause requirement. See § 3663A(a)(2) (defining "victim" as "a person *directly and proximately* harmed as a result of the commission of" the offense (emphasis added)); § 3664(e) (Government bears the "burden of demonstrating the amount of the loss sustained by a victim *as a result of* the offense" (emphasis added)). Cf. *Paroline* v. *United States*, *ante*, at 444–446. And Robers argues that where, as here, a victim receives less money from a later sale than the collateral was worth when received, the market and not the offender is the proximate cause of the deficiency.

We are not convinced. The basic question that a proximate cause requirement presents is "whether the harm alleged has a sufficiently close connection to the conduct" at issue. *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, *ante*, at 133. Here, it does. Fluctuations in property values are common. Their existence (though not direction or amount) is foreseeable. And losses in part incurred through a decline in the value of collateral sold are directly

related to an offender's having obtained collateralized property through fraud. That is not to say that an offender is responsible for everything that reduces the amount of money a victim receives for collateral. Market fluctuations are normally unlike, say, an unexpected natural disaster that destroys collateral or a victim's donation of collateral or its sale to a friend for a nominal sum—any of which, as the Government concedes, could break the causal chain. See Tr. of Oral Arg. 25–27, 38–39, 46, 50–51.

Further, Robers argues that "principles" of state mortgage law "confirm that the return of mortgage collateral compensates a lender for its losses." Brief for Petitioner 30. But whether the collateral compensates a victim for its losses is not the question before us. That question is whether the particular statutory provision at issue here requires that collateral received be valued at the time the victim received it. That statutory provision does not purport to track the details of state mortgage law. Thus, even were we to assume that Robers is right about the details of state mortgage law, we would not find them sufficient to change our interpretation.

Finally, Robers invokes the rule of lenity. To apply this rule, we would have to assume that we could interpret the statutory provision to help an offender like Robers, who is hurt when the market for collateral declines, without harming other offenders, who would be helped when the market for collateral rises. We cannot find such an interpretation. Regardless, the rule of lenity applies only if, after using the usual tools of statutory construction, we are left with a "grievous ambiguity or uncertainty in the statute." *Muscarello* v. *United States*, 524 U. S. 125, 139 (1998) (internal quotation marks omitted). Having come to the end of our analysis, we are left with no such ambiguity or uncertainty here. The statutory provision refers to the money lost, not to the collateral received.

* * *

For these reasons, the judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, concurring.

I join the opinion of the Court. I write separately, however, to clarify that I see its analysis as applying only in cases where a victim intends to sell collateral but encounters a reasonable delay in doing so. See *ante*, at 644–645 (explaining that where a victim "does not intend to sell" collateral, "other provisions of the statute may come into play," enabling a court "to count, as part of the restitution paid, the value of collateral previously received but not sold"). If a victim chooses to hold collateral rather than to reduce it to cash within a reasonable time, then the victim must bear the risk of any subsequent decline in the value of the collateral, because the defendant is not the proximate cause of that decline.

Here, although the banks did not immediately sell the homes they received as collateral, Robers did not adequately argue below that their delay reflected a choice to hold the homes as investments.* Such an argument would likely

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*Before the District Court, Robers suggested precisely the opposite: that the banks had sold the homes too hastily, at fire-sale prices in a falling market. See App. 35 ("The drop in value could have been due to the housing market itself, or due to the victim's rush to cut their losses with the properties and take whatever price they could get at a sheriff's sale, regardless of whether the sale price reflected the fair market value of the property at the time"). Before the Seventh Circuit, Robers did suggest that the banks should have sold more quickly. See Brief for Appellant in No. 10–3794, p. 35 ("[T]here is no 'loss causation' here, . . . because the kind of loss that occurred (due to the market, or to the victims holding the property longer than they should have in a declining market, or to other

have been fruitless, because the delay appears consistent with a genuine desire to dispose of the collateral. Real property is not a liquid asset, which means that converting it to cash often takes time. See, *e. g.*, 698 F. 3d 937, 947 (CA7 2012) ("[R]eal property is not liquid and, absent a huge price discount, cannot be sold immediately"). And indeed, the delays here appear to have resulted from illiquidity. See App. 70 (one of the two homes was placed on the market but did not immediately sell); *id.*, at 89 (the other attracted no bids at a foreclosure sale). Because such delays are foreseeable, it is fair for Robers to bear their cost: the diminution in the homes' value. See *ante*, at 645–646 (analysis of proximate causation).

In other cases, however, a defendant might be able to show that a significant delay in the sale of collateral evinced the victim's choice to hold it as an investment rather than reducing it to cash. Suppose, for example, that a bank received shares of a public company as collateral for a fraudulently obtained loan. "Common stock traded on a national exchange is . . . readily convertible into cash," *Reves* v. *Ernst & Young*, 494 U. S. 56, 69 (1990), so if the bank waited more than a reasonable time to sell the shares, a district court could infer that the bank was not really trying to sell but instead was holding the shares as investment assets. If the shares declined in value after the bank chose to hold them, it would be wrong for the court to make the defendant bear that loss. As the Government acknowledged at oral argument, a victim's choice to hold collateral—rather than selling it in a reasonably expeditious manner—breaks the chain of proximate causation. See, *e. g.*, Tr. of Oral Arg. 38–39, 44–45. If the collateral loses value after the victim chooses to hold it, then that "part of the victim's net los[s]" is "attribut-

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unknown factors) was not the kind for which the defendant's acts could have controlled or accounted"). But this argument does not imply that the banks' delay reflected a choice to hold the homes as investments, only that the banks misjudged the timing of the sales.

able to" the victim's "independent decisions." *Id.*, at 39. The defendant cannot be regarded as the "proximate cause" of that part of the loss, *ibid.*, and so cannot be made to bear it.

In such cases, I would place on the defendant the burden to show—with evidence specific to the market at issue—that a victim delayed unreasonably in selling collateral, manifesting a choice to hold the collateral. See 18 U. S. C. § 3664(e) (burden to be allocated "as justice requires"). Because Robers did not sufficiently argue below that the banks broke the chain of proximate causation by choosing to hold the homes as investments, and because the delay encountered by the banks appears to have been reasonable, it is fair for Robers to bear the cost of that delay. I therefore join the Court in affirming the restitution order.

Syllabus

TOLAN *v.* COTTON

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

No. 13–551. Decided May 5, 2014

Petitioner Tolan and others filed suit under 42 U. S. C. § 1983, alleging that respondent, Police Sergeant Cotton, had exercised excessive force in violation of the Fourth Amendment when he shot Tolan while he was unarmed on his parents' front porch about 15 to 20 feet away from Cotton. The parties disagree as to the facts leading up to the shooting. Tolan claims that he rose to his knees from a facedown position and told Cotton to "get [his] . . . hands off [his] mother" after seeing Cotton push Tolan's mother against a garage door with such force that she fell to the ground and left bruises on her arms and back that lasted for days. By contrast, Cotton asserts that, while he escorted Tolan's mother to the garage, she flipped her arm up and told him to get his hands off her, at which point Tolan stood and shouted. The District Court granted Cotton summary judgment, reasoning that his use of force was not unreasonable and therefore did not violate the Fourth Amendment. The Fifth Circuit affirmed on a different basis, holding that even if Cotton's conduct did violate the Fourth Amendment, he was entitled to qualified immunity because he did not violate a clearly established right.

Held: The Fifth Circuit failed to apply the proper summary judgment standard. Summary judgment is appropriate only if "the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. Rule Civ. Proc. 56(a). In making that determination, a court must view the evidence "in the light most favorable to the opposing party." *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 157. Here, the court failed to credit evidence that contradicted some of its key factual conclusions and resolved disputed issues in favor of the moving party. The court should have acknowledged and credited Tolan's evidence with regard to the lighting at the scene, his mother's demeanor, whether he shouted words that were an overt threat, and his positioning during the shooting. On remand, the court should determine whether, when Tolan's evidence is properly credited and factual inferences are reasonably drawn in his favor, Cotton's actions violated clearly established law.

Certiorari granted; 713 F. 3d 299, vacated and remanded.

PER CURIAM.

During the early morning hours of New Year's Eve, 2008, Police Sergeant Jeffrey Cotton fired three bullets at Robert Tolan; one of those bullets hit its target and punctured Tolan's right lung. At the time of the shooting, Tolan was unarmed on his parents' front porch about 15 to 20 feet away from Cotton. Tolan sued, alleging that Cotton had exercised excessive force in violation of the Fourth Amendment. The District Court granted summary judgment to Cotton, and the Fifth Circuit affirmed, reasoning that regardless of whether Cotton used excessive force, he was entitled to qualified immunity because he did not violate any clearly established right. 713 F. 3d 299 (2013). In articulating the factual context of the case, the Fifth Circuit failed to adhere to the axiom that in ruling on a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 255 (1986). For that reason, we vacate its decision and remand the case for further proceedings consistent with this opinion.

I

A

The following facts, which we view in the light most favorable to Tolan, are taken from the record evidence and the opinions below. At around 2 o'clock on the morning of December 31, 2008, John Edwards, a police officer, was on patrol in Bellaire, Texas, when he noticed a black Nissan sport utility vehicle turning quickly onto a residential street. The officer watched the vehicle park on the side of the street in front of a house. Two men exited: Tolan and his cousin, Anthony Cooper.

Edwards attempted to enter the license plate number of the vehicle into a computer in his squad car. But he keyed an incorrect character; instead of entering plate number

696BGK, he entered 695BGK. That incorrect number matched a stolen vehicle of the same color and make. This match caused the squad car's computer to send an automatic message to other police units, informing them that Edwards had found a stolen vehicle.

Edwards exited his cruiser, drew his service pistol and ordered Tolan and Cooper to the ground. He accused Tolan and Cooper of having stolen the car. Cooper responded, "That's not true." Record 1295. And Tolan explained, "That's my car." *Ibid.* Tolan then complied with the officer's demand to lie facedown on the home's front porch.

As it turned out, Tolan and Cooper were at the home where Tolan lived with his parents. Hearing the commotion, Tolan's parents exited the front door in their pajamas. In an attempt to keep the misunderstanding from escalating into something more, Tolan's father instructed Cooper to lie down, and instructed Tolan and Cooper to say nothing. Tolan and Cooper then remained facedown.

Edwards told Tolan's parents that he believed Tolan and Cooper had stolen the vehicle. In response, Tolan's father identified Tolan as his son, and Tolan's mother explained that the vehicle belonged to the family and that no crime had been committed. Tolan's father explained, with his hands in the air: "[T]his is my nephew. This is my son. We live here. This is my house." *Id.*, at 2059. Tolan's mother similarly offered: "[S]ir this is a big mistake. This car is not stolen. . . . That's our car." *Id.*, at 2075.

While Tolan and Cooper continued to lie on the ground in silence, Edwards radioed for assistance. Shortly thereafter, Sergeant Jeffrey Cotton arrived on the scene and drew his pistol. Edwards told Cotton that Cooper and Tolan had exited a stolen vehicle. Tolan's mother reiterated that she and her husband owned both the car Tolan had been driving and the home where these events were unfolding. Cotton then ordered her to stand against the family's garage door. In response to Cotton's order, Tolan's mother asked: "[A]re

you kidding me? We've lived her[e] 15 years. We've never had anything like this happen before." *Id.*, at 2077; see also *id.*, at 1465.

The parties disagree as to what happened next. Tolan's mother and Cooper testified during Cotton's criminal trial[1] that Cotton grabbed her arm and slammed her against the garage door with such force that she fell to the ground. *Id.*, at 2035, 2078–2080. Tolan similarly testified that Cotton pushed his mother against the garage door. *Id.*, at 2479. In addition, Tolan offered testimony from his mother and photographic evidence to demonstrate that Cotton used enough force to leave bruises on her arms and back that lasted for days. *Id.*, at 2078–2079, 2089–2091. By contrast, Cotton testified in his deposition that when he was escorting the mother to the garage, she flipped her arm up and told him to get his hands off her. *Id.*, at 1043. He also testified that he did not know whether he left bruises but believed that he had not. *Id.*, at 1044.

The parties also dispute the manner in which Tolan responded. Tolan testified in his deposition and during the criminal trial that upon seeing his mother being pushed, *id.*, at 1249, he rose to his knees, *id.*, at 1928. Edwards and Cotton testified that Tolan rose to his feet. *Id.*, at 1051–1052, 1121.

Both parties agree that Tolan then exclaimed, from roughly 15 to 20 feet away, 713 F. 3d, at 303, "[G]et your fucking hands off my mom." Record 1928. The parties also agree that Cotton then drew his pistol and fired three shots at Tolan. Tolan and his mother testified that these shots came with no verbal warning. *Id.*, at 2019, 2080. One of the bullets entered Tolan's chest, collapsing his right lung

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[1] The events described here led to Cotton's criminal indictment in Harris County, Texas, for aggravated assault by a public servant. 713 F. 3d 299, 303 (CA5 2013). He was acquitted. *Ibid.* The testimony of Tolan's mother during Cotton's trial is a part of the record in this civil action. Record 2066–2087.

and piercing his liver. While Tolan survived, he suffered a life-altering injury that disrupted his budding professional baseball career and causes him to experience pain on a daily basis.

B

In May 2009, Cooper, Tolan, and Tolan's parents filed this suit in the Southern District of Texas, alleging claims under Rev. Stat. § 1979, 42 U. S. C. § 1983. Tolan claimed, among other things, that Cotton had used excessive force against him in violation of the Fourth Amendment.[2] After discovery, Cotton moved for summary judgment, arguing that the doctrine of qualified immunity barred the suit. That doctrine immunizes government officials from damages suits unless their conduct has violated a clearly established right.

The District Court granted summary judgment to Cotton. 854 F. Supp. 2d 444 (SD Tex. 2012). It reasoned that Cotton's use of force was not unreasonable and therefore did not violate the Fourth Amendment. *Id.*, at 477–478. The Fifth Circuit affirmed, but on a different basis. 713 F. 3d 299. It declined to decide whether Cotton's actions violated the Fourth Amendment. Instead, it held that even if Cotton's conduct did violate the Fourth Amendment, Cotton was entitled to qualified immunity because he did not violate a clearly established right. *Id.*, at 306.

In reaching this conclusion, the Fifth Circuit began by noting that at the time Cotton shot Tolan, "it was . . . clearly established that an officer had the right to use deadly force if that officer harbored an objective and reasonable belief that a suspect presented an 'immediate threat to [his] safety.' " *Ibid.* (quoting *Deville* v. *Marcantel*, 567 F. 3d 156,

[2] The complaint also alleged that the officers' actions violated the Equal Protection Clause to the extent they were motivated by Tolan's and Cooper's race. 854 F. Supp. 2d 444, 465 (SD Tex. 2012). In addition, the complaint alleged that Cotton used excessive force against Tolan's mother. *Id.*, at 468. Those claims, which were dismissed, *id.*, at 465, 470, are not before this Court.

167 (CA5 2009)). The Court of Appeals reasoned that Tolan failed to overcome the qualified-immunity bar because "an objectively-reasonable officer in Sergeant Cotton's position could have . . . believed" that Tolan "presented an 'immediate threat to the safety of the officers.'" 713 F. 3d, at 307.[3] In support of this conclusion, the court relied on the following facts: The front porch had been "dimly-lit"; Tolan's mother had "refus[ed] orders to remain quiet and calm"; and Tolan's words had amounted to a "verba[l] threa[t]." *Ibid.* Most critically, the court also relied on the purported fact that Tolan was "moving to intervene in" Cotton's handling of his mother, *id.*, at 305, and that Cotton therefore could reasonably have feared for his life, *id.*, at 307. Accordingly, the court held, Cotton did not violate clearly established law in shooting Tolan.

The Fifth Circuit denied rehearing en banc. 538 Fed. Appx. 374 (2013). Three judges voted to grant rehearing. Judge Dennis filed a dissent, contending that the panel opinion "fail[ed] to address evidence that, when viewed in the light most favorable to the plaintiff, creates genuine issues of material fact as to whether an objective officer in Cotton's position could have reasonably and objectively believed that [Tolan] posed an immediate, significant threat of substantial injury to him." *Id.*, at 377.

II

A

In resolving questions of qualified immunity at summary judgment, courts engage in a two-pronged inquiry. The first asks whether the facts, "[t]aken in the light most favor-

[3] Tolan argues that the Fifth Circuit incorrectly analyzed the reasonableness of Sergeant Cotton's beliefs under the second prong of the qualified-immunity analysis rather than the first. See Pet. for Cert. 12, 20. Because we rule in Tolan's favor on the narrow ground that the Fifth Circuit erred in its application of the summary judgment standard, we express no view as to Tolan's additional argument.

able to the party asserting the injury, . . . show the officer's conduct violated a [federal] right[.]" *Saucier* v. *Katz*, 533 U. S. 194, 201 (2001). When a plaintiff alleges excessive force during an investigation or arrest, the federal right at issue is the Fourth Amendment right against unreasonable seizures. *Graham* v. *Connor*, 490 U. S. 386, 394 (1989). The inquiry into whether this right was violated requires a balancing of "'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" *Tennessee* v. *Garner*, 471 U. S. 1, 8 (1985); see *Graham*, *supra*, at 396.

The second prong of the qualified-immunity analysis asks whether the right in question was "clearly established" at the time of the violation. *Hope* v. *Pelzer*, 536 U. S. 730, 739 (2002). Governmental actors are "shielded from liability for civil damages if their actions did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Ibid.* "[T]he salient question . . . is whether the state of the law" at the time of an incident provided "fair warning" to the defendants "that their alleged [conduct] was unconstitutional." *Id.*, at 741.

Courts have discretion to decide the order in which to engage these two prongs. *Pearson* v. *Callahan*, 555 U. S. 223, 236 (2009). But under either prong, courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment. See *Brosseau* v. *Haugen*, 543 U. S. 194, 195, n. 2 (2004) (*per curiam*); *Saucier*, *supra*, at 201; *Hope*, *supra*, at 733, n. 1. This is not a rule specific to qualified immunity; it is simply an application of the more general rule that a "judge's function" at summary judgment is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U. S., at 249. Summary judgment is appropriate only if "the movant shows that there is no genuine issue as to any material fact and the movant is entitled to

judgment as a matter of law." Fed. Rule Civ. Proc. 56(a). In making that determination, a court must view the evidence "in the light most favorable to the opposing party." *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 157 (1970); see also *Anderson*, *supra*, at 255.

Our qualified-immunity cases illustrate the importance of drawing inferences in favor of the nonmovant, even when, as here, a court decides only the clearly established prong of the standard. In cases alleging unreasonable searches or seizures, we have instructed that courts should define the "clearly established" right at issue on the basis of the "specific context of the case." *Saucier*, *supra*, at 201; see also *Anderson* v. *Creighton*, 483 U. S. 635, 640–641 (1987). Accordingly, courts must take care not to define a case's "context" in a manner that imports genuinely disputed factual propositions. See *Brosseau*, *supra*, at 195, 198 (inquiring as to whether conduct violated clearly established law " 'in light of the specific context of the case' " and construing "facts . . . in a light most favorable to" the nonmovant).

B

In holding that Cotton's actions did not violate clearly established law, the Fifth Circuit failed to view the evidence at summary judgment in the light most favorable to Tolan with respect to the central facts of this case. By failing to credit evidence that contradicted some of its key factual conclusions, the court improperly "weigh[ed] the evidence" and resolved disputed issues in favor of the moving party, *Anderson*, 477 U. S., at 249.

First, the court relied on its view that at the time of the shooting, the Tolans' front porch was "dimly-lit." 713 F. 3d, at 307. The court appears to have drawn this assessment from Cotton's statements in a deposition that when he fired at Tolan, the porch was " 'fairly dark,' " and lit by a gas lamp that was " 'decorative.' " *Id.*, at 302. In his own deposition, however, Tolan's father was asked whether the gas lamp was

in fact "more decorative than illuminating." Record 1552. He said that it was not. *Ibid.* Moreover, Tolan stated in his deposition that two floodlights shone on the driveway during the incident, *id.*, at 2496, and Cotton acknowledged that there were two motion-activated lights in front of the house. *Id.*, at 1034. And Tolan confirmed that at the time of the shooting, he was "not in darkness." *Id.*, at 2498–2499.

Second, the Fifth Circuit stated that Tolan's mother "refus[ed] orders to remain quiet and calm," thereby "compound[ing]" Cotton's belief that Tolan "presented an immediate threat to the safety of the officers." 713 F. 3d, at 307 (internal quotation marks omitted). But here, too, the court did not credit directly contradictory evidence. Although the parties agree that Tolan's mother repeatedly informed officers that Tolan was her son, that she lived in the home in front of which he had parked, and that the vehicle he had been driving belonged to her and her husband, there is a dispute as to how calmly she provided this information. Cotton stated during his deposition that Tolan's mother was "very agitated" when she spoke to the officers. Record 1032–1033. By contrast, Tolan's mother testified at Cotton's criminal trial that she was neither "aggravated" nor "agitated." *Id.*, at 2075, 2077.

Third, the court concluded that Tolan was "shouting," 713 F. 3d, at 306, 308, and "verbally threatening" the officer, *id.*, at 307, in the moments before the shooting. The court noted, and the parties agree, that while Cotton was grabbing the arm of his mother, Tolan told Cotton, "[G]et your fucking hands off my mom." Record 1928. But Tolan testified that he "was not screaming." *Id.*, at 2544. And a jury could reasonably infer that his words, in context, did not amount to a statement of intent to inflict harm. Cf. *United States* v. *White*, 258 F. 3d 374, 383 (CA5 2001) ("A threat imports '[a] communicated intent to inflict physical or other harm'" (quoting Black's Law Dictionary 1480 (6th ed. 1990))); *Morris* v. *Noe*, 672 F. 3d 1185, 1196 (CA10 2012) (inferring that the

words "Why was you talking to Mama that way" did not constitute an "overt threa[t]"). Tolan's mother testified in Cotton's criminal trial that he slammed her against a garage door with enough force to cause bruising that lasted for days. Record 2078–2079. A jury could well have concluded that a reasonable officer would have heard Tolan's words not as a threat, but as a son's plea not to continue any assault of his mother.

Fourth, the Fifth Circuit inferred that at the time of the shooting, Tolan was "moving to intervene in Sergeant Cotton's" interaction with his mother. 713 F. 3d, at 305; see also *id.*, at 308 (characterizing Tolan's behavior as "abruptly attempting to approach Sergeant Cotton," thereby "inflam-[ing] an already tense situation"). The court appears to have credited Edwards' account that at the time of the shooting, Tolan was on both feet "[i]n a crouch" or a "charging position" looking as if he was going to move forward. Record 1121–1122. Tolan testified at trial, however, that he was on his knees when Cotton shot him, *id.*, at 1928, a fact corroborated by his mother, *id.*, at 2081. Tolan also testified in his deposition that he "wasn't going anywhere," *id.*, at 2502, and emphasized that he did not "jump up," *id.*, at 2544.

Considered together, these facts lead to the inescapable conclusion that the court below credited the evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by the party opposing that motion. And while "this Court is not equipped to correct every perceived error coming from the lower federal courts," *Boag* v. *MacDougall*, 454 U. S. 364, 366 (1982) (O'Connor, J., concurring), we intervene here because the opinion below reflects a clear misapprehension of summary judgment standards in light of our precedents. Cf. *Brosseau*, 543 U. S., at 197–198 (summarily reversing decision in a Fourth Amendment excessive force case "to correct a clear misapprehension of the qualified immunity standard"); see also *Florida Dept. of Health and Rehabilitative Servs.* v. *Flor-*

ida Nursing Home Assn., 450 U. S. 147, 150 (1981) (*per curiam*) (summarily reversing an opinion that could not "be reconciled with the principles set out" in this Court's sovereign immunity jurisprudence).

The witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system. By weighing the evidence and reaching factual inferences contrary to Tolan's competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party.

Applying that principle here, the court should have acknowledged and credited Tolan's evidence with regard to the lighting, his mother's demeanor, whether he shouted words that were an overt threat, and his positioning during the shooting. This is not to say, of course, that these are the only facts that the Fifth Circuit should consider, or that no other facts might contribute to the reasonableness of the officer's actions as a matter of law. Nor do we express a view as to whether Cotton's actions violated clearly established law. We instead vacate the Fifth Circuit's judgment so that the court can determine whether, when Tolan's evidence is properly credited and factual inferences are reasonably drawn in his favor, Cotton's actions violated clearly established law.

* * *

The petition for certiorari and the NAACP Legal Defense and Educational Fund's motion to file an *amicus curiae* brief are granted. The judgment of the United States Court of Appeals for the Fifth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

The Court takes two actions. It grants the petition for a writ of certiorari, and it summarily vacates the judgment of the Court of Appeals.

The granting of a petition for plenary review is not a decision from which Members of this Court have customarily registered dissents, and I do not do so here. I note, however, that the granting of review in this case sets a precedent that, if followed in other cases, will very substantially alter the Court's practice. See, *e. g.*, this Court's Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"); S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice § 5.12(c)(3), p. 352 (10th ed. 2013) ("[E]rror correction . . . is outside the mainstream of the Court's functions and . . . not among the 'compelling reasons' . . . that govern the grant of certiorari").

In my experience, a substantial percentage of the civil appeals heard each year by the courts of appeals present the question whether the evidence in the summary judgment record is just enough or not quite enough to support a grant of summary judgment. The present case falls into that very large category. There is no confusion in the courts of appeals about the standard to be applied in ruling on a summary judgment motion, and the Court of Appeals invoked the correct standard here. See 713 F. 3d 299, 304 (CA5 2013). Thus, the only issue is whether the relevant evidence, viewed in the light most favorable to the nonmoving party, is sufficient to support a judgment for that party. In the courts of appeals, cases presenting this question are utterly routine. There is no question that this case is important for the parties, but the same is true for a great many other cases that fall into the same category.

On the merits of the case, while I do not necessarily agree in all respects with the Court's characterization of the evidence, I agree that there are genuine issues of material fact and that this is a case in which summary judgment should not have been granted.

I therefore concur in the judgment.

Syllabus

PETRELLA *v.* METRO-GOLDWYN-MAYER, INC., ET AL.

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

No. 12–1315. Argued January 21, 2014—Decided May 19, 2014

The Copyright Act of 1976 (Act) protects copyrighted works published before 1978 for an initial period of 28 years, renewable for a period of up to 67 years. 17 U. S. C. § 304(a). The author's heirs inherit the renewal rights. See § 304(a)(1)(C)(ii)–(iv). When an author who has assigned her rights away "dies before the renewal period, . . . the assignee may continue to use the original work only if the author's successor transfers the renewal rights to the assignee," *Stewart* v. *Abend*, 495 U. S. 207, 221. The Act provides both equitable and legal remedies for infringement: an injunction "on such terms as [a court] may deem reasonable to prevent or restrain infringement of a copyright," § 502(a); and, at the copyright owner's election, either (1) the "owner's actual damages and any additional profits of the infringer," § 504(a)(1), which petitioner seeks in this case, or (2) specified statutory damages, § 504(c). The Act's statute of limitations provides: "No civil action shall be maintained under the [Act] unless it is commenced within three years after the claim accrued." § 507(b). A claim ordinarily accrues when an infringing act occurs. Under the separate-accrual rule that attends the copyright statute of limitations, when a defendant has committed successive violations, each infringing act starts a new limitations period. However, under § 507(b), each infringement is actionable only within three years of its occurrence.

Here, the allegedly infringing work is the motion picture Raging Bull, based on the life of boxing champion Jake LaMotta, who, with Frank Petrella, told his story in, *inter alia*, a screenplay copyrighted in 1963. In 1976, the pair assigned their rights and renewal rights, which were later acquired by respondent United Artists Corporation, a subsidiary of respondent Metro-Goldwyn-Mayer, Inc. (collectively, MGM). In 1980, MGM released, and registered a copyright in, the film Raging Bull, and it continues to market the film today. Frank Petrella died during the initial copyright term, so renewal rights reverted to his heirs. Plaintiff below, petitioner here, Paula Petrella (Petrella), his daughter, renewed the 1963 copyright in 1991, becoming its sole owner. Seven years later, she advised MGM that its exploitation of Raging Bull violated her copyright and threatened suit. Some nine years later, on January 6, 2009,

she filed an infringement suit, seeking monetary and injunctive relief limited to acts of infringement occurring on or after January 6, 2006. Invoking the equitable doctrine of laches, MGM moved for summary judgment. Petrella's 18-year delay in filing suit, MGM argued, was unreasonable and prejudicial to MGM. The District Court granted MGM's motion, holding that laches barred Petrella's complaint. The Ninth Circuit affirmed.

Held:

1. Laches cannot be invoked as a bar to Petrella's pursuit of a claim for damages brought within § 507(b)'s three-year window. Pp. 677–685.

(a) By permitting a successful plaintiff to gain retrospective relief only three years back from the time of suit, the copyright statute of limitations itself takes account of delay. Brought to bear here, § 507(b) directs that Petrella cannot reach MGM's returns on its investment in Raging Bull in years before 2006. Moreover, if infringement within the three-year window is shown, a defendant may offset against profits made in that period expenses incurred in generating those profits. See § 504(b). In addition, a defendant may retain the return on investment shown to be attributable to its own enterprise, as distinct from the value created by the infringed work. See *ibid.* Both before and after the merger of law and equity in 1938, this Court has cautioned against invoking laches to bar legal relief. See, *e. g.*, *Holmberg* v. *Armbrecht*, 327 U. S. 392, 395, 396. Pp. 677–680.

(b) MGM's principal arguments regarding the contemporary scope of the laches defense are unavailing. Pp. 680–685.

(1) MGM urges that, because laches is listed in Federal Rule of Civil Procedure 8(c) as an affirmative defense discrete from a statute of limitations defense, the plea should be "available . . . in every civil action" to bar all forms of relief. Such an expansive role careens away from understandings, past and present, of the essentially gap-filling, not legislation-overriding, office of laches. This Court has never applied laches to bar in their entirety claims for discrete wrongs occurring within a federally prescribed limitations period. Inviting individual judges to set a time limit other than the one Congress prescribed would tug against the uniformity Congress sought to achieve in enacting § 507(b). Pp. 680–681.

(2) MGM contends that laches, like equitable tolling, should be "read into every federal statute of limitation," *Holmberg*, 327 U. S., at 397. However, tolling lengthens the time for commencing a civil action where there is a statute of limitations and is, in effect, a rule of interpretation tied to that statutory limit. See, *e. g.*, *Young* v. *United*

States, 535 U. S. 43, 49–50. In contrast, laches, which originally served as a guide when no statute of limitations controlled, can scarcely be described as a rule for interpreting a statutory prescription. Pp. 681–682.

(3) MGM insists that the laches defense must be available to prevent a copyright owner from sitting still, doing nothing, waiting to see what the outcome of an alleged infringer's investment will be. It is hardly incumbent on copyright owners, however, to challenge each and every actionable infringement. And there is nothing untoward about waiting to see whether an infringer's exploitation undercuts the value of the copyrighted work, has no effect on that work, or even complements it. Section 507(b)'s limitations period, coupled to the separate-accrual rule, allows a copyright owner to defer suit until she can estimate whether litigation is worth the candle. Pp. 682–683.

(4) MGM is concerned that evidence needed or useful to defend against liability will be lost during a copyright owner's inaction. But Congress must have been aware that the passage of time and the author's death could cause evidentiary issues when it provided for reversionary renewal rights that an author's heirs can exercise long after a work was written and copyrighted. Moreover, because a copyright plaintiff bears the burden of proving infringement, any hindrance caused by evidence unavailability is as likely to affect plaintiffs as defendants. The need for extrinsic evidence is also reduced by the registration mechanism, under which both the certificate and the original work must be on file with the Copyright Office before a copyright owner can sue for infringement. Pp. 683–684.

(5) Finally, when a copyright owner engages in intentionally misleading representations concerning his abstention from suit, and the alleged infringer detrimentally relies on such deception, the doctrine of estoppel may bar the copyright owner's claims completely, eliminating all potential remedies. The gravamen of estoppel, a defense long recognized as available in actions at law, is wrongdoing, overt misleading, and consequent loss. Estoppel does not undermine the statute of limitations, for it rests on misleading, whether engaged in early on, or later in time. Pp. 684–685.

2. While laches cannot be invoked to preclude adjudication of a claim for damages brought within the Act's three-year window, in extraordinary circumstances, laches may, at the very outset of the litigation, curtail the relief equitably awarded. For example, where owners of a copyrighted architectural design, although aware of an allegedly infringing housing project, delayed suit until the project was substantially constructed and partially occupied, an order mandating destruction of the

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project would not be tolerable. See *Chirco* v. *Crosswinds Communities, Inc.*, 474 F. 3d 227, 236. Nor, in the face of an unexplained delay in commencing suit, would it be equitable to order "total destruction" of a book already printed, packed, and shipped. See *New Era Publications Int'l* v. *Henry Holt & Co.*, 873 F. 2d 576, 584–585. No such extraordinary circumstance is present here. Petrella notified MGM of her copyright claims *before* MGM invested millions of dollars in creating a new edition of Raging Bull, and the equitable relief she seeks—*e. g.*, disgorgement of unjust gains and an injunction against future infringement—would not result in anything like "total destruction" of the film. Allowing Petrella's suit to go forward will put at risk only a fraction of the income MGM has earned during the more than three decades Raging Bull has been marketed and will work no unjust hardship on innocent third parties. Should Petrella ultimately prevail on the merits, the District Court, in determining appropriate injunctive relief and assessing profits, may take account of Petrella's delay in commencing suit. In doing so, however, the court must closely examine MGM's alleged reliance on Petrella's delay, taking account of MGM's early knowledge of her claims, the protection MGM might have achieved through a declaratory judgment action, the extent to which MGM's investment was protected by the separate-accrual rule, the court's authority to order injunctive relief "on such terms as it may deem reasonable," § 502(a), and any other relevant considerations. Pp. 685–688.

695 F. 3d 946, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which SCALIA, THOMAS, ALITO, SOTOMAYOR, and KAGAN, JJ., joined. BREYER, J., filed a dissenting opinion, in which ROBERTS, C. J., and KENNEDY, J., joined, *post*, p. 688.

Stephanos Bibas argued the cause for petitioner. With him on the briefs were *James A. Feldman* and *Nancy Bregstein Gordon*.

Nicole A. Saharsky argued the cause for the United States as *amicus curiae* urgining reversal. With her on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Delery*, *Deputy Solicitor General Stewart*, and *Scott R. McIntosh*.

Mark A. Perry argued the cause for respondents. With him on the brief were *Theodore B. Olson*, *Blaine H. Ev-*

anson, *Jonathan Zavin*, *Wook Hwang*, and *David Grossman*.*

JUSTICE GINSBURG delivered the opinion of the Court.

The Copyright Act of 1976 provides that "[n]o civil action shall be maintained under the [Act] unless it is commenced within three years after the claim accrued." 17 U. S. C. § 507(b). This case presents the question whether the equitable defense of laches (unreasonable, prejudicial delay in commencing suit) may bar relief on a copyright infringement claim brought within § 507(b)'s three-year limitations period. Section 507(b), it is undisputed, bars relief of any kind for conduct occurring prior to the three-year limitations period. To the extent that an infringement suit seeks relief solely for conduct occurring within the limitations period, however, courts are not at liberty to jettison Congress' judgment on the timeliness of suit. Laches, we hold, cannot be invoked to preclude adjudication of a claim for damages brought within the three-year window. As to equitable relief, in extraordinary circumstances, laches may bar at the very

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*Briefs of *amici curiae* urging reversal were filed for the Authors Guild, Inc., et al. by *Christopher A. Mohr*; for Douglas Laycock et al. by *Mr. Laycock, pro se*; and for Ralph Oman by *Peter Jaszi* and *Mr. Oman, pro se.*

Briefs of *amici curiae* urging affirmance were filed for the Association for Competitive Technology by *John C. O'Quinn*; for the Chamber of Commerce of the United States of America by *H. Christopher Bartolomucci*, *Kate Comerford Todd*, and *Tyler R. Green*; for Dish Network LLC et al. by *E. Joshua Rosenkranz*, *Eric A. Shumsky*, *Rachel M. McKenzie*, and *Annette L. Hurst*; for DRI–The Voice of the Defense Bar by *J. Michael Weston*, *Mary Massaron Ross*, and *Josephine A. DeLorenzo*; for the Motion Picture Association of America, Inc., et al. by *Seth P. Waxman*, *Randolph D. Moss*, and *Catherine M. A. Carroll*; and for the New England Legal Foundation by *Benjamin G. Robbins* and *Martin J. Newhouse.*

Briefs of *amici curiae* were filed for the American Intellectual Property Law Association by *Nancy J. Mertzel*; for the California Society of Entertainment Lawyers by *Steven W. Smyrski*; for T. Leigh Anenson by *Lara M. Krieger*; for Robin Feldman et al. by *Ms. Feldman, pro se*; and for Orly Ravid et al. by *Robert C. Lind, pro se*, and *Michael M. Epstein.*

threshold the particular relief requested by the plaintiff. And a plaintiff's delay can always be brought to bear at the remedial stage, in determining appropriate injunctive relief, and in assessing the "profits of the infringer . . . attributable to the infringement." § 504(b).[1]

Petitioner Paula Petrella, in her suit for copyright infringement, sought no relief for conduct occurring outside § 507(b)'s three-year limitations period. Nevertheless, the courts below held that laches barred her suit in its entirety, without regard to the currency of the conduct of which Petrella complains. That position, we hold, is contrary to § 507(b) and this Court's precedent on the province of laches.

I

The Copyright Act (Act), 17 U. S. C. § 101 *et seq.*, grants copyright protection to original works of authorship. § 102(a). Four aspects of copyright law bear explanation at the outset.

First, the length of a copyright term. Under the Act, a copyright "vests initially in the author or authors of the work," who may transfer ownership to a third party. § 201. The Act confers on a copyright owner certain exclusive rights, including the rights to reproduce and distribute the work and to develop and market derivative works. § 106. Copyrighted works published before 1978—as was the work at issue—are protected for an initial period of 28 years, which may be—and in this case was—extended for a renewal period of up to 67 years. § 304(a). From and after Janu-

[1] As infringement remedies, the Copyright Act provides for injunctions, § 502, impoundment and disposition of infringing articles, § 503, damages and profits, § 504, costs and attorney's fees, § 505. Like other restitutional remedies, recovery of profits "is not easily characterized as legal or equitable," for it is an "amalgamation of rights and remedies drawn from both systems." Restatement (Third) of Restitution and Unjust Enrichment § 4, Comment *b*, p. 28 (2010). Given the "protean character" of the profits-recovery remedy, see *id.*, Comment *c*, at 30, we regard as appropriate its treatment as "equitable" in this case.

ary 1, 1978, works are generally protected from the date of creation until 70 years after the author's death. § 302(a).

Second, copyright inheritance. For works copyrighted under the pre-1978 regime in which an initial period of protection may be followed by a renewal period, Congress provided that the author's heirs inherit the renewal rights. See § 304(a)(1)(C)(ii)–(iv). We held in *Stewart* v. *Abend*, 495 U. S. 207 (1990), that if an author who has assigned her rights away "dies before the renewal period, then the assignee may continue to use the original work [to produce a derivative work] only if the author's successor transfers the renewal rights to the assignee." *Id.*, at 221.[2]

Third, remedies. The Act provides a variety of civil remedies for infringement, both equitable and legal. See §§ 502–505, described *supra*, at 668, n. 1. A court may issue an injunction "on such terms as it may deem reasonable to prevent or restrain infringement of a copyright." § 502(a). At the election of the copyright owner, a court may also award either (1) "the copyright owner's actual damages and any additional profits of the infringer," § 504(a)(1), which petitioner seeks in the instant case, or (2) statutory damages within a defined range, § 504(c).

Fourth, and most significant here, the statute of limitations. Until 1957, federal copyright law did not include a statute of limitations for civil suits. Federal courts therefore used analogous state statutes of limitations to determine the timeliness of infringement claims. See S. Rep. No. 1014, 85th Cong., 1st Sess., 2 (1957) (hereinafter Senate Report). And they sometimes invoked laches to abridge the state-law prescription. As explained in *Teamsters & Employers Welfare Trust of Ill.* v. *Gorman Bros. Ready Mix*, 283 F. 3d 877, 881 (CA7 2002): "When Congress fails to enact a statute of limitations, a [federal] court that borrows a state

[2] For post-1978 works, heirs still have an opportunity to recapture rights of the author. See 3 M. Nimmer & D. Nimmer, Copyright § 11.01[A], p. 11–4 (2013) (hereinafter Nimmer).

statute of limitations but permits it to be abridged by the doctrine of laches is not invading congressional prerogatives. It is merely filling a legislative hole." (Citation omitted.) In 1957, Congress addressed the matter and filled the hole; it prescribed a three-year lookback limitations period for all civil claims arising under the Copyright Act. See Act of Sept. 7, 1957, Pub. L. 85–313, 71 Stat. 633, 17 U. S. C. § 115(b) (1958 ed.). The provision, as already noted, reads: "No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued." § 507(b) (2012 ed.).[3]

The federal limitations prescription governing copyright suits serves two purposes: (1) to render uniform and certain the time within which copyright claims could be pursued; and (2) to prevent the forum shopping invited by disparate state limitations periods, which ranged from one to eight years. Senate Report 2; see H. R. Rep. No. 2419, 84th Cong., 2d Sess., 2 (1956). To comprehend how the Copyright Act's limitations period works, one must understand when a copyright infringement claim accrues.

A claim ordinarily accrues "when [a] plaintiff has a complete and present cause of action." *Bay Area Laundry and Dry Cleaning Pension Trust Fund* v. *Ferbar Corp. of Cal.*, 522 U. S. 192, 201 (1997) (internal quotation marks omitted). In other words, the limitations period generally begins to run at the point when "the plaintiff can file suit and obtain relief." *Ibid.* A copyright claim thus arises or "accrue[s]" when an infringing act occurs.[4]

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[3] The Copyright Act was pervasively revised in 1976, but the three-year lookback statute of limitations has remained materially unchanged. See Act of Oct. 19, 1976, § 101, 90 Stat. 2586.

[4] Although we have not passed on the question, nine Courts of Appeals have adopted, as an alternative to the incident of injury rule, a "discovery rule," which starts the limitations period when "the plaintiff discovers, or with due diligence should have discovered, the injury that forms the basis for the claim." *William A. Graham Co.* v. *Haughey*, 568 F. 3d 425, 433 (CA3 2009) (internal quotation marks omitted). See also 6 W. Patry,

It is widely recognized that the separate-accrual rule attends the copyright statute of limitations.[5] Under that rule, when a defendant commits successive violations, the statute of limitations runs separately from each violation. Each time an infringing work is reproduced or distributed, the infringer commits a new wrong. Each wrong gives rise to a discrete "claim" that "accrue[s]" at the time the wrong occurs.[6] In short, each infringing act starts a new limitations period. See *Stone* v. *Williams*, 970 F. 2d 1043, 1049 (CA2 1992) ("Each act of infringement is a distinct harm giving rise to an independent claim for relief.").

Under the Act's three-year provision, an infringement is actionable within three years, and only three years, of its occurrence. And the infringer is insulated from liability for earlier infringements of the same work. See 3 M. Nimmer & D. Nimmer, Copyright § 12.05[B][1][b], p. 12–150.4 (2013) ("If infringement occurred within three years prior to filing, the action will not be barred even if prior infringements by the same party as to the same work are barred because they occurred more than three years previously.").

Copyright § 20:19, p. 20–28 (2013) ("The overwhelming majority of courts use discovery accrual in copyright cases.").

[5] See generally *id.*, § 20:23, at 20–44; 3 Nimmer § 12.05[B][1][b], at 12–150.2 to 12–150.4. See also, *e. g.*, *William A. Graham Co.*, 568 F. 3d, at 433; *Peter Letterese & Assoc., Inc.* v. *World Inst. of Scientology Enterprises, Int'l*, 533 F. 3d 1287, 1320, n. 39 (CA11 2008); *Bridgeport Music, Inc.* v. *Rhyme Syndicate Music*, 376 F. 3d 615, 621 (CA6 2004); *Makedwde Publishing Co.* v. *Johnson*, 37 F. 3d 180, 182 (CA5 1994); *Roley* v. *New World Pictures, Ltd.*, 19 F. 3d 479, 481 (CA9 1994).

[6] Separately accruing harm should not be confused with harm from past violations that are continuing. Compare *Klehr* v. *A. O. Smith Corp.*, 521 U. S. 179, 190 (1997) (for separately accruing harm, each new act must cause "harm [to the plaintiff] over and above the harm that the earlier acts caused"), with *Havens Realty Corp.* v. *Coleman*, 455 U. S. 363, 380–381 (1982) ("[W]here a plaintiff . . . challenges . . . an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within [the limitations period, measured from] the last asserted occurrence of that practice." (footnote omitted)).

Thus, when a defendant has engaged (or is alleged to have engaged) in a series of discrete infringing acts, the copyright holder's suit ordinarily will be timely under § 507(b) with respect to more recent acts of infringement (*i. e.*, acts within the three-year window), but untimely with respect to prior acts of the same or similar kind.[7]

In sum, Congress provided two controlling time prescriptions: the copyright term, which endures for decades, and may pass from one generation to another; and § 507(b)'s limitations period, which allows plaintiffs during that lengthy term to gain retrospective relief running only three years back from the date the complaint was filed.

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[7] A case arising outside of the copyright context is illustrative. In *Bay Area Laundry and Dry Cleaning Pension Trust Fund* v. *Ferbar Corp. of Cal.*, 522 U. S. 192 (1997), an employer was delinquent in making a series of scheduled payments to an underfunded pension plan. See *id.*, at 198–199. The trustees filed suit just over six years after the first missed payment, barely outside of the applicable six-year statute of limitations. See *id.*, at 198. Because the first missed payment in the series fell outside the statute of limitations, the employer argued that the subsequent missed payments were also time barred. See *id.*, at 206. We rejected that argument. The remaining claims were timely, we held, because "each missed payment create[d] a separate cause of action with its own six-year limitations period." *Ibid.* Cf. *Klehr*, 521 U. S., at 190 (for civil Racketeer Influenced and Corrupt Organizations Act claims, plaintiff may recover for acts occurring within the limitations period, but may not use an "independent, new predicate act as a bootstrap to recover for injuries caused by other earlier predicate acts that took place outside the limitations period"); *National Railroad Passenger Corporation* v. *Morgan*, 536 U. S. 101, 114–121 (2002) (distinguishing discrete acts, each independently actionable, from conduct "cumulative [in] effect," *e. g.*, hostile environment claims pursued under Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*; "in direct contrast to discrete acts, a single [instance of hostility] may not be actionable on its own"). But cf. *post*, at 697 (ignoring the distinction *Morgan* took care to draw between discrete acts independently actionable and conduct cumulative in effect).

II

A

The allegedly infringing work in this case is the critically acclaimed motion picture Raging Bull, based on the life of boxing champion Jake LaMotta. After retiring from the ring, LaMotta worked with his longtime friend, Frank Petrella, to tell the story of the boxer's career. Their venture resulted in three copyrighted works: two screenplays, one registered in 1963, the other in 1973, and a book, registered in 1970. This case centers on the screenplay registered in 1963. The registration identified Frank Petrella as sole author, but also stated that the screenplay was written "in collaboration with" LaMotta. App. 164.

In 1976, Frank Petrella and LaMotta assigned their rights in the three works, including renewal rights, to Chartoff-Winkler Productions, Inc. Two years later, respondent United Artists Corporation, a subsidiary of respondent Metro-Goldwyn-Mayer, Inc. (collectively, MGM), acquired the motion picture rights to the book and both screenplays, rights stated by the parties to be "exclusiv[e] and forever, including all periods of copyright and renewals and extensions thereof." *Id.*, at 49. In 1980, MGM released, and registered a copyright in, the film Raging Bull, directed by Martin Scorsese and starring Robert De Niro, who won a Best Actor Academy Award for his portrayal of LaMotta. MGM continues to market the film, and has converted it into formats unimagined in 1980, including DVD and Blu-ray.

Frank Petrella died in 1981, during the initial terms of the copyrights in the screenplays and book. As this Court's decision in *Stewart* confirmed, Frank Petrella's renewal rights reverted to his heirs, who could renew the copyrights unburdened by any assignment previously made by the author. See 495 U. S., at 220–221 (relying on Court's earlier

decision in *Miller Music Corp.* v. *Charles N. Daniels, Inc.*, 362 U. S. 373 (1960)).

Plaintiff below, petitioner here, Paula Petrella (Petrella) is Frank Petrella's daughter. Learning of this Court's decision in *Stewart*, Petrella engaged an attorney who, in 1991, renewed the copyright in the 1963 screenplay. Because the copyrights in the 1973 screenplay and the 1970 book were not timely renewed, the infringement claims in this case rest exclusively on the screenplay registered in 1963. Petrella is now sole owner of the copyright in that work.[8]

In 1998, seven years after filing for renewal of the copyright in the 1963 screenplay, Petrella's attorney informed MGM that Petrella had obtained the copyright to that screenplay. Exploitation of any derivative work, including Raging Bull, the attorney asserted, infringed on the copyright now vested in Petrella. During the next two years, counsel for Petrella and MGM exchanged letters in which MGM denied the validity of the infringement claims, and Petrella repeatedly threatened to take legal action.

B

Some nine years later, on January 6, 2009, Petrella filed a copyright infringement suit in the United States District Court for the Central District of California. She alleged that MGM violated and continued to violate her copyright in the 1963 screenplay by using, producing, and distributing Raging Bull, a work she described as derivative of the 1963 screenplay. Petrella's complaint sought monetary and injunctive relief. Because the statute of limitations for copyright claims requires commencement of suit "within three years after the claim accrued," § 507(b), Petrella sought relief

[8] Petrella's attorney filed the renewal application on behalf of Frank Petrella's heirs. When Petrella's mother died and her brother assigned his rights to her, Petrella became the sole owner of all rights in the 1963 screenplay.

only for acts of infringement occurring on or after January 6, 2006. No relief, she recognizes, can be awarded for infringing acts prior to that date.

MGM moved for summary judgment on several grounds, among them, the equitable doctrine of laches. Petrella's 18-year delay, from the 1991 renewal of the copyright on which she relied, until 2009, when she commenced suit, MGM maintained, was unreasonable and prejudicial to MGM. See Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment in No. CV 09–0072 (CD Cal.).

The District Court granted MGM's motion. See App. to Pet. for Cert. 28a–48a. As to the merits of the infringement claims, the court found, disputed issues of material fact precluded summary adjudication. See *id.*, at 34a–42a. Even so, the court held, laches barred Petrella's complaint. *Id.*, at 42a–48a. Petrella had unreasonably delayed suit by not filing until 2009, the court concluded, and further determined that MGM was prejudiced by the delay. *Id.*, at 42a–46a. In particular, the court stated, MGM had shown "expectations-based prejudice," because the company had "made significant investments in exploiting the film"; in addition, the court accepted that MGM would encounter "evidentiary prejudice," because Frank Petrella had died and LaMotta, then aged 88, appeared to have sustained a loss of memory. *Id.*, at 44a–46a.[9]

The U. S. Court of Appeals for the Ninth Circuit affirmed the laches-based dismissal. 695 F. 3d 946 (2012). Under Ninth Circuit precedent, the Court of Appeals first observed, "[i]f any part of the alleged wrongful conduct occurred outside of the limitations period, courts presume that the plaintiff's claims are barred by laches." *Id.*, at 951 (internal quo-

[9] LaMotta, the court noted, "ha[d] suffered myriad blows to his head as a fighter years ago," and "no longer recognize[d Petrella], even though he ha[d] known her for forty years." App. to Pet. for Cert. 45a–46a.

tation marks omitted). The presumption was applicable here, the court indicated, because "[t]he statute of limitations for copyright claims in civil cases is three years," *ibid.* (citing § 507(b)), and Petrella was aware of her potential claims many years earlier (as was MGM), *id.*, at 952. "[T]he true cause of Petrella's delay," the court suggested, "was, as [Petrella] admits, that 'the film hadn't made money' [in years she deferred suit]." *Id.*, at 953.[10] Agreeing with the District Court, the Ninth Circuit determined that MGM had established expectations-based prejudice: The company had made a large investment in Raging Bull, believing it had complete ownership and control of the film. *Id.*, at 953–954.[11]

Judge Fletcher concurred only because Circuit precedent obliged him to do so. *Id.*, at 958. Laches in copyright cases, he observed, is "entirely a judicial creation," one notably "in tension with Congress' [provision of a three-year limitations period]." *Ibid.*

We granted certiorari to resolve a conflict among the Circuits on the application of the equitable defense of laches to copyright infringement claims brought within the three-year lookback period prescribed by Congress.[12] 570 U. S. 948 (2013).

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[10] In her declaration, Petrella stated that MGM told her in 2001 that the film was in "a huge deficit financially," "would never show a profit," and, for that reason, "MGM would not continue to send [financial] statements [to her]." App. 234.

[11] The Court of Appeals did not consider whether MGM had also shown evidentiary prejudice. 695 F. 3d 946, 953 (CA9 2012).

[12] See *Lyons Partnership L. P.* v. *Morris Costumes, Inc.*, 243 F. 3d 789, 798 (CA4 2001) (laches defense unavailable in copyright infringement cases, regardless of remedy sought); *Peter Letterese*, 533 F. 3d, at 1320 ("[T]here is a strong presumption [in copyright cases] that a plaintiff's suit is timely if it is filed before the statute of limitations has run. Only in the most extraordinary circumstances will laches be recognized as a defense."); *Chirco* v. *Crosswinds Communities, Inc.*, 474 F. 3d 227, 233 (CA6 2007) (in copyright litigation, laches applies only to "the most compelling of cases"); *Jacobsen* v. *Deseret Book Co.*, 287 F. 3d 936, 950 (CA10 2002) ("Rather than deciding copyright cases on the issue of laches, courts

III

We consider first whether, as the Ninth Circuit held, laches may be invoked as a bar to Petrella's pursuit of legal remedies under 17 U. S. C. § 504(b). The Ninth Circuit erred, we hold, in failing to recognize that the copyright statute of limitations, § 507(b), itself takes account of delay. As earlier observed, see *supra*, at 671–672, a successful plaintiff can gain retrospective relief only three years back from the time of suit. No recovery may be had for infringement in earlier years. Profits made in those years remain the defendant's to keep. Brought to bear here, § 507(b) directs that MGM's returns on its investment in Raging Bull in years outside the three-year window (years before 2006) cannot be reached by Petrella. Only by disregarding that feature of the statute, and the separate-accrual rule attending § 507(b), see *supra*, at 670–671, could the Court of Appeals presume that infringing acts occurring before January 6, 2006, bar all relief, monetary and injunctive, for infringement occurring on and after that date. See 695 F. 3d, at 951; *supra*, at 675–676.[13]

Moreover, if infringement within the three-year lookback period is shown, the Act allows the defendant to prove and offset against profits made in that period "deductible expenses" incurred in generating those profits. § 504(b). In addition, the defendant may prove and offset "elements of profit attributable to factors other than the copyrighted work." *Ibid.* The defendant thus may retain the return

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should generally defer to the three-year statute of limitations."); *New Era Publications Int'l* v. *Henry Holt & Co.*, 873 F. 2d 576, 584–585 (CA2 1989) ("severe prejudice, coupled with . . . unconscionable delay . . . , mandates denial of . . . injunction for laches and relegation of [plaintiff] to its damages remedy"). Cf. *post*, at 688, 700 (acknowledging that application of laches should be "extraordinary," confined to "few and unusual cases").

[13] Assuming Petrella had a winning case on the merits, the Court of Appeals' ruling on laches would effectively give MGM a cost-free license to exploit Raging Bull throughout the long term of the copyright. The value to MGM of such a free, compulsory license could exceed by far MGM's expenditures on the film.

on investment shown to be attributable to its own enterprise, as distinct from the value created by the infringed work. See *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 309 U. S. 390, 402, 407 (1940) (equitably apportioning profits to account for independent contributions of infringing defendant). See also *infra*, at 685–688 (delay in commencing suit as a factor in determining contours of relief appropriately awarded).

Last, but hardly least, laches is a defense developed by courts of equity; its principal application was, and remains, to claims of an equitable cast for which the Legislature has provided no fixed time limitation. See 1 D. Dobbs, Law of Remedies § 2.4(4), p. 104 (2d ed. 1993) (hereinafter Dobbs) ("laches . . . may have originated in equity because no statute of limitations applied, . . . suggest[ing] that laches should be limited to cases in which no statute of limitations applies"). Both before and after the merger of law and equity in 1938,[14] this Court has cautioned against invoking laches to bar legal relief. See *Holmberg* v. *Armbrecht*, 327 U. S. 392, 395, 396 (1946) (in actions at law, "[i]f Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter," but "[t]raditionally . . . , statutes of limitation are not controlling measures of equitable relief"); *Merck & Co.* v. *Reynolds*, 559 U. S. 633, 652 (2010) (quoting, for its current relevance, statement in *United States* v. *Mack*, 295 U. S. 480, 489 (1935), that "[l]aches within the term of the statute of limitations is no defense [to an action] at law"); *County of Oneida* v. *Oneida Indian Nation of N. Y.*, 470 U. S. 226, 244, n. 16 (1985) ("[A]pplication of the equitable defense of laches in an action at law would be novel indeed.").[15]

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[14] See Fed. Rule Civ. Proc. 2 ("There is one form of action—the civil action."); Rule 8(c) (listing among affirmative defenses both "laches" and "statute of limitations").

[15] In contrast to the Copyright Act, the Lanham Act, which governs trademarks, contains no statute of limitations, and expressly provides for defensive use of "equitable principles, including laches." 15 U. S. C.

Because we adhere to the position that, in face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief, the dissent thinks we "plac[e] insufficient weight upon the rules and practice of modern litigation." *Post*, at 699. True, there has been, since 1938, only "one form of action—the civil action." Fed. Rule Civ. Proc. 2. But "the substantive and remedial principles [applicable] prior to the advent of the federal rules [have] not changed." 4 C. Wright & A. Miller, Federal Practice and Procedure § 1043, p. 177 (3d ed. 2002). *Holmberg*, *Merck*, and *Oneida* so illustrate. The dissent presents multiple citations, see *post*, at 688, 690–691, 694–695, 697–698, many of them far afield from the issue at hand, others obscuring what the cited decisions in fact ruled. Compare, *e. g.*, *post*, at 688, 698, with *infra*, at 685–686 (describing *Chirco* v. *Crosswinds Communities, Inc.*, 474 F. 3d 227 (CA6 2007)); *post*, at 688, 697–698, with *infra*, at 680, n. 16 (describing *National Railroad Passenger Corporation* v. *Morgan*, 536 U. S. 101 (2002)); *post*, at 694–695, with *infra*, at 681, n. 16 (describing *Patterson* v. *Hewitt*, 195 U. S. 309 (1904)). Yet tellingly, the dissent has come up with no case in which this Court has approved the application of laches to bar a claim for damages brought within the time allowed by a federal statute of limitations. There is

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§ 1115(b)(9). But cf. *post*, at 695, 698 (citing *Hot Wax, Inc.* v. *Turtle Wax, Inc.*, 191 F. 3d 813 (CA7 1999), but failing to observe that Lanham Act contains no statute of limitations).

The Patent Act states: "[N]o recovery shall be had for any infringement committed more than six years prior to the filing of the complaint." 35 U. S. C. § 286. The Patent Act also provides that "[n]oninfringement, absence of liability for infringement or unenforceability" may be raised "in any action involving the validity or infringement of a patent." § 282(b) (2012 ed.). Based in part on § 282 and commentary thereon, legislative history, and historical practice, the Federal Circuit has held that laches can bar damages incurred prior to the commencement of suit, but not injunctive relief. *A. C. Aukerman Co.* v. *R. L. Chaides Constr. Co.*, 960 F. 2d 1020, 1029–1031, 1039–1041 (1992) (en banc). We have not had occasion to review the Federal Circuit's position.

nothing at all "differen[t]," see *post*, at 699, about copyright cases in this regard.

IV

We turn now to MGM's principal arguments regarding the contemporary scope of the laches defense, all of them embraced by the dissent.

A

Laches is listed among affirmative defenses, along with, but discrete from, the statute of limitations, in Federal Rule of Civil Procedure 8(c). Accordingly, MGM maintains, the plea is "available . . . in every civil action" to bar all forms of relief. Tr. of Oral Arg. 43; see Brief for Respondents 40. To the Court's question, could laches apply where there is an ordinary six-year statute of limitations, MGM's counsel responded yes, case-specific circumstances might warrant a ruling that a suit brought in year five came too late. Tr. of Oral Arg. 52; see *id.*, at 41.

The expansive role for laches MGM envisions careens away from understandings, past and present, of the essentially gap-filling, not legislation-overriding, office of laches. Nothing in this Court's precedent suggests a doctrine of such sweep. Quite the contrary, we have never applied laches to bar in their entirety claims for discrete wrongs occurring within a federally prescribed limitations period.[16] Inviting

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[16] MGM pretends otherwise, but the cases on which it relies do not carry the load MGM would put on them. *Morgan*, described *supra*, at 672, n. 7, is apparently MGM's best case, for it is cited 13 times in MGM's brief. See Brief for Respondents 8, 9, 14, 16, 18, 19, 25, 31, 34, 35, 36, 40, 47; *post*, at 688, 694, 697. *Morgan*, however, does not so much as hint that laches may bar claims for discrete wrongs, all of them occurring within a federal limitations period. Part II–A of that opinion, dealing with the separate-accrual rule, held that "[e]ach discrete discriminatory act starts a new clock for filing charges alleging that act," regardless of whether "past acts" are time barred. 536 U. S., at 113. Parts II–B and II–C of the opinion then *distinguished* separately accruing wrongs from hostile-work-environment claims, cumulative in effect and extending over long periods

individual judges to set a time limit other than the one Congress prescribed, we note, would tug against the uniformity Congress sought to achieve when it enacted § 507(b). See *supra*, at 669–670.

B

MGM observes that equitable tolling "is read into every federal statute of limitation," *Holmberg*, 327 U. S., at 397, and asks why laches should not be treated similarly. See Brief for Respondents 23–26; *post*, at 694–695. Tolling, which lengthens the time for commencing a civil action in appropriate circumstances,[17] applies when there is a statute of limitations; it is, in effect, a rule of interpretation tied to that limit. See *Young* v. *United States*, 535 U. S. 43, 49–50 (2002); *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 464 (1975).[18] Laches, in contrast, originally served as a guide when no statute of limitations controlled the claim; it can scarcely be described as a rule for interpreting a statu-

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of time. *Id.*, at 115–117, 121. Laches could be invoked, the Court reasoned, to limit the continuing violation doctrine's potential to rescue *untimely* claims, not claims accruing separately within the limitations period.

Bay Area Laundry, described, along with *Morgan*, *supra*, at 672, n. 7, is similarly featured by MGM. See also *post*, at 694, 697. But that opinion considered laches only in the context of a federal statute calling for action "[a]s soon as practicable." 29 U. S. C. § 1399(b)(1); see 522 U. S., at 205. *Patterson* v. *Hewitt*, 195 U. S. 309 (1904), described by MGM as a case resembling Petrella's, see Tr. of Oral Arg. 32–33, 53, barred equitable claims that were timely under *state* law. When state law was the reference, federal courts sometimes applied laches as a further control. See *supra*, at 669–670; *Russell* v. *Todd*, 309 U. S. 280, 288, n. 1 (1940) ("Laches may bar equitable remedy before the local statute has run."). No federal statute of limitations figured in *Patterson*.

[17] *E. g.*, a party's infancy or mental disability, absence of the defendant from the jurisdiction, fraudulent concealment. See S. Rep. No. 1014, 85th Cong., 1st Sess., 2–3 (1957) (hereinafter Senate Report).

[18] The legislative history to which the dissent refers, *post*, at 694, speaks of "equitable situations on which the statute of limitations is generally suspended," Senate Report 3, and says nothing about laches shrinking the time Congress allowed.

tory prescription. That is so here, because the statute, § 507(b), makes the starting trigger an infringing act committed three years back from the commencement of suit, while laches, as conceived by the Ninth Circuit and advanced by MGM, makes the presumptive trigger the defendant's *initial* infringing act. See 695 F. 3d, at 951; Brief for United States as *Amicus Curiae* 16.

C

MGM insists that the defense of laches must be available to prevent a copyright owner from sitting still, doing nothing, waiting to see what the outcome of an alleged infringer's investment will be. See Brief for Respondents 48. In this case, MGM stresses, "[Petrella] *conceded* that she waited to file because 'the film was deeply in debt and in the red and would probably never recoup.'" *Id.*, at 47 (quoting from App. 110). The Ninth Circuit similarly faulted Petrella for waiting to sue until the film Raging Bull "made money." 695 F. 3d, at 953 (internal quotation marks omitted). See also *post*, at 689–692 (deploring plaintiffs who wait to see whether the allegedly infringing work makes money).

It is hardly incumbent on copyright owners, however, to challenge each and every actionable infringement. And there is nothing untoward about waiting to see whether an infringer's exploitation undercuts the value of the copyrighted work, has no effect on the original work, or even complements it. Fan sites prompted by a book or film, for example, may benefit the copyright owner. See Wu, Tolerated Use, 31 Colum. J. L. & Arts 617, 619–620 (2008). Even if an infringement is harmful, the harm may be too small to justify the cost of litigation.

If the rule were, as MGM urges, "sue soon, or forever hold your peace," copyright owners would have to mount a federal case fast to stop seemingly innocuous infringements, lest those infringements eventually grow in magnitude. Section 507(b)'s three-year limitations period, however, coupled to the separate-accrual rule, see *supra*, at 669–672, avoids such

litigation profusion. It allows a copyright owner to defer suit until she can estimate whether litigation is worth the candle. She will miss out on damages for periods prior to the three-year lookback, but her right to prospective injunctive relief should, in most cases, remain unaltered.[19]

D

MGM points to the danger that evidence needed or useful to defend against liability will be lost during a copyright owner's inaction. Brief for Respondents 37–38; see *post*, at 689–691.[20] Recall, however, that Congress provided for reversionary renewal rights exercisable by an author's heirs, rights that can be exercised, at the earliest for pre-1978 copyrights, 28 years after a work was written and copyrighted. See *supra*, at 668–669. At that time, the author, and perhaps other witnesses to the creation of the work, will be dead. See *supra*, at 673. Congress must have been aware that the passage of time and the author's death could cause a loss or dilution of evidence. Congress chose, nonetheless, to give the author's family "a second chance to obtain fair remuneration." *Stewart*, 495 U. S., at 220.

Moreover, a copyright plaintiff bears the burden of proving infringement. See 3 W. Patry, Copyright § 9.4, p. 9–18 (2013) (hereinafter Patry) ("As in other civil litigation, a copyright owner bears the burden of establishing a prima facie case."). But cf. *post*, at 691 (overlooking plaintiff's burden to show infringement and the absence of any burden upon the defendant "to prove that it did not infringe"). Any

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[19] The dissent worries that a plaintiff might sue for profits "every three years . . . until the copyright expires." *Post*, at 692; see *post*, at 689–690. That suggestion neglects to note that a plaintiff who proves infringement will likely gain forward-looking injunctive relief stopping the defendant's repetition of infringing acts.

[20] As earlier noted, see *supra*, at 676, n. 11, the Court of Appeals did not reach the question whether evidentiary prejudice existed. 695 F. 3d, at 953.

hindrance caused by the unavailability of evidence, therefore, is at least as likely to affect plaintiffs as it is to disadvantage defendants. That is so in cases of the kind Petrella is pursuing, for a deceased author most probably would have supported his heir's claim.

The registration mechanism, we further note, reduces the need for extrinsic evidence. Although registration is "permissive," both the certificate and the original work must be on file with the Copyright Office before a copyright owner can sue for infringement. 17 U. S. C. §§ 408(b), 411(a). Key evidence in the litigation, then, will be the certificate, the original work, and the allegedly infringing work. And the adjudication will often turn on the factfinder's direct comparison of the original and the infringing works, *i. e.*, on the factfinder's "good eyes and common sense" in comparing the two works' "total concept and overall feel." *Peter F. Gaito Architecture, LLC* v. *Simone Development Corp.*, 602 F. 3d 57, 66 (CA2 2010) (internal quotation marks omitted).

E

Finally, when a copyright owner engages in intentionally misleading representations concerning his abstention from suit, and the alleged infringer detrimentally relies on the copyright owner's deception, the doctrine of estoppel may bar the copyright owner's claims completely, eliminating all potential remedies. See 6 Patry § 20:58, at 20–110 to 20–112.[21] The test for estoppel is more exacting than the test for laches, and the two defenses are differently oriented. The gravamen of estoppel, a defense long recognized as available in actions at law, see *Wehrman* v. *Conklin*, 155 U. S. 314, 327 (1894), is misleading and consequent loss, see 6 Patry § 20:58, at 20–110 to 20–112. Delay may be involved,

[21] Although MGM, in its answer to Petrella's complaint, separately raised both laches and estoppel as affirmative defenses, see Defendants' Answer to Plaintiff's Complaint in No. CV 09–0072 (CD Cal.), the courts below did not address the estoppel plea.

but is not an element of the defense. For laches, timeliness is the essential element. In contrast to laches, urged by MGM entirely to override the statute of limitations Congress prescribed, estoppel does not undermine Congress' prescription, for it rests on misleading, whether engaged in early on, or later in time.

Stating that the Ninth Circuit "ha[d] taken a wrong turn in its formulation and application of laches in copyright cases," Judge Fletcher called for fresh consideration of the issue. 695 F. 3d, at 959. "A recognition of the distinction between . . . estoppel and laches," he suggested, "would be a good place to start." *Ibid.* We agree.

V

The courts below summarily disposed of Petrella's case based on laches, preventing adjudication of any of her claims on the merits and foreclosing the possibility of any form of relief. That disposition, we have explained, was erroneous. Congress' time provisions secured to authors a copyright term of long duration, and a right to sue for infringement occurring no more than three years back from the time of suit. That regime leaves "little place" for a doctrine that would further limit the timeliness of a copyright owner's suit. See 1 Dobbs § 2.6(1), at 152. In extraordinary circumstances, however, the consequences of a delay in commencing suit may be of sufficient magnitude to warrant, at the very outset of the litigation, curtailment of the relief equitably awardable.

Chirco v. *Crosswinds Communities, Inc.*, 474 F. 3d 227 (CA6 2007), is illustrative. In that case, the defendants were alleged to have used without permission, in planning and building a housing development, the plaintiffs' copyrighted architectural design. Long aware of the defendants' project, the plaintiffs took no steps to halt the housing development until more than 168 units were built, 109 of which were occupied. *Id.*, at 230. Although the action was filed

within § 507(b)'s three-year statute of limitations, the District Court granted summary judgment to the defendants, dismissing the entire case on grounds of laches. The trial court's rejection of the entire suit could not stand, the Court of Appeals explained, for it was not within the Judiciary's ken to debate the wisdom of § 507(b)'s three-year lookback prescription. *Id.*, at 235. Nevertheless, the Court of Appeals affirmed the District Court's judgment to this extent: The plaintiffs, even if they might succeed in proving infringement of their copyrighted design, would not be entitled to an order mandating destruction of the housing project. That relief would be inequitable, the Sixth Circuit held, for two reasons: The plaintiffs knew of the defendants' construction plans before the defendants broke ground, yet failed to take readily available measures to stop the project; and the requested relief would "work an *unjust* hardship" upon the defendants and innocent third parties. *Id.*, at 236. See also *New Era Publications Int'l* v. *Henry Holt & Co.*, 873 F. 2d 576, 584–585 (CA2 1989) (despite awareness since 1986 that book containing allegedly infringing material would be published in the United States, copyright owner did not seek a restraining order until 1988, after the book had been printed, packed, and shipped; as injunctive relief "would [have] result[ed] in the total destruction of the work," the court "relegat[ed plaintiff] to its damages remedy").

In sum, the courts below erred in treating laches as a complete bar to Petrella's copyright infringement suit. The action was commenced within the bounds of § 507(b), the Act's time-to-sue prescription, and does not present extraordinary circumstances of the kind involved in *Chirco* and *New Era*. Petrella notified MGM of her copyright claims *before* MGM invested millions of dollars in creating a new edition of Raging Bull. And the equitable relief Petrella seeks—*e. g.*, disgorgement of unjust gains and an injunction against future infringement—would not result in "total destruction" of the film, or anything close to it. See *New Era*, 873 F. 2d, at 584.

MGM released Raging Bull more than three decades ago and has marketed it continuously since then. Allowing Petrella's suit to go forward will put at risk only a fraction of the income MGM has earned during that period and will work no unjust hardship on innocent third parties, such as consumers who have purchased copies of Raging Bull. Cf. *Chirco*, 474 F. 3d, at 235–236 (destruction remedy would have ousted families from recently purchased homes). The circumstances here may or may not (we need not decide) warrant limiting relief at the remedial stage, but they are not sufficiently extraordinary to justify threshold dismissal.

Should Petrella ultimately prevail on the merits, the District Court, in determining appropriate injunctive relief and assessing profits, may take account of her delay in commencing suit. See *supra*, at 668, 677–678. In doing so, however, that court should closely examine MGM's alleged reliance on Petrella's delay.[22] This examination should take account of MGM's early knowledge of Petrella's claims, the protection MGM might have achieved through pursuit of a declaratory judgment action, the extent to which MGM's investment was protected by the separate-accrual rule, the court's authority to order injunctive relief "on such terms as it may deem reasonable," § 502(a), and any other considerations that would justify adjusting injunctive relief or profits. See *Haas* v. *Leo Feist, Inc.*, 234 F. 105, 107–108 (SDNY 1916) (adjudicating copyright infringement suit on the merits and decreeing injunctive relief, but observing that, in awarding profits, account may be taken of copyright owner's inaction until infringer had spent large sums exploiting the work at issue). See also Tr. of Oral Arg. 23 (Government observation that, in fashioning equitable remedies, court has considerable leeway; it could, for example, allow MGM to continue using Raging Bull as a derivative work upon payment of a reason-

[22] While reliance or its absence may figure importantly in this case, we do not suggest that reliance is in all cases a *sine qua non* for adjustment of injunctive relief or profits.

able royalty to Petrella). Whatever adjustments may be in order in awarding injunctive relief, and in accounting for MGM's gains and profits, on the facts thus far presented, there is no evident basis for immunizing MGM's present and future uses of the copyrighted work, free from any obligation to pay royalties.

* * *

For the reasons stated, the judgment of the United States Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BREYER, with whom THE CHIEF JUSTICE and JUSTICE KENNEDY join, dissenting.

Legal systems contain doctrines that help courts avoid the unfairness that might arise were legal rules to apply strictly to every case no matter how unusual the circumstances. "[T]he nature of the equitable," Aristotle long ago observed, is "a correction of law where it is defective owing to its universality." Nicomachean Ethics 99 (D. Ross transl. L. Brown ed. 2009). Laches is one such equitable doctrine. It applies in those extraordinary cases where the plaintiff "unreasonably delays in filing a suit," *National Railroad Passenger Corporation* v. *Morgan*, 536 U. S. 101, 121 (2002), and, as a result, causes "unjust hardship" to the defendant, *Chirco* v. *Crosswinds Communities, Inc.*, 474 F. 3d 227, 236 (CA6 2007) (emphasis deleted). Its purpose is to avoid "inequity." *Galliher* v. *Cadwell*, 145 U. S. 368, 373 (1892). And, as Learned Hand pointed out, it may well be

> "inequitable for the owner of a copyright, with full notice of an intended infringement, to stand inactive while the proposed infringer spends large sums of money in its exploitation, and to intervene only when his speculation has proved a success." *Haas* v. *Leo Feist, Inc.*, 234 F. 105, 108 (SDNY 1916).

Today's decision disables federal courts from addressing that inequity. I respectfully dissent.

I

Circumstances warranting the application of laches in the context of copyright claims are not difficult to imagine. The 3-year limitations period under the Copyright Act may seem brief, but it is not. 17 U. S. C. § 507(b). That is because it is a rolling limitations period, which restarts upon each "separate accrual" of a claim. See *ante*, at 671; 6 W. Patry, Copyright § 20:23, pp. 20–44 to 20–46 (2013). If a defendant reproduces or sells an infringing work on a continuing basis, a plaintiff can sue every 3 years until the copyright term expires—which may be up to 70 years after the author's death. § 302(a) (works created after January 1, 1978, are protected until 70 years after the author's death); § 304(a) (works created before January 1, 1978, are protected for 28 years plus a 67-year renewal period). If, for example, a work earns no money for 20 years, but then, after development expenses have been incurred, it earns profits for the next 30, a plaintiff can sue in year 21 and at regular 3-year intervals thereafter. Each time the plaintiff will collect the defendant's profits earned during the prior three years, unless he settles for a lump sum along the way. The defendant will recoup no more than his outlays and any "elements of profit attributable to factors other than the copyrighted work." §§ 504(a)(1), (b).

A 20-year delay in bringing suit could easily prove inequitable. Suppose, for example, the plaintiff has deliberately waited for the death of witnesses who might prove the existence of understandings about a license to reproduce the copyrighted work, or who might show that the plaintiff's work was in fact derived from *older* copyrighted materials that the defendant has licensed. Or, suppose the plaintiff has delayed in bringing suit because he wants to avoid bargaining with the defendant up front over a license. He knows that if he delays legal action, and the defendant in-

vests time, effort, and resources into making the derivative product, the plaintiff will be in a much stronger position to obtain favorable licensing terms through settlement. Or, suppose the plaintiff has waited until he becomes certain that the defendant's production bet paid off, that the derivative work did and would continue to earn money, and that the plaintiff has a chance of obtaining, say, an 80% share of what is now a 90% pure profit stream. (N. B. The plaintiff's profits recovery will be reduced by any "deductible expenses" incurred by the defendant in producing the work, and by any "elements of profits attributable to factors other than the copyrighted work," § 504(b).) Or, suppose that all of these circumstances exist together.

Cases that present these kinds of delays are not imaginary. One can easily find examples from the lower courts where plaintiffs have brought claims years after they accrued and where delay-related inequity resulted. See, *e. g.*, *Ory* v. *McDonald*, 141 Fed. Appx. 581, 583 (CA9 2005), aff'g 2003 WL 22909286, *1 (CD Cal., Aug. 5, 2003) (claim that a 1960's song infringed the "hook or riff" from the 1926 song "Muskrat Ramble," brought more than 30 years after the song was released); *Danjaq LLC* v. *Sony Corp.*, 263 F. 3d 942, 952–956 (CA9 2001) (claim that seven James Bond films infringed a copyright to a screenplay, brought 19 to 36 years after the films were released, and where "many of the key figures in the creation of the James Bond movies ha[d] died" and "many of the relevant records [went] missing"); *Jackson* v. *Axton*, 25 F. 3d 884, 889 (CA9 1994), overruled on other grounds, *Fogerty* v. *Fantasy, Inc.*, 510 U. S. 517 (1994) (claim of coauthorship of the song "Joy to the World," brought 17 years after the plaintiff learned of his claim such that memories faded, the original paper containing the lyrics was lost, the recording studio (with its records) closed, and the defendant had "arranged his business affairs around the Song" for years); *Newsome* v. *Brown*, 2005 WL 627639, *8–*9 (SDNY, Mar. 16, 2005) (claim regarding the song "It's a Man's World,"

brought 40 years after first accrual, where the plaintiff's memory had faded and a key piece of evidence was destroyed by fire). See also *Chirco*, 474 F. 3d, at 230–231, 234–236 (claim that condominium design infringed plaintiff's design, brought only 2.5 years (or so) after claim accrued but after condominium was built, apartments were sold, and 109 families had moved in).

Consider, too, the present case. The petitioner claims the MGM film Raging Bull violated a copyright originally owned by her father, which she inherited and then renewed in 1991. She waited 18 years after renewing the copyright, until 2009, to bring suit. During those 18 years, MGM spent millions of dollars developing different editions of, and marketing, the film. See App. to Pet. for Cert. 13a. MGM also entered into numerous licensing agreements, some of which allowed television networks to broadcast the film through 2015. *Id.*, at 14a. Meanwhile, three key witnesses died or became unavailable, making it more difficult for MGM to prove that it did not infringe the petitioner's copyright (either because the 1963 screenplay was in fact derived from a different book, the rights to which MGM owned under a nonchallenged license, or because MGM held a license to the screenplay under a 1976 agreement that it signed with Jake LaMotta, who coauthored the screenplay with the petitioner's father, see *id.*, at 3a, 5a; App. 128–129, 257–258, 266–267). Consequently, I believe the Court of Appeals acted lawfully in dismissing the suit due to laches.

Long delays do not automatically prove inequity, but, depending upon the circumstances, they raise that possibility. Indeed, suppose that the copyright holders in the song cases cited above, or their heirs, facing sudden revivals in demand or eventual deaths of witnesses, had brought their claims 50, or even 60, years after those claims first accrued. Or suppose that the loss of evidence was clearly critical to the defendants' abilities to prove their cases. The Court holds that insofar as a copyright claim seeks damages, a court can-

not *ever* apply laches, irrespective of the length of the plaintiff's delay, the amount of the harm that it caused, or the inequity of permitting the action to go forward.

II

Why should laches not be available in an appropriate case? Consider the reasons the majority offers. First, the majority says that the 3-year "copyright statute of limitations . . . itself takes account of delay," and so additional safeguards like laches are not needed. *Ante*, at 677. I agree that sometimes that is so. But I also fear that sometimes it is not. The majority correctly points out that the limitations period limits the retrospective relief a plaintiff can recover. It imposes a cap equal to the profits earned during the prior three years, in addition to any actual damages sustained during this time. *Ibid.*; § 504(b). Thus, if the plaintiff waits from, say, 1980 until 2001 to bring suit, she cannot recover profits for the 1980 to 1998 period. But she can recover the defendant's profits from 1998 through 2001, which might be precisely when net revenues turned positive. And she can sue every three years thereafter until the copyright expires, perhaps in the year 2060. If the plaintiff's suit involves the type of inequitable circumstances I have described, her ability to recover profits from 1998 to 2001 and until the copyright expires could be just the kind of unfairness that laches is designed to prevent.

Second, the majority points out that the plaintiff can recover only the defendant's profits less " 'deductible expenses' incurred in generating those profits." *Ante*, at 677 (quoting § 504(b)). In other words, the majority takes assurance from the fact that the Act enables the defendant to recoup his outlays in developing or selling the allegedly infringing work. Again, sometimes that fact will prevent inequitable results. But sometimes it will not. A plaintiff's delay may

mean that the defendant has already recovered the majority of his expenses, and what is left is primarily profit. It may mean that the defendant has dedicated decades of his life to producing the work, such that the loss of a future profit stream (even if he can recover past expenses) is tantamount to the loss of any income in later years. And in circumstances such as those described, it could prove inequitable to give the profit to a plaintiff who has unnecessarily delayed in filing an action. Simply put, the "deductible expenses" provision does not protect the defendant from the potential inequity highlighted by Judge Hand nearly 100 years ago in his influential copyright opinion. That is, it does not stop a copyright holder (or his heirs) from "stand[ing] inactive while the proposed infringer spends large sums of money" in a risky venture; appearing on the scene only when the venture has proved a success; and thereby collecting substantially more money than he could have obtained at the outset, had he bargained with the investor over a license and royalty fee. *Haas*, 234 F., at 108. But cf. *id.*, at 108–109 (plaintiff to receive injunctive relief since one of the defendants was a "deliberate pirate," but profit award to be potentially reduced in light of laches).

Third, the majority says that "[i]nviting individual judges to set a time limit other than the one Congress prescribed" in the Copyright Act would "tug against the uniformity Congress sought to achieve when it enacted § 507(b)." *Ante*, at 680–681. But why does the majority believe that part of what Congress intended to "achieve" was the elimination of the equitable defense of laches? As the majority recognizes, Congress enacted a uniform statute of limitations for copyright claims in 1957 so that federal courts, in determining timeliness, no longer had to borrow from state law which varied from place to place. See *ante*, at 669–670. Nothing in the 1957 Act—or anywhere else in the text of the copyright statute—indicates that Congress also sought to bar the oper-

ation of laches. The Copyright Act is silent on the subject. And silence is consistent, not inconsistent, with the application of equitable doctrines.

For one thing, the legislative history for § 507 shows that Congress chose not to "specifically enumerat[e] certain equitable considerations which might be advanced in connection with civil copyright actions" because it understood that "'[f]ederal district courts, generally, recognize these equitable defenses anyway.'" S. Rep. No. 1014, 85th Cong., 1st Sess., 2–3 (1957) (quoting the House Judiciary Committee). Courts prior to 1957 had often applied laches in federal copyright cases. See, *e. g.*, *Callaghan* v. *Myers*, 128 U. S. 617, 658–659 (1888) (assuming laches was an available defense in a copyright suit); *Edwin L. Wiegand Co.* v. *Harold E. Trent Co.*, 122 F. 2d 920, 925 (CA3 1941) (applying laches to bar a copyright suit); *D. O. Haynes & Co.* v. *Druggists' Circular*, 32 F. 2d 215, 216–218 (CA2 1929) (same). Congress expected they would continue to do so.

Furthermore, this Court has held that federal courts may "appl[y] equitable doctrines that may toll *or limit* the time period" for suit when applying a statute of limitations, because a statutory "filing period" is a "requirement" subject to adjustment "'when equity so requires.'" *Morgan*, 536 U. S., at 121–122 (quoting *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385, 398 (1982); emphasis added). This Court has read laches into statutes of limitations otherwise silent on the topic of equitable doctrines in a multitude of contexts, as have lower courts. See, *e. g.*, *Morgan*, *supra*, at 121 ("an employer may raise a laches defense" under Title VII); *Bay Area Laundry and Dry Cleaning Pension Trust Fund* v. *Ferbar Corp. of Cal.*, 522 U. S. 192, 205 (1997) (similar, in respect to suits under the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA)); *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 155 (1967) (similar, in respect to an action for declaratory and injunctive relief under the Administrative Procedure Act); *Patterson* v. *Hewitt*, 195 U. S. 309,

319–320 (1904) (similar, in the case of a property action brought within New Mexico's statute of limitations); *Alsop* v. *Riker*, 155 U. S. 448, 460 (1894) (holding that "independently of the statute of limitations," the contract action was barred "because of laches"); *Teamsters & Employers Welfare Trust of Ill.* v. *Gorman Bros. Ready Mix*, 283 F. 3d 877, 883 (CA7 2002) (laches available "in a suit against an [Employee Retirement Income Security Act of 1974 (ERISA)] plan for benefits"); *Hot Wax, Inc.* v. *Turtle Wax, Inc.*, 191 F. 3d 813, 822–823 (CA7 1999) (laches available in a Lanham Act suit filed within the limitations period). Unless Congress indicates otherwise, courts normally assume that equitable rules continue to operate alongside limitations periods, and that equity applies both to plaintiffs and to defendants. See *Astoria Fed. Sav. & Loan Assn.* v. *Solimino*, 501 U. S. 104, 108 (1991) ("Congress is understood to legislate against a background of common-law adjudicatory principles" and to incorporate them "except when a statutory purpose to the contrary is evident" (internal quotation marks omitted)); *Porter* v. *Warner Holding Co.*, 328 U. S. 395, 398 (1946) ("Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction").

The Court today comes to a different conclusion. It reads § 507(b)'s silence as preserving doctrines that lengthen the period for suit when equitable considerations favor the plaintiff (*e. g.*, equitable tolling), but as foreclosing a doctrine that would shorten the period when equity favors the defendant (*i. e.*, laches). See *ante*, at 681–682, 685. I do not understand the logic of reading a silent statute in this manner.

Fourth, the majority defends its rule by observing that laches was "developed by courts of equity," and that this Court has "cautioned against invoking laches to bar legal relief" even following the merger of law and equity in 1938. *Ante*, at 678. The majority refers to three cases that offer support for this proposition, but none is determinative. In

the first, *Holmberg* v. *Armbrecht*, 327 U. S. 392 (1946), the Court said:

> "If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter.
>
> . . . . .
>
> "Traditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief." *Id.*, at 395–396.

This statement, however, constituted part of the Court's explanation as to why a federal statute, silent about limitations, should be applied consistently with "historic principles of equity in the enforcement of federally-created equitable rights" rather than with New York's statute of limitations. *Id.*, at 395. The case had nothing to do with whether laches governs in actions at law. The lawsuit in *Holmberg* had been brought "in equity," and the Court remanded for a determination whether the petitioners were "chargeable with laches." *Id.*, at 393, 397.

The second case the majority cites, *Merck & Co.* v. *Reynolds*, 559 U. S. 633 (2010), provides some additional support, but not much. There, the Court cited a 1935 case for the proposition that "'[l]aches within the term of the statute of limitations is no defense at law.'" *Id.*, at 652 (quoting *United States* v. *Mack*, 295 U. S. 480, 489 (1935)). But *Merck* concerned a federal securities statute that contained both a 2-year statute of limitations, running from the time of "discovery," and a 5-year statute of repose, running from the time of a "violation." 559 U. S., at 638 (citing 28 U. S. C. § 1658(b)). Given that repose statutes set "an outside limit" on suit and are generally "inconsistent with tolling" and similar equitable doctrines, the Court held that the 2-year limitations period at issue was not subject to an "inquiry notice" rule or, by analogy, to laches. *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U. S. 350, 353, 363

(1991) (internal quotation marks omitted); *Merck*, *supra*, at 650–652. *Merck* did not suggest that statutes of limitations are always or normally inconsistent with equitable doctrines when plaintiffs seek damages. It simply found additional support for its conclusion in a case that this Court decided *before* the merger of law and equity. And here, unlike in *Merck*, the statute of limitations is not accompanied by a corollary statute of repose.

In the third case, *County of Oneida* v. *Oneida Indian Nation of N. Y.*, 470 U. S. 226 (1985), the Court said in a footnote that "application of the equitable defense of laches in an action at law would be novel indeed." *Id.*, at 245, n. 16. This statement was made in light of special policies related to Indian tribes, which the Court went on to discuss in the following sentences. *Ibid.* In any event, *Oneida* did not resolve whether laches was available to the defendants, for the lower court had not ruled on the issue. *Id.*, at 244–245.

In sum, there is no reason to believe that the Court meant any of its statements in *Holmberg*, *Merck*, or *Oneida* to announce a general rule about the availability of laches in actions for legal relief, whenever Congress provides a statute of limitations. To the contrary, the Court has said more than once that a defendant could invoke laches in an action for damages (even though no assertion of the defense had actually been made in the case), despite a fixed statute of limitations. See *Morgan*, 536 U. S., at 116–119, 121–122 (laches available in hostile work environment claims seeking damages under Title VII); *Bay Area Laundry*, 522 U. S., at 205 (laches available in actions for "withdrawal liability assessment[s]" under the MPPAA). Lower courts have come to similar holdings in a wide array of circumstances—often approving not only of the availability of the laches defense, but of its application to the case at hand. *E. g.*, *Cayuga Indian Nation of N. Y.* v. *Pataki*, 413 F. 3d 266, 274–277 (CA2 2005) (laches available in a "possessory land claim" in which the District Court awarded damages, whether "character-

ized as an action at law or in equity," and dismissing the action due to laches); *Teamsters*, 283 F. 3d, at 881–883 (laches available in suits under ERISA for benefits, but not warranted in that case); *Hot Wax*, 191 F. 3d, at 822–827 ("[T]he application of the doctrine of laches to Hot Wax's Lanham Act claims [requesting damages] by the district court was proper"); *A. C. Aukerman Co.* v. *R. L. Chaides Constr. Co.*, 960 F. 2d 1020, 1030–1032, 1045–1046 (CA Fed. 1992) (en banc) (laches available in patent suit claiming damages, and remanding for whether the defense was successful); *Cornetta* v. *United States*, 851 F. 2d 1372, 1376–1383 (CA Fed. 1988) (en banc) (same, in suit seeking backpay). Even if we focus only upon federal copyright litigation, four of the six Circuits to have considered the matter have held that laches can bar claims for legal relief. See 695 F. 3d 946, 956 (CA9 2012) (case below, barring all copyright claims due to laches); *Peter Letterese & Assocs., Inc.* v. *World Inst. of Scientology Enterprises, Int'l*, 533 F. 3d 1287, 1319–1322 (CA11 2008) (laches can bar copyright claims for retrospective damages); *Chirco*, 474 F. 3d, at 234–236 ("laches can be argued 'regardless of whether the suit is at law or in equity,'" and holding that while the plaintiffs could obtain damages and an injunction, their request for additional equitable relief "smack[ed] of the inequity against which Judge Hand cautioned in *Haas* and which the judicial system should abhor" (quoting *Teamsters*, *supra*, at 881)); *Jacobsen* v. *Deseret Book Co.*, 287 F. 3d 936, 950–951 (CA10 2002) (laches available in "'rare cases,'" and failing to draw a distinction in the type of remedy sought). But see *New Era Publications Int'l* v. *Henry Holt & Co.*, 873 F. 2d 576, 584–585 (CA2 1989) (laches can bar claims for injunctive relief, but not damages, under the Copyright Act); *Lyons Partnership, L. P.* v. *Morris Costumes, Inc.*, 243 F. 3d 789, 798–799 (CA4 2001) (laches unavailable in copyright cases altogether).

Perhaps more importantly, in permitting laches to apply to copyright claims seeking equitable relief but not to those

seeking legal relief, the majority places insufficient weight upon the rules and practice of modern litigation. Since 1938, Congress and the Federal Rules have replaced what would once have been actions "at law" and actions "in equity" with the "civil action." Fed. Rule Civ. Proc. 2 ("There is one form of action—the civil action"). A federal civil action is subject to both equitable and legal defenses. Fed. Rule Civ. Proc. 8(c)(1) ("In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including: . . . estoppel . . . laches . . . [and] statute of limitations"). Accordingly, since 1938, federal courts have frequently allowed defendants to assert what were formerly equitable defenses—including laches—in what were formerly legal actions. See *supra*, at 697–698 (citing cases). Why should copyright be treated differently? Indeed, the majority concedes that "restitutional remedies" like "profits" (which are often claimed in copyright cases) defy clear classification as "equitable" or "legal." *Ante*, at 668, n. 1 (internal quotation marks omitted). Why should lower courts have to make these uneasy and unnatural distinctions?

Fifth, the majority believes it can prevent the inequities that laches seeks to avoid through the use of a different doctrine, namely, equitable estoppel. *Ante*, at 684–685. I doubt that is so. As the majority recognizes, "the two defenses are differently oriented." *Ante*, at 684. The "gravamen" of estoppel is a misleading representation by the plaintiff that the defendant relies on to his detriment. 6 Patry, Copyright §20:58, at 20–110 to 20–112. The gravamen of laches is the plaintiff's unreasonable delay, and the consequent prejudice to the defendant. *Id.*, §20:54, at 20–96. Where due to the passage of time, evidence favorable to the defense has disappeared or the defendant has continued to invest in a derivative work, what misleading representation by the plaintiff is there to estop?

In sum, as the majority says, the doctrine of laches may occupy only a " 'little place' " in a regime based upon statutes

of limitations. *Ante,* at 685 (quoting 1 D. Dobbs, Law of Remedies §2.6(1), p. 152 (2d ed. 1993)). But that place is an important one. In those few and unusual cases where a plaintiff unreasonably delays in bringing suit and consequently causes inequitable harm to the defendant, the doctrine permits a court to bring about a fair result. I see no reason to erase the doctrine from copyright's lexicon, not even in respect to limitations periods applicable to damages actions.

Consequently, with respect, I dissent.

Syllabus

HALL *v.* FLORIDA

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 12–10882. Argued March 3, 2014—Decided May 27, 2014

After this Court held that the Eighth and Fourteenth Amendments forbid the execution of persons with intellectual disability, see *Atkins* v. *Virginia*, 536 U. S. 304, 321, Hall asked a Florida state court to vacate his sentence, presenting evidence that included an IQ test score of 71. The court denied his motion, determining that a Florida statute mandated that he show an IQ score of 70 or below before being permitted to present any additional intellectual disability evidence. The State Supreme Court rejected Hall's appeal, finding the State's 70-point threshold constitutional.

Held: The State's threshold requirement, as interpreted by the Florida Supreme Court, is unconstitutional. Pp. 707–724.

(a) The Eighth Amendment, which "reaffirms the duty of the government to respect the dignity of all persons," *Roper* v. *Simmons*, 543 U. S. 551, 560, prohibits the execution of persons with intellectual disability. No legitimate penological purpose is served by executing the intellectually disabled. *Atkins*, 563 U. S., at 317, 320. Prohibiting such executions also protects the integrity of the trial process for individuals who face "a special risk of wrongful execution" because they are more likely to give false confessions, are often poor witnesses, and are less able to give meaningful assistance to their counsel. *Id.*, at 320–321. In determining whether Florida's intellectual disability definition implements these principles and *Atkins*' holding, it is proper to consider the psychiatric and professional studies that elaborate on the purpose and meaning of IQ scores and how the scores relate to *Atkins*, and to consider how the several States have implemented *Atkins*. Pp. 707–710.

(b) Florida's rule disregards established medical practice. On its face, Florida's statute could be consistent with the views of the medical community discussed in *Atkins* and with the conclusions reached here. It defines intellectual disability as the existence of concurrent deficits in intellectual and adaptive functioning, long the defining characteristic of intellectual disability. See *Atkins*, *supra*, at 308. And nothing in the statute precludes Florida from considering an IQ test's standard error of measurement (SEM), a statistical fact reflecting the test's inherent imprecision and acknowledging that an individual score is best understood as a range, *e. g.*, five points on either side of the recorded score. As interpreted by the Florida Supreme Court, however, Florida's rule

disregards established medical practice in two interrelated ways: It takes an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts would consider other evidence; and it relies on a purportedly scientific measurement of a defendant's abilities, while refusing to recognize that measurement's inherent imprecision. While professionals have long agreed that IQ test scores should be read as a range, Florida uses the test score as a fixed number, thus barring further consideration of other relevant evidence, *e. g.*, deficits in adaptive functioning, including evidence of past performance, environment, and upbringing. Pp. 710–714.

(c) The rejection of a strict 70-point cutoff in the vast majority of States and a "consistency in the trend," *Roper*, *supra*, at 567, toward recognizing the SEM provide strong evidence of consensus that society does not regard this strict cutoff as proper or humane. At most, nine States mandate a strict IQ score cutoff at 70. Thus, in 41 States, an individual in Hall's position would not be deemed automatically eligible for the death penalty. The direction of change has been consistent. Since *Atkins*, many States have passed legislation to comply with the constitutional requirement that persons with intellectual disability not be executed. Two of those States appear to set a strict cutoff at 70, but at least 11 others have either abolished the death penalty or passed legislation allowing defendants to present additional intellectual disability evidence when their IQ score is above 70. Every state legislature, save one, to have considered the issue after *Atkins* and whose law has been interpreted by its courts has taken a position contrary to Florida's. Pp. 714–718.

(d) *Atkins* acknowledges the inherent error in IQ testing and provides substantial guidance on the definition of intellectual disability. The States play a critical role in advancing the protections of *Atkins* and providing this Court with an understanding of how intellectual disability should be measured and assessed, but *Atkins* did not give them unfettered discretion to define the full scope of the constitutional protection. Clinical definitions for intellectual disability which, by their express terms, rejected a strict IQ test score cutoff at 70, and which have long included the SEM, were a fundamental premise of *Atkins*. See 536 U. S., at 309, nn. 3, 5. A fleeting mention of Florida in a citation listing States that had outlawed the execution of the intellectually disabled, *id.*, at 315, did not signal the *Atkins* Court's approval of the State's current understanding of its law, which had not yet been interpreted by the Florida Supreme Court to require a strict 70-point cutoff. Pp. 718–721.

(e) When a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to pre-

sent additional evidence of intellectual disability, including testimony regarding adaptive deficits. This legal determination of intellectual disability is distinct from a medical diagnosis but is informed by the medical community's diagnostic framework, which is of particular help here, where no alternative intellectual disability definition is presented, and where this Court and the States have placed substantial reliance on the medical profession's expertise. Pp. 721–724.

109 So. 3d 704, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and SCALIA and THOMAS, JJ., joined, *post*, p. 724.

Seth P. Waxman argued the cause for petitioner. With him on the briefs were *Danielle Spinelli*, *Megan Barbero*, *Eric C. Pinkard*, and *Mark E. Olive*.

Allen Winsor, Solicitor General of Florida, argued the cause for respondent. With him on the brief were *Pamela Jo Bondi*, Attorney General, *Carolyn M. Snurkowski*, Associate Deputy Attorney General, *Carol M. Dittmar*, Senior Assistant Attorney General, and *Diane G. DeWolf*, *Rachel E. Nordby*, *Leah A. Sevi*, and *Osvaldo Vazquez*, Deputy Solicitors General.*

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*Briefs of *amici curiae* urging reversal were filed by the American Association on Intellectual and Developmental Disabilities et al. by *James W. Ellis* and *April Land*; for the American Bar Association by *James R. Silkenat* and *John A. Freedman*; for Former Judges et al. by *Beong-Soo Kim*; and for Adam Lamperello et al. by *James J. Berles*.

Briefs of *amici curiae* urging affirmance were filed for the State of Arizona et al. by *Tom Horne*, Attorney General of Arizona, *Robert L. Ellman*, Solicitor General, *Jeffrey A. Zick*, Assistant Attorney General, *Sean D. Jordan* and *Danica L. Milios*, and by the Attorneys General for their respective States as follows: *Luther Strange* of Alabama, *Dustin McDaniel* of Arkansas, *Lawrence G. Wasden* of Idaho, *Derek Schmidt* of Kansas, *E. Scott Pruitt* of Oklahoma, *Alan Wilson* of South Carolina, *Robert E. Cooper, Jr.*, of Tennessee, and *Sean D. Reyes* of Utah; and for the Criminal Justice Legal Foundation by *Kent S. Schneidegger*.

Natalie F. P. Gilfoyle, *Paul M. Smith*, *Aaron M. Panner*, and *Carolyn Polowy* filed a brief for the American Psychological Association et al. as *amici curiae*.

JUSTICE KENNEDY delivered the opinion of the Court.

This Court has held that the Eighth and Fourteenth Amendments to the Constitution forbid the execution of persons with intellectual disability. *Atkins* v. *Virginia*, 536 U. S. 304, 321 (2002). Florida law defines intellectual disability to require an IQ test score of 70 or less. If, from test scores, a prisoner is deemed to have an IQ above 70, all further exploration of intellectual disability is foreclosed. This rigid rule, the Court now holds, creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional.

I

On February 21, 1978, Freddie Lee Hall, petitioner here, and his accomplice, Mark Ruffin, kidnaped, beat, raped, and murdered Karol Hurst, a pregnant, 21-year-old newlywed. Afterward, Hall and Ruffin drove to a convenience store they planned to rob. In the parking lot of the store, they killed Lonnie Coburn, a sheriff's deputy who attempted to apprehend them. Hall received the death penalty for both murders, although his sentence for the Coburn murder was later reduced on account of insufficient evidence of premeditation. *Hall* v. *State*, 403 So. 2d 1319, 1321 (Fla. 1981) (*per curiam*).

Hall argues that he cannot be executed because of his intellectual disability. Previous opinions of this Court have employed the term "mental retardation." This opinion uses the term "intellectual disability" to describe the identical phenomenon. See Rosa's Law, 124 Stat. 2643 (changing entries in the U. S. Code from "mental retardation" to "intellectual disability"); Schalock et al., The Renaming of *Mental Retardation*: Understanding the Change to the Term *Intellectual Disability*, 45 Intellectual & Developmental Disabilities 116 (2007). This change in terminology is approved and used in the latest edition of the Diagnostic and Statistical Manual of Mental Disorders, one of the basic texts used by psychiatrists and other experts; the manual is often referred to by its initials "DSM," followed by its edition number, *e. g.*,

"DSM–5." See American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 33 (5th ed. 2013).

When Hall was first sentenced, this Court had not yet ruled that the Eighth Amendment prohibits States from imposing the death penalty on persons with intellectual disability. See *Penry* v. *Lynaugh*, 492 U. S. 302, 340 (1989). And at the time, Florida law did not consider intellectual disability as a statutory mitigating factor.

After this Court held that capital defendants must be permitted to present nonstatutory mitigating evidence in death penalty proceedings, *Hitchcock* v. *Dugger*, 481 U. S. 393, 398–399 (1987), Hall was resentenced. Hall then presented substantial and unchallenged evidence of intellectual disability. School records indicated that his teachers identified him on numerous occasions as "[m]entally retarded." App. 482–483. Hall had been prosecuted for a different, earlier crime. His lawyer in that matter later testified that the lawyer "[c]ouldn't really understand anything [Hall] said." *Id.*, at 480. And, with respect to the murder trial given him in this case, Hall's counsel recalled that Hall could not assist in his own defense because he had "'a mental . . . level much lower than his age,'" at best comparable to the lawyer's 4-year-old daughter. Brief for Petitioner 11. A number of medical clinicians testified that, in their professional opinion, Hall was "significantly retarded," App. 507; was "mentally retarded," *id.*, at 517; and had levels of understanding "typically [seen] with toddlers," *id.*, at 523.

As explained below in more detail, an individual's ability or lack of ability to adapt or adjust to the requirements of daily life, and success or lack of success in doing so, is central to the framework followed by psychiatrists and other professionals in diagnosing intellectual disability. See DSM–5, at 37. Hall's siblings testified that there was something "very wrong" with him as a child. App. 466. Hall was "slow with speech and . . . slow to learn." *Id.*, at 490. He "walked and

talked long after his other brothers and sisters," *id.*, at 461, and had "great difficulty forming his words," *id.*, at 467.

Hall's upbringing appeared to make his deficits in adaptive functioning all the more severe. Hall was raised—in the words of the sentencing judge—"under the most horrible family circumstances imaginable." *Id.*, at 53. Although "[t]eachers and siblings alike immediately recognized [Hall] to be significantly mentally retarded . . . [t]his retardation did not garner any sympathy from his mother, but rather caused much scorn to befall him." *Id.*, at 20. Hall was "[c]onstantly beaten because he was 'slow' or because he made simple mistakes." *Ibid.* His mother "would strap [Hall] to his bed at night, with a rope thrown over a rafter. In the morning, she would awaken Hall by hoisting him up and whipping him with a belt, rope, or cord." *Ibid.* Hall was beaten "ten or fifteen times a week sometimes." *Id.*, at 477. His mother tied him "in a 'croaker' sack, swung it over a fire, and beat him," "buried him in the sand up to his neck to 'strengthen his legs,'" and "held a gun on Hall . . . while she poked [him] with sticks." *Hall* v. *State*, 614 So. 2d 473, 480 (Fla. 1993) (Barkett, C. J., dissenting).

The jury, notwithstanding this testimony, voted to sentence Hall to death, and the sentencing court adopted the jury's recommendation. The court found that there was "substantial evidence in the record" to support the finding that "Freddie Lee Hall has been mentally retarded his entire life." App. 46. Yet the court also "suspect[ed] that the defense experts [were] guilty of some professional overkill," because "[n]othing of which the experts testified could explain how a psychotic, mentally-retarded, brain-damaged, learning-disabled, speech-impaired person could formulate a plan whereby a car was stolen and a convenience store was robbed." *Id.*, at 42. The sentencing court went on to state that, even assuming the expert testimony to be accurate, "the learning disabilities, mental retardation, and other mental difficulties . . . cannot be used to justify, excuse or extenu-

ate the moral culpability of the defendant in this cause." *Id.*, at 56. Hall was again sentenced to death. The Florida Supreme Court affirmed, concluding that "Hall's argument that his mental retardation provided a pretense of moral or legal justification" had "no merit." *Hall*, 614 So. 2d, at 478. Chief Justice Barkett dissented, arguing that executing a person with intellectual disability violated the State Constitution's prohibition on cruel and unusual punishment. *Id.*, at 481–482.

In 2002, this Court ruled that the Eighth Amendment prohibited the execution of persons with intellectual disability. *Atkins* v. *Virginia*, 536 U. S., at 321. On November 30, 2004, Hall filed a motion claiming that he had intellectual disability and could not be executed. More than five years later, Florida held a hearing to consider Hall's motion. Hall again presented evidence of intellectual disability, including an IQ test score of 71. (Hall had received nine IQ evaluations in 40 years, with scores ranging from 60 to 80, Brief for Respondent 8, but the sentencing court excluded the two scores below 70 for evidentiary reasons, leaving only scores between 71 and 80. See App. 107; 109 So. 3d 704, 707 (Fla. 2012).) In response, Florida argued that Hall could not be found intellectually disabled because Florida law requires that, as a threshold matter, Hall show an IQ test score of 70 or below before presenting any additional evidence of his intellectual disability. App. 279 ("[U]nder the law, if an I. Q. is above 70, a person is not mentally retarded"). The Florida Supreme Court rejected Hall's appeal and held that Florida's 70-point threshold was constitutional. 109 So. 3d, at 707–708.

This Court granted certiorari. 571 U. S. 973 (2013).

II

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Fourteenth

Amendment applies those restrictions to the States. *Roper* v. *Simmons*, 543 U. S. 551, 560 (2005); *Furman* v. *Georgia*, 408 U. S. 238, 239–240 (1972) (*per curiam*). "By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." *Roper*, *supra*, at 560; see also *Trop* v. *Dulles*, 356 U. S. 86, 100 (1958) (plurality opinion) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man").

The Eighth Amendment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems* v. *United States*, 217 U. S. 349, 378 (1910). To enforce the Constitution's protection of human dignity, this Court looks to the "evolving standards of decency that mark the progress of a maturing society." *Trop*, 356 U. S., at 101. The Eighth Amendment's protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be. This is to affirm that the Nation's constant, unyielding purpose must be to transmit the Constitution so that its precepts and guarantees retain their meaning and force.

The Eighth Amendment prohibits certain punishments as a categorical matter. No natural-born citizen may be denationalized. *Ibid.* No person may be sentenced to death for a crime committed as a juvenile. *Roper*, *supra*, at 578. And, as relevant for this case, persons with intellectual disability may not be executed. *Atkins*, 536 U. S., at 321.

No legitimate penological purpose is served by executing a person with intellectual disability. *Id.*, at 317, 320. To do so contravenes the Eighth Amendment, for to impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being. "[P]unishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution." *Kennedy* v. *Louisiana*, 554 U. S. 407, 420 (2008). Rehabilitation, it is evident, is not an applicable rationale for the

death penalty. See *Gregg* v. *Georgia*, 428 U. S. 153, 183 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). As for deterrence, those with intellectual disability are, by reason of their condition, likely unable to make the calculated judgments that are the premise for the deterrence rationale. They have a "diminished ability" to "process information, to learn from experience, to engage in logical reasoning, or to control impulses . . . [which] make[s] it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information." *Atkins*, 536 U. S., at 320. Retributive values are also ill served by executing those with intellectual disability. The diminished capacity of the intellectually disabled lessens moral culpability and hence the retributive value of the punishment. See *id.*, at 319 ("If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution").

A further reason for not imposing the death penalty on a person who is intellectually disabled is to protect the integrity of the trial process. These persons face "a special risk of wrongful execution" because they are more likely to give false confessions, are often poor witnesses, and are less able to give meaningful assistance to their counsel. *Id.*, at 320–321. This is not to say that under current law persons with intellectual disability who "meet the law's requirements for criminal responsibility" may not be tried and punished. *Id.*, at 306. They may not, however, receive the law's most severe sentence. *Id.*, at 318.

The question this case presents is how intellectual disability must be defined in order to implement these principles and the holding of *Atkins*. To determine if Florida's cutoff rule is valid, it is proper to consider the psychiatric and professional studies that elaborate on the purpose and meaning of IQ scores to determine how the scores relate to the hold-

ing of *Atkins*. This in turn leads to a better understanding of how the legislative policies of various States, and the holdings of state courts, implement the *Atkins* rule. That understanding informs our determination whether there is a consensus that instructs how to decide the specific issue presented here. And, in conclusion, this Court must express its own independent determination reached in light of the instruction found in those sources and authorities.

III

A

That this Court, state courts, and state legislatures consult and are informed by the work of medical experts in determining intellectual disability is unsurprising. Those professionals use their learning and skills to study and consider the consequences of the classification schemes they devise in the diagnosis of persons with mental or psychiatric disorders or disabilities. Society relies upon medical and professional expertise to define and explain how to diagnose the mental condition at issue. And the definition of intellectual disability by skilled professionals has implications far beyond the confines of the death penalty: for it is relevant to education, access to social programs, and medical treatment plans. In determining who qualifies as intellectually disabled, it is proper to consult the medical community's opinions.

As the Court noted in *Atkins*, the medical community defines intellectual disability according to three criteria: significantly subaverage intellectual functioning, deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances), and onset of these deficits during the developmental period. See *id.*, at 308, n. 3; DSM–5, at 33; Brief for American Psychological Association et al. as *Amici Curiae* 12–13 (hereinafter APA Brief). This last factor, referred to as "age of onset," is not at issue.

The first and second criteria—deficits in intellectual functioning and deficits in adaptive functioning—are central here. In the context of a formal assessment, "[t]he existence of concurrent deficits in intellectual and adaptive functioning has long been the defining characteristic of intellectual disability." *Id.*, at 11.

On its face, the Florida statute could be consistent with the views of the medical community noted and discussed in *Atkins*. Florida's statute defines intellectual disability for purposes of an *Atkins* proceeding as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18." Fla. Stat. § 921.137(1) (2013). The statute further defines "significantly subaverage general intellectual functioning" as "performance that is two or more standard deviations from the mean score on a standardized intelligence test." *Ibid.* The mean IQ test score is 100. The concept of standard deviation describes how scores are dispersed in a population. Standard deviation is distinct from standard error of measurement, a concept which describes the reliability of a test and is discussed further below. The standard deviation on an IQ test is approximately 15 points, and so two standard deviations is approximately 30 points. Thus a test taker who performs "two or more standard deviations from the mean" will score approximately 30 points below the mean on an IQ test, *i. e.*, a score of approximately 70 points.

On its face this statute could be interpreted consistently with *Atkins* and with the conclusions this Court reaches in the instant case. Nothing in the statute precludes Florida from taking into account the IQ test's standard error of measurement, and as discussed below there is evidence that Florida's Legislature intended to include the measurement error in the calculation. But the Florida Supreme Court has interpreted the provisions more narrowly. It has held that a person whose test score is above 70, including a score

within the margin for measurement error, does not have an intellectual disability and is barred from presenting other evidence that would show his faculties are limited. See *Cherry* v. *State*, 959 So. 2d 702, 712–713 (Fla. 2007) (*per curiam*). That strict IQ test score cutoff of 70 is the issue in this case.

Pursuant to this mandatory cutoff, sentencing courts cannot consider even substantial and weighty evidence of intellectual disability as measured and made manifest by the defendant's failure or inability to adapt to his social and cultural environment, including medical histories, behavioral records, school tests and reports, and testimony regarding past behavior and family circumstances. This is so even though the medical community accepts that all of this evidence can be probative of intellectual disability, including for individuals who have an IQ test score above 70. See APA Brief 15–16 ("[T]he relevant clinical authorities all agree that an individual with an IQ score above 70 may properly be diagnosed with intellectual disability if significant limitations in adaptive functioning also exist"); DSM–5, at 37 ("[A] person with an IQ score above 70 may have such severe adaptive behavior problems . . . that the person's actual functioning is comparable to that of individuals with a lower IQ score").

Florida's rule disregards established medical practice in two interrelated ways. It takes an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence. It also relies on a purportedly scientific measurement of the defendant's abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise.

The professionals who design, administer, and interpret IQ tests have agreed, for years now, that IQ test scores should be read not as a single fixed number but as a range. See D. Wechsler, The Measurement of Adult Intelligence 133 (3d ed. 1944) (reporting the range of error on an early IQ test).

Each IQ test has a "standard error of measurement," *ibid.*, often referred to by the abbreviation "SEM." A test's SEM is a statistical fact, a reflection of the inherent imprecision of the test itself. See R. Furr & V. Bacharach, Psychometrics 118 (2d ed. 2014) (identifying the SEM as "one of the most important concepts in measurement theory"). An individual's IQ test score on any given exam may fluctuate for a variety of reasons. These include the test taker's health; practice from earlier tests; the environment or location of the test; the examiner's demeanor; the subjective judgment involved in scoring certain questions on the exam; and simple lucky guessing. See American Association on Intellectual and Developmental Disabilities, R. Schalock et al., User's Guide To Accompany the 11th Edition of Intellectual Disability: Definition, Classification, and Systems of Supports 22 (2012); A. Kaufman, IQ Testing 101, pp. 138–139 (2009).

The SEM reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score. For purposes of most IQ tests, the SEM means that an individual's score is best understood as a range of scores on either side of the recorded score. The SEM allows clinicians to calculate a range within which one may say an individual's true IQ score lies. See APA Brief 23 ("SEM is a unit of measurement: 1 SEM equates to a confidence of 68% that the measured score falls within a given score range, while 2 SEM provides a 95% confidence level that the measured score is within a broader range"). A score of 71, for instance, is generally considered to reflect a range between 66 and 76 with 95% confidence and a range of 68.5 and 73.5 with a 68% confidence. See DSM–5, at 37 ("Individuals with intellectual disability have scores of approximately two standard deviations or more below the population mean, including a margin for measurement error (generally +5 points). . . . [T]his involves a score of 65–75 (70 ± 5)"); APA Brief 23 ("For example, the average SEM for the WAIS–IV is 2.16 IQ test points and the average SEM for the Stanford-

Binet 5 is 2.30 IQ test points (test manuals report SEMs by different age groupings; these scores are similar, but not identical, often due to sampling error)"). Even when a person has taken multiple tests, each separate score must be assessed using the SEM, and the analysis of multiple IQ scores jointly is a complicated endeavor. See Schneider, Principles of Assessment of Aptitude and Achievement, in The Oxford Handbook of Child Psychological Assessment 286, 289–291, 318 (D. Saklofske, C. Reynolds, V. Schwean eds. 2013). In addition, because the test itself may be flawed, or administered in a consistently flawed manner, multiple examinations may result in repeated similar scores, so that even a consistent score is not conclusive evidence of intellectual functioning.

Despite these professional explanations, Florida law used the test score as a fixed number, thus barring further consideration of other evidence bearing on the question of intellectual disability. For professionals to diagnose—and for the law then to determine—whether an intellectual disability exists once the SEM applies and the individual's IQ score is 75 or below the inquiry would consider factors indicating whether the person had deficits in adaptive functioning. These include evidence of past performance, environment, and upbringing.

B

A significant majority of States implement the protections of *Atkins* by taking the SEM into account, thus acknowledging the error inherent in using a test score without necessary adjustment. This calculation provides "objective indicia of society's standards" in the context of the Eighth Amendment. *Roper*, 543 U. S., at 563. Only the Kentucky and Virginia Legislatures have adopted a fixed score cutoff identical to Florida's. Ky. Rev. Stat. Ann. § 532.130(2) (Lexis Supp. 2013); *Bowling* v. *Commonwealth*, 163 S. W. 3d 361, 375 (Ky. 2005); Va. Code Ann. § 19.2–264.3:1.1 (Lexis Supp. 2013); *Johnson* v. *Commonwealth*, 267 Va. 53, 75, 591 S. E.

2d 47, 59 (2004), vacated and remanded on other grounds, 544 U. S. 901 (2005). Alabama also may use a strict IQ score cutoff at 70, although not as a result of legislative action. See *Smith* v. *State*, 71 So. 3d 12, 20 (Ala. Crim. App. 2008) ("The Alabama Supreme Court . . . did not adopt any 'margin of error' when examining a defendant's IQ score"). Hall does not question the rule in States which use a bright-line cutoff at 75 or greater, Tr. of Oral Arg. 9, and so they are not included alongside Florida in this analysis.

In addition to these States, Arizona, Delaware, Kansas, North Carolina, and Washington have statutes which could be interpreted to provide a bright-line cutoff leading to the same result that Florida mandates in its cases. See Ariz. Rev. Stat. Ann. § 13–753(F) (West 2013); Del. Code Ann., Tit. 11, § 4209(d)(3) (2012 Supp.); Kan. Stat. Ann. § 76–12b01 (2013 Supp.); N. C. Gen. Stat. Ann. § 15A–2005 (Lexis 2013); Wash. Rev. Code § 10.95.030(2)(c) (2012). That these state laws might be interpreted to require a bright-line cutoff does not mean that they will be so interpreted, however. See, *e. g.*, *State* v. *Vela*, 279 Neb. 94, 126, 137, 777 N. W. 2d 266, 292, 299 (2010) (Although Nebraska's statute specifies "[a]n intelligence quotient of seventy or below on a reliably administered intelligence quotient test," "[t]he district court found that [the defendant's] score of 75 on the [IQ test], considered in light of the standard error of measurement, could be considered as subaverage general intellectual functioning for purposes of diagnosing mental retardation").

Arizona's statute appears to set a broad statutory cutoff at 70, Ariz. Rev. Stat. Ann. § 13–753(F), but another provision instructs courts to "take into account the margin of error for a test administered," § 13–753(K)(5). How courts are meant to interpret the statute in a situation like Hall's is not altogether clear. The principal Arizona case on the matter, *State* v. *Roque*, 213 Ariz. 193, 141 P. 3d 368 (2006), states that "the statute accounts for margin of error by requiring multiple tests," and that "if the defendant achieves a

full-scale score of 70 or below on any one of the tests, then the court proceeds to a hearing." *Id.*, at 228, 141 P. 3d, at 403. But that case also notes that the defendant had an IQ score of 80, well outside the margin of error, and that all but one of the subparts of the IQ test were "above 75." *Ibid.*

Kansas has not had an execution in almost five decades, and so its laws and jurisprudence on this issue are unlikely to receive attention on this specific question. See *Atkins*, 536 U. S., at 316 ("[E]ven in those States that allow the execution of mentally retarded offenders, the practice is uncommon. Some States . . . continue to authorize executions, but none have been carried out in decades. Thus there is little need to pursue legislation barring the execution of the mentally retarded in those States"). Delaware has executed three individuals in the past decade, while Washington has executed one person, and has recently suspended its death penalty. None of the four individuals executed recently in those States appears to have brought a claim similar to that advanced here.

Thus, at most nine States mandate a strict IQ score cutoff at 70. Of these, four States (Delaware, Kansas, North Carolina, and Washington) appear not to have considered the issue in their courts. On the other side of the ledger stand the 18 States that have abolished the death penalty, either in full or for new offenses, and Oregon, which has suspended the death penalty and executed only two individuals in the past 40 years. See *Roper*, 543 U. S., at 574 ("[The] Court should have considered those States that had abandoned the death penalty altogether as part of the consensus against the juvenile death penalty"). In those States, of course, a person in Hall's position could not be executed even without a finding of intellectual disability. Thus in 41 States an individual in Hall's position—an individual with an IQ score of 71—would not be deemed automatically eligible for the death penalty.

These aggregate numbers are not the only considerations bearing on a determination of consensus. Consistency of the direction of change is also relevant. See *id.*, at 565–566 (quoting *Atkins*, *supra*, at 315). Since *Atkins*, many States have passed legislation to comply with the constitutional requirement that persons with intellectual disability not be executed. Two of these States, Virginia and Delaware, appear to set a strict cutoff at 70, although as discussed, Delaware's courts have yet to interpret the law. In contrast, at least 11 States have either abolished the death penalty or passed legislation allowing defendants to present additional evidence of intellectual disability when their IQ test score is above 70.

Since *Atkins*, five States have abolished the death penalty through legislation. See 2012 Conn. Pub. Acts no. 12–5; Ill. Comp. Stat., ch. 725, § 119–1 (West 2012); Md. Correc. Servs. Code Ann. § 3–901 *et seq.* (Lexis 2008); N. J. Stat. Ann. § 2C:11–3(b)(1) (West Supp. 2013); 2009 N. M. Laws ch. 11, §§ 5–7. In addition, the New York Court of Appeals invalidated New York's death penalty under the State Constitution in 2004, see *People* v. *LeValle*, 3 N. Y. 3d 88, 817 N. E. 2d 341, and legislation has not been passed to reinstate it. And when it did impose the death penalty, New York did not employ an IQ cutoff in determining intellectual disability. N. Y. Crim. Proc. Law Ann. § 400.27(12)(e) (West 2005).

In addition to these States, at least five others have passed legislation allowing a defendant to present additional evidence of intellectual disability even when an IQ test score is above 70. See Cal. Penal Code Ann. § 1376 (West Supp. 2014) (no IQ cutoff); Idaho Code § 19–2515A (Lexis Supp. 2013) ("seventy (70) or below"); *Pizzutto* v. *State*, 146 Idaho 720, 729, 202 P. 3d 642, 651 (2008) ("The alleged error in IQ testing is plus or minus five points. The district court was entitled to draw reasonable inferences from the undisputed facts"); La. Code Crim. Proc. Ann., Art. 905.5.1 (West Supp. 2014) (no IQ cutoff); Nev. Rev. Stat. § 174.098.7 (2013) (no

IQ cutoff); Utah Code Ann. § 77–15a–102 (Lexis 2012) (no IQ cutoff). The U. S. Code likewise does not set a strict IQ cutoff. See 18 U. S. C. § 3596(c). And no State that previously allowed defendants with an IQ score over 70 to present additional evidence of intellectual disability has modified its law to create a strict cutoff at 70. Cf. *Roper*, *supra*, at 566 ("Since *Stanford* v. *Kentucky*, 492 U. S. 361 (1989), no State that previously prohibited capital punishment for juveniles has reinstated it").

In summary, every state legislature to have considered the issue after *Atkins*—save Virginia's—and whose law has been interpreted by its courts has taken a position contrary to that of Florida. Indeed, the Florida Legislature, which passed the relevant legislation prior to *Atkins*, might well have believed that its law would not create a fixed cutoff at 70. The staff analysis accompanying the 2001 bill states that it "does not contain a set IQ level . . . . Two standard deviations from these tests is approximately a 70 IQ, although it can be extended up to 75." Fla. Senate Staff Analysis and Economic Impact Statement, CS/SB 238, p. 11 (Feb. 14, 2001). But the Florida Supreme Court interpreted the law to require a bright-line cutoff at 70, see *Cherry*, 959 So. 2d, at 712–713, and the Court is bound by that interpretation.

The rejection of the strict 70 cutoff in the vast majority of States and the "consistency in the trend," *Roper*, *supra*, at 567, toward recognizing the SEM provide strong evidence of consensus that our society does not regard this strict cutoff as proper or humane.

C

Atkins itself acknowledges the inherent error in IQ testing. It is true that *Atkins* "did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation" falls within the protection of the Eighth Amendment. *Bobby* v. *Bies*, 556 U. S. 825, 831 (2009). In *Atkins*, the Court stated:

> "Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus. As was our approach in *Ford* v. *Wainwright* with regard to insanity, 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'" 536 U. S., at 317 (quoting *Ford* v. *Wainwright*, 477 U. S. 399, 416–417 (1986); citation omitted).

As discussed above, the States play a critical role in advancing protections and providing the Court with information that contributes to an understanding of how intellectual disability should be measured and assessed. But *Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection.

The *Atkins* Court twice cited definitions of intellectual disability which, by their express terms, rejected a strict IQ test score cutoff at 70. *Atkins* first cited the definition provided in the DSM–IV: "'Mild' mental retardation is typically used to describe people with an IQ level of 50–55 to approximately 70." 536 U. S., at 308, n. 3 (citing DSM 41 (4th ed. 2000)). The Court later noted that "'an IQ between 70 and 75 or lower . . . is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition.'" 536 U. S., at 309, n. 5. Furthermore, immediately after the Court declared that it left "'to the States the task of developing appropriate ways to enforce the constitutional restriction,'" *id.*, at 317, the Court stated in an accompanying footnote that "[t]he [state] statutory definitions of mental retardation are not identical, but generally conform to the clinical definitions," *ibid.*

Thus *Atkins* itself not only cited clinical definitions for intellectual disability but also noted that the States' standards, on which the Court based its own conclusion, conformed to those definitions. In the words of *Atkins*, those persons who meet the "clinical definitions" of intellectual disability

"by definition . . . have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Id.*, at 318. Thus, they bear "diminish[ed] . . . personal culpability." *Ibid.* The clinical definitions of intellectual disability, which take into account that IQ scores represent a range, not a fixed number, were a fundamental premise of *Atkins*. And those clinical definitions have long included the SEM. See DSM 28 (rev. 3d ed. 1987) ("Since any measurement is fallible, an IQ score is generally thought to involve an error of measurement of approximately five points; hence, an IQ of 70 is considered to represent a band or zone of 65 to 75. Treating the IQ with some flexibility permits inclusion in the Mental Retardation category of people with IQs somewhat higher than 70 who exhibit significant deficits in adaptive behavior").

Respondent argues that the current Florida law was favorably cited by the *Atkins* Court. See Brief for Respondent 18 ("As evidence of the national consensus, the Court specifically cited Florida's statute at issue here, which has not substantively changed"). While *Atkins* did refer to Florida's law in a citation listing States which had outlawed the execution of the intellectually disabled, 536 U. S., at 315, that fleeting mention did not signal the Court's approval of Florida's current understanding of the law. As discussed above, when *Atkins* was decided the Florida Supreme Court had not yet interpreted the law to require a strict IQ cutoff at 70. That new interpretation runs counter to the clinical definition cited throughout *Atkins* and to Florida's own legislative report indicating this kind of cutoff need not be used.

Respondent's argument also conflicts with the logic of *Atkins* and the Eighth Amendment. If the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human

dignity would not become a reality. This Court thus reads *Atkins* to provide substantial guidance on the definition of intellectual disability.

D

The actions of the States and the precedents of this Court "give us essential instruction," *Roper*, 543 U. S., at 564, but the inquiry must go further. "[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Coker* v. *Georgia*, 433 U. S. 584, 597 (1977) (plurality opinion). That exercise of independent judgment is the Court's judicial duty. See *Roper*, *supra*, at 574 ("[T]o the extent *Stanford* was based on a rejection of the idea that this Court is required to bring its independent judgment to bear on the proportionality of the death penalty for a particular class of crimes or offenders, it suffices to note that this rejection was inconsistent with prior Eighth Amendment decisions" (citation omitted)).

In this Court's independent judgment, the Florida statute, as interpreted by its courts, is unconstitutional.

In addition to the views of the States and the Court's precedent, this determination is informed by the views of medical experts. These views do not dictate the Court's decision, yet the Court does not disregard these informed assessments. See *Kansas* v. *Crane*, 534 U. S. 407, 413 (2002) ("[T]he science of psychiatry . . . informs but does not control ultimate legal determinations . . . "). It is the Court's duty to interpret the Constitution, but it need not do so in isolation. The legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework. *Atkins* itself points to the diagnostic criteria employed by psychiatric professionals. And the professional community's teachings are of particular help in this case, where no alternative definition of intellectual disability is presented and where this Court

and the States have placed substantial reliance on the expertise of the medical profession.

By failing to take into account the SEM and setting a strict cutoff at 70, Florida "goes against the unanimous professional consensus." APA Brief 15. Neither Florida nor its *amici* point to a single medical professional who supports this cutoff. The DSM–5 repudiates it: "IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks." DSM–5, at 37. This statement well captures the Court's independent assessment that an individual with an IQ test score "between 70 and 75 or lower," *Atkins*, *supra*, at 309, n. 5, may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning.

The flaws in Florida's law are the result of the inherent error in IQ tests themselves. An IQ score is an approximation, not a final and infallible assessment of intellectual functioning. See APA Brief 24 ("[I]t is standard pyschometric practice to report the 'estimates of relevant reliabilities and standard errors of measurement' when reporting a test score"); *ibid.* (the margin of error is "inherent to the accuracy of IQ scores"); Furr, Psychometrics, at 119 ("[T]he standard error of measurement is an important psychometric value with implications for applied measurement"). The SEM is not a concept peculiar to the psychiatric profession and IQ tests. It is a measure that is recognized and relied upon by those who create and devise tests of all sorts. *Id.*, at 118 (identifying the SEM as "one of the most important concepts in measurement theory").

This awareness of the IQ test's limits is of particular importance when conducting the conjunctive assessment necessary to assess an individual's intellectual ability. See American Association on Intellectual and Developmental Disabilities, Intellectual Disability: Definition, Classification,

and Systems of Supports 40 (11th ed. 2010) ("It must be stressed that the diagnosis of [intellectual disability] is intended to reflect a clinical judgment rather than an actuarial determination").

Intellectual disability is a condition, not a number. See DSM–5, at 37. Courts must recognize, as does the medical community, that the IQ test is imprecise. This is not to say that an IQ test score is unhelpful. It is of considerable significance, as the medical community recognizes. But in using these scores to assess a defendant's eligibility for the death penalty, a State must afford these test scores the same studied skepticism that those who design and use the tests do, and understand that an IQ test score represents a range rather than a fixed number. A State that ignores the inherent imprecision of these tests risks executing a person who suffers from intellectual disability. See APA Brief 17 ("Under the universally accepted clinical standards for diagnosing intellectual disability, the court's determination that Mr. Hall is not intellectually disabled cannot be considered valid").

This Court agrees with the medical experts that when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits.

It is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment. See DSM–5, at 37 ("[A] person with an IQ score above 70 may have such severe adaptive behavior problems . . . that the person's actual functioning is comparable to that of individuals with a lower IQ score"). The Florida statute, as interpreted by its courts, misuses the IQ score on its own terms; and this, in turn, bars consideration of evidence that must be considered in determining whether a defendant in a capital case has intellectual disability. Florida's rule is invalid under the Constitution's Cruel and Unusual Punishments Clause.

E

Florida seeks to execute a man because he scored a 71 instead of 70 on an IQ test. Florida is one of just a few States to have this rigid rule. Florida's rule misconstrues the Court's statements in *Atkins* that intellectual disability is characterized by an IQ of "approximately 70." 536 U. S., at 308, n. 3. Florida's rule is in direct opposition to the views of those who design, administer, and interpret the IQ test. By failing to take into account the standard error of measurement, Florida's law not only contradicts the test's own design but also bars an essential part of a sentencing court's inquiry into adaptive functioning. Freddie Lee Hall may or may not be intellectually disabled, but the law requires that he have the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime.

The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution. Florida's law contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world. The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects.

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

So ordered.

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

In *Atkins* v. *Virginia*, 536 U. S. 304 (2002), the Court held that the Eighth Amendment prohibits a death sentence for defendants who are intellectually disabled but does not mandate the use of a single method for identifying such defendants. Today, the Court overrules the latter holding based

largely on the positions adopted by private professional associations. In taking this step, the Court sharply departs from the framework prescribed in prior Eighth Amendment cases and adopts a uniform national rule that is both conceptually unsound and likely to result in confusion. I therefore respectfully dissent.

I

The Court's approach in this case marks a new and most unwise turn in our Eighth Amendment case law. In *Atkins* and other cases, the Court held that the prohibition of cruel and unusual punishment embodies the "evolving standards of decency that mark the progress of a maturing society," and the Court explained that "those evolving standards should be informed by objective factors to the maximum possible extent." *Id.*, at 312 (internal quotation marks omitted). In addition, the Court "pinpointed that the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Ibid.*

In these prior cases, when the Court referred to the evolving standards of a maturing "society," the Court meant the standards of *American society as a whole*. Now, however, the Court strikes down a state law based on the evolving standards of *professional societies*, most notably the American Psychiatric Association (APA). The Court begins its analysis with the views of those associations, see *ante*, at 710–714, and then, after briefly discussing the enactments of state legislatures, see *ante*, at 714–718, returns to the associations' views in interpreting *Atkins* and in exercising the Court's "independent judgment" on the constitutionality of Florida's law, see *ante*, at 718–723. This approach cannot be reconciled with the framework prescribed by our Eighth Amendment cases.

A

Under this Court's modern Eighth Amendment precedents, whether a punishment is "cruel and unusual" depends

on currently prevailing societal norms, and the Court has long held that laws enacted by state legislatures provide the "clearest and most reliable objective evidence of contemporary values," *Penry* v. *Lynaugh*, 492 U. S. 302, 331 (1989). This is so because "in a democratic society[,] legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people," *Gregg* v. *Georgia*, 428 U. S. 153, 175–176 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (internal quotation marks omitted). Under this approach, as originally conceived, the Court first asked whether a challenged practice contravened a clear national consensus evidenced by state legislation, and only if such a consensus was found would the Court go on and ask "whether there is reason to disagree with [the States'] judgment." *Atkins*, 536 U. S., at 313.

Invoking this two-step procedure, *Atkins* held that the Eighth Amendment forbids the execution of defendants who are intellectually disabled. See *id.*, at 315–316. Critical to the Court's analysis was the conclusion that "today our society views mentally retarded offenders as categorically less culpable than the average criminal." *Id.*, at 316. "This consensus," the Court continued, "unquestionably reflects widespread judgment about . . . the relationship between mental retardation and the penological purposes served by the death penalty." *Id.*, at 317.

While *Atkins* identified a consensus against the execution of the intellectually disabled, the Court observed that there was "serious disagreement" among the States with respect to the best method for "determining which offenders are in fact retarded." *Ibid.* The Court therefore "le[ft] to the States the task of developing appropriate ways" to identify these defendants. *Ibid.* (internal quotation marks and alteration omitted). As we noted just five years ago, *Atkins* "did not provide definitive procedural or substantive guides for determining when a person" is intellectually disabled. *Bobby* v. *Bies*, 556 U. S. 825, 831 (2009).

B

Consistent with the role that *Atkins* left for the States, Florida follows the procedure now at issue. As we explained in *Atkins*, in order for a defendant to qualify as intellectually disabled, three separate requirements must be met: It must be shown that a defendant has both (1) significantly subaverage intellectual functioning and (2) deficits in adaptive behavior, and that (3) the onset of both factors occurred before the age of 18. See 536 U. S., at 318; *ante*, at 710. In implementing this framework, Florida has determined that the first requirement cannot be satisfied if the defendant scores higher than 70 on IQ tests, the long-accepted method of measuring intellectual functioning.[1] The Court today holds that this scheme offends the Eighth Amendment. The Court objects that Florida's approach treats IQ test scores as conclusive and ignores the fact that an IQ score might not reflect "true" IQ because of errors in measurement. The Court then concludes that a State must view a defendant's IQ as a range of potential scores calculated using a statistical concept known as the "standard error of measurement" or SEM. See Part II–B–1, *infra*. The Court holds that if this range includes an IQ of 70 or below (the accepted level for intellectual disability), the defendant must be permitted to produce other evidence of intellectual disability in addition to IQ scores.

I see no support for this holding in our traditional approach for identifying our society's evolving standards of decency. Under any fair analysis of current state laws, the same absence of a consensus that this Court found in *Atkins* persists today. It is telling that Hall himself does not rely

[1] See, *e. g.*, American Association of Intellectual and Developmental Disabilities (AAIDD), Intellectual Disability 10–11 (11th ed. 2010) (hereinafter AAIDD 11th ed.) (cataloging history of IQ "cutoff criteria" since 1959). Earlier publications of the AAIDD were published under its former name, the American Association on Mental Retardation (hereinafter AAMR).

on a consensus among States. He candidly argues instead that "the precise number of States that share Florida's approach is immaterial." Reply Brief 2.

The Court's analysis is more aggressive. According to the Court, a "significant majority of States" reject Florida's "strict 70 cutoff" and instead take "the SEM into account" when deciding whether a defendant meets the first requirement of the intellectual-disability test. *Ante*, at 714, 718. On the Court's count, "at most nine States mandate a strict IQ score cutoff at 70," *ante*, at 716; 22 States allow defendants to present "additional evidence" when an individual's test score is between 70 and 75, *ante*, at 722;[2] and 19 States have abolished the death penalty or have long suspended its operation, *ante*, at 716. From these numbers, the Court concludes that "in 41 States" a defendant "with an IQ score of 71" would "not be deemed automatically eligible for the death penalty." *Ibid.*[3] This analysis is deeply flawed.

To begin, in addition to the eight other States that the Court recognizes as having rules similar to Florida's, one more, Idaho, does not appear to require courts to take the SEM into account in rejecting a claim of intellectual disability.[4] And of the remaining 21 States with the death penalty, 9 have either said nothing about the SEM or have not clari-

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[2] I assume that by "additional evidence" the Court means evidence other than further IQ testing because Florida's rule already "allows for multiple evaluations, and . . . [petitioner] could have sought still more testing." Brief for Respondent 44. See also Brief for Petitioner 50; App. 107–108.

[3] As I discuss below, the Florida Supreme Court did not base its decision on a finding that Hall's IQ was 71. The Florida courts considered several IQ scores, all above 70. See App. 107–108; Brief for Petitioner 50.

[4] See Idaho Code § 19–2515A(1)(b) (Lexis Cum. Supp. 2013); *Pizzuto* v. *State*, 146 Idaho 720, 729, 202 P. 3d 642, 651 (2008) (stating that "the legislature did not require that the IQ score be within five points of 70 or below" and giving the District Court discretion to interpret the defendant's IQ).

fied whether they require its use.[5] Accordingly, of the death-penalty States, 10 (including Florida) do not require that the SEM be taken into account, 12 consider the SEM, and 9 have not taken a definitive position on this question. These statistics cannot be regarded as establishing a national consensus against Florida's approach.

Attempting to circumvent these statistics, the Court includes in its count the 19 States that never impose the death penalty, but this maneuver cannot be justified. It is true that the Court has counted non-death-penalty States in some prior Eighth Amendment cases, but those cases concerned the substantive question whether a class of individuals should be categorically ineligible for the death penalty. In *Roper* v. *Simmons*, 543 U. S. 551 (2005), for example, the Court counted non-death-penalty States as part of the consensus against the imposition of a capital sentence for a crime committed by a minor. *Id.*, at 574. The Court reasoned that a State's decision to abolish the death penalty necessarily "demonstrates a judgment that the death penalty is inappropriate for all offenders, including juveniles." *Ibid.*

No similar reasoning is possible here. The fact that a State has abolished the death penalty says nothing about

[5] Montana, New Hampshire, and Wyoming have not ruled on the subject. Two States have not defined "significantly subaverage" intellectual functioning. See Colo. Rev. Stat. Ann. § 18–1.3–1101(2) (2013); S. C. Code Ann. § 16–3–20 (2003 and 2013 Cum. Supp.); *Franklin* v. *Maynard*, 356 S. C. 276, 278–279, 588 S. E. 2d 604, 605 (2003) (*per curiam*). Two States have statutes that impose rebuttable presumptions of intellectual disability if a defendant's IQ is below 65 or 70 but have not said whether a defendant would be allowed to provide further evidence if his IQ were over 70. See Ark. Code Ann. § 5–4–618 (2013); Neb. Rev. Stat. § 28–105.01 (2013 Supp.). One State's Supreme Court mentioned measurement errors but only to explain why a defendant must prove deficits in adaptive behavior despite having an IQ below 70. See *Stripling* v. *State*, 261 Ga. 1, 3, 401 S. E. 2d 500, 504 (1991). Another State's Supreme Court mentioned the SEM in responding to an argument by the defendant, but it did not suggest that the SEM was legally relevant. See *Goodwin* v. *State*, 191 S. W. 3d 20, 30–31, and n. 7 (Mo. 2006).

how that State would resolve the evidentiary problem of identifying defendants who are intellectually disabled. As I explain below, a State may reasonably conclude that Florida's approach is fairer than and just as accurate as the approach that the Court now requires, and therefore it cannot be inferred that a non-death-penalty State, if forced to choose between the two approaches, would necessarily select the Court's. For all these reasons, it is quite wrong for the Court to proclaim that "the vast majority of States" have rejected Florida's approach. *Ante*, at 718.

Not only are the States divided on the question whether the SEM should play a role in determining whether a capital defendant is intellectually disabled, but the States that require consideration of the SEM do not agree on the role that the SEM should play. Those States differ, for example, on the sort of evidence that can be introduced when IQ testing reveals an IQ over 70. Some require further evidence of *intellectual* deficits, while others permit the defendant to move on to the second prong of the test and submit evidence of deficits in *adaptive* behavior.[6] The fairest assessment of the current situation is that the States have adopted a multitude of approaches to a very difficult question.

In light of all this, the resolution of this case should be straightforward: Just as there was no methodological consensus among the States at the time of *Atkins*, there is no such consensus today. And in the absence of such a consensus, we have no basis for holding that Florida's method contravenes our society's standards of decency.

C

Perhaps because it recognizes the weakness of its arguments about a true national consensus, the Court places heavy reliance on the views (some only recently announced) of professional organizations, but the Court attempts to

[6] Compare *Ybarra* v. *State*, 127 Nev. 47, 55, 247 P. 3d 269, 274 (2011), with *State* v. *Dunn*, 2001–1635, pp. 25–26 (La. 5/11/10), 41 So. 3d 454, 470.

downplay the degree to which its decision is dependent upon the views of these private groups. In a game attempt to shoehorn the views of these associations into the national-consensus calculus, the Court reasons as follows. The views of these associations, the Court states, help in determining "how [IQ] scores relate to the holding in *Atkins*"; "[t]his in turn leads to a better understanding of how the legislative policies of various States, and the holdings of state courts, implement the *Atkins* rule"; and "[t]hat understanding informs our determination whether there is a consensus that instructs how to decide the specific issue presented here." *Ante*, at 709–710.

I cannot follow the Court's logic. Under our modern Eighth Amendment cases, what counts are our society's standards—which is to say, the standards of the American people—not the standards of professional associations, which at best represent the views of a small professional elite.

The Court also mistakenly suggests that its methodology is dictated by *Atkins*. See *ante*, at 718–721. On the contrary, *Atkins* expressly left "to the States" the task of defining intellectual disability. And although the *Atkins* Court perceived a "professional consensus" about the best procedure to be used in identifying the intellectually disabled, the *Atkins* Court declined to import that view into the law. 536 U. S., at 316, n. 21. Instead, the Court made clear that this professional consensus was "by no means dispositive." *Id.*, at 317, n. 21; see *id.*, at 317, and n. 22.

D

The Court's reliance on the views of professional associations will also lead to serious practical problems. I will briefly note a few.

First, because the views of professional associations often change,[7] tying Eighth Amendment law to these views will

[7] See Forensic Psychology and Neuropsychology for Criminal and Civil Cases 57 (H. Hall ed. 2008) (hereinafter Forensic Psychology).

lead to instability and continue to fuel protracted litigation. This danger is dramatically illustrated by the most recent publication of the APA, on which the Court relies. This publication fundamentally alters the first prong of the long-standing, two-pronged definition of intellectual disability that was embraced by *Atkins* and has been adopted by most States. In this new publication, the APA discards "significantly subaverage intellectual functioning" as an element of the intellectual-disability test.[8] Elevating the APA's current views to constitutional significance therefore throws into question the basic approach that *Atkins* approved and that most of the States have followed.

It is also noteworthy that changes adopted by professional associations are sometimes rescinded. For example, in 1992 the AAIDD extended the baseline "intellectual functioning cutoff" from an "IQ of 70 or below" to a "score of approximately 70 to 75 or below." AAIDD 11th ed. 10 (Table 1.3) (boldface deleted); see 2 Kaplan & Sadock's Comprehensive Textbook of Psychiatry 3449 (B. Sadock, V. Sadock, & P. Ruiz eds., 9th ed. 2009) (hereinafter Kaplan & Sadock's). That change "generated much controversy"; by 2000, "only 4 states used the 1992 AAIDD definition, with 44 states continuing to use the 1983 definition." *Ibid.* And in the 2002 AAIDD, the baseline "IQ cut-off was changed" back to approximately "70 or less." *Ibid.*

Second, the Court's approach implicitly calls upon the judiciary either to follow every new change in the thinking of these professional organizations or to judge the validity of each new change. Here, for example, the Court tacitly makes the judgment that the diagnostic criteria for intellectual disability that prevailed at the time when *Atkins* was decided are no longer legitimate. The publications that *At-*

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[8] Compare APA, Diagnostic and Statistical Manual of Mental Disorders 39, 41, 42 (rev. 4th ed. 2000) (hereinafter DSM–IV–TR), with APA, Diagnostic and Statistical Manual of Mental Disorders 33, 809 (5th ed. 2013) (hereinafter DSM–5).

kins cited differ markedly from more recent editions now endorsed by the Court. See 536 U. S., at 308, n. 3.

Third, the Court's approach requires the judiciary to determine which professional organizations are entitled to special deference. And what if professional organizations disagree? The Court provides no guidance for deciding which organizations' views should govern.

Fourth, the Court binds Eighth Amendment law to definitions of intellectual disability that are promulgated for use in making a variety of decisions that are quite different from the decision whether the imposition of a death sentence in a particular case would serve a valid penological end. In a death-penalty case, intellectual functioning is important because of its correlation with the ability to understand the gravity of the crime and the purpose of the penalty, as well as the ability to resist a momentary impulse or the influence of others. See *id.*, at 318, 320. By contrast, in determining eligibility for social services, adaptive functioning may be much more important. Cf. DSM–IV–TR, at xxxvii (clinical "considerations" may not be "relevant to legal judgments" that turn on "individual responsibility"); DSM–5, at 20 (similar). Practical problems like these call for legislative judgments, not judicial resolution.

II

Because I find no consensus among the States, I would not independently assess the method that Florida has adopted for determining intellectual disability. But even if it were appropriate for us to look beyond the evidence of societal standards, I could not conclude that Florida's method is unconstitutional. The Court faults Florida for "tak[ing] an IQ score as final and conclusive evidence of a defendant's intellectual capacity" and for failing to recognize that an IQ score may be imprecise. *Ante*, at 712. In my view, however, Florida has adopted a sensible standard that comports with the longstanding belief that IQ tests are the best measure of

intellectual functioning. And although the Court entirely ignores this part of the Florida scheme, the State takes into account the inevitable risk of testing error by permitting defendants to introduce multiple scores.

In contrast, the Court establishes a standard that conflates what have long been understood to be two *independent* requirements for proving intellectual disability: (1) significantly subaverage intellectual functioning and (2) deficits in adaptive behavior. The Court also mandates use of an alternative method of dealing with the risk of testing error without any hint that it is more accurate than Florida's approach.

A

1

The first supposed error that the Court identifies is that Florida "takes an IQ score" as "conclusive evidence" of intellectual functioning. *Ibid.* As an initial matter, one would get the impression from reading the Court's opinion that Hall introduced only one test score (of 71). See *ante*, at 716. In truth, the Florida courts considered multiple scores, all above 70, on the particular IQ test that Hall has dubbed the "gold standard." See Brief for Petitioner 50; App. 107–108.[9] Florida's statute imposes no limit on the number of IQ scores that a defendant may introduce, so the Court is simply wrong to analyze the Florida system as one that views a *single* IQ score above 70 as "final and conclusive evidence" that a defendant does not suffer from subaverage intellectual functioning. See Brief for Respondent 44 ("Florida's Rule allows for multiple evaluations, and if Hall believed a statistical error rate prevented any of his tests from reflecting his true score, he could have sought still more testing").

[9] See Brief for Petitioner 50, and n. 22 (listing his valid IQ scores of 71, 72, 73, and 80). Hall alleges that he also scored a 69 on a Wechsler test, but that score was not admitted into evidence because of doubts about its validity. App. 105–107. Hall does not allege that any potential "practice effect" skewed his scores.

The proper question to ask, therefore, is whether Florida's actual approach falls outside the range of discretion allowed by *Atkins*. The Court offers no persuasive reason for concluding that it does. Indeed, the Court's opinion never identifies what other evidence of intellectual functioning it would require Florida to admit. As we recognized in *Atkins*, the longstanding practices of the States, and at least the previous views of professional organizations, seem to reflect the understanding that IQ scores are the best way to measure intellectual functioning. See 536 U. S., at 316.[10] Until its most recent publication, the APA, for example, ranked the severity of intellectual disability exclusively by IQ scores, necessarily pinpointing the onset of the disability according to IQ. See DSM–IV–TR, at 42.

We have been presented with no solid evidence that the longstanding reliance on multiple IQ test scores as a measure of intellectual functioning is so unreasonable or outside the ordinary as to be unconstitutional. The Court has certainly not supplied any such information.

2

If the Court had merely held that Florida must permit defendants to introduce additional evidence (whatever that might be) of significantly subaverage intellectual functioning, its decision would be more limited in scope. But as I understand the Court's opinion, it also holds that when IQ tests reveal an IQ between 71 and 75, defendants must be allowed to present evidence of deficits in *adaptive behavior*—that is,

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[10] See AAIDD 11th ed. 10 (cataloguing history of IQ "cutoff criteria" since 1959); DSM–IV–TR, at 39 ("Mental Retardation" is "characterized by significantly subaverage intellectual functioning (an IQ of approximately 70 or below) . . . " (boldface deleted)); *id.*, at 41 ("General intellectual functioning is defined by the intelligence quotient . . . " (emphasis deleted)); AAMR, Mental Retardation 14 (10th ed. 2002) (hereinafter AAMR 10th ed.) ("[I]ntellectual functioning is still best represented by IQ scores . . . ").

the *second* prong of the intellectual-disability test. See *ante*, at 711–714, 722. That is a remarkable change in what we took to be a universal understanding of intellectual disability just 12 years ago.

In *Atkins*, we instructed that "clinical definitions of mental retardation require *not only* [(1)] subaverage intellectual functioning, *but also* [(2)] significant limitations in adaptive skills." 536 U. S., at 318 (emphasis and alterations added). That is the approach taken by the vast majority of States.[11] As the Court correctly recognizes, most States require "'*concurrent* deficits'" in intellectual functioning and adaptive behavior, requiring defendants to prove *both*. *Ante*, at 711 (emphasis added).[12]

Yet the Court now holds that when a defendant's IQ score is as high as 75, a court must "consider factors indicating whether the person has deficits in adaptive functioning." *Ante*, at 714; see *ante*, at 711–713, 722. In other words, even when a defendant has failed to show that he meets the first prong of the well-accepted standard for intellectual disability (significantly subaverage intellectual functioning), evidence of the second prong (deficits in adaptive behavior) can establish intellectual disability.

The Court offers little explanation for this sea change. It asserts vaguely that "[i]t is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment." *Ante*, at 723. But the Court ignores the fact that deficits in adaptive behavior cannot be used to establish deficits in men-

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[11] See, *e. g.*, Del. Code Ann., Tit. 11, § 4209 (2007); Idaho Code § 19–2515A; Nev. Rev. Stat. § 174.098 (2013); Va. Code Ann. § 19.2–264.3:1.1 (Lexis Cum. Supp. 2013).

[12] The longstanding views of professional organizations have also been that intellectual functioning and adaptive behavior are independent factors. See, *e. g.*, DSM–IV–TR, at 39. These organizations might recommend examining evidence of adaptive behavior even when an IQ is above 70, but that sheds no light on what the *legal* rule should be given that most States appear to require defendants to prove each prong separately by a preponderance of the evidence.

tal functioning because the two prongs are meant to show distinct components of intellectual disability. "[I]ntellectual functions" include "reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience," while adaptive functioning refers to the ability "to meet developmental and sociocultural standards for personal independence and social responsibility." DSM–5, at 33. Strong evidence of a deficit in adaptive behavior does not necessarily demonstrate a deficit in intellectual functioning. And without the latter, a person simply cannot be classified as intellectually disabled.

It is particularly troubling to relax the proof requirements for the intellectual-functioning prong because that is the prong that most directly relates to the concerns that led to our primary holding in *Atkins*. There, we explained that "the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses"—*i. e.*, diminished *intellectual* functioning—"make it less likely that [a defendant] can process the information of the possibility of execution as a penalty" and therefore be deterred from committing murders. 536 U. S., at 320; see also *id.*, at 318 ("[T]hey often act on impulse rather than pursuant to a premeditated plan . . . "); see also *ante*, at 709. A defendant who does not display significantly subaverage intellectual functioning is therefore not among the class of defendants we identified in *Atkins*.

Finally, relying primarily on proof of adaptive deficits will produce inequities in the administration of capital punishment. As far as I can tell, adaptive behavior is a malleable factor without "firm theoretical and empirical roots." See 2 Kaplan & Sadock's 3448. No consensus exists among States or medical practitioners about what facts are most critical in analyzing that factor, and its measurement relies largely on subjective judgments. Florida's approach avoids the disparities that reliance on such a factor tends to produce. It thus

promotes consistency in the application of the death penalty and confidence that it is not being administered haphazardly.

B

The Court's second "interrelated" objection to Florida's rule is that it fails to account for the risk of error inherent in IQ testing. In order to diminish this risk, the Court establishes a rule that if IQ testing reveals an IQ between 71 and 75, a claim of intellectual disability cannot be rejected on the basis of test scores alone. *Ante*, at 722. The Court both misunderstands how the SEM works and fails to explain why Florida's method of accounting for the risk of error (allowing a defendant to take and rely on multiple tests) is not as effective as the approach that the Court compels.

1

The Court begins with the simple and uncontroversial proposition that every testing situation is susceptible to error and thus may result in an imperfect measurement of "true" IQ. The Court then wades into technical matters that must be understood in order to see where the Court goes wrong.

There are various ways to account for error in IQ testing. One way is Florida's approach (evaluate multiple test results). Another is to use a mathematical measurement called the "standard error of measurement" or SEM. See AAMR 10th ed. 67–71 (App. 4.1). Of critical importance, there is not a single, uniform SEM across IQ tests or even across test takers. Rather, "the [SEM] varies by test, subgroup, and age group." User's Guide To Accompany AAIDD 11th ed.: Definition, Classification, and Systems of Supports 22 (2012).

Once we know the SEM for a particular test and a particular test taker, adding *one* SEM to and subtracting *one* SEM from the obtained score establishes an interval of scores known as the 66% confidence interval. See AAMR 10th ed. 57. That interval represents the range of scores within

which "we are [66%] sure" that the "true" IQ falls. See Oxford Handbook of Child Psychological Assessment 291 (D. Saklofske, C. Reynolds, & V. Schwean eds. 2013). The interval is centered on the obtained score, and it includes scores that are above and below that score by the amount of the SEM. Since there is about a 66% chance that the test taker's "true" IQ falls within this range, there is about a 34% chance that the "true" IQ falls outside the interval, with approximately equal odds that it falls above the interval (17%) or below the interval (17%).

An example: If a test taker scores a 72 on an IQ test with a SEM of 2, the 66% confidence interval is the range of 70 to 74 (72 ± 2). In this situation, there is approximately a 66% chance that the test taker's "true" IQ is between 70 and 74; roughly a 17% chance that it is above 74; and roughly a 17% chance that it is 70 or below. Thus, there is about an 83% chance that the score is above 70.

Similarly, using *two* SEMs, we can build a 95% confidence interval. The process is the same except that we add two SEMs to and subtract two SEMS from the obtained score. To illustrate the use of two SEMs, let us hypothesize a case in which the defendant's obtained score is 74. With the same SEM of 2 as in the prior example, there would be a 95% chance that the true score is between 70 and 78 (74 ± 4); roughly a 2.5% chance that the score is above 78; and about a 2.5% chance that the score is 70 or below. The probability of a true score above 70 would be roughly 97.5%. As these two examples show, the greater the degree of confidence demanded, the greater the range of scores that will fall within the confidence interval and, therefore, the further away from 70 an obtained score could be and yet still have 70 fall within its confidence interval.

2

The Court misunderstands these principles and makes factual mistakes that will surely confuse States attempting to comply with its opinion.

First, the Court unjustifiably assumes a blanket (or very common) error measurement of 5. See *ante*, at 722. That assumption gives rise to the Court's holding that a defendant must be permitted to introduce additional evidence when IQ tests reveal an IQ as high as 75. See *ibid.* SEMs, however, vary by IQ test and test taker, and there is no reason to assume a SEM of 5 points; indeed, it appears that the SEM is generally "estimated to be three to five points" for well-standardized IQ tests. AAMR 10th ed. 57. And we know that the SEM for Hall's most recent IQ test was 2.16—less than half of the Court's estimate of 5. Brief for Petitioner 40, n. 17.

Relatedly, the Court misreads the authorities on which it relies to establish this cutoff IQ score of 75. It is true that certain professional organizations have advocated a cutoff of 75 and that *Atkins* cited those organizations' cutoff. See *ante*, at 714, 722. But the Court overlooks a critical fact: Those organizations endorsed a 75 IQ cutoff based on their express understanding that "*one* standard error of measurement [SEM]" is "three to five points for well-standardized" IQ tests. AAMR, Mental Retardation 37 (9th ed. 1992) (hereinafter AAMR 9th ed.); *Atkins*, 536 U. S., at 309, n. 5 (citing AAMR 9th ed.; 2 Kaplan & Sadock's 2592 (B. Sadock & V. Sadock eds., 7th ed. 2000)); see also AAMR 10th ed. 57; AAIDD 11th ed. 36. In other words, the number 75 was relevant only to the extent that a *single* SEM was "estimated" to be as high as 5 points. AAMR 9th ed. 37. Here, by contrast, we know that the SEM for Hall's latest IQ test was less than half of that estimate; there is no relevance to the number 75 in this case. To blindly import a 5-point margin of error when we know as a matter of fact that the relevant SEM is 2.16 amounts to requiring consideration of more than *two* SEMs—an approach that finds no support in *Atkins* or anywhere else.

Because of these factual errors and ambiguities, it is unclear to me whether the Court concludes that a defendant

is constitutionally entitled to introduce nontest evidence of intellectual disability (1) whenever his score is 75 or lower, on the mistaken understanding that the SEM for most tests is 5; (2) when the 66% confidence interval (using one SEM) includes a score of 70; or (3) when the 95% confidence interval (using two SEMs) includes a score of 70. In my view, none of these approaches is defensible.

An approach tied to a fixed score of 75 can be dismissed out of hand because, as discussed, every test has a different SEM.

The other two approaches would require that a defendant be permitted to submit additional evidence when his IQ is above 70 so long as the 66% or 95% confidence interval (using one SEM or two SEMs, respectively) includes a score of 70, but there is no foundation for this in our Eighth Amendment case law. As Hall concedes, the Eighth Amendment permits States to assign to a defendant the burden of establishing intellectual disability by at least a preponderance of the evidence. See Tr. of Oral Arg. 12. In other words, a defendant can be required to prove that the probability of a 70 or sub-70 IQ is greater than 50%. Under the Court's approach, by contrast, a defendant could prove significantly subaverage intellectual functioning by showing simply that the probability of a "true" IQ of 70 or below is as little as 17% (under a one-SEM rule) or 2.5% (under a two-SEM rule). This totally transforms the allocation and nature of the burden of proof.

I have referred to the 66% and 95% confidence intervals only because they result from the most straightforward application of the SEM in this context: One SEM establishes the 66% confidence interval; two SEMs establish the 95% confidence interval. See AAIDD 11th ed. 36. But it would be simple enough to devise a 51% confidence interval—or a 99% confidence interval for that matter. There is therefore no excuse for mechanically imposing standards that are unhinged from legal logic and that override valid state laws

establishing burdens of proof. The appropriate confidence level is ultimately a judgment best left to legislatures, and their judgment has been that a defendant must establish that it is more likely than not that he is intellectually disabled. I would defer to that determination.

3

The Court also fails to grasp that Florida's system already accounts for the risk of testing error by allowing the introduction of multiple test scores. The Court never explains why its criticisms of the uncertainty resulting from the use of a *single* IQ score apply when a defendant consistently scores above 70 on *multiple* tests. Contrary to the Court's evident assumption, the well-accepted view is that multiple consistent scores establish a much higher degree of confidence.[13]

The Court's only attempt to address this is to say that "the analysis of multiple IQ scores jointly is a complicated endeavor," *ante*, at 714, but any evaluation of intellectual disability, whether based on objective tests or subjective observations, is "complicated." If conducting the proper analysis of multiple scores produces an IQ as reliable as the

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[13] See Oxford Handbook of Child Psychological Assessment 291 (D. Saklofske, C. Reynolds, & V. Schwean eds. 2013) (multiple scores provide "greater precision"); A. Frances, Essentials of Psychiatric Diagnosis: Responding to the Challenge of DSM–5, p. 31 (rev. ed. 2013) ("The pattern of test scores is more important than the score on any given test"). When there are multiple scores, moreover, there is good reason to treat low scores differently from high scores: "Although one cannot do better on an IQ test than one is capable of doing, one can certainly do worse." Forensic Psychology 56. *Ibid.* ("[A] sharp, unexplained drop in IQ scores following incarceration can be strong evidence of malingering"); Frances, *supra*, at 31 ("[H]igher scores are likely to be the more indicative, since there are many reasons why a given score might underestimate a person's intelligence, but no reason why scores should overestimate it").

approach mandated by the Court, there is no basis for rejecting Florida's approach.[14]

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For these reasons, I would affirm the judgment of the Florida Supreme Court.

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[14] The Court also states that because IQ testing itself may be flawed, "multiple examinations may result in repeated similar scores" that are "not conclusive evidence of intellectual functioning." *Ante*, at 714. That argument proves too much: If potential flaws in administering multiple tests are sufficient to render them inaccurate, the Court should conclude that even scores of 90 or 100 are not sufficient. The appropriate remedy for incorrectly administered tests is for a court to disregard those tests, not to ignore the well-established fact that multiple, properly administered tests yielding scores above 70 can give a high degree of confidence that an individual is not intellectually disabled.

Syllabus

WOOD ET AL. *v.* MOSS ET AL.

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

No. 13–115. Argued March 26, 2014—Decided May 27, 2014

While campaigning for a second term, President George W. Bush was scheduled to spend the night at a Jacksonville, Oregon, cottage. Local law enforcement officials permitted a group of Bush supporters and a group of protesters to assemble on opposite sides of a street along the President's motorcade route. When the President made a last-minute decision to have dinner at the outdoor patio area of the Jacksonville Inn's restaurant before resuming the drive to the cottage, the protesters moved to an area in front of the Inn, which placed them within weapons range of the President. The supporters remained in their original location, where a two-story building blocked sight of, and weapons access to, the patio. At the direction of two Secret Service agents responsible for the President's security, petitioners here (the agents), local police cleared the area where the protesters had gathered, eventually moving them two blocks away to a street beyond weapons reach of the President. The agents did not require the guests already inside the Inn to leave, stay clear of the patio, or go through a security screening. After the President dined, his motorcade passed the supporters, but the protesters, now two blocks from the motorcade's route, were beyond his sight and hearing.

The protesters sued the agents for damages, alleging that the agents engaged in viewpoint discrimination in violation of the First Amendment when they moved the protesters away from the Inn but allowed the supporters to remain in their original location. The District Court denied the agents' motion to dismiss the suit for failure to state a claim and on qualified immunity grounds, but on interlocutory appeal, the Ninth Circuit reversed. The court held that the protesters had failed to state a First Amendment claim under the pleading standards of *Bell Atlantic Corp.* v. *Twombly*, 550 U. S. 544, and *Ashcroft* v. *Iqbal*, 556 U. S. 662. Because those decisions were rendered after the protesters commenced suit, the Court of Appeals granted leave to amend the complaint. On remand, the protesters supplemented the complaint with allegations that the agents acted pursuant to an unwritten Secret Service policy of working with the Bush White House to inhibit the expression of disfavored views at presidential appearances. The District Court denied the agents' renewed motion to dismiss. This time, the

Ninth Circuit affirmed, concluding that viewpoint-driven conduct on the agents' part could be inferred from the absence of a legitimate security rationale for the different treatment accorded the two groups of demonstrators. The Court of Appeals further held that the agents were not entitled to qualified immunity because this Court's precedent made clear that the Government may not regulate speech based on its content.

Held: The agents are entitled to qualified immunity. Pp. 756–764.

(a) Government officials may not exclude from public places persons engaged in peaceful expressive activity solely because the government actor fears, dislikes, or disagrees with the views expressed. See, *e. g.*, *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 96. The fundamental right to speak, however, does not leave people at liberty to publicize their views "'whenever and however and wherever they please.'" *United States* v. *Grace*, 461 U. S. 171, 177. In deciding whether the protesters have alleged violation of a clearly established First Amendment right, this Court assumes without deciding that *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, which involved alleged Fourth Amendment violations, extends to First Amendment claims, see, *e. g.*, *Iqbal*, 556 U. S., at 675.

The doctrine of qualified immunity protects government officials from liability for civil damages "unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft* v. *al-Kidd*, 563 U. S. 731, 735. The "dispositive inquiry . . . is whether it would [have been] clear to a reasonable officer" in the agents' position "that [their] conduct was unlawful in the situation [they] confronted." *Saucier* v. *Katz*, 533 U. S. 194, 202. At the time of the Jacksonville incident, this Court had addressed a constitutional challenge to Secret Service actions only once. In *Hunter* v. *Bryant*, 502 U. S. 224, the plaintiff challenged the lawfulness of his arrest by two Secret Service agents for writing and delivering a letter about a plot to assassinate President Reagan. Holding that the agents were shielded by qualified immunity, the Court stated that "accommodation for reasonable error . . . is nowhere more important than when the specter of Presidential assassination is raised." *Id.*, at 229. This Court has recognized the overwhelming importance of safeguarding the President in other contexts as well. See *Watts* v. *United States*, 394 U. S. 705, 707. Mindful that officers may be faced with unanticipated security situations, the key question addressed is whether it should have been clear to the agents that the security perimeter they established violated the First Amendment. Pp. 756–759.

(b) The protesters assert, and the Ninth Circuit agreed, that the agents violated clearly established federal law by denying them "equal access to the President." No decision of which the Court is aware, however, would alert Secret Service agents engaged in crowd control that they bear a First Amendment obligation to make sure that groups with conflicting views are at all times in equivalent positions. Nor would the maintenance of equal access make sense in the situation the agents here confronted, where only the protesters, not the supporters, had a direct line of sight to the patio where the President was dining. The protesters suggest that the agents could have moved the supporters out of the motorcade's range as well, but there would have been no security rationale for such a move. Pp. 759–761.

(c) The protesters allege that, in directing their displacement, the agents acted not to ensure the President's safety, but to insulate the President from their message. These allegations are undermined by a map of the area, which shows that, because of the protesters' location, they posed a potential security risk to the President, while the supporters, because of their location, did not. The protesters' counterarguments are unavailing. They urge that, had the agents' professed interest in the President's safety been sincere, the agents would have screened or removed from the premises persons already at the Inn when the President arrived. But staff, other diners, and Inn guests were on the premises before the agents knew of the President's plans, and thus could not have anticipated seeing the President, no less causing harm to him. The agents also could keep a close watch on the relatively small number of people already inside the Inn, surveillance that would have been impossible for the hundreds of people outside the Inn. A White House manual directs the President's advance team to "work with the Secret Service . . . to designate a protest area . . . preferably not in view of the event site or motorcade route." The manual guides the conduct of the political advance team, not the Secret Service, whose own written guides explicitly prohibit "agents from discriminating between anti-government and pro-government demonstrators." Even assuming, as the protesters maintain, that other agents, at other times and places, have assisted in shielding the President from political speech, this case is scarcely one in which the agents lacked a valid security reason for their actions. Moreover, because individual government officials "cannot be held liable" in a *Bivens* suit "unless they themselves acted [unconstitutionally]," *Iqbal*, 556 U. S., at 683, this Court declines to infer from alleged instances of misconduct on the part of particular agents an unwritten Secret Service policy to suppress disfavored expression,

and then attribute that supposed policy to all field-level operatives. Pp. 761–764.

711 F. 3d 941, reversed.

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

Ian Heath Gershengorn argued the cause for petitioners. With him on the briefs were *Solicitor General Verrilli*, *Assistant Attorney General Delery*, *Barbara L. Herwig*, *Edward Himmelfarb*, and *Jeremy S. Brumbelow.*

Steven M. Wilker argued the cause for respondents. With him on the brief were *Arthur B. Spitzer*, *Kevin Díaz*, *Steven R. Shapiro*, and *Ben Wizner.**

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns a charge that two Secret Service agents, in carrying out their responsibility to protect the President, engaged in unconstitutional viewpoint-based discrimination. The episode in suit occurred in Jacksonville, Oregon, on the evening of October 14, 2004. President George W. Bush, campaigning in the area for a second term, was scheduled to spend the evening at a cottage in Jacksonville. With permission from local law enforcement officials, two groups assembled on opposite sides of the street on which the President's motorcade was to travel to reach the cottage. One group supported the President, the other opposed him.

**Sean R. Gallagher*, *Bennett L. Cohen*, and *Lisa E. Soronen* filed a brief for the National Conference of State Legislatures et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the NAACP Legal Defense & Educational Fund, Inc., by *Rachel D. Godsil*, *Christina Swarns*, *ReNika C. Moore*, *Joshua Civin*, and *Johnathan Smith*; and for Professors of Civil Procedure by *Allan Ides.*

Alexander A. Reinert, *Claire Prestel*, and *Arthur Bryant* filed a brief for Public Justice, P. C., as *amicus curiae.*

The President made a last-minute decision to stop in town for dinner before completing the drive to the cottage. His motorcade therefore turned from the planned route and proceeded to the outdoor patio dining area of the Jacksonville Inn's restaurant. Learning of the route change, the protesters moved down the sidewalk to the area in front of the Inn. The President's supporters remained across the street and about a half block away from the Inn. At the direction of the Secret Service agents, state and local police cleared the block on which the Inn was located and moved the protesters some two blocks away to a street beyond handgun or explosive reach of the President. The move placed the protesters a block farther away from the Inn than the supporters.

Officials are sheltered from suit, under a doctrine known as qualified immunity, when their conduct "does not violate clearly established . . . constitutional rights" a reasonable official, similarly situated, would have comprehended. *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818 (1982). The First Amendment, our precedent makes plain, disfavors viewpoint-based discrimination. See *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 828 (1995). But safeguarding the President is also of overwhelming importance in our constitutional system. See *Watts* v. *United States*, 394 U. S. 705, 707 (1969) (*per curiam*). Faced with the President's sudden decision to stop for dinner, the Secret Service agents had to cope with a security situation not earlier anticipated. No decision of this Court so much as hinted that their on-the-spot action was unlawful because they failed to keep the protesters and supporters, throughout the episode, equidistant from the President.

The United States Court of Appeals for the Ninth Circuit ruled otherwise. It found dispositive of the agents' motion to dismiss "the considerable disparity in the distance each group was allowed to stand from the Presiden[t]." *Moss* v. *United States Secret Serv.*, 711 F. 3d 941, 946 (2013). Because no "clearly established law" so controlled the agents'

response to the motorcade's detour, we reverse the Ninth Circuit's judgment.

I

A

On October 14, 2004, after a nearby campaign appearance, President George W. Bush was scheduled to spend the night at a cottage in Jacksonville, Oregon. Anticipating the visit, a group of individuals, including respondents (the protesters), organized a demonstration to express their opposition to the President and his policies. At around 6 p.m. on the evening the President's motorcade was expected to pass through the town, between 200 and 300 protesters gathered in Jacksonville, on California Street between Third and Fourth Streets. See *infra*, at 750 (map depicting the relevant area in Jacksonville). The gathering had been precleared with local law enforcement authorities. On the opposite side of Third Street, a similarly sized group of individuals (the supporters) assembled to show their support for the President. If, as planned, the motorcade had traveled down Third Street to reach the cottage, with no stops along the way, the protesters and supporters would have had equal access to the President throughout in delivering their respective messages.

This situation was unsettled when President Bush made a spur-of-the-moment decision to stop for dinner at the Jacksonville Inn before proceeding to the cottage. The Inn stands on the north side of California Street, on the block where the protesters had assembled. Learning of the President's change in plans, the protesters moved along the block to face the Inn. The respective positions of the protesters and supporters at the time the President arrived at the Inn are shown on the following map, which the protesters attached as an exhibit to their complaint:[1]

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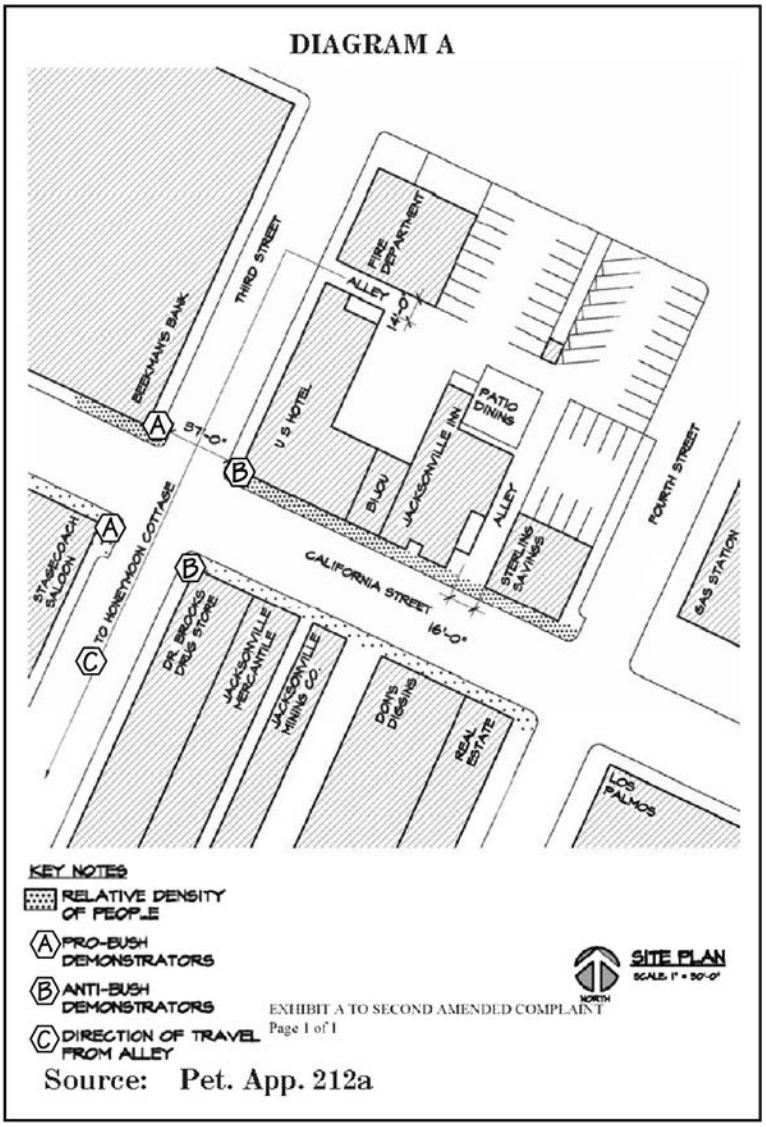
[1] App. to Brief for Petitioners (Diagram A).



As the map indicates, the protesters massed on the sidewalk directly in front of the Inn, while the supporters remained assembled on the block west of Third Street, some

distance from the Inn. The map also shows an alley running along the east side of the Inn (the California Street alley) leading to an outdoor patio used by the Inn's restaurant as a dining area. A six-foot high wooden fence surrounded the patio. At the location where the President's supporters gathered, a large two-story building, the U. S. Hotel, extended north around the corner of California and Third Streets. That structure blocked sight of, and weapons access to, the patio from points on California Street west of the Inn.

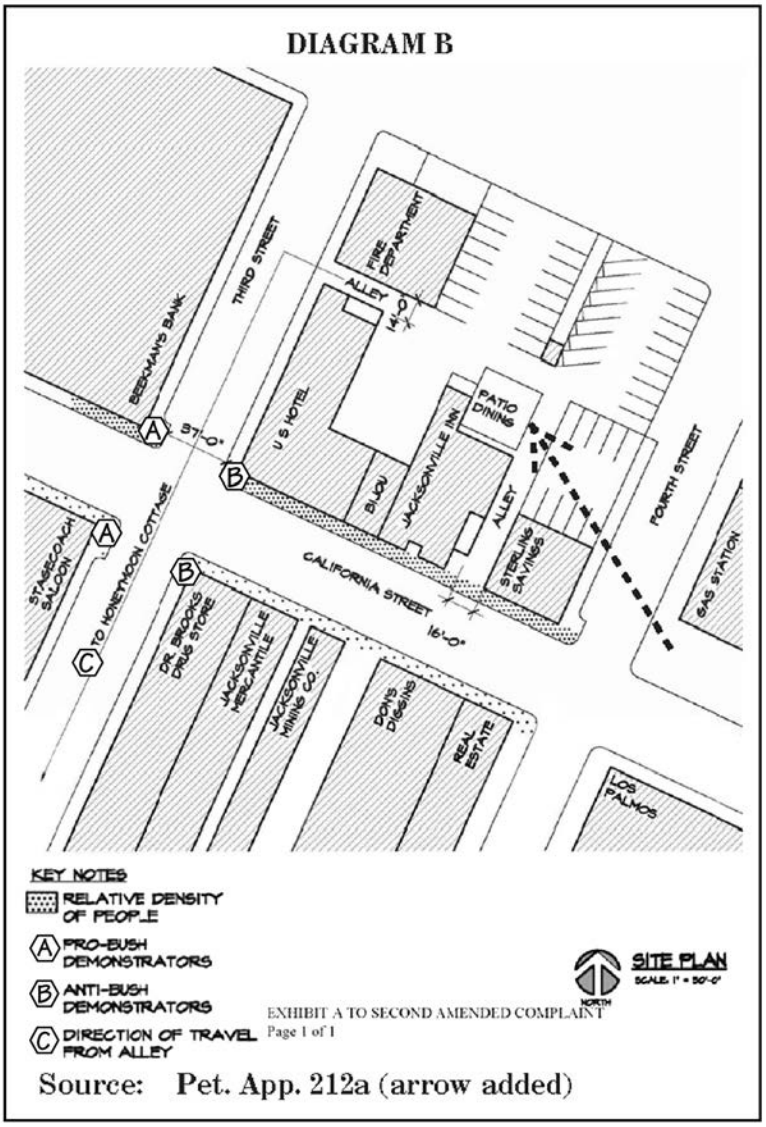
Petitioners are two Secret Service agents (the agents) responsible for the President's security during the Jacksonville visit. Shortly after 7 p.m. on the evening in question, the agents enlisted the aid of local police officers to secure the area for the President's unexpected stop at the Inn. Following the agents' instructions, the local officers first cleared the alley running from Third Street to the patio (the Third Street alley), which the President's motorcade would use to access the Inn. The officers then cleared Third Street north of California Street, as well as the California Street alley.

At around 7:15 p.m., the President arrived at the Inn. As the motorcade entered the Third Street alley, both sets of demonstrators were equally within the President's sight and hearing. When the President reached the outdoor patio dining area, the protesters stood on the sidewalk directly in front of the California Street alley, exhibiting signs and chanting slogans critical of the President and his policies. In view of the short distance between California Street and the patio, the protesters no longer contest that they were then within weapons range of the President. See Tr. of Oral Arg. 3–4, 35, 39–40; Brief for Petitioners 44.

Approximately 15 minutes later, the agents directed the officers to clear the protesters from the block in front of the Inn and move them to the east side of Fourth Street. From their new location, the protesters were roughly the same distance from the President as the supporters. But unlike the

supporters, whose sight and access were obstructed by the U. S. Hotel, only a parking lot separated the protesters from the patio. The protesters thus remained within weapons range of, and had a direct line of sight to, the President's location. This sight line is illustrated by the broken arrow marked on the map shown on the next page:[2]

[2] This map appears as an appendix to the agents' opening brief. See App. to Brief for Petitioners (Diagram B). Except for the arrow, Diagram B is identical to the map included in the protesters' complaint.



After another 15 minutes passed, the agents directed the officers again to move the protesters, this time one block farther away from the Inn, to the east side of Fifth Street.

The relocation was necessary, the agents told the local officers, to ensure that no demonstrator would be "within handgun or explosive range of the President." App. to Pet. for Cert. 177a. The agents, however, did not require the guests already inside the Inn to leave, stay clear of the patio, or go through any security screening. The supporters at all times retained their original location on the west side of Third Street.

After the President dined, the motorcade left the Inn by traveling south on Third Street toward the cottage. On its way, the motorcade passed the President's supporters. The protesters remained on Fifth Street, two blocks away from the motorcade's route, thus beyond the President's sight and hearing.

B

The protesters sued the agents for damages in the U. S. District Court for the District of Oregon. The agents' actions, the complaint asserted, violated the protesters' First Amendment rights by the manner in which the agents established a security perimeter around the President during his unscheduled stop for dinner. See *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971) (recognizing claim for damages against federal agents for violations of plaintiff's Fourth Amendment rights).[3] Specifically, the protesters alleged that the agents engaged in viewpoint discrimination when they moved the protesters away from the Inn, while allowing the supporters to remain in their original location.

The agents moved to dismiss the complaint on the ground that the protesters' allegations were insufficient to state a claim for violation of the First Amendment. The agents further maintained that they were sheltered by qualified im-

[3] The protesters' complaint also asserted claims against state and local police officers for using excessive force in violation of the Fourth Amendment. See *Moss* v. *United States Secret Serv.*, 711 F. 3d 941, 954 (CA9 2013). None of those claims is at issue here.

munity because the constitutional right alleged by the protesters was not clearly established.

The District Court denied the motion, see *Moss* v. *United States Secret Serv.*, 2007 WL 2915608, *1, *20 (D Ore., Oct. 7, 2007), but on interlocutory appeal,[4] the U. S. Court of Appeals for the Ninth Circuit reversed. See *Moss* v. *United States Secret Serv.*, 572 F. 3d 962 (2009). The facts alleged in the complaint, the Court of Appeals held, were insufficient to state a First Amendment claim under the pleading standards prescribed in *Bell Atlantic Corp.* v. *Twombly*, 550 U. S. 544 (2007), and *Ashcroft* v. *Iqbal*, 556 U. S. 662 (2009). 572 F. 3d, at 974–975.[5] Because *Twombly* and *Iqbal* were decided after the protesters filed their complaint, however, the Ninth Circuit instructed the District Court to grant the protesters leave to amend. 572 F. 3d, at 972.

On remand, the protesters supplemented their complaint with allegations that the agents acted pursuant to an "actual but unwritten" Secret Service policy of "work[ing] with the White House under President Bush to eliminate dissent and protest from presidential appearances." App. to Pet. for Cert. 184a. Relying on published media reports, the protesters' amended complaint cited several instances in which other Secret Service agents allegedly engaged in conduct designed to suppress expression critical of President Bush at his public appearances. The amended complaint also included an excerpt from a White House manual instructing the President's advance team to "work with the Secret Service and have them ask the local police department to desig-

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[4] We have repeatedly "stressed the importance of resolving immunity questions at the earliest possible stage [of the] litigation," *Hunter* v. *Bryant*, 502 U. S. 224, 227 (1991) (*per curiam*).

[5] In ruling on a motion to dismiss, we have instructed, courts "must take all of the factual allegations in the complaint as true," but "are not bound to accept as true a legal conclusion couched as a factual allegation." *Ashcroft* v. *Iqbal*, 556 U. S. 662, 678 (2009) (internal quotation marks omitted).

nate a protest area where demonstrators can be placed; preferably not in view of the event site or motorcade route." *Id.*, at 219a. See also *id.*, at 183a.

The agents renewed their motion to dismiss the suit for failure to state a claim and on qualified immunity grounds. The District Court denied the motion, holding that the complaint adequately alleged a violation of the First Amendment, and that the constitutional right asserted was clearly established. *Moss* v. *United States Secret Serv.*, 750 F. Supp. 2d 1197, 1216–1228 (Ore. 2010). The agents again sought an interlocutory appeal.

This time, the Ninth Circuit affirmed, 711 F. 3d 941, satisfied that the amended pleading plausibly alleged that the agents "sought to suppress [the protesters'] political speech" based on the viewpoint they expressed, *id.*, at 958. Viewpoint-driven conduct, the Court of Appeals maintained, could be inferred from the absence of a legitimate security rationale for "the differential treatment" accorded the two groups of demonstrators. See *id.*, at 946. The Court of Appeals further held that the agents were not entitled to qualified immunity because this Court's precedent "make[s] clear . . . 'that the government may not regulate speech based on its substantive content or the message it conveys.'" *Id.*, at 963 (quoting *Rosenberger*, 515 U. S., at 828).

The agents petitioned for rehearing and rehearing en banc, urging that the panel erred in finding the alleged constitutional violation clearly established. Over the dissent of eight judges, the Ninth Circuit denied the en banc petition. See 711 F. 3d, at 947 (O'Scannlain, J., dissenting from denial of rehearing en banc). We granted certiorari. 571 U. S. 1067 (2013).

II

A

It is uncontested and uncontestable that government officials may not exclude from public places persons engaged in

peaceful expressive activity solely because the government actor fears, dislikes, or disagrees with the views those persons express. See, *e. g.*, *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 96 (1972). It is equally plain that the fundamental right to speak secured by the First Amendment does not leave people at liberty to publicize their views "'whenever and however and wherever they please.'" *United States* v. *Grace*, 461 U. S. 171, 177–178 (1983) (quoting *Adderly* v. *Florida*, 385 U. S. 39, 48 (1966)). Our decision in this case starts from those premises.

The particular question before us is whether the protesters have alleged violation of a clearly established First Amendment right based on the agents' decision to order the protesters moved from their original location in front of the Inn, first to the block just east of the Inn, and then another block farther. We note, initially, an antecedent issue: Does the First Amendment give rise to an implied right of action for damages against federal officers who violate that Amendment's guarantees? In *Bivens*, cited *supra*, at 754, we recognized an implied right of action against federal officers for violations of the Fourth Amendment. Thereafter, we have several times assumed without deciding that *Bivens* extends to First Amendment claims. See, *e. g.*, *Iqbal*, 556 U. S., at 675. We do so again in this case. See Tr. of Oral Arg. 10–11 (counsel for petitioners observed that the implication of a right to sue derived from the First Amendment itself was an issue "not preserved below" and therefore "not presented" in this Court).

The doctrine of qualified immunity protects government officials from liability for civil damages "unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft* v. *al-Kidd*, 563 U. S. 731, 735 (2011). And under the governing pleading standard, the "complaint must contain sufficient factual matter, accepted as true, to state a claim to

relief that is plausible on its face." *Iqbal*, 556 U. S., at 678 (internal quotation marks omitted). Requiring the alleged violation of law to be "clearly established" "balances . . . the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson* v. *Callahan*, 555 U. S. 223, 231 (2009). The "dispositive inquiry," we have said, "is whether it would [have been] clear to a reasonable officer" in the agents' position "that [their] conduct was unlawful in the situation [they] confronted." *Saucier* v. *Katz*, 533 U. S. 194, 202 (2001).

At the time of the Jacksonville incident, this Court had addressed a constitutional challenge to Secret Service actions on only one occasion.[6] In *Hunter* v. *Bryant*, 502 U. S. 224 (1991) (*per curiam*), the plaintiff sued two Secret Service agents alleging that they arrested him without probable cause for writing and delivering to two University of Southern California offices a letter referring to a plot to assassinate President Ronald Reagan. We held that qualified immunity shielded the agents from claims that the arrest violated the plaintiff's rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments. "[N]owhere," we stated, is "accommodation for reasonable error . . . more important than when the specter of Presidential assassination is raised." *Id.*, at 229.

In other contexts, we have similarly recognized the Nation's "valid, even . . . overwhelming, interest in protecting the safety of its Chief Executive." *Watts*, 394 U. S., at 707. See also *Rubin* v. *United States*, 525 U. S. 990, 990–991 (1998) (BREYER, J., dissenting from denial of certiorari) ("The phys-

[6] Subsequent to the incident at issue here, we held in *Reichle* v. *Howards*, 566 U. S. 658, 660 (2012), that two Secret Service agents were "immune from suit for allegedly arresting a suspect in retaliation for [negative comments he made about Vice President Cheney], when the agents had probable cause to arrest the suspect for committing a federal crime."

ical security of the President of the United States has a special legal role to play in our constitutional system."). Mindful that "[o]fficers assigned to protect public officials must make singularly swift, on the spot, decisions whether the safety of the person they are guarding is in jeopardy," *Reichle* v. *Howards*, 566 U. S. 658, 671 (2012) (GINSBURG, J., concurring in judgment), we address the key question: Should it have been clear to the agents that the security perimeter they established violated the First Amendment?

B

The protesters assert that it violated clearly established First Amendment law to deny them "equal access to the President," App. to Pet. for Cert. 175a, during his dinner at the Inn and subsequent drive to the cottage, *id.*, at 185a.[7] The Court of Appeals agreed, holding that the agents violated clearly established law by moving the protesters to a location that "was in relevant ways not comparable to the place where the pro-Bush group was allowed to remain." 711 F. 3d, at 946 (internal quotation marks and ellipsis omitted). The Ninth Circuit did not deny that security concerns justified "mov[ing] the anti-Bush protesters *somewhere*." *Ibid.* But, the court determined, no reason was shown for "the considerable disparity in the distance each group was allowed to stand from the Presidential party." *Ibid.* The agents thus offended the First Amendment, in the Court of Appeals' view, because their directions to the local officers placed the protesters at a "comparativ[e] disadvantag[e] in expressing their views" to the President. *Ibid.*

No decision of which we are aware, however, would alert Secret Service agents engaged in crowd control that they

[7] The protesters, however, do not maintain that "the First Amendment entitled them to be returned to their original location after the President's dinner and before his motorcade departed." Brief for Respondents 39–40, n. 7. They urge only that "it was constitutionally improper to move them in the first place." *Id.*, at 40, n. 7; see Tr. of Oral Arg. 50 (same).

bear a First Amendment obligation "to ensure that groups with different viewpoints are at comparable locations at all times." *Id.*, at 952 (O'Scannlain, J., dissenting from denial of rehearing en banc). Nor would the maintenance of equal access make sense in the situation the agents confronted.

Recall that at the protesters' location on the north side of California Street, see *supra*, at 750, they faced an alley giving them a direct line of sight to the outdoor patio where the President stopped to dine. The first move, to the corner of Fourth and California Streets, proved no solution, for there, only a parking lot stood between the protesters and the patio. True, at both locations, a six-foot wooden fence and an unspecified number of local police officers impeded access to the President. Even so, 200 to 300 protesters were within weapons range, and had a largely unobstructed view, of the President's location. See Tr. of Oral Arg. 41 (counsel for respondents acknowledged that "in hindsight, you could . . . conclude" that "proximity [of the protesters to the President] alone . . . is enough to create a security [risk]"). See also Eggen & Fletcher, FBI: Grenade Was a Threat to Bush, Washington Post, May 19, 2005, p. A1 (reporting that a live grenade thrown at President Bush in 2005, had it detonated, could have injured him from 100 feet away).

The protesters suggest that the agents could have moved the President's supporters further to the west so that they would not be in range of the President when the motorcade drove from the Inn to the cottage where the President would stay overnight. See App. to Pet. for Cert. 178a. As earlier explained, however, see *supra*, at 750–751, there would have been no security rationale for such a move. In contrast to the open alley and parking lot on the east side of the Inn, to the west of the Inn where the supporters stood, a large, two-story building blocked sight of, or weapons access to, the patio the agents endeavored to secure.[8] No clearly estab-

[8] Neither side contends that the presence of demonstrators along the President's motorcade route posed an unmanageable security risk, or that

lished law, we agree, required the Secret Service "to interfere with even more speech than security concerns would require in an attempt to keep opposing groups at roughly equal distances from the President." Brief for Petitioners 32. And surely no such law required the agents to attempt to maintain equal distances by "prevail[ing] upon the President not to dine at the Inn." Oral Arg. Audio in No. 10–36152 (CA9) 42:22 to 43:36 (argument by protesters' counsel), available at http://www.ca9.uscourts.gov/media/view.php?pk_id=0000008129 (as visited May 19, 2014, and in Clerk of Court's case file).

III

The protesters allege that, when the agents directed their displacement, the agents acted not to ensure the President's safety from handguns or explosive devices. Instead, the protesters urge, the agents had them moved solely to insulate the President from their message, thereby giving the President's supporters greater visibility and audibility. See Tr. of Oral Arg. 35–36. The Ninth Circuit found sufficient the protesters' allegations that the agents "acted *with the sole intent* to discriminate against [the protesters] because of their viewpoint." 711 F. 3d, at 964. Accordingly, the Court of Appeals "allow[ed] the protestors' claim of viewpoint discrimination to proceed." *Id.*, at 962.

It may be, the agents acknowledged, that clearly established law proscribed the Secret Service from disadvantaging one group of speakers in comparison to another if the

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there would have been a legitimate security rationale for removing the protesters, but not the supporters, from the motorcade route. The President's detour for dinner, however, set the two groups apart. "[T]he security concerns arising from the presence of a large group of people near the open-air patio where the President was dining were plainly different from those associated with permitting a group . . . to remain along Third Street while the President's [armored limousine] traveled by." Brief for Petitioners 46.

agents had "no objectively reasonable security rationale" for their conduct, but acted solely to inhibit the expression of disfavored views. See Tr. of Oral Arg. 28–29; Brief for Petitioners 52 (entitlement to relief might have been established if, for example, "the pro-Bush group had . . . been allowed to move into the nearer location that the anti-Bush had vacated"). We agree with the agents, however, that the map itself, reproduced *supra*, at 750, undermines the protesters' allegations of viewpoint discrimination as the sole reason for the agents' directions. The map corroborates that, because of their location, the protesters posed a potential security risk to the President, while the supporters, because of their location, did not.

The protesters make three arguments to shore up their charge that the agents' asserted security concerns are disingenuous. First, the protesters urge that, had the agents' professed interest in the President's safety been sincere, the agents would have directed all persons present at the Inn to be screened or removed from the premises. See Brief for Respondents 27. But staff, other diners, and Inn guests were there even before the agents themselves knew that the President would dine at the Inn. See Brief for Petitioners 47. Those already at the Inn "could not have had any expectation that they would see the President that evening or any opportunity to premeditate a plan to cause him harm." Reply Brief 16. The Secret Service, moreover, could take measures to ensure that the relatively small number of people already inside the Inn were kept under close watch; no similar surveillance would have been possible for 200 to 300 people congregating in front of the Inn. See *ibid.*

The protesters also point to a White House manual, which states that the President's advance team should "work with the Secret Service . . . to designate a protest area . . . preferably not in view of the event site or motorcade route." App. to Pet. for Cert. 219a. This manual guides the conduct of the President's political advance team. See *id.*, at 220a (dis-

tinguishing between the political role of the advance team and the security mission of the Secret Service).[9] As the complaint acknowledges, the Secret Service has its own "written guidelines, directives, instructions and rules." *Id.*, at 184a. Those guides explicitly "prohibit Secret Service agents from discriminating between anti-government and pro-government demonstrators." *Ibid.*

The protesters maintain that the Secret Service does not adhere to its own written guides. They recite several instances in which Secret Service agents allegedly engaged in viewpoint discrimination. See *id.*, at 189a–194a. Even accepting as true the submission that Secret Service agents, at times, have assisted in shielding the President from political speech, this case is scarcely one in which the agents acted "*without* a valid security reason." Brief for Respondents 40. We emphasize, again, that the protesters were at least as close to the President as were the supporters when the motorcade arrived at the Jacksonville Inn. See *supra*, at 751. And as the map attached to the complaint shows, see *supra*, at 750, when the President reached the patio to dine, the protesters, but not the supporters, were within weapons range of his location. See *supra*, at 760. Given that situation, the protesters cannot plausibly urge that the agents "had no valid security reason to request or order the[ir] eviction." App. to Pet. for Cert. 186a.

We note, moreover, that individual government officials "cannot be held liable" in a *Bivens* suit "unless they themselves acted [unconstitutionally]." *Iqbal*, 556 U. S., at 683. We therefore decline to infer from alleged instances of misconduct on the part of particular agents an unwritten policy of the Secret Service to suppress disfavored expression,

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[9] "An 'advance man' is '[o]ne who arranges for publicity, protocol, transportation, speaking schedules, conferences with local government officials, and minute details of a visit, smoothing the way for a political figure.'" 711 F. 3d, at 950, n. 2 (O'Scannlain, J., dissenting from denial of rehearing en banc) (quoting W. Safire, Safire's Political Dictionary 8 (5th ed. 2008)).

and then to attribute that supposed policy to all field-level operatives. See Reply Brief 20.

* * *

This case comes to us on the agents' petition to review the Ninth Circuit's denial of their qualified immunity defense. See Tr. of Oral Arg. 10 (petitioners' briefing on appeal trained on the issue of qualified immunity). Limiting our decision to that question, we hold, for the reasons stated, that the agents are entitled to qualified immunity. Accordingly, we reverse the judgment of the Court of Appeals.

It is so ordered.

Syllabus

PLUMHOFF ET AL. *v.* RICKARD, A MINOR CHILD, INDIVIDUALLY, AND AS SURVIVING DAUGHTER OF RICKARD, DECEASED, BY AND THROUGH HER MOTHER RICKARD, AS PARENT AND NEXT FRIEND

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

No. 12–1117. Argued March 4, 2014—Decided May 27, 2014

Donald Rickard led police officers on a high-speed car chase that came to a temporary halt when Rickard spun out into a parking lot. Rickard resumed maneuvering his car, and as he continued to use the accelerator even though his bumper was flush against a patrol car, an officer fired three shots into Rickard's car. Rickard managed to drive away, almost hitting an officer in the process. Officers fired 12 more shots as Rickard sped away, striking him and his passenger, both of whom died from some combination of gunshot wounds and injuries suffered when the car eventually crashed.

Respondent, Rickard's minor daughter, filed a 42 U. S. C. § 1983 action, alleging that the officers used excessive force in violation of the Fourth and Fourteenth Amendments. The District Court denied the officers' motion for summary judgment based on qualified immunity, holding that their conduct violated the Fourth Amendment and was contrary to clearly established law at the time in question. After finding that it had appellate jurisdiction, the Sixth Circuit held that the officers' conduct violated the Fourth Amendment. It affirmed the District Court's order, suggesting that it agreed that the officers violated clearly established law.

Held:

1. The Sixth Circuit properly exercised jurisdiction under 28 U. S. C. § 1291, which gives courts of appeals jurisdiction to hear appeals from "final decisions" of the district courts. The general rule that an order denying a summary judgment motion is not a "final decisio[n]," and thus not immediately appealable, does not apply when it is based on a qualified immunity claim. *Johnson* v. *Jones*, 515 U. S. 304, 311. Respondent argues that *Johnson* forecloses appellate jurisdiction here, but the order in *Johnson* was not immediately appealable because it merely decided "a question of 'evidence sufficiency,'" *id.*, at 313, while here, petitioners' qualified immunity claims raise legal issues quite different from any

purely factual issues that might be confronted at trial. Deciding such legal issues is a core responsibility of appellate courts and does not create an undue burden for them. See, *e. g.*, *Scott* v. *Harris*, 550 U. S. 372. Pp. 771–773.

2. The officers' conduct did not violate the Fourth Amendment. Pp. 773–778.

(a) Addressing this question first will be "beneficial" in "develop[ing] constitutional precedent" in an area that courts typically consider in cases in which the defendant asserts a qualified immunity defense, *Pearson* v. *Callahan*, 555 U. S. 223, 236. Pp. 773–774.

(b) Respondent's excessive-force argument requires analyzing the totality of the circumstances from the perspective "of a reasonable officer on the scene." *Graham* v. *Connor*, 490 U. S. 386, 396. Respondent contends that the Fourth Amendment did not allow the officers to use deadly force to terminate the chase, and that, even if they were permitted to fire their weapons, they went too far when they fired as many rounds as they did. Pp. 774–778.

(1) The officers acted reasonably in using deadly force. A "police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." *Scott*, *supra*, at 385. Rickard's outrageously reckless driving—which lasted more than five minutes, exceeded 100 miles per hour, and included the passing of more than two dozen other motorists—posed a grave public safety risk, and the record conclusively disproves that the chase was over when Rickard's car came to a temporary standstill and officers began shooting. Under the circumstances when the shots were fired, all that a reasonable officer could have concluded from Rickard's conduct was that he was intent on resuming his flight, which would again pose a threat to others on the road. Pp. 775–777.

(2) Petitioners did not fire more shots than necessary to end the public safety risk. It makes sense that, if officers are justified in firing at a suspect in order to end a severe threat to public safety, they need not stop shooting until the threat has ended. Here, during the 10-second span when all the shots were fired, Rickard never abandoned his attempt to flee and eventually managed to drive away. A passenger's presence does not bear on whether officers violated Rickard's Fourth Amendment rights, which "are personal rights [that] may not be vicariously asserted." *Alderman* v. *United States*, 394 U. S. 165, 174. Pp. 777–778.

3. Even if the officers' conduct had violated the Fourth Amendment, petitioners would still be entitled to summary judgment based on qualified immunity. An official sued under § 1983 is entitled to qualified im-

munity unless it is shown that the official violated a statutory or constitutional right that was "'clearly established'" at the time of the challenged conduct. *Ashcroft* v. *al-Kidd*, 563 U. S. 731, 735. *Brosseau* v. *Haugen*, 543 U. S. 194, 201, where an officer shot at a fleeing vehicle to prevent possible harm, makes plain that no clearly established law precluded the officer's conduct there. Thus, to prevail, respondent must meaningfully distinguish *Brosseau* or point to any "controlling authority" or "robust 'consensus of cases of persuasive authority,'" *al-Kidd*, *supra*, at 741–742, that emerged between the events there and those here that would alter the qualified immunity analysis. Respondent has made neither showing. If anything, the facts here are more favorable to the officers than the facts in *Brosseau*; and respondent points to no cases that could be said to have clearly established the unconstitutionality of using lethal force to end a high-speed car chase. Pp. 778–781.

509 Fed. Appx. 388, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, THOMAS, SOTOMAYOR, and KAGAN, JJ., joined, in which GINSBURG, J., joined as to the judgment and Parts I, II, and III–C, and in which BREYER, J., joined except as to Part III–B–2.

Michael A. Mosley argued the cause for petitioners. With him on the briefs was *John Wesley Hall, Jr.*

John F. Bash argued the cause for the United States as *amicus curiae* in support of petitioners. With him on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Delery*, *Deputy Solicitor General Gershengorn*, *Barbara L. Herwig*, and *Jonathan H. Levy.*

Gary K. Smith argued the cause and filed a brief for respondent.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Ohio et al. by *Michael DeWine*, Attorney General of Ohio, *Eric E. Murphy*, State Solicitor, and *Peter K. Glenn-Applegate*, Deputy Solicitor, and by the Attorneys General for their respective States as follows: *Luther Strange* of Alabama, *Michael C. Geraghty* of Alaska, *Thomas C. Horne* of Arizona, *Dustin McDaniel* of Arkansas, *John W. Suthers* of Colorado, *Pamela Jo Bondi* of Florida, *Samuel S. Olens* of Georgia, *David M. Louie* of Hawaii, *Lawrence G. Wasden* of Idaho, *Gregory F. Zoeller* of Indiana, *Derek Schmidt* of Kansas, *Bill Schuette* of Michigan, *Jim Hood* of Missis-

JUSTICE ALITO delivered the opinion of the Court.*

The courts below denied qualified immunity for police officers who shot the driver of a fleeing vehicle to put an end to a dangerous car chase. We reverse and hold that the officers did not violate the Fourth Amendment. In the alternative, we conclude that the officers were entitled to qualified immunity because they violated no clearly established law.

I

A

Because this case arises from the denial of the officers' motion for summary judgment, we view the facts in the light most favorable to the nonmoving party, the daughter of the driver who attempted to flee. *Wilkie* v. *Robbins*, 551 U. S. 537, 543, n. 2 (2007). Near midnight on July 18, 2004, Lieutenant Joseph Forthman of the West Memphis, Arkansas, Police Department pulled over a white Honda Accord because the car had only one operating headlight. Donald Rickard was the driver of the Accord, and Kelly Allen was in the passenger seat. Forthman noticed an indentation, "'roughly the size of a head or a basketball,'" in the windshield of the car. *Estate of Allen* v. *West Memphis*, 2011 WL 197426, *1 (WD Tenn., Jan. 20, 2011). He asked Rickard

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sippi, *Timothy C. Fox* of Montana, *Wayne Stenehjem* of North Dakota, *E. Scott Pruitt* of Oklahoma, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Patrick Morrisey* of West Virginia, *J. B. Van Hollen* of Wisconsin, and *Peter K. Michael* of Wyoming; and for the National Conference of State Legislatures et al. by *Dennis J. Herrera*, *Peter J. Keith*, *Christine Van Aken*, *Vince Chhabria*, and *Lisa Soronen*.

Briefs of *amici curiae* urging affirmance were filed for the National Police Accountability Project et al. by *Christopher A. Wimmer*; and for Jonathan R. Nash by *Mr. Nash*, *pro se*.

Eric Schnapper and *David M. Porter* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae*.

*JUSTICE GINSBURG joins the judgment and Parts I, II, and III–C of this opinion. JUSTICE BREYER joins this opinion except as to Part III–B–2.

if he had been drinking, and Rickard responded that he had not. Because Rickard failed to produce his driver's license upon request and appeared nervous, Forthman asked him to step out of the car. Rather than comply with Forthman's request, Rickard sped away.

Forthman gave chase and was soon joined by five other police cruisers driven by Sergeant Vance Plumhoff and Officers Jimmy Evans, Lance Ellis, Troy Galtelli, and John Gardner. The officers pursued Rickard east on Interstate 40 toward Memphis, Tennessee. While on I–40, they attempted to stop Rickard using a "rolling roadblock," *id.*, at *2, but they were unsuccessful. The District Court described the vehicles as "swerving through traffic at high speeds," *id.*, at *8, and respondent does not dispute that the cars attained speeds over 100 miles per hour.[1] See Memorandum of Law in Response to Defendants' Motion for Summary Judgment in No. 2:05–cv–2585 (WD Tenn.), p. 16; see also Tr. of Oral Arg. 54:23–55:6. During the chase, Rickard and the officers passed more than two dozen vehicles.

Rickard eventually exited I–40 in Memphis, and shortly afterward he made "a quick right turn," causing "contact [to] occu[r]" between his car and Evans' cruiser. 2011 WL 197426, *3. As a result of that contact, Rickard's car spun out into a parking lot and collided with Plumhoff's cruiser. Now in danger of being cornered, Rickard put his car into reverse "in an attempt to escape." *Ibid.* As he did so, Evans and Plumhoff got out of their cruisers and approached Rickard's car, and Evans, gun in hand, pounded on the

[1] It is also undisputed that Forthman saw glass shavings on the dashboard of Rickard's car, a sign that the windshield had been broken recently; that another officer testified that the windshield indentation and glass shavings would have justified a suspicion "'that someone had possibly been struck by that vehicle, like a pedestrian'"; and that Forthman saw beer in Rickard's car. See App. 424–426 (Response to Defendant's Statement of Undisputed Material Facts in No. 2:05–cv–2585 (WD Tenn.), ¶¶15–19).

passenger-side window. At that point, Rickard's car "made contact with" yet another police cruiser. *Ibid.* Rickard's tires started spinning, and his car "was rocking back and forth," *ibid.*, indicating that Rickard was using the accelerator even though his bumper was flush against a police cruiser. At that point, Plumhoff fired three shots into Rickard's car. Rickard then "reversed in a 180 degree arc" and "maneuvered onto" another street, forcing Ellis to "step to his right to avoid the vehicle." *Ibid.* As Rickard continued "fleeing down" that street, *ibid.*, Gardner and Galtelli fired 12 shots toward Rickard's car, bringing the total number of shots fired during this incident to 15. Rickard then lost control of the car and crashed into a building. *Ibid.* Rickard and Allen both died from some combination of gunshot wounds and injuries suffered in the crash that ended the chase. See App. 60, 76.

B

Respondent, Rickard's surviving daughter, filed this action under Rev. Stat. § 1979, 42 U. S. C. § 1983, against the six individual police officers and the mayor and chief of police of West Memphis. She alleged that the officers used excessive force in violation of the Fourth and Fourteenth Amendments.

The officers moved for summary judgment based on qualified immunity, but the District Court denied that motion, holding that the officers' conduct violated the Fourth Amendment and was contrary to law that was clearly established at the time in question. The officers appealed, but a Sixth Circuit motions panel initially dismissed the appeal for lack of jurisdiction based on this Court's decision in *Johnson* v. *Jones*, 515 U. S. 304, 309 (1995). Later, however, that panel granted rehearing, vacated its dismissal order, and left the jurisdictional issue to be decided by a merits panel.

The merits panel then affirmed the District Court's decision on the merits. *Estate of Allen* v. *West Memphis*, 509 Fed. Appx. 388 (CA6 2012). On the issue of appellate juris-

diction, the merits panel began by stating that a "motion for qualified immunity denied on the basis of a district court's determination that there exists a triable issue of fact generally cannot be appealed on an interlocutory basis." *Id.*, at 391. But the panel then noted that the Sixth Circuit had previously interpreted our decision in *Scott* v. *Harris*, 550 U. S. 372 (2007), as creating an "exception to this rule" under which an immediate appeal may be taken to challenge " 'blatantly and demonstrably false' " factual determinations. 509 Fed. Appx., at 391 (quoting *Moldowan* v. *Warren*, 578 F. 3d 351, 370 (2009)). Concluding that none of the District Court's factual determinations ran afoul of that high standard, and distinguishing the facts of this case from those in *Scott*, the panel held that the officers' conduct violated the Fourth Amendment. 509 Fed. Appx., at 392, and n. 3. The panel said nothing about whether the officers violated *clearly established* law, but since the panel affirmed the order denying the officers' summary judgment motion,[2] the panel must have decided that issue in respondent's favor.

We granted certiorari. 571 U. S. 1020 (2013).

II

We start with the question whether the Court of Appeals properly exercised jurisdiction under 28 U. S. C. § 1291, which gives the courts of appeals jurisdiction to hear appeals from "final decisions" of the district courts.

An order denying a motion for summary judgment is generally not a final decision within the meaning of § 1291 and is thus generally not immediately appealable. *Johnson*, 515 U. S., at 309. But that general rule does not apply when the summary judgment motion is based on a claim of qualified immunity. *Id.*, at 311; *Mitchell* v. *Forsyth*, 472 U. S. 511, 528 (1985). "[Q]ualified immunity is 'an immunity from suit

[2] After expressing some confusion about whether it should dismiss or affirm, the panel wrote that "it would seem that what we are doing is affirming [the District Court's] judgment." 509 Fed. Appx., at 393.

rather than a mere defense to liability.'" *Pearson* v. *Callahan*, 555 U. S. 223, 231 (2009) (quoting *Mitchell*, *supra*, at 526). As a result, pretrial orders denying qualified immunity generally fall within the collateral order doctrine. See *Ashcroft* v. *Iqbal*, 556 U. S. 662, 671–672 (2009). This is so because such orders conclusively determine whether the defendant is entitled to immunity from suit; this immunity issue is both important and completely separate from the merits of the action, and this question could not be effectively reviewed on appeal from a final judgment because by that time the immunity from standing trial will have been irretrievably lost. See *ibid.*; *Johnson*, *supra*, at 311–312 (citing *Mitchell*, *supra*, at 525–527).

Respondent argues that our decision in *Johnson* forecloses appellate jurisdiction under the circumstances here, but the order from which the appeal was taken in *Johnson* was quite different from the order in the present case. In *Johnson*, the plaintiff brought suit against certain police officers who, he alleged, had beaten him. 515 U. S., at 307. These officers moved for summary judgment, asserting that they were not present at the time of the alleged beating and had nothing to do with it. *Id.*, at 307–308. The District Court determined, however, that the evidence in the summary judgment record was sufficient to support a contrary finding, and the court therefore denied the officers' motion for summary judgment. *Id.*, at 308. The officers then appealed, arguing that the District Court had not correctly analyzed the relevant evidence. *Ibid.*

This Court held that the *Johnson* order was not immediately appealable because it merely decided "a question of 'evidence sufficiency,' *i. e.*, which facts a party may, or may not, be able to prove at trial." *Id.*, at 313. The Court noted that an order denying summary judgment based on a determination of "evidence sufficiency" does not present a legal question in the sense in which the term was used in *Mitchell*, the decision that first held that a pretrial order rejecting

a claim of qualified immunity is immediately appealable. *Johnson*, 515 U. S., at 314. In addition, the Court observed that a determination of evidence sufficiency is closely related to other determinations that the trial court may be required to make at later stages of the case. *Id.*, at 317. The Court also noted that appellate courts have "no comparative expertise" over trial courts in making such determinations and that forcing appellate courts to entertain appeals from such orders would impose an undue burden. *Id.*, at 309–310, 316.

The District Court order in this case is nothing like the order in *Johnson*. Petitioners do not claim that other officers were responsible for shooting Rickard; rather, they contend that their conduct did not violate the Fourth Amendment and, in any event, did not violate clearly established law. Thus, they raise legal issues; these issues are quite different from any purely factual issues that the trial court might confront if the case were tried; deciding legal issues of this sort is a core responsibility of appellate courts, and requiring appellate courts to decide such issues is not an undue burden.

The District Court order here is not materially distinguishable from the District Court order in *Scott* v. *Harris*, and in that case we expressed no doubts about the jurisdiction of the Court of Appeals under § 1291. Accordingly, here, as in *Scott*, we hold that the Court of Appeals properly exercised jurisdiction, and we therefore turn to the merits.

III

A

Petitioners contend that the decision of the Court of Appeals is wrong for two separate reasons. They maintain that they did not violate Rickard's Fourth Amendment rights and that, in any event, their conduct did not violate any Fourth Amendment rule that was clearly established at the time of the events in question. When confronted with such arguments, we held in *Saucier* v. *Katz*, 533 U. S. 194, 200

(2001), that "the first inquiry must be whether a constitutional right would have been violated on the facts alleged." Only after deciding that question, we concluded, may an appellate court turn to the question whether the right at issue was clearly established at the relevant time. *Ibid.*

We subsequently altered this rigid framework in *Pearson*, declaring that "*Saucier*'s procedure should not be regarded as an inflexible requirement." 555 U. S., at 227. At the same time, however, we noted that the *Saucier* procedure "is often beneficial" because it "promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." 555 U. S., at 236. *Pearson* concluded that courts "have the discretion to decide whether that [*Saucier*] procedure is worthwhile in particular cases." *Id.*, at 242.

Heeding our guidance in *Pearson*, we begin in this case with the question whether the officers' conduct violated the Fourth Amendment. This approach, we believe, will be "beneficial" in "develop[ing] constitutional precedent" in an area that courts typically consider in cases in which the defendant asserts a qualified immunity defense. See *id.*, at 236.

B

A claim that law enforcement officers used excessive force to effect a seizure is governed by the Fourth Amendment's "reasonableness" standard. See *Graham* v. *Connor*, 490 U. S. 386 (1989); *Tennessee* v. *Garner*, 471 U. S. 1 (1985). In *Graham*, we held that determining the objective reasonableness of a particular seizure under the Fourth Amendment "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." 490 U. S., at 396 (internal quotation marks omitted). The inquiry requires analyzing the totality of the circumstances. See *ibid.*

We analyze this question from the perspective "of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Ibid.* We thus "allo[w] for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.*, at 396–397.

In this case, respondent advances two main Fourth Amendment arguments. First, she contends that the Fourth Amendment did not allow petitioners to use deadly force to terminate the chase. See Brief for Respondent 24–35. Second, she argues that the "degree of force was excessive," that is, that even if the officers were permitted to fire their weapons, they went too far when they fired as many rounds as they did. See *id.*, at 36–38. We address each issue in turn.

1

In *Scott*, we considered a claim that a police officer violated the Fourth Amendment when he terminated a high-speed car chase by using a technique that placed a "fleeing motorist at risk of serious injury or death." 550 U. S., at 386. The record in that case contained a videotape of the chase, and we found that the events recorded on the tape justified the officer's conduct. We wrote as follows: "Although there is no obvious way to quantify the risks on either side, it is clear from the videotape that respondent posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase." *Id.*, at 383–384. We also wrote:

> "[R]espondent's vehicle rac[ed] down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit. We see it run multiple red lights

> and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up." *Id.*, at 379–380 (footnote omitted).

In light of those facts, "we [thought] it [was] quite clear that [the police officer] did not violate the Fourth Amendment." *Id.*, at 381. We held that a "police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death."[3] *Id.*, at 386.

We see no basis for reaching a different conclusion here. The chase in this case exceeded 100 miles per hour and lasted over five minutes. During that chase, Rickard passed more than two dozen other vehicles, several of which were forced to alter course. Rickard's outrageously reckless driving posed a grave public safety risk. And while it is true that Rickard's car eventually collided with a police car and came temporarily to a near standstill, that did not end the chase. Less than three seconds later, Rickard resumed maneuvering his car. Just before the shots were fired, when the front bumper of his car was flush with that of one of the police cruisers, Rickard was obviously pushing down on the accelerator because the car's wheels were spinning, and then Rickard threw the car into reverse "in an attempt to escape."

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[3] In holding that petitioners' conduct violated the Fourth Amendment, the District Court relied on reasoning that is irreconcilable with our decision in *Scott*. The District Court held that the danger presented by a high-speed chase cannot justify the use of deadly force because that danger was caused by the officers' decision to continue the chase. *Estate of Allen* v. *West Memphis*, 2011 WL 197426, *8 (WD Tenn., Jan. 20, 2011). In *Scott*, however, we declined to "lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive so recklessly that they put other people's lives in danger," concluding that the Constitution "assuredly does not impose this invitation to impunity-earned-by-recklessness." 550 U. S., at 385–386.

Thus, the record conclusively disproves respondent's claim that the chase in the present case was already over when petitioners began shooting. Under the circumstances at the moment when the shots were fired, all that a reasonable police officer could have concluded was that Rickard was intent on resuming his flight and that, if he were allowed to do so, he would once again pose a deadly threat for others on the road. Rickard's conduct even after the shots were fired—as noted, he managed to drive away despite the efforts of the police to block his path—underscores the point.

In light of the circumstances we have discussed, it is beyond serious dispute that Rickard's flight posed a grave public safety risk, and here, as in *Scott*, the police acted reasonably in using deadly force to end that risk.

2

We now consider respondent's contention that, even if the use of deadly force was permissible, petitioners acted unreasonably in firing a total of 15 shots. We reject that argument. It stands to reason that, if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended. As petitioners noted below, "if lethal force is justified, officers are taught to keep shooting until the threat is over." 509 Fed. Appx., at 392.

Here, during the 10-second span when all the shots were fired, Rickard never abandoned his attempt to flee. Indeed, even after all the shots had been fired, he managed to drive away and to continue driving until he crashed. This would be a different case if petitioners had initiated a second round of shots after an initial round had clearly incapacitated Rickard and had ended any threat of continued flight, or if Rickard had clearly given himself up. But that is not what happened.

In arguing that too many shots were fired, respondent relies in part on the presence of Kelly Allen in the front seat

of the car, but we do not think that this factor changes the calculus. Our cases make it clear that "Fourth Amendment rights are personal rights which . . . may not be vicariously asserted." *Alderman* v. *United States*, 394 U. S. 165, 174 (1969); see also *Rakas* v. *Illinois*, 439 U. S. 128, 138–143 (1978). Thus, the question before us is whether petitioners violated Rickard's Fourth Amendment rights, not Allen's. If a suit were brought on behalf of Allen under either § 1983 or state tort law, the risk to Allen would be of central concern.[4] But Allen's presence in the car cannot enhance Rickard's Fourth Amendment rights. After all, it was Rickard who put Allen in danger by fleeing and refusing to end the chase, and it would be perverse if his disregard for Allen's safety worked to his benefit.

C

We have held that petitioners' conduct did not violate the Fourth Amendment, but even if that were not the case, petitioners would still be entitled to summary judgment based on qualified immunity.

An official sued under § 1983 is entitled to qualified immunity unless it is shown that the official violated a statutory or constitutional right that was "'clearly established'" at the time of the challenged conduct. *Ashcroft* v. *al-Kidd*, 563 U. S. 731, 735 (2011). And a defendant cannot be said to have violated a clearly established right unless the right's

[4] There seems to be some disagreement among lower courts as to whether a passenger in Allen's situation can recover under a Fourth Amendment theory. Compare *Vaughan* v. *Cox*, 343 F. 3d 1323 (CA11 2003) (suggesting yes), and *Fisher* v. *Memphis*, 234 F. 3d 312 (CA6 2000) (same), with *Milstead* v. *Kibler*, 243 F. 3d 157 (CA4 2001) (suggesting no), and *Landol-Rivera* v. *Cruz Cosme*, 906 F. 2d 791 (CA1 1990) (same). We express no view on this question. We also note that in *County of Sacramento* v. *Lewis*, 523 U. S. 833, 836 (1998), the Court held that a passenger killed as a result of a police chase could recover under a substantive due process theory only if the officer had "a purpose to cause harm unrelated to the legitimate object of arrest."

contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it. *Id.*, at 741. In other words, "existing precedent must have placed the statutory or constitutional question" confronted by the official "beyond debate." *Ibid.* In addition, "[w]e have repeatedly told courts . . . not to define clearly established law at a high level of generality," *id.*, at 742, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced. We think our decision in *Brosseau* v. *Haugen*, 543 U. S. 194 (2004) (*per curiam*), squarely demonstrates that no clearly established law precluded petitioners' conduct at the time in question. In *Brosseau*, we held that a police officer did not violate clearly established law when she fired at a fleeing vehicle to prevent possible harm to "other officers on foot who [she] believed were in the immediate area, . . . occupied vehicles in [the driver's] path[,] and . . . any other citizens who might be in the area." *Id.*, at 197 (quoting 339 F. 3d 857, 865 (CA9 2003); internal quotation marks omitted). After surveying lower court decisions regarding the reasonableness of lethal force as a response to vehicular flight, we observed that this is an area "in which the result depends very much on the facts of each case" and that the cases "by no means 'clearly establish[ed]' that [the officer's] conduct violated the Fourth Amendment." 543 U. S., at 201. In reaching that conclusion, we held that *Garner* and *Graham*, which are "cast at a high level of generality," did not clearly establish that the officer's decision was unreasonable. 543 U. S., at 199.

Brosseau makes plain that as of February 21, 1999—the date of the events at issue in that case—it was not clearly established that it was unconstitutional to shoot a fleeing driver to protect those whom his flight might endanger. We did not consider later decided cases because they "could not have given fair notice to [the officer]." *Id.*, at 200, n. 4. To defeat immunity here, then, respondent must show at a mini-

mum either (1) that the officers' conduct in this case was materially different from the conduct in *Brosseau* or (2) that between February 21, 1999, and July 18, 2004, there emerged either "'controlling authority'" or a "robust 'consensus of cases of persuasive authority,'" *al-Kidd*, *supra*, at 741–742 (quoting *Wilson* v. *Layne*, 526 U. S. 603, 617 (1999); some internal quotation marks omitted), that would alter our analysis of the qualified immunity question. Respondent has made neither showing.

To begin, certain facts here are more favorable to the officers. In *Brosseau*, an officer on foot fired at a driver who had just begun to flee and who had not yet driven his car in a dangerous manner. In contrast, the officers here shot at Rickard to put an end to what had already been a lengthy, high-speed pursuit that indisputably posed a danger both to the officers involved and to any civilians who happened to be nearby. Indeed, the lone dissenting Justice in *Brosseau* emphasized that in that case, "there was no ongoing or prior high-speed car chase to inform the [constitutional] analysis." 543 U. S., at 206, n. 4 (opinion of Stevens, J.). Attempting to distinguish *Brosseau*, respondent focuses on the fact that the officer there fired only 1 shot, whereas here three officers collectively fired 15 shots. But it was certainly not clearly established at the time of the shooting in this case that the number of shots fired, under the circumstances present here, rendered the use of force excessive.

Since respondent cannot meaningfully distinguish *Brosseau*, her only option is to show that its analysis was out of date by 2004. Yet respondent has not pointed us to any case—let alone a controlling case or a robust consensus of cases—decided between 1999 and 2004 that could be said to have clearly established the unconstitutionality of using lethal force to end a high-speed car chase. And respondent receives no help on this front from the opinions below. The District Court cited only a single case decided between 1999 and 2004 that identified a possible constitutional violation by

an officer who shot a fleeing driver, and the facts of that case—where a reasonable jury could have concluded that the suspect merely "accelerated to eighty to eighty-five miles per hour in a seventy-miles-per-hour zone" and did not "engag[e] in any evasive maneuvers," *Vaughan* v. *Cox*, 343 F. 3d 1323, 1330–1331 (CA11 2003)—bear little resemblance to those here.

* * *

Under the circumstances present in this case, we hold that the Fourth Amendment did not prohibit petitioners from using the deadly force that they employed to terminate the dangerous car chase that Rickard precipitated. In the alternative, we note that petitioners are entitled to qualified immunity for the conduct at issue because they violated no clearly established law.

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

It is so ordered.

Syllabus

MICHIGAN *v.* BAY MILLS INDIAN COMMUNITY ET AL.

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

No. 12–515. Argued December 2, 2013—Decided May 27, 2014

The State of Michigan, petitioner, entered into a compact with respondent Bay Mills Indian Community pursuant to the Indian Gaming Regulatory Act (IGRA). See 25 U. S. C. § 2710(d)(1)(C). The compact authorizes Bay Mills to conduct class III gaming activities (*i. e.*, to operate a casino) on Indian lands located within the State's borders, but prohibits it from doing so outside that territory. Bay Mills later opened a second casino on land it had purchased through a congressionally established land trust. The Tribe claimed it could operate a casino there because the property qualified as Indian land. Michigan disagreed and sued the Tribe under § 2710(d)(7)(A)(ii), which allows a State to enjoin "class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact." The District Court granted the injunction, but the Sixth Circuit vacated. It held that tribal sovereign immunity barred the suit unless Congress provided otherwise, and that § 2710(d)(7)(A)(ii) only authorized suits to enjoin gaming activity located "on Indian lands," whereas Michigan's complaint alleged the casino was outside such territory.

Held: Michigan's suit against Bay Mills is barred by tribal sovereign immunity. Pp. 788–804.

(a) As "'domestic dependent nations,'" Indian tribes exercise "inherent sovereign authority" that is subject to plenary control by Congress. *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Tribe of Okla.*, 498 U. S. 505, 509. Unless and "until Congress acts, the tribes retain" their historic sovereign authority. *United States* v. *Wheeler*, 435 U. S. 313, 323. Among the core aspects of sovereignty that tribes possess—subject to congressional action—is the "common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 58. That immunity applies whether a suit is brought by a State, see, *e. g.*, *Puyallup Tribe, Inc.* v. *Department of Game of Wash.*, 433 U. S. 165, or arises from a tribe's commercial activities off Indian lands, see *Kiowa Tribe of Okla.* v. *Manufacturing Technologies, Inc.*, 523 U. S. 751. Therefore, unless Congress has "unequiv-

ocally" authorized Michigan's suit, *C & L Enterprises, Inc.* v. *Citizen Band Potawatomi Tribe of Okla.*, 532 U. S. 411, 418, it must be dismissed. Pp. 788–791.

(b) IGRA's plain terms do not authorize this suit. Section 2710(d)(7)(A)(ii) partially abrogates tribal immunity with respect to class III gaming located "on Indian lands," but the very premise of Michigan's suit is that Bay Mills' casino is unlawful because it is outside Indian lands. Michigan argues that the casino is authorized, licensed, and operated from within the reservation, and that such administrative action constitutes "class III gaming activity." However, numerous other IGRA provisions make clear that "class III gaming activity" refers to the gambling that goes on in a casino, not the off-site licensing of such games. See, *e. g.*, §§ 2710(d)(3)(C)(i), (d)(9). IGRA's history and design also explain why Congress would have authorized a State to enjoin illegal tribal gaming on Indian lands but not on lands subject to the State's own sovereign jurisdiction. Congress adopted IGRA in response to *California* v. *Cabazon Band of Mission Indians*, 480 U. S. 202, 221–222, which held that States lacked regulatory authority over gaming on Indian lands but left intact States' regulatory power over tribal gaming outside Indian territory. A State therefore has many tools to enforce its law on state land that it does not possess in Indian territory, including, *e. g.*, bringing a civil or criminal action against tribal officials rather than the tribe itself for conducting illegal gaming. A State can also use its leverage in negotiating an IGRA compact to bargain for a waiver of the tribe's immunity. Pp. 791–797.

(c) Michigan urges the Court to overrule *Kiowa* and hold that tribal immunity does not apply to commercial activity outside Indian territory. However, "any departure" from precedent "demands special justification," *Arizona* v. *Rumsey*, 467 U. S. 203, 212, and Michigan offers nothing more than arguments already rejected in *Kiowa*. *Kiowa* rejected these arguments because it is fundamentally Congress's job to determine whether or how to limit tribal immunity; Congress had restricted tribal immunity "in limited circumstances" like § 2710(d)(7)(A)(ii), while "in other statutes" declaring an "intention not to alter it." 523 U. S., at 758. *Kiowa* therefore chose to "defer to the role Congress may wish to exercise in this important judgment." *Ibid.* Congress has since reflected on *Kiowa* and decided to retain tribal immunity in a case like this. Having held that the issue is up to Congress, the Court cannot reverse itself now simply because some may think Congress's conclusion wrong. Pp. 797–803.

695 F. 3d 406, affirmed and remanded.

Syllabus

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, BREYER, and SOTOMAYOR, JJ., joined. SOTOMAYOR, J., filed a concurring opinion, *post*, p. 804. SCALIA, J., filed a dissenting opinion, *post*, p. 814. THOMAS, J., filed a dissenting opinion, in which SCALIA, GINSBURG, and ALITO, JJ., joined, *post*, p. 814. GINSBURG, J., filed a dissenting opinion, *post*, p. 831.

John J. Bursch, Solicitor General of Michigan, argued the cause for petitioner. With him on the briefs were *Bill Schuette*, Attorney General, and *Louis B. Reinwasser* and *Margaret A. Bettenhausen*, Assistant Attorneys General.

Neal Kumar Katyal argued the cause for respondent Bay Mills Indian Community. With him on the brief were *Jessica L. Ellsworth*, *Kathryn L. Tierney*, *Chad P. DePetro*, and *Bruce R. Greene*.

Deputy Solicitor General Kneedler argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Verrilli*, *Acting Assistant Attorney General Dreher*, *Deputy Assistant Attorney General Shenkman*, *Ann O'Connell*, and *Mary Gabrielle Sprague*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Alabama et al. by *Luther Strange*, Attorney General of Alabama, *John C. Neiman, Jr.*, Solicitor General, and *Andrew L. Brasher*, Deputy Solicitor General, and by the Attorneys General for their respective States as follows: *Michael C. Geraghty* of Alaska, *Thomas C. Horne* of Arizona, *John Suthers* of Colorado, *George Jepsen* of Connecticut, *Samuel S. Olens* of Georgia, *David M. Louie* of Hawaii, *Lawrence G. Wasden* of Idaho, *Derek Schmidt* of Kansas, *James D. "Buddy" Caldwell* of Louisiana, *Timothy C. Fox* of Montana, *Jon Bruning* of Nebraska, *Wayne Stenehjem* of North Dakota, *Peter Kilmartin* of Rhode Island, *Marty J. Jackley* of South Dakota, and *John Swallow* of Utah; and for the State of Oklahoma by *E. Scott Pruitt*, Attorney General, and *Patrick R. Wyrick*, Solicitor General.

Joseph H. Webster and *William R. Norman* filed a brief for the Seminole Tribe of Florida et al. as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed for the National Congress of American Indians et al. by *Riyaz A. Kanji*, *John Echohawk*, *Richard A. Guest*, *Thomas J. Perrelli*, and *Joshua M. Segal*; and for Scholars of American Indian Law by *Richard B. Collins* and *Janice Mac Avoy*.

JUSTICE KAGAN delivered the opinion of the Court.

The question in this case is whether tribal sovereign immunity bars Michigan's suit against the Bay Mills Indian Community for opening a casino outside Indian lands. We hold that immunity protects Bay Mills from this legal action. Congress has not abrogated tribal sovereign immunity from a State's suit to enjoin gaming off a reservation or other Indian lands. And we decline to revisit our prior decisions holding that, absent such an abrogation (or a waiver), Indian tribes have immunity even when a suit arises from off-reservation commercial activity. Michigan must therefore resort to other mechanisms, including legal actions against the responsible individuals, to resolve this dispute.

I

The Indian Gaming Regulatory Act (IGRA or Act), 102 Stat. 2467, 25 U. S. C. § 2701 *et seq.*, creates a framework for regulating gaming activity on Indian lands.[1] See § 2702(3) (describing the statute's purpose as establishing "regulatory authority . . . [and] standards for gaming on Indian lands"). The Act divides gaming into three classes. Class III gaming, the most closely regulated and the kind involved here, includes casino games, slot machines, and horse racing. See § 2703(8). A tribe may conduct such gaming on Indian lands only pursuant to, and in compliance with, a compact it has negotiated with the surrounding State. See § 2710(d)(1)(C). A compact typically prescribes rules for operating gaming, allocates law enforcement authority between the tribe and State, and provides remedies for breach of the agreement's terms. See §§ 2710(d)(3)(C)(ii), (v). Notable here, IGRA it-

[1] The Act defines "Indian lands" as "(A) all lands within the limits of any Indian reservation; and (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual[,] or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." § 2703(4).

self authorizes a State to bring suit against a tribe for certain conduct violating a compact: Specifically, § 2710(d)(7)(A)(ii) allows a State to sue in federal court to "enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact . . . that is in effect."

Pursuant to the Act, Michigan and Bay Mills, a federally recognized Indian Tribe, entered into a compact in 1993. See App. to Pet. for Cert. 73a–96a. The compact empowers Bay Mills to conduct class III gaming on "Indian lands"; conversely, it prohibits the Tribe from doing so outside that territory. *Id.*, at 78a, 83a; see n. 1, *supra*. The compact also contains a dispute resolution mechanism, which sends to arbitration any contractual differences the parties cannot settle on their own. See App. to Pet. for Cert. 89a–90a. A provision within that arbitration section states that "[n]othing in this Compact shall be deemed a waiver" of either the Tribe's or the State's sovereign immunity. *Id.*, at 90a. Since entering into the compact, Bay Mills has operated class III gaming, as authorized, on its reservation in Michigan's Upper Peninsula.

In 2010, Bay Mills opened another class III gaming facility in Vanderbilt, a small village in Michigan's Lower Peninsula about 125 miles from the Tribe's reservation. Bay Mills had bought the Vanderbilt property with accrued interest from a federal appropriation, which Congress had made to compensate the Tribe for 19th-century takings of its ancestral lands. See Michigan Indian Land Claims Settlement Act, 111 Stat. 2652. Congress had directed that a portion of the appropriated funds go into a "Land Trust" whose earnings the Tribe was to use to improve or purchase property. According to the legislation, any land so acquired "shall be held as Indian lands are held." § 107(a)(3), *id.*, at 2658. Citing that provision, Bay Mills contended that the Vanderbilt property was "Indian land" under IGRA and the compact; and the Tribe thus claimed authority to operate a casino there.

Michigan disagreed: The State sued Bay Mills in federal court to enjoin operation of the new casino, alleging that the facility violated IGRA and the compact because it was located outside Indian lands. The same day Michigan filed suit, the federal Department of the Interior issued an opinion concluding (as the State's complaint said) that the Tribe's use of Land Trust earnings to purchase the Vanderbilt property did not convert it into Indian territory. See App. 69–101. The District Court entered a preliminary injunction against Bay Mills, which promptly shut down the new casino and took an interlocutory appeal. While that appeal was pending, Michigan amended its complaint to join various tribal officials as defendants, as well as to add state law and federal common law claims. The Court of Appeals for the Sixth Circuit then vacated the injunction, holding (among other things) that tribal sovereign immunity barred Michigan's suit against Bay Mills unless Congress provided otherwise, and that § 2710(d)(7)(A)(ii) did not authorize the action. See 695 F. 3d 406, 413–415 (2012). That provision of IGRA, the Sixth Circuit reasoned, permitted a suit against the Tribe to enjoin only gaming activity located *on* Indian lands, whereas the State's complaint alleged that the Vanderbilt casino was *outside* such territory. See *id.*, at 412.[2] Accordingly, the Court of Appeals concluded that Michigan could proceed, if

[2] The Sixth Circuit framed part of its analysis in jurisdictional terms, holding that the District Court had no authority to consider Michigan's IGRA claim because § 2710(d)(7)(A)(ii) provides federal jurisdiction only over suits to enjoin gaming on Indian lands (and Michigan's suit was not that). See 695 F. 3d, at 412–413. That reasoning is wrong, as all parties agree. See Brief for Michigan 22–25; Brief for Bay Mills 23–24; Brief for United States as *Amicus Curiae* 16–17. The general federal-question statute, 28 U. S. C. § 1331, gives a district court subject matter jurisdiction to decide any claim alleging a violation of IGRA. Nothing in § 2710(d)(7)(A)(ii) or any other provision of IGRA limits that grant of jurisdiction (although those provisions may indicate that a party has no statutory right of action). See *Verizon Md. Inc.* v. *Public Serv. Comm'n of Md.*, 535 U. S. 635, 643–644 (2002).

at all, solely against the individual defendants, and it remanded to the District Court to consider those claims. See *id.*, at 416–417.[3] Although no injunction is currently in effect, Bay Mills has not reopened the Vanderbilt casino.

We granted certiorari to consider whether tribal sovereign immunity bars Michigan's suit against Bay Mills, 570 U. S. 916 (2013), and we now affirm the Court of Appeals' judgment.

II

Indian tribes are "'domestic dependent nations'" that exercise "inherent sovereign authority." *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Tribe of Okla.*, 498 U. S. 505, 509 (1991) (*Potawatomi*) (quoting *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17 (1831)). As dependents, the tribes are subject to plenary control by Congress. See *United States* v. *Lara*, 541 U. S. 193, 200 (2004) ("[T]he Constitution grants Congress" powers "we have consistently described as 'plenary and exclusive'" to "legislate in respect to Indian tribes"). And yet they remain "separate sovereigns preexisting the Constitution." *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 56 (1978). Thus, unless and "until Congress acts, the tribes retain" their historic sovereign authority. *United States* v. *Wheeler*, 435 U. S. 313, 323 (1978).

Among the core aspects of sovereignty that tribes possess—subject, again, to congressional action—is the "common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo*, 436 U. S., at 58. That immunity, we have explained, is "a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Engineering, P. C.*, 476 U. S. 877, 890 (1986); cf. The Federalist No. 81,

[3] The Court of Appeals' decision applied not only to Michigan's case, but also to a consolidated case brought by the Little Traverse Bay Bands of Odawa Indians, which operates a casino about 40 miles from the Vanderbilt property. Little Traverse subsequently dismissed its suit, rather than seek review in this Court.

p. 511 (B. Wright ed. 1961) (A. Hamilton) (It is "inherent in the nature of sovereignty not to be amenable" to suit without consent). And the qualified nature of Indian sovereignty modifies that principle only by placing a tribe's immunity, like its other governmental powers and attributes, in Congress's hands. See *United States* v. *United States Fidelity & Guaranty Co.*, 309 U. S. 506, 512 (1940) (*USF&G*) ("It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit"). Thus, we have time and again treated the "doctrine of tribal immunity [as] settled law" and dismissed any suit against a tribe absent congressional authorization (or a waiver). *Kiowa Tribe of Okla.* v. *Manufacturing Technologies, Inc.*, 523 U. S. 751, 756 (1998).

In doing so, we have held that tribal immunity applies no less to suits brought by States (including in their own courts) than to those by individuals. First in *Puyallup Tribe, Inc.* v. *Department of Game of Wash.*, 433 U. S. 165, 167–168, 172–173 (1977), and then again in *Potawatomi*, 498 U. S., at 509–510, we barred a State seeking to enforce its laws from filing suit against a tribe, rejecting arguments grounded in the State's own sovereignty. In each case, we said a State must resort to other remedies, even if they would be less "efficient." *Id.*, at 514; see *Kiowa*, 523 U. S., at 755 ("There is a difference between the right to demand compliance with state laws and the means available to enforce them"). That is because, as we have often stated (and contrary to the dissent's novel pronouncement, see *post*, at 816 (opinion of THOMAS, J.) (hereinafter the dissent)), tribal immunity "is a matter of federal law and is not subject to diminution by the States." 523 U. S., at 756 (citing *Three Affiliated Tribes*, 476 U. S., at 891; *Washington* v. *Confederated Tribes of Colville Reservation*, 447 U. S. 134, 154 (1980)). Or as we elsewhere explained: While each State at the Constitutional Convention surrendered its immunity from suit by sister States, "it would be absurd to suggest that the tribes"—at a

conference "to which they were not even parties"—similarly ceded their immunity against state-initiated suits. *Blatchford* v. *Native Village of Noatak*, 501 U. S. 775, 782 (1991).

Equally important here, we declined in *Kiowa* to make any exception for suits arising from a tribe's commercial activities, even when they take place off Indian lands. In that case, a private party sued a tribe in state court for defaulting on a promissory note. The plaintiff asked this Court to confine tribal immunity to suits involving conduct on "reservations or to noncommercial activities." 523 U. S., at 758. We said no. We listed *Puyallup*, *Potawatomi*, and *USF&G* as precedents applying immunity to a suit predicated on a tribe's commercial conduct—respectively, fishing, selling cigarettes, and leasing coal mines. 523 U. S., at 754–755. Too, we noted that *Puyallup* involved enterprise "both on and off [the Tribe's] reservation." 523 U. S., at 754 (quoting 433 U. S., at 167). "[O]ur precedents," we thus concluded, have not previously "drawn the[ ] distinctions" the plaintiff pressed in the case. 523 U. S., at 755. They had established a broad principle, from which we thought it improper suddenly to start carving out exceptions. Rather, we opted to "defer" to Congress about whether to abrogate tribal immunity for off-reservation commercial conduct. *Id.*, at 758, 760; see *infra*, at 800–801.

Our decisions establish as well that such a congressional decision must be clear. The baseline position, we have often held, is tribal immunity; and "[t]o abrogate [such] immunity, Congress must 'unequivocally' express that purpose." *C & L Enterprises, Inc.* v. *Citizen Band Potawatomi Tribe of Okla.*, 532 U. S. 411, 418 (2001) (quoting *Santa Clara Pueblo*, 436 U. S., at 58). That rule of construction reflects an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government. See, *e. g.*, *id.*, at 58–60; *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U. S. 9, 18 (1987); *United States* v. *Dion*, 476 U. S. 734, 738–739 (1986).

The upshot is this: Unless Congress has authorized Michigan's suit, our precedents demand that it be dismissed.[4] And so Michigan, naturally enough, makes two arguments: first, that IGRA indeed abrogates the Tribe's immunity from the State's suit; and second, that if it does not, we should revisit—and reverse—our decision in *Kiowa*, so that tribal immunity no longer applies to claims arising from commercial activity outside Indian lands. We consider—and reject—each contention in turn.

III

IGRA partially abrogates tribal sovereign immunity in § 2710(d)(7)(A)(ii)—but this case, viewed most naturally, falls outside that term's ambit. The provision, as noted above, authorizes a State to sue a tribe to "enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact." See *supra*, at 786; *Kiowa*, 523 U. S., at 758 (citing the provision as an example of legislation "restrict[ing] tribal immunity from suit in limited circumstances"). A key phrase in that abrogation is "on Indian lands"—three words reflecting IGRA's overall scope (and repeated some two dozen times in the statute). A State's suit to enjoin gaming activity *on* Indian lands (assuming other requirements are met, see n. 6, *infra*) falls within § 2710(d)(7)(A)(ii); a similar suit to stop gaming activity *off* Indian lands does not. And that creates a fundamental problem for Michigan. After all, the very premise of this suit—the reason Michigan thinks Bay Mills is acting unlawfully—is that the Vanderbilt casino is *outside* Indian lands. See App. to Pet. for Cert. 59a–60a. By dint of that theory, a suit to enjoin gaming in Vanderbilt is correspondingly outside § 2710(d)(7)(A)(ii)'s abrogation of immunity.

Michigan first attempts to fit this suit within § 2710(d)(7)(A)(ii) by relocating the "class III gaming activity" to which

[4] Michigan does not argue here that Bay Mills waived its immunity from suit. Recall that the compact expressly preserves both the Tribe's and the State's sovereign immunity. See *supra*, at 786.

it is objecting. True enough, Michigan states, the Vanderbilt casino lies outside Indian lands. But Bay Mills "authorized, licensed, and operated" that casino from within its own reservation. Brief for Michigan 20. According to the State, that necessary administrative action—no less than, say, dealing craps—is "class III gaming activity," and because it occurred on Indian land, this suit to enjoin it can go forward.

But that argument comes up snake eyes, because numerous provisions of IGRA show that "class III gaming activity" means just what it sounds like—the stuff involved in playing class III games. For example, § 2710(d)(3)(C)(i) refers to "the licensing and regulation of [a class III gaming] activity" and § 2710(d)(9) concerns the "operation of a class III gaming activity." Those phrases make perfect sense if "class III gaming activity" is what goes on in a casino—each roll of the dice and spin of the wheel. But they lose all meaning if, as Michigan argues, "class III gaming activity" refers equally to the off-site licensing or operation of the games. (Just plug in those words and see what happens.) See also §§ 2710(b)(2)(A), (b)(4)(A), (c)(4), (d)(1)(A) (similarly referring to class II or III "gaming activity"). The same holds true throughout the statute. Section 2717(a)(1) specifies fees to be paid by "each gaming operation that conducts a class II or class III gaming activity"—signifying that the gaming activity is the gambling in the poker hall, not the proceedings of the off-site administrative authority. And §§ 2706(a)(5) and 2713(b)(1) together describe a federal agency's power to "clos[e] a gaming activity" for "substantial violation[s]" of law—*e. g.,* to shut down crooked blackjack tables, not the tribal regulatory body meant to oversee them. Indeed, consider IGRA's very first finding: Many tribes, Congress stated, "have licensed gaming activities on Indian lands," thereby necessitating federal regulation. § 2701(1). The "gaming activit[y]" is (once again) the gambling. And that means § 2710(d)(7)(A)(ii) does not allow Michigan's suit even

if Bay Mills took action on its reservation to license or oversee the Vanderbilt facility.

Stymied under § 2710(d)(7)(A)(ii), Michigan next urges us to adopt a "holistic method" of interpreting IGRA that would allow a State to sue a tribe for illegal gaming off, no less than on, Indian lands. Brief for Michigan 30. Michigan asks here that we consider "IGRA's text and structure as a whole." *Id.*, at 28. But (with one briefly raised exception) Michigan fails to identify any specific textual or structural features of the statute to support its proposed result.[5] Rather, Michigan highlights a (purported) anomaly of the statute as written: that it enables a State to sue a tribe for illegal gaming inside, but not outside, Indian country. "[W]hy," Michigan queries, "would Congress authorize a state to obtain a federal injunction against illegal tribal gaming on Indian lands, but not on lands subject to the state's own sovereign jurisdiction?" Reply Brief 1. That question has no answer, Michigan argues: Whatever words Congress may have used in IGRA, it could not have intended that senseless outcome. See Brief for Michigan 28.

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[5] Michigan's single reference to another statutory provision, 18 U. S. C. § 1166, does not advance its argument, because that term includes a geographical limitation similar to the one appearing in § 2710(d)(7)(A)(ii). Section 1166 makes a State's gambling laws applicable "in Indian country" as federal law, and then gives the Federal Government "exclusive jurisdiction over criminal prosecutions" for violating those laws. 18 U. S. C. §§ 1166(a), (d). Michigan briefly argues that, by negative implication, § 1166 gives a State the power "to bring a *civil* suit to enforce [its] anti-gambling laws in Indian country," and that this power applies "even when the defendant is an Indian tribe." Brief for Michigan 26 (emphasis added). Bay Mills and the United States vigorously contest both those propositions, arguing that § 1166 gives States no civil enforcement authority at all, much less as against a tribe. See Brief for Bay Mills 30–31; Brief for United States as *Amicus Curiae* 20–22. But that dispute is irrelevant here. Even assuming Michigan's double inference were valid, § 1166 would still allow a State to sue a tribe for gaming only "in Indian country." So Michigan's suit, alleging that illegal gaming occurred on *state* lands, could no more proceed under § 1166 than under § 2710(d)(7)(A)(ii).

But this Court does not revise legislation, as Michigan proposes, just because the text as written creates an apparent anomaly as to some subject it does not address. Truth be told, such anomalies often arise from statutes, if for no other reason than that Congress typically legislates by parts—addressing one thing without examining all others that might merit comparable treatment. Rejecting a similar argument that a statutory anomaly (between property and non-property taxes) made "not a whit of sense," we explained in one recent case that "Congress wrote the statute it wrote"—meaning, a statute going so far and no further. See *CSX Transp., Inc.* v. *Alabama Dept. of Revenue*, 562 U. S. 277, 295–296 (2011). The same could be said of IGRA's abrogation of tribal immunity for gaming "on Indian lands." This Court has no roving license, in even ordinary cases of statutory interpretation, to disregard clear language simply on the view that (in Michigan's words) Congress "must have intended" something broader. Brief for Michigan 32. And still less do we have that warrant when the consequence would be to expand an abrogation of immunity, because (as explained earlier) "Congress must 'unequivocally' express [its] purpose" to subject a tribe to litigation. *C & L Enterprises*, 532 U. S., at 418; see *supra*, at 790.

In any event, IGRA's history and design provide a more than intelligible answer to the question Michigan poses about why Congress would have confined a State's authority to sue a tribe as § 2710(d)(7)(A)(ii) does. Congress adopted IGRA in response to this Court's decision in *California* v. *Cabazon Band of Mission Indians*, 480 U. S. 202, 221–222 (1987), which held that States lacked any regulatory authority over gaming on Indian lands. *Cabazon* left fully intact a State's regulatory power over tribal gaming outside Indian territory—which, as we will soon show, is capacious. See *infra*, at 795–796. So the problem Congress set out to address in IGRA (*Cabazon*'s ouster of state authority) arose in Indian lands alone. And the solution Congress devised, naturally

enough, reflected that fact. See, *e. g.*, *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 58 (1996) ("[T]he Act grants the States a power that they would not otherwise have, viz., some measure of authority over gaming on Indian lands"). Everything—literally everything—in IGRA affords tools (for either state or federal officials) to regulate gaming on Indian lands, and nowhere else. Small surprise that IGRA's abrogation of tribal immunity does that as well.[6]

And the resulting world, when considered functionally, is not nearly so "enigma[tic]" as Michigan suggests. Reply Brief 1. True enough, a State lacks the ability to sue a tribe for illegal gaming when that activity occurs off the reservation. But a State, on its own lands, has many other powers over tribal gaming that it does not possess (absent consent) in Indian territory. Unless federal law provides differently, "Indians going beyond reservation boundaries" are subject to any generally applicable state law. See *Wagnon* v. *Prairie Band Potawatomi Nation*, 546 U. S. 95, 113 (2005) (quoting *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 148 (1973)). So, for example, Michigan could, in the first instance, deny a license to Bay Mills for an off-reservation

[6] Indeed, the statutory abrogation does not even cover all suits to enjoin gaming on Indian lands, thus refuting the very premise of Michigan's argument-from-anomaly. Section 2710(d)(7)(A)(ii), recall, allows a State to sue a tribe not for all "class III gaming activity located on Indian lands" (as Michigan suggests), but only for such gaming as is "conducted in violation of any Tribal-State compact . . . that is in effect." Accordingly, if a tribe opens a casino on Indian lands before negotiating a compact, the surrounding State cannot sue; only the Federal Government can enforce the law. See 18 U. S. C. § 1166(d). To be precise, then, IGRA's authorization of suit mirrors not the full problem *Cabazon* created (a vacuum of state authority over gaming in Indian country) but, more particularly, Congress's "carefully crafted" compact-based solution to that difficulty. *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 73–74 (1996). So Michigan's binary challenge—if a State can sue to stop gaming in Indian country, why not off?—fails out of the starting gate. In fact, a State *cannot* sue to enjoin all gaming in Indian country; that gaming must, in addition, violate an agreement that the State and tribe have mutually entered.

casino. See Mich. Comp. Laws Ann. §§ 432.206–432.206a (West 2001). And if Bay Mills went ahead anyway, Michigan could bring suit against tribal officials or employees (rather than the Tribe itself) seeking an injunction for, say, gambling without a license. See § 432.220; see also § 600.3801(1)(a) (West 2013) (designating illegal gambling facilities as public nuisances). As this Court has stated before, analogizing to *Ex parte Young*, 209 U. S. 123 (1908), tribal immunity does not bar such a suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct. See *Santa Clara Pueblo*, 436 U. S., at 59. And to the extent civil remedies proved inadequate, Michigan could resort to its criminal law, prosecuting anyone who maintains—or even frequents—an unlawful gambling establishment. See Mich. Comp. Laws Ann. §§ 432.218 (West 2001), 750.303, 750.309 (West 2004). In short (and contrary to the dissent's unsupported assertion, see *post*, at 823), the panoply of tools Michigan can use to enforce its law on its own lands—no less than the suit it could bring on Indian lands under § 2710(d)(7)(A)(ii)—can shutter, quickly and permanently, an illegal casino.[7]

Finally, if a State really wants to sue a tribe for gaming outside Indian lands, the State need only bargain for a waiver of immunity. Under IGRA, a State and tribe negotiating a compact "may include . . . remedies for breach of contract," 25 U. S. C. § 2710(d)(3)(C)(v)—including a provision allowing the State to bring an action against the tribe in the circumstances presented here. States have more than

[7] Michigan contends that these alternative remedies may be more intrusive on, or less respectful of, tribal sovereignty than the suit it wants to bring. See Brief for Michigan 15; Tr. of Oral Arg. 18. Bay Mills, which presumably is better positioned to address that question, emphatically disagrees. See *id.*, at 32–33. And the law supports Bay Mills' position: Dispensing with the immunity of a sovereign for fear of pursuing available remedies against its officers or other individuals would upend all known principles of sovereign immunity.

enough leverage to obtain such terms because a tribe cannot conduct class III gaming on its lands without a compact, see § 2710(d)(1)(C), and cannot sue to enforce a State's duty to negotiate a compact in good faith, see *Seminole Tribe*, 517 U. S., at 47 (holding a State immune from such suits). So as Michigan forthrightly acknowledges, "a party dealing with a tribe in contract negotiations has the power to protect itself by refusing to deal absent the tribe's waiver of sovereign immunity from suit." Brief for Michigan 40. And many States have taken that path. See Brief for Seminole Tribe of Florida et al. as *Amici Curiae* 12–22 (listing compacts with waivers of tribal immunity). To be sure, Michigan did not: As noted earlier, the compact at issue here, instead of authorizing judicial remedies, sends disputes to arbitration and expressly retains each party's sovereign immunity. See *supra*, at 786. But Michigan—like any State—could have insisted on a different deal (and indeed may do so now for the future, because the current compact has expired and remains in effect only until the parties negotiate a new one, see Tr. of Oral Arg. 21). And in that event, the limitation Congress placed on IGRA's abrogation of tribal immunity—whether or not anomalous as an abstract matter—would have made no earthly difference.

IV

Because IGRA's plain terms do not abrogate Bay Mills' immunity from this suit, Michigan (and the dissent) must make a more dramatic argument: that this Court should "revisit[ ] *Kiowa*'s holding" and rule that tribes "have no immunity for illegal commercial activity outside their sovereign territory." Reply Brief 8, 10; see *post*, at 814. Michigan argues that tribes increasingly participate in off-reservation gaming and other commercial activity, and operate in that capacity less as governments than as private businesses. See Brief for Michigan 38 (noting, among other things, that "tribal gaming revenues have more than tripled" since *Kiowa*). Further, Michigan contends, tribes have broader

immunity from suits arising from such conduct than other sovereigns—most notably, because Congress enacted legislation limiting foreign nations' immunity for commercial activity in the United States. See Brief for Michigan 41; 28 U. S. C. § 1605(a)(2). It is time, Michigan concludes, to "[l]evel[ ] the playing field." Brief for Michigan 38.

But this Court does not overturn its precedents lightly. *Stare decisis*, we have stated, "is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991). Although "not an inexorable command," *id.*, at 828, *stare decisis* is a foundation stone of the rule of law, necessary to ensure that legal rules develop "in a principled and intelligible fashion," *Vasquez* v. *Hillery*, 474 U. S. 254, 265 (1986). For that reason, this Court has always held that "any departure" from the doctrine "demands special justification." *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984).

And that is more than usually so in the circumstances here. First, *Kiowa* itself was no one-off: Rather, in rejecting the identical argument Michigan makes, our decision reaffirmed a long line of precedents, concluding that "the doctrine of tribal immunity"—without any exceptions for commercial or off-reservation conduct—"is settled law and controls this case." 523 U. S., at 756; see *id.*, at 754–755; *supra*, at 789–790. Second, we have relied on *Kiowa* subsequently: In another case involving a tribe's off-reservation commercial conduct, we began our analysis with *Kiowa*'s holding that tribal immunity applies to such activity (and then found that the Tribe had waived its protection). See *C & L Enterprises*, 532 U. S., at 418. Third, tribes across the country, as well as entities and individuals doing business with them, have for many years relied on *Kiowa* (along with its forebears and progeny), negotiating their contracts and structuring their

transactions against a backdrop of tribal immunity. As in other cases involving contract and property rights, concerns of *stare decisis* are thus "at their acme." *State Oil Co.* v. *Khan*, 522 U. S. 3, 20 (1997). And fourth (a point we will later revisit, see *infra*, at 800–803), Congress exercises primary authority in this area and "remains free to alter what we have done"—another factor that gives "special force" to *stare decisis*. *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172–173 (1989). To overcome all these reasons for this Court to stand pat, Michigan would need an ace up its sleeve.[8]

But instead, all the State musters are retreads of assertions we have rejected before. *Kiowa* expressly considered the view, now offered by Michigan, that "when tribes take part in the Nation's commerce," immunity "extends beyond what is needed to safeguard tribal self-governance." 523 U. S., at 758. (Indeed, as *Kiowa* noted, see *id.*, at 757, *Potawatomi* had less than a decade earlier rejected Oklahoma's identical contention that "because tribal business activities . . . are now so detached from traditional tribal interests," immunity "no longer makes sense in [the commercial] context," 498 U. S., at 510.) So too, the *Kiowa* Court comprehended the trajectory of tribes' commercial activity (which is the dissent's exclusive rationale for ignoring *stare decisis*, see *post*, at 822–825). In the preceding decade, tribal gam-

[8] Adhering to *stare decisis* is particularly appropriate here given that the State, as we have shown, has many alternative remedies: It has no need to sue the Tribe to right the wrong it alleges. See *supra*, at 795–796. We need not consider whether the situation would be different if no alternative remedies were available. We have never, for example, specifically addressed (nor, so far as we are aware, has Congress) whether immunity should apply in the ordinary way if a tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for off-reservation commercial conduct. The argument that such cases would present a "special justification" for abandoning precedent is not before us. *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984).

ing revenues had increased more than thirtyfold[9] (dwarfing the still strong rate of growth since that time, see *supra*, at 797); and *Kiowa* noted the flourishing of other tribal enterprises, ranging from cigarette sales to ski resorts, see 523 U. S., at 758. Moreover, the *Kiowa* Court understood that other sovereigns did not enjoy similar immunity for commercial activities outside their territory; that seeming "anomal[y]" was a principal point in the dissenting opinion. See *id.*, at 765 (Stevens, J., dissenting). *Kiowa* did more, in fact, than acknowledge those arguments; it expressed a fair bit of sympathy toward them. See *id.*, at 758 (noting "reasons to doubt the wisdom of perpetuating the doctrine" as to off-reservation commercial conduct). Yet the decision could not have been any clearer: "We decline to draw [any] distinction" that would "confine [immunity] to reservations or to noncommercial activities." *Ibid.*

We ruled that way for a single, simple reason: because it is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity. The special brand of sovereignty the tribes retain—both its nature and its extent—rests in the hands of Congress. See *Lara*, 541 U. S., at 200; *Wheeler*, 435 U. S., at 323. *Kiowa* chose to respect that congressional responsibility (as *Potawatomi* had a decade earlier) when it rejected the precursor to Michigan's argument: Whatever our view of the merits, we explained, "we defer to the role Congress may wish to exercise in this important judgment." 523 U. S., at 758; see *Potawatomi*, 498 U. S., at 510 (stating that because "Congress has always been at liberty to dispense with" or limit tribal immunity, "we are not disposed to modify" its scope). Congress, we said—drawing an analogy to its role in shaping foreign sovereign

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[9] See Nat. Gambling Impact Study Comm'n, Final Report, pp. 6–1 to 6–2 (1999), online at http://govinfo.library.unt.edu/ngisc/reports/6.pdf (as visited Apr. 30, 2014, and available in Clerk of Court's case file).

immunity[10]—has the greater capacity "to weigh and accommodate the competing policy concerns and reliance interests" involved in the issue. 523 U. S., at 759. And Congress repeatedly had done just that: It had restricted tribal immunity "in limited circumstances" (including, we noted, in § 2710(d)(7)(A)(ii)), while "in other statutes" declaring an "intention not to alter" the doctrine. *Id.*, at 758; see *Potawatomi*, 498 U. S., at 510 (citing statutory provisions involving tribal immunity). So too, we thought, Congress should make the call whether to curtail a tribe's immunity for off-reservation commercial conduct—and the Court should accept Congress's judgment.

All that we said in *Kiowa* applies today, with yet one more thing: Congress has now reflected on *Kiowa* and made an initial (though of course not irrevocable) decision to retain that form of tribal immunity. Following *Kiowa*, Congress considered several bills to substantially modify tribal immu-

[10] *Kiowa* explained that Congress, in the Foreign Sovereign Immunities Act of 1976, 28 U. S. C. § 1605(a)(2), "den[ied] immunity for the commercial acts of a foreign nation," codifying an earlier State Department document, known as the Tate Letter, announcing that policy. 523 U. S., at 759. Michigan takes issue with *Kiowa*'s account, maintaining that this Court took the lead in crafting the commercial exception to foreign sovereign immunity, and so should feel free to do the same thing here. See Reply Brief 6–7. But the decision Michigan cites, *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U. S. 682 (1976), does not show what the State would like. First, Michigan points to a part of the *Dunhill* opinion commanding only four votes, see *id.*, at 695–706 (opinion of White, J.); the majority's decision was based on the act of state doctrine, not on anything to do with foreign sovereign immunity, see *id.*, at 690–695. And second, even the plurality opinion relied heavily on the views of the Executive Branch as expressed in the Tate Letter—going so far as to attach that document as an appendix. See *id.*, at 696–698 (opinion of White, J.); *id.*, at 711–715 (appendix 2 to opinion of the Court). The opinion therefore illustrates what *Kiowa* highlighted: this Court's historic practice of "defer-r[ing] to the decisions of the political branches," rather than going it alone, when addressing foreign sovereign immunity. *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 486 (1983).

nity in the commercial context. Two in particular—drafted by the chair of the Senate Appropriations Subcommittee on the Interior—expressly referred to *Kiowa* and broadly abrogated tribal immunity for most torts and breaches of contract. See S. 2299, 105th Cong., 2d Sess. (1998); S. 2302, 105th Cong., 2d Sess. (1998). But instead of adopting those reversals of *Kiowa*, Congress chose to enact a far more modest alternative requiring tribes either to disclose or to waive their immunity in contracts needing the Secretary of the Interior's approval. See Indian Tribal Economic Development and Contract Encouragement Act of 2000, § 2, 114 Stat. 46 (codified at 25 U. S. C. § 81(d)(2)); see also F. Cohen, Handbook of Federal Indian Law § 7.05[1][b], p. 643 (2012). Since then, Congress has continued to exercise its plenary authority over tribal immunity, specifically preserving immunity in some contexts and abrogating it in others, but never adopting the change Michigan wants.[11] So rather than confronting, as we did in *Kiowa*, a legislative vacuum as to the precise issue presented, we act today against the backdrop of a congressional choice: to retain tribal immunity (at least for now) in a case like this one.[12]

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[11] Compare, *e. g.*, Prevent All Cigarette Trafficking Act of 2009, §§ 2(e), (3)(a), 124 Stat. 1101, 1108 (preserving immunity), with Arizona Water Settlements Act, §§ 213(a)(2), 301, 118 Stat. 3531, 3551 (abrogating immunity). The dissent's claim that "Congress has never granted tribal sovereign immunity in *any* shape or form," *post*, at 826, apparently does not take into account the many statutes in which Congress preserved or otherwise ratified tribal immunity. See, *e. g.*, 25 U. S. C. § 450n; see generally *Potawatomi*, 498 U. S., at 510 ("Congress has consistently reiterated its approval of the immunity doctrine").

[12] The dissent principally counters that this history is not "relevan[t]" because *Kiowa* was a "common-law decision." *Post*, at 827. But that is to ignore what *Kiowa* (in line with prior rulings) specifically told Congress: that tribal immunity, far from any old common law doctrine, lies in Congress's hands to configure. See 523 U. S., at 758; *Potawatomi*, 498 U. S., at 510; *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 58–60 (1978). When we inform Congress that it has primary responsibility over a sphere of law, and invite Congress to consider a specific issue within that sphere, we cannot deem irrelevant how Congress responds.

Reversing *Kiowa* in these circumstances would scale the heights of presumption: Beyond upending "long-established principle[s] of tribal sovereign immunity," that action would replace Congress's considered judgment with our contrary opinion. *Potawatomi*, 498 U. S., at 510. As *Kiowa* recognized, a fundamental commitment of Indian law is judicial respect for Congress's primary role in defining the contours of tribal sovereignty. See 523 U. S., at 758–760; see also *Santa Clara Pueblo*, 436 U. S., at 60 ("[A] proper respect . . . for the plenary authority of Congress in this area cautions that [the courts] tread lightly"); Cohen, *supra*, § 2.01[1], at 110 ("Judicial deference to the paramount authority of Congress in matters concerning Indian policy remains a central and indispensable principle of the field of Indian law"). That commitment gains only added force when Congress has already reflected on an issue of tribal sovereignty, including immunity from suit, and declined to change settled law. And that force must grow greater still when Congress considered that issue partly at our urging. See *Kiowa*, 523 U. S., at 758 (hinting, none too subtly, that "Congress may wish to exercise" its authority over the question presented). Having held in *Kiowa* that this issue is up to Congress, we cannot reverse ourselves because some may think its conclusion wrong. Congress of course may always change its mind—and we would readily defer to that new decision. But it is for Congress, now more than ever, to say whether to create an exception to tribal immunity for off-reservation commercial activity. As in *Kiowa*—except still more so—"we decline to revisit our case law[,] and choose" instead "to defer to Congress." *Id.*, at 760.

V

As "domestic dependent nations," Indian tribes exercise sovereignty subject to the will of the Federal Government. *Cherokee Nation*, 5 Pet., at 17. Sovereignty implies immunity from lawsuits. Subjection means (among much else) that Congress can abrogate that immunity as and to the ex-

tent it wishes. If Congress had authorized this suit, Bay Mills would have no valid grounds to object. But Congress has not done so: The abrogation of immunity in IGRA applies to gaming on, but not off, Indian lands. We will not rewrite Congress's handiwork. Nor will we create a freestanding exception to tribal immunity for all off-reservation commercial conduct. This Court has declined that course once before. To choose it now would entail both overthrowing our precedent and usurping Congress's current policy judgment. Accordingly, Michigan may not sue Bay Mills to enjoin the Vanderbilt casino, but must instead use available alternative means to accomplish that object.

We affirm the Sixth Circuit's judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SOTOMAYOR, concurring.

The doctrine of tribal immunity has been a part of American jurisprudence for well over a century. See, *e. g.*, *Parks* v. *Ross*, 11 How. 362 (1851); Struve, Tribal Immunity and Tribal Courts, 36 Ariz. St. L. J. 137, 148–155 (2004) (tracing the origins of the doctrine to the mid-19th century); Wood, It Wasn't an Accident: The Tribal Sovereign Immunity Story, 62 Am. U. L. Rev. 1587, 1640–1641 (2013) (same). And in more recent decades, this Court has consistently affirmed the doctrine. See, *e. g.*, *United States* v. *United States Fidelity & Guaranty Co.*, 309 U. S. 506 (1940); *Puyallup Tribe, Inc.* v. *Department of Game of Wash.*, 433 U. S. 165 (1977); *C & L Enterprises, Inc.* v. *Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U. S. 411, 418 (2001). Despite this history, the principal dissent chides the Court for failing to offer a sufficient basis for the doctrine of tribal immunity, *post*, at 816 (opinion of THOMAS, J.), and reasons that we should at least limit the doctrine of tribal sovereign immunity in ways that resemble restrictions on foreign sovereign immunity.

The majority compellingly explains why *stare decisis* and deference to Congress' careful regulatory scheme require affirming the decision below. I write separately to further detail why both history and comity counsel against limiting Tribes' sovereign immunity in the manner the principal dissent advances.

I

Long before the formation of the United States, Tribes "were self-governing sovereign political communities." *United States* v. *Wheeler*, 435 U. S. 313, 322–323 (1978). And Tribes "have not given up their full sovereignty." *Id.*, at 323. Absent contrary congressional acts, Tribes "retain their existing sovereign powers" and "possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *Ibid.* See also 25 U. S. C. § 1301(1) (affirming Tribes' continued "powers of self-government"). In this case then, the question is what type of immunity federal courts should accord to Tribes, commensurate with their retained sovereignty.

In answering this question, the principal dissent analogizes tribal sovereign immunity to foreign sovereign immunity. Foreign sovereigns (unlike States) are generally not immune from suits arising from their commercial activities. *Post*, at 817; see also Foreign Sovereign Immunities Act of 1976, 28 U. S. C. § 1605(a)(2) (commercial-activity exception to foreign sovereign immunity). This analogy, however, lacks force. Indian Tribes have never historically been classified as "foreign" governments in federal courts even when they asked to be.

The case of *Cherokee Nation* v. *Georgia*, 5 Pet. 1 (1831), is instructive. In 1828 and 1829, the Georgia Legislature enacted a series of laws that purported to nullify acts of the Cherokee government and seize Cherokee land, among other things. *Id.*, at 7–8. The Cherokee Nation sued Georgia in this Court, alleging that Georgia's laws violated federal law

and treaties. *Id.*, at 7. As the constitutional basis for jurisdiction, the Tribe relied on Article III, § 2, cl. 1, which extends the federal judicial power to cases "between a state, or the citizens thereof, and foreign states, citizens, or subjects." 5 Pet., at 15 (internal quotation marks omitted). But this Court concluded that it lacked jurisdiction because Tribes were not "foreign state[s]." *Id.*, at 20. The Court reasoned that "[t]he condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence." *Id.*, at 16. Tribes were more akin to "domestic dependent nations," the Court explained, than to foreign nations. *Id.*, at 17. We have repeatedly relied on that characterization in subsequent cases. See, *e. g.*, *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Tribe of Okla.*, 498 U. S. 505, 509 (1991); *Merrion* v. *Jicarilla Apache Tribe*, 455 U. S. 130, 141 (1982). Two centuries of jurisprudence therefore weigh against treating Tribes like foreign visitors in American courts.

II

The principal dissent contends that whenever one sovereign is sued in the courts of another, the question whether to confer sovereign immunity is not a matter of right but rather one of "comity." *Post*, at 816. But in my view, the premise leads to a different conclusion than the one offered by the dissent. Principles of comity strongly counsel in favor of continued recognition of tribal sovereign immunity, including for off-reservation commercial conduct.

Comity—"that is, 'a proper respect for [a sovereign's] functions,'" *Sprint Communications, Inc.* v. *Jacobs*, 571 U. S. 69, 77 (2013)—fosters "respectful, harmonious relations" between governments, *Wood* v. *Milyard*, 566 U. S. 463, 471 (2012). For two reasons, these goals are best served by recognizing sovereign immunity for Indian Tribes, including immunity for off-reservation conduct, except where Congress has expressly abrogated it. First, a legal rule that permit-

ted States to sue Tribes, absent their consent, for commercial conduct would be anomalous in light of the existing prohibitions against Tribes' suing States in like circumstances. Such disparate treatment of these two classes of domestic sovereigns would hardly signal the Federal Government's respect for tribal sovereignty. Second, Tribes face a number of barriers to raising revenue in traditional ways. If Tribes are ever to become more self-sufficient, and fund a more substantial portion of their own governmental functions, commercial enterprises will likely be a central means of achieving that goal.

A

We have held that Tribes may not sue States in federal court, *Blatchford* v. *Native Village of Noatak*, 501 U. S. 775 (1991), including for commercial conduct that chiefly impacts Indian reservations, *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44 (1996). In *Seminole Tribe*, the Tribe sued the State of Florida in federal court under the Indian Gaming Regulatory Act (IGRA)—the same statute petitioner relies on here. The suit alleged that Florida had breached its statutory "duty to negotiate in good faith with [the Tribe] toward the formation of a [gaming] compact." *Id.*, at 47. This Court held that state sovereign immunity prohibited such a suit.

Importantly, the Court barred the Tribe's suit against Florida even though the case involved the State's conduct in the course of commercial negotiations. As this Court later observed, relying in part on *Seminole Tribe*, the doctrine of state sovereign immunity is not "any less robust" when the case involves conduct "that is undertaken for profit, that is traditionally performed by private citizens and corporations, and that otherwise resembles the behavior of 'market participants.'" *College Savings Bank* v. *Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U. S. 666, 684 (1999). Nor did *Seminole Tribe* adopt a state corollary to the "off-reservation" exception to tribal sovereign immunity that the principal dissent urges today. To the contrary, the

negotiations in *Seminole Tribe* concerned gaming on Indian lands, not state lands.

As the principal dissent observes, "comity is about one sovereign respecting the dignity of another." *Post*, at 817. This Court would hardly foster respect for the dignity of Tribes by allowing States to sue Tribes for commercial activity on state lands, while prohibiting Tribes from suing States for commercial activity on Indian lands. Both States and Tribes are domestic governments who come to this Court with sovereignty that they have not entirely ceded to the Federal Government.

Similar asymmetry would result if States could sue Tribes in state courts.[1] In *Nevada* v. *Hicks*, 533 U. S. 353, 355 (2001), this Court considered whether a tribal court had "jurisdiction over civil claims against state officials who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation." It held that the tribal court did not. *Id.*, at 374. In reaching that conclusion, the Court observed that "[s]tate sovereignty does not end at a reservation's border." *Id.*, at 361. And relying on similar principles, some federal courts have more explicitly held that tribal courts may not entertain suits against States. See, *e. g.*, *Montana* v. *Gilham*, 133 F. 3d 1133, 1136–1137 (CA9 1998) (holding that while neither "the Eleventh Amendment [n]or congressional act" barred suits against States in tribal courts, "the inherent sovereign powers of the States" barred such suits). To the extent Tribes are barred from suing in tribal courts, it would be anomalous to permit suits against Tribes in state courts.

Two of the dissenting opinions implicitly address this asymmetry. The principal dissent reasons that States and Tribes should be treated differently for purposes of sovereign immunity because—unlike tribal sovereign immunity—

[1] While this case involves a suit against a Tribe in federal court, the principal dissent also critiques tribal sovereign immunity in state courts. *Post*, at 817–818.

state sovereign immunity has constitutional origins. *Post*, at 816, n. 1. JUSTICE GINSBURG offers another view: that Tribes and States should both receive less immunity. She expresses concerns about cases like *Seminole Tribe*, pointing to dissents that have cataloged the many problems associated with the Court's sprawling state sovereign immunity jurisprudence. *Post*, at 831–832 (citing, among others, *Alden* v. *Maine*, 527 U. S. 706, 814 (1999) (Souter, J., dissenting)).

As things stand, however, *Seminole Tribe* and its progeny remain the law. And so long as that is so, comity would be ill served by unequal treatment of States and Tribes. If Tribes cannot sue States for commercial activities on tribal lands, the converse should also be true. Any other result would fail to respect the dignity of Indian Tribes.

B

The principal dissent contends that Tribes have emerged as particularly "substantial and successful" commercial actors. *Post*, at 825. The dissent expresses concern that, although tribal leaders can be sued for prospective relief, *ante*, at 796 (majority opinion), Tribes' purportedly growing coffers remain unexposed to broad damages liability, *post*, at 822–823. These observations suffer from two flaws.

First, not all Tribes are engaged in highly lucrative commercial activity. Nearly half of federally recognized Tribes in the United States do not operate gaming facilities at all. A. Meister, Casino City's Indian Gaming Industry Report 28 (2009–2010 ed.) (noting that "only 237, or 42 percent, of the 564 federally recognized Native American tribes in the U. S. operate gaming").[2] And even among the Tribes that do, gaming revenue is far from uniform. As of 2009, fewer than 20% of Indian gaming facilities accounted for roughly 70% of the revenues from such facilities. *Ibid.* One must there-

[2] The term "'Indian gaming facility' is defined as any tribal enterprise that offer[s] gaming in accordance with [IGRA].'" A. Meister, Casino City's Indian Gaming Industry Report 10 (2009–2010 ed.).

fore temper any impression that Tribes across the country have suddenly and uniformly found their treasuries filled with gaming revenue.

Second, even if all Tribes were equally successful in generating commercial revenues, that would not justify the commercial-activity exception urged by the principal dissent. For tribal gaming operations cannot be understood as mere profit-making ventures that are wholly separate from the Tribes' core governmental functions. A key goal of the Federal Government is to render Tribes more self-sufficient, and better positioned to fund their own sovereign functions, rather than relying on federal funding. 25 U. S. C. § 2702(1) (explaining that Congress' purpose in enacting IGRA was "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments"); see also Cohen's Handbook of Federal Indian Law 1357–1373 (2012) (Cohen's Handbook) (describing various types of federal financial assistance that Tribes receive). And tribal business operations are critical to the goals of tribal self-sufficiency because such enterprises in some cases "may be the only means by which a tribe can raise revenues," Struve, 36 Ariz. St. L. J., at 169. This is due in large part to the insuperable (and often state-imposed) barriers Tribes face in raising revenue through more traditional means.

For example, States have the power to tax certain individuals and companies based on Indian reservations, making it difficult for Tribes to raise revenue from those sources. See *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Tribe of Okla.*, 498 U. S. 505 (allowing State to collect taxes on sales to non-Indians on Indian land); *Arizona Dept. of Revenue* v. *Blaze Constr. Co.*, 526 U. S. 32 (1999) (allowing taxation of companies owned by non-Indians on Indian land); *Thomas* v. *Gay,* 169 U. S. 264 (1898) (allowing taxation of property owned by non-Indians on Indian land). States may

also tax reservation land that Congress has authorized individuals to hold in fee, regardless of whether it is held by Indians or non-Indians. See *Cass County* v. *Leech Lake Band of Chippewa Indians*, 524 U. S. 103 (1998) (States may tax Indian reservation land if Congress made the land subject to sale under the Indian General Allotment Act of 1887 (also known as the Dawes Act)); *County of Yakima* v. *Confederated Tribes and Bands of Yakima Nation*, 502 U. S. 251 (1992) (same).

As commentators have observed, if Tribes were to impose their own taxes on these same sources, the resulting double taxation would discourage economic growth. Fletcher, In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue, 80 N. D. L. Rev. 759, 771 (2004); see also Cowan, Double Taxation in Indian Country: Unpacking the Problem and Analyzing the Role of the Federal Government in Protecting Tribal Governmental Revenues, 2 Pittsburgh Tax Rev. 93, 95 (2005); Enterprise Zones, Hearings before the Subcommittee on Select Revenue Measures of the House Committee On Ways and Means, 102d Cong., 1st Sess., 234 (1991) (statement of Peterson Zah, President of the Navajo Nation) ("[D]ouble taxation interferes with our ability to encourage economic activity and to develop effective revenue generating tax programs. Many businesses may find it easier to avoid doing business on our reservations rather than . . . bear the brunt of an added tax burden").

If non-Indians controlled only a small amount of property on Indian reservations, and if only a negligible amount of land was held in fee, the double-taxation concern might be less severe. But for many Tribes, that is not the case. History explains why this is so: Federal policies enacted in the late-19th and early-20th centuries rendered a devastating blow to tribal ownership. In 1887, Congress enacted the Dawes Act. 24 Stat. 388. That Act had two major components relevant here. First, it converted the property that

belonged to Indian Tribes into fee property, and allotted the land to individual Indians. *Id.*, at 388–389. Much of this land passed quickly to non-Indian owners. Royster, The Legacy of Allotment, 27 Ariz. St. L. J. 1, 12 (1995). Indeed, by 1934, the amount of land that passed from Indian Tribes to non-Indians totaled 90 million acres. See Cohen's Handbook 74. Other property passed to non-Indians when destitute Indians found themselves unable to pay state taxes, resulting in sheriff's sales. Royster, 27 Ariz. St. L. J., at 12.

A second component of the Dawes Act opened "surplus" land on Indian reservations to settlement by non-Indians. 24 Stat. 389–390. Selling surplus lands to non-Indians was part of a more general policy of forced assimilation. See Cohen's Handbook 75. Sixty million acres of land passed to non-Indian hands as a result of surplus programs. Royster, 27 Ariz. St. L. J., at 13.[3]

These policies have left a devastating legacy, as the cases that have come before this Court demonstrate. We noted in *Montana* v. *United States*, 450 U. S. 544, 548 (1981), for example, that due in large part to the Dawes Act, 28% of the Crow Tribe's reservation in Montana was held in fee by non-Indians. Similarly, Justice White observed in *Brendale* v. *Confederated Tribes and Bands of Yakima Nation*, 492 U. S. 408, 415 (1989) (plurality opinion), that 20% of the Yakima Nation's reservation was owned in fee. For reservations like those, it is particularly impactful that States and local governments may tax property held by non-Indians, *Thomas*, 169 U. S., at 264–265, and land held in fee as a result of the Dawes Act. See *County of Yakima*, 502 U. S., at 259.

Moreover, Tribes are largely unable to obtain substantial revenue by taxing tribal members who reside on non-fee land that was not allotted under the Dawes Act. As one scholar

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[3] This figure does not include land taken from Indian Tribes after World War II; during that time, some Tribes and reservations were liquidated and given to non-Indians. A. Debo, A History of Indians of the United States 301–312 (1970).

recently observed, even if Tribes imposed high taxes on Indian residents, "there is very little income, property, or sales they could tax." Fletcher, 80 N. D. L. Rev., at 774. The poverty and unemployment rates on Indian reservations are significantly greater than the national average. See n. 4, *infra*. As a result, "there is no stable tax base on most reservations." Fletcher, 80 N. D. L. Rev., at 774; see Williams, Small Steps on the Long Road to Self-Sufficiency for Indian Nations: The Indian Tribal Governmental Tax Status Act of 1982, 22 Harv. J. Legis. 335, 385 (1985).

To be sure, poverty has decreased over the past few decades on reservations that have gaming activity. One recent study found that between 1990 and 2000, the presence of a tribal casino increased average per capita income by 7.4% and reduced the family poverty rate by 4.9 percentage points. Anderson, Tribal Casino Impacts on American Indians Well-Being: Evidence From Reservation-Level Census Data, 31 Contemporary Economic Policy 291, 298 (Apr. 2013). But even reservations that have gaming continue to experience significant poverty, especially relative to the national average. See *id.*, at 296. The same is true of Indian reservations more generally.[4]

* * *

Both history and proper respect for tribal sovereignty—or comity—counsel against creating a special "commercial activity" exception to tribal sovereign immunity. For these reasons, and for the important reasons of *stare decisis* and

[4] See Dept. of Interior, Office of Assistant Secretary–Indian Affairs, 2013 American Indian Population and Labor Force Report 11 (Jan. 16, 2014) (placing the poverty rate among American Indians at 23%); see also Dept. of Commerce, Bureau of Census, Press Release, Income, Poverty and Health Insurance Coverage in the United States: 2010 (Sept. 13, 2011) (stating that the national poverty rate in 2010 was 15.1%), online at http://www.census.gov/newsroom/releases/archives/income_wealth/cb11-157.html (as visited May 22, 2014, and available in Clerk of Court's case file).

deference to Congress outlined in the majority opinion, I concur.

JUSTICE SCALIA, dissenting.

In *Kiowa Tribe of Okla.* v. *Manufacturing Technologies, Inc.*, 523 U. S. 751 (1998), this Court expanded the judge-invented doctrine of tribal immunity to cover off-reservation commercial activities. *Id.*, at 760. I concurred in that decision. For the reasons given today in JUSTICE THOMAS's dissenting opinion, which I join, I am now convinced that *Kiowa* was wrongly decided; that, in the intervening 16 years, its error has grown more glaringly obvious; and that *stare decisis* does not recommend its retention. Rather than insist that Congress clean up a mess that I helped make, I would overrule *Kiowa* and reverse the judgment below.

JUSTICE THOMAS, with whom JUSTICE SCALIA, JUSTICE GINSBURG, and JUSTICE ALITO join, dissenting.

In *Kiowa Tribe of Okla.* v. *Manufacturing Technologies, Inc.*, 523 U. S. 751 (1998), this Court extended the judge-made doctrine of tribal sovereign immunity to bar suits arising out of an Indian tribe's commercial activities conducted outside its territory. That was error. Such an expansion of tribal immunity is unsupported by any rationale for that doctrine, inconsistent with the limits on tribal sovereignty, and an affront to state sovereignty.

That decision, wrong to begin with, has only worsened with the passage of time. In the 16 years since *Kiowa*, tribal commerce has proliferated and the inequities engendered by unwarranted tribal immunity have multiplied. Nevertheless, the Court turns down a chance to rectify its error. Still lacking a substantive justification for *Kiowa*'s rule, the majority relies on notions of deference to Congress and *stare decisis*. Because those considerations do not support (and cannot sustain) *Kiowa*'s unjustifiable rule and its mounting consequences, I respectfully dissent.

I

A

There is no substantive basis for *Kiowa*'s extension of tribal immunity to off-reservation commercial acts. As this Court explained in *Kiowa*, the common-law doctrine of tribal sovereign immunity arose "almost by accident." *Id.*, at 756. The case this Court typically cited as the doctrine's source "simply does not stand for that proposition," *ibid.* (citing *Turner* v. *United States*, 248 U. S. 354 (1919)), and later cases merely "reiterated the doctrine" "with little analysis," 523 U. S., at 757. In fact, far from defending the doctrine of tribal sovereign immunity, the *Kiowa* majority "doubt[ed] the wisdom of perpetuating the doctrine." *Id.*, at 758. The majority here suggests just one *post hoc* justification: that tribes automatically receive immunity as an incident to their historic sovereignty. But that explanation fails to account for the fact that immunity does not apply of its own force in the courts of another sovereign. And none of the other colorable rationales for the doctrine—*i. e.*, considerations of comity, and protection of tribal self-sufficiency and self-government—supports extending immunity to suits arising out of a tribe's commercial activities conducted beyond its territory.

1

Despite the Indian tribes' subjection to the authority and protection of the United States Government, this Court has deemed them "domestic dependent nations" that retain limited attributes of their historic sovereignty. *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17 (1831); see also *United States* v. *Wheeler*, 435 U. S. 313, 323 (1978) ("The sovereignty that the Indian tribes retain is of a unique and limited character"). The majority suggests that tribal immunity is one such attribute of sovereignty that tribes have retained. See *ante*, at 788–789; Brief for Respondent Bay Mills Indian Community 48. On that view, immunity from suit applies automati-

cally, on the theory that it is simply "inherent in the nature of sovereignty." The Federalist No. 81, p. 548 (J. Cooke ed. 1961) (A. Hamilton).

This basis for immunity—the only substantive basis the majority invokes—is unobjectionable when a tribe raises immunity as a defense in its own courts. We have long recognized that in the sovereign's own courts, "the sovereign's power to determine the jurisdiction of its own courts and to define the substantive legal rights of its citizens adequately explains the lesser authority to define its own immunity." *Kiowa*, *supra*, at 760 (Stevens, J., dissenting) (citing *Kawananakoa* v. *Polyblank*, 205 U. S. 349, 353 (1907)). But this notion cannot support a tribe's claim of immunity in the courts of another sovereign—either a State (as in *Kiowa*) or the United States (as here). Sovereign immunity is not a freestanding "right" that applies of its own force when a sovereign faces suit in the courts of another. *Republic of Austria* v. *Altmann*, 541 U. S. 677, 688 (2004). Rather, "[t]he sovereign's claim to immunity in the courts of a second sovereign . . . normally depends on the second sovereign's law." *Kiowa*, *supra*, at 760–761 (Stevens, J., dissenting); see, *e. g.*, *Altmann*, *supra*, at 711 (BREYER, J., concurring) (application of foreign sovereign immunity "is a matter, not of legal right, but of 'grace and comity' ").[1] In short, to the extent an Indian tribe may claim immunity in federal or state court, it is

[1] State sovereign immunity is an exception: This Court has said that the States' immunity from suit in federal court is secured by the Constitution. See *Kimel* v. *Florida Bd. of Regents*, 528 U. S. 62, 73 (2000) ("[F]or over a century now, we have made clear that the Constitution does not provide for federal jurisdiction over suits against nonconsenting States"); *Alden* v. *Maine*, 527 U. S. 706, 733 (1999) ("Although the sovereign immunity of the States derives at least in part from the common-law tradition, . . . the immunity exists today by constitutional design"). Unlike the States, Indian tribes "are not part of this constitutional order," and their immunity is not guaranteed by it. *United States* v. *Lara*, 541 U. S. 193, 219 (2004) (THOMAS, J., concurring in judgment).

because federal or state law provides it, not merely because the tribe is sovereign. Outside of tribal courts, the majority's inherent-immunity argument is hardly persuasive.

2

Immunity for independent foreign nations in federal courts is grounded in international "comity," *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 486 (1983), *i. e.*, respecting the dignity of other sovereigns so as not to "'"imperil the amicable relations between governments and vex the peace of nations,"'" *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398, 418 (1964). But whatever its relevance to tribal immunity, comity is an ill-fitting justification for extending immunity to tribes' off-reservation commercial activities. Even with respect to fully sovereign foreign nations, comity has long been discarded as a sufficient reason to grant immunity for commercial acts. In 1976, Congress provided that foreign states are not immune from suits based on their "commercial activity" in the United States or abroad. Foreign Sovereign Immunities Act, 28 U. S. C. §1605(a)(2); see also *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U. S. 682, 703–704 (1976) (plurality opinion of White, J., joined by Burger, C. J., and Powell and Rehnquist, JJ.) ("Subjecting foreign governments to the rule of law in their commercial dealings" is "unlikely to touch very sharply on 'national nerves,'" because "[i]n their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns").

There is a further reason that comity cannot support tribal immunity for off-reservation commercial activities. At bottom, comity is about one sovereign respecting the dignity of another. See *Nevada* v. *Hall*, 440 U. S. 410, 416 (1979). But permitting immunity for a tribe's off-reservation acts represents a substantial affront to a different set of sovereigns—the States, whose sovereignty is guaranteed by the Constitution, see *New York* v. *United States*, 505 U. S. 144, 188 (1992)

("The Constitution . . . 'leaves to the several States a residuary and inviolable sovereignty'" (quoting The Federalist No. 39, at 256 (J. Madison))). When an Indian tribe engages in commercial activity outside its own territory, it necessarily acts within the territory of a sovereign State. This is why, "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 148–149 (1973). A rule barring all suits against a tribe arising out of a tribe's conduct within state territory—whether private actions or (as here) actions brought by the State itself—stands in stark contrast to a State's broad regulatory authority over Indians within its own territory. Indeed, by foreclosing key mechanisms upon which States depend to enforce their laws against tribes engaged in off-reservation commercial activity, such a rule effects a breathtaking pre-emption of state power. *Kiowa*, 523 U. S., at 764 (Stevens, J., dissenting). What is worse, because that rule of immunity also applies in state courts, it strips the States of their prerogative "to decide for themselves whether to accord such immunity to Indian tribes as a matter of comity." *Id.*, at 760 (same). The States may decide whether to grant immunity in their courts to *other sovereign States*, see *Hall*, *supra*, at 417–418 (a State's immunity from suit in the courts of a second State depends on whether the second has chosen to extend immunity to the first "as a matter of comity"), but when it comes to Indian tribes, this Court has taken that right away. *Kiowa*, *supra*, at 765 (Stevens, J., dissenting).

Nor does granting tribes immunity with respect to their commercial conduct in state territory serve the practical aim of comity: allaying friction between sovereigns. See *Banco Nacional de Cuba*, *supra*, at 417–418. We need look no further than this case (and many others cited by petitioner and *amici* States) to see that such broad immunity has only ag-

gravated relationships between States and tribes throughout the country. See *infra*, at 823–825; see generally Brief for State of Alabama et al. 11–16; Brief for State of Oklahoma 8–10, 12–15.

3

This Court has previously suggested that recognizing tribal immunity furthers a perceived congressional goal of promoting tribal self-sufficiency and self-governance. See *Kiowa*, *supra*, at 757; *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Engineering, P. C.*, 476 U. S. 877, 890 (1986). Whatever the force of this assertion as a general matter, it is easy to reject as a basis for extending tribal immunity to off-reservation commercial activities. In *Kiowa* itself, this Court dismissed the self-sufficiency rationale as "inapposite to modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities." 523 U. S., at 757–758. The Court expressed concern that "[i]n this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." *Id.*, at 758.

Nor is immunity for off-reservation commercial acts necessary to protect tribal self-governance. As the *Kiowa* majority conceded, "[i]n our interdependent and mobile society, . . . tribal immunity extends beyond what is needed to safeguard tribal self-governance." *Ibid.* Such broad immunity far exceeds the modest scope of tribal sovereignty, which is limited only to "what is necessary to protect tribal self-government or to control internal relations." *Montana* v. *United States*, 450 U. S. 544, 564 (1981); see also *Nevada* v. *Hicks*, 533 U. S. 353, 392 (2001) (O'Connor, J., concurring in part and concurring in judgment) ("[T]ribes retain sovereign interests in activities that occur on land owned and controlled by the tribe . . . "). And no party has suggested that immunity from the isolated suits that may arise out of extraterritorial commercial dealings is somehow fundamen-

tal to protecting tribal government or regulating a tribe's internal affairs.

B

Despite acknowledging that there is scant substantive justification for extending tribal immunity to off-reservation commercial acts, this Court did just that in *Kiowa*. See 523 U. S., at 758. The *Kiowa* majority admitted that the Court—rather than Congress—"has taken the lead in drawing the bounds of tribal immunity." *Id.*, at 759. Nevertheless, the Court adopted a rule of expansive immunity purportedly to "defer to the role Congress may wish to exercise in this important judgment." *Id.*, at 758.

This asserted "deference" to Congress was a fiction and remains an enigma, however, because the *Kiowa* Court did not actually leave to Congress the decision whether to extend tribal immunity. Tribal immunity is a common-law doctrine adopted and shaped by this Court. *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Tribe of Okla.*, 498 U. S. 505, 510 (1991); *Kiowa*, 523 U. S., at 759. Before *Kiowa*, we had never held that tribal sovereign immunity applied to off-reservation commercial activities.[2] Thus, faced with an unresolved question about a common-law doctrine of its own design, the *Kiowa* Court had to make a choice: tailor the immunity to the realities of their commercial enterprises, or "grant . . . virtually unlimited tribal immunity." *Id.*, at 764 (Stevens, J., dissenting). The Court

[2] The Court in *Kiowa* noted that in one case, we upheld a claim of immunity where "a state court had asserted jurisdiction over tribal fishing 'both on and off its reservation.'" 523 U. S., at 754 (quoting *Puyallup Tribe, Inc.* v. *Department of Game of Wash.*, 433 U. S. 165, 167 (1977)). It went on to admit, however, that *Puyallup* "did not discuss the relevance of where the fishing had taken place." 523 U. S., at 754. And, as Justice Stevens explained in dissent, that case was about whether the state courts had jurisdiction to regulate fishing activities *on* the reservation; "we had no occasion to consider the validity of an injunction relating solely to off-reservation fishing." *Id.*, at 763.

took the latter course. In doing so, it did not "defe[r] to Congress or exercis[e] 'caution'—rather, it . . . creat[ed] law." *Id.*, at 765 (citation omitted). To be sure, Congress had the power to "alter" that decision if it wanted. *Id.*, at 759 (majority opinion). But Congress has the authority to do that with respect to any nonconstitutional decision involving federal law, and the mere existence of this authority could not be the basis for choosing one outcome over another in *Kiowa*.[3]

Accident or no, it was this Court, not Congress, that adopted the doctrine of tribal sovereign immunity in the first instance. And it was this Court that left open a question about its scope. Why should Congress—and only Congress, according to the *Kiowa* Court—have to take on a problem this Court created? In other areas of federal common law, until Congress intervenes, it is up to us to correct our errors. See, *e. g.*, *Exxon Shipping Co.* v. *Baker*, 554 U. S. 471, 507 (2008) ("[I]f, in the absence of legislation, judicially derived standards leave the door open to outlier punitive-damages awards [in maritime law], it is hard to see how the judiciary can wash its hands of a problem it created, simply by calling quantified standards legislative"); *National Metropolitan Bank* v. *United States*, 323 U. S. 454, 456 (1945) ("[I]n the absence of an applicable Act of Congress, federal courts must fashion the governing rules" in commercial-paper cases af-

[3] Nor did the *Kiowa* Court "defer" to any pre-existing congressional policy choices. As I have already made clear, the rule the Court chose in *Kiowa* was divorced from, and in some ways contrary to, any federal interest. See Part I–A, *supra*; see also *Kiowa*, 523 U. S., at 765 (Stevens, J., dissenting). And the rule is a "strikingly anomalous" departure from the immunities of other sovereigns in federal and state court. *Ibid.* (observing that *Kiowa* conferred on Indian tribes "broader immunity than the States, the Federal Government, and foreign nations"); see also Florey, Indian Country's Borders: Territoriality, Immunity, and the Construction of Tribal Sovereignty, 51 Boston College L. Rev. 595, 627 (2010) (After *Kiowa*, "the actual contours of [tribal immunity] remain astonishingly broad").

fecting the rights and liabilities of the United States). We have the same duty here.

II

Today, the Court reaffirms *Kiowa*. Unsurprisingly, it offers no new substantive defense for *Kiowa*'s indefensible view of tribal immunity. Instead, the majority relies on a combination of the *Kiowa* Court's purported deference to Congress and considerations of *stare decisis*. I have already explained why it was error to ground the *Kiowa* rule in deference to Congress. I turn now to *stare decisis*. Contrary to the majority's claim, that policy does not require us to preserve this Court's mistake in *Kiowa*. The Court's failure to justify *Kiowa*'s rule and the decision's untoward consequences outweigh the majority's arguments for perpetuating the error.

A

Stare decisis may sometimes be "the preferred course," but as this Court acknowledges, it is "not an inexorable command." *Payne* v. *Tennessee*, 501 U. S. 808, 827, 828 (1991). "[W]hen governing decisions are unworkable or are badly reasoned," *id.*, at 827, or "experience has pointed up the precedent's shortcomings," *Pearson* v. *Callahan*, 555 U. S. 223, 233 (2009), "'this Court has never felt constrained to follow precedent,'" *Payne*, *supra*, at 827. See also *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U. S. 271, 282–283 (1988) (overruling precedent as "deficient in utility and sense," "unsound in theory, unworkable and arbitrary in practice, and unnecessary to achieve any legitimate goals"). The discussion above explains why *Kiowa* was unpersuasive on its own terms. Now, the adverse consequences of that decision make it even more untenable.

In the 16 years since *Kiowa*, the commercial activities of tribes have increased dramatically. This is especially evident within the tribal gambling industry. Combined tribal gaming revenues in 28 States have more than tripled—from

$8.5 billion in 1998 to $27.9 billion in 2012. National Indian Gaming Commission, 2012 Indian Gaming Revenues Increase 2.7 Percent (July 23, 2013), online at http://www.nigc.gov/LinkClick.aspx?fileticket=Fhd5shyZ1fM%3D (all Internet materials as visited May 2, 2014, and available in Clerk of Court's case file). But tribal businesses extend well beyond gambling and far past reservation borders. In addition to ventures that take advantage of on-reservation resources (like tourism, recreation, mining, forestry, and agriculture), tribes engage in "domestic and international business ventures" including manufacturing, retail, banking, construction, energy, telecommunications, and more. Graham, An Interdisciplinary Approach to American Indian Economic Development, 80 N. D. L. Rev. 597, 600–604 (2004). Tribal enterprises run the gamut: They sell cigarettes and prescription drugs online; engage in foreign financing; and operate greeting card companies, national banks, cement plants, ski resorts, and hotels. *Ibid.*; see also, *e. g.*, The Harvard Project on American Indian Economic Development, The State of the Native Nations 124 (2008) (Ho-Chunk, Inc., a tribal corporation of the Winnebago Tribe of Nebraska, operates "hotels in Nebraska and Iowa," "numerous retail grocery and convenience stores," a "tobacco and gasoline distribution company," and "a temporary labor service provider"); Four Fires, San Manuel Band of Mission Indians, http://www.sanmanuel-nsn.gov/fourfires.php.html) (four Tribes from California and Wisconsin jointly own and operate a $43 million hotel in Washington, D. C.). These manifold commercial enterprises look the same as any other—except immunity renders the tribes largely litigationproof.

As the commercial activity of tribes has proliferated, the conflict and inequities brought on by blanket tribal immunity have also increased. Tribal immunity significantly limits, and often extinguishes, the States' ability to protect their citizens and enforce the law against tribal businesses. This case is but one example: No one can seriously dispute that

Bay Mills' operation of a casino outside its reservation (and thus within Michigan territory) would violate both state law and the Tribe's compact with Michigan. Yet, immunity poses a substantial impediment to Michigan's efforts to halt the casino's operation permanently. The problem repeats itself every time a tribe fails to pay state taxes, harms a tort victim, breaches a contract, or otherwise violates state laws, and tribal immunity bars the only feasible legal remedy. Given the wide reach of tribal immunity, such scenarios are commonplace.[4] See, *e. g.*, *Oneida Indian Nation of New York* v. *Madison Cty.*, 605 F. 3d 149, 163 (CA2 2010) (Cabranes, J., joined by Hall, J., concurring) ("The holding in this case comes down to this: an Indian tribe can purchase land (including land that was never part of a reservation); refuse to pay lawfully-owed taxes; and suffer no consequences because the taxing authority cannot sue to collect the taxes owed"); see also *Furry* v. *Miccosukee Tribe of Indians of Fla.*, 685 F. 3d 1224 (CA11 2012) (Tribe immune from a suit arising out of a fatal off-reservation car crash that alleged negligence and violation of state dram shop laws); *Native American Distributing* v. *Seneca-Cayuga Tobacco Co.*, 546 F. 3d 1288 (CA10 2008) (tribal officials and a tobacco-products manufacturer were immune from a suit brought by a national

[4] Lower courts have held that tribal immunity shields not only Indian tribes themselves, but also entities deemed "arms of the tribe." See, *e. g.*, *Breakthrough Management Group, Inc.* v. *Chukchansi Gold Casino & Resort*, 629 F. 3d 1173, 1191–1195 (CA10 2010) (casino and economic development authority were arms of the Tribe); *Memphis Biofuels, LLC* v. *Chickasaw Nation Industries, Inc.*, 585 F. 3d 917, 921 (CA6 2009) (tribal conglomerate was an arm of the Tribe). In addition, tribal immunity has been interpreted to cover tribal employees and officials acting within the scope of their employment. See, *e. g.*, *Cook* v. *AVI Casino Enterprises, Inc.*, 548 F. 3d 718, 726–727 (CA9 2008); *Native American Distributing* v. *Seneca-Cayuga Tobacco Co.*, 546 F. 3d 1288, 1296 (CA10 2008); *Chayoon* v. *Chao*, 355 F. 3d 141, 143 (CA2 2004) (*per curiam*); *Tamiami Partners, Ltd.* v. *Miccosukee Tribe of Indians of Fla.*, 177 F. 3d 1212, 1225–1226 (CA11 1999).

distributor alleging breach of contract and interstate market manipulation); *Tonasket* v. *Sargent*, 830 F. Supp. 2d 1078 (ED Wash. 2011) (tribal immunity foreclosed an action against the Tribe for illegal price fixing, antitrust violations, and unfair competition), aff'd, 510 Fed. Appx. 648 (CA9 2013); *Multimedia Games, Inc.* v. *WLGC Acquisition Corp.*, 214 F. Supp. 2d 1131 (ND Okla. 2001) (tribal immunity barred a suit alleging copyright infringement, unfair competition, breach of contract, and other claims against a tribal business development agency).

In the wake of *Kiowa*, tribal immunity has also been exploited in new areas that are often heavily regulated by States. For instance, payday lenders (companies that lend consumers short-term advances on paychecks at interest rates that can reach upwards of 1,000 percent per annum) often arrange to share fees or profits with tribes so they can use tribal immunity as a shield for conduct of questionable legality. Martin & Schwartz, The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk? 69 Wash. & Lee L. Rev. 751, 758–759, 777 (2012). Indian tribes have also created conflict in certain States by asserting tribal immunity as a defense against violations of state campaign finance laws. See generally Moylan, Sovereign Rules of the Game: Requiring Campaign Finance Disclosure in the Face of Tribal Sovereign Immunity, 20 B. U. Pub. Interest L. J. 1 (2010).

In sum, any number of Indian tribes across the country have emerged as substantial and successful competitors in interstate and international commerce, both within and beyond Indian lands. As long as tribal immunity remains out of sync with this reality, it will continue to invite problems, including *de facto* deregulation of highly regulated activities; unfairness to tort victims; and increasingly fractious relations with States and individuals alike. The growing harms wrought by *Kiowa*'s unjustifiable rule fully justify overruling it.

B

In support of its adherence to *stare decisis*, the majority asserts that "Congress has now reflected on *Kiowa*" and has decided to "retain" the decision. *Ante*, at 801; see also *ante*, at 802 ("[W]e act today against the backdrop of an apparent congressional choice: to keep tribal immunity . . . in a case like this one"). On its face, however, this is a curious assertion. To this day, Congress has never granted tribal sovereign immunity in *any* shape or form—much less immunity that extends as far as *Kiowa* went. What the majority really means, I gather, is that the Court must stay its hand because Congress has implicitly approved of *Kiowa*'s rule by *not* overturning it.

This argument from legislative inaction is unavailing. As a practical matter, it is " 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of" one of this Court's decisions. *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 175, n. 1 (1989) (quoting *Johnson* v. *Transportation Agency, Santa Clara Cty.*, 480 U. S. 616, 672 (1987) (SCALIA, J., dissenting)); see also *Girouard* v. *United States*, 328 U. S. 61, 69 (1946) ("It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law"); *Helvering* v. *Hallock*, 309 U. S. 106, 121 (1940) ("[W]e walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle"). There are many reasons Congress might not act on a decision like *Kiowa*, and most of them have nothing at all to do with Congress' desire to preserve the decision. See *Johnson*, 480 U. S., at 672 (SCALIA, J., dissenting) (listing various kinds of legislative inertia, including an "inability to agree upon how to alter the status quo" and "indifference to the status quo").

Even assuming the general validity of arguments from legislative inaction, they are a poor fit in this common-law context. Such arguments are typically based on the premise

that the failure of later Congresses to reject a judicial decision interpreting a statute says something about what Congress understands the statute to mean. See, *e. g.*, *id.*, at 629, n. 7 (majority opinion). But it is not clear why Congress' unenacted "opinion" has any relevance to determining the correctness of a decision about a doctrine created and shaped by this Court. Giving dispositive weight to congressional silence regarding a common-law decision of this Court effectively codifies that decision based only on Congress' failure to address it. This approach is at odds with our Constitution's requirements for enacting law. Cf. *Patterson*, *supra*, at 175, n. 1 ("Congress may legislate . . . only through the passage of a bill which is approved by both Houses and signed by the President. Congressional inaction cannot amend a duly enacted statute" (citation omitted)). It is also the direct opposite of this Court's usual approach in common-law cases, where we have made clear that, "in the absence of an applicable Act of Congress, federal courts must fashion the governing rules." *National Metropolitan Bank*, 323 U. S., at 456; see also *supra*, at 821–822; *Moragne* v. *States Marine Lines, Inc.*, 398 U. S. 375, 378 (1970) (precedent barring recovery for wrongful death, "somewhat dubious even when rendered, is such an unjustifiable anomaly in the present maritime [common] law that it should no longer be followed").[5] Allow-

[5] The majority appears to agree that the Court can revise the judicial doctrine of tribal immunity, because it reserves the right to make an "off-reservation" tort exception to *Kiowa*'s blanket rule. See *ante*, at 799, n. 8. In light of that reservation, the majority's declaration that it is "Congress's job . . . to determine whether or how to limit tribal immunity" rings hollow. *Ante*, at 800. Such a judge-made exception would no more defer to Congress to "make the call whether to curtail a tribe's immunity" than would recognizing that *Kiowa* was wrongly decided in the first instance. *Ante*, at 801. In any event, I welcome the majority's interest in fulfilling its independent responsibility to correct *Kiowa*'s mistaken extension of immunity "without any exceptions for commercial or off-reservation conduct." *Ante*, at 798. I regret only that the Court does not see fit to take that step today.

ing legislative inaction to guide common-law decisionmaking is not deference, but abdication.[6]

In any event, because legislative inaction is usually indeterminate, we "'require very persuasive circumstances enveloping Congressional silence to debar this Court from reexamining its own doctrines.'" *Girouard*, *supra*, at 69. Here, the majority provides nothing that solidifies the inference of approval it draws from congressional silence in the wake of *Kiowa*.

First, the majority cites two Senate bills that proposed to abrogate tribal immunity for contract and tort claims against tribes. See S. 2299, 105th Cong., 2d Sess. (1998) (contract claims); S. 2302, 105th Cong., 2d Sess. (1998) (tort claims). Neither bill expresses Congress' views on *Kiowa*'s rule, for both died in committee without a vote.

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[6] Of course, *stare decisis* still applies in the common-law context; I reject only the notion that arguments from legislative inaction have any place in the analysis.

I also reject the majority's intimation that *stare decisis* applies as strongly to common-law decisions as to those involving statutory interpretation. The majority asserts that *stare decisis* should have "'special force'" in this case because Congress "'remains free to alter what we have is done.'" *Ante*, at 799 (quoting *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172–173 (1989)). Although the Court has invoked this reasoning in the statutory context, I am not aware of a case in which we have relied upon it to preserve a common-law decision of this Court. Indeed, we have minimized that reasoning when interpreting the Sherman Act precisely because "the Court has treated the Sherman Act as a *common-law* statute." *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U. S. 877, 899 (2007) (emphasis added); see also *State Oil Co.* v. *Khan*, 522 U. S. 3, 20–21 (1997) ("[T]he general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress 'expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition'"). Surely no higher standard of *stare decisis* can apply when dealing with common law proper, which Congress certainly expects the Court to shape in the absence of legislative action. See, *e. g.*, *National Metropolitan Bank* v. *United States*, 323 U. S. 454, 456 (1945).

Second, the majority notes various post-*Kiowa* enactments that either abrogate tribal immunity in various limited contexts or leave it be. See *ante*, at 801–802, and n. 10. None of these enactments provides a reason to believe that Congress both considered and approved *Kiowa*'s holding. None of them targets with any precision the immunity of Indian tribes for off-reservation commercial activities. See, *e. g.*, Indian Tribal Economic Development and Contract Encouragement Act of 2000 (codified at 25 U. S. C. § 81(d)(2)) (for contracts that encumber *Indian lands* for more than seven years, tribes must either provide for breach-of-contract remedies or disclose tribal immunity if applicable). And given the exceedingly narrow contexts in which these provisions apply, see, *e. g.*, Arizona Water Settlements Act, § 213(a)(2), 118 Stat. 3531 (abrogating one Tribe's immunity for the limited purpose of enforcing water settlements), the far stronger inference is that Congress simply did not address *Kiowa* or its extension of immunity in these Acts; rather, Congress considered only whether an abrogation of judge-made tribal immunity was necessary to the narrow regulatory scheme on the table. See, *e. g.*, Prevent All Cigarette Trafficking Act of 2009, §§ 2(e), 3(a), 124 Stat. 1101, 1108.

The majority posits that its inference of congressional approval of *Kiowa* is stronger because Congress failed to act after the *Kiowa* Court "urg[ed]" Congress to consider the question presented. *Ante*, at 803; *ante*, at 800 ("[W]e defer to the role Congress may wish to exercise in this important judgment" (quoting *Kiowa*, 523 U. S., at 758)). But this circumstance too raises any number of inferences. Congress is under no obligation to review and respond to every statement this Court makes; perhaps legislative inertia simply won out. The majority seems to suggest that Congress understood *Kiowa* to assign the burgeoning problems of expansive common-law immunity to the Legislature, and then chose to let those problems fester. But Congress has not explained its inaction, and we should not pretend that it has

done so by remaining silent after we supposedly prodded it to say something. Even if we credit the relevance of post-*Kiowa* congressional silence in this common-law context—and I do not—there is certainly not enough evidence of congressional acquiescence here "that we can properly place on the shoulders of Congress the burden of the Court's own error." *Girouard*, 328 U. S., at 69–70.

C

The majority's remaining arguments for retaining *Kiowa* are also unconvincing.

First, the majority characterizes *Kiowa* as one case in a "long line of precedents" in which the Court has recognized tribal immunity "without any exceptions for commercial or off-reservation conduct." *Ante*, at 798. True, the Court has relied on tribal immunity as a general matter in several cases. But not until *Kiowa* were we required to decide whether immunity should extend to commercial activities beyond Indian reservations. See *supra*, at 820. And after *Kiowa*, we have mentioned it only once, and then only in dicta. *C & L Enterprises, Inc.* v. *Citizen Band Potawatomi Tribe of Okla.*, 532 U. S. 411, 418 (2001) (holding that the Tribe had waived its immunity in a construction contract). Thus, overturning *Kiowa* would overturn *Kiowa* only.

Second, the majority suggests that tribes and their business partners have now relied on *Kiowa* in structuring their contracts and transactions. *Ante*, at 798–799. But even when *Kiowa* extended the scope of tribal immunity, it was readily apparent that the Court had strong misgivings about it. Not one Member of the *Kiowa* Court identified a substantive justification for its extension of immunity: Three would not have expanded the immunity in the first place, *Kiowa*, 523 U. S., at 760 (Stevens, J., dissenting), and the other six essentially expressed hope that Congress would overrule the Court's decision, see *id.*, at 758–759. Against that backdrop, it would hardly be reasonable for a tribe to rely on *Kiowa* as

a permanent grant of immunity for off-reservation commercial activities. In any event, the utter absence of a reasoned justification for *Kiowa*'s rule and its growing adverse effects easily outweigh this generalized assertion of reliance. See, *e. g.*, *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U. S. 877, 906 (2007) (in the antitrust context, overturning the *per se* rule against vertical price restraints in part because the "reliance interests" in the case could not "justify an inefficient rule").

* * *

In *Kiowa*, this Court adopted a rule without a reason: a sweeping immunity from suit untethered from commercial realities and the usual justifications for immunity, premised on the misguided notion that only Congress can place sensible limits on a doctrine we created. The decision was mistaken then, and the Court's decision to reaffirm it in the face of the unfairness and conflict it has engendered is doubly so. I respectfully dissent.

JUSTICE GINSBURG, dissenting.

I join JUSTICE THOMAS' dissenting opinion with one reservation. *Kiowa Tribe of Okla.* v. *Manufacturing Technologies, Inc.*, 523 U. S. 751 (1998), held for the first time that tribal sovereign immunity extends to suits arising out of an Indian tribe's off-reservation commercial activity. For the reasons stated in the dissenting opinion I joined in *Kiowa*, *id.*, at 760–766 (opinion of Stevens, J.), and cogently recapitulated today by JUSTICE THOMAS, this Court's declaration of an immunity thus absolute was and remains exorbitant. But I also believe that the Court has carried beyond the pale the immunity possessed by States of the United States. Compare *ante*, at 821, n. 3 (THOMAS, J., dissenting), with *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 100 (1996) (Souter, J., dissenting) ("[T]he Court today holds for the first time since the founding of the Republic that Congress has no authority to subject a State to the jurisdiction of a federal

court at the behest of an individual asserting a federal right. . . . I part company from the Court because I am convinced its decision is fundamentally mistaken."); *Kimel* v. *Florida Bd. of Regents*, 528 U. S. 62, 93 (2000) (Stevens, J., dissenting in part and concurring in part) ("Congress' power to authorize federal remedies against state agencies that violate federal statutory obligations is coextensive with its power to impose those obligations on the States in the first place. Neither the Eleventh Amendment nor the doctrine of sovereign immunity places any limit on that power."); *Alden* v. *Maine*, 527 U. S. 706, 814 (1999) (Souter, J., dissenting) (court's enhancement of the States' immunity from suit "is true neither to history nor to the structure of the Constitution"). Neither brand of immoderate, judicially confirmed immunity, I anticipate, will have staying power.

Syllabus

MARTINEZ *v.* ILLINOIS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 13–5967. Decided May 27, 2014

Petitioner Martinez's criminal trial was delayed nearly four years because the State could not locate the two complaining witnesses. On the day of trial, the State sought another continuance, arguing that it was unable to proceed because the witnesses still could not be located. The trial court denied the motion, saying that it would swear in the jury. The prosecution stated that it would not participate in the trial. After the jury was sworn, the prosecution declined to make an opening statement or call any witnesses, and the defense moved for a judgment of acquittal. The court granted the motion and dismissed the charges. The State appealed, arguing that the trial court should have granted a continuance. Martinez responded that the State's appeal was improper because he had been acquitted. Siding with the State, the Illinois Appellate Court held that jeopardy had never attached and that the trial court had erred in failing to grant a continuance. The Illinois Supreme Court affirmed. Because the State had indicated that it would not participate before the jury was sworn, the court reasoned, Martinez was never at risk of conviction and thus jeopardy did not attach.

Held: Martinez's acquittal bars his retrial. Few if any rules of criminal procedure are clearer than the rule that "jeopardy attaches when the jury is empaneled and sworn." *Crist* v. *Bretz*, 437 U. S. 28, 35. The State Supreme Court misread this Court's precedents in suggesting that the swearing of the jury is anything other than a bright line at which jeopardy attaches. *Serfass* v. *United States*, 420 U. S. 377. Because the jury was empaneled and sworn, Martinez was subjected to jeopardy. When jeopardy has attached, the question remains whether the jeopardy ended in a manner that bars the defendant's retrial. Here, there is no doubt that Martinez's jeopardy ended in such a manner: The trial court acquitted him of the charged offenses. This Court's "cases have defined an acquittal to encompass any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense." *Evans* v. *Michigan*, 568 U. S. 313, 318. The trial court clearly made such a ruling here. Because the trial court "acted on its view that the prosecution had failed to prove its case," *id.*, at 325, its action was an acquittal. Thus, the State cannot retry Martinez.

Certiorari granted; 2013 IL 113475, 990 N. E. 2d 215, reversed and remanded.

PER CURIAM.

The trial of Esteban Martinez was set to begin on May 17, 2010. His counsel was ready; the State was not. When the court swore in the jury and invited the State to present its first witness, the State declined to present any evidence. So Martinez moved for a directed not-guilty verdict, and the court granted it. The State appealed, arguing that the trial court should have granted its motion for a continuance. The question is whether the Double Jeopardy Clause bars the State's attempt to appeal in the hope of subjecting Martinez to a new trial.

The Illinois Supreme Court manifestly erred in allowing the State's appeal, on the theory that jeopardy never attached because Martinez "was never at risk of conviction." 2013 IL 113475, ¶39, 990 N. E. 2d 215, 224. Our cases have repeatedly stated the bright-line rule that "jeopardy attaches when the jury is empaneled and sworn." *Crist* v. *Bretz*, 437 U. S. 28, 35 (1978); see *infra*, at 839. There is simply no doubt that Martinez was subjected to jeopardy. And because the trial court found the State's evidence insufficient to sustain a conviction, there is equally no doubt that Martinez may not be retried.

We therefore grant Martinez's petition for certiorari and reverse the judgment of the Illinois Supreme Court.

I

A

The State of Illinois indicted Martinez in August 2006 on charges of aggravated battery and mob action against Avery Binion and Demarco Scott. But Martinez's trial date did not arrive for nearly four years.[1]

[1] Much of that delay was due to Martinez and his counsel. See 2013 IL 113475, ¶4, n. 1, 990 N. E. 2d 215, 216, n. 1 (summarizing the lengthy procedural history).

The story picks up for present purposes on July 20, 2009, when the State moved to continue an August 3 trial date because it had not located the complaining witnesses, Binion and Scott. The State subpoenaed both men four days later, and the court rescheduled Martinez's trial to September 28. But the State sought another continuance, shortly before that date, because it still had not found Binion and Scott. The court rescheduled the trial to November 9, and the State reissued subpoenas. But November 9 came and went (the court continued the case when Martinez showed up late) and the trial was eventually delayed to the following March 29. In early February, the State yet again subpoenaed Binion and Scott. When March 29 arrived, the trial court granted the State another continuance. It reset the trial date for May 17 and ordered Binion and Scott to appear in court on May 10. And the State once more issued subpoenas.[2]

On the morning of May 17, however, Binion and Scott were again nowhere to be found. At 8:30, when the trial was set to begin, the State asked for a brief continuance. The court offered to delay swearing the jurors until a complete jury had been empaneled and told the State that it could at that point either have the jury sworn or move to dismiss its case. When Binion and Scott still had not shown up after the jury was chosen, the court offered to call the other cases on its docket so as to delay swearing the jury a bit longer. But when all these delays had run out, Binion and Scott were still nowhere in sight. The State filed a written motion for a continuance, arguing that it was "unable to proceed" without Binion and Scott. Tr. 7. The court denied that motion:

> "The case before the Court began on July 7, 2006. In two months we will then be embarking upon half a decade of pending a Class 3 felony. Avery Binion, Jr., and

[2] These facts are set forth in the opinion of the Illinois Appellate Court. 2011 IL App (2d) 100498, ¶¶5–7, 969 N. E. 2d 840, 842–843.

> Demarco [Scott] are well known in Elgin, both are convicted felons. One would believe that the Elgin Police Department would know their whereabouts. They were ordered to be in court today. The Court will issue body writs for both of these gentlemen.
>
> "In addition, the State's list of witnesses indicates twelve witnesses. Excluding Mr. Scott and Mr. Binion, that's ten witnesses. The Court would anticipate it would take every bit of today and most of tomorrow to get through ten witnesses. By then the People may have had a chance to execute the arrest warrant body writs for these two gentlemen.
>
> "The Court will deny the motion for continuance. I will swear the jury in in 15, 20 minutes. Perhaps you might want to send the police out to find these two gentlemen." *Id.*, at 8–9.

After a brief recess, the court offered to delay the start of the trial for several more hours if the continuance would "be of any help" to the State. *Id.*, at 9. But when the State made clear that Binion and Scott's "whereabouts" remained "unknown," the court concluded that the delay "would be a further waste of time." *Id.*, at 10. The following colloquy ensued:

> "THE COURT: . . . It's a quarter to eleven and [Binion and Scott] have not appeared on their own will, so I'm going to bring the jury in now then to swear them.
>
> "[The Prosecutor]: Okay. Your Honor, may I approach briefly?
>
> "THE COURT: Yes.
>
> "[The Prosecutor]: Your Honor, just so your Honor is aware, I know that it's the process to bring them in and swear them in; however, the State will not be participating in the trial. I wanted to let you know that.
>
> "THE COURT: Very well. We'll see how that works." *Id.*, at 10–11.

The jury was then sworn. After instructing the jury, the court directed the State to proceed with its opening statement. The prosecutor demurred: "Your Honor, respectfully, the State is not participating in this case." *Id.*, at 20. After the defense waived its opening statement, the court directed the State to call its first witness. Again, the prosecutor demurred: "Respectfully, your Honor, the State is not participating in this matter." *Ibid.* The defense then moved for a judgment of acquittal:

> "[Defense Counsel]: Judge, the jury has been sworn. The State has not presented any evidence. I believe they've indicated their intention not to present any evidence or witnesses.
>
> "Based on that, Judge, I would ask the Court to enter directed findings of not guilty to both counts, aggravated battery and mob action.
>
> "THE COURT: Do the People wish to reply?
>
> "[The Prosecutor]: No, your Honor. Respectfully, the State is not participating.
>
> "THE COURT: The Court will grant the motion for a directed finding and dismiss the charges." *Id.*, at 21.

B

The State appealed, arguing that the trial court should have granted a continuance. Martinez responded that the State's appeal was improper because he had been acquitted. The Illinois Appellate Court sided with the State, holding that jeopardy had never attached and that the trial court had erred in failing to grant a continuance. 2011 IL App (2d) 100498, ¶¶46, 53–56, 969 N. E. 2d 840, 854, 856–858.

The Illinois Supreme Court granted review on the jeopardy issue and affirmed. 990 N. E. 2d 215. It began by recognizing that "[g]enerally, in cases of a jury trial, jeopardy attaches when a jury is empaneled and sworn, as that is the point when the defendant is '"put to trial before the

trier of the facts."'" *Id.*, at 222 (quoting *Serfass* v. *United States*, 420 U. S. 377, 394 (1975)). But it reasoned that under this Court's precedents, "'"rigid, mechanical" rules'" should not govern the inquiry into whether jeopardy has attached. 990 N. E. 2d, at 222 (quoting *Serfass*, *supra*, at 390). Rather, it opined, the relevant question is whether a defendant "was '"subjected to the hazards of trial and possible conviction."'" 990 N. E. 2d, at 222 (quoting *Serfass*, *supra*, at 391).

Here, the court concluded, Martinez "was never at risk of conviction"—and jeopardy therefore did not attach—because "[t]he State indicated it would not participate prior to the jury being sworn." 990 N. E. 2d, at 224. And because Martinez "was not placed in jeopardy," the court held, the trial "court's entry of directed verdicts of not guilty did not constitute true acquittals." *Id.*, at 225. Indeed, the court remarked, the trial court "repeatedly referred to its action as a 'dismissal' rather than an acquittal." *Ibid.*

Justice Burke dissented, writing that the majority's conclusion "that impaneling and swearing the jury had no legal significance" ran "contrary to well-established principles regarding double jeopardy." *Id.*, at 227. Moreover, she argued, its assertion that Martinez was not in danger of conviction was "belied by the actions of the court and the prosecutor." *Id.*, at 229. She explained that under the majority's holding, the State could "unilaterally render a trial a 'sham' simply by refusing to call witnesses after a jury has been selected." *Ibid.*

II

This case presents two issues. First, did jeopardy attach to Martinez? Second, if so, did the proceeding end in such a manner that the Double Jeopardy Clause bars his retrial? Our precedents clearly dictate an affirmative answer to each question.

A

There are few if any rules of criminal procedure clearer than the rule that "jeopardy attaches when the jury is empaneled and sworn." *Crist*, 437 U. S., at 35; see also *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, 569 (1977); *Serfass*, *supra*, at 388; 6 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 25.1(d) (3d ed. 2007).

Our clearest exposition of this rule came in *Crist*, which addressed the constitutionality of a Montana statute providing that jeopardy did not attach until the swearing of the first witness. As *Crist* explains, "the precise point at which jeopardy [attaches] in a jury trial might have been open to argument before this Court's decision in *Downum* v. *United States*," in which "the Court held that the Double Jeopardy Clause prevented a second prosecution of a defendant whose first trial had ended just after the jury had been sworn and before any testimony had been taken." 437 U. S., at 35. But *Downum* v. *United States*, 372 U. S. 734 (1963), put any such argument to rest: Its holding "necessarily pinpointed the stage in a jury trial when jeopardy attaches, and [it] has since been understood as explicit authority for the proposition that jeopardy attaches when the jury is empaneled and sworn." *Crist*, *supra*, at 35.

The Illinois Supreme Court misread our precedents in suggesting that the swearing of the jury is anything other than a bright line at which jeopardy attaches. It relied on *Serfass*, understanding that case to mean "that in assessing whether and when jeopardy attaches, '"rigid, mechanical" rules' should not be applied." 990 N. E. 2d, at 222. Under *Serfass*, the court reasoned, the relevant question is whether a defendant was as a functional matter "'"subjected to the hazards of trial and possible conviction."'" 990 N. E. 2d, at 222.

But *Serfass* does not apply a functional approach to the determination of when jeopardy has attached. As to that question, it states the same bright-line rule as every other case: Jeopardy attaches when "a defendant is 'put to trial,'"

and in a jury trial, that is "when a jury is empaneled and sworn." 420 U. S., at 388. Indeed, *Serfass* explicitly rejects a functional approach to the question whether jeopardy has attached. See *id.*, at 390 (refuting the defendant's argument that "'constructiv[e] jeopardy had attached'" upon the pretrial grant of a motion to dismiss the indictment, which the defendant characterized as "the 'functional equivalent of an acquittal on the merits'"). The *Serfass* Court acknowledged "that we have disparaged 'rigid, mechanical' rules in the interpretation of the Double Jeopardy Clause." *Ibid.* But it was referring to the case of *Illinois* v. *Somerville*, 410 U. S. 458 (1973), in which we declined to apply "rigid, mechanical" reasoning in answering a very different question: not whether jeopardy had attached, but whether the manner in which it terminated (by mistrial) barred the defendant's retrial. *Id.*, at 467. By contrast, *Serfass* explains, the rule that jeopardy attaches at the start of a trial is "by no means a mere technicality, nor is it a 'rigid, mechanical' rule." 420 U. S., at 391. And contrary to the Illinois Supreme Court's interpretation, *Serfass* creates not the slightest doubt about when a "trial" begins.

The Illinois Supreme Court's error was consequential, for it introduced confusion into what we have consistently treated as a bright-line rule: A jury trial begins, and jeopardy attaches, when the jury is sworn. We have never suggested the exception perceived by the Illinois Supreme Court—that jeopardy may not have attached where, under the circumstances of a particular case, the defendant was not genuinely at risk of conviction.[3] Martinez was

[3] Some commentators have suggested that there may be limited exceptions to this rule—*e. g.*, where the trial court lacks jurisdiction or where a defendant obtains an acquittal by fraud or corruption. See 6 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 25.1(d) (3d ed. 2007). The scope of any such exceptions is not presented here. Nor need we reach a situation where the prosecutor had no opportunity to dismiss the charges to avoid the consequences of empaneling the jury. Cf. *People* v. *Deems*, 81 Ill. 2d 384, 387–389, 410 N. E. 2d 8, 10–11 (1980).

subjected to jeopardy because the jury in his case was sworn.

B

"'[T]he conclusion that jeopardy has attached,'" however, "'begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial.'" *Id.*, at 390. The remaining question is whether the jeopardy ended in such a manner that the defendant may not be retried. See 6 LaFave, *supra*, § 25.1(g) (surveying circumstances in which retrial is and is not allowed). Here, there is no doubt that Martinez's jeopardy ended in a manner that bars his retrial: The trial court acquitted him of the charged offenses. "Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '[a] verdict of acquittal . . . could not be reviewed . . . without putting [a defendant] twice in jeopardy, and thereby violating the Constitution.'" *Martin Linen*, *supra*, at 571.

"[O]ur cases have defined an acquittal to encompass any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense." *Evans* v. *Michigan*, 568 U. S. 313, 318 (2013). And the trial court clearly made such a ruling here. After the State declined to present evidence against Martinez, his counsel moved for "directed findings of not guilty to both counts," and the court "grant[ed] the motion for a directed finding." Tr. 21. That is a textbook acquittal: a finding that the State's evidence cannot support a conviction.

The Illinois Supreme Court thought otherwise. It first opined that "[b]ecause [Martinez] was not placed in jeopardy, the [trial] court's entry of directed verdicts of not guilty did not constitute true acquittals." 990 N. E. 2d, at 225. But the premise of that argument is incorrect: Martinez was in jeopardy, for the reasons given above. The court went on to "note that, in directing findings of not guilty," the trial court "referred to its action as a 'dismissal' rather than an acquittal." *Ibid.* Under our precedents, however, that is immaterial: "[W]e have emphasized that what constitutes an

'acquittal' is not to be controlled by the form of the judge's action"; it turns on "whether the ruling of the judge, whatever its label, actually represents a resolution . . . of some or all of the factual elements of the offense charged." *Martin Linen*, 430 U. S., at 571; see also *Evans*, *supra*, at 325 ("Our decision turns not on the form of the trial court's action, but rather whether it 'serve[s]' substantive 'purposes' or procedural ones"); *United States* v. *Scott*, 437 U. S. 82, 96 (1978) ("We have previously noted that 'the trial judge's characterization of his own action cannot control the classification of the action' ").

Here, as in *Evans* and *Martin Linen*, the trial court's action was an acquittal because the court "acted on its view that the prosecution had failed to prove its case." *Evans*, *supra*, at 325; see *Martin Linen*, *supra*, at 572 ("[T]he District Court in this case evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction"). And because Martinez was acquitted, the State cannot retry him.[4]

III

The functional rule adopted by the Illinois Supreme Court is not necessary to avoid unfairness to prosecutors or to the public. On the day of trial, the court was acutely aware of the significance of swearing a jury. It repeatedly delayed that act to give the State additional time to find its witnesses. It had previously granted the State a number of continuances for the same purpose. See *supra*, at 835. And,

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[4] Indeed, even if the trial court had chosen to dismiss the case or declare a mistrial rather than granting Martinez's motion for a directed verdict, the Double Jeopardy Clause probably would still bar his retrial. We confronted precisely this scenario in *Downum* v. *United States*, 372 U. S. 734 (1963), holding that once jeopardy has attached, the absence of witnesses generally does not constitute the kind of " 'extraordinary and striking circumstanc[e]' " in which a trial court may exercise "discretion to discharge the jury before it has reached a verdict." *Id.*, at 736; see also *Arizona* v. *Washington*, 434 U. S. 497, 508, n. 24 (1978).

critically, the court told the State on the day of trial that it could "move to dismiss [its] case" before the jury was sworn. Tr. 3. Had the State accepted that invitation, the Double Jeopardy Clause would not have barred it from recharging Martinez. Instead, the State participated in the selection of jurors and did not ask for dismissal before the jury was sworn. When the State declined to dismiss its case, it "'took a chance[,] . . . enter[ing] upon the trial of the case without sufficient evidence to convict.'" *Downum*, 372 U. S., at 737. Here, the State knew, or should have known, that an acquittal forever bars the retrial of the defendant when it occurs after jeopardy has attached. The Illinois Supreme Court's holding is understandable, given the significant consequence of the State's mistake, but it runs directly counter to our precedents and to the protection conferred by the Double Jeopardy Clause.

* * *

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment of the Supreme Court of Illinois is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Syllabus

BOND *v.* UNITED STATES

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

No. 12–158. Argued November 5, 2013—Decided June 2, 2014

To implement the international Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction, Congress enacted the Chemical Weapons Convention Implementation Act of 1998. The statute forbids, among other things, any person knowingly to "possess[ ] or use . . . any chemical weapon." 18 U. S. C. § 229(a)(1). A "chemical weapon" is "[a] toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter." § 229F(1)(A). A "toxic chemical" is "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. The term includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere." § 229F(8)(A). "[P]urposes not prohibited by this chapter" is defined as "[a]ny peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity," and other specific purposes. § 229F(7).

Petitioner Bond sought revenge against Myrlinda Haynes—with whom her husband had carried on an affair—by spreading two toxic chemicals on Haynes's car, mailbox, and doorknob in hopes that Haynes would develop an uncomfortable rash. On one occasion Haynes suffered a minor chemical burn that she treated by rinsing with water, but Bond's attempted assaults were otherwise entirely unsuccessful. Federal prosecutors charged Bond with violating, among other things, section 229(a). Bond moved to dismiss the chemical weapons charges on the ground that the Act violates the Tenth Amendment. When the District Court denied her motion, she pleaded guilty but reserved the right to appeal. The Third Circuit initially held that Bond lacked standing to raise her Tenth Amendment challenge, but this Court reversed. On remand, the Third Circuit rejected her Tenth Amendment argument and her additional argument that section 229 does not reach her conduct.

Held: Section 229 does not reach Bond's simple assault. Pp. 854–866.

(a) The parties debate whether section 229 is a necessary and proper means of executing the Federal Government's power to make treaties,

but "normally [this] Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Escambia County* v. *McMillan*, 466 U. S. 48, 51 (*per curiam*). Thus, this Court starts with Bond's argument that section 229 does not cover her conduct. Pp. 854–855.

(b) This Court has no need to interpret the scope of the international Chemical Weapons Convention in this case. The treaty specifies that a signatory nation should implement its obligations "in accordance with its constitutional processes." Art. VII(1), 1974 U. N. T. S. 331. Bond was prosecuted under a federal statute, which, unlike the treaty, must be read consistent with the principles of federalism inherent in our constitutional structure. Pp. 855–866.

(1) A fair reading of section 229 must recognize the duty of "federal courts to be certain of Congress's intent before finding that federal law overrides" the "usual constitutional balance of federal and state powers." *Gregory* v. *Ashcroft*, 501 U. S. 452, 460. This principle applies to federal laws that punish local criminal activity, which has traditionally been the responsibility of the States. This Court's precedents have referred to basic principles of federalism in the Constitution to resolve ambiguity in federal statutes. See, *e. g.*, *United States* v. *Bass*, 404 U. S. 336; *Jones* v. *United States*, 529 U. S. 848. Here, the ambiguity in the statute derives from the improbably broad reach of the key statutory definition, given the term—"chemical weapon"—that is being defined, the deeply serious consequences of adopting such a boundless reading, and the lack of any apparent need to do so in light of the context from which the statute arose—a treaty about chemical warfare and terrorism, not about local assaults. Thus, the Court can reasonably insist on a clear indication that Congress intended to reach purely local crimes before interpreting section 229's expansive language in a way that intrudes on the States' police power. Pp. 856–860.

(2) No such clear indication is found in section 229. An ordinary speaker would not describe Bond's feud-driven act of spreading irritating chemicals as involving a "chemical weapon." And the chemicals at issue here bear little resemblance to those whose prohibition was the object of an international Convention. Where the breadth of a statutory definition creates ambiguity, it is appropriate to look to the ordinary meaning of the term being defined (here, "chemical weapon") in settling on a fair reading of the statute. See *Johnson* v. *United States*, 559 U. S. 133.

The Government's reading of section 229 would transform a statute concerned with acts of war, assassination, and terrorism into a massive federal anti-poisoning regime that reaches the simplest of assaults. In light of the principle that Congress does not normally intrude upon the

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States' police power, this Court is reluctant to conclude that Congress meant to punish Bond's crime with a federal prosecution for a chemical weapons attack. In fact, only a handful of prosecutions have been brought under section 229, and most of those involved crimes not traditionally within the States' purview, *e. g.*, terrorist plots.

Pennsylvania's laws are sufficient to prosecute assaults like Bond's, and there is no indication in section 229 that Congress intended to abandon its traditional "reluctan[ce] to define as a federal crime conduct readily denounced as criminal by the States," *Bass*, *supra*, at 349. That principle goes to the very structure of the Constitution, and "protects the liberty of the individual from arbitrary power." *Bond* v. *United States*, 564 U. S. 211, 222. The global need to prevent chemical warfare does not require the Federal Government to reach into the kitchen cupboard. Pp. 860–866.

681 F. 3d 149, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined, and in which ALITO, J., joined as to Part I, *post*, p. 867. THOMAS, J., filed an opinion concurring in the judgment, in which SCALIA, J., joined, and in which ALITO, J., joined as to Parts I, II, and III, *post*, p. 882. ALITO, J., filed an opinion concurring in the judgment, *post*, p. 896.

Paul D. Clement argued the cause for petitioner. With him on the briefs were *Erin E. Murphy*, *Ashley C. Parrish*, *Adam M. Conrad*, and *Robert E. Goldman*.

Solicitor General Verrilli argued the cause for the United States. With him on the brief were *Acting Assistant Attorney General Carlin*, *Deputy Solicitor General Dreeben*, *Joseph R. Palmore*, *Virginia M. Vander Jagt*, and *Aditya Bamzai*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Virginia et al. by *Kenneth T. Cuccinelli II*, Attorney General of Virginia, *E. Duncan Getchell, Jr.*, Solicitor General, *Michael H. Brady*, Assistant Solicitor General, *Patricia L. West*, Chief Deputy Attorney General, and *Wesley G. Russell, Jr.*, Deputy Attorney General, and by the Attorneys General and other officials for their respective States as follows: *Luther Strange*, Attorney General of Alabama, *Michael C. Geraghty*, Attorney General of Alaska, *Samuel S. Olens*, Attorney General of Georgia, *Law-*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The horrors of chemical warfare were vividly captured by John Singer Sargent in his 1919 painting Gassed. The nearly life-sized work depicts two lines of soldiers, blinded by mustard gas, clinging single file to orderlies guiding them to an improvised aid station. There they would receive little treatment and no relief; many suffered for weeks only to have the gas claim their lives. The soldiers were shown staggering through piles of comrades too seriously burned to even join the procession.

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rence Wasden, Attorney General of Idaho, *Derek Schmidt*, Attorney General of Kansas, and *John Campbell*, Chief Deputy Attorney General, *Timothy C. Fox*, Attorney General of Montana, *Jon Bruning*, Attorney General of Nebraska, *Alan Wilson*, Attorney General of South Carolina, *Patrick Morrisey*, Attorney General of West Virginia, and *J. B. Van Hollen*, Attorney General of Wisconsin; for the American Center for Law and Justice by *Jay Alan Sekulow*, *Stuart J. Roth*, *Colby M. May*, *Walter M. Weber*, *Jordan A. Sekulow*, and *Tiffany N. Barrans*; for the Cato Institute et al. by *Nicholas Quinn Rosenkranz*, *Edwin Meese III*, *Ilya Shapiro*, *John C. Eastman*, and *Martin S. Kaufman*; for the Center for Individual Rights by *Michael E. Rosman*; for the Home School Legal Defense Association by *Michael P. Farris*, *J. Michael Smith*, *James R. Mason III*, and *Darren A. Jones*; for the Judicial Education Project by *William S. Consovoy*, *Thomas R. McCarthy*, and *Carrie Severino*; and for United States Congressman Steve Stockman et al. by *Herbert W. Titus*, *William J. Olson*, *John S. Miles*, *Jeremiah L. Morgan*, and *Michael Connelly*.

Briefs of *amici curiae* urging affirmance were filed for the American Chemistry Council by *Seth P. Waxman*; for Professors of International Law and Legal History by *Jennifer S. Martinez*; for the Yale Law School Center for Global Legal Challenges by *Oona A. Hathaway*; for David Boyle by *Mr. Boyle, pro se*; for Sarah H. Cleveland et al. by *Walter Dellinger* and *Anton Metlitsky*; and for David M. Golove et al. by *Martin S. Lederman*, *Mr. Golove, pro se*, and *Andrew J. Pincus*.

Briefs of *amici curiae* were filed for the Constitutional Accountability Center by *Douglas T. Kendall*, *Elizabeth B. Wydra*, and *Brianne J. Gorod*; for Former State Department Legal Advisers by *John B. Bellinger III*; and for the Goldwater Institute, Scharf-Norton Center for Constitutional Government by *Clint Bolick* and *Nicholas C. Dranias*.

The painting reflects the devastation that Sargent witnessed in the aftermath of the Second Battle of Arras during World War I. That battle and others like it led to an overwhelming consensus in the international community that toxic chemicals should never again be used as weapons against human beings. Today that objective is reflected in the international Convention on Chemical Weapons, which has been ratified or acceded to by 190 countries. The United States, pursuant to the Federal Government's constitutionally enumerated power to make treaties, ratified the treaty in 1997. To fulfill the United States' obligations under the Convention, Congress enacted the Chemical Weapons Convention Implementation Act of 1998. The Act makes it a federal crime for a person to use or possess any chemical weapon, and it punishes violators with severe penalties. It is a statute that, like the Convention it implements, deals with crimes of deadly seriousness.

The question presented by this case is whether the Implementation Act also reaches a purely local crime: an amateur attempt by a jilted wife to injure her husband's lover, which ended up causing only a minor thumb burn readily treated by rinsing with water. Because our constitutional structure leaves local criminal activity primarily to the States, we have generally declined to read federal law as intruding on that responsibility, unless Congress has clearly indicated that the law should have such reach. The Chemical Weapons Convention Implementation Act contains no such clear indication, and we accordingly conclude that it does not cover the unremarkable local offense at issue here.

I

A

In 1997, the President of the United States, upon the advice and consent of the Senate, ratified the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction.

S. Treaty Doc. No. 103–21, 1974 U. N. T. S. 317. The nations that ratified the Convention (State Parties) had bold aspirations for it: "general and complete disarmament under strict and effective international control, including the prohibition and elimination of all types of weapons of mass destruction." Convention Preamble, *ibid.* This purpose traces its origin to World War I, when "[o]ver a million casualties, up to 100,000 of them fatal, are estimated to have been caused by chemicals . . . , a large part following the introduction of mustard gas in 1917." Kenyon, Why We Need a Chemical Weapons Convention and an OPCW, in The Creation of the Organisation for the Prohibition of Chemical Weapons 1, 4 (I. Kenyon & D. Feakes eds. 2007) (Kenyon & Feakes). The atrocities of that war led the community of nations to adopt the 1925 Geneva Protocol, which prohibited the use of chemicals as a method of warfare. *Id.*, at 5.

Up to the 1990s, however, chemical weapons remained in use both in and out of wartime, with devastating consequences. Iraq's use of nerve agents and mustard gas during its war with Iran in the 1980s contributed to international support for a renewed, more effective chemical weapons ban. *Id.*, at 6, 10–11. In 1994 and 1995, long-held fears of the use of chemical weapons by terrorists were realized when Japanese extremists carried out two attacks using sarin gas. *Id.*, at 6. The Convention was conceived as an effort to update the Geneva Protocol's protections and to expand the prohibition on chemical weapons beyond state actors in wartime. Convention Preamble, 1974 U. N. T. S. 318 (the State Parties are "[d]etermined for the sake of all mankind, to exclude completely the possibility of the use of chemical weapons, . . . thereby complementing the obligations assumed under the Geneva Protocol of 1925"). The Convention aimed to achieve that objective by prohibiting the development, stockpiling, or use of chemical weapons by any State Party or person within a State Party's jurisdiction. Arts. I, II, VII. It also established an elaborate reporting process re-

quiring State Parties to destroy chemical weapons under their control and submit to inspection and monitoring by an international organization based in The Hague, Netherlands. Arts. VIII, IX.

The Convention provides:

> "(1) Each State Party to this Convention undertakes never under any circumstances:
>
> "(a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone;
>
> "(b) To use chemical weapons;
>
> "(c) To engage in any military preparations to use chemical weapons;
>
> "(d) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention." Art. I, *id.*, at 319.

"Chemical Weapons" are defined in relevant part as "[t]oxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes." Art. II(1)(a), *ibid.* "Toxic Chemical," in turn, is defined as "Any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. This includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere." Art. II(2), *id.*, at 320. "Purposes Not Prohibited Under this Convention" means "[i]ndustrial, agricultural, research, medical, pharmaceutical or other peaceful purposes," Art. II(9)(a), *id.*, at 322, and other specific purposes not at issue here, Arts. II(9)(b)–(d).

Although the Convention is a binding international agreement, it is "not self-executing." W. Krutzsch & R. Trapp, A Commentary on the Chemical Weapons Convention 109 (1994). That is, the Convention creates obligations only for

State Parties and "does not by itself give rise to domestically enforceable federal law" absent "implementing legislation passed by Congress." *Medellín* v. *Texas*, 552 U. S. 491, 505, n. 2 (2008). It instead provides that "[e]ach State Party shall, in accordance with its constitutional processes, adopt the necessary measures to implement its obligations under this Convention." Art. VII(1), 1974 U. N. T. S. 331. "In particular," each State Party shall "[p]rohibit natural and legal persons anywhere . . . under its jurisdiction . . . from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity." Art. VII(1)(a), *id.*, at 331–332.

Congress gave the Convention domestic effect in 1998 when it passed the Chemical Weapons Convention Implementation Act. See 112 Stat. 2681–856. The Act closely tracks the text of the treaty: It forbids any person knowingly "to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon." 18 U. S. C. § 229(a)(1). It defines "chemical weapon" in relevant part as "[a] toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter as long as the type and quantity is consistent with such a purpose." § 229F(1)(A). "Toxic chemical," in turn, is defined in general as "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. The term includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere." § 229F(8)(A). Finally, "purposes not prohibited by this chapter" is defined as "[a]ny peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity," and other specific purposes. § 229F(7). A person who violates section 229 may be subject to severe punishment: imprisonment "for any term of years," or if a victim's

death results, the death penalty or imprisonment "for life." § 229A(a).

B

Petitioner Carol Anne Bond is a microbiologist from Lansdale, Pennsylvania. In 2006, Bond's closest friend, Myrlinda Haynes, announced that she was pregnant. When Bond discovered that her husband was the child's father, she sought revenge against Haynes. Bond stole a quantity of 10-chloro-10H-phenoxarsine (an arsenic-based compound) from her employer, a chemical manufacturer. She also ordered a vial of potassium dichromate (a chemical commonly used in printing photographs or cleaning laboratory equipment) on Amazon.com. Both chemicals are toxic to humans and, in high enough doses, potentially lethal. It is undisputed, however, that Bond did not intend to kill Haynes. She instead hoped that Haynes would touch the chemicals and develop an uncomfortable rash.

Between November 2006 and June 2007, Bond went to Haynes's home on at least 24 occasions and spread the chemicals on her car door, mailbox, and doorknob. These attempted assaults were almost entirely unsuccessful. The chemicals that Bond used are easy to see, and Haynes was able to avoid them all but once. On that occasion, Haynes suffered a minor chemical burn on her thumb, which she treated by rinsing with water. Haynes repeatedly called the local police to report the suspicious substances, but they took no action. When Haynes found powder on her mailbox, she called the police again, who told her to call the post office. Haynes did so, and postal inspectors placed surveillance cameras around her home. The cameras caught Bond opening Haynes's mailbox, stealing an envelope, and stuffing potassium dichromate inside the muffler of Haynes's car.

Federal prosecutors naturally charged Bond with two counts of mail theft, in violation of 18 U. S. C. § 1708. More surprising, they also charged her with two counts of possessing and using a chemical weapon, in violation of section

229(a). Bond moved to dismiss the chemical weapon counts on the ground that section 229 exceeded Congress's enumerated powers and invaded powers reserved to the States by the Tenth Amendment. The District Court denied Bond's motion. She then entered a conditional guilty plea that reserved her right to appeal. The District Court sentenced Bond to six years in federal prison plus five years of supervised release, and ordered her to pay a $2,000 fine and $9,902.79 in restitution.

Bond appealed, raising a Tenth Amendment challenge to her conviction. The Government contended that Bond lacked standing to bring such a challenge. The Court of Appeals for the Third Circuit agreed. We granted certiorari, the Government confessed error, and we reversed. We held that, in a proper case, an individual may "assert injury from governmental action taken in excess of the authority that federalism defines." *Bond* v. *United States*, 564 U. S. 211, 220 (2011) (*Bond I*). We "expresse[d] no view on the merits" of Bond's constitutional challenge. *Id.*, at 226.

On remand, Bond renewed her constitutional argument. She also argued that section 229 does not reach her conduct because the statute's exception for the use of chemicals for "peaceful purposes" should be understood in contradistinction to the "warlike" activities that the Convention was primarily designed to prohibit. Bond argued that her conduct, though reprehensible, was not at all "warlike." The Court of Appeals rejected this argument. 681 F. 3d 149 (CA3 2012). The court acknowledged that the Government's reading of section 229 would render the statute "striking" in its "breadth" and turn every "kitchen cupboard and cleaning cabinet in America into a potential chemical weapons cache." *Id.*, at 154, n. 7. But the court nevertheless held that Bond's use of "'highly toxic chemicals with the intent of harming Haynes' can hardly be characterized as 'peaceful' under that word's commonly understood meaning." *Id.*, at 154 (citation omitted).

The Third Circuit also rejected Bond's constitutional challenge to her conviction, holding that section 229 was "necessary and proper to carry the Convention into effect." *Id.*, at 162. The Court of Appeals relied on this Court's opinion in *Missouri* v. *Holland*, 252 U. S. 416 (1920), which stated that "[i]f the treaty is valid there can be no dispute about the validity of the statute" that implements it "as a necessary and proper means to execute the powers of the Government," *id.*, at 432.

We again granted certiorari, 568 U. S. 1140 (2013).

II

In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder. The States have broad authority to enact legislation for the public good—what we have often called a "police power." *United States* v. *Lopez*, 514 U. S. 549, 567 (1995). The Federal Government, by contrast, has no such authority and "can exercise only the powers granted to it," *McCulloch* v. *Maryland*, 4 Wheat. 316, 405 (1819), including the power to make "all Laws which shall be necessary and proper for carrying into Execution" the enumerated powers, U. S. Const., Art. I, §8, cl. 18. For nearly two centuries it has been "clear" that, lacking a police power, "Congress cannot punish felonies generally." *Cohens* v. *Virginia*, 6 Wheat. 264, 428 (1821). A criminal act committed wholly within a State "cannot be made an offence against the United States, unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States." *United States* v. *Fox*, 95 U. S. 670, 672 (1878).

The Government frequently defends federal criminal legislation on the ground that the legislation is authorized pursuant to Congress's power to regulate interstate commerce. In this case, however, the Court of Appeals held that the Government had explicitly disavowed that argument before

the District Court. 681 F. 3d, at 151, n. 1. As a result, in this Court the parties have devoted significant effort to arguing whether section 229, as applied to Bond's offense, is a necessary and proper means of executing the National Government's power to make treaties. U. S. Const., Art. II, § 2, cl. 2. Bond argues that the lower court's reading of *Missouri* v. *Holland* would remove all limits on federal authority, so long as the Federal Government ratifies a treaty first. She insists that to effectively afford the Government a police power whenever it implements a treaty would be contrary to the Framers' careful decision to divide power between the States and the National Government as a means of preserving liberty. To the extent that *Holland* authorizes such usurpation of traditional state authority, Bond says, it must be either limited or overruled.

The Government replies that this Court has never held that a statute implementing a valid treaty exceeds Congress's enumerated powers. To do so here, the Government says, would contravene another deliberate choice of the Framers: to avoid placing subject matter limitations on the National Government's power to make treaties. And it might also undermine confidence in the United States as an international treaty partner.

Notwithstanding this debate, it is "a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Escambia County* v. *McMillan*, 466 U. S. 48, 51 (1984) (*per curiam*); see also *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring). Bond argues that section 229 does not cover her conduct. So we consider that argument first.

III

Section 229 exists to implement the Convention, so we begin with that international agreement. As explained, the Convention's drafters intended for it to be a comprehensive

ban on chemical weapons. But even with its broadly worded definitions, we have doubts that a treaty about *chemical weapons* has anything to do with Bond's conduct. The Convention, a product of years of worldwide study, analysis, and multinational negotiation, arose in response to war crimes and acts of terrorism. See Kenyon & Feakes 6. There is no reason to think the sovereign nations that ratified the Convention were interested in anything like Bond's common law assault.

Even if the treaty does reach that far, nothing prevents Congress from implementing the Convention in the same manner it legislates with respect to innumerable other matters—observing the Constitution's division of responsibility between sovereigns and leaving the prosecution of purely local crimes to the States. The Convention, after all, is agnostic between enforcement at the state versus federal level: It provides that "[e]ach State Party shall, *in accordance with its constitutional processes*, adopt the necessary measures to implement its obligations under this Convention." Art. VII(1), 1974 U. N. T. S. 331 (emphasis added); see also Tabassi, National Implementation: Article VII, in Kenyon & Feakes 205, 207 ("Since the creation of national law, the enforcement of it and the structure and administration of government are all sovereign acts reserved exclusively for [State Parties], it is not surprising that the Convention is so vague on the critical matter of national implementation.").

Fortunately, we have no need to interpret the scope of the Convention in this case. Bond was prosecuted under section 229, and the statute—unlike the Convention—must be read consistent with principles of federalism inherent in our constitutional structure.

A

In the Government's view, the conclusion that Bond "knowingly" "use[d]" a "chemical weapon" in violation of section 229(a) is simple: The chemicals that Bond placed on Haynes's home and car are "toxic chemical[s]" as defined by

the statute, and Bond's attempt to assault Haynes was not a "peaceful purpose." §§229F(1), (8), (7). The problem with this interpretation is that it would "dramatically intrude[ ] upon traditional state criminal jurisdiction," and we avoid reading statutes to have such reach in the absence of a clear indication that they do. *United States* v. *Bass*, 404 U. S. 336, 350 (1971).

Part of a fair reading of statutory text is recognizing that "Congress legislates against the backdrop" of certain unexpressed presumptions. *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 248 (1991). As Justice Frankfurter put it in his famous essay on statutory interpretation, correctly reading a statute "demands awareness of certain presuppositions." Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 537 (1947). For example, we presume that a criminal statute derived from the common law carries with it the requirement of a culpable mental state—even if no such limitation appears in the text—unless it is clear that the Legislature intended to impose strict liability. *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 437 (1978). To take another example, we presume, absent a clear statement from Congress, that federal statutes do not apply outside the United States. *Morrison* v. *National Australia Bank Ltd.*, 561 U. S. 247, 255 (2010). So even though section 229, read on its face, would cover a chemical weapons crime if committed by a U. S. citizen in Australia, we would not apply the statute to such conduct absent a plain statement from Congress.[1] The notion that some things "go without saying" applies to legislation just as it does to everyday life.

Among the background principles of construction that our cases have recognized are those grounded in the relationship between the Federal Government and the States under our

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[1] Congress has in fact included just such a plain statement in section 229(c)(2): "Conduct prohibited by [section 229(a)] is within the jurisdiction of the United States if the prohibited conduct . . . takes place outside of the United States and is committed by a national of the United States."

Constitution. It has long been settled, for example, that we presume federal statutes do not abrogate state sovereign immunity, *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 243 (1985), impose obligations on the States pursuant to section 5 of the Fourteenth Amendment, *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 16–17 (1981), or preempt state law, *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947).

Closely related to these is the well-established principle that "'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides'" the "usual constitutional balance of federal and state powers." *Gregory* v. *Ashcroft*, 501 U. S. 452, 460 (1991) (quoting *Atascadero*, *supra*, at 243). To quote Frankfurter again, if the Federal Government would "'radically readjust[] the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit'" about it. *BFP* v. *Resolution Trust Corporation*, 511 U. S. 531, 544 (1994) (quoting Some Reflections, *supra*, at 539–540; second alteration in original). Or as explained by Justice Marshall, when legislation "affect[s] the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Bass*, *supra*, at 349.

We have applied this background principle when construing federal statutes that touched on several areas of traditional state responsibility. See *Gregory*, *supra*, at 460 (qualifications for state officers); *BFP*, *supra*, at 544 (titles to real estate); *Solid Waste Agency of Northern Cook Cty.* v. *Army Corps of Engineers*, 531 U. S. 159, 174 (2001) (land and water use). Perhaps the clearest example of traditional state authority is the punishment of local criminal activity. *United States* v. *Morrison*, 529 U. S. 598, 618 (2000). Thus, "we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between

federal and state criminal jurisdiction." *Bass*, 404 U. S., at 349.

In *Bass*, we interpreted a statute that prohibited any convicted felon from "'receiv[ing], possess[ing], or transport-[ing] in commerce or affecting commerce . . . any firearm.'" *Id.*, at 337. The Government argued that the statute barred felons from possessing *all* firearms and that it was not necessary to demonstrate a connection to interstate commerce. We rejected that reading, which would "render[ ] traditionally local criminal conduct a matter for federal enforcement and would also involve a substantial extension of federal police resources." *Id.*, at 350. We instead read the statute more narrowly to require proof of a connection to interstate commerce in every case, thereby "preserv[ing] as an element of all the offenses a requirement suited to federal criminal jurisdiction alone." *Id.*, at 351.

Similarly, in *Jones* v. *United States*, 529 U. S. 848, 850 (2000), we confronted the question whether the federal arson statute, which prohibited burning "'any . . . property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce,'" reached an owner-occupied private residence. Once again we rejected the Government's "expansive interpretation," under which "hardly a building in the land would fall outside the federal statute's domain." *Id.*, at 857. We instead held that the statute was "most sensibly read" more narrowly to reach only buildings used in "active employment for commercial purposes." *Id.*, at 855. We noted that "arson is a paradigmatic common-law state crime," *id.*, at 858, and that the Government's proposed broad reading would "'significantly change[ ] the federal-state balance,'" *ibid.* (quoting *Bass*, 404 U. S., at 349), "mak-[ing] virtually every arson in the country a federal offense," 529 U. S., at 859.

These precedents make clear that it is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute. In this case, the

ambiguity derives from the improbably broad reach of the key statutory definition given the term—"chemical weapon"—being defined; the deeply serious consequences of adopting such a boundless reading; and the lack of any apparent need to do so in light of the context from which the statute arose—a treaty about chemical warfare and terrorism. We conclude that, in this curious case, we can insist on a clear indication that Congress meant to reach purely local crimes, before interpreting the statute's expansive language in a way that intrudes on the police power of the States. See *Bass*, *supra*, at 349.[2]

B

We do not find any such clear indication in section 229. "Chemical weapon" is the key term that defines the statute's reach, and it is defined extremely broadly. But that general definition does not constitute a clear statement that Congress meant the statute to reach local criminal conduct.

In fact, a fair reading of section 229 suggests that it does not have as expansive a scope as might at first appear. To begin, as a matter of natural meaning, an educated user of English would not describe Bond's crime as involving a "chemical weapon." Saying that a person "used a chemical weapon" conveys a very different idea than saying the person "used a chemical in a way that caused some harm." The

[2] JUSTICE SCALIA contends that the relevance of *Bass* and *Jones* to this case is "entirely made up," *post*, at 869 (opinion concurring in judgment), but not because he disagrees with interpreting statutes in light of principles of federalism. Rather, he says that *Bass* was a case where the statute was unclear. We agree; we simply think the statute in this case is also subject to construction, for the reasons given. As for *Jones*, JUSTICE SCALIA argues that the discussion of federalism in that case was beside the point. *Post*, at 869. We do not read *Jones* that way; the Court adopted the "most sensibl[e] read[ing]" of the statute, 529 U. S., at 855, which suggests that other sensible readings were possible. In arriving at its fair reading of the statute, the Court considered the dramatic extent to which the Government's broader interpretation would have expanded "the federal statute's domain." *Id.*, at 857. We do the same here.

natural meaning of "chemical weapon" takes account of both the particular chemicals that the defendant used and the circumstances in which she used them.

When used in the manner here, the chemicals in this case are not of the sort that an ordinary person would associate with instruments of chemical warfare. The substances that Bond used bear little resemblance to the deadly toxins that are "of particular danger to the objectives of the Convention." Why We Need a Chemical Weapons Convention and an OPCW, in Kenyon & Feakes 17 (describing the Convention's Annex on Chemicals, a nonexhaustive list of covered substances that are subject to special regulation). More to the point, the use of something as a "weapon" typically connotes "[a]n instrument of offensive or defensive combat," Webster's Third New International Dictionary 2589 (2002), or "[a]n instrument of attack or defense in combat, as a gun, missile, or sword," American Heritage Dictionary 2022 (3d ed. 1992). But no speaker in natural parlance would describe Bond's feud-driven act of spreading irritating chemicals on Haynes's doorknob and mailbox as "combat." Nor do the other circumstances of Bond's offense—an act of revenge born of romantic jealousy, meant to cause discomfort, that produced nothing more than a minor thumb burn—suggest that a chemical weapon was deployed in Norristown, Pennsylvania. Potassium dichromate and 10-chloro-10H-phenoxarsine might be chemical weapons if used, say, to poison a city's water supply. But Bond's crime is worlds apart from such hypotheticals, and covering it would give the statute a reach exceeding the ordinary meaning of the words Congress wrote.

In settling on a fair reading of a statute, it is not unusual to consider the ordinary meaning of a defined term, particularly when there is dissonance between that ordinary meaning and the reach of the definition. In *Johnson* v. *United States*, 559 U. S. 133, 136 (2010), for example, we considered the statutory term " 'violent felony,' " which the Armed Career Crimi-

nal Act defined in relevant part as an offense that "'has as an element the use . . . of physical force against the person of another.'" Although "physical force against . . . another" might have meant *any* force, however slight, we thought it "clear that in the context of a statutory definition of '*violent* felony,' the phrase 'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person." *Id.*, at 140. The ordinary meaning of "chemical weapon" plays a similar limiting role here.

The Government would have us brush aside the ordinary meaning and adopt a reading of section 229 that would sweep in everything from the detergent under the kitchen sink to the stain remover in the laundry room. Yet no one would ordinarily describe those substances as "chemical weapons." The Government responds that because Bond used "specialized, highly toxic" (though legal) chemicals, "this case presents no occasion to address whether Congress intended [section 229] to apply to common household substances." Brief for United States 13, n. 3. That the statute *would* apply so broadly, however, is the inescapable conclusion of the Government's position: Any parent would be guilty of a serious federal offense—possession of a chemical weapon—when, exasperated by the children's repeated failure to clean the goldfish tank, he considers poisoning the fish with a few drops of vinegar. We are reluctant to ignore the ordinary meaning of "chemical weapon" when doing so would transform a statute passed to implement the international Convention on Chemical Weapons into one that also makes it a federal offense to poison goldfish. That would not be a "realistic assessment[ ] of congressional intent." *Post*, at 872 (SCALIA, J., concurring in judgment).

In light of all of this, it is fully appropriate to apply the background assumption that Congress normally preserves "the constitutional balance between the National Government and the States." *Bond I*, 564 U. S., at 222. That assumption is grounded in the very structure of the Constitu-

tion. And as we explained when this case was first before us, maintaining that constitutional balance is not merely an end unto itself. Rather, "[b]y denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Ibid.*

The Government's reading of section 229 would "'alter sensitive federal-state relationships,'" convert an astonishing amount of "traditionally local criminal conduct" into "a matter for federal enforcement," and "involve a substantial extension of federal police resources." *Bass*, 404 U. S., at 349–350. It would transform the statute from one whose core concerns are acts of war, assassination, and terrorism into a massive federal anti-poisoning regime that reaches the simplest of assaults. As the Government reads section 229, "hardly" a poisoning "in the land would fall outside the federal statute's domain." *Jones*, 529 U. S., at 857. Of course Bond's conduct is serious and unacceptable—and against the laws of Pennsylvania. But the background principle that Congress does not normally intrude upon the police power of the States is critically important. In light of that principle, we are reluctant to conclude that Congress meant to punish Bond's crime with a federal prosecution for a chemical weapons attack.

In fact, with the exception of this unusual case, the Federal Government itself has not looked to section 229 to reach purely local crimes. The Government has identified only a handful of prosecutions that have been brought under this section. Brief in Opposition 27, n. 5. Most of those involved either terrorist plots or the possession of extremely dangerous substances with the potential to cause severe harm to many people. See *United States* v. *Ghane*, 673 F. 3d 771 (CA8 2012) (defendant possessed enough potassium cyanide to kill 450 people); *United States* v. *Crocker*, 260 Fed. Appx. 794 (CA6 2008) (defendant attempted to acquire VX nerve gas and chlorine gas as part of a plot to attack a fed-

eral courthouse); *United States* v. *Krar*, 134 Fed. Appx. 662 (CA5 2005) (*per curiam*) (defendant possessed sodium cyanide); *United States* v. *Fries*, 2012 WL 689157 (D Ariz., Feb. 28, 2012) (defendant set off a homemade chlorine bomb in the victim's driveway, requiring evacuation of a residential neighborhood). The Federal Government undoubtedly has a substantial interest in enforcing criminal laws against assassination, terrorism, and acts with the potential to cause mass suffering. Those crimes have not traditionally been left predominantly to the States, and nothing we have said here will disrupt the Government's authority to prosecute such offenses.

It is also clear that the laws of the Commonwealth of Pennsylvania (and every other State) are sufficient to prosecute Bond. Pennsylvania has several statutes that would likely cover her assault. See 18 Pa. Cons. Stat. §§2701 (2012) (simple assault), 2705 (reckless endangerment), 2709 (harassment).[3] And state authorities regularly enforce these laws in poisoning cases. See, *e. g.*, Gamiz, Family Survives Poisoned Burritos, Allentown, Pa., Morning Call, May 18, 2013 (defendant charged with assault, reckless endangerment, and harassment for feeding burritos poisoned with prescription medication to her husband and daughter); Cops: Man Was Poisoned Over 3 Years, Harrisburg, Pa., Patriot News, Aug. 12, 2012, p. A11 (defendant charged with assault and reckless endangerment for poisoning a man with eye drops over three years so that "he would pay more attention to her").

The Government objects that Pennsylvania authorities charged Bond with only a minor offense based on her "harassing telephone calls and letters," *Bond I*, 564 U. S., at 214, and declined to prosecute her for assault. But we have tra-

[3] Pennsylvania also prohibits using "a weapon of mass destruction," including a "chemical agent." 18 Pa. Cons. Stat. §§2716(a), (i). Just as we conclude that Bond's offense cannot be fairly described as the use of a chemical weapon, Pennsylvania authorities apparently determined that her crime did not involve a "weapon of mass destruction."

ditionally viewed the exercise of state officials' prosecutorial discretion as a valuable feature of our constitutional system. See *Bordenkircher* v. *Hayes*, 434 U. S. 357, 364 (1978). And nothing in the Convention shows a clear intent to abrogate that feature. Prosecutorial discretion involves carefully weighing the benefits of a prosecution against the evidence needed to convict, the resources of the public fisc, and the public policy of the State. Here, in its zeal to prosecute Bond, the Federal Government has "displaced" the "public policy of the Commonwealth of Pennsylvania, enacted in its capacity as sovereign," that Bond does not belong in prison for a chemical weapons offense. *Bond I*, *supra*, at 224; see also *Jones*, *supra*, at 859 (Stevens, J., concurring) (federal prosecution of a traditionally local crime "illustrates how a criminal law like this may effectively displace a policy choice made by the State").

As we have explained, "Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States." *Bass*, 404 U. S., at 349. There is no clear indication of a contrary approach here. Section 229 implements the Convention, but Bond's crime could hardly be more unlike the uses of mustard gas on the Western Front or nerve agents in the Iran-Iraq war that form the core concerns of that treaty. See Kenyon & Feakes 6. There are no life-sized paintings of Bond's rival washing her thumb. And there are no apparent interests of the United States Congress or the community of nations in seeing Bond end up in federal prison, rather than dealt with (like virtually all other criminals in Pennsylvania) by the Commonwealth. The Solicitor General acknowledged as much at oral argument. See Tr. of Oral Arg. 47 ("I don't think anybody would say [that] whether or not Ms. Bond is prosecuted would give rise to an international incident").

This case is unusual, and our analysis is appropriately limited. Our disagreement with our colleagues reduces to whether section 229 is "utterly clear." *Post*, at 871 (SCALIA,

J., concurring in judgment). We think it is not, given that the definition of "chemical weapon" in a particular case can reach beyond any normal notion of such a weapon, that the context from which the statute arose demonstrates a much more limited prohibition was intended, and that the most sweeping reading of the statute would fundamentally upset the Constitution's balance between national and local power. This exceptional convergence of factors gives us serious reason to doubt the Government's expansive reading of section 229, and calls for us to interpret the statute more narrowly.

In sum, the global need to prevent chemical warfare does not require the Federal Government to reach into the kitchen cupboard, or to treat a local assault with a chemical irritant as the deployment of a chemical weapon. There is no reason to suppose that Congress—in implementing the Convention on Chemical Weapons—thought otherwise.

* * *

The Convention provides for implementation by each ratifying nation "in accordance with its constitutional processes." Art. VII(1), 1974 U. N. T. S. 331. As James Madison explained, the constitutional process in our "compound republic" keeps power "divided between two distinct governments." The Federalist No. 51, p. 323 (C. Rossiter ed. 1961). If section 229 reached Bond's conduct, it would mark a dramatic departure from that constitutional structure and a serious reallocation of criminal law enforcement authority between the Federal Government and the States. Absent a clear statement of that purpose, we will not presume Congress to have authorized such a stark intrusion into traditional state authority.

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

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, and with whom JUSTICE ALITO joins as to Part I, concurring in the judgment.

Somewhere in Norristown, Pennsylvania, a husband's paramour suffered a minor thumb burn at the hands of a betrayed wife. The United States Congress—"every where extending the sphere of its activity, and drawing all power into its impetuous vortex"[1]—has made a federal case out of it. What are we to do?

It is the responsibility of "the legislature, not the Court, . . . to define a crime, and ordain its punishment." *United States* v. *Wiltberger*, 5 Wheat. 76, 95 (1820) (Marshall, C. J., for the Court). And it is "emphatically the province and duty of the judicial department to say what the law [including the Constitution] is." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803) (same). Today, the Court shirks its job and performs Congress's. As sweeping and unsettling as the Chemical Weapons Convention Implementation Act of 1998 may be, it is clear beyond doubt that it covers what Bond did; and we have no authority to amend it. So we are forced to decide—there is no way around it—whether the Act's application to what Bond did was constitutional.

I would hold that it was not, and for that reason would reverse the judgment of the Court of Appeals for the Third Circuit.

I. The Statutory Question

A. Unavoidable Meaning of the Text

The meaning of the Act is plain. No person may knowingly "develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon." 18 U. S. C. § 229(a)(1). A "chemical weapon" is "[a] toxic chemical and

[1] The Federalist No. 48, p. 333 (J. Cooke ed. 1961) (J. Madison) (hereinafter The Federalist).

its precursors, except where intended for a purpose not prohibited under this chapter as long as the type and quantity is consistent with such a purpose." § 229F(1)(A). A "toxic chemical" is "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. The term includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere." § 229F(8)(A). A "purpose not prohibited" is "[a]ny peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity." § 229F(7)(A).

Applying those provisions to this case is hardly complicated. Bond possessed and used "chemical[s] which through [their] chemical action on life processes can cause death, temporary incapacitation or permanent harm." Thus, she possessed "toxic chemicals." And, because they were not possessed or used only for a "purpose not prohibited," § 229F(1)(A), they were "chemical weapons." Ergo, Bond violated the Act. End of statutory analysis, I would have thought.[2]

The Court does not think the interpretive exercise so simple. But that is only because its result-driven antitextualism befogs what is evident.

B. The Court's Interpretation

The Court's account of the clear-statement rule reads like a really good lawyer's brief for the wrong side, relying on cases that are *so close* to being on point that someone eager to reach the favored outcome might swallow them. The rel-

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[2] Petitioner offers one textual argument that the Court does not consider. She argues that the exception for "peaceful purposes" is best understood as a term of art meaning roughly any purpose that is not "warlike." Brief for Petitioner 50–57. Though that reading is more defensible than the Court's, the Act will not bear it. If "peaceful" meant "nonwarlike," the statute's exception for "any individual self-defense device, including . . . pepper spray or chemical mace," § 229C—the prosaic uses of which are surely nonwarlike—would have been unnecessary.

evance to this case of *United States* v. *Bass*, 404 U. S. 336 (1971), and *Jones* v. *United States*, 529 U. S. 848 (2000), is, in truth, entirely made up. In *Bass*, we had to decide whether a statute forbidding "'receiv[ing], possess[ing], or transport-[ing] in commerce or affecting commerce . . . any firearm'" prohibited possessing a gun that lacked any connection to interstate commerce. 404 U. S., at 337–339. Though the Court relied in part on a federalism-inspired interpretive presumption, it did so only *after* it had found, in Part I of the opinion, applying traditional interpretive tools, that the text in question was ambiguous, *id.*, at 339–347. Adopting in Part II the narrower of the two possible readings, we said that "*unless Congress conveys its purpose clearly*, it will not be deemed to have significantly changed the federal-state balance." *Id.*, at 349 (emphasis added). Had Congress "convey[ed] its purpose clearly" by enacting a clear and even sweeping statute, the presumption would not have applied.

Jones is also irrelevant. To determine whether an owner-occupied private residence counted as a "'property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce'" under the federal arson statute, 529 U. S., at 850–851, our opinion examined *not* the federal-jurisdiction-expanding consequences of answering yes but rather the ordinary meaning of the words—and answered no, *id.*, at 855–857. Then, in a separate part of the opinion, we observed that our reading was consistent with the principle that we should adopt a construction that avoids "grave and doubtful constitutional questions," *id.*, at 857, and, quoting *Bass*, the principle that Congress must convey its purpose clearly before its laws will be "'deemed to have significantly changed the federal-state balance,'" 529 U. S., at 858. To say that the best reading of the text conformed to those principles is not to say that those principles can render clear text ambiguous.[3]

[3] Other cases in the *Bass* line confirm that broad text "need only be plain to anyone reading [it]" in order to be given its obvious meaning. *Salinas* v. *United States*, 522 U. S. 52, 60 (1997) (internal quotation marks omitted);

The latter is what the Court says today. Inverting *Bass* and *Jones*, it *starts* with the federalism-related consequences of the statute's meaning and reasons backwards, holding that, if the statute has what the Court considers a disruptive effect on the "federal-state balance" of criminal jurisdiction, *ante*, at 859, that effect causes the text, even if clear on its face, to be ambiguous. Just ponder what the Court says: "[The Act's] ambiguity *derives* from the improbably broad reach of the key statutory definition . . . the deeply serious consequences of adopting such a boundless reading; and the lack of any apparent need to do so . . . ." *Ante*, at 860 (emphasis added). Imagine what future courts can do with that judge-empowering principle: Whatever has improbably broad, deeply serious, and apparently unnecessary consequences . . . *is ambiguous*!

The same skillful use of oh-so-close-to-relevant cases characterizes the Court's *pro forma* attempt to find ambiguity in the text itself, specifically, in the term "[c]hemical weapon." The ordinary meaning of weapon, the Court says, is an instrument of combat, and "no speaker in natural parlance would describe Bond's feud-driven act of spreading irritating chemicals on Haynes's doorknob and mailbox as 'combat.'" *Ante*, at 861. Undoubtedly so, but undoubtedly beside the point, since the Act supplies its own definition of "chemical weapon," which unquestionably does bring Bond's action within the statutory prohibition. The Court retorts that "it is not unusual to consider the ordinary meaning of a defined term, particularly when there is dissonance between that ordinary meaning and the reach of the definition." *Ibid.* *So close* to true! What is "not unusual" is using the ordinary meaning of the term being defined for the purpose of resolving *an ambiguity in the definition.* When, for example, "draft," a word of many meanings, is one of the words used in a definition of "breeze," we know it has nothing to do with

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see also *Pennsylvania Dept. of Corrections* v. *Yeskey*, 524 U. S. 206, 209 (1998); cf. *United States* v. *Lopez*, 514 U. S. 549, 562 (1995).

military conscription or beer. The point is illustrated by the almost-relevant case the Court cites for its novel principle, *Johnson* v. *United States*, 559 U. S. 133 (2010). There the defined term was "violent felony," which the Act defined as an offense that " 'has as an element the use . . . of physical force against the person of another.' " *Id.*, at 135 (quoting § 924(e)(2)(B)(i)). We had to figure out what "physical force" meant, since the statute "*d[id] not define*" *it*. *Id.*, at 138 (emphasis added). So we consulted (among other things) the general meaning of the term being defined, "violent felony." *Id.*, at 140.

In this case, by contrast, the ordinary meaning of the term being defined is irrelevant, because the statute's own definition—however expansive—is utterly clear: any "chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals," § 229F(8)(A), unless the chemical is possessed or used for a "peaceful purpose," § 229F(1)(A), (7)(A). The statute parses itself. There is no opinion of ours, and none written by any court or put forward by any commentator since Aristotle, which says, or even suggests, that "dissonance" between ordinary meaning and the unambiguous words of a definition is to be resolved in favor of ordinary meaning. If that were the case, there would hardly be any use in providing a definition. No, the true rule is entirely clear: "When a statute includes an explicit definition, we must follow that definition, *even if it varies from that term's ordinary meaning*." *Stenberg* v. *Carhart*, 530 U. S. 914, 942 (2000) (emphasis added). Once again, contemplate the judge-empowering consequences of the new interpretive rule the Court today announces: When there is "dissonance" between the statutory definition and the ordinary meaning of the defined word, the latter may prevail.

But even text clear on its face, the Court suggests, must be read against the backdrop of established interpretive presumptions. Thus, we presume "that a criminal statute

derived from the common law carries with it the requirement of a culpable mental state—even if no such limitation appears in the text." *Ante*, at 857. And we presume that "federal statutes do not apply outside the United States." *Ibid.* Both of those are, indeed, established interpretive presumptions that are (1) based upon realistic assessments of congressional intent, and (2) well known to Congress—thus furthering rather than subverting genuine legislative intent. To apply these presumptions, then, is not to rewrite clear text; it is to interpret words fairly, in light of their statutory context. But there is nothing either (1) realistic or (2) well known about the presumption the Court shoves down the throat of a resisting statute today. Who in the world would have thought that a definition is inoperative if it contradicts ordinary meaning? When this statute was enacted, there was not yet a "*Bond* presumption" to that effect—though presumably Congress will have to take account of the *Bond* presumption in the future, perhaps by adding at the end of all its definitions that depart from ordinary connotation "and we really mean it."

C. The Statute as Judicially Amended

I suspect the Act will not survive today's gruesome surgery. A criminal statute must clearly define the conduct it proscribes. If it does not "'give a person of ordinary intelligence fair notice'" of its scope, *United States* v. *Batchelder*, 442 U. S. 114, 123 (1979), it denies due process.

The *new* § 229(a)(1) fails that test. Henceforward, a person "shall be fined . . . , imprisoned for any term of years, or both," § 229A(a)(1)—or, if he kills someone, "shall be punished by death or imprisoned for life," § 229A(a)(2)—whenever he "develop[s], produce[s], otherwise acquire[s], transfer[s] directly or indirectly, receive[s], stockpile[s], retain[s], own[s], possess[es], or use[s], or threaten[s] to use," § 229(a)(1), any chemical "*of the sort that an ordinary person would associate with instruments of chemical warfare*,"

ante, at 861 (emphasis added). Whether that test is satisfied, the Court unhelpfully (and also illogically) explains, depends not only on the "particular chemicals that the defendant used" but also on "the circumstances in which she used them." *Ibid.* The "detergent under the kitchen sink" and "the stain remover in the laundry room" are apparently out, *ante*, at 862—but what if they are deployed to poison a neighborhood water fountain? Poisoning a goldfish tank is also apparently out, *ibid.*, but what if the fish belongs to a Congressman or Governor and the act is meant as a menacing message, a small-time equivalent of leaving a severed horse head in the bed? See *ante*, at 863 (using the "concerns" driving the Convention—"acts of war, assassination, and terrorism"—as guideposts of statutory meaning). Moreover, the Court's illogical embellishment seems to apply only to the "use" of a chemical, *ante*, at 861, but "use" is only 1 of *11* kinds of activity that the statute prohibits. What, one wonders, makes something a "chemical weapon" when it is merely "stockpile[d]" or "possess[ed]"? To these questions and countless others, one guess is as bad as another.

No one should have to ponder the totality of the circumstances in order to determine whether his conduct is a felony. Yet that is what the Court will now require of all future handlers of harmful toxins—that is to say, all of us. Thanks to the Court's revisions, the Act, which before was merely broad, is now broad and unintelligible. "[N]o standard of conduct is specified at all." *Coates* v. *Cincinnati*, 402 U. S. 611, 614 (1971). Before long, I suspect, courts will be required to say so.

II. The Constitutional Question

Since the Act is clear, the *real* question this case presents is whether the Act is constitutional as applied to petitioner. An unreasoned and citation-less sentence from our opinion in *Missouri* v. *Holland*, 252 U. S. 416 (1920), purported to furnish the answer: "If the treaty is valid"—and no one ar-

gues that the Convention is not—"there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government." *Id.*, at 432.[4] Petitioner and her *amici* press us to consider whether there is anything to this *ipse dixit*. The Constitution's text and structure show that there is not.[5]

A. Text

Under Article I, § 8, cl. 18, Congress has the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." One such "other Powe[r]" appears in Article II, § 2, cl. 2: "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." Read together, the two Clauses empower Congress to pass laws "necessary and

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[4] Nineteen years earlier, the Court embraced a similar view—also without reasoning. See *Neely* v. *Henkel*, 180 U. S. 109, 121 (1901) ("The power of Congress to make all laws necessary and proper for carrying into execution . . . all [powers] vested in the Government of the United States . . . includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President by and with the advice and consent of the Senate to insert in a treaty with a foreign power"). There is also dictum arguably favorable to *Holland* in *Prigg* v. *Pennsylvania*, 16 Pet. 539, 619 (1842) ("[T]he power is nowhere in positive terms conferred upon Congress to make laws to carry the stipulations of treaties into effect. It has been supposed to result from the duty of the national government to fulfill all the obligations of treaties"). But see *Mayor of New Orleans* v. *United States*, 10 Pet. 662, 736 (1836) ("The government of the United States . . . is one of limited powers. It can exercise authority over no subjects, except those which have been delegated to it. Congress cannot, by legislation, enlarge the federal jurisdiction, nor can it be enlarged under the treaty-making power").

[5] I agree with the Court that the Government waived its defense of the Act as an exercise of the commerce power. *Ante*, at 854–855.

proper for carrying into Execution . . . [the] Power . . . to make Treaties."

It is obvious what the Clauses, read together, do *not* say. They do not authorize Congress to enact laws for carrying into execution "Treaties," even treaties that do not execute themselves, such as the Chemical Weapons Convention.[6] Surely it makes sense, the Government contends, that Congress would have the power to carry out the obligations to which the President and the Senate have committed the Nation. The power to "carry into Execution" the "Power . . . to make Treaties," it insists, *has to* mean the power to execute the treaties themselves.

That argument, which makes no pretense of resting on text, unsurprisingly misconstrues it. Start with the phrase "to make Treaties." A treaty is a contract with a foreign nation *made*, the Constitution states, by the President with the concurrence of "two thirds of the Senators present." That is true of self-executing and non-self-executing treaties alike; the Constitution does not distinguish between the two. So, because the President and the Senate can enter into a non-self-executing compact with a foreign nation but can never by themselves (without the House) give that compact domestic effect through legislation, the power of the President and the Senate "to make" a treaty cannot possibly mean to "enter into a compact with a foreign nation and then give that compact domestic legal effect." We have said in another context that a right "to make contracts" (a treaty, of course, is a contract) does not "extend . . . to conduct . . . *after* the contract relation has been established . . . . Such *postformation* conduct does not involve the right to make a contract, but rather implicates the *performance* of established contract obligations." *Patterson* v. *McLean Credit*

[6] Non-self-executing treaties are treaties whose commitments do not "automatically have effect as domestic law," *Medellín* v. *Texas*, 552 U. S. 491, 504 (2008), and "can only be enforced pursuant to legislation to carry them into effect," *Whitney* v. *Robertson*, 124 U. S. 190, 194 (1888).

Union, 491 U. S. 164, 177 (1989) (emphasis added). Upon the President's agreement and the Senate's ratification, a treaty—no matter what kind—has been *made* and is not susceptible of any more making.

How might Congress have helped "carr[y]" the power to make the treaty—here, the Chemical Weapons Convention—"into Execution"? In any number of ways. It could have appropriated money for hiring treaty negotiators, empowered the Department of State to appoint those negotiators, formed a commission to study the benefits and risks of entering into the agreement, or paid for a bevy of spies to monitor the treaty-related deliberations of other potential signatories. See G. Lawson & G. Seidman, The Constitution of Empire: Territorial Expansion and American Legal History 63 (2004). The Necessary and Proper Clause interacts similarly with other Article II powers: "[W]ith respect to the executive branch, the Clause would allow Congress to institute an agency to help the President wisely employ his pardoning power . . . . Most important, the Clause allows Congress to establish officers to assist the President in exercising his 'executive Power.'" Calabresi & Prakash, The President's Power to Execute the Laws, 104 Yale L. J. 541, 591 (1994).

But a power to help the President *make* treaties is not a power to *implement* treaties already made. See generally Rosenkranz, Executing the Treaty Power, 118 Harv. L. Rev. 1867 (2005). Once a treaty has been made, Congress's power to do what is "necessary and proper" to assist the making of treaties drops out of the picture. To legislate compliance with the United States' treaty obligations, Congress must rely upon its independent (though quite robust) Article I, § 8, powers.

B. Structure

"[T]he Constitutio[n] confer[s] upon Congress . . . not all governmental powers, but only discrete, enumerated ones." *Printz* v. *United States*, 521 U. S. 898, 919 (1997). And, of

course, "enumeration presupposes something not enumerated." *Gibbons* v. *Ogden*, 9 Wheat. 1, 195 (1824). But in *Holland*, the proponents of unlimited congressional power found a loophole: "By negotiating a treaty and obtaining the requisite consent of the Senate, the President . . . may endow Congress with a source of legislative authority independent of the powers enumerated in Article I." L. Tribe, American Constitutional Law § 4–4, pp. 645–646 (3d ed. 2000). Though *Holland*'s change to the Constitution's text appears minor (the power to carry into execution the *power to make treaties* becomes the power to carry into execution *treaties*), the change to its structure is seismic.

To see why vast expansion of congressional power is not just a remote possibility, consider two features of the modern practice of treaty making. In our Nation's early history, and extending through the time when *Holland* was written, treaties were typically bilateral, and addressed only a small range of topics relating to the obligations of each state to the other, and to citizens of the other—military neutrality, for example, or military alliance, or guarantee of most-favored-nation trade treatment. See Bradley, The Treaty Power and American Federalism, 97 Mich. L. Rev. 390, 396 (1998). But beginning in the last half of the last century, many treaties were "detailed multilateral instruments negotiated and drafted at international conferences," *ibid.*, and they sought to regulate states' treatment of their own citizens, or even "the activities of individuals and private entities," A. Chayes & A. Chayes, The New Sovereignty: Compliance with International Regulatory Agreements 14 (1995). "[O]ften vague and open-ended," such treaties "touch on almost every aspect of domestic civil, political, and cultural life." Bradley & Goldsmith, Treaties, Human Rights, and Conditional Consent, 149 U. Pa. L. Rev. 399, 400 (2000).

Consider also that, at least according to some scholars, the Treaty Clause comes with no implied subject-matter limitations. See, *e. g.*, L. Henkin, Foreign Affairs and the United

States Constitution 191, 197 (2d ed. 1996); but see Bradley, *supra*, at 433–439. On this view, "[t]he Tenth Amendment . . . does not limit the power to make treaties or other agreements," Restatement (Third) of Foreign Relations Law of the United States § 302, Comment *d*, p. 154 (1986), and the treaty power can be used to regulate matters of strictly domestic concern, see *id.*, at Comment *c*, p. 153; but see *post*, at 884–896 (THOMAS, J., concurring in judgment).

If that is true, then the possibilities of what the Federal Government may accomplish, with the right treaty in hand, are endless and hardly farfetched. It could begin, as some scholars have suggested, with abrogation of this Court's constitutional rulings. For example, the holding that a statute prohibiting the carrying of firearms near schools went beyond Congress's enumerated powers, *United States* v. *Lopez*, 514 U. S. 549, 551 (1995), could be reversed by negotiating a treaty with Latvia providing that neither sovereign would permit the carrying of guns near schools. Similarly, Congress could reenact the invalidated part of the Violence Against Women Act of 1994 that provided a civil remedy for victims of gender-motivated violence, just so long as there were a treaty on point—and some authors think there already is, see MacKinnon, The Supreme Court, 1999 Term, Comment, 114 Harv. L. Rev. 135, 167 (2000).

But reversing some of this Court's decisions is the least of the problem. Imagine the United States' entry into an Antipolygamy Convention, which called for—and Congress enacted—legislation providing that, when a spouse of a man with more than one wife dies intestate, the surviving husband may inherit no part of the estate. Constitutional? The Federalist answers with a rhetorical question: "Suppose by some forced constructions of its authority (which indeed cannot easily be imagined) the Federal Legislature should attempt to vary the law of descent in any State; would it not be evident that . . . it had exceeded its jurisdiction and infringed upon that of the State?" The Federalist No. 33, at

206 (A. Hamilton). Yet given the Antipolygamy Convention, *Holland* would uphold it. Or imagine that, to execute a treaty, Congress enacted a statute prohibiting state inheritance taxes on real property. Constitutional? Of course not. Again, The Federalist: "Suppose . . . [Congress] should undertake to abrogate a land tax imposed by the authority of a State, would it not be equally evident that this was an invasion of that concurrent jurisdiction in respect to this species of tax which its constitution plainly supposes to exist in the State governments?" No. 33, at 206. *Holland* would uphold it. As these examples show, *Holland* places Congress only one treaty away from acquiring a general police power.

The Necessary and Proper Clause cannot bear such weight. As Chief Justice Marshall said regarding it, no "great substantive and independent power" can be "implied as incidental to other powers, or used as a means of executing them." *McCulloch* v. *Maryland*, 4 Wheat. 316, 411 (1819); see Baude, Rethinking the Federal Eminent Domain Power, 122 Yale L. J. 1738, 1749–1755 (2013). No law that flattens the principle of state sovereignty, whether or not "necessary," can be said to be "proper." As an old, well-known treatise put it, "it would not be a proper or constitutional exercise of the treaty-making power to provide that Congress should have a general legislative authority over a subject which has not been given it by the Constitution." 1 W. Willoughby, The Constitutional Law of the United States § 216, p. 504 (1910).

We would not give the Government's support of the *Holland* principle the time of day were we confronted with "treaty-implementing" legislation that abrogated the freedom of speech or some other constitutionally protected individual right. We proved just that in *Reid* v. *Covert*, 354 U. S. 1 (1957), which held that commitments made in treaties with Great Britain and Japan would not permit civilian wives of American servicemen stationed in those countries

to be tried for murder by court-martial. The plurality opinion said that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." *Id.*, at 16.

To be sure, the *Reid* plurality purported to distinguish the *ipse dixit* of *Holland* with its own unsupported *ipse dixit*. "[T]he people and the States," it said, "have delegated [the treaty] power to the National Government [so] the Tenth Amendment is no barrier." 354 U. S., at 18. The opinion does not say why (and there is no reason why) only the Tenth Amendment, and not the other nine, has been "delegated" away by the treaty power. The distinction between provisions protecting individual liberty, on the one hand, and "structural" provisions, on the other, cannot be the explanation, since structure in general—and especially the structure of limited federal powers—is *designed* to protect individual liberty. "The federal structure . . . secures the freedom of the individual. . . . By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Bond* v. *United States*, 564 U. S. 211, 221–222 (2011).

The Government raises a functionalist objection: If the Constitution does not limit a *self-executing treaty* to the subject matter delineated in Article I, §8, then it makes no sense to impose that limitation upon a statute implementing a *non-self-executing treaty*. See Tr. of Oral Arg. 32–33. The premise of the objection (that the power to make self-executing treaties is limitless) is, to say the least, arguable. But even if it is correct, refusing to extend that proposition to non-self-executing treaties makes a great deal of sense. Suppose, for example, that the self-aggrandizing Federal Government wishes to take over the law of intestacy. If the President and the Senate find in some foreign state a ready accomplice, they have two options. First, they can enter into a treaty with "stipulations" specific enough that they

"require no legislation to make them operative," *Whitney* v. *Robertson*, 124 U. S. 190, 194 (1888), which would mean in this example something like a comprehensive probate code. But for that to succeed, the President and a supermajority of the Senate would need to reach agreement on all the details—which, when once embodied in the treaty, could not be altered or superseded by ordinary legislation. The second option—far the better one—is for Congress to gain lasting and flexible control over the law of intestacy by means of a non-self-executing treaty. "[Implementing] legislation is as much subject to modification and repeal by Congress as legislation upon any other subject." *Ibid.* And to make such a treaty, the President and Senate would need to agree only that they desire power over the law of intestacy.

The famous scholar and jurist Henry St. George Tucker saw clearly the danger of *Holland*'s *ipse dixit* five years before it was written:

> "[The statement is made that] if the treaty-making power, composed of the President and Senate, in discharging its functions under the government, finds that it needs certain legislative powers which Congress does not possess to carry out its desires, it may . . . infuse into Congress such powers, although the Framers of the Constitution omitted to grant them to Congress. . . . Every reputable commentator upon the Constitution from Story down to the present day, has held that the legislative powers of Congress lie in grant and are limited by such grant. . . . [S]hould such a construction as that asserted in the above statement obtain through judicial endorsement, our system of government would soon topple and fall." Limitations on the Treaty-Making Power Under the Constitution of the United States § 113, pp. 129–130 (1915).

* * *

We have here a supposedly "narrow" opinion which, in order to be "narrow," sets forth interpretive principles never

before imagined that will bedevil our jurisprudence (and proliferate litigation) for years to come. The immediate product of these interpretive novelties is a statute that should be the envy of every lawmaker bent on trapping the unwary with vague and uncertain criminal prohibitions. All this to leave in place an ill-considered *ipse dixit* that enables the fundamental constitutional principle of limited federal powers to be set aside by the President and Senate's exercise of the treaty power. We should not have shirked our duty and distorted the law to preserve that assertion; we should have welcomed and eagerly grasped the opportunity—nay, the obligation—to consider and repudiate it.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, and with whom JUSTICE ALITO joins as to Parts I, II, and III, concurring in the judgment.

By its clear terms, the statute at issue in this case regulates local criminal conduct that is subject to the powers reserved to the States. See *ante*, at 867 (SCALIA, J., concurring in judgment). That aggrandizement of federal power cannot be justified as a "necessary and proper" means of implementing a treaty addressing similar subject matter. See *ante*, at 873–875. To the contrary, reading the Necessary and Proper Clause to expand Congress' power upon the ratification of every new treaty defies an indisputable first principle of our constitutional order: " '[T]he Constitution created a Federal Government of limited powers.' " *New York* v. *United States*, 505 U. S. 144, 155 (1992) (quoting *Gregory* v. *Ashcroft*, 501 U. S. 452, 457 (1991)). I accordingly join JUSTICE SCALIA's opinion in full.

I write separately to suggest that the treaty power (hereinafter Treaty Power) is itself a limited federal power. Cf. *United States* v. *Lopez*, 514 U. S. 549, 584 (1995) (THOMAS, J., concurring) ("[W]e *always* have rejected readings of . . . the scope of federal power that would permit Congress to exercise a police power"). The Constitution empowers the Pres-

ident, "by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." Art. II, § 2. The Constitution does not, however, comprehensively define the proper bounds of the Treaty Power, and this Court has not yet had occasion to do so. As a result, some have suggested that the Treaty Power is boundless—that it can reach any subject matter, even those that are of strictly domestic concern. See, *e. g.*, Restatement (Third) of Foreign Relations Law of the United States § 302, Comment *c* (1986). A number of recent treaties reflect that suggestion by regulating what appear to be purely domestic affairs. See, *e. g.*, Bradley, The Treaty Power and American Federalism, 97 Mich. L. Rev. 390, 402–409 (1998) (hereinafter Bradley) (citing examples).

Yet to interpret the Treaty Power as extending to every conceivable domestic subject matter—even matters without any nexus to foreign relations—would destroy the basic constitutional distinction between domestic and foreign powers. See *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 319 (1936) ("[T]he federal power over external affairs [is] in origin and essential character different from that over internal affairs . . . "). It would also lodge in the Federal Government the potential for "a 'police power' over all aspects of American life." *Lopez*, *supra*, at 584 (THOMAS, J., concurring). A treaty-based power of that magnitude—no less than a plenary power of legislation—would threaten "'"the liberties that derive from the diffusion of sovereign power."'" *Bond* v. *United States*, 564 U. S. 211, 221 (2011). And a treaty-based police power would pose an even greater threat when exercised through a self-executing treaty because it would circumvent the role of the House of Representatives in the legislative process. See The Federalist No. 52, p. 355 (J. Cooke ed. 1961) (J. Madison) (noting that the House has a more "immediate dependence on, & an intimate sympathy with the people").

I doubt the Treaty Power creates such a gaping loophole in our constitutional structure. Although the parties have

not challenged the constitutionality of the particular treaty at issue here, in an appropriate case I believe the Court should address the scope of the Treaty Power as it was originally understood. Today, it is enough to highlight some of the structural and historical evidence suggesting that the Treaty Power can be used to arrange intercourse with other nations, but not to regulate purely domestic affairs.

I

The Treaty Power was not drafted on a blank slate. To the contrary, centuries of experience—reflected in treatises, dictionaries, and actual practice—shaped the contours of that power.

Early treatises discussed a wide variety of treaties that nevertheless shared a common thread: All of them governed genuinely international matters such as war, peace, and trade between nations. See, *e. g.*, 2 H. Grotius, De Jure Belli Ac Pacis 394–396 (1646 ed., F. Kelsey transl. 1925) (treaties are made "for the sake either of peace or of some alliance," including "for the restoration of captives and of captured property, and for safety"; "that neither signatory shall have fortresses in the territory of the other, or defend the subjects of the other, or furnish a passage to the enemy of the other"; and for "commercial relations" and agreements on "import duties" (footnote omitted)); 2 S. Pufendorf, De Jure Naturae et Gentium 1331 (1688 ed., C. Oldfather & W. Oldfather transls. 1934) (treaties are made "to form some union or society, the end of which is either commercial relations, or a united front in war"); 3 E. de Vattel, The Law of Nations 165 (1758 ed., C. Fenwick transl. 1916) (treaties, which "can be subdivided into as many classes as there are varieties in the character of national relations," "deal with conditions of commerce, with mutual defense, with belligerent relations, with rights of passage, . . . stipulations not to fortify certain places, etc.").

Founding-era dictionaries reflect a similar understanding. To be sure, some early dictionaries briefly defined "treaty"

simply as a "compact of accommodation relating to public affairs." See, *e. g.*, 2 S. Johnson, A Dictionary of the English Language 2056 (rev. 4th ed. 1773). More detailed definitions, however, recognized the particular character of treaties as addressing matters of intercourse between nations rather than domestic regulation. See, *e. g.*, J. Buchanan, A New English Dictionary (1769) (defining "treaty" as "[a] covenant or agreement between several nations for peace, commerce, navigation, &c."); N. Bailey, An Universal Etymological English Dictionary (26th ed. 1789) (same); J. Montefiore, A Commercial Dictionary (1803) (noting "treaties of alliance" for military aid; "treaties of subsidy" for the provision of soldiers; treaties of navigation and commerce; treaties governing fishing and timber rights; and treaties on import duties); 2 N. Webster, An American Dictionary of the English Language 97 (1828) (noting "treaties for regulating commercial intercourse, treaties of alliance, offensive and defensive, treaties for hiring troops, [and] treaties of peace").

Treaty practice under the Articles of Confederation was also consistent with the understanding that treaties govern matters of international intercourse. The Articles provided: "The United States in Congress assembled, shall have the sole and exclusive right and power of . . . entering into treaties and alliances . . . ." Art. IX. The Congress of the Confederation exercised that power by making treaties that fell squarely within the traditional scope of the power. See, *e. g.*, Treaty with the Cherokee, Art. IV, Nov. 28, 1785, 7 Stat. 19, 2 C. Kappler, Indian Affairs: Laws and Treaties 9 (1904) (territorial borders); Definitive Treaty of Peace, U. S.-Gr. Brit., Art. VII, Sept. 3, 1783, 8 Stat. 83, T. S. No. 104 (peace); Contract for the Payment of Loans, U. S.-Fr., Arts. I–IV, July 16, 1782, 8 Stat. 614–615, T. S. No. 83¼ (repayment of sovereign debt); Definitive Treaty of Peace, U. S.-Gr. Brit., Art. III, Sept. 3, 1783, 8 Stat. 82, T. S. No. 104 (fishery rights in disputed waters); Treaty of Amity and Commerce, U. S.-Prussia, Arts. IV–IX, Sept. 10, 1785, 8 Stat. 86–88, T. S.

No. 292 (treatment of vessels in a treaty partners' waters); Convention Defining and Establishing the Functions and Privileges of Consuls and Vice-Consuls, U. S.-Fr., Arts. I–III, Nov. 14, 1788, 8 Stat. 106–108, T. S. No. 84 (privileges and immunities of diplomatic officials); Treaty of Amity and Commerce, U. S.-Swed., Arts. III–IV, Apr. 3, 1783, 8 Stat. 60, T. S. No. 346 (rights of citizens of one treaty partner residing in the territory of the other).

These treaties entered into under the Articles of Confederation would not have suggested to the Framers that granting a power to "make Treaties" included authorization to regulate purely domestic matters. Whenever these treaties affected legal rights within United States territory, they addressed only rights that related to *foreign* subjects or *foreign* property. See, *e. g.*, Treaty of Amity and Commerce, U. S.-Neth., Art. IV, Oct. 8, 1782, 8 Stat. 34, T. S. No. 249 (affording burial rights "when any subjects or inhabitants of either party shall die in the territory of the other"); Treaty with the Cherokee, Art. VII, Nov. 28, 1785, 7 Stat. 19, 2 Kappler, *supra*, at 10 ("If any citizen of the United States . . . shall commit a robbery or murder, or other capital crime, on any Indian, such offender or offenders shall be punished in the same manner as if [the crime] had been committed on a citizen of the United States . . . "); Convention Relative to Recaptured Vessels, U. S.-Neth., Art. I, Oct. 8, 1782, 8 Stat. 50, T. S. No. 250 ("The vessells of either of the two nations re-captured by the privateers of the other, shall be restored to the first proprietor . . . "). Preconstitutional practice therefore reflects the use of the treatymaking power only for matters of international intercourse; that practice provides no support for using treaties to regulate purely domestic affairs.

II

A

Debates preceding the ratification of the proposed Constitution confirm the limited scope of the powers possessed by

the Federal Government generally; the Treaty Power was no exception. The Framers understood that most regulatory matters were to be left to the States. See The Federalist No. 45, at 313 (J. Madison) ("The powers delegated by the proposed Constitution to the Federal Government, are few and defined"); see also *Lopez*, 514 U. S., at 590–592 (THOMAS, J., concurring) (citing sources). Consistent with that general understanding of limited federal power, evidence from the ratification campaign suggests that the Treaty Power was limited and, in particular, confined to matters of intercourse with other nations.

In essays during the ratification campaign in New York, James Madison took the view that the Treaty Power was inherently limited. The Federal Government's powers, Madison wrote, "will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce"—the traditional subjects of treatymaking. The Federalist No. 45, at 313. If the "external" Treaty Power contained a capacious domestic regulatory authority, that would plainly conflict with Madison's firm understanding that "[t]he powers delegated by the proposed Constitution to the Federal Government, are few and defined." *Ibid.* Madison evidently saw no conflict, however, because the Treaty Power included authority to "regulate the intercourse with foreign nations" rather than all domestic affairs. *Id.*, No. 42, at 279.

Madison reiterated that understanding at the 1788 Virginia ratifying convention, where the most extensive discussion of the proposed Treaty Power occurred, see Bradley 410; Golove, Treaty-Making and the Nation, 98 Mich. L. Rev. 1075, 1141–1142 (2000) (hereinafter Golove). There, Anti-Federalists leveled the charge that the Treaty Power gave the Federal Government excessive power. See, *e. g.*, 3 Debates on the Federal Constitution 509 (J. Elliot 2d ed. 1876) (hereinafter Elliot's Debates) (G. Mason) ("The President and Senate can make any treaty whatsoever"); *id.*, at 513 (P. Henry) ("To me this power appears still destructive; for they

can make any treaty"). But Madison insisted that just "because this power is given to Congress," it did not follow that the Treaty Power was "absolute and unlimited." *Id.*, at 514. The President and the Senate lacked the power "to dismember the empire," for example, because "[t]he exercise of the power must be consistent with the object of the delegation." *Ibid.* "The object of treaties," in Madison's oft-repeated formulation, "is the regulation of intercourse with foreign nations, and is external." *Ibid.*

Although Alexander Hamilton undoubtedly believed that the Treaty Power was broad within its proper sphere, see *infra* this page and 889, the view he expressed in essays during the New York ratification campaign is entirely consistent with Madison's. After noting that the Treaty Power was one of the "most unexceptionable parts" of the proposed Constitution, Hamilton distinguished the Treaty Power from the legislative power "to prescribe rules for the regulation of the society" and from the executive power to "execut[e] . . . the laws." The Federalist No. 75, at 503–504. "The power of making treaties," he concluded, "is plainly neither the one nor the other." *Id.*, at 504. Rather, Hamilton explained that treaties "are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign." *Id.*, at 504–505. That description is difficult to square with a view of the Treaty Power that would allow the Federal Government to prescribe rules over all aspects of domestic life.

B

It did not escape the attention of the Framers that the Treaty Power was drafted without explicitly enumerated limits on what sorts of treaties are permissible. See, *e. g.*, Hamilton, The Defence No. XXXVI, in 20 Papers of Alexander Hamilton 6 (H. Syrett ed. 1974) ("A power 'to make treaties,' granted in these indefinite terms, extends to all kinds of treaties and with all the latitude which such a power under any form of Government can possess"). The Articles of

Confederation had, for example, explicitly restricted certain categories of treaties. See Art. IX ("[N]o treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever"). The Constitution omitted those restrictions.

That decision was not a grant of unlimited power, but rather a grant of flexibility; the Federal Government needed the ability to respond to unforeseeable varieties of intercourse with other nations. James Madison, for example, did "not think it possible to enumerate all the cases in which such external regulations would be necessary." 3 Elliot's Debates 514; see also *id.*, at 363 (E. Randolph) ("The various contingencies which may form the object of treaties, are, in the nature of things, incapable of definition"). But Madison nevertheless recognized that any exercise of the Treaty Power "must be consistent with the object of the delegation," which is "the regulation of intercourse with foreign nations." *Id.*, at 514; see also Hamilton, The Defence, *supra*, at 6 ("[W]hatever is a *proper subject of compact between Nation & Nation* may be embraced by a Treaty" (emphasis added)). That understanding of the Treaty Power did not permit the President and the Senate to exercise domestic authority commensurate with their substantial power over external affairs.

C

The understanding that treaties are limited to, in Madison's words, "the regulation of intercourse with foreign nations," endured in the years after the Constitution was ratified.

In 1796, an extended debate regarding the proper scope of the Treaty Power arose in the aftermath of a controversial treaty with Great Britain that addressed the validity of prerevolutionary debts and the property rights of British sub-

jects. Treaty of Amity, Commerce and Navigation, Nov. 19, 1794, 8 Stat. 116, T. S. No. 105. When President Washington requested appropriations to implement that so-called "Jay Treaty" (after its chief negotiator, John Jay), the House of Representatives engaged in a month-long floor debate over its own role in the process of implementing treaties. See 5 Annals of Cong. 426 (1796); see generally D. Currie, The Constitution in Congress: The Federalist Period 1789–1801, pp. 211–217 (1997). Some Congressmen argued that the House had a right to independently review the merits of the treaty. See, *e. g.*, 5 Annals of Cong. 427–428 (remarks of Rep. Livingston) ("[T]he House w[as] vested with a discretionary power of carrying the Treaty into effect, or refusing it their sanction"). Others insisted that "if the Treaty was the supreme law of the land, then there was no discretionary power in the House, except on the question of its constitutionality." *Id.*, at 436–437 (Rep. Murray).

That latter group relied in part on the observation that the Treaty Power was limited by its nature, and thus the Constitution's failure to specify a role for the House did not pose a mortal threat to that Chamber's legislative prerogatives. Representative James Hillhouse of Connecticut expounded that position in the floor debate. Hillhouse recognized that the House had an "indispensable duty to look into every Treaty" to ensure that it is constitutional, *i. e.*, "whether it related to objects within the province of the Treaty-making power, a power which is not unlimited." *Id.*, at 660. He further explained that "[t]he objects upon which it can operate are understood and well defined, and if the Treaty-making power were to embrace other objects, their doings would have no more binding force than if the Legislature were to assume and exercise judicial powers under the name of legislation." *Ibid.*

Hillhouse "advert[ed] to the general definition of the Treaty-making power" to explain why the Treaty Power was not a threat to the House's legislative prerogatives:

> "[I]f we look into our code of laws, we shall find few of them that can be affected, to any great degree, by the Treaty-making power. All laws regulating our own internal police, so far as the citizens of the United States alone are concerned, are wholly beyond its reach; no foreign nation having any interest or concern in that business, every attempt to interfere would be a mere nullity, as much as if two individuals were to enter into a contract to regulate the conduct or actions of a third person, who was no party to such contract." *Id.*, at 662.

He accordingly denied that "the President and Senate hav[e] it in their power, by forming Treaties with an Indian tribe or a foreign nation, to legislate over the United States," concluding instead that the Treaty Power "cannot affect the Legislative power of Congress but in a very small and limited degree." *Id.*, at 663.

Other Representatives who participated in the Jay Treaty debates agreed with Hillhouse that the Treaty Power had a limited scope. See, *e. g.*, *id.*, at 516 (Rep. Sedgwick) (classifying the uses of the power as "1. To compose and adjust differences, whether to terminate or to prevent war. 2. To form contracts for mutual security or defence; or to make Treaties, offensive or defensive. 3. To regulate an intercourse for mutual benefit, or to form Treaties of commerce"). James Madison, who opposed the Jay Treaty as a Representative from Virginia, also took the opportunity to reiterate his view that "the Treaty-making power was a limited power." *Id.*, at 777.

Other historical evidence from the postratification period is in accord. For example, Thomas Jefferson's Senate Manual of Parliamentary Procedure, drafted while he was Vice President and therefore president of the Senate, Bradley 415, noted the need for a treaty to have a nexus to international intercourse. If a treaty did not "concern the foreign nation, party to the contract," then "it would be a mere nullity *res inter alias acta*." Thomas Jefferson's Senate Manual (1801), in 9 The Writings of Thomas Jefferson 80–81 (H. Washington

ed. 1861). Later, Justice Story likewise anchored the Treaty Power in intercourse between nations. J. Story, Commentaries on the Constitution of the United States 552–553 (abr. ed. 1833). ("The power 'to make treaties' is by the constitution general; and of course it embraces all sorts of treaties, for peace or war; for commerce or territory; for alliance or succours; for indemnity for injuries or payment of debts; for the recognition or enforcement of principles of public law; and for any other purposes, which the policy or interests of independent sovereigns may dictate in their intercourse with each other").

The touchstone of all of these views was that the Treaty Power is limited to matters of international intercourse. Even if a treaty *may* reach some local matters,[1] it still *must* relate to intercourse with other nations. The Jay Treaty, for example, altered state property law, but only with respect to British subjects, who could hold and devise real property in the United States "in like manner as if they were natives." Art. IX, 8 Stat. 122. An 1815 treaty with Great Britain was held to pre-empt a state law authorizing the seizure of "'free negroes or persons of color'" at ports in part because the state law applied to British sailors. See *Elkison* v. *Deliesseline*, 8 F. Cas. 493, 495 (No. 4,366) (CC SC 1823) (Johnson, Circuit Justice). And treaties with China and Japan, which afforded subjects of those countries the same rights and privileges as citizens of other nations, were understood to pre-empt state laws that discriminated against Chinese and Japanese subjects. See, *e. g.*, *Baker* v. *Portland*, 2 F. Cas. 472, 474 (No. 777) (CC Ore. 1879). Cf. Brief for United States 29, 33–38.

The postratification theory and practice of treatymaking accordingly confirms the understanding that treaties by

[1] This point remains disputed. Compare Bradley 456 (contending that treaties should be subject "to the same federalism restrictions that apply to Congress's legislative powers") with Golove 1077 (arguing treaties can address "subjects that are otherwise beyond Congress's legislative powers").

their nature relate to intercourse with other nations (including their people and property), rather than to purely domestic affairs.

III

The original understanding that the Treaty Power was limited to international intercourse has been well represented in this Court's precedents. Although we have not had occasion to define the limits of the power in much detail, we have described treaties as dealing in some manner with intercourse between nations. See, *e. g.*, *Holmes* v. *Jennison*, 14 Pet. 540, 569 (1840) ("The power to make treaties . . . was designed to include all those subjects, which in the ordinary intercourse of nations had usually been made subjects of negotiation and treaty"); *Holden* v. *Joy*, 17 Wall. 211, 242–243 (1872) ("[T]he framers of the Constitution intended that [the Treaty Power] should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty, if not inconsistent with the nature of our government and the relation between the States and the United States"). Cf. *Power Auth. of N. Y.* v. *Federal Power Comm'n*, 247 F. 2d 538, 542–543 (CADC 1957) (Bazelon, J.) ("No court has ever said . . . that the treaty power can be exercised without limit to affect matters which are of purely domestic concern and do not pertain to our relations with other nations"), vacated as moot, 355 U. S. 64 (1957) (*per curiam*).

A common refrain in these cases is that the Treaty Power "extends to all proper subjects of negotiation with foreign governments." *In re Ross*, 140 U. S. 453, 463 (1891); see also *Geofroy* v. *Riggs*, 133 U. S. 258, 266 (1890) (same); *Asakura* v. *Seattle*, 265 U. S. 332, 341 (1924) (same). Those cases identified certain paradigmatic instances of "intercourse" that were "proper negotiating subjects" fit for treaty. See, *e. g.*, *Holmes*, *supra*, at 569 ("[T]he treaty-making power must have authority to decide how far the right of a foreign nation . . . will be recognised and enforced, when it demands the surrender of any [fugitive] charged with offences against

it"); *Geofroy*, *supra*, at 266 ("It is also clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised or inherited, are fitting subjects for such negotiation and of regulation by mutual stipulations between the two countries"); *Asakura*, *supra*, at 341 ("Treaties for the protection of citizens of one country residing in the territory of another are numerous, and make for good understanding between nations" (footnote omitted)). Nothing in our cases, on the other hand, suggests that the Treaty Power conceals a police power over domestic affairs.

Whatever its other defects, *Missouri* v. *Holland*, 252 U. S. 416 (1920), is consistent with that view. There, the Court addressed the constitutionality of a treaty that regulated the capture of birds that migrated between Canada and the United States. Convention with Great Britain for the Protection of Migratory Birds, Aug. 16, 1916, 39 Stat. 1702, T. S. No. 628. Although the Court upheld a statute implementing that treaty based on an improperly broad view of the Necessary and Proper Clause, see *ante*, at 877–879 (SCALIA, J., concurring in judgment), *Holland* did not conclude that the Treaty Power itself was unlimited. See 252 U. S., at 433 ("We do not mean to imply that there are no qualifications to the treaty-making power . . . "). To the contrary, the holding in *Holland* is consistent with the understanding that treaties are limited to matters of international intercourse. The Court observed that the treaty at issue addressed *migratory* birds that were "only transitorily within the State and ha[d] no permanent habitat therein." *Id.*, at 435; see also *id.*, at 434 ("[T]he treaty deals with creatures that [only] for the moment are within the state borders"). As such, the birds were naturally a matter of international intercourse because they were creatures in international transit.[2]

[2] The Solicitor General also defended the treaty in *Holland* on a basis that recognized the limited scope of the Treaty Power. Acknowledging that the Treaty Power addressed "matters in which a foreign government

At least until recently, the original understanding that the Treaty Power is limited was widely shared outside the Court as well. See Golove 1288 ("[V]irtually every authority, including the Supreme Court, has on countless occasions from the earliest days recognized general subject matter limitations on treaties"). The Second Restatement on the Foreign Relations Law of the United States, for example, opined that the Treaty Power is available only if the subject matter of the treaty "is of international concern." § 117(1)(a) (1964–1965). The Second Restatement explained that a treaty "must relate to the external concerns of the nation as distinguished from matters of a purely internal nature." *Id.*, Comment *b*; see also Treaties and Executive Agreements: Hearings on S. J. Res. 1 before a Subcommittee of the Senate Committee on the Judiciary, 84th Cong., 1st Sess., 183 (1955) (Secretary of State Dulles) (Treaties cannot regulate matters "which do not essentially affect the actions of nations in relation to international affairs, but are purely internal"); Proceedings of the American Society of International Law 194–196 (1929) (C. Hughes) ("[The Treaty Power] is not a power intended to be exercised . . . with respect to matters that have no relation to international concerns"). But see Restatement (Third) of Foreign Relations Law of the United States § 302, Comment *c* ("Contrary to what was once suggested, the Constitution does not require that an international agreement deal only with 'matters of international concern' "). At a minimum, the Second Restatement firmly

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may have an interest, and which may properly be the subject of negotiations with that Government," Brief for Appellee in *Missouri* v. *Holland*, O. T. 1919, No. 609, p. 41, the Solicitor General expressly reserved the question "[w]hether a treaty . . . for the protection of game which remains permanently within the United States would be a valid exercise of the treaty-making power," *id.*, at 42. Because the treaty at issue focused on creatures in international transit—it was "limited to regulations for the protection of birds which regularly migrate between the United States and Canada"—the Solicitor General concluded that the treaty concerned "a proper subject of negotiations." *Ibid.*

reflects the understanding shared by the Framers that the Treaty Power has substantive limits. Only in the latter part of the past century have treaties challenged that prevailing conception by addressing "matters that in the past countries would have addressed wholly domestically" and "purport[ing] to regulate the relationship between nations and their own citizens," Bradley 396; see also *ante*, at 877 (opinion of SCALIA, J.). But even the Solicitor General in this case would not go that far; he acknowledges that "there may well be a line to be drawn" regarding "whether the subject matter of [a] treaty is a proper subject for a treaty." Tr. of Oral Arg. 43:10–43:15.

* * *

In an appropriate case, I would draw a line that respects the original understanding of the Treaty Power. I acknowledge that the distinction between matters of international intercourse and matters of purely domestic regulation may not be obvious in all cases. But this Court has long recognized that the Treaty Power is limited, and hypothetical difficulties in line-drawing are no reason to ignore a constitutional limit on federal power.

The parties in this case have not addressed the proper scope of the Treaty Power or the validity of the treaty here. The preservation of limits on the Treaty Power is nevertheless a matter of fundamental constitutional importance, and the Court ought to address the scope of the Treaty Power when that issue is presented. Given the increasing frequency with which treaties have begun to test the limits of the Treaty Power, see Bradley 402–409, that chance will come soon enough.

JUSTICE ALITO, concurring in the judgment.

As explained in Part I of JUSTICE SCALIA's concurring opinion, which I join, petitioner's conduct violated 18 U. S. C. § 229, the federal criminal statute under which she was con-

victed. I therefore find it necessary to reach the question whether this statute represents a constitutional exercise of federal power, and as the case comes to us, the only possible source of federal power to be considered is the treaty power.

For the reasons set out in Parts I–III of JUSTICE THOMAS' concurring opinion, which I join, I believe that the treaty power is limited to agreements that address matters of legitimate international concern. The treaty pursuant to which § 229 was enacted, the Chemical Weapons Convention, is not self-executing, and thus the Convention itself does not have domestic effect without congressional action. The control of true chemical weapons, as that term is customarily understood, is a matter of great international concern, and therefore the heart of the Convention clearly represents a valid exercise of the treaty power. But insofar as the Convention may be read to obligate the United States to enact domestic legislation criminalizing conduct of the sort at issue in this case, which typically is the sort of conduct regulated by the States, the Convention exceeds the scope of the treaty power. Section 229 cannot be regarded as necessary and proper to carry into execution the treaty power, and accordingly it lies outside Congress' reach unless supported by some other power enumerated in the Constitution. The Government has presented no such justification for this statute.

For these reasons, I would reverse petitioner's conviction on constitutional grounds.

Syllabus

NAUTILUS, INC. *v.* BIOSIG INSTRUMENTS, INC.

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

No. 13–369. Argued April 28, 2014—Decided June 2, 2014

The Patent Act requires that a patent specification "conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as [the] invention." 35 U. S. C. § 112, ¶2. This case concerns the proper reading of the statute's clarity and precision demand.

Assigned to respondent Biosig Instruments, Inc., the patent in dispute (the '753 patent) involves a heart-rate monitor used with exercise equipment. Prior heart-rate monitors, the patent asserts, were often inaccurate in measuring the electrical signals accompanying each heartbeat (electrocardiograph or ECG signals) because of the presence of other electrical signals (electromyogram or EMG signals), generated by the user's skeletal muscles, that can impede ECG signal detection. The invention claims to improve on prior art by detecting and processing ECG signals in a way that filters out the EMG interference.

Claim 1 of the '753 patent, which contains the limitations critical to this dispute, refers to a "heart rate monitor for use by a user in association with exercise apparatus and/or exercise procedures." The claim "comprise[s]," among other elements, a cylindrical bar fitted with a display device; "electronic circuitry including a difference amplifier"; and, on each half of the cylindrical bar, a "live" electrode and a "common" electrode "mounted . . . in spaced relationship with each other."

Biosig filed this patent infringement suit, alleging that Nautilus, Inc., without obtaining a license, sold exercise machines containing Biosig's patented technology. The District Court, after conducting a hearing to determine the proper construction of the patent's claims, granted Nautilus' motion for summary judgment on the ground that the claim term "in spaced relationship with each other" failed § 112, ¶2's definiteness requirement. The Federal Circuit reversed and remanded, concluding that a patent claim passes the § 112, ¶2 threshold so long as the claim is "amenable to construction," and the claim, as construed, is not "insolubly ambiguous." Under that standard, the court determined, the '753 patent survived indefiniteness review.

Held:

1. A patent is invalid for indefiniteness if its claims, read in light of the patent's specification and prosecution history, fail to inform, with

reasonable certainty, those skilled in the art about the scope of the invention. The parties agree that definiteness is to be evaluated from the perspective of a person skilled in the relevant art, that claims are to be read in light of the patent's specification and prosecution history, and that definiteness is to be measured as of the time of the patent application. The parties disagree as to how much imprecision § 112, ¶2 tolerates.

Section 112's definiteness requirement must take into account the inherent limitations of language. See *Festo Corp.* v. *Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U. S. 722, 731. On the one hand, some modicum of uncertainty is the "price of ensuring the appropriate incentives for innovation," *id.*, at 732; and patents are "not addressed to lawyers, or even to the public generally," but to those skilled in the relevant art, *Carnegie Steel Co.* v. *Cambria Iron Co.*, 185 U. S. 403, 437. At the same time, a patent must be precise enough to afford clear notice of what is claimed, thereby "'appris[ing] the public of what is still open to them,'" *Markman* v. *Westview Instruments, Inc.*, 517 U. S. 370, 373, in a manner that avoids "[a] zone of uncertainty which enterprise and experimentation may enter only at the risk of infringement claims," *United Carbon Co.* v. *Binney & Smith Co.*, 317 U. S. 228, 236. The standard adopted here mandates clarity, while recognizing that absolute precision is unattainable. It also accords with opinions of this Court stating that "the certainty which the law requires in patents is not greater than is reasonable, having regard to their subject-matter." *Minerals Separation, Ltd.* v. *Hyde*, 242 U. S. 261, 270. Pp. 908–911.

2. The Federal Circuit's standard, which tolerates some ambiguous claims but not others, does not satisfy the statute's definiteness requirement. The Court of Appeals inquired whether the '753 patent's claims were "amenable to construction" or "insolubly ambiguous," but such formulations lack the precision § 112, ¶2 demands. To tolerate imprecision just short of that rendering a claim "insolubly ambiguous" would diminish the definiteness requirement's public-notice function and foster the innovation-discouraging "zone of uncertainty," *United Carbon*, 317 U. S., at 236, against which this Court has warned. While some of the Federal Circuit's fuller explications of the term "insolubly ambiguous" may come closer to tracking the statutory prescription, this Court must ensure that the Federal Circuit's test is at least "probative of the essential inquiry." *Warner-Jenkinson Co.* v. *Hilton Davis Chemical Co.*, 520 U. S. 17, 40. The expressions "insolubly ambiguous" and "amenable to construction," which permeate the Federal Circuit's recent decisions concerning § 112, ¶2, fall short in this regard and can leave courts and the patent bar at sea without a reliable compass. Pp. 911–912.

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3. This Court, as "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7, follows its ordinary practice of remanding so that the Federal Circuit can reconsider, under the proper standard, whether the relevant claims in the '753 patent are sufficiently definite, see, *e. g.*, *Johnson* v. *California*, 543 U. S. 499, 515. P. 913.

715 F. 3d 891, vacated and remanded.

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

John D. Vandenberg argued the cause for petitioner. With him on the briefs were *James E. Geringer*, *Jeffrey S. Love*, *Philip Warrick*, *Thomas G. Hungar*, *Matthew D. McGill*, and *Jonathan C. Bond.*

Mark D. Harris argued the cause for respondent. With him on the brief were *James H. Shalek*, *Steven M. Bauer*, and *Daniel C. Mulveny.*

Curtis E. Gannon argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Delery*, *Deputy Solicitor General Stewart*, and *Mark R. Freeman.**

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*Briefs of *amici curiae* urging reversal were filed for AARP by *Barbara A. Jones* and *Michael Schuster*; for Amazon.com, Inc., et al. by *John Thorne*, *Aaron M. Panner*, *Anthony Peterman*, *Dion Messer*, and *Robert H. Tiller*; for the Electronic Frontier Foundation et al. by *Daniel K. Nazer*, *Michael Barclay*, *Julie P. Samuels*, and *Charles Duan*; for NOVA Chemicals Inc. et al. by *Seth P. Waxman*, *Thomas G. Saunders*, *Christina Manfredi McKinley*, *Donald R. Dunner*, *Darrel C. Karl*, and *H. Woodruff Turner*; for Microsoft Corp. by *E. Joshua Rosenkranz*, *Eric A. Shumsky*, *T. Andrew Culbert*, *Isabella Fu*, and *Monte Cooper*; and for Yahoo! Inc. by *Jeffrey A. Lamken*, *Martin V. Totaro*, *John M. Whealan*, and *Kevin T. Kramer.*

Briefs of *amici curiae* urging affirmance were filed for the Biotechnology Industry Organization by *Richard P. Bress* and *Gabriel K. Bell*; for Interval Licensing LLC by *Thomas C. Goldstein*, *Tejinder Singh*, *Max L. Tribble, Jr.*, *Michael Heim*, *Nathan J. Davis*, and *Justin A. Nelson*; and for Nokia Corp. et al. by *Patrick J. Flinn.*

Briefs of *amici curiae* were filed for the American Bar Association by *James R. Silkenat*, *John P. Elwood*, *William L. LaFuze*, *Stephen C. Stout*,

JUSTICE GINSBURG delivered the opinion of the Court.

The Patent Act requires that a patent specification "conclude with one or more claims *particularly pointing out and distinctly claiming* the subject matter which the applicant regards as [the] invention." 35 U. S. C. § 112, ¶2 (2006 ed.) (emphasis added). This case, involving a heart-rate monitor used with exercise equipment, concerns the proper reading of the statute's clarity and precision demand. According to the Federal Circuit, a patent claim passes the § 112, ¶2 threshold so long as the claim is "amenable to construction," and the claim, as construed, is not "insolubly ambiguous." 715 F. 3d 891, 898–899 (2013). We conclude that the Federal Circuit's formulation, which tolerates some ambiguous claims but not others, does not satisfy the statute's definiteness requirement. In place of the "insolubly ambiguous" standard, we hold that a patent is invalid for indefiniteness if its claims, read in light of the specification delineating the patent, and the prosecution history, fail to inform, with reasonable certainty, those skilled in the art about the scope of the invention. Expressing no opinion on the validity of the patent-in-suit, we remand, instructing the Federal Circuit to decide the case employing the standard we have prescribed.

I

Authorized by the Constitution "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to . . . Inventors the exclusive Right to their . . . Discoveries," Art. I, § 8, cl. 8, Congress has enacted patent laws rewarding inventors with a limited monopoly. "Th[at] monopoly is a property right," and "like any property right, its boundaries

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and *Ajeet P. Pai*; for the American Intellectual Property Law Association by *J. Campbell Barker*; for the Intellectual Property Law Association of Chicago by *Jeffrey B. Burgan*; for the Intellectual Property Owners Association by *Paul H. Berghoff, Philip S. Johnson*, and *Kevin H. Rhodes*; for Sigram Schindler Beteiligungsgesellschaft mbH by *Chidambaram S. Iyer*; and for Peter S. Menell by *Mr. Menell, pro se.*

should be clear." *Festo Corp.* v. *Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U. S. 722, 730 (2002). See also *Markman* v. *Westview Instruments, Inc.*, 517 U. S. 370, 373 (1996) ("It has long been understood that a patent must describe the exact scope of an invention and its manufacture . . . ."). Thus, when Congress enacted the first Patent Act in 1790, it directed that patent grantees file a written specification "containing a description . . . of the thing or things . . . invented or discovered," which "shall be so particular" as to "distinguish the invention or discovery from other things before known and used." Act of Apr. 10, 1790, § 2, 1 Stat. 110.

The patent laws have retained this requirement of definiteness even as the focus of patent construction has shifted. Under early patent practice in the United States, we have recounted, it was the written specification that "represented the key to the patent." *Markman*, 517 U. S., at 379. Eventually, however, patent applicants began to set out the invention's scope in a separate section known as the "claim." See generally 1 R. Moy, Walker on Patents § 4.2, pp. 4–17 to 4–20 (4th ed. 2012). The Patent Act of 1870 expressly conditioned the receipt of a patent on the inventor's inclusion of one or more such claims, described with particularity and distinctness. See Act of July 8, 1870, § 26, 16 Stat. 201 (to obtain a patent, the inventor must "particularly point out and distinctly claim the part, improvement, or combination which [the inventor] claims as his invention or discovery").

The 1870 Act's definiteness requirement survives today, largely unaltered. Section 112 of the Patent Act of 1952, applicable to this case, requires the patent applicant to conclude the specification with "one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention." 35 U. S. C. § 112, ¶2 (2006 ed.). A lack of definiteness renders invalid "the patent or any claim in suit." § 282, ¶2(3).[1]

[1] In the Leahy-Smith America Invents Act, Pub. L. 112–29, 125 Stat. 284, enacted in 2011, Congress amended several parts of the Patent Act. Those amendments modified §§ 112 and 282 in minor respects not pertinent

II

A

The patent in dispute, U. S. Patent No. 5,337,753 ('753 patent), issued to Dr. Gregory Lekhtman in 1994 and assigned to respondent Biosig Instruments, Inc., concerns a heart-rate monitor for use during exercise. Previous heart-rate monitors, the patent asserts, were often inaccurate in measuring the electrical signals accompanying each heartbeat (electrocardiograph or ECG signals). The inaccuracy was caused by electrical signals of a different sort, known as electromyogram or EMG signals, generated by an exerciser's skeletal muscles when, for example, she moves her arm, or grips an exercise monitor with her hand. These EMG signals can "mask" ECG signals and thereby impede their detection. App. 52, 147.

Dr. Lekhtman's invention claims to improve on prior art by eliminating that impediment. The invention focuses on a key difference between EMG and ECG waveforms: While ECG signals detected from a user's left hand have a polarity opposite to that of the signals detected from her right hand,[2] EMG signals from each hand have the same polarity. The patented device works by measuring equalized EMG signals detected at each hand and then using circuitry to subtract the identical EMG signals from each other, thus filtering out the EMG interference.

As relevant here, the '753 patent describes a heart-rate monitor contained in a hollow cylindrical bar that a user

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here. In any event, the amended versions of those provisions are inapplicable to patent applications filed before September 16, 2012, and proceedings commenced before September 16, 2011. See §§4(e), 15(c), 20(*l*), 125 Stat. 297, 328, 335, notes following 35 U. S. C. §§2, 111, 119. Here, the application for the patent-in-suit was filed in 1992, and the relevant court proceedings were initiated in 2010. Accordingly, this opinion's citations to the Patent Act refer to the 2006 edition of the United States Code.

[2] This difference in polarity occurs because the heart is not aligned vertically in relation to the center of the body; the organ tilts leftward from apex to bottom. App. 213.

grips with both hands, such that each hand comes into contact with two electrodes, one "live" and one "common." The device is illustrated in figure 1 of the patent, *id.*, at 41, reproduced in the appendix to this opinion.

Claim 1 of the '753 patent, which contains the limitations critical to this dispute, refers to a "heart rate monitor for use by a user in association with exercise apparatus and/or exercise procedures." *Id.*, at 61. The claim "comprise[s]," among other elements, an "elongate member" (cylindrical bar) with a display device; "electronic circuitry including a difference amplifier"; and, on each half of the cylindrical bar, a live electrode and a common electrode "mounted . . . in spaced relationship with each other." *Ibid.*[3] The claim sets forth additional elements, including that the cylindrical bar is to be held in such a way that each of the user's hands "contact[s]" both electrodes on each side of the bar. *Id.*, at 62. Further, the EMG signals detected by the two electrode pairs are to be "of substantially equal magnitude and phase" so that the difference amplifier will "produce a substantially zero [EMG] signal" upon subtracting the signals from one another. *Ibid.*

B

The dispute between the parties arose in the 1990's, when Biosig allegedly disclosed the patented technology to StairMaster Sports Medical Products, Inc. According to Biosig, StairMaster, without ever obtaining a license, sold exercise machines that included Biosig's patented technology, and petitioner Nautilus, Inc., continued to do so after acquiring the StairMaster brand. In 2004, based on these allegations, Biosig brought a patent infringement suit against Nautilus in the U. S. District Court for the Southern District of New York.

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[3] As depicted in figure 1 of the patent, *id.*, at 41, reproduced in the appendix to this opinion, the live electrodes are identified by numbers 9 and 13, and the common electrodes, by 11 and 15.

With Biosig's lawsuit launched, Nautilus asked the U. S. Patent and Trademark Office (PTO) to reexamine the '753 patent. The reexamination proceedings centered on whether the patent was anticipated or rendered obvious by prior art—principally, a patent issued in 1984 to an inventor named Fujisaki, which similarly disclosed a heart-rate monitor using two pairs of electrodes and a difference amplifier. Endeavoring to distinguish the '753 patent from prior art, Biosig submitted a declaration from Dr. Lekhtman. The declaration attested, among other things, that the '753 patent sufficiently informed a person skilled in the art how to configure the detecting electrodes so as "to produce equal EMG [signals] from the left and right hands." *Id.*, at 160. Although the electrodes' design variables—including spacing, shape, size, and material—cannot be standardized across all exercise machines, Dr. Lekhtman explained, a skilled artisan could undertake a "trial and error" process of equalization. This would entail experimentation with different electrode configurations in order to optimize EMG signal cancellation. *Id.*, at 155–156, 158.[4] In 2010, the PTO issued a determination confirming the patentability of the '753 patent's claims.

Biosig thereafter reinstituted its infringement suit, which the parties had voluntarily dismissed without prejudice while PTO reexamination was underway. In 2011, the District Court conducted a hearing to determine the proper construction of the patent's claims, see *Markman* v. *Westview Instruments, Inc.*, 517 U. S. 370 (1996) (claim construction is a matter of law reserved for court decision), including the

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[4] Dr. Lekhtman's declaration also referred to an expert report prepared by Dr. Henrietta Galiana, Chair of the Department of Biomedical Engineering at McGill University, for use in the infringement litigation. That report described how Dr. Galiana's laboratory technician, equipped with a wooden dowel, wire, metal foil, glue, electrical tape, and the drawings from the '753 patent, was able in two hours to build a monitor that "worked just as described in the . . . patent." *Id.*, at 226.

claim term "in spaced relationship with each other." According to Biosig, that "spaced relationship" referred to the distance between the live electrode and the common electrode in each electrode pair. Nautilus, seizing on Biosig's submissions to the PTO during the reexamination, maintained that the "spaced relationship" must be a distance "greater than the width of each electrode." App. 245. The District Court ultimately construed the term to mean "there is a defined relationship between the live electrode and the common electrode on one side of the cylindrical bar and the same or a different defined relationship between the live electrode and the common electrode on the other side of the cylindrical bar," without any reference to the electrodes' width. App. to Pet. for Cert. 43a–44a.

Nautilus moved for summary judgment, arguing that the term "spaced relationship," as construed, was indefinite under § 112, ¶2. The District Court granted the motion. Those words, the District Court concluded, "did not tell [the court] or anyone what precisely the space should be," or even supply "any parameters" for determining the appropriate spacing. *Id.*, at 72a.

The Federal Circuit reversed and remanded. A claim is indefinite, the majority opinion stated, "only when it is 'not amenable to construction' or 'insolubly ambiguous.'" 715 F. 3d 891, 898 (2013) (quoting *Datamize, LLC* v. *Plumtree Software, Inc.*, 417 F. 3d 1342, 1347 (CA Fed. 2005)). Under that standard, the majority determined, the '753 patent survived indefiniteness review. Considering first the "intrinsic evidence"—*i. e.*, the claim language, the specification, and the prosecution history—the majority discerned "certain inherent parameters of the claimed apparatus, which to a skilled artisan may be sufficient to understand the metes and bounds of 'spaced relationship.'" 715 F. 3d, at 899. These sources of meaning, the majority explained, make plain that the distance separating the live and common electrodes on

each half of the bar "cannot be greater than the width of a user's hands"; that is so "because claim 1 requires the live and common electrodes to independently detect electrical signals at two distinct points of a hand." *Ibid.* Furthermore, the majority noted, the intrinsic evidence teaches that this distance cannot be "infinitesimally small, effectively merging the live and common electrodes into a single electrode with one detection point." *Ibid.* The claim's functional provisions, the majority went on to observe, shed additional light on the meaning of "spaced relationship." Surveying the record before the PTO on reexamination, the majority concluded that a skilled artisan would know that she could attain the indicated functions of equalizing and removing EMG signals by adjusting design variables, including spacing.

In a concurring opinion, Judge Schall reached the majority's result employing "a more limited analysis." *Id.*, at 905. Judge Schall accepted the majority's recitation of the definiteness standard, under which claims amenable to construction are nonetheless indefinite when "the construction remains insolubly ambiguous." *Ibid.* (internal quotation marks omitted). The District Court's construction of "spaced relationship," Judge Schall maintained, was sufficiently clear: The term means "there is a fixed spatial relationship between the live electrode and the common electrode" on each side of the cylindrical bar. *Ibid.* Judge Schall agreed with the majority that the intrinsic evidence discloses inherent limits of that spacing. But, unlike the majority, Judge Schall did not "presum[e] a functional linkage between the 'spaced relationship' limitation and the removal of EMG signals." *Id.*, at 906. Other limitations of the claim, in his view, and not the " 'spaced relationship' limitation itself," "included a functional requirement to remove EMG signals." *Ibid.*

We granted certiorari, 571 U. S. 1118 (2014), and now vacate and remand.

III

A

Although the parties here disagree on the dispositive question—does the '753 patent withstand definiteness scrutiny—they are in accord on several aspects of the § 112, ¶2 inquiry. First, definiteness is to be evaluated from the perspective of someone skilled in the relevant art. See, *e. g.*, *General Elec. Co.* v. *Wabash Appliance Corp.*, 304 U. S. 364, 371 (1938). See also § 112, ¶1 (patent's specification "shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable *any person skilled in the art* to which it pertains, or with which it is most nearly connected, to make and use the same" (emphasis added)). Second, in assessing definiteness, claims are to be read in light of the patent's specification and prosecution history. See, *e. g.*, *United States* v. *Adams*, 383 U. S. 39, 48–49 (1966) (specification); *Festo Corp.*, 535 U. S., at 741 (prosecution history). Third, "[d]efiniteness is measured from the viewpoint of a person skilled in [the] art *at the time the patent was filed*." Brief for Respondent 55 (emphasis added). See generally Sarroff & Manzo, An Introduction to, Premises of, and Problems With Patent Claim Construction, in Patent Claim Construction in the Federal Circuit 9 (E. Manzo ed. 2014) ("Patent claims . . . should be construed from an objective perspective of a [skilled artisan], based on what the applicant actually claimed, disclosed, and stated during the application process.").

The parties differ, however, in their articulations of just how much imprecision § 112, ¶2 tolerates. In Nautilus' view, a patent is invalid when a claim is "ambiguous, such that readers could reasonably interpret the claim's scope differently." Brief for Petitioner 37. Biosig and the Solicitor General would require only that the patent provide reasonable notice of the scope of the claimed invention. See Brief

for Respondent 18; Brief for United States as *Amicus Curiae* 9–10.

Section 112, we have said, entails a "delicate balance." *Festo*, 535 U. S., at 731. On the one hand, the definiteness requirement must take into account the inherent limitations of language. See *ibid.* Some modicum of uncertainty, the Court has recognized, is the "price of ensuring the appropriate incentives for innovation." *Id.*, at 732. One must bear in mind, moreover, that patents are "not addressed to lawyers, or even to the public generally," but rather to those skilled in the relevant art. *Carnegie Steel Co.* v. *Cambria Iron Co.*, 185 U. S. 403, 437 (1902) (also stating that "any description which is sufficient to apprise [steel manufacturers] in the language of the art of the definite feature of the invention, and to serve as a warning to others of what the patent claims as a monopoly, is sufficiently definite to sustain the patent").[5]

At the same time, a patent must be precise enough to afford clear notice of what is claimed, thereby " 'appris[ing] the public of what is still open to them.' " *Markman*, 517 U. S., at 373 (quoting *McClain* v. *Ortmayer*, 141 U. S. 419, 424 (1891)).[6] Otherwise there would be "[a] zone of uncertainty

[5] See also *Eibel Process Co.* v. *Minnesota & Ontario Paper Co.*, 261 U. S. 45, 58, 65–66 (1923) (upholding as definite a patent for an improvement to a papermaking machine, which provided that a wire be placed at a "high" or "substantial elevation," where "readers . . . skilled in the art of paper making and versed in the use of the . . . machine" would have "no difficulty . . . in determining . . . the substantial [elevation] needed" for the machine to operate as specified).

[6] See also *United Carbon Co.* v. *Binney & Smith Co.*, 317 U. S. 228, 236 (1942) ("The statutory requirement of particularity and distinctness in claims is met only when they clearly distinguish what is claimed from what went before in the art and clearly circumscribe what is foreclosed from future enterprise."); *General Elec. Co.* v. *Wabash Appliance Corp.*, 304 U. S. 364, 369 (1938) ("The limits of a patent must be known for the protection of the patentee, the encouragement of the inventive genius of others and the assurance that the subject of the patent will be dedicated ultimately to the public.").

which enterprise and experimentation may enter only at the risk of infringement claims." *United Carbon Co.* v. *Binney & Smith Co.*, 317 U. S. 228, 236 (1942). And absent a meaningful definiteness check, we are told, patent applicants face powerful incentives to inject ambiguity into their claims. See Brief for Petitioner 30–32 (citing patent treatises and drafting guides). See also Federal Trade Commission, The Evolving IP Marketplace: Aligning Patent Notice and Remedies With Competition 85 (2011) (quoting testimony that patent system fosters "an incentive to be as vague and ambiguous as you can with your claims" and "defer clarity at all costs").[7] Eliminating that temptation is in order, and "the patent drafter is in the best position to resolve the ambiguity in . . . patent claims." *Halliburton Energy Servs., Inc.* v. *M–I LLC*, 514 F. 3d 1244, 1255 (CA Fed. 2008). See also *Hormone Research Foundation, Inc.* v. *Genentech, Inc.*, 904 F. 2d 1558, 1563 (CA Fed. 1990) ("It is a well-established axiom in patent law that a patentee is free to be his or her own lexicographer . . . .").

To determine the proper office of the definiteness command, therefore, we must reconcile concerns that tug in opposite directions. Cognizant of the competing concerns, we read § 112, ¶2 to require that a patent's claims, viewed in light of the specification and prosecution history, inform those skilled in the art about the scope of the invention with reasonable certainty. The definiteness requirement, so understood, mandates clarity, while recognizing that absolute precision is unattainable. The standard we adopt accords with opinions of this Court stating that "the certainty which the law requires in patents is not greater than is reasonable, having regard to their subject-matter." *Minerals Separation, Ltd.* v. *Hyde*, 242 U. S. 261, 270 (1916). See also *United*

[7] Online at http://www.ftc.gov/sites/default/files/documents/reports/evolving-ip-marketplace-aligning-patent-notice-and-remedies-competition-report-federal-trade/110307patentreport.pdf (as visited May 30, 2014, and available in Clerk of Court's case file).

Carbon, 317 U. S., at 236 ("claims must be reasonably clear-cut"); *Markman*, 517 U. S., at 389 (claim construction calls for "the necessarily sophisticated analysis of the whole document," and may turn on evaluations of expert testimony).

B

In resolving Nautilus' definiteness challenge, the Federal Circuit asked whether the '753 patent's claims were "amenable to construction" or "insolubly ambiguous." Those formulations can breed lower court confusion,[8] for they lack the precision § 112, ¶2 demands. It cannot be sufficient that a court can ascribe *some* meaning to a patent's claims; the definiteness inquiry trains on the understanding of a skilled artisan at the time of the patent application, not that of a court viewing matters *post hoc*. To tolerate imprecision just short of that rendering a claim "insolubly ambiguous" would diminish the definiteness requirement's public-notice function and foster the innovation-discouraging "zone of uncertainty," *United Carbon*, 317 U. S., at 236, against which this Court has warned.

Appreciating that "terms like 'insolubly ambiguous' may not be felicitous," Brief for Respondent 34, Biosig argues the phrase is a shorthand label for a more probing inquiry that the Federal Circuit applies in practice. The Federal Circuit's fuller explications of the term "insolubly ambiguous," we recognize, may come closer to tracking the statutory prescription. See, *e. g.*, 715 F. 3d, at 898 (case below) ("[I]f reasonable efforts at claim construction result in a definition that does not provide sufficient particularity and clarity to inform skilled artisans of the bounds of the claim, the claim is

[8] See, *e. g.*, *Every Penny Counts, Inc.* v. *Wells Fargo Bank, N. A.*, 4 F. Supp. 3d 1286, 1291–1292 (MD Fla. 2014) (finding that "the account," as used in claim, "lacks definiteness," because it might mean several different things and "no informed and confident choice is available among the contending definitions," but that "the extent of the indefiniteness . . . falls far short of the 'insoluble ambiguity' required to invalidate the claim").

insolubly ambiguous and invalid for indefiniteness." (internal quotation marks omitted)). But although this Court does not "micromanag[e] the Federal Circuit's particular word choice" in applying patent-law doctrines, we must ensure that the Federal Circuit's test is at least "probative of the essential inquiry." *Warner-Jenkinson Co.* v. *Hilton Davis Chemical Co.*, 520 U. S. 17, 40 (1997). Falling short in that regard, the expressions "insolubly ambiguous" and "amenable to construction" permeate the Federal Circuit's recent decisions concerning § 112, ¶2's requirement.[9] We agree with Nautilus and its *amici* that such terminology can leave courts and the patent bar at sea without a reliable compass.[10]

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[9] *E. g.*, *Hearing Components, Inc.* v. *Shure Inc.*, 600 F. 3d 1357, 1366 (CA Fed. 2010) ("the definiteness of claim terms depends on whether those terms can be given any reasonable meaning"); *Datamize, LLC* v. *Plumtree Software, Inc.*, 417 F. 3d 1342, 1347 (CA Fed. 2005) ("Only claims 'not amenable to construction' or 'insolubly ambiguous' are indefinite."); *Exxon Research & Engineering Co.* v. *United States*, 265 F. 3d 1371, 1375 (CA Fed. 2001) ("If a claim is insolubly ambiguous, and no narrowing construction can properly be adopted, we have held the claim indefinite."). See also Dept. of Commerce, Manual of Patent Examining Procedure § 2173.02(I), p. 294 (9th ed. 2014) (PTO manual describing Federal Circuit's test as upholding a claim's validity "if some meaning can be gleaned from the language").

[10] The Federal Circuit suggests that a permissive definiteness standard "'accord[s] respect to the statutory presumption of patent validity.'" 715 F. 3d 891, 902 (2013) (quoting *Exxon Research*, 265 F. 3d, at 1375). See also § 282, ¶1 ("[a] patent shall be presumed valid," and "[t]he burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity"); *Microsoft Corp.* v. *i4i Ltd. Partnership*, 564 U. S. 91, 95 (2011) (invalidity defenses must be proved by "clear and convincing evidence"). As the parties appear to agree, however, this presumption of validity does not alter the degree of clarity that § 112, ¶2 demands from patent applicants; to the contrary, it incorporates that definiteness requirement by reference. See § 282, ¶2(3) (defenses to infringement actions include "[i]nvalidity of the patent or any claim in suit for failure to comply with . . . any requirement of [§ 112]").

The parties nonetheless dispute whether factual findings subsidiary to the ultimate issue of definiteness trigger the clear-and-convincing-evidence standard and, relatedly, whether deference is due to the PTO's

IV

Both here and in the courts below, the parties have advanced conflicting arguments as to the definiteness of the claims in the '753 patent. Nautilus maintains that the claim term "spaced relationship" is open to multiple interpretations reflecting markedly different understandings of the patent's scope, as exemplified by the disagreement among the members of the Federal Circuit panel.[11] Biosig responds that "spaced relationship," read in light of the specification and as illustrated in the accompanying drawings, delineates the permissible spacing with sufficient precision.

"[M]indful that we are a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005), we decline to apply the standard we have announced to the controversy between Nautilus and Biosig. As we have explained, the Federal Circuit invoked a standard more amorphous than the statutory definiteness requirement allows. We therefore follow our ordinary practice of remanding so that the Court of Appeals can reconsider, under the proper standard, whether the relevant claims in the '753 patent are sufficiently definite. See, *e. g.*, *Johnson* v. *California*, 543 U. S. 499, 515 (2005); *Gasperini* v. *Center for Humanities, Inc.*, 518 U. S. 415, 438 (1996).

* * *

For the reasons stated, we vacate the judgment of the United States Court of Appeals for the Federal Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

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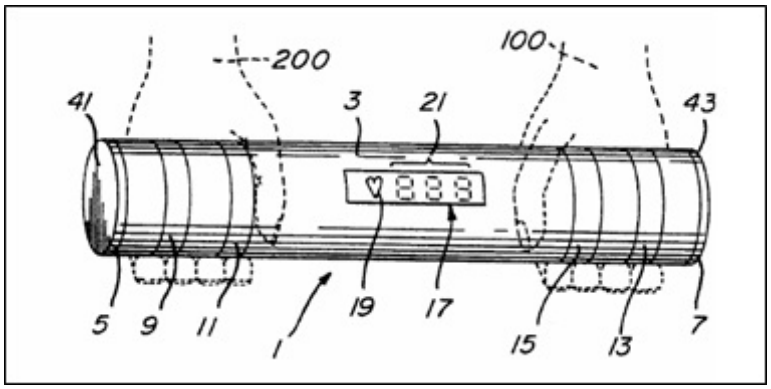
resolution of disputed issues of fact. We leave these questions for another day. The court below treated definiteness as "a legal issue [the] court reviews without deference," 715 F. 3d, at 897, and Biosig has not called our attention to any contested factual matter—or PTO determination thereof—pertinent to its infringement claims.

[11] Notably, however, all three panel members found Nautilus' arguments unavailing.

APPENDIX



Patent No. 5,337,753, Figure 1

Syllabus

LIMELIGHT NETWORKS, INC. *v.* AKAMAI TECHNOLOGIES, INC., ET AL.

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

No. 12–786. Argued April 30, 2014—Decided June 2, 2014

Akamai Technologies, Inc., a respondent here, is the exclusive licensee of a patent that claims a method of delivering electronic data using a content delivery network (CDN). Petitioner, Limelight Networks, Inc., also operates a CDN and carries out several of the steps claimed in the patent, but its customers, rather than Limelight itself, perform a step of the patent known as "tagging." Under Federal Circuit case law, liability for direct infringement under 35 U. S. C. § 271(a) requires performance of all steps of a method patent to be attributable to a single party. This position was most recently refined in *Muniauction, Inc.* v. *Thomson Corp.*, 532 F. 3d 1318. The District Court concluded that Limelight could not have directly infringed the patent at issue because performance of the tagging step could not be attributed to it. The en banc Federal Circuit reversed, holding that a defendant who performed some steps of a method patent and encouraged others to perform the rest could be liable for inducement of infringement even if no one was liable for direct infringement. The en banc court concluded that the evidence could support liability for Limelight on an inducement theory and remanded for further proceedings.

Held: A defendant is not liable for inducing infringement under § 271(b) when no one has directly infringed under § 271(a) or any other statutory provision. Pp. 920–926.

(a) Liability for inducement must be predicated on direct infringement. *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 365 U. S. 336, 341. Assuming that *Muniauction*'s holding is correct, respondents' method has not been infringed because the performance of all of its steps is not attributable to any one person. Since direct infringement has not occurred, there can be no inducement of infringement under § 271(b). The Federal Circuit's contrary view would deprive § 271(b) of ascertainable standards and require the courts to develop two parallel bodies of infringement law. This Court's reading of § 271(b) is reinforced by § 271(f)(1), which illustrates that Congress knows how to impose inducement liability predicated on noninfringing conduct when it wishes to do so. The notion that conduct which would be infringing in altered circumstances can form the basis for contributory infringement

has been rejected, see *Deepsouth Packing Co.* v. *Laitram Corp.*, 406 U. S. 518, 526–527, and there is no reason to apply a different rule for inducement. Pp. 920–923.

(b) Respondents claim that principles from tort law and criminal aiding and abetting doctrine, as well as patent law principles in existence before the 1952 Patent Act, support the Federal Circuit's reading of the statute, but their arguments are unpersuasive. Though a would-be infringer could evade liability by dividing performance of a method patent's steps with another whose conduct cannot be attributed to the defendant, this is merely a result of the Federal Circuit's interpretation of § 271(a), and a desire to avoid this consequence does not justify fundamentally altering the rules of inducement liability clearly required by the Patent Act's text and structure. Pp. 923–926.

(c) Because the question presented here is clearly focused on § 271(b) and presupposes that Limelight has not committed direct infringement under § 271(a), the Court declines to address whether the Federal Circuit's decision in *Muniauction* is correct. P. 926.

692 F. 3d 1301, reversed and remanded.

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

Aaron M. Panner argued the cause for petitioner. With him on the briefs were *John Christopher Rozendaal*, *Gregory G. Rapawy*, *Michael E. Joffre*, *Alexander F. MacKinnon*, and *Dion Messer*.

Ginger D. Anders argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Delery*, *Deputy Solicitor General Stewart*, *Scott R. McIntosh*, and *Scott C. Weidenfeller*.

Seth P. Waxman argued the cause for respondents. With him on the brief were *Thomas G. Saunders*, *Donald R. Dunner*, *Kara F. Stoll*, *Jennifer S. Swan*, *Mark C. Fleming*, and *Robert S. Frank, Jr.**

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*Briefs of *amici curiae* urging reversal were filed for Altera Corp. et al. by *Jerry R. Selinger*, *B. Todd Patterson*, and *Gero G. McClellan*; for Cargill, Inc., et al. by *Aaron D. Van Oort*, *Nicholas J. Nelson*, *Joel D. Sayres*, *Natalie Hanlon-Leh*, and *Calvin L. Litsey*; for the Clearing House et al. by *George F. Pappas*, *Robert A. Long, Jr.*, and *Ranganath Sudarshan*; for CTIA–The Wireless Association by *Pratik A. Shah*, *Ruthanne M.*

JUSTICE ALITO delivered the opinion of the Court.

This case presents the question whether a defendant may be liable for inducing infringement of a patent under 35 U. S. C. § 271(b) when no one has directly infringed the patent under § 271(a) or any other statutory provision. The statutory text and structure and our prior case law require that we answer this question in the negative. We accordingly reverse the Federal Circuit, which reached the opposite conclusion.

I

A

Respondent the Massachusetts Institute of Technology is the assignee of U. S. Patent No. 6,108,703 ('703 patent), which

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Deutsch, *John B. Capehart*, *David R. Clonts*, *Michael Altschul*, and *Matthew Pearson*; for Google, Inc., et al. by *Kathleen M. Sullivan* and *David Perlson*; for International Business Machines Corp. by *Mark J. Abate*, *William M. Jay*, and *Marian Underweiser*; for Microsoft Corp. by *Matthew D. McGill*; for Newegg, Inc., et al. by *Peter J. Brann* and *Stacy O. Stitham*; for Patent and Intellectual Property Law Scholars by *Shubha Ghosh*; and for Ten Intellectual Property Law Professors by *Timothy R. Holbrook*, *pro se*.

Briefs of *amici curiae* urging affirmance were filed for the American Intellectual Property Law Association by *Jeffrey I. D. Lewis* and *Scott B. Howard*; for Bally Technologies, Inc., et al. by *Adrian M. Pruetz*, *Rex Hwang*, and *Charles C. Koole*; for Biotechnology Industry Organization by *Scott A. M. Chambers*, *Richard J. Oparil*, and *Kevin M. Bell*; for Eli Lilly and Co. by *Mark J. Stewart* and *Steven P. Caltrider*; for Myriad Genetics, Inc., et al. by *Benjamin G. Jackson*; for the Pharmaceutical Research and Manufacturers of America by *Carter G. Phillips*, *Jeffrey P. Kushan*, *Quin M. Sorenson*, and *James M. Spears*; for the William Mitchell College of Law Intellectual Property Institute by *R. Carl Moy*; and for Robert Mankes by *Anthony J. Biller* and *David E. Bennett*.

Briefs of *amici curiae* were filed for the American Bar Association by *James R. Silkenat*, *James C. Martin*, *Brian D. Roche*, and *Donna M. Doblick*; for Conejo Valley Bar Association by *Steven C. Sereboff*, *Mark A. Goldstein*, *Michael D. Harris*, and *M. Kala Sarvaiya*; for the Electronic Frontier Foundation by *Julie P. Samuels*, *Michael Barclay*, and *Daniel K. Nazer*; and for the Intellectual Property Owners Association by *Robert P. Taylor*, *Philip Johnson*, and *Kevin H. Rhodes*.

claims a method of delivering electronic data using a "content delivery network," or "CDN." Respondent Akamai Technologies, Inc., is the exclusive licensee. Akamai maintains many servers distributed in various locations. Proprietors of Web sites, known as "content providers," contract with Akamai to deliver their Web sites' content to individual Internet users. The '703 patent provides for the designation of certain components of a content provider's Web site (often large files, such as video or music files) to be stored on Akamai's servers and accessed from those servers by Internet users. The process of designating components to be stored on Akamai's servers is known as "tagging." By "aggregat[ing] the data demands of multiple content providers with differing peak usage patterns and serv[ing] that content from multiple servers in multiple locations," 614 F. Supp. 2d 90, 96 (Mass. 2009), as well as by delivering content from servers located in the same geographic area as the users who are attempting to access it, Akamai is able to increase the speed with which Internet users access the content of its customers' Web sites.

Petitioner Limelight Networks, Inc., also operates a CDN and carries out several of the steps claimed in the '703 patent. But instead of tagging those components of its customers' Web sites that it intends to store on its servers (a step included in the '703 patent), Limelight requires its customers to do their own tagging.[1] Respondents claim that Limelight "provides instructions and offers technical assistance" to its customers regarding how to tag, 629 F. 3d 1311, 1321 (CA Fed. 2010), but the record is undisputed that Limelight does not tag the components to be stored on its servers.

B

In 2006, respondents sued Limelight in the United States District Court for the District of Massachusetts, claiming

[1] In its brief, Limelight disputes whether its customers actually "tag" within the meaning of the patent. Brief for Petitioner 7, n. 4. We assume, *arguendo*, that Limelight's customers do in fact "tag" within the patent's meaning.

patent infringement. The case was tried to a jury, which found that Limelight had committed infringement and awarded more than $40 million in damages.

Respondents' victory was short lived, however. After the jury returned its verdict, the Federal Circuit decided *Muniauction, Inc.* v. *Thomson Corp.*, 532 F. 3d 1318 (2008). In that case the Court of Appeals rejected a claim that the defendant's method, involving bidding on financial instruments using a computer system, directly infringed the plaintiff's patent. The defendant performed some of the steps of the patented method, and its customers, to whom the defendant gave access to its system along with instructions on the use of the system, performed the remaining steps. The court started from "the proposition that direct infringement requires a single party to perform every step of a claimed method." *Id.*, at 1329. This requirement is satisfied even though the steps are actually undertaken by multiple parties, the court explained, if a single defendant "exercises 'control or direction' over the entire process such that every step is attributable to the controlling party." *Ibid.* The court held that the defendant in *Muniauction* was not liable for direct infringement because it did not exercise control or direction over its customers' performance of those steps of the patent that the defendant itself did not perform. *Id.*, at 1330.

In light of *Muniauction*, Limelight moved for reconsideration of its earlier motion for judgment as a matter of law, which the District Court had denied. The District Court granted the motion, concluding that *Muniauction* precluded a finding of direct infringement under § 271(a) because infringement of the '703 patent required tagging and Limelight does not control or direct its customers' tagging. A panel of the Federal Circuit affirmed, explaining that a defendant that does not itself undertake all of a patent's steps can be liable for direct infringement only "when there is an agency relationship between the parties who perform the method steps or when one party is contractually obligated to the

other to perform the steps." 629 F. 3d, at 1320. Since neither of these conditions was met in the present case, the Federal Circuit panel held that Limelight could not be held liable for direct infringement.[2] *Ibid.*

The Federal Circuit granted en banc review and reversed. The en banc court found it unnecessary to revisit its § 271(a) direct infringement case law. Instead, it concluded that the "evidence could support a judgment in [respondents'] favor on a theory of induced infringement" under § 271(b). 692 F. 3d 1301, 1319 (2012) (*per curiam*). This was true, the court explained, because § 271(b) liability arises when a defendant carries out some steps constituting a method patent and encourages others to carry out the remaining steps—even if no one would be liable as a direct infringer in such circumstances, because those who performed the remaining steps did not act as agents of, or under the direction or control of, the defendant. The Court of Appeals did not dispute that "there can be no indirect infringement without direct infringement," *id.*, at 1308, but it explained that "[r]equiring proof that there has been direct infringement . . . is not the same as requiring proof that a single party would be liable as a direct infringer," *id.*, at 1308–1309 (emphasis deleted). Judge Newman and Judge Linn both dissented (with the latter joined by Judges Dyk, Prost, and O'Malley).

Limelight sought certiorari, which we granted. 571 U. S. 1118 (2014).

II

A

Neither the Federal Circuit, see 692 F. 3d, at 1308, nor respondents, see Tr. of Oral Arg. 44, dispute the proposition

[2] The panel noted that Limelight's contracts instruct its customers to tag the components they wish to be stored on Limelight's CDN, but concluded that, because these contracts did not give Limelight control over its customers, the customers' tagging could not be attributed to Limelight. See 629 F. 3d, at 1321.

that liability for inducement must be predicated on direct infringement. This is for good reason, as our case law leaves no doubt that inducement liability may arise "if, but only if, [there is] direct infringement." *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 365 U. S. 336, 341 (1961) (emphasis deleted).[3]

One might think that this simple truth is enough to dispose of this appeal. But the Federal Circuit reasoned that a defendant can be liable for inducing infringement under § 271(b) even if no one has committed direct infringement within the terms of § 271(a) (or any other provision of the patent laws), because direct infringement can exist independently of a violation of these statutory provisions. See 692 F. 3d, at 1314.

The Federal Circuit's analysis fundamentally misunderstands what it means to infringe a method patent. A method patent claims a number of steps; under this Court's case law, the patent is not infringed unless all the steps are carried out. See, *e. g.*, *Aro*, *supra*, at 344 (a "patent covers only the totality of the elements in the claim and . . . no element, separately viewed, is within the grant"). This principle follows ineluctably from what a patent is: the conferral of rights in a particular claimed set of elements. "Each element contained in a patent claim is deemed material to defining the scope of the patented invention," *Warner-Jenkinson Co.* v. *Hilton Davis Chemical Co.*, 520 U. S. 17, 29 (1997), and a patentee's rights extend only to the claimed combination of elements, and no further.

The Federal Circuit held in *Muniauction* that a method's steps have not all been performed as claimed by the patent unless they are all attributable to the same defendant, either

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[3] *Aro* addressed contributory infringement under § 271(c), rather than inducement of infringement under § 271(b), but we see no basis to distinguish for these purposes between the two, which after all spring from common stock. See *Global-Tech Appliances, Inc.* v. *SEB S. A.*, 563 U. S. 754, 764 (2011).

because the defendant actually performed those steps or because he directed or controlled others who performed them. See 532 F. 3d, at 1329–1330. Assuming without deciding that the Federal Circuit's holding in *Muniauction* is correct, there has simply been no infringement of the method in which respondents have staked out an interest, because the performance of all the patent's steps is not attributable to any one person. And, as both the Federal Circuit and respondents admit, where there has been no direct infringement, there can be no inducement of infringement under § 271(b).

The Federal Circuit's contrary view would deprive § 271(b) of ascertainable standards. If a defendant can be held liable under § 271(b) for inducing conduct that does not constitute infringement, then how can a court assess when a patent holder's rights have been invaded? What if a defendant pays another to perform just one step of a 12-step process, and no one performs the other steps, but that one step can be viewed as the most important step in the process? In that case the defendant has not encouraged infringement, but no principled reason prevents him from being held liable for inducement under the Federal Circuit's reasoning, which permits inducement liability when fewer than all of a method's steps have been performed within the meaning of the patent. The decision below would require the courts to develop two parallel bodies of infringement law: one for liability for direct infringement, and one for liability for inducement.

Section 271(f)(1) reinforces our reading of § 271(b). That subsection imposes liability on a party who "supplies or causes to be supplied in or from the United States all or a substantial portion of the components of a patented invention . . . in such manner as to actively induce the combination of such components outside of the United States in a manner that would infringe the patent *if such combination occurred within the United States*." (Emphasis added.) As this provision illustrates, when Congress wishes to impose liability for

inducing activity that does not itself constitute direct infringement, it knows precisely how to do so. The courts should not create liability for inducement of noninfringing conduct where Congress has elected not to extend that concept.

The Federal Circuit seems to have adopted the view that Limelight induced infringement on the theory that the steps that Limelight and its customers perform would infringe the '703 patent if all the steps were performed by the same person. But we have already rejected the notion that conduct which would be infringing in altered circumstances can form the basis for contributory infringement, and we see no reason to apply a different rule for inducement. In *Deepsouth Packing Co.* v. *Laitram Corp.*, 406 U. S. 518 (1972), a manufacturer produced components of a patented machine and then exported those components overseas to be assembled by its foreign customers.[4] (The assembly by the foreign customers did not violate U. S. patent laws.) In both *Deepsouth* and this case, the conduct that the defendant induced or contributed to would have been infringing if committed in altered circumstances: in *Deepsouth* if the machines had been assembled in the United States, see *id.*, at 526, and in this case if performance of all of the claimed steps had been attributable to the same person. In *Deepsouth*, we rejected the possibility of contributory infringement because the machines had not been assembled in the United States, and direct infringement had consequently never occurred. See *id.*, at 526–527. Similarly, in this case, performance of all the claimed steps cannot be attributed to a single person, so direct infringement never occurred. Limelight cannot be liable for inducing infringement that never came to pass.

B

Respondents' arguments in support of the Federal Circuit's reading of the statute are unpersuasive. First, re-

[4] Section 271(f) now prohibits the exporter's conduct at issue in *Deepsouth*.

spondents note that tort law imposes liability on a defendant who harms another through a third party, even if that third party would not himself be liable, and respondents contend that, given the background tort principles against which the Patent Act of 1952 was enacted, it should not matter that no one is liable for direct infringement in this case. But the reason Limelight could not have induced infringement under § 271(b) is not that no third party is *liable* for direct infringement; the problem, instead, is that no direct infringement was *committed*. *Muniauction* (which, again, we assume to be correct) instructs that a method patent is not directly infringed—and the patentee's interest is thus not violated—unless a single actor can be held responsible for the performance of all steps of the patent. Because Limelight did not undertake all steps of the '703 patent and cannot otherwise be held responsible for all those steps, respondents' rights have not been violated. Unsurprisingly, respondents point us to no tort case in which liability was imposed because a defendant caused an innocent third party to undertake action that did not violate the plaintiff's legal rights.

In a related argument, respondents contend that, at tort, liability sometimes attaches where two or more defendants inflict injury, even if each defendant's conduct, standing alone, would not be actionable. See W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Torts § 52, p. 354 (5th ed. 1984) (multiple defendants who each add negligible impurities to stream liable if aggregate impurities cause harm). But the rationale for imposing liability in these circumstances is that the defendants collectively invaded the plaintiff's protected interests. See *ibid.* By contrast, under the *Muniauction* rule, respondents' interests in the '703 patent have not been invaded.

Second, respondents seek to analogize § 271(b) to the federal aiding and abetting statute, 18 U. S. C. § 2, and they argue that two parties who divide all the necessary elements of a crime between them are both guilty under § 2. The

analogy does not hold up. The aiding and abetting statute must be read "against its common-law background," *Standefer* v. *United States*, 447 U. S. 10, 19 (1980), and at common law two or more defendants, each of whom committed an element of a crime, were liable as principals. See, *e. g.*, 1 J. Bishop, Commentaries on the Criminal Law § 649, p. 392 (7th ed. 1882). While we have drawn on criminal law concepts in the past in interpreting § 271(b), see *Global-Tech Appliances, Inc.* v. *SEB S. A.*, 563 U. S. 754, 766–768 (2011), we think it unlikely that Congress had this particular doctrine in mind when it enacted the Patent Act of 1952, given the doctrine's inconsistency with the Act's cornerstone principle that patentees have a right only to the set of elements claimed in their patents and nothing further.

Third, respondents contend that patent law principles established before the enactment of the Patent Act demonstrate that a defendant that performs some steps of a patent with the purpose of having its customers perform the remaining steps is liable for inducing infringement. But here, too, the nature of the rights created by the Patent Act defeats the notion that Congress could have intended to permit inducement liability where there is no underlying direct infringement. According to respondents, their understanding of the pre-1952 doctrine casts doubt on the *Muniauction* rule for direct infringement under § 271(a), on the ground that that rule has the indirect effect of preventing inducement liability where Congress would have wanted it. But the possibility that the Federal Circuit erred by too narrowly circumscribing the scope of § 271(a) is no reason for this Court to err a second time by misconstruing § 271(b) to impose liability for inducing infringement where no infringement has occurred.

Finally, respondents, like the Federal Circuit, criticize our interpretation of § 271(b) as permitting a would-be infringer to evade liability by dividing performance of a method patent's steps with another whom the defendant neither

directs nor controls. We acknowledge this concern. Any such anomaly, however, would result from the Federal Circuit's interpretation of § 271(a) in *Muniauction*. A desire to avoid *Muniauction*'s natural consequences does not justify fundamentally altering the rules of inducement liability that the text and structure of the Patent Act clearly require—an alteration that would result in its own serious and problematic consequences, namely, creating for § 271(b) purposes some free-floating concept of "infringement" both untethered to the statutory text and difficult for the lower courts to apply consistently.

III

Respondents ask us to review the merits of the Federal Circuit's *Muniauction* rule for direct infringement under § 271(a). We decline to do so today.

In the first place, the question presented is clearly focused on § 271(b), not § 271(a). We granted certiorari on the following question: "Whether the Federal Circuit erred in holding that a defendant may be held liable for inducing patent infringement under 35 U. S. C. § 271(b) even though no one has committed direct infringement under § 271(a)." Pet. for Cert. i. The question presupposes that Limelight has not committed direct infringement under § 271(a). And since the question on which we granted certiorari did not involve § 271(a), petitioner did not address that important issue in its opening brief. Our decision on the § 271(b) question necessitates a remand to the Federal Circuit, and on remand, the Federal Circuit will have the opportunity to revisit the § 271(a) question if it so chooses.

IV

The judgment below is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Reporter's Note

The next page is purposely numbered 1001. The numbers between 926 and 1001 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR MARCH 10 THROUGH
JUNE 4, 2014

MARCH 10, 2014

Certiorari Dismissed

No. 13–8112. MOSBY *v.* MAY ET AL. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

Miscellaneous Orders

No. 13M88. MUHSSEN *v.* BIALAS. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 13–483. LANE *v.* FRANKS ET AL. C. A. 11th Cir. [Certiorari granted, 571 U. S. 1161.] Motion of petitioner to dispense with printing joint appendix granted.

No. 13–662. BANK OF AMERICA, N. A. *v.* ROSE ET AL. Sup. Ct. Cal.; and

No. 13–787. MISSOURI EX REL. KCP&L GREATER MISSOURI OPERATIONS CO. *v.* MISSOURI PUBLIC SERVICE COMMISSION ET AL. Ct. App. Mo., Western Dist. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 13–8115. MAYO *v.* NATIONAL TEACHERS ASSOCIATES LIFE INSURANCE CO. Sup. Ct. Va.; and

No. 13–8464. EMBODY *v.* COOPER. Ct. App. Tenn. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until March 31, 2014, within which to pay

the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 13–858. In re Del Rio;

No. 13–8150. In re K'napp; and

No. 13–8486. In re Rosa. Petitions for writs of mandamus denied.

Certiorari Granted

No. 13–640. Public Employees' Retirement System of Mississippi *v.* IndyMac MBS, Inc., et al. C. A. 2d Cir. Certiorari granted. Reported below: 721 F. 3d 95.

Certiorari Denied

No. 13–449. Falls Church, aka Church at the Falls-Falls Church *v.* Protestant Episcopal Church in the United States of America et al. Sup. Ct. Va. Certiorari denied. Reported below: 285 Va. 651, 740 S. E. 2d 530.

No. 13–479. Oakey *v.* US Airways Pilots Disability Income Plan. C. A. D. C. Cir. Certiorari denied. Reported below: 723 F. 3d 227.

No. 13–552. Long *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 722 F. 3d 257.

No. 13–667. Lioi *v.* Robinson, Individually, as Guardian and Next Friend of I. Y. et al., and as Personal Representative of the Estate of Williams, Deceased, et al. C. A. 4th Cir. Certiorari denied. Reported below: 536 Fed. Appx. 340.

No. 13–672. Easton Area School District *v.* B. H., a Minor, By and Through Her Mother, Hawk, et al. C. A. 3d Cir. Certiorari denied. Reported below: 725 F. 3d 293.

No. 13–679. Mutual First Federal Credit Union et al. *v.* Charvat. C. A. 8th Cir. Certiorari denied. Reported below: 725 F. 3d 819.

No. 13–682. Jerusalem Cafe, LLC, et al. *v.* Lucas et al. C. A. 8th Cir. Certiorari denied. Reported below: 721 F. 3d 927.

No. 13–683. Catsimatidis *v.* Irizarry et al. C. A. 2d Cir. Certiorari denied. Reported below: 722 F. 3d 99.

No. 13–786. Bosch *v.* City of Houston, Texas. C. A. 5th Cir. Certiorari denied. Reported below: 535 Fed. Appx. 333.

No. 13–789. Jones *v.* Michigan. Ct. App. Mich. Certiorari denied.

No. 13–814. Wallace et al. *v.* NCL (Bahamas) Ltd. C. A. 11th Cir. Certiorari denied. Reported below: 733 F. 3d 1093.

No. 13–824. Briggs & Veselka Corp. *v.* Cantrell et al. C. A. 5th Cir. Certiorari denied. Reported below: 728 F. 3d 444.

No. 13–826. Emory et al. *v.* United Airlines, Inc., et al. C. A. D. C. Cir. Certiorari denied. Reported below: 720 F. 3d 915.

No. 13–938. Ifenatuora *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 528 Fed. Appx. 333.

No. 13–939. Gushlak *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 728 F. 3d 184.

No. 13–6459. Johnson *v.* Edwards et al. C. A. 5th Cir. Certiorari denied. Reported below: 509 Fed. Appx. 362.

No. 13–6646. Cipriano Gomez *v.* Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied. Reported below: 526 Fed. Appx. 355.

No. 13–6655. Sanchez *v.* California. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 13–6876. Rodriguez *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied.

No. 13–7039. Winarske *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 715 F. 3d 1063.

No. 13–7186. Alberto Martinez *v.* Barnes, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 535 Fed. Appx. 614.

No. 13–7190. Farrington *v.* United States; and

No. 13–7191. Hill *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 725 F. 3d 471.

No. 13–7236. ZUBIA-MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 537 Fed. Appx. 549.

No. 13–7397. CAHILL *v.* CAHILL. Sup. Ct. Va. Certiorari denied.

No. 13–8072. ROSALES *v.* ICICLE SEAFOODS, INC., ET AL. Sup. Ct. Alaska. Certiorari denied. Reported below: 316 P. 3d 580.

No. 13–8076. TICHOT *v.* CUMBERLAND COUNTY SHERIFF'S DEPARTMENT. C. A. 1st Cir. Certiorari denied.

No. 13–8077. TAYLOR *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 13–8087. LONG *v.* CROWLEY ET AL. C. A. 2d Cir. Certiorari denied.

No. 13–8095. MACY *v.* WATSON ET AL. C. A. 9th Cir. Certiorari denied.

No. 13–8097. JACKSON *v.* SANTIAGO, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 13–8101. STEWART *v.* TEXAS DEPARTMENT OF CRIMINAL JUSTICE ET AL. Ct. App. Tex., 7th Dist. Certiorari denied.

No. 13–8107. MCFADDEN *v.* SMITH ET AL. Sup. Ct. Mich. Certiorari denied. Reported below: 493 Mich. 971, 829 N. W. 2d 240.

No. 13–8125. OPPEL *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 13–8126. MCKENZIE *v.* ELLIS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 541 Fed. Appx. 784.

No. 13–8128. PENA *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 13–8129. PAYNE *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 233 Ariz. 484, 314 P. 3d 1239.

No. 13–8135. THIBEAULT *v.* TELLO ET AL. C. A. 1st Cir. Certiorari denied.

No. 13–8138. WALKER *v.* ZOELLER, ATTORNEY GENERAL OF INDIANA. C. A. 7th Cir. Certiorari denied.

No. 13–8139. WILLIAMSON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 123 So. 3d 1060.

No. 13–8142. BIRTHA *v.* LOUISIANA. Ct. App. La., 5th Cir. Certiorari denied.

No. 13–8144. JEAN-PHILIPPE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 123 So. 3d 1071.

No. 13–8147. JONES *v.* JOHNSON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 541 Fed. Appx. 749.

No. 13–8159. MELTON *v.* JOYNER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 543 Fed. Appx. 326.

No. 13–8180. KHAN *v.* COLVIN, ACTING COMMISSIONER OF SOCIAL SECURITY. C. A. 9th Cir. Certiorari denied.

No. 13–8185. NDJOKO *v.* HOLDER, ATTORNEY GENERAL. C. A. 11th Cir. Certiorari denied.

No. 13–8202. JONES *v.* COLVIN, ACTING COMMISSIONER OF SOCIAL SECURITY. C. A. D. C. Cir. Certiorari denied.

No. 13–8227. CHEN *v.* COLONIUS. C. A. 10th Cir. Certiorari denied.

No. 13–8234. GOODRICH *v.* GOODRICH ET AL. Ct. App. Ga. Certiorari denied.

No. 13–8273. NEALY *v.* TEXAS. Ct. App. Tex., 13th Dist. Certiorari denied.

No. 13–8285. DESUE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 129 So. 3d 1067.

No. 13–8286. DUNLOP *v.* COLVIN, ACTING COMMISSIONER OF SOCIAL SECURITY. C. A. 11th Cir. Certiorari denied. Reported below: 518 Fed. Appx. 691.

No. 13–8298. SHERRILL *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA. C. A. 9th Cir. Certiorari denied.

No. 13–8301. BLANK *v.* TABERA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 480.

No. 13–8303. CROSLAND *v.* WENEROWICZ, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 13–8307. TAGGART *v.* OFFICE OF INSPECTOR GENERAL ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 530 Fed. Appx. 17.

No. 13–8314. ARMSTRONG *v.* WILKES, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT CAMBRIDGE SPRINGS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 13–8329. FINLEY *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 174 Wash. App. 1028.

No. 13–8350. CAVITT *v.* CULLEN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 728 F. 3d 1000.

No. 13–8402. KENDALL *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 541 Fed. Appx. 781.

No. 13–8422. PEREZ *v.* LEWIS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 543 Fed. Appx. 710.

No. 13–8444. BONCK *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: 372 Mont. 548, 317 P. 3d 203.

No. 13–8452. ORMSBY *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 2013 ME 88, 81 A. 3d 336.

No. 13–8465. CAMPOS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 13–8466. BYNUM *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 536 Fed. Appx. 669.

No. 13–8467. BAILEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 547 Fed. Appx. 756.

No. 13–8470. DE LEON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 728 F. 3d 500.

No. 13–8477. MENDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 554.

No. 13–8478. AVILA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 522 Fed. Appx. 369.

No. 13–8480. WHITE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 13–8481. AMEDA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 535 Fed. Appx. 876.

No. 13–8488. RIGGLEMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 175.

No. 13–8491. RAND *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 13–8497. GOMEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 546 Fed. Appx. 652.

No. 13–8500. RHODES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 730 F. 3d 727.

No. 13–8502. SIMPSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 13–8505. QUINN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 736 F. 3d 921.

No. 13–8506. STEWART *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 13–8509. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 545 Fed. Appx. 864.

No. 13–8512. DONG CAI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 13–8519. ALFREDO ROBLES, AKA ROBLES RAMOS, AKA LAURO ROBLES, AKA RAMOS ROBLES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 13–8522. NEWSOME *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 13–8524. MOORE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 13–8527. AGRAWAL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 726 F. 3d 235.

No. 13–8531. RUIZ-GALLEGOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 543 Fed. Appx. 476.

No. 13–8533. EDWARDS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 530 Fed. Appx. 606.

No. 13–8536. LOPEZ-BELTRAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 13–8539. CRAWFORD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 734 F. 3d 339.

No. 13–8540. COOPER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 739 F. 3d 873.

No. 13–8543. JOYNER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 531 Fed. Appx. 329.

No. 13–8544. MCCLOUD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 730 F. 3d 600.

No. 13–8547. BUCZEK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 531 Fed. Appx. 105.

No. 13–8554. RICKETT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 535 Fed. Appx. 668.

No. 13–8561. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 546 Fed. Appx. 195.

No. 13–8562. RAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 13–8565. RICHARDSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 529 Fed. Appx. 342.

No. 13–8566. LORD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 543 Fed. Appx. 995.

No. 13–8569. TURNER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 530 Fed. Appx. 432.

No. 13–8574. ANGUIANO-JIMENEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 535 Fed. Appx. 609.

No. 13–8581. WESTBROOK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 178.

No. 13–8584. HARAKALY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 734 F. 3d 88.

No. 13–8585. HOPKINS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 76 A. 3d 826.

No. 13–8596. GEORGE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 732 F. 3d 296.

No. 13–8597. FINLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 546 Fed. Appx. 507.

No. 13–8598. FIREMPONG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 542 Fed. Appx. 484.

No. 13–8601. SALAZAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 548 Fed. Appx. 289.

No. 13–8606. PICKENS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 546 Fed. Appx. 170.

No. 13–8608. VALLADARES-REAL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 548 Fed. Appx. 392.

No. 13–8612. LACKARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 549 Fed. Appx. 193.

No. 13–8614. BRYANT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 13–8622. SCOTT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 552 Fed. Appx. 838.

No. 13–8624. WHITWORTH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 13–8625. NEUMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 13–8626. COLON-DIAZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 13–8628. GOMEZ-RODRIGUEZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 13–557. BISTLINE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 720 F. 3d 631.

No. 13–794. WOLFCHILD ET AL. *v.* UNITED STATES ET AL. C. A. Fed. Cir. Motion of Historic Shingle Springs Miwok for

leave to file brief as *amicus curiae* granted. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this motion and this petition. Reported below: 731 F. 3d 1280.

No. 13–795. ZEPHIER ET AL. *v.* UNITED STATES ET AL. C. A. Fed. Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 731 F. 3d 1280.

No. 13–8366. GHAILANI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 733 F. 3d 29.

No. 13–8515. ESKRIDGE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 545 Fed. Appx. 723.

Rehearing Denied

No. 13–6913. ALEXANDER *v.* MICHIGAN ADJUTANT GENERAL ET AL., 571 U. S. 1134;

No. 13–7100. MAYFIELD *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 571 U. S. 1137;

No. 13–7109. BITON *v.* GRIER ET AL., 571 U. S. 1138;

No. 13–7157. REID *v.* ILLINOIS, 571 U. S. 1139;

No. 13–7224. ALFORD *v.* UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA, 571 U. S. 1141;

No. 13–7228. MOLLER *v.* COLVIN, ACTING COMMISSIONER OF SOCIAL SECURITY, 571 U. S. 1141;

No. 13–7280. GILLESPIE *v.* REVERSE MORTGAGE SOLUTIONS, INC., ET AL., 571 U. S. 1142;

No. 13–7453. KALU *v.* UNITED STATES, 571 U. S. 1147;

No. 13–7611. FULLER *v.* UNITED STATES, 571 U. S. 1152; and

No. 13–7645. HANNA *v.* UNITED STATES, 571 U. S. 1153. Petitions for rehearing denied.

No. 12–1301. GOODIN *v.* FIDELITY NATIONAL TITLE INSURANCE CO., 569 U. S. 1031. Motion for leave to file petition for rehearing denied.

No. 13–6836. GUIBILO *v.* UNITED STATES, 571 U. S. 1059. Petition for rehearing denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

March 12, 2014

Dismissal Under Rule 46

No. 13–499. In re Sealed Case. C. A. D. C. Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 716 F. 3d 603.

March 19, 2014

Certiorari Denied

No. 13–9226 (13A943). Jasper *v.* Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to Justice Scalia, and by him referred to the Court, denied. Certiorari denied. Reported below: 559 Fed. Appx. 366.

March 20, 2014

Miscellaneous Order

No. 13–354. Sebelius, Secretary of Health and Human Services, et al. *v.* Hobby Lobby Stores, Inc., et al. C. A. 10th Cir.; and

No. 13–356. Conestoga Wood Specialties Corp. et al. *v.* Sebelius, Secretary of Health and Human Services, et al. C. A. 3d Cir. [Certiorari granted, 571 U. S. 1067.] A total of 90 minutes is allotted for oral argument, and the time is to be divided equally.

Certiorari Denied

No. 13–9192 (13A938). Henry *v.* Florida. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to Justice Thomas, and by him referred to the Court, denied. Certiorari denied. Reported below: 134 So. 3d 938.

March 21, 2014

Miscellaneous Orders

No. 12–751. Fifth Third Bancorp et al. *v.* Dudenhoeffer et al. C. A. 6th Cir. [Certiorari granted, 571 U. S. 1108.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 13–298. ALICE CORPORATION PTY. LTD. *v.* CLS BANK INTERNATIONAL ET AL. C. A. Fed. Cir. [Certiorari granted, 571 U. S. 1090.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

MARCH 24, 2014

Certiorari Granted—Vacated and Remanded

No. 13–5968. JOHNSON *v.* UNITED STATES. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Alleyne* v. *United States*, 570 U. S. 99 (2013). Reported below: 515 Fed. Appx. 183.

No. 13–7198. MONDRAGON GARCIA *v.* UNITED STATES (Reported below: 539 Fed. Appx. 345); RAMIREZ-MATA *v.* UNITED STATES (539 Fed. Appx. 348); PENA-MEDRANO *v.* UNITED STATES (539 Fed. Appx. 348); HERNANDEZ LOPEZ, AKA LOPEZ-HERNANDEZ *v.* UNITED STATES (539 Fed. Appx. 397); CASTILLO-RAMIREZ *v.* UNITED STATES (539 Fed. Appx. 400); and TORRES-TORRES, AKA TORRES *v.* UNITED STATES (539 Fed. Appx. 376). C. A. 5th Cir. Motion of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and case remanded for further consideration in light of the position asserted by the Solicitor General in his brief for the United States filed on February 20, 2014.

Certiorari Dismissed

No. 13–8172. MOON *v.* MULLIN ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 549 Fed. Appx. 666.

No. 13–8222. MCPHERRON *v.* HOGAN ET AL. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 537 Fed. Appx. 16.

No. 13–8228. COOPER *v.* GRAMIAK, WARDEN. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk

is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

No. 13–8384. SKAMFER *v.* CIRCUIT COURT OF WISCONSIN, DODGE COUNTY. Sup. Ct. Wis. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 13–8750. CRUZ *v.* UNITED STATES. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. JUSTICE KAGAN took no part in the consideration or decision of this motion and this petition. Reported below: 537 Fed. Appx. 26.

Miscellaneous Orders

No. 13A465. SKINNER *v.* ADDISON, WARDEN. Application for certificate of appealability, addressed to JUSTICE KAGAN and referred to the Court, denied.

No. D–2768. IN RE COURY. Elie S. Coury, of Danbury, Conn., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to the practice of law before this Court. The rule to show cause, issued on February 24, 2014 [571 U. S. 1193], is discharged.

No. D–2769. IN RE DISCIPLINE OF SIMON. Lennox Jacinto Simon, of Mitchellville, Md., is suspended from the practice of law in this Court and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 13M89. BRADLEY *v.* WISCONSIN DEPARTMENT OF CHILDREN AND FAMILIES. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 13M90. EILER *v.* SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION, UNEMPLOYMENT INSURANCE DIVISION. Motion for leave to proceed as a veteran denied.

No. 13M91. NELSON *v.* PAINE WEBBER CORP. ET AL.; and

No. 13M92. Oji *v.* City of Yonkers Police Department et al. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 13–369. Nautilus, Inc. *v.* Biosig Instruments, Inc. C. A. Fed. Cir. Motion of Ananda M. Chakrabarty, Ph. D., for leave to file brief as *amicus curiae* out of time granted.

No. 13–550. Tibble et al. *v.* Edison International et al. C. A. 9th Cir.; and

No. 13–791. Moores et al. *v.* Hildes, Individually and as Trustee of the David and Kathleen Hildes 1999 Charitable Remainder Unitrust Dated June 25, 1999. C. A. 9th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 13–7115. Johnson *v.* Davis, Warden. C. A. 4th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [571 U. S. 1120] denied.

No. 13–7143. Casey *v.* Florida. Sup. Ct. Fla. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [571 U. S. 1120] denied.

No. 13–7356. Martinez *v.* Martinez et al. C. A. 10th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [571 U. S. 1161] denied.

No. 13–8221. Nhuong Van Nguyen *v.* Superior Court of California, Riverside County. Sup. Ct. Cal.;

No. 13–8239. Ashmore *v.* Prus et al. C. A. 2d Cir.;

No. 13–8592. Genbao Gao *v.* Hawaii Department of the Attorney General. Int. Ct. App. Haw.; and

No. 13–8630. Rhodes-Lyons *v.* United States. C. A. 9th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until April 14, 2014, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 13–8600. In re Raisbeck;

No. 13–8604. In re Ware;

No. 13–8629. In re Angel Rodriguez; and

No. 13–8901. In re Davis. Petitions for writs of habeas corpus denied.

No. 13–8123. IN RE DOZIER; and

No. 13–8274. IN RE K'NAPP. Petitions for writs of mandamus denied.

No. 13–870. IN RE RADER; and

No. 13–8324. IN RE HUMINSKI. Petitions for writs of mandamus and/or prohibition denied.

Certiorari Granted

No. 13–7211. JENNINGS *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 4 presented by the petition. Reported below: 537 Fed. Appx. 326.

Certiorari Denied

No. 13–385. DOE *v.* VIRGINIA DEPARTMENT OF STATE POLICE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 713 F. 3d 745.

No. 13–581. RYAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 725 F. 3d 623.

No. 13–597. ADAMS ET AL. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 720 F. 3d 915.

No. 13–599. MINGO LOGAN COAL CO. *v.* ENVIRONMENTAL PROTECTION AGENCY. C. A. D. C. Cir. Certiorari denied. Reported below: 714 F. 3d 608.

No. 13–651. MOBILITY MEDICAL, INC., ET AL. *v.* MISSISSIPPI DEPARTMENT OF REVENUE. Sup. Ct. Miss. Certiorari denied. Reported below: 119 So. 3d 1002.

No. 13–706. FREDERICK COUNTY BOARD OF COMMISSIONERS ET AL. *v.* ORELLANA SANTOS. C. A. 4th Cir. Certiorari denied. Reported below: 725 F. 3d 451.

No. 13–733. YSM REALTY, INC., ET AL. *v.* GROSSBARD ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 532 Fed. Appx. 313.

No. 13–775. LEE *v.* THOMAS, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 726 F. 3d 1172.

No. 13–799. DeMartini et ux. *v.* Kraemer. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 13–804. Cheese & Whey Systems, Inc., et al. *v.* Tetra Pak Cheese & Powder Systems, Inc., et al. C. A. Fed. Cir. Certiorari denied. Reported below: 725 F. 3d 1341.

No. 13–819. Holdner et al. *v.* Pardue, Individually and as Personal Representative of the Estate of Pardue, et al. Ct. App. Ore. Certiorari denied. Reported below: 255 Ore. App. 826, 299 P. 3d 891.

No. 13–834. Khan *v.* Regions Bank. C. A. 6th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 617.

No. 13–835. Ke-En Wang *v.* Ying Jing Yan. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 106 App. Div. 3d 662, 965 N. Y. S. 2d 723.

No. 13–836. Tehama-Colusa Canal Authority *v.* Department of the Interior et al. C. A. 9th Cir. Certiorari denied. Reported below: 721 F. 3d 1086.

No. 13–848. O_2Micro International Ltd. *v.* Monolithic Power Systems, Inc., et al. C. A. Fed. Cir. Certiorari denied. Reported below: 726 F. 3d 1359.

No. 13–851. Deutsche Bank Securities Inc. *v.* Moneygram Payment Systems, Inc. Ct. App. Minn. Certiorari denied.

No. 13–853. Cobb *v.* City of Roswell, Georgia. C. A. 11th Cir. Certiorari denied. Reported below: 533 Fed. Appx. 888.

No. 13–855. S. M. *v.* Florida Department of Revenue, on Behalf of A. C. S. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 146 So. 3d 36.

No. 13–864. Portillo-Castro *v.* Holder, Attorney General. C. A. 10th Cir. Certiorari denied. Reported below: 543 Fed. Appx. 815.

No. 13–871. Harris et ux. *v.* Griffin Wheel Co. Super. Ct. Pa. Certiorari denied. Reported below: 64 A. 3d 30.

No. 13–872. Fernandez-Taveras *v.* Holder, Attorney General. C. A. 3d Cir. Certiorari denied. Reported below: 731 F. 3d 281.

No. 13–883. SMITH *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 2013 IL App (2d) 120508–U.

No. 13–900. DIX *v.* TOTAL PETROCHEMICALS USA, INC., PENSION PLAN. C. A. 3d Cir. Certiorari denied. Reported below: 540 Fed. Appx. 130.

No. 13–908. TMM INVESTMENTS, LTD. *v.* OHIO CASUALTY INSURANCE CO. C. A. 5th Cir. Certiorari denied. Reported below: 730 F. 3d 466.

No. 13–917. RILEY *v.* LOUISIANA ATTORNEY DISCIPLINARY BOARD. Sup. Ct. La. Certiorari denied. Reported below: 2013–1475 (La. 8/28/13), 120 So. 3d 250.

No. 13–932. SANCTUARY SURGICAL CENTRE, INC., ET AL. *v.* AETNA HEALTH, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 546 Fed. Appx. 846.

No. 13–944. ACUTE CARE SPECIALISTS II ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 727 F. 3d 802.

No. 13–951. CHILDERS *v.* FLOYD, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 736 F. 3d 1331.

No. 13–952. GUZMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 13–953. DALLAS SCHOOL DISTRICT ET AL. *v.* NORTHEAST PENNSYLVANIA SCHOOL DISTRICTS (HEALTH) TRUST. Commw. Ct. Pa. Certiorari denied. Reported below: 67 A. 3d 102.

No. 13–954. MCDOWELL ET AL. *v.* PRICE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 731 F. 3d 775.

No. 13–964. ALIOTO *v.* HOILES. C. A. 10th Cir. Certiorari denied. Reported below: 531 Fed. Appx. 842.

No. 13–965. WEISS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 539 Fed. Appx. 952.

No. 13–981. LONGALE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 533 Fed. Appx. 42.

No. 13–982. KUYPER, INDIVIDUALLY AND AS TRUSTEE OF KUYPER FAMILY LIVING TRUST, ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 13–988. McIllwain *v.* LegalZoom.com, Inc. Sup. Ct. Ark. Certiorari denied. Reported below: 2013 Ark. 370, 429 S. W. 3d 261.

No. 13–1002. Razmilovic *v.* Securities and Exchange Commission. C. A. 2d Cir. Certiorari denied. Reported below: 738 F. 3d 14.

No. 13–1004. Pitonyak *v.* Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied. Reported below: 732 F. 3d 525.

No. 13–6007. Lewis *v.* Navy Federal Credit Union. C. A. 4th Cir. Certiorari denied. Reported below: 485 Fed. Appx. 621.

No. 13–6765. Hatch *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 722 F. 3d 1193.

No. 13–6903. Galindo-Vega *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 522 Fed. Appx. 388.

No. 13–6908. Torda, Mother of Torda *v.* Fairfax County School Board. C. A. 4th Cir. Certiorari denied. Reported below: 517 Fed. Appx. 162.

No. 13–6949. Pabellon Rodriguez *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 735 F. 3d 1.

No. 13–7367. Trottie *v.* Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied. Reported below: 720 F. 3d 231.

No. 13–7755. Schoppman *v.* University of South Florida Board of Trustees. C. A. 11th Cir. Certiorari denied. Reported below: 519 Fed. Appx. 549.

No. 13–7848. Brooks *v.* Thomas, Commissioner, Alabama Department of Corrections, et al. C. A. 11th Cir. Certiorari denied. Reported below: 719 F. 3d 1292.

No. 13–7853. Guetzloe *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 522 Fed. Appx. 749.

No. 13–7930. FRIAS-ALMANZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 540 Fed. Appx. 268.

No. 13–8161. SHEA ET AL. *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 547 Fed. Appx. 820.

No. 13–8170. LESTER *v.* BALLARD, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 541 Fed. Appx. 310.

No. 13–8181. EZELL *v.* DEPARTMENT OF REHABILITATION. C. A. 9th Cir. Certiorari denied. Reported below: 530 Fed. Appx. 626.

No. 13–8182. WARD *v.* MCCABE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 538 Fed. Appx. 257.

No. 13–8183. TYSON *v.* PADULA, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 539 Fed. Appx. 120.

No. 13–8192. RUBIN *v.* URIBE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–8204. GUMMO *v.* PIERCE COUNTY, WASHINGTON, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 529 Fed. Appx. 866.

No. 13–8208. HILTON *v.* BEARD, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied. Reported below: 530 Fed. Appx. 669.

No. 13–8210. COOK *v.* EARLS, WARDEN. Sup. Ct. Mo. Certiorari denied.

No. 13–8212. VERDUN *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 13–8213. ORTIZ *v.* MCDONALD, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–8214. MIKELL *v.* VARANO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT COAL TOWNSHIP. C. A. 3d Cir. Certiorari denied.

No. 13–8217. GRIFFIN *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 81 A. 3d 999.

No. 13–8223. SAYER *v.* GEISZLER. Sup. Ct. Mont. Certiorari denied. Reported below: 373 Mont. 439, 318 P. 3d 171.

No. 13–8230. DODSON *v.* OHIO. Ct. App. Ohio, 10th App. Dist., Franklin County. Certiorari denied.

No. 13–8243. TODD *v.* BRIESENICK ET AL. C. A. 9th Cir. Certiorari denied.

No. 13–8247. MCNEELY *v.* BEARD, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied. Reported below: 542 Fed. Appx. 619.

No. 13–8252. KALISZ *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 124 So. 3d 185.

No. 13–8253. PRICE *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 13–8254. BALL *v.* FAMIGLIO ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 726 F. 3d 448.

No. 13–8256. BROWN *v.* CASSADY, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER. Sup. Ct. Mo. Certiorari denied.

No. 13–8262. VARGHESE *v.* MILLER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 736 F. 3d 817.

No. 13–8266. SHEPARD *v.* CHAVEZ, ACTING WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–8270. BURKS *v.* COLLINS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 534 Fed. Appx. 259.

No. 13–8272. LYON *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 13–8278. WASHINGTON *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 13–8281. DODD *v.* TRAMMELL, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 730 F. 3d 1177.

No. 13–8290. CARROLL *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2013 IL App (1st) 110819–U.

No. 13–8293. RODRIGUEZ *v.* BEARD, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied.

No. 13–8294. SMITH *v.* HARLING ET AL. C. A. 2d Cir. Certiorari denied.

No. 13–8296. KNOX *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 13–8300. BOX *v.* STEELE, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 13–8308. WATSON *v.* BEARD, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied. Reported below: 526 Fed. Appx. 779.

No. 13–8309. THLANG *v.* BARNES, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 548 Fed. Appx. 407.

No. 13–8310. RITCHIE *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied.

No. 13–8312. WENDT *v.* UBS FINANCIAL SERVICES, INC. Ct. App. Cal., 2d App. Dist., Div. 1. Certiorari denied.

No. 13–8319. WILLIAMS *v.* SCHWARTZ ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 529 Fed. Appx. 89.

No. 13–8322. HALE *v.* MCDONALD, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 537 Fed. Appx. 731.

No. 13–8326. HUTCHINSON *v.* POVEDA ET AL. C. A. 11th Cir. Certiorari denied.

No. 13–8328. GONZALEZ *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 13–8331. GUTIERREZ *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 13–8332. SANT *v.* FOLINO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GREENE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 13–8333. CONTRERAS *v.* SUPERIOR COURT OF CALIFORNIA, SAN DIEGO COUNTY, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 13–8336. OGEONE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 13–8337. ALVAREZ *v.* BITER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 539 Fed. Appx. 807.

No. 13–8343. WHEELER *v.* HINSTON. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 13–8351. DAVIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 542 Fed. Appx. 689.

No. 13–8352. DOLL *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 21 N. Y. 3d 665, 998 N. E. 2d 384.

No. 13–8373. COTTRELL *v.* VILSACK, SECRETARY OF AGRICULTURE. C. A. D. C. Cir. Certiorari denied.

No. 13–8390. ENTLER *v.* YOUNG. C. A. 9th Cir. Certiorari denied. Reported below: 517 Fed. Appx. 553.

No. 13–8393. MUHAMMAD *v.* MARTIN. C. A. 7th Cir. Certiorari denied.

No. 13–8396. LACEY *v.* HOMEOWNERS OF AMERICA INSURANCE CO. C. A. 10th Cir. Certiorari denied. Reported below: 546 Fed. Appx. 755.

No. 13–8411. ROBERTS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 137 Ohio St. 3d 230, 2013-Ohio-4580, 998 N. E. 2d 1100.

No. 13–8412. LAROSE *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 412 S. W. 3d 294.

No. 13–8416. AZROUI *v.* E*TRADE SECURITIES, LLC. C. A. 7th Cir. Certiorari denied. Reported below: 499 Fed. Appx. 606.

No. 13–8424. MURRILLO *v.* HOUSTON, DIRECTOR, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES. C. A. 8th Cir. Certiorari denied.

No. 13–8428. BURCH *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 535 Fed. Appx. 789.

No. 13–8437. CROSS *v.* STEVENSON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 535 Fed. Appx. 229.

No. 13–8441. RISBY *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 539 Fed. Appx. 337.

No. 13–8442. RISBY *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 539 Fed. Appx. 336.

No. 13–8443. RISBY *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 539 Fed. Appx. 338.

No. 13–8447. MOUTON *v.* LOUISIANA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 513.

No. 13–8458. LOPEZ *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 13–8459. MOORE *v.* WADDLE ET AL. C. A. 8th Cir. Certiorari denied.

No. 13–8469. MARABLE *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 173 So. 3d 11.

No. 13–8474. MATTHEWS *v.* BROWN. Sup. Ct. Va. Certiorari denied.

No. 13–8487. STEPHENSON *v.* JOHN SMITH ENTERPRISES, DBA MCDONALD'S CORP. Sup. Ct. Va. Certiorari denied.

No. 13–8514. DOVE *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 367 N. C. 236, 748 S. E. 2d 543.

No. 13–8528. WICKS-EL *v.* GOSSETT, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 13–8529. JONES *v.* WOLINSKY. Ct. App. D. C. Certiorari denied.

No. 13–8542. O'DONNELL *v.* LAMAS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ROCKVIEW, ET AL. C. A. 3d Cir. Certiorari denied.

No. 13–8546. NEWCOMB *v.* PREMO, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 536 Fed. Appx. 721.

No. 13–8549. ATKINS *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 13–8567. MAGAZINE *v.* STEVENSON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 521 Fed. Appx. 222.

No. 13–8582. THOMAS *v.* STEVENSON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 539 Fed. Appx. 275.

No. 13–8586. HARDY *v.* BEIGHTLER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 538 Fed. Appx. 624.

No. 13–8611. LINDSEY *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 13–8617. FLEMING *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 535 Fed. Appx. 770.

No. 13–8621. DIXON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 542 Fed. Appx. 273.

No. 13–8637. JEAN *v.* FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 13–8640. PENA-SILVA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 552 Fed. Appx. 632.

No. 13–8641. CAMACHO OLIVAS, AKA HERNANDEZ-JARA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 524.

No. 13–8642. OUEDRAOGO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 531 Fed. Appx. 731.

No. 13–8644. VITAL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 531 Fed. Appx. 950.

No. 13–8646. MANUEL DIAZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 548 Fed. Appx. 456.

No. 13–8649. LIEBEL *v.* ROZUM, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT SOMERSET, ET AL. C. A. 3d Cir. Certiorari denied.

No. 13–8655. MORENO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 540 Fed. Appx. 276.

No. 13–8657. ROJAS-MURGA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 548 Fed. Appx. 1011.

No. 13–8662. AURELHOMME *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 535 Fed. Appx. 819.

No. 13–8664. DOUCETTE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 746.

No. 13–8668. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 539 Fed. Appx. 161.

No. 13–8672. ANDERSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 741 F. 3d 938.

No. 13–8680. MCINTOSH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 470 Fed. Appx. 742.

No. 13–8682. WILLIAMS *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 546 Fed. Appx. 301.

No. 13–8683. SILER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 734 F. 3d 1290.

No. 13–8687. LAWHORN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 735 F. 3d 817.

No. 13–8688. MESBAHUDDIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 532 Fed. Appx. 4.

No. 13–8693. BILLOW *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 533 Fed. Appx. 757.

No. 13–8695. TORY *v.* FLEMING, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 553 Fed. Appx. 305.

No. 13–8697. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 731 F. 3d 1222.

No. 13–8699. COLEMAN *v.* STEWARD, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 13–8704. LARMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 547 Fed. Appx. 475.

No. 13–8711. WIGGAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 530 Fed. Appx. 51.

No. 13–8716. DAVIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 599 Fed. Appx. 815.

No. 13–8717. CROWE, AKA DILLARD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 735 F. 3d 1229.

No. 13–8719. ESPINOZA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 13–8721. ABRAHAMSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 731 F. 3d 751.

No. 13–8722. ACHAVAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 547 Fed. Appx. 470.

No. 13–8723. LUIS GAMEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 547 Fed. Appx. 497.

No. 13–8724. ANDRES-FRANCISCO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 535 Fed. Appx. 599.

No. 13–8726. STITT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 13–8728. ROLAND, AKA LOWE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 545 Fed. Appx. 108.

No. 13–8729. SOLOMAN, AKA ROBINSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 550 Fed. Appx. 86.

No. 13–8735. ADAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 545 Fed. Appx. 659.

No. 13–8739. ZORN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 545 Fed. Appx. 470.

No. 13–8740. TEPEZANO-BEJARANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 547 Fed. Appx. 509.

No. 13–8741. WALKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 547 Fed. Appx. 358.

No. 13–8747. BERRY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 496 Fed. Appx. 938.

No. 13–8748. CARNEGLIA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 13–8749. COVIELLO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 13–8755. WILLIAMS *v.* TURNER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 13–8757. ABSTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 536 Fed. Appx. 905.

No. 13–8758. ROYET ARIAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 13–8760. COLON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 532 Fed. Appx. 241.

No. 13–8761. CASH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 733 F. 3d 1264.

No. 13–8763. DELGADO-DAMIAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 540 Fed. Appx. 378.

No. 13–8766. KANNELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 545 Fed. Appx. 881.

No. 13–8769. MORGAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 738 F. 3d 1002.

No. 13–8770. SMITH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 529 Fed. Appx. 798.

No. 13–8771. RODGER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 521 Fed. Appx. 824.

No. 13–8779. CAVAZOS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 542 Fed. Appx. 263.

No. 13–8783. ABDALLAH *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 13–8784. ALVANEZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 536 Fed. Appx. 317.

No. 13–8785. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 547 Fed. Appx. 225.

No. 13–8790. REYNOLDS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 534 Fed. Appx. 347.

No. 13–8792. ALCANTAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 733 F. 3d 143.

No. 13–8794. NEWELL *v.* SMITH, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 13–8797. THOMPSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 870.

No. 13–8798. WYSS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 542 Fed. Appx. 401.

No. 13–8800. WILCOX *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 902.

No. 13–8802. COATS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 542 Fed. Appx. 263.

No. 13–8810. MCGEE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 736 F. 3d 263.

No. 13–8812. JARJIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 261.

No. 13–8817. GRIFFIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 545 Fed. Appx. 583.

No. 13–8822. SALTER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 545 Fed. Appx. 893.

No. 13–486. WALBURG *v.* NACK. C. A. 8th Cir. Motions of Anda, Inc.; Law Professor A. Christopher Bryant et al.; and National Federation of Independent Business Small Business Legal Center et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 715 F. 3d 680.

No. 13–625. A. GALLO & CO., INC., ET AL. *v.* ESTY, COMMISSIONER, CONNECTICUT DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION, ET AL. Sup. Ct. Conn. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 309 Conn. 810, 73 A. 3d 693.

No. 13–850. TRAMMELL, WARDEN *v.* DODD. C. A. 10th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 730 F. 3d 1177.

No. 13–869. STRINE ET AL. *v.* DELAWARE COALITION FOR OPEN GOVERNMENT, INC. C. A. 3d Cir. Motions of TechNet and Law Firms for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 733 F. 3d 510.

No. 13–8492. PAIGE *v.* SCHNEIDERMAN, ATTORNEY GENERAL OF NEW YORK. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 13–8563. STEBBINS *v.* MICROSOFT CORP. C. A. 9th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 520 Fed. Appx. 589.

Rehearing Denied

No. 12–315. AIR WISCONSIN AIRLINES CORP. *v.* HOEPER, 571 U. S. 237;

No. 12–10073. ALEXANDER *v.* FIRST WIND ENERGY, LLC, ET AL., 571 U. S. 1070;

No. 12–10591. FUGIT *v.* UNITED STATES, 571 U. S. 1163;

No. 12–10982. GODWIN *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, 571 U. S. 879;

No. 13–612. HARDY *v.* FEDERAL NATIONAL MORTGAGE ASSOCIATION ET AL., 571 U. S. 1175;

No. 13–614. IN RE MCDONALD, 571 U. S. 1174;

No. 13–622. DULAL-WHITEWAY *v.* HOLDER, ATTORNEY GENERAL, 571 U. S. 1131;

No. 13–656. JAEGEL ET UX. *v.* SKAGIT COUNTY, WASHINGTON, 571 U. S. 1164;

No. 13–681. VAN HORN *v.* KEEFER ET AL., 571 U. S. 1176;

No. 13–5508. WINGER *v.* PIERCE ET AL., 571 U. S. 1164;

No. 13–5892. COLLINS *v.* UNITED STATES, 571 U. S. 1132;

No. 13–6350. GU *v.* ABRAHAM ET AL., 571 U. S. 1028;

No. 13–6587. GREENE *v.* FLORIDA, 571 U. S. 1078;

No. 13–6659. BENHAM *v.* HAGEN ET AL., 571 U. S. 1177;

No. 13–6838. GILYARD *v.* ANGLIN, WARDEN, 571 U. S. 1080;

No. 13–6869. MAGGESE *v.* STOIA ET AL., 571 U. S. 1134;

No. 13–7025. WILBORN *v.* COAKLEY, ATTORNEY GENERAL OF MASSACHUSETTS, ET AL., 571 U. S. 1136;

No. 13–7122. TODD *v.* BIGELOW, WARDEN, 571 U. S. 1138;

No. 13–7278. Olive *v.* Florida, 571 U. S. 1142;

No. 13–7318. Mendez *v.* New Jersey State Lottery Commission et al., 571 U. S. 1143;

No. 13–7345. Scheib *v.* Keystone Residential Properties, LLC, et al., 571 U. S. 1165;

No. 13–7369. Wright *v.* Pixley, Warden, 571 U. S. 1165;

No. 13–7390. Lafonta *v.* United States, 571 U. S. 1145;

No. 13–7393. Young *v.* Orwick et al., 571 U. S. 1166;

No. 13–7402. DeSue *v.* Kinsaul, 571 U. S. 1166;

No. 13–7410. Radbod *v.* Arias et al., 571 U. S. 1166;

No. 13–7473. Green *v.* Virginia Employment Commission, 571 U. S. 1148;

No. 13–7477. Casteel *v.* United States, 571 U. S. 1148;

No. 13–7486. Grazzini-Rucki *v.* Rucki, 571 U. S. 1178;

No. 13–7602. Kelly *v.* Omaha Housing Authority et al., 571 U. S. 1167;

No. 13–7636. Ham *v.* Board of Trustees of the Leland Stanford Junior University, 571 U. S. 1180;

No. 13–7747. Eads *v.* United States, 571 U. S. 1155;

No. 13–7771. Black *v.* United States, 571 U. S. 1156;

No. 13–7787. Ragan *v.* Commissioner of Internal Revenue, 571 U. S. 1181;

No. 13–7803. Keeter *v.* United States, 571 U. S. 1168;

No. 13–7840. Utsey *v.* Donahoe, Postmaster General, 571 U. S. 1181;

No. 13–7946. Smith *v.* Secretary, Pennsylvania Department of Environmental Protection, 571 U. S. 1183;

No. 13–8015. In re Quinerly, 571 U. S. 1163; and

No. 13–8032. Brewer *v.* United States, 571 U. S. 1185. Petitions for rehearing denied.

No. 12–9146. Simmons *v.* Wallace et al., 569 U. S. 978. Motion for leave to file petition for rehearing denied.

No. 13–610. Dade *v.* United States, 571 U. S. 1157. Petition for rehearing denied. Justice Kagan took no part in the consideration or decision of this petition.

No. 13–7229. Pennington-Thurman *v.* AT&T Inc. et al., 571 U. S. 1157. Petition for rehearing denied. Justice Alito took no part in the consideration or decision of this petition.

March 25, 2014

Miscellaneous Orders

No. 13A965. Ferguson *v.* Lombardi, Director, Missouri Department of Corrections. Application for stay of execution of sentence of death, presented to Justice Alito, and by him referred to the Court, denied. Justice Ginsburg, Justice Breyer, Justice Sotomayor, and Justice Kagan would grant the application for stay of execution.

No. 13A972 (13–9374). Ferguson *v.* Lombardi, Director, Missouri Department of Corrections, et al. Application for stay of execution of sentence of death, presented to Justice Alito, and by him referred to the Court, denied. Justice Ginsburg, Justice Breyer, Justice Sotomayor, and Justice Kagan would grant the application for stay of execution.

No. 13–9313 (13A958). In re Ferguson. Application for stay of execution of sentence of death, presented to Justice Alito, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 13–1069 (13A898). Ferguson *v.* Steele, Warden. Sup. Ct. Mo. Application for stay of execution of sentence of death, presented to Justice Alito, and by him referred to the Court, denied. Certiorari denied.

No. 13–9274 (13A952). Ferguson *v.* Steele, Warden. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to Justice Alito, and by him referred to the Court, denied. Certiorari denied.

March 26, 2014

Dismissal Under Rule 46

No. 12–604. Madison County, New York, et al. *v.* Oneida Indian Nation of New York et al. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 665 F. 3d 408.

MARCH 27, 2014

Certiorari Denied

No. 13–9344 (13A963). DOYLE *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

MARCH 31, 2014

Certiorari Granted—Vacated and Remanded

No. 12–10209. ARMSTRONG *v.* UNITED STATES (Reported below: 706 F. 3d 1); and VOISINE *v.* UNITED STATES (495 Fed. Appx. 101). C. A. 1st Cir. Motion of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and case remanded for further consideration in light of *United States* v. *Castleman*, *ante*, p. 157.

Certiorari Dismissed

No. 13–8958. MOHSEN *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 13M93. OSBOURNE *v.* COLORITE PLASTICS. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 13M94. PAYTON *v.* MERIT SYSTEMS PROTECTION BOARD. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 13M95. ADAMS *v.* EMC MORTGAGE CORP. ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied. JUSTICE ALITO took no part in the consideration or decision of this motion.

No. 141, Orig. TEXAS *v.* NEW MEXICO ET AL. Motion of the United States for leave to intervene granted. [For earlier order herein, see, *e. g.*, 571 U. S. 1173.]

No. 13–7749. NYANJOM *v.* HAWKER BEECHCRAFT, INC. C. A. 10th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [571 U. S. 1194] denied.

No. 13–7929. Gossage *v.* Merit Systems Protection Board. C. A. Fed. Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [571 U. S. 1194] denied.

No. 13–8406. Boutang *v.* Texas. Ct. App. Tex., 4th Dist.;
No. 13–8414. Merritt *v.* R&R Capital LLC et al. Sup. Ct. Del.;
No. 13–8715. McKoy *v.* Donahoe, Postmaster General, et al. C. A. 2d Cir.;
No. 13–8745. Yates et ux. *v.* Commissioner of Internal Revenue. C. A. 4th Cir.;
No. 13–8814. Alexis L. A. *v.* Ronald J. R. Ct. App. Wis.; and
No. 13–8835. Johnson *v.* Florida. Dist. Ct. App. Fla., 1st Dist. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until April 21, 2014, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 13–9023. In re Johnson. Petition for writ of habeas corpus denied.

No. 13–9099. In re Metcalf. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8.

Certiorari Granted

No. 13–854. Teva Pharmaceuticals USA, Inc., et al. *v.* Sandoz, Inc., et al. C. A. Fed. Cir. Certiorari granted. Reported below: 723 F. 3d 1363.

Certiorari Denied

No. 12–1349. United States ex rel. Nathan *v.* Takeda Pharmaceuticals North America, Inc., et al. C. A. 4th Cir. Certiorari denied. Reported below: 707 F. 3d 451.

No. 13–436. Arizona *v.* Okun. Ct. App. Ariz. Certiorari denied. Reported below: 231 Ariz. 462, 296 P. 3d 998.

No. 13–607. Northover *v.* Archuleta, Director, Office of Personnel Management. C. A. Fed. Cir. Certiorari denied. Reported below: 733 F. 3d 1148.

No. 13–689. CARRION *v.* AGFA CONSTRUCTION, INC. C. A. 2d Cir. Certiorari denied. Reported below: 720 F. 3d 382.

No. 13–700. BANK OF AMERICA, N. A. *v.* SINKFIELD. C. A. 11th Cir. Certiorari denied.

No. 13–857. CASTRO *v.* FLORIDA BOARD OF BAR EXAMINERS. Sup. Ct. Fla. Certiorari denied.

No. 13–861. TRUITT *v.* UNUM LIFE INSURANCE COMPANY OF AMERICA. C. A. 5th Cir. Certiorari denied. Reported below: 729 F. 3d 497.

No. 13–867. DASH *v.* MAYWEATHER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 731 F. 3d 303.

No. 13–875. LAITY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied.

No. 13–876. KIRK *v.* OHIO. Ct. App. Ohio, 3d App. Dist., Crawford County. Certiorari denied. Reported below: 2013-Ohio-1941.

No. 13–878. BOGART *v.* OLIVIER FAMILY INTERESTS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 527 Fed. Appx. 596.

No. 13–880. MAREMA ET AL. *v.* FIRST FEDERAL SAVINGS BANK OF ELIZABETHTOWN, INC. Ct. App. Ky. Certiorari denied. Reported below: 405 S. W. 3d 512.

No. 13–886. BAYSHORE FORD TRUCK SALES, INC., ET AL. *v.* FORD MOTOR CO. C. A. 3d Cir. Certiorari denied. Reported below: 540 Fed. Appx. 113.

No. 13–889. SANDOZ, INC., ET AL. *v.* ALLERGAN, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 726 F. 3d 1286.

No. 13–898. MCCARTHY *v.* HUGHES ET VIR. C. A. 6th Cir. Certiorari denied. Reported below: 734 F. 3d 473.

No. 13–903. IN THE MATTER OF AN ATTORNEY (ANONYMOUS) *v.* GRIEVANCE COMMITTEE FOR THE SEVENTH JUDICIAL DISTRICT. Ct. App. N. Y. Certiorari denied. Reported below: 22 N. Y. 3d 1052, 4 N. E. 3d 370.

No. 13–914. Doe *v.* Neer et al. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 409 S. W. 3d 451.

No. 13–926. Lutfi *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 527 Fed. Appx. 236.

No. 13–927. United States ex rel. King *v.* University of Texas Health Science Center—Houston. C. A. 5th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 490.

No. 13–930. H. B. *v.* Florida Department of Children and Families. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 119 So. 3d 448.

No. 13–968. Craig *v.* Harrington, Warden. C. A. 7th Cir. Certiorari denied.

No. 13–976. Bruce *v.* Drexler. Ct. App. Colo. Certiorari denied. Reported below: 315 P. 3d 179.

No. 13–978. Patras *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 544 Fed. Appx. 137.

No. 13–984. Taggart *v.* Norwest Mortgage Inc. et al. C. A. 3d Cir. Certiorari denied. Reported below: 539 Fed. Appx. 42.

No. 13–986. Eric B. *v.* Illinois. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 2013 IL App (2d) 120938–U.

No. 13–995. Wilf *v.* Board of Regents of the University System of Georgia et al. C. A. 11th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 906.

No. 13–1003. Frazin *v.* Haynes & Boone, LLP, et al. C. A. 5th Cir. Certiorari denied. Reported below: 732 F. 3d 313.

No. 13–1024. Angel Valdez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 540 Fed. Appx. 363.

No. 13–1025. Patino Restrepo *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 547 Fed. Appx. 34.

No. 13–1026. Kull *v.* Kutztown University of Pennsylvania. C. A. 3d Cir. Certiorari denied. Reported below: 543 Fed. Appx. 244.

No. 13–1030. BOGUE *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 522 Fed. Appx. 169.

No. 13–1033. KERCHER ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 539 Fed. Appx. 517.

No. 13–1040. IRVINE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 729 F. 3d 455.

No. 13–6396. WALLIS *v.* LEVINE ET AL. C. A. 7th Cir. Certiorari denied.

No. 13–7981. ABDO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 733 F. 3d 562.

No. 13–8004. HERNANDEZ, AKA HERNANDEZ-LLANAS *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 537 Fed. Appx. 531.

No. 13–8054. MCMILLAN *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 139 So. 3d 184.

No. 13–8340. VINES *v.* WASHINGTON METROPOLITAN AREA TRANSPORTATION AUTHORITY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 541 Fed. Appx. 276.

No. 13–8364. VICTOR *v.* MICHIGAN. C. A. 6th Cir. Certiorari denied.

No. 13–8369. JOHNSON *v.* BRAZELTON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–8371. WALKER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2013 IL App (1st) 103575–U.

No. 13–8372. WAGNER *v.* MORGAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 13–8374. CARDWELL *v.* PALMETTO BANK. Ct. App. S. C. Certiorari denied.

No. 13–8375. BROOKS *v.* FUNK ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 539 Fed. Appx. 146.

No. 13–8377. BREEDEN *v.* MISSISSIPPI. Ct. App. Miss. Certiorari denied. Reported below: 168 So. 3d 975.

No. 13–8385. KOCH *v.* GREGORY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 536 Fed. Appx. 659.

No. 13–8389. DAY *v.* CITY OF CHICAGO, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied.

No. 13–8391. NAJAFIAN *v.* EDUCATIONAL CREDIT MANAGEMENT CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 539 Fed. Appx. 287.

No. 13–8395. DE LA ROSA *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 13–8398. MORTON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 129 So. 3d 1069.

No. 13–8399. EVANS *v.* BOSTON RED SOX ET AL. C. A. 9th Cir. Certiorari denied.

No. 13–8400. EVANS *v.* CERBERUS CAPITAL MANAGEMENT, LP, ET AL. C. A. 9th Cir. Certiorari denied.

No. 13–8420. REEVES *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 233 Ariz. 182, 310 P. 3d 970.

No. 13–8421. BOWEN *v.* GRAMIAK, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 13–8425. MITCHELL *v.* BAUMAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 13–8430. WILLIAMS *v.* HILL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–8483. BURGIE *v.* HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. Sup. Ct. Ark. Certiorari denied. Reported below: 2013 Ark. 360.

No. 13–8490. KOCH *v.* BROWN, SUPERINTENDENT, WABASH VALLEY CORRECTIONAL INSTITUTION. C. A. 7th Cir. Certiorari denied.

No. 13–8496. CURRIE *v.* WARREN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 13–8503. SAIF'ULLAH, AKA JACKSON *v.* CHAPPELL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–8508. JONES *v.* MCDANIEL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 717 F. 3d 1062.

No. 13–8523. MEJIA *v.* MCDONALD, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–8525. SPAN *v.* BELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 13–8526. SMITH *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist., Div. 5. Certiorari denied.

No. 13–8559. RUA *v.* HOLDER, ATTORNEY GENERAL. C. A. 1st Cir. Certiorari denied.

No. 13–8571. MCCREARY *v.* MASTO ET AL. C. A. 9th Cir. Certiorari denied.

No. 13–8578. STOYER *v.* FOGELMAN. Ct. App. Ohio, 10th App. Dist., Franklin County. Certiorari denied. Reported below: 2013-Ohio-1254.

No. 13–8587. CABRERA *v.* DEPARTMENT OF JUSTICE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 537 Fed. Appx. 387.

No. 13–8588. EADDY *v.* COLVIN, ACTING COMMISSIONER OF SOCIAL SECURITY. C. A. 4th Cir. Certiorari denied. Reported below: 537 Fed. Appx. 210.

No. 13–8589. COX *v.* SOCIAL SECURITY ADMINISTRATION. C. A. 4th Cir. Certiorari denied. Reported below: 542 Fed. Appx. 297.

No. 13–8610. VAN KLAVEREN *v.* KLEE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 13–8613. WEST *v.* TAYLOR, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 13–8651. BROWN *v.* AUD ET AL. C. A. 6th Cir. Certiorari denied.

No. 13–8665. WEEKS *v.* BOWERSOX, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 13–8733. MONTANO-RIVAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 546 Fed. Appx. 683.

No. 13–8734. MUSE *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 293 Ga. 647, 748 S. E. 2d 904.

No. 13–8777. DAVID *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 13–8788. PINSON *v.* BERKEBILE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 553 Fed. Appx. 852.

No. 13–8793. MCKENZIE *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 125 So. 3d 906.

No. 13–8796. TURNER *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 622 Pa. 318, 80 A. 3d 754.

No. 13–8799. THOMAS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 736 F. 3d 54.

No. 13–8808. HUNTON *v.* SINCLAIR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 732 F. 3d 1124.

No. 13–8811. KITTS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 13–8826. WATSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 66 A. 3d 542.

No. 13–8829. DEREJE *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied.

No. 13–8834. BOWLING *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 232 W. Va. 529, 753 S. E. 2d 27.

No. 13–8836. HANJUAN JIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 733 F. 3d 718.

No. 13–8838. BUCCI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 13–8839. KERR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 737 F. 3d 33.

No. 13–8845. VALDEZ-CASTENEDA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 545 Fed. Appx. 706.

No. 13–8847. PRINCE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 547 Fed. Appx. 587.

No. 13–8851. FELIX *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 532 Fed. Appx. 714.

No. 13–8852. PENDLETON *v.* BALLARD, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 13–8862. ECCLESTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 545 Fed. Appx. 774.

No. 13–8863. CUEVAS-PEREDA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 546 Fed. Appx. 679.

No. 13–8868. MOOSE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 529 Fed. Appx. 807.

No. 13–8874. ADETILOYE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 716 F. 3d 1030.

No. 13–8882. SOTO-VALDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 13–8885. DEVINE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 13–8889. BYERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 546 Fed. Appx. 325.

No. 13–8890. BIRT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 537 Fed. Appx. 34.

No. 13–8895. MACWILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 213.

No. 13–8897. BOATLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 535.

No. 13–8898. BARNETT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 13–8902. DONOVAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 13–8907. ROYAL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 731 F. 3d 333.

No. 13–8908. BELK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 540 Fed. Appx. 227.

No. 13–8911. JACKSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 736 F. 3d 953.

No. 13–8917. SANDERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 13–8925. JOHNSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 512 Fed. Appx. 648.

No. 13–8927. TORRES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 545 Fed. Appx. 561.

No. 13–8930. MENDOZA-BALLARDO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 13–8931. ALCANTAR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 540 Fed. Appx. 697.

No. 13–8936. TRUJILLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 484.

No. 13–8938. THIEL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 546 Fed. Appx. 801.

No. 13–8944. KYNASTON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 534 Fed. Appx. 624.

No. 13–8945. LYONS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 733 F. 3d 777.

No. 13–8947. BLEWETT ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 3d 647.

No. 13–8948. BELL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 545 Fed. Appx. 179.

No. 13–8951. RILEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 542 Fed. Appx. 290.

No. 13–8954. RILEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 539 Fed. Appx. 760.

No. 13–8962. TUCKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 537 Fed. Appx. 257.

No. 13–8964. SOTO-HERRERA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 13–8969. CABRERA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 13–8973. BENNETT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 548 Fed. Appx. 897.

No. 13–8977. RODRIGUEZ-PENTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 547 Fed. Appx. 738.

No. 13–8979. GARRISON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 517 Fed. Appx. 528.

No. 13–8981. HOPKINS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 13–8982. HAGGARD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 509 Fed. Appx. 558.

No. 13–8983. GARCIA-HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 540 Fed. Appx. 377.

No. 13–8984. FROHLICH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 737 F. 3d 527.

No. 13–8985. GRAHAM *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 531 Fed. Appx. 929.

No. 13–8986. HUNTER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 536 Fed. Appx. 955.

No. 13–8987. FAUSNAUGHT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 13–8988. HERNANDEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 13–9076. ECHARD *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied.

No. 13–9080. GERLACH *v.* BALLARD, WARDEN. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 233 W. Va. 141, 756 S. E. 2d 195.

No. 13–562. ALASKA *v.* JEWELL, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. THE CHIEF

JUSTICE took no part in the consideration or decision of this petition. Reported below: 720 F. 3d 1214.

No. 13–829. ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON ET AL. *v.* SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. D. C. Cir. Certiorari before judgment denied.

No. 13–890. KEMPTER *v.* MICHIGAN BELL TELEPHONE CO., DBA AT&T MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 534 Fed. Appx. 487.

No. 13–891. PRIESTS FOR LIFE ET AL. *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL. C. A. D. C. Cir. Certiorari before judgment denied.

No. 13–8848. ROWLEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 543 Fed. Appx. 104.

No. 13–8850. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 723 F. 3d 510.

No. 13–8888. BOYD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 540 Fed. Appx. 174.

No. 13–8952. RUVALCABA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

Rehearing Denied

No. 13–7339. MAXBERRY *v.* SALLIE MAE EDUCATION LOANS, 571 U. S. 1165;

No. 13–7392. WISEMAN *v.* UNITED STATES, 571 U. S. 1145;

No. 13–7420. ROLLIE *v.* FALK ET AL., 571 U. S. 1146;

No. 13–7517. MILLER *v.* KASHANI ET AL., 571 U. S. 1179;

No. 13–7679. KAMERLING *v.* UNITED STATES, 571 U. S. 1154; and

No. 13–7960. TURNER *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS, 571 U. S. 1217. Petitions for rehearing denied.

April 3, 2014

Certiorari Denied

No. 13–8284 (13A957). Sells *v.* Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to Justice Scalia, and by him referred to the Court, denied. Certiorari denied. Reported below: 536 Fed. Appx. 483.

No. 13–9529 (13A999). Sells *v.* Livingston, Executive Director, Texas Department of Criminal Justice, et al. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to Justice Scalia, and by him referred to the Court, denied. Certiorari denied. Reported below: 561 Fed. Appx. 342.

April 7, 2014

Dismissal Under Rule 46

No. 13–8579. Tierney *v.* Unknown Dentist et al. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46.

Vacated and Remanded on Appeal

No. 12–683. James *v.* Federal Election Commission. Appeal from D. C. D. C. Judgment vacated, and case remanded for further consideration in light of *McCutcheon* v. *Federal Election Comm'n*, *ante*, p. 185. Reported below: 914 F. Supp. 2d 1.

Certiorari Dismissed

No. 13–8404. Larson *v.* Carrasco, Warden, et al. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 13–8556. Jackson *v.* Berger. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 539 Fed. Appx. 188.

No. 13–9088. Beras *v.* United States. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Justice

KAGAN took no part in the consideration or decision of this motion and this petition.

Miscellaneous Orders

No. 13A845. SINHA *v.* U. S. BANK N. A. C. A. 9th Cir., Bkrtcy. App. Panel. Application for stay, addressed to JUSTICE GINSBURG and referred to the Court, denied.

No. D–2758. IN RE DISBARMENT OF VESEL. Disbarment entered. [For earlier order herein, see 571 U. S. 1191.]

No. 13–7664. JONES *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [571 U. S. 1189] denied.

No. 13–7756. DEL GIORNO *v.* WEST VIRGINIA BOARD OF MEDICINE. C. A. 4th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [571 U. S. 1194] denied.

No. 13–8552. TRITZ *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 9th Cir.;
No. 13–9002. GRAY *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir.;
No. 13–9003. GRAY *v.* UNITED STATES. C. A. 7th Cir.;
No. 13–9040. JOHNSON *v.* UNITED STATES. C. A. 9th Cir.; and
No. 13–9077. BING YI CHEN *v.* UNITED STATES. C. A. 2d Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until April 28, 2014, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 13–9120. IN RE BANKS. Petition for writ of habeas corpus denied.

No. 13–961. IN RE WOOD. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 13–719. DART CHEROKEE BASIN OPERATING CO., LLC, ET AL. *v.* OWENS. C. A. 10th Cir. Motion of Chamber of Commerce of the United States of America for leave to file brief as *amicus curiae* granted. Certiorari granted.

Certiorari Denied

No. 13–407. Iowa Right to Life Committee, Inc. *v.* Tooker, Iowa Ethics and Campaign Disclosure Board Executive Director, et al. C. A. 8th Cir. Certiorari denied. Reported below: 717 F. 3d 576.

No. 13–444. Brown et al. *v.* United Airlines, Inc., et al. C. A. 1st Cir. Certiorari denied. Reported below: 720 F. 3d 60.

No. 13–454. Quantum Entertainment Ltd. *v.* Department of the Interior, Bureau of Indian Affairs. C. A. D. C. Cir. Certiorari denied. Reported below: 714 F. 3d 1338.

No. 13–585. Elane Photography, LLC *v.* Willock. Sup. Ct. N. M. Certiorari denied. Reported below: 2013–NMSC–040, 309 P. 3d 53.

No. 13–722. Walia *v.* Dewan et al. C. A. 4th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 240.

No. 13–780. Bower, on His Own Behalf and as Guardian and Legal Custodian of His Minor Children, N et al. *v.* EgyptAir Airlines. C. A. 1st Cir. Certiorari denied. Reported below: 731 F. 3d 85.

No. 13–793. Fuhr *v.* Trinity Health Corp. et al. Sup. Ct. Mich. Certiorari denied. Reported below: 495 Mich. 869, 837 N. W. 2d 275.

No. 13–813. Tyrues *v.* Shinseki, Secretary of Veterans Affairs. C. A. Fed. Cir. Certiorari denied. Reported below: 732 F. 3d 1351.

No. 13–887. Allen et al. *v.* Monsanto Co. et al. Sup. Ct. App. W. Va. Certiorari denied.

No. 13–905. Haviland et al. *v.* Metropolitan Life Insurance Co. C. A. 6th Cir. Certiorari denied. Reported below: 730 F. 3d 563.

No. 13–910. Hussain *v.* Frost. C. A. 3d Cir. Certiorari denied. Reported below: 532 Fed. Appx. 196.

No. 13–920. Huron Mountain Club *v.* Army Corps of Engineers et al. C. A. 6th Cir. Certiorari denied. Reported below: 545 Fed. Appx. 390.

No. 13–970. BLAIR *v.* RUTHERFORD COUNTY BOARD OF EDUCATION ET AL. Ct. App. Tenn. Certiorari denied.

No. 13–997. CITY OF CHICAGO, ILLINOIS, ET AL. *v.* JIMENEZ. C. A. 7th Cir. Certiorari denied. Reported below: 732 F. 3d 710.

No. 13–1017. NAGLY *v.* MASSACHUSETTS DEPARTMENT OF CHILDREN AND FAMILIES. App. Ct. Mass. Certiorari denied. Reported below: 84 Mass. App. 1119, 997 N. E. 2d 1220.

No. 13–1028. BROOKS *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 838 N. W. 2d 563.

No. 13–1050. PETTEY ET UX. *v.* CITIMORTGAGE, INC. C. A. 6th Cir. Certiorari denied. Reported below: 538 Fed. Appx. 708.

No. 13–1072. BABIY ET AL. *v.* CONTINENTAL BANK. Super. Ct. Pa. Certiorari denied. Reported below: 64 A. 3d 30–31.

No. 13–7327. CABANTAC, AKA REYES *v.* HOLDER, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 736 F. 3d 787.

No. 13–7574. MANUEL LOPEZ *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 56 Cal. 4th 1028, 301 P. 3d 1177.

No. 13–7896. BELL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 415 S. W. 3d 278.

No. 13–7929. GOSSAGE *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 513 Fed. Appx. 981.

No. 13–8038. SHARP *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied.

No. 13–8094. LAMBRIX *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 124 So. 3d 890.

No. 13–8434. TAYLOR *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 13–8435. ZINK ET AL. *v.* LOMBARDI, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS. C. A. 8th Cir. Certiorari denied. Reported below: 741 F. 3d 888.

No. 13–8451. RICHARDS *v.* CENTRE COUNTY TRANSPORTATION AUTHORITY. C. A. 3d Cir. Certiorari denied. Reported below: 540 Fed. Appx. 83.

No. 13–8455. MORTIMER *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 100 So. 3d 99.

No. 13–8456. BURRELL *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 13–8461. DAVID *v.* LACKNER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–8462. J. E. R. *v.* LEHIGH COUNTY, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 534 Fed. Appx. 104.

No. 13–8463. GOLDEN *v.* GOLDEN. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 13–8468. BUTLER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 13–8472. WHITMORE *v.* BEARD, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied.

No. 13–8473. LYONS *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 622 Pa. 91, 79 A. 3d 1053.

No. 13–8479. MONTALTO *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 127 So. 3d 1115.

No. 13–8493. PIACITELLI *v.* FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 13–8498. PENA SOTO *v.* LOPEZ, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–8499. POPE *v.* WALKER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–8501. ROBERTSON *v.* SMITH, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 13–8504. SIMMONS *v.* SURRY COUNTY, NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 546 Fed. Appx. 323.

No. 13–8511. TWITTY *v.* ZATECKY, SUPERINTENDENT, PENDLETON CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 13–8513. DOSS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 13–8516. SEGRAVES *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 64 A. 3d 29.

No. 13–8520. SMITH *v.* DIAZ, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–8521. NETTING *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 129 So. 3d 1069.

No. 13–8532. RUFF *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 13–8534. CASTILLE *v.* FIRST TRANSIT, INC. C. A. 10th Cir. Certiorari denied.

No. 13–8535. LOVE *v.* WILSON, SUPERINTENDENT, INDIANA STATE PRISON. C. A. 7th Cir. Certiorari denied.

No. 13–8537. TOWNSEND *v.* ACCOMACK COUNTY, VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 540 Fed. Appx. 207.

No. 13–8538. JONES *v.* GRAZIANO ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 541 Fed. Appx. 325.

No. 13–8541. PAYNE *v.* SHELDON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 13–8551. TAYLOR *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 13–8557. KUMVACHIRAPITAG *v.* GATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 71.

No. 13–8568. COOK *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 287 Neb. xxi.

No. 13–8631. LUCAS *v.* YOUNG, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 517 Fed. Appx. 207.

No. 13–8659. CRAMER *v.* BICKELL, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 13–8666. DIXON *v.* OHIO. Ct. App. Ohio, 7th App. Dist., Mahoning County. Certiorari denied. Reported below: 2013-Ohio-2951.

No. 13–8667. DAVENPORT *v.* PHIPPS, JUDGE, ET AL. C. A. 11th Cir. Certiorari denied.

No. 13–8685. MCFARLANE *v.* HOLDER, ATTORNEY GENERAL. C. A. 2d Cir. Certiorari denied.

No. 13–8702. LARSGARD *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 13–8714. BROWN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2013 IL App (1st) 091009, 988 N. E. 2d 1063.

No. 13–8720. CASTANEIRA *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 321 Ga. App. 418, 740 S. E. 2d 400.

No. 13–8746. GREEN *v.* GAP, INC. C. A. 4th Cir. Certiorari denied. Reported below: 546 Fed. Appx. 228.

No. 13–8773. COOPER *v.* TEXAS. County Ct. at Law No. 2, Collin County, Tex. Certiorari denied.

No. 13–8806. DELARM *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 13–8813. KELLEY *v.* HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 13–8820. STOLLAR *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 624 Pa. 107, 84 A. 3d 635.

No. 13–8825. BODANA *v.* CAGLE. C. A. 11th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 902.

No. 13–8858. SURRATT *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 143 So. 3d 834.

No. 13–8871. JERRY *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 133 So. 3d 526.

No. 13–8914. WASHINGTON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2013 IL App (1st) 111152–U.

No. 13–8932. HUMPHRIES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 539 Fed. Appx. 782.

No. 13–8967. DIXON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 13–8989. DOBIE, AKA PARKER, AKA WALLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 542 Fed. Appx. 257.

No. 13–8995. MONZON-MUNOZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 550 Fed. Appx. 428.

No. 13–8996. GRAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 548 Fed. Appx. 163.

No. 13–8999. CAVEZZA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 13–9005. RUSH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 550 Fed. Appx. 427.

No. 13–9006. DE LA TORRE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 543 Fed. Appx. 827.

No. 13–9008. HODGE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 729 F. 3d 717.

No. 13–9009. HODGES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 13–9014. BERNARD, AKA BENARD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 542 Fed. Appx. 577.

No. 13–9016. HOPSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 13–9017. FUNES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 13–9018. CURTIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 13–9020. CAMACHO-CORONA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 13–9022. TORRES-ALFARO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 13–9029. BOGGAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 550 Fed. Appx. 731.

No. 13–9030. ALCON-MATEO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 538 Fed. Appx. 776.

No. 13–9031. DANIELS *v.* JARVIS, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 538 Fed. Appx. 850.

No. 13–9033. HARMES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 547 Fed. Appx. 500.

No. 13–9034. FRANKLIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 545 Fed. Appx. 243.

No. 13–9037. VENTURA FUENTES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 548 Fed. Appx. 153.

No. 13–9039. KIDD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 13–9043. ROSADO-MARQUEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 13–9050. ZHEN GUAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 535 Fed. Appx. 47.

No. 13–9052. OKECHUKWU IRUKE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 663.

No. 13–9053. HOOVER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 548 Fed. Appx. 300.

No. 13–9056. BURROUGHS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 13–9057. BALL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 541 Fed. Appx. 556.

No. 13–9060. WALTERS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 545 Fed. Appx. 564.

No. 13–9061. TOSTADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 548 Fed. Appx. 170.

No. 13–9064. EFFRON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 13–9079. PERRIN, AKA HILL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 694.

No. 13–9101. BROWN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 934 A. 2d 930.

No. 13–9102. BETHEA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 547 Fed. Appx. 316.

No. 13–9104. SCOTT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 731 F. 3d 659.

No. 13–9105. RUTHERFORD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 548 Fed. Appx. 601.

No. 13–9106. RUNYAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 549 Fed. Appx. 906.

No. 13–892. SEPULVADO *v.* JINDAL, GOVERNOR OF LOUISIANA, ET AL. C. A. 5th Cir. Motions of Allen S. Keller, M. D., et al. and Bar Human Rights Committee of England and Wales for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 729 F. 3d 413.

No. 13–912. DONAT, WARDEN, ET AL. *v.* HONEYCUTT. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 535 Fed. Appx. 624.

No. 13–931. KLAYMAN ET AL. *v.* OBAMA, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari before judgment denied.

No. 13–948. MARTIN *v.* SUPREME COURT OF NEW JERSEY. Sup. Ct. N. J. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

Rehearing Denied

No. 13–7107. PASKAUSKIENE *v.* ALCOR PETROLAB, LLP, 571 U. S. 1138;

No. 13–7380. SEALS *v.* MITCHELL ET AL., 571 U. S. 1166;
No. 13–7432. ASHRAF *v.* UNITED STATES, 571 U. S. 1146;
No. 13–7513. SAUNDERS, AKA MARSH *v.* MISSISSIPPI, 571 U. S. 1179;
No. 13–7634. ALFORD *v.* PENNSYLVANIA BOARD OF PROBATION AND PAROLE ET AL., 571 U. S. 1208;
No. 13–8191. CAMPBELL *v.* UNITED STATES, 571 U. S. 1225; and
No. 13–8316. IN RE THOMPSON, 571 U. S. 1195. Petitions for rehearing denied.

No. 13–6909. TRICE *v.* ALLSTATE INSURANCE CO. ET AL., 571 U. S. 1177. Motion of Dante' Trice to be substituted as a party granted. Petition for rehearing denied.

No. 13–7509. GRMUSA *v.* PNC BANK, 571 U. S. 1185. Petition for rehearing denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

No. 13–7937. IN RE WARE, 571 U. S. 1195. Petition for rehearing denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

APRIL 15, 2014

Dismissal Under Rule 46

No. 13–9275. SHANNON *v.* DOANE MARKETING RESEARCH ET AL. C. A. 8th Cir. Certiorari dismissed under this Court's Rule 46.1.

APRIL 16, 2014

Miscellaneous Order

No. 13–9715 (13A1036). LUIS VILLEGAS *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. JUSTICE GINSBURG, JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN would grant the application for stay of execution.

APRIL 18, 2014

Miscellaneous Orders

No. 12–761. POM WONDERFUL LLC *v.* COCA-COLA CO. C. A. 9th Cir. [Certiorari granted, 571 U. S. 1118.] Motion of the So-

licitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. JUSTICE BREYER took no part in the consideration or decision of this motion

No. 12–786. LIMELIGHT NETWORKS, INC. *v.* AKAMAI TECHNOLOGIES, INC., ET AL. C. A. Fed. Cir. [Certiorari granted, 571 U. S. 1118.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 12–842. REPUBLIC OF ARGENTINA *v.* NML CAPITAL, LTD. C. A. 2d Cir. [Certiorari granted, 571 U. S. 1118.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 13–132. RILEY *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 1. [Certiorari granted, 571 U. S. 1161.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 13–193. SUSAN B. ANTHONY LIST ET AL. *v.* DRIEHAUS ET AL. C. A. 6th Cir. [Certiorari granted, 571 U. S. 1118.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 13–339. CTS CORP. *v.* WALDBURGER ET AL. C. A. 4th Cir. [Certiorari granted, 571 U. S. 1118.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 13–369. NAUTILUS, INC. *v.* BIOSIG INSTRUMENTS, INC. C. A. Fed. Cir. [Certiorari granted, 571 U. S. 1118.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 13–461. AMERICAN BROADCASTING COS., INC., ET AL. *v.* AEREO, INC., FKA BAMBOOM LABS, INC. C. A. 2d Cir. [Certiorari granted, 571 U. S. 1118.] Motion of the Deputy Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 13–483. LANE *v.* FRANKS ET AL. C. A. 11th Cir. [Certiorari granted, 571 U. S. 1161.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae*, for divided argument, and for allocation of argument time granted.

April 21, 2014

Certiorari Granted—Vacated and Remanded

No. 13–796. LG Electronics, Inc., et al. *v.* InterDigital Communications, LLC, et al. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded with instructions to dismiss the case as moot. See *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950). Reported below: 718 F. 3d 1336.

No. 13–7264. Ajoku *v.* United States. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the confession of error by the Solicitor General in his brief for the United States filed on March 10, 2014. Justice Scalia would deny the petition for writ of certiorari. Reported below: 718 F. 3d 882.

No. 13–7357. Russell *v.* United States. C. A. 1st Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the confession of error by the Solicitor General in his brief for the United States filed on March 10, 2014. Justice Scalia would deny the petition for writ of certiorari. Reported below: 728 F. 3d 23.

No. 13–7621. Willan *v.* Ohio. Sup. Ct. Ohio. Reported below: 136 Ohio St. 3d 222, 2013-Ohio-2405, 994 N. E. 2d 400; and

No. 13–7916. Greer *v.* United States. C. A. 3d Cir. Reported below: 527 Fed. Appx. 225. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Alleyne* v. *United States*, 570 U. S. 99 (2013).

No. 13–7698. Shaeffer *v.* United States. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the position asserted by the Solicitor General in his brief for the United States filed on March 10, 2014.

Certiorari Dismissed

No. 13–8590. Nixon *v.* Abbott, Attorney General of Texas, et al. Ct. App. Tex., 5th Dist.; and

No. 13–8591. NIXON *v.* GOLDMAN SACHS MORTGAGE CORP. C. A. 5th Cir. Motions of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 13–8620. JONES *v.* LEMKE, WARDEN. App. Ct. Ill., 4th Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 2013 IL App (4th) 120888–U.

No. 13–8636. JONES *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 129 So. 3d 1078.

No. 13–8661. THOMAS *v.* CHESTER, WARDEN. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*). Reported below: 548 Fed. Appx. 508.

No. 13–8752. ELLIS *v.* BENEDETTI ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

No. 13–8903. DARBY *v.* REDMANN, WARDEN. C. A. 8th Cir.; and

No. 13–8957. DARBY *v.* REDMANN, WARDEN, ET AL. C. A. 8th Cir. Motions of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 13M96. BENAVIDES *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS;

No. 13M104. CHAUDHRY *v.* JOHNSON, SECRETARY OF HOMELAND SECURITY, ET AL.; and

No. 13M108. POTTER *v.* FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION ET AL. Motions for leave to proceed as veterans denied.

No. 13M97. WALLS *v.* DELAWARE;

No. 13M98. CORRIGAN *v.* STELLAR MANAGEMENT, LLC, ET AL.;

No. 13M100. SCHWEDER *v.* ARROYO ET AL.;

No. 13M101. WOODARD *v.* TEXAS SOUTHERN UNIVERSITY;

No. 13M102. STAUB *v.* CARNIVALE;

No. 13M105. GARRIGA *v.* HACKBARTH, DISTRICT DIRECTOR OF KENDALL FIELD OFFICE OF CITIZENSHIP AND IMMIGRATION SERVICES;

No. 13M106. DRAKE *v.* HEDGPETH, WARDEN; and

No. 13M107. ADAMS *v.* FEDEX GROUND PACKAGE SYSTEM, INC., ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 13M99. ARAUJO DE ACEVEDO *v.* HEALTHCARE SERVICES GROUP, INC., ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 13M103. E. M. B. R. *v.* S. M. ET UX. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted.

No. 13–1158. VOGT *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON. C. A. 9th Cir. Motion of petitioner to expedite consideration of petition for writ of certiorari and for leave to file affidavit under seal denied.

No. 13–7938. TATE *v.* FLORIDA. C. A. 11th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [571 U. S. 1190] denied.

No. 13–8168. CHAN LAI *v.* IPSON ET AL. C. A. 9th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [571 U. S. 1190] denied.

No. 13–8197. SOLAN *v.* ZICKEFOOSE. C. A. 3d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [571 U. S. 1235] denied.

No. 13–8341. TASSONE *v.* FOXWOODS RESORT CASINO ET AL. C. A. 2d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [571 U. S. 1236] denied.

No. 13–8691. BAILEY *v.* MORENO ET AL. C. A. 4th Cir.;

No. 13–8709. BEACH-MATHURA *v.* MIAMI-DADE COUNTY PUBLIC SCHOOLS ET AL. Sup. Ct. Fla.;

No. 13–8804. ELLIS *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir.; and

No. 13–8980. HOLMES *v.* TENDERLOIN HOUSING CLINIC, INC., ET AL. C. A. 9th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until May 12, 2014, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 13–1121. IN RE FARLEY;

No. 13–9371. IN RE ADAMS;

No. 13–9415. IN RE FISHER; and

No. 13–9445. IN RE HERNANDEZ. Petitions for writs of habeas corpus denied.

No. 13–9388. IN RE WHITE. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8.

No. 13–960. IN RE TAYLOR. Petition for writ of mandamus denied.

Certiorari Granted

No. 13–604. HEIEN *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari granted. Reported below: 367 N. C. 163, 749 S. E. 2d 278.

No. 13–628. ZIVOTOFSKY, BY HIS PARENTS AND GUARDIANS, ZIVOTOFSKY ET UX. *v.* KERRY, SECRETARY OF STATE. C. A. D. C. Cir. Certiorari granted. Reported below: 725 F. 3d 197.

No. 13–7120. JOHNSON *v.* UNITED STATES. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 526 Fed. Appx. 708.

Certiorari Denied

No. 13–645. MACH MINING, LLC *v.* SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 728 F. 3d 643.

No. 13–674. MOORE, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HART, DECEASED, ET AL. *v.* HAWKER BEECHCRAFT CORP. Sup. Ct. Del. Certiorari denied. Reported below: 74 A. 3d 654.

No. 13–701. YAMAN *v.* YAMAN. C. A. 1st Cir. Certiorari denied. Reported below: 730 F. 3d 1.

No. 13–704. HERDEN ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 726 F. 3d 1042.

No. 13–744. NATALE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 719 F. 3d 719.

No. 13–806. ARIZONA ET AL. *v.* VALLE DEL SOL, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 732 F. 3d 1006.

No. 13–807. BROWN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 726 F. 3d 993.

No. 13–815. SIMMONS ET AL. *v.* SABINE RIVER AUTHORITY OF LOUISIANA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 732 F. 3d 469.

No. 13–841. SCOTT, GOVERNOR OF FLORIDA *v.* AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES COUNCIL 79 ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 717 F. 3d 851.

No. 13–924. GARCIA *v.* PALMER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 536 Fed. Appx. 511.

No. 13–925. SLATER *v.* DIRECTOR, NEW JERSEY DIVISION OF TAXATION. Super. Ct. N. J., App. Div. Certiorari denied.

No. 13–929. HAYWOOD *v.* SAINT MICHAEL'S COLLEGE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 536 Fed. Appx. 123.

No. 13–942. LASKIN ET AL. *v.* SIEGEL, INDIVIDUALLY AND AS TRUSTEE OF THE PHILLIP P. SIEGEL REVOCABLE TRUST DATED

August 28, 1998, and as Executor of the Estate of Siegel, et al. C. A. 7th Cir. Certiorari denied. Reported below: 728 F. 3d 731.

No. 13–943. Kornman et al. *v.* Faulkner, as Trustee of the Heritage Creditors Trust. C. A. 5th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 512.

No. 13–945. Smith *v.* Rowell. Ct. App. Ohio, 10th App. Dist., Franklin County. Certiorari denied. Reported below: 2013-Ohio-2216.

No. 13–957. Parris *v.* Cummins Power South, LLC. Sup. Ct. Fla. Certiorari denied. Reported below: 130 So. 3d 693.

No. 13–958. Mitrano *v.* JPMorgan Chase Bank et al. C. A. 4th Cir. Certiorari denied.

No. 13–969. Adeyemo et al. *v.* Kerry, Secretary of State, et al. C. A. 4th Cir. Certiorari denied. Reported below: 546 Fed. Appx. 187.

No. 13–971. U. S. Bank Trust N. A. *v.* AMR Corp., aka AMR, et al. C. A. 2d Cir. Certiorari denied. Reported below: 730 F. 3d 88.

No. 13–974. LeMasters *v.* Ohio. Ct. App. Ohio, 12th App. Dist., Madison County. Certiorari denied. Reported below: 2013-Ohio-2969.

No. 13–987. Thomason *v.* Bagley et al. Sup. Ct. Idaho. Certiorari denied. Reported below: 155 Idaho 193, 307 P. 3d 1219.

No. 13–998. Hammond *v.* Kmart Corp. et al. C. A. 1st Cir. Certiorari denied. Reported below: 733 F. 3d 360.

No. 13–1022. Johnston & Johnston *v.* Conseco Life Insurance Co. C. A. 5th Cir. Certiorari denied. Reported below: 732 F. 3d 555.

No. 13–1027. Root *v.* Fairfax County, Virginia. C. A. 4th Cir. Certiorari denied. Reported below: 541 Fed. Appx. 333.

No. 13–1029. Estate of C. A., a Minor Child, Deceased, et al. *v.* Castro et al. C. A. 5th Cir. Certiorari denied. Reported below: 547 Fed. Appx. 621.

No. 13–1048. KING *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 536 Fed. Appx. 358.

No. 13–1078. BOLUS *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 75 A. 3d 552.

No. 13–1081. MARINO *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 367 N. C. 263, 749 S. E. 2d 889.

No. 13–1085. COLE *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 126 So. 3d 880.

No. 13–1090. ONEBEACON INSURANCE CO. ET AL. *v.* PLANT INSULATION CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 734 F. 3d 900.

No. 13–1094. HOBBS *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 352.

No. 13–1097. DAUENHAUER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 533 Fed. Appx. 785.

No. 13–1108. MARTSOLF *v.* CHRISTIE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 552 Fed. Appx. 149.

No. 13–1114. MCCLAMMA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 548 Fed. Appx. 598.

No. 13–1122. BEVERLY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 536 Fed. Appx. 1004.

No. 13–1128. TOLLIVER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 730 F. 3d 1216.

No. 13–1132. NICKERSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 731 F. 3d 1009.

No. 13–1151. THOMAS ET AL. *v.* PIPPIN. C. A. Fed. Cir. Certiorari denied. Reported below: 534 Fed. Appx. 992.

No. 13–7016. JERNIGAN *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 521 Fed. Appx. 931.

No. 13–7047. CASTILLO *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 722 F. 3d 1281.

No. 13–7399. QUINN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 728 F. 3d 243.

No. 13–7429. AVENAMO MORALES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 535 Fed. Appx. 781.

No. 13–7521. VALDAVINOS-TORRES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 704 F. 3d 679.

No. 13–7709. TODD *v.* HEALEY. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 2013 IL App (2d) 120931–U.

No. 13–7723. ABERNATHY *v.* COZZA-RHODES, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 713 F. 3d 538.

No. 13–7769. SIMARD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 731 F. 3d 156.

No. 13–7773. RICE *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 13–7789. BUSTOS *v.* RUBERA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 535 Fed. Appx. 553.

No. 13–7875. KEHOE, AKA COLLINS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 712 F. 3d 1251.

No. 13–8111. MILLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 13–8203. BERRIOS-RAMIREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 540 Fed. Appx. 456.

No. 13–8306. TAYLOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 539 Fed. Appx. 635.

No. 13–8318. MARTINEZ-CANADA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 541 Fed. Appx. 471.

No. 13–8325. HERNANDEZ-HERNANDEZ *v.* UNITED STATES (Reported below: 543 Fed. Appx. 385); MONTES DE OCA-BACA *v.* UNITED STATES (543 Fed. Appx. 390); OCAMPO-BARRERA *v.* UNITED STATES (543 Fed. Appx. 396); RICO-TOVAR *v.* UNITED STATES (543 Fed. Appx. 389); and PABLO SANCHEZ *v.* UNITED STATES (548 Fed. Appx. 318). C. A. 5th Cir. Certiorari denied.

No. 13–8446. ROSIOREANU *v.* CITY OF NEW YORK, NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 526 Fed. Appx. 118.

No. 13–8464. EMBODY *v.* COOPER. Ct. App. Tenn. Certiorari denied.

No. 13–8545. CROMARTIE *v.* CHATMAN, WARDEN. Super. Ct. Butts County, Ga. Certiorari denied.

No. 13–8548. BUTLER *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 2012–2359 (La. 5/17/13), 117 So. 3d 87.

No. 13–8550. SARTAIN *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: 373 Mont. 443, 318 P. 3d 174.

No. 13–8560. VANPELT *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 2013 IL App (4th) 110600–U.

No. 13–8564. SPAULDING *v.* POITIER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 548 Fed. Appx. 587.

No. 13–8572. GALZINSKI *v.* MCDONALD, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 520 Fed. Appx. 634.

No. 13–8573. SUTTON *v.* CARPENTER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 13–8575. BONTY *v.* RAMSEY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 519 Fed. Appx. 501.

No. 13–8576. FEINGOLD *v.* DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA. C. A. 11th Cir. Certiorari denied. Reported below: 730 F. 3d 1268.

No. 13–8580. TODD *v.* RUSSELL, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 13–8583. WORTHY *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 13–8595. GAINES *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 13–8599. REQUENA *v.* CLINE. Ct. App. Kan. Certiorari denied. Reported below: 48 Kan. App. 2d xxxi, 298 P. 3d 1139.

No. 13–8602. WILLIAMS *v.* WASHINGTON DEPARTMENT OF CORRECTIONS ET AL. C. A. 9th Cir. Certiorari denied.

No. 13–8603. WILKIN *v.* DENNEY, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 13–8607. WHEELER *v.* JOHNSON, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 539 Fed. Appx. 819.

No. 13–8609. SANCHEZ *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 2013 IL App (3d) 120046–U.

No. 13–8615. MORGAN *v.* JAVOIS. C. A. 8th Cir. Certiorari denied. Reported below: 744 F. 3d 535.

No. 13–8616. GLOVER *v.* TEXAS. Ct. App. Tex., 7th Dist. Certiorari denied. Reported below: 406 S. W. 3d 343.

No. 13–8619. HOLBROOK *v.* BALLARD, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 539 Fed. Appx. 148.

No. 13–8623. SHONG-CHING TONG *v.* CHO ET AL. Ct. App. Cal., 2d App. Dist., Div. 5. Certiorari denied.

No. 13–8632. TILLMAN *v.* LOUISIANA. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 47,921 (La. App. 2 Cir. 2/27/13), 110 So. 3d 1248.

No. 13–8633. TUCOVIC *v.* WAL-MART STORES EAST, L. P., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 534 Fed. Appx. 562.

No. 13–8635. O'BLOCK *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 128 So. 3d 807.

No. 13–8638. MANEY *v.* NEELY, SUPERINTENDENT, PIEDMONT CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 536 Fed. Appx. 323.

No. 13–8639. MOLINA *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 13–8643. SMITH *v.* LEWIS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 535 Fed. Appx. 598.

No. 13–8647. PELON MACIEL *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 57 Cal. 4th 482, 304 P. 3d 983.

No. 13–8650. ALMANZAR *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 13–8652. AMADO *v.* PARAMO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–8653. BOLDEN *v.* BARNES. C. A. 7th Cir. Certiorari denied.

No. 13–8654. PATKINS *v.* SUBIA, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–8656. SCOTT *v.* COOPER ET AL. C. A. 10th Cir. Certiorari denied.

No. 13–8658. LANDRITH *v.* BANK OF NEW YORK MELLON ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 531 Fed. Appx. 944.

No. 13–8660. WILLIAMS *v.* RUSSELL, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 13–8663. CARR *v.* ALLIED WASTE SYSTEMS OF ALAMEDA COUNTY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 516 Fed. Appx. 677.

No. 13–8669. WHITNEY *v.* BERGHUIS, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 13–8670. T. E. *v.* FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 127 So. 3d 518.

No. 13–8671. BOUDREAUX *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 13–8674. BROWNLEE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 13–8675. CARAWAY *v.* PARAMO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–8676. DORSEY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 13–8677. WILLIAMS *v.* VENTURA COUNTY, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 13–8678. WHITING *v.* BONAZZA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 545 Fed. Appx. 126.

No. 13–8679. DRIESSEN *v.* HOME LOAN STATE BANK. C. A. 10th Cir. Certiorari denied. Reported below: 550 Fed. Appx. 677.

No. 13–8684. OWENS *v.* BOWERSOX, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 13–8686. NEALY *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 13–8689. DRAKE *v.* HUBBARD, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 13–8692. CEARA *v.* DIRUSSO. C. A. 2d Cir. Certiorari denied.

No. 13–8694. BRASHEARS *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 13–8698. SAMHA *v.* LAGANA, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 13–8713. ROSS *v.* SCHWARZENEGGER, FORMER GOVERNOR OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 536 Fed. Appx. 689.

No. 13–8730. SIMPSON *v.* HAMILTON COUNTY BOARD OF COMMISSIONERS ET AL. C. A. 6th Cir. Certiorari denied.

No. 13–8732. GOFORTH ET AL. *v.* DEPARTMENT OF EDUCATION. C. A. 3d Cir. Certiorari denied. Reported below: 532 Fed. Appx. 98.

No. 13–8774. CHAVEZ *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 2013 IL App (2d) 110785–U.

No. 13–8776. CLARK *v.* MACLAREN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 13–8782. BROWNE *v.* BAKER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 545 Fed. Appx. 674.

No. 13–8795. COLESON *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 13–8807. WILSON *v.* CHANDLER, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 13–8816. BURRELL *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 13–8818. TATE *v.* HETZEL, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 13–8819. MCKEITHER *v.* FOLINO ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 540 Fed. Appx. 76.

No. 13–8823. STOGNER *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 13–8828. DAVIS *v.* CAVAZOS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 13–8831. CARD *v.* KEFFER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 543 Fed. Appx. 377.

No. 13–8833. WUHOLO *v.* PREMO, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied.

No. 13–8840. VICTORINO *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 127 So. 3d 478.

No. 13–8841. WEAVER *v.* SHERMAN, ACTING WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 540 Fed. Appx. 668.

No. 13–8843. THOMAS *v.* NELMS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 546 Fed. Appx. 275.

No. 13–8846. PRINCE *v.* CHOW, CHAPTER 7 TRUSTEE. C. A. 5th Cir. Certiorari denied. Reported below: 548 Fed. Appx. 262.

No. 13–8861. COOPER *v.* SANTIAGO, ADMINISTRATOR, NEW JERSEY STATE PRISON. C. A. 3d Cir. Certiorari denied.

No. 13–8864. CONVILLE *v.* DUNCAN, SECRETARY OF EDUCATION. C. A. 8th Cir. Certiorari denied. Reported below: 513 Fed. Appx. 636.

No. 13–8869. LOCKHART *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 2013 IL App (2d) 110344–U.

No. 13–8873. BOOSE *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 13–8875. BRADFORD *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 13–8892. AVENDANO JOVEL *v.* HOLDER, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied.

No. 13–8894. JACKSON *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 13–8896. QUILLEN *v.* OHIO. Ct. App. Ohio, 12th App. Dist., Butler County. Certiorari denied. Reported below: 2013-Ohio-3672.

No. 13–8904. CAIN *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 495 Mich. 874, 838 N. W. 2d 150.

No. 13–8909. TUFT *v.* TEXAS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 488.

No. 13–8910. PRICE *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 548 Fed. Appx. 573.

No. 13–8916. MARTIN *v.* MACOMBER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–8920. DIEKEMPER *v.* EGGMAN, TRUSTEE. C. A. 7th Cir. Certiorari denied.

No. 13–8926. REED *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 2013 IL App (2d) 120248–U.

No. 13–8933. ROHWEDER *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 130 Nev. 1237.

No. 13–8935. WELCH *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 13–8937. VINCENT *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied.

No. 13–8942. MARTINEZ *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 2013 IL App (4th) 120337–U.

No. 13–8949. SCARBER *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 13–8965. JONES *v.* PFISTER, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 13–8966. JOHNSON *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 13–8968. DURAN *v.* BRAVO, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 531 Fed. Appx. 923.

No. 13–8971. CASTNER *v.* OHIO. Ct. App. Ohio, 9th App. Dist., Summit County. Certiorari denied.

No. 13–8972. CASSIDY *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 119 So. 3d 455.

No. 13–8991. EVANS *v.* MISSISSIPPI. Ct. App. Miss. Certiorari denied. Reported below: 114 So. 3d 778.

No. 13–8992. MARTIN CHAVEZ *v.* TRANI, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 534 Fed. Appx. 799.

No. 13–8997. SHEARER *v.* WETZEL, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 13–8998. PHILLIPS *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 286 Neb. 974, 840 N. W. 2d 500.

No. 13–9010. GARCIA GUTIERREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 13–9015. NEWBURY *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied.

No. 13–9025. GRAJEDA *v.* SCRIBNER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 541 Fed. Appx. 776.

No. 13–9027. WHITLEY *v.* NORTH CAROLINA ET AL. Sup. Ct. N. C. Certiorari denied. Reported below: 367 N. C. 270, 752 S. E. 2d 497.

No. 13–9032. HERNANDEZ *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 22 N. Y. 3d 972, 1 N. E. 3d 785.

No. 13–9035. FOSTON *v.* LAW, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 545 Fed. Appx. 656.

No. 13–9036. HELM *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 146 So. 3d 33.

No. 13–9049. KINZLE *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 174 Wash. App. 1073.

No. 13–9059. XUESHI WANG *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 3. Certiorari denied.

No. 13–9063. CONOVER *v.* FISHER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT SMITHFIELD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 13–9065. DIRDEN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 13–9082. HUNEYCUTT *v.* NEELY, SUPERINTENDENT, PIEDMONT CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 539 Fed. Appx. 151.

No. 13–9087. TREJO-RUIZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 52.

No. 13–9094. DUNN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 549 Fed. Appx. 397.

No. 13–9095. CORTEZ-VELEZ, AKA CORTEZ-BELEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 548 Fed. Appx. 242.

No. 13–9100. BLACK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 737 F. 3d 280.

No. 13–9103. YAHSI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 549 Fed. Appx. 83.

No. 13–9107. VALENTINE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 13–9108. TRIMINIO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 538 Fed. Appx. 232.

No. 13–9109. THOMPSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 548 Fed. Appx. 200.

No. 13–9110. WARREN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 13–9111. WALLACE *v.* FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 13–9112. PAYNE *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 82 A. 3d 730.

No. 13–9119. BLADE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 13–9122. MITCHELL *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 80 A. 3d 962.

No. 13–9125. ROLAND *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 13–9131. NUNES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 435 Fed. Appx. 328.

No. 13–9133. WHEELER *v.* CROSS, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 13–9135. CALDWELL *v.* PHELPS, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 13–9136. OLIVER *v.* HARRINGTON. C. A. 7th Cir. Certiorari denied.

No. 13–9137. DARBY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 549 Fed. Appx. 499.

No. 13–9140. BROADY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 13–9144. HILL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 737 F. 3d 683.

No. 13–9146. COLBERT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 542 Fed. Appx. 700.

No. 13–9147. SANTOS CASTRO, AKA CASTRO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 546 Fed. Appx. 652.

No. 13–9149. MEDEARIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 548 Fed. Appx. 220.

No. 13–9153. DAVALOS TRUEBA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 13–9154. YANDAL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 13–9158. TONEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 13–9160. SANTANA-GOMEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 547 Fed. Appx. 904.

No. 13–9161. FORSTER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 549 Fed. Appx. 757.

No. 13–9162. GUY *v.* EVANS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–9163. FONSECA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 540 Fed. Appx. 921.

No. 13–9164. HUBBARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 553 Fed. Appx. 330.

No. 13–9165. HUART *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 735 F. 3d 972.

No. 13–9166. GOMEZ-LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 545 Fed. Appx. 708.

No. 13–9167. GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 545 Fed. Appx. 703.

No. 13–9168. GOMEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 725 F. 3d 1121.

No. 13–9169. FLORES-LOPEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 936.

No. 13–9171. RIOS GOMEZ, AKA SEALED 19 *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 548 Fed. Appx. 221.

No. 13–9172. HAMILTON *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 82 A. 3d 723.

No. 13–9173. HUNTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 735 F. 3d 172.

No. 13–9174. HERNANDEZ-CARNALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 547 Fed. Appx. 597.

No. 13–9177. JOHNSON *v.* DUFFY, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 542 Fed. Appx. 615.

No. 13–9178. LEONARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 547 Fed. Appx. 325.

No. 13–9181. ROBINSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 13–9182. PORTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 13–9183. ORTIZ-MIRANDA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 13–9184. ADAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 739 F. 3d 873.

No. 13–9187. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 214.

No. 13–9190. MOJICA-RIVERA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 13–9193. SHEFFIELD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 549 Fed. Appx. 186.

No. 13–9203. CHAPMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 541 Fed. Appx. 725.

No. 13–9204. WILLIAMS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 526 Fed. Appx. 29.

No. 13–9206. ONEIL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 542 Fed. Appx. 225.

No. 13–9207. LANE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 556 Fed. Appx. 43.

No. 13–9209. LOPEZ *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 85 A. 3d 104.

No. 13–9212. ANDAVERDE-TINOCO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 741 F. 3d 509.

No. 13–9214. STRUNK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 245.

No. 13–9216. MENSAH, AKA APPIAH *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 737 F. 3d 789.

No. 13–9217. MOLINA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 550 Fed. Appx. 790.

No. 13–9218. DOBBINS *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied.

No. 13–9220. GARCIA MONDRAGON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 741 F. 3d 1010.

No. 13–9221. ONYESOH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 549 Fed. Appx. 700.

No. 13–9223. PEPE *v.* GRIFFIN, SUPERINTENDENT, SULLIVAN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 542 Fed. Appx. 54.

No. 13–9224. TIEN TRUONG NGUYEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 543 Fed. Appx. 715.

No. 13–9225. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 554 Fed. Appx. 869.

No. 13–9227. RODRIGUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 530 Fed. Appx. 908.

No. 13–9228. BELTRAN VARGAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 548 Fed. Appx. 298.

No. 13–9230. VASSAR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 541 Fed. Appx. 58.

No. 13–9232. BAILEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 13–9233. BISHOP *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 934 A. 2d 930.

No. 13–9237. LOPEZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 547 Fed. Appx. 223.

No. 13–9238. LEYGA *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 544 Fed. Appx. 964.

No. 13–9240. KOLUPA *v.* LAVALLEY, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 13–9241. SACKSITH *v.* EBBERT, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 552 Fed. Appx. 108.

No. 13–9242. BOOMER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 13–9243. GLENN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 540 Fed. Appx. 140.

No. 13–9244. HARVEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 545 Fed. Appx. 881.

No. 13–9245. GOMEZ-BAUTISTA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 549 Fed. Appx. 611.

No. 13–9246. SINKLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 555 Fed. Appx. 217.

No. 13–9247. CARBARY *v.* UTTECHT, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–9253. BENNETT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 13–9255. MCWAINE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 13–9259. LOVE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 550 Fed. Appx. 286.

No. 13–9269. SESSION *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 13–9271. ALVAREZ-MARQUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 542 Fed. Appx. 543.

No. 13–9279. GIULIANO *v.* DREW, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 540 Fed. Appx. 202.

No. 13–9286. FIGUEROA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 13–9294. KENNEY *v.* THOMAS, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 13–9295. LANG *v.* LACKNER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–9298. PENA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 550 Fed. Appx. 563.

No. 13–9299. MONZON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 13–9303. CASTILLO FLORES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 548 Fed. Appx. 1005.

No. 13–9304. COX *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 549 Fed. Appx. 169.

No. 13–9307. DYAB *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 546 Fed. Appx. 601.

No. 13–9309. SALAZAR *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 13–9312. TORBETT *v.* HOLDER, ATTORNEY GENERAL, ET AL. C. A. 6th Cir. Certiorari denied.

No. 13–9314. LEWIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 548 Fed. Appx. 314.

No. 13–9317. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 540 Fed. Appx. 573.

No. 13–9318. KING *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 13–9319. LIVINGSTON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 404 Fed. Appx. 685.

No. 13–9320. AGOLLI *v.* OFFICE DEPOT, INC. C. A. 4th Cir. Certiorari denied. Reported below: 548 Fed. Appx. 871.

No. 13–9323. AGUILAR-LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 672.

No. 13–9326. WHITE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 538 Fed. Appx. 731.

No. 13–9327. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 550 Fed. Appx. 179.

No. 13–9328. WILLIAMS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 529 Fed. Appx. 6.

No. 13–9335. ELK SHOULDER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 738 F. 3d 948.

No. 13–9336. SETTLES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 540 Fed. Appx. 172.

No. 13–9337. CASH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 13–9340. BIFIELD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 547 Fed. Appx. 273.

No. 13–9342. ANTONIO ALVARADO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 13–9348. WARREN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 737 F. 3d 1278.

No. 13–9349. WOODS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 13–9352. OTTAVIANO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 3d 586.

No. 13–9355. RAMIREZ-CRUZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 147.

No. 13–9356. KENDRICK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 13–9360. RIVERA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 531.

No. 13–9361. ALMARAZ-LUEVANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 782.

No. 13–9362. BELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 731 F. 3d 552.

No. 13–9363. BALDERAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 550 Fed. Appx. 471.

No. 13–9366. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 13–9367. BLANDING *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 548 Fed. Appx. 885.

No. 13–9372. BESHEARS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 13–9373. CAPO-CARRILLO, AKA TRUJILLO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 13–9374. FERGUSON *v.* LOMBARDI, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS, ET AL. C. A. 8th Cir. Certiorari denied.

No. 13–9383. FRAZIER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 554 Fed. Appx. 842.

No. 13–638. HUSSAIN *v.* OBAMA, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 718 F. 3d 964.

Statement of JUSTICE BREYER respecting the denial of certiorari.

The Authorization for Use of Military Force (AUMF), passed in September 2001, empowers the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." § 2(a), 115 Stat. 224. In *Hamdi* v. *Rumsfeld*, 542 U. S. 507 (2004), five Members of the Court agreed that the AUMF authorizes the President to detain enemy combatants. *Id.*, at 517–518 (plurality opinion); *id.*, at 587 (THOMAS, J., dissenting). In her opinion for a plurality of the Court, Justice O'Connor understood enemy combatants to include "an individual who . . . was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there." *Id.*, at 516 (internal quotation marks omitted). She concluded

that the "detention of individuals falling into the *limited category we are considering, for the duration of the particular conflict in which they were captured*," is "an exercise of the 'necessary and appropriate force'" that Congress authorized under the AUMF. *Id.*, at 518 (emphasis added). She explained, however, that the President's power to detain under the AUMF may be different when the "practical circumstances" of the relevant conflict are "entirely unlike those of the conflicts that informed the development of the law of war." *Id.*, at 521.

In this case, the District Court concluded, and the Court of Appeals agreed, that petitioner Abdul Al Qader Ahmed Hussain could be detained under the AUMF because he was "part of al-Qaeda *or* the Taliban at the time of his apprehension." 821 F. Supp. 2d 67, 76–79 (DC 2011) (internal quotation marks omitted; emphasis added); accord, 718 F. 3d 964, 966–967 (CADC 2013). But even assuming this is correct, in either case—that is, irrespective of whether Hussain was part of al Qaeda *or* the Taliban—it is possible that Hussain was not an "individual who . . . was part of or supporting forces hostile to the United States or coalition partners *in Afghanistan* and *who engaged in an armed conflict against the United States there*." 542 U. S., at 516 (internal quotation marks omitted; emphasis added).

The Court has not directly addressed whether the AUMF authorizes, and the Constitution permits, detention on the basis that an individual was part of al Qaeda, or part of the Taliban, but was not "engaged in an armed conflict against the United States" in Afghanistan prior to his capture. Nor have we considered whether, assuming detention on these bases is permissible, either the AUMF or the Constitution limits the duration of detention.

The circumstances of Hussain's detention may involve these unanswered questions, but his petition does not ask us to answer them. See Pet. for Cert. i. Therefore, I agree with the Court's decision to deny certiorari.

No. 13–842. EXXON MOBIL CORP. ET AL. *v.* CITY OF NEW YORK, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 725 F. 3d 65.

No. 13–966. GIANNANGELI *v.* TARGET NATIONAL BANK. C. A. 10th Cir. Certiorari denied. JUSTICE ALITO took no part in the

consideration or decision of this petition. Reported below: 543 Fed. Appx. 785.

No. 13–8648. MARTINEZ *v.* LAVALLEY, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 13–9143. BROWN *v.* WALTON, WARDEN. C. A. 6th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 13–9211. BROWN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 13–9379. SOLANO-MORETA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

Rehearing Denied

No. 13–475. SNYDER *v.* SMITH COLLEGE, 571 U. S. 1127;

No. 13–666. JONES *v.* HSBC, 571 U. S. 1198;

No. 13–675. OZINAL *v.* JOHNS HOPKINS HEALTH SYSTEM CORP. ET AL., 571 U. S. 1198;

No. 13–718. MCBROOM *v.* DICKERSON, 571 U. S. 1200;

No. 13–727. COX *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR, ET AL., 571 U. S. 1200;

No. 13–734. CHRISTIE *v.* OBAMA, PRESIDENT OF THE UNITED STATES, 571 U. S. 1200;

No. 13–757. JAFARI *v.* OLD DOMINION TRANSIT MANAGEMENT CO., DBA GREATER RICHMOND TRANSIT CO., 571 U. S. 1201;

No. 13–774. SIEGEL, ADMINISTRATOR OF THE ESTATE OF AKKAD, DECEASED, ET AL. *v.* HYATT INTERNATIONAL (EUROPE, AFRICA, MIDDLE EAST) LLC ET AL., 571 U. S. 1202;

No. 13–800. PATEL *v.* GEORGIA DEPARTMENT OF BEHAVIORAL HEALTH AND DEVELOPMENTAL DISABILITIES, 571 U. S. 1238;

No. 13–5319. GREEN *v.* UNITED STATES, 571 U. S. 1204;

No. 13–6734. IN RE RIVERA, 571 U. S. 1093;

No. 13–6742. KIM *v.* INTERNAL REVENUE SERVICE, 571 U. S. 1030;

No. 13–6955. EM *v.* HARRINGTON, WARDEN, 571 U. S. 1135;

No. 13–7096. ROGERS *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 571 U. S. 1137;

No. 13–7334. PICKETT *v.* ALLEN ET AL., 571 U. S. 1205;

No. 13–7442. APONTE *v.* FLORIDA, 571 U. S. 1177;

No. 13–7495. KNOX *v.* DIXON CORRECTIONAL INSTITUTE ET AL., 571 U. S. 1178;

No. 13–7558. IN RE KIDWELL ET UX., 571 U. S. 1195;

No. 13–7581. TOMPKINS *v.* ROGERS ET AL., 571 U. S. 1206;

No. 13–7604. KISSEL *v.* UNITED STATES, 571 U. S. 1152;

No. 13–7649. ROULHAC *v.* JANEK, 571 U. S. 1208;

No. 13–7782. CHRISTOPHER *v.* ST. VINCENT DE PAUL OF BALTIMORE INC. ET AL., 571 U. S. 1211;

No. 13–7825. JOHNSON *v.* ULINE, INC., 571 U. S. 1213;

No. 13–7855. BLACK *v.* CALIFORNIA, 571 U. S. 1213;

No. 13–7863. YBARRA *v.* ARKANSAS, 571 U. S. 1214;

No. 13–7864. DREW *v.* UNITED STATES, 571 U. S. 1182;

No. 13–7922. BOZELKO *v.* CONNECTICUT, 571 U. S. 1215;

No. 13–7950. ARABZADEGAN *v.* TEXAS, 571 U. S. 1216;

No. 13–7957. LONG *v.* CITY OF SAN FRANCISCO, CALIFORNIA, ET AL., 571 U. S. 1216;

No. 13–8085. BUTSCH *v.* OBENLAND, SUPERINTENDENT, CLALLAM BAY CORRECTIONS CENTER, 571 U. S. 1221;

No. 13–8092. SECHLER *v.* UNITED STATES, 571 U. S. 1221;

No. 13–8108. RAMON OCHOA *v.* RUBIN, AKA RUBIN OCHOA, 571 U. S. 1222;

No. 13–8118. MATHIS *v.* UNITED STATES, 571 U. S. 1222;

No. 13–8201. SWISHER *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 571 U. S. 1225;

No. 13–8285. DESUE *v.* FLORIDA, *ante*, p. 1005;

No. 13–8367. KELLER *v.* FLORIDA, 571 U. S. 1229;

No. 13–8484. IN RE GODFREY, 571 U. S. 1195; and

No. 13–8624. WHITWORTH *v.* UNITED STATES, *ante*, p. 1009. Petitions for rehearing denied.

No. 13–8403. JOHNSON *v.* UNITED STATES, 571 U. S. 1245. Petition for rehearing denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

April 22, 2014

Certiorari Denied

No. 13–9835 (13A1063). Rousan *v.* Lombardi, Director, Missouri Department of Corrections, et al. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to Justice Alito, and by him referred to the Court, denied. Certiorari denied.

April 23, 2014

Certiorari Denied

No. 13–9776 (13A1053). Hendrix *v.* Florida. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to Justice Thomas, and by him referred to the Court, denied. Certiorari denied. Reported below: 136 So. 3d 1122.

April 25, 2014

Miscellaneous Orders. (For the Court's orders prescribing amendments to the Federal Rules of Appellate Procedure, see *post*, p. 1163; amendments to the Federal Rules of Bankruptcy Procedure, see *post*, p. 1171; an amendment to the Federal Rules of Civil Procedure, see *post*, p. 1219; amendments to the Federal Rules of Criminal Procedure, see *post*, p. 1225; and amendments to the Federal Rules of Evidence, see *post*, p. 1235.)

April 28, 2014

Certiorari Granted—Vacated and Remanded

No. 12–651. Amy et al. *v.* United States District Court for the Western District of Washington et al. C. A. 9th Cir. Motion of National Crime Victim Law Institute for leave to file brief as *amicus curiae* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Paroline* v. *United States*, *ante*, p. 434. Reported below: 698 F. 3d 1151.

No. 12–8505. Wright *v.* United States. C. A. 5th Cir. Reported below: 701 F. 3d 749;

No. 13–5023. ROGERS *v.* UNITED STATES. C. A. 1st Cir. Reported below: 714 F. 3d 82;

No. 13–5251. DANIEL *v.* UNITED STATES. C. A. 5th Cir. Reported below: 532 Fed. Appx. 522;

No. 13–8211. VEGA *v.* UNITED STATES. C. A. 5th Cir. Reported below: 539 Fed. Appx. 441;

No. 13–8703. LUNDQUIST *v.* UNITED STATES. C. A. 2d Cir. Reported below: 731 F. 3d 124; and

No. 13–8803. DEGOLLADO *v.* UNITED STATES. C. A. 5th Cir. Reported below: 547 Fed. Appx. 592. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Paroline* v. *United States*, *ante*, p. 434.

No. 13–69. VICKY *v.* FAST ET AL. C. A. 8th Cir. Motion of National Crime Victim Law Institute for leave to file brief as *amicus curiae* granted. Motion of respondent Robert M. Fast for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Paroline* v. *United States*, *ante*, p. 434. Reported below: 709 F. 3d 712.

No. 13–496. ROBINSON, WARDEN *v.* DRUMMOND. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *White* v. *Woodall*, *ante*, p. 415. Reported below: 728 F. 3d 520.

No. 13–699. WETZEL, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. *v.* WASHINGTON. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *White* v. *Woodall*, *ante*, p. 415. Reported below: 726 F. 3d 471.

No. 13–8124. CARLSON *v.* MINNESOTA DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT ET AL. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Sprint Communications, Inc.* v. *Jacobs*, 571 U. S. 69 (2013). Reported below: 515 Fed. Appx. 638.

No. 13–8433. VILLARREAL *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis*

granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the position asserted by the Solicitor General in his brief for the United States filed on March 21, 2014. Reported below: 540 Fed. Appx. 365.

Certiorari Dismissed

No. 13–8700. SANDLES *v.* UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT. C. A. 7th Cir.; and

No. 13–8701. SANDLES *v.* CHASTANG ET AL. C. A. 6th Cir. Motions of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 13–8751. EDMOND *v.* SPARKMAN ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

No. 13–9254. RILEY *v.* DELAWARE. Sup. Ct. Del. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 83 A. 3d 738.

No. 13–9376. JOELSON *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

Miscellaneous Orders

No. 13M109. RODRIGUEZ *v.* PETRAKIS; and

No. 13M110. DAVIS *v.* UNITED STATES. Motions for leave to proceed as veterans denied.

No. 13M111. REYES *v.* FLANAGAN, JUDGE, CIRCUIT COURT OF ILLINOIS, COOK COUNTY. Motion to direct the Clerk to file peti-

tion for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 13–8832. SULIEMAN *v.* FISHER. Ct. App. Mich.; and

No. 13–8900. COOK *v.* ILLINOIS DEPARTMENT OF CORRECTIONS. C. A. 7th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until May 19, 2014, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 13–9562. IN RE VOLKMAN. Petition for writ of habeas corpus denied.

No. 13–9498. IN RE BROWN. Petition for writ of habeas corpus denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 13–9543. IN RE JONES. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*). JUSTICE KAGAN took no part in the consideration or decision of this motion and this petition.

No. 13–9410. IN RE FIORANI. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

Certiorari Granted

No. 13–684. JESINOSKI ET UX. *v.* COUNTRYWIDE HOME LOANS, INC., ET AL. C. A. 8th Cir. Certiorari granted. Reported below: 729 F. 3d 1092.

No. 13–7451. YATES *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 733 F. 3d 1059.

Certiorari Denied

No. 13–393. IOWA *v.* KOOIMA. Sup. Ct. Iowa. Certiorari denied. Reported below: 833 N. W. 2d 202.

No. 13–600. NEW YORK ET AL. *v.* SIMON. C. A. 2d Cir. Certiorari denied. Reported below: 727 F. 3d 167.

No. 13–693. WHITLEY *v.* HANNA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 726 F. 3d 631.

No. 13–754. ROBINSON *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 13–758. HEDGES ET AL. *v.* OBAMA, PRESIDENT OF THE UNITED STATES, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 724 F. 3d 170.

No. 13–846. IVEY *v.* KING. Sup. Ct. Ala. Certiorari denied. Reported below: 142 So. 3d 467.

No. 13–849. NEW YORK LIFE INSURANCE CO. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 724 F. 3d 256.

No. 13–860. RICHTER *v.* CITY OF DES MOINES, WASHINGTON. C. A. 9th Cir. Certiorari denied. Reported below: 532 Fed. Appx. 755.

No. 13–863. HOLMES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 727 F. 3d 1230.

No. 13–873. US FOODS, INC., FKA US FOODSERVICE, INC. *v.* CATHOLIC HEALTHCARE WEST ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 729 F. 3d 108.

No. 13–977. BASS ET AL. *v.* CITY OF JACKSON, MISSISSIPPI. C. A. 5th Cir. Certiorari denied. Reported below: 540 Fed. Appx. 300.

No. 13–985. THOMASON *v.* MADISON REAL PROPERTY, LLC. Ct. App. Idaho. Certiorari denied.

No. 13–989. HENDERSON *v.* CARTER. Ct. App. Cal., 2d App. Dist., Div. 5. Certiorari denied.

No. 13–1000. SUAREZ ET AL. *v.* CHARRON ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 731 F. 3d 241.

No. 13–1005. MCDERMOTT *v.* PIFER. Sup. Ct. N. D. Certiorari denied. Reported below: 2013 ND 153, 836 N. W. 2d 432.

No. 13–1007. FELDMAN *v.* BAC HOME LOANS SERVICING, LP, ET AL. Ct. App. Cal., 2d App. Dist., Div. 2. Certiorari denied.

No. 13–1008. DOE *v.* HARRIS, ATTORNEY GENERAL OF CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 535 Fed. Appx. 630.

No. 13–1011. USPPS, LTD. *v.* AVERY DENNISON CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 541 Fed. Appx. 386.

No. 13–1039. ELERATH *v.* MCGUIRE, CLERK, SUPREME COURT OF CALIFORNIA, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 13–1058. MIZRACH, AS SUCCESSOR PERSONAL REPRESENTATIVE OF THE ESTATE OF KURLAND, DECEASED *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 539 Fed. Appx. 284.

No. 13–1060. RUBIO-MONTANO ET AL. *v.* HOLDER, ATTORNEY GENERAL. C. A. 10th Cir. Certiorari denied. Reported below: 547 Fed. Appx. 888.

No. 13–1070. REININGER *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 430 N. J. Super. 517, 65 A. 3d 865.

No. 13–1101. B. U. U. *v.* FLORIDA BOARD OF BAR EXAMINERS. Sup. Ct. Fla. Certiorari denied. Reported below: 124 So. 3d 172.

No. 13–1105. JACKSON *v.* LOUISIANA. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 2012–0090 (La. App. 4 Cir. 4/24/13), 115 So. 3d 1155.

No. 13–1106. SEBBEN *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 145 Conn. App. 528, 77 A. 3d 811.

No. 13–1112. GAMMON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 533 Fed. Appx. 437.

No. 13–1120. IBIDA *v.* HAGEL, SECRETARY OF DEFENSE, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 523 Fed. Appx. 251.

No. 13–1130. HEADIFEN *v.* HARKER. C. A. 5th Cir. Certiorari denied. Reported below: 549 Fed. Appx. 300.

No. 13–1156. DELACRUZ *v.* COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 13–1161. BLUM *v.* KENTUCKY BAR ASSN. Sup. Ct. Ky. Certiorari denied. Reported below: 404 S. W. 3d 841.

No. 13–1167. FORREST *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 125 So. 3d 155.

No. 13–7132. GABRION *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 719 F. 3d 511.

No. 13–7463. BRUCE *v.* GREGORY ET AL. C. A. 11th Cir. Certiorari denied.

No. 13–7490. SHIBIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 722 F. 3d 233.

No. 13–7788. BURNS *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 720 F. 3d 1296.

No. 13–7909. ESPINOZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 733 F. 3d 568.

No. 13–7913. HAGER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 721 F. 3d 167.

No. 13–8017. RAMIREZ-RODRIGUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 13–8037. DYKES *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 403 S. C. 499, 744 S. E. 2d 505.

No. 13–8148. MASON *v.* JOHNSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 729 F. 3d 545.

No. 13–8249. CLAY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 720 F. 3d 1021.

No. 13–8394. FITZPATRICK *v.* ROBINSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 723 F. 3d 624.

No. 13–8423. MORENO-DE LA CRUZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 543 Fed. Appx. 415.

No. 13–8555. SOLOMON *v.* LOUISIANA. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 2011–1676 (La. App. 4 Cir. 3/13/13), 112 So. 3d 323.

No. 13–8593. HAMMOND *v.* LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 2012–1559 (La. App. 1 Cir. 3/25/13), 115 So. 3d 513.

No. 13–8634. MORIN *v.* UNIVERSITY OF MASSACHUSETTS ET AL. C. A. 1st Cir. Certiorari denied.

No. 13–8690. CLAASSEN *v.* MILLER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–8708. DICKEY *v.* DISTRICT OF COLUMBIA COURT OF APPEALS. Ct. App. D. C. Certiorari denied. Reported below: 73 A. 3d 127.

No. 13–8710. ENRIQUEZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 13–8712. ANDERSON *v.* TALLERICO. C. A. 9th Cir. Certiorari denied.

No. 13–8718. COMPTON *v.* CHAPPELL, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 539 Fed. Appx. 746.

No. 13–8727. RAY *v.* OHIO. Ct. App. Ohio, 8th App. Dist., Cuyahoga County. Certiorari denied.

No. 13–8731. OLIVER *v.* SWARTHOUT, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–8736. AKBAR, AKA BROWN *v.* MCCALL, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 543 Fed. Appx. 340.

No. 13–8737. ALCALDE *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 13–8738. BOULDIN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 13–8742. THOMPSON *v.* LOUISIANA. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 2012–1097 (La. App. 3 Cir. 4/10/13), 111 So. 3d 580.

No. 13–8753. ROSS *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 32 A. 3d 837.

No. 13–8754. SCRIBNER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 13–8756. TAYLOR *v.* ALLEN COUNTY CHILD SUPPORT ENFORCEMENT AGENCY ET AL. C. A. 6th Cir. Certiorari denied.

No. 13–8759. CHRISTIAN *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 13–8762. ESCARENO-MERAZ *v.* ARIZONA. Ct. App. Ariz. Certiorari denied. Reported below: 232 Ariz. 586, 307 P. 3d 1013.

No. 13–8767. JONES *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 57 Cal. 4th 899, 306 P. 3d 1136.

No. 13–8768. CALHOUN *v.* NEELY, SUPERINTENDENT, PIEDMONT CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 540 Fed. Appx. 238.

No. 13–8772. STEZZI *v.* CITIZENS BANK OF PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 542 Fed. Appx. 124.

No. 13–8775. ECHOLS *v.* BICKELL, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 13–8778. DIXON *v.* CALDWELL, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 13–8780. CAMPBELL *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 129 Nev. 1102.

No. 13–8786. London *v.* Glunt, Superintendent, State Correctional Institution at Houtzdale, et al. C. A. 3d Cir. Certiorari denied.

No. 13–8787. Rick *v.* Louisiana. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 2012–1569 (La. App. 1 Cir. 4/26/13).

No. 13–8789. Pitts *v.* Cain, Warden. C. A. 5th Cir. Certiorari denied.

No. 13–8791. Librace *v.* Winston Towers 200 Assn., Inc., et al. Sup. Ct. Fla. Certiorari denied. Reported below: 133 So. 3d 527.

No. 13–8815. Anderson *v.* Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 13–8842. Young *v.* King, Superintendent, Southern Mississippi Correctional Institution. C. A. 5th Cir. Certiorari denied.

No. 13–8853. Osegueda *v.* Grounds, Warden. C. A. 9th Cir. Certiorari denied.

No. 13–8866. Carroll *v.* City of Stone Mountain, Georgia. C. A. 11th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 926.

No. 13–8893. Lassiter *v.* New Jersey. Super. Ct. N. J., App. Div. Certiorari denied.

No. 13–8953. Reedom *v.* Crappell et al. C. A. 5th Cir. Certiorari denied.

No. 13–8990. Cadogan *v.* Lizarraga, Acting Warden. C. A. 9th Cir. Certiorari denied.

No. 13–9004. Toole *v.* Obama, President of the United States, et al. C. A. D. C. Cir. Certiorari denied. Reported below: 542 Fed. Appx. 1.

No. 13–9012. Burton *v.* Beard, Secretary, California Department of Corrections and Rehabilitation. C. A. 9th Cir. Certiorari denied. Reported below: 546 Fed. Appx. 624.

No. 13–9046. HALE *v.* FLORIDA PAROLE COMMISSION ET AL. C. A. 11th Cir. Certiorari denied.

No. 13–9055. BRADLEY *v.* DELIETO ET AL. Sup. Ct. Conn. Certiorari denied.

No. 13–9066. DUNCAN *v.* BUCHANAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 13–9068. HINTON *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 539 Fed. Appx. 118.

No. 13–9074. GREEN *v.* ALABAMA ET AL. C. A. 11th Cir. Certiorari denied.

No. 13–9086. WOLFE *v.* LOUISIANA. Ct. App. La., 4th Cir. Certiorari denied.

No. 13–9089. RATCHFORD ET AL. *v.* EVANS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 536 Fed. Appx. 679.

No. 13–9090. BERK ET AL. *v.* MOHR ET AL. C. A. 6th Cir. Certiorari denied.

No. 13–9129. DE MEDEIROS *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 13–9145. DEVORE *v.* NOOTH, SUPERINTENDENT, SNAKE RIVER CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied.

No. 13–9235. MARCELIN *v.* LOUISIANA. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 2012–0645 (La. App. 4 Cir. 5/22/13), 116 So. 3d 928.

No. 13–9265. K. F. *v.* WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES. Sup. Ct. Wash. Certiorari denied.

No. 13–9291. HERSHFIELD *v.* KING GEORGE COUNTY, VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 13–9350. THOMAS *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 13–9368. BROWN *v.* DANIELS, CORRECTIONAL ADMINISTRATOR, MAURY CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 540 Fed. Appx. 197.

No. 13–9378. JACOBS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 656.

No. 13–9384. ISOLA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 548 Fed. Appx. 723.

No. 13–9391. DJENASEVIC, AKA GENASE, AKA KRAJA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 545 Fed. Appx. 946.

No. 13–9394. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 537 Fed. Appx. 272.

No. 13–9395. ANGELO ATONDO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 552 Fed. Appx. 622.

No. 13–9396. BLAIR *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 13–9399. JEFFERSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 725 F. 3d 829.

No. 13–9403. DAVIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 13–9406. MIKNEVICH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 13–9407. PERKINS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 13–9408. MOORE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 13–9414. HAYES *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 13–9421. FLACK *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 232 W. Va. 708, 753 S. E. 2d 761.

No. 13–9424. GREENWOOD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 13–9427. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 311.

No. 13–9432. FREYLING *v.* UNITED STATES (two judgments). C. A. 9th Cir. Certiorari denied.

No. 13–9433. FREEMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 516 Fed. Appx. 696.

No. 13–9441. HUBBARD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 508 Fed. Appx. 561.

No. 13–9446. HANEY *v.* NANGALAMA ET AL. C. A. 9th Cir. Certiorari denied.

No. 13–9449. THOMAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 548 Fed. Appx. 987.

No. 13–9452. MABIE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 13–9454. RAMIREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 219.

No. 13–9456. MCDANIEL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 13–9462. BRIDGEWATER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 13–9470. RAYMOND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 13–9476. JACQUES, AKA POLANCO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 555 Fed. Appx. 41.

No. 13–9480. DEERING, AKA WILLIAMS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 13–9488. WHITE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 13–9493. REESE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 548 Fed. Appx. 927.

No. 13–9513. GETZ *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 77 A. 3d 271.

No. 13–874. WETZEL, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. *v.* LAMBERT. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 537 Fed. Appx. 78.

No. 13–973. MARTIN *v.* MARYLAND STATE BOARD OF LAW EXAMINERS. Ct. App. Md. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

No. 13–1042. NOVELL, INC. *v.* MICROSOFT CORP. C. A. 10th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 731 F. 3d 1064.

No. 13–1104. KLINE *v.* KANSAS DISCIPLINARY ADMINISTRATOR. Sup. Ct. Kan. Motions of Eagle Forum Education & Legal Defense Fund, Inc., et al. and National Lawyers' Association et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 298 Kan. 96, 311 P. 3d 321.

No. 13–9461. DENMARK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 13–9463. JENNINGS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 13–9491. SPOTTS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 537 Fed. Appx. 208.

Rehearing Denied

No. 13–6958. GARCIA *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 571 U. S. 1135;

No. 13–8044. MATTHEWS *v.* UNITED STATES, 571 U. S. 1219;

No. 13–8121. RASHID, AKA BUCHANAN *v.* UNITED STATES, 571 U. S. 1222;

No. 13–8286. DUNLOP *v.* COLVIN, ACTING COMMISSIONER OF SOCIAL SECURITY, *ante*, p. 1005;

No. 13–8307. TAGGART *v.* OFFICE OF INSPECTOR GENERAL ET AL., *ante*, p. 1006;

No. 13–8317. WESTBROOK *v.* KING, SUPERINTENDENT, SOUTH MISSISSIPPI CORRECTIONAL INSTITUTION, 571 U. S. 1241; and

No. 13–8547. BUCZEK *v.* UNITED STATES, *ante*, p. 1008. Petitions for rehearing denied.

MAY 5, 2014

Certiorari Granted—Vacated and Remanded. (See also No. 13–551, *ante*, p. 650.)

No. 13–788. KOBE PROPERTIES SARL ET AL. *v.* CHECKPOINT SYSTEMS, INC. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Octane Fitness, LLC* v. *ICON Health & Fitness, Inc.*, *ante*, p. 545, and *Highmark Inc.* v. *Allcare Health Management System, Inc.*, *ante*, p. 559. Reported below: 711 F. 3d 1341.

Certiorari Dismissed

No. 13–9067. CONCEPCION *v.* CUSTOMS AND BORDER PROTECTION AGENCY. C. A. D. C. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*). Reported below: 550 Fed. Appx. 1.

No. 13–9574. GIBSON *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*). Reported below: 548 Fed. Appx. 913.

Miscellaneous Orders

No. 13A1089. LIBERTARIAN PARTY OF OHIO ET AL. *v.* HUSTED, OHIO SECRETARY OF STATE, ET AL. C. A. 6th Cir. Application

for stay and injunctive relief, presented to JUSTICE THOMAS, and by him referred to the Court, denied.

No. D–2745. IN RE DISBARMENT OF HAACKE. Disbarment entered. [For earlier order herein, see 571 U. S. 1008.]

No. D–2747. IN RE DISBARMENT OF DAVY. Disbarment entered. [For earlier order herein, see 571 U. S. 1068.]

No. D–2748. IN RE DISBARMENT OF NACHWALTER. Disbarment entered. [For earlier order herein, see 571 U. S. 1068.]

No. D–2751. IN RE DISBARMENT OF JAEGER. Disbarment entered. [For earlier order herein, see 571 U. S. 1091.]

No. D–2752. IN RE DISBARMENT OF MURRAY. Disbarment entered. [For earlier order herein, see 571 U. S. 1091.]

No. D–2753. IN RE DISBARMENT OF SIEGEL. Disbarment entered. [For earlier order herein, see 571 U. S. 1091.]

No. D–2754. IN RE DISBARMENT OF SAIA. Disbarment entered. [For earlier order herein, see 571 U. S. 1091.]

No. D–2755. IN RE DISBARMENT OF PATTON. Disbarment entered. [For earlier order herein, see 571 U. S. 1091.]

No. D–2756. IN RE DISBARMENT OF MCCARTHY. Disbarment entered. [For earlier order herein, see 571 U. S. 1091.]

No. D–2757. IN RE DISBARMENT OF MALVONE. Disbarment entered. [For earlier order herein, see 571 U. S. 1092.]

No. 13M112. SIMON *v.* TERRELL, WARDEN; and
No. 13M113. DIXON *v.* MORGAN, WARDEN. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 13–852. FEDERAL NATIONAL MORTGAGE ASSOCIATION *v.* SUNDQUIST. Sup. Ct. Utah. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 13–7211. JENNINGS *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. [Certiorari granted, *ante*, p. 1015.] Motion of petitioner for appointment of counsel granted. Randolph L. Schaffer, Jr., Esq., of Houston, Tex., is appointed to serve as counsel for petitioner in this case.

No. 13–8844. TAAL *v.* ST. MARY'S BANK. Sup. Ct. N. H.;

No. 13–8887. SHLIKAS *v.* NAVIENT, LLC, FKA SLM CORP., ET AL. C. A. 4th Cir.;

No. 13–8928. SHUMIN ZHANG *v.* CHENG ET AL. Ct. App. Cal., 2d App. Dist., Div. 1; and

No. 13–8955. JOHNSON *v.* REGIONS BANK ET AL. Ct. App. Ga. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until May 27, 2014, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 13–9698. IN RE BUSH. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

No. 13–9504. IN RE CASTEEL. Petition for writ of mandamus denied.

No. 13–1018. IN RE MCDONALD. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 13–975. T-MOBILE SOUTH, LLC *v.* CITY OF ROSWELL, GEORGIA. C. A. 11th Cir. Motion of Competitive Carriers Association for leave to file brief as *amicus curiae* granted. Certiorari granted. Reported below: 731 F. 3d 1213.

No. 13–1010. M&G POLYMERS USA, LLC, ET AL. *v.* TACKETT ET AL. C. A. 6th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 733 F. 3d 589.

Certiorari Denied

No. 13–641. PERSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 522 Fed. Appx. 724.

No. 13–680. GARCIA-REYES *v.* HOLDER, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied. Reported below: 539 Fed. Appx. 467.

No. 13–708. MINEMYER *v.* R-BOC REPRESENTATIVES, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 515 Fed. Appx. 897.

No. 13–712. JACKSON ET AL. *v.* SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 731 F. 3d 556.

No. 13–762. BURDEN *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS (Reported below: 727 F. 3d 1161); and COLEMAN *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS (727 F. 3d 1161). C. A. Fed. Cir. Certiorari denied.

No. 13–768. AL WARAFI *v.* OBAMA, PRESIDENT OF THE UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 716 F. 3d 627.

No. 13–827. DRAKE ET AL. *v.* JEREJIAN, JUDGE, SUPERIOR COURT OF NEW JERSEY, BERGEN COUNTY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 724 F. 3d 426.

No. 13–893. RITCHIE, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF RITCHIE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 733 F. 3d 871.

No. 13–901. LOS ANGELES COUNTY FLOOD CONTROL DISTRICT ET AL. *v.* NATURAL RESOURCES DEFENSE COUNCIL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 725 F. 3d 1194.

No. 13–907. TORRALVA *v.* PELOQUIN ET AL. Ct. App. Tex., 13th Dist. Certiorari denied. Reported below: 399 S. W. 3d 690.

No. 13–911. FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC, ET AL. *v.* SPIVERY-JONES, ADMINISTRATRIX OF THE ESTATE OF JONES, DECEASED. Super. Ct. Pa. Certiorari denied. Reported below: 75 A. 3d 560.

No. 13–916. ALLSTATE INSURANCE CO. *v.* JACOBSEN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED. Sup. Ct. Mont. Certiorari denied. Reported below: 371 Mont. 393, 310 P. 3d 452.

No. 13–992. VODA *v.* MEDTRONIC, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 541 Fed. Appx. 1003.

No. 13–996. ADELL *v.* JOHN RICHARDS HOME BUILDING CO., L. L. C., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 552 Fed. Appx. 401.

No. 13–1020. RICHARDS *v.* RICHARDS, AKA SEE, ET AL. Ct. App. Ga. Certiorari denied. Reported below: 321 Ga. App. XXIV.

No. 13–1031. LUCA ET UX. *v.* BANK OF AMERICA, N. A. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 2013 IL App (3d) 120601, 999 N. E. 2d 361.

No. 13–1043. KELLER ET AL. *v.* CITY OF FREMONT, NEBRASKA, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 719 F. 3d 931.

No. 13–1046. JASO *v.* COCA-COLA CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 537 Fed. Appx. 557.

No. 13–1063. PEREZ-RODRIGUEZ *v.* BANK OF NEW YORK MELLON ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 127 So. 3d 518.

No. 13–1099. EAGLE COVE CAMP & CONFERENCE CENTER, INC., ET AL. *v.* TOWN OF WOODBORO, WISCONSIN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 734 F. 3d 673.

No. 13–1113. BROWN *v.* VERMONT. Sup. Ct. Vt. Certiorari denied. Reported below: 2013 VT 112, 195 Vt. 342, 88 A. 3d 402.

No. 13–1131. HAYES *v.* HARMONY GOLD MINING CO. LTD. ET AL. C. A. 2d Cir. Certiorari denied.

No. 13–1145. LEBLANC *v.* BELLOW. C. A. 5th Cir. Certiorari denied. Reported below: 550 Fed. Appx. 181.

No. 13–1168. NORTH PACIFIC ERECTORS, INC. *v.* ALASKA DEPARTMENT OF ADMINISTRATION. Sup. Ct. Alaska. Certiorari denied. Reported below: 337 P. 3d 495.

No. 13–1182. NUGENT *v.* AETNA LIFE INSURANCE CO. C. A. 5th Cir. Certiorari denied. Reported below: 540 Fed. Appx. 473.

No. 13–1196. ELLER *v.* TRANS UNION, LLC. C. A. 10th Cir. Certiorari denied. Reported below: 739 F. 3d 467.

No. 13–1219. ALVAREZ-AYALA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 142.

No. 13–6870. LAWS *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 536 Fed. Appx. 409.

No. 13–7467. ROLLE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 530 Fed. Appx. 902.

No. 13–8018. HERNANDEZ-MANDUJANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 721 F. 3d 345.

No. 13–8042. JIRAK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 728 F. 3d 806.

No. 13–8221. NHUONG VAN NGUYEN *v.* SUPERIOR COURT OF CALIFORNIA, RIVERSIDE COUNTY. Sup. Ct. Cal. Certiorari denied.

No. 13–8592. GENBAO GAO *v.* HAWAII DEPARTMENT OF THE ATTORNEY GENERAL. Int. Ct. App. Haw. Certiorari denied. Reported below: 130 Haw. 303, 309 P. 3d 971.

No. 13–8835. JOHNSON *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 124 So. 3d 234.

No. 13–8849. SAUNDERS *v.* PHILADELPHIA DISTRICT ATTORNEY'S OFFICE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 546 Fed. Appx. 68.

No. 13–8859. RINDAHL *v.* MCCLOUD ET AL. C. A. 8th Cir. Certiorari denied.

No. 13–8860. STEELE *v.* HUNT, SUPERINTENDENT, COLUMBUS CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 219.

No. 13–8865. CLARK *v.* HUMAN RESOURCE ADMINISTRATION ET AL. C. A. 2d Cir. Certiorari denied.

No. 13–8867. MERRIEL *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 13–8870. MATHIS *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 128 So. 3d 801.

No. 13–8872. BARASHKOFF *v.* CITY OF SEATTLE, WASHINGTON, ET AL. C. A. 9th Cir. Certiorari denied.

No. 13–8876. NEAL *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 213 Md. App. 731.

No. 13–8877. MIZHIRUMBAY-GUAMAN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 109 App. Div. 3d 668, 970 N. Y. S. 2d 876.

No. 13–8878. MISENHEIMER *v.* HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 13–8880. THOMPSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 4. Certiorari denied.

No. 13–8881. LUSICK *v.* CITY OF PHILADELPHIA, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 549 Fed. Appx. 56.

No. 13–8883. RICHARDSON *v.* MCDONALD, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–8884. CANTU *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 13–8886. SCOTT *v.* ZERINGUE ET AL. C. A. 5th Cir. Certiorari denied.

No. 13–8891. BELL *v.* LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 2012–1615 (La. App. 1 Cir. 4/26/13).

No. 13–8906. ALVARADO *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 2013 IL App (3d) 120467, 993 N. E. 2d 1122.

No. 13–8912. ZAVALA *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 13–8913. JOSEPH *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 13–8918. RUFFIN *v.* HOUSTON INDEPENDENT SCHOOL DISTRICT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 548 Fed. Appx. 964.

No. 13–8919. SANTOS *v.* TANNER, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 13–8921. ALEXANDER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 13–8922. BROWN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 126 So. 3d 211.

No. 13–8924. SMITH ET UX. *v.* COUNTRYWIDE HOME LOANS, INC., ET AL. C. A. 11th Cir. Certiorari denied.

No. 13–8929. GERBER *v.* CAMP HOPE DIVISION ET AL. C. A. 2d Cir. Certiorari denied.

No. 13–8934. ROBINSON *v.* NORMAN, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 13–8943. GLOSSIP *v.* TRAMMELL, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 530 Fed. Appx. 708.

No. 13–8946. HUNG THANH MAI *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 57 Cal. 4th 986, 305 P. 3d 1175.

No. 13–9019. DESPER *v.* COMMUNITY CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 529 Fed. Appx. 314.

No. 13–9071. GODETT *v.* HOLDER, ATTORNEY GENERAL. C. A. 11th Cir. Certiorari denied.

No. 13–9072. GUILLEN *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: 372 Mont. 547, 317 P. 3d 202.

No. 13–9084. MARABLE *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 173 So. 3d 11.

No. 13–9141. BAUMHOFER *v.* COLVIN, ACTING COMMISSIONER OF SOCIAL SECURITY. C. A. 9th Cir. Certiorari denied. Reported below: 542 Fed. Appx. 564.

No. 13–9148. ELLIS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 5. Certiorari denied.

No. 13–9159. CHACON-TELLO *v.* HOLDER, ATTORNEY GENERAL. C. A. 3d Cir. Certiorari denied. Reported below: 544 Fed. Appx. 55.

No. 13–9179. MCCABE *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 174 Wash. App. 1080.

No. 13–9197. SHIELDS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2013 IL App (1st) 102739–U.

No. 13–9198. HERSHIPS *v.* SUPERIOR COURT OF CALIFORNIA, SACRAMENTO COUNTY, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 13–9208. KIDD *v.* WILLIAMS, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 734 F. 3d 696.

No. 13–9251. ROSS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2012 IL App (1st) 092445–U.

No. 13–9283. GRAHAM *v.* BRADSHAW. Sup. Ct. N. H. Certiorari denied.

No. 13–9288. STEBBINS *v.* UNIVERSITY OF ARKANSAS. C. A. 8th Cir. Certiorari denied. Reported below: 543 Fed. Appx. 616.

No. 13–9290. HEARNS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 2. Certiorari denied.

No. 13–9296. KRECIC *v.* BROWN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 549 Fed. Appx. 293.

No. 13–9300. MOORE *v.* CORTEZ MASTO, ATTORNEY GENERAL OF NEVADA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 542 Fed. Appx. 650.

No. 13–9301. RUBIO *v.* VAUGHN ET AL. Ct. App. Tenn. Certiorari denied.

No. 13–9315. COOK *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied. Reported below: 312 P. 3d 1072.

No. 13–9358. JACOBS *v.* ESTEFAN ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 531 Fed. Appx. 1004.

No. 13–9417. GONZALEZ *v.* VARANO ET AL. C. A. 3d Cir. Certiorari denied.

No. 13–9429. LOVEJOY *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 2013 IL App (2d) 110289.

No. 13–9437. HENDRY *v.* DONAHOE, POSTMASTER GENERAL. C. A. 2d Cir. Certiorari denied.

No. 13–9467. OGEONE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 13–9468. HOOPER *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 838 N. W. 2d 775.

No. 13–9472. NARVAEZ *v.* SCRIBNER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 416.

No. 13–9473. HUNTER, AKA PRIEST *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 739 F. 3d 492.

No. 13–9475. LANDSDOWN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 735 F. 3d 805.

No. 13–9479. GUERRERO AVILA *v.* SPENCER, COMMISSIONER, MASSACHUSETTS DEPARTMENT OF CORRECTION, ET AL. C. A. 1st Cir. Certiorari denied.

No. 13–9482. RICO CENTENO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 13–9484. MCDUFFIE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 550 Fed. Appx. 859.

No. 13–9485. PHILLIPS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 13–9490. TAYLOR *v.* PATENT AND TRADEMARK OFFICE. C. A. 9th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 341.

No. 13–9495. STRATTON *v.* COLEMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FAYETTE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 13–9497. ADETILOYE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 13–9501. BABSA-AY *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 540 Fed. Appx. 999.

No. 13–9502. MARQUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 547 Fed. Appx. 517.

No. 13–9511. DICKSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 13–9514. FLORES-GONZALES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 315.

No. 13–9517. GODBY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 13–9518. HERRERA-RAMOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 300.

No. 13–9519. HERNANDEZ-ABRAHAM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 550 Fed. Appx. 849.

No. 13–9520. IGLESIAS *v.* WAL-MART STORES EAST L. P. C. A. 4th Cir. Certiorari denied. Reported below: 542 Fed. Appx. 295.

No. 13–9521. HODGE *v.* GELB, SUPERINTENDENT, SOUZA-BARANOWSKI CORRECTIONAL CENTER. C. A. 1st Cir. Certiorari denied. Reported below: 739 F. 3d 34.

No. 13–9522. RONE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 547 Fed. Appx. 360.

No. 13–9523. CARRERA-CASTRO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 225.

No. 13–9524. DAY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 372 Fed. Appx. 980.

No. 13–9525. SCOTT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 732 F. 3d 910.

No. 13–9530. FELIPE RASCO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 545 Fed. Appx. 895.

No. 13–9531. HERNANDEZ FLORES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 395.

No. 13–9533. SANCHEZ-CRUZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 548 Fed. Appx. 252.

No. 13–9534. CHEEK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 740 F. 3d 440.

No. 13–9535. PINEDA-MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 550 Fed. Appx. 246.

No. 13–9538. PEREZ-REQUENA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 145.

No. 13–9540. CROWE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 546 Fed. Appx. 293.

No. 13–9541. DENNIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 549 Fed. Appx. 408.

No. 13–9542. CALDERON-VALDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 186.

No. 13–9544. JACQUES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 13–9545. BACKUS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 550 Fed. Appx. 260.

No. 13–9547. BUNN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 85 A. 3d 104.

No. 13–9548. AYYUBI, AKA MCCLAIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 13–9550. PALMA-PALMA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 220.

No. 13–9557. GALDAMEZ-ESCOBAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 179.

No. 13–9558. HOOKER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 70 A. 3d 1197.

No. 13–9563. THOMAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 726 F. 3d 1086.

No. 13–9564. SENSI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 542 Fed. Appx. 8.

No. 13–9565. AUGUSTINE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 742 F. 3d 1258.

No. 13–9567. GRAHAM *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 13–9569. MORALES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 531.

No. 13–9570. YANEZ VERDUGO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 313.

No. 13–9571. FILPO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 13–9572. ASTORGA SAMANIEGO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 552.

No. 13–9578. GARDNER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 545 Fed. Appx. 265.

No. 13–9581. FOSTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 210.

No. 13–9582. HOLMES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 13–9588. CORTEZ-DUTRIEVILLE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 743 F. 3d 881.

No. 13–9595. JIMENEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 394.

No. 13–9599. NIELSEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 933.

No. 13–9606. BROOKS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 736 F. 3d 921.

No. 13–9608. BALLARD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 551 Fed. Appx. 33.

No. 13–9616. COLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 13–9623. NEALY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 192.

No. 13–9625. HARPER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 554 Fed. Appx. 832.

No. 13–9626. ATKINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 13–9629. REVERIO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 552.

No. 13–677. BEARD, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION *v.* AGUILAR. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 725 F. 3d 970.

JUSTICE ALITO, with whom JUSTICE SCALIA joins, dissenting.

I dissent from the Court's decision to deny certiorari. See *Tolan* v. *Cotton*, *ante*, p. 661 (ALITO, J., concurring in judgment).

No. 13–1115. MARTIN *v.* PENNSYLVANIA BOARD OF LAW EXAMINERS. Sup. Ct. Pa. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 621 Pa. 127, 74 A. 3d 1025.

No. 13–1170. WILLIS *v.* MARCHANT ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 552 Fed. Appx. 278.

No. 13–1184. COHEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 539 Fed. Appx. 743.

Rehearing Denied

No. 13–812. JAFFE *v.* PREGERSON, JUDGE, UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, ET AL., 571 U. S. 1238;

No. 13–855. S. M. *v.* FLORIDA DEPARTMENT OF REVENUE, ON BEHALF OF A. C. S., *ante*, p. 1016;

No. 13–875. LAITY *v.* NEW YORK, *ante*, p. 1034;

No. 13–6459. JOHNSON *v.* EDWARDS ET AL., *ante*, p. 1003;

No. 13–7567. BITON *v.* LIPPERT ET AL., 571 U. S. 1206;

No. 13–7599. MCWILLIAMS *v.* SCHUMACHER ET AL., 571 U. S. 1207;

No. 13–7668. YBARRA *v.* HOOTS, 571 U. S. 1208;

No. 13–7763. Venzie *v.* Yatauro, Administrator, Adult Diagnostic and Treatment Center, 571 U. S. 1211;

No. 13–7841. Taylor *v.* Omeechevarria, 571 U. S. 1213;

No. 13–7857. Bell *v.* Batson, Deputy Warden, et al., 571 U. S. 1213;

No. 13–7872. Pettway *v.* Crews, Secretary, Florida Department of Corrections, et al., 571 U. S. 1214;

No. 13–7888. In re Biton, 571 U. S. 1195;

No. 13–7889. In re Biton, 571 U. S. 1195;

No. 13–7900. Biton *v.* Abrutyn et al., 571 U. S. 1215;

No. 13–7952. Korte *v.* Midland Funding, LLC, et al., 571 U. S. 1239;

No. 13–8227. Chen *v.* Colonius, *ante*, p. 1005;

No. 13–8298. Sherrill *v.* United States District Court for the District of Arizona, *ante*, p. 1005;

No. 13–8355. Tokley *v.* Santiago, Administrator, New Jersey State Prison, et al., 571 U. S. 1229;

No. 13–8421. Bowen *v.* Gramiak, Warden, *ante*, p. 1037;

No. 13–8439. Driessen *v.* Citibank, N. A., 571 U. S. 1243; and

No. 13–8604. In re Ware, *ante*, p. 1014. Petitions for rehearing denied.

May 19, 2014

Certiorari Granted—Vacated and Remanded

No. 13–862. Thomas, Tutrix, on Behalf of Thomas *v.* Nugent. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Tolan* v. *Cotton*, *ante*, p. 650 (*per curiam*). Reported below: 539 Fed. Appx. 456.

No. 13–7557. Lawler *v.* United States. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Alleyne* v. *United States*, 570 U. S. 99 (2013). Reported below: 721 F. 3d 828.

No. 13–8114. Nagi *v.* United States. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Rosemond* v. *United States*, *ante*, p. 65. Reported below: 541 Fed. Appx. 556.

No. 13–8627. TAX-GARCIA *v.* UNITED STATES (Reported below: 544 Fed. Appx. 564); RUEDA-CASTANEDA, AKA RUEDA CASTANEDA *v.* UNITED STATES (547 Fed. Appx. 521); and MORA-FERNANDEZ *v.* UNITED STATES (548 Fed. Appx. 165). C. A. 5th Cir. Motion of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and case remanded for further consideration in light of the position asserted by the Solicitor General in his brief for the United States filed on April 8, 2014.

Certiorari Dismissed

No. 13–9115. CASEY *v.* FLORIDA. Sup. Ct. Fla. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

No. 13–9651. DOWDY *v.* UNITED STATES. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

No. 13–9666. CREDICO *v.* VERRILLI, SOLICITOR GENERAL OF THE UNITED STATES, ET AL. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 13M114. BOHANNAN *v.* DOE ET AL.;

No. 13M115. MIDDLETON *v.* BOWERSOX; and

No. 13M118. KLINGE *v.* VANDECAR ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 13M116. TAYLOR *v.* WINNECOUR; TAYLOR *v.* WINNECOUR; TAYLOR *v.* WINNECOUR ET AL.; and TAYLOR *v.* WINNECOUR ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 13M117. SEARCY *v.* DEPARTMENT OF AGRICULTURE. Motion for leave to proceed as a veteran granted.

No. 13M119. KARMATZIS *v.* HAMILTON ET AL.; and
No. 13M120. MASCIANTONIO *v.* UNITED STATES ET AL. Motions for leave to proceed as veterans denied.

No. 13–1067. OBB PERSONENVERKEHR AG *v.* SACHS. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 13–8228. COOPER *v.* GRAMIAK, WARDEN. C. A. 11th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 1012] denied.

No. 13–8414. MERRITT *v.* R&R CAPITAL LLC ET AL. Sup. Ct. Del. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 1033] denied.

No. 13–9040. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 1045] denied.

No. 13–9077. BING YI CHEN *v.* UNITED STATES. C. A. 2d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 1045] denied.

No. 13–9603. RICOTTA *v.* SAN DIEGO COUNTY EMPLOYEES RETIREMENT ASSN. Ct. App. Cal., 4th App. Dist., Div. 1. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 9, 2014, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 13–9853. IN RE CARTER-BEY; and
No. 13–9896. IN RE LLOVERA LINARES. Petitions for writs of habeas corpus denied.

No. 13–1198. IN RE DEL RIO. Petition for writ of mandamus denied.

Certiorari Granted

No. 13–894. Department of Homeland Security *v.* MacLean. C. A. Fed. Cir. Certiorari granted. Reported below: 714 F. 3d 1301.

Certiorari Denied

No. 12–10638. Lipsey *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 509 Fed. Appx. 714.

No. 13–690. Rack Room Shoes *v.* United States et al.; and No. 13–822. Forever 21, Inc., et al. *v.* United States et al. C. A. Fed. Cir. Certiorari denied. Reported below: 718 F. 3d 1370.

No. 13–742. Droganes *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 728 F. 3d 580.

No. 13–772. Free Speech *v.* Federal Election Commission. C. A. 10th Cir. Certiorari denied. Reported below: 720 F. 3d 788.

No. 13–811. Almond Bros. Lumber Co. et al. *v.* United States et al. C. A. Fed. Cir. Certiorari denied. Reported below: 721 F. 3d 1320.

No. 13–820. Sheppard *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 13–879. Pitcairn Properties, Inc. *v.* LJL 33rd Street Associates, LLC. C. A. 2d Cir. Certiorari denied. Reported below: 725 F. 3d 184.

No. 13–922. Tsolainos *v.* Cain, Warden. C. A. 5th Cir. Certiorari denied. Reported below: 540 Fed. Appx. 394.

No. 13–928. Crockett et al. *v.* Reed Elsevier, Inc. C. A. 6th Cir. Certiorari denied. Reported below: 734 F. 3d 594.

No. 13–934. Edmonson *v.* Lincoln National Life Insurance Co. C. A. 3d Cir. Certiorari denied. Reported below: 725 F. 3d 406.

No. 13–941. Aracoma Coal Co. et al. *v.* United States. C. A. Fed. Cir. Certiorari denied. Reported below: 521 Fed. Appx. 929.

No. 13–959. STONE *v.* BEAR, STEARNS & CO., INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 538 Fed. Appx. 169.

No. 13–962. LEATH *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 461 S. W. 3d 73.

No. 13–963. MISSOURI *v.* MCNEAL. Sup. Ct. Mo. Certiorari denied. Reported below: 412 S. W. 3d 886.

No. 13–1035. BANK OF AMERICA, N. A., ET AL. *v.* DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied. Reported below: 80 A. 3d 650.

No. 13–1047. DAWKINS *v.* FULTON COUNTY, GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 733 F. 3d 1084.

No. 13–1054. JALDIN ET UX. *v.* RECONTRUST CO., N. A., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 539 Fed. Appx. 97.

No. 13–1065. AIR METHODS CORP. *v.* OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 737 F. 3d 660.

No. 13–1068. SECOND AVENUE DINER CORP. ET AL. *v.* KREISLER. C. A. 2d Cir. Certiorari denied. Reported below: 731 F. 3d 184.

No. 13–1071. BAXTER INTERNATIONAL, INC., ET AL. *v.* FRESENIUS USA, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 721 F. 3d 1330.

No. 13–1076. PAIGE *v.* VERMONT ET AL. Sup. Ct. Vt. Certiorari denied. Reported below: 2013 VT 105, 195 Vt. 302, 88 A. 3d 1182.

No. 13–1084. CRAIG *v.* RICH TOWNSHIP HIGH SCHOOL DISTRICT 227 ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 736 F. 3d 1110.

No. 13–1086. STAKER ET UX. *v.* WELLS FARGO BANK, N. A., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 550 Fed. Appx. 580.

No. 13–1087. PULVER *v.* BATTELLE MEMORIAL INSTITUTE. C. A. 9th Cir. Certiorari denied. Reported below: 536 Fed. Appx. 730.

No. 13–1088. BEDKE ET AL. *v.* CASSIA COUNTY SHERIFF'S DEPARTMENT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 540 Fed. Appx. 601.

No. 13–1089. ALFONSO ET AL. *v.* DIAMONDHEAD FIRE PROTECTION DISTRICT ET AL. Sup. Ct. Miss. Certiorari denied. Reported below: 122 So. 3d 54.

No. 13–1092. FEUDALE *v.* BARNES FOUNDATION ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 74 A. 3d 129.

No. 13–1100. PEZHMAN *v.* DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 113 App. Div. 3d 417, 977 N. Y. S. 2d 886.

No. 13–1107. VANREYENDAM *v.* WOLFENBERGER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 13–1109. SENEY, INDIVIDUALLY AND AS PARENT AND NEXT FRIEND OF I. S. ET AL., ET VIR *v.* RENT-A-CENTER, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 738 F. 3d 631.

No. 13–1110. LIA ET AL. *v.* SAPORITO ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 541 Fed. Appx. 71.

No. 13–1119. FREEMAN *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 13–1135. SHELTON ET AL. *v.* CITIMORTGAGE, INC. C. A. 8th Cir. Certiorari denied. Reported below: 735 F. 3d 747.

No. 13–1141. STAN LEE MEDIA, INC. *v.* CONAN SALES CO. LLC ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 546 Fed. Appx. 725.

No. 13–1158. VOGT *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON. C. A. 9th Cir. Certiorari denied.

No. 13–1183. DANIEL *v.* ALLSTATE INSURANCE CO. C. A. 5th Cir. Certiorari denied. Reported below: 541 Fed. Appx. 506.

No. 13–1202. BARNETT *v.* ATHENS REGIONAL MEDICAL CENTER, INC. C. A. 11th Cir. Certiorari denied. Reported below: 550 Fed. Appx. 711.

No. 13–1206. MIRAN *v.* NEW YORK (three judgments). App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 107 App. Div. 3d 28, 964 N. Y. S. 2d 309 (first judgment); 107 App. Div. 3d 41, 963 N. Y. S. 2d 896 (second judgment); 107 App. Div. 3d 43, 963 N. Y. S. 2d 896 (third judgment).

No. 13–1207. LESINSKI *v.* SOUTH FLORIDA WATER MANAGEMENT DISTRICT. C. A. 11th Cir. Certiorari denied. Reported below: 739 F. 3d 598.

No. 13–1213. RENNIE *v.* LIZARRAGA, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 539 Fed. Appx. 726.

No. 13–1215. WHITE *v.* KUBOTEK CORP. ET AL. C. A. 1st Cir. Certiorari denied.

No. 13–1229. SEARS ET AL. *v.* BADAMI ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 734 F. 3d 810.

No. 13–1238. RUST *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied. Reported below: 133 So. 3d 529.

No. 13–1246. BOUCHAT *v.* BALTIMORE RAVENS LIMITED PARTNERSHIP ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 737 F. 3d 932.

No. 13–1247. WESTE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 13–1262. WESTERN MANAGEMENT, INC., ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 552 Fed. Appx. 990.

No. 13–1265. TAMEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 13–7250. HERNANDEZ JIMENEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 537 Fed. Appx. 678.

No. 13–7580. BATISTE *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 121 So. 3d 808.

No. 13–8186. ACOSTA *v.* DREW, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 539 Fed. Appx. 214.

No. 13–8215. MICHEL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 533 Fed. Appx. 779.

No. 13–8224. STARGELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 738 F. 3d 1018.

No. 13–8354. RUIZ *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 728 F. 3d 416.

No. 13–8406. BOUTANG *v.* TEXAS. Ct. App. Tex., 4th Dist. Certiorari denied. Reported below: 402 S. W. 3d 782.

No. 13–8415. BELL *v.* BONDI, ATTORNEY GENERAL OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 461 Fed. Appx. 843.

No. 13–8510. WILSON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 142 So. 3d 732.

No. 13–8577. GOODE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 550 Fed. Appx. 84.

No. 13–8594. HARRIS *v.* HAWAII. Int. Ct. App. Haw. Certiorari denied. Reported below: 129 Haw. 450, 303 P. 3d 1227.

No. 13–8725. SEARS *v.* CHATMAN, WARDEN. Sup. Ct. Ga. Certiorari denied. Reported below: 294 Ga. 117, 751 S. E. 2d 365.

No. 13–8745. YATES ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 548 Fed. Appx. 68.

No. 13–8814. ALEXIS L. A. *v.* RONALD J. R. Ct. App. Wis. Certiorari denied. Reported below: 2013 WI App 79, 348 Wis. 2d 552, 834 N. W. 2d 437.

No. 13–8939. JUAREZ-REYES *v.* JOYNER, CORRECTIONAL ADMINISTRATOR I, HARNETT CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 539 Fed. Appx. 160.

No. 13–8940. MARTIN *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 13–8941. JOHNSON *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 60 A. 3d 581.

No. 13–8950. WILLIAMS *v.* OHIO. Ct. App. Ohio, 5th App. Dist., Stark County. Certiorari denied. Reported below: 2013-Ohio-3448.

No. 13–8959. WINEGARNER *v.* CITY OF LEWISVILLE, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 13–8960. VALBERT *v.* SOUTH CAROLINA DEPARTMENT OF MENTAL HEALTH ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 549 Fed. Appx. 179.

No. 13–8961. SCOLMAN *v.* THURMER, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 13–8963. EDWARDS *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 13–8970. DEVAUGHN *v.* BACA, SHERIFF, LOS ANGELES COUNTY, CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 13–8974. BLACKWELL *v.* STROTHER, JUDGE, DISTRICT COURT OF TEXAS, MCLENNAN COUNTY, ET AL. C. A. 5th Cir. Certiorari denied.

No. 13–8975. ABUNDIS *v.* PEREZ, ACTING WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–8976. BRAY *v.* MOORE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 13–8978. COGGINS *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 293 Ga. 864, 750 S. E. 2d 331.

No. 13–9000. EPPS *v.* MCCALL, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 543 Fed. Appx. 308.

No. 13–9001. COSTA *v.* MISSOURI. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 412 S. W. 3d 325.

No. 13–9007. MILLER *v.* WALT DISNEY COMPANY CHANNEL 7 KABC ET AL. C. A. 9th Cir. Certiorari denied.

No. 13–9011. FUENTES *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2013 IL App (1st) 092909–U.

No. 13–9013. DeJesus Esquivel *v.* California. Ct. App. Cal., 2d App. Dist., Div. 4. Certiorari denied.

No. 13–9021. Turner *v.* California. Ct. App. Cal., 6th App. Dist. Certiorari denied. Reported below: 219 Cal. App. 4th 151, 161 Cal. Rptr. 3d 567.

No. 13–9024. McFadden *v.* South Carolina et al. C. A. 4th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 218.

No. 13–9038. Lewis *v.* Johnson, Judge, et al. Ct. App. D. C. Certiorari denied.

No. 13–9041. Littlejohn *v.* California. Ct. App. Cal., 2d App. Dist., Div. 6. Certiorari denied.

No. 13–9042. Lane *v.* Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 13–9044. Bridges *v.* Rivard, Warden. C. A. 6th Cir. Certiorari denied.

No. 13–9045. Gilbert *v.* Mossbarger, Warden, et al. C. A. 5th Cir. Certiorari denied. Reported below: 533 Fed. Appx. 491.

No. 13–9047. Faulcon *v.* Bartkowski et al. C. A. 3d Cir. Certiorari denied.

No. 13–9048. Kalluvilayil *v.* Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 13–9051. Grimes *v.* Beary et al. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 100 So. 3d 711.

No. 13–9054. Speers *v.* Indiana. Sup. Ct. Ind. Certiorari denied. Reported below: 999 N. E. 2d 850.

No. 13–9058. Williams *v.* Swarthout, Warden. C. A. 9th Cir. Certiorari denied.

No. 13–9062. Fosselman *v.* Evans, Warden. C. A. 9th Cir. Certiorari denied.

No. 13–9069. MOUTON *v.* SMITH, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 13–9070. GREEN *v.* LOCKETT ET AL. C. A. 3d Cir. Certiorari denied.

No. 13–9073. HENDERSON *v.* PARKER, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 536 Fed. Appx. 774.

No. 13–9075. CAMPONDONICA *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 13–9078. CECIL *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING. C. A. 10th Cir. Certiorari denied.

No. 13–9081. GREEN *v.* THOMPSON ET AL. C. A. 3d Cir. Certiorari denied.

No. 13–9083. HARRIS *v.* HART, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 13–9091. ANDERSON *v.* UMG RECORDINGS, INC., ET AL. C. A. 2d Cir. Certiorari denied.

No. 13–9092. GUTIERREZ *v.* TEXAS. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 13–9093. CARR *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 212 Md. App. 774.

No. 13–9096. DEL REAL *v.* DOTNETNUKE CORP. C. A. 11th Cir. Certiorari denied.

No. 13–9098. M. P. F., AKA W. M. *v.* FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 127 So. 3d 517.

No. 13–9113. CURTIS *v.* NEWTON, SUPERINTENDENT, RIVERSIDE REGIONAL JAIL. Sup. Ct. Va. Certiorari denied.

No. 13–9114. CORRION *v.* MACLAREN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 13–9116. COPELAND *v.* FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 13–9117. SILVA *v.* MOSES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 542 Fed. Appx. 308.

No. 13–9121. BENDER *v.* WALSH, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 13–9123. OWENS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 13–9124. PARKER *v.* SINGLETARY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 546 Fed. Appx. 859.

No. 13–9126. DIAZ *v.* URIBE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–9127. CULMER *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 69 A. 3d 1282.

No. 13–9128. CARMONA *v.* MACLAREN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 13–9132. PIERCE *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 13–9134. CHAPMAN *v.* MACLAREN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 13–9138. TINSLEY *v.* NEW JERSEY. C. A. 3d Cir. Certiorari denied.

No. 13–9139. CORRION *v.* CIRCUIT COURT OF MICHIGAN, LIVINGSTON COUNTY. Ct. App. Mich. Certiorari denied.

No. 13–9142. BOLDRINI *v.* WILSON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 542 Fed. Appx. 152.

No. 13–9152. IVINS *v.* LIZARRAGA, ACTING WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 540 Fed. Appx. 741.

No. 13–9155. SAMANIEGO *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 13–9156. SAMS *v.* RIVARD, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 13–9157. TAMBOURA *v.* CHAPPELL, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 550 Fed. Appx. 489.

No. 13–9170. HUERTA *v.* ADAMS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 545 Fed. Appx. 671.

No. 13–9175. HAMPTON *v.* RITA ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 545 Fed. Appx. 533.

No. 13–9176. LEWIS *v.* FUNK ET AL. C. A. 7th Cir. Certiorari denied.

No. 13–9180. SIMS *v.* CITY OF COLUMBUS, OHIO, ET AL. C. A. 6th Cir. Certiorari denied.

No. 13–9185. CAMPBELL *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 13–9186. CRAIG *v.* VALENZUELA, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–9188. BENNETT *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 13–9189. SIMMONS *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 13–9191. CHAMBER *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 13–9194. MICHAEL *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 549 Fed. Appx. 960.

No. 13–9201. PARRISH *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 621 Pa. 210, 77 A. 3d 557.

No. 13–9256. NAZERI *v.* LONG, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–9268. CHAUDHRY *v.* JOHNSON, SECRETARY OF HOMELAND SECURITY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 542 Fed. Appx. 570.

No. 13–9285. GUY *v.* PIERCE, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 13–9292. HENDERSON *v.* BORG ET AL. C. A. 9th Cir. Certiorari denied.

No. 13–9308. MONBO *v.* MORGAN PROPERTIES TRUST ET AL. Cir. Ct. Baltimore County, Md. Certiorari denied.

No. 13–9321. ALFREDO ALVAREZ ET UX. *v.* HSBC BANK USA, N. A. C. A. 4th Cir. Certiorari denied. Reported below: 733 F. 3d 136.

No. 13–9329. TORVISCO *v.* HOLDER, ATTORNEY GENERAL. C. A. 8th Cir. Certiorari denied.

No. 13–9343. TODD *v.* UTAH. Ct. App. Utah. Certiorari denied. Reported below: 2013 UT App 231, 312 P. 3d 936.

No. 13–9398. COX *v.* NORTH CAROLINA. Gen. Ct. Justice, Super. Ct. Div., Lenoir County, N. C. Certiorari denied.

No. 13–9402. SIMS *v.* VIACOM, INC. C. A. 3d Cir. Certiorari denied. Reported below: 544 Fed. Appx. 99.

No. 13–9404. ROBINSON *v.* CHAPPIUS, SUPERINTENDENT, ELMIRA CORRECTIONAL FACILITY AND RECEPTION CENTER. C. A. 2d Cir. Certiorari denied.

No. 13–9411. WINSLOW *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 548 Fed. Appx. 951.

No. 13–9423. FRAISE *v.* BINGHAM. C. A. 5th Cir. Certiorari denied.

No. 13–9428. REEVES *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 549 Fed. Appx. 838.

No. 13–9443. HAMILTON *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 2013–1094 (La. 10/25/13), 124 So. 3d 1095.

No. 13–9451. YAN YAN *v.* PENN STATE UNIVERSITY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 529 Fed. Appx. 167.

No. 13–9453. KING *v.* STEVENSON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 546 Fed. Appx. 245.

No. 13–9469. WESSON *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 137 Ohio St. 3d 309, 2013-Ohio-4575, 999 N. E. 2d 557.

No. 13–9510. WEYHRICH *v.* NOOTH, SUPERINTENDENT, SNAKE RIVER CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied. Reported below: 542 Fed. Appx. 637.

No. 13–9526. THOMPSON *v.* BURACH ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 513 Fed. Appx. 691.

No. 13–9559. DEJESUS *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 939 So. 2d 110.

No. 13–9560. MALDONADO *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 466 Mass. 742, 2 N. E. 3d 145.

No. 13–9566. AMOS *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 2013 IL App (3d) 110472–U.

No. 13–9580. HUBBARD *v.* ALBRIGHT, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 13–9587. LEE, AKA THOMPSON *v.* BIGELOW, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 555 Fed. Appx. 806.

No. 13–9589. COOK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 550 Fed. Appx. 265.

No. 13–9590. BEST *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 622 Pa. 366, 80 A. 3d 1186.

No. 13–9605. SCOTT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 13–9609. VALDEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 739 F. 3d 1052.

No. 13–9611. LATSON *v.* O'BRIEN, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 548 Fed. Appx. 950.

No. 13–9624. SHEPPERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 739 F. 3d 176.

No. 13–9627. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 547 Fed. Appx. 251.

No. 13–9628. GAMBLE *v.* CRADDOCK. C. A. 4th Cir. Certiorari denied. Reported below: 558 Fed. Appx. 331.

No. 13–9630. SCOTT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 553 Fed. Appx. 555.

No. 13–9633. SHEDWIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 556 Fed. Appx. 347.

No. 13–9637. FOREMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 560 Fed. Appx. 219.

No. 13–9640. NUNEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 560 F. 3d 62.

No. 13–9643. GAYA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 13–9645. SCOTT *v.* OLIVER, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 13–9649. EPPERSON *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 82 A. 3d 729.

No. 13–9650. CARTER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 545 Fed. Appx. 574.

No. 13–9652. KINH DUC TRAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 564 Fed. Appx. 310.

No. 13–9655. COLEMAN *v.* LEMKE, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 739 F. 3d 342.

No. 13–9656. EVANS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 13–9657. ROBINSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 13–9658. SLOTT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 549 Fed. Appx. 210.

No. 13–9662. HARRIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 739 F. 3d 633.

No. 13–9663. CLOUD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 13–9669. WADE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 546.

No. 13–9673. SIMPSON *v.* UNITED STATES; and
No. 13–9697. SHAFER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 741 F. 3d 539.

No. 13–9674. SYLVESTER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 549.

No. 13–9678. HIGGINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 739 F. 3d 733.

No. 13–9682. ELLIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 737 F. 3d 55.

No. 13–9687. JONES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 740 F. 3d 127.

No. 13–9688. MANNING *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 552 Fed. Appx. 958.

No. 13–9703. SOTOMAYOR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 563 Fed. Appx. 123.

No. 13–9705. BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 13–9706. BUEN ROSTRO, AKA BUENROSTRO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 13–9714. MARTINEZ *v.* NEW YORK. Sup. Ct. N. Y., New York County. Certiorari denied.

No. 13–9717. PENN *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 2013 Ark. 409.

No. 13–9719. NICOLESCU *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 541 Fed. Appx. 93.

No. 13–9722. BOYCE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 742 F. 3d 792.

No. 13–9723. BEGAY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 550 Fed. Appx. 604.

No. 13–9724. BEN-ARI, AKA LEVINSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 537 Fed. Appx. 828.

No. 13–9727. HUITRON MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 13–9732. DUPREE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 540 Fed. Appx. 884.

No. 13–9736. MORRIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 558 Fed. Appx. 173.

No. 13–9737. OLIVER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 13–9738. MAPUNI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 531 Fed. Appx. 780.

No. 13–9740. ROMO RIOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 13–9746. ROLON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 13–9747. CURRY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 552 Fed. Appx. 309.

No. 13–9749. COX *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 13–9751. THOMAS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 737 F. 3d 1202.

No. 13–9755. HERRIMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 739 F. 3d 1250.

No. 13–9757. BECKTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 740 F. 3d 303.

No. 13–9758. ALLEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 533 Fed. Appx. 908.

No. 13–9763. MILLER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 13–9765. MOUNIER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 307 Fed. Appx. 379.

No. 13–9766. GOODWIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 552 Fed. Appx. 541.

No. 13–9767. WILKINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 541 Fed. Appx. 272.

No. 13–9768. BROOKS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 747 F. 3d 186.

No. 13–9769. ANGEL BUILES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 13–9770. ARDREY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 739 F. 3d 1189.

No. 13–9773. MCMAHAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 13–9774. PORTER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 542 Fed. Appx. 904.

No. 13–9777. BRISBANE *v.* STEWART, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 233.

No. 13–9785. HARO-MUNOZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 552 Fed. Appx. 689.

No. 13–9789. CEDILLO-NAVAEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 235.

No. 13–9793. BLACK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 739 F. 3d 931.

No. 13–9801. HUGHES *v.* BARBEE, WARDEN. Ct. Crim. App. Tenn. Certiorari denied.

No. 13–803. DECKERS OUTDOOR CORP. *v.* UNITED STATES. C. A. Fed. Cir. Motion of American Association of Exporters and Importers for leave to file brief as *amicus curiae* out of time denied. Certiorari denied. Reported below: 714 F. 3d 1363.

No. 13–1079. ACHEAMPONG *v.* BANK OF NEW YORK MELLON ET AL. C. A. 6th Cir. Motion of Michigan Legal Services et al. for leave to file brief as *amici curiae* granted. Certiorari denied. Reported below: 531 Fed. Appx. 751.

No. 13–8696. ZEIGLER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 130 So. 3d 694.

No. 13–8994. DANIEL *v.* TARGET CORP. C. A. 6th Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

No. 13–9097. POYSON *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. C. A. 9th Cir. Reported below: 743 F. 3d 1185.

No. 13–9638. MITCHELL, AKA JONES, AKA FARRAKHAN-MUHAMMAD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 538 Fed. Appx. 357.

No. 13–9715. LUIS VILLEGAS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari dismissed as moot.

No. 13–9792. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 552 Fed. Appx. 916.

No. 13–9798. KURTI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 550 Fed. Appx. 61.

Rehearing Denied

No. 13–651. MOBILITY MEDICAL, INC., ET AL. *v.* MISSISSIPPI DEPARTMENT OF REVENUE, *ante*, p. 1015;

No. 13–7378. DAKER *v.* WARREN, SHERIFF, COBB COUNTY, GEORGIA, 571 U. S. 1166;

No. 13–7379. DAKER *v.* WARREN, SHERIFF, COBB COUNTY, GEORGIA, 571 U. S. 1166;

No. 13–7543. IN RE ORTIZ, 571 U. S. 1124;

No. 13–7566. BOGANY *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 571 U. S. 1206;

No. 13–7755. SCHOPPMAN *v.* UNIVERSITY OF SOUTH FLORIDA BOARD OF TRUSTEES, *ante*, p. 1018;

No. 13–7958. KING *v.* WHARTON, MAYOR OF THE CITY OF MEMPHIS, TENNESSEE, ET AL., 571 U. S. 1216;

No. 13–8081. THORNTON *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, 571 U. S. 1221;

No. 13–8180. KHAN *v.* COLVIN, ACTING COMMISSIONER OF SOCIAL SECURITY, *ante*, p. 1005;

No. 13–8270. BURKS *v.* COLLINS ET AL., *ante*, p. 1020;

No. 13–8326. HUTCHINSON *v.* POVEDA ET AL., *ante*, p. 1021;

No. 13–8340. VINES *v.* WASHINGTON METROPOLITAN AREA TRANSPORTATION AUTHORITY ET AL., *ante*, p. 1036;

No. 13–8377. BREEDEN *v.* MISSISSIPPI, *ante*, p. 1036;

No. 13–8383. MOORE *v.* UNITED STATES, 571 U. S. 1230;

No. 13–8396. LACEY *v.* HOMEOWNERS OF AMERICA INSURANCE CO., *ante*, p. 1022;

No. 13–8430. WILLIAMS *v.* HILL, WARDEN, *ante*, p. 1037;

No. 13–8557. KUMVACHIRAPITAG *v.* GATES ET AL., *ante*, p. 1049;

No. 13–8568. COOK *v.* NEBRASKA, *ante*, p. 1049;

No. 13–8589. COX *v.* SOCIAL SECURITY ADMINISTRATION, *ante*, p. 1038; and

No. 13–8721. ABRAHAMSON *v.* UNITED STATES, *ante*, p. 1026. Petitions for rehearing denied.

No. 13–639. HATCHIGIAN *v.* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 98, HEALTH & WELFARE FUND, ET AL., 571 U. S. 1198. Motion for leave to file petition for rehearing denied.

MAY 21, 2014

Dismissal Under Rule 46

No. 13–43. MAERSK DRILLING USA, INC. *v.* TRANSOCEAN OFFSHORE DEEPWATER DRILLING, INC. C. A. Fed. Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 699 F. 3d 1340.

Miscellaneous Order

No. 13A1153. BUCKLEW *v.* LOMBARDI, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, treated as an application for stay pending appeal in the United States Court of Appeals for the Eighth Circuit. Application granted pending disposition of petitioner's appeal. We leave for further consideration in the lower courts whether an evidentiary hearing is necessary.

Certiorari Denied

No. 13–10165 (13A1146). BUCKLEW *v.* MISSOURI. Sup. Ct. Mo. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Certiorari denied. The order heretofore entered by JUSTICE ALITO is vacated.

MAY 27, 2014

Certiorari Granted—Reversed and Remanded. (See No. 13–5967, *ante*, p. 833.)

Certiorari Dismissed

No. 13–9266. RAISER *v.* LOIS ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

No. 13–9284. FLINT *v.* GEORGIA ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 13–9297. SANDLES *v.* GEHT ET AL. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 13–9370. ANTHONY *v.* ETUE ET AL. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 13–9392. ARIEGWE *v.* KIRKEGARD, WARDEN, ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 13–9653. K'NAPP *v.* CLAY ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. D–2750. IN RE DISBARMENT OF BAILEY. Disbarment entered. [For earlier order herein, see 571 U. S. 1091.] JUSTICE ALITO took no part in the consideration or decision of this matter.

No. 13M121. SMADI *v.* UNITED STATES. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 13M122. DOE *v.* PHILADELPHIA HOUSING AUTHORITY ET AL. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record denied.

No. 13M123. IN RE AKERS;
No. 13M124. IN RE AKERS; and
No. 13M125. IN RE AKERS. Motions for leave to proceed as a veteran denied.

No. 13–896. COMMIL USA, LLC *v.* CISCO SYSTEMS, INC. C. A. Fed. Cir.; and
No. 13–1044. CISCO SYSTEMS, INC. *v.* COMMIL USA, LLC. C. A. Fed. Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States. JUSTICE BREYER took no part in the consideration or decision of these petitions.

No. 13–9196. SPANO *v.* FLORIDA BAR. Sup. Ct. Fla.; and
No. 13–9263. MCCUTHISON *v.* TENNESSEE DEPARTMENT OF HUMAN SERVICES ET AL. C. A. 6th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until June 17, 2014, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 13–9930. IN RE VIOLETT; and
No. 13–9937. IN RE BUNN. Petitions for writs of habeas corpus denied.

No. 13–9983. IN RE SWEENEY. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule

33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

No. 13–9236. IN RE LEWIS. Petition for writ of mandamus denied.

No. 13–9817. IN RE SCHOTZ. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus dismissed. See this Court's Rule 39.8. JUSTICE KAGAN took no part in the consideration or decision of this motion and this petition.

No. 13–9854. IN RE ANDERSON. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 13–485. COMPTROLLER OF THE TREASURY OF MARYLAND *v.* WYNNE ET UX. Ct. App. Md. Certiorari granted. Reported below: 431 Md. 147, 64 A. 3d 453.

Certiorari Denied

No. 13–127. TURNER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 709 F. 3d 1187.

No. 13–504. BREWINGTON *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 367 N. C. 29, 743 S. E. 2d 626.

No. 13–632. JAMES ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 712 F. 3d 79.

No. 13–633. ORTIZ-ZAPE *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 367 N. C. 1, 743 S. E. 2d 156.

No. 13–739. KITTKA *v.* FRANKS. C. A. 6th Cir. Certiorari denied. Reported below: 539 Fed. Appx. 668.

No. 13–761. GALLOWAY *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 122 So. 3d 614.

No. 13–837. PARKS *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 716 F. 3d 581.

No. 13–847. VILLAGE OF HOBART, WISCONSIN *v.* ONEIDA TRIBE OF INDIANS OF WISCONSIN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 732 F. 3d 837.

No. 13–885. YOHE *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 621 Pa. 527, 79 A. 3d 520.

No. 13–940. NORTH DAKOTA *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 730 F. 3d 750.

No. 13–1096. HOLMES *v.* WINTER. Ct. App. N. Y. Certiorari denied. Reported below: 22 N. Y. 3d 300, 3 N. E. 3d 694.

No. 13–1116. MAHMOODIAN *v.* PIRNIA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 489 Fed. Appx. 711.

No. 13–1118. DEBORD *v.* MERCY HEALTH SYSTEM OF KANSAS, INC. C. A. 10th Cir. Certiorari denied. Reported below: 737 F. 3d 642.

No. 13–1134. LOTHIAN CASSIDY, L. L. C., ET AL. *v.* MARKOWITZ ET AL. C. A. 2d Cir. Certiorari denied.

No. 13–1136. AITKEN *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 13–1139. BEZIO *v.* DRAEGER ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 737 F. 3d 819.

No. 13–1140. REYNOLDS *v.* TEXAS. Ct. App. Tex., 10th Dist. Certiorari denied.

No. 13–1144. RILEY *v.* SOUTH DAKOTA. Sup. Ct. S. D. Certiorari denied. Reported below: 2013 S.D. 95, 841 N. W. 2d 431.

No. 13–1150. SNIDER INTERNATIONAL CORP. ET AL. *v.* TOWN OF FOREST HEIGHTS, MARYLAND, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 739 F. 3d 140.

No. 13–1157. CUNNINGHAM ET AL. *v.* ABBOTT ET AL. Sup. Ct. Ky. Certiorari denied. Reported below: 413 S. W. 3d 589.

No. 13–1164. COMMERCE & INDUSTRY INSURANCE CO. ET AL. *v.* MICHIGAN DEPARTMENT OF TREASURY. Ct. App. Mich. Certiorari denied. Reported below: 301 Mich. App. 256, 836 N. W. 2d 695.

No. 13–1179. IRVING *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 146 So. 3d 52.

No. 13–1195. BASZAK *v.* FEDERAL BUREAU OF INVESTIGATION ET AL. C. A. D. C. Cir. Certiorari denied.

No. 13–1243. CAIN *v.* PONTON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 545 Fed. Appx. 222.

No. 13–1248. TAVAKKOLI *v.* TEXAS. Ct. App. Tex., 9th Dist. Certiorari denied.

No. 13–1257. SCOTT *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 2011 WI App 114, 336 Wis. 2d 473, 801 N. W. 2d 348.

No. 13–1259. DURAN *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 233 Ariz. 310, 312 P. 3d 109.

No. 13–1260. MITRANO *v.* TYLER, CHAPTER 7 TRUSTEE. C. A. 4th Cir. Certiorari denied.

No. 13–1267. FALGOUT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 13–1272. KOMOROSKI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 13–1277. WINDSTEAD ET AL. *v.* DISTRICT OF COLUMBIA ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 548 Fed. Appx. 1.

No. 13–1278. NAKANO *v.* UNITED STATES (Reported below: 742 F. 3d 1208); and NAKANO *v.* COMMISSIONER OF INTERNAL REVENUE (552 Fed. Appx. 724). C. A. 9th Cir. Certiorari denied.

No. 13–1294. CAMPBELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 587 Fed. Appx. 31.

No. 13–1297. WARD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 732 F. 3d 175.

No. 13–7394. MAXWELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 724 F. 3d 724.

No. 13–7768. MARSHALL *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 309 P. 3d 943.

No. 13–8239. ASHMORE *v.* PRUS ET AL. C. A. 2d Cir. Certiorari denied.

No. 13–8552. TRITZ *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 721 F. 3d 1133.

No. 13–8618. EDWARDS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 57 Cal. 4th 658, 306 P. 3d 1049.

No. 13–8706. SMITH *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 2013 OK CR 14, 306 P. 3d 557.

No. 13–8707. BUCK *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 418 S. W. 3d 98.

No. 13–8743. WALKER *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 2013 WI App 84, 348 Wis. 2d 761, 833 N. W. 2d 872.

No. 13–8765. LARA-UNZUETA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 735 F. 3d 954.

No. 13–8781. THOMPSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 735 F. 3d 291.

No. 13–8915. TATE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 2012–2763 (La. 11/5/13), 130 So. 3d 829.

No. 13–9002. GRAY *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 723 F. 3d 790.

No. 13–9003. GRAY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 723 F. 3d 795.

No. 13–9118. ARAUZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 6. Certiorari denied.

No. 13–9195. REYES *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 13–9199. GUIDRY *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 13–9202. EDWARDS *v.* SWARTHOUT, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 533 Fed. Appx. 776.

No. 13–9213. BUTTS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 2. Certiorari denied.

No. 13–9222. RICE *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 13–9229. YOUNG *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 990 N. E. 2d 72.

No. 13–9234. BURTON *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 2014 Ark. 44.

No. 13–9239. MAGALLON *v.* HOLLAND, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–9248. HIRAMANEK *v.* COURT OF APPEAL OF CALIFORNIA, SIXTH APPELLATE DISTRICT. Sup. Ct. Cal. Certiorari denied.

No. 13–9249. HAENDEL *v.* PONT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 548 Fed. Appx. 218.

No. 13–9250. SKLAR *v.* TOSHIBA AMERICA INFORMATION SYSTEMS, INC. Ct. App. Cal., 2d App. Dist., Div. 1. Certiorari denied. Reported below: 218 Cal. App. 4th 853, 160 Cal. Rptr. 3d 557.

No. 13–9252. SEIBERT *v.* TATUM, WARDEN. Super. Ct. Chattooga County, Ga. Certiorari denied.

No. 13–9257. MOSLEY *v.* HARRINGTON, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 13–9260. JOHNSON *v.* CITY OF WAKEFIELD, MICHIGAN. C. A. 6th Cir. Certiorari denied.

No. 13–9261. GREENE *v.* RENICO, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 13–9262. MILLER *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 234 Ariz. 31, 316 P. 3d 1219.

No. 13–9264. REEVES *v.* WELLS FARGO HOME MORTGAGE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 564.

No. 13–9267. REMY *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 22 N. Y. 3d 958, 999 N. E. 2d 554.

No. 13–9270. BROCK *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 13–9272. BROWN *v.* BACA, SHERIFF, LOS ANGELES COUNTY, CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 13–9273. SMITH *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 13–9276. JOHNSON *v.* MURRAY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 548 Fed. Appx. 277.

No. 13–9277. JOINER *v.* DUFFEY, WARDEN. Super. Ct. Mitchell County, Ga. Certiorari denied.

No. 13–9278. FLANAGAN *v.* CASH, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–9282. HOLLOWAY *v.* BAUMAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 13–9287. GRANT *v.* CATALDO ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 106 App. Div. 3d 646, 967 N. Y. S. 2d 863.

No. 13–9289. FAGNES *v.* KELLER, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 13–9293. FRANCIS *v.* SHORBA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 533 Fed. Appx. 697.

No. 13–9305. COVARRUBIAS *v.* GROUNDS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–9306. JONES *v.* INDIANA ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 533 Fed. Appx. 672.

No. 13–9310. FLORES VERA *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 13–9311. LEDESMA ZEPEDA *v.* SULLIVAN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 543 Fed. Appx. 729.

No. 13–9316. ELLISON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 556 Fed. Appx. 175.

No. 13–9322. AURICH *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 13–9324. WALDRIP *v.* HUMPHREY, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 532 Fed. Appx. 878.

No. 13–9325. VOLK *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 13–9330. WILLIAMS *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 84 Mass. App. 1113, 994 N. E. 2d 818.

No. 13–9331. TOLEDO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 5. Certiorari denied.

No. 13–9332. WILLIAMS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 58 Cal. 4th 197, 315 P. 3d 1.

No. 13–9334. GREEN *v.* THARP. C. A. 6th Cir. Certiorari denied.

No. 13–9339. SHONG-CHING TONG *v.* CALIFORNIA DEPARTMENT OF MOTOR VEHICLES. Ct. App. Cal., 2d App. Dist., Div. 2. Certiorari denied.

No. 13–9341. ANDREWS *v.* ROZUM, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT SOMERSET, ET AL. C. A. 3d Cir. Certiorari denied.

No. 13–9345. WOODSON *v.* ZATECKY, SUPERINTENDENT, PENDLETON CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 13–9346. TIJERINA *v.* PATTERSON ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 543 Fed. Appx. 771.

No. 13–9357. JEFFERS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 13–9369. ANTHONY *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 13–9416. FARROW *v.* CURTIN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 13–9438. GARCIA *v.* URIBE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–9483. SIMMONS *v.* FEDERAL AVIATION ADMINISTRATION. C. A. 9th Cir. Certiorari denied.

No. 13–9492. BIDWAI *v.* PEREZ, SECRETARY OF LABOR, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 181.

No. 13–9494. BYNUM *v.* DOMINO'S PIZZA, INC. C. A. 11th Cir. Certiorari denied.

No. 13–9515. FERNANDEZ *v.* LEWIS. C. A. 9th Cir. Certiorari denied.

No. 13–9551. SMALL *v.* SOTO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–9552. SCHWARTZMILLER *v.* SHERMAN, ACTING WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–9577. LAWRENCE *v.* SONY PICTURES ENTERTAINMENT, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 534 Fed. Appx. 651.

No. 13–9579. HERRON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 168 So. 3d 170.

No. 13–9585. GARCIA VERONICA *v.* HOLDER, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 516 Fed. Appx. 631.

No. 13–9593. ALMARAZ *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 13–9594. JORDAN *v.* SOTO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–9610. WARD *v.* NORMAN, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 13–9614. JACKSON *v.* HILL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–9646. LeFleur *v.* Michigan. Ct. App. Mich. Certiorari denied.

No. 13–9660. Bethea *v.* Crews, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 13–9661. Appukkutta *v.* New York Supreme Court et al. C. A. 2d Cir. Certiorari denied.

No. 13–9665. Daniel *v.* Ohio. Ct. App. Ohio, 9th App. Dist., Summit County. Certiorari denied. Reported below: 2013-Ohio-3510.

No. 13–9668. Rodriguez *v.* Rozum, Superintendent, State Correctional Institution at Somerset, et al. C. A. 3d Cir. Certiorari denied. Reported below: 535 Fed. Appx. 125.

No. 13–9675. Aparicio *v.* Baker, Warden, et al. C. A. 9th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 684.

No. 13–9683. Lindsey *v.* Delaware. Sup. Ct. Del. Certiorari denied. Reported below: 83 A. 3d 738.

No. 13–9684. Franklin *v.* Washington. Ct. App. Wash. Certiorari denied. Reported below: 174 Wash. App. 1062.

No. 13–9704. Allen *v.* California. Ct. App. Cal., 2d App. Dist., Div. 2. Certiorari denied.

No. 13–9711. Redman *v.* New York State Department of Correctional Services et al. C. A. 2d Cir. Certiorari denied. Reported below: 541 Fed. Appx. 52.

No. 13–9721. Fradiue *v.* Macomber, Acting Warden, et al. C. A. 9th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 297.

No. 13–9731. Cox *v.* Obsidian Finance Group, LLC, et al. C. A. 9th Cir. Certiorari denied. Reported below: 740 F. 3d 1284.

No. 13–9781. Payne *v.* Florida. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 128 So. 3d 802.

No. 13–9797. Hanner *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 549 Fed. Appx. 289.

No. 13–9803. HILL *v.* HOLDER, ATTORNEY GENERAL. C. A. 3d Cir. Certiorari denied.

No. 13–9804. RAGLAND *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 13–9819. WHITE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 543 Fed. Appx. 563.

No. 13–9820. THOMPSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 553 Fed. Appx. 181.

No. 13–9821. VENTA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 13–9827. ALLEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 13–9832. NELSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 732 F. 3d 504.

No. 13–9836. STERLING *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 738 F. 3d 228.

No. 13–9837. CRAWFORD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 552 Fed. Appx. 240.

No. 13–9839. GALLON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 552 Fed. Appx. 712.

No. 13–9840. MARTINEZ RIQUENE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 552 Fed. Appx. 940.

No. 13–9841. DELOSSANTOS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 13–9842. THOMAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 223.

No. 13–9846. THORNTON *v.* O'BRIEN, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 549 Fed. Appx. 177.

No. 13–9847. THORNTON *v.* DANIELS, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 554 Fed. Appx. 762.

No. 13–9848. SANDERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 558.

No. 13–9850. De La Torre-Ventura *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 552 Fed. Appx. 744.

No. 13–9852. Slanaker *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 13–9858. Rene Pinto *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 13–9859. Ku Il Lee *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 564 Fed. Appx. 323.

No. 13–9860. Clark *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 13–9861. Crawford *v.* Meeks, Warden. C. A. 3d Cir. Certiorari denied. Reported below: 561 Fed. Appx. 128.

No. 13–9866. Quintana *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 13–9872. Noriega-Alanis *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 550 Fed. Appx. 233.

No. 13–9877. Carroll *v.* Holland, Warden. C. A. 6th Cir. Certiorari denied.

No. 13–9878. Robinson *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 286.

No. 13–9883. Ronquillo *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 13–9886. Shelton *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 548 Fed. Appx. 904.

No. 13–9888. Gamez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 553 Fed. Appx. 430.

No. 13–9889. Gray et al. *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 870.

No. 13–9892. Suttles *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 546 Fed. Appx. 215.

No. 13–9899. Brown *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 13–9905. DANIELS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 554 Fed. Appx. 885.

No. 13–9911. MAGANA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 553 Fed. Appx. 699.

No. 13–9914. ORTEGA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 567 Fed. Appx. 525.

No. 13–9915. BARNETT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 540 Fed. Appx. 532.

No. 13–9916. HAMILTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 13–9918. ADESOYE *v.* BATTS, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 553 Fed. Appx. 419.

No. 13–9919. CALVIN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 543 Fed. Appx. 807.

No. 13–9920. TAYLOR *v.* OLIVER, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 13–9921. WINSOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 549 Fed. Appx. 630.

No. 13–9922. TISDALE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 553 Fed. Appx. 836.

No. 13–9926. YACAMAN MEZA *v.* HOLDER, ATTORNEY GENERAL, ET AL. C. A. 11th Cir. Certiorari denied.

No. 13–9929. STATEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 557 Fed. Appx. 119.

No. 13–9932. TAYLOR *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 549 Fed. Appx. 562.

No. 13–9935. STRAYHORN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 743 F. 3d 917.

No. 13–9936. ALLEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 558 Fed. Appx. 915.

No. 13–9940. DIAZ-SOSA, AKA ORTEGA GONZALEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 553 Fed. Appx. 718.

No. 13–9941. QUINTERO-MENDOZA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 561 Fed. Appx. 607.

No. 13–9942. CRUZ-ALICEA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 13–868. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS *v.* DETRICH. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 740 F. 3d 1237.

No. 13–921. OKLAHOMA ET AL. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. 10th Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 723 F. 3d 1201.

No. 13–1123. LYNCH *v.* CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 737 F. 3d 150.

No. 13–1296. VILAR ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 729 F. 3d 62.

No. 13–9302. HSIAO-PING CHENG *v.* SCHLUMBERGER. C. A. 9th Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

No. 13–9824. MILLIS *v.* CROSS, WARDEN. C. A. 7th Cir. Certiorari before judgment denied.

No. 13–9864. ROLLNESS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 13–9894. JOHNSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 551 Fed. Appx. 22.

Rehearing Denied

No. 13–961. IN RE WOOD, *ante*, p. 1045;

No. 13–1017. NAGLY *v.* MASSACHUSETTS DEPARTMENT OF CHILDREN AND FAMILIES, *ante*, p. 1047;

No. 13–7577. De Adams *v.* Grounds, Warden, 571 U. S. 1206;
No. 13–7969. Franklin *v.* Workers' Compensation Appeals Board et al., 571 U. S. 1217;
No. 13–8278. Washington *v.* California, *ante*, p. 1020;
No. 13–8496. Currie *v.* Warren, Warden, *ante*, p. 1037;
No. 13–8501. Robertson *v.* Smith, Warden, *ante*, p. 1048;
No. 13–8588. Eaddy *v.* Colvin, Acting Commissioner of Social Security, *ante*, p. 1038;
No. 13–8771. Rodger *v.* United States, *ante*, p. 1027;
No. 13–8839. Kerr *v.* United States, *ante*, p. 1039;
No. 13–8917. Sanders *v.* United States, *ante*, p. 1041; and
No. 13–8969. Cabrera *v.* United States, *ante*, p. 1042. Petitions for rehearing denied.

June 2, 2014

Certiorari Dismissed

No. 13–8764. Shove *v.* Chappell, Warden, et al. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 13A1101. Meade et al. *v.* United States. D. C. E. D. Ky. Application for stay, addressed to Justice Ginsburg and referred to the Court, denied.

No. D–2770. In re Discipline of Adams. Edward R. Adams, of New York, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2771. In re Discipline of Barakat. Fred Barakat, of Chadds Ford, Pa., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2772. In re Discipline of Cegelski. Frank B. Cegelski, of Rochester, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2773. IN RE DISCIPLINE OF HARRINGTON. James J. Harrington, of Newport, R. I., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2774. IN RE DISCIPLINE OF SLOANE. Stephen P. Sloane, of State College, Pa., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 13M126. WEDINGTON *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari with supplemental appendix under seal granted.

No. 13M127. COPE *v.* SOCIAL SECURITY ADMINISTRATION ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 13–719. DART CHEROKEE BASIN OPERATING CO., LLC, ET AL. *v.* OWENS. C. A. 10th Cir. [Certiorari granted, *ante*, p. 1045.] Motion of petitioners to dispense with printing joint appendix granted.

No. 13–720. KIMBLE ET AL *v.* MARVEL ENTERPRISES, INC. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 13–9410. IN RE FIORANI. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 1086] denied.

No. 13–9973. GOFFER *v.* UNITED STATES. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 23, 2014, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 13–10029. IN RE BELL. Petition for writ of habeas corpus denied.

No. 13–9359. IN RE JONES. Petition for writ of mandamus denied.

No. 13–9499. IN RE AKERS. Petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Noted

No. 13–895. ALABAMA LEGISLATIVE BLACK CAUCUS ET AL. *v.* ALABAMA ET AL.; and

No. 13–1138. ALABAMA DEMOCRATIC CONFERENCE ET AL. *v.* ALABAMA ET AL. Appeals from D. C. M. D. Ala. Probable jurisdiction noted limited to Question 2 presented by the statement as to jurisdiction in No. 13–895 and Question 1 presented by the statement as to jurisdiction in No. 13–1138. Cases consolidated, and a total of one hour is allotted for oral argument. Reported below: 989 F. Supp. 2d 1227.

Certiorari Denied

No. 13–731. MORRIS ET AL. *v.* GEORGE. C. A. 9th Cir. Certiorari denied. Reported below: 736 F. 3d 829.

No. 13–933. CAMPBELL-PONSTINGLE ET AL. *v.* KOVACIC ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 724 F. 3d 687.

No. 13–993. KWONG ET AL. *v.* DE BLASIO, MAYOR OF THE CITY OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 723 F. 3d 160.

No. 13–1009. RISEN *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 724 F. 3d 482.

No. 13–1013. GENON POWER MIDWEST, L. P. *v.* BELL ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 734 F. 3d 188.

No. 13–1014. NSK CORP. ET AL. *v.* INTERNATIONAL TRADE COMMISSION ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 716 F. 3d 1352.

No. 13–1023. TESORO CORPORATION AND SUBSIDIARIES *v.* ALASKA DEPARTMENT OF REVENUE. Sup. Ct. Alaska. Certiorari denied. Reported below: 312 P. 3d 830.

No. 13–1064. COURTNEY ET AL. *v.* DANNER, CHAIRMAN AND COMMISSIONER OF THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 736 F. 3d 1152.

No. 13–1073. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS *v.* JAMES. C. A. 9th Cir. Certiorari denied. Reported below: 733 F. 3d 911.

No. 13–1154. CSI INSURANCE GROUP *v.* CLEVELAND INDIANS BASEBALL CO., L. P. C. A. 6th Cir. Certiorari denied. Reported below: 727 F. 3d 633.

No. 13–1155. CHARLESTON *v.* BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS AT CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 741 F. 3d 769.

No. 13–1159. WATERFIELD *v.* LAW ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 546 Fed. Appx. 841.

No. 13–1160. TEXAS *v.* BROWN. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 13–1163. YADAV ET AL. *v.* TOWNSHIP OF WEST WINDSOR, NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 13–1169. WHITFIELD *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 321 Ga. App. XXVII.

No. 13–1171. HAN *v.* UNIVERSITY OF DAYTON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 541 Fed. Appx. 622.

No. 13–1172. DEUTSCH *v.* CELEBRITY CRUISES, INC. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 129 So. 3d 1076.

No. 13–1173. COOK *v.* AAGARD ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 547 Fed. Appx. 857.

No. 13–1176. KING *v.* LUMPKIN. C. A. 11th Cir. Certiorari denied. Reported below: 545 Fed. Appx. 799.

No. 13–1177. ANDRULONIS *v.* REILLY, FKA ANDRULONIS. Ct. Sp. App. Md. Certiorari denied. Reported below: 211 Md. App. 754 and 767.

No. 13–1199. YOUNGJOHN *v.* WASHINGTON STATE BAR ASSN. Sup. Ct. Wash. Certiorari denied.

No. 13–1214. FISHER ET AL. *v.* RUTHERFORD COUNTY REGIONAL PLANNING COMMISSION ET AL. Ct. App. Tenn. Certiorari denied.

No. 13–1218. CAMPBELL *v.* HINES, ENVIRONMENTAL ADMINISTRATOR, OHIO ENVIRONMENTAL PROTECTION AGENCY, ET AL. C. A. 6th Cir. Certiorari denied.

No. 13–1226. DESAI *v.* BOOKER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 732 F. 3d 628.

No. 13–1228. DOLEZAL *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 6. Certiorari denied. Reported below: 221 Cal. App. 4th 167, 163 Cal. Rptr. 3d 901.

No. 13–1245. CARPENTINO *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 166 N. H. 9, 85 A. 3d 906.

No. 13–1266. MORRIS *v.* ATCHITY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 760.

No. 13–1275. BLOCH ET AL. *v.* WELLS FARGO HOME MORTGAGE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 755 F. 3d 886.

No. 13–1287. OLSEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 704 F. 3d 1172.

No. 13–1300. BYRD ET UX. *v.* ARVEST BANK. C. A. 6th Cir. Certiorari denied. Reported below: 548 Fed. Appx. 324.

No. 13–1320. MARTINEZ *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS. C. A. 9th Cir. Certiorari denied. Reported below: 550 Fed. Appx. 391.

No. 13–1334. ROSCOE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 542 Fed. Appx. 598.

No. 13–5753. QUINCE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 116 So. 3d 1262.

No. 13–8261. TAYLOR *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 620 Pa. 429, 67 A. 3d 1245.

No. 13–8401. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 734 F. 3d 270.

No. 13–8821. SULLY *v.* AYERS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 725 F. 3d 1057.

No. 13–8830. CARBAJAL *v.* HOTSENPILLER ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 524 Fed. Appx. 425.

No. 13–9347. WHITEHURT *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 83 A. 3d 362.

No. 13–9351. MULLICANE *v.* CLARK, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 550 Fed. Appx. 366.

No. 13–9354. EADDY *v.* ROZUM ET AL. C. A. 3d Cir. Certiorari denied.

No. 13–9375. KHAN *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 13–9377. LEE *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 13–9381. GLENN *v.* WALSH, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 743 F. 3d 402.

No. 13–9387. WHITE *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 13–9389. TAYLOR *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 555 Fed. Appx. 410.

No. 13–9390. TAYLOR *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 13–9393. BAKER *v.* MACOMBER, ACTING WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 548 Fed. Appx. 376.

No. 13–9397. DAVIS *v.* BROWN, SUPERINTENDENT, WABASH VALLEY CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 13–9400. CRISWELL *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 13–9401. PRYOR *v.* WILSON, WARDEN. Sup. Ct. Wyo. Certiorari denied.

No. 13–9405. MORGAN *v.* SWARTHOUT, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–9409. PHILLIPS *v.* CHRONISTER, JUDGE, YORK COUNTY COURT OF COMMON PLEAS. Sup. Ct. Pa. Certiorari denied.

No. 13–9412. HANDY *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 13–9413. TORLUCCI *v.* MACOMBER, ACTING WARDEN; and TORLUCCI *v.* GARCETTI ET AL. C. A. 9th Cir. Certiorari denied.

No. 13–9418. MANUEL GUTIERREZ *v.* URIBE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–9419. HIPPENSTEEL *v.* 66TH DISTRICT COURT OF MICHIGAN. C. A. 6th Cir. Certiorari denied.

No. 13–9420. SCARNATI *v.* JOHNSTON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 550 Fed. Appx. 74.

No. 13–9422. HILL *v.* LEE, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 13–9425. QURESHI *v.* FARHADI. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 105 App. Div. 3d 990, 964 N. Y. S. 2d 214.

No. 13–9426. RUFFIN *v.* HOUSTON INDEPENDENT SCHOOL DISTRICT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 542 Fed. Appx. 430.

No. 13–9430. POUNCY *v.* SOLOTAROFF ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 13–9431. WILLIAMS *v.* COURT OF APPEALS OF TEXAS, FIRST DISTRICT. Sup. Ct. Tex. Certiorari denied.

No. 13–9434. ROBINSON *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 550 Fed. Appx. 63.

No. 13–9436. HOUSTON *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 13–9439. FRANKLIN *v.* WALKER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 546 Fed. Appx. 722.

No. 13–9440. HEIDEN *v.* IOWA. Sup. Ct. Iowa. Certiorari denied.

No. 13–9442. HAZLIP *v.* TEXAS. Ct. App. Tex., 9th Dist. Certiorari denied.

No. 13–9444. HURD *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 13–9447. HAKODA *v.* STEWARD, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 13–9448. WARD *v.* DUNKLOW ET AL. C. A. 6th Cir. Certiorari denied.

No. 13–9450. WRIGHT *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 2014 Ark. 25.

No. 13–9455. OGEONE *v.* NACINO, JUDGE. C. A. 9th Cir. Certiorari denied.

No. 13–9457. MORGAN *v.* FAYRAM, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 13–9458. BELL *v.* CHILDREN'S PROTECTIVE SERVICES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 547 Fed. Appx. 453.

No. 13–9459. ESPINOSA *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 139 So. 3d 297.

No. 13–9460. DAY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2012 IL App (1st) 103160–U.

No. 13–9464. JOHNSON *v.* SUNSHINE HOUSE, INC. C. A. 4th Cir. Certiorari denied. Reported below: 546 Fed. Appx. 167.

No. 13–9465. LALENA *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 134 So. 3d 465.

No. 13–9466. ROSS *v.* FRAUENHEIM, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 551 Fed. Appx. 367.

No. 13–9471. BERRYHILL *v.* ILLINOIS STATE TOLL HIGHWAY AUTHORITY. C. A. 7th Cir. Certiorari denied.

No. 13–9505. REED *v.* LUDWICK, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 13–9549. MEEKS *v.* JUNIOUS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 13–9597. JOHNSON *v.* BECKSTROM, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 13–9600. OGEONE *v.* NAKAKUNI, UNITED STATES ATTORNEY. C. A. 9th Cir. Certiorari denied.

No. 13–9602. SEARCY *v.* BERGHUIS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 549 Fed. Appx. 357.

No. 13–9619. HOOD *v.* VESSEL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 511.

No. 13–9632. JOHNSON *v.* DEPARTMENT OF JUSTICE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 541 Fed. Appx. 160.

No. 13–9641. MOORE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 13–9647. CHANCE *v.* TORRINGTON SAVINGS BANK MORTGAGE SERVICING CO. App. Ct. Conn. Certiorari denied. Reported below: 146 Conn. App. 616, 78 A. 3d 248.

No. 13–9664. CAIN *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 13–9672. PULLEY *v.* UNITEDHEALTH GROUP INC. C. A. 8th Cir. Certiorari denied. Reported below: 549 Fed. Appx. 591.

No. 13–9676. ADAMS *v.* UNIVERSITY OF TENNESSEE HEALTH SCIENCE CENTER AT MEMPHIS ET AL. C. A. 6th Cir. Certiorari denied.

No. 13–9696. MITCHELL *v.* SANCHEZ ET AL. C. A. 8th Cir. Certiorari denied.

No. 13–9699. ALLEN *v.* LOUISIANA. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 48,324 (La. App. 2 Cir. 6/26/13), 118 So. 3d 514.

No. 13–9701. MITCHELL *v.* KJMC 89.3 F. M. ET AL. C. A. 8th Cir. Certiorari denied.

No. 13–9709. ROSAS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 2. Certiorari denied.

No. 13–9712. JOHNSON *v.* DUNNAHOE ET AL. C. A. 9th Cir. Certiorari denied.

No. 13–9753. WILLIAMSON *v.* HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 13–9771. JIVES *v.* OBENLAND, SUPERINTENDENT, CLALLAM BAY CORRECTIONS CENTER. C. A. 9th Cir. Certiorari denied.

No. 13–9779. LIZALEK *v.* COUNTY OF MILWAUKEE, WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 2013 WI App 105, 349 Wis. 2d 788, 837 N. W. 2d 177.

No. 13–9806. MAGRAW *v.* RODEN, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION AT NORFOLK. C. A. 1st Cir. Certiorari denied. Reported below: 743 F. 3d 1.

No. 13–9879. LARSON *v.* WILLIAMS, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 13–9884. WESTER *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 2013 IL App (2d) 111085–U.

No. 13–9897. LOCKETT *v.* CITY OF CHICAGO, ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 488 Fed. Appx. 159.

No. 13–9910. LEE *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 898.

No. 13–9938. DAVIDSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 13–9939. DAWSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 542 Fed. Appx. 803.

No. 13–9944. DAVIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 545 Fed. Appx. 228.

No. 13–9953. SMITH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 557 Fed. Appx. 606.

No. 13–9954. RICHARDSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 556 Fed. Appx. 29.

No. 13–9958. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 553 Fed. Appx. 516.

No. 13–9963. BAQUEDANO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 535 Fed. Appx. 487.

No. 13–9965. BOULDING *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 13–9975. FISHER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 540 Fed. Appx. 226.

No. 13–9976. HOLLAND *v.* EBBERT, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 546 Fed. Appx. 81.

No. 13–9982. GILLETTE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 3d 63.

No. 13–9986. BATTLE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 560 Fed. Appx. 206.

No. 13–9987. FOSTER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 740 F. 3d 1202.

No. 13–9989. BARNES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 560 Fed. Appx. 36.

No. 13–9991. SOWELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 13–9993. MCCUIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 553 Fed. Appx. 425.

No. 13–9994. OVALLES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 553 Fed. Appx. 315.

No. 13–9995. WILLIAMS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 554 Fed. Appx. 128.

No. 13–9999. HELTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 737 F. 3d 1121.

No. 13–10002. JACKSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 741 F. 3d 861.

No. 13–10005. WILKERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 558 Fed. Appx. 332.

No. 13–10006. MOTE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 553 Fed. Appx. 117.

No. 13–10007. PERRYMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 558 Fed. Appx. 795.

No. 13–10010. DUNN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 533 Fed. Appx. 908.

No. 13–10012. CARPENTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 13–10019. HOGAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 550 Fed. Appx. 756.

No. 13–10025. STAROWICZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 13–10028. HERRON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 554 Fed. Appx. 388.

No. 13–10030. PURVIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 13–10032. SANTANA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 552 Fed. Appx. 87.

No. 13–10034. SILVA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 742 F. 3d 1.

No. 13–10035. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 554 Fed. Appx. 128.

No. 13–10037. SWEOWAT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 538 Fed. Appx. 805.

No. 13–1165. CISCO SYSTEMS, INC., ET AL. *v.* TECSEC, INC. C. A. Fed. Cir. Certiorari denied. JUSTICE BREYER and JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 731 F. 3d 1336.

No. 13–9386. RESENDIZ *v.* LEWIS, WARDEN. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

Rehearing Denied

No. 12–10991. GREENE *v.* UNITED STATES, 571 U. S. 880;

No. 13–7016. JERNIGAN *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS, *ante*, p. 1062;

No. 13–7929. GOSSAGE *v.* MERIT SYSTEMS PROTECTION BOARD, *ante*, p. 1047;

No. 13–8041. BROWN *v.* FOULK, ACTING WARDEN, 571 U. S. 1240;

No. 13–8123. IN RE DOZIER, *ante*, p. 1015;

No. 13–8330. GUNN *v.* UNITED STATES, 571 U. S. 1228;

No. 13–8702. LARSGARD *v.* ARIZONA, *ante*, p. 1050;

No. 13–8720. CASTANEIRA *v.* GEORGIA, *ante*, p. 1050;

No. 13–8847. PRINCE *v.* UNITED STATES, *ante*, p. 1040; and

No. 13–8937. VINCENT *v.* UNITED STATES ET AL., *ante*, p. 1069. Petitions for rehearing denied.

No. 13–6959. HERTULAR *v.* UNITED STATES, 571 U. S. 1087. Petition for rehearing denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

JUNE 3, 2014

Dismissal Under Rule 46

No. 12–1472. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS *v.* HURLES. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 706 F. 3d 1021.

JUNE 4, 2014

Dismissal Under Rule 46

No. 13–1372. MICHIGAN *v.* SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 737 F. 3d 1075.

Miscellaneous Order

No. 13A1173. NATIONAL ORGANIZATION FOR MARRIAGE, INC. *v.* GEIGER ET AL. D. C. Ore. Application for stay, presented to JUSTICE KENNEDY, and by him referred to the Court, denied.

AMENDMENTS TO FEDERAL RULES OF APPELLATE PROCEDURE

The following amendments to the Federal Rules of Appellate Procedure were prescribed by the Supreme Court of the United States on April 25, 2014, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1162. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Appellate Procedure and amendments thereto, see 389 U. S. 1063, 398 U. S. 971, 401 U. S. 1029, 406 U. S. 1005, 441 U. S. 973, 475 U. S. 1153, 490 U. S. 1125, 500 U. S. 1007, 507 U. S. 1059, 511 U. S. 1155, 514 U. S. 1137, 517 U. S. 1255, 523 U. S. 1147, 535 U. S. 1123, 538 U. S. 1071, 544 U. S. 1151, 547 U. S. 1221, 550 U. S. 983, 556 U. S. 1291, 559 U. S. 1119, 563 U. S. 1045, and 569 U. S. 1125.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 25, 2014

To the Senate and House of Representatives of the United States of America in Congress Assembled:

I have the honor to submit to the Congress the amendments to the Federal Rules of Appellate Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying this rule are excerpts from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 25, 2014

ORDERED:

1. That the Federal Rules of Appellate Procedure be, and they hereby are, amended by including therein amendments to Appellate Rule 6.

[See *infra*, pp. 1165–1168.]

2. That the foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 2014, and shall govern in all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Rule 6. Appeal in a bankruptcy case.

(*a*) *Appeal from a judgment, order, or decree of a district court exercising original jurisdiction in a bankruptcy case.*—An appeal to a court of appeals from a final judgment, order, or decree of a district court exercising jurisdiction under 28 U. S. C. § 1334 is taken as any other civil appeal under these rules.

(*b*) *Appeal from a judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction in a bankruptcy case.*

(*1*) *Applicability of other rules.*—These rules apply to an appeal to a court of appeals under 28 U. S. C. § 158(d)(1) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U. S. C. § 158(a) or (b), but with these qualifications:

(A) Rules 4(a)(4), 4(b), 9, 10, 11, 12(c), 13–20, 22–23, and 24(b) do not apply;

(B) the reference in Rule 3(c) to "Form 1 in the Appendix of Forms" must be read as a reference to Form 5;

(C) when the appeal is from a bankruptcy appellate panel, "district court," as used in any applicable rule, means "appellate panel"; and

(D) in Rule 12.1, "district court" includes a bankruptcy court or bankruptcy appellate panel.

(*2*) *Additional rules.*—In addition to the rules made applicable by Rule 6(b)(1), the following rules apply:

(*A*) *Motion for rehearing.*

(i) If a timely motion for rehearing under Bankruptcy Rule 8022 is filed, the time to appeal for all

parties runs from the entry of the order disposing of the motion. A notice of appeal filed after the district court or bankruptcy appellate panel announces or enters a judgment, order, or decree—but before disposition of the motion for rehearing—becomes effective when the order disposing of the motion for rehearing is entered.

(ii) If a party intends to challenge the order disposing of the motion—or the alteration or amendment of a judgment, order, or decree upon the motion—then the party, in compliance with Rules 3(c) and 6(b)(1)(B), must file a notice of appeal or amended notice of appeal. The notice or amended notice must be filed within the time prescribed by Rule 4—excluding Rules 4(a)(4) and 4(b)—measured from the entry of the order disposing of the motion.

(iii) No additional fee is required to file an amended notice.

(*B*) *The record on appeal.*

(i) Within 14 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule 8009—and serve on the appellee—a statement of the issues to be presented on appeal and a designation of the record to be certified and made available to the circuit clerk.

(ii) An appellee who believes that other parts of the record are necessary must, within 14 days after being served with the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included.

(iii) The record on appeal consists of:

- the redesignated record as provided above;
- the proceedings in the district court or bankruptcy appellate panel; and
- a certified copy of the docket entries prepared by the clerk under Rule 3(d).

(*C*) *Making the record available.*

(i) When the record is complete, the district clerk or bankruptcy-appellate-panel clerk must number the documents constituting the record and promptly make it available to the circuit clerk. If the clerk makes the record available in paper form, the clerk will not send documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals, unless directed to do so by a party or the circuit clerk. If unusually bulky or heavy exhibits are to be made available in paper form, a party must arrange with the clerks in advance for their transportation and receipt.

(ii) All parties must do whatever else is necessary to enable the clerk to assemble the record and make it available. When the record is made available in paper form, the court of appeals may provide by rule or order that a certified copy of the docket entries be made available in place of the redesignated record. But any party may request at any time during the pendency of the appeal that the redesignated record be made available.

(*D*) *Filing the record.*—When the district clerk or bankruptcy-appellate-panel clerk has made the record available, the circuit clerk must note that fact on the docket. The date noted on the docket serves as the filing date of the record. The circuit clerk must immediately notify all parties of the filing date.

(*c*) *Direct review by permission under 28 U. S. C. § 158(d)(2).*

(*1*) *Applicability of other rules.*—These rules apply to a direct appeal by permission under 28 U. S. C. § 158(d)(2), but with these qualifications:

(A) Rules 3–4, 5(a)(3), 6(a), 6(b), 8(a), 8(c), 9–12, 13–20, 22–23, and 24(b) do not apply;

(B) as used in any applicable rule, "district court" or "district clerk" includes—to the extent appropriate—a bankruptcy court or bankruptcy appellate panel or its clerk; and

(C) the reference to "Rules 11 and 12(c)" in Rule 5(d)(3) must be read as a reference to Rules 6(c)(2)(B) and (C).

(*2*) *Additional rules.*—In addition, the following rules apply:

(*A*) *The record on appeal.*—Bankruptcy Rule 8009 governs the record on appeal.

(*B*) *Making the record available.*—Bankruptcy Rule 8010 governs completing the record and making it available.

(*C*) *Stays pending appeal.*—Bankruptcy Rule 8007 applies to stays pending appeal.

(*D*) *Duties of the circuit clerk.*—When the bankruptcy clerk has made the record available, the circuit clerk must note that fact on the docket. The date noted on the docket serves as the filing date of the record. The circuit clerk must immediately notify all parties of the filing date.

(*E*) *Filing a representation statement.*—Unless the court of appeals designates another time, within 14 days after entry of the order granting permission to appeal, the attorney who sought permission must file a statement with the circuit clerk naming the parties that the attorney represents on appeal.

AMENDMENTS TO FEDERAL RULES OF BANKRUPTCY PROCEDURE

The following amendments to the Federal Rules of Bankruptcy Procedure were prescribed by the Supreme Court of the United States on April 25, 2014, pursuant to 28 U. S. C. § 2075, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1170. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2075, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Bankruptcy Procedure and amendments thereto, see, *e. g.*, 461 U. S. 973, 471 U. S. 1147, 480 U. S. 1077, 490 U. S. 1119, 500 U. S. 1017, 507 U. S. 1075, 511 U. S. 1169, 514 U. S. 1145, 517 U. S. 1263, 520 U. S. 1285, 526 U. S. 1169, 529 U. S. 1147, 532 U. S. 1077, 535 U. S. 1139, 538 U. S. 1075, 541 U. S. 1097, 544 U. S. 1163, 547 U. S. 1227, 550 U. S. 989, 553 U. S. 1105, 556 U. S. 1307, 559 U. S. 1127, 563 U. S. 1051, 566 U. S. 1045, and 569 U. S. 1141.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 25, 2014

To the Senate and House of Representatives of the United States of America in Congress Assembled:

I have the honor to submit to the Congress the amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2075 of Title 28, United States Code.

Accompanying these rules are excerpts from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 25, 2014

ORDERED:

1. That the Federal Rules of Bankruptcy Procedure be, and they hereby are, amended by including therein amendments to Bankruptcy Rules 1014, 7004, 7008, 7054, 8001–8028, 9023, and 9024.

[See *infra*, pp. 1173–1215.]

2. That the foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on December 1, 2014, and shall govern in all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Bankruptcy Procedure in accordance with the provisions of Section 2075 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 1014. Dismissal and change of venue.

. . . . .

(*b*) *Procedure when petitions involving the same debtor or related debtors are filed in different courts.*—If petitions commencing cases under the Code or seeking recognition under chapter 15 are filed in different districts by, regarding, or against (1) the same debtor, (2) a partnership and one or more of its general partners, (3) two or more general partners, or (4) a debtor and an affiliate, the court in the district in which the first-filed petition is pending may determine, in the interest of justice or for the convenience of the parties, the district or districts in which any of the cases should proceed. The court may so determine on motion and after a hearing, with notice to the following entities in the affected cases: the United States trustee, entities entitled to notice under Rule 2002(a), and other entities as the court directs. The court may order the parties to the later-filed cases not to proceed further until it makes the determination.

Rule 7004. Process; service of summons, complaint.

. . . . .

(*e*) *Summons: time limit for service within the United States.*—Service made under Rule 4(e), (g), (h)(1), (i), or (j)(2) F. R. Civ. P. shall be by delivery of the summons and complaint within 7 days after the summons is issued. If service is by any authorized form of mail, the summons and complaint shall be deposited in the mail within 7 days after the summons is issued. If a summons is not timely delivered or mailed, another summons will be issued for service. This subdivision does not apply to service in a foreign country.

. . . . .

Rule 7008. General rules of pleading.

Rule 8 F. R. Civ. P. applies in adversary proceedings. The allegation of jurisdiction required by Rule 8(a) shall also contain a reference to the name, number, and chapter of the case under the Code to which the adversary proceeding relates and to the district and division where the case under the Code is pending. In an adversary proceeding before a bankruptcy judge, the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement that the proceeding is core or non-core and, if non-core, that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy judge.

Rule 7054. Judgments; costs.

(*a*) *Judgments.*—Rule 54(a)–(c) F. R. Civ. P. applies in adversary proceedings.

(*b*) *Costs; attorney's fees.*

(*1*) *Costs other than attorney's fees.*—The court may allow costs to the prevailing party except when a statute of the United States or these rules otherwise provides. Costs against the United States, its officers and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on 14 days' notice; on motion served within seven days thereafter, the action of the clerk may be reviewed by the court.

(*2*) *Attorney's fees.*

(A) Rule 54(d)(2)(A)–(C) and (E) F. R. Civ. P. applies in adversary proceedings except for the reference in Rule 54(d)(2)(C) to Rule 78.

(B) By local rule, the court may establish special procedures to resolve fee-related issues without extensive evidentiary hearings.

Rule 8001. Scope of Part VIII Rules; definition of "BAP"; method of transmission.

(*a*) *General scope.*—These Part VIII rules govern the procedure in a United States district court and a bankruptcy appellate panel on appeal from a judgment, order, or decree

of a bankruptcy court. They also govern certain procedures on appeal to a United States court of appeals under 28 U. S. C. § 158(d).

(*b*) *Definition of "BAP."*—"BAP" means a bankruptcy appellate panel established by a circuit's judicial council and authorized to hear appeals from a bankruptcy court under 28 U. S. C. § 158.

(*c*) *Method of transmitting documents.*—A document must be sent electronically under these Part VIII rules, unless it is being sent by or to an individual who is not represented by counsel or the court's governing rules permit or require mailing or other means of delivery.

Rule 8002. Time for filing notice of appeal.

(*a*) *In general.*

(*1*) *Fourteen-day period.*—Except as provided in subdivisions (b) and (c), a notice of appeal must be filed with the bankruptcy clerk within 14 days after entry of the judgment, order, or decree being appealed.

(*2*) *Filing before the entry of judgment.*—A notice of appeal filed after the bankruptcy court announces a decision or order—but before entry of the judgment, order, or decree—is treated as filed on the date of and after the entry.

(*3*) *Multiple appeals.*—If one party files a timely notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise allowed by this rule, whichever period ends later.

(*4*) *Mistaken filing in another court.*—If a notice of appeal is mistakenly filed in a district court, BAP, or court of appeals, the clerk of that court must state on the notice the date on which it was received and transmit it to the bankruptcy clerk. The notice of appeal is then considered filed in the bankruptcy court on the date so stated.

(*b*) *Effect of a motion on the time to appeal.*

(*1*) *In general.*—If a party timely files in the bankruptcy court any of the following motions, the time to file an ap-

peal runs for all parties from the entry of the order disposing of the last such remaining motion:

(A) to amend or make additional findings under Rule 7052, whether or not granting the motion would alter the judgment;

(B) to alter or amend the judgment under Rule 9023;

(C) for a new trial under Rule 9023; or

(D) for relief under Rule 9024 if the motion is filed within 14 days after the judgment is entered.

(*2*) *Filing an appeal before the motion is decided.*—If a party files a notice of appeal after the court announces or enters a judgment, order, or decree—but before it disposes of any motion listed in subdivision (b)(1)—the notice becomes effective when the order disposing of the last such remaining motion is entered.

(*3*) *Appealing the ruling on the motion.*—If a party intends to challenge an order disposing of any motion listed in subdivision (b)(1)—or the alteration or amendment of a judgment, order, or decree upon the motion—the party must file a notice of appeal or an amended notice of appeal. The notice or amended notice must comply with Rule 8003 or 8004 and be filed within the time prescribed by this rule, measured from the entry of the order disposing of the last such remaining motion.

(*4*) *No additional fee.*—No additional fee is required to file an amended notice of appeal.

(*c*) *Appeal by an inmate confined in an institution.*

(*1*) *In general.*—If an inmate confined in an institution files a notice of appeal from a judgment, order, or decree of a bankruptcy court, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If the institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U. S. C. § 1746 or by a notarized statement, either of which must

set forth the date of deposit and state that first-class postage has been prepaid.

(*2*) *Multiple appeals.*—If an inmate files under this subdivision the first notice of appeal, the 14-day period provided in subdivision (a)(3) for another party to file a notice of appeal runs from the date when the bankruptcy clerk dockets the first notice.

(*d*) *Extending the time to appeal.*

(*1*) *When the time may be extended.*—Except as provided in subdivision (d)(2), the bankruptcy court may extend the time to file a notice of appeal upon a party's motion that is filed:

(A) within the time prescribed by this rule; or

(B) within 21 days after that time, if the party shows excusable neglect.

(*2*) *When the time may not be extended.*—The bankruptcy court may not extend the time to file a notice of appeal if the judgment, order, or decree appealed from:

(A) grants relief from an automatic stay under § 362, 922, 1201, or 1301 of the Code;

(B) authorizes the sale or lease of property or the use of cash collateral under § 363 of the Code;

(C) authorizes the obtaining of credit under § 364 of the Code;

(D) authorizes the assumption or assignment of an executory contract or unexpired lease under § 365 of the Code;

(E) approves a disclosure statement under § 1125 of the Code; or

(F) confirms a plan under § 943, 1129, 1225, or 1325 of the Code.

(*3*) *Time limits on an extension.*—No extension of time may exceed 21 days after the time prescribed by this rule, or 14 days after the order granting the motion to extend time is entered, whichever is later.

Rule 8003. Appeal as of right—how taken; docketing the appeal.

(*a*) *Filing the notice of appeal.*

(*1*) *In general.*—An appeal from a judgment, order, or decree of a bankruptcy court to a district court or BAP under 28 U. S. C. § 158(a)(1) or (a)(2) may be taken only by filing a notice of appeal with the bankruptcy clerk within the time allowed by Rule 8002.

(*2*) *Effect of not taking other steps.*—An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the district court or BAP to act as it considers appropriate, including dismissing the appeal.

(*3*) *Contents.*—The notice of appeal must:

(A) conform substantially to the appropriate Official Form;

(B) be accompanied by the judgment, order, or decree, or the part of it, being appealed; and

(C) be accompanied by the prescribed fee.

(*4*) *Additional copies.*—If requested to do so, the appellant must furnish the bankruptcy clerk with enough copies of the notice to enable the clerk to comply with subdivision (c).

(*b*) *Joint or consolidated appeals.*

(*1*) *Joint notice of appeal.*—When two or more parties are entitled to appeal from a judgment, order, or decree of a bankruptcy court and their interests make joinder practicable, they may file a joint notice of appeal. They may then proceed on appeal as a single appellant.

(*2*) *Consolidating appeals.*—When parties have separately filed timely notices of appeal, the district court or BAP may join or consolidate the appeals.

(*c*) *Serving the notice of appeal.*

(*1*) *Serving parties and transmitting to the United States trustee.*—The bankruptcy clerk must serve the notice of appeal on counsel of record for each party to the appeal, excluding the appellant, and transmit it to the

United States trustee. If a party is proceeding pro se, the clerk must send the notice of appeal to the party's last known address. The clerk must note, on each copy, the date when the notice of appeal was filed.

(*2*) *Effect of failing to serve or transmit notice.*—The bankruptcy clerk's failure to serve notice on a party or transmit notice to the United States trustee does not affect the validity of the appeal.

(*3*) *Noting service on the docket.*—The clerk must note on the docket the names of the parties served and the date and method of the service.

(*d*) *Transmitting the notice of appeal to the district court or BAP; docketing the appeal.*

(*1*) *Transmitting the notice.*—The bankruptcy clerk must promptly transmit the notice of appeal to the BAP clerk if a BAP has been established for appeals from that district and the appellant has not elected to have the district court hear the appeal. Otherwise, the bankruptcy clerk must promptly transmit the notice to the district clerk.

(*2*) *Docketing in the district court or BAP.*—Upon receiving the notice of appeal, the district or BAP clerk must docket the appeal under the title of the bankruptcy case and the title of any adversary proceeding, and must identify the appellant, adding the appellant's name if necessary.

Rule 8004. Appeal by leave—how taken; docketing the appeal.

(*a*) *Notice of appeal and motion for leave to appeal.*—To appeal from an interlocutory order or decree of a bankruptcy court under 28 U. S. C. § 158(a)(3), a party must file with the bankruptcy clerk a notice of appeal as prescribed by Rule 8003(a). The notice must:

(1) be filed within the time allowed by Rule 8002;

(2) be accompanied by a motion for leave to appeal prepared in accordance with subdivision (b); and

(3) unless served electronically using the court's transmission equipment, include proof of service in accordance with Rule 8011(d).

(*b*) *Contents of the motion; response.*

(*1*) *Contents.*—A motion for leave to appeal under 28 U. S. C. § 158(a)(3) must include the following:

(A) the facts necessary to understand the question presented;

(B) the question itself;

(C) the relief sought;

(D) the reasons why leave to appeal should be granted; and

(E) a copy of the interlocutory order or decree and any related opinion or memorandum.

(*2*) *Response.*—A party may file with the district or BAP clerk a response in opposition or a cross-motion within 14 days after the motion is served.

(*c*) *Transmitting the notice of appeal and the motion; docketing the appeal; determining the motion.*

(*1*) *Transmitting to the district court or BAP.*—The bankruptcy clerk must promptly transmit the notice of appeal and the motion for leave to the BAP clerk if a BAP has been established for appeals from that district and the appellant has not elected to have the district court hear the appeal. Otherwise, the bankruptcy clerk must promptly transmit the notice and motion to the district clerk.

(*2*) *Docketing in the district court or BAP.*—Upon receiving the notice and motion, the district or BAP clerk must docket the appeal under the title of the bankruptcy case and the title of any adversary proceeding, and must identify the appellant, adding the appellant's name if necessary.

(*3*) *Oral argument not required.*—The motion and any response or cross-motion are submitted without oral argument unless the district court or BAP orders otherwise.

(*d*) *Failure to file a motion with a notice of appeal.*—If an appellant timely files a notice of appeal under this rule but does not include a motion for leave, the district court or BAP may order the appellant to file a motion for leave,

or treat the notice of appeal as a motion for leave and either grant or deny it. If the court orders that a motion for leave be filed, the appellant must do so within 14 days after the order is entered, unless the order provides otherwise.

(*e*) *Direct appeal to a court of appeals.*—If leave to appeal an interlocutory order or decree is required under 28 U. S. C. § 158(a)(3), an authorization of a direct appeal by the court of appeals under 28 U. S. C. § 158(d)(2) satisfies the requirement.

Rule 8005. Election to have an appeal heard by the district court instead of the BAP.

(*a*) *Filing of a statement of election.*—To elect to have an appeal heard by the district court, a party must:

(1) file a statement of election that conforms substantially to the appropriate Official Form; and

(2) do so within the time prescribed by 28 U. S. C. § 158(c)(1).

(*b*) *Transmitting the documents related to the appeal.*—Upon receiving an appellant's timely statement of election, the bankruptcy clerk must transmit to the district clerk all documents related to the appeal. Upon receiving a timely statement of election by a party other than the appellant, the BAP clerk must transmit to the district clerk all documents related to the appeal and notify the bankruptcy clerk of the transmission.

(*c*) *Determining the validity of an election.*—A party seeking a determination of the validity of an election must file a motion in the court where the appeal is then pending. The motion must be filed within 14 days after the statement of election is filed.

(*d*) *Motion for leave without a notice of appeal—effect on the timing of an election.*—If an appellant moves for leave to appeal under Rule 8004 but fails to file a separate notice of appeal with the motion, the motion must be treated as a notice of appeal for purposes of determining the timeliness of a statement of election.

Rule 8006. Certifying a direct appeal to the court of appeals.

(*a*) *Effective date of a certification.*—A certification of a judgment, order, or decree of a bankruptcy court for direct review in a court of appeals under 28 U. S. C. § 58(d)(2) is effective when:

(1) the certification has been filed;

(2) a timely appeal has been taken under Rule 8003 or 8004; and

(3) the notice of appeal has become effective under Rule 8002.

(*b*) *Filing the certification.*—The certification must be filed with the clerk of the court where the matter is pending. For purposes of this rule, a matter remains pending in the bankruptcy court for 30 days after the effective date under Rule 8002 of the first notice of appeal from the judgment, order, or decree for which direct review is sought. A matter is pending in the district court or BAP thereafter.

(*c*) *Joint certification by all appellants and appellees.*—A joint certification by all the appellants and appellees under 28 U. S. C. § 158(d)(2)(A) must be made by using the appropriate Official Form. The parties may supplement the certification with a short statement of the basis for the certification, which may include the information listed in subdivision (f)(2).

(*d*) *The court that may make the certification.*—Only the court where the matter is pending, as provided in subdivision (b), may certify a direct review on request of parties or on its own motion.

(*e*) *Certification on the court's own motion.*

(*1*) *How accomplished.*—A certification on the court's own motion must be set forth in a separate document. The clerk of the certifying court must serve it on the parties to the appeal in the manner required for service of a notice of appeal under Rule 8003(c)(1). The certification must be accompanied by an opinion or memorandum

that contains the information required by subdivision (f)(2)(A)–(D).

(*2*) *Supplemental statement by a party.*—Within 14 days after the court's certification, a party may file with the clerk of the certifying court a short supplemental statement regarding the merits of certification.

(*f*) *Certification by the court on request.*

(*1*) *How requested.*—A request by a party for certification that a circumstance specified in 28 U. S. C. § 158(d)(2)(A)(i)–(iii) applies—or a request by a majority of the appellants and a majority of the appellees—must be filed with the clerk of the court where the matter is pending within 60 days after the entry of the judgment, order, or decree.

(*2*) *Service and contents.*—The request must be served on all parties to the appeal in the manner required for service of a notice of appeal under Rule 8003(c)(1), and it must include the following:

(A) the facts necessary to understand the question presented;

(B) the question itself;

(C) the relief sought;

(D) the reasons why the direct appeal should be allowed, including which circumstance specified in 28 U. S. C. § 158(d)(2)(A)(i)–(iii) applies; and

(E) a copy of the judgment, order, or decree and any related opinion or memorandum.

(*3*) *Time to file a response or a cross-request.*—A party may file a response to the request within 14 days after the request is served, or such other time as the court where the matter is pending allows. A party may file a cross-request for certification within 14 days after the request is served, or within 60 days after the entry of the judgment, order, or decree, whichever occurs first.

(*4*) *Oral argument not required.*—The request, cross-request, and any response are submitted without oral

argument unless the court where the matter is pending orders otherwise.

(5) *Form and service of the certification.*—If the court certifies a direct appeal in response to the request, it must do so in a separate document. The certification must be served on the parties to the appeal in the manner required for service of a notice of appeal under Rule 8003(c)(1).

(*g*) *Proceeding in the court of appeals following a certification.*—Within 30 days after the date the certification becomes effective under subdivision (a), a request for permission to take a direct appeal to the court of appeals must be filed with the circuit clerk in accordance with F. R. App. P. 6(c).

Rule 8007. Stay pending appeal; bonds; suspension of proceedings.

(*a*) *Initial motion in the bankruptcy court.*

(*1*) *In general.*—Ordinarily, a party must move first in the bankruptcy court for the following relief:

(A) a stay of a judgment, order, or decree of—the bankruptcy court pending appeal;

(B) the approval of a supersedeas bond;

(C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending; or

(D) the suspension or continuation of proceedings in a case or other relief permitted by subdivision (e).

(*2*) *Time to file.*—The motion may be made either before or after the notice of appeal is filed.

(*b*) *Motion in the district court, the BAP, or the court of appeals on direct appeal.*

(*1*) *Request for relief.*—A motion for the relief specified in subdivision (a)(1)—or to vacate or modify a bankruptcy court's order granting such relief—may be made in the court where the appeal is pending.

(*2*) *Showing or statement required.*—The motion must:

(A) show that moving first in the bankruptcy court would be impracticable; or

(B) if a motion was made in the bankruptcy court, either state that the court has not yet ruled on the motion, or state that the court has ruled and set out any reasons given for the ruling.

(*3*) *Additional content.*—The motion must also include:

(A) the reasons for granting the relief requested and the facts relied upon;

(B) affidavits or other sworn statements supporting facts subject to dispute; and

(C) relevant parts of the record.

(*4*) *Serving notice.*—The movant must give reasonable notice of the motion to all parties.

(*c*) *Filing a bond or other security.*—The district court, BAP, or court of appeals may condition relief on filing a bond or other appropriate security with the bankruptcy court.

(*d*) *Bond for a trustee or the United States.*—The court may require a trustee to file a bond or other appropriate security when the trustee appeals. A bond or other security is not required when an appeal is taken by the United States, its officer, or its agency or by direction of any department of the federal government.

(*e*) *Continuation of proceedings in the bankruptcy court.*—Despite Rule 7062 and subject to the authority of the district court, BAP, or court of appeals, the bankruptcy court may:

(1) suspend or order the continuation of other proceedings in the case; or

(2) issue any other appropriate orders during the pendency of an appeal to protect the rights of all parties in interest.

Rule 8008. Indicative rulings.

(*a*) *Relief pending appeal.*—If a party files a timely motion in the bankruptcy court for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the bankruptcy court may:

(1) defer considering the motion;

(2) deny the motion; or

(3) state that the court would grant the motion if the court where the appeal is pending remands for that purpose, or state that the motion raises a substantial issue.

(*b*) *Notice to the court where the appeal is pending.*—The movant must promptly notify the clerk of the court where the appeal is pending if the bankruptcy court states that it would grant the motion or that the motion raises a substantial issue.

(*c*) *Remand after an indicative ruling.*—If the bankruptcy court states that it would grant the motion or that the motion raises a substantial issue, the district court or BAP may remand for further proceedings, but it retains jurisdiction unless it expressly dismisses the appeal. If the district court or BAP remands but retains jurisdiction, the parties must promptly notify the clerk of that court when the bankruptcy court has decided the motion on remand.

Rule 8009. Record on appeal; sealed documents.

(*a*) *Designating the record on appeal; statement of the issues.*

(*1*) *Appellant.*

(A) The appellant must file with the bankruptcy clerk and serve on the appellee a designation of the items to be included in the record on appeal and a statement of the issues to be presented.

(B) The appellant must file and serve the designation and statement within 14 days after:

(i) the appellant's notice of appeal as of right becomes effective under Rule 8002; or

(ii) an order granting leave to appeal is entered.

A designation and statement served prematurely must be treated as served on the first day on which filing is timely.

(*2*) *Appellee and cross-appellant.*—Within 14 days after being served, the appellee may file with the bankruptcy clerk and serve on the appellant a designation of additional

items to be included in the record. An appellee who files a cross-appeal must file and serve a designation of additional items to be included in the record and a statement of the issues to be presented on the cross-appeal.

(*3*) *Cross-appellee.*—Within 14 days after service of the cross-appellant's designation and statement, a cross-appellee may file with the bankruptcy clerk and serve on the cross-appellant a designation of additional items to be included in the record.

(*4*) *Record on appeal.*—The record on appeal must include the following:

- docket entries kept by the bankruptcy clerk;
- items designated by the parties;
- the notice of appeal;
- the judgment, order, or decree being appealed;
- any order granting leave to appeal;
- any certification required for a direct appeal to the court of appeals;
- any opinion, findings of fact, and conclusions of law relating to the issues on appeal, including transcripts of all oral rulings;
- any transcript ordered under subdivision (b);
- any statement required by subdivision (c); and
- any additional items from the record that the court where the appeal is pending orders.

(*5*) *Copies for the bankruptcy clerk.*—If paper copies are needed, a party filing a designation of items must provide a copy of any of those items that the bankruptcy clerk requests. If the party fails to do so, the bankruptcy clerk must prepare the copy at the party's expense.

(*b*) *Transcript of proceedings.*

(*1*) *Appellant's duty to order.*—Within the time period prescribed by subdivision (a)(1), the appellant must:

(A) order in writing from the reporter, as defined in Rule 8010(a)(1), a transcript of such parts of the proceedings not already on file as the appellant considers necessary for the appeal, and file a copy of the order with the bankruptcy clerk; or

(B) file with the bankruptcy clerk a certificate stating that the appellant is not ordering a transcript.

(*2*) *Cross-appellant's duty to order.*—Within 14 days after the appellant files a copy of the transcript order or a certificate of not ordering a transcript, the appellee as cross-appellant must:

(A) order in writing from the reporter, as defined in Rule 8010(a)(1), a transcript of such additional parts of the proceedings as the cross-appellant considers necessary for the appeal, and file a copy of the order with the bankruptcy clerk; or

(B) file with the bankruptcy clerk a certificate stating that the cross-appellant is not ordering a transcript.

(*3*) *Appellee's or cross-appellee's right to order.*—Within 14 days after the appellant or cross-appellant files a copy of a transcript order or certificate of not ordering a transcript, the appellee or cross-appellee may order in writing from the reporter a transcript of such additional parts of the proceedings as the appellee or cross-appellee considers necessary for the appeal. A copy of the order must be filed with the bankruptcy clerk.

(*4*) *Payment.*—At the time of ordering, a party must make satisfactory arrangements with the reporter for paying the cost of the transcript.

(*5*) *Unsupported finding or conclusion.*—If the appellant intends to argue on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all relevant testimony and copies of all relevant exhibits.

(*c*) *Statement of the evidence when a transcript is unavailable.*—If a transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be filed within the time prescribed by subdivision (a)(1) and served on the appellee, who may serve objections or proposed amendments within 14 days after being served. The statement and any

objections or proposed amendments must then be submitted to the bankruptcy court for settlement and approval. As settled and approved, the statement must be included by the bankruptcy clerk in the record on appeal.

(*d*) *Agreed statement as the record on appeal.*—Instead of the record on appeal as defined in subdivision (a), the parties may prepare, sign, and submit to the bankruptcy court a statement of the case showing how the issues presented by the appeal arose and were decided in the bankruptcy court. The statement must set forth only those facts alleged and proved or sought to be proved that are essential to the court's resolution of the issues. If the statement is accurate, it—together with any additions that the bankruptcy court may consider necessary to a full presentation of the issues on appeal—must be approved by the bankruptcy court and must then be certified to the court where the appeal is pending as the record on appeal. The bankruptcy clerk must then transmit it to the clerk of that court within the time provided by Rule 8010. A copy of the agreed statement may be filed in place of the appendix required by Rule 8018(b) or, in the case of a direct appeal to the court of appeals, by F. R. App. P. 30.

(*e*) *Correcting or modifying the record.*

(*1*) *Submitting to the bankruptcy court.*—If any difference arises about whether the record accurately discloses what occurred in the bankruptcy court, the difference must be submitted to and settled by the bankruptcy court and the record conformed accordingly. If an item has been improperly designated as part of the record on appeal, a party may move to strike that item.

(*2*) *Correcting in other ways.*—If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected, and a supplemental record may be certified and transmitted:

(A) on stipulation of the parties;

(B) by the bankruptcy court before or after the record has been forwarded; or

(C) by the court where the appeal is pending.

(*3*) *Remaining questions.*—All other questions as to the form and content of the record must be presented to the court where the appeal is pending.

(*f*) *Sealed documents.*—A document placed under seal by the bankruptcy court may be designated as part of the record on appeal. In doing so, a party must identify it without revealing confidential or secret information, but the bankruptcy clerk must not transmit it to the clerk of the court where the appeal is pending as part of the record. Instead, a party must file a motion with the court where the appeal is pending to accept the document under seal. If the motion is granted, the movant must notify the bankruptcy court of the ruling, and the bankruptcy clerk must promptly transmit the sealed document to the clerk of the court where the appeal is pending.

(*g*) *Other necessary actions.*—All parties to an appeal must take any other action necessary to enable the bankruptcy clerk to assemble and transmit the record.

Rule 8010. Completing and transmitting the record.

(*a*) *Reporter's duties.*

(*1*) *Proceedings recorded without a reporter present.*—If proceedings were recorded without a reporter being present, the person or service selected under bankruptcy court procedures to transcribe the recording is the reporter for purposes of this rule.

(*2*) *Preparing and filing the transcript.*—The reporter must prepare and file a transcript as follows:

(A) Upon receiving an order for a transcript in accordance with Rule 8009(b), the reporter must file in the bankruptcy court an acknowledgment of the request that shows when it was received, and when the reporter expects to have the transcript completed.

(B) After completing the transcript, the reporter must file it with the bankruptcy clerk, who will notify the district, BAP, or circuit clerk of its filing.

(C) If the transcript cannot be completed within 30 days after receiving the order, the reporter must request an extension of time from the bankruptcy clerk. The clerk must enter on the docket and notify the parties whether the extension is granted.

(D) If the reporter does not file the transcript on time, the bankruptcy clerk must notify the bankruptcy judge.

(*b*) *Clerk's duties.*

(*1*) *Transmitting the record—In general.*—Subject to Rule 8009(f) and subdivision (b)(5) of this rule, when the record is complete, the bankruptcy clerk must transmit to the clerk of the court where the appeal is pending either the record or a notice that the record is available electronically.

(*2*) *Multiple appeals.*—If there are multiple appeals from a judgment, order, or decree, the bankruptcy clerk must transmit a single record.

(*3*) *Receiving the record.*—Upon receiving the record or notice that it is available electronically, the district, BAP, or circuit clerk must enter that information on the docket and promptly notify all parties to the appeal.

(*4*) *If paper copies are ordered.*—If the court where the appeal is pending directs that paper copies of the record be provided, the clerk of that court must so notify the appellant. If the appellant fails to provide them, the bankruptcy clerk must prepare them at the appellant's expense.

(*5*) *When leave to appeal is requested.*—Subject to subdivision (c), if a motion for leave to appeal has been filed under Rule 8004, the bankruptcy clerk must prepare and transmit the record only after the district court, BAP, or court of appeals grants leave.

(*c*) *Record for a preliminary motion in the district court, BAP, or court of appeals.*—This subdivision (c) applies if, before the record is transmitted, a party moves in the district court, BAP, or court of appeals for any of the following relief:

- leave to appeal;
- dismissal;

- a stay pending appeal;
- approval of a supersedeas bond, or additional security on a bond or undertaking on appeal; or
- any other intermediate order.

The bankruptcy clerk must then transmit to the clerk of the court where the relief is sought any parts of the record designated by a party to the appeal or a notice that those parts are available electronically.

Rule 8011. Filing and service; signature.

(*a*) *Filing.*

(*1*) *With the clerk.*—A document required or permitted to be filed in a district court or BAP must be filed with the clerk of that court.

(*2*) *Method and timeliness.*

(*A*) *In general.*—Filing may be accomplished by transmission to the clerk of the district court or BAP. Except as provided in subdivision (a)(2)(B) and (C), filing is timely only if the clerk receives the document within the time fixed for filing.

(*B*) *Brief or appendix.*—A brief or appendix is also timely filed if, on or before the last day for filing, it is:

(i) mailed to the clerk by first-class mail—or other class of mail that is at least as expeditious—postage prepaid, if the district court's or BAP's procedures permit or require a brief or appendix to be filed by mailing; or

(ii) dispatched to a third-party commercial carrier for delivery within 3 days to the clerk, if the court's procedures so permit or require.

(*C*) *Inmate filing.*—A document filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If the institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U. S. C. § 1746 or by a notarized statement, either of which must

set forth the date of deposit and state that first-class postage has been prepaid.

(*D*) *Copies.*—If a document is filed electronically, no paper copy is required. If a document is filed by mail or delivery to the district court or BAP, no additional copies are required. But the district court or BAP may require by local rule or by order in a particular case the filing or furnishing of a specified number of paper copies.

(*3*) *Clerk's refusal of documents.*—The court's clerk must not refuse to accept for filing any document transmitted for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice.

(*b*) *Service of all documents required.*—Unless a rule requires service by the clerk, a party must, at or before the time of the filing of a document, serve it on the other parties to the appeal. Service on a party represented by counsel must be made on the party's counsel.

(*c*) *Manner of service.*

(*1*) *Methods.*—Service must be made electronically, unless it is being made by or on an individual who is not represented by counsel or the court's governing rules permit or require service by mail or other means of delivery. Service may be made by or on an unrepresented party by any of the following methods:

(A) personal delivery;

(B) mail; or

(C) third-party commercial carrier for delivery within 3 days.

(*2*) *When service is complete.*—Service by electronic means is complete on transmission, unless the party making service receives notice that the document was not transmitted successfully. Service by mail or by commercial carrier is complete on mailing or delivery to the carrier.

(*d*) *Proof of service.*

(*1*) *What is required.*—A document presented for filing must contain either:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) the mail or electronic address, the fax number, or the address of the place of delivery, as appropriate for the manner of service, for each person served.

(*2*) *Delayed proof.*—The district or BAP clerk may permit documents to be filed without acknowledgment or proof of service, but must require the acknowledgment or proof to be filed promptly thereafter.

(*3*) *Brief or appendix.*—When a brief or appendix is filed, the proof of service must also state the date and manner by which it was filed.

(*e*) *Signature.*—Every document filed electronically must include the electronic signature of the person filing it or, if the person is represented, the electronic signature of counsel. The electronic signature must be provided by electronic means that are consistent with any technical standards that the Judicial Conference of the United States establishes. Every document filed in paper form must be signed by the person filing the document or, if the person is represented, by counsel.

Rule 8012. Corporate disclosure statement.

(*a*) *Who must file.*—Any nongovernmental corporate party appearing in the district court or BAP must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

(*b*) *Time to file; supplemental filing.*—A party must file the statement with its principal brief or upon filing a motion, response, petition, or answer in the district court or BAP,

whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include a statement before the table of contents. A party must supplement its statement whenever the required information changes.

Rule 8013. Motions; intervention.

(*a*) *Contents of a motion; response; reply.*

(*1*) *Request for relief.*—A request for an order or other relief is made by filing a motion with the district or BAP clerk, with proof of service on the other parties to the appeal.

(*2*) *Contents of a motion.*

(*A*) *Grounds and the relief sought.*—A motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it.

(*B*) *Motion to expedite an appeal.*—A motion to expedite an appeal must explain what justifies considering the appeal ahead of other matters. If the district court or BAP grants the motion, it may accelerate the time to transmit the record, the deadline for filing briefs and other documents, oral argument, and the resolution of the appeal. A motion to expedite an appeal may be filed as an emergency motion under subdivision (d).

(*C*) *Accompanying documents.*

(i) Any affidavit or other document necessary to support a motion must be served and filed with the motion.

(ii) An affidavit must contain only factual information, not legal argument.

(iii) A motion seeking substantive relief must include a copy of the bankruptcy court's judgment, order, or decree, and any accompanying opinion as a separate exhibit.

(*D*) *Documents barred or not required.*

(i) A separate brief supporting or responding to a motion must not be filed.

(ii) Unless the court orders otherwise, a notice of motion or a proposed order is not required.

(*3*) *Response and reply; time to file.*—Unless the district court or BAP orders otherwise,

(A) any party to the appeal may file a response to the motion within 7 days after service of the motion; and

(B) the movant may file a reply to a response within 7 days after service of the response, but may only address matters raised in the response.

(*b*) *Disposition of a motion for a procedural order.*—The district court or BAP may rule on a motion for a procedural order—including a motion under Rule 9006(b) or (c)—at any time without awaiting a response. A party adversely affected by the ruling may move to reconsider, vacate, or modify it within 7 days after the procedural order is served.

(*c*) *Oral argument.*—A motion will be decided without oral argument unless the district court or BAP orders otherwise.

(*d*) *Emergency motion.*

(*1*) *Noting the emergency.*—When a movant requests expedited action on a motion because irreparable harm would occur during the time needed to consider a response, the movant must insert the word "Emergency" before the title of the motion.

(*2*) *Contents of the motion.*—The emergency motion must

(A) be accompanied by an affidavit setting out the nature of the emergency;

(B) state whether all grounds for it were submitted to the bankruptcy court and, if not, why the motion should not be remanded for the bankruptcy court to consider;

(C) include the e-mail addresses, office addresses, and telephone numbers of moving counsel and, when known, of opposing counsel and any unrepresented parties to the appeal; and

(D) be served as prescribed by Rule 8011.

(*3*) *Notifying opposing parties.*—Before filing an emergency motion, the movant must make every practicable effort to notify opposing counsel and any unrepresented parties in time for them to respond. The affidavit accompanying the emergency motion must state when and how notice was given or state why giving it was impracticable.

(*e*) *Power of a single BAP judge to entertain a motion.*

(*1*) *Single judge's authority.*—A BAP judge may act alone on any motion, but may not dismiss or otherwise determine an appeal, deny a motion for leave to appeal, or deny a motion for a stay pending appeal if denial would make the appeal moot.

(*2*) *Reviewing a single judge's action.*—The BAP may review a single judge's action, either on its own motion or on a party's motion.

(*f*) *Form of documents; page limits; number of copies.*

(*1*) *Format of a paper document.*—Rule 27(d)(1) F. R. App. P. applies in the district court or BAP to a paper version of a motion, response, or reply.

(*2*) *Format of an electronically filed document.*—A motion, response, or reply filed electronically must comply with the requirements for a paper version regarding covers, line spacing, margins, typeface, and type style. It must also comply with the page limits under paragraph (3).

(*3*) *Page limits.*—Unless the district court or BAP orders otherwise:

(A) a motion or a response to a motion must not exceed 20 pages, exclusive of the corporate disclosure statement and accompanying documents authorized by subdivision (a)(2)(C); and

(B) a reply to a response must not exceed 10 pages.

(*4*) *Paper copies.*—Paper copies must be provided only if required by local rule or by an order in a particular case.

(*g*) *Intervening in an appeal.*—Unless a statute provides otherwise, an entity that seeks to intervene in an appeal pending in the district court or BAP must move for leave to intervene and serve a copy of the motion on the parties to the

appeal. The motion or other notice of intervention authorized by statute must be filed within 30 days after the appeal is docketed. It must concisely state the movant's interest, the grounds for intervention, whether intervention was sought in the bankruptcy court, why intervention is being sought at this stage of the proceeding, and why participating as an amicus curiae would not be adequate.

Rule 8014. Briefs.

(*a*) *Appellant's brief.*—The appellant's brief must contain the following under appropriate headings and in the order indicated:

(1) a corporate disclosure statement, if required by Rule 8012;

(2) a table of contents, with page references;

(3) a table of authorities—cases (alphabetically arranged), statutes, and other authorities—with references to the pages of the brief where they are cited;

(4) a jurisdictional statement, including:

(A) the basis for the bankruptcy court's subject-matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(B) the basis for the district court's or BAP's jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(C) the filing dates establishing the timeliness of the appeal; and

(D) an assertion that the appeal is from a final judgment, order, or decree, or information establishing the district court's or BAP's jurisdiction on another basis;

(5) a statement of the issues presented and, for each one, a concise statement of the applicable standard of appellate review;

(6) a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings

presented for review, with appropriate references to the record;

(7) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;

(8) the argument, which must contain the appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies;

(9) a short conclusion stating the precise relief sought; and

(10) the certificate of compliance, if required by Rule 8015(a)(7) or (b).

(*b*) *Appellee's brief.*—The appellee's brief must conform to the requirements of subdivision (a)(1)–(8) and (10), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:

(1) the jurisdictional statement;

(2) the statement of the issues and the applicable standard of appellate review; and

(3) the statement of the case.

(*c*) *Reply brief.*—The appellant may file a brief in reply to the appellee's brief. A reply brief must comply with the requirements of subdivision (a)(2)–(3).

(*d*) *Statutes, rules, regulations, or similar authority.*—If the court's determination of the issues presented requires the study of the Code or other statutes, rules, regulations, or similar authority, the relevant parts must be set out in the brief or in an addendum.

(*e*) *Briefs in a case involving multiple appellants or appellees.*—In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another's brief. Parties may also join in reply briefs.

(*f*) *Citation of supplemental authorities.*—If pertinent and significant authorities come to a party's attention after the party's brief has been filed—or after oral argument but before a decision—a party may promptly advise the district or BAP clerk by a signed submission setting forth the citations. The submission, which must be served on the other parties to the appeal, must state the reasons for the supplemental citations, referring either to the pertinent page of a brief or to a point argued orally. The body of the submission must not exceed 350 words. Any response must be made within 7 days after the party is served, unless the court orders otherwise, and must be similarly limited.

Rule 8015. Form and length of briefs; form of appendices and other papers.

(*a*) *Paper copies of a brief.*—If a paper copy of a brief may or must be filed, the following provisions apply:

(*1*) *Reproduction.*

(A) A brief may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.

(B) Text must be reproduced with a clarity that equals or exceeds the output of a laser printer.

(C) Photographs, illustrations, and tables may be reproduced by any method that results in a good copy of the original. A glossy finish is acceptable if the original is glossy.

(*2*) *Cover.*—The front cover of a brief must contain:

(A) the number of the case centered at the top;

(B) the name of the court;

(C) the title of the case as prescribed by Rule 8003(d)(2) or 8004(c)(2);

(D) the nature of the proceeding and the name of the court below;

(E) the title of the brief, identifying the party or parties for whom the brief is filed; and

(F) the name, office address, telephone number, and e-mail address of counsel representing the party for whom the brief is filed.

(*3*) *Binding.*—The brief must be bound in any manner that is secure, does not obscure the text, and permits the brief to lie reasonably flat when open.

(*4*) *Paper size, line spacing, and margins.*—The brief must be on 8½-by-11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

(*5*) *Typeface.*—Either a proportionally spaced or monospaced face may be used.

(A) A proportionally spaced face must include serifs, but sans-serif type may be used in headings and captions. A proportionally spaced face must be 14-point or larger.

(B) A monospaced face may not contain more than 10½ characters per inch.

(*6*) *Type styles.*—A brief must be set in plain, roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined.

(*7*) *Length.*

(*A*) *Page limitation.*—A principal brief must not exceed 30 pages, or a reply brief 15 pages, unless it complies with (B) and (C).

(*B*) *Type-volume limitation.*

(i) A principal brief is acceptable if:

- it contains no more than 14,000 words; or
- it uses a monospaced face and contains no more than 1,300 lines of text.

(ii) A reply brief is acceptable if it contains no more than half of the type volume specified in item (i).

(iii) Headings, footnotes, and quotations count toward the word and line limitations. The corporate

disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules, or regulations, and any certificates of counsel do not count toward the limitation.

(*C*) *Certificate of compliance.*

(i) A brief submitted under subdivision (a)(7)(B) must include a certificate signed by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:

- the number of words in the brief; or
- the number of lines of monospaced type in the brief.

(ii) The certification requirement is satisfied by a certificate of compliance that conforms substantially to the appropriate Official Form.

(*b*) *Electronically filed briefs.*—A brief filed electronically must comply with subdivision (a), except for (a)(1), (a)(3), and the paper requirement of (a)(4).

(*c*) *Paper copies of appendices.*—A paper copy of an appendix must comply with subdivision (a)(1), (2), (3), and (4), with the following exceptions:

(1) An appendix may include a legible photocopy of any document found in the record or of a printed decision.

(2) When necessary to facilitate inclusion of odd-sized documents such as technical drawings, an appendix may be a size other than 8½-by-11 inches, and need not lie reasonably flat when opened.

(*d*) *Electronically filed appendices.*—An appendix filed electronically must comply with subdivision (a)(2) and (4), except for the paper requirement of (a)(4).

(*e*) *Other documents.*

(*1*) *Motion.*—Rule 8013(f) governs the form of a motion, response, or reply.

(*2*) *Paper copies of other documents.*—A paper copy of any other document, other than a submission under Rule 8014(f), must comply with subdivision (a), with the following exceptions:

(A) A cover is not necessary if the caption and signature page together contain the information required by subdivision (a)(2).

(B) Subdivision (a)(7) does not apply.

(*3*) *Other documents filed electronically.*—Any other document filed electronically, other than a submission under Rule 8014(f), must comply with the appearance requirements of paragraph (2).

(*f*) *Local variation.*—A district court or BAP must accept documents that comply with the applicable requirements of this rule. By local rule, a district court or BAP may accept documents that do not meet all of the requirements of this rule.

Rule 8016. Cross-appeals

(*a*) *Applicability.*—This rule applies to a case in which a cross-appeal is filed. Rules 8014(a)–(c), 8015(a)(7)(A)–(B), and 8018(a)(1)–(3) do not apply to such a case, except as otherwise provided in this rule.

(*b*) *Designation of appellant.*—The party who files a notice of appeal first is the appellant for purposes of this rule and Rule 8018(a)(4) and (b) and Rule 8019. If notices are filed on the same day, the plaintiff, petitioner, applicant, or movant in the proceeding below is the appellant. These designations may be modified by the parties' agreement or by court order.

(*c*) *Briefs.*—In a case involving a cross-appeal:

(*1*) *Appellant's principal brief.*—The appellant must file a principal brief in the appeal. That brief must comply with Rule 8014(a).

(*2*) *Appellee's principal and response brief.*—The appellee must file a principal brief in the cross-appeal and must, in the same brief, respond to the principal brief in

the appeal. That brief must comply with Rule 8014(a), except that the brief need not include a statement of the case unless the appellee is dissatisfied with the appellant's statement.

(*3*) *Appellant's response and reply brief.*—The appellant must file a brief that responds to the principal brief in the cross-appeal and may, in the same brief, reply to the response in the appeal. That brief must comply with Rule 8014(a)(2)–(8) and (10), except that none of the following need appear unless the appellant is dissatisfied with the appellee's statement in the cross-appeal:

(A) the jurisdictional statement;

(B) the statement of the issues and the applicable standard of appellate review; and

(C) the statement of the case.

(*4*) *Appellee's reply brief.*—The appellee may file a brief in reply to the response in the cross-appeal. That brief must comply with Rule 8014(a)(2)–(3) and (10) and must be limited to the issues presented by the cross-appeal.

(*d*) *Length.*

(*1*) *Page limitation.*—Unless it complies with paragraphs (2) and (3), the appellant's principal brief must not exceed 30 pages; the appellee's principal and response brief, 35 pages; the appellant's response and reply brief, 30 pages; and the appellee's reply brief, 15 pages.

(*2*) *Type-volume limitation.*

(A) The appellant's principal brief or the appellant's response and reply brief is acceptable if:

(i) it contains no more than 14,000 words; or

(ii) it uses a monospaced face and contains no more than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if:

(i) it contains no more than 16,500 words; or

(ii) it uses a monospaced face and contains no more than 1,500 lines of text.

(C) The appellee's reply brief is acceptable if it contains no more than half of the type volume specified in subparagraph (A).

(D) Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules, or regulations, and any certificates of counsel do not count toward the limitation.

(*3*) *Certificate of compliance.*—A brief submitted either electronically or in paper form under paragraph (2) must comply with Rule 8015(a)(7)(C).

(*e*) *Time to serve and file a brief.*—Briefs must be served and filed as follows, unless the district court or BAP by order in a particular case excuses the filing of briefs or specifies different time limits:

(1) the appellant's principal brief, within 30 days after the docketing of notice that the record has been transmitted or is available electronically;

(2) the appellee's principal and response brief, within 30 days after the appellant's principal brief is served;

(3) the appellant's response and reply brief, within 30 days after the appellee's principal and response brief is served; and

(4) the appellee's reply brief, within 14 days after the appellant's response and reply brief is served, but at least 7 days before scheduled argument unless the district court or BAP, for good cause, allows a later filing.

Rule 8017. Brief of an amicus curiae.

(*a*) *When permitted.*—The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing. On its own motion, and with notice to all parties to an appeal, the

district court or BAP may request a brief by an amicus curiae.

(*b*) *Motion for leave to file.*—The motion must be accompanied by the proposed brief and state:

(1) the movant's interest; and

(2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the appeal.

(*c*) *Contents and form.*—An amicus brief must comply with Rule 8015. In addition to the requirements of Rule 8015, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 8012. An amicus brief need not comply with Rule 8014, but must include the following:

(1) a table of contents, with page references;

(2) a table of authorities—cases (alphabetically arranged), statutes, and other authorities—with references to the pages of the brief where they are cited;

(3) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

(4) unless the amicus curiae is one listed in the first sentence of subdivision (a), a statement that indicates whether:

(A) a party's counsel authored the brief in whole or in part;

(B) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(C) a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person;

(5) an argument, which may be preceded by a summary and need not include a statement of the applicable standard of review; and

(6) a certificate of compliance, if required by Rule 8015(a)(7)(C) or 8015(b).

(*d*) *Length.*—Except by the district court's or BAP's permission, an amicus brief must be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

(*e*) *Time for filing.*—An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's principal brief is filed. The district court or BAP may grant leave for later filing, specifying the time within which an opposing party may answer.

(*f*) *Reply brief.*—Except by the district court's or BAP's permission, an amicus curiae may not file a reply brief.

(*g*) *Oral argument.*—An amicus curiae may participate in oral argument only with the district court's or BAP's permission.

Rule 8018. Serving and filing briefs; appendices.

(*a*) *Time to serve and file a brief.*—The following rules apply unless the district court or BAP by order in a particular case excuses the filing of briefs or specifies different time limits:

(1) The appellant must serve and file a brief within 30 days after the docketing of notice that the record has been transmitted or is available electronically.

(2) The appellee must serve and file a brief within 30 days after service of the appellant's brief.

(3) The appellant may serve and file a reply brief within 14 days after service of the appellee's brief, but a reply brief must be filed at least 7 days before scheduled argu-

ment unless the district court or BAP, for good cause, allows a later filing.

(4) If an appellant fails to file a brief on time or within an extended time authorized by the district court or BAP, an appellee may move to dismiss the appeal—or the district court or BAP, after notice, may dismiss the appeal on its own motion. An appellee who fails to file a brief will not be heard at oral argument unless the district court or BAP grants permission.

(*b*) *Duty to serve and file an appendix to the brief.*

(*1*) *Appellant.*—Subject to subdivision (e) and Rule 8009(d), the appellant must serve and file with its principal brief excerpts of the record as an appendix. It must contain the following:

(A) the relevant entries in the bankruptcy docket;

(B) the complaint and answer, or other equivalent filings;

(C) the judgment, order, or decree from which the appeal is taken;

(D) any other orders, pleadings, jury instructions, findings, conclusions, or opinions relevant to the appeal;

(E) the notice of appeal; and

(F) any relevant transcript or portion of it.

(*2*) *Appellee.*—The appellee may also serve and file with its brief an appendix that contains material required to be included by the appellant or relevant to the appeal or cross-appeal, but omitted by the appellant.

(*3*) *Cross-appellee.*—The appellant as cross-appellee may also serve and file with its response an appendix that contains material relevant to matters raised initially by the principal brief in the cross-appeal, but omitted by the cross-appellant.

(*c*) *Format of the appendix.*—The appendix must begin with a table of contents identifying the page at which each part begins. The relevant docket entries must follow the table of contents. Other parts of the record must follow chronologically. When pages from the transcript of pro-

ceedings are placed in the appendix, the transcript page numbers must be shown in brackets immediately before the included pages. Omissions in the text of documents or of the transcript must be indicated by asterisks. Immaterial formal matters (captions, subscriptions, acknowledgments, and the like) should be omitted.

(*d*) *Exhibits.*—Exhibits designated for inclusion in the appendix may be reproduced in a separate volume or volumes, suitably indexed.

(*e*) *Appeal on the original record without an appendix.*—The district court or BAP may, either by rule for all cases or classes of cases or by order in a particular case, dispense with the appendix and permit an appeal to proceed on the original record, with the submission of any relevant parts of the record that the district court or BAP orders the parties to file.

Rule 8019. Oral argument.

(*a*) *Party's statement.*—Any party may file, or a district court or BAP may require, a statement explaining why oral argument should, or need not, be permitted.

(*b*) *Presumption of oral argument and exceptions.*—Oral argument must be allowed in every case unless the district judge—or all the BAP judges assigned to hear the appeal—examine the briefs and record and determine that oral argument is unnecessary because

(1) the appeal is frivolous;

(2) the dispositive issue or issues have been authoritatively decided; or

(3) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

(*c*) *Notice of argument; postponement.*—The district court or BAP must advise all parties of the date, time, and place for oral argument, and the time allowed for each side. A motion to postpone the argument or to allow longer argument must be filed reasonably in advance of the hearing date.

(*d*) *Order and contents of argument.*—The appellant opens and concludes the argument. Counsel must not read at length from briefs, the record, or authorities.

(*e*) *Cross-appeals and separate appeals.*—If there is a cross-appeal, Rule 8016(b) determines which party is the appellant and which is the appellee for the purposes of oral argument. Unless the district court or BAP directs otherwise, a cross-appeal or separate appeal must be argued when the initial appeal is argued. Separate parties should avoid duplicative argument.

(*f*) *Nonappearance of a party.*—If the appellee fails to appear for argument, the district court or BAP may hear the appellant's argument. If the appellant fails to appear for argument, the district court or BAP may hear the appellee's argument. If neither party appears, the case will be decided on the briefs unless the district court or BAP orders otherwise.

(*g*) *Submission on briefs.*—The parties may agree to submit a case for decision on the briefs, but the district court or BAP may direct that the case be argued.

(*h*) *Use of physical exhibits at argument; removal.*—Counsel intending to use physical exhibits other than documents at the argument must arrange to place them in the courtroom on the day of the argument before the court convenes. After the argument, counsel must remove the exhibits from the courtroom unless the district court or BAP directs otherwise. The clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them.

Rule 8020. Frivolous appeal and other misconduct.

(*a*) *Frivolous appeal—damages and costs.*—If the district court or BAP determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

(*b*) *Other misconduct.*—The district court or BAP may discipline or sanction an attorney or party appearing before

it for other misconduct, including failure to comply with any court order. First, however, the court must afford the attorney or party reasonable notice, an opportunity to show cause to the contrary, and, if requested, a hearing.

Rule 8021. Costs.

(*a*) *Against whom assessed.*—The following rules apply unless the law provides or the district court or BAP orders otherwise:

(1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;

(2) if a judgment, order, or decree is affirmed, costs are taxed against the appellant;

(3) if a judgment, order, or decree is reversed, costs are taxed against the appellee;

(4) if a judgment, order, or decree is affirmed or reversed in part, modified, or vacated, costs are taxed only as the district court or BAP orders.

(*b*) *Costs for and against the United States.*—Costs for or against the United States, its agency, or its officer may be assessed under subdivision (a) only if authorized by law.

(*c*) *Costs on appeal taxable in the bankruptcy court.*—The following costs on appeal are taxable in the bankruptcy court for the benefit of the party entitled to costs under this rule:

(1) the production of any required copies of a brief, appendix, exhibit, or the record;

(2) the preparation and transmission of the record;

(3) the reporter's transcript, if needed to determine the appeal;

(4) premiums paid for a supersedeas bond or other bonds to preserve rights pending appeal; and

(5) the fee for filing the notice of appeal.

(*d*) *Bill of costs; objections.*—A party who wants costs taxed must, within 14 days after entry of judgment on appeal, file with the bankruptcy clerk, with proof of service, an itemized and verified bill of costs. Objections must be filed

within 14 days after service of the bill of costs, unless the bankruptcy court extends the time.

Rule 8022. Motion for rehearing.

(*a*) *Time to file; contents; response; action by the district court or BAP if granted.*

(*1*) *Time.*—Unless the time is shortened or extended by order or local rule, any motion for rehearing by the district court or BAP must be filed within 14 days after entry of judgment on appeal.

(*2*) *Contents.*—The motion must state with particularity each point of law or fact that the movant believes the district court or BAP has overlooked or misapprehended and must argue in support of the motion. Oral argument is not permitted.

(*3*) *Response.*—Unless the district court or BAP requests, no response to a motion for rehearing is permitted. But ordinarily, rehearing will not be granted in the absence of such a request.

(*4*) *Action by the District Court or BAP.*—If a motion for rehearing is granted, the district court or BAP may do any of the following:

(A) make a final disposition of the appeal without reargument;

(B) restore the case to the calendar for reargument or resubmission; or

(C) issue any other appropriate order.

(*b*) *Form of the motion; length.*—The motion must comply in form with Rule 8013(f)(1) and (2). Copies must be served and filed as provided by Rule 8011. Unless the district court or BAP orders otherwise, a motion for rehearing must not exceed 15 pages.

Rule 8023. Voluntary dismissal.

The clerk of the district court or BAP must dismiss an appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due.

An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the district court or BAP.

Rule 8024. Clerk's duties on disposition of the appeal.

(*a*) *Judgment on appeal.*—The district or BAP clerk must prepare, sign, and enter the judgment after receiving the court's opinion or, if there is no opinion, as the court instructs. Noting the judgment on the docket constitutes entry of judgment.

(*b*) *Notice of a judgment.*—Immediately upon the entry of a judgment, the district or BAP clerk must:

(1) transmit a notice of the entry to each party to the appeal, to the United States trustee, and to the bankruptcy clerk, together with a copy of any opinion; and

(2) note the date of the transmission on the docket.

(*c*) *Returning physical items.*—If any physical items were transmitted as the record on appeal, they must be returned to the bankruptcy clerk on disposition of the appeal.

Rule 8025. Stay of a district court or BAP judgment.

(*a*) *Automatic stay of judgment on appeal.*—Unless the district court or BAP orders otherwise, its judgment is stayed for 14 days after entry.

(*b*) *Stay pending appeal to the court of appeals.*

(*1*) *In general.*—On a party's motion and notice to all other parties to the appeal, the district court or BAP may stay its judgment pending an appeal to the court of appeals.

(*2*) *Time limit.*—The stay must not exceed 30 days after the judgment is entered, except for cause shown.

(*3*) *Stay continued.*—If, before a stay expires, the party who obtained the stay appeals to the court of appeals, the stay continues until final disposition by the court of appeals.

(*4*) *Bond or other security.*—A bond or other security may be required as a condition for granting or continuing a stay of the judgment. A bond or other security may be

required if a trustee obtains a stay, but not if a stay is obtained by the United States or its officer or agency or at the direction of any department of the United States government.

(*c*) *Automatic stay of an order, judgment, or decree of a bankruptcy court.*—If the district court or BAP enters a judgment affirming an order, judgment, or decree of the bankruptcy court, a stay of the district court's or BAP's judgment automatically stays the bankruptcy court's order, judgment, or decree for the duration of the appellate stay.

(*d*) *Power of a court of appeals not limited.*—This rule does not limit the power of a court of appeals or any of its judges to do the following:

(1) stay a judgment pending appeal;

(2) stay proceedings while an appeal is pending;

(3) suspend, modify, restore, vacate, or grant a stay or an injunction while an appeal is pending; or

(4) issue any order appropriate to preserve the status quo or the effectiveness of any judgment to be entered.

Rule 8026. Rules by circuit councils and district courts; procedure when there is no controlling law.

(*a*) *Local rules by circuit councils and district courts.*

(*1*) *Adopting local rules.*—A circuit council that has authorized a BAP under 28 U. S. C. § 158(b) may make and amend rules governing the practice and procedure on appeal from a judgment, order, or decree of a bankruptcy court to the BAP. A district court may make and amend rules governing the practice and procedure on appeal from a judgment, order, or decree of a bankruptcy court to the district court. Local rules must be consistent with, but not duplicative of, Acts of Congress and these Part VIII rules. Rule 83 F. R. Civ. P. governs the procedure for making and amending rules to govern appeals.

(*2*) *Numbering.*—Local rules must conform to any uniform numbering system prescribed by the Judicial Conference of the United States.

(*3*) *Limitation on imposing requirements of form.*—A local rule imposing a requirement of form must not be enforced in a way that causes a party to lose any right because of a nonwillful failure to comply.

(*b*) *Procedure when there is no controlling law.*

(*1*) *In general.*—A district court or BAP may regulate practice in any manner consistent with federal law, applicable federal rules, the Official Forms, and local rules.

(*2*) *Limitation on sanctions.*—No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, applicable federal rules, the Official Forms, or local rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

Rule 8027. Notice of a mediation procedure.

If the district court or BAP has a mediation procedure applicable to bankruptcy appeals, the clerk must notify the parties promptly after docketing the appeal of:

(a) the requirements of the mediation procedure; and

(b) any effect the mediation procedure has on the time to file briefs.

Rule 8028. Suspension of rules in Part VIII.

In the interest of expediting decision or for other cause in a particular case, the district court or BAP, or where appropriate the court of appeals, may suspend the requirements or provisions of the rules in Part VIII, except Rules 8001, 8002, 8003, 8004, 8005, 8006, 8007, 8012, 8020, 8024, 8025, 8026, and 8028.

Rule 9023. New trials; amendment of judgments.

Except as provided in this rule and Rule 3008, Rule 59 F. R. Civ. P. applies in cases under the Code. A motion for a new trial or to alter or amend a judgment shall be filed, and a court may on its own order a new trial, no later than 14 days after entry of judgment. In some circumstances,

Rule 8008 governs post-judgment motion practice after an appeal has been docketed and is pending.

Rule 9024. Relief from judgment or order.

Rule 60 F. R. Civ. P. applies in cases under the Code except that (1) a motion to reopen a case under the Code or for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(c), (2) a complaint to revoke a discharge in a chapter 7 liquidation case may be filed only within the time allowed by § 727(e) of the Code, and (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by § 1144, § 1230, or § 1330. In some circumstances, Rule 8008 governs post-judgment motion practice after an appeal has been docketed and is pending.

AMENDMENT TO FEDERAL RULES OF CIVIL PROCEDURE

The following amendment to the Federal Rules of Civil Procedure was prescribed by the Supreme Court of the United States on April 25, 2014, pursuant to 28 U. S. C. § 2072, and was reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1218. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Civil Procedure and amendments thereto, see 308 U. S. 645, 308 U. S. 642, 329 U. S. 839, 335 U. S. 919, 341 U. S. 959, 368 U. S. 1009, 374 U. S. 861, 383 U. S. 1029, 389 U. S. 1121, 398 U. S. 977, 401 U. S. 1017, 419 U. S. 1133, 446 U. S. 995, 456 U. S. 1013, 461 U. S. 1095, 471 U. S. 1153, 480 U. S. 953, 485 U. S. 1043, 500 U. S. 963, 507 U. S. 1089, 514 U. S. 1151, 517 U. S. 1279, 520 U. S. 1305, 523 U. S. 1221, 526 U. S. 1183, 529 U. S. 1155, 532 U. S. 1085, 535 U. S. 1147, 538 U. S. 1083, 544 U. S. 1173, 547 U. S. 1233, 550 U. S. 1003, 553 U. S. 1149, 556 U. S. 1341, 559 U. S. 1139, and 569 U. S. 1149.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 25, 2014

To the Senate and House of Representatives of the United States of America in Congress Assembled:

I have the honor to submit to the Congress the amendment to the Federal Rules of Civil Procedure that has been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying this rule are excerpts from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 25, 2014

ORDERED:

1. That the Federal Rules of Civil Procedure be, and they hereby are, amended by including therein an amendment to Civil Rule 77.

[See *infra*, p. 1221.]

2. That the foregoing amendment to the Federal Rules of Civil Procedure shall take effect on December 1, 2014, and shall govern in all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendment to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 77. Conducting business; clerk's authority; notice of an order or judgment.

. . . . .

(*c*) *Clerk's office hours; clerk's orders.*

(*1*) *Hours.*—The clerk's office—with a clerk or deputy on duty—must be open during business hours every day except Saturdays, Sundays, and legal holidays. But a court may, by local rule or order, require that the office be open for specified hours on Saturday or a particular legal holiday other than one listed in Rule 6(a)(6)(A).

. . . . .

AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

The following amendments to the Federal Rules of Criminal Procedure were prescribed by the Supreme Court of the United States on April 25, 2014, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1224. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Criminal Procedure and amendments thereto, see 327 U. S. 821, 335 U. S. 917, 949, 346 U. S. 941, 350 U. S. 1017, 383 U. S. 1087, 389 U. S. 1125, 401 U. S. 1025, 406 U. S. 979, 415 U. S. 1056, 416 U. S. 1001, 419 U. S. 1136, 425 U. S. 1157, 441 U. S. 985, 456 U. S. 1021, 461 U. S. 1117, 471 U. S. 1167, 480 U. S. 1041, 485 U. S. 1057, 490 U. S. 1135, 495 U. S. 967, 500 U. S. 991, 507 U. S. 1161, 511 U. S. 1175, 514 U. S. 1159, 517 U. S. 1285, 520 U. S. 1313, 523 U. S. 1227, 526 U. S. 1189, 529 U. S. 1179, 535 U. S. 1157, 541 U. S. 1103, 544 U. S. 1181, 547 U. S. 1269, 550 U. S. 1165, and 553 U. S. 1155, 556 U. S. 1363, 559 U. S. 1151, 563 U. S. 1063, 566 U. S. 1053, and 569 U. S. 1161.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 25, 2014

To the Senate and House of Representatives of the United States of America in Congress Assembled:

I have the honor to submit to the Congress the amendments to the Federal Rules of Criminal Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the Reports of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 25, 2014

ORDERED:

1. That the Federal Rules of Criminal Procedure be, and they hereby are, amended by including therein amendments to Criminal Rules 5, 6, 12, 34, and 58.

[See *infra*, pp. 1227–1231.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 2014, and shall govern in all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 5. Initial appearance.

. . . . .

(*d*) *Procedure in a felony case.*

(*1*) *Advice.*—If the defendant is charged with a felony, the judge must inform the defendant of the following:

. . . . .

(D) any right to a preliminary hearing;

(E) the defendant's right not to make a statement, and that any statement made may be used against the defendant; and

(F) that a defendant who is not a United States citizen may request that an attorney for the government or a federal law enforcement official notify a consular officer from the defendant's country of nationality that the defendant has been arrested—but that even without the defendant's request, a treaty or other international agreement may require consular notification.

. . . . .

Rule 6. The grand jury.

. . . . .

(*e*) *Recording and disclosing the proceedings.*

. . . . .

(*3*) *Exceptions.*

. . . . .

(D) An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence (as defined in 50 U. S. C. § 3003), or foreign intelligence information (as defined in Rule 6(e)(3)(D)(iii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national se-

curity official to assist the official receiving the information in the performance of that official's duties. An attorney for the government may also disclose any grand-jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate federal, state, state subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities.

. . . . .

Rule 12. Pleadings and pretrial motions.

. . . . .

(*b*) *Pretrial motions.*

(*1*) *In general.*—A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits. Rule 47 applies to a pretrial motion.

(*2*) *Motions that may be made at any time.*—A motion that the court lacks jurisdiction may be made at any time while the case is pending.

(*3*) *Motions that must be made before trial.*—The following defenses, objections, and requests must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits:

(A) a defect in instituting the prosecution, including:

(i) improper venue;

(ii) preindictment delay;

(iii) a violation of the constitutional right to a speedy trial;

(iv) selective or vindictive prosecution; and

(v) an error in the grand-jury proceeding or preliminary hearing;

(B) a defect in the indictment or information, including:

(i) joining two or more offenses in the same count (duplicity);

(ii) charging the same offense in more than one count (multiplicity);

(iii) lack of specificity;

(iv) improper joinder; and

(v) failure to state an offense;

(C) suppression of evidence;

(D) severance of charges or defendants under Rule 14; and

(E) discovery under Rule 16.

(*4*) *Notice of the government's intent to use evidence.*

(*A*) *At the government's discretion.*—At the arraignment or as soon afterward as practicable, the government may notify the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to object before trial under Rule 12(b)(3)(C).

(*B*) *At the defendant's request.*—At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.

(*c*) *Deadline for a pretrial motion; consequences of not making a timely motion.*

(*1*) *Setting the deadline.*—The court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing. If the court does not set one, the deadline is the start of trial.

(*2*) *Extending or resetting the deadline.*—At any time before trial, the court may extend or reset the deadline for pretrial motions.

(*3*) *Consequences of not making a timely motion under Rule 12(b)(3).*—If a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely. But a court may consider the defense, objection, or request if the party shows good cause.

(*d*) *Ruling on a motion.*—The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court must state its essential findings on the record.

(*e*) *[Reserved]*

. . . . .

Rule 34. Arresting judgment.

(*a*) *In general.*—Upon the defendant's motion or on its own, the court must arrest judgment if the court does not have jurisdiction of the charged offense.

. . . . .

Rule 58. Petty offenses and other misdemeanors.

. . . . .

(*b*) *Pretrial procedure.*

. . . . .

(*2*) *Initial appearance.*—At the defendant's initial appearance on a petty offense or other misdemeanor charge, the magistrate judge must inform the defendant of the following:

. . . . .

(F) the right to a jury trial before either a magistrate judge or a district judge—unless the charge is a petty offense;

(G) any right to a preliminary hearing under Rule 5.1, and the general circumstances, if any, under which the defendant may secure pretrial release; and

(H) that a defendant who is not a United States citizen may request that an attorney for the government or a federal law enforcement official notify a consular offi-

cer from the defendant's country of nationality that the defendant has been arrested—but that even without the defendant's request, a treaty or other international agreement may require consular notification.

. . . . .

AMENDMENTS TO FEDERAL RULES OF EVIDENCE

The following amendments to the Federal Rules of Evidence were prescribed by the Supreme Court of the United States on April 25, 2014, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1234. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier reference to the Federal Rules of Evidence, see 409 U. S. 1132. For earlier publication of the Federal Rules of Evidence and amendments thereto, see 441 U. S. 1005, 480 U. S. 1023, 485 U. S. 1049, 493 U. S. 1173, 500 U. S. 1001, 507 U. S. 1187, 511 U. S. 1187, 520 U. S. 1323, 523 U. S. 1235, 529 U. S. 1189, 538 U. S. 1097, 547 U. S. 1281, 559 U. S. 1157, 563 U. S. 1075, and 569 U. S. 1167.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 25, 2014

To the Senate and House of Representatives of the United States of America in Congress Assembled:

I have the honor to submit to the Congress the amendments to the Federal Rules of Evidence that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the Report of the Committee on Rules of Practice amd Procedure to the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 25, 2014

ORDERED:

1. That the Federal Rules of Evidence be, and they hereby are, amended by including therein amendments to Evidence Rules 801(d)(1)(B) and 803(6)–(8).

[See *infra*, pp. 1237–1238.]

2. That the foregoing amendments to the Federal Rules of Evidence shall take effect on December 1, 2014, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Evidence in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

Rule 801. Definitions that apply to this article; exclusions from hearsay.

. . . . .

(*d*) *Statements that are not hearsay.*—A statement that meets the following conditions is not hearsay:

(*1*) *A declarant-witness's prior statement.*—The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

. . . . .

(B) is consistent with the declarant's testimony and is offered:

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

. . . . .

Rule 803. Exceptions to the rule against hearsay—regardless of whether the declarant is available as a witness.

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

. . . . .

(*6*) *Records of a regularly conducted activity.*—A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

(*7*) *Absence of a record of a regularly conducted activity.*—Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness.

(*8*) *Public records.*—A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

. . . . .

Reporter's Note

The next page is purposely numbered 1301. The numbers between 1238 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINION OF INDIVIDUAL JUSTICE
IN CHAMBERS

TEVA PHARMACEUTICALS USA, INC., ET AL. *v.* SANDOZ, INC., ET AL.

ON APPLICATION TO RECALL AND STAY MANDATE

No. 13A1003 (13–854). Decided April 18, 2014

Application to recall and stay the mandate of the United States Court of Appeals for the Federal Circuit in this patent infringement case is denied. Applicants cannot show a likelihood of irreparable harm from denial of a stay because, if they prevail in this Court, they will be able to recover damages for past patent infringement.

CHIEF JUSTICE ROBERTS, Circuit Justice.

The application to recall and stay the mandate of the United States Court of Appeals for the Federal Circuit, see 723 F. 3d 1363 (2013), is denied. To obtain such relief, applicants Teva Pharmaceuticals USA, Inc., and related firms, must demonstrate (1) a "reasonable probability" that this Court will grant certiorari, (2) a "fair prospect" that the Court will reverse the decision below, and (3) a "likelihood that irreparable harm [will] result from the denial of a stay." *Maryland* v. *King*, 567 U. S. 1301, 1302 (2012) (ROBERTS, C. J., in chambers) (internal quotation marks omitted). Teva has of course satisfied the first requirement, and has also shown a fair prospect of success on the merits. I am not convinced, however, that it has shown a likelihood of irreparable harm from denial of a stay. Respondents acknowledge that, should Teva prevail in this Court and its patent be held valid, Teva will be able to recover damages from respondents for past patent infringement. See Brief in Opposition 25–28.

Given the availability of that remedy, the extraordinary relief that Teva seeks is unwarranted.

It is so ordered.

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No-adverse-inference instruction—Nontestifying defendant—Penalty phase.—Because Kentucky Supreme Court's holding—that Fifth Amendment's requirement of a no-adverse-inference instruction to protect a nontestifying defendant at guilt phase is not required at penalty phase—was not objectively unreasonable, Sixth Circuit erred in granting respondent's petition for a writ of habeas corpus. White v. Woodall, p. 415.

HAGUE CONVENTION ON CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION.

Article 12 limitations period—Equitable tolling.—Convention's Article 12 limitations period—which requires a court to return an abducted child when left-behind parent makes request within one year of abduction, but which permits court to consider whether child is settled in its new environment when request is made after 1-year period expires—is not subject to equitable tolling. Lozano v. Montoya Alvarez, p. 1.

ILLINOIS. See **Constitutional Law,** II.

IMMUNITY OF INDIAN TRIBES FROM SUIT. See **Indian Gaming Regulatory Act.**

INDEFINITENESS. See **Patent Law,** 2.

INDIAN GAMING REGULATORY ACT.

Tribal sovereign immunity—Illegal gaming activity on nontribal land.—Tribal sovereign immunity bars Michigan's suit against Bay Mills

INDIAN GAMING REGULATORY ACT—Continued.
Indian Community for violating Act by operating a casino on nontribal land, because provision that would waive immunity, 25 U. S. C. § 2710(d)(1)(C), only authorizes suit to enjoin illegal gaming activity occurring "on Indian lands." Michigan v. Bay Mills Indian Community, p. 782.

INFRINGEMENT OF PATENTS. See **Patent Law,** 1.

JURY INSTRUCTIONS. See **Criminal Law,** 1; **Habeas Corpus.**

LACHES. See **Copyright Act.**

LANHAM ACT.

Pleading elements of cause of action—False advertising.—Respondent adequately pleaded elements of cause of action for false advertising under Act: Its alleged injuries—lost sales and damage to its business reputation—fall within zone of interests protected by Act and it sufficiently alleged that its injuries were proximately caused by petitioner's misrepresentations. Lexmark Int'l, Inc. v. Static Control Components, Inc., p. 118.

LAW ENFORCEMENT OFFICIALS' USE OF EXCESSIVE FORCE. See **Constitutional Law,** VI, 2.

LIMITATION OF ACTIONS. See **Copyright Act.**

LOANS. See **Mandatory Victims Restitution Act of 1996.**

MANDATORY VICTIMS RESTITUTION ACT OF 1996.

Fraudulent mortgage loan applications—Bank losses—Restitution amount.—Act's phrase "any part of the property . . . returned," 18 U. S. C. § 3663A(b)(1)(B), refers, here, to money banks lost as result of petitioner's fraudulent mortgage loan applications and not to collateral banks received; thus, petitioner's obligation to banks is difference between amount lent to him and amount banks received in selling houses, not value of houses on date banks took title to them in foreclosure. Robers v. United States, p. 639.

MENTALLY DISABLED CRIMINALS. See **Constitutional Law,** I.

MICHIGAN. See **Constitutional Law,** III; **Indian Gaming Regulatory Act.**

MORTGAGES. See **Mandatory Victims Restitution Act of 1996.**

PARENTS AND CHILDREN. See **Hague Convention on Civil Aspects of International Child Abduction.**

PATENT LAW.

1. *Fee-shifting provision—District courts' exceptional-case determination—Abuse of discretion review.*—Because District Courts may make an

PATENT LAW—Continued.

exceptional-case determination under Patent Act's fee-shifting provision, 35 U. S. C. § 285, in exercise of their discretion, all aspects of that determination should be reviewed for abuse of discretion, not *de novo*. Highmark Inc. v. Allcare Health Management System, Inc., p. 559.

2. *Fee-shifting provision—"Exceptional case"—District courts' discretion.*—Framework of *Brooks Furniture Mfg., Inc.* v. *Dutailier Int'l, Inc.*, 393 F. 3d 1378, for determining whether a case is "exceptional" under Act's fee-shifting provision, 35 U. S. C. § 285, is unduly rigid and impermissibly encumbers statutory grant of discretion to district courts. Octane Fitness, LLC v. ICON Health & Fitness, Inc., p. 545.

3. *Inducing infringement—Liability.*—A defendant is not liable for inducing patent infringement under 35 U. S. C. § 271(b) when no one has directly infringed under § 271(a), a predicate for § 271(b) liability, or any other patent law provision. Limelight Networks, Inc. v. Akamai Technologies, Inc., p. 915.

4. *Invalidation for indefiniteness—Federal Circuit standard.*—A patent is invalid for indefiniteness under 35 U. S. C. § 112, ¶2, if its claims, read in light of patent's specification and prosecution history, fail to inform, with reasonable certainty, those skilled in art about scope of invention; Federal Circuit's standard, which tolerates some ambiguous claims but not others, does not satisfy definiteness requirement. Nautilus, Inc. v. Biosig Instruments, Inc., p. 898.

PAYROLL TAXES. See **Taxes.**

POLLUTION. See **Clean Air Act.**

PRAYER TO OPEN MUNICIPAL BOARD MEETINGS. See **Constitutional Law,** IV.

PRE-EMPTION OF STATE LAW. See **Airline Deregulation Act of 1978.**

PRIVILEGE AGAINST SELF-INCRIMINATION. See **Habeas Corpus.**

PROPERTY RIGHTS. See **General Railroad Right-of-Way Act of 1875.**

PROTESTS. See **Qualified Immunity From Suit,** 2.

PROXIMATE CAUSE. See **Criminal Law,** 2**; Lanham Act.**

PUBLIC LANDS. See **General Railroad Right-of-Way Act of 1875.**

QUALIFIED IMMUNITY FROM SUIT. See also **Constitutional Law,** VI.

1. *Clearly established law—Summary judgment—Nonmoving party.*—In holding that Sergeant Cotton did not violate any clearly established

QUALIFIED IMMUNITY FROM SUIT—Continued.

law when he shot Tolan, Fifth Circuit neglected to adhere to fundamental principle that evidence at summary judgment should be viewed in light most favorable to nonmoving party, *i. e.*, Tolan, with respect to central facts of case. Tolan v. Cotton, p. 650.

2. *Secret Service agents—Viewpoint-discrimination claim.*—Petitioner Secret Service agents are shielded by qualified immunity from First Amendment claim of respondent protesters who were relocated farther away from President than President's supporters. Wood v. Moss, p. 744.

RACIAL PREFERENCES. See **Constitutional Law,** III.

RAILROADS. See **General Railroad Right-of-Way Act of 1875.**

RESTITUTION AWARDS. See **Criminal Law,** 2**; Mandatory Victims Restitution Act of 1996.**

RIGHTS OF WAY. See **General Railroad Right-of-Way Act of 1875.**

SEARCHES AND SEIZURES. See **Constitutional Law,** VI.

SENTENCING. See **Criminal Law,** 1.

SEVERANCE PAYMENTS. See **Taxes.**

STANDING TO SUE. See **Lanham Act.**

STATE IMPLEMENTATION PLANS. See **Clean Air Act.**

STATUTES OF LIMITATIONS. See **Copyright Act; Hague Convention on Civil Aspects of International Child Abduction.**

SUPPLEMENTAL UNEMPLOYMENT BENEFITS. See **Taxes.**

SUPREME COURT.

1. Amendments to Federal Rules of Appellate Procedure, p. 1161.
2. Amendments to Federal Rules of Bankruptcy Procedure, p. 1169.
3. Amendment to Federal Rules of Civil Procedure, p. 1217.
4. Amendments to Federal Rules of Criminal Procedure, p. 1223.
5. Amendments to Federal Rules of Evidence, p. 1233.

TAXES.

Federal Insurance Contributions Act—Severance payments to involuntarily terminated employees—Taxable wages.—Respondents' severance payments to involuntarily terminated employees, which were made pursuant to plans that did not tie payments to receipt of state unemployment insurance and varied based on job seniority and time served, are taxable wages for purposes of Act. United States v. Quality Stores, Inc., p. 141.

TRIBAL IMMUNITY FROM SUIT. See **Indian Gaming Regulatory Act.**

UNIVERSITY ADMISSIONS POLICIES. See **Constitutional Law,** III.

VEHICLE STOPS. See **Constitutional Law,** VI.

VICTIMS' COMPENSATION. See **Criminal Law,** 2.

WAGES. See **Taxes.**

WARRANTLESS SEARCHES. See **Constitutional Law,** VI, 1.

WITHHOLDING TAXES. See **Taxes.**

WORDS AND PHRASES.

"[A]ny part of the property . . . returned." Mandatory Victims Restitution Act of 1996, 18 U. S. C. § 3663A(b)(1)(B). Robers v. United States, p. 639.

"[C]hemical weapons." Chemical Weapons Convention Implementation Act of 1998, 18 U. S. C. § 229(a)(1). Bond v. United States, p. 844.

"[U]se or attempted use of physical force." 18 U. S. C. 921(a)(33)(A). United States v. Castleman, p. 157.

ZONE OF INTERESTS. See **Lanham Act.**