584
1 of 2

PRELIMINARY PRINT

VOLUME 584 U. S. - PART 1

PAGES 1–380; 901–970

OFFICIAL REPORTS

OF

THE SUPREME COURT

MARCH 21 THROUGH MAY 9, 2018

CHRISTINE LUCHOK FALLON
REPORTER OF DECISIONS

For sale by the Superintendent of Documents, U. S. Government Publishing Office
Washington, D.C. 20402

Vol. 584 (Pp. 1–380; 901–970)
UNITED STATES REPORTS
Part 1

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

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

RETIRED

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

OFFICERS OF THE COURT

JEFFERSON B. SESSIONS, III, ATTORNEY GENERAL.
NOEL J. FRANCISCO, SOLICITOR GENERAL.
SCOTT S. HARRIS, CLERK.
CHRISTINE LUCHOK FALLON, REPORTER OF DECISIONS.
PAMELA TALKIN, MARSHAL.
LINDA S. MASLOW, LIBRARIAN.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective June 27, 2017, 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, SAMUEL A. ALITO, JR., Associate Justice.

For the Sixth Circuit, ELENA KAGAN, Associate Justice.

For the Seventh Circuit, ELENA KAGAN, Associate Justice.

For the Eighth Circuit, NEIL M. GORSUCH, 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.

June 27, 2017.

(For next previous allotment, see 582 U. S., Pt. 2, p. III.)

INDEX

(Vol. 584 U. S., Part 1)

TABLE OF CASES REPORTED

(Vol. 584 U. S., Part 1)

NOTE: All undesignated references herein to the United States Code are to the 2012 edition, one of its supplements, or both.

Cases reported before page 901 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 901 *et seq.* are those in which orders were entered. The page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of this preliminary print.

An individual attorney whose name appears on a brief filed with the Court will be listed in the United States Reports in connection with the opinion in the case concerning which the document is filed if the attorney is a member of the Court's Bar at the time the case is argued.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2017

MARINELLO *v.* UNITED STATES

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

No. 16–1144. Argued December 6, 2017—Decided March 21, 2018

Between 2004 and 2009, the Internal Revenue Service (IRS) intermittently investigated petitioner Marinello's tax activities. In 2012, the Government indicted Marinello for violating, among other criminal tax statutes, a provision in 26 U. S. C. § 7212(a) known as the Omnibus Clause, which forbids "corruptly or by force or threats of force . . . obstruct[ing] or imped[ing], or endeavor[ing] to obstruct or impede, the due administration of [the Internal Revenue Code]." The judge instructed the jury that, to convict Marinello of an Omnibus Clause violation, it must find that he "corruptly" engaged in at least one of eight specified activities, but the jury was not told that it needed to find that Marinello knew he was under investigation and intended corruptly to interfere with that investigation. Marinello was convicted. The Second Circuit affirmed, rejecting his claim that an Omnibus Clause violation requires the Government to show the defendant tried to interfere with a pending IRS proceeding, such as a particular investigation.

Held: To convict a defendant under the Omnibus Clause, the Government must prove the defendant was aware of a pending tax-related proceeding, such as a particular investigation or audit, or could reasonably foresee that such a proceeding would commence. Pp. 6–14.

(a) In *United States* v. *Aguilar*, 515 U. S. 593, this Court interpreted a similarly worded criminal statute—which made it a felony "corruptly

or by threats or force . . . [to] influenc[e], obstruc[t], or imped[e], or endeavo[r] to influence, obstruct, or impede, the due administration of justice," 18 U. S. C. § 1503(a). There, the Court required the Government to show there was a "nexus" between the defendant's obstructive conduct and a particular judicial proceeding. The Court said that the defendant's "act must have a relationship in time, causation, or logic with the judicial proceedings." 515 U. S., at 599. In reaching this conclusion, the Court emphasized that it has "traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress and out of concern that 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.'" *Id.*, at 600. That reasoning applies here with similar strength. The verbs "obstruct" and "impede" require an object. The taxpayer must hinder a particular person or thing. The object in § 7212(a) is the "due administration of [the Tax Code]." That phrase is best viewed, like the "due administration of justice" in *Aguilar*, as referring to discrete targeted administrative acts rather than every conceivable task involved in the Tax Code's administration. Statutory context confirms this reading. The Omnibus Clause appears in the middle of a sentence that refers to efforts to "intimidate or impede any officer or employee of the United States acting in an official capacity." § 7212(a). The first part of the sentence also refers to "force or threats of force," which the statute elsewhere defines as "threats of bodily harm to the officer or employee of the United States or to a member of his family." *Ibid.* And § 7212(b) refers to the "forcibl[e] rescu[e]" of "any property after it shall have been seized under" the Internal Revenue Code. Subsections (a) and (b) thus refer to corrupt or forceful actions taken against individual identifiable persons or property. In context, the Omnibus Clause logically serves as a "catchall" for the obstructive conduct the subsection sets forth, not for every violation that interferes with routine administrative procedures such as the processing of tax returns, receipt of tax payments, or issuance of tax refunds. The statute's legislative history does not suggest otherwise. The broader context of the full Internal Revenue Code also counsels against a broad reading. Interpreting the Omnibus Clause to apply to all Code administration could transform the Code's numerous misdemeanor provisions into felonies, making them redundant or perhaps the subject matter of plea bargaining. It could also result in a similar lack of fair warning and related kinds of unfairness that led this Court to "exercise" interpretive "restraint" in *Aguilar*. See 515 U. S., at 600. The Government claims that the "corrupt state of mind" requirement will cure any overbreadth problem, but it is difficult to imagine a scenario when that requirement

Syllabus

will make a practical difference in the context of federal tax prosecutions. And to rely on prosecutorial discretion to narrow the otherwise wide-ranging scope of a criminal statute's general language places too much power in the prosecutor's hands. Pp. 6–11.

(b) Following the same approach taken in similar cases, the Government here must show that there is a "nexus" between the defendant's conduct and a particular administrative proceeding, such as an investigation, an audit, or other targeted administrative action. See *Aguilar*, *supra*, at 599. The term "particular administrative proceeding" does not mean every act carried out by IRS employees in the course of their administration of the Tax Code. Just because a taxpayer knows that the IRS will review her tax return annually does not transform every Tax Code violation into an obstruction charge. In addition to satisfying the nexus requirement, the Government must show that the proceeding was pending at the time the defendant engaged in the obstructive conduct or, at the least, was then reasonably foreseeable by the defendant. See *Arthur Andersen LLP* v. *United States*, 544 U. S. 696, 703, 707–708. Pp. 11–14.

839 F. 3d 209, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, SOTOMAYOR, KAGAN, and GORSUCH, JJ., joined. THOMAS, J., filed a dissenting opinion, in which ALITO, J., joined, *post*, p. 16.

Matthew S. Hellman argued the cause for petitioner. With him on the briefs were *David Bitkower*, *Joseph M. LaTona*, *David A. Strauss*, and *Sarah M. Konsky*.

Robert A. Parker argued the cause for the United States. With him on the brief were *Solicitor General Francisco*, *Acting Assistant Attorney General Hubbert*, *Deputy Solicitor General Dreeben*, *S. Robert Lyons*, *Stanley J. Okula, Jr.*, *Gregory Victor Davis*, and *Gregory S. Knapp*.*

---

*Briefs of *amici curiae* urging reversal were filed for the American College of Tax Counsel by *Jenny L. Johnson*, *Guinevere M. Moore*, *Armando Gomez*, and *David W. Foster*; for the Cause of Action Institute et al. by *Erica L. Marshall*, *John Vecchione*, and *Joshua L. Dratel*; for the Chamber of Commerce of the United States of America et al. by *Lewis J. Liman*, *Nowell D. Bamberger*, *Kate Comerford Todd*, *Warren Postman*, *Karen R. Harned*, and *Elizabeth Milito*; and for the New York Council of Defense Lawyers by *Alexandra A. E. Shapiro*.

JUSTICE BREYER delivered the opinion of the Court.

A clause in § 7212(a) of the Internal Revenue Code makes it a felony "corruptly or by force" to "endeavo[r] to obstruct or imped[e] the due administration of this title." 26 U. S. C. § 7212(a). The question here concerns the breadth of that statutory phrase. Does it cover virtually all governmental efforts to collect taxes? Or does it have a narrower scope? In our view, "due administration of [the Tax Code]" does not cover routine administrative procedures that are near-universally applied to all taxpayers, such as the ordinary processing of income tax returns. Rather, the clause as a whole refers to specific interference with targeted governmental tax-related proceedings, such as a particular investigation or audit.

I

The Internal Revenue Code provision at issue, § 7212(a), has two substantive clauses. The first clause, which we shall call the "Officer Clause," forbids

> "corruptly or by force or threats of force (including any threatening letter or communication) endeavor[ing] to intimidate or impede any *officer or employee* of the United States acting in an official capacity under [the Internal Revenue Code]." *Ibid.* (emphasis added).

The second clause, which we shall call the "Omnibus Clause," forbids

> "corruptly or by force or threats of force (including any threatening letter or communication) obstruct[ing] or imped[ing], or endeavor[ing] to obstruct or impede, *the due administration* of [the Internal Revenue Code]." *Ibid.* (emphasis added).

As we said at the outset, we here consider the scope of the Omnibus Clause. (We have placed the full text of § 7212 in the Appendix, *infra*.)

Between 2004 and 2009, the Internal Revenue Service (IRS) opened, then closed, then reopened an investigation into the tax activities of Carlo Marinello, the petitioner here. In 2012 the Government indicted Marinello, charging him with violations of several criminal tax statutes including the Omnibus Clause. In respect to the Omnibus Clause the Government claimed that Marinello had engaged in at least one of eight different specified activities, including "failing to maintain corporate books and records," "failing to provide" his tax accountant "with complete and accurate" tax "information," "destroying . . . business records," "hiding income," and "paying employees . . . with cash." 839 F. 3d 209, 213 (CA2 2016).

Before the jury retired to consider the charges, the judge instructed it that, to convict Marinello of violating the Omnibus Clause, it must find unanimously that he engaged in at least one of the eight practices just mentioned, that the jurors need not agree on which one, and that he did so "corruptly," meaning "with the intent to secure an unlawful advantage or benefit, either for [himself] or for another." App. in No. 15–2224 (CA2), p. 432. The judge, however, did not instruct the jury that it must find that Marinello knew he was under investigation and intended corruptly to interfere with that investigation. The jury subsequently convicted Marinello on all counts.

Marinello appealed to the Court of Appeals for the Second Circuit. He argued, among other things, that a violation of the Omnibus Clause requires the Government to show that the defendant had tried to interfere with a "pending IRS proceeding," such as a particular investigation. Brief for Appellant in No. 15–2224, pp. 23–25. The appeals court disagreed. It held that a defendant need not possess "'an awareness of a particular [IRS] action or investigation.'" 839 F. 3d, at 221 (quoting *United States* v. *Wood*, 384 Fed. Appx. 698, 704 (CA10 2010); alteration in original). The full

Court of Appeals rejected Marinello's petition for rehearing, two judges dissenting. 855 F. 3d 455 (CA2 2017).

Marinello then petitioned for certiorari, asking us to decide whether the Omnibus Clause requires the Government to prove the defendant was aware of "a pending IRS action or proceeding, such as an investigation or audit," when he "engaged in the purportedly obstructive conduct." Pet. for Cert. i. In light of a division of opinion among the Circuits on this point, we granted the petition. Compare *United States* v. *Kassouf*, 144 F. 3d 952 (CA6 1998) (requiring showing of a pending proceeding), with 839 F. 3d, at 221 (disagreeing with *Kassouf*).

II

In *United States* v. *Aguilar*, 515 U. S. 593 (1995), we interpreted a similarly worded criminal statute. That statute made it a felony "corruptly or by threats or force, or by any threatening letter or communication, [to] influenc[e], obstruc[t], or imped[e], or endeavo[r] to influence, obstruct, or impede, the due administration of justice." 18 U. S. C. § 1503(a). The statute concerned not (as here) "the due administration of" *the Internal Revenue Code* but rather "the due administration of *justice*." (We have placed the full text of § 1503 in the Appendix, *infra*.)

In interpreting that statute we pointed to earlier cases in which courts had held that the Government must prove "an intent to influence judicial or grand jury proceedings." *Aguilar*, *supra*, at 599 (citing *United States* v. *Brown*, 688 F. 2d 596, 598 (CA9 1982)). We noted that some courts had imposed a "'nexus' requirement": that the defendant's "act must have a relationship in time, causation, or logic with the judicial proceedings." *Aguilar*, *supra*, at 599 (citing *United States* v. *Wood*, 6 F. 3d 692, 696 (CA10 1993), and *United States* v. *Walasek*, 527 F. 2d 676, 679, and n. 12 (CA3 1975)). And we adopted the same requirement.

We set forth two important reasons for doing so. We wrote that we "have traditionally exercised restraint in as-

sessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress and out of concern that 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.'" *Aguilar*, *supra*, at 600 (quoting *McBoyle* v. *United States*, 283 U. S. 25, 27 (1931); citation omitted). Both reasons apply here with similar strength.

As to Congress' intent, the literal language of the statute is neutral. The statutory words "obstruct or impede" are broad. They can refer to anything that "block[s]," "make[s] difficult," or "hinder[s]." Black's Law Dictionary 1246 (10th ed. 2014) (obstruct); Webster's New International Dictionary 1248 (2d ed. 1957) (Webster's) (impede); *id.*, at 1682 (obstruct); accord, 5 Oxford English Dictionary 80 (1933) (impede); 7 *id.*, at 36 (obstruct). But the verbs "obstruct" and "impede" suggest an object—the taxpayer must hinder a particular person or thing. Here, the object is the "due administration of this title." The word "administration" can be read literally to refer to every "[a]ct or process of administering" including every act of "managing" or "conduct[ing]" any "office," or "perform[ing] the executive duties of" any "institution, business, or the like." Webster's 34. But the whole phrase—the due administration of the Tax Code—is best viewed, like the due administration of justice, as referring to only some of those acts or to some separable parts of an institution or business. Cf. *Aguilar*, *supra*, at 600–601 (concluding false statements made to an investigating agent rather than a grand jury do not support a conviction for obstruction of justice).

Here statutory context confirms that the text refers to specific, targeted acts of administration. The Omnibus Clause appears in the middle of a statutory sentence that refers specifically to efforts to "intimidate or impede *any officer or employee of the United States* acting in an official capacity." 26 U. S. C. § 7212(a) (emphasis added). The first

part of the sentence also refers to "force or threats of force," which the statute elsewhere defines as "threats of bodily harm to the *officer or employee of the United States or to a member of his family.*" *Ibid.* (emphasis added). The following subsection refers to the "forcibl[e] rescu[e]" of "any *property* after it shall have been seized under" the Internal Revenue Code. § 7212(b) (emphasis added). Subsections (a) and (b) thus refer to corrupt or forceful actions taken against individual identifiable persons or property. And in that context the Omnibus Clause logically serves as a "catch-all" in respect to the obstructive conduct the subsection sets forth, not as a "catchall" for every violation that interferes with what the Government describes as the "continuous, ubiquitous, and universally known" administration of the Internal Revenue Code. Brief in Opposition 9.

Those who find legislative history helpful can find confirmation of the more limited scope of the Omnibus Clause in the House and Senate Reports written when Congress first enacted the Omnibus Clause. See H. R. Rep. No. 1337, 83d Cong., 2d Sess. (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. (1954). According to the House Report, § 7212 "provides for the punishment of threats or threatening acts against *agents* of the Internal Revenue Service, or any other *officer* or *employee* of the United States, or *members of the families of such persons*, on account of the performance by such agents or officers or employees of their official duties" and "*will also punish the corrupt solicitation of an internal revenue employee.*" H. R. Rep. No. 1337, at A426 (emphasis added). The Senate Report also refers to the section as aimed at targeting officers and employees. It says that § 7212 "covers all cases where the *officer* is intimidated or injured; *that is*, where corruptly, by force or threat of force, directly or by communication, an attempt is made to impede the administration of the internal-revenue laws." S. Rep. No. 1622, at 147 (emphasis added). We have found nothing in the statute's history suggesting that Congress intended the Omnibus Clause as a catchall applicable to the entire Code including

the routine processing of tax returns, receipt of tax payments, and issuance of tax refunds.

Viewing the Omnibus Clause in the broader statutory context of the full Internal Revenue Code also counsels against adopting the Government's broad reading. That is because the Code creates numerous misdemeanors, ranging from willful failure to furnish a required statement to employees, § 7204, to failure to keep required records, § 7203, to misrepresenting the number of exemptions to which an employee is entitled on IRS Form W–4, § 7205, to failure to pay any tax owed, however small the amount, § 7203. To interpret the Omnibus Clause as applying to all Code administration would potentially transform many, if not all, of these misdemeanor provisions into felonies, making the specific provisions redundant, or perhaps the subject matter of plea bargaining. Some overlap in criminal provisions is, of course, inevitable. See, *e. g.*, *Sansone* v. *United States*, 380 U. S. 343, 349 (1965) (affirming conviction for tax evasion despite overlap with other provisions). Indeed, as the dissent notes, *post*, at 22 (opinion of THOMAS, J.), Marinello's preferred reading of § 7212 potentially overlaps with another provision of federal law that criminalizes the obstruction of the "due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States," 18 U. S. C. § 1505. But we have not found any case from this Court interpreting a statutory provision that would create overlap and redundancy to the degree that would result from the Government's broad reading of § 7212—particularly when it would "'render superfluous other provisions in the same enactment.'" *Freytag* v. *Commissioner*, 501 U. S. 868, 877 (1991) (quoting *Pennsylvania Dept. of Public Welfare* v. *Davenport*, 495 U. S. 552, 562 (1990)); see also *Yates* v. *United States*, 574 U. S. 528, 543 (2015) (plurality opinion).

A broad interpretation would also risk the lack of fair warning and related kinds of unfairness that led this Court in *Aguilar* to "exercise" interpretive "restraint." See 515

U. S., at 600; see also *Yates*, *supra,* at 547–548; *Arthur Andersen LLP* v. *United States*, 544 U. S. 696, 703–704 (2005). Interpreted broadly, the provision could apply to a person who pays a babysitter $41 per week in cash without withholding taxes, see 26 CFR § 31.3102–1(a) (2017); IRS, Publication 926, pp. 5–6 (2018), leaves a large cash tip in a restaurant, fails to keep donation receipts from every charity to which he or she contributes, or fails to provide every record to an accountant. Such an individual may sometimes believe that, in doing so, he is running the risk of having violated an IRS rule, but we sincerely doubt he would believe he is facing a potential felony prosecution for tax obstruction. Had Congress intended that outcome, it would have spoken with more clarity than it did in § 7212(a).

The Government argues that the need to show the defendant's obstructive conduct was done "corruptly" will cure any overbreadth problem. But we do not see how. The Government asserts that "corruptly" means acting with "the specific intent to obtain an unlawful advantage" for the defendant or another. See Tr. of Oral Arg. 37; accord, 839 F. 3d, at 218. Yet, practically speaking, we struggle to imagine a scenario where a taxpayer would "willfully" violate the Tax Code (the *mens rea* requirement of various tax crimes, including misdemeanors, see, *e. g.*, 26 U. S. C. §§ 7203, 7204, 7207) without intending someone to obtain an unlawful advantage. See *Cheek* v. *United States*, 498 U. S. 192, 201 (1991) ("Willfulness . . . requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty"). A taxpayer may know with a fair degree of certainty that her babysitter will not declare a cash payment as income—and, if so, a jury could readily find that the taxpayer acted to obtain an unlawful benefit for another. For the same reason, we find unconvincing the dissent's argument that the distinction between "willfully" and "corruptly"—at least as defined by the Government—

reflects any meaningful difference in culpability. See *post*, at 21.

Neither can we rely upon prosecutorial discretion to narrow the statute's scope. True, the Government used the Omnibus Clause only sparingly during the first few decades after its enactment. But it used the clause more often after the early 1990's. Brief for Petitioner 9. And at oral argument the Government told us that, where more punitive and less punitive criminal provisions both apply to a defendant's conduct, the Government will charge a violation of the more punitive provision as long as it can readily prove that violation at trial. Tr. of Oral Arg. 46–47, 55–57; see Office of Atty. Gen., Department Charging and Sentencing Policy (May 10, 2017), online at http://www.justice.gov/opa/press-release/file/965896/download (as last visited Mar. 16, 2018).

Regardless, to rely upon prosecutorial discretion to narrow the otherwise wide-ranging scope of a criminal statute's highly abstract general statutory language places great power in the hands of the prosecutor. Doing so risks allowing "policemen, prosecutors, and juries to pursue their personal predilections," *Smith* v. *Goguen*, 415 U. S. 566, 575 (1974), which could result in the nonuniform execution of that power across time and geographic location. And insofar as the public fears arbitrary prosecution, it risks undermining necessary confidence in the criminal justice system. That is one reason why we have said that we "cannot construe a criminal statute on the assumption that the Government will 'use it responsibly.'" *McDonnell* v. *United States*, 579 U. S. 550, 576 (2016) (quoting *United States* v. *Stevens*, 559 U. S. 460, 480 (2010)). And it is why "[w]e have traditionally exercised restraint in assessing the reach of a federal criminal statute." *Aguilar*, *supra*, at 600.

III

In sum, we follow the approach we have taken in similar cases in interpreting § 7212(a)'s Omnibus Clause. To be

sure, the language and history of the provision at issue here differ somewhat from that of other obstruction provisions we have considered in the past. See *Aguilar*, *supra* (interpreting a statute prohibiting the obstruction of "the due administration of justice"); *Arthur Andersen*, *supra* (interpreting a statute prohibiting the destruction of an object with intent to impair its integrity or availability for use in an official proceeding); *Yates*, *supra*, at 531 (interpreting a statute prohibiting the destruction, concealment, or covering up of any "'record, document, or tangible object with the intent to'" obstruct the "'investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States'"). The Government and the dissent urge us to ignore these precedents because of those differences. The dissent points out, for example, that the predecessor to the obstruction statute we interpreted in *Aguilar*, 18 U. S. C. § 1503, prohibited influencing, intimidating, or impeding "any witness or officer in any court of the United States" or endeavoring "to obstruct or imped[e] the due administration of justice *therein*." *Pettibone* v. *United States*, 148 U. S. 197, 202 (1893) (citing Rev. Stat. § 5399; emphasis added); see *post*, at 23. But Congress subsequently deleted the word "therein," leaving only a broadly worded prohibition against obstruction of "the due administration of justice." Act of June 25, 1948, § 1503, 62 Stat. 769–770. Congress then used that same amended formulation when it enacted § 7212, prohibiting the obstruction of "the due administration" of the Tax Code. Internal Revenue Code of 1954, 68A Stat. 855. Given this similarity, it is helpful to consider how we have interpreted § 1503 and other obstruction statutes in considering § 7212. The language of some and the underlying principles of all these cases are similar. We consequently find these precedents—though not controlling—highly instructive for use as a guide toward a proper resolution of the issue now before us. See *Smith* v. *City of Jackson*, 544 U. S. 228, 233 (2005).

We conclude that, to secure a conviction under the Omnibus Clause, the Government must show (among other things) that there is a "nexus" between the defendant's conduct and a particular administrative proceeding, such as an investigation, an audit, or other targeted administrative action. That nexus requires a "relationship in time, causation, or logic with the [administrative] proceedings." *Aguilar*, 515 U. S., at 599 (citing *Wood*, 6 F. 3d, at 696). By "particular administrative proceeding" we do not mean every act carried out by IRS employees in the course of their "continuous, ubiquitous, and universally known" administration of the Tax Code. Brief in Opposition 9. While we need not here exhaustively itemize the types of administrative conduct that fall within the scope of the statute, that conduct does not include routine, day-to-day work carried out in the ordinary course by the IRS, such as the review of tax returns. The Government contends the processing of tax returns is part of the administration of the Internal Revenue Code and any corrupt effort to interfere with that task can therefore serve as the basis of an obstruction conviction. But the same could have been said of the defendant's effort to mislead the investigating agent in *Aguilar*. The agent's investigation was, at least in some broad sense, a part of the administration of justice. But we nevertheless held the defendant's conduct did not support an obstruction charge. 515 U. S., at 600. In light of our decision in *Aguilar*, we find it appropriate to construe § 7212's Omnibus Clause more narrowly than the Government proposes. Just because a taxpayer knows that the IRS will review her tax return every year does not transform every violation of the Tax Code into an obstruction charge.

In addition to satisfying this nexus requirement, the Government must show that the proceeding was pending at the time the defendant engaged in the obstructive conduct or, at the least, was then reasonably foreseeable by the defendant. See *Arthur Andersen*, 544 U. S., at 703, 707–708 (requiring

the Government to prove a proceeding was foreseeable in order to convict a defendant for persuading others to shred documents to prevent their "use in an official proceeding"). It is not enough for the Government to claim that the defendant knew the IRS may catch on to his unlawful scheme eventually. To use a maritime analogy, the proceeding must at least be in the offing.

For these reasons, the Second Circuit's judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

APPENDIX

26 U. S. C. § 7212: "Attempts to interfere with administration of internal revenue laws

"(a) Corrupt or forcible interference

"Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than $3,000, or imprisoned not more than 1 year, or both. The term 'threats of force', as used in this subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family.

"(b) Forcible rescue of seized property

"Any person who forcibly rescues or causes to be rescued any property after it shall have been seized under this title, or shall attempt or endeavor so to do, shall, excepting in cases otherwise provided for, for every such offense, be fined

not more than $500, or not more than double the value of the property so rescued, whichever is the greater, or be imprisoned not more than 2 years."

18 U. S. C. § 1503: "Influencing or injuring officer or juror generally

"(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

"(b) The punishment for an offense under this section is—

"(1) in the case of a killing, the punishment provided in sections 1111 and 1112;

"(2) in the case of an attempted killing, or a case in which the offense was committed against a petit juror and in which a class A or B felony was charged, imprisonment for not more than 20 years, a fine under this title, or both; and

"(3) in any other case, imprisonment for not more than 10 years, a fine under this title, or both."

JUSTICE THOMAS, with whom JUSTICE ALITO joins, dissenting.

The Omnibus Clause of 26 U. S. C. § 7212(a) of the Internal Revenue Code (Tax Code) makes it a felony to "corruptly . . . endeavo[r] to obstruct or imped[e] the due administration of this title." "[T]his title" refers to Title 26, which contains the entire Tax Code and authorizes the Internal Revenue Service (IRS) to calculate, assess, and collect taxes. I would hold that the Omnibus Clause does what it says: forbid corrupt efforts to impede the IRS from performing any of these activities. The Court, however, reads "this title" to mean "a particular [IRS] proceeding." *Ante*, at 13. And that proceeding must be either "pending" or "in the offing." *Ante*, at 13–14. The Court may well prefer a statute written that way, but that is not what Congress enacted. I respectfully dissent.

I

Petitioner Carlo J. Marinello, II, owned and managed a company that provided courier services. Marinello, however, kept almost no records of the company's earnings or expenditures. He shredded or discarded most business records. He paid his employees in cash and did not give them tax documents. And he took tens of thousands of dollars from the company each year to pay his personal expenses.

Unbeknownst to Marinello, the IRS began investigating him in 2004. The IRS learned that he had not filed a tax return—corporate or individual—since at least 1992. But the investigation came to a standstill because the IRS did not have enough information about Marinello's earnings. This was not surprising given his diligent efforts to avoid creating a paper trail. After the investigation ended, Marinello consulted a lawyer and an accountant, both of whom

advised him that he needed to file tax returns and keep business records. Despite these warnings, Marinello did neither for another four years.

In 2009, the IRS decided to investigate Marinello again. In an interview with an IRS agent, Marinello initially claimed he was exempt from filing tax returns because he made less than $1,000 per year. Upon further questioning, however, Marinello changed his story. He admitted that he earned more than $1,000 per year, but said he "'never got around'" to paying taxes. 839 F. 3d 209, 212 (CA2 2016). He also admitted that he shredded documents, did not keep track of the company's income or expenses, and used the company's income for personal bills. His only excuse was that he "took the easy way out." *Ibid.* After just a few hours of deliberation, a jury convicted Marinello of corruptly endeavoring to obstruct or impede the due administration of the Tax Code, § 7212(a).

II

Section 7212(a)'s Omnibus Clause prohibits "corruptly . . . obstruct[ing] or imped[ing], or endeavor[ing] to obstruct or impede, the due administration of this title." I agree with the Court's interpretations of "obstruct or impede" and "due administration," which together refer to conduct that hinders the IRS' performance of its official duties. See *ante*, at 7. I also agree that the object of these words—the thing a person is prohibited from obstructing the due administration of—is "this title," *i. e.*, Title 26, which contains the entire Tax Code. See *ibid.* But I part ways when the Court concludes that the whole phrase "due administration of the Tax Code" means "only some of" the Tax Code—specifically "particular [IRS] proceeding[s], such as an investigation, an audit, or other targeted administrative action." *Ante*, at 7, 13. That limitation has no basis in the text. In my view, the plain text of the Omnibus Clause prohibits obstructing the due administration of the Tax Code in its entirety, not just particular IRS proceedings.

A

The words "this title" cannot be read to mean "only some of this title." As this Court recently reiterated, phrases such as "this title" most naturally refer to the cited provision "as a whole." *Rubin* v. *Islamic Republic of Iran*, 583 U. S. 202, 212 (2018). Congress used "this title" throughout Title 26 to refer to the Tax Code in its entirety. See, *e. g.*, § 7201 ("[a]ny person who willfully attempts in any manner to evade or defeat any tax imposed by this title"); § 7203 ("[a]ny person required under this title to pay any estimated tax or tax, or required by this title . . . to make a return, keep any records, or supply any information, who willfully fails to [do so]"). And "[w]hen Congress wanted to refer only to a particular subsection or paragraph, it said so." *NLRB* v. *SW General, Inc.*, 580 U. S. 288, 300 (2017); see, *e. g.*, § 7204 (criminalizing willfully failing to furnish a statement "required under section 6051"); § 7207 (criminalizing willfully furnishing fraudulent or materially false information "required pursuant to section 6047(b), section 6104(d), or subsection (i) or (j) of section 527"); § 7210 (criminalizing neglecting to appear or produce documents "required under section 6420(e)(2), 6421(g)(2), 6427(j)(2), 7602, 7603, and 7604(b)"). Thus, "this title" must refer to the Tax Code as a whole.

The phrase "due administration of this title" likewise refers to the due administration of the entire Tax Code. As this Court has recognized, "administration" of the Tax Code includes four basic steps: information gathering, assessment, levy, and collection. See *Direct Marketing Assn.* v. *Brohl*, 575 U. S. 1, 8–10 (2015). The first "phase of tax administration procedure" is "information gathering." *Id.*, at 8; see, *e. g.*, §§ 6001–6096. "This step includes private reporting of information used to determine tax liability, including reports by third parties who do not owe the tax." *Id.*, at 8 (citation omitted). The "next step in the process" is "'assessment,'" which includes "the process by which [a taxpayer's liability] is calculated" and the "official recording of a taxpayer's liabil-

ity." *Id.*, at 9; see, *e. g.*, §§ 6201–6241. After information gathering and assessment come "'levy'" and "'collection.'" See *id.*, at 9–10; see, *e. g.*, §§ 6301–6344. Levy refers to "a specific mode of collection under which the Secretary of the Treasury distrains and seizes a recalcitrant taxpayer's property." *Id.*, at 9. Collection refers to "the act of obtaining payment of taxes due." *Id.*, at 10.

Subtitle F of the Tax Code—titled "Procedure and Administration"—contains directives related to each of these steps. It requires taxpayers to keep certain records and file certain returns, § 6001; specifies that taxpayers with qualifying incomes must file returns, § 6012; and authorizes the Secretary of the Treasury to create returns for taxpayers who fail to file returns or who file fraudulent ones, § 6020. It requires the Secretary to make inquiries, determinations, and assessments of tax liabilities. § 6201. And it authorizes the Secretary to collect and levy taxes. §§ 6301, 6331. Subtitle F also gives the Secretary the power to commence proceedings to recover unpaid taxes or fees, §§ 7401–7410, and to conduct investigations into the accuracy of particular returns, §§ 7601–7613.

Accordingly, the phrase "due administration of this title" refers to the entire process of taxation, from gathering information to assessing tax liabilities to collecting and levying taxes. It is not limited to only a few specific provisions within the Tax Code.

B

The Court rejects this straightforward reading, describing the "literal language" of the Omnibus Clause as "neutral." *Ante*, at 7. It concludes that the statute prohibits only acts related to a pending or imminent proceeding. *Ante*, at 13–14. There is no textual or contextual support for this limitation.

The text of the Omnibus Clause is not "neutral"; it omits the limitation that the Court reads into it. The Omnibus Clause nowhere suggests that "only some of" the processes

in the Tax Code are covered, *ante*, at 7, or that the line between covered and uncovered processes is drawn at some vague notion of "proceeding." The Omnibus Clause does not use the word "proceeding" at all, but instead refers to the entire Tax Code, which covers much more than that. This Court cannot "lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply." *Jama* v. *Immigration and Customs Enforcement*, 543 U. S. 335, 341 (2005).

Having failed to find its proposed limit in the text, the Court turns to context. However, its two contextual arguments fare no better.

First, the Court contends that the Omnibus Clause must be limited to pending or imminent proceedings because the other clauses of § 7212 are limited to actions "taken against individual identifiable persons or property." *Ante*, at 8. But specific clauses in a statute typically do not limit the scope of a general omnibus clause. See *Ali* v. *Federal Bureau of Prisons*, 552 U. S. 214, 225 (2008) (explaining that the *ejusdem generis* canon does not apply to a "disjunctive" phrase in a statute "with one specific and one general category"). Nor do the other clauses in § 7212 contain the pending-or-imminent-proceeding requirement that the Court reads into the Omnibus Clause. See § 7212(a) (prohibiting efforts to "intimidate or impede any officer or employee of the United States acting in an official capacity"); § 7212(b) (prohibiting "forcibly rescu[ing] or caus[ing] to be rescued any property after it shall have been seized under this title"). They thus provide no support for the Court's atextual limitation.

Second, the Court asserts that its reading prevents the Omnibus Clause from overlapping with certain misdemeanors in the Tax Code. *Ante*, at 9 (discussing §§ 7203, 7204, 7205). But there is no redundancy problem because these provisions have different *mens rea* requirements. The Omnibus Clause requires that an act be done "corruptly," but

the misdemeanor provisions require that an act be done "willfully." The difference between these *mens rea* requirements is significant. While "willfully" requires proof only "that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty," *Cheek* v. *United States*, 498 U. S. 192, 201 (1991), "corruptly" requires proof that the defendant "act[ed] with an intent to procure an unlawful benefit either for [himself] or for some other person," *United States* v. *Floyd*, 740 F. 3d 22, 31 (CA1 2014) (collecting cases); see also Black's Law Dictionary 414 (rev. 4th ed. 1951) ("corruptly" "generally imports a wrongful design to acquire some pecuniary or other advantage"). In other words, "corruptly" requires proof that the defendant not only knew he was obtaining an "unlawful benefit" but that his "objective" or "purpose" was to obtain that unlawful benefit. See 21 Am. Jur. 2d, Criminal Law § 114 (2016) (explaining that specific intent requires both knowledge and purpose).

The Court dismisses the significance of the different *mens rea* requirements, see *ante*, at 10, but this difference is important under basic principles of criminal law. The law recognizes that the same conduct, when committed with a higher *mens rea*, is more culpable and thus more deserving of punishment. See *Schad* v. *Arizona*, 501 U. S. 624, 643 (1991) (plurality opinion). For that reason, different *mens rea* requirements often differentiate culpability for the same conduct. See, *e. g.*, 40 C. J. S., Homicide § 80 (2014) (explaining that the distinction between first- and second-degree murder is based on the defendant's state of mind); § 103 (same for voluntary and involuntary manslaughter). Unless the Court means to cast doubt on this well-established principle, it should not casually dismiss the different *mens rea* requirements in the Omnibus Clause and the various misdemeanors in the Tax Code.

Even if the Omnibus Clause did overlap with these other misdemeanors, that would prove little. For better or worse,

redundancy abounds in both the criminal law and the Tax Code. This Court has repeatedly declined to depart from the plain meaning of the text simply because the same conduct would be criminalized under two or more provisions. See, *e. g.*, *Loughrin* v. *United States*, 573 U. S. 351, 358, n. 4 (2014) ("No doubt, the overlap between the two clauses is substantial on our reading, but that is not uncommon in criminal statutes"); *Hubbard* v. *United States*, 514 U. S. 695, 714, n. 14 (1995) ("Congress may, and often does, enact separate criminal statutes that may, in practice, cover some of the same conduct"); *Sansone* v. *United States*, 380 U. S. 343, 352 (1965) (allowing the Government to proceed on a felony tax evasion charge even though that charge "'covered precisely the same ground'" as two misdemeanors in the Tax Code). In fact, the Court's interpretation of the Omnibus Clause does not eliminate the redundancy. Certain misdemeanor offenses in the Tax Code—such as failing to obey a summons, § 7210—apply to conduct that takes place during a proceeding and, thus, would still violate the Omnibus Clause under the Court's interpretation. The Court's interpretation also makes the Omnibus Clause largely redundant with 18 U. S. C. § 1505, which already prohibits "corruptly . . . endeavor[ing] to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States." Avoiding redundancy is thus not a reason to favor the Court's interpretation. Cf. *Marx* v. *General Revenue Corp.*, 568 U. S. 371, 385 (2013) ("[T]he canon against surplusage 'assists only where a competing interpretation gives effect to every clause and word of a statute'").*

*The Court also relies on legislative history to support its interpretation. See *ante*, at 8–9. Even assuming legislative history could impose a requirement that does not appear in the text, the Court cites nothing in the legislative history that limits the Omnibus Clause to proceedings—or even uses the word "proceeding." In fact, the legislative history does not say anything at all about the Omnibus Clause. As Marinello concedes,

C

The Court contends that its narrow reading of "due administration of this title" is supported by three decisions interpreting other obstruction statutes, though it admits that the "language and history" of the Omnibus Clause "differ somewhat" from those other obstruction provisions. *Ante*, at 12 (citing *United States* v. *Aguilar*, 515 U. S. 593 (1995); *Arthur Andersen LLP* v. *United States*, 544 U. S. 696 (2005); *Yates* v. *United States*, 574 U. S. 528 (2015) (plurality opinion)). "[D]iffer somewhat" is putting it lightly. The differences between the Omnibus Clause and those other obstruction statutes demonstrate why the former does not contain the Court's proceeding requirement.

Aguilar interpreted 18 U. S. C. § 1503. The omnibus clause of § 1503 forbids corruptly endeavoring to obstruct "the due administration of justice." The Court concluded that this language requires the prosecution to prove a "nexus" between the defendant's obstructive act and "judicial proceedings." 515 U. S., at 599–600. But this nexus requirement was based on the specific history of § 1503. The predecessor to that statute prohibited obstructing "the due administration of justice" "in any *court* of the United States." *Pettibone* v. *United States*, 148 U. S. 197, 202 (1893) (citing Rev. Stat. § 5399). Based on this statutory history, the Court assumed that § 1503 continued to refer to the administration of justice in a court. *Aguilar*, *supra*, at 599. None of that history is present here.

Arthur Andersen is even further afield. There the Court interpreted 18 U. S. C. § 1512(b)(2)(A), which prohibits "knowingly . . . corruptly persuad[ing] another person . . . with intent to . . . cause or induce [that] person to . . . with-

---

the vague snippets of legislative history that the Court cites are discussing a different portion of 26 U. S. C. § 7212(a), involving threats against IRS officers and their family members. See Reply Brief 11 ("The conceded focus of § 7212(a)'s legislative history was the *officers* clause" and it was "relative[ly] silen[t] regarding [the Omnibus Clause]").

hold testimony, or withhold a record, document, or other object, from an official proceeding." Relying on *Aguilar*, the Court concluded that § 1512(b)(2)(A) required the Government to show a "nexus" with "[a] particular proceeding." 544 U. S., at 707–708. But this nexus requirement came from the statutory text, which expressly included "an official proceeding." If anything, then, § 1512(b)(2)(A) cuts against the Court's interpretation of the Omnibus Clause because it shows that Congress knows how to impose a "proceeding" requirement when it wants to do so. See *Kucana* v. *Holder*, 558 U. S. 233, 248 (2010); *Jama*, 543 U. S., at 341.

Yates underscores this point. There the Court interpreted 18 U. S. C. § 1519, which prohibits obstructing "the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States." The four Justices in the plurality recognized that this language made § 1519 broader than other obstruction statutes: Section 1519 "covers conduct intended to impede any federal investigation or proceeding, including one not even on the verge of commencement." 574 U. S., at 547. The plurality contrasted the term "'official proceeding'" with the phrase "'investigation or proper administration of any matter within the jurisdiction of any department or agency,'" noting that the latter is broader. *Id.*, at 542. The same is true for the broad language of the Omnibus Clause.

In sum, these cases demonstrate that, when text and history justify it, this Court interprets obstruction statutes to include a proceeding requirement. But we have never inserted such a requirement into an obstruction statute without textual or historical support. Today the Court does precisely that.

D

All else having failed, the Court invokes lenity-sounding concerns to justify reading its proceeding requirement into the Omnibus Clause. See *ante*, at 7, 9–10. But the rule of lenity applies only if after applying ordinary tools of statu-

tory interpretation, "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). The Court identifies no such grievous ambiguity in the Omnibus Clause, and breadth is not the same thing as ambiguity. The Omnibus Clause is both "very broad" and "very clear." *Yates*, *supra*, at 566 (KAGAN, J., dissenting). Lenity does not apply.

If the Court is concerned that the Omnibus Clause does not give defendants "fair warning" of what it prohibits, *ante*, at 6–7, I am hard pressed to see how today's decision makes things better. The Court outlines its atextual proceeding requirement in only the vaguest of terms. Under its interpretation, the prosecution must prove a "nexus" between the defendant's conduct and some "particular administrative proceeding." *Ante*, at 13. "[P]articular administrative proceeding" is defined negatively as "not . . . every act carried out by IRS employees in the course of their 'continuous, ubiquitous, and universally known' administration of the Tax Code." *Ibid.* Further, the Government must prove that the proceeding was "reasonably foreseeable" to the defendant. *Ibid.* "Reasonably foreseeable" is again defined negatively as "not . . . that the defendant knew the IRS may catch onto his unlawful scheme eventually." *Ante*, at 14. It is hard to see how the Court's statute is less vague than the one Congress drafted, which simply instructed individuals not to corruptly obstruct or impede the IRS' administration of the Tax Code.

E

To be sure, § 7212(a) is a sweeping obstruction statute. Congress may well have concluded that a broad statute was warranted because "our tax structure is based on a system of self-reporting" and "the Government depends upon the good faith and integrity of each potential taxpayer to disclose honestly all information relevant to tax liability." *United*

States v. *Bisceglia*, 420 U. S. 141, 145 (1975). Whether or not we agree with Congress' judgment, we must leave the ultimate "[r]esolution of the pros and cons of whether a statute should sweep broadly or narrowly . . . for Congress." *United States* v. *Rodgers*, 466 U. S. 475, 484 (1984). "[I]t is not our task to assess the consequences of each approach and adopt the one that produces the least mischief. Our charge is to give effect to the law Congress enacted." *Lewis* v. *Chicago*, 560 U. S. 205, 217 (2010).

The Court frets that the Omnibus Clause might apply to "a person who pays a babysitter $41 per week in cash without withholding taxes," "leaves a large cash tip in a restaurant," "fails to keep donation receipts from every charity," or "fails to provide every record to an accountant." *Ante*, at 10. Whether the Omnibus Clause would cover these hypotheticals—and whether the Government would waste its resources identifying and prosecuting them—is debatable. But what should not be debatable is that the statute covers Marinello, who systematically shredded documents and hid evidence about his company's earnings to avoid paying taxes even after warnings from his lawyer and accountant. It is not hard to find similar cases prosecuted under the Omnibus Clause. See, *e. g.*, *United States* v. *Sorenson*, 801 F. 3d 1217, 1221–1222 (CA10 2015) (defendant hid taxable income in elaborate system of trusts); *Floyd*, 740 F. 3d, at 26–27, 31–32 (defendant created elaborate scheme to avoid paying payroll taxes).

The Court, in its effort to exclude hypotheticals, has constructed an opening in the Omnibus Clause large enough that even the worst offenders can escape liability. In doing so, it failed to heed what this Court recognized in a similar case: "[T]he authority vested in tax collectors may be abused, as all power is subject to abuse. However, the solution is not to restrict that authority so as to undermine the efficacy of the federal tax system." *Bisceglia*, *supra*, at 146.

* * *

Regardless of whether this Court thinks the Omnibus Clause should contain a proceeding requirement, it does not have one. Because the text prohibits all efforts to obstruct the due administration of the Tax Code, I respectfully dissent.

Syllabus

AYESTAS, AKA ZELAYA COREA *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

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

No. 16–6795. Argued October 30, 2017—Decided March 21, 2018

Petitioner Ayestas was convicted of murder and sentenced to death in a Texas state court. He secured new counsel, but his conviction and sentence were affirmed on appeal. A third legal team sought, unsuccessfully, state habeas relief, claiming trial-level ineffective assistance of counsel but not counsel's failure to investigate petitioner's mental health and alcohol and drug abuse during the trial's penalty phase. His fourth set of attorneys did raise that failure in a federal habeas petition, but because the claim had never been raised in state court, the District Court held, it was barred by procedural default. That decision was vacated and remanded for reconsideration in light of *Martinez* v. *Ryan*, 566 U. S. 1—where this Court held that an Arizona prisoner seeking federal habeas relief could overcome the procedural default of a trial-level ineffective-assistance-of-counsel claim by showing that the claim is substantial and that state habeas counsel was also ineffective in failing to raise the claim in a state habeas proceeding—and *Trevino* v. *Thaler*, 569 U. S. 413—which extended that holding to Texas prisoners. Petitioner filed an *ex parte* motion asking the District Court for funding to develop his claim that both his trial and state habeas counsel were ineffective, relying on 18 U. S. C. §3599(f), which provides, in relevant part, that a district court "may authorize" funding for "investigative, expert, or other services . . . reasonably necessary for the representation of the defendant." The court found his claim precluded by procedural default and thus denied his funding request. The Fifth Circuit also rejected the funding claim under its precedent: that a §3599(f) funding applicant must show that he has a "substantial need" for investigative or other services, and that funding may be denied when an applicant fails to present "a viable constitutional claim that is not procedurally barred." 817 F. 3d 888, 895–896.

Held:

1. The District Court's denial of petitioner's funding request was a judicial decision subject to appellate review under the standard jurisdictional provisions. Pp. 37–43.

Syllabus

(a) Title 28 U. S. C. §§ 1291, 2253, and 1254 confer jurisdiction to review decisions made by a district court in a *judicial* capacity. "Administrative" decisions—about, *e. g.*, facilities, personnel, equipment, supplies, and rules of procedure—are "not subject to [this Court's] review," *Hohn* v. *United States*, 524 U. S. 236, 245, but the District Court's ruling here does not remotely resemble such decisions. Petitioner's request was made by motion in his federal habeas proceeding, which is indisputably a judicial proceeding. And resolution of the funding question requires the application of a legal standard—whether the funding is "reasonably necessary" for effective representation—that demands an evaluation of petitioner's prospects of obtaining habeas relief. Pp. 38–40.

(b) Respondent's arguments in support of her claim that § 3599's funding requests are nonadversarial and administrative are unpersuasive. First, that the requests can be decided *ex parte* does not make the proceeding nonadversarial. The habeas proceeding here was clearly adversarial. And petitioner and respondent plainly have adverse interests on the funding question and have therefore squared off as adversaries. The mere fact that a § 3599 funding request may sometimes be made *ex parte* is thus hardly dispositive. Second, nothing in § 3599 even hints that the funding decisions may be revised by the Director of the Administrative Office of the Courts. Lower court cases that appear to have accepted Administrative Office review of certain Criminal Justice Act (CJA) payments, even if a proper interpretation of the CJA, are inapposite. Finally, the fact that § 3599(g)(2) requires funding in excess of the generally applicable statutory cap to be approved by the circuit's chief judge or another designated circuit judge, instead of by a panel of three, does not make the proceeding administrative. If Congress wishes to make certain rulings reviewable by a single circuit judge, the Constitution does not stand in the way. Pp. 40–43.

2. The Fifth Circuit did not apply the correct legal standard in affirming the denial of petitioner's funding request. Section 3599 authorizes funding for the "reasonably necessary" services of experts, investigators, and the like. But the Fifth Circuit's requirement that applicants show a "substantial need" for the services is arguably a more demanding standard. Section 3599 appears to use the term "necessary" to mean something less than essential. Because it makes little sense to refer to something as being "reasonably essential," the Court concludes that the statutory phrase calls for the district court to determine, in its discretion, whether a reasonable attorney would regard the services as sufficiently important, guided by considerations detailed in the opinion. The term "substantial" in the Fifth Circuit's test, however, suggests a heavier burden. And that court exacerbated the difference by also

Syllabus

requiring a funding applicant to present "a viable constitutional claim that is not procedurally barred." That rule that is too restrictive after *Trevino*, see 569 U. S., at 429, because, in cases where funding stands a credible chance of enabling a habeas petitioner to overcome the procedural default obstacle, it may be error for a district court to refuse funding. That being said, district courts were given broad discretion in assessing funding requests when Congress changed the phrase "shall authorize" in § 3599's predecessor statute, see 21 U. S. C. § 848(q)(9), to "may authorize" in § 3599(f). A funding applicant must not be expected to prove that he will be able to win relief if given the services, but the "reasonably necessary" test does require an assessment of the likely utility of the services requested.

Respondent's alternative ground for affirmance—that funding is never "reasonably necessary" where a habeas petitioner seeks to present a procedurally defaulted ineffective-assistance-of-trial-counsel claim that depends on facts outside the state-court record—remains open for the Fifth Circuit to consider on remand. Pp. 43–48.

817 F. 3d 888, vacated and remanded.

ALITO, J., delivered the opinion for a unanimous Court. SOTOMAYOR, J., filed a concurring opinion, in which GINSBURG, J., joined, *post*, p. 48.

Lee B. Kovarsky argued the cause for petitioner. With him on the briefs were *Meaghan VerGow*, *Deanna M. Rice*, *Jason Zarrow*, *Samantha Goldstein*, *Jared Tyler*, and *Sheri Lynn Johnson*.

Scott A. Keller, Solicitor General of Texas, argued the cause for respondent. With him on the brief were *Ken Paxton*, Attorney General of Texas, *Jeffrey C. Mateer*, First Assistant Attorney General, *J. Campbell Barker*, Deputy Solicitor General, and *Beth Klusmann* and *Jason R. LaFond*, Assistant Solicitors General.*

---

*Briefs of *amici curiae* urging reversal were filed for the American Bar Association by *Linda A. Klein*, *Clifford M. Sloan*, and *Donald P. Salzman*; for the Capital Punishment Center of the University of Texas at Austin School of Law by *Jordan M. Steiker*, *Jim Marcus*, and *Raoul D. Schonemann*; for the Constitution Project by *Eugene A. Sokoloff*; and for the National Association of Criminal Defense Lawyers et al. by *Jessica Ring Amunson*, *Matthew S. Hellman*, *David A. Strauss*, *Sarah M. Konsky*, *Barbara E. Bergman*, *David D. Cole*, and *Brian W. Stull*.

A brief of *amici curiae* urging affirmance was filed for the State of Arizona et al. by *Mark Brnovich*, Attorney General of Arizona, *Dominic*

JUSTICE ALITO delivered the opinion of the Court.

Petitioner Carlos Ayestas, who was convicted of murder and sentenced to death in a Texas court, argues that he was wrongfully denied funding for investigative services needed to prove his entitlement to federal habeas relief. Petitioner moved for funding under 18 U. S. C. § 3599(f), which makes funds available if they are "reasonably necessary," but petitioner's motion was denied. We hold that the lower courts applied the wrong legal standard, and we therefore vacate the judgment below and remand for further proceedings.

I

A

In 1997, petitioner was convicted of capital murder in a Texas court. Evidence at trial showed that he and two accomplices invaded the home of a 67-year-old Houston woman, Santiaga Paneque, bound her with duct tape and electrical cord, beat and strangled her, and then made off with a stash of her belongings.

The jury also heard testimony from Henry Nuila regarding an incident that occurred about two weeks after the murder. Petitioner was drunk at the time, and he revealed to Nuila that he had recently murdered a woman in Houston. Petitioner then brandished an Uzi machinegun and threatened to murder Nuila if he did not help petitioner kill his two accomplices. Fortunately for Nuila, petitioner kept talking until he eventually passed out; Nuila then called the police, who arrested petitioner, still in possession of the gun.

E. Draye, Solicitor General, *Lacey Stover Gard*, Chief Counsel, and *J. D. Nielsen*, Assistant Attorney General, by *Kevin T. Kane*, Chief State's Attorney of Connecticut, and by the Attorneys General for their respective States as follows: *Leslie Rutledge* of Arkansas, *Christopher M. Carr* of Georgia, *Lawrence G. Wasden* of Idaho, *Curtis T. Hill, Jr.*, of Indiana, *Derek Schmidt* of Kansas, *Jeff Landry* of Louisiana, *Joshua D. Hawley* of Missouri, *Timothy C. Fox* of Montana, *Douglas J. Peterson* of Nebraska, *Adam Paul Laxalt* of Nevada, *Alan Wilson* of South Carolina, *Patrick Morrisey* of West Virginia, and *Brad D. Schimel* of Wisconsin.

After the jury found petitioner guilty, it was asked to determine whether he should be sentenced to death or to life in prison. In order to impose a death sentence, Texas law required the jury to answer the following three questions. First, would petitioner pose a continuing threat to society? Second, had he personally caused the death of the victim, intended to kill her, or anticipated that she would be killed? Third, in light of all the evidence surrounding the crime and petitioner's background, were there sufficient mitigating circumstances to warrant a sentence of life without parole instead of death? Tex. Code Crim. Proc. Ann., Art. 37.071, §§2(b), (e) (Vernon Cum. Supp. 2017). Only if the jury gave a unanimous yes to the first two questions, and a unanimous no to the third question, could a death sentence be imposed; otherwise, petitioner would receive a sentence of life without parole. See §§2(d)(2), (f)(2), (g).

In asking the jury to impose a death sentence, the prosecution supplemented the trial record with evidence of petitioner's criminal record and his encounter with a man named Candelario Martinez a few days after the murder. Martinez told the jury that he was standing in a hotel parking lot waiting for a friend when petitioner approached and began to make small talk. Before long, petitioner pulled out a machinegun and forced Martinez into a room where two of petitioner's compatriots were holding Martinez's friend at knifepoint. Ordered to lie down on the bathroom floor and await his execution, Martinez begged for his life while petitioner and his cohorts haggled about who would carry out the killing. Finally, petitioner relented, but he threatened to kill Martinez and his family if he contacted the police. Petitioner then stole Martinez's truck.

Petitioner's trial counsel presented very little mitigation evidence. This was due, at least in part, to petitioner's steadfast refusal for many months to allow his lawyers to contact his family members, who were living in Honduras and might have testified about his character and upbringing.

Petitioner gave in on the eve of trial, and at that point, according to the state habeas courts, his lawyers "made every effort to contact [his] family." App. 171. They repeatedly contacted petitioner's family members and urged them to attend the trial; they requested that the U. S. Embassy in Honduras facilitate family members' travel to the United States; and they met in person with the Honduran Consulate to seek assistance. But these efforts were to no avail. Petitioner's sister told his legal team that the family would not leave Honduras because the journey would create economic hardship and because their father was ill and had killed one of their neighbors. A defense attorney who spoke to petitioner's mother testified that she seemed unconcerned about her son's situation. In general, the state habeas courts found, petitioner "did nothing to assist counsel's efforts to contact his family and did not want them contacted by the consulate or counsel." *Id.*, at 174.

In the end, the only mitigation evidence introduced by petitioner's trial counsel consisted of three letters from petitioner's English instructor. The letters, each two sentences long, described petitioner as "a serious and attentive student who was progressing well in English." *Ibid.*

The jury unanimously concluded that petitioner should be sentenced to death, and a capital sentence was imposed. Petitioner secured new counsel to handle his appeal, and his conviction and sentence were affirmed by the Texas Court of Criminal Appeals in 1998. *Ayestas* v. *State*, No. 72,928, App. 115. Petitioner did not seek review at that time from this Court.

B

While petitioner's direct appeal was still pending, a third legal team filed a habeas petition on his behalf in state court. This petition included several claims of trial-level ineffective assistance of counsel, but the petition did not assert that trial counsel were ineffective for failing to investigate petitioner's mental health and abuse of alcohol and drugs. Petitioner's

quest for state habeas relief ended unsuccessfully in 2008. *Ex parte Ayestas*, No. WR–69,674–01 (Tex. Ct. Crim. App., Sept. 10, 2008), 2008 WL 4151814 (*per curiam*) (unpublished).

In 2009, represented by a fourth set of attorneys, petitioner filed a federal habeas petition under 28 U. S. C. § 2254, and this time he *did* allege that his right to the effective assistance of counsel at trial was violated because his attorneys failed to conduct an adequate search for mitigation evidence. As relevant here, petitioner argued that trial counsel overlooked evidence that he was mentally ill and had a history of drug and alcohol abuse. *Ayestas* v. *Thaler*, Civ. Action No. H–09–2999 (SD Tex., Jan. 26, 2011), 2011 WL 285138, *4. Petitioner alleged that he had a history of substance abuse, and he noted that he had been diagnosed with schizophrenia while the state habeas proceeding was still pending. See Pet. for Writ of Habeas Corpus in *Ayestas* v. *Quarterman*, No. 4:09–cv–2999 (SD Tex.), Doc. 1, pp. 21–23. Petitioner claimed that trial counsel's deficient performance caused prejudice because there was a reasonable chance that an adequate investigation would have produced mitigation evidence that would have persuaded the jury to spare his life.

Among the obstacles standing between petitioner and federal habeas relief, however, was the fact that he never raised this trial-level ineffective-assistance-of-counsel claim in state court. The District Court therefore held that the claim was barred by procedural default, *Ayestas* v. *Thaler*, 2011 WL 285138, *4–*7, and the Fifth Circuit affirmed, *Ayestas* v. *Thaler*, 462 Fed. Appx. 474, 482 (2012) (*per curiam*).

Petitioner sought review in this Court, and we vacated the decision below and remanded for reconsideration in light of two of our subsequent decisions, *Martinez* v. *Ryan*, 566 U. S. 1 (2012), and *Trevino* v. *Thaler*, 569 U. S. 413 (2013). *Ayestas* v. *Thaler*, 569 U. S. 1015 (2013). *Martinez* held that an Arizona prisoner seeking federal habeas relief could overcome the procedural default of a trial-level

ineffective-assistance-of-counsel claim by showing that the claim is substantial and that state habeas counsel was also ineffective in failing to raise the claim in a state habeas proceeding. 566 U. S., at 14. *Trevino* extended that holding to Texas prisoners, 569 U. S., at 416–417, and on remand, petitioner argued that he fell within *Trevino* because effective state habeas counsel would have uncovered evidence showing that trial counsels' investigative efforts were deficient.

To assist in developing these claims, petitioner filed an *ex parte* motion asking the District Court for $20,016 in funding to conduct a search for evidence supporting his petition. He relied on 18 U. S. C. § 3599(f), which provides in relevant part as follows:

> "Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor."

Petitioner averred that the funds would be used to conduct an investigation that would show that his trial counsel and his state habeas counsel were ineffective. Accordingly, he claimed, the investigation would establish both that his trial-level ineffective-assistance-of-counsel claim was not barred by procedural default and that he was entitled to resentencing based on the denial of his Sixth Amendment right to the effective assistance of trial counsel.

The District Court refused the funding request and ultimately denied petitioner's habeas petition. *Ayestas* v. *Stephens*, Civ. Action No. H–09–2999 (SD Tex., Nov. 18, 2014), 2014 WL 6606498, *6–*7. On the merits of petitioner's new ineffective-assistance-of-trial-counsel claim, the District Court held that petitioner failed both prongs of the *Strickland* test. See *Strickland* v. *Washington*, 466 U. S.

668 (1984). Noting that most of the evidence bearing on petitioner's mental health had emerged only after he was sentenced, the court concluded that petitioner's trial lawyers were not deficient in failing to find such evidence in time for the sentencing proceeding. 2014 WL 6606498, *5. In addition, the court found that state habeas counsel did not render deficient performance by failing to investigate petitioner's history of substance abuse, and that, in any event, petitioner was not prejudiced at the sentencing phase of the trial or during the state habeas proceedings because the potential mitigation evidence at issue would not have made a difference to the jury in light of "the extremely brutal nature of [the] crime and [petitioner's] history of criminal violence." *Ibid.*

With respect to funding, the District Court pointed to Fifth Circuit case law holding that a § 3599(f) funding applicant cannot show that investigative services are "'reasonably necessary'" unless the applicant can show that he has a "'substantial need'" for those services. *Id.*, at *6. In addition, the court noted that "[t]he Fifth Circuit upholds the denial of funding" when, among other things, "a petitioner has . . . failed to supplement his funding request with a viable constitutional claim that is not procedurally barred." *Ibid.* (internal quotation marks omitted).

Given its holding that petitioner's new ineffective-assistance-of-counsel claim was precluded by procedural default, this rule also doomed his request for funding. The District Court denied petitioner's habeas petition and refused to grant him a certificate of appealability (COA). *Id.*, at *7. On appeal, the Fifth Circuit held that a COA was not needed for review of the funding issue, but it rejected that claim for essentially the same reasons as the District Court, citing both the "substantial need" test and the rule that funding may be denied when a funding applicant fails to present "a viable constitutional claim that is not procedurally barred." *Ayestas* v. *Stephens*, 817 F. 3d 888, 895–896 (2016)

(internal quotation marks omitted). With respect to petitioner's other claims, including his claim of ineffective assistance of trial counsel, the Fifth Circuit refused to issue a COA. *Id.*, at 898.

C

We granted certiorari to decide whether the lower courts applied the correct legal standard in denying the funding request. 581 U. S. 904 (2017).

II

Before we reach that question, however, we must consider a jurisdictional argument advanced by respondent, the Director of the Texas Department of Criminal Justice.[1] Re-

[1] We also consider a jurisdictional issue not raised by the parties, namely, whether we have jurisdiction even though no COA has yet been issued. We do not have jurisdiction if jurisdiction was lacking in the Court of Appeals, and the jurisdiction of a court of appeals to entertain an appeal from a final order in a habeas proceeding is dependent on the issuance of a COA. See 28 U. S. C. § 2253(c)(1); *Gonzalez* v. *Thaler*, 565 U. S. 134, 142 (2012).

In this case, petitioner appealed an order of the District Court that denied both his request for funding under 18 U. S. C. § 3599 and his underlying habeas claims. The Court of Appeals denied a COA as to the merits of his request for habeas relief but held that a COA was not required insofar as petitioner challenged the District Court's denial of funding under § 3599. The Fifth Circuit relied on *Harbison* v. *Bell*, 556 U. S. 180 (2009), in which a prisoner appealed from an order that denied counsel under § 3599 for a state clemency proceeding but that did not address the merits of any habeas petition. This Court held that a COA was not required. Here, petitioner took his appeal from the final order in his habeas proceeding.

The parties have not briefed whether that difference between *Harbison* and the present case is relevant or whether an appeal from a denial of a § 3599 request for funding would fit within the COA framework, and we find it unnecessary to resolve the issue. Though we take no view on the merits, we will assume for the sake of argument that the Court of Appeals could not entertain petitioner's § 3599 claim without the issuance of a COA.

We may review the denial of a COA by the lower courts. See, *e. g.*, *Miller-El* v. *Cockrell*, 537 U. S. 322, 326–327 (2003). When the lower

spondent contends that the District Court's denial of petitioner's funding request was an administrative, not a judicial, decision and therefore falls outside the scope of the jurisdictional provisions on which petitioner relied in seeking review in the Court of Appeals and in this Court.

A

When the District Court denied petitioner's funding request and his habeas petition, he took an appeal to the Fifth Circuit under 28 U. S. C. §§ 1291 and 2253, which grant the courts of appeals jurisdiction to review final "decisions" and "orders" of a district court.[2] And when the Fifth Circuit affirmed, petitioner sought review in this Court under § 1254, which gives us jurisdiction to review "[c]ases" in the courts of appeals.[3] As respondent correctly notes, these provisions confer jurisdiction to review decisions made by a district court in a *judicial* capacity. But we have recognized that not all decisions made by a federal court are "judicial"

---

courts deny a COA and we conclude that their reason for doing so was flawed, we may reverse and remand so that the correct legal standard may be applied. See *Slack* v. *McDaniel*, 529 U. S. 473, 485–486, 489–490 (2000). We take that course here. As we will explain, the correctness of the rule applied by the District Court in denying the funding request was not only debatable; it was erroneous.

[2] In relevant part § 1291 declares that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Similarly, § 2253 provides, as relevant, that "[i]n a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held." § 2253(a).

[3] "Cases in the courts of appeals may be reviewed by the Supreme Court by . . . writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." § 1254(1).

in nature; some decisions are properly understood to be "administrative," and in that case they are "not subject to our review." *Hohn* v. *United States*, 524 U. S. 236, 245 (1998).

The need for federal judges to make many administrative decisions is obvious. The Federal Judiciary, while tiny in comparison to the Executive Branch, is nevertheless a large and complex institution, with an annual budget exceeding $7 billion and more than 32,000 employees. See Administrative Office of the U. S. Courts, The Judiciary FY 2018 Congressional Budget Summary Revised 9–10 (June 2017). Administering this operation requires many "decisions" in the ordinary sense of the term—decisions about such things as facilities, personnel, equipment, supplies, and rules of procedure. *In re Application for Exemption from Electronic Pub. Access Fees by Jennifer Gollan and Shane Shifflett*, 728 F. 3d 1033, 1037 (CA9 2013). It would be absurd to suggest that every "final decision" on any such matter is appealable under § 1291 or reviewable in this Court under § 1254. See *Hohn*, *supra*; 15A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3903, pp. 134–135 (2d ed. 1992). Such administrative decisions are not the kind of decisions or orders—*i. e.*, decisions or orders made in a judicial capacity—to which the relevant jurisdictional provisions apply.

Respondent argues that the denial of petitioner's funding request was just such an administrative decision, but the District Court's ruling does not remotely resemble the sort of administrative decisions noted above. Petitioner's request was made by motion in his federal habeas proceeding, which is indisputably a judicial proceeding. And as we will explain, resolution of the funding question requires the application of a legal standard—whether the funding is "reasonably necessary" for effective representation—that demands an evaluation of petitioner's prospects of obtaining habeas relief. We have never held that a ruling like that is adminis-

trative and thus not subject to appellate review under the standard jurisdictional provisions.

Respondent claims that two factors support the conclusion that the funding decision was administrative, but her argument is unpersuasive.

B

Respondent first argues as follows: Judicial proceedings must be adversarial; 18 U. S. C. § 3599(f) funding adjudications are not adversarial because the statute allows requests to be decided *ex parte*; therefore, § 3599(f) funding adjudications are not judicial in nature. This reasoning is flawed.

It is certainly true that cases and controversies in our legal system are adversarial in nature, *e. g.*, *Bond* v. *United States*, 564 U. S. 211, 217 (2011); *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–241 (1937), but here, both the habeas proceeding as a whole and the adjudication of the specific issue of funding were adversarial. That the habeas proceeding was adversarial is beyond dispute. And on the funding question, petitioner and respondent plainly have adverse interests and have therefore squared off as adversaries. The motion for funding was formally noted as "opposed" on the District Court's docket. App. 341. That is not surprising: On one side, petitioner is seeking funding that he hopes will prevent his execution. On the other, respondent wants to enforce the judgment of the Texas courts and to do so without undue delay. Petitioner and respondent have vigorously litigated the funding question all the way to this Court.

In arguing that the funding dispute is nonadversarial, respondent attaches too much importance to the fact that the request was made *ex parte*. As we have noted, the "*ex parte* nature of a proceeding has not been thought to imply that an act otherwise within a judge's lawful jurisdiction was deprived of its judicial character." *Forrester* v. *White*, 484 U. S. 219, 227 (1988).

In our adversary system, *ex parte* motions are disfavored, but they have their place. See, *e. g.*, *Hohn*, *supra*, at 248

(application for COA); *Dalia* v. *United States*, 441 U. S. 238, 255 (1979) (application for a search warrant); 50 U. S. C. § 1805(a) (application to conduct electronic surveillance for foreign intelligence); 18 U. S. C. § 2518(3) (applications to intercept "wire, oral, or electronic communications"); 15 U. S. C. § 1116(d)(1)(A) (application to seize certain goods and counterfeit marks involved in violations of the trademark laws); Fed. Rule Crim. Proc. 17(b) (application for witness subpoena); Fed. Rule Crim. Proc. 47(c) (generally recognizing *ex parte* motions and applications); *Ullmann* v. *United States*, 350 U. S. 422, 423–424, 434 (1956) (application for an order granting a witness immunity in exchange for self-incriminating testimony); *United States* v. *Monsanto*, 491 U. S. 600, 603–604 (1989) (motion to freeze defendant's assets pending trial).

Thus, the mere fact that a § 3599 funding request may sometimes be made *ex parte* is hardly dispositive. See *Hohn*, *supra*, at 249; *Tutun* v. *United States*, 270 U. S. 568, 577 (1926).

C

Respondent's second argument is based on the venerable principle "that Congress cannot vest review of the decisions of Article III courts in" entities other than "superior courts in the Article III hierarchy." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S. 211, 218–219 (1995) (citing *Hayburn's Case*, 2 Dall. 409 (1792)). Respondent claims that § 3599 funding decisions may be revised by the Director of the Administrative Office of the Courts and that this shows that such decisions must be administrative. This argument, however, rests on a faulty premise. Nothing in § 3599 even hints that review by the Director of the Administrative Office is allowed.

Respondent's argument rests in part on a handful of old lower court cases that appear to have accepted Administrative Office review of Criminal Justice Act of 1964 (CJA) payments that had been authorized by a District Court and ap-

proved by the chief judge of the relevant Circuit. See *United States* v. *Aadal*, 282 F. Supp. 664, 665 (SDNY 1968); *United States* v. *Gast*, 297 F. Supp. 620, 621–622 (Del. 1969); see also *United States* v. *Hunter*, 385 F. Supp. 358, 362 (DC 1974). The basis for these decisions was a provision of the CJA, 18 U. S. C. § 3006A(h) (1964 ed.), stating that CJA payments "shall be made under the supervision of the Director of the Administrative Office of the United States Courts."[4]

It is not clear whether these decisions correctly interpreted the CJA,[5] but in any event, no similar language appears in § 3599. And respondent has not identified a single instance in which the Director of the Administrative Office or any other nonjudicial officer has attempted to review or alter a § 3599 decision.

Moreover, attorneys' requests for CJA funds are markedly different from the funding application at issue here. Attorneys appointed under the CJA typically submit those requests after the conclusion of the case, and the prosecution has no stake in the resolution of the matter. The judgment in the criminal case cannot be affected by a decision on compensation for services that have been completed, and any funds awarded come out of the budget of the Judiciary, not the Executive. See 18 U. S. C. § 3006A(i) (2012 ed.). Thus, the adversaries in the criminal case are not pitted against each other. In this case, on the other hand, as we have explained, petitioner and respondent have strong adverse interests. For these reasons, we reject respondent's argument that the adjudication of the funding issue is nonadversarial and administrative.

---

[4] This language now appears at 18 U. S. C. § 3006A(i) (2012 ed.).

[5] As far as we are aware, neither the Administrative Office nor any other nonjudicial entity currently claims the power to revise or reject a CJA compensation order issued by a court. Nothing in the CJA Guidelines suggests such a policy. See generally 7A Guide to Judiciary Policy (May 17, 2017).

Respondent, however, claims that the funding decision is administrative for an additional reason. "A § 3599(f) funding determination is properly deemed administrative," she contends, "because it . . . may be revised outside the traditional Article III judicial hierarchy." Brief for Respondent 23. The basis for this argument is a provision of § 3599 stating that funding in excess of the generally applicable statutory cap of $7,500 must be approved by the chief judge of the circuit or another designated circuit judge. § 3599(g)(2). If a funding decision is judicial and not administrative, respondent suggests, it could not be reviewed by a single circuit judge as opposed to a panel of three.

This argument confuses what is familiar with what is constitutionally required. Nothing in the Constitution ties Congress to the typical structure of appellate review established by statute. If Congress wishes to make certain rulings reviewable by a single circuit judge, rather than a panel of three, the Constitution does not stand in the way.

III

Satisfied that we have jurisdiction, we turn to the question whether the Court of Appeals applied the correct legal standard when it affirmed the denial of petitioner's funding request.

Section 3599(a) authorizes federal courts to provide funding to a party who is facing the prospect of a death sentence and is "financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services." The statute applies to defendants in federal cases, § 3599(a)(1), as well as to state and federal prisoners seeking collateral relief in federal court, § 3599(a)(2).

Here we are concerned not with legal representation but with services provided by experts, investigators, and the like. Such services must be "reasonably necessary for the representation of the [applicant]" in order to be eligible for funding. § 3599(f). If the statutory standard is met, a

court "may authorize the [applicant's] attorneys to obtain such services on [his] behalf." *Ibid.*

The Fifth Circuit has held that individuals seeking funding for such services must show that they have a "substantial need" for the services. 817 F. 3d, at 896; *Allen* v. *Stephens*, 805 F. 3d 617, 626 (2015); *Ward* v. *Stephens*, 777 F. 3d 250, 266, cert. denied, 577 U. S. 844 (2015). Petitioner contends that this interpretation is more demanding than the standard—"reasonably necessary"—set out in the statute. And although the difference between the two formulations may not be great, petitioner has a point.

In the strictest sense of the term, something is "necessary" only if it is essential. See Webster's Third New International Dictionary 1510 (1993) (something is necessary if it "must be by reason of the nature of things," if it "cannot be otherwise by reason of inherent qualities"); 10 Oxford English Dictionary 275–276 (2d ed. 1989) (OED) (defining the adjective "necessary" to mean "essential"). But in ordinary speech, the term is often used more loosely to refer to something that is merely important or strongly desired. ("I need a vacation." "I need to catch up with an old friend.") The term is sometimes used in a similar way in the law. The term "necessary" in the Necessary and Proper Clause does not mean "*absolutely* necessary," *McCulloch* v. *Maryland*, 4 Wheat. 316, 414–415 (1819), and a "necessary" business expense under the Internal Revenue Code, 26 U. S. C. § 162(a), may be an expense that is merely helpful and appropriate, *Commissioner* v. *Tellier*, 383 U. S. 687, 689 (1966). As Black's Law Dictionary puts it, the term "may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought." Black's Law Dictionary 928 (5th ed. 1979) (Black's).

Section 3599 appears to use the term "necessary" to mean something less than essential. The provision applies to services that are "reasonably necessary," but it makes little sense to refer to something as being "reasonably essential."

What the statutory phrase calls for, we conclude, is a determination by the district court, in the exercise of its discretion, as to whether a reasonable attorney would regard the services as sufficiently important, guided by the considerations we set out more fully below.

The Fifth Circuit's test—"substantial need"—is arguably more demanding. We may assume that the term "need" is comparable to "necessary"—that is, that something is "needed" if it is "necessary." But the term "substantial" suggests a heavier burden than the statutory term "reasonably." Compare 13 OED 291 (defining "reasonably" to mean, among other things, "[s]ufficiently, suitably, fairly"; "[f]airly or pretty well") with 17 *id.*, at 66–67 (defining "substantial," with respect to "reasons, causes, evidence," to mean "firmly or solidly established"); see also Black's 1456 (10th ed. 2014) (defining "reasonable" to mean "[f]air, proper, or moderate under the circumstances . . . . See plausible"); *id.*, at 1656 (defining "substantial" to mean, among other things, "[i]mportant, essential, and material").

The difference between "reasonably necessary" and "substantially need[ed]" may be small, but the Fifth Circuit exacerbated the problem by invoking precedent to the effect that a habeas petitioner seeking funding must present "a viable constitutional claim that is not procedurally barred." 817 F. 3d, at 895 (internal quotation marks omitted). See also, *e. g.*, *Riley* v. *Dretke*, 362 F. 3d 302, 307 (CA5 2004) ("A petitioner cannot show a substantial need when his claim is procedurally barred from review"); *Allen*, *supra*, at 638–639 (describing " 'our rule that a prisoner cannot show a substantial need for funds when his claim is procedurally barred from review' " (quoting *Crutsinger* v. *Stephens*, 576 Fed. Appx. 422, 431 (CA5 2014) (*per curiam*))); *Ward*, *supra*, at 266 ("The denial of funding will be upheld . . . when the constitutional claim is procedurally barred").

The Fifth Circuit adopted this rule before our decision in *Trevino*, but after *Trevino*, the rule is too restrictive. *Trevino* permits a Texas prisoner to overcome the failure to

raise a substantial ineffective-assistance claim in state court by showing that state habeas counsel was ineffective, 569 U. S., at 429, and it is possible that investigation might enable a petitioner to carry that burden. In those cases in which funding stands a credible chance of enabling a habeas petitioner to overcome the obstacle of procedural default, it may be error for a district court to refuse funding.

Congress has made it clear, however, that district courts have broad discretion in assessing requests for funding. Section 3599's predecessor declared that district courts "shall authorize" funding for services deemed "reasonably necessary." 21 U. S. C. § 848(q)(9) (1988 ed.). Applying this provision, courts of appeals reviewed district court funding decisions for abuse of discretion. *E. g.*, *Bonin* v. *Calderon*, 59 F. 3d 815, 837 (CA9 1995); *In re Lindsey*, 875 F. 2d 1502, 1507, n. 4 (CA11 1989); *United States* v. *Alden*, 767 F. 2d 314, 319 (CA7 1984). Then, as part of the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1226, Congress changed the verb from "shall" to "may" and thus made it perfectly clear that determining whether funding is "reasonably necessary" is a decision as to which district courts enjoy broad discretion. See *Kingdomware Technologies, Inc.* v. *United States*, 579 U. S. 162, 171–172 (2016).

A natural consideration informing the exercise of that discretion is the likelihood that the contemplated services will help the applicant win relief. After all, the proposed services must be "*reasonably* necessary" for the applicant's representation, and it would not be reasonable—in fact, it would be quite unreasonable—to think that services are necessary to the applicant's representation if, realistically speaking, they stand little hope of helping him win relief. Proper application of the "reasonably necessary" standard thus requires courts to consider the potential merit of the claims that the applicant wants to pursue, the likelihood that the services will generate useful and admissible evidence, and

the prospect that the applicant will be able to clear any procedural hurdles standing in the way.

To be clear, a funding applicant must not be expected to *prove* that he will be able to win relief if given the services he seeks. But the "reasonably necessary" test requires an assessment of the likely utility of the services requested, and § 3599(f) cannot be read to guarantee that an applicant will have enough money to turn over every stone.

Petitioner does not deny this. He agrees that an applicant must "articulat[e] specific reasons why the services are warranted"—which includes demonstrating that the underlying claim is at least "'plausible'"—and he acknowledges that there may even be cases in which it would be within a court's discretion to "deny funds after a finding of 'reasonable necessity.'" Brief for Petitioner 43.

These interpretive principles are consistent with the way in which § 3599's predecessors were read by the lower courts. See, *e. g.*, *Alden*, *supra*, at 318–319 (explaining that it was "appropriate for the district court to satisfy itself that [the] defendant may have a plausible defense before granting the defendant's . . . motion for psychiatric assistance to aid in that defense," and that it is not proper to use the funding statute to subsidize a "'fishing expedition'"); *United States* v. *Hamlet*, 480 F. 2d 556, 557 (CA5 1973) (*per curiam*) (upholding District Court's refusal to fund psychiatric services based on the District Court's conclusion that "the request for psychiatric services was . . . lacking in merit" because there was "no serious possibility that appellant was legally insane at any time pertinent to the crimes committed"). This abundance of precedent shows courts have plenty of experience making the determinations that § 3599(f) contemplates.

IV

Perhaps anticipating that we might not accept the Fifth Circuit's reading of § 3599(f), respondent devotes a substan-

tial portion of her brief to an alternative ground for affirmance that was neither presented nor passed on below.

Respondent contends that whatever "reasonably necessary" means, funding is *never* "reasonably necessary" in a case like this one, where a habeas petitioner seeks to present a procedurally defaulted ineffective-assistance-of-trial-counsel claim that depends on facts outside the state-court record. Citing 28 U. S. C. §2254(e)(2), respondent contends that the fruits of any such investigation would be inadmissible in a federal habeas court.

We decline to decide in the first instance whether respondent's reading of §2254(e)(2) is correct. Petitioner agrees that the argument remains open for the Fifth Circuit to consider on remand. Tr. of Oral Arg. 6.

* * *

We conclude that the Fifth Circuit's interpretation of §3599(f) is not a permissible reading of the statute. We therefore vacate the judgment below and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, concurring.

The Court correctly concludes that the Fifth Circuit applied the wrong legal standard in evaluating a request for funding for investigative services under 18 U. S. C. §3599(f). That should come as no surprise, as the Fifth Circuit required capital habeas petitioners to show a "'substantial need'" for services, when the statute requires only a showing that the services are "'reasonably necessary.'" *Ante*, at 44. "Substantial," of course, imposes a higher burden than "reasonable." *Ante*, at 45. The Fifth Circuit "exacerbated the problem" by requiring a showing of "a viable constitutional claim that is not procedurally barred," which ignores "that

investigation might enable a petitioner . . . to overcome the obstacle of procedural default." *Ante*, at 45–46 (internal quotation marks omitted). I therefore join the opinion of the Court in full holding that to satisfy § 3599(f), a petitioner need only show that "a reasonable attorney would regard the services as sufficiently important." *Ante*, at 45.

Having answered the question presented of what is the appropriate § 3599(f) standard, the Court remands Ayestas' case for the lower courts to consider the application of the standard in the first instance. *Ante*, at 48.[1] I write separately to explain why, on the record before this Court, there should be little doubt that Ayestas has satisfied § 3599(f).

I

At the center of the § 3599(f) funding request in this case is Ayestas' claim that his trial counsel was ineffective for failing to investigate mitigation. Specifically, Ayestas claims that his trial counsel was deficient in failing to conduct an investigation of his mental health and substance abuse, which could have been presented at the penalty phase of the trial to convince the jury to spare his life. As the Court notes, however, Ayestas faces a hurdle in presenting this ineffective-assistance-of-trial-counsel claim in his federal habeas petition, as his state postconviction counsel never presented that claim in the Texas collateral proceedings. See *ante*, at 34.

To overcome that procedural default, Ayestas relies on *Martinez* v. *Ryan*, 566 U. S. 1 (2012), and *Trevino* v. *Thaler*, 569 U. S. 413 (2013). In those cases, this Court recognized a "particular concern" in the application of a procedural default rule that would prevent a petitioner from "present[ing] a claim of trial error," especially "when the claim is one of ineffective assistance of counsel." *Martinez*, 566 U. S., at 12. "The right to the effective assistance of counsel," the Court

[1] The Court also declines to consider arguments that respondent advanced that were neither presented nor passed on below. *Ante*, at 47–48.

reasoned, "is a bedrock principle in our justice system." *Ibid.* The Court thus held that where the "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal," then "'a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel . . . was ineffective.'" *Trevino*, 569 U. S., at 429 (quoting *Martinez*, 566 U. S., at 17; alteration omitted).[2]

Therefore, the fact that Ayestas' postconviction counsel failed to raise his ineffective-assistance-of-trial-counsel claim in state court does not bar federal review of that claim if Ayestas can show that the "attorney in his first collateral proceeding was ineffective" and that "his claim of ineffective assistance of trial counsel is substantial." *Id.*, at 18. The substantiality of the ineffective-assistance-of-trial-counsel claim and the ineffectiveness of postconviction counsel are both analyzed under the familiar framework set out in *Strickland* v. *Washington*, 466 U. S. 668 (1984). "Ineffective assistance under *Strickland* is deficient performance by counsel resulting in prejudice, with performance being measured against an objective standard of reasonableness." *Rompilla* v. *Beard*, 545 U. S. 374, 380 (2005) (citation and internal quotation marks omitted).

Remember, however, the specific context in which ineffective assistance is being considered in Ayestas' case: a request

[2] The reason for this exception is evident. Excusing the procedural default "acknowledges, as an equitable matter, that the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient." *Martinez*, 566 U. S., at 14. "Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy," and "the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record." *Id.*, at 11–12; see also *Trevino*, 569 U. S., at 423–424, 428.

under § 3599(f) for investigative services, which requires a showing only that "a reasonable attorney would regard the services as sufficiently important." *Ante*, at 45. Ayestas is not "expected to *prove* that he will be able to win relief if given the services he seeks." *Ante*, at 47 (emphasis in original). A court simply must consider at this stage "the potential merit of the claims that the applicant wants to pursue, the likelihood that the services will generate useful and admissible evidence, and the prospect that the applicant will be able to clear any procedural hurdles standing in the way." *Ante*, at 46–47. Thus, the inquiry is not whether Ayestas can prove that his trial counsel was ineffective under *Strickland* or whether he will succeed in overcoming the procedural default under *Martinez* and *Trevino*. Rather, at this § 3599(f) request stage, the focus is on the potential merit of these claims.

II

A

With this framework in mind, the focus first is on the evidence of the deficient performance of Ayestas' state-appointed counsel.[3] Trial counsel secured the appointment of an investigator, who met with Ayestas shortly after the appointment. For nearly 15 months, however, there was apparently no investigation into Ayestas' history in preparation for trial. Counsel instructed the investigator "to resume investigation" only about a month before jury selection. Record 878. The investigator then subpoenaed psychological and disciplinary prison records and had Ayestas fill out a questionnaire, in response to which Ayestas revealed that he had experienced multiple head traumas and had a history of substance abuse. Jail records also noted a rules infraction for possession of homemade intoxicants. Trial counsel never followed up on any of this information, sought further

[3] The State appointed two attorneys to represent Ayestas at trial. I refer to them together as "trial counsel."

related records, or had Ayestas evaluated by a mental health professional.

About two weeks before jury selection, trial counsel for the first time reached out to Ayestas' family in Honduras. Shortly thereafter, five days before trial, counsel wrote Ayestas' family stating that she needed them to come testify. Ayestas' family agreed, but they indicated that they could not obtain visas because a letter that trial counsel was supposed to have sent to the U. S. Embassy to facilitate their travel never arrived, and ultimately no family members appeared at Ayestas' trial.

The guilt phase lasted two days, and trial counsel presented no witnesses. The penalty phase lasted less than a day, and trial counsel presented two minutes of mitigation evidence consisting of three letters from an instructor who taught English classes to Ayestas in prison, attesting that he was "a serious and attentive student." App. 41–43.[4]

On this record, Ayestas has made a strong showing that trial counsel was deficient. "It is unquestioned that under the prevailing professional norms at the time of [Ayestas'] trial, counsel had an obligation to conduct a thorough investigation of [his] background." *Porter* v. *McCollum*, 558 U. S. 30, 39 (2009) (*per curiam*) (internal quotation marks omitted). Here, Ayestas' trial counsel "clearly did not satisfy those norms." *Ibid.* With a client facing a possible death sentence, counsel and her investigator did not start looking into Ayestas' personal history until the eve of trial. The little the investigator uncovered—head trauma and a history of substance abuse—should have prompted further inquiry. Yet trial counsel did nothing. Even if Ayestas prohibited counsel from contacting his family in Honduras until the

[4] Trial counsel also attempted to introduce evidence that Ayestas had no criminal history in Honduras, but failed to link Ayestas to the records, which were under his given name, "Dennis Zelaya Corea." See *Ayestas* v. *Stephens*, 817 F. 3d 888, 892, n. 1 (CA5 2016) (*per curiam*).

start of trial was imminent, see *ante*, at 32–33,[5] that still would not explain why counsel failed to perform any other mitigation investigation, see *Porter*, 558 U. S., at 40 (noting that even if the defendant is "uncooperative, . . . that does not obviate the need for defense counsel to conduct *some* sort of mitigation investigation" (emphasis in original)). In the end, the decision to sentence Ayestas to death was made in less than one day, and his counsel spent less than two minutes presenting mitigation to the jury. *Two minutes*.

This Court has recognized that the decision not to present mitigation may be supported in certain cases by "strategic judgments," provided the reviewing court is satisfied with "the adequacy of the investigations supporting those judgments." *Wiggins* v. *Smith*, 539 U. S. 510, 521 (2003). But this does not appear to be one of those cases. There is nothing in the record that would support the conclusion that counsel chose the two-minutes-of-mitigation strategy after careful investigation and consideration of Ayestas' case. Instead, counsel for the most part "did not even take the first step of interviewing witnesses or requesting records" and "ignored pertinent avenues for investigation of which [they] should have been aware." *Porter*, 558 U. S., at 39–40.

In evaluating the potential merit of Ayestas' claim, the Fifth Circuit misapplied *Strickland* and the § 3599(f) standard. It reasoned that Ayestas had not presented a viable claim that trial counsel was deficient in failing to investigate Ayestas' mental illness because, as he was not diagnosed with schizophrenia until his time in prison, there was nothing that flagged mental illness issues prior to trial.[6] See *Ayes-*

[5] During postconviction proceedings, trial counsel filed an affidavit asserting that Ayestas did not allow contact with his family in Honduras until after jury selection had commenced. When the record evidence contradicted that assertion, counsel submitted another affidavit with a revised timeline. Ayestas disputes having instructed trial counsel not to contact his family in Honduras.

[6] It is unclear whether the Fifth Circuit ultimately relied on its determination that trial counsel was not deficient in rejecting Ayestas' claims. In its panel opinion, it incorrectly stated that trial counsel had conducted a

tas v. *Stephens*, 817 F. 3d 888, 895–897 (2016) (*per curiam*). The absence of a documented diagnosis, however, did not excuse trial counsel from their "obligation to conduct a thorough investigation of [Ayestas'] background." *Porter*, 558 U. S., at 39 (internal quotation marks omitted). In fact, the obligation to investigate exists in part precisely because it is all too common for individuals to go years battling an undiagnosed and untreated mental illness.

In any event, the Fifth Circuit failed to consider that one of the purposes of the § 3599(f) investigation was to look at Ayestas' life around the time of the crime and trial to determine if there were mitigating circumstances that trial counsel could have discovered, such as whether symptoms of his schizophrenia had begun to manifest even before his diagnosis. The Court makes clear today that in evaluating § 3599(f) funding requests, courts must consider "the likelihood that the services will generate useful and admissible evidence." *Ante*, at 46. It was error, therefore, for the Fifth Circuit to evaluate the merit of the ineffective-assistance-of-trial-counsel claim and to deny § 3599(f) funding based solely on an evaluation of the evidence in the record at the time of the request, without evaluating the potential evidence that Ayestas sought. *Ante*, at 46–47.

B

The evidence concerning the deficiency of Ayestas' state postconviction counsel is similarly strong. State postconviction counsel retained the services of a mitigation specialist, who prepared an investigation plan noting that it was "obvious no social history investigation was conducted" and that the jury had "heard nothing about [Ayestas'] mental health,

---

psychological evaluation of Ayestas. 817 F. 3d, at 897. After Ayestas corrected the record in his petition for rehearing, the panel issued an order reaffirming its holding, relying on its finding of no prejudice. See *Ayestas* v. *Stephens*, 826 F. 3d 214, 215 (2016) (*per curiam*). Still, the Fifth Circuit never disavowed its conclusion regarding trial-counsel deficiency. *Ibid.*

possible mental illness, [or] substance abuse history." App. 81, 267. The plan also noted that it was "clear [that Ayestas] had a history of substance abuse." Record 721; see also App. 267. The specialist recommended a comprehensive investigation into Ayestas' biological, psychological, and social history to explore, *inter alia*, issues related to addiction and mental health.

State postconviction counsel failed to follow these recommendations. He did nothing to investigate issues related to Ayestas' mental health or substance abuse. Notably, Ayestas suffered a psychotic episode and was diagnosed with schizophrenia while his state postconviction application was pending. Moreover, in 2003, a counsel-arranged evaluation pursuant to *Atkins* v. *Virginia*, 536 U. S. 304 (2002), noted concerns about Ayestas' "delusional thinking." App. 139–140. These events still did not prompt counsel to investigate Ayestas' mental health history.

Instead, state postconviction counsel explored the circumstances of Ayestas' arrest, conducted some juror interviews, and interviewed Ayestas' mother and sisters, obtaining affidavits regarding Ayestas' upbringing in Honduras and their interactions with trial counsel. Postconviction counsel eventually filed an application that contained a narrow claim of ineffective assistance of trial counsel with respect to mitigation regarding the attorneys' failure to secure the attendance of Ayestas' family members at trial. The Texas Court of Criminal Appeals denied the application, relying on the affidavit submitted by trial counsel, see n. 4, *supra*, to find no ineffectiveness in failing to get Ayestas' family to attend trial.

The Fifth Circuit concluded that Ayestas' state postconviction counsel was not ineffective because, in its view, Ayestas had not established any deficiency at trial in the failure to investigate mental health and substance abuse mitigation. See 817 F. 3d, at 898. That conclusion, as noted in Part II–A, *supra*, was based on a misapplication of *Strickland* and

the § 3599(f) standard, and thus cannot support a finding that the failure to present the claim in postconviction proceedings was "strategic." 817 F. 3d, at 898. Nor is there anything else in the record that would excuse that deficiency. State postconviction counsel ignored his own mitigation specialist, who alerted him to a serious failing in the trial because the jury heard virtually no mitigation and to the serious failings of trial counsel because of the failure to conduct a social history investigation of Ayestas. Even after Ayestas' psychotic episode, schizophrenia diagnosis, and documented tendencies of "delusional thinking" during the course of the representation, state postconviction counsel did nothing. As with trial counsel, the record provides no support for any "strategic justification" to disregard completely a mitigation investigation of Ayestas' mental health and substance abuse.

III

Strickland next requires consideration of prejudice. To establish prejudice, this Court has held that a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," meaning "a probability sufficient to undermine confidence in the outcome." 466 U. S., at 694. In cases alleging a failure to investigate mitigation, as here, the Court must "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U. S., at 534.

Even with the scant evidence in the record at this time as to what Ayestas could have presented to the jury in the form of mitigation, Ayestas has made a strong showing that his claim has potential merit. That trial counsel presented only two minutes of mitigation already goes a long way to establishing prejudice. In fact, the State emphasized to the jury at sentencing:

> "Does he have anything there that would lead you to conclude there is some type of mitigation, anything at

> all? There is no drug problem . . . no health problem . . . no alcohol problem. . . . [O]nly . . . these three pieces of paper . . . . Making steps to learn a second language does not lessen his moral blameworthiness . . . ." Record 4747.

The State, in contrast, presented evidence of Ayestas' criminal history as well as victim impact testimony. After deliberating for only 25 minutes, the jury assessed a punishment of death against Ayestas, finding that he was a future danger, that he intended to cause death or anticipated the loss of life, and that there were no mitigating circumstances that warranted imposition of a life sentence over a death sentence. Had just one juror dissented on a single one of these findings, no death sentence could have been imposed. See Tex. Code Crim. Proc. Ann., Art. 37.071, §2(g) (Vernon Cum. Supp. 2017); see also *ante,* at 32. With even minimal investigation by trial counsel, at least one may well have, as this Court has held that evidence of mental illness and substance abuse is relevant to assessing moral culpability. See *Rompilla*, 545 U. S., at 393; *Porter*, 558 U. S., at 43–44. Instead, the jury "heard almost nothing that would humanize [him] or allow them to accurately gauge his moral culpability." *Id.*, at 41. There is thus good reason to believe that, were Ayestas' §3599(f) motion granted, he could establish prejudice under *Strickland.*

The Fifth Circuit held otherwise based on its belief that no amount of mitigation would have changed the outcome of the sentencing given the "brutality of the crime." 817 F. 3d, at 898. That "brutality of the crime" rationale is simply contrary to our directive in case after case that, in assessing prejudice, a court must "consider the totality of the available mitigation evidence . . . and reweigh it against the evidence in aggravation." *Porter*, 558 U. S., at 41 (internal quotation marks and alterations omitted); see also *Williams* v. *Taylor*, 529 U. S. 362, 397–398 (2000); *Wiggins*, 539 U. S., at 534. By

considering aggravation in isolation, the Fifth Circuit directly contravened this fundamental principle.[7]

IV

In sum, Ayestas has made a strong showing that he is entitled to § 3599(f) funding. As the Court notes, the statute affords district courts some discretion in these funding determinations, even where a petitioner shows the services are "'reasonably necessary.'" *Ante*, at 46–47. Exercise of that discretion may be appropriate if there is a showing of gamesmanship or where the State has provided funding for the same investigation services, as Ayestas conceded at argument. See Tr. of Oral Arg. 13. Nonetheless, the troubling failures of counsel at both the trial and state postconviction stages of Ayestas' case are exactly the types of facts that should prompt courts to afford investigatory services to ensure that trial errors that go to a "bedrock principle in our justice system" do not go unaddressed. *Martinez*, 566 U. S., at 12.

---

[7] Notably, application of this "brutality of the crime" rule is particularly irrational in the § 3599(f) context, where the court is unaware of what the undiscovered evidence of mitigation looks like.

Syllabus

HALL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HALL AND AS SUCCESSOR TRUSTEE OF THE ETHLYN LOUISE HALL FAMILY TRUST *v.* HALL ET AL.

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

No. 16–1150. Argued January 16, 2018—Decided March 27, 2018

Respondent Samuel Hall served as caretaker and legal adviser to his mother Ethlyn Hall, a property owner in the United States Virgin Islands. After falling out with Samuel, Ethlyn transferred her property into a trust and designated her daughter, petitioner Elsa Hall, as her successor trustee. Ethlyn sued Samuel and his law firm over the handling of her affairs (the "trust case"). When Ethlyn died, Elsa took Ethlyn's place as trustee and as plaintiff. Samuel later filed a separate complaint against Elsa in her individual capacity (the "individual case").

On Samuel's motion, the District Court consolidated the trust and individual cases under Federal Rule of Civil Procedure 42(a). The District Court held a single trial of the consolidated cases. In the individual case, the jury returned a verdict for Samuel, but the District Court granted Elsa a new trial. In the trust case, the jury returned a verdict against Elsa, and she filed a notice of appeal from the judgment in that case. Samuel moved to dismiss the appeal on jurisdictional grounds, arguing that the judgment in the trust case was not final and appealable because his claims against Elsa remained unresolved in the individual case. The Court of Appeals for the Third Circuit agreed and dismissed the appeal.

Held: When one of several cases consolidated under Rule 42(a) is finally decided, that decision confers upon the losing party the immediate right to appeal, regardless of whether any of the other consolidated cases remain pending. Pp. 64–78.

(a) Title 28 U. S. C. § 1291 vests the courts of appeals with jurisdiction over "appeals from all final decisions of the district courts," except those directly appealable to this Court. Under § 1291, "any litigant armed with a final judgment from a lower federal court is entitled to take an appeal." *Arizona* v. *Manypenny*, 451 U. S. 232, 244. Here an appeal would normally lie from the judgment in the trust case. But Samuel argues that because the trust and individual cases were consolidated under Rule 42(a)(2), they merged and should be regarded as one case, such that the judgment in the trust case was merely interlocutory and

not appealable before the consolidated cases in the aggregate are finally resolved. Pp. 64–65.

(b) Rule 42(a)(2) provides that if "actions before the court involve a common question of law or fact, the court may . . . consolidate the actions." The meaning of the term "consolidate" in this context is ambiguous. But the term has a legal lineage stretching back at least to the first federal consolidation statute, enacted by Congress in 1813. Act of July 22, 1813, § 3, 3 Stat. 21 (later codified as Rev. Stat. § 921 and 28 U. S. C. § 734 (1934 ed.)). That history makes clear that one of multiple cases consolidated under the Rule retains its independent character, at least to the extent it is appealable when finally resolved, regardless of any ongoing proceedings in the other cases. Pp. 65–66.

(c) Under the consolidation statute—which was in force for 125 years, until its replacement by Rule 42(a)—consolidation was understood not as completely merging the constituent cases into one, but as enabling more efficient case management while preserving the distinct identities of the cases and rights of the separate parties in them. See, *e. g.*, *Rich* v. *Lambert*, 12 How. 347; *Mutual Life Ins. Co.* v. *Hillmon*, 145 U. S. 285; *Stone* v. *United States*, 167 U. S. 178. Just five years before Rule 42(a) became law, the Court reiterated that, under the consolidation statute, consolidation did not result in the merger of constituent cases. *Johnson* v. *Manhattan R. Co.*, 289 U. S. 479, 496–497. This body of law supports the inference that, prior to Rule 42(a), a judgment completely resolving one of several consolidated cases was an immediately appealable final decision. Pp. 67–72.

(d) Rule 42(a) was expressly modeled on the consolidation statute. Because the Rule contained no definition of "consolidate," the term presumably carried forward the same meaning ascribed to it under the statute and reaffirmed in *Johnson*.

Samuel nonetheless asserts that "consolidate" took on a different meaning under Rule 42(a). He describes the Rule as permitting two forms of consolidation: consolidation for limited purposes and consolidation for all purposes. He locates textual authority for the former in a new provision, subsection (a)(1), which permits courts to "join for hearing or trial any or all matters at issue in the actions." And he contends that subsection (a)(2), so as not to be superfluous, must permit the merger of cases that have been consolidated for all purposes into a single, undifferentiated case. But the narrow grant of authority in subsection (a)(1) cannot fairly be read as the exclusive source of a district court's power to consolidate cases for limited purposes, because there is much more to litigation than hearings or trials. Instead, that undisputed power must stem from subsection (a)(2). That defeats Samuel's argument that interpreting subsection (a)(2) to adopt the traditional un-

derstanding of consolidation would render it duplicative of subsection (a)(1), and that subsection (a)(2) therefore must permit courts to merge the actions into a single unit.

Moreover, a Federal Rules Advisory Committee would not take a term that had long meant that separate actions do not merge into one, and silently and abruptly reimagine the same term to mean that they do. Nothing in the pertinent Committee proceedings supports the notion that Rule 42(a) was meant to overturn the settled understanding of consolidation; the Committee simply commented that Rule 42(a) "is based upon" its statutory predecessor, "but insofar as the statute differs from this rule, it is modified." Advisory Committee's Notes on 1937 Adoption of Fed. Rule Civ. Proc. 42(a), 28 U. S. C. App., p. 887. The limited extent to which this Court has addressed consolidation since adoption of Rule 42(a) confirms that the traditional understanding remains in place. See, *e. g.*, *Bank Markazi* v. *Peterson*, 578 U. S. 212, 232–233; *Butler* v. *Dexter*, 425 U. S. 262, 266–267.

This decision does not mean that district courts may not consolidate cases for all purposes in appropriate circumstances. But constituent cases retain their separate identities at least to the extent that a final decision in one is immediately appealable by the losing party. Pp. 72–77.

679 Fed. Appx. 142, reversed and remanded.

ROBERTS, C. J., delivered the opinion for a unanimous Court.

Andrew C. Simpson argued the cause for petitioner and filed the briefs.

Neal Kumar Katyal argued the cause for respondents. With him on the brief was *Marie E. Thomas Griffith*.*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Three Terms ago, we held that one of multiple cases consolidated for multidistrict litigation under 28 U. S. C. § 1407 is immediately appealable upon an order disposing of that case, regardless of whether any of the others remain pending. *Gelboim* v. *Bank of America Corp.*, 574 U. S. 405

*A brief of *amici curiae* urging affirmance was filed for Retired United States District Judges by *Ruthanne M. Deutsch* and *Hyland Hunt*.

(2015). We left open, however, the question whether the same is true with respect to cases consolidated under Rule 42(a) of the Federal Rules of Civil Procedure. *Id.*, at 413, n. 4. This case presents that question.

I

Petitioner Elsa Hall and respondent Samuel Hall are siblings enmeshed in a long-running family feud. Their mother, Ethlyn Hall, lived and owned property in the United States Virgin Islands. Samuel, a lawyer in the Virgin Islands, served as Ethlyn's caretaker and provided her with legal assistance. But trouble eventually came to paradise, and Samuel and Ethlyn fell out over Samuel's management of Ethlyn's real estate holdings. During a visit from Elsa, Ethlyn established an *inter vivos* trust, transferred all of her property into the trust, and designated Elsa as her successor trustee. Ethlyn then moved to Miami—under circumstances disputed by the parties—to live with her daughter.

The family squabble made its way to court in May 2011. Ethlyn, acting in her individual capacity and as trustee of her *inter vivos* trust, sued Samuel and his law firm in Federal District Court (the "trust case"). Ethlyn's claims—for breach of fiduciary duty, legal malpractice, conversion, fraud, and unjust enrichment—concerned the handling of her affairs by Samuel and his law firm before she left for Florida.

Then Ethlyn died, and Elsa stepped into her shoes as trustee and accordingly as plaintiff in the trust case. Samuel promptly filed counterclaims in that case against Elsa—in both her individual and representative capacities—for intentional infliction of emotional distress, fraud, breach of fiduciary duty, conversion, and tortious interference. Samuel contended that Elsa had turned their mother against him by taking advantage of Ethlyn's alleged mental frailty. But Samuel ran into an obstacle: Elsa was not a party to the trust case in her individual capacity (only Ethlyn had been). So Samuel filed a new complaint against Elsa in her individ-

ual capacity in the same District Court (the "individual case"), raising the same claims that he had asserted as counterclaims in the trust case.

The trust and individual cases initially proceeded along separate tracks. Eventually, on Samuel's motion, the District Court consolidated the cases under Rule 42(a) of the Federal Rules of Civil Procedure, ordering that "[a]ll submissions in the consolidated case shall be filed in" the docket assigned to the trust case. App. to Pet. for Cert. A–15.

Just before the trial commenced, the District Court dismissed from the trust case Samuel's counterclaims against Elsa. Those claims remained in the individual case. The parties then tried the consolidated cases together before a jury.

In the individual case, the jury returned a verdict for Samuel on his intentional infliction of emotional distress claim against Elsa, awarding him $500,000 in compensatory damages and $1.5 million in punitive damages. The clerk entered judgment in that case, but the District Court granted Elsa a new trial, which had the effect of reopening the judgment. The individual case remains pending before the District Court.

In the trust case, the jury returned a verdict against Elsa, in her representative capacity, on her claims against Samuel and his law firm. The clerk entered judgment in that case directing that Elsa "recover nothing" and that "the action be dismissed on the merits." *Id.*, at A–12.

Elsa filed a notice of appeal from the District Court's judgment in the trust case. Samuel and his law firm moved to dismiss the appeal on jurisdictional grounds, arguing that the judgment was not final and appealable because his claims against Elsa remained unresolved in the individual case. The Court of Appeals for the Third Circuit agreed. When two cases have been consolidated for all purposes, the court reasoned, a final decision on one set of claims is generally not appealable while the second set remains pending.

The court explained that it considers "whether a less-than-complete judgment is appealable" on a "case-by-case basis." 679 Fed. Appx. 142, 145 (2017). Here, the fact that the claims in the trust and individual cases had been "scheduled together and tried before a single jury" "counsel[ed] in favor of keeping the claims together on appeal." *Ibid.* The court dismissed Elsa's appeal for lack of jurisdiction.

We granted certiorari, 582 U. S. 966 (2017), and now reverse.

II

A

Had the District Court never consolidated the trust and individual cases, there would be no question that Elsa could immediately appeal from the judgment in the trust case. Title 28 U. S. C. § 1291 vests the courts of appeals with jurisdiction over "appeals from all final decisions of the district courts," except those directly appealable to this Court. A final decision "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Ray Haluch Gravel Co.* v. *Central Pension Fund of Operating Engineers and Participating Employers*, 571 U. S. 177, 183 (2014). The archetypal final decision is "one[ ] that trigger[s] the entry of judgment." *Mohawk Industries, Inc.* v. *Carpenter*, 558 U. S. 100, 103 (2009). Appeal from such a final decision is a "matter of right." *Gelboim*, 574 U. S., at 407. Under § 1291, "any litigant armed with a final judgment from a lower federal court is entitled to take an appeal," *Arizona* v. *Manypenny*, 451 U. S. 232, 244 (1981), which generally must be filed within 30 days, 28 U. S. C. § 2107(a).

Here the jury's verdict against Elsa resolved all of the claims in the trust case, and the clerk accordingly entered judgment in that case providing that "the action be dismissed on the merits." App. to Pet. for Cert. A–12. With the entry of judgment, the District Court "completed its adjudication of [Elsa's] complaint and terminated [her] action."

Gelboim, 574 U. S., at 414. An appeal would normally lie from that judgment.

But, Samuel contends, there is more to the litigation than the suit Elsa pursued against him in her representative capacity. There is also his suit against her in her individual capacity, which has not yet been decided. Because the District Court consolidated the trust and individual cases under Rule 42(a)(2), he argues, they merged and should be regarded as one case. Viewed that way, the judgment in the trust case was merely interlocutory, and more remains to be done in the individual case before the consolidated cases in the aggregate are finally resolved and subject to appeal.

B

Rule 42(a)—entitled "[c]onsolidation"—provides that if "actions before the court involve a common question of law or fact, the court may" take one of three measures. First, the court may "join for hearing or trial any or all matters at issue in the actions." Fed. Rule Civ. Proc. 42(a)(1). Second, the court may "consolidate the actions." Rule 42(a)(2). Third, the court may "issue any other orders to avoid unnecessary cost or delay." Rule 42(a)(3). Whether the judgment entered in the trust case is an immediately appealable final decision turns on the effect of consolidation under Rule 42(a).

Samuel, looking to dictionary definitions, asserts that the "plain meaning of the phrase 'consolidate the actions' is . . . to unite two or more actions into one whole—that is, to join them into a single case." Brief for Respondents 23 (citing Black's Law Dictionary (10th ed. 2014); some internal quotation marks and alterations omitted). But the meaning of "consolidate" in the present context is ambiguous. When Rule 42(a) was adopted, the term was generally defined, as it is now, as meaning to "unite, as various particulars, into one mass or body; to bring together in close union; to combine." Webster's New International Dictionary 570 (2d

ed. 1939). Consolidation can thus sometimes signify the complete merger of discrete units: "The company consolidated two branches." But the term can also mean joining together discrete units without causing them to lose their independent character. The United States, for example, is composed of States "unite[d], as various particulars, into one mass or body," "br[ought] together in close union," or "combine[d]." Yet all agree that entry into our Union "by no means implies the loss of distinct and individual existence . . . by the States." *Texas* v. *White*, 7 Wall. 700, 725 (1869). "She consolidated her books" hardly suggests that the "books" became "book." The very metaphor Samuel offers—that consolidation "make[s] two one, like marriage"—highlights this point. Tr. of Oral Arg. 57. However dear to each other, spouses would be surprised to hear that their union extends beyond the metaphysical. This is not a plain meaning case.

It is instead about a term—consolidate—with a legal lineage stretching back at least to the first federal consolidation statute, enacted by Congress in 1813. Act of July 22, 1813, § 3, 3 Stat. 21 (later codified as Rev. Stat. § 921 and 28 U. S. C. § 734 (1934 ed.)). Over 125 years, this Court, along with the courts of appeals and leading treatises, interpreted that term to mean the joining together—but not the complete merger—of constituent cases. Those authorities particularly emphasized that constituent cases remained independent when it came to judgments and appeals. Rule 42(a), promulgated in 1938, was expressly based on the 1813 statute. The history against which Rule 42(a) was adopted resolves any ambiguity regarding the meaning of "consolidate" in subsection (a)(2). It makes clear that one of multiple cases consolidated under the Rule retains its independent character, at least to the extent it is appealable when finally resolved, regardless of any ongoing proceedings in the other cases.

C

Lord Mansfield pioneered the consolidation of related cases in England, and the practice quickly took root in American courts. See *Mutual Life Ins. Co.* v. *Hillmon*, 145 U. S. 285, 292 (1892). In 1813, Congress authorized the newly formed federal courts, when confronted with "causes of like nature, or relative to the same question," to "make such orders and rules concerning proceedings therein as may be conformable to the principles and usages belonging to courts for avoiding unnecessary costs or delay in the administration of justice" and to "consolidate[ ]" the causes when it "shall appear reasonable." § 3, 3 Stat. 21. This consolidation statute applied at law, equity, and admiralty, see 1 W. Rose, A Code of Federal Procedure § 823(a) (1907) (Rose), and remained in force for 125 years, until its replacement by Rule 42(a).

From the outset, we understood consolidation not as completely merging the constituent cases into one, but instead as enabling more efficient case management while preserving the distinct identities of the cases and the rights of the separate parties in them. In *Rich* v. *Lambert*, 12 How. 347 (1852), for example, we considered an appeal from several consolidated cases in admiralty. The appellees, the owners of cargo damaged during shipment, raised a challenge to our jurisdiction that turned on the nature of the consolidation. At the time, we could exercise appellate jurisdiction only over cases involving at least $2,000 in controversy. The damages awarded to the cargo owners in the consolidated cases surpassed $2,000 in the aggregate, but most of the constituent cases did not individually clear that jurisdictional hurdle. *Id.*, at 352–353.

We declined to view the consolidated cases as one for purposes of appeal, concluding that we had jurisdiction only over those constituent cases that individually involved damages exceeding $2,000. *Ibid.* As we explained, "although [a con-

solidated] proceeding assumes the form of a joint suit, it is in reality a mere joinder of distinct causes of action by distinct parties, arising out of a common injury, and which are heard and determined, so far as the merits are concerned, the same as in the case of separate libels for each cause of action." *Id.*, at 353. Consolidation was "allowed by the practice of the court for its convenience, and the saving of time and expense to the parties." *Ibid.*

The trial court's decree, we noted, had the effect of individually resolving each constituent case. *Ibid.* ("The same decree . . . is entered as in the case of separate suits."); see Black's Law Dictionary 532 (3d ed. 1933) ("decree" is a "judgment of a court of equity or admiralty, answering for most purposes to the judgment of a court of common law"). Accordingly, we did "not perceive . . . any ground for a distinction as to the right of appeal from a decree as entered in these cases from that which exists where the proceedings have been distinct and separate throughout." *Rich*, 12 How., at 353; see *Hanover Fire Ins. Co.* v. *Kinneard*, 129 U. S. 176, 177 (1889) (evaluating appellate jurisdiction over a writ of error in one of several consolidated cases without reference to the others).

We elaborated on the principles underlying consolidation in *Mutual Life Insurance Co.* v. *Hillmon*, 145 U. S. 285. *Hillmon*, a staple of law school courses on evidence, involved three separate actions instituted against different life insurance companies by one Sallie Hillmon, the beneficiary on policies purchased by her husband John. Sallie claimed she was entitled to the sizable proceeds of the policies because John had died while journeying through southern Kansas with two companions in search of a site for a cattle ranch. The three companies countered that John was in fact still alive, having conspired with one of the companions to murder the other and pass his corpse off as John's, all as part of an insurance fraud scheme. The trial court consolidated the cases and tried them together. *Id.*, at 285–287.

The court, for purposes of determining the number of peremptory juror challenges to which each defendant was entitled, treated the three cases as though they had merged into one. *Ibid.* On appeal we disagreed, holding that each defendant should receive the full complement of peremptory challenges. *Id.*, at 293. That was because, "although the defendants might lawfully be compelled, at the discretion of the court, to try the cases together, the causes of action remained distinct, and required separate verdicts and judgments; and no defendant could be deprived, without its consent, of any right material to its defence . . . to which it would have been entitled if the cases had been tried separately." *Ibid.* On remand, one case settled, and a consolidated trial of the others "result[ed] in separate judgments" for Sallie. *Connecticut Mut. Life Ins. Co.* v. *Hillmon*, 188 U. S. 208, 209 (1903).

In *Stone* v. *United States*, 167 U. S. 178, 189 (1897), we held that a party appealing from the judgment in one of two cases consolidated for trial could not also raise claims with respect to the other case. John Stone was the sole defendant in one case and one of three defendants in the other. *Id.*, at 179–181. After a consolidated trial, the jury returned a verdict in the case against Stone alone; its verdict in the multidefendant case was set aside. *Id.*, at 181. Stone appealed from the judgment in his case, arguing that the failure to grant a peremptory challenge in the multidefendant case affected the jury's verdict in his. *Id.*, at 189. We rejected that claim, punctiliously respecting the distinction between the constituent cases. There was "no merit in the objection," we said, because in the case before us Stone had "had the benefit of the three peremptory challenges" to which he was entitled in that case. *Ibid.*; see *Stone* v. *United States*, 64 F. 667, 672 (CA9 1894) ("The two cases, although consolidated, were separate and distinct. Defendant had exercised all the rights and privileges he was entitled to in this case.").

And just five years before Rule 42(a) became law, we reiterated that, under the consolidation statute, consolidation did not result in the merger of constituent cases. *Johnson* v. *Manhattan R. Co.*, 289 U. S. 479, 496–497 (1933). A major case of its day, *Johnson* arose from the "financial embarrassment" during the Great Depression of two companies involved in operating the New York subway system. *Johnson* v. *Manhattan R. Co.*, 61 F. 2d 934, 936 (CA2 1932). In the resulting litigation, the District Court consolidated two suits, apparently with the intent to "effect an intervention of the parties to the [first suit] in the [second] suit"—in other words, to make the two suits one. *Id.*, at 940. Judge Learned Hand, writing for the Second Circuit on appeal, would have none of it: "consolidation does not merge the suits; it is a mere matter of convenience in administration, to keep them in step. They remain as independent as before." *Ibid.* We affirmed, relying on *Hillmon* and several lower court cases reflecting the same understanding of consolidation. *Johnson*, 289 U. S., at 497, n. 8. We explained once more that "consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." *Id.*, at 496–497.

Decisions by the Courts of Appeals, with isolated departures,* reflected the same understanding in cases involving all manners of consolidation. See, *e. g.*, *Baltimore S. S. Co.*,

*See, *e. g.*, *Edward P. Allis Co.* v. *Columbia Mill Co.*, 65 F. 52, 54 (CA8 1894) (involving two suits "consolidated, and tried as one action," with the "complaint in the first suit . . . treated as a counterclaim interposed in the second suit"). State practice was varied. Compare, *e. g.*, *East Bay Municipal Util. Dist.* v. *Kieffer*, 99 Cal. App. 240, 263 (1929) (denial of rehearing) ("By such consolidation the three proceedings became one proceeding and should have been determined by a single verdict, 'a single set of findings and a single judgment.' "), with *Missouri Pac. R. Co.* v. *Helmert*, 196 Ark. 1073, 121 S. W. 2d 103 (1938) (consolidated cases resulted in separate judgments).

Inc. v. *Koppel Indus. Car & Equip. Co.*, 299 F. 158, 160 (CA4 1924) ("the consolidation for convenience of trial did not merge the two causes of action" or "deprive either party of any right or relieve it of any burden incident to the libel or cross-libel as a separate proceeding"); *Taylor* v. *Logan Trust Co.*, 289 F. 51, 53 (CA8 1923) (parties to one constituent case could not appeal orders in the other because "consolidation did not make the parties to one suit parties to the other"; cited in *Johnson*); *Toledo, St. L. & K. C. R. Co.* v. *Continental Trust Co.*, 95 F. 497, 506 (CA6 1899) (consolidation "operates as a mere carrying on together of two separate suits supposed to involve identical issues" and "does not avoid the necessity of separate decrees in each case"; cited in *Johnson*).

One frequently cited case illustrates the point. In *Adler* v. *Seaman*, 266 F. 828, 831 (CA8 1920), the District Court "sought to employ consolidation as a medium of getting the two independent suits united," but the Court of Appeals made clear that the consolidation statute did not authorize such action. The court explained that constituent cases sometimes "assume certain natural attitudes toward each other, such as 'in the nature of' a cross-bill or intervention." *Id.*, at 838. Be that as it may, the court continued, "this is purely a rule of convenience, and does not result in actually making such parties defendants or interveners in the other suit." *Ibid.* The court described "the result of consolidation" as instead "merely to try cases together, necessitating separate verdicts and judgments or separate decrees," and to "leave" the constituent cases "separate, independent action[s]." *Id.*, at 838, 840.

Treatises summarizing federal precedent applying the consolidation statute also concluded that consolidated cases "remain distinct." 1 Rose § 823(c), at 758. They recognized that consolidated cases should "remain separate as to parties, pleadings, and judgment," W. Simkins, Federal Practice 63 (rev. ed. 1923), and that "[t]here must be separate verdicts, judgments or decrees, even although the consolidating party

wished for one verdict," 1 Rose § 823(c), at 758 (footnote omitted); see also G. Virden, Consolidation Under Rule 42 of the Federal Rules of Civil Procedure, in 141 F. R. D. 169, 173–174 (1992) (Virden) ("as of 1933 and the *Johnson* case of that year, it was well settled that consolidation in the federal courts did not merge the separate cases into a single action").

Several aspects of this body of law support the inference that, prior to Rule 42(a), a judgment completely resolving one of several consolidated cases was an immediately appealable final decision. We made clear, for example, that each constituent case must be analyzed individually on appeal to ascertain jurisdiction and to decide its disposition—a compartmentalized analysis that would be gratuitous if the cases had merged into a single case subject to a single appeal. We emphasized that constituent cases should end in separate decrees or judgments—the traditional trigger for the right to appeal, for which there would be no need if an appeal could arise only from the resolution of the consolidated cases as a whole. We explained that the parties to one case did not become parties to the other by virtue of consolidation—indicating that the right of each to pursue his individual case on appeal should not be compromised by the litigation conduct of the other. And, finally, we held that consolidation could not prejudice rights to which the parties would have been due had consolidation never occurred. Forcing an aggrieved party to wait for other cases to conclude would substantially impair his ability to appeal from a final decision fully resolving his own case—a "matter of right," *Gelboim*, 574 U. S., at 407, to which he was "entitled," *Manypenny*, 451 U. S., at 244.

D

Against this background, two years after *Johnson*, the Rules Advisory Committee began discussion of what was to become Rule 42(a). The Rule, which became effective in 1938, was expressly modeled on its statutory predecessor, the Act of July 22, 1813. See Advisory Committee's Notes

on 1937 Adoption of Fed. Rule Civ. Proc. 42(a), 28 U. S. C. App., p. 887. The Rule contained no definition of "consolidate," so the term presumably carried forward the same meaning we had ascribed to it under the consolidation statute for 125 years and had just recently reaffirmed in *Johnson*. See Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 537 (1947) ("if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it"); cf. *Class* v. *United States*, 583 U. S. 174, 184 (2018) (Federal Rule of Criminal Procedure 11(a)(2) did not silently alter existing doctrine established by this Court's past decisions).

Samuel nonetheless asserts that there is a significant distinction between the original consolidation statute and Rule 42(a). The statute authorized district courts to "consolidate" related "causes when it appears reasonable to do so" or to "make such orders and rules . . . as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice." 28 U. S. C. § 734 (1934 ed.). Rule 42(a) permits district courts not only to "consolidate the actions" (subsection (a)(2)) and "issue any other orders to avoid unnecessary cost or delay" (subsection (a)(3)), but also to "join for hearing or trial any or all matters at issue in the actions" (subsection (a)(1)).

Whatever "consolidate" meant under the statute, Samuel posits, it took on a different meaning under Rule 42(a) with the addition of subsection (a)(1). Samuel describes the Rule as "permit[ting] two forms of consolidation": consolidation that "extend[s] only to certain proceedings," such as discovery, and consolidation "for all purposes." Brief for Respondents 4–5. He locates textual authority for the former in subsection (a)(1), which he says empowers courts to "join[ ] multiple actions for procedural purposes." *Id.*, at 23. In light of this broad grant of authority, he contends, subsection (a)(2) must provide for something more if it is not to be su-

perfluous. And Samuel sees that something more as the ability to merge cases that have been consolidated for "all purposes" into a single, undifferentiated case—one appealable only when all issues in each formerly distinct case have been decided. See *id.*, at 22–24 (to "consolidate" separate actions is "to join them into a single case" or "meld [them] into a single unit" (alterations omitted)).

We disagree. It is only by substantially overreading subsection (a)(1) that Samuel can argue that its addition compels a radical reinterpretation of the familiar term "consolidate" in subsection (a)(2). The text of subsection (a)(1) permits the joining of cases only for "hearing or trial." That narrow grant of authority cannot fairly be read as the exclusive source of a district court's power to "join[ ] multiple actions for procedural purposes." *Id.*, at 23. There is, after all, much more to litigation than hearings or trials—such as motions practice or discovery. A district court's undisputed ability to consolidate cases for such limited purposes must therefore stem from subsection (a)(2). That defeats Samuel's argument that interpreting subsection (a)(2) to adopt the traditional understanding of consolidation would render it "wholly duplicative of [subsection] (a)(1)," and that subsection (a)(2) "therefore must permit courts . . . to 'consolidate' the actions *themselves* into a single unit." *Id.*, at 23–24. Samuel's reinterpretation of "consolidate" is, in other words, a solution in search of a problem.

We think, moreover, that if Rule 42(a) were meant to transform consolidation into something sharply contrary to what it had been, we would have heard about it. Congress, we have held, "does not alter the fundamental details" of an existing scheme with "vague terms" and "subtle device[s]." *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001); cf. *Class*, 583 U. S., at 184. That is true in spades when it comes to the work of the Federal Rules Advisory Committees. Their laborious drafting process requires years of effort and many layers of careful review before a

proposed Rule is presented to this Court for possible submission to Congress. See Report of Advisory Committee on Rules for Civil Procedure (Apr. 1937) (describing the exhaustive process undertaken to draft the first Federal Rules of Civil Procedure). No sensible draftsman, let alone a Federal Rules Advisory Committee, would take a term that had meant, for more than a century, that separate actions do not merge into one, and silently and abruptly reimagine the same term to mean that they do.

Similarly, nothing in the pertinent proceedings of the Rules Advisory Committee supports the notion that Rule 42(a) was meant to overturn the settled understanding of consolidation. See *United States* v. *Vonn*, 535 U. S. 55, 64, n. 6 (2002) (Advisory Committee Notes are "a reliable source of insight into the meaning of a rule"). In this instance, the Committee simply commented that Rule 42(a) "is based upon" its statutory predecessor, "but insofar as the statute differs from this rule, it is modified." Advisory Committee's Notes on 1937 Adoption of Fed. Rule Civ. Proc. 42(a), 28 U. S. C. App., at 887. The Committee did not identify any specific instance in which Rule 42(a) changed the statute, let alone the dramatic transformation Samuel would have us recognize. See Virden 174–181 (evaluating the history of the development of Rule 42(a) and finding no evidence that the Committee intended a shift in meaning along the lines proposed by Samuel). This is significant because when the Committee intended a new rule to change existing federal practice, it typically explained the departure. See, *e. g.*, Advisory Committee's Notes on 1937 Adoption of Fed. Rule Civ. Proc. 4, 28 U. S. C. App., p. 747 (a predecessor statute "is substantially continued insofar as it applies to a summons, but its requirements as to teste of process are superseded"); Advisory Committee's Notes on 1937 Adoption of Fed. Rule Civ. Proc. 18, 28 U. S. C. App., p. 802 ("In respect to fraudulent conveyances the rule changes the former rule requiring a prior judgment against the owner . . . to conform to the

provisions of the Uniform Fraudulent Conveyance Act, §§ 9 and 10.").

As a leading treatise explained at the time, through consolidation under Rule 42(a) "one or many or all of the phases of the several actions may be merged. But merger is never so complete in consolidation as to deprive any party of any substantial rights which he may have possessed had the actions proceeded separately." 3 J. Moore & J. Friedman, Moore's Federal Practice § 42.01, pp. 3050–3051 (1938). Thus, "separate verdicts and judgments are normally necessary." *Id.*, at 3051, n. 12.

The limited extent to which this Court has addressed consolidation since adoption of Rule 42(a) confirms the traditional understanding. Just recently in *Bank Markazi* v. *Peterson*, 578 U. S. 212, 232–233 (2016), for example, the Court determined that cases "consolidated for administrative purposes at the execution stage . . . were not independent of the original actions for damages and each claim retained its separate character." The Court quoted as authority a treatise explaining that "actions do not lose their separate identity because of consolidation." *Id.*, at 233 (quoting 9A C. Wright & A. Miller, Federal Practice and Procedure § 2382, p. 10 (3d ed. 2008) (Wright & Miller)).

In *Butler* v. *Dexter*, 425 U. S. 262, 266–267 (1976) (*per curiam*), we dismissed an appeal because the constitutional question that supplied our jurisdiction had been raised not in the case before us, but instead only in other cases with which it had been consolidated. We explained that "[e]ach case . . . must be considered separately to determine whether or not this Court has jurisdiction to consider its merits." *Id.*, at 267, n. 12; see *Rich*, 12 How., at 352–353. And in *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U. S. 682, 735, and n. 22 (1976) (Marshall, J., dissenting), four dissenting Justices—reaching an issue not addressed by the majority—cited *Johnson* for the proposition that actions are

"not merged" and do "not lose their separate identities because of . . . consolidation" under Rule 42(a).

In the face of all the foregoing, we cannot accept Samuel's contention that "consolidate" in Rule 42(a) carried a very different meaning—with very different consequences—than it had in *Johnson*, just five years before the Rule was adopted.

None of this means that district courts may not consolidate cases for "all purposes" in appropriate circumstances. District courts enjoy substantial discretion in deciding whether and to what extent to consolidate cases. See 9A Wright & Miller § 2383 (collecting cases). What our decision does mean is that constituent cases retain their separate identities at least to the extent that a final decision in one is immediately appealable by the losing party. That is, after all, the point at which, by definition, a "district court disassociates itself from a case." *Swint* v. *Chambers County Comm'n*, 514 U. S. 35, 42 (1995). We thus express no view on any issue arising prior to that time.

* * *

The normal rule is that a "final decision" confers upon the losing party the immediate right to appeal. That rule provides clear guidance to litigants. Creating exceptions to such a critical step in litigation should not be undertaken lightly. Congress has granted us the authority to prescribe rules "defin[ing] when a ruling of a district court is final for the purposes of appeal under" § 1291, 28 U. S. C. § 2072(c), and we have explained that changes with respect to the meaning of final decision "are to come from rulemaking, . . . not judicial decisions in particular controversies," *Microsoft Corp.* v. *Baker*, 582 U. S. 23, 39 (2017). If, as Samuel fears, our holding in this case were to give rise to practical problems for district courts and litigants, the appropriate Federal Rules Advisory Committees would certainly remain free to take the matter up and recommend revisions accordingly.

Rule 42(a) did not purport to alter the settled understanding of the consequences of consolidation. That understanding makes clear that when one of several consolidated cases is finally decided, a disappointed litigant is free to seek review of that decision in the court of appeals.

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

It is so ordered.

Syllabus

ENCINO MOTORCARS, LLC *v.* NAVARRO ET AL.

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

No. 16–1362. Argued January 17, 2018—Decided April 2, 2018

Respondents, current and former service advisors for petitioner Encino Motorcars, LLC, sued petitioner for backpay, alleging that petitioner violated the Fair Labor Standards Act (FLSA) by failing to pay them overtime. Petitioner moved to dismiss, arguing that service advisors are exempt from the FLSA's overtime-pay requirement under 29 U. S. C. §213(b)(10)(A), which applies to "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements." The District Court agreed and dismissed the suit. The Court of Appeals for the Ninth Circuit reversed. It found the statute ambiguous and the legislative history inconclusive, and it deferred to a 2011 Department of Labor rule that interpreted "salesman" to exclude service advisors. This Court vacated the Ninth Circuit's judgment, holding that courts could not defer to the procedurally defective 2011 rule, *Encino Motorcars, LLC* v. *Navarro*, 579 U. S. 211, 220–224 (*Encino I*), but not deciding whether the exemption covers service advisors, *id.*, at 224. On remand, the Ninth Circuit again held that the exemption does not include service advisors.

Held: Because service advisors are "salesm[e]n . . . primarily engaged in . . . servicing automobiles," they are exempt from the FLSA's overtime-pay requirement. Pp. 85–91.

(a) A service advisor is obviously a "salesman." The ordinary meaning of "salesman" is someone who sells goods or services, and service advisors "sell [customers] services for their vehicles," *Encino I*, *supra*, at 214. Pp. 85–86.

(b) Service advisors are also "primarily engaged in . . . servicing automobiles." "Servicing" can mean either "the action of maintaining or repairing a motor vehicle" or "[t]he action of providing a service." 15 Oxford English Dictionary 39. Service advisors satisfy both definitions because they are integral to the servicing process. They "mee[t] customers; liste[n] to their concerns about their cars; sugges[t] repair and maintenance services; sel[l] new accessories or replacement parts; recor[d] service orders; follo[w] up with customers as the services are performed (for instance, if new problems are discovered); and explai[n] the repair and maintenance work when customers return for their vehicles." *Encino I*, *supra*, at 214–215. While service advisors do not spend most

of their time physically repairing automobiles, neither do partsmen, who the parties agree are "primarily engaged in . . . servicing automobiles." Pp. 86–87.

(c) The Ninth Circuit invoked the distributive canon—matching "salesman" with "selling" and "partsman [and] mechanic" with "[servicing]"—to conclude that the exemption simply does not apply to "salesm[e]n . . . primarily engaged in . . . servicing automobiles." But the word "or," which connects all of the exemption's nouns and gerunds, is "almost always disjunctive." *United States* v. *Woods*, 571 U. S. 31, 45. Using "or" to join "selling" and "servicing" thus suggests that the exemption covers a salesman primarily engaged in either activity.

Statutory context supports this reading. First, the distributive canon has the most force when one-to-one matching is present, but here, the statute would require matching some of three nouns with one of two gerunds. Second, the distributive canon has the most force when an ordinary, disjunctive reading is linguistically impossible. But here, "salesman . . . primarily engaged in . . . servicing automobiles" is an apt description of a service advisor. Third, a narrow distributive phrasing is an unnatural fit here because the entire exemption bespeaks breadth, starting with "any" and using the disjunctive "or" three times. Pp. 87–88.

(d) The Ninth Circuit also invoked the principle that exemptions to the FLSA should be construed narrowly. But the Court rejects this principle as a guide to interpreting the FLSA. Because the FLSA gives no textual indication that its exemptions should be construed narrowly, they should be given a fair reading. Pp. 88–89.

(e) Finally, the Ninth Circuit's reliance on two extraneous sources to support its interpretation—the 1966–1967 Occupational Outlook Handbook and the FLSA's legislative history—is unavailing. Pp. 89–90.

845 F. 3d 925, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, ALITO, and GORSUCH, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 91.

Paul D. Clement argued the cause for petitioner. With him on the briefs were *Todd B. Scherwin*, *Wendy McGuire Coats*, *George W. Hicks, Jr.*, and *Matthew D. Rowen*.

James A. Feldman argued the cause for respondents. With him on the brief were *Nancy Bregstein Gordon* and *Keven Steinberg*.*

JUSTICE THOMAS delivered the opinion of the Court.

The Fair Labor Standards Act (FLSA), 52 Stat. 1060, as amended, 29 U. S. C. § 201 *et seq.*, requires employers to pay overtime compensation to covered employees. The FLSA exempts from the overtime-pay requirement "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles" at a covered dealership. § 213(b)(10)(A). We granted certiorari to decide whether this exemption applies to service advisors—employees at car dealerships who consult with customers about their servicing needs and sell them servicing solutions. We conclude that service advisors are exempt.

I

A

Enacted in 1938, the FLSA requires employers to pay overtime to covered employees who work more than 40 hours in a week. 29 U. S. C. § 207(a). But the FLSA exempts many categories of employees from this requirement. See § 213. Employees at car dealerships have long been among those exempted.

---

*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America et al. by *Matthew W. Lampe*, *Warren D. Postman*, *E. Michael Rossman*, *Ryan J. Watson*, and *Deborah White*; and for the National Automobile Dealers Association et al. by *Felicia R. Reid* and *Douglas I. Greenhaus*.

Briefs of *amici curiae* urging affirmance were filed for the International Association of Machinists and Aerospace Workers, AFL-CIO, by *David A. Rosenfeld*, *Mark D. Schneider*, and *Caren P. Sencer*; for Law Professors by *David C. Frederick*; for the National Employment Lawyers Association by *Michael L. Foreman*; and for Sen. Patty Murray et al. by *Vincent Levy*, *Daniel M. Sullivan*, *Gregory Dubinsky*, and *Matthew V. H. Noller*.

Congress initially exempted all employees at car dealerships from the overtime-pay requirement. See Fair Labor Standards Amendments of 1961, § 9, 75 Stat. 73. Congress then narrowed that exemption to cover "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft." Fair Labor Standards Amendments of 1966, § 209, 80 Stat. 836. In 1974, Congress enacted the version of the exemption at issue here. It provides that the FLSA's overtime-pay requirement does not apply to "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." § 213(b)(10)(A).

This language has long been understood to cover service advisors. Although the Department of Labor initially interpreted it to exclude them, 35 Fed. Reg. 5896 (1970) (codified at 29 CFR § 779.372(c)(4) (1971)), the federal courts rejected that view, see *Brennan* v. *Deel Motors, Inc.*, 475 F. 2d 1095 (CA5 1973); *Brennan* v. *North Bros. Ford, Inc.*, 76 CCH LC ¶33,247 (ED Mich. 1975), aff'd *sub nom. Dunlop* v. *North Bros. Ford, Inc.*, 529 F. 2d 524 (CA6 1976) (table). After these decisions, the Department issued an opinion letter in 1978, explaining that service advisors are exempt in most cases. See Dept. of Labor, Wage & Hour Div., Opinion Letter No. 1520 (WH–467) (1978), [1978–1981 Transfer Binder] CCH Wages–Hours Administrative Rulings ¶31,207. From 1978 to 2011, Congress made no changes to the exemption, despite amending § 213 nearly a dozen times. The Department also continued to acquiesce in the view that service advisors are exempt. See Dept. of Labor, Wage & Hour Div., Field Operations Handbook, Insert No. 1757, 24L04(k) (Oct. 20, 1987), online at https://perma.cc/5GHD-KCJJ (as last visited Mar. 28, 2018).

In 2011, however, the Department reversed course. It issued a rule that interpreted "salesman" to exclude service advisors. 76 Fed. Reg. 18859 (2011) (codified at 29 CFR § 779.372(c)). That regulation prompted this litigation.

B

Petitioner Encino Motorcars, LLC, is a Mercedes-Benz dealership in California. Respondents are current and former service advisors for petitioner. Service advisors "interact with customers and sell them services for their vehicles." *Encino Motorcars, LLC* v. *Navarro*, 579 U. S. 211, 214 (2016) (*Encino I*). They "mee[t] customers; liste[n] to their concerns about their cars; sugges[t] repair and maintenance services; sel[l] new accessories or replacement parts; recor[d] service orders; follo[w] up with customers as the services are performed (for instance, if new problems are discovered); and explai[n] the repair and maintenance work when customers return for their vehicles." *Ibid.*

In 2012, respondents sued petitioner for backpay. Relying on the Department's 2011 regulation, respondents alleged that petitioner had violated the FLSA by failing to pay them overtime. Petitioner moved to dismiss, arguing that service advisors are exempt under § 213(b)(10)(A). The District Court agreed with petitioner and dismissed the complaint, but the Court of Appeals for the Ninth Circuit reversed. Finding the text ambiguous and the legislative history "inconclusive," the Ninth Circuit deferred to the Department's 2011 rule under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). *Navarro* v. *Encino Motorcars, LLC*, 780 F. 3d 1267, 1275 (2015).

We granted certiorari and vacated the Ninth Circuit's judgment. We explained that courts cannot defer to the 2011 rule because it is procedurally defective. See *Encino I*, 579 U. S., at 220–224. Specifically, the regulation under-

mined significant reliance interests in the automobile industry by changing the treatment of service advisors without a sufficiently reasoned explanation. *Id.*, at 222. But we did not decide whether, without administrative deference, the exemption covers service advisors. *Id.*, at 224. We remanded that issue for the Ninth Circuit to address in the first instance. *Ibid.*

C

On remand, the Ninth Circuit again held that the exemption does not include service advisors. The Court of Appeals agreed that a service advisor is a "'salesman'" in a "generic sense," 845 F. 3d 925, 930 (2017), and is "'primarily engaged in . . . servicing automobiles'" in a "general sense," *id.*, at 931. Nonetheless, it concluded that "Congress did not intend to exempt service advisors." *Id.*, at 929.

The Ninth Circuit began by noting that the Department's 1966–1967 Occupational Outlook Handbook listed 12 job titles in the table of contents that could be found at a car dealership, including "automobile mechanics," "automobile parts countermen," "automobile salesmen," and "automobile service advisors." *Id.*, at 930. Because the FLSA exemption listed three of these positions, but not service advisors, the Ninth Circuit concluded that service advisors are not exempt. *Ibid.* The Ninth Circuit also determined that service advisors are not primarily engaged in "servicing" automobiles, which it defined to mean "only those who are actually occupied in the repair and maintenance of cars." *Id.*, at 931. And the Ninth Circuit further concluded that the exemption does not cover salesmen who are primarily engaged in servicing. *Id.*, at 933. In reaching this conclusion, the Ninth Circuit invoked the distributive canon. See A. Scalia & B. Garner, Reading Law 214 (2012) ("Distributive phrasing applies each expression to its appropriate referent"). It reasoned that "Congress intended the gerunds—selling and servicing—to be distributed to their appropriate subjects—salesman, partsman, and mechanic. A salesman

sells; a partsman services; and a mechanic services." 845 F. 3d, at 934. Finally, the Court of Appeals noted that its interpretation was supported by the principle that exemptions to the FLSA should be construed narrowly, *id.*, at 935, and by the lack of any "mention of service advisors" in the legislative history, *id.*, at 939.

We granted certiorari, 582 U. S. 966 (2017), and now reverse.

II

The FLSA exempts from its overtime-pay requirement "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." § 213(b)(10)(A). The parties agree that petitioner is a "nonmanufacturing establishment primarily engaged in the business of selling [automobiles] to ultimate purchasers." The parties also agree that a service advisor is not a "partsman" or "mechanic," and that a service advisor is not "primarily engaged in selling . . . automobiles." The question, then, is whether service advisors are "salesm[e]n . . . primarily engaged in . . . servicing automobiles." We conclude that they are. Under the best reading of the text, service advisors are "salesm[e]n," and they are "primarily engaged in . . . servicing automobiles." The distributive canon, the practice of construing FLSA exemptions narrowly, and the legislative history do not persuade us otherwise.

A

A service advisor is obviously a "salesman." The term "salesman" is not defined in the statute, so "we give the term its ordinary meaning." *Taniguchi* v. *Kan Pacific Saipan, Ltd.*, 566 U. S. 560, 566 (2012). The ordinary meaning of "salesman" is someone who sells goods or services. See 14 Oxford English Dictionary 391 (2d ed. 1989) ("[a] man whose

business it is to sell goods or conduct sales"); Random House Dictionary of the English Language 1262 (1966) ("a man who sells goods, services, etc."). Service advisors do precisely that. As this Court previously explained, service advisors "sell [customers] services for their vehicles." *Encino I*, 579 U. S., at 214.

B

Service advisors are also "primarily engaged in . . . servicing automobiles." §213(b)(10)(A). The word "servicing" in this context can mean either "the action of maintaining or repairing a motor vehicle" or "[t]he action of providing a service." 15 Oxford English Dictionary, at 39; see also Random House Dictionary of the English Language, at 1304 ("to make fit for use; repair; restore to condition for service"). Service advisors satisfy both definitions. Service advisors are integral to the servicing process. They "mee[t] customers; liste[n] to their concerns about their cars; sugges[t] repair and maintenance services; sel[l] new accessories or replacement parts; recor[d] service orders; follo[w] up with customers as the services are performed (for instance, if new problems are discovered); and explai[n] the repair and maintenance work when customers return for their vehicles." *Encino I*, *supra*, at 214–215. If you ask the average customer who services his car, the primary, and perhaps only, person he is likely to identify is his service advisor.

True, service advisors do not spend most of their time physically repairing automobiles. But the statutory language is not so constrained. All agree that partsmen, for example, are "primarily engaged in . . . servicing automobiles." Brief for Petitioner 40; Brief for Respondents 41–44. But partsmen, like service advisors, do not spend most of their time under the hood. Instead, they "obtain the vehicle parts . . . and provide those parts to the mechanics." *Encino I*, *supra*, at 215; see also 1 Dept. of Labor, Dictionary of Occupational Titles 33 (3d ed. 1965) (defining "partsman" as someone who "[p]urchases, stores, and issues spare parts

for automotive and industrial equipment"). In other words, the phrase "primarily engaged in . . . servicing automobiles" must include some individuals who do not physically repair automobiles themselves but who are integrally involved in the servicing process. That description applies to partsmen and service advisors alike.

C

The Ninth Circuit concluded that service advisors are not covered because the exemption simply does not apply to "salesm[e]n . . . primarily engaged in . . . servicing automobiles." The Ninth Circuit invoked the distributive canon to reach this conclusion. Using that canon, it matched "salesman" with "selling" and "partsma[n] [and] mechanic" with "servicing." We reject this reasoning.

The text of the exemption covers "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements." § 213(b)(10)(A). The exemption uses the word "or" to connect all of its nouns and gerunds, and "or" is "almost always disjunctive." *United States* v. *Woods*, 571 U. S. 31, 45 (2013). Thus, the use of "or" to join "selling" and "servicing" suggests that the exemption covers a salesman primarily engaged in either activity.

Unsurprisingly, statutory context can overcome the ordinary, disjunctive meaning of "or." The distributive canon, for example, recognizes that sometimes "[w]here a sentence contains several antecedents and several consequents," courts should "read them distributively and apply the words to the subjects which, by context, they seem most properly to relate." 2A N. Singer & S. Singer, Sutherland Statutes and Statutory Construction § 47:26, p. 448 (rev. 7th ed. 2014).

But here, context favors the ordinary disjunctive meaning of "or" for at least three reasons. First, the distributive canon has the most force when the statute allows for one-to-one matching. But here, the distributive canon would mix and match some of three nouns—"salesman, partsman, or

mechanic"—with one of two gerunds—"selling or servicing." §213(b)(10)(A). We doubt that a legislative drafter would leave it to the reader to figure out the precise combinations. Second, the distributive canon has the most force when an ordinary, disjunctive reading is linguistically impossible. Cf., *e. g.*, *Huidekoper's Lessee* v. *Douglass*, 3 Cranch 1, 67 (1805) (Marshall, C. J.) (applying the distributive canon when a purely disjunctive reading "would involve a contradiction in terms"). But as explained above, the phrase "salesman . . . primarily engaged in . . . servicing automobiles" not only makes sense; it is an apt description of a service advisor. Third, a narrow distributive phrasing is an unnatural fit here because the entire exemption bespeaks breadth. It begins with the word "any." See *Ali* v. *Federal Bureau of Prisons*, 552 U. S. 214, 219 (2008) (noting the "'expansive meaning'" of "any"). And it uses the disjunctive word "or" three times. In fact, all agree that the third list in the exemption—"automobiles, trucks, or farm implements"—modifies every other noun and gerund. But it would be odd to read the exemption as starting with a distributive phrasing and then, halfway through and without warning, switching to a disjunctive phrasing—all the while using the same word ("or") to signal both meanings. See *Brown* v. *Gardner*, 513 U. S. 115, 118 (1994) (noting the "vigorous" presumption that, "when a term is repeated within a given sentence," it "is used to mean the same thing"). The more natural reading is that the exemption covers any combination of its nouns, gerunds, and objects.

D

The Ninth Circuit also invoked the principle that exemptions to the FLSA should be construed narrowly. 845 F. 3d, at 935–936. We reject this principle as a useful guidepost for interpreting the FLSA. Because the FLSA gives no "textual indication" that its exemptions should be construed narrowly, "there is no reason to give [them] anything other than a fair (rather than a 'narrow') interpretation." Scalia,

Reading Law, at 363. The narrow-construction principle relies on the flawed premise that the FLSA "'pursues'" its remedial purpose "'at all costs.'" *American Express Co.* v. *Italian Colors Restaurant*, 570 U. S. 228, 234 (2013) (quoting *Rodriguez* v. *United States*, 480 U. S. 522, 525–526 (1987) (*per curiam*)); see also *Henson* v. *Santander Consumer USA Inc.*, 582 U. S. 79, 89 (2017) ("[I]t is quite mistaken to assume . . . that whatever might appear to further the statute's primary objective must be the law" (internal quotation marks and alterations omitted)). But the FLSA has over two dozen exemptions in § 213(b) alone, including the one at issue here. Those exemptions are as much a part of the FLSA's purpose as the overtime-pay requirement. See *id.*, at 89 ("Legislation is, after all, the art of compromise, the limitations expressed in statutory terms often the price of passage"). We thus have no license to give the exemption anything but a fair reading.

E

Finally, the Ninth Circuit relied on two extraneous sources to support its interpretation: the Department's 1966–1967 Occupational Outlook Handbook and the FLSA's legislative history. We find neither persuasive.

1

The Ninth Circuit first relied on the Department's 1966–1967 Occupational Outlook Handbook. It identified 12 jobs from the Handbook's table of contents that it thought could be found at automobile dealerships. See 845 F. 3d, at 930. The Ninth Circuit then stressed that the exemption aligns with three of those job titles—"[a]utomobile mechanics," "[a]utomobile parts countermen," and "[a]utomobile salesmen"—but not "[a]utomobile service advisors." *Ibid.*

The Ninth Circuit cited nothing, however, suggesting that the exemption was meant to align with the job titles listed in the Handbook. To the contrary, the exemption applies to

"any salesman . . . primarily engaged in selling or servicing automobiles." It is not limited, like the term in the Handbook, to "automobile salesmen." And the ordinary meaning of "salesman" plainly includes service advisors.

2

The Ninth Circuit also relied on legislative history to support its interpretation. See *id.*, at 936–939. Specifically, it noted that the legislative history discusses "automobile salesmen, partsmen, and mechanics" but never discusses service advisors. *Id.*, at 939. Although the Ninth Circuit had previously found that same legislative history "inconclusive," *Encino*, 780 F. 3d, at 1275, on remand it was "firmly persuaded" that the legislative history demonstrated Congress' desire to exclude service advisors, 845 F. 3d, at 939.

The Ninth Circuit was right the first time. As we have explained, the best reading of the statute is that service advisors are exempt. Even for those Members of this Court who consider legislative history, silence in the legislative history, "no matter how 'clanging,'" cannot defeat the better reading of the text and statutory context. *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479, 496, n. 13 (1985). If the text is clear, it needs no repetition in the legislative history; and if the text is ambiguous, silence in the legislative history cannot lend any clarity. See *Avco Corp.* v. *Department of Justice*, 884 F. 2d 621, 625 (CADC 1989). Even if Congress did not foresee all of the applications of the statute, that is no reason not to give the statutory text a fair reading. See *Union Bank* v. *Wolas*, 502 U. S. 151, 158 (1991).

* * *

In sum, we conclude that service advisors are exempt from the overtime-pay requirement of the FLSA because they are "salesm[e]n . . . primarily engaged in . . . servicing automobiles." §213(b)(10)(A). Accordingly, we reverse the

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

It is so ordered.

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

Diverse categories of employees staff automobile dealerships. Of employees so engaged, Congress explicitly exempted from the Fair Labor Standards Act hours requirements only three occupations: salesmen, partsmen, and mechanics. The Court today approves the exemption of a fourth occupation: automobile service advisors. In accord with the judgment of the Court of Appeals for the Ninth Circuit, I would not enlarge the exemption to include service advisors or other occupations outside Congress' enumeration.

Respondents are service advisors at a Mercedes-Benz automobile dealership in the Los Angeles area. They work regular hours, 7 a.m. to 6 p.m., at least five days per week, on the dealership premises. App. 54. Their weekly minimum is 55 hours. Maximum hours, for workers covered by the Fair Labor Standards Act (FLSA or Act), are 40 per week. 29 U. S. C. §207(a)(1). In this action, respondents seek time-and-a-half compensation for hours worked beyond the 40 per week maximum prescribed by the FLSA.

The question presented: Are service advisors exempt from receipt of overtime compensation under 29 U. S. C. §213(b)(10)(A)? That exemption covers "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." Service advisors, such as respondents, neither sell automobiles nor service (*i. e.*, repair or maintain) vehicles. Rather, they "meet and greet [car] owners"; "solicit and sugges[t]" repair services "to remedy the [owner's] complaints"; "solicit and suggest . . . supplemental [vehicle] service[s]"; and provide owners with cost estimates. App. 55. Because service advisors neither sell nor repair automo-

biles, they should remain outside the exemption and within the Act's coverage.

I

In 1961, Congress exempted all automobile-dealership employees from the Act's overtime-pay requirements. See Fair Labor Standards Amendments of 1961, § 9, 75 Stat. 73.[1] Five years later, in 1966, Congress confined the dealership exemption to three categories of employees: automobile salesmen, mechanics, and partsmen. See Fair Labor Standards Amendments of 1966, § 209, 80 Stat. 836. At the time, it was well understood that mechanics perform "preventive maintenance" and "repairs," Dept. of Labor, Occupational Outlook Handbook 477 (1966–1967 ed.) (Handbook), while partsmen requisition parts, "suppl[y] [them] to mechanics," *id.*, at 312, and, at times, have "mechanical responsibilities in repairing parts," Brief for International Association of Machinists and Aerospace Workers, AFL–CIO, as *Amicus Curiae* 30; see Handbook, at 312–313 (partsmen may "measure parts for interchangeability," test parts for "defect[s]," and "repair parts"). Congress did not exempt numerous other categories of dealership employees, among them, automobile painters, upholsterers, bookkeeping workers, cashiers, janitors, purchasing agents, shipping and receiving clerks, and, most relevant here, service advisors. These positions and their duties were well known at the time, as documented in U. S. Government catalogs of American jobs. See Handbook, at XIII, XV, XVI (table of contents); Brief for International Association of Machinists and Aerospace Workers,

[1] The exemption further extended to all employees of establishments selling "trucks" and "farm implements." Fair Labor Standards Amendments of 1961, § 9, 75 Stat. 73. When Congress later narrowed the provision's scope for automobile-dealership employees, it similarly diminished the exemption's application to workers at truck and farm-implement dealerships. See, *e. g.*, Fair Labor Standards Amendments of 1966, § 209, 80 Stat. 836.

AFL–CIO, as *Amicus Curiae* 34 (noting "more than twenty distinct [job] classifications" in the service department alone).

"Where Congress explicitly enumerates certain exceptions . . . , additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *TRW Inc.* v. *Andrews*, 534 U. S. 19, 28 (2001) (internal quotation marks omitted). The Court thus has no warrant to add to the three explicitly exempt categories (salesmen, partsmen, and mechanics) a fourth (service advisors) for which the Legislature did not provide. The reach of today's ruling is uncertain, troublingly so: By expansively reading the exemption to encompass all salesmen, partsmen, and mechanics who are "integral to the servicing process," *ante*, at 86, the Court risks restoring much of what Congress intended the 1966 amendment to terminate, *i. e.*, the blanket exemption of all dealership employees from overtime-pay requirements.

II

Had the § 213(b)(10)(A) exemption covered "any salesman or mechanic primarily engaged in selling or servicing automobiles," there could be no argument that service advisors fit within it. Only "salesmen" primarily engaged in "selling" automobiles and "mechanics" primarily engaged in "servicing" them would fall outside the Act's coverage. Service advisors, defined as "*salesmen* primarily engaged in the *selling of services*," *Encino Motorcars, LLC* v. *Navarro*, 579 U. S. 211, 227 (2016) (THOMAS, J., dissenting) (emphasis added), plainly do not belong in either category. Moreover, even if the exemption were read to reach "salesmen" "primarily engaged in *servicing* automobiles," not just selling them, service advisors would not be exempt. The ordinary meaning of "servicing" is "the action of maintaining or repairing a motor vehicle." *Ante*, at 86 (quoting 15 Oxford English Dictionary 39 (2d ed. 1989)). As described above,

see *supra*, at 91, service advisors neither maintain nor repair automobiles.[2]

Petitioner stakes its case on Congress' addition of the "partsman" job to the exemption. See Reply Brief 6–10. That inclusion, petitioner urges, has a vacuum effect: It draws into the exemption job categories other than the three for which Congress provided, in particular, service advisors. Because partsmen, like service advisors, neither "sell" nor "service" automobiles in the conventional sense, petitioner reasons, Congress must have intended the word "service" to mean something broader than repair and maintenance.

To begin with, petitioner's premise is flawed. Unlike service advisors, partsmen "'get their hands dirty' by 'working as a mechanic's right-hand man or woman.'" *Encino Motorcars*, 579 U. S., at 225, n. 1 (GINSBURG, J., concurring) (quoting Brief for Respondents in No. 15–415, p. 11; alterations omitted); see *supra*, at 92 (describing duties of partsmen). As the Solicitor General put it last time this case was before the Court, a mechanic "might be able to obtain the parts to complete a repair without the real-time assistance of a partsman by his side." Brief for United States as *Amicus Curiae* in No. 15–415, p. 23. But dividing the "key [repair] tasks . . . between two individuals" only "reinforces" "that both the mechanic and the partsman are . . . involved in repairing ('servicing') the vehicle." *Ibid.* Service advisors, in contrast, "*sell* . . . *services* [to customers] for their vehicles," *Encino Motorcars*, 579 U. S., at 214 (emphasis

[2] Service advisors do not maintain or repair motor vehicles even if, as the Court concludes, they are "integral to the servicing process." *Ante*, at 86. The Ninth Circuit provided an apt analogy: "[A] receptionist-scheduler at a dental office fields calls from patients, matching their needs (*e. g.*, a broken tooth or jaw pain) with the appropriate provider, appointment time, and length of anticipated service. That work is integral to a patient's obtaining dental services, but we would not say that the receptionist-scheduler is 'primarily engaged in' cleaning teeth or installing crowns." 845 F. 3d 925, 932 (2017).

added)—services that are later performed by mechanics and partsmen.

Adding partsmen to the exemption, moreover, would be an exceptionally odd way for Congress to have indicated that "servicing" should be given a meaning deviating from its ordinary usage. There is a more straightforward explanation for Congress' inclusion of partsmen alongside salesmen and mechanics: Common features of the three enumerated jobs make them unsuitable for overtime pay.

Both salesmen and mechanics work irregular hours, including nights and weekends, not uncommonly offsite, rendering time worked not easily tracked.[3] As noted in the 1966 Senate floor debate, salesmen "go out at unusual hours, trying to earn commissions." 112 Cong. Rec. 20504 (1966) (remarks of Sen. Bayh). See also *ibid.* (remarks of Sen. Yarborough) ("[T]he salesman . . . [can] sell an Oldsmobile, a Pontiac, or a Buick all day long and all night. He is not under any overtime."). Mechanics' work may involve similar "difficult[ies] [in] keeping regular hours." *Ibid.* For example, mechanics may be required to "answe[r] calls in . . . rural areas," *ibid.*, or to "go out on the field where there is a harvesting of sugarbeets," *id.*, at 20505 (remarks of Sen. Clark).[4] And, like salesmen, mechanics may be "subject to

---

[3] In addition to practical difficulties in calculating hours, a core purpose of overtime may not be served when employees' hours regularly fluctuate. Enacted in the midst of the Great Depression, the FLSA overtime rules encourage employers to hire more individuals who work 40-hour weeks, rather than maintaining a staff of fewer employees who consistently work longer hours. See *Overnight Motor Transp. Co.* v. *Missel*, 316 U. S. 572, 577–578 (1942) (overtime rules apply "financial pressure" on employers to "spread employment"); 7 D. VanDeusen, Labor and Employment Law § 176.02[1] (2018). But if a position's working hours routinely ebb and flow, while averaging 40 each week, then it does not make sense to encourage employers to hire more workers for that position.

[4] Recall that the exemption extends to salesmen, mechanics, and partsmen at dealerships selling farm implements and trucks, not just automobiles. See *supra*, at 92, n. 1.

substantial seasonal variations in business." *Id.*, at 20502 (remarks of Sen. Hruska).

Congress added "partsman" to the exemption because it believed that job, too, entailed irregular hours. See *ibid.* This is "especially true," several Senators emphasized, "in the farm equipment business where farmers, during planting, cultivating and harvesting seasons, may call on their dealers for parts at any time during the day or evening and on weekends." *Ibid.* (remarks of Sen. Bayh). See also *id.*, at 20503 (remarks of Sen. Mansfield). In Senator Bayh's experience, for instance, a mechanic who "could not find [a] necessary part" after hours might "call the partsman, get him out of bed, and get him to come down to the store." *Id.*, at 20504. See also *id.*, at 20503 (remarks of Sen. Hruska) ("Are we going to say to the farmer who needs a part . . . on Sunday: You cannot get a spark plug . . . because the partsman is not exempt, but you can have machinery repaired by a mechanic who is exempt[?]"). Although some Senators opposed adding partsmen to the exemption because, as they understood the job's demands, partsmen did not work irregular hours, *e. g.*, *id.*, at 20505 (remarks of Sen. Clark), the crux of the debate underscores the exemption's rationale.

That rationale has no application here. Unlike salesmen, partsmen, and mechanics, service advisors "wor[k] ordinary, fixed schedules on-site." Brief for Respondents 47 (citing Handbook, at 316). Respondents, for instance, work *regular* 11-hour shifts, at all times of the year, for a weekly minimum of 55 hours. See App. 54. Service advisors thus do not implicate the concerns underlying the § 213(b)(10)(A) exemption. Indeed, they are precisely the type of workers Congress intended the FLSA to shield "from the evil of overwork," *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U. S. 728, 739 (1981) (internal quotation marks omitted).

I note, furthermore, that limiting the exemption to the three delineated jobs—salesman, partsman, and mechanic—

does not leave the phrase "primarily engaged in selling or servicing," §213(b)(10)(A), without utility. Congress included that language to ensure that only employees who actually perform the tasks commonly associated with the enumerated positions would be covered. Otherwise, for example, a worker who acts as a "salesman" in name only could lose the FLSA's protections merely because of the formal title listed on the employer's payroll records. See *Bowers* v. *Fred Haas Toyota World*, 2017 WL 5127289, *4 (SD Tex., June 21, 2017) ("[An employee's] title alone is not dispositive of whether he meets the . . . exemption."). Thus, by partsmen "primarily engaged in . . . *servicing* automobiles," Congress meant nothing more than partsmen primarily engaged in *the ordinary duties of a partsman*, *i. e.*, requisitioning, supplying, and repairing parts. See *supra*, at 91, 94–95. The inclusion of "partsman" therefore should not result in the removal of service advisors from the Act's protections.

III

Petitioner contends that "affirming the decision below would disrupt decades of settled expectations" while exposing "employers to substantial retroactive liability." Brief for Petitioner 51. "[M]any dealerships," petitioner urges, "have offered compensation packages based primarily on sales commissions," in reliance on court decisions and agency guidance ranking service advisors as exempt. *Id.*, at 51–52. Respondents here, for instance, are compensated on a "pure commission basis." App. 55. Awarding retroactive overtime pay to employees who were "focused on earning commissions," not "working a set number of hours," petitioner argues, would yield an "unjustified windfal[l]." Brief for Petitioner 53.

Petitioner's concerns are doubly overstated. As the Court previously acknowledged, see *Encino Motorcars*, 579 U. S., at 223, the FLSA provides an affirmative defense that explicitly protects regulated parties from retroactive liabil-

ity for actions taken in good-faith reliance on superseded agency guidance. See 29 U. S. C. § 259(a). Given the Department of Labor's longstanding view that service advisors fit within the § 213(b)(10)(A) exemption, see *ante*, at 82, the reliance defense would surely shield employers from retroactive liability were the Court to construe the exemption properly.

Congress, moreover, has spoken directly to the treatment of *commission*-based workers. The FLSA exempts from its overtime directives any employee of a "retail or service establishment" who receives more than half of his or her pay on commission, so long as the employee's "regular rate of pay" is more than 1½ times the minimum wage. § 207(i). Thus, even without the § 213(b)(10)(A) exemption, many service advisors compensated on commission would remain ineligible for overtime remuneration.[5]

In crafting the commission-pay exemption, Congress struck a deliberate balance: It exempted *higher* paid commissioned employees, perhaps in recognition of their potentially irregular hours, see *Mechmet* v. *Four Seasons Hotels, Ltd.*, 825 F. 2d 1173, 1176–1177 (CA7 1987); cf. *supra*, at 95–96, but it maintained protection for *lower* paid employees, to vindicate the Act's "principal . . . purpose" of shielding "workers from substandard wages and oppressive working hours," *Barrentine*, 450 U. S., at 739.[6] By stretching the § 213(b)(10)(A) exemption to encompass even the lowest income service advisors compensated on commission, the Court up-

---

[5] The current FLSA minimum wage, for example, is $7.25 per hour. See 29 U. S. C. § 206(a)(1)(C). The only commission-based service advisors at retail or service establishments who are *not* already exempt under § 207(i)—and who thus remain eligible for overtime—are those earning less than $10.88 per hour. Providing such workers time-and-a-half pay, as Congress directed, would confer, at most, $5.44 per overtime hour.

[6] Congress struck a similar balance in 29 U. S. C. § 207(f), which exempts employees whose duties "necessitate irregular hours of work," but only if they receive specified minimum rates of pay.

sets Congress' careful balance, while stripping away protection for the most vulnerable workers in this occupation.

* * *

This Court once recognized that the "particularity" of FLSA exemptions "preclude[s] their enlargement by implication." *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 617 (1944). Employees outside the Act's "narrow and specific" exemptions, the Court affirmed, "remain within the Act." *Powell* v. *United States Cartridge Co.*, 339 U. S. 497, 517 (1950).[7] The Court today, in adding an exemption of its own creation, veers away from that comprehension of the FLSA's mission. I would instead resist, as the Ninth Circuit did, diminishment of the Act's overtime strictures.

---

[7] This Court has long held that FLSA "exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those [cases] plainly and unmistakably within their terms and spirit." *Arnold* v. *Ben Kanowsky, Inc.*, 361 U. S. 388, 392 (1960). This principle is a well-grounded application of the general rule that an "exception to a general statement of policy is usually read . . . narrowly in order to preserve the primary operation of the provision." *Maracich* v. *Spears*, 570 U. S. 48, 60 (2013) (internal quotation marks omitted). In a single paragraph, the Court "reject[s]" this longstanding principle as applied to the FLSA, *ante*, at 88, without even acknowledging that it unsettles more than half a century of our precedent.

Syllabus

KISELA v. HUGHES

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

No. 17–467. Decided April 2, 2018

Arizona police officer Andrew Kisela and two other officers responded to a 911 call about a woman behaving erratically and hacking a tree with a kitchen knife. When the officers arrived, they spotted a woman, later identified as Sharon Chadwick, standing on the other side of a chain-link fence from them in the driveway of a nearby house. The officers then saw another woman, Amy Hughes, emerge from the house carrying a large knife. Hughes matched the description of the woman who had been seen hacking a tree. Hughes walked toward Chadwick and stopped no more than six feet from her. The officers drew their guns and, at least twice, ordered Hughes to drop the knife. Hughes did not acknowledge the officers' presence or drop the knife. Kisela then fired four shots through the fence striking Hughes. Hughes was transported to a hospital where she was treated for non-life-threatening injuries. Hughes sued Kisela under 42 U. S. C. § 1983, alleging that Kisela had used excessive force in violation of the Fourth Amendment. The District Court granted summary judgment to Kisela, but the Ninth Circuit reversed, holding that the record, viewed in the light most favorable to Hughes, was sufficient to demonstrate that Kisela violated the Fourth Amendment and that the violation was clearly established.

Held: Even assuming a Fourth Amendment violation occurred in this case, Kisela was at least entitled to qualified immunity. "Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *White* v. *Pauly*, 580 U. S. 73, 78–79 (internal quotation marks omitted). Thus, an officer "cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Plumhoff* v. *Rickard*, 572 U. S. 765, 778–779. The Ninth Circuit failed to implement that necessary part of the qualified-immunity standard in a correct way. This is far from an obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment. And the court made additional errors in concluding that its own precedent clearly established that Kisela used excessive force.

Certiorari granted; 862 F. 3d 775, reversed and remanded.

PER CURIAM.

Petitioner Andrew Kisela, a police officer in Tucson, Arizona, shot respondent Amy Hughes. Kisela and two other officers had arrived on the scene after hearing a police radio report that a woman was engaging in erratic behavior with a knife. They had been there but a few minutes, perhaps just a minute. When Kisela fired, Hughes was holding a large kitchen knife, had taken steps toward another woman standing nearby, and had refused to drop the knife after at least two commands to do so. The question is whether at the time of the shooting Kisela's actions violated clearly established law.

The record, viewed in the light most favorable to Hughes, shows the following. In May 2010, somebody in Hughes' neighborhood called 911 to report that a woman was hacking a tree with a kitchen knife. Kisela and another police officer, Alex Garcia, heard about the report over the radio in their patrol car and responded. A few minutes later the person who had called 911 flagged down the officers; gave them a description of the woman with the knife; and told them the woman had been acting erratically. About the same time, a third police officer, Lindsay Kunz, arrived on her bicycle.

Garcia spotted a woman, later identified as Sharon Chadwick, standing next to a car in the driveway of a nearby house. A chain-link fence with a locked gate separated Chadwick from the officers. The officers then saw another woman, Hughes, emerge from the house carrying a large knife at her side. Hughes matched the description of the woman who had been seen hacking a tree. Hughes walked toward Chadwick and stopped no more than six feet from her.

All three officers drew their guns. At least twice they told Hughes to drop the knife. Viewing the record in the light most favorable to Hughes, Chadwick said "take it easy" to both Hughes and the officers. Hughes appeared calm, but

she did not acknowledge the officers' presence or drop the knife. The top bar of the chain-link fence blocked Kisela's line of fire, so he dropped to the ground and shot Hughes four times through the fence. Then the officers jumped the fence, handcuffed Hughes, and called paramedics, who transported her to a hospital. There she was treated for non-life-threatening injuries. Less than a minute had transpired from the moment the officers saw Chadwick to the moment Kisela fired shots.

All three of the officers later said that at the time of the shooting they subjectively believed Hughes to be a threat to Chadwick. After the shooting, the officers discovered that Chadwick and Hughes were roommates, that Hughes had a history of mental illness, and that Hughes had been upset with Chadwick over a $20 debt. In an affidavit produced during discovery, Chadwick said that a few minutes before the shooting her boyfriend had told her Hughes was threatening to kill Chadwick's dog, named Bunny. Chadwick "came home to find" Hughes "somewhat distressed," and Hughes was in the house holding Bunny "in one hand and a kitchen knife in the other." Hughes asked Chadwick if she "wanted her to use the knife on the dog." The officers knew none of this, though. Chadwick went outside to get $20 from her car, which is when the officers first saw her. In her affidavit Chadwick said that she did not feel endangered at any time. *Ibid.* Based on her experience as Hughes' roommate, Chadwick stated that Hughes "occasionally has episodes in which she acts inappropriately," but "she is only seeking attention." Record 108.

Hughes sued Kisela under Rev. Stat. § 1979, 42 U. S. C. § 1983, alleging that Kisela had used excessive force in violation of the Fourth Amendment. The District Court granted summary judgment to Kisela, but the Court of Appeals for the Ninth Circuit reversed. 862 F. 3d 775 (2016).

The Court of Appeals first held that the record, viewed in the light most favorable to Hughes, was sufficient to demon-

strate that Kisela violated the Fourth Amendment. See *id.*, at 782. The court next held that the violation was clearly established because, in its view, the constitutional violation was obvious and because of Circuit precedent that the court perceived to be analogous. *Id.*, at 785. Kisela filed a petition for rehearing en banc. Over the dissent of seven judges, the Court of Appeals denied it. Kisela then filed a petition for certiorari in this Court. That petition is now granted.

In one of the first cases on this general subject, *Tennessee* v. *Garner*, 471 U. S. 1 (1985), the Court addressed the constitutionality of the police using force that can be deadly. There, the Court held that "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Id.*, at 11.

In *Graham* v. *Connor*, 490 U. S. 386, 396 (1989), the Court held that the question whether an officer has used excessive force "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Ibid.* And "[t]he calculus of reasonableness must embody allowance 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.

Here, the Court need not, and does not, decide whether Kisela violated the Fourth Amendment when he used deadly force against Hughes. For even assuming a Fourth Amend-

ment violation occurred—a proposition that is not at all evident—on these facts Kisela was at least entitled to qualified immunity.

"Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *White* v. *Pauly*, 580 U. S. 73, 78–79 (2017) (*per curiam*) (internal quotation marks omitted). "Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct." *Brosseau* v. *Haugen*, 543 U. S. 194, 198 (2004) (*per curiam*).

Although "this Court's case law does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *White*, 580 U. S., at 79 (alteration and internal quotation marks omitted). "In other words, immunity protects all but the plainly incompetent or those who knowingly violate the law." *Ibid.* (internal quotation marks omitted). This Court has "'repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.'" *City and County of San Francisco* v. *Sheehan*, 575 U. S. 600, 613 (2015) (quoting *Ashcroft* v. *al-Kidd*, 563 U. S. 731, 742 (2011)); see also *Brosseau*, *supra*, at 198–199.

"[S]pecificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Mullenix* v. *Luna*, 577 U. S. 7, 12 (2015) (*per curiam*) (alteration and internal quotation marks omitted). Use of excessive force is an area of the law "in which the result depends very much on the facts of each case," and thus police officers are entitled to qualified immunity unless existing precedent "squarely governs" the specific facts at issue. *Id.*, at 13 (internal quota-

tion marks omitted; emphasis deleted). Precedent involving similar facts can help move a case beyond the otherwise "hazy border between excessive and acceptable force" and thereby provide an officer notice that a specific use of force is unlawful. *Id.*, at 18 (internal quotation marks omitted).

"Of course, general statements of the law are not inherently incapable of giving fair and clear warning to officers." *White*, 580 U. S., at 79 (internal quotation marks omitted). But the general rules set forth in "*Garner* and *Graham* do not by themselves create clearly established law outside an 'obvious case.'" *Id.*, at 80. Where constitutional guidelines seem inapplicable or too remote, it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness. An officer "cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Plumhoff* v. *Rickard*, 572 U. S. 765, 778–779 (2014). That is a necessary part of the qualified-immunity standard, and it is a part of the standard that the Court of Appeals here failed to implement in a correct way.

Kisela says he shot Hughes because, although the officers themselves were in no apparent danger, he believed she was a threat to Chadwick. Kisela had mere seconds to assess the potential danger to Chadwick. He was confronted with a woman who had just been seen hacking a tree with a large kitchen knife and whose behavior was erratic enough to cause a concerned bystander to call 911 and then flag down Kisela and Garcia. Kisela was separated from Hughes and Chadwick by a chain-link fence; Hughes had moved to within a few feet of Chadwick; and she failed to acknowledge at least two commands to drop the knife. Those commands were loud enough that Chadwick, who was standing next to Hughes, heard them. This is far from an obvious

case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment.

The Court of Appeals made additional errors in concluding that its own precedent clearly established that Kisela used excessive force. To begin with, "even if 'a controlling circuit precedent could constitute clearly established . . . law in these circumstances,' it does not do so here." *Sheehan*, *supra*, at 614 (citation omitted). In fact, the most analogous Circuit precedent favors Kisela. See *Blanford* v. *Sacramento County*, 406 F. 3d 1110 (CA9 2005). In *Blanford*, the police responded to a report that a man was walking through a residential neighborhood carrying a sword and acting in an erratic manner. *Id.*, at 1112. There, as here, the police shot the man after he refused their commands to drop his weapon (there, as here, the man might not have heard the commands). *Id.*, at 1113. There, as here, the police believed (perhaps mistakenly), that the man posed an immediate threat to others. *Ibid.* There, the Court of Appeals determined that the use of deadly force did not violate the Fourth Amendment. *Id.*, at 1119. Based on that decision, a reasonable officer could have believed the same thing was true in the instant case.

In contrast, not one of the decisions relied on by the Court of Appeals—*Deorle* v. *Rutherford*, 272 F. 3d 1272 (CA9 2001), *Glenn* v. *Washington County*, 673 F. 3d 864 (CA9 2011), and *Harris* v. *Roderick*, 126 F. 3d 1189 (CA9 1997)—supports denying Kisela qualified immunity. As for *Deorle*, this Court has already instructed the Court of Appeals not to read its decision in that case too broadly in deciding whether a new set of facts is governed by clearly established law. *Sheehan*, 575 U. S., at 614–616. *Deorle* involved a police officer who shot an unarmed man in the face, without warning, even though the officer had a clear line of retreat; there were no bystanders nearby; the man had been "physically compliant

and generally followed all the officers' instructions"; and he had been under police observation for roughly 40 minutes. 272 F. 3d, at 1276, 1281–1282. In this case, by contrast, Hughes was armed with a large knife; was within striking distance of Chadwick; ignored the officers' orders to drop the weapon; and the situation unfolded in less than a minute. "Whatever the merits of the decision in *Deorle*, the differences between that case and the case before us leap from the page." *Sheehan*, *supra*, at 614.

Glenn, which the panel described as "[t]he most analogous Ninth Circuit case," 862 F. 3d, at 783, was decided after the shooting at issue here. Thus, *Glenn* "could not have given fair notice to [Kisela]" because a reasonable officer is not required to foresee judicial decisions that do not yet exist in instances where the requirements of the Fourth Amendment are far from obvious. *Brosseau*, 543 U. S., at 200, n. 4. *Glenn* was therefore "of no use in the clearly established inquiry." *Brosseau*, *supra*, at 200, n. 4. Other judges brought this mistaken or misleading citation to the panel's attention while Kisela's petition for rehearing en banc was pending before the Court of Appeals. 862 F. 3d, at 795, n. 2 (Ikuta, J., dissenting from denial of rehearing en banc). The panel then amended its opinion, but nevertheless still attempted to "rely on *Glenn* as illustrative, not as indicative of the clearly established law in 2010." *Id.*, at 784, n. 2 (majority opinion). The panel failed to explain the difference between "illustrative" and "indicative" precedent, and none is apparent.

The amended opinion also asserted, for the first time and without explanation, that the Court of Appeals' decision in *Harris* clearly established that the shooting here was unconstitutional. 862 F. 3d, at 785. The new mention of *Harris* replaced a reference in the panel's first opinion to *Glenn*—the case that postdated the shooting at issue here. Compare 841 F. 3d 1081, 1090 (CA9 2016) ("As indicated by *Glenn* and

Deorle, . . . that right was clearly established"), with 862 F. 3d, at 785 ("As indicated by *Deorle* and *Harris*, . . . that right was clearly established").

The panel's reliance on *Harris* "does not pass the straight-face test." 862 F. 3d, at 797 (opinion of Ikuta, J.). In *Harris*, the Court of Appeals determined that a Federal Bureau of Investigation sniper, who was positioned safely on a hilltop, used excessive force when he shot a man in the back while the man was retreating to a cabin during what has been referred to as the Ruby Ridge standoff. 126 F. 3d, at 1202–1203. Suffice it to say, a reasonable police officer could miss the connection between the situation confronting the sniper at Ruby Ridge and the situation confronting Kisela in Hughes' front yard.

For these reasons, the petition for certiorari is granted; the judgment of the Court of Appeals is reversed; and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

Officer Andrew Kisela shot Amy Hughes while she was speaking with her roommate, Sharon Chadwick, outside of their home. The record, properly construed at this stage, shows that at the time of the shooting: Hughes stood stationary about six feet away from Chadwick, appeared "composed and content," Appellant's Excerpts of Record 109 (Record), and held a kitchen knife down at her side with the blade facing away from Chadwick. Hughes was nowhere near the officers, had committed no illegal act, was suspected of no crime, and did not raise the knife in the direction of Chadwick or anyone else. Faced with these facts, the two other responding officers held their fire, and one testified that he "wanted to continue trying verbal command[s] and see if that would work." *Id.*, at 120. But not Kisela. He thought it

necessary to use deadly force, and so, without giving a warning that he would open fire, he shot Hughes four times, leaving her seriously injured.

If this account of Kisela's conduct sounds unreasonable, that is because it was. And yet, the Court today insulates that conduct from liability under the doctrine of qualified immunity, holding that Kisela violated no "clearly established" law. See *ante,* at 103–105. I disagree. Viewing the facts in the light most favorable to Hughes, as the Court must at summary judgment, a jury could find that Kisela violated Hughes' clearly established Fourth Amendment rights by needlessly resorting to lethal force. In holding otherwise, the Court misapprehends the facts and misapplies the law, effectively treating qualified immunity as an absolute shield. I therefore respectfully dissent.

I

This case arrives at our doorstep on summary judgment, so we must "view the evidence . . . in the light most favorable to" Hughes, the nonmovant, "with respect to the central facts of this case." *Tolan* v. *Cotton*, 572 U. S. 650, 657 (2014) (*per curiam*). The majority purports to honor this well-settled principle, but its efforts fall short. Although the majority sets forth most of the relevant events that transpired, it conspicuously omits several critical facts and draws premature inferences that bear on the qualified-immunity inquiry. Those errors are fatal to its analysis, because properly construing all of the facts in the light most favorable to Hughes, and drawing all inferences in her favor, a jury could find that the following events occurred on the day of Hughes' encounter with the Tucson police.

On May 21, 2010, Kisela and Officer-in-Training Alex Garcia received a "'check welfare'" call about a woman chopping away at a tree with a knife. 862 F. 3d 775, 778 (CA9 2016). They responded to the scene, where they were informed by the person who had placed the call (not Chadwick) that the

woman with the knife had been acting "erratically." *Ibid.* A third officer, Lindsay Kunz, later joined the scene. The officers observed Hughes, who matched the description given to the officers of the woman alleged to have been cutting the tree, emerge from a house with a kitchen knife in her hand. Hughes exited the front door and approached Chadwick, who was standing outside in the driveway.

Hughes then stopped about six feet from Chadwick, holding the kitchen knife down at her side with the blade pointed away from Chadwick. Hughes and Chadwick conversed with one another; Hughes appeared "composed and content," Record 109, and did not look angry. See 862 F. 3d, at 778. At no point during this exchange did Hughes raise the kitchen knife or verbally threaten to harm Chadwick or the officers. Chadwick later averred that, during the incident, she was never in fear of Hughes and "was not the least bit threatened by the fact that [Hughes] had a knife in her hand" and that Hughes "never acted in a threatening manner." Record 110–111. The officers did not observe Hughes commit any crime, nor was Hughes suspected of committing one. See 862 F. 3d, at 780.

Nevertheless, the officers hastily drew their guns and ordered Hughes to drop the knife. The officers gave that order twice, but the commands came "in quick succession." *Id.*, at 778. The evidence in the record suggests that Hughes may not have heard or understood the officers' commands and may not have been aware of the officers' presence at all. Record 109–110, 195, 323–324 (Officer Kunz's testimony that "it seemed as though [Hughes] didn't even know we were there," and "[i]t was like she didn't hear us almost"); *id.*, at 304 (Officer Garcia's testimony that Hughes acted "almost as if we weren't there"). Although the officers were in uniform, they never verbally identified themselves as law enforcement officers.

Kisela did not wait for Hughes to register, much less respond to, the officers' rushed commands. Instead, Kisela

immediately and unilaterally escalated the situation. Without giving any advance warning that he would shoot, and without attempting less dangerous methods to deescalate the situation, he dropped to the ground and shot four times at Hughes (who was stationary) through a chain-link fence. After being shot, Hughes fell to the ground, screaming and bleeding from her wounds. She looked at the officers and asked, "'Why'd you shoot me?'" *Id.*, at 308. Hughes was immediately transported to the hospital, where she required treatment for her injuries. Kisela alone resorted to deadly force in this case. Confronted with the same circumstances as Kisela, neither of his fellow officers took that drastic measure.

II

Police officers are not entitled to qualified immunity if "(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" *District of Columbia* v. *Wesby*, 583 U. S. 48, 62–63 (2018) (quoting *Reichle* v. *Howards*, 566 U. S. 658, 664 (2012)). Faithfully applying that well-settled standard, the Ninth Circuit held that a jury could find that Kisela violated Hughes' clearly established Fourth Amendment rights. That conclusion was correct.

A

I begin with the first step of the qualified-immunity inquiry: whether there was a violation of a constitutional right. Hughes alleges that Kisela violated her Fourth Amendment rights by deploying excessive force against her. In assessing such a claim, courts must ask "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." *Graham* v. *Connor*, 490 U. S. 386, 397 (1989). That inquiry "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers

or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.*, at 396; see also *Tennessee* v. *Garner*, 471 U. S. 1, 11 (1985). All of those factors (and others) support the Ninth Circuit's conclusion that a jury could find that Kisela's use of deadly force was objectively unreasonable. 862 F. 3d, at 779–782. Indeed, the panel's resolution of this question was so convincing that not a single judge on the Ninth Circuit, including the seven who dissented from denial of rehearing en banc, expressly disputed that conclusion. See *id.*, at 791–799 (opinion of Ikuta, J.). Neither does the majority here, which simply assumes without deciding that "a Fourth Amendment violation occurred." *Ante*, at 103–104.

First, Hughes committed no crime and was not suspected of committing a crime. The officers were responding to a "check welfare" call, which reported no criminal activity, and the officers did not observe any illegal activity while at the scene. The mere fact that Hughes held a kitchen knife down at her side with the blade pointed away from Chadwick hardly elevates the situation to one that justifies deadly force.

Second, a jury could reasonably conclude that Hughes presented no immediate or objective threat to Chadwick or the other officers. It is true that Kisela had received a report that a woman matching Hughes' description had been acting erratically. But the police officers themselves never witnessed any erratic conduct. Instead, when viewed in the light most favorable to Hughes, the record evidence of what the police encountered paints a calmer picture. It shows that Hughes was several feet from Chadwick and even farther from the officers, she never made any aggressive or threatening movements, and she appeared "composed and content" during the brief encounter.

Third, Hughes did not resist or evade arrest. Based on this record, there is significant doubt as to whether she was aware of the officers' presence at all, and evidence suggests

that Hughes did not hear the officers' swift commands to drop the knife.

Finally, the record suggests that Kisela could have, but failed to, use less intrusive means before deploying deadly force. 862 F. 3d, at 781. For instance, Hughes submitted expert testimony concluding that Kisela should have used his Taser and that shooting his gun through the fence was dangerous because a bullet could have fragmented against the fence and hit Chadwick or his fellow officers. *Ibid.*; see also *Bryan* v. *MacPherson*, 630 F. 3d 805, 831 (CA9 2010) (noting that "police are required to consider what other tactics if any were available to effect the arrest" and whether there are "clear, reasonable, and less intrusive alternatives" (internal quotation marks and alteration omitted)). Consistent with that assessment, the other two officers on the scene declined to fire at Hughes, and one of them explained that he was inclined to use "some of the lesser means" than shooting, including verbal commands, because he believed there was time "[t]o try to talk [Hughes] down." Record 120–121. That two officers on the scene, presented with the same circumstances as Kisela, did not use deadly force reveals just how unnecessary and unreasonable it was for Kisela to fire four shots at Hughes. See *Plumhoff* v. *Rickard*, 572 U. S. 765, 775 (2014) ("We analyze [the objective reasonableness] question from the perspective of a reasonable officer on the scene" (internal quotation marks omitted)).

Taken together, the foregoing facts would permit a jury to conclude that Kisela acted outside the bounds of the Fourth Amendment by shooting Hughes four times.

B

Rather than defend the reasonableness of Kisela's conduct, the majority sidesteps the inquiry altogether and focuses instead on the "clearly established" prong of the qualified-immunity analysis. *Ante*, at 103–104. To be "'clearly established' . . . [t]he contours of the right must be sufficiently

clear that a reasonable official would understand that what he is doing violates that right." *Anderson* v. *Creighton*, 483 U. S. 635, 640 (1987). That standard is not nearly as onerous as the majority makes it out to be. As even the majority must acknowledge, *ante*, at 104, this Court has long rejected the notion that "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful," *Anderson*, 483 U. S., at 640. "[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope* v. *Pelzer*, 536 U. S. 730, 741 (2002). At its core, then, the "clearly established" inquiry boils down to whether Kisela had "fair notice" that he acted unconstitutionally. See *ibid.*; *Brosseau* v. *Haugen*, 543 U. S. 194, 198 (2004) (*per curiam*) ("[T]he focus" of qualified immunity "is on whether the officer had fair notice that her conduct was unlawful").

The answer to that question is yes. This Court's precedents make clear that a police officer may only deploy deadly force against an individual if the officer "has probable cause to believe that the [person] poses a threat of serious physical harm, either to the officer or to others." *Garner*, 471 U. S., at 11; see also *Graham*, 490 U. S., at 397. It is equally well established that any use of lethal force must be justified by some legitimate governmental interest. See *Scott* v. *Harris*, 550 U. S. 372, 383 (2007); *Mullenix* v. *Luna*, 577 U. S. 7, 20, 21–22 (2015) (SOTOMAYOR, J., dissenting). Consistent with those clearly established principles, and contrary to the majority's conclusion, Ninth Circuit precedent predating these events further confirms that Kisela's conduct was clearly unreasonable. See *Brosseau*, 543 U. S., at 199 ("[A] body of relevant case law" may "'clearly establish'" the violation of a constitutional right); *Ashcroft* v. *al-Kidd*, 563 U. S. 731, 746 (2011) (KENNEDY, J., concurring) ("[Q]ualified immunity is lost when plaintiffs point either to 'cases of controlling authority in their jurisdiction at the time of the incident' or to 'a consensus of cases of persuasive authority such that a

reasonable officer could not have believed that his actions were lawful'" (quoting *Wilson* v. *Layne*, 526 U. S. 603, 617 (1999))). Because Kisela plainly lacked any legitimate interest justifying the use of deadly force against a woman who posed no objective threat of harm to officers or others, had committed no crime, and appeared calm and collected during the police encounter, he was not entitled to qualified immunity.

The Ninth Circuit's opinion in *Deorle* v. *Rutherford*, 272 F. 3d 1272 (2001), proves the point. In that case, the police encountered a man who had reportedly been acting "erratically." *Id.*, at 1276. The man was "verbally abusive," shouted "'kill me'" at the officers, screamed that he would "'kick [the] ass'" of one of the officers, and "brandish[ed] a hatchet at a police officer," ultimately throwing it "into a clump of trees when told to put it down." *Id.*, at 1276–1277. The officers also observed the man carrying an unloaded crossbow in one hand and what appeared to be "a can or a bottle of lighter fluid in the other." *Id.*, at 1277. The man discarded the crossbow when instructed to do so by the police and then steadily walked toward one of the officers. *Ibid.* In response, that officer, without giving a warning, shot the man in the face with beanbag rounds. *Id.*, at 1278. The man suffered serious injuries, including multiple fractures to his cranium and the loss of his left eye. *Ibid.*

The Ninth Circuit denied qualified immunity to the officer, concluding that his use of force was objectively unreasonable under clearly established law. *Id.*, at 1285–1286. The court held, "Every police officer should know that it is objectively unreasonable to shoot . . . an unarmed man who: has committed no serious offense, is mentally or emotionally disturbed, has been given no warning of the imminent use of such a significant degree of force, poses no risk of flight, and presents no objectively reasonable threat to the safety of the officer or other individuals." *Id.*, at 1285.

The same holds true here. Like the man in *Deorle*, Hughes committed no serious crime, had been given no

warning of the imminent use of force, posed no risk of flight, and presented no objectively reasonable threat to the safety of officers or others. In fact, Hughes presented even less of a danger than the man in *Deorle*, for, unlike him, she did not threaten to "kick [their] ass," did not appear agitated, and did not raise her kitchen knife or make any aggressive gestures toward the police or Chadwick. If the police officers acted unreasonably in shooting the agitated, screaming man in *Deorle* with beanbag bullets, *a fortiori* Kisela acted unreasonably in shooting the calm-looking, stationary Hughes with real bullets. In my view, *Deorle* and the precedent it cites place the unlawfulness of Kisela's conduct " 'beyond debate.' " *Wesby*, 583 U. S., at 64.

The majority strains mightily to distinguish *Deorle*, to no avail. It asserts, for instance, that, unlike the man in *Deorle*, Hughes was "armed with a large knife." *Ante*, at 107. But that is not a fair characterization of the record, particularly at this procedural juncture. Hughes was not "armed" with a knife. She was holding "a kitchen knife—an everyday household item which can be used as a weapon but ordinarily is a tool for safe, benign purposes"—down at her side with the blade pointed away from Chadwick. 862 F. 3d, at 788 (Berzon, J., concurring in denial of rehearing en banc). Hughes also spoke calmly with Chadwick during the events at issue, did not raise the knife, and made no other aggressive movements, undermining any suggestion that she was a threat to Chadwick or anyone else. Similarly, the majority asserts that Hughes was "within striking distance" of Chadwick, *ante*, at 107, but that stretches the facts and contravenes this Court's repeated admonition that inferences must be drawn in the exact opposite direction, *i. e.*, in favor of Hughes. See *Tolan*, 572 U. S., at 657. The facts, properly viewed, show that, when she was shot, Hughes had stopped and stood still about six feet away from Chadwick. Whether Hughes could "strik[e]" Chadwick from that particular distance, even though the kitchen knife was held down

at her side, is an inference that should be drawn by the jury, not this Court.

The majority next posits that Hughes, unlike the man in *Deorle*, "ignored the officers' orders to drop the" kitchen knife. *Ante*, at 107. Yet again, the majority here draws inferences in favor of Kisela, instead of Hughes. The available evidence would allow a reasonable jury to find that Hughes did not hear or register the officers' swift commands and that Kisela, like his fellow officers on the scene, should have realized that as well. See *supra*, at 109–111. Accordingly, at least at the summary-judgment stage, the Court is mistaken in distinguishing *Deorle* based on Hughes' ostensible disobedience to the officers' directives.

The majority also implies that *Deorle* is distinguishable because the police in that case observed the man over a 40-minute period, whereas the situation here unfolded in less than a minute. *Ante*, at 106–107. But that fact favors Hughes, not Kisela. The only reason this case unfolded in such an abrupt timeframe is because Kisela, unlike his fellow officer, showed no interest in trying to talk further to Hughes or use a "lesser means" of force. See Record 120–121, 304.

Finally, the majority passingly notes that "this Court has already instructed the Court of Appeals not to read [*Deorle*] too broadly." *Ante*, at 106 (citing *City and County of San Francisco* v. *Sheehan*, 575 U. S. 600, 614–616 (2015)). But the Court in *Sheehan* concluded that *Deorle* was plainly distinguishable because, unlike in *Deorle*, the officers there confronted a woman who "was dangerous, recalcitrant, law breaking, and out of sight." 575 U. S., at 614. As explained above, however, Hughes was none of those things: She did not threaten or endanger the officers or Chadwick, she did not break any laws, and she was visible to the officers on the scene. See *supra*, at 109–111. Thus, there simply is no basis for the Court's assertion that "'the differences between [*Deorle*] and the case before us leap from the page.'" *Ante*, at 107 (quoting *Sheehan*, 575 U. S., at 614).

Deorle, moreover, is not the only case that provided fair notice to Kisela that shooting Hughes under these circumstances was unreasonable. For instance, the Ninth Circuit has held that the use of deadly force against an individual holding a semiautomatic rifle was unconstitutional where the individual "did not point the gun at the officers and apparently was not facing them when they shot him the first time." *Curnow* v. *Ridgecrest Police*, 952 F. 2d 321, 325 (1991). Similarly, in *Harris* v. *Roderick*, 126 F. 3d 1189 (1997), the Ninth Circuit held that the officer unreasonably used deadly force against a man who, although armed, made "no threatening movement" or "aggressive move of any kind." *Id.*, at 1203.* Both *Curnow* and *Harris* establish that, where, as here, an individual with a weapon poses no objective and immediate threat to officers or third parties, law enforcement cannot resort to excessive force. See *Harris*, 126 F. 3d, at 1201 ("Law enforcement officers may not shoot to kill unless, at a minimum, the suspect presents an immediate threat to the officer or others, or is fleeing and his escape will result in a serious threat of injury to persons").

If all that were not enough, decisions from several other Circuits illustrate that the Fourth Amendment clearly forbids the use of deadly force against a person who is merely holding a knife but not threatening anyone with it. See, *e. g.*, *McKinney* v. *DeKalb County*, 997 F. 2d 1440, 1442 (CA11 1993) (affirming denial of summary judgment based on qualified immunity to officer who shot a person holding a butcher knife in one hand and a foot-long stick in the other,

---

*The majority insists that reliance on *Harris* fails the "'straight-face test'" because *Harris* involved a Federal Bureau of Investigation sniper on a hilltop who shot a man while he was retreating to a cabin during a standoff. *Ante*, at 108 (quoting 862 F. 3d, at 797 (opinion of Ikuta, J.)). If anything, though, the context of *Harris* could be viewed as more dangerous than the context here because, unlike Hughes, the suspect in *Harris* had engaged in a firefight with other officers the previous day, during which an officer was shot. See 126 F. 3d, at 1193–1194.

where the person threw the stick and began to rise from his seated position); *Reyes* v. *Bridgwater*, 362 Fed. Appx. 403, 404–405 (CA5 2010) (reversing grant of summary judgment based on qualified immunity to officer who shot a person holding a kitchen knife in his apartment entryway, even though he refused to follow the officer's multiple commands to drop the knife); *Duong* v. *Telford*, 186 Fed. Appx. 214, 215, 217 (CA3 2006) (affirming denial of summary judgment based on qualified immunity to officer who shot a person holding a knife because a reasonable jury could conclude that the plaintiff was sitting down and pointing the knife away from the officer at the time he was shot and had not received any warnings to drop the knife).

Against this wall of case law, the majority points to a single Ninth Circuit decision, *Blanford* v. *Sacramento County*, 406 F. 3d 1110 (2005), as proof that Kisela reasonably could have believed that Hughes posed an immediate danger. But *Blanford* involved far different circumstances. In that case, officers observed a man walking through a neighborhood brandishing a 2½-foot cavalry sword; officers commanded the man to drop the sword, identified themselves as police, and warned "'We'll shoot.'" *Id.*, at 1112–1113. The man responded with "a loud growling or roaring sound," which increased the officers' concern that he posed a risk of harm. *Id.*, at 1113. In an effort to "evade [police] authority," the man, while still wielding the sword, tried to enter a home, thus prompting officers to open fire to protect anyone who might be inside. *Id.*, at 1113, 1118. The Ninth Circuit concluded that use of deadly force was reasonable in those circumstances. See *id.*, at 1119.

This case differs significantly from *Blanford* in several key respects. Unlike the man in *Blanford*, Hughes held a kitchen knife down by her side, as compared to a 2½-foot sword; she appeared calm and collected, and did not make threatening noises or gestures toward the officers on the scene; she stood still in front of her own home, and was not

wandering about the neighborhood, evading law enforcement, or attempting to enter another house. Moreover, unlike the officers in *Blanford*, Kisela never verbally identified himself as an officer and never warned Hughes that he was going to shoot before he did so. Given these significant differences, no reasonable officer would believe that *Blanford* justified Kisela's conduct. The majority's conclusion to the contrary is fanciful.

* * *

In sum, precedent existing at the time of the shooting clearly established the unconstitutionality of Kisela's conduct. The majority's decision, no matter how much it says otherwise, ultimately rests on a faulty premise: that those cases are not identical to this one. But that is not the law, for our cases have never required a factually identical case to satisfy the "clearly established" standard. *Hope*, 536 U. S., at 739. It is enough that governing law places "the constitutionality of the officer's conduct beyond debate." *Wesby*, 583 U. S., at 63 (internal quotation marks omitted). Because, taking the facts in the light most favorable to Hughes, it is "beyond debate" that Kisela's use of deadly force was objectively unreasonable, he was not entitled to summary judgment on the basis of qualified immunity.

III

For the foregoing reasons, it is clear to me that the Court of Appeals got it right. But even if that result were not so clear, I cannot agree with the majority's apparent view that the decision below was so manifestly incorrect as to warrant "the extraordinary remedy of a summary reversal." *Major League Baseball Players Assn.* v. *Garvey*, 532 U. S. 504, 512–513 (2001) (Stevens, J., dissenting). "A summary reversal is a rare disposition, usually reserved by this Court for situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Schweiker* v. *Hansen*, 450 U. S. 785, 791 (1981) (Marshall, J.,

dissenting); *Office of Personnel Management* v. *Richmond*, 496 U. S. 414, 422 (1990) ("Summary reversals of courts of appeals are unusual under any circumstances"). This is not such a case. The relevant facts are hotly disputed, and the qualified-immunity question here is, at the very best, a close call. Rather than letting this case go to a jury, the Court decides to intervene prematurely, purporting to correct an error that is not at all clear.

This unwarranted summary reversal is symptomatic of "a disturbing trend regarding the use of this Court's resources" in qualified-immunity cases. *Salazar-Limon* v. *Houston*, 581 U. S. 946, 954 (2017) (SOTOMAYOR, J., dissenting from denial of certiorari). As I have previously noted, this Court routinely displays an unflinching willingness "to summarily reverse courts for wrongly denying officers the protection of qualified immunity" but "rarely intervene[s] where courts wrongly afford officers the benefit of qualified immunity in these same cases." *Ibid.*; see also Baude, Is Qualified Immunity Unlawful? 106 Cal. L. Rev. 45, 82 (2018) ("[N]early all of the Supreme Court's qualified immunity cases come out the same way—by finding immunity for the officials"); Reinhardt, The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences, 113 Mich. L. Rev. 1219, 1244–1250 (2015). Such a one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment.

The majority today exacerbates that troubling asymmetry. Its decision is not just wrong on the law; it also sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished. Because there is nothing right or just under the law about this, I respectfully dissent.

Syllabus

WILSON *v.* SELLERS, WARDEN

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

No. 16–6855. Argued October 30, 2017—Decided April 17, 2018

Petitioner Marion Wilson was convicted of murder and sentenced to death. He sought habeas relief in Georgia Superior Court, claiming that his counsel's ineffectiveness during sentencing violated the Sixth Amendment. The court denied the petition, in relevant part, because it concluded that counsel's performance was not deficient and had not prejudiced Wilson. The Georgia Supreme Court summarily denied his application for a certificate of probable cause to appeal. Wilson subsequently filed a federal habeas petition, raising the same ineffective-assistance claim. The District Court assumed that his counsel was deficient but deferred to the state habeas court's conclusion that any deficiencies did not prejudice Wilson. The Eleventh Circuit affirmed. First, however, the panel concluded that the District Court was wrong to "look though" the State Supreme Court's unexplained decision and assume that it rested on the grounds given in the state habeas court's opinion, rather than ask what arguments "could have supported" the State Supreme Court's summary decision. The en banc court agreed with the panel's methodology.

Held: A federal habeas court reviewing an unexplained state-court decision on the merits should "look through" that decision to the last related state-court decision that provides a relevant rationale and presume that the unexplained decision adopted the same reasoning. The State may rebut the presumption by showing that the unexplained decision most likely relied on different grounds than the reasoned decision below. Pp. 128–134.

(a) In *Ylst* v. *Nunnemaker*, 501 U. S. 797, the Court held that where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim are presumed to rest upon the same ground. In *Ylst*, where the last reasoned opinion on the claim explicitly imposed a procedural default, the Court presumed that a later decision rejecting the claim did not silently disregard that bar and consider the merits.

Since *Ylst*, every Circuit to have considered the matter, but for the Eleventh Circuit, has applied a "look through" presumption even where the state courts did not apply a procedural bar to review, and most Circuits applied the presumption prior to *Ylst*. The presumption is

often realistic, for state higher courts often issue summary decisions when they have examined the lower court's reasoning and found nothing significant with which they disagree. The presumption also is often more efficiently applied than a contrary approach that would require a federal court to imagine what might have been the state court's supportive reasoning.

The State argues that *Harrington* v. *Richter*, 562 U. S. 86, controls here and that *Ylst* should apply, at most, where the federal habeas court is trying to determine whether a state-court decision without opinion rested on a state procedural ground or whether the state court reached the merits of a federal issue. *Richter*, however, did not directly concern the issue in this case—whether to "look through" the silent state higher court opinion to the lower court's reasoned opinion in order to determine the reasons for the higher court's decision. In *Richter*, there was no lower court opinion to look to. And *Richter* does not say that *Ylst*'s reasoning does not apply in the context of an unexplained decision on the merits. Indeed, this Court has "looked though" to lower court decisions in cases involving the merits. See, *e. g.*, *Premo* v. *Moore*, 562 U. S. 115, 123–133. Pp. 128–132.

(b) The State's further arguments are unconvincing. It points out that the "look though" presumption may not accurately identify the grounds for a higher court's decision. But the "look through" presumption is not an absolute rule. Additional evidence that might not be sufficient to rebut the presumption in a case like *Ylst*, where the lower court rested on a state-law procedural ground, would allow a federal court to conclude that counsel has rebutted the presumption in a case decided on the merits. For instance, a federal court may conclude that the presumption is rebutted where counsel identifies convincing alternative arguments for affirmance that were made to the State's highest court, or equivalent evidence such as an alternative ground that is obvious in the state-court record. The State also argues that this Court does not necessarily presume that a federal court of appeals' silent opinion adopts the reasoning of the court below, but that is a different context. Were there to be a "look through" approach as a general matter in that context, judges and lawyers might read those decisions as creating, through silence, binding circuit precedent. Here, a federal court "looks through" the silent decision for a specific and narrow purpose, to identify the grounds for the higher court's decision as the Antiterrorism and Effective Death Penalty Act requires. Nor does the "look through" approach show disrespect for the States; rather, it seeks to replicate the grounds for the higher state court's decision. Finally, the "look through" approach is unlikely to lead state courts to write full opinions

where they would have preferred to decide summarily, at least not to any significant degree. Pp. 132–134.

834 F. 3d 1227, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. GORSUCH, J., filed a dissenting opinion, in which THOMAS and ALITO, JJ., joined, *post*, p. 134.

Mark E. Olive argued the cause for petitioner. With him on the briefs were *Brian S. Kammer*, *Marcia A. Widder*, *John H. Blume*, *Autumn N. Nero*, and *David J. Harth*.

Sarah Hawkins Warren argued the cause for respondent. With her on the brief were *Christopher M. Carr*, Attorney General of Georgia, *Andrew A. Pinson*, Deputy Solicitor General, *Beth A. Burton*, Deputy Attorney General, and *Sabrina D. Graham*, Senior Assistant Attorney General.*

JUSTICE BREYER delivered the opinion of the Court.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) requires a prisoner who challenges (in a federal habeas court) a matter "adjudicated on the merits in

---

**Timothy P. O'Toole* filed a brief for Retired State Supreme Court Justices as *amici curiae* urging reversal.

A brief of *amici curiae* urging affirmance was filed for the State of Arkansas et al. by *Leslie Rutledge*, Attorney General of Arkansas, *Lee Rudofsky*, Solicitor General, *Brooke Gasaway*, Assistant Attorney General, and *Nicholas J. Bronni*, Deputy Solicitor General, and by the Attorneys General for their respective States as follows: *Steve Marshall* of Alabama, *Mark Brnovich* of Arizona, *Pamela Jo Bondi* of Florida, *Lawrence G. Wasden* of Idaho, *Curtis T. Hill, Jr.*, of Indiana, *Thomas J. Miller* of Iowa, *Derek Schmidt* of Kansas, *Jeff Landry* of Louisiana, *Bill Schuette* of Michigan, *Joshua D. Hawley* of Missouri, *Timothy C. Fox* of Montana, *Douglas J. Peterson* of Nebraska, *Adam Paul Laxalt* of Nevada, *Hector H. Balderas* of New Mexico, *Michael DeWine* of Ohio, *Mike Hunter* of Oklahoma, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Herbert H. Slatery III* of Tennessee, *Ken Paxton* of Texas, *Sean D. Reyas* of Utah, *Patrick Morrisey* of West Virginia, *Brad D. Schimel* of Wisconsin, and *Peter K. Michael* of Wyoming.

State court" to show that the relevant state-court "decision" (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U. S. C. § 2254(d). Deciding whether a state court's decision "involved" an unreasonable application of federal law or "was based on" an unreasonable determination of fact requires the federal habeas court to "train its attention on the particular reasons—both legal and factual—why state courts rejected a state prisoner's federal claims," *Hittson* v. *Chatman*, 576 U. S. 1028 (2015) (GINSBURG, J., concurring in denial of certiorari), and to give appropriate deference to that decision, *Harrington* v. *Richter*, 562 U. S. 86, 101–102 (2011).

This is a straightforward inquiry when the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion. In that case, a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable. We have affirmed this approach time and again. See, *e. g.*, *Porter* v. *McCollum*, 558 U. S. 30, 39–44 (2009) (*per curiam*); *Rompilla* v. *Beard*, 545 U. S. 374, 388–392 (2005); *Wiggins* v. *Smith*, 539 U. S. 510, 523–538 (2003).

The issue before us, however, is more difficult. It concerns how a federal habeas court is to find the state court's reasons when the relevant state-court decision on the merits, say, a state supreme court decision, does not come accompanied with those reasons. For instance, the decision may consist of a one-word order, such as "affirmed" or "denied." What then is the federal habeas court to do? We hold that the federal court should "look through" the unexplained decision to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning. But the State may rebut the presumption by showing that the unexplained affirmance relied or most likely did rely on different grounds

than the lower state court's decision, such as alternative grounds for affirmance that were briefed or argued to the state supreme court or obvious in the record it reviewed.

I

In 1997 a Georgia jury convicted petitioner, Marion Wilson, of murder and related crimes. After a sentencing hearing, the jury sentenced Wilson to death. In 1999 the Georgia Supreme Court affirmed Wilson's conviction and sentence, *Wilson* v. *State*, 271 Ga. 811, 525 S. E. 2d 339 (1999), and this Court denied his petition for certiorari, *Wilson* v. *Georgia*, 531 U. S. 838 (2000).

Wilson then filed a petition for habeas corpus in a state court, the Superior Court for Butts County. Among other things, he claimed that his counsel was "ineffective" during his sentencing, in violation of the Sixth Amendment. See *Strickland* v. *Washington*, 466 U. S. 668, 687 (1984) (setting forth "two components" of an ineffective-assistance-of-counsel claim: "that counsel's performance was deficient" and "that the deficient performance prejudiced the defense"). Wilson identified new evidence that he argued trial counsel should have introduced at sentencing, namely, testimony from various witnesses about Wilson's childhood and the impairment of the frontal lobe of Wilson's brain.

After a hearing, the state habeas court denied the petition in relevant part because it thought Wilson's evidence did not show that counsel was "deficient," and, in any event, counsel's failure to find and present the new evidence that Wilson offered had not prejudiced Wilson. *Wilson* v. *Terry*, No. 2001–v–38 (Super. Ct. Butts Cty., Ga., Dec. 1, 2008), App. 60–61. In the court's view, that was because the new evidence was "inadmissible on evidentiary grounds," was "cumulative of other testimony," or "otherwise would not have, in reasonable probability, changed the outcome of the trial." *Id.*, at 61. Wilson applied to the Georgia Supreme Court for a certificate of probable cause to appeal the state habeas

court's decision. But the Georgia Supreme Court denied the application without any explanatory opinion. *Wilson* v. *Terry*, No. 2001–v–38 (May 3, 2010), App. 87, cert. denied, 562 U. S. 1093 (2010).

Wilson subsequently filed a petition for habeas corpus in the United States District Court for the Middle District of Georgia. He made what was essentially the same "ineffective assistance" claim. After a hearing, the District Court denied Wilson's petition. *Wilson* v. *Humphrey*, No. 5:10–cv–489 (Dec. 19, 2013), App. 88–89. The court assumed that Wilson's counsel had indeed been "deficient" in failing adequately to investigate Wilson's background and physical condition for mitigation evidence and to present what he likely would have found at the sentencing hearing. *Id.*, at 144. But, the court nonetheless deferred to the state habeas court's conclusion that these deficiencies did not "prejudice" Wilson, primarily because the testimony of many witnesses was "cumulative," and because the evidence of physical impairments did not include any physical examination or other support that would have shown the state-court determination was "unreasonable." *Id.*, at 187; see *Richter*, 562 U. S., at 111–112.

Wilson appealed to the Court of Appeals for the Eleventh Circuit. *Wilson* v. *Warden*, 774 F. 3d 671 (2014). The panel first held that the District Court had used the wrong method for determining the reasoning of the relevant state court, namely, that of the Georgia Supreme Court (the final and highest state court to decide the merits of Wilson's claims). *Id.*, at 678. That state-court decision, the panel conceded, was made without an opinion. But, the federal court was wrong to "look through" that decision and assume that it rested on the grounds given in the lower court's decision. Instead of "looking through" the decision to the state habeas court's opinion, the federal court should have asked what arguments "could have supported" the Georgia Supreme Court's refusal to grant permission to appeal. The panel

proceeded to identify a number of bases that it believed reasonably could have supported the decision. *Id.*, at 678–681.

The Eleventh Circuit then granted Wilson rehearing en banc so that it could consider the matter of methodology. *Wilson* v. *Warden*, 834 F. 3d 1227 (2016). Ultimately six judges (a majority) agreed with the panel and held that its "could have supported" approach was correct. *Id.*, at 1235. Five dissenting judges believed that the District Court should have used the methodology it did use, namely, the "look through" approach. *Id.*, at 1242–1247, 1247–1269. Wilson then sought certiorari here. Because the Eleventh Circuit's opinion creates a split among the Circuits, we granted the petition. Compare *id.*, at 1235 (applying "could have supported" approach), with *Grueninger* v. *Director, Va. Dept. of Corrections*, 813 F. 3d 517, 525–526 (CA4 2016) (applying "look through" presumption post-*Richter*), and *Cannedy* v. *Adams*, 706 F. 3d 1148, 1156–1159 (CA9 2013) (same); see also *Clements* v. *Clarke*, 592 F. 3d 45, 52 (CA1 2010) (applying "look through" presumption pre-*Richter*); *Bond* v. *Beard*, 539 F. 3d 256, 289–290 (CA3 2008) (same); *Mark* v. *Ault*, 498 F. 3d 775, 782–783 (CA8 2007) (same); *Joseph* v. *Coyle*, 469 F. 3d 441, 450 (CA6 2006) (same).

II

We conclude that federal habeas law employs a "look through" presumption. That conclusion has parallels in this Court's precedent. In *Ylst* v. *Nunnemaker*, 501 U. S. 797 (1991), a defendant, convicted in a California state court of murder, appealed his conviction to the state appeals court where he raised a constitutional claim based on *Miranda* v. *Arizona*, 384 U. S. 436 (1966). 501 U. S., at 799–800. The appeals court rejected that claim, writing that " 'an objection based upon a *Miranda* violation cannot be raised for the first time on appeal.' " *Id.*, at 799. The defendant then similarly challenged his conviction in the California Supreme Court and on collateral review in several state courts (including

once again the California Supreme Court). In each of these latter instances the state court denied the defendant relief (or review). In each instance the court did so without an opinion or other explanation. *Id.*, at 799–800.

Subsequently, the defendant asked a federal habeas court to review his constitutional claim. *Id.*, at 800. The higher state courts had given no reason for their decision. And this Court ultimately had to decide how the federal court was to find the state court's reasoning in those circumstances. Should it have "looked through" the unreasoned decisions to the state procedural ground articulated in the appeals court or should it have used a different method?

In answering that question Justice Scalia wrote the following for the Court:

> "The problem we face arises, of course, because many formulary orders are not meant to convey *anything* as to the reason for the decision. Attributing a reason is therefore both difficult and artificial. We think that the attribution necessary for federal habeas purposes can be facilitated, and sound results more often assured, by applying the following presumption: Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground. If an earlier opinion 'fairly appear[s] to rest primarily upon federal law,' we will presume that no procedural default has been invoked by a subsequent unexplained order that leaves the judgment or its consequences in place. Similarly where, as here, the last reasoned opinion on the claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits." *Id.*, at 803 (citation omitted).

Since *Ylst*, every Circuit to have considered the matter has applied this presumption, often called the "look through"

presumption, but for the Eleventh Circuit—even where the state courts did not apply a procedural bar to review. See *supra*, at 128. And most Federal Circuits applied it prior to *Ylst*. See *Ylst*, *supra*, at 803 (citing *Prihoda* v. *McCaughtry*, 910 F. 2d 1379, 1383 (CA7 1990); *Harmon* v. *Barton*, 894 F. 2d 1268, 1272 (CA11 1990); *Evans* v. *Thompson*, 881 F. 2d 117, 123, n. 2 (CA4 1989); *Ellis* v. *Lynaugh*, 873 F. 2d 830, 838 (CA5 1989)).

That is not surprising in light of the fact that the "look through" presumption is often realistic, for state higher courts often (but certainly not always, see *Redmon* v. *Johnson*, 302 Ga. 763, 809 S. E. 2d 468 (2018)) write "denied" or "affirmed" or "dismissed" when they have examined the lower court's reasoning and found nothing significant with which they disagree.

Moreover, a "look through" presumption is often (but not always) more efficiently applied than a contrary approach—an approach, for example, that would require a federal habeas court to imagine what might have been the state court's supportive reasoning. The latter task may prove particularly difficult where the issue involves state law, such as state procedural rules that may constrain the scope of a reviewing court's summary decision, a matter in which a federal judge often lacks comparative expertise. See *Ylst*, *supra*, at 805.

The State points to a later case, *Harrington* v. *Richter*, 562 U. S. 86, which, it says, controls here instead of *Ylst*. In its view, *Ylst* should apply, at most, to cases in which the federal habeas court is trying to determine whether a state-court decision without opinion rested on a state procedural ground (for example, a procedural default) or whether the state court has reached the merits of a federal issue. In support, it notes that *Richter* held that the state-court decisions to which AEDPA refers include summary dispositions, *i. e.*, decisions without opinion. *Richter* added that "determining whether a state court's decision resulted from an un-

reasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning." 562 U. S., at 98.

Richter then said that, where "a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Ibid.* And the Court concluded that, when "a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Id.*, at 99.

In our view, however, *Richter* does not control here. For one thing, *Richter* did not directly concern the issue before us—whether to "look through" the silent state higher court opinion to the reasoned opinion of a lower court in order to determine the reasons for the higher court's decision. Indeed, it could not have considered that matter, for in *Richter*, there was no lower court opinion to look to. That is because the convicted defendant sought to raise his federal constitutional claim for the first time in the California Supreme Court (via a direct petition for habeas corpus, as California law permits). *Id.*, at 96.

For another thing, *Richter* does not say the reasoning of *Ylst* does not apply in the context of an unexplained decision on the merits. To the contrary, the Court noted that it was setting forth a presumption, which "may be overcome when there is reason to think some other explanation for the state court's decision is more likely." *Richter*, *supra*, at 99–100. And it referred in support to *Ylst*, 501 U. S., at 803.

Further, we have "looked through" to lower court decisions in cases involving the merits. See, *e. g.*, *Premo* v. *Moore*, 562 U. S. 115, 123–133 (2011); *Sears* v. *Upton*, 561 U. S. 945, 951–956 (2010) (*per curiam*). Indeed, we decided one of those cases, *Premo*, on the same day we decided *Richter*. And in our opinion in *Richter* we referred to *Premo*.

562 U. S., at 91. Had we intended *Richter*'s "could have supported" framework to apply even where there is a reasoned decision by a lower state court, our opinion in *Premo* would have looked very different. We did not even cite the reviewing state court's summary affirmance. Instead, we focused exclusively on the actual reasons given by the lower state court, and we deferred to those reasons under AEDPA. 562 U. S., at 132 ("The state postconviction court's decision involved no unreasonable application of Supreme Court precedent").

III

The State's further arguments do not convince us. The State points out that there could be many cases in which a "look through" presumption does not accurately identify the grounds for the higher court's decision. And we agree. We also agree that it is more likely that a state supreme court's single word "affirm" rests upon alternative grounds where the lower state court decision is unreasonable than, *e. g.*, where the lower court rested on a state-law procedural ground, as in *Ylst*. But that is why we have set forth a presumption and not an absolute rule. And the unreasonableness of the lower court's decision itself provides some evidence that makes it less likely the state supreme court adopted the same reasoning. Thus, additional evidence that might not be sufficient to rebut the presumption in a case like *Ylst* would allow a federal court to conclude that counsel has rebutted the presumption in a case like this one. For instance, a federal habeas court may conclude that counsel has rebutted the presumption on the basis of convincing alternative arguments for affirmance made to the State's highest court or equivalent evidence presented in its briefing to the federal court similarly establishing that the State's highest court relied on a different ground than the lower state court, such as the existence of a valid ground for affirmance that is obvious from the state-court record. The dissent argues that the Georgia Supreme Court's recent decision in

Redmon v. *Johnson* rebuts the presumption in Georgia because that court indicated its summary decisions should not be read to adopt the lower court's reasoning. *Post*, at 140–141, 143–144 (opinion of GORSUCH, J.). This misses the point. A presumption that can be rebutted by evidence of, for instance, an alternative ground that was argued or that is clear in the record was the likely basis for the decision is in accord with full and proper respect for state courts, like those in Georgia, which have well-established systems and procedures in place in order to ensure proper consideration to the arguments and contention in the many cases they must process to determine whether relief should be granted when a criminal conviction or its ensuing sentence is challenged.

The State also points out that we do not necessarily presume that a silent opinion of a federal court of appeals adopts the reasoning of the court below. The dissent similarly invokes these "traditional rules of appellate practice." See *post*, at 138–140, 143. But neither the State nor the dissent provides examples of similar context. Were we to adopt a "look through" approach in respect to silent federal appeals court decisions as a general matter in other contexts, we would risk judges and lawyers reading those decisions as creating, through silence, a precedent that could be read as binding throughout the circuit—just what a silent decision may be thought not to do. Here, however, we "look through" the silent decision for a specific and narrow purpose—to identify the grounds for the higher court's decision, as AEDPA directs us to do. See *supra*, at 124–126. We see no reason why the federal court's interpretation of the state court's silence should be taken as binding precedent outside this context, for example, as a statewide binding interpretation of state law.

Further, the State argues that the "look through" approach shows disrespect for the States. See Brief for Respondent 39 ("Wilson's approach to summary decisions reflects an utter lack of faith in the ability of the highest

state courts to adjudicate constitutional rights"). We do not believe this is so. Rather the presumption seeks to replicate the grounds for the higher state court's decision. Where there are convincing grounds to believe the silent court had a different basis for its decision than the analysis followed by the previous court, the federal habeas court is free, as we have said, to find to the contrary. In our view, this approach is more likely to respect what the state court actually did, and easier to apply in practice, than to ask the federal court to substitute for silence the federal court's thought as to more supportive reasoning.

Finally, the State argues that the "look through" approach will lead state courts to believe they must write full opinions where, given the workload, they would have preferred to have decided summarily. Though the matter is empirical, given the narrowness of the context, we do not believe that they will feel compelled to do so—at least not to any significant degree. The State offers no such evidence in the many Circuits that have applied *Ylst* outside the procedural context. See *supra*, at 128.

For these reasons, we reverse the Eleventh Circuit's judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GORSUCH, with whom JUSTICE THOMAS and JUSTICE ALITO join, dissenting.

After a state supreme court issues a summary order sustaining a criminal conviction, should a federal habeas court reviewing that decision presume it rests only on the reasons found in a lower state court opinion? The answer is no. The statute governing federal habeas review permits no such "look through" presumption. Nor do traditional principles of appellate review. In fact, we demand the *opposite* presumption for our work—telling readers that we independently review each case and that our summary affirmances

may be read only as signaling agreement with a lower court's judgment and not necessarily its reasons. Because I can discern no good reason to treat the work of our state court colleagues with less respect than we demand for our own, I would reject petitioner's presumption and must respectfully dissent.

Even so, some good news can be found here. While the Court agrees to adopt a "look through" presumption, it does so only after making major modifications to petitioner's proposal. The Court tells us that the presumption should count for little in cases "where the lower state court decision is unreasonable" because it is not "likely" a state supreme court would adopt unreasonable reasoning. *Ante*, at 132. In cases like that too, the Court explains, federal courts remain free to sustain state court convictions whenever reasonable "ground[s] for affirmance [are] obvious from the state-court record" or appear in the parties' submissions in state court or the federal habeas proceeding. *Ibid.* Exactly right, and exactly what the law has always demanded. So while the Court takes us on a journey through novel presumptions and rebuttals, it happily returns us in the end very nearly to the place where we began and belonged all along.

* * *

To see the problem with petitioner's presumption, start with the statute. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) governs federal review of state criminal convictions. It says a federal court may not grant habeas relief overturning a state court conviction "with respect to any claim that was adjudicated on the merits in State court proceedings" unless (among other things) the petitioner can show that the state court proceedings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U. S. C. § 2254(d)(1). As the text and our precedent make clear, a federal habeas court must focus its review on the

final state court decision on the merits, not any preceding decision by an inferior state court. See *Greene* v. *Fisher*, 565 U. S. 34, 40 (2011). Nor does it matter whether the final state court decision comes with a full opinion or in a summary order: the same deference is due all final state court decisions. *Harrington* v. *Richter*, 562 U. S. 86, 98 (2011); *Cullen* v. *Pinholster*, 563 U. S. 170, 187 (2011).

The upshot of these directions is clear. Even when the final state court decision "is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing *there was no reasonable basis* for the state court to deny relief." *Richter*, 562 U. S., at 98 (emphasis added). And before a federal court can disregard a final summary state court decision, it "must determine what arguments or theories . . . *could have supporte[d]* the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Id.*, at 102 (emphasis added). Far from suggesting federal courts should presume a state supreme court summary order rests on views expressed in a lower court's opinion, then, AEDPA and our precedents require more nearly the *opposite* presumption: federal courts must presume the order rests on any reasonable basis the law and facts allow.

If this standard seems hard for a habeas petitioner to overcome, "that is because it was meant to be." *Ibid.* In AEDPA, Congress rejected the notion that federal habeas review should be "a substitute for ordinary error correction." *Id.*, at 102–103. Instead, AEDPA "reflects the view that habeas corpus is a 'guard against *extreme malfunctions* in the state criminal justice systems.'" *Id.*, at 102 (emphasis added). "The reasons for this approach are familiar. 'Federal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.' It 'disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offend-

ers, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.'" *Id.*, at 103 (citations omitted).

Petitioner and the Court today labor to distinguish these authorities, but I don't see how they might succeed. They point to the fact that in *Richter* no state court had issued a reasoned order, while here a lower state court did. See Brief for Petitioner 28–30; *ante*, at 131. But on what account of AEDPA or *Richter* does that factual distinction make a legal difference? Both the statute and our precedent explain that federal habeas review looks to the final state court decision, not any decision preceding it. Both instruct that to dislodge the final state court decision a petitioner must prove it involved an unreasonable application of federal law. And to carry that burden in the face of a final state court summary decision, *Richter* teaches that the petitioner must show no lawful basis could have reasonably supported it. To observe that some final state court summary decisions are preceded by lower court reasoned opinions bears no more relevance to the AEDPA analysis than to say that some final state court summary decisions are issued on Mondays.[1]

---

[1] Petitioner and the Court separately suggest that *Premo* v. *Moore*, 562 U. S. 115 (2011), supports their position because the Court there did not follow *Richter*'s approach. See Brief for Petitioner 40; *ante*, at 131–132. But the following sentences from *Moore* (with emphasis added) are clear proof it did: "'[t]he question is whether there is *any reasonable argument* that counsel satisfied *Strickland*'s deferential standard,'" 562 U. S., at 123 (quoting *Richter*); "[t]o overcome the limitation imposed by §2254(d), the Court of Appeals had to conclude that both findings [*i. e.*, no deficient performance and no prejudice] *would have* involved an unreasonable application of clearly established law," *ibid.* (citing *Richter*); "[t]he state court here *reasonably could have* determined that [no prejudice existed]," *id.*, at 129. *Moore* simply found that a reasonable basis—provided by a state postconviction court—could (and did) support the denial of habeas relief. *Id.*, at 123. It did not rely on an unreasonable basis provided by a lower court to grant habeas relief, as petitioner seeks to have us do. *Moore* thus accords with AEDPA and our precedents, while petitioner's presumption does not.

Unable to distinguish *Richter*, petitioner seeks to confine it by caricature. Because that case requires a federal court to "imagine" its own arguments for denying habeas relief and engage in "decision-making-by-hypothetical," he argues it should be limited to its facts. Brief for Petitioner 28–30, 33; Reply Brief 9. But the Court today does not adopt petitioner's characterization, and for good reason: *Richter* requires no such thing. In our adversarial system a federal court generally isn't *required* to imagine or hypothesize arguments that neither the parties before it nor any lower court has presented. To determine if a reasonable basis "could have supported" a summary denial of habeas relief under *Richter*, a federal court must look to the state lower court opinion (if there is one), any argument presented by the parties in the state proceedings, and any argument presented in the federal habeas proceeding. Of course, a federal court sometimes may consider on its own motion alternative bases for denying habeas relief apparent in the law and the record, but it does not generally bear an *obligation* to do so. See *Wood* v. *Milyard*, 566 U. S. 463, 471–473 (2012) (discussing *Day* v. *McDonough*, 547 U. S. 198 (2006), and *Granberry* v. *Greer*, 481 U. S. 129 (1987)).

Nor is that the end of the problems with petitioner's "look through" presumption. It also defies traditional rules of appellate practice that informed Congress's work when it adopted AEDPA and that should inform our work today. *McQuiggin* v. *Perkins*, 569 U. S. 383, 398, n. 3 (2013). Appellate courts usually have an independent duty to review the facts and law in the cases that come to them. Often they see errors in lower court opinions. But often, too, they may affirm on alternative bases either argued by the parties or (sometimes) apparent to them on the face of the record. See, *e. g.*, *SEC* v. *Chenery Corp.*, 318 U. S. 80, 88 (1943) (noting "the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct 'al-

though the lower court relied upon a wrong ground or gave a wrong reason' "); *Wood*, *supra*, at 473. And a busy appellate court sometimes may not see the profit in devoting its limited resources to explaining the error and the alternative basis for affirming when the outcome is sure to remain the same, so it issues a summary affirmance instead. To reflect these realities, this Court has traditionally warned readers *against* presuming our summary affirmance orders rest on reasons articulated in lower court opinions. *Comptroller of Treasury of Md.* v. *Wynne*, 575 U. S. 542, 560 (2015) (" '[A] summary affirmance is an affirmance of the judgment only,' and 'the rationale of the affirmance may not be gleaned solely from the opinion below' "); *Mandel* v. *Bradley*, 432 U. S. 173, 176 (1977) (*per curiam*). The courts of appeals have issued similar warnings for similar reasons about their own summary orders. See, *e. g.*, *Rates Technology, Inc.* v. *Mediatrix Telecom, Inc.*, 688 F. 3d 742, 750 (CA Fed. 2012); *DeShong* v. *Seaboard Coast Line R. Co.*, 737 F. 2d 1520, 1523 (CA11 1984). And respect for this traditional principle of appellate practice surely weighs against presuming a state court's summary disposition rests solely on a lower court's opinion. On what account could we reasonably demand more respect for our summary decisions than we are willing to extend to those of our state court colleagues?

Petitioner and the Court offer only this tepid reply. They suggest that their "look through" presumption seeks to reflect "realistic[ally]" the basis on which the state summary decision rests. See Brief for Petitioner 44; *ante*, at 130. But to the extent this is a claim that their presumption comports realistically with longstanding traditions of appellate practice, it is wrong for the reasons just laid out. In fact, applying traditional understandings of appellate practice, this Court has refused to presume that state appellate courts even read lower court opinions rather than just the briefs before them. See *Baldwin* v. *Reese*, 541 U. S. 27, 31 (2004).

And surely it is a mystery how the Court might today presume state supreme courts *rely* on that which it traditionally presumes they do not *read*.

If the argument here is instead an empirical claim that the "look through" presumption comports realistically with what happened in this case and others like it, it is wrong too. Petitioner was convicted in Georgia. And during the pendency of this case in our Court, the Georgia Supreme Court issued an order confirming that lower courts in that State may not "presum[e] that when this Court summarily denies an application to appeal an order denying habeas corpus relief, we necessarily agree with everything said in that order." *Redmon* v. *Johnson*, 302 Ga. 763, 768, 809 S. E. 2d 468, 472 (2018). The court explained that it has long followed just this rule for all the reasons you'd expect. It independently reviews the facts and law in each habeas case. If it finds something it thinks might amount to a consequential error, the court sets the case for argument and usually prepares a full opinion. But "[o]n many occasions," the court finds only "inconsequential errors." *Id.*, at 765–766, 809 S. E. 2d, at 471.[2] And in these cases the court normally issues a sum-

[2] In language that will sound familiar to all judges and lawyers involved in litigating habeas claims, the Georgia Supreme Court explained that "[t]here are many examples of inconsequential errors, but among the most common are the following:

- The habeas court rejects a claim both on a procedural ground and, alternatively, on the substantive merits. This Court determines that one of those rulings appears factually or legally erroneous, but the other is correct, so an appeal would result in the habeas court's judgment being affirmed on the correct ground.
- In addressing an ineffective assistance of counsel claim under *Strickland* v. *Washington*, 466 U. S. 668 (1984), the habeas court rules that counsel did not perform deficiently as alleged. That ruling appears to be erroneous, but this Court determines based on our review of the record that no prejudice resulted from the deficient performance, so an appeal would result in affirming the habeas court's judgment. See *id.*, at 697; *Rozier* v. *Caldwell*, 300 Ga. 30, 31–32 (2016).
- In addressing other claims that require the petitioner to prove each element of a multi-part test, such as a claim under *Brady* v. *Maryland*,

mary affirmance because the costs associated with full treatment of the appeal outweigh the benefits of correcting what is at most harmless error, especially given the court's heavy caseload and the need to attend to more consequential matters.[3] Petitioner's presumption thus does not seek to reflect reality; it seeks to deny it.

The presumption is especially unrealistic in another way. The Court and petitioner presume that a summary order by a state supreme court adopts *all the specific reasons* expressed by a lower state court. In doing so, they disregard a far more realistic possibility: that the state supreme court might have relied only on the same *grounds* for the denial of relief as did the lower court without necessarily adopting all its reasoning. Here, the lower state court denied petitioner's *Strickland* claim on the grounds that counsel's perform-

---

373 U. S. 83 (1963), the habeas court makes factual or legal errors regarding the petitioner's proof of one element but correctly concludes (or the record clearly shows) that the petitioner has not proved another required element. An appeal would result in this Court's affirming the habeas court's judgment.

- The habeas court misstates a legal standard in one part of its order, but recites the standard correctly elsewhere in the order, and it is clear that the judgment is correct applying the right standard.
- In addressing a habeas petition with multitudinous claims, the habeas court's order fails to explicitly rule on a claim, but the record shows that the claim is entirely meritless." *Redmon*, 302 Ga., at 766–767, 809 S. E. 2d, at 471 (some citations omitted).

[3] "[T]he burdens of invoking the full appellate process, including writing opinions simply to point out factual or legal errors that do not affect the judgment, are significant for this Court. We issue about 350 published opinions each year, all en banc, meaning that each Justice (seven of us until 2017, nine now) must evaluate an opinion a day and author 35 to 50 majority opinions a year, with the help of only two law clerks in each chambers. Moreover, the Georgia Constitution requires this Court to issue its decision within the two terms of court after an appeal is docketed (which means within about eight months, given our three terms per year). . . . And our reasoned decisions are precedent binding on all other Georgia courts, . . . so issuing opinions where the relevant law is already well-established runs the risk of creating inconsistencies." *Id.*, at 767–768, 809 S. E. 2d, at 472 (footnote omitted).

ance was not deficient and petitioner suffered no prejudice. And it gave several reasons for its conclusions: for example, the evidence petitioner sought to admit "would have been inadmissible on evidentiary grounds, cumulative of other testimony, or otherwise would not have, in reasonable probability, changed the outcome of the trial." App. 61. In summarily denying relief, the state supreme court might have reached the same conclusions (no deficient performance and no prejudice) without resting on the exact same reasons.

While the "look through" presumption cannot be squared with AEDPA's text, traditional rules, or Georgia's actual practice, petitioner and the Court contend it is at least consistent with *Ylst* v. *Nunnemaker*, 501 U. S. 797 (1991). See Brief for Petitioner 38; *ante*, at 128–131. But it is not. In habeas review of state court convictions, federal courts may only review questions of federal law. So if a state court decision rejecting a petitioner's federal law claim rests on a state procedural defect (say the petitioner filed too late under state rules), federal courts generally have no authority to reach the federal claim. *Ylst* simply teaches that, if a lower state court opinion expressly relied on an independent and adequate state ground, we should presume a later state appellate court summary disposition invoked it too. See 501 U. S., at 801, 803. The decision thus seeks to protect state court decisions from displacement and reaches a result consistent with the traditional rule that a summary order invokes *all* fairly presented bases for affirmance.

Neither can *Ylst* be reimagined today as meaning anything more. The case came years before AEDPA's new standards for habeas review and can offer nothing useful about them. The work of interpreting AEDPA's demands was left instead to *Richter*. And, as we've seen, *Richter* forecloses petitioner's presumption. Of course, and as petitioner stresses, *Richter* didn't overrule *Ylst*. But that's for the simple reason that *Ylst* continues to do important, if limited, work in the disposition of procedural default claims because "AEDPA

did not change the application of pre-AEDPA procedural default principles." B. Means, Federal Habeas Manual § 9B:3 (2017).

Uncomfortable questions follow too from any effort to reimagine *Ylst*. If we were to take *Ylst* as suggesting that summary decisions presumptively rely only on the reasons found in lower court opinions, wouldn't we have to overrule our many precedents like *Wynne* and *Mandel* that explicitly reject any such presumption? Wouldn't circuit courts have to discard their own similar precedents? See *supra*, at 138–139. Consistency would seem to demand no less.

The only answer petitioner and the Court offer is no answer at all. Consistency, they suggest, is overrated. *Everywhere else* in the law we should retain the usual rule that a summary affirmance can't be read as presumptively resting on the lower court's reasons. They encourage us to use *Ylst* only as a tool for making a *special exception* for AEDPA cases: here and here alone should we adopt petitioner's "look through" presumption. Brief for Petitioner 18, 20; *ante*, at 133 (stating that "we 'look through' the silent decision for a specific and narrow purpose" under AEDPA). But just stating this good-for-habeas-only rule should be enough to reject it. Summary orders that happen to arise in state habeas cases should receive no less respect than those that arise anywhere else in the law. If anything, they should receive *more* respect, because federal habeas review of state court decisions "'intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.'" *Richter*, 562 U. S., at 103.

* * *

Petitioner's novel presumption not only lacks any provenance in the law, it promises nothing for its trouble. Consider the most obvious question it invites, one suggested by the facts of our own case: what happens when a state supreme court issues an order explaining that its summary

affirmances do not necessarily adopt the reasons in lower court opinions? Should that be enough to rebut the "look through" presumption? After defending the presumption, even the dissent in the Eleventh Circuit decision under review recognized that a disclaimer along these lines should suffice to rebut it. See *Wilson* v. *Warden*, 834 F. 3d 1227, 1263 (2016) (en banc) (opinion of J. Pryor, J.) ("The Georgia Supreme Court could simply issue a one-line order denying an application for a certificate of probable cause that indicates agreement with the result the superior court reached but not the lower court's reasons for rejecting the petitioner's claim"). And, of course, the Georgia Supreme Court has recently responded to the dissent's invitation by issuing just such a disclaimer. So in the end petitioner's presumption seems likely to accomplish nothing for him and only needless work for others—inducing more state supreme courts to churn out more orders restating the obvious fact that their summary dispositions don't necessarily rest on the reasons given by lower courts. Along the way, too, it seems federal courts will have their hands full. For while the Eleventh Circuit dissent had no difficulty acknowledging that an order like Georgia's suffices to overcome petitioner's presumption, the Court today refuses to supply the same obvious answer.

Consider, too, the questions that would follow in the unlikely event a general order like the one from the Georgia Supreme Court wasn't considered enough to overcome petitioner's presumption. Quickly federal courts would be forced to decide: does the "look through" presumption survive even when a state supreme court includes language in *every* summary order explaining that its decision does not necessarily adopt the reasoning below? What if the state supreme court says something slightly different but to the same effect, declaring in each case that it has independently considered the relevant law and evidence before denying relief? And if we start dictating what state court disclaimers should look like and where they should appear, what exactly

is left of Congress's direction that our review is intended to guard only against "'extreme malfunctions'" in state criminal justice systems? *Richter*, *supra*, at 102. Wouldn't we be slipping into the business of "tell[ing] state courts how they must write their opinions," something this Court has long said federal habeas courts "have no power" to do? *Coleman* v. *Thompson*, 501 U. S. 722, 739 (1991).

Apart from whether a (general or case-specific) order from a state supreme court suffices to overcome petitioner's presumption, there's the question what else might. Say a lower state court opinion includes an error but the legal briefs or other submissions presented to the state supreme court supply sound alternative bases for affirmance. In those circumstances, should a federal habeas court really presume that the state supreme court chose to repeat the lower court's mistake rather than rely on the solid grounds argued to it by the parties? What if a sound alternative basis for affirmance is presented for the first time in the parties' federal habeas submissions: are we to presume that the state supreme court was somehow less able to identify a reasonable basis for affirmance than federal habeas counsel?

Here at least the Court does offer an answer. Petitioner insists that federal courts should presume that state supreme court summary orders rest on *unreasonable* lower state court opinions even in the face of *reasonable* alternative arguments presented to the state supreme court or in federal habeas proceedings. But seeming to recognize the unreasonableness of this request, the Court opts to reshape radically petitioner's proposed presumption before adopting it. First, the Court states that "it is more likely that a state supreme court's single word 'affirm' rests upon alternative grounds where the lower state court decision is unreasonable." *Ante*, at 132. Then, the Court proceeds to explain that "a federal habeas court may conclude that counsel has rebutted the presumption on the basis of convincing alternative arguments for affirmance made to the State's highest

court or equivalent evidence presented in its briefing to the federal court similarly establishing that the State's highest court relied on a different ground than the lower state court, such as the existence of a valid ground for affirmance that is obvious from the state-court record." *Ibid.*

The Court's reshaping of petitioner's presumption reveals just how futile this whole business really is. If, as the Court holds, the "look through" presumption can be rebutted "where the lower state court decision is unreasonable," *ibid.*, it's hard to see what good it does. Petitioner sought to assign *unreasonable* lower court opinions to final state court summary decisions. To hear now that essentially only *reasonable* (and so sustainable) lower state court opinions are presumptively adopted by final state court summary decisions will surely leave him sour on this journey and federal habeas courts scratching their heads about the point of it all. And if, as the Court also tells us, a federal habeas court can always deny relief on a basis that is apparent from the record or on the basis of alternative arguments presented by the parties in state or federal proceedings, then the "look through" presumption truly means nothing and we are back where we started. With the Court's revisions to petitioner's presumption, a federal habeas court is neither obliged to *look through* exclusively to the reasons given by a lower state court nor required to *presume* that a summary order adopts those reasons.

All this is welcome news of a sort. The Court may promise us a future of foraging through presumptions and rebuttals. But at least at the end of it we rest knowing that what was true before remains true today: a federal habeas court should look at all the arguments presented in state and federal court and examine the state court record. And a federal habeas court should sustain a state court summary decision denying relief if those materials reveal a basis to do so reasonably consistent with this Court's holdings. Exactly what a federal court applying the statute and *Richter* has

had to do all along. See *supra*, at 135–138. And exactly what the Eleventh Circuit correctly held it had to do in this case.

* * *

Today, petitioner invites us to adopt a novel presumption that AEDPA, traditional principles of appellate review, and Georgia practice all preclude. It's an invitation that requires us to treat the work of state court colleagues with disrespect we would not tolerate for our own. And all to what end? None at all, it turns out. As modified by the Court, petitioner's presumption nearly drops us back where we began, with only trouble to show for the effort. Respectfully, I would decline the invitation to this circuitous journey and just affirm.

Syllabus

SESSIONS, ATTORNEY GENERAL *v.* DIMAYA

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

No. 15–1498. Argued January 17, 2017—Reargued October 2, 2017—Decided April 17, 2018

The Immigration and Nationality Act (INA) virtually guarantees that any alien convicted of an "aggravated felony" after entering the United States will be deported. See 8 U. S. C. §§ 1227(a)(2)(A)(iii), 1229b(a)(3), (b)(1)(C). An aggravated felony includes "a crime of violence (as defined in [18 U. S. C. § 16] . . .) for which the term of imprisonment [is] at least one year." § 1101(a)(43)(F). Section 16's definition of a crime of violence is divided into two clauses—often referred to as the elements clause, § 16(a), and the residual clause, § 16(b). The residual clause, the provision at issue here, defines a "crime of violence" as "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." To decide whether a person's conviction falls within the scope of that clause, courts apply the categorical approach. This approach has courts ask not whether "the particular facts" underlying a conviction created a substantial risk, *Leocal* v. *Ashcroft*, 543 U. S. 1, 7, nor whether the statutory elements of a crime require the creation of such a risk in each and every case, but whether "the ordinary case" of an offense poses the requisite risk, *James* v. *United States*, 550 U. S. 192, 208.

Respondent James Dimaya is a lawful permanent resident of the United States with two convictions for first-degree burglary under California law. After his second offense, the Government sought to deport him as an aggravated felon. An Immigration Judge and the Board of Immigration Appeals held that California first-degree burglary is a "crime of violence" under § 16(b). While Dimaya's appeal was pending in the Ninth Circuit, this Court held that a similar residual clause in the Armed Career Criminal Act (ACCA)—defining "violent felony" as any felony that "otherwise involves conduct that presents a serious potential risk of physical injury to another," 18 U. S. C. § 924(e)(2)(B)—was unconstitutionally "void for vagueness" under the Fifth Amendment's Due Process Clause. *Johnson* v. *United States*, 576 U. S. 591, 597–598. Relying on *Johnson*, the Ninth Circuit held that § 16(b), as incorporated into the INA, was also unconstitutionally vague.

Held: The judgment is affirmed.

803 F. 3d 1110, affirmed.

JUSTICE KAGAN delivered the opinion of the Court with respect to Parts I, III, IV–B, and V, concluding that § 16's residual clause is unconstitutionally vague. Pp. 157–162, 166–175.

(a) A straightforward application of *Johnson* effectively resolves this case. Section 16(b) has the same two features as ACCA's residual clause—an ordinary-case requirement and an ill-defined risk threshold—combined in the same constitutionally problematic way. To begin, ACCA's residual clause created "grave uncertainty about how to estimate the risk posed by a crime" because it "tie[d] the judicial assessment of risk" to a speculative hypothesis about the crime's "ordinary case," but provided no guidance on how to figure out what that ordinary case was. 576 U. S., at 597. Compounding that uncertainty, ACCA's residual clause layered an imprecise "serious potential risk" standard on top of the requisite "ordinary case" inquiry. The combination of "indeterminacy about how to measure the risk posed by a crime [and] indeterminacy about how much risk it takes for the crime to qualify as a violent felony" resulted in "more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.*, at 598. Section 16(b) suffers from those same two flaws. Like ACCA's residual clause, § 16(b) calls for a court to identify a crime's "ordinary case" in order to measure the crime's risk but "offers no reliable way" to discern what the ordinary version of any offense looks like. *Ibid.* And its "substantial risk" threshold is no more determinate than ACCA's "serious potential risk" standard. Thus, the same "[t]wo features" that "conspire[d] to make" ACCA's residual clause unconstitutionally vague also exist in § 16(b), with the same result. *Id.*, at 597. Pp. 157–162.

(b) The Government identifies three textual discrepancies between ACCA's residual clause and § 16(b) that it claims make § 16(b) easier to apply and thus cure the constitutional infirmity. None, however, relates to the pair of features that *Johnson* found to produce impermissible vagueness or otherwise makes the statutory inquiry more determinate. Pp. 166–174.

(1) First, the Government argues that § 16(b)'s express requirement (absent from ACCA) that the risk arise from acts taken "in the course of committing the offense" serves as a "temporal restriction"—in other words, a court applying § 16(b) may not "consider risks arising *after*" the offense's commission is over. Brief for Petitioner 31. But this is not a meaningful limitation: In the ordinary case of any offense, the riskiness of a crime arises from events occurring during its commission, not events occurring later. So with or without the temporal language, a court applying the ordinary-case approach, whether in § 16's or ACCA's residual clause, would do the same thing—ask what usually happens

when a crime is committed. The phrase "in the course of" makes no difference as to either outcome or clarity and cannot cure the statutory indeterminacy *Johnson* described.

Second, the Government says that the § 16(b) inquiry, which focuses on the risk of "physical force," "trains solely" on the conduct typically involved in a crime. Brief for Petitioner 36. In contrast, ACCA's residual clause asked about the risk of "physical injury," requiring a second inquiry into a speculative "chain of causation that could possibly result in a victim's injury." *Ibid.* However, this Court has made clear that "physical force" means "force capable of causing physical pain or injury." *Johnson* v. *United States*, 559 U. S. 133, 140. So under § 16(b) too, a court must not only identify the conduct typically involved in a crime, but also gauge its potential consequences. Thus, the force/injury distinction does not clarify a court's analysis of whether a crime qualifies as violent.

Third, the Government notes that § 16(b) avoids the vagueness of ACCA's residual clause because it is not preceded by a "confusing list of exemplar crimes." Brief for Petitioner 38. Those enumerated crimes were in fact too varied to assist this Court in giving ACCA's residual clause meaning. But to say that they failed to resolve the clause's vagueness is hardly to say they caused the problem. Pp. 166–171.

(2) The Government also relies on judicial experience with § 16(b), arguing that because it has divided lower courts less often and resulted in only one certiorari grant, it must be clearer than its ACCA counterpart. But in fact, a host of issues respecting § 16(b)'s application to specific crimes divide the federal appellate courts. And while this Court has only heard oral arguments in two § 16(b) cases, this Court vacated the judgments in a number of other § 16(b) cases, remanding them for further consideration in light of ACCA decisions. Pp. 171–174.

JUSTICE KAGAN, joined by JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR, concluded in Parts II and IV–A:

(a) The Government argues that a more permissive form of the void-for-vagueness doctrine applies than the one *Johnson* employed because the removal of an alien is a civil matter rather than a criminal case. This Court's precedent forecloses that argument. In *Jordan* v. *De George*, 341 U. S. 223, the Court considered what vagueness standard applied in removal cases and concluded that, "in view of the grave nature of deportation," the most exacting vagueness standard must apply. *Id.*, at 231. Nothing in the ensuing years calls that reasoning into question. This Court has reiterated that deportation is "a particularly severe penalty," which may be of greater concern to a convicted alien than "any potential jail sentence." *Jae Lee* v. *United States*, 582 U. S. 357, 370. Pp. 155–157.

Syllabus

(b) Section 16(b) demands a categorical, ordinary-case approach. For reasons expressed in *Johnson*, that approach cannot be abandoned in favor of a conduct-based approach, which asks about the specific way in which a defendant committed a crime. To begin, the Government once again "has not asked [the Court] to abandon the categorical approach in residual-clause cases," suggesting the fact-based approach is an untenable interpretation of § 16(b). 576 U. S., at 604. Moreover, a fact-based approach would generate constitutional questions. In any event, § 16(b)'s text demands a categorical approach. This Court's decisions have consistently understood language in the residual clauses of both ACCA and § 16 to refer to "the statute of conviction, not to the facts of each defendant's conduct." *Taylor* v. *United States*, 495 U. S. 575, 601. And the words "by its nature" in § 16(b) even more clearly compel an inquiry into an offense's normal and characteristic quality—that is, what the offense ordinarily entails. Finally, given the daunting difficulties of accurately "reconstruct[ing]," often many years later, "the conduct underlying [a] conviction," the conduct-based approach's "utter impracticability"—and associated inequities—is as great in § 16(b) as in ACCA. *Johnson*, 576 U. S., at 605. Pp. 162–166.

JUSTICE GORSUCH, agreeing that the Immigration and Nationality Act provision at hand is unconstitutionally vague for the reasons identified in *Johnson* v. *United States*, 576 U. S. 591, concluded that the void for vagueness doctrine, at least properly conceived, serves as a faithful expression of ancient due process and separation of powers principles the Framers recognized as vital to ordered liberty under the Constitution. The Government's argument that a less-than-fair-notice standard should apply where (as here) a person faces only civil, not criminal, consequences from a statute's operation is unavailing. In the criminal context, the law generally must afford "ordinary people fair notice of the conduct it punishes," *id.*, at 595, and it is hard to see how the Due Process Clause might often require any less than that in the civil context. Nor is there any good reason to single out civil deportation for assessment under the fair notice standard because of the special gravity of its penalty when so many civil laws impose so many similarly severe sanctions. Alternative approaches that do not concede the propriety of the categorical ordinary case analysis are more properly addressed in another case, involving either the Immigration and Nationality Act or another statute, where the parties have a chance to be heard. Pp. 175–192.

KAGAN, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III, IV–B, and V, in which GINSBURG, BREYER, SOTOMAYOR, and GORSUCH, JJ., joined, and an opinion with

respect to Parts II and IV–A, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. GORSUCH, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 175. ROBERTS, C. J., filed a dissenting opinion, in which KENNEDY, THOMAS, and ALITO, JJ., joined, *post*, p. 192. THOMAS, J., filed a dissenting opinion, in which KENNEDY and ALITO, JJ., joined as to Parts I–C–2, II–A–1, and II–B, *post*, p. 205.

Deputy Solicitor General Kneedler argued and reargued the cause for petitioner. With him on the briefs were *Acting Solicitor General Gershengorn*, *Principal Deputy Assistant Attorney General Mizer*, *John F. Bash*, *Donald E. Keener*, and *Bryan S. Beier*.

E. Joshua Rosenkranz argued and reargued the cause for respondent. With him on the brief were *Thomas M. Bondy*, *Brian P. Goldman*, *Naomi J. Mower*, and *Andrew Knapp*.*

JUSTICE KAGAN announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III, IV–B, and V, and an opinion with respect to Parts II and IV–A, in which JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join.

Three Terms ago, in *Johnson* v. *United States*, this Court held that part of a federal law's definition of "violent felony" was impermissibly vague. See 576 U. S. 591 (2015). The question in this case is whether a similarly worded clause in a statute's definition of "crime of violence" suffers from the same constitutional defect. Adhering to our analysis in *Johnson*, we hold that it does.

---

*Briefs of *amici curiae* urging affirmance were filed for the National Association of Federal Defenders by *Kara Hartzler*, *Vincent J. Brunkow*, *Daniel L. Kaplan*, *Donna F. Coltharp*, and *Sarah S. Gannett*; for the National Immigration Law Center by *Andrew J. Pincus*, *Charles A. Rothfeld*, *Michael B. Kimberly*, *Paul W. Hughes*, and *Eugene R. Fidell*; for the National Immigration Project of the National Lawyers Guild et al. by *Sejal R. Zota* and *Eamon P. Joyce*; and for Retired Article III Judges by *Justin Florence* and *Jonathan Ference-Burke*.

I

The Immigration and Nationality Act (INA) renders deportable any alien convicted of an "aggravated felony" after entering the United States. 8 U. S. C. § 1227(a)(2)(A)(iii). Such an alien is also ineligible for cancellation of removal, a form of discretionary relief allowing some deportable aliens to remain in the country. See §§ 1229b(a)(3), (b)(1)(C). Accordingly, removal is a virtual certainty for an alien found to have an aggravated-felony conviction, no matter how long he has previously resided here.

The INA defines "aggravated felony" by listing numerous offenses and types of offenses, often with cross-references to federal criminal statutes. § 1101(a)(43); see *Luna Torres* v. *Lynch*, 578 U. S. 452, 455 (2016). According to one item on that long list, an aggravated felony includes "a crime of violence (as defined in section 16 of title 18 . . .) for which the term of imprisonment [is] at least one year." § 1101(a)(43)(F). The specified statute, 18 U. S. C. § 16, provides the federal criminal code's definition of "crime of violence." Its two parts, often known as the elements clause and the residual clause, cover:

> "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> "(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

Section 16(b), the residual clause, is the part of the statute at issue in this case.

To decide whether a person's conviction "falls within the ambit" of that clause, courts use a distinctive form of what we have called the categorical approach. *Leocal* v. *Ashcroft*, 543 U. S. 1, 7 (2004). The question, we have explained, is not whether "the particular facts" underlying a conviction

posed the substantial risk that § 16(b) demands. *Ibid.* Neither is the question whether the statutory elements of a crime require (or entail) the creation of such a risk in each case that the crime covers.[1] The § 16(b) inquiry instead turns on the "nature of the offense" generally speaking. *Ibid.* (referring to § 16(b)'s "by its nature" language). More precisely, § 16(b) requires a court to ask whether "the ordinary case" of an offense poses the requisite risk. *James* v. *United States*, 550 U. S. 192, 208 (2007); see *infra*, at 160.

In the case before us, Immigration Judges employed that analysis to conclude that respondent James Dimaya is deportable as an aggravated felon. A native of the Philippines, Dimaya has resided lawfully in the United States since 1992. But he has not always acted lawfully during that time. Twice, Dimaya was convicted of first-degree burglary under California law. See Cal. Penal Code Ann. §§ 459, 460(a). Following his second offense, the Government initiated a removal proceeding against him. Both an Immigration Judge and the Board of Immigration Appeals held that California first-degree burglary is a "crime of violence" under § 16(b). "[B]y its nature," the Board reasoned, the offense "carries a substantial risk of the use of force." App. to Pet. for Cert. 46a. Dimaya sought review in the Court of Appeals for the Ninth Circuit.

While his appeal was pending, this Court held unconstitutional part of the definition of "violent felony" in the Armed Career Criminal Act (ACCA), 18 U. S. C. § 924(e). ACCA prescribes a 15-year mandatory minimum sentence if a person convicted of being a felon in possession of a firearm has

---

[1] The analysis thus differs from the form of categorical approach used to determine whether a prior conviction is for a particular listed offense (say, murder or arson). In that context, courts ask what the elements of a given crime always require—in effect, what is legally necessary for a conviction. See, *e. g.*, *Descamps* v. *United States*, 570 U. S. 254, 260–261 (2013); *Moncrieffe* v. *Holder*, 569 U. S. 184, 190–191 (2013).

three prior convictions for a "violent felony." § 924(e)(1). The definition of that statutory term goes as follows:

> "any crime punishable by imprisonment for a term exceeding one year . . . that—
>
> "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> "(ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*" § 924(e)(2)(B) (emphasis added).

The italicized portion of that definition (like the similar language of § 16(b)) came to be known as the statute's residual clause. In *Johnson* v. *United States*, the Court declared that clause "void for vagueness" under the Fifth Amendment's Due Process Clause. 576 U. S., at 597–598.

Relying on *Johnson*, the Ninth Circuit held that § 16(b), as incorporated into the INA, was also unconstitutionally vague, and accordingly ruled in Dimaya's favor. See *Dimaya* v. *Lynch*, 803 F. 3d 1110, 1120 (2015). Two other Circuits reached the same conclusion, but a third distinguished ACCA's residual clause from § 16's.[2] We granted certiorari to resolve the conflict. *Lynch* v. *Dimaya*, 579 U. S. 969 (2016).

II

"The prohibition of vagueness in criminal statutes," our decision in *Johnson* explained, is an "essential" of due process, required by both "ordinary notions of fair play and the settled rules of law." 576 U. S., at 595 (quoting *Connally* v. *General Constr. Co.*, 269 U. S. 385, 391 (1926)). The void-

[2] Compare *Shuti* v. *Lynch*, 828 F. 3d 440 (CA6 2016) (finding § 16(b) unconstitutionally vague); *United States* v. *Vivas-Ceja*, 808 F. 3d 719 (CA7 2015) (same), with *United States* v. *Gonzalez-Longoria*, 831 F. 3d 670 (CA5 2016) (en banc) (upholding § 16(b)).

for-vagueness doctrine, as we have called it, guarantees that ordinary people have "fair notice" of the conduct a statute proscribes. *Papachristou* v. *Jacksonville*, 405 U. S. 156, 162 (1972). And the doctrine guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges. See *Kolender* v. *Lawson*, 461 U. S. 352, 357–358 (1983). In that sense, the doctrine is a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not. Cf. *id.*, at 358, n. 7 ("[I]f the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, [it would] substitute the judicial for the legislative department" (internal quotation marks omitted)).

The Government argues that a less searching form of the void-for-vagueness doctrine applies here than in *Johnson* because this is not a criminal case. See Brief for Petitioner 13–15. As the Government notes, this Court has stated that "[t]he degree of vagueness that the Constitution [allows] depends in part on the nature of the enactment": In particular, the Court has "expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 498–499 (1982). The removal of an alien is a civil matter. See *Arizona* v. *United States*, 567 U. S. 387, 396 (2012). Hence, the Government claims, the need for clarity is not so strong; even a law too vague to support a conviction or sentence may be good enough to sustain a deportation order. See Brief for Petitioner 25–26.

But this Court's precedent forecloses that argument, because we long ago held that the most exacting vagueness standard should apply in removal cases. In *Jordan* v. *De George*, we considered whether a provision of immigration

law making an alien deportable if convicted of a "crime involving moral turpitude" was "sufficiently definite." 341 U. S. 223, 229 (1951). That provision, we noted, "is not a criminal statute" (as § 16(b) actually is). *Id.*, at 231; *supra*, at 153. Still, we chose to test (and ultimately uphold) it "under the established criteria of the 'void for vagueness' doctrine" applicable to criminal laws. 341 U. S., at 231. That approach was demanded, we explained, "in view of the grave nature of deportation," *ibid.*—a "drastic measure," often amounting to lifelong "banishment or exile," *ibid.* (quoting *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, 10 (1948)).

Nothing in the ensuing years calls that reasoning into question. To the contrary, this Court has reiterated that deportation is "a particularly severe penalty," which may be of greater concern to a convicted alien than "any potential jail sentence." *Jae Lee* v. *United States*, 582 U. S. 357, 370 (2017) (quoting *Padilla* v. *Kentucky*, 559 U. S. 356, 365, 368 (2010)). And we have observed that as federal immigration law increasingly hinged deportation orders on prior convictions, removal proceedings became ever more "intimately related to the criminal process." *Chaidez* v. *United States*, 568 U. S. 342, 352 (2013) (quoting *Padilla*, 559 U. S., at 365). What follows, as *Jordan* recognized, is the use of the same standard in the two settings.

For that reason, the Government cannot take refuge in a more permissive form of the void-for-vagueness doctrine than the one *Johnson* employed. To salvage § 16's residual clause, even for use in immigration hearings, the Government must instead persuade us that it is materially clearer than its now-invalidated ACCA counterpart. That is the issue we next address, as guided by *Johnson*'s analysis.

III

Johnson is a straightforward decision, with equally straightforward application here. Its principal section begins as follows: "Two features of [ACCA's] residual clause

conspire to make it unconstitutionally vague." 576 U. S., at 597. The opinion then identifies each of those features and explains how their joinder produced "hopeless indeterminacy," inconsistent with due process. *Id.*, at 598. And with that reasoning, *Johnson* effectively resolved the case now before us. For § 16's residual clause has the same two features as ACCA's, combined in the same constitutionally problematic way. Consider those two, just as *Johnson* described them:

"In the first place," *Johnson* explained, ACCA's residual clause created "grave uncertainty about how to estimate the risk posed by a crime" because it "tie[d] the judicial assessment of risk" to a hypothesis about the crime's "ordinary case." *Id.*, at 597. Under the clause, a court focused on neither the "real-world facts" nor the bare "statutory elements" of an offense. *Ibid.* Instead, a court was supposed to "imagine" an "idealized ordinary case of the crime"—or otherwise put, the court had to identify the "kind of conduct the 'ordinary case' of a crime involves." *Ibid.* But how, *Johnson* asked, should a court figure that out? By using a "statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?" *Ibid.* (internal quotation marks omitted). ACCA provided no guidance, rendering judicial accounts of the "ordinary case" wholly "speculative." *Ibid.* *Johnson* gave as its prime example the crime of attempted burglary. One judge, contemplating the "ordinary case," would imagine the "violent encounter" apt to ensue when a "would-be burglar [was] spotted by a police officer [or] private security guard." *Ibid.* Another judge would conclude that "any confrontation" was more "likely to consist of [an observer's] yelling 'Who's there?' . . . and the burglar's running away." *Ibid.* But how could either judge really know? "The residual clause," *Johnson* summarized, "offer[ed] no reliable way" to discern what the ordinary version of any offense looked like. *Id.*, at 598. And without that, no one could tell how much risk the offense generally posed.

Compounding that first uncertainty, *Johnson* continued, was a second: ACCA's residual clause left unclear what threshold level of risk made any given crime a "violent felony." See *ibid.* The Court emphasized that this feature alone would not have violated the void-for-vagueness doctrine: Many perfectly constitutional statutes use imprecise terms like "serious potential risk" (as in ACCA's residual clause) or "substantial risk" (as in § 16's). The problem came from layering such a standard on top of the requisite "ordinary case" inquiry. As the Court explained:

> "[W]e do not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct; the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree[.] The residual clause, however, requires application of the 'serious potential risk' standard to an idealized ordinary case of the crime. Because the elements necessary to determine the imaginary ideal are uncertain[,] this abstract inquiry offers significantly less predictability than one that deals with the actual . . . facts." *Id.*, at 603–604 (some internal quotation marks, citations, and alterations omitted).

So much less predictability, in fact, that ACCA's residual clause could not pass constitutional muster. As the Court again put the point, in the punch line of its decision: "By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause" violates the guarantee of due process. *Id.*, at 598.[3]

---

[3] *Johnson* also anticipated and rejected a significant aspect of JUSTICE THOMAS's dissent in this case. According to JUSTICE THOMAS, a court may not invalidate a statute for vagueness if it is clear in any of its applications—as he thinks is true of *completed* burglary, which is the offense Dimaya committed. See *post*, at 220–223. But as an initial matter, *Johnson* explained that supposedly easy applications of the residual clause might not be "so easy after all." 576 U. S., at 602. The crime of com-

Section 16's residual clause violates that promise in just the same way. To begin where *Johnson* did, § 16(b) also calls for a court to identify a crime's "ordinary case" in order to measure the crime's risk. The Government explicitly acknowledges that point here. See Brief for Petitioner 11 ("Section 16(b), like [ACCA's] residual clause, requires a court to assess the risk posed by the ordinary case of a particular offense"). And indeed, the Government's briefing in *Johnson* warned us about that likeness, observing that § 16(b) would be "equally susceptible to [an] objection" that focused on the problems of positing a crime's ordinary case. Supp. Brief for Respondent, O. T. 2014, No. 13–7120, pp. 22–23. Nothing in § 16(b) helps courts to perform that task, just as nothing in ACCA did. We can as well repeat here what we asked in *Johnson*: How does one go about divining the conduct entailed in a crime's ordinary case? Statistical analyses? Surveys? Experts? Google? Gut instinct? See *Johnson*, 576 U. S., at 597; *supra*, at 158; *post*, at 189 (GORSUCH, J., concurring in part and concurring in judgment). And we can as well reiterate *Johnson*'s example: In the ordinary case of attempted burglary, is the would-be culprit spotted and confronted, or scared off by a yell? See *post*, at 189 (opinion of GORSUCH, J.) (offering other knotty examples). Once again, the questions have no good answers; the "ordinary case" remains, as *Johnson* described it,

---

pleted burglary at issue here illustrates that point forcefully. See *id.*, at 598 (asking whether an "ordinary burglar invade[s] an occupied home by night or an unoccupied home by day"); *Dimaya* v. *Lynch*, 803 F. 3d 1110, 1116, n. 7 (CA9 2015) (noting that only about seven percent of burglaries actually involve violence); Cal. Penal Code Ann. §§ 459, 460 (West 2010) (sweeping so broadly as to cover even dishonest door-to-door salesmen). And still more fundamentally, *Johnson* made clear that our decisions "squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." 576 U. S., at 602.

an excessively "speculative," essentially inscrutable thing. 576 U. S., at 597; accord *post*, at 230 (THOMAS, J., dissenting).[4]

And § 16(b) also possesses the second fatal feature of ACCA's residual clause: uncertainty about the level of risk that makes a crime "violent." In ACCA, that threshold was "serious potential risk"; in § 16(b), it is "substantial risk." See *supra*, at 153, 155. But the Government does not argue that the latter formulation is any more determinate than the former, and for good reason. As THE CHIEF JUSTICE's valiant attempt to do so shows, that would be slicing the baloney mighty thin. See *post*, at 196–198 (dissenting opinion). And indeed, *Johnson* as much as equated the two phrases: Return to the block quote above, and note how *Johnson*—as though anticipating this case—refers to them interchangeably, as alike examples of imprecise "qualitative standard[s]." See *supra*, at 159; 576 U. S., at 604. Once again, the point is not that such a non-numeric standard is alone problematic: In *Johnson*'s words, "we do not doubt" the constitutionality of applying § 16(b)'s "substantial risk [standard] to real-world conduct." *Id.*, at 603–604 (internal quotation marks omitted). The difficulty comes, in § 16's residual clause just as in ACCA's, from applying such a standard to "a judge-imagined abstraction"—*i. e.*, "an idealized ordinary case of the crime." *Id.*, at 598, 604. It is then that the standard ceases to work in a way consistent with due process.

In sum, § 16(b) has the same "[t]wo features" that "conspire[d] to make [ACCA's residual clause] unconstitutionally

[4] THE CHIEF JUSTICE's dissent makes light of the difficulty of identifying a crime's ordinary case. In a single footnote, THE CHIEF JUSTICE portrays that task as no big deal: Just eliminate the "atypical" cases, and (presto!) the crime's nature and risk are revealed. See *post*, at 196, n. 1. That rosy view—at complete odds with *Johnson*—underlies his whole dissent (and especially, his analysis of how § 16(b) applies to particular offenses, see *post*, at 198–200). In effect, THE CHIEF JUSTICE is able to conclude that § 16(b) can survive *Johnson* only by refusing to acknowledge one of the two core insights of that decision.

vague." *Id.*, at 597. It too "requires a court to picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents" some not-well-specified-yet-sufficiently-large degree of risk. *Id.*, at 596. The result is that § 16(b) produces, just as ACCA's residual clause did, "more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.*, at 598.

IV

The Government and dissents offer two fundamentally different accounts of how § 16(b) can escape unscathed from our decision in *Johnson*. JUSTICE THOMAS accepts that the ordinary-case inquiry makes § 16(b) "impossible to apply." *Post*, at 230. His solution is to overthrow our historic understanding of the statute: We should now read § 16(b), he says, to ask about the risk posed by a particular defendant's particular conduct. In contrast, the Government, joined by THE CHIEF JUSTICE, accepts that § 16(b), as long interpreted, demands a categorical approach, rather than a case-specific one. They argue only that "distinctive textual features" of § 16's residual clause make applying it "more predictable" than its ACCA counterpart. Brief for Petitioner 28, 29. We disagree with both arguments.

A

The essentials of JUSTICE THOMAS's position go as follows. Section 16(b), he says, cannot have one meaning, but could have one of two others. See *post*, at 229. The provision cannot demand an inquiry merely into the elements of a crime, because that is the province of § 16(a). See *supra*, at 153 (setting out § 16(a)'s text). But that still leaves a pair of options: the categorical, ordinary-case approach and the "underlying-conduct approach," which asks about the specific way in which a defendant committed a crime. *Post*, at 229. According to JUSTICE THOMAS, each option is textually viable (although he gives a slight nod to the latter based on

§ 16(b)'s use of the word "involves"). See *post*, at 227–229. What tips the scales is that only one—the conduct approach—is at all "workable." *Post*, at 230. The difficulties of the ordinary-case inquiry, JUSTICE THOMAS rightly observes, underlie this Court's view that § 16(b) is too vague. So abandon that inquiry, JUSTICE THOMAS urges. After all, he reasons, it is the Court's "plain duty," under the constitutional avoidance canon, to adopt any reasonable construction of a statute that escapes constitutional problems. *Post*, at 231 (quoting *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407 (1909)).

For anyone who has read *Johnson*, that argument will ring a bell. The dissent there issued the same invitation, based on much the same reasoning, to jettison the categorical approach in residual-clause cases. 576 U. S., at 631–636 (opinion of ALITO, J.). The Court declined to do so. It first noted that the Government had not asked us to switch to a fact-based inquiry. It then observed that the Court "had good reasons" for originally adopting the categorical approach, based partly on ACCA's text (which, by the way, uses the word "involves" identically) and partly on the "utter impracticability" of the alternative. *Id.*, at 604–605 (majority opinion). "The only plausible interpretation" of ACCA's residual clause, we concluded, "requires use of the categorical approach"—even if that approach could not in the end satisfy constitutional standards. *Id.*, at 605 (internal quotation marks and alteration omitted).

The same is true here—except more so. To begin where *Johnson* did, the Government once again "has not asked us to abandon the categorical approach in residual-clause cases." *Id.*, at 604. To the contrary, and as already noted, the Government has conceded at every step the correctness of that statutory construction. See *supra*, at 160. And this time, the Government's decision is even more noteworthy than before—precisely because the *Johnson* dissent laid out the opposite view, presenting it in prepackaged form for the

Government to take off the shelf and use in the § 16(b) context. Of course, we are not foreclosed from going down JUSTICE THOMAS's path just because the Government has not done so. But we find it significant that the Government cannot bring itself to say that the fact-based approach JUSTICE THOMAS proposes is a tenable interpretation of § 16's residual clause.

Perhaps one reason for the Government's reluctance is that such an approach would generate its own constitutional questions. As JUSTICE THOMAS relates, *post*, at 225, 231, this Court adopted the categorical approach in part to "avoid[ ] the Sixth Amendment concerns that would arise from sentencing courts' making findings of fact that properly belong to juries." *Descamps* v. *United States*, 570 U. S. 254, 267 (2013). JUSTICE THOMAS thinks that issue need not detain us here because "the right of trial by jury ha[s] no application in a removal proceeding." *Post*, at 231 (internal quotation marks omitted). But although this particular case involves removal, § 16(b) is a criminal statute, with criminal sentencing consequences. See *supra*, at 153. And this Court has held (it could hardly have done otherwise) that "we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context." *Leocal*, 543 U. S., at 12, n. 8. So JUSTICE THOMAS's suggestion would merely ping-pong us from one constitutional issue to another. And that means the avoidance canon cannot serve, as he would like, as the interpretive tie breaker.

In any event, § 16(b)'s text creates no draw: Best read, it demands a categorical approach. Our decisions have consistently understood language in the residual clauses of both ACCA and § 16 to refer to "the statute of conviction, not to the facts of each defendant's conduct." *Taylor* v. *United States*, 495 U. S. 575, 601 (1990); see *Leocal*, 543 U. S., at 7 (Section 16 "directs our focus to the 'offense' of conviction . . . rather than to the particular facts"). Simple references to a "conviction," "felony," or "offense," we have stated, are

"read naturally" to denote the "crime as *generally* committed." *Nijhawan* v. *Holder*, 557 U. S. 29, 34 (2009); see *Leocal*, 543 U. S., at 7; *Johnson*, 576 U. S., at 604–605. And the words "by its nature" in § 16(b) make that meaning all the clearer. The statute, recall, directs courts to consider whether an offense, *by its nature*, poses the requisite risk of force. An offense's "nature" means its "normal and characteristic quality." Webster's Third New International Dictionary 1507 (2002). So § 16(b) tells courts to figure out what an offense normally—or, as we have repeatedly said, "ordinarily"—entails, not what happened to occur on one occasion. And the same conclusion follows if we pay attention to language that is *missing* from § 16(b). As we have observed in the ACCA context, the absence of terms alluding to a crime's circumstances, or its commission, makes a fact-based interpretation an uncomfortable fit. See *Descamps*, 570 U. S., at 267. If Congress had wanted judges to look into a felon's actual conduct, "it presumably would have said so; other statutes, in other contexts, speak in just that way." *Id.*, at 267–268.[5] The upshot of all this textual evidence is that § 16's residual clause—like ACCA's, except still more plainly—has no "plausible" fact-based reading. *Johnson*, 576 U. S., at 605.

[5] For example, in *United States* v. *Hayes*, 555 U. S. 415 (2009), this Court held that a firearms statute referring to former crimes as "committed by" specified persons requires courts to consider underlying facts. *Id.*, at 421. And in *Nijhawan* v. *Holder*, 557 U. S. 29 (2009), the Court similarly adopted a non-categorical interpretation of one of the aggravated felonies listed in the INA because of the phrase, appended to the named offense, "in which the loss to the victim or victims exceeds $10,000." *Id.*, at 32, 38 (emphasis deleted). JUSTICE THOMAS suggests that *Nijhawan* rejected the relevance of our ACCA precedents in interpreting the INA's aggravated-felony list—including its incorporation of § 16(b). *Post*, at 232. But that misreads the decision. In *Nijhawan*, we considered an item on the INA's list that looks nothing like ACCA, and we concluded—no surprise here—that our ACCA decisions did not offer a useful guide. As to items on the INA's list that *do* mirror ACCA, the opposite conclusion of course follows.

And finally, the "utter impracticability"—and associated inequities—of such an interpretation is as great in the one statute as in the other. *Ibid.* This Court has often described the daunting difficulties of accurately "reconstruct-[ing]," often many years later, "the conduct underlying [a] conviction." *Ibid.*; *Descamps*, 570 U. S., at 270; *Taylor*, 495 U. S., at 601–602. According to JUSTICE THOMAS, we need not worry here because immigration judges have some special factfinding talent, or at least experience, that would mitigate the risk of error attaching to that endeavor in federal courts. See *post*, at 232–233. But we cannot see putting so much weight on the superior factfinding prowess of (notoriously overburdened) immigration judges. And as we have said before, § 16(b) is a criminal statute with applications outside the immigration context. See *supra*, at 153, 164. Once again, then, we have no ground for discovering a novel interpretation of § 16(b) that would remove us from the dictates of *Johnson*.

B

Agreeing that is so, the Government (joined by THE CHIEF JUSTICE) takes a narrower path to the same desired result. It points to three textual discrepancies between ACCA's residual clause and § 16(b), and argues that they make § 16(b) significantly easier to apply. But each turns out to be the proverbial distinction without a difference. None relates to the pair of features—the ordinary-case inquiry and a hazy risk threshold—that *Johnson* found to produce impermissible vagueness. And none otherwise affects the determinacy of the statutory inquiry into whether a prior conviction is for a violent crime. That is why, contrary to the Government's final argument, the experience of applying *both* statutes has generated confusion and division among lower courts.

1

The Government first—and foremost—relies on § 16(b)'s express requirement (absent from ACCA) that the risk arise

from acts taken "in the course of committing the offense." Brief for Petitioner 31. (THE CHIEF JUSTICE's dissent echoes much of this argument. See *post*, at 197–198.) Because of that "temporal restriction," a court applying § 16(b) may not "consider risks arising *after*" the offense's commission is over. Brief for Petitioner 31. In the Government's view, § 16(b)'s text thereby demands a "significantly more focused inquiry" than did ACCA's residual clause. *Id.*, at 32.

To assess that claim, start with the meaning of § 16(b)'s "in the course of" language. That phrase, understood in the normal way, includes the conduct occurring throughout a crime's commission—not just the conduct sufficient to satisfy the offense's formal elements. The Government agrees with that construction, explaining that the words "in the course of" sweep in everything that happens while a crime continues. See Tr. of Oral Arg. 57–58 (Oct. 2, 2017) (illustrating that idea with reference to conspiracy, burglary, kidnapping, and escape from prison). So, for example, conspiracy may be a crime of violence under § 16(b) because of the risk of force while the conspiracy is ongoing (*i. e.*, "in the course of" the conspiracy); it is irrelevant that conspiracy's elements are met as soon as the participants have made an agreement. See *ibid.*; *United States* v. *Doe*, 49 F. 3d 859, 866 (CA2 1995). Similarly, and closer to home, burglary may be a crime of violence under § 16(b) because of the prospects of an encounter while the burglar remains in a building (*i. e.*, "in the course of" the burglary); it does not matter that the elements of the crime are met at the precise moment of his entry. See Tr. of Oral Arg. 57–58 (Oct. 2, 2017); *James*, 550 U. S., at 203. In other words, a court applying § 16(b) gets to consider everything that is likely to take place for as long as a crime is being committed.

Because that is so, § 16(b)'s "in the course of" language does little to narrow or focus the statutory inquiry. All that the phrase excludes is a court's ability to consider the risk that force will be used after the crime has entirely con-

cluded—so, for example, after the conspiracy has dissolved or the burglar has left the building. We can construct law-school-type hypotheticals fitting that fact pattern—say, a burglar who constructs a booby trap that later knocks out the homeowner. But such imaginative forays cannot realistically affect a court's view of the *ordinary case* of a crime, which is all that matters under the statute. See *supra*, at 153–154, 158. In the ordinary case, the riskiness of a crime arises from events occurring during its commission, not events occurring later. So with or without § 16(b)'s explicit temporal language, a court applying the section would do the same thing—ask what usually happens when a crime goes down.

And that is just what courts did when applying ACCA's residual clause—and for the same reason. True, that clause lacked an express temporal limit. But not a single one of this Court's ACCA decisions turned on conduct that might occur after a crime's commission; instead, each hinged on the risk arising from events that could happen while the crime was ongoing. See, *e. g.*, *Sykes* v. *United States*, 564 U. S. 1, 10 (2011) (assessing the risks attached to the "confrontations that initiate and terminate" vehicle flight, along with "intervening" events); *Chambers* v. *United States*, 555 U. S. 122, 128 (2009) (rejecting the Government's argument that violent incidents "occur[ring] long after" a person unlawfully failed to report to prison rendered that crime a violent felony). Nor could those decisions have done otherwise, given the statute's concern with the ordinary (rather than the outlandish) case. Once again, the riskiness of a crime in the ordinary case depends on the acts taken during—not after—its commission. Thus, the analyses under ACCA's residual clause and § 16(b) coincide.

The upshot is that the phrase "in the course of" makes no difference as to either outcome or clarity. Every offense that could have fallen within ACCA's residual clause might equally fall within § 16(b). And the difficulty of deciding whether it does so remains just as intractable. Indeed, we

cannot think of a single federal crime whose treatment becomes more obvious under § 16(b) than under ACCA because of the words "in the course of."[6] The phrase, then, cannot cure the statutory indeterminacy *Johnson* described.

Second, the Government (and again, THE CHIEF JUSTICE's dissent, see *post*, at 197) observes that § 16(b) focuses on the risk of "physical force" whereas ACCA's residual clause asked about the risk of "physical injury." The § 16(b) inquiry, the Government says, "trains solely" on the conduct typically involved in a crime. Brief for Petitioner 36. By contrast, the Government continues, ACCA's residual clause required a second inquiry: After describing the ordinary criminal's conduct, a court had to "speculate about a chain of causation that could possibly result in a victim's injury." *Ibid.* The Government's conclusion is that the § 16(b) inquiry is "more specific." *Ibid.*

---

[6] In response to repeated questioning at two oral arguments, the Government proposed one (and only one) such crime—but we disagree that § 16(b)'s temporal language would aid in its analysis. According to the Government, possession of a short-barreled shotgun could count as violent under ACCA but not under § 16(b) because shooting the gun is "not in the course of committing the crime of possession." Tr. of Oral Arg. 59–60 (Oct. 2, 2017); see Tr. of Oral Arg. 6–7 (Jan. 17, 2017); Brief for Petitioner 32–34. That is just wrong: When a criminal shoots a gun, he does so while ("in the course of") possessing it (except perhaps in some physics-defying fantasy world). What makes the offense difficult to classify as violent is something different: that while some people use the short-barreled shotguns they possess to commit murder, others merely store them in a nearby firearms cabinet—and it is hard to settle which is the more likely scenario. Compare *Johnson*, 576 U. S., at 642 (ALITO, J., dissenting) ("It is fanciful to assume that a person who [unlawfully possesses] a notoriously dangerous weapon is unlikely to use that weapon in violent ways"), with *id.*, at 610 (THOMAS, J., concurring) (Unlawful possession of a short-barreled shotgun "takes place in a variety of ways . . . many, perhaps most, of which do not involve likely accompanying violence" (internal quotation marks omitted)). But contrary to THE CHIEF JUSTICE's suggestion, see *post*, at 198–199 (which, again, is tied to his disregard of the ordinary-case inquiry, see *supra*, at 161, n. 4), that issue must be settled no less under § 16(b) than under ACCA.

But once more, we struggle to see how that statutory distinction would matter. To begin with, the first of the Government's two steps—defining the conduct in the ordinary case—is almost always the difficult part. Once that is accomplished, the assessment of consequences tends to follow as a matter of course. So, for example, if a crime is likely enough to lead to a shooting, it will also be likely enough to lead to an injury. And still more important, § 16(b) involves two steps as well—and essentially the same ones. In interpreting statutes like § 16(b), this Court has made clear that "physical force" means "force capable of causing physical pain or injury." *Johnson* v. *United States*, 559 U. S. 133, 140 (2010) (defining the term for purposes of deciding what counts as a "violent" crime). So under § 16(b) too, a court must not only identify the conduct typically involved in a crime, but also gauge its potential consequences. Or said a bit differently, evaluating the risk of "physical force" itself entails considering the risk of "physical injury." For those reasons, the force/injury distinction is unlikely to affect a court's analysis of whether a crime qualifies as violent. All the same crimes might—or, then again, might not—satisfy both requirements. Accordingly, this variance in wording cannot make ACCA's residual clause vague and § 16(b) not.

Third, the Government briefly notes that § 16(b), unlike ACCA's residual clause, is not preceded by a "confusing list of exemplar crimes." Brief for Petitioner 38. (THE CHIEF JUSTICE's dissent reiterates this argument, with some additional references to our caselaw. See *post*, at 201–203.) Here, the Government is referring to the offenses ACCA designated as violent felonies independently of the residual clause (*i. e.*, burglary, arson, extortion, and use of explosives). See *supra*, at 155. According to the Government, those crimes provided "contradictory and opaque indications" of what non-specified offenses should also count as violent. Brief for Petitioner 38. Because § 16(b) lacks any such enumerated crimes, the Government concludes, it avoids the vagueness of ACCA's residual clause.

We readily accept a part of that argument. This Court for several years looked to ACCA's listed crimes for help in giving the residual clause meaning. See, *e. g.*, *Begay* v. *United States*, 553 U. S. 137, 142 (2008); *James*, 550 U. S., at 203. But to no avail. As the Government relates (and *Johnson* explained), the enumerated crimes were themselves too varied to provide such assistance. See Brief for Petitioner 38–40; 576 U. S., at 603. Trying to reconcile them with each other, and then compare them to whatever unlisted crime was at issue, drove many a judge a little batty. And more to the point, the endeavor failed to bring any certainty to the residual clause's application. See Brief for Petitioner 38–40.

But the Government's conclusion does not follow. To say that ACCA's listed crimes failed to resolve the residual clause's vagueness is hardly to say they caused the problem. Had they done so, *Johnson* would not have needed to strike down the clause. It could simply have instructed courts to give up on trying to interpret the clause by reference to the enumerated offenses. (Contrary to THE CHIEF JUSTICE's suggestion, see *post*, at 171, discarding an interpretive tool once it is found not to actually aid in interpretation hardly "expand[s]" the scope of a statute.) That *Johnson* went so much further—invalidating a statutory provision rather than construing it independently of another—demonstrates that the list of crimes was not the culprit. And indeed, *Johnson* explicitly said as much. As described earlier, *Johnson* found the residual clause's vagueness to reside in just "two" of its features: the ordinary-case requirement and a fuzzy risk standard. See 576 U. S., at 597–598; *supra*, at 158–159. Strip away the enumerated crimes—as Congress did in § 16(b)—and those dual flaws yet remain. And ditto the textual indeterminacy that flows from them.

2

Faced with the two clauses' linguistic similarity, the Government relies significantly on an argument rooted in judicial

experience. Our opinion in *Johnson*, the Government notes, spoke of the longstanding "trouble" that this Court and others had in "making sense of [ACCA's] residual clause." 576 U. S., at 601; see Brief for Petitioner 45. According to the Government, § 16(b) has not produced "comparable difficulties." *Id.*, at 46. Lower courts, the Government claims, have divided less often about the provision's meaning, and as a result this Court granted certiorari on "only a single Section 16(b) case" before this one. *Ibid.*[7] "The most likely explanation," the Government concludes, is that "Section 16(b) is clearer" than its ACCA counterpart. *Id.*, at 47.

But in fact, a host of issues respecting § 16(b)'s application to specific crimes divide the federal appellate courts. Does car burglary qualify as a violent felony under § 16(b)? Some courts say yes, another says no.[8] What of statutory rape? Once again, the Circuits part ways.[9] How about evading arrest? The decisions point in different directions.[10] Resi-

---

[7] And, THE CHIEF JUSTICE emphasizes, we decided that one unanimously! See *post*, at 194 (discussing *Leocal* v. *Ashcroft*, 543 U. S. 1 (2004)). But one simple application does not a clear statute make. As we put the point in *Johnson*: Our decisions "squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." 576 U. S., at 602; see *supra*, at 161, n. 4.

[8] Compare *Escudero-Arciniega* v. *Holder*, 702 F. 3d 781, 784–785 (CA5 2012) (*per curiam*) (yes, it does), and *United States* v. *Guzman-Landeros*, 207 F. 3d 1034, 1035 (CA8 2000) (*per curiam*) (same), with *Sareang Ye* v. *INS*, 214 F. 3d 1128, 1133–1134 (CA9 2000) (no, it does not).

[9] Compare *Aguiar* v. *Gonzales*, 438 F. 3d 86, 89–90 (CA1 2006) (statutory rape involves a substantial risk of force); *Chery* v. *Ashcroft*, 347 F. 3d 404, 408–409 (CA2 2003) (same); and *United States* v. *Velazquez-Overa*, 100 F. 3d 418, 422 (CA5 1996) (same), with *Valencia* v. *Gonzales*, 439 F. 3d 1046, 1052 (CA9 2006) (statutory rape does not involve such a risk).

[10] Compare *Dixon* v. *Attorney Gen.*, 768 F. 3d 1339, 1343–1346 (CA11 2014) (holding that one such statute falls under § 16(b)), with *Flores-Lopez* v. *Holder*, 685 F. 3d 857, 863–865 (CA9 2012) (holding that another does not).

dential trespass? The same is true.[11] Those examples do not exhaust the current catalogue of Circuit conflicts concerning § 16(b)'s application. See Brief for National Immigration Project of the National Lawyers Guild et al. as *Amici Curiae* 7–18 (citing divided appellate decisions as to the unauthorized use of a vehicle, firearms possession, and abduction). And that roster would just expand with time, mainly because, as *Johnson* explained, precious few crimes (of the thousands that fill the statute books) have an obvious, non-speculative—and therefore undisputed—"ordinary case." See 576 U. S., at 597–598.

Nor does this Court's prior handling of § 16(b) cases support the Government's argument. To be sure, we have heard oral argument in only two cases arising from § 16(b) (including this one), as compared with five involving ACCA's residual clause (including *Johnson*).[12] But while some of those ACCA suits were pending before us, we received a number of petitions for certiorari presenting related issues in the § 16(b) context. And after issuing the relevant ACCA decisions, we vacated the judgments in those § 16(b) cases

---

[11] Compare *United States* v. *Venegas-Ornelas*, 348 F. 3d 1273, 1277–1278 (CA10 2003) (residential trespass is a crime of violence), with *Zivkovic* v. *Holder*, 724 F. 3d 894, 906 (CA7 2013) (it is not).

[12] From all we can tell—and all the Government has told us, see Brief for Petitioner 45–52—lower courts have also decided many fewer cases involving § 16(b) than ACCA's residual clause. That disparity likely reflects the Government's lesser need to rely on § 16(b). That provision is mainly employed (as here) in the immigration context, to establish an "aggravated felony" requiring deportation. See *supra*, at 153. But immigration law offers many other ways to achieve that result. The INA lists 80 or so crimes that count as aggravated felonies; only if a conviction is not for one of those specified offenses need the Government resort to § 16(b) (or another catch-all provision). See *Luna Torres* v. *Lynch*, 578 U. S. 452, 455 (2016). By contrast, ACCA enumerates only four crimes as a basis for enhancing sentences; the Government therefore had reason to use the statute's residual clause more often.

and remanded them for further consideration.[13] That we disposed of the ACCA and § 16(b) petitions in that order, rather than its opposite, provides no reason to disregard the indeterminacy that § 16(b) shares with ACCA's residual clause.

And of course, this Court's experience in deciding ACCA cases only supports the conclusion that § 16(b) is too vague. For that record reveals that a statute with all the same hallmarks as § 16(b) could not be applied with the predictability the Constitution demands. See *id.*, at 598–600; *supra*, at 157–159. The Government would condemn us to repeat the past—to rerun the old ACCA tape, as though we remembered nothing from its first showing. But why should we disregard a lesson so hard learned? "Insanity," Justice Scalia wrote in the last ACCA residual-clause case before *Johnson*, "is doing the same thing over and over again, but expecting different results." *Sykes*, 564 U. S., at 28 (dissenting opinion). We abandoned that lunatic practice in *Johnson* and see no reason to start it again.

V

Johnson tells us how to resolve this case. That decision held that "[t]wo features of [ACCA's] residual clause conspire[d] to make it unconstitutionally vague." 576 U. S., at 597. Because the clause had both an ordinary-case requirement and an ill-defined risk threshold, it necessarily "devolv[ed] into guesswork and intuition," invited arbitrary enforcement, and failed to provide fair notice. *Id.*, at 600. Section 16(b) possesses the exact same two features. And none of the minor linguistic disparities in the statutes makes

---

[13] See, *e. g.*, *Amendariz-Moreno* v. *United States*, 555 U. S. 1133 (2009) (vacating and remanding for reconsideration in light of *Begay* v. *United States*, 553 U. S. 137 (2008), and *Chambers* v. *United States*, 555 U. S. 122 (2009)); *Castillo-Lucio* v. *United States*, 555 U. S. 1133 (2009) (same); *Addo* v. *Mukasey*, 555 U. S. 1132 (2009) (vacating and remanding in light of *Chambers*); *Serna-Guerra* v. *Holder*, 556 U. S 1279 (2009) (same); *Reyes-Figueroa* v. *United States*, 555 U. S. 1132 (2009) (same).

any real difference. So just like ACCA's residual clause, § 16(b) "produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.*, at 598. We accordingly affirm the judgment of the Court of Appeals.

It is so ordered.

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

Vague laws invite arbitrary power. Before the Revolution, the crime of treason in English law was so capaciously construed that the mere expression of disfavored opinions could invite transportation or death. The founders cited the crown's abuse of "pretended" crimes like this as one of their reasons for revolution. See Declaration of Independence ¶21. Today's vague laws may not be as invidious, but they can invite the exercise of arbitrary power all the same—by leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up.

The law before us today is such a law. Before holding a lawful permanent resident alien like James Dimaya subject to removal for having committed a crime, the Immigration and Nationality Act requires a judge to determine that the ordinary case of the alien's crime of conviction involves a substantial risk that physical force may be used. But what does that mean? Just take the crime at issue in this case, California burglary, which applies to everyone from armed home intruders to door-to-door salesmen peddling shady products. How, on that vast spectrum, is anyone supposed to locate the ordinary case and say whether it includes a substantial risk of physical force? The truth is, no one knows. The law's silence leaves judges to their intuitions and the people to their fate. In my judgment, the Constitution demands more.

* * *

I begin with a foundational question. Writing for the Court in *Johnson* v. *United States*, 576 U. S. 591 (2015), Jus-

tice Scalia held the residual clause of the Armed Career Criminal Act void for vagueness because it invited "more unpredictability and arbitrariness" than the Constitution allows. *Id.*, at 598. Because the residual clause in the statute now before us uses almost exactly the same language as the residual clause in *Johnson*, respect for precedent alone would seem to suggest that both clauses should suffer the same judgment.

But first in *Johnson* and now again today JUSTICE THOMAS has questioned whether our vagueness doctrine can fairly claim roots in the Constitution as originally understood. See, *e. g.*, *post*, at 206–210 (dissenting opinion); *Johnson*, *supra*, at 611–624 (opinion concurring in judgment). For its part, the Court has yet to offer a reply. I believe our colleague's challenge is a serious and thoughtful one that merits careful attention. At day's end, though, it is a challenge to which I find myself unable to subscribe. Respectfully, I am persuaded instead that void for vagueness doctrine, at least properly conceived, serves as a faithful expression of ancient due process and separation of powers principles the framers recognized as vital to ordered liberty under our Constitution.

Consider first the doctrine's due process underpinnings. The Fifth and Fourteenth Amendments guarantee that "life, liberty, or property" may not be taken "without due process of law." That means the government generally may not deprive a person of those rights without affording him the benefit of (at least) those "customary procedures to which freemen were entitled by the old law of England." *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1, 28 (1991) (Scalia, J., concurring in judgment) (internal quotation marks omitted). Admittedly, some have suggested that the Due Process Clause does less work than this, allowing the government to deprive people of their liberty through whatever procedures (or lack of them) the government's current laws may tolerate. *Post*, at 207, n. 1 (opinion of THOMAS, J.) (collecting authorities). But in my view the weight of the historical evidence shows that the Clause sought to ensure that the people's

rights are never any less secure against governmental invasion than they were at common law. Lord Coke took this view of the English due process guarantee. 1 E. Coke, The Second Part of the Institutes of the Laws of England 50 (1797). John Rutledge, our second Chief Justice, explained that Coke's teachings were carefully studied and widely adopted by the framers, becoming "'almost the foundations of our law.'" *Klopfer* v. *North Carolina*, 386 U. S. 213, 225 (1967). And many more students of the Constitution besides—from Justice Story to Justice Scalia—have agreed that this view best represents the original understanding of our own Due Process Clause. See, *e. g.*, *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 277 (1856); 3 J. Story, Commentaries on the Constitution of the United States § 1783, p. 661 (1833); *Pacific Mut.*, *supra*, at 28–29 (opinion of Scalia, J.); Eberle, Procedural Due Process: The Original Understanding, 4 Const. Comment. 339, 341 (1987).

Perhaps the most basic of due process's customary protections is the demand of fair notice. See *Connally* v. *General Constr. Co.*, 269 U. S. 385, 391 (1926); see also Note, Textualism as Fair Notice, 123 Harv. L. Rev. 542, 543 (2009) ("From the inception of Western culture, fair notice has been recognized as an essential element of the rule of law"). Criminal indictments at common law had to provide "precise and sufficient certainty" about the charges involved. 4 W. Blackstone, Commentaries on the Laws of England 301 (1769) (Blackstone). Unless an "offence [was] set forth with clearness and certainty," the indictment risked being held void in court. *Id.*, at 302 (emphasis deleted); 2 W. Hawkins, Pleas of the Crown, ch. 25, §§ 99, 100, pp. 244–245 (2d ed. 1726) ("[I]t seems to have been anciently the common Practice, where an Indictment appeared to be [in]sufficient, either for its Uncertainty or the Want of proper legal words, not to put the defendant to answer it").

The same held true in civil cases affecting a person's life, liberty, or property. A civil suit began by obtaining a writ—a detailed and specific form of action asking for partic-

ular relief. Bellia, Article III and the Cause of Action, 89 Iowa L. Rev. 777, 784–786 (2004); Subrin, How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective, 135 U. Pa. L. Rev. 909, 914–915 (1987). Because the various civil writs were clearly defined, English subjects served with one would know with particularity what legal requirement they were alleged to have violated and, accordingly, what would be at issue in court. *Id.*, at 917; Moffitt, Pleadings in the Age of Settlement, 80 Ind. L. J. 727, 731 (2005). And a writ risked being held defective if it didn't provide fair notice. *Goldington* v. *Bassingburn*, Y. B. Trin. 3 Edw. II, f. 27b, 196 (1310) (explaining that it was "the law of the land" that "no one [could] be taken by surprise" by having to "answer in court for what [one] has not been warned to answer").

The requirement of fair notice applied to statutes too. Blackstone illustrated the point with a case involving a statute that made "stealing sheep, or other cattle," a felony. 1 Blackstone 88 (emphasis deleted). Because the term "cattle" embraced a good deal more then than it does now (including wild animals, no less), the court held the statute failed to provide adequate notice about what it did and did not cover—and so the court treated the term "cattle" as a nullity. *Ibid.* All of which, Blackstone added, had the salutary effect of inducing the legislature to reenter the field and make itself clear by passing a new law extending the statute to "bulls, cows, oxen," and more "by name." *Ibid.*

This tradition of courts refusing to apply vague statutes finds parallels in early American practice as well. In *The Enterprise*, 8 F. Cas. 732 (No. 4,499) (CC NY 1810), for example, Justice Livingston found that a statute setting the circumstances in which a ship may enter a port during an embargo was too vague to be applied, concluding that "the court had better pass" the statutory terms by "as unintelligible and useless" rather than "put on them, at great uncertainty, a very harsh signification, and one which the legislature may

never have designed." *Id.*, at 735. In *United States* v. *Sharp*, 27 F. Cas. 1041 (No. 16,264) (CC Pa. 1815), Justice Washington confronted a statute which prohibited seamen from making a "revolt." *Id.*, at 1043. But he was unable to determine the meaning of this provision "by any authority . . . either in the common, admiralty, or civil law." *Ibid.* As a result, he declined to "recommend to the jury, to find the prisoners guilty of making, or endeavouring to make a revolt, however strong the evidence may be." *Ibid.*[1]

Nor was the concern with vague laws confined to the most serious offenses like capital crimes. Courts refused to apply vague laws in criminal cases involving relatively modest pen-

[1] Many state courts also held vague laws ineffectual. See, *e. g.*, *State* v. *Mann*, 2 Ore. 238, 240–241 (1867) (holding statute that prohibited "gambling devices" was "void" because "the term has no settled and definite meaning"); *Drake* v. *Drake*, 15 N. C. 110, 115 (1833) (explaining that "if the terms in which [a statute] is couched be so vague as to convey no definite meaning to those whose duty it is to execute it . . . it is necessarily inoperative"); *McConvill* v. *Mayor and Aldermen of Jersey City*, 39 N. J. L. 38, 44 (1876) (holding that an ordinance was "bad for vagueness and uncertainty in the thing forbidden"); *State* v. *Boon*, 1 N. C. 103, 105 (1801) (refusing to apply a statute because "no punishment whatever can be inflicted; without using a discretion and indulging a latitude, which in criminal cases ought never to be allowed a Judge"); *Ex parte Jackson*, 45 Ark. 158, 164 (1885) (declaring a statutory prohibition on acts "injurious to the public morals" to be "vague" and "simply null" (emphasis deleted)); *McJunkins* v. *State*, 10 Ind. 140, 145 (1858) ("It would therefore appear that the term *public indecency* has no fixed legal meaning—is vague and indefinite, and cannot in itself imply a definite offense"); *Jennings* v. *State*, 16 Ind. 335, 336 (1861) ("We are of opinion that for want of a proper definition, no act is made criminal by the terms 'public indecency,' employed in the statute"); *Commonwealth* v. *Bank of Pennsylvania*, 3 Watts & Serg. 173, 177 (Pa. 1842) (holding "the language of [shareholder election] legislation so devoid of certainty" that "no valid election [could have] been held, and that none can be held without further legislation"); *Cheezem* v. *State*, 2 Ind. 149, 150 (1850) (finding statute to "contai[n] no prohibition of any kind whatever" and thus declaring it "a nullity"); see also Note, Statutory Standards of Personal Conduct: Indefiniteness and Uncertainty as Violations of Due Process, 38 Harv. L. Rev. 963, 964, n. 4 (1925) (collecting cases).

alties. See, *e. g.*, *McJunkins* v. *State*, 10 Ind. 140, 145 (1858). They applied the doctrine in civil cases too. See, *e. g.*, *Drake* v. *Drake*, 15 N. C. 110, 115 (1833); *Commonwealth* v. *Bank of Pennsylvania*, 3 Watts & Serg. 173, 177 (Pa. 1842). As one court put it, "all laws" "ought to be expressed in such a manner as that its meaning may be unambiguous, and in such language as may be readily understood by those upon whom it is to operate." *McConvill* v. *Mayor and Aldermen of Jersey City*, 39 N. J. L. 38, 42 (1876). "'It is impossible . . . to dissent from the doctrine of Lord Coke, that acts of parliament ought to be plainly and clearly, and not cunningly and darkly penned, especially in penal matters.'" *Id.*, at 42–43.

These early cases, admittedly, often spoke in terms of construing vague laws strictly rather than declaring them void. See, *e. g.*, *post*, at 208–209 (opinion of THOMAS, J.); *Johnson*, 576 U. S., at 613–616 (opinion of THOMAS, J.). But in substance void the law is often exactly what these courts did: rather than try to construe or interpret the statute before them, judges frequently held the law simply too vague to apply. Blackstone, for example, did not suggest the court in his illustration should have given a narrowing construction to the term "cattle," but argued against giving it any effect *at all*. 1 Blackstone 88; see also Scalia, Assorted Canards of Contemporary Legal Analysis, 40 Case W. Res. L. Rev. 581, 582 (1989) ("I doubt . . . that any modern court would go to the lengths described by Blackstone in its application of the rule that penal statutes are to be strictly construed"); Note, Indefinite Criteria of Definiteness in Statutes, 45 Harv. L. Rev. 160, n. 3 (1931) (explaining that "since strict construction, in effect, nullified ambiguous provisions, it was but a short step to declaring them void *ab initio*"); n. 1, *supra* (state courts holding vague statutory terms "void" or "null").

What history suggests, the structure of the Constitution confirms. Many of the Constitution's other provisions presuppose and depend on the existence of reasonably clear laws. Take the Fourth Amendment's requirement that ar-

rest warrants must be supported by probable cause, and consider what would be left of that requirement if the alleged crime had no meaningful boundaries. Or take the Sixth Amendment's mandate that a defendant must be informed of the accusations against him and allowed to bring witnesses in his defense, and consider what use those rights would be if the charged crime was so vague the defendant couldn't tell what he's alleged to have done and what sort of witnesses he might need to rebut that charge. Without an assurance that the laws supply fair notice, so much else of the Constitution risks becoming only a "parchment barrie[r]" against arbitrary power. The Federalist No. 48, p. 308 (C. Rossiter ed. 1961) (J. Madison).

Although today's vagueness doctrine owes much to the guarantee of fair notice embodied in the Due Process Clause, it would be a mistake to overlook the doctrine's equal debt to the separation of powers. The Constitution assigns "[a]ll legislative Powers" in our federal government to Congress. Art. I, § 1. It is for the people, through their elected representatives, to choose the rules that will govern their future conduct. See The Federalist No. 78, at 465 (A. Hamilton) ("The legislature . . . prescribes the rules by which the duties and rights of every citizen are to be regulated"). Meanwhile, the Constitution assigns to judges the "judicial Power" to decide "Cases" and "Controversies." Art. III, § 2. That power does not license judges to craft new laws to govern future conduct, but only to "discer[n] the course prescribed by law" as it currently exists and to "follow it" in resolving disputes between the people over past events. *Osborn* v. *Bank of United States*, 9 Wheat. 738, 866 (1824).

From this division of duties, it comes clear that legislators may not "abdicate their responsibilities for setting the standards of the criminal law," *Smith* v. *Goguen*, 415 U. S. 566, 575 (1974), by leaving to judges the power to decide "the various crimes includable in [a] vague phrase," *Jordan* v. *De George*, 341 U. S. 223, 242 (1951) (Jackson, J., dissenting). For "if the

legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large[, t]his would, to some extent, substitute the judicial for the legislative department of government." *Kolender* v. *Lawson*, 461 U. S. 352, 358, n. 7 (1983) (internal quotation marks omitted). Nor is the worry only that vague laws risk allowing judges to assume legislative power. Vague laws also threaten to transfer legislative power to police and prosecutors, leaving to them the job of shaping a vague statute's contours through their enforcement decisions. See *Grayned* v. *City of Rockford*, 408 U. S. 104, 108–109 (1972) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis").

These structural worries are more than just formal ones. Under the Constitution, the adoption of new laws restricting liberty is supposed to be a hard business, the product of an open and public debate among a large and diverse number of elected representatives. Allowing the legislature to hand off the job of lawmaking risks substituting this design for one where legislation is made easy, with a mere handful of unelected judges and prosecutors free to "condem[n] all that [they] personally disapprove and for no better reason than [they] disapprove it." *Jordan*, *supra*, at 242 (Jackson, J., dissenting). Nor do judges and prosecutors act in the open and accountable forum of a legislature, but in the comparatively obscure confines of cases and controversies. See, *e. g.*, A. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 151 (1962) ("A vague statute delegates to administrators, prosecutors, juries, and judges the authority of *ad hoc* decision, which is in its nature difficult if not impossible to hold to account, because of its narrow impact"). For just these reasons, Hamilton warned, while "liberty can have nothing to fear from the judiciary alone," it has "every thing to fear from" the union of the judicial and legislative powers.

The Federalist No. 78, at 466. No doubt, too, for reasons like these this Court has held "that the *more important* aspect of vagueness doctrine 'is not actual notice, but . . . the requirement that a legislature establish minimal guidelines to govern law enforcement'" and keep the separate branches within their proper spheres. *Kolender*, *supra*, at 358 (quoting *Goguen*, *supra*, at 574 (emphasis added)).

* * *

Persuaded that vagueness doctrine enjoys a secure footing in the original understanding of the Constitution, the next question I confront concerns the standard of review. What degree of imprecision should this Court tolerate in a statute before declaring it unconstitutionally vague? For its part, the government argues that where (as here) a person faces only civil, not criminal, consequences from a statute's operation, we should declare the law unconstitutional only if it is "unintelligible." But in the criminal context this Court has generally insisted that the law must afford "ordinary people fair notice of the conduct it punishes." *Johnson*, 576 U. S., at 595. And I cannot see how the Due Process Clause might often require any less than that in the civil context either. Fair notice of the law's demands, as we've seen, is "the first essential of due process." *Connally*, 269 U. S., at 391. And as we've seen, too, the Constitution sought to preserve a common law tradition that usually aimed to ensure fair notice before any deprivation of life, liberty, or property could take place, whether under the banner of the criminal or the civil law. See *supra*, at 176–180.

First principles aside, the government suggests that at least this Court's precedents support adopting a less-than-fair-notice standard for civil cases. But even that much I do not see. This Court has already expressly held that a "stringent vagueness test" should apply to at least some civil laws—those abridging basic First Amendment freedoms. *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455

U. S. 489, 499 (1982). This Court has made clear, too, that due process protections against vague laws are "not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute." *Giaccio* v. *Pennsylvania*, 382 U. S. 399, 402 (1966). So the happenstance that a law is found in the civil or criminal part of the statute books cannot be dispositive. To be sure, this Court has also said that what qualifies as fair notice depends "in part on the nature of the enactment." *Hoffman Estates*, 455 U. S., at 498. And the Court has sometimes "expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." *Id.*, at 498–499. But to acknowledge these truisms does nothing to prove that civil laws must always be subject to the government's emaciated form of review.

In fact, if the severity of the consequences counts when deciding the standard of review, shouldn't we also take account of the fact that today's civil laws regularly impose penalties far more severe than those found in many criminal statutes? Ours is a world filled with more and more civil laws bearing more and more extravagant punishments. Today's "civil" penalties include confiscatory rather than compensatory fines, forfeiture provisions that allow homes to be taken, remedies that strip persons of their professional licenses and livelihoods, and the power to commit persons against their will indefinitely. Some of these penalties are routinely imposed and are routinely graver than those associated with misdemeanor crimes—and often harsher than the punishment for felonies. And not only are "punitive civil sanctions . . . rapidly expanding," they are "sometimes more severely punitive than the parallel criminal sanctions *for the same conduct*." Mann, Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law, 101 Yale L. J. 1795, 1798 (1992) (emphasis added). Given all this, any suggestion that criminal cases warrant a heightened standard of review does more to persuade me that the criminal standard

should be set *above* our precedent's current threshold than to suggest the civil standard should be buried *below* it.

Retreating to a more modest line of argument, the government emphasizes that this case arises in the immigration context and so implicates matters of foreign relations where the Executive enjoys considerable constitutional authority. But to acknowledge that the *President* has broad authority to act in this general area supplies no justification for allowing *judges* to give content to an impermissibly vague law.

Alternatively still, JUSTICE THOMAS suggests that, at least at the time of the founding, aliens present in this country may not have been understood as possessing any rights under the Due Process Clause. For support, he points to the Alien Friends Act of 1798. An Act Concerning Aliens § 1, 1 Stat. 571; *post*, at 210–215 (opinion of THOMAS, J.). But the Alien Friends Act—better known as the "Alien" part of the Alien and Sedition Acts—is one of the most notorious laws in our country's history. It was understood as a temporary war measure, not one that the legislature would endorse in a time of tranquility. See, *e. g.*, Fehlings, Storm on the Constitution: The First Deportation Law, 10 Tulsa J. Comp. & Int'l L. 63, 70–71 (2002). Yet even then it was widely condemned as unconstitutional by Madison and many others. It also went unenforced, may have cost the Federalist Party its existence, and lapsed a mere two years after its enactment. With this fuller view, it seems doubtful the Act tells us a great deal about aliens' due process rights at the founding.[2]

[2] See, *e. g.*, Virginia Resolutions, in 4 Debates on the Federal Constitution 528 (J. Elliot ed. 1836) (explaining that the Act, "by uniting legislative and judicial powers to those of executive, subverts . . . the particular organization, and positive provisions of the federal constitution" (emphasis deleted)); Madison's Report on the Virginia Resolutions (Jan. 7, 1800), in 17 Papers of James Madison 318 (D. Mattern ed. 1991) (Madison's Report) (contending that the Act violated "the only preventive justice known to American jurisprudence," because "[t]he ground of suspicion is to be judged of, not by any judicial authority, but by the executive magistrate

Besides, none of this much matters. Whether Madison or his adversaries had the better of the debate over the constitutionality of the Alien Friends Act, Congress is surely free to extend existing forms of liberty to new classes of persons—liberty that the government may then take only after affording due process. See, *e. g.*, *Sandin* v. *Conner*, 515 U. S. 472, 477–478 (1995); Easterbrook, Substance and Due Process, 1982 S. Ct. Rev. 85, 88 ("If . . . the constitution, statute, or regulation creates a liberty or property interest, then the second step—determining 'what process is due'—comes into play"). Madison made this very point, suggesting an alien's admission in this country could in some circumstances be analogous to the "grant of land to an individual," which "may be of favor not of right; but the moment the grant is made, the favor becomes a right, and must be forfeited before it can be taken away." Madison's Report 319. And, of course, that's exactly what Congress eventually chose to do here.

---

alone"); L. Canfield & H. Wilder, The Making of Modern America 158 (H. Anderson et al. eds. 1952) ("People all over the country protested against the Alien and Sedition Acts"); M. Baseler, "Asylum for Mankind": America, 1607–1800, p. 287 (1998) ("The election of 1800 was a referendum on—and a repudiation of—the Federalist 'doctrines' enunciated in the debates" over, among other things, the Alien Friends Act); Moore, Aliens and the Constitution, 88 N. Y. U. L. Rev. 801, 865, n. 300 (2013) ("The Aliens Act and Sedition Act were met with widespread criticism"); Lindsay, Immigration, Sovereignty, and the Constitution of Foreignness, 45 Conn. L. Rev. 743, 759 (2013) ("[T]he [Alien Friends] Act proved wildly unpopular among the American public, and contributed to the Republican electoral triumph in 1800 and the subsequent demise of the Federalist Party"). Whether the law was unenforced or, at most, enforced only once, the literature is not quite clear. Compare Sidak, War, Liberty, and Enemy Aliens, 67 N. Y. U. L. Rev. 1402, 1406 (1992) (explaining the Act was never enforced); Cole, Enemy Aliens, 54 Stan. L. Rev. 953, 989 (2002) (same); Klein & Wittes, Preventative Detention in American Theory and Practice, 2 Harv. Nat. Sec. J. 85, 102, n. 71 (2011) (same); Rosenfeld, Deportation Proceedings and Due Process of Law, 26 Colum. Hum. Rts. L. Rev. 713, 726, 733 (1995) (same), with Fehlings, Storm on the Constitution: The First Deportation Law, 10 Tulsa J. Comp. & Int'l L. 63, 109 (2002) (stating that the Act was enforced once, on someone who was planning on leaving the country in a few months anyway).

Decades ago, it enacted a law affording Mr. Dimaya lawful permanent residency in this country, extending to him a statutory liberty interest others traditionally have enjoyed to remain in and move about the country free from physical imprisonment and restraint. See *Dimaya* v. *Lynch*, 803 F. 3d 1110, 1111 (CA9 2015); 8 U. S. C. §§ 1101(a)(20), 1255. No one suggests Congress *had* to enact statutes of this sort. And exactly what processes must attend the deprivation of a statutorily afforded liberty interest like this may pose serious and debatable questions. Cf. *Murray's Lessee*, 18 How., at 277 (approving summary procedures in another context). But however summary those procedures might be, it's hard to fathom why fair notice of the law—the most venerable of due process's requirements—would not be among them. *Connally*, 269 U. S., at 391.[3]

---

[3] This Court already and long ago held that due process requires affording aliens the "opportunity, at some time, to be heard" before some lawful authority in advance of removal—and it's unclear how that opportunity might be meaningful without fair notice of the law's demands. *The Japanese Immigrant Case*, 189 U. S. 86, 101 (1903). Nor do the cases JUSTICE THOMAS cites hold that a statutory right to lawful permanent residency in this country can be withdrawn without due process. *Post*, at 214–215 (dissenting opinion). Rather, each merely holds that the particular statutory removal procedures under attack comported with due process. See *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 585 (1952) (rejecting argument that an "alien is entitled to constitutional [due process] protection . . . *to the same extent as the citizen*" before removal (emphasis added)); *United States ex rel. Turner* v. *Williams*, 194 U. S. 279, 289–290 (1904) (deporting an alien found to be in violation of a constitutionally valid law doesn't violate due process); *Fong Yue Ting* v. *United States*, 149 U. S. 698, 730 (1893) (deporting an alien who hasn't "complied with the conditions" required to stay in the country doesn't violate due process). Even when it came to judicially unenforceable privileges in the past, "executive officials had to respect statutory privileges that had been granted to private individuals and that Congress had not authorized the officials to abrogate." Nelson, Adjudication in the Political Branches, 107 Colum. L. Rev. 559, 581 (2007) (emphasis deleted). So in a case like ours it would've been incumbent on any executive official to determine that the alien committed a qualifying crime, and statutory vagueness could pose a disabling problem even there.

Today, a plurality of the Court agrees that we should reject the government's plea for a feeble standard of review, but for a different reason. *Ante*, at 156. My colleagues suggest the law before us should be assessed under the fair notice standard because of the special gravity of its civil deportation penalty. But, grave as that penalty may be, I cannot see why we would single it out for special treatment when (again) so many civil laws today impose so many similarly severe sanctions. Why, for example, would due process require Congress to speak more clearly when it seeks to deport a lawfully resident alien than when it wishes to subject a citizen to indefinite civil commitment, strip him of a business license essential to his family's living, or confiscate his home? I can think of no good answer.

* * *

With the fair notice standard now in hand, all that remains is to ask how it applies to the case before us. And here at least the answer comes readily for me: to the extent it requires an "ordinary case" analysis, the portion of the Immigration and Nationality Act before us fails the fair notice test for the reasons Justice Scalia identified in *Johnson* and the Court recounts today.

Just like the statute in *Johnson*, the statute here instructs courts to impose special penalties on individuals previously "convicted of" a "crime of violence." 8 U. S. C. §§ 1227(a)(2)(A)(iii), 1101(a)(43)(F). Just like the statute in *Johnson*, the statute here fails to specify which crimes qualify for that label. Instead, and again like the statute in *Johnson*, the statute here seems to require a judge to guess about the ordinary case of the crime of conviction and then guess whether a "substantial risk" of "physical force" attends its commission. 18 U. S. C. § 16(b); *Johnson*, 576 U. S., at 597–598. *Johnson* held that a law that asks so much of courts while offering them so little by way of guidance is unconstitutionally vague. And I do not see how we might reach a different judgment here.

Any lingering doubt is resolved for me by taking account of just some of the questions judges trying to apply the statute using an ordinary case analysis would have to confront. Does a conviction for witness tampering ordinarily involve a threat to the kneecaps or just the promise of a bribe? Does a conviction for kidnapping ordinarily involve throwing someone into a car trunk or a noncustodial parent picking up a child from daycare? These questions do not suggest obvious answers. Is the court supposed to hold evidentiary hearings to sort them out, entertaining experts with competing narratives and statistics, before deciding what the ordinary case of a given crime looks like and how much risk of violence it poses? What is the judge to do if there aren't any reliable statistics available? Should (or must) the judge predict the effects of new technology on what qualifies as the ordinary case? After all, surely the risk of injury calculus for crimes like larceny can be expected to change as more thefts are committed by computer rather than by gunpoint. Or instead of requiring real evidence, does the statute mean to just leave it all to a judicial hunch? And on top of all that may be the most difficult question yet: at what level of generality is the inquiry supposed to take place? Is a court supposed to pass on the ordinary case of burglary in the relevant neighborhood or county, or should it focus on statewide or even national experience? How is a judge to know? How are the people to know?

The implacable fact is that this isn't your everyday ambiguous statute. It leaves the people to guess about what the law demands—and leaves judges to make it up. You cannot discern answers to any of the questions this law begets by resorting to the traditional canons of statutory interpretation. No amount of staring at the statute's text, structure, or history will yield a clue. Nor does the statute call for the application of some preexisting body of law familiar to the judicial power. The statute doesn't even ask for application of common experience. Choice, pure and raw, is required. Will, not judgment, dictates the result.

* * *

Having said this much, it is important to acknowledge some limits on today's holding too. I have proceeded on the premise that the Immigration and Nationality Act, as it incorporates § 16(b) of the criminal code, commands courts to determine the risk of violence attending the ordinary case of conviction for a particular crime. I have done so because no party before us has argued for a different way to read these statutes in combination; because our precedent seemingly requires this approach; and because the government itself has conceded (repeatedly) that the law compels it. *Johnson*, *supra*, at 604; *Taylor* v. *United States*, 495 U. S. 575, 600 (1990); Brief for Petitioner 11, 30, 32, 36, 40, 47 (conceding that an ordinary case analysis is required).

But any more than that I would not venture. In response to the problems engendered by the ordinary case analysis, JUSTICE THOMAS suggests that we should overlook the government's concession about the propriety of that approach; reconsider our precedents endorsing it; and read the statute as requiring us to focus on the facts of the alien's crime as committed rather than as the facts appear in the ordinary case of conviction. *Post*, at 223–235. But normally courts do not rescue parties from their concessions, maybe least of all concessions from a party as able to protect its interests as the federal government. And normally, too, the crucible of adversarial testing is crucial to sound judicial decisionmaking. We rely on it to "yield insights (or reveal pitfalls) we cannot muster guided only by our own lights." *Maslenjak* v. *United States*, 582 U. S. 335, 354 (2017) (GORSUCH, J., concurring in part and concurring in judgment).

While sometimes we may or even must forgo the adversarial process, I do not see the case for doing so today. Maybe especially because I am not sure JUSTICE THOMAS's is the only available alternative reading of the statute we would have to consider, even if we did reject the government's concession and wipe the precedential slate clean. We might

also have to consider an interpretation that would have courts ask not whether the alien's crime of conviction ordinarily involves a risk of physical force, or whether the defendant's particular crime involved such a risk, but whether the defendant's crime of conviction *always* does so. After all, the language before us requires a conviction for an "offense . . . that, *by its nature*, involves a substantial risk of physical force." 18 U. S. C. § 16(b) (emphasis added). Plausibly, anyway, the word "nature" might refer to an inevitable characteristic of the offense; one that would present itself automatically, whenever the statute is violated. See 10 Oxford English Dictionary 247 (2d ed. 1989). While I remain open to different arguments about our precedent and the proper reading of language like this, I would address them in another case, whether involving the INA or a different statute, where the parties have a chance to be heard and we might benefit from their learning.

It's important to note the narrowness of our decision today in another respect too. Vagueness doctrine represents a procedural, not a substantive, demand. It does not forbid the legislature from acting toward any end it wishes, but only requires it to act with enough clarity that reasonable people can know what is required of them and judges can apply the law consistent with their limited office. Our history surely bears examples of the judicial misuse of the so-called "substantive component" of due process to dictate policy on matters that belonged to the people to decide. But concerns with substantive due process should not lead us to react by withdrawing an ancient procedural protection compelled by the original meaning of the Constitution.

Today's decision sweeps narrowly in yet one more way. By any fair estimate, Congress has largely satisfied the procedural demand of fair notice even in the INA provision before us. The statute lists a number of specific crimes that can lead to a lawful resident's removal—for example, murder, rape, and sexual abuse of a minor. 8 U. S. C.

§ 1101(a)(43)(A). Our ruling today does not touch this list. We address only the statute's "residual clause" where Congress ended its own list and asked us to begin writing our own. Just as Blackstone's legislature passed a revised statute clarifying that "cattle" covers bulls and oxen, Congress remains free at any time to add more crimes to its list. It remains free, as well, to write a new residual clause that affords the fair notice lacking here. Congress might, for example, say that a conviction for any felony carrying a prison sentence of a specified length opens an alien to removal. Congress has done almost exactly this in other laws. See, *e. g.*, 18 U. S. C. § 922(g). What was done there could be done here.

But those laws are not this law. And while the statute before us doesn't rise to the level of threatening death for "pretended offences" of treason, no one should be surprised that the Constitution looks unkindly on any law so vague that reasonable people cannot understand its terms and judges do not know where to begin in applying it. A government of laws and not of men can never tolerate that arbitrary power. And, in my judgment, that foundational principle dictates today's result. Because I understand them to be consistent with what I have said here, I join Parts I, III, IV–B, and V of the Court's opinion and concur in the judgment.

CHIEF JUSTICE ROBERTS, with whom JUSTICE KENNEDY, JUSTICE THOMAS, and JUSTICE ALITO join, dissenting.

In *Johnson* v. *United States*, we concluded that the residual clause of the Armed Career Criminal Act was unconstitutionally vague, given the "indeterminacy of the wide-ranging inquiry" it required. 576 U. S. 591, 597 (2015). Today, the Court relies wholly on *Johnson*—but only some of *Johnson*—to strike down another provision, 18 U. S. C. § 16(b). Because § 16(b) does not give rise to the concerns that drove the Court's decision in *Johnson*, I respectfully dissent.

I

The term "crime of violence" appears repeatedly throughout the Federal Criminal Code. Section 16 of Title 18 defines it to mean:

> "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> "(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

This definition of "crime of violence" is also incorporated in the definition of "aggravated felony" in the Immigration and Nationality Act. 8 U. S. C. § 1101(a)(43)(F) ("aggravated felony" includes "a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year" (footnote omitted)). A conviction for an aggravated felony carries serious consequences under the immigration laws. It can serve as the basis for an alien's removal from the United States, and can preclude cancellation of removal by the Attorney General. §§ 1227(a)(2)(A)(iii), 1229b(a)(3).

Those consequences came to pass in respondent James Dimaya's case. An Immigration Judge and the Board of Immigration Appeals interpreted § 16(b) to cover Dimaya's two prior convictions for first-degree residential burglary under California law, subjecting him to removal. To stave off that result, Dimaya argued that the language of § 16(b) was void for vagueness under the Due Process Clause of the Fifth Amendment.

The parties begin by disputing whether a criminal or more relaxed civil vagueness standard should apply in resolving Dimaya's challenge. A plurality of the Court rejects the Government's argument in favor of a civil standard, because of the "grave nature of deportation," *Jordan* v. *De George*,

341 U. S. 223, 231 (1951); see *ante*, at 157 (plurality opinion); JUSTICE GORSUCH does so for broader reasons, see *ante*, at 183–188 (opinion concurring in part and concurring in judgment). I see no need to resolve which standard applies, because I would hold that § 16(b) is not unconstitutionally vague even under the standard applicable to criminal laws.

II

This is not our first encounter with § 16(b). In *Leocal* v. *Ashcroft*, 543 U. S. 1 (2004), we were asked to decide whether either subsection of § 16 covers a particular category of state crimes, specifically driving under the influence (DUI) offenses involving no more than negligent conduct. *Id.*, at 6. Far from finding § 16(b) "hopeless[ly] indetermina[te]," *Johnson*, 576 U. S., at 598, we considered the provision clear and unremarkable: "while § 16(b) is broader than § 16(a) in the sense that physical force need not actually be applied," the provision "simply covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense," *Leocal*, 543 U. S., at 10–11. Applying that standard to the state offense at issue, we concluded—unanimously—that § 16(b) "cannot be read to include [a] conviction for DUI causing serious bodily injury under Florida law." *Id.*, at 11.

Leocal thus provides a model for how courts should assess whether a particular crime "by its nature" involves a risk of the use of physical force. At the outset, our opinion set forth the elements of the Florida DUI statute, which made it a felony "for a person to operate a vehicle while under the influence and, 'by reason of such operation, caus[e] . . . [s]erious bodily injury to another.' " *Id.*, at 7. Our § 16(b) analysis, in turn, focused on those specific elements in concluding that a Florida offender's acts would not naturally give rise to the requisite risk of force "in the course of committing the offense." *Id.*, at 11. "In no 'ordinary or natural' sense," we explained, "can it be said that a person risks having to 'use'

physical force against another person in the course of operating a vehicle while intoxicated and causing injury." *Ibid.*

The Court holds that the same provision we had no trouble applying in *Leocal* is in fact incapable of reasoned application. The sole justification for this turnabout is the resemblance between the language of § 16(b) and the language of the residual clause of the Armed Career Criminal Act (ACCA) that was at issue in *Johnson*. The latter provision defined a "violent felony" to include "any crime punishable by imprisonment for a term exceeding one year . . . that . . . is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*" 18 U. S. C. § 924(e)(2)(B)(ii) (emphasis added).

In *Johnson*, we concluded that the ACCA residual clause (the "or otherwise" language) gave rise to two forms of intractable uncertainty, which "conspire[d]" to render the provision unconstitutionally vague. 576 U. S., at 597. First, the residual clause asked courts to gauge the "potential risk" of "physical injury" posed by the conduct involved in the crime. *Ibid.* That inquiry, we determined, entailed not only an evaluation of the "criminal's behavior," but also required courts to consider "how the idealized ordinary case of the crime subsequently plays out." *Ibid.* Second, the residual clause obligated courts to compare that risk to an indeterminate standard—one that was inextricably linked to the provision's four enumerated crimes, which presented differing kinds and degrees of risk. *Id.*, at 598. This murky confluence of features, each of which "may [have been] tolerable in isolation," together "ma[de] a task for us which at best could be only guesswork." *Id.*, at 602.

Section 16(b) does not present the same ambiguities. The two provisions do correspond to some extent. Under our decisions, both ask the sentencing court to consider whether a particular offense, defined without regard to the facts of the conviction, poses a specified risk. And, relevant to both

statutes, we have explained that in deciding whether statutory elements inherently produce a risk, a court must take into account how those elements will ordinarily be fulfilled. See *James* v. *United States*, 550 U. S. 192, 208 (2007) (this categorical inquiry asks "whether the conduct encompassed by the elements of the offense, in the ordinary case, presents" the requisite risk).[1] In the Court's view, that effectively resolves this case. But the Court too readily dismisses the significant textual distinctions between § 16(b) and the ACCA residual clause. See also *ante*, at 175–176 (opinion of GORSUCH, J.). Those differences undermine the conclusion that § 16(b) shares each of the "dual flaws" of that clause. *Ante*, at 171 (majority opinion).

To begin, § 16(b) yields far less uncertainty "about how to estimate the risk posed by a crime." *Johnson*, 576 U. S., at 597. There are three material differences between § 16(b) and the ACCA residual clause in this respect. First, the ACCA clause directed the reader to consider whether the offender's conduct presented a "*potential* risk" of injury. Forced to give meaning to that befuddling choice of phrase—which layered one indeterminate term on top of another—we understood the word "potential" to signify that "Congress intended to encompass possibilities even more contingent or remote than a simple 'risk.'" *James*, 550 U. S., at 207–208. As we explained in *Johnson*, that made for a "speculative"

[1] All this "ordinary case" caveat means is that while "[o]ne can always hypothesize unusual cases in which even a prototypically violent crime might not present a genuine risk," courts should exclude those atypical cases in assessing whether the offense qualifies. *James*, 550 U. S., at 208. As we have explained, under that approach, it is not the case that "every conceivable factual offense covered by a statute" must pose the requisite risk "before the offense can be deemed" a crime of violence. *Ibid.* But the same is true of the categorical approach generally. See *ibid.* (using the terms just quoted to characterize both the ordinary case approach and the categorical approach for enumerated offenses set forth in *Taylor* v. *United States*, 495 U. S. 575 (1990)); *Moncrieffe* v. *Holder*, 569 U. S. 184, 191 (2013); *Gonzales* v. *Duenas-Alvarez*, 549 U. S. 183, 193 (2007).

inquiry "detached from statutory elements." 576 U. S., at 597. In other words, the offense elements could not constrain the risk inquiry in the manner they do here. See *Leocal*, 543 U. S., at 11. The "serious potential risk" standard also forced courts to assess in an expansive way the "collateral consequences" of the perpetrator's acts. For example, courts had to take into account the concern that *others* might cause injury in attempting to apprehend the offender. See *Sykes* v. *United States*, 564 U. S. 1, 8–9 (2011). Section 16(b), on the other hand, asks about "risk" alone, a familiar concept of everyday life. It therefore calls for a commonsense inquiry that does not compel a court to venture beyond the offense elements to consider contingent and remote possibilities.

Second, § 16(b) focuses exclusively on the risk that the offender will "use[ ]" "physical force" "against" another person or another person's property. Thus, unlike the ACCA residual clause, "§ 16(b) plainly does not encompass all offenses which create a 'substantial risk' that *injury will result from* a person's conduct." *Leocal*, 543 U. S., at 10, n. 7 (emphasis added). The point is not that an inquiry into the risk of "physical force" is markedly more determinate than an inquiry into the risk of "physical injury." But see *ante*, at 169–170. The difference is that § 16(b) asks about the risk that the offender himself will *actively employ* force against person or property. That language does not sweep in all instances in which the offender's acts, or another person's reaction, might result in unintended or negligent harm.

Third, § 16(b) has a temporal limit that the ACCA residual clause lacked: The "substantial risk" of force must arise "in the course of committing the offense." Properly interpreted, this means the statute requires a substantial risk that the perpetrator will use force while carrying out the crime. See *Leocal*, 543 U. S., at 10 ("The reckless disregard in § 16 relates . . . to the risk that the use of physical force against another might be required in committing a crime.").

The provision thereby excludes more attenuated harms that might arise following the completion of the crime. The ACCA residual clause, by contrast, contained no similar language restricting its scope. And the absence of such a limit, coupled with the reference to "potential" risks, gave courts free rein to classify an offense as a violent felony based on injuries that might occur after the offense was over and done. See, *e. g.*, *United States* v. *Benton*, 639 F. 3d 723, 732 (CA6 2011) (finding that "solicitation to commit aggravated assault" qualified under the ACCA residual clause on the theory that the solicited individual might subsequently carry out the requested act).

Why does any of this matter? Because it mattered in *Johnson*. More precisely, the expansive language in the ACCA residual clause contributed to our determination that the clause gave rise to "grave uncertainty about how to estimate the risk posed by a crime." 576 U. S., at 597. "Critically," we said—a word that tends to mean something—"*picturing the criminal's behavior is not enough*." *Ibid.* (emphasis added). Instead, measuring "potential risk" "seemingly require[d] the judge to imagine how the idealized ordinary case of the crime *subsequently plays out*." *Ibid.* (emphasis added). Not so here. In applying § 16(b), considering "the criminal's behavior" *is* enough.

Those three distinctions—the unadorned reference to "risk," the focus on the offender's own active employment of force, and the "in the course of committing" limitation—also mean that many hard cases under ACCA are easier under § 16(b). Take the firearm possession crime from *Johnson* itself, which had as its constituent elements (1) unlawfully (2) possessing (3) a short-barreled shotgun. None of those elements, "by its nature," carries "a substantial risk" that the possessor will use force against another "in the course of committing the offense." Nothing inherent in the act of firearm possession, even when it is unlawful, gives rise to a substantial risk that the owner will then shoot someone.

See *United States* v. *Serafin*, 562 F. 3d 1105, 1113 (CA10 2009) (recognizing that "*Leocal* instructs [a court] to focus not on whether possession will likely *result* in violence, but instead whether one possessing an unregistered weapon necessarily risks the need to employ force to commit possession").[2] Yet short-barreled shotgun possession presented a closer question under the ACCA residual clause, because the "serious potential risk" language seemingly directed us to consider "the circumstances and conduct that ordinarily attend the offense," in addition to the offense itself. *Johnson*, 576 U. S., at 639 (ALITO, J., dissenting); see *id.*, at 642 (reasoning that the crime must qualify because "a person who chooses to break the law and risk the heavy criminal penalty incurred by possessing a notoriously dangerous weapon is [likely] to use that weapon in violent ways").

Failure to report to a penal institution, the subject of *Chambers* v. *United States*, 555 U. S. 122 (2009), is another crime "whose treatment becomes more obvious under § 16(b) than under ACCA," *ante*, at 169. In *Chambers*, the Government argued that the requisite risk of injury arises not necessarily at the time the offender fails to report to prison, but instead later, when an officer attempts to recapture the

[2] The Court protests that this straightforward analysis fails to take account of the crime's ordinary case. *Ante*, at 169, n. 6. But the fact that the element of "possession" may "take[ ] place in a variety of ways"—for instance, one may possess a firearm "in a closet, in a storeroom, in a car, in a pocket," "unloaded, disassembled, or locked away," *Johnson*, 576 U. S., at 610 (THOMAS, J., concurring in judgment)—matters very little. That is because none of the alternative ways of satisfying that element produce a substantial risk that the possessor will use physical force against the person or property of another. And no one would say that a person "possesses" a gun by firing it or threatening someone with it. Cf. *id.*, at 611 ("[T]he risk that the Government identifies arises not from the act of possessing the weapon, but from the act of using it."). The Court's insistence that this offense is nonetheless "difficult to classify" under § 16(b), *ante*, at 169, n. 6, is surprising in light of our assessment, just two Terms ago, that § 16 does not cover "felon-in-possession laws and other firearms offenses," *Luna Torres* v. *Lynch*, 578 U. S. 452, 466 (2016).

fugitive. 555 U. S., at 128. The majority is correct that we ultimately "reject[ed]" the Government's contention. *Ante*, at 168. But we did so after "assum[ing] for argument's sake" its premise—that is, "the relevance of violence that may occur long after an offender fails to report." 555 U. S., at 128; see *id.*, at 129 (looking at 160 cases of "failure to report" and observing that "none at all involved violence . . . during the commission of the offense itself, [nor] during the offender's later apprehension"). The "in the course of committing the offense" language in § 16(b) helpfully forecloses that debate.

DUI offenses are yet another example. Because § 16(b) asks about the risk that the offender will "use[ ]" "physical force," we readily concluded in *Leocal* that the subsection does not cover offenses where the danger arises from the offender's negligent or accidental conduct, including drunk driving. 543 U. S., at 11. Applying the ACCA residual clause proved more trying. When asked to decide whether the clause covered drunk driving offenses, a majority of the Court concluded that the answer was no. *Begay* v. *United States*, 553 U. S. 137 (2008). Our decision was based, however, on the inference that the clause must cover only "purposeful, 'violent,' and 'aggressive' conduct"—a test derived not from the "conduct that presents a serious potential risk of physical injury" language, but instead by reference to (what we guessed to be) the unifying characteristics of the enumerated offenses. *Id.*, at 144–145. Four Members of the Court criticized that test, see *id.*, at 150–153 (Scalia, J., concurring in judgment); *id.*, at 158–160, 162–163 (ALITO, J., dissenting), though they themselves disagreed about whether DUIs were covered, see *id.*, at 153–154 (opinion of Scalia, J.); *id.*, at 156–158 (opinion of ALITO, J.). And the Court distanced itself from the *Begay* requirement only a few years later when confronting the crime of vehicular flight. See *Sykes*, 564 U. S., at 12–13; *Johnson*, 576 U. S., at 600–601.

Which brings me to the second part of the Court's analysis: its objection that § 16(b), like the ACCA residual clause, leaves "uncertainty about the level of risk that makes a crime 'violent.'" *Ante*, at 161. The "substantial risk" standard in § 16(b) is significantly less confusing because it is not tied to a disjointed list of paradigm offenses. Recall that the ACCA provision defined a "violent felony" to include a crime that "is burglary, arson, or extortion, involves use of explosives, or *otherwise* involves conduct that presents a serious potential risk of physical injury to another." 18 U. S. C. § 924(e)(2)(B)(ii) (emphasis added). As our Court recognized early on, that "otherwise" told the reader to understand the "serious potential risk of physical injury" standard by way of the four enumerated crimes. *James*, 550 U. S., at 203. But how, exactly? That question dogged our residual clause cases for years, until we said *no más* in *Johnson*.

In our first foray, *James*, we resolved the case by asking whether the risk posed by the crime of attempted burglary was "comparable to that posed by its closest analog among the enumerated offenses," which was completed burglary. 550 U. S., at 203. While that rule "[took] care of attempted burglary," it "offer[ed] no help at all with respect to the vast majority of offenses, which have no apparent analog among the enumerated crimes." *Johnson*, 576 U. S., at 599. The *James* dissent, for its part, would have determined the requisite degree of risk from the least dangerous of the enumerated crimes, and compared the offense to that. 550 U. S., at 218–219 (opinion of Scalia, J.). But that approach also proved to be harder than it sounded. See *id.*, at 219–227.

After *James* came *Begay*, in which we concluded that the enumerated offenses served as an independent limitation on the *kind* of crime that could qualify. 553 U. S., at 142; see *Chambers*, 555 U. S., at 128 (applying the *Begay* standard). As discussed, that test was short lived (though we did not purport to wholly repudiate it). See *Sykes*, 564 U. S., at 13.

Finally, in *Sykes*—our penultimate residual clause case—we acknowledged the prior use of the closest-analog test in *James*, but instead focused on whether the risk posed by vehicular flight was "similar in degree of danger" to the listed offenses of arson and burglary. 564 U. S., at 8–10. As a result, Justice Scalia's dissent characterized the *Sykes* majority as applying the test from his prior dissent in *James*, not *James* itself. See 564 U. S., at 29–30, 33. This series of precedents laid bare our "repeated inability to craft a principled test out of the statutory text," *id.*, at 34 (opinion of Scalia, J.), as the Court ultimately acknowledged in *Johnson*, 576 U. S., at 599.

The enumerated offenses, and our Court's failed attempts to make sense of them, were essential to *Johnson*'s conclusion that the residual clause "leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.*, at 598. As *Johnson* explained, the issue was not that the statute employed a fuzzy standard. That kind of thing appears in the statute books all the time. *Id.*, at 598, 603. In the majority's retelling today, the difficulty inhered solely in the fact that the statute paired such a standard with the ordinary case inquiry. See *ante,* at 159, 161, 171. But that account sidesteps much of *Johnson*'s reasoning. See 576 U. S., at 596–597, 598, 599–601, 603. Our opinion emphasized that the word "otherwise" "force[d]" courts to interpret the amorphous standard "in light of" the four enumerated crimes, which are "not much more similar to one another in kind than in degree of risk posed." *Id.*, at 598, 600. Or, as *Johnson* put it more vividly, "[t]he phrase 'shades of red,' standing alone, does not generate confusion or unpredictability; but the phrase 'fire-engine red, light pink, maroon, *navy blue*, or colors that otherwise involve shades of red' assuredly does so." *Id.*, at 603. Indeed, the author of *Johnson* had previously, and repeatedly, described this feature of the residual clause as the "crucial . . . respect" in which the law was problematic. See *James*, 550 U. S., at

230, n. 7 (opinion of Scalia, J.); *Sykes*, 564 U. S., at 35 (opinion of Scalia, J.).

With § 16(b), by contrast, a court need simply consider the meaning of the word "substantial"—a word our Court has interpreted and applied innumerable times across a wide variety of contexts.[3] The court does not need to give that familiar word content by reference to four different offenses with varying amounts and kinds of risk.

In its effort to recast a considerable portion of *Johnson* as dicta, the majority speculates that if the enumerated offenses had truly mattered to the outcome, the Court would have told lower courts to "give up on trying to interpret the clause by reference to" those offenses, rather than striking down the provision entirely. *Ante,* at 171. No litigant in *Johnson* suggested that solution, which is not surprising. Such judicial redrafting could have expanded the reach of the criminal provision—surely a job for Congress alone.

In any event, I doubt the majority's proposal would have done the trick. And that is because the result in *Johnson* did not follow from the presence of one frustrating textual feature or another. Quite the opposite: The decision emphasized that it was the "sum" of the "uncertainties" in the ACCA residual clause, confirmed by years of experience, that "convince[d]" us the provision was beyond salvage. *Johnson*, 576 U. S., at 601–602. Those failings do not characterize the provision at issue here.

---

[3] To name a round dozen: *Ayestas* v. *Davis*, *ante*, at 45; *Life Technologies Corp.* v. *Promega Corp.*, 580 U. S. 140, 146–149 (2017); *Virginia* v. *Hicks*, 539 U. S. 113, 119–120, 122–124 (2003); *Toyota Motor Mfg., Ky., Inc.* v. *Williams*, 534 U. S. 184, 196–198 (2002); *Slack* v. *McDaniel*, 529 U. S. 473, 483–484 (2000); *Gentile* v. *State Bar of Nev.*, 501 U. S. 1030, 1075–1076 (1991); *Cage* v. *Louisiana*, 498 U. S. 39, 41 (1990) (*per curiam*); *Steadman* v. *SEC*, 450 U. S. 91, 98 (1981); *Palermo* v. *United States*, 360 U. S. 343, 351–353 (1959); *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586, 593–596 (1957); *Levinson* v. *Spector Motor Service*, 330 U. S. 649, 670–671 (1947); *Consolidated Edison Co.* v. *NLRB*, 305 U. S. 197, 229 (1938).

III

The more constrained inquiry required under § 16(b)—which asks only whether the offense elements naturally carry with them a risk that the offender will use force in committing the offense—does not itself engender "grave uncertainty about how to estimate the risk posed by a crime." And the provision's use of a commonplace substantial risk standard—one not tied to a list of crimes that lack a unifying feature—does not give rise to intolerable "uncertainty about how much risk it takes for a crime to qualify." That should be enough to reject Dimaya's facial vagueness challenge.[4]

Because I would rely on those distinctions to uphold § 16(b), the Court reproaches me for not giving sufficient weight to a "core insight" of *Johnson*. *Ante*, at 161, n. 4; see *ante*, at 188 (opinion of GORSUCH, J.) (arguing that § 16(b) runs afoul of *Johnson* "to the extent [§ 16(b)] requires an 'ordinary case' analysis"). But the fact that the ACCA residual clause required the ordinary case approach was not itself sufficient to doom the law. We instead took pains to clarify that our opinion should not be read to impart such an absolute rule. See *Johnson*, 576 U. S., at 602. I would adhere to that careful holding and not reflexively extend the decision to a different statute whose reach is, on the whole, far more clear.

---

[4] The Court also finds it probative that "a host of issues" respecting § 16(b) "divide" the lower courts. *Ante*, at 172. Yet the Court does little to explain how those alleged conflicts vindicate its particular concern about the provision (namely, the ordinary case inquiry). And as the Government illustrates, many of those divergent results likely can be chalked up to material differences in the state offense statutes at issue. Compare *Escudero-Arciniega* v. *Holder*, 702 F. 3d 781, 783–785 (CA5 2012) (*per curiam*) (reasoning that New Mexico car burglary "requires that the criminal lack authorization to enter the vehicle—a requirement alone which will most often ensure some force [against property] is used"), with *Sareang Ye* v. *INS*, 214 F. 3d 1128, 1134 (CA9 2000) (finding it relevant that California car burglary does not require unlawful or unprivileged entry); see Reply Brief 17–20, and nn. 5–6.

The Court does the opposite, and the ramifications of that decision are significant. First, of course, today's holding invalidates a provision of the Immigration and Nationality Act—part of the definition of "aggravated felony"—on which the Government relies to "ensure that dangerous criminal aliens are removed from the United States." Brief for Petitioner 54. Contrary to the Court's back-of-the-envelope assessment, see *ante*, at 173, n. 12, the Government explains that the definition is "critical" for "numerous" immigration provisions, Brief for Petitioner 12.

In addition, § 16 serves as the universal definition of "crime of violence" for all of Title 18 of the United States Code. Its language is incorporated into many procedural and substantive provisions of criminal law, including provisions concerning racketeering, money laundering, domestic violence, using a child to commit a violent crime, and distributing information about the making or use of explosives. See 18 U. S. C. §§ 25(a)(1), 842(p)(2), 1952(a), 1956(c)(7)(B)(ii), 1959(a)(4), 2261(a), 3561(b). Of special concern, § 16 is replicated in the definition of "crime of violence" applicable to § 924(c), which prohibits using or carrying a firearm "during and in relation to any crime of violence," or possessing a firearm "in furtherance of any such crime." §§ 924(c)(1)(A), (c)(3). Though I express no view on whether § 924(c) can be distinguished from the provision we consider here, the Court's holding calls into question convictions under what the Government warns us is an "oft-prosecuted offense." Brief for Petitioner 12.

Because *Johnson* does not compel today's result, I respectfully dissent.

JUSTICE THOMAS, with whom JUSTICE KENNEDY and JUSTICE ALITO join as to Parts I–C–2, II–A–1, and II–B, dissenting.

I agree with THE CHIEF JUSTICE that 18 U. S. C. § 16(b), as incorporated by the Immigration and Nationality Act

(INA), is not unconstitutionally vague. Section 16(b) lacks many of the features that caused this Court to invalidate the residual clause of the Armed Career Criminal Act (ACCA) in *Johnson* v. *United States*, 576 U. S. 591 (2015). ACCA's residual clause—a provision that this Court had applied four times before *Johnson*—was not unconstitutionally vague either. See *id.*, at 607–608 (THOMAS, J., concurring in judgment); *id.*, at 636–639 (ALITO, J., dissenting). But if the Court insists on adhering to *Johnson*, it should at least take *Johnson* at its word that the residual clause was vague due to the "'sum'" of its specific features. *Id.*, at 602 (majority opinion). By ignoring this limitation, the Court jettisons *Johnson*'s assurance that its holding would not jeopardize "dozens of federal and state criminal laws." *Id.*, at 603.

While THE CHIEF JUSTICE persuasively explains why respondent cannot prevail under our precedents, I write separately to make two additional points. First, I continue to doubt that our practice of striking down statutes as unconstitutionally vague is consistent with the original meaning of the Due Process Clause. See *id.*, at 613–624 (opinion of THOMAS, J.). Second, if the Court thinks that § 16(b) is unconstitutionally vague because of the "categorical approach," see *ante*, at 157–162, then the Court should abandon that approach—not insist on reading it into statutes and then strike them down. Accordingly, I respectfully dissent.

I

I continue to harbor doubts about whether the vagueness doctrine can be squared with the original meaning of the Due Process Clause—and those doubts are only amplified in the removal context. I am also skeptical that the vagueness doctrine can be justified as a way to prevent delegations of core legislative power in this context. But I need not resolve these questions because, if the vagueness doctrine has any basis in the Due Process Clause, it must be limited to cases in which the statute is unconstitutionally vague as ap-

plied to the person challenging it. That is not the case for respondent, whose prior convictions for first-degree residential burglary in California fall comfortably within the scope of § 16(b).

A

The Fifth Amendment's Due Process Clause provides that no person shall be "deprived of life, liberty, or property, without due process of law." Section 16(b), as incorporated by the INA, cannot violate this Clause unless the following propositions are true: The Due Process Clause requires federal statutes to provide certain minimal procedures, the vagueness doctrine is one of those procedures, and the vagueness doctrine applies to statutes governing the removal of aliens. Although I need not resolve any of these propositions today, each one is questionable. I will address them in turn.

1

First, the vagueness doctrine is not legitimate unless the "law of the land" view of due process is incorrect. Under that view, due process "require[s] only that our Government . . . proceed . . . according to written constitutional and statutory provision[s] before depriving someone of life, liberty, or property." *Nelson* v. *Colorado*, 581 U. S. 128, 131, n. 1 (2017) (THOMAS, J., dissenting) (internal quotation marks omitted). More than a half century after the founding, the Court rejected this view of due process in *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272 (1856). See *id.*, at 276 (holding that the Due Process Clause "is a restraint on the legislative as well as on the executive and judicial powers of the government"). But the textual and historical support for the law-of-the-land view is not insubstantial.[1]

[1] See, *e. g.*, *In re Winship*, 397 U. S. 358, 382–384 (1970) (Black, J., dissenting); Rosenkranz, The Objects of the Constitution, 63 Stan. L. Rev. 1005, 1041–1043 (2011); Berger, "Law of the Land" Reconsidered, 74 Nw. U. L. Rev. 1, 2–17 (1979); Corwin, The Doctrine of Due Process of Law Before the Civil War, 24 Harv. L. Rev. 366, 368–373 (1911); see also 4 The

2

Even under *Murray's Lessee*, the vagueness doctrine is legitimate only if it is a "settled usag[e] and mod[e] of proceeding existing in the common and statute law of England, before the emigration of our ancestors." *Id.*, at 277. That proposition is dubious. Until the end of the 19th century, "there is little indication that anyone . . . believed that courts had the power under the Due Process Claus[e] to nullify statutes on [vagueness] ground[s]." *Johnson*, *supra*, at 616–617 (opinion of THOMAS, J.). That is not because Americans were unfamiliar with vague laws. Rather, early American courts, like their English predecessors, addressed vague laws through statutory construction instead of constitutional law. See Note, Void for Vagueness: An Escape From Statutory Interpretation, 23 Ind. L. J. 272, 274–279 (1948). They invoked the rule of lenity and declined to apply vague penal statutes on a case-by-case basis. See *Johnson*, 576 U. S., at 613–616 (opinion of THOMAS, J.); *e. g.*, *ante*, at 178–180, and n. 1 (GORSUCH, J., concurring in part and concurring in judgment) (collecting cases).[2] The modern vagueness doctrine,

---

Papers of Alexander Hamilton 35 (H. Syrett & J. Cooke eds. 1962) ("The words '*due process*' have a precise technical import, and . . . can never be referred to an act of legislature").

[2] Before the 19th century, when virtually all felonies were punishable by death, English courts would sometimes go to extremes to find a reason to invoke the rule of lenity. See Hall, Strict or Liberal Construction of Penal Statutes, 48 Harv. L. Rev. 748, 751 (1935); *e. g.*, *ante*, at 178–180 (GORSUCH, J., concurring in part and concurring in judgment) (citing Blackstone's discussion of a case about "cattle"). As the death penalty became less common, courts on this side of the Atlantic tempered the rule of lenity, clarifying that the rule requires an "ambiguity" in the text and cannot be used "to defeat the obvious intention of the legislature." *United States* v. *Wiltberger*, 5 Wheat. 76, 95 (1820) (Marshall, C. J.).

Early American courts also declined to apply nonpenal statutes that were "unintelligible." *Johnson* v. *United States*, 576 U. S. 591, 616, n. 3 (2015) (THOMAS, J., concurring in judgment); *e. g.*, *ante*, at 178–180, and n. 1 (opinion of GORSUCH, J.) (collecting cases). Like lenity, however, this practice reflected a principle of statutory construction that was much nar-

which claims the judicial authority to "strike down" vague legislation on its face, did not emerge until the turn of the 20th century. See *Johnson*, *supra*, at 616–618 (opinion of THOMAS, J.).

The difference between the traditional rule of lenity and the modern vagueness doctrine is not merely semantic. Most obviously, lenity is a tool of statutory construction, which means States can abrogate it—and many have. Hall, Strict or Liberal Construction of Penal Statutes, 48 Harv. L. Rev. 748, 752–754 (1935); see also Scalia, Assorted Canards of Contemporary Legal Analysis, 40 Case W. Res. L. Rev. 581, 583 (1989) ("Arizona, by the way, seems to have preserved a fair and free society without adopting the rule that criminal statutes are to be strictly construed" (citing Ariz. Rev. Stat. Ann. § 1–211C (1989))). The vagueness doctrine, by contrast, is a rule of constitutional law that States cannot alter or abolish. Lenity, moreover, applies only to "penal" statutes, 1 W. Blackstone, Commentaries on the Laws of England 88 (1765), but the vagueness doctrine extends to all regulations of individual conduct, both penal and nonpenal, *Johnson*, *supra*, at 612–613 (opinion of THOMAS, J.); see also Note, Indefinite Criteria of Definiteness in Statutes, 45 Harv. L. Rev. 160, 163 (1931) (explaining that the modern vagueness doctrine was not merely an "extension of the rule of strict construction of penal statutes" because it "expressly include[s] civil statutes within its scope," reflecting a "regrettable disregard" for legislatures).[3] In short,

---

rower than the modern constitutional vagueness doctrine. Unintelligible statutes were considered inoperative because they were impossible to apply to individual cases, not because they were unconstitutional for failing to provide "fair notice." See *Johnson*, *supra*, at 616, n. 3 (opinion of THOMAS, J.).

[3] This distinction between penal and nonpenal statutes would be decisive here because, traditionally, civil deportation laws were not considered penal. See *Bugajewitz* v. *Adams*, 228 U. S. 585, 591 (1913); *Fong Yue Ting* v. *United States*, 149 U. S. 698, 709, 730 (1893). Although this Court has applied a kind of strict construction to civil deportation laws, that practice

early American courts were not applying the modern vagueness doctrine by another name. They were engaged in a fundamentally different enterprise.

Tellingly, the modern vagueness doctrine emerged at a time when this Court was actively interpreting the Due Process Clause to strike down democratically enacted laws—first in the name of the "liberty of contract," then in the name of the "right to privacy." See *Johnson*, *supra*, at 618–621 (opinion of THOMAS, J.). That the vagueness doctrine "develop[ed] on the federal level concurrently with the growth of the tool of substantive due process" does not seem like a coincidence. Note, 23 Ind. L. J., at 278. Like substantive due process, the vagueness doctrine provides courts with "open-ended authority to oversee [legislative] choices." *Kolender* v. *Lawson*, 461 U. S. 352, 374 (1983) (White, J., dissenting). This Court, for example, has used the vagueness doctrine to invalidate antiloitering laws, even though those laws predate the Declaration of Independence. See *Johnson*, *supra*, at 613 (opinion of THOMAS, J.) (discussing *Chicago* v. *Morales*, 527 U. S. 41 (1999)).

This Court also has a bad habit of invoking the Due Process Clause to constitutionalize rules that were traditionally left to the democratic process. See, *e. g.*, *Williams* v. *Pennsylvania*, 579 U. S. 1 (2016); *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559 (1996); *Foucha* v. *Louisiana*, 504 U. S. 71 (1992); cf. *Montgomery* v. *Louisiana*, 577 U. S. 190 (2016). If vagueness is another example of this practice, then that is all the more reason to doubt its legitimacy.

3

Even assuming the Due Process Clause prohibits vague laws, this prohibition might not apply to laws governing the removal of aliens. Cf. *Johnson*, *supra*, at 622, n. 7 (opinion of THOMAS, J.) (stressing the need for specificity when assessing alleged due process rights). The Founders were familiar

did not emerge until the mid-20th century. See *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, 10 (1948).

with English law, where "'the only question that ha[d] ever been made in regard to the power to expel aliens [was] whether it could be exercised by the King without the consent of Parliament.'" *Demore* v. *Kim*, 538 U. S. 510, 538 (2003) (O'Connor, J., concurring in part and concurring in judgment) (quoting *Fong Yue Ting* v. *United States*, 149 U. S. 698, 709 (1893)). And, in this country, the notion that the Due Process Clause governed the removal of aliens was not announced until the 20th century.

Less than a decade after the ratification of the Bill of Rights, the founding generation had an extensive debate about the relationship between the Constitution and federal removal statutes. In 1798, the Fifth Congress enacted the Alien Acts. One of those Acts, the Alien Friends Act, gave the President unfettered discretion to expel any aliens "he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof." An Act Concerning Aliens § 1, 1 Stat. 571. This statute was modeled after the Aliens Act 1793 in England, which similarly gave the King unfettered discretion to expel aliens as he "shall think necessary for the publick Security." 33 Geo. III, ch. 4, § 18, in 39 Eng. Stat. at Large 16. Both the Fifth Congress and the States thoroughly debated the Alien Friends Act. Virginia and Kentucky enacted resolutions (anonymously drafted by Madison and Jefferson) opposing the Act, while 10 States enacted counterresolutions condemning the views of Virginia and Kentucky. See Fehlings, Storm on the Constitution: The First Deportation Law, 10 Tulsa J. Comp. & Int'l L. 63, 85, 103 (2002).

The Jeffersonian Democratic-Republicans, who viewed the Alien Friends Act as a threat to their party and the institution of slavery,[4] raised a number of constitutional objections.

[4] The Jeffersonian Democratic-Republicans who opposed the Alien Friends Act primarily represented slave States, and their party's political strength came from the South. See Fehlings, Storm on the Constitution:

Some of the Jeffersonians argued that the Alien Friends Act violated the Fifth Amendment's Due Process Clause. They complained that the Act failed to provide aliens with all the accouterments of a criminal trial. See, *e. g.*, Kentucky Resolutions ¶6, in 4 Debates on the Constitution 541–542 (J. Elliot ed. 1836) (Elliot's Debates); 8 Annals of Cong. 1982–1983 (1798) (statement of Rep. Gallatin); Madison's Report on the Virginia Resolutions (Jan. 7, 1800), in 6 Writings of James Madison 361–362 (G. Hunt ed. 1906) (Madison's Report).[5]

The Federalists gave two primary responses to this due process argument. First, the Federalists argued that the rights of aliens were governed by the law of nations, not the Constitution. See, *e. g.*, Randolph, Debate on Virginia Resolutions, in The Virginia Report of 1799–1800, pp. 34–35 (1850) (Virginia Debates) (statement of George K. Taylor) (arguing that aliens "were not a party to the [Constitution]" and that "cases between the government and aliens . . . arise under the law of nations"); *id.*, at 100 (statement of William Cowan) (identifying the source of rights "as to citizens, the Constitution; as to aliens, the law of nations"); A. Addison, A Charge to the Grand Juries of the County Courts of the Fifth

---

The First Deportation Law, 10 Tulsa J. Comp. & Int'l L. 63, 84 (2002). The Jeffersonians opposed any federal control over immigration, which their constituents feared would be used to pre-empt state laws that prohibited the entry of free blacks. *Id.*, at 84–85; see also Berns, Freedom of the Press and the Alien and Sedition Laws: A Reappraisal, 1970 S. Ct. Rev. 109, 116 ("Whether pro- or anti-slavery, most southerners, including Jefferson and Madison . . . were united behind a policy of denying to the national government any competence to deal with the question of slavery"). The fear was that "mobile free Negroes would intermingle with slaves, encourage them to run away, and foment insurrection." I. Berlin, Slaves Without Masters 92 (1974).

[5] The Jeffersonians also argued that the Alien Friends Act violated due process because, if aliens disobeyed the President's orders to leave the country, they could be convicted of a crime and imprisoned without a trial. See, *e. g.*, Kentucky Resolutions ¶6, 4 Elliot's Debates 541. That charge was false. The Alien Friends Act gave federal courts jurisdiction over alleged violations of the President's orders. See § 4, 1 Stat. 571.

Circuit of the State of Pennsylvania 18 (1799) (Charge to the Grand Juries) ("[T]he Constitution leaves aliens, as in other countries, to the protection of the general principles of the law of nations"); Answer to the Resolutions of the State of Kentucky, Oct. 29, 1799, in 4 Records of the Governor and Council of the State of Vermont 528 (1876) (denying "that aliens had any rights among us, except what they derived from the law of nations, and rights of hospitality"). The law of nations imposed no enforceable limits on a nation's power to remove aliens. See, *e. g.*, 1 E. de Vattel, Law of Nations §§230–231, pp. 108–109 (J. Chitty et al. transl. and ed. 1883).

Second, the Federalists responded that the expulsion of aliens "did not touch life, liberty, or property." Virginia Debates 34. The founding generation understood the phrase "life, liberty, or property" to refer to a relatively narrow set of core private rights that did not depend on the will of the government. See *Wellness Int'l Network, Ltd.* v. *Sharif*, 575 U. S. 665, 713–714 (2015) (THOMAS, J., dissenting); Nelson, Adjudication in the Political Branches, 107 Colum. L. Rev. 559, 566–568 (2007) (Nelson). Quasi-private rights—"privileges" or "franchises" bestowed by the government on individuals—did not qualify and could be taken away without judicial process. See *B&B Hardware, Inc.* v. *Hargis Industries, Inc.*, 575 U. S. 138, 172 (2015) (THOMAS, J., dissenting); Nelson 567–569. The Federalists argued that an alien's right to reside in this country was one such privilege. See, *e. g.*, Virginia Debates 34 (arguing that "ordering away an alien . . . was not a matter of right, but of favour," which did not require a jury trial); Report of the Select Committee of the House of Representatives, Made to the House of Representatives on Feb. 21, 1799, 9 Annals of Cong. 2987 (1799) (stating that aliens "remain in the country . . . merely as matter of favor and permission" and can be removed at any time without a criminal trial); Charge to the Grand Juries 11–13 (similar). According to the Minority Address of the

Virginia Legislature (anonymously drafted by John Marshall), "[T]he right of remaining in our country is vested in no alien; he enters and remains by the courtesy of the sovereign power, and that courtesy may at pleasure be withdrawn" without judicial process. Address of the Minority in the Virginia Legislature to the People of that State 9–10 (1799) (Virginia Minority Address). Unlike "a grant of land," the "[a]dmission of an alien to residence . . . is revocable, like a permission." A. Addison, Analysis of the Report of the Committee of the Virginia Assembly 23 (1800). Removing a resident alien from the country did not affect "life, liberty, or property," the Federalists argued, until the alien became a naturalized citizen. See *id.*, at 23–24; Charge to the Grand Juries 11–13. That the alien's permanent residence was conferred by statute would not have made a difference. See Nelson 571, 580–582; *Teva Pharmaceuticals USA, Inc.* v. *Sandoz, Inc.*, 574 U. S. 318, 344, n. 2 (2015) (THOMAS, J., dissenting).

After the Alien Friends Act lapsed in 1800, Congress did not enact another removal statute for nearly a century. The States enacted their own removal statutes during this period, see G. Neuman, Strangers to the Constitution 19–43 (1996), and I am aware of no decision questioning the legality of these statutes under state due process or law-of-the-land provisions. Beginning in the late 19th century, the Federal Government reinserted itself into the regulation of immigration. When this Court was presented with constitutional challenges to Congress' removal laws, it initially rejected them for many of the same reasons that Marshall and the Federalists had cited in defense of the Alien Friends Act. Although the Court rejected the Federalists' argument that resident aliens do not enjoy constitutional rights, see *Wong Wing* v. *United States*, 163 U. S. 228, 238 (1896), it agreed that civil deportation statutes do not implicate "life, liberty, or property," see, *e. g.*, *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 584–585 (1952) ("[T]hat admission for permanent resi-

dence confers a 'vested right' on the alien [is] not founded in precedents of this Court"); *United States ex rel. Turner* v. *Williams*, 194 U. S. 279, 290 ("[T]he deportation of an alien who is found to be here in violation of law is not a deprivation of liberty without due process of law"); *Fong Yue Ting*, 149 U. S., at 730 ("[Deportation] is but a method of enforcing the return to his own country of an alien who has not complied with [statutory] conditions . . . . He has not, therefore, been deprived of life, liberty, or property without due process of law"); *id.*, at 713–715 (similar). Consistent with this understanding, "federal immigration laws from 1891 until 1952 made no express provision for judicial review." *Demore*, 538 U. S., at 538 (opinion of O'Connor, J.).

It was not until the 20th century that this Court held that nonpenal removal statutes could violate the Due Process Clause. See *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 49 (1950). That ruling opened the door for the Court to apply the then-nascent vagueness doctrine to immigration statutes. But the Court upheld vague standards in immigration laws that it likely would not have tolerated in criminal statutes. See, *e. g.*, *Boutilier* v. *INS*, 387 U. S. 118, 122 (1967) ("'psychopathic personality'"); *Jordan* v. *De George*, 341 U. S. 223, 232 (1951) ("'crime involving moral turpitude'"); cf. *Mahler* v. *Eby*, 264 U. S. 32, 40 (1924) ("'undesirable residents'"). Until today, this Court has never held that an immigration statute is unconstitutionally vague.

Thus, for more than a century after the founding, it was, at best, unclear whether federal removal statutes could violate the Due Process Clause. And until today, this Court had never deemed a federal removal statute void for vagueness. Given this history, it is difficult to conclude that a ban on vague removal statutes is a "settled usag[e] and mod[e] of proceeding existing in the common and statute law of England, before the emigration of our ancestors" protected by the Fifth Amendment's Due Process Clause. *Murray's Lessee*, 18 How., at 277.

B

Instead of a longstanding procedure under *Murray's Lessee*, perhaps the vagueness doctrine is really a way to enforce the separation of powers—specifically, the doctrine of nondelegation. See Chapman & McConnell, Due Process as Separation of Powers, 121 Yale L. J. 1672, 1806 (2012) ("Vague statutes have the effect of delegating lawmaking authority to the executive"). Madison raised a similar objection to the Alien Friends Act, arguing that its expansive language effectively allowed the President to exercise legislative (and judicial) power. See Madison's Report 369–371. And this Court's precedents have occasionally described the vagueness doctrine in terms of nondelegation. See, *e. g.*, *Grayned* v. *City of Rockford*, 408 U. S. 104, 108–109 (1972) ("A vague law impermissibly delegates basic policy matters"). But they have not been consistent on this front. See, *e. g.*, *Aptheker* v. *Secretary of State*, 378 U. S. 500, 516 (1964) ("'The objectionable quality of vagueness . . . does not depend upon . . . unchanneled delegation of legislative powers'"); *Maynard* v. *Cartwright*, 486 U. S. 356, 361 (1988) ("Objections to vagueness under the Due Process Clause rest on the lack of notice").

I agree that the Constitution prohibits Congress from delegating core legislative power to another branch. See *Department of Transportation* v. *Association of American Railroads*, 575 U. S. 43, 68 (2015) (*AAR*) (THOMAS, J., concurring in judgment) ("Congress improperly 'delegates' legislative power when it authorizes an entity other than itself to make a determination that requires an exercise of legislative power"); accord, *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 487 (2001) (THOMAS, J., concurring). But I locate that principle in the Vesting Clauses of Articles I, II, and III—not in the Due Process Clause. *AAR*, *supra*, at 67–69 (opinion of THOMAS, J.); see also *Hampton* v. *Mow Sun Wong*, 426 U. S. 88, 123 (1976) (Rehnquist, J., dissenting) ("[T]hat there was an improper delegation of authority . . .

has not previously been thought to depend upon the procedural requirements of the Due Process Clause"). In my view, impermissible delegations of legislative power violate this principle, not just delegations that deprive individuals of "life, liberty, or property," Amdt. 5.

Respondent does not argue that § 16(b), as incorporated by the INA, is an impermissible delegation of power. See Brief for Respondent 50 (stating that "there is no delegation question" in this case). I would not reach that question here, because this case can be resolved on narrower grounds. See Part I–C, *infra*. But at first blush, it is not at all obvious that the nondelegation doctrine would justify wholesale invalidation of § 16(b).

If § 16(b) delegates power in this context, it delegates power primarily to the Executive Branch entities that administer the INA—namely, the Attorney General, immigration judges, and the Board of Immigration Appeals (BIA). But Congress does not "delegate" when it merely authorizes the Executive Branch to exercise a power that it already has. See *AAR*, *supra*, at 68 (opinion of THOMAS, J.). And there is some founding-era evidence that "the executive Power," Art. II, § 1, includes the power to deport aliens.

Blackstone—one of the political philosophers whose writings on executive power were "most familiar to the Framers," Prakash & Ramsey, The Executive Power Over Foreign Affairs, 111 Yale L. J. 231, 253 (2001)—described the power to deport aliens as executive and located it with the King. Alien friends, Blackstone explained, are "liable to be sent home whenever the king sees occasion." 1 Commentaries on the Laws of England 252 (1765). When our Constitution was ratified, moreover, "[e]minent English judges, sitting in the Judicial Committee of the Privy Council, ha[d] gone very far in supporting the . . . expulsion, by the executive authority of a colony, of aliens." *Demore*, 538 U. S., at 538 (opinion of O'Connor, J.) (quoting *Fong Yue Ting*, 149 U. S., at 709). Some of the Federalists defending the Alien Friends Act

similarly argued that the President had the power to remove aliens. See, *e. g.*, Virginia Debates 35 (statement of George K. Taylor) (arguing that the power to remove aliens is "most properly entrusted" with the President, since "[h]e, by the Constitution, was bound to execute the laws" and is "the executive officer, with whom all persons and bodies whatever were accustomed to communicate"); Virginia Minority Address 9 (arguing that the removal of aliens "is a measure of general safety, in its nature political and not forensic, the execution of which is properly trusted to the department which represents the nation in all its interior relations"); Charge to the Grand Juries 29–30 ("As a measure of national defence, this discretion, of expulsion or indulgence, seems properly vested in the branch of the government peculiarly charged with the direction of the executive powers, and of our foreign relations. There is in it a mixture of external policy, and of the law of nations, that justifies this disposition"). More recently, this Court recognized that "[r]emoval decisions" implicate "our customary policy of deference to the President in matters of foreign affairs" because they touch on "our relations with foreign powers and require consideration of changing political and economic circumstances." *Jama* v. *Immigration and Customs Enforcement*, 543 U. S. 335, 348 (2005) (internal quotation marks omitted). Taken together, this evidence makes it difficult to confidently conclude that the INA, through § 16(b), delegates core legislative power to the Executive.

Instead of the Executive, perhaps § 16(b) impermissibly delegates power to the Judiciary, since the courts of appeals often review the BIA's application of § 16(b). I assume that, at some point, a statute could be so devoid of content that a court tasked with interpreting it "would simply be making up a law—that is, exercising legislative power." Lawson, Delegation and Original Meaning, 88 Va. L. Rev. 327, 339 (2002); see *id.*, at 339–340 (providing examples such as a gibberish-filled statute or a statute that requires " 'goodness

and niceness' "). But I am not confident that our modern vagueness doctrine—which focuses on whether regulations of individual conduct provide "fair warning," are "clearly defined," and do not encourage "arbitrary and discriminatory enforcement," *Grayned*, *supra*, at 108; *Kolender*, 461 U. S., at 357—accurately demarcates the line between legislative and judicial power. The Founders understood that the interpretation of legal texts, even vague ones, remained an exercise of core judicial power. See *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 119–120 (2015) (THOMAS, J., concurring in judgment); Hamburger, The Constitution's Accommodation of Social Change, 88 Mich. L. Rev. 239, 303–310 (1989). Courts were expected to clarify the meaning of such texts over time as they applied their terms to specific cases. See *id.*, at 309–310; Nelson, Originalism and Interpretive Conventions, 70 U. Chi. L. Rev. 519, 526 (2003). Although early American courts declined to apply vague or unintelligible statutes as appropriate in individual cases, they did not wholesale invalidate them as unconstitutional delegations of legislative power. See *Johnson*, 576 U. S., at 615–616, and n. 3 (opinion of THOMAS, J.).

C

1

I need not resolve these historical questions today, as this case can be decided on narrower grounds. If the vagueness doctrine has any basis in the original meaning of the Due Process Clause, it must be limited to case-by-case challenges to particular applications of a statute. That is what early American courts did when they applied the rule of lenity. See *id.*, at 615–616. And that is how early American courts addressed constitutional challenges to statutes more generally. See *id.*, at 615 ("[T]here is good evidence that [antebellum] courts . . . understood judicial review to consist 'of a refusal to give a statute effect as operative law in resolving a case,' a notion quite distinct from our modern practice of

'"strik[ing] down" legislation'" (quoting Walsh, Partial Unconstitutionality, 85 N. Y. U. L. Rev. 738, 756 (2010))).

2

This Court's precedents likewise recognize that, outside the First Amendment context, a challenger must prove that the statute is vague as applied to him. See *Holder* v. *Humanitarian Law Project*, 561 U. S. 1, 18–19 (2010); *United States* v. *Williams*, 553 U. S. 285, 304 (2008); *Maynard*, 486 U. S., at 361; *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 495, and n. 7 (1982) (collecting cases). *Johnson* did not overrule these precedents. While *Johnson* weakened the principle that a facial challenge requires a statute to be vague "in *all* applications," 576 U. S., at 603 (emphasis added), it did not address whether a statute must be vague as applied to the person challenging it. That question did not arise because the Court concluded that ACCA's residual clause was vague as applied to the crime at issue there: unlawful possession of a short-barreled shotgun. See *id.*, at 600.

In my view, § 16(b) is not vague as applied to respondent. When respondent committed his burglaries in 2007 and 2009, he was "sufficiently forewarned . . . that the statutory consequence . . . is deportation." *De George*, 341 U. S., at 232. At the time, courts had "unanimous[ly]" concluded that residential burglary is a crime of violence, and not "a single opinion . . . ha[d] held that [it] is *not*." *United States* v. *M. C. E.*, 232 F. 3d 1252, 1255–1256 (CA9 2000); see also *United States* v. *Davis*, 881 F. 2d 973, 976 (CA11 1989) (explaining that treating residential burglary as a crime of violence was "[i]n accord with common law tradition and the settled law of the federal circuits"). Residential burglary "ha[d] been considered a violent offense for hundreds of years . . . because of the potential for mayhem if burglar encounters resident." *United States* v. *Pinto*, 875 F. 2d 143, 144 (CA7 1989). The Model Penal Code had recognized that risk, see ALI, Model

Penal Code § 221.1, Comment 3(c), p. 75 (1980); the Sentencing Commission had recognized that risk; see United States Sentencing Commission, Guidelines Manual § 4B1.2(a)(2) (Nov. 2006); and this Court had repeatedly recognized that risk, see, *e. g.*, *James* v. *United States*, 550 U. S. 192, 203 (2007); *Taylor* v. *United States*, 495 U. S. 575, 588 (1990). In *Leocal* v. *Ashcroft*, 543 U. S. 1 (2004), this Court unanimously agreed that burglary is the "classic example" of a crime of violence under § 16(b), because it "involves a substantial risk that the burglar will use force against a victim in completing the crime." *Id.*, at 10.

That same risk is present with respect to respondent's statute of conviction—first-degree residential burglary, Cal. Penal Code Ann. §§ 459, 460(a) (West 1999). The California Supreme Court has explained that the State's burglary laws recognize "the dangers to personal safety created by the *usual* burglary situation." *People* v. *Davis*, 18 Cal. 4th 712, 721, 958 P. 2d 1083, 1089 (1998) (emphasis added). "'[T]he fact that a building is used as a home . . . increases such danger,'" which is why California elevates residential burglary to a first-degree offense. *People* v. *Rodriguez*, 122 Cal. App. 4th 121, 133, 18 Cal. Rptr. 3d 550, 558 (2004); see also *People* v. *Wilson*, 208 Cal. App. 3d 611, 615, 256 Cal. Rptr. 422, 425 (1989) ("[T]he higher degree . . . is intended to prevent those situations which are most dangerous, most likely to cause personal injury" (emphasis deleted)). Although unlawful entry is not an element of the offense, courts "unanimous[ly]" agree that the offense still involves a substantial risk of physical force. *United States* v. *Avila*, 770 F. 3d 1100, 1106 (CA4 2014); accord, *United States* v. *Maldonado*, 696 F. 3d 1095, 1102, 1104 (CA10 2012); *United States* v. *Scanlan*, 667 F. 3d 896, 900 (CA7 2012); *United States* v. *Echeverria–Gomez*, 627 F. 3d 971, 976 (CA5 2010); *United States* v. *Becker*, 919 F. 2d 568, 573 (CA9 1990). First-degree residential burglary requires entry into an inhabited dwelling, with the intent to commit a felony, against the will

of the homeowner—the key elements that create the risk of violence. See *United States* v. *Park*, 649 F. 3d 1175, 1178–1180 (CA9 2011); *Avila*, *supra*, at 1106–1107; *Becker*, *supra*, at 571, n. 5. As this Court has explained, "[t]he main risk of burglary arises not from the simple physical act of wrongfully entering onto another's property, but rather from the possibility of a face-to-face confrontation between the burglar and a third party." *James*, *supra*, at 203.

Drawing on *Johnson* and the decision below, the Court suggests that residential burglary might not be a crime of violence because " 'only about seven percent of burglaries actually involve violence.' " *Ante*, at 160, n. 3 (citing *Dimaya* v. *Lynch*, 803 F. 3d 1110, 1116, n. 7 (CA9 2015)); see Bureau of Justice Statistics, S. Catalano, National Crime Victimization Survey: Victimization During Household Burglary 1 (Sept. 2010), https://www.bjs.gov/content/pub/pdf/vdhb.pdf (as last visited Apr. 13, 2018). But this statistic—which measures actual violence against a member of the household, see *id.*, at 1, 12—is woefully underinclusive. It excludes other potential victims besides household members—for example, "a police officer, or a bystande[r] who comes to investigate," *James*, *supra*, at 203. And § 16(b) requires only a risk of physical force, not actual physical force, and that risk would seem to be present whenever someone is home during the burglary. Further, *Johnson* is not conclusive because, unlike ACCA's residual clause, § 16(b) covers offenses that involve a substantial risk of physical force "against the person *or property* of another." (Emphasis added.) Surely the ordinary case of residential burglary involves at least one of these risks. According to the statistics referenced by the Court, most burglaries involve either a forcible entry (*e. g.*, breaking a window or slashing a door screen), an attempted forcible entry, or an unlawful entry when someone is home. See Bureau of Justice Statistics, *supra*, at 2 (Table 1). Thus, under any metric, respondent's convictions for first-degree residential burglary are crimes of violence under § 16(b).

3

Finally, if facial vagueness challenges are ever appropriate, I adhere to my view that a law is not facially vague "'[i]f any fool would know that a particular category of conduct would be within the reach of the statute, if there is an unmistakable core that a reasonable person would know is forbidden by the law.'" *Morales*, 527 U. S., at 112 (THOMAS, J., dissenting) (quoting *Kolender*, 461 U. S., at 370–371 (White, J., dissenting)). The residual clause of ACCA had such a core. See *Johnson*, 576 U. S., at 602; *id.*, at 636–637 (ALITO, J., dissenting). And § 16(b) has an even wider core, as THE CHIEF JUSTICE explains. Thus, the Court should not have invalidated § 16(b), either on its face or as applied to respondent.

II

Even taking the vagueness doctrine and *Johnson* at face value, I disagree with the Court's decision to invalidate § 16(b). The sole reason that the Court deems § 16(b) unconstitutionally vague is because it reads the statute as incorporating the categorical approach—specifically, the "ordinary case" approach from ACCA's residual clause. Although the Court mentions "[t]wo features" of § 16(b) that make it vague—the ordinary-case approach and an imprecise risk standard—the Court admits that the second feature is problematic only in combination with the first. *Ante*, at 161. Without the ordinary-case approach, the Court "'do[es] not doubt'" the constitutionality of § 16(b). *Ibid.*

But if the categorical approach renders § 16(b) unconstitutionally vague, then constitutional avoidance requires us to make a reasonable effort to avoid that interpretation. And a reasonable alternative interpretation is available: Instead of asking whether the ordinary case of an alien's offense presents a substantial risk of physical force, courts should ask whether the alien's actual underlying conduct presents a substantial risk of physical force. I will briefly discuss the

origins of the categorical approach and then explain why the Court should abandon it for § 16(b).

A

1

The categorical approach originated with Justice Blackmun's opinion for the Court in *Taylor* v. *United States*, 495 U. S. 575 (1990). The question in *Taylor* was whether ACCA's reference to "burglary" meant burglary as defined by state law or burglary in the generic sense. After "devoting 10 pages of [its] opinion to legislative history," *id.*, at 603 (Scalia, J., concurring in part and concurring in judgment), and finding that Congress had made "an inadvertent casualty in [the] complex drafting process," *id.*, at 589–590 (majority opinion), the Court concluded that ACCA referred to burglary in the generic sense, *id.*, at 598. The Court then addressed how the Government would prove that a defendant was convicted of generic burglary, as opposed to another offense. *Id.*, at 599–602. *Taylor* rejected the notion that the Government could introduce evidence about the "particular facts" of the defendant's underlying crime. *Id.*, at 600. Instead, the Court adopted a "categorical approach," which focused primarily on the "statutory definition of the prior offense." *Id.*, at 602.

Although *Taylor* was interpreting one of ACCA's enumerated offenses, this Court later extended the categorical approach to ACCA's residual clause. See *James*, 550 U. S., at 208. That extension required some reworking. Because ACCA's enumerated-offenses clause asks whether a prior conviction "is burglary, arson, or extortion," 18 U. S. C. § 924(e)(2)(B)(ii), *Taylor* instructed courts to focus on the definition of the underlying crime. The residual clause, by contrast, asks whether a prior conviction "involves conduct that presents a serious potential risk of physical injury to another." § 924(e)(2)(B)(ii). Thus, the Court held that the categorical approach for the residual clause asks "whether

the conduct encompassed by the elements of the offense, *in the ordinary case*, presents a serious potential risk of injury to another." *James*, *supra*, at 208 (emphasis added). This "ordinary case" approach allowed courts to apply the residual clause without inquiring into the individual facts of the defendant's prior crime.

Taylor gave a few reasons why the categorical approach was the correct reading of ACCA, see 495 U. S., at 600–601, but the "heart of the decision" was the Court's concern with limiting the amount of evidence that the parties could introduce at sentencing. *Shepard* v. *United States*, 544 U. S. 13, 23 (2005). Specifically, the Court was worried about potential violations of the Sixth Amendment. If the parties could introduce evidence about the defendant's underlying conduct, then sentencing proceedings might devolve into a full-blown minitrial, with factfinding by the judge instead of the jury. See *id.*, at 24–26; *Taylor*, *supra*, at 601. While this Court's decision in *Almendarez-Torres* v. *United States*, 523 U. S. 224 (1998), allows judges to find facts about a defendant's prior convictions, a full-blown minitrial would look "too much like" the kind of factfinding that the Sixth Amendment requires the jury to conduct. *Shepard*, 544 U. S., at 25. By construing ACCA to require a categorical approach, then, the Court was following "[t]he rule of reading statutes to avoid serious risks of unconstitutionality." *Ibid.*

2

I disagreed with the Court's decision to extend the categorical approach to ACCA's residual clause. See *James*, 550 U. S., at 231–232 (dissenting opinion). The categorical approach was an " 'unnecessary exercise,' " I explained, because it created the same Sixth Amendment problem that it tried to avoid. *Id.*, at 231. Absent waiver, a defendant has the right to have a jury find "every fact that is by law a basis for imposing or increasing punishment," including the fact of a prior conviction. *Apprendi* v. *New Jersey*, 530 U. S. 466,

501 (2000) (THOMAS, J., concurring). The exception recognized in *Almendarez-Torres* for prior convictions is an aberration, has been seriously undermined by subsequent precedents, and should be reconsidered. See *Mathis* v. *United States*, 579 U. S. 500, 521–522 (2016) (THOMAS, J., concurring); *Shepard*, *supra*, at 27–28 (THOMAS, J., concurring in part and concurring in judgment). In my view, if the Government wants to enhance a defendant's sentence based on his prior convictions, it must put those convictions in the indictment and prove them to a jury beyond a reasonable doubt.[6]

B

My objection aside, the ordinary-case approach soon created problems of its own. The Court's attempt to avoid the Scylla of the Sixth Amendment steered it straight into the Charybdis of the Fifth. The ordinary-case approach that was created to honor the individual right to a jury is now, according to the Court, so vague that it deprives individuals of due process.

I see no good reason for the Court to persist in reading the ordinary-case approach into § 16(b). The text of § 16(b) does not mandate the ordinary-case approach, the concerns that led this Court to adopt it do not apply here, and there are no prudential reasons for retaining it. In my view, we should abandon the categorical approach for § 16(b).

---

[6] The Sixth Amendment is, thus, not a reason to maintain the categorical approach in criminal cases. Contra, *ante*, at 164 (plurality opinion). Even if it were, the Sixth Amendment does not apply in immigration cases like this one. See Part II–B–2, *infra*. The plurality contends that, if it must contort the text of § 16(b) to avoid a Sixth Amendment problem in criminal cases, then it must also contort the text of § 16(b) in immigration cases, even though the Sixth Amendment problem does not arise in the immigration context. See *ante*, at 164–166. But, as I have explained elsewhere, this "lowest common denominator" approach to constitutional avoidance is both ahistorical and illogical. See *Clark* v. *Martinez*, 543 U. S. 371, 395–401 (2005) (dissenting opinion).

1

The text of § 16(b) does not require a categorical approach. The INA declares an alien deportable if he is "convicted of an aggravated felony" after he is admitted to the United States. 8 U. S. C. § 1227(a)(2)(A)(iii). Aggravated felonies include "crime[s] of violence" as defined in § 16. § 1101(a)(43)(F). Section 16, in turn, defines crimes of violence as follows:

> "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> "(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

At first glance, § 16(b) is not clear about the precise question it poses. On the one hand, the statute might refer to the metaphysical "nature" of the offense and ask whether it ordinarily involves a substantial risk of physical force. On the other hand, the statute might refer to the underlying facts of the offense that the offender committed; the words "by its nature," "substantial risk," and "may" would mean only that an offender who engages in risky conduct cannot benefit from the fortuitous fact that physical force was not actually used during his offense. The text can bear either interpretation. See *Nijhawan* v. *Holder*, 557 U. S. 29, 33–34 (2009) ("[I]n ordinary speech words such as 'crime,' 'felony,' 'offense,' and the like sometimes refer to a generic crime . . . and sometimes refer to the specific acts in which an offender engaged on a specific occasion"). It is entirely natural to use words like "nature" and "offense" to refer to an offender's actual underlying conduct.[7]

---

[7] See, *e. g.*, 18 U. S. C. § 3553(a)(2) (directing sentencing judges to consider "the nature and circumstances of the offense"); *Schware* v. *Board of Bar Examiners of N. M.*, 353 U. S. 232, 243 (1957) (describing "the nature

Although both interpretations are linguistically possible, several factors indicate that the underlying-conduct approach is the better one. To begin, § 16(b) asks whether an offense "involves" a substantial risk of force. The word "involves" suggests that the offense must *necessarily* include a substantial risk of force. See New Oxford Dictionary of English 962 (2001) ("include (something) as a necessary part or result"); Random House Dictionary of the English Language 1005 (2d ed. 1987) ("1. to include as a necessary circumstance, condition, or consequence"); Oxford American Dictionary 349 (1980) ("1. to contain within itself, to make

---

of the offense" committed by a bar applicant as "recruiting persons to go overseas to aid the Loyalists in the Spanish Civil War"); *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U. S. 443, 482 (1993) (O'Connor, J., dissenting) (describing "the nature of the offense at issue" as not "involving grave physical injury" but rather as a "business dispute between two companies in the oil and gas industry"); *United States* v. *Broce*, 488 U. S. 563, 585–587 (1989) (Blackmun, J., dissenting) (describing "the nature of the charged offense" in terms of the specific facts alleged in the indictment); *People* v. *Golba*, 273 Mich. App. 603, 611, 729 N. W. 2d 916, 922 (2007) ("[T]he underlying factual basis for a conviction governs whether the offense 'by its nature constitutes a sexual offense against an individual who is less than 18 years of age' " (quoting Mich. Comp. Laws § 28.722(e)(xi) (2006))); A Fix for Animal Abusers, Boston Herald, Nov. 22, 2017, p. 16 ("prosecutors were so horrified at the nature of his offense—his torture of a neighbor's dog"); Ward, Attorney of Convicted Ex-Official Accuses Case's Judge, Pittsburgh Post-Gazette, Nov. 10, 2015, p. B1 (identifying the "nature of his offense" as "taking money from an elderly, widowed client, and giving it to campaign funds"); Cross-Burning–Article Painted an Inaccurate Picture of Young Man in Question, Seattle Times, Aug. 12, 1991, p. A9 ("[The defendant] took no steps to prevent the cross that was burned from being constructed on his family's premises and later . . . assisted in concealing a second cross . . . . This was the nature of his offense"); Libman, A Parole/Probation Officer Talks With Norma Libman, Chicago Tribune, May 29, 1988, p. I31 (describing "the nature of the offense" as "not serious" if "there was no definitive threat on life" or if "the dollar-and-cents amount was not great"); Walsh, District–U. S. Argument Delays Warrant for Escapee's Arrest, Washington Post, May 29, 1986, p. C1 (describing "the nature of Murray's alleged offenses" as "point-[ing] at two officers a gun that was later found to contain one round of ammunition").

necessary as a condition or result"). That condition is always satisfied if the Government must prove that the alien's underlying conduct involves a substantial risk of force, but it is not always satisfied if the Government need only prove that the "ordinary case" involves such a risk. See *Johnson*, 576 U. S., at 635–636 (ALITO, J., dissenting). Tellingly, the other aggravated felonies in the INA that use the word "involves" employ the underlying-conduct approach. See 8 U. S. C. § 1101(a)(43)(M)(i) ("an offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000"); § 1101(h)(3) ("any crime of reckless driving or of driving while intoxicated or under the influence of alcohol or of prohibited substances if such crime involves personal injury to another"). As do the similarly worded provisions of the Comprehensive Crime Control Act of 1984, the bill that contained § 16(b). See, *e. g.*, 98 Stat. 2059 (elevating the burden of proof for the release of "a person found not guilty only by reason of insanity of an offense involving bodily injury to, or serious damage to the property of, another person, or involving a substantial risk of such injury or damage"); *id.*, at 2068 (establishing the sentence for drug offenses "involving" specific quantities and types of drugs); *id.*, at 2137 (defining violent crimes in aid of racketeering to include "attempting or conspiring to commit a crime involving maiming, assault with a dangerous weapon, or assault resulting in serious bodily injury").

A comparison of § 16(b) and § 16(a) further highlights why the former likely adopts an underlying-conduct approach. Section 16(a) covers offenses that have the use, attempted use, or threatened use of physical force "as an element." Because § 16(b) covers "other" offenses and is separated from § 16(a) by the disjunctive word "or," the natural inference is that § 16(b) asks a different question. In other words, § 16(b) must require immigration judges to look beyond the elements of an offense to determine whether it involves a substantial risk of physical force. But if the elements are insufficient, where else should immigration judges look to de-

termine the riskiness of an offense? Two options are possible, only one of which is workable.

The first option is to consult the underlying facts of the alien's crime and then assess its riskiness. This approach would provide a definitive answer in every case. And courts are already familiar with this kind of inquiry. Cf. *Johnson*, *supra*, at 603 (noting that "dozens" of similarly worded laws ask courts to assess "the riskiness of conduct in which an individual defendant engages *on a particular occasion*"). Nothing suggests that Congress imposed a more limited inquiry when it enacted § 16(b) in 1984. At the time, Congress had not yet enacted ACCA's residual clause, this Court had not yet created the categorical approach, and this Court had not yet recognized a Sixth Amendment limit on judicial fact-finding at sentencing, see *Chambers* v. *United States*, 555 U. S. 122, 132 (2009) (ALITO, J., concurring in judgment).

The second option is to imagine the "ordinary case" of the alien's crime and then assess the riskiness of that hypothetical offense. But the phrase "ordinary case" does not appear in the statute. And imagining the ordinary case, the Court reminds us, is "hopeless[ly] indetermina[te]," "wholly 'speculative,'" and mere "guesswork." *Ante*, at 158, 174 (quoting *Johnson*, *supra*, at 597, 598, 600); see also *Chambers*, *supra*, at 133 (opinion of ALITO, J.) (observing that the categorical approach is "nearly impossible to apply consistently"). Because courts disfavor interpretations that make a statute impossible to apply, see A. Scalia & B. Garner, Reading Law 63 (2012), this Court should reject the ordinary-case approach for § 16(b) and adopt the underlying-facts approach instead. See *Johnson*, *supra*, at 633 (ALITO, J., dissenting) ("When another interpretation is ready at hand, why should we assume that Congress gave the clause a meaning that is impossible—or even, exceedingly difficult—to apply").

2

That the categorical approach is not the better reading of § 16(b) should not be surprising, since the categorical ap-

proach was never really about the best reading of the text. As explained, this Court adopted that approach to avoid a potential Sixth Amendment problem with sentencing judges conducting minitrials to determine a defendant's past conduct. But even assuming the categorical approach solved this Sixth Amendment problem in criminal cases, no such problem arises in immigration cases. "[T]he provisions of the Constitution securing the right of trial by jury have no application" in a removal proceeding. *Turner*, 194 U. S., at 290. And, in criminal cases, the underlying-conduct approach would be perfectly constitutional if the Government included the defendant's prior conduct in the indictment, tried it to a jury, and proved it beyond a reasonable doubt. See *Johnson*, 576 U. S., at 635 (ALITO, J., dissenting). Nothing in § 16(b) prohibits the Government from proceeding this way, so the plurality is wrong to suggest that the underlying-conduct approach would necessarily "ping-pong us from one constitutional issue to another." *Ante*, at 164.

If constitutional avoidance applies here at all, it requires us to *reject* the categorical approach for § 16(b). According to the Court, the categorical approach is unconstitutionally vague. And, all agree that the underlying-conduct approach would not be. See *Johnson*, *supra*, at 603–604 (majority opinion) ("[W]e do not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct"). Thus, if the underlying-conduct approach is a "reasonabl[e]" interpretation of § 16(b), it is our "plain duty" to adopt it. *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407 (1909). And it is reasonable, as explained above.

In *Johnson*, the Court declined to adopt the underlying-conduct approach for ACCA's residual clause. See 576 U. S., at 604–605. The Court concluded that the categorical approach was the only reasonable reading of ACCA because the residual clause uses the word "convictions." *Ibid.* The Court also stressed the "utter impracticability of requir-

ing a sentencing court to reconstruct, long after the original conviction, the conduct underlying that conviction." *Id.*, at 605.

Neither of these arguments is persuasive with respect to the INA. Moreover, this Court has already rejected them. In *Nijhawan*, this Court unanimously concluded that one of the aggravated felonies in the INA—"an offense that . . . involves fraud or deceit in which the loss to the victim or victims exceeds $10,000," § 1101(a)(43)(M)(i)—applies the underlying-conduct approach, not the categorical approach. 557 U. S., at 32. Although the INA also refers to "convict[ions]," § 1227(a)(2)(A)(iii), the Court was not swayed by that argument. The word "convict[ion]" means only that the defendant's underlying conduct must " 'be tied to the specific counts covered by the conviction,' " not "acquitted or dismissed counts or general conduct." *Id.*, at 42. As for the supposed practical problems with proving an alien's prior conduct, the Court did not find that argument persuasive either. "[T]he 'sole purpose' of the 'aggravated felony' inquiry," the Court explained, " 'is to ascertain the nature of a prior conviction; it is not an invitation to relitigate the conviction itself.' " *Ibid.* And because the INA places the burden on the Government to prove an alien's conduct by clear and convincing evidence, § 1229a(c)(3)(A), "uncertainties caused by the passage of time are likely to count in the alien's favor," *id.*, at 42.

There are additional reasons why the practical problems identified in *Johnson* should not matter for § 16(b)—even assuming they should have mattered for ACCA's residual clause, see *Lewis* v. *Chicago*, 560 U. S. 205, 217 (2010) ("[I]t is not our task to assess the consequences of each approach and adopt the one that produces the least mischief. Our charge is to give effect to the law Congress enacted"). In a removal proceeding, any difficulties with identifying an alien's past conduct will fall on immigration judges, not federal courts. But those judges are already accustomed to

finding facts about the conduct underlying an alien's prior convictions, since some of the INA's aggravated felonies employ the underlying-conduct approach. The BIA has instructed immigration judges to determine such conduct based on "any evidence admissible in removal proceedings," not just the elements of the offense or the record of conviction. See *Matter of Babaisakov*, 24 I. & N. Dec. 306, 307 (2007). No one has submitted any evidence that the BIA's approach has been "utter[ly] impracticab[le]" or "daunting[ly] difficul[t]" in practice. *Ante*, at 166. And even if it were, "how much time the agency wants to devote to the resolution of particular issues is . . . a question for the agency itself." *Ali* v. *Mukasey*, 521 F. 3d 737, 741 (CA7 2008). Hypothetical burdens on the BIA should not influence how this Court interprets § 16(b).

In short, we should not blithely assume that the reasons why this Court adopted the categorical approach for ACCA's residual clause also apply to the INA's list of aggravated felonies. As *Nijhawan* explained, "the 'aggravated felony' statute, unlike ACCA, contains some language that refers to generic crimes and some language that almost certainly refers to the specific circumstances in which a crime was committed." 557 U. S., at 38. "The question" in each case is "to which category [the aggravated felony] belongs." *Ibid.* As I have explained, § 16(b) belongs in the underlying-conduct category. Because that is the better reading of § 16(b)'s text—or at least a reasonable reading—the Court should have adopted it here.

3

I see no prudential reason for maintaining the categorical approach for § 16(b). The Court notes that the Government "explicitly acknowledges" that § 16(b) employs the categorical approach. *Ante*, at 160. But we cannot permit the Government's concessions to dictate how we interpret a statute, much less cause us to invalidate a statute enacted by a coor-

dinate branch. See *United States Nat. Bank of Ore.* v. *Independent Ins. Agents of America, Inc.*, 508 U. S. 439, 446–447 (1993); *Young* v. *United States*, 315 U. S. 257, 258–259 (1942). This Court's "traditional practice" is to "refus[e] to decide constitutional questions" when other grounds of decision are available, "whether or not they have been properly raised before us by the parties." *Neese* v. *Southern R. Co.*, 350 U. S. 77, 78 (1955) (*per curiam*); see also Vermeule, Saving Constructions, 85 Geo. L. J. 1945, 1948–1949 (1997) (explaining that courts commonly "decide an antecedent statutory issue, even one waived by the parties, if its resolution could preclude a constitutional claim"). This Court has raised potential saving constructions "on our own motion" when they could avoid a ruling on constitutional vagueness grounds, even in cases where the Government was a party. *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81, 88 (1921). We should have followed that established practice here.

Nor should *stare decisis* prevent us from rejecting the categorical approach for § 16(b). This Court has never held that § 16(b) incorporates the ordinary-case approach. Although *Leocal* held that § 16(b) incorporates a version of the categorical approach, the Court must not feel bound by that decision, as it largely overrules it today. See *ante*, at 172, n. 7. Surely the Court cannot credibly invoke *stare decisis* to defend the categorical approach—the same approach it says only a "lunatic" would continue to apply. *Ante*, at 174. If the Court views the categorical approach that way—the same way *Johnson* viewed it—then it must also agree that "[s]tanding by [the categorical approach] would undermine, rather than promote, the goals that *stare decisis* is meant to serve." 576 U. S., at 606. That is especially true if the Court's decision leads to the invalidation of scores of similarly worded state and federal statutes, which seems even more likely after today than it did after *Johnson*. Instead of adhering to an interpretation that it thinks unconstitutional and then using that interpretation to strike down an-

other statute, the Court should have taken this opportunity to abandon the categorical approach for § 16(b) once and for all.

* * *

The Court's decision today is triply flawed. It unnecessarily extends our incorrect decision in *Johnson*. It uses a constitutional doctrine with dubious origins to invalidate yet another statute (while calling into question countless more). And it does all this in the name of a statutory interpretation that we should have discarded long ago. Because I cannot follow the Court down any of these rabbit holes, I respectfully dissent.

Syllabus

UNITED STATES *v.* MICROSOFT CORP.

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

No. 17–2. Argued February 27, 2018—Decided April 17, 2018

Federal law enforcement agents sought a warrant under 18 U. S. C. § 2703, requiring respondent Microsoft Corp. to disclose all e-mails and other information associated with a customer's account that the agents believed was being used to further illegal drug trafficking. A Magistrate Judge issued the warrant, which Microsoft moved to quash with respect to account information stored at its datacenter in Dublin, Ireland. The Magistrate Judge denied the motion. The District Court affirmed and held Microsoft in contempt for failing to fully comply with the warrant. The Second Circuit reversed, holding that such disclosure would be an unauthorized extraterritorial application of § 2703. Congress subsequently enacted the Clarifying Lawful Overseas Use of Data Act which required service providers to disclose customer information under § 2703, regardless whether such information is located outside the United States. The Government then obtained a new warrant covering the information at issue.

Held: Because no live dispute remains between the parties over the issue on which certiorari was granted, this case is moot. The judgment below is vacated, and the case is remanded to the Second Circuit with instructions to vacate the District Court's contempt finding and denial of Microsoft's motion to quash, and to direct the District Court to dismiss the case as moot.

829 F. 3d 197, vacated and remanded.

Deputy Solicitor General Dreeben argued the cause for the United States. With him on the briefs were *Solicitor General Francisco*, *Acting Assistant Attorney General Cronan*, *Morgan L. Goodspeed*, and *Ross B. Goldman*.

E. Joshua Rosenkranz argued the cause for respondent. With him on the brief were *Robert M. Loeb*, *Brian P. Goldman*, *Evan M. Rose*, *Bradford L. Smith*, *David M. Howard*, *James M. Garland*, and *Alexander A. Berengaut*.*

---

*A brief of *amici curiae* urging reversal was filed for the State of Vermont et al. by *Thomas J. Donovan*, Attorney General of Vermont, *Benjamin D. Battles*, Solicitor General, and *Eleanor L. P. Spottswood* and *Evan*

PER CURIAM.

The Court granted certiorari in this case to decide whether, when the Government has obtained a warrant under 18 U. S. C. §2703, a U. S. provider of e-mail services

---

P. Meenan, Assistant Attorneys General, by *Kevin T. Kane*, Chief State's Attorney of Connecticut, and by the Attorneys General of their respective jurisdictions as follows: *Steve Marshall* of Alabama, *Leslie Rutledge* of Arkansas, *Cynthia H. Coffman* of Colorado, *Matthew P. Denn* of Delaware, *Pamela Jo Bondi* of Florida, *Lisa Madigan* of Illinois, *Curtis T. Hill, Jr.*, of Indiana, *Thomas J. Miller* of Iowa, *Derek Schmidt* of Kansas, *Andy Beshear* of Kentucky, *Jeff Landry* of Louisiana, *Janet T. Mills* of Maine, *Brian E. Frosh* of Maryland, *Maura Healey* of Massachusetts, *Bill Schuette* of Michigan, *Lori Swanson* of Minnesota, *Jim Hood* of Mississippi, *Timothy C. Fox* of Montana, *Doug Peterson* of Nebraska, *Adam Paul Laxalt* of Nevada, *Christopher S. Porrino* of New Jersey, *Hector H. Balderas* of New Mexico, *Eric T. Schneiderman* of New York, *Josh Stein* of North Carolina, *Michael DeWine* of Ohio, *Mike Hunter* of Oklahoma, *Ellen F. Rosenblum* of Oregon, *Josh Shapiro* of Pennsylvania, *Wanda Vasquez-Garced* of Puerto Rico, *Peter F. Kilmartin* of Rhode Island, *Alan Wilson* of South Carolina, *Ken Paxton* of Texas, *Mark R. Herring* of Virginia, and *Peter K. Michael* of Wyoming.

Briefs of *amici curiae* urging affirmance were filed for the Brennan Center for Justice at NYU School of Law et al. by *Brett J. Williamson*, *Nathaniel Asher*, *David K. Lukmire*, *Faiza Patel*, *Michael W. Price*, *David D. Cole*, *Jennifer Stisa Granick*, *Arthur Rizer*, *Charles Duan*, *Lee Tien*, *Andrew Crocker*, and *Mahesha P. Subbaraman*; for Bundesverband der Deutschen Industrie e. V. et al. by *Saad Gul*; for the Competitive Enterprise Institute et al. by *Jim Harper*, *Ilya Shapiro*, and *Manuel S. Klausner*; for the Council of Bars and Law Societies of Europe by *Nowell D. Bamberger*; for DIGITALEUROPE et al. by *Ilana H. Eisenstein* and *Ethan H. Townsend*; for Digital Rights Ireland Limited et al. by *Owen C. Pell* and *Susan L. Grace*; for Electronic Privacy Information Center et al. by *Marc Rotenburg* and *Alan Butler*; for EU Data Protection and Privacy Scholars by *Daniel M. Sullivan*, *Vincent Levy*, and *Matthew V. H. Noller*; for the European Company Lawyers Association by *Jonathan I. Blackman* and *Jared Gerber*; for Fourth Amendment Scholars by *Michael Vatis*; for Gesellschaft für Freiheitsrechte e. V. by *Mr. Pell* and *Ms. Grace*; for International and Extraterritorial Law Scholars by *J. Carl Cecere*; for International Business Machines Corporation by *Paul D. Clement*, *George W. Hicks, Jr.*, and *Damon C. Andrews*; for InternetLab Law and Technology Center by *Amy Neuhardt* and *Jessica Phillips*; for Ireland by *Thomas J. Goodwin* and *Charles D. Ray*; for Members of Congress by *Michael E.*

must disclose to the Government electronic communications within its control even if the provider stores the communications abroad. 583 U. S. 931 (2017).

In December 2013, federal law enforcement agents applied to the United States District Court for the Southern District of New York for a § 2703 warrant requiring Microsoft to disclose all e-mails and other information associated with the account of one of its customers. Satisfied that the agents had demonstrated probable cause to believe that the account was being used to further illegal drug trafficking, a Magistrate Judge issued the requested § 2703 warrant. App. 22–26. The warrant directed Microsoft to disclose to the Government the contents of a specified e-mail account and all other records or information associated with the account "[t]o the extent that the information . . . is within [Microsoft's] possession, custody, or control." *Id.*, at 24.

Bern; for the Policing Project at New York University School of Law by *Eric Citron* and *Barry Friedman*; for Privacy International et al. by *Brian M. Willen*; for the Reporters Committee for Freedom of the Press et al. by *Bruce D. Brown*, *Laura R. Handman*, *Alison Schary*, *Richard A. Bernstein*, *Kevin M. Goldberg*, *David M. Giles*, *David Bralow*, *Marcia Hofmann*, *Barbara W. Wall*, *George Freeman*, *James Cregan*, *Mickey H. Osterreicher*, *Jonathan Hart*, *Micah Ratner*, *Barbara L. Camens*, *Bruce W. Sanford*, and *Lauren Fisher*; for Technology Companies by *Marc J. Zwillinger* and *Catherine M. A. Carroll*; for the Washington Legal Foundation by *Richard A. Samp* and *Cory L. Andrews*; for Jan Philipp Albrecht et al. by *Mr. Pell* and *Ms. Grace*; for 12 Business and Consumer Associations by *Andrew J. Pincus* and *Paul W. Hughes*; and for 51 Computer Scientists by *John D. Vandenberg* and *Klaus H. Hamm.*

Briefs of *amici curiae* were filed for the E-Discovery Institute et al. by *David Kessler*; for the European Commission on Behalf of the European Union by *Adam G. Unikowsky* and *Patrick W. Pearsall;* for Former Law Enforcement, National Security, and Intelligence Officials by *Gus P. Coldebella*; for the Government of the United Kingdom of Great Britain et al. by *Donald I. Baker*, *W. Todd Miller*, and *Ishai Mooreville*; for the New Zealand Privacy Commissioner by *Allyson N. Ho* and *William R. Peterson*; and for Joseph Cannataci by *Vivek Krishnamurthy.*

After service of the § 2703 warrant, Microsoft determined that the account's e-mail contents were stored in a sole location: Microsoft's datacenter in Dublin, Ireland. *Id.*, at 34. Microsoft moved to quash the warrant with respect to the information stored in Ireland. The Magistrate Judge denied Microsoft's motion. *In re Warrant To Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corp.*, 15 F. Supp. 3d 466 (SDNY 2014). The District Court, after a hearing, adopted the Magistrate Judge's reasoning and affirmed his ruling. See *In re Warrant To Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corp.*, 829 F. 3d 197, 204–205 (CA2 2016). Soon after, acting on a stipulation submitted jointly by the parties, the District Court held Microsoft in civil contempt for refusing to comply fully with the warrant. *Id.*, at 205. On appeal, a panel of the Court of Appeals for the Second Circuit reversed the denial of the motion to quash and vacated the civil contempt finding, holding that requiring Microsoft to disclose the electronic communications in question would be an unauthorized extraterritorial application of § 2703. *Id.*, at 222.

The parties now advise us that on March 23, 2018, Congress enacted and the President signed into law the Clarifying Lawful Overseas Use of Data Act (CLOUD Act), as part of the Consolidated Appropriations Act, 2018, Pub. L. 115–141. The CLOUD Act amends the Stored Communications Act, 18 U. S. C. § 2701 *et seq.*, by adding the following provision:

> "A [service provider] shall comply with the obligations of this chapter to preserve, backup, or disclose the contents of a wire or electronic communication and any record or other information pertaining to a customer or subscriber within such provider's possession, custody, or control, regardless of whether such communication, record, or other information is located within or outside of the United States." CLOUD Act § 103(a)(1).

Soon thereafter, the Government obtained, pursuant to the new law, a new § 2703 warrant covering the information requested in the § 2703 warrant at issue in this case.

No live dispute remains between the parties over the issue with respect to which certiorari was granted. See *Department of Treasury, Bureau of Alcohol, Tobacco and Firearms* v. *Galioto*, 477 U. S. 556, 559 (1986). Further, the parties agree that the new warrant has replaced the original warrant. This case, therefore, has become moot. Following the Court's established practice in such cases, the judgment on review is accordingly vacated, and the case is remanded to the United States Court of Appeals for the Second Circuit with instructions first to vacate the District Court's contempt finding and its denial of Microsoft's motion to quash, then to direct the District Court to dismiss the case as moot.

It is so ordered.

Syllabus

JESNER ET AL. *v.* ARAB BANK, PLC

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

No. 16–499. Argued October 11, 2017—Decided April 24, 2018

Petitioners filed suits under the Alien Tort Statute (ATS), alleging that they, or the persons on whose behalf they assert claims, were injured or killed by terrorist acts committed abroad, and that those acts were in part caused or facilitated by respondent Arab Bank, PLC, a Jordanian financial institution with a branch in New York. They seek to impose liability on the bank for the conduct of its human agents, including high-ranking bank officials. They claim that the bank used its New York branch to clear dollar-denominated transactions that benefited terrorists through the Clearing House Interbank Payments System (CHIPS) and to launder money for a Texas-based charity allegedly affiliated with Hamas. While the litigation was pending, this Court held, in *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U. S. 108, that the ATS does not extend to suits against foreign corporations when "all the relevant conduct took place outside the United States," *id.*, at 124, but it left unresolved the Second Circuit's broader holding in its *Kiobel* decision: that foreign corporations may not be sued under the ATS. Deeming that broader holding binding precedent, the District Court dismissed petitioners' ATS claims and the Second Circuit affirmed.

Held: The judgment is affirmed.

808 F. 3d 144, affirmed.

JUSTICE KENNEDY delivered the opinion of the Court with respect to Parts I, II–B–1, and II–C, concluding that foreign corporations may not be defendants in suits brought under the ATS. Pp. 253–257, 264–265, and 270–272.

(a) The Judiciary Act of 1789 included what is now known as the ATS, which provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U. S. C. § 1350. The ATS is "strictly jurisdictional" and does not by its own terms provide or delineate the definition of a cause of action for international-law violations. *Sosa* v. *Alvarez-Machain*, 542 U. S. 692, 713–714. It was enacted against the backdrop of the general common law, which in 1789 recognized a limited category of "torts in violation of the law of nations," *id.*, at 714; and one of its principal objectives was to avoid foreign

entanglements by ensuring the availability of a federal forum where the failure to have one might cause another nation to hold the United States responsible for an injury to a foreign citizen, see *id.*, at 715–719. The ATS was invoked but a few times over its first 190 years, but with the evolving recognition—*e. g.*, in the Nuremberg trials—that certain crimes against humanity violate basic precepts of international law, courts began to give some redress for violations of clear and unambiguous international human-rights protections. After the Second Circuit first permitted plaintiffs to bring ATS actions based on modern human-rights laws, Congress enacted the Torture Victim Protection Act of 1991 (TVPA), creating an express cause of action for victims of torture and extrajudicial killing in violation of international law. ATS suits became more frequent; and modern ATS litigation has the potential to involve groups of foreign plaintiffs suing foreign corporations in the United States for alleged human-rights violations in other nations. In *Sosa*, the Court held that in certain narrow circumstances courts may recognize a common-law cause of action for claims based on the present-day law of nations, 542 U. S., at 732, but it explicitly held that ATS litigation implicates serious separation-of-powers and foreign-relations concerns, *id.*, at 727–728. The Court subsequently held in *Kiobel* that "the presumption against extraterritoriality applies to [ATS] claims," 569 U. S., at 124, and that even claims that "touch and concern the territory of the United States . . . must do so with sufficient force to displace" that presumption, *id.*, at 124–125. Pp. 253–257.

(b) *Sosa* is consistent with this Court's general reluctance to extend judicially created private rights of action. Recent precedents cast doubt on courts' authority to extend or create private causes of action, even in the realm of domestic law, rather than leaving such decisions to the Legislature, which is better positioned "to consider if the public interest would be served by imposing a new substantive legal liability," *Ziglar* v. *Abbasi*, 582 U. S. 120, 136 (internal quotation marks omitted). This caution extends to the question whether the courts should exercise the judicial authority to mandate a rule imposing liability upon artificial entities like corporations. Thus, in *Correctional Services Corp.* v. *Malesko*, 534 U. S. 61, 72, the Court concluded that Congress, not the courts, should decide whether corporate defendants could be held liable in actions under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388.

Neither the language of the ATS nor precedent supports an exception to these general principles in this context. Separation-of-powers concerns that counsel against courts creating private rights of action apply with particular force in the context of the ATS, which implicates foreign-

policy concerns that are the province of the political branches. And courts must exercise "great caution" before recognizing new forms of liability under the ATS. *Sosa*, *supra*, at 728. The question whether a proper application of *Sosa* would preclude courts from ever recognizing new ATS causes of action need not be decided here, for either way it would be inappropriate for courts to extend ATS liability to foreign corporations absent further action from Congress. Pp. 264–265.

(c) The ATS was intended to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations when the absence of such a remedy might provoke foreign nations to hold the United States accountable. But here, and in similar cases, the opposite is occurring. Petitioners are foreign nationals seeking millions of dollars in damages from a major Jordanian financial institution for injuries suffered in attacks by foreign terrorists in the Middle East. The only alleged connections to the United States are the CHIPS transactions in Arab Bank's New York branch and a brief allegation about a charity in Texas. At a minimum, the relatively minor connection between the terrorist attacks and the alleged conduct in the United States illustrates the perils of extending the scope of ATS liability to foreign multinational corporations like Arab Bank.

For 13 years, this litigation has caused considerable diplomatic tensions with Jordan, a critical ally that considers the litigation an affront to its sovereignty. And this is not the first time that a foreign sovereign has raised objections to ATS litigation in this Court. See *Sosa*, *supra*, at 733, n. 21. These are the very foreign-relations tensions the First Congress sought to avoid.

Nor are the courts well suited to make the required policy judgments implicated by foreign corporate liability. Like the presumption against extraterritoriality, judicial caution under *Sosa* "guards against our courts triggering . . . serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches." *Kiobel*, *supra*, at 124. Accordingly, the Court holds that foreign corporations may not be defendants in suits brought under the ATS. Pp. 270–272.

JUSTICE KENNEDY, joined by THE CHIEF JUSTICE and JUSTICE THOMAS, concluded in Parts II–A, II–B–2, II–B–3, and III:

(a) Before recognizing an ATS common-law action, federal courts must apply the two-part test announced in *Sosa*. The threshold question is whether a plaintiff can demonstrate that the alleged violation is "'of a norm that is specific, universal, and obligatory.'" 542 U. S., at 732. Assuming that such a norm can control, it must be determined whether allowing the case to proceed under the ATS is a proper exercise

of judicial discretion or whether caution requires the political branches to grant specific authority before corporate liability can be imposed. *Id.*, at 732–733, and nn. 20–21. With regard to the first *Sosa* question, the Court need not resolve whether corporate liability is a question governed by international law or whether that law imposes liability on corporations, because, as shown by the parties' opposing arguments, there is at least sufficient doubt on the point to turn to *Sosa*'s second question: whether the Judiciary must defer to Congress to determine in the first instance whether that universal norm has been recognized and, if so, whether it should be enforced in ATS suits. Pp. 257–263.

(b) Especially here, in the realm of international law, it is important to look to analogous statutes for guidance on the appropriate boundaries of judge-made causes of action. The logical statutory analogy for an ATS common-law action is the TVPA—the only ATS cause of action created by Congress rather than the courts. Drafted as "an unambiguous and modern basis for [an ATS] cause of action," H. R. Rep. No. 102–367, p. 3, the TVPA reflects Congress' considered judgment of the proper structure for such an action. Absent a compelling justification, courts should not deviate from that model. Relevant here, the TVPA limits liability to "individuals," a term which unambiguously limits liability to natural persons, *Mohamad* v. *Palestinian Authority*, 566 U. S. 449, 453–456. Congress' decision to exclude liability for corporations in TVPA actions is all but dispositive in this case. Pp. 265–268.

(c) Other considerations relevant to the exercise of judicial discretion also counsel against allowing liability under the ATS for foreign corporations, absent congressional instructions. Corporate liability under the ATS has not been shown to be essential to serving that statute's goals, the ATS will seldom be the only way for plaintiffs to hold the perpetrators liable, and plaintiffs still can sue the individual corporate employees responsible for a violation of international law under the ATS. That the corporate form can be an instrument for inflicting grave harm and suffering poses serious and complex questions for the international community and for Congress. And this complexity makes it all the more important that Congress determine whether victims of human-rights abuses may sue foreign corporations in federal court. Pp. 268–270.

(d) In making its determination, Congress might decide that violations of international law do, or should, impose that liability to ensure that corporations make every effort to deter human-rights violations, and so that compensation for injured persons will be a cost of doing business. Or Congress could conclude that neutral judicial safeguards may not be ensured in every country and that, as a reciprocal matter, ATS liability for foreign corporations should be subject to some limitations or preconditions. Finally, Congress might find that corporate lia-

bility should be limited to cases where a corporation's management was actively complicit in the crime. Pp. 272–274.

JUSTICE ALITO concluded that the outcome in this case is justified not only by "judicial caution" but also by the separation of powers. Assuming that *Sosa* v. *Alvarez-Machain*, 542 U. S. 692, correctly held that federal courts, exercising their authority in limited circumstances to make federal common law, may create causes of action under the ATS, this Court should not create such causes of action against foreign corporate defendants. The objective for courts in any case requiring the creation of federal common law must be "to find the rule that will best effectuate the federal policy." *Textile Workers* v. *Lincoln Mills of Ala.*, 353 U. S. 448, 457. The First Congress enacted the ATS to help the United States avoid diplomatic friction. Putting that objective together with the rules governing federal common law generally, the following principle emerges: Federal courts should decline to create federal common law causes of action whenever doing so would not materially advance the ATS's objective of avoiding diplomatic strife. Applying that principle here, it is clear that courts should not create causes of action under the ATS against foreign corporate defendants. Customary international law does not generally require corporate liability, so declining to create it under the ATS cannot give other nations just cause for complaint against the United States. To the contrary, creating causes of action against foreign corporations under the ATS may instead provoke exactly the sort of diplomatic strife inimical to the statute's fundamental purpose. Pp. 274–280.

JUSTICE GORSUCH concluded that there are two more fundamental reasons why this lawsuit should be dismissed. Pp. 280–292.

(a) This Court has suggested that Congress originally enacted the ATS to afford federal courts jurisdiction to hear tort claims related to three violations of international law that were already embodied in English common law: violations of safe conducts extended to aliens, interference with ambassadors, and piracy. *Sosa* v. *Alvarez-Machain*, 542 U. S. 692, 715. Here, the plaintiffs seek much more. They want the federal courts to recognize a new cause of action, one that did not exist at the time of the statute's adoption, one that Congress has never authorized. They find support in a passage suggesting that the ATS may afford federal judges "discretion [to] conside[r] [creating] new cause[s] of action" if they "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the [three specified] 18th-century" torts. *Id.*, at 725. This is doubtful, for the people's elected representatives, not judges, make the laws that govern them. But even accepting *Sosa*'s framework, a proper application of that framework would preclude courts from recognizing any

Syllabus

new causes of action under the ATS. When courts are confronted with a request to fashion a new cause of action, "separation-of-powers principles are or should be central to the analysis." *Ziglar* v. *Abbasi*, 582 U. S. 120, 135. The first and most important question is whether Congress or the courts should decide, and the right answer "most often will be Congress." *Ibid.* There is no reason to make a special exception for the ATS, which was designed as "a jurisdictional statute creating no new causes of action." *Sosa*, 542 U. S., at 724. The context in which any *Sosa* discretion would be exercised confirms the wisdom of restraint. The "practical consequences" that might follow a decision to create a new ATS cause of action, see *id.*, at 732–733, would likely involve questions of foreign affairs and national security—matters implicating the expertise and authority not of the Judiciary but of the political branches. Pp. 281–285.

(b) Another independent problem is that this suit is by foreigners against a foreigner over the meaning of international norms. The original understanding of the ATS, which was but one clause in one section of the Judiciary Act of 1789, likely would have required a domestic defendant in order to comply with the requirements of the diversity-of-citizenship clause of Article III. Precedent interpreting a neighboring provision of the Judiciary Act confirms that conclusion. See *Mossman* v. *Higginson*, 4 Dall. 12, 14. In any event, separation-of-powers limits on the judicial function and deference to the political branches should lead federal courts to require a domestic defendant before agreeing to exercise any *Sosa*-generated discretion to entertain an ATS suit. Pp. 285–292.

KENNEDY, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–B–1, and II–C, in which ROBERTS, C. J., and THOMAS, ALITO, and GORSUCH, JJ., joined, and an opinion with respect to Parts II–A, II–B–2, II–B–3, and III, in which ROBERTS, C. J., and THOMAS, J., joined. THOMAS, J., filed a concurring opinion, *post*, p. 274. ALITO, J., *post*, p. 274, and GORSUCH, J., *post*, p. 280, filed opinions concurring in part and concurring in the judgment. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, BREYER, and KAGAN, JJ., joined, *post*, p. 293.

Jeffrey L. Fisher argued the cause for petitioners. With him on the briefs were *David T. Goldberg*, *Pamela S. Karlan*, *Jenny S. Martinez*, *Michael E. Elsner*, *John M. Eubanks*, *Jodi Westbrook Flowers*, and *Mark Werbner*.

Counsel

Brian H. Fletcher argued the cause for the United States as *amicus curiae* urging vacatur. On the brief were *Deputy Solicitor General Kneedler*, *Acting Assistant Attorney General Readler*, *Deputy Assistant Attorney General Mooppan*, *Eric J. Feigin*, *Douglas N. Letter*, *Sharon Swingle*, and *Melissa N. Patterson*.

Paul D. Clement argued the cause for respondent. With him on the brief were *Erin E. Murphy*, *Edmund G. LaCour, Jr.*, and *Jonathan Siegfried*.*

---

*Briefs of *amici curiae* urging reversal were filed for Canadian International and National Security Law Scholars by *Carey R. D'Avino*; for Comparative Law Scholars et al. by *Agnieszka M. Fryszman*; for the Constitutional Accountability Center by *Brianne J. Gorod*, *Elizabeth B. Wydra*, and *David H. Gans*; for Earthrights International by *Richard L. Herz* and *Marco B. Simons*; for Financial Regulation Scholars et al. by *Deepak Gupta*; for Former U. S. Counterterrorism and National Security Officials by *Hyland Hunt*, *Ruthanne M. Deutsch*, and *Elizabeth J. Cabraser*; for the Interfaith Center on Corporate Responsibility et al. by *Daniel M. Rosenthal*, *Nicole G. Berner*, and *Claire Prestel*; for International Law Scholars by *William S. Dodge*; for Nuremberg Scholars by *Elizabeth Van Schaack*; for Procedural and Corporate Law Professors by *Amy J. Wildermuth* and *Burt Neuborne*; for the Yale Law School Center for Global Legal Challenges by *Oona A. Hathaway*; for Barbara Aronstein Black et al. by *Sarah P. Alexander*, *Tyler R. Giannini*, and *Susan H. Farbstein*; for Jack Bloom et al. by *Jerry S. Goldman*, *Bruce Strong*, and *Jeffrey E. Glen*; for David J. Scheffer by *Mr. Scheffer*, *pro se*; and for Thomas Schoenbaum et al. by *George Rutherglen*, *Toby J. Heytens*, *Daniel R. Ortiz*, *Mr. Schoenbaum*, and *Joel Samuels*, all *pro se*; and for Sen. Sheldon Whitehouse et al. by *Peter Margulies*.

Briefs of *amici curiae* urging affirmance were filed for the Central Bank of Jordan by *William E. White*; for Former State Department Officials by *Michael K. Kellogg* and *Geoffrey M. Klineberg*; for the Hashemite Kingdom of Jordan by *Neal Kumar Katyal* and *Jessica L. Ellsworth*; for the Institute of International Bankers by *Richard C. Pepperman II* and *H. Rodgin Cohen*; for Professors of International Law et al. by *Samuel Estreicher*, *pro se*; and for the Union of Arab Banks by *Douglas Hallward-Driemeier*.

Briefs of *amici curiae* were filed for the Center for Constitutional Rights et al. by *Katherine Gallagher*, *Baher Azmy*, and *Beth Stephens*;

JUSTICE KENNEDY announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–B–1, and II–C, and an opinion with respect to Parts II–A, II–B–2, II–B–3, and III, in which THE CHIEF JUSTICE and JUSTICE THOMAS join.

Petitioners in this case, or the persons on whose behalf petitioners now assert claims, allegedly were injured or killed by terrorist acts committed abroad. Those terrorist acts, it is contended, were in part caused or facilitated by a foreign corporation. Petitioners now seek to impose liability on the foreign corporation for the conduct of its human agents, including its then-chairman and other high-ranking management officials. The suits were filed in a United States District Court under the Alien Tort Statute, commonly referred to as the ATS. See 28 U. S. C. § 1350.

The foreign corporation charged with liability in these ATS suits is Arab Bank, PLC; and it is respondent here. Some of Arab Bank's officials, it is alleged, allowed the bank to be used to transfer funds to terrorist groups in the Middle East, which in turn enabled or facilitated criminal acts of terrorism, causing the deaths or injuries for which petitioners now seek compensation. Petitioners seek to prove Arab Bank helped the terrorists receive the moneys in part by means of currency clearances and bank transactions passing through its New York City offices, all by means of electronic transfers.

It is assumed here that those individuals who inflicted death or injury by terrorism committed crimes in violation of well-settled, fundamental precepts of international law, precepts essential for basic human-rights protections. It is assumed as well that individuals who knowingly and purposefully facilitated banking transactions to aid, enable, or facilitate the terrorist acts would themselves be committing crimes under the same international-law prohibitions.

---

and for the Chamber of Commerce of the United States of America et al. by *Jonathan D. Hacker* and *Anton Metlitsky.*

Petitioners contend that international and domestic laws impose responsibility and liability on a corporation if its human agents use the corporation to commit crimes in violation of international laws that protect human rights. The question here is whether the Judiciary has the authority, in an ATS action, to make that determination and then to enforce that liability in ATS suits, all without any explicit authorization from Congress to do so.

The answer turns upon the proper interpretation and implementation of the ATS. The statute provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." § 1350. The Court must first ask whether the law of nations imposes liability on corporations for human-rights violations committed by its employees. The Court must also ask whether it has authority and discretion in an ATS suit to impose liability on a corporation without a specific direction from Congress to do so.

I

A

Petitioners are plaintiffs in five ATS lawsuits filed against Arab Bank in the United States District Court for the Eastern District of New York. The suits were filed between 2004 and 2010.

A significant majority of the plaintiffs in these lawsuits—about 6,000 of them—are foreign nationals whose claims arise under the ATS. These foreign nationals are petitioners here. They allege that they or their family members were injured by terrorist attacks in the Middle East over a 10-year period. Two of the five lawsuits also included claims brought by American nationals under the Anti-terrorism Act of 1990, 18 U. S. C. § 2333(a), but those claims are not at issue.

Arab Bank is a major Jordanian financial institution with branches throughout the world, including in New York. Ac-

cording to the Kingdom of Jordan, Arab Bank "accounts for between one-fifth and one-third of the total market capitalization of the Amman Stock Exchange." Brief for Hashemite Kingdom of Jordan as *Amicus Curiae* 2. Petitioners allege that Arab Bank helped finance attacks by Hamas andother terrorist groups. Among other claims, petitioners allege that Arab Bank maintained bank accounts for terrorists and their front groups and allowed the accounts to be used to pay the families of suicide bombers.

Most of petitioners' allegations involve conduct that occurred in the Middle East. Yet petitioners allege as well that Arab Bank used its New York branch to clear dollar-denominated transactions through the Clearing House Interbank Payments System. That elaborate system is commonly referred to as CHIPS. It is alleged that some of these CHIPS transactions benefited terrorists.

Foreign banks often use dollar-clearing transactions to facilitate currency exchanges or to make payments in dollars from one foreign bank account to another. Arab Bank and certain *amici* point out that CHIPS transactions are enormous both in volume and in dollar amounts. The transactions occur predominantly in the United States but are used by major banks both in the United States and abroad. The CHIPS system is used for dollar-denominated transactions and for transactions where the dollar is used as an intermediate currency to facilitate a currency exchange. Brief for Institute of International Bankers as *Amicus Curiae* 12–13, and n. 8. In New York each day, on average, about 440,000 of these transfers occur, in dollar amounts totaling about $1.5 trillion. *Id.*, at 14. The "clearance activity is an entirely mechanical function; it occurs without human intervention in the proverbial 'blink of an eye.'" *Ibid.* There seems to be no dispute that the speed and volume of these transactions are such that individual supervision is simply not a systemic reality. As noted below, substantial regulations govern these transactions, both in the United States and in Jordan.

In addition to the dollar-clearing transactions, petitioners allege that Arab Bank's New York branch was used to launder money for the Holy Land Foundation for Relief and Development (HLF), a Texas-based charity that petitioners sayis affiliated with Hamas. According to petitioners, Arab Bank used its New York branch to facilitate the transfer of funds from HLF to the bank accounts of terrorist-affiliated charities in the Middle East.

During the pendency of this litigation, there was an unrelated case that also implicated the issue whether the ATS is applicable to suits in this country against foreign corporations. See *Kiobel* v. *Royal Dutch Petroleum Co.*, 621 F. 3d 111 (CA2 2010). That suit worked its way through the trial court and the Court of Appeals for the Second Circuit. The *Kiobel* litigation did not involve banking transactions. Its allegations were that holding companies incorporated in the Netherlands and the United Kingdom had, through a Nigerian subsidiary, aided and abetted the Nigerian Government in human-rights abuses. *Id.*, at 123. In *Kiobel*, the Court of Appeals held that the ATS does not extend to suits against corporations. *Id.*, at 120. This Court granted certiorari. *Kiobel* v. *Royal Dutch Petroleum Co.*, 565 U. S. 961 (2011).

After additional briefing and reargument, this Court held that, given all the circumstances, the suit could not be maintained under the ATS. *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U. S. 108, 114, 124–125 (2013). The rationale of the holding, however, was not that the ATS does not extend to suits against foreign corporations. That question was left unresolved. The Court ruled, instead, that "all the relevant conduct took place outside the United States." *Id.*, at 124. Dismissal of the action was required based on the presumption against extraterritorial application of statutes.

So while this Court in *Kiobel* affirmed the ruling that the action there could not be maintained, it did not address the broader holding of the Court of Appeals that dismissal was required because corporations may not be sued under the

ATS. Still, the courts of the Second Circuit deemed that broader holding to be binding precedent. As a consequence, in the instant case the District Court dismissed petitioners'-ATS claims based on the earlier *Kiobel* holding in the Court of Appeals; and on review of the dismissal order the Court of Appeals, also adhering to its earlier holding, affirmed. *In re Arab Bank, PLC Alien Tort Statute Litigation*, 808 F. 3d 144 (2015). This Court granted certiorari in the instant case. 581 U. S. 904 (2017).

Since the Court of Appeals relied on its *Kiobel* holding in the instant case, it is instructive to begin with an analysis of that decision. The majority opinion in *Kiobel*, written by Judge Cabranes, held that the ATS does not apply to alleged international-law violations by a corporation. 621 F. 3d, at 120. Judge Cabranes relied in large part on the fact that international criminal tribunals have consistently limited their jurisdiction to natural persons. *Id.*, at 132–137.

Judge Leval filed a separate opinion. He concurred in the judgment on other grounds but disagreed with the proposition that the foreign corporation was not subject to suit under the ATS. *Id.*, at 196. Judge Leval conceded that "international law, of its own force, imposes no liabilities on corporations or other private juridical entities." *Id.*, at 186. But he reasoned that corporate liability for violations of international law is an issue of "civil compensatory liability" that international law leaves to individual nations. *Ibid.* Later decisions in the Courts of Appeals for the Seventh, Ninth, and District of Columbia Circuits agreed with Judge Leval and held that corporations can be subject to suit under the ATS. See *Flomo* v. *Firestone Nat. Rubber Co.*, 643 F. 3d 1013, 1017–1021 (CA7 2011); *Doe I* v. *Nestle USA, Inc.*, 766 F. 3d 1013, 1020–1022 (CA9 2014); *Doe VIII* v. *Exxon Mobil Corp.*, 654 F. 3d 11, 40–55 (CADC 2011), vacated on other grounds, 527 Fed. Appx. 7 (CADC 2013). The respective opinions by Judges Cabranes and Leval are scholarly and extensive, providing significant guidance for this Court in the case now before it.

With this background, it is now proper to turn to the history of the ATS and the decisions interpreting it.

B

Under the Articles of Confederation, the Continental Congress lacked authority to "'cause infractions of treaties, or of the law of nations to be punished.'" *Sosa* v. *Alvarez-Machain*, 542 U. S. 692, 716 (2004) (quoting J. Madison, Journal of the Constitutional Convention 60 (E. Scott ed. 1893)). The Continental Congress urged the States to authorize suits for damages sustained by foreign citizens as a result of violations of international law; but the state courts' vindication of the law of nations remained unsatisfactory. Concerns with the consequent international-relations tensions "persisted through the time of the Constitutional Convention." 542 U. S., at 717.

Under the Articles of Confederation, the inability of the central government to ensure adequate remedies for foreign citizens caused substantial foreign-relations problems. In 1784, the French Minister lodged a protest with the Continental Congress after a French adventurer, the Chevalier de Longchamps, assaulted the Secretary of the French Legation in Philadelphia. See *Kiobel*, 569 U. S., at 120. A few years later, a New York constable caused an international incident when he entered the house of the Dutch Ambassador and arrested one of his servants. *Ibid.* Under the Articles of Confederation, there was no national forum available to resolve disputes like these under any binding laws that were or could be enacted or enforced by a central government.

The Framers addressed these matters at the 1787 Philadelphia Convention; and, as a result, Article III of the Constitution extends the federal judicial power to "all Cases affecting Ambassadors, other public ministers and Consuls," and "to controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects." §2. The First Congress passed a statute to implement these provisions: The Judiciary Act of 1789 authorized federal jurisdic-

tion over suits involving disputes between aliens and United States citizens and suits involving diplomats. §§ 9, 11, 1 Stat. 76–79.

The Judiciary Act also included what is now the statute known as the ATS. § 9, *id.*, at 76. As noted, the ATS is central to this case and its brief text bears repeating. Its full text is: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U. S. C. § 1350.

The ATS is "strictly jurisdictional" and does not by its own terms provide or delineate the definition of a cause of action for violations of international law. *Sosa*, 542 U. S., at 713–714. But the statute was not enacted to sit on a shelf awaiting further legislation. *Id.*, at 714. Rather, Congress enacted it against the backdrop of the general common law, which in 1789 recognized a limited category of "torts in violation of the law of nations." *Ibid.*

In the 18th century, international law primarily governed relationships between and among nation-states, but in a few instances it governed individual conduct occurring outside national borders (for example, "disputes relating to prizes, to shipwrecks, to hostages, and ransom bills"). *Id.*, at 714–715 (internal quotation marks omitted). There was, furthermore, a narrow domain in which "rules binding individuals for the benefit of other individuals overlapped with" the rules governing the relationships between nation-states. *Id.*, at 715. As understood by Blackstone, this domain included "three specific offenses against the law of nations addressed by the criminal law of England: violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Ibid.* (citing 4 W. Blackstone, Commentaries on the Laws of England 68 (1769)). "It was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on the minds of the men who drafted the ATS." 542 U. S., at 715.

This history teaches that Congress drafted the ATS "to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations." *Id.*, at 720. The principal objective of the statute, when first enacted, was to avoid foreign entanglements by ensuring the availability of a federal forum where the failure to provide one might cause another nation to hold the United States responsible for an injury to a foreign citizen. See *id.*, at 715–719; *Kiobel*, 569 U. S., at 123–124.

Over the first 190 years or so after its enactment, the ATS was invoked but a few times. Yet with the evolving recognition—for instance, in the Nuremberg trials after World War II—that certain acts constituting crimes against humanity are in violation of basic precepts of international law, courts began to give some redress for violations of international human-rights protections that are clear and unambiguous. In the modern era this began with the decision of the Court of Appeals for the Second Circuit in *Filartiga* v. *Pena-Irala*, 630 F. 2d 876 (1980).

In *Filartiga*, it was alleged that a young man had been tortured and murdered by Paraguayan police officers, and that an officer named Pena-Irala was one of the supervisors and perpetrators. Some members of the victim's family were in the United States on visas. When they discovered that Pena-Irala himself was living in New York, they filed suit against him. The action, seeking damages for the suffering and death he allegedly had caused, was filed in the United States District Court for the Eastern District of New York. The Court of Appeals found that there was jurisdiction under the ATS. For this holding it relied upon the universal acknowledgment that acts of official torture are contrary to the law of nations. *Id.*, at 890. This Court did not review that decision.

In the midst of debates in the courts of appeals over whether the court in *Filartiga* was correct in holding that plaintiffs could bring ATS actions based on modern human-rights laws absent an express cause of action created by an

additional statute, Congress enacted the Torture Victim Protection Act of 1991 (TVPA), 106 Stat. 73, note following 28 U. S. C. § 1350. H. R. Rep. No. 102–367, pp. 3–4 (1991) (H. R. Rep.) (citing *Tel-Oren* v. *Libyan Arab Republic*, 726 F. 2d 774 (CADC 1984)); S. Rep. No. 102–249, pp. 3–5 (1991) (S. Rep.) (same). The TVPA—which is codified as a note following the ATS—creates an express cause of action for victims of torture and extrajudicial killing in violation of international law.

After *Filartiga* and the TVPA, ATS lawsuits became more frequent. Modern ATS litigation has the potential to involve large groups of foreign plaintiffs suing foreign corporations in the United States for alleged human-rights violations in other nations. For example, in *Kiobel* the plaintiffs were Nigerian nationals who sued Dutch, British, and Nigerian corporations for alleged crimes in Nigeria. 569 U. S., at 111–112. The extent and scope of this litigation in United States courts have resulted in criticism here and abroad. See *id.*, at 124 (noting objections to ATS litigation by Canada, Germany, Indonesia, Papua New Guinea, South Africa, Switzerland, and the United Kingdom).

In *Sosa*, the Court considered the question whether courts may recognize new, enforceable international norms in ATS lawsuits. 542 U. S., at 730–731. The *Sosa* Court acknowledged the decisions made in *Filartiga* and similar cases; and it held that in certain narrow circumstances courts may recognize a common-law cause of action for claims based on the present-day law of nations, in addition to the "historical paradigms familiar when § 1350 was enacted." 542 U. S., at 732. The Court was quite explicit, however, in holding that ATS litigation implicates serious separation-of-powers and foreign-relations concerns. *Id.*, at 727–728. Thus, ATS claims must be "subject to vigilant doorkeeping." *Id.*, at 729.

This Court next addressed the ATS in *Kiobel*, the case already noted. There, this Court held that "the presumption against extraterritoriality applies to claims under the

ATS, and that nothing in the statute rebuts the presumption." 569 U. S., at 124. The Court added that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." *Id.*, at 124–125.

II

With these principles in mind, this Court now must decide whether common-law liability under the ATS extends to a foreign corporate defendant. It could be argued, under the Court's holding in *Kiobel*, that even if, under accepted principles of international law and federal common law, corporations are subject to ATS liability for human-rights crimes committed by their human agents, in this case the activities of the defendant corporation and the alleged actions of its employees have insufficient connections to the United States to subject it to jurisdiction under the ATS. Various *amici* urge this as a rationale to affirm here, while the Government argues that the Court should remand this case so the Court of Appeals can address the issue in the first instance. There are substantial arguments on both sides of that question; but it is not the question on which this Court granted certiorari, nor is it the question that has divided the Courts of Appeals.

The question whether foreign corporations are subject to liability under the ATS should be addressed; for, if there is no liability for Arab Bank, the lengthy and costly litigation concerning whether corporate contacts like those alleged here suffice to impose liability would be pointless. In addition, a remand to the Court of Appeals would require prolonging litigation that already has caused significant diplomatic tensions with Jordan for more than a decade. So it is proper for this Court to decide whether corporations, or at least foreign corporations, are subject to liability in an ATS suit filed in a United States district court.

Before recognizing a common-law action under the ATS, federal courts must apply the test announced in *Sosa*. An initial, threshold question is whether a plaintiff can demon-

strate that the alleged violation is "of a norm that is specific, universal, and obligatory." 542 U. S., at 732 (internal quotation marks omitted). And even assuming that, under international law, there is a specific norm that can be controlling, it must be determined further whether allowing this case to proceed under the ATS is a proper exercise of judicial discretion, or instead whether caution requires the political branches to grant specific authority before corporate liability can be imposed. See *id.*, at 732–733, and nn. 20–21. "[T]he potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Id.*, at 727.

It must be said that some of the considerations that pertain to determining whether there is a specific, universal, and obligatory norm that is established under international law are applicable as well in determining whether deference must be given to the political branches. For instance, the fact that the charters of some international tribunals and the provisions of some congressional statutes addressing international human-rights violations are specifically limited to individual wrongdoers, and thus foreclose corporate liability, has significant bearing both on the content of the norm being asserted and the question whether courts should defer to Congress. The two inquiries inform each other and are, to that extent, not altogether discrete.

With that introduction, it is proper now to turn first to the question whether there is an international-law norm imposing liability on corporations for acts of their employees that contravene fundamental human rights.

A

Petitioners and Arab Bank disagree as to whether corporate liability is a question of international law or only a question of judicial authority and discretion under domestic law.

The dispute centers on a footnote in *Sosa*. In the course of holding that international norms must be "sufficiently definite to support a cause of action," the Court in *Sosa* noted that a "related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Id.*, at 732, and n. 20.

In the Court of Appeals' decision in *Kiobel*, the majority opinion by Judge Cabranes interpreted footnote 20 to mean that corporate defendants may be held liable under the ATS only if there is a specific, universal, and obligatory norm that corporations are liable for violations of international law. 621 F. 3d, at 127. In Judge Cabranes' view, "[i]nternational law is not silent on the question of the *subjects* of international law—that is, those that, to varying extents, have legal status, personality, rights, and *duties* under international law," "[n]or does international law leave to individual States the responsibility of defining those subjects." *Id.*, at 126 (internal quotation marks omitted). There is considerable force and weight to the position articulated by Judge Cabranes. And, assuming the Court of Appeals was correct that under *Sosa* corporate liability is a question of international law, there is an equally strong argument that petitioners cannot satisfy the high bar of demonstrating a specific, universal, and obligatory norm of liability for corporations. Indeed, Judge Leval agreed with the conclusion that international law does "not provide for any form of liability of corporations." *Kiobel*, 621 F. 3d, at 186.

1

In modern times, there is no doubt, of course, that "the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights," leading "the nations of the world to recognize that respect for fundamental human rights is in their individual

and collective interest." *Filartiga*, 630 F. 2d, at 890. That principle and commitment support the conclusion that human-rights norms must bind the individual men and women responsible for committing humanity's most terrible crimes, not just nation-states in their interactions with one another. "The singular achievement of international law since the Second World War has come in the area of human rights," where international law now imposes duties on individuals as well as nation-states. *Kiobel*, 621 F. 3d, at 118.

It does not follow, however, that current principles of international law extend liability—civil or criminal—for human-rights violations to corporations or other artificial entities. This is confirmed by the fact that the charters of respective international criminal tribunals often exclude corporations from their jurisdictional reach.

The Charter for the Nuremberg Tribunal, created by the Allies after World War II, provided that the Tribunal had jurisdiction over natural persons only. See Agreement for Prosecution and Punishment of Major War Criminals of the European Axis, Art. 6, Aug. 8, 1945, 59 Stat. 1547, E. A. S. No. 472. Later, a United States Military Tribunal prosecuted 24 executives of the German corporation IG Farben. 7 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, pp. 11–60 (1952) (*The Farben Case*). Among other crimes, Farben's employees had operated a slave-labor camp at Auschwitz and "knowingly and intentionally manufactured and provided" the poison gas used in the Nazi death chambers. *Kiobel*, 621 F. 3d, at 135. Although the Military Tribunal "used the term 'Farben' as descriptive of the instrumentality of cohesion in the name of which" the crimes were committed, the Tribunal noted that "corporations act through individuals." 8 *The Farben Case*, at 1153. Farben itself was not held liable. See *ibid.*

The jurisdictional reach of more recent international tribunals also has been limited to "natural persons." See Statute

of the International Criminal Tribunal for the Former Yugoslavia, S. C. Res. 827 (May 25, 1993), adopting U. N. Secretary-General Rep. Pursuant to Paragraph 2 of Security Council Resolution 808, Art. 6, U. N. Doc. S/25704 (May 3, 1993); Statute of the International Tribunal for Rwanda, Art. 5, S. C. Res. 955, Art. 5 (Nov. 8, 1994). The Rome Statute of the International Criminal Court, for example, limits that tribunal's jurisdiction to "natural persons." See Rome Statute of the International Criminal Court, Art. 25(1), July 17, 1998, 2187 U. N. T. S. 105. The drafters of the Rome Statute considered, but rejected, a proposal to give the International Criminal Court jurisdiction over corporations. Eser, Individual Criminal Responsibility, in 1 Rome Statute of the International Criminal Court 767, 778–779 (A. Cassese et al. eds. 2002).

The international community's conscious decision to limit the authority of these international tribunals to natural persons counsels against a broad holding that there is a specific, universal, and obligatory norm of corporate liability under currently prevailing international law.

2

In light of the sources just discussed, the sources petitioners rely on to support their contention that liability for corporations is well established as a matter of international law lend weak support to their position.

Petitioners first point to the International Convention for the Suppression of the Financing of Terrorism. This Convention imposes an obligation on "Each State Party" "to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity," violated the Convention. International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, S. Treaty Doc. No. 106–49, 2178 U. N. T. S. 232. But by its terms the Convention imposes its obligations only on nation-

states "to enable" corporations to be held liable in certain circumstances under domestic law. The United States and other nations, including Jordan, may fulfill their obligations under the Convention by adopting detailed regulatory regimes governing financial institutions. See, *e. g.*, 18 U. S. C. § 2333(a) (private right of action under the Antiterrorism Act); 31 U. S. C. § 5311 *et seq.* (Bank Secrecy Act); 31 CFR pt. 595 (2017) (Terrorism Sanctions Regulations); Brief for Central Bank of Jordan as *Amicus Curiae* 5 (describing Jordan's "comprehensive approach to preventing money laundering and terrorist financing"). The Convention neither requires nor authorizes courts, without congressional authorization, to displace those detailed regulatory regimes by allowing common-law actions under the ATS. And nothing in the Convention's text requires signatories to hold corporations liable in common-law tort actions raising claims under international law.

In addition, petitioners and their *amici* cite a few cases from other nations and the Special Tribunal for Lebanon that, according to petitioners, are examples of corporations being held liable for violations of international law. *E. g.*, Brief for Petitioners 50–51. Yet even assuming that these cases are relevant examples, at most they demonstrate that corporate liability might be permissible under international law in some circumstances. That falls far short of establishing a specific, universal, and obligatory norm of corporate liability.

It must be remembered that international law is distinct from domestic law in its domain as well as its objectives. International human-rights norms prohibit acts repugnant to all civilized peoples—crimes like genocide, torture, and slavery, that make their perpetrators "enem[ies] of all mankind." *Sosa*, 542 U. S., at 732 (internal quotation marks omitted). In the American legal system, of course, corporations are often subject to liability for the conduct of their human employees, and so it may seem necessary and natural

that corporate entities are liable for violations of international law under the ATS. It is true, furthermore, that the enormity of the offenses that can be committed against persons in violation of international human-rights protections can be cited to show that corporations should be subject to liability for the crimes of their human agents. But the international community has not yet taken that step, at least in the specific, universal, and obligatory manner required by *Sosa*. Indeed, there is precedent to the contrary in the statement during the Nuremberg proceedings that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." *The Nurnberg Trial*, 6 F. R. D. 69, 110 (1946).

Petitioners also contend that international law leaves questions of remedies open for determination under domestic law. As they see it, corporate liability is a remedial consideration, not a substantive principle that must be supported by a universal and obligatory norm if it is to be implemented under the ATS. According to petitioners, footnote 20 in *Sosa* does no more than recognize the distinction in international law between state and private actors. But, as just explained, there is a similar distinction in international law between corporations and natural persons. And it is far from obvious why the question whether corporations may be held liable for the international crimes of their employees is a mere question of remedy.

In any event, the Court need not resolve the questions whether corporate liability is a question that is governed by international law or, if so, whether international law imposes liability on corporations. There is at least sufficient doubt on the point to turn to *Sosa*'s second question—whether the Judiciary must defer to Congress, allowing it to determine in the first instance whether that universal norm has been recognized and, if so, whether it is prudent and necessary to direct its enforcement in suits under the ATS.

B

1

Sosa is consistent with this Court's general reluctance to extend judicially created private rights of action. The Court's recent precedents cast doubt on the authority of courts to extend or create private causes of action even in the realm of domestic law, where this Court has "recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." 542 U. S., at 727 (citing *Correctional Services Corp.* v. *Malesko*, 534 U. S. 61, 68 (2001); *Alexander* v. *Sandoval*, 532 U. S. 275, 286–287 (2001)). That is because "the Legislature is in the better position to consider if the public interest would be served by imposing a new substantive legal liability." *Ziglar* v. *Abbasi*, 582 U. S. 120, 136 (2017) (internal quotation marks omitted). Thus, "if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy, . . . courts must refrain from creating the remedy in order to respect the role of Congress." *Id.*, at 137.

This caution extends to the question whether the courts should exercise the judicial authority to mandate a rule that imposes liability upon artificial entities like corporations. Thus, in *Malesko* the Court held that corporate defendants may not be held liable in *Bivens* actions. See *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971). Allowing corporate liability would have been a "marked extension" of *Bivens* that was unnecessary to advance its purpose of holding individual officers responsible for "engaging in unconstitutional wrongdoing." *Malesko*, 534 U. S., at 74. Whether corporate defendants should be subject to suit was "a question for Congress, not us, to decide." *Id.*, at 72.

Neither the language of the ATS nor the precedents interpreting it support an exception to these general principles in this context. In fact, the separation-of-powers concerns

that counsel against courts creating private rights of action apply with particular force in the context of the ATS. See *infra*, at 270–272. The political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns. See *Kiobel*, 569 U. S., at 116–117. That the ATS implicates foreign relations "is itself a reason for a high bar to new private causes of action for violating international law." *Sosa*, *supra*, at 727.

In *Sosa*, the Court emphasized that federal courts must exercise "great caution" before recognizing new forms of liability under the ATS. 542 U. S., at 728. In light of the foreign-policy and separation-of-powers concerns inherent in ATS litigation, there is an argument that a proper application of *Sosa* would preclude courts from ever recognizing any new causes of action under the ATS. But the Court need not resolve that question in this case. Either way, absent further action from Congress, it would be inappropriate for courts to extend ATS liability to foreign corporations.

2

Even in areas less fraught with foreign-policy consequences, the Court looks to analogous statutes for guidance on the appropriate boundaries of judge-made causes of action. See, *e. g.*, *Miles* v. *Apex Marine Corp.*, 498 U. S. 19, 24 (1990); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 736 (1975). Doing so is even more important in the realm of international law, where "the general practice has been to look for legislative guidance before exercising innovative authority over substantive law." *Sosa*, *supra*, at 726.

Here, the logical place to look for a statutory analogy to an ATS common-law action is the TVPA—the only cause of action under the ATS created by Congress rather than the courts. As explained above, Congress drafted the TVPA to "establish an unambiguous and modern basis for a cause of action" under the ATS. H. R. Rep., at 3; S. Rep., at 4. Congress took care to delineate the TVPA's boundaries. In

doing so, it could weigh the foreign-policy implications of its rule. Among other things, Congress specified who may be liable, created an exhaustion requirement, and established a limitations period. *Kiobel*, 569 U. S., at 117. In *Kiobel*, the Court recognized that "[e]ach of these decisions carries with it significant foreign policy implications." *Ibid.* The TVPA reflects Congress' considered judgment of the proper structure for a right of action under the ATS. Absent a compelling justification, courts should not deviate from that model.

The key feature of the TVPA for this case is that it limits liability to "individuals," which, the Court has held, unambiguously limits liability to natural persons. *Mohamad* v. *Palestinian Authority*, 566 U. S. 449, 453–456 (2012). Congress' decision to exclude liability for corporations in actions brought under the TVPA is all but dispositive of the present case. That decision illustrates that significant foreign-policy implications require the courts to draw a careful balance in defining the scope of actions under the ATS. It would be inconsistent with that balance to create a remedy broader than the one created by Congress. Indeed, it "would be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries." *Sosa*, *supra*, at 726.

According to petitioners, the TVPA is not a useful guidepost because Congress limited liability under that statute to "individuals" out of concern for the sovereign immunity of foreign governmental entities, not out of general hesitation about corporate liability under the ATS. The argument seems to run as follows: The TVPA provides a right of action to victims of torture and extrajudicial killing, and under international law those human-rights violations require state action. For a corporation's employees to violate these norms therefore would require the corporation to be an instrumentality of a foreign state or other sovereign entity. That concern is absent, petitioners insist, for crimes that lack a state-action requirement—for example, genocide, slavery, or, in the present case, the financing of terrorists.

At least two flaws inhere in this argument. First, in *Mohamad* the Court unanimously rejected petitioners' account of the TVPA's legislative history. 566 U. S., at 453, 458–460. The Court instead read that history to demonstrate that Congress acted to exclude all corporate entities, not just the sovereign ones. *Id.*, at 459–460 (citing Hearing and Markup on H. R. 1417 before the House Committee on Foreign Affairs and Its Subcommittee on Human Rights and International Organizations, 100th Cong., 2d Sess., 87–88 (1988)); see also 566 U. S., at 461–462 (BREYER, J., concurring). Second, even for international-law norms that do not require state action, plaintiffs can still use corporations as surrogate defendants to challenge the conduct of foreign governments. In *Kiobel*, for example, the plaintiffs sought to hold a corporate defendant liable for "aiding and abetting the Nigerian Government in committing," among other things, "crimes against humanity." 569 U. S., at 114; see also, *e. g.*, *Sarei* v. *Rio Tinto, PLC*, 671 F. 3d 736, 761–763 (CA9 2011) (en banc) (corporate defendant allegedly used Papua New Guinea's military to commit genocide), vacated and remanded, 569 U. S. 945 (2013).

Petitioners contend that, instead of the TVPA, the most analogous statute here is the Antiterrorism Act. That Act does permit suits against corporate entities. See 18 U. S. C. §§ 2331(3), 2333(d)(2). In fact, in these suits some of the foreign plaintiffs joined their claims to those of United States nationals suing Arab Bank under the Antiterrorism Act. But the Antiterrorism Act provides a cause of action only to "national[s] of the United States" and their "estate, survivors, or heirs." § 2333(a). In contrast, the ATS is available only for claims brought by "an alien." 28 U. S. C. § 1350. A statute that excludes foreign nationals (with the possible exception of foreign survivors or heirs) is an inapt analogy for a common-law cause of action that provides a remedy for foreign nationals only.

To the extent, furthermore, that the Antiterrorism Act is relevant, it suggests that there should be no common-law

action under the ATS for allegations like petitioners'. Otherwise, foreign plaintiffs could bypass Congress' express limitations on liability under the Antiterrorism Act simply by bringing an ATS lawsuit. The Antiterrorism Act, as mentioned above, is part of a comprehensive statutory and regulatory regime that prohibits terrorism and terrorism financing. The detailed regulatory structures prescribed by Congress and the federal agencies charged with oversight of financial institutions reflect the careful deliberation of the political branches on when, and how, banks should be held liable for the financing of terrorism. It would be inappropriate for courts to displace this considered statutory and regulatory structure by holding banks subject to common-law liability in actions filed under the ATS.

In any event, even if the Antiterrorism Act were a suitable model for an ATS suit, Congress' decision in the TVPA to limit liability to individuals still demonstrates that there are two reasonable choices. In this area, that is dispositive—Congress, not the Judiciary, must decide whether to expand the scope of liability under the ATS to include foreign corporations.

3

Other considerations relevant to the exercise of judicial discretion also counsel against allowing liability under the ATS for foreign corporations, absent instructions from Congress to do so. It has not been shown that corporate liability under the ATS is essential to serve the goals of the statute. As to the question of adequate remedies, the ATS will seldom be the only way for plaintiffs to hold the perpetrators liable. See, *e. g.*, 18 U. S. C. § 1091 (criminal prohibition on genocide); § 1595 (civil remedy for victims of slavery). And plaintiffs still can sue the individual corporate employees responsible for a violation of international law under the ATS. If the Court were to hold that foreign corporations have lia-

bility for international-law violations, then plaintiffs may well ignore the human perpetrators and concentrate instead on multinational corporate entities.

As explained above, in the context of criminal tribunals international law itself generally limits liability to natural persons. Although the Court need not decide whether the seeming absence of a specific, universal, and obligatory norm of corporate liability under international law by itself forecloses petitioners' claims against Arab Bank, or whether this is an issue governed by international law, the lack of a clear and well-established international-law rule is of critical relevance in determining whether courts should extend ATS liability to foreign corporations without specific congressional authorization to do so. That is especially so in light of the TVPA's limitation of liability to natural persons, which parallels the distinction between corporations and individuals in international law.

If, moreover, the Court were to hold that foreign corporations may be held liable under the ATS, that precedent-setting principle "would imply that other nations, also applying the law of nations, could hale our [corporations] into their courts for alleged violations of the law of nations." *Kiobel*, 569 U. S., at 124. This judicially mandated doctrine, in turn, could subject American corporations to an immediate, constant risk of claims seeking to impose massive liability for the alleged conduct of their employees and subsidiaries around the world, all as determined in foreign courts, thereby "hinder[ing] global investment in developing economies, where it is most needed." Brief for United States as *Amicus Curiae* in *American Isuzu Motors, Inc.* v. *Ntsebeza*, O. T. 2007, No. 07–919, p. 20 (internal quotation marks omitted).

In other words, allowing plaintiffs to sue foreign corporations under the ATS could establish a precedent that discourages American corporations from investing abroad, including

in developing economies where the host government might have a history of alleged human-rights violations or where judicial systems might lack the safeguards of United States courts. And, in consequence, that often might deter the active corporate investment that contributes to the economic development that so often is an essential foundation for human rights.

It is also true, of course, that natural persons can and do use corporations for sinister purposes, including conduct that violates international law. That the corporate form can be an instrument for inflicting grave harm and suffering poses serious and complex questions both for the international community and for Congress. So there are strong arguments for permitting the victims to seek relief from corporations themselves. Yet the urgency and complexity of this problem make it all the more important that Congress determine whether victims of human-rights abuses may sue foreign corporations in federal courts in the United States. Congress, not the Judiciary, is the branch with "the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain." *Kiobel*, 569 U. S., at 116 (internal quotation marks omitted). As noted further below, there are many delicate and important considerations that Congress is in a better position to examine in determining whether and how best to impose corporate liability. And, as the TVPA illustrates, Congress is well aware of the necessity of clarifying the proper scope of liability under the ATS in a timely way.

C

The ATS was intended to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the absence of such a remedy might provoke foreign nations to hold the United States accountable. Brief for United States as *Amicus Curiae* 7. But here, and in similar cases, the opposite is occurring.

Petitioners are foreign nationals seeking hundreds of millions of dollars in damages from a major Jordanian financial institution for injuries suffered in attacks by foreign terrorists in the Middle East. The only alleged connections to the United States are the CHIPS transactions in Arab Bank's New York branch and a brief allegation regarding a charity in Texas. The Court of Appeals did not address, and the Court need not now decide, whether these allegations are sufficient to "touch and concern" the United States under *Kiobel*. See 569 U. S., at 124–125.

At a minimum, the relatively minor connection between the terrorist attacks at issue in this case and the alleged conduct in the United States well illustrates the perils of extending the scope of ATS liability to foreign multinational corporations like Arab Bank. For 13 years, this litigation has "caused significant diplomatic tensions" with Jordan, a critical ally in one of the world's most sensitive regions. Brief for United States as *Amicus Curiae* 30. "Jordan is a key counterterrorism partner, especially in the global campaign to defeat the Islamic State in Iraq and Syria." *Id.*, at 31. The United States explains that Arab Bank itself is "a constructive partner with the United States in working to prevent terrorist financing." *Id.*, at 32 (internal quotation marks omitted). Jordan considers the instant litigation to be a "grave affront" to its sovereignty. See Brief for Hashemite Kingdom of Jordan as *Amicus Curiae* 3; see *ibid.* ("By exposing Arab Bank to massive liability, this suit thus threatens to destabilize Jordan's economy and undermine its cooperation with the United States").

This is not the first time, furthermore, that a foreign sovereign has appeared in this Court to note its objections to ATS litigation. *Sosa*, 542 U. S., at 733, n. 21 (noting objections by the European Commission and South Africa); Brief for the Federal Republic of Germany as *Amicus Curiae* in *Kiobel* v. *Royal Dutch Petroleum Co.*, O. T. 2012, No. 10–1491, p. 1; Brief for the Government of the United Kingdom of Great Britain and Northern Ireland et al. as *Amici Curiae*

in No. 10–1491, p. 3. These are the very foreign-relations tensions the First Congress sought to avoid.

Petitioners insist that whatever the faults of this litigation—for example, its tenuous connections to the United States and the prolonged diplomatic disruptions it has caused—the fact that Arab Bank is a foreign corporate entity, as distinct from a natural person, is not one of them. That misses the point. As demonstrated by this litigation, foreign corporate defendants create unique problems. And courts are not well suited to make the required policy judgments that are implicated by corporate liability in cases like this one.

Like the presumption against extraterritoriality, judicial caution under *Sosa* "guards against our courts triggering . . . serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches." *Kiobel*, 569 U. S., at 124. If, in light of all the concerns that must be weighed before imposing liability on foreign corporations via ATS suits, the Court were to hold that it has the discretion to make that determination, then the cautionary language of *Sosa* would be little more than empty rhetoric. Accordingly, the Court holds that foreign corporations may not be defendants in suits brought under the ATS.

III

With the ATS, the First Congress provided a federal remedy for a narrow category of international-law violations committed by individuals. Whether, more than two centuries on, a similar remedy should be available against foreign corporations is similarly a decision that Congress must make.

The political branches can determine, referring to international law to the extent they deem proper, whether to impose liability for human-rights violations upon foreign corporations in this Nation's courts and, conversely, that courts in other countries should be able to hold United States corporations liable. Congress might determine that violations of in-

ternational law do, or should, impose that liability to ensure that corporations make every effort to deter human-rights violations and so that, even when those efforts cannot be faulted, compensation for injured persons will be a cost of doing business. If Congress and the Executive were to determine that corporations should be liable for violations of international law, that decision would have special power and force because it would be made by the branches most immediately responsive to, and accountable to, the electorate.

It is still another possibility that, in the careful exercise of its expertise in the field of foreign affairs, Congress might conclude that neutral judicial safeguards may not be ensured in every country; and so, as a reciprocal matter, it could determine that liability of foreign corporations under the ATS should be subject to some limitations or preconditions. Congress might deem this more careful course to be the best way to encourage American corporations to undertake the extensive investments and foreign operations that can be an important beginning point for creating the infrastructures that allow human rights, as well as judicial safeguards, to emerge. These delicate judgments, involving a balance that it is the prerogative of the political branches to make, especially in the field of foreign affairs, would, once again, also be entitled to special respect, especially because those careful distinctions might themselves advance the Rule of Law. All this underscores the important separation-of-powers concerns that require the Judiciary to refrain from making these kinds of decisions under the ATS. The political branches, moreover, surely are better positioned than the Judiciary to determine if corporate liability would, or would not, create special risks of disrupting good relations with foreign governments.

Finally, Congress might find that corporate liability should be limited to cases where a corporation's management was actively complicit in the crime. Cf. ALI, Model Penal Code § 2.07(1)(c) (1985) (a corporation may be held criminally liable

where "the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting on behalf of the corporation within the scope of his office or employment"). Again, the political branches are better equipped to make the preliminary findings and consequent conclusions that should inform this determination.

These and other considerations that must shape and instruct the formulation of principles of international and domestic law are matters that the political branches are in the better position to define and articulate. For these reasons, judicial deference requires that any imposition of corporate liability on foreign corporations for violations of international law must be determined in the first instance by the political branches of the Government.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE THOMAS, concurring.

I join the Court's opinion in full because it correctly applies our precedents. I also agree with the points raised by my concurring colleagues. Courts should not be in the business of creating new causes of action under the Alien Tort Statute, see *post*, at 281–285 (GORSUCH, J., concurring in part and concurring in judgment), especially when it risks international strife, see *post*, at 276–280 (ALITO, J., concurring in part and concurring in judgment). And the Alien Tort Statute likely does not apply to suits between foreign plaintiffs and foreign defendants. See *post*, at 285–292 (opinion of GORSUCH, J.).

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

Creating causes of action under the Alien Tort Statute against foreign corporate defendants would precipitate exactly the sort of diplomatic strife that the law was enacted to prevent. As a result, I agree with the Court that we

should not take that step, and I join Parts I, II–B–1, and II–C of the opinion of the Court. I write separately to elaborate on why that outcome is compelled not only by "judicial caution," *ante*, at 272 (majority opinion), but also by the separation of powers.

I

The ATS is a jurisdictional statute. It provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U. S. C. § 1350. By its terms, the ATS does not create any causes of action.

In *Sosa* v. *Alvarez-Machain*, 542 U. S. 692 (2004), however, this Court nevertheless held that federal courts, exercising their authority in limited circumstances to make federal common law, may create causes of action that aliens may assert under the ATS. That holding takes some explaining.

According to *Sosa*, when the First Congress enacted the ATS in 1789, it assumed that the statute would "have practical effect the moment it became law" because the general common law "would provide a cause of action for [a] modest number of international law violations." *Id.*, at 724. That assumption, however, depended on the continued existence of the general common law. And in 1938—a century and a half after Congress enacted the ATS—this Court rejected the "fallacy" underlying the general common law, declaring definitively that "[t]here is no federal general common law." *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78, 79 (1938). That left the ATS in an awkward spot: Congress had not created any causes of action for the statute on the assumption that litigants would use those provided by the general common law, but now the general common law was no more.

In *Sosa*, this Court did its best to resolve that problem. "[I]t would be unreasonable to assume," the Court explained, "that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the [general] common law might lose

some metaphysical cachet on the road to modern realism." 542 U. S., at 730. Although the general common law was gone, the Court concluded, federal courts could still exercise their authority to create so-called "federal common law" for those "'few and restricted'" areas "in which Congress has given the courts the power to develop substantive law." *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 640 (1981). *Sosa* interpreted the ATS as conferring such authorization.

As a result, *Sosa* held that federal courts, subject to certain conditions, may "recognize private causes of action [under the ATS] for certain torts in violation of the law of nations." 542 U. S., at 724. But before doing so, *Sosa* stressed, courts should follow a two-step process. First, they should ensure that the contemplated cause of action reflects an international law norm that is "'specific, universal and obligatory.'" *Id.*, at 732. Second, if a suitable norm is identified, federal courts should decide whether there is any other reason to limit "the availability of relief." *Id.*, at 733, n. 21.

II

For the reasons articulated by Justice Scalia in *Sosa* and by JUSTICE GORSUCH today, I am not certain that *Sosa* was correctly decided. See *id.*, at 739–751 (Scalia, J., dissenting); *post*, at 282–285 (GORSUCH, J., concurring in part and concurring in judgment). But even taking that decision on its own terms, this Court should not create causes of action under the ATS against foreign corporate defendants. As part of *Sosa*'s second step, a court should decline to create a cause of action as a matter of federal common law where the result would be to further, not avoid, diplomatic strife. Properly applied, that rule easily resolves the question presented by this case.*

*Because this case involves a foreign corporation, we have no need to reach the question whether an alien may sue a United States corporation under the ATS. And since such a suit may generally be brought in fed-

Sosa interpreted the ATS to authorize the federal courts to create causes of action as a matter of federal common law. We have repeatedly emphasized that "in fashioning federal [common law] principles to govern areas left open by Congress, our function is to effectuate congressional policy." *United States* v. *Kimbell Foods, Inc.*, 440 U. S. 715, 738 (1979). Fidelity to congressional policy is not only prudent but necessary: Going beyond the bounds of Congress's authorization would mean unconstitutionally usurping part of the "legislative Powers." U. S. Const., Art. I, § 1. Accordingly, the objective for courts in every case requiring the creation of federal common law must be "to find the rule that will best effectuate the federal policy." *Textile Workers* v. *Lincoln Mills of Ala.*, 353 U. S. 448, 457 (1957).

The ATS was meant to help the United States avoid diplomatic friction. The First Congress enacted the law to provide a forum for adjudicating that "narrow set of violations of the law of nations" that, if left unaddressed, "threaten[ed] serious consequences" for the United States. *Sosa*, 542 U. S., at 715; see also Brief for Professors of International Law et al. as *Amici Curiae* 7–12. Specifically, the First Congress was concerned about offenses like piracy, violation of safe conducts, and infringement of the rights of ambassadors, each of which "if not adequately redressed could rise to an issue of war." *Sosa*, *supra*, at 715. That threat was existentially terrifying for the young Nation. See *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U. S. 108, 123–124 (2013). To minimize the danger, the First Congress enacted the ATS, "ensur[ing] that the United States could provide a forum for adjudicating such incidents" and thus helping the Nation avoid further diplomatic imbroglios. *Id.*, at 124; see *ante*, at 270 (majority opinion).

Putting that objective together with the rules governing federal common law generally, the following principle

---

eral court based on diversity jurisdiction, 28 U. S. C. § 1332(a)(2), it is unclear why ATS jurisdiction would be needed in that situation.

emerges: Federal courts should decline to create federal common law causes of action under *Sosa*'s second step whenever doing so would not materially advance the ATS's objective of avoiding diplomatic strife. And applying that principle here, it is clear that federal courts should not create causes of action under the ATS against foreign corporate defendants. All parties agree that customary international law does not *require* corporate liability as a general matter. See Brief for Petitioners 30; Brief for Respondent 22; see also *ante*, at 263 (plurality opinion); *post*, at 294–296 (SOTOMAYOR, J., dissenting). But if customary international law does not require corporate liability, then declining to create it under the ATS cannot give other nations just cause for complaint against the United States.

To the contrary, ATS suits against foreign corporations may provoke—and, indeed, frequently *have* provoked—exactly the sort of diplomatic strife inimical to the fundamental purpose of the ATS. Some foreign states appear to interpret international law as foreclosing civil corporate liability for violations of the law of nations. See Brief for Government of the United Kingdom et al. as *Amici Curiae* in *Kiobel* v. *Royal Dutch Petroleum Co.*, O. T. 2012, No. 10–1491, p. 14. Creating ATS causes of action against foreign corporate defendants would put the United States at odds with these nations. Even when states do not object to this sort of corporate liability as a *legal* matter, they may be concerned about ATS suits against their corporations for political reasons. For example, Jordan considers this suit "a direct affront" to its sovereignty and one that "risks destabilizing Jordan's economy and undercutting one of the most stable and productive alliances the United States has in the Middle East." Brief for Hashemite Kingdom of Jordan as *Amicus Curiae* 4. Courting these sorts of problems—which seem endemic to ATS litigation—was the opposite of what the First Congress had in mind.

In response, the dissent argues merely that any diplomatic friction "can be addressed with a tool more tailored to the

source of the problem than a blanket ban on corporate liability." *Post*, at 310. Even on its own terms, that argument is problematic: Many of the "more tailored" tools offered by the dissent will still be hotly litigated by ATS plaintiffs, and it may be years before incorrect initial decisions about their applicability can be reviewed by the courts of appeals. See *ante*, at 257 (plurality opinion).

In any event, the dissent misunderstands the relevant standard. The question before us is whether the United States would be embroiled in fewer international controversies if we created causes of action under the ATS against foreign corporate defendants. Unless corporate liability would actively *decrease* diplomatic disputes, we have no authority to act. On that score, the dissent can only speculate that declining to create causes of action against foreign corporate defendants "might" lead to diplomatic friction. *Post*, at 321. But the dissent has no real-world examples to support its hunch, and that is not surprising; the ATS already goes further than any other statute in the world in granting aliens the right to sue civilly for violations of international law, especially in light of the many other avenues for relief available. See *ante*, at 268 (plurality opinion). It would be rather rich for any other nation to complain that the ATS does not go far enough. Indeed, no country has.

Finally, the dissent invokes "the considered judgment of the Executive Branch and Congress" that ATS suits against foreign corporations are "necessary 'to help the United States avoid diplomatic friction.'" *Post*, at 321, n. 13. Tellingly, however, the dissent cannot muster a single source that actually supports that bold contention. Instead, the dissent immediately retreats to two far more modest assertions. First, the dissent observes that the Executive Branch has twice suggested that this Court should allow causes of action against corporate defendants under the ATS. But both times the Executive Branch defended that perspective primarily under the first step of *Sosa*; here, however, we are dealing with *Sosa*'s second step, and with the risk

of diplomatic friction in particular. Second, the dissent also notes that the Executive Branch and Congress have each taken steps to hold corporations liable for certain acts like terrorism. *Post*, at 321, n. 13. That is, of course, true, but it is also entirely irrelevant. Congress and the Executive Branch may be willing to trade off the risk of some diplomatic friction in exchange for the promotion of other objectives (such as "holding foreign corporations to account for certain egregious conduct," *ibid.*). That is their prerogative as the political branches. But consistent with the separation of powers, we have neither the luxury nor the right to make such policy decisions ourselves.

Creating causes of action under the ATS against foreign corporate defendants would be a no-win proposition. Foreign corporate liability would not only fail to meaningfully advance the objectives of the ATS, but it would also lead to precisely those "serious consequences in international affairs" that the ATS was enacted to avoid. *Sosa*, 542 U. S., at 715. Under those circumstances, federal courts have a duty to refrain from acting. Although that may make it more difficult for aliens to hold foreign corporations liable for human rights abuses, we have repeatedly rejected the view that the ATS was meant to transform the federal courts into forums for the litigation of all human rights suits. See *ante*, at 254–255, 270–272 (majority opinion); *Kiobel*, 569 U. S., at 123–124; *Sosa*, *supra*, at 715–718. Declining to extend the ATS to foreign corporate defendants is thus not about "[i]mmunizing corporations that violate human rights," *post*, at 324, but rather about furthering the purpose that the ATS was actually meant to serve—avoiding diplomatic strife.

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

I am pleased to join the Court's judgment and Parts I, II–B–1, and II–C of its opinion. Respectfully, though, I believe there are two more fundamental reasons why this lawsuit

must be dismissed. A group of foreign plaintiffs wants a federal court to invent a new cause of action so they can sue another foreigner for allegedly breaching international norms. In any other context, a federal judge faced with a request like that would know exactly what to do with it: dismiss it out of hand. Not because the defendant happens to be a corporation instead of a human being. But because the job of creating new causes of action and navigating foreign policy disputes belongs to the political branches. For reasons passing understanding, federal courts have sometimes treated the Alien Tort Statute as a license to overlook these foundational principles. I would end ATS exceptionalism. We should refuse invitations to create new forms of legal liability. And we should not meddle in disputes between foreign citizens over international norms. I write because I am hopeful that courts in the future might pause to consider both of these reasons for restraint before taking up cases like this one. Whatever powers courts may possess in ATS suits, they are powers judges should be doubly careful not to abuse.

I

First adopted in 1789, the current version of the ATS provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U. S. C. § 1350. More than 200 years later, the meaning of this terse provision has still "proven elusive." *Sosa* v. *Alvarez-Machain*, 542 U. S. 692, 719 (2004). At the same time, this Court has suggested that Congress enacted the statute to afford federal courts jurisdiction to hear tort claims related to three violations of international law that were already embodied in English common law: violations of safe conducts extended to aliens, interference with ambassadors, and piracy. *Id.*, at 715; 4 W. Blackstone, Commentaries on the Laws of England 68 (1769) (Blackstone); see also Bellia & Clark, The Alien Tort Statute and the Law of Nations,

78 U. Chi. L. Rev. 445 (2011) (arguing that the ATS meant to supply jurisdiction over a slightly larger set of claims involving intentional torts by Americans against aliens).

In this case, the plaintiffs seek much more. They want the federal courts to recognize a new cause of action, one that did not exist at the time of the statute's adoption, one that Congress has never authorized. While their request might appear inconsistent with *Sosa*'s explanation of the ATS's modest origin, the plaintiffs say that a caveat later in the opinion saves them. They point to a passage where the Court went on to suggest that the ATS may *also* afford federal judges "discretion [to] conside[r creating] new cause[s] of action" if they "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the [three] 18th-century" torts the Court already described. 542 U. S., at 725.

I harbor serious doubts about *Sosa*'s suggestion. In our democracy the people's elected representatives make the laws that govern them. Judges do not. The Constitution's provisions insulating judges from political accountability may promote our ability to render impartial judgments in disputes between the people, but they do nothing to recommend us as policymakers for a large nation. Recognizing just this, our cases have held that when confronted with a request to fashion a new cause of action, "separation-of-powers principles are or should be central to the analysis." *Ziglar* v. *Abbasi*, 582 U. S. 120, 135 (2017). The first and most important question in that analysis "is 'who should decide' . . . , Congress or the courts?" and the right answer "most often will be Congress." *Ibid.* Deciding that, henceforth, persons like A who engage in certain conduct will be liable to persons like B is, in every meaningful sense, just like enacting a new law. And in our constitutional order the job of writing new laws belongs to Congress, not the courts. Adopting new causes of action may have been a "proper function for common-law courts," but it is not appropriate "for

federal tribunals" mindful of the limits of their constitutional authority. *Alexander* v. *Sandoval*, 532 U. S. 275, 287 (2001) (internal quotation marks omitted).

Nor can I see any reason to make a special exception for the ATS. As *Sosa* initially acknowledged, the ATS was designed as "a jurisdictional statute creating no new causes of action." 542 U. S., at 724; accord, *ante*, at 254 (majority opinion). And I would have thought that the end of the matter. A statute that creates no new causes of action . . . creates no new causes of action. To the extent *Sosa* continued on to claim for federal judges the discretionary power to create new forms of liability on their own, it invaded terrain that belongs to the people's representatives and should be promptly returned to them. 542 U. S., at 747 (Scalia, J., concurring in part and concurring in judgment).[1]

But even accepting *Sosa*'s framework does not end the matter. As the Court acknowledges, there is a strong argument that "a proper application of *Sosa* would preclude courts from ever recognizing any new causes of action under the ATS." *Ante*, at 265. I believe that argument is correct. For the reasons just described, separation-of-powers considerations ordinarily require us to defer to Congress in the creation of new forms of liability. This Court hasn't yet used *Sosa*'s assertion of discretionary authority to recognize a new cause of action, and I cannot imagine a sound reason, hundreds of years after the statute's passage, to start now.

---

[1] The dissent claims that Congress's decision to give federal courts "jurisdiction over claims based on 'the law of nations'" necessarily implies the authority to develop that law. *Post*, at 307. That does not follow. Federal courts have *jurisdiction* over all kinds of cases—for example, those arising under the law of torts or contracts. Yet following our decision in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), federal courts are generally no longer permitted to promulgate new federal common law causes of action in those areas. *Id.*, at 75. I can see no reason to treat the law of nations differently. See *Sosa* v. *Alvarez-Machain*, 542 U. S. 692, 744–746 (2004) (Scalia, J., concurring in part and concurring in judgment).

For a court inclined to claim the discretion to enter this field, it is a discretion best exercised by staying out of it.

The context in which any *Sosa* discretion would be exercised confirms the wisdom of restraint. *Sosa* acknowledged that any decision to create a new cause of action would "inevitably [involve] an element of judgment about the practical consequences" that might follow. 542 U. S., at 732. But because the point of such a claim would be to vindicate "a norm of international character," *id.*, at 725, those "practical consequences" would likely involve questions of foreign affairs and national security—matters that implicate neither judicial expertise nor authority. It is for Congress to "define and punish . . . Offences against the Law of Nations" and to regulate foreign commerce. U. S. Const., Art. I., §8. And it is for the President to resolve diplomatic disputes and command the Armed Forces. Art. II, §§2–3. Foreign policy and national security decisions are "delicate, complex, and involve large elements of prophecy" for which "the Judiciary has neither aptitude, facilities[,] nor responsibility." *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S. 103, 111 (1948) (Jackson, J.). And I find it difficult to imagine a case in which a federal court might safely conclude otherwise. Take this very lawsuit by way of example. The Kingdom of Jordan considers it to be "a 'grave affront' to its sovereignty," and the State Department worries about its foreign policy implications. *Ante*, at 271. Whether American interests justify the "practical consequence" of offending another nation in this way (or in worse ways yet) is a question that should be addressed "only by those directly responsible to the people whose welfare" such decisions "advance or imperil." *Waterman S. S. Corp.*, *supra*, at 111. So while I have no quarrel with the dissent's observation, *post*, at 306–307, that lower federal courts are not free to overrule *Sosa*'s framework or treat it as optional, I do know that the analysis *Sosa* requires should come out the same way in virtually every case. If *Sosa* is right—and I am sure it is—that fed-

eral courts must "inevitably" exercise "an element of judgment" about delicate questions of foreign affairs when deciding whether to create a new cause of action, then judges should exercise *good* judgment by declining the project before we create real trouble.

II

Another independent problem lurks here. This is a suit by foreigners against a foreigner over the meaning of international norms. Respectfully, I do not think the original understanding of the ATS or our precedent permits federal courts to hear cases like this. At a minimum, both those considerations and simple common sense about the limits of the judicial function should lead federal courts to require a domestic defendant before agreeing to exercise any *Sosa*-generated discretion to entertain an ATS suit.

Start with the statute. What we call the Alien Tort Statute began as just one clause among many in § 9 of the Judiciary Act of 1789, which specified the jurisdiction of the federal courts. 1 Stat. 76–78. The ATS clause gave the district courts "cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."[2] Like

[2] "Sec. 9. *And be it further enacted*, That the district courts shall have, exclusively of the courts of the several States, cognizance of all crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas; where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted; and shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it; and shall also have exclusive original cognizance of all seizures on

today's recodified version, 28 U. S. C. § 1350, the original text of the ATS did not expressly call for a U. S. defendant. But I think it likely would have been understood to contain such a requirement when adopted.

That is because the First Congress passed the Judiciary Act in the shadow of the Constitution. The Act created the federal courts and vested them with statutory authority to entertain claims consistent with the newly ratified terms of Article III. Meanwhile, under Article III, Congress could not have extended to federal courts the power to hear just any suit between two aliens (unless, for example, one was a diplomat). Diversity of citizenship was required. So, because Article III's diversity-of-citizenship clause calls for a U. S. party, and because the ATS clause requires an alien plaintiff, it follows that an American defendant was needed for an ATS suit to proceed.

Precedent confirms this conclusion. In *Mossman* v. *Higginson*, 4 Dall. 12, 14 (1800), this Court addressed the meaning of a neighboring provision of the Judiciary Act. Section 11 gave the circuit courts power to hear, among other things, civil cases where "an alien is a party." 1 Stat. 78. As with § 9, you might think § 11's language could be read to permit a suit *between* aliens. Yet this Court held § 11 must instead

---

land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States. *And shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.* And shall also have cognizance, concurrent as last mentioned, of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars. And shall also have jurisdiction, exclusively of the courts of the several States, of all suits against consuls or vice-consuls, except for offences above the description aforesaid. And the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury." 1 Stat. 76–77 (some emphasis added; footnotes omitted).

be construed to refer only to cases "where, indeed, an alien is one party, but a citizen is the other." *Mossman*, 4 Dall., at 14 (internal quotation marks omitted). That was necessary, *Mossman* explained, to give the statute a "constructio[n] consistent" with the diversity-jurisdiction clause of Article III. *Ibid.* And as a matter of precedent, I cannot think of a good reason why we would now read § 9 differently than *Mossman* read § 11. Like cases are, after all, supposed to come out alike. See *Sarei* v. *Rio Tinto, PLC*, 671 F. 3d 736, 828 (CA9 2011) (Ikuta, J., dissenting) ("*Mossman*'s analysis [of § 11] is equally applicable to [§ 9]. . . . ATS does not give federal courts jurisdiction to hear international law claims between two aliens"), vacated and remanded, 569 U. S. 945 (2013).

Nor does it appear the ATS meant to rely on any other head of Article III jurisdiction. You might wonder, for example, if the First Congress considered a "violation of the law of nations" to be a violation of, and thus "arise under," federal law. But that does not seem likely. At the founding, the law of nations was considered a distinct "system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world," 4 Blackstone 66. While this Court has called international law "part of our law," *The Paquete Habana*, 175 U. S. 677, 700 (1900), and a component of the "law of the land," *The Nereide*, 9 Cranch 388, 423 (1815), that simply meant international law was no different than the law of torts or contracts—it was "part of the so-called general common law," but *not* part of federal law. *Sosa*, 542 U. S., at 739–740 (opinion of Scalia, J.). See Bradley & Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 Harv. L. Rev. 815, 824, 849–850 (1997); see also Young, Sorting Out the Debate Over Customary International Law, 42 Va. J. Int'l L. 365, 374–375 (2002). The text of the Constitution appears to recognize just this distinction. Article I speaks of "Offences against the Law of

Nations," while both Article III and Article VI's Supremacy Clause, which defines the scope of pre-emptive federal law, omit that phrase while referring to the "Laws of the United States." Congress may act to bring provisions of international law into federal law, but they cannot find their way there on their own. "The law of nations is not embodied in any provision of the Constitution, nor in any treaty, act of Congress, or any authority, or commission derived from the United States." *Caperton* v. *Bowyer*, 14 Wall. 216, 228 (1872).

Even so, that hardly left the ATS without important work to perform. At the time of the founding, "[i]f a nation failed to redress injuries by its citizens upon the citizens of another nation, the perpetrators' nation violated the 'perfect rights' of the other nation," which "provided the offended nation with just cause for reprisals or war." Bellia & Clark, 78 U. Chi. L. Rev., at 476.[3] This reality posed an existential threat to the new Nation. Under the Articles of Confederation, States regularly refused to redress injuries their citizens caused foreigners. British creditors, for example, often found their efforts to collect debts from American debtors thwarted. *Id.*, at 498–501. Seeking to remedy these and similar problems, the Continental Congress in 1781 passed a resolution encouraging the States, among other things, to establish tribunals for vindicating "offences against the law

---

[3] As a leading treatise explained, a sovereign "ought not to suffer his subjects to molest the subjects of others, or to do them an injury, much less should he permit them audaciously to offend foreign powers." 1 E. de Vattel, The Law of Nations, bk. II, § 76, p. 145 (1760). Instead, the nation "ought to oblige the guilty to repair the damage, if that be possible, to inflict on him an exemplary punishment, or, in short, according to the nature of the case, and the circumstances attending it, to deliver him up to the offended state there to receive justice." *Ibid.* A sovereign who "refuses to cause a reparation to be made of the damage caused by his subject, or to punish the guilty, or, in short, to deliver him up, renders himself in some measure an accomplice in the injury, and becomes responsible for it." *Id.*, § 77, at 145; see also Bellia & Clark, The Alien Tort Statute and the Law of Nations, 78 U. Chi. L. Rev. 472–477 (2011).

of nations" and to "authorise suits to be instituted for damages by the party injured." *Id.*, at 495–496. But the States did too little, too late. So when the framers gathered to write the Constitution they included among their chief priorities endowing the national government with sufficient power to ensure the country's compliance with the law of nations. See 1 Records of the Federal Convention of 1787, pp. 24–25 (M. Farrand rev. 1966).

Together with other provisions of the Judiciary Act, the ATS served that purpose. The law of nations required countries to ensure foreign citizens could obtain redress for wrongs committed by domestic defendants, whether "through criminal punishment, extradition, or a civil remedy." Bellia & Clark, 78 U. Chi. L. Rev., at 509. Yet in 1789 this country had no comprehensive criminal code and no extradition treaty with Great Britain. *Id.*, at 509–510. Section 11 achieved a partial solution to the problem by permitting civil diversity suits in federal court between aliens and domestic parties, but that provision required at least $500 in controversy. 1 Stat. 78; cf. 28 U. S. C. §1332(a) (today's minimum is $75,000). But, as Professors Bellia and Clark have explained, "[h]ad Congress stopped there, it would have omitted an important category of law of nations violations that threatened the peace of the United States: personal injuries that US citizens inflicted upon aliens resulting in less than $500 in damages." 78 U. Chi. L. Rev., at 509. So the ATS neatly filled the remaining gap by allowing aliens to sue in federal court for a tort in violation of the law of nations regardless of the amount in controversy. One obvious advantage of this solution "was that it was self-executing—it placed the burden on injured aliens to bring suit and did not require the still-forming US government immediately to marshal the resources necessary to prosecute crimes" or aid extraditions. *Id.*, at 510.

Any attempt to decipher a cryptic old statute is sure to meet with challenges. For example, one could object that this reading of the Act does not assign to the ATS the work

of addressing assaults by aliens against foreign ambassadors on our soil, even though *Sosa* suggested the statute was enacted partly in response to precisely such a case: the "Marbois incident of May 1784, in which a French adventurer, De Longchamps, verbally and physically assaulted the Secretary of the French Legion in Philadelphia." 542 U. S., at 716. Many thought that the States' failure to provide a forum for relief to the foreign minister was a scandal and part of what prompted the framers of the Constitution to strengthen the national government. *Id.*, at 717; Bellia & Clark, *supra*, at 467 ("The Confederation's inability to remedy or curtail violations like these was a significant factor precipitating the Federal Convention of 1787").

But worries along these lines may be misplaced. The ATS was never meant to serve as a freestanding statute, only as one clause in one section of the Judiciary Act. So even if you think *something* in the Judiciary Act must be interpreted to address the Marbois incident, that doesn't mean it must be the ATS clause. And, as it happens, a different provision of the Act *did* deal expressly with the problem of ambassadorial assaults: Section 13 conferred on this Court "original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul shall be a party." 1 Stat. 80–81. That implemented Article III's provision empowering us to hear suits "affecting Ambassadors, other public ministers and Consuls." § 2. And given that § 13 deals with the problem of "ambassadors" so directly, it is unclear why we must read § 9 to address that same problem. See Lee, The Safe-Conduct Theory of the Alien Tort Statute, 106 Colum. L. Rev. 830, 855–858 (2006).

Along different but similar lines, some might be concerned that requiring a U. S. defendant in ATS suits would leave the problem of piracy inadequately addressed, given that *Sosa* suggested that piracy was one of the three offenses the ATS may have meant to capture, and many pirates were foreigners. See 542 U. S., at 719. But here the response is much

the same. A separate clause of § 9 gave the district courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction." 1 Stat. 77. That statute has long been given a broad construction covering "all maritime contracts, torts and injuries," *DeLovio* v. *Boit*, 7 F. Cas. 418, 442 (No. 3,776) (CC Mass. 1815) (Story, J.), along with "prize jurisdiction, which probably included almost all 'piracy' cases after 1789," Lee, *supra*, at 867. So it is not clear why it's necessary to cram the problem of piracy into the ATS. If anything, it may be necessary *not* to do so. Structural features of § 9 make it at least questionable that both provisions were meant to address the same subject matter: Cases falling within § 9's ATS clause could also be brought in state court or in the circuit courts, 1 Stat. 77, while § 9's admiralty jurisdiction was generally exclusive, *id.*, at 76–77. See Lee, *supra*, at 868. And the two provisions also called for incompatible procedures: Section 9 required jury trials "in all causes *except* civil causes of admiralty and maritime jurisdiction." 1 Stat. 77 (emphasis added).

If doubt lingers on these historical questions, it is a doubt that should counsel restraint all the same. Even if the ATS might have meant to allow foreign *ambassadors* to sue foreign defendants, or foreign plaintiffs to sue foreign *pirates*, what would that prove about more mine-run cases like ours, where none of those special concerns are implicated? There are at least serious historical arguments suggesting the ATS was not meant to apply to suits like this one. And to the extent *Sosa* affords courts discretion to proceed, these arguments should inform any decision whether to exercise that discretion. In *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U. S. 108, 116–117 (2013), the Court invoked *Sosa* discretion to refuse to hear cases involving foreign conduct. I can see no reason why courts should respond differently when it comes to cases involving foreign defendants.[4]

[4] The dissent is wrong to suggest, *post*, at 308, that *Sosa* "forecloses" the possibility of recognizing a U. S.-defendant requirement in ATS cases. *Sosa* said nothing about the subject. And were *Sosa* taken to preclude

Any consideration of *Sosa*'s discretion must also account for proper limits on the judicial function. As discussed above, federal courts generally lack the institutional expertise and constitutional authority to oversee foreign policy and national security, and should be wary of straying where they do not belong. See *supra*, at 284–285. Yet there are degrees of institutional incompetence and constitutional evil. It is one thing for courts to assume the task of creating new causes of action to ensure *our* citizens abide by the law of nations and *avoid* reprisals against this country. It is altogether another thing for courts to punish *foreign* parties for conduct that could not be attributed to the United States and thereby *risk* reprisals against this country. If a foreign state or citizen violates an "international norm" in a way that offends another foreign state or citizen, the Constitution arms the President and Congress with ample means to address it. Or, if they think best, the political branches may choose to look the other way. But in all events, the decision to impose sanctions in disputes between foreigners over international norms is not ours to make. It is a decision that belongs to those answerable to the people and assigned by the Constitution to defend this Nation. If they wish our help, they are free to enlist it, but we should not ever be in the business of elbowing our way in.

---

any future limits on ATS suits it did not itself anticipate, then *Kiobel* must have been wrong to apply the canon against extraterritorial application to that statute. But that is not so. The dissent also observes that *Sosa* "involved an ATS suit brought by a citizen of Mexico against a citizen of Mexico," and that certain *amici* in *Sosa* filed briefs arguing that the Court lacked authority over the ATS claims for that reason. See *post*, at 308. But *Sosa* did not address those arguments; questions that "merely lurk in the record are not resolved, and no resolution of them may be inferred." *Illinois Bd. of Elections* v. *Socialist Workers Party*, 440 U. S. 173, 183 (1979) (citations and internal quotation marks omitted); accord, *RJR Nabisco, Inc.* v. *European Community*, 579 U. S. 325, 350–351, n. 10 (2016) (issue present but unaddressed by the Court in a previous case was not implicitly decided).

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

The Court today holds that the Alien Tort Statute (ATS), 28 U. S. C. § 1350, categorically forecloses foreign corporate liability. In so doing, it absolves corporations from responsibility under the ATS for conscience-shocking behavior. I disagree both with the Court's conclusion and its analytic approach. The text, history, and purpose of the ATS, as well as the long and consistent history of corporate liability in tort, confirm that tort claims for law-of-nations violations may be brought against corporations under the ATS. Nothing about the corporate form in itself raises foreign-policy concerns that require the Court, as a matter of common-law discretion, to immunize all foreign corporations from liability under the ATS, regardless of the specific law-of-nations violations alleged. I respectfully dissent.

I

The plurality assumes without deciding that whether corporations can be permissible defendants under the ATS turns on the first step of the two-part inquiry set out in *Sosa* v. *Alvarez-Machain*, 542 U. S. 692 (2004). But by asking whether there is "a specific, universal, and obligatory norm of liability for corporations" in international law, *ante*, at 259, the plurality fundamentally misconceives how international law works and so misapplies the first step of *Sosa*.

A

In *Sosa*, the Court considered whether a Mexican citizen could recover under the ATS for a claim of arbitrary detention by a Mexican national who had been hired by the Drug Enforcement Administration to seize and transport him to the United States. See 542 U. S., at 697–698. The Court held that the ATS permits federal courts to "recognize private causes of action for certain torts in violation of the law of nations," *id.*, at 724, without the need for any "further

congressional action," *id.*, at 712. The Court then articulated a two-step framework to guide that inquiry. First, a court must determine whether the particular international-law norm alleged to have been violated is "accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms," *i. e.*, "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.*, at 724–725. Only if the norm is " 'specific, universal, and obligatory' " may federal courts recognize a cause of action for its violation. *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U. S. 108, 117 (2013) (quoting *Sosa*, 542 U. S., at 732). Second, if that threshold hurdle is satisfied, a court should consider whether allowing a particular case to proceed is an appropriate exercise of judicial discretion. *Id.*, at 727–728, 732–733, 738. Applying that framework, *Sosa* held that the alleged arbitrary detention claim at issue failed at step one because "a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy." *Id.*, at 738.

Sosa's norm-specific first step is inapposite to the categorical question whether corporations may be sued under the ATS as a general matter. International law imposes certain obligations that are intended to govern the behavior of states and private actors. See *id.*, at 714–715; 1 Restatement (Third) of Foreign Relations Law of the United States, pt. II, Introductory Note, pp. 70–71 (1987) (Restatement). Among those obligations are substantive prohibitions on certain conduct thought to violate human rights, such as genocide, slavery, extrajudicial killing, and torture. See 2 Restatement § 702. Substantive prohibitions like these are the norms at which *Sosa*'s step-one inquiry is aimed and for which *Sosa* requires that there be sufficient international consensus.

Sosa does not, however, demand that there be sufficient international consensus with regard to the mechanisms of

enforcing these norms, for enforcement is not a question with which customary international law is concerned. Although international law determines what substantive conduct violates the law of nations, it leaves the specific rules of how to enforce international-law norms and remedy their violation to states, which may act to impose liability collectively through treaties or independently via their domestic legal systems. See, *e. g.*, L. Henkin, Foreign Affairs and the United States Constitution 245 (2d ed. 1996) ("International law itself . . . does not require any particular reaction to violations of law"); Denza, The Relationship Between International and National Law, in International Law 423 (M. Evans ed. 2006) ("[I]nternational law does not itself prescribe how it should be applied or enforced at the national level"); 1 Restatement § 111, Comment *h* ("In the absence of special agreement, it is ordinarily for the United States to decide how it will carry out its international obligations"); Brief for International Law Scholars as *Amici Curiae* 9–10.

In keeping with the nature of international law, *Sosa* consistently used the word "norm" to refer to substantive conduct. For example, *Sosa* commands that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted." 542 U. S., at 732. That statement would make little sense if "norm" encompassed enforcement mechanisms like "corporate liability." Unlike "the prohibition on genocide," "corporate liability" cannot be violated. Moreover, "the historical paradigms familiar when § 1350 was enacted" are all prohibitions on conduct, and *Sosa* clearly contemplated that courts should compare the charged conduct with the historical conduct. See *ibid.* (quoting *Filartiga* v. *Pena-Irala*, 630 F. 2d 876 (1980), where the Court of Appeals for the Second Circuit compared a "'torturer'" to "'the pirate and slave trader before him,'" *id.*, at 890, and Judge Edwards' concurrence in *Tel-Oren* v. *Libyan Arab Republic*, 726 F. 2d 774 (CADC

1984), which suggested that the "'limits of section 1350's reach'" be defined by "'a handful of heinous actions—each of which violates definable, universal and obligatory norms,'" *id.*, at 781). There is no indication in *Sosa* that the Court also intended for courts to undertake the apples-to-oranges comparison of the conduct proscribed under customary international law and the forms of liability available under domestic law.

The text of the ATS also reflects this distinction between prohibiting conduct and determining enforcement. The statute provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U. S. C. § 1350. The phrase "of the law of nations" modifies "violation," not "civil action." The statutory text thus requires only that the alleged conduct be specifically and universally condemned under international law, not that the civil action be of a type that the international community specifically and universally practices or endorses.

B

1

The plurality nonetheless allies itself with the view that international law supplies the rule of decision in this case based on its reading of footnote 20 in *Sosa*. That footnote sets out "[a] related consideration" to "the determination whether a norm is sufficiently definite to support a cause of action." 542 U. S., at 732, and n. 20. In full, it states:

> "A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual. Compare *Tel-Oren* v. *Libyan Arab Republic*, 726 F. 2d 774, 791–795 (CADC 1984) (Edwards, J., concurring) (insufficient consensus in 1984 that torture by private

> actors violates international law), with *Kadic* v. *Karadžić*, 70 F. 3d 232, 239–241 (CA2 1995) (sufficient consensus in 1995 that genocide by private actors violates international law)." *Ibid.*

In the Second Circuit's decision in *Kiobel* v. *Royal Dutch Petroleum*, 621 F. 3d 111 (2010), the majority opinion read footnote 20 to "requir[e] that [courts] look to *international law* to determine [their] jurisdiction over ATS claims against a particular class of defendant, such as corporations." *Id.*, at 127 (emphasis in original). The plurality today accords "considerable force and weight to [that] position," *ante*, at 259, and so proceeds to assess whether there exists a specific, universal, and obligatory norm of liability for corporations in international law, *ante*, at 259–263. But the Court of Appeals mistook the meaning of footnote 20, which simply draws attention to the fact that, under international law, "the distinction between conduct that does and conduct that does not violate the law of nations can turn on whether the conduct is done by or on behalf of a State or by a private actor independently of a State." *Kiobel*, 621 F. 3d, at 177 (Leval, J., concurring in judgment).

The international-law norm against genocide, for example, imposes obligations on all actors. Acts of genocide thus violate the norm irrespective of whether they are committed privately or in concert with the state. See Convention on the Prevention and Punishment of the Crime of Genocide, Art. II, Dec. 9, 1948, 102 Stat. 3045 (defining "genocide" as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group"); see also 18 U. S. C. § 1091(a) ("Whoever" commits genocide "shall be punished as provided in subsection (b)"). In contrast, other norms, like the prohibition on torture, require state action. Conduct thus qualifies as torture and violates the norm only when done "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." Convention

Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 1, Dec. 10, 1984, S. Treaty Doc. No. 100–20, 1465 U. N. T. S. 114 (Torture Convention).[1]

Footnote 20 in *Sosa* flags this distinction and instructs courts to consider whether there is "sufficient consensus" that, with respect to the particular conduct prohibited under "a given norm," the type of defendant being sued can be alleged to have violated that specific norm. 542 U. S., at 732, n. 20. Because footnote 20 contemplates a norm-specific inquiry, not a categorical one, it is irrelevant to the categorical question presented here. Assuming the prohibition against financing of terrorism is sufficiently "specific, universal, and obligatory" to satisfy the first step of *Sosa*, a question on which I would remand to the Court of Appeals, nothing in international law suggests a corporation may not violate it.[2]

---

[1] This distinction is similar to the state-action doctrine in domestic law. The prohibitions in the Bill of Rights, for instance, apply only to state actors, whereas the Thirteenth Amendment's prohibition on slavery applies to all actors, state and private. See *United States* v. *Kozminski*, 487 U. S. 931, 942 (1988).

[2] At present, the norm-specific query contemplated by footnote 20 is likely resolved simply by considering whether the given international-law norm binds only state actors or state and nonstate actors alike, because there does not appear to be an international-law norm that contemplates a finer distinction between types of private actors. See Brief for United States as *Amicus Curiae* in *Kiobel* v. *Royal Dutch Petroleum Co.*, O. T. 2012, No. 10–1491, p. 20 ("At the present time, the United States is not aware of any international-law norm, accepted by civilized nations and defined with the degree of specificity required by *Sosa*, that requires, or necessarily contemplates, a distinction between natural and juridical actors"); Dodge, Corporate Liability Under Customary International Law, 43 Geo. J. Int'l L. 1045, 1050 (2012) ("None of the norms that are actionable under *Sosa* distinguish between natural and juridical persons").

Sosa itself supports the proposition that international law does not distinguish between types of private actors, but rather treats natural persons and corporations alike. Footnote 20 groups corporations and individuals together under the larger category of "private actor." *Sosa*, 542 U. S., at 732, n. 20 ("if the defendant is a private actor such as a corporation or an

The plurality briefly acknowledges this critique of its reading of footnote 20, but nonetheless assumes the correctness of its approach because of its view that there exists a "distinction in international law between corporations and natural persons." *Ante*, at 263. The plurality attempts to substantiate this proposition by pointing to the charters of certain international criminal tribunals and noting that none was given jurisdiction over corporate defendants. That argument, however, confuses the substance of international law with how it has been enforced in particular contexts.

Again, the question of who must undertake the prohibited conduct for there to be a violation of an international-law norm is one of international law, but how a particular actor is held liable for a given law-of-nations violation generally is a question of enforcement left up to individual states. Sometimes, states act collectively and establish international tribunals to punish certain international-law violations. Each such tribunal is individually negotiated, and the limitations placed on its jurisdiction are typically driven by strategic considerations and resource constraints.

For example, the Allies elected not to prosecute corporations at Nuremberg because of pragmatic factors. Those factors included scarce judicial resources, a preference of the occupation governments to swiftly dismantle the most culpa-

---

individual"); see also *id.*, at 760 (BREYER, J., concurring in part and concurring in judgment) ("The norm must extend liability to the type of perpetrator (*e. g.*, a private actor) the plaintiff seeks to sue" (citing *id.*, at 732, n. 20)). *Sosa* also describes the two Court of Appeals decisions on which it relies as having considered whether there was sufficient consensus that particular conduct—torture or genocide—"violates international law" when undertaken "by private actors." *Ibid.* (discussing *Tel-Oren* v. *Libyan Arab Republic*, 726 F. 2d 774, 791–795 (CADC 1984) (Edwards, J., concurring), and *Kadic* v. *Karadžić*, 70 F. 3d 232, 239–241 (CA2 1995)). Even though the defendant in *Kadic* was a natural person, see *id.*, at 237, and the defendants in *Tel-Oren* were juridical entities, see 726 F. 2d, at 775–776, *Sosa* refers to them all as "private actors," 542 U. S., at 732, n. 20.

ble German companies without destroying Germany's postwar economy, and a desire to focus on establishing the principle of nonstate criminal responsibility for human-rights violations. See Brief for Nuremberg Scholars as *Amici Curiae* 4, 11–13.

More recently, the delegations that negotiated the Rome Statute of the International Criminal Court in the 1990's elected not to extend that tribunal's jurisdiction to corporations in part because states had varying domestic practices as to whether and how to impose criminal liability on corporations. See Frulli, Jurisdiction *Ratione Personae*, in 1 Rome Statute of the International Criminal Court 527, 532–533 (A. Cassese et al. eds. 2002); Brief for Ambassador David J. Scheffer as *Amicus Curiae* 8–10.

Taken to its natural conclusion, the plurality's focus on the practice of international criminal tribunals would prove too much. No international tribunal has been created and endowed with the jurisdiction to hold natural persons civilly (as opposed to criminally) liable, yet the majority and respondent accept that natural persons can be held liable under the ATS. See *ante*, at 272; Tr. of Oral Arg. 62. It cannot be persuasive evidence for purposes of ascertaining the availability of corporate civil liability under the ATS, then, that the jurisdiction of the handful of international criminal tribunals that states have seen fit to create in the last 75 years has not extended to corporate defendants.

Ultimately, the evidence on which the plurality relies does not prove that international law distinguishes between corporations and natural persons as a categorical matter. To the contrary, it proves only that states' collective efforts to enforce various international-law norms have, to date, often focused on natural rather than corporate defendants.

In fact, careful review of states' collective and individual enforcement efforts makes clear that corporations are subject to certain obligations under international law. For instance, the United States Military Tribunal that prosecuted several corporate executives of IG Farben declared that cor-

porations could violate international law. See 8 Trials of War Criminals Before the Nuernberg Military Tribunals Under Council Control Law No. 10, p. 1132 (1952) ("Where private individuals, including juristic persons, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action . . . is in violation of international law").[3] Similarly, the International Criminal Tribunal for Rwanda found that three nonnatural entities—a private radio station, newspaper, and political party—were responsible for genocide. See *Prosecutor* v. *Nahimana*, Case No. ICTR–99–52–T, Judgment and Sentence ¶953 (Dec. 3, 2003). Most recently, the appeals panel of the Special Tribunal for Lebanon held that corporations may be prosecuted for contempt. See *Prosecutor* v. *New TV S. A. L.*, Case No. STL–14–05/PT/AP/AR126.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings ¶74 (Oct. 2, 2014).

In addition, various international agreements require signatory states to impose liability on corporations for certain conduct.[4] Of particular relevance here, the International Convention for the Suppression of the Financing of Terrorism provides: "Any person commits an offence within the meaning of this Convention if that person by any means, di-

---

[3] The Nuremberg Tribunal also was empowered to adjudicate a form of criminal organizational liability, pursuant to which an individual member of a convicted organization would face a rebuttable presumption of guilt in a subsequent proceeding. Brief for Nuremberg Scholars as *Amici Curiae* 4, 20–21 (citing Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, Arts. 9–10, 59 Stat. 1544, E. A. S. No. 472); see also Brief for Nuremberg Scholars 21–22 (citing *United States* v. *Goering*, 22 Trial of the Major War Criminals Before the International Military Tribunal 171, 505, 511, 516–517 (Int'l Mil. Trib. 1946) (declaring three organizations criminal)).

[4] See, *e. g.*, United Nations Convention Against Transnational Organized Crime, Art. 10(1), Nov. 15, 2000, T. I. A. S. No. 13127, S. Treaty Doc. No. 108–16; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Art. 2, Dec. 17, 1997, 2802 U. N. T. S. 230.

rectly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out" an act of terrorism. Art. 2, Dec. 9, 1999, S. Treaty Doc. No. 106–49, 2178 U. N. T. S. 230. It then requires each signatory state, "in accordance with its domestic legal principles," to "take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity," violated the Convention. Art. 5(1), *id.*, at 232. The Convention provides that "[s]uch liability may be criminal, civil, or administrative," *ibid.*, so long as the penalties, which can include monetary sanctions, are "effective, proportionate and dissuasive." Art. 5(3), *id.*, at 232. The United States is a party to the Convention, along with 131 other states.[5]

The plurality dismisses the relevance of this Convention because it does not require states parties to hold corporations liable in common-law tort actions, but rather permits them to "fulfill their obligations . . . by adopting detailed regulatory regimes governing financial institutions." *Ante*, at 262. That critique misses the point. The significance of the Convention is that the international community agreed that financing terrorism is unacceptable conduct and that such conduct violates the Convention when undertaken by corporations. That the Convention leaves up to each state party how to impose liability on corporations, *e. g.*, via erecting a regulatory regime, providing for tort actions, or imposing criminal sanctions, is unremarkable[6] and simply reflects

---

[5] See International Convention for the Suppression of the Financing of Terrorism, online at https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-11.en.pdf (all Internet materials as last visited Apr. 16, 2018).

[6] The Genocide Convention also does not specifically require that states parties recognize tort claims for genocide, but federal courts have long permitted such actions under the ATS as a matter of federal common law. See, *e. g.*, *Kadic*, 70 F. 3d, at 236. The same is true of the Torture

that international law sets out standards of conduct and leaves it to individual states to determine how best to enforce those standards.

Finally, a number of states, acting individually, have imposed criminal and civil liability on corporations for law-of-nations violations through their domestic legal systems. See, *e. g.*, *New TV S. A. L.*, Case No. STL–14–05/PT/AP/AR126.1, ¶¶52–55 (listing more than 40 countries that provide for corporate criminal liability); A. Ramasastry & R. Thompson, Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law 22–24 (2006), available at https://www.biicl.org/files/4364_536.pdf (noting that 15 of 16 countries surveyed permit civil claims against corporations for human-rights violations); Brief for Comparative Law Scholars and Practitioners as *Amici Curiae* 15–19 (detailing provisions creating corporate civil liability for international-law violations in England, France, the Netherlands, and Canada).

C

Instead of asking whether there exists a specific, universal, and obligatory norm of corporate liability under international law, the relevant inquiry in response to the question presented here is whether there is any reason—under either international law or our domestic law—to distinguish between a corporation and a natural person who is alleged to have violated the law of nations under the ATS. As explained above, international law provides no such reason. See *Kiobel*, 621 F. 3d, at 175 (Leval, J., concurring in judgment) ("[T]he answer international law furnishes is that it takes no position on the question"). Nor does domestic law. The text, history, and purpose of the ATS plainly support the conclusion that corporations may be held liable.

Beginning "with the language of the statute itself," *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235, 241

Convention. See, *e. g.*, *Filartiga* v. *Pena-Irala*, 630 F. 2d 876, 885 (CA2 1980).

(1989), two aspects of the text of the ATS make clear that the statute allows corporate liability. First, the text confers jurisdiction on federal district courts to hear "civil action[s]" for "tort[s]." 28 U. S. C. § 1350. Where Congress uses a term of art like tort, "it presumably knows and adopts the cluster of ideas that were attached to [the] borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Morissette* v. *United States*, 342 U. S. 246, 263 (1952).

Corporations have long been held liable in tort under the federal common law. See *Philadelphia, W., & B. R. Co.* v. *Quigley*, 21 How. 202, 210 (1859) ("At a very early period, it was decided in Great Britain, as well as in the United States, that actions might be maintained against corporations for torts; and instances may be found, in the judicial annals of both countries, of suits for torts arising from the acts of their agents, of nearly every variety"); *Chestnut Hill & Spring House Turnpike Co.* v. *Rutter*, 4 Serg. & Rawle 6, 17 (Pa. 1818) ("[F]rom the earliest times to the present, corporations have been held liable for torts"). This Court "has assumed that, when Congress creates a tort action, it legislates against a legal background of ordinary tort-related . . . rules and consequently intends its legislation to incorporate those rules." *Meyer* v. *Holley*, 537 U. S. 280, 285 (2003). The presumption, then, is that, in providing for "tort" liability, the ATS provides for corporate liability.

Second, whereas the ATS expressly limits the class of permissible plaintiffs to "alien[s]," § 1350, it "does not distinguish among classes of defendants," *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U. S. 428, 438 (1989). That silence as to defendants cannot be presumed to be inadvertent. That is because in the same section of the Judiciary Act of 1789 as what is now the ATS, Congress provided the federal district courts with jurisdiction over "all suits against consuls or vice-consuls." § 9, 1 Stat. 77. Where

Congress wanted to limit the range of permissible defendants, then, it clearly knew how to do so. *Russello* v. *United States*, 464 U. S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" (internal quotation marks omitted)).

Nothing about the historical background against which the ATS was enacted rebuts the presumption that the statute incorporated the accepted principle of corporate liability for tortious conduct. Under the Articles of Confederation, the Continental Congress was unable to provide redress to foreign citizens for violations of treaties or the law of nations, which threatened to undermine the United States' relationships with other nations. See *Kiobel*, 569 U. S., at 123. The First Congress responded with, *inter alia*, the ATS. Although the two incidents that highlighted the need to provide foreign citizens with a federal forum in which to pursue their grievances involved conflicts between natural persons, see *ante*, at 253 (majority opinion) (describing the assault by a French adventurer on the Secretary of the French Legation and the arrest of one of the Dutch Ambassador's servants by a New York constable), there is "no reason to conclude that the First Congress was supremely concerned with the risk that natural persons would cause the United States to be drawn into foreign entanglements, but was content to allow formal legal associations of individuals, i. e., corporations, to do so," *Doe* v. *Exxon Mobil Corp.*, 654 F. 3d 11, 47 (CADC 2011), vacated on other grounds, 527 Fed. Appx. 7 (CADC 2013); see also Brief for United States as *Amicus Curiae* 6 ("The ATS was enacted to ensure a private damages remedy for incidents with the potential for serious diplomatic consequences, and Congress had no good reason to limit the set of possible defendants in such actions to potentially judgment-proof individuals"). Indeed, foreclosing corporations from

liability under the ATS would have been at odds with the contemporaneous practice of imposing liability for piracy on ships, juridical entities. See, *e. g.*, *Skinner* v. *East India Co.*, 6 State Trials 710, 711 (1666); *The Marianna Flora*, 11 Wheat. 1, 40–41 (1826); *Harmony* v. *United States*, 2 How. 210, 233 (1844).

Finally, the conclusion that corporations may be held liable under the ATS for violations of the law of nations is not of recent vintage. More than a century ago, the Attorney General acknowledged that corporations could be held liable under the ATS. See 26 Op. Atty. Gen. 250, 252 (1907) (stating that citizens of Mexico could bring a claim under the ATS against a corporation, the American Rio Grande Land and Irrigation Company, for violating provisions of a treaty between the United States and Mexico).

D

In his concurrence, JUSTICE GORSUCH urges courts to exercise restraint in recognizing causes of action under the ATS. But whether the ATS provides a cause of action for violations of the norms against genocide, crimes against humanity, and financing of terrorism is not the question the parties have asked the Court to decide. I therefore see no reason why it is necessary to delve into the propriety of creating new causes of action. Nevertheless, because I disagree with the premises on which the concurrence relies, I offer two brief observations.

First, JUSTICE GORSUCH says it "pass[es] understanding" why federal courts have exercised jurisdiction over ATS claims raised by foreign plaintiffs against foreign defendants for breaches of international norms. See *ante*, at 281 (opinion concurring in part and concurring in judgment). Modern ATS cases, however, are not being litigated against a blank slate. The Court held in *Sosa* that Congress authorized the federal courts to "recognize private causes of action for certain torts in violation of the law of nations," 542 U. S., at 724,

so long as the underlying norm had no "less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted," *id.*, at 732. That holding was no mere "suggestion," *ante*, at 282 (opinion of GORSUCH, J.), as this Court has made clear. See *Kiobel*, 569 U. S., at 116–117.

Given that the First Congress authorized suit for violations based on "the law of nations" and "treat[ies] of the United States," 28 U. S. C. § 1350, it is natural to conclude that Congress intended the district courts to consider new claims under the law of nations as that law and our Nation's treaty obligations continued to develop. If Congress intended to limit such cases to violations of safe conduct, assaults against ambassadors, piracy, and—as JUSTICE GORSUCH suggests may have been the case—"'personal injuries that US citizens inflicted upon aliens resulting in less than $500 in damages,'" *ante*, at 289 (quoting Bellia & Clark, The Alien Tort Statute and the Law of Nations, 78 U. Chi. L. Rev. 445, 509 (2011)), it easily could have said so. Instead, it granted the federal courts jurisdiction over claims based on "the law of nations," a body of law that Congress did not understand to be static. See *United States* v. *The La Jeune Eugenie*, 26 F. Cas. 832, 846 (No. 15,551) (CC Mass. 1822) (Story, J.) ("What, therefore, the law of nations is . . . may be considered as modified by practice, or ascertained by the treaties of nations at different periods. It does not follow . . . that because a principle cannot be found settled by the consent or practice of nations at one time, it is to be concluded, that at no subsequent period the principle can be considered as incorporated into the public code of nations").

The question for courts considering new ATS claims is, "Who are today's pirates?" *Kiobel*, 569 U. S., at 129 (BREYER, J., concurring in judgment). Torturers and those who commit genocide are now fairly viewed, like pirates, as "common enemies of all mankind." *Id.*, at 131 (internal quotation marks omitted). On remand, the Court of Appeals

would decide whether the financiers of terrorism are the same. The fact that few norms have overcome *Sosa*'s high hurdle is strong evidence that the carefully considered standard set forth in that case is generating exactly the kind of "judicial caution" the Court stressed as necessary. See 542 U. S., at 725.

Second, the concurrence suggests that federal courts may lack jurisdiction to entertain suits between aliens based solely on a violation of the law of nations. It contends that ATS suits between aliens fall under neither the federal courts' diversity jurisdiction nor our federal question jurisdiction. The Court was not unaware of this argument when it decided *Sosa*. As noted, that case involved an ATS suit brought by a citizen of Mexico against a citizen of Mexico, and various *amici* argued that the Court lacked Article III jurisdiction over such suits. See Brief for National Foreign Trade Counsel et al. as *Amici Curiae* in *Sosa* v. *Alvarez-Machain*, O. T. 2003, No. 03–339, pp. 24–25; see also Brief for Washington Legal Foundation et al. as *Amici Curiae* in No. 03–339, pp. 14–21. The Court nonetheless proceeded to decide the case, which it could not have done had it been concerned about its Article III power to do so. See *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 514 (2006). That decision forecloses the argument the concurrence now makes, as *Sosa* authorized courts to "recognize private claims *under federal common law* for violations of" certain international-law norms. 542 U. S., at 732 (emphasis added); see also *id.*, at 729–730 (explaining that, post-*Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), there are "limited enclaves in which federal courts may derive from substantive law in a common law way," including the law of nations, and that "it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism"); *Sarei* v. *Rio Tinto*, 671 F. 3d 736, 749–754 (CA9 2011) (en banc) (discussing *Sosa* and concluding that federal

courts have Article III jurisdiction to hear ATS cases between aliens), vacated and remanded, 569 U. S. 945 (2013) (remanding for further consideration in light of *Kiobel*).

Sosa was correct as a legal matter. Moreover, our Nation has an interest not only in providing a remedy when our own citizens commit law-of-nations violations but also in preventing our Nation from serving as a safe harbor for today's pirates. See *Kiobel*, 569 U. S., at 133–134 (BREYER, J., concurring in judgment). To that end, Congress has ratified treaties requiring the United States "to punish or extradite offenders, even when the offense was not committed . . . by a national." 1 Restatement § 404, Reporters' Note 1, at 255–257; see Torture Convention, Arts. 5, 7; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Art. 3, Dec. 14, 1973, 28 U. S. T. 1975, T. I. A. S. No. 8532; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U. S. T. 565, T. I. A. S. No. 7570; Convention for the Suppression of Unlawful Seizure of Aircraft, Art. 4, Dec. 16, 1970, 22 U. S. T. 1641, T. I. A. S. No. 7192; Geneva Convention Relative to the Treatment of Prisoners of War, Art. 129, Aug. 12, 1949, 6 U. S. T. 3316, T. I. A. S. No. 3364. To the extent suits against foreign defendants may lead to international friction, that concern is better addressed under the presumption the Court established in *Kiobel* against extraterritorial application of the ATS, see 569 U. S., at 124–125, than it is by relitigating settled precedent.

II

At its second step, *Sosa* cautions that courts should consider whether permitting a case to proceed is an appropriate exercise of judicial discretion in light of potential foreign-policy implications. See 542 U. S., at 727–728, 732–733, 738. The plurality only assumes without deciding that international law does not impose liability on corporations, so it necessarily proceeds to *Sosa*'s second step. Here, too, its analysis is flawed.

A

Nothing about the corporate form in itself justifies categorically foreclosing corporate liability in all ATS actions. Each source of diplomatic friction that respondent Arab Bank and the plurality identify can be addressed with a tool more tailored to the source of the problem than a blanket ban on corporate liability.

Arab Bank contends that foreign citizens should not be able "to sue a Jordanian corporation in New York for events taking place in the Middle East." Brief for Respondent 42. The heart of that qualm was already addressed in *Kiobel*, which held that the presumption against extraterritoriality applies to the ATS. 569 U. S., at 124. Only where the claims "touch and concern the territory of the United States . . . with sufficient force" can the presumption be displaced. *Id.*, at 124–125. "[M]ere corporate presence" does not suffice. *Id.*, at 125. Thus, contrary to the majority's contention, "the relatively minor connection between the terrorist attacks at issue in this case and the alleged conduct in the United States" does not "well illustrat[e] the perils of extending the scope of ATS liability to foreign multinational corporations," *ante*, at 271, but merely illustrates the risks of extending the scope of ATS liability extraterritorially absent sufficient connection to the United States.

Arab Bank also bemoans the unfairness of being sued when others—namely, the individuals and organizations that carried out the terrorist attacks—were "the direct cause" of the harm petitioners here suffered. Brief for Respondent 41. That complaint, though, is a critique of the imposition of liability for financing terrorism, not an argument that ATS suits against corporations generally necessarily cause diplomatic tensions.

Arab Bank further expresses concern that ATS suits are being filed against corporations in an effort to recover for the bad acts of foreign governments or officials. See *id.*, at 40. But the Bank's explanation of this problem reveals that

the true source of its grievance is the availability of aiding and abetting liability. See *ibid.* ("[N]umerous ATS suits have alleged that a corporation has aided or abetted bad acts committed by a *foreign government and its officials*" (emphasis in original)); *id.*, at 41 ("[A]iding and abetting suits under the ATS have given plaintiffs 'a clear means for effectively circumventing' critical limits on foreign sovereign immunity" (quoting Brief for United States as *Amicus Curiae* in *American Isuzu Motors, Inc.* v. *Ntsebeza*, O. T. 2007, No. 07–919, p. 15)). The plurality too points to an aiding and abetting case to support its contention that plaintiffs "use corporations as surrogate defendants to challenge the conduct of foreign governments." *Ante*, at 267 (discussing *Kiobel*, in which plaintiffs sought to hold a corporate defendant liable for "'aiding and abetting the Nigerian Government in committing'" law-of-nations violations (quoting 569 U. S., at 114)). Yet not all law-of-nations violations asserted against corporations are premised on aiding and abetting liability; it is possible for a corporation to violate international-law norms independent of a foreign state or foreign state officials. In this respect, too, the Court's rule is ill fitted to the problem identified.

Notably, even the Hashemite Kingdom of Jordan does not argue that there are foreign-policy tensions inherent in suing a corporation generally. Instead, Jordan contends that this particular suit is an affront to its sovereignty because of its extraterritorial character and because of the role that Arab Bank specifically plays in the Jordanian economy. See Brief for Hashemite Kingdom of Jordan as *Amicus Curiae* 6–12.[7]

---

[7] Jordan does argue that corporate liability is unavailable under the ATS, but that argument is based on its view that there is no universally recognized international-law norm of corporate liability, see Brief for Hashemite Kingdom of Jordan as *Amicus Curiae* 12–15, not a contention that corporate status alone presents foreign-policy concerns justifying immunity for all corporations in all ATS suits irrespective of circumstance.

The majority also cites to instances in which other foreign sovereigns have "appeared in this Court to note [their] objections to ATS litigation," *ante*, at 271, but none of those objections was about the availability of corporate liability as a general matter. See *Sosa*, 542 U. S., at 733, n. 21 (noting argument of the European Commission that "basic principles of international law require that before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal system, and perhaps in other forums such as international claims tribunals"); *ibid.* (noting objections by South Africa to "several class actions seeking damages from various corporations alleged to have participated in, or abetted, the regime of apartheid" on the basis that the cases "interfere[d] with the policy embodied by its Truth and Reconciliation Commission"); Brief for Federal Republic of Germany as *Amicus Curiae* in *Kiobel* v. *Royal Dutch Petroleum Co.*, O. T. 2012, No. 10–1491, p. 1 ("The Federal Republic of Germany has consistently maintained its opposition to overly broad assertions of extraterritorial civil jurisdiction arising out of aliens' claims against foreign defendants for alleged foreign activities that caused injury on foreign soil"); Brief for Government of the United Kingdom of Great Britain and Northern Ireland et al. as *Amici Curiae* in No. 10–1491, p. 3 ("The Governments remain deeply concerned about . . . suits by foreign plaintiffs against foreign defendants for conduct that entirely took place in the territory of a foreign sovereign").

As the United States urged at oral argument, when international friction arises, a court should respond with the doctrine that speaks directly to the friction's source. See Tr. of Oral Arg. 28 (acknowledging that "ATS litigation in recent decades has raised international friction" and explaining that "the way to deal with that friction is with a doctrine that speaks directly to the international entanglement . . . as those questions arise"). In addition to the presumption against extraterritoriality, federal courts have at their dis-

posal a number of tools to address any foreign-relations concerns that an ATS case may raise. This Court has held that a federal court may exercise personal jurisdiction over a foreign corporate defendant only if the corporation is incorporated in the United States, has its principal place of business or is otherwise at home here, or if the activities giving rise to the lawsuit occurred or had their impact here. See *Daimler AG* v. *Bauman*, 571 U. S. 117 (2014). Courts also can dismiss ATS suits for a plaintiff's failure to exhaust the remedies available in her domestic forum, on *forum non conveniens* grounds, for reasons of international comity, or when asked to do so by the State Department. See *Kiobel*, 569 U. S., at 133 (BREYER, J., concurring in judgment); *Sosa*, 542 U. S., at 733, n. 21.

Several of these doctrines might be implicated in this case, and I would remand for the Second Circuit to address them in the first instance.[8] The majority, however, prefers to use a sledgehammer to crack a nut. I see no need for such an ill-fitting and disproportionate response. Foreclosing foreign corporate liability in all ATS actions, irrespective of circumstance or norm, is simply too broad a response to case-specific concerns that can be addressed via other means.[9]

---

[8] For instance, the alleged conduct might not sufficiently touch and concern the United States to displace the presumption against extraterritoriality; the prohibition on terrorism financing might not be a specific, universal, and obligatory norm warranting recognition under the ATS; and petitioners might not be able to prove the requisite *mens rea*. In addition, petitioners have asserted direct, rather than vicarious, liability against respondent. A suit based on only vicarious liability may raise different questions not presented here.

[9] The majority's overly blunt rule is also unlikely to resolve any foreign-relations concerns at play in this case. Arab Bank is still being sued under the Antiterrorism Act of 1990 for the exact same conduct as alleged here. It is also hard to imagine that Jordan would have been perfectly content to see the CEO of Arab Bank and high-level officials at the New York branch sued under the ATS.

B

1

The Court urges that "[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns." *Ante,* at 265. I agree that the political branches are well poised to assess the foreign-policy concerns attending ATS litigation, which is why I give significant weight to the fact that the Executive Branch, in briefs signed by the Solicitor General and State Department Legal Advisor, has twice urged the Court to reach exactly the opposite conclusion of the one embraced by the majority. See Brief for United States as *Amicus Curiae* 5 ("This Court should vacate the decision below, which rests on the mistaken premise that a federal common-law claim under the ATS may never be brought against a corporation"); Brief for United States as *Amicus Curiae* in *Kiobel* v. *Royal Dutch Petroleum Co.*, O. T. 2012, No. 10–1491, p. 7 ("Courts may recognize corporate liability in actions under the ATS as a matter of federal common law. . . . *Sosa*'s cautionary admonitions provide no reason to depart from the common law on this issue"). At oral argument in this case, the United States told the Court that it saw no "sound reason to categorically exclude corporate liability." Tr. of Oral Arg. 29. It explained that another country would hold the United States accountable for not providing a remedy against a corporate defendant in a "classic" ATS case, such as one involving a "foreign officia[l] injured in the United States," *id.*, at 32–33, and suggested that foreclosing the ability to recover from a corporation actually would raise "the possibility of friction," *id.*, at 33. Notably, the Government's position that categorically barring corporate liability under the ATS is wrong has been consistent across two administrations led by Presidents of different political parties.

Likewise, when Members of Congress have weighed in on the question whether corporations can be proper defendants in an ATS suit, it has been to advise the Court against the

rule it now adopts. See Brief for Sen. Sheldon Whitehouse et al. as *Amici Curiae* 7–11; Brief for Former Sen. Arlen Specter et al. as *Amici Curiae* in *Kiobel* v. *Royal Dutch Petroleum Co.*, O. T. 2012, No. 10–1491, pp. 17–18. Congress has also never seen it necessary to immunize corporations from ATS liability even though corporations have been named as defendants in ATS suits for years. See *Monessen Southwestern R. Co.* v. *Morgan*, 486 U. S. 330, 338 (1988) ("Congress' failure to disturb a consistent judicial interpretation of a statute may provide some indication that 'Congress at least acquiesces in, and apparently affirms, that [interpretation]'" (quoting *Cannon* v. *University of Chicago*, 441 U. S. 677, 703 (1979))).

Given the deference to the political branches that *Sosa* encourages, I find it puzzling that the Court so eagerly departs from the express assessment of the Executive Branch and Members of Congress that corporations can be defendants in ATS actions.

2

The plurality instead purports to defer to Congress by relying heavily on the Torture Victim Protection Act of 1991 (TVPA), 106 Stat. 73, note following 28 U. S. C. § 1350, to support its categorical bar. See *ante*, at 265. The TVPA makes available to all individuals, not just foreign citizens, a civil cause of action for torture and extrajudicial killing that may be brought against natural persons. See *Mohamad* v. *Palestinian Authority*, 566 U. S. 449, 451–452, 454 (2012). The plurality extrapolates from Congress' decision regarding the scope of liability under the TVPA a rule that it contends should govern all ATS suits. See *ante*, at 265. But there is no reason to think that because Congress saw fit to permit suits only against natural persons for two specific law-of-nations violations, Congress meant to foreclose corporate liability for all law-of-nations violations. The plurality's contrary conclusion ignores the critical textual differences between the ATS and TVPA, as well as the TVPA's legisla-

tive history, which emphasizes Congress' intent to leave the ATS undisturbed.

On its face, the TVPA is different from the ATS in several significant ways: It is focused on only two law-of-nations violations, torture and extrajudicial killing; it makes a cause of action available to all individuals, not just foreign citizens; and it uses the word "individual" to delineate who may be liable. See 28 U. S. C. § 1350 note. The ATS, by contrast, is concerned with all law-of-nations violations generally, makes a cause of action available only to foreign citizens, and is silent as to who may be liable. Because of the textual differences between the two statutes, the Court unanimously concluded in *Mohamad* that the ATS "offers no comparative value" in ascertaining the scope of liability under the TVPA. 566 U. S., at 458. It makes little sense, then, to conclude that the TVPA has dispositive comparative value in discerning the scope of liability under the ATS.

Furthermore, Congress repeatedly emphasized in the House and Senate Reports on the TVPA that the statute was meant to supplement the ATS, not replace or cabin it. See H. R. Rep. No. 102–367, pt. 1, p. 3 (1991) ("Section 1350 has other important uses and should not be replaced. There should also, however, be a clear and specific remedy, not limited to aliens, for torture and extrajudicial killing"); *id.*, at 4 ("The TVPA . . . would also enhance the remedy already available under section 1350 in an important respect: While the [ATS] provides a remedy to aliens only, the TVPA would extend a civil remedy also to U. S. citizens who may have been tortured abroad"); *ibid.* ("[C]laims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered b[y] section 1350. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law"); S. Rep. No. 102–249, pp. 4–5 (1991); see also *Sosa*, 542 U. S., at 731 (explaining that the TVPA "supplement[ed] the judicial determination" in *Filartiga*).

Lacking any affirmative evidence that Congress' decision to limit liability under the TVPA to natural persons indicates a legislative judgment about the proper scope of liability in all ATS suits, the plurality focuses its efforts on dismissing petitioners' argument that Congress limited TVPA liability to natural persons to harmonize the statute with the Foreign Sovereign Immunities Act of 1976 (FSIA), which generally immunizes foreign states from suit. See *ante*, at 266–267.[10] Contrary to the plurality's contention, however, this Court did not reject petitioners' account of the TVPA's legislative history in *Mohamad*. In fact, that decision agreed that the legislative history "clarifi[es] that the Act does not encompass liability against foreign states." 566 U. S., at 459. What *Mohamad* rejected was the argument that because the TVPA forecloses liability against foreign states, it necessarily permits liability against corporations. In concluding that the TVPA encompasses only natural persons, *Mohamad* took no position on why Congress excluded organizations from its reach.[11]

To infer from the TVPA that no corporation may ever be held liable under the ATS for any violation of any international-law norm, moreover, ignores that Congress has elsewhere imposed liability on corporations for conduct prohibited by customary international law. For instance, the

---

[10] The TVPA requires state action to trigger liability. See 28 U. S. C. § 1350 note (imposing liability on "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation" subjects an individual to torture or extrajudicial killing). Absent a limitation on suits against states and state entities, the TVPA arguably would have been in conflict with the FSIA.

[11] Petitioners may be right that Congress limited liability under the TVPA to natural persons to harmonize the statute with the FSIA. That Congress thought it necessary to achieve that goal by foreclosing liability against all organizational defendants, not just those operating under the authority of a foreign government, might indicate that Congress thought such line drawing would be difficult or that an expansive approach was the cleanest way to avoid the statute becoming a backdoor to suits against foreign governments.

Antiterrorism Act of 1990 (ATA) created a civil cause of action for U. S. nationals injured by an act of international terrorism and expressly provides for corporate liability. 18 U. S. C. §2333. That Congress foreclosed corporate liability for torture and extrajudicial killing claims under the TVPA but permitted corporate liability for terrorism-related claims under the ATA is strong evidence that Congress exercises its judgment as to the appropriateness of corporate liability on a norm-by-norm basis, and that courts should do the same when considering whether to permit causes of action against corporations for law-of-nations violations under the ATS.

The plurality dismisses the ATA as "an inapt analogy" because the ATA "provides a cause of action only to 'national[s] of the United States,' " whereas the ATS "provides a remedy for foreign nationals only." *Ante*, at 267 (quoting 18 U. S. C. §2333(a)). But if encompassing different groups of plaintiffs is what makes two statutes poor comparators for each other, the TVPA, too, is an inapt analogy, for it permits suits by all individuals, U. S. and foreign nationals alike.

The plurality also posits that the ATA "suggests that there should be no common-law action under the ATS for allegations like petitioners'," *ante*, at 267–268, because permitting such suits would allow foreign plaintiffs to "bypass Congress' express limitations on liability under the [ATA] simply by bringing an ATS lawsuit," *ante*, at 268. Yet an ATS suit alleging terrorism-related conduct does not "bypass" or "displace" any "statutory and regulatory structure," *ibid.*, any more than an ATA suit does. As this case demonstrates, U. S. nationals and foreign citizens may bring ATA and ATS suits in the same court, at the same time, for the same underlying conduct. To the extent the plurality is suggesting that Congress, in enacting the ATA, meant to foreclose ATS suits based on terrorism financing, the plurality offers no evidence to support that hypothesis, and the legislative history suggests that Congress enacted the ATA to provide U. S. citizens with the same remedy already available to foreign citi-

zens under the ATS. See Hearing on S. 2465 before the Subcommittee on Courts and Administrative Practice of the Senate Committee on the Judiciary, 101st Cong., 1st Sess., 90 (1990) (testimony of Joseph A. Morris) (noting that ATS actions for terrorism "would be preserved").

At bottom, the ATS and TVPA are related but distinct statutes that coexist independently. There is no basis to conclude that the considered judgment Congress made about who should be liable under the TVPA for torture and extrajudicial killing should restrict who can be held liable under the ATS for other law-of-nations violations, particularly where Congress made a different judgment about the scope of liability under the ATA for terrorism.

C

Finally, the plurality offers a set of "[o]ther considerations relevant to the exercise of judicial discretion" that it concludes "counsel against allowing liability under the ATS for foreign corporations." *Ante*, at 268. None is persuasive.

First, the plurality asserts that "[i]t has not been shown that corporate liability under the ATS is essential to serve the goals of the statute" because "the ATS will seldom be the only way for plaintiffs to hold the perpetrators liable" and because "plaintiffs still can sue the individual corporate employees responsible for a violation of international law under the ATS." *Ibid.* This Court has never previously required that, to maintain an ATS action, a plaintiff must show that the ATS is the exclusive means by which to hold the alleged perpetrator liable and that no relief can be had from other parties. Such requirements extend far beyond the inquiry *Sosa* contemplated and are without any basis in the statutory text.

Moreover, even if there are other grounds on which a suit alleging conduct constituting a law-of-nations violation can be brought, such as a state-law tort claim, the First Congress created the ATS because it wanted foreign plaintiffs to be

able to bring their claims in federal court and sue for law-of-nations violations. A suit for state-law battery, even if based on the same alleged conduct, is not the equivalent of a federal suit for torture; the latter contributes to the uptake of international human-rights norms, and the former does not.[12]

Furthermore, holding corporations accountable for violating the human rights of foreign citizens when those violations touch and concern the United States may well be necessary to avoid the international tension with which the First Congress was concerned. Consider again the assault on the Secretary of the French Legation in Philadelphia by a French adventurer. See *supra*, at 305; *ante*, at 253 (majority opinion). Would the diplomatic strife that followed really have been any less charged if a corporation had sent its agent to accost the Secretary? Or, consider piracy. If a corporation owned a fleet of vessels and directed them to seize other ships in U. S. waters, there no doubt would be calls to hold the corporation to account. See *Kiobel*, 621 F. 3d, at 156, and n. 10 (observing that "Somali pirates essentially operate as limited partnerships"). Finally, take, for example, a corporation posing as a job-placement agency that actually traffics in persons, forcibly transporting foreign nationals to the United States for exploitation and profiting from their abuse. Not only are the individual employees of that business less likely to be able fully to compensate successful ATS plaintiffs, but holding only individual employees liable does not impose accountability for the institution-wide disregard for human rights. Absent a corporate sanction, that harm will

[12] Counsel for Arab Bank acknowledged the symbolic force of ATS liability at oral argument. See Tr. of Oral Arg. 60 ("[T]he idea of the ATS is . . . not just that you violated a statute but that you have violated some specific universal obligatory norm so you are essentially an enemy of mankind. So, as much as my clients would not like to be an ATA defendant, they would really, really, really not like to be . . . labeled an enemy of mankind").

persist unremedied. Immunizing the corporation from suit under the ATS merely because it is a corporation, even though the violations stemmed directly from corporate policy and practice, might cause serious diplomatic friction.[13]

Second, the plurality expresses concern that if foreign corporations are subject to liability under the ATS, other nations could hale American corporations into court and sub-

---

[13] JUSTICE ALITO, adopting a more absolutist position than the plurality, asserts without qualification that "federal courts should not create causes of action under the ATS against foreign corporate defendants" because doing so "would precipitate . . . diplomatic strife." *Ante*, at 274, 278 (opinion concurring in part and concurring in judgment). The conclusion that ATS suits against foreign corporate defendants for law-of-nations and treaty violations always will cause diplomatic friction and that such suits will never be necessary "to help the United States avoid diplomatic friction," *ante*, at 277, however, is at odds with the considered judgment of the Executive Branch and Congress regarding the importance of holding foreign corporations to account for certain egregious conduct. As noted, see Part II–B–1, *supra*, the Executive Branch has twice urged the Court not to foreclose the ability of foreign nationals to sue foreign corporate defendants under the ATS. The United States also has ratified several international agreements that require it to impose liability on corporations, both foreign and domestic, for certain actions, including the financing of terrorism. See *supra*, at 301–302. Congress, too, has expressly authorized civil suits against corporations for acts related to terrorism. See 18 U. S. C. § 2333. The Executive Branch and Congress surely would not have taken these positions, entered into these obligations, or made available these causes of action if the result were intolerable diplomatic strife.

JUSTICE ALITO also faults the lack of "real-world examples" of instances in which diplomatic friction has resulted from a court's refusal to permit an individual to bring an ATS suit against a foreign corporation solely because of the defendant's status as a foreign juridical entity. *Ante*, at 279. Such refusals, though, have been rare, as no other Court of Appeals besides the Second Circuit that has considered the question has imposed a bar on corporate liability. Compare *Doe* v. *Drummond Co.*, 782 F. 3d 576, 584 (CA11 2015); *Doe I* v. *Nestle USA, Inc.*, 766 F. 3d 1013, 1022 (CA9 2014); *Doe* v. *Exxon Mobil Corp.*, 654 F. 3d 11, 39–57 (CADC 2011), vacated on other grounds, 527 Fed. Appx. 7 (CADC 2013); *Flomo* v. *Firestone Nat. Rubber Co.*, 643 F. 3d 1013, 1017–1021 (CA7 2011), with *Kiobel* v. *Royal Dutch Petroleum*, 621 F. 3d 111, 120 (CA2 2010).

ject them "to an immediate, constant risk of claims seeking to impose massive liability for the alleged conduct of their employees and subsidiaries around the world," a prospect that will deter American corporations from investing in developing economies. *Ante*, at 269. The plurality offers no empirical evidence to support these alarmist conjectures, which is especially telling given that plaintiffs have been filing ATS suits against foreign corporations in United States courts for years. It does cite to an *amicus* brief for the United States in *American Isuzu Motors, Inc.* v. *Ntsebeza*, see *ante*, at 269, but that case was concerned with the availability of civil aiding and abetting liability, not corporate liability generally, and the United States never contended that permitting corporate liability under the ATS would undermine global investment. Instead, it argued that permitting extraterritorial aiding and abetting cases would interfere with foreign relations and deter "the free flow of trade and investment." See Brief for United States as *Amicus Curiae*, O. T. 2007, No. 07–919, pp. 12–16, 20. Driven by hypothetical worry about besieged American corporations, today's decision needlessly goes much further, encompassing all ATS suits against all foreign corporations, not just those cases with extraterritorial dimensions premised on an aiding and abetting theory.

* * *

In sum, international law establishes what conduct violates the law of nations, and specifies whether, to constitute a law-of-nations violation, the alleged conduct must be undertaken by a particular type of actor. But it is federal common law that determines whether corporations may, as a general matter, be held liable in tort for law-of-nations violations. Applying that framework here, I would hold that the ATS does not categorically foreclose corporate liability. Tort actions against corporations have long been available under federal common law. Whatever the majority might think of the value of modern-day ATS litigation, it has identified nothing to support its conclusion that "foreign corporate

defendants create unique problems" that necessitate a categorical rule barring all foreign corporate liability. *Ante*, at 272.

Absent any reason to believe that the corporate form in itself raises serious foreign-policy concerns, and given the repeated urging from the Executive Branch and Members of Congress that the Court need not and should not foreclose corporate liability, I would reverse the decision of the Court of Appeals for the Second Circuit and remand for further proceedings, including whether the allegations here sufficiently touch and concern the United States, see *Kiobel*, 569 U. S., at 124–125, and whether the international-law norms alleged to have been violated by Arab Bank—the prohibitions on genocide, crimes against humanity, and financing of terrorism—are of sufficiently definite content and universal acceptance to give rise to a cause of action under the ATS.

III

In categorically barring all suits against foreign corporations under the ATS, the Court ensures that foreign corporations—entities capable of wrongdoing under our domestic law—remain immune from liability for human-rights abuses, however egregious they may be.

Corporations can be and often are a force for innovation and growth. Many of their contributions to society should be celebrated. But the unique power that corporations wield can be used both for good and for bad. Just as corporations can increase the capacity for production, so, too, some can increase the capacity for suffering. Consider the genocide that took upwards of 800,000 lives in Rwanda in 1994, which was fueled by incendiary rhetoric delivered via a private radio station, the Radio Télévision Libre des Mille Collines (RTLM). Men spoke the hateful words, but the RTLM made their widespread influence possible.[14]

[14] See, *e. g.*, *Nahimana* v. *Prosecutor*, Case No. ICTR 99–52–A, Appeals Judgment ¶176 (Nov. 28, 2007) (upholding finding that the RTLM Collines broadcasts "contributed substantially to the killing of Tutsi"); G. Prunier,

There can be, and sometimes is, a profit motive for these types of abuses. Although the market does not price all externalities, the law does. We recognize as much when we permit a civil suit to proceed against a paint company that long knew its product contained lead yet continued to sell it to families, or against an oil company that failed to undertake the requisite safety checks on a pipeline that subsequently burst. There is no reason why a different approach should obtain in the human-rights context.

Immunizing corporations that violate human rights from liability under the ATS undermines the system of accountability for law-of-nations violations that the First Congress endeavored to impose. It allows these entities to take advantage of the significant benefits of the corporate form and enjoy fundamental rights, see, *e. g.*, *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310 (2010); *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U. S. 682 (2014), without having to shoulder attendant fundamental responsibilities.

I respectfully dissent.

The Rwanda Crisis: History of a Genocide 224 (2d ed. 1999) (detailing incitements to murder broadcast on the RTLM, including: "'The graves are not yet full. Who is going to do the good work and help us fill them completely' "); Yanagizawa-Drott, Propaganda and Conflict: Evidence From the Rwandan Genocide, 129 Q. J. Econ. 1947, 1950 (2014) (analyzing village-level data from Rwanda to estimate that the RTLM's transmissions caused 10 percent of the total participation in the genocide).

Syllabus

OIL STATES ENERGY SERVICES, LLC *v.* GREENE'S ENERGY GROUP, LLC, ET AL.

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

No. 16–712. Argued November 27, 2017—Decided April 24, 2018

Inter partes review authorizes the United States Patent and Trademark Office (PTO) to reconsider and cancel an already-issued patent claim in limited circumstances. See 35 U. S. C. §§ 311–319. Any person who is not the owner of the patent may petition for review. § 311(a). If review is instituted, the process entitles the petitioner and the patent owner to conduct certain discovery, § 316(a)(5); to file affidavits, declarations, and written memoranda, § 316(a)(8); and to receive an oral hearing before the Patent Trial and Appeal Board, § 316(a)(10). A final decision by the Board is subject to Federal Circuit review. §§ 318, 319.

Petitioner Oil States Energy Services, LLC, obtained a patent relating to technology for protecting wellhead equipment used in hydraulic fracturing. It sued respondent Greene's Energy Group, LLC, in Federal District Court for infringement. Greene's Energy challenged the patent's validity in the District Court and also petitioned the PTO for inter partes review. Both proceedings progressed in parallel. The District Court issued a claim-construction order favoring Oil States, while the Board issued a decision concluding that Oil States' claims were unpatentable. Oil States appealed to the Federal Circuit. In addition to its patentability arguments, it challenged the constitutionality of inter partes review, arguing that actions to revoke a patent must be tried in an Article III court before a jury. While the case was pending, the Federal Circuit issued a decision in a separate case, rejecting the same constitutional arguments raised by Oil States. The court then summarily affirmed the Board's decision in this case.

Held:

1. Inter partes review does not violate Article III. Pp. 333–344.

(a) Under this Court's precedents, Congress has significant latitude to assign adjudication of public rights to entities other than Article III courts. *Executive Benefits Ins. Agency* v. *Arkison*, 573 U. S. 25, 32. Inter partes review falls squarely within the public-rights doctrine. The decision to grant a patent is a matter involving public rights. Inter partes review is simply a reconsideration of that grant, and Congress has permissibly reserved the PTO's authority to conduct that reconsideration. Pp. 333–337.

(i) The grant of a patent falls within the public-rights doctrine. *United States* v. *Duell*, 172 U. S. 576, 582–583. Granting a patent involves a matter "arising between the government and others." *Ex parte Bakelite Corp.*, 279 U. S. 438, 451. Specifically, patents are "public franchises." *Seymour* v. *Osborne*, 11 Wall. 516, 533. Additionally, granting patents is one of "the constitutional functions" that can be carried out by "the executive or legislative departments" without "'judicial determination.'" *Crowell* v. *Benson*, 285 U. S. 22, 50–51. Pp. 335–336.

(ii) Inter partes review involves the same basic matter as the grant of a patent. It is "a second look at an earlier . . . grant," *Cuozzo Speed Technologies, LLC* v. *Lee*, 579 U. S. 261, 279, and it involves the same interests as the original grant, see *Duell*, *supra*, at 586. That inter partes review occurs after the patent has issued does not make a difference here. Patents remain "subject to [the Board's] authority" to cancel outside of an Article III court, *Crowell*, *supra*, at 50, and this Court has recognized that franchises can be qualified in this manner, see, *e. g.*, *Louisville Bridge Co.* v. *United States*, 242 U. S. 409, 421. Pp. 336–337.

(b) Three decisions that recognize patent rights as the "private property of the patentee," *United States* v. *American Bell Telephone Co.*, 128 U. S. 315, 370, do not contradict this conclusion. See also *McCormick Harvesting Machine Co.* v. *Aultman*, 169 U. S. 606, 609; *Brown* v. *Duchesne*, 19 How. 183, 197. Nor do they foreclose the kind of post-issuance administrative review that Congress has authorized here. Those cases were decided under the Patent Act of 1870 and are best read as describing the statutory scheme that existed at that time. Pp. 337–339.

(c) Although patent validity was often decided in 18th-century English courts of law, that history does not establish that inter partes review violates the "general" principle that "Congress may not 'withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law,'" *Stern* v. *Marshall*, 564 U. S. 462, 484. Another means of canceling a patent at that time—a petition to the Privy Council to vacate a patent—closely resembles inter partes review. The parties have cited nothing to suggest that the Framers were not aware of this common practice when writing the Patent Clause, or that they excluded the practice from the scope of the Clause. Relatedly, the fact that American courts have traditionally adjudicated patent validity in this country does not mean that they must forever do so. Historical practice is not decisive here because matters governed by the public-rights doctrine may be assigned to the Legislature, the Executive, or the Judiciary. *Ex parte Bakelite Corp.*, *supra*, at 451. That Congress chose the courts in the past does not foreclose its choice of the PTO today. Pp. 340–342.

Syllabus

(d) Finally, the similarities between the various procedures used in inter partes review and procedures typically used in courts does not lead to the conclusion that inter partes review violates Article III. This Court has never adopted a "looks like" test to determine if an adjudication has improperly occurred outside an Article III court. See, *e. g.*, *Williams* v. *United States*, 289 U. S. 553, 563. Pp. 342–343.

(e) This holding is narrow. The Court addresses only the constitutionality of inter partes review and the precise constitutional challenges that Oil States raised here. The decision should not be misconstrued as suggesting that patents are not property for purposes of the Due Process Clause or the Takings Clause. P. 344.

2. Inter partes review does not violate the Seventh Amendment. When Congress properly assigns a matter to adjudication in a non-Article III tribunal, "the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder." *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33, 52–53. Thus, the rejection of Oil States' Article III challenge also resolves its Seventh Amendment challenge. Pp. 344–345.

639 Fed. Appx. 639, affirmed.

THOMAS, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, ALITO, SOTOMAYOR, and KAGAN, JJ., joined. BREYER, J., filed a concurring opinion, in which GINSBURG and SOTOMAYOR, JJ., joined, *post*, p. 345. GORSUCH, J., filed a dissenting opinion, in which ROBERTS, C. J., joined, *post*, p. 346.

Allyson N. Ho argued the cause for petitioner. With her on the briefs were *Judd E. Stone* and *C. Erik Hawes*.

Christopher M. Kise argued the cause for respondent Greene's Energy Group, LLC. With him on the brief were *Joshua M. Hawkes*, *Pavan K. Agarwal*, *David B. Goroff*, *George E. Quillin*, and *Lawrence J. Dougherty*. *Deputy Solicitor General Stewart* argued the cause for the federal respondent. With him on the brief were *Solicitor General Francisco*, *Acting Assistant Attorney General Readler*, *Rachel P. Kovner*, *Douglas N. Letter*, *Mark R. Freeman*, *Sarah T. Harris*, *Nathan K. Kelley*, *Thomas W. Krause*, *Farheena Y. Rasheed*, and *Mary Beth Walker*.*

---

*Briefs of *amici curiae* urging reversal were filed for AbbVie, Inc., et al. by *Lori Alvino McGill* and *Rakesh N. Kilaru*; for Alliacense Limited LLC by *Edward P. Heller III*; for the Biotechnology Innovation Organization

JUSTICE THOMAS delivered the opinion of the Court.

The Leahy-Smith America Invents Act, 35 U. S. C. § 100 *et seq.*, establishes a process called "inter partes review." Under that process, the United States Patent and Trademark Office (PTO) is authorized to reconsider and to cancel

---

et al. by *Jonathan S. Massey*, *Rob Park*, and *Kenneth M. Goldman*; for the Cato Institute et al. by *Ilya Shapiro*; for the Eagle Forum Education & Legal Defense Fund by *Andrew L. Schlafly*; for Evolutionary Intelligence LLC by *Gene C. Schaerr*, *S. Kyle Duncan*, and *Stephen S. Schwartz*; for IEEE-USA by *Maura K. Moran*; for InterDigital, Inc., by *Alexandra A. E. Shapiro*, *Andrew G. Isztwan*, *Sriranga Veeraraghavan*, and *Jeffrey A. Birchak*; for LiquidPower Specialty Products Inc. by *Thomas C. Goldstein* and *Patricia M. Rice*; for the Pacific Legal Foundation et al. by *Mark F. Hearne II*, *Stephen S. Davis*, *Abram J. Pafford*, and *Brian T. Hodges*; for the Pharmaceutical Research and Manufacturers of America by *Jeffrey A. Lamken*, *Eric R. Nitz*, *James C. Stansel*, and *David E. Korn*; for Security People, Inc., by *Frear Stephen Schmid*; for Thirty-Nine Affected Patent Owners by *Jay Q. Knobloch*; for Unisone Strategic IP, Inc., by *Anton N. Handal* and *Gabriel G. Hedrick*; for the University of New Mexico by *Alfonso Garcia Chan*, *Michael W. Shore*, and *Russell J. DePalma*; for US Inventor, Inc., et al. by *Robert P. Greenspoon*; for J. Kenneth Blackwell et al. by *Roy I. Liebman*; for James W. Ely, Jr., et al. by *Steven J. Lechner*; for Dmitry Karshtedt by *Mr. Karshtedt*, *pro se*; for Gary Lauder et al. by *J. Carl Cecere*; and for 27 Law Professors by *Sean D. Jordan* and *Adam W. Aston*.

Briefs of *amici curiae* urging affirmance were filed for AARP et al. by *Barbara A. Jones*, *William Alvarado Rivera*, and *Jamaica P. Szeliga*; for ACT | The App Association by *Brian Scarpelli*; for the Alliance of Automobile Manufacturers by *John Thorne* and *Gregory G. Rapawy*; for America's Health Insurance Plans by *Anna-Rose Mathieson* and *Julie Simon Miller*; for Apple Inc. by *Douglas Hallward-Driemeier*, *Scott McKeown*, *Matthew Rizzolo*, *Jonathan Ference-Burke*, and *Samuel Brenner*; for Arris Group, Inc., et al. by *Steffen N. Johnson*, *Andrew R. Sommer*, *Michael L. Brody*, *Jennifer Hightower*, and *Anthony Baca*; for Askeladden LLC by *Carter G. Phillips*, *Joseph R. Guerra*, and *Joshua J. Fougere*; for the Association for Accessible Medicines by *Eric D. Miller* and *Jeffrey K. Francer*; for BSA | The Software Alliance by *Andrew J. Pincus*, *Paul W. Hughes*, and *Matthew A. Waring*; for Dell Inc. et al. by *Theodore B. Olson*, *Amir C. Tayrani*, *Krishnendu Gupta*, *Michele K. Connors*, and *Thomas A. Brown*; for General Electric Company by *Roy T. Englert, Jr.*, *Daniel N. Lerman*, *Paul R. Garcia*, and *Garrick A. Sevilla*; for the Initiative for Medicines, Access & Knowledge by *Daniel B. Ravicher*; for Intel

an issued patent claim in limited circumstances. In this case, we address whether inter partes review violates Article III or the Seventh Amendment of the Constitution. We hold that it violates neither.

I

A

Under the Patent Act, the PTO is "responsible for the granting and issuing of patents." 35 U. S. C. § 2(a)(1).

et al. by *Donald B. Verrilli, Jr.*, *Ginger D. Anders*, *Matthew J. Hult*, and *Keith R. Weed*; for the Internet Association et al. by *John F. Duffy*, *James W. Dabney*, *Richard M. Koehl*, and *Emma L. Baratta*; for Knowledge Ecology International by *Andrew S. Goldman*; for Mylan Pharmaceuticals Inc. by *William A. Rakoczy*; for Professors of Administrative Law et al. by *Thomas H. Lee*; for Public Knowledge et al. by *Charles Duan* and *Vera Ranieri*; for the Retail Litigation Center, Inc., et al. by *W. Stephen Cannon*, *Seth D. Greenstein*, and *Deborah White*; for SAP America, Inc., et al. by *Andrew M. Mason* and *John D. Vandenberg*; for Taiwan Semiconductor Manufacturing Co., Ltd., by *Mark S. Davies*, *Katherine M. Kopp*, and *Michael Shen*; for Unified Patents Inc. by *William G. Jenks* and *Jonathan Stroud*; for U. S. Golf Manufacturers Council by *Peter J. Brann*, *Stacy O. Stitham*, *Michael J. Kline*, and *William B. Lacy*; for Volkswagen Group of America, Inc., by *Charles J. Hawkins*; for Lee A. Hollaar by *William R. Hubbard*; and for 72 Professors of Intellectual Property Law by *Mark A. Lemley* and *Arti K. Rai*.

Briefs of *amici curiae* were filed for the American Intellectual Property Law Association by *Meredith Martin Addy* and *Mark L. Whitaker*; for the Association of Amicus Counsel by *Robert J. Rando*, *Alan M. Sack*, and *Charles E. Miller*; for the Boston Patent Law Association by *Sophie F. Wang* and *Margaret E. Ives*; for the Civil Jury Project at New York University School of Law by *Stephen D. Susman*, *Samuel Issacharoff*, and *Erwin Chemerinsky*; for the Houston Intellectual Property Law Association by *L. Lee Eubanks IV*; for the Intellectual Property Law Association of Chicago by *John R. Linzer*, *Robert H. Resis*, *Charles W. Shifley*, and *Donald W. Rupert*; for the Intellectual Property Owners Association by *Paul H. Berghoff*, *Brandon J. Kennedy*, *Kevin H. Rhodes*, *Steven W. Miller*, and *Mark W. Lauroesch*; for the Patent Trial and Appeal Board Bar Association by *Joshua M. Segal*, *Aaron A. Barlow*, and *Paul D. Margolis*; for Shire Pharmaceuticals LLC by *Edgar H. Haug*, *Nicholas F. Giove*, *Richard F. Kurz*, *Jonathan A. Herstoff*, and *James Harrington*; for H. Tomás Gómez-Arostegui et al. by *Mr. Gómez-Arostegui*, *pro se*; and for 3M Company et al. by *Hyland Hunt* and *Ruthanne M. Deutsch*.

When an inventor applies for a patent, an examiner reviews the proposed claims and the prior art to determine if the claims meet the statutory requirements. See §§ 112, 131. Those requirements include utility, novelty, and nonobviousness based on the prior art. §§ 101, 102, 103. The Director of the PTO then approves or rejects the application. See §§ 131, 132(a). An applicant can seek judicial review of a final rejection. §§ 141(a), 145.

B

Over the last several decades, Congress has created administrative processes that authorize the PTO to reconsider and cancel patent claims that were wrongly issued. In 1980, Congress established "*ex parte* reexamination," which still exists today. See Act To Amend the Patent and Trademark Laws, 35 U. S. C. § 301 *et seq.* *Ex parte* reexamination permits "[a]ny person at any time" to "file a request for reexamination." § 302. If the Director determines that there is "a substantial new question of patentability" for "any claim of the patent," the PTO can reexamine the patent. §§ 303(a), 304. The reexamination process follows the same procedures as the initial examination. § 305.

In 1999, Congress added a procedure called "inter partes reexamination." See American Inventors Protection Act, §§ 4601–4608, 113 Stat. 1501A–567 to 1501A–572. Under this procedure, any person could file a request for reexamination. 35 U. S. C. § 311(a) (2006 ed.). The Director would determine if the request raised "a substantial new question of patentability affecting any claim of the patent" and, if so, commence a reexamination. §§ 312(a), 313 (2006 ed.). The reexamination would follow the general procedures for initial examination, but would allow the third-party requester and the patent owner to participate in a limited manner by filing responses and replies. §§ 314(a), (b) (2006 ed.). Inter partes reexamination was phased out when the America Invents Act went into effect in 2012. See § 6, 125 Stat. 299–305.

C

The America Invents Act replaced inter partes reexamination with inter partes review, the procedure at issue here. See *id.*, at 299. Any person other than the patent owner can file a petition for inter partes review. 35 U. S. C. § 311(a) (2012 ed.). The petition can request cancellation of "1 or more claims of a patent" on the grounds that the claim fails the novelty or nonobviousness standards for patentability. § 311(b). The challenges must be made "only on the basis of prior art consisting of patents or printed publications." *Ibid.* If a petition is filed, the patent owner has the right to file a preliminary response explaining why inter partes review should not be instituted. § 313.

Before he can institute inter partes review, the Director must determine "that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged." § 314(a). The decision whether to institute inter partes review is committed to the Director's discretion. See *Cuozzo Speed Technologies, LLC* v. *Lee*, 579 U. S. 261, 273 (2016). The Director's decision is "final and nonappealable." § 314(d).[1]

Once inter partes review is instituted, the Patent Trial and Appeal Board—an adjudicatory body within the PTO created to conduct inter partes review—examines the patent's validity. See 35 U. S. C. §§ 6, 316(c). The Board sits in three-member panels of administrative patent judges. See § 6(c). During the inter partes review, the petitioner and the patent owner are entitled to certain discovery, § 316(a)(5); to file affidavits, declarations, and written memoranda, § 316(a)(8); and to receive an oral hearing before the Board, § 316(a)(10). The petitioner has the burden of proving unpatentability by a preponderance of the evidence. § 316(e). The owner can file a motion to amend the patent by voluntar-

[1] The Director has delegated his authority to the Patent Trial and Appeal Board. See 37 CFR § 42.108(c) (2017).

ily canceling a claim or by "propos[ing] a reasonable number of substitute claims." § 316(d)(1)(B). The owner can also settle with the petitioner by filing a written agreement prior to the Board's final decision, which terminates the proceedings with respect to that petitioner. § 317. If the settlement results in no petitioner remaining in the inter partes review, the Board can terminate the proceeding or issue a final written decision. § 317(a).

If the proceeding does not terminate, the Board must issue a final written decision no later than a year after it notices the institution of inter partes review, but that deadline can be extended up to six months for good cause. §§ 316(a)(11), 318(a). If the Board's decision becomes final, the Director must "issue and publish a certificate." § 318(b). The certificate cancels patent claims "finally determined to be unpatentable," confirms patent claims "determined to be patentable," and incorporates into the patent "any new or amended claim determined to be patentable." *Ibid.*

A party dissatisfied with the Board's decision can seek judicial review in the Court of Appeals for the Federal Circuit. § 319. Any party to the inter partes review can be a party in the Federal Circuit. *Ibid.* The Director can intervene to defend the Board's decision, even if no party does. See § 143; *Cuozzo*, *supra*, at 279. When reviewing the Board's decision, the Federal Circuit assesses "the Board's compliance with governing legal standards de novo and its underlying factual determinations for substantial evidence." *Randall Mfg.* v. *Rea*, 733 F. 3d 1355, 1362 (CA Fed. 2013).

II

Petitioner Oil States Energy Services, LLC, and respondent Greene's Energy Group, LLC, are both oilfield services companies. In 2001, Oil States obtained a patent relating to an apparatus and method for protecting wellhead equipment used in hydraulic fracturing. In 2012, Oil States sued Greene's Energy in Federal District Court for infringing

that patent. Greene's Energy responded by challenging the patent's validity. Near the close of discovery, Greene's Energy also petitioned the Board to institute inter partes review. It argued that two of the patent's claims were unpatentable because they were anticipated by prior art not mentioned by Oil States in its original patent application. Oil States filed a response opposing review. The Board found that Greene's Energy had established a reasonable likelihood that the two claims were unpatentable and, thus, instituted inter partes review.

The proceedings before the District Court and the Board progressed in parallel. In June 2014, the District Court issued a claim-construction order. The order construed the challenged claims in a way that foreclosed Greene's Energy's arguments about the prior art. But a few months later, the Board issued a final written decision concluding that the claims were unpatentable. The Board acknowledged the District Court's contrary decision, but nonetheless concluded that the claims were anticipated by the prior art.

Oil States sought review in the Federal Circuit. In addition to its arguments about patentability, Oil States challenged the constitutionality of inter partes review. Specifically, it argued that actions to revoke a patent must be tried in an Article III court before a jury. While Oil States' case was pending, the Federal Circuit issued an opinion in a different case, rejecting the same constitutional arguments. *MCM Portfolio LLC* v. *Hewlett-Packard Co.*, 812 F. 3d 1284, 1288–1293 (2015). The Federal Circuit summarily affirmed the Board's decision in this case. 639 Fed. Appx. 639 (2016).

We granted certiorari to determine whether inter partes review violates Article III or the Seventh Amendment. 582 U. S. 903 (2017). We address each issue in turn.

III

Article III vests the judicial power of the United States "in one supreme Court, and in such inferior Courts as the

Congress may from time to time ordain and establish." § 1. Consequently, Congress cannot "confer the Government's 'judicial Power' on entities outside Article III." *Stern* v. *Marshall*, 564 U. S. 462, 484 (2011). When determining whether a proceeding involves an exercise of Article III judicial power, this Court's precedents have distinguished between "public rights" and "private rights." *Executive Benefits Ins. Agency* v. *Arkison*, 573 U. S. 25, 32 (2014) (internal quotation marks omitted). Those precedents have given Congress significant latitude to assign adjudication of public rights to entities other than Article III courts. See *ibid.*; *Stern*, *supra*, at 488–492.

This Court has not "definitively explained" the distinction between public and private rights, *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 69 (1982) (plurality opinion), and its precedents applying the public-rights doctrine have "not been entirely consistent," *Stern*, 564 U. S., at 488. But this case does not require us to add to the "various formulations" of the public-rights doctrine. *Ibid.* Our precedents have recognized that the doctrine covers matters "which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." *Crowell* v. *Benson*, 285 U. S. 22, 50 (1932). In other words, the public-rights doctrine applies to matters "'arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it.'" *Ibid.* (quoting *Ex parte Bakelite Corp.*, 279 U. S. 438, 451 (1929)). Inter partes review involves one such matter: reconsideration of the Government's decision to grant a public franchise.

A

Inter partes review falls squarely within the public-rights doctrine. This Court has recognized, and the parties do not dispute, that the decision to *grant* a patent is a matter involv-

ing public rights—specifically, the grant of a public franchise. Inter partes review is simply a reconsideration of that grant, and Congress has permissibly reserved the PTO's authority to conduct that reconsideration. Thus, the PTO can do so without violating Article III.

1

This Court has long recognized that the grant of a patent is a "'matte[r] involving public rights.'" *United States* v. *Duell*, 172 U. S. 576, 582–583 (1899) (quoting *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1856)). It has the key features to fall within this Court's longstanding formulation of the public-rights doctrine.

Ab initio, the grant of a patent involves a matter "arising between the government and others." *Ex parte Bakelite Corp.*, *supra*, at 451. As this Court has long recognized, the grant of a patent is a matter between "'the public, who are the grantors, and . . . the patentee.'" *Duell*, *supra*, at 586 (quoting *Butterworth* v. *United States ex rel. Hoe*, 112 U. S. 50, 59 (1884)). By "issuing . . . patents," the PTO "take[s] from the public rights of immense value and bestow[s] them upon the patentee." *United States* v. *American Bell Telephone Co.*, 128 U. S. 315, 370 (1888). Specifically, patents are "public franchises" that the Government grants "to the inventors of new and useful improvements." *Seymour* v. *Osborne*, 11 Wall. 516, 533 (1871); accord, *Pfaff* v. *Wells Electronics, Inc.*, 525 U. S. 55, 63–64 (1998). The franchise gives the patent owner "the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States." 35 U. S. C. § 154(a)(1). That right "did not exist at common law." *Gayler* v. *Wilder*, 10 How. 477, 494 (1851). Rather, it is a "creature of statute law." *Crown Die & Tool Co.* v. *Nye Tool & Machine Works*, 261 U. S. 24, 40 (1923).

Additionally, granting patents is one of "the constitutional functions" that can be carried out by "the executive or leg-

islative departments" without "'judicial determination.'" *Crowell*, *supra*, at 50–51 (quoting *Ex parte Bakelite Corp.*, *supra*, at 451). Article I gives Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." § 8, cl. 8. Congress can grant patents itself by statute. See, *e. g.*, *Bloomer* v. *McQuewan*, 14 How. 539, 548–550 (1853). And, from the founding to today, Congress has authorized the Executive Branch to grant patents that meet the statutory requirements for patentability. See 35 U. S. C. §§ 2(a)(1), 151; see also Act of July 8, 1870, § 31, 16 Stat. 202; Act of July 4, 1836, § 7, 5 Stat. 119–120; Act of Apr. 10, 1790, ch. 7, § 1, 1 Stat. 109–110. When the PTO "adjudicate[s] the patentability of inventions," it is "exercising the executive power." *Freytag* v. *Commissioner*, 501 U. S. 868, 910 (1991) (Scalia, J., concurring in part and concurring in judgment) (emphasis deleted).

Accordingly, the determination to grant a patent is a "matte[r] involving public rights." *Murray's Lessee*, *supra*, at 284. It need not be adjudicated in Article III court.

2

Inter partes review involves the same basic matter as the grant of a patent. So it, too, falls on the public-rights side of the line.

Inter partes review is "a second look at an earlier administrative grant of a patent." *Cuozzo*, 579 U. S., at 279. The Board considers the same statutory requirements that the PTO considered when granting the patent. See 35 U. S. C. § 311(b). Those statutory requirements prevent the "issuance of patents whose effects are to remove existent knowledge from the public domain." *Graham* v. *John Deere Co. of Kansas City*, 383 U. S. 1, 6 (1966). So, like the PTO's initial review, the Board's inter partes review protects "the public's paramount interest in seeing that patent monopolies

are kept within their legitimate scope," *Cuozzo*, *supra*, at 279–280 (internal quotation marks and alterations omitted). Thus, inter partes review involves the same interests as the determination to grant a patent in the first instance. See *Duell*, *supra*, at 586.

The primary distinction between inter partes review and the initial grant of a patent is that inter partes review occurs *after* the patent has issued. But that distinction does not make a difference here. Patent claims are granted subject to the qualification that the PTO has "the authority to reexamine—and perhaps cancel—a patent claim" in an inter partes review. *Cuozzo*, *supra*, at 267. Patents thus remain "subject to [the Board's] authority" to cancel outside of an Article III court. *Crowell*, 285 U. S., at 50.

This Court has recognized that franchises can be qualified in this manner. For example, Congress can grant a franchise that permits a company to erect a toll bridge, but qualify the grant by reserving its authority to revoke or amend the franchise. See, *e. g.*, *Louisville Bridge Co.* v. *United States*, 242 U. S. 409, 421 (1917) (collecting cases). Even after the bridge is built, the Government can exercise its reserved authority through legislation or an administrative proceeding. See, *e. g.*, *id.*, at 420–421; *Hannibal Bridge Co.* v. *United States*, 221 U. S. 194, 205 (1911); *Bridge Co.* v. *United States*, 105 U. S. 470, 478–482 (1882). The same is true for franchises that permit companies to build railroads or telegraph lines. See, *e. g.*, *United States* v. *Union Pacific R. Co.*, 160 U. S. 1, 24–25, 37–38 (1895).

Thus, the public-rights doctrine covers the matter resolved in inter partes review. The Constitution does not prohibit the Board from resolving it outside of an Article III court.

B

Oil States challenges this conclusion, citing three decisions that recognize patent rights as the "private property of the patentee." *American Bell Telephone Co.*, *supra*, at 370; see

also *McCormick Harvesting Machine Co.* v. *Aultman*, 169 U. S. 606, 609 (1898) ("[A granted patent] has become the property of the patentee"); *Brown* v. *Duchesne*, 19 How. 183, 197 (1857) ("[T]he rights of a party under a patent are his private property"). But those cases do not contradict our conclusion.

Patents convey only a specific form of property right—a public franchise. See *Pfaff*, 525 U. S., at 63–64. And patents are "entitled to protection as any other property, *consisting of a franchise.*" *Seymour*, 11 Wall., at 533 (emphasis added). As a public franchise, a patent can confer only the rights that "the statute prescribes." *Gayler*, 10 How., at 494; *Wheaton* v. *Peters*, 8 Pet. 591, 663–664 (1834) (noting that Congress has "the power to prescribe the conditions on which such right shall be enjoyed"). It is noteworthy that one of the precedents cited by Oil States acknowledges that the patentee's rights are "derived altogether" from statutes, "are to be regulated and measured by these laws, and cannot go beyond them." *Brown*, *supra*, at 195.[2]

One such regulation is inter partes review. See *Cuozzo*, 579 U. S., at 267–268. The Patent Act provides that, "[s]ubject to the provisions of this title, patents shall have the attributes of personal property." 35 U. S. C. § 261. This provision qualifies any property rights that a patent owner has in an issued patent, subjecting them to the express provisions of the Patent Act. See *eBay Inc.* v. *MercExchange, L. L. C.*, 547 U. S. 388, 392 (2006). Those provisions include inter partes review. See §§ 311–319.

[2] This Court has also recognized this dynamic for state-issued franchises. For instance, States often reserve the right to alter or revoke a corporate charter either "in the act of incorporation or in some general law of the State which was in operation at the time the charter was granted." *Pennsylvania College Cases*, 13 Wall. 190, 214, and n. † (1872). That reservation remains effective even after the corporation comes into existence, and such alterations do not offend the Contracts Clause of Article I, § 10. See *Pennsylvania College Cases*, *supra*, at 212–214; *e. g.*, *Miller* v. *State*, 15 Wall. 478, 488–489 (1873).

Nor do the precedents that Oil States cites foreclose the kind of post-issuance administrative review that Congress has authorized here. To be sure, two of the cases make broad declarations that "[t]he only authority competent to set a patent aside, or to annul it, or to correct it for any reason whatever, is vested in the courts of the United States, and not in the department which issued the patent." *McCormick Harvesting Machine Co.*, *supra*, at 609; accord, *American Bell Telephone Co.*, 128 U. S., at 364. But those cases were decided under the Patent Act of 1870. See *id.*, at 371; *McCormick Harvesting Machine Co.*, *supra*, at 611. That version of the Patent Act did not include any provision for post-issuance administrative review. Those precedents, then, are best read as a description of the statutory scheme that existed at that time. They do not resolve Congress' authority under the Constitution to establish a different scheme.[3]

[3] The dissent points to *McCormick*'s statement that the Patent Office Commissioner could not invalidate the patent at issue because it would "'deprive the applicant of his property without due process of law, and would be in fact an invasion of the judicial branch.'" *Post*, at 354 (opinion of GORSUCH, J.) (quoting *McCormick Harvesting Machine Co.* v. *Aultman*, 169 U. S. 606, 612 (1898)). But that statement followed naturally from the Court's determination that, under the Patent Act of 1870, the Commissioner "was *functus officio*" and "had no power to revoke, cancel, or annul" the patent at issue. 169 U. S., at 611–612.

Nor is it significant that the *McCormick* Court "equated invention patents with land patents." *Post*, at 354. *McCormick* itself makes clear that the analogy between the two depended on the particulars of the Patent Act of 1870. See 169 U. S., at 609–610. Modern invention patents, by contrast, are meaningfully different from land patents. The land-patent cases invoked by the dissent involved a "transaction [in which] 'all authority or control' over the lands has passed from 'the Executive Department.'" *Boesche* v. *Udall*, 373 U. S. 472, 477 (1963) (quoting *Moore* v. *Robbins*, 96 U. S. 530, 533 (1878)). Their holdings do not apply when "the Government continues to possess some measure of control over" the right in question. *Boesche*, 373 U. S., at 477; see *id.*, at 477–478 (affirming administrative cancellations of public-land leases). And that is true of modern invention patents under the current Patent Act, which gives the PTO

C

Oil States and the dissent contend that inter partes review violates the "general" principle that "Congress may not 'withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.'" *Stern*, 564 U. S., at 484 (quoting *Murray's Lessee*, 18 How., at 284). They argue that this is so because patent validity was often decided in English courts of law in the 18th century. For example, if a patent owner brought an infringement action, the defendant could challenge the validity of the patent as an affirmative defense. See Lemley, Why Do Juries Decide If Patents Are Valid? 99 Va. L. Rev. 1673, 1682, 1685–1686, and n. 52 (2013). Or, an individual could challenge the validity of a patent by filing a writ of *scire facias* in the Court of Chancery, which would sit as a law court when adjudicating the writ. See *id.*, at 1683–1685, and n. 44; Bottomley, Patent Cases in the Court of Chancery, 1714–58, 35 J. Legal Hist. 27, 36–37, 41–43 (2014).

But this history does not establish that patent validity is a matter that, "'from its nature,'" must be decided by a court. *Stern*, *supra*, at 484 (quoting *Murray's Lessee*, *supra*, at 284). The aforementioned proceedings were between private parties. But there was another means of canceling a patent in 18th-century England, which more closely resembles inter partes review: a petition to the Privy Council to vacate a patent. See Lemley, *supra*, at 1681–1682; Hulme, Privy Council Law and Practice of Letters Patent for Invention From the Restoration to 1794 (Pt. I), 33 L. Q. Rev. 63 (1917). The Privy Council was composed of the Crown's advisers. Lemley, *supra*, at 1681. From the 17th through the 20th centuries, English patents had a standard revocation clause that permitted six or more Privy Counsellors to declare a patent void if they determined the invention was contrary to

---

continuing authority to review and potentially cancel patents after they are issued. See 35 U. S. C. §§ 261, 311–319.

law, "prejudicial" or "inconvenient," not new, or not invented by the patent owner. See 11 W. Holdsworth, A History of English Law 426–427, and n. 6 (1938); Davies, The Early History of the Patent Specification, 50 L. Q. Rev. 86, 102–106 (1934). Individuals could petition the Council to revoke a patent, and the petition was referred to the Attorney General. The Attorney General examined the petition, considered affidavits from the petitioner and patent owner, and heard from counsel. See, *e. g.*, *Bull* v. *Lydall*, PC2/81, pp. 180–181 (1706). Depending on the Attorney General's conclusion, the Council would either void the patent or dismiss the petition. See, *e. g.*, *Darby* v. *Betton*, PC2/99, pp. 358–359 (1745) (voiding the patent); *Baker* v. *James*, PC2/103, pp. 320–321, 346–347 (1753) (dismissing the petition).

The Privy Council was a prominent feature of the English system. It had exclusive authority to revoke patents until 1753, and after that, it had concurrent jurisdiction with the courts. See Hulme (Pt. II), 33 L. Q. Rev., at 189–191, 193–194. The Privy Council continued to consider revocation claims and to revoke patents throughout the 18th century. Its last revocation was in 1779. See *id.*, at 192–193. It considered, but did not act on, revocation claims in 1782, 1794, and 1810. See *ibid.*; *Board of Ordinance* v. *Parr*, PC1/3919 (1810).

The Patent Clause in our Constitution "was written against the backdrop" of the English system. *Graham*, 383 U. S., at 5. Based on the practice of the Privy Council, it was well understood at the founding that a patent system could include a practice of granting patents subject to potential cancellation in the executive proceeding of the Privy Council. The parties have cited nothing in the text or history of the Patent Clause or Article III to suggest that the Framers were not aware of this common practice. Nor is there any reason to think they excluded this practice during their deliberations. And this Court has recognized that, "[w]ithin the scope established by the Constitution, Congress

may set out conditions and tests for patentability." *Id.*, at 6. We conclude that inter partes review is one of those conditions.[4]

For similar reasons, we disagree with the dissent's assumption that, because courts have traditionally adjudicated patent validity in this country, courts must forever continue to do so. See *post*, at 353–354. Historical practice is not decisive here because matters governed by the public-rights doctrine "from their nature" can be resolved in multiple ways: Congress can "reserve to itself the power to decide," "delegate that power to executive officers," or "commit it to judicial tribunals." *Ex parte Bakelite Corp.*, 279 U. S., at 451. That Congress chose the courts in the past does not foreclose its choice of the PTO today.

D

Finally, Oil States argues that inter partes review violates Article III because it shares "every salient characteristic associated with the exercise of the judicial power." Brief for Petitioner 20. Oil States highlights various procedures used in inter partes review: motion practice before the Board; discovery, depositions, and cross-examination of wit-

[4] Oil States also suggests that inter partes review could be an unconstitutional condition because it conditions the benefit of a patent on accepting the possibility of inter partes review. Cf. *Koontz* v. *St. Johns River Water Management Dist.*, 570 U. S. 595, 604 (2013) ("[T]he government may not deny a benefit to a person because he exercises a constitutional right" (internal quotation marks omitted)). Even assuming a patent is a "benefit" for purposes of the unconstitutional-conditions doctrine, that doctrine does not apply here. The doctrine prevents the Government from using conditions "to produce a result which it could not command directly." *Perry* v. *Sindermann*, 408 U. S. 593, 597 (1972) (internal quotation marks and alterations omitted). But inter partes review is consistent with Article III, see Part III–A, *supra*, and falls within Congress' Article I authority, see Part III–C, *supra*, so it is something Congress can "command directly," *Perry*, *supra*, at 597.

nesses; introduction of evidence and objections based on the Federal Rules of Evidence; and an adversarial hearing before the Board. See 35 U. S. C. § 316(a); 77 Fed. Reg. 48758, 48761–48763 (2012). Similarly, Oil States cites PTO regulations that use terms typically associated with courts—calling the hearing a "trial," *id.*, at 48758; the Board members "judges," *id.*, at 48763; and the Board's final decision a "judgment," *id.*, at 48761, 48766–48767.

But this Court has never adopted a "looks like" test to determine if an adjudication has improperly occurred outside of an Article III court. The fact that an agency uses court-like procedures does not necessarily mean it is exercising the judicial power. See *Freytag*, 501 U. S., at 910 (opinion of Scalia, J.). This Court has rejected the notion that a tribunal exercises Article III judicial power simply because it is "called a court and its decisions called judgments." *Williams* v. *United States*, 289 U. S. 553, 563 (1933). Nor does the fact that an administrative adjudication is final and binding on an individual who acquiesces in the result necessarily make it an exercise of the judicial power. See, *e. g.*, *Murray's Lessee*, 18 How., at 280–281 (permitting the Treasury Department to conduct "final and binding" audits outside of an Article III court). Although inter partes review includes some of the features of adversarial litigation, it does not make any binding determination regarding "the liability of [Greene's Energy] to [Oil States] under the law as defined." *Crowell*, 285 U. S., at 51. It remains a matter involving public rights, one "between the government and others, which from [its] nature do[es] not require judicial determination." *Ex parte Bakelite Corp.*, *supra*, at 451.[5]

---

[5] Oil States also points out that inter partes review "is initiated by private parties and implicates no waivers of sovereign immunity." Brief for Petitioner 30–31. But neither of those features takes inter partes review outside of the public-rights doctrine. That much is clear from *United States* v. *Duell*, 172 U. S. 576 (1899), which held that the doctrine covers

E

We emphasize the narrowness of our holding. We address the constitutionality of inter partes review only. We do not address whether other patent matters, such as infringement actions, can be heard in a non-Article III forum. And because the Patent Act provides for judicial review by the Federal Circuit, see 35 U. S. C. § 319, we need not consider whether inter partes review would be constitutional "without any sort of intervention by a court at any stage of the proceedings," *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U. S. 442, 455, n. 13 (1977). Moreover, we address only the precise constitutional challenges that Oil States raised here. Oil States does not challenge the retroactive application of inter partes review, even though that procedure was not in place when its patent issued. Nor has Oil States raised a due process challenge. Finally, our decision should not be misconstrued as suggesting that patents are not property for purposes of the Due Process Clause or the Takings Clause. See, *e. g.*, *Florida Prepaid Postsecondary Ed. Expense Bd.* v. *College Savings Bank*, 527 U. S. 627, 642 (1999); *James* v. *Campbell*, 104 U. S. 356, 358 (1882).

IV

In addition to Article III, Oil States challenges inter partes review under the Seventh Amendment. The Seventh

---

interference proceedings—a procedure to "determin[e] which of two claimants is entitled to a patent"—even though interference proceedings were initiated by "'private interests compet[ing] for preference'" and did not involve a waiver of sovereign immunity. *Id.*, at 582, 586 (quoting *Butterworth* v. *United States ex rel. Hoe*, 112 U. S. 50, 59 (1884)). Also, inter partes review is not initiated by private parties in the way that a common-law cause of action is. To be sure, a private party files the petition for review. 35 U. S. C. § 311(a). But the decision to institute review is made by the Director and committed to his unreviewable discretion. See *Cuozzo Speed Technologies, LLC* v. *Lee*, 579 U. S. 261, 273 (2016).

Amendment preserves the "right of trial by jury" in "Suits at common law, where the value in controversy shall exceed twenty dollars." This Court's precedents establish that, when Congress properly assigns a matter to adjudication in a non-Article III tribunal, "the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder." *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33, 53–54 (1989); accord, *Atlas Roofing Co.*, *supra*, at 450–455. No party challenges or attempts to distinguish those precedents. Thus, our rejection of Oil States' Article III challenge also resolves its Seventh Amendment challenge. Because inter partes review is a matter that Congress can properly assign to the PTO, a jury is not necessary in these proceedings.

V

Because inter partes review does not violate Article III or the Seventh Amendment, we affirm the judgment of the Court of Appeals.

It is so ordered.

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

I join the Court's opinion in full. The conclusion that inter partes review is a matter involving public rights is sufficient to show that it violates neither Article III nor the Seventh Amendment. But the Court's opinion should not be read to say that matters involving private rights may never be adjudicated other than by Article III courts, say, sometimes by agencies. Our precedent is to the contrary. *Stern* v. *Marshall*, 564 U. S. 462, 494 (2011); *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833, 853–856 (1986); see also *Stern*, *supra*, at 513 (BREYER, J., dissenting) ("The presence of 'private rights' does not automatically determine the outcome of the question but requires a more 'searching' examination of the relevant factors").

JUSTICE GORSUCH, with whom THE CHIEF JUSTICE joins, dissenting.

After much hard work and no little investment you devise something you think truly novel. Then you endure the further cost and effort of applying for a patent, devoting maybe $30,000 and two years to that process alone. At the end of it all, the Patent Office agrees your invention is novel and issues a patent. The patent affords you exclusive rights to the fruits of your labor for two decades. But what happens if someone later emerges from the woodwork, arguing that it was all a mistake and your patent should be canceled? Can a political appointee and his administrative agents, instead of an independent judge, resolve the dispute? The Court says yes. Respectfully, I disagree.

We sometimes take it for granted today that independent judges will hear our cases and controversies. But it wasn't always so. Before the Revolution, colonial judges depended on the Crown for their tenure and salary and often enough their decisions followed their interests. The problem was so serious that the founders cited it in their Declaration of Independence (see ¶11). Once free, the framers went to great lengths to guarantee a degree of judicial independence for future generations that they themselves had not experienced. Under the Constitution, judges "hold their Offices during good Behaviour" and their "Compensation . . . shall not be diminished during the[ir] Continuance in Office." Art. III, § 1. The framers knew that "a fixed provision" for judges' financial support would help secure "the independence of the judges," because "a power over a man's subsistence amounts to a power over his will." The Federalist No. 79, p. 472 (C. Rossiter ed. 1961) (A. Hamilton) (emphasis deleted). They were convinced, too, that "[p]eriodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to [the courts'] necessary independence." The Federalist No. 78, at 471 (A. Hamilton).

Today, the government invites us to retreat from the promise of judicial independence. Until recently, most everyone considered an issued patent a personal right—no less than a home or farm—that the federal government could revoke only with the concurrence of independent judges. But in the statute before us Congress has tapped an executive agency, the Patent Trial and Appeal Board, for the job. Supporters say this is a good thing because the Patent Office issues too many low quality patents; allowing a subdivision of that office to clean up problems after the fact, they assure us, promises an efficient solution. And, no doubt, dispensing with constitutionally prescribed procedures is often expedient. Whether it is the guarantee of a warrant before a search, a jury trial before a conviction—or, yes, a judicial hearing before a property interest is stripped away—the Constitution's constraints can slow things down. But economy supplies no license for ignoring these—often vitally inefficient—protections. The Constitution "reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs," and it is not our place to replace that judgment with our own. *United States* v. *Stevens*, 559 U. S. 460, 470 (2010).

Consider just how efficient the statute before us is. The Director of the Patent Office is a political appointee who serves at the pleasure of the President. 35 U. S. C. §§3(a)(1), (4). He supervises and pays the Board members responsible for deciding patent disputes. §§1(a), 3(b)(6), 6(a). The Director is allowed to select which of these members, and how many of them, will hear any particular patent challenge. See §6(c). If they (somehow) reach a result he does not like, the Director can add more members to the panel—including himself—and order the case reheard. See §§6(a), (c); *In re Alappat*, 33 F. 3d 1526, 1535 (CA Fed. 1994) (en banc); *Nidec Motor Corp.* v. *Zhongshan Broad Ocean Motor Co. Ltd.*, 868 F. 3d 1013, 1020 (CA Fed. 2017) (Dyk, J., concurring), cert. pending, No. 17–751. Nor has the Director

proven bashful about asserting these statutory powers to secure the " 'policy judgments' " he seeks. Brief for Petitioner 46 (quoting Patent Office Solicitor); see also Brief for Shire Pharmaceuticals LLC as *Amicus Curiae* 22–30.

No doubt this efficient scheme is well intended. But can there be any doubt that it also represents a retreat from the promise of judicial independence? Or that when an independent Judiciary gives ground to bureaucrats in the adjudication of cases, the losers will often prove the unpopular and vulnerable? Powerful interests are capable of amassing armies of lobbyists and lawyers to influence (and even capture) politically accountable bureaucracies. But what about everyone else?

Of course, all this invites the question: How do we know which cases independent judges must hear? The Constitution's original public meaning supplies the key, for the Constitution cannot secure the people's liberty any less today than it did the day it was ratified. The relevant constitutional provision, Article III, explains that the federal "judicial Power" is vested in independent judges. As originally understood, the judicial power extended to "suit[s] at the common law, or in equity, or admiralty." *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1856). From this and as we've recently explained, it follows that, "[w]hen a suit is made of the stuff of the traditional actions at common law tried by the courts at Westminster in 1789 . . . and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with" Article III judges endowed with the protections for their independence the framers thought so important. *Stern* v. *Marshall*, 564 U. S. 462, 484 (2011) (internal quotation marks omitted). The Court does not quarrel with this test. See *ante*, at 340–342. We part ways only on its application.[1]

[1] Some of our concurring colleagues see it differently. See *ante*, at 345 (BREYER, J., concurring). They point to language in *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833 (1986), promoting the notion that

As I read the historical record presented to us, only courts could hear patent challenges in England at the time of the founding. If facts were in dispute, the matter first had to proceed in the law courts. See, *e. g.*, *Newsham* v. *Gray*, 2 Atk. 286, 26 Eng. Rep. 575 (Ch. 1742). If successful there, a challenger then had to obtain a writ of *scire facias* in the law side of the Court of Chancery. See, *e. g.*, Pfander, Jurisdiction-Stripping and the Supreme Court's Power To Supervise Inferior Tribunals, 78 Texas L. Rev. 1433, 1446, n. 53 (2000); Lemley, Why Do Juries Decide If Patents Are Valid? 99 Va. L. Rev. 1673, 1686–1687 (2013) (Lemley, Juries). The last time an executive body (the King's Privy Council) invalidated an invention patent on an ordinary application was in 1745, in *Darby* v. *Betton*, PC2/99, pp. 358–359; and the last time the Privy Council even *considered* doing so was in 1753, in *Baker* v. *James*, PC2/103, pp. 320–321. After *Baker* v. *James*, the Privy Council "divest[ed] itself of its functions" in ordinary patent disputes, Hulme, Privy Council Law and Practice of Letters Patent for Invention From the Restoration to 1794 (Pt. II), 33 L. Q. Rev. 180, 194 (1917), which "thereafter [were] adjudicated solely by the law courts, as opposed to the [Crown's] prerogative courts," Mossoff, Rethinking the Development of Patents: An Intellectual History, 1550–1800, 52 Hastings L. J. 1255, 1286–1287 (2001) (Mossoff, Rethinking Patents).[2]

---

the political branches may "depart from the requirements of Article III" when the benefits outweigh the costs. *Id.*, at 851. Color me skeptical. The very point of our written Constitution was to prevent the government from "depart[ing]" from its protections for the people and their liberty just because someone later happens to think the costs outweigh the benefits. See *United States* v. *Stevens*, 559 U. S. 460, 470 (2010).

[2] See also Brief for H. Tomás Gómez-Arostegui et al. as *Amici Curiae* 6–37; Brief for Alliacense Limited LLC as *Amicus Curiae* 10–11; Gómez-Arostegui & Bottomley, Privy Council and *Scire Facias* 1700–1883, p. 2 (Nov. 6, 2017) (Addendum), https://ssrn.com/abstract=3054989 (all Internet materials as last visited Apr. 20, 2018); Observations on the Utility of Patents, and on the Sentiments of Lord Kenyon Respecting That Subject

This shift to courts paralleled a shift in thinking. Patents began as little more than feudal favors. *Id.*, at 1261. The Crown both issued and revoked them. Lemley, Juries 1680–1681. And they often permitted the lucky recipient the exclusive right to do very ordinary things, like operate a toll bridge or run a tavern. *Ibid.* But by the 18th century, inventors were busy in Britain and invention patents came to be seen in a different light. They came to be viewed not as endowing accidental and anticompetitive monopolies on the fortunate few but as a procompetitive means to secure to individuals the fruits of their labor and ingenuity; encourage others to emulate them; and promote public access to new technologies that would not otherwise exist. Mossoff, Rethinking Patents 1288–1289. The Constitution itself reflects this new thinking, authorizing the issuance of patents precisely because of their contribution to the "Progress of Science and useful Arts." Art. I, § 8, cl. 8. "In essence, there was a change in perception—from viewing a patent as a contract between the crown and the patentee to viewing it as a 'social contract' between the patentee and society." Walterscheid, The Early Evolution of the United States Patent Law: Antecedents (Pt. 3), 77 J. Pat. & Tm. Off. Soc. 771, 793 (1995). And as invention patents came to be seen so differently, it is no surprise courts came to treat them more solicitously.[3]

---

23 (2d ed. 1791) ("If persons of the same trade find themselves aggrieved by Patents taken for any thing already in use, their remedy is at hand. It is by a writ of *Scire Facias*"); *Mancius* v. *Lawton*, 10 Johns. 23, 24 (N. Y. 1813) (Kent, C. J.) (noting the "settled English course" that "[l]etters-patent . . . can only be avoided in chancery, by a writ of *scire facias* sued out on the part of the government, or by some individual prosecuting in its name" (emphasis deleted)).

[3] See also, *e. g.*, Mossoff, Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent "Privilege" in Historical Context, 92 Cornell L. Rev. 953, 967–968 (2007) (Mossoff, Reevaluating the Patent Privilege) ("[A]n American patent in the late eighteenth century was radically different from the royal monopoly privilege dispensed by Queen Eliz-

Unable to dispute that judges alone resolved virtually all patent challenges by the time of the founding, the Court points to three English cases that represent the Privy Council's dying gasp in this area: *Board of Ordnance* v. *Wilkinson*, PC2/123 (1779); *Grill [Grice]* v. *Waters*, PC2/127 (1782); and *Board of Ordnance* v. *Parr*, PC1/3919 (1810).[4] Filed in 1779, 1782, and 1810, each involved an effort to override a patent on munitions during wartime, no doubt in an effort to increase their supply. But even then appealing to the Privy Council was seen as a last resort. The 1779 petition (the last Privy Council revocation ever) came only after the patentee twice refused instructions to litigate the patent's validity in a court of law. Gómez-Arostegui & Bottomley, Addendum 6 (citing *Board of Ordnance* v. *Wilkinson*, PC2/123 (1779), and PC1/11/150 (1779)). The Council did not act on the 1782 petition but instead referred it to the Attorney General where it appears to have been abandoned. Gómez-Arostegui & Bottomley, Addendum 17–18. Meanwhile, in response to the 1810 petition the Attorney General admitted that *scire facias* was the "usual manner" of revoking a patent and so directed the petitioner to proceed at law even as he suggested the Privy Council might be available in the event

abeth or King James in the early seventeenth century. Patents no longer created, and sheltered from competition, manufacturing monopolies—they secured the exclusive control of an inventor over his novel and useful scientific or mechanical invention" (footnote omitted)); Mossoff, Rethinking Patents 1286–1287; H. Fox, Monopolies and Patents: A Study of the History and Future of the Patent Monopoly 4 (1947).

[4] The 1794 petition the Court invokes, *ante*, at 341, involved a Scottish patent. *Simpson* v. *Cunningham*, PC2/141, p. 88 (1794). The English and Scottish patents systems, however, were distinct and enforced by different regimes. Gómez-Arostegui, Patent and Copyright Exhaustion in England Circa 1800, pp. 10–16, 37, 49–50 (Feb. 9, 2017), https://ssrn.com/abstract=2905847. Besides, even in that case the Scottish Lord Advocate "'was of opinion, that the question should be tried in a court of law.'" Gómez-Arostegui & Bottomley, Addendum, *supra*, at 23 (citing Petition of William Cunningham, p. 5, *Cunningham* v. *Simpson*, Signet Library Edinburgh, Session Papers 207:3 (Ct. Sess. Feb. 23, 1796)).

of a "very pressing and imminent" danger to the public. *Id.*, at 20 (citing PC1/3919 (1810)).

In the end, these cases do very little to support the Court's holding. At most, they suggest that the Privy Council might have possessed some residual power to revoke patents to address wartime necessities. Equally, they might serve only as more unfortunate evidence of the maxim that in time of war, the laws fall silent.[5] But whatever they do, these cases do not come close to proving that patent disputes were routinely permitted to proceed outside a court of law.

Any lingering doubt about English law is resolved for me by looking to our own. While the Court is correct that the Constitution's Patent Clause "'was written against the backdrop'" of English practice, *ante*, at 341 (quoting *Graham* v. *John Deere Co. of Kansas City*, 383 U. S. 1, 5 (1966)), it's also true that the Clause sought to *reject* some of early English practice. Reflecting the growing sentiment that patents shouldn't be used for anticompetitive monopolies over "goods or businesses which had long before been enjoyed by the public," the framers wrote the Clause to protect only procompetitive invention patents that are the product of hard work and insight and "add to the sum of useful knowledge." *Id.*, at 5–6. In light of the Patent Clause's restrictions on this score, courts took the view that when the federal government "grants a patent the grantee is entitled to it *as a matter of right*, and does not receive it, as was originally supposed to be the case in England, as a matter of grace and favor." *James* v. *Campbell*, 104 U. S. 356, 358 (1882) (emphasis added). As Chief Justice Marshall explained, courts treated American invention patents as recognizing an "inchoate property" that exists "from the moment of invention." *Evans* v. *Jordan*, 8 F. Cas. 872, 873 (No. 4,564) (CC

[5] After all, the English statute of monopolies appeared to require the "force and validitie" of all patents to be determined only by "the Comon Lawes of this Realme & not otherwise." 21 Jac. 1, c. 3, §2 (1624). So the Privy Council cases on which the Court relies may not reflect the best understanding of the British Constitution.

Va. 1813). American patent holders thus were thought to "hol[d] a property in [their] invention[s] by as good a title as the farmer holds his farm and flock." *Hovey* v. *Henry*, 12 F. Cas. 603, 604 (No. 6,742) (CC Mass. 1846) (Woodbury, J.). And just as with farm and flock, it was widely accepted that the government could divest patent owners of their rights only through proceedings before independent judges.

This view held firm for most of our history. In fact, from the time it established the American patent system in 1790 until about 1980, Congress left the job of invalidating patents at the federal level to courts alone. The only apparent exception to this rule cited to us was a 4-year period when *foreign* patentees had to "work" or commercialize their patents or risk having them revoked. Hovenkamp, The Emergence of Classical American Patent Law, 58 Ariz. L. Rev. 263, 283–284 (2016). And the fact that for almost 200 years "earlier Congresses avoided use of [a] highly attractive"—and surely more efficient—means for extinguishing patents should serve as good "reason to believe that the power was thought not to exist" at the time of the founding. *Printz* v. *United States*, 521 U. S. 898, 905 (1997).

One more episode still underscores the point. When the Executive sought to claim the right to cancel a patent in the 1800s, this Court firmly rebuffed the effort. The Court explained:

> "It has been settled by repeated decisions of this court that when a patent has [been issued by] the Patent Office, it has passed beyond the control and jurisdiction of that office, and is not subject to be revoked or cancelled by the President, or any other officer of the Government. It has become the property of the patentee, and as such is entitled to the same legal protection as other property." *McCormick Harvesting Machine Co.* v. *Aultman*, 169 U. S. 606, 608–609 (1898) (citations omitted).

As a result, the Court held, "[t]he only authority competent to set a patent aside, or to annul it, or to correct it for any

reason whatever, is vested in the courts of the United States, and not in the department which issued the patent." *Id.*, at 609.

The Court today replies that *McCormick* sought only to interpret certain statutes then in force, not the Constitution. *Ante*, at 339, and n. 3. But this much is hard to see. Allowing the Executive to withdraw a patent, *McCormick* said, "would be to deprive the applicant of his property without due process of law, and would be in fact an invasion of the judicial branch of the government by the executive." 169 U. S., at 612. *McCormick* also pointed to "repeated decisions" in similar cases that themselves do not seem to rest merely on statutory grounds. See *id.*, at 608–609 (citing *United States* v. *Schurz*, 102 U. S. 378 (1880), and *United States* v. *American Bell Telephone Co.*, 128 U. S. 315 (1888)). And *McCormick* equated invention patents with land patents. 169 U. S., at 609. That is significant because, while the Executive has always dispensed public lands to homesteaders and other private persons, it has never been constitutionally empowered to withdraw land patents from their recipients (or their successors-in-interest) except through a "judgment of a court." *United States* v. *Stone*, 2 Wall. 525, 535 (1865); *Wellness Int'l Network, Ltd.* v. *Sharif*, 575 U. S. 665, 715 (2015) (THOMAS, J., dissenting) ("Although Congress could authorize executive agencies to dispose of public rights in land—often by means of adjudicating a claimant's qualifications for a land grant under a statute—the United States had to go to the courts if it wished to revoke a patent" (emphasis deleted)).

With so much in the relevant history and precedent against it, the Court invites us to look elsewhere. Instead of focusing on the revocation of patents, it asks us to abstract the level of our inquiry and focus on their issuance. Because the job of issuing invention patents traditionally belonged to the Executive, the Court proceeds to argue, the job of revoking them can be left there too. *Ante*, at 334–337. But that

doesn't follow. Just because you give a gift doesn't mean you forever enjoy the right to reclaim it. And, as we've seen, just because the Executive could *issue* an invention (or land) patent did not mean the Executive could *revoke* it. To reward those who had proven the social utility of their work (and to induce others to follow suit), the law long afforded patent holders more protection than that against the threat of governmental intrusion and dispossession. The law requires us to honor those historical rights, not diminish them.

Still, the Court asks us to look away in yet another direction. At the founding, the Court notes, the Executive could sometimes both dispense and revoke public franchises. And because, it says, invention patents are a species of public franchises, the Court argues the Executive should be allowed to dispense and revoke them too. *Ante*, at 337. But labels aside, by the time of the founding the law treated patents protected by the Patent Clause quite differently from ordinary public franchises. Many public franchises amounted to little more than favors resembling the original royal patents the framers expressly refused to protect in the Patent Clause. The Court points to a good example: the state-granted exclusive right to operate a toll bridge. *Ibid.* By the founding, courts in this country (as in England) had come to view anticompetitive monopolies like that with disfavor, narrowly construing the rights they conferred. See *Proprietors of Charles River Bridge* v. *Proprietors of Warren Bridge*, 11 Pet. 420, 544 (1837). By contrast, courts routinely applied to invention patents protected by the Patent Clause the "liberal common sense construction" that applies to other instruments creating private property rights, like land deeds. *Davis* v. *Palmer*, 7 F. Cas. 154, 158 (No. 3,645) (CC Va. 1827) (Marshall, C. J.); see also Mossoff, Reevaluating the Patent Privilege 990 (listing more differences in treatment). As Justice Story explained, invention patents protected by the Patent Clause were "not to be treated as mere monopolies odious in the eyes of the law, and

therefore not to be favored." *Ames* v. *Howard*, 1 F. Cas. 755, 756 (No. 326) (CC Mass. 1833). For precisely these reasons and as we've seen, the law traditionally treated patents issued under the Patent Clause very differently than monopoly franchises when it came to governmental invasions. Patents alone required independent judges. Nor can simply invoking a mismatched label obscure that fact. The people's historic rights to have independent judges decide their disputes with the government should not be a "constitutional Maginot Line, easily circumvented" by such "simpl[e] maneuver[s]." *Bank Markazi* v. *Peterson*, 578 U. S. 212, 247 (2016) (ROBERTS, C. J., dissenting).

Today's decision may not represent a rout but it at least signals a retreat from Article III's guarantees. Ceding to the political branches ground they wish to take in the name of efficient government may seem like an act of judicial restraint. But enforcing Article III isn't about protecting judicial authority for its own sake. It's about ensuring the people today and tomorrow enjoy no fewer rights against governmental intrusion than those who came before. And the loss of the right to an independent judge is never a small thing. It's for that reason Hamilton warned the Judiciary to take "all possible care . . . to defend itself against" intrusions by the other branches. The Federalist No. 78, at 466. It's for that reason I respectfully dissent.

Syllabus

SAS INSTITUTE INC. *v.* IANCU, DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE, ET AL.

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

No. 16–969. Argued November 27, 2017—Decided April 24, 2018

Inter partes review allows private parties to challenge previously issued patent claims in an adversarial process before the Patent Office. At the outset, a party must file a petition to institute review, 35 U. S. C. § 311(a), that identifies the challenged claims and the grounds for challenge with particularity, § 312(a)(3). The patent owner, in turn, may file a response. § 313. If the Director of the Patent Office determines "there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition," § 314(a), he decides "whether to institute . . . review . . . pursuant to [the] petition," § 314(b). "If . . . review is instituted and not dismissed," at the end of the litigation the Patent Trial and Appeal Board "shall issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner." § 318(a).

Petitioner SAS sought review of respondent ComplementSoft's software patent, alleging that all 16 of the patent's claims were unpatentable. Relying on a Patent Office regulation recognizing a power of "partial institution," 37 CFR § 42.108(a), the Director instituted review on some of the claims and denied review on the rest. The Board's final decision addressed only the claims on which the Director had instituted review. On appeal, the Federal Circuit rejected SAS's argument that § 318(a) required the Board to decide the patentability of every claim challenged in the petition.

Held: When the Patent Office institutes an inter partes review, it must decide the patentability of all of the claims the petitioner has challenged. The plain text of § 318(a) resolves this case. Its directive is both mandatory and comprehensive. The word "shall" generally imposes a nondiscretionary duty, and the word "any" ordinarily implies every member of a group. Thus, § 318(a) means that the Board *must* address *every* claim the petitioner has challenged. The Director's "partial institution" power appears nowhere in the statutory text. And both text and context strongly counsel against inferring such a power.

The statute envisions an inter partes review guided by the initial petition. See § 312(a)(3). Congress structured the process such that the petitioner, not the Director, defines the proceeding's contours. The

ex parte reexamination statute shows that Congress knew exactly how to authorize the Director to investigate patentability questions "[o]n his own initiative, and at any time," § 303(a). The inter partes review statute indicates that the Director's decision "whether" to institute review "pursuant to [the] petition" is a yes-or-no choice. § 314(b).

Section 314(a)'s requirement that the Director find "a reasonable likelihood" that the petitioner will prevail on "at least 1 of the claims challenged in the petition" suggests, if anything, a regime where a reasonable prospect of success on a single claim justifies review of them all. Again, if Congress had wanted to adopt the Director's claim-by-claim approach, it knew how to do so. See § 304. Nor does it follow that, because § 314(a) invests the Director with discretion on the question *whether* to institute review, it also invests him with discretion regarding *what* claims that review will encompass. The rest of the statute confirms, too, that the petitioner's petition, not the Director's discretion, should guide the life of the litigation. See, *e. g.*, § 316(a)(8).

The Director suggests that a textual discrepancy between § 314(a)—which addresses whether to institute review based on claims found "in the petition"—and § 318(a)—which addresses the Board's final resolution of the claims challenged "by the petitioner"—means that the Director enjoys the power to institute a review covering fewer than all of the claims challenged in the petition. However, the statute's winnowing mechanism—which allows a patent owner to concede one part of a petitioner's challenge and "[c]ancel any challenged patent claim," § 316(d)(1)(A)—fully explains why Congress adopted the slightly different language.

The Director's policy argument—that partial institution is efficient because it permits the Board to focus on the most promising challenges and avoid spending time and resources on others—is properly addressed to Congress, not this Court. And the Director's asserted "partial institution" power, which is wholly unmentioned in the statute, is not entitled to deference under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837. Finally, notwithstanding § 314(d)—which makes the Director's determination whether to institute an inter partes review "final and nonappealable"—judicial review remains available consistent with the Administrative Procedure Act to ensure that the Patent Office does not exceed its statutory bounds. *Cuozzo Speed Technologies, LLC* v. *Lee*, 579 U. S. 261, distinguished. Pp. 362–371.

825 F. 3d 1341, reversed and remanded.

GORSUCH, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and ALITO, JJ., joined. GINSBURG, J., filed

a dissenting opinion, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 372. BREYER, J., filed a dissenting opinion, in which GINSBURG and SOTOMAYOR, JJ., joined, and in which KAGAN, J., joined except as to Part III–A, *post*, p. 372.

Gregory A. Castanias argued the cause for petitioner. With him on the briefs were *John A. Marlott* and *David B. Cochran.*

Jonathan C. Bond argued the cause for respondents. With him on the brief for the federal respondent were *Acting Solicitor General Wall*, *Deputy Solicitor General Stewart*, *Mark R. Freeman*, *Joshua M. Salzman*, *Nathan K. Kelley*, *Thomas W. Krause*, *Joseph G. Piccolo*, and *Robert J. McManus.* *Michael Kanovitz* and *Matthew V. Topic* filed a brief for respondent ComplementSoft, LLC.*

JUSTICE GORSUCH delivered the opinion of the Court.

A few years ago Congress created "inter partes review." The new procedure allows private parties to challenge previously issued patent claims in an adversarial process before the Patent Office that mimics civil litigation. Recently, the Court upheld the inter partes review statute against a constitutional challenge. *Oil States Energy Services, LLC* v. *Greene's Energy Group, LLC*, *ante*, p. 325. Now we take up a question concerning the statute's operation. When the Patent Office initiates an inter partes review, must it resolve *all* of the claims in the case, or may it choose to limit its review to only *some* of them? The statute, we find, supplies a clear answer: The Patent Office must "issue a final written decision with respect to the patentability of *any* patent claim challenged by the petitioner." 35 U. S. C. § 318(a) (emphasis added). In this context, as in so many others, "any" means

---

**Lauren A. Degnan*, *Kevin H. Rhodes*, and *Steven W. Miller* filed a brief for the Intellectual Property Owners Association as *amicus curiae* urging reversal.

Iftikhar Ahmed filed a brief for the Houston Intellectual Property Law Association as *amicus curiae* urging affirmance.

"every." The agency cannot curate the claims at issue but must decide them all.

"To promote the Progress of Science and useful Arts," Congress long ago created a patent system granting inventors rights over the manufacture, sale, and use of their inventions. U. S. Const., Art. I, § 8, cl. 8; see 35 U. S. C. § 154(a)(1). To win a patent, an applicant must (among other things) file "claims" that describe the invention and establish to the satisfaction of the Patent Office the invention's novelty and nonobviousness. See §§ 102, 103, 112(b), 131; *Cuozzo Speed Technologies, LLC* v. *Lee*, 579 U. S. 261, 266–267 (2016).

Sometimes, though, bad patents slip through. Maybe the invention wasn't novel, or maybe it was obvious all along, and the patent owner shouldn't enjoy the special privileges it has received. To remedy these sorts of problems, Congress has long permitted parties to challenge the validity of patent claims in federal court. See §§ 282(b)(2)–(3). More recently, Congress has supplemented litigation with various administrative remedies. The first of these was ex parte reexamination. Anyone, including the Director of the Patent Office, can seek ex parte reexamination of a patent claim. §§ 302, 303(a). Once instituted, though, an ex parte reexamination follows essentially the same inquisitorial process between patent owner and examiner as the initial Patent Office examination. § 305. Later, Congress supplemented ex parte reexamination with inter partes reexamination. Inter partes reexamination (since repealed) provided a slightly more adversarial process, allowing a third party challenger to submit comments throughout the proceeding. § 314(b)(2) (2006 ed.) (repealed). But otherwise it too followed a more or less inquisitorial course led by the Patent Office. § 314(a). Apparently unsatisfied with this approach, in 2011 Congress repealed inter partes reexamination and replaced it with inter partes review. See §§ 311–319 (2012 ed.).

The new inter partes review regime looks a good deal more like civil litigation. At its outset, a party must file "a petition to institute an inter partes review of [a] patent." § 311(a). The petition "may request to cancel as unpatentable 1 or more claims of [the] patent" on the ground that the claims are obvious or not novel. § 311(b); see §§ 102 and 103. In doing so, the petition must identify "each claim challenged," the grounds for the challenge, and the evidence supporting the challenge. § 312(a)(3). The patent owner, in turn, may respond with "a preliminary response to the petition" explaining "why no inter partes review should be instituted." § 313. With the parties' submissions before him, the Director then decides "whether to institute an inter partes review . . . pursuant to [the] petition." § 314(b). (In practice, the agency's Patent Trial and Appeal Board exercises this authority on behalf of the Director, see 37 CFR § 42.4(a) (2017).) Before instituting review, the Director must determine, based on the parties' papers, "that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition." 35 U. S. C. § 314(a).

Once the Director institutes an inter partes review, the matter proceeds before the Board with many of the usual trappings of litigation. The parties conduct discovery and join issue in briefing and at an oral hearing. §§ 316(a)(5), (6), (8), (10), (13). During the course of the case, the patent owner may seek to amend its patent or to cancel one or more of its claims. § 316(d). The parties may also settle their differences and seek to end the review. § 317. But "[i]f an inter partes review is instituted and not dismissed," at the end of the litigation the Board "shall issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner." § 318(a).

Our case arose when SAS sought an inter partes review of ComplementSoft's software patent. In its petition, SAS alleged that all 16 of the patent's claims were unpatentable

for various reasons. The Director (in truth the Board acting on the Director's behalf) concluded that SAS was likely to succeed with respect to at least one of the claims and that an inter partes review was therefore warranted. But instead of instituting review on all of the claims challenged in the petition, the Director instituted review on only some (claims 1 and 3–10) and denied review on the rest. The Director did all this on the strength of a Patent Office regulation that purported to recognize a power of "partial institution," claiming that "[w]hen instituting *inter partes* review, the [Director] may authorize the review to proceed on all or some of the challenged claims and on all or some or the grounds of unpatentability asserted for each claim." 37 CFR § 42.108(a). At the end of litigation, the Board issued a final written decision finding claims 1, 3, and 5–10 to be unpatentable while upholding claim 4. But the Board's decision did not address the remaining claims on which the Director had refused review.

That last fact led SAS to seek review in the Federal Circuit. There SAS argued that 35 U. S. C. § 318(a) required the Board to decide the patentability of *every* claim SAS challenged in its petition, not just some. For its part, the Federal Circuit rejected SAS's argument over a vigorous dissent by Judge Newman. *SAS Institute, Inc.* v. *ComplementSoft, LLC*, 825 F. 3d 1341 (2016). We granted certiorari to decide the question ourselves. 581 U. S. 992 (2017).

We find that the plain text of § 318(a) supplies a ready answer. It directs that "[i]f an inter partes review is instituted and not dismissed under this chapter, the [Board] *shall issue* a final written decision with respect to the patentability of *any patent claim challenged by the petitioner* . . . ." § 318(a) (emphasis added). This directive is both mandatory and comprehensive. The word "shall" generally imposes a nondiscretionary duty. See *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U. S. 26, 35 (1998). And the word "any" naturally carries "an expansive meaning."

United States v. *Gonzales*, 520 U. S. 1, 5 (1997). When used (as here) with a "singular noun in affirmative contexts," the word "any" ordinarily "refer[s] to a member of a particular group or class without distinction or limitation" and in this way "impl[ies] *every* member of the class or group." Oxford English Dictionary (3d ed., Mar. 2016), www.oed.com/view/Entry/8973 (OED) (emphasis added) (all Internet materials as last visited Apr. 20, 2018). So when § 318(a) says the Board's final written decision "shall" resolve the patentability of "any patent claim challenged by the petitioner," it means the Board *must* address *every* claim the petitioner has challenged.

That would seem to make this an easy case. Where a statute's language carries a plain meaning, the duty of an administrative agency is to follow its commands as written, not to supplant those commands with others it may prefer. *Social Security Bd.* v. *Nierotko*, 327 U. S. 358, 369 (1946). Because SAS challenged all 16 claims of ComplementSoft's patent, the Board in its final written decision had to address the patentability of all 16 claims. Much as in the civil litigation system it mimics, in an inter partes review the petitioner is master of its complaint and normally entitled to judgment on all of the claims it raises, not just those the decisionmaker might wish to address.

The Director replies that things are not quite as simple as they seem. Maybe the Board has to decide every claim challenged by the petitioner in an inter partes review. But, he says, that doesn't mean every challenged claim gains admission to the review process. In the Director's view, he retains discretion to decide which claims make it into an inter partes review and which don't. The trouble is, nothing in the statute says anything like that. The Director's claimed "partial institution" power appears nowhere in the text of § 318, or anywhere else in the statute for that matter. And what can be found in the statutory text and context strongly counsels against the Director's view.

Start where the statute does. In its very first provision, the statute says that a party may seek inter partes review by filing "a petition to institute an inter partes review." § 311(a). This language doesn't authorize the Director to start proceedings on his own initiative. Nor does it contemplate a petition that asks the Director to initiate whatever kind of inter partes review he might choose. Instead, the statute envisions that a petitioner will seek an inter partes review of a particular kind—one guided by a petition describing "each claim challenged" and "the grounds on which the challenge to each claim is based." § 312(a)(3). From the outset, we see that Congress chose to structure a process in which it's the petitioner, not the Director, who gets to define the contours of the proceeding. And "[j]ust as Congress' choice of words is presumed to be deliberate" and deserving of judicial respect, "so too are its structural choices." *University of Tex. Southwestern Medical Center* v. *Nassar*, 570 U. S. 338, 353 (2013).

It's telling, too, to compare this structure with what came before. In the ex parte reexamination statute, Congress embraced an inquisitorial approach, authorizing the Director to investigate a question of patentability "[o]n his own initiative, and any time." § 303(a). If Congress had wanted to give the Director similar authority over the institution of inter partes review, it knew exactly how to do so—it could have simply borrowed from the statute next door. But rather than create (another) agency-led, inquisitorial process for reconsidering patents, Congress opted for a party-directed, adversarial process. Congress's choice to depart from the model of a closely related statute is a choice neither we nor the agency may disregard. See *Nassar*, *supra*, at 353–354.

More confirmation comes as we move to the point of institution. Here the statute says the Director must decide "whether to institute an inter partes review . . . pursuant to a petition." § 314(b). The Director, we see, is given only

the choice "whether" to institute an inter partes review. That language indicates a binary choice—either institute review or don't. And by using the term "pursuant to," Congress told the Director what he must say yes or no to: an inter partes review that proceeds "[i]n accordance with" or "in conformance to" the petition. OED, www.oed.com/view/Entry/155073. Nothing suggests the Director enjoys a license to depart from the petition and institute a *different* inter partes review of his own design.

To this the Director replies by pointing to another part of § 314. Section 314(a) provides that the Director may not authorize an inter partes review unless he determines "there is a reasonable likelihood" the petitioner will prevail on "at least 1 of the claims challenged in the petition." The Director argues that this language requires him to "evaluate claims individually" and so must allow him to institute review on a claim-by-claim basis as well. Brief for Federal Respondent 28. But this language, if anything, suggests just the opposite. Section 314(a) does not require the Director to evaluate every claim individually. Instead, it simply requires him to decide whether the petitioner is likely to succeed on "at least 1" claim. Once that single claim threshold is satisfied, it doesn't matter whether the petitioner is likely to prevail on any *additional* claims; the Director need not even consider any other claim before instituting review. Rather than contemplate claim-by-claim institution, then, the language anticipates a regime where a reasonable prospect of success on a single claim justifies review of all.

Here again we know that if Congress wanted to adopt the Director's approach it knew exactly how to do so. The ex parte reexamination statute allows the Director to assess whether a request raises "a substantial new question of patentability affecting any claim" and (if so) to institute reexamination limited to "resolution of *the question*." § 304 (emphasis added). In other words, that statute allows the Director to institute proceedings on a claim-by-claim and

ground-by-ground basis. But Congress didn't choose to pursue that known and readily available approach here. And its choice to try something new must be given effect rather than disregarded in favor of the comfort of what came before. See *Nassar*, *supra*, at 353–354.

Faced with this difficulty, the Director tries another tack. He points to the fact that § 314(a) doesn't *require* him to institute an inter partes review even after he finds the "reasonable likelihood" threshold met with respect to one claim. Whether to institute proceedings upon such a finding, he says, remains a matter left to his discretion. See *Cuozzo*, 579 U. S., at 273. But while § 314(a) invests the Director with discretion on the question *whether* to institute review, it doesn't follow that the statute affords him discretion regarding *what* claims that review will encompass. The text says only that the Director can decide "whether" to institute the requested review—not "whether *and to what extent*" review should proceed. § 314(b).

The rest of the statute confirms, too, that the petitioner's petition, not the Director's discretion, is supposed to guide the life of the litigation. For example, § 316(a)(8) tells the Director to adopt regulations ensuring that, "after an inter partes review has been instituted," the patent owner will file "a response to the petition." Surely it would have made little sense for Congress to insist on a response *to the petition* if, in truth, the Director enjoyed the discretion to limit the claims under review. What's the point, after all, of answering claims that aren't in the proceeding? If Congress had meant to afford the Director the power he asserts, we would have expected it to instruct him to adopt regulations requiring the patent owner to file a response *to the Director's institution notice* or *to the claims on which the Director instituted review*. Yet we have nothing like that here. And then and again there is § 318(a). At the end of the proceeding, § 318(a) categorically commands the Board to address in its final written decision "any patent claim challenged by the

petitioner." In all these ways, the statute tells us that the petitioner's contentions, not the Director's discretion, define the scope of the litigation all the way from institution through to conclusion.

The Director says we can find at least some hint of the discretion he seeks by comparing § 314(a) and § 318(a). He notes that, when addressing whether to institute review at the beginning of the litigation, § 314(a) says he must focus on the claims found "in the petition"; but when addressing what claims the Board must address at the end of the litigation, § 318(a) says it must resolve the claims challenged "by the petitioner." According to the Director, this (slight) linguistic discrepancy means the claims the Board must address in its final decision are not necessarily the same as those identified in the petition. And the only possible explanation for this arrangement, the Director submits, is that he must enjoy the (admittedly implicit) power to institute an inter partes review that covers fewer than all of the claims challenged in the petition.

We just don't see it. Whatever differences they might display, § 314(a) and § 318(a) both focus on the *petitioner's* contentions and, given that, it's difficult to see how they might be read to give the *Director* power to decide what claims are at issue. Particularly when there's a much simpler and sounder explanation for the statute's wording. As we've seen, a patent owner may move to "[c]ancel any challenged patent claim" during the course of an inter partes review, effectively conceding one part of a petitioner's challenge. § 316(d)(1)(A). Naturally, then, the claims challenged "in the petition" will not always survive to the end of the case; some may drop out thanks to the patent owner's actions. And in that light it is plain enough why Congress provided that only claims still challenged "by the petitioner" at the litigation's end must be addressed in the Board's final written decision. The statute's own winnowing mechanism fully explains why Congress adopted slightly different lan-

guage in § 314(a) and § 318(a). We need not and will not invent an atextual explanation for Congress's drafting choices when the statute's own terms supply an answer. See *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235, 240–241 (1989) ("[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute").

Moving past the statute's text and context, the Director attempts a policy argument. He tells us that partial institution is efficient because it permits the Board to focus on the most promising challenges and avoid spending time and resources on others. Brief for Federal Respondent 35–36; see also *post*, at 372 (GINSBURG, J., dissenting); *post*, at 378–379 (BREYER, J., dissenting). SAS responds that all patent challenges usually end up being litigated *somewhere*, and that partial institution creates inefficiency by requiring the parties to litigate in two places instead of one—the Board for claims the Director chooses to entertain and a federal court for claims he refuses. Indeed, SAS notes, the government itself once took the same view, arguing that partial institution "'undermine[s] the Congressional efficiency goal'" for this very reason. Brief for Petitioner 30. Each side offers plausible reasons why its approach might make for the more efficient policy. But who should win that debate isn't our call to make. Policy arguments are properly addressed to Congress, not this Court. It is Congress's job to enact policy and it is this Court's job to follow the policy Congress has prescribed. And whatever its virtues or vices, Congress's prescribed policy here is clear: The petitioner in an inter partes review is entitled to a decision on all the claims it has challenged.*

---

*JUSTICE GINSBURG suggests the Director might yet avoid this command by refusing to review a petition he thinks too broad while signaling his willingness to entertain one more tailored to his sympathies. *Post*, at 372 (dissenting opinion). We have no occasion today to consider whether this stratagem is consistent with the statute's demands. See *Cuozzo*

That leaves the Director to suggest that, however this Court might read the statute, he should win anyway because of *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). Even though the statute says nothing about his asserted "partial institution" power, the Director says the statute is at least ambiguous on the propriety of the practice and so we should leave the matter to his judgment. For its part, SAS replies that we might use this case as an opportunity to abandon *Chevron* and embrace the "'impressive body'" of pre-*Chevron* law recognizing that "'the meaning of a statutory term'" is properly a matter for "'judicial [rather than] administrative judgment.'" Brief for Petitioner 41 (quoting *Pittston Stevedoring Corp.* v. *Dellaventura*, 544 F. 2d 35, 49 (CA2 1976) (Friendly, J.)).

But whether *Chevron* should remain is a question we may leave for another day. Even under *Chevron*, we owe an agency's interpretation of the law no deference unless, after "employing traditional tools of statutory construction," we find ourselves unable to discern Congress's meaning. 467 U. S., at 843, n. 9. And after applying traditional tools of interpretation here, we are left with no uncertainty that could warrant deference. The statutory provisions before us deliver unmistakable commands. The statute hinges inter partes review on the filing of a petition challenging specific patent claims; it makes the petition the centerpiece of the proceeding both before and after institution; and it

---

Speed Technologies, LLC v. *Lee*, 579 U. S. 261, 275 (2016) (noting that courts may invalidate "'shenanigans'" by the Director that are "outside [his] statutory limits"); *CAB* v. *Delta Air Lines, Inc.*, 367 U. S. 316, 328 (1961) (questioning an agency's "power to do indirectly what it cannot do directly"). But even assuming (without granting) the law would tolerate this tactic, it would show only that a lawful means exists for the Director to achieve his policy aims—not that he "should be allowed to improvise on the powers granted by Congress" by devising an extralegal path to the same goal. *Id.*, at 330. That an agency's improvisation might be thought by some more expedient than what the law allows, *post*, at 372, does nothing to commend it either, for lawful ends do not justify unlawful means.

requires the Board's final written decision to address every claim the petitioner presents for review. There is no room in this scheme for a wholly unmentioned "partial institution" power that lets the Director select only some challenged claims for decision. The Director may (today) think his approach makes for better policy, but policy considerations cannot create an ambiguity when the words on the page are clear. See *SEC* v. *Sloan*, 436 U. S. 103, 116–117 (1978). Neither may we defer to an agency official's preferences because we imagine some "hypothetical reasonable legislator" would have favored that approach. *Post*, at 380 (BREYER, J., dissenting). Our duty is to give effect to the text that 535 *actual* legislators (plus one President) enacted into law.

At this point, only one final question remains to resolve. Even if the statute forbids his partial institution practice, the Director suggests we lack the power to say so. By way of support, he points to § 314(d) and our decision in *Cuozzo*, 579 U. S. 261. Section 314(d) says that the "determination by the Director whether to institute an inter partes review under this section shall be final and nonappealable." In *Cuozzo*, we held that this provision prevented courts from entertaining an argument that the Director erred in instituting an inter partes review of certain patent claims. *Id.*, at 271–276. The Director reads these authorities as foreclosing judicial review of any legal question bearing on the institution of inter partes review—including whether the statute permits his "partial institution" practice.

But this reading overreads both the statute and our precedent. As *Cuozzo* recognized, we begin with "the 'strong presumption' in favor of judicial review." *Id.*, at 273. To overcome that presumption, *Cuozzo* explained, this Court's precedents require "clear and convincing indications" that Congress meant to foreclose review. *Ibid.* (internal quotation marks omitted). Given the strength of this presumption and the statute's text, *Cuozzo* concluded that § 314(d) precludes judicial review only of the Director's "initial determination" under § 314(a) that "there is a 'reasonable likeli-

hood' that the claims are unpatentable on the grounds asserted" and review is therefore justified. *Ibid.*; see *id.*, at 275 (review unavailable "where a patent holder merely challenges the Patent Office's 'determin[ation] that the information presented in the petition . . . shows that there is a reasonable likelihood' of success 'with respect to at least 1 of the claims challenged' "); *id.*, at 276 (claim that a "petition was not pleaded 'with particularity' under § 312 is little more than a challenge to the Patent Office's conclusion, under § 314(a), that the 'information presented in the petition' warranted review"). In fact, *Cuozzo* proceeded to emphasize that § 314(d) does not "enable the agency to act outside its statutory limits." *Id.*, at 275. If a party believes the Patent Office has engaged in " 'shenanigans' " by exceeding its statutory bounds, judicial review remains available consistent with the Administrative Procedure Act, which directs courts to set aside agency action "not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations." *Ibid.*; 5 U. S. C. §§ 706(2)(A), (C).

And that, of course, is exactly the sort of question we are called upon to decide today. SAS does not seek to challenge the Director's conclusion that it showed a "reasonable likelihood" of success sufficient to warrant "institut[ing] an inter partes review." 35 U. S. C. §§ 314(a), (d). No doubt SAS remains very pleased with the Director's judgment on that score. Instead, SAS contends that the Director exceeded his statutory authority by limiting the review to fewer than all of the claims SAS challenged. And nothing in § 314(d) or *Cuozzo* withdraws our power to ensure that an inter partes review proceeds in accordance with the law's demands.

Because everything in the statute before us confirms that SAS is entitled to a final written decision addressing all of the claims it has challenged and nothing suggests we lack the power to say so, the judgment of the Federal Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

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

Given the Court's wooden reading of 35 U. S. C. § 318(a), and with "no mandate to institute [inter partes] review" at all, *Cuozzo Speed Technologies, LLC* v. *Lee*, 579 U. S. 261, 273 (2016), the Patent Trial and Appeal Board could simply deny a petition containing challenges having no "reasonable likelihood" of success, § 314(a). Simultaneously, the Board might note that one or more specified claims warrant reexamination, while others challenged in the petition do not. Petitioners would then be free to file new or amended petitions shorn of challenges the Board finds unworthy of inter partes review. Why should the statute be read to preclude the Board's more rational way to weed out insubstantial challenges? For the reasons stated by JUSTICE BREYER, the Court's opinion offers no persuasive answer to that question, and no cause to believe Congress wanted the Board to spend its time so uselessly.

JUSTICE BREYER, with whom JUSTICE GINSBURG and JUSTICE SOTOMAYOR join, and with whom JUSTICE KAGAN joins except as to Part III–A, dissenting.

This case requires us to engage in a typical judicial exercise, construing a statute that is technical, unclear, and constitutes a minor procedural part of a larger administrative scheme. I would follow an interpretive technique that judges often use in such cases. Initially, using "traditional tools of statutory construction," *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 446 (1987), I would look to see whether the relevant statutory phrase is ambiguous or leaves a gap that Congress implicitly delegated authority to the agency to fill. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984). If so, I would look to see whether the agency's interpretation is reasonable. *Id.*, at 843. Because I believe there is such a gap and because the Patent Office's interpretation of the ambiguous phrase is rea-

sonable, I would conclude that the Patent Office's interpretation is lawful.

I

The Court sets out the statutory framework that establishes "inter partes review." See *ante*, at 361; 35 U. S. C. §§311–319. An example will help the reader keep that framework in mind. Suppose the Patent Office issues a patent containing, say, 16 different claims. A challenger, believing the patent is invalid, seeks to invoke the inter partes review procedure.

The statutory chapter entitled "Inter partes review" explains just how this is to be done. See §§311–319. First, the challenger files a petition requesting "cancel[lation]" of one or more of the patent claims as "unpatentable" because "prior art" shows, for example, that they are not "novel." §311(b); see §§102, 103. That petition must detail the grounds for the challenge and the supporting evidence, along with providing certain technical information. §312. Second, the patent owner may file a "preliminary response" to the petition. §313.

Third, the Director of the Patent Office will decide whether to "institute" inter partes review. §314. The statute specifies that the Director "may not authorize an inter partes review to be instituted unless the Director determines . . . that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition." §314(a). Thus, in my example, if the Director determines that none of the 16 challenges in the petition has likely merit, he cannot institute an inter partes review. Even if there is one potentially meritorious challenge, we have said that the statute contains "no mandate to institute review," so the Director still has discretion to deny a petition. *Cuozzo Speed Technologies, LLC* v. *Lee*, 579 U. S. 261, 273 (2016). We have also held that the Director's decision whether to institute review is normally not reviewable. *Id.*, at 275–276.

The Director, by regulation, has delegated the power to institute review to the Patent Trial and Appeal Board. 37 CFR § 42.4(a) (2017). And the Director has further provided by regulation that where a petition challenges several patent claims (say, all 16 claims in my example), "the Board may authorize the review to proceed on all *or some* of the challenged claims." § 42.108(a) (emphasis added). Thus, where some, but not all, of the challenges have likely merit (say, 1 of the 16 has likely merit and the others are close to frivolous), the Board is free to conduct inter partes review only as to the challenge with likely merit.

Fourth, the statute next describes the relation of a petition for review and an instituted review to other proceedings involving the challenged patent. 35 U. S. C. § 315. Fifth, the statute describes what happens once the Board begins its inter partes review, including how the Board is to take evidence and make its decisions, § 316, and the nature and effect of settlements, § 317.

Sixth, the statute sets forth the section primarily at issue here, which describes what happens at the end of the process. It says:

> "Final Written Decision.—If an inter partes review is instituted and not dismissed under this chapter, the Patent Trial and Appeal Board shall issue a final written decision with respect to the patentability of *any patent claim challenged by the petitioner* and any new claim added under section 316(d)." § 318(a) (emphasis added).

Finally, the chapter says that a "party dissatisfied with the final written decision . . . may appeal the decision" to the U. S. Court of Appeals for the Federal Circuit. § 319; see § 141(c).

Thus, going through this process, if a petitioner files a petition challenging 16 claims and the Board finds that the challenges to 15 of the claims are frivolous, the Board may then, as it interprets the statute, begin and proceed through the inter partes review process as to the remaining claim, num-

ber 16, but not in respect to the other 15 claims. Eventually the Board will produce a "final written decision" as to the patentability of claim number 16, which decision the challenger (or the patentee) can appeal to the Federal Circuit.

II

Now let us return to the question at hand, the meaning of the phrase "any patent claim challenged by the petitioner" in § 318(a). Do those words unambiguously refer, as the majority believes, to "any patent claim challenged by the petitioner" *in the petitioner's original petition*? The words "in the petitioner's original petition" do not appear in the statute. And the words that do appear, "any patent claim challenged by the petitioner," could be modified by using different words that similarly do not appear, for example, the words "in the inter partes review proceeding." But without added words, the phrase "challenged by the petitioner" does not tell us whether the relevant challenge is one made in the initial petition or only one made in the inter partes review proceeding itself. And, linguistically speaking, there is as much reason to fill that gap with reference to the claims still being challenged in the proceeding itself as there is to fill it with reference to claims that were initially challenged in the petition but which the Board weeded out before the inter partes review proceeding began.

Which reading we give the statute makes a difference. The first reading, the majority's reading, means that in my example, the Board must consider and write a final, and *appealable*, see § 319, decision in respect to the challenges to all 16 claims, including the 15 frivolous challenges. The second reading requires the Board to write a final, appealable decision only in respect to the challenge to the claim (number 16 in my example) that survived the Board's initial screening, namely, in my example, the one challenge in respect to which the Board found a "reasonable likelihood that the petitioner would prevail." § 314(a).

I cannot find much in the statutory context to support the majority's claim that the statutory words "claim challenged by the petitioner" refer unambiguously to claims challenged initially in the petition. After all, the majority agrees that they do not refer to claims that initially were challenged in the petition but were later settled or withdrawn. *Ante*, at 367; see § 316(d)(1)(A) (allowing the patent owner to cancel a challenged patent claim during inter partes review); § 317 (addressing settlement). The majority says that weeded-out challenges, unlike settled matters or canceled claims, involve claims that are still being "challenged 'by the petitioner' at the litigation's end." *Ante*, at 367. But weeded-out challenges are the same as settled matters and canceled claims in this respect. The petitioner cannot continue to challenge a claim once that challenge is weeded out by the Board at the institution phase. He cannot pursue it before the Board in the inter partes review, and normally he cannot pursue it in a court of appeals. See *Cuozzo*, 579 U. S., at 275–276. The petitioner might bring a totally separate case in court in which he challenges the claim, but that is a different matter that is not the subject of this statutory chapter.

Nor does the chapter's structure help fill the statutory gap. I concede that if we examine the "final written decision" section, § 318(a), just after reading the three initial sections of the statute, §§ 311, 312, and 313, we may be tempted to believe that the words "any patent claim challenged" in § 318(a) must refer to the claims challenged in the petition, just as the words "each claim challenged" in § 312(a)(3) unmistakably do. But once we look at the whole statute, this temptation disappears. The first section, § 311, describing the inter partes review process, does not use the word "challenge." The next section, § 312, describes the requirements for the initial petition, which is filed *before* any inter partes proceeding has been instituted. It is about the petition, so it is not surprising that it refers to the claims challenged in the petition. The next section, § 313, concerns the preliminary response, which is similarly filed before the inter partes re-

view proceeding has been instituted and is thus similarly focused on the petition, although it does not use the word "challenged."

The very next section, however, § 314, along with part of § 315, describes preliminary screening and the *institution* of the inter partes review proceeding. The remainder of § 315, and the following sections, §§ 316 and 317, then describe how that proceeding, once instituted, will be conducted (and provide for settlements). Only then does § 318 appear. That statutory provision tells the Board that, at the conclusion of the inter partes review proceeding, it must "issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner." § 318(a). And in this context, a context about the inter partes review proceeding itself, it is more than reasonable to think that the phrase "patent claim challenged by the petitioner" refers to challenges made in the proceeding, not challenges made in the petition but never made a part of the proceeding.

I am not helped by examining, as the majority examines, what Congress might have done had it used other language. *Ante*, at 364–366. The majority points out that had Congress meant anything other than "challenged in the petition," it might have said so more clearly. *Ibid.* But similarly, if Congress had meant "challenged in the petition," it might have used the words "in the petition." After all, it used those very words only four sections earlier. See § 314(a) (referring to "claims challenged in the petition"). This argument, like many such arguments, is a wash.

Neither am I helped by analogizing the inter partes review proceeding to civil litigation. Cf. *ante*, at 361, 363. That is because, as this Court said in *Cuozzo*, inter partes review is a "hybrid proceeding." 579 U. S., at 280. It has some adversarial characteristics, but "in other significant respects, inter partes review is less like a judicial proceeding and more like a specialized agency proceeding." *Id.*, at 279. Its purposes are not limited to "helping resolve concrete patent-related disputes among parties," but extend to "reexamin-

[ing] . . . an earlier administrative grant of a patent" and "protect[ing] the public's 'paramount interest in seeing that patent monopolies . . . are kept within their legitimate scope.'" *Id.*, at 279–280 (quoting *Precision Instrument Mfg. Co.* v. *Automotive Maintenance Machinery Co.*, 324 U. S. 806, 816 (1945); ellipsis in original); see also *Oil States Energy Services, LLC* v. *Greene's Energy Group, LLC*, *ante*, at 336–337.

Finally, I would turn to the likely purposes of the statutory provision. As the majority points out, § 314(a) makes clear that the "Director" (now his delegate, the Board) is to determine whether there is a "reasonable likelihood" of success as to at least one of the claims the petition challenges. If not, he cannot initiate an inter partes review proceeding. If so, § 314(a) "invests the Director with discretion on the question whether to institute review." *Ante*, at 366 (emphasis deleted); *Cuozzo*, *supra*, at 273. As I have said, Patent Office regulations allow the Board to proceed with inter partes review of some of the claims a petitioner challenges (say, only those where there is a reasonable likelihood of success), but not of others. 37 CFR § 42.108(a).

The majority points out that it does not follow from § 314(a) that the statute affords the Director discretion regarding *what claims that review will encompass*. The text says only that the Director can decide "whether" to institute the requested review, not "whether and to what extent" review should proceed. *Ante*, at 366 (emphasis deleted). That is certainly so. But I think that when we, as judges, face a difficult text, it is often helpful to ask not just "whether" or "what" but also "why." Why, asks the Patent Office, would Congress have intended to require the Board to proceed with an inter partes review, take evidence, and hear argument in respect to challenges to claims that the Board had previously determined had no "reasonable likelihood" of success? The statute would seem to give the Director discretion to achieve the opposite, namely, to avoid wasting the Board's time and effort reviewing challenges that it has already decided have

no "reasonable likelihood of success." In my example, why make the Board do further work on the challenges to claims 1 through 15, which the Board has already decided are near frivolous?

More than that, to read § 318(a) as requiring a "final written decision" in respect to those 15 perhaps frivolous challenges would seem to lead to judicial review of the Board's decision about those frivolous challenges. After all, § 319 of the statute says that a "party dissatisfied with the final written decision of the [Board] under section 318(a)," the provision before us, "may appeal the decision" to the Federal Circuit. And the majority's interpretation is anomalous in that it is difficult to imagine why Congress, with one hand, would make the agency's weeding-out decision nonreviewable, see *Cuozzo*, *supra*, at 275–276, yet at the same time would make the decision reviewable via the requirement that the Board issue a "final written" appealable "decision" with respect to that weeded-out challenge.

III

I end up where I began. Section 318(a) contains a gap just after the words "challenged by the petitioner." Considerations of context, structure, and purpose do not close the gap. And under *Chevron*, "where a statute leaves a 'gap' or is 'ambigu[ous],' we typically interpret it as granting the agency leeway to enact rules that are reasonable in light of the text, nature, and purpose of the statute." *Cuozzo*, *supra*, at 277 (quoting *United States* v. *Mead Corp.*, 533 U. S. 218, 229 (2001); alteration in original).

A

In referring to *Chevron*, I do not mean that courts are to treat that case like a rigid, black-letter rule of law, instructing them always to allow agencies leeway to fill every gap in every statutory provision. See *Mead Corp.*, *supra*, at 229–231. Rather, I understand *Chevron* as a rule of thumb, guiding courts in an effort to respect that leeway which Con-

gress intended the agencies to have. I recognize that Congress does not always consider such matters, but if not, courts can often implement a more general, virtually omnipresent congressional purpose—namely, the creation of a well-functioning statutory scheme—by using a canon-like, judicially created construct, the hypothetical reasonable legislator, and asking what such legislators would likely have intended had Congress considered the question of delegating gap-filling authority to the agency.

B

To answer this question, we have previously held that a "statute's complexity, the vast number of claims that it engenders, and the consequent need for agency expertise and administrative experience" normally "lead us to read [a] statute as delegating to the Agency considerable authority to fill in, through interpretation, matters of detail related to its administration." *Barnhart* v. *Walton*, 535 U. S. 212, 225 (2002). These considerations all favor such a reading here. Indeed, the question before us is one of agency administration in respect to detailed matters that an agency working with the statute is particularly likely to understand. In addition, the agency filled the gap here through the exercise of rulemaking authority explicitly given it by Congress to issue regulations "setting forth the standards for the showing of sufficient grounds to institute a review" and "establishing and governing inter partes review." §§ 316(a)(2), (4); *Cuozzo*, 579 U. S., at 276–277; cf. *Mead Corp.*, *supra*, at 227. Thus, there is a gap, the agency possesses gap-filling authority, and it filled the gap with a regulation that, for reasons I have stated, is a reasonable exercise of that authority.

* * *

I consequently would affirm the judgment of the Federal Circuit. And, with respect, I dissent from the Court's contrary conclusion.

Reporter's Note

The next page is purposely numbered 901. The numbers between 380 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR MARCH 22 THROUGH
MAY 9, 2018

MARCH 22, 2018

Dismissal Under Rule 46

No. 17–368. SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT *v.* TESLA ENERGY OPERATIONS, INC., FKA SOLARCITY CORP. C. A. 9th Cir. [Certiorari granted *sub nom. Salt River Project Agricultural Improvement and Power District* v. *SolarCity Corp.*, 583 U. S. 1009.] Writ of certiorari dismissed under this Court's Rule 46.1.

MARCH 26, 2018

Dismissal Under Rule 46

No. 17–682. OLIVER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT CAMBRIDGE SPRINGS, ET AL. *v.* MCDANIELS. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 700 Fed. Appx. 119.

Certiorari Granted—Vacated and Remanded

No. 17–5112. WESTBROOKS *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 *Marinello* v. *United States*, *ante*, p. 1. Reported below: 858 F. 3d 317.

Certiorari Dismissed

No. 17–7552. BACH *v.* JPMORGAN CHASE BANK, N. A. Ct. App. Wis. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of*

Appeals, 506 U. S. 1 (1992) (*per curiam*). Reported below: 2017 WI App 50, 377 Wis. 2d 335, 900 N. W. 2d 871.

No. 17–7778. JIAU *v.* POOLE 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: 682 Fed. Appx. 613.

No. 17–7844. DAY *v.* TRUMP, PRESIDENT OF THE UNITED STATES. 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. Reported below: 860 F. 3d 686.

Miscellaneous Orders

No. 17A892. DEWITT *v.* CALIFORNIA CITIZENS REDISTRICTING COMMISSION ET AL. C. A. 9th Cir. Application for injunctive relief, addressed to JUSTICE GORSUCH and referred to the Court, denied.

No. 17M92. SUTTLES *v.* TEXAS;
No. 17M93. LAKEY *v.* UNIVERSITY OF MICHIGAN HOSPITAL;
No. 17M94. BRADLEY *v.* STEVENSON, WARDEN; and
No. 17M95. ROSEMOND *v.* RATTRAY ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 137, Orig. MONTANA *v.* WYOMING ET AL. Final motion of the Special Master for allowance of fees and disbursements granted, and the Special Master is awarded a total of $51,984.57 for the period January 1, 2017, through January 10, 2018, to be paid equally by Montana and Wyoming. Barton H. Thompson, of Stanford, Cal., the Special Master in this case, is hereby discharged with the thanks of the Court. JUSTICE KAGAN took no part in the consideration or decision of this motion. [For earlier decision herein, see, *e. g.*, 583 U. S. 142.]

No. 17–5639. CHAVEZ-MEZA *v.* UNITED STATES. C. A. 10th Cir. [Certiorari granted, 583 U. S. 1089.] Motion of petitioner for leave to file volume II of the joint appendix under seal granted. JUSTICE GORSUCH took no part in the consideration or decision of this motion.

No. 17–7880. BELL *v.* INOVA HEALTH CARE, DBA INOVA FAIRFAX HOSPITAL. Sup. Ct. Va. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until

April 16, 2018, 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. 17–7931. IN RE JEANLOUIS; and
No. 17–8013. IN RE BENSAM. Petitions for writs of habeas corpus denied.

No. 17–1038. IN RE DOUCE. Petition for writ of mandamus and/or prohibition denied.

Certiorari Denied

No. 17–429. TAVARES *v.* WHITEHOUSE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 851 F. 3d 863.

No. 17–540. STARR INTERNATIONAL CO., INC. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 856 F. 3d 953.

No. 17–670. STONE *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: 388 Mont. 239, 400 P. 3d 692.

No. 17–712. BROTT ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 858 F. 3d 425.

No. 17–721. GAUGER *v.* STINSON;
No. 17–749. JOHNSON *v.* STINSON; and
No. 17–788. RAWSON *v.* STINSON. C. A. 7th Cir. Certiorari denied. Reported below: 868 F. 3d 516.

No. 17–735. LEE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 701 Fed. Appx. 175.

No. 17–795. SAMMONS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 860 F. 3d 296.

No. 17–869. DAVENPORT ET AL. *v.* CITY OF SANDY SPRINGS, GEORGIA. C. A. 11th Cir. Certiorari denied. Reported below: 868 F. 3d 1248.

No. 17–900. CRANE CO. *v.* POAGE. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 523 S. W. 3d 496.

No. 17–942. R. K. B. ET AL. *v.* E. T. Sup. Ct. Utah. Certiorari denied. Reported below: 2017 UT 59, 417 P. 3d 1.

No. 17–959. IDAHO DEPARTMENT OF CORRECTION *v.* FULLER. C. A. 9th Cir. Certiorari denied. Reported below: 865 F. 3d 1154.

No. 17–999. JACKSON *v.* CONNECTICUT DEPARTMENT OF PUBLIC HEALTH ET AL. C. A. 2d Cir. Certiorari denied.

No. 17–1014. LUTTERODT *v.* EMILY LANE OWNERS ASSN., INC., ET AL. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 17–1016. BALTIERRA *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 2017 IL App (4th) 160791–U.

No. 17–1017. BRUNS ET UX. *v.* BRYANT ET AL. Ct. App. N. C. Certiorari denied. Reported below: 251 N. C. App. 925, 795 S. E. 2d 830.

No. 17–1031. MARTIN ET AL. *v.* BAILEY ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 159 A. 3d 42.

No. 17–1062. NIOTTI-SOLTESZ *v.* PIOTROWSKI ET AL. Ct. App. Ohio, 11th App. Dist., Trumbull County. Certiorari denied. Reported below: 2017-Ohio-711, 86 N. E. 3d 1.

No. 17–1067. HOOD *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. 6th Cir. Certiorari denied.

No. 17–1068. EDIONSERI *v.* SESSIONS, ATTORNEY GENERAL. C. A. 8th Cir. Certiorari denied. Reported below: 860 F. 3d 1101.

No. 17–1080. UNITED SOURCE ONE, INC. *v.* DEPARTMENT OF AGRICULTURE ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 865 F. 3d 710.

No. 17–1097. MICHIGAN *v.* TERRANCE. Ct. App. Mich. Certiorari denied.

No. 17–1122. WHITE *v.* METROPOLITAN WASHINGTON AIRPORTS AUTHORITY. C. A. 4th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 143.

No. 17–1133. SPRENG *v.* THOMPSON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT MERCER, ET AL. C. A. 3d Cir. Certiorari denied.

No. 17–1143. KINNEY *v.* CLARK. Ct. App. Cal., 2d App. Dist., Div. 1. Certiorari denied. Reported below: 12 Cal. App. 5th 724, 219 Cal. Rptr. 3d 247.

No. 17–1156. BOYER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 17–1157. BLOUGH *v.* SILBERMAN ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 702 Fed. Appx. 927.

No. 17–1177. ALEXANDER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2017 IL App (1st) 142170, 82 N. E. 3d 96.

No. 17–1187. BOBBITT *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 172 A. 3d 458.

No. 17–1188. CARTER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 17–1200. INDEPENDENT PARTY ET AL. *v.* PADILLA, CALIFORNIA SECRETARY OF STATE. C. A. 9th Cir. Certiorari denied. Reported below: 702 Fed. Appx. 631.

No. 17–1218. BROOKS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 2017 IL 121413, 104 N. E. 3d 417.

No. 17–6373. WILLIAMSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 859 F. 3d 843.

No. 17–6560. BRADY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 694 Fed. Appx. 184.

No. 17–6914. JACKSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 696 Fed. Appx. 981.

No. 17–7436. ZAMORA *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 17–7464. CRISWELL *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 17–7465. DODD *v.* MCCOLLUM, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 715 Fed. Appx. 844.

No. 17–7474. GOUCH-ONASSIS *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 17–7479. ORTIZ *v.* DEPARTMENT OF FAMILY ET AL. Sup. Ct. P. R. Certiorari denied.

No. 17–7481. RICHARD *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 17–7486. JOHNSON *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 159 A. 3d 1000.

No. 17–7492. DANIEL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 17–7497. IROMUANYA *v.* FRAKES, DIRECTOR, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES. C. A. 8th Cir. Certiorari denied. Reported below: 866 F. 3d 872.

No. 17–7503. MORRIS *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 17–7507. ISMAIL *v.* ORANGE COUNTY, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 693 Fed. Appx. 507.

No. 17–7509. WIZAR *v.* SHERMAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 17–7511. WEAVER *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 237 So. 3d 329.

No. 17–7515. YANKTON *v.* BYRD, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 17–7541. MANCUSO *v.* TDGA, LLC, ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 301 Ga. 671, 802 S. E. 2d 248.

No. 17–7544. DIAZ *v.* LEWIS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 715 Fed. Appx. 608.

No. 17–7546. HENDERSON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 248 So. 3d 992.

No. 17–7547. CROMARTIE *v.* LAW OFFICES OF E. PEYTON FAULK, LLC, ET AL. Ct. Civ. App. Ala. Certiorari denied. Reported below: 241 So. 3d 679.

No. 17–7555. PRESLEY *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 17–7561. AVILA *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 17–7570. DICKEY *v.* SAMUEL. C. A. 4th Cir. Certiorari denied. Reported below: 696 Fed. Appx. 636.

No. 17–7576. SALERNO *v.* DEPARTMENT OF THE INTERIOR. C. A. Fed. Cir. Certiorari denied. Reported below: 717 Fed. Appx. 981.

No. 17–7579. CATANIA *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 17–7583. DAVIS *v.* SESSIONS, ATTORNEY GENERAL. C. A. 3d Cir. Certiorari denied. Reported below: 739 Fed. Appx. 108.

No. 17–7617. EVERETT *v.* WILSON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 270.

No. 17–7618. COWAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 519.

No. 17–7632. PIRESTANI *v.* REAGAN ET AL. Sup. Ct. Del. Certiorari denied. Reported below: 173 A. 3d 78.

No. 17–7633. DEVLIN *v.* MONTANA. C. A. 9th Cir. Certiorari denied.

No. 17–7639. RHODES *v.* OHTA ET AL. C. A. 9th Cir. Certiorari denied.

No. 17–7775. HOWERTON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 17–7777. HAYES *v.* CUMBERLAND COUNTY BOARD OF EDUCATION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 696 Fed. Appx. 640.

No. 17–7789. SADDIQ *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 703 Fed. Appx. 570.

No. 17–7794. SMITH-JETER *v.* ARTSPACE EVERETT LOFTS CONDOMINIUM ASSN. C. A. 9th Cir. Certiorari denied. Reported below: 689 Fed. Appx. 862.

No. 17–7795. BURGEST *v.* DANIELS, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 17–7800. GOODRICH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 17–7815. MONTGOMERY *v.* COAKLEY. C. A. 4th Cir. Certiorari denied. Reported below: 696 Fed. Appx. 625.

No. 17–7820. VANAMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–7821. ZATER *v.* PASTRANA, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 17–7822. MARTIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 722 Fed. Appx. 61.

No. 17–7823. JACKSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 264.

No. 17–7824. PARKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 152.

No. 17–7827. BARAJAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 724 Fed. Appx. 517.

No. 17–7828. GILL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 870 F. 3d 62.

No. 17–7833. NICHOLSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 400.

No. 17–7834. KNOX *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 17–7835. KRZECZOWSKI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 17–7836. RILEY *v.* MEDEIROS, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION AT NORFOLK. C. A. 1st Cir. Certiorari denied.

No. 17–7838. RANGEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 277.

No. 17–7841. SANCHEZ *v.* MADDEN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 411.

No. 17–7846. MIXSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 182.

No. 17–7847. PERSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 714 Fed. Appx. 547.

No. 17–7852. WALKER-COUVERTIER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 860 F. 3d 1.

No. 17–7854. WILSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 701 Fed. Appx. 294.

No. 17–7857. MUHAMMAD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–7859. BUCIO DELGADO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 702 Fed. Appx. 626.

No. 17–7860. JUSTICE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 703 Fed. Appx. 345.

No. 17–7861. RICHARDSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 703 Fed. Appx. 197.

No. 17–7862. COLLINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 712 Fed. Appx. 392.

No. 17–7863. ELLISON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 17–7868. YEPIZ ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 718 Fed. Appx. 456.

No. 17–7870. LYNCH *v.* PFIZER, INC. C. A. 9th Cir. Certiorari denied. Reported below: 689 Fed. Appx. 541.

No. 17–7875. PERRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 17–7877. BROWNLEE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 472.

No. 17–7878. BRANCH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 703 Fed. Appx. 464.

No. 17–7881. HARRISON ET AL. *v.* HUGGINS ET AL. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 2017 IL App (4th) 170026–U.

No. 17–7885. GRIFFIN ET AL. *v.* HESS CORP., AKA AMERADA PETROLEUM CORP., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 715 Fed. Appx. 338.

No. 17–7893. ANDERSON *v.* UNITED STATES; and
No. 17–7898. PLANY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 392.

No. 17–7895. JOHNSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 17–7897. JONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–7905. VICKERS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 708 Fed. Appx. 732.

No. 17–7909. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 133.

No. 17–7910. REDDEN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 875 F. 3d 374.

No. 17–7915. SALINAS-ACEVEDO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 846 F. 3d 417.

No. 17–7920. BERNARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 693 Fed. Appx. 223.

No. 17–807. TINGLE *v.* PERDUE, SECRETARY OF AGRICULTURE, ET AL.; and
No. 17–897. MANDAN *v.* PERDUE, SECRETARY OF AGRICULTURE, ET AL. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of these petitions. Reported below: 856 F. 3d 1039.

No. 17–1005. OATH HOLDINGS, INC. *v.* AJEMIAN ET AL. Sup. Jud. Ct. Mass. Motion of Facebook, Inc., et al. for leave to file

brief as *amici curiae* granted. Reported below: 478 Mass. 169, 84 N. E. 3d 766.

No. 17–1073. GRIFFIN *v.* UNITED HEALTHCARE OF GEORGIA, INC., ET AL. C. A. 11th Cir. Certiorari before judgment denied.

No. 17–6859. AL FAWWAZ, AKA OMAR, AKA HAMAD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 694 Fed. Appx. 847.

No. 17–7528. BROWN *v.* AMICA INSURANCE CO. ET AL. Sup. Jud. Ct. Me. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

Rehearing Denied

No. 17–612. QIAN *v.* CAROL WILSON FINE ARTS, INC., 583 U. S. 1055;

No. 17–6413. JARA *v.* STANDARD PARKING ET AL., 583 U. S. 1065;

No. 17–6425. JAMES *v.* PENNSYLVANIA, 583 U. S. 1065;

No. 17–6479. MITSKOG *v.* MERIT SYSTEMS PROTECTION BOARD, 583 U. S. 1067;

No. 17–6686. EMMEL *v.* AMTRUST-NP SFR, VENTURE, LLC, 583 U. S. 1073;

No. 17–6703. BREWER *v.* UNITED STATES, 583 U. S. 1073;

No. 17–6755. BRENNAN *v.* UNITED STATES, 583 U. S. 1044;

No. 17–6775. BARNETT *v.* UNITED STATES, 583 U. S. 1076;

No. 17–6818. LOCASCIO *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 583 U. S. 1104;

No. 17–6821. BARNETT *v.* UNITED STATES, 583 U. S. 1077;

No. 17–6841. WRIGHT *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 583 U. S. 1077;

No. 17–6896. BUNCH *v.* UNITED STATES, 583 U. S. 1079; and

No. 17–7203. CVJETICANIN *v.* UNITED STATES, 583 U. S. 1107. Petitions for rehearing denied.

MARCH 27, 2018

Miscellaneous Order

No. 17–8228 (17A1030). IN RE RODRIGUEZ. 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.

APRIL 2, 2018

Dismissal Under Rule 46

No. 17–883. ALEXANDER ET AL. *v.* ORLOWSKI ET AL. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 872 F. 3d 417.

Certiorari Granted—Reversed and Remanded. (See No. 17–467, *ante*, p. 100.)

Certiorari Dismissed

No. 17–7843. DOVE *v.* JONES. 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: 694 Fed. Appx. 180.

Miscellaneous Orders

No. D–3013. IN RE DISCIPLINE OF SIEGEL. Stacy Enid Lebow Siegel, of Towson, Md., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–3014. IN RE DISCIPLINE OF WERTKIN. Jeffrey Adam Wertkin, of Washington, D. C., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–3015. IN RE DISCIPLINE OF BASSI. Keith Alan Bassi, of Charleroi, 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–3016. IN RE DISCIPLINE OF BRAZIL. Harold E. Brazil, of Washington, D. C., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–3017. IN RE DISCIPLINE OF CRAWFORD. Thomas Allen Crawford, Jr., of Pittsburgh, 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–3018. IN RE DISCIPLINE OF GASKINS. Johnny S. Gaskins, of Raleigh, N. C., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–3019. IN RE DISCIPLINE OF LANDRY. Larry James Landry, of Seattle, Wash., 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–3020. IN RE DISCIPLINE OF DENRICH. Diana Beth Denrich, of Frederick, Md., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–3021. IN RE DISCIPLINE OF SMITH. Edward Smith, Jr., of Baltimore, 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. D–3022. IN RE DISCIPLINE OF ROBINSON. Peggy M. Hairston Robinson, of Baton Rouge, La., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–3024. IN RE DISCIPLINE OF TERRELL. Donald B. Terrell, of Washington, D. C., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–3025. IN RE DISCIPLINE OF ANDREWS. William Lee Andrews III, of Roanoke, Va., is suspended from the practice of

law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–3026. IN RE DISCIPLINE OF HARRELL. Sidney Moxey Harrell, Jr., of Mobile, Ala., 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–3027. IN RE DISCIPLINE OF LOUDON. Byron Carroll Loudon, of Overland Park, Kan., 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. 17M96. JONES *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 17M97. IN RE GRAND JURY SUBPOENAS RETURNABLE DECEMBER 16, 2015. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted.

No. 17M98. BROWN *v.* UNITED STATES. Motion to direct the Clerk to file petition for writ of certiorari out of time denied. JUSTICE KAGAN took no part in the consideration or decision of this motion.

No. 141, Orig. TEXAS *v.* NEW MEXICO ET AL. A. Gregory Grimsal, Esq., of New Orleans, La., the Special Master in this case, is hereby discharged with the thanks of the Court. It is ordered that the Honorable Michael J. Melloy, of Cedar Rapids, Iowa, is appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings, to direct subsequent proceedings, to summon witnesses, to issue subpoenas, and to take such evidence as may be introduced and such as he may deem it necessary to call for. The Special Master is directed to submit reports as he may deem appropriate. The cost of printing his reports, and all other proper expenses, including travel expenses, shall be submitted to the Court. [For earlier decision herein, see, *e. g.*, 583 U. S. 407.]

No. 17–7581. IN RE STONER; and
No. 17–7925. IN RE WATKINS. Petitions for writs of mandamus denied.

No. 17–7606. IN RE WILLIAMS. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus dismissed. See this Court's Rule 39.8.

Certiorari Granted

No. 17–5554. STOKELING *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 684 Fed. Appx. 870.

Certiorari Denied

No. 16–1071. SOKOLOW ET AL. *v.* PALESTINE LIBERATION ORGANIZATION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 835 F. 3d 317.

No. 16–8616. HARRIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 844 F. 3d 1260.

No. 17–202. DALEIDEN, AKA SARKIS, ET AL. *v.* NATIONAL ABORTION FEDERATION ET AL.; and
No. 17–482. NEWMAN *v.* NATIONAL ABORTION FEDERATION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 685 Fed. Appx. 623.

No. 17–730. ORTIZ-CERVANTES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 868 F. 3d 695.

No. 17–760. D. L., BY AND THROUGH HIS NEXT FRIEND, J. L. ET AL. *v.* CLEAR CREEK INDEPENDENT SCHOOL DISTRICT. C. A. 5th Cir. Certiorari denied. Reported below: 695 Fed. Appx. 733.

No. 17–775. LEE *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 244 So. 3d 998.

No. 17–871. WENZEL ET AL. *v.* ESTATE OF PERRY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 872 F. 3d 439.

No. 17–904. LOUDOUN COUNTY, VIRGINIA *v.* DULLES DUTY FREE, LLC. Sup. Ct. Va. Certiorari denied. Reported below: 294 Va. 9, 803 S. E. 2d 54.

No. 17–905. MAHONEY ET AL. *v.* CITY OF SEATTLE, WASHINGTON, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 871 F. 3d 873.

No. 17–911. CRAWFORD ET AL. *v.* DEPARTMENT OF THE TREASURY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 868 F. 3d 438.

No. 17–913. D. T. *v.* W. G. Ct. Civ. App. Ala. Certiorari denied. Reported below: 255 So. 3d 764.

No. 17–980. R+L CARRIERS, INC. *v.* INTERMEC TECHNOLOGIES CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 698 Fed. Appx. 614.

No. 17–1001. SEVERSON *v.* HEARTLAND WOODCRAFT, INC. C. A. 7th Cir. Certiorari denied. Reported below: 872 F. 3d 476.

No. 17–1015. BLAKE *v.* MJ OPTICAL, INC. C. A. 8th Cir. Certiorari denied. Reported below: 870 F. 3d 820.

No. 17–1024. DAWSON ET AL. *v.* CITY OF GRAND HAVEN, MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 17–1025. FROST-TSUJI ARCHITECTS *v.* HIGHWAY INN, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 700 Fed. Appx. 674.

No. 17–1036. TORRE *v.* NORTHROP GRUMMAN SYSTEMS CORP. C. A. 8th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 477.

No. 17–1044. VOLK ET UX. *v.* FRANZ ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 874 F. 3d 356.

No. 17–1045. LEISER ET AL. *v.* MCCARTHY ET AL. Sup. Ct. Va. Certiorari denied.

No. 17–1048. HARRIS *v.* WELLS FARGO BANK, N. A. C. A. 4th Cir. Certiorari denied. Reported below: 693 Fed. Appx. 232.

No. 17–1051. GRISE ET AL. *v.* ALLEN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 714 Fed. Appx. 489.

No. 17–1055. PETTER INVESTMENTS, DBA RIVEER *v.* HYDRO ENGINEERING. C. A. Fed. Cir. Certiorari denied. Reported below: 697 Fed. Appx. 698.

No. 17–1057. COTUNA *v.* WALMART STORES, INC. C. A. 6th Cir. Certiorari denied.

No. 17–1070. XIU JIAN SUN *v.* KIN CHEUNG. C. A. 2d Cir. Certiorari denied.

No. 17–1076. LAKE VILLA OXFORD ASSOCIATES, LLP, ET AL. *v.* HOMESTEAD PROPERTIES, LP. Ct. App. Mich. Certiorari denied.

No. 17–1081. FAPARUSI *v.* CASE WESTERN RESERVE UNIVERSITY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 269.

No. 17–1113. GOLDEN *v.* INDIANAPOLIS HOUSING AGENCY. C. A. 7th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 835.

No. 17–1129. TRIPP ET AL. *v.* SCHOLZ ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 872 F. 3d 857.

No. 17–1148. JEFFRIES *v.* BURTON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 715 Fed. Appx. 490.

No. 17–1178. BACALL *v.* JACKSON, ACTING WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 502.

No. 17–1205. WALTER *v.* IANCU, DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE. C. A. Fed. Cir. Certiorari denied. Reported below: 698 Fed. Appx. 1022.

No. 17–1206. QUIROZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 874 F. 3d 562.

No. 17–1207. POULSEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 717 Fed. Appx. 509.

No. 17–1217. ANDERSON *v.* BORDERS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 17–1220. TRI-FANUCCHI FARMS *v.* AGRICULTURAL LABOR RELATIONS BOARD. Sup. Ct. Cal. Certiorari denied. Reported below: 3 Cal. 5th 1161, 405 P. 3d 1110.

No. 17–1221. PALIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 874 F. 3d 418.

No. 17–5152. LAMB *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 847 F. 3d 928.

No. 17–5876. MATTHEWS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 689 Fed. Appx. 840.

No. 17–5965. WESTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 681 Fed. Appx. 235.

No. 17–6095. SHEA *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 17–6611. PERRY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–6910. HORTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 863 F. 3d 1041.

No. 17–7207. DAVIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 867 F. 3d 1021.

No. 17–7551. ANDERSON *v.* GREENVILLE HEALTH SYSTEM. C. A. 4th Cir. Certiorari denied. Reported below: 687 Fed. Appx. 281.

No. 17–7560. NICHOLS *v.* MAYS ET AL. Ct. App. Mich. Certiorari denied.

No. 17–7575. ROBINSON ET AL. *v.* CHESAPEAKE BANK OF MARYLAND ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 703 Fed. Appx. 212.

No. 17–7577. RAMIREZ *v.* GRIFFITH, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 17–7578. CRITTENDON *v.* TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES ET AL. C. A. 5th Cir. Certiorari denied.

No. 17–7585. WARREN *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 17–7586. WIJE *v.* BURNS ET AL. C. A. 5th Cir. Certiorari denied.

No. 17–7587. TRAHAN *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 17–7593. CULCULOGLU *v.* CULCULOGLU. Sup. Ct. Nev. Certiorari denied. Reported below: 133 Nev. 998, 387 P. 3d 215.

No. 17–7601. BAZZO *v.* ASUNCION, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 17–7611. MONTGOMERY *v.* OHIO. Ct. App. Ohio, 6th App. Dist., Lucas County. Certiorari denied. Reported below: 2016-Ohio-7527.

No. 17–7625. CONNER *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 690 Fed. Appx. 288.

No. 17–7647. SMITH *v.* ANDERSON. C. A. 7th Cir. Certiorari denied. Reported below: 874 F. 3d 966.

No. 17–7662. TASKOV *v.* SESSIONS, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied.

No. 17–7680. BURKE *v.* FURTADO. C. A. 6th Cir. Certiorari denied.

No. 17–7690. SUNKETT *v.* BITER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 17–7696. SUTTON *v.* VAN LEEUWEN ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 708 Fed. Appx. 514.

No. 17–7710. ANDERSON *v.* SYSTEMS TECHNOLOGY, INC., ET AL. C. A. 9th Cir. Certiorari denied.

No. 17–7731. LEONARD *v.* TEXAS (two judgments). Ct. App. Tex., 8th Dist. Certiorari denied.

No. 17–7756. SHAYKIN *v.* ROMANOWSKI, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 17–7766. UGAY, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF UGAY *v.* SHULKIN, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 716 Fed. Appx. 940.

No. 17–7802. CLARK *v.* STODDARD, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 17–7839. RUSSELL *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 261 So. 3d 454.

No. 17–7840. CLAYBORNE *v.* TECUMSEH DEPARTMENT OF CORRECTIONS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 593.

No. 17–7858. PATTON *v.* LINK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 17–7883. BLACKLEDGE *v.* BLACKLEDGE. C. A. 3d Cir. Certiorari denied. Reported below: 866 F. 3d 169.

No. 17–7890. KING *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 151 App. Div. 3d 633, 58 N. Y. S. 3d 40.

No. 17–7901. MILES *v.* LARIVA, WARDEN. C. A. D. C. Cir. Certiorari denied.

No. 17–7913. SCHUM *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 696 Fed. Appx. 516.

No. 17–7928. SEYMORE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 17–7932. PEREZ-MALDONADO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 709 Fed. Appx. 548.

No. 17–7934. KELLY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 875 F. 3d 781.

No. 17–7935. MABIE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 862 F. 3d 624.

No. 17–7938. MORALES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 593.

No. 17–7940. CAUICH-GAMBOA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 395.

No. 17–7942. Blanton *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 390.

No. 17–7944. Okonkwo *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 702 Fed. Appx. 866.

No. 17–7946. Huett *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 299.

No. 17–7947. Hinkle *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 272.

No. 17–7948. Graham *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 707 Fed. Appx. 23.

No. 17–7949. Haag *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 703 Fed. Appx. 448.

No. 17–7950. Gittens *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 701 Fed. Appx. 786.

No. 17–7953. Williams *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 17–7954. Wolf *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 699 Fed. Appx. 62.

No. 17–7955. Thomas *v.* Hollingsworth, Warden. C. A. 3d Cir. Certiorari denied. Reported below: 712 Fed. Appx. 126.

No. 17–7957. Knaup *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 453.

No. 17–7959. Lewis *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 234.

No. 17–7961. Glover et al. *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 715 Fed. Appx. 253.

No. 17–7962. Garcia-Pinedo *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 382.

No. 17–7966. Hall *v.* United States; and
No. 17–7967. Hall *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 159 A. 3d 315.

No. 17–7969. Sile-Perez *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 17–7971. SANTIFUL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 701 Fed. Appx. 242.

No. 17–7977. MARTIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 17–8022. HOPE *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 239 So. 3d 737.

No. 17–890. LOPEZ ET AL. *v.* ESTATE OF PERRY ET AL. C. A. 7th Cir. Motion of International Municipal Lawyers Association for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 872 F. 3d 439.

No. 17–909. N. M., MOTHER OF A. J. ET AL., CHILDREN *v.* FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES. Dist. Ct. App. Fla., 5th Dist. Motion of respondent Guardian ad Litem Program, on behalf of S. M., for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 230 So. 3d 1235.

No. 17–1069. GRIFFIN *v.* VERIZON COMMUNICATIONS INC. ET AL. C. A. 11th Cir. Certiorari before judgment denied.

No. 17–7171. GUARDADO *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS; and

No. 17–7545. COZZIE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 17–7171, 226 So. 3d 213; No. 17–7545, 225 So. 3d 717.

JUSTICE SOTOMAYOR, dissenting.

Twice now this Court has declined to vacate and remand to the Florida Supreme Court in cases where that court failed to address a substantial Eighth Amendment challenge to capital defendants' sentences, and twice I have dissented from that inaction. See *Truehill* v. *Florida*, 583 U. S. 938, 939 (2017); *Middleton* v. *Florida*, 583 U. S. 1162 (2018). Four petitioners were involved in those cases. Today we add two more to the list, for a total of at least six capital defendants who now face execution by the State without having received full consideration of their claims.

It should not be necessary for me to explain again why petitioners' challenges are substantial, why the Florida Supreme Court should have addressed those challenges, or why this Court has an obligation to intervene. Nevertheless, recent developments at

the Florida Supreme Court compel me to dissent in full once again.

As a reminder, like the petitioners in *Truehill* and *Middleton*, Jesse Guardado and Steven Cozzie challenge their death sentences pursuant to *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985). I summarized those challenges in *Middleton* as follows:

> "[Petitioners] were sentenced to death under a Florida capital sentencing scheme that this Court has since declared unconstitutional. See *Hurst* v. *Florida*, 577 U. S. 92 (2016). Relying on the unanimity of the juries' recommendations of death, the Florida Supreme Court post-*Hurst* declined to disturb the petitioners' death sentences, reasoning that the unanimity ensured that jurors had made the necessary findings of fact under *Hurst*. By doing so, the Florida Supreme Court effectively transformed the pre-*Hurst* jury recommendations into binding findings of fact with respect to the petitioners' death sentences." 583 U. S., at 1163 (opinion dissenting from denial of certiorari).

Reliance on those pre-*Hurst* recommendations, rendered after the juries repeatedly were instructed that their role was merely advisory, implicates *Caldwell*, where this Court recognized that "the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role," in contravention of the Eighth Amendment. 472 U. S., at 333.

Following the dissent from the denial of certiorari in *Truehill*, the Florida Supreme Court has on at least two occasions taken the position that it has, in fact, considered and rejected petitioners' *Caldwell*-based challenges.[1] In *Franklin* v. *State*, 236 So. 3d 989 (2018) (*per curiam*), the Florida Supreme Court stated that, "prior to *Hurst*, [it] repeatedly rejected *Caldwell* challenges to the standard jury instructions." *Id.*, at 992. The decisions it cited in support of that pre-*Hurst* precedent rely on one fact: "Informing the jury that its recommended sentence is 'advisory' is a correct statement of Florida law and does not violate *Caldwell*."

[1] The cases in which the Florida Supreme Court has taken this position, *i. e.*, that it has considered and rejected the *Caldwell*-based claims discussed herein, are not the ones currently under review before our Court in these petitions.

Rigterink v. *State*, 66 So. 3d 866, 897 (Fla. 2011) (*per curiam*); *Globe* v. *State*, 877 So. 2d 663, 673–674 (Fla. 2004) (*per curiam*) (stating that it has rejected *Caldwell* challenges to the standard jury instructions, citing cases that similarly rely on the fact that the instructions accurately reflect the advisory nature of the jurors' role). But of course, "the rationale underlying [this] previous rejection of the *Caldwell* challenge [has] now [been] undermined by this Court in *Hurst*," *Truehill*, 583 U. S., at 939, and the Florida Supreme Court must therefore "grapple with the Eighth Amendment implications of [its subsequent post-*Hurst*] holding" that "then-advisory jury findings are now binding and sufficient to satisfy *Hurst*," *Middleton*, 583 U. S., at 1163. Its pre-*Hurst* precedent thus does not absolve the Florida Supreme Court from addressing petitioners' new post-*Hurst Caldwell*-based challenges.

The Florida Supreme Court in *Franklin* did not stop there, however. It went on to state that it had "also rejected *Caldwell*-related *Hurst* claims" more recently, citing *Truehill* v. *State*, 211 So. 3d 930 (2017) (*per curiam*), and *Oliver* v. *State*, 214 So. 3d 606 (2017) (*per curiam*), noting that "the defendants in *Oliver* and *Truehill* petitioned the United States Supreme Court for a writ of certiorari to review their *Caldwell* claims, which the Court denied." *Franklin*, 236 So. 3d, at 992–993. This is a surprising statement, because Quentin Truehill and Terence Oliver were the two petitioners whose claims were at issue in my dissent in *Truehill*. *Franklin* did not discuss that dissent, joined by two other Justices, which specifically noted that "the Florida Supreme Court has failed to address" the important *Caldwell*-based challenge. *Truehill*, 583 U. S., at 939. Earlier this month, in rejecting a motion to vacate a sentence brought by petitioner Jesse Guardado, the Florida Supreme Court again held that it had "considered and rejected" post-*Hurst Caldwell*-based challenges, citing *Franklin*, 236 So. 3d 989, and *Truehill*, 211 So. 3d 930. *Guardado* v. *State*, 238 So. 3d 162, 163 (2018) (*per curiam*).[2]

[2] As petitioner Guardado explained in his supplemental brief, in addition to the postconviction motion that forms the basis of the petition currently before our Court, he also filed a motion to vacate his sentence. See Supp. Brief for Petitioner 1. It was with respect to that motion that the Florida Supreme Court issued the opinion stating that it had "considered and rejected" the *Caldwell*-based challenge. No mention of the *Caldwell*-based claim was made in the Florida Supreme Court opinion directly under review in this petition. 226 So. 3d 213 (2017) (*per curiam*). In fact, petitioner

It is hard to understand how the Florida Supreme Court "considered and rejected" these *Caldwell*-based challenges based on its decisions in *Truehill* and *Oliver*. Those cases did not mention or discuss *Caldwell*. Nor did they mention or discuss the fundamental Eighth Amendment principle it announced: "[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell*, 472 U. S., at 328–329. In neither *Truehill* nor *Oliver* did the Florida Supreme Court discuss the grave Eighth Amendment concerns implicated by its finding that the *Hurst* violations in those cases are harmless, a conclusion that transforms those advisory jury recommendations into binding findings of fact. Although the Florida Supreme Court noted in *Truehill* that the defendant in that case "contends that he is entitled to relief pursuant to *Hurst* v. *Florida* because the jury in his case was repeatedly instructed regarding the nonbinding nature of its verdict," 211 So. 3d, at 955, that was the first and last reference to that argument. There was absolutely no reference to the argument in *Oliver*. 214 So. 3d 606.[3]

Therefore, the Florida Supreme Court has (again)[4] failed to address an important and substantial Eighth Amendment challenge to capital defendants' sentences post-*Hurst*. Nothing in its pre-*Hurst* precedent, nor in its opinions in *Truehill* and *Oliver*,

---

Guardado filed a motion with the Florida Supreme Court for rehearing and clarification of the denial of his postconviction motion, noting, *inter alia*, that the opinion "unreasonably omitted any consideration or discussion of [his] arguments regarding the interplay between *Caldwell* and *Hurst*." App. to Pet. for Cert. in No. 17–7171, p. 68a. The Florida Supreme Court denied the motion in an unreasoned one-line order. See *id.*, at 7a. Petitioner Steven Cozzie also moved for rehearing below, similarly arguing in part that the Florida Supreme Court "overlooked the effect of instructing [his] jury many times that its recommendation was advisory only," citing *Caldwell*. App. to Pet. for Cert. in No. 17–7545, p. 66a. The Florida Supreme Court also denied the motion in an unreasoned one-line order. See *id.*, at 43a.

[3] Tellingly, in neither *Franklin* nor *Guardado* did the Florida Supreme Court supply a pincite for its "consider[ation] and reject[ion]" in *Truehill* and *Oliver* of these *Caldwell*-based claims.

[4] "Toutes choses sont dites déjà; mais comme personne n'écoute, il faut toujours recommencer." Gide, Le Traité du Narcisse 8 (1892), in Le Traité du Narcisse 104 (R. Robidoux ed. 1978) ("Everything has been said already; but as no one listens, we must always begin again").

addresses or resolves these substantial *Caldwell*-based challenges. This Court can and should intervene in the face of this troubling situation.

I dissent.

No. 17–7916. ABU GHAYTH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 709 Fed. Appx. 718.

Rehearing Denied

No. 17–517. UPPAL *v.* HEALTH LAW FIRM, 583 U. S. 1083;

No. 17–759. LACY *v.* BP P. L. C. ET AL., 583 U. S. 1107;

No. 17–5073. CARTWRIGHT *v.* MASSACHUSETTS, 583 U. S. 878;

No. 17–6378. RIEDLINGER *v.* CITY OF EVERETT, WASHINGTON, 583 U. S. 1064;

No. 17–6525. RIDEOUT *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, 583 U. S. 1068; and

No. 17–6857. LEWIS *v.* UNITED STATES, 583 U. S. 1078. Petitions for rehearing denied.

No. 17–928. JONES ET AL. *v.* PARMLEY ET AL., 583 U. S. 1151. Petition for rehearing denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

APRIL 3, 2018

Miscellaneous Order

No. 16–317. DEUTSCHE BANK TRUST COMPANY AMERICAS ET AL. *v.* ROBERT R. MCCORMICK FOUNDATION ET AL. C. A. 2d Cir.

Statement of JUSTICE KENNEDY and JUSTICE THOMAS respecting the petition for certiorari.

The parties are advised that consideration of the petition for certiorari will be deferred for an additional period of time. This will allow the Court of Appeals or the District Court to consider whether to recall the mandate, entertain a Federal Rule of Civil Procedure 60(b) motion to vacate the earlier judgment, or provide any other available relief in light of this Court's decision in *Merit Management Group, LP* v. *FTI Consulting, Inc.*, 583 U. S. 366 (2018). The petition for certiorari in this case was pending when the Court decided *Merit Management.* The Court of Appeals or

the District Court could decide whether relief from judgment is appropriate given the possibility that there might not be a quorum in this Court. See 28 U. S. C. § 2109.

April 5, 2018

Dismissals Under Rule 46

No. 17–7402. Ballard *v.* United States. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 46.

No. 17–7797. Brandon *v.* Schroyer et al. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 46.

April 13, 2018

Miscellaneous Orders

No. 16–1011. WesternGeco LLC *v.* ION Geophysical Corp. C. A. Fed. Cir. [Certiorari granted, 583 U. S. 1089.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 16–1215. Lamar, Archer & Cofrin, LLP *v.* Appling. C. A. 11th Cir. [Certiorari granted, 583 U. S. 1088.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 16–1220. Animal Science Products, Inc., et al. *v.* Hebei Welcome Pharmaceutical Co. Ltd. et al. C. A. 2d Cir. [Certiorari granted, 583 U. S. 1089.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Joint motion of respondents and the Ministry of Commerce of the People's Republic of China for leave to allow the Ministry of Commerce of the People's Republic of China to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 17–130. Lucia et al. *v.* Securities and Exchange Commission. C. A. D. C. Cir. [Certiorari granted, 583 U. S. 1089.] Motion of the Solicitor General for divided argument granted.

No. 17–269. Washington *v.* United States et al. C. A. 9th Cir. [Certiorari granted, 583 U. S. 1089.] Joint motion of respondents for divided argument granted. Justice Kennedy took no part in the consideration or decision of this motion.

No. 17–494. South Dakota *v.* Wayfair, Inc., et al. Sup. Ct. S. D. [Certiorari granted, 583 U. S. 1089.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 17–586. Abbott, Governor of Texas, et al. *v.* Perez et al.; and

No. 17–626. Abbott, Governor of Texas, et al. *v.* Perez et al. D. C. W. D. Tex. [Probable jurisdiction postponed, 583 U. S. 1088.] Motion of the Solicitor General for divided argument and motion of appellees for enlargement of time for oral argument and for divided argument granted, and the time is divided as follows: 25 minutes for appellants, 10 minutes for the Solicitor General in support of appellants, 15 minutes for appellees in No. 17–586, and 20 minutes for appellees in No. 17–626.

No. 17–965. Trump, President of the United States, et al. *v.* Hawaii et al. C. A. 9th Cir. [Certiorari granted, 583 U. S. 1099.] Motion of Becket Fund for Religious Liberty for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

April 16, 2018

Certiorari Granted—Vacated and Remanded

No. 16–9604. Sykes *v.* United States. C. A. 8th Cir. Reported below: 844 F. 3d 712; and

No. 17–6344. Brown *v.* United States. C. A. 8th Cir. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *United States* v. *Naylor*, 887 F. 3d 397 (CA8 2018).

Certiorari Dismissed

No. 17–7829. Bach *v.* Circuit Court of Wisconsin, Milwaukee County. Ct. App. Wis. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 17–7831. Bach *v.* Circuit Court of Wisconsin, Milwaukee County, et al. Sup. Ct. Wis. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dis-

missed. See this Court's Rule 39.8. Reported below: 2017 WI 101, 378 Wis. 2d 430, 905 N. W. 2d 842.

Miscellaneous Orders

No. 17A980. QORANE, AKA GAAS *v.* SESSIONS, ATTORNEY GENERAL. C. A. 5th Cir. Application for stay, addressed to JUSTICE GINSBURG and referred to the Court, denied.

No. D–3007. IN RE DISBARMENT OF GUREVICH. Disbarment entered. [For earlier order herein, see 583 U. S. 994.]

No. D–3023. IN RE DISCIPLINE OF NYCE. Kinsley Frampton Nyce, of Columbus, Ohio, 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–3028. IN RE DISCIPLINE OF SACKS. Stephen Howard Sacks, of Baltimore, 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. 17M99. VIOLA *v.* KIRSCH ET AL.; and VIOLA *v.* ESCAPULE ET AL.;

No. 17M100. ROLLE *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS; and

No. 17M102. BONCZEK *v.* BOARD OF TRUSTEES NATIONAL ROOFING INDUSTRY PENSION PLAN ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 17M101. RUSSELL *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 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. 148, Orig. MISSOURI ET AL. *v.* CALIFORNIA;

No. 149, Orig. INDIANA ET AL. *v.* MASSACHUSETTS;

No. 17–834. KANSAS *v.* GARCIA; KANSAS *v.* MORALES; and KANSAS *v.* OCHOA-LARA. Sup. Ct. Kan.; and

No. 17–936. GILEAD SCIENCES, INC. *v.* UNITED STATES EX REL. CAMPIE ET AL. C. A. 9th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 17–587. Mount Lemmon Fire District *v.* Guido et al. C. A. 9th Cir. [Certiorari granted, 583 U. S. 1155.] Motion of petitioner to dispense with printing joint appendix granted.

No. 17–7801. Bagi *v.* City of Parma, Ohio. C. A. 6th Cir.; and

No. 17–7871. Marro *v.* Citibank, N. A. Sup. Ct. Va. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until May 4, 2018, 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. 17–8258. In re Spivey. Petition for writ of habeas corpus denied.

No. 17–7702. In re Bell; and

No. 17–7735. In re Clemons. Petitions for writs of mandamus denied.

Certiorari Denied

No. 17–658. Blagojevich *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 854 F. 3d 918.

No. 17–689. March *v.* Mills, Individually and in Her Official Capacity as Attorney General of Maine, et al. C. A. 1st Cir. Certiorari denied. Reported below: 867 F. 3d 46.

No. 17–887. Brown, Warden *v.* Brown. C. A. 7th Cir. Certiorari denied. Reported below: 847 F. 3d 502.

No. 17–933. New England Regional Council of Carpenters *v.* Connecticut Ironworkers Employers Assn., Inc., et al. C. A. 2d Cir. Certiorari denied. Reported below: 869 F. 3d 92.

No. 17–977. Etihad Airways P. J. S. C. *v.* Doe et vir. C. A. 6th Cir. Certiorari denied. Reported below: 870 F. 3d 406.

No. 17–1063. Dung Quoc Pham *v.* Blaylock et al. C. A. 5th Cir. Certiorari denied. Reported below: 712 Fed. Appx. 360.

No. 17–1083. Higgins *v.* Zion, Individually and as Successor in Interest to Zion. C. A. 9th Cir. Certiorari denied. Reported below: 874 F. 3d 1072.

No. 17–1089. LAKE *v.* SKELTON. C. A. 11th Cir. Certiorari denied. Reported below: 840 F. 3d 1334.

No. 17–1095. MELTON *v.* PHILLIPS. C. A. 5th Cir. Certiorari denied. Reported below: 875 F. 3d 256.

No. 17–1096. MILEY *v.* CENLAR FSB ET AL. Ct. App. Ga. Certiorari denied.

No. 17–1100. SMITH *v.* SMITH. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 2017 IL App (5th) 160409–U.

No. 17–1101. HALL ET AL. *v.* FLORES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 873 F. 3d 739.

No. 17–1116. FOSTER *v.* KLEUESSENDORF ET AL. (Reported below: 500 Mich. 1001, 895 N. W. 2d 188); and FOSTER *v.* GANGES TOWNSHIP ET AL. (500 Mich. 1062, 898 N. W. 2d 607). Sup. Ct. Mich. Certiorari denied.

No. 17–1117. LUSTER *v.* LIZARRAGA, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 17–1118. BRIDGES ET AL. *v.* EMPIRE SCAFFOLD, LLC. C. A. 5th Cir. Certiorari denied. Reported below: 875 F. 3d 222.

No. 17–1119. CAJIGAS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 17–1124. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE *v.* MCMAHON. C. A. 6th Cir. Certiorari denied.

No. 17–1125. ALEXIS, AKA ALEXIEV *v.* FEDERAL BUREAU OF INVESTIGATION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 507.

No. 17–1126. ACKERMANN *v.* CVS PHARMACY. Cir. Ct. Montgomery County, Md. Certiorari denied.

No. 17–1128. ALOTAIBI *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 133 Nev. 650, 404 P. 3d 761.

No. 17–1139. AAMES *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 703 Fed. Appx. 450.

No. 17–1141. BROWN *v.* CITY OF GRAND RAPIDS, MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 17–1144. COOK ET AL. *v.* MAYS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 871 F. 3d 437.

No. 17–1145. QUINTEROS *v.* SESSIONS, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied.

No. 17–1158. MILLS *v.* REICHLE. Sup. Ct. R. I. Certiorari denied. Reported below: 162 A. 3d 617.

No. 17–1162. U1IT4LESS, INC., DBA NYBIKERGEAR *v.* FEDEX CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 871 F. 3d 199.

No. 17–1166. ZUZA *v.* OFFICE OF THE HIGH REPRESENTATIVE ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 857 F. 3d 935.

No. 17–1167. WILKINSON *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 531 So. 3d 626.

No. 17–1169. KLEINSMITH *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 409 P. 3d 305.

No. 17–1170. DRK PHOTO *v.* MCGRAW-HILL GLOBAL EDUCATION HOLDINGS, LLC, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 870 F. 3d 978.

No. 17–1181. KIEFER *v.* ISANTI COUNTY, MINNESOTA. Sup. Ct. Minn. Certiorari denied.

No. 17–1182. PRESS COMMUNICATIONS, LLC *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 875 F. 3d 1117.

No. 17–1196. LIBERTARIAN PARTY OF COLORADO *v.* WILLIAMS, COLORADO SECRETARY OF STATE (Reported below: 401 P. 3d 558); and FRAZIER *v.* WILLIAMS, COLORADO SECRETARY OF STATE (401 P. 3d 541). Sup. Ct. Colo. Certiorari denied.

No. 17–1199. WILSON *v.* HAWAII ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 709 Fed. Appx. 501.

No. 17–1202. ANIEL *v.* RESCAP LIQUIDATING TRUST. C. A. 2d Cir. Certiorari denied. Reported below: 697 Fed. Appx. 93.

No. 17–1208. SMITH ET AL. *v.* CITY OF SANTA CLARA, CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 876 F. 3d 987.

No. 17–1214. BEYOND NUCLEAR *v.* NUCLEAR REGULATORY COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 707 Fed. Appx. 8.

No. 17–1219. LUNDERVILLE *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 1st Cir. Certiorari denied.

No. 17–1224. HALIM ET AL. *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist., Div. 4. Certiorari denied. Reported below: 14 Cal. App. 5th 632, 223 Cal. Rptr. 3d 491.

No. 17–1230. GOLDBERG ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 881 F. 3d 529.

No. 17–1231. D COSTA ET AL. *v.* SESSIONS, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 172.

No. 17–1238. R&R GROUND MAINTENANCE INC. *v.* ALABAMA POWER CO. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 713 Fed. Appx. 853.

No. 17–1240. TUERK *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied.

No. 17–1242. HERB *v.* TRUMP, PRESIDENT OF THE UNITED STATES. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 235 So. 3d 900.

No. 17–1250. JEFF MERCER, LLC *v.* LOUISIANA DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT ET AL. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 51,371 (La. App. 2 Cir. 6/7/17), 222 So. 3d 1017.

No. 17–1257. GRANT *v.* NIELSEN, SECRETARY OF HOMELAND SECURITY. C. A. 3d Cir. Certiorari denied. Reported below: 698 Fed. Appx. 697.

No. 17–1261. MULLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 866 F. 3d 76.

No. 17–1262. EVERY *v.* DEPARTMENT OF VETERANS AFFAIRS ET AL. C. A. 1st Cir. Certiorari denied.

No. 17–1265. JONES *v.* TEXAS JUVENILE JUSTICE DEPARTMENT. C. A. 5th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 215.

No. 17–1266. CRANMER ET AL. *v.* PHILADELPHIA INDEMNITY INSURANCE CO. C. A. 3d Cir. Certiorari denied. Reported below: 719 Fed. Appx. 95.

No. 17–1275. MINIOR *v.* RHODE ISLAND. Sup. Ct. R. I. Certiorari denied. Reported below: 175 A. 3d 1202.

No. 17–1278. BECK *v.* OHIO. Ct. App. Ohio, 1st App. Dist., Hamilton County. Certiorari denied. Reported below: 2016-Ohio-8122, 75 N. E. 3d 899.

No. 17–1280. OPENRISK, LLC *v.* MICROSTRATEGY SERVICES CORP. C. A. 4th Cir. Certiorari denied. Reported below: 876 F. 3d 518.

No. 17–1281. CHARNOCK *v.* VIRGINIA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 158.

No. 17–1293. TAGAMI *v.* CITY OF CHICAGO, ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 875 F. 3d 375.

No. 17–1296. SMITH *v.* ASSOCIATED CREDIT UNION, INC. Sup. Ct. Ga. Certiorari denied.

No. 17–1310. MINNIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 872 F. 3d 889.

No. 17–1312. CHON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 17–6674. SEUGASALA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 702 Fed. Appx. 572.

No. 17–6681. PERRY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 862 F. 3d 620.

No. 17–6749. BELL *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 2017 Ark. 231, 522 S. W. 3d 788.

No. 17–6780. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 706 Fed. Appx. 241.

No. 17–6937. Visciotti *v.* Davis, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 862 F. 3d 749.

No. 17–7042. Workman *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 863 F. 3d 1313.

No. 17–7045. Acker *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied. Reported below: 693 Fed. Appx. 384.

No. 17–7068. Clemens *v.* Colorado. Sup. Ct. Colo. Certiorari denied. Reported below: 401 P. 3d 525.

No. 17–7121. West *v.* Rieth et al. C. A. 5th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 211.

No. 17–7199. Burtons *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 696 Fed. Appx. 372.

No. 17–7270. Alexis *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 239.

No. 17–7296. Gray *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 589.

No. 17–7306. Humphreys *v.* Sellers, Warden. Sup. Ct. Ga. Certiorari denied.

No. 17–7348. Davis *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 605.

No. 17–7414. Smack *v.* Delaware. Sup. Ct. Del. Certiorari denied. Reported below: 172 A. 3d 390.

No. 17–7615. Smith *v.* Michigan. Ct. App. Mich. Certiorari denied.

No. 17–7620. Morris *v.* Knutson. C. A. 7th Cir. Certiorari denied. Reported below: 696 Fed. Appx. 745.

No. 17–7631. Morris *v.* Jones, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 17–7636. Pattison *v.* Morrow, Warden, et al. C. A. 9th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 772.

No. 17–7638. TRIGG *v.* JONES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 268.

No. 17–7642. DAVIS *v.* ROUNDTREE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 700 Fed. Appx. 377.

No. 17–7644. DUPLICHAN *v.* KENT, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 17–7650. EVERSON *v.* ARMSTRONG ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 697 Fed. Appx. 66.

No. 17–7654. COYLE *v.* JACKSON ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 702 Fed. Appx. 727.

No. 17–7655. LEACHMAN *v.* STEPHENS ET AL. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 17–7659. YATES *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 230 So. 3d 1235.

No. 17–7663. ADKINS *v.* HBL, LLC. C. A. 4th Cir. Certiorari denied. Reported below: 702 Fed. Appx. 177.

No. 17–7664. WILLIAMS *v.* FLORIDA DEPARTMENT OF CORRECTIONS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 678 Fed. Appx. 877.

No. 17–7669. MORALES *v.* HEDGPETH, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 700 Fed. Appx. 761.

No. 17–7673. DUNSMORE *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 17–7675. SORO *v.* KEYES CO. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 237 So. 3d 324.

No. 17–7676. RICKS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 17–7683. ANDERSON *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 17–7685. LAY *v.* ROYAL, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 860 F. 3d 1307.

No. 17–7688. Bowling *v.* White, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 694 Fed. Appx. 1008.

No. 17–7691. Suarez *v.* Anthem, Inc., fka WellPoint. C. A. 10th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 607.

No. 17–7693. Holman *v.* Sachse, Warden. Sup. Ct. Mo. Certiorari denied. Reported below: 530 S. W. 3d 500.

No. 17–7699. Brown *v.* Hunt, Superintendent, Columbus Correctional Facility, et al. C. A. 4th Cir. Certiorari denied. Reported below: 694 Fed. Appx. 201.

No. 17–7705. Smith *v.* Superior Court of Georgia, Cobb County. C. A. 11th Cir. Certiorari denied.

No. 17–7707. Baker *v.* Jones, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 17–7708. Pleasant-Bey *v.* Tennessee. Sup. Ct. Tenn. Certiorari denied.

No. 17–7724. Davis *v.* Texas (two judgments). Ct. Crim. App. Tex. Certiorari denied.

No. 17–7733. Bonner *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 17–7738. Cotton *v.* County of San Bernardino, California, et al. C. A. 9th Cir. Certiorari denied. Reported below: 700 Fed. Appx. 776.

No. 17–7742. Vue *v.* Dowling, Warden. C. A. 10th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 749.

No. 17–7746. Mackey *v.* Berryhill, Deputy Commissioner for Operations, Social Security Administration. C. A. 6th Cir. Certiorari denied.

No. 17–7752. Skyy et al. *v.* City of Arlington, Texas. C. A. 5th Cir. Certiorari denied. Reported below: 712 Fed. Appx. 396.

No. 17–7753. REED *v.* ARNOLD, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 17–7754. SHALLCROSS *v.* FOSTER, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 17–7759. LONG *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 17–7776. GENTILE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 17–7805. PAPPILLION *v.* VANNOY, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 17–7806. BRYNER *v.* CITY OF CLEARFIELD, UTAH, ET AL. Ct. App. Utah. Certiorari denied.

No. 17–7807. ANDERSON *v.* DICKSON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 715 Fed. Appx. 481.

No. 17–7812. CISNEROS *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 17–7813. CLEWIS *v.* HIRSCH ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 700 Fed. Appx. 347.

No. 17–7816. ZANA *v.* NEVEN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 744.

No. 17–7837. SCOTT *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 17–7842. DUART *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 477 Mass. 630, 82 N. E. 3d 1002.

No. 17–7864. IAQUINTA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 701 Fed. Appx. 271.

No. 17–7867. VILLA-GOMEZ *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 9 Cal. App. 5th 527, 215 Cal. Rptr. 3d 161.

No. 17–7876. PULLMAN *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 17–7882. BEAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–7889. DAVIS, AKA STRONG *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 175 A. 3d 375.

No. 17–7892. BARTLETT *v.* ALASKA BAR ASSN. Sup. Ct. Alaska. Certiorari denied.

No. 17–7896. MACIAS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 541 S. W. 3d 782.

No. 17–7899. LEE *v.* DUCART, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 17–7908. ADAMS *v.* TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 17–7914. RUCANO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 149 App. Div. 3d 876, 49 N. Y. S. 3d 925.

No. 17–7919. DULAURENCE *v.* TELEGEN ET AL. C. A. 1st Cir. Certiorari denied.

No. 17–7921. WEIBLE *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist., Div. 3. Certiorari denied.

No. 17–7923. WOODRUFF *v.* CROCKETT ET AL. C. A. 11th Cir. Certiorari denied.

No. 17–7927. RETTIG *v.* UTAH. Sup. Ct. Utah. Certiorari denied. Reported below: 2017 UT 83, 416 P. 3d 520.

No. 17–7936. LABRANCHE *v.* DEPARTMENT OF DEFENSE. C. A. 5th Cir. Certiorari denied. Reported below: 720 Fed. Appx. 182.

No. 17–7937. KHOSHMOOD *v.* SOCIAL SECURITY ADMINISTRATION; and KHOSHMOOD *v.* BERRYHILL, DEPUTY COMMISSIONER FOR OPERATIONS, SOCIAL SECURITY ADMINISTRATION (Reported below: 715 Fed. Appx. 4). C. A. D. C. Cir. Certiorari denied.

No. 17–7963. FRANCO *v.* UNITED STATES; and

No. 17–8050. BARRAGAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 871 F. 3d 689.

No. 17–7972. BARNES *v.* TEXAS. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 17–7975. TARVER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–7979. JACKSON *v.* WILSON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 214.

No. 17–7982. TINGLE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 880 F. 3d 850.

No. 17–7983. WALKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 192.

No. 17–7986. WILSON *v.* ZUBIATE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 718 Fed. Appx. 479.

No. 17–7987. YOUNGER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 17–7990. EYLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 729 Fed. Appx. 513.

No. 17–7992. DEAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 717 Fed. Appx. 925.

No. 17–7995. MORMON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 282.

No. 17–7996. PHILENTROPE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–7998. MCDANIEL *v.* HOFFNER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 17–7999. NAVARRETE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 535.

No. 17–8004. STRAW *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN. C. A. 7th Cir. Certiorari denied.

No. 17–8006. BROOKS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 17–8007. JACQUES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 717 Fed. Appx. 934.

No. 17–8011. BLOUNT *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 860 F. 3d 732.

No. 17–8014. BOLDEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 17–8015. COOK *v.* BAYLE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 718 Fed. Appx. 51.

No. 17–8016. BOATWRIGHT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 17–8021. CARRILLO-TAMAYO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 225.

No. 17–8023. HERNANDEZ-NUNEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 317.

No. 17–8024. HARRIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 714 Fed. Appx. 364.

No. 17–8025. OWENS *v.* RAY, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 690 Fed. Appx. 815.

No. 17–8026. PARTIDA-CALLES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 316.

No. 17–8028. RAINS *v.* SMITH, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 17–8030. BETHANY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 144 App. Div. 3d 1666, 42 N. Y. S. 3d 495.

No. 17–8033. LAMBERT *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 199 Wash. App. 51, 395 P. 3d 1080.

No. 17–8036. ALSTON *v.* CITY OF MADISON, WISCONSIN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 853 F. 3d 901.

No. 17–8037. AKOBUNDU *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 17–8038. BURKS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 693 Fed. Appx. 261.

No. 17–8039. CRITTENDEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 142.

No. 17–8044. GATTIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 877 F. 3d 150.

No. 17–8045. FRENTZ *v.* BROWN, SUPERINTENDENT, WABASH VALLEY CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied. Reported below: 876 F. 3d 285.

No. 17–8047. SMITH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 17–8048. STITZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 877 F. 3d 533.

No. 17–8049. RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 224.

No. 17–8051. ADORNO *v.* MELVIN, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 876 F. 3d 917.

No. 17–8052. BRIDGEWATER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 304.

No. 17–8055. OSMAN ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 190.

No. 17–8057. MEDINA *v.* CHOATE. C. A. 10th Cir. Certiorari denied. Reported below: 875 F. 3d 1025.

No. 17–8060. BUILES *v.* KUTA, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 712 Fed. Appx. 132.

No. 17–8061. MANNINO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 706 Fed. Appx. 355.

No. 17–8063. JAMES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 17–8068. ALBRITTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 178.

No. 17–8070. SANDLAIN *v.* ENGLISH, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 714 Fed. Appx. 827.

No. 17–8075. PHILLIPS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 17–8076. MIRANDA-MARTINEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 17–8078. POWELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 259.

No. 17–8086. SYLVESTER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–8087. SANCHEZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 476.

No. 17–8090. THOMAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 17–8092. TRUJILLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 17–8093. AMMONS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 17–8094. BENTON *v.* UNITED STATES (Reported below: 876 F. 3d 1260); and MCDANIEL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 17–8095. HAROON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 874 F. 3d 479.

No. 17–8100. JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 17–8101. ELLIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 683 Fed. Appx. 276.

No. 17–8103. CAMPBELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–8104. SHORT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 689 Fed. Appx. 813.

No. 17–8106. RAYA-ORTEGA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 17–8107. MAIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 876 F. 3d 725.

No. 17–8108. ROBLEDO-CRUZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 706 Fed. Appx. 179.

No. 17–8110. JONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–8111. KLUG *v.* ENGLISH, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 17–8114. NANDA ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 867 F. 3d 522.

No. 17–8115. TORRES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 17–8119. WERLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 877 F. 3d 879.

No. 17–8120. WORTLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 649.

No. 17–8121. BARRERA-VALDIVIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 689 Fed. Appx. 487.

No. 17–8123. WOOLLAM *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 478 Mass. 493, 87 N. E. 3d 64.

No. 17–8125. CAIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 877 F. 3d 562.

No. 17–8126. SILVER *v.* RESCAP BORROWER CLAIMS TRUST. C. A. 2d Cir. Certiorari denied. Reported below: 698 Fed. Appx. 34.

No. 17–8127. YASITH CHHUN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 17–8131. COUTINO-LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 689 Fed. Appx. 872.

No. 17–8132. MURPHY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 775.

No. 17–8136. BLAKE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 868 F. 3d 960.

No. 17–8137. ASFOUR *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 717 Fed. Appx. 822.

No. 17–8140. WHITTLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 713 Fed. Appx. 457.

No. 17–8141. WILD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 706 Fed. Appx. 376.

No. 17–8142. CORRAL-GARCIA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 17–8143. STRAW *v.* HILL, ATTORNEY GENERAL OF INDIANA, ET AL. C. A. 7th Cir. Certiorari denied.

No. 17–8144. SANDERS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 745.

No. 17–8155. DEL CAMPO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 689 Fed. Appx. 488.

No. 17–8158. LATTA *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 341 Ga. App. 696, 802 S. E. 2d 264.

No. 17–8159. KING *v.* MARION COUNTY CIRCUIT COURT. C. A. 7th Cir. Certiorari denied. Reported below: 868 F. 3d 589.

No. 17–8172. CARR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 713 Fed. Appx. 17.

No. 17–8173. CHAPMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 866 F. 3d 129.

No. 17–8177. KENDALL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 876 F. 3d 1264.

No. 17–8178. JOHNSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 400.

No. 17–8179. BOWE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–8182. ROBBIO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–8183. SAMPSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–8184. RAMOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 717 Fed. Appx. 693.

No. 17–8191. MORIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 706 Fed. Appx. 219.

No. 17–8194. BLACK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 718 Fed. Appx. 687.

No. 17–8195. BEASLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 300.

No. 17–8196. BLAYLOCK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 241.

No. 17–923. REID *v.* DONELAN, SHERIFF, FRANKLIN COUNTY, MASSACHUSETTS, ET AL. C. A. 1st Cir. Certiorari before judgment denied.

No. 17–1108. MEDICAL DEVICE BUSINESS SERVICES, INC., FKA DEPUY ORTHOPAEDICS, INC., ET AL. *v.* UNITED STATES EX REL. NARGOL ET AL., ET AL. C. A. 1st Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 865 F. 3d 29.

No. 17–6261. FELL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR and JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 17–7715. CASANOVA *v.* ULIBARRI, WARDEN. C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition.

No. 17–8077. POULNOTT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

Rehearing Denied

No. 17–607. JARRETT *v.* CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES ET AL., 583 U. S. 1055;

No. 17–757. MCGEHEE ET AL. *v.* KENTUCKY TRANSPORTATION CABINET, DEPARTMENT OF HIGHWAYS, 583 U. S. 1116;

No. 17–798. HOLBROOK *v.* RONNIES LLC, 583 U. S. 1117;

No. 17–824. PAYN *v.* KELLEY ET AL., 583 U. S. 1117;

No. 17–833. LUCAS *v.* COLORADO STATE PUBLIC DEFENDER ET AL., 583 U. S. 1117;

No. 17–892. BODY BY COOK, INC., ET AL. *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE ET AL., 583 U. S. 1120;

No. 17–943. Ostrander *v.* Virginia, 583 U. S. 1167;
No. 17–6738. Thompson *v.* Newsome et al., 583 U. S. 1094;
No. 17–6743. Smith *v.* Washington, 583 U. S. 1095;
No. 17–6903. In re Rouse, 583 U. S. 1050;
No. 17–6940. Conner *v.* Department of Education et al., 583 U. S. 1125;
No. 17–7031. Bailey *v.* Warfield & Rohr, 583 U. S. 1126;
No. 17–7053. Gillespie *v.* Reverse Mortgage Solutions, 583 U. S. 1127;
No. 17–7054. Gillespie *v.* Reverse Mortgage Solutions, 583 U. S. 1127;
No. 17–7060. In re Charles, 583 U. S. 1113;
No. 17–7093. Roosa *v.* Florida, 583 U. S. 1128;
No. 17–7098. Dietrich *v.* City of Grosse Pointe Park, Michigan, et al., 583 U. S. 1128;
No. 17–7101. Green *v.* Creighton/CHI Health et al., 583 U. S. 1128;
No. 17–7303. Rotte *v.* United States, 583 U. S. 1134;
No. 17–7318. Smith *v.* City of Wyoming, Ohio, et al., 583 U. S. 1170; and
No. 17–7361. Simmons *v.* United States, 583 U. S. 1135. Petitions for rehearing denied.

April 19, 2018

Miscellaneous Orders

No. 17A1150. Moody *v.* Alabama. Sup. Ct. Ala. Application for stay of execution of sentence of death, presented to Justice Thomas, and by him referred to the Court, denied.

No. 17–8530 (17A1139). In re Moody. Application for stay of execution of sentence of death, presented to Justice Thomas, and by him referred to the Court, denied. Petition for writ of mandamus denied.

Certiorari Denied

No. 17–8564 (17A1145). Moody *v.* Stewart, Warden (Reported below: 887 F. 3d 1281); and Moody *v.* Sessions, Attorney General (730 Fed. Appx. 851). C. A. 11th Cir. Application for stay of execution of sentence of death, presented to Justice Thomas, and by him referred to the Court, denied. Certiorari denied. The order heretofore entered by Justice Thomas is vacated.

April 23, 2018

Certiorari Granted—Vacated and Remanded

No. 17–5562. Wilson *v.* Sellers, Warden. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Wilson* v. *Sellers*, *ante*, p. 122. Reported below: 842 F. 3d 1155.

Certiorari Dismissed

No. 17–7817. Wei Zhou *v.* Marquette University. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 17M103. Nouna *v.* Ross, Secretary of Commerce. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 17M104. Wooten *v.* Superior Court of California, San Joaquin County, 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. 17M105. Carbajal-Valdez *v.* United States. Motion for leave to file petition for writ of certiorari with supplemental appendix under seal granted.

No. 17–804. EVE–USA, Inc., et al. *v.* Mentor Graphics Corp. C. A. Fed. Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Justice Gorsuch took no part in the consideration or decision of this petition.

No. 17–965. Trump, President of the United States, et al. *v.* Hawaii et al. C. A. 9th Cir. [Certiorari granted, 583 U. S. 1099.] Motion of David Boyle for leave to file brief as *amicus curiae* granted.

No. 17–6849. Selden *v.* United States District Court for the Middle District of Florida. C. A. 11th Cir. Motion of

petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [583 U. S. 1100] denied.

No. 17–7313. LUCZAK *v.* PFISTER ET AL. C. A. 7th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [583 U. S. 1111] denied.

No. 17–8084. KOCH *v.* CITY OF SARGENT, NEBRASKA. Ct. App. Neb. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until May 14, 2018, 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. 17–8291. IN RE PERAZA VIERA. Petition for writ of habeas corpus denied.

No. 17–1374. IN RE BOZELKO; and

No. 17–8234. IN RE WITCHARD. Petitions for writs of mandamus denied.

Certiorari Granted

No. 17–765. UNITED STATES *v.* STITT. C. A. 6th Cir.; and

No. 17–766. UNITED STATES *v.* SIMS. C. A. 8th Cir. Motions of respondents for leave to proceed *in forma pauperis* granted. Certiorari granted, cases consolidated, and a total of one hour is allotted for oral argument. Reported below: No. 17–765, 860 F. 3d 854; No. 17–766, 854 F. 3d 1037.

Certiorari Denied

No. 17–671. MARBLE *v.* POOLE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 687 Fed. Appx. 587.

No. 17–843. JORDAN *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR, ET AL. C. A. 5th Cir. Certiorari denied.

No. 17–850. HOUGHTALING *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 326 Conn. 330, 163 A. 3d 563.

No. 17–912. BOSTIC *v.* DUNBAR, ACTING WARDEN. Sup. Ct. Mo. Certiorari denied.

No. 17–945. QUINN ET AL. *v.* BOARD OF COUNTY COMMISSIONERS FOR QUEEN ANNE'S COUNTY, MARYLAND, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 862 F. 3d 433.

No. 17–991. LONG *v.* PFISTER, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 874 F. 3d 544.

No. 17–1086. GREDE, NOT INDIVIDUALLY BUT AS LIQUIDATION TRUSTEE OF THE SENTINEL LIQUIDATION TRUST *v.* FCSTONE, LLC. C. A. 7th Cir. Certiorari denied. Reported below: 867 F. 3d 767.

No. 17–1155. BOLTON *v.* CITY OF HATTIESBURG, MISSISSIPPI. C. A. 5th Cir. Certiorari denied. Reported below: 701 Fed. Appx. 370.

No. 17–1160. PRICE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS LIEUTENANT OF HAYWOOD COUNTY SHERIFF'S DEPARTMENT, ET AL. *v.* HENSLEY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 876 F. 3d 573.

No. 17–1163. COLEMAN *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. Sup. Ct. Va. Certiorari denied.

No. 17–1193. CLAYTOR ET AL. *v.* VOLKSWAGEN GROUP OF AMERICA, INC. Sup. Ct. Va. Certiorari denied.

No. 17–1215. PUERTO RICO TELEPHONE CO., INC. *v.* SAN JUAN CABLE LLC. C. A. 1st Cir. Certiorari denied. Reported below: 874 F. 3d 767.

No. 17–1216. BEHRMANN ET UX. *v.* GOLDSTEIN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 134.

No. 17–1223. WILSON, AS EXECUTOR OF THE ESTATE OF WILSON *v.* DALLAS COUNTY HOSPITAL DISTRICT, DBA PARKLAND HEALTH & HOSPITAL SYSTEM, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 715 Fed. Appx. 319.

No. 17–1248. STORER ET AL. *v.* CLARK ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 860 F. 3d 1340.

No. 17–1255. FRENCH *v.* JONES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 876 F. 3d 1228.

No. 17–1271. KANOFSKY *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 693 Fed. Appx. 229.

No. 17–1276. BURWICK *v.* PILKERTON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 700 Fed. Appx. 214.

No. 17–1308. SEWELL *v.* BULL ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 277 So. 3d 958.

No. 17–1321. GRANTON *v.* WASHINGTON STATE LOTTERY. C. A. 9th Cir. Certiorari denied. Reported below: 682 Fed. Appx. 598.

No. 17–1322. HENRY *v.* FLORIDA BAR ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 701 Fed. Appx. 878.

No. 17–1334. MCDANIEL *v.* PERDUE, SECRETARY OF AGRICULTURE. C. A. D. C. Cir. Certiorari denied. Reported below: 717 Fed. Appx. 5.

No. 17–1338. FOX *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 878 F. 3d 574.

No. 17–1344. WEYGANDT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 681 Fed. Appx. 630.

No. 17–1346. WINANS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 17–1373. ADAMCIK *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied. Reported below: 163 Idaho 114, 408 P. 3d 474.

No. 17–6021. ALFARO-GRANADOS *v.* UNITED STATES; and
No. 17–6116. ALVARADO-LINARES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 969.

No. 17–6477. DAVIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 254.

No. 17–6567. JOHNSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 702 Fed. Appx. 349.

No. 17–6779. STEELE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 17–7002. SIMS *v.* LOUISIANA. Ct. App. La., 3d Cir. Certiorari denied.

No. 17–7019. REEVES *v.* GREEN. C. A. 4th Cir. Certiorari denied. Reported below: 692 Fed. Appx. 154.

No. 17–7463. HAND *v.* SHOOP, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 871 F. 3d 390.

No. 17–7494. BAIN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 874 F. 3d 1.

No. 17–7504. THOMPSON *v.* PARKER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 867 F. 3d 641.

No. 17–7634. MINOR *v.* HASTINGS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 704 Fed. Appx. 103.

No. 17–7774. FERGUSON *v.* GETTEL ACURA. C. A. 11th Cir. Certiorari denied.

No. 17–7787. STANTON *v.* DOE ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 586.

No. 17–7790. SHEVCHANKO *v.* CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION ET AL. C. A. 9th Cir. Certiorari denied.

No. 17–7792. D. S. *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied.

No. 17–7799. BELSER *v.* WASHINGTON, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS, ET AL. C. A. 6th Cir. Certiorari denied.

No. 17–7811. ANORUO *v.* TENET HEALTHSYSTEM HAHNEMANN, DBA HAHNEMANN UNIVERSITY HOSPITAL. C. A. 3d Cir. Certiorari denied. Reported below: 697 Fed. Appx. 110.

No. 17–7814. CLARKSON *v.* VANNOY, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 17–7826. DANIELS *v.* TEXAS (seven judgments). Ct. Crim. App. Tex. Certiorari denied.

No. 17–7832. DELGADO *v.* GODINEZ ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 683 Fed. Appx. 528.

No. 17–7866. TOLBERT *v.* HILL, ASSOCIATE JUDGE, CIRCUIT COURT OF ILLINOIS, COOK COUNTY. Sup. Ct. Ill. Certiorari denied.

No. 17–7874. BIRCH *v.* WILLIAMS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 852.

No. 17–7958. JOHNSON *v.* FILSON, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 17–7968. STRIBLING *v.* BROCK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 703 Fed. Appx. 461.

No. 17–8005. STRAW *v.* SUPREME COURT OF INDIANA. C. A. 7th Cir. Certiorari denied.

No. 17–8010. BREITZMAN *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 2017 WI 100, 378 Wis. 2d 431, 904 N. W. 2d 93.

No. 17–8020. BRYAN *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 17–8031. REED *v.* NATIONAL FOOTBALL LEAGUE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 683 Fed. Appx. 619.

No. 17–8032. STEELE *v.* THOMAS, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 17–8043. MORGAN *v.* KANSAS ET AL. C. A. 10th Cir. Certiorari denied.

No. 17–8065. COMBS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 620.

No. 17–8071. JACKSON *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 17–8082. SHILLING *v.* WALSH. Super. Ct. Pa. Certiorari denied.

No. 17–8097. ANGEL PEREZ *v.* NEW YORK CITY DEPARTMENT OF EDUCATION. C. A. 2d Cir. Certiorari denied.

No. 17–8129. TIJERINA *v.* LASHBROOK, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 17–8135. THOMPSON *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 700 Fed. Appx. 575.

No. 17–8149. MATTHEWS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 701 Fed. Appx. 284.

No. 17–8150. MALDONADO-GOMEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 689 Fed. Appx. 571.

No. 17–8152. MARTIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 719 Fed. Appx. 881.

No. 17–8156. ADRIAN MANZANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 689 Fed. Appx. 472.

No. 17–8157. KENNEDY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 720 Fed. Appx. 104.

No. 17–8162. MUNOZ GONZALEZ ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 869 F. 3d 1089 and 711 Fed. Appx. 829.

No. 17–8163. GUZMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 706 Fed. Appx. 836.

No. 17–8164. SINGH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 726 Fed. Appx. 845.

No. 17–8169. LUIS GUTIERREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 876 F. 3d 1254.

No. 17–8171. ROWE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 878 F. 3d 623.

No. 17–8175. AXSOM *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 17–8185. SEWELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 712 Fed. Appx. 917.

No. 17–8186. STURGIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 17–8190. OSER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 256.

No. 17–8197. LESTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 241.

No. 17–8199. DELGADO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–8200. WOLFF *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 714 Fed. Appx. 617.

No. 17–8203. GARZA *v.* UNITED STATES (Reported below: 708 Fed. Appx. 218); RIVERA *v.* UNITED STATES (710 Fed. Appx. 213); TORRES-LARRAGA *v.* UNITED STATES (713 Fed. Appx. 333); and BARAJAS *v.* UNITED STATES (714 Fed. Appx. 478). C. A. 5th Cir. Certiorari denied.

No. 17–8204. SAID *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied.

No. 17–8209. DUNSTON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 17–8210. WEBB *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 874 F. 3d 418.

No. 17–8211. TAYLOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 701 Fed. Appx. 391.

No. 17–8212. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 713 Fed. Appx. 208.

No. 17–8213. BREWER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 557.

No. 17–8214. DIEHL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 393.

No. 17–8215. BURTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 17–8220. RUSSELL *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 239 So. 3d 1.

No. 17–8223. SCHLAKE *v.* UNITED STATES (two judgments). C. A. 9th Cir. Certiorari denied.

No. 17–8226. ECHOLS *v.* CSX TRANSPORTATION, INC. C. A. 4th Cir. Certiorari denied. Reported below: 700 Fed. Appx. 267.

No. 17–8240. EVERETT *v.* GEORGIA ET AL. C. A. 11th Cir. Certiorari denied.

No. 17–8243. ROLAND *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 17–8246. STRAW *v.* EXECUTIVE COMMITTEE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS. C. A. 7th Cir. Certiorari denied.

No. 17–8250. PERSAUD *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 17–8254. BATISTA *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 151 Ohio St. 3d 584, 2017-Ohio-8304, 91 N. E. 3d 724.

No. 17–8255. BARCENAS-PATINO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 707 Fed. Appx. 285.

No. 17–8299. NEEL *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 17–8311. RUSSELL *v.* OHIO. Ct. App. Ohio, 10th App. Dist., Franklin County. Certiorari denied. Reported below: 2017-Ohio-2871.

No. 17–1226. FRONT ROW TECHNOLOGIES, LLC *v.* MLB ADVANCED MEDIA, L. P., ET AL. C. A. Fed. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 697 Fed. Appx. 701.

No. 17–7784. COTTON *v.* JOHNSON & JOHNSON. C. A. 6th Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

No. 17–8167. SPALDING *v.* UNITED STATES. C. A. 5th Cir. Certiorari before judgment denied.

No. 17–8168. INGRAM *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 721 Fed. Appx. 811.

Rehearing Denied

No. 17–567. SCOTT ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, 583 U. S. 1167;

No. 17–924. CABACOFF *v.* SELECT PORTFOLIO SERVICING, INC., 583 U. S. 1167;

No. 17–947. JACKSON *v.* COLORADO, 583 U. S. 1121;

No. 17–1022. MEISNER *v.* ZYMOGENETICS, INC., ET AL., 583 U. S. 1168;

No. 17–1054. NGUYEN *v.* UNITED STATES, 583 U. S. 1169;

No. 17–6269. RICHARDSON *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 583 U. S. 1063;

No. 17–6393. LAVELLE *v.* U. S. BANK N. A., AS TRUSTEE, 583 U. S. 1064;

No. 17–6426. NUNEZ-GARCIA *v.* UNITED STATES, 583 U. S. 1122; and

No. 17–6844. WESSINGER *v.* VANNOY, WARDEN, 583 U. S. 1173. Petitions for rehearing denied.

APRIL 25, 2018

Certiorari Denied

No. 17–8521 (17A1140). DAVILA *v.* TEXAS (two judgments). Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Certiorari denied.

APRIL 26, 2018

Dismissal Under Rule 46

No. 17–161. BLUE CROSS BLUE SHIELD OF NORTH CAROLINA *v.* JEMSEK CLINIC, P. A., ET AL. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 850 F. 3d 150.

Miscellaneous Orders. (For the Court's orders prescribing amendments to the Federal Rules of Appellate Procedure, see *post*, p. 1045; amendments to the Federal Rules of Bankruptcy Procedure, see *post*, p. 1059; amendments to the Federal Rules of Civil Procedure, see *post*, p. 1079; and amendments to the Federal Rules of Criminal Procedure, see *post*, p. 1089.)

APRIL 30, 2018

Certiorari Dismissed

No. 17–8278. BAMDAD *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*).

No. 17–8313. St. Louis *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. 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: 173 A. 3d 537.

Miscellaneous Orders

No. 17M106. Doe *v.* United States. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record denied.

No. 17M107. Lothian Cassidy, L. L. C., et al. *v.* Lothian Exploration & Development II, L. P. (LEAD II), et al.; and Shoshana Trust et al. *v.* Raleigh et al. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 17M108. Alexsam, Inc. *v.* Wildcard Systems, Inc., et al. Motion for leave to file petition for writ of certiorari with supplemental appendix under seal granted.

No. 17–312. United States *v.* Sanchez-Gomez et al. C. A. 9th Cir. [Certiorari granted, 583 U. S. 1036.] Motion of respondent Rene Sanchez-Gomez for appointment of counsel granted, and Ellis M. Johnston III, Esq., of San Diego, Cal., is appointed to serve as counsel for respondent Rene Sanchez-Gomez in this case.

No. 17–8425. In re Sevion-El. Petition for writ of habeas corpus denied.

No. 17–7918. In re Colen. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 17–961. Frank et al. *v.* Gaos, Individually and on Behalf of all Others Similarly Situated, et al. C. A. 9th Cir. Certiorari granted. Reported below: 869 F. 3d 737.

No. 17–988. LAMPS PLUS, INC., ET AL. *v.* VARELA. C. A. 9th Cir. Certiorari granted. Reported below: 701 Fed. Appx. 670.

No. 17–8151. BUCKLEW *v.* PRECYTHE, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS, ET AL. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. In addition to the questions presented in the petition, the parties are directed to brief and argue the following question: "Whether petitioner met his burden under *Glossip* v. *Gross*, 576 U. S. 8 (2015), to prove what procedures would be used to administer his proposed alternative method of execution, the severity and duration of pain likely to be produced, and how they compare to the State's method of execution." Reported below: 883 F. 3d 1087.

Certiorari Denied

No. 16–778. LICCI ET AL. *v.* LEBANESE CANADIAN BANK, SAL. C. A. 2d Cir. Certiorari denied. Reported below: 834 F. 3d 201.

No. 16–1526. CELGARD, LLC *v.* IANCU, DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE. C. A. Fed. Cir. Certiorari denied. Reported below: 671 Fed. Appx. 797.

No. 17–39. HILLCREST LABORATORIES, INC. *v.* MOVEA, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 683 Fed. Appx. 929.

No. 17–110. PAICE LLC ET AL. *v.* FORD MOTOR CO.; and
No. 17–111. PAICE LLC ET AL. *v.* FORD MOTOR CO. C. A. Fed. Cir. Certiorari denied. Reported below: 685 Fed. Appx. 940.

No. 17–112. PAICE LLC ET AL. *v.* FORD MOTOR CO.; and
No. 17–113. PAICE LLC ET AL. *v.* FORD MOTOR CO. C. A. Fed. Cir. Certiorari denied. Reported below: 685 Fed. Appx. 950.

No. 17–114. DEPOMED, INC. *v.* IANCU, DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE. C. A. Fed. Cir. Certiorari denied. Reported below: 680 Fed. Appx. 947.

No. 17–116. AFFINITY LABS OF TEXAS, LLC *v.* SAMSUNG ELECTRONICS CO., LTD., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 680 Fed. Appx. 1016.

No. 17–117. AFFINITY LABS OF TEXAS, LLC *v.* IANCU, DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE. C. A.

Fed. Cir. Certiorari denied. Reported below: 680 Fed. Appx. 1017.

No. 17–159. IPR Licensing, Inc. *v.* ZTE Corp. et al. C. A. Fed. Cir. Certiorari denied. Reported below: 685 Fed. Appx. 933.

No. 17–214. Security People, Inc. *v.* Iancu, Director, United States Patent and Trademark Office, et al. C. A. Fed. Cir. Certiorari denied.

No. 17–220. Paice LLC et al. *v.* Ford Motor Co.;
No. 17–221. Paice LLC et al. *v.* Ford Motor Co.; and
No. 17–222. Paice LLC et al. *v.* Ford Motor Co. C. A. Fed. Cir. Certiorari denied. Reported below: 681 Fed. Appx. 904.

No. 17–229. Paice LLC et al. *v.* Ford Motor Co. C. A. Fed. Cir. Certiorari denied. Reported below: 681 Fed. Appx. 885.

No. 17–232. Affinity Labs of Texas, LLC *v.* Iancu, Director, United States Patent and Trademark Office. C. A. Fed. Cir. Certiorari denied. Reported below: 856 F. 3d 883.

No. 17–233. Affinity Labs of Texas, LLC *v.* Iancu, Director, United States Patent and Trademark Office. C. A. Fed. Cir. Certiorari denied. Reported below: 856 F. 3d 902.

No. 17–330. Integrated Claims Systems, LLC *v.* Travelers Lloyds of Texas Insurance Co. et al. C. A. Fed. Cir. Certiorari denied. Reported below: 684 Fed. Appx. 959.

No. 17–349. Skky, Inc. *v.* MindGeek, s. a. r. l., et al. C. A. Fed. Cir. Certiorari denied. Reported below: 859 F. 3d 1014.

No. 17–357. Google, LLC *v.* Unwired Planet, LLC. C. A. Fed. Cir. Certiorari denied. Reported below: 841 F. 3d 1376.

No. 17–408. Outdry Technologies Corp. *v.* Geox S. p. A. C. A. Fed. Cir. Certiorari denied. Reported below: 859 F. 3d 1364.

No. 17–535. TransPerfect Global, Inc. *v.* Iancu, Director, United States Patent and Trademark Office. C. A. Fed. Cir. Certiorari denied. Reported below: 703 Fed. Appx. 953.

No. 17–617. C-Cation Technologies, LLC *v.* Arris Group, Inc., et al. C. A. Fed. Cir. Certiorari denied. Reported below: 695 Fed. Appx. 574.

No. 17–643. AT&T Intellectual Property II, L. P. *v.* Iancu, Director, United States Patent and Trademark Office. C. A. Fed. Cir. Certiorari denied. Reported below: 856 F. 3d 991.

No. 17–656. Audatex North America, Inc. *v.* Mitchell International, Inc. C. A. Fed. Cir. Certiorari denied. Reported below: 703 Fed. Appx. 986.

No. 17–751. Nidec Motor Corp. *v.* Zhongshan Broad Ocean Motor Co., Ltd., et al. C. A. Fed. Cir. Certiorari denied. Reported below: 868 F. 3d 1013.

No. 17–768. Hitachi Metals, Ltd. *v.* Alliance of Rare-Earth Permanent Magnet Industry. C. A. Fed. Cir. Certiorari denied. Reported below: 699 Fed. Appx. 929.

No. 17–787. Enova Technology Corp. *v.* Seagate Technology (US) Holdings, Inc., et al. C. A. Fed. Cir. Certiorari denied. Reported below: 706 Fed. Appx. 987.

No. 17–819. Ameren Corp. et al. *v.* Federal Communications Commission et al. C. A. 8th Cir. Certiorari denied. Reported below: 865 F. 3d 1009.

No. 17–859. Hertz Corp. et al. *v.* Superior Court of California, City and County of San Francisco, et al. Ct. App. Cal., 1st App. Dist., Div. 5. Certiorari denied.

No. 17–862. Maricopa County, Arizona, et al. *v.* Villa. C. A. 9th Cir. Certiorari denied. Reported below: 865 F. 3d 1224.

No. 17–914. Livingston Christian Schools *v.* Genoa Charter Township. C. A. 6th Cir. Certiorari denied. Reported below: 858 F. 3d 996.

No. 17–915. North Coast Railroad Authority *v.* Friends of the Eel River et al. Sup. Ct. Cal. Certiorari denied. Reported below: 3 Cal. 5th 677, 399 P. 3d 37.

No. 17–1009. CONSTITUTION PIPELINE CO., LLC *v.* NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 868 F. 3d 87.

No. 17–1018. UNILOC USA, INC., ET AL. *v.* SEGA OF AMERICA, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 711 Fed. Appx. 986.

No. 17–1043. WORLDWIDE OILFIELD MACHINE, INC. *v.* AMERIFORGE GROUP, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 698 Fed. Appx. 1036.

No. 17–1052. BUSSELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 695.

No. 17–1127. THOMAS E. PROCTOR HEIRS TRUST *v.* CORNWALL MOUNTAIN INVESTMENTS, L. P., ET AL. (Reported below: 168 A. 3d 332); and MARGARET O. F. PROCTOR TRUST *v.* CORNWALL MOUNTAIN INVESTMENTS, L. P., ET AL. (158 A. 3d 148). Super. Ct. Pa. Certiorari denied.

No. 17–1161. NATIONWIDE BIWEEKLY ADMINISTRATION, INC., ET AL. *v.* HUBANKS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 873 F. 3d 716.

No. 17–1168. LONG ET AL. *v.* SOUTH DAKOTA. Sup. Ct. S. D. Certiorari denied. Reported below: 2017 S.D. 78, 904 N. W. 2d 358.

No. 17–1173. WILLIAMS *v.* GRAND TRUNK WESTERN RAILROAD CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 875 F. 3d 821.

No. 17–1186. LUCE ET AL. *v.* TOWN OF CAMPBELL, WISCONSIN. C. A. 7th Cir. Certiorari denied. Reported below: 872 F. 3d 512.

No. 17–1190. UTTERBACK *v.* TRUSTMARK NATIONAL BANK ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 241.

No. 17–1191. GOMEZ *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 17–1192. TIRAT-GEFEN *v.* BATISTA ALMEIDA. Sup. Ct. Va. Certiorari denied.

No. 17–1195. WANN *v.* ST. FRANCOIS COUNTY, MISSOURI, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 857.

No. 17–1209. BARCLAYS PLC ET AL. *v.* WAGGONER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 875 F. 3d 79.

No. 17–1254. BARTH *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 705 Fed. Appx. 1003.

No. 17–1256. FRANKLIN-MASON *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 692 Fed. Appx. 633.

No. 17–1260. MOBLEY *v.* LEATHERWOOD ET AL. C. A. 6th Cir. Certiorari denied.

No. 17–1263. SUKHOVA *v.* SESSIONS, ATTORNEY GENERAL. C. A. 2d Cir. Certiorari denied. Reported below: 698 Fed. Appx. 638.

No. 17–1267. SANDHU *v.* SESSIONS, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 681 Fed. Appx. 647.

No. 17–1323. GRAHAM *v.* WELLS FARGO BANK, N. A., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 831.

No. 17–1350. NAHMANI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 696 Fed. Appx. 457.

No. 17–1362. SCHNEIDER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 474.

No. 17–1367. INDUSTRIAL MODELS, INC. *v.* SNF, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 716 Fed. Appx. 949.

No. 17–1380. CHAPMAN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 11th Cir. Certiorari denied. Reported below: 715 Fed. Appx. 885.

No. 17–1381. IN RE GRAND JURY SUBPOENAS RETURNABLE DECEMBER 16, 2015. C. A. 2d Cir. Certiorari denied. Reported below: 871 F. 3d 141.

No. 17–6338. MARTINEZ-RIVERA *v.* UNITED STATES (Reported below: 696 Fed. Appx. 169); and TELLO-SEGUNDO *v.* UNITED STATES (693 Fed. Appx. 331). C. A. 5th Cir. Certiorari denied.

No. 17–6562. SAUCEDO-RIOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 690 Fed. Appx. 882.

No. 17–6596. MILLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 696 Fed. Appx. 696.

No. 17–7085. GONZALEZ *v.* ARIZONA EX REL. BRNOVICH, ATTORNEY GENERAL OF ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 17–7157. SNYDER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 871 F. 3d 1122.

No. 17–7173. MARTINEZ-CERDA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 398.

No. 17–7607. WESTOVER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 713 Fed. Appx. 734.

No. 17–7845. OGLETREE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 17–7848. ORTEGA *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2017 IL App (1st) 143424–U.

No. 17–7850. PHILLIP *v.* MCARDLE. C. A. 2d Cir. Certiorari denied.

No. 17–7851. MCPHERSON *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 2017 IL App (2d) 150299–U.

No. 17–7853. WILLACY *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 703 Fed. Appx. 744.

No. 17–7856. NELSON *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 17–7865. GARCIA *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 316.

No. 17–7891. BLUEFELD *v.* COHEN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 788.

No. 17–7900. NORWOOD *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 17–7903. THOMAS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 17–7904. WILSON *v.* VANNOY, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 708 Fed. Appx. 804.

No. 17–7907. OCHOA *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. Reported below: 2017–NMSC–031, 406 P. 3d 505.

No. 17–7911. RICES *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 4 Cal. 5th 49, 406 P. 3d 788.

No. 17–7917. ESPINOZA *v.* MCGRATH, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 17–7922. WORTH *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 145 App. Div. 3d 1573, 42 N. Y. S. 3d 905.

No. 17–7926. STANBACK *v.* DANIELS. C. A. 4th Cir. Certiorari denied. Reported below: 694 Fed. Appx. 183.

No. 17–7933. BRUMFIELD *v.* NATCHITOCHES PARISH DETENTION CENTER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 689 Fed. Appx. 309.

No. 17–7943. STANLEY *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 200 Wash. App. 1035.

No. 17–7945. RICHARDSON *v.* LINK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 17–7951. AUSTIN *v.* JACKSONVILLE SHERIFF'S OFFICE. Sup. Ct. Fla. Certiorari denied.

No. 17–7956. TEDESCO *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 161 A. 3d 375.

No. 17–7973. Roosevelt W. et al. *v.* Los Angeles County Department of Children and Family Services. Ct. App. Cal., 2d App. Dist., Div. 4. Certiorari denied.

No. 17–7985. Wright *v.* Horton, Warden. C. A. 6th Cir. Certiorari denied.

No. 17–7997. Nomesiri *v.* Price. C. A. 9th Cir. Certiorari denied.

No. 17–8001. Ratcliff *v.* Texas et al. C. A. 5th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 410.

No. 17–8029. Seals, aka Seals-Brown *v.* Llopis et al. C. A. 9th Cir. Certiorari denied. Reported below: 678 Fed. Appx. 533.

No. 17–8062. Kelly *v.* Trierweiler, Warden. C. A. 6th Cir. Certiorari denied.

No. 17–8064. Chandler *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 17–8079. Pyles *v.* Spiller et al. C. A. 7th Cir. Certiorari denied. Reported below: 708 Fed. Appx. 279.

No. 17–8088. Royster *v.* Shoop, Warden. C. A. 6th Cir. Certiorari denied.

No. 17–8133. Warfield *v.* Illinois. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 2017 IL App (4th) 140813–U.

No. 17–8218. Washington *v.* Diamond. C. A. 9th Cir. Certiorari denied.

No. 17–8227. Cramer *v.* City of Auburn, California, et al. C. A. 9th Cir. Certiorari denied. Reported below: 688 Fed. Appx. 483.

No. 17–8229. Mathias *v.* Brittain, Superintendent, State Correctional Institution at Frackville, et al. C. A. 3d Cir. Certiorari denied. Reported below: 876 F. 3d 462.

No. 17–8233. Willoughby *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 17–8238. WHITE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 709 Fed. Appx. 194.

No. 17–8251. ORTIZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 17–8252. ORELLANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 915.

No. 17–8259. SEVILLA-ACOSTA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 17–8276. ALEXANDER *v.* WILLIAMS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 171.

No. 17–8287. ROBINSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 624 Fed. Appx. 135.

No. 17–8293. VEATCH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 338.

No. 17–8300. STAMPER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 17–8303. COURTRIGHT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 17–8307. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 718 Fed. Appx. 890.

No. 17–8308. WHITEWATER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 879 F. 3d 289.

No. 17–8310. DELOGE *v.* DESOTO COUNTY SHERIFF'S DEPARTMENT ET AL. Ct. App. Miss. Certiorari denied. Reported below: 230 So. 3d 1026.

No. 17–8316. ZIMNY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 873 F. 3d 38.

No. 17–8317. FORD-BEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 175.

No. 17–8318. FELIX *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 715 Fed. Appx. 958.

No. 17–8320. SHAH *v.* QUINTANA, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 17–8322. HARRISON *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 2017 IL App (4th) 170100–U.

No. 17–8323. WINSTEAD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 717 Fed. Appx. 369.

No. 17–8330. BAEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 720 Fed. Appx. 984.

No. 17–8337. EVANS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 17–8342. TAYLOR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 719 Fed. Appx. 495.

No. 17–8343. WILSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 182 A. 3d 118.

No. 17–8377. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–8379. ARREDONDO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 702 Fed. Appx. 243.

No. 17–558. LINKGINE, INC. *v.* VIGLINK, INC., ET AL. C. A. Fed. Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 689 Fed. Appx. 965.

No. 17–707. KIP CR P1 LP, SUCCESSOR IN TITLE TO CROSSROADS SYSTEMS, INC. *v.* ORACLE CORP. ET AL. C. A. Fed. Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 690 Fed. Appx. 665.

No. 17–708. KIP CR P1 LP, SUCCESSOR IN TITLE TO CROSSROADS SYSTEMS, INC. *v.* CISCO SYSTEMS, INC., ET AL. C. A. Fed. Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 694 Fed. Appx. 780.

No. 17–756. PUBLIC SERVICE COMPANY OF NEW MEXICO *v.* BARBOAN ET AL. C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 857 F. 3d 1101.

No. 17–1084. COLORADO *v.* FUENTES-ESPINOZA. Sup. Ct. Colo. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 408 P. 3d 445.

No. 17–1249. CRUZ SALES *v.* SESSIONS, ATTORNEY GENERAL. C. A. 9th Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 868 F. 3d 779.

No. 17–1341. BASCIANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 17–1355. MANNING *v.* JONES ET AL. C. A. 8th Cir. Motion of National Association of Legal Scholars et al. for leave to file brief as *amici curiae* granted. Certiorari denied. Reported below: 875 F. 3d 408.

No. 17–8056. MEDRANO *v.* SESSIONS, ATTORNEY GENERAL. C. A. 2d Cir. Certiorari before judgment denied.

No. 17–8333. COLLINS, AKA TURNER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 17–8341. RIOS-MORALES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 878 F. 3d 978.

Rehearing Denied

No. 17–1006. LAITY *v.* NEW YORK ET AL., 583 U. S. 1181;

No. 17–1028. IN RE WU ET UX., 583 U. S. 1155;

No. 17–1131. TAYLOR *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, 583 U. S. 1183;

No. 17–6500. HOWELL *v.* BROWN, SUPERINTENDENT, WABASH VALLEY CORRECTIONAL FACILITY, 583 U. S. 1067;

No. 17–6933. PEAK *v.* UNITED STATES, 583 U. S. 1080;

No. 17–7017. STEPTOE *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 583 U. S. 1126;

No. 17–7018. ENRIQUEZ SANCHEZ *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 583 U. S. 1126;

No. 17–7063. ODEJIMI *v.* TOWN OF WINDSOR, NEW YORK, 583 U. S. 1127;

No. 17–7160. MALUMPHY *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL., 583 U. S. 1130;

No. 17–7249. BAEZ ROMERO *v.* DHL EXPRESS (USA), INC., ET AL., 583 U. S. 1170;

No. 17–7278. WEISSERT *v.* PALMER, WARDEN, 583 U. S. 1133;

No. 17–7314. LILLIE *v.* HERNANDEZ, WARDEN, 583 U. S. 1134;

No. 17–7327. COTTON, AKA CORNELIUS-COTTON *v.* SUPREME COURT OF THE UNITED STATES ET AL., 583 U. S. 1171;

No. 17–7450. DARBY *v.* SHULKIN, SECRETARY OF VETERANS AFFAIRS, 583 U. S. 1159;

No. 17–7466. IN RE CERVANTES, 583 U. S. 1113;

No. 17–7470. RIOS *v.* LEWIS, WARDEN, 583 U. S. 1188;

No. 17–7487. MARTINEZ *v.* UNITED STATES, 583 U. S. 1138; and

No. 17–7565. JACKSON *v.* UNITED STATES, 583 U. S. 1161. Petitions for rehearing denied.

MAY 4, 2018

Certiorari Denied

No. 17–8787 (17A1220). BUTTS *v.* GEORGIA. Sup. Ct. Ga. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

No. 17–8788 (17A1221). BUTTS *v.* SELLERS, WARDEN. Sup. Ct. Ga. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

MAY 9, 2018

Dismissal Under Rule 46

No. 16–388. PATTERSON ET AL. *v.* RAYMOURS FURNITURE CO., INC. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 659 Fed. Appx. 40.