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CASES ADJUDGED

IN

THE SUPREME COURT

AT

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JUNE 14 THROUGH SEPTEMBER 30, 2018

END OF TERM

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CHRISTINE LUCHOK FALLON

REPORTER OF DECISIONS

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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.

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RETIRED

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

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* JUSTICE KENNEDY retired effective July 31, 2018.

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.

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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., p. v.)
(For next subsequent allotment, see *post*, p. v.)

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For the Tenth Circuit, Sonia Sotomayor, Associate Justice.

For the Eleventh Circuit, Clarence Thomas, Associate Justice.

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

August 1, 2018.

(For next previous allotment, see *ante*, p. iv.)

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Wyoming; Northern Arapaho Tribe *v.* 1024
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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2017

MINNESOTA VOTERS ALLIANCE ET AL. *v.* MANSKY ET AL.

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

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No. 16–1435. Argued February 28, 2018—Decided June 14, 2018

Minnesota law prohibits individuals, including voters, from wearing a "political badge, political button, or other political insignia" inside a polling place on Election Day. Minn. Stat. §211B.11(1) (Supp. 2017). This "political apparel ban" covers articles of clothing and accessories with political insignia upon them. State election judges have the authority to decide whether a particular item falls within the ban. Violators are subject to a civil penalty or prosecution for a petty misdemeanor.

Days before the November 2010 election, petitioner Minnesota Voters Alliance (MVA) and other plaintiffs challenged the ban in Federal District Court on First Amendment grounds. In response to the lawsuit, the State distributed an Election Day Policy to election officials providing guidance on enforcement of the ban. The Election Day Policy specified examples of prohibited apparel to include items displaying the name of a political party, items displaying the name of a candidate, items supporting or opposing a ballot question, "[i]ssue oriented material designed to influence or impact voting," and "[m]aterial promoting a group with recognizable political views." App. to Pet. for Cert. I–1 to I–2. On Election Day, some voters ran into trouble with the ban, including petitioner Andrew Cilek, who allegedly was turned away from the polls

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for wearing a "Please I. D. Me" button and a T-shirt bearing the words "Don't Tread on Me" and a Tea Party Patriots logo.

MVA and the other plaintiffs argued that the ban was unconstitutional both on its face and as applied to their particular items of apparel. The District Court granted the State's motion to dismiss, and the Eighth Circuit affirmed the dismissal of the facial challenge and remanded the case for further proceedings on the as-applied challenge. The District Court granted summary judgment to the State on the as-applied challenge, and the Eighth Circuit affirmed. MVA, Cilek, and petitioner Susan Jeffers (collectively MVA) petitioned for review of their facial First Amendment claim only.

Held: Minnesota's political apparel ban violates the Free Speech Clause of the First Amendment. Pp. 11–23.

(a) Because the political apparel ban applies only in a specific location—the interior of a polling place—it implicates the Court's "'forum based' approach for assessing restrictions that the government seeks to place on the use of its property." *International Soc. for Krishna Consciousness, Inc.* v. *Lee,* 505 U. S. 672, 678. A polling place in Minnesota qualifies as a nonpublic forum under the Court's precedents. As such it may be subject to content-based restrictions on speech, see, *e. g., Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 806–811, so long as the restrictions are "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view," *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 46. Because the text of the statute makes no distinction based on the speaker's political persuasion, the question is whether the apparel ban is "reasonable in light of the purpose served by the forum": voting. *Cornelius*, 473 U. S., at 806. Pp. 11–13.

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(b) Minnesota's prohibition on political apparel serves a permissible objective. In *Burson* v. *Freeman,* 504 U. S. 191, the Court upheld a Tennessee law imposing a 100-foot zone around polling place entrances in which no person could solicit votes, distribute campaign materials, or "display . . . campaign posters, signs or other campaign materials." *Id.*, at 193–194 (plurality opinion). In finding that the law withstood even strict scrutiny, the *Burson* plurality—whose analysis was endorsed by Justice Scalia's opinion concurring in the judgment—emphasized the problems of fraud, voter intimidation, confusion, and general disorder that had plagued polling places in the past. Against that historical backdrop, the plurality and Justice Scalia upheld Tennessee's determination that a campaign-free zone outside the polls was necessary to secure the advantages of the secret ballot and protect the right to vote.

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MVA argues that *Burson* considered only active campaigning outside the polling place by campaign workers and others trying to engage voters approaching the polls, while Minnesota's ban prohibits passive self-expression by voters themselves when voting. But although the plurality and Justice Scalia in *Burson* did not expressly address the application of the Tennessee law to apparel—or consider the interior of the polling place as opposed to its environs—the Tennessee law swept broadly to ban even the plain "display" of a campaign-related message, and the *Burson* Court upheld the law in full. The plurality's conclusion that the State was warranted in designating an area for the voters as "their own" as they enter the polling place, *id.*, at 210, suggests an interest more significant, not less, within that place.

No basis exists for rejecting Minnesota's determination that some forms of campaign advocacy should be excluded from the polling place in order to set it aside as "an island of calm in which voters can peacefully contemplate their choices." Brief for Respondents 43. Casting a vote is a weighty civic act, and the State may reasonably decide that the interior of the polling place should reflect the distinction between voting and campaigning. And while the Court has noted the "nondisruptive" nature of expressive apparel in more mundane settings, see, *e. g.*, *Board of Airport Comm'rs of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U. S. 569, 576, those observations do not speak to the unique context of a polling place on Election Day. Pp. 13–16.

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(c) But the line the State draws must be reasonable. The State therefore must be able to articulate some sensible basis for distinguishing what may come in from what must stay out. The unmoored use of the term "political" in the Minnesota law, combined with haphazard interpretations the State has provided in official guidance and representations to this Court, cause Minnesota's restriction to fail this test.

The statute does not define the term "political," a word that can broadly encompass anything "of or relating to government, a government, or the conduct of governmental affairs." Webster's Third New International Dictionary 1755. The State argues that the apparel ban should be interpreted more narrowly to proscribe "only words and symbols that an objectively reasonable observer would perceive as conveying a message about the electoral choices at issue in [the] polling place." Brief for Respondents 13. At the same time, the State argues that the category of "political" apparel is not limited to campaign apparel.

The Court considers a State's authoritative constructions in interpreting a state law. But far from clarifying the indeterminate scope of the provision, Minnesota's "electoral choices" construction introduces confusing line-drawing problems. For specific examples of what messages

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are banned under that standard, the State points to the Election Day Policy. The first three categories of prohibited items in the Policy are clear. But the next category—"issue oriented material designed to influence or impact voting"—raises more questions than it answers. The State takes the position that any subject on which a political candidate or party has taken a stance qualifies as an "issue" within the meaning of that category. Such a rule—whose fair enforcement requires an election judge to maintain a mental index of the platforms and positions of every candidate and party on the ballot—is not reasonable.

The next broad category in the Election Day Policy—any item "promoting a group with recognizable political views"—makes matters worse. The State does not confine that category to groups that have endorsed a candidate or taken a position on a ballot question. As a result, any number of associations, educational institutions, businesses, and religious organizations could have an opinion on an "issue confronting voters." The State represents that the ban is limited to apparel promoting groups with "well-known" political positions. But that requirement only increases the potential for erratic application, as its enforcement may turn in significant part on the background knowledge of the particular election judge applying it.

It is "self-evident" that an indeterminate prohibition carries with it "[t]he opportunity for abuse, especially where [it] has received a virtually open-ended interpretation." *Jews for Jesus*, 482 U. S., at 576. The discretion election judges exercise in enforcing the ban must be guided by objective, workable standards. Without them, an election judge's own politics may shape his views on what counts as "political." And if voters experience or witness episodes of unfair or inconsistent enforcement of the ban, the State's interest in maintaining a polling place free of distraction and disruption would be undermined by the very measure intended to further it. Thus, if a State wishes to set its polling places apart as areas free of partisan discord, it must employ a more discernible approach than the one offered by Minnesota here. Pp. 16–23.

849 F. 3d 749, reversed and remanded.

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ROBERTS, C. J., delivered the opinion of the Court, in which KENNEDY, THOMAS, GINSBURG, ALITO, KAGAN, and GORSUCH, JJ., joined. SOTOMAYOR, J., filed a dissenting opinion, in which BREYER, J., joined, *post*, p. 26.

J. David Breemer argued the cause for petitioners. With him on the briefs were *Wencong Fa*, *Deborah J. La Fetra*, *Oliver J. Dunford*, and *Erick G. Kaardal*.

Daniel P. Rogan argued the cause for respondents. With him on the brief were *Beth A. Stack*, *Elaine J. Goldenberg*, *Ginger D. Anders*, *Nathan J. Hartshorn*, Assistant Attorney General of Minnesota, and *Robert B. Roche*.*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Under Minnesota law, voters may not wear a political badge, political button, or anything bearing political insignia inside a polling place on Election Day. The question presented is whether this ban violates the Free Speech Clause of the First Amendment.

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *David D. Cole*, *Lee Rowland*, *John B. Gordon*, *Lisa S. Blatt*, and *Robert J. Katerberg*; for the American Civil Rights Union et al. by *John J. Park, Jr.*, and *Kenneth A. Klukowski*; for the Cato Institute et al. by *Ilya Shapiro*, *John W. Whitehead*, and *Manuel S. Klausner*; for the Goldwater Institute by *Timothy Sandefur* and *Christina Sandefur*; for the Institute for Free Speech by *Allen Dickerson*, *Zac Morgan*, and *Owen Yeates*; for the James Madison Center for Free Speech, Inc., by *James Bopp, Jr.*, and *Richard E. Coleson*; for the Justice and Freedom Fund by *James L. Hirsen* and *Deborah J. Dewart*; and for the Southeastern Legal Foundation et al. by *Kimberly S. Hermann* and *Braden Boucek*.

Briefs of *amici curiae* urging affirmance were filed for the State of Tennessee et al. by *Herbert H. Slatery III*, Attorney General of Tennessee, *Andrée S. Blumstein*, Solicitor General, *Jonathan David Shaub*, Assistant Solicitor General, and *Sarah K. Campbell*, and by the Attorneys General for their respective States as follows: *Curtis T. Hill, Jr.*, of Indiana, *Derek Schmidt* of Kansas, *Jeff Landry* of Louisiana, *Bill Schuette* of Michigan, *Jim Hood* of Mississippi, *Timothy C. Fox* of Montana, *Douglas J. Peterson* of Nebraska, *Peter F. Kilmartin* of Rhode Island, *Ken Paxton* of Texas, and *Sean D. Reyes* of Utah; for the Brennan Center for Justice at NYU School of Law et al. by *Daniel I. Weiner* and *Wendy R. Weiser*; for Campaign Legal Center by *Paul M. Smith*, *Adav Noti*, and *Mark P. Gaber*; and for the National Association of Counties et al. by *Charles A. Rothfeld*, *Andrew J. Pincus*, *Michael B. Kimberly*, *Paul W. Hughes*, *Lisa Soronen*, and *Eugene R. Fidell*.

I

A

Today, Americans going to their polling places on Election Day expect to wait in a line, briefly interact with an election official, enter a private voting booth, and cast an anonymous ballot. Little about this ritual would have been familiar to a voter in the mid-to-late nineteenth century. For one thing, voters typically deposited privately prepared ballots at the polls instead of completing official ballots on-site. These pre-made ballots often took the form of "party tickets"—printed slates of candidate selections, often distinctive in appearance, that political parties distributed to their supporters and pressed upon others around the polls. See E. Evans, A History of the Australian Ballot System in the United States 6–11 (1917) (Evans); R. Bensel, The American Ballot Box in the Mid-Nineteenth Century 14–15 (2004) (Bensel).

The physical arrangement confronting the voter was also different. The polling place often consisted simply of a "voting window" through which the voter would hand his ballot to an election official situated in a separate room with the ballot box. *Id.*, at 11, 13; see, *e. g.*, C. Rowell, Digest of Contested-Election Cases in the Fifty-First Congress, H. R. Misc. Doc. No. 137, 51st Cong., 2d Sess., 224 (1891) (report of Rep. Lacey) (considering whether "the ability to reach the window and actually tender the ticket to the [election] judges" is "essential in all cases to constitute a good offer to vote"); Holzer, Election Day 1860, Smithsonian Magazine (Nov. 2008), pp. 46, 52 (describing the interior voting window on the third floor of the Springfield, Illinois courthouse where Abraham Lincoln voted). As a result of this arrangement, "the actual act of voting was usually performed in the open," frequently within view of interested onlookers. Rusk, The Effect of the Australian Ballot Reform on Split Ticket Voting: 1876–1908, Am. Pol. Sci. Rev. 1220, 1221 (1970) (Rusk); see Evans 11–13.

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As documented in *Burson* v. *Freeman*, 504 U. S. 191 (1992) (plurality opinion), "[a]pproaching the polling place under this system was akin to entering an open auction place." *Id.*, at 202. The room containing the ballot boxes was "usually quiet and orderly," but "[t]he public space outside the window . . . was chaotic." Bensel 13. Electioneering of all kinds was permitted. See *id.*, at 13, 16–17; R. Dinkin, Election Day: A Documentary History 19 (2002). Crowds would gather to heckle and harass voters who appeared to be supporting the other side. Indeed, "[u]nder the informal conventions of the period, election etiquette required only that a 'man of ordinary courage' be able to make his way to the voting window." Bensel 20–21. "In short, these early elections were not a very pleasant spectacle for those who believed in democratic government." *Burson*, 504 U. S., at 202 (plurality opinion) (internal quotation marks omitted).

By the late nineteenth century, States began implementing reforms to address these vulnerabilities and improve the reliability of elections. Between 1888 and 1896, nearly every State adopted the secret ballot. See *id.*, at 203–205. Because voters now needed to mark their state-printed ballots on-site and in secret, voting moved into a sequestered space where the voters could "deliberate and make a decision in . . . privacy." Rusk 1221; see Evans 35; 1889 Minn. Stat. ch. 3, §§27–28, p. 21 (regulating, as part of Minnesota's secret ballot law, the arrangement of voting compartments inside the polling place). In addition, States enacted "viewpoint-neutral restrictions on election-day speech" in the immediate vicinity of the polls. *Burson*, 504 U. S., at 214–215 (Scalia, J., concurring in judgment) (by 1900, 34 of 45 States had such restrictions). Today, all 50 States and the District of Columbia have laws curbing various forms of speech in and around polling places on Election Day.

Minnesota's such law contains three prohibitions, only one of which is challenged here. See Minn. Stat. §211B.11(1)

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(Supp. 2017). The first sentence of § 211B.11(1) forbids any person to "display campaign material, post signs, ask, solicit, or in any manner try to induce or persuade a voter within a polling place or within 100 feet of the building in which a polling place is situated" to "vote for or refrain from voting for a candidate or ballot question." The second sentence prohibits the distribution of "political badges, political buttons, or other political insignia to be worn at or about the polling place." The third sentence—the "political apparel ban"—states that a "political badge, political button, or other political insignia may not be worn at or about the polling place." Versions of all three prohibitions have been on the books in Minnesota for over a century. See 1893 Minn. Laws ch. 4, § 108, pp. 51–52; 1912 Minn. Laws, 1st Spec. Sess., ch. 3, p. 24; 1988 Minn. Laws ch. 578, Art. 3, § 11, p. 594 (reenacting the prohibitions as part of § 211B.11).

There is no dispute that the political apparel ban applies only *within* the polling place, and covers articles of clothing and accessories with "political insignia" upon them. Minnesota election judges—temporary government employees working the polls on Election Day—have the authority to decide whether a particular item falls within the ban. App. to Pet. for Cert. I–1. If a voter shows up wearing a prohibited item, the election judge is to ask the individual to conceal or remove it. *Id.*, at I–2. If the individual refuses, the election judge must allow him to vote, while making clear that the incident "will be recorded and referred to appropriate authorities." *Ibid.* Violators are subject to an administrative process before the Minnesota Office of Administrative Hearings, which, upon finding a violation, may issue a reprimand or impose a civil penalty. Minn. Stat. §§ 211B.32, 211B.35(2) (2014). That administrative body may also refer the complaint to the county attorney for prosecution as a petty misdemeanor; the maximum penalty is a $300 fine. §§ 211B.11(4) (Supp. 2017), 211B.35(2) (2014), 609.02(4a) (2016).

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Petitioner Minnesota Voters Alliance (MVA) is a nonprofit organization that "seeks better government through election reforms." Pet. for Cert. 5. Petitioner Andrew Cilek is a registered voter in Hennepin County and the executive director of MVA; petitioner Susan Jeffers served in 2010 as a Ramsey County election judge. Five days before the November 2010 election, MVA, Jeffers, and other likeminded groups and individuals filed a lawsuit in Federal District Court challenging the political apparel ban on First Amendment grounds. The groups—calling themselves "Election Integrity Watch" (EIW)—planned to have supporters wear buttons to the polls printed with the words "Please I. D. Me," a picture of an eye, and a telephone number and web address for EIW. (Minnesota law does not require individuals to show identification to vote.) One of the individual plaintiffs also planned to wear a "Tea Party Patriots" shirt. The District Court denied the plaintiffs' request for a temporary restraining order and preliminary injunction and allowed the apparel ban to remain in effect for the upcoming election.

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In response to the lawsuit, officials for Hennepin and Ramsey Counties distributed to election judges an "Election Day Policy," providing guidance on the enforcement of the political apparel ban. The Minnesota Secretary of State also distributed the Policy to election officials throughout the State. The Policy specified that examples of apparel falling within the ban "include, but are not limited to":

- "Any item including the name of a political party in Minnesota, such as the Republican, [Democratic-Farmer-Labor], Independence, Green or Libertarian parties.
- Any item including the name of a candidate at any election.
- Any item in support of or opposition to a ballot question at any election.

- Issue oriented material designed to influence or impact voting (including specifically the 'Please I. D. Me' buttons).
- Material promoting a group with recognizable political views (such as the Tea Party, MoveOn.org, and so on)." App. to Pet. for Cert. I–1 to I–2.

As alleged in the plaintiffs' amended complaint and supporting declarations, some voters associated with EIW ran into trouble with the ban on Election Day. One individual was asked to cover up his Tea Party shirt. Another refused to conceal his "Please I. D. Me" button, and an election judge recorded his name and address for possible referral. And petitioner Cilek—who was wearing the same button and a T-shirt with the words "Don't Tread on Me" and the Tea Party Patriots logo—was twice turned away from the polls altogether, then finally permitted to vote after an election judge recorded his information.

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Back in court, MVA and the other plaintiffs (now joined by Cilek) argued that the ban was unconstitutional both on its face and as applied to their apparel. The District Court granted the State's motions to dismiss, and the Court of Appeals for the Eighth Circuit affirmed in part and reversed in part. *Minnesota Majority* v. *Mansky*, 708 F. 3d 1051 (2013). In evaluating MVA's facial challenge, the Court of Appeals observed that this Court had previously upheld a state law restricting speech "related to a political campaign" in a 100-foot zone outside a polling place; the Court of Appeals determined that Minnesota's law likewise passed constitutional muster. *Id.*, at 1056–1058 (quoting *Burson*, 504 U. S., at 197 (plurality opinion)). The Court of Appeals reversed the dismissal of the plaintiffs' as-applied challenge, however, finding that the District Court had improperly considered matters outside the pleadings. 708 F. 3d, at 1059. Judge Shepherd concurred in part and dissented in part. In his view, Minnesota's broad restriction on political apparel did not "ration-

ally and reasonably" serve the State's asserted interests. *Id.*, at 1062. On remand, the District Court granted summary judgment for the State on the as-applied challenge, and this time the Court of Appeals affirmed. *Minnesota Majority* v. *Mansky*, 849 F. 3d 749 (2017).

MVA, Cilek, and Jeffers (hereinafter MVA) petitioned for review of their facial First Amendment claim only. We granted certiorari. 583 U. S. 972 (2017).

II

The First Amendment prohibits laws "abridging the freedom of speech." Minnesota's ban on wearing any "political badge, political button, or other political insignia" plainly restricts a form of expression within the protection of the First Amendment.

But the ban applies only in a specific location: the interior of a polling place. It therefore implicates our "'forum based' approach for assessing restrictions that the government seeks to place on the use of its property." *International Soc. for Krishna Consciousness, Inc.* v. *Lee*, 505 U. S. 672, 678 (1992) (*ISKCON*). Generally speaking, our cases recognize three types of government-controlled spaces: traditional public forums, designated public forums, and nonpublic forums. In a traditional public forum—parks, streets, sidewalks, and the like—the government may impose reasonable time, place, and manner restrictions on private speech, but restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited. See *Pleasant Grove City* v. *Summum*, 555 U. S. 460, 469 (2009). The same standards apply in designated public forums—spaces that have "not traditionally been regarded as a public forum" but which the government has "intentionally opened up for that purpose." *Id.*, at 469–470. In a nonpublic forum, on the other hand—a space that "is not by tradition or designation a forum for public communication"—the government has much more flexibility to craft rules lim-

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iting speech. *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 46 (1983). The government may reserve such a forum "for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Ibid.*

This Court employs a distinct standard of review to assess speech restrictions in nonpublic forums because the government, "no less than a private owner of property," retains the "power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley* v. *Florida*, 385 U. S. 39, 47 (1966). "Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 799–800 (1985). Accordingly, our decisions have long recognized that the government may impose some content-based restrictions on speech in nonpublic forums, including restrictions that exclude political advocates and forms of political advocacy. See *id.*, at 806–811; *Greer* v. *Spock*, 424 U. S. 828, 831–833, 838–839 (1976); *Lehman* v. *Shaker Heights*, 418 U. S. 298, 303–304 (1974) (plurality opinion); *id.*, at 307–308 (Douglas, J., concurring in judgment).

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A polling place in Minnesota qualifies as a nonpublic forum. It is, at least on Election Day, government-controlled property set aside for the sole purpose of voting. The space is "a special enclave, subject to greater restriction." *ISKCON*, 505 U. S., at 680. Rules strictly govern who may be present, for what purpose, and for how long. See Minn. Stat. § 204C.06 (2014). And while the four-Justice plurality in *Burson* and Justice Scalia's concurrence in the judgment parted ways over whether the public sidewalks and streets *surrounding* a polling place qualify as a nonpublic forum, neither opinion suggested that the interior of the

building was anything but. See 504 U. S., at 196–197, and n. 2 (plurality opinion); *id.*, at 214–216 (opinion of Scalia, J.).

We therefore evaluate MVA's First Amendment challenge under the nonpublic forum standard. The text of the apparel ban makes no distinction based on the speaker's political persuasion, so MVA does not claim that the ban discriminates on the basis of viewpoint on its face. The question accordingly is whether Minnesota's ban on political apparel is "reasonable in light of the purpose served by the forum": voting. *Cornelius*, 473 U. S., at 806.

III

A

We first consider whether Minnesota is pursuing a permissible objective in prohibiting voters from wearing particular kinds of expressive apparel or accessories while inside the polling place. The natural starting point for evaluating a First Amendment challenge to such a restriction is this Court's decision in *Burson*, which upheld a Tennessee law imposing a 100-foot campaign-free zone around polling place entrances. Under the Tennessee law—much like Minnesota's buffer-zone provision—no person could solicit votes for or against a candidate, party, or ballot measure, distribute campaign materials, or "display . . . campaign posters, signs or other campaign materials" within the restricted zone. 504 U. S., at 193–194 (plurality opinion). The plurality found that the law withstood even the strict scrutiny applicable to speech restrictions in traditional public forums. *Id.*, at 211. In his opinion concurring in the judgment, Justice Scalia argued that the less rigorous "reasonableness" standard of review should apply, and found the law "at least reasonable" in light of the plurality's analysis. *Id.*, at 216.

That analysis emphasized the problems of fraud, voter intimidation, confusion, and general disorder that had plagued polling places in the past. See *id.*, at 200–204. Against that historical backdrop, the plurality and Justice Scalia upheld Tennessee's determination, supported

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by overwhelming consensus among the States and "common sense," that a campaign-free zone outside the polls was "necessary" to secure the advantages of the secret ballot and protect the right to vote. *Id.*, at 200, 206–208, 211. As the plurality explained, "[t]he State of Tennessee has decided that [the] last 15 seconds before its citizens enter the polling place should be their own, as free from interference as possible." *Id.*, at 210. That was not "an unconstitutional choice." *Ibid.*

MVA disputes the relevance of *Burson* to Minnesota's apparel ban. On MVA's reading, *Burson* considered only "active campaigning" outside the polling place by campaign workers and others trying to engage voters approaching the polls. Brief for Petitioners 36–37. Minnesota's law, by contrast, prohibits what MVA characterizes as "passive, silent" self-expression by voters themselves when voting. Reply Brief 17. MVA also points out that the plurality focused on the extent to which the restricted zone combated "voter intimidation and election fraud," 504 U. S., at 208—concerns that, in MVA's view, have little to do with a prohibition on certain types of voter apparel.

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Campaign buttons and apparel did come up in the *Burson* briefing and argument, but neither the plurality nor Justice Scalia expressly addressed such applications of the law.[1] Nor did either opinion specifically consider the interior of the

[1] The State of Tennessee represented that its prohibition on campaign displays extended both to items of apparel and to voters. Tr. of Oral Arg. in No. 90–1056, p. 33 (argument of Atty. Gen. Burson) (explaining that the statute banned "[t]ee-shirts," "campaign buttons," and "hats" because such items "implicate and invite the same problems," and that voters would be "asked to take campaign button[s] off as they go in"); see Brief for State of Tennessee et al. as *Amici Curiae* 3, 28–30, and n. 3 (making the same representation in the present case). The *Burson* plaintiff also emphasized that the Tennessee law would cover apparel, including apparel worn by voters, see Brief for Respondent in No. 90–1056, p. 3; Tr. of Oral Arg. in No. 90–1056, p. 21, and Justice Stevens in dissent referred to the application of the law to campaign buttons, see *Burson*, 504 U. S., at 218–219, 224.

polling place as opposed to its environs, and it is true that the plurality's reasoning focused on campaign activities of a sort not likely to occur in an area where, for the most part, only voters are permitted while voting. At the same time, Tennessee's law swept broadly to ban even the plain "display" of a campaign-related message, and the Court upheld the law in full. The plurality's conclusion that the State was warranted in designating an area for the voters as "their own" as they *enter* the polling place suggests an interest more significant, not less, *within* that place. *Id.*, at 210.

In any event, we see no basis for rejecting Minnesota's determination that some forms of advocacy should be excluded from the polling place, to set it aside as "an island of calm in which voters can peacefully contemplate their choices." Brief for Respondents 43. Casting a vote is a weighty civic act, akin to a jury's return of a verdict, or a representative's vote on a piece of legislation. It is a time for choosing, not campaigning. The State may reasonably decide that the interior of the polling place should reflect that distinction.

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To be sure, our decisions have noted the "nondisruptive" nature of expressive apparel in more mundane settings. *Board of Airport Comm'rs of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U. S. 569, 576 (1987) (so characterizing "the wearing of a T-shirt or button that contains a political message" in an airport); *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 508 (1969) (students wearing black armbands to protest the Vietnam War engaged in "silent, passive expression of opinion, unaccompanied by any disorder or disturbance"). But those observations do not speak to the unique context of a polling place on Election Day. Members of the public are brought together at that place, at the end of what may have been a divisive election season, to reach considered decisions about their government and laws. The State may reasonably take steps to ensure that partisan discord not follow the voter up to the voting

booth, and distract from a sense of shared civic obligation at the moment it counts the most. That interest may be thwarted by displays that do not raise significant concerns in other situations.

Other States can see the matter differently, and some do.[2] The majority, however, agree with Minnesota that at least some kinds of campaign-related clothing and accessories should stay outside.[3] That broadly shared judgment is entitled to respect. Cf. *Burson*, 504 U. S., at 206 (plurality opinion) (finding that a "widespread and time-tested consensus" supported the constitutionality of campaign buffer zones).

Thus, in light of the special purpose of the polling place itself, Minnesota may choose to prohibit certain apparel there because of the message it conveys, so that voters may focus on the important decisions immediately at hand.

B

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But the State must draw a reasonable line. Although there is no requirement of narrow tailoring in a nonpublic forum, the State must be able to articulate some sensible basis for distinguishing what may come in from what must stay out. See *Cornelius*, 473 U. S., at 808–809. Here, the unmoored use of the term "political" in the Minnesota law, combined with haphazard interpretations the State has pro-

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[2] See, *e. g.*, Ala. Secretary of State, 2018 Alabama Voter Guide 14 (voters may wear "campaign buttons or T-shirts with political advertisements"); 2018 Va. Acts ch. 700, § 1 (prohibitions on exhibiting campaign material "shall not be construed" to prohibit a voter "from wearing a shirt, hat, or other apparel on which a candidate's name or a political slogan appears or from having a sticker or button attached to his apparel on which a candidate's name or a political slogan appears"); R. I. Bd. of Elections, Rules and Regulations for Polling Place Conduct 3 (2016) (voters may "display or wear any campaign or political party button, badge or other document or item designed or tending to aid, injure or defeat any candidate for public office or any political party or any question," but they must "immediately exit the polling location without unreasonable delay" after voting).

[3] See Appendix, *infra*.

vided in official guidance and representations to this Court, cause Minnesota's restriction to fail even this forgiving test.

Again, the statute prohibits wearing a "political badge, political button, or other political insignia." It does not define the term "political." And the word can be expansive. It can encompass anything "of or relating to government, a government, or the conduct of governmental affairs," Webster's Third New International Dictionary 1755 (2002), or anything "[o]f, relating to, or dealing with the structure or affairs of government, politics, or the state," American Heritage Dictionary 1401 (3d ed. 1996). Under a literal reading of those definitions, a button or T-shirt merely imploring others to "Vote!" could qualify.

The State argues that the apparel ban should not be read so broadly. According to the State, the statute does not prohibit "any conceivably 'political' message" or cover "all 'political' speech, broadly construed." Brief for Respondents 21, 23. Instead, the State interprets the ban to proscribe "only words and symbols that an objectively reasonable observer would perceive as conveying a message about the electoral choices at issue in [the] polling place." *Id.*, at 13; see *id.*, at 19 (the ban "applies not to *any* message regarding government or its affairs, but to messages relating to questions of governmental affairs facing voters on a given election day").

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At the same time, the State argues that the category of "political" apparel is *not* limited to campaign apparel. After all, the reference to "campaign material" in the first sentence of the statute—describing what one may not "display" in the buffer zone as well as inside the polling place—implies that the distinct term "political" should be understood to cover a broader class of items. As the State's counsel explained to the Court, Minnesota's law "expand[s] the scope of what is prohibited from campaign speech to additional political speech." Tr. of Oral Arg. 50.

We consider a State's "authoritative constructions" in interpreting a state law. *Forsyth County* v. *Nationalist*

Movement, 505 U. S. 123, 131 (1992). But far from clarifying the indeterminate scope of the political apparel provision, the State's "electoral choices" construction introduces confusing line-drawing problems. Cf. *Jews for Jesus*, 482 U. S., at 575–576 (a resolution banning all "First Amendment activities" in an airport could not be saved by a "murky" construction excluding "airport-related" activity).

For specific examples of what is banned under its standard, the State points to the 2010 Election Day Policy—which it continues to hold out as authoritative guidance regarding implementation of the statute. See Brief for Respondents 22–23. The first three examples in the Policy are clear enough: items displaying the name of a political party, items displaying the name of a candidate, and items demonstrating "support of or opposition to a ballot question." App. to Pet. for Cert. I–2.

But the next example—"[i]ssue oriented material designed to influence or impact voting," *ibid.*—raises more questions than it answers. What qualifies as an "issue"? The answer, as far as we can tell from the State's briefing and argument, is any subject on which a political candidate or party has taken a stance. See Tr. of Oral Arg. 37 (explaining that the "electoral choices" test looks at the "issues that have been raised" in a campaign "that are relevant to the election"). For instance, the Election Day Policy specifically notes that the "Please I. D. Me" buttons are prohibited. App. to Pet. for Cert. I–2. But a voter identification requirement was not on the ballot in 2010, see Brief for Respondents 47, n. 24, so a Minnesotan would have had no explicit "electoral choice" to make in that respect. The buttons were nonetheless covered, the State tells us, because the Republican candidates for Governor and Secretary of State had staked out positions on whether photo identification should be required. *Ibid.*; see App. 58–60.[4]

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[4] The State also maintains that the "Please I. D. Me" buttons were properly banned because the buttons were designed to confuse other voters

A rule whose fair enforcement requires an election judge to maintain a mental index of the platforms and positions of every candidate and party on the ballot is not reasonable. Candidates for statewide and federal office and major political parties can be expected to take positions on a wide array of subjects of local and national import. See, *e. g.*, Democratic Platform Committee, 2016 Democratic Party Platform (approved July 2016) (stating positions on over 90 issues); Republican Platform Committee, Republican Platform 2016 (approved July 2016) (similar). Would a "Support Our Troops" shirt be banned, if one of the candidates or parties had expressed a view on military funding or aid for veterans? What about a "#MeToo" shirt, referencing the movement to increase awareness of sexual harassment and assault? At oral argument, the State indicated that the ban would cover such an item if a candidate had "brought up" the topic. Tr. of Oral Arg. 64–65.

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The next broad category in the Election Day Policy—any item "promoting a group with recognizable political views," App. to Pet. for Cert. I–2—makes matters worse. The State construes the category as limited to groups with "views" about "the issues confronting voters in a given election." Brief for Respondents 23. The State does not, however, confine that category to groups that have endorsed a candidate or taken a position on a ballot question.

Any number of associations, educational institutions, businesses, and religious organizations could have an opinion on an "issue[ ] confronting voters in a given election." For instance, the American Civil Liberties Union, the AARP, the

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about whether they needed photo identification to vote. Brief for Respondents 46–47. We do not doubt that the State may prohibit messages intended to mislead voters about voting requirements and procedures. But that interest does not align with the State's construction of "political" to refer to messages "about the electoral choices at issue in [the] polling place." *Id.*, at 13.

World Wildlife Fund, and Ben & Jerry's all have stated positions on matters of public concern.[5] If the views of those groups align or conflict with the position of a candidate or party on the ballot, does that mean that their insignia are banned? See *id.*, at 24, n. 15 (representing that "AFL–CIO or Chamber of Commerce apparel" would be banned if those organizations "had objectively recognizable views on an issue in the election at hand"). Take another example: In the run-up to the 2012 election, Presidential candidates of both major parties issued public statements regarding the then-existing policy of the Boy Scouts of America to exclude members on the basis of sexual orientation.[6] Should a Scout leader in 2012 stopping to vote on his way to a troop meeting have been asked to cover up his uniform?

The State emphasizes that the ban covers only apparel promoting groups whose political positions are sufficiently "well-known." Tr. of Oral Arg. 37. But that requirement, if anything, only increases the potential for erratic application. Well known by whom? The State tells us the lodestar is the "typical observer" of the item. Brief for Respondents 21. But that measure may turn in significant

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[5] See, *e. g.*, American Civil Liberties Union, Campaign for Smart Justice (2018), online at http://www.aclu.org/issues/mass-incarceration/smart-justice/campaign-smart-justice (taking positions on criminal justice reform) (all Internet materials as last visited June 11, 2018); AARP, Government & Elections, online at https://www.aarp.org/politics-society/government-elections/ (listing positions on Social Security and health care); World Wildlife Fund, A Win on Capitol Hill (Apr. 17, 2018), online at https://www.worldwildlife.org/stories/a-win-on-capitol-hill (describing the organization's position on federal funding for international conservation programs); Ben & Jerry's, Issues We Care About, online at https://www.benjerry.com/values/issues-we-care-about (sharing the corporation's views on campaign finance reform, international conflict, and civil rights).

[6] C. Camia, Obama, Romney Opposed to Boy Scouts Ban on Gays, USA Today OnPolitics (updated Aug. 08, 2012), online at http://content.usatoday.com/communities/onpolitics/post/2012/08/barack-obama-boy-scouts-gays-mitt-romney-/1.

part on the background knowledge and media consumption of the particular election judge applying it.

The State's "electoral choices" standard, considered together with the nonexclusive examples in the Election Day Policy, poses riddles that even the State's top lawyers struggle to solve. A shirt declaring "All Lives Matter," we are told, could be "perceived" as political. Tr. of Oral Arg. 41. How about a shirt bearing the name of the National Rifle Association? Definitely out. *Id.*, at 39–40. That said, a shirt displaying a rainbow flag could be worn "*unless* there was an issue on the ballot" that "related somehow . . . to gay rights." *Id.*, at 38 (emphasis added). A shirt simply displaying the text of the Second Amendment? Prohibited. *Id.*, at 40. But a shirt with the text of the *First* Amendment? "It would be allowed." *Ibid.*

"[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward* v. *Rock Against Racism*, 491 U. S. 781, 794 (1989). But the State's difficulties with its restriction go beyond close calls on borderline or fanciful cases. And that is a serious matter when the whole point of the exercise is to prohibit the expression of political views.

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It is "self-evident" that an indeterminate prohibition carries with it "[t]he opportunity for abuse, especially where [it] has received a virtually open-ended interpretation." *Jews for Jesus*, 482 U. S., at 576; see *Heffron* v. *International Soc. for Krishna Consciousness, Inc.*, 452 U. S. 640, 649 (1981) (warning of the "more covert forms of discrimination that may result when arbitrary discretion is vested in some governmental authority"). Election judges "have the authority to decide what is political" when screening individuals at the entrance to the polls. App. to Pet. for Cert. I–1. We do not doubt that the vast majority of election judges strive to enforce the statute in an evenhanded manner, nor that some degree of discretion in this setting is necessary. But that discretion must be guided by objective, workable standards.

Without them, an election judge's own politics may shape his views on what counts as "political." And if voters experience or witness episodes of unfair or inconsistent enforcement of the ban, the State's interest in maintaining a polling place free of distraction and disruption would be undermined by the very measure intended to further it.

That is not to say that Minnesota has set upon an impossible task. Other States have laws proscribing displays (including apparel) in more lucid terms. See, *e. g.*, Cal. Elec. Code Ann. §319.5 (West Cum. Supp. 2018) (prohibiting "the visible display . . . of information that advocates for or against any candidate or measure," including the "display of a candidate's name, likeness, or logo," the "display of a ballot measure's number, title, subject, or logo," and "[b]uttons, hats," or "shirts" containing such information); Tex. Elec. Code Ann. §61.010(a) (West 2010) (prohibiting the wearing of "a badge, insignia, emblem, or other similar communicative device relating to a candidate, measure, or political party appearing on the ballot, or to the conduct of the election"). We do not suggest that such provisions set the outer limit of what a State may proscribe, and do not pass on the constitutionality of laws that are not before us. But we do hold that if a State wishes to set its polling places apart as areas free of partisan discord, it must employ a more discernible approach than the one Minnesota has offered here.[7]

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[7] The State argues that, in the event this Court concludes that there is a "substantial question" about the proper interpretation of §211B.11(1), we should postpone our decision and certify that issue to the Minnesota Supreme Court. Brief for Respondents 57; see Minn. Stat. §480.065(3). The dissent takes up this cause as well. See *post*, at 26 (opinion of SOTOMAYOR, J.). The decision to certify, however, "rests in the sound discretion of the federal court." *Expressions Hair Design* v. *Schneiderman*, 581 U. S. 37, 58 (2017) (SOTOMAYOR, J., concurring in judgment). We decline to exercise that discretion in this instance. Minnesota's request for certification comes very late in the day: This litigation had been ongoing in the federal courts for over seven years before the State made its certification request in its merits brief before this Court. See *Stenberg*

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Cases like this "present[ ] us with a particularly difficult reconciliation: the accommodation of the right to engage in political discourse with the right to vote." *Burson*, 504 U. S., at 198 (plurality opinion). Minnesota, like other States, has sought to strike the balance in a way that affords the voter the opportunity to exercise his civic duty in a setting removed from the clamor and din of electioneering. While that choice is generally worthy of our respect, Minnesota has not supported its good intentions with a law capable of reasoned application.

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.

APPENDIX

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State Laws Prohibiting Accessories or Apparel in the Polling Place*

Alaska	Alaska Stat. §§ 15.15.170, 15.56.016(a)(2) (2016)
Arkansas	Ark. Code Ann. § 7–1–103(a)(9) (Supp. 2017)

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v. *Carhart*, 530 U. S. 914, 945 (2000) (noting, in denying certification, that the State had never asked the lower federal courts to certify). And the State has not offered sufficient reason to believe that certification would obviate the need to address the constitutional question. Our analysis today reflects the State's proffered interpretation; nothing in that analysis would change if the State's interpretation were also adopted by the Minnesota Supreme Court. Nor has the State (or the dissent) suggested a viable alternative construction that the Minnesota Supreme Court might adopt instead. See Brief for Respondents 56–58; *post*, at 29–32.

*Based on statutory or regulatory language and official resources, where available.

Appendix to opinion of the Court

California	Cal. Elec. Code Ann. §§ 319.5, 18370 (West Cum. Supp. 2018)
Colorado	Colo. Rev. Stat. § 1–13–714(1) (2017)
Connecticut	Conn. Gen. Stat. § 9–236 (2017)
Delaware	Del. Code Ann., Tit. 15, § 4942 (2015)
District of Columbia	D. C. Code § 1–1001.10(b)(2) (2016); D. C. Munic. Regs., tit. 3, § 707, 65 D. C. Reg. 4504 (2018)
Georgia	Ga. Code Ann. § 21–2–414(a) (Supp. 2017)
Hawaii	Haw. Rev. Stat. § 11–132(d) (2009); Haw. Admin. Rule § 3–172–63(a) (2017)
Illinois	Ill. Comp. Stat., ch. 10, § 5/7–41(c) (West 2016)
Indiana	Ind. Code § 3–14–3–16 (2011)
Kansas	Kan. Stat. Ann. § 25–2430(a) (2006)
Louisiana	La. Rev. Stat. Ann. § 18:1462 (West Cum. Supp. 2018)
Massachusetts	Mass. Gen. Laws, ch. 54, § 65 (2007)
Michigan	Mich. Comp. Laws Ann. § 168.744 (West Cum. Supp. 2018)
Minnesota	Minn. Stat. § 211B.11(1) (Supp. 2017)
Mississippi	Miss. Code Ann. § 23–15–895 (Cum. Supp. 2017)

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Missouri	Mo. Rev. Stat. § 115.637(18) (2006)
Montana	Mont. Code Ann. § 13–35–211 (2017)
Nebraska	Neb. Rev. Stat. § 32–1524(2) (2016)
Nevada	Nev. Rev. Stat. § 293.740 (2015)
New Hampshire	N. H. Rev. Stat. Ann. § 659:43(I) (Cum. Supp. 2017)
New Jersey	N. J. Stat. Ann. § 19:34–19 (West 2014)
New Mexico	N. M. Stat. Ann. § 1–20–16 (2011)
New York	N. Y. Elec. Law Ann. § 8–104(1) (West 2018)
North Dakota	N. D. Cent. Code Ann. § 16.1–10–03 (2015)
Ohio	Ohio Rev. Code Ann. § 3501.35(A) (Lexis Supp. 2018)
South Carolina	S. C. Code Ann. § 7–25–180 (Cum. Supp. 2017)
South Dakota	S. D. Codified Laws § 12–18–3 (Cum. Supp. 2017)
Tennessee	Tenn. Code Ann. § 2–7–111(b) (2014)
Texas	Tex. Elec. Code Ann. § 61.010(a) (West 2010)
Utah	Utah Code § 20A–3–501 (2017)
Vermont	Vt. Stat. Ann., Tit. 17, § 2508(a)(1) (Cum. Supp. 2017)
Wisconsin	Wis. Stat. § 12.03 (2011–2012)

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JUSTICE SOTOMAYOR, with whom JUSTICE BREYER joins, dissenting.

I agree with the Court that "[c]asting a vote is a weighty civic act" and that "State[s] may reasonably take steps to ensure that partisan discord not follow the voter up to the voting booth," including by "prohibit[ing] certain apparel [in polling places] because of the message it conveys." *Ante*, at 15–16. I disagree, however, with the Court's decision to declare Minnesota's political apparel ban unconstitutional on its face because, in its view, the ban is not "capable of reasoned application," *ante*, at 23, when the Court has not first afforded the Minnesota state courts "'a reasonable opportunity to pass upon'" and construe the statute, *Babbitt* v. *Farm Workers*, 442 U. S. 289, 308 (1979). I would certify this case to the Minnesota Supreme Court for a definitive interpretation of the political apparel ban under Minn. Stat. §211B.11(1) (Supp. 2017), which likely would obviate the hypothetical line-drawing problems that form the basis of the Court's decision today.

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I

As the Court acknowledges, Minnesota adopted its political apparel ban late in the 19th century against the backdrop of often "'chaotic'" voting conditions where "[c]rowds would gather to heckle and harass voters who appeared to be supporting the other side." *Ante*, at 7. Polling places became "highly charged ethnic, religious, and ideological battlegroun[s] in which individuals were stereotyped as friend or foe," even "on the basis of clothing." R. Bensel, The American Ballot Box in the Mid-Nineteenth Century 21 (2004). As a result, States began adopting reforms "to address these vulnerabilities and improve the reliability of elections." *Ante*, at 7.

Minnesota thus enacted the political apparel ban at issue in this case, which prohibits an individual from wearing "[a] political badge, political button, or other political insignia . . . at or about the polling place." §211B.11(1). Respondents

maintain that this prohibition, together with other election-day regulations, furthers Minnesota's compelling interests in (1) "maintaining peace, order and decorum in the polling place," (2) "protecting voters from confusion and undue influence such as intimidation," and (3) "preserving the integrity of its election process." Brief for Respondents 41 (internal quotation marks and alterations omitted); see *Burson* v. *Freeman*, 504 U. S. 191, 193, 199 (1992) (plurality opinion) (recognizing such interests as compelling).

The majority accords due respect to the weight of these state interests in concluding that there is "no basis for rejecting Minnesota's determination that some forms of advocacy should be excluded from the polling place, to set it aside as 'an island of calm in which voters can peacefully contemplate their choices.'" *Ante*, at 15. Polling places today may not much resemble the chaotic scenes of the turn of the 20th century, but they remain vulnerable to interpersonal conflicts and partisan efforts to influence voters.* Even acts of interference that are "undetected or less than blatant . . . may nonetheless drive the voter away before remedial action

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*See, *e. g.*, J. Johnson, Fight Breaks Out at Polling Place (Nov. 8, 2016) (describing a fight in which a voter sprayed pepper spray at a campaign volunteer who allegedly had been handing out campaign materials), http://www.wpbf.com/article/fight-breaks-out-at-polling-place/8258506 (all Internet materials as last visited June 8, 2018); R. Reilly, A Guy in a Trump Shirt Carried a Gun Outside of a Virginia Polling Place. Authorities Say That's Fine (Nov. 4, 2016) (describing a man wearing a shirt bearing the name of a candidate and carrying a weapon outside of a polling place), https://www.huffingtonpost.com/entry/trumpsupporter-gun-voter-intimidation-virginia_us_581cf16ee4b0aac624846eb5; Morris, Early Voting Long Waits Led to Disturbance at Voting Site, Houston Chronicle, Nov. 5, 2012, p. B2 (reporting that individuals wearing shirts bearing the name of a racial equality organization allegedly were "disruptive," "took over" a polling place, and were "electioneering and voicing support" for a particular candidate); Police Arrest Poll Worker After Dispute With a Voter, Orlando Sentinel, Nov. 8, 2006, p. A5 (reporting arrest of a poll worker who was "charged with assault and interfering with an election after allegedly choking a voter and pushing him out the door"); Perez, Bill Aims To Stop Voter Harassment, Orlando Sentinel, Mar. 2, 2005, p. B1 (reporting "[s]houting matches and rowdy behavior" and "harass[ment] and intimidat[ion] at the polls").

can be taken." *Burson*, 504 U. S., at 207; see also Brief for Campaign Legal Center as *Amicus Curiae* 9 (noting that, "[a]bsent a ban on political paraphernalia, [poll] workers might unintentionally exhibit unconscious bias against voters who wear the 'wrong' paraphernalia").

In holding that a polling place constitutes a nonpublic forum and that a State must establish only that its limitations on speech inside the polling place are reasonable, see *ante*, at 12–13, the Court goes a long way in preserving States' discretion to determine what measures are appropriate to further important interests in maintaining order and decorum, preventing confusion and intimidation, and protecting the integrity of the voting process. The Court errs, however, in declaring Minnesota's political apparel ban unconstitutional under that standard, without any guidance from the State's highest court on the proper interpretation of that state law. *Ante*, at 22, n. 7.

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II

The Court invalidates Minnesota's political apparel ban based on its inability to define the term "political" in §211B.11(1), so as to discern "some sensible basis for distinguishing what may come in from what must stay out" of a polling place. *Ante*, at 16. The majority believes that the law is not "capable of reasoned application," *ante*, at 23, but it reaches that conclusion without taking the preferential step of first asking the state courts to provide "an accurate picture of how, exactly, the statute works," *Expressions Hair Design* v. *Schneiderman*, 581 U. S. 37, 55 (2017) (SOTOMAYOR, J., concurring in judgment). It is a "cardinal principle" that, "when confronting a challenge to the constitutionality of a . . . statute," courts "will first ascertain whether a construction . . . is fairly possible that will contain the statute within constitutional bounds," and in the context of a challenge to a state statute, federal courts should be particularly hesitant to speculate as to possible constructions of the

state law when "the state courts stand willing to address questions of state law on certification." *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 78–79 (1997) (internal quotation marks omitted); see Minn. Stat. § 480.065(3) (2016) (authorizing the Minnesota Supreme Court to answer certified questions). Certification "save[s] time, energy, and resources and helps build a cooperative judicial federalism." *Lehman Brothers* v. *Schein*, 416 U. S. 386, 391 (1974). Neither of the majority's proffered reasons for declining to certify this case justifies its holding.

First, the Court notes that respondents' "request for certification comes very late in the day," as the litigation already had been ongoing for more than seven years before the request. *Ante*, at 22, n. 7. But certification is not an argument subject to forfeiture by the parties. It is a tool of the federal courts that serves to avoid "friction-generating error" where a federal court attempts to construe a statute "not yet reviewed by the State's highest court." *Arizonans for Official English*, 520 U. S., at 79. This Court has certified questions to a state court "sua sponte, even though the parties had not sought such relief and even though the district court and the court of appeals previously had resolved the disputed point of state law." S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice § 9.4, p. 611 (10th ed. 2013) (citing *Elkins* v. *Moreno*, 435 U. S. 647, 660–663, 668–669 (1978)); see also *Massachusetts* v. *Feeney*, 429 U. S. 66 (1976) (*per curiam*) (certifying a question to the Supreme Judicial Court of the Commonwealth of Massachusetts "on [the Court's] own motion"). Respondents' delay in asking for certification does nothing to alter this Court's responsibility as a matter of state-federal comity to give due deference to the state courts in interpreting their own laws.

Second, the majority maintains that respondents have "not offered sufficient reason to believe that certification would obviate the need to address the constitutional question," as

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"nothing in [its] analysis would change if [respondents'] interpretation were also adopted by the Minnesota Supreme Court." *Ante*, at 23, n. 7. The majority also relies on its view that respondents have not "suggested a viable alternative construction that the Minnesota Supreme Court might adopt instead." *Ibid.* To presume that the Minnesota Supreme Court would adopt respondents' interpretation wholesale or that it could not provide a construction of its own that is "capable of reasoned application," *ante*, at 23, however, reflects precisely the "'gratuitous'" "'[s]peculation . . . about the meaning of a state statute'" that this Court has discouraged, *Arizonans for Official English*, 520 U. S., at 79.

It is at least "fairly possible" that the state court could "ascertain . . . a construction . . . that will contain the statute within constitutional bounds." *Id.*, at 78 (internal quotation marks omitted). Ultimately, the issue comes down to the meaning of the adjective "political," as used to describe what constitutes a "political badge, political button, or other political insignia." §211B.11(1). The word "political" is, of course, not inherently incapable of definition. This Court elsewhere has encountered little difficulty discerning its meaning in the context of statutes subject to First Amendment challenges. See, *e. g.*, *Civil Service Comm'n* v. *Letter Carriers*, 413 U. S. 548, 550–551 (1973) (rejecting First Amendment overbreadth and vagueness challenge to §9(a) of the Hatch Act, then codified at 5 U. S. C. §7324(a)(2), which prohibited federal employees from taking "'an active part in political management or in political campaigns'"); *Broadrick* v. *Oklahoma*, 413 U. S. 601, 602 (1973) (rejecting First Amendment overbreadth and vagueness challenge to a similar Oklahoma law that "restricts the political activities of the State's classified civil servants").

Even here, the majority recognizes a substantial amount of speech that "clear[ly]" qualifies as "political," such as "items displaying the name of a political party, items displaying the name of a candidate, and items demonstrating support of or

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opposition to a ballot question." *Ante*, at 18 (internal quotation marks omitted). The fact that the majority has some difficulty deciphering guidance to § 211B.11(1) that also proscribes "[i]ssue oriented material designed to influence or impact voting" and "[m]aterial promoting a group with recognizable political views," App. to Pet. for Cert. I–2; see *ante*, at 18–21, does not mean that the statute as a whole is not subject to a construction that falls within constitutional bounds. As this Court has made clear in the context of the First Amendment overbreadth doctrine, the "mere fact" that petitioners "can conceive of some impermissible applications of [the] statute is not sufficient to render it" unconstitutional. *United States* v. *Williams*, 553 U. S. 285, 303 (2008) (internal quotation marks omitted). That is especially so where the state court is capable of clarifying the boundaries of state law in a manner that would permit the Court to engage in a comprehensive constitutional analysis. See, *e. g.*, *Virginia* v. *American Booksellers Assn., Inc.*, 484 U. S. 383 (1988) (certifying questions to the Virginia Supreme Court for clarification as to whether a state statute was readily susceptible to a narrowing construction that would not violate the First Amendment); *Commonwealth* v. *American Booksellers Assn., Inc.*, 236 Va. 168, 372 S. E. 2d 618 (1988) (responding to certification with such a narrowing construction).

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Furthermore, the Court also should consider the history of Minnesota's "implementation" of the statute in evaluating the facial challenge here. *Forsyth County* v. *Nationalist Movement*, 505 U. S. 123, 131 (1992). That history offers some assurance that the statute has not been interpreted or applied in an unreasonable manner. There is no evidence that any individual who refused to remove a political item has been prohibited from voting, and respondents maintain that no one has been referred for prosecution for violating the provision. See Brief for Respondents 4, n. 2. Since the political apparel ban was enacted in the late 19th century, this is the first time the statute has been challenged on the

basis that certain speech is not "political." Tr. of Oral Arg. 44. Even then, petitioners' as-applied challenge was rejected by the District Court and the Court of Appeals for the Eighth Circuit. See *Minnesota Majority* v. *Mansky*, 62 F. Supp. 3d 870, 878 (Minn. 2014); *Minnesota Majority* v. *Mansky*, 2015 WL 13636675, *12 (D Minn., Mar. 23, 2015); *Minnesota Majority* v. *Mansky*, 849 F. 3d 749, 752–753 (CA8 2017). Petitioners did not seek review of those claims in this Court. See Pet. for Cert. i. On the whole, the historical application of the law helps illustrate that the statute is not so "indeterminate" so as to "carr[y] with it '[t]he opportunity for abuse.'" *Ante*, at 21.

III

Especially where there are undisputedly many constitutional applications of a state law that further weighty state interests, the Court should be wary of invalidating a law without giving the State's highest court an opportunity to pass upon it. See *Babbitt*, 442 U. S., at 309; *Arizonans for Official English*, 520 U. S., at 79. Because the Court declines to take the obvious step of certification in this case, I respectfully dissent.

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Syllabus

ANIMAL SCIENCE PRODUCTS, INC., ET AL. *v.* HEBEI WELCOME PHARMACEUTICAL CO. LTD. ET AL.

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

No. 16–1220. Argued April 24, 2018—Decided June 14, 2018

Petitioners, U. S.-based purchasers of vitamin C (U. S. purchasers), filed a class-action suit, alleging that four Chinese corporations that manufacture and export the nutrient (Chinese sellers), including the two respondents here, had agreed to fix the price and quantity of vitamin C exported to the United States, in violation of § 1 of the Sherman Act. The Chinese sellers moved to dismiss the complaint on the ground that Chinese law required them to fix the price and quantity of vitamin C exports, thus shielding them from liability under U. S. antitrust law. The Ministry of Commerce of the People's Republic of China (Ministry) filed an *amicus* brief in support of the motion, explaining that it is the administrative authority authorized to regulate foreign trade, and stating that the alleged conspiracy in restraint of trade was actually a pricing regime mandated by the Chinese Government. The U. S. purchasers countered that the Ministry had identified no law or regulation ordering the Chinese sellers' price agreement, highlighted a publication announcing that the Chinese sellers had agreed to control the quantity and rate of exports without government intervention, and presented supporting expert testimony.

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The District Court denied the Chinese sellers' motion in relevant part, concluding that it did not regard the Ministry's statements as "conclusive," particularly in light of the U. S. purchasers' evidence. When the Chinese sellers subsequently moved for summary judgment, the Ministry submitted another statement, reiterating its stance, and the U. S. purchasers pointed to China's statement to the World Trade Organization that it ended its export administration of vitamin C in 2002. The court denied this motion as well. The case was then tried to a jury, which returned a verdict for the U. S. purchasers.

The Second Circuit reversed, holding that the District Court erred by denying the Chinese sellers' motion to dismiss the complaint. When a foreign government whose law is in contention submits an official statement on the meaning and interpretation of its domestic law, the court concluded, federal courts are "bound to defer" to the foreign government's construction of its own law, whenever that construction is "reasonable." Inspecting only the Ministry's brief and the sources cited therein, the court found the Ministry's account of Chinese law "reasonable."

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Held: A federal court determining foreign law under Federal Rule of Civil Procedure 44.1 should accord respectful consideration to a foreign government's submission, but the court is not bound to accord conclusive effect to the foreign government's statements.

Rule 44.1 fundamentally changed the mode of determining foreign law in federal courts. Before adoption of the rule in 1966, a foreign nation's laws had to be "proved as facts." *Talbot* v. *Seeman*, 1 Cranch 1, 38. Rule 44.1, in contrast, specifies that a court's determination of foreign law "must be treated as a ruling on a question of law." And in ascertaining foreign law, courts are not limited to materials submitted by the parties, but "may consider any relevant material or source." Appellate review, as is true of domestic law determinations, is *de novo*. The purpose of these changes was to align, to the extent possible, the process for determining alien law and the process for determining domestic law.

Neither Rule 44.1 nor any other rule or statute addresses the weight a federal court determining foreign law should give to the views presented by a foreign government. In the spirit of "international comity," *Société Nationale Industrielle Aérospatiale* v. *United States Dist. Court for Southern Dist. of Iowa*, 482 U. S. 522, 543, and n. 27, a federal court should carefully consider a foreign state's views about the meaning of its own laws. The appropriate weight in each case, however, will depend upon the circumstances; a federal court is neither bound to adopt the foreign government's characterization nor required to ignore other relevant materials. No single formula or rule will fit all cases, but relevant considerations include the statement's clarity, thoroughness, and support; its context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement's consistency with the foreign government's past positions.

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Judged in this light, the Second Circuit's unyielding rule is inconsistent with Rule 44.1 and, tellingly, with this Court's treatment of analogous submissions from States of the United States. If the relevant state law is established by a decision of "the State's highest court," that decision is "binding on the federal courts," *Wainwright* v. *Goode*, 464 U. S. 78, 84, but views of the State's attorney general, while attracting "respectful consideration," do not garner controlling weight, *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 76–77, n. 30. Furthermore, because the Second Circuit riveted its attention on the Ministry's submission, it did not address evidence submitted by the U. S. purchasers. The court also misperceived the pre-Rule 44.1 decision of *United States* v. *Pink*, 315 U. S. 203. Under the particular circumstances of that case, this Court found conclusive a declaration from the government of the Russian Socialist Federal Soviet Republic on the extraterritorial effect of a decree nationalizing assets: The declaration was *obtained by*

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the United States through official "diplomatic channels," *id.*, at 218; there was no indication that the declaration was inconsistent with the Russian Government's past statements; and the declaration was consistent with expert evidence in point.

The Second Circuit expressed concern about reciprocity, but the United States has not historically argued that foreign courts are *bound* to accept its characterizations or precluded from considering other relevant sources. International practice is also inconsistent with the Second Circuit's rigid rule. Pp. 41–47.

837 F. 3d 175, vacated and remanded.

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

Michael J. Gottlieb argued the cause for petitioners. With him on the briefs were *William A. Isaacson*, *David Boies*, *James T. Southwick*, *Shawn L. Raymond*, *Michael D. Hausfeld*, *Brian A. Ratner*, *Melinda R. Coolidge*, and *Brent W. Landau*.

Brian H. Fletcher argued the cause for the United States as *amicus curiae* urging vacatur. With him on the brief were *Solicitor General Francisco*, *Assistant Attorney General Delrahim*, *Deputy Solicitor General Stewart*, *Kristen C. Limarzi*, *James J. Fredricks*, *Frances Marshall*, and *Jennifer G. Newstead*.

Carter G. Phillips argued the cause for the Ministry of Commerce of the People's Republic of China as *amicus curiae* urging affirmance. With him on the brief were *Kwaku A. Akowuah*, *Tobias S. Loss-Eaton*, and *Joel M. Mitnick*.

Jonathan M. Jacobson argued the cause for respondents. With him on the brief were *Daniel P. Weick*, *Justin A. Cohen*, *Susan A. Creighton*, *Scott A. Sher*, *Bradley T. Tennis*, and *Elyse Dorsey*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Antitrust Institute by *Richard M. Brunell* and *Randy M. Stutz*; for the Chamber of Commerce of the United States of America by *Luke A. Sobota*; for Professors of Conflict of Laws et al. by *Neil A.F. Popović*; and for Donald Clark et al. by *Brian P. Murray*.

Briefs of *amici curiae* urging affirmance were filed for the China Chamber of International Commerce by *Sienho Yee*; and for Chinese Professors

JUSTICE GINSBURG delivered the opinion of the Court.

When foreign law is relevant to a case instituted in a federal court, and the foreign government whose law is in contention submits an official statement on the meaning and interpretation of its domestic law, may the federal court look beyond that official statement? The Court of Appeals for the Second Circuit answered generally "no," ruling that federal courts are "bound to defer" to a foreign government's construction of its own law, whenever that construction is "reasonable." *In re Vitamin C Antitrust Litigation*, 837 F. 3d 175, 189 (2016).

We hold otherwise. A federal court should accord respectful consideration to a foreign government's submission, but is not bound to accord conclusive effect to the foreign government's statements. Instead, Federal Rule of Civil Procedure 44.1 instructs that, in determining foreign law, "the court may consider any relevant material or source . . . whether or not submitted by a party." As "[t]he court's determination must be treated as a ruling on a question of law," Fed. Rule Civ. Proc. 44.1, the court "may engage in its own research and consider any relevant material thus found," Advisory Committee's 1966 Note on Fed. Rule Civ. Proc. 44.1, 28 U. S. C. App., p. 892 (hereinafter Advisory Committee's Note). Because the Second Circuit ordered dismissal of this case on the ground that the foreign government's statements could not be gainsaid, we vacate that court's judgment and remand the case for further consideration.

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I

Petitioners, U. S.-based purchasers of vitamin C (hereinafter U. S. purchasers), filed a class-action suit against four

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of Administrative Law by *Timothy J. Droske*, *Nathaniel H. Akerman*, and *Lanier Saperstein*.

Briefs of *amici curiae* were filed for Professors of International Litigation by *Jonathan S. Massey*; and for Samuel Estreicher et al. by *Mr. Estreicher* and *Thomas H. Lee*, both *pro se*.

Chinese corporations that manufacture and export the nutrient (hereinafter Chinese sellers). The U. S. purchasers alleged that the Chinese sellers, two of whom are respondents here, had agreed to fix the price and quantity of vitamin C exported to the United States from China, in violation of § 1 of the Sherman Act, 15 U. S. C. § 1. More particularly, the U. S. purchasers stated that the Chinese sellers had formed a cartel "facilitated by the efforts of their trade association," the Chamber of Commerce of Medicines and Health Products Importers and Exporters (Chamber). Complaint in No. 1:05–CV–453, Docket No. 1, ¶43. The Judicial Panel on Multidistrict Litigation consolidated the instant case and related suits for pretrial proceedings in the United States District Court for the Eastern District of New York.

The Chinese sellers moved to dismiss the U. S. purchasers' complaint on the ground that Chinese law required them to fix the price and quantity of vitamin C exports. Therefore, the Chinese sellers urged, they are shielded from liability under U. S. antitrust law by the act of state doctrine, the foreign sovereign compulsion doctrine, and principles of international comity. The Ministry of Commerce of the People's Republic of China (Ministry) filed a brief as *amicus curiae* in support of the Chinese sellers' motion. The Ministry's brief stated that the Ministry is "the highest administrative authority in China authorized to regulate foreign trade," App. to Pet. for Cert. 190a; that the Chamber is "an entity under the Ministry's direct and active supervision" and is authorized to regulate vitamin C exports, *id.*, at 196a; and that the conspiracy in restraint of trade alleged by the U. S. purchasers was in fact "a regulatory pricing regime mandated by the government of China," *id.*, at 197a.[1]

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[1] The Ministry told the District Court: For much of the 20th century, China allowed only state-owned entities to export products. App. to Pet. for Cert. 198a. When China started to allow private enterprises to obtain

In response, the U. S. purchasers disputed that Chinese law required the Chinese sellers to engage in price fixing. Among other things, the U. S. purchasers noted that the Ministry had not identified any written law or regulation expressly ordering the Chinese sellers' price agreement.[2] They also highlighted a Chamber announcement that the manufacturers "were able to reach a self-regulated agreement . . . whereby they would voluntarily control the quan-

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export licenses, the Ministry established the Chamber to regulate exports under the Ministry's authority and direction. *Ibid.*

In 1997, the Ministry authorized the establishment of the Chamber's Vitamin C Subcommittee. *Id.*, at 202a. That year, the Ministry promulgated a regulation authorizing and requiring the subcommittee to limit the production of vitamin C for export and to set export prices. *Id.*, at 202a–204a. Under the regulation delineating this "Export Licensing System," the Ministry issued export licenses only to manufacturers whose export volume and price complied with the output quota and price coordinated by the Vitamin C Subcommittee. *Id.*, at 204a.

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In 2002, the Ministry replaced the Export Licensing System with a "Verification and Chop System." *Id.*, at 208a. As set forth in a 2002 Ministry Notice, the Chamber itself—instead of the Ministry—would inspect each export contract and certify its compliance with the coordinated quotas and price by affixing a special seal, known as a "chop." *Id.*, at 208a–209a. China's Customs would allow export only if the exporter presented its contract bearing the Chamber's "chop." *Id.*, at 209a. According to the Ministry, it was implicit in this arrangement that vitamin C exporters would remain under an obligation to fix prices and volumes. *Id.*, at 208a.

The effect of China's regime on the Chinese sellers' liability under the Sherman Act, we note, is not an issue before the Court today.

[2] The complaint, the U. S. purchasers emphasized, was directed only at conduct occurring after December 2001. As they understood the Ministry's 2002 Notice, see *supra* this page, n. 1, vitamin C exporters could have lawfully opted out of price fixing. Beyond that, the Vitamin C Subcommittee had replaced its 1997 Charter with a new 2002 Charter, App. 182–197, which eliminated the 1997 Charter's requirement that subcommittee members "[s]trictly execute" the "coordinated price" set by the Chamber, compare *id.*, at 85, with *id.*, at 185, and granted members an express "[r]igh[t]" to "freely resign from the Subcommittee," *id.*, at 186.

tity and pace of exports . . . without any government intervention." App. 109. In addition, the U. S. purchasers presented expert testimony that the Chinese Government's authorization of a Vitamin C Subcommittee within the Chamber did not necessarily mean that the subcommittee's price fixing was mandated by law.

The District Court denied the Chinese sellers' motion to dismiss the complaint in relevant part. *In re Vitamin C Antitrust Litigation*, 584 F. Supp. 2d 546, 559 (EDNY 2008). That court acknowledged that the Ministry's *amicus* brief was "entitled to substantial deference." *Id.*, at 557. The court, however, did not regard the Ministry's statements as "conclusive," emphasizing particularly that the U. S. purchasers had submitted evidence suggesting that the price fixing was voluntary. *Ibid.* The record, the District Court determined, was "too ambiguous to foreclose further inquiry into the voluntariness of [the Chinese sellers'] actions." *Id.*, at 559.

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After further discovery, focused on whether Chinese law compelled the Chinese sellers to enter into a price-fixing agreement, the Chinese sellers moved for summary judgment. See *In re Vitamin C Antitrust Litigation*, 810 F. Supp. 2d 522, 525–526 (EDNY 2011). The Ministry submitted an additional statement, reiterating that "the Ministry specifically charged the Chamber . . . with the authority and responsibility . . . for regulating, through consultation, the price of vitamin C manufactured for export." App. 133. The Chinese sellers tendered expert testimony in accord with the Ministry's account, which stressed that the Ministry's "interpretation of its own regulations and policies carries decisive weight under Chinese law." *Id.*, at 142. The U. S. purchasers, in response, cited further materials supporting their opposing view, including China's statement to the World Trade Organization (WTO) that it "gave up export administration of . . . vitamin C" in 2002. 810 F. Supp. 2d, at 532 (internal quotation marks omitted). Denying

the Chinese sellers' motion for summary judgment, the District Court held that Chinese law did not require the sellers to fix the price or quantity of vitamin C exports. *Id.*, at 525.

The case was then tried to a jury, which returned a verdict for the U. S. purchasers. The jury found that the Chinese sellers had agreed to fix the prices and quantities of vitamin C exports, see App. to Pet. for Cert. 276a–279a, and further found that the Chinese sellers were not "actually compelled" by China to enter into those agreements, *id.*, at 278a. In accord with the jury's verdict, the District Court entered judgment for the U. S. purchasers, awarding some $147 million in treble damages and enjoining the Chinese sellers from further violations of the Sherman Act.

The Court of Appeals for the Second Circuit reversed, holding that the District Court erred in denying the Chinese sellers' motion to dismiss the complaint. *In re Vitamin C Antitrust Litigation*, 837 F. 3d 175, 178, 195–196 (2016). The Court of Appeals determined that the propriety of dismissal hinged on whether the Chinese sellers could adhere to both Chinese law and U. S. antitrust law. See *id.*, at 186. That question, in turn, depended on "the amount of deference" owed to the Ministry's characterization of Chinese law. *Ibid.* Cognizant of "competing authority" on this question, *ibid.*, the Court of Appeals settled on a highly deferential rule: "[W]hen a foreign government, acting through counsel or otherwise, directly participates in U. S. court proceedings by providing a [statement] regarding the construction and effect of [the foreign government's] laws and regulations, which is reasonable under the circumstances presented, a U. S. court is bound to defer to those statements," *id.*, at 189. The appeals court "note[d] that[,] if the Chinese Government had not appeared in this litigation, the [D]istrict [C]ourt's careful and thorough treatment of the evidence before it in analyzing what Chinese law required at both the motion to dismiss and summary judgment stages would have been entirely appropriate." *Id.*, at 191, n. 10.

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Applying its highly deferential rule, the Court of Appeals concluded that the Ministry's account of Chinese law was "reasonable." In so concluding, the Court of Appeals inspected only the Ministry's brief and sources cited therein. *Id.*, at 189–190. Because it thought that "a U. S. court [must] not embark on a challenge to a foreign government's official representation," *id.*, at 189, the Court of Appeals disregarded the submissions made by the U. S. purchasers casting doubt on the Ministry's account of Chinese law, *id.*, at 189–190. Based solely on the Ministry's statements, the Court of Appeals held that "Chinese law required [the Chinese sellers] to engage in activities in China that constituted antitrust violations here in the United States." *Ibid.*

We granted certiorari to resolve a Circuit conflict over this question: Is a federal court determining foreign law under Rule 44.1 required to treat as conclusive a submission from the foreign government describing its own law? 583 U. S. 1089 (2018).[3]

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II

At common law, the content of foreign law relevant to a dispute was treated "as a question of fact." Miller, Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine, 65 Mich. L. Rev. 613, 617–619 (1967) (Miller). In 1801, this Court endorsed

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[3] Compare *In re Vitamin C Antitrust Litigation*, 837 F. 3d 175 (CA2 2016) (case below), with *In re Oil Spill by Amoco Cadiz*, 954 F. 2d 1279, 1311–1313 (CA7 1992) (adopting French Government's interpretation of French law, but only after considering all of the circumstances, including the French Government's statements in other contexts); *United States* v. *McNab*, 331 F. 3d 1228, 1239–1242 (CA11 2003) (noting Honduran Government's shift in position on the question of Honduran law and determining that the original position stated the proper interpretation); *McKesson HBOC, Inc.* v. *Islamic Republic of Iran*, 271 F. 3d 1101, 1108–1109 (CADC 2001), vacated in part on other grounds, 320 F. 3d 280 (CADC 2003) (declining to adopt the view of Iranian law advanced by Iranian Government because it was not supported by the affidavits submitted by Iran's experts).

the common-law rule, instructing that "the laws of a foreign nation" must be "proved as facts." *Talbot* v. *Seeman*, 1 Cranch 1, 38 (1801); see, *e. g.*, *Church* v. *Hubbart*, 2 Cranch 187, 236 (1804) ("Foreign laws are well understood to be facts."). Ranking questions of foreign law as questions of fact, however, "had a number of undesirable practical consequences." 9A C. Wright & A. Miller, Federal Practice and Procedure § 2441, p. 324 (3d ed. 2008) (Wright & Miller). Foreign law "had to be raised in the pleadings" and proved "in accordance with the rules of evidence." *Ibid.* Appellate review was deferential and limited to the record made in the trial court. *Ibid.*; see also Miller 623.

Federal Rule of Civil Procedure 44.1, adopted in 1966, fundamentally changed the mode of determining foreign law in federal courts. The Rule specifies that a court's determination of foreign law "must be treated as a ruling on a question of law," rather than as a finding of fact.[4] Correspondingly, in ascertaining foreign law, courts are not limited to materials submitted by the parties; instead, they "may consider any relevant material or source . . . , whether or not . . . admissible under the Federal Rules of Evidence." *Ibid.* Appellate review, as is true of domestic law determinations, is *de novo.* Advisory Committee's Note, at 892. Rule 44.1 frees courts "to reexamine and amplify material . . . presented by counsel in partisan fashion or in insufficient detail." *Ibid.* The "obvious" purpose of the changes Rule 44.1 ordered was "to make the process of determining alien law identical with the method of ascertaining domestic law to the extent that it is possible to do so." Wright & Miller § 2444, at 338–342.

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Federal courts deciding questions of foreign law under Rule 44.1 are sometimes provided with the views of the relevant foreign government, as they were in this case through

[4] Federal Rule of Criminal Procedure 26.1 establishes "substantially the same" rule for criminal cases. Advisory Committee's 1966 Note on Fed. Rule Crim. Proc. 26.1, 18 U. S. C. App., p. 709.

the *amicus* brief of the Ministry. See *supra*, at 37. As the Court of Appeals correctly observed, Rule 44.1 does not address the weight a federal court determining foreign law should give to the views presented by the foreign government. See 837 F. 3d, at 187. Nor does any other rule or statute. In the spirit of "international comity," *Société Nationale Industrielle Aérospatiale* v. *United States Dist. Court for Southern Dist. of Iowa*, 482 U. S. 522, 543, and n. 27 (1987), a federal court should carefully consider a foreign state's views about the meaning of its own laws. See *United States* v. *McNab*, 331 F. 3d 1228, 1241 (CA11 2003); cf. *Bodum USA, Inc.* v. *La Cafetière, Inc.*, 621 F. 3d 624, 638–639 (CA7 2010) (Wood, J., concurring). But the appropriate weight in each case will depend upon the circumstances; a federal court is neither bound to adopt the foreign government's characterization nor required to ignore other relevant materials. When a foreign government makes conflicting statements, see *supra*, at 39, or, as here, offers an account in the context of litigation, there may be cause for caution in evaluating the foreign government's submission.

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Given the world's many and diverse legal systems, and the range of circumstances in which a foreign government's views may be presented, no single formula or rule will fit all cases in which a foreign government describes its own law. Relevant considerations include the statement's clarity, thoroughness, and support; its context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement's consistency with the foreign government's past positions.

Judged in this light, the Court of Appeals erred in deeming the Ministry's submission binding, so long as facially reasonable. That unyielding rule is inconsistent with Rule 44.1 (determination of an issue of foreign law "must be treated as a ruling on a question of law"; court may consider "any relevant material or source") and, tellingly, with this Court's

treatment of analogous submissions from States of the United States. If the relevant state law is established by a decision of "the State's highest court," that decision is "binding on the federal courts." *Wainwright* v. *Goode*, 464 U. S. 78, 84 (1983) (*per curiam*); see *Mullaney* v. *Wilbur*, 421 U. S. 684, 691 (1975). But views of the State's attorney general, while attracting "respectful consideration," do not garner controlling weight. *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 76–77, n. 30 (1997); see, *e. g.*, *Virginia* v. *American Booksellers Assn., Inc.*, 484 U. S. 383, 393–396 (1988). Furthermore, because the Court of Appeals riveted its attention on the Ministry's submission, it did not address other evidence, including, for example, China's statement to the WTO that China had "g[i]ve[n] up export administration . . . of vitamin C" at the end of 2001. 810 F. Supp. 2d, at 532 (internal quotation marks omitted).[5]

The Court of Appeals also misperceived this Court's decision in *United States* v. *Pink*, 315 U. S. 203 (1942). See 837 F. 3d, at 186–187, 189. *Pink*, properly comprehended, is not compelling authority for the attribution of controlling weight to the Ministry's brief. We note, first, that *Pink* was a pre-Rule 44.1 decision. Second, *Pink* arose in unusual circumstances. *Pink* was an action brought by the United States to recover assets of the U. S. branch of a Russian insurance company that had been nationalized in 1918, after the Russian revolution. 315 U. S., at 210–211. In 1933, the Soviet Government assigned the nationalized assets located in this country to the United States. *Id.*, at 211–212. The disposi-

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[5] The Court of Appeals additionally mischaracterized the Ministry's brief as a "sworn evidentiary proffer." 837 F. 3d, at 189. In so describing the Ministry's submission, the Court of Appeals overlooked that a court's resolution of an issue of foreign law "must be treated as a ruling on a question of law." Fed. Rule Civ. Proc. 44.1. The Ministry's brief, while a probative source for resolving the legal question at hand, was not an attestation to facts.

tion of the case turned on the extraterritorial effect of the nationalization decree—specifically, whether the decree reached assets of the Russian insurance company located in the United States, or was instead limited to property in Russia. *Id.*, at 213–215, 217. To support the position that the decree reached all of the company's assets, the United States obtained an "official declaration of the Commissariat for Justice" of the Russian Socialist Federal Soviet Republic. *Id.*, at 218. The declaration certified that the nationalization decree reached "the funds and property of former insurance companies . . . irrespective of whether [they were] situated within the territorial limits of [Russia] or abroad." *Id.*, at 220 (internal quotation marks omitted). This Court determined that "the evidence supported [a] finding" that "the Commissariat for Justice ha[d] power to interpret existing Russian law." *Ibid.* "That being true," the Court concluded, the "official declaration [wa]s conclusive so far as the intended extraterritorial effect of the Russian decree [wa]s concerned." *Ibid.*

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This Court's treatment of the Commissariat's submission as conclusive rested on a document *obtained by the United States*, through official "diplomatic channels." *Id.*, at 218. There was no indication that the declaration was inconsistent with the Soviet Union's past statements. Indeed, the Court emphasized that the declaration was consistent with expert evidence in point. See *ibid.* That the Commissariat's declaration was deemed "conclusive" in the circumstances *Pink* presented scarcely suggests that all submissions by a foreign government are entitled to the same weight.

The Court of Appeals also reasoned that a foreign government's characterization of its own laws should be afforded "the same respect and treatment that we would expect our government to receive in comparable matters." 837 F. 3d, at 189. The concern for reciprocity is sound, but it does not warrant the Court of Appeals' judgment. Indeed, the

United States, historically, has not argued that foreign courts are *bound* to accept its characterizations or precluded from considering other relevant sources.[6]

The understanding that a government's expressed view of its own law is ordinarily entitled to substantial but not conclusive weight is also consistent with two international treaties that establish formal mechanisms by which one government may obtain from another an official statement characterizing its laws. Those treaties specify that "[t]he information given in the reply shall not bind the judicial authority from which the request emanated." European Convention on Information on Foreign Law, Art. 8, June 7, 1968, 720 U. N. T. S. 154; see Inter-American Convention on Proof of and Information on Foreign Law, Art. 6, May 8, 1979, O. A. S. T. S. 1439 U. N. T. S. 111 (similar). Although the United States is not a party to those treaties, they reflect an international practice inconsistent with the Court of Appeals' "binding, if reasonable" resolution.

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Because the Court of Appeals concluded that the District Court was bound to defer to the Ministry's brief, the court did not consider the shortcomings the District Court identified in the Ministry's position or other aspects of "the [D]istrict [C]ourt's careful and thorough treatment of the evidence before it." 837 F. 3d, at 191, n. 10. The correct interpretation of Chinese law is not before this Court, and we take no position on it. But the materials identified by the District Court were at least relevant to the weight the

[6] The Chinese sellers assert, see Supp. Brief for Respondents 7–8, that the United States sought a greater degree of deference in a 2002 submission to a World Trade Organization panel. In fact, the submission acknowledged that "the Panel is not bound to accept the interpretation [of U. S. law] presented by the United States." Brief for United States as *Amicus Curiae* 29, n. 6 (quoting Second Written Submission of the United States of America, *United States—Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221 ¶11 (Mar. 8, 2002)).

Ministry's submissions should receive and to the question whether Chinese law required the Chinese sellers' conduct. We therefore vacate the judgment of the Court of Appeals and remand the case for renewed consideration consistent with this opinion.

It is so ordered.

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Syllabus

GILL ET AL. *v.* WHITFORD ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

No. 16–1161. Argued October 3, 2017—Decided June 18, 2018

Members of the Wisconsin Legislature are elected from single-member legislative districts. Under the Wisconsin Constitution, the legislature must redraw the boundaries of those districts following each census. After the 2010 census, the legislature passed a new districting plan known as Act 43. Twelve Democratic voters, the plaintiffs in this case, alleged that Act 43 harms the Democratic Party's ability to convert Democratic votes into Democratic seats in the legislature. They asserted that Act 43 does this by "cracking" certain Democratic voters among different districts in which those voters fail to achieve electoral majorities and "packing" other Democratic voters in a few districts in which Democratic candidates win by large margins. The plaintiffs argued that the degree to which packing and cracking has favored one political party over another can be measured by an "efficiency gap" that compares each party's respective "wasted" votes—*i. e.*, votes cast for a losing candidate or for a winning candidate in excess of what that candidate needs to win—across all legislative districts. The plaintiffs claimed that the statewide enforcement of Act 43 generated an excess of wasted Democratic votes, thereby violating the plaintiffs' First Amendment right of association and their Fourteenth Amendment right to equal protection. The defendants, several members of the state election commission, moved to dismiss the plaintiffs' claims. They argued that the plaintiffs lacked standing to challenge the constitutionality of Act 43 as a whole because, as individual voters, their legally protected interests extend only to the makeup of the legislative district in which they vote. The three-judge District Court denied the defendants' motion and, following a trial, concluded that Act 43 was an unconstitutional partisan gerrymander. Regarding standing, the court held that the plaintiffs had suffered a particularized injury to their equal protection rights.

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Held: The plaintiffs have failed to demonstrate Article III standing. Pp. 60–73.

(a) Over the past five decades this Court has repeatedly been asked to decide what judicially enforceable limits, if any, the Constitution sets on partisan gerrymandering. Previous attempts at an answer have left few clear landmarks for addressing the question and have generated

conflicting views both of how to conceive of the injury arising from partisan gerrymandering and of the appropriate role for the Federal Judiciary in remedying that injury. See *Gaffney* v. *Cummings*, 412 U. S. 735, *Davis* v. *Bandemer*, 478 U. S. 109, *Vieth* v. *Jubelirer*, 541 U. S. 267, and *League of United Latin American Citizens* v. *Perry*, 548 U. S. 399. Pp. 60–64.

(b) A plaintiff may not invoke federal-court jurisdiction unless he can show "a personal stake in the outcome of the controversy," *Baker* v. *Carr*, 369 U. S. 186, 204. That requirement ensures that federal courts "exercise power that is judicial in nature," *Lance* v. *Coffman*, 549 U. S. 437, 439, 441. To meet that requirement, a plaintiff must show an injury in fact—his pleading and proof that he has suffered the "invasion of a legally protected interest" that is "concrete and particularized," *i. e.*, which "affect[s] the plaintiff in a personal and individual way." *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560, and n. 1.

The right to vote is "individual and personal in nature," *Reynolds* v. *Sims*, 377 U. S. 533, 561, and "voters who allege facts showing disadvantage to themselves as individuals have standing to sue" to remedy that disadvantage, *Baker*, 369 U. S., at 206. The plaintiffs here alleged that they suffered such injury from partisan gerrymandering, which works through the "cracking" and "packing" of voters. To the extent that the plaintiffs' alleged harm is the dilution of their votes, that injury is district specific. An individual voter in Wisconsin is placed in a single district. He votes for a single representative. The boundaries of the district, and the composition of its voters, determine whether and to what extent a particular voter is packed or cracked. A plaintiff who complains of gerrymandering, but who does not live in a gerrymandered district, "assert[s] only a generalized grievance against governmental conduct of which he or she does not approve." *United States* v. *Hays*, 515 U. S. 737, 745.

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The plaintiffs argue that their claim, like the claims presented in *Baker* and *Reynolds*, is statewide in nature. But the holdings in those cases were expressly premised on the understanding that the injuries giving rise to those claims were "individual and personal in nature," *Reynolds*, 377 U. S., at 561, because the claims were brought by voters who alleged "facts showing disadvantage to themselves as individuals," *Baker*, 369 U. S., at 206. The plaintiffs' mistaken insistence that the claims in *Baker* and *Reynolds* were "statewide in nature" rests on a failure to distinguish injury from remedy. In those malapportionment cases, the only way to vindicate an individual plaintiff's right to an equally weighted vote was through a wholesale "restructuring of the geographical distribution of seats in a state legislature." *Reynolds*, 377 U. S., at 561. Here, the plaintiffs' claims turn on allegations that their

votes have been diluted. Because that harm arises from the particular composition of the voter's own district, remedying the harm does not necessarily require restructuring all of the State's legislative districts. It requires revising only such districts as are necessary to reshape the voter's district. This fits the rule that a "remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Lewis* v. *Casey*, 518 U. S. 343, 357.

The plaintiffs argue that their legal injury also extends to the statewide harm to their interest "in their collective representation in the legislature," and in influencing the legislature's overall "composition and policymaking." Brief for Appellees 31. To date, however, the Court has not found that this presents an individual and personal injury of the kind required for Article III standing. A citizen's interest in the overall composition of the legislature is embodied in his right to vote for his representative. The harm asserted by the plaintiffs in this case is best understood as arising from a burden on their own votes. Pp. 64–69.

(c) Four of the plaintiffs in this case pleaded such a particularized burden. But as their case progressed to trial, they failed to pursue their allegations of individual harm. They instead rested their case on their theory of statewide injury to Wisconsin Democrats, in support of which they offered three kinds of evidence. First, they presented testimony pointing to the lead plaintiff's hope of achieving a Democratic majority in the legislature. Under the Court's cases to date, that is a collective political interest, not an individual legal interest. Second, they produced evidence regarding the mapmakers' deliberations as they drew district lines. The District Court relied on this evidence in concluding that those mapmakers sought to understand the partisan effect of the maps they were drawing. But the plaintiffs' establishment of injury in fact turns on effect, not intent, and requires a showing of a burden on the plaintiffs' votes that is "actual or imminent, not 'conjectural' or 'hypothetical.'" *Defenders of Wildlife*, 504 U. S., at 560. Third, the plaintiffs presented partisan-asymmetry studies showing that Act 43 had skewed Wisconsin's statewide map in favor of Republicans. Those studies do not address the effect that a gerrymander has on the votes of particular citizens. They measure instead the effect that a gerrymander has on the fortunes of political parties. That shortcoming confirms the fundamental problem with the plaintiffs' case as presented on this record. It is a case about group political interests, not individual legal rights. Pp. 69–72.

(d) Where a plaintiff has failed to demonstrate standing, this Court usually directs dismissal. See, *e. g.*, *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S. 332, 354. Here, however, where the case concerns an unsettled kind of claim that the Court has not agreed upon, the contours and

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justiciability of which are unresolved, the case is remanded to the District Court to give the plaintiffs an opportunity to prove concrete and particularized injuries using evidence that would tend to demonstrate a burden on their individual votes. Cf. *Alabama Legislative Black Caucus* v. *Alabama*, 575 U. S. 254, 264–265. Pp. 72–73.

218 F. Supp. 3d 837, vacated and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, ALITO, SOTOMAYOR, and KAGAN, JJ., joined, and in which THOMAS and GORSUCH, JJ., joined except as to Part III. KAGAN, J., filed a concurring opinion, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined, *post*, p. 73. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, in which GORSUCH, J., joined, *post*, p. 86.

Misha Tseytlin, Solicitor General of Wisconsin, argued the cause for appellants. With him on the briefs were *Brad D. Schimel*, Attorney General of Wisconsin, *Kevin M. LeRoy*, Deputy Solicitor General, *Ryan J. Walsh*, Chief Deputy Solicitor General, *Amy C. Miller*, Assistant Solicitor General, and *Brian P. Keenan*, Assistant Attorney General.

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Erin E. Murphy argued the cause for Wisconsin State Senate et al. as *amici curiae* urging reversal. With her on the brief were *Paul D. Clement* and *Kevin St. John*.

Paul M. Smith argued the cause for appellees. With him on the brief were *J. Gerald Hebert*, *Danielle M. Lang*, *Nicholas O. Stephanopoulos*, *Ruth M. Greenwood*, *Jessica Ring Amunson*, *Michele Odorizzi*, *Douglas M. Poland*, and *Peter G. Earle*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Texas et al. by *Ken Paxton*, Attorney General of Texas, *Scott A. Keller*, Solicitor General, *Jeffrey C. Mateer*, First Assistant Attorney General, *Matthew H. Frederick*, Deputy Solicitor General, and *Kristofer S. Monson*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Steve Marshall* of Alabama, *Mark Brnovich* of Arizona, *Leslie Rutledge* of Arkansas, *Christopher M. Carr* of Georgia, *Curtis T. Hill, Jr.*, of Indiana, *Derek Schmidt* of Kansas, *Jeff Landry* of Louisiana, *Bill Schuette* of Michigan, *Joshua D. Hawley* of Missouri, *Adam Paul Laxalt* of Nevada, *Michael DeWine* of Ohio, *Mike Hunter* of Oklahoma, *Alan Wilson* of South Carolina, *Sean D. Reyes* of Utah, and *Patrick Morrisey*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The State of Wisconsin, like most other States, entrusts to its legislature the periodic task of redrawing the boundaries

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of West Virginia; for the American Civil Rights Union et al. by *J. Christian Adams* and *Kaylan L. Phillips*; for Judicial Watch, Inc., et al. by *Robert D. Popper*, *Chris Fedeli*, and *Lauren M. Burke*; for the Legacy Foundation by *Thomas J. Josefiak*; for the Majority Leader and Temporary President of the New York State Senate et al. by *David L. Lewis*; for the National Republican Congressional Committee by *Jason Torchinsky*; for the Republican National Committee by *Michael T. Morley* and *John R. Phillippe, Jr.*; for the Republican State Leadership Committee by *Efrem M. Braden*, *Katherine L. McKnight*, and *Richard B. Raile*; for the Southeastern Legal Foundation by *John J. Park, Jr.*, and *Kimberly S. Hermann*; for Tennessee State Senators by *John L. Ryder* and *Linda Carver Whitlow Knight*; for the Wisconsin Institute for Law & Liberty by *Douglas R. Cox*, *Amir C. Tayrani*, and *Richard M. Esenberg*; and for Wisconsin Manufacturers & Commerce by *Jordan C. Corning* and *Eric M. McLeod*.

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Briefs of *amici curiae* urging affirmance were filed for the State of Oregon et al. by *Ellen F. Rosenblum*, Attorney General of Oregon, *Benjamin Gutman*, Solicitor General, and *Erin K. Galli*, *Jona J. Maukonen*, *Cecil Reniche-Smith*, and *Jordan R. Silk*, Assistant Attorneys General, and by the Attorneys General for their respective jurisdictions as follows: *Jahna Lindemuth* of Alaska, *Xavier Becerra* of California, *George Jepsen* of Connecticut, *Matthew P. Denn* of Delaware, *Karl A. Racine* of the District of Columbia, *Douglas S. Chin* of Hawaii, *Lisa Madigan* of Illinois, *Thomas J. Miller* of Iowa, *Andy Beshear* of Kentucky, *Janet T. Mills* of Maine, *Maura Healey* of Massachusetts, *Lori Swanson* of Minnesota, *Hector Balderas* of New Mexico, *Eric T. Schneiderman* of New York, *Peter F. Kilmartin* of Rhode Island, *Thomas J. Donovan, Jr.*, of Vermont, and *Robert W. Ferguson* of Washington; for the American Civil Liberties Union et al. by *Perry M. Grossman*, *Arthur N. Eisenberg*, *Samuel Issacharoff*, *T. Alora Thomas*, *Theresa J. Lee*, *Dale E. Ho*, *Cecillia D. Wang*, *David D. Cole*, and *Laurence J. Dupuis*; for the American Jewish Committee et al. by *David Leit* and *Natalie J. Kraner*; for the Bipartisan Group of Current and Former Members of Congress by *Seth P. Waxman*, *Jonathan Cedarbaum*, *Ari J. Savitzky*, and *Jason D. Hirsch*; for Bipartisan Group of 65 Current and Former State Legislators by *Vincent Levy* and *Gregory Dubinsky*; for the Brennan Center for Justice at N. Y. U. School of Law by *Anton Metlitsky*, *Bradley N. Garcia*, *Wendy R. Weiser*, *Michael C. Li*,

of the State's legislative districts. A group of Wisconsin Democratic voters filed a complaint in the District Court, alleging that the legislature carried out this task with an eye to diminishing the ability of Wisconsin Democrats to convert Democratic votes into Democratic seats in the legislature.

Daniel I. Weiner, and *Thomas F. Wolf*; for the California Citizens Redistricting Commission et al. by *Brian A. Sutherland* and *Benjamin R. Fliegel*; for the Center for Media and Democracy by *Joseph H. Yeager, Jr.*, *Harmony A. Mappes*, *Dulany Lucetta Pope*, *Matthew B. Harris*, *Jeffrey P. Justman*, and *Theodore R. Boehm*; for Colleagues of Norman Dorsen by *Burt Neuborne*, *pro se*; for Common Cause by *Gregory L. Diskant*, *Jonah M. Knobler*, *Emmet J. Bondurant*, and *Edwin M. Speas, Jr.*; for Constitutional Law Professors by *Kathleen M. Sullivan* and *Daniel H. Bromberg*; for Current Members of Congress et al. by *Elizabeth B. Wydra*, *Brianne J. Gorod*, and *David H. Gans*; for Election Law Scholars et al. by *Bradley S. Phillips*; for FairVote et al. by *Justin A. Nelson*; for the Georgia State Conference of the NAACP et al. by *Kristen Clarke*, *Jon Greenbaum*, *Ezra D. Rosenberg*, *William V. Custer*, and *Jennifer B. Dempsey*; for Historians by *Clifford M. Sloan*; for the International Municipal Lawyers Association et al. by *Paul A. Diller*, *Charles W. Thompson, Jr.*, and *Amanda Kellar Karras*; for Law Professors by *Pamela S. Karlan*, *Jeffrey L. Fisher*, and *David T. Goldberg*; for the League of Conservation Voters et al. by *Ira M. Feinberg*; for the League of Women Voters by *Kathleen R. Hartnett* and *Lloyd Leonard*; for the NAACP Legal Defense & Educational Fund et al. by *Justin Levitt*, *Sherrilyn A. Ifill*, *Janai S. Nelson*, *Samuel Spital*, *Leah C. Aden*, and *Laura W. Brill*; for Political Geography Scholars by *Tacy F. Flint*, *Richard H. Pildes*, and *Jeffrey T. Green*; for Political Science Professors by *Robert A. Atkins*, *Nicholas Groombridge*, and *Andrew J. Ehrlich*; for Represent.Us et al. by *Atara Miller*, *Daniel M. Perry*, and *Scott Greytak*; for Robin Best et al. by *Steven J. Hyman*, *Alan E. Sash*, and *Jacqueline C. Gerrald*; for David Boyle by *Mr. Boyle*, *pro se*; for Sen. Bill Brock et al. by *David C. Frederick* and *Charles Fried*; for Heather K. Gerken et al. by *Ms. Gerken*, *pro se*, and *Kevin K. Russell*; for Eric S. Lander by *H. Reed Witherby*; for Sen. John McCain et al. by *Mark W. Mosier*; for D. Thorne Rave III by *Mr. Rave*, *pro se*; and for 44 Election Law Scholars et al. by *Andrew Chin*, *pro se*.

Briefs of *amici curiae* were filed for the Plaintiffs in the Maryland Redistricting Litigation *Benisek* v. *Lamone* by *Michael B. Kimberly* and *Paul W. Hughes*; for Bernard Grofman et al. by *E. Joshua Rosenkranz*, *Rachel Wainer Apter*, and *Thomas M. Bondy*; and for Eric McGhee by *Daniel F. Kolb*.

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The plaintiffs asserted that, in so doing, the legislature had infringed their rights under the First and Fourteenth Amendments.

But a plaintiff seeking relief in federal court must first demonstrate that he has standing to do so, including that he has "a personal stake in the outcome," *Baker* v. *Carr*, 369 U. S. 186, 204 (1962), distinct from a "generally available grievance about government," *Lance* v. *Coffman*, 549 U. S. 437, 439 (2007) (*per curiam*). That threshold requirement "ensures that we act *as judges*, and do not engage in policy-making properly left to elected representatives." *Hollingsworth* v. *Perry*, 570 U. S. 693, 700 (2013). Certain of the plaintiffs before us alleged that they had such a personal stake in this case, but never followed up with the requisite proof. The District Court and this Court therefore lack the power to resolve their claims. We vacate the judgment and remand the case for further proceedings, in the course of which those plaintiffs may attempt to demonstrate standing in accord with the analysis in this opinion.

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I

Wisconsin's Legislature consists of a State Assembly and a State Senate. Wis. Const., Art. IV, § 1. The 99 members of the Assembly are chosen from single districts that must "consist of contiguous territory and be in as compact form as practicable." § 4. State senators are likewise chosen from single-member districts, which are laid on top of the State Assembly districts so that three Assembly districts form one Senate district. See § 5; Wis. Stat. § 4.001 (2011).

The Wisconsin Constitution gives the legislature the responsibility to "apportion and district anew the members of the senate and assembly" at the first session following each census. Art. IV, § 3. In recent decades, however, that responsibility has just as often been taken up by federal courts. Following the census in 1980, 1990, and 2000, federal courts drew the State's legislative districts when the legislature

and the Governor—split on party lines—were unable to agree on new districting plans. The legislature has broken the logjam just twice in the last 40 years. In 1983, a Democratic legislature passed, and a Democratic Governor signed, a new districting plan that remained in effect until the 1990 census. See 1983 Wis. Laws ch. 4. In 2011, a Republican legislature passed, and a Republican Governor signed, the districting plan at issue here, known as Act 43. See Wis. Stat. §§ 4.009, 4.01–4.99; 2011 Wis. Laws ch. 4. Following the passage of Act 43, Republicans won majorities in the State Assembly in the 2012 and 2014 elections. In 2012, Republicans won 60 Assembly seats with 48.6% of the two-party statewide vote for Assembly candidates. In 2014, Republicans won 63 Assembly seats with 52% of the statewide vote. 218 F. Supp. 3d 837, 853 (WD Wis. 2016).

In July 2015, twelve Wisconsin voters filed a complaint in the Western District of Wisconsin challenging Act 43. The plaintiffs identified themselves as "supporters of the public policies espoused by the Democratic Party and of Democratic Party candidates." 1 App. 32, Complaint ¶15. They alleged that Act 43 is a partisan gerrymander that "unfairly favor[s] Republican voters and candidates," and that it does so by "cracking" and "packing" Democratic voters around Wisconsin. *Id.*, at 28–30, ¶¶5–7. As they explained:

> "Cracking means dividing a party's supporters among multiple districts so that they fall short of a majority in each one. Packing means concentrating one party's backers in a few districts that they win by overwhelming margins." *Id.*, at 29, ¶5.

Four of the plaintiffs—Mary Lynne Donohue, Wendy Sue Johnson, Janet Mitchell, and Jerome Wallace—alleged that they lived in State Assembly districts where Democrats have been cracked or packed. *Id.*, at 34–36, ¶¶20, 23, 24, 26; see *id.*, at 50–53, ¶¶60–70 (describing packing and cracking in Assembly Districts 22, 26, 66, and 91). All of the plain-

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tiffs also alleged that, regardless of "whether they themselves reside in a district that has been packed or cracked," they have been "harmed by the manipulation of district boundaries" because Democrats statewide "do not have the same opportunity provided to Republicans to elect representatives of their choice to the Assembly." *Id.*, at 33, ¶16.

The plaintiffs argued that, on a statewide level, the degree to which packing and cracking has favored one party over another can be measured by a single calculation: an "efficiency gap" that compares each party's respective "wasted" votes across all legislative districts. "Wasted" votes are those cast for a losing candidate or for a winning candidate in excess of what that candidate needs to win. *Id.*, at 28–29, ¶5. The plaintiffs alleged that Act 43 resulted in an unusually large efficiency gap that favored Republicans. *Id.*, at 30, ¶7. They also submitted a "Demonstration Plan" that, they asserted, met all of the legal criteria for apportionment, but was at the same time "almost perfectly balanced in its partisan consequences." *Id.*, at 31, ¶10. They argued that because Act 43 generated a large and unnecessary efficiency gap in favor of Republicans, it violated the First Amendment right of association of Wisconsin Democratic voters and their Fourteenth Amendment right to equal protection. The plaintiffs named several members of the state election commission as defendants in the action. *Id.*, at 36, ¶¶28–30.

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The election officials moved to dismiss the complaint. They argued, among other things, that the plaintiffs lacked standing to challenge the constitutionality of Act 43 as a whole because, as individual voters, their legally protected interests extend only to the makeup of the legislative districts in which they vote. A three-judge panel of the District Court, see 28 U. S. C. §2284(a), denied the defendants' motion. In the District Court's view, the plaintiffs "identif[ied] their injury as not simply their inability to elect a representative in their own districts, but also their reduced opportunity to be represented by Democratic legislators across

the state." *Whitford* v. *Nichol*, 151 F. Supp. 3d 918, 924 (WD Wis. 2015). It therefore followed, in the District Court's opinion, that "[b]ecause plaintiffs' alleged injury in this case relates to their statewide representation, . . . they should be permitted to bring a statewide claim." *Id.*, at 926.

The case proceeded to trial, where the plaintiffs presented testimony from four fact witnesses. The first was lead plaintiff William Whitford, a retired law professor at the University of Wisconsin in Madison. Whitford testified that he lives in Madison in the 76th Assembly District, and acknowledged on cross-examination that this is, under any plausible circumstances, a heavily Democratic district. Under Act 43, the Democratic share of the Assembly vote in Whitford's district is 81.9%; under the plaintiffs' ideal map—their Demonstration Plan—the projected Democratic share of the Assembly vote in Whitford's district would be 82%. 147 Record 35–36. Whitford therefore conceded that Act 43 had not "affected [his] ability to vote for and elect a Democrat in [his] district." *Id.*, at 37. Whitford testified that he had nevertheless suffered a harm "relate[d] to [his] ability to engage in campaign activity to achieve a majority in the Assembly and the Senate." *Ibid.* As he explained, "[t]he only practical way to accomplish my policy objectives is to get a majority of the Democrats in the Assembly and the Senate ideally in order to get the legislative product I prefer." *Id.*, at 33.

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The plaintiffs also presented the testimony of legislative aides Adam Foltz and Tad Ottman, as well as that of Professor Ronald Gaddie, a political scientist who helped design the Act 43 districting map, regarding how that map was designed and adopted. In particular, Professor Gaddie testified about his creation of what he and the District Court called "S curves": color-coded tables of the estimated partisan skew of different draft redistricting maps. See 218 F. Supp. 3d, at 850, 858. The colors corresponded with assessments regarding whether different districts tilted Re-

publican or Democratic under various statewide political scenarios. The S curve for the map that was eventually adopted projected that "Republicans would maintain a majority under any likely voting scenario," with Democrats needing 54% of the statewide vote to secure a majority in the legislature. *Id.*, at 852.

Finally, the parties presented testimony from four expert witnesses. The plaintiffs' experts, Professor Kenneth Mayer and Professor Simon Jackman, opined that—according to their efficiency-gap analyses—the Act 43 map would systematically favor Republicans for the duration of the decade. See *id.*, at 859–861. The defendants' experts, Professor Nicholas Goedert and Sean Trende, opined that efficiency gaps alone are unreliable measures of durable partisan advantage, and that the political geography of Wisconsin currently favors Republicans because Democrats—who tend to be clustered in large cities—are inefficiently distributed in many parts of Wisconsin for purposes of winning elections. See *id.*, at 861–862.

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At the close of evidence, the District Court concluded—over the dissent of Judge Griesbach—that the plaintiffs had proved a violation of the First and Fourteenth Amendments. The court set out a three-part test for identifying unconstitutional gerrymanders: A redistricting map violates the First Amendment and the Equal Protection Clause of the Fourteenth Amendment if it "(1) is intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation, (2) has that effect, and (3) cannot be justified on other, legitimate legislative grounds." *Id.*, at 884.

The court went on to find, based on evidence concerning the manner in which Act 43 had been adopted, that "one of the purposes of Act 43 was to secure Republican control of the Assembly under any likely future electoral scenario for the remainder of the decade." *Id.*, at 896. It also found that the "more efficient distribution of Republican voters has

allowed the Republican Party to translate its votes into seats with significantly greater ease and to achieve—and preserve—control of the Wisconsin legislature." *Id.*, at 905. As to the third prong of its test, the District Court concluded that the burdens the Act 43 map imposed on Democrats could not be explained by "legitimate state prerogatives [or] neutral factors." *Id.*, at 911. The court recognized that "Wisconsin's political geography, particularly the high concentration of Democratic voters in urban centers like Milwaukee and Madison, affords the Republican Party a natural, but modest, advantage in the districting process," but found that this inherent geographic disparity did not account for the magnitude of the Republican advantage. *Id.*, at 921, 924.

Regarding standing, the court held that the plaintiffs had a "cognizable equal protection right against state-imposed barriers on [their] ability to vote effectively for the party of [their] choice." *Id.*, at 928. It concluded that Act 43 "prevent[ed] Wisconsin Democrats from being able to translate their votes into seats as effectively as Wisconsin Republicans," and that "Wisconsin Democrats, therefore, have suffered a personal injury to their Equal Protection rights." *Ibid.* The court turned away the defendants' argument that the plaintiffs' injury was not sufficiently particularized by finding that "[t]he harm that the plaintiffs have experienced . . . is one shared by Democratic voters in the State of Wisconsin. The dilution of their votes is both personal and acute." *Id.*, at 930.

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Judge Griesbach dissented. He wrote that, under this Court's existing precedents, "partisan intent" to benefit one party rather than the other in districting "is not illegal, but is simply the consequence of assigning the task of redistricting to the political branches." *Id.*, at 939. He observed that the plaintiffs had not attempted to prove that "specific districts . . . had been gerrymandered," but rather had "relied on statewide data and calculations." *Ibid.* And he argued that the plaintiffs' proof, resting as it did on statewide

data, had "no relevance to any gerrymandering injury alleged by a voter in a single district." *Id.*, at 952. On that basis, Judge Griesbach would have entered judgment for the defendants.

The District Court enjoined the defendants from using the Act 43 map in future elections and ordered them to have a remedial districting plan in place no later than November 1, 2017. The defendants appealed directly to this Court, as provided under 28 U. S. C. § 1253. We stayed the District Court's judgment and postponed consideration of our jurisdiction. 582 U. S. 914 (2017).

II

A

Over the past five decades this Court has been repeatedly asked to decide what judicially enforceable limits, if any, the Constitution sets on the gerrymandering of voters along partisan lines. Our previous attempts at an answer have left few clear landmarks for addressing the question. What our precedents have to say on the topic is, however, instructive as to the myriad competing considerations that partisan gerrymandering claims involve. Our efforts to sort through those considerations have generated conflicting views both of how to conceive of the injury arising from partisan gerrymandering and of the appropriate role for the Federal Judiciary in remedying that injury.

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Our first consideration of a partisan gerrymandering claim came in *Gaffney* v. *Cummings*, 412 U. S. 735 (1973). There a group of plaintiffs challenged the constitutionality of a Connecticut redistricting plan that "consciously and overtly adopted and followed a policy of 'political fairness,' which aimed at a rough scheme of proportional representation of the two major political parties." *Id.*, at 738. To that end, the redistricting plan broke up numerous towns, "wiggl[ing] and joggl[ing]" district boundary lines in order to "ferret out pockets of each party's strength." *Id.*, at 738, and n. 3, 752,

n. 18. The plaintiffs argued that, notwithstanding the rough population equality of the districts, the plan was unconstitutional because its consciously political design was "nothing less than a gigantic political gerrymander." *Id.*, at 752. This Court rejected that claim. We reasoned that it would be "idle" to hold that "any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it," because districting "inevitably has and is intended to have substantial political consequences." *Id.*, at 752–753.

Thirteen years later came *Davis* v. *Bandemer*, 478 U. S. 109 (1986). Unlike the bipartisan gerrymander at issue in *Gaffney*, the allegation in *Bandemer* was that Indiana Republicans had gerrymandered Indiana's legislative districts "to favor Republican incumbents and candidates and to disadvantage Democratic voters" through what the plaintiffs called the "stacking" (packing) and "splitting" (cracking) of Democrats. 478 U. S., at 116–117 (plurality opinion). A majority of the Court agreed that the case before it was justiciable. *Id.*, at 125, 127. The Court could not, however, settle on a standard for what constitutes an unconstitutional partisan gerrymander.

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Four Justices would have required the *Bandemer* plaintiffs to "prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." *Id.*, at 127. In that plurality's view, the plaintiffs had failed to make a sufficient showing on the latter point because their evidence of unfavorable election results for Democrats was limited to a single election cycle. See *id.*, at 135.

Three Justices, concurring in the judgment, would have held that the "Equal Protection Clause does not supply judicially manageable standards for resolving purely political gerrymandering claims." *Id.*, at 147 (opinion of O'Connor, J.). Justice O'Connor took issue, in particular, with the plurality's focus on factual questions concerning "statewide

electoral success." *Id.*, at 158. She warned that allowing district courts to "strike down apportionment plans on the basis of their prognostications as to the outcome of future elections or future apportionments invites 'findings' on matters as to which neither judges nor anyone else can have any confidence." *Id.*, at 160.

Justice Powell, joined by Justice Stevens, concurred in part and dissented in part. In his view, the plaintiffs' claim was not simply that their "voting strength was diluted statewide," but rather that "certain key districts were grotesquely gerrymandered to enhance the election prospects of Republican candidates." *Id.*, at 162, 169. Thus, he would have focused on the question "whether the boundaries of the voting districts have been distorted deliberately and arbitrarily to achieve illegitimate ends." *Id.*, at 165.

Eighteen years later, we revisited the issue in *Vieth* v. *Jubelirer*, 541 U. S. 267 (2004). In that case the plaintiffs argued that Pennsylvania's Legislature had created "meandering and irregular" congressional districts that "ignored all traditional redistricting criteria, including the preservation of local government boundaries," in order to provide an advantage to Republican candidates for Congress. *Id.*, at 272–273 (plurality opinion) (brackets omitted).

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The *Vieth* Court broke down on numerous lines. Writing for a four-Justice plurality, Justice Scalia would have held that the plaintiffs' claims were nonjusticiable because there was no "judicially discernible and manageable standard" by which to decide them. *Id.*, at 306. On those grounds, the plurality affirmed the dismissal of the claims. *Ibid.* JUSTICE KENNEDY concurred in the judgment. He noted that "there are yet no agreed upon substantive principles of fairness in districting," and that, consequently, "we have no basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden" on constitutional rights. *Id.*, at 307–308. He rejected the principle advanced by the plaintiffs—that "a majority of vot-

ers in [Pennsylvania] should be able to elect a majority of [Pennsylvania's] congressional delegation"—as a "precept" for which there is "no authority." *Id.*, at 308. Yet JUSTICE KENNEDY recognized the possibility that "in another case a standard might emerge that suitably demonstrates how an apportionment's *de facto* incorporation of partisan classifications burdens" representational rights. *Id.*, at 312.

Four Justices dissented in three different opinions. Justice Stevens would have permitted the plaintiffs' claims to proceed on a district-by-district basis, using a legal standard similar to the standard for racial gerrymandering set forth in *Shaw* v. *Hunt*, 517 U. S. 899 (1996). See 541 U. S., at 335–336, 339. Under this standard, any district with a "bizarre shape" for which the only possible explanation was "a naked desire to increase partisan strength" would be found unconstitutional under the Equal Protection Clause. *Id.*, at 339. Justice Souter, joined by JUSTICE GINSBURG, agreed that a plaintiff alleging unconstitutional partisan gerrymandering should proceed on a district-by-district basis, as "we would be able to call more readily on some existing law when we defined what is suspect at the district level." See *id.*, at 346–347.

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JUSTICE BREYER dissented on still other grounds. In his view, the drawing of single-member legislative districts—even according to traditional criteria—is "rarely . . . politically neutral." *Id.*, at 359. He therefore would have distinguished between gerrymandering for passing political advantage and gerrymandering leading to the "unjustified entrenchment" of a political party. *Id.*, at 360–361.

The Court last took up this question in *League of United Latin American Citizens* v. *Perry*, 548 U. S. 399 (2006) (*LULAC*). The plaintiffs there challenged a mid-decade redistricting map passed by the Texas Legislature. As in *Vieth*, a majority of the Court could find no justiciable standard by which to resolve the plaintiffs' partisan gerrymandering claims. Relevant to this case, an *amicus* brief

in support of the *LULAC* plaintiffs proposed a "symmetry standard" to "measure partisan bias" by comparing how the two major political parties "would fare hypothetically if they each . . . received a given percentage of the vote." 548 U. S., at 419 (opinion of KENNEDY, J.). JUSTICE KENNEDY noted some wariness at the prospect of "adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs." *Id.*, at 420. Aside from that problem, he wrote, the partisan bias standard shed no light on "how much partisan dominance is too much." *Ibid.* JUSTICE KENNEDY therefore concluded that "asymmetry alone is not a reliable measure of unconstitutional partisanship." *Ibid.*

Justice Stevens would have found that the Texas map was a partisan gerrymander based in part on the asymmetric advantage it conferred on Republicans in converting votes to seats. *Id.*, at 466–467, 471–473 (opinion concurring in part and dissenting in part). Justice Souter, writing for himself and JUSTICE GINSBURG, noted that he would not "rule out the utility of a criterion of symmetry," and that "further attention could be devoted to the administrability of such a criterion at all levels of redistricting and its review." *Id.*, at 483–484 (opinion concurring in part and dissenting in part).

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B

At argument on appeal in this case, counsel for the plaintiffs argued that this Court *can* address the problem of partisan gerrymandering because it *must*: The Court should exercise its power here because it is the "only institution in the United States" capable of "solv[ing] this problem." Tr. of Oral Arg. 62. Such invitations must be answered with care. "Failure of political will does not justify unconstitutional remedies." *Clinton* v. *City of New York*, 524 U. S. 417, 449 (1998) (KENNEDY, J., concurring). Our power as judges to "say what the law is," *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803), rests not on the default of politically accountable

officers, but is instead grounded in and limited by the necessity of resolving, according to legal principles, a plaintiff's particular claim of legal right.

Our considerable efforts in *Gaffney*, *Bandemer*, *Vieth*, and *LULAC* leave unresolved whether such claims may be brought in cases involving allegations of partisan gerrymandering. In particular, two threshold questions remain: what is necessary to show standing in a case of this sort, and whether those claims are justiciable. Here we do not decide the latter question because the plaintiffs in this case have not shown standing under the theory upon which they based their claims for relief.

To ensure that the Federal Judiciary respects "the proper—and properly limited—role of the courts in a democratic society," *Allen* v. *Wright*, 468 U. S. 737, 750 (1984), a plaintiff may not invoke federal-court jurisdiction unless he can show "a personal stake in the outcome of the controversy." *Baker*, 369 U. S., at 204. A federal court is not "a forum for generalized grievances," and the requirement of such a personal stake "ensures that courts exercise power that is judicial in nature." *Lance*, 549 U. S., at 439, 441. We enforce that requirement by insisting that a plaintiff satisfy the familiar three-part test for Article III standing: that he "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc.* v. *Robins*, 578 U. S. 330, 338 (2016). Foremost among these requirements is injury in fact—a plaintiff's pleading and proof that he has suffered the "invasion of a legally protected interest" that is "concrete and particularized," *i. e.*, which "affect[s] the plaintiff in a personal and individual way." *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560, and n. 1 (1992).

We have long recognized that a person's right to vote is "individual and personal in nature." *Reynolds* v. *Sims*, 377 U. S. 533, 561 (1964). Thus, "voters who allege facts show-

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ing disadvantage to themselves as individuals have standing to sue" to remedy that disadvantage. *Baker*, 369 U. S., at 206. The plaintiffs in this case alleged that they suffered such injury from partisan gerrymandering, which works through "packing" and "cracking" voters of one party to disadvantage those voters. 1 App. 28–29, 32–33, Complaint ¶¶5, 15. That is, the plaintiffs claim a constitutional right not to be placed in legislative districts deliberately designed to "waste" their votes in elections where their chosen candidates will win in landslides (packing) or are destined to lose by closer margins (cracking). *Id.*, at 32–33, ¶15.

To the extent the plaintiffs' alleged harm is the dilution of their votes, that injury is district specific. An individual voter in Wisconsin is placed in a single district. He votes for a single representative. The boundaries of the district, and the composition of its voters, determine whether and to what extent a particular voter is packed or cracked. This "disadvantage to [the voter] as [an] individual[ ]," *Baker*, 369 U. S., at 206, therefore results from the boundaries of the particular district in which he resides. And a plaintiff's remedy must be "limited to the inadequacy that produced [his] injury in fact." *Lewis* v. *Casey*, 518 U. S. 343, 357 (1996). In this case the remedy that is proper and sufficient lies in the revision of the boundaries of the individual's own district.

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For similar reasons, we have held that a plaintiff who alleges that he is the object of a racial gerrymander—a drawing of district lines on the basis of race—has standing to assert only that his own district has been so gerrymandered. See *United States* v. *Hays*, 515 U. S. 737, 744–745 (1995). A plaintiff who complains of gerrymandering, but who does not live in a gerrymandered district, "assert[s] only a generalized grievance against governmental conduct of which he or she does not approve." *Id.*, at 745. Plaintiffs who complain of racial gerrymandering in their State cannot sue to invalidate the whole State's legislative districting map; such complaints

must proceed "district by district." *Alabama Legislative Black Caucus* v. *Alabama*, 575 U. S. 254, 262 (2015).

The plaintiffs argue that their claim of statewide injury is analogous to the claims presented in *Baker* and *Reynolds*, which they assert were "statewide in nature" because they rested on allegations that "districts *throughout a state* [had] been malapportioned." Brief for Appellees 29. But, as we have already noted, the holdings in *Baker* and *Reynolds* were expressly premised on the understanding that the injuries giving rise to those claims were "individual and personal in nature," *Reynolds*, 377 U. S., at 561, because the claims were brought by voters who alleged "facts showing disadvantage to themselves as individuals," *Baker*, 369 U. S., at 206.

The plaintiffs' mistaken insistence that the claims in *Baker* and *Reynolds* were "statewide in nature" rests on a failure to distinguish injury from remedy. In those malapportionment cases, the only way to vindicate an individual plaintiff's right to an equally weighted vote was through a wholesale "restructuring of the geographical distribution of seats in a state legislature." *Reynolds*, 377 U. S., at 561; see, *e. g.*, *Moss* v. *Burkhart*, 220 F. Supp. 149, 156–160 (WD Okla. 1963) (directing the county-by-county reapportionment of the Oklahoma Legislature), aff'd *sub nom. Williams* v. *Moss*, 378 U. S. 558 (1964) (*per curiam*).

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Here, the plaintiffs' partisan gerrymandering claims turn on allegations that their votes have been diluted. That harm arises from the particular composition of the voter's own district, which causes his vote—having been packed or cracked—to carry less weight than it would carry in another, hypothetical district. Remedying the individual voter's harm, therefore, does not necessarily require restructuring all of the State's legislative districts. It requires revising only such districts as are necessary to reshape the voter's district—so that the voter may be unpacked or uncracked, as the case may be. Cf. *Alabama Legislative Black Cau-*

cus, 575 U. S., at 262–263. This fits the rule that a "remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Lewis*, 518 U. S., at 357.

The plaintiffs argue that their legal injury is not limited to the injury that they have suffered as individual voters, but extends also to the statewide harm to their interest "in their collective representation in the legislature," and in influencing the legislature's overall "composition and policymaking." Brief for Appellees 31. But our cases to date have not found that this presents an individual and personal injury of the kind required for Article III standing. On the facts of this case, the plaintiffs may not rely on "the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past." *Lance*, 549 U. S., at 442. A citizen's interest in the overall composition of the legislature is embodied in his right to vote for his representative. And the citizen's abstract interest in policies adopted by the legislature on the facts here is a nonjusticiable "general interest common to all members of the public." *Ex parte Lévitt*, 302 U. S. 633, 634 (1937) (*per curiam*).

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We leave for another day consideration of other possible theories of harm not presented here and whether those theories might present justiciable claims giving rise to statewide remedies. JUSTICE KAGAN's concurring opinion endeavors to address "other kinds of constitutional harm," see *post*, at 80, perhaps involving different kinds of plaintiffs, see *post*, at 80–81, and differently alleged burdens, see *post*, at 81. But the opinion of the Court rests on the understanding that we lack jurisdiction to decide this case, much less to draw speculative and advisory conclusions regarding others. See *Public Workers* v. *Mitchell*, 330 U. S. 75, 90 (1947) (noting that courts must "respect the limits of [their] unique authority" and engage in "[j]udicial exposition . . . only when necessary to decide definite issues between litigants"). The reasoning of this Court

with respect to the disposition of this case is set forth in this opinion and none other. And the sum of the standing principles articulated here, as applied to this case, is that the harm asserted by the plaintiffs is best understood as arising from a burden on those plaintiffs' own votes. In this gerrymandering context that burden arises through a voter's placement in a "cracked" or "packed" district.

C

Four of the plaintiffs in this case—Mary Lynne Donohue, Wendy Sue Johnson, Janet Mitchell, and Jerome Wallace—pleaded a particularized burden along such lines. They alleged that Act 43 had "dilut[ed] the influence" of their votes as a result of packing or cracking in their legislative districts. See 1 App. 34–36, Complaint ¶¶20, 23, 24, 26. The facts necessary to establish standing, however, must not only be alleged at the pleading stage, but also proved at trial. See *Defenders of Wildlife*, 504 U. S., at 561. As the proceedings in the District Court progressed to trial, the plaintiffs failed to meaningfully pursue their allegations of individual harm. The plaintiffs did not seek to show such requisite harm since, on this record, it appears that not a single plaintiff sought to prove that he or she lives in a cracked or packed district. They instead rested their case at trial—and their arguments before this Court—on their theory of statewide injury to Wisconsin Democrats, in support of which they offered three kinds of evidence.

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First, the plaintiffs presented the testimony of the lead plaintiff, Professor Whitford. But Whitford's testimony does not support any claim of packing or cracking of himself as a voter. Indeed, Whitford expressly acknowledged that Act 43 did not affect the weight of his vote. 147 Record 37. His testimony points merely to his hope of achieving a Democratic majority in the legislature—what the plaintiffs describe here as their shared interest in the composition of "the legislature as a whole." Brief for Appellees 32.

Under our cases to date, that is a collective political interest, not an individual legal interest, and the Court must be cautious that it does not become "a forum for generalized grievances." *Lance*, 549 U. S., at 439, 441.

Second, the plaintiffs provided evidence regarding the mapmakers' deliberations as they drew district lines. As the District Court recounted, the plaintiffs' evidence showed that the mapmakers "test[ed] the partisan makeup and performance of districts as they might be configured in different ways." 218 F. Supp. 3d, at 891. Each of the mapmakers' alternative configurations came with a table that listed the number of "Safe" and "Lean" seats for each party, as well as "Swing" seats. *Ibid.* The mapmakers also labeled certain districts as ones in which "GOP seats [would be] strengthened a lot," *id.*, at 893; 2 App. 344, or which would result in "Statistical Pick Ups" for Republicans. 218 F. Supp. 3d, at 893 (alterations omitted). And they identified still other districts in which "GOP seats [would be] strengthened a little," "weakened a little," or were "likely lost." *Ibid.*

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The District Court relied upon this evidence in concluding that, "from the outset of the redistricting process, the drafters sought to understand the partisan effects of the maps they were drawing." *Id.*, at 895. That evidence may well be pertinent with respect to any ultimate determination whether the plaintiffs may prevail in their claims against the defendants, assuming such claims present a justiciable controversy. But the question at this point is whether the plaintiffs have established injury in fact. That turns on effect, not intent, and requires a showing of a burden on the plaintiffs' votes that is "actual or imminent, not 'conjectural' or 'hypothetical.'" *Defenders of Wildlife*, 504 U. S., at 560.

Third, the plaintiffs offered evidence concerning the impact that Act 43 had in skewing Wisconsin's statewide political map in favor of Republicans. This evidence, which made up the heart of the plaintiffs' case, was derived from partisan-asymmetry studies similar to those discussed in *LULAC*.

The plaintiffs contend that these studies measure deviations from "partisan symmetry," which they describe as the "social scientific tenet that [districting] maps should treat parties symmetrically." Brief for Appellees 37. In the District Court, the plaintiffs' case rested largely on a particular measure of partisan asymmetry—the "efficiency gap" of wasted votes. See *supra*, at 56. That measure was first developed in two academic articles published shortly before the initiation of this lawsuit. See Stephanopoulos & McGhee, Partisan Gerrymandering and the Efficiency Gap, 82 U. Chi. L. Rev. 831 (2015); McGhee, Measuring Partisan Bias in Single-Member District Electoral Systems, 39 Leg. Studies Q. 55 (2014).

The plaintiffs asserted in their complaint that the "efficiency gap captures in a single number all of a district plan's cracking and packing." 1 App. 28–29, Complaint ¶5 (emphasis deleted). That number is calculated by subtracting the statewide sum of one party's wasted votes from the statewide sum of the other party's wasted votes and dividing the result by the statewide sum of all votes cast, where "wasted votes" are defined as all votes cast for a losing candidate and all votes cast for a winning candidate beyond the 50% plus one that ensures victory. See Brief for Eric McGhee as *Amicus Curiae* 6, and n. 3. The larger the number produced by that calculation, the greater the asymmetry between the parties in their efficiency in converting votes into legislative seats. Though they take no firm position on the matter, the plaintiffs have suggested that an efficiency gap in the range of 7% to 10% should trigger constitutional scrutiny. See Brief for Appellees 52–53, and n. 17.

The plaintiffs and their *amici curiae* promise us that the efficiency gap and similar measures of partisan asymmetry will allow the federal courts—armed with just "a pencil and paper or a hand calculator"—to finally solve the problem of partisan gerrymandering that has confounded the Court for decades. Brief for Heather K. Gerken et al. as *Amici Cu-*

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riae 27 (citing Wang, Let Math Save Our Democracy, N. Y. Times, Dec. 5, 2015). We need not doubt the plaintiffs' math. The difficulty for standing purposes is that these calculations are an average measure. They do not address the effect that a gerrymander has on the votes of particular citizens. Partisan-asymmetry metrics such as the efficiency gap measure something else entirely: the effect that a gerrymander has on the fortunes of political parties.

Consider the situation of Professor Whitford, who lives in District 76, where, defendants contend, Democrats are "naturally" packed due to their geographic concentration, with that of plaintiff Mary Lynne Donohue, who lives in Assembly District 26 in Sheboygan, where Democrats like her have allegedly been deliberately cracked. By all accounts, Act 43 has not affected Whitford's individual vote for his Assembly representative—even plaintiffs' own demonstration map resulted in a virtually identical district for him. Donohue, on the other hand, alleges that Act 43 burdened her individual vote. Yet neither the efficiency gap nor the other measures of partisan asymmetry offered by the plaintiffs are capable of telling the difference between what Act 43 did to Whitford and what it did to Donohue. The single statewide measure of partisan advantage delivered by the efficiency gap treats Whitford and Donohue as indistinguishable, even though their individual situations are quite different.

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That shortcoming confirms the fundamental problem with the plaintiffs' case as presented on this record. It is a case about group political interests, not individual legal rights. But this Court is not responsible for vindicating generalized partisan preferences. The Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it.

III

In cases where a plaintiff fails to demonstrate Article III standing, we usually direct the dismissal of the plaintiff's claims. See, *e. g.*, *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S.

332, 354 (2006). This is not the usual case. It concerns an unsettled kind of claim this Court has not agreed upon, the contours and justiciability of which are unresolved. Under the circumstances, and in light of the plaintiffs' allegations that Donohue, Johnson, Mitchell, and Wallace live in districts where Democrats like them have been packed or cracked, we decline to direct dismissal.

We therefore remand the case to the District Court so that the plaintiffs may have an opportunity to prove concrete and particularized injuries using evidence—unlike the bulk of the evidence presented thus far—that would tend to demonstrate a burden on their individual votes. Cf. *Alabama Legislative Black Caucus*, 575 U. S., at 264–265 (remanding for further consideration of the plaintiffs' gerrymandering claims on a district-by-district basis). We express no view on the merits of the plaintiffs' case. We caution, however, that "standing is not dispensed in gross": A plaintiff's remedy must be tailored to redress the plaintiff's particular injury. *Cuno*, 547 U. S., at 353.

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The judgment of the District Court is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

The Court holds today that a plaintiff asserting a partisan gerrymandering claim based on a theory of vote dilution must prove that she lives in a packed or cracked district in order to establish standing. See *ante*, at 65–69. The Court also holds that none of the plaintiffs here have yet made that required showing. See *ante*, at 69.

I agree with both conclusions, and with the Court's decision to remand this case to allow the plaintiffs to prove that they live in packed or cracked districts, see *ante* this page. I write to address in more detail what kind of evidence the

present plaintiffs (or any additional ones) must offer to support that allegation. And I write to make some observations about what would happen if they succeed in proving standing—that is, about how their vote dilution case could then proceed on the merits. The key point is that the case could go forward in much the same way it did below: Given the charges of statewide packing and cracking, affecting a slew of districts and residents, the challengers could make use of statewide evidence and seek a statewide remedy.

I also write separately because I think the plaintiffs may have wanted to do more than present a vote dilution theory. Partisan gerrymandering no doubt burdens individual votes, but it also causes other harms. And at some points in this litigation, the plaintiffs complained of a different injury—an infringement of their First Amendment right of association. The Court rightly does not address that alternative argument: The plaintiffs did not advance it with sufficient clarity or concreteness to make it a real part of the case. But because on remand they may well develop the associational theory, I address the standing requirement that would then apply. As I'll explain, a plaintiff presenting such a theory would not need to show that her particular voting district was packed or cracked for standing purposes because that fact would bear no connection to her substantive claim. Indeed, everything about the litigation of that claim—from standing on down to remedy—would be statewide in nature.

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Partisan gerrymandering, as this Court has recognized, is "incompatible with democratic principles." *Arizona State Legislature* v. *Arizona Independent Redistricting Comm'n*, 576 U. S. 787, 791 (2015) (quoting *Vieth* v. *Jubelirer*, 541 U. S. 267, 292 (2004) (plurality opinion); alterations omitted). More effectively every day, that practice enables politicians to entrench themselves in power against the people's will. And only the courts can do anything to remedy the problem, because gerrymanders benefit those who control the political branches. None of those facts gives judges any excuse to

disregard Article III's demands. The Court is right to say they were not met here. But partisan gerrymandering injures enough individuals and organizations in enough concrete ways to ensure that standing requirements, properly applied, will not often or long prevent courts from reaching the merits of cases like this one. Or from insisting, when they do, that partisan officials stop degrading the nation's democracy.

I

As the Court explains, the plaintiffs' theory in this case focuses on vote dilution. See *ante*, at 67 ("Here, the plaintiffs' partisan gerrymandering claims turn on allegations that their votes have been diluted"); see also *ante*, at 66, 67–69. That is, the plaintiffs assert that Wisconsin's State Assembly Map has caused their votes "to carry less weight than [they] would carry in another, hypothetical district." *Ante*, at 67. And the mechanism used to wreak that harm is "packing" and "cracking." *Ante*, at 66. In a relatively few districts, the mapmakers packed supermajorities of Democratic voters—well beyond the number needed for a Democratic candidate to prevail. And in many more districts, dispersed throughout the State, the mapmakers cracked Democratic voters—spreading them sufficiently thin to prevent them from electing their preferred candidates. The result of both practices is to "waste" Democrats' votes. *Ibid.*

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The harm of vote dilution, as this Court has long stated, is "individual and personal in nature." *Reynolds* v. *Sims*, 377 U. S. 533, 561 (1964); see *ante*, at 67. It arises when an election practice—most commonly, the drawing of district lines—devalues one citizen's vote as compared to others. Of course, such practices invariably affect more than one citizen at a time. For example, our original one-person, one-vote cases considered how malapportioned maps "contract[ed] the value" of urban citizens' votes while "expand[ing]" the value of rural citizens' votes. *Wesberry* v. *Sanders*, 376 U. S. 1, 7

(1964). But we understood the injury as giving diminished weight to each particular vote, even if millions were so touched. In such cases, a voter living in an overpopulated district suffered "disadvantage to [herself] as [an] individual[ ]": Her vote counted for less than the votes of other citizens in her State. *Baker* v. *Carr*, 369 U. S. 186, 206 (1962); see *ante*, at 67. And that kind of disadvantage is what a plaintiff asserting a vote dilution claim—in the one-person, one-vote context or any other—always alleges.

To have standing to bring a partisan gerrymandering claim based on vote dilution, then, a plaintiff must prove that the value of her own vote has been "contract[ed]." *Wesberry*, 376 U. S., at 7. And that entails showing, as the Court holds, that she lives in a district that has been either packed or cracked. See *ante*, at 69. For packing and cracking are the ways in which a partisan gerrymander dilutes votes. Cf. *Voinovich* v. *Quilter*, 507 U. S. 146, 153–154 (1993) (explaining that packing or cracking can also support racial vote dilution claims). Consider the perfect form of each variety. When a voter resides in a packed district, her preferred candidate will win no matter what; when a voter lives in a cracked district, her chosen candidate stands no chance of prevailing. But either way, such a citizen's vote carries less weight—has less consequence—than it would under a neutrally drawn map. See *ante*, at 66, 67. So when she shows that her district has been packed or cracked, she proves, as she must to establish standing, that she is "among the injured." *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 563 (1992) (quoting *Sierra Club* v. *Morton*, 405 U. S. 727, 735 (1972)); see *ante*, at 69.

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In many partisan gerrymandering cases, that threshold showing will not be hard to make. Among other ways of proving packing or cracking, a plaintiff could produce an alternative map (or set of alternative maps)—comparably consistent with traditional districting principles—under which her vote would carry more weight. Cf. *ante*, at 72 (suggest-

ing how an alternative map may shed light on vote dilution or its absence); *Easley* v. *Cromartie*, 532 U. S. 234, 258 (2001) (discussing the use of alternative maps as evidence in a racial gerrymandering case); *Cooper* v. *Harris*, 581 U. S. 285, 317–322 (2017) (same); Brief for Political Geography Scholars as *Amici Curiae* 12–14 (describing computer simulation techniques for devising alternative maps). For example, a Democratic plaintiff living in a 75%-Democratic district could prove she was packed by presenting a different map, drawn without a focus on partisan advantage, that would place her in a 60%-Democratic district. Or conversely, a Democratic plaintiff residing in a 35%-Democratic district could prove she was cracked by offering an alternative, neutrally drawn map putting her in a 50–50 district. The precise numbers are of no import. The point is that the plaintiff can show, through drawing alternative district lines, that partisan-based packing or cracking diluted her vote.

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Here, the Court is right that the plaintiffs have so far failed to make such a showing. See *ante*, at 69–72. William Whitford was the only plaintiff to testify at trial about the alleged gerrymander's effects. He expressly acknowledged that his district would be materially identical under any conceivable map, whether or not drawn to achieve partisan advantage. See *ante*, at 69, 72. That means Wisconsin's plan could not have diluted Whitford's own vote. So whatever other claims he might have, see *infra*, at 80–81, Whitford is not "among the injured" in a vote dilution challenge. *Lujan*, 504 U. S., at 563 (quoting *Sierra Club*, 405 U. S., at 735). Four other plaintiffs differed from Whitford by alleging in the complaint that they lived in packed or cracked districts. But for whatever reason, they failed to back up those allegations with evidence as the suit proceeded. See *ante*, at 69. So they too did not show the injury—a less valuable vote—central to their vote dilution theory.

That problem, however, may be readily fixable. The Court properly remands this case to the District Court "so

that the plaintiffs may have an opportunity" to "demonstrate a burden on their individual votes." *Ante*, at 73. That means the plaintiffs—both the four who initially made those assertions and any others (current or newly joined)—now can introduce evidence that their individual districts were packed or cracked. And if the plaintiffs' more general charges have a basis in fact, that evidence may well be at hand. Recall that the plaintiffs here alleged—and the District Court found, see 218 F. Supp. 3d 837, 896 (WD Wis. 2016)—that a unified Republican government set out to ensure that Republicans would control as many State Assembly seats as possible over a decade (five consecutive election cycles). To that end, the government allegedly packed and cracked Democrats throughout the State, not just in a particular district (see, *e. g.*, *Benisek* v. *Lamone*, *post*, p. 155 (*per curiam*)) or region. Assuming that is true, the plaintiffs should have a mass of packing and cracking proof, which they can now also present in district-by-district form to support their standing. In other words, a plaintiff residing in each affected district can show, through an alternative map or other evidence, that packing or cracking indeed occurred there. And if (or to the extent) that test is met, the court can proceed to decide all distinctive merits issues and award appropriate remedies.

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When the court addresses those merits questions, it can consider statewide (as well as local) evidence. Of course, the court below and others like it are currently debating, without guidance from this Court, what elements make up a vote dilution claim in the partisan gerrymandering context. But assume that the plaintiffs must prove illicit partisan intent—a purpose to dilute Democrats' votes in drawing district lines. The plaintiffs could then offer evidence about the mapmakers' goals in formulating the entire statewide map (which would predictably carry down to individual districting decisions). So, for example, the plaintiffs here introduced proof that the mapmakers looked to partisan voting data when drawing districts throughout the State—and that they graded draft maps according to the amount of advan-

tage those maps conferred on Republicans. See 218 F. Supp. 3d, at 890–896. This Court has explicitly recognized the relevance of such statewide evidence in addressing racial gerrymandering claims of a district-specific nature. "Voters," we held, "of course[ ] can present statewide *evidence* in order to prove racial gerrymandering in a particular district." *Alabama Legislative Black Caucus* v. *Alabama*, 575 U. S. 254, 263 (2015). And in particular, "[s]uch evidence is perfectly relevant" to showing that mapmakers had an invidious "motive" in drawing the lines of "multiple districts in the State." *Id.*, at 266–267. The same should be true for partisan gerrymandering.

Similarly, cases like this one might warrant a statewide remedy. Suppose that mapmakers pack or crack a critical mass of State Assembly districts all across the State to elect as many Republican politicians as possible. And suppose plaintiffs residing in those districts prevail in a suit challenging that gerrymander on a vote dilution theory. The plaintiffs might then receive exactly the relief sought in this case. To be sure, remedying each plaintiff's vote dilution injury "requires revising only such districts as are necessary to reshape [that plaintiff's] district—so that the [plaintiff] may be unpacked or uncracked, as the case may be." *Ante*, at 67. But with enough plaintiffs joined together—attacking all the packed and cracked districts in a statewide gerrymander—those obligatory revisions could amount to a wholesale restructuring of the State's districting plan. The Court recognizes as much. It states that a proper remedy in a vote dilution case "does not *necessarily* require restructuring all of the State's legislative districts." *Ibid.* (emphasis added). Not necessarily—but possibly. It all depends on how much redistricting is needed to cure all the packing and cracking that the mapmakers have done.

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II

Everything said so far relates only to suits alleging that a partisan gerrymander dilutes individual votes. That is the

way the Court sees this litigation. See *ante*, at 65–69. And as I'll discuss, that is the most reasonable view. See *infra*, at 82–83. But partisan gerrymanders inflict other kinds of constitutional harm as well. Among those injuries, partisan gerrymanders may infringe the First Amendment rights of association held by parties, other political organizations, and their members. The plaintiffs here have sometimes pointed to that kind of harm. To the extent they meant to do so, and choose to do so on remand, their associational claim would occasion a different standing inquiry than the one in the Court's opinion.

JUSTICE KENNEDY explained the First Amendment associational injury deriving from a partisan gerrymander in his concurring opinion in *Vieth*, 541 U. S. 267. "Representative democracy," JUSTICE KENNEDY pointed out, is today "unimaginable without the ability of citizens to band together" to advance their political beliefs. *Id.*, at 314 (opinion concurring in judgment) (quoting *California Democratic Party* v. *Jones*, 530 U. S. 567, 574 (2000)). That means significant "First Amendment concerns arise" when a State purposely "subject[s] a group of voters or their party to disfavored treatment." 541 U. S., at 314. Such action "burden[s] a group of voters' representational rights." *Ibid.*; see *id.*, at 315 (similarly describing the "burden[ ] on a disfavored party and its voters" and the "burden [on] a group's representational rights"). And it does so because of their "political association," "participation in the electoral process," "voting history," or "expression of political views." *Id.*, at 314–315.

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As so formulated, the associational harm of a partisan gerrymander is distinct from vote dilution. Consider an active member of the Democratic Party in Wisconsin who resides in a district that a partisan gerrymander has left untouched (neither packed nor cracked). His individual vote carries no less weight than it did before. But if the gerrymander ravaged the party he works to support, then he indeed suffers harm, as do all other involved members of that party. This

is the kind of "burden" to "a group of voters' representational rights" JUSTICE KENNEDY spoke of. *Id.*, at 314. Members of the "disfavored party" in the State, *id.*, at 315, deprived of their natural political strength by a partisan gerrymander, may face difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office (not to mention eventually accomplishing their policy objectives). See *Anderson* v. *Celebrezze*, 460 U. S. 780, 791–792, and n. 12 (1983) (concluding that similar harms inflicted by a state election law amounted to a "burden imposed on . . . associational rights"). And what is true for party members may be doubly true for party officials and triply true for the party itself (or for related organizations). Cf. *California Democratic Party*, 530 U. S., at 586 (holding that a state law violated state political parties' First Amendment rights of association). By placing a state party at an enduring electoral disadvantage, the gerrymander weakens its capacity to perform all its functions.

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And if that is the essence of the harm alleged, then the standing analysis should differ from the one the Court applies. Standing, we have long held, "turns on the nature and source of the claim asserted." *Warth* v. *Seldin*, 422 U. S. 490, 500 (1975). Indeed, that idea lies at the root of today's opinion. It is because the Court views the harm alleged as vote dilution that it (rightly) insists that each plaintiff show packing or cracking in her own district to establish her standing. See *ante*, at 65–69; *supra*, at 76. But when the harm alleged is not district specific, the proof needed for standing should not be district specific either. And the associational injury flowing from a statewide partisan gerrymander, whether alleged by a party member or the party itself, has nothing to do with the packing or cracking of any single district's lines. The complaint in such a case is instead that the gerrymander has burdened the ability of like-minded people across the State to affiliate in a political party

and carry out that organization's activities and objects. See *supra*, at 80–81. Because a plaintiff can have that complaint without living in a packed or cracked district, she need not show what the Court demands today for a vote dilution claim. Or said otherwise: Because on this alternative theory, the valued association and the injury to it are statewide, so too is the relevant standing requirement.

On occasion, the plaintiffs here have indicated that they have an associational claim in mind. In addition to repeatedly alleging vote dilution, their complaint asserted in general terms that Wisconsin's districting plan infringes their "First Amendment right to freely associate with each other without discrimination by the State based on that association." 1 App. 61, Complaint ¶91. Similarly, the plaintiffs noted before this Court that "[b]eyond diluting votes, partisan gerrymandering offends First Amendment values by penalizing citizens because of . . . their association with a political party." Brief for Appellees 36 (internal quotation marks omitted). And finally, the plaintiffs' evidence of partisan asymmetry well fits a suit alleging associational injury (although, as noted below, that was not how it was used, see *infra* this page and 83). As the Court points out, what those statistical metrics best measure is a gerrymander's effect "on the fortunes of political parties" and those associated with them. *Ante*, at 72.

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In the end, though, I think the plaintiffs did not sufficiently advance a First Amendment associational theory to avoid the Court's holding on standing. Despite referring to that theory in their complaint, the plaintiffs tried this case as though it were about vote dilution alone. Their testimony and other evidence went toward establishing the effects of rampant packing and cracking on the value of individual citizens' votes. Even their proof of partisan asymmetry was used for that purpose—although as noted above, it could easily have supported the alternative theory of associational

harm, see *supra*, at 82. The plaintiffs joining in this suit do not include the State Democratic Party (or any related statewide organization). They did not emphasize their membership in that party, or their activities supporting it. And they did not speak to any tangible associational burdens—ways the gerrymander had debilitated their party or weakened its ability to carry out its core functions and purposes, see *supra*, at 80–81. Even in this Court, when disputing the State's argument that they lacked standing, the plaintiffs reiterated their suit's core theory: that the gerrymander "intentionally, severely, durably, and unjustifiably dilutes Democratic votes." Brief for Appellees 29–30. Given that theory, the plaintiffs needed to show that their own votes were indeed diluted in order to establish standing.

But nothing in the Court's opinion prevents the plaintiffs on remand from pursuing an associational claim, or from satisfying the different standing requirement that theory would entail. The Court's opinion is about a suit challenging a partisan gerrymander on a particular ground—that it dilutes the votes of individual citizens. That opinion "leave[s] for another day consideration of other possible theories of harm not presented here and whether those theories might present justiciable claims giving rise to statewide remedies." *Ante*, at 68. And in particular, it leaves for another day the theory of harm advanced by JUSTICE KENNEDY in *Vieth*: that a partisan gerrymander interferes with the vital "ability of citizens to band together" to further their political beliefs. 541 U. S., at 314 (quoting *California Democratic Party*, 530 U. S., at 574). Nothing about that injury is "generalized" or "abstract," as the Court says is true of the plaintiffs' dissatisfaction with the "overall composition of the legislature." *Ante*, at 68. A suit raising an associational theory complains of concrete "burdens on a disfavored party" and its members as they pursue their political interests and goals. *Vieth*, 541 U. S., at 315 (opinion of KENNEDY, J.); see *supra*, at 80–81.

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And when the suit alleges that a gerrymander has imposed those burdens on a statewide basis, then its litigation should be statewide too—as to standing, liability, and remedy alike.

III

Partisan gerrymandering jeopardizes "[t]he ordered working of our Republic, and of the democratic process." *Vieth*, 541 U. S., at 316 (opinion of KENNEDY, J.). It enables a party that happens to be in power at the right time to entrench itself there for a decade or more, no matter what the voters would prefer. At its most extreme, the practice amounts to "rigging elections." *Id.*, at 317 (internal quotation marks omitted). It thus violates the most fundamental of all democratic principles—that "the voters should choose their representatives, not the other way around." *Arizona State Legislature*, 576 U. S., at 824 (quoting Berman, Managing Gerrymandering, 83 Texas L. Rev. 781 (2005)).

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And the evils of gerrymandering seep into the legislative process itself. Among the *amicus* briefs in this case are two from bipartisan groups of congressional members and state legislators. They know that both parties gerrymander. And they know the consequences. The congressional brief describes a "cascade of negative results" from excessive partisan gerrymandering: indifference to swing voters and their views; extreme political positioning designed to placate the party's base and fend off primary challenges; the devaluing of negotiation and compromise; and the impossibility of reaching pragmatic, bipartisan solutions to the nation's problems. Brief for Bipartisan Group of Current and Former Members of Congress as *Amici Curiae* 4; see *id.*, at 10–23. The state legislators tell a similar story. In their view, partisan gerrymandering has "sounded the death-knell of bipartisanship," creating a legislative environment that is "toxic" and "tribal[ ]." Brief for Bipartisan Group of 65 Current and Former State Legislators as *Amici Curiae* 6, 25.

I doubt James Madison would have been surprised. What, he asked when championing the Constitution, would make the House of Representatives work? The House must be structured, he answered, to instill in its members "an habitual recollection of their dependence on the people." The Federalist No. 57, p. 352 (C. Rossiter ed. 1961). Legislators must be "compelled to anticipate the moment" when their "exercise of [power] is to be reviewed." *Ibid.* When that moment does not come—when legislators can entrench themselves in office despite the people's will—the foundation of effective democratic governance dissolves.

And our history offers little comfort. Yes, partisan gerrymandering goes back to the Republic's earliest days; and yes, American democracy has survived. But technology makes today's gerrymandering altogether different from the crude linedrawing of the past. New redistricting software enables pinpoint precision in designing districts. With such tools, mapmakers can capture every last bit of partisan advantage, while still meeting traditional districting requirements (compactness, contiguity, and the like). See Brief for Political Science Professors as *Amici Curiae* 28. Gerrymanders have thus become ever more extreme and durable, insulating officeholders against all but the most titanic shifts in the political tides. The 2010 redistricting cycle produced some of the worst partisan gerrymanders on record. *Id.*, at 3. The technology will only get better, so the 2020 cycle will only get worse.

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Courts have a critical role to play in curbing partisan gerrymandering. Over fifty years ago, we committed to providing judicial review in the redistricting arena, because we understood that "a denial of constitutionally protected rights demands judicial protection." *Reynolds*, 377 U. S., at 566. Indeed, the need for judicial review is at its most urgent in these cases. For here, politicians' incentives conflict with voters' interests, leaving citizens without any political rem-

edy for their constitutional harms. Of course, their dire need provides no warrant for courts to disregard Article III. Because of the way this suit was litigated, I agree that the plaintiffs have so far failed to establish their standing to sue, and I fully concur in the Court's opinion. But of one thing we may unfortunately be sure. Courts—and in particular this Court—will again be called on to redress extreme partisan gerrymanders. I am hopeful we will then step up to our responsibility to vindicate the Constitution against a contrary law.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, concurring in part and concurring in the judgment.

I join Parts I and II of the Court's opinion because I agree that the plaintiffs have failed to prove Article III standing. I do not join Part III, which gives the plaintiffs another chance to prove their standing on remand. When a plaintiff lacks standing, our ordinary practice is to remand the case with instructions to dismiss for lack of jurisdiction. *E. g.*, *Lance* v. *Coffman*, 549 U. S. 437, 442 (2007) (*per curiam*); *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S. 332, 354 (2006); *United States* v. *Hays*, 515 U. S. 737, 747 (1995). The Court departs from our usual practice because this is supposedly "not the usual case." *Ante*, at 73. But there is nothing unusual about it. As the Court explains, the plaintiffs' lack of standing follows from long-established principles of law. See *ante*, at 65–69. After a year and a half of litigation in the District Court, including a 4-day trial, the plaintiffs had a more-than-ample opportunity to prove their standing under these principles. They failed to do so. Accordingly, I would have remanded this case with instructions to dismiss.

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Syllabus

LOZMAN *v.* CITY OF RIVIERA BEACH, FLORIDA

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

No. 17–21. Argued February 27, 2018—Decided June 18, 2018

After petitioner Lozman towed his floating home into a slip in a marina owned by the city of Riviera Beach, he became an outspoken critic of the City's plan to use its eminent domain power to seize waterfront homes for private development and often made critical comments about officials during the public-comment period of city council meetings. He also filed a lawsuit alleging that the City Council's approval of an agreement with developers violated Florida's open-meetings laws. In June 2006 the Council held a closed-door session, in part to discuss Lozman's lawsuit. He alleges that the meeting's transcript shows that councilmembers devised an official plan to intimidate him, and that many of his subsequent disputes with city officials and employees were part of the City's retaliation plan. Five months after the closed-door meeting, the Council held a public meeting. During the public-comment session, Lozman began to speak about the arrests of officials from other jurisdictions. When he refused a councilmember's request to stop making his remarks, the councilmember told the police officer in attendance to "carry him out." The officer handcuffed Lozman and ushered him out of the meeting. The City contends that he was arrested for violating the City Council's rules of procedure by discussing issues unrelated to the City and then refusing to leave the podium. Lozman claims that his arrest was to retaliate for his lawsuit and his prior public criticisms of city officials. The State's attorney determined that there was probable cause for his arrest, but decided to dismiss the charges.

Lozman then filed suit under 42 U. S. C. § 1983, alleging a number of incidents that, under his theory, showed the City's purpose was to harass him, including by initiating an admiralty lawsuit against his floating home, see *Lozman* v. *Riviera Beach*, 568 U. S. 115. The jury returned a verdict for the City on all of the claims. The District Court instructed the jury that, for Lozman to prevail on his claim of a retaliatory arrest at the city council meeting, he had to prove that the arresting officer was motivated by impermissible animus against Lozman's protected speech and that the officer lacked probable cause to make the arrest. The Eleventh Circuit affirmed, concluding that any error the District Court made when it instructed the jury to consider the officer's retaliatory animus was harmless because the jury necessarily determined that the arrest was supported by probable cause when it found

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for the City on Lozman's other claims. The existence of probable cause, the court ruled, defeated a First Amendment claim for retaliatory arrest.

Held: The existence of probable cause does not bar Lozman's First Amendment retaliation claim under the circumstances of this case. Pp. 94–102.

(a) The issue here is narrow. Lozman concedes that there was probable cause for his arrest. Nonetheless, he claims, the arrest violated the First Amendment because it was ordered in retaliation for his earlier, protected speech: his open-meetings lawsuit and his prior public criticisms of city officials. Pp. 94–95.

(b) In a § 1983 case, a city or other local governmental entity cannot be subject to liability unless the harm was caused in the implementation of "official municipal policy." *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 691. The Court assumes that Lozman's arrest was taken pursuant to an official city policy.

Two major precedents bear on the issue whether the conceded existence of probable cause for the arrest bars recovery regardless of any intent or purpose to retaliate for past speech. Lozman argues that the controlling rule is found in *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, a civil case in which a city board of education decided not to rehire an untenured teacher after a series of incidents, including a telephone call to a local radio station. The phone call was protected speech, but, the Court held, there was no liability unless the alleged constitutional violation was a but-for cause of the employment termination. *Id.*, at 285–287. The City counters that the applicable precedent is *Hartman* v. *Moore*, 547 U. S. 250, where the Court held that a plaintiff alleging a retaliatory prosecution must show the absence of probable cause for the underlying criminal charge, *id.*, at 265–266. If there was probable cause, the case ends. If the plaintiff proves the absence of probable cause, then the *Mt. Healthy* test governs. Pp. 95–99.

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(c) Whether *Hartman* or *Mt. Healthy* governs here is a determination that must await a different case. For Lozman's claim is far afield from the typical retaliatory arrest claim, and the difficulties that might arise if *Mt. Healthy* is applied to the mine run of arrests made by police officers are not present here. Lozman alleges that the City itself retaliated against him pursuant to an "official municipal policy" of intimidation. *Monell*, *supra*, at 691. The fact that he must prove the existence and enforcement of an official policy motivated by retaliation separates his claim from the typical retaliatory arrest claim. An official retaliatory policy can be long term and pervasive, unlike an ad hoc, on-the-spot decision by an individual officer. And it can be difficult to dislodge. A citizen can seek to have an individual officer disciplined or removed from service, but there may be little practical recourse when

the government itself orchestrates the retaliation. Lozman's allegations, if proved, also alleviate the problems that the City says will result from applying *Mt. Healthy* in retaliatory arrest cases, for it is unlikely that the connection between the alleged animus and injury in a case like this will be "weakened . . . by [an official's] legitimate consideration of speech," *Reichle* v. *Howards*, 566 U. S. 658, 668, and there is little risk of a flood of retaliatory arrest suits against high-level policymakers. Because Lozman alleges that the City deprived him of the right to petition, "'one of the most precious of the liberties safeguarded by the Bill of Rights,'" *BE&K Constr. Co.* v. *NLRB*, 536 U. S. 516, 524, his speech is high in the hierarchy of First Amendment values. On these facts, *Mt. Healthy* provides the correct standard for assessing a retaliatory arrest claim. On remand, the Eleventh Circuit may consider any arguments in support of the District Court's judgment that have been preserved by the City, including whether a reasonable juror could find that the City formed a retaliatory policy to intimidate Lozman during its closed-door session, whether a reasonable juror could find that the arrest constituted an official act by the City, and whether, under *Mt. Healthy*, the City has proved that it would have arrested Lozman regardless of any retaliatory animus. Pp. 99–102.

681 Fed. Appx. 746, vacated and remanded.

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KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, ALITO, SOTOMAYOR, KAGAN, and GORSUCH, JJ., joined. THOMAS, J., filed a dissenting opinion, *post*, 102.

Pamela S. Karlan argued the cause for petitioner. With her on the briefs were *Jeffrey L. Fisher*, *David T. Goldberg*, and *Kerri L. Barsh.*

Shay Dvoretzky argued the cause for respondent. With him on the brief were *Jeffrey R. Johnson*, *Benjamin M. Flowers*, *Benjamin L. Bedard*, *Stephanie W. Kaufer*, and *Andrew DeGraffenreidt III.*

Acting Solicitor General Wall argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Deputy Assistant Attorney General Davis*, *Robert A. Parker*, and *Barbara L. Herwig.**

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*Briefs of *amici curiae* urging reversal were filed for the First Amendment Foundation et al. by *Cathleen H. Hartge*, *Nancy G. Abudu*, *Lee Rowland*, *Ginger D. Anders*, and *David D. Cole*; for the Institute for Free

JUSTICE KENNEDY delivered the opinion of the Court.

This case requires the Court to address the intersection of principles that define when arrests are lawful and principles that prohibit the government from retaliating against a person for having exercised the right to free speech. An arrest deprives a person of essential liberties, but if there is probable cause to believe the person has committed a criminal offense there is often no recourse for the deprivation. See, *e. g.*, *Devenpeck* v. *Alford*, 543 U. S. 146, 153 (2004). At the same time, the First Amendment prohibits government officials from retaliating against individuals for engaging in protected speech. *Crawford-El* v. *Britton*, 523 U. S. 574, 592 (1998).

The petitioner in this case alleges that high-level city policymakers adopted a plan to retaliate against him for protected speech and then ordered his arrest when he at-

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Speech by *Floyd Abrams* and *Allen Dickerson*; for the Institute for Justice et al. by *Michael B. Kimberly*, *Matthew A. Waring*, *Paul M. Sherman*, and *Ilya Shapiro*; for the Marion B. Brechner First Amendment Project et al. by *Clay Calvert*; for the National Press Photographers Association et al. by *Robert Corn-Revere*, *Ronald G. London*, *Mickey H. Osterreicher*, *Bruce D. Brown*, *Gregg P. Leslie*, *Kevin M. Goldberg*, *Cheryl L. Davis*, *Andrew Crocker*, *Theresa Chmara*, *Michael A. Bamberger*, and *Richard M. Zuckerman*; and for the Roderick and Solange MacArthur Justice Center by *David M. Shapiro*.

Briefs of *amici curiae* urging affirmance were filed for the State of Alaska by *Jahna Lindemuth*, Attorney General of Alaska, and *Dario Borghesan* and *Anna R. Jay*, Assistant Attorneys General; for the District of Columbia et al. by *Karl A. Racine*, Attorney General of the District of Columbia, *Loren L. Alikhan*, Acting Solicitor General, *Stacy L. Anderson*, Acting Deputy Solicitor General, and *Carl J. Schifferle*, Senior Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Lawrence G. Wasden* of Idaho, *Curtis T. Hill, Jr.*, of Indiana, *Jeff Landry* of Louisiana, *Jim Hood* of Mississippi, *Mike Hunter* of Oklahoma, *Josh Shapiro* of Pennsylvania, *Peter F. Kilmartin* of Rhode Island, *Sean D. Reyes* of Utah, and *Peter K. Michael* of Wyoming; and for the National Association of Counties et al. by *Sean R. Gallagher*, *Bennett L. Cohen*, and *Lisa E. Soronen*.

tempted to make remarks during the public-comment portion of a city council meeting. The petitioner now concedes there was probable cause for the arrest. The question is whether the presence of probable cause bars the petitioner's retaliatory arrest claim under these circumstances.

I

The city of Riviera Beach (City) is on the Atlantic coast of Florida, about 75 miles north of Miami. The petitioner here is Fane Lozman. In 2006 Lozman towed his floating home into a slip in the City-owned marina, where he became a resident. Thus began his contentious relationship with the City's elected officials.

Soon after his arrival Lozman became an outspoken critic of the City's plan to use its eminent domain power to seize homes along the waterfront for private development. Lozman often spoke during the public-comment period at city council meetings and criticized councilmembers, the mayor, and other public employees. He also filed a lawsuit alleging that the Council's approval of an agreement with developers violated Florida's open-meetings laws.

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In June 2006 the Council held a closed-door session, in part to discuss the open-meetings lawsuit that Lozman recently had filed. According to the transcript of the meeting, Councilmember Elizabeth Wade suggested that the City use its resources to "intimidate" Lozman and others who had filed lawsuits against the City. App. 176. Later in the meeting a different councilmember asked whether there was "a consensus of what Ms. Wade is saying," and others responded in the affirmative. *Id.*, at 181–182. Lozman alleges that these remarks formed an official plan to intimidate him. The City, on the other hand, maintains that the only consensus reached during the meeting was to invest the money and resources necessary to prevail in the litigation against it.

In all events, Lozman became embroiled in a number of disputes with city officials and employees over the ensuing

years, many of which Lozman says were part of the City's plan of retaliation. The dispute that led to this litigation took place in 2006. In November of that year, five months after the closed-door meeting where the "intimidate" comment was made, the City Council held a public meeting. The agenda included a public-comment session in which citizens could address the Council for a few minutes. As he had done on earlier occasions and would do more than 200 times over the coming years, see Tr. in No. 9:08–cv–80134 (SD Fla.), Doc. 785, p. 61, Lozman stepped up to the podium to give remarks. He began to discuss the recent arrest of a former county official. Councilmember Wade interrupted Lozman, directing him to stop making those remarks. Lozman continued speaking, this time about the arrest of a former official from the city of West Palm Beach. Wade then called for the assistance of the police officer in attendance. The officer approached Lozman and asked him to leave the podium. Lozman refused. So Wade told the officer to "carry him out." The officer handcuffed Lozman and ushered him out of the meeting. The incident was recorded on video. See Record, Def. Exh. 505, Doc. 687, available at https://www.supremecourt.gov/media/video/mp4files/Lozman_v_RivieraBeach.mp4. According to the City, Lozman was arrested because he violated the City Council's rules of procedure by discussing issues unrelated to the City and then refused to leave the podium. According to Lozman, the arrest was to retaliate for his open-meetings lawsuit against the City and his prior public criticisms of city officials.

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Under arrest, Lozman was escorted to police headquarters. He was charged with disorderly conduct and resisting arrest without violence and then released. Later, the State's attorney determined there was probable cause to arrest Lozman for those offenses but decided to dismiss the charges.

Lozman filed this lawsuit under Rev. Stat. § 1979, 42 U. S. C. § 1983. The complaint described a number of alleged incidents that, under Lozman's theory, showed the City's purpose to harass him in different ways. These ranged from a city employee telling Lozman that his dog needed a muzzle to the City's initiation of an admiralty lawsuit against Lozman's floating home—the latter resulting in an earlier decision by this Court. See *Lozman* v. *Riviera Beach*, 568 U. S. 115 (2013). The evidence and arguments presented by both parties with respect to all the matters alleged in Lozman's suit consumed 19 days of trial before a jury. The jury returned a verdict for the City on all of the claims.

Before this Court, Lozman seeks a reversal only as to the City's alleged retaliatory arrest at the November 2006 city council meeting. The District Court instructed the jury that, for Lozman to prevail on this claim, he had to prove that the arresting officer was himself motivated by impermissible animus against Lozman's protected speech and that the officer lacked probable cause to make the arrest. The District Court determined that the evidence was insufficient as a matter of law to support probable cause for the offenses charged at the time of the arrest (disorderly conduct and resisting arrest without violence). But the District Court concluded that there may have been probable cause to arrest Lozman for violating a Florida statute that prohibits interruptions or disturbances in schools, churches, or other public assemblies. Fla. Stat. § 871.01 (2017). (The City had brought this statute to the District Court's attention during the course of the litigation.) The District Court allowed the jury to decide whether there was probable cause to arrest for the public-disturbance offense.

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Judgment having been entered for the City after the jury's verdict, Lozman appealed. The Court of Appeals for the Eleventh Circuit affirmed. 681 Fed. Appx. 746 (2017). As

relevant here, the Court of Appeals assumed that the District Court erred when it instructed the jury that the officer, rather than the City, must have harbored the retaliatory animus. But the Court of Appeals held that any error was harmless because the jury necessarily determined that the arrest was supported by probable cause when it found for the City on some of Lozman's other claims—specifically, his claims that the arrest violated the Fourth Amendment and state law. *Id.*, at 751–752. And, under precedents which the Court of Appeals deemed controlling, the existence of probable cause defeated a First Amendment claim for retaliatory arrest. See *id.*, at 752 (citing *Dahl* v. *Holley*, 312 F. 3d 1228, 1236 (CA11 2002)).

This Court granted certiorari, 583 U. S. 972 (2017), on the issue whether the existence of probable cause defeats a First Amendment claim for retaliatory arrest under § 1983. The Court considered this issue once before, see *Reichle* v. *Howards*, 566 U. S. 658, 663 (2012), but resolved the case on different grounds.

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II

The issue before the Court is a narrow one. In this Court Lozman does not challenge the constitutionality of Florida's statute criminalizing disturbances at public assemblies. He does not argue that the statute is overly broad, *e. g.*, *Terminiello* v. *Chicago*, 337 U. S. 1 (1949); *Watchtower Bible & Tract Soc. of N. Y., Inc.* v. *Village of Stratton*, 536 U. S. 150 (2002); or that it impermissibly targets speech based on its content or viewpoint, *e. g.*, *Texas* v. *Johnson*, 491 U. S. 397 (1989); *Cohen* v. *California*, 403 U. S. 15 (1971); or that it was enforced in a way that curtailed Lozman's right to peaceful assembly, *e. g.*, *Brown* v. *Louisiana*, 383 U. S. 131 (1966). Lozman, furthermore, does not challenge the validity of the City Council's asserted limitations on the subjects speakers may discuss during the public-comment portion of city council meetings (although he continues to dispute whether those limitations in fact existed).

Instead Lozman challenges only the lawfulness of his arrest, and even that challenge is a limited one. There is no contention that the City ordered Lozman's arrest to discriminate against him based on protected classifications, or that the City denied Lozman his equal protection rights by placing him in a "class of one." See *Village of Willowbrook* v. *Olech*, 528 U. S. 562 (2000) (*per curiam*). Lozman, moreover, now concedes that there was probable cause for the arrest. Although Lozman does not indicate what facts he believes support this concession, it appears that the existence of probable cause must be based on the assumption that Lozman failed to depart the podium after receiving a lawful order to leave.

Lozman's claim is that, notwithstanding the presence of probable cause, his arrest at the city council meeting violated the First Amendment because the arrest was ordered in retaliation for his earlier, protected speech: his open-meetings lawsuit and his prior public criticisms of city officials. The question this Court is asked to consider is whether the existence of probable cause bars that First Amendment retaliation claim.

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III

It is well established that in a § 1983 case a city or other local governmental entity cannot be subject to liability at all unless the harm was caused in the implementation of "official municipal policy." *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 691 (1978); see *Los Angeles County* v. *Humphries*, 562 U. S. 29, 36 (2010). Lozman's § 1983 damages claim is against only the City itself, based on the acts of its officers and employees—here, the members of the City Council. Lozman says that the City, through its city councilmembers, formed an official policy to retaliate against him and ordered his arrest. The Court assumes in the discussion to follow that the arrest was taken pursuant to an official city policy, but whether there was such a policy and what its content may have been are issues not decided here.

This brings the discussion to the issue the parties deem central to the case: whether the conceded existence of probable cause for the arrest bars recovery regardless of any intent or purpose to retaliate for past speech. Two major precedents could bear on this point, and the parties disagree on which should be applicable here. The first is this Court's decision in *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274 (1977). See also *Board of Comm'rs, Wabaunsee Cty.* v. *Umbehr*, 518 U. S. 668 (1996). Lozman urges that the rule of *Mt. Healthy* should control and that under it he is entitled to recover. The second is this Court's decision in *Hartman* v. *Moore*, 547 U. S. 250 (2006), which the City cites for the proposition that once there is probable cause there can be no further claim that the arrest was retaliation for protected speech.

Mt. Healthy arose in a civil, not criminal, context. A city board of education decided not to rehire an untenured school teacher after a series of incidents indicating unprofessional demeanor. 429 U. S., at 281–283. One of the incidents was a telephone call the teacher made to a local radio station to report on a new school policy. *Id.*, at 282. Because the board of education did not suggest that the teacher violated any established policy in making the call, this Court accepted a finding by the District Court that the call was protected speech. *Id.*, at 284. The Court went on to hold, however, that since the other incidents, standing alone, would have justified the dismissal, relief could not be granted if the board could show that the discharge would have been ordered even without reference to the protected speech. *Id.*, at 285–287. In terms of precepts in the law of torts, the Court held that even if retaliation might have been a substantial motive for the board's action, still there was no liability unless the alleged constitutional violation was a but-for cause of the employment termination. *Ibid.*; see also *Umbehr*, *supra*, at 675.

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The City resists the applicability of the *Mt. Healthy* test as the sole determinant here. It contends that, where there was probable cause for the arrest, the applicable precedent is *Hartman*—a case that was in the criminal sphere and that turned on the existence of probable cause.

The background in *Hartman* was that a company and its chief executive, William Moore, had engaged in an extensive lobbying and governmental relations campaign opposing a particular postal service policy. 547 U. S., at 252–253. Moore and the company were later prosecuted for violating federal statutes in the course of that lobbying. *Id.*, at 253–254. After being acquitted, Moore filed suit against five postal inspectors, alleging that they had violated his First Amendment rights when they instigated his prosecution in retaliation for his criticisms of the Postal Service. *Id.*, at 254. This Court held that a plaintiff alleging a retaliatory prosecution must show the absence of probable cause for the underlying criminal charge. *Id.*, at 265–266. If there was probable cause, the case ends. If the plaintiff proves the absence of probable cause, then the *Mt. Healthy* test governs: The plaintiff must show that the retaliation was a substantial or motivating factor behind the prosecution, and, if that showing is made, the defendant can prevail only by showing that the prosecution would have been initiated without respect to retaliation. See 547 U. S., at 265–266.

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The Court in *Hartman* deemed it necessary to inquire as to the existence of probable cause because proving the link between the defendant's retaliatory animus and the plaintiff's injury in retaliatory prosecution cases "is usually more complex than it is in other retaliation cases." *Id.*, at 261. An action for retaliatory prosecution "will not be brought against the prosecutor, who is absolutely immune from liability for the decision to prosecute." *Id.*, at 261–262. Instead, the plaintiff must sue some other government official and prove that the official "induced the prosecutor to bring

charges that would not have been initiated without his urging." *Id.*, at 262. Noting that inquiries with respect to probable cause are commonplace in criminal cases, the Court determined that requiring plaintiffs in retaliatory prosecution cases to prove the lack of probable cause would help "bridge the gap between the nonprosecuting government agent's motive and the prosecutor's action." *Id.*, at 263.

The City's argument here is that, just as probable cause is a bar in retaliatory prosecution cases, so too should it be a bar in this case, involving a retaliatory arrest. There is undoubted force in the City's position. *Reichle*, 566 U. S., at 667–668. There are on average about 29,000 arrests per day in this country. Dept. of Justice–FBI, Uniform Crime Report, Crime in the United States, 2016 (Fall 2017). In deciding whether to arrest, police officers often make split-second judgments. The content of the suspect's speech might be a consideration in circumstances where the officer must decide whether the suspect is ready to cooperate or, on the other hand, whether he may present a continuing threat to interests that the law must protect. See, *e. g.*, *District of Columbia* v. *Wesby*, 583 U. S. 48, 60 (2018) ("suspect's untruthful and evasive answers to police questioning could support probable cause" (internal quotation marks omitted)).

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For these reasons retaliatory arrest claims, much like retaliatory prosecution claims, can "present a tenuous causal connection between the defendant's alleged animus and the plaintiff's injury." *Reichle*, 566 U. S., at 668. That means it can be difficult to discern whether an arrest was caused by the officer's legitimate or illegitimate consideration of speech. *Ibid.* And the complexity of proving (or disproving) causation in these cases creates a risk that the courts will be flooded with dubious retaliatory arrest suits. See Brief for District of Columbia et al. as *Amici Curiae* 5–11.

At the same time, there are substantial arguments that *Hartman*'s framework is inapt in retaliatory arrest cases, and that *Mt. Healthy* should apply without a threshold in-

quiry into probable cause. For one thing, the causation problem in retaliatory arrest cases is not the same as the problem identified in *Hartman*. *Hartman* relied in part on the fact that, in retaliatory prosecution cases, the causal connection between the defendant's animus and the prosecutor's decision to prosecute is weakened by the "presumption of regularity accorded to prosecutorial decisionmaking." 547 U. S., at 263. That presumption does not apply in this context. See *Reichle*, *supra*, at 669. In addition, there is a risk that some police officers may exploit the arrest power as a means of suppressing speech. See Brief for Institute for Free Speech as *Amicus Curiae*.

IV

The parties' arguments raise difficult questions about the scope of First Amendment protections when speech is made in connection with, or contemporaneously to, criminal activity. But whether in a retaliatory arrest case the *Hartman* approach should apply, thus barring a suit where probable cause exists, or, on the other hand, the inquiry should be governed only by *Mt. Healthy* is a determination that must await a different case. For Lozman's claim is far afield from the typical retaliatory arrest claim, and the difficulties that might arise if *Mt. Healthy* is applied to the mine run of arrests made by police officers are not present here.

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Here Lozman does not sue the officer who made the arrest. Indeed, Lozman likely could not have maintained a retaliation claim against the arresting officer in these circumstances, because the officer appears to have acted in good faith, and there is no showing that the officer had any knowledge of Lozman's prior speech or any motive to arrest him for his earlier expressive activities.

Instead Lozman alleges more governmental action than simply an arrest. His claim is that the City itself retaliated against him pursuant to an "official municipal policy" of intimidation. *Monell*, 436 U. S., at 691. In particular, he

alleges that the City, through its legislators, formed a premeditated plan to intimidate him in retaliation for his criticisms of city officials and his open-meetings lawsuit. And he asserts that the City itself, through the same high officers, executed that plan by ordering his arrest at the November 2006 city council meeting.

The fact that Lozman must prove the existence and enforcement of an official policy motivated by retaliation separates Lozman's claim from the typical retaliatory arrest claim. An official retaliatory policy is a particularly troubling and potent form of retaliation, for a policy can be long term and pervasive, unlike an ad hoc, on-the-spot decision by an individual officer. An official policy also can be difficult to dislodge. A citizen who suffers retaliation by an individual officer can seek to have the officer disciplined or removed from service, but there may be little practical recourse when the government itself orchestrates the retaliation. For these reasons, when retaliation against protected speech is elevated to the level of official policy, there is a compelling need for adequate avenues of redress.

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In addition, Lozman's allegations, if proved, alleviate the problems that the City says will result from applying *Mt. Healthy* in retaliatory arrest cases. The causation problem in arrest cases is not of the same difficulty where, as is alleged here, the official policy is retaliation for prior, protected speech bearing little relation to the criminal offense for which the arrest is made. In determining whether there was probable cause to arrest Lozman for disrupting a public assembly, it is difficult to see why a city official could have legitimately considered that Lozman had, months earlier, criticized city officials or filed a lawsuit against the City. So in a case like this one it is unlikely that the connection between the alleged animus and injury will be "weakened . . . by [an official's] legitimate consideration of speech." *Reichle*, 566 U. S., at 668. This unique class of retaliatory arrest claims, moreover, will require objective evidence of a policy motivated by retaliation to survive summary judg-

ment. Lozman, for instance, cites a transcript of a closed-door city council meeting and a video recording of his arrest. There is thus little risk of a flood of retaliatory arrest suits against high-level policymakers.

As a final matter, it must be underscored that this Court has recognized the "right to petition as one of the most precious of the liberties safeguarded by the Bill of Rights." *BE&K Constr. Co.* v. *NLRB*, 536 U. S. 516, 524 (2002) (internal quotation marks omitted). Lozman alleges the City deprived him of this liberty by retaliating against him for his lawsuit against the City and his criticisms of public officials. Thus, Lozman's speech is high in the hierarchy of First Amendment values. See *Connick* v. *Myers*, 461 U. S. 138, 145 (1983).

For these reasons, Lozman need not prove the absence of probable cause to maintain a claim of retaliatory arrest against the City. On facts like these, *Mt. Healthy* provides the correct standard for assessing a retaliatory arrest claim. The Court need not, and does not, address the elements required to prove a retaliatory arrest claim in other contexts.

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This is not to say, of course, that Lozman is ultimately entitled to relief or even a new trial. On remand, the Court of Appeals, applying *Mt. Healthy* and other relevant precedents, may consider any arguments in support of the District Court's judgment that have been preserved by the City. Among other matters, the Court of Appeals may wish to consider (1) whether any reasonable juror could find that the City actually formed a retaliatory policy to intimidate Lozman during its June 2006 closed-door session; (2) whether any reasonable juror could find that the November 2006 arrest constituted an official act by the City; and (3) whether, under *Mt. Healthy*, the City has proved that it would have arrested Lozman regardless of any retaliatory animus—for example, if Lozman's conduct during prior city council meetings had also violated valid rules as to proper subjects of discussion, thus explaining his arrest here.

For these reasons, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, dissenting.

We granted certiorari to decide "whether the existence of probable cause defeats a First Amendment claim for retaliatory arrest under [42 U. S. C.] § 1983." *Ante,* at 94. Instead of resolving that question, the Court decides that probable cause should not defeat a "unique class of retaliatory arrest claims." *Ante,* at 100. To fall within this unique class, a claim must involve objective evidence, of an official municipal policy of retaliation, formed well before the arrest, in response to highly protected speech, that has little relation to the offense of arrest. See *ante,* at 99–101. No one briefed, argued, or even hinted at the rule that the Court announces today. Instead of dreaming up our own rule, I would have answered the question presented and held that plaintiffs must plead and prove a lack of probable cause as an element of a First Amendment retaliatory-arrest claim. I respectfully dissent.

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I

The petition for certiorari asked us to resolve whether "the existence of probable cause defeat[s] a First Amendment retaliatory-arrest claim as a matter of law." Pet. for Cert. i. That question has divided the federal courts for decades. See *id.*, at 10–13. We granted certiorari to consider it six years ago in *Reichle* v. *Howards*, 566 U. S. 658, 663 (2012). But we did not resolve it then because the petitioner's second question presented—whether qualified immunity applied—fully resolved the case. *Ibid.* Since *Reichle*, the split in the federal courts has widened. See Pet. for Cert. 12–13. In this case, we again granted certiorari, 583 U. S. 972 (2017), this time only on the question of probable cause, see Pet. for Cert. i.

Yet the Court chooses not to resolve that question, leaving in place the decades-long disagreement among the federal courts. The parties concentrated all their arguments on this question in their briefs and at oral argument. Neither party suggested that there was something special about Fane Lozman's claim that would justify a narrower rule. See, *e. g.*, Tr. of Oral Arg. 15–16 (refusing to take the "fall-back position" that this "is some special kind of case"). Yet the Court does that work for them by defining a "unique class of retaliatory arrest claims" that do not require plaintiffs to plead and prove a lack of probable cause. *Ante*, at 100.

By my count, the Court has identified five conditions that are necessary to trigger its new rule. First, there must be "an 'official municipal policy' of intimidation." *Ante*, at 99 (quoting *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 691 (1978)). Second, the policy must be "premeditated" and formed well before the arrest—here, for example, the policy was formed "months earlier." *Ante*, at 100.[1] Third, there must be "objective evidence" of such a policy. *Ibid.* Fourth, there must be "little relation" between the "protected speech" that prompted the retaliatory policy and "the criminal offense for which the arrest is made." *Ibid.* Finally, the protected speech that provoked the retaliatory policy must be "high in the hierarchy of First Amendment values." *Ante*, at 101. Where all these features are present, the Court explains, there is not the same "causation problem" that exists for other retaliatory-arrest claims. *Ante*, at 100.

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I find it hard to believe that there will be many cases where this rule will even arguably apply, and even harder to

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[1] This requirement suggests that the Court's rule does not apply when the "policy" that the plaintiff challenges is an on-the-spot decision by a single official with final policymaking authority, like the "policy" that this Court recognized in *Pembaur* v. *Cincinnati*, 475 U. S. 469 (1986). See *id.*, at 484–485 (holding that a county prosecutor's order to forcibly enter the plaintiff's clinic was a "municipal policy").

believe that the plaintiffs in those cases will actually prove all five requirements. Not even Lozman's case is a good fit, as the Court admits when it discusses the relevant considerations for remand. See *ante*, at 101. In my view, we should not have gone out of our way to fashion a complicated rule with no apparent applicability to this case or any other.

II

Turning to the question presented, I would hold that plaintiffs bringing a First Amendment retaliatory-arrest claim must plead and prove an absence of probable cause.[2] This Court has "repeatedly noted that 42 U. S. C. § 1983 creates '"a species of tort liability."'" *Memphis Community School Dist.* v. *Stachura*, 477 U. S. 299, 305 (1986) (footnote omitted). Accordingly, we "defin[e] the contours and prerequisites of a § 1983 claim" by "look[ing] first to the common law of torts." *Manuel* v. *Joliet*, 580 U. S. 357, 370 (2017); see, *e. g.*, *Heck* v. *Humphrey*, 512 U. S. 477, 484 (1994) (analogizing to the "common-law cause of action for malicious prosecution"); *id.*, at 491 (THOMAS, J., concurring) (emphasizing that the decision was "consistent . . . with the state of the common law at the time § 1983 was enacted").

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When § 1983 was enacted, there was no common-law tort for retaliatory arrest in violation of the freedom of speech. See *Hartman* v. *Moore*, 547 U. S. 250, 259 (2006). I would therefore look to the common-law torts that "provid[e] the closest analogy" to this claim. *Heck*, *supra*, at 484. The closest analogs here are the three arrest-based torts under the common law: false imprisonment, malicious prosecution, and malicious arrest. In defining the elements of these

[2] I am skeptical that 42 U. S. C. § 1983 recognizes a claim for retaliatory arrests under the First Amendment. I adhere to the view that "*no* 'intent-based' constitutional tort would have been actionable under the § 1983 that Congress enacted." *Crawford-El* v. *Britton*, 523 U. S. 574, 612 (1998) (Scalia, J., dissenting). But because no party presses this argument, I assume that such claims are actionable under § 1983.

three torts, 19th-century courts emphasized the importance of probable cause.

Consider first the tort of false imprisonment. Common-law courts stressed the need to shape this tort with an "indulgence" for peace officers, who are "specially charged with a duty in the enforcement of the laws." T. Cooley, Law of Torts 175 (1880) (Cooley); see, *e. g.*, *Hogg* v. *Ward*, 3 H. & N. 417, 423, 157 Eng. Rep. 533, 536 (Ex. 1858) (opinion of Watson, B.) (stressing "the utmost importance that the police throughout the country should be supported in the execution of their duty"). Accordingly, private citizens were always liable for false imprisonment if the arrestee had not actually committed a felony, but constables were "excused" if they had "made [the arrest] on reasonable grounds of belief"—*i. e.*, probable cause. Cooley 175; accord, 2 C. Addison, Law of Torts § 803, p. 18 (1876); 1 F. Hilliard, The Law of Torts or Private Wrongs § 18, pp. 207–208, and n. (a) (1866). As Lord Mansfield explained, it was "of great consequence to the police" that probable cause shield officers from false-imprisonment claims, as "it would be a terrible thing" if the threat of liability dissuaded them from performing their official duties. *Ledwith* v. *Catchpole*, 2 Cald. 291, 295 (K. B. 1783). This concern outweighed "the mischief and inconvenience to the public" from the reality that "[m]any an innocent man has and may be taken up upon such suspicion." *Ibid.* Many State Supreme Courts agreed with Lord Mansfield's reasoning. See, *e. g.*, *Burns* v. *Erben*, 40 N. Y. 463, 469 (1869) (opinion of Woodruff, J.) (quoting *Ledwith*); *Brockway* v. *Crawford*, 48 N. C. 433, 437 (1856) ("[The] exempt[ion] from responsibility" for arrests based on probable cause "encourages . . . a sharp look-out for the apprehension of felons"). As one court put it, "How, in the great cities of this land, could police power be exercised, if every peace officer is liable to civil action for false imprisonment" whenever "persons arrested upon probable cause shall afterwards be found innocent?" *Hawley* v. *Butler*, 54 Barb. 490, 496 (N. Y. 1868).

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Courts also stressed the importance of probable cause when defining the torts of malicious prosecution and malicious arrest. See, *e. g.*, *Ahern* v. *Collins*, 39 Mo. 145, 150 (1866) (holding that "malice and want of probable cause are necessary ingredients of both"). For the tort of malicious prosecution, courts emphasized the "necessity" of both the "allegation" and "proof" of probable cause, in light of the public interest "that criminals should be brought to justice." *Hogg* v. *Pinckney*, 16 S. C. 387, 393 (1882); see also *Chrisman* v. *Carney*, 33 Ark. 316, 326 (1878) ("The existence of probable cause is of itself alone a complete and entire defense . . . . The interest which society has in the enforcement of the criminal laws requires this rule"). Similarly, if the element of probable cause were not "strictly guarded," "ill consequences would ensue to the public, for no one would willingly undertake to vindicate a breach of the public law and discharge his duty to society, with the prospect of an annoying suit staring him in the face." *Ventress* v. *Rosser*, 73 Ga. 534, 541 (1884); accord, *Cardival* v. *Smith*, 109 Mass. 158 (1872). The element of probable cause also played an evidentiary role for both torts. Lack of probable cause provided "evidence of malice, though inconclusive," *Herman* v. *Brookerhoff*, 8 Watts 240, 241 (Pa. 1839), because "[m]alice may be inferred from a total want of probable cause," *Ventress*, *supra*, at 541; accord, *Ahern*, *supra*, at 150.

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In sum, when § 1983 was enacted, the common law recognized probable cause as an important element for ensuring that arrest-based torts did not unduly interfere with the objectives of law enforcement. Common-law courts were wary of "throw[ing] down the bars which protect public officers from suits for acts done within the scope of their duty and authority, by recognizing the right of every one who chooses to imagine or assert that he is aggrieved by their doings, to make use of an allegation that they were malicious in motive to harass them with suits on that ground." *Chesley* v. *King*, 74 Me. 164, 175–176 (1882).

Applying that principle here, it follows that plaintiffs bringing a First Amendment retaliatory-arrest claim under § 1983 should have to plead and prove a lack of probable cause. I see no justification for deviating from the historical practice simply because an arrest claim is framed in terms of the First Amendment. Even under a First Amendment theory, "the significance of probable cause or the lack of it looms large." *Hartman*, 547 U. S., at 265. The presence of probable cause will tend to disprove that the arrest was done out of retaliation for the plaintiff's speech, and the absence of probable cause will tend to prove the opposite. See *id.*, at 261. Because "[p]robable cause or its absence will be at least an evidentiary issue in practically all such cases" and "[b]ecause showing [its] absence . . . will have high probative force, and can be made mandatory with little or no added cost," the absence of probable cause should be an "element" of the plaintiff's case. *Id.*, at 265–266; see also *id.*, at 264, n. 10 (refusing to carve out an exception for unusual cases).

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Moreover, as with the traditional arrest-based torts, police officers need the safe harbor of probable cause in the First Amendment context to be able to do their jobs effectively. Police officers almost always exchange words with suspects before arresting them. And often a suspect's "speech provides evidence of a crime or suggests a potential threat." *Reichle*, 566 U. S., at 668. If probable cause were not required, the threat of liability might deter an officer from arresting a suspected criminal who, for example, has a political bumper sticker on his car, cf. *Kilpatrick* v. *United States*, 432 Fed. Appx. 937 (CA11 2011); is participating in a politically tinged protest, *Morse* v. *San Francisco Bay Area Rapid Transit Dist.*, 2014 WL 572352 (ND Cal., Feb. 11, 2014); or confronts and criticizes the officer during the arrest of a third party, *Holland* v. *San Francisco*, 2013 WL 968295 (ND Cal., Mar. 12, 2013). Allowing plaintiffs to bring a retaliatory-arrest claim in such circumstances, without pleading and proving a lack of probable cause, would permit

plaintiffs to harass officers with the kind of suits that common-law courts deemed intolerable.

* * *

Because we should have answered the question presented and held that probable cause necessarily defeats First Amendment retaliatory-arrest claims, I respectfully dissent.

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Syllabus

CHAVEZ-MEZA *v.* UNITED STATES

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

No. 17–5639. Argued April 23, 2018—Decided June 18, 2018

The Federal Sentencing Guidelines require a sentencing judge to first identify the recommended Guidelines sentencing range based on certain offender and offense characteristics. The judge might choose a penalty within that Guidelines range, or the judge may "depart" or "vary" from the Guidelines and select a sentence outside the range. See *United States* v. *Booker*, 543 U. S. 220, 258–265. Either way, the judge must take into account certain statutory sentencing factors, see 18 U. S. C. § 3553(a), and must "state in open court the reasons for [imposing] the particular sentence," § 3553(c). But when it comes to how detailed that statement of reasons must be, "[t]he law leaves much . . . to the judge's own professional judgment." *Rita* v. *United States*, 551 U. S. 338, 356. The explanation need not be lengthy, especially where "a matter is . . . conceptually simple . . . and the record makes clear that the sentencing judge considered the evidence and arguments." *Id.*, at 359.

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Here, petitioner pleaded guilty to possessing methamphetamine with intent to distribute. The judge reviewed the Guidelines, determined the range to be 135 to 168 months, and imposed a sentence at the bottom of the range. The Sentencing Commission later lowered the relevant range to 108 to 135 months, and petitioner sought a sentence reduction under § 3582(c)(2). Petitioner asked the judge to reduce his sentence to the bottom of the new range, but the judge reduced petitioner's sentence to 114 months instead. The order was entered on a form certifying that the judge had "considered" petitioner's "motion" and had "tak[en] into account" the § 3553(a) factors and the relevant Guidelines policy statement. On appeal, petitioner argued the sentencing judge did not adequately explain why he rejected petitioner's request for a 108-month sentence. The Court of Appeals affirmed.

Held: Because the record as a whole demonstrates the judge had a reasoned basis for his decision, the judge's explanation for petitioner's sentence reduction was adequate. Pp. 115–120.

(a) The Government argues petitioner was not entitled to an explanation at all because the statute governing sentence-modification motions does not expressly require a sentencing judge to state his reasons for imposing a particular sentence. See § 3582(c)(2). It is unnecessary to go as far as the Government urges, however, because, even assuming

the District Court had a duty to explain its reasons when modifying petitioner's sentence, what the court did here was sufficient. Pp. 115–116.

(b) Petitioner contends that a district court must explain its reasoning in greater detail when the court imposes a "disproportionate" sentence reduction—that is, when the court reduces the prisoner's sentence to a different point in the amended Guidelines range than the court previously selected in the original Guidelines range. That argument is unconvincing. As a technical matter, determining "proportionality" may prove difficult when the sentence is somewhere in the middle of the range. More importantly, the choice among points on the Guidelines range often reflects the belief that the chosen sentence is the "right" sentence based on various factors, including those found in § 3553(a). If the applicable Guidelines range is later reduced, it is unsurprising that the sentencing judge may choose a nonproportional point in the new range. Pp. 116–117.

(c) Even assuming that a judge reducing a prisoner's sentence must satisfy the same explanation requirement that applies at an original sentencing, the District Court's explanation was adequate. At the original sentencing, petitioner asked for a downward variance from the Guidelines range, which the judge denied. The judge observed that petitioner's sentence was high because of the destructiveness of methamphetamine and the quantity involved. The record from the original sentencing was before the judge—the same judge who imposed the original sentence—when he considered petitioner's sentence-modification motion. By entering the form order, the judge certified that he had "considered" petitioner's "motion" and had "tak[en] into account" the § 3553(a) factors and the relevant Guidelines policy statement. Because the record as a whole suggests the judge originally believed that 135 months was an appropriately high sentence in light of petitioner's offense conduct, it is unsurprising that he considered a sentence somewhat higher than the bottom of the reduced range to be appropriate as well. That is not to say that a disproportionate sentence reduction *never* may require a more detailed explanation. But given the simplicity of this case, the judge's awareness of the arguments, his consideration of the relevant sentencing factors, and the intuitive reason why he picked a sentence above the very bottom of the new range, his explanation fell within the scope of lawful professional judgment that the law confers upon the sentencing judge. Pp. 117–120.

854 F. 3d 655, affirmed.

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BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, GINSBURG, and ALITO, JJ., joined. KENNEDY, J., filed a dis-

senting opinion, in which SOTOMAYOR and KAGAN, JJ., joined, *post*, p. 120. GORSUCH, J., took no part in the consideration or decision of the case.

Todd A. Coberly, by appointment of the Court, 583 U. S. 1166, argued the cause for petitioner. With him on the briefs were *A. Nathaniel Chakeres*, *Steven J. Horowitz*, *Jeffrey T. Green*, and *Sarah O'Rourke Schrup*.

Deputy Attorney General Rosenstein argued the cause for the United States. On the brief were *Solicitor General Francisco*, *Acting Assistant Attorney General Cronan*, *Eric J. Feigin*, *Morgan L. Goodspeed*, and *Alexander P. Robbins*.*

JUSTICE BREYER delivered the opinion of the Court.

This case concerns a criminal drug offender originally sentenced in accordance with the Federal Sentencing Guidelines. Subsequently, the Sentencing Commission lowered the applicable Guidelines sentencing range; the offender asked for a sentence reduction in light of the lowered range; and the District Judge reduced his original sentence from 135 months' imprisonment to 114 months'. The offender, believing he should have obtained a yet greater reduction, argues that the District Judge did not adequately explain why he imposed a sentence of 114 months rather than a lower sentence. The Court of Appeals held that the judge's explanation was adequate. And we agree with the Court of Appeals.

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I

A

The Sentencing Guidelines require a sentencing judge to consider certain listed characteristics of the offender and the offense for which he was convicted. Those characteristics

*Briefs of *amici curiae* urging reversal were filed for the Center on the Administration of Criminal Law by *Mark W. Mosier*; and for the National Association of Criminal Defense Lawyers et al. by *Amy Mason Saharia*, *Barbara E. Bergman*, *Donna F. Coltharp*, *Sarah S. Gannett*, and *Daniel L. Kaplan*.

(and certain other factors) bring the judge to a Guidelines table that sets forth a range of punishments, for example, 135 to 168 months' imprisonment. A sentencing judge often will choose a specific penalty from a Guidelines range. But a judge also has the legal authority to impose a sentence outside the range either because he or she "departs" from the range (as is permitted by certain Guidelines rules) or because he or she chooses to "vary" from the Guidelines by not applying them at all. See *United States* v. *Booker*, 543 U. S. 220, 258–265 (2005) (holding the Sentencing Guidelines are advisory). The judge, however, must always take account of certain statutory factors. See 18 U. S. C. § 3553(a) (requiring the judge to consider the "seriousness of the offense" and the need to "afford adequate deterrence," among other factors). And, of particular relevance here, the judge "shall state in open court the reasons for [the] imposition of the particular sentence." § 3553(c). If the sentence is outside the Guidelines range (whether because of a "departure" or a "variance"), the judge must state "the specific reason for the imposition of a . . . different" sentence. § 3553(c)(2). If the sentence is within the Guidelines range, and the Guidelines range exceeds 24 months, the judge must also state "the reason for imposing a sentence at a particular point within the range." § 3553(c)(1).

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B

We here consider one aspect of the judge's obligation to provide reasons. In an earlier case, we set forth the law that governs the explanation requirement at sentencing. In *Rita* v. *United States*, 551 U. S. 338 (2007), the offender sought a downward departure from the Guidelines. The record, we said, showed that the sentencing judge "listened to each argument[,] . . . considered the supporting evidence[,] . . . was fully aware of defendant's various physical ailments[,]" imposed a sentence at the bottom of the Guidelines range, and, having considered the § 3553(a) factors, said sim-

ply that the sentence was "'appropriate.'" *Id.*, at 358. We held that where "a matter is as conceptually simple as in the case at hand and the record makes clear that the sentencing judge considered the evidence and arguments, we do not believe the law requires the judge to write more extensively." *Id.*, at 359.

We also discussed more generally the judge's obligation to explain. We wrote that the statute calls

> "for the judge to 'state' his 'reasons.' And that requirement reflects sound judicial practice. Judicial decisions are reasoned decisions. Confidence in a judge's use of reason underlies the public's trust in the judicial institution. A public statement of those reasons helps provide the public with the assurance that creates that trust." *Id.*, at 356.

But, we continued,

> "we cannot read the statute (or our precedent) as insisting upon a full opinion in every case. The appropriateness of brevity or length, conciseness or detail, when to write, what to say, depends upon circumstances. Sometimes a judicial opinion responds to every argument; sometimes it does not; sometimes a judge simply writes the word 'granted' or 'denied' on the face of a motion while relying upon context and the parties' prior arguments to make the reasons clear. The law leaves much, in this respect, to the judge's own professional judgment." *Ibid.*

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At bottom, the sentencing judge need only "set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority." *Ibid.*

When a judge applies a sentence within the Guidelines range, he or she often does not need to provide a lengthy explanation. As we said in *Rita*, "[c]ircumstances may well make clear that the judge rests his decision upon the Com-

mission's own reasoning that the Guidelines sentence is a proper sentence (in terms of § 3553(a) and other congressional mandates) in the typical case, and that the judge has found that the case before him is typical." *Id.*, at 357.

We have followed this same reasoning in other sentencing cases, including *Gall* v. *United States*, 552 U. S. 38 (2007), which we decided the same year as *Rita*. Cf. *Kimbrough* v. *United States*, 552 U. S. 85, 109 (2007) (suggesting a district judge's decision to vary from the Guidelines range may be entitled to greater respect when the judge finds a particular case " 'outside the "heartland" ' " of the Guidelines). Indeed, the case before us differs from the Guidelines cases that *Rita* describes in only one significant respect. It concerns a limited form of *re*sentencing.

C

The relevant lower court proceedings are not complicated. In 2013, petitioner pleaded guilty to a federal crime, namely, possessing methamphetamine with the intent to distribute it. The judge reviewed the Guidelines, determined that the applicable range was 135 to 168 months' imprisonment, and imposed a sentence at the bottom of that range: 135 months. Pursuant to its statutory authority, the Sentencing Commission subsequently lowered the relevant Guidelines range from 135 to 168 months to 108 to 135 months. United States Sentencing Commission, Guidelines Manual App. C, Amdt. 782 (Supp. Nov. 2012–Nov. 2016) (USSG); see also 28 U. S. C. § 994(*o*). Petitioner then sought and obtained a sentence modification. See 18 U. S. C. § 3582(c)(2); USSG § 1B1.10. He asked the judge to lower his sentence to the bottom of the new range, namely, 108 months. But the judge instead lowered it to 114 months, not 108 months. The order was entered on a form issued by the Administrative Office of the United States Courts. The form certified the judge had "considered" petitioner's motion and "tak[en] into account" the § 3553(a) factors and the relevant Guidelines policy statement. App. 106–107 (under seal).

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Petitioner appealed, claiming that the judge did not adequately explain why he rejected petitioner's 108-month request. The Court of Appeals rejected his argument. 854 F. 3d 655 (CA10 2017). In its view, "absent any indication the court failed to consider the § 3553(a) factors, a district court . . . need not explain choosing a particular guidelines-range sentence." *Id.*, at 659. Petitioner sought certiorari, and we granted his petition.

II

A

The Government, pointing out that this is a sentence-modification case, argues that this fact alone should secure it a virtually automatic victory. That is because, unlike an ordinary Guidelines sentencing case, the statute governing sentence-modification motions does not insist that the judge provide a "reason for imposing a sentence at a particular point within the range." Compare § 3553(c)(1) with § 3582(c)(2). It adds that sentence modifications also differ procedurally from sentencing in that the offender is not entitled to be present in court at the time the reduced sentence is imposed. See *Dillon* v. *United States*, 560 U. S. 817, 828 (2010) (citing Fed. Rule Crim. Proc. 43(b)(4)). As we have said before, "Congress intended to authorize only a limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding." *Dillon*, *supra*, at 826. These procedural features, the Government asserts, mean that "the court has no duty" to provide an "on-the-record explanation" of its reasons. Brief for United States 12, 19.

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We need not go so far. Even assuming (purely for argument's sake) district courts have equivalent duties when initially sentencing a defendant and when later modifying the sentence, what the District Court did here was sufficient. At the original sentencing, the judge "must adequately explain the chosen sentence to allow for meaningful appellate review." *Gall*, 552 U. S., at 50; see also *Rita*, 551 U. S., at 356

("The sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority"). Just how much of an explanation this requires, however, depends, as we have said, upon the circumstances of the particular case. *Id.*, at 356–357. In some cases, it may be sufficient for purposes of appellate review that the judge simply relied upon the record, while making clear that he or she has considered the parties' arguments and taken account of the § 3553(a) factors, among others. But in other cases, more explanation may be necessary (depending, perhaps, upon the legal arguments raised at sentencing, see *id.*, at 357). That may be the case even when there is little evidence in the record affirmatively showing that the sentencing judge failed to consider the § 3553(a) factors. If the court of appeals considers an explanation inadequate in a particular case, it can send the case back to the district court for a more complete explanation. Cf. *Molina-Martinez* v. *United States*, 578 U. S. 189, 204 (2016) ("[A]ppellate courts retain broad discretion in determining whether a remand for resentencing is necessary").

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B

Petitioner argues that the judge should have explained more here because there is, or should be, some kind of presumption that the judge will choose a point within the new lower Guidelines range that is "proportional" to the point previously chosen in the older higher Guidelines range. We are not aware of any law or any convincing reason, however, suggesting that this is so.

As a technical matter, determining just what "proportionality" means in this context would often prove difficult when the sentence is somewhere in the middle of the Guidelines range. The Sentencing Table calculates punishments according to a logarithmic scale. Take petitioner's original and amended Guidelines ranges, for example. The original

range was 135 to 168 months, a difference of 33 months. The amended range, by comparison, is 108 to 135 months, a difference of 27 months. And viewed logarithmically, what may seem the middle of a new lower range is not necessarily proportionate to what may seem the middle of the old higher range. Nothing in the Guidelines, or elsewhere, encourages arguments about such matters among lawyers or judges who are not experts in advanced mathematics.

More importantly, the Guidelines ranges reflect to some degree what many, perhaps most, judges believed in the pre-Guidelines era was a proper sentence based upon the criminal behavior at issue and the characteristics of the offender. Thus, a judge's choice among points on a range will often simply reflect the judge's belief that the chosen sentence is the "right" sentence (or as close as possible to the "right" sentence) based on various factors, including those found in § 3553(a). Insofar as that is so, it is unsurprising that changing the applicable range may lead a judge to choose a nonproportional point on the new range. We see nothing that favors the one or the other. So, as is true of most Guidelines sentences, the judge need not provide a lengthy explanation if the "context and the record" make clear that the judge had "a reasoned basis" for reducing the defendant's sentence. *Rita*, *supra*, at 356, 359.

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C

Turning to the facts of this case, we find that the District Court's explanation satisfies the standard we used in *Rita* and *Gall*, assuming it applies to sentence modifications. In *Rita*, as we earlier said, we upheld as lawful a sentencing judge's explanation that stated simply that the Guidelines sentence imposed was "'appropriate.'" 551 U. S., at 358. We noted that, in respect to the brevity or length of the reasons the judge gives for imposing a particular Guidelines sentence, the "law leaves much" to "the judge's own professional judgment." *Id.*, at 356. We pointed out that the sentencing judge in that case had "set forth enough to satisfy

the appellate court that he ha[d] considered the parties' arguments and ha[d] a reasoned basis for exercising his own legal decisionmaking authority." *Ibid.* The same is true here.

At petitioner's original sentencing, he sought a variance from the Guidelines range (135 to 168 months) on the ground that his history and family circumstances warranted a lower sentence. The judge denied his request. In doing so, the judge noted that he had "consulted the sentencing factors of 18 U. S. C. 3553(a)(1)." He explained that the "reason the guideline sentence is high in this case, even the low end of 135 months, is because of the [drug] quantity." He pointed out that petitioner had "distributed 1.7 kilograms of actual methamphetamine," a "significant quantity." And he said that "one of the other reasons that the penalty is severe in this case is because of methamphetamine." He elaborated this latter point by stating that he had "been doing this a long time, and from what [he] gather[ed] and what [he had] seen, methamphetamine, it destroys individual lives, it destroys families, it can destroy communities." App. 25.

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This record was before the judge when he considered petitioner's request for a sentence modification. He was the same judge who had sentenced petitioner originally. Petitioner asked the judge to reduce his sentence to 108 months, the bottom of the new range, stressing various educational courses he had taken in prison. The Government pointed to his having also broken a moderately serious rule while in prison. The judge certified (on a form) that he had "considered" petitioner's "motion" and had "tak[en] into account" the relevant Guidelines policy statements and the § 3553(a) factors. *Id.*, at 106–107 (under seal). He then reduced the sentence to 114 months. The record as a whole strongly suggests that the judge originally believed that, given petitioner's conduct, 135 months was an appropriately high sentence. So it is unsurprising that the judge considered a sentence somewhat higher than the bottom of the reduced range to be

appropriate. As in *Rita*, there was not much else for the judge to say.

The dissent would have us ignore the record from the initial sentencing and consider only what the judge said when modifying petitioner's sentence. See *post*, at 123–124 (opinion of KENNEDY, J.). But, as we have made clear before, a sentence modification is "not a plenary resentencing proceeding." *Dillon*, 560 U. S., at 826. We therefore need not turn a blind eye to what the judge said at petitioner's initial sentencing. The dissent suggests the judge's failure to grant petitioner a proportional reduction "limits the relevance of the initial sentencing proceeding." *Post*, at 124. To the contrary, the record of the initial sentencing sheds light on why the court picked a point slightly above the bottom of the reduced Guidelines range when it modified petitioner's sentence. Our decision is not (as the dissent claims) based on mere "speculation." *Post*, at 126. Rather, we simply find the record as a whole satisfies us that the judge "considered the parties' arguments and ha[d] a reasoned basis for exercising his own legal decisionmaking authority." *Rita*, *supra*, at 356.

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This is not to say that a disproportionate sentence reduction *never* may require a more detailed explanation. It could be that, under different facts and a different record, the district court's use of a barebones form order in response to a motion like petitioner's would be inadequate. As we said above, the courts of appeals are well suited to request a more detailed explanation when necessary. See *supra*, at 116. The dissent asserts that appellate courts would not need to remand for further explanation if district courts provided an additional "short statement or check[ed] additional boxes" on the form order. *Post*, at 126. That may be so, and nothing in this decision prevents judges from saying more when, in their professional judgment, saying more is appropriate. Providing a more detailed statement of reasons often serves "a salutary purpose" separate and apart from facilitating ap-

pellate review. *Rita*, 551 U. S., at 357. But our task here is to decide the case before us. And given the simplicity of *this* case, the judge's awareness of the arguments, his consideration of the relevant sentencing factors, and the intuitive reason why he picked a sentence above the very bottom of the new range, the judge's explanation (minimal as it was) fell within the scope of the lawful professional judgment that the law confers upon the sentencing judge. See *id.*, at 356.

The Court of Appeals concluded the same. Its judgment is therefore affirmed.

It is so ordered.

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

JUSTICE KENNEDY, with whom JUSTICE SOTOMAYOR and JUSTICE KAGAN join, dissenting.

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When the District Court reduced petitioner Adaucto Chavez-Meza's sentence, it entered its order on a terse "AO–247" form. An example of this form is attached as an Appendix, *infra*. On the form order, the District Court checked a box next to preprinted language stating that it had "considered" Chavez-Meza's motion for a reduced sentence and that it had "tak[en] into account the policy statement set forth at USSG §1B1.10 and the sentencing factors set forth in 18 U. S. C. §3553(a), to the extent that they are applicable." App. 106–107 (under seal). The District Court checked another box indicating that Chavez-Meza's motion was granted, and the court stated that it was reducing his sentence to 114 months. *Ibid.* But the District Court did not explain why it chose that particular sentence or why it had not sentenced Chavez-Meza to the bottom of his Guidelines range, as it had done at his original sentencing. Under these circumstances, in my view the District Court's order

was insufficient to allow for meaningful appellate review, a conclusion that requires this respectful dissent.

My disagreement with the majority is based on a serious problem—the difficulty for prisoners and appellate courts in ascertaining a district court's reasons for imposing a sentence when the court fails to state those reasons on the record; yet, in the end, my disagreement turns on a small difference, for a remedy is simple and easily attained.

Just a slight expansion of the AO–247 form would answer the concerns expressed in this dissent in most cases, and likely in the instant one. If the form were expanded to include just a few more categories covering the factors most often bearing on a trial court's sentencing determination, the objections petitioner raises likely would be met. The statute would be satisfied; district judges would have a helpful form that might well reduce the time for consideration of cases—and even if not would help ensure the full consideration which tends to result in uniformity and fairness; the courts of appeals, from the outset, would have far more assistance in determining whether appeals have merit; and this in turn would yield judicial efficiencies that the sentencing system must have to be effective and that courts of appeals must have to ensure that the relevant statute can be administered and applied in an efficient, fair, and uniform way. The Court today, however, gives its full approval to a conclusory order. Its resulting holding is detrimental to the judicial system and to prisoners alike.

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The Sentencing Reform Act of 1984 authorizes a district court to reduce a prisoner's sentence when he "has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U. S. C. §3582(c)(2). Congress specified that district courts may reduce a defendant's sentence only "after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is

consistent with applicable policy statements issued by the Sentencing Commission." *Ibid.*

In *United States* v. *Taylor*, 487 U. S. 326, 336 (1988), this Court addressed a statutory scheme that, like § 3582(c)(2), required district courts to consider specific statutory factors when they exercised their discretion. The Court held that "[w]here, as here, Congress has declared that a decision will be governed by consideration of particular factors, a district court must carefully consider those factors as applied to the particular case and, whatever its decision, clearly articulate their effect in order to permit meaningful appellate review." *Id.*, at 336–337.

Here, the form order fails to provide sufficient information either to give adequate and efficient instruction to the trial court or to permit meaningful appellate review. The form order discloses no basis for determining why the District Court did not sentence Chavez-Meza to the bottom of his new Guidelines range, as it had when it imposed his original sentence.

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The Court points out that there is no presumption in favor of a proportional reduction when a judge reduces a prisoner's sentence pursuant to § 3582(c)(2). *Ante*, at 116–117. That is true, as far as it goes. The issue here, however, is not whether district courts must grant proportional reductions; rather, the issue is what explanation should be required to permit meaningful review of a trial court's resentencing order.

The amount of necessary explanation might be different when a district court grants a proportional reduction—for example, when it sentences a defendant to the top or the bottom of his Guidelines range for both the initial and reduced sentence. In that circumstance, in most instances, an appellate court properly can infer that the district court's reasons were the same as those it gave when it imposed the initial sentence. See Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 6–11 (explain-

ing that district courts typically grant proportional reductions and that the Sentencing Commission often assumes they will do so). Less explanation is necessary, not because proportional reductions are favored as a legal matter but because the initial sentencing proceeding provides a record from which an appellate court can make prompt and reliable inferences as to the reasons that informed the trial court's decision to resentence a defendant to the same relative point on his amended Guidelines range. Contrary to the Court's suggestion, furthermore, one need not have an advanced degree in mathematics, much less a calculator, to draw this reasonable inference. District courts, as a matter of routine, regularly grant proportional reductions; and it seems unlikely that they conduct intricate logarithmic computations before doing so.

In contrast to a proportional reduction in a prisoner's sentence, a nonproportional reduction suggests that the district court's reasons for choosing a particular sentence might be different from those it gave when it imposed the sentence in the first instance. Accordingly, a more specific explanation—but by no means an elaborate one—is necessary for an appellate court to determine why the district court chose a new point on the revised Guidelines range.

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The Court's analogy to *Rita* v. *United States*, 551 U. S. 338, 356 (2007), fails as well. See *ante*, at 117–119. In *Rita*, the District Court imposed the defendant's sentence at a hearing. The record made clear that "the sentencing judge listened to each argument," "considered the supporting evidence," and then determined that a 33-month sentence was "appropriate." 551 U. S., at 358. But here there was no hearing when the District Court reduced Chavez-Meza's sentence in light of the amended Guidelines. The District Court's reasoning must be surmised from its terse, largely uninformative order. At Chavez-Meza's initial sentencing there was a hearing similar to the one in *Rita*. But the fact that the District Court did not grant Chavez-

Meza a proportional reduction when it later reconsidered his sentence limits the relevance of the initial sentencing proceeding.

The District Court may well have had a legitimate reason for reducing Chavez-Meza's sentence to 114 months instead of 108 months. And even a brief explanation stating that reason likely would have sufficed, for district courts need not write at length each time they rule upon a § 3582(c)(2) motion.

The Court is quite correct to point out that a trial judge "need only 'set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority.'" *Ante*, at 113 (quoting *Rita*, *supra*, at 356). It is likely that even a checkbox form would suffice in most cases, provided the form lists enough of the common reasons so that an appellate court, in most cases, can easily ascertain why the district court chose a particular sentence. Here, for example, the District Court simply could have added a sentence or two to the AO–247 form's "Additional Comments" box. Or, perhaps preferably, trial courts could use an expanded version of the AO–247 form that allows judges to indicate, even by checking a box, the reason or reasons for choosing a particular sentence.

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In this case, however, the District Court's reasons remain a mystery. The Court today speculates that the District Court sentenced Chavez-Meza to 114 months because he distributed a large quantity of methamphetamine. *Ante*, at 118–119. For its part, the Court of Appeals speculated that the reason might have been "an incident of misconduct while in prison." 854 F. 3d 655, 660 (CA10 2017). But there is no basis for these assumptions in the District Court's order. The sort of guesswork the Court relies upon in today's decision is insufficient to provide meaningful appellate review of a district court's exercise of its discretion under § 3582(c)(2). See *Taylor*, 487 U. S., at 342–343.

According to the Court of Appeals, the relevant provisions of the Sentencing Reform Act must be read to allow a trial court not to give or state any reasons at all for a resentencing order. 854 F. 3d, at 658. This was error. The Court of Appeals reached its conclusion by comparing the provisions that relate to original sentencing—§ 3553(c)—with the provisions that pertain to the resentencing process—§ 3582(c)(2). It reasoned that, because the former has an express requirement to state reasons while the latter does not, the statutory structure eliminates any requirement for reasons upon resentencing. The Court of Appeals' analysis, however, ignores the scope of the statutory text in § 3553(c). That section pertains to a procedure that is a full-scale adversary proceeding, where the defendant and counsel are present. As part of that procedure, the statute states: "The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence." § 3553(c).

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The statute does not require a full-scale adversary proceeding when resentencing is being considered after a Guidelines reduction. But it is incorrect to conclude that the absence of all those requirements forecloses the necessity to make a record that allows an appellate court to exercise meaningful review of the reasons for the resentencing order. This conclusion follows from this Court's decision in *Taylor*, holding that courts must "clearly articulate" their reasoning "in order to permit meaningful appellate review," even without any specific statutory command. 487 U. S., at 336–337. So the fact that Congress adopted a detailed explanatory requirement in another part of the statute does not displace *Taylor*'s background rule that district courts must provide enough reasoning for appellate courts to review their decisions when they exercise discretion under a statute like § 3582(c)(2).

The Court quite correctly rejects the Government's invitation to adopt the Court of Appeals' interpretation. See

ante, at 115–116. The Court's ensuing analysis, however, is, in my respectful view, still incorrect. On the one hand, the Court holds that appellate courts may determine on a case-by-case basis whether a form order like the one here provides enough explanation. See *ante*, at 116, 119. Thus, any prisoner can appeal and argue that the order was insufficient in his case. On the other hand, the Court does not impose any serious requirement that a district court state its reasons on the front end—that is, before the appeal, when the district court rules on the § 3582(c)(2) motion. Thus, in cases like this one, appeals will often be based on speculation that requires the prisoner, the Government, and the court of appeals to hypothesize the potential reasons for the prisoner's sentence when a reduction is weighed and considered.

This is an unwise allocation of judicial resources. District courts, to state the obvious, are best positioned to explain their reasons for imposing a particular sentence. Under the majority's opinion, however, appellate courts will often lack clarity as to a district court's reasoning and will be forced to either speculate (as the Court does today) based on their own view of the record, or remand the case for further explanation, likely followed by another appeal. What could have taken a sentence or two at the front end now can, and likely will, produce dozens of pages of briefs, bench memoranda, orders, and judicial opinions as the case makes its way first to the appellate court, then back down to the trial court and perhaps back to the appellate court again.

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A better, more efficient rule would require trial courts in cases like this one to provide their reasons in their initial decisions either by giving a short statement or checking additional boxes. We must be conscious of the fact that retroactive amendments to the Guidelines can result in thousands of resentencings. That is all the more reason the inefficiencies resulting from today's decision ought to be avoided. And given the uncertainty that will ensue from today's decision, district courts would be wise to say more than the court

said in this case, even in the absence of a holding requiring it to do so on the specific facts at issue here.

For these reasons, I respectfully dissent.

APPENDIX

AO 247 (Rev. 11/11) Order Regarding Motion for Sentence Reduction Pursuant to 18 U.S.C. § 3582(c)(2) Page 1 of 2 (Page 2 Not for Public Disclosure)

UNITED STATES DISTRICT COURT
for the

United States of America
v.

Case No: _____

USM No: _____

Date of Original Judgment: _____

Date of Previous Amended Judgment: _____
(Use Date of Last Amended Judgment if Any)

Defendant's Attorney

ORDER REGARDING MOTION FOR SENTENCE REDUCTION PURSUANT TO 18 U.S.C. § 3582(c)(2)

Upon motion of ☐ the defendant ☐ the Director of the Bureau of Prisons ☐ the court under 18 U.S.C. § 3582(c)(2) for a reduction in the term of imprisonment imposed based on a guideline sentencing range that has subsequently been lowered and made retroactive by the United States Sentencing Commission pursuant to 28 U.S.C. § 994(u), and having considered such motion, and taking into account the policy statement set forth at USSG §1B1.10 and the sentencing factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable,

IT IS ORDERED that the motion is:

☐ DENIED. ☐ GRANTED and the defendant's previously imposed sentence of imprisonment *(as reflected in the last judgment issued)* of _____ months **is reduced to** _____.

(Complete Parts I and II of Page 2 when motion is granted)

Except as otherwise provided, all provisions of the judgment dated _____ shall remain in effect.

IT IS SO ORDERED.

Order Date: _____

Judge's signature

Effective Date: _____
(if different from order date)

Printed name and title

Appendix to opinion of KENNEDY, J.

AO 247 (Rev. 11/11) Order Regarding Motion for Sentence Reduction Pursuant to 18 U.S.C. § 3582(c)(2) Page 2 of 2 (Page 2 Not for Public Disclosure)

This page contains information that should not be filed in court unless under seal.
(Not for Public Disclosure)

DEFENDANT: _____
CASE NUMBER: _____
DISTRICT:

I. COURT DETERMINATION OF GUIDELINE RANGE ***(Prior to Any Departures)***

Previous Total Offense Level:	_____	Amended Total Offense Level:	_____
Criminal History Category:	_____	Criminal History Category:	_____
Previous Guideline Range:	_____ to _____ months	Amended Guideline Range:	_____ to _____ months

II. SENTENCE RELATIVE TO THE AMENDED GUIDELINE RANGE

☐ The reduced sentence is within the amended guideline range.
☐ The previous term of imprisonment imposed was less than the guideline range applicable to the defendant at the time of sentencing as a result of a substantial assistance departure or Rule 35 reduction, and the reduced sentence is comparably less than the amended guideline range.
☐ The reduced sentence is above the amended guideline range.

III. ADDITIONAL COMMENTS

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Syllabus

ROSALES-MIRELES *v.* UNITED STATES

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

No. 16–9493. Argued February 21, 2018—Decided June 18, 2018

Each year, district courts sentence thousands of individuals to imprisonment for violations of federal law. To help ensure certainty and fairness in those sentences, federal district courts are required to consider the advisory United States Sentencing Guidelines. Prior to sentencing, the United States Probation Office prepares a presentence investigation report to help the court determine the applicable Guidelines range. Ultimately, the district court is responsible for ensuring the Guidelines range it considers is correct. At times, however, an error in the calculation of the Guidelines range goes unnoticed by the court and the parties. On appeal, such errors not raised in the district court may be remedied under Federal Rule of Criminal Procedure 52(b), provided that, as established in *United States* v. *Olano*, 507 U. S. 725: (1) the error was not "intentionally relinquished or abandoned," (2) the error is plain, and (3) the error "affected the defendant's substantial rights," *Molina-Martinez* v. *United States*, 578 U. S. 189, 194. If those conditions are met, "the court of appeals should exercise its discretion to correct the forfeited error if the error ' "seriously affects the fairness, integrity or public reputation of judicial proceedings." ' " *Ibid.* This last consideration is often called *Olano*'s fourth prong. The issue here is when a Guidelines error that satisfies *Olano*'s first three conditions warrants relief under the fourth prong.

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Petitioner Florencio Rosales-Mireles pleaded guilty to illegal reentry into the United States. In calculating the Guidelines range, the Probation Office's presentence report mistakenly counted a state misdemeanor conviction twice. As a result, the report yielded a Guidelines range of 77 to 96 months, when the correctly calculated range would have been 70 to 87 months. Rosales-Mireles did not object to the error in the District Court, which relied on the miscalculated Guidelines range and sentenced him to 78 months of imprisonment. On appeal, Rosales-Mireles challenged the incorrect Guidelines range for the first time. The Fifth Circuit found that the Guidelines error was plain and that it affected Rosales-Mireles' substantial rights because there was a "reasonable probability that he would have been subject to a different sentence but for the error." The Fifth Circuit nevertheless declined to remand the case for resentencing, concluding that Rosales-Mireles had

not established that the error would seriously affect the fairness, integrity, or public reputation of judicial proceedings because neither the error nor the resulting sentence "would shock the conscience."

Held: A miscalculation of a Guidelines sentencing range that has been determined to be plain and to affect a defendant's substantial rights calls for a court of appeals to exercise its discretion under Rule 52(b) to vacate the defendant's sentence in the ordinary case. Pp. 137–145.

(a) Although "Rule 52(b) is permissive, not mandatory," *Olano*, 507 U. S., at 735, it is well established that courts "should" correct a forfeited plain error affecting substantial rights "if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings,'" *id.*, at 736. Like the narrow rule rejected in *Olano*, which would have called for relief only for a miscarriage of justice, the Fifth Circuit's shock-the-conscience standard too narrowly confines the extent of the court of appeals' discretion. It is not reflected in Rule 52(b), nor in how the plain-error doctrine has been applied by this Court, which has reversed judgments for plain error based on inadvertent or unintentional errors by the court or the parties below and has remanded cases involving such errors, including sentencing errors, for consideration of *Olano*'s fourth prong. The errors are not required to amount to a "powerful indictment" of the system. The Fifth Circuit's emphasis on the district judge's "competence or integrity" also unnecessarily narrows *Olano*'s instruction to correct an error if it seriously affects "judicial proceedings." Pp. 137–139.

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(b) The effect of the Fifth Circuit's heightened standard is especially pronounced in cases like this one. An error resulting in a higher range than the Guidelines provide usually establishes a reasonable probability that a defendant will serve a prison sentence greater than "necessary" to fulfill the purposes of incarceration, 18 U. S. C. § 3553(a). See *Molina-Martinez*, 578 U. S., at 198. That risk of unnecessary deprivation of liberty particularly undermines the fairness, integrity, or public reputation of judicial proceedings in the context of a plain Guidelines error because Guidelines miscalculations ultimately result from judicial error, as the district court is charged in the first instance with ensuring the Guidelines range it considers is correct. Moreover, remands for resentencing are relatively inexpensive proceedings compared to remands for retrial. Ensuring the accuracy of Guidelines determinations also furthers the Sentencing Commission's goal of achieving uniformity and proportionality in sentencing more broadly, since including uncorrected sentences based on incorrect Guidelines ranges in the data the Commission collects could undermine the Commission's ability to make appropriate revisions to the Guidelines. Because any exercise of dis-

cretion at the fourth prong of *Olano* inherently requires "a case-specific and fact-intensive" inquiry, *Puckett* v. *United States*, 556 U. S. 129, 142, countervailing factors may satisfy the court of appeals that the fairness, integrity, and public reputation of the proceedings will be preserved absent correction. But there are no such factors in this case. Pp. 139–142.

(c) The Government and dissent maintain that even though the Fifth Circuit's standard was inaccurate, Rosales-Mireles is still not entitled to relief. But their arguments are unpersuasive. They caution that granting this type of relief would be inconsistent with the Court's statements that discretion under Rule 52(b) should be exercised "sparingly," *Jones* v. *United States*, 527 U. S. 373, 389, and reserved for "exceptional circumstances," *United States* v. *Atkinson*, 297 U. S. 157, 160. In contrast to the *Jones* remand, however, no additional jury proceedings would be required in a remand for resentencing based on a Guidelines miscalculation. Plus, the circumstances of Rosales-Mireles' case are exceptional under this Court's precedent, as they are reasonably likely to have resulted in a longer prison sentence than necessary and there are no countervailing factors that otherwise further the fairness, integrity, or public reputation of judicial proceedings. The Government and dissent also assert that Rosales-Mireles' sentence is presumptively reasonable because it falls within the corrected Guidelines range. But a court of appeals can consider a sentence's substantive reasonableness only after it ensures "that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range." *Gall* v. *United States*, 552 U. S. 38, 51. If a district court cannot properly determine whether, considering all sentencing factors, including the correct Guidelines range, a sentence is "sufficient, but not greater than necessary," 18 U. S. C. § 3553(a), the resulting sentence would not bear the reliability that would support a "presumption of reasonableness" on review. See 552 U. S., at 51. And regardless of its ultimate reasonableness, a sentence that lacks reliability because of unjust procedures may well undermine public perception of the proceedings. Finally, the Government and dissent maintain that the Court's decision will create an opportunity for "sandbagging" that Rule 52(b) is supposed to prevent. But that concern fails to account for the realities at play in sentencing proceedings, where it is highly speculative that a defendant would benefit from a strategy of deliberately forgoing an objection in the district court, with hopes of arguing for reversal under plain-error review later. Pp. 142–145.

850 F. 3d 246, reversed and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, KAGAN, and GORSUCH, JJ.,

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joined. THOMAS, J., filed a dissenting opinion, in which ALITO, J., joined, *post*, p. 145.

Kristin L. Davidson argued the cause for petitioner. With her on the briefs were *Maureen Scott Franco*, *Bradford W. Bogan*, *Jeffrey T. Green*, *Joshua J. Fougere*, and *Timothy Crooks*.

Jonathan Y. Ellis argued the cause for the United States. With him on the brief were *Solicitor General Francisco*, *Acting Assistant Attorney General Cronan*, *Deputy Solicitor General Dreeben*, *Robert A. Parker*, and *Kirby A. Heller*.*

JUSTICE SOTOMAYOR delivered the opinion of the Court.

Federal Rule of Criminal Procedure 52(b) provides that a court of appeals may consider errors that are plain and affect substantial rights, even though they are raised for the first time on appeal. This case concerns the bounds of that discretion, and whether a miscalculation of the United States Sentencing Guidelines range, that has been determined to be plain and to affect a defendant's substantial rights, calls for a court of appeals to exercise its discretion under Rule 52(b) to vacate the defendant's sentence. The Court holds that such an error will in the ordinary case, as here, seriously affect the fairness, integrity, or public reputation of judicial proceedings, and thus will warrant relief.

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I

A

Each year, thousands of individuals are sentenced to terms of imprisonment for violations of federal law. District courts must determine in each case what constitutes a sen-

*A brief of *amici curiae* urging reversal was filed for the National Association of Criminal Defense Lawyers et al. by *John D. Cline*, *Barbara E. Bergman*, *Mary Price*, *Peter Goldberger*, *Sarah Gannett*, and *Daniel L. Kaplan.*

tence that is "sufficient, but not greater than necessary," 18 U. S. C. § 3553(a), to achieve the overarching sentencing purposes of "retribution, deterrence, incapacitation, and rehabilitation." *Tapia* v. *United States*, 564 U. S. 319, 325 (2011); 18 U. S. C. §§ 3551(a), 3553(a)(2). Those decisions call for the district court to exercise discretion. Yet, to ensure "'certainty and fairness'" in sentencing, district courts must operate within the framework established by Congress. *United States* v. *Booker*, 543 U. S. 220, 264 (2005) (quoting 28 U. S. C. § 991(b)(1)(B)).

The Sentencing Guidelines serve an important role in that framework. "'[D]istrict courts *must* begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process.'" *Peugh* v. *United States*, 569 U. S. 530, 541 (2013) (quoting *Gall* v. *United States*, 552 U. S. 38, 50, n. 6 (2007); emphasis in *Peugh*). Courts are not bound by the Guidelines, but even in an advisory capacity the Guidelines serve as "a meaningful benchmark" in the initial determination of a sentence and "through the process of appellate review." 569 U. S., at 541.

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Of course, to consult the applicable Guidelines range, a district court must first determine what that range is. This can be a "complex" undertaking. *Molina-Martinez* v. *United States*, 578 U. S. 189, 193 (2016). The United States Probation Office, operating as an arm of the district court, first creates a presentence investigation report, "which includes a calculation of the advisory Guidelines range it considers to be applicable." *Ibid.*; see Fed. Rules Crim. Proc. 32(c)(1)(A), (d)(1); United States Sentencing Commission, Guidelines Manual § 1B1.1(a) (Nov. 2016) (USSG). That calculation derives from an assessment of the "offense characteristics, offender characteristics, and other matters that might be relevant to the sentence." *Rita* v. *United States*, 551 U. S. 338, 342 (2007) (internal quotation marks omitted). Specifically, an offense level is calculated by identifying a base level for the offense of conviction and adjusting

that level to account for circumstances specific to the defendant's case, such as how the crime was committed and whether the defendant accepted responsibility. See USSG §§ 1B1.1(a)(1)–(5). A numerical value is then attributed to any prior offenses committed by the defendant, which are added together to generate a criminal history score that places the defendant within a particular criminal history category. §§ 1B1.1(a)(6), 4A1.1. Together, the offense level and the criminal history category identify the applicable Guidelines range. § 1B1.1(a)(7).

B

The district court has the ultimate responsibility to ensure that the Guidelines range it considers is correct, and the "[f]ailure to calculate the correct Guidelines range constitutes procedural error." *Peugh*, 569 U. S., at 537. Given the complexity of the calculation, however, district courts sometimes make mistakes. It is unsurprising, then, that "there will be instances when a district court's sentencing of a defendant within the framework of an incorrect Guidelines range goes unnoticed" by the parties as well, which may result in a defendant raising the error for the first time on appeal. *Molina-Martinez*, 578 U. S., at 193–194. Those defendants are not entirely without recourse.

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Federal Rule of Criminal Procedure 52(b) provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the [district] court's attention." In *United States* v. *Olano*, 507 U. S. 725 (1993), the Court established three conditions that must be met before a court may consider exercising its discretion to correct the error. "First, there must be an error that has not been intentionally relinquished or abandoned. Second, the error must be plain—that is to say, clear or obvious. Third, the error must have affected the defendant's substantial rights." *Molina-Martinez*, 578 U. S., at 194 (citations omitted). To satisfy this third condition, the defendant ordinarily must "'show a reasonable probability that, but for the error,' the

outcome of the proceeding would have been different." *Ibid.* (quoting *United States* v. *Dominguez Benitez*, 542 U. S. 74, 76, 83 (2004)). Once those three conditions have been met, "the court of appeals should exercise its discretion to correct the forfeited error if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Molina-Martinez*, 578 U. S., at 194 (internal quotation marks omitted). It is this last consideration, often called *Olano*'s fourth prong, that we are asked to clarify and apply in this case.

C

Petitioner Florencio Rosales-Mireles pleaded guilty to illegal reentry in violation of 8 U. S. C. §§ 1326(a), (b)(2). The Probation Office in its presentence investigation report mistakenly counted a 2009 state conviction of misdemeanor assault twice. This double counting resulted in a criminal history score of 13, which placed Rosales-Mireles in criminal history category VI. Combined with his offense level of 21, that yielded a Guidelines range of 77 to 96 months. Had the criminal history score been calculated correctly, Rosales-Mireles would have been in criminal history category V, and the resulting Guidelines range would have been 70 to 87 months. See USSG ch. 5, pt. A (sentencing table).

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Rosales-Mireles did not object to the double-counting error before the District Court. Relying on the erroneous presentence investigation report, and after denying Rosales-Mireles' request for a downward departure, the District Court sentenced Rosales-Mireles to 78 months of imprisonment, one month above the lower end of the Guidelines range that everyone thought applied.

On appeal, Rosales-Mireles argued for the first time that his criminal history score and the resulting Guidelines range were incorrect because of the double counting of his 2009 conviction. Because he had not objected in the District Court, the Court of Appeals for the Fifth Circuit reviewed for plain error. 850 F. 3d 246, 248 (2017).

Applying the *Olano* framework, the Fifth Circuit concluded that Rosales-Mireles had established that the Guidelines miscalculation constituted an error that was plain, satisfying *Olano*'s first two conditions. It also held that the error affected Rosales-Mireles' substantial rights, thus satisfying the third condition, because there was "a reasonable probability that he would have been subject to a different sentence but for the error." 850 F. 3d, at 249. In reaching that conclusion, the Fifth Circuit rejected the Government's argument that Rosales-Mireles would have received the same sentence regardless of the Guidelines error, because the District Court had denied a downward departure "based, in part, on Rosales-Mireles' criminal history," which "erroneously included an extra conviction." *Ibid.*

The Fifth Circuit nevertheless declined to exercise its discretion to vacate and remand the case for resentencing because it concluded that Rosales-Mireles failed to establish that the error would seriously affect the fairness, integrity, or public reputation of judicial proceedings. In its view, "the types of errors that warrant reversal are ones that would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge." *Id.*, at 250 (internal quotation marks and alterations omitted). Because Rosales-Mireles' sentence of 78 months fell within the correct range of 70 to 87 months, the Fifth Circuit held that neither the error nor the resulting sentence "would shock the conscience." *Ibid.*

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The Fifth Circuit's articulation of *Olano*'s fourth prong is out of step with the practice of other Circuits.[1] We granted

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[1] Compare 850 F. 3d 246, 250 (CA5 2017), with *United States* v. *Dahl*, 833 F. 3d 345, 357, 359 (CA3 2016); *United States* v. *Figueroa-Ocasio*, 805 F. 3d 360, 367–368, 373–374 (CA1 2015); *United States* v. *Sabillon-Umana*, 772 F. 3d 1328, 1333–1334 (CA10 2014) (Gorsuch, J.); *United States* v. *Joseph*, 716 F. 3d 1273, 1281 (CA9 2013); *United States* v. *Garrett*, 528 F. 3d 525, 527, 529–530 (CA7 2008).

certiorari to resolve that conflict, 582 U. S. 967 (2017), and now reverse.

II

A

Although "Rule 52(b) is permissive, not mandatory," *Olano*, 507 U. S., at 735, it is well established that courts "should" correct a forfeited plain error that affects substantial rights "if the error 'seriously affects the fairness, integrity or public reputation of judicial proceedings.'" *Id.*, at 736 (quoting *United States* v. *Atkinson*, 297 U. S. 157, 160 (1936); alteration omitted); see also *Molina-Martinez*, 578 U. S., at 194–195. The Court in *Olano* rejected a narrower rule that would have called for relief only "'"in those circumstances in which a miscarriage of justice would otherwise result,"'" that is to say, where a defendant is actually innocent. 507 U. S., at 736 (quoting *United States* v. *Young*, 470 U. S. 1, 15 (1985)). By focusing instead on principles of fairness, integrity, and public reputation, the Court recognized a broader category of errors that warrant correction on plain-error review. See 507 U. S., at 736–737.

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Like the miscarriage-of-justice rule that the Court rejected in *Olano*, the Fifth Circuit's standard is unduly restrictive. To be sure, a conclusion that an error "shock[s] the conscience of the common man, serve[s] as a powerful indictment against our system of justice, or seriously call[s] into question the competence or integrity of the district judge," 850 F. 3d, at 250 (internal quotation marks omitted), would demand an exercise of discretion to correct the error. Limiting relief only to those circumstances, however, too narrowly confines the extent of a court of appeals' discretion.

The "shock the conscience" standard typically is employed when determining whether governmental action violates due process rights under the Fifth and Fourteenth Amendments. See *County of Sacramento* v. *Lewis*, 523 U. S. 833, 848, n. 8 (1998) ("[I]n a due process challenge to executive action, the

threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience"). This Court has said that the "shock the conscience" standard is satisfied where the conduct was "intended to injure in some way unjustifiable by any government interest," or in some circumstances if it resulted from deliberate indifference. *Id.*, at 849–850.

That standard is not reflected in Rule 52(b) itself, nor in how this Court has applied the plain-error doctrine. The Court repeatedly has reversed judgments for plain error on the basis of inadvertent or unintentional errors of the court or the parties below. See, *e. g.*, *Silber* v. *United States*, 370 U. S. 717, 717–718 (1962) (*per curiam*) (reversing judgment for plain error as a result of insufficient indictment); *Brasfield* v. *United States*, 272 U. S. 448, 449–450 (1926) (reversing judgment for plain error where the trial judge improperly inquired of a jury's numerical division); *Clyatt* v. *United States*, 197 U. S. 207, 222 (1905) (reversing judgment for plain error where the Government presented insufficient evidence to sustain conviction). The Court also "routinely remands" cases involving inadvertent or unintentional errors, including sentencing errors, for consideration of *Olano*'s fourth prong with the understanding that such errors may qualify for relief. *Hicks* v. *United States*, 582 U. S. 924 (2017) (GORSUCH, J., concurring).

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The Fifth Circuit's additional focus on errors that "serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge," 850 F. 3d, at 250 (internal quotation marks omitted), similarly alters the Rule 52(b) standard. The Court has never said that errors must amount to a "powerful indictment" of the system, a phrase which implies by its terms that the only errors worthy of correction are those that rise to the level of grossly serious misconduct. Simi-

larly, the Fifth Circuit's emphasis on the "competence or integrity of the district judge" narrows *Olano*'s instruction that an error should be corrected if it seriously affects "judicial proceedings." In articulating such a high standard, the Fifth Circuit substantially changed *Olano*'s fourth prong.

B

The effect of the Fifth Circuit's heightened standard is especially pronounced in a case like this one. A plain Guidelines error that affects a defendant's substantial rights is precisely the type of error that ordinarily warrants relief under Rule 52(b).

In *Molina-Martinez*, the Court recognized that "[w]hen a defendant is sentenced under an incorrect Guidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." 578 U. S., at 198. In other words, an error resulting in a higher range than the Guidelines provide usually establishes a reasonable probability that a defendant will serve a prison sentence that is more than "necessary" to fulfill the purposes of incarceration. 18 U. S. C. § 3553(a); *Tapia*, 564 U. S., at 325. "To a prisoner," this prospect of additional "time behind bars is not some theoretical or mathematical concept." *Barber* v. *Thomas*, 560 U. S. 474, 504 (2010) (KENNEDY, J., dissenting). "[A]ny amount of actual jail time" is significant, *Glover* v. *United States*, 531 U. S. 198, 203 (2001), and "ha[s] exceptionally severe consequences for the incarcerated individual [and] for society which bears the direct and indirect costs of incarceration," *United States* v. *Jenkins*, 854 F. 3d 181, 192 (CA2 2017). The possibility of additional jail time thus warrants serious consideration in a determination whether to exercise discretion under Rule 52(b). It is crucial in maintaining public perception of fairness and integrity in the justice sys-

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tem that courts exhibit regard for fundamental rights and respect for prisoners "as people." T. Tyler, Why People Obey the Law 164 (2006).

The risk of unnecessary deprivation of liberty particularly undermines the fairness, integrity, or public reputation of judicial proceedings in the context of a plain Guidelines error because of the role the district court plays in calculating the range and the relative ease of correcting the error. Unlike "case[s] where trial strategies, in retrospect, might be criticized for leading to a harsher sentence," Guidelines miscalculations ultimately result from judicial error. *Glover*, 531 U. S., at 204; see also *Peugh*, 569 U. S., at 537. That was especially so here where the District Court's error in imposing Rosales-Mireles' sentence was based on a mistake made in the presentence investigation report by the Probation Office, which works on behalf of the District Court. Moreover, "a remand for resentencing, while not costless, does not invoke the same difficulties as a remand for retrial does." *Molina-Martinez*, 578 U. S., at 204 (internal quotation marks omitted). "A resentencing is a brief event, normally taking less than a day and requiring the attendance of only the defendant, counsel, and court personnel." *United States* v. *Williams*, 399 F. 3d 450, 456 (CA2 2005).

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Ensuring the accuracy of Guidelines determinations also serves the purpose of "providing certainty and fairness in sentencing" on a greater scale. 28 U. S. C. § 994(f); see also § 991(b)(1)(B); *Booker*, 543 U. S., at 264. The Guidelines assist federal courts across the country in achieving uniformity and proportionality in sentencing. See *Rita*, 551 U. S., at 349. To realize those goals, it is important that sentencing proceedings actually reflect the nature of the offense and criminal history of the defendant, because the United States Sentencing Commission relies on data developed during sentencing proceedings, including information in the presentence investigation report, to determine whether revisions to the Guidelines are necessary. See *id.*, at 350. When sen-

tences based on incorrect Guidelines ranges go uncorrected, the Commission's ability to make appropriate amendments is undermined.[2]

In broad strokes, the public legitimacy of our justice system relies on procedures that are "neutral, accurate, consistent, trustworthy, and fair," and that "provide opportunities for error correction." Bowers & Robinson, Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility, 47 Wake Forest L. Rev. 211, 215–216 (2012). In considering claims like Rosales-Mireles', then, "what reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise that threaten to require individuals to linger longer in federal prison than the law demands?" *United States* v. *Sabillon-Umana*, 772 F. 3d 1328, 1333–1334 (CA10 2014) (Gorsuch, J.). In the context of a plain Guidelines error that affects substantial rights, that diminished view of the proceedings ordinarily will satisfy *Olano*'s fourth prong, as it does in this case.[3] As the Fifth Circuit itself concluded, there is a reasonable probability that, without correction of

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[2] Similarly, the work of the Federal Bureau of Prisons is hindered by uncorrected Guidelines errors, because the Bureau relies, in part, on aspects of the Guidelines calculation in designating and classifying prisoners based on security and program needs. See Federal Bureau of Prisons, Program Statement No. P5100.08, Subject: Inmate Security Designation and Custody Classification, ch. 2, p. 1, ch. 4, p. 8, ch. 6, p. 5 (Sept. 12, 2006).

[3] The dissent maintains that "adhering to procedure" does not have "prime importance for purposes of the fourth prong" because the Court has held in some instances, where the error was not likely to have affected the substantive outcome, that the procedural error alone did not satisfy *Olano*'s fourth prong. *Post,* at 151–152 (opinion of Thomas, J.) (citing *Johnson* v. *United States*, 520 U. S. 461 (1997); *United States* v. *Cotton*, 535 U. S. 625 (2002); *United States* v. *Marcus*, 560 U. S. 258 (2010)). The cases on which the dissent relies do not stand for the view, however, that procedural errors are unimportant or could never satisfy *Olano*'s fourth prong, especially where, as here, the defendant has shown a likelihood that the error affected the substantive outcome.

the Guidelines error, Rosales-Mireles will spend more time in prison than the District Court otherwise would have considered necessary. 850 F. 3d, at 249. That error was based on a mistake by the Probation Office, a mistake that can be remedied through a relatively inexpensive resentencing proceeding.

Of course, any exercise of discretion at the fourth prong of *Olano* inherently requires "a case-specific and fact-intensive" inquiry. *Puckett* v. *United States*, 556 U. S. 129, 142 (2009); see also *Young*, 470 U. S., at 16–17, n. 14. There may be instances where countervailing factors satisfy the court of appeals that the fairness, integrity, and public reputation of the proceedings will be preserved absent correction. But on the facts of this case, there are no such factors.[4]

III

The United States and the dissent agree with Rosales-Mireles that the Fifth Circuit's formulation of the standard for the exercise of discretion under Rule 52(b) "is an inaccurate description" of *Olano*'s fourth prong. Brief for United States 34; *post*, at 146, n. 1 (opinion of THOMAS, J.) ("[T]he Fifth Circuit's standard is higher than the one articulated in this Court's precedents"). They nevertheless maintain that Rosales-Mireles is not entitled to relief. We are unpersuaded, though a few points merit brief discussion.

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First, the United States and the dissent caution that a grant of relief in Rosales-Mireles' case and in others like his would be inconsistent with the Court's statements that discretion under Rule 52(b) should be exercised "sparingly," *Jones* v. *United States*, 527 U. S. 373, 389 (1999), and reserved

[4] As the dissent points out, *post*, at 153, a defendant bears the "burden to persuade the court that the error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Vonn*, 535 U. S. 55, 63 (2002) (internal quotation marks omitted). In the ordinary case, proof of a plain Guidelines error that affects the defendant's substantial rights is sufficient to meet that burden.

for "exceptional circumstances," *Atkinson*, 297 U. S., at 160. As an initial matter, *Jones* and the cases it relies on for the point that discretion should be exercised "sparingly" would have required additional jury proceedings on remand, either at resentencing or retrial. See 527 U. S., at 384, 389; see also *Young*, 470 U. S. 1; *United States* v. *Frady*, 456 U. S. 152 (1982); *Henderson* v. *Kibbe*, 431 U. S. 145 (1977). As we have explained, a decision remanding a case to the district court for resentencing on the basis of a Guidelines miscalculation is far less burdensome than a retrial, or other jury proceedings, and thus does not demand such a high degree of caution.

In any event, the circumstances surrounding Rosales-Mireles' case are exceptional within the meaning of the Court's precedent on plain-error review, as they are reasonably likely to have resulted in a longer prison sentence than necessary and there are no countervailing factors that otherwise further the fairness, integrity, or public reputation of judicial proceedings. The fact that, as a result of the Court's holding, most defendants in Rosales-Mireles' situation will be eligible for relief under Rule 52(b) does not justify a decision that ignores the harmful effects of allowing the error to persist.

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Second, the United States and the dissent assert that, because Rosales-Mireles' sentence falls within the corrected Guidelines range, the sentence is presumptively reasonable and "less likely to indicate a serious injury to the fairness, integrity, or public reputation of judicial proceedings." Brief for United States 20–21; see also *post*, at 154. A substantive reasonableness determination, however, is an entirely separate inquiry from whether an error warrants correction under plain-error review.

Before a court of appeals can consider the substantive reasonableness of a sentence, "[i]t must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range." *Gall*, 552 U. S., at 51. This makes eminent

sense, for the district court is charged in the first instance with determining whether, taking all sentencing factors into consideration, including the correct Guidelines range, a sentence is "sufficient, but not greater than necessary." 18 U. S. C. § 3553(a). If the district court is unable properly to undertake that inquiry because of an error in the Guidelines range, the resulting sentence no longer bears the reliability that would support a "presumption of reasonableness" on review. See *Gall*, 552 U. S., at 51. Likewise, regardless of its ultimate reasonableness, a sentence that lacks reliability because of unjust procedures may well undermine public perception of the proceedings. See Hollander-Blumoff, The Psychology of Procedural Justice in the Federal Courts, 63 Hastings L. J. 127, 132–134 (2011) (compilation of psychology research showing that the fairness of procedures influences perceptions of outcomes). The mere fact that Rosales-Mireles' sentence falls within the corrected Guidelines range does not preserve the fairness, integrity, or public reputation of the proceedings.[5]

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Third, the United States and the dissent contend that our decision "creates the very opportunity for 'sandbagging' that Rule 52(b) is supposed to prevent." *Post*, at 149; Brief for United States 17–18, 27. But that concern fails to account for the realities at play in sentencing proceedings. As this Court repeatedly has explained, "the Guidelines are 'the starting point for every sentencing calculation in the federal system,'" *Hughes* v. *United States*, 584 U. S. 675, 686 (2018) (quoting *Peugh*, 569 U. S., at 542). It is hard to imagine that defense counsel would "deliberately forgo objection *now*" to

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[5] The dissent's discussion of Rosales-Mireles' criminal history, *post*, at 153–154, misses the point. That history is relevant to the District Court's determination of an appropriate sentence under 18 U. S. C. § 3553(a). It does not help explain whether the plain procedural error in Rosales-Mireles' sentencing proceedings, which may have resulted in a longer sentence than is justified in light of that history, seriously affects the fairness, integrity, or public reputation of judicial proceedings.

a plain Guidelines error that would subject her client to a higher Guidelines range, "because [counsel] perceives some slightly expanded chance to argue for 'plain error' *later*." *Henderson* v. *United States*, 568 U. S. 266, 276 (2013) (emphasis in original). Even setting aside the conflict such a strategy would create with defense counsel's ethical obligations to represent her client vigorously and her duty of candor toward the court, any benefit from such a strategy is highly speculative. There is no guarantee that a court of appeals would agree to a remand, and no basis to believe that a district court would impose a lower sentence upon resentencing than the court would have imposed at the original sentencing proceedings had it been aware of the plain Guidelines error.

IV

For the foregoing reasons, we conclude that the Fifth Circuit abused its discretion in applying an unduly burdensome articulation of *Olano*'s fourth prong and declining to remand Rosales-Mireles' case for resentencing. In the ordinary case, as here, the failure to correct a plain Guidelines error that affects a defendant's substantial rights will seriously affect the fairness, integrity, and public reputation of judicial proceedings. The judgment of the Court of Appeals is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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JUSTICE THOMAS, with whom JUSTICE ALITO joins, dissenting.

The Court holds that, "in the ordinary case," a miscalculation of the advisory Sentencing Guidelines range will "seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Ante*, at 132. In other words, a defendant who does not alert the district court to a plain miscalculation of his Guidelines range—and is not happy with

the sentence he receives—can raise the Guidelines error for the first time on appeal and ordinarily get another shot at a more favorable sentence. The Court's decision goes far beyond what was necessary to answer the question presented.[1] And it contravenes long-established principles of plain-error review. I respectfully dissent.

I

Under Federal Rule of Criminal Procedure 52(b), "[a] plain error that affects substantial rights *may* be considered even though it was not brought to the court's attention." (Emphasis added.) The "point of the plain-error rule" is to "requir[e] defense counsel to be on his toes." *United States* v. *Vonn*, 535 U. S. 55, 73 (2002). Its demanding standard is meant to "encourage timely objections and reduce wasteful reversals by demanding strenuous exertion to get relief for unpreserved error." *United States* v. *Dominguez Benitez*, 542 U. S. 74, 82 (2004). If the standard were not stringent, there would be nothing "prevent[ing] a litigant from '"sandbagging"' the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor." *Puckett* v. *United States*, 556 U. S. 129, 134 (2009). Satisfying the plain-error standard "is difficult, 'as it should be.'" *Id.*, at 135.

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This Court has held that Rule 52(b) is satisfied only when four requirements are met: "(1) there is 'an error,' (2) the error is 'plain,'" "(3) the error 'affect[s] substantial rights,'" and "(4) . . . 'the error "seriously affect[s] the fairness, integ-

[1] We granted certiorari to decide whether "the fourth prong of plain error review [demands], as the Fifth Circuit Court of Appeals required, that the error be one that 'would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge.'" Pet. for Cert. i; 582 U. S. 967 (2017). Although I doubt it changed the outcome in any case, I agree that the Fifth Circuit's standard is higher than the one articulated in this Court's precedents—at least to the extent it requires an uncorrected error to "shock the conscience." See *ante*, at 136–138.

rity or public reputation of judicial proceedings."'" *Henderson* v. *United States*, 568 U. S. 266, 272 (2013). The fourth requirement—the one at issue here—is discretionary. *Ibid.* It should "be applied on a case-specific and fact-intensive basis." *Puckett*, *supra*, at 142. And it cannot be satisfied by "a plain error affecting substantial rights . . . , without more, . . . for otherwise the discretion afforded by Rule 52(b) would be illusory." *United States* v. *Olano*, 507 U. S. 725, 737 (1993). Instead, "only 'particularly egregious errors'" will meet the fourth prong's rigorous standard. *United States* v. *Young*, 470 U. S. 1, 15 (1985) (quoting *United States* v. *Frady*, 456 U. S. 152, 163 (1982)); see also *United States* v. *Atkinson*, 297 U. S. 157, 160 (1936) (explaining that courts should provide relief under plain-error review only in "exceptional circumstances").

II

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The Court holds that Guidelines errors will "ordinar[ily]" satisfy the fourth prong of plain-error review. *Ante*, at 145. This result contravenes several established principles from our precedents.

To begin, the Court's decision is at odds with the principle that the fourth prong of plain-error review "be applied on a case-specific and fact-intensive basis." *Puckett*, *supra*, at 142. By holding that a Guidelines error "ordinarily will satisfy [the] fourth prong" absent "countervailing factors," *ante*, at 141–142, the Court creates what is essentially a rebuttable presumption that plain Guidelines errors satisfy Rule 52(b). And, based on the Court's application of it today, this presumption certainly must be difficult to rebut. The Court matter-of-factly asserts, in a single sentence with no analysis, that "there are no [countervailing] factors" in this case that counsel in favor of affirmance. *Ante*, at 142. It does so without even discussing the particular details of the defendant's crime, what happened at his sentencing, the reasoning that the District Court employed, the difference between the

defendant's calculated Guidelines range and the correct one, or where his sentence fell relative to the correct Guidelines range. This approach is neither "case-specific" nor "fact-intensive." *Puckett*, *supra*, at 142. The Court candidly admits as much. See *ante*, at 142, n. 4. But this is exactly the kind of "'*per se* approach to plain-error review'" that we have consistently rejected. *Puckett*, *supra*, at 142.

The Court's rebuttable presumption also renders the fourth prong of plain-error review "illusory" in most Guidelines cases. *Olano*, *supra*, at 737. The Court expressly states that Guidelines errors will satisfy the fourth prong in "the ordinary case." *Ante*, at 145. But this Court has repeatedly held that the fourth prong limits courts' discretion to "correct[ing] only 'particularly egregious errors.'" *Young*, *supra*, at 15. Because Rule 52(b) "'is not a run-of-the-mill remedy,'" *Frady*, *supra*, at 163, n. 14, relief should be granted "sparingly" in "'the rare case,'" *Jones* v. *United States*, 527 U. S. 373, 389 (1999), and only in "exceptional circumstances," *Atkinson*, *supra*, at 160. Today's decision turns that principle on its head by making relief available "in the ordinary case." *Ante*, at 132.

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The Court asserts that relief under plain-error review need not be exceptional or rare when a remand would not require "additional jury proceedings." *Ante*, at 143. But that distinction has no basis in the text of Rule 52(b) or this Court's precedents. The only Rule 52(b) precedent that the Court cites for this assertion is *Molina-Martinez* v. *United States*, 578 U. S. 189, 204 (2016). See *ante*, at 140. That decision rejected the Fifth Circuit's categorical rule requiring defendants to present "additional evidence" (beyond the Guidelines error itself) to prove prejudice under the third prong of plain-error review. See 578 U. S., at 197. In dicta it suggested that, "in the ordinary case," the Guidelines error would be enough to satisfy the third prong's requirement that the error affect substantial rights. *Id.*, at 204. And it rebuffed the Government's pragmatic "concern over

the judicial resources needed" if Guidelines errors usually satisfy the third prong of plain-error review. *Id.*, at 203. But *Molina-Martinez* did not discuss the fourth prong of plain-error review, which is at issue here and is an independent requirement, see *Olano*, *supra*, at 737. Nor did it relax the plain-error standard whenever reversal would not require "additional jury proceedings." *Ante*, at 143. Thus, *Molina-Martinez* gives no support to the Court's innovation.

Additionally, the Court's encouragement of remands based on ordinary Guidelines errors undermines "the policies that underpin Rule 52(b)." *Dominguez Benitez*, 542 U. S., at 82. As explained, the plain-error standard encourages defendants to make timely objections in order to avoid sandbagging and to prevent wasteful reversals and remands. After today, however, most defendants who fail to object to a Guidelines error will be in virtually the same position as those who do. Today's decision, especially when combined with *Molina-Martinez*, means that plain Guidelines errors will satisfy Rule 52(b) in all but the unusual case. That creates the very opportunity for "sandbagging" that Rule 52(b) is supposed to prevent, *Puckett*, 556 U. S., at 134 (internal quotation marks omitted), by allowing a defendant who is aware of a mistake in the presentence report to "simply relax and wait to see if the sentence later str[ikes] him as satisfactory," *Vonn*, 535 U. S., at 73. Oddly, defendants who do not object to a Guidelines error could be in a better position than ones who do. An objection would give the district court a chance to explain why it would "arrive at the same sentencing conclusion" even if the defendant was correct about an alleged Guidelines error, which would "mak[e] clear" that the Guidelines error did not "adversely affect the defendant's ultimate sentence." *United States* v. *Sabillon-Umana*, 772 F. 3d 1328, 1334 (CA10 2014). Today's decision thus inverts Rule 52(b) by giving defendants an incentive to withhold timely objections and "'game' the system." *Puckett*, *supra*, at 140.

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III

Even if it were appropriate to create rebuttable presumptions under the fourth prong of plain-error review, the Court is wrong to conclude that the "ordinary" Guidelines error will "seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Ante*, at 132. Whether a district court's failure to correctly calculate the advisory Guidelines range satisfies the fourth prong of plain-error review will depend on the circumstances of each case. And the circumstances of this case prove the folly of the Court's presumption.

A

The Court asserts that plain Guidelines errors must ordinarily be corrected to ensure that defendants do not "linger longer in federal prison than the law demands." *Ante*, at 141 (internal quotation marks omitted). But the Guidelines are not "law." They neither "define criminal offenses" nor "fix the permissible sentences for criminal offenses." *Beckles* v. *United States*, 580 U. S. 256, 262 (2017) (emphasis deleted). Instead, they are purely "advisory" and "merely guide the district courts' discretion." *Id.*, at 265. They provide advice about what sentencing range the Sentencing Commission believes is appropriate, "but they 'do not constrain'" district courts. *Ibid.* Accordingly, district courts are free to disagree with the Guidelines range, for reasons as simple as a policy disagreement with the Sentencing Commission. See *Pepper* v. *United States*, 562 U. S. 476, 501 (2011); 18 U. S. C. §3661. In fact, district courts commit reversible error if they "trea[t] the Guidelines as mandatory." *Gall* v. *United States*, 552 U. S. 38, 51 (2007). Although the Guidelines range is one of the factors that courts must consider at sentencing, 18 U. S. C. §3553(a), judges need not give the Guidelines range any particular weight. The only thing that "the law demands" is that a defendant's sentence be substantively reasonable and within the applicable statutory range.

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See *Jones* v. *United States*, 574 U. S. 948, 948–950 (2014) (Scalia, J., dissenting from denial of certiorari); *Kimbrough* v. *United States*, 552 U. S. 85, 113–114 (2007) (Scalia, J., concurring).

The Court also justifies its presumption by repeatedly stressing the importance of procedural rules to the public's perception of judicial proceedings. See *ante*, at 141 ("[T]he public legitimacy of our justice system relies on procedures"); *ante*, at 144 ("[U]njust procedures may well undermine public perception of [sentencing] proceedings"). It even cites a hodgepodge of psychological studies on procedural justice. *Ibid.* (citing Hollander-Blumoff, The Psychology of Procedural Justice in the Federal Courts, 63 Hastings L. J. 127, 132–134 (2011) (Hollander-Blumoff)).

Putting aside the obvious problems with this research,[2] the Court contradicts our precedents by suggesting that adhering to procedure has prime importance for purposes of the fourth prong. This Court has repeatedly concluded that purely procedural errors—ones that likely did not affect the

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[2] The article that the Court cites makes broad claims based on limited research. For instance, the article states that, "[w]hen people feel that they have received fair treatment, they are more likely to adhere to, accept, and feel satisfied with a given outcome, and to view the system that gave rise to that outcome as legitimate." Hollander-Blumoff 134. But the only support it provides for that proposition is a telephone survey of a few hundred Chicago residents. See *id.*, at 134, n. 37 (citing T. Tyler, Why People Obey the Law 162 (2006)); see also *id.*, at 8–15 (explaining the study's methodology). The article also draws conclusions about the general importance of "procedural justice" in court, based on marginally relevant studies of noncourt settings such as "arbitration and mediation," interactions with "police officers" and "work supervisors," and "highly relational settings like the family." See Hollander-Blumoff 132–134. Crucially, none of this research has any bearing on the far more complicated question of "procedural justice" at issue here: whether it is presumptively unfair to penalize a defendant who fails to object to an error until appeal. The contemporaneous-objection rule, after all, is also a procedural rule that affects the fairness, integrity, and reputation of judicial proceedings.

substantive outcome—do not satisfy the fourth prong of plain-error review. In *Johnson* v. *United States*, 520 U. S. 461 (1997), for example, the District Court failed to submit a materiality element to the jury, but this Court found that the fourth prong of plain-error review was not satisfied because "the evidence supporting materiality was 'overwhelming.'" *Id.*, at 470. Reversal based on errors that have no actual "'effect on the judgment,'" this Court explained, "'encourages litigants to abuse the judicial process and bestirs the public to ridicule it.'" *Ibid.* (quoting R. Traynor, The Riddle of Harmless Error 50 (1970)). Similarly, in *United States* v. *Cotton*, 535 U. S. 625 (2002), the indictment failed to allege a fact that increased the statutory maximum, but the evidence of that fact "was 'overwhelming' and 'essentially uncontroverted.'" *Id.*, at 633. This Court held that reversing a defendant's sentence based on such a technicality would be "[t]he real threat . . . to the 'fairness, integrity, and public reputation of judicial proceedings.'" *Id.*, at 634. And in *United States* v. *Marcus*, 560 U. S. 258 (2010), the Second Circuit had held that an *ex post facto* error automatically satisfies the plain-error standard, "'no matter how unlikely'" it was that the jury actually convicted the defendant based on conduct that predated the statute of conviction. *Id.*, at 261 (emphasis deleted). In reversing that decision, this Court emphasized that, "in most circumstances, an error that does not affect the jury's verdict does not significantly impugn the 'fairness,' 'integrity,' or 'public reputation' of the judicial process." *Id.*, at 265–266. Thus, the Court is mistaken when it asserts that, because Guidelines errors are procedural mistakes, they are particularly likely to implicate the fourth prong of plain error.

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B

While the Court holds that the ordinary Guidelines error will satisfy the fourth prong of plain-error review, it admits that there can be "instances where countervailing factors"

preclude defendants from satisfying the fourth prong. *Ante*, at 142. Because the Court does not question our existing plain-error precedents, see *ante*, at 142–143, the burden presumably remains on defendants to establish that there are no such countervailing factors, and to persuade the appellate court that any countervailing factor identified by the Government is insufficient. See *Vonn*, 535 U. S., at 63 ("[A] defendant has the further burden to persuade the court that the error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" (internal quotation marks omitted)); *Dominguez Benitez*, 542 U. S., at 82 ("[T]he burden of establishing entitlement to relief for plain error is on the defendant claiming it"). But the Court does not explain what the defendant in this case has done to satisfy his burden.

If this case is an ordinary one, it highlights the folly of the Court's new rebuttable presumption. Petitioner Florencio Rosales-Mireles has a penchant for entering this country illegally and committing violent crimes—especially against women. A Mexican citizen, Rosales-Mireles entered the United States illegally in 1997. In 2002, he was convicted of assault for throwing his girlfriend to the floor of their apartment and dragging her outside by her hair. In 2009, he was convicted of aggravated assault with serious bodily injury and assault causing bodily injury to a family member.[3] His convictions stemmed from an altercation in which he attempted to stab one man and did stab another—once in the shoulder and twice in the chest. In January 2010, Rosales-Mireles was removed to Mexico. But that same month he reentered the United States illegally. In 2015, he was convicted in Texas state court of assaulting his wife and 14-

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[3] These assaults occurred in 2001, but Rosales-Mireles was not arrested for years—apparently because he was going by the name "Emilio Ruiz" at the time of the assaults. When Rosales-Mireles was eventually arrested in 2009, he had two outstanding warrants for other assaults of his wife.

year-old son. During the altercation, Rosales-Mireles grabbed his wife by the hair and punched her in the face repeatedly.

Most recently, Rosales-Mireles pleaded guilty to illegal reentry. See 8 U. S. C. §§ 1326(a), (b)(2). The District Court sentenced him to 78 months in prison, which was within the Guidelines range he argued for on appeal. See *ante*, at 135. In choosing that sentence, the District Court emphasized that it was "the second time he's come to the courts for being here illegally"; that he had "attempted to hide in the United States with multiple aliases, birth dates, [and] Social Security numbers"; and that his "assaultive behavior" spanned from "at least . . . 2001 to 2015." App. 20.

The sentence that Rosales-Mireles received was not only within both the improperly and properly calculated Guidelines ranges but also in the bottom half of both possible ranges. See *ante*, at 135. If the District Court had used the proper Guidelines range at his initial sentencing, then the sentence that it ultimately gave Rosales-Mireles would have been presumptively reasonable on appeal. See 850 F. 3d 246, 250 (CA5 2017); *Rita* v. *United States*, 551 U. S. 338, 347 (2007). And the Fifth Circuit determined that his sentence was in fact reasonable. See 850 F. 3d, at 250–251. Leaving that reasonable sentence in place would not "'seriously affect the fairness, integrity or public reputation of judicial proceedings.'" *Young*, 470 U. S., at 15. A sentence that is substantively reasonable is hardly the kind of "particularly egregious erro[r]" that warrants plain-error relief. *Frady*, 456 U. S., at 163.

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* * *

Rule 52(b) strikes a "careful balance . . . between judicial efficiency and the redress of injustice." *Puckett*, 556 U. S., at 135. Because today's decision upsets that balance for scores of cases involving Guidelines errors, I respectfully dissent.

Syllabus

BENISEK ET AL. *v.* LAMONE, ADMINISTRATOR, MARYLAND STATE BOARD OF ELECTIONS, ET AL.

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

No. 17–333. Argued March 28, 2018—Decided June 18, 2018

Appellants (plaintiffs below) are Republican voters who allege that Maryland's Sixth Congressional District was gerrymandered in 2011 as political retaliation. In May 2017, six years after the Maryland General Assembly redrew the Sixth District, appellants moved the District Court to enjoin Maryland's election officials from holding congressional elections under the 2011 map, and they urged the court to enter a preliminary injunction by August 18 to allow time for the creation of a new districting map. The District Court denied the motion on August 24—finding that plaintiffs had failed to show a likelihood of success on the merits—and stayed further proceedings pending this Court's disposition of partisan gerrymandering claims in *Gill* v. *Whitford*, *ante*, p. 48. Appellants ask this Court to vacate the District Court's order and remand for further consideration of whether a preliminary injunction is appropriate.

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Held: Under the circumstances here, the District Court's decision to deny a preliminary injunction was not an abuse of discretion. A preliminary injunction does not follow as a matter of course from a plaintiff's showing of a likelihood of success on the merits. A court must also consider, among other things, whether the movant has shown "that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. 7, 20. Here, those considerations tilt against appellants' request. First, a party requesting a preliminary injunction—in election cases as elsewhere—must generally show reasonable diligence. Cf. *Holmberg* v. *Armbrecht*, 327 U. S. 392, 396. Here appellants did not seek a preliminary injunction in the District Court until six years, and three general elections, after the 2011 map was adopted, and over three years after they filed their first complaint. Appellants attribute their delay to a convoluted case history and discovery delays, but the delay largely arose from a circumstance within their control: namely, their failure to plead the claims giving rise to their request for injunctive relief until 2016. Appellants' unnecessary, years-long delay in seeking injunctive relief weighed against their request. Second, a due regard for the public in-

terest in orderly elections supported the District Court's decision. See *Purcell* v. *Gonzalez*, 549 U. S. 1, 4–5. Appellants represented that any injunctive relief would have to be granted by August 18, 2017, to ensure the timely completion of a new districting scheme in advance of the 2018 election season. The District Court could not act within that time constraint, and determined it would be a mistake to adjudicate plaintiffs' claims in a fluctuating legal environment when this Court's forthcoming decision in *Gill* might provide firmer guidance. That determination was within the sound discretion of the District Court, which could have reasonably concluded that an injunction would have been against the public's interest in an orderly electoral process.

266 F. Supp. 3d 799, affirmed.

Michael B. Kimberly argued the cause for appellants. With him on the briefs was *Paul W. Hughes.*

Steven M. Sullivan, Solicitor General of Maryland, argued the cause for appellees. With him on the brief were *Brian E. Frosh*, Attorney General of Maryland, *Adam D. Snyder*, Deputy Chief of Litigation, and *Sarah W. Rice*, *Jennifer L. Katz*, and *Andrea W. Trento*, Assistant Attorneys General.*

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Theresa J. Lee*, *T. Alora Thomas*, *Dale E. Ho*, *Cecillia D. Wang*, *Deborah A. Jeon*, *David D. Cole*, *Arthur N. Eisenberg*, *Perry M. Grossman*, and *Samuel Issacharoff*; for Bipartisan Current and Former Members of Congress by *Elizabeth B. Wydra*, *Brianne J. Gorod*, and *David H. Gans*; for the Brennan Center for Justice at N. Y. U. School of Law by *Vincent Levy*, *Gregory Dubinsky*, *Matthew V. H. Noller*, *Wendy R. Weiser*, *Michael C. Li*, and *Thomas P. Wolf*; for Common Cause by *Emmet J. Bondurant*, *Gregory L. Diskant*, and *Jonah M. Knobler*; for the International Municipal Lawyers Association et al. by *G. Michael Parsons, Jr.*, *Corey W. Roush*, *Charles W. Thompson, Jr.*, and *Amanda Kellar Karras*; and for Stephen M. Shapiro by *Alan B. Morrison.*

Briefs of *amici curiae* urging affirmance were filed for the State of Michigan et al. by *Bill Schuette*, Attorney General of Michigan, and *Aaron D. Lindstrom*, Solicitor General, and by the Attorneys General for their respective States as follows: *Leslie Rutledge* of Arkansas, *Cynthia Coffman* of Colorado, *Christopher M. Carr* of Georgia, *Curtis T. Hill, Jr.*, of Indiana, *Jeff Landry* of Louisiana, *Joshua D. Hawley* of Missouri, *Michael DeWine* of Ohio, *Mike Hunter* of Oklahoma, *Alan Wilson* of South Carolina, *Ken Paxton* of Texas, and *Sean D. Reyes* of Utah; for the State of Wisconsin by *Brad D. Schimel*, Attorney General of Wisconsin, *Misha Tseytlin*, Solicitor General, *Kevin M. LeRoy*, Deputy Solicitor General,

PER CURIAM.

This appeal arises from the denial of a motion for a preliminary injunction in the District Court. Appellants are several Republican voters, plaintiffs below, who allege that Maryland's Sixth Congressional District was gerrymandered in 2011 for the purpose of retaliating against them for their political views.

In May 2017, six years after the Maryland General Assembly redrew the Sixth District, plaintiffs moved the District Court to enjoin Maryland's election officials from holding congressional elections under the 2011 map. They asserted that "extend[ing] this constitutional offense"—*i. e.*, the alleged gerrymander—"into the 2018 election would be a manifest and irreparable injury." Record in No. 1:13–cv–3233, Doc. 177–1, p. 3. In order to allow time for the creation of a new districting map, plaintiffs urged the District Court to enter a preliminary injunction by August 18, 2017. *Id.*, at 32.

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On August 24, 2017, the District Court denied plaintiffs' motion and stayed further proceedings pending this Court's disposition of partisan gerrymandering claims in *Gill* v. *Whitford*, *ante*, p. 48. 266 F. Supp. 3d 799. The District Court found that plaintiffs had failed to show a likelihood of success on the merits sufficient to warrant a preliminary injunction. *Id.*, at 808–814. The District Court also held

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Amy C. Miller, Assistant Solicitor General, and *Brian P. Keenan*, Assistant Attorney General; for Freedom Partners Chamber of Commerce by *Douglas R. Cox* and *Amir C. Tayrani*; and for Sen. Joseph B. Scarnati III by *Jason Torchinsky* and *Brian S. Paszamant*.

Briefs of *amici curiae* were filed for the Campaign Legal Center et al. by *Paul M. Smith*, *Ruth M. Greenwood*, *Nicholas O. Stephanopoulos*, and *Allison J. Riggs*; for Governor Lawrence Joseph Hogan, Jr., et al. by *James C. Martin*, *Colin E. Wrabley*, *M. Patrick Yingling*, *Brian A. Sutherland*, and *Benjamin R. Fliegel*; for Judicial Watch, Inc., et al. by *Robert D. Popper*, *Chris Fedeli*, and *T. Russell Nobile*; for the National Association for the Advancement of Colored People, Inc., et al. by *Kristin Clarke*, *Jon Greenbaum*, *Ezra D. Rosenberg*, *William V. Custer*, *Jennifer B. Dempsey*, and *Khyla D. Craine*; and for Michael Kang by *Daniel F. Kolb*.

that it was "in no position to award [p]laintiffs the remedy they . . . requested on the timetable they . . . demanded." *Id.*, at 815. The court explained that, notwithstanding its "diligence in ruling on the pending preliminary injunction motion (which has been a priority for each member of this panel)," plaintiffs' proposed August deadline for injunctive relief had "already come and gone." *Ibid.*

In addition, the District Court emphasized that it was concerned about "measuring the legality and constitutionality of any redistricting plan in Maryland . . . according to the proper legal standard." *Id.*, at 816. In the District Court's view, it would be "better equipped to make that legal determination and to chart a wise course for further proceedings" after this Court issued a decision in *Gill*. 266 F. Supp. 3d, at 816. Plaintiffs ask this Court to vacate the District Court's order and remand for further consideration of whether a preliminary injunction is appropriate.

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We now note our jurisdiction and review the District Court's decision for an abuse of discretion, keeping in mind that a preliminary injunction is "an extraordinary remedy never awarded as of right." *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. 7, 24 (2008). As a matter of equitable discretion, a preliminary injunction does not follow as a matter of course from a plaintiff's showing of a likelihood of success on the merits. See *id.*, at 32. Rather, a court must also consider whether the movant has shown "that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.*, at 20.

Plaintiffs made no such showing below. Even if we assume—contrary to the findings of the District Court—that plaintiffs were likely to succeed on the merits of their claims, the balance of equities and the public interest tilted against their request for a preliminary injunction.

First, a party requesting a preliminary injunction must generally show reasonable diligence. Cf. *Holmberg* v. *Armbrecht*, 327 U. S. 392, 396 (1946). That is as true in election law cases as elsewhere. See *Lucas* v. *Townsend*, 486 U. S. 1301, 1305 (1988) (KENNEDY, J., in chambers); *Fishman* v. *Schaffer*, 429 U. S. 1325, 1330 (1976) (Marshall, J., in chambers). In this case, appellants did not move for a preliminary injunction in the District Court until six years, and three general elections, after the 2011 map was adopted, and over three years after the plaintiffs' first complaint was filed.

Plaintiffs argue that they have nevertheless pursued their claims diligently, and they attribute their delay in seeking a preliminary injunction to the "convoluted procedural history of the case" and the "dogged refusal to cooperate in discovery" by state officials. Reply Brief 22. Yet the record suggests that the delay largely arose from a circumstance within plaintiffs' control: namely, their failure to plead the claims giving rise to their request for preliminary injunctive relief until 2016. Although one of the seven plaintiffs before us filed a complaint in 2013 alleging that Maryland's congressional map was an unconstitutional gerrymander, that initial complaint did not present the retaliation theory asserted here. See Amended Complaint, Doc. 11, p. 3 (Dec. 2, 2013) (explaining that the gerrymandering claim did not turn upon "the reason or intent of the legislature" in adopting the map).

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It was not until 2016 that the remaining plaintiffs joined the case and filed an amended complaint alleging that Maryland officials intentionally retaliated against them because of their political views. See 3 App. 640–643. Plaintiffs' newly presented claims—unlike the gerrymandering claim presented in the 2013 complaint—required discovery into the motives of the officials who produced the 2011 congressional map. See, *e. g.*, Memorandum of Law in Support of Plaintiffs' Motion To Compel, Doc. 111–1, p. 3 (Jan. 4, 2017) (describing plaintiffs' demand that various state officials "tes-

tify . . . and answer questions concerning legislative intent"). It is true that the assertion of legislative privilege by those officials delayed the completion of that discovery. See Joint Motion To Extend Deadlines for Completion of Fact Discovery and Expert Witness Disclosures, Doc. 161, pp. 1–2 (Mar. 3, 2017); Joint Motion To Extend Deadlines for Completion of Fact Discovery and Expert Witness Disclosures, Doc. 170, pp. 1–2 (Mar. 27, 2017). But that does not change the fact that plaintiffs could have sought a preliminary injunction much earlier. See *Fishman*, *supra*, at 1330. In considering the balance of equities among the parties, we think that plaintiffs' unnecessary, years-long delay in asking for preliminary injunctive relief weighed against their request.

Second, a due regard for the public interest in orderly elections supported the District Court's discretionary decision to deny a preliminary injunction and to stay the proceedings. See *Purcell* v. *Gonzalez*, 549 U. S. 1, 4–5 (2006) (*per curiam*). Plaintiffs themselves represented to the District Court that any injunctive relief would have to be granted by August 18, 2017, to ensure the timely completion of a new districting scheme in advance of the 2018 election season. Despite the District Court's undisputedly diligent efforts, however, that date had "already come and gone" by the time the court ruled on plaintiffs' motion. 266 F. Supp. 3d, at 815. (Such deadline has also, of course, long since passed for purposes of entering a preliminary injunction on remand from this Court.)

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On top of this time constraint was the legal uncertainty surrounding any potential remedy for the plaintiffs' asserted injury. At the time the District Court made its decision, the appeal in *Gill* was pending before this Court. The District Court recognized that our decision in *Gill* had the potential to "shed light on critical questions in this case" and to set forth a "framework" by which plaintiffs' claims could be decided and, potentially, remedied. 266 F. Supp. 3d, at 815–816. In the District Court's view, "charging ahead" and ad-

judicating the plaintiffs' claims in that fluctuating legal environment, when firmer guidance from this Court might have been forthcoming, would have been a mistake. *Id.*, at 816. Such a determination was within the sound discretion of the District Court. Given the District Court's decision to wait for this Court's ruling in *Gill* before further adjudicating plaintiffs' claims, the court reasonably could have concluded that a preliminary injunction would have been against the public interest, as an injunction might have worked a needlessly "chaotic and disruptive effect upon the electoral process," *Fishman*, *supra*, at 1330, and because the "purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held," *University of Tex.* v. *Camenisch*, 451 U. S. 390, 395 (1981). In these particular circumstances, we conclude that the District Court's decision denying a preliminary injunction cannot be regarded as an abuse of discretion.

The order of the District Court is

Affirmed.

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Syllabus

SOUTH DAKOTA *v.* WAYFAIR, INC., ET AL.

CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

No. 17–494. Argued April 17, 2018—Decided June 21, 2018

South Dakota, like many States, taxes the retail sales of goods and services in the State. Sellers are required to collect and remit the tax to the State, but if they do not then in-state consumers are responsible for paying a use tax at the same rate. Under *National Bellas Hess, Inc.* v. *Department of Revenue of Ill.*, 386 U. S. 753, and *Quill Corp.* v. *North Dakota*, 504 U. S. 298, South Dakota may not require a business that has no physical presence in the State to collect its sales tax. Consumer compliance rates are notoriously low, however, and it is estimated that *Bellas Hess* and *Quill* cause South Dakota to lose between $48 and $58 million annually. Concerned about the erosion of its sales tax base and corresponding loss of critical funding for state and local services, the South Dakota Legislature enacted a law requiring out-of-state sellers to collect and remit sales tax "as if the seller had a physical presence in the State." The Act covers only sellers that, on an annual basis, deliver more than $100,000 of goods or services into the State or engage in 200 or more separate transactions for the delivery of goods or services into the State. Respondents, top online retailers with no employees or real estate in South Dakota, each meet the Act's minimum sales or transactions requirement, but do not collect the State's sales tax. South Dakota filed suit in state court, seeking a declaration that the Act's requirements are valid and applicable to respondents and an injunction requiring respondents to register for licenses to collect and remit the sales tax. Respondents sought summary judgment, arguing that the Act is unconstitutional. The trial court granted their motion. The State Supreme Court affirmed on the ground that *Quill* is controlling precedent.

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Held: Because the physical presence rule of *Quill* is unsound and incorrect, *Quill Corp.* v. *North Dakota*, 504 U. S. 298, and *National Bellas Hess, Inc.* v. *Department of Revenue of Ill.*, 386 U. S. 753, are overruled. Pp. 171–189.

(a) An understanding of this Court's Commerce Clause principles and their application to state taxes is instructive here. Pp. 171–175.

(1) Two primary principles mark the boundaries of a State's authority to regulate interstate commerce: State regulations may not discriminate against interstate commerce; and States may not impose undue burdens on interstate commerce. These principles guide the courts in

adjudicating challenges to state laws under the Commerce Clause. Pp. 172–174.

(2) They also animate Commerce Clause precedents addressing the validity of state taxes, which will be sustained so long as they (1) apply to an activity with a substantial nexus with the taxing State, (2) are fairly apportioned, (3) do not discriminate against interstate commerce, and (4) are fairly related to the services the State provides. See *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, 279. Before *Complete Auto*, the Court held in *Bellas Hess* that a "seller whose only connection with customers in the State is by common carrier or . . . mail" lacked the requisite minimum contacts with the State required by the Due Process Clause and the Commerce Clause, and that unless the retailer maintained a physical presence in the State, the State lacked the power to require that retailer to collect a local tax. 386 U. S., at 758. In *Quill*, the Court overruled the due process holding, but not the Commerce Clause holding, grounding the physical presence rule in *Complete Auto*'s requirement that a tax have a "substantial nexus" with the activity being taxed. Pp. 174–175.

(b) The physical presence rule has long been criticized as giving out-of-state sellers an advantage. Each year, it becomes further removed from economic reality and results in significant revenue losses to the States. These critiques underscore that the rule, both as first formulated and as applied today, is an incorrect interpretation of the Commerce Clause. Pp. 175–183.

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(1) *Quill* is flawed on its own terms. First, the physical presence rule is not a necessary interpretation of *Complete Auto*'s nexus requirement. That requirement is "closely related," *Bellas Hess*, 386 U. S., at 756, to the due process requirement that there be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Miller Brothers Co.* v. *Maryland*, 347 U. S. 340, 344–345. And, as *Quill* itself recognized, a business need not have a physical presence in a State to satisfy the demands of due process. When considering whether a State may levy a tax, Due Process and Commerce Clause standards, though not identical or coterminous, have significant parallels. The reasons given in *Quill* for rejecting the physical presence rule for due process purposes apply as well to the question whether physical presence is a requisite for an out-of-state seller's liability to remit sales taxes. Other aspects of the Court's doctrine can better and more accurately address potential burdens on interstate commerce, whether or not *Quill*'s physical presence rule is satisfied.

Second, *Quill* creates rather than resolves market distortions. In effect, it is a judicially created tax shelter for businesses that limit their physical presence in a State but sell their goods and services to the

State's consumers, something that has become easier and more prevalent as technology has advanced. The rule also produces an incentive to avoid physical presence in multiple States, affecting development that might be efficient or desirable.

Third, *Quill* imposes the sort of arbitrary, formalistic distinction that the Court's modern Commerce Clause precedents disavow in favor of "a sensitive, case-by-case analysis of purposes and effects," *West Lynn Creamery, Inc.* v. *Healy*, 512 U. S. 186, 201. It treats economically identical actors differently for arbitrary reasons. For example, a business that maintains a few items of inventory in a small warehouse in a State is required to collect and remit a tax on all of its sales in the State, while a seller with a pervasive Internet presence cannot be subject to the same tax for the sales of the same items. Pp. 176–180.

(2) When the day-to-day functions of marketing and distribution in the modern economy are considered, it becomes evident that *Quill*'s physical presence rule is artificial, not just "at its edges," 504 U. S., at 315, but in its entirety. Modern e-commerce does not align analytically with a test that relies on the sort of physical presence defined in *Quill*. And the Court should not maintain a rule that ignores substantial virtual connections to the State. Pp. 180–181.

(3) The physical presence rule of *Bellas Hess* and *Quill* is also an extraordinary imposition by the Judiciary on States' authority to collect taxes and perform critical public functions. Forty-one States, two Territories, and the District of Columbia have asked the Court to reject *Quill*'s test. Helping respondents' customers evade a lawful tax unfairly shifts an increased share of the taxes to those consumers who buy from competitors with a physical presence in the State. It is essential to public confidence in the tax system that the Court avoid creating inequitable exceptions. And it is also essential to the confidence placed in the Court's Commerce Clause decisions. By giving some online retailers an arbitrary advantage over their competitors who collect state sales taxes, *Quill*'s physical presence rule has limited States' ability to seek long-term prosperity and has prevented market participants from competing on an even playing field. Pp. 181–183.

(c) *Stare decisis* can no longer support the Court's prohibition of a valid exercise of the States' sovereign power. If it becomes apparent that the Court's Commerce Clause decisions prohibit the States from exercising their lawful sovereign powers, the Court should be vigilant in correcting the error. It is inconsistent with this Court's proper role to ask Congress to address a false constitutional premise of this Court's own creation. The Internet revolution has made *Quill*'s original error all the more egregious and harmful. The *Quill* Court did not have before it the present realities of the interstate marketplace, where the

Syllabus

Internet's prevalence and power have changed the dynamics of the national economy. The expansion of e-commerce has also increased the revenue shortfall faced by States seeking to collect their sales and use taxes, leading the South Dakota Legislature to declare an emergency. The argument, moreover, that the physical presence rule is clear and easy to apply is unsound, as attempts to apply the physical presence rule to online retail sales have proved unworkable.

Because the physical presence rule as defined by *Quill* is no longer a clear or easily applicable standard, arguments for reliance based on its clarity are misplaced. *Stare decisis* may accommodate "legitimate reliance interest[s]," *United States* v. *Ross*, 456 U. S. 798, 824, but a business "is in no position to found a constitutional right . . . on the practical opportunities for tax avoidance," *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, 366. Startups and small businesses may benefit from the physical presence rule, but here South Dakota affords small merchants a reasonable degree of protection. Finally, other aspects of the Court's Commerce Clause doctrine can protect against any undue burden on interstate commerce, taking into consideration the small businesses, startups, or others who engage in commerce across state lines. The potential for such issues to arise in some later case cannot justify retaining an artificial, anachronistic rule that deprives States of vast revenues from major businesses. Pp. 183–188.

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(d) In the absence of *Quill* and *Bellas Hess*, the first prong of the *Complete Auto* test simply asks whether the tax applies to an activity with a substantial nexus with the taxing State, 430 U. S., at 279. Here, the nexus is clearly sufficient. The Act applies only to sellers who engage in a significant quantity of business in the State, and respondents are large, national companies that undoubtedly maintain an extensive virtual presence. Any remaining claims regarding the Commerce Clause's application in the absence of *Quill* and *Bellas Hess* may be addressed in the first instance on remand. Pp. 188–189.

2017 S.D. 56, 901 N. W. 2d 754, vacated and remanded.

KENNEDY, J., delivered the opinion of the Court, in which THOMAS, GINSBURG, ALITO, and GORSUCH, JJ., joined. THOMAS, J., *post*, p. 189, and GORSUCH, J., *post*, p. 190, filed concurring opinions. ROBERTS, C. J., filed a dissenting opinion, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 191.

Marty J. Jackley, Attorney General of South Dakota, argued the cause for petitioner. With him on the briefs were *Richard M. Williams*, Deputy Attorney General, *Kirsten E.*

Jasper, Assistant Attorney General, *Andrew L. Fergel*, *Eric F. Citron*, *Thomas C. Goldstein*, and *Erica Oleszczuk Evans*.

Deputy Solicitor General Stewart argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Francisco*, *Acting Assistant Attorney General Readler*, *Deputy Assistant Attorney General Mooppan*, *Robert A. Parker*, *Mark B. Stern*, and *Nicolas Y. Riley*.

George S. Isaacson argued the cause for respondents. With him on the brief were *Martin I. Eisenstein* and *Matthew P. Schaefer*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Colorado et al. by *Cynthia H. Coffman*, Attorney General of Colorado, *Frederick R. Yarger*, Solicitor General, *Melanie J. Snyder*, Chief Deputy Attorney General, and *Grant T. Sullivan*, Assistant Solicitor General, and by the Attorneys General for their respective jurisdictions as follows: *Steve Marshall* of Alabama, *Mark Brnovich* of Arizona, *Leslie Rutledge* of Arkansas, *Xavier Becerra* of California, *George Jepsen* of Connecticut, *Karl A. Racine* of the District of Columbia, *Pamela Jo Bondi* of Florida, *Christopher M. Carr* of Georgia, *Russell A. Suzuki* of Hawaii, *Lawrence G. Wasden* of Idaho, *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, *Lori Swanson* of Minnesota, *Jim Hood* of Mississippi, *Douglas J. Peterson* of Nebraska, *Adam Paul Laxalt* of Nevada, *Gurbir S. Grewal* of New Jersey, *Hector Balderas* of New Mexico, *Eric T. Schneiderman* of New York, *Josh Stein* of North Carolina, *Wayne Stenehjem* of North Dakota, *Michael DeWine* of Ohio, *Mike Hunter* of Oklahoma, *Ellen F. Rosenblum* of Oregon, *Josh Shapiro* of Pennsylvania, *Wanda Vàzquez-Garced* of Puerto Rico, *Peter F. Kilmartin* of Rhode Island, *Herbert H. Slatery III* of Tennessee, *Ken Paxton* of Texas, *Sean D. Reyes* of Utah, *Thomas J. Donovan, Jr.*, of Vermont, *Claude Earl Walker* of the Virgin Islands, *Mark Herring* of Virginia, *Robert W. Ferguson* of Washington, *Brad Schimel* of Wisconsin, and *Peter K. Michael* of Wyoming; for the City of Little Rock, Arkansas, by *Thomas M. Carpenter*; for Four United States Senators by *Alan B. Morrison* and *Darien Shanske*; for the International Council of Shopping Centers et al. by *Seth P. Waxman*; for Law Professors et al. by *Debra L. Greenberger*; for the Multistate Tax Commission et al. by *Helen Hecht*, *Lila Disque*, *Bruce Fort*, *Richard Cram*, *Gregory S. Matson*, and *Gale Garriott*; for the

JUSTICE KENNEDY delivered the opinion of the Court.

When a consumer purchases goods or services, the consumer's State often imposes a sales tax. This case requires

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National Governors Association et al. by *Tillman J. Breckenridge*, *Lisa Soronen*, and *Patricia E. Roberts*; for the Retail Litigation Center, Inc., by *Donald B. Verrilli, Jr.*, *Deborah White*, *Mark Yohalem*, and *Timothy M. Haake*; for the South Dakota Retailers Association by *William M. Van Camp*; for the Streamlined Sales Tax Governing Board, Inc., by *Laura K. McNally* and *Andrew R. DeVooght*; for the Tax Foundation by *Joseph D. Henchman*; and for Brill et al. by *David W. T. Daniels*.

Briefs of *amici curiae* urging affirmance were filed for the State of Montana by *Timothy C. Fox*, Attorney General of Montana, *Jon Bennion*, Chief Deputy Attorney General, *Dale Schowengerdt*, Solicitor General, and *J. Stuart Segrest*, Assistant Attorney General; for the State of New Hampshire by *Gordon J. MacDonald*, Attorney General of New Hampshire, *Laura E. B. Lombardi*, Senior Assistant Attorney General, and *Anthony J. Galdieri*, Assistant Attorney General; for the American Academy of Attorney-Certified Public Accountants, Inc., by *James H. Sutton, Jr.*, *Sydney S. Traum*, *Michael E. Breslin*, *Mark Krasner*, *Gerald Donnini*, and *Jonathan Taylor*; for the American Catalog Mailers Association by *Edward J. Bernert* and *Thomas D. Warren*; for the American Legislative Exchange Council by *Jonathan P. Hauenschild*; for Americans for Tax Reform by *Clark R. Calhoun*; for America's Collectibles Network, Inc., by *Charles A. Trost* and *Charles A. Wagner III*; for the Cato Institute by *Ilya Shapiro*; for Colony Brands, Inc., by *Warren L. Dean, Jr.*, *Kathleen E. Kraft*, *Jeffrey R. Surlas*, and *James M. Burger*; for the Competitive Enterprise Institute by *Erik S. Jaffe* and *Sam Kazman*; for the Computer & Communications Industry Association by *Matt Schruers* and *Ali Sternburg*; for eBay, Inc., et al. by *Andrew J. Pincus*, *Leah S. Robinson*, and *Amy F. Nogid*; for Etsy, Inc., by *Kevin P. Martin*, *William M. Jay*, and *Andrew Kim*; for the National Auctioneers Association et al. by *Jonathan M. Dunitz* and *Brian T. Marshall*; for the National Taxpayers Union Foundation et al. by *Paul D. Clement*, *Erin E. Murphy*, and *Matthew D. Rowen*; for the Online Merchants Guild by *Paul S. Rafelson*; for the United Network Equipment Dealers Association et al. by *Jonathan Band*; for Washington State Tax Practitioners by *Dirk Giseburt*; for Chris Cox et al. by *Carl Szabo*; for Bob Goodlatte et al. by *David Salmons* and *Bryan Killian*; and for Sen. Ted Cruz et al. by *Gene C. Schaerr*.

Briefs of *amici curiae* were filed for Flipper LLC by *Melanie L. Oxhorn*; for the National Association of Certified Service Providers et al. by *Ruthanne M. Deutsch* and *Hyland Hunt*; for the National Congress of

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the Court to determine when an out-of-state seller can be required to collect and remit that tax. All concede that taxing the sales in question here is lawful. The question is whether the out-of-state seller can be held responsible for its payment, and this turns on a proper interpretation of the Commerce Clause, U. S. Const., Art. I, § 8, cl. 3.

In two earlier cases the Court held that an out-of-state seller's liability to collect and remit the tax to the consumer's State depended on whether the seller had a physical presence in that State, but that mere shipment of goods into the consumer's State, following an order from a catalog, did not satisfy the physical presence requirement. *National Bellas Hess, Inc.* v. *Department of Revenue of Ill.*, 386 U. S. 753 (1967); *Quill Corp.* v. *North Dakota*, 504 U. S. 298 (1992). The Court granted certiorari here to reconsider the scope and validity of the physical presence rule mandated by those cases.

I

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Like most States, South Dakota has a sales tax. It taxes the retail sales of goods and services in the State. S. D. Codified Laws §§ 10–45–2, 10–45–4 (2010 and Supp. 2017). Sellers are generally required to collect and remit this tax to the Department of Revenue. § 10–45–27.3. If for some reason the sales tax is not remitted by the seller, then in-state consumers are separately responsible for paying a use tax at the same rate. See §§ 10–46–2, 10–46–4, 10–46–6. Many States employ this kind of complementary sales and use tax regime.

Under this Court's decisions in *Bellas Hess* and *Quill*, South Dakota may not require a business to collect its sales tax if the business lacks a physical presence in the State.

American Indians et al. by *Sam Hirsch*, *Ian Heath Gershengorn*, *Thomasina Real Bird*, and *Eric Antoine*; for Tax Executives Institute, Inc., by *A. Pilar Mata*, *W. Patrick Evans*, and *Eli J. Dicker*; for John S. Baker, Jr., by *Mr. Baker*, *pro se*; and for David A. Fruchtman by *Mr. Fruchtman*, *pro se*.

Without that physical presence, South Dakota instead must rely on its residents to pay the use tax owed on their purchases from out-of-state sellers. "[T]he impracticability of [this] collection from the multitude of individual purchasers is obvious." *National Geographic Soc.* v. *California Bd. of Equalization*, 430 U. S. 551, 555 (1977). And consumer compliance rates are notoriously low. See, *e. g.*, GAO, Report to Congressional Requesters: Sales Taxes, States Could Gain Revenue From Expanded Authority, but Businesses Are Likely To Experience Compliance Costs 5 (GAO–18–114, Nov. 2017) (Sales Taxes Report); California State Bd. of Equalization, Revenue Estimate: Electronic Commerce and Mail Order Sales 7 (2013) (Table 3) (estimating a 4 percent collection rate). It is estimated that *Bellas Hess* and *Quill* cause the States to lose between $8 and $33 billion every year. See Sales Taxes Report, at 11–12 (estimating $8 to $13 billion); Brief for Petitioner 34–35 (citing estimates of $23 and $33.9 billion). In South Dakota alone, the department of revenue estimates revenue loss at $48 to $58 million annually. App. 24. Particularly because South Dakota has no state income tax, it must put substantial reliance on its sales and use taxes for the revenue necessary to fund essential services. Those taxes account for over 60 percent of its general fund.

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In 2016, South Dakota confronted the serious inequity *Quill* imposes by enacting S. 106—"An Act to provide for the collection of sales taxes from certain remote sellers, to establish certain Legislative findings, and to declare an emergency." S. 106, 2016 Leg. Assembly, 91st Sess. (S. D. 2016) (S. B. 106). The legislature found that the inability to collect sales tax from remote sellers was "seriously eroding the sales tax base" and "causing revenue losses and imminent harm . . . through the loss of critical funding for state and local services." § 8(1). The legislature also declared an emergency: "Whereas, this Act is necessary for the support of the state government and its existing public institutions,

an emergency is hereby declared to exist." § 9. Fearing further erosion of the tax base, the legislature expressed its intention to "apply South Dakota's sales and use tax obligations to the limit of federal and state constitutional doctrines" and noted the urgent need for this Court to reconsider its precedents. §§ 8(11), (8).

To that end, the Act requires out-of-state sellers to collect and remit sales tax "as if the seller had a physical presence in the state." § 1. The Act applies only to sellers that, on an annual basis, deliver more than $100,000 of goods or services into the State or engage in 200 or more separate transactions for the delivery of goods or services into the State. *Ibid.* The Act also forecloses the retroactive application of this requirement and provides means for the Act to be appropriately stayed until the constitutionality of the law has been clearly established. §§ 5, 3, 8(10).

Respondents Wayfair, Inc., Overstock.com, Inc., and Newegg, Inc., are merchants with no employees or real estate in South Dakota. Wayfair, Inc., is a leading online retailer of home goods and furniture and had net revenues of over $4.7 billion last year. Overstock.com, Inc., is one of the top online retailers in the United States, selling a wide variety of products from home goods and furniture to clothing and jewelry; and it had net revenues of over $1.7 billion last year. Newegg, Inc., is a major online retailer of consumer electronics in the United States. Each of these three companies ships its goods directly to purchasers throughout the United States, including South Dakota. Each easily meets the minimum sales or transactions requirement of the Act, but none collects South Dakota sales tax. 2017 S.D. 56, ¶¶ 10–11, 901 N. W. 2d 754, 759–760.

Pursuant to the Act's provisions for expeditious judicial review, South Dakota filed a declaratory judgment action against respondents in state court, seeking a declaration that the requirements of the Act are valid and applicable to respondents and an injunction requiring respondents to regis-

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ter for licenses to collect and remit sales tax. App. 11, 30. Respondents moved for summary judgment, arguing that the Act is unconstitutional. 901 N. W. 2d, at 759–760. South Dakota conceded that the Act cannot survive under *Bellas Hess* and *Quill* but asserted the importance, indeed the necessity, of asking this Court to review those earlier decisions in light of current economic realities. 901 N. W. 2d, at 760; see also S. B. 106, § 8. The trial court granted summary judgment to respondents. App. to Pet. for Cert. 17a.

The South Dakota Supreme Court affirmed. It stated: "However persuasive the State's arguments on the merits of revisiting the issue, *Quill* has not been overruled [and] remains the controlling precedent on the issue of Commerce Clause limitations on interstate collection of sales and use taxes." 901 N. W. 2d, at 761. This Court granted certiorari. 583 U. S. 1089 (2018).

II

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The Constitution grants Congress the power "[t]o regulate Commerce . . . among the several States." Art. I, § 8, cl. 3. The Commerce Clause "reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes* v. *Oklahoma*, 441 U. S. 322, 325–326 (1979). Although the Commerce Clause is written as an affirmative grant of authority to Congress, this Court has long held that in some instances it imposes limitations on the States absent congressional action. Of course, when Congress exercises its power to regulate commerce by enacting legislation, the legislation controls. *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S. 761, 769 (1945). But this Court has observed that "in general Congress has left it to the courts to formulate the rules" to preserve "the free flow of interstate commerce." *Id.*, at 770.

To understand the issue presented in this case, it is instructive first to survey the general development of this Court's Commerce Clause principles and then to review the application of those principles to state taxes.

A

From early in its history, a central function of this Court has been to adjudicate disputes that require interpretation of the Commerce Clause in order to determine its meaning, its reach, and the extent to which it limits state regulations of commerce. *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824), began setting the course by defining the meaning of commerce. Chief Justice Marshall explained that commerce included both "the interchange of commodities" and "commercial intercourse." *Id.*, at 189, 193. A concurring opinion further stated that Congress had the exclusive power to regulate commerce. See *id.*, at 236 (opinion of Johnson, J.). Had that latter submission prevailed and States been denied the power of concurrent regulation, history might have seen sweeping federal regulations at an early date that foreclosed the States from experimentation with laws and policies of their own, or, on the other hand, proposals to reexamine *Gibbons*' broad definition of commerce to accommodate the necessity of allowing States the power to enact laws to implement the political will of their people.

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Just five years after *Gibbons*, however, in another opinion by Chief Justice Marshall, the Court sustained what in substance was a state regulation of interstate commerce. In *Willson* v. *Black Bird Creek Marsh Co.*, 2 Pet. 245 (1829), the Court allowed a State to dam and bank a stream that was part of an interstate water system, an action that likely would have been an impermissible intrusion on the national power over commerce had it been the rule that only Congress could regulate in that sphere. See *id.*, at 252. Thus, by implication at least, the Court indicated that the power to regulate commerce in some circumstances was held by

the States and Congress concurrently. And so both a broad interpretation of interstate commerce and the concurrent regulatory power of the States can be traced to *Gibbons* and *Willson*.

Over the next few decades, the Court refined the doctrine to accommodate the necessary balance between state and federal power. In *Cooley* v. *Board of Wardens of Port of Philadelphia ex rel. Soc. for Relief of Distressed Pilots*, 12 How. 299 (1852), the Court addressed local laws regulating river pilots who operated in interstate waters and guided many ships on interstate or foreign voyages. The Court held that, while Congress surely could regulate on this subject had it chosen to act, the State, too, could regulate. The Court distinguished between those subjects that by their nature "imperatively deman[d] a single uniform rule, operating equally on the commerce of the United States," and those that "deman[d] th[e] diversity, which alone can meet . . . local necessities." *Id.*, at 319. Though considerable uncertainties were yet to be overcome, these precedents still laid the groundwork for the analytical framework that now prevails for Commerce Clause cases.

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This Court's doctrine has developed further with time. Modern precedents rest upon two primary principles that mark the boundaries of a State's authority to regulate interstate commerce. First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce. State laws that discriminate against interstate commerce face "a virtually *per se* rule of invalidity." *Granholm* v. *Heald*, 544 U. S. 460, 476 (2005) (internal quotation marks omitted). State laws that "regulat[e] even-handedly to effectuate a legitimate local public interest . . . will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970); see also *Southern Pacific*, *supra*, at 779. Although subject to exceptions and varia-

tions, see, *e. g.*, *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794 (1976); *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U. S. 573 (1986), these two principles guide the courts in adjudicating cases challenging state laws under the Commerce Clause.

B

These principles also animate the Court's Commerce Clause precedents addressing the validity of state taxes. The Court explained the now-accepted framework for state taxation in *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274 (1977). The Court held that a State "may tax exclusively interstate commerce so long as the tax does not create any effect forbidden by the Commerce Clause." *Id.*, at 285. After all, "interstate commerce may be required to pay its fair share of state taxes." *D. H. Holmes Co.* v. *McNamara*, 486 U. S. 24, 31 (1988). The Court will sustain a tax so long as it (1) applies to an activity with a substantial nexus with the taxing State, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services the State provides. See *Complete Auto*, *supra*, at 279.

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Before *Complete Auto*, the Court had addressed a challenge to an Illinois tax that required out-of-state retailers to collect and remit taxes on sales made to consumers who purchased goods for use within Illinois. *Bellas Hess*, 386 U. S., at 754–755. The Court held that a mail-order company "whose only connection with customers in the State is by common carrier or the United States mail" lacked the requisite minimum contacts with the State required by both the Due Process Clause and the Commerce Clause. *Id.*, at 758. Unless the retailer maintained a physical presence such as "retail outlets, solicitors, or property within a State," the State lacked the power to require that retailer to collect a local use tax. *Ibid.* The dissent disagreed: "There should be no doubt that this large-scale, systematic, continuous so-

licitation and exploitation of the Illinois consumer market is a sufficient 'nexus' to require Bellas Hess to collect from Illinois customers and to remit the use tax." *Id.*, at 761–762 (opinion of Fortas, J., joined by Black and Douglas, JJ.).

In 1992, the Court reexamined the physical presence rule in *Quill*. That case presented a challenge to North Dakota's "attempt to require an out-of-state mail-order house that has neither outlets nor sales representatives in the State to collect and pay a use tax on goods purchased for use within the State." 504 U. S., at 301. Despite the fact that *Bellas Hess* linked due process and the Commerce Clause together, the Court in *Quill* overruled the due process holding, but not the Commerce Clause holding; and it thus reaffirmed the physical presence rule. 504 U. S., at 307–308, 317–318.

The Court in *Quill* recognized that intervening precedents, specifically *Complete Auto*, "might not dictate the same result were the issue to arise for the first time today." 504 U. S., at 311. But, nevertheless, the *Quill* majority concluded that the physical presence rule was necessary to prevent undue burdens on interstate commerce. *Id.*, at 313, and n. 6. It grounded the physical presence rule in *Complete Auto*'s requirement that a tax have a "'substantial nexus'" with the activity being taxed. 504 U. S., at 311.

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Three Justices based their decision to uphold the physical presence rule on *stare decisis* alone. *Id.*, at 320 (Scalia, J., joined by KENNEDY and THOMAS, JJ., concurring in part and concurring in judgment). Dissenting in relevant part, Justice White argued that "there is no relationship between the physical-presence/nexus rule the Court retains and Commerce Clause considerations that allegedly justify it." *Id.*, at 327 (opinion concurring in part and dissenting in part).

III

The physical presence rule has "been the target of criticism over many years from many quarters." *Direct Marketing Assn.* v. *Brohl*, 814 F. 3d 1129, 1148, 1150–1151 (CA10

2016) (Gorsuch, J., concurring). *Quill*, it has been said, was "premised on assumptions that are unfounded" and "riddled with internal inconsistencies." Rothfeld, *Quill*: Confusing the Commerce Clause, 56 Tax Notes, July 27, 1992, pp. 487, 488. *Quill* created an inefficient "online sales tax loophole" that gives out-of-state businesses an advantage. A. Laffer & D. Arduin, Pro-Growth Tax Reform and E-Fairness 1, 4 (July 2013). And "while nexus rules are clearly necessary," the Court "should focus on rules that are appropriate to the twenty-first century, not the nineteenth." Hellerstein, Deconstructing the Debate Over State Taxation of Electronic Commerce, 13 Harv. J. L. & Tech. 549, 553 (2000). Each year, the physical presence rule becomes further removed from economic reality and results in significant revenue losses to the States. These critiques underscore that the physical presence rule, both as first formulated and as applied today, is an incorrect interpretation of the Commerce Clause.

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A

Quill is flawed on its own terms. First, the physical presence rule is not a necessary interpretation of the requirement that a state tax must be "applied to an activity with a substantial nexus with the taxing State." *Complete Auto*, 430 U. S., at 279. Second, *Quill* creates rather than resolves market distortions. And third, *Quill* imposes the sort of arbitrary, formalistic distinction that the Court's modern Commerce Clause precedents disavow.

1

All agree that South Dakota has the authority to tax these transactions. S. B. 106 applies to sales of "tangible personal property, products transferred electronically, or services *for delivery into South Dakota*." §1 (emphasis added). "It has long been settled" that the sale of goods or services "has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that

State." *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U. S. 175, 184 (1995); see also 2 C. Trost & P. Hartman, Federal Limitations on State and Local Taxation 2d § 11:1, p. 471 (2003) ("Generally speaking, a sale is attributable to its destination").

The central dispute is whether South Dakota may require remote sellers to collect and remit the tax without some additional connection to the State. The Court has previously stated that "[t]he imposition on the seller of the duty to insure collection of the tax from the purchaser does not violate the [C]ommerce [C]lause." *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, 50, n. 9 (1940). It is a "'familiar and sanctioned device.'" *Scripto, Inc.* v. *Carson*, 362 U. S. 207, 212 (1960). There just must be "a substantial nexus with the taxing State." *Complete Auto*, *supra*, at 279.

This nexus requirement is "closely related," *Bellas Hess*, 386 U. S., at 756, to the due process requirement that there be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax," *Miller Brothers Co.* v. *Maryland*, 347 U. S. 340, 344–345 (1954). It is settled law that a business need not have a physical presence in a State to satisfy the demands of due process. *Burger King Corp.* v. *Rudzewicz*, 471 U. S. 462, 476 (1985). Although physical presence "'frequently will enhance'" a business' connection with a State, "'it is an inescapable fact of modern commercial life that a substantial amount of business is transacted [with no] need for physical presence within a State in which business is conducted.'" *Quill*, 504 U. S., at 308. *Quill* itself recognized that "[t]he requirements of due process are met irrespective of a corporation's lack of physical presence in the taxing State." *Ibid.*

When considering whether a State may levy a tax, Due Process and Commerce Clause standards may not be identical or coterminous, but there are significant parallels. The reasons given in *Quill* for rejecting the physical presence

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rule for due process purposes apply as well to the question whether physical presence is a requisite for an out-of-state seller's liability to remit sales taxes. Physical presence is not necessary to create a substantial nexus.

The *Quill* majority expressed concern that without the physical presence rule "a state tax might unduly burden interstate commerce" by subjecting retailers to tax-collection obligations in thousands of different taxing jurisdictions. *Id.*, at 313, n. 6. But the administrative costs of compliance, especially in the modern economy with its Internet technology, are largely unrelated to whether a company happens to have a physical presence in a State. For example, a business with one salesperson in each State must collect sales taxes in every jurisdiction in which goods are delivered; but a business with 500 salespersons in one central location and a website accessible in every State need not collect sales taxes on otherwise identical nationwide sales. In other words, under *Quill*, a small company with diverse physical presence might be equally or more burdened by compliance costs than a large remote seller. The physical presence rule is a poor proxy for the compliance costs faced by companies that do business in multiple States. Other aspects of the Court's doctrine can better and more accurately address any potential burdens on interstate commerce, whether or not *Quill*'s physical presence rule is satisfied.

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2

The Court has consistently explained that the Commerce Clause was designed to prevent States from engaging in economic discrimination so they would not divide into isolated, separable units. See *Philadelphia* v. *New Jersey*, 437 U. S. 617, 623 (1978). But it is "not the purpose of the [C]ommerce [C]lause to relieve those engaged in interstate commerce from their just share of state tax burden." *Complete Auto*, *supra*, at 288 (internal quotation marks omitted). And it is certainly not the purpose of the Commerce Clause

to permit the Judiciary to create market distortions. "If the Commerce Clause was intended to put businesses on an even playing field, the [physical presence] rule is hardly a way to achieve that goal." *Quill*, *supra*, at 329 (opinion of White, J.).

Quill puts both local businesses and many interstate businesses with physical presence at a competitive disadvantage relative to remote sellers. Remote sellers can avoid the regulatory burdens of tax collection and can offer *de facto* lower prices caused by the widespread failure of consumers to pay the tax on their own. This "guarantees a competitive benefit to certain firms simply because of the organizational form they choose" while the rest of the Court's jurisprudence "is all about preventing discrimination between firms." *Direct Marketing*, 814 F. 3d, at 1150–1151 (Gorsuch, J., concurring). In effect, *Quill* has come to serve as a judicially created tax shelter for businesses that decide to limit their physical presence and still sell their goods and services to a State's consumers—something that has become easier and more prevalent as technology has advanced.

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Worse still, the rule produces an incentive to avoid physical presence in multiple States. Distortions caused by the desire of businesses to avoid tax collection mean that the market may currently lack storefronts, distribution points, and employment centers that otherwise would be efficient or desirable. The Commerce Clause must not prefer interstate commerce only to the point where a merchant physically crosses state borders. Rejecting the physical presence rule is necessary to ensure that artificial competitive advantages are not created by this Court's precedents. This Court should not prevent States from collecting lawful taxes through a physical presence rule that can be satisfied only if there is an employee or a building in the State.

3

The Court's Commerce Clause jurisprudence has "eschewed formalism for a sensitive, case-by-case analysis of

purposes and effects." *West Lynn Creamery, Inc.* v. *Healy*, 512 U. S. 186, 201 (1994). *Quill*, in contrast, treats economically identical actors differently, and for arbitrary reasons.

Consider, for example, two businesses that sell furniture online. The first stocks a few items of inventory in a small warehouse in North Sioux City, South Dakota. The second uses a major warehouse just across the border in South Sioux City, Nebraska, and maintains a sophisticated website with a virtual showroom accessible in every State, including South Dakota. By reason of its physical presence, the first business must collect and remit a tax on all of its sales to customers from South Dakota, even those sales that have nothing to do with the warehouse. See *National Geographic*, 430 U. S., at 561; *Scripto, Inc.*, 362 U. S., at 211–212. But, under *Quill*, the second, hypothetical seller cannot be subject to the same tax for the sales of the same items made through a pervasive Internet presence. This distinction simply makes no sense. So long as a state law avoids "any effect forbidden by the Commerce Clause," *Complete Auto*, 430 U. S., at 285, courts should not rely on anachronistic formalisms to invalidate it. The basic principles of the Court's Commerce Clause jurisprudence are grounded in functional, marketplace dynamics; and States can and should consider those realities in enacting and enforcing their tax laws.

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B

The *Quill* Court itself acknowledged that the physical presence rule is "artificial at its edges." 504 U. S., at 315. That was an understatement when *Quill* was decided; and when the day-to-day functions of marketing and distribution in the modern economy are considered, it is all the more evident that the physical presence rule is artificial in its entirety.

Modern e-commerce does not align analytically with a test that relies on the sort of physical presence defined in *Quill*. In a footnote, *Quill* rejected the argument that "title to 'a

few floppy diskettes' present in a State" was sufficient to constitute a "substantial nexus," *id.*, at 315, n. 8. But it is not clear why a single employee or a single warehouse should create a substantial nexus while "physical" aspects of pervasive modern technology should not. For example, a company with a website accessible in South Dakota may be said to have a physical presence in the State via the customers' computers. A website may leave cookies saved to the customers' hard drives, or customers may download the company's app onto their phones. Or a company may lease data storage that is permanently, or even occasionally, located in South Dakota. Cf. *United States* v. *Microsoft Corp.*, 584 U. S. 236 (2018) (*per curiam*). What may have seemed like a "clear," "bright-line tes[t]" when *Quill* was written now threatens to compound the arbitrary consequences that should have been apparent from the outset. 504 U. S., at 315.

The "dramatic technological and social changes" of our "increasingly interconnected economy" mean that buyers are "closer to most major retailers" than ever before—"regardless of how close or far the nearest storefront." *Direct Marketing Assn.* v. *Brohl*, 575 U. S. 1, 17, 18 (2015) (KENNEDY, J., concurring). Between targeted advertising and instant access to most consumers via any internet-enabled device, "a business may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term." *Id.*, at 18. A virtual showroom can show far more inventory, in far more detail, and with greater opportunities for consumer and seller interaction than might be possible for local stores. Yet the continuous and pervasive virtual presence of retailers today is, under *Quill*, simply irrelevant. This Court should not maintain a rule that ignores these substantial virtual connections to the State.

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C

The physical presence rule as defined and enforced in *Bellas Hess* and *Quill* is not just a technical legal problem—it

is an extraordinary imposition by the Judiciary on States' authority to collect taxes and perform critical public functions. Forty-one States, two Territories, and the District of Columbia now ask this Court to reject the test formulated in *Quill*. See Brief for Colorado et al. as *Amici Curiae*. *Quill*'s physical presence rule intrudes on States' reasonable choices in enacting their tax systems. And that it allows remote sellers to escape an obligation to remit a lawful state tax is unfair and unjust. It is unfair and unjust to those competitors, both local and out of State, who must remit the tax; to the consumers who pay the tax; and to the States that seek fair enforcement of the sales tax, a tax many States for many years have considered an indispensable source for raising revenue.

In essence, respondents ask this Court to retain a rule that allows their customers to escape payment of sales taxes—taxes that are essential to create and secure the active market they supply with goods and services. An example may suffice. Wayfair offers to sell a vast selection of furnishings. Its advertising seeks to create an image of beautiful, peaceful homes, but it also says that "'[o]ne of the best things about buying through Wayfair is that we do not have to charge sales tax.'" Brief for Petitioner 55. What Wayfair ignores in its subtle offer to assist in tax evasion is that creating a dream home assumes solvent state and local governments. State taxes fund the police and fire departments that protect the homes containing their customers' furniture and ensure goods are safely delivered; maintain the public roads and municipal services that allow communication with and access to customers; support the "sound local banking institutions to support credit transactions [and] courts to ensure collection of the purchase price," *Quill*, 504 U. S., at 328 (opinion of White, J.); and help create the "climate of consumer confidence" that facilitates sales, see *ibid.* According to respondents, it is unfair to stymie their tax-free solicitation of customers. But there is nothing unfair about requir-

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ing companies that avail themselves of the States' benefits to bear an equal share of the burden of tax collection. Fairness dictates quite the opposite result. Helping respondents' customers evade a lawful tax unfairly shifts to those consumers who buy from their competitors with a physical presence that satisfies *Quill*—even one warehouse or one salesperson—an increased share of the taxes. It is essential to public confidence in the tax system that the Court avoid creating inequitable exceptions. This is also essential to the confidence placed in this Court's Commerce Clause decisions. Yet the physical presence rule undermines that necessary confidence by giving some online retailers an arbitrary advantage over their competitors who collect state sales taxes.

In the name of federalism and free markets, *Quill* does harm to both. The physical presence rule it defines has limited States' ability to seek long-term prosperity and has prevented market participants from competing on an even playing field.

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IV

"Although we approach the reconsideration of our decisions with the utmost caution, *stare decisis* is not an inexorable command." *Pearson* v. *Callahan*, 555 U. S. 223, 233 (2009) (quoting *State Oil Co.* v. *Khan*, 522 U. S. 3, 20 (1997); alterations and internal quotation marks omitted). Here, *stare decisis* can no longer support the Court's prohibition of a valid exercise of the States' sovereign power.

If it becomes apparent that the Court's Commerce Clause decisions prohibit the States from exercising their lawful sovereign powers in our federal system, the Court should be vigilant in correcting the error. While it can be conceded that Congress has the authority to change the physical presence rule, Congress cannot change the constitutional default rule. It is inconsistent with the Court's proper role to ask Congress to address a false constitutional premise of this Court's own creation. Courts have acted as the front line of review in this limited sphere; and hence it is important

that their principles be accurate and logical, whether or not Congress can or will act in response. It is currently the Court, and not Congress, that is limiting the lawful prerogatives of the States.

Further, the real world implementation of Commerce Clause doctrines now makes it manifest that the physical presence rule as defined by *Quill* must give way to the "far-reaching systemic and structural changes in the economy" and "many other societal dimensions" caused by the Cyber Age. *Direct Marketing*, 575 U. S., at 18 (KENNEDY, J., concurring). Though *Quill* was wrong on its own terms when it was decided in 1992, since then the Internet revolution has made its earlier error all the more egregious and harmful.

The *Quill* Court did not have before it the present realities of the interstate marketplace. In 1992, less than 2 percent of Americans had Internet access. See Brief for Retail Litigation Center, Inc., et al. as *Amici Curiae* 11, and n. 10. Today that number is about 89 percent. *Ibid.*, and n. 11. When it decided *Quill*, the Court could not have envisioned a world in which the world's largest retailer would be a remote seller, S. Li, Amazon Overtakes Wal-Mart as Biggest Retailer, L. A. Times, July 24, 2015, http://www.latimes.com/business/la-fi-amazon-walmart-20150724-story.html (all Internet materials as last visited June 18, 2018).

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The Internet's prevalence and power have changed the dynamics of the national economy. In 1992, mail-order sales in the United States totaled $180 billion. 504 U. S., at 329 (opinion of White, J.). Last year, e-commerce retail sales alone were estimated at $453.5 billion. Dept. of Commerce, U. S. Census Bureau News, Quarterly Retail E-Commerce Sales: 4th Quarter 2017 (CB18–21, Feb. 16, 2018). Combined with traditional remote sellers, the total exceeds half a trillion dollars. Sales Taxes Report, at 9. Since the Department of Commerce first began tracking e-commerce sales, those sales have increased tenfold from 0.8 percent to 8.9

percent of total retail sales in the United States. Compare Dept. of Commerce, U. S. Census Bureau, Retail E-Commerce Sales in Fourth Quarter 2000 (CB01–28, Feb. 16, 2001), https://www.census.gov/mrts/www/data/pdf/00Q4.pdf, with U. S. Census Bureau News, Quarterly Retail E-Commerce Sales: 4th Quarter 2017. And it is likely that this percentage will increase. Last year, e-commerce grew at four times the rate of traditional retail, and it shows no sign of any slower pace. See *ibid.*

This expansion has also increased the revenue shortfall faced by States seeking to collect their sales and use taxes. In 1992, it was estimated that the States were losing between $694 million and $3 billion per year in sales tax revenues as a result of the physical presence rule. Brief for Law Professors et al. as *Amici Curiae* 11, n. 7. Now estimates range from $8 to $33 billion. Sales Taxes Report, at 11–12; Brief for Petitioner 34–35. The South Dakota Legislature has declared an emergency, S. B. 106, § 9, which again demonstrates urgency of overturning the physical presence rule.

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The argument, moreover, that the physical presence rule is clear and easy to apply is unsound. Attempts to apply the physical presence rule to online retail sales are proving unworkable. States are already confronting the complexities of defining physical presence in the Cyber Age. For example, Massachusetts proposed a regulation that would have defined physical presence to include making apps available to be downloaded by in-state residents and placing cookies on in-state residents' web browsers. See 830 Code Mass. Regs. 64H.1.7 (2017). Ohio recently adopted a similar standard. See Ohio Rev. Code Ann. § 5741.01(I)(2)(i) (Lexis Supp. 2018). Some States have enacted so-called "click through" nexus statutes, which define nexus to include out-of-state sellers that contract with in-state residents who refer customers for compensation. See, *e. g.*, N. Y. Tax Law Ann. § 1101(b)(8)(vi) (West 2017); Brief for Tax Foundation as *Amicus Curiae* 20–22 (listing 21 States with similar stat-

utes). Others still, like Colorado, have imposed notice and reporting requirements on out-of-state retailers that fall just short of actually collecting and remitting the tax. See *Direct Marketing*, 814 F. 3d, at 1133 (discussing Colo. Rev. Stat. § 39–21–112(3.5)); Brief for Tax Foundation 24–26 (listing nine States with similar statutes). Statutes of this sort are likely to embroil courts in technical and arbitrary disputes about what counts as physical presence.

Reliance interests are a legitimate consideration when the Court weighs adherence to an earlier but flawed precedent. See *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. 446, 457–458 (2015). But even on its own terms, the physical presence rule as defined by *Quill* is no longer a clear or easily applicable standard, so arguments for reliance based on its clarity are misplaced. And, importantly, *stare decisis* accommodates only "legitimate reliance interest[s]." *United States* v. *Ross*, 456 U. S. 798, 824 (1982). Here, the tax distortion created by *Quill* exists in large part because consumers regularly fail to comply with lawful use taxes. Some remote retailers go so far as to advertise sales as tax free. See S. B. 106, § 8(3); see also Brief for Petitioner 55. A business "is in no position to found a constitutional right on the practical opportunities for tax avoidance." *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, 366 (1941).

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Respondents argue that "the physical presence rule has permitted start-ups and small businesses to use the Internet as a means to grow their companies and access a national market, without exposing them to the daunting complexity and business-development obstacles of nationwide sales tax collection." Brief for Respondents 29. These burdens may pose legitimate concerns in some instances, particularly for small businesses that make a small volume of sales to customers in many States. State taxes differ, not only in the rate imposed but also in the categories of goods that are taxed and, sometimes, the relevant date of purchase. Eventually, software that is available at a reasonable cost may

make it easier for small businesses to cope with these problems. Indeed, as the physical presence rule no longer controls, those systems may well become available in a short period of time, either from private providers or from state taxing agencies themselves. And in all events, Congress may legislate to address these problems if it deems it necessary and fit to do so.

In this case, however, South Dakota affords small merchants a reasonable degree of protection. The law at issue requires a merchant to collect the tax only if it does a considerable amount of business in the State; the law is not retroactive; and South Dakota is a party to the Streamlined Sales and Use Tax Agreement, see *infra*, at 189.

Finally, other aspects of the Court's Commerce Clause doctrine can protect against any undue burden on interstate commerce, taking into consideration the small businesses, startups, or others who engage in commerce across state lines. For example, the United States argues that tax-collection requirements should be analyzed under the balancing framework of *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137. Others have argued that retroactive liability risks a double tax burden in violation of the Court's apportionment jurisprudence because it would make both the buyer and the seller legally liable for collecting and remitting the tax on a transaction intended to be taxed only once. See Brief for Law Professors et al. as *Amici Curiae* 7, n. 5. Complex state tax systems could have the effect of discriminating against interstate commerce. Concerns that complex state tax systems could be a burden on small business are answered in part by noting that, as discussed below, there are various plans already in place to simplify collection; and since in-state businesses pay the taxes as well, the risk of discrimination against out-of-state sellers is avoided. And, if some small businesses with only *de minimis* contacts seek relief from collection systems thought to be a burden, those entities may still do so under other theories. These issues

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are not before the Court in the instant case; but their potential to arise in some later case cannot justify retaining this artificial, anachronistic rule that deprives States of vast revenues from major businesses.

For these reasons, the Court concludes that the physical presence rule of *Quill* is unsound and incorrect. The Court's decisions in *Quill Corp.* v. *North Dakota*, 504 U. S. 298 (1992), and *National Bellas Hess, Inc.* v. *Department of Revenue of Ill.*, 386 U. S. 753 (1967), should be, and now are, overruled.

V

In the absence of *Quill* and *Bellas Hess*, the first prong of the *Complete Auto* test simply asks whether the tax applies to an activity with a substantial nexus with the taxing State. 430 U. S., at 279. "[S]uch a nexus is established when the taxpayer [or collector] 'avails itself of the substantial privilege of carrying on business' in that jurisdiction." *Polar Tankers, Inc.* v. *City of Valdez*, 557 U. S. 1, 11 (2009).

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Here, the nexus is clearly sufficient based on both the economic and virtual contacts respondents have with the State. The Act applies only to sellers that deliver more than $100,000 of goods or services into South Dakota or engage in 200 or more separate transactions for the delivery of goods and services into the State on an annual basis. S. B. 106, § 1. This quantity of business could not have occurred unless the seller availed itself of the substantial privilege of carrying on business in South Dakota. And respondents are large, national companies that undoubtedly maintain an extensive virtual presence. Thus, the substantial nexus requirement of *Complete Auto* is satisfied in this case.

The question remains whether some other principle in the Court's Commerce Clause doctrine might invalidate the Act. Because the *Quill* physical presence rule was an obvious barrier to the Act's validity, these issues have not yet been litigated or briefed, and so the Court need not resolve them

here. That said, South Dakota's tax system includes several features that appear designed to prevent discrimination against or undue burdens upon interstate commerce. First, the Act applies a safe harbor to those who transact only limited business in South Dakota. Second, the Act ensures that no obligation to remit the sales tax may be applied retroactively. S. B. 106, § 5. Third, South Dakota is one of more than 20 States that have adopted the Streamlined Sales and Use Tax Agreement. This system standardizes taxes to reduce administrative and compliance costs: It requires a single, state level tax administration, uniform definitions of products and services, simplified tax rate structures, and other uniform rules. It also provides sellers access to sales tax administration software paid for by the State. Sellers who choose to use such software are immune from audit liability. See App. 26–27. Any remaining claims regarding the application of the Commerce Clause in the absence of *Quill* and *Bellas Hess* may be addressed in the first instance on remand.

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The judgment of the Supreme Court of South Dakota is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE THOMAS, concurring.

Justice Byron White joined the majority opinion in *National Bellas Hess, Inc.* v. *Department of Revenue of Ill.*, 386 U. S. 753 (1967). Twenty-five years later, we had the opportunity to overrule *Bellas Hess* in *Quill Corp.* v. *North Dakota*, 504 U. S. 298 (1992). Only Justice White voted to do so. See *id.*, at 322 (opinion concurring in part and dissenting in part). I should have joined his opinion. Today, I am slightly further removed from *Quill* than Justice White was from *Bellas Hess*. And like Justice White, a quarter century of experience has convinced me that *Bellas Hess* and

Quill "can no longer be rationally justified." 504 U. S., at 333. The same is true for this Court's entire negative Commerce Clause jurisprudence. See *Comptroller of Treasury of Md.* v. *Wynne*, 575 U. S. 542, 578 (2015) (THOMAS, J., dissenting). Although I adhered to that jurisprudence in *Quill*, it is never too late to "surrende[r] former views to a better considered position." *McGrath* v. *Kristensen*, 340 U. S. 162, 178 (1950) (Jackson, J., concurring). I therefore join the Court's opinion.

JUSTICE GORSUCH, concurring.

Our dormant commerce cases usually prevent States from discriminating between in-state and out-of-state firms. *National Bellas Hess, Inc.* v. *Department of Revenue of Ill.*, 386 U. S. 753 (1967), and *Quill Corp.* v. *North Dakota*, 504 U. S. 298 (1992), do just the opposite. For years they have enforced a judicially created tax break for out-of-state Internet and mail-order firms at the expense of in-state brick-and-mortar rivals. See *ante*, at 178–179; *Direct Marketing Assn.* v. *Brohl*, 814 F. 3d 1129, 1150 (CA10 2016) (Gorsuch, J., concurring). As Justice White recognized 26 years ago, judges have no authority to construct a discriminatory "tax shelter" like this. *Quill*, *supra*, at 329 (opinion concurring in part and dissenting in part). The Court is right to correct the mistake, and I am pleased to join its opinion.

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My agreement with the Court's discussion of the history of our dormant Commerce Clause jurisprudence, however, should not be mistaken for agreement with all aspects of the doctrine. The Commerce Clause is found in Article I and authorizes *Congress* to regulate interstate commerce. Meanwhile our dormant commerce cases suggest Article III *courts* may invalidate state laws that offend no congressional statute. Whether and how much of this can be squared with the text of the Commerce Clause, justified by *stare decisis*, or defended as misbranded products of federalism or antidiscrimination imperatives flowing from Article IV's Privileges

and Immunities Clause are questions for another day. See *Energy & Environment Legal Inst.* v. *Epel*, 793 F. 3d 1169, 1171 (CA10 2015); *Comptroller of Treasury of Md.* v. *Wynne*, 575 U. S. 542, 571–574 (2015) (Scalia, J., dissenting); *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U. S. 564, 610–620 (1997) (THOMAS, J., dissenting). Today we put *Bellas Hess* and *Quill* to rest and rightly end the paradox of condemning interstate discrimination in the national economy while promoting it ourselves.

CHIEF JUSTICE ROBERTS, with whom JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

In *National Bellas Hess, Inc.* v. *Department of Revenue of Ill.*, 386 U. S. 753 (1967), this Court held that, under the dormant Commerce Clause, a State could not require retailers without a physical presence in that State to collect taxes on the sale of goods to its residents. A quarter century later, in *Quill Corp.* v. *North Dakota*, 504 U. S. 298 (1992), this Court was invited to overrule *Bellas Hess* but declined to do so. Another quarter century has passed, and another State now asks us to abandon the physical-presence rule. I would decline that invitation as well.

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I agree that *Bellas Hess* was wrongly decided, for many of the reasons given by the Court. The Court argues in favor of overturning that decision because the "Internet's prevalence and power have changed the dynamics of the national economy." *Ante*, at 184. But that is the very reason I oppose discarding the physical-presence rule. E-commerce has grown into a significant and vibrant part of our national economy against the backdrop of established rules, including the physical-presence rule. Any alteration to those rules with the potential to disrupt the development of such a critical segment of the economy should be undertaken by Congress. The Court should not act on this important question of current economic policy, solely to expiate a mistake it made over 50 years ago.

I

This Court "does not overturn its precedents lightly." *Michigan* v. *Bay Mills Indian Community*, 572 U. S. 782, 798 (2014). Departing from the doctrine of *stare decisis* is an "exceptional action" demanding "special justification." *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984). The bar is even higher in fields in which Congress "exercises primary authority" and can, if it wishes, override this Court's decisions with contrary legislation. *Bay Mills*, 572 U. S., at 799 (tribal sovereign immunity); see, *e. g.*, *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. 446, 456 (2015) (statutory interpretation); *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U. S. 258, 274 (2014) (judicially created doctrine implementing a judicially created cause of action). In such cases, we have said that "the burden borne by the party advocating the abandonment of an established precedent" is "greater" than usual. *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172 (1989). That is so "even where the error is a matter of serious concern, provided correction can be had by legislation." *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U. S. 409, 424 (1986) (quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406 (1932) (Brandeis, J., dissenting)).

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We have applied this heightened form of *stare decisis* in the dormant Commerce Clause context. Under our dormant Commerce Clause precedents, when Congress has not yet legislated on a matter of interstate commerce, it is the province of "the courts to formulate the rules." *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S. 761, 770 (1945). But because Congress "has plenary power to regulate commerce among the States," *Quill*, 504 U. S., at 305, it may at any time replace such judicial rules with legislation of its own, see *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, 424–425 (1946).

In *Quill*, this Court emphasized that the decision to hew to the physical-presence rule on *stare decisis* grounds was

"made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve." 504 U. S., at 318 (footnote omitted). Even assuming we had gone astray in *Bellas Hess*, the "very fact" of Congress's superior authority in this realm "g[a]ve us pause and counsel[ed] withholding our hand." *Quill*, 504 U. S., at 318 (alterations omitted). We postulated that "the better part of both wisdom and valor [may be] to respect the judgment of the other branches of the Government." *Id.*, at 319; see *id.*, at 320 (Scalia, J., concurring in part and concurring in judgment) (recognizing that *stare decisis* has "special force" in the dormant Commerce Clause context due to Congress's "final say over regulation of interstate commerce"). The Court thus left it to Congress "to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes." *Id.*, at 318 (majority opinion).

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II

This is neither the first, nor the second, but the third time this Court has been asked whether a State may obligate sellers with no physical presence within its borders to collect tax on sales to residents. Whatever salience the adage "third time's a charm" has in daily life, it is a poor guide to Supreme Court decisionmaking. If *stare decisis* applied with special force in *Quill*, it should be an even greater impediment to overruling precedent now, particularly since this Court in *Quill* "tossed [the ball] into Congress's court, for acceptance or not as that branch elects." *Kimble*, 576 U. S., at 456; see *Quill*, 504 U. S., at 318 ("Congress is now free to decide" the circumstances in which "the States may burden interstate . . . concerns with a duty to collect use taxes").

Congress has in fact been considering whether to alter the rule established in *Bellas Hess* for some time. See Addendum to Brief for Four United States Senators as *Amici Cu-*

riae 1–4 (compiling efforts by Congress between 2001 and 2017 to pass legislation respecting interstate sales tax collection); Brief for Rep. Bob Goodlatte et al. as *Amici Curiae* 20–23 (Goodlatte Brief) (same). Three bills addressing the issue are currently pending. See Marketplace Fairness Act of 2017, S. 976, 115th Cong., 1st Sess. (2017); Remote Transactions Parity Act of 2017, H. R. 2193, 115th Cong., 1st Sess. (2017); No Regulation Without Representation Act, H. R. 2887, 115th Cong., 1st Sess. (2017). Nothing in today's decision precludes Congress from continuing to seek a legislative solution. But by suddenly changing the ground rules, the Court may have waylaid Congress's consideration of the issue. Armed with today's decision, state officials can be expected to redirect their attention from working with Congress on a national solution, to securing new tax revenue from remote retailers. See, *e. g.,* Brief for Sen. Ted Cruz et al. as *Amici Curiae* 10–11 ("Overturning *Quill* would undo much of Congress' work to find a workable national compromise under the Commerce Clause.").

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The Court proceeds with an inexplicable sense of urgency. It asserts that the passage of time is only increasing the need to take the extraordinary step of overruling *Bellas Hess* and *Quill*: "Each year, the physical presence rule becomes further removed from economic reality and results in significant revenue losses to the States." *Ante*, at 176. The factual predicates for that assertion include a Government Accountability Office (GAO) estimate that, under the physical-presence rule, States lose billions of dollars annually in sales tax revenue. See *ante*, at 169, 185 (citing GAO, Report to Congressional Requesters: Sales Taxes, States Could Gain Revenue From Expanded Authority, but Businesses Are Likely To Experience Compliance Costs 5 (GAO–18–114, Nov. 2017) (Sales Taxes Report)). But evidence in the same GAO report indicates that the pendulum is swinging in the opposite direction, and has been for some time. States and local governments are already able to collect approximately 80 per-

cent of the tax revenue that would be available if there were no physical-presence rule. See Sales Taxes Report 8. Among the top 100 Internet retailers that rate is between 87 and 96 percent. See *id.*, at 41. Some companies, including the online behemoth Amazon,* now voluntarily collect and remit sales tax in every State that assesses one—even those in which they have no physical presence. See *id.*, at 10. To the extent the physical-presence rule is harming States, the harm is apparently receding with time.

The Court rests its decision to overrule *Bellas Hess* on the "present realities of the interstate marketplace." *Ante*, at 184. As the Court puts it, allowing remote sellers to escape remitting a lawful tax is "unfair and unjust." *Ante*, at 182. "[U]nfair and unjust to . . . competitors . . . who must remit the tax; to the consumers who pay the tax; and to the States that seek fair enforcement of the sales tax." *Ibid.* But "the present realities of the interstate marketplace" include the possibility that the marketplace itself could be affected by abandoning the physical-presence rule. The Court's focus on unfairness and injustice does not appear to embrace consideration of that current public policy concern.

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The Court, for example, breezily disregards the costs that its decision will impose on retailers. Correctly calculating and remitting sales taxes on all e-commerce sales will likely prove baffling for many retailers. Over 10,000 jurisdictions levy sales taxes, each with "different tax rates, different rules governing tax-exempt goods and services, different product category definitions, and different standards for determining whether an out-of-state seller has a substantial presence" in the jurisdiction. Sales Taxes Report 3. A few examples: New Jersey knitters pay sales tax on yarn pur-

*C. Isidore, Amazon To Start Collecting State Sales Taxes Everywhere (Mar. 29, 2017), http://money.cnn.com/2017/03/29/technology/amazon-sales-tax/index.html (all Internet materials as last visited June 19, 2018).

chased for art projects, but not on yarn earmarked for sweaters. See Brief for eBay, Inc., et al. as *Amici Curiae* 8, n. 3 (eBay Brief). Texas taxes sales of plain deodorant at 6.25 percent but imposes no tax on deodorant with antiperspirant. See *id.*, at 7. Illinois categorizes Twix and Snickers bars—chocolate-and-caramel confections usually displayed side-by-side in the candy aisle—as food and candy, respectively (Twix have flour; Snickers don't), and taxes them differently. See *id.*, at 8; Brief for Etsy, Inc., as *Amicus Curiae* 14–17 (Etsy Brief) (providing additional illustrations).

The burden will fall disproportionately on small businesses. One vitalizing effect of the Internet has been connecting small, even "micro" businesses to potential buyers across the Nation. People starting a business selling their embroidered pillowcases or carved decoys can offer their wares throughout the country—but probably not if they have to figure out the tax due on every sale. See Sales Taxes Report 22 (indicating that "costs will likely increase the most for businesses that do not have established legal teams, software systems, or outside counsel to assist with compliance related questions"). And the software said to facilitate compliance is still in its infancy, and its capabilities and expense are subject to debate. See Etsy Brief 17–19 (describing the inadequacies of such software); eBay Brief 8–12 (same); Sales Taxes Report 16–20 (concluding that businesses will incur "high" compliance costs). The Court's decision today will surely have the effect of dampening opportunities for commerce in a broad range of new markets.

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A good reason to leave these matters to Congress is that legislators may more directly consider the competing interests at stake. Unlike this Court, Congress has the flexibility to address these questions in a wide variety of ways. As we have said in other dormant Commerce Clause cases, Congress "has the capacity to investigate and analyze facts be-

yond anything the Judiciary could match." *General Motors Corp.* v. *Tracy*, 519 U. S. 278, 309 (1997); see *Department of Revenue of Ky.* v. *Davis*, 553 U. S. 328, 356 (2008).

Here, after investigation, Congress could reasonably decide that current trends might sufficiently expand tax revenues, obviating the need for an abrupt policy shift with potentially adverse consequences for e-commerce. Or Congress might decide that the benefits of allowing States to secure additional tax revenue outweigh any foreseeable harm to e-commerce. Or Congress might elect to accommodate these competing interests, by, for example, allowing States to tax Internet sales by remote retailers only if revenue from such sales exceeds some set amount per year. See Goodlatte Brief 12–14 (providing varied examples of how Congress could address sales tax collection). In any event, Congress can focus directly on current policy concerns rather than past legal mistakes. Congress can also provide a nuanced answer to the troubling question whether any change will have retroactive effect.

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An erroneous decision from this Court may well have been an unintended factor contributing to the growth of e-commerce. See, *e. g.*, W. Taylor, Who's Writing the Book on Web Business? Fast Company (Oct. 31, 1996), https://www.fastcompany.com/27309/whos-writing-book-web-business. The Court is of course correct that the Nation's economy has changed dramatically since the time that *Bellas Hess* and *Quill* roamed the earth. I fear the Court today is compounding its past error by trying to fix it in a totally different era. The Constitution gives Congress the power "[t]o regulate Commerce . . . among the several States." Art. I, §8. I would let Congress decide whether to depart from the physical-presence rule that has governed this area for half a century.

I respectfully dissent.

Syllabus

PEREIRA *v.* SESSIONS, ATTORNEY GENERAL

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

No. 17–459. Argued April 23, 2018—Decided June 21, 2018

Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, nonpermanent residents who are subject to removal proceedings may be eligible for cancellation of removal if, among other things, they have "been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of [an] application" for cancellation. 8 U. S. C. § 1229b(b)(1)(A). Under the stop-time rule, however, the period of continuous presence is "deemed to end . . . when the alien is served a notice to appear under section 1229(a)." § 1229b(d)(1)(A). Section 1229(a), in turn, provides that the Government shall serve noncitizens in removal proceedings with a written "'notice to appear,'" specifying, among other things, "[t]he time and place at which the [removal] proceedings will be held." § 1229(a)(1)(G)(i). Per a 1997 regulation stating that a "notice to appear" served on a noncitizen need only provide "the time, place and date of the initial removal hearing, where practicable," 62 Fed. Reg. 10332, the Department of Homeland Security (DHS), at least in recent years, almost always serves noncitizens with notices that fail to specify the time, place, or date of initial removal hearings whenever the agency deems it impracticable to include such information. The Board of Immigration Appeals (BIA) has held that such notices trigger the stop-time rule even if they do not specify the time and date of the removal proceedings.

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Petitioner Wescley Fonseca Pereira is a native and citizen of Brazil who came to the United States in 2000 and remained after his visa expired. Following a 2006 arrest for operating a vehicle while under the influence of alcohol, DHS served Pereira with a document titled "notice to appear" that did not specify the date and time of his initial removal hearing, instead ordering him to appear at a time and date to be set in the future. More than a year later, in 2007, the Immigration Court mailed Pereira a more specific notice setting the date and time for his initial hearing, but the notice was sent to the wrong address and was returned as undeliverable. As a result, Pereira failed to appear, and the Immigration Court ordered him removed in absentia.

In 2013, Pereira was arrested for a minor motor vehicle violation and detained by DHS. The Immigration Court reopened the removal pro-

ceedings after Pereira demonstrated that he never received the 2007 notice. Pereira then applied for cancellation of removal, arguing that he had been continuously present in the United States for more than 10 years and that the stop-time rule was not triggered by DHS' initial 2006 notice because the document lacked information about the time and date of his removal hearing. The Immigration Court disagreed and ordered Pereira removed. The BIA agreed with the Immigration Court that the 2006 notice triggered the stop-time rule, even though it failed to specify the time and date of Pereira's initial removal hearing. The Court of Appeals for the First Circuit denied Pereira's petition for review of the BIA's order. Applying the framework set forth in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, it held that the stop-time rule is ambiguous and that the BIA's interpretation of the rule was a permissible reading of the statute.

Held: A putative notice to appear that fails to designate the specific time or place of the noncitizen's removal proceedings is not a "notice to appear under § 1229(a)," and so does not trigger the stop-time rule. Pp. 207–219.

(a) The Court need not resort to *Chevron* deference, for the unambiguous statutory text alone is enough to resolve this case. Under the stop-time rule, "any period of . . . continuous physical presence" is "deemed to end . . . when the alien is served a notice to appear under section 1229(a)." 8 U. S. C. § 1229b(d)(1). By expressly referencing § 1229(a), the statute specifies where to look to find out what "notice to appear" means. Section 1229(a), in turn, clarifies that the type of notice "referred to as a 'notice to appear' " throughout the statutory section is a "written notice . . . specifying," as relevant here, "[t]he time and place at which the [removal] proceedings will be held." § 1229(a)(1)(G)(i). Thus, to trigger the stop-time rule, the Government must serve a notice to appear that, at the very least, "specif[ies]" the "time and place" of the removal hearing.

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The Government and dissent point out that the stop-time rule refers broadly to a notice to appear under "§ 1229(a)"—which includes paragraph (1), as well as paragraphs (2) and (3). But that does not matter, because only paragraph (1) bears on the meaning of a "notice to appear." If anything, paragraph (2), which allows for a "change or postponement" of the proceedings to a "new time and place," § 1229(a)(2)(A)(i), bolsters the Court's interpretation of the statute because the provision presumes that the Government has already served a "notice to appear" that specified a time and place as required by § 1229(a)(1)(G)(i). Another neighboring provision, § 1229(b)(1), lends further support for the view that a "notice to appear" must specify the time and place of removal proceed-

ings to trigger the stop-time rule. Section 1229(b)(1) gives a noncitizen "the opportunity to secure counsel before the first [removal] hearing date" by mandating that such "hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear." For that provision to have any meaning, the "notice to appear" must specify the time and place that the noncitizen, and his counsel, must appear at the removal proceedings. Finally, common sense reinforces the conclusion that a notice that does not specify when and where to appear for a removal proceeding is not a "notice to appear" that triggers the stop-time rule. After all, an essential function of a "notice to appear" is to provide noncitizens "notice" of the information (*i. e.*, the "time" and "place") that would enable them "to appear" at the removal hearing in the first place. Without conveying such information, the Government cannot reasonably expect noncitizens to appear for their removal proceedings. Pp. 207–212.

(b) The Government and the dissent advance a litany of counterarguments, all of which are unpersuasive. To begin, the Government mistakenly argues that § 1229(a) is not definitional. That is wrong. Section 1229(a) speaks in definitional terms, requiring that a notice to appear specify, among other things, the "time and place at which the proceedings will be held." As such, the dissent is misguided in arguing that a defective notice to appear, which fails to specify time-and-place information, is still a notice to appear for purposes of the stop-time rule. Equally unavailing is the Government's (and the dissent's) attempt to generate ambiguity in the statute based on the word "under." In light of the plain language and statutory context, the word "under," as used in the stop-time rule, clearly means "in accordance with" or "according to" because it connects the stop-time trigger in § 1229b(d)(1) to a "notice to appear" that specifies the enumerated time-and-place information. The Government fares no better in arguing that surrounding statutory provisions reinforce its preferred reading of the stop-time rule, as none of those provisions supports its atextual interpretation. Unable to root its reading in the statutory text, the Government and dissent raise a number of practical concerns, but those concerns are meritless and do not justify departing from the statute's clear text. In a final attempt to salvage its atextual interpretation, the Government turns to the alleged statutory purpose and legislative history of the stop-time rule. Even for those who consider statutory purpose and legislative history, however, neither supports the Government's position. Requiring the Government to furnish time-and-place information in a notice to appear is entirely consistent with Congress' stated objective of preventing noncitizens from exploiting administrative delays to accumulate lengthier periods of continuous precedent. Pp. 212–219.

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866 F. 3d 1, reversed and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, GINSBURG, BREYER, KAGAN, and GORSUCH, JJ., joined. KENNEDY, J., filed a concurring opinion, *post*, p. 219. ALITO, J., filed a dissenting opinion, *post*, p. 221.

David J. Zimmer argued the cause for petitioner. With him on the briefs were *William M. Jay*, *Alexandra Lu*, *Jeffrey B. Rubin*, and *Todd C. Pomerleau*.

Frederick Liu argued the cause for respondent. On the brief were *Solicitor General Francisco*, *Acting Assistant Attorney General Readler*, *Deputy Solicitor General Kneedler*, *Jonathan C. Bond*, *Donald E. Keener*, *John W. Blakeley*, and *Patrick J. Glen*.*

JUSTICE SOTOMAYOR delivered the opinion of the Court.

Nonpermanent residents, like petitioner here, who are subject to removal proceedings and have accrued 10 years of continuous physical presence in the United States, may be eligible for a form of discretionary relief known as cancellation of removal. 8 U. S. C. § 1229b(b)(1). Under the so-called "stop-time rule" set forth in § 1229b(d)(1)(A), however, that period of continuous physical presence is "deemed to end . . . when the alien is served a notice to appear under section 1229(a)." Section 1229(a), in turn, provides that the Government shall serve noncitizens in removal proceedings with "written notice (in this section referred to as a 'notice to appear') . . . specifying" several required pieces of information, including "[t]he time and place at which the [removal] proceedings will be held." § 1229(a)(1)(G)(i).[1]

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*Briefs of *amici curiae* urging reversal were filed for the American Immigration Lawyers Association et al. by *Bradley N. Garcia* and *Jeremy Maltby*; for the National Immigrant Justice Center by *Lindsay C. Harrison* and *Charles Roth*; and for Paul Wickham Schmidt by *Eric F. Citron*.

[1] The Court uses the term "noncitizen" throughout this opinion to refer to any person who is not a citizen or national of the United States. See 8 U. S. C. § 1101(a)(3).

The narrow question in this case lies at the intersection of those statutory provisions. If the Government serves a noncitizen with a document that is labeled "notice to appear," but the document fails to specify either the time or place of the removal proceedings, does it trigger the stop-time rule? The answer is as obvious as it seems: No. A notice that does not inform a noncitizen when and where to appear for removal proceedings is not a "notice to appear under section 1229(a)" and therefore does not trigger the stop-time rule. The plain text, the statutory context, and common sense all lead inescapably and unambiguously to that conclusion.

I

A

Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 110 Stat. 3009–546, the Attorney General of the United States has discretion to "cancel removal" and adjust the status of certain nonpermanent residents. § 1229b(b). To be eligible for such relief, a nonpermanent resident must meet certain enumerated criteria, the relevant one here being that the noncitizen must have "been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of [an] application" for cancellation of removal. § 1229b(b)(1)(A).[2]

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IIRIRA also established the stop-time rule at issue in this case. Under that rule, "any period of . . . continuous physical presence in the United States shall be deemed to end . . . when the alien is served a notice to appear under section 1229(a) of this title."[3] § 1229b(d)(1)(A). Section 1229(a), in

[2] Lawful permanent residents also may be eligible for cancellation of removal if, *inter alia*, they have continuously resided in the United States for at least seven years. § 1229b(a)(2).

[3] The period of continuous physical presence also stops if and when "the alien has committed" certain enumerated offenses that would constitute grounds for removal or inadmissibility. § 1229b(d)(1)(B). That provision is not at issue here.

turn, provides that "written notice (in this section referred to as a 'notice to appear') shall be given . . . to the alien . . . specifying":

> "(A) The nature of the proceedings against the alien.
>
> "(B) The legal authority under which the proceedings are conducted.
>
> "(C) The acts or conduct alleged to be in violation of law.
>
> "(D) The charges against the alien and the statutory provisions alleged to have been violated.
>
> "(E) The alien may be represented by counsel and the alien will be provided (i) a period of time to secure counsel under subsection (b)(1) of this section and (ii) a current list of counsel prepared under subsection (b)(2) of this section.
>
> "(F)(i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 1229a of this title.
>
> "(ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number.
>
> "(iii) The consequences under section 1229a(b)(5) of this title of failure to provide address and telephone information pursuant to this subparagraph.
>
> "**(G)(i) The time and place at which the [removal] proceedings will be held.**
>
> "(ii) The consequences under section 1229a(b)(5) of this title of the failure, except under exceptional circumstances, to appear at such proceedings." § 1229(a)(1) (boldface added).

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The statute also enables the Government to "change or postpon[e] . . . the time and place of [the removal] proceedings." § 1229(a)(2)(A). To do so, the Government must give the

noncitizen "a written notice . . . specifying . . . the new time or place of the proceedings" and "the consequences . . . of failing, except under exceptional circumstances, to attend such proceedings." *Ibid.* The Government is not required to provide written notice of the change in time or place of the proceedings if the noncitizen is "not in detention" and "has failed to provide [his] address" to the Government. § 1229(a)(2)(B).

The consequences of a noncitizen's failure to appear at a removal proceeding can be quite severe. If a noncitizen who has been properly served with the "written notice required under paragraph (1) or (2) of section 1229(a)" fails to appear at a removal proceeding, he "shall be ordered removed in absentia" if the Government "establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable." § 1229a(b)(5)(A). Absent "exceptional circumstances," a noncitizen subject to an in absentia removal order is ineligible for some forms of discretionary relief for 10 years if, "at the time of the notice described in paragraph (1) or (2) of section 1229(a)," he "was provided oral notice . . . of the time and place of the proceedings and of the consequences" of failing to appear. § 1229a(b)(7). In certain limited circumstances, however, a removal order entered in absentia may be rescinded—*e. g.*, when the noncitizen "demonstrates that [he] did not receive notice in accordance with paragraph (1) or (2) of section 1229(a)." § 1229a(b)(5)(C)(ii).

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B

In 1997, shortly after Congress passed IIRIRA, the Attorney General promulgated a regulation stating that a "notice to appear" served on a noncitizen need only provide "the time, place and date of the initial removal hearing, where practicable." 62 Fed. Reg. 10332 (1997). Per that regulation, the Department of Homeland Security (DHS), at least in recent years, almost always serves noncitizens with no-

tices that fail to specify the time, place, or date of initial removal hearings whenever the agency deems it impracticable to include such information. See Brief for Petitioner 14; Brief for Respondent 48–49; Tr. of Oral Arg. 52–53 (Government's admission that "almost 100 percent" of "notices to appear omit the time and date of the proceeding over the last three years"). Instead, these notices state that the times, places, or dates of the initial hearings are "to be determined." Brief for Petitioner 14.

In *Matter of Camarillo*, 25 I. & N. Dec. 644 (2011), the Board of Immigration Appeals (BIA) addressed whether such notices trigger the stop-time rule even if they do not specify the time and date of the removal proceedings. The BIA concluded that they do. *Id.*, at 651. It reasoned that the statutory phrase "notice to appear 'under section [1229](a)'" in the stop-time rule "merely specifies the document the DHS must serve on the alien to trigger the 'stop-time' rule," but otherwise imposes no "substantive requirements" as to what information that document must include to trigger the stop-time rule. *Id.*, at 647.

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C

Petitioner Wescley Fonseca Pereira is a native and citizen of Brazil. In 2000, at age 19, he was admitted to the United States as a temporary "non-immigrant visitor." 866 F. 3d 1, 2 (CA1 2017). After his visa expired, he remained in the United States. Pereira is married and has two young daughters, both of whom are United States citizens. He works as a handyman and, according to submissions before the Immigration Court, is a well-respected member of his community.

In 2006, Pereira was arrested in Massachusetts for operating a vehicle while under the influence of alcohol. On May 31, 2006, while Pereira was detained, DHS served him (in person) with a document labeled "Notice to Appear." App. 7–13. That putative notice charged Pereira as removable for

overstaying his visa, informed him that "removal proceedings" were being initiated against him, and provided him with information about the "[c]onduct of the hearing" and the consequences for failing to appear. *Id.*, at 7, 10–12. Critical here, the notice did not specify the date and time of Pereira's removal hearing. Instead, it ordered him to appear before an Immigration Judge in Boston "on a date to be set at a time to be set." *Id.*, at 9 (underlining in original).

More than a year later, on August 9, 2007, DHS filed the 2006 notice with the Boston Immigration Court. The Immigration Court thereafter attempted to mail Pereira a more specific notice setting the date and time for his initial removal hearing for October 31, 2007, at 9:30 a.m. But that second notice was sent to Pereira's street address rather than his post office box (which he had provided to DHS), so it was returned as undeliverable. Because Pereira never received notice of the time and date of his removal hearing, he failed to appear, and the Immigration Court ordered him removed in absentia. Unaware of that removal order, Pereira remained in the United States.

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In 2013, after Pereira had been in the country for more than 10 years, he was arrested for a minor motor vehicle violation (driving without his headlights on) and was subsequently detained by DHS. The Immigration Court reopened the removal proceedings after Pereira demonstrated that he never received the Immigration Court's 2007 notice setting out the specific date and time of his hearing. Pereira then applied for cancellation of removal, arguing that the stop-time rule was not triggered by DHS' initial 2006 notice because the document lacked information about the time and date of his removal hearing.

The Immigration Court disagreed, finding the law "quite settled that DHS need not put a date certain on the Notice to Appear in order to make that document effective." App. to Pet. for Cert. 23a. The Immigration Court therefore concluded that Pereira could not meet the 10-year physical-

presence requirement under § 1229b(b), thereby rendering him statutorily ineligible for cancellation of removal, and ordered Pereira removed from the country. The BIA dismissed Pereira's appeal. Adhering to its precedent in *Camarillo*, the BIA agreed with the Immigration Court that the 2006 notice triggered the stop-time rule and that Pereira thus failed to satisfy the 10-year physical-presence requirement and was ineligible for cancellation of removal. The Court of Appeals for the First Circuit denied Pereira's petition for review of the BIA's order. 866 F. 3d 1. Applying the framework set forth in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), the Court of Appeals first found that the stop-time rule in § 1229b(d)(1) is ambiguous because it "does not explicitly state that the date and time of the hearing must be included in a notice to appear in order to cut off an alien's period of continuous physical presence." 866 F. 3d, at 5. Then, after reviewing the statutory text and structure, the administrative context, and pertinent legislative history, the Court of Appeals held that the BIA's interpretation of the stop-time rule was a permissible reading of the statute. *Id.*, at 6–8.

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II

A

The Court granted certiorari in this case, 583 U. S. 1089 (2018), to resolve division among the Courts of Appeals on a simple, but important, question of statutory interpretation: Does service of a document styled as a "notice to appear" that fails to specify "the items listed" in § 1229(a)(1) trigger the stop-time rule?[4] Pet. for Cert. i.

[4] Compare *Orozco-Velasquez* v. *Attorney General United States*, 817 F. 3d 78, 83–84 (CA3 2016) (holding that the stop-time rule unambiguously requires service of a "notice to appear" that meets § 1229(a)(1)'s requirements), with *Moscoso-Castellanos* v. *Lynch*, 803 F. 3d 1079, 1083 (CA9 2015) (finding the statute ambiguous and deferring to the BIA's interpretation); *O'Garro* v. *United States Atty. Gen.*, 605 Fed. Appx. 951, 953 (CA11

As a threshold matter, the Court notes that the question presented by Pereira, which focuses on all "items listed" in § 1229(a)(1), sweeps more broadly than necessary to resolve the particular case before us. Although the time-and-place information in a notice to appear will vary from case to case, the Government acknowledges that "[m]uch of the information Section 1229(a)(1) calls for does not" change and is therefore "included in standardized language on the I–862 notice-to-appear form." Brief for Respondent 36 (referencing 8 U. S. C. §§ 1229(a)(1)(A)–(B), (E)–(F), and (G)(ii)). In fact, the Government's 2006 notice to Pereira included all of the information required by § 1229(a)(1), except it failed to specify the date and time of Pereira's removal proceedings. See App. 10–12. Accordingly, the dispositive question in this case is much narrower, but no less vital: Does a "notice to appear" that does not specify the "time and place at which the proceedings will be held," as required by § 1229(a)(1)(G)(i), trigger the stop-time rule?[5]

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In addressing that narrower question, the Court need not resort to *Chevron* deference, as some lower courts have done, for Congress has supplied a clear and unambiguous answer to the interpretive question at hand. See 467 U. S., at 842–843 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress"). A putative notice to appear that fails to designate the specific

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2015) (*per curiam*) (same); *Guaman-Yuqui* v. *Lynch*, 786 F. 3d 235, 239–240 (CA2 2015) (*per curiam*) (same); *Gonzalez-Garcia* v. *Holder*, 770 F. 3d 431, 434–435 (CA6 2014) (same); *Yi Di Wang* v. *Holder*, 759 F. 3d 670, 674–675 (CA7 2014) (same); *Urbina* v. *Holder*, 745 F. 3d 736, 740 (CA4 2014) (same).

[5] The Court leaves for another day whether a putative notice to appear that omits any of the other categories of information enumerated in § 1229(a)(1) triggers the stop-time rule. Contrary to the dissent's assertion, this exercise of judicial restraint is by no means "tantamount to admitting" that the Government's (and dissent's) atextual interpretation is a permissible construction of the statute. *Post*, at 230 (opinion of ALITO, J.).

time or place of the noncitizen's removal proceedings is not a "notice to appear under section 1229(a)," and so does not trigger the stop-time rule.

B

The statutory text alone is enough to resolve this case. Under the stop-time rule, "any period of . . . continuous physical presence" is "deemed to end . . . when the alien is served a notice to appear under section 1229(a)." 8 U. S. C. § 1229b(d)(1). By expressly referencing § 1229(a), the statute specifies where to look to find out what "notice to appear" means. Section 1229(a), in turn, clarifies that the type of notice "referred to as a 'notice to appear' " throughout the statutory section is a "written notice . . . specifying," as relevant here, "[t]he time and place at which the [removal] proceedings will be held." § 1229(a)(1)(G)(i). Thus, based on the plain text of the statute, it is clear that to trigger the stop-time rule, the Government must serve a notice to appear that, at the very least, "specif[ies]" the "time and place" of the removal proceedings.

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It is true, as the Government and dissent point out, that the stop-time rule makes broad reference to a notice to appear under "section 1229(a)," which includes paragraph (1), as well as paragraphs (2) and (3). See Brief for Respondent 27–28; *post*, at 225–226 (opinion of ALITO, J.). But the broad reference to § 1229(a) is of no consequence, because, as even the Government concedes, only paragraph (1) bears on the meaning of a "notice to appear." Brief for Respondent 27. By contrast, paragraph (2) governs the "[n]otice of change in time or place of proceedings," and paragraph (3) provides for a system to record noncitizens' addresses and phone numbers. Nowhere else within § 1229(a) does the statute purport to delineate the requirements of a "notice to appear." In fact, the term "notice to appear" appears only in paragraph (1) of § 1229(a).

If anything, paragraph (2) of § 1229(a) actually bolsters the Court's interpretation of the statute. Paragraph (2) pro-

vides that, "in the case of any change or postponement in the time and place of [removal] proceedings," the Government shall give the noncitizen "written notice . . . specifying . . . the new time or place of the proceedings." § 1229(a)(2)(A)(i). By allowing for a "change or postponement" of the proceedings to a "new time or place," paragraph (2) presumes that the Government has already served a "notice to appear under section 1229(a)" that specified a time and place as required by § 1229(a)(1)(G)(i). Otherwise, there would be no time or place to "change or postpon[e]." § 1229(a)(2). Notably, the dissent concedes that paragraph (2) confirms that a notice to appear must "state the 'time and place' of the removal proceeding as required by § 1229(a)(1).'" *Post*, at 233. The dissent nevertheless retorts that this point is "entirely irrelevant." *Ibid.* Not so. Paragraph (2) clearly reinforces the conclusion that "a notice to appear under section 1229(a)," § 1229b(d)(1), must include at least the time and place of the removal proceedings to trigger the stop-time rule.

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Another neighboring statutory provision lends further contextual support for the view that a "notice to appear" must include the time and place of the removal proceedings to trigger the stop-time rule. Section 1229(b)(1) gives a noncitizen "the opportunity to secure counsel before the first [removal] hearing date" by mandating that such "hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear." For § 1229(b)(1) to have any meaning, the "notice to appear" must specify the time and place that the noncitizen, and his counsel, must appear at the removal hearing. Otherwise, the Government could serve a document labeled "notice to appear" without listing the time and location of the hearing and then, years down the line, provide that information a day before the removal hearing when it becomes available. Under that view of the statute, a noncitizen theoretically would have had the "opportunity to secure counsel," but that opportunity will not

be meaningful if, given the absence of a specified time and place, the noncitizen has minimal time and incentive to plan accordingly, and his counsel, in turn, receives limited notice and time to prepare adequately. It therefore follows that, if a "notice to appear" for purposes of § 1229(b)(1) must include the time-and-place information, a "notice to appear" for purposes of the stop-time rule under § 1229b(d)(1) must as well. After all, "it is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Taniguchi* v. *Kan Pacific Saipan, Ltd.*, 566 U. S. 560, 571 (2012) (internal quotation marks omitted).[6]

Finally, common sense compels the conclusion that a notice that does not specify when and where to appear for a removal proceeding is not a "notice to appear" that triggers the stop-time rule. If the three words "notice to appear" mean anything in this context, they must mean that, at a minimum, the Government has to provide noncitizens "notice" of the information, *i. e.*, the "time" and "place," that would enable them "to appear" at the removal hearing in the

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[6] The dissent argues that, if a notice to appear must furnish time-and-place information, the Government "may be forced by the Court's interpretation to guess that the hearing will take place far in the future, only to learn shortly afterwards that the hearing is in fact imminent." *Post*, at 234. In such a scenario, the dissent hypothesizes, a noncitizen would be "lulled into a false sense of security" and thus would have little meaningful opportunity to secure counsel and prepare adequately. *Ibid.* But nothing in our interpretation of the statute "force[s]" the Government to guess when and where a hearing will take place, *ibid.*, nor does our interpretation prevent DHS and the Immigration Courts from working together to streamline the scheduling of removal proceedings, see *infra*, at 218. Far from "lull[ing]" noncitizens into a false sense of security, *post*, at 234, our reading (unlike the Government's and the dissent's) still gives meaning to a noncitizen's "opportunity to secure counsel before the first [removal] hearing date," § 1229(b)(1), by informing the noncitizen that the Government is committed to moving forward with removal proceedings at a specific time and place. Equipped with that knowledge, a noncitizen has an incentive to obtain counsel and prepare for his hearing.

first place. Conveying such time-and-place information to a noncitizen is an essential function of a notice to appear, for without it, the Government cannot reasonably expect the noncitizen to appear for his removal proceedings. To hold otherwise would empower the Government to trigger the stop-time rule merely by sending noncitizens a barebones document labeled "Notice to Appear," with no mention of the time and place of the removal proceedings, even though such documents would do little if anything to facilitate appearance at those proceedings.[7] "'We are not willing to impute to Congress . . . such [a] contradictory and absurd purpose,'" *United States* v. *Bryan*, 339 U. S. 323, 342 (1950), particularly where doing so has no basis in the statutory text.

III

Straining to inject ambiguity into the statute, the Government and the dissent advance several overlapping arguments. None is persuasive.

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[7] At oral argument, the Government conceded that a blank piece of paper would not suffice to trigger the stop-time rule because (in its view) such a hypothetical notice would fail to specify the charges against the noncitizen. Tr. of Oral Arg. 39–40 (arguing that notice to appear must "tell the alien what proceedings he must appear for and why he must appear for them"). The dissent also endorses the view that a notice to appear "can also be understood to serve primarily as a charging document." *Post*, at 234–235. But neither the Government nor the dissent offers any convincing basis, much less one rooted in the statutory text, for treating time-and-place information as any less crucial than charging information for purposes of triggering the stop-time rule. Furthermore, there is no reason why a notice to appear should have only one essential function. Even if a notice to appear functions as a "charging document," that is not mutually exclusive with the conclusion that a notice to appear serves another equally integral function: telling a noncitizen when and where to appear. At bottom, the Government's self-serving position that a notice to appear must specify charging information, but not the time-and-place information, reveals the arbitrariness inherent in its atextual approach to the stop-time rule.

A

First, the Government posits that § 1229(a) "is not worded in the form of a definition" and thus cannot circumscribe what type of notice counts as a "notice to appear" for purposes of the stop-time rule. Brief for Respondent 32. Section 1229(a), however, does speak in definitional terms, at least with respect to the "time and place at which the proceedings will be held": It specifically provides that the notice described under paragraph (1) is "referred to as a 'notice to appear,' " which in context is quintessential definitional language.[8] It then defines that term as a "written notice" that, as relevant here, "specif[ies] . . . [t]he time and place at which the [removal] proceedings will be held." § 1229(a)(1)(G)(i). Thus, when the term "notice to appear" is used elsewhere in the statutory section, including as the trigger for the stop-time rule, it carries with it the substantive time-and-place criteria required by § 1229(a).

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Resisting this straightforward understanding of the text, the dissent posits that "§ 1229(a)(1)'s language can be understood to define what makes a notice to appear *complete*." *Post*, at 231 (emphasis in original). In the dissent's view, a defective notice to appear is still a "notice to appear" even if it is incomplete—much like a three-wheeled Chevy is still a car. *Post*, at 230–231. The statutory text proves otherwise. Section 1229(a)(1) does not say a "notice to appear" is "complete" when it specifies the time and place of the removal proceedings. Rather, it defines a "notice to appear" as a

[8] Congress has employed similar definitional language in other statutory schemes. See, *e. g.*, 21 U. S. C. § 356(b)(1) (creating new class of "fast track product[s]" by setting out drug requirements and providing: "In this section, such a drug is referred to as a 'fast track product' "); § 356(a)(1) ("In this section, such a drug is referred to as a 'breakthrough therapy' "); 38 U. S. C. § 7451(a)(2) ("hereinafter in this section referred to as 'covered positions' "); 42 U. S. C. § 285g–4(b) ("hereafter in this section referred to as 'medical rehabilitation' ").

"written notice" that "specif[ies]," at a minimum, the time and place of the removal proceedings. § 1229(a)(1)(G)(i). Moreover, the omission of time-and-place information is not, as the dissent asserts, some trivial, ministerial defect, akin to an unsigned notice of appeal. Cf. *Becker* v. *Montgomery*, 532 U. S. 757, 763, 768 (2001). Failing to specify integral information like the time and place of removal proceedings unquestionably would "deprive [the notice to appear] of its essential character." *Post*, at 232, n. 5; see *supra*, at 212, n. 7.[9]

B

The Government and the dissent next contend that Congress' use of the word "under" in the stop-time rule renders the statute ambiguous. Brief for Respondent 22–23; *post*, at 224–225. Recall that the stop-time rule provides that "any period of . . . continuous physical presence" is "deemed to end . . . when the alien is served a notice to appear under section 1229(a)." § 1229b(d)(1)(A). According to the Government, the word "under" in that provision means "subject to," "governed by," or "issued under the authority of." Brief for Respondent 24. The dissent offers yet another alternative, insisting that "under" can also mean "'authorized by.'" *Post*, at 224. Those definitions, the Government and dissent maintain, support the BIA's view that the stop-time rule applies so long as DHS serves a notice that is "authorized by," or "subject to or governed by, or issued under the

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[9] The dissent maintains that Congress' decision to make the stop-time rule retroactive to certain pre-IIRIRA "orders to show cause" "sheds considerable light on the question presented" because orders to show cause did not necessarily include time-and-place information. *Post*, at 227. That argument compares apples to oranges. Even if the stop-time rule sometimes applies retroactively to an order to show cause, that provides scant support for the dissent's view that, under the new post-IIRIRA statutory regime, an entirely different document called a "notice to appear," which, by statute, must specify the time and place of removal proceedings, see § 1229(a)(1)(G)(i), need not include such information to trigger the stop-time rule.

authority of" § 1229(a), even if the notice bears none of the time-and-place information required by that provision. See Brief for Respondent 24; *post*, at 224–225.

We disagree. It is, of course, true that "[t]he word 'under' is [a] chameleon" that " 'must draw its meaning from its context.' " *Kucana* v. *Holder*, 558 U. S. 233, 245 (2010) (quoting *Ardestani* v. *INS*, 502 U. S. 129, 135 (1991)). But nothing in the text or context here supports either the Government's or the dissent's preferred definition of "under." Based on the plain language and statutory context discussed above, we think it obvious that the word "under," as used in the stop-time rule, can only mean "in accordance with" or "according to," for it connects the stop-time trigger in § 1229b(d)(1) to a "notice to appear" that contains the enumerated time-and-place information described in § 1229(a)(1)(G)(i). See 18 Oxford English Dictionary 950 (2d ed. 1989) (defining "under" as "[i]n accordance with"); Black's Law Dictionary 1525 (6th ed. 1990) (defining "under" as "according to"). So construed, the stop-time rule applies only if the Government serves a "notice to appear" "[i]n accordance with" or "according to" the substantive time-and-place requirements set forth in § 1229(a). See *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U. S. 519, 530 (2013) (internal quotation marks omitted). Far from generating any "degree of ambiguity," *post*, at 224, the word "under" provides the glue that bonds the stop-time rule to the substantive time-and-place requirements mandated by § 1229(a).

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C

The Government argues that surrounding statutory provisions reinforce its preferred reading. See Brief for Respondent 25–27. It points, for instance, to two separate provisions relating to in absentia removal orders: § 1229a(b)(5)(A), which provides that a noncitizen may be removed in absentia if the Government has provided "written notice required under paragraph (1) or (2) of section 1229(a)"; and § 1229a(b)(5)(C)(ii), which provides that, once an in ab-

sentia removal order has been entered, the noncitizen may seek to reopen the proceeding if, *inter alia*, he "demonstrates that [he] did not receive notice in accordance with paragraph (1) or (2) of section 1229(a)." According to the Government, those two provisions use the distinct phrases "required under" and "in accordance with" as shorthand for a notice that satisfies § 1229(a)(1)'s requirements, whereas the stop-time rule uses the phrase "under section 1229(a)" to encompass a different type of notice that does not necessarily include the information outlined in § 1229(a)(1). See Brief for Respondent 25–26. That logic is unsound. The Government essentially argues that phrase 1 ("written notice required under paragraph (1) . . . of section 1229(a)") and phrase 2 ("notice in accordance with paragraph (1) . . . of section 1229(a)") can refer to the same type of notice even though they use entirely different words, but that phrase 3 ("notice to appear under section 1229(a)") cannot refer to that same type of notice because it uses words different from phrases 1 and 2. But the Government offers no convincing reason why that is so. The far simpler explanation, and the one that comports with the actual statutory language and context, is that each of these three phrases refers to notice satisfying, at a minimum, the time-and-place criteria defined in § 1229(a)(1).

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Equally unavailing is the Government's invocation of § 1229a(b)(7). Brief for Respondent 26–27. Under that provision, a noncitizen who is ordered removed in absentia is ineligible for various forms of discretionary relief for a 10-year period if the noncitizen, "at the time of the notice described in paragraph (1) or (2) of section 1229(a) of [Title 8], was provided oral notice . . . of the time and place of the proceedings" and "of the consequences . . . of failing, other than because of exceptional circumstances," to appear. § 1229a(b)(7). The Government argues that the express reference to "the time and place of the proceedings" in § 1229a(b)(7) shows that, when Congress wants to attach

substantive significance to whether a noncitizen is given information about the specific "time and place" of a removal proceeding, it knows exactly how to do so. Brief for Respondent 26–27. But even if § 1229a(b)(7) may impose harsher consequences on noncitizens who fail to appear at removal proceedings after having specifically received oral notice of the time and place of such proceedings, that reveals nothing about the distinct question here—*i. e.*, whether Congress intended the stop-time rule to apply when the Government fails to provide written notice of the time and place of removal proceedings. As to that question, the statute makes clear that Congress fully intended to attach substantive significance to the requirement that noncitizens be given notice of at least the time and place of their removal proceedings. A document that fails to include such information is not a "notice to appear under section 1229(a)" and thus does not trigger the stop-time rule.

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D

Unable to find sure footing in the statutory text, the Government and the dissent pivot away from the plain language and raise a number of practical concerns. These practical considerations are meritless and do not justify departing from the statute's clear text. See *Burrage* v. *United States*, 571 U. S. 204, 218 (2014).

The Government, for its part, argues that the "administrative realities of removal proceedings" render it difficult to guarantee each noncitizen a specific time, date, and place for his removal proceedings. Brief for Respondent 48. That contention rests on the misguided premise that the time-and-place information specified in the notice to appear must be etched in stone. That is incorrect. As noted above, § 1229(a)(2) expressly vests the Government with power to change the time or place of a noncitizen's removal proceedings so long as it provides "written notice . . . specifying . . . the new time or place of the proceedings" and the

consequences of failing to appear. § 1229(a)(2); see Tr. of Oral Arg. 16–19. Nothing in our decision today inhibits the Government's ability to exercise that statutory authority after it has served a notice to appear specifying the time and place of the removal proceedings.

The dissent raises a similar practical concern, which is similarly misplaced. The dissent worries that requiring the Government to specify the time and place of removal proceedings, while allowing the Government to change that information, might encourage DHS to provide "arbitrary dates and times that are likely to confuse and confound all who receive them." *Post*, at 229. The dissent's argument wrongly assumes that the Government is utterly incapable of specifying an accurate date and time on a notice to appear and will instead engage in "arbitrary" behavior. See *ibid.* The Court does not embrace those unsupported assumptions. As the Government concedes, "a scheduling system previously enabled DHS and the immigration court to coordinate in setting hearing dates in some cases." Brief for Respondent 50, n. 15; Brief for National Immigrant Justice Center as *Amicus Curiae* 30–31. Given today's advanced software capabilities, it is hard to imagine why DHS and immigration courts could not again work together to schedule hearings before sending notices to appear.

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Finally, the dissent's related contention that including a changeable date would "mislead" and "prejudice" noncitizens is unfounded. *Post*, at 228. As already explained, if the Government changes the date of the removal proceedings, it must provide written notice to the noncitizen, § 1229(a)(2). This notice requirement mitigates any potential confusion that may arise from altering the hearing date. In reality, it is the dissent's interpretation of the statute that would "confuse and confound" noncitizens, *post*, at 229, by authorizing the Government to serve notices that lack any information about the time and place of the removal proceedings.

E

In a last ditch effort to salvage its atextual interpretation, the Government invokes the alleged purpose and legislative history of the stop-time rule. Brief for Respondent 37–40. Even for those who consider statutory purpose and legislative history, however, neither supports the Government's atextual position that Congress intended the stop-time rule to apply when a noncitizen has been deprived notice of the time and place of his removal proceedings. By the Government's own account, Congress enacted the stop-time rule to prevent noncitizens from exploiting administrative delays to "buy time" during which they accumulate periods of continuous presence. *Id.*, at 37–38 (citing H. R. Rep. No. 104–469, pt. 1, p. 122 (1996)). Requiring the Government to furnish time-and-place information in a notice to appear, however, is entirely consistent with that objective because, once a proper notice to appear is served, the stop-time rule is triggered, and a noncitizen would be unable to manipulate or delay removal proceedings to "buy time." At the end of the day, given the clarity of the plain language, we "apply the statute as it is written." *Burrage*, 571 U. S., at 218.

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IV

For the foregoing reasons, the judgment of the Court of Appeals for the First Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KENNEDY, concurring.

I agree with the Court's opinion and join it in full.

This separate writing is to note my concern with the way in which the Court's opinion in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), has

come to be understood and applied. The application of that precedent to the question presented here by various Courts of Appeals illustrates one aspect of the problem.

The first Courts of Appeals to encounter the question concluded or assumed that the notice necessary to trigger the stop-time rule found in 8 U. S. C. § 1229b(d)(1) was not "perfected" until the immigrant received all the information listed in § 1229(a)(1). *Guamanrrigra* v. *Holder*, 670 F. 3d 404, 410 (CA2 2012) (*per curiam*); see also *Dababneh* v. *Gonzales*, 471 F. 3d 806, 809 (CA7 2006); *Garcia-Ramirez* v. *Gonzales*, 423 F. 3d 935, 937, n. 3 (CA9 2005) (*per curiam*).

That emerging consensus abruptly dissolved not long after the Board of Immigration Appeals (BIA) reached a contrary interpretation of § 1229b(d)(1) in *Matter of Camarillo*, 25 I. & N. Dec. 644 (2011). After that administrative ruling, in addition to the decision under review here, at least six Courts of Appeals, citing *Chevron*, concluded that § 1229b(d)(1) was ambiguous and then held that the BIA's interpretation was reasonable. See *Moscoso-Castellanos* v. *Lynch*, 803 F. 3d 1079, 1083 (CA9 2015); *O'Garro* v. *United States Atty. Gen.*, 605 Fed. Appx. 951, 953 (CA11 2015) (*per curiam*); *Guaman-Yuqui* v. *Lynch*, 786 F. 3d 235, 239–240 (CA2 2015) (*per curiam*); *Gonzalez-Garcia* v. *Holder*, 770 F. 3d 431, 434–435 (CA6 2014); *Yi Di Wang* v. *Holder*, 759 F. 3d 670, 674–675 (CA7 2014); *Urbina* v. *Holder*, 745 F. 3d 736, 740 (CA4 2014). But see *Orozco-Velasquez* v. *Attorney General United States*, 817 F. 3d 78, 81–82 (CA3 2016). The Court correctly concludes today that those holdings were wrong because the BIA's interpretation finds little support in the statute's text.

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In according *Chevron* deference to the BIA's interpretation, some Courts of Appeals engaged in cursory analysis of the questions whether, applying the ordinary tools of statutory construction, Congress' intent could be discerned, 467 U. S., at 843, n. 9, and whether the BIA's interpretation was reasonable, *id.*, at 845. In *Urbina* v. *Holder*, for example,

the court stated, without any further elaboration, that "we agree with the BIA that the relevant statutory provision is ambiguous." 745 F. 3d, at 740. It then deemed reasonable the BIA's interpretation of the statute, "for the reasons the BIA gave in that case." *Ibid.* This analysis suggests an abdication of the Judiciary's proper role in interpreting federal statutes.

The type of reflexive deference exhibited in some of these cases is troubling. And when deference is applied to other questions of statutory interpretation, such as an agency's interpretation of the statutory provisions that concern the scope of its own authority, it is more troubling still. See *Arlington* v. *FCC*, 569 U. S. 290, 327 (2013) (ROBERTS, C. J., dissenting) ("We do not leave it to the agency to decide when it is in charge"). Given the concerns raised by some Members of this Court, see, *e. g.*, *id.*, at 312–328; *Michigan* v. *EPA*, 576 U. S. 743, 760–764 (2015) (THOMAS, J., concurring); *Gutierrez-Brizuela* v. *Lynch*, 834 F. 3d 1142, 1149–1158 (CA10 2016) (Gorsuch, J., concurring), it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision. The proper rules for interpreting statutes and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the Judiciary. See, *e. g.*, *Arlington*, *supra*, at 312–316 (ROBERTS, C. J., dissenting).

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JUSTICE ALITO, dissenting.

Although this case presents a narrow and technical issue of immigration law, the Court's decision implicates the status of an important, frequently invoked, once celebrated, and now increasingly maligned precedent, namely, *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). Under that decision, if a federal statute is ambiguous and the agency that is authorized to implement it

offers a reasonable interpretation, then a court is supposed to accept that interpretation. Here, a straightforward application of *Chevron* requires us to accept the Government's construction of the provision at issue. But the Court rejects the Government's interpretation in favor of one that it regards as the best reading of the statute. I can only conclude that the Court, for whatever reason, is simply ignoring *Chevron*.

I

As amended, the Immigration and Nationality Act generally requires the Government to remove nonpermanent resident aliens who overstay the terms of their admission into this country. See 8 U. S. C. §§ 1227(a)(1)(B)–(C). But under certain circumstances, the Government may decide to cancel their removal instead. See § 1229b. To be eligible for such relief, an alien must demonstrate that he or she "has been physically present in the United States for a continuous period of not less than 10 years." § 1229b(b)(1)(A). "For purposes of" that rule, however, "any period of . . . continuous physical presence in the United States shall be deemed to end . . . when the alien is served a notice to appear under section 1229(a) of this title." § 1229b(d)(1). That language acts as a stop-time rule, preventing the continuous-presence clock from continuing to run once an alien is served with a notice to appear.

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The question presented by this case is whether the stop-time rule is triggered by service of a notice to appear that is incomplete in some way. A provision of the amended Immigration and Nationality Act requires that the Government serve an alien who it seeks to remove with a notice to appear "specifying" a list of things, including "[t]he nature of the proceedings against the alien," "[t]he legal authority under which the proceedings are conducted," "[t]he acts or conduct alleged to be in violation of law," "[t]he charges against the alien and the statutory provisions alleged to have been violated," and (what is relevant here) "[t]he time and place at

which the proceedings will be held." §§ 1229(a)(1)(A), (B), (C), (D), (G)(i).

Petitioner Wescley Pereira is a Brazilian citizen who entered the United States lawfully in 2000 but then illegally overstayed his nonimmigrant visa. In 2006, the Government caused him to be served in person with a document styled as a notice to appear for removal proceedings. Pereira concedes that he overstayed his visa and is thus removable, but he argues that he is nonetheless eligible for cancellation of removal because he has now been in the country continuously for more than 10 years. He contends that the notice served on him in 2006 did not qualify as a notice to appear because it lacked one piece of information that such a notice is supposed to contain, namely, the time at which his removal proceedings were to be held. Thus, Pereira contends, that notice did not trigger the stop-time rule, and the clock continued to run.

The Board of Immigration Appeals (BIA) has rejected this interpretation of the stop-time rule in the past. It has held that "[a]n equally plausible reading" is that the stop-time rule "merely specifies the document the [Government] must serve on the alien to trigger the 'stop-time' rule and does not impose substantive requirements for a notice to appear to be effective in order for that trigger to occur." *Matter of Camarillo*, 25 I. & N. Dec. 644, 647 (2011). It therefore held in this case that Pereira is ineligible for cancellation of removal.

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II

A

Pereira, on one side, and the Government and the BIA, on the other, have a quasi-metaphysical disagreement about the meaning of the concept of a notice to appear. Is a notice to appear a document that contains certain essential characteristics, namely, all the information required by § 1229(a)(1), so that any notice that omits any of that information is not a

"notice to appear" at all? Or is a notice to appear a document that is conventionally called by that name, so that a notice that omits some of the information required by § 1229(a)(1) may still be regarded as a "notice to appear"?

Picking the better of these two interpretations might have been a challenge in the first instance. But the Court did not need to decide that question, for under *Chevron* we are obligated to defer to a Government agency's interpretation of the statute that it administers so long as that interpretation is a "'permissible'" one. *INS* v. *Aguirre-Aguirre*, 526 U. S. 415, 424 (1999). All that is required is that the Government's view be "reasonable"; it need not be "the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U. S. 208, 218 (2009). Moreover, deference to the Government's interpretation "is especially appropriate in the immigration context" because of the potential foreign-policy implications. *Aguirre-Aguirre*, *supra*, at 425. In light of the relevant text, context, statutory history, and statutory purpose, there is no doubt that the Government's interpretation of the stop-time rule is indeed permissible under *Chevron*.

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B

By its terms, the stop-time rule is consistent with the Government's interpretation. As noted, the stop-time rule provides that "any period of . . . continuous physical presence in the United States shall be deemed to end . . . when the alien is served a notice to appear under section 1229(a) of this title." § 1229b(d)(1). A degree of ambiguity arises from Congress's use of the word "under," for as the Court recognizes, "'[t]he word "under" is [a] chameleon,'" *ante*, at 215, having "'many dictionary definitions'" and no "uniform, consistent meaning," *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U. S. 519, 531 (2013). Everyone agrees, however, that "under" is often used to mean "authorized by." See, *e. g.*, Webster's New World College Dictionary 1453 (3d ed. 1997)

("authorized . . . by"); American Heritage Dictionary 1945 (3d ed. 1992) ("[w]ith the authorization of"); see also Brief for Respondent 24 (agreeing that "under" can mean "subject to," "governed by," or "issued under the authority of"); Brief for Petitioner 28. And when the term is used in this way, it does not necessarily mean that the act done pursuant to that authorization was done in strict compliance with the terms of the authorization. For example, one might refer to a litigant's disclosure "under" Rule 26(a) of the Federal Rules of Civil Procedure even if that disclosure did not comply with Rule 26(a) in every respect. Or one might refer to regulations promulgated "under" a statute even if a court later found those regulations inconsistent with the statute's text.

That use of the word "under" perfectly fits the Government's interpretation of the stop-time rule. The Government served Pereira with a notice to appear "under" § 1229(a) in the sense that the notice was "authorized by" that provision, which states that a notice to appear "shall be given" to an alien in a removal proceeding and outlines several rules governing such notices. On that reasonable reading, the phrase "under section 1229(a)" acts as shorthand for the type of document governed by § 1229(a).

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C

That interpretation is bolstered by the stop-time rule's cross-reference to "section 1229(a)." § 1229b(d)(1). Pereira interprets that cross-reference as picking up every substantive requirement that applies to notices to appear. But those substantive requirements are found only in § 1229(a)*(1)*. Thus, the cross-reference to "section 1229(a)," as opposed to "section 1229(a)(1)," tends to undermine Pereira's interpretation, because if Congress had meant for the stop-time rule to incorporate the substantive requirements located in § 1229(a)(1), it presumably would have referred specifically to that provision and not more generally to "section 1229(a)." We normally presume that "[w]hen Congress

want[s] to refer only to a particular subsection or paragraph, it [says] so," *NLRB* v. *SW General, Inc.*, 580 U. S. 288, 300 (2017), and it is instructive that neighboring statutory provisions in this case are absolutely riddled with such specific cross-references.[1] In the stop-time rule, however, Congress chose to insert a broader cross-reference, one that refers to the general process of serving notices to appear as a whole. See § 1229(a). Thus, Pereira essentially "wants to cherry pick from the material covered by the statutory cross-reference. But if Congress had intended to refer to the definition in [§ 1229(a)(1)] alone, it presumably would have done so." *Cyan, Inc.* v. *Beaver County Employees Retirement Fund*, 583 U. S. 416, 428 (2018).[2]

D

Statutory history also strongly supports the Government's argument that a notice to appear should trigger the stop-time rule even if it fails to include the date and time of the alien's removal proceeding. When Congress enacted the stop-time rule, it decreed that the rule should "apply to notices to appear issued before, on, or after the date of the enactment of this Act." Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 309(c)(5), 110 Stat. 3009–627. This created a problem: Up until that point, there was no such thing as a "notice to appear," so the reference to "notices to appear issued before . . . this Act" made little sense. When Congress became aware of the problem,

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[1] See, *e. g.*, § 1229a(b)(5)(A) ("paragraph (1) . . . of section 1229(a)"); § 1229a(b)(5)(C)(ii) (same); § 1229a(b)(7) (same); § 1229a(b)(5)(B) ("address required under section 1229(a)(1)(F)"); see also § 1229a(b)(7) (referring to § 1229(a)(1)(G)(i)'s "time and place" requirement).

[2] According to the Court, "the broad reference to § 1229(a) is of no consequence, because, as even the Government concedes, only paragraph (1) bears on the meaning of a 'notice to appear.'" *Ante*, at 209. But that is precisely the point: If "only paragraph (1) bears on the meaning of a 'notice to appear,'" then Congress's decision to refer to § 1229(a) more broadly indicates that it meant to do something *other* than to pick up the substantive requirements of § 1229(a)(1).

it responded by clarifying that the stop-time rule should apply not only to notices to appear, but also "to orders to show cause . . . issued before, on, or after the date" of the clarifying amendment's enactment. Nicaraguan Adjustment and Central American Relief Act, § 203(1), 111 Stat. 2196, as amended, 8 U. S. C. § 1101 note. That clarification sheds considerable light on the question presented here because orders to show cause did not necessarily include the date or location of proceedings (even if they otherwise served a function similar to that now served by notices to appear). See 8 U. S. C. § 1252b(a)(2)(A) (1994 ed.).

That statutory history supports the Government's interpretation twice over. First, it demonstrates that when it comes to triggering the stop-time rule, Congress attached no particular significance to the presence (or absence) of information about the date and time of a removal proceeding. Congress was more than happy for the stop-time rule to be activated either by notices to appear or by orders to show cause, even though the latter often lacked any information about the date and time of proceedings.

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Second, and even more important, the statutory history also shows that Congress clearly thought of orders to show cause as the functional equivalent of notices to appear for purposes of the stop-time rule. After an initially confusing reference to "notices to appear" issued before the creation of the stop-time rule, Congress clarified that it had meant to refer to "orders to show cause." By equating orders to show cause with notices to appear, Congress indicated that when the stop-time rule refers to "a notice to appear," it is referring to a category of documents that do not necessarily provide the date and time of a future removal proceeding.[3]

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[3] Although the Court charges me with "compar[ing] apples to oranges," *ante*, at 214, n. 9, Congress was the one that equated orders to show cause and notices to appear for purposes of the stop-time rule. By ignoring that decision, the Court rewrites the statute to *its* taste.

E

Finally, Pereira's contrary interpretation leads to consequences that clash with any conceivable statutory purpose. Pereira's interpretation would require the Government to include a date and time on every notice to appear that it issues. But at the moment, the Government lacks the ability to do that with any degree of accuracy. The Department of Homeland Security sends out the initial notice to appear, but the removal proceedings themselves are scheduled by the Immigration Court, which is part of the Department of Justice. See 8 CFR § 1003.18(a) (2018). The Department of Homeland Security cannot dictate the scheduling of a matter on the docket of the Immigration Court, and at present, the Department of Homeland Security generally cannot even access the Immigration Court's calendar. *Camarillo*, 25 I. & N. Dec., at 648; Tr. of Oral Arg. 52–53. The Department of Homeland Security may thus be hard pressed to include on initial notices to appear a hearing date that is anything more than a rough estimate subject to considerable change. See § 1229(a)(2); see also *ante*, at 217–218 (disclaiming any effect on the Government's ability to change initial hearing dates).

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Including an estimated and changeable date, however, may do much more harm than good. See *Gonzalez-Garcia* v. *Holder*, 770 F. 3d 431, 434–435 (CA6 2014). It is likely to mislead many recipients and to prejudice those who make preparations on the assumption that the initial date is firm. And it forces the Government to go through the pointless exercise of first including a date that it knows may very well be altered and then changing it once the real date becomes clear. Such a system serves nobody's interests.

Statutory interpretation is meant to be "a holistic endeavor," and sometimes language "that may seem ambiguous in isolation" becomes clear because "only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Assn. of Tex.* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 371

(1988). The real-world effects produced by Pereira's interpretation—arbitrary dates and times that are likely to confuse and confound all who receive them—illustrate starkly the merits of the Government's alternative construction.

III

Based on the relevant text, context, statutory history, and statutory purpose, the Government makes a convincing case that the stop-time rule can be triggered even by a notice to appear that omits the date and time of a removal proceeding. But the Court holds instead that in order "to trigger the stop-time rule, the Government must serve a notice to appear that, at the very least, 'specif[ies]' the 'time and place' of the removal proceedings." *Ante*, at 209. According to the Court, that conclusion is compelled by the statutory text, the statutory context, and "common sense." *Ante*, at 211. While the Court's interpretation may be reasonable, the Court goes much too far in saying that it is the *only* reasonable construction.

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A

Start with the text. As noted, the stop-time rule provides that "any period of . . . continuous physical presence in the United States shall be deemed to end . . . when the alien is served a notice to appear under section 1229(a)." § 1229b(d)(1). The Court does not dispute that it is entirely consistent with standard English usage to read this language as the Government and I do. See *ante*, at 214–215. It therefore follows that the stop-time rule itself does not foreclose the Government's interpretation.

That leaves only § 1229(a)(1), which specifies the information that a notice to appear must contain. The Court's treatment of this provision contradicts itself. On the one hand, the Court insists that this provision is "definitional" and that it sets out the essential characteristics without which a notice is not a notice to appear. *Ante*, at 213. But on the other hand, the Court states that it "leaves for another day

whether a putative notice to appear that omits any of the other categories of information enumerated in § 1229(a)(1) triggers the stop-time rule." *Ante*, at 208, n. 5. The Court cannot have it both ways. If § 1229(a)(1) is definitional and sets out the essential characteristics of a notice to appear, then the omission of any required item of information makes a putative notice to appear a nullity. So if the Court means what it says—that its interpretation of § 1229(a)(1)'s language leaves open the consequences of omitting other categories of information—that is tantamount to admitting that § 1229(a)(1) itself cannot foreclose the Government's interpretation.[4]

In any event, the Government's interpretation can easily be squared with the text of § 1229(a)(1). That provision states that a "written notice (*in this section referred to as a 'notice to appear'*) shall be given in person to the alien . . . specifying" 10 categories of information, including the "time and place" of the removal proceeding. § 1229(a)(1) (emphasis added). According to Pereira, that language cinches the case against the Government's interpretation: By equating a "notice to appear" with a "written notice [that] specif[ies]" the relevant categories of information, § 1229(a)(1) establishes that a notice lacking any of those 10 pieces of information cannot qualify as a "notice to appear" and thus cannot trigger the stop-time rule. In Pereira's eyes, § 1229(a)(1) defines what a notice to appear is, and most of the Court's opinion is to the same effect.

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This may be a plausible interpretation of § 1229(a)(1)'s language, but it is not the only one. It is at least as reasonable to read that language as simply giving a name to the new

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[4] Nor can the Court get away with labeling its self-contradictions as "judicial restraint." *Ante*, at 208, n. 5. Either § 1229(a)(1) sets out the essential characteristics of a notice to appear or it does not; the Court cannot stop at a halfway point unsupported by either text or logic while maintaining that its resting place is "clear" in light of the statutory text. *Ante*, at 208.

type of notice to which that provision refers. Or to put the point another way, § 1229(a)(1)'s language can be understood to define what makes a notice to appear *complete*. See *Camarillo*, *supra*, at 647. Under that interpretation, a notice that omits some of the information required by § 1229(a)(1) might still be a "notice to appear."

We often use language in this way. In everyday life, a person who sees an old Chevy with three wheels in a junkyard would still call it a car. Language is often used the same way in the law. Consider the example of a notice of appeal. Much like a notice to appear, a notice of appeal must meet several substantive requirements; all notices of appeal, for example, "must be signed." Fed. Rule Civ. Proc. 11(a). So what happens if a notice of appeal is incomplete in some way—say, because it is unsigned but otherwise impeccable? If a court clerk wanted to point out the lack of a signature to an attorney, the clerk is far more likely to say, "there is a problem with your notice of appeal," than to say, "there is a problem with this document you filed; it's not signed and therefore I don't know what to call it, but I can't call it a notice of appeal because it is unsigned."

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Furthermore, just because a legal document is incomplete, it does not necessarily follow that it is without legal effect. Consider again the notice of appeal. As a general matter, an appeal "may be taken" in a civil case "only by filing a notice of appeal" "within 30 days after entry of the judgment or order appealed from." Fed. Rules App. Proc. 3(a), 4(a)(1)(A). While an unsigned notice of appeal does not meet the substantive requirements set out in Rule 11, in *Becker* v. *Montgomery*, 532 U. S. 757, 763, 768 (2001), this Court unanimously held that a litigant who filed a timely but unsigned notice of appeal still beat the 30-day clock for filing appeals. As we explained, "imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court." *Id.*, at 767.

If Rule 11 of the Federal Rules of Civil Procedure can be read in this way, it is not unreasonable to do the same with § 1229(a)(1). And in trying to distinguish an empty signature line on a notice of appeal as a "trivial, ministerial defect," *ante*, at 214, the Court gives the game away by once again assuming its own conclusion. Whether the omission of the date and time certain on a notice to appear is essential for present purposes is the central issue in this case, and the Court gives no textually based reason to think that it is. The Government could reasonably conclude that a notice to appear that omits the date and time of a proceeding is still a notice to appear (albeit a defective one), much in the same way that a complaint without the e-mail address of the signer is still a complaint (albeit a defective one, see Rule 11(a)), or a clock missing the number "8" is still a clock (albeit a defective one).

Pereira and the Court are right that § 1229(a)(1) sets out the substantive requirements for notices to appear, but that fact alone does not control whether an incomplete notice to appear triggers the stop-time rule.[5]

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B

With the text of both the stop-time rule and § 1229(a)(1) irreducibly ambiguous, the Court must next look to two neighboring provisions to support its conclusion that its interpretation is the only reasonable one. Neither provision is sufficient.

The Court first observes that the second paragraph of § 1229(a) allows the Government to move or reschedule a

[5] Of course, courts should still demand that the Government justify why whatever is left off a notice to appear does not deprive it of its essential character as a "notice to appear." As the Government rightly concedes, for example, a blank sheet of paper would not constitute a "notice to appear." Tr. of Oral Arg. 39–40; see Brief for Respondent 35–36. But for all the reasons the Government gives, omission of the date and time of a future removal proceeding is not, by itself, enough to turn a notice to appear into something else.

removal proceeding unilaterally and then to inform the alien of "the new time or place of the proceedings." § 1229(a)(2)(A)(i). "By allowing for a 'change or postponement' of the proceedings to a 'new time or place,' " the Court reasons, "paragraph (2) presumes that the Government has already served a 'notice to appear . . . ' that specified a time and place as required." *Ante*, at 210.

That is entirely correct—and entirely irrelevant. No one doubts that § 1229(a)(1) requires that a notice to appear include the "time and place" of the removal proceeding. See § 1229(a)(1)(G)(i). Indeed, that is common ground between the two parties. See Brief for Petitioner 10–11; Brief for Respondent 3. Paragraph (2) undoubtedly assumes that notices to appear will state the "time and place" of the removal proceeding as required by § 1229(a)(1), but it has nothing to say about whether the failure to include that information affects the operation of the stop-time rule. By suggesting otherwise, the Court is merely reasoning backwards from its conclusion.

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The other provision cited by the Court, § 1229(b)(1), is no more helpful. As the Court explains, § 1229(b)(1) generally precludes the Government from scheduling a hearing date " 'earlier than 10 days after the service of the notice to appear' " in order to give the alien " 'the opportunity to secure counsel.' " *Ante*, at 210. Unless a notice to appear includes the time and place of the hearing, the Court frets, "the Government could serve a document labeled 'notice to appear' without listing the time and location of the hearing and then, years down the line, provide that information a day before the removal hearing when it becomes available." *Ibid.* But that remote and speculative possibility depends entirely on the Immigration Court's allowing a removal proceeding to go forward only one day after an alien (and the Government) receives word of a hearing date. See 8 CFR § 1003.18(a). Even assuming that such an unlikely event were to come to pass, the court's decision would surely be subject to review

on appeal. See generally 8 CFR § 1003.1; 8 U. S. C. § 1252. Regardless, the Court's interpretation of the stop-time rule would not prevent a similar type of problem from arising. When the Government sends an initial notice to appear from now on, it may be forced by the Court's interpretation to guess that the hearing will take place far in the future, only to learn shortly afterwards that the hearing is in fact imminent. An alien lulled into a false sense of security by that initial notice to appear will have as little meaningful " 'opportunity to secure counsel' " and "time to prepare adequately," *ante*, at 210–211, as one who initially received a notice to appear without any hearing date.

C

Finally, the Court turns to "common sense" to support its preferred reading of the text. According to the Court, it should be "obvious" to anyone that "a notice that does not specify when and where to appear for a removal proceeding is not a 'notice to appear.' " *Ante*, at 202, 211. But what the Court finds so obvious somehow managed to elude every Court of Appeals to consider the question save one. See *Moscoso-Castellanos* v. *Lynch*, 803 F. 3d 1079, 1083 (CA9 2015); *O'Garro* v. *United States Atty. Gen.*, 605 Fed. Appx. 951, 953 (CA11 2015) (*per curiam*); *Guaman-Yuqui* v. *Lynch*, 786 F. 3d 235, 240 (CA2 2015) (*per curiam*); *Gonzalez-Garcia* v. *Holder*, 770 F. 3d 431, 434–435 (CA6 2014); *Yi Di Wang* v. *Holder*, 759 F. 3d 670, 675 (CA7 2014); *Urbina* v. *Holder*, 745 F. 3d 736, 740 (CA4 2014).

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That is likely because the Court's "common sense" depends on a very specific understanding of the purpose of a notice to appear. In the Court's eyes, notices to appear serve primarily as a vehicle for communicating to aliens when and where they should appear for their removal hearings. That is certainly a reasonable interpretation with some intuitive force behind it. But that is not the only possible understanding or even necessarily the best one. As the Government reasonably explains, a notice to appear can also be un-

derstood to serve primarily as a charging document. See Tr. of Oral Arg. 39–45. Indeed, much of § 1229(a)(1) reinforces that view through the informational requirements it imposes on notices to appear. See, *e. g.*, § 1229(a)(1)(A) ("nature of the proceedings"); § 1229(a)(1)(B) ("legal authority" for "the proceedings"); § 1229(a)(1)(C) ("acts or conduct alleged"); § 1229(a)(1)(D) ("charges against the alien"); *ibid.* ("statutory provisions alleged to have been violated"). Interpreted in this way, a notice to appear hardly runs afoul of "common sense" by simply omitting the date and time of a future removal proceeding.[6]

Today's decision appears even less commonsensical once its likely consequences are taken into account. As already noted, going forward the Government will be forced to include an arbitrary date and time on every notice to appear that it issues. See *supra*, at 228. Such a system will only serve to confuse everyone involved, and the Court offers no explanation as to why it believes otherwise. Although the Court expresses surprise at the idea that its opinion will "'forc[e]' the Government to guess when and where a hearing will take place," *ante*, at 211, n. 6, it is undisputed that the Government currently lacks the capability to do anything other than speculate about the likely date and time of future

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[6] The Court responds to this point in two ways. First, it faults me for failing to offer a reason "rooted in the statutory tex[t] for treating time-and-place information as any less crucial than charging information for purposes of triggering the stop-time rule." *Ante*, at 212, n. 7. But exactly the same criticism can be leveled against the Court's own reading, which noticeably fails to offer any reason "rooted in the statutory text" why time-and-place information should be treated as any *more* crucial than charging information for purposes of triggering the stop-time rule. Second, the Court also observes misleadingly that "there is no reason why a notice to appear should have only one essential function," and that a notice to appear might thus serve the dual purpose of both presenting charges and informing an alien "when and where to appear." *Ibid.* Of course it might, but it is also equally reasonable to interpret a notice to appear as serving only one of those functions. Under *Chevron*, it was the Government—not this Court—that was supposed to make that interpretive call.

removal proceedings. See Tr. of Oral Arg. 47–49, 52–53. At most, we can hope that the Government develops a system in the coming years that allows it to determine likely dates and times before it sends out initial notices to appear. But nothing in either today's decision or the statute can guarantee such an outcome, so the Court is left crossing its fingers and hoping for the best. *Ante*, at 211, n. 6, 218.

* * *

Once the errors and false leads are stripped away, the most that remains of the Court's argument is a textually permissible interpretation consistent with the Court's view of "common sense." That is not enough to show that the Government's contrary interpretation is unreasonable. Choosing between these competing interpretations might have been difficult in the first instance. But under *Chevron*, that choice was not ours to make. Under *Chevron*, this Court was obliged to defer to the Government's interpretation.

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In recent years, several Members of this Court have questioned *Chevron*'s foundations. See, *e. g.*, *ante*, at 220–221 (KENNEDY, J., concurring); *Michigan* v. *EPA*, 576 U. S. 743, 760 (2015) (THOMAS, J., concurring); *Gutierrez-Brizuela* v. *Lynch*, 834 F. 3d 1142, 1149 (CA10 2016) (Gorsuch, J., concurring). But unless the Court has overruled *Chevron* in a secret decision that has somehow escaped my attention, it remains good law.

I respectfully dissent.

Syllabus

LUCIA ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION

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

No. 17–130. Argued April 23, 2018—Decided June 21, 2018

The Securities and Exchange Commission (SEC or Commission) has statutory authority to enforce the nation's securities laws. One way it can do so is by instituting an administrative proceeding against an alleged wrongdoer. Typically, the Commission delegates the task of presiding over such a proceeding to an administrative law judge (ALJ). The SEC currently has five ALJs. Other staff members, rather than the Commission proper, selected them all. An ALJ assigned to hear an SEC enforcement action has the "authority to do all things necessary and appropriate" to ensure a "fair and orderly" adversarial proceeding. 17 CFR §§201.111, 200.14(a). After a hearing ends, the ALJ issues an initial decision. The Commission can review that decision, but if it opts against review, it issues an order that the initial decision has become final. See §201.360(d). The initial decision is then "deemed the action of the Commission." 15 U. S. C. §78d–1(c).

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The SEC charged petitioner Raymond Lucia with violating certain securities laws and assigned ALJ Cameron Elliot to adjudicate the case. Following a hearing, Judge Elliot issued an initial decision concluding that Lucia had violated the law and imposing sanctions. On appeal to the SEC, Lucia argued that the administrative proceeding was invalid because Judge Elliot had not been constitutionally appointed. According to Lucia, SEC ALJs are "Officers of the United States" and thus subject to the Appointments Clause. Under that Clause, only the President, "Courts of Law," or "Heads of Departments" can appoint such "Officers." But none of those actors had made Judge Elliot an ALJ. The SEC and the Court of Appeals for the D. C. Circuit rejected Lucia's argument, holding that SEC ALJs are not "Officers of the United States," but are instead mere employees—officials with lesser responsibilities who are not subject to the Appointments Clause.

Held: The Commission's ALJs are "Officers of the United States," subject to the Appointments Clause. Pp. 244–252.

(a) This Court's decisions in *United States* v. *Germaine*, 99 U. S. 508, and *Buckley* v. *Valeo*, 424 U. S. 1, set out the basic framework for distinguishing between officers and employees. To qualify as an officer, rather than an employee, an individual must occupy a "continuing" posi-

tion established by law, *Germaine*, 99 U. S., at 511, and must "exercis[e] significant authority pursuant to the laws of the United States," *Buckley*, 424 U. S., at 126.

In *Freytag* v. *Commissioner*, 501 U. S. 868, the Court applied this framework to "special trial judges" (STJs) of the United States Tax Court. STJs could issue the final decision of the Tax Court in "comparatively narrow and minor matters." *Id.*, at 873. In more major matters, they could preside over the hearing but could not issue a final decision. Instead, they were to "prepare proposed findings and an opinion" for a regular Tax Court judge to consider. *Ibid.* The proceeding challenged in *Freytag* was a major one. The losing parties argued on appeal that the STJ who presided over their hearing was not constitutionally appointed.

This Court held that STJs are officers. Citing *Germaine*, the *Freytag* Court first found that STJs hold a continuing office established by law. See 501 U. S., at 881. The Court then considered, as *Buckley* demands, the "significance" of the "authority" STJs wield. 501 U. S., at 881. The Government had argued that STJs are employees in all cases in which they could not enter a final decision. But the Court thought that the Government's focus on finality "ignore[d] the significance of the duties and discretion that [STJs] possess." *Ibid.* Describing the responsibilities involved in presiding over adversarial hearings, the Court said: STJs "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders." *Id.*, at 881–882. And the Court observed that "[i]n the course of carrying out these important functions," STJs "exercise significant discretion." *Id.*, at 882.

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Freytag's analysis decides this case. The Commission's ALJs, like the Tax Court's STJs, hold a continuing office established by law. SEC ALJs "receive[ ] a career appointment," 5 CFR § 930.204(a), to a position created by statute, see 5 U. S. C. §§ 556–557, 5372, 3105. And they exercise the same "significant discretion" when carrying out the same "important functions" as STJs do. *Freytag*, 501 U. S., at 882. Both sets of officials have all the authority needed to ensure fair and orderly adversarial hearings—indeed, nearly all the tools of federal trial judges. The Commission's ALJs, like the Tax Court's STJs, "take testimony," "conduct trials," "rule on the admissibility of evidence," and "have the power to enforce compliance with discovery orders." *Id.*, at 881–882. So point for point from *Freytag*'s list, SEC ALJs have equivalent duties and powers as STJs in conducting adversarial inquiries.

Moreover, at the close of those proceedings, SEC ALJs issue decisions much like that in *Freytag*. STJs prepare proposed findings and an opinion adjudicating charges and assessing tax liabilities. Similarly, the

Syllabus

Commission's ALJs issue initial decisions containing factual findings, legal conclusions, and appropriate remedies. And what happens next reveals that the ALJ can play the more autonomous role. In a major Tax Court case, a regular Tax Court judge must always review an STJ's opinion, and that opinion comes to nothing unless the regular judge adopts it. By contrast, the SEC can decide against reviewing an ALJ's decision, and when it does so the ALJ's decision itself "becomes final" and is "deemed the action of the Commission." 17 CFR § 201.360(d)(2); 15 U. S. C. § 78d–1(c). Pp. 244–251.

(b) Judge Elliot heard and decided Lucia's case without a constitutional appointment. "[O]ne who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case" is entitled to relief. *Ryder* v. *United States*, 515 U. S. 177, 182. Lucia made just such a timely challenge. And the "appropriate" remedy for an adjudication tainted with an appointments violation is a new "hearing before a properly appointed" official. *Id.*, at 183, 188. In this case, that official cannot be Judge Elliot, even if he has by now received a constitutional appointment. Having already both heard Lucia's case and issued an initial decision on the merits, he cannot be expected to consider the matter as though he had not adjudicated it before. To cure the constitutional error, another ALJ (or the Commission itself) must hold the new hearing. Pp. 251–252.

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868 F. 3d 1021, reversed and remanded.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, ALITO, and GORSUCH, JJ., joined. THOMAS, J., filed a concurring opinion, in which GORSUCH, J., joined, *post*, p. 252. BREYER, J., filed an opinion concurring in the judgment in part and dissenting in part, in which GINSBURG and SOTOMAYOR, JJ., joined as to Part III, *post*, p. 255. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 268.

Mark A. Perry argued the cause for petitioners. With him on the briefs were *Jason Neal*, *Kellam M. Conover*, *Shannon U. Han*, and *Stephen P. Dent*. *Deputy Solicitor General Wall* argued the cause for respondent in support of petitioners. With him on the briefs were *Solicitor General Francisco*, *Acting Assistant Attorney General Readler*, *Deputy Solicitor General Kneedler*, *Deputy Assistant Attorney General Mooppan*, *Allon Kedem*, and *Joshua M. Salzman*.

Counsel

Anton Metlitsky, by invitation of the Court, 583 U. S. 1099, argued the cause as *amicus curiae* in support of the judgment below. With him on the brief were *Jonathan D. Hacker*, *Deanna M. Rice*, and *Samantha M. Goldstein*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Utah et al. by *Sean D. Reyes*, Attorney General of Utah, *Tyler R. Green*, Solicitor General, and *Stanford E. Purser*, Deputy Solicitor General, and by the Attorneys General for their respective States as follows: *Steve Marshall* of Alabama, *Leslie Rutledge* of Arkansas, *Curtis T. Hill, Jr.*, of Indiana, *Derek Schmidt* of Kansas, *Jeff Landry* of Louisiana, *Bill Schuette* of Michigan, *Joshua D. Hawley* of Missouri, *Doug Peterson* of Nebraska, *Mike Hunter* of Oklahoma, *Peter F. Kilmartin* of Rhode Island, *Alan Wilson* of South Carolina, *Ken Paxton* of Texas, *Brad Schimel* of Wisconsin, and *Peter K. Michael* of Wyoming; for the Cato Institute by *Ilya Shapiro*; for the Chamber of Commerce of the United States of America by *Andrew J. Pincus*; for Equity Dealers of America by *Ilana H. Eisenstein* and *Ethan H. Townsend*; for J. S. Oliver Capital Management, L. P., et al. by *Andrew J. Morris*; for the New Civil Liberties Alliance by *Jonathan F. Mitchell* and *Margaret A. Little*; for the Pacific Legal Foundation by *Oliver J. Dunford* and *Jeffrey W. McCoy*; for RD Legal Capital, LLC, et al. by *Albert Giang*; for Scholars of Corpus Linguistics by *Gene C. Schaerr*; for SHOW, Inc., by *David Broiles*; for the Washington Legal Foundation by *Cory L. Andrews* and *Richard A. Samp*; for Wing F. Chau by *Alex Lipman*, *Justin S. Weddle*, *Ashley L. Baynham*, and *Stephen A. Best*; for Jennifer L. Mascott by *William S. Consovoy* and *J. Michael Connolly*; and for Anthony Michael Sabino by *Mr. Sabino*, *pro se*.

Briefs of *amici curiae* urging affirmance were filed for the American Federation of Labor and Congress of Industrial Organizations by *Harold Craig Becker*, *Lynn K. Rhinehart*, and *Matthew J. Ginsburg*; for the Association of Administrative Law Judges by *Ruthanne M. Deutsch*, *Hyland Hunt*, and *Harold J. Krent*; for Constitutional and Administrative Law Scholars by *Brianne J. Gorod*, *Elizabeth B. Wydra*, *Ashwin P. Phatak*, *Gillian E. Metzger*, *pro se*, and *Peter Shane*, *pro se*; for Cornell Securities Law Clinic by *William A. Jacobson*; for the National Black Lung Association by *Stephen A. Sanders*; for the National Organization of Social Security Claimants' Representatives by *Eric Schnaufer*; and for David Zaring by *Katharine M. Mapes*.

Briefs of *amici curiae* were filed for Administrative Law Scholars by *Richard J. Pierce, Jr.*, *Robert Glicksman*, *Alan B. Morrison*, and *Jonathan R. Siegel*, all *pro se*; for the Federal Administrative Law Judges Conference by *John M. Vittone*; for the Forum of United States Administra-

JUSTICE KAGAN delivered the opinion of the Court.

The Appointments Clause of the Constitution lays out the permissible methods of appointing "Officers of the United States," a class of government officials distinct from mere employees. Art. II, § 2, cl. 2. This case requires us to decide whether administrative law judges (ALJs) of the Securities and Exchange Commission (SEC or Commission) qualify as such "Officers." In keeping with *Freytag* v. *Commissioner*, 501 U. S. 868 (1991), we hold that they do.

I

The SEC has statutory authority to enforce the nation's securities laws. One way it can do so is by instituting an administrative proceeding against an alleged wrongdoer. By law, the Commission may itself preside over such a proceeding. See 17 CFR § 201.110 (2017). But the Commission also may, and typically does, delegate that task to an ALJ. See *ibid.*; 15 U. S. C. § 78d–1(a). The SEC currently has five ALJs. Other staff members, rather than the Commission proper, selected them all. See App. to Pet. for Cert. 295a–297a.

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An ALJ assigned to hear an SEC enforcement action has extensive powers—the "authority to do all things necessary and appropriate to discharge his or her duties" and ensure a "fair and orderly" adversarial proceeding. §§ 201.111, 200.14(a). Those powers "include, but are not limited to," supervising discovery; issuing, revoking, or modifying subpoenas; deciding motions; ruling on the admissibility of evidence; administering oaths; hearing and examining witnesses; generally "[r]egulating the course of" the proceeding and the "conduct of the parties and their counsel"; and imposing sanctions for "[c]ontemptuous conduct" or violations of procedural requirements. §§ 201.111, 201.180; see

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tive Law Judges by *Gerald Marvin Bober*; and for Urska Velikonja et al. by *Brian Wolfman*.

§§ 200.14(a), 201.230. As that list suggests, an SEC ALJ exercises authority "comparable to" that of a federal district judge conducting a bench trial. *Butz* v. *Economou*, 438 U. S. 478, 513 (1978).

After a hearing ends, the ALJ issues an "initial decision." § 201.360(a)(1). That decision must set out "findings and conclusions" about all "material issues of fact [and] law"; it also must include the "appropriate order, sanction, relief, or denial thereof." § 201.360(b). The Commission can then review the ALJ's decision, either upon request or *sua sponte*. See § 201.360(d)(1). But if it opts against review, the Commission "issue[s] an order that the [ALJ's] decision has become final." § 201.360(d)(2). At that point, the initial decision is "deemed the action of the Commission." § 78d–1(c).

This case began when the SEC instituted an administrative proceeding against petitioner Raymond Lucia and his investment company. Lucia marketed a retirement savings strategy called "Buckets of Money." In the SEC's view, Lucia used misleading slideshow presentations to deceive prospective clients. The SEC charged Lucia under the Investment Advisers Act, § 80b–1 *et seq.*, and assigned ALJ Cameron Elliot to adjudicate the case. After nine days of testimony and argument, Judge Elliot issued an initial decision concluding that Lucia had violated the Act and imposing sanctions, including civil penalties of $300,000 and a lifetime bar from the investment industry. In his decision, Judge Elliot made factual findings about only one of the four ways the SEC thought Lucia's slideshow misled investors. The Commission thus remanded for factfinding on the other three claims, explaining that an ALJ's "personal experience with the witnesses" places him "in the best position to make findings of fact" and "resolve any conflicts in the evidence." App. to Pet. for Cert. 241a. Judge Elliot then made additional findings of deception and issued a revised initial decision, with the same sanctions. See *id.*, at 118a.

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On appeal to the SEC, Lucia argued that the administrative proceeding was invalid because Judge Elliot had not been constitutionally appointed. According to Lucia, the Commission's ALJs are "Officers of the United States" and thus subject to the Appointments Clause. Under that Clause, Lucia noted, only the President, "Courts of Law," or "Heads of Departments" can appoint "Officers." See Art. II, § 2, cl. 2. And none of those actors had made Judge Elliot an ALJ. To be sure, the Commission itself counts as a "Head[ ] of Department[ ]." *Ibid.*; see *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 511–513 (2010). But the Commission had left the task of appointing ALJs, including Judge Elliot, to SEC staff members. See *supra*, at 241. As a result, Lucia contended, Judge Elliot lacked constitutional authority to do his job.

The Commission rejected Lucia's argument. It held that the SEC's ALJs are not "Officers of the United States." Instead, they are "mere employees"—officials with lesser responsibilities who fall outside the Appointments Clause's ambit. App. to Pet. for Cert. 87a. The Commission reasoned that its ALJs do not "exercise significant authority independent of [its own] supervision." *Id.*, at 88a. Because that is so (said the SEC), they need no special, high-level appointment. See *id.*, at 86a.

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Lucia's claim fared no better in the Court of Appeals for the D. C. Circuit. A panel of that court seconded the Commission's view that SEC ALJs are employees rather than officers, and so are not subject to the Appointments Clause. See 832 F. 3d 277, 283–289 (2016). Lucia then petitioned for rehearing en banc. The Court of Appeals granted that request and heard argument in the case. But the ten members of the en banc court divided evenly, resulting in a *per curiam* order denying Lucia's claim. See 868 F. 3d 1021 (2017). That decision conflicted with one from the Court of Appeals for the Tenth Circuit. See *Bandimere* v. *SEC*, 844 F. 3d 1168, 1179 (2016).

Lucia asked us to resolve the split by deciding whether the Commission's ALJs are "Officers of the United States within the meaning of the Appointments Clause." Pet. for Cert. i. Up to that point, the Federal Government (as represented by the Department of Justice) had defended the Commission's position that SEC ALJs are employees, not officers. But in responding to Lucia's petition, the Government switched sides.[1] So when we granted the petition, 583 U. S. 1089 (2018), we also appointed an *amicus curiae* to defend the judgment below.[2] We now reverse.

II

The sole question here is whether the Commission's ALJs are "Officers of the United States" or simply employees of the Federal Government. The Appointments Clause prescribes the exclusive means of appointing "Officers." Only the President, a court of law, or a head of department can do so. See Art. II, § 2, cl. 2.[3] And as all parties agree, none

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[1] In the same certiorari-stage brief, the Government asked us to add a second question presented: whether the statutory restrictions on removing the Commission's ALJs are constitutional. See Brief in Response 21. When we granted certiorari, we chose not to take that step. See 583 U. S. 1089 (2018). The Government's merits brief now asks us again to address the removal issue. See Brief for United States 39–55. We once more decline. No court has addressed that question, and we ordinarily await "thorough lower court opinions to guide our analysis of the merits." *Zivotofsky* v. *Clinton*, 566 U. S. 189, 201 (2012).

[2] We appointed Anton Metlitsky to brief and argue the case, 583 U. S. 1099 (2018), and he has ably discharged his responsibilities.

[3] That statement elides a distinction, not at issue here, between "principal" and "inferior" officers. See *Edmond* v. *United States*, 520 U. S. 651, 659–660 (1997). Only the President, with the advice and consent of the Senate, can appoint a principal officer; but Congress (instead of relying on that method) may authorize the President alone, a court, or a department head to appoint an inferior officer. See *ibid.* Both the Government and Lucia view the SEC's ALJs as inferior officers and acknowledge that the Commission, as a head of department, can constitutionally appoint them. See Brief for United States 38; Brief for Petitioners 50–51.

of those actors appointed Judge Elliot before he heard Lucia's case; instead, SEC staff members gave him an ALJ slot. See Brief for Petitioners 15; Brief for United States 38; Brief for Court-Appointed *Amicus Curiae* 21. So if the Commission's ALJs are constitutional officers, Lucia raises a valid Appointments Clause claim. The only way to defeat his position is to show that those ALJs are not officers at all, but instead non-officer employees—part of the broad swath of "lesser functionaries" in the Government's workforce. *Buckley* v. *Valeo*, 424 U. S. 1, 126, n. 162 (1976) (*per curiam*). For if that is true, the Appointments Clause cares not a whit about who named them. See *United States* v. *Germaine*, 99 U. S. 508, 510 (1879).

Two decisions set out this Court's basic framework for distinguishing between officers and employees. *Germaine* held that "civil surgeons" (doctors hired to perform various physical exams) were mere employees because their duties were "occasional or temporary" rather than "continuing and permanent." *Id.*, at 511–512. Stressing "ideas of tenure [and] duration," the Court there made clear that an individual must occupy a "continuing" position established by law to qualify as an officer. *Id.*, at 511. *Buckley* then set out another requirement, central to this case. It determined that members of a federal commission were officers only after finding that they "exercis[ed] significant authority pursuant to the laws of the United States." 424 U. S., at 126. The inquiry thus focused on the extent of power an individual wields in carrying out his assigned functions.

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Both the *amicus* and the Government urge us to elaborate on *Buckley*'s "significant authority" test, but another of our precedents makes that project unnecessary. The standard is no doubt framed in general terms, tempting advocates to add whatever glosses best suit their arguments. See Brief for *Amicus Curiae* 14 (contending that an individual wields "significant authority" when he has "(i) the power to bind the government or private parties (ii) in her own name

rather than in the name of a superior officer"); Reply Brief for United States 2 (countering that an individual wields that authority when he has "the power to bind the government or third parties on significant matters" or to undertake other "important and distinctively sovereign functions"). And maybe one day we will see a need to refine or enhance the test *Buckley* set out so concisely. But that day is not this one, because in *Freytag* v. *Commissioner*, 501 U. S. 868 (1991), we applied the unadorned "significant authority" test to adjudicative officials who are near-carbon copies of the Commission's ALJs. As we now explain, our analysis there (sans any more detailed legal criteria) necessarily decides this case.

The officials at issue in *Freytag* were the "special trial judges" (STJs) of the United States Tax Court. The authority of those judges depended on the significance of the tax dispute before them. In "comparatively narrow and minor matters," they could both hear and definitively resolve a case for the Tax Court. *Id.*, at 873. In more major matters, they could preside over the hearing, but could not issue the final decision; instead, they were to "prepare proposed findings and an opinion" for a regular Tax Court judge to consider. *Ibid.* The proceeding challenged in *Freytag* was a major one, involving $1.5 billion in alleged tax deficiencies. See *id.*, at 871, n. 1. After conducting a 14-week trial, the STJ drafted a proposed decision in favor of the Government. A regular judge then adopted the STJ's work as the opinion of the Tax Court. See *id.*, at 872. The losing parties argued on appeal that the STJ was not constitutionally appointed.

This Court held that the Tax Court's STJs are officers, not mere employees. Citing *Germaine*, the Court first found that STJs hold a continuing office established by law. See 501 U. S., at 881. They serve on an ongoing, rather than a "temporary [or] episodic[,] basis"; and their "duties, salary, and means of appointment" are all specified in the Tax Code.

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Ibid. The Court then considered, as *Buckley* demands, the "significance" of the "authority" STJs wield. 501 U. S., at 881. In addressing that issue, the Government had argued that STJs are employees, rather than officers, in all cases (like the one at issue) in which they could not "enter a final decision." *Ibid.* But the Court thought the Government's focus on finality "ignore[d] the significance of the duties and discretion that [STJs] possess." *Ibid.* Describing the responsibilities involved in presiding over adversarial hearings, the Court said: STJs "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders." *Id.*, at 881–882. And the Court observed that "[i]n the course of carrying out these important functions, the [STJs] exercise significant discretion." *Id.*, at 882. That fact meant they were officers, even when their decisions were not final.[4]

Freytag says everything necessary to decide this case. To begin, the Commission's ALJs, like the Tax Court's STJs, hold a continuing office established by law. See *id.*, at 881. Indeed, everyone here—Lucia, the Government, and the *amicus*—agrees on that point. See Brief for Petitioners 21; Brief for United States 17–18, n. 3; Brief for *Amicus Curiae*

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[4] The Court also provided an alternative basis for viewing the STJs as officers. "Even if the duties of [STJs in major cases] were not as significant as we . . . have found them," we stated, "our conclusion would be unchanged." *Freytag*, 501 U. S., at 882. That was because the Government had conceded that in minor matters, where STJs could enter final decisions, they had enough "independent authority" to count as officers. *Ibid.* And we thought it made no sense to classify the STJs as officers for some cases and employees for others. See *ibid.* JUSTICE SOTOMAYOR relies on that back-up rationale in trying to reconcile *Freytag* with her view that "a prerequisite to officer status is the authority" to issue at least some "final decisions." *Post*, at 272 (dissenting opinion). But *Freytag* has two parts, and its primary analysis explicitly rejects JUSTICE SOTOMAYOR's theory that final decisionmaking authority is a *sine qua non* of officer status. See 501 U. S., at 881–882. As she acknowledges, she must expunge that reasoning to make her reading work. See *post*, at 272 ("That part of the opinion[ ] was unnecessary to the result").

22, n. 7. Far from serving temporarily or episodically, SEC ALJs "receive[ ] a career appointment." 5 CFR § 930.204(a) (2018). And that appointment is to a position created by statute, down to its "duties, salary, and means of appointment." *Freytag*, 501 U. S., at 881; see 5 U. S. C. §§ 556–557, 5372, 3105.

Still more, the Commission's ALJs exercise the same "significant discretion" when carrying out the same "important functions" as STJs do. *Freytag*, 501 U. S., at 882. Both sets of officials have all the authority needed to ensure fair and orderly adversarial hearings—indeed, nearly all the tools of federal trial judges. See *Butz*, 438 U. S., at 513; *supra*, at 241–242. Consider in order the four specific (if overlapping) powers *Freytag* mentioned. First, the Commission's ALJs (like the Tax Court's STJs) "take testimony." 501 U. S., at 881. More precisely, they "[r]eceiv[e] evidence" and "[e]xamine witnesses" at hearings, and may also take pre-hearing depositions. 17 CFR §§ 201.111(c), 200.14(a)(4); see 5 U. S. C. § 556(c)(4). Second, the ALJs (like STJs) "conduct trials." 501 U. S., at 882. As detailed earlier, they administer oaths, rule on motions, and generally "regulat[e] the course of" a hearing, as well as the conduct of parties and counsel. § 201.111; see §§ 200.14(a)(1), (a)(7); *supra*, at 241. Third, the ALJs (like STJs) "rule on the admissibility of evidence." 501 U. S., at 882; see § 201.111(c). They thus critically shape the administrative record (as they also do when issuing document subpoenas). See § 201.111(b). And fourth, the ALJs (like STJs) "have the power to enforce compliance with discovery orders." 501 U. S., at 882. In particular, they may punish all "[c]ontemptuous conduct," including violations of those orders, by means as severe as excluding the offender from the hearing. See § 201.180(a)(1). So point for point—straight from *Freytag*'s list—the Commission's ALJs have equivalent duties and powers as STJs in conducting adversarial inquiries.

And at the close of those proceedings, ALJs issue decisions much like that in *Freytag*—except with potentially more in-

dependent effect. As the *Freytag* Court recounted, STJs "prepare proposed findings and an opinion" adjudicating charges and assessing tax liabilities. 501 U. S., at 873; see *supra*, at 246. Similarly, the Commission's ALJs issue decisions containing factual findings, legal conclusions, and appropriate remedies. See § 201.360(b); *supra*, at 242. And what happens next reveals that the ALJ can play the more autonomous role. In a major case like *Freytag*, a regular Tax Court judge must always review an STJ's opinion. And that opinion counts for nothing unless the regular judge adopts it as his own. See 501 U. S., at 873. By contrast, the SEC can decide against reviewing an ALJ decision at all. And when the SEC declines review (and issues an order saying so), the ALJ's decision itself "becomes final" and is "deemed the action of the Commission." § 201.360(d)(2); 15 U. S. C. § 78d–1(c); see *supra*, at 242. That last-word capacity makes this an *a fortiori* case: If the Tax Court's STJs are officers, as *Freytag* held, then the Commission's ALJs must be too.

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The *amicus* offers up two distinctions to support the opposite conclusion. His main argument relates to "the power to enforce compliance with discovery orders"—the fourth of *Freytag*'s listed functions. 501 U. S., at 882. The Tax Court's STJs, he states, had that power "because they had authority to punish contempt" (including discovery violations) through fines or imprisonment. Brief for *Amicus Curiae* 37; see *id.*, at 37, n. 10 (citing 26 U. S. C. § 7456(c)). By contrast, he observes, the Commission's ALJs have less capacious power to sanction misconduct. The *amicus*'s secondary distinction involves how the Tax Court and Commission, respectively, review the factfinding of STJs and ALJs. The Tax Court's rules state that an STJ's findings of fact "shall be presumed" correct. Tax Court Rule 183(d). In comparison, the *amicus* notes, the SEC's regulations include no such deferential standard. See Brief for *Amicus Curiae* 10, 38, n. 11.

But those distinctions make no difference for officer status. To start with the *amicus*'s primary point, *Freytag* refer-

enced only the general "power to enforce compliance with discovery orders," not any particular method of doing so. 501 U. S., at 882. True enough, the power to toss malefactors in jail is an especially muscular means of enforcement—the nuclear option of compliance tools. But just as armies can often enforce their will through conventional weapons, so too can administrative judges. As noted earlier, the Commission's ALJs can respond to discovery violations and other contemptuous conduct by excluding the wrongdoer (whether party or lawyer) from the proceedings—a powerful disincentive to resist a court order. See § 201.180(a)(1)(i); *supra*, at 248. Similarly, if the offender is an attorney, the ALJ can "[s]ummarily suspend" him from representing his client—not something the typical lawyer wants to invite. § 201.180(a)(1)(ii). And finally, a judge who will, in the end, issue an opinion complete with factual findings, legal conclusions, and sanctions has substantial informal power to ensure the parties stay in line. Contrary to the *amicus*'s view, all that is enough to satisfy *Freytag*'s fourth item (even supposing, which we do not decide, that each of those items is necessary for someone conducting adversarial hearings to count as an officer).

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And the *amicus*'s standard-of-review distinction fares just as badly. The *Freytag* Court never suggested that the deference given to STJs' factual findings mattered to its Appointments Clause analysis. Indeed, the relevant part of *Freytag* did not so much as mention the subject (even though it came up at oral argument, see Tr. of Oral Arg. 33–41). And anyway, the Commission often accords a similar deference to its ALJs, even if not by regulation. The Commission has repeatedly stated, as it did below, that its ALJs are in the "best position to make findings of fact" and "resolve any conflicts in the evidence." App. to Pet. for Cert. 241a (quoting *In re Nasdaq Stock Market, LLC*, SEC Release No. 57741 (Apr. 30, 2008)). (That was why the SEC insisted that Judge Elliot make factual findings on all four allegations of

Lucia's deception. See *supra*, at 242.) And when factfinding derives from credibility judgments, as it frequently does, acceptance is near-automatic. Recognizing ALJs' "personal experience with the witnesses," the Commission adopts their "credibility finding[s] absent overwhelming evidence to the contrary." App. to Pet. for Cert. 241a; *In re Clawson*, SEC Release No. 48143 (July 9, 2003). That practice erases the constitutional line the *amicus* proposes to draw.

The only issue left is remedial. For all the reasons we have given, and all those *Freytag* gave before, the Commission's ALJs are "Officers of the United States," subject to the Appointments Clause. And as noted earlier, Judge Elliot heard and decided Lucia's case without the kind of appointment the Clause requires. See *supra*, at 244–245. This Court has held that "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case" is entitled to relief. *Ryder* v. *United States*, 515 U. S. 177, 182–183 (1995). Lucia made just such a timely challenge: He contested the validity of Judge Elliot's appointment before the Commission, and continued pressing that claim in the Court of Appeals and this Court. So what relief follows? This Court has also held that the "appropriate" remedy for an adjudication tainted with an appointments violation is a new "hearing before a properly appointed" official. *Id.*, at 183, 188. And we add today one thing more. That official cannot be Judge Elliot, even if he has by now received (or receives sometime in the future) a constitutional appointment. Judge Elliot has already both heard Lucia's case and issued an initial decision on the merits. He cannot be expected to consider the matter as though he had not adjudicated it before.[5] To cure the

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[5] JUSTICE BREYER disagrees with our decision to wrest further proceedings from Judge Elliot, arguing that "[f]or him to preside once again would not violate the structural purposes [of] the Appointments Clause." *Post*, at 267 (opinion concurring in judgment in part and dissenting in part). But our Appointments Clause remedies are designed not only to advance those

constitutional error, another ALJ (or the Commission itself) must hold the new hearing to which Lucia is entitled.[6]

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

It is so ordered.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, concurring.

I agree with the Court that this case is indistinguishable from *Freytag* v. *Commissioner*, 501 U. S. 868 (1991). If the special trial judges in *Freytag* were "Officers of the United States," Art. II, § 2, cl. 2, then so are the administrative law judges of the Securities and Exchange Commission. Mov-

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purposes directly, but also to create "[ ]incentive[s] to raise Appointments Clause challenges." *Ryder* v. *United States*, 515 U. S. 177, 183 (1995). We best accomplish that goal by providing a successful litigant with a hearing before a new judge. That is especially so because (as JUSTICE BREYER points out) the old judge would have no reason to think he did anything wrong on the merits, see *post*, at 267—and so could be expected to reach all the same judgments. But we do not hold that a new officer is required for every Appointments Clause violation. As JUSTICE BREYER suggests, we can give that remedy here because other ALJs (and the Commission) are available to hear this case on remand. See *ibid.* If instead the Appointments Clause problem is with the Commission itself, so that there is no substitute decisionmaker, the rule of necessity would presumably kick in and allow the Commission to do the rehearing. See *FTC* v. *Cement Institute*, 333 U. S. 683, 700–703 (1948); 3 K. Davis, Administrative Law Treatise § 19.9 (2d ed. 1980).

[6] While this case was on judicial review, the SEC issued an order "ratif[ying]" the prior appointments of its ALJs. Order (Nov. 30, 2017), online at https://www.sec.gov/litigation/opinions/2017/33-10440.pdf (as last visited June 18, 2018). Lucia argues that the order is invalid. See Brief for Petitioners 50–56. We see no reason to address that issue. The Commission has not suggested that it intends to assign Lucia's case on remand to an ALJ whose claim to authority rests on the ratification order. The SEC may decide to conduct Lucia's rehearing itself. Or it may assign the hearing to an ALJ who has received a constitutional appointment independent of the ratification.

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ing forward, however, this Court will not be able to decide every Appointments Clause case by comparing it to *Freytag*. And, as the Court acknowledges, our precedents in this area do not provide much guidance. See *ante*, at 245. While precedents like *Freytag* discuss what is *sufficient* to make someone an officer of the United States, our precedents have never clearly defined what is *necessary*. I would resolve that question based on the original public meaning of "Officers of the United States." To the Founders, this term encompassed all federal civil officials "'with responsibility for an ongoing statutory duty.'" *NLRB* v. *SW General, Inc.*, 580 U. S. 288, 314 (2017) (THOMAS, J., concurring); Mascott, Who Are "Officers of the United States"? 70 Stan. L. Rev. 443, 564 (2018) (Mascott).[1]

The Appointments Clause provides the exclusive process for appointing "officers of the United States." See *SW General*, *supra*, at 311 (opinion of THOMAS, J.). While principal officers must be nominated by the President and confirmed by the Senate, Congress can authorize the appointment of "inferior Officers" by "the President alone," "the Courts of Law," or "the Heads of Departments." Art. II, § 2, cl. 2.

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This alternative process for appointing inferior officers strikes a balance between efficiency and accountability. Given the sheer number of inferior officers, it would be too burdensome to require each of them to run the gauntlet of Senate confirmation. See *United States* v. *Germaine*, 99 U. S. 508, 509–510 (1879); 2 Records of the Federal Convention of 1787, pp. 627–628 (M. Farrand ed. 1911). But, by specifying only a limited number of actors who can appoint inferior officers without Senate confirmation, the Appoint-

[1] I address only the dividing line between "Officers of the United States," who are subject to the Appointments Clause, and nonofficer employees, who are not. I express no view on the meaning of "Office" or "Officer" in any other provision of the Constitution, or the difference between principal officers and inferior officers under the Appointments Clause.

ments Clause maintains clear lines of accountability—encouraging good appointments and giving the public someone to blame for bad ones. See The Federalist No. 76, p. 455 (C. Rossiter ed. 1961) (A. Hamilton); Wilson, Lectures on Law: Government, in 1 The Works of James Wilson 343, 359–361 (J. Andrews ed. 1896).

The Founders likely understood the term "Officers of the United States" to encompass all federal civil officials who perform an ongoing, statutory duty—no matter how important or significant the duty. See Mascott 454. "Officers of the United States" was probably not a term of art that the Constitution used to signify some special type of official. Based on how the Founders used it and similar terms, the phrase "of the United States" was merely a synonym for "federal," and the word "Office[r]" carried its ordinary meaning. See *id.*, at 471–479. The ordinary meaning of "officer" was anyone who performed a continuous public duty. See *id.*, at 484–507; *e. g.*, *United States* v. *Maurice*, 26 F. Cas. 1211, 1214 (No. 15,747) (CC Va. 1823) (defining officer as someone in "'a public charge or employment'" who performed a "continuing" duty); 8 Annals of Cong. 2304–2305 (1799) (statement of Rep. Harper) (explaining that the word officer "is derived from the Latin word *officium*" and "includes all persons holding posts which require the performance of some public duty"). For federal officers, that duty is "established by Law"—that is, by statute. Art. II, § 2, cl. 2. The Founders considered individuals to be officers even if they performed only ministerial statutory duties—including recordkeepers, clerks, and tidewaiters (individuals who watched goods land at a customhouse). See Mascott 484–507. Early congressional practice reflected this understanding. With exceptions not relevant here,[2] Congress re-

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[2] The First Congress exempted certain officials with ongoing statutory duties, such as deputies and military officers, from the requirements of the Appointments Clause. But these narrow exceptions do not disprove the

quired all federal officials with ongoing statutory duties to be appointed in compliance with the Appointments Clause. See *id.*, at 507–545.

Applying the original meaning here, the administrative law judges of the Securities and Exchange Commission easily qualify as "Officers of the United States." These judges exercise many of the agency's statutory duties, including issuing initial decisions in adversarial proceedings. See 15 U. S. C. § 78d–1(a); 17 CFR §§ 200.14, 200.30–9 (2017). As explained, the importance or significance of these statutory duties is irrelevant. All that matters is that the judges are continuously responsible for performing them.

In short, the administrative law judges of the Securities and Exchange Commission are "Officers of the United States" under the original meaning of the Appointments Clause. They have "'responsibility for an ongoing statutory duty,'" which is sufficient to resolve this case. *SW General*, 580 U. S., at 314 (opinion of THOMAS, J.). Because the Court reaches the same conclusion by correctly applying *Freytag*, I join its opinion.

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JUSTICE BREYER, with whom JUSTICE GINSBURG and JUSTICE SOTOMAYOR join as to Part III, concurring in the judgment in part and dissenting in part.

I agree with the Court that the Securities and Exchange Commission did not properly appoint the Administrative Law Judge who presided over petitioner Lucia's hearing. But I disagree with the majority in respect to two matters. First, I would rest our conclusion upon statutory, not constitutional, grounds. I believe it important to do so because I cannot answer the constitutional question that the majority answers without knowing the answer to a different, embedded constitutional question, which the Solicitor General

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rule, as background principles of founding-era law explain each of them. See Mascott 480–483, 515–530.

urged us to answer in this case: the constitutionality of the statutory "for cause" removal protections that Congress provided for administrative law judges. Cf. *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477 (2010). Second, I disagree with the Court in respect to the proper remedy.

I

The relevant statute here is the Administrative Procedure Act. That Act governs the appointment of administrative law judges. It provides (as it has, in substance, since its enactment in 1946) that "[e]ach agency shall appoint as many administrative law judges as are necessary for" hearings governed by the Administrative Procedure Act. 5 U. S. C. § 3105; see also Administrative Procedure Act, § 11, 60 Stat. 244 (original version, which refers to "examiners" as administrative law judges were then called). In the case of the Securities and Exchange Commission, the relevant "agency" is the Commission itself. But the Commission did not appoint the Administrative Law Judge who presided over Lucia's hearing. Rather, the Commission's staff appointed that Administrative Law Judge, without the approval of the Commissioners themselves. See *ante*, at 241; App. to Pet. for Cert. 298a–299a.

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I do not believe that the Administrative Procedure Act permits the Commission to delegate its power to appoint its administrative law judges to its staff. We have held that, for purposes of the Constitution's Appointments Clause, the Commission itself is a "'Hea[d]'" of a "'Departmen[t].'" *Free Enterprise Fund*, *supra*, at 512–513. Thus, reading the statute as referring to the Commission itself, and not to its staff, avoids a difficult constitutional question, namely, the very question that the Court answers today: whether the Commission's administrative law judges are constitutional "inferior Officers" whose appointment Congress may vest only in the President, the "Courts of Law," or the "Heads of

Departments." Art. II, § 2, cl. 2; see *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401 (1916) ("A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score").

I have found no other statutory provision that would permit the Commission to delegate the power to appoint its administrative law judges to its staff. The statute establishing and governing the Commission does allow the Commission to "delegate, by published order or rule, any of its functions to a division of the Commission, an individual Commissioner, an administrative law judge, or an employee or employee board." 15 U. S. C. § 78d–1(a). But this provision requires a "published order or rule," and the Commission here published no relevant delegating order or rule. Rather, Lucia discovered the Commission's appointment system for administrative law judges only when the Commission's enforcement division staff filed an affidavit in this case describing that staff-based system. See App. to Pet. for Cert. 295a–299a. Regardless, the same constitutional-avoidance reasons that should inform our construction of the Administrative Procedure Act should also lead us to interpret the Commission's general delegation authority as excluding the power to delegate to staff the authority to appoint its administrative law judges, so as to avoid the constitutional question the Court reaches in this case. See *Jin Fuey Moy*, *supra*, at 401.

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The analysis may differ for other agencies that employ administrative law judges. Each agency's governing statute is different, and some, unlike the Commission's, may allow the delegation of duties without a published order or rule. See, *e. g.*, 42 U. S. C. § 902(a)(7) (applicable to the Social Security Administration). Similarly, other agencies' administrative law judges perform distinct functions, and their means of appointment may therefore not raise the constitutional questions that inform my reading of the relevant statutes here.

The upshot, in my view, is that for statutory, not constitutional, reasons, the Commission did not lawfully appoint the Administrative Law Judge here at issue. And this Court should decide no more than that.

II

A

The reason why it is important to go no further arises from the holding in a case this Court decided eight years ago, *Free Enterprise Fund*, *supra*. The case concerned statutory provisions protecting members of the Public Company Accounting Oversight Board from removal without cause. The Court held in that case that the Executive Vesting Clause of the Constitution, Art. II, § 1 ("[t]he executive Power shall be vested in a President of the United States of America"), prohibited Congress from providing members of the Board with "multilevel protection from removal" by the President. *Free Enterprise Fund*, 561 U. S., at 484; see *id.*, at 514 ("Congress cannot limit the President's authority" by providing "two levels of protection from removal for those who . . . exercise significant executive power"). But see *id.*, at 514–549 (BREYER, J., dissenting). Because, in the Court's view, the relevant statutes (1) granted the Securities and Exchange Commissioners protection from removal without cause, (2) gave the Commissioners sole authority to remove Board members, and (3) protected Board members from removal without cause, the statutes provided Board members with two levels of protection from removal and consequently violated the Constitution. *Id.*, at 495–498.

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In addressing the constitutionality of the Board members' removal protections, the Court emphasized that the Board members were "executive officers"—more specifically, "inferior officers" for purposes of the Appointments Clause. *E. g.*, *id.*, at 492–495, 504–505. The significance of that fact to the Court's analysis is not entirely clear. The Court said:

> "The parties here concede that Board members are executive 'Officers', as that term is used in the Constitution. We do not decide the status of other Government employees, nor do we decide whether 'lesser functionaries subordinate to officers of the United States' must be subject to the same sort of control as those who exercise 'significant authority pursuant to the laws.' " *Id.*, at 506 (quoting *Buckley* v. *Valeo*, 424 U. S. 1, 126, and n. 162 (1976) (*per curiam*); citations omitted).

Thus, the Court seemed not only to limit its holding to the Board members themselves, but also to suggest that Government employees who were not officers would be distinguishable from the Board members on that ground alone.

For present purposes, however, the implications of *Free Enterprise Fund*'s technical-sounding holding about "multilevel protection from removal" remain potentially dramatic. 561 U. S., at 484. The same statute, the Administrative Procedure Act, that provides that the "agency" will appoint its administrative law judges also protects the administrative law judges from removal without cause. In particular, the statute says that an

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> "action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board." 5 U. S. C. § 7521(a).

As with appointments, this provision constituted an important part of the Administrative Procedure Act when it was originally enacted in 1946. See § 11, 60 Stat. 244.

The Administrative Procedure Act thus allows administrative law judges to be removed only "for good cause" found by the Merit Systems Protection Board. § 7521(a). And the President may, in turn, remove members of the Merit Sys-

tems Protection Board only for "inefficiency, neglect of duty, or malfeasance in office." § 1202(d). Thus, Congress seems to have provided administrative law judges with two levels of protection from removal without cause—just what *Free Enterprise Fund* interpreted the Constitution to forbid in the case of the Board members.

The substantial independence that the Administrative Procedure Act's removal protections provide to administrative law judges is a central part of the Act's overall scheme. See *Ramspeck* v. *Federal Trial Examiners Conference*, 345 U. S. 128, 130 (1953); *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 46 (1950). Before the Administrative Procedure Act, hearing examiners "were in a dependent status" to their employing agency, with their classification, compensation, and promotion all dependent on how the agency they worked for rated them. *Ramspeck*, 345 U. S., at 130. As a result of that dependence, "[m]any complaints were voiced against the actions of the hearing examiners, it being charged that they were mere tools of the agency concerned and subservient to the agency heads in making their proposed findings of fact and recommendations." *Id.*, at 131. The Administrative Procedure Act responded to those complaints by giving administrative law judges "independence and tenure within the existing Civil Service system." *Id.*, at 132; cf. *Wong Yang Sung*, *supra*, at 41–46 (referring to removal protections as among the Administrative Procedure Act's "safeguards . . . intended to ameliorate" the perceived "evils" of commingling of adjudicative and prosecutorial functions in agencies).

If the *Free Enterprise Fund* Court's holding applies equally to the administrative law judges—and I stress the "if"—then to hold that the administrative law judges are "Officers of the United States" is, *perhaps*, to hold that their removal protections are unconstitutional. This would risk transforming administrative law judges from independent adjudicators into *dependent* decisionmakers, serving at the pleasure of the Commission. Similarly, to apply *Free Enter-*

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prise Fund's holding to high-level civil servants threatens to change the nature of our merit-based civil service as it has existed from the time of President Chester Alan Arthur. See *Free Enterprise Fund*, 561 U. S., at 540–542 (BREYER, J., dissenting).

I have stressed the words "if" and "perhaps" in the previous paragraph because *Free Enterprise Fund*'s holding may not invalidate the removal protections applicable to the Commission's administrative law judges even if the judges are inferior "officers of the United States" for purposes of the Appointments Clause. In my dissent in *Free Enterprise Fund*, I pointed out that under the majority's analysis, the removal protections applicable to administrative law judges—including specifically the Commission's administrative law judges—would seem to be unconstitutional. *Id.*, at 542, 587. But the Court disagreed, saying that "none of the positions [my dissent] identifie[d] are similarly situated to the Board." *Id.*, at 506.

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The *Free Enterprise Fund* Court gave three reasons why administrative law judges were distinguishable from the Board members at issue in that case. First, the Court said that "[w]hether administrative law judges are necessarily 'Officers of the United States' is disputed." *Id.*, at 507, n. 10. Second, the Court said that "unlike members of the Board, many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions, see [5 U. S. C.] §§ 554(d), 3105, or possess purely recommendatory powers." *Ibid.* And, third, the Court pointed out that the civil service "employees" and administrative law judges to whom I referred in my dissent do not "enjoy the same significant and unusual protections from Presidential oversight as members of the Board." *Id.*, at 506. The Court added that the kind of "for cause" protection the statutes provided for Board members was "unusually high." *Id.*, at 503.

The majority here removes the first distinction, for it holds that the Commission's administrative law judges are inferior

"Officers of the United States." *Ante*, at 241. The other two distinctions remain. See, *e. g.*, *Wiener* v. *United States*, 357 U. S. 349, 355–356 (1958) (holding that Congress is free to protect bodies tasked with "'adjudicat[ing] according to law' . . . 'from the control or coercive influence, direct or indirect,' . . . of either the Executive or the Congress" (quoting *Humphrey's Executor* v. *United States*, 295 U. S. 602, 629 (1935))). But the Solicitor General has nevertheless argued strongly that we should now decide the constitutionality of the administrative law judges' removal protections as well as their means of appointment. And in his view, the administrative law judges' statutory removal protections violate the Constitution (as interpreted in *Free Enterprise Fund*), unless we construe those protections as giving the Commission substantially greater power to remove administrative law judges than it presently has. See Merits Brief for Respondent 45–55.

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On the Solicitor General's account, for the administrative law judges' removal protections to be constitutional, the Commission itself must have the power to remove administrative law judges "for failure to follow lawful instructions or perform adequately." *Id.*, at 48. The Merit Systems Protection Board would then review only the Commission's factfinding, and not whether the facts (as found) count as "good cause" for removal. *Id.*, at 52–53. This technical-sounding standard would seem to weaken the administrative law judges' "for cause" removal protections considerably, by permitting the Commission to remove an administrative law judge with whose judgments it disagrees—say, because the judge did not find a securities-law violation where the Commission thought there was one, or vice versa. In such cases, the law allows the Commission to overrule an administrative law judge's findings, for the decision is ultimately the Commission's. See 15 U. S. C. § 78d–1(b). But it does not allow the Commission to fire the administrative law judge. See 5 U. S. C. § 7521.

And now it should be clear why the application of *Free Enterprise Fund* to administrative law judges is important. If that decision does not limit or forbid Congress' statutory "for cause" protections, then a holding that the administrative law judges are "inferior Officers" does not conflict with Congress' intent as revealed in the statute. But, if the holding is to the contrary, and more particularly if a holding that administrative law judges are "inferior Officers" brings with it application of *Free Enterprise Fund*'s limitation on "for cause" protections from removal, then a determination that administrative law judges are, constitutionally speaking, "inferior Officers" would directly conflict with Congress' intent, as revealed in the statute. In that case, it would be clear to me that Congress did not intend that consequence, and that it therefore did not intend to make administrative law judges "inferior Officers" at all.

B

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Congress' intent on the question matters, in my view, because the Appointments Clause is properly understood to grant Congress a degree of leeway as to whether particular Government workers are officers or instead mere employees not subject to the Appointments Clause. The words "by Law" appear twice in the Clause. It says that the President ("with the Advice and Consent of the Senate") shall appoint "Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, . . . which shall be *established by Law*." Art. II, § 2, cl. 2 (emphasis added). It then adds that "Congress may *by Law* vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." *Ibid.* (emphasis added).

The use of the words "by Law" to describe the establishment and means of appointment of "Officers of the United States," together with the fact that Article I of the Constitution vests the legislative power in Congress, suggests that (other than the officers the Constitution specifically lists)

Congress, not the Judicial Branch alone, must play a major role in determining who is an "Office[r] of the United States." And Congress' intent in this specific respect is often highly relevant. Congress' leeway is not, of course, absolute—it may not, for example, say that positions the Constitution itself describes as "Officers" are not "Officers." But given the constitutional language, the Court, when deciding whether other positions are "Officers of the United States" under the Appointments Clause, should give substantial weight to Congress' decision.

How is the Court to decide whether Congress intended that the holder of a particular Government position count as an "Office[r] of the United States"? Congress might, of course, write explicitly into the statute that the employee "is an officer of the United States under the Appointments Clause," but an explicit phrase of this kind is unlikely to appear. If it does not, then I would approach the question like any other difficult question of statutory interpretation. Several considerations, among others, are likely to be relevant. First, as the Court said in *Freytag* v. *Commissioner*, 501 U. S. 868, 881 (1991), and repeats today, *ante*, at 245, where Congress grants an appointee "'significant authority pursuant to the laws to the United States,'" that supports the view that (but should not determinatively decide that) Congress made that appointee an "Office[r] of the United States." *Freytag*, *supra*, at 881 (quoting *Buckley*, 424 U. S., at 126); see also *United States* v. *Germaine*, 99 U. S. 508, 511 (1879) (holding that the term "officer" "embraces the ideas of tenure, duration, emolument, and duties"). The means of appointment that Congress chooses is also instructive. Where Congress provides a method of appointment that mimics a method the Appointments Clause allows for "Officers," that fact too supports the view that (but does not determinatively decide that) Congress viewed the position as one to be held by an "Officer," and vice versa. See *id.*, at 509–511. And the Court's decision in *Free Enterprise Fund* suggests a

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third indication of "Officer" status—did Congress provide the position with removal protections that would be unconstitutional if provided for an "Officer"? See 561 U. S., at 514. That fact would support (but again not be determinative of) the opposite view—that Congress did not intend to confer "inferior Officer" status on the position.

As I said, these statutory features, while highly relevant, need not always prove determinative. The vast number of different civil service positions, with different tasks, different needs, and different requirements for independence, mean that this is not the place to lay down bright-line rules. Rather, as this Court has said, "[t]he versatility of circumstances often mocks a natural desire for definitiveness" in this area. *Wiener*, 357 U. S., at 352.

No case from this Court holds that Congress lacks this sort of constitutional leeway in determining whether a particular Government position will be filled by an "Office[r] of the United States." To the contrary, while we have repeatedly addressed whether particular officials are "Officers," in all cases but one, we have upheld the appointment procedures Congress enacted as consistent with the Appointments Clause. See, *e. g.*, *Edmond* v. *United States*, 520 U. S. 651, 666 (1997) (holding that Congress' appointment procedure for military court judges "is in conformity with the Appointments Clause of the Constitution"); *Freytag*, *supra*, at 888–891 (same as to special trial judges of the Tax Court); *Rice* v. *Ames*, 180 U. S. 371, 378 (1901) (same as to district court "commissioners"); *Ex parte Siebold*, 100 U. S. 371, 397–398 (1880) (same as to "supervisors of election"). But see *Buckley*, *supra*, at 124–137.

The one exception was *Buckley*, 424 U. S., at 124–137, in which the Court set aside Congress' prescribed appointment method for some members of the Federal Election Commission—appointment by Congress itself—as inconsistent with the Appointments Clause. But *Buckley* involved Federal Election Commission members with enormous powers.

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They had "primary and substantial responsibility for administering and enforcing the" Federal Election Campaign Act of 1971, *id.*, at 109, an "intricate statutory scheme . . . to regulate federal election campaigns," *id.*, at 12. They had "extensive rulemaking and adjudicative powers," *id.*, at 110; the power to enforce the law through civil lawsuits, *id.*, at 111; and the power to disqualify a candidate from running for federal office, *id.*, at 112–113. Federal Election Commissioners thus had powers akin to the "principal Officer[s]" of an Executive Department, whom the Constitution expressly refers to as "Officers," see Art. II, § 2, cl. 1. It is not surprising that Congress exceeded any leeway the Appointments Clause granted when it deviated from the Clause's appointments' methods in respect to an office with powers very similar to those of the Officers listed in the Constitution itself.

Thus, neither *Buckley* nor any other case forecloses an interpretation of the Appointments Clause that focuses principally on whether the relevant statutes show that Congress intended that a particular Government position be held by an "Office[r] of the United States." Adopting such an approach, I would not answer the question whether the Securities and Exchange Commission's administrative law judges are constitutional "Officers" without first deciding the preexisting *Free Enterprise Fund* question—namely, what effect that holding would have on the statutory "for cause" removal protections that Congress provided for administrative law judges. If, for example, *Free Enterprise Fund* means that saying administrative law judges are "inferior Officers" will cause them to lose their "for cause" removal protections, then I would likely hold that the administrative law judges are not "Officers," for to say otherwise would be to contradict Congress' enactment of those protections in the Administrative Procedure Act. In contrast, if *Free Enterprise Fund* does not mean that an administrative law judge (if an "Office[r] of the United States") would lose "for cause"

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protections, then it is more likely that interpreting the Administrative Procedure Act as conferring such status would not run contrary to Congress' intent. In such a case, I would more likely hold that, given the other features of the Administrative Procedure Act, Congress did intend to make administrative law judges inferior "Officers of the United States."

III

Separately, I also disagree with the majority's conclusion that the proper remedy in this case requires a hearing before a *different* administrative law judge. *Ante*, at 251–252. The Securities and Exchange Commission has now itself appointed the Administrative Law Judge in question, and I see no reason why he could not rehear the case. After all, when a judge is reversed on appeal and a new trial ordered, typically the judge who rehears the case is the same judge who heard it the first time. The reversal here is based on a technical constitutional question, and the reversal implies no criticism at all of the original judge or his ability to conduct the new proceedings. For him to preside once again would not violate the structural purposes that we have said the Appointments Clause serves, see *Freytag*, 501 U. S., at 878, nor would it, in any obvious way, violate the Due Process Clause.

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Regardless, this matter was not addressed below and has not been fully argued here. I would, at a minimum, ask the Court of Appeals to examine it on remand rather than decide it here now. That is especially so because the majority seems to state a general rule that a different "Officer" must *always* preside after an Appointments Clause violation. In a case like this one, that is a relatively minor imposition, because the Commission has other administrative law judges. But in other cases—say, a case adjudicated by an improperly appointed (but since reappointed) Commission itself—the "Officer" in question may be the *only* such "Officer," so that no substitute will be available. The majority

suggests that in such cases, the "rule of necessity" may excuse compliance with its newfound different-"Officer" requirement. *Ante*, at 251–252, n. 5. But that still does not explain why the Constitution would require a hearing before a different "Officer" at all.

* * *

The Court's decision to address the Appointments Clause question separately from the constitutional removal question is problematic. By considering each question in isolation, the Court risks (should the Court later extend *Free Enterprise Fund*) unraveling, step by step, the foundations of the Federal Government's administrative adjudication system as it has existed for decades, and perhaps of the merit-based civil service system in general. And the Court risks doing so without considering that potential consequence. For these reasons, I concur in the judgment in part and, with respect, I dissent in part.

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JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

The Court today and scholars acknowledge that this Court's Appointments Clause jurisprudence offers little guidance on who qualifies as an "Officer of the United States." See, *e. g.*, *ante*, at 245 ("The standard is no doubt framed in general terms, tempting advocates to add whatever glosses best suit their arguments"); Plecnik, Officers Under the Appointments Clause, 11 Pitt. Tax Rev. 201, 204 (2014). The lack of guidance is not without consequence. "[Q]uestions about the Clause continue to arise regularly both in the operation of the Executive Branch and in proposed legislation." 31 Opinion of Office of Legal Counsel 73, 76 (2007) (Op. OLC). This confusion can undermine the reliability and finality of proceedings and result in wasted resources. See *ante*, at 251–252 (opinion of the Court) (order-

ing the Commission to grant petitioners a new administrative hearing).

As the majority notes, see *ante*, at 245, this Court's decisions currently set forth at least two prerequisites to officer status: (1) An individual must hold a "continuing" office established by law, *United States* v. *Germaine*, 99 U. S. 508, 511–512 (1879), and (2) an individual must wield "significant authority," *Buckley* v. *Valeo*, 424 U. S. 1, 126 (1976) (*per curiam*). The first requirement is relatively easy to grasp; the second, less so. To be sure, to exercise "significant authority," the person must wield considerable powers in comparison to the average person who works for the Federal Government. As this Court has noted, the vast majority of those who work for the Federal Government are not "Officers of the United States." See *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 506, n. 9 (2010) (indicating that well over 90% of those who render services to the Federal Government and are paid by it are not constitutional officers). But this Court's decisions have yet to articulate the types of powers that will be deemed significant enough to constitute "significant authority."

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To provide guidance to Congress and the Executive Branch, I would hold that one requisite component of "significant authority" is the ability to make final, binding decisions on behalf of the Government. Accordingly, a person who merely advises and provides recommendations to an officer would not herself qualify as an officer.

There is some historical support for such a requirement. For example, in 1822, the Supreme Judicial Court of Maine opined in the "fullest early explication" of the meaning of an "'office,'" that "'the term "office" implies a delegation of a portion of the sovereign power to, and possession of it by the person filling the office,'" that "'in its effects[,] . . . will bind the rights of others.'" 31 Op. OLC 83 (quoting 3 Greenl.

(Me.) 481, 482). In 1899, a Report of the Judiciary Committee of the House of Representatives noted that "the creation and conferring of an office involves a delegation to the individual of . . . sovereign functions," *i. e.*, "the power to . . . legislate, . . . execute law, or . . . hear and determine judicially questions submitted." 1 A. Hinds, Precedents of the House of Representatives of the United States 607 (1907). Those who merely assist others in exercising sovereign functions but who do not have the authority to exercise sovereign powers themselves do not wield significant authority. *Id.*, at 607–608. Consequently, a person who possesses the "mere power to investigate some particular subject and report thereon" or to engage in negotiations "without [the] power to make binding" commitments on behalf of the Government is not an officer. *Ibid.*

Confirming that final decisionmaking authority is a prerequisite to officer status would go a long way to aiding Congress and the Executive Branch in sorting out who is an officer and who is a mere employee. At the threshold, Congress and the Executive Branch could rule out as an officer any person who investigates, advises, or recommends, but who has no power to issue binding policies, execute the laws, or finally resolve adjudicatory questions.

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Turning to the question presented here, it is true that the administrative law judges (ALJs) of the Securities and Exchange Commission wield "extensive powers." *Ante*, at 241. They preside over adversarial proceedings that can lead to the imposition of significant penalties on private parties. See *ante*, at 242 (noting that the proceedings in the present case resulted in the imposition of $300,000 in civil penalties, as well as a lifetime bar from the investment industry). In the hearings over which they preside, Commission ALJs also exercise discretion with respect to important matters. See *ante*, at 241 (discussing Commission ALJs' powers to supervise discovery, issue subpoenas, rule on the admissibility of evi-

dence, hear and examine witnesses, and regulate the course of the proceedings).

Nevertheless, I would hold that Commission ALJs are not officers because they lack final decisionmaking authority. As the Commission explained below, the Commission retains "'plenary authority over the course of [its] administrative proceedings and the rulings of [its] law judges.'" *In re Raymond J. Lucia Cos.*, SEC Release No. 75837 (Sept. 3, 2015). Commission ALJs can issue only "initial" decisions. 5 U. S. C. § 557(b). The Commission can review any initial decision upon petition or on its own initiative. 15 U. S. C. § 78d–1(b). The Commission's review of an ALJ's initial decision is *de novo*. 5 U. S. C. § 557(c). It can "make any findings or conclusions that in its judgment are proper and on the basis of the record." 17 CFR § 201.411(a) (2017). The Commission is also in no way confined by the record initially developed by an ALJ. The Commission can accept evidence itself or refer a matter to an ALJ to take additional evidence that the Commission deems relevant or necessary. See *ibid.*; § 201.452. In recent years, the Commission has accepted review in every case in which it was sought. See R. Jackson, Fact and Fiction: The SEC's Oversight of Administrative Law Judges (Mar. 9, 2018), http://clsbluesky.law.columbia.edu/2018/03/09/fact-and-fiction-the-secs-oversight-of-administrative-law-judges/ (as last visited June 19, 2018). Even where the Commission does not review an ALJ's initial decision, as in cases in which no party petitions for review and the Commission does not act *sua sponte*, the initial decision still only becomes final when the Commission enters a finality order. 17 CFR § 201.360(d)(2). And by operation of law, every action taken by an ALJ "shall, for all purposes, . . . be deemed the action of the *Commission*." 15 U. S. C. § 78d–1(c) (emphasis added). In other words, Commission ALJs do not exercise significant authority because they do not, and cannot,

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enter final, binding decisions against the Government or third parties.

The majority concludes that this case is controlled by *Freytag* v. *Commissioner*, 501 U. S. 868 (1991). See *ante*, at 245–246. In *Freytag*, the Court suggested that the Tax Court's special trial judges (STJs) acted as constitutional officers even in cases where they could not enter final, binding decisions. In such cases, the Court noted, the STJs presided over adversarial proceedings in which they exercised "significant discretion" with respect to "important functions," such as ruling on the admissibility of evidence and hearing and examining witnesses. 501 U. S., at 881–882. That part of the opinion, however, was unnecessary to the result. The Court went on to conclude that even if the STJs' duties in such cases were "not as significant as [the Court] found them to be," its conclusion "would be unchanged." *Id.*, at 882. The Court noted that STJs could enter final decisions in certain types of cases, and that the Government had conceded that the STJs acted as officers with respect to those proceedings. *Ibid.* Because STJs could not be "officers for purposes of some of their duties . . . , but mere employees with respect to other[s]," the Court held they were officers in all respects. *Ibid.* *Freytag* is, therefore, consistent with a rule that a prerequisite to officer status is the authority, in at least some instances, to issue final decisions that bind the Government or third parties.*

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Because I would conclude that Commission ALJs are not officers for purposes of the Appointments Clause, it is not necessary to reach the constitutionality of their removal protections. See *ante*, at 255–256 (BREYER, J., concurring in judgment in part and dissenting in part). In any event, for at least the reasons stated in JUSTICE BREYER's opinion, *Free*

*Even the majority opinion is not inconsistent with such a rule, in that it appears to conclude, wrongly in my view, that Commission ALJs can at times render final decisions. See *ante*, at 249.

Enterprise Fund is readily distinguishable from the circumstances at play here. See *ante*, at 258–263.

As a final matter, although I would conclude that Commission ALJs are not officers, I share JUSTICE BREYER's concerns regarding the Court's choice of remedy, and so I join Part III of his opinion.

For the foregoing reasons, I respectfully dissent.

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Syllabus

WISCONSIN CENTRAL LTD. ET AL. *v.* UNITED STATES

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

No. 17–530. Argued April 16, 2018—Decided June 21, 2018

As the Great Depression took its toll, struggling railroad pension funds reached the brink of insolvency. During that time before the rise of the modern interstate highway system, privately owned railroads employed large numbers of Americans and provided services vital to the nation's commerce. To address the emergency, Congress adopted the Railroad Retirement Tax Act of 1937. That legislation federalized private railroad pension plans and it remains in force even today. Under the law's terms, private railroads and their employees pay a tax based on employees' incomes. In return, the federal government provides employees a pension often more generous than the social security system supplies employees in other industries.

This case arises from a peculiar feature of the statute and its history. At the time of the Act's adoption, railroads compensated employees not just with money but also with food, lodging, railroad tickets, and the like. Because railroads typically didn't count these in-kind benefits when calculating an employee's pension on retirement, neither did Congress in its new statutory pension scheme. Nor did Congress seek to tax these in-kind benefits. Instead, it limited its levies to employee "compensation" and defined that term to capture only "any form of money remuneration."

It's this limitation that poses today's question. To encourage employee performance and to align employee and corporate goals, some railroads have (like employers in many fields) adopted employee stock option plans. The government argues that these stock options qualify as a form of "compensation" subject to taxation under the Act. In its view, stock options can easily be converted into money and so qualify as "money remuneration." The railroads and their employees reply that stock options aren't "money remuneration" and remind the Court that when Congress passed the Act it sought to mimic existing industry pension practices that generally took no notice of in-kind benefits. Who has the better of it?

Held: Employee stock options are not taxable "compensation" under the Railroad Retirement Tax Act because they are not "money remuneration."

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Syllabus

When Congress adopted the Act in 1937, "money" was understood as currency "issued by [a] recognized authority as a medium of exchange." Pretty obviously, stock options do not fall within that definition. While stock can be bought or sold for money, it isn't usually considered a medium of exchange. Few people value goods and services in terms of stock, or buy groceries and pay rent with stock. Adding the word "remuneration" also does not alter the meaning of the phrase. When the statute speaks of taxing "any form of money remuneration," it indicates Congress wanted to tax monetary compensation in any of the many forms an employer might choose. It does not prove that Congress wanted to tax things, like stock, that are not money at all.

The broader statutory context points to this conclusion. For example, the 1939 Internal Revenue Code, adopted just two years later, also treated "money" and "stock" as different things. See, *e. g.*, §27(d). And a companion statute enacted by the same Congress, the Federal Insurance Contributions Act, taxes "all remuneration," including benefits "paid in any medium other than cash." §3121(a). The Congress that enacted both of these pension schemes knew well the difference between "money" and "all" forms of remuneration, and its choice to use the narrower term in the context of railroad pensions alone requires respect, not disregard.

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Even the Internal Revenue Service (then the Bureau of Internal Revenue) seems to have understood all this back in 1938. Shortly after the Railroad Retirement Tax Act's enactment, the IRS issued a regulation explaining that the Act taxes "all remuneration in money, or in something which may be used in lieu of money (scrip and merchandise orders, for example)." The regulation said the Act covered things like "[s]alaries, wages, commissions, fees, [and] bonuses." But the regulation nowhere suggested that stock was taxable.

In light of these textual and structural clues and others, the Court thinks it's clear enough that the term "money" unambiguously excludes "stock." Pp. 277–283.

856 F. 3d 490, reversed and remanded.

GORSUCH, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and ALITO, JJ., joined. BREYER, J., filed a dissenting opinion, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 285.

Thomas H. Dupree, Jr., argued the cause for petitioners. With him on the briefs were *Rajiv Mohan*, *Richard F. Riley*,

Jr., *William J. McKenna*, *David T. Ralston, Jr.*, and *Jonathan W. Garlough.*

Rachel P. Kovner argued the cause for the United States. With her on the brief were *Solicitor General Francisco*, *Principal Deputy Assistant Attorney General Zuckerman*, *Deputy Solicitor General Stewart*, *Gilbert S. Rothenberg*, *Francesca Ugolini*, and *Ellen Page DelSole.**

JUSTICE GORSUCH delivered the opinion of the Court.

As the Great Depression took its toll, struggling railroad pension funds reached the brink of insolvency. During that time before the modern interstate highway system, privately owned railroads employed large numbers of Americans and provided services vital to the nation's commerce. To address the emergency, Congress adopted the Railroad Retirement Tax Act of 1937. That legislation federalized private railroad pension plans and it remains in force today. Under the law's terms, private railroads and their employees pay a tax based on employees' incomes. 26 U. S. C. §§ 3201(a)–(b), 3221(a)–(b). In return, the federal government provides employees a pension often more generous than the social security system supplies employees in other industries. See *Hisquierdo* v. *Hisquierdo*, 439 U. S. 572, 573–575 (1979).

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Our case arises from a peculiar feature of the statute and its history. At the time of the Act's adoption, railroads compensated employees not just with money but also with food, lodging, railroad tickets, and the like. Because railroads typically didn't count these in-kind benefits when calculating an employee's pension on retirement, neither did Congress in its new statutory pension scheme. Nor did Congress seek to tax these in-kind benefits. Instead, it limited

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*Briefs of *amici curiae* urging reversal were filed for the Association of American Railroads by *Daniel Saphire* and *Janet L. Bartelmay*; for CSX Corporation et al. by *Bryan Killian*, *Mary B. Hevener*, *Robert R. Martinelli*, *Steven P. Johnson*, and *Stephanie Schuster*; and for Norfolk Southern Corporation by *M. Miller Baker* and *David R. Fuller.*

itself to taxing employee "compensation," and defined that term to capture only "any form of money remuneration." § 3231(e)(1).

It's this limitation that poses today's question. To encourage employee performance and align employee and corporate goals, some railroads (like employers in many fields) have adopted employee stock option plans. Typical of many, the plan before us permits an employee to exercise stock options in various ways—purchasing stock with her own money and holding it as an investment; purchasing stock but immediately selling a portion to finance the purchase; or purchasing stock at the option price, selling it all immediately at the market price, and taking the profits. App. 41–42. The government argues that stock options like these qualify as a form of taxable "money remuneration" under the Act because stock can be easily *converted* into money. The railroads reply that stock options aren't "money" at all and remind us that when Congress passed the Act it sought to mimic existing industry pension practices that generally took no notice of in-kind benefits. Who has the better of it? Courts have divided on the answer, so we agreed to take up the question. 583 U. S. 1089 (2018).

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We start with the key statutory term: "money remuneration." As usual, our job is to interpret the words consistent with their "ordinary meaning . . . at the time Congress enacted the statute." *Perrin* v. *United States*, 444 U. S. 37, 42 (1979). And when Congress adopted the Act in 1937, "money" was ordinarily understood to mean currency "issued by [a] recognized authority as a medium of exchange." Webster's New International Dictionary 1583 (2d ed. 1942); see also 6 Oxford English Dictionary 603 (1st ed. 1933) ("In mod[ern] use commonly applied indifferently to coin and to such promissory documents representing coin (esp. government and bank notes) as are currently accepted as a medium of exchange"); Black's Law Dictionary 1200 (3d ed. 1933) (in its "popular sense, 'money' means any currency, tokens, bank-

notes, or other circulating medium in general use as the representative of value"); *Railway Express Agency, Inc.* v. *Virginia*, 347 U. S. 359, 365 (1954) ("[M]oney . . . is a medium of exchange"). Pretty obviously, stock options do not fall within that definition. While stock can be bought or sold for money, few of us buy groceries or pay rent or value goods and services in terms of stock. When was the last time you heard a friend say his new car cost "2,450 shares of Microsoft"? Good luck, too, trying to convince the Internal Revenue Service (IRS) to treat your stock options as a medium of exchange at tax time. See Rev. Rul. 76–350, 1976–2 Cum. Bull. 396; see also, *e. g.*, *In re Boyle's Estate*, 2 Cal. App. 2d 234, 236 (1934) ("[T]he word 'money' when taken in its ordinary and grammatical sense does not include corporate stocks"); *Helvering* v. *Credit Alliance Corp.*, 316 U. S. 107, 112 (1942) (distinguishing between "money . . . and . . . stock").

Nor does adding the word "remuneration" alter the calculus. Of course, "remuneration" can encompass any kind of reward or compensation, not just money. 8 Oxford English Dictionary 439. But in the sentence before us, the adjective "money" modifies the noun "remuneration." So "money" limits the kinds of remuneration that will qualify for taxation; "remuneration" doesn't expand what counts as money. When the statute speaks of taxing "any form of money remuneration," then, it indicates Congress wanted to tax monetary compensation in any of the many forms an employer might choose—coins, paper currency, checks, wire transfers, and the like. It does not prove Congress wanted to tax things, like stock, that aren't money at all.

The broader statutory context points to the same conclusion the immediate text suggests. The 1939 Internal Revenue Code, part of the same title as our statute and adopted just two years later, expressly treated "money" and "stock" as different things. Consider a few examples. The Code described "stock of the corporation" as "property other than money." § 27(d). It explained that a corporate distribution

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is taxable when distributed "either (A) in [the company's] stock . . . or (B) in money." § 115(f)(2). And it discussed transfers of "money in addition to . . . stock or securities." § 372(b). While ultimately ruling for the government, even the Court of Appeals in this case conceded that the 1939 Code "treat[ed] 'money' and 'stock' as different concepts." 856 F. 3d 490, 492 (CA7 2017).

That's not all. The same Congress that enacted the Railroad Retirement Tax Act enacted a companion statute, the Federal Insurance Contributions Act (FICA), to fund social security pensions for employees in other industries. And while the Railroad Retirement Tax Act taxes only "*money* remuneration," FICA taxes "*all* remuneration"— including benefits "paid in any medium other than cash." § 3121(a) (emphasis added). We usually "presume differences in language like this convey differences in meaning." *Henson* v. *Santander Consumer USA Inc.*, 582 U. S. 79, 86 (2017). And that presumption must bear particular strength when the same Congress passed both statutes to handle much the same task. See *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 432 (1987). The Congress that enacted both of these pension schemes knew well the difference between "money" and "all" forms of remuneration. Its choice to use the narrower term in the context of railroad pensions alone requires respect, not disregard.

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Even the IRS (then the Bureau of Internal Revenue) seems to have understood all this back in 1938. Shortly after the Railroad Retirement Tax Act's enactment, the IRS issued a regulation explaining that the Act taxes "all remuneration in money, or in something which may be used in lieu of money." 26 CFR § 410.5 (1938). By way of example, the regulation said the Act taxed things like "[s]alaries, wages, commissions, fees, [and] bonuses." § 410.6(a). But it nowhere suggested that stock was taxable. Nor was the possibility lost on the IRS. The IRS said the Act *did* tax money payments *related* to stock—"[p]ayments made by an

employer into a stock bonus . . . fund." § 410.6(f). But the agency did not seek to extend the same treatment to stock itself. So even assuming the validity of the regulation, it seems only to confirm our understanding.

To be sure, the regulation also lists "scrip and merchandise orders" as examples of qualifying mediums of exchange. § 410.5. For argument's sake, too, we will accept that the word "scrip" can sometimes embrace stock. But even if "scrip" is *capable* of bearing this meaning, at the time the IRS promulgated the regulation in 1938 that was not its *ordinary* meaning. As even the government acknowledged before the Court of Appeals, "scrip" ordinarily meant "company-issued certificates" that employees could use in lieu of cash "to purchase merchandise at a company store." Brief for United States in Nos. 16–3300 etc. (CA7), p. 37. This understanding fits perfectly as well with the whole phrase in which the term appears; both "scrip and merchandise orders" were frequently used at the time to purchase goods at company stores. See, *e. g.*, Webster's New International Dictionary 2249 (defining "scrip" as a "certificate . . . issued to circulate in lieu of government currency" or "by a corporation that pays wages partly in orders on a company store"); *Keokee Consol. Coke Co.* v. *Taylor*, 234 U. S. 224, 226 (1914) (company gave its employees "scrip . . . as an advance of monthly wages in payment for labor performed" that could be used to purchase merchandise at the company store); Gatch, Local Money in the United States During the Great Depression, 26 Essays in Economic & Bus. History 47–48 (2008).

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What does the government have to say about all this? It concedes that money remuneration often means remuneration in a commonly used medium of exchange. But, it submits, the term can carry a much more expansive meaning too. At least sometimes, the government says, "money" means any "property or possessions of any kind viewed as convertible into money or having value expressible in terms of money." 6 Oxford English Dictionary 603. The dissent

takes the same view. See *post,* at 287 (opinion of BREYER, J.). But while the term "money" *sometimes* might be used in this much more expansive sense, that isn't how the term was *ordinarily* used at the time of the Act's adoption (or is even today). Baseball cards, vinyl records, snow globes, and fidget spinners all have "value expressible in terms of money." Even that "priceless" Picasso has a price. Really, almost *anything* can be reduced to a "value expressible in terms of money." But in ordinary usage does "money" mean almost *everything*?

The government and the dissent supply no persuasive proof that Congress sought to invoke their idiosyncratic definition. If Congress really thought everything is money, why did it take such pains to differentiate between money and stock in the Internal Revenue Code of 1939? Why did it so carefully distinguish "money remuneration" in the Act and "all remuneration" in FICA? Why did it include the word "money" to qualify "remuneration" if all remuneration counts as money? And wouldn't the everything-is-money interpretation encompass railroad tickets, food, and lodging—exactly the sort of in-kind benefits we know the Act was written to *exclude*? These questions they cannot answer.

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To be sure, the government and dissent do seek to offer a different structural argument of their own. They point to certain of the Act's tax exemptions, most notably the exemption for qualified stock options. See 26 U. S. C. § 3231(e)(12); *post,* at 289–290 (BREYER, J., dissenting). Because the Act *excludes* qualified stock options from taxation, the argument goes, to avoid superfluity it must *include* other sorts of stock options like the nonqualified stock options the railroads issued here. The problem, though, is that the exemption covers "*any* remuneration *on account of*" qualified stock options. § 3231(e)(12) (emphasis added). And, as the government concedes, companies sometimes include money payments when qualified stock options are exercised (often to compensate for fractional shares due an employee). Brief

for United States 30. As a result, the exemption does work under anyone's reading.

The government replies that Congress would not have bothered to write an exemption that does only this modest work. To have been worth the candle, Congress must have assumed that stock options would qualify as money remuneration without a specific exemption. But we will not join this guessing game. It is not our function "to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have" intended. *Henson*, 582 U. S., at 89. Besides, even if the railroads' interpretation of the statute threatens to leave one of many exemptions with little to do, that's hardly a reason to abandon it, for the government's and dissent's alternative promises a graver surplusage problem of its own. As it did in 1939, the Internal Revenue Code today repeatedly distinguishes between "stock" and "money." See, *e. g.*, §306(c)(2) (referring to a situation where "money had been distributed in lieu of . . . stock"). All these distinctions the government and dissent would simply obliterate.

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Reaching further afield, the government and dissent point to a 1938 agency interpretation of another companion statute, the Railroad Retirement Act of 1937. See *post*, at 292 (BREYER, J., dissenting). Here, the Railroad Retirement Board suggested that the term "money remuneration" in the Railroad Retirement Act could sometimes include in-kind benefits. Again we may assume the validity of the regulation because, even taken on its own terms, it only ends up confirming our interpretation. The Board indicated that in-kind benefits could count as money remuneration *only* if the employer and employee agreed to this treatment and to the dollar value of the benefit. 20 CFR §222.2 (1938). That same year, the Board made clear that stock was treated just like any other in-kind benefit under this rule: "stock cannot be considered as a 'form of money remuneration earned by an individual for services rendered' " unless part of an em-

ployee's "agreed compensation" and awarded "at a definite agreed value." Railroad Retirement Bd. Gen. Counsel Memorandum No. L–1938–440, pp. 1–2 (1938). Later, the Board provided fuller explanation for its longstanding view, stating that these conditions are necessary because, unlike FICA, the Act does *not* cover "'remuneration . . . paid in any medium.'" Railroad Retirement Bd. Gen. Counsel Memorandum No. L–1986–82, p. 6 (1986). For decades, then, the Board has taken the view that nonmonetary remuneration is "not . . . included in compensation under the [Act] unless the employer and employee first agree to [its] dollar value . . . and then agree that this dollar value shall be part of the employee's compensation package." *Ibid.* None of these preconditions would be needed, of course, if the Act *automatically* taxed in-kind benefits as the government and dissent insist.

Finally, the government seeks *Chevron* deference for a more recent IRS interpretation treating "compensation" under the Act as having "the same meaning as the term wages in" FICA "except as specifically limited by the Railroad Retirement Tax Act." 26 CFR §31.3231(e)–1 (2017). But in light of all the textual and structural clues before us, we think it's clear enough that the term "money" excludes "stock," leaving no ambiguity for the agency to fill. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843, n. 9 (1984). Nor does the regulation help the government even on its own terms. FICA's definition of wages—"*all* remuneration"—*is* "specifically limited by the Railroad Retirement Tax Act," which applies only to "*money* remuneration." So in the end all the regulation winds up saying is that everyone should look carefully at the relevant statutory texts. We agree, and that is what we have done.

The Court of Appeals in this case tried a different tack still, if over a dissent. The majority all but admitted that stock isn't money, but suggested it would make "good practi-

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cal sense" for our statute to cover stock as well as money. 856 F. 3d, at 492. Meanwhile, Judge Manion dissented, countering that it's a judge's job only to apply, not revise or update, the terms of statutes. See *id.*, at 493. The Eighth Circuit made much the same point when it addressed the question. See *Union Pacific R. Co.* v. *United States*, 865 F. 3d 1045, 1048–1049 (2017). Judge Manion and the Eighth Circuit were right. Written laws are meant to be understood and lived by. If a fog of uncertainty surrounded them, if their meaning could shift with the latest judicial whim, the point of reducing them to writing would be lost. That is why it's a "fundamental canon of statutory construction" that words generally should be "interpreted as taking their ordinary, contemporary, common meaning . . . at the time Congress enacted the statute." *Perrin*, 444 U. S., at 42. Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences. Until it exercises that power, the people may rely on the original meaning of the written law.

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This hardly leaves us, as the dissent worries, "trapped in a monetary time warp, forever limited to those forms of money commonly used in the 1930's." *Post*, at 287 (opinion of BREYER, J.). While every statute's *meaning* is fixed at the time of enactment, new *applications* may arise in light of changes in the world. So "money," as used in this statute, must always mean a "medium of exchange." But what *qualifies* as a "medium of exchange" may depend on the facts of the day. Take electronic transfers of paychecks. Maybe they weren't common in 1937, but we do not doubt they would qualify today as "money remuneration" under the statute's original public meaning. The problem with the government's and the dissent's position today is not that stock and stock options weren't common in 1937, but that they were not then—and are not now—recognized as mediums of exchange.

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

It is so ordered.

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

The case before us concerns taxable "compensation" under the Railroad Retirement Tax Act. The statute defines the statutory word "compensation" as including "any form of money remuneration paid to an individual for services rendered." 26 U. S. C. §3231(e)(1). Does that phrase include stock options paid to railroad employees "for services rendered"? *Ibid.* In my view, the language itself is ambiguous but other traditional tools of statutory interpretation point to the answer, "yes." Consequently, the Government's interpretation of the language—which it has followed consistently since the inception of the statute—is lawful. I therefore dissent.

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I

A stock option consists of a right to buy a specified amount of stock at a specific price. If that price is lower than the current market price of the stock, a holder of the option can exercise the option, buy the stock at the option price, and keep the stock, or he can buy the stock, sell it at the higher market price, and pocket the difference. Companies often compensate their employees in part by paying them with stock options, hoping that by doing so they will provide an incentive for their employees to work harder to increase the value of the company.

Employees at petitioners' companies who receive and exercise a stock option may keep the stock they buy as long as they wish. But they also have another choice called the "cashless exercise" method. App. 42. That method permits an employee to check a box on a form, thereby asking the company's financial agents to buy the stock (at the option

price) and then immediately sell the stock (at the higher market price) with the proceeds deposited into the employee's bank account—just like a deposited paycheck. *Ibid.* About half (around 49%) of petitioners' employees used this method (or a variation of it) during the relevant time period. Separate App. of Plaintiffs-Appellants in No. 16–3300 (CA7), p. 45. The Solicitor General tells us that many more employees at other railroads also use this "cashless exercise" method—93% in the case of CSX, 90% to 95% in the case of BNSF. Brief for United States 20 (citing *CSX Corp.* v. *United States*, 2017 WL 2800181, *2 (MD Fla., May 2, 2017), and *BNSF R. Co.* v. *United States*, 775 F. 3d 743, 747 (CA5 2015)).

II

A

Does a stock option received by an employee (along with, say, a paycheck) count as a "form"—some form, "any form"—of "money remuneration?" The railroads, as the majority notes, believe they can find the answer to this question by engaging in (and winning) a war of 1930's dictionaries. I am less sanguine. True, some of those dictionaries say that "money" primarily refers to currency or promissory documents used as "'a medium of exchange.'" See *ante,* at 277–278. But even this definition has its ambiguities. A railroad employee cannot use her paycheck as a "medium of exchange." She cannot hand it over to a cashier at the grocery store; she must first deposit it. The same is true of stock, which must be converted into cash and deposited in the employee's account before she can enjoy its monetary value. Moreover, what we view as money has changed over time. Cowrie shells once were such a medium but no longer are, see J. Weatherford, The History of Money 24 (1997); our currency originally included gold coins and bullion, but, after 1934, gold could not be used as a medium of exchange, see Gold Reserve Act of 1934, ch. 6, § 2, 48 Stat. 337; perhaps one

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day employees will be paid in Bitcoin or some other type of cryptocurrency, see F. Martin, Money: The Unauthorized Biography—From Coinage to Cryptocurrencies 275–278 (1st Vintage Books ed. 2015). Nothing in the statute suggests the meaning of this provision should be trapped in a monetary time warp, forever limited to those forms of money commonly used in the 1930's.

Regardless, the formal "medium of exchange" definition is not the only dictionary definition of "money," now or then. The Oxford English Dictionary, for example, included in its definition "property or possessions of any kind viewed as convertible into money," 6 Oxford English Dictionary 603 (1st ed. 1933); Black's Law Dictionary said that money was the representative of "everything that can be transferred in commerce," Black's Law Dictionary 1200 (3d ed. 1933); and the New Century Dictionary defined money as "property considered with reference to its pecuniary value," 1 New Century Dictionary of the English Language 1083 (1933). Although the majority brushes these definitions aside as contrary to the term's "ordinary usage," *ante*, at 281, a broader understanding of money is perfectly intuitive—particularly in the context of compensation. Indeed, many of the country's top executives are compensated in both cash and stock or stock options. Often, as is the case with the president of petitioners' parent company, executives' stock-based compensation far exceeds their cash salary. Brief for United States 6–7. But if you were to ask (on, say, a mortgage application) how much money one of those executives made last year, it would make no sense to leave the stock and stock options out of the calculation.

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So, where does this duel of definitions lead us? Some seem too narrow; some seem too broad; some seem indeterminate. The result is ambiguity. Were it up to me to choose based only on what I have discussed so far, I would say that a stock option is a "form of money remuneration." Why? Because for many employees it almost immediately

takes the form of an increased bank balance, because it strongly resembles a paycheck in this respect, and because the statute refers to "*any form*" of money remuneration. A paycheck is not money, but it is a means of remunerating employees monetarily. The same can be said of stock options.

B

Fortunately, we have yet more tools in our interpretive arsenal, namely, all the "traditional tools of statutory construction." *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 446 (1987). Let us look to purpose. What could Congress' purpose have been when it used the word "money"? The most obvious purpose would be to exclude certain in-kind benefits that are nonmonetary—either because they are nontransferrable or otherwise difficult to value. When Congress enacted the statute, it was common for railroad workers to receive free transportation for life. Taxation of Interstate Carriers and Employees: Hearings on H. R. 8652 before the House Committee on Ways and Means, 74th Cong., 1st Sess., 6 (1935). Unlike stock options, it would have been difficult to value this benefit. And even very broad definitions of "money" would seem to exclude it. *E. g.*, 6 Oxford English Dictionary, at 603.

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Another interpretive tool, the statute's history, tends to confirm this view of the statutory purpose (and further supports inclusion of stock options for that reason). An earlier version of the Act explicitly excluded from taxation any "free transportation," along with such in-kind benefits as "board, rents, housing, [and] lodging" provided that their value was less than $10 per month (about $185 per month today). S. 2862, 74th Cong., 1st Sess., § 1(e), p. 3 (1935). In other words, they were incidental benefits that were particularly difficult to value. Congress later dropped these specific provisions from the bill on the ground that they were "superfluous." S. Rep. No. 697, 75th Cong., 1st Sess., 8 (1937).

Excluding stock options from taxation under the statute would not further this basic purpose and would be inconsistent with this aspect of the statute's history, for stock options are financial instruments. They can readily be bought and sold, they are not benefits in kind (*i. e.*, they have no value to employees other than their financial value), and—compared to, say, meals or spontaneous train trips—they are not particularly difficult to value.

Nor is it easy to see what purpose the majority's interpretation would serve. Congress designed the Act to provide a financially stable, self-sustaining system of retirement benefits for railroad employees. See S. Rep. No. 6, 83d Cong., 1st Sess., pt. 1, pp. 64–65 (1953); see also 2 Staff of the House Committee on Interstate and Foreign Commerce and the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess., 12–15 (Jt. Comm. Print 1972) (describing financial difficulties facing the private railroad pension programs that Congress sought to replace). Nevertheless, petitioners speculate that Congress intended to limit the Act's tax base to employees' "regular pay" because that more closely resembled the way private pensions in the railroad industry calculated a retiree's annuity. Brief for Petitioners 8. But the Act taxes not simply monthly paychecks but also bonuses, commissions, and contributions to an employee's retirement account (like a 401(k)), see §§3231(e)(1), (8)—none of which were customarily considered in railroad pension calculations. Why distinguish stock options from these other forms of money remuneration—particularly when almost half the employees who participated in petitioners' stock option plan (and nearly all such employees at other railroads) have the option's value paid directly into their bank accounts in cash? See *supra*, at 285–286.

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The statute's structure as later amended offers further support. That is because a later amendment expressly *excluded* from taxation certain stock options, namely, "[q]uali-

fied stock options," see § 3231(e)(12), which tax law treats more favorably (and which are also excluded from the Social Security tax base, § 3121(a)(22)). What need would there be to exclude expressly a subset of stock options if the statute already excluded *all* stock options from its coverage? The same is true of certain in-kind benefits, such as life-insurance premiums. See § 3231(e)(1)(i). Congress has more recently amended the statute to exclude expressly other hard-to-value fringe benefits. See § 3231(e)(5). Again what need would there be to do so if all noncash benefits, including stock options, were already excluded?

C

There are, of course, counterarguments and other considerations, which the majority sets forth in its opinion. The majority asserts, for example, that Congress must have intended the Act to be read more narrowly because, shortly after enacting the statutory language at issue in this dispute, Congress enacted the Federal Insurance Contributions Act (FICA), which uses different language to establish its tax base. The Railroad Retirement Tax Act defines "compensation" in part as "any form of money remuneration," § 3231(e)(1), while FICA defines "wages" as including the "cash value of all remuneration (including benefits) paid in any medium other than cash," § 3121(a). But there is no canon of interpretation forbidding Congress to use different words in different statutes to mean somewhat the same thing. See *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U. S. 519, 540 (2013). And the meaning of the statutory terms as I read them are not identical, given FICA's definition of "wages" would include those types of noncash benefits that the Railroad Retirement Tax Act exempts from taxation. See *supra*, at 288.

At most, this conflicting statutory language leaves the meaning of "money remuneration" unclear. In these circumstances, I would give weight to the interpretation of the

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Government agency that Congress charged with administering the statute. "[W]here 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 Speed Technologies, LLC* v. *Lee*, 579 U. S. 261, 276–277 (2016) (citing *United States* v. *Mead Corp.*, 533 U. S. 218, 229 (2001); *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843 (1984)). And even outside that framework, I would find the agency's views here particularly persuasive. *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 139–140 (1944). The interpretation was made contemporaneously with the enactment of the statute itself, *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315 (1933), and the Government has not since interpreted the statute in a way that directly contradicts that contemporaneous interpretation, see, *e. g.*, *Cardoza-Fonseca*, 480 U. S., at 446, n. 30; *Watt* v. *Alaska*, 451 U. S. 259, 272–273 (1981). Congress, over a period of nearly 90 years, has never revised or repealed the agencies' interpretation, despite modifying other provisions in the statute, which "'is persuasive evidence that the interpretation is the one intended by Congress.'" *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833, 846 (1986) (quoting *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 274–275 (1974)). Nor did the railroad industry object to the taxation of stock options based on the Government's interpretation until recent years. See, *e. g.*, *Union Pacific R. Co.* v. *United States*, 2016 U. S. Dist. LEXIS 86023, *4–*5 (D Neb., July 1, 2016) (noting that Union Pacific began issuing stock options in tax year 1981 and paid railroad retirement taxes on them for decades, challenging the Government's interpretation only in 2014).

What is that interpretation? Shortly after the Act was passed, the Department of Treasury issued a regulation defining the term "compensation" in the Act as reaching both "all remuneration in money, or in something which may be used in lieu of money (scrip and merchandise orders, for ex-

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ample)." 26 CFR §410.5 (1938). In the 1930's, "scrip" could refer to "[c]ertificates of ownership, either absolute or conditional, of shares in a public company, corporate profits, etc." Black's Law Dictionary, at 1588; C. Alsager, Dictionary of Business Terms 321 (1932) ("A certificate which represents fractions of shares of stock"); 3 F. Stroud, Judicial Dictionary 1802 (2d ed. 1903) ("[a] certificate, transferable by delivery, entitling its holder to *become* a Shareholder or Bondholder in respect of the shares or bonds therein mentioned"). The majority, though clearly fond of 1930's-era dictionaries, rejects these definitions because, in its view, they do not reflect the term's "*ordinary* meaning." *Ante*, at 280. But the majority has no basis for this assertion. Contra, *Eisner* v. *Macomber*, 252 U. S. 189, 227 (1920) (Brandeis, J., dissenting) (referring to "bonds, scrip or stock" as similar instruments of corporate finance).

The Treasury Department was not alone in interpreting the term "money remuneration" more broadly. In 1938 the Railroad Retirement Board's regulations treated the term "any form of money remuneration" as including "a commodity, service, or privilege" that had an "agreed upon" value. 20 CFR §222.2; see also 20 CFR §211.2 (2018) (current version). At least one contemporaneous legal opinion from the Board's general counsel specifically concluded that stock received by "employees as a part of their agreed compensation for services actually rendered and at a definite agreed value" qualified as a "form of money remuneration." Railroad Retirement Bd. Gen. Counsel Memorandum No. L–1938–440, p. 2 (1938). And in a more recent opinion, the Board's general counsel stated that nonqualified stock options (the type of stock option at issue in this dispute) are taxable under the Act. Railroad Retirement Bd. Gen. Counsel Memorandum No. L–2005–25, p. 6 (2005).

The majority plucks from the Act's long administrative history a 1986 Board legal opinion stating that an in-kind benefit should not be treated as compensation " 'unless the em-

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ployer and employee first agree to [its] dollar value . . . and then agree that this dollar value shall be part of the employee's compensation package.'" *Ante*, at 283 (quoting Railroad Retirement Bd. Gen. Counsel Memorandum No. L–1986–82, p. 6 (1986)). But the majority neglects to share that the deputy general counsel who wrote that legal opinion was not discussing stock or stock options, but rather was discussing a "fringe benefit"—specifically free rail passes employers purchased on behalf of their employees so they could ride on other carriers' trains. *Ante*, at 283. As I explained above, *supra*, at 288, such nontransferrable travel benefits were difficult to value and thus were excluded from the Act's definition of money remuneration. (Though the Board's willingness to treat at least *some* fringe benefits as a "form of money remuneration" demonstrates that the Board took a more flexible view of the term—a view that is contrary to the rigid dictionary definition of "money" the majority prefers, which excludes all forms of in-kind benefits. See *ante*, at 277–278.)

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A stock option, unlike free travel benefits, has a readily discernible value: namely, the difference between the option price and the market price when the employee exercises the option. For those employees who use the "cashless exercise" method, that difference is the amount that is deposited into their account as cash (minus fees). See *supra*, at 285. No one disputes that this is the value of the option when it is exercised. See Stipulations of Fact in No. 14–cv–10243, Exh. 13 (ND Ill.), p. CN168 (describing the taxable benefit from exercising a stock option). And no one disputes that granting employees stock options is a form of remuneration. See *ante*, at 278 (acknowledging that "'remuneration' can encompass any kind of reward or compensation"). The 1986 legal opinion on rail passes the majority invokes simply has no bearing on the tax treatment of stock options in this case.

More recently, the Treasury has issued a regulation stating that the Railroad Retirement Tax Act's term "compensa-

tion" (which, the reader will recall, the Act defines as "any form of money remuneration") has the same meaning as the term "wages" in FICA "'*except as specifically limited by the Railroad Retirement Tax Act*'" *or by regulation.* Brief for Petitioners 47. Petitioners do not dispute that FICA long has counted stock options as compensation. See *id.*, at 39–47. Neither the statute's text nor any regulation limits us from doing the same for the Railroad Retirement Tax Act. If anything, the earlier Treasury and Board regulations and opinions make clear that, in the Treasury Department's view, the Act does *not* "specifically limit" the application of its terms by excluding stock options from its coverage.

The Treasury Department's interpretation is a reasonable one. For one thing, it creates greater uniformity between the Railroad Retirement Tax Act's pension-like taxing system and the Social Security system governed by FICA. To seek administrative uniformity is (other things being equal) a reasonable objective given the similarity of purpose and methods the two Acts embody. And subsequent amendments to the Railroad Retirement Tax Act (which have generally mirrored provisions in FICA) demonstrate that Congress intended these tax regimes to be treated the same. See Update of Railroad Retirement Tax Act Regulations, 59 Fed. Reg. 66188 (1994) (observing that Congress has taken steps to "confor[m] the structure of the [Railroad Retirement Tax Act] to parallel that of the FICA"); compare §§ 3231(e)(1), (9), with §§ 3121(a)(2)(C), (a)(19). For another, it helps to avoid the unfairness that would arise out of treating differently two individuals (who received roughly the same amount of money in their bank accounts) simply because one received a paycheck while the other received proceeds from selling company stock.

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Here, in respect to stock options, the Act's language has a degree of ambiguity. But the statute's purpose, along with its amendments, argues in favor of including stock options. The Government has so interpreted the statute for decades,

and Congress has never suggested it held a contrary view, despite making other statutory changes. In these circumstances, I believe the Government has the stronger argument. I would read the statutory phrase as including stock options. And, with respect, I dissent from the majority's contrary view.

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Syllabus

CARPENTER *v.* UNITED STATES

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

No. 16–402. Argued November 29, 2017—Decided June 22, 2018

Cell phones perform their wide and growing variety of functions by continuously connecting to a set of radio antennas called "cell sites." Each time a phone connects to a cell site, it generates a time-stamped record known as cell-site location information (CSLI). Wireless carriers collect and store this information for their own business purposes. Here, after the FBI identified the cell phone numbers of several robbery suspects, prosecutors were granted court orders to obtain the suspects' cell phone records under the Stored Communications Act. Wireless carriers produced CSLI for petitioner Timothy Carpenter's phone, and the Government was able to obtain 12,898 location points cataloging Carpenter's movements over 127 days—an average of 101 data points per day. Carpenter moved to suppress the data, arguing that the Government's seizure of the records without obtaining a warrant supported by probable cause violated the Fourth Amendment. The District Court denied the motion, and prosecutors used the records at trial to show that Carpenter's phone was near four of the robbery locations at the time those robberies occurred. Carpenter was convicted. The Sixth Circuit affirmed, holding that Carpenter lacked a reasonable expectation of privacy in the location information collected by the FBI because he had shared that information with his wireless carriers.

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Held:

1. The Government's acquisition of Carpenter's cell-site records was a Fourth Amendment search. Pp. 303–316.

(a) The Fourth Amendment protects not only property interests but certain expectations of privacy as well. *Katz* v. *United States*, 389 U. S. 347, 351. Thus, when an individual "seeks to preserve something as private," and his expectation of privacy is "one that society is prepared to recognize as reasonable," official intrusion into that sphere generally qualifies as a search and requires a warrant supported by probable cause. *Smith* v. *Maryland*, 442 U. S. 735, 740 (internal quotation marks and alterations omitted). The analysis regarding which expectations of privacy are entitled to protection is informed by historical understandings "of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted." *Carroll* v. *United States*, 267 U. S. 132, 149. These Founding-era understandings continue to in-

form this Court when applying the Fourth Amendment to innovations in surveillance tools. See, *e. g.*, *Kyllo* v. *United States*, 533 U. S. 27. Pp. 303–305.

(b) The digital data at issue—personal location information maintained by a third party—does not fit neatly under existing precedents but lies at the intersection of two lines of cases. One set addresses a person's expectation of privacy in his physical location and movements. See, *e. g.*, *United States* v. *Jones*, 565 U. S. 400 (five Justices concluding that privacy concerns would be raised by GPS tracking). The other addresses a person's expectation of privacy in information voluntarily turned over to third parties. See *United States* v. *Miller*, 425 U. S. 435 (no expectation of privacy in financial records held by a bank), and *Smith*, 442 U. S. 735 (no expectation of privacy in records of dialed telephone numbers conveyed to telephone company). Pp. 306–309.

(c) Tracking a person's past movements through CSLI partakes of many of the qualities of GPS monitoring considered in *Jones*—it is detailed, encyclopedic, and effortlessly compiled. At the same time, however, the fact that the individual continuously reveals his location to his wireless carrier implicates the third-party principle of *Smith* and *Miller*. Given the unique nature of cell-site records, this Court declines to extend *Smith* and *Miller* to cover them. Pp. 309–316.

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(1) A majority of the Court has already recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements. Allowing government access to cell-site records—which "hold for many Americans the 'privacies of life,'" *Riley* v. *California*, 573 U. S. 373, 403—contravenes that expectation. In fact, historical cell-site records present even greater privacy concerns than the GPS monitoring considered in *Jones*: They give the Government near perfect surveillance and allow it to travel back in time to retrace a person's whereabouts, subject only to the five-year retention policies of most wireless carriers. The Government contends that CSLI data is less precise than GPS information, but it thought the data accurate enough here to highlight it during closing argument in Carpenter's trial. At any rate, the rule the Court adopts "must take account of more sophisticated systems that are already in use or in development," *Kyllo*, 533 U. S., at 36, and the accuracy of CSLI is rapidly approaching GPS-level precision. Pp. 310–313.

(2) The Government contends that the third-party doctrine governs this case, because cell-site records, like the records in *Smith* and *Miller*, are "business records," created and maintained by wireless carriers. But there is a world of difference between the limited types of personal information addressed in *Smith* and *Miller* and the exhaustive chronicle of location information casually collected by wireless carriers.

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The third-party doctrine partly stems from the notion that an individual has a reduced expectation of privacy in information knowingly shared with another. *Smith* and *Miller*, however, did not rely solely on the act of sharing. They also considered "the nature of the particular documents sought" and limitations on any "legitimate 'expectation of privacy' concerning their contents." *Miller*, 425 U. S., at 442. In mechanically applying the third-party doctrine to this case the Government fails to appreciate the lack of comparable limitations on the revealing nature of CSLI.

Nor does the second rationale for the third-party doctrine—voluntary exposure—hold up when it comes to CSLI. Cell phone location information is not truly "shared" as the term is normally understood. First, cell phones and the services they provide are "such a pervasive and insistent part of daily life" that carrying one is indispensable to participation in modern society. *Riley*, 573 U. S., at 385. Second, a cell phone logs a cell-site record by dint of its operation, without any affirmative act on the user's part beyond powering up. Pp. 313–316.

(d) This decision is narrow. It does not express a view on matters not before the Court; does not disturb the application of *Smith* and *Miller* or call into question conventional surveillance techniques and tools, such as security cameras; does not address other business records that might incidentally reveal location information; and does not consider other collection techniques involving foreign affairs or national security. P. 316.

Patent Digital Mapping Information

2. The Government did not obtain a warrant supported by probable cause before acquiring Carpenter's cell-site records. It acquired those records pursuant to a court order under the Stored Communications Act, which required the Government to show "reasonable grounds" for believing that the records were "relevant and material to an ongoing investigation." 18 U. S. C. § 2703(d). That showing falls well short of the probable cause required for a warrant. Consequently, an order issued under § 2703(d) is not a permissible mechanism for accessing historical cell-site records. Not all orders compelling the production of documents will require a showing of probable cause. A warrant is required only in the rare case where the suspect has a legitimate privacy interest in records held by a third party. And even though the Government will generally need a warrant to access CSLI, case-specific exceptions—*e. g.*, exigent circumstances—may support a warrantless search. Pp. 316–321.

819 F. 3d 880, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which THOMAS and ALITO, JJ., joined, *post*, p. 321.

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THOMAS, J., filed a dissenting opinion, *post*, p. 342. ALITO, J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 361. GORSUCH, J., filed a dissenting opinion, *post*, p. 386.

Nathan Freed Wessler argued the cause for petitioner. With him on the briefs were *Ben Wizner*, *Brett Max Kaufman*, *David D. Cole*, *Cecillia D. Wang*, *Jennifer Stisa Granick*, *Harold Gurewitz*, *Daniel S. Korobkin*, *Michael J. Steinberg*, *Kary L. Moss*, and *Jeffrey L. Fisher*.

Deputy Solicitor General Dreeben argued the cause for the United States. With him on the brief were *Solicitor General Francisco*, *Acting Assistant Attorney General Blanco*, *Elizabeth B. Prelogar*, and *Jenny C. Ellickson*.*

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*Briefs of *amici curiae* urging reversal were filed for the Center for Competitive Politics et al. by *Allen Dickerson* and *Zac Morgan*; for the Center for Democracy & Technology by *Andrew J. Pincus*; for the Competitive Enterprise Institute et al. by *Jim Harper*, *Ilya Shapiro*, *Manuel S. Klausner*, and *Curt Levey*; for Data & Society Research Institute et al. by *Marcia Hofmann* and *Andrew D. Selbst*; for the Electronic Frontier Foundation et al. by *Andrew Crocker*, *Jennifer Lynch*, *Jamie Williams*, *Faiza Patel*, *Michael W. Price*, *Rachel Levinson-Waldman*, *David Oscar Markus*, *Meghan Skelton*, *Donna Coltharp*, *Sarah Gannett*, and *Dan Kaplan*; for the Electronic Privacy Information Center et al. by *Marc Rotenberg* and *Alan Butler*; for Empirical Fourth Amendment Scholars by *Sarah O' Rourke Schrup* and *Jeffrey T. Green*; for the Institute for Justice et al. by *Wesley Hottot* and *Robert Frommer*; for the Reporters Committee for Freedom of the Press et al. by *Bruce D. Brown*, *Kevin M. Goldberg*, *James Cregan*, *Mickey H. Osterreicher*, *Robert A. Bertsche*, *Kurt Wimmer*, *Barbara L. Camens*, *Laura R. Handman*, *Alison Schary*, *Thomas R. Burke*, and *Bruce W. Sanford*; for Restore the Fourth, Inc., by *Mahesha P. Subbaraman*; for The Rutherford Institute by *John W. Whitehead* and *D. Alicia Hickok*; for Scholars of Criminal Procedure and Privacy by *Harry Sandick*; for Scholars of the History and Original Meaning of the Fourth Amendment by *Elizabeth B. Wydra*, *Brianne J. Gorod*, and *Brian R. Frazelle*; for Technology Experts by *Alex Abdo* and *Jameel Jaffer*; and for the United States Justice Foundation et al. by *Joseph W. Miller*, *Michael Boos*, *J. Mark Brewer*, *Robert J. Olson*, *Herbert W. Titus*, *William J. Olson*, and *Jeremiah L. Morgan*.

Briefs of *amici curiae* urging affirmance were filed for the State of Florida by *Pamela Jo Bondi*, Attorney General of Florida, *Amit Agarwal*,

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

This case presents the question whether the Government conducts a search under the Fourth Amendment when it accesses historical cell phone records that provide a comprehensive chronicle of the user's past movements.

I

A

There are 396 million cell phone service accounts in the United States—for a Nation of 326 million people. Cell phones perform their wide and growing variety of functions by connecting to a set of radio antennas called "cell sites." Although cell sites are usually mounted on a tower, they can also be found on light posts, flagpoles, church steeples, or the sides of buildings. Cell sites typically have several directional antennas that divide the covered area into sectors.

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Cell phones continuously scan their environment looking for the best signal, which generally comes from the closest cell site. Most modern devices, such as smartphones, tap into the wireless network several times a minute whenever their signal is on, even if the owner is not using one of the

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Solicitor General, and *Denise M. Harle* and *Jordan E. Pratt*, Deputy Solicitors General, and by Attorneys General for their respective jurisdictions as follows: *Steve Marshall* of Alabama, *Mark Brnovich* of Arizona, *Cynthia H. Coffman* of Colorado, *Lawrence G. Wasden* of Idaho, *Curtis T. Hill, Jr.*, of Indiana, *Derek Schmidt* of Kansas, *Andy Beshear* of Kentucky, *Brian E. Frosh* of Maryland, *Bill Schuette* of Michigan, *Timothy C. Fox* of Montana, *Doug Peterson* of Nebraska, *Gordon J. MacDonald* of New Hampshire, *Hector H. Balderas* of New Mexico, *Mike Hunter* of Oklahoma, *Josh Shapiro* of Pennsylvania, *Alan Wilson* of South Carolina, *Herbert H. Slatery III* of Tennessee, and *Peter K. Michael* of Wyoming; for the National District Attorneys Association by *John M. Castellano* and *Linda Cantoni*; for Orin S. Kerr by *Mr. Kerr*, *pro se*; and for Michael Varco by *Mr. Varco*, *pro se*.

Seth P. Waxman, *Jonathan G. Cedarbaum*, and *Catherine M. A. Carroll* filed a brief for Technology Companies as *amici curiae*.

phone's features. Each time the phone connects to a cell site, it generates a time-stamped record known as cell-site location information (CSLI). The precision of this information depends on the size of the geographic area covered by the cell site. The greater the concentration of cell sites, the smaller the coverage area. As data usage from cell phones has increased, wireless carriers have installed more cell sites to handle the traffic. That has led to increasingly compact coverage areas, especially in urban areas.

Wireless carriers collect and store CSLI for their own business purposes, including finding weak spots in their network and applying "roaming" charges when another carrier routes data through their cell sites. In addition, wireless carriers often sell aggregated location records to data brokers, without individual identifying information of the sort at issue here. While carriers have long retained CSLI for the start and end of incoming calls, in recent years phone companies have also collected location information from the transmission of text messages and routine data connections. Accordingly, modern cell phones generate increasingly vast amounts of increasingly precise CSLI.

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B

In 2011, police officers arrested four men suspected of robbing a series of Radio Shack and (ironically enough) T-Mobile stores in Detroit. One of the men confessed that, over the previous four months, the group (along with a rotating cast of getaway drivers and lookouts) had robbed nine different stores in Michigan and Ohio. The suspect identified 15 accomplices who had participated in the heists and gave the FBI some of their cell phone numbers; the FBI then reviewed his call records to identify additional numbers that he had called around the time of the robberies.

Based on that information, the prosecutors applied for court orders under the Stored Communications Act to obtain cell phone records for petitioner Timothy Carpenter and

several other suspects. That statute, as amended in 1994, permits the Government to compel the disclosure of certain telecommunications records when it "offers specific and articulable facts showing that there are reasonable grounds to believe" that the records sought "are relevant and material to an ongoing criminal investigation." 18 U. S. C. § 2703(d). Federal Magistrate Judges issued two orders directing Carpenter's wireless carriers—MetroPCS and Sprint—to disclose "cell/site sector [information] for [Carpenter's] telephone[ ] at call origination and at call termination for incoming and outgoing calls" during the four-month period when the string of robberies occurred. App. to Pet. for Cert. 60a, 72a. The first order sought 152 days of cell-site records from MetroPCS, which produced records spanning 127 days. The second order requested seven days of CSLI from Sprint, which produced two days of records covering the period when Carpenter's phone was "roaming" in northeastern Ohio. Altogether the Government obtained 12,898 location points cataloging Carpenter's movements—an average of 101 data points per day.

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Carpenter was charged with six counts of robbery and an additional six counts of carrying a firearm during a federal crime of violence. See 18 U. S. C. §§ 924(c), 1951(a). Prior to trial, Carpenter moved to suppress the cell-site data provided by the wireless carriers. He argued that the Government's seizure of the records violated the Fourth Amendment because they had been obtained without a warrant supported by probable cause. The District Court denied the motion. App. to Pet. for Cert. 38a–39a.

At trial, seven of Carpenter's confederates pegged him as the leader of the operation. In addition, FBI agent Christopher Hess offered expert testimony about the cell-site data. Hess explained that each time a cell phone taps into the wireless network, the carrier logs a time-stamped record of the cell site and particular sector that were used. With this information, Hess produced maps that placed Carpenter's

phone near four of the charged robberies. In the Government's view, the location records clinched the case: They confirmed that Carpenter was "right where the . . . robbery was at the exact time of the robbery." App. 131 (closing argument). Carpenter was convicted on all but one of the firearm counts and sentenced to more than 100 years in prison.

The Court of Appeals for the Sixth Circuit affirmed. 819 F. 3d 880 (2016). The court held that Carpenter lacked a reasonable expectation of privacy in the location information collected by the FBI because he had shared that information with his wireless carriers. Given that cell phone users voluntarily convey cell-site data to their carriers as "a means of establishing communication," the court concluded that the resulting business records are not entitled to Fourth Amendment protection. *Id.*, at 888 (quoting *Smith* v. *Maryland*, 442 U. S. 735, 741 (1979)).

We granted certiorari. 581 U. S. 1017 (2017).

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II

A

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The "basic purpose of this Amendment," our cases have recognized, "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara* v. *Municipal Court of City and County of San Francisco*, 387 U. S. 523, 528 (1967). The Founding generation crafted the Fourth Amendment as a "response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity." *Riley* v. *California*, 573 U. S. 373, 403 (2014). In fact, as John Adams recalled, the patriot James Otis's 1761 speech condemning writs of assistance was "the first act of opposition to the

arbitrary claims of Great Britain" and helped spark the Revolution itself. *Ibid.* (quoting 10 Works of John Adams 248 (C. Adams ed. 1856)).

For much of our history, Fourth Amendment search doctrine was "tied to common-law trespass" and focused on whether the Government "obtains information by physically intruding on a constitutionally protected area." *United States* v. *Jones*, 565 U. S. 400, 405, 406–407, n. 3 (2012). More recently, the Court has recognized that "property rights are not the sole measure of Fourth Amendment violations." *Soldal* v. *Cook County*, 506 U. S. 56, 64 (1992). In *Katz* v. *United States*, 389 U. S. 347, 351 (1967), we established that "the Fourth Amendment protects people, not places," and expanded our conception of the Amendment to protect certain expectations of privacy as well. When an individual "seeks to preserve something as private," and his expectation of privacy is "one that society is prepared to recognize as reasonable," we have held that official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause. *Smith*, 442 U. S., at 740 (internal quotation marks and alterations omitted).

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Although no single rubric definitively resolves which expectations of privacy are entitled to protection,[1] the analy-

[1] JUSTICE KENNEDY believes that there is such a rubric—the "property-based concepts" that *Katz* purported to move beyond. *Post*, at 322 (dissenting opinion). But while property rights are often informative, our cases by no means suggest that such an interest is "fundamental" or "dispositive" in determining which expectations of privacy are legitimate. *Post*, at 328–329. JUSTICE THOMAS (and to a large extent JUSTICE GORSUCH) would have us abandon *Katz* and return to an exclusively property-based approach. *Post*, at 342–343, 357–360 (THOMAS J., dissenting); *post*, at 391–394 (GORSUCH, J., dissenting). *Katz* of course "discredited" the "premise that property interests control," 389 U. S., at 353, and we have repeatedly emphasized that privacy interests do not rise or fall with property rights, see, *e. g.*, *United States* v. *Jones*, 565 U. S. 400, 411 (2012) (refusing to "make trespass the exclusive test"); *Kyllo* v. *United States*, 533 U. S. 27, 32 (2001) ("We have since decoupled violation of a person's Fourth Amendment rights from trespassory violation of his property."). Neither party has asked the Court to reconsider *Katz* in this case.

sis is informed by historical understandings "of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted." *Carroll* v. *United States*, 267 U. S. 132, 149 (1925). On this score, our cases have recognized some basic guideposts. First, that the Amendment seeks to secure "the privacies of life" against "arbitrary power." *Boyd* v. *United States*, 116 U. S. 616, 630 (1886). Second, and relatedly, that a central aim of the Framers was "to place obstacles in the way of a too permeating police surveillance." *United States* v. *Di Re*, 332 U. S. 581, 595 (1948).

We have kept this attention to Founding-era understandings in mind when applying the Fourth Amendment to innovations in surveillance tools. As technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes, this Court has sought to "assure[ ] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo* v. *United States*, 533 U. S. 27, 34 (2001). For that reason, we rejected in *Kyllo* a "mechanical interpretation" of the Fourth Amendment and held that use of a thermal imager to detect heat radiating from the side of the defendant's home was a search. *Id.*, at 35. Because any other conclusion would leave homeowners "at the mercy of advancing technology," we determined that the Government—absent a warrant—could not capitalize on such new sense-enhancing technology to explore what was happening within the home. *Ibid.*

Likewise in *Riley*, the Court recognized the "immense storage capacity" of modern cell phones in holding that police officers must generally obtain a warrant before searching the contents of a phone. 573 U. S., at 393. We explained that while the general rule allowing warrantless searches incident to arrest "strikes the appropriate balance in the context of physical objects, neither of its rationales has much force with respect to" the vast store of sensitive information on a cell phone. *Id.*, at 386.

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B

The case before us involves the Government's acquisition of wireless carrier cell-site records revealing the location of Carpenter's cell phone whenever it made or received calls. This sort of digital data—personal location information maintained by a third party—does not fit neatly under existing precedents. Instead, requests for cell-site records lie at the intersection of two lines of cases, both of which inform our understanding of the privacy interests at stake.

The first set of cases addresses a person's expectation of privacy in his physical location and movements. In *United States* v. *Knotts*, 460 U. S. 276 (1983), we considered the Government's use of a "beeper" to aid in tracking a vehicle through traffic. Police officers in that case planted a beeper in a container of chloroform before it was purchased by one of Knotts's co-conspirators. The officers (with intermittent aerial assistance) then followed the automobile carrying the container from Minneapolis to Knotts's cabin in Wisconsin, relying on the beeper's signal to help keep the vehicle in view. The Court concluded that the "augment[ed]" visual surveillance did not constitute a search because "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Id.*, at 281, 282. Since the movements of the vehicle and its final destination had been "voluntarily conveyed to anyone who wanted to look," Knotts could not assert a privacy interest in the information obtained. *Id.*, at 281.

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This Court in *Knotts*, however, was careful to distinguish between the rudimentary tracking facilitated by the beeper and more sweeping modes of surveillance. The Court emphasized the "limited use which the government made of the signals from this particular beeper" during a discrete "automotive journey." *Id.*, at 284, 285. Significantly, the Court reserved the question whether "different constitutional prin-

ciples may be applicable" if "twenty-four hour surveillance of any citizen of this country [were] possible." *Id.*, at 283–284.

Three decades later, the Court considered more sophisticated surveillance of the sort envisioned in *Knotts* and found that different principles did indeed apply. In *United States* v. *Jones*, FBI agents installed a GPS tracking device on Jones's vehicle and remotely monitored the vehicle's movements for 28 days. The Court decided the case based on the Government's physical trespass of the vehicle. 565 U. S., at 404–405. At the same time, five Justices agreed that related privacy concerns would be raised by, for example, "surreptitiously activating a stolen vehicle detection system" in Jones's car to track Jones himself, or conducting GPS tracking of his cell phone. *Id.*, at 426, 428 (ALITO, J., concurring in judgment); *id.*, at 415 (SOTOMAYOR, J., concurring). Since GPS monitoring of a vehicle tracks "every movement" a person makes in that vehicle, the concurring Justices concluded that "longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy"—regardless whether those movements were disclosed to the public at large. *Id.*, at 430 (opinion of ALITO, J.); *id.*, at 415 (opinion of SOTOMAYOR, J.).[2]

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In a second set of decisions, the Court has drawn a line between what a person keeps to himself and what he shares

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[2]JUSTICE KENNEDY argues that this case is in a different category from *Jones* and the dragnet-type practices posited in *Knotts* because the disclosure of the cell-site records was subject to "judicial authorization." *Post*, at 333–335. That line of argument conflates the threshold question whether a "search" has occurred with the separate matter of whether the search was reasonable. The subpoena process set forth in the Stored Communications Act does not determine a target's expectation of privacy. And in any event, neither *Jones* nor *Knotts* purported to resolve the question of what authorization may be required to conduct such electronic surveillance techniques. But see *Jones*, 565 U. S., at 430 (ALITO, J., concurring in judgment) (indicating that longer term GPS tracking may require a warrant).

with others. We have previously held that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith*, 442 U. S., at 743–744. That remains true "even if the information is revealed on the assumption that it will be used only for a limited purpose." *United States* v. *Miller*, 425 U. S. 435, 443 (1976). As a result, the Government is typically free to obtain such information from the recipient without triggering Fourth Amendment protections.

This third-party doctrine largely traces its roots to *Miller*. While investigating Miller for tax evasion, the Government subpoenaed his banks, seeking several months of canceled checks, deposit slips, and monthly statements. The Court rejected a Fourth Amendment challenge to the records collection. For one, Miller could "assert neither ownership nor possession" of the documents; they were "business records of the banks." *Id.*, at 440. For another, the nature of those records confirmed Miller's limited expectation of privacy, because the checks were "not confidential communications but negotiable instruments to be used in commercial transactions," and the bank statements contained information "exposed to [bank] employees in the ordinary course of business." *Id.*, at 442. The Court thus concluded that Miller had "take[n] the risk, in revealing his affairs to another, that the information [would] be conveyed by that person to the Government." *Id.*, at 443.

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Three years later, *Smith* applied the same principles in the context of information conveyed to a telephone company. The Court ruled that the Government's use of a pen register—a device that recorded the outgoing phone numbers dialed on a landline telephone—was not a search. Noting the pen register's "limited capabilities," the Court "doubt[ed] that people in general entertain any actual expectation of privacy in the numbers they dial." 442 U. S., at 742. Telephone subscribers know, after all, that the numbers are used by the telephone company "for a variety of

legitimate business purposes," including routing calls. *Id.*, at 743. And at any rate, the Court explained, such an expectation "is not one that society is prepared to recognize as reasonable." *Ibid.* (internal quotation marks omitted). When Smith placed a call, he "voluntarily conveyed" the dialed numbers to the phone company by "expos[ing] that information to its equipment in the ordinary course of business." *Id.*, at 744 (internal quotation marks omitted). Once again, we held that the defendant "assumed the risk" that the company's records "would be divulged to police." *Id.*, at 745.

III

The question we confront today is how to apply the Fourth Amendment to a new phenomenon: the ability to chronicle a person's past movements through the record of his cell phone signals. Such tracking partakes of many of the qualities of the GPS monitoring we considered in *Jones*. Much like GPS tracking of a vehicle, cell phone location information is detailed, encyclopedic, and effortlessly compiled.

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At the same time, the fact that the individual continuously reveals his location to his wireless carrier implicates the third-party principle of *Smith* and *Miller*. But while the third-party doctrine applies to telephone numbers and bank records, it is not clear whether its logic extends to the qualitatively different category of cell-site records. After all, when *Smith* was decided in 1979, few could have imagined a society in which a phone goes wherever its owner goes, conveying to the wireless carrier not just dialed digits, but a detailed and comprehensive record of the person's movements.

We decline to extend *Smith* and *Miller* to cover these novel circumstances. Given the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection. Whether the Government employs its own surveillance technology as in *Jones* or lever-

ages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI. The location information obtained from Carpenter's wireless carriers was the product of a search.[3]

A

A person does not surrender all Fourth Amendment protection by venturing into the public sphere. To the contrary, "what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz*, 389 U. S., at 351–352. A majority of this Court has already recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements. *Jones*, 565 U. S., at 430 (ALITO, J., concurring in judgment); *id.*, at 415 (SOTOMAYOR, J., concurring). Prior to the digital age, law enforcement might have pursued a suspect for a brief stretch, but doing so "for any extended period of time was difficult and costly and therefore rarely undertaken." *Id.*, at 429 (opinion of ALITO, J.). For that reason, "society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period." *Id.*, at 430.

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[3] The parties suggest as an alternative to their primary submissions that the acquisition of CSLI becomes a search only if it extends beyond a limited period. See Reply Brief 12 (proposing a 24-hour cutoff); Brief for United States 55–56 (suggesting a seven-day cutoff). As part of its argument, the Government treats the seven days of CSLI requested from Sprint as the pertinent period, even though Sprint produced only two days of records. Brief for United States 56. Contrary to JUSTICE KENNEDY's assertion, *post*, at 338–339, we need not decide whether there is a limited period for which the Government may obtain an individual's historical CSLI free from Fourth Amendment scrutiny, and if so, how long that period might be. It is sufficient for our purposes today to hold that accessing seven days of CSLI constitutes a Fourth Amendment search.

Allowing government access to cell-site records contravenes that expectation. Although such records are generated for commercial purposes, that distinction does not negate Carpenter's anticipation of privacy in his physical location. Mapping a cell phone's location over the course of 127 days provides an all-encompassing record of the holder's whereabouts. As with GPS information, the time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his "familial, political, professional, religious, and sexual associations." *Id.*, at 415 (opinion of SOTOMAYOR, J.). These location records "hold for many Americans the 'privacies of life.'" *Riley*, 573 U. S., at 403 (quoting *Boyd*, 116 U. S., at 630). And like GPS monitoring, cell phone tracking is remarkably easy, cheap, and efficient compared to traditional investigative tools. With just the click of a button, the Government can access each carrier's deep repository of historical location information at practically no expense.

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In fact, historical cell-site records present even greater privacy concerns than the GPS monitoring of a vehicle we considered in *Jones*. Unlike the bugged container in *Knotts* or the car in *Jones*, a cell phone—almost a "feature of human anatomy," *Riley*, 573 U. S., at 385—tracks nearly exactly the movements of its owner. While individuals regularly leave their vehicles, they compulsively carry cell phones with them all the time. A cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales. See *id.*, at 395 (noting that "nearly three-quarters of smart phone users report being within five feet of their phones most of the time, with 12% admitting that they even use their phones in the shower"); contrast *Cardwell* v. *Lewis*, 417 U. S. 583, 590 (1974) (plurality opinion) ("A car has little capacity for escaping public scrutiny."). Accordingly, when the Government tracks the location of a cell

phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user.

Moreover, the retrospective quality of the data here gives police access to a category of information otherwise unknowable. In the past, attempts to reconstruct a person's movements were limited by a dearth of records and the frailties of recollection. With access to CSLI, the Government can now travel back in time to retrace a person's whereabouts, subject only to the retention polices of the wireless carriers, which currently maintain records for up to five years. Critically, because location information is continually logged for all of the 400 million devices in the United States—not just those belonging to persons who might happen to come under investigation—this newfound tracking capacity runs against everyone. Unlike with the GPS device in *Jones*, police need not even know in advance whether they want to follow a particular individual, or when.

Whoever the suspect turns out to be, he has effectively been tailed every moment of every day for five years, and the police may—in the Government's view—call upon the results of that surveillance without regard to the constraints of the Fourth Amendment. Only the few without cell phones could escape this tireless and absolute surveillance.

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The Government and JUSTICE KENNEDY contend, however, that the collection of CSLI should be permitted because the data is less precise than GPS information. Not to worry, they maintain, because the location records did "not on their own suffice to place [Carpenter] at the crime scene"; they placed him within a wedge-shaped sector ranging from one-eighth to four square miles. Brief for United States 24; see *post,* at 337–338. Yet the Court has already rejected the proposition that "inference insulates a search." *Kyllo*, 533 U. S., at 36. From the 127 days of location data it received, the Government could, in combination with other information, deduce a detailed log of Carpenter's movements, including when he was at the site of the robberies. And the Govern-

ment thought the CSLI accurate enough to highlight it during the closing argument of his trial. App. 131.

At any rate, the rule the Court adopts "must take account of more sophisticated systems that are already in use or in development." *Kyllo*, 533 U. S., at 36. While the records in this case reflect the state of technology at the start of the decade, the accuracy of CSLI is rapidly approaching GPS-level precision. As the number of cell sites has proliferated, the geographic area covered by each cell sector has shrunk, particularly in urban areas. In addition, with new technology measuring the time and angle of signals hitting their towers, wireless carriers already have the capability to pinpoint a phone's location within 50 meters. Brief for Electronic Frontier Foundation et al. as *Amici Curiae* 12 (describing triangulation methods that estimate a device's location inside a given cell sector).

Accordingly, when the Government accessed CSLI from the wireless carriers, it invaded Carpenter's reasonable expectation of privacy in the whole of his physical movements.

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B

The Government's primary contention to the contrary is that the third-party doctrine governs this case. In its view, cell-site records are fair game because they are "business records" created and maintained by the wireless carriers. The Government (along with JUSTICE KENNEDY) recognizes that this case features new technology, but asserts that the legal question nonetheless turns on a garden-variety request for information from a third-party witness. Brief for United States 32–34; *post*, at 331–333.

The Government's position fails to contend with the seismic shifts in digital technology that made possible the tracking of not only Carpenter's location but also everyone else's, not for a short period but for years and years. Sprint Corporation and its competitors are not your typical witnesses. Unlike the nosy neighbor who keeps an eye on comings and

goings, they are ever alert, and their memory is nearly infallible. There is a world of difference between the limited types of personal information addressed in *Smith* and *Miller* and the exhaustive chronicle of location information casually collected by wireless carriers today. The Government thus is not asking for a straightforward application of the third-party doctrine, but instead a significant extension of it to a distinct category of information.

The third-party doctrine partly stems from the notion that an individual has a reduced expectation of privacy in information knowingly shared with another. But the fact of "diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely." *Riley*, 573 U. S., at 392. *Smith* and *Miller*, after all, did not rely solely on the act of sharing. Instead, they considered "the nature of the particular documents sought" to determine whether "there is a legitimate 'expectation of privacy' concerning their contents." *Miller*, 425 U. S., at 442. *Smith* pointed out the limited capabilities of a pen register; as explained in *Riley*, telephone call logs reveal little in the way of "identifying information." *Smith*, 442 U. S., at 742; *Riley*, 573 U. S., at 400. *Miller* likewise noted that checks were "not confidential communications but negotiable instruments to be used in commercial transactions." 425 U. S., at 442. In mechanically applying the third-party doctrine to this case, the Government fails to appreciate that there are no comparable limitations on the revealing nature of CSLI.

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The Court has in fact already shown special solicitude for location information in the third-party context. In *Knotts*, the Court relied on *Smith* to hold that an individual has no reasonable expectation of privacy in public movements that he "voluntarily conveyed to anyone who wanted to look." *Knotts*, 460 U. S., at 281; see *id.*, at 283 (discussing *Smith*). But when confronted with more pervasive tracking, five Justices agreed that longer term GPS monitoring of even a vehi-

cle traveling on public streets constitutes a search. *Jones*, 565 U. S., at 430 (ALITO, J., concurring in judgment); *id.*, at 415 (SOTOMAYOR, J., concurring). JUSTICE GORSUCH wonders why "someone's location when using a phone" is sensitive, *post*, at 388, and JUSTICE KENNEDY assumes that a person's discrete movements "are not particularly private," *post*, at 336. Yet this case is not about "using a phone" or a person's movement at a particular time. It is about a detailed chronicle of a person's physical presence compiled every day, every moment, over several years. Such a chronicle implicates privacy concerns far beyond those considered in *Smith* and *Miller*.

Neither does the second rationale underlying the third-party doctrine—voluntary exposure—hold up when it comes to CSLI. Cell phone location information is not truly "shared" as one normally understands the term. In the first place, cell phones and the services they provide are "such a pervasive and insistent part of daily life" that carrying one is indispensable to participation in modern society. *Riley*, 573 U. S., at 385. Second, a cell phone logs a cell-site record by dint of its operation, without any affirmative act on the part of the user beyond powering up. Virtually any activity on the phone generates CSLI, including incoming calls, texts, or e-mails and countless other data connections that a phone automatically makes when checking for news, weather, or social media updates. Apart from disconnecting the phone from the network, there is no way to avoid leaving behind a trail of location data. As a result, in no meaningful sense does the user voluntarily "assume[ ] the risk" of turning over a comprehensive dossier of his physical movements. *Smith*, 442 U. S., at 745.

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We therefore decline to extend *Smith* and *Miller* to the collection of CSLI. Given the unique nature of cell phone location information, the fact that the Government obtained the information from a third party does not overcome Car-

penter's claim to Fourth Amendment protection. The Government's acquisition of the cell-site records was a search within the meaning of the Fourth Amendment.

* * *

Our decision today is a narrow one. We do not express a view on matters not before us: real-time CSLI or "tower dumps" (a download of information on all the devices that connected to a particular cell site during a particular interval). We do not disturb the application of *Smith* and *Miller* or call into question conventional surveillance techniques and tools, such as security cameras. Nor do we address other business records that might incidentally reveal location information. Further, our opinion does not consider other collection techniques involving foreign affairs or national security. As Justice Frankfurter noted when considering new innovations in airplanes and radios, the Court must tread carefully in such cases, to ensure that we do not "embarrass the future." *Northwest Airlines, Inc.* v. *Minnesota*, 322 U. S. 292, 300 (1944).[4]

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IV

Having found that the acquisition of Carpenter's CSLI was a search, we also conclude that the Government must generally obtain a warrant supported by probable cause before acquiring such records. Although the "ultimate measure of the constitutionality of a governmental search is 'reasonableness,'" our cases establish that warrantless searches are typically unreasonable where "a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing." *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646, 652–653 (1995). Thus, "[i]n the absence of a warrant, a

[4] JUSTICE GORSUCH faults us for not promulgating a complete code addressing the manifold situations that may be presented by this new technology—under a constitutional provision turning on what is "reasonable," no less. *Post,* at 395–397. Like JUSTICE GORSUCH, we "do not begin to claim all the answers today," *post,* at 399, and therefore decide no more than the case before us.

search is reasonable only if it falls within a specific exception to the warrant requirement." *Riley*, 573 U. S., at 382.

The Government acquired the cell-site records pursuant to a court order issued under the Stored Communications Act, which required the Government to show "reasonable grounds" for believing that the records were "relevant and material to an ongoing investigation." 18 U. S. C. § 2703(d). That showing falls well short of the probable cause required for a warrant. The Court usually requires "some quantum of individualized suspicion" before a search or seizure may take place. *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 560–561 (1976). Under the standard in the Stored Communications Act, however, law enforcement need only show that the cell-site evidence might be pertinent to an ongoing investigation—a "gigantic" departure from the probable cause rule, as the Government explained below. App. 34. Consequently, an order issued under Section 2703(d) of the Act is not a permissible mechanism for accessing historical cell-site records. Before compelling a wireless carrier to turn over a subscriber's CSLI, the Government's obligation is a familiar one—get a warrant.

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JUSTICE ALITO contends that the warrant requirement simply does not apply when the Government acquires records using compulsory process. Unlike an actual search, he says, subpoenas for documents do not involve the direct taking of evidence; they are at most a "constructive search" conducted by the target of the subpoena. *Post*, at 374. Given this lesser intrusion on personal privacy, JUSTICE ALITO argues that the compulsory production of records is not held to the same probable cause standard. In his view, this Court's precedents set forth a categorical rule—separate and distinct from the third-party doctrine—subjecting subpoenas to lenient scrutiny without regard to the suspect's expectation of privacy in the records. *Post*, at 368–379.

But this Court has never held that the Government may subpoena third parties for records in which the suspect has a reasonable expectation of privacy. Almost all of the exam-

ples JUSTICE ALITO cites, see *post*, at 374–375, contemplated requests for evidence implicating diminished privacy interests or for a corporation's own books.[5] The lone exception, of course, is *Miller*, where the Court's analysis of the third-party subpoena merged with the application of the third-party doctrine. 425 U. S., at 444 (concluding that Miller lacked the necessary privacy interest to contest the issuance of a subpoena to his bank).

JUSTICE ALITO overlooks the critical issue. At some point, the dissent should recognize that CSLI is an entirely different species of business record—something that implicates basic Fourth Amendment concerns about arbitrary government power much more directly than corporate tax or payroll ledgers. When confronting new concerns wrought by digital technology, this Court has been careful not to uncritically extend existing precedents. See *Riley*, 573 U. S., at 386 ("A search of the information on a cell phone bears little resemblance to the type of brief physical search considered [in prior precedents].").

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If the choice to proceed by subpoena provided a categorical limitation on Fourth Amendment protection, no type of record would ever be protected by the warrant requirement. Under JUSTICE ALITO's view, private letters, digital contents of a cell phone—any personal information reduced to docu-

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[5] See *United States* v. *Dionisio*, 410 U. S. 1, 14 (1973) ("No person can have a reasonable expectation that others will not know the sound of his voice"); *Donovan* v. *Lone Steer, Inc.*, 464 U. S. 408, 411, 415 (1984) (payroll and sales records); *California Bankers Assn.* v. *Shultz*, 416 U. S. 21, 67 (1974) (Bank Secrecy Act reporting requirements); *See* v. *Seattle*, 387 U. S. 541, 544 (1967) (financial books and records); *United States* v. *Powell*, 379 U. S. 48, 49, 57 (1964) (corporate tax records); *McPhaul* v. *United States*, 364 U. S. 372, 374, 382 (1960) (books and records of an organization); *United States* v. *Morton Salt Co.*, 338 U. S. 632, 634, 651–653 (1950) (Federal Trade Commission reporting requirement); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 189, 204–208 (1946) (payroll records); *Hale* v. *Henkel*, 201 U. S. 43, 45, 75 (1906) (corporate books and papers).

ment form, in fact—may be collected by subpoena for no reason other than "official curiosity." *United States* v. *Morton Salt Co.*, 338 U. S. 632, 652 (1950). JUSTICE KENNEDY declines to adopt the radical implications of this theory, leaving open the question whether the warrant requirement applies "when the Government obtains the modern-day equivalents of an individual's own 'papers' or 'effects,' even when those papers or effects are held by a third party." *Post*, at 332 (citing *United States* v. *Warshak*, 631 F. 3d 266, 283–288 (CA6 2010)). That would be a sensible exception, because it would prevent the subpoena doctrine from overcoming any reasonable expectation of privacy. If the third-party doctrine does not apply to the "modern-day equivalents of an individual's own 'papers' or 'effects,' " then the clear implication is that the documents should receive full Fourth Amendment protection. We simply think that such protection should extend as well to a detailed log of a person's movements over several years.

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This is certainly not to say that all orders compelling the production of documents will require a showing of probable cause. The Government will be able to use subpoenas to acquire records in the overwhelming majority of investigations. We hold only that a warrant is required in the rare case where the suspect has a legitimate privacy interest in records held by a third party.

Further, even though the Government will generally need a warrant to access CSLI, case-specific exceptions may support a warrantless search of an individual's cell-site records under certain circumstances. "One well-recognized exception applies when ' "the exigencies of the situation" make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.' " *Kentucky* v. *King*, 563 U. S. 452, 460 (2011) (quoting *Mincey* v. *Arizona*, 437 U. S. 385, 394 (1978)). Such exigen-

cies include the need to pursue a fleeing suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence. 563 U. S., at 460, and n. 3.

As a result, if law enforcement is confronted with an urgent situation, such fact-specific threats will likely justify the warrantless collection of CSLI. Lower courts, for instance, have approved warrantless searches related to bomb threats, active shootings, and child abductions. Our decision today does not call into doubt warrantless access to CSLI in such circumstances. While police must get a warrant when collecting CSLI to assist in the mine-run criminal investigation, the rule we set forth does not limit their ability to respond to an ongoing emergency.

* * *

As Justice Brandeis explained in his famous dissent, the Court is obligated—as "[s]ubtler and more far-reaching means of invading privacy have become available to the Government"—to ensure that the "progress of science" does not erode Fourth Amendment protections. *Olmstead* v. *United States*, 277 U. S. 438, 473–474 (1928). Here the progress of science has afforded law enforcement a powerful new tool to carry out its important responsibilities. At the same time, this tool risks Government encroachment of the sort the Framers, "after consulting the lessons of history," drafted the Fourth Amendment to prevent. *Di Re*, 332 U. S., at 595.

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We decline to grant the state unrestricted access to a wireless carrier's database of physical location information. In light of the deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection. The Government's acquisition of the cell-site records here was a search under that Amendment.

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

This case involves new technology, but the Court's stark departure from relevant Fourth Amendment precedents and principles is, in my submission, unnecessary and incorrect, requiring this respectful dissent.

The new rule the Court seems to formulate puts needed, reasonable, accepted, lawful, and congressionally authorized criminal investigations at serious risk in serious cases, often when law enforcement seeks to prevent the threat of violent crimes. And it places undue restrictions on the lawful and necessary enforcement powers exercised not only by the Federal Government, but also by law enforcement in every State and locality throughout the Nation. Adherence to this Court's longstanding precedents and analytic framework would have been the proper and prudent way to resolve this case.

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The Court has twice held that individuals have no Fourth Amendment interests in business records which are possessed, owned, and controlled by a third party. *United States* v. *Miller*, 425 U. S. 435 (1976); *Smith* v. *Maryland*, 442 U. S. 735 (1979). This is true even when the records contain personal and sensitive information. So when the Government uses a subpoena to obtain, for example, bank records, telephone records, and credit card statements from the businesses that create and keep these records, the Government does not engage in a search of the business' customers within the meaning of the Fourth Amendment.

In this case petitioner challenges the Government's right to use compulsory process to obtain a now-common kind of business record: cell-site records held by cell phone service

providers. The Government acquired the records through an investigative process enacted by Congress. Upon approval by a neutral magistrate, and based on the Government's duty to show reasonable necessity, it authorizes the disclosure of records and information that are under the control and ownership of the cell phone service provider, not its customer. Petitioner acknowledges that the Government may obtain a wide variety of business records using compulsory process, and he does not ask the Court to revisit its precedents. Yet he argues that, under those same precedents, the Government searched his records when it used court-approved compulsory process to obtain the cell-site information at issue here.

Cell-site records, however, are no different from the many other kinds of business records the Government has a lawful right to obtain by compulsory process. Customers like petitioner do not own, possess, control, or use the records, and for that reason have no reasonable expectation that they cannot be disclosed pursuant to lawful compulsory process.

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The Court today disagrees. It holds for the first time that by using compulsory process to obtain records of a business entity, the Government has not just engaged in an impermissible action, but has conducted a search of the business' customer. The Court further concludes that the search in this case was unreasonable and the Government needed to get a warrant to obtain more than six days of cell-site records.

In concluding that the Government engaged in a search, the Court unhinges Fourth Amendment doctrine from the property-based concepts that have long grounded the analytic framework that pertains in these cases. In doing so it draws an unprincipled and unworkable line between cell-site records on the one hand and financial and telephonic records on the other. According to today's majority opinion, the Government can acquire a record of every credit card purchase and phone call a person makes over months or years without upsetting a legitimate expectation of privacy. But,

in the Court's view, the Government crosses a constitutional line when it obtains a court's approval to issue a subpoena for more than six days of cell-site records in order to determine whether a person was within several hundred city blocks of a crime scene. That distinction is illogical and will frustrate principled application of the Fourth Amendment in many routine yet vital law enforcement operations.

It is true that the Cyber Age has vast potential both to expand and restrict individual freedoms in dimensions not contemplated in earlier times. See *Packingham* v. *North Carolina*, 582 U. S. 98, 104–105 (2017). For the reasons that follow, however, there is simply no basis here for concluding that the Government interfered with information that the cell phone customer, either from a legal or commonsense standpoint, should have thought the law would deem owned or controlled by him.

I

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Before evaluating the question presented it is helpful to understand the nature of cell-site records, how they are commonly used by cell phone service providers, and their proper use by law enforcement.

When a cell phone user makes a call, sends a text message or e-mail, or gains access to the Internet, the cell phone establishes a radio connection to an antenna at a nearby cell site. The typical cell site covers a more-or-less circular geographic area around the site. It has three (or sometimes six) separate antennas pointing in different directions. Each provides cell service for a different 120-degree (or 60-degree) sector of the cell site's circular coverage area. So a cell phone activated on the north side of a cell site will connect to a different antenna than a cell phone on the south side.

Cell phone service providers create records each time a cell phone connects to an antenna at a cell site. For a phone call, for example, the provider records the date, time, and

duration of the call; the phone numbers making and receiving the call; and, most relevant here, the cell site used to make the call, as well as the specific antenna that made the connection. The cell-site and antenna data points, together with the date and time of connection, are known as cell-site location information, or cell-site records. By linking an individual's cell phone to a particular 120- or 60-degree sector of a cell site's coverage area at a particular time, cell-site records reveal the general location of the cell phone user.

The location information revealed by cell-site records is imprecise, because an individual cell-site sector usually covers a large geographic area. The FBI agent who offered expert testimony about the cell-site records at issue here testified that a cell site in a city reaches between a half mile and two miles in all directions. That means a 60-degree sector covers between approximately one-eighth and two square miles (and a 120-degree sector twice that area). To put that in perspective, in urban areas cell-site records often would reveal the location of a cell phone user within an area covering between around a dozen and several hundred city blocks. In rural areas cell-site records can be up to 40 times more imprecise. By contrast, a Global Positioning System (GPS) can reveal an individual's location within around 15 feet.

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Major cell phone service providers keep cell-site records for long periods of time. There is no law requiring them to do so. Instead, providers contract with their customers to collect and keep these records because they are valuable to the providers. Among other things, providers aggregate the records and sell them to third parties along with other information gleaned from cell phone usage. This data can be used, for example, to help a department store determine which of various prospective store locations is likely to get more foot traffic from middle-aged women who live in affluent zip codes. The market for cell phone data is now estimated to be in the billions of dollars. See Brief for Technology Experts as *Amici Curiae* 23.

Cell-site records also can serve an important investigative function, as the facts of this case demonstrate. Petitioner, Timothy Carpenter, along with a rotating group of accomplices, robbed at least six RadioShack and T-Mobile stores at gunpoint over a 2-year period. Five of those robberies occurred in the Detroit area, each crime at least four miles from the last. The sixth took place in Warren, Ohio, over 200 miles from Detroit.

The Government, of course, did not know all of these details in 2011 when it began investigating Carpenter. In April of that year police arrested four of Carpenter's coconspirators. One of them confessed to committing nine robberies in Michigan and Ohio between December 2010 and March 2011. He identified 15 accomplices who had participated in at least one of those robberies; named Carpenter as one of the accomplices; and provided Carpenter's cell phone number to the authorities. The suspect also warned that the other members of the conspiracy planned to commit more armed robberies in the immediate future.

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The Government at this point faced a daunting task. Even if it could identify and apprehend the suspects, still it had to link each suspect in this changing criminal gang to specific robberies in order to bring charges and convict. And, of course, it was urgent that the Government take all necessary steps to stop the ongoing and dangerous crime spree.

Cell-site records were uniquely suited to this task. The geographic dispersion of the robberies meant that, if Carpenter's cell phone were within even a dozen to several hundred city blocks of one or more of the stores when the different robberies occurred, there would be powerful circumstantial evidence of his participation; and this would be especially so if his cell phone usually was not located in the sectors near the stores except during the robbery times.

To obtain these records, the Government applied to Federal Magistrate Judges for disclosure orders pursuant to § 2703(d)

of the Stored Communications Act. That Act authorizes a magistrate judge to issue an order requiring disclosure of cell-site records if the Government demonstrates "specific and articulable facts showing that there are reasonable grounds to believe" the records "are relevant and material to an ongoing criminal investigation." 18 U. S. C. §§ 2703(d), 2711(3). The full statutory provision is set out in the Appendix, *infra*.

From Carpenter's primary service provider, MetroPCS, the Government obtained records from between December 2010 and April 2011, based on its understanding that nine robberies had occurred in that timeframe. The Government also requested seven days of cell-site records from Sprint, spanning the time around the robbery in Warren, Ohio. It obtained two days of records.

These records confirmed that Carpenter's cell phone was in the general vicinity of four of the nine robberies, including the one in Ohio, at the times those robberies occurred.

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II

The first Clause of the Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The customary beginning point in any Fourth Amendment search case is whether the Government's actions constitute a "search" of the defendant's person, house, papers, or effects, within the meaning of the constitutional provision. If so, the next question is whether that search was reasonable.

Here the only question necessary to decide is whether the Government searched anything of Carpenter's when it used compulsory process to obtain cell-site records from Carpenter's cell phone service providers. This Court's decisions in *Miller* and *Smith* dictate that the answer is no, as every Court of Appeals to have considered the question has recognized. See *United States* v. *Thompson*, 866 F. 3d 1149 (CA10 2017); *United States* v. *Graham*, 824 F. 3d 421 (CA4

2016) (en banc); *Carpenter* v. *United States*, 819 F. 3d 880 (CA6 2016); *United States* v. *Davis*, 785 F. 3d 498 (CA11 2015) (en banc); *In re Application of U. S. for Historical Cell Site Data*, 724 F. 3d 600 (CA5 2013).

A

Miller and *Smith* hold that individuals lack any protected Fourth Amendment interests in records that are possessed, owned, and controlled only by a third party. In *Miller* federal law enforcement officers obtained four months of the defendant's banking records. 425 U. S., at 437–438. And in *Smith* state police obtained records of the phone numbers dialed from the defendant's home phone. 442 U. S., at 737. The Court held in both cases that the officers did not search anything belonging to the defendants within the meaning of the Fourth Amendment. The defendants could "assert neither ownership nor possession" of the records because the records were created, owned, and controlled by the companies. *Miller*, *supra*, at 440; see *Smith*, *supra*, at 741. And the defendants had no reasonable expectation of privacy in information they "voluntarily conveyed to the [companies] and exposed to their employees in the ordinary course of business." *Miller*, *supra*, at 442; see *Smith*, 442 U. S., at 744. Rather, the defendants "assumed the risk that the information would be divulged to police." *Id.*, at 745.

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Miller and *Smith* have been criticized as being based on too narrow a view of reasonable expectations of privacy. See, *e. g.*, Ashdown, The Fourth Amendment and the "Legitimate Expectation of Privacy," 34 Vand. L. Rev. 1289, 1313–1316 (1981). Those criticisms, however, are unwarranted. The principle established in *Miller* and *Smith* is correct for two reasons, the first relating to a defendant's attenuated interest in property owned by another, and the second relating to the safeguards inherent in the use of compulsory process.

First, *Miller* and *Smith* placed necessary limits on the ability of individuals to assert Fourth Amendment interests

in property to which they lack a "requisite connection." *Minnesota* v. *Carter*, 525 U. S. 83, 99 (1998) (KENNEDY, J., concurring). Fourth Amendment rights, after all, are personal. The Amendment protects "[t]he right of the people to be secure in *their* persons, houses, papers, and effects"—not the persons, houses, papers, and effects of others. (Emphasis added.)

The concept of reasonable expectations of privacy, first announced in *Katz* v. *United States*, 389 U. S. 347 (1967), sought to look beyond the "arcane distinctions developed in property and tort law" in evaluating whether a person has a sufficient connection to the thing or place searched to assert Fourth Amendment interests in it. *Rakas* v. *Illinois*, 439 U. S. 128, 143 (1978). Yet "property concepts" are, nonetheless, fundamental "in determining the presence or absence of the privacy interests protected by that Amendment." *Id.*, at 143–144, n. 12. This is so for at least two reasons. First, as a matter of settled expectations from the law of property, individuals often have greater expectations of privacy in things and places that belong to them, not to others. And second, the Fourth Amendment's protections must remain tethered to the text of that Amendment, which, again, protects only a person's own "persons, houses, papers, and effects."

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Katz did not abandon reliance on property-based concepts. The Court in *Katz* analogized the phone booth used in that case to a friend's apartment, a taxicab, and a hotel room. 389 U. S., at 352, 359. So when the defendant "shu[t] the door behind him" and "pa[id] the toll," *id.*, at 352, he had a temporary interest in the space and a legitimate expectation that others would not intrude, much like the interest a hotel guest has in a hotel room, *Stoner* v. *California*, 376 U. S. 483 (1964), or an overnight guest has in a host's home, *Minnesota* v. *Olson*, 495 U. S. 91 (1990). The Government intruded on that space when it attached a listening device to

the phone booth. *Katz*, 389 U. S., at 348. (And even so, the Court made it clear that the Government's search could have been reasonable had there been judicial approval on a case-specific basis, which, of course, did occur here. *Id.*, at 357–359.)

Miller and *Smith* set forth an important and necessary limitation on the *Katz* framework. They rest upon the commonsense principle that the absence of property law analogues can be dispositive of privacy expectations. The defendants in those cases could expect that the third-party businesses could use the records the companies collected, stored, and classified as their own for any number of business and commercial purposes. The businesses were not bailees or custodians of the records, with a duty to hold the records for the defendants' use. The defendants could make no argument that the records were their own papers or effects. See *Miller*, *supra*, at 440 ("the documents subpoenaed here are not respondent's 'private papers' "); *Smith*, *supra*, at 741 ("petitioner obviously cannot claim that his 'property' was invaded"). The records were the business entities' records, plain and simple. The defendants had no reason to believe the records were owned or controlled by them and so could not assert a reasonable expectation of privacy in the records.

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The second principle supporting *Miller* and *Smith* is the longstanding rule that the Government may use compulsory process to compel persons to disclose documents and other evidence within their possession and control. See *United States* v. *Nixon*, 418 U. S. 683, 709 (1974) (it is an "ancient proposition of law" that "the public has a right to every man's evidence" (internal quotation marks and alterations omitted)). A subpoena is different from a warrant in its force and intrusive power. While a warrant allows the Government to enter and seize and make the examination itself, a subpoena simply requires the person to whom it is directed to make the disclosure. A subpoena, moreover, provides the

recipient the "opportunity to present objections" before complying, which further mitigates the intrusion. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 195 (1946).

For those reasons this Court has held that a subpoena for records, although a "constructive" search subject to Fourth Amendment constraints, need not comply with the procedures applicable to warrants—even when challenged by the person to whom the records belong. *Id.*, at 202, 208. Rather, a subpoena complies with the Fourth Amendment's reasonableness requirement so long as it is "'sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.'" *Donovan* v. *Lone Steer, Inc.*, 464 U. S. 408, 415 (1984). Persons with no meaningful interests in the records sought by a subpoena, like the defendants in *Miller* and *Smith*, have no rights to object to the records' disclosure—much less to assert that the Government must obtain a warrant to compel disclosure of the records. See *Miller*, 425 U. S., at 444–446; *SEC* v. *Jerry T. O'Brien, Inc.*, 467 U. S. 735, 742–743 (1984).

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Based on *Miller* and *Smith* and the principles underlying those cases, it is well established that subpoenas may be used to obtain a wide variety of records held by businesses, even when the records contain private information. See 2 W. LaFave, Search and Seizure § 4.13 (5th ed. 2012). Credit cards are a prime example. State and federal law enforcement, for instance, often subpoena credit card statements to develop probable cause to prosecute crimes ranging from drug trafficking and distribution to healthcare fraud to tax evasion. See *United States* v. *Phibbs*, 999 F. 2d 1053 (CA6 1993) (drug distribution); *McCune* v. *DOJ*, 592 Fed. Appx. 287 (CA5 2014) (healthcare fraud); *United States* v. *Green*, 305 F. 3d 422 (CA6 2002) (drug trafficking and tax evasion); see also 12 U. S. C. §§ 3402(4), 3407 (allowing the Government to subpoena financial records if "there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry"). Subpoenas also may be used to obtain vehi-

cle registration records, hotel records, employment records, and records of utility usage, to name just a few other examples. See 1 LaFave, *supra*, § 2.7(c).

And law enforcement officers are not alone in their reliance on subpoenas to obtain business records for legitimate investigations. Subpoenas also are used for investigatory purposes by state and federal grand juries, see *United States* v. *Dionisio*, 410 U. S. 1 (1973), state and federal administrative agencies, see *Oklahoma Press*, *supra*, and state and federal legislative bodies, see *McPhaul* v. *United States*, 364 U. S. 372 (1960).

B

Carpenter does not question these traditional investigative practices. And he does not ask the Court to reconsider *Miller* and *Smith*. Carpenter argues only that, under *Miller* and *Smith*, the Government may not use compulsory process to acquire cell-site records from cell phone service providers.

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There is no merit in this argument. Cell-site records, like all the examples just discussed, are created, kept, classified, owned, and controlled by cell phone service providers, which aggregate and sell this information to third parties. As in *Miller*, Carpenter can "assert neither ownership nor possession" of the records and has no control over them. 425 U. S., at 440.

Carpenter argues that he has Fourth Amendment interests in the cell-site records because they are in essence his personal papers by operation of 47 U. S. C. § 222. That statute imposes certain restrictions on how providers may use "customer proprietary network information"—a term that encompasses cell-site records. §§ 222(c), (h)(1)(A). The statute in general prohibits providers from disclosing personally identifiable cell-site records to private third parties. § 222(c)(1). And it allows customers to request cell-site records from the provider. § 222(c)(2).

Carpenter's argument is unpersuasive, however, for § 222 does not grant cell phone customers any meaningful interest in cell-site records. The statute's confidentiality protections may be overridden by the interests of the providers or the Government. The providers may disclose the records "to protect the[ir] rights or property" or to "initiate, render, bill, and collect for telecommunications services." §§ 222(d)(1), (2). They also may disclose the records "as required by law"—which, of course, is how they were disclosed in this case. § 222(c)(1). Nor does the statute provide customers any practical control over the records. Customers do not create the records; they have no say in whether or for how long the records are stored; and they cannot require the records to be modified or destroyed. Even their right to request access to the records is limited, for the statute "does not preclude a carrier from being reimbursed by the customers . . . for the costs associated with making such disclosures." H. R. Rep. No. 104–204, pt. 1, p. 90 (1995). So in every legal and practical sense the "network information" regulated by § 222 is, under that statute, "proprietary" to the service providers, not Carpenter. The Court does not argue otherwise.

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Because Carpenter lacks a requisite connection to the cell-site records, he also may not claim a reasonable expectation of privacy in them. He could expect that a third party—the cell phone service provider—could use the information it collected, stored, and classified as its own for a variety of business and commercial purposes.

All this is not to say that *Miller* and *Smith* are without limits. *Miller* and *Smith* may not apply when the Government obtains the modern-day equivalents of an individual's own "papers" or "effects," even when those papers or effects are held by a third party. See *Ex parte Jackson*, 96 U. S. 727, 733 (1878) (letters held by mail carrier); *United States* v. *Warshak*, 631 F. 3d 266, 283–288 (CA6 2010) (e-mails held by Internet service provider). As already discussed, however, this case does not involve property or a bailment of

that sort. Here the Government's acquisition of cell-site records falls within the heartland of *Miller* and *Smith*.

In fact, Carpenter's Fourth Amendment objection is even weaker than those of the defendants in *Miller* and *Smith*. Here the Government did not use a mere subpoena to obtain the cell-site records. It acquired the records only after it proved to a Magistrate Judge reasonable grounds to believe that the records were relevant and material to an ongoing criminal investigation. See 18 U. S. C. § 2703(d). So even if § 222 gave Carpenter some attenuated interest in the records, the Government's conduct here would be reasonable under the standards governing subpoenas. See *Donovan*, 464 U. S., at 415.

Under *Miller* and *Smith*, then, a search of the sort that requires a warrant simply did not occur when the Government used court-approved compulsory process, based on a finding of reasonable necessity, to compel a cell phone service provider, as owner, to disclose cell-site records.

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III

The Court rejects a straightforward application of *Miller* and *Smith*. It concludes instead that applying those cases to cell-site records would work a "significant extension" of the principles underlying them, *ante*, at 314, and holds that the acquisition of more than six days of cell-site records constitutes a search, *ante*, at 310, n. 3.

In my respectful view the majority opinion misreads this Court's precedents, old and recent, and transforms *Miller* and *Smith* into an unprincipled and unworkable doctrine. The Court's newly conceived constitutional standard will cause confusion; will undermine traditional and important law enforcement practices; and will allow the cell phone to become a protected medium that dangerous persons will use to commit serious crimes.

A

The Court errs at the outset by attempting to sidestep *Miller* and *Smith*. The Court frames this case as following

instead from *United States* v. *Knotts*, 460 U. S. 276 (1983), and *United States* v. *Jones*, 565 U. S. 400 (2012). Those cases, the Court suggests, establish that "individuals have a reasonable expectation of privacy in the whole of their physical movements." *Ante*, at 306–307, 310.

Knotts held just the opposite: "A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." 460 U. S., at 281. True, the Court in *Knotts* also suggested that "different constitutional principles may be applicable" to "dragnet-type law enforcement practices." *Id.*, at 284. But by dragnet practices the Court was referring to "'twenty-four hour surveillance of any citizen of this country . . . without judicial knowledge or supervision.'" *Id.*, at 283.

Those "different constitutional principles" mentioned in *Knotts*, whatever they may be, do not apply in this case. Here the Stored Communications Act requires a neutral judicial officer to confirm in each case that the Government has "reasonable grounds to believe" the cell-site records "are relevant and material to an ongoing criminal investigation." 18 U. S. C. § 2703(d). This judicial check mitigates the Court's concerns about "'a too permeating police surveillance.'" *Ante*, at 305 (quoting *United States* v. *Di Re*, 332 U. S. 581, 595 (1948)). Here, even more so than in *Knotts*, "'reality hardly suggests abuse.'" 460 U. S., at 283.

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The Court's reliance on *Jones* fares no better. In *Jones* the Government installed a GPS tracking device on the defendant's automobile. The Court held the Government searched the automobile because it "physically occupied private property [of the defendant] for the purpose of obtaining information." 565 U. S., at 404. So in *Jones* it was "not necessary to inquire about the target's expectation of privacy in his vehicle's movements." *Grady* v. *North Carolina*, 575 U. S. 306, 309 (2015) (*per curiam*).

Despite that clear delineation of the Court's holding in *Jones*, the Court today declares that *Jones* applied the " 'different constitutional principles' " alluded to in *Knotts* to establish that an individual has an expectation of privacy in the sum of his whereabouts. *Ante*, at 306–307, 310. For that proposition the majority relies on the two concurring opinions in *Jones*, one of which stated that "longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy." 565 U. S., at 430 (ALITO, J., concurring in judgment). But *Jones* involved direct governmental surveillance of a defendant's automobile without judicial authorization—specifically, GPS surveillance accurate within 50 to 100 feet. *Id.*, at 402–403 (majority opinion). Even assuming that the different constitutional principles mentioned in *Knotts* would apply in a case like *Jones*—a proposition the Court was careful not to announce in *Jones*, *supra*, at 412–413—those principles are inapplicable here. Cases like this one, where the Government uses court-approved compulsory process to obtain records owned and controlled by a third party, are governed by the two majority opinions in *Miller* and *Smith*.

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B

The Court continues its analysis by misinterpreting *Miller* and *Smith*, and then it reaches the wrong outcome on these facts even under its flawed standard.

The Court appears, in my respectful view, to read *Miller* and *Smith* to establish a balancing test. For each "qualitatively different category" of information, the Court suggests, the privacy interests at stake must be weighed against the fact that the information has been disclosed to a third party. See *ante*, at 309–310, 313–316. When the privacy interests are weighty enough to "overcome" the third-party disclosure, the Fourth Amendment's protections apply. See *ante*, at 315.

That is an untenable reading of *Miller* and *Smith*. As already discussed, the fact that information was relinquished

to a third party was the entire basis for concluding that the defendants in those cases lacked a reasonable expectation of privacy. *Miller* and *Smith* do not establish the kind of category-by-category balancing the Court today prescribes.

But suppose the Court were correct to say that *Miller* and *Smith* rest on so imprecise a foundation. Still the Court errs, in my submission, when it concludes that cell-site records implicate greater privacy interests—and thus deserve greater Fourth Amendment protection—than financial records and telephone records.

Indeed, the opposite is true. A person's movements are not particularly private. As the Court recognized in *Knotts*, when the defendant there "traveled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination." 460 U. S., at 281–282. Today expectations of privacy in one's location are, if anything, even less reasonable than when the Court decided *Knotts* over 30 years ago. Millions of Americans choose to share their location on a daily basis, whether by using a variety of location-based services on their phones, or by sharing their location with friends and the public at large via social media.

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And cell-site records, as already discussed, disclose a person's location only in a general area. The records at issue here, for example, revealed Carpenter's location within an area covering between around a dozen and several hundred city blocks. "Areas of this scale might encompass bridal stores and Bass Pro Shops, gay bars and straight ones, a Methodist church and the local mosque." 819 F. 3d 880, 889 (CA6 2016). These records could not reveal where Carpenter lives and works, much less his " 'familial, political, professional, religious, and sexual associations.' " *Ante*, at 311 (quoting *Jones*, *supra*, at 415 (SOTOMAYOR, J., concurring)).

By contrast, financial records and telephone records do " 'revea[l] . . . personal affairs, opinions, habits and associa-

tions.'" *Miller*, 425 U. S., at 451 (Brennan, J., dissenting); see *Smith*, 442 U. S., at 751 (Marshall, J., dissenting). What persons purchase and to whom they talk might disclose how much money they make; the political and religious organizations to which they donate; whether they have visited a psychiatrist, plastic surgeon, abortion clinic, or AIDS treatment center; whether they go to gay bars or straight ones; and who are their closest friends and family members. The troves of intimate information the Government can and does obtain using financial records and telephone records dwarfs what can be gathered from cell-site records.

Still, the Court maintains, cell-site records are "unique" because they are "comprehensive" in their reach; allow for retrospective collection; are "easy, cheap, and efficient compared to traditional investigative tools"; and are not exposed to cell phone service providers in a meaningfully voluntary manner. *Ante*, at 311, 315–316, 320. But many other kinds of business records can be so described. Financial records are of vast scope. Banks and credit card companies keep a comprehensive account of almost every transaction an individual makes on a daily basis. "With just the click of a button, the Government can access each [company's] deep repository of historical [financial] information at practically no expense." *Ante*, at 311. And the decision whether to transact with banks and credit card companies is no more or less voluntary than the decision whether to use a cell phone. Today, just as when *Miller* was decided, "'it is impossible to participate in the economic life of contemporary society without maintaining a bank account.'" 425 U. S., at 451 (Brennan, J., dissenting). But this Court, nevertheless, has held that individuals do not have a reasonable expectation of privacy in financial records.

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Perhaps recognizing the difficulty of drawing the constitutional line between cell-site records and financial and telephonic records, the Court posits that the accuracy of cell-site records "is rapidly approaching GPS-level precision." *Ante*, at 313. That is certainly plausible in the era of cyber technol-

ogy, yet the privacy interests associated with location information, which is often disclosed to the public at large, still would not outweigh the privacy interests implicated by financial and telephonic records.

Perhaps more important, those future developments are no basis upon which to resolve this case. In general, the Court "risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear." *Ontario* v. *Quon*, 560 U. S. 746, 759 (2010). That judicial caution, prudent in most cases, is imperative in this one.

Technological changes involving cell phones have complex effects on crime and law enforcement. Cell phones make crimes easier to coordinate and conceal, while also providing the Government with new investigative tools that may have the potential to upset traditional privacy expectations. See Kerr, An Equilibrium-Adjustment Theory of the Fourth Amendment, 125 Harv. L. Rev. 476, 512–517 (2011). How those competing effects balance against each other, and how property norms and expectations of privacy form around new technology, often will be difficult to determine during periods of rapid technological change. In those instances, and where the governing legal standard is one of reasonableness, it is wise to defer to legislative judgments like the one embodied in § 2703(d) of the Stored Communications Act. See *Jones*, 565 U. S., at 430 (ALITO, J., concurring). In § 2703(d) Congress weighed the privacy interests at stake and imposed a judicial check to prevent executive overreach. The Court should be wary of upsetting that legislative balance and erecting constitutional barriers that foreclose further legislative instructions. See *Quon*, *supra*, at 759. The last thing the Court should do is incorporate an arbitrary and outside limit—in this case six days' worth of cell-site records—and use it as the foundation for a new constitutional framework. The Court's decision runs roughshod over the mechanism Congress put in place to govern the acquisition

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of cell-site records and closes off further legislative debate on these issues.

C

The Court says its decision is a "narrow one." *Ante*, at 316. But its reinterpretation of *Miller* and *Smith* will have dramatic consequences for law enforcement, courts, and society as a whole.

Most immediately, the Court's holding that the Government must get a warrant to obtain more than six days of cell-site records limits the effectiveness of an important investigative tool for solving serious crimes. As this case demonstrates, cell-site records are uniquely suited to help the Government develop probable cause to apprehend some of the Nation's most dangerous criminals: serial killers, rapists, arsonists, robbers, and so forth. See also, *e. g.*, *Davis*, 785 F. 3d, at 500–501 (armed robbers); Brief for State of Alabama et al. as *Amici Curiae* 21–22 (serial killer). These records often are indispensable at the initial stages of investigations when the Government lacks the evidence necessary to obtain a warrant. See *United States* v. *Pembrook*, 876 F. 3d 812, 816–819 (CA6 2017). And the long-term nature of many serious crimes, including serial crimes and terrorism offenses, can necessitate the use of significantly more than six days of cell-site records. The Court's arbitrary 6-day cutoff has the perverse effect of nullifying Congress' reasonable framework for obtaining cell-site records in some of the most serious criminal investigations.

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The Court's decision also will have ramifications that extend beyond cell-site records to other kinds of information held by third parties, yet the Court fails "to provide clear guidance to law enforcement" and courts on key issues raised by its reinterpretation of *Miller* and *Smith*. *Riley* v. *California*, 573 U. S. 373, 398 (2014).

First, the Court's holding is premised on cell-site records being a "distinct category of information" from other business records. *Ante*, at 314. But the Court does not explain

what makes something a distinct category of information. Whether credit card records are distinct from bank records; whether payment records from digital wallet applications are distinct from either; whether the electronic bank records available today are distinct from the paper and microfilm records at issue in *Miller*; or whether cell-phone call records are distinct from the home-phone call records at issue in *Smith*, are just a few of the difficult questions that require answers under the Court's novel conception of *Miller* and *Smith*.

Second, the majority opinion gives courts and law enforcement officers no indication how to determine whether any particular category of information falls on the financial-records side or the cell-site-records side of its newly conceived constitutional line. The Court's multifactor analysis—considering intimacy, comprehensiveness, expense, retrospectivity, and voluntariness—puts the law on a new and unstable foundation.

Third, even if a distinct category of information is deemed to be more like cell-site records than financial records, courts and law enforcement officers will have to guess how much of that information can be requested before a warrant is required. The Court suggests that less than seven days of location information may not require a warrant. See *ante*, at 310, n. 3; see also *ante*, at 316 (expressing no opinion on "real-time CSLI," tower dumps, and security-camera footage). But the Court does not explain why that is so, and nothing in its opinion even alludes to the considerations that should determine whether greater or lesser thresholds should apply to information like IP addresses or website browsing history.

Fourth, by invalidating the Government's use of court-approved compulsory process in this case, the Court calls into question the subpoena practices of federal and state grand juries, legislatures, and other investigative bodies, as JUSTICE ALITO's opinion explains. See *post*, at 362–379 (dissenting opinion). Yet the Court fails even to mention the

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serious consequences this will have for the proper administration of justice.

In short, the Court's new and uncharted course will inhibit law enforcement and "keep defendants and judges guessing for years to come." *Riley*, 573 U. S., at 401 (internal quotation marks omitted).

* * *

This case should be resolved by interpreting accepted property principles as the baseline for reasonable expectations of privacy. Here the Government did not search anything over which Carpenter could assert ownership or control. Instead, it issued a court-authorized subpoena to a third party to disclose information it alone owned and controlled. That should suffice to resolve this case.

Having concluded, however, that the Government searched Carpenter when it obtained cell-site records from his cell phone service providers, the proper resolution of this case should have been to remand for the Court of Appeals to determine in the first instance whether the search was reasonable. Most courts of appeals, believing themselves bound by *Miller* and *Smith*, have not grappled with this question. And the Court's reflexive imposition of the warrant requirement obscures important and difficult issues, such as the scope of Congress' power to authorize the Government to collect new forms of information using processes that deviate from traditional warrant procedures, and how the Fourth Amendment's reasonableness requirement should apply when the Government uses compulsory process instead of engaging in an actual, physical search.

These reasons all lead to this respectful dissent.

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APPENDIX

"§ 2703. Required disclosure of customer communications or records

"(d) REQUIREMENTS FOR COURT ORDER.—A court order for disclosure under subsection (b) or (c) may be issued by

any court that is a court of competent jurisdiction and shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation. In the case of a State governmental authority, such a court order shall not issue if prohibited by the law of such State. A court issuing an order pursuant to this section, on a motion made promptly by the service provider, may quash or modify such order, if the information or records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider."

JUSTICE THOMAS, dissenting.

This case should not turn on "whether" a search occurred. *Ante,* at 300. It should turn, instead, on *whose* property was searched. The Fourth Amendment guarantees individuals the right to be secure from unreasonable searches of "*their* persons, houses, papers, and effects." (Emphasis added.) In other words, "*each* person has the right to be secure against unreasonable searches . . . in *his own* person, house, papers, and effects." *Minnesota* v. *Carter*, 525 U. S. 83, 92 (1998) (Scalia, J., concurring). By obtaining the cell-site records of MetroPCS and Sprint, the Government did not search Carpenter's property. He did not create the records, he does not maintain them, he cannot control them, and he cannot destroy them. Neither the terms of his contracts nor any provision of law makes the records his. The records belong to MetroPCS and Sprint.

The Court concludes that, although the records are not Carpenter's, the Government must get a warrant because Carpenter had a reasonable "expectation of privacy" in the location information that they reveal. *Ante,* at 310. I agree with JUSTICE KENNEDY, JUSTICE ALITO, JUSTICE GORSUCH, and every Court of Appeals to consider the question that this is not the best reading of our precedents.

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The more fundamental problem with the Court's opinion, however, is its use of the "reasonable expectation of privacy" test, which was first articulated by Justice Harlan in *Katz* v. *United States*, 389 U. S. 347, 360–361 (1967) (concurring opinion). The *Katz* test has no basis in the text or history of the Fourth Amendment. And, it invites courts to make judgments about policy, not law. Until we confront the problems with this test, *Katz* will continue to distort Fourth Amendment jurisprudence. I respectfully dissent.

I

Katz was the culmination of a series of decisions applying the Fourth Amendment to electronic eavesdropping. The first such decision was *Olmstead* v. *United States*, 277 U. S. 438 (1928), where federal officers had intercepted the defendants' conversations by tapping telephone lines near their homes. *Id.*, at 456–457. In an opinion by Chief Justice Taft, the Court concluded that this wiretap did not violate the Fourth Amendment. No "search" occurred, according to the Court, because the officers did not physically enter the defendants' homes. *Id.*, at 464–466. And neither the telephone lines nor the defendants' intangible conversations qualified as "persons, houses, papers, [or] effects" within the meaning of the Fourth Amendment. *Ibid.*[1] In the ensuing decades, this Court adhered to *Olmstead* and rejected Fourth Amendment challenges to various methods of electronic surveillance. See *On Lee* v. *United States*, 343 U. S. 747, 749–753 (1952) (use of microphone to overhear conversa-

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[1] Justice Brandeis authored the principal dissent in *Olmstead*. He consulted the "underlying purpose," rather than "the words of the [Fourth] Amendment," to conclude that the wiretap was a search. 277 U. S., at 476. In Justice Brandeis' view, the Framers "recognized the significance of man's spiritual nature, of his feelings and of his intellect" and "sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations." *Id.*, at 478. Thus, "every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed," should constitute an unreasonable search under the Fourth Amendment. *Ibid.*

tions with confidential informant); *Goldman* v. *United States*, 316 U. S. 129, 131–132, 135–136 (1942) (use of detectaphone to hear conversations in office next door).

In the 1960s, however, the Court began to retreat from *Olmstead*. In *Silverman* v. *United States*, 365 U. S. 505 (1961), for example, federal officers had eavesdropped on the defendants by driving a "spike mike" several inches into the house they were occupying. *Id.*, at 506–507. This was a "search," the Court held, because the "unauthorized physical penetration into the premises" was an "actual intrusion into a constitutionally protected area." *Id.*, at 509, 512. The Court did not mention *Olmstead*'s other holding that intangible conversations are not "persons, houses, papers, [or] effects." That omission was significant. The Court confirmed two years later that "[i]t follows from [*Silverman*] that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of 'papers and effects.'" *Wong Sun* v. *United States*, 371 U. S. 471, 485 (1963); accord, *Berger* v. *New York*, 388 U. S. 41, 51 (1967).

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In *Katz*, the Court rejected *Olmstead*'s remaining holding—that eavesdropping is not a search absent a physical intrusion into a constitutionally protected area. The federal officers in *Katz* had intercepted the defendant's conversations by attaching an electronic device to the outside of a public telephone booth. 389 U. S., at 348. The Court concluded that this was a "search" because the officers "violated the privacy upon which [the defendant] justifiably relied while using the telephone booth." *Id.*, at 353. Although the device did not physically penetrate the booth, the Court overruled *Olmstead* and held that "the reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion." 389 U. S., at 353. The Court did not explain what should replace *Olmstead*'s physical-intrusion requirement. It simply asserted that "the Fourth Amend-

ment protects people, not places" and "what [a person] seeks to preserve as private . . . may be constitutionally protected." 389 U. S., at 351.

Justice Harlan's concurrence in *Katz* attempted to articulate the standard that was missing from the majority opinion. While Justice Harlan agreed that "'the Fourth Amendment protects people, not places,'" he stressed that "[t]he question . . . is what protection it affords to those people," and "the answer . . . requires reference to a 'place.'" *Id.*, at 361. Justice Harlan identified a "twofold requirement" to determine when the protections of the Fourth Amendment apply: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Ibid.*

Justice Harlan did not cite anything for this "expectation of privacy" test, and the parties did not discuss it in their briefs. The test appears to have been presented for the first time at oral argument by one of the defendant's lawyers. See Winn, *Katz* and the Origins of the "Reasonable Expectation of Privacy" Test, 40 McGeorge L. Rev. 1, 9–10 (2009). The lawyer, a recent law-school graduate, apparently had an "[e]piphany" while preparing for oral argument. Schneider, *Katz v. United States*: The Untold Story, 40 McGeorge L. Rev. 13, 18 (2009). He conjectured that, like the "reasonable person" test from his Torts class, the Fourth Amendment should turn on "whether a reasonable person . . . could have expected his communication to be private." *Id.*, at 19. The lawyer presented his new theory to the Court at oral argument. See, *e. g.*, Tr. of Oral Arg. in *Katz* v. *United States*, O. T. 1967, No. 35, p. 5 (proposing a test of "whether or not, objectively speaking, the communication was intended to be private"); *id.*, at 11 ("We propose a test using a way that's not too dissimilar from the tort 'reasonable man' test"). After some questioning from the Justices, the lawyer conceded that his test should also require individuals to

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subjectively expect privacy. See *id.*, at 12. With that modification, Justice Harlan seemed to accept the lawyer's test almost verbatim in his concurrence.

Although the majority opinion in *Katz* had little practical significance after Congress enacted the Omnibus Crime Control and Safe Streets Act of 1968, Justice Harlan's concurrence profoundly changed our Fourth Amendment jurisprudence. It took only one year for the full Court to adopt his two-pronged test. See *Terry* v. *Ohio*, 392 U. S. 1, 10 (1968). And by 1979, the Court was describing Justice Harlan's test as the "lodestar" for determining whether a "search" had occurred. *Smith* v. *Maryland*, 442 U. S. 735, 739 (1979). Over time, the Court minimized the subjective prong of Justice Harlan's test. See Kerr, *Katz* Has Only One Step: The Irrelevance of Subjective Expectations, 82 U. Chi. L. Rev. 113 (2015). That left the objective prong—the "reasonable expectation of privacy" test that the Court still applies today. See *ante*, at 304; *United States* v. *Jones*, 565 U. S. 400, 406 (2012).

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II

Under the *Katz* test, a "search" occurs whenever "government officers violate a person's 'reasonable expectation of privacy.'" *Jones*, *supra*, at 406. The most glaring problem with this test is that it has "no plausible foundation in the text of the Fourth Amendment." *Carter*, 525 U. S., at 97 (opinion of Scalia, J.). The Fourth Amendment, as relevant here, protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches." By defining "search" to mean "any violation of a reasonable expectation of privacy," the *Katz* test misconstrues virtually every one of these words.

A

The *Katz* test distorts the original meaning of "searc[h]"—the word in the Fourth Amendment that it purports to define, see *ante*, at 304; *Smith*, *supra*. Under the *Katz* test, the government conducts a search anytime it violates someone's

"reasonable expectation of privacy." That is not a normal definition of the word "search."

At the founding, "search" did not mean a violation of someone's reasonable expectation of privacy. The word was probably not a term of art, as it does not appear in legal dictionaries from the era. And its ordinary meaning was the same as it is today: "'[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as, to *search* the house for a book; to *search* the wood for a thief.'" *Kyllo* v. *United States*, 533 U. S. 27, 32, n. 1 (2001) (quoting N. Webster, An American Dictionary of the English Language 66 (1828) (reprint 6th ed. 1989)); accord, 2 S. Johnson, A Dictionary of the English Language (4th ed. 1773) ("[i]nquiry by looking into every suspected place"); N. Bailey, An Universal Etymological English Dictionary (22d ed. 1770) ("a seeking after, a looking for, &c."); 2 J. Ash, The New and Complete Dictionary of the English Language (2d ed. 1795) ("[a]n enquiry, an examination, the act of seeking, an enquiry by looking into every suspected place; a quest; a pursuit"); T. Sheridan, A Complete Dictionary of the English Language (6th ed. 1796) (similar). The word "search" was not associated with "reasonable expectation of privacy" until Justice Harlan coined that phrase in 1967. The phrase "expectation(s) of privacy" does not appear in the pre-*Katz* federal or state case reporters, the papers of prominent Founders,[2] early congressional documents and debates,[3] collections of early American English texts,[4] or early American newspapers.[5]

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[2] National Archives, Library of Congress, Founders Online, https://founders.archives.gov (all Internet materials as last visited June 18, 2018).

[3] Library of Congress, A Century of Lawmaking for a New Nation, U. S. Congressional Documents and Debates, 1774–1875 (May 1, 2003), https://memory.loc.gov/ammem/amlaw/lawhome.html.

[4] Corpus of Historical American English, https://corpus.byu.edu/coha; Google Books (American), https://googlebooks.byu.edu/x.asp; Corpus of Founding Era American English, https://lawncl.byu.edu/cofea.

[5] Readex, America's Historical Newspapers (2018), https://www.readex.com/content/americas-historical-newspapers.

B

The *Katz* test strays even further from the text by focusing on the concept of "privacy." The word "privacy" does not appear in the Fourth Amendment (or anywhere else in the Constitution for that matter). Instead, the Fourth Amendment references "[t]he right of the people to be secure." It then qualifies that right by limiting it to "persons" and three specific types of property: "houses, papers, and effects." By connecting the right to be secure to these four specific objects, "[t]he text of the Fourth Amendment reflects its close connection to property." *Jones*, *supra*, at 405. "[P]rivacy," by contrast, "was not part of the political vocabulary of the [founding]. Instead, liberty and privacy rights were understood largely in terms of property rights." Cloud, Property Is Privacy: Locke and Brandeis in the Twenty-First Century, 55 Am. Crim. L. Rev. 37, 42 (2018).

Those who ratified the Fourth Amendment were quite familiar with the notion of security in property. Security in property was a prominent concept in English law. See, *e. g.*, 3 W. Blackstone, Commentaries on the Laws of England 288 (1768) ("[E]very man's house is looked upon by the law to be his castle"); 3 E. Coke, Institutes of Laws of England 162 (6th ed. 1680) ("[F]or a man[']s house is his Castle, & domus sua cuique est tutissimum refugium [each man's home is his safest refuge]"). The political philosophy of John Locke, moreover, "permeated the 18th-century political scene in America." *Obergefell* v. *Hodges*, 576 U. S. 644, 727 (2015) (THOMAS, J., dissenting). For Locke, every individual had a property right "in his own Person" and in anything he "removed from the common state [of] Nature" and "mixed his Labour with." Second Treatise of Civil Government § 27 (1690) (emphasis deleted). Because property is "very unsecure" in the state of nature, *id.*, § 123, individuals form governments to obtain "a secure Enjoyment of their Properties," *id.*, § 95. Once a government is formed, however, it cannot be given "a Power to destroy that which every one designs to secure"; it cannot

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legitimately "endeavour to take away, and destroy the [pr]operty of the People," or exercise "an absolute power, over [their] Lives, Liberties, and Estates." *Id.*, § 222.

The concept of security in property recognized by Locke and the English legal tradition appeared throughout the materials that inspired the Fourth Amendment. In *Entick* v. *Carrington*, 19 How. St. Tr. 1029 (C. P. 1765)—a heralded decision that the founding generation considered "the true and ultimate expression of constitutional law," *Boyd* v. *United States*, 116 U. S. 616, 626 (1886)—Lord Camden explained that "[t]he great end, for which men entered into society, was to secure their property." 19 How. St. Tr., at 1066. The American colonists echoed this reasoning in their "widespread hostility" to the Crown's writs of assistance[6]—a practice that inspired the Revolution and became "[t]he driving force behind the adoption of the [Fourth] Amendment." *United States* v. *Verdugo-Urquidez*, 494 U. S. 259, 266 (1990). Prominent colonists decried the writs as destroying "'domestic security'" by permitting broad searches of homes. M. Smith, The Writs of Assistance Case 475 (1978) (quoting a 1772 Boston town meeting); see also *id.*, at 562 (complaining that "'every householder in this province, will necessarily become *less secure* than he was before this writ'" (quoting a 1762 article in the Boston Gazette)); *id.*, at 493 (complaining that the writs were "'expressly contrary to the common law, which ever regarded a man's *house* as his castle, or a place of perfect security'" (quoting a 1768 letter from John Dickinson)). James Otis, who argued the famous Writs of Assistance case, contended that the writs violated "'the fundamental Principl[e] of Law'" that "'[a] Man who is quiet, is as secure in his House, as a Prince in his Castle.'" *Id.*, at 339 (quoting John Adams' notes). John Adams at-

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[6] Writs of assistance were "general warrants" that gave "customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws." *Stanford* v. *Texas*, 379 U. S. 476, 481 (1965).

tended Otis' argument and later drafted Article XIV of the Massachusetts Constitution,[7] which served as a model for the Fourth Amendment. See Clancy, The Framers' Intent: John Adams, His Era, and the Fourth Amendment, 86 Ind. L. J. 979, 982 (2011); Donohue, The Original Fourth Amendment, 83 U. Chi. L. Rev. 1181, 1269 (2016) (Donohue). Adams agreed that "[p]roperty must be secured, or liberty cannot exist." Discourse on Davila, in 6 The Works of John Adams 280 (C. Adams ed. 1851).

Of course, the founding generation understood that, by securing their property, the Fourth Amendment would often protect their privacy as well. See, *e. g.*, *Boyd*, *supra*, at 630 (explaining that searches of houses invade "the privacies of life"); *Wilkes* v. *Wood*, 19 How. St. Tr. 1153, 1154 (C. P. 1763) (argument of counsel contending that seizures of papers implicate "our most private concerns"). But the Fourth Amendment's attendant protection of privacy does not justify *Katz*'s elevation of privacy as the *sine qua non* of the Amendment. See T. Clancy, The Fourth Amendment: Its History and Interpretation § 3.4.4, p. 78 (2008) ("[The *Katz* test] confuse[s] the reasons for exercising the protected right with the right itself. A purpose of exercising one's Fourth Amendment rights might be the desire for privacy, but the individual's motivation is not the right protected"); cf. *United States* v. *Gonzalez-Lopez*, 548 U. S. 140, 145 (2006) (rejecting "a line of reasoning that 'abstracts from the right to its purposes, and then eliminates the right' ").

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[7] "Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the person or objects of search, arrest, or seizure: And no warrant ought to be issued, but in cases, and with the formalities, prescribed by the laws." Mass. Const., pt. I, Art. XIV (1780).

opinion in *Katz* recognized, the Fourth Amendment "cannot be translated into a general constitutional 'right to privacy,'" as its protections "often have nothing to do with privacy at all." 389 U. S., at 350. Justice Harlan's focus on privacy in his concurrence—an opinion that was issued between *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), and *Roe* v. *Wade*, 410 U. S. 113 (1973)—reflects privacy's status as the organizing constitutional idea of the 1960s and 1970s. The organizing constitutional idea of the founding era, by contrast, was property.

C

In shifting the focus of the Fourth Amendment from property to privacy, the *Katz* test also reads the words "persons, houses, papers, and effects" out of the text. At its broadest formulation, the *Katz* test would find a search "*wherever* an individual may harbor a reasonable 'expectation of privacy.'" *Terry*, 392 U. S., at 9 (emphasis added). The Court today, for example, does not ask whether cell-site location records are "persons, houses, papers, [or] effects" within the meaning of the Fourth Amendment.[8] Yet "persons, houses, papers, and effects" cannot mean "anywhere" or "anything." *Katz*'s catchphrase that "the Fourth Amendment protects people, not places," is not a serious attempt to reconcile the constitutional text. See *Carter*, 525 U. S., at 98, n. 3 (opinion of Scalia, J.). The Fourth Amendment obviously protects people; "[t]he question . . . is what protection it affords to those people." *Katz*, 389 U. S., at 361 (Harlan, J., concurring). The Founders decided to protect the people from unreason-

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[8] The answer to that question is not obvious. Cell-site location records are business records that mechanically collect the interactions between a person's cell phone and the company's towers; they are not private papers and do not reveal the contents of any communications. Cf. Schnapper, Unreasonable Searches and Seizures of Papers, 71 Va. L. Rev. 869, 923–924 (1985) (explaining that business records that do not reveal "personal or speech-related confidences" might not satisfy the original meaning of "papers").

able searches and seizures of four specific things—persons, houses, papers, and effects. They identified those four categories as "the objects of privacy protection to which the *Constitution* would extend, leaving further expansion to the good judgment . . . of the people through their representatives in the legislature." *Carter*, *supra*, at 97–98 (opinion of Scalia, J.).

This limiting language was important to the Founders. Madison's first draft of the Fourth Amendment used a different phrase: "their persons[,] their houses, their papers, and their *other property*." 1 Annals of Cong. 452 (1789) (emphasis added). In one of the few changes made to Madison's draft, the House Committee of Eleven changed "other property" to "effects." See House Committee of Eleven Report (July 28, 1789), in N. Cogan, The Complete Bill of Rights 334 (2d ed. 2015). This change might have narrowed the Fourth Amendment by clarifying that it does not protect real property (other than houses). See *Oliver* v. *United States*, 466 U. S. 170, 177, and n. 7 (1984); Davies, Recovering the Original Fourth Amendment, 98 Mich. L. Rev. 547, 709–714 (1999) (Davies). Or the change might have broadened the Fourth Amendment by clarifying that it protects commercial goods, not just personal possessions. See Donohue 1301. Or it might have done both. Whatever its ultimate effect, the change reveals that the Founders understood the phrase "persons, houses, papers, and effects" to be an important measure of the Fourth Amendment's overall scope. See Davies 710. The *Katz* test, however, displaces and renders that phrase entirely "superfluous." *Jones*, 565 U. S., at 405.

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D

"[P]ersons, houses, papers, and effects" are not the only words that the *Katz* test reads out of the Fourth Amendment. The Fourth Amendment specifies that the people have a right to be secure from unreasonable searches of "their" persons, houses, papers, and effects. Although

phrased in the plural, "[t]he obvious meaning of ['their'] is that *each* person has the right to be secure against unreasonable searches and seizures in *his own* person, house, papers, and effects." *Carter*, *supra*, at 92 (opinion of Scalia, J.); see also *District of Columbia* v. *Heller*, 554 U. S. 570, 579 (2008) (explaining that the Constitution uses the plural phrase "the people" to "refer to individual rights, not 'collective' rights"). Stated differently, the word "their" means, at the very least, that individuals do not have Fourth Amendment rights in *someone else's* property. See *Carter*, *supra*, at 92–94 (opinion of Scalia, J.). Yet, under the *Katz* test, individuals can have a reasonable expectation of privacy in another person's property. See, *e. g.*, *Carter*, *supra*, at 89 (majority opinion) ("[A] person may have a legitimate expectation of privacy in the house of someone else"). Until today, our precedents have not acknowledged that individuals can claim a reasonable expectation of privacy in someone else's business records. See *ante*, at 322 (KENNEDY, J., dissenting). But the Court erases that line in this case, at least for cell-site location records. In doing so, it confirms that the *Katz* test does not necessarily require an individual to prove that the government searched *his* person, house, paper, or effect.

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Carpenter attempts to argue that the cell-site records are, in fact, his "papers," see Brief for Petitioner 32–35; Reply Brief 14–15, but his arguments are unpersuasive, see *ante*, at 331–332 (opinion of KENNEDY, J.); *post*, at 379–383 (ALITO, J., dissenting). Carpenter stipulated below that the cell-site records are the business records of Sprint and MetroPCS. See App. 51. He cites no property law in his briefs to this Court, and he does not explain how he has a property right in the companies' records under the law of any jurisdiction at any point in American history. If someone stole these records from Sprint or MetroPCS, Carpenter does not argue that he could recover in a traditional tort action. Nor do his contracts with Sprint and MetroPCS make the records his, even though such provisions could exist in

the marketplace. Cf., *e. g.*, Google Terms of Service (Oct. 25, 2017), https://policies.google.com/terms ("Some of our Services allow you to upload, submit, store, send or receive content. You retain ownership of any intellectual property rights that you hold in that content. In short, what belongs to you stays yours").

Instead of property, tort, or contract law, Carpenter relies on the federal Telecommunications Act of 1996 to demonstrate that the cell-site records are his papers. The Telecommunications Act generally bars cell-phone companies from disclosing customers' cell-site location information to the public. See 47 U. S. C. § 222(c). This is sufficient to make the records his, Carpenter argues, because the Fourth Amendment merely requires him to identify a source of "positive law" that "protects against access by the public without consent." Brief for Petitioner 32–33 (citing Baude & Stern, The Positive Law Model of the Fourth Amendment, 129 Harv. L. Rev. 1821, 1825–1826 (2016); emphasis deleted).

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Carpenter is mistaken. To come within the text of the Fourth Amendment, Carpenter must prove that the cell-site records are *his*; positive law is potentially relevant only insofar as it answers that question. The text of the Fourth Amendment cannot plausibly be read to mean "any violation of positive law" any more than it can plausibly be read to mean "any violation of a reasonable expectation of privacy."

Thus, the Telecommunications Act is insufficient because it does not give Carpenter a property right in the cell-site records. Section 222, titled "Privacy of customer information," protects customers' privacy by preventing cell-phone companies from disclosing sensitive information about them. The statute creates a "duty to protect the confidentiality" of information relating to customers, § 222(a), and creates "[p]rivacy requirements" that limit the disclosure of that information, § 222(c)(1). Nothing in the text pre-empts state property law or gives customers a property interest in the companies' business records (assuming Congress even has

that authority).[9] Although § 222 "protects the interests of individuals against wrongful uses or disclosures of personal data, the rationale for these legal protections has not historically been grounded on a perception that people have property rights in personal data as such." Samuelson, Privacy as Intellectual Property? 52 Stan. L. Rev. 1125, 1130–1131 (2000) (footnote omitted). Any property rights remain with the companies.

E

The *Katz* test comes closer to the text of the Fourth Amendment when it asks whether an expectation of privacy is "reasonable," but it ultimately distorts that term as well. The Fourth Amendment forbids "unreasonable searches." In other words, reasonableness determines the legality of a search, not "whether a search . . . within the meaning of the Constitution has *occurred*." *Carter*, 525 U. S., at 97 (opinion of Scalia, J.) (internal quotation marks omitted).

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Moreover, the *Katz* test invokes the concept of reasonableness in a way that would be foreign to the ratifiers of the Fourth Amendment. Originally, the word "unreasonable" in the Fourth Amendment likely meant "against reason"—as in "against the reason of the common law." See Donohue 1270–1275; Davies 686–693; *California* v. *Acevedo*, 500 U. S. 565, 583 (1991) (Scalia, J., concurring in judgment). At the

[9] Carpenter relies on an order from the Federal Communications Commission (FCC), which weakly states that "'*[t]o the extent* [a customer's location information] is property, . . . it is better understood as belonging to the customer, not the carrier.'" Brief for Petitioner 34, and n. 23 (quoting 13 FCC Rcd. 8061, 8093, ¶43 (1998); emphasis added). But this order was vacated by the Court of Appeals for the Tenth Circuit. *U. S. West, Inc.* v. *FCC*, 182 F. 3d 1224, 1240 (1999). Notably, the carrier in that case argued that the FCC's regulation of customer information was a taking of *its* property. See *id.*, at 1230. Although the panel majority had no occasion to address this argument, see *id.*, at 1239, n. 14, the dissent concluded that the carrier had failed to prove the information was "property" at all, see *id.*, at 1247–1248 (opinion of Briscoe, J.).

founding, searches and seizures were regulated by a robust body of common-law rules. See generally W. Cuddihy, The Fourth Amendment: Origins and Original Meaning 602–1791 (2009); *e. g.*, *Wilson* v. *Arkansas*, 514 U. S. 927, 931–936 (1995) (discussing the common-law knock-and-announce rule). The search-and-seizure practices that the Founders feared most—such as general warrants—were already illegal under the common law, and jurists such as Lord Coke described violations of the common law as "against reason." See Donohue 1270–1271, and n. 513. Locke, Blackstone, Adams, and other influential figures shortened the phrase "against reason" to "unreasonable." See *id.*, at 1270–1275. Thus, by prohibiting "unreasonable" searches and seizures in the Fourth Amendment, the Founders ensured that the newly created Congress could not use legislation to abolish the established common-law rules of search and seizure. See T. Cooley, Constitutional Limitations *303; 3 J. Story, Commentaries on the Constitution of the United States §1895, p. 748 (1833).

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Although the Court today maintains that its decision is based on "Founding-era understandings," *ante*, at 305, the Founders would be puzzled by the Court's conclusion as well as its reasoning. The Court holds that the Government unreasonably searched Carpenter by subpoenaing the cell-site records of Sprint and MetroPCS without a warrant. But the Founders would not recognize the Court's "warrant requirement." *Ante*, at 318. The common law required warrants for some types of searches and seizures, but not for many others. The relevant rule depended on context. See *Acevedo*, *supra*, at 583–584 (opinion of Scalia, J.); Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 763–770 (1994); Davies 738–739. In cases like this one, a subpoena for third-party documents was not a "search" to begin with, and the common law did not limit the government's authority to subpoena third parties. See *post*, at 362–371 (ALITO, J., dissenting). Suffice it to say, the Founders

would be confused by this Court's transformation of their common-law protection of property into a "warrant requirement" and a vague inquiry into "reasonable expectations of privacy."

III

That the *Katz* test departs so far from the text of the Fourth Amendment is reason enough to reject it. But the *Katz* test also has proved unworkable in practice. Jurists and commentators tasked with deciphering our jurisprudence have described the *Katz* regime as "an unpredictable jumble," "a mass of contradictions and obscurities," "all over the map," "riddled with inconsistency and incoherence," "a series of inconsistent and bizarre results that [the Court] has left entirely undefended," "unstable," "chameleon-like," "notoriously unhelpful," "a conclusion rather than a starting point for analysis," "distressingly unmanageable," "a dismal failure," "flawed to the core," "unadorned fiat," and "inspired by the kind of logic that produced Rube Goldberg's bizarre contraptions."[10] Even Justice Harlan, four years

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[10] Kugler & Strahilevitz, Actual Expectations of Privacy, Fourth Amendment Doctrine, and the Mosaic Theory, 2015 S. Ct. Rev. 205, 261; Bradley, Two Models of the Fourth Amendment, 83 Mich. L. Rev. 1468 (1985); Kerr, Four Models of Fourth Amendment Protection, 60 Stan. L. Rev. 503, 505 (2007); Solove, Fourth Amendment Pragmatism, 51 Boston College L. Rev. 1511 (2010); Wasserstrom & Seidman, The Fourth Amendment as Constitutional Theory, 77 Geo. L. J. 19, 29 (1988); Colb, What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy, 55 Stan. L. Rev. 119, 122 (2002); T. Clancy, The Fourth Amendment: Its History and Interpretation § 3.3.4, p. 65 (2008); *Minnesota* v. *Carter*, 525 U. S. 83, 97 (1998) (Scalia, J., concurring); *State* v. *Campbell*, 306 Ore. 157, 164, 759 P. 2d 1040, 1044 (1988); Wilkins, Defining the "Reasonable Expectation of Privacy": An Emerging Tripartite Analysis, 40 Vand. L. Rev. 1077, 1107 (1987); Yeager, Search, Seizure and the Positive Law: Expectations of Privacy Outside the Fourth Amendment, 84 J. Crim. L. & C. 249, 251 (1993); Thomas, Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment, 80 Notre Dame L. Rev. 1451, 1500 (2005); *Rakas* v. *Illinois*, 439 U. S. 128, 165 (1978) (White, J., dissenting); Cloud, Rube Goldberg Meets the Consti-

after penning his concurrence in *Katz*, confessed that the test encouraged "the substitution of words for analysis." *United States* v. *White*, 401 U. S. 745, 786 (1971) (dissenting opinion).

After 50 years, it is still unclear what question the *Katz* test is even asking. This Court has steadfastly declined to elaborate the relevant considerations or identify any meaningful constraints. See, *e. g.*, *ante*, at 304 ("[N]o single rubric definitively resolves which expectations of privacy are entitled to protection"); *O'Connor* v. *Ortega*, 480 U. S. 709, 715 (1987) (plurality opinion) ("We have no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable"); *Oliver*, 466 U. S., at 177 ("No single factor determines whether an individual legitimately may claim under the Fourth Amendment that a place should be free of government intrusion").

Justice Harlan's original formulation of the *Katz* test appears to ask a descriptive question: Whether a given expectation of privacy is "one that society is prepared to recognize as 'reasonable.'" 389 U. S., at 361 (concurring opinion). As written, the *Katz* test turns on society's actual, current views about the reasonableness of various expectations of privacy.

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But this descriptive understanding presents several problems. For starters, it is easily circumvented. If, for example, "the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry," individuals could not realistically expect privacy in their homes. *Smith*, 442 U. S., at 740, n. 5; see also Chemerinsky, Rediscovering Brandeis's Right to Privacy, 45 Brandeis L. J. 643, 650 (2007) ("[Under *Katz*, t]he government seemingly can deny privacy just by letting people know in advance not to expect any"). A purely descriptive understanding of the *Katz* test also risks "circular[ity]." *Kyllo*, 533 U. S., at 34. While this Court is

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tution: The Supreme Court, Technology and the Fourth Amendment, 72 Miss. L. J. 5, 7 (2002).

supposed to base its decisions on society's expectations of privacy, society's expectations of privacy are, in turn, shaped by this Court's decisions. See Posner, The Uncertain Protection of Privacy by the Supreme Court, 1979 S. Ct. Rev. 173, 188 ("[W]hether [a person] will or will not have [a reasonable] expectation [of privacy] will depend on what the legal rule is").

To address this circularity problem, the Court has insisted that expectations of privacy must come from outside its Fourth Amendment precedents, "either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Rakas* v. *Illinois*, 439 U. S. 128, 144, n. 12 (1978). But the Court's supposed reliance on "real or personal property law" rings hollow. The whole point of *Katz* was to "'discredi[t]'" the relationship between the Fourth Amendment and property law, 389 U. S., at 353, and this Court has repeatedly downplayed the importance of property law under the *Katz* test, see, *e. g.*, *United States* v. *Salvucci*, 448 U. S. 83, 91 (1980) ("[P]roperty rights are neither the beginning nor the end of this Court's inquiry [under *Katz*]"); *Rawlings* v. *Kentucky*, 448 U. S. 98, 105 (1980) ("[This Court has] emphatically rejected the notion that 'arcane' concepts of property law ought to control the ability to claim the protections of the Fourth Amendment"). Today, for example, the Court makes no mention of property law, except to reject its relevance. See *ante*, at 304, and n. 1.

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As for "understandings that are recognized and permitted by society," this Court has never answered even the most basic questions about what this means. See Kerr, Four Models of Fourth Amendment Protection, 60 Stan. L. Rev. 503, 504–505 (2007). For example, our precedents do not explain who is included in "society," how we know what they "recogniz[e] and permi[t]," and how much of society must agree before something constitutes an "understanding."

Here, for example, society might prefer a balanced regime that prohibits the Government from obtaining cell-site loca-

tion information unless it can persuade a neutral magistrate that the information bears on an ongoing criminal investigation. That is precisely the regime Congress created under the Stored Communications Act and Telecommunications Act. See 47 U. S. C. §222(c)(1); 18 U. S. C. §§2703(c)(1)(B), (d). With no sense of irony, the Court invalidates this regime today—the one that society actually created "in the form of its elected representatives in Congress." 819 F. 3d 880, 890 (2016).

Truth be told, this Court does not treat the *Katz* test as a descriptive inquiry. Although the *Katz* test is phrased in descriptive terms about society's views, this Court treats it like a normative question—whether a particular practice *should* be considered a search under the Fourth Amendment. Justice Harlan thought this was the best way to understand his test. See *White*, 401 U. S., at 786 (dissenting opinion) (explaining that courts must assess the "desirability" of privacy expectations and ask whether courts "should" recognize them by "balanc[ing]" the "impact on the individual's sense of security . . . against the utility of the conduct as a technique of law enforcement"). And a normative understanding is the only way to make sense of this Court's precedents, which bear the hallmarks of subjective policymaking instead of neutral legal decisionmaking. "[T]he only thing the past three decades have established about the *Katz* test" is that society's expectations of privacy "bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable." *Carter*, 525 U. S., at 97 (opinion of Scalia, J.). Yet, "[t]hough we know ourselves to be eminently reasonable, self-awareness of eminent reasonableness is not really a substitute for democratic election." *Sosa* v. *Alvarez-Machain*, 542 U. S. 692, 750 (2004) (Scalia, J., concurring in part and concurring in judgment).

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* * *

In several recent decisions, this Court has declined to apply the *Katz* test because it threatened to narrow the orig-

inal scope of the Fourth Amendment. See *Grady* v. *North Carolina*, 575 U. S. 306, 308–309 (2015) (*per curiam*); *Florida* v. *Jardines*, 569 U. S. 1, 5 (2013); *Jones*, 565 U. S., at 406–407. But as today's decision demonstrates, *Katz* can also be invoked to expand the Fourth Amendment beyond its original scope. This Court should not tolerate errors in either direction. "The People, through ratification, have already weighed the policy tradeoffs that constitutional rights entail." *Luis* v. *United States*, 578 U. S. 5, 33 (2016) (THOMAS, J., concurring in judgment). Whether the rights they ratified are too broad or too narrow by modern lights, this Court has no authority to unilaterally alter the document they approved.

Because the *Katz* test is a failed experiment, this Court is dutybound to reconsider it. Until it does, I agree with my dissenting colleagues' reading of our precedents. Accordingly, I respectfully dissent.

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JUSTICE ALITO, with whom JUSTICE THOMAS joins, dissenting.

I share the Court's concern about the effect of new technology on personal privacy, but I fear that today's decision will do far more harm than good. The Court's reasoning fractures two fundamental pillars of Fourth Amendment law, and in doing so, it guarantees a blizzard of litigation while threatening many legitimate and valuable investigative practices upon which law enforcement has rightfully come to rely.

First, the Court ignores the basic distinction between an actual search (dispatching law enforcement officers to enter private premises and root through private papers and effects) and an order merely requiring a party to look through its own records and produce specified documents. The former, which intrudes on personal privacy far more deeply, requires probable cause; the latter does not. Treating an order to produce like an actual search, as today's decision does, is revolutionary. It violates both the original understanding of the Fourth Amendment and more than a century

of Supreme Court precedent. Unless it is somehow restricted to the particular situation in the present case, the Court's move will cause upheaval. Must every grand jury subpoena *duces tecum* be supported by probable cause? If so, investigations of terrorism, political corruption, white-collar crime, and many other offenses will be stymied. And what about subpoenas and other document-production orders issued by administrative agencies? See, *e. g.*, 15 U. S. C. § 57b–1(c) (Federal Trade Commission); §§ 77s(c), 78u(a)–(b) (Securities and Exchange Commission); 29 U. S. C. § 657(b) (Occupational Safety and Health Administration); 29 CFR § 1601.16(a)(2) (2017) (Equal Employment Opportunity Commission).

Second, the Court allows a defendant to object to the search of a third party's property. This also is revolutionary. The Fourth Amendment protects "[t]he right of the people to be secure in *their* persons, houses, papers, and effects" (emphasis added), not the persons, houses, papers, and effects of others. Until today, we have been careful to heed this fundamental feature of the Amendment's text. This was true when the Fourth Amendment was tied to property law, and it remained true after *Katz* v. *United States*, 389 U. S. 347 (1967), broadened the Amendment's reach.

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By departing dramatically from these fundamental principles, the Court destabilizes long-established Fourth Amendment doctrine. We will be making repairs—or picking up the pieces—for a long time to come.

I

Today the majority holds that a court order requiring the production of cell-site records may be issued only after the Government demonstrates probable cause. See *ante*, at 316–317. That is a serious and consequential mistake. The Court's holding is based on the premise that the order issued in this case was an actual "search" within the meaning of the Fourth Amendment, but that premise is inconsistent with the

original meaning of the Fourth Amendment and with more than a century of precedent.

A

The order in this case was the functional equivalent of a subpoena for documents, and there is no evidence that these writs were regarded as "searches" at the time of the founding. Subpoenas *duces tecum* and other forms of compulsory document production were well known to the founding generation. Blackstone dated the first writ of subpoena to the reign of King Richard II in the late 14th century, and by the end of the 15th century, the use of such writs had "become the daily practice of the [Chancery] court." 3 W. Blackstone, Commentaries on the Laws of England 53 (G. Tucker ed. 1803) (Blackstone). Over the next 200 years, subpoenas would grow in prominence and power in tandem with the Court of Chancery, and by the end of Charles II's reign in 1685, two important innovations had occurred.

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First, the Court of Chancery developed a new species of subpoena. Until this point, subpoenas had been used largely to compel attendance and oral testimony from witnesses; these subpoenas correspond to today's subpoenas *ad testificandum*. But the Court of Chancery also improvised a new version of the writ that tacked onto a regular subpoena an order compelling the witness to bring certain items with him. By issuing these so-called subpoenas *duces tecum*, the Court of Chancery could compel the production of papers, books, and other forms of physical evidence, whether from the parties to the case or from third parties. Such subpoenas were sufficiently commonplace by 1623 that a leading treatise on the practice of law could refer in passing to the fee for a "*Sub pœna* of *Ducas tecum*" (seven shillings and two pence) without needing to elaborate further. T. Powell, The Attourneys Academy 79 (1623). Subpoenas *duces tecum* would swell in use over the next century as the rules for their application became ever more developed and definite. See, *e. g.*, 1 G. Jacob, The Compleat Chancery-

Practiser 290 (1730) ("The *Subpoena duces tecum* is awarded when the Defendant has confessed by his Answer that he hath such Writings in his Hands as are prayed by the Bill to be discovered or brought into Court").

Second, although this new species of subpoena had its origins in the Court of Chancery, it soon made an appearance in the work of the common-law courts as well. One court later reported that "[t]he Courts of Common law . . . employed the same or similar means . . . from the time of Charles the Second at least." *Amey* v. *Long*, 9 East. 473, 484, 103 Eng. Rep. 653, 658 (K. B. 1808).

By the time Blackstone published his Commentaries on the Laws of England in the 1760's, the use of subpoenas *duces tecum* had bled over substantially from the courts of equity to the common-law courts. Admittedly, the transition was still incomplete: In the context of jury trials, for example, Blackstone complained about "the want of a compulsive power for the production of books and papers belonging to the parties." Blackstone 381; see also, *e. g.*, *Entick* v. *Carrington*, 19 How. St. Tr. 1029, 1073 (C. P. 1765) ("I wish some cases had been shewn, where the law forceth evidence out of the owner's custody by process. [But] where the adversary has by force or fraud got possession of your own proper evidence, there is no way to get it back but by action"). But Blackstone found some comfort in the fact that at least those documents "[i]n the hands of third persons . . . can generally be obtained by rule of court, or by adding a clause of requisition to the writ of *subpoena*, which is then called a *subpoena duces tecum*." Blackstone 381; see also, *e. g.*, *Leeds* v. *Cook*, 4 Esp. 256, 257, 170 Eng. Rep. 711 (N. P. 1803) (third-party subpoena *duces tecum*); *Rex* v. *Babb*, 3 T. R. 579, 580, 100 Eng. Rep. 743, 744 (K. B. 1790) (third-party document production). One of the primary questions outstanding, then, was whether common-law courts would remedy the "defect[s]" identified by the Commentaries, and allow parties to use subpoenas *duces tecum* not only with

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respect to third parties but also with respect to each other. Blackstone 381.

That question soon found an affirmative answer on both sides of the Atlantic. In the United States, the First Congress established the federal court system in the Judiciary Act of 1789. As part of that Act, Congress authorized "all the said courts of the United States . . . in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery." § 15, 1 Stat. 82. From that point forward, federal courts in the United States could compel the production of documents regardless of whether those documents were held by parties to the case or by third parties.

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In Great Britain, too, it was soon definitively established that common-law courts, like their counterparts in equity, could subpoena documents held either by parties to the case or by third parties. After proceeding in fits and starts, the King's Bench eventually held in *Amey* v. *Long* that the "writ of subpœna duces tecum [is] a writ of compulsory obligation and effect in the law." 9 East., at 486, 103 Eng. Rep., at 658. Writing for a unanimous court, Lord Chief Justice Ellenborough explained that "[t]he right to resort to means competent to compel the production of written, as well as oral, testimony seems essential to the very existence and constitution of a Court of Common Law." *Id.*, at 484, 103 Eng. Rep., at 658. Without the power to issue subpoenas *duces tecum*, the Lord Chief Justice observed, common-law courts "could not possibly proceed with due effect." *Ibid.*

The prevalence of subpoenas *duces tecum* at the time of the founding was not limited to the civil context. In criminal cases, courts and prosecutors were also using the writ to compel the production of necessary documents. In *Rex* v.

Dixon, 3 Burr. 1687, 97 Eng. Rep. 1047 (K. B. 1765), for example, the King's Bench considered the propriety of a subpoena *duces tecum* served on an attorney named Samuel Dixon. Dixon had been called "to give evidence before the grand jury of the county of Northampton" and specifically "to produce three vouchers . . . in order to found a prosecution by way of indictment against [his client] Peach . . . for forgery." *Ibid.*, 97 Eng. Rep., at 1047–1048. Although the court ultimately held that Dixon had not needed to produce the vouchers on account of attorney-client privilege, none of the justices expressed the slightest doubt about the general propriety of subpoenas *duces tecum* in the criminal context. See *id.*, at 1688, 97 Eng. Rep., at 1048. As Lord Chief Justice Ellenborough later explained, "[i]n that case no objection was taken to the writ, but to the special circumstances under which the party possessed the papers; so that the Court may be considered as recognizing the general obligation to obey writs of that description in other cases." *Amey, supra*, at 485, 103 Eng. Rep., at 658; see also 4 J. Chitty, Criminal Law 185 (1816) (template for criminal subpoena *duces tecum*).

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As *Dixon* shows, subpoenas *duces tecum* were routine in part because of their close association with grand juries. Early American colonists imported the grand jury, like so many other common-law traditions, and they quickly flourished. See *United States* v. *Calandra*, 414 U. S. 338, 342–343 (1974). Grand juries were empaneled by the federal courts almost as soon as the latter were established, and both they and their state counterparts actively exercised their wide-ranging common-law authority. See R. Younger, The People's Panel 47–55 (1963). Indeed, "the Founders thought the grand jury so essential . . . that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by 'a presentment or indictment of a Grand Jury.'" *Calandra*, 414 U. S., at 343.

Given the popularity and prevalence of grand juries at the time, the Founders must have been intimately familiar with the tools they used—including compulsory process—to accomplish their work. As a matter of tradition, grand juries were "accorded wide latitude to inquire into violations of criminal law," including the power to "compel the production of evidence or the testimony of witnesses as [they] conside[r] appropriate." *Ibid.* Long before national independence was achieved, grand juries were already using their broad inquisitorial powers not only to present and indict criminal suspects but also to inspect public buildings, to levy taxes, to supervise the administration of the laws, to advance municipal reforms such as street repair and bridge maintenance, and in some cases even to propose legislation. Younger, *supra*, at 5–26. Of course, such work depended entirely on grand juries' ability to access any relevant documents.

Grand juries continued to exercise these broad inquisitorial powers up through the time of the founding. See *Blair* v. *United States*, 250 U. S. 273, 280 (1919) ("At the foundation of our Federal Government the inquisitorial function of the grand jury and the compulsion of witnesses were recognized as incidents of the judicial power"). In a series of lectures delivered in the early 1790's, Justice James Wilson crowed that grand juries were "the peculiar boast of the common law" thanks in part to their wide-ranging authority: "All the operations of government, and of its ministers and officers, are within the compass of their view and research." 2 J. Wilson, The Works of James Wilson 534, 537 (R. McCloskey ed. 1967). That reflected the broader insight that "[t]he grand jury's investigative power must be broad if its public responsibility is adequately to be discharged." *Calandra*, *supra*, at 344.

Compulsory process was also familiar to the founding generation in part because it reflected "the ancient proposition of law" that "'"the public . . . has a right to every man's

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evidence."'" *United States* v. *Nixon*, 418 U. S. 683, 709 (1974); see also *ante*, at 329–330 (KENNEDY, J., dissenting). As early as 1612, "Lord Bacon is reported to have declared that 'all subjects, without distinction of degrees, owe to the King tribute and service, not only of their deed and hand, but of their knowledge and discovery.'" *Blair*, 250 U. S., at 279–280. That duty could be "onerous at times," yet the Founders considered it "necessary to the administration of justice according to the forms and modes established in our system of government." *Id.*, at 281; see also *Calandra*, *supra*, at 345.

B

Talk of kings and common-law writs may seem out of place in a case about cell-site records and the protections afforded by the Fourth Amendment in the modern age. But this history matters, not least because it tells us what was on the minds of those who ratified the Fourth Amendment and how they understood its scope. That history makes it abundantly clear that the Fourth Amendment, as originally understood, did not apply to the compulsory production of documents at all.

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The Fourth Amendment does not regulate all methods by which the Government obtains documents. Rather, it prohibits only those "searches and seizures" of "persons, houses, papers, and effects" that are "unreasonable." Consistent with that language, "at least until the latter half of the 20th century" "our Fourth Amendment jurisprudence was tied to common-law trespass." *United States* v. *Jones*, 565 U. S. 400, 405 (2012). So by its terms, the Fourth Amendment does not apply to the compulsory production of documents, a practice that involves neither any physical intrusion into private space nor any taking of property by agents of the state. Even Justice Brandeis—a stalwart proponent of construing the Fourth Amendment liberally—acknowledged that "under any ordinary construction of language," "there is no 'search' or 'seizure' when a defendant is required to

produce a document in the orderly process of a court's procedure." *Olmstead* v. *United States*, 277 U. S. 438, 476 (1928) (dissenting opinion).[1]

Nor is there any reason to believe that the Founders intended the Fourth Amendment to regulate courts' use of compulsory process. American colonists rebelled against the Crown's physical invasions of their persons and their property, not against its acquisition of information by any and all means. As Justice Black once put it, "[t]he Fourth Amendment was aimed directly at the abhorred practice of breaking in, ransacking and searching homes and other buildings and seizing people's personal belongings without warrants issued by magistrates." *Katz*, 389 U. S., at 367 (dissenting opinion). More recently, we have acknowledged that "the Fourth Amendment was the founding generation's response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity." *Riley* v. *California*, 573 U. S. 373, 403 (2014).

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General warrants and writs of assistance were noxious not because they allowed the government to acquire evidence in

[1] Any other interpretation of the Fourth Amendment's text would run into insuperable problems because it would apply not only to subpoenas *duces tecum* but to all other forms of compulsory process as well. If the Fourth Amendment applies to the compelled production of documents, then it must also apply to the compelled production of testimony—an outcome that we have repeatedly rejected and which, if accepted, would send much of the field of criminal procedure into a tailspin. See, *e. g.*, *United States* v. *Dionisio*, 410 U. S. 1, 9 (1973) ("It is clear that a subpoena to appear before a grand jury is not a 'seizure' in the Fourth Amendment sense, even though that summons may be inconvenient or burdensome"); *United States* v. *Calandra*, 414 U. S. 338, 354 (1974) ("Grand jury questions . . . involve no independent governmental invasion of one's person, house, papers, or effects"). As a matter of original understanding, a subpoena *duces tecum* no more effects a "search" or "seizure" of papers within the meaning of the Fourth Amendment than a subpoena *ad testificandum* effects a "search" or "seizure" of a person.

criminal investigations, but because of the *means* by which they permitted the government to acquire that evidence. Then, as today, searches could be quite invasive. Searches generally begin with officers "mak[ing] nonconsensual entries into areas not open to the public." *Donovan* v. *Lone Steer, Inc.*, 464 U. S. 408, 414 (1984). Once there, officers are necessarily in a position to observe private spaces generally shielded from the public and discernible only with the owner's consent. Private area after private area becomes exposed to the officers' eyes as they rummage through the owner's property in their hunt for the object or objects of the search. If they are searching for documents, officers may additionally have to rifle through many other papers—potentially filled with the most intimate details of a person's thoughts and life—before they find the specific information they are seeking. See *Andresen* v. *Maryland*, 427 U. S. 463, 482, n. 11 (1976). If anything sufficiently incriminating comes into view, officers seize it. *Horton* v. *California*, 496 U. S. 128, 136–137 (1990). Physical destruction always lurks as an underlying possibility; "officers executing search warrants on occasion must damage property in order to perform their duty." *Dalia* v. *United States*, 441 U. S. 238, 258 (1979); see, *e. g.*, *United States* v. *Ramirez*, 523 U. S. 65, 71–72 (1998) (breaking garage window); *United States* v. *Ross*, 456 U. S. 798, 817–818 (1982) (ripping open car upholstery); *Brown* v. *Battle Creek Police Dept.*, 844 F. 3d 556, 572 (CA6 2016) (shooting and killing two pet dogs); *Lawmaster* v. *Ward*, 125 F. 3d 1341, 1350, n. 3 (CA10 1997) (breaking locks).

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Compliance with a subpoena *duces tecum* requires none of that. A subpoena *duces tecum* permits a subpoenaed individual to conduct the search for the relevant documents himself, without law enforcement officers entering his home or rooting through his papers and effects. As a result, subpoenas avoid the many incidental invasions of privacy that necessarily accompany any actual search. And it was *those* invasions of privacy—which, although incidental, could often

be extremely intrusive and damaging—that led to the adoption of the Fourth Amendment.

Neither this Court nor any of the parties have offered the slightest bit of historical evidence to support the idea that the Fourth Amendment originally applied to subpoenas *duces tecum* and other forms of compulsory process. That is telling, for as I have explained, these forms of compulsory process were a feature of criminal (and civil) procedure well known to the Founders. The Founders would thus have understood that holding the compulsory production of documents to the same standard as actual searches and seizures would cripple the work of courts in civil and criminal cases alike. It would be remarkable to think that, despite that knowledge, the Founders would have gone ahead and sought to impose such a requirement. It would be even more incredible to believe that the Founders would have imposed that requirement through the inapt vehicle of an amendment directed at different concerns. But it would blink reality entirely to argue that this entire process happened without anyone saying *the least thing about it*—not during the drafting of the Bill of Rights, not during any of the subsequent ratification debates, and not for most of the century that followed. If the Founders thought the Fourth Amendment applied to the compulsory production of documents, one would imagine that there would be *some* founding-era evidence of the Fourth Amendment being applied to the compulsory production of documents. Cf. *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 505 (2010); *Printz* v. *United States*, 521 U. S. 898, 905 (1997). Yet none has been brought to our attention.

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C

Of course, our jurisprudence has not stood still since 1791. We now evaluate subpoenas *duces tecum* and other forms of compulsory document production under the Fourth Amendment, although we employ a reasonableness standard that is

less demanding than the requirements for a warrant. But the road to that doctrinal destination was anything but smooth, and our initial missteps—and the subsequent struggle to extricate ourselves from their consequences—should provide an object lesson for today's majority about the dangers of holding compulsory process to the same standard as actual searches and seizures.

For almost a century after the Fourth Amendment was enacted, this Court said and did nothing to indicate that it might regulate the compulsory production of documents. But that changed temporarily when the Court decided *Boyd* v. *United States*, 116 U. S. 616 (1886), the first—and, until today, the only—case in which this Court has ever held the compulsory production of documents to the same standard as actual searches and seizures.

The *Boyd* Court held that a court order compelling a company to produce potentially incriminating business records violated both the Fourth and the Fifth Amendments. The Court acknowledged that "certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching amongst his papers, are wanting" when the Government relies on compulsory process. *Id.*, at 622. But it nevertheless asserted that the Fourth Amendment ought to "be liberally construed," *id.*, at 635, and further reasoned that compulsory process "effects the sole object and purpose of search and seizure" by "forcing from a party evidence against himself," *id.*, at 622. "In this regard," the Court concluded, "the Fourth and Fifth Amendments run almost into each other." *Id.*, at 630. Having equated compulsory process with actual searches and seizures and having melded the Fourth Amendment with the Fifth, the Court then found the order at issue unconstitutional because it compelled the production of property to which the Government did not have superior title. See *id.*, at 622–630.

In a concurrence joined by Chief Justice Waite, Justice Miller agreed that the order violated the Fifth Amendment,

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id., at 639, but he strongly protested the majority's invocation of the Fourth Amendment. He explained: "[T]here is no reason why this court should assume that the action of the court below, in requiring a party to produce certain papers . . . , authorizes an unreasonable search or seizure of the house, papers, or effects of that party. There is in fact no search and no seizure." *Ibid.* "If the mere service of a notice to produce a paper . . . is a search," Justice Miller concluded, "then a change has taken place in the meaning of words, which has not come within my reading, and which I think was unknown at the time the Constitution was made." *Id.*, at 641.

Although *Boyd* was replete with stirring rhetoric, its reasoning was confused from start to finish in a way that ultimately made the decision unworkable. See 3 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 8.7(a) (4th ed. 2015). Over the next 50 years, the Court would gradually roll back *Boyd*'s erroneous conflation of compulsory process with actual searches and seizures.

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That effort took its first significant stride in *Hale* v. *Henkel*, 201 U. S. 43 (1906), where the Court found it "quite clear" and "conclusive" that "the search and seizure clause of the Fourth Amendment was not intended to interfere with the power of courts to compel, through a *subpœna duces tecum*, the production, upon a trial in court, of documentary evidence." *Id.*, at 73. Without that writ, the Court recognized, "it would be 'utterly impossible to carry on the administration of justice.' " *Ibid.*

Hale, however, did not entirely liberate subpoenas *duces tecum* from Fourth Amendment constraints. While refusing to treat such subpoenas as the equivalent of actual searches, *Hale* concluded that they must not be unreasonable. And it held that the subpoena *duces tecum* at issue was "far too sweeping in its terms to be regarded as reasonable." *Id.*, at 76. The *Hale* Court thus left two critical questions unanswered: Under the Fourth Amendment, what

makes the compulsory production of documents "reasonable," and how does that standard differ from the one that governs actual searches and seizures?

The Court answered both of those questions definitively in *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186 (1946), where we held that the Fourth Amendment regulates the compelled production of documents, but less stringently than it does full-blown searches and seizures. *Oklahoma Press* began by admitting that the Court's opinions on the subject had "perhaps too often . . . been generative of heat rather than light," "mov[ing] with variant direction" and sometimes having "highly contrasting" "emphasis and tone." *Id.*, at 202. "The primary source of misconception concerning the Fourth Amendment's function" in this context, the Court explained, "lies perhaps in the identification of cases involving so-called 'figurative' or 'constructive' search with cases of actual search and seizure." *Ibid.* But the Court held that "the basic distinction" between the compulsory production of documents on the one hand, and actual searches and seizures on the other, meant that two different standards had to be applied. *Id.*, at 204.

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Having reversed *Boyd*'s conflation of the compelled production of documents with actual searches and seizures, the Court then set forth the relevant Fourth Amendment standard for the former. When it comes to "the production of corporate or other business records," the Court held that the Fourth Amendment "at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be 'particularly described,' if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant." *Oklahoma Press*, 327 U. S., at 208. Notably, the Court held that a showing of probable cause was not necessary so long as "the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry." *Id.*, at 209.

Since *Oklahoma Press*, we have consistently hewed to that standard. See, *e. g.*, *Lone Steer, Inc.*, 464 U. S., at 414–415; *United States* v. *Miller*, 425 U. S. 435, 445–446 (1976); *California Bankers Assn.* v. *Shultz*, 416 U. S. 21, 67 (1974); *United States* v. *Dionisio*, 410 U. S. 1, 11–12 (1973); *See* v. *Seattle*, 387 U. S. 541, 544 (1967); *United States* v. *Powell*, 379 U. S. 48, 57–58 (1964); *McPhaul* v. *United States*, 364 U. S. 372, 382–383 (1960); *United States* v. *Morton Salt Co.*, 338 U. S. 632, 652–653 (1950); cf. *McLane Co.* v. *EEOC*, 581 U. S. 72, 84–85 (2017). By applying *Oklahoma Press* and thereby respecting "the traditional distinction between a search warrant and a subpoena," *Miller*, *supra*, at 446, this Court has reinforced "the basic compromise" between "the public interest" in every man's evidence and the private interest "of men to be free from officious intermeddling." *Oklahoma Press*, *supra*, at 213.

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Today, however, the majority inexplicably ignores the settled rule of *Oklahoma Press* in favor of a resurrected version of *Boyd*. That is mystifying. This should have been an easy case regardless of whether the Court looked to the original understanding of the Fourth Amendment or to our modern doctrine.

As a matter of original understanding, the Fourth Amendment does not regulate the compelled production of documents at all. Here the Government received the relevant cell-site records pursuant to a court order compelling Carpenter's cell service provider to turn them over. That process is thus immune from challenge under the original understanding of the Fourth Amendment.

As a matter of modern doctrine, this case is equally straightforward. As JUSTICE KENNEDY explains, no search or seizure of Carpenter or his property occurred in this case. *Ante*, at 326–341; see also Part II, *infra*. But even if the majority were right that the Government "searched" Carpenter, it would at most be a "figurative or constructive search" gov-

erned by the *Oklahoma Press* standard, not an "actual search" controlled by the Fourth Amendment's warrant requirement.

And there is no doubt that the Government met the *Oklahoma Press* standard here. Under *Oklahoma Press*, a court order must " 'be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.' " *Lone Steer, Inc.*, *supra*, at 415. Here, the type of order obtained by the Government almost necessarily satisfies that standard. The Stored Communications Act allows a court to issue the relevant type of order "only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that . . . the records . . . sough[t] are relevant and material to an ongoing criminal investigation." 18 U. S. C. §2703(d). And the court "may quash or modify such order" if the provider objects that the "records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider." *Ibid.* No such objection was made in this case, and Carpenter does not suggest that the orders contravened the *Oklahoma Press* standard in any other way.

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That is what makes the majority's opinion so puzzling. It decides that a "search" of Carpenter occurred within the meaning of the Fourth Amendment, but then it leaps straight to imposing requirements that—until this point—have governed only *actual* searches and seizures. See *ante*, at 316–317. Lost in its race to the finish is any real recognition of the century's worth of precedent it jeopardizes. For the majority, this case is apparently no different from one in which Government agents raided Carpenter's home and removed records associated with his cell phone.

Against centuries of precedent and practice, all that the Court can muster is the observation that "this Court has never held that the Government may subpoena third parties for records in which the suspect has a reasonable expectation of privacy." *Ante*, at 317. Frankly, I cannot imagine a con-

cession more damning to the Court's argument than that. As the Court well knows, the reason that we have never seen such a case is because—until today—defendants categorically had no "reasonable expectation of privacy" and no property interest in records belonging to third parties. See Part II, *infra*. By implying otherwise, the Court tries the nice trick of seeking shelter under the cover of precedents that it simultaneously perforates.

Not only that, but even if the Fourth Amendment permitted someone to object to the subpoena of a third party's records, the Court cannot explain why that individual should be entitled to *greater* Fourth Amendment protection than the party actually being subpoenaed. When parties are subpoenaed to turn over their records, after all, they will at most receive the protection afforded by *Oklahoma Press* even though they will own and have a reasonable expectation of privacy in the records at issue. Under the Court's decision, however, the Fourth Amendment will extend greater protections to someone else who is not being subpoenaed and does not own the records. That outcome makes no sense, and the Court does not even attempt to defend it.

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We have set forth the relevant Fourth Amendment standard for subpoenaing business records many times over. Out of those dozens of cases, the majority cannot find even one that so much as suggests an exception to the *Oklahoma Press* standard for sufficiently personal information. Instead, we have always "described the constitutional requirements" for compulsory process as being "'settled'" and as applying categorically to all "'subpoenas [of] corporate books or records.'" *Lone Steer, Inc.*, 464 U. S., at 415 (internal quotation marks omitted). That standard, we have held, is "*the most*" protection the Fourth Amendment gives "to the production of corporate records and papers." *Oklahoma Press*, 327 U. S., at 208 (emphasis added).[2]

[2] All that the Court can say in response is that we have "been careful not to uncritically extend existing precedents" when confronting new technologies. *Ante*, at 318. But applying a categorical rule categorically does

Although the majority announces its holding in the context of the Stored Communications Act, nothing stops its logic from sweeping much further. The Court has offered no meaningful limiting principle, and none is apparent. Cf. Tr. of Oral Arg. 31 (Carpenter's counsel admitting that "a grand jury subpoena . . . would be held to the same standard as any other subpoena or subpoena-like request for [cell-site] records").

Holding that subpoenas must meet the same standard as conventional searches will seriously damage, if not destroy, their utility. Even more so than at the founding, today the government regularly uses subpoenas *duces tecum* and other forms of compulsory process to carry out its essential functions. See, *e. g.*, *Dionisio*, 410 U. S., at 11–12 (grand jury subpoenas); *McPhaul*, 364 U. S., at 382–383 (legislative subpoenas); *Oklahoma Press*, *supra*, at 208–209 (administrative subpoenas). Grand juries, for example, have long "compel[led] the production of evidence" in order to determine "*whether* there is probable cause to believe a crime has been committed." *Calandra*, 414 U. S., at 343 (emphasis added). Almost by definition, then, grand juries will be unable at first to demonstrate "the probable cause required for a warrant." *Ante*, at 317 (majority opinion); see also *Oklahoma Press*, *supra*, at 213. If they are required to do so, the effects are as predictable as they are alarming: Many investigations will sputter out at the start, and a host of criminals will be able to evade law enforcement's reach.

"To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence." *Nixon*, 418 U. S., at 709. For over a hundred years, we have understood that holding subpoenas to the same standard as actual searches and seizures "would stop much if not all of investigation in the public interest at the threshold of inquiry." *Oklahoma Press*, *supra*,

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not "extend" precedent, so the Court's statement ends up sounding a lot like a tacit admission that it is overruling our precedents.

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at 213. Today a skeptical majority decides to put that understanding to the test.

II

Compounding its initial error, the Court also holds that a defendant has the right under the Fourth Amendment to object to the search of a third party's property. This holding flouts the clear text of the Fourth Amendment, and it cannot be defended under either a property-based interpretation of that Amendment or our decisions applying the reasonable-expectations-of-privacy test adopted in *Katz*, 389 U. S. 347. By allowing Carpenter to object to the search of a third party's property, the Court threatens to revolutionize a second and independent line of Fourth Amendment doctrine.

A

It bears repeating that the Fourth Amendment guarantees "[t]he right of the people to be secure in *their* persons, houses, papers, and effects." (Emphasis added.) The Fourth Amendment does not confer rights with respect to the persons, houses, papers, and effects of others. Its language makes clear that "Fourth Amendment rights are personal," *Rakas* v. *Illinois*, 439 U. S. 128, 140 (1978), and as a result, this Court has long insisted that they "may not be asserted vicariously," *id.*, at 133. It follows that a "person who is aggrieved . . . only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." *Id.*, at 134.

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In this case, as JUSTICE KENNEDY cogently explains, the cell-site records obtained by the Government belong to Carpenter's cell service providers, not to Carpenter. See *ante*, at 331–332. Carpenter did not create the cell-site records. Nor did he have possession of them; at all relevant times, they were kept by the providers. Once Carpenter subscribed to his provider's service, he had no right to prevent the company from creating or keeping the information in its

records. Carpenter also had no right to demand that the providers destroy the records, no right to prevent the providers from destroying the records, and, indeed, no right to modify the records in any way whatsoever (or to prevent the providers from modifying the records). Carpenter, in short, has no meaningful control over the cell-site records, which are created, maintained, altered, used, and eventually destroyed by his cell service providers.

Carpenter responds by pointing to a provision of the Telecommunications Act that requires a provider to disclose cell-site records when a customer so requests. See 47 U. S. C. § 222(c)(2). But a statutory disclosure requirement is hardly sufficient to give someone an ownership interest in the documents that must be copied and disclosed. Many statutes confer a right to obtain copies of documents without creating any property right.[3]

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[3] See, *e. g.*, Freedom of Information Act, 5 U. S. C. § 552(a) ("Each agency shall make available to the public information as follows . . . "); Privacy Act, 5 U. S. C. § 552a(d)(1) ("Each agency that maintains a system of records shall . . . upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof . . . "); Fair Credit Reporting Act, 15 U. S. C. § 1681j(a)(1)(A) ("All consumer reporting agencies . . . shall make all disclosures pursuant to section 1681g of this title once during any 12-month period upon request of the consumer and without charge to the consumer"); Right to Financial Privacy Act of 1978, 12 U. S. C. § 3404(c) ("The customer has the right . . . to obtain a copy of the record which the financial institution shall keep of all instances in which the customer's record is disclosed to a Government authority pursuant to this section, including the identity of the Government authority to which such disclosure is made"); Government in the Sunshine Act, 5 U. S. C. § 552b(f)(2) ("Copies of such transcript, or minutes, or a transcription of such recording disclosing the identity of each speaker, shall be furnished to any person at the actual cost of duplication or transcription"); Cable Act, 47 U. S. C. § 551(d) ("A cable subscriber shall be provided access to all personally identifiable information regarding that subscriber which is collected and maintained by a cable operator"); Family Educational Rights and Privacy Act of 1974, 20 U. S. C. § 1232g(a)(1)(A)

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Carpenter's argument is particularly hard to swallow because nothing in the Telecommunications Act precludes cell service providers from charging customers a fee for accessing cell-site records. See *ante*, at 332 (KENNEDY, J., dissenting). It would be very strange if the owner of records were required to pay in order to inspect his own property.

Nor does the Telecommunications Act give Carpenter a property right in the cell-site records simply because they are subject to confidentiality restrictions. See 47 U. S. C. § 222(c)(1) (without a customer's permission, a cell service provider may generally "use, disclose, or permit access to individually identifiable [cell-site records]" only with respect to "its provision" of telecommunications services). Many federal statutes impose similar restrictions on private entities' use or dissemination of information in their own records without conferring a property right on third parties.[4]

("No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. . . . Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made").

[4] See, *e. g.*, Family Educational Rights and Privacy Act, 20 U. S. C. § 1232g(b)(1) ("No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information . . .) of students without the written consent of their parents to any individual, agency, or organization . . . "); Video Privacy Protection Act, 18 U. S. C. § 2710(b)(1) ("A video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider shall be liable to the aggrieved person for the relief provided in subsection (d)"); Driver Privacy Protection Act, 18 U. S. C. § 2721(a)(1) ("A State department of motor vehicles, and any officer, employee, or contractor thereof, shall not knowingly disclose or otherwise make available to any person or entity . . . personal information . . . "); Fair

It would be especially strange to hold that the Telecommunication Act's confidentiality provision confers a property right when the Act creates an express exception for any disclosure of records that is "required by law." 47 U. S. C. § 222(c)(1). So not only does Carpenter lack "'the most essential and beneficial'" of the "'constituent elements'" of property, *Dickman* v. *Commissioner*, 465 U. S. 330, 336 (1984)—*i. e.*, the right to use the property to the exclusion of others—but he cannot even exclude the party he would most like to keep out, namely, the Government.[5]

Credit Reporting Act, 15 U. S. C. § 1681b(a) ("[A]ny consumer reporting agency may furnish a consumer report under the following circumstances and no other . . . "); Right to Financial Privacy Act, 12 U. S. C. § 3403(a) ("No financial institution, or officer, employees, or agent of a financial institution, may provide to any Government authority access to or copies of, or the information contained in, the financial records of any customer except in accordance with the provisions of this chapter"); Patient Safety and Quality Improvement Act, 42 U. S. C. § 299b–22(b) ("Notwithstanding any other provision of Federal, State, or local law, and subject to subsection (c) of this section, patient safety work product shall be confidential and shall not be disclosed"); Cable Act, 47 U. S. C. § 551(c)(1) ("[A] cable operator shall not disclose personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber concerned and shall take such actions as are necessary to prevent unauthorized access to such information by a person other than the subscriber or cable operator").

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[5] Carpenter also cannot argue that he owns the cell-site records merely because they fall into the category of records referred to as "customer proprietary network information." 47 U. S. C. § 222(c). Even assuming labels alone can confer property rights, nothing in this particular label indicates whether the "information" is "proprietary" to the "customer" or to the provider of the "network." At best, the phrase "customer proprietary network information" is ambiguous, and context makes clear that it refers to the *provider's* information. The Telecommunications Act defines the term to include all "information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship." § 222(h)(1)(A). For Carpenter to be right, he must own not only the cell-

For all these reasons, there is no plausible ground for maintaining that the information at issue here represents Carpenter's "papers" or "effects."[6]

B

In the days when this Court followed an exclusively property-based approach to the Fourth Amendment, the distinction between an individual's Fourth Amendment rights and those of a third party was clear cut. We first asked whether the object of the search—say, a house, papers, or effects—belonged to the defendant, and, if it did, whether the Government had committed a "trespass" in acquiring the evidence at issue. *Jones*, 565 U. S., at 411, n. 8.

When the Court held in *Katz* that "property rights are not the sole measure of Fourth Amendment violations," *Soldal* v. *Cook County*, 506 U. S. 56, 64 (1992), the sharp boundary between personal and third-party rights was tested. Under *Katz*, a party may invoke the Fourth Amendment whenever law enforcement officers violate the party's "justifiable" or "reasonable" expectation of privacy. See 389 U. S., at 353; see also *id.*, at 361 (Harlan, J., concurring) (applying the Fourth Amendment where "a person [has] exhibited an actual (subjective) expectation of privacy" and where that "expectation [is] one that society is prepared to recognize as 'reasonable' "). Thus freed from the limitations imposed by property law, parties began to argue that they had a reasonable expectation of privacy in items owned by others. After all, if a trusted third party took care not to disclose information about the person in question, that person might well

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site records in this case, but also records relating to, for example, the "technical configuration" of his subscribed service—records that presumably include such intensely personal and private information as transmission wavelengths, transport protocols, and link layer system configurations.

[6] Thus, this is not a case in which someone has entrusted papers that he or she owns to the safekeeping of another, and it does not involve a bailment. Cf. *post*, at 400 (GORSUCH, J., dissenting).

have a reasonable expectation that the information would not be revealed.

Efforts to claim Fourth Amendment protection against searches of the papers and effects of others came to a head in *Miller*, 425 U. S. 435, where the defendant sought the suppression of two banks' microfilm copies of his checks, deposit slips, and other records. The defendant did not claim that he owned these documents, but he nonetheless argued that "analysis of ownership, property rights and possessory interests in the determination of Fourth Amendment rights ha[d] been severely impeached" by *Katz* and other recent cases. See Brief for Respondent in *United States* v. *Miller*, O. T. 1975, No. 74–1179, p. 6. Turning to *Katz*, he then argued that he had a reasonable expectation of privacy in the banks' records regarding his accounts. Brief for Respondent in No. 74–1179, at 6; see also *Miller*, *supra*, at 442–443.

Acceptance of this argument would have flown in the face of the Fourth Amendment's text, and the Court rejected that development. Because Miller gave up "dominion and control" of the relevant information to his bank, *Rakas*, 439 U. S., at 149, the Court ruled that he lost any protected Fourth Amendment interest in that information. See *Miller*, *supra*, at 442–443. Later, in *Smith* v. *Maryland*, 442 U. S. 735, 745 (1979), the Court reached a similar conclusion regarding a telephone company's records of a customer's calls. As JUSTICE KENNEDY concludes, *Miller* and *Smith* are thus best understood as placing "necessary limits on the ability of individuals to assert Fourth Amendment interests in property to which they lack a 'requisite connection.'" *Ante*, at 327–328.

The same is true here, where Carpenter indisputably lacks any meaningful property-based connection to the cell-site records owned by his provider. Because the records are not Carpenter's in any sense, Carpenter may not seek to use the Fourth Amendment to exclude them.

By holding otherwise, the Court effectively allows Carpenter to object to the "search" of a third party's property, not

recognizing the revolutionary nature of this change. The Court seems to think that *Miller* and *Smith* invented a new "doctrine"—"the third-party doctrine"—and the Court refuses to "extend" this product of the 1970's to a new age of digital communications. *Ante*, at 309, 315. But the Court fundamentally misunderstands the role of *Miller* and *Smith*. Those decisions did not forge a new doctrine; instead, they rejected an argument that would have disregarded the clear text of the Fourth Amendment and a formidable body of precedent.

In the end, the Court never explains how its decision can be squared with the fact that the Fourth Amendment protects only "[t]he right of the people to be secure in *their* persons, houses, papers, and effects." (Emphasis added.)

* * *

Although the majority professes a desire not to "'embarrass the future,'" *ante*, at 316, we can guess where today's decision will lead.

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One possibility is that the broad principles that the Court seems to embrace will be applied across the board. All subpoenas *duces tecum* and all other orders compelling the production of documents will require a demonstration of probable cause, and individuals will be able to claim a protected Fourth Amendment interest in any sensitive personal information about them that is collected and owned by third parties. Those would be revolutionary developments indeed.

The other possibility is that this Court will face the embarrassment of explaining in case after case that the principles on which today's decision rests are subject to all sorts of qualifications and limitations that have not yet been discovered. If we take this latter course, we will inevitably end up "mak[ing] a crazy quilt of the Fourth Amendment." *Smith*, *supra*, at 745.

All of this is unnecessary. In the Stored Communications Act, Congress addressed the specific problem at issue in this

case. The Act restricts the misuse of cell-site records by cell service providers, something that the Fourth Amendment cannot do. The Act also goes beyond current Fourth Amendment case law in restricting access by law enforcement. It permits law enforcement officers to acquire cell-site records only if they meet a heightened standard and obtain a court order. If the American people now think that the Act is inadequate or needs updating, they can turn to their elected representatives to adopt more protective provisions. Because the collection and storage of cell-site records affects nearly every American, it is unlikely that the question whether the current law requires strengthening will escape Congress's notice.

Legislation is much preferable to the development of an entirely new body of Fourth Amendment case law for many reasons, including the enormous complexity of the subject, the need to respond to rapidly changing technology, and the Fourth Amendment's limited scope. The Fourth Amendment restricts the conduct of the Federal Government and the States; it does not apply to private actors. But today, some of the greatest threats to individual privacy may come from powerful private companies that collect and sometimes misuse vast quantities of data about the lives of ordinary Americans. If today's decision encourages the public to think that this Court can protect them from this looming threat to their privacy, the decision will mislead as well as disrupt. And if holding a provision of the Stored Communications Act to be unconstitutional dissuades Congress from further legislation in this field, the goal of protecting privacy will be greatly disserved.

The desire to make a statement about privacy in the digital age does not justify the consequences that today's decision is likely to produce.

JUSTICE GORSUCH, dissenting.

In the late 1960s this Court suggested for the first time that a search triggering the Fourth Amendment occurs when

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the government violates an "expectation of privacy" that "society is prepared to recognize as 'reasonable.'" *Katz* v. *United States*, 389 U. S. 347, 361 (1967) (Harlan, J., concurring). Then, in a pair of decisions in the 1970s applying the *Katz* test, the Court held that a "reasonable expectation of privacy" *doesn't* attach to information shared with "third parties." See *Smith* v. *Maryland*, 442 U. S. 735, 743–744 (1979); *United States* v. *Miller*, 425 U. S. 435, 443 (1976). By these steps, the Court came to conclude, the Constitution does nothing to limit investigators from searching records you've entrusted to your bank, accountant, and maybe even your doctor.

What's left of the Fourth Amendment? Today we use the Internet to do most everything. Smartphones make it easy to keep a calendar, correspond with friends, make calls, conduct banking, and even watch the game. Countless Internet companies maintain records about us and, increasingly, *for* us. Even our most private documents—those that, in other eras, we would have locked safely in a desk drawer or destroyed—now reside on third party servers. *Smith* and *Miller* teach that the police can review all of this material, on the theory that no one reasonably expects any of it will be kept private. But no one believes that, if they ever did.

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What to do? It seems to me we could respond in at least three ways. The first is to ignore the problem, maintain *Smith* and *Miller*, and live with the consequences. If the confluence of these decisions and modern technology means our Fourth Amendment rights are reduced to nearly nothing, so be it. The second choice is to set *Smith* and *Miller* aside and try again using the *Katz* "reasonable expectation of privacy" jurisprudence that produced them. The third is to look for answers elsewhere.

*

Start with the first option. *Smith* held that the government's use of a pen register to record the numbers people dial on their phones doesn't infringe a reasonable expectation

of privacy because that information is freely disclosed to the third party phone company. 442 U. S., at 743–744. *Miller* held that a bank account holder enjoys no reasonable expectation of privacy in the bank's records of his account activity. That's true, the Court reasoned, "even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." 425 U. S., at 443. Today the Court suggests that *Smith* and *Miller* distinguish between *kinds* of information disclosed to third parties and require courts to decide whether to "extend" those decisions to particular classes of information, depending on their sensitivity. See *ante*, at 309–316. But as the Sixth Circuit recognized and JUSTICE KENNEDY explains, no balancing test of this kind can be found in *Smith* and *Miller*. See *ante*, at 335–336 (dissenting opinion). Those cases announced a categorical rule: Once you disclose information to third parties, you forfeit any reasonable expectation of privacy you might have had in it. And even if *Smith* and *Miller* did permit courts to conduct a balancing contest of the kind the Court now suggests, it's still hard to see how that would help the petitioner in this case. Why is someone's location when using a phone so much more sensitive than who he was talking to (*Smith*) or what financial transactions he engaged in (*Miller*)? I do not know and the Court does not say.

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The problem isn't with the Sixth Circuit's application of *Smith* and *Miller* but with the cases themselves. Can the government demand a copy of all your e-mails from Google or Microsoft without implicating your Fourth Amendment rights? Can it secure your DNA from 23andMe without a warrant or probable cause? *Smith* and *Miller* say yes it can—at least without running afoul of *Katz*. But that result strikes most lawyers and judges today—me included—as pretty unlikely. In the years since its adoption, countless scholars, too, have come to conclude that the "third-party doctrine is not only wrong, but horribly wrong." Kerr, The

Case for the Third-Party Doctrine, 107 Mich. L. Rev. 561, 563, n. 5, 564 (2009) (collecting criticisms but defending the doctrine (footnotes omitted)). The reasons are obvious. "As an empirical statement about subjective expectations of privacy," the doctrine is "quite dubious." Baude & Stern, The Positive Law Model of the Fourth Amendment, 129 Harv. L. Rev. 1821, 1872 (2016). People often *do* reasonably expect that information they entrust to third parties, especially information subject to confidentiality agreements, will be kept private. Meanwhile, if the third party doctrine is supposed to represent a normative assessment of when a person should expect privacy, the notion that the answer might be "never" seems a pretty unattractive societal prescription. *Ibid.*

What, then, is the explanation for our third-party doctrine? The truth is, the Court has never offered a persuasive justification. The Court has said that by conveying information to a third party you "'assum[e] the risk'" it will be revealed to the police and therefore lack a reasonable expectation of privacy in it. *Smith*, *supra*, at 744. But assumption of risk doctrine developed in tort law. It generally applies when "by contract or otherwise [one] expressly agrees to accept a risk of harm" or impliedly does so by "manifest[ing] his willingness to accept" that risk and thereby "take[s] his chances as to harm which may result from it." Restatement (Second) of Torts §§ 496B, 496C(1), and Comment *b*, pp. 565, 570 (1964); see also 1 D. Dobbs, P. Hayden, & E. Bublick, Law of Torts §§ 235–236, pp. 841–850 (2d ed. 2017). That rationale has little play in this context. Suppose I entrust a friend with a letter and he promises to keep it secret until he delivers it to an intended recipient. In what sense have I agreed to bear the risk that he will turn around, break his promise, and spill its contents to someone else? More confusing still, what have I done to "manifest my willingness to accept" the risk that the government will pry the document from my friend and read it *without* his consent?

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One possible answer concerns knowledge. I know that my friend *might* break his promise, or that the government *might* have some reason to search the papers in his possession. But knowing about a risk doesn't mean you assume responsibility for it. Whenever you walk down the sidewalk you know a car may negligently or recklessly veer off and hit you, but that hardly means you accept the consequences and absolve the driver of any damage he may do to you. Epstein, Privacy and the Third Hand: Lessons From the Common Law of Reasonable Expectations, 24 Berkeley Tech. L. J. 1199, 1204 (2009); see W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser & Keeton on Law of Torts 490 (5th ed. 1984).

Some have suggested the third party doctrine is better understood to rest on consent than assumption of risk. "So long as a person knows that they are disclosing information to a third party," the argument goes, "their choice to do so is voluntary and the consent valid." Kerr, *supra*, at 588. I confess I still don't see it. Consenting to give a third party access to private papers that remain my property is not the same thing as consenting to a *search of those papers by the government.* Perhaps there are exceptions, like when the third party is an undercover government agent. See Murphy, The Case Against the Case for Third-Party Doctrine: A Response to Epstein and Kerr, 24 Berkeley Tech. L. J. 1239, 1252 (2009); cf. *Hoffa* v. *United States*, 385 U. S. 293 (1966). But otherwise this conception of consent appears to be just assumption of risk relabeled—you've "consented" to whatever risks are foreseeable.

Another justification sometimes offered for third party doctrine is clarity. You (and the police) know exactly how much protection you have in information confided to others: none. As rules go, "the king always wins" is admirably clear. But the opposite rule would be clear too: Third party disclosures *never* diminish Fourth Amendment protection (call it "the king always loses"). So clarity alone cannot justify the third party doctrine.

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In the end, what do *Smith* and *Miller* add up to? A doubtful application of *Katz* that lets the government search almost whatever it wants whenever it wants. The Sixth Circuit had to follow that rule and faithfully did just that, but it's not clear why we should.

*

There's a second option. What if we dropped *Smith* and *Miller*'s third party doctrine and retreated to the root *Katz* question whether there is a "reasonable expectation of privacy" in data held by third parties? Rather than solve the problem with the third party doctrine, I worry this option only risks returning us to its source: After all, it was *Katz* that produced *Smith* and *Miller* in the first place.

Katz's problems start with the text and original understanding of the Fourth Amendment, as JUSTICE THOMAS thoughtfully explains today. *Ante,* at 346–357 (dissenting opinion). The Amendment's protections do not depend on the breach of some abstract "expectation of privacy" whose contours are left to the judicial imagination. Much more concretely, it protects your "person," and your "houses, papers, and effects." Nor does your right to bring a Fourth Amendment claim depend on whether a judge happens to agree that your subjective expectation to privacy is a "reasonable" one. Under its plain terms, the Amendment grants you the right to invoke its guarantees whenever one of your protected things (your person, your house, your papers, or your effects) is unreasonably searched or seized. Period.

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History too holds problems for *Katz*. Little like it can be found in the law that led to the adoption of the Fourth Amendment or in this Court's jurisprudence until the late 1960s. The Fourth Amendment came about in response to a trio of 18th-century cases "well known to the men who wrote and ratified the Bill of Rights, [and] famous throughout the colonial population." Stuntz, The Substantive Origins of Criminal Procedure, 105 Yale L. J. 393, 397 (1995). The first two were English cases invalidating the Crown's use of

general warrants to enter homes and search papers. *Entick* v. *Carrington*, 19 How. St. Tr. 1029 (K. B. 1765); *Wilkes* v. *Wood*, 19 How. St. Tr. 1153 (K. B. 1763); see W. Cuddihy, The Fourth Amendment: Origins and Original Meaning 439–487 (2009); *Boyd* v. *United States*, 116 U. S. 616, 625–630 (1886). The third was American: the Boston Writs of Assistance Case, which sparked colonial outrage at the use of writs permitting government agents to enter houses and businesses, breaking open doors and chests along the way, to conduct searches and seizures—and to force third parties to help them. Stuntz, *supra*, at 404–409; M. Smith, The Writs of Assistance Case (1978). No doubt the colonial outrage engendered by these cases rested in part on the government's intrusion upon privacy. But the framers chose not to protect privacy in some ethereal way dependent on judicial intuitions. They chose instead to protect privacy in particular places and things—"persons, houses, papers, and effects"—and against particular threats—"unreasonable" governmental "searches and seizures." See *Entick*, *supra*, at 1066 ("Papers are the owner's goods and chattels: they are his dearest property; and so far from enduring a seizure, that they will hardly bear an inspection"); see also *ante*, p. 342 (THOMAS, J., dissenting).

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Even taken on its own terms, *Katz* has never been sufficiently justified. In fact, we still don't even know what its "reasonable expectation of privacy" test *is*. Is it supposed to pose an empirical question (what privacy expectations do people *actually* have) or a normative one (what expectations *should* they have)? Either way brings problems. If the test is supposed to be an empirical one, it's unclear why judges rather than legislators should conduct it. Legislators are responsive to their constituents and have institutional resources designed to help them discern and enact majoritarian preferences. Politically insulated judges come armed with only the attorneys' briefs, a few law clerks, and

their own idiosyncratic experiences. They are hardly the representative group you'd expect (or want) to be making empirical judgments for hundreds of millions of people. Unsurprisingly, too, judicial judgments often fail to reflect public views. See Slobogin & Schumacher, Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society," 42 Duke L. J. 727, 732, 740–742 (1993). Consider just one example. Our cases insist that the seriousness of the offense being investigated does *not* reduce Fourth Amendment protection. *Mincey* v. *Arizona*, 437 U. S. 385, 393–394 (1978). Yet scholars suggest that most people *are* more tolerant of police intrusions when they investigate more serious crimes. See Blumenthal, Adya, & Mogle, The Multiple Dimensions of Privacy: Testing Lay "Expectations of Privacy," 11 U. Pa. J. Const. L. 331, 352–353 (2009). And I very much doubt that this Court would be willing to adjust its *Katz* cases to reflect these findings even if it believed them.

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Maybe, then, the *Katz* test should be conceived as a normative question. But if that's the case, why (again) do judges, rather than legislators, get to determine whether society *should be* prepared to recognize an expectation of privacy as legitimate? Deciding what privacy interests *should be* recognized often calls for a pure policy choice, many times between incommensurable goods—between the value of privacy in a particular setting and society's interest in combating crime. Answering questions like that calls for the exercise of raw political will belonging to legislatures, not the legal judgment proper to courts. See The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton). When judges abandon legal judgment for political will we not only risk decisions where "reasonable expectations of privacy" come to bear "an uncanny resemblance to those expectations of privacy" shared by Members of this Court. *Minnesota* v.

Carter, 525 U. S. 83, 97 (1998) (Scalia, J., concurring). We also risk undermining public confidence in the courts themselves.

My concerns about *Katz* come with a caveat. *Sometimes*, I accept, judges may be able to discern and describe existing societal norms. See, *e. g.*, *Florida* v. *Jardines*, 569 U. S. 1, 8 (2013) (inferring a license to enter on private property from the "'habits of the country'" (quoting *McKee* v. *Gratz*, 260 U. S. 127, 136 (1922))); Sachs, Finding Law, 107 Cal. L. Rev. 527 (2019). That is particularly true when the judge looks to positive law rather than intuition for guidance on social norms. See *Byrd* v. *United States*, 584 U. S. 395, 405 (2018) ("general property-based concept[s] guid[e the] resolution of this case"). So there may be *some* occasions where *Katz* is capable of principled application—though it may simply wind up approximating the more traditional option I will discuss in a moment. Sometimes it may also be possible to apply *Katz* by analogizing from precedent when the line between an existing case and a new fact pattern is short and direct. But so far this Court has declined to tie itself to any significant restraints like these. See *ante*, at 304, n. 1 ("[W]hile property rights are often informative, our cases by no means suggest that such an interest is 'fundamental' or 'dispositive' in determining which expectations of privacy are legitimate").

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As a result, *Katz* has yielded an often unpredictable—and sometimes unbelievable—jurisprudence. *Smith* and *Miller* are only two examples; there are many others. Take *Florida* v. *Riley*, 488 U. S. 445 (1989), which says that a police helicopter hovering 400 feet above a person's property invades no reasonable expectation of privacy. Try that one out on your neighbors. Or *California* v. *Greenwood*, 486 U. S. 35 (1988), which holds that a person has no reasonable expectation of privacy in the garbage he puts out for collection. In that case, the Court said that the homeowners

forfeited their privacy interests because "[i]t is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public." *Id.*, at 40 (footnotes omitted). But the habits of raccoons don't prove much about the habits of the country. I doubt, too, that most people spotting a neighbor rummaging through their garbage would think they lacked reasonable grounds to confront the rummager. Making the decision all the stranger, California state law expressly *protected* a homeowner's property rights in discarded trash. *Id.*, at 43. Yet rather than defer to that as evidence of the people's habits and reasonable expectations of privacy, the Court substituted its own curious judgment.

Resorting to *Katz* in data privacy cases threatens more of the same. Just consider. The Court today says that judges should use *Katz*'s reasonable expectation of privacy test to decide what Fourth Amendment rights people have in cell-site location information, explaining that "no single rubric definitively resolves which expectations of privacy are entitled to protection." *Ante*, at 304. But then it offers a twist. Lower courts should be sure to add two special principles to their *Katz* calculus: the need to avoid "arbitrary power" and the importance of "plac[ing] obstacles in the way of a too permeating police surveillance." *Ante*, at 305 (internal quotation marks omitted). While surely laudable, these principles don't offer lower courts much guidance. The Court does not tell us, for example, how far to carry either principle or how to weigh them against the legitimate needs of law enforcement. At what point does access to electronic data amount to "arbitrary" authority? When does police surveillance become "'too permeating'"? And what sort of "obstacles" should judges "place" in law enforcement's path when it does? We simply do not know.

The Court's application of these principles supplies little more direction. The Court declines to say whether there is

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any sufficiently limited period of time "for which the Government may obtain an individual's historical [location information] free from Fourth Amendment scrutiny." *Ante*, at 310, n. 3; see *ante*, at 309–313. But then it tells us that access to seven days' worth of information *does* trigger Fourth Amendment scrutiny—even though here the carrier "produced only two days of records." *Ante*, at 310, n. 3. Why is the relevant fact the seven days of information the government *asked for* instead of the two days of information the government *actually saw*? Why seven days instead of ten or three or one? And in what possible sense did the government "search" five days' worth of location information it was never even sent? We do not know.

Later still, the Court adds that it can't say whether the Fourth Amendment is triggered when the government collects "real-time CSLI or 'tower dumps' (a download of information on all the devices that connected to a particular cell site during a particular interval)." *Ante*, at 316. But what distinguishes historical data from real-time data, or seven days of a single person's data from a download of *everyone's* data over some indefinite period of time? Why isn't a tower dump the *paradigmatic* example of "too permeating police surveillance" and a dangerous tool of "arbitrary" authority—the touchstones of the majority's modified *Katz* analysis? On what possible basis could such mass data collection survive the Court's test while collecting a single person's data does not? Here again we are left to guess. At the same time, though, the Court offers some firm assurances. It tells us its decision does *not* "call into question conventional surveillance techniques and tools, such as security cameras." *Ante*, at 316. That, however, just raises more questions for lower courts to sort out about what techniques qualify as "conventional" and why those techniques would be okay *even if* they lead to "permeating police surveillance" or "arbitrary police power."

Nor is this the end of it. After finding a reasonable expectation of privacy, the Court says there's still more work to

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do. Courts must determine whether to "extend" *Smith* and *Miller* to the circumstances before them. *Ante*, at 309–310, 313–316. So apparently *Smith* and *Miller* aren't quite left for dead; they just no longer have the clear reach they once did. How do we measure their new reach? The Court says courts now must conduct a *second Katz*-like balancing inquiry, asking whether the fact of disclosure to a third party outweighs privacy interests in the "category of information" so disclosed. *Ante*, at 312, 313–316. But how are lower courts supposed to weigh these radically different interests? Or assign values to different categories of information? All we know is that historical cell-site location information (for seven days, anyway) escapes *Smith*'s and *Miller*'s shorn grasp, while a lifetime of bank or phone records does not. As to any other kind of information, lower courts will have to stay tuned.

In the end, our lower court colleagues are left with two amorphous balancing tests, a series of weighty and incommensurable principles to consider in them, and a few illustrative examples that seem little more than the product of judicial intuition. In the Court's defense, though, we have arrived at this strange place not because the Court has misunderstood *Katz*. Far from it. We have arrived here because this is where *Katz* inevitably leads.

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There is another way. From the founding until the 1960s, the right to assert a Fourth Amendment claim didn't depend on your ability to appeal to a judge's personal sensibilities about the "reasonableness" of your expectations or privacy. It was tied to the law. *Jardines*, 569 U. S., at 11; *United States* v. *Jones*, 565 U. S. 400, 405 (2012). The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." True to those words and their original understanding, the traditional approach asked if a house, paper, or effect was *yours* under law. No more was

needed to trigger the Fourth Amendment. Though now often lost in *Katz*'s shadow, this traditional understanding persists. *Katz* only "supplements, rather than displaces, the traditional property-based understanding of the Fourth Amendment." *Byrd*, 584 U. S., at 403–404 (internal quotation marks omitted); *Jardines*, *supra*, at 11 (same); *Soldal* v. *Cook County*, 506 U. S. 56, 64 (1992) (*Katz* did not "snuf[f] out the previously recognized protection for property under the Fourth Amendment").

Beyond its provenance in the text and original understanding of the Amendment, this traditional approach comes with other advantages. Judges are supposed to decide cases based on "democratically legitimate sources of law"—like positive law or analogies to items protected by the enacted Constitution—rather than "their own biases or personal policy preferences." Pettys, Judicial Discretion in Constitutional Cases, 26 J. L. & Pol. 123, 127 (2011). A Fourth Amendment model based on positive legal rights "carves out significant room for legislative participation in the Fourth Amendment context," too, by asking judges to consult what the people's representatives have to say about their rights. Baude & Stern, 129 Harv. L. Rev., at 1852. Nor is this approach hobbled by *Smith* and *Miller*, for those cases are just *limitations* on *Katz*, addressing only the question whether individuals have a reasonable expectation of privacy in materials they share with third parties. Under this more traditional approach, Fourth Amendment protections for your papers and effects do not automatically disappear just because you share them with third parties.

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Given the prominence *Katz* has claimed in our doctrine, American courts are pretty rusty at applying the traditional approach to the Fourth Amendment. We know that if a house, paper, or effect is yours, you have a Fourth Amendment interest in its protection. But what kind of legal interest is sufficient to make something *yours*? And what source of law determines that? Current positive law? The

common law at 1791, extended by analogy to modern times? Both? See *Byrd*, *supra*, at 412–413 (THOMAS, J., concurring); cf. Re, The Positive Law Floor, 129 Harv. L. Rev. Forum 313 (2016). Much work is needed to revitalize this area and answer these questions. I do not begin to claim all the answers today, but (unlike with *Katz*) at least I have a pretty good idea what the questions *are*. And it seems to me a few things can be said.

First, the fact that a third party has access to or possession of your papers and effects does not necessarily eliminate your interest in them. Ever hand a private document to a friend to be returned? Toss your keys to a valet at a restaurant? Ask your neighbor to look after your dog while you travel? You would not expect the friend to share the document with others; the valet to lend your car to his buddy; or the neighbor to put Fido up for adoption. Entrusting your stuff to others is a *bailment*. A bailment is the "delivery of personal property by one person (the *bailor*) to another (the *bailee*) who holds the property for a certain purpose." Black's Law Dictionary 169 (10th ed. 2014); J. Story, Commentaries on the Law of Bailments § 2, p. 2 (1832) ("[A] bailment is a delivery of a thing in trust for some special object or purpose, and upon a contract, expressed or implied, to conform to the object or purpose of the trust"). A bailee normally owes a legal duty to keep the item safe, according to the terms of the parties' contract if they have one, and according to the "implication[s] from their conduct" if they don't. 8 C. J. S., Bailments § 36, pp. 468–469 (2017). A bailee who uses the item in a different way than he's supposed to, or against the bailor's instructions, is liable for conversion. *Id.*, § 43, at 481; see *Goad* v. *Harris*, 207 Ala. 357, 92 So. 546 (1922); *Knight* v. *Seney*, 290 Ill. 11, 17, 124 N. E. 813, 815–816 (1919); *Baxter* v. *Woodward*, 191 Mich. 379, 385, 158 N. W. 137, 139 (1916). This approach is quite different from *Smith*'s and *Miller*'s (counter)-intuitive approach to reasonable expectations of privacy; where those cases extin-

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guish Fourth Amendment interests once records are given to a third party, property law may preserve them.

Our Fourth Amendment jurisprudence already reflects this truth. In *Ex parte Jackson*, 96 U. S. 727 (1878), this Court held that sealed letters placed in the mail are "as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles." *Id.*, at 733. The reason, drawn from the Fourth Amendment's text, was that "[t]he constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to *their papers*, thus closed against inspection, *wherever they may be*." *Ibid.* (emphasis added). It did not matter that letters were bailed to a third party (the government, no less). The sender enjoyed the same Fourth Amendment protection as he does "when papers are subjected to search in one's own household." *Ibid.*

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These ancient principles may help us address modern data cases too. Just because you entrust your data—in some cases, your modern-day papers and effects—to a third party may not mean you lose any Fourth Amendment interest in its contents. Whatever may be left of *Smith* and *Miller*, few doubt that e-mail should be treated much like the traditional mail it has largely supplanted—as a bailment in which the owner retains a vital and protected legal interest. See *ante*, at 332 (KENNEDY, J., dissenting) (noting that enhanced Fourth Amendment protection may apply when the "modern-day equivalents of an individual's own 'papers' or 'effects' . . . are held by a third party" through "bailment"); *ante*, at 383, n. 6 (ALITO, J., dissenting) (reserving the question whether Fourth Amendment protection may apply in the case of "bailment" or when "someone has entrusted papers that he or she owns to the safekeeping of another"); *United States* v. *Warshak*, 631 F. 3d 266, 285–286 (CA6 2010) (relying on an analogy to *Jackson* to extend Fourth Amendment protection to e-mail held by a third party service provider).

Second, I doubt that complete ownership or exclusive control of property is always a necessary condition to the assertion of a Fourth Amendment right. Where houses are concerned, for example, individuals can enjoy Fourth Amendment protection without fee simple title. Both the text of the Amendment and the common-law rule support that conclusion. "People call a house 'their' home when legal title is in the bank, when they rent it, and even when they merely occupy it rent free." *Carter*, 525 U. S., at 95–96 (Scalia, J., concurring). That rule derives from the common law. *Oystead* v. *Shed*, 13 Mass. 520, 523 (1816) (explaining, citing "[t]he very learned judges, *Foster*, *Hale*, and *Coke*," that the law "would be as much disturbed by a forcible entry to arrest a boarder or a servant, who had acquired, by contract, express or implied, a right to enter the house at all times, and to remain in it as long as they please, as if the object were to arrest the master of the house or his children"). That is why tenants and resident family members—though they have no legal title—have standing to complain about searches of the houses in which they live. *Chapman* v. *United States*, 365 U. S. 610, 616–617 (1961); *Bumper* v. *North Carolina*, 391 U. S. 543, 548, n. 11 (1968).

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Another point seems equally true: Just because you *have* to entrust a third party with your data doesn't necessarily mean you should lose all Fourth Amendment protections in it. Not infrequently one person comes into possession of someone else's property without the owner's consent. Think of the finder of lost goods or the policeman who impounds a car. The law recognizes that the goods and the car still belong to their true owners, for "where a person comes into lawful possession of the personal property of another, even though there is no formal agreement between the property's owner and its possessor, the possessor will become a constructive bailee when justice so requires." *Christensen* v. *Hoover*, 643 P. 2d 525, 529 (Colo. 1982); Laidlaw, Principles of Bailment, 16 Cornell L. Q. 286

(1931). At least some of this Court's decisions have already suggested that use of technology is functionally compelled by the demands of modern life, and in that way the fact that we store data with third parties may amount to a sort of involuntary bailment too. See *ante*, at 311–312 (majority opinion); *Riley* v. *California*, 573 U. S. 373, 385 (2014).

Third, positive law may help provide detailed guidance on evolving technologies without resort to judicial intuition. State (or sometimes federal) law often creates rights in both tangible and intangible things. See *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1001 (1984). In the context of the Takings Clause we often ask whether those state-created rights are sufficient to make something someone's property for constitutional purposes. See *id.*, at 1001–1003; *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, 590–595 (1935). A similar inquiry may be appropriate for the Fourth Amendment. Both the States and federal government are actively legislating in the area of third party data storage and the rights users enjoy. See, *e. g.*, Stored Communications Act, 18 U. S. C. § 2701 *et seq.*; Tex. Prop. Code Ann. § 111.004(12) (West 2014) (defining "[p]roperty" to include "property held in any digital or electronic medium"). State courts are busy expounding common-law property principles in this area as well. *E. g.*, *Ajemian* v. *Yahoo!, Inc.*, 478 Mass. 169, 170, 84 N. E. 3d 766, 768 (2017) (e-mail account is a "form of property often referred to as a 'digital asset' "); *Eysoldt* v. *ProScan Imaging*, 194 Ohio App. 3d 630, 638, 2011-Ohio-2359, 957 N. E. 2d 780, 786 (permitting action for conversion of web account as intangible property). If state legislators or state courts say that a digital record has the attributes that normally make something property, that may supply a sounder basis for judicial decisionmaking than judicial guesswork about societal expectations.

Fourth, while positive law may help establish a person's Fourth Amendment interest there may be some circumstances where positive law cannot be used to defeat it.

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Ex parte Jackson reflects that understanding. There this Court said that "[n]o law of Congress" could authorize letter carriers "to invade the secrecy of letters." 96 U. S., at 733. So the post office couldn't impose a regulation dictating that those mailing letters surrender all legal interests in them once they're deposited in a mailbox. If that is right, *Jackson* suggests the existence of a constitutional floor below which Fourth Amendment rights may not descend. Legislatures cannot pass laws declaring your house or papers to be your property except to the extent the police wish to search them without cause. As the Court has previously explained, "we must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" *Jones*, 565 U. S., at 406 (quoting *Kyllo* v. *United States*, 533 U. S. 27, 34 (2001)). Nor does this mean protecting only the specific rights known at the founding; it means protecting their modern analogues too. So, for example, while thermal imaging was unknown in 1791, this Court has recognized that using that technology to look inside a home constitutes a Fourth Amendment "search" of that "home" no less than a physical inspection might. *Id.*, at 40.

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Fifth, this constitutional floor may, in some instances, bar efforts to circumvent the Fourth Amendment's protection through the use of subpoenas. No one thinks the government can evade *Jackson*'s prohibition on opening sealed letters without a warrant simply by issuing a subpoena to a postmaster for "all letters sent by John Smith" or, worse, "all letters sent by John Smith concerning a particular transaction." So the question courts will confront will be this: What other kinds of records are sufficiently similar to letters in the mail that the same rule should apply?

It may be that, as an original matter, a subpoena requiring the recipient to produce records wasn't thought of as a "search or seizure" by the government implicating the Fourth Amendment, see *ante*, at 362–371 (opinion of ALITO, J.),

but instead as an act of compelled self-incrimination implicating the Fifth Amendment, see *United States* v. *Hubbell*, 530 U. S. 27, 49–55 (2000) (THOMAS, J., concurring); Nagareda, Compulsion "To Be a Witness" and the Resurrection of *Boyd*, 74 N. Y. U. L. Rev. 1575, 1619, and n. 172 (1999). But the common law of searches and seizures does not appear to have confronted a case where private documents equivalent to a mailed letter were entrusted to a bailee and then subpoenaed. As a result, "[t]he common-law rule regarding subpoenas for documents held by third parties entrusted with information from the target is . . . unknown and perhaps unknowable." Dripps, Perspectives on the Fourth Amendment Forty Years Later: Toward the Realization of an Inclusive Regulatory Model, 100 Minn. L. Rev. 1885, 1922 (2016). Given that (perhaps insoluble) uncertainty, I am content to adhere to *Jackson* and its implications for now.

To be sure, we must be wary of returning to the doctrine of *Boyd* v. *United States*, 116 U. S. 616. *Boyd* invoked the Fourth Amendment to restrict the use of subpoenas even for ordinary business records and, as JUSTICE ALITO notes, eventually proved unworkable. See *ante*, at 373 (dissenting opinion); 3 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 8.7(a), pp. 185–187 (4th ed. 2015). But if we were to overthrow *Jackson* too and deny Fourth Amendment protection to *any* subpoenaed materials, we would do well to reconsider the scope of the Fifth Amendment while we're at it. Our precedents treat the right against self-incrimination as applicable only to testimony, not the production of incriminating evidence. See *Fisher* v. *United States*, 425 U. S. 391, 401 (1976). But there is substantial evidence that the privilege against self-incrimination was also originally understood to protect a person from being forced to turn over potentially incriminating evidence. Nagareda, *supra*, at 1605–1623; *Rex* v. *Purnell*, 96 Eng. Rep. 20 (K. B. 1748); C. Slobogin, Privacy at Risk 145 (2007).

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What does all this mean for the case before us? To start, I cannot fault the Sixth Circuit for holding that *Smith* and *Miller* extinguish any *Katz*-based Fourth Amendment interest in third party cell-site data. That is the plain effect of their categorical holdings. Nor can I fault the Court today for its implicit but unmistakable conclusion that the rationale of *Smith* and *Miller* is wrong; indeed, I agree with that. The Sixth Circuit was powerless to say so, but this Court can and should. At the same time, I do not agree with the Court's decision today to keep *Smith* and *Miller* on life support and supplement them with a new and multilayered inquiry that seems to be only *Katz*-squared. Returning there, I worry, promises more trouble than help. Instead, I would look to a more traditional Fourth Amendment approach. Even if *Katz* may still supply one way to prove a Fourth Amendment interest, it has never been the only way. Neglecting more traditional approaches may mean failing to vindicate the full protections of the Fourth Amendment.

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Our case offers a cautionary example. It seems to me entirely possible a person's cell-site data could qualify as *his* papers or effects under existing law. Yes, the telephone carrier holds the information. But 47 U. S. C. § 222 designates a customer's cell-site location information as "customer proprietary network information" (CPNI), § 222(h)(1)(A), and gives customers certain rights to control use of and access to CPNI about themselves. The statute generally forbids a carrier to "use, disclose, or permit access to individually identifiable" CPNI without the customer's consent, except as needed to provide the customer's telecommunications services. § 222(c)(1). It also requires the carrier to disclose CPNI "upon affirmative written request by the customer, to any person designated by the customer." § 222(c)(2). Congress even afforded customers a private cause of action for damages against carriers who violate the Act's terms. § 207.

Plainly, customers have substantial legal interests in this information, including at least some right to include, exclude, and control its use. Those interests might even rise to the level of a property right.

The problem is that we do not know anything more. Before the district court and court of appeals, Mr. Carpenter pursued only a *Katz* "reasonable expectations" argument. He did not invoke the law of property or any analogies to the common law, either there or in his petition for certiorari. Even in his merits brief before this Court, Mr. Carpenter's discussion of his positive law rights in cell-site data was cursory. He offered no analysis, for example, of what rights state law might provide him in addition to those supplied by §222. In these circumstances, I cannot help but conclude—reluctantly—that Mr. Carpenter forfeited perhaps his most promising line of argument.

Unfortunately, too, this case marks the second time this Term that individuals have forfeited Fourth Amendment arguments based on positive law by failing to preserve them. See *Byrd*, 584 U. S., at 404. Litigants have had fair notice since at least *United States* v. *Jones* (2012) and *Florida* v. *Jardines* (2013) that arguments like these may vindicate Fourth Amendment interests even where *Katz* arguments do not. Yet the arguments have gone unmade, leaving courts to the usual *Katz* hand waving. These omissions do not serve the development of a sound or fully protective Fourth Amendment jurisprudence.

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Syllabus

WESTERNGECO LLC *v.* ION GEOPHYSICAL CORP.

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

No. 16–1011. Argued April 16, 2018—Decided June 22, 2018

Petitioner WesternGeco LLC owns patents for a system used to survey the ocean floor. Respondent ION Geophysical Corp. began selling a competing system that was built from components manufactured in the United States, shipped to companies abroad, and assembled there into a system indistinguishable from WesternGeco's. WesternGeco sued for patent infringement under 35 U. S. C. §§ 271(f)(1) and (f)(2). The jury found ION liable and awarded WesternGeco damages in royalties and lost profits under § 284. ION moved to set aside the verdict, arguing that WesternGeco could not recover damages for lost profits because § 271(f) does not apply extraterritorially. The District Court denied the motion, but the Federal Circuit reversed. ION was liable for infringement under § 271(f)(2), the court reasoned, but § 271(f) does not allow patent owners to recover for lost foreign profits. On remand from this Court in light of *Halo Electronics, Inc.* v. *Pulse Electronics, Inc.*, 579 U. S. 93, the Federal Circuit reinstated the portion of its decision regarding § 271(f)'s extraterritoriality.

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Held: WesternGeco's award for lost profits was a permissible domestic application of § 284 of the Patent Act. Pp. 412–417.

(a) The presumption against extraterritoriality assumes that federal statutes "apply only within the territorial jurisdiction of the United States." *Foley Bros., Inc.* v. *Filardo*, 336 U. S. 281, 285. The two-step framework for deciding extraterritoriality questions asks, first, "whether the presumption . . . has been rebutted." *RJR Nabisco, Inc.* v. *European Community*, 579 U. S. 325, 337. If not, the second step asks "whether the case involves a domestic application of the statute." *Ibid.* Courts make the second determination by identifying "the statute's 'focus'" and then asking whether the conduct relevant to that focus occurred in United States territory. *Ibid.* If so, the case involves a permissible domestic application of the statute. It is "usually . . . preferable" to begin with step one, but courts have the discretion to begin with step two "in appropriate cases." *Id.*, at 338, n. 5. The Court exercises that discretion here. Pp. 412–413.

(b) When determining "the statute's 'focus'"—*i. e.*, "the objec[t] of [its] solicitude," *Morrison* v. *National Australia Bank Ltd.*, 561 U. S. 247, 267—the provision at issue is not analyzed in a vacuum. If it works

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in tandem with other provisions, it must be assessed in concert with those provisions. Section 284, the Patent Act's general damages provision, states that "the court shall award the claimant damages adequate to compensate for the infringement." The focus of that provision is "the infringement." The "overriding purpose" of § 284 is to "affor[d] patent owners complete compensation" for infringements. *General Motors Corp.* v. *Devex Corp.*, 461 U. S. 648, 655. Section 271 identifies several ways that a patent can be infringed. Thus, to determine § 284's focus in a given case, the type of infringement that occurred must be identified. Here, § 271(f)(2) was the basis for WesternGeco's infringement claim and the lost-profits damages that it received. That provision regulates the domestic act of "suppl[ying] in or from the United States," and this Court has acknowledged that it vindicates domestic interests, see, *e. g.*, *Microsoft Corp.* v. *AT&T Corp.*, 550 U. S. 437, 457. In sum, the focus of § 284 in a case involving infringement under § 271(f)(2) is on the act of exporting components from the United States. So the conduct in this case that is relevant to the statutory focus clearly occurred in the United States. Pp. 413–416.

(c) ION's contrary arguments are unpersuasive. The award of damages is not the statutory focus here. The damages themselves are merely the means by which the statute achieves its end of remedying infringements, and the overseas events giving rise to the lost-profits damages here were merely incidental to the infringement. In asserting that damages awards for foreign injuries are always an extraterritorial application of a damages provision, ION misreads a portion of *RJR Nabisco* that interpreted a substantive element of a cause of action, not a remedial damages provision. See 579 U. S., at 346. Pp. 416–417.

837 F. 3d 1358, reversed and remanded.

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THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, ALITO, SOTOMAYOR, and KAGAN, JJ., joined. GORSUCH, J., filed a dissenting opinion, in which, BREYER, J., joined, *post*, p. 418.

Paul D. Clement argued the cause for petitioner. With him on the briefs were *Gregg F. LoCascio*, *John C. O'Quinn*, *William H. Burgess*, and *Timothy K. Gilman*.

Zachary D. Tripp argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Francisco*, *Acting Assistant Attorney General Readler*, *Deputy Solicitor General Stewart*, *Mark R. Freeman*, and *Joseph F. Busa*.

Kannon K. Shanmugam argued the cause for respondent. With him on the brief were *David I. Berl*, *Amy Mason Saharia*, *Masha G. Hansford*, *William T. Marks*, *Danielle J. Healey*, and *Justin M. Barnes*.*

JUSTICE THOMAS delivered the opinion of the Court.

Under the Patent Act, a company can be liable for patent infringement if it ships components of a patented invention overseas to be assembled there. See 35 U. S. C. § 271(f)(2). A patent owner who proves infringement under this provision is entitled to recover damages. § 284. The question in this case is whether these statutes allow the patent owner to recover for lost foreign profits. We hold that they do.

I

The Patent Act gives patent owners a "civil action for infringement." § 281. Section 271 outlines several types of infringement. The general infringement provision, § 271(a), covers most infringements that occur "within the United States." The subsection at issue in this case, § 271(f), "ex-

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*Briefs of *amici curiae* urging reversal were filed for the Intellectual Property Law Association of Chicago by *Donald W. Rupert*, *John Linzer*, and *David L. Applegate*; for Power Integrations, Inc., by *Alexandra A. E. Shapiro*; and for Stephen Yelderman by *Rachel C. Hughey* and *Mr. Yelderman*, *pro se*.

Briefs of *amici curiae* urging affirmance were filed for the Electronic Frontier Foundation et al. by *Daniel K. Nazer*, *Charles Duan*, *Bernard Chao*, and *Brian J. Love*; and for Fairchild Semiconductor International, Inc., et al. by *Kathleen M. Sullivan*, *Cleland B. Welton II*, and *Derek L. Shaffer*.

Briefs of *amici curiae* were filed for the American Intellectual Property Law Association by *David W. Long*; for the Houston Intellectual Property Law Association by *Iftikhar Ahmed*; for Intellectual Property Law Scholars by *Sarah M. Shalf*, *Timothy R. Holbrook*, and *David Hricik*; for the Intellectual Property Owners Association by *D. Bartley Eppenauer*, *Kyle E. Friesen*, *Steven W. Miller*, and *Mark W. Lauroesch*; and for the New York Intellectual Property Law Association by *Irena Royzman*, *Jordan M. Engelhardt*, *Jonathan D. Schenker*, and *Robert J. Rando*.

pands the definition of infringement to include supplying from the United States a patented invention's components." *Microsoft Corp.* v. *AT&T Corp.*, 550 U. S. 437, 444–445 (2007). It contains two provisions that "work in tandem" by addressing "different scenarios." *Life Technologies Corp.* v. *Promega Corp.*, 580 U. S. 140, 150 (2017). Section 271(f)(1) addresses the act of exporting a substantial portion of an invention's components:

> "Whoever without authority supplies or causes to be supplied in or from the United States all or a substantial portion of the components of a patented invention, where such components are uncombined in whole or in part, in such manner as to actively induce the combination of such components outside of the United States in a manner that would infringe the patent if such combination occurred within the United States, shall be liable as an infringer."

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Section 271(f)(2), the provision at issue here, addresses the act of exporting components that are specially adapted for an invention:

> "Whoever without authority supplies or causes to be supplied in or from the United States any component of a patented invention that is especially made or especially adapted for use in the invention and not a staple article or commodity of commerce suitable for substantial noninfringing use, where such component is uncombined in whole or in part, knowing that such component is so made or adapted and intending that such component will be combined outside of the United States in a manner that would infringe the patent if such combination occurred within the United States, shall be liable as an infringer."

Patent owners who prove infringement under § 271 are entitled to relief under § 284, which authorizes "damages adequate to compensate for the infringement, but in no event

less than a reasonable royalty for the use made of the invention by the infringer."

II

Petitioner WesternGeco LLC owns four patents relating to a system that it developed for surveying the ocean floor. The system uses lateral-steering technology to produce higher quality data than previous survey systems. WesternGeco does not sell its technology or license it to competitors. Instead, it uses the technology itself, performing surveys for oil and gas companies. For several years, WesternGeco was the only surveyor that used such lateral-steering technology.

In late 2007, respondent ION Geophysical Corporation began selling a competing system. It manufactured the components for its competing system in the United States and then shipped them to companies abroad. Those companies combined the components to create a surveying system indistinguishable from WesternGeco's and used the system to compete with WesternGeco.

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WesternGeco sued for patent infringement under §§ 271(f)(1) and (f)(2). At trial, WesternGeco proved that it had lost 10 specific survey contracts due to ION's infringement. The jury found ION liable and awarded WesternGeco damages of $12.5 million in royalties and $93.4 million in lost profits. ION filed a post-trial motion to set aside the verdict, arguing that WesternGeco could not recover damages for lost profits because § 271(f) does not apply extraterritorially. The District Court denied the motion. 953 F. Supp. 2d 731, 755–756 (SD Tex. 2013).

On appeal, the Court of Appeals for the Federal Circuit reversed the award of lost-profits damages. *WesternGeco LLC* v. *ION Geophysical Corp.*, 791 F. 3d 1340, 1343 (2015).[1]

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[1] The Federal Circuit held that ION was liable for infringement under § 271(f)(2). *WesternGeco*, 791 F. 3d, at 1347–1349. It did not address whether ION was liable under § 271(f)(1). *Id.*, at 1348.

The Federal Circuit had previously held that § 271(a), the general infringement provision, does not allow patent owners to recover for lost foreign sales. See *id.*, at 1350–1351 (citing *Power Integrations, Inc.* v. *Fairchild Semiconductor Int'l, Inc.*, 711 F. 3d 1348 (CA Fed. 2013)). Section 271(f) should be interpreted the same way, the Federal Circuit reasoned, because it was "designed" to put patent infringers "in a similar position." *WesternGeco*, 791 F. 3d, at 1351. Judge Wallach dissented. See *id.*, at 1354–1364. WesternGeco petitioned for review in this Court. We granted the petition, vacated the Federal Circuit's judgment, and remanded for further consideration in light of our decision in *Halo Electronics, Inc.* v. *Pulse Electronics, Inc.*, 579 U. S. 93 (2016). *WesternGeco LLC* v. *ION Geophysical Corp.*, 579 U. S. 915 (2016).

On remand, the panel majority reinstated the portion of its decision regarding the extraterritoriality of § 271(f). 837 F. 3d 1358, 1361, 1364 (CA Fed. 2016). Judge Wallach dissented again, *id.*, at 1364–1369, and we granted certiorari again, 583 U. S. 1089 (2018). We now reverse.

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III

Courts presume that federal statutes "apply only within the territorial jurisdiction of the United States." *Foley Bros., Inc.* v. *Filardo*, 336 U. S. 281, 285 (1949). This principle, commonly called the presumption against extraterritoriality, has deep roots. See A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts § 43, p. 268 (2012) (tracing it to the medieval maxim *Statuta suo clauduntur territorio, nec ultra territorium disponunt*); *e. g.*, *United States* v. *Palmer*, 3 Wheat. 610, 631 (1818) (Marshall, C. J.) ("[G]eneral words must . . . be limited to cases within the jurisdiction of the state"). The presumption rests on "the commonsense notion that Congress generally legislates with domestic concerns in mind." *Smith* v. *United States*, 507 U. S. 197, 204, n. 5 (1993). And it prevents "unintended clashes between our laws and those of other nations which

could result in international discord." *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 248 (1991).

This Court has established a two-step framework for deciding questions of extraterritoriality. The first step asks "whether the presumption against extraterritoriality has been rebutted." *RJR Nabisco, Inc.* v. *European Community*, 579 U. S. 325, 337 (2016). It can be rebutted only if the text provides a "clear indication of an extraterritorial application." *Morrison* v. *National Australia Bank Ltd.*, 561 U. S. 247, 255 (2010). If the presumption against extraterritoriality has not been rebutted, the second step of our framework asks "whether the case involves a domestic application of the statute." *RJR Nabisco*, 579 U. S., at 337. Courts make this determination by identifying "the statute's 'focus'" and asking whether the conduct relevant to that focus occurred in United States territory. *Ibid.* If it did, then the case involves a permissible domestic application of the statute. See *ibid.*

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We resolve this case at step two. While "it will usually be preferable" to begin with step one, courts have the discretion to begin at step two "in appropriate cases." *Id.*, at 338, n. 5 (citing *Pearson* v. *Callahan*, 555 U. S. 223, 236–243 (2009)). One reason to exercise that discretion is if addressing step one would require resolving "difficult questions" that do not change "the outcome of the case," but could have far-reaching effects in future cases. See *id.*, at 236–237. That is true here. WesternGeco argues that the presumption against extraterritoriality should never apply to statutes, such as § 284, that merely provide a general damages remedy for conduct that Congress has declared unlawful. Resolving that question could implicate many other statutes besides the Patent Act. We therefore exercise our discretion to forgo the first step of our extraterritoriality framework.

A

Under the second step of our framework, we must identify "the statute's 'focus.'" *RJR Nabisco*, *supra*, at 337. The

focus of a statute is "the objec[t] of [its] solicitude," which can include the conduct it "seeks to 'regulate,'" as well as the parties and interests it "seeks to 'protec[t]'" or vindicate. *Morrison*, *supra*, at 267 (quoting *Superintendent of Ins. of N. Y.* v. *Bankers Life & Casualty Co.*, 404 U. S. 6, 12, 10 (1971)). "If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application" of the statute, "even if other conduct occurred abroad." *RJR Nabisco*, 579 U. S., at 337. But if the relevant conduct occurred in another country, "then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U. S. territory." *Ibid.*

When determining the focus of a statute, we do not analyze the provision at issue in a vacuum. See *Morrison*, *supra*, at 267–269. If the statutory provision at issue works in tandem with other provisions, it must be assessed in concert with those other provisions. Otherwise, it would be impossible to accurately determine whether the application of the statute in the case is a "domestic application." *RJR Nabisco*, 579 U. S., at 337. And determining how the statute has actually been applied is the whole point of the focus test. See *ibid.*

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Applying these principles here, we conclude that the conduct relevant to the statutory focus in this case is domestic. We begin with § 284. It provides a general damages remedy for the various types of patent infringement identified in the Patent Act. The portion of § 284 at issue here states that "the court shall award the claimant damages adequate to compensate for the infringement." We conclude that "the infringement" is the focus of this statute. As this Court has explained, the "overriding purpose" of § 284 is to "affor[d] patent owners complete compensation" for infringements. *General Motors Corp.* v. *Devex Corp.*, 461 U. S. 648, 655 (1983). "The question" posed by the statute is "'how much ha[s] the Patent Holder . . . suffered by the infringement.'"

Aro Mfg. Co. v. *Convertible Top Replacement Co.*, 377 U. S. 476, 507 (1964). Accordingly, the infringement is plainly the focus of § 284.

But that observation does not fully resolve this case, as the Patent Act identifies several ways that a patent can be infringed. See § 271. To determine the focus of § 284 in a given case, we must look to the type of infringement that occurred. We thus turn to § 271(f)(2), which was the basis for WesternGeco's infringement claim and the lost-profits damages that it received.[2]

Section 271(f)(2) focuses on domestic conduct. It provides that a company "shall be liable as an infringer" if it "supplies" certain components of a patented invention "in or from the United States" with the intent that they "will be combined outside of the United States in a manner that would infringe the patent if such combination occurred within the United States." The conduct that § 271(f)(2) regulates—*i. e.*, its focus—is the domestic act of "suppl[ying] in or from the United States." As this Court has acknowledged, § 271(f) vindicates domestic interests: It "was a direct response to a gap in our patent law," *Microsoft Corp.*, 550 U. S., at 457, and "reach[es] components that are manufactured in the United States but assembled overseas," *Life Technologies*, 580 U. S., at 151. As the Federal Circuit explained, § 271(f)(2) protects against "domestic entities who export components . . . from the United States." *WesternGeco*, 791 F. 3d, at 1351.

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In sum, the focus of § 284, in a case involving infringement under § 271(f)(2), is on the act of exporting components from the United States. In other words, the domestic infringement is "the objec[t] of the statute's solicitude" in this context. *Morrison*, *supra*, at 267. The conduct in this case that is relevant to that focus clearly occurred in the United States, as it was ION's domestic act of supplying the components that infringed WesternGeco's patents. Thus, the lost-

[2] Because the Federal Circuit did not address § 271(f)(1), see n. 1, *supra*, we limit our analysis to § 271(f)(2).

profits damages that were awarded to WesternGeco were a domestic application of § 284.

B

ION's arguments to the contrary are not persuasive. ION contends that the statutory focus here is "self-evidently on the award of damages." Brief for Respondent 22. While § 284 does authorize damages, what a statute authorizes is not necessarily its focus. Rather, the focus is "the objec[t] of the statute's solicitude"—which can turn on the "conduct," "parties," or interests that it regulates or protects. *Morrison*, 561 U. S., at 267. Here, the damages themselves are merely the means by which the statute achieves its end of remedying infringements. Similarly, ION is mistaken to assert that this case involves an extraterritorial application of § 284 simply because "lost-profits damages occurred extraterritorially, and foreign conduct subsequent to [ION's] infringement was necessary to give rise to the injury." Brief for Respondent 22. Those overseas events were merely incidental to the infringement. In other words, they do not have "primacy" for purposes of the extraterritoriality analysis. *Morrison*, *supra*, at 267.

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ION also draws on the conclusion in *RJR Nabisco* that "RICO damages claims" based "entirely on injury suffered abroad" involve an extraterritorial application of 18 U. S. C. § 1964(c). 579 U. S., at 354. From this principle, ION extrapolates a general rule that damages awards for foreign injuries are always an extraterritorial application of a damages provision. This argument misreads *RJR Nabisco*. That portion of *RJR Nabisco* interpreted a substantive element of a cause of action, not a remedial damages provision. See *id.*, at 346. It explained that a plaintiff could not bring a damages claim under § 1964(c) unless he could prove that he was "'injured in his business or property,'" which required proof of "a *domestic* injury." *Ibid.* Thus, *RJR Na-*

bisco was applying the presumption against extraterritoriality to interpret the scope of § 1964(c)'s injury requirement; it did not make any statements about damages—a separate legal concept.

Two of our colleagues contend that the Patent Act does not permit damages awards for lost foreign profits. *Post*, at 418 (GORSUCH, J., joined by BREYER, J., dissenting). Their position wrongly conflates legal injury with the damages arising from that injury. See *post*, at 418–420. And it is not the better reading of "the plain text of the Patent Act." *Post*, at 425. Taken together, § 271(f)(2) and § 284 allow the patent owner to recover for lost foreign profits. Under § 284, damages are "adequate" to compensate for infringement when they "plac[e the patent owner] in as good a position as he would have been in" if the patent had not been infringed. *General Motors Corp.*, 461 U. S., at 655. Specifically, a patent owner is entitled to recover "'the difference between [its] pecuniary condition after the infringement, and what [its] condition would have been if the infringement had not occurred.'" *Aro Mfg. Co.*, 377 U. S., at 507. This recovery can include lost profits. See *Yale Lock Mfg. Co.* v. *Sargent*, 117 U. S. 536, 552–553 (1886). And, as we hold today, it can include lost foreign profits when the patent owner proves infringement under § 271(f)(2).[3]

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We hold that WesternGeco's damages award for lost profits was a permissible domestic application of § 284. The judgment of the Federal Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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[3] In reaching this holding, we do not address the extent to which other doctrines, such as proximate cause, could limit or preclude damages in particular cases.

JUSTICE GORSUCH, with whom JUSTICE BREYER joins, dissenting.

The Court holds that WesternGeco's lost profits claim does not offend the judicially created presumption against the extraterritorial application of statutes. With that much, I agree. But I cannot subscribe to the Court's further holding that the terms of the Patent Act permit awards of this kind. In my view the Act's terms prohibit the lost profits sought in this case, whatever the general presumption against extraterritoriality applicable to all statutes might allow. So while the Federal Circuit may have relied in part on a mistaken extraterritoriality analysis, I respectfully submit it reached the right result in concluding that the Patent Act forecloses WesternGeco's claim for lost profits.

The reason is straightforward. A U. S. patent provides a lawful monopoly over the manufacture, use, and sale of an invention within this country only. Meanwhile, WesternGeco seeks lost profits for uses of its invention beyond our borders. Specifically, the company complains that it lost lucrative foreign surveying contracts because ION's customers used its invention overseas to steal that business. In measuring its damages, WesternGeco assumes it could have charged monopoly rents abroad premised on a U. S. patent that has no legal force there. Permitting damages of this sort would effectively allow U. S. patent owners to use American courts to extend their monopolies to foreign markets. That, in turn, would invite other countries to use their own patent laws and courts to assert control over our economy. Nothing in the terms of the Patent Act supports that result and much militates against it.

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Start with the key statutory language. Under the Patent Act, a patent owner enjoys "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) (emphasis added). Emphasizing the point, the Act proceeds to explain that to "infring[e] the patent" someone must "with-

out authority mak[e], us[e], offe[r] to sell, or sel[l] [the] patented invention, *within the United States*." § 271(a) (emphasis added). So making, using, or selling a patented invention *inside* the United States invites a claim for infringement. But those same acts *outside* the United States do not infringe a U. S. patent right.

These principles work their way into the statutory measure of damages too. A patent owner who proves infringement is entitled to receive "damages adequate to compensate *for the infringement*." § 284 (emphasis added). Because an infringement must occur within the United States, that means a plaintiff can recover damages for the making, using, or selling of its invention within the United States, but not for the making, using, or selling of its invention elsewhere.

What's the upshot for our case? The jury was free to award WesternGeco royalties for the infringing products ION produced in this country; indeed, ION has not challenged that award either here or before the Federal Circuit. If ION's infringement had cost WesternGeco sales in this country, it could have recovered for that harm too. At the same time, WesternGeco is not entitled to lost profits caused by the use of its invention *outside* the United States. That foreign conduct isn't "infringement" and so under § 284's plain terms isn't a proper basis for awarding "compensat[ion]." No doubt WesternGeco thinks it unfair that its invention was used to compete against it overseas. But that's simply not the kind of harm for which our patent laws provide compensation because a U. S. patent does not protect its owner from competition beyond our borders.

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This Court's precedents confirm what the statutory text indicates. In *Brown* v. *Duchesne*, 19 How. 183 (1857), the Court considered whether the use of an American invention on the high seas could support a damages claim under the U. S. patent laws. It said no. The Court explained that "the use of [an invention] outside of the jurisdiction of the United States is not an infringement of [the patent owner's]

rights," and so the patent owner "has no claim to any compensation for" that foreign use. *Id.*, at 195–196. A defendant must "compensate the patentee," the Court continued, only to the extent that it has "com[e] in competition with the [patent owner] where the [patent owner] was entitled to the exclusive use" of his invention—namely, within the United States. *Id.*, at 196. What held true there must hold true here. ION must compensate WesternGeco for its intrusion on WesternGeco's exclusive right to make, use, and sell its invention in the United States. But WesternGeco "has no claim to any compensation for" noninfringing uses of its invention "outside of the jurisdiction of the United States." *Id.*, at 195–196.[1]

Other precedents offer similar teachings. In *Birdsall* v. *Coolidge*, 93 U. S. 64 (1876), the Court explained that damages are supposed to compensate a patent owner for "the unlawful acts of the defendant." *Ibid.* To that end, the Court held, damages "shall be *precisely commensurate* with the injury suffered, neither more nor less." *Ibid.* (emphasis added). It's undisputed that the only injury WesternGeco suffered here came from ION's infringing activity within the United States. A damages award that sweeps much more broadly to cover third parties' noninfringing foreign uses can hardly be called "precisely commensurate" with that injury.

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[1] The Solicitor General disputes this reading of *Duchesne*. In his view, the Court indicated that, if a defendant "committed domestic infringement" by making the invention in the United States, the patent owner would have been entitled to recover for any subsequent use of the invention, including " 'the use of this improvement . . . on the high seas.' " Brief for United States as *Amicus Curiae* 17 (quoting *Duchesne*, 19 How., at 196). I am unpersuaded. The Court proceeded to explain that the "only use" of the invention that might require compensation was "in navigating the vessel into and out of [Boston] harbor, . . . *while she was within the jurisdiction of the United States*." *Id.*, at 196 (emphasis added). With respect to uses outside the United States, the Court made clear that "compensation" was unavailable. *Id.*, at 195–196. Tellingly, WesternGeco does not adopt the Solicitor General's reading of *Duchesne*—or even cite the case.

This Court's leading case on lost profit damages points the same way. In *Yale Lock Mfg. Co.* v. *Sargent*, 117 U. S. 536 (1886), the patent owner "availed himself of his exclusive right by keeping his patent a monopoly" and selling the invention himself. *Id.*, at 552. As damages for a competitor's infringement of the patent, the patent owner could recover "the difference between his pecuniary condition after the infringement, and what his condition would have been if the infringement had not occurred." *Ibid.* And that difference, the Court held, "is to be measured" by the additional profits the patent owner "would have realized from such sales if the infringement had not interfered with such monopoly." *Id.*, at 552–553. So, again, the Court tied the measure of damages to the degree of interference with the patent owner's exclusive right to make, use, and sell its invention. And, again, that much is missing here because foreign uses of WesternGeco's invention could not have interfered with its U. S. patent monopoly.[2]

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You might wonder whether § 271(f)(2) calls for a special exception to these general principles. WesternGeco certainly thinks it does. It's true, too, that § 271(f)(2) expressly refers to foreign conduct. The statute says that someone who exports a specialized component, "intending that [it] will be combined outside of the United States in a manner that

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[2] WesternGeco claims this Court permitted recovery based on foreign sales of an invention in *Manufacturing Co.* v. *Cowing*, 105 U. S. 253 (1882), but the Court never mentioned, much less decided, the issue. It merely observed, in passing, that the only markets for the invention at issue were "the oil-producing regions of Pennsylvania and Canada." *Id.*, at 256. The Court did not even say whether the Canada-bound products were actually sold *in* Canada (as opposed, say, to Canadian buyers in the United States). Meanwhile, in *Dowagiac Mfg. Co.* v. *Minnesota Moline Plow Co.*, 235 U. S. 641 (1915), the Court *rejected* "recovery of either profits or damages" for products sold in Canada. *Id.*, at 650. And while it distinguished *Cowing* on the ground that the defendants there had made the infringing articles in the United States, that hardly elevated *Cowing*'s failure to address the foreign sales issue into a reasoned decision on the question.

would infringe the patent if such combination occurred within the United States, shall be liable as an infringer." From this language, you might wonder whether § 271(f)(2) seeks to protect patent owners from the foreign conduct that occurred in this case.

It does not. Section 271(f)(2) modifies the circumstances when the law will treat an invention as having been made within the United States. It permits an infringement claim—and the damages that come with it—not only when someone produces the complete invention in this country for export, but also when someone exports key components of the invention for assembly abroad. A person who ships components from the United States intending they be assembled across the border is "liable" to the patent owner for royalties and lost profits the same as if he made the entire invention here. § 271(f)(2). But none of this changes the bedrock rule that *foreign uses* of an invention (even an invention made in this country) do not infringe a U. S. patent. Nor could it. For after § 271(f)(2)'s adoption, as before, patent rights exclude others from making, using, and selling an invention only "throughout the United States." § 154(a)(1).

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The history of the statute underscores the point. In *Deepsouth Packing Co.* v. *Laitram Corp.*, 406 U. S. 518 (1972), the Court held that a defendant did not "make" an invention within the United States when it produced the invention's components here but sold them to foreign buyers for final assembly abroad. *Id.*, at 527–528. The Court recognized that, if the defendant had assembled the parts in this country and then sold them to the foreign buyers, it would have unlawfully made and sold the invention within the United States. *Id.*, at 527. But because what it made and sold in this country "fell short" of the complete invention, the Court held, the patent laws did not prohibit its conduct. *Ibid.* The dissent, by contrast, argued that for all practical purposes the invention "was *made* in the United States" since "everything was accomplished in this country except putting the pieces together." *Id.*, at 533 (opinion of Black-

mun, J.). Apparently Congress agreed, for it then added § 271(f)(2) and made clear that someone who *almost makes* an invention in this country may be held liable as if he made the complete invention in this country. As the Solicitor General has explained, the new statute "effectively treat[ed] the *domestic supply* of the components of a patented invention for assembly abroad as tantamount to the *domestic manufacture* of the completed invention for export." Brief for United States as *Amicus Curiae* 22 (emphasis added). Section 271(f)(2) thus expands what qualifies as *making an invention in this country* but does nothing to suggest that U. S. patents protect against—much less guarantee compensation for—*uses abroad*.

Any suggestion that § 271(f)(2) provides protection against foreign uses would also invite anomalous results. It would allow greater recovery when a defendant exports a *component* of an invention in violation of § 271(f)(2) than when a defendant exports the *entire* invention in violation of § 271(a). And it would threaten to "'convert[] a single act of supply from the United States into a springboard for liability.'" *Microsoft Corp.* v. *AT&T Corp.*, 550 U. S. 437, 456 (2007). Here, for example, supplying a single infringing product from the United States would make ION responsible for any foreseeable harm its customers cause by using the product to compete against WesternGeco worldwide, even though WesternGeco's U. S. patent doesn't protect it from such competition. It's some springboard, too. The harm flowing from foreign uses in this case appears to outstrip wildly the harm inflicted by ION's domestic production: The jury awarded $93.4 million in lost profits from uses in 10 foreign surveys but only $12.5 million in royalties for 2,500 U. S.-made products.

Even more dramatic examples are not hard to imagine. Suppose a company develops a prototype microchip in a U. S. lab with the intention of manufacturing and selling the chip in a foreign country as part of a new smartphone. Suppose too that the chip infringes a U. S. patent and that the patent

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owner sells its own phone with its own chip overseas. Under the terms of the Patent Act, the developer commits an act of infringement by creating the prototype here, but the additional chips it makes and sells outside the United States do not qualify as infringement. Under WesternGeco's approach, however, the patent owner could recover any profits it lost to that foreign competition—or even three times as much, see §284—effectively giving the patent owner a monopoly over foreign markets through its U. S. patent. That's a very odd role for U. S. patent law to play in foreign markets, as "foreign law alone, not United States law," is supposed to govern the manufacture, use, and sale "of patented inventions in foreign countries." *Microsoft*, *supra*, at 456.

Worse yet, the tables easily could be turned. If our courts award compensation to U. S. patent owners for foreign uses where our patents don't run, what happens when foreign courts return the favor? Suppose our hypothetical microchip developer infringed a foreign patent in the course of developing its new chip abroad, but then mass produced and sold the chip in the United States. A foreign court might reasonably hold the U. S. company liable for infringing the foreign patent in the foreign country. But if it followed WesternGeco's theory, the court might then award monopoly rent damages reflecting a right to control the market for the chip in *this* country—even though the foreign patent lacks any legal force here. It is doubtful Congress would accept that kind of foreign "control over our markets." *Deepsouth*, *supra*, at 531. And principles of comity counsel against an interpretation of our patent laws that would interfere so dramatically with the rights of other nations to regulate their own economies. While Congress may seek to extend U. S. patent rights beyond our borders if it chooses, cf. §105 (addressing inventions made, used, and sold in outer space), nothing in the Patent Act fairly suggests that it has taken that step here.

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Today's decision unfortunately forecloses further consideration of these points. Although its opinion focuses almost entirely on why the presumption against extraterritoriality applicable to all statutes does not forbid the damages sought here, the Court asserts in a few cursory sentences that the Patent Act by its terms allows recovery for foreign uses in cases like this. See *ante*, at 417. In doing so, the Court does not address the textual or doctrinal analysis offered here. It does not explain why "damages adequate to compensate *for the infringement*" should include damages for harm from *noninfringing* uses. §284 (emphasis added). It does not try to reconcile its holding with the teachings of *Duchesne*, *Birdsall*, and *Yale Lock*. And it ignores *Microsoft*'s admonition that §271(f)(2) should not be read to create springboards for liability based on foreign conduct. Instead, the Court relies on two cases that do not come close to supporting its broad holding. In *General Motors Corp.* v. *Devex Corp.*, 461 U. S. 648 (1983), the Court held that prejudgment interest should normally be awarded so as to place the patent owner "in as good a position as [it] would have been in had the infringer" not infringed. *Id.*, at 655. Allowing recovery for foreign uses, however, puts the patent owner in a *better* position than it was before by allowing it to demand monopoly rents outside the United States as well as within. In *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 377 U. S. 476 (1964), meanwhile, the Court simply applied *Yale Lock*'s rule that a patent owner may recover "'the difference between his pecuniary condition after the infringement, and what his condition would have been if the infringement had not occurred.'" 377 U. S., at 507 (quoting *Yale Lock*, 117 U. S., at 552). As we've seen, that test seeks to measure the interference with the patent owner's lawful monopoly over *U. S.* markets alone.

By failing to heed the plain text of the Patent Act and the lessons of our precedents, the Court ends up assuming that patent damages run (literally) to the ends of the earth. It

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allows U. S. patent owners to extend their patent monopolies far beyond anything Congress has authorized and shields them from foreign competition U. S. patents were never meant to reach. Because I cannot agree that the Patent Act requires that result, I respectfully dissent.

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Syllabus

ORTIZ *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

No. 16–1423. Argued January 16, 2018—Decided June 22, 2018

Congress has long provided for specialized military courts to adjudicate charges against service members. Today, courts-martial hear cases involving crimes unconnected with military service. They are also subject to several tiers of appellate review, and thus are part of an integrated "court-martial system" that resembles civilian structures of justice. That system begins with the court-martial itself, a tribunal that determines guilt or innocence and levies punishment, up to lifetime imprisonment or execution. The next phase occurs at one of four appellate courts: the Court of Criminal Appeals (CCA) for the Army, Navy-Marine Corps, Air Force, or Coast Guard. They review decisions where the sentence is a punitive discharge, incarceration for more than one year, or death. The Court of Appeals for the Armed Forces (CAAF) sits atop the court-martial system. The CAAF is a "court of record" composed of five civilian judges, 10 U. S. C. § 941, which must review certain weighty cases and may review others. Finally, 28 U. S. C. § 1259 gives this Court jurisdiction to review the CAAF's decisions by writ of certiorari.

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Petitioner Keanu Ortiz, an Airman First Class, was convicted by a court-martial of possessing and distributing child pornography, and he was sentenced to two years' imprisonment and a dishonorable discharge. An Air Force CCA panel, including Colonel Martin Mitchell, affirmed that decision. The CAAF then granted Ortiz's petition for review to consider whether Judge Mitchell was disqualified from serving on the CCA because he had been appointed to the Court of Military Commission Review (CMCR). The Secretary of Defense had initially put Judge Mitchell on the CMCR under his statutory authority to "assign [officers] who are appellate military judges" to serve on that court. 10 U. S. C. § 950f(b)(2). To moot a possible constitutional problem with the assignment, the President (with the Senate's advice and consent) also appointed Judge Mitchell to the CMCR pursuant to § 950f(b)(3). Shortly thereafter, Judge Mitchell participated in Ortiz's CCA appeal.

Ortiz claimed that Judge Mitchell's CMCR appointment barred his continued CCA service under both a statute and the Constitution. First, he argued that the appointment violated § 973(b)(2)(A), which provides that unless "otherwise authorized by law," an active-duty

military officer "may not hold, or exercise the functions of," certain "civil office[s]" in the Federal Government. Second, he argued that the Appointments Clause prohibits simultaneous service on the CMCR and the CCA. The CAAF rejected both grounds for ordering another appeal.

Held:

1. This Court has jurisdiction to review the CAAF's decisions. The judicial character and constitutional pedigree of the court-martial system enable this Court, in exercising appellate jurisdiction, to review the decisions of the court sitting at its apex.

An *amicus curiae*, Professor Aditya Bamzai, argues that cases decided by the CAAF do not fall within Article III's grant of appellate jurisdiction to this Court. In *Marbury* v. *Madison*, 1 Cranch 137, Chief Justice Marshall explained that "the essential criterion of appellate jurisdiction" is "that it revises and corrects the proceedings in a cause already instituted, and does not create that cause." *Id.*, at 175. Here, Ortiz's petition asks the Court to "revise and correct" the latest decision in a "cause" that began in and progressed through military justice "proceedings." Unless Chief Justice Marshall's test implicitly exempts cases instituted in a military court, the case is now appellate.

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There is no reason to make that distinction. The military justice system's essential character is judicial. Military courts decide cases in strict accordance with a body of federal law and afford virtually the same procedural protections to service members as those given in a civilian criminal proceeding. The judgments a military tribunal renders "rest on the same basis, and are surrounded by the same considerations[, as] give conclusiveness to the judgments of other legal tribunals." *Ex parte Reed*, 100 U. S. 13, 23. Accordingly, such judgments have res judicata and Double Jeopardy effect. The jurisdiction and structure of the court-martial system likewise resemble those of other courts whose decisions this Court reviews. Courts-martial try service members for garden-variety crimes unrelated to military service, and can impose terms of imprisonment and capital punishment. Their decisions are also subject to an appellate process similar to the one found in most States. And just as important, the constitutional foundation of courts-martial is not in the least insecure. See *Dynes* v. *Hoover*, 20 How. 65, 79. The court-martial is older than the Constitution, was recognized and sanctioned by the Framers, and has been authorized here since the first Congress. Throughout that history, courts-martial have operated as instruments of military justice, not mere military command. They are bound, like any court, by the fundamental principles of law and the duty to adjudicate cases without partiality.

Syllabus

Bamzai argues that the Court lacks jurisdiction because the CAAF is not an Article III court, but is instead in the Executive Branch. This Court's appellate jurisdiction, however, covers more than the decisions of Article III courts. This Court can review proceedings of state courts. See *Martin* v. *Hunter's Lessee*, 1 Wheat. 304. It can also review certain non-Article III judicial systems created by Congress. In particular, the Court has upheld its exercise of appellate jurisdiction over decisions of non-Article III territorial courts, see *United States* v. *Coe*, 155 U. S. 76, and it has uncontroversially exercised appellate jurisdiction over non-Article III District of Columbia courts, see *Palmore* v. *United States*, 411 U. S. 389. The non-Article III court-martial system stands on much the same footing as territorial and D. C. courts. All three rest on an expansive constitutional delegation, have deep historical roots, and perform an inherently judicial role. Thus, in *Palmore*, this Court viewed the military, territories, and District as "specialized areas having particularized needs" in which Article III "give[s] way to accommodate plenary grants of power to Congress." *Id.*, at 408.

Bamzai does not provide a sufficient reason to divorce military courts from territorial and D. C. courts when it comes to defining this Court's appellate jurisdiction. He first relies on the fact that territorial and D. C. courts exercise power over discrete geographic areas, while military courts do not. But this distinction does not matter to the jurisdictional inquiry. His second argument focuses on the fact that the CAAF is in the Executive Branch. In his view, two of the Court's precedents—*Ex parte Vallandigham*, 1 Wall. 243, and *Marbury*, 1 Cranch 137—show that the Court may never accept appellate jurisdiction from any person or body within that branch. As to *Vallandigham*, that case goes to show only that not every military tribunal is alike. Unlike the military commission in *Vallandigham*, which lacked "judicial character," 1 Wall., at 253, the CAAF is a permanent court of record established by Congress, and its decisions are final unless the Court reviews and reverses them. As to *Marbury*, James Madison's failure to transmit William Marbury's commission was not a judicial decision by a court. Here, by contrast, three constitutionally rooted courts rendered inherently judicial decisions. Pp. 435–448.

2. Judge Mitchell's simultaneous service on the CCA and the CMCR violated neither § 973(b)(2)(A) nor the Appointments Clause. Pp. 448–454.

(a) The statutory issue turns on two interlocking provisions. Section 973(b)(2)(A) is the statute that Ortiz claims was violated here. It prohibits military officers from "hold[ing], or exercis[ing] the functions of," certain "civil office[s]" in the Federal Government, "[e]xcept as otherwise authorized by law." Section 950f(b) is the statute that the Govern-

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ment claims "otherwise authorize[s]" Judge Mitchell's CMCR service, even if a seat on that court is a covered "civil office." It provides two ways to become a CMCR judge. Under § 950f(b)(2), the Secretary of Defense "may assign" qualified officers serving on a CCA to be judges on the CMCR. Under § 950f(b)(3), the President (with the Senate's advice and consent) "may appoint" persons—whether officers or civilians is unspecified—to CMCR judgeships.

Ortiz argues that Judge Mitchell was not "authorized by law" to serve on the CMCR after his appointment because § 950f(b)(3) makes no express reference to military officers. In the circumstances here, however, the express authorization to assign military officers to the CMCR under § 950f(b)(2) was the only thing necessary to exempt Judge Mitchell from § 973(b)(2)(A). Once the Secretary of Defense placed Judge Mitchell on the CMCR pursuant to § 950f(b)(2), the President's later appointment made no difference. It did not negate the Secretary's earlier action, but rather ratified what the Secretary had already done. Thus, after the appointment, Judge Mitchell served on the CMCR by virtue of both the Secretary's assignment and the President's appointment. And because § 950f(b)(2) expressly authorized the Secretary's assignment, Judge Mitchell's CMCR service could not run afoul of § 973(b)(2)(A)'s general rule. Pp. 449–452.

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(b) Ortiz also raises an Appointments Clause challenge to Judge Mitchell's simultaneous service on the CCA and the CMCR. That Clause distinguishes between principal officers and inferior officers. CCA judges are inferior officers. Ortiz views CMCR judges as principal officers. And Ortiz argues that, under the Appointments Clause, a single judge cannot serve as an inferior officer on one court and a principal officer on another. But the Court has never read the Appointments Clause to impose rules about dual service, separate and distinct from methods of appointment. And if the Court were ever to apply the Clause to dual office-holding, it would not start here. Ortiz does not show how Judge Mitchell's CMCR service would result in "undue influence" on his CCA colleagues. Pp. 452–454.

76 M. J. 125 and 189, affirmed.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. THOMAS, J., filed a concurring opinion, *post*, p. 454. ALITO, J., filed a dissenting opinion, in which GORSUCH, J., joined, *post*, p. 463.

Stephen I. Vladeck argued the cause for petitioner. With him on the briefs were *Mary J. Bradley*, *Christopher D. Car-*

rier, *Brian L. Mizer*, *Johnathan D. Legg*, *Lauren-Ann L. Shure*, and *Eugene R. Fidell*.

Aditya Bamzai, *pro se*, argued the cause as *amicus curiae* in support of neither party. With him on the brief was *Adam J. White*.

Brian H. Fletcher argued the cause for the United States. With him on the brief were *Solicitor General Francisco*, *Acting Assistant Attorney General Boente*, *Deputy Solicitor General Kneedler*, *Joseph F. Palmer*, and *Danielle S. Tarin*.

JUSTICE KAGAN delivered the opinion of the Court.

This case is about the legality of a military officer serving as a judge on both an Air Force appeals court and the Court of Military Commission Review (CMCR). The petitioner, an airman convicted of crimes in the military justice system, contends that the judge's holding of dual offices violated a statute regulating military service, as well as the Constitution's Appointments Clause. The Court of Appeals for the Armed Forces (CAAF) rejected those claims, and we granted a petition for certiorari. We hold first that this Court has jurisdiction to review decisions of the CAAF, even though it is not an Article III court. We then affirm the CAAF's determination that the judge's simultaneous service was lawful.

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I

In the exercise of its authority over the armed forces, Congress has long provided for specialized military courts to adjudicate charges against service members. Today, trial-level courts-martial hear cases involving a wide range of offenses, including crimes unconnected with military service; as a result, the jurisdiction of those tribunals overlaps substantially with that of state and federal courts. See *Solorio* v. *United States*, 483 U. S. 435, 436 (1987); *United States* v. *Kebodeaux*, 570 U. S. 387, 404 (2013) (ALITO, J., concurring in judgment). And courts-martial are now subject to several

tiers of appellate review, thus forming part of an integrated "court-martial system" that closely resembles civilian structures of justice. *United States* v. *Denedo*, 556 U. S. 904, 920 (2009); see *Weiss* v. *United States*, 510 U. S. 163, 174 (1994).

That system begins with the court-martial itself, an officer-led tribunal convened to determine guilt or innocence and levy appropriate punishment, up to lifetime imprisonment or execution. See 10 U. S. C. §§ 816, 818, 856a. The next phase of military justice occurs at one of four appellate courts: the Court of Criminal Appeals (CCA) for the Army, Navy-Marine Corps, Air Force, or Coast Guard. Those courts, using three-judge panels of either officers or civilians, review all decisions in which the sentence imposed involves a punitive discharge, incarceration for more than one year, or death. See §§ 866(a)–(c). Atop the court-martial system is the CAAF, a "court of record" made up of five civilian judges appointed to serve 15-year terms. § 941; see §§ 942(a)–(b). The CAAF must review certain weighty cases (including those in which capital punishment was imposed), and may grant petitions for review in any others. See § 867. Finally, this Court possesses statutory authority to step in afterward: Under 28 U. S. C. § 1259, we have jurisdiction to review the CAAF's decisions by writ of certiorari.

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Petitioner Keanu Ortiz's case has run the gamut of this legal system. Ortiz, an Airman First Class in the Air Force, was charged with knowingly possessing and distributing child pornography, in violation of the Uniform Code of Military Justice. A court-martial found Ortiz guilty as charged and imposed a sentence of two years' imprisonment and a dishonorable discharge. On appeal, an Air Force CCA panel, including Colonel Martin Mitchell, summarily affirmed the court-martial's decision. The CAAF then granted Ortiz's petition for review to consider whether Judge Mitchell was disqualified from serving on the CCA, thus entitling Ortiz to an appellate do-over.

That issue arose from Judge Mitchell's simultaneous service on the CMCR. Congress created the CMCR as an appel-

late tribunal to review the decisions of military commissions, particularly those operating in Guantanamo Bay.[1] The Secretary of Defense put Judge Mitchell on that court shortly after he became a member of the CCA, under a statutory provision authorizing the Secretary to "assign [officers] who are appellate military judges" to serve on the CMCR as well. 10 U. S. C. § 950f(b)(2). Around the same time, a military-commission defendant argued to the Court of Appeals for the D. C. Circuit that the Appointments Clause requires the President and Senate (rather than the Secretary) to place judges on the CMCR. The D. C. Circuit avoided resolving that issue, but suggested that the President and Senate could "put [it] to rest" by appointing the very CMCR judges whom the Secretary had previously assigned. *In re al-Nashiri*, 791 F. 3d 71, 86 (2015). The President decided to take that advice, and nominated each of those judges—Mitchell, among them—under an adjacent statutory provision authorizing him to "appoint, by and with the advice and consent of the Senate," CMCR judges. § 950f(b)(3). The Senate then confirmed those nominations. About a month later, Judge Mitchell—now wearing his CCA robe—participated in the panel decision rejecting Ortiz's appeal.

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In Ortiz's view, Judge Mitchell's appointment to the CMCR barred his continued service on the CCA under both a statute and the Constitution. First, Ortiz invoked 10 U. S. C. § 973(b). That statute, designed to ensure civilian preeminence in government, provides that unless "otherwise authorized by law," an active-duty military officer like Judge Mitchell "may not hold, or exercise the functions of," certain "civil office[s]" in the Federal Government. § 973(b)(2)(A). According to Ortiz, a CMCR judgeship is a covered civil office, and no other law allowed the President to put Mitchell

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[1] In contrast to courts-martial, military commissions have historically been used to substitute for civilian courts in times of martial law or temporary military government, as well as to try members of enemy forces for violations of the laws of war. See *Hamdan* v. *Rumsfeld*, 548 U. S. 557, 595–597 (2006) (plurality opinion).

in that position: Thus, his appointment to the CMCR violated § 973(b). See Brief in Support of Petition Granted in No. 16–0671 (CAAF), pp. 17–22. And the proper remedy, Ortiz argued, was to terminate Judge Mitchell's military service effective the date of his CMCR appointment and void all his later actions as a CCA judge—including his decision on Ortiz's appeal. See *ibid.* Second and independently, Ortiz relied on the Appointments Clause to challenge Judge Mitchell's dual service. See *id.*, at 27–40. The premise of his argument was that CMCR judges are "principal officers" under that Clause, whereas CCA judges (as this Court has held) are "inferior officers." *Edmond* v. *United States*, 520 U. S. 651, 666 (1997). Ortiz claimed that the Appointments Clause prohibits someone serving as a principal officer on one court (the CMCR) from sitting alongside inferior officers on another court (the CCA). Because Judge Mitchell had done just that, Ortiz concluded, the CCA's ruling on his appeal could not stand.

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The CAAF rejected both grounds for ordering another appeal. See 76 M. J. 189 (2017). In considering the statutory question, the court chose not to decide whether § 973(b) precluded Judge Mitchell from serving on the CMCR while an active-duty officer. Even if so, the CAAF held, the remedy for the violation would not involve terminating the judge's military service or voiding actions he took on the CCA. See *id.*, at 192. Turning next to the constitutional issue, the CAAF "s[aw] no Appointments Clause problem." *Id.*, at 193. Even assuming Judge Mitchell was a principal officer when sitting on the CMCR, the court held, that status in no way affected his service on the CCA: "When Colonel Mitchell sits as a CCA judge, he is no different from any other CCA judge." *Ibid.* The CAAF thus upheld the CCA's affirmance of Ortiz's convictions.

This Court granted Ortiz's petition for certiorari to consider whether either § 973(b) or the Appointments Clause prevents a military officer from serving, as Judge Mitchell

did, on both a CCA and the CMCR. 582 U. S. 967 (2017). We now affirm the decision below.[2]

II

We begin with a question of our own jurisdiction to review the CAAF's decisions. Congress has explicitly authorized us to undertake such review in 28 U. S. C. § 1259. See *ibid.* ("Decisions of the [CAAF] may be reviewed by the Supreme Court by writ of certiorari"). Both the Federal Government and Ortiz view that grant of jurisdiction as constitutionally proper. But an *amicus curiae*, Professor Aditya Bamzai, argues that it goes beyond what Article III allows. That position is a new one to this Court: We have previously reviewed nine CAAF decisions without anyone objecting that we lacked the power to do so.[3] Still, we think the argument is serious, and deserving of sustained consideration. That analysis leads us to conclude that the judicial character and constitutional pedigree of the court-martial system enable this Court, in exercising appellate jurisdiction, to review the decisions of the court sitting at its apex.

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Bamzai starts with a proposition no one can contest—that our review of CAAF decisions cannot rest on our *original* jurisdiction. Brief for Aditya Bamzai as *Amicus Curiae* 11. Article III of the Constitution grants this Court original ju-

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[2] At the same time we issued a writ of certiorari in this case, we granted and consolidated petitions in two related cases—*Dalmazzi* v. *United States*, No. 16–961, and *Cox* v. *United States*, No. 16–1017. Those cases raise issues of statutory jurisdiction that our disposition today makes it unnecessary to resolve. We accordingly dismiss *Dalmazzi*, *post*, p. 527, and *Cox*, *post*, p. 528, as improvidently granted in opinions accompanying this decision.

[3] See *United States* v. *Denedo*, 556 U. S. 904 (2009); *Clinton* v. *Goldsmith*, 526 U. S. 529 (1999); *United States* v. *Scheffer*, 523 U. S. 303 (1998); *Edmond* v. *United States*, 520 U. S. 651 (1997); *Loving* v. *United States*, 517 U. S. 748 (1996); *Ryder* v. *United States*, 515 U. S. 177 (1995); *Davis* v. *United States*, 512 U. S. 452 (1994); *Weiss* v. *United States*, 510 U. S. 163 (1994); *Solorio* v. *United States*, 483 U. S. 435 (1987).

risdiction in a limited category of cases: those "affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party." § 2, cl. 2. That list, of course, does not embrace Ortiz's case, or any other that the CAAF considers. And ever since *Marbury* v. *Madison*, 1 Cranch 137 (1803), this Court has recognized that our original jurisdiction cannot extend any further than the cases enumerated: If Congress attempts to confer more on us, we must (as Chief Justice Marshall famously did, in the pioneer act of judicial review) strike down the law. *Id.*, at 174–180. As a result, Bamzai is right to insist that § 1259 could not authorize this Court, as part of its original jurisdiction, to hear military cases like Ortiz's.

The real issue is whether our *appellate* jurisdiction can cover such cases. Article III's sole reference to appellate jurisdiction provides no apparent barrier, but also no substantial guidance: Following its specification of this Court's original jurisdiction, Article III says only that in all "other Cases" that the Constitution comprehends (including cases, like this one, involving federal questions), "the supreme Court shall have appellate Jurisdiction, both as to Law and Fact." § 2, cl. 2. The Constitution's failure to say anything more about appellate jurisdiction leads Bamzai to focus on Chief Justice Marshall's opinion in *Marbury*. See Brief for Bamzai 2–4, 12–14. In that case (as you surely recall), William Marbury petitioned this Court—without first asking any other—to issue a writ of mandamus to Secretary of State James Madison directing him to deliver a commission. After holding (as just related) that the Court's original jurisdiction did not extend so far, Chief Justice Marshall also rejected the idea that the Court could provide the writ in the exercise of its appellate jurisdiction. "[T]he essential criterion of appellate jurisdiction," the Chief Justice explained, is "that it revises and corrects the proceedings in a cause already instituted, and does not create that cause." 1 Cranch, at 175. Marbury's petition, Chief Justice Marshall held,

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commenced the cause—or, to use the more modern word, the case; hence, it was not a matter for appellate jurisdiction. Bamzai contends that the same is true of Ortiz's petition.

On any ordinary understanding of the great Chief Justice's words, that is a surprising claim. Ortiz's petition asks us to "revise and correct" the latest decision in a "cause" that began in and progressed through military justice "proceedings." *Ibid.* Or, as the Government puts the point, this case fits within Chief Justice Marshall's standard because "it comes to th[is] Court on review of the Court of Appeals for the Armed Forces' decision, which reviewed a criminal proceeding that originated in [a] court[]-martial." Tr. of Oral Arg. 47–48. So this Court would hardly be the first to render a decision in the case. Unless Chief Justice Marshall's test implicitly exempts cases instituted in a military court—as contrasted, for example, with an ordinary federal court—the case is now appellate.[4]

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The military justice system's essential character—in a word, judicial—provides no reason to make that distinction. Accord *post*, at 459–461 (THOMAS, J., concurring). Each level of military court decides criminal "cases" as that term is generally understood, and does so in strict accordance with a body

[4] The dissent asserts that, in setting out that test, we have "basically proceed[ed] as though *Marbury* were our last word on the subject" and overlooked "two centuries of precedent." *Post*, at 470 (opinion of ALITO, J.). But the cases the dissent faults us for failing to cite stand for the same principle that we—and more important, *Marbury*—already set out. They too say that our appellate jurisdiction permits us to review only prior judicial decisions, rendered by courts. See, *e. g.*, *Ex parte Yerger*, 8 Wall. 85, 97 (1869) (Our "appellate jurisdiction" may "be exercised only in the revision of judicial decisions"); *The Alicia*, 7 Wall. 571, 573 (1869) ("An appellate jurisdiction necessarily implies some judicial determination . . . of an inferior tribunal, from which an appeal has been taken"); *Cohens* v. *Virginia*, 6 Wheat. 264, 396 (1821) (In exercising appellate jurisdiction, we act as a "supervising Court, whose peculiar province it is to correct the errors of an inferior Court"); *Ex parte Bollman*, 4 Cranch 75, 101 (1807) (We exercise "appellate jurisdiction" in "revisi[ng] a decision of an inferior court"); *post*, at 466–468, 472, 473–474. *Marbury*, then, remains the key precedent.

of federal law (of course including the Constitution). The procedural protections afforded to a service member are "virtually the same" as those given in a civilian criminal proceeding, whether state or federal. 1 D. Schlueter, Military Criminal Justice: Practice and Procedure § 1–7, p. 50 (9th ed. 2015) (Schlueter). And the judgments a military tribunal renders, as this Court long ago observed, "rest on the same basis, and are surrounded by the same considerations[, as] give conclusiveness to the judgments of other legal tribunals." *Ex parte Reed*, 100 U. S. 13, 23 (1879). Accordingly, we have held that the "valid, final judgments of military courts, like those of any court of competent jurisdiction[,] have res judicata effect and preclude further litigation of the merits." *Schlesinger* v. *Councilman*, 420 U. S. 738, 746 (1975). In particular, those judgments have identical effect under the Double Jeopardy Clause. See *Grafton* v. *United States*, 206 U. S. 333, 345 (1907).

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The jurisdiction and structure of the court-martial system likewise resemble those of other courts whose decisions we review. Although their jurisdiction has waxed and waned over time, courts-martial today can try service members for a vast swath of offenses, including garden-variety crimes unrelated to military service. See 10 U. S. C. §§ 877–934; *Solorio*, 483 U. S., at 438–441; *supra*, at 431. As a result, the jurisdiction of those tribunals overlaps significantly with the criminal jurisdiction of federal and state courts. See *Kebodeaux*, 570 U. S., at 404 (Alito, J., concurring in judgment). The sentences meted out are also similar: Courts-martial can impose, on top of peculiarly military discipline, terms of imprisonment and capital punishment. See § 818(a); *post*, at 459 (Thomas, J., concurring) ("[T]hese courts decide questions of the most momentous description, affecting even life itself" (internal quotation marks and ellipses omitted)). And the decisions of those tribunals are subject to an appellate process—what we have called an "integrated system of military courts and review procedures"—that replicates the judicial apparatus found in most States. *Councilman*, 420 U. S., at 758. By

the time a case like Ortiz's arrives on our doorstep under 28 U. S. C. § 1259, it has passed through not one or two but three military courts (including two that can have civilian judges).

And just as important, the constitutional foundation of courts-martial—as judicial bodies responsible for "the trial and punishment" of service members—is not in the least insecure. *Dynes* v. *Hoover*, 20 How. 65, 79 (1858). The court-martial is in fact "older than the Constitution," 1 Schlueter § 1–6(B), at 39; the Federalist Papers discuss "trials by courts-martial" under the Articles of Confederation, see No. 40, p. 250 (C. Rossiter ed. 1961). When it came time to draft a new charter, the Framers "recogni[zed] and sanction[ed] existing military jurisdiction," W. Winthrop, Military Law and Precedents 48 (2d ed. 1920) (emphasis deleted), by exempting from the Fifth Amendment's Grand Jury Clause all "cases arising in the land or naval forces." And by granting legislative power "[t]o make Rules for the Government and Regulation of the land and naval Forces," the Framers also authorized Congress to carry forward courts-martial. Art. I, § 8, cl. 14. Congress did not need to be told twice. The very first Congress continued the court-martial system as it then operated. See Winthrop, *supra*, at 47. And from that day to this one, Congress has maintained courts-martial in all their essentials to resolve criminal charges against service members. See 1 Schlueter § 1–6, at 35–48.

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Throughout that history, and reflecting the attributes described above, courts-martial have operated as instruments of military justice, not (as the dissent would have it) mere "military command," *post*, at 480 (opinion of ALITO, J.). As one scholar has noted, courts-martial "have long been understood to exercise 'judicial' power," of the same kind wielded by civilian courts. Nelson, Adjudication in the Political Branches, 107 Colum. L. Rev. 559, 576 (2007); see W. De Hart, Observations on Military Law 14 (1859) (Military courts are "imbued or endowed with the like essence of judicial power" as "ordinary courts of civil judicature"); accord *post*, at 459–461 (THOMAS, J., concurring). Attorney General Bates, even in

the middle of the Civil War, characterized a court-martial "proceeding, from its inception, [a]s judicial," because the "trial, finding, and sentence are the solemn acts of a court organized and conducted under the authority of and according to the prescribed forms of law." *Runkle* v. *United States*, 122 U. S. 543, 558 (1887) (quoting 11 Op. Atty. Gen. 19, 21 (1864)). Colonel Winthrop—whom we have called the "Blackstone of Military Law," *Reid* v. *Covert*, 354 U. S. 1, 19, n. 38 (1957) (plurality opinion)—agreed with Bates. He regarded a court-martial as "in the strictest sense" a "court of law and justice"—"bound, like any court, by the fundamental principles of law" and the duty to adjudicate cases "without partiality, favor, or affection." Winthrop, *supra*, at 54.[5]

Despite all this, Bamzai claims that "*Marbury* bars th[is] Court from deciding" any cases coming to us from the court-martial system. Brief for Bamzai 3. He begins, much as

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[5] The independent adjudicative nature of courts-martial is not inconsistent with their disciplinary function, as the dissent claims, see *post*, at 480–487. By adjudicating criminal charges against service members, courts-martial of course help to keep troops in line. But the way they do so—in comparison to, say, a commander in the field—is fundamentally judicial. Accord *post*, at 462 (THOMAS, J., concurring) ("While the CAAF is in the Executive Branch and its purpose is to help the President maintain troop discipline, those facts do not change the *nature* of the power that it exercises"). Colonel Winthrop stated as much: Even while courts-martial "enforc[e] discipline" in the armed forces, they remain "as fully a court of law and justice as is any civil tribunal." W. Winthrop, Military Law and Precedents 49, 54 (2d ed. 1920). And he was right. When a military judge convicts a service member and imposes punishment—up to execution—he is not meting out extra-judicial discipline. He is acting *as a judge*, in strict compliance with legal rules and principles—rather than as an "arm of military command." *Post*, at 480. It is in fact one of the glories of this country that the military justice system is so deeply rooted in the rule of law. In asserting the opposite—that military courts are not "judicial" in "character"—the dissent cannot help but do what it says it would like to avoid: "denigrat[e the court-martial] system." *Post*, at 488; see *post*, at 486.

we did above, by explaining that under *Marbury* the Court can exercise appellate jurisdiction only when it is "supervising an earlier decision by a lower court." Brief for Bamzai 13. The next step is where the argument gets interesting. The CAAF, Bamzai contends, simply does not qualify as such a body (nor does any other military tribunal). True enough, "the CAAF is called a 'court' "; and true enough, it decides cases, just as other courts do. *Id.*, at 3; see *id.*, at 28. But the CAAF, Bamzai notes, is "not an *Article III* court," *id.*, at 3 (emphasis added): As all agree, its members lack the tenure and salary protections that are the hallmarks of the Article III judiciary, see 10 U. S. C. §§ 942(b), (c). Congress established the CAAF under its Article I, rather than its Article III, powers, and Congress located the CAAF (as we have previously observed) within the Executive Branch, rather than the judicial one. See § 941; *Edmond*, 520 U. S., at 664, and n. 2. Those facts, in Bamzai's view, prevent this Court from exercising appellate jurisdiction over the CAAF. "For constitutional purposes," Bamzai concludes, the members of the CAAF "stand on equal footing with James Madison in *Marbury*." Brief for Bamzai 4. (With variations here and there, the dissent makes the same basic argument.)

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But this Court's appellate jurisdiction, as Justice Story made clear ages ago, covers more than the decisions of Article III courts. In *Martin* v. *Hunter's Lessee*, 1 Wheat. 304 (1816), we considered whether our appellate jurisdiction extends to the proceedings of state courts, in addition to those of the Article III federal judiciary. We said yes, as long as the case involves subject matter suitable for our review. *Id.*, at 338–352. For our "appellate power," Story wrote, "is not limited by the terms of [Article III] to any particular courts." *Id.*, at 338. Or again: "[I]t will be in vain to search in the letter of the [C]onstitution for any qualification as to the tribunal" from which a given case comes. *Ibid.* The decisions we review might come from Article III courts, but they need not.

The same lesson emerges from two contexts yet more closely resembling this one—each involving a non-Article III judicial system created by Congress. First, in *United States* v. *Coe*, 155 U. S. 76 (1894), this Court upheld the exercise of appellate jurisdiction over decisions of federal territorial courts, despite their lack of Article III status. We observed there that the Constitution grants Congress broad authority over the territories: to "make all needful Rules and Regulations respecting" those areas. Art. IV, § 3, cl. 2; see *Coe*, 155 U. S., at 85. And we recognized that Congress, with this Court's permission, had long used that power to create territorial courts that did not comply with Article III. See *ibid.* Chief Justice Marshall had held such a court constitutional in 1828 even though its authority was "not a part of that judicial power which is defined in the 3d article." *American Ins. Co.* v. *356 Bales of Cotton*, 1 Pet. 511, 546 (1828); see *Coe*, 155 U. S., at 85 (describing that opinion as having "settled" that Article III "does not exhaust the power of Congress to establish courts"). The exception to Article III for territorial courts was thus an established and prominent part of the legal landscape by the time *Coe* addressed this Court's role in reviewing their decisions. And so the Court found the issue simple. "There has never been any question," we declared, "that the judicial action of [territorial courts] may, in accordance with the Constitution, be subjected to [our] appellate jurisdiction." *Id.*, at 86.

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Second, we have routinely, and uncontroversially, exercised appellate jurisdiction over cases adjudicated in the non-Article III District of Columbia courts.[6] Here too, the

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[6] See, *e. g.*, *Artis* v. *District of Columbia*, 583 U. S. 71 (2018); *Turner* v. *United States*, 582 U. S. 313 (2017); *United States* v. *Dixon*, 509 U. S. 688 (1993); *Jones* v. *United States*, 463 U. S. 354 (1983); *Tuten* v. *United States*, 460 U. S. 660 (1983); *Whalen* v. *United States*, 445 U. S. 684 (1980); *United States* v. *Crews*, 445 U. S. 463 (1980); *Pernell* v. *Southall Realty*, 416 U. S. 363 (1974); *Palmore* v. *United States*, 411 U. S. 389 (1973). In none of

Constitution grants Congress an unqualified power: to legislate for the District "in all Cases whatsoever." Art. I, § 8, cl. 17. Under that provision, we long ago determined, "Congress has the entire control over the [D]istrict for every purpose of government," including that of "organizing a judicial department." *Kendall* v. *United States ex rel. Stokes*, 12 Pet. 524, 619 (1838). So when Congress invoked that authority to create a set of local courts, this Court upheld the legislation—even though the judges on those courts lacked Article III protections. See *Palmore* v. *United States*, 411 U. S. 389, 407–410 (1973). We relied on the Constitution's "plenary grant[ ] of power to Congress to legislate with respect to" the national capital. *Id.*, at 408. And several years later, we referred as well to the "historical consensus" supporting congressional latitude over the District's judiciary. *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 70 (1982) (plurality opinion); see *id.*, at 65, n. 16. To be sure, we have never explicitly held, as we did in the territorial context, that those same considerations support our appellate jurisdiction over cases resolved in the D. C. courts. But some things go unsaid because they are self-evident. And indeed, even Bamzai readily acknowledges that this Court can review decisions of the D. C. Court of Appeals. See Brief for Bamzai 23, 25.

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The non-Article III court-martial system stands on much the same footing as territorial and D. C. courts, as we have often noted. The former, just like the latter, rests on an expansive constitutional delegation: As this Court early held, Article I gives Congress the power—"entirely independent" of Article III—"to provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilized nations." *Dynes*, 20 How., at 79; see *supra*, at 439. The former has, if anything, deeper historical

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these or similar cases has anyone ever challenged our appellate jurisdiction.

roots, stretching from before this nation's beginnings up to the present. See *supra*, at 439. And the former, no less than the others, performs an inherently judicial role, as to substantially similar cases. See *supra*, at 438–441. So it is not surprising that we have lumped the three together. In *Palmore*, the Court viewed the military, territories, and District as a triad of "specialized areas having particularized needs" in which Article III "give[s] way to accommodate plenary grants of power to Congress." 411 U. S., at 408. And in *Northern Pipeline*, the plurality said of all three that "a constitutional grant of power [as] historically understood" has bestowed "exceptional powers" on Congress to create courts outside Article III. 458 U. S., at 66, 70.[7] Given those well-understood connections, we would need a powerful reason to divorce military courts from territorial and D. C. courts when it comes to defining our appellate jurisdiction.

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[7] In addition, several Justices in separate opinions have made the same linkage. See, *e. g.*, *Wellness Int'l Network, Ltd.* v. *Sharif*, 575 U. S. 665, 689–690 (2015) (ROBERTS, C. J., dissenting) (noting that "narrow exceptions permit Congress to establish non-Article III courts to exercise general jurisdiction in the territories and the District of Columbia [and] to serve as military tribunals"); *id.*, at 711 (THOMAS, J., dissenting) (referring to territorial courts and courts-martial as "unique historical exceptions" to Article III); *Stern* v. *Marshall*, 564 U. S. 462, 504–505 (2011) (Scalia, J., concurring) (noting the "firmly established historical practice" of exempting territorial courts and courts-martial from Article III's demands).

The dissent must dismiss all this authority, from Justices both functionalist and formalist, to aver that "it is *only* when Congress legislates for the Territories and the District that it may lawfully vest judicial power in tribunals that do not conform to Article III." *Post*, at 478; see *post*, at 476–478. Not so, we have made clear, because (once again) of an exceptional grant of power to Congress, an entrenched historical practice, and (for some more functionalist judges) particularized needs. The result is "that Congress has the power [apart from Article III] to provide for the adjudication of disputes among the Armed Forces," just as in the territories and the District. *Wellness*, 575 U. S., at 712 (THOMAS, J., dissenting).

And Bamzai fails to deliver one. His initial attempt relies on a simple fact about territorial and D. C. courts: They exercise power over "discrete geographic areas." Brief for Bamzai 23. Military courts do not; they instead exercise power over discrete individuals—*i. e.*, members of the armed forces. So Bamzai gives us a distinction: places vs. people. What he does not offer is a good reason why that distinction should matter in our jurisdictional inquiry—why it is one of substance, rather than convenience. He mentions that the territorial and D. C. courts are "functional equivalents of state courts." *Id.*, at 24; see Tr. of Oral Arg. 33, 35. But for starters, that could be said of courts-martial too. As we have described, they try all the "ordinary criminal offenses" (murder, assault, robbery, drug crimes, etc., etc., etc.) that state courts do. *Kebodeaux*, 570 U. S., at 404 (ALITO, J., concurring in judgment); see *supra*, at 431, 438. And more fundamentally, we do not see why geographical *state*-likeness, rather than historical *court*-likeness, should dispose of the issue. As we have shown, the petition here asks us to "revise[ ] and correct[ ] the proceedings in a cause already instituted" in a judicial system recognized since the founding as competent to render the most serious decisions. *Marbury*, 1 Cranch, at 175; see *supra*, at 437–440. That should make the case an appeal, whether or not the domain that system covers is precisely analogous to, say, Alabama.

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So Bamzai tries another route to cleave off military courts, this time focusing on their location in the Executive Branch. See Brief for Bamzai 26–30. Bamzai actually never says in what branch (if any) he thinks territorial and D. C. courts reside. But he knows—because this Court has said—that the CAAF is an "Executive Branch entity." *Edmond*, 520 U. S., at 664, and n. 2; see *supra*, at 441. And in Bamzai's view, two of our precedents show that we may never accept appellate jurisdiction from any person or body within that branch. See Brief for Bamzai 2–4. The first case he cites is *Ex parte Vallandigham*, 1 Wall. 243 (1864), in which the

Court held that it lacked jurisdiction over decisions of a temporary Civil War-era military commission. See *id.*, at 251–252. The second is *Marbury* itself, in which the Court held (as if this needed repeating) that it lacked jurisdiction to review James Madison's refusal to deliver a commission appointing William Marbury a justice of the peace. See 1 Cranch, at 175–176; *supra,* at 436.

As to the first, *Vallandigham* goes to show only that not every military tribunal is alike. The commission the Court considered there was established by General Ambrose Burnside (he of the notorious facial hair) for a time-limited, specialized purpose—to try persons within the military Department of Ohio (Burnside's then-command) for aiding the Confederacy. See 1 Wall., at 243–244. And the General kept firm control of the commission (made up entirely of his own field officers): After personally ordering Vallandigham's arrest, he (and he alone) also reviewed the commission's findings and sentence. See *id.*, at 247–248; J. McPherson, Battle Cry of Freedom 596–597 (1988). This Court therefore found that the commission lacked "judicial character." 1 Wall., at 253. It was more an adjunct to a general than a real court—and so we did not have appellate jurisdiction over its decisions.[8] But the very thing that Burnside's com-

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[8] The dissent offers a different—and doubly misleading—explanation for *Vallandigham.* First, it says that we found jurisdiction lacking because the commission was "was not one of the 'courts of the United States' established under Article III." *Post,* at 473 (quoting *Vallandigham,* 1 Wall., at 251). But the dissent is reading from the wrong part of the opinion. *Vallandigham* contained two holdings—first (and relevant here), that Article III precluded the Court from exercising appellate jurisdiction over the commission's decisions, and second (and irrelevant here), that the Judiciary Act of 1789 had not authorized such jurisdiction. The language the dissent quotes relates only to the irrelevant statutory holding: The Judiciary Act, the Court explained, confined our jurisdiction to decisions of Article III courts, and the commission did not fit under that rubric. By contrast, the language we quote in the text formed the basis of the Court's constitutional holding—which is all that matters here. Second, the dissent contends that *Vallandigham* "*recognized* that the military tribunal

mission lacked, the court-martial system—and, in particular, the CAAF (whose decision Ortiz asks us to review)—possesses in spades. Once again, the CAAF is a permanent "court of record" created by Congress; it stands at the acme of a firmly entrenched judicial system that exercises broad jurisdiction in accordance with established rules and procedures; and its own decisions are final (except if we review and reverse them). See *supra*, at 431–432, 437–440.[9] That is "judicial character" more than sufficient to separate the CAAF from Burnside's commission, and align it instead with territorial and D. C. (and also state and federal) courts of appeals.

And the differences between the CAAF's decisions and James Madison's delivery refusal should have already leaped off the page. To state the obvious: James Madison was not a court, either in name or in function. He was the Secretary

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had 'judicial character,'" even as it found jurisdiction lacking. *Post*, at 473. Not so. *Vallandigham* expressly *rejected* the argument that the commission had "judicial character." 1 Wall., at 253. Though the Court understood that the commission pronounced guilt and imposed sentences, it did not think the commission was acting as a court in rendering its decisions. See *ibid.* (citing *United States* v. *Ferreira*, 13 How. 40, 46–47 (1852), in which the Court held that a claims tribunal was without judicial "character" and labeled its decisions the "award[s] of a commissioner," "not the judgment[s] of a court of justice").

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[9] The dissent contends that the CAAF's decisions are not always final because the President, relevant branch secretary, or one of his subordinates must approve a sentence of death or dismissal from the armed forces before it goes into effect. See *post*, at 490. But as the Government has explained, the President's (or other executive official's) authority at that stage extends only to punishment: It is "akin to relief by commutation in the federal or state system." Tr. of Oral Arg. 57; see *Loving* v. *United States*, 62 M. J. 235, 247 (CAAF 2005) (likening the approval authority to "executive clemency powers"). The President, even when "mitigat[ing a] sentence[,]" cannot "upset[ ] the conviction" or "the judgment of the CAAF." Tr. of Oral Arg. 55–56. Rather, as we said above, the CAAF's judgment is final when issued (except if we reverse it). See 10 U. S. C. § 871(c)(1) (stating that even when a sentence is subject to an executive official's approval, the "judgment" is "final" when judicial review is concluded).

of State—the head of a cabinet department (and, by the way, the right arm of the President). Likewise, Madison's failure to transmit Marbury's commission was not a judicial decision; it was an enforcement action (though in the form of non-action), pertaining only to the execution of law. As Chief Justice Marshall saw, Secretary Madison merely triggered the case of *Marbury* v. *Madison*; he did not hear and resolve it, as a judicial body would have done. See 1 Cranch, at 175. The Chief Justice's opinion thus cleanly divides that case from this one, even if both (as Bamzai notes) formally involve executive officers. Here, three constitutionally rooted courts, ending with the CAAF, rendered inherently judicial decisions—just as such tribunals have done since our nation's founding. In reviewing, "revis[ing,] and correct[ing]" those proceedings, as Ortiz asks, we do nothing more or different than in generally exercising our appellate jurisdiction. *Ibid.*

But finally, in holding that much, we say nothing about whether we could exercise appellate jurisdiction over cases from other adjudicative bodies in the Executive Branch, including those in administrative agencies. Our resolution of the jurisdictional issue here has rested on the judicial character, as well as the constitutional foundations and history, of the court-martial system. We have relied, too, on the connections that our cases have long drawn between that judicial system and those of the territories and the District. If Congress were to grant us appellate jurisdiction over decisions of newer entities advancing an administrative (rather than judicial) mission, the question would be different—and the answer not found in this opinion.

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III

We may now turn to the issues we took this case to decide. Recall that Ortiz seeks a new appeal proceeding before the Air Force CCA, based on Judge Mitchell's participation in his last one. See *supra*, at 432–434. Ortiz's challenge turns on Judge Mitchell's simultaneous service on another court, the CMCR. Originally, the Secretary of Defense had assigned

Judge Mitchell to sit on that court. Then, to moot a possible constitutional problem with Judge Mitchell's CMCR service, the President (with the Senate's advice and consent) appointed Judge Mitchell as well. A short time later, Judge Mitchell ruled on Ortiz's CCA appeal. Ortiz contends that doing so violated both a federal statute and the Appointments Clause. We disagree on both counts.

A

The statutory issue respecting Judge Mitchell's dual service turns on two interlocking provisions. The first is § 973(b)(2)(A)—the statute Ortiz claims was violated here. As noted earlier, that law—in the interest of ensuring civilian preeminence in government—prohibits active-duty military officers like Judge Mitchell from "hold[ing], or exercis[ing] the functions of," certain "civil office[s]" in the Federal Government, "[e]xcept as otherwise authorized by law." See *supra*, at 433. The second is § 950f(b)—a statute the Government claims "otherwise authorize[s]" Judge Mitchell's service on the CMCR, even if a seat on that court is a covered "civil office." As also noted above, § 950f(b) provides two ways to become a CMCR judge. See *supra*, at 433. Under § 950f(b)(2), the Secretary of Defense "may assign" qualified officers serving on a CCA to "be judges on the [CMCR]" as well. And under § 950f(b)(3), the President (with the Senate's advice and consent) "may appoint" persons—whether officers or civilians is unspecified—to CMCR judgeships.

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Against that statutory backdrop, Ortiz claims that Judge Mitchell became disqualified from serving on the CCA the moment his presidential appointment to the CMCR became final. See Brief for Petitioners 39–42. Notably, Ortiz has no statutory objection to Judge Mitchell's simultaneous service on those courts before that date—when he sat on the CMCR solely by virtue of the Secretary of Defense's assignment. See *id.*, at 40. Nor could he reasonably lodge such a complaint, for § 950f(b)(2), in no uncertain terms, "otherwise

authorize[s]" the Secretary to place a military judge on the CMCR—thus exempting such an officer from § 973(b)(2)(A)'s prohibition. But in Ortiz's view, the provision in § 950f(b)(3) for presidential appointments contains no similar authorization, because it makes no "express[ ] or unambiguous[ ]" reference to military officers. *Id.*, at 20. And so, Ortiz concludes, § 973(b)(2)(A)'s general rule must govern.

In the circumstances here, however, the authorization in § 950f(b)(2) was the only thing necessary to exempt Judge Mitchell from the civil office-holding ban—not just before but also after his presidential appointment. That provision, as just noted, unambiguously permitted the Secretary of Defense to place Judge Mitchell on the CMCR, even if such a judgeship is a "civil office." See *supra*, at 449. And once that happened, the President's later appointment of Judge Mitchell made not a whit of difference. Nothing in § 950f (or any other law) suggests that the President's appointment erased or otherwise negated the Secretary's earlier action. To the contrary, that appointment (made for purposes of protecting against a constitutional challenge, see *supra*, at 433) merely ratified what the Secretary had already done. The nomination papers that the President submitted to the Senate reflect that fact. They sought confirmation of Judge Mitchell's appointment as a CMCR judge "[i]n accordance with [his] continued status as [a CMCR] judge pursuant to [his] assignment by the Secretary of Defense[,] under 10 U. S. C. Section 950f(b)(2)." 162 Cong. Rec. S1474 (Mar. 14, 2016). So after the Senate approved the nomination, Judge Mitchell served on the CMCR by virtue of *both* the Secretary's assignment and the President's appointment. And because § 950f(b)(2) expressly authorized the Secretary's assignment, Judge Mitchell's service on the CMCR could not run afoul of § 973(b)(2)(A)'s general rule.[10]

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[10] We state no opinion on a broader argument the Government makes—that § 950f(b)(2) would exempt Judge Mitchell from § 973(b)(2)(A)'s office-holding ban even if the Secretary had not assigned him to the CMCR

Ortiz argues in response that the President's appointment demanded its own clear authorization because only that appointment put Judge Mitchell into a "new office." Reply Brief 7. According to Ortiz, an officer who receives a secretarial assignment to the CMCR "exercise[s] additional duties"—but he does not hold a second position. Tr. of Oral Arg. 13. A presidential appointment alone, he says, effects that more dramatic change. And Ortiz contends that § 973(b)(2)(A)'s rule cares about that difference. That law, Ortiz says, requires a legislative authorization when, and only when, a service member receives a whole new office—which is to say here when, and only when, the President appoints a judge to the CMCR. See Tr. of Oral Arg. 4–5 (stating that § 973(b)(2)(A) "prohibit[s] military officers from holding [civil offices] absent express congressional authorization, while generally allowing military officers to be assigned to exercise the duties of such positions").

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But that argument is contrary to § 973(b)(2)(A)'s text, as well as to the purposes it reflects. The statute draws no distinction between secretarial assignees and presidential appointees, nor between those who exercise the duties of an office and those who formally hold it. True enough, we have sometimes referred to § 973(b)(2)(A) as a rule about dual "office-holding," see *supra*, at 450, and n. 10—but that is mere shorthand. In fact, § 973(b)(2)(A)'s prohibition applies broadly, and uniformly, to any military officer who "hold[s], or exercise[s] the functions of," a covered civil office. And the "except as otherwise authorized" caveat applies in the

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before the President's appointment. See Brief for United States 27–29. And because we hold that the Secretary's assignment authorized Judge Mitchell to serve on the CMCR while an active-duty military officer, we need not decide whether a CMCR judgeship is a covered "civil office" subject to § 973(b)(2)(A). Neither need we address the remedial issue on which the CAAF ruled, see *supra*, at 434—*i. e.*, whether a violation of § 973(b)(2)(A) would have immediately terminated Judge Mitchell's military service and voided later decisions he made (including in Ortiz's case) as a military judge.

same way—to "hold[ing]" and "exercis[ing]" alike. So the very distinction that Ortiz relies on, the statute rejects: Indeed, the law could not be clearer in its indifference. That is because Congress determined that military officers threaten civilian preeminence in government by *either* "hold[ing]" *or* "exercis[ing] the functions of" important civil offices. Except . . . if Congress decides otherwise and says as much.

And once again, here Congress did exactly that. Judge Mitchell became a CMCR judge, while remaining in the military, because of a secretarial assignment that Congress explicitly authorized. See *supra*, at 449–450. After his presidential appointment, he continued on the same court, doing the same work, in keeping with the same congressional approval. Even supposing he obtained a "new office" in the way Ortiz says, that acquisition is of no moment. With or without that formal office, Judge Mitchell "h[e]ld, or exercise[d] the functions of," a CMCR judgeship, and so was subject to § 973(b)(2)(A)'s ban. But likewise, with or without that formal office, Judge Mitchell could receive permission from Congress to do the job—that is, to sit as a judge on the CMCR. And § 950f(b)(2) gave Judge Mitchell that legislative green light, from the date of his assignment through his ruling on Ortiz's case and beyond.

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B

Finally, Ortiz raises an Appointments Clause challenge to Judge Mitchell's simultaneous service on the CCA and the CMCR. That Clause provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint" the "Officers of the United States," but that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Art. II, § 2, cl. 2. Litigants usually invoke the Appointments Clause when they object to how a government official is

placed in his office. A litigant may assert, for example, that because someone is a principal rather than an inferior officer, he must be nominated by the President and confirmed by the Senate. (Recall that just such an argument about CMCR judges led to Judge Mitchell's presidential appointment. See *supra*, at 433.) But Ortiz's argument is not of that genre. He does not claim that the process used to make Judge Mitchell either a CCA judge or a CMCR judge violated the Appointments Clause. Instead, he claims to find in that Clause a principle relating to dual service. A CCA judge, Ortiz notes, is an inferior officer. See *Edmond*, 520 U. S., at 666. But a CMCR judge, he says (though the Government has argued otherwise), is a principal officer. And in Ortiz's view, a single judge cannot, consistent with the Appointments Clause, serve as an inferior officer on one court and a principal officer on another. He calls such dual office-holding "incongru[ous]" and "functionally incompatible." Brief for Petitioners 50. The problem, he suggests, is that the other (inferior officer) judges on the CCA will be "unduly influenced by" Judge Mitchell's principal-officer status on the CMCR. *Id.*, at 51.

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But that argument stretches too far. This Court has never read the Appointments Clause to impose rules about dual service, separate and distinct from methods of appointment. Nor has it ever recognized principles of "incongruity" or "incompatibility" to test the permissibility of holding two offices. As Ortiz himself acknowledges, he can "cite no authority holding that the Appointments Clause prohibits this sort of simultaneous service." *Id.*, at 52.

And if we were ever to apply the Clause to dual office-holding, we would not start here. Ortiz tells no plausible story about how Judge Mitchell's service on the CMCR would result in "undue influence" on his CCA colleagues. The CMCR does not review the CCA's decisions (or vice versa); indeed, the two courts do not have any overlapping

jurisdiction. They are parts of separate judicial systems, adjudicating different kinds of charges against different kinds of defendants. See *supra*, at 431–433, and n. 1. We cannot imagine that anyone on the CCA acceded to Judge Mitchell's views because he also sat on the CMCR—any more than we can imagine a judge on an Article III Court of Appeals yielding to a colleague because she did double duty on the Foreign Intelligence Surveillance Court of Review (another specialized court). The CAAF put the point well: "When Colonel Mitchell sits as a CCA judge, he is no different from any other CCA judge." 76 M. J., at 193; see *supra*, at 434. So there is no violation of the Appointments Clause.

IV

This Court has appellate jurisdiction to review the CAAF's decisions. In exercising that jurisdiction, we hold that Judge Mitchell's simultaneous service on the CCA and the CMCR violated neither § 973(b)(2)(A)'s office-holding ban nor the Constitution's Appointments Clause. We therefore affirm the judgment below.

It is so ordered.

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JUSTICE THOMAS, concurring.

I join the Court's opinion in full, which persuasively explains why petitioner's statutory and constitutional arguments lack merit. I also agree that the statute giving this Court appellate jurisdiction to review the decisions of the Court of Appeals for the Armed Forces (CAAF), 28 U. S. C. § 1259, complies with Article III of the Constitution. I write separately to explain why that conclusion is consistent with the Founders' understanding of judicial power—specifically, the distinction they drew between public and private rights.[1]

[1] I express no view on any other arguments that were not raised by the parties or *amicus* in this case, including any arguments based on Article II of the Constitution.

I

Article III vests "[t]he judicial Power of the United States" in this Court and any inferior courts that Congress chooses to establish. § 1. The judicial power includes the power to resolve the specific types of "Cases" and "Controversies" listed in § 2. Article III divides this Court's jurisdiction over those cases into two categories: "original Jurisdiction" and "appellate Jurisdiction." This Court has original jurisdiction in cases affecting ambassadors, other public ministers, and consuls, and cases in which a State is a party. This Court has appellate jurisdiction "[i]n all the other Cases before mentioned" in § 2. Because all agree that the CAAF decides "other Cases" that are not reserved for this Court's original jurisdiction, we can review its decisions only under our appellate jurisdiction.

The text of Article III imposes two important limits on this Court's appellate jurisdiction. First, as mentioned, this Court can review only the "other Cases" that are "before mentioned"—*i. e.*, the subject matters of cases listed in § 2 that are not reserved for its original jurisdiction. Second, this Court's "appellate Jurisdiction" cannot be "original." As Chief Justice Marshall explained, "the essential criterion of appellate jurisdiction" is that "it revises and corrects the proceedings in a cause already instituted, and does not create that cause." *Marbury* v. *Madison*, 1 Cranch 137, 175 (1803). Thus, this Court cannot exercise appellate jurisdiction unless it is reviewing an already completed exercise of "judicial power." *In re Sanborn*, 148 U. S. 222, 224 (1893); see also *The Alicia*, 7 Wall. 571, 573 (1869) ("An appellate jurisdiction necessarily implies some judicial determination, some judgment, decree, or order of an inferior tribunal, from which an appeal has been taken"); 3 J. Story, Commentaries on the Constitution of the United States § 1755, p. 627 (1833) (explaining that this Court can review only decisions "by one clothed with judicial authority, and acting in a judicial capacity").

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Other than these two limits, the text of Article III imposes no other self-executing constraints on this Court's appellate jurisdiction. Most notably, it does not require appeals to come from any specific type of tribunal, such as an Article III court. As Justice Story explained, "The appellate power is not limited by the terms of the third article to any particular courts. . . . It is the *case*, then, and not *the court*, that gives the jurisdiction. If the judicial power extends to the case, it will be in vain to search in the letter of the constitution for any qualification as to the tribunal." *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 338 (1816). Hamilton made the same point years earlier: "The Constitution in direct terms gives an appellate jurisdiction to the Supreme Court in all the enumerated cases . . . , without a single expression to confine its operation to the inferior federal courts. The objects of appeal, not the tribunals from which it is to be made, are alone contemplated." The Federalist No. 82, pp. 493–494 (C. Rossiter ed. 1961); see also *id.*, No. 81, at 489 (A. Hamilton) (rejecting a "technical interpretation" of the word "appellate" and defining it to mean "nothing more than the power of one tribunal to review the proceedings of another"). This Court has relied on the lack of tribunal-specific limits in Article III to exercise appellate jurisdiction over several types of non-Article III courts, including state courts, see *Martin*, *supra*, at 338, and territorial courts, see *United States* v. *Coe*, 155 U. S. 76, 85–86 (1894); *Wellness Int'l Network, Ltd.* v. *Sharif*, 575 U. S. 665, 711–712, n. 2 (2015) (THOMAS, J., dissenting) (discussing *American Ins. Co.* v. *356 Bales of Cotton*, 1 Pet. 511, 546 (1828)). In short, this Court's appellate jurisdiction requires the exercise of *a* judicial power, not necessarily "*[t]he* judicial Power of the United States" that Article III vests exclusively in the federal courts, § 1 (emphasis added).

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The Founders' understanding of judicial power was heavily influenced by the well-known distinction between public and

private rights. See *Spokeo, Inc.* v. *Robins*, 578 U. S. 330, 343–345 (2016) (THOMAS, J., concurring); *Wellness*, *supra*, at 712–717 (opinion of THOMAS, J.); Nelson, Adjudication in the Political Branches, 107 Colum. L. Rev. 559, 565 (2007) (Nelson). Public rights "'belon[g] to the people at large,'" while private rights belong to "'each individual.'" *Wellness*, 575 U. S., at 713 (opinion of THOMAS, J.). The three classic private rights—life, liberty, and property—are "'unalienable'" and "'absolute,'" as they are "not dependent upon the will of the government." *Ibid.* The Founders linked the disposition of private rights with the exercise of judicial power. See *id.*, at 714. They considered "the power to act conclusively against [private] rights [as] the core of the judicial power." *Ibid.*

A disposition of private rights did not amount to an exercise of judicial power, however, unless it also satisfied "some basic procedural requirements." Nelson 574. Stated differently, the disposition had to "assume such a form that the judicial power is capable of acting on it." *Osborn* v. *Bank of United States*, 9 Wheat. 738, 819 (1824). "[T]hat form generally required the presence (actual or constructive) of adverse parties who had been given some opportunity to be heard before the court rendered a final judgment that bound them." Nelson 574. Once a dispute took this form, judicial power is exercised by "'determin[ing] all differences according to the established law.'" *Wellness*, *supra*, at 710 (opinion of THOMAS, J.) (quoting J. Locke, Second Treatise of Civil Government § 125, p. 63 (J. Gough ed. 1947)).

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II

A

So understood, the CAAF exercises a judicial power. As I explained in *Wellness*, military courts adjudicate core private rights to life, liberty, and property. See 575 U. S., at 711–712 (dissenting opinion). That these courts adjudi-

cate core private rights does not contradict the Vesting Clause of Article III, which permits only federal courts to exercise "the judicial Power of the United States." Like other provisions of the Constitution, this language must be read against "commonly accepted background understandings and interpretive principles in place when the Constitution was written," including the principle that general constitutional rules could apply "differently to civil than to military entities." Mascott, Who Are "Officers of the United States"? 70 Stan. L. Rev. 443, 480–483 (2018) (citing Nelson 576); see also *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 64 (1982) (plurality opinion) (explaining that interpreting Article III to exclude military courts "simply acknowledge[s] that the literal command of Art. III . . . must be interpreted in light of . . . historical context . . . and of the structural imperatives of the Constitution as a whole"). Based on the "constellation of constitutional provisions that [indicate] Congress has the power to provide for the adjudication of disputes among the Armed Forces it creates," our precedents have long construed the Vesting Clause of Article III to extend "only to *civilian* judicial power." *Wellness*, *supra*, at 712 (opinion of THOMAS, J.) (citing *Dynes* v. *Hoover*, 20 How. 65, 78–79 (1858)). In other words, the powers that the Constitution gives Congress over the military are "so exceptional" that they are thought to include the power to create courts that can exercise a judicial power outside the confines of Article III. *Northern Pipeline*, *supra*, at 64. Thus, military courts are better thought of as an "exception" or "carve-out" from the Vesting Clause of Article III, rather than an entity that does not implicate the Vesting Clause because it does not exercise judicial power in the first place. See *Wellness*, *supra*, at 711–712 (opinion of THOMAS, J.).

No party in this case challenges the legitimacy of the historical exception for military courts. And for good reason: "At the time of the Framing, . . . it was already common for

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nations to organize military tribunals that stood apart from the ordinary civilian courts, and the United States itself had done so." Nelson 576. As the Court explains, military courts predate the Constitution, were well known to the Founders, were authorized by the First Congress, and are expressly contemplated by the Fifth Amendment. *Ante*, at 439. The crucial point for present purposes, however, is that military courts are considered exempt from the structural requirements of Article III "because of other provisions of the Constitution, not because of the definition of judicial power." *Wellness*, *supra*, at 712 (opinion of THOMAS, J.) (citing Nelson 576). They plainly fall within that definition.

Military courts "have long been understood to exercise 'judicial' power" because they "act upon core private rights to person and property." *Id.*, at 576. "[C]lothed with judicial powers," these courts decide "questions of the most momentous description, affecting . . . even life itself." W. De Hart, Observations on Military Law 14 (1859); see also 11 Op. Atty. Gen. 19, 21 (1864) (explaining that military courts are "judicial" because they "pass upon the most sacred questions of human rights . . . which, in the very nature of things, . . . must be adjudged *according to law*"). Here, for example, the CAAF adjudicated the legality of petitioner's child-pornography convictions and his sentence of two years' confinement—a classic deprivation of liberty, see *Obergefell* v. *Hodges*, 576 U. S. 644, 724–726 (2015) (THOMAS, J., dissenting). "The passing of judgment on the life and liberty of those convicted by the government in a military trial surely falls within the judicial power." Willis, The Constitution, the United States Court of Military Appeals and the Future, 57 Mil. L. Rev. 27, 84 (1972). This Court has acknowledged that military courts adjudicate core private rights, as it has repeatedly held that the prosecution of *non*servicemembers in these courts would violate Article III. See *Northern Pipeline*, *supra*, at 66, n. 17 (plurality opinion); *e. g.*, *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11 (1955) (former

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servicemembers); *Reid* v. *Covert*, 354 U. S. 1 (1957) (spouses of servicemembers).[2]

In addition to adjudicating private rights, the CAAF's cases "assume such a form that the judicial power is capable of acting on [them]." *Osborn*, *supra*, at 819. The CAAF adjudicates cases involving "adverse parties who ha[ve] been given some opportunity to be heard." Nelson 574. It has independent authority to "prescribe" its own "rules of procedure," 10 U. S. C. § 944, which provide for briefing, oral argument, and other procedures that mirror a federal court of appeals. See generally CAAF Rules of Practice and Proc. (2017). The CAAF also decides cases "'according to the established law.'" *Wellness*, 575 U. S., at 710 (opinion of THOMAS, J.). It can act "only with respect to matters of law," § 867(c), and its civilian judges decide cases by independently interpreting the Constitution, the Uniform Code of Military Justice, and other federal laws. Lastly, the CAAF renders "final judgment[s] that b[ind] [the parties]." Nelson 574. Its judgments are "final and conclusive" as soon as they are published and are "binding upon all departments, courts, agencies, and officers of the United States." § 876. The Executive Branch has no statutory authority to review or modify the CAAF's decisions.[3] In short, when it

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[2] Servicemembers consent to military jurisdiction when they enlist. While this consent might allow military courts to adjudicate a servicemember's private rights, it does not transform the nature of the power that the military courts exercise, or somehow transform the servicemember's private right to life, liberty, or property into a public right. See *Wellness Int'l Network, Ltd.* v. *Sharif*, 575 U. S. 665, 710–711, 718 (2015) (THOMAS, J., dissenting).

[3] Unlike the CAAF's decisions, court-martial proceedings are not final until they are approved by the convening authority. See 10 U. S. C. § 876. But the CAAF does not review court-martial proceedings until *after* they have been approved and have been reviewed by an intermediate Court of Criminal Appeals. See § 867(c). Because "the [CAAF] reviews court-martial convictions after executive branch review ends," the "[r]eview of its decisions in the Supreme Court of the United States, by certiorari, . . . poses no finality problems" under Article III. Pfander, Article I Tribu-

comes to the CAAF, "'[t]he whole proceeding from its inception is judicial.'" *Runkle* v. *United States*, 122 U. S. 543, 558 (1887) (quoting 11 Op. Atty. Gen., at 21).[4]

B

Professor Bamzai contends that the CAAF exercises an executive, not a judicial, power. He notes that this Court has described the CAAF as an "Executive Branch entity," *Edmond* v. *United States*, 520 U. S. 651, 664 (1997), and he cites commentators who describe military courts as "instrumentalities of the executive power" because they help the President maintain discipline over the Armed Forces, W. Winthrop, Military Law and Precedents 49 (2d ed. 1920) (emphasis deleted); G. Davis, Military Law of the United States 15 (2d ed. 1909). Professor Bamzai also compares the CAAF to administrative agencies, which he contends exercise executive power. If agencies exercised core judicial power, he notes, they would be acting unconstitutionally because they do not enjoy the

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nals, Article III Courts, and the Judicial Power of the United States, 118 Harv. L. Rev. 643, 717, n. 327 (2004).

[4] Most of the statutes cited above are unique to the CAAF—the court whose decision we are reviewing and, thus, the only one that matters for purposes of our appellate jurisdiction. I express no view on whether this Court could directly review the CAAF, absent these statutes. And I express no view on whether this Court could directly review the decisions of other military courts, such as courts-martial or military commissions. Cf. *id.*, at 723, n. 358 (suggesting that this Court could not directly review courts-martial and military commissions because their proceedings are "summary" and "create no record to support writ of error review"); Choper & Yoo, Wartime Process: A Dialogue on Congressional Power To Remove Issues From the Federal Courts, 95 Cal. L. Rev. 1243, 1283 (2007) (suggesting that the adjudication of the rights of enemy aliens by law-of-war military commissions might be better understood as exercising the President's power to conduct war, not judicial power). And, of course, this Court's appellate jurisdiction does not allow it to directly review decisions of the Executive Branch that do not "assume such a form that the judicial power is capable of acting on [them]." *Osborn* v. *Bank of United States*, 9 Wheat. 738, 819 (1824).

structural protections of Article III. See *Arlington* v. *FCC*, 569 U. S. 290, 304, n. 4 (2013).

These arguments miss the mark. While the CAAF is in the Executive Branch and its purpose is to help the President maintain troop discipline, those facts do not change the *nature* of the power that it exercises. See Brigadier General S. T. Ansell's Brief Filed in Support of His Office Opinion (Dec. 11, 1917), reprinted in Hearings on S. 64 before the Subcommittee of the Senate Committee on Military Affairs, 66th Cong., 1st Sess., 71, 76 (1919). And it is the nature of the power, not the branch exercising it, that controls our appellate jurisdiction:

> "The controlling question is whether the function to be exercised . . . is a judicial function . . . . We must not 'be misled by a name, but look to the substance and intent of the proceeding.' *United States* v. *Ritchie*, 17 How. 525, 534 [(1855)]. 'It is not important . . . whether such a proceeding was originally begun by an administrative or executive determination, if when it comes to the court, whether legislative or constitutional, it calls for the exercise of only the judicial power.'" *Federal Radio Comm'n* v. *Nelson Brothers Bond & Mortgage Co. (Station WIBO)*, 289 U. S. 266, 277–278 (1933) (some citations omitted).

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As explained, the CAAF exercises a judicial power because it adjudicates private rights. That the Constitution permits this Executive Branch entity to exercise a particular judicial power—due to the political branches' expansive constitutional powers over the military—does not change the analysis.

Professor Bamzai's analogy to administrative agencies is flawed. Professor Bamzai assumes that, when administrative agencies adjudicate private rights, they are not exercising judicial power. But they are. See *B&B Hardware, Inc.* v. *Hargis Industries, Inc.*, 575 U. S. 138, 171–172 (2015)

(THOMAS, J., dissenting). In fact, they are unconstitutionally exercising "[t]he judicial Power of the United States," as agencies are not Article III courts and do not "enjoy a unique, textually based" carveout from the Vesting Clause of Article III. *Wellness*, *supra*, at 718 (opinion of THOMAS, J.). The CAAF does enjoy such a carveout, as I explained in *Wellness*. But both it and administrative agencies exercise a judicial power when they adjudicate private rights. Contrary to the premise underlying Professor Bamzai's argument, questions implicating the separation of powers cannot be answered by arguing, in circular fashion, that whatever the Executive Branch does is necessarily an exercise of executive power.

* * *

Because the CAAF exercises a judicial power, the statute giving this Court appellate jurisdiction over its decisions does not violate Article III. For these reasons, and the reasons given by the Court, I concur.

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JUSTICE ALITO, with whom JUSTICE GORSUCH joins, dissenting.

I begin with a story that is familiar to students of constitutional law. After his Federalist Party was defeated in the pivotal election of 1800, outgoing President John Adams attempted to fill the Federal Judiciary with individuals favored by his party. The Senate confirmed Adams's nominees, and Adams diligently signed their commissions and sent them to the Secretary of State, one John Marshall, so that the Great Seal could be affixed and the commissions could be delivered. Most of the commissions were promptly sealed and dispatched, but a few were left behind, including the commission of William Marbury, who had been nominated and confirmed as a justice of the peace for the District of Columbia.

After Thomas Jefferson was sworn in as the Nation's third President, he was furious about Adams's eleventh-hour judi-

cial appointments,[1] and his Secretary of State, James Madison, made a fateful decision. Evaluating the facts and the law as he saw them, Madison concluded that he was under no legal obligation to deliver the commissions that had been left in Marshall's office, and he decided not to do so.

Outraged, Marbury filed suit directly in our Court, asking that Madison be ordered to deliver his commission. But we dismissed his case, holding, among other things, that it did not fall within our "appellate jurisdiction." *Marbury* v. *Madison*, 1 Cranch 137, 175–176, 180 (1803). Why? Because "appellate jurisdiction" means jurisdiction to review "the proceedings in a cause [*i. e.*, a case] already instituted" in another court. *Id.*, at 175. Madison was an Executive Branch officer, not a court, and therefore Marbury's dispute with Madison did not become a "cause" or case until it was brought before this Court. As a result, review of Madison's decision did not fall within our "appellate" jurisdiction. *Id.*, at 175–176.

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That conclusion was straightforward enough. But suppose that Madison's decisionmaking process had been more formal. Suppose that he had heard argument about his legal obligations—and perhaps even testimony about Marbury's qualifications. (After all, President Jefferson reappointed some of Adams's nominees, but not Marbury.[2]) Or suppose Madison had convened an Executive Branch committee to make an initial determination. Suppose that this entity was labeled the "Court of Commission Review." Suppose that the members wore robes and were called judges, held their meeting in a courthouse, and adopted court-like procedures. With all these adornments, would Madison's decision have fallen within our appellate jurisdic-

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[1] Letter from T. Jefferson to H. Knox (Mar. 27, 1801), in 33 Papers of Thomas Jefferson 465, 466 (B. Oberg ed. 2006).

[2] Prakash, The Appointment and Removal of William J. Marbury and When an Office Vests, 89 Notre Dame L. Rev. 199, 209 (2013).

tion? Would *Marbury* v. *Madison* have come out the other way?

The answer is no, and the reason is the same as before. Our appellate jurisdiction permits us to review one thing: the lawful exercise of *judicial* power. Lower federal courts exercise the judicial power of the United States. State courts exercise the judicial power of sovereign state governments. Even territorial courts, we have held, exercise the judicial power of the territorial governments set up by Congress. Executive Branch officers, on the other hand, cannot lawfully exercise the judicial power of *any* sovereign, no matter how court-like their decisionmaking process might appear. That means their decisions cannot be appealed directly to our Court.

We have followed this rule for more than two centuries. It squarely resolves this case. Courts-martial are older than the Republic and have always been understood to be Executive Branch entities that help the President, as Commander in Chief, to discipline the Armed Forces. As currently constituted, military tribunals do not comply with Article III, and thus they cannot exercise the Federal Government's judicial power. That fact compels us to dismiss Ortiz's petition for lack of jurisdiction.

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Today's decision is unprecedented, and it flatly violates the unambiguous text of the Constitution. Although the arguments in the various opinions issued today may seem complex, the ultimate issue is really quite simple. The Court and the concurrence say that Congress may confer part of the judicial power of the United States on an entity that is indisputably part of the Executive Branch. But Article III of the Constitution vests "[t]he judicial Power of the United States"—every single drop of it—in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish" in compliance with that Article. A decision more contrary to the plain words of the Constitution is not easy to recall.

I

Under Article III of the Constitution, the judicial power of the United States may be vested only in tribunals whose judges have life tenure and salary protection. § 1. "There is no exception to this rule in the Constitution." *Benner* v. *Porter*, 9 How. 235, 244 (1850); *Oil States Energy Services, LLC* v. *Greene's Energy Group, LLC*, 584 U. S. 325, 333–334 (2018); *Stern* v. *Marshall*, 564 U. S. 462, 503 (2011); *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 330–331 (1816) (Story, J.).

The Court of Appeals for the Armed Forces (CAAF) is not such a tribunal. Its judges serve 15-year terms and can be removed by the President for cause. 10 U. S. C. §§ 942(b), (c). As the majority acknowledges, the CAAF is an Executive Branch entity, and as such, it cannot be vested with the judicial power conferred by Article III. If the CAAF *were* to do something that either amounts to or requires the exercise of judicial power, it would be unconstitutional.

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After specifying the only institutions that may exercise the judicial power of the United States, Article III defines the permissible scope of the jurisdiction of this Court. Article III allows us to exercise both "original" and "appellate" jurisdiction. Our original jurisdiction is limited to "Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party," § 2, so it is obvious that Ortiz's case does not fall within our original jurisdiction. But what about our appellate jurisdiction? If we directly reviewed a decision of the CAAF, would that be an exercise of "appellate" review in the sense meant by Article III? The answer is no.

A

The understanding of appellate jurisdiction embodied in Article III has deep roots. Blackstone explained that a "court of appeal" has jurisdiction only to "reverse or affirm the judgment of the inferior *courts*." 3 W. Blackstone, Commentaries on the Laws of England 411 (1768) (Blackstone)

(emphasis added). Echoing Blackstone, we have held that our appellate jurisdiction permits us to act only as "[a] supervising Court, whose peculiar province it is to correct the errors of an inferior Court." *Cohens* v. *Virginia*, 6 Wheat. 264, 396 (1821) (Marshall, C. J.). And we have reiterated that "[a]n appellate jurisdiction necessarily implies some judicial determination, some judgment, decree, or order of an inferior tribunal, from which an appeal has been taken." *The Alicia*, 7 Wall. 571, 573 (1869); *Webster* v. *Cooper*, 10 How. 54, 55 (1850); 3 J. Story, Commentaries on the Constitution of the United States § 916, p. 652 (1833) (Story).

Those principles make it easy to understand what *Marbury* meant when it held that "[i]t is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause." 1 Cranch, at 175. The cause (or case) must have been created previously, somewhere else. And as Blackstone suggested, what "creates" a "case" in the relevant sense—that is, what transforms a dispute into a "case" that an appellate court has jurisdiction to resolve—is the prior submission of the dispute to a tribunal that is lawfully vested with judicial power.

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We held exactly that not long after *Marbury*, and in a decision no less seminal. A dispute "becomes a case" for purposes of Article III, we held, only when it "assume[s] such a form that *the judicial power* is *capable of acting* on it. That power is capable of acting only when the subject is *submitted to it* by a party who asserts his rights in the form prescribed by law. It *then* becomes a case." *Osborn* v. *Bank of United States*, 9 Wheat. 738, 819 (1824) (Marshall, C. J.) (emphasis added). Hence, in order to create a "case" that Article III permits us to review on appeal, a litigant must have first "submitted" the dispute to another tribunal that was "capable" of exercising the "judicial power" of the government to which the tribunal belongs. As discussed, Executive Branch tribunals cannot fill that essential role.

We reiterated this principle in *Cohens*, another foundational precedent of the Marshall Court. "To commence a suit," Chief Justice Marshall explained, "is to demand something by the institution of process *in a Court of justice*." 6 Wheat., at 408 (emphasis added). Courts of justice are those tribunals "erected by" the sovereign and properly vested with the sovereign's own "power of judicature." 1 Blackstone 257 (1765). When the sovereign is the Federal Government, that means only courts established under Article III, for only those courts may exercise the judicial power of the United States. See *Cohens*, *supra*, at 405; The Federalist No. 78, pp. 469–472 (C. Rossiter ed. 1961) ("the courts of justice" are those described in Article III).

This view of appellate jurisdiction explains why, in *Martin* v. *Hunter's Lessee*, Justice Story declared that "if . . . congress should not establish [inferior Article III] courts, the appellate jurisdiction of the supreme court would have nothing to act upon, unless it could act upon cases pending in the state courts." 1 Wheat., at 339–340. Without decisions of Article III courts or state courts to review, our appellate jurisdiction would have lain idle—but *not* because there were no Executive Branch tribunals, like the CAAF, deciding federal questions. To the contrary, executive agencies have "conduct[ed] adjudications"—often taking "'judicial' forms"—"since the beginning of the Republic." *Arlington* v. *FCC*, 569 U. S. 290, 304–305, n. 4 (2013); *Freytag* v. *Commissioner*, 501 U. S. 868, 910 (1991) (Scalia, J., concurring in part and concurring in judgment); see generally J. Mashaw, Creating the Administrative Constitution 34–35 (2012).

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Such Executive Branch adjudications, however, do not give rise to "cases" that Article III grants us appellate jurisdiction to review, precisely because officers of the Executive Branch cannot lawfully be vested with judicial power. That is why Chief Justice Marshall declared, without qualification, that "[a] mandamus to an *officer* [of the Executive Branch] is held to be the exercise of original jurisdiction; but a manda-

mus to an *inferior court* of the United States, is in the nature of appellate jurisdiction." *Ex parte Crane*, 5 Pet. 190, 193 (1831) (emphasis added). Time has not sown doubts about the truth of that rule. *E. g.*, *Verizon Md. Inc.* v. *Public Serv. Comm'n of Md.*, 535 U. S. 635, 644, n. 3 (2002) ("judicial review of executive action, including determinations made by a state administrative agency," involves the exercise of federal court's "original jurisdiction" rather than its "appellate jurisdiction," which covers only "state-court judgments"); L. Jaffe, Judicial Control of Administrative Action 263, n. 5 (1965).

We have taken this same approach when deciding whether we may assert appellate jurisdiction to review the decision of a state tribunal: We look to state law to see whether the tribunal in question was eligible to receive the State's judicial power. *E. g.*, *Betts* v. *Brady*, 316 U. S. 455, 458–460 (1942); cf. *Chicago, R. I. & P. R. Co.* v. *Stude*, 346 U. S. 574, 578–579 (1954) (federal courts cannot exercise removal jurisdiction—which is appellate in nature, *Martin*, *supra*, at 349—while a dispute is still in state "administrative" proceedings; removal is proper only after "the jurisdiction of the state district court is invoked"); *Verizon Md.*, *supra*.

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B

This understanding of appellate jurisdiction bars our review here. The dispute between Ortiz and the Federal Government has been presented to four tribunals: the initial court-martial, the Air Force Court of Criminal Appeals, the CAAF, and this Court. Each of those tribunals belongs to a branch of the Federal Government. Yet only one of them—our Court—is capable, under the Constitution, of exercising the Government's judicial power. Thus, the dispute between Ortiz and the Federal Government did not become an Article III "case" until Ortiz petitioned our Court to hear it. That means our present adjudication—no less than our adjudication of the dispute between Marbury and Madison—

lacks "the essential criterion of appellate jurisdiction." 1 Cranch, at 175.

The majority does not question this framework; indeed, it acknowledges that, per *Marbury*, we can assert jurisdiction here only if the dispute before us blossomed into an Article III "case" before it landed at our doorstep. *Ante*, at 436–437. Curiously, however, the majority basically proceeds as though *Marbury* were our last word on the subject. *Ante*, at 436–437, and n 4. That is simply not right. As discussed, our foundational precedents expressly delineate the prerequisites to the formation of a constitutional case: The dispute must, at a minimum, have been previously presented to and decided by a tribunal lawfully vested with the judicial power of the government to which it belongs. Nothing of the sort occurred here; traversing a series of "proceedings" internal to the Executive Branch, *ante*, at 437, does not count. And while there undoubtedly are differences between this case and *Marbury*, even some that "lea[p] off the page," *ante*, at 447, those distinctions are irrelevant to our jurisdiction. The dispositive common ground is that, just as in *Marbury*, we are here asked to resolve a dispute that has been presented only to Executive Branch officers. The present dispute thus lies beyond the "peculiar province" of our appellate jurisdiction to review. *Cohens*, 6 Wheat., at 396.

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C

If there were any doubt that Article III forbids us to take appeals directly from the Executive Branch, two centuries of precedent—almost all of it overlooked by the majority—would put those doubts to rest.

1

First consider the history of our relationship with the Court of Claims. Congress established that court in 1855 to adjudicate claims against the United States. § 1, 10 Stat. 612. Congress provided the court's judges with life tenure

and salary protection, just as Article III requires. *Ibid.* The Court of Claims was a court of record, and it followed all the procedures—and possessed all the ancillary powers (subpoena, contempt, etc.)—that one would expect to find in a court of justice. §§ 3–7, 10 Stat. 613; § 4, 12 Stat. 765–766. Its decisions had preclusive effect, and were appealable directly to our Court. §§ 7, 5, *id.*, at 766. If the court rendered judgment for a claimant, however, the Secretary of the Treasury could partially revise its decision by modifying the amount of the judgment to be paid (though not the court's legal conclusion that the claimant was in the right). § 14, *id.*, at 768.

Under principles as old as *Hayburn's Case*, 2 Dall. 409 (1792), a court whose judgments are not self-executing no more complies with Article III than a tribunal whose judges are not life tenured. For that reason alone, we dismissed for lack of jurisdiction the first time a party appealed a Court of Claims decision directly to our Court. *Gordon* v. *United States*, 2 Wall. 561 (1865); 117 U. S. Appx. 697 (1864). It did not even matter that the court's decision in that case had been *against* the claimant, and was thus immune from revision, and would have been fully binding if we had affirmed. All that mattered was that the Court of Claims, like the CAAF, lacked an attribute that Article III makes prerequisite to the vesting of judicial power. *Id.*, at 704. In words that apply as much here, we said that "the so-called judgments of the Court of Claims . . . could not be deemed an exercise of judicial power, and could not, therefore, be revised by this court." *In re Sanborn*, 148 U. S. 222, 224 (1893). It was irrelevant how much the Court of Claims otherwise "resemble[d] . . . courts whose decisions we review." *Ante*, at 438.

The story does not end there, however. In 1866 Congress did something it has never done with respect to courts-martial: It brought the Court of Claims into compliance with Article III by repealing the provision that made some of its

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decisions revisable by the Treasury Secretary. Ch. 19, § 1, 14 Stat. 9. We began hearing appeals from it "immediately." *United States* v. *Jones*, 119 U. S. 477, 478 (1886). We now were able to "accep[t] appellate jurisdiction over what was, necessarily, an exercise of the judicial power which *alone* [we] may review." *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 554 (1962) (plurality opinion) (citing *Marbury*, *supra*, at 174–175; emphasis added).

2

Next consider our practice in entertaining petitions for writs of habeas corpus.

Four years after *Marbury*, we reaffirmed its core holding in *Ex parte Bollman*, 4 Cranch 75 (1807) (Marshall, C. J.). Two men were taken into federal custody, and their confinement was approved by an Article III court. *United States* v. *Bollman*, 24 F. Cas. 1189, 1190, 1196 (No. 14,622) (CC DC 1807). They then petitioned our Court for a writ of habeas corpus. Applying *Marbury*, we held that the jurisdiction "which the court is now asked to exercise is clearly *appellate*. It is the revision of a decision of an inferior court." 4 Cranch, at 101.

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Contrast *Bollman* with *Ex parte Barry*, 2 How. 65 (1844), and *In re Metzger*, 5 How. 176 (1847). In *Barry*, the petitioner sought relief in this Court without first presenting his claim to an inferior federal court or a state court, and so Justice Story explained that "[t]he case, then, is one avowedly and nakedly for the exercise of original jurisdiction by this court" and was required to be dismissed. 2 How., at 65. In *Metzger*, "the district judge" had "heard and decided" the lawfulness of the petitioner's custody, but the judge had done so only "*at his chambers*, and not in court." 5 How., at 191 (emphasis added). His judgment was not provisional, like some early Court of Claims decisions—but his status as a judge at chambers was still fatal to our jurisdiction. In a technical sense, a judge at chambers "exercises a

special authority" distinct from the judicial power vested by Article III—which meant that the Constitution would permit us to review his decision in "[t]he exercise of an original jurisdiction only." *Id.*, at 191–192.

3

Finally, and especially pertinent here, we have adhered to the *Marbury* principle in the many instances in our Court's history in which we have been asked to review the decision of a military tribunal. First, in *Ex parte Vallandigham*, 1 Wall. 243 (1864), an Ohio resident had been tried and sentenced by a military commission, and its decision became final after being approved up the chain of command. Vallandigham sought relief directly from our Court, without first petitioning a lower federal court. We held that we lacked jurisdiction. *Id.*, at 254. The military commission, like the CAAF, was not one of the "courts of the United States" established under Article III, *id.*, at 251, and thus it could not exercise the judicial power of the Federal Government, but could exercise only "a special authority," *id.*, at 253—just like the Court of Claims, and just like a judge at chambers. Given that fact, we held it was "certain" that any review of its decisions could take place only in the exercise of our original, and not appellate, jurisdiction. *Id.*, at 251–252. And despite what the majority seems to think, see *ante*, at 446, n. 8, in *Vallandigham* we *recognized* that the military tribunal had "judicial character" in the sense that it had "the authority . . . to examine, to decide and sentence," but—in the same breath—we affirmed the crucial point, namely, that such character "'is not judicial . . . in the sense in which judicial *power* is granted to the courts of the United States.'" 1 Wall., at 253 (emphasis added).

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Contrast *Vallandigham* with a pair of decisions we issued shortly thereafter. In *Ex parte Milligan*, 4 Wall. 2 (1866), and *Ex parte Yerger*, 8 Wall. 85 (1869), we again were asked

to grant relief to petitioners who, just like Vallandigham (and just like Ortiz), were in custody under orders of a non-Article III military tribunal. But unlike Vallandigham and Ortiz, Milligan and Yerger first sought relief in a lower federal court. *Milligan*, *supra*, at 107–108; *Yerger*, 8 Wall., at 102–103. That fact made all the difference—again, because of the rule that we possess, "under the Constitution, an appellate jurisdiction, to be exercised only in the revision of judicial decisions." *Id.*, at 97. The decisions of non-Article III military courts do not qualify.

Similarly, after World War II we received "more than a hundred" habeas petitions from individuals in the custody of "various American or international military tribunals abroad," almost none of whom had "first sought [relief] in a lower federal court." R. Fallon, J. Manning, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 292 (7th ed. 2015). Consistent with *Marbury*, we denied review in every one. Fallon, *supra*, at 292–293. Thus, while it is surely true that "not every military tribunal is alike" in all respects, *ante*, at 446, before today, they were at least alike in this respect: Their decisions could not be reviewed directly here.

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D

The unbroken line of authorities discussed above vividly illustrates the nature and limits of our appellate jurisdiction as defined in Article III. Today's decision cannot be squared with those authorities, and the majority barely even tries. The majority says not a word about the Court of Claims, even though that tribunal surely had sufficient "court-likeness," *ante*, at 445 (emphasis deleted), to come within the scope of our appellate jurisdiction under today's test. Nor does the majority acknowledge the slew of on-point habeas decisions—save for *Vallandigham*, which it waves away by emphasizing irrelevant factual details (like the commanding

officer's facial hair). Despite its running refrain that the CAAF displays a "judicial *character*," *ante*, at 435 (emphasis added); see also *ante*, at 437–438, 447, 448, the majority simply never comes to grips with the substance of our holdings: We may not hear an appeal directly from any tribunal that has not been lawfully vested with judicial *power*. That rule directly covers the CAAF, and it bars our review.

II

Having said very little about a large body of controlling precedent, the majority says very much about the fact that we have long heard appeals directly from territorial courts and the courts of the District of Columbia. *Ante*, at 442–445. The majority claims to be looking for a "powerful reason" why our appellate jurisdiction should treat courts-martial any differently. *Ante*, at 444. A careful reading of our decisions shows that we have a good reason ready at hand—one that is fully consistent with *Marbury*.

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The reason, as I explain below, is this: Congress enjoys a unique authority to create governments for the Territories and the District of Columbia and to confer on the various branches of those governments powers that are distinct from the legislative, executive, and judicial power of the United States. Thus, for example, the courts of the District of Columbia exercise the judicial power of the District, not that of the United States. The courts of the United States Virgin Islands exercise the judicial power of that Territory, not the judicial power of the United States. By contrast, the CAAF and other military tribunals are indisputably part of the Executive Branch of the Government of the United States. They exercise the power of the United States, not that of any other government, and since they are part of the Executive, the only power that they may lawfully exercise is executive, not judicial. Unless they are removed from the Executive Branch and transformed into Article III courts, they

may not exercise any part of the judicial power of the United States. Nor need they exercise judicial power to carry out their functions, as we have always understood.

A

We have long said that Congress's authority to govern the Territories and the District of Columbia stems as much from its inherent sovereign powers as it does from specific constitutional provisions in Articles IV and I. *Sere* v. *Pitot*, 6 Cranch 332, 336–337 (1810) (Marshall, C. J.); *American Ins. Co.* v. *356 Bales of Cotton*, 1 Pet. 511, 546 (1828) (Marshall, C. J.); *Late Corp. of Church of Jesus Christ of Latter-day Saints* v. *United States*, 136 U. S. 1, 42 (1890); see also Art. IV, § 3, cl. 2 (Territories); Art. I, § 8, cl. 17 (District). Perhaps reflecting that view, the founding generation understood—and for more than two centuries, we have recognized—that Congress's power to govern the Territories and the District is *sui generis* in one very specific respect: When exercising it, Congress is not bound by the Vesting Clauses of Articles I, II, and III.

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The Vesting Clauses impose strict limits on the kinds of institutions that Congress can vest with legislative, executive, and judicial power. See generally *Department of Transportation* v. *Association of American Railroads*, 575 U. S. 43, 67–69 (2015) (THOMAS, J., concurring in judgment). Those limits apply when Congress legislates in every other area, including when it regulates the Armed Forces. See *Loving* v. *United States*, 517 U. S. 748, 767–768, 771–774 (1996) (Article I nondelegation doctrine applies to congressional regulation of courts-martial). But it has been our consistent view that those same limits do not apply when Congress creates institutions to govern the Territories and the District. As we said in *Benner* v. *Porter*, 9 How. 235, 242 (1850), territorial governments set up by Congress "are not organized under the Constitution, nor subject to its complex distribution of the powers of government, as the organic

law; but are the creations, exclusively, of the legislative department." Congress may therefore give territorial governments "a legislative, an executive, and a judiciary, with such powers as it has been their will to assign to those departments." *Sere*, *supra*, at 337. That is why we have often repeated that "[i]n legislating for [the Territories], Congress exercises the combined powers of the general, and of a state government." *American Ins. Co.*, *supra*, at 546; *Palmore* v. *United States*, 411 U. S. 389, 403 (1973). Just as the Vesting Clauses do not constrain the States in organizing their own governments, *Dreyer* v. *Illinois*, 187 U. S. 71, 84 (1902), those Clauses do not constrain Congress in organizing territorial governments.

Thus, unlike any of its other powers, Congress's power over the Territories allows it to create governments in miniature, and to vest those governments with the legislative, executive, and judicial powers, not of the United States, but of the Territory itself. For that reason we have upheld delegations of legislative, executive, and judicial power to territorial governments despite acknowledging that each one would be incompatible with the Vesting Clauses of the Federal Constitution if those Clauses applied. See, *e. g.*, *Dorr* v. *United States*, 195 U. S. 138, 153 (1904) (territorial legislature); *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, 322–323 (1937); *Snow* v. *United States*, 18 Wall. 317, 321–322 (1873) (territorial executive); *American Ins. Co.*, *supra* (territorial courts); *Sere*, *supra*; *Kendall* v. *United States ex rel. Stokes*, 12 Pet. 524, 619 (1838); *Keller* v. *Potomac Elec. Power Co.*, 261 U. S. 428, 442–443 (1923).

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The Framers evidently shared this view. Thus, James Madison took it for granted that Congress could create "a municipal legislature" for the District of Columbia, The Federalist No. 43, at 272–273, something that would otherwise violate the Vesting Clause of Article I, which prohibits Congress from delegating legislative powers to any other entity, *Wayman* v. *Southard*, 10 Wheat. 1, 42–43 (1825) (Marshall,

C. J.). And Justice Story declared, without hesitation, that "[w]hat shall be the form of government established in the territories depends exclusively upon the discretion of congress. Having a right to erect a territorial government, they may confer on it such powers, legislative, judicial, and executive, as they may deem best." 3 Story § 667, at 478.

The upshot is that it is *only* when Congress legislates for the Territories and the District that it may lawfully vest judicial power in tribunals that do not conform to Article III. And that, in turn, explains why territorial courts and those of the District—exercising the judicial power of their respective governments—may have their decisions appealed directly here. We said as much in *United States* v. *Coe*, 155 U. S. 76, 86 (1894), where we explained that *because* Congress's "power of government . . . over the Territories . . . includes the ultimate executive, legislative, and judicial power, it follows that the judicial action of all inferior courts established by Congress may, in accordance with the Constitution, be subjected to [our] appellate jurisdiction."

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The rule of appellate jurisdiction we recognized in *Coe* is identical to the rule we have applied ever since *Marbury*: Our appellate jurisdiction is proper only if the underlying decision represents an exercise of judicial power lawfully vested in the tribunal below. Territorial courts and those of the District of Columbia have such power; the CAAF does not, and cannot be given it so long as it fails to comply with Article III. That is reason enough to treat these tribunals differently.[3]

[3] It is true that our decisions concerning territorial governments, and territorial courts in particular, have had their share of critics. See, *e. g.*, M. Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power 36–39 (1980); Currie, The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801–1835, 49 U. Chi. L. Rev. 646, 719 (1982); C. Wright, Law of Federal Courts 41 (4th ed. 1983); Fallon, Of Legislative Courts, Administrative Agencies, and Article III, 101 Harv. L. Rev. 915, 972 (1988); Bator, The Constitution as Architecture: Legislative and Administrative Courts Under Article III, 65 Ind. L. J. 233, 240–

B

The majority responds to this conclusion by suggesting, albeit without much elaboration, that just as the Constitution gives Congress the "exceptional" power to confer non-Article III judicial power on the courts of the Territories and the District of Columbia, the Constitution also gives Congress the "exceptional" power to vest military tribunals with non-Article III judicial power. See *ante*, at 444, and n. 7. But the Vesting Clauses are exclusive, which means that the Government's judicial power is not shared between Article II and Article III. See *supra*, at 466 (collecting cases); see also, *e. g.*, *Arlington*, 569 U. S., at 304–305, n. 4; *Ex parte Randolph*, 20 F. Cas. 242, 254 (No. 11,558) (CC Va. 1833) (Marshall, C. J.) (those whose "offices are held at the pleasure of the president . . . are, consequently, incapable of exercising any portion of the judicial power"); *Association of American Railroads*, 575 U. S., at 68, 74 (THOMAS, J., concurring in judgment); *B&B Hardware, Inc.* v. *Hargis Industries, Inc.*, 575 U. S. 138, 170–171 (2015) (THOMAS, J., dissenting). And neither the majority nor the concurrence ever explains how the Constitution's various provisions relating to the military, through their penumbras and emanations, can be said to produce a hybrid executive-judicial power that is nowhere mentioned in the Constitution's text, that is foreclosed by its structure, and that had gone almost entirely unnoticed before today.

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Thus, to make the majority's argument parallel to the argument regarding the courts of the Territories and the Dis-

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242 (1990); G. Lawson & G. Seidman, The Constitution of Empire 149 (2004). But the theory underlying our cases was widely shared at the founding; our decisions have never seriously questioned it; and, if taken at face value, it coheres with the rest of our jurisprudence. Seeing no need to revisit these precedents, I would not disturb them. I certainly would not do what the majority has done: stretch an arguably anomalous doctrine and export it (in mutated form) to other contexts where it can only cause mischief.

trict of Columbia, the majority would have to argue that the military, like the governments of the Territories and the District, is somehow not part of the Federal Government—"not organized under the Constitution, . . . as the organic law," *Benner*, 9 How., at 242—but is a government unto itself. To set out that argument, however, is to expose its weakness, for nothing could be more antithetical to the Constitution and to our traditional understanding of the relationship between the military and civilian authority. The military is not an entity unto itself, separate from the civilian government established by the Constitution. On the contrary, it is part of the Executive Branch of the Government of the United States, and it is under the command of the President, who is given the power of Commander in Chief and is ultimately answerable to the people.

To appreciate the constitutional status of military tribunals, it is helpful to recall their origins. Courts-martial are older than the Republic, and they have always been understood to be an arm of military command exercising executive power, as opposed to independent courts of law exercising judicial power. Blackstone declared that the court-martial system of the British Empire was based solely on "the necessity of order and discipline" in the military. 1 Blackstone 400. Indeed, Blackstone explained that courts-martial exercise a "discretionary power" to "inflict" "punishment . . . extend[ing] to death itself," which was "to be guided by the directions of the crown," in express contrast to "the king's courts," which dispense "justice according to the laws of the land." *Id.*, at 402, 400. The crown's "extensive" power over the military—exercised, in part, through courts-martial—was "executive power." *Id.*, at 408. Many others have echoed the point. Thus, "[a]t the time of our separation [from Britain], . . . a court-martial . . . was not a judicial body. Its functions were not judicial functions. It was but an agency of the power of military command to do its bidding." Ansell, Military Justice, 5 Cornell L. Q. 1, 6 (1919).

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When the United States declared its independence and prepared for war with Britain, the leaders of the new Nation were deeply impressed by the British court-martial system and sought to replicate it. John Adams, who in 1776 drafted the Continental Articles for the Government of the Army, was convinced that it would be "in vain" for the American patriots to seek "a more complete system of military discipline" than the existing British model. 3 The Works of John Adams 68 (C. Adams ed. 1851). He and Thomas Jefferson therefore proposed adopting "the British articles of war, *totidem verbis*." *Id.*, at 68–69. The Continental Congress agreed. *Id.*, at 69. And when the Constitution and the Bill of Rights were adopted, no one suggested that this required any alteration of the existing system of military justice. On the contrary, as the majority recounts, the First Congress continued the existing articles of war unchanged. *Ante*, at 439. Courts-martial fit effortlessly into the structure of government established by the Constitution. They were instruments of military command. Under the Constitution, the President, as the head of the Executive Branch, was made the Commander in Chief. Art. II, § 2. So the role of the courts-martial was to assist the President in the exercise of that command authority.

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The ratification of the Constitution and the Bill of Rights did naturally raise some constitutional questions. For example, founding-era courts-martial adjudicated a long list of offenses, some carrying capital punishment, including for crimes involving homicide, assault, and theft. American Articles of War of 1776, § 13, in 2 W. Winthrop, Military Law and Precedents 1495–1498 (2d ed. 1896) (Winthrop); see also, *e. g.*, American Articles of War of 1806, Arts. 39, 51, 54, in *id.*, at 1514–1516. In civilian life, a person charged with similar offenses was entitled to protections, such as trial by jury, that were unavailable in courts-martial. Moreover, the Constitution entitled such persons to *judicial* process—which courts-martial, lacking the necessary structural at-

tributes of Article III courts, could not afford. So how could they try serious crimes, including even capital offenses?

The simple answer goes back to the fundamental nature of courts-martial as instruments of command. As Blackstone recognized, the enforcement of military discipline, an essential feature of any effective fighting force, was viewed as an *executive* prerogative. It represented the exercise of the power given to the President as the head of the Executive Branch and the Commander in Chief and delegated by him to military commanders. Thus, adjudications by courts-martial are executive decisions; courts-martial are not courts; they do not wield judicial power; and their proceedings are not criminal prosecutions within the meaning of the Constitution. As we explained in *Milligan*, the need to maintain military order required those serving in the military to surrender certain rights that they enjoyed in civilian life and to submit to discipline by the military command. Although *Milligan* confirmed the general rule that "it is the birthright of every American citizen" to have the Federal Government adjudicate criminal charges against him only in an Article III court, 4 Wall., at 119, 122, we also stated that "[e]very one connected with" "the military or naval service . . . while thus serving, surrenders his right to be tried by the civil courts," *id.*, at 123. That is why the historical evidence strongly suggests that the provisions of the Bill of Rights were not originally understood to apply to courts-martial. See Prakash, The Sweeping Domestic War Powers of Congress, 113 Mich. L. Rev. 1337, 1346 (2015); Wiener, Courts-Martial and the Bill of Rights: The Original Practice II, 72 Harv. L. Rev. 266, 290–291, 294 (1958); see also 1 Winthrop 54, 241, 430, 605; *Milligan*, *supra*, at 137–138 (Chase, C. J., concurring in judgment).[4]

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[4] In fact, "for over half a century after the adoption of the Bill of Rights, its provisions were never invoked in a military situation save in a single instance," and in that case "the denial of its applicability to the military . . . was approved by no less an authority than

Due to reforms adopted in the recent past, it is possible today to mistake a military tribunal for a regular court and thus to forget its fundamental nature as an instrument of military discipline, but no one would have made that mistake at the time of the founding and for many years thereafter. Notwithstanding modest reforms in 1874, a court-martial continued into the 20th century to serve "primarily as a function or instrument of the executive department to be used in maintaining discipline in the armed forces. It was therefore not a 'court,' as that term is normally used." Schlueter, The Court-Martial: An Historical Survey, 87 Mil. L. Rev. 129, 150–153, 154–155 (1980). Hence, Colonel Winthrop—whom we have called "the 'Blackstone of Military Law,'" *Reid* v. *Covert*, 354 U. S. 1, 19, n. 38 (1957) (plurality opinion)—echoed the original Blackstone in describing courts-martial as "simply *instrumentalities of the executive power*, provided by Congress for the President as Commander-in-chief, to aid him in properly commanding the army and navy and enforcing discipline therein." 1 Winthrop 54.

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Indeed, Brigadier General Samuel T. Ansell, who served as acting Judge Advocate General from 1917 to 1919, groused that the American system at the time of World War I was still "basically . . . the British system as it existed at the time of the separation" and described it as one "arising out of and regulated by the mere power of Military Command rather than Law." Ansell, 5 Cornell L. Q., at 1. Around the same time, Edmund Morgan—who would later help draft the Uniform Code of Military Justice (UCMJ)—declared it "too clear for argument that the principle at the foundation of the existing system is the supremacy of military command. To maintain that principle, military command dominates and controls the proceeding from its initiation to the final execution of the sentence. While the actual trial has the semblance of a judicial proceeding and is required to be con-

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the father of the Bill of Rights himself." Wiener, 72 Harv. L. Rev., at 291.

ducted pursuant to the forms of law, . . . [i]n truth and in fact, . . . courts-martial are exactly what Colonel Winthrop has asserted them to be." Morgan, The Existing Court-Martial System and the Ansell Army Articles, 29 Yale L. J. 52, 66 (1919).

For instance, until 1920 the President and commanding officers could disapprove a court-martial sentence and order that a more severe one be imposed instead, for whatever reason. We twice upheld the constitutionality of this practice, *Swaim* v. *United States*, 165 U. S. 553, 564–566 (1897); *Ex parte Reed*, 100 U. S. 13, 20, 23 (1879), which was widely used during World War I, see Wiener, *supra*, at 273. Similarly, until 1920 it was permissible for the same officer to serve as both prosecutor and defense counsel in the same case. West, A History of Command Influence on the Military Judicial System, 18 UCLA L. Rev. 1, 14 (1970). Congress discontinued such practices by statute, but through the end of World War II, courts-martial remained blunt instruments to enforce discipline. Schlueter, *supra*, at 157–158; see also West, *supra*, at 8, n. 18.

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It is precisely because Article II authorizes the President to discipline the military without invoking the judicial power of the United States that the Constitution has always been understood to permit courts-martial to operate in the manner described above. Thus, in *Dynes* v. *Hoover*, 20 How. 65, 79 (1858), we said that the Constitution makes clear that the Government's power to "tr[y] and punis[h]" military offenses "is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other."

Moreover, the principle that the Government need not exercise judicial power when it adjudicates military offenses accords with the historical understanding of the meaning of due process. In the 19th century, it was widely believed that the constitutional guarantee of due process imposed the

rule that the Government must exercise its judicial power before depriving anyone of a core private right. See generally Nelson, Adjudication in the Political Branches, 107 Colum. L. Rev. 559, 562, 568–569, and n. 42 (2007); *e. g.*, *Cohen* v. *Wright*, 22 Cal. 293, 318 (1863) ("The terms 'due process of law' have a distinct legal signification, clearly securing to every person . . . a judicial trial . . . before he can be deprived of life, liberty, or property"); *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 275, 280 (1856) (similar). Yet for most of our history we held that "[t]o those in the military or naval service of the United States the military law is due process." *Reaves* v. *Ainsworth*, 219 U. S. 296, 304 (1911); *United States ex rel. French* v. *Weeks*, 259 U. S. 326, 335 (1922); see also *Milligan*, 4 Wall., at 138 (Chase, C. J., concurring in judgment) ("[T]he power of Congress, in the government of the land and naval forces and of the militia, is not at all affected by the fifth or any other amendment"); Wiener, 72 Harv. L. Rev., at 279 (in the history of courts-martial, "of due process of law as a constitutional concept, there is no trace"); cf. 1 Blackstone 403–404 (explaining the basic due process rights soldiers surrender upon entering the army).

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This understanding of the power wielded by military tribunals parallels our current jurisprudence regarding the authority of other Executive Branch entities to adjudicate disputes that affect individual rights. An exercise of judicial power may be necessary for the disposition of private rights, including the rights at stake in a criminal case. *B&B Hardware*, 575 U. S., at 172–173 (THOMAS, J., dissenting); see also *Wellness Int'l Network, Ltd.* v. *Sharif*, 575 U. S. 665, 711 (2015) (THOMAS, J., dissenting). But the adjudication of public rights does not demand the exercise of judicial power. *Id.*, at 711–712. Similarly, enforcement of military discipline is not a function that demands the exercise of judicial power, either. *Dynes*, *supra*; *Murray's Lessee*, *supra*, at 284.

In short, military offenses are "exceptions" to Article III in the same way that true public rights disputes are exceptions to Article III: The Federal Government can adjudicate either one without exercising its judicial power. This means that when Congress assigns either of these functions to an Executive Branch tribunal—whether the Patent Trial and Appeal Board, the Court of Claims, or the CAAF—that does not imply that the tribunal in question is exercising judicial power. And the point holds notwithstanding the undoubted fidelity to "the rule of law" that such officers bring to their tasks. *Ante,* at 440, n. 5. Contrary to the majority's odd suggestion, acting "in strict compliance with legal rules and principles" is not a uniquely judicial virtue. *Ibid.* The most basic duty of the President and his subordinates, after all, is to "take Care that the Laws be *faithfully executed.*" Art. II, §3 (emphasis added). Hence, acting with fidelity to law is something every executive officer is charged with doing, but those officers remain *executive* officers all the same. For that reason, and in light of the history recounted above, the majority's suggestion that "[t]he military justice system's essential character" is "judicial," and has been "maintained" as such since the "very first Congress," *ante,* at 437, 439, simply does not square with the actual operation of the court-martial system or the consensus view of its place in our constitutional scheme.

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C

In response to this history, the majority tries to enlist Colonel Winthrop as an ally, *ante,* at 440, and n. 5, but Winthrop had a firmer grasp than the majority on the distinction between functions that can be described as "judicial" in a colloquial sense and functions that represent an exercise of "judicial power" in the constitutional sense. Thus, while Winthrop observed that courts-martial resemble constitutional courts in certain respects, he made those observations "*[n]otwithstanding* that the court-martial is only an instru-

mentality of the executive power having no relation or connection, in law, with the judicial establishments of the country." 1 Winthrop 61 (emphasis added). Nor was Winthrop the only military commentator who employed such terms casually from time to time. *E. g.*, W. De Hart, Observations on Military Law 6 (1859) (describing an officer's authority to appoint members of a court-martial as "a legislative power"); *id.*, at 14 (describing courts-martial as "being clothed with judicial powers"). Indeed, our own Court has frequently described functions as "judicial" in a colloquial sense, despite knowing they are executive in the constitutional sense. *E. g.*, *Smelting Co.* v. *Kemp*, 104 U. S. 636, 640 (1882) (Land Department officers "exercise a judicial function" although they are "part of the administrative and executive branch of the government"); *Murray's Lessee*, 18 How., at 280–281; *Vallandigham*, 1 Wall., at 253; *Arlington*, 569 U. S., at 304–305, n. 4.

The majority's reliance on Attorney General Bates is even weaker. *Ante*, at 439–440. Bates wrote a memo to President Lincoln opining that when the President acts to "approve and confirm the sentence of a court martial," or to "revis[e] its proceedings," Congress intended him to "act *judicially*—that is, [to] exercise the discretion confided to him within the limits of law." 11 Op. Atty. Gen. 20–21 (1864). Bates was arguing that a President could not revoke a court-martial sentence after it had been carried into execution. He was describing an implicit limit on the power of the President under the system of military justice established by statute. His reference to certain Presidential actions as "judicial" had nothing to do with judicial review, and in *Vallandigham*, *supra*, at 254, we rejected the idea that "the President's action" in approving a court-martial decision is an exercise of judicial power that we can review directly.

In sum, the majority has done nothing to undermine the overwhelming historical consensus that courts-martial permissibly carry out their functions by exercising executive rather than judicial power.

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III

What remains of the majority's analysis boils down to the assertion that courts-martial "resemble" conventional courts, *ante*, at 438, indeed, that "court-likeness" is the dispositive issue, *ante*, at 445 (emphasis deleted).

The first thing to be said in response to this theory is that we have "never adopted a 'looks like' test to determine if an adjudication" involves an exercise of judicial power. *Oil States*, 584 U. S., at 343. On the contrary, we have frequently repudiated this mode of analysis as utterly inadequate to police separation-of-powers disputes. See, *e. g.*, *INS* v. *Chadha*, 462 U. S. 919, 953, n. 16 (1983); *Arlington*, *supra*; *Gordon*, 117 U. S. Appx., at 699. In fact, of all the cases on which the majority relies, not a single one suggests that our appellate jurisdiction turns on the extent to which the underlying tribunal looks like a court.

In any event, the majority's "looks like" test fails on its own terms. It is certainly true that today's military justice system provides many protections for the accused and is staffed by officers who perform their duties diligently, responsibly, and with an appropriate degree of independence. Nothing I say about the current system should be interpreted as denigrating that system or as impugning the dedication, professionalism, and integrity of the officers who serve in it, notwithstanding the majority's insistence to the contrary. *Ante*, at 440, n. 5. As explained above, military officers' undoubted fidelity to law has nothing to do with the court-martial system's status under our Constitution. That status is what my point here concerns. And that status has never changed.

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Today's court-martial system was put in place in 1950, when Congress enacted the UCMJ in response to criticism following World War II. 64 Stat. 108. Among its innovations, the UCMJ subjected courts-martial to more elaborate procedural rules than ever before. It also created a system of internal appellate tribunals within the military chain of

command. Those entities—which we now call the Army, Navy-Marine Corps, Air Force, and Coast Guard Courts of Criminal Appeals and the Court of Appeals for the Armed Forces—did not exist before 1950. Congress augmented this system in 1983, for the first time in American history providing for direct Supreme Court review of certain decisions of the highest military tribunal. 97 Stat. 1405–1406; 10 U. S. C. § 867a; 28 U. S. C. § 1259.

Such reforms, as I have indicated, are fully consistent with the President's overriding duty to "faithfully execut[e]" the laws. Art. II, § 3. Hence, even after Congress passed the UCMJ, we continued to recognize that the court-martial system "'has always been and continues to be primarily an instrument of discipline,'" *O'Callahan* v. *Parker*, 395 U. S. 258, 266 (1969), and that "courts-martial are constitutional instruments to carry out congressional and executive will," *Palmore*, 411 U. S., at 404; see also, *e. g.*, *Reid*, 354 U. S., at 36 (plurality opinion); *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11, 17 (1955); *Chappell* v. *Wallace*, 462 U. S. 296, 300 (1983). For that reason, even if the majority were to begin its analysis in 1950, and to confine it to the CAAF—which the majority has *not* done—it would still be incorrect to perceive anything other than executive power at issue here.

Slip Opinion Pending Publication

An examination of the CAAF confirms this point. The CAAF's members are appointed by the President for a term of years, and he may remove them for cause, 10 U. S. C. §§ 942(b), (c), under a standard we have recognized as "very broad," *Bowsher* v. *Synar*, 478 U. S. 714, 729 (1986). These and other provisions of the UCMJ "make clear that [the CAAF] is within the Executive Branch." *Edmond* v. *United States*, 520 U. S. 651, 664, n. 2 (1997). For instance, the CAAF is subject to oversight by the Secretaries of Defense, Homeland Security, and the military departments, and its members must meet annually to discuss their work with members of the military and appointees of the Secretary of Defense. 10 U. S. C. § 946. The CAAF must review any

case a judge advocate general orders it to hear. §867(a)(2). And, contrary to the majority's assertion, the CAAF's decisions are not "final (except if we review and reverse them)." *Ante*, at 447.

In fact, in the most serious cases that the CAAF reviews—those in which a court-martial imposes a sentence of death or dismissal from the Armed Forces—the CAAF's judgment cannot be executed until the President, the relevant branch Secretary, or one of his subordinates approves it. 10 U. S. C. §§871(a), (b). That is why the UCMJ provides that "[a]fter [the CAAF] has acted on a case," the "convening authority [shall] take action in accordance with that decision," "*unless there is to be further action by the President or the Secretary concerned*." §867(e) (emphasis added). In such cases the "proceedings, findings, and sentences" of the court-martial system—including the CAAF's "appellate review"—are not final until approved. §876.[5] Indeed, even if *our* Court affirms such a judgment, it cannot be executed until the relevant military authority approves it—a requirement that is not subject to any timeframe or substantive standards. See Manual for Courts-Martial, United States Rule for Courts-Martial 1205(b) (2016).[6]

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[5] Thus, JUSTICE THOMAS is mistaken when he asserts that "[t]he Executive Branch has no statutory authority to review or modify the CAAF's decisions." *Ante*, at 460 (concurring opinion). And anyway, even if the CAAF's decisions were final, it would not imply that they are judicial. Insofar as the Government can adjudicate military offenses without exercising its judicial power, finality would be equally consistent with executive as well as judicial power.

[6] For example, in 1996 we granted certiorari to the CAAF and affirmed the court-martial conviction and capital sentence of Dwight Loving. *Loving* v. *United States*, 517 U. S. 748 (1996). Yet our judgment could not be deemed final—and hence could not be carried out—until the President approved it. Neither President Clinton nor President Bush would do so. *Loving* v. *United States*, 68 M. J. 1, 3 (CAAF 2009). President Obama eventually commuted the sentence to life without parole, https://www.justice.gov/pardon/obama-commutations (as last visited June 21, 2018).

Such revisory powers have always been a feature of the court-martial system. 1 Winthrop 683. And because the UCMJ preserves the chain of command's historic revisory power over the CAAF's most significant decisions, there is no way for us to conclude that the CAAF is "judicial" under any known definition of that term. And it should not matter that Ortiz's own sentence is not subject to approval, just as it did not matter that the Court of Claims decision at issue in *Gordon* was not subject to review by the Treasury Secretary. This point is elementary. At least since *Hayburn's Case*, 2 Dall., at 411, n., 413, n., it has been firmly established that it is "'radically inconsistent'" with the "'judicial power'" for any court's judgments, "'under any circumstances,'" to "'be liable to a reversion, or even suspension,'" by members of the Executive or Legislative Branches. Indeed, "[t]he award of execution is a part, and an essential part of every judgment passed by a court exercising judicial power." *Gordon*, 117 U. S. Appx., at 702; *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S. 211, 218–219 (1995).

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Simply put, the CAAF's Executive Branch status is more than a label. The CAAF is what we have always thought it to be: an agent of executive power to aid the Commander in Chief. It follows that our appellate jurisdiction does not permit us to review its decisions directly. That conclusion is unaffected by Congress's decision to give greater procedural protections to members of the military. Nor would the conclusion be altered if Congress imported into the military justice system additional rights and procedures required in the civilian courts. If Congress wants us to review CAAF decisions, it can convert that tribunal into an Article III court or it can make CAAF decisions reviewable first in a lower federal court—perhaps one of the regional courts of appeals or the Federal Circuit—with additional review available here. But as long as the CAAF retains its current status as an Executive Branch entity, Congress cannot give our Court jurisdiction to review its decisions directly.

* * *

The arguments in this case might appear technical, but important interests are at stake. The division between our Court's original and appellate jurisdiction provoked extended and impassioned debate at the time of the founding. See Amar, *Marbury*, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U. Chi. L. Rev. 443, 468–478 (1989). The Framers well understood that the resolution of this dry jurisdictional issue would have practical effects, *ibid.*, and in a similar vein, the Court's holding that the CAAF exercises something akin to judicial power will have unavoidable implications for many important issues that may arise regarding the operation of the military justice system, not to mention judicial review of the many decisions handed down by administrative agencies.

The majority disclaims the latter possibility, *ante*, at 448, but its effort is halfhearted at best. In reality there is no relevant distinction, so far as our appellate jurisdiction is concerned, between the court-martial system and the "other adjudicative bodies in the Executive Branch" that the majority tells us not to worry about. *Ibid.* The majority cites the "judicial character . . . of the court-martial system," as well as its "constitutional foundations and history," *ibid.*, but as I have explained, the constitutional foundations, history, and fundamental character of military tribunals show that they are Executive Branch entities that can only permissibly exercise executive power—just like civilian administrative agencies.

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The Founders erected a high wall around our original jurisdiction, deliberately confining it to two classes of cases that were unlikely to touch the lives of most people. See The Federalist No. 81, at 488. Today's decision erodes that wall. Because the Court ignores both the wisdom of the Founders, the clear, consistent teaching of our precedents, and the unambiguous text of the Constitution, I respectfully dissent.

Syllabus

CURRIER *v.* VIRGINIA

CERTIORARI TO THE SUPREME COURT OF VIRGINIA

No. 16–1348. Argued February 20, 2018—Decided June 22, 2018

Petitioner Michael Currier was indicted for burglary, grand larceny, and unlawful possession of a firearm by a convicted felon. Because the prosecution could introduce evidence of Mr. Currier's prior burglary and larceny convictions to prove the felon-in-possession charge, and worried that evidence might prejudice the jury's consideration of the other charges, Mr. Currier and the government agreed to a severance and asked the court to try the burglary and larceny charges first, followed by a second trial on the felon-in-possession charge. At the first trial, Mr. Currier was acquitted. He then sought to stop the second trial, arguing that it would amount to double jeopardy. Alternatively, he asked the court to prohibit the state from relitigating at the second trial any issue resolved in his favor at the first. The trial court denied his requests and allowed the second trial to proceed unfettered. The jury convicted him on the felon-in-possession charge. The Virginia Court of Appeals rejected his double jeopardy arguments, and the Virginia Supreme Court summarily affirmed.

Preliminary Pending Publication

Held: The judgment is affirmed.

292 Va. 737, 798 S. E. 2d 164, affirmed.

JUSTICE GORSUCH delivered the opinion of the Court with respect to Parts I and II, concluding that, because Mr. Currier consented to a severance, his trial and conviction on the felon-in-possession charge did not violate the Double Jeopardy Clause, which provides that no person may be tried more than once "for the same offence." Mr. Currier argues that *Ashe* v. *Swenson*, 397 U. S. 436, requires a ruling for him. There, the Court held that the Double Jeopardy Clause barred a defendant's prosecution for robbing a poker player because the defendant's acquittal in a previous trial for robbing a different poker player from the same game established that the defendant "was not one of the robbers," *id.*, at 446. *Ashe*'s suggestion that the relitigation of an issue may amount to the impermissible relitigation of an offense represented a significant innovation in this Court's jurisprudence. But whatever else may be said about *Ashe*, the Court has emphasized that its test is a demanding one. *Ashe* forbids a second trial only if to secure a conviction the prosecution must prevail on an issue the jury necessarily resolved in the defendant's favor in the first trial. A second trial is not precluded simply because it is unlikely—or even very unlikely—that the original jury ac-

quitted without finding the fact in question. To say that the second trial is tantamount to a trial of the same offense as the first and thus forbidden by the Double Jeopardy Clause, the Court must be able to say that it would have been irrational for the jury in the first trial to acquit without finding in the defendant's favor on a fact essential to a conviction in the second.

Bearing all that in mind, a critical difference emerges between this case and *Ashe*: Even assuming that Mr. Currier's second trial qualified as the retrial of the same offense under *Ashe*, he consented to the second trial. In *Jeffers* v. *United States*, 432 U. S. 137, where the issue was a trial on a greater offense after acquittal on a lesser included offense, the Court held that the Double Jeopardy Clause is not violated when the defendant "elects to have the . . . offenses tried separately and persuades the trial court to honor his election." *Id.*, at 152. If consent can overcome a traditional double jeopardy complaint about a second trial for a greater offense, it must also suffice to overcome a double jeopardy complaint under *Ashe*'s more innovative approach. Holding otherwise would be inconsistent not only with *Jeffers* but with other cases too. See, *e. g.*, *United States* v. *Dinitz*, 424 U. S. 600. And cases Mr. Currier cites for support, *e. g.*, *Harris* v. *Washington*, 404 U. S. 55, merely applied *Ashe*'s test and concluded that a second trial was impermissible. They do not address the question whether the Double Jeopardy Clause prevents a second trial when the defendant *consents* to it.

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Mr. Currier contends that he had no choice but to seek two trials, because evidence of his prior convictions would have tainted the jury's consideration of the burglary and larceny charges. This is not a case, however, where the defendant had to give up one constitutional right to secure another. Instead, Mr. Currier faced a lawful choice between two courses of action that each bore potential costs and rationally attractive benefits. Difficult strategic choices are "not the same as no choice," *United States* v. *Martinez-Salazar*, 528 U. S. 304, 315, and the Constitution "does not . . . forbid requiring" a litigant to make them, *McGautha* v. *California*, 402 U. S. 183, 213. Pp. 498–503.

JUSTICE GORSUCH, joined by THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE ALITO, concluded in Part III that civil issue preclusion principles cannot be imported into the criminal law through the Double Jeopardy Clause to prevent parties from retrying any issue or introducing any evidence about a previously tried issue. Mr. Currier argues that, even if he consented to a second trial, that consent did not extend to the relitigation of any issues the first jury resolved in his favor. Even assuming for argument's sake that Mr. Currier's consent to holding a second trial didn't more broadly imply consent to the manner it was conducted, his argument must be rejected on a narrower ground as re-

Syllabus

futed by the text and history of the Double Jeopardy Clause and by this Court's contemporary double jeopardy cases, *e. g.*, *Blockburger* v. *United States*, 284 U. S. 299; *Dowling* v. *United States*, 493 U. S. 342. Nor is it even clear that civil preclusion principles would help defendants like Mr. Currier. See, *e. g.*, *Bravo-Fernandez* v. *United States*, 580 U. S. 5, 10. Grafting civil preclusion principles onto the criminal law could also invite ironies—*e. g.*, making severances more costly might make them less freely available. Pp. 503–510.

JUSTICE KENNEDY concluded that, because Parts I and II of the Court's opinion resolve this case in a full and proper way, the extent of the Double Jeopardy Clause protections discussed and defined in *Ashe* need not be reexamined here. Pp. 511–512.

GORSUCH, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II, in which ROBERTS, C. J., and KENNEDY, THOMAS, and ALITO, JJ., joined, and an opinion with respect to Part III, in which ROBERTS, C. J., and THOMAS and ALITO, JJ., joined. KENNEDY, J., filed an opinion concurring in part, *post*, p. 511. GINSBURG, J., filed a dissenting opinion, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 512.

Jeffrey L. Fisher argued the cause for petitioner. With him on the briefs were *David T. Goldberg*, *Pamela S. Karlan*, and *J. Addison Barnhardt*.

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Matthew R. McGuire, Acting Deputy Solicitor General of Virginia, argued the cause for respondent. With him on the brief were *Mark. R. Herring*, Attorney General of Virginia, *Trevor S. Cox*, Acting Solicitor General, and *Virginia B. Theisen*, Senior Assistant Attorney General.

Erica L. Ross argued the cause for the United States as *amicus curiae* urging affirmance. With her on the brief were *Solicitor General Francisco*, *Acting Assistant Attorney General Cronan*, *Deputy Solicitor General Dreeben*, *Eric J. Feigin*, and *Alexander P. Robbins*.*

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*Briefs of *amici curiae* urging reversal were filed for the Cato Institute by *David Debold*, *Clark M. Neily III*, and *Jay R. Schweikert*; and for the National Association of Criminal Defense Lawyers by *R. Stanton Jones*, *Lisa S. Blatt*, *Anthony J. Franze*, *Elie Salamon*, and *Jonathan Hacker*.

A brief of *amici curiae* urging affirmance was filed for the State of Indiana et al. by *Curtis T. Hill, Jr.*, Attorney General of Indiana, *Thomas M. Fisher*, Solicitor General, and *Aaron T. Craft*, *Lara Langeneckert*, and

JUSTICE GORSUCH announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II, and an opinion with respect to Part III, in which THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE ALITO join.

About to face trial, Michael Currier worried the prosecution would introduce prejudicial but probative evidence against him on one count that could infect the jury's deliberations on others. To address the problem, he agreed to sever the charges and hold two trials instead of one. But after the first trial finished, Mr. Currier turned around and argued that proceeding with the second would violate his right against double jeopardy. All of which raises the question: Can a defendant who agrees to have the charges against him considered in two trials later successfully argue that the second trial offends the Fifth Amendment's Double Jeopardy Clause?

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I

This case began when police dredged up a safe full of guns from a Virginia river. Paul Garrison, the safe's owner, had reported it stolen from his home. Before the theft, Mr. Garrison said, it contained not just the guns but also $71,000 in cash. Now, most of the money was missing. As the investigation unfolded, the police eventually found their way to Mr. Garrison's nephew. Once confronted, the nephew quickly confessed. Along the way, he pointed to Michael

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Julia C. Payne, Deputy Attorneys General, and by the Attorneys General for their respective States as follows: *Steve Marshall* of Alabama, *Leslie Rutledge* of Arkansas, *Cynthia H. Coffman* of Colorado, *Derek Schmidt* of Kansas, *Jeff Landry* of Louisiana, *Janet T. Mills* of Maine, *Bill Schuette* of Michigan, *Timothy C. Fox* of Montana, *Doug Peterson* of Nebraska, *Joshua H. Stein* of North Carolina, *Wayne Stenehjem* of North Dakota, *Mike Hunter* of Oklahoma, *Josh Shapiro* of Pennsylvania, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Ken Paxton* of Texas, *Sean D. Reyes* of Utah, *Brad D. Schimel* of Wisconsin, and *Peter K. Michael* of Wyoming.

Currier as his accomplice. A neighbor also reported that she saw Mr. Currier leave the Garrison home around the time of the crime. On the strength of this evidence, a grand jury indicted Mr. Currier for burglary, grand larceny, and unlawful possession of a firearm by a convicted felon. The last charge followed in light of Mr. Currier's previous convictions for (as it happens) burglary and larceny.

Because the prosecution could introduce evidence of his prior convictions to prove the felon-in-possession charge, and worried that the evidence might prejudice the jury's consideration of the other charges, Mr. Currier and the government agreed to a severance. They asked the court to try the burglary and larceny charges first. Then, they said, the felon-in-possession charge could follow in a second trial. Some jurisdictions routinely refuse requests like this. Instead, they seek to address the risk of prejudice with an instruction directing the jury to consider the defendant's prior convictions only when assessing the felon-in-possession charge. See Brief for State of Indiana et al. as *Amici Curiae* 10. Other jurisdictions allow parties to stipulate to the defendant's past convictions so the particulars of those crimes don't reach the jury's ears. *Ibid.* Others take a more protective approach yet and view severance requests with favor. *Id.*, at 11–12; see, *e. g.*, *Hackney* v. *Commonwealth*, 28 Va. App. 288, 294–296, 504 S. E. 2d 385, 389 (1998) (en banc). Because Virginia falls into this last group, the trial court granted the parties' joint request in this case.

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The promised two trials followed. At the first, the prosecution produced the nephew and the neighbor who testified to Mr. Currier's involvement in the burglary and larceny. But Mr. Currier argued that the nephew lied and the neighbor was unreliable and, in the end, the jury acquitted. Then, before the second trial on the firearm charge could follow, Mr. Currier sought to stop it. Now, he argued, holding a second trial would amount to double jeopardy. Alternatively and at the least, he asked the court to forbid the

government from relitigating in the second trial any issue resolved in his favor at the first. So, for example, he said the court should exclude from the new proceeding any evidence about the burglary and larceny. The court replied that it could find nothing in the Double Jeopardy Clause requiring either result so it allowed the second trial to proceed unfettered. In the end, the jury convicted Mr. Currier on the felon-in-possession charge.

Before the Virginia Court of Appeals, Mr. Currier repeated his double jeopardy arguments without success. The court held that the "concern that lies at the core" of the Double Jeopardy Clause—namely, "the avoidance of prosecutorial oppression and overreaching through successive trials"—had no application here because the charges were severed for Mr. Currier's benefit and at his behest. 65 Va. App. 605, 609–613, 779 S. E. 2d 834, 836–837 (2015). The Virginia Supreme Court summarily affirmed. 292 Va. 737, 798 S. E. 2d 164 (2016). Because courts have reached conflicting results on the double jeopardy arguments Mr. Currier pressed in this case, we granted certiorari to resolve them. 583 U. S. 931 (2017).

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II

The Double Jeopardy Clause, applied to the States through the Fourteenth Amendment, provides that no person may be tried more than once "for the same offence." This guarantee recognizes the vast power of the sovereign, the ordeal of a criminal trial, and the injustice our criminal justice system would invite if prosecutors could treat trials as dress rehearsals until they secure the convictions they seek. See *Green* v. *United States*, 355 U. S. 187, 188 (1957). At the same time, this Court has said, the Clause was not written or originally understood to pose "an insuperable obstacle to the administration of justice" in cases where "there is no semblance of [these] type[s] of oppressive practices." *Wade* v. *Hunter*, 336 U. S. 684, 688–689 (1949).

On which side of the line does our case fall? Mr. Currier suggests this Court's decision in *Ashe* v. *Swenson*, 397 U. S. 436 (1970), requires a ruling for him. There, the government accused a defendant of robbing six poker players in a game at a private home. At the first trial, the jury acquitted the defendant of robbing one victim. Then the State sought to try the defendant for robbing a second victim. This Court held the second prosecution violated the Double Jeopardy Clause. *Id.*, at 446. To be sure, the Clause speaks of barring successive trials for the same offense. And, to be sure, the State sought to try the defendant for a *different* robbery. But, the Court reasoned, because the first jury necessarily found that the defendant "was not one of the robbers," a second jury could not "rationally" convict the defendant of robbing the second victim without calling into question the earlier acquittal. *Id.*, at 445–446. In these circumstances, the Court indicated, any relitigation of the issue whether the defendant participated as "one of the robbers" would be tantamount to the forbidden relitigation of the same offense resolved at the first trial. *Id.*, at 445; see *Yeager* v. *United States*, 557 U. S. 110, 119–120 (2009).

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Ashe's suggestion that the relitigation of an issue can sometimes amount to the impermissible relitigation of an offense represented a significant innovation in our jurisprudence. Some have argued that it sits uneasily with this Court's double jeopardy precedent and the Constitution's original meaning. See, *e. g.*, *Ashe*, *supra*, at 460–461 (Burger, C. J., dissenting); *Yeager*, *supra*, at 127–128 (Scalia, J., dissenting). But whatever else may be said about *Ashe*, we have emphasized that its test is a demanding one. *Ashe* forbids a second trial only if to secure a conviction the prosecution must prevail on an issue the jury necessarily resolved in the defendant's favor in the first trial. See *Yeager*, 557 U. S., at 119–120; *id.*, at 127 (KENNEDY, J., concurring in part and concurring in judgment); *id.*, at 133–134 (ALITO, J., dissent-

ing). A second trial "is not precluded simply because it is unlikely—or even very unlikely—that the original jury acquitted without finding the fact in question." *Ibid.* To say that the second trial is tantamount to a trial of the same offense as the first and thus forbidden by the Double Jeopardy Clause, we must be able to say that "it would have been *irrational* for the jury" in the first trial to acquit without finding in the defendant's favor on a fact essential to a conviction in the second. *Id.*, at 127 (opinion of KENNEDY, J.) (internal quotation marks omitted).

Bearing all that in mind, a critical difference immediately emerges between our case and *Ashe*. Even assuming without deciding that Mr. Currier's second trial qualified as the retrial of the same offense under *Ashe*, he consented to it. Nor does anyone doubt that trying all three charges in one trial would have prevented any possible *Ashe* complaint Mr. Currier might have had.

How do these features affect the double jeopardy calculus? A precedent points the way. In *Jeffers* v. *United States*, 432 U. S. 137 (1977), the defendant sought separate trials on each of the counts against him to reduce the possibility of prejudice. The court granted his request. After the jury convicted the defendant in the first trial of a lesser included offense, he argued that the prosecution could not later try him for a greater offense. In any other circumstance the defendant likely would have had a good argument. Historically, courts have treated greater and lesser included offenses as the same offense for double jeopardy purposes, so a conviction on one normally precludes a later trial on the other. *Id.*, at 150–151 (plurality opinion); *Brown* v. *Ohio*, 432 U. S. 161, 168–169 (1977) (collecting authorities). But, *Jeffers* concluded, it's different when the defendant consents to two trials where one could have done. If a single trial on multiple charges would suffice to avoid a double jeopardy complaint, "there is no violation of the Double Jeopardy Clause when [the defendant] elects to have the . . . offenses tried

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separately and persuades the trial court to honor his election." 432 U. S., at 152.

What was true in *Jeffers*, we hold, can be no less true here. If a defendant's consent to two trials can overcome concerns lying at the historic core of the Double Jeopardy Clause, so too we think it must overcome a double jeopardy complaint under *Ashe*. Nor does anything in *Jeffers* suggest that the outcome should be different if the first trial yielded an acquittal rather than a conviction when a defendant consents to severance. While we acknowledge that *Ashe*'s protections apply only to trials following acquittals, as a general rule, the Double Jeopardy Clause "'protects against a second prosecution for the same offense after conviction'" as well as "'against a second prosecution for the same offense after acquittal.'" *Brown*, *supra*, at 165. Because the Clause applies equally in both situations, consent to a second trial should in general have equal effect in both situations.

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Holding otherwise would introduce an unwarranted inconsistency not just with *Jeffers* but with other precedents too. In *United States* v. *Dinitz*, 424 U. S. 600 (1976), for example, this Court held that a defendant's mistrial motion implicitly invited a second trial and was enough to foreclose any double jeopardy complaint about it. In reaching this holding, the Court expressly rejected "the contention that the permissibility of a retrial . . . depends on a knowing, voluntary, and intelligent waiver" from the defendant. *Id.*, at 609–610, n. 11. Instead, it explained, none of the "'prosecutorial or judicial overreaching'" forbidden by the Constitution can be found when a second trial follows thanks to the defendant's motion. *Id.* at 607. In *United States* v. *Scott*, 437 U. S. 82 (1978), this Court likewise held that a defendant's motion effectively invited a retrial of the same offense, and "the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of [a] voluntary choice" like that. *Id.*, at 96, 99; see also *Evans* v. *Michigan*, 568 U. S. 313, 326 (2013) ("[R]etrial is generally

allowed [when] the defendant consents to a disposition that contemplates reprosecution"). While relinquishing objections sometimes turns on state or federal procedural rules, these precedents teach that consenting to two trials when one would have avoided a double jeopardy problem precludes any constitutional violation associated with holding a second trial. In these circumstances, our cases hold, the defendant wins a potential benefit and experiences none of the prosecutorial "oppression" the Double Jeopardy Clause exists to prevent. Nor, again, can we discern a good reason to treat *Ashe* double jeopardy complaints more favorably than traditional ones when a defendant consents to severance.

Against these precedents, Mr. Currier asks us to consider others, especially *Harris* v. *Washington*, 404 U. S. 55 (1971) (*per curiam*), and *Turner* v. *Arkansas*, 407 U. S. 366 (1972) (*per curiam*). But these cases merely applied *Ashe*'s test and concluded that a second trial was impermissible. They did not address the question whether double jeopardy protections apply if the defendant *consents* to a second trial. Meanwhile, as we've seen, *Jeffers*, *Dinitz*, and *Scott* focus on that question directly and make clear that a defendant's consent dispels any specter of double jeopardy abuse that holding two trials might otherwise present. This Court's teachings are consistent and plain: The "Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." *Scott*, *supra*, at 99.

Mr. Currier replies that he had no real choice but to seek two trials. Without a second trial, he says, evidence of his prior convictions would have tainted the jury's consideration of the burglary and larceny charges. And, he notes, Virginia law guarantees a severance in cases like his unless the defendant and prosecution agree to a single trial. But no one disputes that the Constitution permitted Virginia to try all three charges at once with appropriate cautionary instructions. So this simply isn't a case where the defendant

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had to give up one constitutional right to secure another. Instead, Mr. Currier faced a lawful choice between two courses of action that each bore potential costs and rationally attractive benefits. It might have been a hard choice. But litigants every day face difficult decisions. Whether it's the defendant who finds himself in the shoes of Jeffers, Dinitz, and Scott and forced to choose between allowing an imperfect trial to proceed or seeking a second that promises its own risks. Or whether it's the defendant who must decide between exercising his right to testify in his own defense or keeping impeachment evidence of past bad acts from the jury. See, *e. g.*, *Brown* v. *United States*, 356 U. S. 148, 154–157 (1958). This Court has held repeatedly that difficult strategic choices like these are "not the same as no choice," *United States* v. *Martinez-Salazar*, 528 U. S. 304, 315 (2000), and the Constitution "does not . . . forbid requiring" a litigant to make them, *McGautha* v. *California*, 402 U. S. 183, 213 (1971).

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III

Even if he voluntarily consented to holding the second trial, Mr. Currier argues, that consent did not extend to the relitigation of any issues the first jury resolved in his favor. So, Mr. Currier says, the court should have excluded evidence suggesting he possessed the guns in Mr. Garrison's home, leaving the prosecution to prove that he possessed them only later, maybe down by the river. To support this argument, Mr. Currier points to issue preclusion principles in civil cases and invites us to import them for the first time into the criminal law through the Double Jeopardy Clause. In his view, the Clause should do much more than bar the retrial of the same offense (or crimes tantamount to the same offense under *Ashe*); it should be read now to prevent the parties from retrying any issue or introducing any evidence about a previously tried issue. While the dissent today agrees with us that the trial court committed no double jeopardy violation in holding the second trial, on this alternative

argument it sides with Mr. Currier. See *post,* at 522, 523, 525–526.

We cannot. Even assuming for argument's sake that Mr. Currier's consent to *holding* a second trial didn't more broadly imply consent to the *manner* it was conducted, we must reject his argument on a narrower ground. Just last Term this Court warned that issue preclusion principles should have only "guarded application . . . in criminal cases." *Bravo-Fernandez* v. *United States*, 580 U. S. 5, 10 (2016). We think that caution remains sound.

Mr. Currier's problems begin with the text of the Double Jeopardy Clause. As we've seen, the Clause speaks not about prohibiting the relitigation of issues or evidence but offenses. Contrast this with the language of the Reexamination Clause. There, the Seventh Amendment says that "[i]n Suits at common law . . . *no fact* tried by a jury, *shall be otherwise re-examined* in any Court of the United States, than according to the rules of the common law." (Emphasis added.) Words in one provision are, of course, often understood "by comparing them with other words and sentences in the same instrument." 1 J. Story, Commentaries on the Constitution of the United States § 400, p. 384 (1833). So it's difficult to ignore that only in the Seventh Amendment—and only for civil suits—can we find anything resembling contemporary issue preclusion doctrine.

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What problems the text suggests, the original public understanding of the Fifth Amendment confirms. The Double Jeopardy Clause took its cue from English common law pleas that prevented courts from retrying a criminal defendant previously acquitted or convicted of the crime in question. See *Scott*, 437 U. S., at 87; 4 W. Blackstone, Commentaries on the Laws of England 329–330 (1769). But those pleas barred only repeated "prosecution for the same identical act *and* crime," not the retrial of particular issues or evidence. *Id.*, at 330 (emphasis added). As Sir Matthew Hale explained:

> "If *A.* commit a burglary . . . and likewise at the same time steal goods out of the house, if he be indicted of larciny for the goods and acquitted, yet he may be indicted for the burglary notwithstanding the acquittal. And *è converso*, if indicted for the burglary and acquitted, yet he may be indicted of the larciny, for they are several offenses, tho committed at the same time." 2 M. Hale, The History of the Pleas of the Crown, ch. 31, pp. 245–246 (1736 ed.).

Both English and early American cases illustrate the point. In *Turner's Case*, 30 Kel. J. 30, 84 Eng. Rep. 1068 (K. B. 1663), for example, a jury acquitted the defendant of breaking into a home and stealing money from the owner. Even so, the court held that the defendant could be tried later for the theft of money "stolen at the same time" from the owner's servant. *Ibid.* In *Commonwealth* v. *Roby*, 12 Pickering 496 (Mass. 1832), the court, invoking Blackstone, held that "[i]n considering the identity of the offence, it must appear by the plea, that the offence charged in both cases was the same *in law* and *in fact*." *Id.*, at 504. The court explained that a second prosecution isn't precluded "if the offences charged in the two indictments be perfectly distinct in point of law, *however nearly they may be connected in fact*." *Ibid.* (emphasis added). Another court even ruled "that a man acquitted for stealing the horse hath yet been arraigned and convict for stealing the saddle, tho both were done at the same time." 2 Hale, *supra*, at 246. These authorities and many more like them demonstrate that early courts regularly confronted cases just like ours and expressly rejected the notion that the Double Jeopardy Clause barred the relitigation of issues or facts. See also *Grady* v. *Corbin*, 495 U. S. 508, 533–535 (1990) (Scalia, J., dissenting) (collecting authorities); 2 W. Hawkins, Pleas of the Crown, ch. 35, p. 371 (1726 ed.); 1 J. Chitty, Criminal Law 452–457 (1816); M. Friedland, Double Jeopardy 179, and n. 2 (1969). Any suggestion that our case presents a new phenomenon,

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then, risks overlooking this long history. See *post,* at 515–516 (GINSBURG, J., dissenting).

This Court's contemporary double jeopardy cases confirm what the text and history suggest. Under *Blockburger* v. *United States*, 284 U. S. 299 (1932), the courts apply today much the same double jeopardy test they did at the founding. *Id.*, at 304. To prevent a second trial on a new charge, the defendant must show an identity of *statutory elements* between the two charges against him; it's not enough that "a substantial overlap [exists] in the *proof* offered to establish the crimes." *Iannelli* v. *United States*, 420 U. S. 770, 785, n. 17 (1975) (emphasis added). Of course, *Ashe* later pressed *Blockburger*'s boundaries by suggesting that, in narrow circumstances, the retrial of an issue can be considered tantamount to the retrial of an offense. See *Yeager*, 557 U. S., at 119. But, as we've seen, even there a court's ultimate focus remains on the practical identity of offenses, and the only available remedy is the traditional double jeopardy bar against the retrial of the same offense—not a bar against the relitigation of issues or evidence. See *id.*, at 119–120. Even at the outer reaches of our double jeopardy jurisprudence, then, this Court has never sought to regulate the retrial of issues or evidence in the name of the Double Jeopardy Clause.

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Nor in acknowledging this do we plow any new ground. In *Dowling* v. *United States*, 493 U. S. 342 (1990), the defendant faced charges of bank robbery. At trial, the prosecution introduced evidence of the defendant's involvement in an earlier crime, even though the jury in that case had acquitted. Like Mr. Currier, the defendant in *Dowling* argued that the trial court should have barred relitigation of an issue resolved in his favor in an earlier case and therefore excluded evidence of the acquitted offense. But the Court refused the request and in doing so expressly "decline[d] to extend *Ashe* . . . to exclude in all circumstances, as [the defendant] would have it, relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because

it relates to alleged criminal conduct for which a defendant has been acquitted." *Id.*, at 348. If a second trial is permissible, the admission of evidence at that trial is governed by normal evidentiary rules—not by the terms of the Double Jeopardy Clause. "So far as merely evidentiary . . . facts are concerned," the Double Jeopardy Clause "is inoperative." *Yates* v. *United States*, 354 U. S. 298, 338 (1957).

On its own terms, too, any effort to transplant civil preclusion principles into the Double Jeopardy Clause would quickly meet trouble. While the Clause embodies a kind of "claim preclusion" rule, even this rule bears little in common with its civil counterpart. In civil cases, a claim generally may not be tried if it arises out of the same transaction or common nucleus of operative facts as another already tried. Restatement (Second) of Judgments § 19 (1980); Moschzisker, Res Judicata, 38 Yale L. J. 299, 325 (1929). But in a criminal case, *Blockburger* precludes a trial on an offense only if a court has previously heard the same offense as measured by its statutory elements. 284 U. S., at 304. And this Court has emphatically refused to import into criminal double jeopardy law the civil law's more generous "same transaction" or same criminal "episode" test. See *Garrett* v. *United States*, 471 U. S. 773, 790 (1985); see also *Ashe*, 397 U. S., at 448 (Harlan, J., concurring).

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It isn't even clear that civil preclusion principles would help defendants like Mr. Currier. Issue preclusion addresses the effect in a current case of a prior adjudication in *another case*. So it doesn't often have much to say about the preclusive effects of rulings "within the framework of a continuing action." 18A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4434 (2d ed. 2002); see also 18B *id.*, § 4478. Usually, only the more flexible law of the case doctrine governs the preclusive effect of an earlier decision "within a single action." *Ibid.* And that doctrine might counsel against affording conclusive effect to a prior jury verdict on a particular issue when the parties *agreed* to hold a second trial covering much the same terrain at a later stage

of the proceedings. Besides, even if issue preclusion is the right doctrine for cases like ours, its application usually depends "on 'an underlying confidence that the result achieved in the initial litigation was substantially correct.'" *Bravo-Fernandez*, 580 U. S., at 10 (quoting *Standefer* v. *United States*, 447 U. S. 10, 23, n. 18 (1980)). As a result, the doctrine does not often bar the relitigation of issues when "[t]he party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action." Restatement (Second) of Judgments § 28. In criminal cases, of course, the government cannot obtain appellate review of acquittals. So a faithful application of civil preclusion principles in our case and others like it might actually militate *against* finding preclusion. See *Bravo-Fernandez*, *supra*, at 10; *Standefer*, *supra*, at 22–23, and n. 18.

Neither Mr. Currier nor the dissent offers a persuasive reply to these points. They cannot dispute that the text of the Double Jeopardy Clause, which bars a prosecution for the same offense, is inconsistent with an issue preclusion rule that purports to bar a "second prosecution involv[ing] . . . a different 'offense.'" *Post*, at 515. They decline to "engage" with the Clause's history, though the dissent appears to agree that the Clause was not originally understood to include an issue preclusion rule. See *post*, at 515–516, 524. Neither Mr. Currier nor the dissent seeks to show that, even taken on their own terms, civil issue preclusion principles would apply to cases like this one. Without text, history, or logic to stand on, the dissent leans heavily on a comparison to *Dowling*. In *Dowling*, the dissent emphasizes, the two trials involved different criminal episodes while the two trials here addressed the same set of facts. But *Dowling* did not rest its holding on this feature and the dissent does not explain its relevance. If issue preclusion really did exist in criminal law, why wouldn't it preclude the retrial of *any* previously tried issue, regardless of whether that issue stems from the same or a different "criminal episode"?

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In the end, Mr. Currier and the dissent must emphasize various policy reasons for adopting a new rule of issue preclusion into the criminal law. See *post*, at 515–516, 519–520. They contend that issue preclusion is "needed" to combat the "prosecutorial excesses" that could result from the proliferation of criminal offenses, *post*, at 515–516, though we aren't sure what to make of this given the dissent's later claim that "issue preclusion requires no showing of prosecutorial overreaching," *post*, at 519. In any event, there are risks with the approach Mr. Currier and the dissent propose. Consider, for example, the ironies that grafting civil preclusion principles onto the criminal law could invite. Issue preclusion is sometimes applied offensively against civil defendants who lost on an issue in an earlier case. *Parklane Hosiery Co.* v. *Shore*, 439 U. S. 322, 331–332 (1979). By parallel logic, could we expect the government to invoke the doctrine to bar criminal defendants from relitigating issues decided against them in a prior trial? It's an outcome few defendants would welcome but one some have already promoted. See, *e. g.*, Kennelly, Precluding the Accused: Offensive Collateral Estoppel in Criminal Cases, 80 Va. L. Rev. 1379, 1380–1381, 1416, 1426–1427 (1994); Vestal, Issue Preclusion and Criminal Prosecutions, 65 Iowa L. Rev. 281, 297, 320–321 (1980).

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Maybe worse yet, consider the possible effect on severances. Today, some state courts grant severance motions liberally to benefit defendants. But what would happen if this Court unilaterally increased the costs associated with severance in the form of allowing issue preclusion for defendants only? Granting a severance is no small thing. It means a court must expend resources for two trials where the Constitution would have permitted one. Witnesses and victims must endure a more protracted ordeal. States sometimes accept these costs to protect a defendant from potential prejudice. But 20 States appearing before us have warned that some jurisdictions might respond to any decision increasing the costs of severed trials by making them less freely available. See Brief for State of Indiana et al. as *Amici*

Curiae 4, 16–20. Of course, that's only a prediction. But it's a hard if unwanted fact that "[t]oday's elaborate body of procedural rules" can contribute to making "trials expensive [and] rare." W. Stuntz, The Collapse of American Criminal Justice 39 (2011). And it would be a mistake to ignore the possibility that by making severances more costly we might wind up making them rarer too.

The fact is, civil preclusion principles and double jeopardy are different doctrines, with different histories, serving different purposes. Historically, both claim and issue preclusion have sought to "promot[e] judicial economy by preventing needless litigation." *Parklane Hosiery*, *supra*, at 326. That interest may make special sense in civil cases where often only money is at stake. But the Double Jeopardy Clause and the common law principles it built upon govern *criminal* cases and concern more than efficiency. They aim instead, as we've seen, to balance vital interests against abusive prosecutorial practices with consideration to the public's safety. The Clause's terms and history simply do not contain the rights Mr. Currier seeks.

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Nor are we at liberty to rewrite those terms or that history. While the growing number of criminal offenses in our statute books may be cause for concern, see *post*, at 515–516 (GINSBURG, J., dissenting), no one should expect (or want) judges to revise the Constitution to address every social problem they happen to perceive. The proper authorities, the States and Congress, are empowered to adopt new laws or rules experimenting with issue or claim preclusion in criminal cases if they wish. In fact, some States have already done so. On these matters, the Constitution dictates no answers but entrusts them to a self-governing people to resolve.

*

The judgment of the Virginia Supreme Court is

Affirmed.

JUSTICE KENNEDY, concurring in part.

I join Parts I and II of the Court's opinion, which, in my view, suffice to resolve this case in a full and proper way.

There is a strong public "interest in giving the prosecution one complete opportunity to convict those who have violated its laws." *Arizona* v. *Washington*, 434 U. S. 497, 509 (1978). The reason that single opportunity did not occur in one trial here was because both parties consented to sever the possession charge to avoid introducing evidence of petitioner's prior conviction during his trial for burglary and larceny. Petitioner acknowledges that by consenting to severance he cannot argue that the Double Jeopardy Clause bars the second trial. See Brief for Petitioner 9–10. He instead contends that, even though he consented to severance, he preserved the double jeopardy protections applied in *Ashe* v. *Swenson*, 397 U. S. 436 (1970), protections that, in *Ashe*, were a bar to relitigation of factual issues adjudicated in a previous trial.

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The Double Jeopardy Clause reflects the principle that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green* v. *United States*, 355 U. S. 184, 187–188 (1957). But this "is not a principle which can be expanded to include situations in which the defendant is responsible for the second prosecution." *United States* v. *Scott*, 437 U. S. 82, 95–96 (1978); see also *id.*, at 99 (The "Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice"). This rule recurs throughout the Court's double jeopardy cases, see, *e. g.*, *Jeffers* v. *United States*, 432 U. S. 137, 152 (1977); *Ohio* v. *Johnson*, 467 U. S. 493, 500, n. 9, 502 (1984);

Evans v. *Michigan*, 568 U. S. 313, 326 (2013), and, in my view, it controls here.

The end result is that when a defendant's voluntary choices lead to a second prosecution he cannot later use the Double Jeopardy Clause, whether thought of as protecting against multiple trials or the relitigation of issues, to forestall that second prosecution. The extent of the Double Jeopardy Clause protections discussed and defined in *Ashe* need not be reexamined here; for, whatever the proper formulation and implementation of those rights are, they can be lost when a defendant agrees to a second prosecution. Of course, this conclusion is premised on the defendant's having a voluntary choice, and a different result might obtain if that premise were absent. Cf. *Turner* v. *Arkansas*, 407 U. S. 366, 367 (1972) (*per curiam*) (applying *Ashe* to a second trial where state law prohibited a single trial of the charges at issue).

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

Michael Nelson Currier was charged in Virginia state court with (1) breaking and entering, (2) grand larceny, and (3) possessing a firearm after having been convicted of a felony. All three charges arose out of the same criminal episode. Under Virginia practice, unless the prosecutor and the defendant otherwise agree, a trial court must sever a charge of possession of a firearm by a convicted felon from other charges that do not require proof of a prior conviction. Virginia maintains this practice recognizing that evidence of a prior criminal conviction, other than on the offense for which the defendant is being tried, can be highly prejudicial in jury trials.

After trial for breaking and entering and grand larceny, the jury acquitted Currier of both charges. The prosecutor then chose to proceed against Currier on the severed felon-

in-possession charge. Currier objected to the second trial on double jeopardy grounds. He argued that the jury acquittals of breaking and entering and grand larceny established definitively and with finality that he had not participated in the alleged criminal episode. Invoking the issue-preclusion component of the double jeopardy ban, Currier urged that in a second trial, the Commonwealth could not introduce evidence of his alleged involvement in breaking and entering and grand larceny, charges on which he had been acquitted. He further maintained that without allowing the prosecution a second chance to prove breaking and entering and grand larceny, the evidence would be insufficient to warrant conviction of the felon-in-possession charge.

I would hold that Currier's acquiescence in severance of the felon-in-possession charge does not prevent him from raising a plea of issue preclusion based on the jury acquittals of breaking and entering and grand larceny.

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I

This Court's decisions "have recognized that the [Double Jeopardy] Clause embodies two vitally important interests." *Yeager* v. *United States*, 557 U. S. 110, 117 (2009). "The first is the 'deeply ingrained' principle that 'the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.' " *Id.*, at 117–118 (quoting *Green* v. *United States*, 355 U. S. 184, 187–188 (1957)). The second interest the Clause serves is preservation of the "finality of judgments," 557 U. S., at 118 (internal quotation marks omitted), particularly acquittals, see *id.*, at 122–123 (an acquittal's "finality is unassailable"); *Evans* v.

Michigan, 568 U. S. 313, 319 (2013) ("The law attaches particular significance to an acquittal." (internal quotation marks omitted)).

The Clause effectuates its overall guarantee through multiple protections. Historically, among those protections, the Court has safeguarded the right not to be subject to multiple trials for the "same offense." See *Brown* v. *Ohio*, 432 U. S. 161, 165 (1977). That claim-preclusive rule stops the government from litigating the "same offense" or criminal charge in successive prosecutions, regardless of whether the first trial ends in a conviction or an acquittal. See *Bravo-Fernandez* v. *United States*, 580 U. S. 5, 9 (2016); *Brown*, 432 U. S., at 165. To determine whether two offenses are the "same," this Court has held, a court must look to the offenses' elements. *Blockburger* v. *United States*, 284 U. S. 299, 304 (1932). If each offense "requires proof of a fact which the other does not," *Blockburger* established, the offenses are discrete and the prosecution of one does not bar later prosecution of the other. *Ibid.* If, however, two offenses are greater and lesser included offenses, the government cannot prosecute them successively. See *Brown*, 432 U. S., at 169.

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Also shielded by the Double Jeopardy Clause is the issue-preclusive effect of an acquittal. First articulated in *Ashe* v. *Swenson*, 397 U. S. 436 (1970), the issue-preclusive aspect of the Double Jeopardy Clause prohibits the government from relitigating issues necessarily resolved in a defendant's favor at an earlier trial presenting factually related offenses. *Ashe* involved the robbery of six poker players by a group of masked men. *Id.*, at 437. Missouri tried Ashe first for the robbery of Donald Knight. *Id.*, at 438. At trial, proof that Knight was the victim of a robbery was "unassailable"; the sole issue in dispute was whether Ashe was one of the robbers. *Id.*, at 438, 445. A jury found Ashe not guilty. *Id.*, at 439. Missouri then tried Ashe for robbing a different poker player at the same table. *Ibid.* The witnesses at the second trial "were for the most part the same," although

their testimony for the prosecution was "substantially stronger" than it was at the first trial. *Id.*, at 439–440. The State also "refined its case" by declining to call a witness whose identification testimony at the first trial had been "conspicuously negative." *Id.*, at 440. The second time around, the State secured a conviction. *Ibid.*

Although the second prosecution involved a different victim and thus a different "offense," this Court held that the second prosecution violated the Double Jeopardy Clause. A component of that Clause, the Court explained, rests on the principle that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.*, at 443, 445. Consequently, "after a jury determined by its verdict that [Ashe] was not one of the robbers," the State could not "constitutionally hale him before a new jury to litigate that issue again." *Id.*, at 446.

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In concluding that the Double Jeopardy Clause includes issue-preclusion protection for defendants, the Court acknowledged that no prior decision had "squarely held [issue preclusion] to be a constitutional requirement." *Id.*, at 445, n. 10. "Until perhaps a century ago," the Court explained, "few situations arose calling for [issue preclusion's] application." *Ibid.* "[A]t common law" and "under early federal criminal statutes, offense categories were relatively few and distinct," and "[a] single course of criminal conduct was likely to yield but a single offense." *Ibid.* "[W]ith the advent of specificity in draftsmanship and the extraordinary proliferation of overlapping and related statutory offenses," however, "it became possible for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction." *Ibid.* With this proliferation, "the potential for unfair and abusive reprosecutions became far more pronounced." *Ibid.*

Toward the end of the 19th century, courts increasingly concluded that greater protections than those traditionally afforded under the Double Jeopardy Clause were needed to

spare defendants from prosecutorial excesses. Federal courts, cognizant of the increased potential for exposing defendants to multiple charges based on the same criminal episode, borrowed issue-preclusion principles from the civil context to bar relitigation of issues necessarily resolved against the government in a criminal trial. *Ibid.*; cf. *United States* v. *Oppenheimer*, 242 U. S. 85, 87 (1916) ("It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt"). By 1970, when *Ashe* was decided, issue preclusion, "[a]lthough first developed in civil litigation," had become "an established rule of federal criminal law." *Ashe*, 397 U. S., at 443. The question presented in *Ashe* was whether issue preclusion is not just an established rule of federal criminal procedure, but also a rule of constitutional stature. The Court had no "hesitat[ion]" in concluding that it is. *Id.*, at 445.

Since *Ashe*, this Court has reaffirmed that issue preclusion ranks with claim preclusion as a Double Jeopardy Clause component. *Harris* v. *Washington*, 404 U. S. 55, 56 (1971) (*per curiam*). Given criminal codes of prolix character, issue preclusion both arms defendants against prosecutorial excesses, see *Ashe*, 397 U. S., at 445, n. 10, and preserves the integrity of acquittals, see *Yeager*, 557 U. S., at 118–119. See also *id.*, at 119 (Double Jeopardy Clause shields defendants against "relitiga[tion] [of] any issue that was necessarily decided by a jury's acquittal in a prior trial").

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II

On March 7, 2012, a large safe containing some $71,000 in cash and 20 firearms was stolen from Paul and Brenda Garrison's home. When police recovered the safe, which had been dumped in a river, the firearms remained inside, but most of the cash was gone. After a neighbor reported seeing a white pickup truck leaving the Garrisons' driveway around the time of the theft, police identified the Garrisons' nephew,

Bradley Wood, as a suspect. Wood later implicated Currier as an accomplice. A grand jury indicted Currier for breaking and entering, grand larceny, and possessing a firearm after having been convicted of a felony. The felon aspect of the felon-in-possession charge was based on Currier's prior convictions for burglary and larceny. Currier was "in possession" of the firearms, the prosecution contended, based on his brief handling of the guns contained in the safe (taking them out and putting them back) when the remaining cash was removed from inside.

Virginia courts, like many others, recognize that trying a felon-in-possession charge together with offenses that do not permit the introduction of prior felony convictions can be hugely prejudicial to a defendant. See *Hackney* v. *Commonwealth*, 28 Va. App. 288, 293–294, 504 S. E. 2d 385, 388 (1998) (en banc). Evidence of prior convictions, they have observed, can "confus[e] the issues before the jury" and "prejudice the defendant in the minds of the jury by showing his or her depravity and criminal propensity." *Id.*, at 293, 504 S. E. 2d, at 388. Virginia courts therefore hold that "unless the Commonwealth and defendant agree to joinder, a trial court must sever a charge of possession of a firearm by a convicted felon from other charges that do not require proof of a prior conviction." *Id.*, at 295, 504 S. E. 2d, at 389. In Currier's case, the prosecution and Currier acceded to the Commonwealth's default rule, and the trial court accordingly severed the felon-in-possession charge from the breaking and entering and grand larceny charges.

The Commonwealth proceeded to try Currier first for breaking and entering and grand larceny. Witnesses for the prosecution testified to Currier's involvement in the crimes. First, Wood testified that Currier helped him break into the Garrisons' home and steal the safe. Second, the Garrisons' neighbor testified that she believed Currier was the passenger in the pickup truck she had seen leaving the Garrisons' residence. The prosecution also sought to introduce evi-

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dence that a cigarette butt found in Wood's pickup truck carried Currier's DNA. But the court excluded that evidence because the prosecution failed to disclose it at least 21 days in advance of trial, as Virginia law required.

The sole issue in dispute at the first trial, Currier maintains, was whether he participated in the break-in and theft. See App. 35 (prosecutor's closing statement, stating "What is in dispute? Really only one issue and one issue alone. Was the defendant, Michael Currier, one of those people that was involved in the offense?"). The case was submitted to the jury, which acquitted Currier of both offenses.

Despite the jury's acquittal verdicts, the prosecution proceeded against Currier on the felon-in-possession charge. In advance of his second trial, Currier moved to dismiss the gun-possession charge based on the issue-preclusion component of the Double Jeopardy Clause. He urged that the jury at his first trial rejected the government's contention that he was involved in the break-in and theft. Cf. *Ashe*, 397 U. S., at 446 (common issue in first and second trials was whether Ashe was one of the robbers). If the government could not attempt to prove anew his participation in the break-in and theft, he reasoned, there would be no basis for a conviction on the gun-possession charge. *I. e.*, his involvement in handling the guns, on the government's theory of the case, depended on his anterior involvement in breaking and entering the Garrisons' residence and stealing their safe. The trial court refused to dismiss the prosecution or to bar the government from introducing evidence of Currier's alleged involvement in the break-in and theft.

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At the second trial, the prosecution shored up its attempt to prove Currier's participation in the break-in and theft. The witnesses refined their testimony. Remedying its earlier procedural lapse by timely notifying Currier, the prosecution introduced the cigarette butt evidence. And, of course, to show Currier was a felon, the prosecution intro-

duced his prior burglary and larceny convictions. The jury found Currier guilty of the felon-in-possession offense.

III

The Court holds that even if Currier could have asserted a double jeopardy issue-preclusion defense in opposition to the second trial, he relinquished that right by acquiescing in severance of the felon-in-possession charge. This holding is not sustainable. A defendant's consent to severance does not waive his right to rely on the issue-preclusive effect of an acquittal.

A

It bears clarification first that, contra to the Court's presentation, issue preclusion requires no showing of prosecutorial overreaching. But cf. *ante*, at 502 (stating that "the Double Jeopardy Clause exists to prevent [prosecutorial oppression]"). This Court so ruled in *Harris* v. *Washington*, 404 U. S. 55, and it has subsequently reinforced the point in *Turner* v. *Arkansas*, 407 U. S. 366 (1972) (*per curiam*), and *Yeager* v. *United States*, 557 U. S. 110.

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In *Harris*, the Washington Supreme Court declined to give an acquittal issue-preclusive effect because there was "no indication of bad faith of the state in deliberately making a 'trial run' in the first prosecution." *State* v. *Harris*, 78 Wash. 2d 894, 901, 480 P. 2d 484, 488 (1971). The State Supreme Court further observed that "it was to the advantage of the defendant, and not the state, to separate the trials" because certain evidence was inadmissible in the first trial that would be admissible in the second. *Id.*, at 898, 480 P. 2d, at 486. This Court reversed and explained that an acquittal has issue-preclusive effect "irrespective of the good faith of the State in bringing successive prosecutions." *Harris*, 404 U. S., at 57.

In *Turner*, Arkansas prosecutors believed the defendant had robbed and murdered someone. 407 U. S., at 366. An

Arkansas statute required that murder be charged separately, with no other charges appended. *Id.*, at 367. After a jury acquitted Turner on the murder charge, the State sought to try him for robbery. *Id.*, at 366–367. Even though state law, not an overzealous prosecutor, dictated the sequential trials, this Court held that the defendant was entitled to assert issue preclusion and found the case "squarely controlled by *Ashe*." *Id.*, at 370.

In *Yeager*, the defendant stood trial on numerous factually related offenses. 557 U. S., at 113–114. After a jury acquitted on some counts but hung on others, the prosecution sought to retry a number of the hung counts. *Id.*, at 115. The defendant argued that issue preclusion should apply in the second trial. In opposition, the prosecution stressed that a retrial "presen[ted] none of the governmental overreaching that double jeopardy is supposed to prevent." Brief for United States in *Yeager* v. *United States*, O. T. 2008, No. 08–67, p. 26 (internal quotation marks omitted). Indeed, the prosecution had "attempted to bring all the charges in a single proceeding," and it was seeking a second trial on some charges only "because the jury hung." *Ibid.* The Court did not regard as controlling the lack of prosecutorial overreaching. Instead, it emphasized that "[a] jury's verdict of acquittal represents the community's collective judgment regarding all the evidence and arguments presented to it" and that, once rendered, an acquittal's "finality is unassailable." 557 U. S., at 122–123.

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B

There is in Currier's case no suggestion that he expressly waived a plea of issue preclusion at a second trial, or that he failed to timely assert the plea. Instead, the contention, urged by the prosecution and embraced by this Court, is that Currier surrendered his right to assert the issue-preclusive effect of his first-trial acquittals by consenting to two trials.

This Court "indulge[s] every reasonable presumption against waiver of fundamental constitutional rights." *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938) (internal quotation marks omitted). It has found "waiver by conduct" only where a defendant has engaged in "conduct inconsistent with the assertion of [the] right." *Pierce Oil Corp.* v. *Phoenix Refining Co.*, 259 U. S. 125, 129 (1922). For example, a defendant who "voluntarily absents himself" from trial waives his Sixth Amendment right to be present. *Taylor* v. *United States*, 414 U. S. 17, 19 (1973) (*per curiam*) (internal quotation marks omitted). Similarly, a defendant who "obtains the absence of a witness by wrongdoing" may "forfeit" or "waive" his Sixth Amendment right to confront the absent witness. *Davis* v. *Washington*, 547 U. S. 813, 833 (2006). Where, however, a defendant takes no action inconsistent with the assertion of a right, the defendant will not be found to have waived the right.

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Currier took no action inconsistent with assertion of an issue-preclusion plea. To understand why, one must comprehend just what issue preclusion forecloses. Unlike the right against a second trial for the same offense (claim preclusion), issue preclusion prevents relitigation of a previously rejected theory of criminal liability without necessarily barring a successive trial. Take *Ashe*, for example. Issue preclusion prevented the prosecution from arguing, at a second trial, that Ashe was one of the robbers who held up the poker players at gunpoint. But if the prosecution sought to prove, instead, that Ashe waited outside during the robbery and then drove the getaway car, issue preclusion would not have barred that trial. Similarly here, the prosecution could not again attempt to prove that Currier participated in the break-in and theft of the safe at the Garrisons' residence. But a second trial could be mounted if the prosecution alleged, for instance, that Currier was present at the river's edge when others showed up to dump the safe in the river,

and that Currier helped to empty out and replace the guns contained in the safe.

In short, issue preclusion does not operate, as claim preclusion does, to bar a successive trial altogether. Issue preclusion bars only a subset of possible trials—those in which the prosecution rests its case on a theory of liability a jury earlier rejected. That being so, consenting to a second trial is not inconsistent with—and therefore does not foreclose—a defendant's gaining the issue-preclusive effect of an acquittal.

The Court cites *Jeffers* v. *United States*, 432 U. S. 137 (1977), *United States* v. *Dinitz*, 424 U. S. 600 (1976), and *United States* v. *Scott*, 437 U. S. 82 (1978), as support for a second trial, on the ground that Currier consented to it. Those decisions do not undermine the inviolacy of an acquittal.

In *Jeffers*, the defendant was charged with two offenses, one of which was a lesser included offense of the other. 432 U. S., at 140–141, 150. He asked for, and gained, separate trials of the two charges. *Id.*, at 142–143. After *conviction* on the lesser included charge, he argued that a second trial on the remaining charge would violate his double jeopardy right "against multiple prosecutions." *Id.*, at 139, 143–144. A plurality of this Court rejected Jeffers' argument, reasoning that he had waived the relevant right because he was "solely responsible for the successive prosecutions." *Id.*, at 154.

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Jeffers presented a claim-preclusion question. The Court there said not one word about issue preclusion. Nor did the Court address the staying power of an acquittal. It had no occasion to do so, as Jeffers was *convicted* on the first charge. Indeed, some years later, three Justices, including the author of the *Jeffers* plurality, stated: "There is no doubt that had the defendant in *Jeffers* been *acquitted* at the first trial, the [issue-preclusion protection] embodied in the Double Jeop-

ardy Clause would have barred a second trial on the greater offense." *Green* v. *Ohio*, 455 U. S. 976, 980 (1982) (White, J., joined by Blackmun and Powell, JJ., dissenting from the denial of certiorari) (emphasis added).

Dinitz and *Scott* are even weaker reeds. In *Dinitz*, the defendant requested, and gained, a mistrial after the trial judge expelled his lead counsel from the courtroom. 424 U. S., at 602–605. In *Scott*, the defendant sought and obtained dismissal of two of three counts prior to their submission to the jury. 437 U. S., at 84. The question in each case was whether the defendant's actions deprived him of the right to be spared from a second trial on the same offenses. Both decisions simply concluded that when a defendant voluntarily seeks to terminate a trial before a substantive ruling on guilt or innocence, the Double Jeopardy Clause is not offended by a second trial. The cases, however, said nothing about the issue-preclusive effect of a prior acquittal at a subsequent trial. Cf. *Burks* v. *United States*, 437 U. S. 1, 17 (1978) ("It cannot be meaningfully said that a person 'waives' his right to a judgment of acquittal by moving for a new trial."). As was the case in *Jeffers*, *Dinitz* and *Scott* presented no occasion to do so.[1]

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[1] *Ohio* v. *Johnson*, 467 U. S. 493 (1984), cited by JUSTICE KENNEDY, *ante*, at 511, is not in point. It, too, like *Jeffers*, *Scott*, and *Dinitz*, involved claim preclusion, not issue preclusion, *i. e.*, trial of greater offenses after guilty pleas to lesser offenses. See *supra*, at 514. The case does contain an enigmatic footnote stating, "in a case such as this, where the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of [issue preclusion] are inapplicable." 467 U. S., at 500, n. 9. True in a case like *Johnson*, which involved no prior acquittals, I would not read more into a terse, unelaborated footnote that contains no citation.

Evans v. *Michigan*, 568 U. S. 313 (2013), cited by the Court, *ante*, at 501–502, and JUSTICE KENNEDY, *ante*, at 512, is even further afield. There, the trial court erroneously granted a judgment of acquittal. The State sought retrial in view of the error. This Court held that, despite the error, the acquittal was a final judgment, which could not be undone. 568 U. S., at

IV

Venturing beyond JUSTICE KENNEDY's rationale for resolving this case, the plurality would take us back to the days before the Court recognized issue preclusion as a constitutionally grounded component of the Double Jeopardy Clause. See *ante*, at 508 (questioning whether issue preclusion "really . . . exist[s] in criminal law"). I would not engage in that endeavor to restore things past.[2]

One decision, however, should be set straight. The plurality asserts that *Dowling* v. *United States*, 493 U. S. 342 (1990), established that issue preclusion has no role to play in regulating the issues or evidence presented at a successive trial. *Ante*, at 506–507. *Dowling* did no such thing. The case is tied to Federal Rule of Evidence 404(b), which allows the prosecution to introduce evidence of a defendant's past criminal conduct for described purposes other than to show a defendant's bad character. See Fed. Rule Evid. 404(b)(2). The defendant in *Dowling* was prosecuted for robbing a bank. 493 U. S., at 344. To bolster its case that Dowling was the perpetrator, the Government sought to introduce evidence that Dowling participated in a home invasion two

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316. Whatever may be said of *Evans*, that decision is certainly no authority for watering down the issue-preclusive effect of a judgment acquitting the defendant.

Garrett v. *United States*, 471 U. S. 773 (1985), cited by the plurality, *ante*, at 507, also involves claim preclusion, not issue preclusion. The Court held, unremarkably, that a crime transpiring in one day is not the "same offense" as a continuing criminal enterprise spanning more than five years. 471 U. S., at 788.

[2] If issue preclusion does exist in criminal law, the plurality asserts, it has only "guarded application," *Bravo-Fernandez* v. *United States*, 580 U. S. 5, 10 (2016). See *ante*, at 504. I do not gainsay that assertion. *Bravo-Fernandez* itself, however, involved the special problem of inconsistent verdicts rendered by the same jury. It held only that an acquittal cannot convey rejection of the prosecutor's allegations when the jury simultaneously convicts the defendant of an offense turning on acceptance of the same allegations. 580 U. S., at 8–9.

weeks after the bank robbery. *Id.*, at 344–345. One difficulty for the prosecution: Dowling had been acquitted of the home invasion. *Id.*, at 345. Nevertheless, the trial court admitted the evidence, informing the jurors that Dowling had been acquitted of the home-invasion charge and instructing them on the "limited purpose" for which the evidence was introduced. *Id.*, at 345–346.

The Court in *Dowling* "decline[d] to extend *Ashe*" to forbid the prosecution from introducing evidence, under Rule 404(b), of a crime for which the defendant had been acquitted, one involving criminal conduct unrelated to the bank robbery for which Dowling stood trial. *Id.*, at 348. The charge for which Dowling was acquitted took place at a different time and involved different property, a different location, and different victims. *Id.*, at 344. See also *United States* v. *Felix*, 503 U. S. 378, 386 (1992) (stressing that the two crimes in *Dowling* were "unrelated"). It surely could not be said that, in the bank robbery trial, Dowling was being tried a second time for the later-occurring home invasion offense. Here, by contrast, the two trials involved the same criminal episode. See *Ashe*, 397 U. S., at 446 ("same robbery"); *Turner*, 407 U. S., at 368–369 ("the same set of facts, circumstances, and the same occasion" (internal quotation marks omitted)).

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Extending *Dowling* from the Evidence Rule 404(b) context in which it was embedded to retrials involving the same course of previously acquitted conduct would undermine issue preclusion's core tenet. That tenet was well stated by Judge Friendly in *United States* v. *Kramer*, 289 F. 2d 909 (CA2 1961):

> "A defendant who has satisfied one jury that he had no responsibility for a crime ought not be forced to convince another of this [lack of responsibility]. . . . The very nub of [issue preclusion] is to extend *res judicata* beyond those cases where the prior judgment is a complete bar. The Government is free, within limits set by the Fifth

> Amendment, to charge an acquitted defendant with other crimes claimed to arise from the same or related conduct; but it may not prove the new charge by asserting facts necessarily determined against it on the first trial . . . ." *Id.*, at 915–916 (citation omitted).

So here. The first trial established that Currier did not participate in breaking and entering the Garrisons' residence or in stealing their safe. The government can attempt to prove Currier possessed firearms through a means other than breaking and entering the Garrisons' residence and stealing their safe. But the government should not be permitted to show in the felon-in-possession trial what it failed to show in the first trial, *i. e.*, Currier's participation in the charged breaking and entering and grand larceny, after a full and fair opportunity to do so.

* * *

For the reasons stated, I would reverse the judgment of the Virginia Supreme Court.

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Syllabus

DALMAZZI *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

No. 16–961. Argued January 16, 2018—Decided June 22, 2018

Certiorari dismissed. Reported below: 76 M. J. 1.

Stephen I. Vladeck argued the cause for petitioner. With him on the briefs were *Mary J. Bradley*, *Christopher D. Carrier*, *Brian L. Mizer*, *Johnathan D. Legg*, *Lauren-Ann L. Shure*, and *Eugene R. Fidell*.

Aditya Bamzai, *pro se*, argued the cause as *amicus curiae* in support of neither party. With him on the brief was *Adam J. White*.

Brian H. Fletcher argued the cause for the United States. With him on the brief were *Solicitor General Francisco*, *Acting Assistant Attorney General Boente*, *Deputy Solicitor General Kneedler*, *Joseph F. Palmer*, and *Danielle S. Tarin*.

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PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

It is so ordered.

Syllabus

COX *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

No. 16–1017. Argued January 16, 2018—Decided June 22, 2018*
Certiorari dismissed. Reported below: 76 M. J. 64; 76 M. J. 54.

Stephen I. Vladeck argued the cause for petitioners. With him on the briefs were *Mary J. Bradley*, *Christopher D. Carrier*, *Brian L. Mizer*, *Johnathan D. Legg*, *Lauren-Ann L. Shure*, and *Eugene R. Fidell*.

Aditya Bamzai, *pro se*, argued the cause as *amicus curiae* in support of neither party. With him on the brief was *Adam J. White*.

Brian H. Fletcher argued the cause for the United States. With him on the brief were *Solicitor General Francisco*, *Acting Assistant Attorney General Boente*, *Deputy Solicitor General Kneedler*, *Joseph F. Palmer*, and *Danielle S. Tarin*.

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PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

It is so ordered.

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*Together with *Craig* v. *United States*, *Lewis* v. *United States*, *Miller* v. *United States*, *Morchinek* v. *United States*, and *O'Shaughnessy* v. *United States* (see this Court's Rule 12.4), also on certiorari to the same court.

Syllabus

OHIO ET AL. *v.* AMERICAN EXPRESS CO. ET AL.

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

No. 16–1454. Argued February 26, 2018—Decided June 25, 2018

Respondent credit-card companies American Express Company and American Express Travel Related Services Company (collectively, Amex) operate what economists call a "two-sided platform," providing services to two different groups (cardholders and merchants) who depend on the platform to intermediate between them. Because the interaction between the two groups is a transaction, credit-card networks are a special type of two-sided platform known as a "transaction" platform. The key feature of transaction platforms is that they cannot make a sale to one side of the platform without simultaneously making a sale to the other. Unlike traditional markets, two-sided platforms exhibit "indirect network effects," which exist where the value of the platform to one group depends on how many members of another group participate. Two-sided platforms must take these effects into account before making a change in price on either side, or they risk creating a feedback loop of declining demand. Thus, striking the optimal balance of the prices charged on each side of the platform is essential for two-sided platforms to maximize the value of their services and to compete with their rivals.

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Visa and MasterCard—two of the major players in the credit-card market—have significant structural advantages over Amex. Amex competes with them by using a different business model, which focuses on cardholder spending rather than cardholder lending. To encourage cardholder spending, Amex provides better rewards than the other credit-card companies. Amex must continually invest in its cardholder rewards program to maintain its cardholders' loyalty. But to fund those investments, it must charge merchants higher fees than its rivals. Although this business model has stimulated competitive innovations in the credit-card market, it sometimes causes friction with merchants. To avoid higher fees, merchants sometimes attempt to dissuade cardholders from using Amex cards at the point of sale—a practice known as "steering." Amex places antisteering provisions in its contracts with merchants to combat this.

In this case, the United States and several States (collectively, plaintiffs) sued Amex, claiming that its antisteering provisions violate § 1 of

the Sherman Antitrust Act. The District Court agreed, finding that the credit-card market should be treated as two separate markets—one for merchants and one for cardholders—and that Amex's antisteering provisions are anticompetitive because they result in higher merchant fees. The Second Circuit reversed. It determined that the credit-card market is one market, not two. And it concluded that Amex's antisteering provisions did not violate § 1.

Held: Amex's antisteering provisions do not violate federal antitrust law. Pp. 540–552.

(a) Section 1 of the Sherman Act prohibits "unreasonable restraints" of trade. *State Oil Co.* v. *Khan*, 522 U. S. 3, 10. Restraints may be unreasonable in one of two ways—unreasonable *per se* or unreasonable as judged under the "rule of reason." *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U. S. 717, 723. The parties agree that Amex's antisteering provisions should be judged under the rule of reason using a three-step burden-shifting framework. They ask this Court to decide whether the plaintiffs have satisfied the first step in that framework—*i. e.*, whether they have proved that Amex's antisteering provisions have a substantial anticompetitive effect that harms consumers in the relevant market. Pp. 540–542.

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(b) Applying the rule of reason generally requires an accurate definition of the relevant market. In this case, both sides of the two-sided credit-card market—cardholders and merchants—must be considered. Only a company with both cardholders and merchants willing to use its network could sell transactions and compete in the credit-card market. And because credit-card networks cannot make a sale unless both sides of the platform simultaneously agree to use their services, they exhibit more pronounced indirect network effects and interconnected pricing and demand. Indeed, credit-card networks are best understood as supplying only one product—the transaction—that is jointly consumed by a cardholder and a merchant. Accordingly, the two-sided market for credit-card transactions should be analyzed as a whole. Pp. 542–547.

(c) The plaintiffs have not carried their burden to show anticompetitive effects. Their argument—that Amex's antisteering provisions increase merchant fees—wrongly focuses on just one side of the market. Evidence of a price increase on one side of a two-sided transaction platform cannot, by itself, demonstrate an anticompetitive exercise of market power. Instead, plaintiffs must prove that Amex's antisteering provisions increased the cost of credit-card transactions above a competitive level, reduced the number of credit-card transactions, or otherwise stifled competition in the two-sided credit-card market. They failed to do so. Pp. 547–552.

Syllabus

(1) The plaintiffs offered no evidence that the price of credit-card transactions was higher than the price one would expect to find in a competitive market. Amex's increased merchant fees reflect increases in the value of its services and the cost of its transactions, not an ability to charge above a competitive price. It uses higher merchant fees to offer its cardholders a more robust rewards program, which is necessary to maintain cardholder loyalty and encourage the level of spending that makes it valuable to merchants. In addition, the evidence that does exist cuts against the plaintiffs' view that Amex's antisteering provisions are the cause of any increases in merchant fees: Visa and MasterCard's merchant fees have continued to increase, even at merchant locations where Amex is not accepted. Pp. 547–549.

(2) The plaintiffs' evidence that Amex's merchant-fee increases between 2005 and 2010 were not entirely spent on cardholder rewards does not prove that Amex's antisteering provisions gave it the power to charge anticompetitive prices. This Court will "not infer competitive injury from price and output data absent some evidence that tends to prove that output was restricted or prices were above a competitive level." *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U. S. 209, 237. There is no such evidence here. Output of credit-card transactions increased during the relevant period, and the plaintiffs did not show that Amex charged more than its competitors. P. 549.

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(3) The plaintiffs also failed to prove that Amex's antisteering provisions have stifled competition among credit-card companies. To the contrary, while they have been in place, the market experienced expanding output and improved quality. Nor have Amex's antisteering provisions ended competition between credit-card networks with respect to merchant fees. Amex's competitors have exploited its higher merchant fees to their advantage. Lastly, there is nothing inherently anticompetitive about the provisions. They actually stem negative externalities in the credit-card market and promote interbrand competition. And they do not prevent competing credit-card networks from offering lower merchant fees or promoting their broader merchant acceptance. Pp. 549–552.

838 F. 3d 179, affirmed.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, ALITO, and GORSUCH, JJ., joined. BREYER, J., filed a dissenting opinion, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 552.

Eric C. Murphy, State Solicitor of Ohio, argued the cause for petitioners and state respondents. With him on the

briefs were *Michael DeWine*, Attorney General of Ohio, *Michael J. Hendershot*, Chief Deputy Solicitor, and *Hannah C. Wilson*, Deputy Solicitor, and the Attorneys General for their respective States as follows: *George Jepsen* of Connecticut, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Tom Miller* of Iowa, *Brian E. Frosh* of Maryland, *Bill Schuette* of Michigan, *Tim Fox* of Montana, *Douglas J. Peterson* of Nebraska, *Peter Kilmartin* of Rhode Island, *Herbert H. Slatery III* of Tennessee, *Ken Paxton* of Texas, *Sean D. Reyes* of Utah, and *Thomas J. Donovan, Jr.*, of Vermont.

Deputy Solicitor General Stewart argued the cause for the United States as respondent supporting petitioners urging vacatur and remand. With him on the brief were *Solicitor General Francisco*, *Assistant Attorney General Delrahim*, *Brian H. Fletcher*, *Kristen C. Limarzi*, *Robert B. Nicholson*, *Nickolai G. Levin*, and *Andrew J. Ewalt.*

Evan R. Chesler argued the cause for respondent American Express et al. With him on the brief were *Peter T. Barbur*, *Kevin J. Orsini*, *Rory A. Leraris*, *Mark Califano*, *Suzanne E. Wachsstock*, *Michael K. Kellogg*, *Aaron M. Panner*, *Derek T. Ho*, *Benjamin J. Horwich*, and *Justin P. Raphael.**

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*Briefs of *amici curiae* urging reversal were filed for the State of New York et al. by *Eric T. Schneiderman*, Attorney General of New York, *Barbara D. Underwood*, Solicitor General, *Steven C. Wu*, Deputy Solicitor General, *Judith N. Vale*, Senior Assistant Solicitor General, *Beau W. Buffier*, Bureau Chief, *Elinor R. Hoffman*, Deputy Bureau Chief, and *Jeremy R. Kashia*, Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Jahna Lindemuth* of Alaska, *Xavier Becerra* of California, *Matthew P. Denn* of Delaware, *Karl A. Racine* of the District of Columbia, *Douglas S. Chin* of Hawaii, *Curtis T. Hill, Jr.*, of Indiana, *Andy Beshear* of Kentucky, *Janet T. Mills* of Maine, *Maura Healey* of Massachusetts, *Lori Swanson* of Minnesota, *Jim Hood* of Mississippi, *Hector H. Balderas* of New Mexico, *Josh Stein* of North Carolina, *Ellen F. Rosenblum* of Oregon, *Josh Shapiro* of Pennsylvania, *Alan Wilson* of South Carolina, *Bob Ferguson* of Washington, and *Brad Schimel* of Wisconsin; for Ahold U. S. A., Inc., et al. by *Paul E. Slater*, *Eric L. Bloom*, *Phillip F. Cramer*, *Ryan T. Holt*, *Eric G. Osborne*, *Richard Alan Arnold*,

JUSTICE THOMAS delivered the opinion of the Court.

American Express Company and American Express Travel Related Services Company (collectively, Amex) provide credit-card services to both merchants and cardholders. When a cardholder buys something from a merchant who accepts Amex credit cards, Amex processes the transaction through its network, promptly pays the merchant, and subtracts a fee. If a merchant wants to accept Amex credit cards—and attract Amex cardholders to its business—Amex requires the merchant to agree to an antisteering contractual

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William J. Blechman, *Joseph M. Vanek*, *David P. Germaine*, and *Matthew T. Slater*; for the American Antitrust Institute by *Richard M. Brunell*; for the American Medical Association et al. by *Matthew L. Cantor* and *Jeffrey I. Shinder*; for the Australian Retailers Association by *Robert N. Kaplan*; for Discover Financial Services by *Elizabeth P. Papez* and *Andrew C. Nichols*; for the International Air and Transport Association et al. by *Donald I. Baker*, *W. Todd Miller*, and *David A. Berg*; for the Medical Advisory Group by *James A. Wilson*, *Robert N. Webner*, *Kenneth J. Rubin*, and *Nathan L. Colvin*; for the Open Markets Institute by *Deepak Gupta*; for the United States Public Interest Group Education Fund, Inc., by *Sharon K. Robertson*, *Michael Landis*, and *Gregory P. Slover*; for Wal-Mart Stores, Inc., et al. by *Mark T. Stancil*, *Matthew M. Madden*, *Deborah White*, *Alden L. Atkins*, *John P. Elwood*, *William L. Taylor*, and *David B. Goldston*; for John M. Connor et al. by *Anthony J. Bolognese*; for 20 Merchants by *George D. Ruttinger*, *Andrew I. Gavil*, *Charles D. Austin*, and *Jordan L. Ludwig*; and for 28 Professors of Antitrust Law by *Eric F. Citron*.

Briefs of *amici curiae* urging affirmance were filed for Antitrust Law Scholars et al. by *Jonathan M. Jacobson*, *Daniel P. Weick*, and *Elyse Dorsey*; for the Australian Taxpayers' Alliance by *Kenneth E. Lee*, *Teena-Ann V. Sankoorikal*, and *Dylan A. Stern*; for the Clearing House Association L. L. C. by *Richard S. Taffet*, *David B. Salmons*, *Judd E. Stone*, and *Robert C. Hunter*; for the Computer & Communications Industry Association by *Neal Kumar Katyal*, *Jessica L. Ellsworth*, and *Eugene A. Sokoloff*; for Pharmaceutical Research and Manufacturers of America by *Aaron M. Streett*, *Joseph Ostoyich*, and *William Lavery*; for David S. Evans et al. by *Elai Katz*; and for J. Gregory Sidak et al. by *Robert M. Langer* and *Aaron S. Bayer*.

Thomas R. McCarthy, *Bryan K. Weir*, and *David E. Wheeler* filed a brief for Verizon Communications Inc. as *amicus curiae*.

provision. The antisteering provision prohibits merchants from discouraging customers from using their Amex card after they have already entered the store and are about to buy something, thereby avoiding Amex's fee. In this case, we must decide whether Amex's antisteering provisions violate federal antitrust law. We conclude they do not.

I

A

Credit cards have become a primary way that consumers in the United States purchase goods and services. When a cardholder uses a credit card to buy something from a merchant, the transaction is facilitated by a credit-card network. The network provides separate but interrelated services to both cardholders and merchants. For cardholders, the network extends them credit, which allows them to make purchases without cash and to defer payment until later. Cardholders also can receive rewards based on the amount of money they spend, such as airline miles, points for travel, or cash back. For merchants, the network allows them to avoid the cost of processing transactions and offers them quick, guaranteed payment. This saves merchants the trouble and risk of extending credit to customers, and it increases the number and value of sales that they can make.

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By providing these services to cardholders and merchants, credit-card companies bring these parties together, and therefore operate what economists call a "two-sided platform." As the name implies, a two-sided platform offers different products or services to two different groups who both depend on the platform to intermediate between them. See Evans & Schmalensee, Markets With Two-Sided Platforms, 1 Issues in Competition L. & Pol'y 667 (2008) (Evans & Schmalensee); Evans & Noel, Defining Antitrust Markets When Firms Operate Two-Sided Platforms, 2005 Colum. Bus. L. Rev. 667, 668 (Evans & Noel); Filistrucchi, Geradin, Van

Damme, & Affeldt, Market Definition in Two-Sided Markets: Theory and Practice, 10 J. Competition L. & Econ. 293, 296 (2014) (Filistrucchi). For credit cards, that interaction is a transaction. Thus, credit-card networks are a special type of two-sided platform known as a "transaction" platform. See *id.*, at 301, 304, 307; Evans & Noel 676–678. The key feature of transaction platforms is that they cannot make a sale to one side of the platform without simultaneously making a sale to the other. See Klein, Lerner, Murphy, & Plache, Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees, 73 Antitrust L. J. 571, 580, 583 (2006) (Klein). For example, no credit-card transaction can occur unless both the merchant and the cardholder simultaneously agree to use the same credit-card network. See Filistrucchi 301.

Two-sided platforms differ from traditional markets in important ways. Most relevant here, two-sided platforms often exhibit what economists call "indirect network effects." Evans & Schmalensee 667. Indirect network effects exist where the value of the two-sided platform to one group of participants depends on how many members of a different group participate. D. Evans & R. Schmalensee, Matchmakers: The New Economics of Multisided Platforms 25 (2016). In other words, the value of the services that a two-sided platform provides increases as the number of participants on both sides of the platform increases. A credit card, for example, is more valuable to cardholders when more merchants accept it and is more valuable to merchants when more cardholders use it. See Evans & Noel 686–687; Klein 580, 584. To ensure sufficient participation, two-sided platforms must be sensitive to the prices that they charge each side. See Evans & Schmalensee 675; Evans & Noel 680; Muris, Payment Card Regulation and the (Mis)Application of the Economics of Two-Sided Markets, 2005 Colum. Bus. L. Rev. 515, 532–533 (Muris); Rochet & Tirole,

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Platform Competition in Two-Sided Markets, 1 J. Eur. Econ. Assn. 990, 1013 (2003). Raising the price on side A risks losing participation on that side, which decreases the value of the platform to side B. If participants on side B leave due to this loss in value, then the platform has even less value to side A—risking a feedback loop of declining demand. See Evans & Schmalensee 675; Evans & Noel 680–681. Two-sided platforms therefore must take these indirect network effects into account before making a change in price on either side. See Evans & Schmalensee 675; Evans & Noel 680–681.[1]

Sometimes indirect network effects require two-sided platforms to charge one side much more than the other. See Evans & Schmalensee 667, 675, 681, 690–691; Evans & Noel 668, 691; Klein 585; Filistrucchi 300. For two-sided platforms, "'the [relative] price structure matters, and platforms must design it so as to bring both sides on board.'" Evans & Schmalensee 669 (quoting Rochet & Tirole, Two-Sided Markets: A Progress Report, 37 RAND J. Econ. 645, 646 (2006)). The optimal price might require charging the side with more elastic demand a below-cost (or even negative) price. See Muris 519, 550; Klein 579; Evans & Schmalensee 675; Evans & Noel 681. With credit cards, for example, networks often charge cardholders a lower fee than merchants because cardholders are more price sensitive.[2]

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[1] In a competitive market, indirect network effects also encourage companies to take increased profits from a price increase on side A and spend them on side B to ensure more robust participation on that side and to stem the impact of indirect network effects. See Evans & Schmalensee 688; Evans & Noel 670–671, 695. Indirect network effects thus limit the platform's ability to raise overall prices and impose a check on its market power. See Evans & Schmalensee 688; Evans & Noel 695.

[2] "Cardholders are more price-sensitive because many consumers have multiple payment methods, including alternative payment cards. Most merchants, by contrast, cannot accept just one major card because they are likely to lose profitable incremental sales if they do not take [all] the major payment cards. Because most consumers do not carry all of the

See Muris 522; Klein 573–574, 585, 595. In fact, the network might well *lose* money on the cardholder side by offering rewards such as cash back, airline miles, or gift cards. See Klein 587; Evans & Schmalensee 672. The network can do this because increasing the number of cardholders increases the value of accepting the card to merchants and, thus, increases the number of merchants who accept it. Muris 522; Evans & Schmalensee 692. Networks can then charge those merchants a fee for every transaction (typically a percentage of the purchase price). Striking the optimal balance of the prices charged on each side of the platform is essential for two-sided platforms to maximize the value of their services and to compete with their rivals.

B

Amex, Visa, MasterCard, and Discover are the four dominant participants in the credit-card market. Visa, which is by far the largest, has 45% of the market as measured by transaction volume.[3] Amex and MasterCard trail with 26.4% and 23.3%, respectively, while Discover has just 5.3% of the market.

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Visa and MasterCard have significant structural advantages over Amex. Visa and MasterCard began as bank cooperatives and thus almost every bank that offers credit cards is in the Visa or MasterCard network. This makes it very likely that the average consumer carries, and the average merchant accepts, Visa or MasterCard. As a result, the vast majority of Amex cardholders have a Visa or MasterCard, but only a small number of Visa and MasterCard cardholders have an Amex. Indeed, Visa and MasterCard account for more than 432 million cards in circulation in the United States, while Amex has only 53 million. And while 3.4 million merchants at 6.4 million locations accept Amex,

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major payment cards, refusing to accept a major card may cost the merchant substantial sales." Muris 522.

[3] All figures are accurate as of 2013.

nearly three million more locations accept Visa, MasterCard, and Discover.[4]

Amex competes with Visa and MasterCard by using a different business model. While Visa and MasterCard earn half of their revenue by collecting interest from their cardholders, Amex does not. Amex instead earns most of its revenue from merchant fees. Amex's business model thus focuses on cardholder spending rather than cardholder lending. To encourage cardholder spending, Amex provides better rewards than other networks. Due to its superior rewards, Amex tends to attract cardholders who are wealthier and spend more money. Merchants place a higher value on these cardholders, and Amex uses this advantage to recruit merchants.

Amex's business model has significantly influenced the credit-card market. To compete for the valuable cardholders that Amex attracts, both Visa and MasterCard have introduced premium cards that, like Amex, charge merchants higher fees and offer cardholders better rewards. To maintain their lower merchant fees, Visa and MasterCard have created a sliding scale for their various cards—charging merchants less for low-reward cards and more for high-reward cards. This differs from Amex's strategy, which is to charge merchants the same fee no matter the rewards that its card offers. Another way that Amex has influenced the credit-card market is by making banking and card-payment services available to low-income individuals, who otherwise could not qualify for a credit card and could not afford the fees that traditional banks charge. See 2 Record 3835–3837,

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[4] Discover entered the credit-card market several years after Amex, Visa, and MasterCard. It nonetheless managed to gain a foothold because Sears marketed Discover to its already significant base of private-label cardholders. Discover's business model shares certain features with Amex, Visa, and MasterCard. Like Amex, Discover interacts directly with its cardholders. But like Visa and MasterCard, Discover uses banks that cooperate with its network to interact with merchants.

4527–4529. In sum, Amex's business model has stimulated competitive innovations in the credit-card market, increasing the volume of transactions and improving the quality of the services.

Despite these improvements, Amex's business model sometimes causes friction with merchants. To maintain the loyalty of its cardholders, Amex must continually invest in its rewards program. But, to fund those investments, Amex must charge merchants higher fees than its rivals. Even though Amex's investments benefit merchants by encouraging cardholders to spend more money, merchants would prefer not to pay the higher fees. One way that merchants try to avoid them, while still enticing Amex's cardholders to shop at their stores, is by dissuading cardholders from using Amex at the point of sale. This practice is known as "steering."

Amex has prohibited steering since the 1950s by placing antisteering provisions in its contracts with merchants. These antisteering provisions prohibit merchants from implying a preference for non-Amex cards; dissuading customers from using Amex cards; persuading customers to use other cards; imposing any special restrictions, conditions, disadvantages, or fees on Amex cards; or promoting other cards more than Amex. The antisteering provisions do not, however, prevent merchants from steering customers toward debit cards, checks, or cash.

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C

In October 2010, the United States and several States (collectively, plaintiffs) sued Amex, claiming that its antisteering provisions violate § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1.[5] After a 7-week trial, the District

[5] Plaintiffs also sued Visa and MasterCard, claiming that their antisteering provisions violated § 1. But Visa and MasterCard voluntarily revoked their antisteering provisions and are no longer parties to this case.

Court agreed that Amex's antisteering provisions violate § 1. *United States* v. *American Express Co.*, 88 F. Supp. 3d 143, 151–152 (EDNY 2015). It found that the credit-card market should be treated as two separate markets—one for merchants and one for cardholders. See *id.*, at 171–175. Evaluating the effects on the merchant side of the market, the District Court found that Amex's antisteering provisions are anticompetitive because they result in higher merchant fees. See *id.*, at 195–224.

The Court of Appeals for the Second Circuit reversed. *United States* v. *American Express Co.*, 838 F. 3d 179, 184 (2016). It concluded that the credit-card market is one market, not two. *Id.*, at 196–200. Evaluating the credit-card market as a whole, the Second Circuit concluded that Amex's antisteering provisions were not anticompetitive and did not violate § 1. See *id.*, at 200–206.

We granted certiorari, 583 U. S. 931 (2017), and now affirm.

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II

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U. S. C. § 1. This Court has long recognized that, "[i]n view of the common law and the law in this country" when the Sherman Act was passed, the phrase "restraint of trade" is best read to mean "undue restraint." *Standard Oil Co. of N. J.* v. *United States*, 221 U. S. 1, 59–60 (1911). This Court's precedents have thus understood § 1 "to outlaw only *unreasonable* restraints." *State Oil Co.* v. *Khan*, 522 U. S. 3, 10 (1997) (emphasis added).

Restraints can be unreasonable in one of two ways. A small group of restraints are unreasonable *per se* because they "'"always or almost always tend to restrict competition and decrease output."'" *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U. S. 717, 723 (1988). Typically only "horizontal" restraints—restraints "imposed by

agreement between competitors"—qualify as unreasonable *per se*. *Id.*, at 730. Restraints that are not unreasonable *per se* are judged under the "rule of reason." *Id.*, at 723. The rule of reason requires courts to conduct a fact-specific assessment of "market power and market structure . . . to assess the [restraint]'s actual effect" on competition. *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U. S. 752, 768 (1984). The goal is to "distinguis[h] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U. S. 877, 886 (2007).

In this case, both sides correctly acknowledge that Amex's antisteering provisions are vertical restraints—*i. e.*, restraints "imposed by agreement between firms at different levels of distribution." *Business Electronics*, *supra*, at 730. The parties also correctly acknowledge that, like nearly every other vertical restraint, the antisteering provisions should be assessed under the rule of reason. See *Leegin*, *supra*, at 882; *State Oil*, *supra*, at 19; *Business Electronics*, *supra*, at 726; *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 57 (1977).

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To determine whether a restraint violates the rule of reason, the parties agree that a three-step, burden-shifting framework applies. Under this framework, the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. See 1 J. Kalinowski, Antitrust Laws and Trade Regulation § 12.02[1] (2d ed. 2017) (Kalinowski); P. Areeda & H. Hovenkamp, Fundamentals of Antitrust Law § 15.02[B] (4th ed. 2017) (Areeda & Hovenkamp); *Capital Imaging Assoc., P. C.* v. *Mohawk Valley Medical Associates, Inc.*, 996 F. 2d 537, 543 (CA2 1993). If the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint. See 1 Kalinowski § 12.02[1]; Areeda & Hovenkamp § 15.02[B]; *Capital Im-*

aging Assoc., *supra*, at 543. If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means. See 1 Kalinowski § 12.02[1]; *Capital Imaging Assoc.*, *supra*, at 543.

Here, the parties ask us to decide whether the plaintiffs have carried their initial burden of proving that Amex's antisteering provisions have an anticompetitive effect. The plaintiffs can make this showing directly or indirectly. Direct evidence of anticompetitive effects would be "'proof of actual detrimental effects [on competition],'" *FTC* v. *Indiana Federation of Dentists*, 476 U. S. 447, 460 (1986), such as reduced output, increased prices, or decreased quality in the relevant market, see 1 Kalinowski § 12.02[2]; *Craftsman Limousine, Inc.* v. *Ford Motor Co.*, 491 F. 3d 381, 390 (CA8 2007); *Virgin Atlantic Airways Ltd.* v. *British Airways PLC*, 257 F. 3d 256, 264 (CA2 2001). Indirect evidence would be proof of market power plus some evidence that the challenged restraint harms competition. See 1 Kalinowski § 12.02[2]; *Tops Markets, Inc.* v. *Quality Markets, Inc.*, 142 F. 3d 90, 97 (CA2 1998); *Spanish Broadcasting System of Fla.* v. *Clear Channel Communications, Inc.*, 376 F. 3d 1065, 1073 (CA11 2004).

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Here, the plaintiffs rely exclusively on direct evidence to prove that Amex's antisteering provisions have caused anticompetitive effects in the credit-card market.[6] To assess this evidence, we must first define the relevant market. Once defined, it becomes clear that the plaintiffs' evidence is insufficient to carry their burden.

A

Because "[l]egal presumptions that rest on formalistic distinctions rather than actual market realities are generally

[6] Although the plaintiffs relied on indirect evidence below, they have abandoned that argument in this Court. See Brief for United States 23, n. 4 (citing Pet. for Cert. i, 18–25).

disfavored in antitrust law," *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U. S. 451, 466–467 (1992), courts usually cannot properly apply the rule of reason without an accurate definition of the relevant market.[7] "Without a definition of [the] market there is no way to measure [the defendant's] ability to lessen or destroy competition." *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U. S. 172, 177 (1965); accord, 2 Kalinowski § 24.01[4][a]. Thus, the relevant market is defined as "the area of effective competition." *Ibid.* Typically this is the "arena within which significant substitution in consumption or production occurs." Areeda & Hovenkamp § 5.02; accord, 2 Kalinowski § 24.02[1]; *United States* v. *Grinnell Corp.*,

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[7] The plaintiffs argue that we need not define the relevant market in this case because they have offered actual evidence of adverse effects on competition—namely, increased merchant fees. See Brief for United States 40–41 (citing *FTC* v. *Indiana Federation of Dentists*, 476 U. S. 447 (1986), and *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U. S. 643 (1980) (*per curiam*)). We disagree. The cases that the plaintiffs cite for this proposition evaluated whether horizontal restraints had an adverse effect on competition. See *Indiana Federation of Dentists*, *supra*, at 450–451, 459 (agreement between competing dentists not to share X rays with insurance companies); *Catalano*, *supra*, at 644–645, 650 (agreement among competing wholesalers not to compete on extending credit to retailers). Given that horizontal restraints involve agreements between competitors not to compete in some way, this Court concluded that it did not need to precisely define the relevant market to conclude that these agreements were anticompetitive. See *Indiana Federation of Dentists*, *supra*, at 460–461; *Catalano*, *supra*, at 648–649. But vertical restraints are different. See *Arizona* v. *Maricopa County Medical Soc.*, 457 U. S. 332, 348, n. 18 (1982); *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U. S. 877, 888 (2007). Vertical restraints often pose no risk to competition unless the entity imposing them has market power, which cannot be evaluated unless the Court first defines the relevant market. See *id.*, at 898 (noting that a vertical restraint "may not be a serious concern unless the relevant entity has market power"); Easterbrook, Vertical Arrangements and the Rule of Reason, 53 Antitrust L. J. 135, 160 (1984) ("[T]he possibly anticompetitive manifestations of vertical arrangements can occur only if there is market power").

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384 U. S. 563, 571 (1966). But courts should "combin[e]" different products or services into "a single market" when "that combination reflects commercial realities." *Id.*, at 572; see also *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 336 (1962) (pointing out that "the definition of the relevant market" must "'correspond to the commercial realities' of the industry").

As explained, credit-card networks are two-sided platforms. Due to indirect network effects, two-sided platforms cannot raise prices on one side without risking a feedback loop of declining demand. See Evans & Schmalensee 674–675; Evans & Noel 680–681. And the fact that two-sided platforms charge one side a price that is below or above cost reflects differences in the two sides' demand elasticity, not market power or anticompetitive pricing. See Klein 574, 595, 598, 626. Price increases on one side of the platform likewise do not suggest anticompetitive effects without some evidence that they have increased the overall cost of the platform's services. See *id.*, at 575, 594, 626. Thus, courts must include both sides of the platform—merchants and cardholders—when defining the credit-card market.

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To be sure, it is not always necessary to consider both sides of a two-sided platform. A market should be treated as one sided when the impacts of indirect network effects and relative pricing in that market are minor. See Filistrucchi 321–322. Newspapers that sell advertisements, for example, arguably operate a two-sided platform because the value of an advertisement increases as more people read the newspaper. *Id.*, at 297, 315; Klein 579. But in the newspaper-advertisement market, the indirect network effects operate in only one direction; newspaper readers are largely indifferent to the amount of advertising that a newspaper contains. See Filistrucchi 321, 323, and n. 99; Klein 583. Because of these weak indirect network effects, the market for newspaper advertising behaves much like a one-sided market and should be analyzed as such. See Filistruc-

chi 321; *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 610 (1953).

But two-sided transaction platforms, like the credit-card market, are different. These platforms facilitate a single, simultaneous transaction between participants. For credit cards, the network can sell its services only if a merchant and cardholder both simultaneously choose to use the network. Thus, whenever a credit-card network sells one transaction's worth of card-acceptance services to a merchant it also must sell one transaction's worth of card-payment services to a cardholder. It cannot sell transaction services to either cardholders or merchants individually. See Klein 583 ("Because cardholders and merchants jointly consume a single product, payment card transactions, their consumption of payment card transactions must be directly proportional"). To optimize sales, the network must find the balance of pricing that encourages the greatest number of matches between cardholders and merchants.

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Because they cannot make a sale unless both sides of the platform simultaneously agree to use their services, two-sided transaction platforms exhibit more pronounced indirect network effects and interconnected pricing and demand. Transaction platforms are thus better understood as "suppl[ying] only one product"—transactions. Klein 580. In the credit-card market, these transactions "are jointly consumed by a cardholder, who uses the payment card to make a transaction, and a merchant, who accepts the payment card as a method of payment." *Ibid.* Tellingly, credit cards determine their market share by measuring the volume of transactions they have sold.[8]

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[8] Contrary to the dissent's assertion, *post*, at 562–563, merchant services and cardholder services are not complements. See Filistrucchi 297 ("[A] two-sided market [is] different from markets for complementary products, in which both products are bought by the same buyers, who, in their buying decisions, can therefore be expected to take into account both prices"). As already explained, credit-card companies are best understood as sup-

Evaluating both sides of a two-sided transaction platform is also necessary to accurately assess competition. Only other two-sided platforms can compete with a two-sided platform for transactions. See Filistrucchi 301. A credit-card company that processed transactions for merchants, but that had no cardholders willing to use its card, could not compete with Amex. See *ibid.* Only a company that had both cardholders and merchants willing to use its network could sell transactions and compete in the credit-card market. Similarly, if a merchant accepts the four major credit cards, but a cardholder only uses Visa or Amex, only those two cards can compete for the particular transaction. Thus, competition cannot be accurately assessed by looking at only one side of the platform in isolation.[9]

For all these reasons, "[i]n two-sided transaction markets, only one market should be defined." *Id.*, at 302; see also Evans & Noel 671 ("[F]ocusing on one dimension of . . . competition tends to distort the competition that actually exists among [two-sided platforms]"). Any other analysis would lead to "'"mistaken inferences"'" of the kind that could "'"chill the very conduct the antitrust laws are designed to protect."'" *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U. S. 209, 226 (1993); see also *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574, 594 (1986) ("'[W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition'"); *Leegin*, 551 U. S., at 895 (noting that courts

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plying only one product—transactions—which is jointly consumed by a cardholder and a merchant. See Klein 580. Merchant services and cardholder services are both inputs to this single product. See *ibid.*

[9] Nontransaction platforms, by contrast, often do compete with companies that do not operate on both sides of their platform. A newspaper that sells advertising, for example, might have to compete with a television network, even though the two do not meaningfully compete for viewers. See Filistrucchi 301.

should avoid "increas[ing] the total cost of the antitrust system by prohibiting procompetitive conduct the antitrust laws should encourage"). Accordingly, we will analyze the two-sided market for credit-card transactions as a whole to determine whether the plaintiffs have shown that Amex's antisteering provisions have anticompetitive effects.

B

The plaintiffs have not carried their burden to prove anticompetitive effects in the relevant market. The plaintiffs stake their entire case on proving that Amex's agreements increase merchant fees. We find this argument unpersuasive.

As an initial matter, the plaintiffs' argument about merchant fees wrongly focuses on only one side of the two-sided credit-card market. As explained, the credit-card market must be defined to include both merchants and cardholders. Focusing on merchant fees alone misses the mark because the product that credit-card companies sell is transactions, not services to merchants, and the competitive effects of a restraint on transactions cannot be judged by looking at merchants alone. Evidence of a price increase on one side of a two-sided transaction platform cannot by itself demonstrate an anticompetitive exercise of market power. To demonstrate anticompetitive effects on the two-sided credit-card market as a whole, the plaintiffs must prove that Amex's antisteering provisions increased the cost of credit-card transactions above a competitive level, reduced the number of credit-card transactions, or otherwise stifled competition in the credit-card market. See 1 Kalinowski § 12.02[2]; *Craftsman Limousine, Inc.*, 491 F. 3d, at 390; *Virgin Atlantic Airways Ltd.*, 257 F. 3d, at 264. They failed to do so.

1

The plaintiffs did not offer any evidence that the price of credit-card transactions was higher than the price one would

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expect to find in a competitive market. As the District Court found, the plaintiffs failed to offer any reliable measure of Amex's transaction price or profit margins. 88 F. Supp. 3d, at 198, 215. And the evidence about whether Amex charges more than its competitors was ultimately inconclusive. *Id.*, at 199, 202, 215.

Amex's increased merchant fees reflect increases in the value of its services and the cost of its transactions, not an ability to charge above a competitive price. Amex began raising its merchant fees in 2005 after Visa and MasterCard raised their fees in the early 2000s. *Id.*, at 195, 199–200. As explained, Amex has historically charged higher merchant fees than these competitors because it delivers wealthier cardholders who spend more money. *Id.*, at 200–201. Amex's higher merchant fees are based on a careful study of how much additional value its cardholders offer merchants. See *id.*, at 192–193. On the other side of the market, Amex uses its higher merchant fees to offer its cardholders a more robust rewards program, which is necessary to maintain cardholder loyalty and encourage the level of spending that makes Amex valuable to merchants. *Id.*, at 160, 191–195. That Amex allocates prices between merchants and cardholders differently from Visa and MasterCard is simply not evidence that it wields market power to achieve anticompetitive ends. See Evans & Noel 670–671; Klein 574–575, 594–595, 598, 626.

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In addition, the evidence that does exist cuts against the plaintiffs' view that Amex's antisteering provisions are the cause of any increases in merchant fees. Visa and MasterCard's merchant fees have continued to increase, even at merchant locations where Amex is not accepted and, thus, Amex's antisteering provisions do not apply. See 88 F. Supp. 3d, at 222. This suggests that the cause of increased merchant fees is not Amex's antisteering provisions, but rather increased competition for cardholders and a corre-

sponding marketwide adjustment in the relative price charged to merchants. See Klein 575, 609.

2

The plaintiffs did offer evidence that Amex increased the percentage of the purchase price that it charges merchants by an average of 0.09% between 2005 and 2010 and that this increase was not entirely spent on cardholder rewards. See 88 F. Supp. 3d, at 195–197, 215. The plaintiffs believe that this evidence shows that the price of Amex's transactions increased.

Even assuming the plaintiffs are correct, this evidence does not prove that Amex's antisteering provisions gave it the power to charge anticompetitive prices. "Market power is the ability to raise price profitably *by restricting output.*" Areeda & Hovenkamp § 5.01 (emphasis added); accord, *Kodak*, 504 U. S., at 464; *Business Electronics*, 485 U. S., at 723. This Court will "not infer competitive injury from price and output data absent some evidence that tends to prove that output was restricted or prices were above a competitive level." *Brooke Group Ltd.*, 509 U. S., at 237. There is no such evidence in this case. The output of credit-card transactions grew dramatically from 2008 to 2013, increasing 30%. See 838 F. 3d, at 206. "Where . . . output is expanding at the same time prices are increasing, rising prices are equally consistent with growing product demand." *Brooke Group Ltd.*, *supra*, at 237. And, as previously explained, the plaintiffs did not show that Amex charged more than its competitors.

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3

The plaintiffs also failed to prove that Amex's antisteering provisions have stifled competition among credit-card companies. To the contrary, while these agreements have been in place, the credit-card market experienced expanding output and improved quality. Amex's business model spurred Visa

and MasterCard to offer new premium card categories with higher rewards. And it has increased the availability of card services, including free banking and card-payment services for low-income customers who otherwise would not be served. Indeed, between 1970 and 2001, the percentage of households with credit cards more than quadrupled, and the proportion of households in the bottom-income quintile with credit cards grew from just 2% to over 38%. See D. Evans & R. Schmalensee, Paying With Plastic: The Digital Revolution in Buying and Borrowing 88–89 (2d ed. 2005) (Paying With Plastic).

Nor have Amex's antisteering provisions ended competition between credit-card networks with respect to merchant fees. Instead, fierce competition between networks has constrained Amex's ability to raise these fees and has, at times, forced Amex to lower them. For instance, when Amex raised its merchant prices between 2005 and 2010, some merchants chose to leave its network. 88 F. Supp. 3d, at 197. And when its remaining merchants complained, Amex stopped raising its merchant prices. *Id.*, at 198. In another instance in the late 1980s and early 1990s, competition forced Amex to offer lower merchant fees to "everyday spend" merchants—supermarkets, gas stations, pharmacies, and the like—to persuade them to accept Amex. See *id.*, at 160–161, 202.

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In addition, Amex's competitors have exploited its higher merchant fees to their advantage. By charging lower merchant fees, Visa, MasterCard, and Discover have achieved broader merchant acceptance—approximately 3 million more locations than Amex. *Id.*, at 204. This broader merchant acceptance is a major advantage for these networks and a significant challenge for Amex, since consumers prefer cards that will be accepted everywhere. *Ibid.* And to compete even further with Amex, Visa and MasterCard charge different merchant fees for different types of cards to maintain their comparatively lower merchant fees and broader accept-

ance. Over the long run, this competition has created a trend of declining merchant fees in the credit-card market. In fact, since the first credit card was introduced in the 1950s, merchant fees—including Amex's merchant fees—have decreased by more than half. See *id.*, at 202–203; Paying With Plastic 54, 126, 152.

Lastly, there is nothing inherently anticompetitive about Amex's antisteering provisions. These agreements actually stem negative externalities in the credit-card market and promote interbrand competition. When merchants steer cardholders away from Amex at the point of sale, it undermines the cardholder's expectation of "welcome acceptance"—the promise of a frictionless transaction. 88 F. Supp. 3d, at 156. A lack of welcome acceptance at one merchant makes a cardholder less likely to use Amex at all other merchants. This externality endangers the viability of the entire Amex network. And it undermines the investments that Amex has made to encourage increased cardholder spending, which discourages investments in rewards and ultimately harms both cardholders and merchants. Cf. *Leegin*, 551 U. S., at 890–891 (recognizing that vertical restraints can prevent retailers from free riding and thus increase the availability of "tangible or intangible services or promotional efforts" that enhance competition and consumer welfare). Perhaps most importantly, antisteering provisions do not prevent Visa, MasterCard, or Discover from competing against Amex by offering lower merchant fees or promoting their broader merchant acceptance.[10]

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[10] The plaintiffs argue that *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 610 (1972), forbids any restraint that would restrict competition in part of the market—here, for example, merchant steering. See Brief for Petitioners and Respondents Nebraska, Tennessee, and Texas 30, 42. *Topco* does not stand for such a broad proposition. *Topco* concluded that a horizontal agreement between competitors was unreasonable *per se*, even though the agreement did not extend to every competitor in the market. See 405 U. S., at 599, 608. A horizontal agreement between competitors is markedly different from a vertical agreement that incidentally affects

In sum, the plaintiffs have not satisfied the first step of the rule of reason. They have not carried their burden of proving that Amex's antisteering provisions have anticompetitive effects. Amex's business model has spurred robust interbrand competition and has increased the quality and quantity of credit-card transactions. And it is "[t]he promotion of interbrand competition," after all, that "is . . . 'the primary purpose of the antitrust laws.'" *Id.*, at 890.

* * *

Because Amex's antisteering provisions do not unreasonably restrain trade, we affirm the judgment of the Court of Appeals.

It is so ordered.

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

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For more than 120 years, the American economy has prospered by charting a middle path between pure laissez-faire and state capitalism, governed by an antitrust law "dedicated to the principle that *markets*, not individual firms and certainly not political power, produce the optimal mixture of goods and services." 1 P. Areeda & H. Hovenkamp, Antitrust Law ¶100b, p. 4 (4th ed. 2013) (Areeda & Hovenkamp). By means of a strong antitrust law, the United States has sought to avoid the danger of monopoly capitalism. Long gone, we hope, are the days when the great trusts presided unfettered by competition over the American economy.

This lawsuit is emblematic of the American approach. Many governments around the world have responded to concerns about the high fees that credit-card companies often charge merchants by regulating such fees directly. See GAO, Credit and Debit Cards: Federal Entities Are Taking

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one particular method of competition. See *Leegin*, 551 U. S., at 888; *Maricopa County Medical Soc.*, 457 U. S., at 348, n. 18.

Actions To Limit Their Interchange Fees, but Additional Revenue Collection Cost Savings May Exist 31–35 (GAO–08–558, 2008). The United States has not followed that approach. The Government instead filed this lawsuit, which seeks to restore market competition over credit-card merchant fees by eliminating a contractual barrier with anticompetitive effects. The majority rejects that effort. But because the challenged contractual term clearly has serious anticompetitive effects, I dissent.

I

I agree with the majority and the parties that this case is properly evaluated under the three-step "rule of reason" that governs many antitrust lawsuits. *Ante*, at 541–542. Under that approach, a court looks first at the agreement or restraint at issue to assess whether it has had, or is likely to have, anticompetitive effects. *FTC* v. *Indiana Federation of Dentists*, 476 U. S. 447, 459 (1986). In doing so, the court normally asks whether the restraint may tend to impede competition and, if so, whether those who have entered into that restraint have sufficient economic or commercial power for the agreement to make a negative difference. See *id.*, at 459–461. Sometimes, but not always, a court will try to determine the appropriate market (the market that the agreement affects) and determine whether those entering into that agreement have the power to raise prices above the competitive level in that market. See *ibid.*

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It is important here to understand that in cases under § 1 of the Sherman Act (unlike in cases challenging a merger under § 7 of the Clayton Act, 15 U. S. C. § 18), it may well be unnecessary to undertake a sometimes complex, market power inquiry:

> "Since the purpose [in a Sherman Act § 1 case] of the inquiries into . . . market power is [simply] to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detri-

> mental effects, such as a reduction in output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'" *Indiana Federation of Dentists*, *supra*, at 460–461 (quoting 7 P. Areeda, Antitrust Law ¶1511, p. 429 (3d ed. 1986)).

Second (as treatise writers summarize the case law), if an antitrust plaintiff meets the initial burden of showing that an agreement will likely have anticompetitive effects, normally the "burden shifts to the defendant to show that the restraint in fact serves a legitimate objective." 7 Areeda & Hovenkamp ¶1504b, at 415; see *California Dental Assn.* v. *FTC*, 526 U. S. 756, 771 (1999); *id.*, at 788 (BREYER, J., dissenting).

Third, if the defendant successfully bears this burden, the antitrust plaintiff may still carry the day by showing that it is possible to meet the legitimate objective in less restrictive ways, or, perhaps by showing that the legitimate objective does not outweigh the harm that competition will suffer, *i. e.*, that the agreement "on balance" remains unreasonable. 7 Areeda & Hovenkamp ¶1507a, at 442.

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Like the Court of Appeals and the parties, the majority addresses only the first step of that three-step framework. *Ante,* at 542.

II

A

This case concerns the credit-card business. As the majority explains, *ante,* at 534–535, that business involves the selling of two different but related card services. First, when a shopper uses a credit card to buy something from a participating merchant, the credit-card company pays the merchant the amount of money that the merchant's customer has charged to his card and charges the merchant a fee, say, 5%, for that speedy-payment service. I shall refer to that kind of transaction as a merchant-related card service. Second, the credit-card company then sends a bill to the merchant's

customer, the shopper who holds the card; and the shopper pays the card company the sum that merchant charged the shopper for the goods or services he or she bought. The cardholder also often pays the card company a fee, such as an annual fee for the card or an interest charge for delayed payment. I shall call that kind of transaction a shopper-related card service. The credit-card company can earn revenue from the sale (directly or indirectly) of each of these services: (1) speedy payment for merchants and (2) credit for shoppers. (I say "indirectly" to reflect the fact that card companies often create or use networks of banks as part of the process—but I have found nothing here suggesting that that fact makes a significant difference to my analysis.)

Sales of the two basic card services are related. A shopper can pay for a purchase with a particular credit card only if the merchant has signed up for merchant-related card services with the company that issued the credit card that the shopper wishes to use. A firm in the credit-card business is therefore unlikely to make money unless quite a few merchants agree to accept that firm's card and quite a few shoppers agree to carry and use it. In general, the more merchants that sign up with a particular card company, the more useful that card is likely to prove to shoppers and so the more shoppers will sign up; so too, the more shoppers that carry a particular card, the more useful that card is likely to prove to merchants (as it obviously helps them obtain the shoppers' business) and so the more merchants will sign up. Moreover, as a rough rule of thumb (and assuming constant charges), the larger the networks of paying merchants and paying shoppers that a card firm maintains, the larger the revenues that the firm will likely receive, since more payments will be processed using its cards. Thus, it is not surprising that a card company may offer shoppers incentives (say, points redeemable for merchandise or travel) for using its card or that a firm might want merchants to accept its card exclusively.

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B

This case focuses upon a practice called "steering." American Express has historically charged higher merchant fees than its competitors. App. to Pet. for Cert. 173a–176a. Hence, fewer merchants accept American Express' cards than its competitors'. *Id.*, at 184a–187a. But, perhaps because American Express cardholders are, on average, wealthier, higher spending, or more loyal to American Express than other cardholders, vast numbers of merchants still accept American Express cards. See *id.*, at 156a, 176a–177a, 184a–187a. Those who do, however, would (in order to avoid the higher American Express fee) often prefer that their customers use a different card to charge a purchase. Thus, the merchant has a monetary incentive to "steer" the customer toward the use of a different card. A merchant might tell the customer, for example, "American Express costs us more," or "please use Visa if you can," or "free shipping if you use Discover." See *id.*, at 100a–102a.

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Steering makes a difference, because without it, the shopper does not care whether the merchant pays more to American Express than it would pay to a different card company—the shopper pays the same price either way. But if steering works, then American Express will find it more difficult to charge more than its competitors for merchant-related services, because merchants will respond by steering their customers, encouraging them to use other cards. Thus, American Express dislikes steering; the merchants like it; and the shoppers may benefit from it, whether because merchants will offer them incentives to use less expensive cards or in the form of lower retail prices overall. See *id.*, at 92a, 97a–104a.

In response to its competitors' efforts to convince merchants to steer shoppers to use less expensive cards, American Express tried to stop, or at least to limit, steering by placing antisteering provisions in most of its contracts with merchants. It called those provisions "nondiscrimination

provisions." They prohibited steering of the forms I have described above (and others as well). See *id.*, at 95a–96a, 100a–101a. After placing them in its agreements, American Express found it could maintain, or even raise, its higher merchant prices without losing too many transactions to other firms. *Id.*, at 195a–198a. These agreements—the "nondiscrimination provisions"—led to this lawsuit.

C

In 2010 the United States and 17 States brought this antitrust case against American Express. They claimed that the "nondiscrimination provisions" in its contracts with merchants created an unreasonable restraint of trade. (Initially Visa and MasterCard were also defendants, but they entered into consent judgments, dropping similar provisions from their contracts with merchants.) After a 7-week bench trial, the District Court entered judgment for the Government, setting forth its findings of fact and conclusions of law in a 97-page opinion. 88 F. Supp. 3d 143 (EDNY 2015).

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Because the majority devotes little attention to the District Court's detailed factual findings, I will summarize some of the more significant ones here. Among other things, the District Court found that beginning in 2005 and during the next five years, American Express raised the prices it charged merchants on 20 separate occasions. See *id.*, at 195–196. In doing so, American Express did not take account of the possibility that large merchants would respond to the price increases by encouraging shoppers to use a different credit card because the nondiscrimination provisions prohibited any such steering. *Id.*, at 215. The District Court pointed to merchants' testimony stating that, had it not been for those provisions, the large merchants would have responded to the price increases by encouraging customers to use other, less expensive cards. *Ibid.*

The District Court also found that even though American Express raised its merchant prices 20 times in this 5-year

period, it did not lose the business of any large merchant. *Id.*, at 197. Nor did American Express increase benefits (or cut credit-card prices) to American Express cardholders in tandem with the merchant price increases. *Id.*, at 196. Even had there been no direct evidence of injury to competition, American Express' ability to raise merchant prices without losing any meaningful market share, in the District Court's view, showed that American Express possessed power in the relevant market. See *id.*, at 195.

The District Court also found that, in the absence of the provisions, prices to merchants would likely have been lower. *Ibid.* It wrote that in the late 1990's, Discover, one of American Express' competitors, had tried to develop a business model that involved charging lower prices to merchants than the other companies charged. *Id.*, at 213. Discover then invited each "merchant to save money by shifting volume to Discover," while simultaneously offering merchants additional discounts "if they would steer customers to Discover." *Ibid.* The court determined that these efforts failed because of American Express' (and the other card companies') "nondiscrimination provisions." These provisions, the court found, "denied merchants the ability to express a preference for Discover or to employ any other tool by which they might steer share to Discover's lower-priced network." *Id.*, at 214. Because the provisions eliminated any advantage that lower prices might produce, Discover "abandoned its low-price business model" and raised its merchant fees to match those of its competitors. *Ibid.* This series of events, the court concluded, was "emblematic of the harm done to the competitive process" by the "nondiscrimination provisions." *Ibid.*

The District Court added that it found no offsetting procompetitive benefit to shoppers. *Id.*, at 225–238. Indeed, it found no offsetting benefit of any kind. See *ibid.*

American Express appealed, and the U. S. Court of Appeals for the Second Circuit held in its favor. 838 F. 3d 179 (2016). The Court of Appeals did not reject any fact found

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by the District Court as "clearly erroneous." See Fed. Rule Civ. Proc. 52(a)(6). Rather, it concluded that the District Court had erred in step 1 of its rule-of-reason analysis by failing to account for what the Second Circuit called the credit-card business' "two-sided market" (or "two-sided platform"). 838 F. 3d, at 185–186, 196–200.

III

The majority, like the Court of Appeals, reaches only step 1 in its "rule of reason" analysis. *Ante*, at 542–543. To repeat, that step consists of determining whether the challenged "nondiscrimination provisions" have had, or are likely to have, anticompetitive effects. See *Indiana Federation of Dentists*, 476 U. S., at 459. Do those provisions tend to impede competition? And if so, does American Express, which imposed that restraint as a condition of doing business with its merchant customers, have sufficient economic or commercial power for the provision to make a negative difference? See *id.*, at 460–461.

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A

Here the District Court found that the challenged provisions have had significant anticompetitive effects. In particular, it found that the provisions have limited or prevented price competition among credit-card firms for the business of merchants. 88 F. Supp. 3d, at 209. That conclusion makes sense: In the provisions, American Express required the merchants to agree not to encourage customers to use American Express' competitors' credit cards, even cards from those competitors, such as Discover, that intended to charge the merchants lower prices. See *id.*, at 214. By doing so, American Express has "disrupt[ed] the normal price-setting mechanism" in the market. *Id.*, at 209. As a result of the provisions, the District Court found, American Express was able to raise merchant prices repeatedly without any significant loss of business, because merchants were unable to respond to such price increases by encouraging shoppers to

pay with other cards. *Id.*, at 215. The provisions also meant that competitors like Discover had little incentive to lower their merchant prices, because doing so did not lead to any additional market share. *Id.*, at 214. The provisions thereby "suppress[ed] [American Express'] competitors' incentive[s] to offer lower prices . . . resulting in higher profit-maximizing prices across the network services market." *Id.*, at 209. Consumers throughout the economy paid higher retail prices as a result, and they were denied the opportunity to accept incentives that merchants might otherwise have offered to use less expensive cards. *Id.*, at 216, 220. I should think that, considering step 1 alone, there is little more that need be said.

The majority, like the Court of Appeals, says that the District Court should have looked not only at the market for the card companies' merchant-related services but also at the market for the card companies' shopper-related services, and that it should have combined them, treating them as a single market. *Ante*, at 546–547; 838 F. 3d, at 197. But I am not aware of any support for that view in antitrust law. Indeed, this Court has held to the contrary.

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In *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 610 (1953), the Court held that an antitrust court should begin its definition of a relevant market by focusing narrowly on the good or service directly affected by a challenged restraint. The Government in that case claimed that a newspaper's advertising policy violated the Sherman Act's "rule of reason." See *ibid.* In support of that argument, the Government pointed out, and the District Court had held, that the newspaper dominated the market for the sales of newspapers to readers in New Orleans, where it was the sole morning daily newspaper. *Ibid.* But this Court reversed. We explained that "every newspaper is a dual trader in separate though interdependent markets; it sells the paper's news and advertising content to its readers; in

effect that readership is in turn sold to the buyers of advertising space." *Ibid.* We then added:

> "This case concerns solely one of these markets. The Publishing Company stands accused not of tying sales to its readers but only to buyers of general and classified space in its papers. For this reason, dominance in the advertising market, not in readership, must be decisive in gauging the legality of the Company's unit plan." *Ibid.*

Here, American Express stands accused not of limiting or harming competition for shopper-related card services, but only of merchant-related card services, because the challenged contract provisions appear only in American Express' contracts with merchants. That is why the District Court was correct in considering, at step 1, simply whether the agreement had diminished competition in merchant-related services.

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B

The District Court did refer to market definition, and the majority does the same. *Ante*, at 542–547. And I recognize that properly defining a market is often a complex business. Once a court has identified the good or service directly restrained, as *Times-Picayune Publishing Co.* requires, it will sometimes add to the relevant market what economists call "substitutes": other goods or services that are reasonably substitutable for that good or service. See, *e. g.*, *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377, 395–396 (1956) (explaining that cellophane market includes other, substitutable flexible wrapping materials as well). The reason that substitutes are included in the relevant market is that they restrain a firm's ability to profitably raise prices, because customers will switch to the substitutes rather than pay the higher prices. See 2B Areeda & Hovenkamp ¶561, at 378.

But while the market includes substitutes, it does not include what economists call complements: goods or services that are used together with the restrained product, but that cannot be substituted for that product. See *id.*, ¶565a, at 429; *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U. S. 451, 463 (1992). An example of complements is gasoline and tires. A driver needs both gasoline and tires to drive, but they are not substitutes for each other, and so the sale price of tires does not check the ability of a gasoline firm (say, a gasoline monopolist) to raise the price of gasoline above competitive levels. As a treatise on the subject states: "Grouping complementary goods into the same market" is "economic nonsense" and would "undermin[e] the rationale for the policy against monopolization or collusion in the first place." 2B Areeda & Hovenkamp ¶565a, at 431.

Here, the relationship between merchant-related card services and shopper-related card services is primarily that of complements, not substitutes. Like gasoline and tires, both must be purchased for either to have value. Merchants upset about a price increase for merchant-related services cannot avoid that price increase by becoming cardholders, in the way that, say, a buyer of newspaper advertising can switch to television advertising or direct mail in response to a newspaper's advertising price increase. The two categories of services serve fundamentally different purposes. And so, also like gasoline and tires, it is difficult to see any way in which the price of shopper-related services could act as a check on the card firm's sale price of merchant-related services. If anything, a lower price of shopper-related card services is likely to cause more shoppers to use the card, and increased shopper popularity should make it *easier* for a card firm to raise prices to merchants, not *harder*, as would be the case if the services were substitutes. Thus, unless there is something unusual about this case—a possibility I discuss below, see *infra*, at 565–572—there is no justification for treating shopper-related services and merchant-related services

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as if they were part of a single market, at least not at step 1 of the "rule of reason."

C

Regardless, a discussion of market definition was legally unnecessary at step 1. That is because the District Court found strong *direct* evidence of anticompetitive effects flowing from the challenged restraint. 88 F. Supp. 3d, at 207–224. As I said, *supra*, at 558, this evidence included Discover's efforts to break into the credit-card business by charging lower prices for merchant-related services, only to find that the "nondiscrimination provisions," by preventing merchants from encouraging shoppers to use Discover cards, meant that lower merchant prices did not result in any additional transactions using Discover credit cards. 88 F. Supp. 3d, at 213–214. The direct evidence also included the fact that American Express raised its merchant prices 20 times in five years without losing any appreciable market share. *Id.*, at 195–198, 208–212. It also included the testimony of numerous merchants that they would have steered shoppers away from American Express cards in response to merchant price increases (thereby checking the ability of American Express to raise prices) had it not been for the nondiscrimination provisions. See *id.*, at 221–222. It included the factual finding that American Express "did not even account for the possibility that [large] merchants would respond to its price increases by attempting to shift share to a competitor's network" because the nondiscrimination provisions prohibited steering. *Id.*, at 215. It included the District Court's ultimate finding of fact, not overturned by the Court of Appeals, that the challenged provisions "were integral to" American Express' "[price] increases and thereby caused merchants to pay higher prices." *Ibid.*

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As I explained above, this Court has stated that "[s]ince the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of

actual detrimental effects . . . can obviate the need for" those inquiries. *Indiana Federation of Dentists*, 476 U. S., at 460–461 (internal quotation marks omitted). That statement is fully applicable here. Doubts about the District Court's market-definition analysis are beside the point in the face of the District Court's findings of actual anticompetitive harm.

The majority disagrees that market definition is irrelevant. See *ante*, at 543–544, and n. 7. The majority explains that market definition is necessary because the nondiscrimination provisions are "vertical restraints" and "[v]ertical restraints often pose no risk to competition unless the entity imposing them has market power, which cannot be evaluated unless the Court first determines the relevant market." *Ante*, at 543, n. 7. The majority thus, in a footnote, seems categorically to exempt vertical restraints from the ordinary "rule of reason" analysis that has applied to them since the Sherman Act's enactment in 1890. The majority's only support for this novel exemption is *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U. S. 877 (2007). But *Leegin* held that the "rule of reason" *applied* to the vertical restraint at issue in that case. See *id.*, at 898–899. It said nothing to suggest that vertical restraints are not subject to the usual "rule of reason" analysis. See also *infra*, at 575.

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One critical point that the majority's argument ignores is that proof of actual adverse effects on competition *is*, *a fortiori*, proof of market power. Without such power, the restraints could not have brought about the anticompetitive effects that the plaintiff proved. See *Indiana Federation of Dentists*, *supra*, at 460 ("[T]he purpose of the inquiries into market definition and market power is to determine *whether an arrangement has the potential for* genuine adverse effects on competition" (emphasis added)). The District Court's findings of actual anticompetitive harm from the nondiscrimination provisions thus showed that, whatever the relevant market might be, American Express had enough

power in that market to cause that harm. There is no reason to require a separate showing of market definition and market power under such circumstances. And so the majority's extensive discussion of market definition is legally unnecessary.

D

The majority's discussion of market definition is also wrong. Without raising any objection in general with the longstanding approach I describe above, *supra*, at 561–563, the majority agrees with the Court of Appeals that the market for American Express' card services is special because it is a "two-sided transaction platform." *Ante*, at 534–537, 544–547. The majority explains that credit-card firms connect two distinct groups of customers: first, merchants who accept credit cards, and second, shoppers who use the cards. *Ante*, at 534–535; accord, 838 F. 3d, at 186. The majority adds that "no credit-card transaction can occur unless both the merchant and the cardholder simultaneously agree to use the same credit-card network." *Ante*, at 535. And it explains that the credit-card market involves "indirect network effects," by which it means that shoppers want a card that many merchants will accept and merchants want to accept those cards that many customers have and use. *Ibid.* From this, the majority concludes that "courts must include both sides of the platform—merchants and cardholders—when defining the credit-card market." *Ante*, at 544; accord, 838 F. 3d, at 197.

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1

Missing from the majority's analysis is any explanation as to *why*, given the purposes that market definition serves in antitrust law, the fact that a credit-card firm can be said to operate a "two-sided transaction platform" means that its merchant-related and shopper-related services should be combined into a single market. The phrase "two-sided transaction platform" is not one of antitrust art—I can find

no case from this Court using those words. The majority defines the phrase as covering a business that "offers different products or services to two different groups who both depend on the platform to intermediate between them," where the business "cannot make a sale to one side of the platform without simultaneously making a sale to the other" side of the platform. *Ante*, at 534–535. I take from that definition that there are four relevant features of such businesses on the majority's account: They (1) offer different products or services, (2) to different groups of customers, (3) whom the "platform" connects, (4) in simultaneous transactions. See *ibid.*

What is it about businesses with those four features that the majority thinks justifies a special market-definition approach for them? It cannot be the first two features—that the company sells different products to different groups of customers. Companies that sell multiple products to multiple types of customers are commonplace. A firm might mine for gold, which it refines and sells both to dentists in the form of fillings and to investors in the form of ingots. Or a firm might drill for both oil and natural gas. Or a firm might make both ignition switches inserted into auto bodies and tires used for cars. I have already explained that, ordinarily, antitrust law will not group the two nonsubstitutable products together for step 1 purposes. *Supra*, at 561–563.

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Neither should it normally matter whether a company sells related, or complementary, products, *i. e.*, products which must both be purchased to have any function, such as ignition switches and tires, or cameras and film. It is well established that an antitrust court in such cases looks at the product where the attacked restraint has an anticompetitive effect. *Supra*, at 560; see *Eastman Kodak*, 504 U. S., at 463. The court does not combine the customers for the separate, nonsubstitutable goods and see if "overall" the restraint has a negative effect. See *ibid.*; 2B Areeda & Hovenkamp

¶565a. That is because, as I have explained, the complementary relationship between the products is irrelevant to the purposes of market definition. See s*upra,* at 561–563.

The majority disputes my characterization of merchant-related and shopper-related services as "complements." See *ante,* at 545–546, n. 8. The majority relies on an academic article which devotes one sentence to the question, saying that "a two-sided market [is] different from markets for complementary products [*e. g.*, tires and gas], in which both products are bought by the same buyers, who, in their buying decisions, can therefore be expected to take into account both prices." Filistrucchi, Geradin, Van Damme, & Affeldt, Market Definition in Two-Sided Markets: Theory and Practice, 10 J. Competition L. & Econ. 293, 297 (2014) (Filistrucchi). I agree that two-sided platforms—at least as some academics define them, but see *infra*, at 570–572—may be distinct from some types of complements in the respect the majority mentions (even though the services resemble complements because they must be used together for either to have value). But the distinction the majority mentions has nothing to do with the relevant question. The relevant question is whether merchant-related and shopper-related services are *substitutes*, one for the other, so that customers can respond to a price increase for one service by switching to the other service. As I have explained, the two types of services are not substitutes in this way. *Supra,* at 562–564. And so the question remains, just as before: What is it about the economic relationship between merchant-related and shopper-related services that would justify the majority's novel approach to market definition?

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What about the last two features—that the company connects the two groups of customers to each other, in simultaneous transactions? That, too, is commonplace. Consider a farmers' market. It brings local farmers and local shoppers together, and transactions will occur only if a farmer and a

shopper simultaneously agree to engage in one. Should courts abandon their ordinary step 1 inquiry if several competing farmers' markets in a city agree that only certain kinds of farmers can participate, or if a farmers' market charges a higher fee than its competitors do and prohibits participating farmers from raising their prices to cover it? Why? If farmers' markets are special, what about travel agents that connect airlines and passengers? What about internet retailers, who, in addition to selling their own goods, allow (for a fee) other goods-producers to sell over their networks? Each of those businesses seems to meet the majority's four-prong definition.

Apparently as its justification for applying a special market-definition rule to "two-sided transaction platforms," the majority explains that such platforms "often exhibit" what it calls "indirect network effects." *Ante*, at 535. By this, the majority means that sales of merchant-related card services and (different) shopper-related card services are interconnected, in that increased merchant-buyers mean increased shopper-buyers (the more stores in the card's network, the more customers likely to use the card), and vice versa. See *ibid.* But this, too, is commonplace. Consider, again, a farmers' market. The more farmers that participate (within physical and esthetic limits), the more customers the market will likely attract, and vice versa. So too with travel agents: The more airlines whose tickets a travel agent sells, the more potential passengers will likely use that travel agent, and the more potential passengers that use the travel agent, the easier it will likely be to convince airlines to sell through the travel agent. And so forth. Nothing in antitrust law, to my knowledge, suggests that a court, when presented with an agreement that restricts competition in any one of the markets my examples suggest, should abandon traditional market-definition approaches and include in the relevant market services that are complements, not substitutes, of the restrained good. See *supra*, at 561–563.

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To justify special treatment for "two-sided transaction platforms," the majority relies on the Court's decision in *United States* v. *Grinnell Corp.*, 384 U. S. 563, 571–572 (1966). In *Grinnell*, the Court treated as a single market several different "central station services," including burglar alarm services and fire alarm services. *Id.*, at 571. It did so even though, for *consumers*, "burglar alarm services are not interchangeable with fire alarm services." *Id.*, at 572. But that is because, for *producers*, the services were indeed interchangeable: A company that offered one could easily offer the other, because they all involve "a single basic service—the protection of property through use of a central service station." *Ibid.* Thus, the "commercial realit[y]" that the *Grinnell* Court relied on, *ibid.*, was that the services being grouped were what economists call "producer substitutes." See 2B Areeda & Hovenkamp ¶561, at 378. And the law is clear that "two products produced interchangeably from the same production facilities are presumptively in the same market," even if they are not "close substitutes for each other on the demand side." *Ibid.* That is because a firm that produces one such product can, in response to a price increase in the other, easily shift its production and thereby limit its competitor's power to impose the higher price. See *id.*, ¶561a, at 379.

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Unlike the various types of central station services at issue in *Grinnell Corp.*, however, the shopper-related and merchant-related services that American Express provides are not "producer substitutes" any more than they are traditional substitutes. For producers as for consumers, the services are instead complements. Credit-card companies must sell them together for them to be useful. As a result, the credit-card companies cannot respond to, say, merchant-related price increases by shifting production away from shopper-related services to merchant-related services. The relevant "commercial realities" in this case are thus com-

pletely different from those in *Grinnell Corp.* (The majority also cites *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 336–337 (1962), for this point, but the "commercial realities" considered in that case were that "shoe stores in the outskirts of cities compete effectively with stores in central downtown areas," and thus are part of the same market. *Id.*, at 338–339. Here, merchant-related services do not, as I have said, compete with shopper-related services, and so *Brown Shoe Co.* does not support the majority's position.) Thus, our precedent provides no support for the majority's special approach to defining markets involving "two-sided transaction platforms."

3

What about the academic articles the majority cites? The first thing to note is that the majority defines "two-sided transaction platforms" much more broadly than the economists do. As the economists who coined the term explain, if a "two-sided market" meant simply that a firm connects two different groups of customers via a platform, then "pretty much any market would be two-sided, since buyers and sellers need to be brought together for markets to exist and gains from trade to be realized." Rochet & Tirole, Two-Sided Markets: A Progress Report, 37 RAND J. Econ. 645, 646 (2006). The defining feature of a "two-sided market," according to these economists, is that "the platform can affect the volume of transactions by charging more to one side of the market and reducing the price paid by the other side by an equal amount." *Id.*, at 664–665; accord, Filistrucchi 299. That requirement appears nowhere in the majority's definition. By failing to limit its definition to platforms that economists would recognize as "two sided" in the relevant respect, the majority carves out a much broader exception to the ordinary antitrust rules than the academic articles it relies on could possibly support.

Even as limited to the narrower definition that economists use, however, the academic articles the majority cites do not

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support the majority's flat rule that firms operating "two-sided transaction platforms" should always be treated as part of a single market for all antitrust purposes. *Ante*, at 545–547. Rather, the academics explain that for market-definition purposes, "[i]n some cases, the fact that a business can be thought of as two-sided may be irrelevant," including because "nothing in the analysis of the practices [at issue] really hinges on the linkages between the demands of participating groups." Evans & Schmalensee, Markets With Two-Sided Platforms, 1 Issues in Competition L. & Pol'y 667, 689 (2008). "In other cases, the fact that a business is two-sided will prove important both by identifying the real dimensions of competition and focusing on sources of constraints." *Ibid.* That flexible approach, however, is precisely the one the District Court followed in this case, by considering the effects of "[t]he two-sided nature of the . . . card industry" throughout its analysis. 88 F. Supp. 3d, at 155.

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Neither the majority nor the academic articles it cites offer any explanation for why the features of a "two-sided transaction platform" justify always treating it as a single antitrust market, rather than accounting for its economic features in other ways, as the District Court did. The article that the majority repeatedly quotes as saying that "'[i]n two-sided transaction markets, only one market should be defined,'" *ante*, at 546 (quoting Filistrucchi 302), justifies that conclusion only for purposes of assessing the effects of a merger. In such a case, the article explains, "[e]veryone would probably agree that a payment card company such as American Express is either in the relevant market on both sides or on neither side . . . . The analysis of a merger between two payment card platforms should thus consider . . . both sides of the market." *Id.*, at 301. In a merger case this makes sense, but it is also meaningless, because, whether there is one market or two, a reviewing court will consider both sides, because it must examine the effects of the merger in each affected market and submarket. See *Brown Shoe Co.*, 370

U. S., at 325. As for a nonmerger case, the article offers only *United States* v. *Grinnell* as a justification, see Filistrucchi 303, and as I have already explained, *supra*, at 569–570, *Grinnell* does not support this proposition.

E

Put all of those substantial problems with the majority's reasoning aside, though. Even if the majority were right to say that market definition was relevant, and even if the majority were right to further say that the District Court should have defined the market in this case to include shopper-related services as well as merchant-related services, that *still* would not justify the majority in affirming the Court of Appeals. That is because, as the majority is forced to admit, the plaintiffs *made* the factual showing that the majority thinks is required. See *ante*, at 549.

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Recall why it is that the majority says that market definition matters: because if the relevant market includes both merchant-related services and card-related services, then the plaintiffs had the burden to show that as a result of the nondiscrimination provisions, "the price of credit-card transactions"—considering both fees charged to merchants and rewards paid to cardholders—"was higher than the price one would expect to find in a competitive market." *Ante*, at 547–548. This mirrors the Court of Appeals' holding that the Government had to show that the "nondiscrimination provisions" had "made *all* [American Express] customers on both sides of the platform—*i. e.*, both merchants and cardholders—worse off overall." 838 F. 3d, at 205.

The problem with this reasoning, aside from it being wrong, is that the majority admits that the plaintiffs *did* show this: They "offer[ed] evidence" that American Express "increased the percentage of the purchase price that it charges merchants . . . and that this increase was not entirely spent on cardholder rewards." *Ante*, 549 (citing 88 F. Supp. 3d, at 195–197, 215). Indeed, the plaintiffs did not

merely "offer evidence" of this—they persuaded the District Court, which made an unchallenged factual finding that the merchant price increases that resulted from the nondiscrimination provisions "were not wholly offset by additional rewards expenditures or otherwise passed through to cardholders, and *resulted in a higher net price*." *Id.*, at 215 (emphasis added).

In the face of this problem, the majority retreats to saying that even net price increases do not matter after all, absent a showing of lower output, because if output is increasing, "'rising prices are equally consistent with growing product demand.'" *Ante*, at 549 (quoting *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U. S. 209, 237 (1993)). This argument, unlike the price argument, has nothing to do with the credit-card market being a "two-sided transaction platform," so if this is the basis for the majority's holding, then nearly all of the opinion is dicta. The argument is also wrong. It is true as an economic matter that a firm exercises market power by restricting output in order to raise prices. But the relevant restriction of output is as compared with a hypothetical world in which the restraint was not present and prices were lower. The fact that credit-card use in general has grown over the last decade, as the majority says, see *ante*, at 549–550, says nothing about whether such use would have grown more or less without the nondiscrimination provisions. And because the relevant question is a comparison between reality and a hypothetical state of affairs, to require actual proof of reduced output is often to require the impossible—tantamount to saying that the Sherman Act does not apply at all.

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In any event, there are features of the credit-card market that may tend to limit the usual relationship between price and output. In particular, merchants generally spread the costs of credit-card acceptance across all their customers (whatever payment method they may use), while the benefits of card use go only to the cardholders. See, *e. g.*, 88

F. Supp. 3d, at 216; Brief for John M. Connor et al. as *Amici Curiae* 34–35. Thus, higher credit-card merchant fees may have only a limited effect on credit-card transaction volume, even as they disrupt the marketplace by extracting anticompetitive profits.

IV

A

For the reasons I have stated, the Second Circuit was wrong to lump together the two different services sold, *at step 1*. But I recognize that the Court of Appeals has not yet considered whether the relationship between the two services might make a difference at steps 2 and 3. That is to say, American Express might wish to argue that the nondiscrimination provisions, while anticompetitive in respect to merchant-related services, nonetheless have an adequate offsetting procompetitive benefit in respect to its shopper-related services. I believe that American Express should have an opportunity to ask the Court of Appeals to consider that matter.

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American Express might face an uphill battle. A Sherman Act §1 defendant can rarely, if ever, show that a procompetitive benefit in the market for one product offsets an anticompetitive harm in the market for another. In *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 611 (1972), this Court wrote:

> "If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this . . . is a decision that must be made by Congress and not by private forces or by the courts. Private forces are too keenly aware of their own interests in making such decisions and courts are ill-equipped and ill-situated for such decisionmaking."

American Express, pointing to vertical price-fixing cases like our decision in *Leegin*, argues that comparing competition-

related pros and cons is more common than I have just suggested. See 551 U. S., at 889–892. But *Leegin* held only that vertical price fixing is subject to the "rule of reason" instead of being *per se* unlawful; the "rule of reason" still applies to vertical agreements just as it applies to horizontal agreements. See *id.*, at 898–899.

Moreover, the procompetitive justifications for vertical price-fixing agreements are not apparently applicable to the distinct types of restraints at issue in this case. A vertically imposed price-fixing agreement typically involves a manufacturer controlling the terms of sale for its own product. A television manufacturer, for example, will insist that its dealers not cut prices for the manufacturer's own televisions below a particular level. Why might a manufacturer want its dealers to refrain from price competition in the manufacturer's own products? Perhaps because, for example, the manufacturer wants to encourage the dealers to develop the market for the manufacturer's brand, thereby increasing *interbrand* competition for the same ultimate product, namely, a television. This type of reasoning does not appear to apply to American Express' nondiscrimination provisions, which seek to control the terms on which merchants accept *other brands'* cards, not merely American Express' own.

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Regardless, I would not now hold that an agreement such as the one before us can never be justified by procompetitive benefits of some kind. But the Court of Appeals would properly consider procompetitive justifications not at step 1, but at steps 2 and 3 of the "rule of reason" inquiry. American Express would need to show just how this particular anticompetitive merchant-related agreement has procompetitive benefits in the shopper-related market. In doing so, American Express would need to overcome the District Court's factual findings that the agreement had no such effects. See 88 F. Supp. 3d, at 224–238.

B

The majority charts a different path. Notwithstanding its purported acceptance of the three-step, burden-shifting framework I have described, *ante*, at 541–542, the majority addresses American Express' procompetitive justifications now, at step 1 of the analysis, see *ante*, at 549–552. And in doing so, the majority inexplicably ignores the District Court's factual findings on the subject.

The majority reasons that the challenged nondiscrimination provisions "stem negative externalities in the credit-card market and promote interbrand competition." *Ante*, at 551. The "negative externality" the majority has in mind is this: If one merchant persuades a shopper not to use his American Express card at that merchant's store, that shopper becomes less likely to use his American Express card at other merchants' stores. *Ibid.* The majority worries that this "endangers the viability of the entire [American Express] network," *ibid.*, but if so that is simply a consequence of American Express' merchant fees being higher than a competitive market will support. "The antitrust laws were enacted for 'the protection of *competition*, not *competitors.*'" *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U. S. 328, 338 (1990). If American Express' merchant fees are so high that merchants successfully induce their customers to use other cards, American Express can remedy that problem by lowering those fees or by spending more on cardholder rewards so that cardholders decline such requests. What it may not do is demand contractual protection from price competition.

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In any event, the majority ignores the fact that the District Court, in addition to saying what I have just said, also rejected this argument on independent factual grounds. It explained that American Express "presented no expert testimony, financial analysis, or other direct evidence establishing that without its [nondiscrimination provisions] it will, in fact, be unable to adapt its business to a more competitive mar-

ket." 88 F. Supp. 3d, at 231. It further explained that the testimony that was provided on the topic "was notably inconsistent," with some of American Express' witnesses saying only that invalidation of the provisions "would require American Express to adapt its current business model." *Ibid.* After an extensive discussion of the record, the District Court found that "American Express possesses the flexibility and expertise necessary to adapt its business model to suit a market in which it is required to compete on both the cardholder and merchant sides of the [credit-card] platform." *Id.*, at 231–232. The majority evidently rejects these factual findings, even though no one has challenged them as clearly erroneous.

Similarly, the majority refers to the nondiscrimination provisions as preventing "free riding" on American Express' "investments in rewards" for cardholders. *Ante*, at 551; see also *ante*, at 539 (describing steering in terms suggestive of free riding). But as the District Court explained, "[p]lainly . . . investments tied to card use (such as Membership Rewards points, purchase protection, and the like) are not subject to free-riding, since the network does not incur any cost if the cardholder is successfully steered away from using his or her American Express card." 88 F. Supp. 3d, at 237. This, I should think, is an unassailable conclusion: American Express pays rewards to cardholders only for transactions in which cardholders use their American Express cards, so if a steering effort succeeds, no rewards are paid. As for concerns about free riding on American Express' fixed expenses, including its investments in its brand, the District Court acknowledged that free riding was in theory possible, but explained that American Express "ma[de] no effort to identify the fixed expenses to which its experts referred or to explain how they are subject to free riding." *Ibid.*; see also *id.*, at 238 (American Express' own data showed "that the network's ability to confer a credentialing benefit trails that of its competitors, casting doubt on

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whether there is in fact any particular benefit associated with accepting [American Express] that is subject to free riding"). The majority does not even acknowledge, much less reject, these factual findings, despite coming to the contrary conclusion.

Finally, the majority reasons that the nondiscrimination provisions "do not prevent Visa, MasterCard, or Discover from competing against [American Express] by offering lower merchant fees or promoting their broader merchant acceptance." *Ante*, at 551. But again, the District Court's factual findings were to the contrary. As I laid out above, the District Court found that the nondiscrimination provisions *in fact did prevent* Discover from pursuing a low-merchant-fee business model, by "den[ying] merchants the ability to express a preference for Discover or to employ any other tool by which they might steer share to Discover's lower-priced network." 88 F. Supp. 3d, at 214; see *supra*, at 558. The majority's statements that the nondiscrimination provisions are procompetitive are directly contradicted by this and other factual findings.

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For the reasons I have explained, the majority's decision in this case is contrary to basic principles of antitrust law, and it ignores and contradicts the District Court's detailed factual findings, which were based on an extensive trial record. I respectfully dissent.

Syllabus

ABBOTT, GOVERNOR OF TEXAS, ET AL. *v.* PEREZ ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

No. 17–586. Argued April 24, 2018—Decided June 25, 2018*

In 2011, the Texas Legislature adopted a new congressional districting plan and new districting maps for the two houses of the State Legislature to account for population growth revealed in the 2010 census. To do so, Texas had to comply with a complicated legal regime. The Equal Protection Clause of the Fourteenth Amendment forbids "racial gerrymandering," that is, intentionally assigning citizens to a district on the basis of race without sufficient justification. *Shaw* v. *Reno*, 509 U. S. 630, 641. But other legal requirements tend to require that state legislatures consider race in drawing districts. Like all States, Texas is subject to § 2 of the Voting Rights Act of 1965 (VRA), which is violated when a state districting plan provides "less opportunity" for racial minorities "to elect representatives of their choice," *League of United Latin American Citizens* v. *Perry*, 548 U. S. 399, 425. And at the time, Texas was also subject to § 5, which barred it from making any districting changes unless it could prove that they did not result in retrogression with respect to the ability of racial minorities to elect the candidates of their choice, *Alabama Legislative Black Caucus* v. *Alabama*, 575 U. S. 254, 259. In an effort to harmonize these conflicting demands, the Court has assumed that compliance with the VRA is a compelling State interest for Fourteenth Amendment purposes, see, *e. g.*, *Bethune-Hill* v. *Virginia State Bd. of Elections*, 580 U. S. 178, 193; and a State's consideration of race in making a districting decision is narrowly tailored if the State has "good reasons" for believing that its decision is necessary in order to comply with the VRA, *Cooper* v. *Harris*, 581 U. S. 285, 293.

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The Texas Legislature's 2011 plans were immediately tied up in litigation and never used. The case was assigned to a three-judge court (Texas court). Texas also submitted the plans for preclearance to the District Court for the District of Columbia (D. C. court). The Texas court drew up interim plans for the State's rapidly approaching primaries, giving no deference to the Legislature's plans. Texas chal-

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*Together with No. 17–626, *Abbott, Governor of Texas, et al.* v. *Perez et al.*, also on appeal from the same court.

lenged the court-ordered plans in this Court, which reversed and remanded with instructions for the Texas court to start with the Texas Legislature's 2011 plans but to make adjustments as required by the Constitution and the VRA. The Texas court then adopted new interim plans. After the D. C. court denied preclearance of the 2011 plans, Texas used the Texas court's interim plans for the 2012 elections. In 2013, the Legislature repealed the 2011 plans and enacted the Texas court's plans (with minor modifications). After *Shelby County* v. *Holder*, 570 U. S. 529, was decided, Texas, no longer covered by § 5, obtained a vacatur of the D. C. court's preclearance order. But the Texas court did not dismiss the case against the 2011 plans as moot. Instead, it allowed the plaintiffs to amend their complaint to challenge the 2013 plans and held that their challenges to the 2011 plans were live. Texas conducted its 2014 and 2016 elections under the 2013 plans. In 2017, the Texas court found defects in several of the districts in the 2011 federal congressional and State House plans (the State Senate plan is not at issue here). Subsequently, it also invalidated multiple Congressional (CD) and House (HD) Districts in the 2013 plans, holding that the Legislature failed to cure the "taint" of discriminatory intent allegedly harbored by the 2011 Legislature. And the court relied on that finding to invalidate several challenged 2013 districts. The court also held that three districts—CD27, HD32, and HD34—were invalid under § 2 of the VRA because they had the *effect* of depriving Latinos of the equal opportunity to elect their candidates of choice. And it found that HD90 was a racial gerrymander based on changes made by the 2013 Legislature. It gave the state attorney general three days to tell the court whether the Legislature would remedy the violations; and if the Legislature did not intend to adopt new plans, the court would hold remedial hearings.

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Held:

1. This Court has jurisdiction to review the orders at issue. Pp. 594–603.

(a) The Texas court's orders fall within 28 U. S. C. § 1253, which gives the Court jurisdiction to hear an appeal from an order of a three-judge district court "granting or denying . . . an interlocutory or permanent injunction." The Texas court did not *call* its orders "injunctions," but where an order has the "practical effect" of granting or denying an injunction, it should be treated as such for purposes of appellate jurisdiction. *Carson* v. *American Brands, Inc.*, 450 U. S. 79, 83. Pp. 594–598.

(b) The text of the orders and the context in which they were issued make clear that they qualify as interlocutory injunctions under § 1253. The orders were unequivocal that the current legislative plans "violate § 2 and the Fourteenth Amendment" and that these violations "must be remedied." And the short timeframe the attorney general

was given to act is strong evidence that the court did not intend to allow the elections to go ahead under the plans it had just condemned. The unmistakable import of these actions is that the court intended to have new plans ready for use in this year's elections. Texas also had reason to fear that if it tried to conduct elections under those plans, the court would infer an evil motive and perhaps subject the State to the strictures of preclearance under § 3(c) of the VRA. These cases differ from *Gunn* v. *University Comm. to End War in Viet Nam*, 399 U. S. 383, where the order did not have the same practical effect as an injunction. Nor does it matter that the remedy is not yet known. The issue here is whether this year's elections can be held under the plans enacted by the Legislature, not whether any particular remedies should ultimately be ordered if it is determined that the current plans are flawed. Section 1253 must be strictly but sensibly construed, and here the District Court's orders, for all intents and purposes, constituted injunctions. Thus, § 1253 provides jurisdiction. Pp. 598–603.

2. The Texas court erred in requiring the State to show that the 2013 Legislature purged the "taint" that the court attributed to the defunct and never-used plans enacted by a prior Legislature in 2011. Pp. 603–614.

(a) Whenever a challenger claims that a state law was enacted with discriminatory intent, the burden of proof lies with the challenger, not the State. *Reno* v. *Bossier Parish School Bd.*, 520 U. S. 471, 481. In redistricting cases, the "good faith of [the] state legislature must be presumed." *Miller* v. *Johnson*, 515 U. S. 900, 915. The allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination, which is but "one evidentiary source" relevant to the question of intent. *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 267. Here, the 2011 plans were repealed, and not reenacted, by the 2013 Legislature. Nor did it use criteria that arguably carried forward the effects of the 2011 Legislature's discriminatory intent. Instead, it enacted, with only small changes, the Texas court plans developed pursuant to this Court's instructions. The Texas court contravened these basic burden of proof principles, referring, *e. g.*, to the need to "cure" the earlier Legislature's "taint" and concluding that the Legislature had engaged in no deliberative process to do so. This fundamentally flawed approach must be reversed. Pp. 603–607.

(b) Both the 2011 Legislature's intent and the court's interim plans are relevant to the extent that they give rise to—or tend to refute—inferences about the 2013 Legislature's intent, but they must be weighed together with other relevant direct and circumstantial evidence of the Legislature's intent. But when this evidence is taken into ac-

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count, the evidence in the record is plainly insufficient to prove that the 2013 Legislature acted in bad faith and engaged in intentional discrimination. Pp. 607–614.

3. Once the Texas court's intent finding is reversed, there remain only four districts that were invalidated on alternative grounds. The Texas court's holding as to the three districts in which it relied on § 2's "effects" test are reversed, but its holding that HD90 is a racial gerrymander is affirmed. Pp. 614–622.

(a) To make out a § 2 "effects" claim, a plaintiff must establish the three "*Gingles* factors": (1) a geographically compact minority population sufficient to constitute a majority in a single-member district, (2) political cohesion among the members of the minority group, and (3) bloc voting by the majority to defeat the minority's preferred candidate. *Thornburg* v. *Gingles*, 478 U. S. 30, 48–51. A plaintiff who makes that showing must then prove that, under the totality of the circumstances, the district lines dilute the votes of the members of the minority group. Pp. 614–619.

(1) The Texas court held that CD27 violates § 2 because it has the effect of diluting the votes of Nueces County Latino voters, who, the court concluded, should have been included in a Latino opportunity district rather than CD27, which is not such a district. Plaintiffs, however, could not show that an additional Latino opportunity district could be created in that part of Texas. Pp. 614–616.

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(2) The Texas court similarly erred in holding that HD32 and HD34, which make up the entirety of Nueces County, violate § 2. The 2013 plan created two districts that lie wholly within the county: HD34 is a Latino opportunity district, but HD32 is not. The court's findings show that these two districts do not violate § 2, and it is hard to see how the ultimate *Gingles* vote dilution standard could be met if the alternative plan would not enhance the ability of minority voters to elect the candidates of their choice. Pp. 616–619.

(b) HD90 is an impermissible racial gerrymander. HD90 was not copied from the Texas court's interim plans. Instead, the 2013 Legislature substantially modified that district. In 2011, the Legislature, responding to pressure from counsel to one of the plaintiff groups, increased the district's Latino population in an effort to make it a Latino opportunity district. It also moved the city of Como, which is predominantly African-American, out of the district. When Como residents and their Texas House representative objected, the Legislature moved Como back. But that decreased the Latino population, so the Legislature moved more Latinos into the district. Texas argues that its use of race as the predominant factor in HD90's design was permissible because it had "*good reasons* to believe" that this was necessary to sat-

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isfy § 2, *Bethune-Hill*, 580 U. S., at 194. But it is the State's burden to prove narrow tailoring, and Texas did not do so on the record here. Pp. 620–622.

No. 17–586, 274 F. Supp. 3d 624, reversed; No. 17–626, 267 F. Supp. 3d 750, reversed in part and affirmed in part; and cases remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and GORSUCH, JJ., joined. THOMAS, J., filed a concurring opinion, in which GORSUCH, J., joined, *post*, p. 622. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, BREYER, and KAGAN, JJ., joined, *post*, p. 622.

Scott A. Keller, Solicitor General of Texas, argued the cause for appellants in both cases. With him on the briefs were *Ken Paxton*, Attorney General of Texas, *Jeffrey C. Mateer*, First Assistant Attorney General, *Matthew H. Frederick*, Deputy Solicitor General, *Andrew B. Davis*, Assistant Solicitor General, *Paul D. Clement*, and *Erin E. Murphy*.

Deputy Solicitor General Kneedler argued the cause for the United States as *amicus curiae* urging reversal. With him on the briefs were *Solicitor General Francisco*, *Acting Assistant Attorney General Gore*, *Deputy Solicitor General Wall*, *Deputy Assistant Attorney General Friel*, *Jeffrey E. Sandberg*, and *Bonnie I. Robin-Vergeer*.

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Renea Hicks argued the cause for appellees in No. 17–586. With him on the brief were *Marc E. Elias*, *Bruce V. Spiva*, *Abha Khanna*, *José Garza*, *David Richards*, *Allison J. Riggs*, *Robert Notzon*, *Victor L. Goode*, *Luis R. Vera, Jr.*, *Gary L. Bledsoe*, *J. Gerald Herbert*, *Mark P. Gaber*, *Jessica Ring Amunson*, *Gerald H. Goldstein*, *Donald H. Flanary III*, *Jesse Gaines*, and *Rolando L. Rios*. *Ms. Riggs* argued the cause for appellees in No. 17–626. With her on the brief were *Pamela S. Karlan*, *Jeffrey L. Fisher*, *David T. Goldberg*, *Messrs. Richards*, *Garza*, *Notzon*, *Goode*, *Bledsoe*, and *Vera*, and *Nina Perales*.†

†A brief of *amici curiae* urging reversal was filed for the State of Louisiana et al. by *Jeff Landry*, Attorney General of Louisiana, and *Elizabeth B. Murrill*, Solicitor General, and by the Attorneys General for their re-

JUSTICE ALITO delivered the opinion of the Court.

Before us for review are orders of a three-judge court in the Western District of Texas effectively directing the State not to conduct this year's elections using districting plans that the court itself adopted some years earlier. The court developed those plans for use in the 2012 elections pursuant to our directions in *Perry* v. *Perez*, 565 U. S. 388 (2012) (*per curiam*). We instructed the three-judge court to start with the plans adopted by the Texas Legislature (or Legislature) in 2011 but to make adjustments as required by the Constitution and the Voting Rights Act. *Id.*, at 392–396. After those plans were used in 2012, the Texas Legislature enacted them (with only minor modifications) in 2013, and the plans were used again in both 2014 and 2016.

Last year, however, the three-judge court reversed its prior analysis and held that some of the districts in those plans are unlawful. After reviewing the repealed 2011 plans, which had never been used, the court found that they were tainted by discriminatory intent and that the 2013 Legislature had not "cured" that "taint."

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We now hold that the three-judge court committed a fundamental legal error. It was the challengers' burden to show that the 2013 Legislature acted with discriminatory intent when it enacted plans that the court itself had produced. The 2013 Legislature was not obligated to show that it had "cured" the unlawful intent that the court attributed to the

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spective States as follows: *Steven T. Marshall* of Alabama, *Joshua D. Hawley* of Missouri, *Michael DeWine* of Ohio, *Alan Wilson* of South Carolina, and *Brad D. Schimel* of Wisconsin.

Briefs of *amici curiae* urging affirmance were filed for the Campaign Legal Center et al. by *Kristen Clarke*, *Ezra D. Rosenberg*, *Jon M. Greenbaum*, *Danielle M. Lang*, *Adav Noti*, *Sherrilyn A. Ifill*, *Janai S. Nelson*, *Samuel Spital*, and *Leah C. Aden*; and for Common Cause et al. by *Eugene R. Fidell*, *Charles A. Rothfeld*, *Michael B. Kimberly*, *Andrew J. Pincus*, and *Paul W. Hughes*.

2011 Legislature. Thus, the essential pillar of the three-judge court's reasoning was critically flawed.

When the congressional and state legislative districts are reviewed under the proper legal standards, all but one of them, we conclude, are lawful.

I

A

The 2010 decennial census revealed that the population of Texas had grown by more than 20% and the State was therefore apportioned four additional seats in the United States House of Representatives. C. J. S. 369a.[1] To accommodate this new allocation and the population changes shown by the census, the Legislature adopted a new congressional districting plan, as well as new districting maps for the two houses of the State Legislature.

Redistricting is never easy, and the task was especially complicated in Texas in 2011. Not only was the Legislature required to draw districts that were substantially equal in population, see *Perry*, *supra*, at 391–392; *Reynolds* v. *Sims*, 377 U. S. 533 (1964); *Wesberry* v. *Sanders*, 376 U. S. 1 (1964), and to comply with special state-law districting rules,[2] but federal law imposed complex and delicately balanced requirements regarding the consideration of race.

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Then, as now, federal law restricted the use of race in making districting decisions. The Equal Protection Clause forbids "racial gerrymandering," that is, intentionally assigning citizens to a district on the basis of race without sufficient

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[1] There are several appendixes in these cases. We use "App." to refer to the joint appendix filed at the merits stage. We use "C. J. S." and "H. J. S." to refer to the appendixes attached to Texas's jurisdictional statements in No. 17–586 and No. 17–626, respectively. We use "C. J. S. Findings" and "H. J. S. Findings" to refer to appellees' supplemental appendixes in No. 17–586 and No. 17–626.

[2] See, *e. g.*, Tex. Const., Art. III, § 25 (Senate), § 26 (House).

justification. *Shaw* v. *Reno*, 509 U. S. 630, 641 (1993). It also prohibits intentional "vote dilution"—"invidiously . . . minimiz[ing] or cancel[ing] out the voting potential of racial or ethnic minorities." *Mobile* v. *Bolden*, 446 U. S. 55, 66–67 (1980) (plurality opinion).

While the Equal Protection Clause imposes these important restrictions, its application in the field of districting is complicated. For one thing, because a voter's race sometimes correlates closely with political party preference, see *Cooper* v. *Harris*, 581 U. S. 285, 308 (2017); *Easley* v. *Cromartie*, 532 U. S. 234, 243 (2001), it may be very difficult for a court to determine whether a districting decision was based on race or party preference. Here, the three-judge court found that the two factors were virtually indistinguishable.[3]

At the same time that the Equal Protection Clause restricts the consideration of race in the districting process, compliance with the Voting Rights Act of 1965 (VRA), 79 Stat. 437, as amended, 52 U. S. C. § 10301 *et seq.*, pulls in the opposite direction: It often insists that districts be created precisely because of race. Two provisions of the VRA exert such demands, and in 2011, Texas was subject to both. At that time, Texas was covered by § 5 of the VRA[4] and was thus barred from making any districting changes unless it could prove that they did not result in "retrogression" with respect to the ability of racial minorities to elect the candidates of their choice. *Alabama Legislative Black Caucus* v.

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[3] The court found: "[I]t is difficult to differentiate an intent to affect Democrats from an intent to affect minority voters. Making minorities worse off will likely make Democrats worse off, and vice versa." C. J. S. Findings 467a (citation omitted). "This correlation is so strong that [an expert] assessed whether districts were minority opportunity districts by looking at Democratic results/wins (noting that in Texas, minority candidates of choice means Democrats)." *Ibid.*

[4] See *Shelby County* v. *Holder*, 570 U. S. 529 (2013).

Alabama, 575 U. S. 254, 259 (2015). That showing obviously demanded consideration of race.

On top of this, Texas was (and still is) required to comply with §2 of the VRA. A State violates §2 if its districting plan provides "'less opportunity'" for racial minorities "'to elect representatives of their choice.'" *League of United Latin American Citizens* v. *Perry*, 548 U. S. 399, 425 (2006) (*LULAC*). In a series of cases tracing back to *Thornburg* v. *Gingles*, 478 U. S. 30 (1986), we have interpreted this standard to mean that, under certain circumstances, States must draw "opportunity" districts in which minority groups form "effective majorit[ies]," *LULAC*, *supra*, at 426.

Since the Equal Protection Clause restricts consideration of race and the VRA demands consideration of race, a legislature attempting to produce a lawful districting plan is vulnerable to "'competing hazards of liability.'" *Bush* v. *Vera*, 517 U. S. 952, 977 (1996) (plurality opinion). In an effort to harmonize these conflicting demands, we have assumed that compliance with the VRA may justify the consideration of race in a way that would not otherwise be allowed. In technical terms, we have assumed that complying with the VRA is a compelling state interest, see, *e. g.*, *Bethune-Hill* v. *Virginia State Bd. of Elections*, 580 U. S. 178, 193 (2017); *Shaw* v. *Hunt*, 517 U. S. 899, 915 (1996), and that a State's consideration of race in making a districting decision is narrowly tailored and thus satisfies strict scrutiny if the State has "'good reasons'" for believing that its decision is necessary in order to comply with the VRA. *Cooper*, *supra*, at 293.

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B

Facing this legal obstacle course, the Texas Legislature in 2011 adopted new districting plans, but those plans were immediately tied up in litigation and were never used. Several plaintiff groups quickly filed challenges in the District Court for the Western District of Texas, arguing that some

of the districts in the new plans were racial gerrymanders, some were based on intentional vote dilution, and some had the effect of depriving minorities of the equal opportunity to elect the candidates of their choice. This case was assigned to a three-judge court, as required by 28 U. S. C. § 2284(a). (We will call this court "the Texas court" or simply "the District Court.")

The situation was further complicated by the requirement that Texas obtain preclearance of its new plans. To do this, Texas filed for a declaratory judgment in the District Court for the District of Columbia. See *Texas* v. *United States*, 887 F. Supp. 2d 133 (2012). (We will call this court "the D. C. court.") By early 2012, the D. C. court had not yet issued a decision, and Texas needed usable plans for its rapidly approaching primaries. Accordingly, the Texas court drew up interim plans for that purpose. *Perez* v. *Perry*, 835 F. Supp. 2d 209 (2011). In creating those plans, the majority of the Texas court thought that it was not "required to give any deference to the Legislature's enacted plan." *Id.*, at 213. Instead, it based its plans on what it called "neutral principles that advance the interest of the collective public good." *Id.*, at 212.[5]

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Texas challenged those court-ordered plans in this Court, and we reversed. *Perry* v. *Perez*, 565 U. S. 388 (2012) (*per curiam*). Noting that "[r]edistricting is 'primarily the duty and responsibility of the State,'" we held that the Texas court should have respected the legislative judgments embodied in the 2011 plans to the extent allowed by the Constitution and the VRA. *Id.*, at 392–399.

We remanded the case with very specific instructions. The Texas court was told to start with the plans adopted by the Legislature but to modify those plans as needed so as "not to incorporate . . . any legal defects." *Id.*, at 394. With

[5] Judge Smith dissented, arguing that the majority had produced a "runaway plan" that "award[ed] judgment on the pleadings in favor of one side—a slam-dunk victory for the plaintiffs." *Perez* v. *Perry*, 835 F. Supp. 2d 209, 218 (WD Tex. 2011).

respect to claims under the Constitution or §2 of the VRA, the District Court was told to change a district if the plaintiffs were *likely* to succeed on the merits of their challenge. *Ibid.* And with respect to §5 claims, the court was instructed to make whatever changes were needed to obviate any legal claim that was "not insubstantial."[6] *Id.*, at 395. Thus, our instructions, in an abundance of caution, demanded changes in the challenged 2011 plans without proof that those changes were actually required by either the Constitution or the VRA.

On remand, the Texas court ordered additional briefing and heard two more days of argument. App. 29a, 35a–50a; Order in Civ. No. 11–cv–00360, Doc. No. 616. It issued two opinions, totaling more than 70 pages, and analyzed disputed districts in detail. C. J. S. 367a–423a; H. J. S. 300a–315a. While stressing the preliminary nature of its determinations, see C. J. S. 368a; H. J. S. 314a–315a, the court found that some districts required change and that others were lawful, C. J. S. 367a–423a; H. J. S. 300a–315a. The court then adopted plans for the State's congressional districts and for both houses of the State Legislature. (The plan for the State Senate is not at issue.)

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Both the congressional plan and the plan for the Texas House departed significantly from the State's 2011 plans. At least 8 of the 36 congressional districts were markedly altered, and 21 districts in the plan for the Texas House were "substantially" changed. *Id.*, at 314a; C. J. S. 397a–408a.

In August 2012, the D. C. court denied preclearance of the plans adopted by the Legislature in 2011, see *Texas* v. *United States*, *supra*, so the State conducted the 2012 elections under the interim plans devised by the Texas court. At the same time, Texas filed an appeal in this Court contesting the

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[6] The Texas court was given more leeway to make changes to districts challenged under §5 because it would have been inappropriate for that court to address the "merits of §5 challenges," a task committed by statute to the District Court for the District of Columbia. *Perez*, 565 U. S., at 394.

decision of the D. C. court,[7] but that appeal ultimately died for two reasons.

First, the 2011 plans were repealed. The Texas attorney general urged the Legislature to pass new redistricting plans, C. J. S. 429a, and in his view, the "best way to remedy the violations found by the D. C. court" was to "adopt the [Texas court's] interim plans as the State's permanent redistricting maps." *Id.*, at 432a. Doing so, he said, would "confirm the legislature's intent" to adopt "a redistricting plan that fully comports with the law." *Id.*, at 429a.

The Governor called a special session to do just that, and the Legislature complied. One of the legislative sponsors, Senator Seliger, explained that, although "'the Texas Legislature remains confident that the legislatively-drawn maps adopted in 2011 are fair and legal . . . , there remain several outstanding legal questions regarding these maps that undermine the stability and predictability of the electoral process in Texas.'" 274 F. Supp. 3d 624, 649, n. 40 (2017). Counsel for one of the plaintiff groups, the Mexican American Legal Defense and Education Fund (MALDEF), testified in favor of the plans. C. J. S. 436a–439a. The 2013 Legislature then repealed the 2011 plans and enacted the Texas court's interim plans with just a few minor changes. The federal congressional plan was not altered at all, and only small modifications were made to the plan for the Texas House. C. J. S. Findings 231a–232a.

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On the day after the Legislature passed the new plans and the day before the Governor signed them, this Court issued its decision in *Shelby County* v. *Holder*, 570 U. S. 529 (2013), which invalidated the coverage formula in § 4 of the VRA. Now no longer subject to § 5, Texas obtained a vacatur of the D. C. court's order on preclearance. 274 F. Supp. 3d, at 634–635, and n. 11.

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[7] Notice of Appeal in *Texas* v. *United States*, Civ. No. 11–cv–1303 (D DC, Aug. 31, 2012), Doc. 234.

With the never-effective 2011 plans now repealed and any preclearance issues overcome by events, the State argued in the Texas court that the plaintiffs' case against the 2011 plans was moot. In September 2013, the Texas court allowed the plaintiffs to amend their complaints to challenge the 2013 plans, but the court held that their challenges to the 2011 plans were still alive, reasoning that the repeal of the 2011 plans represented the "voluntary cessation" of allegedly unconstitutional conduct.[8]

Texas conducted its 2014 and 2016 elections under the plans that had been preliminarily approved by the Texas court and subsequently adopted (with only minor changes) by the Legislature in 2013. But in March and April 2017, after multiple trials, the Texas court issued a pair of rulings on the defunct 2011 plans. The court reaffirmed the conclusions it had reached in 2012 about defects in the 2011 plans, and it went further. Contrary to its earlier decision, it held that Congressional District (CD) 35 is an impermissible racial gerrymander and that CD27 violates § 2 of the VRA because it has the effect of diluting the electoral opportunities of Latino voters. C. J. S. 181a, 193a–194a. Previously, the court had provided detailed reasons for rejecting the very arguments that it now accepted. *Id.*, at 409a–423a. Similarly, the court held that multiple districts in the plan for the Texas House were the result of intentional vote dilution. These included districts in the counties of Nueces (House District (HD) 32, HD34), Bell (HD54, HD55), and Dallas (HD103, HD104, HD105). H. J. S. 275a–276a.[9]

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[8] We express no view on the correctness of this holding.

[9] Judge Smith again dissented, on both mootness and the merits. On mootness, Judge Smith explained that, "[s]ix years later, we are still enveloped in litigation over plans that have never been used and will never be implemented." C. J. S. 349a. On the merits, Judge Smith argued that the majority erroneously inferred a "complex, widespread conspiracy of scheming and plotting, by various legislators and staff, carefully designed to obscure the alleged race-based motive," when the intent was in fact partisan. H. J. S. 294a; C. J. S. 351a.

In August 2017, having ruled on the repealed 2011 plans, the Texas court finally turned its attention to the plans then in effect—*i. e.*, the plans that had been developed by the court, adopted by the Legislature in 2013, and used in both the 2014 and 2016 elections. The court invalidated the districts in those plans that correspond to districts in the 2011 plan that it had just held to be unlawful, *i. e.*, CD27, CD35, HD32, HD34, HD54, HD55, HD103, HD104, and HD105. See 274 F. Supp. 3d 624 (No. 17–586) and 267 F. Supp. 3d 750 (2017) (No. 17–626).

In reaching these conclusions, the court pointed to the discriminatory intent allegedly harbored by the 2011 Legislature, and it attributed this same intent to the 2013 Legislature because it had failed to "engage in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans." 274 F. Supp. 3d, at 645–652; 267 F. Supp. 3d, at 757. The court saw "no indication that the Legislature looked to see whether any discriminatory taint remained in the plans." 274 F. Supp. 3d, at 649. And it faulted the State because it "did not accept [findings of the D. C. court] and instead appealed to the Supreme Court." *Ibid.* Seeing no evidence that the State had undergone "a change of heart," the court concluded that the Legislature's "decision to adopt the [District Court's] plans" was a "litigation strategy designed to insulate the 2011 or 2013 plans from further challenge, regardless of their legal infirmities." *Id.*, at 649–650. Finally, summarizing its analysis, the court reiterated that the 2011 Legislature's "discriminatory taint was not removed by the [2013] Legislature's enactment of the Court's interim plans, because the Legislature engaged in no deliberative process to remove any such taint, and in fact intended any such taint to be maintained but be safe from remedy." *Id.*, at 686.

The Texas court's decisions about CD35 and all but three of the Texas House districts were based entirely on its finding that the 2013 Legislature had not purged its predeces-

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sor's discriminatory intent. However, the court also held that three districts—CD27, HD32, and HD34—were invalid under § 2 of the VRA because they had the effect of depriving Latinos of the equal opportunity to elect their candidates of choice. *Id.*, at 682–686; 267 F. Supp. 3d, at 775–783. And the court found independent proof that HD90 was a racial gerrymander. *Id.*, at 788–794.

The court held that violations in all these districts "must be remedied." 274 F. Supp. 3d, at 686; see also 267 F. Supp. 3d, at 795 (describing State House district violations that "must be remedied"). Mindful that October 1 was the deadline for the Texas secretary of state to provide voter registration templates to the State's counties, App. 380a–381a, the court took steps to bring about prompt remedial action. In two orders issued on August 15 and 24, the Texas attorney general was instructed to advise the court, within three days, "whether the Legislature intends to take up redistricting in an effort to cure these violations." 274 F. Supp. 3d, at 686; 267 F. Supp. 3d, at 795. If the Legislature chose not to do so, the court warned, it would "hold a hearing to consider remedial plans." *Ibid.* After the Governor made clear that the State would not act, the court ordered the parties to proceed with a hearing on the congressional plan on September 5, as well as a hearing on the plan for the Texas House on September 6. 274 F. Supp. 3d, at 686; 267 F. Supp. 3d, at 795; App. 134a–136a; Defendants' Opposed Motion To Stay Order on Plan C235 Pending Appeal or Final Judgment in Civ. No. 11–cv–00360, Doc. 1538, pp. 3–4; Defendants' Opposed Motion To Stay Order on Plan H358 Pending Appeal or Final Judgment, Doc. 1550, pp. 4–5.

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Texas applied for stays of both orders, but the District Court denied the applications. App. 134a–136a. Texas then asked this Court to stay the orders, and we granted that relief. After receiving jurisdictional statements, we postponed consideration of jurisdiction and set the cases for consolidated argument. 583 U. S. 1088 (2018).

II

Before reaching the merits of these appeals, we must assure ourselves that we have jurisdiction to review the orders at issue. Appellants claim that the orders amount to injunctions and are therefore appealable to this Court under 28 U. S. C. § 1253. Appellees disagree, contending that the orders do not qualify as injunctions. We hold that we have jurisdiction because the orders were effectively injunctions in that they barred Texas from using the districting plans now in effect to conduct this year's elections.

A

The Judiciary Act of 1789, 1 Stat. 73, "established the general principle that only final decisions of the federal district courts would be reviewable on appeal." *Carson* v. *American Brands, Inc.*, 450 U. S. 79, 83 (1981) (emphasis deleted). But because "rigid application of this principle was found to create undue hardship in some cases," Congress created exceptions. *Ibid.* Two are relevant here. We have jurisdiction under 28 U. S. C. § 1253 to hear an appeal from an order of a three-judge district court "granting or denying . . . an interlocutory or permanent injunction." Similarly, § 1292(a)(1) gives the courts of appeals jurisdiction over "[i]nterlocutory orders of the district courts" "granting, continuing, modifying, refusing or dissolving injunctions," "except where a direct review may be had in the Supreme Court."

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The orders in these cases fall within § 1253. To be sure, the District Court did not *call* its orders "injunctions"—in fact, it disclaimed the term, App. 134a–136a—but the label attached to an order is not dispositive. We have previously made clear that where an order has the "practical effect" of granting or denying an injunction, it should be treated as such for purposes of appellate jurisdiction. *Carson*, *supra*, at 83; see also *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U. S. 271, 287–288 (1988). We applied this test in

Carson, holding that an order that declined to enter a consent decree prohibiting certain conduct could be appealed under § 1292(a)(1) because it was the practical equivalent of an order denying an injunction and threatened serious and perhaps irreparable harm if not immediately reviewed. 450 U. S., at 83–84, 86–90.

This "practical effect" rule serves a valuable purpose. If an interlocutory injunction is improperly granted or denied, much harm can occur before the final decision in the district court. Lawful and important conduct may be barred, and unlawful and harmful conduct may be allowed to continue. Recognizing this, Congress authorized interlocutory appellate review of such orders. But if the availability of interlocutory review depended on the district court's use of the term "injunction" or some other particular language, Congress's scheme could be frustrated. The harms that Congress wanted to avoid could occur so long as the district court was careful about its terminology. The "practical effect" inquiry prevents such manipulation.

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In analogous contexts, we have not allowed district courts to "shield [their] orders from appellate review" by avoiding the label "injunction." *Sampson* v. *Murray*, 415 U. S. 61, 87 (1974). For instance, in *Sampson*, we held that an order labeled a temporary restraining order (which is not appealable under § 1292(a)(1)) should be treated as a "preliminary injunction" (which is appealable) since the order had the same practical effect as a preliminary injunction. *Id.*, at 86–88.

Appellees and the dissent contend that the "practical effect" approach should be confined to § 1292(a)(1), but we see no good reason why it should not apply to § 1253 as well. Appellees note that we "narrowly construe[]" § 1253, *Goldstein* v. *Cox*, 396 U. S. 471, 478 (1970), but we also construe § 1292(a)(1) "narrowly," *Carson*, *supra*, at 84. In addition, the relevant language in the two provisions is nearly identi-

cal;[10] both provisions serve the same purpose; and we have previously called them "analogous." *Goldstein*, *supra*, at 475.

The provisions are also textually interlocked. Section 1292(a)(1) does not apply where "direct review may be had in the Supreme Court," *i. e.*, where § 1253 applies. If the "practical effects" test applied under § 1292(a)(1) but not § 1253, the consequences would be unfortunate and strange. We would have to identify the magic language needed for an order to qualify as an order granting or denying an injunction, and that standard would hardly constitute the sort of "[s]imple" rule that the dissent prizes. *Post*, at 635 (opinion of SOTOMAYOR, J.). Then, having developed that standard, we would have to apply it in any case in which a party took an appeal to us from an order of a three-judge court that clearly had the practical effect of an injunction. If we concluded that the magic-words test was not met, the order would appear to be appealable to one of the courts of appeals under § 1292(a)(1). In the language of that provision, the order would be an "orde[r] of [a] district cour[t] of the United States . . . granting [an] injunctio[n]." And because this Court would lack jurisdiction under § 1253, the appeal would not fall within § 1292(1)'s exception for cases "where a direct review may be had in the Supreme Court." Having taken pains to provide for review in this Court, and not in the courts of appeals, of three-judge court orders granting injunctions Congress surely did not intend to produce that result.[11]

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[10] In relevant part, § 1253 applies to "an order granting . . . an interlocutory . . . injunction." Section 1292(a)(1) applies to "[i]nterlocutory orders . . . granting . . . injunctions." Although the similarity is obvious, the dissent perceives some unspecified substantive difference.

[11] The dissent sees nothing strange about such a result because we held in *Mitchell* v. *Donovan*, 398 U. S. 427 (1970) (*per curiam*), that we lacked jurisdiction under § 1253 to hear an appeal from a three-judge court order denying a declaratory judgment. The decision in *Donovan* was based on the plain language of § 1253, which says nothing about orders granting or

Appellees argue that an order denying an injunction (the situation in *Carson*) and an order granting an injunction (the situation here) should be treated differently, Brief for Appellees in No. 17–586, p. 27, but they offer no convincing reason for doing so. No authority supports their argument. The language of §§ 1253 and 1292(a)(1) makes no such distinction, and we have stated that the "practical effect" analysis applies to the "granting or denying" of injunctions. *Gulfstream*, *supra*, at 287–288.

In addition, appellees' suggested distinction would put appellate courts in an awkward position. Suppose that a district court granted an injunction that was narrower than the one requested by the moving party. Would an appellate court (whether this Court or a court of appeals) have jurisdiction to rule on only part of that decision? Suppose the appellate court concluded that the district court was correct in refusing to give the movant all the injunctive relief it sought because the movant's entire claim was doomed to fail. Would the appellate court be limited to holding only that the lower court properly denied the relief that was withheld? The rule advocated by the appellees would needlessly complicate appellate review.[12]

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denying declaratory judgments. By contrast, § 1253 gives us jurisdiction to hear appeals from orders granting or denying injunctions.

The same goes for *Rockefeller* v. *Catholic Medical Center of Brooklyn & Queens, Inc.*, 397 U. S. 820 (1970) (*per curiam*), also cited by the dissent. In that case, the District Court issued a declaratory judgment, not an injunction. Again, the text of § 1253 says nothing about declaratory judgments.

[12] The inquiry required by the practical effects test is no more difficult when the question is whether an injunction was effectively granted than it is when the question is whether an injunction was effectively denied. Lower courts have had "no problem concluding that [certain orders have] the practical effect of granting an injunction." *I. A. M. Nat. Pension Fund Benefit Plan A* v. *Cooper Industries, Inc.*, 789 F. 2d 21, 24 (CADC 1986); see also *Andrew* v. *American Import Center*, 110 A. 3d 626, 634 (DC 2015) ("[G]ranting a stay pending arbitration does have the 'practical effect' of enjoining the party opposing arbitration").

Finally, appellees point in passing to Rule 65(d) of the Federal Rules of Civil Procedure, which requires that an injunction "state its terms specifically" and "describe in reasonable detail . . . the act or acts restrained or required." Rules 65(d)(1)(B), (C); see Brief for Appellees in No. 17–586, at 27. But as explained in *Gunn* v. *University Comm. to End War in Viet Nam*, 399 U. S. 383, 389, n. 4 (1970), we have never suggested that a failure to meet the specificity requirements of Rule 65(d) would "deprive the Court of jurisdiction under § 1253."

A contrary holding would be perverse. Rule 65(b) protects the party against which an injunction is issued by requiring clear notice as to what that party must do or refrain from doing. Where a vague injunction does not comply with Rule 65(b), the aggrieved party has a particularly strong need for appellate review. It would be odd to hold that there can be no appeal in such a circumstance.

For these reasons, we hold that we have jurisdiction under § 1253 to hear an appeal from an order that has the same practical effect as one granting or denying an injunction.

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B

With these principles settled, we conclude that the orders in these cases qualify as interlocutory injunctions under § 1253. The text of the orders and the context in which they were issued make this clear.

The orders are unequivocal that the current legislative plans "violate § 2 and the Fourteenth Amendment" and that these violations "must be remedied." 274 F. Supp. 3d, at 686; see also, *e. g.*, 267 F. Supp. 3d, at 795 ("[V]iolations found by this Court in its Order on [the State House plan] now require a remedy"); *ibid.* ("In Bell County, the intentional discrimination previously found by the Court must be remedied"); *ibid.* ("In Dallas County, the intentional discrimination previously found by the Court must be remedied").

We do not suggest that this language alone is sufficient to show that the orders had the practical effect of enjoining use of the current plans in this year's elections, but the court did not stop with these pronouncements. As we have noted, the orders required the Texas attorney general to inform the court within three days whether the Legislature would remedy the violations, and the orders stated that if the Legislature did not intend to adopt new plans, the court would hold remedial hearings.

The short time given the Legislature to respond is strong evidence that the three-judge court did not intend to allow the elections to go ahead under the plans it had just condemned. The Legislature was not in session, so in order to take up the task of redistricting, the Governor would have been required to convene a special session—which is no small matter. And, when the Governor declined to call a special session, the court moved ahead with its scheduled hearings and invited the parties to continue preparing for them even after this Court administratively stayed the August 15 order.

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The import of these actions is unmistakable: The court intended to have new plans ready for use in this year's elections. Nothing in the record even hints that the court contemplated the possibility of allowing the elections to proceed under the 2013 plans.

What is more, Texas had reason to believe that it would risk deleterious consequences if it defied the court and attempted to conduct the elections under the plans that the court had found to be based on intentional racial discrimination. In the very orders at issue, the court inferred discriminatory intent from Texas's choice to appeal the D. C. court's preclearance decision rather than immediately taking steps to bring its plans into compliance with that decision. 274 F. Supp. 3d, at 649; see Part III, *infra*. Reading such an order, Texas had reason to fear that if it tried to conduct elections under plans that the court had found to be racially

discriminatory, the court would infer an evil motive and perhaps subject the State once again to the strictures of preclearance under § 3(c) of the VRA.[13] This is a remedy that the plaintiffs hoped to obtain, see, *e. g.*, App. 177a, and that the District Court seemed inclined to consider, see C. J. S. 122a–123a (declining to declare moot the challenges to the long-since-repealed 2011 plans because "there remains the possibility of declaratory and equitable relief under § 3(c)").

Contending that the orders here do not qualify under § 1253, appellees analogize these cases to *Gunn*, 399 U. S. 383, but there is no relevant similarity. In *Gunn*, anti-war protesters were charged with violating a Texas "disturbing-the-peace statute," *id.*, at 384, and they challenged the constitutionality of the statute in federal court. After the state charges were dismissed, the District Court issued a "discursive" opinion "expressing the view that [the statute was] constitutionally invalid." *Id.*, at 386–387. But the court then refrained from going any further, "pending the next session, special or general, of the Texas legislature, at which time the State of Texas may, if it so desires, enact such disturbing-the-peace statute as will meet constitutional requirements." *University Comm. to End War in Viet Nam* v. *Gunn*, 289 F. Supp. 469, 475 (WD Tex. 1968). The defendants appealed to this Court, and at the time of our decision two years later, neither the Legislature nor the District Court had taken any further action. We therefore held that we lacked jurisdiction under § 1253. The District Court order in that case did not have the same practical effect as an injunction. Indeed,

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[13] Section 3(c) provides that if "the court finds that violations of the fourteenth or fifteenth amendment justif[y] equitable relief," the court "shall retain jurisdiction for such period as it may deem appropriate and during such period no voting" practice shall go into effect unless first precleared by the court or the United States Attorney General. 52 U. S. C. § 10302(c).

it had no practical effect whatsoever and is thus entirely different from the orders now before us.[14]

Appellees suggest that appellate jurisdiction is lacking in these cases because we do not know at this point "what a remedy would entail, who it would affect, and when it would be implemented." Brief for Appellees in No. 17–586, at 27. The dissent makes a similar argument with respect to two of the Texas House districts. *Post*, at 633–634.[15] But the issue here is whether this year's elections can be held under the plans enacted by the Legislature, not whether any particular remedies would have ultimately been ordered by the District Court.

Appellees and the dissent also fret that this Court will be inundated with redistricting appeals if we accept jurisdiction

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[14] The other authority cited by the dissent is a footnote in *Whitcomb* v. *Chavis*, 403 U. S. 124 (1971), a case that came to us in an exceedingly complicated procedural posture. In *Whitcomb*, the District Court held in August 1969 that Indiana's legislative districting scheme was unconstitutional, but the court made it clear that it would take no further action for two months. See *Chavis* v. *Whitcomb*, 305 F. Supp. 1364, 1392 (SD Ind.). The Governor nevertheless appealed to this Court, but by the time we ruled, the Governor had taken another appeal from a later order, entered in December 1969, prohibiting the use of Indiana's current plans and requiring the use of court-created plans in the 1970 elections. See 403 U. S., at 139; Juris. Statement in *Whitcomb* v. *Chavis*, O. T. 1970, No. 92, pp. 1–3. And to further complicate matters, by the time we reviewed the case, the Indiana Legislature had enacted new plans. *Whitcomb*, 403 U. S., at 140.

This Court entertained the later appeal and reversed, but the Court dismissed the earlier—and by then, entirely superfluous—appeal, stating that, at the time when it was issued, "no judgment had been entered and no injunction had been granted or denied." *Id.*, at 138, n. 19. But that cursory conclusion has little relevance here, where the District Court's orders were far more specific, immediate, and likely to demand compliance.

[15] While we think it clear that the District Court effectively enjoined the use of these districts as currently configured for this year's elections, even if the court had not done so, that would not affect our jurisdiction to review the court's order with respect to all other districts.

here, Brief for Appellees in No. 17–626, p. 34; *post*, at 635–637, and n. 8, but there is no reason to fear such a flood. Because § 1253 expressly authorizes "interlocutory" appeals, there is no question that there can be more than one appeal in a case challenging a redistricting plan. District courts sometimes expressly enjoin the use of districting plans before moving on to the remedial phase. See, *e. g.*, *Whitford* v. *Gill*, No. 3:15–cv–421 (WD Wis., Feb. 22, 2017), Doc. 190; *Harris* v. *McCrory*, No. 1:13–cv–949 (MDNC, Feb. 5, 2016), Doc. 143. But appeals from such orders have not overwhelmed our docket. Our holding here will affect only a small category of additional cases.[16]

It should go without saying that our decision does not mean that a State can always appeal a district court order holding a redistricting plan unlawful. A finding on liability cannot be appealed unless an injunction is granted or denied, and in some cases a district court may see no need for interlocutory relief. If a plan is found to be unlawful long before the next scheduled election, a court may defer any injunctive relief until the case is completed. And if a plan is found to be unlawful very close to the election date, the only reasonable option may be to use the plan one last time.

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We appreciate our obligation to heed the limits of our jurisdiction, and we reiterate that § 1253 must be strictly construed. But it also must be sensibly construed, and here the District Court's orders, for all intents and purposes, constituted injunctions barring the State from conducting this year's elections pursuant to a statute enacted by the Legislature. Unless that statute is unconstitutional, this would seriously and irreparably harm[17] the State, and only an inter-

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[16] The dissent cites exactly two cases (*Gunn* and *Whitcomb*) decided during the past half-century in which a party attempted to take an appeal to this Court from a three-judge court order holding a state statute unconstitutional but declining to issue an injunction.

[17] The dissent argues that we give "short shrift" to the irreparable harm question, *post*, at 637, but the inability to enforce its duly enacted plans

locutory appeal can protect that State interest. See *Carson*, 450 U. S., at 89–90. As a result, § 1253 provides jurisdiction.

III

We now turn to the merits of the appeal. The primary question is whether the Texas court erred when it required the State to show that the 2013 Legislature somehow purged the "taint" that the court attributed to the defunct and never-used plans enacted by a prior Legislature in 2011.

A

Whenever a challenger claims that a state law was enacted with discriminatory intent, the burden of proof lies with the challenger, not the State. *Reno* v. *Bossier Parish School Bd.*, 520 U. S. 471, 481 (1997). This rule takes on special significance in districting cases.

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Redistricting "is primarily the duty and responsibility of the State," and "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions." *Miller* v. *Johnson*, 515 U. S. 900, 915 (1995) (internal quotation marks omitted). "[I]n assessing the sufficiency of a challenge to a districting plan," a court "must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus." *Id.*, at 915–916. And the "good faith of [the] state legislature must be presumed." *Id.*, at 915.

The allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination. "[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *Mobile*, 446 U. S., at 74 (plurality opinion). The "ultimate question remains whether a discriminatory intent has been proved in a given case." *Ibid.* The "histori-

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clearly inflicts irreparable harm on the State, see, *e. g.*, *Maryland* v. *King*, 567 U. S. 1301 (2012) (ROBERTS, C. J., in chambers).

cal background" of a legislative enactment is "one evidentiary source" relevant to the question of intent. *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 267 (1977). But we have never suggested that past discrimination flips the evidentiary burden on its head.

Neither the District Court nor appellees have pointed to any authority that would justify shifting the burden. The appellees rely primarily on *Hunter* v. *Underwood*, 471 U. S. 222 (1985), but that case addressed a very different situation. *Hunter* involved an equal protection challenge to an article of the Alabama Constitution adopted in 1901 at a constitutional convention avowedly dedicated to the establishment of white supremacy. *Id.*, at 228–230. The article disfranchised anyone convicted of any crime on a long list that included many minor offenses. *Id.*, at 226–227. The court below found that the article had been adopted with discriminatory intent, and this Court accepted that conclusion. *Id.*, at 229. The article was never repealed, but over the years, the list of disqualifying offenses had been pruned, and the State argued that what remained was facially constitutional. *Id.*, at 232–233. This Court rejected that argument because the amendments did not alter the intent with which the article, including the parts that remained, had been adopted. *Id.*, at 233. But the Court specifically declined to address the question whether the then-existing version would have been valid if "[re]enacted today." *Ibid.*

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In these cases, we do not confront a situation like the one in *Hunter*. Nor is this a case in which a law originally enacted with discriminatory intent is later reenacted by a different legislature. The 2013 Texas Legislature did not reenact the plan previously passed by its 2011 predecessor. Nor did it use criteria that arguably carried forward the effects of any discriminatory intent on the part of the 2011 Legislature. Instead, it enacted, with only very small changes, plans that had been developed by the Texas court pursuant to instructions from this Court "not to incorporate . . . any legal defects." *Perry*, 565 U. S., at 394.

Under these circumstances, there can be no doubt about what matters: It is the intent of the 2013 Legislature. And it was the plaintiffs' burden to overcome the presumption of legislative good faith and show that the 2013 Legislature acted with invidious intent.

The Texas court contravened these basic principles. Instead of holding the plaintiffs to their burden of overcoming the presumption of good faith and proving discriminatory intent, it reversed the burden of proof. It imposed on the State the obligation of proving that the 2013 Legislature had experienced a true "change of heart" and had "engage[d] in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans." 274 F. Supp. 3d, at 649.

The Texas court's references to the need to "cure" the earlier Legislature's "taint" cannot be dismissed as stray comments. On the contrary, they were central to the court's analysis. The court referred repeatedly to the 2013 Legislature's duty to expiate its predecessor's bad intent, and when the court summarized its analysis, it drove the point home. It stated: "The discriminatory taint [from the 2011 plans] was not removed by the Legislature's enactment of the Court's interim plans, because the Legislature engaged in no deliberative process to remove any such taint, and in fact intended any such taint to be maintained but be safe from remedy." *Id.*, at 686.[18]

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[18] The dissent attempts to rehabilitate this statement by focusing on the last part of this sentence, in which the District Court stated that the Legislature "'"intended [the] taint to be maintained but safe from remedy."'" *Post*, at 654. In making this argument, the dissent, like the District Court, refuses to heed the presumption of legislative good faith and the allocation of the burden of proving intentional discrimination. We do not dispute that the District Court purportedly found that the 2013 Legislature acted with discriminatory intent. The problem is that, in making that finding, it relied overwhelmingly on what it perceived to be the 2013 Legislature's duty to show that it had purged the bad intent of its predecessor.

The dissent labors to explain away all these references to the 2013 Legislature's supposed duty to purge its predecessor's allegedly discriminatory intent, but the dissent loses track of its own argument and characterizes the District Court's reasoning exactly as we have. Indeed, the dissent criticizes us on page 653 of its opinion for saying precisely the same thing that it said 11 pages earlier. On page 653, the dissent states:

> "[T]he majority quotes the orders as requiring proof that the Legislature '"engage[d] in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans."' But the District Court did not put the burden on Texas to make that affirmative showing." *Post*, at 653 (quoting *supra*, at 605, in turn quoting 274 F. Supp. 3d, at 649; citations omitted).

But earlier, the dissent itself describes the District Court's analysis as follows:

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> "Despite knowing of the discrimination in its 2011 maps, 'the Legislature did not engage in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans.'" *Post*, at 642–643 (quoting 274 F. Supp. 3d, at 649).

And this is not just a single slip of the pen. The dissent writes that the District Court was required "to assess how the 2013 Legislature addressed the known discrimination that motivated" the districts approved by that Court in 2012. *Post*, at 651. The dissent quotes the District Court's statement that "'there is no indication that the Legislature looked to see whether any discriminatory taint remained in the plans.'" *Post*, at 644 (quoting 274 F. Supp. 3d, at 649). And there is also this: "Texas was just 'not truly interested in fixing any remaining discrimination in [its 2011 maps].'" *Post*, at 642 (quoting 274 F. Supp. 3d, at 651, n. 45). The District Court's true mode of analysis is so obvious that the

dissent cannot help but repeat it. And that approach was fundamentally flawed and demands reversal.

While a district court's finding of fact on the question of discriminatory intent is reviewed for clear error, see *Cromartie*, 532 U. S., at 242, whether the court applied the correct burden of proof is a question of law subject to plenary review, *U. S. Bank N. A.* v. *Village at Lakeridge, LLC*, 583 U. S. 387, 393 (2018); *Highmark Inc.* v. *Allcare Health Management System, Inc.*, 572 U. S. 559, 563 (2014). And when a finding of fact is based on the application of an incorrect burden of proof, the finding cannot stand. *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 501 (1984) ("An appellate cour[t has] power to correct errors of law, including those that . . . infect . . . a finding of fact that is predicated on a misunderstanding of the governing rule of law").

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In holding that the District Court disregarded the presumption of legislative good faith and improperly reversed the burden of proof, we do not suggest either that the intent of the 2011 Legislature is irrelevant or that the plans enacted in 2013 are unassailable because they were previously adopted on an interim basis by the Texas court. Rather, both the intent of the 2011 Legislature and the court's adoption of the interim plans are relevant to the extent that they naturally give rise to—or tend to refute—inferences regarding the intent of the 2013 Legislature. They must be weighed together with any other direct and circumstantial evidence of that Legislature's intent. But when all the relevant evidence in the record is taken into account, it is plainly insufficient to prove that the 2013 Legislature acted in bad faith and engaged in intentional discrimination.[19] See, *e. g.*,

[19] The dissent is simply wrong in claiming over and over that we have not thoroughly examined the record. See *post*, at 639, 647–648, 650, 654, 662, 665. The dissent seems to think that the repetition of these charges

Ricci v. *DeStefano*, 557 U. S. 557, 585 (2009); *McCleskey* v. *Zant*, 499 U. S. 467, 497 (1991). There is thus no need for any further prolongation of this already protracted litigation.

The only direct evidence brought to our attention suggests that the 2013 Legislature's intent was legitimate. It wanted to bring the litigation about the State's districting plans to an end as expeditiously as possible. The attorney general advised the Legislature that the best way to do this was to adopt the interim, court-issued plans. The sponsor of the 2013 plans voiced the same objective, and the Legislature then adopted the court-approved plans.

On its face, this explanation of the Legislature's intent is entirely reasonable and certainly legitimate. The Legislature had reason to know that any new plans it devised were likely to be attacked by one group of plaintiffs or another. (The plaintiffs' conflicting positions with regard to some of the districts in the plans now before us bear this out.) Litigating districting cases is expensive and time consuming, and until the districts to be used in the next election are firmly established, a degree of uncertainty clouds the electoral process. Wishing to minimize these effects is understandable and proper.

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The court below discounted this direct evidence, but its reasons for doing so are not sound. The court stated that the "strategy" of the 2013 Legislature was to "insulate [the plans] from further challenge, regardless of [the plans'] legal infirmities." 274 F. Supp. 3d, at 650; see also *id.*, at 651, n. 45. But there is no evidence that the Legislature's aim was to gain acceptance of plans that it knew were unlawful.[20]

somehow makes them true. It does not. On the contrary, it betrays the substantive weakness of the dissent's argument.

[20] The dissent and the District Court attach much meaning to the attorney general's use of the term "insulate" when he advised the Legislature to adopt the District Court's plans to avoid further legal challenge. Setting aside that the word "insulate" is a common term used to describe minimizing legal concerns, the context of the letter makes clear that the attorney general was trying to make the point that adopting these plans was the best method of obtaining legal compliance, not the start of a grand

Indeed, there is no evidence that the Legislature thought that the plans were invalid—and as we will explain, the Legislature had sound reasons to believe just the opposite.[21]

The District Court found it significant that the Legislature must have realized that enacting the interim plans would not "end the litigation," because it knew that at least some plaintiffs would pursue their challenges anyway. *Id.*, at 651, n. 45. But even if, as seems likely, the Legislature did not think that all the plaintiffs would immediately abandon all their claims, it does not follow that the Legislature was insincere in stating that it adopted the court-approved plan with the aim of bringing the litigation to a close. It was reasonable for the Legislature to think that approving the court-approved plans might at least reduce objections and thus simplify and expedite the conclusion of the litigation.[22] That MALDEF, counsel for one of the plaintiff groups, testified in favor of the plans is evidence that the Legislature's objective was reasonable. C. J. S. 436a–439a.

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Not only does the direct evidence suggest that the 2013 Legislature lacked discriminatory intent, but the circumstan-

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conspiracy to trick the District Court. Indeed, if his plan was to dupe the District Court, shouting it to the world in a public letter was an odd way to go about it.

[21] In any event, the Texas court was simply wrong that Texas believed its plans would be free from any legal challenge. 274 F. Supp. 3d 624, 651 (2017). Texas consistently acknowledged that effects claims would continue to be available and responded in detail to those arguments in both the District Court and this Court. See Brief for Appellants 64; Defendants' Post-Trial Brief, Doc. 1526, p. 53. Moreover, Texas has not argued that intentional discrimination claims are unavailable; it has instead argued that intent must be assessed with respect to the *2013 Legislature*, the Legislature that actually enacted the plans at issue.

[22] The 2013 Legislature had no reason to believe that the District Court would spend four years examining moot plans before reversing its own previous decisions by imputing the intent of the 2011 Legislature to the 2013 Legislature. At the very least, the 2013 Legislature had good reason to believe that adopting the court-approved plans would lessen the time, expense, and complexity of further litigation (even if that belief turned out to be wrong).

tial evidence points overwhelmingly to the same conclusion. Consider the situation when the Legislature adopted the court-approved interim plans. First, the Texas court had adopted those plans, and no one would claim that the court acted with invidious intent when it did so. Second, the Texas court approved those plans only after reviewing them and modifying them as required to comply with our instructions. Not one of the judges on that court expressed the view that the plans were unlawful. Third, we had directed the Texas court to make changes in response to any claims under the Equal Protection Clause and §2 of the VRA if those claims were merely likely to prevail. *Perry*, 565 U. S., at 394. And the Texas court was told to accommodate any claim under §5 of the VRA unless it was "insubstantial." *Id.*, at 395. Fourth, the Texas court had made a careful analysis of all the claims, had provided a detailed examination of individual districts, and had modified many districts. Its work was anything but slapdash. All these facts gave the Legislature good reason to believe that the court-approved interim plans were legally sound.

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Is there any evidence from which a contrary inference can reasonably be drawn? Appellees stress the preliminary nature of the Texas court's approval of the interim plans, and as we have said, that fact is relevant. But in light of our instructions to the Texas court and the care with which the interim plans were developed, the court's approval still gave the Legislature a sound basis for thinking that the interim plans satisfied all legal requirements.

The court below and the dissent infer bad faith because the Legislature "pushed the redistricting bills through quickly in a special session." 274 F. Supp. 3d, at 649. But we do not see how the brevity of the legislative process can give rise to an inference of bad faith—and certainly not an inference that is strong enough to overcome the presumption of legislative good faith (a concept to which the dissent pays

only the briefest lipservice, *post*, at 641). The "special session" was necessary because the regular session had ended. As explained, the Legislature had good reason to believe that the interim plans were sound, and the adoption of those already-completed plans did not require a prolonged process. After all, part of the reason for adopting those plans was to avoid the time and expense of starting from scratch and leaving the electoral process in limbo while that occurred.[23]

The District Court and the dissent also err when they charge that Representative Darby, the chair of the Texas House Redistricting Committee at the time in question, " 'willfully ignored those who pointed out deficiencies' " in the plans. *Post*, at 643 (quoting 274 F. Supp. 3d, at 651, n. 45). This accusation is not only misleading, it misses the point. The Legislature adopted the interim plans in large part because they had the preliminary approval of the District Court, and Darby was open about the fact that he wanted to minimize amendments to the plans for that reason. See, *e. g.*, Joint Exh. 17.3, pp. S1–S2. That Darby generally hoped to minimize amendments—so that the plans would remain legally compliant—hardly shows that he, or the Legislature, acted with discriminatory intent. In any event, it is misleading to characterize this attitude as "willfu[l] ignor[ance]." The record shows that, although Darby hoped to minimize amendments, he did not categorically refuse to consider changes. This is illustrated by his support for an amendment to HD90, which was offered by the then-incumbent, Democrat Lon Burnam, precisely because it fixed an objection raised by the Mexican-American Legal Caucus

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[23] Moreover, in criticizing the Legislature for moving too quickly, the dissent downplays the significant time and effort that went into consideration of the 2013 plans. Legislative committees held multiple field hearings in four cities, Tr. 1507 (July 14, 2017), and the legislative actors spent significant time considering the legislation, as well as accepting and rejecting amendments, see, *e. g.*, Joint Exh. 17.3, p. S29; Joint Exh. 24.4, p. 21.

(MALC) that the district's Latino population was too low. 267 F. Supp. 3d, at 790.[24]

The Texas court faulted the 2013 Legislature for failing to take into account the problems with the 2011 plans that the D. C. court identified in denying preclearance, *ibid.*, but the basis for that criticism is hard to understand. One of the 2013 Legislature's principal reasons for adopting the court-approved plans was to fix the problems identified by the D. C. court. The attorney general advised the Legislature to adopt the interim plans because he thought that was the "best way to remedy the violations found by the D. C. court." C. J. S. 432a. Chairman Darby similarly stated that the 2013 plans fixed the errors found by the D. C. court, Tr. 1498, 1584–1585 (July 14, 2017), as did Senator Seliger, Joint Exh. 26.2, p. A–5.

There is nothing to suggest that the Legislature proceeded in bad faith—or even that it acted unreasonably—in pursuing this strategy. Recall that we instructed the Texas court, in developing the interim plans, to remedy any §5 claim that was "not insubstantial." *Perry*, 565 U. S., at 395. And that is just what the interim plans, which the Legislature later enacted, attempted to do. For instance, the D. C. court held that the congressional plan had one too few "ability to elect" districts for Latinos, largely because of changes to CD23, *Texas*, 887 F. Supp. 2d, at 156–159; the interim plan (and, by extension, the 2013 plan) amended CD23, C. J. S. 397a–399a. Similarly, in the plan for the Texas House, the D. C. court found §5 retrogression with respect to HD35, HD117, and HD149, *Texas*, *supra*, at 167–175, and all of those districts were changed in the 2013 plans, H. J. S. 305a–307a, 312a.

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[24] The dissent tries to minimize the relevance of this amendment by arguing that it turned HD90 into a racial gerrymander. See *post*, at 643, n. 12. But again this is misleading. The Legislature adopted changes to HD90 at the behest of *minority groups*, not out of a desire to discriminate. See Part IV–B, *infra*. That is, Darby was *too* solicitous of changes with respect to HD90.

Although the D. C. court found that the 2011 Legislature acted with discriminatory intent in framing the congressional plan, that finding was based on evidence about districts that the interim plan later changed. The D. C. court was concerned about the intent reflected in the drawing of CDs 9, 18, and 30, but all those districts were amended by the Texas court. *Texas*, *supra*, at 159–160; C. J. S. 406a–408a. With respect to the plan for the Texas House, the D. C. court made no intent findings, but its areas of concern were generally addressed by the Texas court and the 2013 plans. Compare *Texas*, *supra*, at 178 (noting evidence of unlawful intent in HD117), with H. J. S. 307a (amending HD117).[25]

It is indicative of the District Court's mistaken approach that it inferred bad faith from Texas's decision to take an appeal to this Court from the D. C. court's decision denying preclearance. See 274 F. Supp. 3d, at 649 ("Defendants did not accept [these findings] and instead appealed to the Supreme Court"). Congress gave the State the right to appeal, and no bad motive can be inferred from its decision to make use of this right—unless of course the State had no reasonable grounds for appeal. Before our decision in *Shelby County* mooted Texas's appeal to this Court from the D. C. court's preclearance decision, Texas filed a jurisdictional statement claiming that the D. C. court made numerous errors, but the Texas court made no attempt to show that Texas's arguments were frivolous.

As a final note, appellees assert that the 2013 Legislature should have either defended the 2011 plans in litigation or gone back to the drawing board and devised entirely new plans, Brief for Appellees in No. 17–626, at 45, but there is

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[25] In assessing the significance of the D. C. court's evaluation of intent, it is important not to forget that the burden of proof in a preclearance proceeding was on the State. *Texas* v. *United States*, 887 F. Supp. 2d 133, 151 (DC 2012). Particularly where race and partisanship can so often be confused, see *supra*, at 586, and n. 3, the burden of proof may be crucial.

no reason why the Legislature's options should be limited in this way. It was entirely permissible for the Legislature to favor a legitimate option that promised to simplify and reduce the burden of litigation. That the Legislature chose this course is not proof of discriminatory intent.

IV

Once the Texas court's intent finding is reversed, there remain only four districts that were invalidated on alternative grounds. For three of these districts, the District Court relied on the "effects" test of § 2. We reverse as to each of these, but we affirm the District Court's final holding that HD90 is a racial gerrymander.

A

To make out a § 2 "effects" claim, a plaintiff must establish the three so-called "*Gingles* factors." These are (1) a geographically compact minority population sufficient to constitute a majority in a single-member district, (2) political cohesion among the members of the minority group, and (3) bloc voting by the majority to defeat the minority's preferred candidate. *Gingles*, 478 U. S., at 48–51; *LULAC*, 548 U. S., at 425. If a plaintiff makes that showing, it must then go on to prove that, under the totality of the circumstances, the district lines dilute the votes of the members of the minority group. *Id.*, at 425–426.

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The Texas court held that CD27 violates § 2 of the VRA because it has the effect of diluting the votes of Latino voters in Nueces County. C. J. S. 191a. CD27 is anchored in Nueces County (home to Corpus Christi) and follows the Gulf of Mexico to the northeast before taking a turn inland to the northwest in the direction of Austin. Nueces County contains a Latino population of roughly 200,000 (a little less than one-third the size of an ideal Texas congressional district), and the court held that the Nueces County Latinos

should have been included in a Latino opportunity district, rather than CD27, which is not such a district. The court found that an area centered on Nueces County satisfies the *Gingles* factors and that, under the totality of the circumstances, the placement of the Nueces County Latinos in CD27 deprives them of the equal opportunity to elect candidates of their choice. C. J. S. 181a–195a.

The problem with this holding is that plaintiffs could not establish a violation of §2 of the VRA without showing that there is a "'possibility of creating more than the existing number of reasonably compact'" opportunity districts. *LULAC*, *supra*, at 430. And as the Texas court itself found, the geography and demographics of south and west Texas do not permit the creation of any more than the seven Latino opportunity districts that exist under the current plan. 274 F. Supp. 3d, at 684, and n. 85.

Attempting to get around this problem, the Texas court relied on our decision in *LULAC*, but it misapplied our holding. In *LULAC*, we held that the State should have created six proper Latino opportunity districts but instead drew only five. 548 U. S., at 435. Although the State claimed that the plan actually included a sixth opportunity district, that district failed to satisfy the *Gingles* factors. 548 U. S., at 430. We held that a "State's creation of an opportunity district for those without a §2 right offers no excuse for its failure to provide an opportunity district for those with a §2 right." *Ibid.*

Here, the Texas court concluded that Texas committed the same violation as in *LULAC*: It created "an opportunity district for those without a §2 right" (the Latinos in CD35), while failing to create such a district "for those with a §2 right" (the Latinos of Nueces County). *Ibid.* This holding is based on a flawed analysis of CD35.

CD35 lies to the north of CD27 and runs along I–35 from San Antonio up to Austin, the center of Travis County. In the District Court's view, the Latinos of CD35 do not have a

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§2 right because one of the *Gingles* factors, majority bloc voting, is not present. The Court reached this conclusion because the non-Latino voters of Travis County tend to favor the same candidates as the great majority of Latinos. There are two serious problems with the District Court's analysis.

First, the Court took the wrong approach in evaluating the presence of majority bloc voting in CD35. The Court looked at only one, small part of the district, the portion that falls within Travis County. 274 F. Supp. 3d, at 683; C. J. S. 175a–176a. But Travis County makes up only 21% of the district. We have made clear that redistricting analysis must take place at the district level. *Bethune-Hill*, 580 U. S., at 191–192. In failing to perform that district-level analysis, the District Court went astray.

Second, here, unlike in *LULAC*, the 2013 Legislature had "good reasons" to believe that the district at issue (here CD35) was a viable Latino opportunity district that satisfied the *Gingles* factors. CD35 was based on a concept proposed by MALDEF, C. J. S. Findings 315a–316a, and the Latino Redistricting Task Force (a plaintiff group) argued that the district is mandated by §2. C. J. S. 174a. The only *Gingles* factor disputed by the court was majority bloc voting, and there is ample evidence that this factor is met. Indeed, the court found that majority bloc voting exists throughout the State. C. J. S. Findings 467a. In addition, the District Court extensively analyzed CD35 in 2012 and determined that it was likely not a racial gerrymander and that even if it was, it likely satisfied strict scrutiny. C. J. S. 415a. In other words, the 2013 Legislature justifiably thought that it had placed a viable opportunity district along the I–35 corridor.

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2

The District Court similarly erred in holding that HD32 and HD34 violate §2. These districts make up the entirety of Nueces County, which has a population that is almost ex-

actly equal to twice the population of an ideal Texas House district. (It can fit 2.0295 ideal districts. H. J. S. Findings 91a.) In 2010, Latinos made up approximately 56% of the voting age population of the county. *Ibid.* The 2013 plan created two districts that lie wholly within the county; one, HD34, is a Latino opportunity district, but the other, HD32, is not. 267 F. Supp. 3d, at 767.

Findings made by the court below show that these two districts do not violate § 2 of the VRA. Under *Gingles*, the ultimate question is whether a districting decision dilutes the votes of minority voters, see *LULAC*, *supra*, at 425–426, and it is hard to see how this standard could be met if the alternative to the districting decision at issue would not enhance the ability of minority voters to elect the candidates of their choice.

The only plaintiff that pressed a § 2 claim with respect to HD32 and HD34 was MALC, 267 F. Supp. 3d, at 767, and as the District Court recognized, that group's own expert determined that it was not possible to divide Nueces County into more than one *performing* Latino district. In his analysis, the expert relied on Nueces County election returns for statewide elections between 2010 and 2016. *Id.*, at 775–776. Based on this data, he calculated that when both HD32 and HD34 were maintained as Latino-majority districts, one performed for Latinos in only 7 out of 35 relevant elections, and the other did so in *none* of the 35 elections. *Ibid.* In order to create two performing districts in that area, it was necessary, he found, to break county lines in *multiple* places, *id.*, at 778, but the District Court held that "breaking the County Line Rule" in the Texas Constitution, see Art. III, § 26, to "remove Anglos and incorporate even more Hispanics to improve electoral outcomes goes beyond what § 2 requires," 267 F. Supp. 3d, at 783. So if Texas could *not* create two performing districts in Nueces County and did *not* have to break county lines, the logical result is that Texas did not dilute the Latino vote.

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The court refused to accept this conclusion, but its reasons for doing so cannot stand up. As an initial matter, the court thought that the two districts would have to be redrawn based on its finding regarding the intent of the 2013 Legislature,[26] and it therefore deferred a final decision on the § 2 issue and advised the plaintiffs to consider at the remedial phase of the case whether they preferred to have two districts that might not perform or just one safe district. *Id.*, at 783. The court's decision cannot be sustained on this ground, since its finding of discriminatory intent is erroneous.

The only other reason provided by the court was the observation that MALC "failed to show" that two majority-Latino districts in Nueces County would not perform. *Id.*, at 782. This observation twisted the burden of proof beyond recognition. It suggested that a plaintiff might succeed on its § 2 claim because its expert failed to show that the necessary factual basis for the claim could not be established.[27]

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[26] The District Court also purported to find a violation of the "one person, one vote" principle in Nueces County, 267 F. Supp. 3d 750, 783 (2017); H. J. S. 254a–255a, but that finding was in actuality a restatement of its racial discrimination finding. The population deviations from the ideal are quite small (0.34% in HD32 and 3.29% in HD34, *id.*, at 254a), and the District Court relied solely on the "evidence of the use of race in drawing the lines in Nueces County" to find a one person, one vote violation. *Id.*, at 255a; see also *id.*, at 254a ("[T]he State intentionally discriminated against minority voters by overpopulating minority districts and underpopulating Anglo districts"). Even assuming that a court could find a one person, one vote violation on the basis of such a small deviation, cf. *Brown* v. *Thomson*, 462 U. S. 835, 842–843 (1983) (noting that deviations under 10% are generally insufficient to show invidious discrimination), the District Court erred in relying on its unsound finding regarding racial discrimination.

Moreover, plaintiffs rejected any separate one person, one vote claims before the District Court, Tr. 22 (July 10, 2017), and they have not mentioned such a claim as a separate theory in their briefing in this Court.

[27] The District Court's belief that simple Latino majorities in Nueces County might be sufficient to create opportunity districts—and that Texas should have known as much—conflicts with other parts of its decision. With respect to numerous other districts, the District Court *chided* Texas

Courts cannot find § 2 effects violations on the basis of *uncertainty*. In any event, if even the District Court remains unsure how to draw these districts to comply with § 2 (after six years of litigation, almost a dozen trials, and numerous opinions), the Legislature surely had the "'broad discretion'" to comply as it reasonably saw fit in 2013, *LULAC*, 548 U. S., at 429.

The dissent charges us with ignoring the District Court's "'intensely local appraisal'" of Nueces County, *post*, at 662, but almost none of the "findings" that the District Court made with respect to HD32 and HD34 referred to present local conditions, and none cast any significant light on the question whether another opportunity district is possible at the present time. For instance, what the dissent describes as Texas's "long 'history of voting-related discrimination,'" *id.*, at 663; in no way undermines—or even has any logical bearing on—the conclusions reached by MALC's expert about whether Latino voters would have a real opportunity to elect the candidates of their choice if the county were divided into two districts with narrow majorities of Latino citizens of voting age. The same is true with respect to the District Court's findings regarding racially polarized voting in the county and Latinos' "continuing pattern of disadvantage" relative to non-Latinos. 267 F. Supp. 3d, at 779 (internal quotation marks omitted). Perhaps recognizing as much, both the District Court and the dissent point to the anticipated future growth in the percentage of eligible voters of Latino descent, but the districts now at issue would not necessarily be used beyond 2020, after which time the 2020 census would likely require redistricting once again.

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for focusing on bare numbers and not considering real opportunity to elect. See, *e. g.*, C. J. S. 134a ("[T]he court rejects [the] bright-line rule that any HCVAP-majority district is by definition a Latino opportunity district" because it "may still lack real electoral opportunity" (internal quotation marks omitted)); H. J. S. 121a (Texas "increase[d the Latino population] while simultaneously ensuring that election success rates remained minimally improved").

B

HD90 is a district in Tarrant County that, unlike the other districts at issue in this appeal, was not copied from the District Court's interim plans. Instead, the 2013 Legislature substantially modified the district developed by the District Court, and the District Court held that the 2013 Legislature's creation is an invalid racial gerrymander. 267 F. Supp. 3d, at 794.

In drawing HD90, the Legislature was pulled in opposite directions by competing groups. In 2011, the Legislature, responding to pressure from MALDEF, increased the Latino population of the district in an effort to make it a Latino opportunity district. H. J. S. Findings 258a–262a. In the process of doing so, the Legislature moved the community of Como, which is predominantly African-American, out of the district. But Como residents and the member of the Texas House who represented the district, Lon Burnam, objected, and in 2013, the Legislature moved Como back into the district. 267 F. Supp. 3d, at 788–789. That change was opposed by MALC because it decreased the Latino population below 50%. App. 398a–399a. So the Legislature moved Latinos into the district to bring the Latino population back above 50%. 267 F. Supp. 3d, at 789–790.

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In light of these maneuvers, Texas does not dispute that race was the predominant factor in the design of HD90, but it argues that this was permissible because it had "'*good reasons* to believe'" that this was necessary to satisfy §2 of the VRA. *Bethune-Hill*, 580 U. S., at 194.

Texas offers two pieces of evidence to support its claim. The first—that one of the plaintiffs, MALC, demanded as much—is insufficient. A group that wants a State to create a district with a particular design may come to have an overly expansive understanding of what §2 demands. So one group's demands alone cannot be enough.

The other item of evidence consists of the results of the Democratic primaries in 2012 and 2014. In 2012, Repre-

sentative Burnham, who was not the Latino candidate of choice, narrowly defeated a Latino challenger by 159 votes. And in 2014, the present representative, Ramon Romero, Jr., beat Burnam by 110 votes. See Brief for Appellants 70. These election returns may be suggestive, but standing alone, they were not enough to give the State good reason to conclude that it had to alter the district's lines solely on the basis of race. And putting these two evidentiary items together helps, but it is simply too thin a reed to support the drastic decision to draw lines in this way.

We have previously rejected proffers of evidence that were at least as strong as Texas's here. For example, in *Cooper*, 581 U. S., at 300, we analyzed North Carolina's justification for deliberately moving "African-American voters" into a district to "ensure . . . the district's racial composition" in the face of its expansion in size. North Carolina argued that its race-based decisions were necessary to comply with §2, but the State could point to "no meaningful legislative inquiry" into "whether a new, enlarged" district, "created without a focus on race, . . . could lead to §2 liability." *Id.*, at 304. North Carolina pointed to two expert reports on "voting patterns throughout the State," but we rejected that evidence as insufficient. *Ibid.*, n. 5. Here, Texas has pointed to no actual "legislative inquiry" that would establish the need for its manipulation of the racial makeup of the district.

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By contrast, where we have accepted a State's "good reasons" for using race in drawing district lines, the State made a strong showing of a pre-enactment analysis with justifiable conclusions. In *Bethune-Hill*, the State established that the primary mapdrawer "discussed the district with incumbents from other majority-minority districts[,] . . . considered turnout rates, the results of the recent contested primary and general elections," and the district's large prison population. 580 U. S., at 194. The State established that it had performed a "functional analysis" and acted to achieve an "in-

formed bipartisan consensus." *Ibid.* Texas's showing here is not equivalent.

Perhaps Texas could have made a stronger showing, but it is the State's burden to prove narrow tailoring, and it did not do so on the record before us. We hold that HD90 is an impermissible racial gerrymander. On remand, the District Court will have to consider what if any remedy is appropriate at this time.

* * *

Except with respect to one Texas House district, we hold that the court below erred in effectively enjoining the use of the districting maps adopted by the Legislature in 2013. We therefore reverse with respect to No. 17–586; reverse in part and affirm in part with respect to No. 17–626; and remand for proceedings consistent with this opinion.

It is so ordered.

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JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, concurring.

I adhere to my view that §2 of the Voting Rights Act of 1965 does not apply to redistricting. See *Cooper* v. *Harris*, 581 U. S. 285, 327 (2017) (concurring opinion) (citing *Holder* v. *Hall*, 512 U. S. 874, 922–923 (1994) (THOMAS, J., concurring in judgment)). Thus, §2 cannot provide a basis for invalidating any district, and it cannot provide a justification for the racial gerrymander in House District 90. Because the Court correctly applies our precedents and reaches the same conclusion, I join its opinion in full.

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

The Court today goes out of its way to permit the State of Texas to use maps that the three-judge District Court unanimously found were adopted for the purpose of preserving the racial discrimination that tainted its previous maps.

In reaching its desired result, the majority commits three fundamental errors along the way.

First, the majority disregards the strict limits of our appellate jurisdiction and reads into the District Court orders a nonexistent injunction to justify its premature intervention. Second, the majority indulges Texas' distorted reading of the District Court's meticulous orders, mistakenly faulting the court for supposedly shifting the burden of proof to the State to show that it cured the taint of past discrimination, all the while ignoring the clear language and unambiguous factual findings of the orders below. Third, the majority elides the standard of review that guides our resolution of the factual disputes in these appeals—indeed, mentioning it only in passing—and selectively parses through the facts. As a result of these errors, Texas is guaranteed continued use of much of its discriminatory maps.

This disregard of both precedent and fact comes at serious costs to our democracy. It means that, after years of litigation and undeniable proof of intentional discrimination, minority voters in Texas—despite constituting a majority of the population within the State—will continue to be underrepresented in the political process. Those voters must return to the polls in 2018 and 2020 with the knowledge that their ability to exercise meaningfully their right to vote has been burdened by the manipulation of district lines specifically designed to target their communities and minimize their political will. The fundamental right to vote is too precious to be disregarded in this manner. I dissent.

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I

A

The first obstacle the majority faces in its quest to intervene in these cases is jurisdictional. The statute that governs our jurisdiction over these appeals is 28 U. S. C. § 1253, which provides that "any party may appeal to the Supreme Court from an order granting or denying . . . an interlocutory

or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." Unlike the more typical certiorari process, for cases falling within § 1253, appellate review in this Court is mandatory. That is why, until today, this Court has repeatedly recognized and adhered to a "long-established rule" requiring "strict construction" of this jurisdictional statute "to protect our appellate docket." *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368, 375, 378 (1949); see, *e. g.*, *Gonzalez* v. *Automatic Employees Credit Union*, 419 U. S. 90, 98 (1974) (noting that "only a narrow construction" of our jurisdiction under § 1253 "is consonant with the overriding policy, historically encouraged by Congress, of minimizing the mandatory docket of this Court in the interests of sound judicial administration"); *Gunn* v. *University Comm. to End War in Viet Nam*, 399 U. S. 383, 387 (1970) (similar); *Goldstein* v. *Cox*, 396 U. S. 471, 477–478 (1970) (rejecting a construction of § 1253 that would "involve an expansion of [our] mandatory appellate jurisdiction," even where the statutory text "is subject to [that] construction," in light of "canon of construction" requiring that § 1253 be "narrowly construed"); *Phillips* v. *United States*, 312 U. S. 246, 248–250 (1941) (explaining that § 1253 is an "exceptional procedure" and that "inasmuch as this procedure . . . brings direct review of a district court to this Court, any loose construction . . . would defeat the purposes of Congress . . . to keep within narrow confines our appellate docket").

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In line with that command, this Court has held that a ruling on the merits will not suffice to invoke our mandatory appellate jurisdiction in the absence of an order granting or denying an injunction. In fact, even if a three-judge district court unequivocally indicates that a state law must be enjoined as it stands, we have required more before accepting mandatory review. For example, the Court in *Gunn* found no jurisdiction where the three-judge District Court held that a Texas disturbing-the-peace statute was " 'impermissibly and unconstitutionally broad,' " concluded that the plain-

tiffs were "'entitled to their declaratory judgment to that effect, and to injunctive relief against the enforcement of [the statute] as now worded, insofar as it may affect the rights guaranteed under the First Amendment,'" and stayed the mandate to allow the State to, "'if it so desires, enact such disturbing-the-peace statute as will meet constitutional requirements.'" 399 U. S., at 386. Despite the District Court's resolution of the merits and its clear indication that, unless amended, the disturbing-the-peace statute would be enjoined, this Court dismissed an appeal from the State for want of jurisdiction, concluding that the District Court merely wrote a "rather discursive *per curiam* opinion" and "there was no order of any kind either granting or denying an injunction—interlocutory or permanent." *Id.*, at 387. The Court explained that, in addition to the congressional command to "'keep within narrow confines our appellate docket,'" other "policy considerations" counseled limiting "our power of review," including "that until a district court issues an injunction, or enters an order denying one, it is simply not possible to know with any certainty what the court has decided." *Id.*, at 387–388. Those considerations, the Court thought, were "conspicuously evident" in that case, where the opinion did not specify, for instance, exactly what was to be enjoined or against whom the injunction would run. *Id.*, at 388.

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Similarly, *Whitcomb* v. *Chavis*, 403 U. S. 124 (1971), concerned a redistricting challenge in which a three-judge District Court held that "a redistricting of [the challenged county was] necessitated" and "that the evidence adduced . . . and the additional apportionment requirements set forth by the Supreme Court call[ed] for a redistricting of the entire state as to both houses of the General Assembly," *Chavis* v. *Whitcomb*, 305 F. Supp. 1364, 1391 (SD Ind. 1969). Recognizing "that the federal judiciary functions within a system of federalism which entrusts the responsibility of legislative apportionment and districting primarily to the state legislature," the District Court afforded the Governor "a reason-

able opportunity to call a Special Session of the General Assembly of the State of Indiana so that it may enact legislation to redistrict the State and reapportion the legislative seats in the General Assembly in accordance with federal constitutional requirements and in compliance with [its] opinion." *Id.*, at 1392. The District Court gave the State a little over two months to enact new statutes "to remedy the improper districting and malapportionment." *Ibid.* When the Governor appealed from that order, this Court dismissed for want of jurisdiction because "at [the] time no judgment had been entered and no injunction had been granted or denied." 403 U. S., at 138, n. 19. The findings of liability on the merits and the unequivocal indication that the redistricting and malapportionment violations had to be remedied were not enough.

B

Straightforward application of this precedent compels the conclusion that this Court lacks jurisdiction over these appeals. Here, Texas appeals from two orders entered by the three-judge District Court on August 15 and 24, 2017. Those orders concern the constitutional and statutory challenges to Texas' State House and federal congressional redistricting plans, enacted by the Texas Legislature (hereinafter Legislature) in 2013 (hereinafter the 2013 maps). As relevant here, the orders concerned Texas House districts in Bell County (HD54 and HD55), Dallas County (HD103, HD104, and HD105), Nueces County (HD32 and HD34), and Tarrant County (HD90), as well as federal congressional districts encompassing Nueces County (CD27) and parts of Travis County (CD35). The District Court concluded that plaintiffs had proved intentional discrimination as to HD54, HD55, HD103, HD104, HD105, HD32, HD34, and CD27.[1] It also

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[1] The Fourteenth Amendment and §2 of the Voting Rights Act of 1965 prohibit intentional "vote dilution," *i. e.*, purposefully enacting "a particular voting scheme . . . 'to minimize or cancel out the voting potential of

concluded that plaintiffs had proved a "results" violation under §2 of the Voting Rights Act as to HD32, HD34, and CD27,[2] and had established a racial gerrymandering claim as to HD90 and CD35.[3]

Having ruled on the challengers' statutory and constitutional claims, the District Court stated that all but one of the "violations must be remedied by either the Texas Legislature or [the District] Court." 274 F. Supp. 3d 624, 686 (WD Tex. 2017); see also 267 F. Supp. 3d 750, 795 (WD Tex. 2017).[4] With respect to the §2 results violation concerning HD32 and HD34, however, the District Court noted that it had yet to decide "whether §2 requires a remedy for this results violation." *Id.*, at 783, 795. The District Court then ordered "the [Texas] Office of the Attorney General [to] file a written advisory within three business days stating whether the Legislature intends to take up redistricting in an effort to cure these violations and, if so, when the matter will be considered." 274 F. Supp. 3d, at 686; see also 267 F. Supp. 3d, at 795. The court went on: "If the Legislature does not intend to take up redistricting, the [District] Court will hold a hearing to consider remedial plans" on September 5 and 6, 2017, respecting the congressional and Texas House districts. 274 F. Supp. 3d, at 686–687; see also 267 F. Supp.

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racial or ethnic minorities,' an action disadvantaging voters of a particular race." *Miller* v. *Johnson*, 515 U. S. 900, 911 (1995) (citations omitted).

[2] The §2 "results" test focuses, as relevant here, on vote dilution accomplished through cracking or packing, *i. e.*, "the dispersal of [a protected class of voters] into districts in which they constitute an ineffective minority of voters or from the concentration of [those voters] into districts where they constitute an excessive majority." *Thornburg* v. *Gingles*, 478 U. S. 30, 46, n. 11 (1986).

[3] The Fourteenth Amendment "limits racial gerrymanders" and "prevents a State, in the absence of 'sufficient justification,' from 'separating its citizens into different voting districts on the basis of race.'" *Cooper* v. *Harris*, 581 U. S. 285, 291 (2017).

[4] The various appendixes are abbreviated herein consistent with the majority opinion. See *ante*, at 585, n. 1.

3d, at 795. "In preparation for the hearing[s]," the District Court ordered the parties to confer and to "take immediate steps to consult with their experts and mapdrawers and prepare" maps to present at those hearings. 274 F. Supp. 3d, at 687; 267 F. Supp. 3d, at 795.

The District Court went no further. Though there had been a determination on the merits that Texas violated both the Equal Protection Clause and § 2 of the Voting Rights Act with respect to a number of districts in the 2013 maps, the District Court did not enjoin use of the 2013 maps for the upcoming 2018 elections. For instance, with respect to the congressional map, the District Court explained that its order "only partially addresse[d]" the challengers' claims, as it had "bifurcated the remedial phase" from the merits phase. 274 F. Supp. 3d, at 687. Importantly, in denying Texas' motions for a stay, the District Court took care to make abundantly clear the scope of its orders: "Although the [District] Court found violations [in the congressional and Texas House maps], the [District] Court has not enjoined [their] use for any upcoming elections." App. 134a–136a.

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That is the end of the inquiry under our precedent, as our past cases are directly on point. Like in *Gunn* and *Whitcomb*, the District Court issued a ruling on the merits against the State. Like in *Gunn* and *Whitcomb*, the District Court was clear that those violations required a remedy. Like in *Gunn* and *Whitcomb*, the District Court stayed its hand and did not enter an injunction, instead allowing the State an opportunity to remedy the violations. Therefore, like in *Gunn* and *Whitcomb*, this Court lacks jurisdiction under § 1253 because there is "no order of any kind either granting or denying an injunction—interlocutory or permanent." *Gunn*, 399 U. S., at 387.[5]

[5] Contrary to what the majority contends, whether *Whitcomb* involved an "exceedingly complicated procedural posture" has no effect on whether, at the time the State first appealed, the District Court had granted or denied an injunction for purposes of § 1253 jurisdiction. *Ante*, at 601,

C

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Despite this precedent, the majority nonetheless concludes that our intervention at this early stage is not only authorized, but mandatory. None of the justifications that the majority offers for deviating from our precedent is persuasive.

The majority justifies its jurisdictional overreach by holding that § 1253 mandates appellate review in this Court if a three-judge district court order "has the 'practical effect' of granting or denying an injunction." *Ante*, at 594. It reasons that the Court has "previously made clear that where an order has the 'practical effect' of granting or denying an injunction, it should be treated as such for purposes of appellate jurisdiction." *Ibid.* That reasoning, however, has no application here. Whereas this Court has applied the "practical effect" rule in the context of the courts of appeals' appellate jurisdiction under 28 U. S. C. § 1292(a)(1), it has never applied it to questions of its own mandatory appellate docket under § 1253. That explains why the only cases the majority can round up to support its position concern jurisdiction

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n. 14. Nor was the order at issue in *Whitcomb* less "specific" or less "likely to demand compliance" than the orders at issue in these appeals. *Ibid.* The District Court in *Whitcomb*, like here, issued an order on the merits finding the State liable and unambiguously holding that a remedy was required. *Chavis* v. *Whitcomb*, 305 F. Supp. 1364, 1391–1392 (SD Ind. 1969). The District Court discussed how the Indiana Legislature might go about redistricting. *Ibid.* Also, the orders here were no more "immediate" than the order in *Whitcomb*. *Ante*, at 601, n. 14. As in *Whitcomb*, the District Court here first attempted to defer to the State to redistrict, and nothing in the record suggests that the court would not have allowed the Texas Legislature a reasonable amount of time to redistrict had the State decided to take up the task, as the District Court did in *Whitcomb*. To the extent the majority relies on the 3-day deadline contained in the orders below, that deadline was solely for the Texas attorney general to inform the District Court whether the Legislature intended to take up redistricting; it was not a deadline to enact new maps. See *infra*, at 638–639. *Whitcomb* is thus not distinguishable in any relevant respect.

under § 1292(a)(1). *Ante,* at 594–595 (citing *Carson* v. *American Brands, Inc.*, 450 U. S. 79, 83–84 (1981), and *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U. S. 271, 287–288 (1988)).

This distinction matters a great deal. Courts of appeals generally have jurisdiction over direct appeals from the district courts. See 15A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3901, p. 13 (3d ed. 1992) ("Courts of appeals jurisdiction extends to nearly every action that might be taken by a district court"). In contrast, exercising mandatory review over direct appeals in this Court is a truly "exceptional procedure," *Phillips*, 312 U. S., at 248, in no small part due to our "necessarily finite docket," 16B Wright, Federal Practice and Procedure § 4003, at 19. Reading § 1253 broadly risks transforming that exceptional procedure into a routine matter, when our precedent commands a strict construction precisely so that we can "'keep within narrow confines our appellate docket.'" *Goldstein*, 396 U. S., at 478.

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Brushing that distinction aside, the majority contends that "we also construe § 1292(a)(1) 'narrowly,'" and have referred to the statutes as "'analogous.'" *Ante,* at 595–596. True, but that is no response to the jurisdictional obstacle of § 1253. The command from our precedent is not simply one to undertake the same narrow interpretation as we do for § 1292(a)(1). Rather, our "long-established rule" requires "strict construction" of § 1253, *Stainback*, 336 U. S., at 378, so that even where the statutory text could be read to expand our mandatory appellate docket, this Court will not adopt that reading if a narrower construction is available, *Goldstein*, 396 U. S., at 477–478. That "strict construction" rule exists for a purpose specific to this Court: to protect our "carefully limited appellate jurisdiction." *Board of Regents of Univ. of Tex. System* v. *New Left Ed. Project*, 404 U. S. 541, 543 (1972). Unlike the courts of appeals, which hear cases on mandatory jurisdiction regularly, this Court hears

cases on mandatory jurisdiction only rarely. The majority nowhere grapples with that vital contextual distinction between § 1253 and § 1292(a)(1). Nor does the majority acknowledge that, in interpreting § 1253, this Court has itself recognized that distinction, noting that "this Court *above all others* must limit its review of interlocutory orders." *Goldstein*, 396 U. S., at 478 (emphasis added).

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Looking to escape that pitfall in its reasoning, the majority turns to the text of the two jurisdictional statutes. But the text provides no refuge for its position. The majority first states that "the relevant language in the two provisions is nearly identical." *Ante*, at 595–596. But whereas § 1253 provides for appeal "from an order granting or denying . . . an interlocutory or permanent injunction," § 1292(a)(1) provides for appeal from "[i]nterlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." It is a stretch, to say the least, to characterize these provisions as "nearly identical." *Ante*, at 595–596.

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Next, the majority contends that § 1253 and § 1292(a)(1) are "textually interlocked," *ante*, at 596, in that § 1292(a)(1) provides for appeal to the courts of appeals, "except where a direct review may be had in the Supreme Court." In its view, this demonstrates that the "practical effect" rule must apply under § 1253. The majority reasons that "the consequences would be unfortunate and strange" otherwise, imagining that an order from a three-judge district court that had the practical effect of an injunction but did not invoke § 1253 jurisdiction would "appear to be appealable to one of the courts of appeals" in light of the "excep[t]" clause, a result "Congress surely did not intend" given that it took "pains to provide for review in this Court, and not in the courts of appeals, of three-judge court orders granting injunctions." *Ante*, at 596.

This reasoning rests on a mistaken premise. Congress did not provide for review of *every* three-judge court order in this Court. It provided for review of only certain narrow categories of orders, *i. e.*, those granting or denying an injunction. There is nothing "unfortunate" or "strange" about the proposition that orders from a three-judge court that do not fall within these narrow categories of actions made directly appealable to this Court can be appealed only to the courts of appeals. In fact, this Court itself has recognized as much. See, *e. g.*, *Rockefeller* v. *Catholic Medical Center of Brooklyn & Queens, Inc.*, 397 U. S. 820 (1970) (*per curiam*) ("The judgment appealed from does not include an order granting or denying an interlocutory or permanent injunction and is therefore not appealable to this Court under 28 U. S. C. § 1253. The judgment of the District Court is vacated and the case is remanded to that court so that it may enter a fresh decree from which timely appeal may be taken to the Court of Appeals" (citation omitted)); see also *Mitchell* v. *Donovan*, 398 U. S. 427, 431–432 (1970) (*per curiam*) (concluding that "this Court lacks jurisdiction of the appeal" under § 1253 and directing "the District Court [to] enter a fresh order . . . thus affording the appellants an opportunity to take a timely appeal to the Court of Appeals").[6] And to the extent a party prematurely appeals to the court of appeals an order that would otherwise fall within § 1253, *e. g.*,

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[6] The majority opinion attempts to distinguish *Donovan* and *Rockefeller* by stating that the decisions there were "based on the plain language of § 1253, which says nothing about orders granting or denying declaratory judgments." *Ante*, at 596–597, n. 11. But of course, "the plain language of § 1253" also "says nothing about" noninjunctive orders, like the ones issued by the District Court below. Notably, the order at issue in *Rockefeller* looked similar to the orders on appeal here: There, the three-judge District Court declined to enter an injunction only because "the state ha[d] shown a desire to comply with applicable federal requirements," but its order nevertheless clearly resolved the merits against the State. See *Catholic Medical Center of Brooklyn & Queens, Inc.* v. *Rockefeller*, 305 F. Supp. 1268, 1271 (EDNY 1969).

if Texas had appealed the August 15 and 24 orders to the Court of Appeals for the Fifth Circuit, that court surely will be more than capable of identifying as much and instructing the party to wait for an actual injunction before bringing an appeal to this Court.

3

The majority attempts to bolster its jurisdictional conclusion with a passing reference to the "valuable purpose" served by the "'practical effect'" rule, *i. e.*, preventing district courts from manipulating proceedings by avoiding labeling their orders as "'injunction[s].'" *Ante*, at 595. Notably, the majority cites no evidence for the proposition that district courts are engaging in any kind of manipulation. Nor is there any indication that the District Court here attempted to manipulate the proceedings by shielding its orders from appellate review. Instead, the District Court carefully adhered to a common practice in cases implicating important state interests, staying its hand as to the remedy to allow the State an opportunity to act, as happened in *Gunn* and *Whitcomb*.

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More important, the majority ignores the "valuable purposes" served by the longstanding rule requiring strict construction of §1253. Not only does it comply with the congressional command to "'keep within narrow confines our appellate docket,'" but without strict enforcement of the requirement that an order grant or deny an injunction, "it is simply not possible to know with any certainty what the court has decided." *Gunn*, 399 U. S., at 387–388. Such clarity "is absolutely vital in a case where a federal court is asked to nullify a law duly enacted by a sovereign State." *Id.*, at 389. Orders coming to this Court on direct appeal under the "practical effect" rule will more often than not lack that clarity.

In these cases, for instance, what does the majority read the "practical effect" of the orders to have been with respect to HD32 and HD34? The District Court held that the chal-

lengers had "not proven that §2 requires breaking the County Line Rule" in the Texas Constitution, Art. III, but that "§2 could require" drawing two majority-HCVAP[7] districts. 267 F. Supp. 3d, at 783, 795. Does the majority read that to mean that the §2 results violation could potentially go without a remedy? If so, there would have been no obstacle to use of the 2013 maps for those districts even after a remedial phase. Or does the majority read that to mean that the challengers still had more to show before the District Court "would" redraw the districts that §2 "could" require to be redrawn? And what is the effect of the conclusion respecting the County Line Rule on the potential remedy for the intentional vote dilution holding as to HD32 and HD34? The majority conveniently avoids confronting this lack of clarity by ignoring the relevant record, instead stating without explanation that it believes "it clear that the District Court effectively enjoined use of these districts as currently configured." *Ante*, at 601, n. 15. But it cannot escape the reality that its rule will "needlessly complicate appellate review," *ante*, at 597, given that "it is simply not possible [absent an injunction] to know with any certainty what the court has decided," *Gunn*, 399 U. S., at 388.

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I do not disagree that "lack of specificity in an injunctive order would [not] alone deprive the Court of jurisdiction under §1253." *Id.*, at 389, n. 4; see also *ante*, at 598 (quoting *Gunn*). "But the absence of any semblance of effort by the District Court to comply with [the specificity required of injunctive orders under the Federal Rules] makes clear that the court did not think its [orders] constituted an order granting an injunction." *Gunn*, 399 U. S., at 389, n. 4. If any doubt remained as to the effect of the orders here, moreover, the District Court explicitly assured the parties that, even though it had found violations, it was not enjoining use of the 2013 maps for the upcoming elections. App. 134a–136a.

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[7] "HCVAP" stands for Hispanic citizen voting age population.

Finally, it is axiomatic that "administrative simplicity is a major virtue in a jurisdictional statute." *Hertz Corp.* v. *Friend*, 559 U. S. 77, 94 (2010).

> "Complex jurisdictional tests complicate a case . . . . Complex tests produce appeals and reversals, [and] encourage gamesmanship . . . . Judicial resources too are at stake [as] courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case. Simple jurisdictional rules also promote greater predictability." *Ibid.* (citations omitted).

Simple is thus the name of the game when it comes to jurisdictional rules. The rule in the majority opinion is anything but. Although the majority claims that a mere "finding on liability cannot be appealed unless an injunction is granted or denied," *ante*, at 602, the rule it embraces today makes it hard to understand when a finding on liability would not be read, as the majority does here, as having the "practical effect" of an injunction. It is a worrisome prospect that, after today, whenever a three-judge district court expresses that a statutory or constitutional violation must be remedied, the party held liable will straightaway file an appeal in this Court and assert jurisdiction under § 1253, even where the district court is clear that no injunction has issued.[8]

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[8] The majority guarantees that there is "no reason to fear such a flood" of appeals from three-judge district court orders because "appeals from [orders expressly enjoining redistricting plans] have not overwhelmed our docket." *Ante*, at 602. But of course, its jurisdictional ruling applies to all § 1253 cases, not just those involving redistricting. The majority also makes much of the fact that only "two cases (*Gunn* and *Whitcomb*) decided during the past half-century" have involved the scenario at issue here, *i. e.*, an effort to invoke our mandatory jurisdiction to review "a three-judge court order holding a state statute unconstitutional but declining to issue an injunction." *Ante*, at 602, n. 16. The majority never stops to consider, however, that one reason so few cases have come to the Court in this posture may be that *Gunn* and *Whitcomb* drew clear jurisdictional

The majority opinion purports to add a limit by distinguishing between unappealable orders that find a plan "unlawful long before the next scheduled election" or "very close to the election date," and those (presumably) appealable orders that are entered neither "long before" nor "very close" to the next election. *Ante*, at 602.[9] What does that even mean? The orders at issue here were entered about 15 months before the 2018 elections, and according to the majority fall within the not "long before" but not "very close" appealable range. Why this is so, however, the majority never says. Without any definitions for its boundary posts, courts will be left to wonder: What about orders entered 17 or 18 months before an election? Are those considered "long before" so they would be unappealable? And are orders entered 14, 13, or 12 months before the election similarly unappealable because they were entered "very close" to the election date? And what does the majority mean by "the election date"? Does that include primaries? What about registration deadlines, or ballot-printing deadlines? It is not uncommon for there to be, at any given time, multiple impending deadlines relating to an upcoming election. Thinking through the many variations of jurisdictional disputes that will arise over the years following this novel reading of § 1253 should be enough to stop the majority from rewriting our long established jurisprudence in this area.

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After today, our mandatory appellate docket will be flooded by unhappy litigants in three-judge district court cases, demanding our review. Given the lack of predictabil-

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lines that litigants easily understood—the same clear lines the majority erases today.

[9] The majority believes these "long before" and "very close" limits guide district courts' determinations about whether to enter an injunction. *Ante*, at 602. Presumably the majority would resort to the same indeterminate limits in determining whether, in its view, a noninjunctive order had the "practical effect" of an injunction such that it would be justified to accept an appeal under § 1253.

ity, the rule will incentivize appeals and "encourage gamesmanship." *Hertz Corp.*, 559 U. S., at 94. The Court will no doubt regret the day it opened its courthouse doors to such time-consuming and needless manipulation of its docket.

D

Even if the majority were correct to import the "practical effect" rule into the § 1253 context, moreover, that would still not justify the Court's premature intervention in these appeals for at least two reasons. First, while taking from *Carson* the "practical effect" rule it likes, the majority gives short shrift to the second half of that case, in which the Court was explicit that "[u]nless a litigant can show that an interlocutory order . . . might have a 'serious, perhaps irreparable, consequence,' and that the order can be 'effectually challenged' only by immediate appeal, the general congressional policy against piecemeal review will preclude interlocutory appeal." 450 U. S., at 84. Texas has made no showing of a "serious, perhaps irreparable consequence" requiring our immediate intervention, nor has Texas shown that the orders could not be "effectually challenged" after the remedial stage was completed. In fact, when Texas sought a stay of those orders before this Court, the 2018 elections were more than a year away. For the majority, however, it is enough that the District Court found the Texas redistricting maps to be in violation of federal law. *Ante*, at 602–603. That cursory application of *Carson*, in particular whether the injunctions the majority reads into the August 15 and 24 orders could be "effectually challenged" absent immediate appeal to this Court, deprives that limit to our jurisdiction of much of its meaning when assessing Texas' request for our intervention in these cases. Nothing in our precedent supports that truncated approach. And in any event, if Texas wanted review of the orders after any injunction was entered by the District Court, it could have asked this Court for an emergency stay.

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Second, the August 15 and 24 orders at issue here simply did not have the "practical effect" of enjoining Texas' use of the 2013 maps. The majority thinks otherwise in part because the District Court noted that the violations "'must be remedied.'" *Ante*, at 598. In addition, the majority believes that "Texas had reason to fear that if it tried to conduct elections under plans that the court had found to be racially discriminatory, the court would infer an evil motive and perhaps subject the State once again to the strictures of preclearance under § 3(c) of the Voting Rights Act." *Ante*, at 599–600. But the majority forgets that the District Court made explicit that "[a]lthough [it] found violations [in the 2013 maps], [it] ha[d] not enjoined [their] use for any upcoming elections." App. 134a–136a. That the District Court requested the Texas attorney general to advise it, within "three business days," whether "the Legislature intends to take up redistricting in an effort to cure [the] violations," 274 F. Supp. 3d, at 686; 267 F. Supp. 3d, at 795, does not undermine that unequivocal statement. Nothing in that language indicates that the District Court required the Legislature to "redraw both maps *immediately*" or else "the court would do so itself." Brief for Appellants 20 (emphasis in original). Instead, recognizing "that the federal judiciary functions within a system of federalism which entrusts the responsibility of legislative . . . districting primarily to the state legislature," *Whitcomb*, 305 F. Supp., at 1392, the District Court gave Texas an opportunity to involve its Legislature and asked for a simple statement of intent so that the court could manage its docket accordingly. This request for a statement of intent, which was necessary for the District Court to manage its own docket, does not transform the orders into injunctions.

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As to the second point, if Texas had any "fear" regarding the use of its maps, despite having been explicitly told that the maps were not enjoined, that would still not be enough. This Court recognized in *Gunn* that the State in that case,

faced with the order declaring its statute unconstitutional, "would no doubt hesitate long before disregarding it." 399 U. S., at 390. That hesitation was not enough in *Gunn* to magically transform an order into an injunction for purposes of § 1253, and nothing about these cases justifies the majority taking out its wand today. Whatever "fear" Texas had does not transform the August 15 and 24 orders into injunctions. And absent an injunction, this Court lacks jurisdiction over these appeals. The cases should thus be dismissed.

II

Having rewritten the limits of § 1253, the majority moves to the merits. There again the Court goes astray. It asserts that the District Court legally erred when it purportedly shifted the burden of proof and "required the State to show that the 2013 Legislature somehow purged the 'taint' that the court attributed to the defunct and never-used plans enacted by a prior legislature in 2011." *Ante,* at 603. But that holding ignores the substantial amount of evidence of Texas' discriminatory intent, and indulges Texas' warped reading of the legal analysis and factual record below.[10]

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A

Before delving into the content of the August 15 and 24 orders, a quick recap of the rather convoluted history of these cases is useful. In 2011, the Texas Legislature redrew its electoral districts. Various plaintiff groups challenged the 2011 maps under § 2 of the Voting Rights Act and the Fourteenth Amendment, and those lawsuits were consolidated before the three-judge District Court below pursuant to 28 U. S. C. § 2284(a). Because Texas then was subject to preclearance under § 5 of the Voting Rights Act, the 2011

[10] Because the Court reaches the merits of these appeals despite lacking jurisdiction, this dissent addresses that portion of the majority opinion as well.

maps did not take effect immediately, and Texas filed a declaratory action in the District Court for the District of Columbia to obtain preclearance.

"Faced with impending election deadlines and unprecleared plans that could not be used in the [2012] election, [the District] Court was faced with the 'unwelcome obligation' of implementing interim plans so that the primaries could proceed." 274 F. Supp. 3d, at 632. In January 2012, this Court vacated the first iteration of those interim maps in *Perry* v. *Perez*, 565 U. S. 388, 394–395 (2012) (*per curiam*), finding that the District Court failed to afford sufficient deference to the Legislature. In February 2012, the District Court issued more deferential interim plans, but noted that its analysis had been expedited and curtailed, and that it had only made preliminary conclusions that might be revised on full consideration. C. J. S. 367a–424a; H. J. S. 300a–315a.

In August 2012, the D. C. District Court denied preclearance of the 2011 maps. *Texas* v. *United States*, 887 F. Supp. 2d 133 (2012). It concluded that the federal congressional map had "retrogressive effect" and "was enacted with discriminatory intent," *id.*, at 159, 161, and that the State House map was retrogressive and that "the full record strongly suggests that the retrogressive effect . . . may not have been accidental," *id.*, at 178. Texas appealed, and the case was eventually dismissed following *Shelby County* v. *Holder*, 570 U. S. 529 (2013) (holding unconstitutional the formula used to subject States to the preclearance requirement).

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In June 2013, the Texas Governor called a special legislative session, and that same month the Legislature adopted the 2012 interim maps as the permanent maps for the State. The Legislature made small changes to the maps, including redrawing the lines in HD90, but the districts at issue in these appeals all remained materially unchanged from the 2011 maps.

The District Court in these cases denied Texas' motion to dismiss the challenges to the 2011 maps, and the challengers

amended their complaints to assert claims respecting the 2013 maps. In April and May 2017, the District Court held that districts in Texas' 2011 maps violated § 2 and the Fourteenth Amendment. The August 15 and 24 orders respecting the 2013 maps followed.

B

The majority believes that, in analyzing the 2013 maps, the District Court erroneously "attributed [the] same [discriminatory] intent [harbored by the 2011 Legislature] to the 2013 Legislature" and required the 2013 Legislature to purge that taint. *Ante*, at 592. The District Court did no such thing. It engaged in a painstaking analysis of discriminatory intent under *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252 (1977), which is critical to understanding why, as explained in Part II–D, *infra*, the District Court did not improperly presume that the Legislature acted with discriminatory intent.

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Under *Arlington Heights*, "in determining whether racially discriminatory intent existed," this Court considers "circumstantial and direct evidence" of: (1) the discriminatory "impact of the official action," (2) the "historical background," (3) the "specific sequence of events leading up to the challenged decision," (4) departures from procedures or substance, and (5) the "legislative or administrative history," including any "contemporary statements" of the lawmakers. 429 U. S., at 266–268. Although this analysis must start from a strong "presumption of good faith," *Miller* v. *Johnson*, 515 U. S. 900, 916 (1995), a court must not overlook the relevant facts. This Court reviews the "findings of fact" made by the District Court, including those respecting legislative motivations, "only for clear error." *Cooper* v. *Harris*, 581 U. S. 285, 293 (2017); see also *Anderson* v. *Bessemer City*, 470 U. S. 564, 573 (1985). The Court therefore "may not reverse just because we 'would have decided the [matter] differently.' . . . A finding that is 'plausible' in light of the

full record—even if another is equally or more so—must govern." *Harris*, 581 U. S., at 293.

The District Court followed the guidance in *Arlington Heights* virtually to a tee, and its factual findings are more than "plausible" in light of the record. To start, there is no question as to the discriminatory impact of the 2013 plans, as the "specific portions of the 2011 plans that [the District Court] found to be discriminatory or unconstitutional racial gerrymanders continue unchanged in the 2013 plans, their harmful effects 'continu[ing] to this day.'" 274 F. Supp. 3d, at 649 (alteration in original). Texas, moreover, has a long "history of discrimination" against minority voters. *Id.*, at 648, n. 37. "In the last four decades, Texas has found itself in court every redistricting cycle, and each time it has lost." *Texas*, 887 F. Supp. 2d, at 161.

There is also ample evidence that the 2013 Legislature knew of the discrimination that tainted its 2011 maps. "The 2013 plans were enacted by a substantially similar Legislature with the same leadership only two years after the original enactment." 274 F. Supp. 3d, at 648, n. 37. The Legislature was also well aware that "the D. C. court concluded that [its 2011] maps were tainted by evidence of discriminatory purpose," H. J. S. 443a, and despite the District Court having warned of the potential that the Voting Rights Act may require further changes to the maps, "the Legislature continued its steadfast refusal to consider [that] possibility," 274 F. Supp. 3d, at 649.

Turning to deliberative process—on which the majority is singularly focused, to the exclusion of the rest of the factors analyzed in the orders below, see Part II–D, *infra*—the District Court concluded that Texas was just "not truly interested in fixing any remaining discrimination in the [maps]." 274 F. Supp. 3d, at 651, n. 45. Despite knowing of the discrimination in its 2011 maps, "the Legislature did not engage in a deliberative process to ensure that the 2013 plans cured

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any taint from the 2011 plans."[11] *Id.*, at 649. For instance, Representative Darby, a member of the redistricting committee, "kept stating that he wanted to be informed of legal deficiencies so he could fix them," but "he did not himself seek to have the plan evaluated for deficiencies and he willfully ignored those who pointed out deficiencies, continuing to emphasize that he had thought 'from the start' that the interim plans were fully legal." *Id.*, at 651, n. 45.[12] The

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[11] The majority is correct that our reference to these findings in the District Court orders below is "not just a single slip of the pen." *Ante*, at 606. That is because these findings form part (though not the whole) of the comprehensive analysis that led the District Court to conclude that the 2013 Legislature acted with the specific intent to further the discrimination in its 2011 maps. Full consideration of that analysis, as I have endeavored to do here, requires review of those findings, and when read in the context of the full factual record and legal reasoning contained in the orders below, it is clear that these statements do not come close to suggesting what Texas and the majority read into them, *i. e.*, that the District Court somehow shifted the burden of proof to require Texas to show that it cured the taint from its past maps.

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[12] The majority again engages in its own factfinding, without reference to the fact that our review is for clear error only, when it decides that the District Court was wrong in concluding that Representative Darby willfully ignored the deficiencies in the 2013 maps. The legislative hearing that the District Court cited, see 274 F. Supp. 3d, at 651, n. 45, shows, *inter alia*, that Representative Darby: told certain members of the Legislature that changes to district lines would not be considered; rejected proposed amendments where there was disagreement among the impacted members; rejected an amendment to the legislative findings that set out the history underlying the 2011 maps and related court rulings; acknowledged that the accepted amendments did not address concerns of retrogression or minority opportunity to elect their preferred candidates; and dismissed concerns regarding the packing and cracking of minority voters in, *inter alia*, HD32, HD34, HD54, and HD55, stating simply that the 2012 court had already rejected the challengers' claims respecting those districts but without engaging in meaningful discussion of the other legislators' concerns. See Joint Exh. 17.3, pp. S7–S9, S11, S30–S35, S39–S43, S53. Instead of addressing what is evident from the 64-page hearing transcript, the majority fixates on the single fact that Representative

Legislature made no substantive changes to the challenged districts that were the subject of the 2011 complaints, and "there is no indication that the Legislature looked to see whether any discriminatory taint remained in the plans." *Id.*, at 649. In fact, the only substantive change that the Legislature made to the maps was to add *more* discrimination in the form of a new racially gerrymandered HD90, as the majority concedes. *Ante*, at 620–622.

The absence of a true deliberative process was coupled with a troubling sequence of events leading to the enactment of the 2013 maps. Specifically, "the Legislature pushed the redistricting bills through quickly in a special session," 274 F. Supp. 3d, at 649, despite months earlier having been urged by the Texas attorney general to take on redistricting during the regular session, *id.*, at 634; see also H. J. S. 440a. By pushing the bills through a special session, the Legislature did not have to comply with "a two-thirds rule in the Senate or a calendar rule in the House," 274 F. Supp. 3d, at 649, n. 38, and it avoided the "full public notice and hearing" that would have allowed "'meaningful input' from all Texans, including the minority community," H. J. S. 444a. In addition, "necessary resources were not allocated to support a true deliberative process." 274 F. Supp. 3d, at 649. For instance, the House committee "did not have counsel when the session started." *Ibid.*, n. 39.

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Nor can Texas credibly claim to have understood the 2012 interim orders as having endorsed the legality of its maps so that adopting them would resolve the challengers' com-

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Darby accepted an amendment for the redrawing of the new (racially gerrymandered) HD90, believing that this fact somehow erases or outweighs all the evidence in the record showing that Representative Darby was not interested in addressing concerns regarding the interim plans. *Ante*, at 611–612, and n. 24. Even if Representative Darby was in fact responsive to minority concerns regarding the composition of HD90—which the record contradicts, see 267 F. Supp. 3d, at 791, 793—that does not undermine the weight of *all* of the evidence in the record regarding his intent with respect to the enactment of the 2013 maps as a whole.

plaints. In its 2012 interim orders, "the [District] Court clearly warned that its preliminary conclusions . . . were not based on a full examination of the record or the governing law and were subject to revision" "given the severe time constraints . . . at the time" the orders were adopted. *Id.*, at 650. The District Court also explained that the "claims presented . . . involve difficult and unsettled legal issues as well as numerous factual disputes." C. J. S. 367a. During the redistricting hearings, chief legislative counsel for the Texas Legislative Council in 2013, Jeff Archer, advised the Legislature that the District Court "'had not made full determinations, . . . had not made fact findings on every issue, had not thoroughly analyzed all the evidence,'" and had "'made it explicitly clear that this was an interim plan to address basically first impression of voting rights issues.'" 274 F. Supp. 3d, at 650 (alterations in original); see also App. 441a–442a (testimony that interim plans were "impromptu" and "preliminary" and that the District Court "disclaimed making final determinations"). Archer explained that although the Legislature had "'put to bed'" challenges regarding "'those issues that the [District] Court identified so far,'" it had not "'put the rest to bed.'" 274 F. Supp. 3d, at 651, n. 45; see also App. 446a–447a (advising that, "on a realistic level," the Legislature had not "removed legal challenges" and that adopting the interim maps "in no way would inoculate the plans").

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There was substantial evidence that the 2013 Legislature instead adopted the interim plans as part of a "strategy [that] involved adopting the interim maps, however flawed," to insulate (and thus continue to benefit from) the discriminatory taint of its 2011 maps. 274 F. Supp. 3d, at 651. Texas hoped that, by adopting the 2012 interim maps, the challengers "would have no remedy, and [the Legislature] would maintain the benefit of such discrimination or unconstitutional effects." *Ibid.* That strategy originated with the Texas attorney general, who was responsible for defending

the State in the redistricting challenges. *Id.*, at 650, and n. 41. He advised the Legislature that adopting the interim plans was the "'best way to avoid further intervention from federal judges'" and to "'*insulate* [Texas'] redistricting plans from further legal challenge.'" *Id.*, at 650 (emphasis added); see also H. J. S. 443a. The Texas attorney general also drafted the "legislative fact findings accompanying the plans, *before* the Legislature had engaged in any fact findings on the bills," stating that the 2012 interim plans "complied 'with all federal and state constitutional provisions or laws applicable to redistricting plans.'" 274 F. Supp. 3d, at 650, n. 41 (emphasis added). That the legislative factfindings were predrafted by the attorney defending Texas in these redistricting challenges—purporting to conclude that the 2012 interim plans complied with the law, when in fact the evidence showed that the Legislature did not engage in a true deliberative process or meaningfully consider evidence of the legality of the plans so that it could have endorsed such factfindings—demonstrates that the adoption of the interim plans was a mere pretext to insulate the discriminatory benefits of the 2011 plans. That explains why legislators thought that removal of those factfindings would "'gu[t] the bill.'" *Ibid.*

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In the end, having presided over years of litigation and seeing firsthand all of the evidence, the District Court thought it clear that Texas' "strategy involved adopting the interim maps, however flawed," so that the challengers "would have no remedy, and [Texas] would maintain the benefit of such discrimination and unconstitutional effects." *Id.*, at 651. It is hard to imagine what a more thorough consideration of the *Arlington Heights* factors in these cases would have looked like. Review of the District Court's thorough inquiry leads to the inescapable conclusion that it did not err—let alone clearly err—in concluding that the "Legislature in 2013 intentionally furthered and continued the existing discrimination in the plans." 274 F. Supp. 3d, at 652.

C

In contrast to that thorough *Arlington Heights* inquiry, the majority engages in a cursory analysis of the record to justify its conclusion that the evidence "overwhelmingly" shows that Texas acted with legitimate intent. *Ante*, at 609–610. Two critical things are conspicuously missing from its analysis: first, consideration of the actual factual record (or most of it, anyway),[13] and second, meaningful consideration of the limits of our review of facts on these appeals.[14]

The majority first makes reference to the fact that the Texas attorney general "advised the Legislature that the best way to [end the redistricting litigation] was to adopt the interim, court-issued plans," a position repeated by the sponsor of the plans. *Ante*, at 608. And in its view, it was reasonable for the Legislature to believe that adopting the interim plans "might at least reduce objections and thus simplify and expedite the conclusion of the litigation." *Ante*, at 609. The majority also states that "there is no evidence that the Legislature thought that the plans were invalid." *Ante*, at 609. In reaching those findings, however, the majority ignores all of the evidence in the record that demonstrates that the Legislature was aware of (and ignored) the infirmities in the maps, that it knew that adopting the interim plans would not resolve the litigation concerning the disputed dis-

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[13] The majority contends in passing that its analysis takes account of "all the relevant evidence in the record," *ante*, at 607, and n. 19, apparently believing that stating it explicitly somehow makes it true. It does not. The District Court orders in these cases are part of the public record and readers can therefore judge for themselves.

[14] The majority never explains why it believes it appropriate to engage in what amounts to *de novo* review of the factual record. Presumably, it justifies its *de novo* review with its claim of legal error as to the finding of invidious intent. See Part II–D, *infra*. But even if the majority were correct that the District Court improperly shifted the burden to the State to disprove invidious intent, the proper next step would have been to remand to the District Court for reconsideration of the facts in the first instance under the correct legal standard.

tricts, and that it nevertheless moved forward with the bills as a strategy to "insulate" the discriminatory maps from further judicial scrutiny and perpetuate the discrimination embedded in the 2012 interim maps. See Part II–B, *supra*.

Instead of engaging with the factual record, the majority opinion sets out its own view of "the situation when the Legislature adopted the court-approved interim plans." *Ante*, at 610. Under that view, "the Legislature [had] good reason to believe that the court-approved interim plans were legally sound," particularly in light of our remand instructions in *Perry*, 565 U. S. 388. *Ante*, at 610. The majority nowhere considers, however, the evidence regarding what the Legislature *actually* had before it concerning the effect of the interim orders, including the explicit cautionary statements in the orders and the repeated warnings of the chief legislative counsel that the interim plans were preliminary, incomplete, and impromptu.[15] See Part II–B, *supra*.

The majority finds little significance in the fact that the Legislature " 'pushed the redistricting bills through quickly

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[15] The majority is also just flat wrong on its characterization of the interim orders. With respect to all but two of the challenged State House districts, the discussion in the interim orders states only in general terms that the District Court "preliminarily [found] that any [§2] and constitutional challenges do not have a likelihood of success, and any [§5] challenges are insubstantial," emphasizing the "preliminarily nature of [its] order." H. J. S. 303a, 307a–309a. With respect to the congressional districts, the District Court opined that the "claims are not without merit" and were "a close call," but ultimately concluded that the challengers had not at that time demonstrated a likelihood of success on the merits. C. J. S. 409a, 419a. The District Court nevertheless emphasized that there remained "unsettled legal issues as well as numerous factual disputes" such that the interim map was "not a final ruling on the merits of any claims." *Id.*, at 367a. It is a stretch to characterize these interim orders as providing "a careful analysis of all the claims," *ante*, at 610, and borderline disingenuous to state that, despite repeated and explicit warnings that its rulings were not final and subject to change, the District Court was somehow "reversing its own previous decisions" when it finally did render a final decision, *ante*, at 609, n. 22.

in a special session,'" reasoning that a special session was needed "because the regular session had ended." *Ante*, at 610–611. That of course ignores the evidence that the Legislature disregarded requests by the Texas attorney general, months earlier, to take up redistricting during the regular session, that proceeding through a special session permitted the Legislature to circumvent procedures that would have ensured full and adequate consideration, and that resources were not sufficiently allocated to permit considered review of the plans. See Part II–B, *supra*.

Finally, the majority sees nothing wrong with the fact that the Legislature failed "to take into account the problems with the 2011 plans that the D. C. court identified in denying preclearance." *Ante*, at 612. It maintains that the purpose of adopting the interim plans was to "fix the problems identified by the D. C. court" and reasons that the interim maps did just that by modifying any problematic districts. *Ibid.* But of course the finding of discriminatory intent rested not only on what happened with particular districts. Rather, the evidence suggested that discriminatory motive permeated the entire 2011 redistricting process, as the D. C. court considered that "Texas has found itself in court every redistricting cycle [in the last four decades], and each time it has lost"; that "Black and Hispanic members of Congress testified at trial that they were excluded completely from the process of drafting new maps, while the preferences of Anglo members were frequently solicited and honored"; that the redistricting committees "released a joint congressional redistricting proposal for the public to view only after the start of a special legislative session, and each provided only seventy-two hours' notice before the sole public hearing on the proposed plan in each committee"; that minority members of the Texas Legislature "raised concerns regarding their exclusion from the drafting process and their inability to influence the plan"; and that the Legislature departed from normal procedure in the "failure to release a redistrict-

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ing proposal during the regular session, the limited time for review, and the failure to provide counsel with the necessary election data to evaluate [Voting Rights Act] compliance." 887 F. Supp. 2d, at 161. The majority also ignores the findings of retrogression concerning the previous version of CD25, which of course are relevant to the challengers' claims about CD27 and CD35 in this litigation and were not addressed in the 2012 interim plans. See Part III–A, *infra*. That the 2012 interim maps addressed some of the deficiencies identified by the D. C. court in the preclearance litigation does not mean that the Legislature in 2013 was free to wholly disregard the significance of other evidence of discrimination that tainted its 2011 maps and were entrenched in the 2012 interim maps.

Even had the majority not ignored the factual record, it still would be wrong in concluding that the District Court erred in finding that the 2013 Legislature acted with the intent to further and benefit from the discrimination in the 2011 maps. In light of the record before this Court, the finding of invidious intent is at least more than "'plausible'" and thus "must govern." *Harris*, 581 U. S., at 293. The majority might think that it has a "better view of the facts" than the District Court did, but "the very premise of clear error review is that there are often 'two permissible'—because two 'plausible'—'views of the evidence.'" *Id.*, at 299.

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D

The majority resists the weight of all this evidence of invidious intent not only by disregarding most of it and ignoring the clear-error posture but also by endorsing Texas' distorted characterizations of the intent analysis in the orders below. Specifically, the majority accepts Texas' argument that the District Court "reversed the burden of proof" and "imposed on the State the obligation of proving that the 2013 Legislature had experienced a true 'change of heart' and had 'engage[d] in a deliberative process to ensure that

the 2013 plans cured any taint from the 2011 plans.'" *Ante*, at 605 (alteration in original). The District Court did no such thing, and only a selective reading of the orders below could support Texas' position.

It is worth noting, as a preliminary matter, that the majority does not question the relevance of historical discrimination in assessing present discriminatory intent. Indeed, the majority leaves undisturbed the longstanding principle recognized in *Arlington Heights* that the "'historical background' of a legislative enactment is 'one evidentiary source' relevant to the question of intent." *Ante*, at 603–604 (quoting *Arlington Heights*, 429 U. S., at 267). With respect to these cases, the majority explicitly acknowledges that, in evaluating whether the 2013 Legislature acted with discriminatory purpose, "the intent of the 2011 Legislature [is] relevant" and "must be weighed together with any other direct and circumstantial evidence" bearing on intent. *Ante*, at 607.

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If consideration of this "'historical background'" factor means anything in the context of assessing intent of the 2013 Legislature, it at a minimum required the District Court to assess how the 2013 Legislature addressed the known discrimination that motivated the drawing of the district lines that the Legislature was adopting, unchanged, from the 2011 maps. Therefore, the findings as to whether the 2013 Legislature engaged in a good-faith effort to address any known discrimination that tainted its 2011 plans were entirely apposite, so long as the District Court "weighed [this factor] together with any other direct and circumstantial evidence" bearing on the intent question, and so long as the burden remained on the challengers to establish invidious intent. *Ibid.*

The majority faults the District Court for not adequately engaging in that weighing and giving too "central" a focus to the historical factor in its intent analysis. *Ante*, at 605; see also *ibid.*, n. 18. That alleged "central" focus, the majority contends, led the District Court to shift the

burden of proof on the intent inquiry away from the challengers, instead requiring Texas to show that the Legislature cured its past transgressions. *Ante*, at 605. Those conclusions can only be supported if, as Texas and the majority have done, one engages in a highly selective reading of the District Court orders.

To begin, entirely absent from the majority opinion is any reference to the portions of the District Court orders that unequivocally confirm its understanding that the burden remained on the challengers to show that the 2013 Legislature acted with invidious intent. The District Court was explicit that the challengers bore the burden to "establish their claim by showing that the Legislature adopted the plans with a discriminatory purpose, maintained the district lines with a discriminatory purpose, or intentionally furthered preexisting intentional discrimination." 274 F. Supp. 3d, at 646; see also *id.*, at 645 (discussing Circuit precedent regarding the showing needed for "a plaintiff [to] meet the purpose standard").[16]

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Even when it does look at the actual language of the orders, the majority picks the few phrases that it believes support its argument, choosing to disregard the rest. For in-

[16] The majority spends some time distinguishing *Hunter* v. *Underwood*, 471 U. S. 222 (1985), adamant that it does not support "shifting the burden" as it purports the District Court did below. *Ante*, at 604. But the District Court agreed that *Hunter* was distinguishable and did not rely on it to support any sort of burden shifting. As the majority explains, *Hunter* involved a state constitutional provision adopted with discriminatory intent that, despite pruning over the years, the State never repealed. *Ante*, at 604 (citing 471 U. S., at 229, 232–233). The District Court discussed the differences between *Hunter* and these cases, namely, that *Hunter* "did not involve a later reenactment . . . which is what [Texas] now claims cleanses the plans." 274 F. Supp. 3d, at 647. It noted the important distinction that, "'when a plan is reenacted—as opposed to merely remaining on the books like the provision in *Hunter*—the state of mind of the reenacting body must also be considered.'" *Id.*, at 648. That the majority ignores that the District Court did not, as it suggests, rely on *Hunter* as controlling is another example of how it conveniently overlooks the District Court's express legal analysis.

stance, the majority quotes the District Court order as having required Texas to show that the 2013 Legislature had a "'change of heart.'" *Ante*, at 605 (quoting 274 F. Supp. 3d, at 649). When that sentence is read in full, however, it is evident that the District Court was not imposing a "duty to expiate" the bad intent of the previous Legislature, as the majority contends, *ante*, at 605, but instead was describing what the weighing of the direct and circumstantial evidence revealed about the motivations of the 2013 Legislature: "The decision to adopt the interim plans was not a change of heart concerning the validity of [the challengers'] claims . . .—it was a litigation strategy designed to insulate the 2011 or 2013 plans from further challenge, regardless of their legal infirmities." 274 F. Supp. 3d, at 649–650.

Likewise, the majority quotes the orders as requiring proof that the Legislature "'engage[d] in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans.'" *Ante*, at 605 (quoting 274 F. Supp. 3d, at 649). But the District Court did not put the burden on Texas to make that affirmative showing. Instead, that partial quote is lifted from a sentence in which the District Court, having held a trial on these factual issues, concluded that the challengers had met their burden to show that "the Legislature did not engage in a deliberative process," which it supported later in that paragraph with findings that the Legislature "pushed the redistricting bills through quickly in a special session" without allocating the "necessary resources . . . to support a true deliberative process." *Id.*, at 649.

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The majority finally asserts that the District Court "drove the point home" when it "summarized its analysis" as follows: "'The discriminatory taint [from the 2011 plans] was not removed by the Legislature's enactment of the Court's interim plans, because the Legislature engaged in no deliberative process to remove any such taint, and in fact intended any such taint to be maintained but safe from remedy.'" *Ante*, at 605 (quoting 274 F. Supp. 3d, at 686). The majority no

doubt hopes that the reader will focus on the portion of the sentence in which the District Court concludes that the discriminatory taint found in the 2011 maps "'was not removed'" by the enactment of the interim maps "'because the Legislature engaged in no deliberative process to remove any such taint.'" *Ante,* at 605 (quoting 274 F. Supp. 3d, at 686).[17] But the majority ignores the import of the remaining part of the sentence, in which the District Court held that the Legislature "in fact intended any such taint to be maintained but be safe from remedy." *Id.*, at 652; see also *id.*, at 686. The majority also conveniently leaves out the sentence that immediately follows: "The Legislature in 2013 intentionally furthered and continued the existing discrimination in the plans." *Id.*, at 652. When read in full and in context, it is clear that the District Court remained focused on the evidence proving the intent of the 2013 Legislature to shield its plans from a remedy and thus further the discrimination, rather than simply presuming invidious intent from the failure to remove the taint, as the majority claims.

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In selectively reviewing the record below, the majority attempts to shield itself from the otherwise unavoidable conclusion that the District Court did not err. If forced to acknowledge the true scope of the legal analysis in the orders below, the majority would find itself without support for its insistence that the District Court was singularly focused on whether the Legislature "removed" past taint. And then the majority would have to contend with the thorough analysis of the *Arlington Heights* factors, Part II–B, *supra*, that

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[17] Notably, the majority takes no issue with that first conclusion, *i. e.*, that the enactment of the interim plans does not, on its own, insulate the 2013 plans from challenge. It explicitly notes that the opinion does not hold that the "2013 [plans] are unassailable because they were previously adopted on an interim basis by the Texas court," noting that such a factor is relevant insofar as it informs the inquiry into the intent of the 2013 Legislature. *Ante,* at 607.

led the District Court to conclude that the 2013 Legislature acted with invidious intent.

III

The majority fares no better in its district-by-district analysis. In line with the theme underlying the rest of its analysis, the majority opinion overlooks the factual record and mischaracterizes the bulk of the analysis in the orders below in concluding that the District Court erred in finding a §2 results violation as to CD27, HD32, and HD34. I first address CD27, and then turn to HD32 and HD34.

A

1

To put in context the objections to the District Court's conclusion regarding CD27, a brief review of the District Court's factual findings as to that district is necessary. Before 2011, CD27 was a Latino opportunity district, *i. e.*, a majority-HCVAP district with an opportunity to elect a Hispanic-preferred candidate. When the Legislature reconfigured the district in 2013, it moved Nueces County, a majority-HCVAP county, into a new Anglo-majority district to protect an incumbent "who was not the candidate of choice of those Latino voters" and likely would have been "ousted" by them absent the redistricting. C. J. S. 191a. The District Court found that the "placement of Nueces County Hispanics in an Anglo-majority district ensures that the Anglo majority usually will defeat the minority-preferred candidate, given the racially polarized voting in the area." *Id.*, at 189a–190a. It also found that "the political processes are not equally open to Hispanics" in Texas as a result of its "history of official discrimination touching on the right of Hispanics to register, vote, and otherwise to participate in the democratic process [that] is well documented," and that "Latinos bear the effects of past discrimination in areas such as education and employment/income, which hinder their

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ability to participate effectively in the political process." *Id.*, at 190a–191a. Given those findings, the District Court concluded that the newly constituted CD27 "has the effect of diluting Nueces County Hispanic voters' electoral opportunity." *Id.*, at 191a.

Texas nevertheless contended (and maintains here) that no §2 results violation existed because only "seven compact Latino opportunity districts could be drawn in South/West Texas," *id.*, at 181a, and that all seven districts already existed under its maps. To explain how it counted to seven, Texas pointed to the creation of CD35 as a supposed new Latino opportunity district that joined Travis County Hispanics with Hispanics in San Antonio. The District Court agreed that only seven such districts could be drawn in the area, but rejected Texas' invocation of CD35 as a defense. The District Court concluded that because Travis County "[did] not have Anglo bloc voting," 274 F. Supp. 3d, at 683, §2 did not require the placement of Travis County Hispanics in an opportunity district, C. J. S. 176a; see also *Thornburg* v. *Gingles*, 478 U. S. 30, 51 (1986). The District Court found that Texas had moved Travis County Hispanics from their pre-2011 district, CD25, to the newly constituted CD35, not to comply with §2, but "to use race as a tool for partisan goals . . . to intentionally destroy an existing district with significant minority population (both African American and Hispanic) that consistently elected a Democrat (CD25)." 274 F. Supp. 3d, at 683. Thus, it concluded that "CD35 was an impermissible racial gerrymander because race predominated in its creation without furthering a compelling state interest." *Ibid.*

Importantly, the District Court concluded that, without CD35, Texas could have drawn one more Latino opportunity district in South/West Texas that included Nueces County Hispanics. C. J. S. 181a; see also *id.*, at 190a ("Plaintiffs have thus shown that a district could be drawn in which Hispanics, including Nueces County Hispanics, are sufficiently numerous and geographically compact to constitute a major-

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ity HCVAP"); *id.*, at 192a ("Numerous maps also demonstrated that accommodating the §2 rights of all or most Nueces County Hispanic voters would not compromise the §2 rights of any other voters, and in fact including it substantially accommodates the §2 rights of Hispanic voters in South/West Texas"). Indeed, "[p]lans were submitted during the legislative session and during this litigation that showed that seven compact districts could be drawn that included all or most Nueces County Hispanic voters but not Travis County voters." *Id.*, at 181a, n. 47.

2

Nothing in the record or the parties' briefs suggests that the District Court clearly erred in these findings of fact, which unambiguously support its conclusion that there is a §2 results violation with respect to CD27. Nevertheless, the majority offers two reasons for reversing that conclusion. First, the majority contends that the District Court erred because "in evaluating the presence of majority bloc voting in CD35," it "looked at only one, small part of the district, the portion that falls within Travis County." *Ante*, at 616. It cites to *Bethune-Hill* v. *Virginia State Bd. of Elections*, 580 U. S. 178, 192 (2017), an equal protection racial gerrymandering case, for the proposition "that redistricting analysis must take place at the district level." *Ante*, at 616. According to the majority, then, the District Court should have looked at the existence of majority bloc voting in CD35 as a whole after the 2011 redistricting.

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But the majority confuses the relevant inquiry, as well as the relevant timeline. The particular §2 question here does not concern the status of Travis County Latinos in the newly constituted CD35 after the 2011 redistricting. Rather, it concerns the status of Travis County Latinos in the old CD25, prior to the 2011 redistricting. That is because the challengers' §2 claim concerns the choices before the Legislature *at the time of the 2011 redistricting*, when it was deciding which Latinos in Southwest Texas to place in the

new opportunity district to be created in that area of the State. The Legislature chose to include Travis County Latinos in an opportunity district at the expense of the Nueces County Latinos, who were instead moved into a majority-Anglo district. So the question is whether, knowing that Nueces County Latinos indisputably had a §2 right, the Legislature's choice was nevertheless justified because the Travis County Latinos also had a §2 right that needed to be accommodated. In other words, did the Legislature actually create a new §2 opportunity district for persons with a §2 right, or did it simply move people without a §2 right into a new district and just call it an opportunity district? To answer that question, the status of Travis County Latinos in 2011 is the only thing that matters, and the District Court thus correctly focused its inquiry on whether bloc voting existed in Travis County *prior* to the 2011 redistricting, such that Travis County Latinos could be found to have a §2 right. Whether the newly constituted CD35 *now* qualifies as a §2 opportunity district—an inquiry that would, as the majority suggests, call for districtwide consideration—is beside the point.

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Second, the majority reasons that "the 2013 Legislature had 'good reasons' to believe that [CD35] was a viable Latino opportunity district that satisfied the *Gingles* factors." *Ante*, at 615. For this, the majority cites to the fact that the district "was based on a concept proposed by MALDEF" and that one group of plaintiffs "argued that the district [was] mandated by §2," and vaguely suggests that, contrary to the District Court's finding, "there is ample evidence" of majority bloc voting in CD35. *Ibid.*[18]

The majority forgets, yet again, that we review factual findings for clear error. *Harris*, 581 U. S., at 293. Indeed,

[18] The majority also believes that the interim orders gave the Legislature cover with respect to CD35, *ante*, at 616, forgetting that the District Court explicitly and repeatedly warned the parties that its interim orders did not resolve all factual and legal disputes in the cases.

its analysis is too cursory even for *de novo* review. The majority does not meaningfully engage with the full factual record below. Instead, it looks only to the handful of favorable facts cited in Texas' briefs. Compare Brief for Appellants 46 with *ante*, at 616–617. Had the majority considered the full record, it could only have found that the District Court cited ample evidence in support of its conclusion that the Legislature had no basis for believing that §2 required its drawing of CD35. In fact, the District Court noted that Texas in 2011 "actually asserted that CD35 is not required by §2," C. J. S. 174a, n. 40, that the main plan architect testified that he was not sure whether §2 required drawing the district, and that testimony at trial showed that the district was drawn because, on paper, it would fulfill the requirement of being majority-HCVAP while providing Democrats only one new district, and "not because all of the *Gingles* factors were satisfied," *id.*, at 179a, n. 45. The District Court also concluded that "there is no evidence that any member of the Legislature . . . had any basis in evidence for believing that CD35 was required by §2 other than its HCVAP-majority status." *Ibid.*

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Had the majority properly framed the inquiry and applied the clear-error standard to the full factual record, it could not convincingly dispute the existence of a §2 results violation as to CD27. Texas diluted the voting strength of Nueces County Latinos by transforming a minority-opportunity district into a majority-Anglo district. The State cannot defend that result by pointing to CD35, because its "creation of an opportunity district for [Travis County Latinos] without a §2 right offers no excuse for its failure to provide an opportunity district for [Nueces County Latinos] with a §2 right." *League of United Latin American Citizens* v. *Perry*, 548 U. S. 399, 430 (2006) (*LULAC*).[19]

[19] It is worth noting that Texas' efforts to suppress the voting strength of minority voters in Nueces County eerily mirror the actions this Court invalidated as a violation of §2 in *LULAC*, 548 U. S. 399. Like in *LULAC*,

B

1

I turn now to HD32 and HD34. Before the 2011 redistricting, Nueces County had within it two Latino opportunity districts and part of one Anglo-represented district. 267 F. Supp. 3d, at 767. Due to slower population growth reflected in the 2010 census, however, Nueces County was entitled to have within it only two districts. Accordingly, during the 2011 redistricting, the Legislature opted to "eliminate one of the Latino opportunity districts . . . and draw two districts wholly within Nueces County—one strongly Latino (HD34) and one a safe Anglo Republican seat (HD32) to protect [an] incumbent." *Ibid.* "Based on an analysis of the *Gingles* requirements and the totality of the circumstances," however, the District Court found that the Legislature could have drawn two compact minority districts in Nueces County. *Id.*, at 780. Namely, the evidence demonstrated that it was possible to draw a map with "two districts with greater than 50% HCVAP," that "Latinos in Nueces County are highly cohesive, and that Anglos vote as a block usually to defeat minority preferred candidates." *Id.*, at 777–778.

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"a majority-Hispanic district that would likely have elected the Hispanic-preferred candidate was flipped into an Anglo-majority district to protect a candidate that was not preferred by the Hispanic voters." C. J. S. 182a; see also *LULAC*, 548 U. S., at 427–429. And like in *LULAC*, Texas attempted to defend that curtailment of minority voters' rights by pointing to the creation of another supposed opportunity district. 274 F. Supp. 3d, at 684–685; *LULAC*, 548 U. S., at 429. In finding a §2 results violation, the Court concluded that the "vote dilution of a group that was beginning to . . . overcome prior electoral discrimination . . . cannot be sustained." *Id.*, at 442. The Court also rejected Texas' defense, holding that its "creation of an opportunity district for those without a §2 right offers no excuse for its failure to provide an opportunity district for those with a §2 right." *Id.*, at 430. In line with *LULAC*, the Court should hold that Texas has once again contravened §2 in its drawing of CD27.

The District Court then considered two proposed configurations for those districts: one with two HCVAP-majority districts located wholly within Nueces County, and another that required breaking the County Line Rule. *Id.*, at 777. The challengers preferred the latter configuration because, according to their expert, "an exogenous election index" revealed that the two HCVAP-majority districts wholly within Nueces County did "not perform sufficiently." *Id.*, at 778. The District Court did not accept that expert's assessment at face value. Instead, it explained that "an exogenous election index alone will not determine opportunity," and so evaluated the expert testing and ample other evidence and ultimately concluded that the challengers had "not adequately demonstrated that they lack equal opportunity in [an alternative] configuration . . . such that a county line break is necessary." *Id.*, at 778, 781. Thus, although it found that "two HCVAP-districts could have been drawn that would provide Hispanics with equal electoral opportunity, and that §2 could require those two districts," because §2 did not require the challengers' requested remedy (*i. e.*, breaking the County Line Rule), the District Court had to "consider whether §2 requires a remedy" and directed the challengers to "consider their preferred configuration for the remedy stage" that was to follow (before Texas prematurely appealed). *Id.*, at 783.

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The majority purports to accept these factual findings and contends that they "show that [HD32 and HD34] do not violate §2." *Ante*, at 617. Specifically, the majority points to the fact that the challengers' "own expert determined that it was not possible to divide Nueces County into more than one *performing* Latino district" without breaking the County Line Rule, a remedy the District Court concluded was not required by §2. *Ibid.* (emphasis in original). "So if Texas could *not* create two performing districts in Nueces County and did *not* have to break county lines," the

majority reasons, "the logical result is that Texas did not dilute the Latino vote." *Ibid.* (emphasis in original). In its view, a districting decision cannot be said to dilute the votes of minority voters "if the alternative to the districting decision at issue would not enhance the ability of minority voters to elect the candidates of their choice." *Ibid.*

At bottom, then, the majority rests its conclusion on one aspect of the challengers' expert evidence, *i. e.*, that it was not possible to place within Nueces County more than one performing Latino district without breaking county lines. The majority acknowledges the District Court's finding that the challengers had "'failed to show' that two majority-Latino districts in Nueces County would not perform," but waves away that finding by concluding that the District Court "twisted the burden of proof beyond recognition" by "suggest[ing] that a plaintiff might succeed on its §2 claim because its expert failed to show that the necessary factual basis for the claim could not be established." *Ante*, at 618. That conclusion is only possible because the majority closes its eyes to significant evidence in the record and misrepresents the District Court's conclusion about the potential for creating two performing Latino-majority districts in Nueces County.

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The majority, of course, is right on one thing: The District Court recognized that the challengers' expert opined that the two HCVAP-majority districts would not perform based on the results of an exogenous election index. See *ante*, at 617. But the majority ignores that the District Court rejected that expert's conclusion because "the results of an exogenous election index alone will not determine opportunity," as "[s]uch indices often do not mirror endogenous election performance." 267 F. Supp. 3d, at 778. Instead of "just relying on an exogenous election index to measure opportunity," the District Court "conduct[ed] an intensely local appraisal to determine whether real electoral opportunity exists." *Ibid.*

That "intensely local appraisal" resulted in a lengthy analysis that considered, among other facts: that Texas had a long "history of voting-related discrimination"; that "racially polarized voting exist[s] in Nueces County and its house district elections, the level is high, and the high degree of Anglo bloc voting plays a role in the defeat of Hispanic candidates"; "that Hispanics, including in Nueces County, suffer a 'continuing pattern of disadvantage' relative to non-Hispanics"; that population growth in the county "was [driven by] Hispanic growth" and that the "HCVAP continues to climb"; that the districts "include demographic distributions strongly favoring Hispanic voters," and that the "numbers translate into a significant advantage in house district elections"; and that data analysis showed that "performance for Latinos increased significantly in presidential election years," which "indicates that the districts provide potential to elect." *Id.*, at 778–782.[20]

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The District Court's focus on the history of the county as well as its potential performance going forward was an important point of departure from the challengers' expert, who considered only the former. See *LULAC*, 548 U. S., at 442 (noting "a significant distinction" in analysis of what district performance "'had been'" compared to "how it would operate today . . . given the growing Latino political power in the district"). The District Court also found the expert's analysis lacking in other key respects. Namely, the District Court noted that one of the majority-HCVAP districts "provides opportunity, at least in presidential election years";

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[20] The majority contends that the District Court did not engage in a sufficiently local analysis because it cited to the statewide history of discrimination against minority voters, the continuing disadvantage of Latino voters, and racially polarized voting. *Ante*, at 619. The majority not only misapprehends the importance of that statewide evidence to the local appraisal, but again ignores the many other factual findings and analysis that are specific to Nueces County and thus problematic for its conclusion. See *infra*, at 664–665.

that "[m]ost of the elections in [the exogenous election] index did not involve a *Latino* Democrat candidate"; and that the expert "only looked at statewide races and no county races," even though it was "conceivable that, in competitive local races with Latino candidates, Hispanic voters would mobilize in significantly higher numbers." 267 F. Supp. 3d, at 781 (emphasis in original).

Based on this review of the evidence, the District Court concluded "that Hispanics have equal opportunity in two districts drawn wholly within Nueces County (or at least [the challengers] failed to show that they do not)." *Id.*, at 782. It further explained that, whereas the "evidence shows that two HCVAP-districts could have been drawn that would provide Hispanics with equal electoral opportunity, . . . the evidence does not show that the Legislature was required to break the County Line Rule to draw what [the challengers] consider to be 'effective' districts." *Id.*, at 783.

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When read in the context of the full analysis just detailed, it is clear that the District Court was not "twist[ing] the burden of proof," *ante*, at 618, when it observed that the challengers "failed to show that" the two HCVAP-majority districts drawn wholly within Nueces County would not perform. That statement plainly refers to the challengers' failure to rebut the finding that the two districts wholly within Nueces County provided equal electoral opportunity to Hispanics, as they needed to do to show that § 2 required breaking the County Line Rule. If anything is "twisted . . . beyond recognition," *ibid.*, it is the majority opinion's description of the District Court's findings. For while relying on a reference to what the challengers' expert opined, the majority wholly ignores the District Court's lengthy discussion rejecting that opinion on the basis of other evidence in the record.[21]

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[21] Contrary to what the majority suggests, the District Court did not believe that "simple Latino majorities in Nueces County might be sufficient to create opportunity districts" based only on "bare num-

This Court has been clear that "the ultimate right of § 2 is equality of opportunity." *Johnson* v. *De Grandy*, 512 U. S. 997, 1014, n. 11 (1994). The District Court found that two HCVAP-majority districts drawn wholly within Nueces County provided such "equality of opportunity," and its findings of fact are not clearly erroneous. Only by selectively reading the factual record and ignoring the relevant analysis of those facts can the majority escape the § 2 results violation that flows from those findings.

IV

The Equal Protection Clause of the Fourteenth Amendment and § 2 of the Voting Rights Act secure for all voters in our country, regardless of race, the right to equal participation in our political processes. Those guarantees mean little, however, if courts do not remain vigilant in curbing States' efforts to undermine the ability of minority voters to meaningfully exercise that right. For although we have made progress, "voting discrimination still exists; no one doubts that." *Shelby County*, 570 U. S., at 536.

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The Court today does great damage to that right of equal opportunity. Not because it denies the existence of that right, but because it refuses its enforcement. The Court intervenes when no intervention is authorized and blinds itself to the overwhelming factual record below. It does all of this to allow Texas to use electoral maps that, in design and ef-

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bers." *Ante*, at 618–619, n. 27. Consistent with its rebuke of Texas elsewhere in the opinion for advocating a "bright-line rule that any HCVAP-majority district is by definition a Latino opportunity district" because it "may still lack 'real electoral opportunity,'" C. J. S. 134a, the District Court in its analysis of HD32 and HD34 was clear that the challengers "could assert that [the] HCVAP-majority districts do not present real electoral opportunity due to racially polarized voting and lower registration and turnout caused by the lingering effects of official discrimination." 267 F. Supp. 3d, at 781. Based on its review of that evidence, it concluded that the two majority-HCVAP districts drawn within Nueces County provided minority voters equal electoral opportunity. *Id.*, at 783.

fect, burden the rights of minority voters to exercise that most precious right that is "preservative of all rights." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370 (1886); see *Husted* v. *A. Philip Randolph Institute*, 584 U. S. 756, 810 (2018) (SOTOMAYOR, J., dissenting) ("Our democracy rests on the ability of all individuals, regardless of race, income, or status, to exercise their right to vote"). Because our duty is to safeguard that fundamental right, I dissent.

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TRUMP, PRESIDENT OF THE UNITED STATES, ET AL. *v.* HAWAII ET AL.

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

No. 17–965. Argued April 25, 2018—Decided June 26, 2018

In September 2017, the President issued Proclamation No. 9645, seeking to improve vetting procedures for foreign nationals traveling to the United States by identifying ongoing deficiencies in the information needed to assess whether nationals of particular countries present a security threat. The Proclamation placed entry restrictions on the nationals of eight foreign states whose systems for managing and sharing information about their nationals the President deemed inadequate. Foreign states were selected for inclusion based on a review undertaken pursuant to one of the President's earlier Executive Orders. As part of that review, the Department of Homeland Security (DHS), in consultation with the State Department and intelligence agencies, developed an information and risk assessment "baseline." DHS then collected and evaluated data for all foreign governments, identifying those having deficient information-sharing practices and presenting national security concerns, as well as other countries "at risk" of failing to meet the baseline. After a 50-day period during which the State Department made diplomatic efforts to encourage foreign governments to improve their practices, the Acting Secretary of Homeland Security concluded that eight countries—Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen—remained deficient. She recommended entry restrictions for certain nationals from all of those countries but Iraq, which had a close cooperative relationship with the U. S. She also recommended including Somalia, which met the information-sharing component of the baseline standards but had other special risk factors, such as a significant terrorist presence. After consulting with multiple Cabinet members, the President adopted the recommendations and issued the Proclamation. Invoking his authority under 8 U. S. C. §§ 1182(f) and 1185(a), he determined that certain restrictions were necessary to "prevent the entry of those foreign nationals about whom the United States Government lacks sufficient information" and "elicit improved identity-management and information-sharing protocols and practices from foreign governments." The Proclamation imposes a range of entry restrictions that vary based on the "distinct circumstances" in each of the eight countries. It exempts lawful permanent residents and pro-

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vides case-by-case waivers under certain circumstances. It also directs DHS to assess on a continuing basis whether the restrictions should be modified or continued, and to report to the President every 180 days. At the completion of the first such review period, the President determined that Chad had sufficiently improved its practices, and he accordingly lifted restrictions on its nationals.

Plaintiffs—the State of Hawaii, three individuals with foreign relatives affected by the entry suspension, and the Muslim Association of Hawaii—argue that the Proclamation violates the Immigration and Nationality Act (INA) and the Establishment Clause. The District Court granted a nationwide preliminary injunction barring enforcement of the restrictions. The Ninth Circuit affirmed, concluding that the Proclamation contravened two provisions of the INA: § 1182(f), which authorizes the President to "suspend the entry of all aliens or any class of aliens" whenever he "finds" that their entry "would be detrimental to the interests of the United States," and § 1152(a)(1)(A), which provides that "no person shall . . . be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." The court did not reach the Establishment Clause claim.

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Held:

1. This Court assumes without deciding that plaintiffs' statutory claims are reviewable, notwithstanding consular nonreviewability or any other statutory nonreviewability issue. See *Sale* v. *Haitian Centers Council, Inc.*, 509 U. S. 155. Pp. 682–683.

2. The President has lawfully exercised the broad discretion granted to him under § 1182(f) to suspend the entry of aliens into the United States. Pp. 683–697.

(a) By its terms, § 1182(f) exudes deference to the President in every clause. It entrusts to the President the decisions whether and when to suspend entry, whose entry to suspend, for how long, and on what conditions. It thus vests the President with "ample power" to impose entry restrictions in addition to those elsewhere enumerated in the INA. *Sale*, 509 U. S., at 187. The Proclamation falls well within this comprehensive delegation. The sole prerequisite set forth in § 1182(f) is that the President "find[ ]" that the entry of the covered aliens "would be detrimental to the interests of the United States." The President has undoubtedly fulfilled that requirement here. He first ordered DHS and other agencies to conduct a comprehensive evaluation of every single country's compliance with the information and risk assessment baseline. He then issued a Proclamation with extensive findings about the deficiencies and their impact. Based on that review, he

found that restricting entry of aliens who could not be vetted with adequate information was in the national interest.

Even assuming that some form of inquiry into the persuasiveness of the President's findings is appropriate, but see *Webster* v. *Doe*, 486 U. S. 592, 600, plaintiffs' attacks on the sufficiency of the findings cannot be sustained. The 12-page Proclamation is more detailed than any prior order issued under § 1182(f). And such a searching inquiry is inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere. See, *e. g.*, *Sale*, 509 U. S., at 187–188.

The Proclamation comports with the remaining textual limits in § 1182(f). While the word "suspend" often connotes a temporary deferral, the President is not required to prescribe in advance a fixed end date for the entry restriction. Like its predecessors, the Proclamation makes clear that its "conditional restrictions" will remain in force only so long as necessary to "address" the identified "inadequacies and risks" within the covered nations. Finally, the Proclamation properly identifies a "class of aliens" whose entry is suspended, and the word "class" comfortably encompasses a group of people linked by nationality. Pp. 684–688.

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(b) Plaintiffs have not identified any conflict between the Proclamation and the immigration scheme reflected in the INA that would implicitly bar the President from addressing deficiencies in the Nation's vetting system. The existing grounds of inadmissibility and the narrow Visa Waiver Program do not address the failure of certain high-risk countries to provide a minimum baseline of reliable information. Further, neither the legislative history of § 1182(f) nor historical practice justifies departing from the clear text of the statute. Pp. 688–693.

(c) Plaintiffs' argument that the President's entry suspension violates § 1152(a)(1)(A) ignores the basic distinction between admissibility determinations and visa issuance that runs throughout the INA. Section 1182 defines the universe of aliens who are admissible into the United States (and therefore eligible to receive a visa). Once § 1182 sets the boundaries of admissibility, § 1152(a)(1)(A) prohibits discrimination in the allocation of immigrant visas based on nationality and other traits. Had Congress intended in § 1152(a)(1)(A) to constrain the President's power to determine who may enter the country, it could have chosen language directed to that end. Common sense and historical practice confirm that § 1152(a)(1)(A) does not limit the President's delegated authority under § 1182(f). Presidents have repeatedly exercised their authority to suspend entry on the basis of nationality. And on plaintiffs' reading, the President would not be permitted to suspend

entry from particular foreign states in response to an epidemic, or even if the United States were on the brink of war. Pp. 694–697.

3. Plaintiffs have not demonstrated a likelihood of success on the merits of their claim that the Proclamation violates the Establishment Clause. Pp. 697–711.

(a) The individual plaintiffs have Article III standing to challenge the exclusion of their relatives under the Establishment Clause. A person's interest in being united with his relatives is sufficiently concrete and particularized to form the basis of an Article III injury in fact. Cf., *e. g.*, *Kerry* v. *Din*, 576 U. S. 86, 101. Pp. 697–699.

(b) Plaintiffs allege that the primary purpose of the Proclamation was religious animus and that the President's stated concerns about vetting protocols and national security were but pretexts for discriminating against Muslims. At the heart of their case is a series of statements by the President and his advisers both during the campaign and since the President assumed office. The issue, however, is not whether to denounce the President's statements, but the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility. In doing so, the Court must consider not only the statements of a particular President, but also the authority of the Presidency itself. Pp. 699–702.

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(c) The admission and exclusion of foreign nationals is a "fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo* v. *Bell*, 430 U. S. 787, 792. Although foreign nationals seeking admission have no constitutional right to entry, this Court has engaged in a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U. S. citizen. That review is limited to whether the Executive gives a "facially legitimate and bona fide" reason for its action, *Kleindienst* v. *Mandel*, 408 U. S. 753, 769, but the Court need not define the precise contours of that narrow inquiry in this case. For today's purposes, the Court assumes that it may look behind the face of the Proclamation to the extent of applying rational basis review, *i. e.*, whether the entry policy is plausibly related to the Government's stated objective to protect the country and improve vetting processes. Plaintiffs' extrinsic evidence may be considered, but the policy will be upheld so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds. Pp. 702–705.

(d) On the few occasions where the Court has struck down a policy as illegitimate under rational basis scrutiny, a common thread has been that the laws at issue were "divorced from any factual context from which [the Court] could discern a relationship to legitimate state interests." *Romer* v. *Evans*, 517 U. S. 620, 635. The Proclamation does not

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fit that pattern. It is expressly premised on legitimate purposes and says nothing about religion. The entry restrictions on Muslim-majority nations are limited to countries that were previously designated by Congress or prior administrations as posing national security risks. Moreover, the Proclamation reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies. Plaintiffs challenge the entry suspension based on their perception of its effectiveness and wisdom, but the Court cannot substitute its own assessment for the Executive's predictive judgments on such matters. See *Holder* v. *Humanitarian Law Project*, 561 U. S. 1, 33–34.

Three additional features of the entry policy support the Government's claim of a legitimate national security interest. First, since the President introduced entry restrictions in January 2017, three Muslim-majority countries—Iraq, Sudan, and Chad—have been removed from the list. Second, for those countries still subject to entry restrictions, the Proclamation includes numerous exceptions for various categories of foreign nationals. Finally, the Proclamation creates a waiver program open to all covered foreign nationals seeking entry as immigrants or nonimmigrants. Under these circumstances, the Government has set forth a sufficient national security justification to survive rational basis review. Pp. 705–710.

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878 F. 3d 662, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which KENNEDY, THOMAS, ALITO, and GORSUCH, JJ., joined. KENNEDY, J., *post*, p. 711, and THOMAS, J., *post*, p. 712, filed concurring opinions. BREYER, J., filed a dissenting opinion, in which KAGAN, J., joined, *post*, p. 721. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 728.

Solicitor General Francisco argued the cause for petitioners. With him on the briefs were *Acting Assistant Attorney General Readler, Deputy Solicitors General Wall* and *Kneedler, Deputy Assistant Attorney General Mooppan, Jonathan C. Bond, Michael R. Huston, Sharon Swingle*, and *H. Thomas Byron III.*

Neal Kumar Katyal argued the cause for respondents. With him on the brief were *Russell A. Suzuki*, Acting Attorney General of Hawaii, *Clyde J. Wadsworth*, Solicitor General, and *Deirdre Marie-Iha, Donna H. Kalama, Kimberly T. Guidry, Robert T. Nakatsuji, Kaliko'onalani D. Fernandes,* and *Kevin M. Richardson*, Deputy Attorneys General,

Counsel

Colleen E. Roh Sinzdak, *Mitchell P. Reich*, *Elizabeth Hagerty*, *Sundeep Iyer*, *Reedy C. Swanson*, *Thomas P. Schmidt*, and *Sara Solow.**

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*Briefs of *amici curiae* urging reversal were filed for the State of Texas et al. by *Ken Paxton*, Attorney General of Texas, *Scott A. Keller*, Solicitor General, *Jeffrey C. Mateer*, First Assistant Attorney General, and *Ari Cuenin*, Assistant Solicitor General, and by the Attorneys General for their respective States as follows: *Steve Marshall* of Alabama, *Mark Brnovich* of Arizona, *Leslie Rutledge* of Arkansas, *Pamela Jo Bondi* of Florida, *Curtis T. Hill, Jr.*, of Indiana, *Derek Schmidt* of Kansas, *Jeff Landry* of Louisiana, *Joshua D. Hawley* of Missouri, *Michael DeWine* of Ohio, *Mike Hunter* of Oklahoma, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, and *Patrick Morrisey* of West Virginia; for the American Center for Law and Justice by *Jay Alan Sekulow*, *Stuart J. Roth*, *Colby M. May*, *Andrew J. Ekonomou*, *Jordan Sekulow*, *Craig L. Parshall*, *Matthew R. Clark*, *Benjamin P. Sisney*, *Edward L. White III*, *Erik M. Zimmerman*, *Francis J. Manion*, and *Geoffrey R. Surtees*; for the American Civil Rights Union by *Kenneth A. Klukowski*; for the Center for Constitutional Jurisprudence by *John C. Eastman* and *Anthony T. Caso*; for Citizens United et al. by *William J. Olson*, *Herbert W. Titus*, *Robert J. Olson*, *Jeremiah L. Morgan*, and *Joseph W. Miller*; for the Eagle Forum Education & Legal Defense Fund by *Lawrence J. Joseph*; for the Foundation for Moral Law by *John Eidsmoe* and *Matthew J. Clark*; for the Great Lakes Justice Center by *William Wagner* and *Erin Elizabeth Mersino*; for the Immigration Reform Law Institute by *Christopher J. Hajec*, *Julie B. Axelrod*, and *Michael M. Hethmon*; for the Liberty, Life, and Law Foundation by *Deborah J. Dewart*; for National Security Experts by *David Yerushalmi* and *Robert Joseph Muise*; for the Southeastern Legal Foundation by *William S. Consovoy*, *J. Michael Connolly*, and *Kimberly S. Hermann*; and for the Zionist Organization of America by *Elizabeth Berney*.

Briefs of *amici curiae* urging affirmance were filed for the State of New York et al. by *Eric T. Schneiderman*, Attorney General of New York, *Barbara D. Underwood*, Solicitor General, *Anisha S. Dasgupta*, Deputy Solicitor General, and *Zainab A. Chaudhry*, Assistant Solicitor General, and by the Attorneys General for their respective jurisdictions as follows: *Xavier Becerra* of California, *George Jepsen* of Connecticut, *Matthew P. Denn* of Delaware, *Karl A. Racine* of the District of Columbia, *Lisa Madigan* of Illinois, *Thomas J. Miller* of Iowa, *Janet T. Mills* of Maine, *Brian E. Frosh* of Maryland, *Maura Healey* of Massachusetts, *Gurbir S. Grewal* of New Jersey, *Hector Balderas* of New Mexico, *Ellen F. Rosen-*

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CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Under the Immigration and Nationality Act, foreign nationals seeking entry into the United States undergo a vet-

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blum of Oregon, *Peter F. Kilmartin* of Rhode Island, *Thomas J. Donovan, Jr.*, of Vermont, *Mark R. Herring* of Virginia, and *Robert Ferguson* of Wisconsin; for Chicago et al. by *Benna Ruth Solomon*, *Ryan P. Poscablo*, *Brian Neff*, *Michael N. Feuer*, *Zachary W. Carter*, and *Andrew W. Worseck*; for the American-Arab Anti-Discrimination Committee by *Christopher J. Wright*, *E. Austin Bonner*, *Abed A. Ayoub*, and *Anton C. Hajjar*; for the American Bar Association by *Hilarie Bass*, *Danielle Spinelli*, and *Kevin M. Lamb*; for the American Council on Education et al. by *Chad Golder*, *Brad D. Brian*, and *Michael R. Doyen*; for the American Jewish Committee by *Adam S. Lurie*, *Vijaya R. Palaniswamy*, *Caitlin K. Potratz*, *John W. Akin*, *Stephen A. Cobb*, and *Marc D. Stern*; for the Anti-Defamation League et al. by *John B. Harris* and *Caren Decter*; for the Association of American Medical Colleges et al. by *Joshua David Rogaczewski* and *Frank R. Trinity*; for the Association of Art Museum Directors et al. by *Sharon Katz*; for the Cato Institute by *David Y. Livshiz*, *Daniel Braun*, *Peter Jaffe*, and *Lauren Kaplin*; for Certain Immigrant Rights Organizations by *Alan C. Turner* and *Harrison Frahn*; for Colleges et al. by *Thomas J. Perrelli* and *Lindsay C. Harrison*; for Constitutional Law Scholars by *Ilya Somin*, *pro se*, *Barry R. Levy*, *H. Thomas Watson*, and *Kirk C. Jenkins*; for Constitutional Law Scholars by *Roberta A. Kaplan* and *Joshua Matz*; for Episcopal Bishops by *Jake Ewart* and *Michael R. Scott*; for Federal Courts Scholars by *Matthew S. Hellman* and *Sarah M. Konsky*; for Former Executive Branch Officials by *Robert M. Loeb*, *Kelsi Brown Corkran*, *Thomas M. Bondy*, and *Matthew L. Bush*; for Former National Security Officials by *Harold Hongju Koh*, *William J. Murphy*, *John J. Connolly*, *Phillip Spector*, and *Jonathan Freiman*; for the Freedom From Religion Foundation by *Rebecca S. Markert*; for Immigration Equality et al. by *Eric J. Gorman*, *Matthew E. Sloan*, *Jennifer H. Berman*, *Noelle M. Reed*, *Richard A. Schwartz*, *Allison B. Holcombe*, *Alyssa J. Clover*, and *Sarah Grossnickle*; for Immigration Law Professors et al. by *Robert A. Wiygul* and *Mark A. Aronchick*; for Immigration Law Scholars on the Text and Structure of the Immigration and Nationality Act by *Fatima Marouf* and *Deborah Anker*; for Interfaith Group of Religious and Interreligious Organizations by *Joseph R. Palmore*, *Marc A. Hearron*, and *Jennifer K. Brown*; for International Law Scholars et al. by *Aaron X. Fellmeth*, *Bruce V. Spiva*, and *Elisabeth C. Frost*; for the Japanese American Citizens League by *Walter D. Dellinger*, *George T. Framp-*

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ting process to ensure that they satisfy the numerous requirements for admission. The Act also vests the President with authority to restrict the entry of aliens whenever he finds that their entry "would be detrimental to the interests

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ton, Jr., and *Joseph N. Roth*; for Labor Organizations by *Barbara J. Chisholm*, *Kristin M. García*, *Nicole G. Berner*, *Deborah L. Smith*, *Judith Rivlin*, *David J. Strom*, *Alice O'Brien*, *Emma Leheny*, *Lubna A. Alam*, *Ava Barbour*, *Mario Martínez*, and *Nicholas Clark*; for the Massachusetts Technology Leadership Council, Inc., by *Christopher Escobedo Hart* and *Daniel L. McFadden*; for Members of Congress by *Elizabeth B. Wydra*, *Brianne J. Gorod*, *David H. Gans*, *Peter Karanjia*, *Geoffrey Brounell*, *Victor A. Kovner*, and *Raymond H. Brescia*; for the Muslim Justice League et al. by *Benjamin G. Shatz*; for the NAACP Legal Defense & Educational Fund, Inc., by *Ajmel Quereshi*, *Christopher Kemmitt*, *Sherrilyn A. Ifill*, *Janai S. Nelson*, *Samuel Spital*, and *Jin Hee Lee*; for the National Asian Pacific American Bar Association et al. by *James W. Kim*, *Navdeep Singh*, *Meredith S. H. Higashi*, *Rachana Pathak*, and *Albert Giang*; for the National Association of Muslim Lawyers et al. by *Adeel A. Mangi*, *Michael F. Buchanan*, and *Michael R. McDonald*; for the National Immigrant Justice Center et al. by *Robert N. Hochman* and *Charles Roth*; for the National League of Cities et al. by *Stuart Banner* and *Lisa E. Soronen*; for New York University by *Steven E. Obus* and *Terrance J. Nolan*; for the Pars Equality Center et al. by *Lisa S. Blatt*, *John A. Freedman*, *R. Stanton Jones*, *Nancy L. Perkins*, *Ronald A. Schechter*, *Robert N. Weiner*, *Kristen Clarke*, *Jon Greenbaum*, *Cyrus Mehri*, *Joanna K. Wasik*, and *Susan S. Hu*; for PEN America et al. by *Robert Corn-Revere* and *Robert D. Balin*; for Plaintiffs in *International Refugee Assistance Project* v. *Trump* by *Omar C. Jadwat*, *Lee Gelernt*, *Hina Shamsi*, *Karen C. Tumlin*, *Nicholas Espíritu*, *Melissa S. Keaney*, *Esther Sung*, *Marielena Hincapié*, *Justin B. Cox*, *David Rocah*, *Deborah A. Jeon*, *Sonia Kumar*, *Linda Evarts*, *Mariko Hirose*, *Cecillia D. Wang*, *Cody H. Wofsy*, *David Cole*, *Daniel Mach*, and *Heather L. Weaver*; for Plaintiffs in *Iranian Alliances Across Borders* v. *Trump* by *Richard B. Katskee*, *Eric Rothschild*, *Sirine Shebaya*, *Mark H. Lynch*, *Mark W. Mosier*, and *Jose E. Arvelo*; for Professors of Federal Courts Jurisprudence et al. by *Meir Feder*, *Rasha Gerges Shields*, *Rajeev Muttreja*, and *Judith Resnik*, *Burt Neuborne*, and *Lucas Guttentag*, all *pro se*; for Retired Generals of the U. S. Armed Forces et al. by *Donald Francis Donovan*, *Carl J. Micarelli*, and *Hardy Vieux*; for the Roderick & Solange MacArthur Justice Center by *Amir H. Ali*; for Scholars of Immigration Law by *Peter Margulies*, and *Alan E. Schoenfeld* and *Shoba Sivaprasad Wadhia*, both *pro se*; for the

of the United States." 8 U. S. C. § 1182(f). Relying on that delegation, the President concluded that it was necessary to impose entry restrictions on nationals of countries that do not share adequate information for an informed entry determination, or that otherwise present national security risks. Presidential Proclamation No. 9645, 82 Fed. Reg. 45161 (2017) (Proclamation). The plaintiffs in this litigation, respondents here, challenged the application of those entry restrictions to certain aliens abroad. We now decide whether the President had authority under the Act to issue the Proc-

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Tahirih Justice Center et al. by *Scott L. Winkelman*; for the United States Conference of Catholic Bishops et al. by *Theodore J. Boutrous, Jr.*, *Ethan D. Dettmer*, *Joshua S. Lipshutz*, *Anthony R. Picarello, Jr.*, and *Jeffrey Hunter Moon*; and for U. S. Companies by *Andrew J. Pincus* and *Paul W. Hughes*; for David Boyle by *Mr. Boyle*, *pro se*; for Mickey Edwards et al. by *Tadhg Dooley* and *Benjamin M. Daniels*; for Khizr Khan by *Dan Jackson*; for Karen Korematsu et al. by *Pratik A. Shah*, *Robert S. Chang*, *Eric K. Yamamoto*, *Robert L. Rusky*, *Dale Minami*, *Peter Irons*, *Leigh-Ann K. Miyasato*, *Robert A. Johnson*, *Jessica M. Weisel*, and *Rodney L. Kawakami*; for Evan McMullin et al. by *John B. Bellinger III*, *Elliott C. Mogul*, and *R. Reeves Anderson*; for Janet Napolitano et al. by *Michael J. Gottlieb* and *J. Wells Harrell*; for William Webster et al. by *Richard D. Bernstein*; for Eblal Zakzok et al. by *Robert A. Atkins*, *Andrew J. Ehrlich*, *Steven C. Herzog*, *Faiza Patel*, *Michael Price*, *Lena F. Masri*, and *Carolyn Homer*; and for 36 Appellate Lawyers by *Charles A. Bird*, *Richard A. Derevan*, *Jon B. Eisenberg*, *Kathryn E. Karcher*, *Wendy Cole Lascher*, *Robin Meadow*, *Susan Alexander*, *Robert Bacon*, *Charles Bonneau*, *Orly Degani*, *Jay-Allen Eisen*, *David Ettinger*, *Dennis Fischer*, *Paul Fogel*, *Cliff Gardner*, *Robert Gersetin*, *Howard Goodfriend*, *Mark Alan Hart*, *Laurie Hepler*, *Steven Hirsch*, *Charity Kenyon*, *Todd Lundell*, *Erick Multhaup*, *Bradley Pauley*, *Barbara Ravitz*, *Kent Richland*, *Amitai Schwartz*, *Elisabeth Semel*, *Charles Sevilla*, *Catherine Smith*, *Cindy Tobisman*, *Michael Traynor*, and *Douglas Young*.

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Briefs of *amici curiae* were filed for the Alliance Defending Freedom by *David A. Cortman*, *Rory T. Gray*, *Kristen K. Waggoner*, and *Jonathan A. Scruggs*; for the Becket Fund for Religious Liberty by *Eric C. Rassbach*, *Mark L. Rienzi*, *Diana M. Verm*, and *Joseph C. Davis*; for the Christian Legal Society et al. by *Kimberlee Wood Colby*; and for Scholars of Mormon History & Law by *Anna-Rose Mathieson*.

lamation, and whether the entry policy violates the Establishment Clause of the First Amendment.

I

A

Shortly after taking office, President Trump signed Executive Order No. 13769, Protecting the Nation From Foreign Terrorist Entry Into the United States. 82 Fed. Reg. 8977 (2017) (EO–1). EO–1 directed the Secretary of Homeland Security to conduct a review to examine the adequacy of information provided by foreign governments about their nationals seeking to enter the United States. § 3(a). Pending that review, the order suspended for 90 days the entry of foreign nationals from seven countries—Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen—that had been previously identified by Congress or prior administrations as posing heightened terrorism risks. § 3(c). The District Court for the Western District of Washington entered a temporary restraining order blocking the entry restrictions, and the Court of Appeals for the Ninth Circuit denied the Government's request to stay that order. *Washington* v. *Trump*, 847 F. 3d 1151 (2017) (*per curiam*).

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In response, the President revoked EO–1, replacing it with Executive Order No. 13780, which again directed a worldwide review. 82 Fed. Reg. 13209 (2017) (EO–2). Citing investigative burdens on agencies and the need to diminish the risk that dangerous individuals would enter without adequate vetting, EO–2 also temporarily restricted the entry (with case-by-case waivers) of foreign nationals from six of the countries covered by EO–1: Iran, Libya, Somalia, Sudan, Syria, and Yemen. §§ 2(c), 3(a). The order explained that those countries had been selected because each "is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones." § 1(d). The entry restriction was to stay in effect for 90 days, pending completion of the worldwide review.

These interim measures were immediately challenged in court. The District Courts for the Districts of Maryland and Hawaii entered nationwide preliminary injunctions barring enforcement of the entry suspension, and the respective Courts of Appeals upheld those injunctions, albeit on different grounds. *International Refugee Assistance Project* (*IRAP*) v. *Trump*, 857 F. 3d 554 (CA4 2017); *Hawaii* v. *Trump*, 859 F. 3d 741 (CA9 2017) (*per curiam*). This Court granted certiorari and stayed the injunctions—allowing the entry suspension to go into effect—with respect to foreign nationals who lacked a "credible claim of a bona fide relationship" with a person or entity in the United States. *Trump* v. *IRAP*, 582 U. S. 571, 582 (2017) (*per curiam*). The temporary restrictions in EO–2 expired before this Court took any action, and we vacated the lower court decisions as moot. *Trump* v. *IRAP*, 583 U. S. 912 (2017); *Trump* v. *Hawaii*, 583 U. S. 941 (2017).

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On September 24, 2017, after completion of the worldwide review, the President issued the Proclamation before us—Proclamation No. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats. 82 Fed. Reg. 45161. The Proclamation (as its title indicates) sought to improve vetting procedures by identifying ongoing deficiencies in the information needed to assess whether nationals of particular countries present "public-safety threats." § 1(a). To further that purpose, the Proclamation placed entry restrictions on the nationals of eight foreign states whose systems for managing and sharing information about their nationals the President deemed inadequate.

The Proclamation described how foreign states were selected for inclusion based on the review undertaken pursuant to EO–2. As part of that review, the Department of Homeland Security (DHS), in consultation with the State Department and several intelligence agencies, developed a "baseline" for the information required from foreign governments

to confirm the identity of individuals seeking entry into the United States, and to determine whether those individuals pose a security threat. § 1(c). The baseline included three components. The first, "identity-management information," focused on whether a foreign government ensures the integrity of travel documents by issuing electronic passports, reporting lost or stolen passports, and making available additional identity-related information. Second, the agencies considered the extent to which the country discloses information on criminal history and suspected terrorist links, provides travel document exemplars, and facilitates the U. S. Government's receipt of information about airline passengers and crews traveling to the United States. Finally, the agencies weighed various indicators of national security risk, including whether the foreign state is a known or potential terrorist safe haven and whether it regularly declines to receive returning nationals following final orders of removal from the United States. *Ibid.*

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DHS collected and evaluated data regarding all foreign governments. § 1(d). It identified 16 countries as having deficient information-sharing practices and presenting national security concerns, and another 31 countries as "at risk" of similarly failing to meet the baseline. § 1(e). The State Department then undertook diplomatic efforts over a 50-day period to encourage all foreign governments to improve their practices. § 1(f). As a result of that effort, numerous countries provided DHS with travel document exemplars and agreed to share information on known or suspected terrorists. *Ibid.*

Following the 50-day period, the Acting Secretary of Homeland Security concluded that eight countries—Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen—remained deficient in terms of their risk profile and willingness to provide requested information. The Acting Secretary recommended that the President impose entry restrictions on certain nationals from all of those countries ex-

cept Iraq. §§ 1(g), (h). She also concluded that although Somalia generally satisfied the information-sharing component of the baseline standards, its "identity-management deficiencies" and "significant terrorist presence" presented special circumstances justifying additional limitations. She therefore recommended entry limitations for certain nationals of that country. § 1(i). As for Iraq, the Acting Secretary found that entry limitations on its nationals were not warranted given the close cooperative relationship between the U. S. and Iraqi Governments and Iraq's commitment to combating ISIS. § 1(g).

After consulting with multiple Cabinet members and other officials, the President adopted the Acting Secretary's recommendations and issued the Proclamation. Invoking his authority under 8 U. S. C. §§ 1182(f) and 1185(a), the President determined that certain entry restrictions were necessary to "prevent the entry of those foreign nationals about whom the United States Government lacks sufficient information"; "elicit improved identity-management and information-sharing protocols and practices from foreign governments"; and otherwise "advance [the] foreign policy, national security, and counterterrorism objectives" of the United States. Proclamation § 1(h)(i). The President explained that these restrictions would be the "most likely to encourage cooperation" while "protect[ing] the United States until such time as improvements occur." *Ibid.*

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The Proclamation imposed a range of restrictions that vary based on the "distinct circumstances" in each of the eight countries. *Ibid.* For countries that do not cooperate with the United States in identifying security risks (Iran, North Korea, and Syria), the Proclamation suspends entry of all nationals, except for Iranians seeking nonimmigrant student and exchange-visitor visas. §§ 2(b)(ii), (d)(ii), (e)(ii). For countries that have information-sharing deficiencies but are nonetheless "valuable counterterrorism partner[s]" (Chad, Libya, and Yemen), it restricts entry of nationals

seeking immigrant visas and nonimmigrant business or tourist visas. §§2(a)(i), (c)(i), (g)(i). Because Somalia generally satisfies the baseline standards but was found to present special risk factors, the Proclamation suspends entry of nationals seeking immigrant visas and requires additional scrutiny of nationals seeking nonimmigrant visas. §2(h)(ii). And for Venezuela, which refuses to cooperate in information sharing but for which alternative means are available to identify its nationals, the Proclamation limits entry only of certain government officials and their family members on nonimmigrant business or tourist visas. §2(f)(ii).

The Proclamation exempts lawful permanent residents and foreign nationals who have been granted asylum. §3(b). It also provides for case-by-case waivers when a foreign national demonstrates undue hardship, and that his entry is in the national interest and would not pose a threat to public safety. §3(c)(i); see also §3(c)(iv) (listing examples of when a waiver might be appropriate, such as if the foreign national seeks to reside with a close family member, obtain urgent medical care, or pursue significant business obligations). The Proclamation further directs DHS to assess on a continuing basis whether entry restrictions should be modified or continued, and to report to the President every 180 days. §4. Upon completion of the first such review period, the President, on the recommendation of the Secretary of Homeland Security, determined that Chad had sufficiently improved its practices, and he accordingly lifted restrictions on its nationals. Presidential Proclamation No. 9723, 83 Fed. Reg. 15937 (2018).

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B

Plaintiffs in this case are the State of Hawaii, three individuals (Dr. Ismail Elshikh, John Doe #1, and John Doe #2), and the Muslim Association of Hawaii. The State operates the University of Hawaii system, which recruits students and faculty from the designated countries. The three individual plaintiffs are U. S. citizens or lawful permanent resi-

dents who have relatives from Iran, Syria, and Yemen applying for immigrant or nonimmigrant visas. The Association is a nonprofit organization that operates a mosque in Hawaii.

Plaintiffs challenged the Proclamation—except as applied to North Korea and Venezuela—on several grounds. As relevant here, they argued that the Proclamation contravenes provisions in the Immigration and Nationality Act (INA), 66 Stat. 187, as amended. Plaintiffs further claimed that the Proclamation violates the Establishment Clause of the First Amendment, because it was motivated not by concerns pertaining to national security but by animus toward Islam.

The District Court granted a nationwide preliminary injunction barring enforcement of the entry restrictions. The court concluded that the Proclamation violated two provisions of the INA: § 1182(f), because the President did not make sufficient findings that the entry of the covered foreign nationals would be detrimental to the national interest, and § 1152(a)(1)(A), because the policy discriminates against immigrant visa applicants on the basis of nationality. 265 F. Supp. 3d 1140, 1155–1159 (Haw. 2017). The Government requested expedited briefing and sought a stay pending appeal. The Court of Appeals for the Ninth Circuit granted a partial stay, permitting enforcement of the Proclamation with respect to foreign nationals who lack a bona fide relationship with the United States. This Court then stayed the injunction in full pending disposition of the Government's appeal. 583 U. S. 1009 (2017).

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The Court of Appeals affirmed. The court first held that the Proclamation exceeds the President's authority under § 1182(f). In its view, that provision authorizes only a "temporary" suspension of entry in response to "exigencies" that "Congress would be ill-equipped to address." 878 F. 3d 662, 684, 688 (2017). The court further reasoned that the Proclamation "conflicts with the INA's finely reticulated regulatory scheme" by addressing "matters of immigration already passed upon by Congress." *Id.*, at 685, 690. The Ninth

Circuit then turned to § 1152(a)(1)(A) and determined that the entry restrictions also contravene the prohibition on nationality-based discrimination in the issuance of immigrant visas. The court did not reach plaintiffs' Establishment Clause claim.

We granted certiorari. 583 U. S. 1099 (2018).

II

Before addressing the merits of plaintiffs' statutory claims, we consider whether we have authority to do so. The Government argues that plaintiffs' challenge to the Proclamation under the INA is not justiciable. Relying on the doctrine of consular nonreviewability, the Government contends that because aliens have no "claim of right" to enter the United States, and because exclusion of aliens is "a fundamental act of sovereignty" by the political branches, review of an exclusion decision "is not within the province of any court, unless expressly authorized by law." *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537, 542–543 (1950). According to the Government, that principle barring review is reflected in the INA, which sets forth a comprehensive framework for review of orders of removal, but authorizes judicial review only for aliens physically present in the United States. See Brief for Petitioners 19–20 (citing 8 U. S. C. § 1252).

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The justiciability of plaintiffs' challenge under the INA presents a difficult question. The Government made similar arguments that no judicial review was available in *Sale* v. *Haitian Centers Council, Inc.*, 509 U. S. 155 (1993). The Court in that case, however, went on to consider on the merits a statutory claim like the one before us without addressing the issue of reviewability. The Government does not argue that the doctrine of consular nonreviewability goes to the Court's jurisdiction, see Tr. of Oral Arg. 13, nor does it point to any provision of the INA that expressly strips the Court of jurisdiction over plaintiffs' claims, see *Sebelius* v. *Auburn Regional Medical Center*, 568 U. S. 145, 153 (2013)

(requiring Congress to "clearly state[ ]" that a statutory provision is jurisdictional). As a result, we may assume without deciding that plaintiffs' statutory claims are reviewable, notwithstanding consular nonreviewability or any other statutory nonreviewability issue, and we proceed on that basis.

III

The INA establishes numerous grounds on which an alien abroad may be inadmissible to the United States and ineligible for a visa. See, *e. g.*, 8 U. S. C. §§ 1182(a)(1) (health-related grounds), (a)(2) (criminal history), (a)(3)(B) (terrorist activities), (a)(3)(C) (foreign policy grounds). Congress has also delegated to the President authority to suspend or restrict the entry of aliens in certain circumstances. The principal source of that authority, § 1182(f), enables the President to "suspend the entry of all aliens or any class of aliens" whenever he "finds" that their entry "would be detrimental to the interests of the United States."[1]

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Plaintiffs argue that the Proclamation is not a valid exercise of the President's authority under the INA. In their view, § 1182(f) confers only a residual power to temporarily halt the entry of a discrete group of aliens engaged in harmful conduct. They also assert that the Proclamation violates another provision of the INA—8 U. S. C. § 1152(a)(1)(A)—because it discriminates on the basis of nationality in the issuance of immigrant visas.

By its plain language, § 1182(f) grants the President broad discretion to suspend the entry of aliens into the United

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[1] The President also invoked his power under 8 U. S. C. § 1185(a)(1), which grants the President authority to adopt "reasonable rules, regulations, and orders" governing entry or removal of aliens, "subject to such limitations and exceptions as [he] may prescribe." Because this provision "substantially overlap[s]" with § 1182(f), we agree with the Government that we "need not resolve . . . the precise relationship between the two statutes" in evaluating the validity of the Proclamation. Brief for Petitioners 32–33.

States. The President lawfully exercised that discretion based on his findings—following a worldwide, multi-agency review—that entry of the covered aliens would be detrimental to the national interest. And plaintiffs' attempts to identify a conflict with other provisions in the INA, and their appeal to the statute's purposes and legislative history, fail to overcome the clear statutory language.

A

The text of § 1182(f) states:

> "Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate."

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By its terms, § 1182(f) exudes deference to the President in every clause. It entrusts to the President the decisions whether and when to suspend entry ("[w]henever [he] finds that the entry" of aliens "would be detrimental" to the national interest); whose entry to suspend ("all aliens or any class of aliens"); for how long ("for such period as he shall deem necessary"); and on what conditions ("any restrictions he may deem to be appropriate"). It is therefore unsurprising that we have previously observed that § 1182(f) vests the President with "ample power" to impose entry restrictions in addition to those elsewhere enumerated in the INA. *Sale*, 509 U. S., at 187 (finding it "perfectly clear" that the President could "establish a naval blockade" to prevent illegal migrants from entering the United States); see also *Abourezk* v. *Reagan*, 785 F. 2d 1043, 1049, n. 2 (CADC 1986) (describing the "sweeping proclamation power" in § 1182(f) as enabling the President to supplement the other grounds of inadmissibility in the INA).

The Proclamation falls well within this comprehensive delegation. The sole prerequisite set forth in § 1182(f) is that the President "find[ ]" that the entry of the covered aliens "would be detrimental to the interests of the United States." The President has undoubtedly fulfilled that requirement here. He first ordered DHS and other agencies to conduct a comprehensive evaluation of every single country's compliance with the information and risk assessment baseline. The President then issued a Proclamation setting forth extensive findings describing how deficiencies in the practices of select foreign governments—several of which are state sponsors of terrorism—deprive the Government of "sufficient information to assess the risks [those countries' nationals] pose to the United States." Proclamation § 1(h)(i). Based on that review, the President found that it was in the national interest to restrict entry of aliens who could not be vetted with adequate information—both to protect national security and public safety, and to induce improvement by their home countries. The Proclamation therefore "craft[ed] . . . country-specific restrictions that would be most likely to encourage cooperation given each country's distinct circumstances," while securing the Nation "until such time as improvements occur." *Ibid.*[2]

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Plaintiffs believe that these findings are insufficient. They argue, as an initial matter, that the Proclamation fails to provide a persuasive rationale for why nationality alone renders the covered foreign nationals a security risk. And they further discount the President's stated concern about deficient vetting because the Proclamation allows many aliens from the designated countries to enter on nonimmigrant visas.

Such arguments are grounded on the premise that § 1182(f) not only requires the President to *make* a finding

[2] The Proclamation states that it does not disclose every ground for the country-specific restrictions because "[d]escribing all of those reasons publicly . . . would cause serious damage to the national security of the United States, and many such descriptions are classified." § 1(j).

that entry "would be detrimental to the interests of the United States," but also to explain that finding with sufficient detail to enable judicial review. That premise is questionable. See *Webster* v. *Doe*, 486 U. S. 592, 600 (1988) (concluding that a statute authorizing the CIA Director to terminate an employee when the Director "shall deem such termination necessary or advisable in the interests of the United States" forecloses "any meaningful judicial standard of review"). But even assuming that some form of review is appropriate, plaintiffs' attacks on the sufficiency of the President's findings cannot be sustained. The 12-page Proclamation—which thoroughly describes the process, agency evaluations, and recommendations underlying the President's chosen restrictions—is more detailed than any prior order a President has issued under § 1182(f). Contrast Presidential Proclamation No. 6958, 3 CFR 133 (1996) (President Clinton) (explaining in one sentence why suspending entry of members of the Sudanese Government and armed forces "is in the foreign policy interests of the United States"); Presidential Proclamation No. 4865, 3 CFR 50–51 (1981) (President Reagan) (explaining in five sentences why measures to curtail "the continuing illegal migration by sea of large numbers of undocumented aliens into the southeastern United States" are "necessary").

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Moreover, plaintiffs' request for a searching inquiry into the persuasiveness of the President's justifications is inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere. "Whether the President's chosen method" of addressing perceived risks is justified from a policy perspective is "irrelevant to the scope of his [§ 1182(f)] authority." *Sale*, 509 U. S., at 187–188. And when the President adopts "a preventive measure . . . in the context of international affairs and national security," he is "not required to conclusively link all of the pieces in the puzzle before [courts] grant weight to [his] empirical

conclusions." *Holder* v. *Humanitarian Law Project*, 561 U. S. 1, 35 (2010).

The Proclamation also comports with the remaining textual limits in § 1182(f). We agree with plaintiffs that the word "suspend" often connotes a "defer[ral] till later," Webster's Third New International Dictionary 2303 (1966). But that does not mean that the President is required to prescribe in advance a fixed end date for the entry restrictions. Section 1182(f) authorizes the President to suspend entry "for such period as he shall deem necessary." It follows that when a President suspends entry in response to a diplomatic dispute or policy concern, he may link the duration of those restrictions, implicitly or explicitly, to the resolution of the triggering condition. See, *e. g.*, Presidential Proclamation No. 5829, 3 CFR 88 (1988) (President Reagan) (suspending the entry of certain Panamanian nationals "until such time as . . . democracy has been restored in Panama"); Presidential Proclamation No. 8693, 3 CFR 86–87 (2011) (President Obama) (suspending the entry of individuals subject to a travel restriction under United Nations Security Council resolutions "until such time as the Secretary of State determines that [the suspension] is no longer necessary"). In fact, not one of the 43 suspension orders issued prior to this litigation has specified a precise end date.

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Like its predecessors, the Proclamation makes clear that its "conditional restrictions" will remain in force only so long as necessary to "address" the identified "inadequacies and risks" within the covered nations. Proclamation Preamble, and § 1(h); see *ibid.* (explaining that the aim is to "relax[ ] or remove[ ]" the entry restrictions "as soon as possible"). To that end, the Proclamation establishes an ongoing process to engage covered nations and assess every 180 days whether the entry restrictions should be modified or terminated. §§ 4(a), (b). Indeed, after the initial review period, the President determined that Chad had made sufficient im-

provements to its identity-management protocols, and he accordingly lifted the entry suspension on its nationals. See Proclamation No. 9723, 83 Fed. Reg. 15937.

Finally, the Proclamation properly identifies a "class of aliens"—nationals of select countries—whose entry is suspended. Plaintiffs argue that "class" must refer to a well-defined group of individuals who share a common "characteristic" apart from nationality. Brief for Respondents 42. But the text of § 1182(f), of course, does not say that, and the word "class" comfortably encompasses a group of people linked by nationality. Plaintiffs also contend that the class cannot be "overbroad." *Id.*, at 42. But that simply amounts to an unspoken tailoring requirement found nowhere in Congress's grant of authority to suspend entry of not only "any class of aliens" but "all aliens."

In short, the language of § 1182(f) is clear, and the Proclamation does not exceed any textual limit on the President's authority.

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B

Confronted with this "facially broad grant of power," 878 F. 3d, at 688, plaintiffs focus their attention on statutory structure and legislative purpose. They seek support in, first, the immigration scheme reflected in the INA as a whole, and, second, the legislative history of § 1182(f) and historical practice. Neither argument justifies departing from the clear text of the statute.

1

Plaintiffs' structural argument starts with the premise that § 1182(f) does not give the President authority to countermand Congress's considered policy judgments. The President, they say, may supplement the INA, but he cannot supplant it. And in their view, the Proclamation falls in the latter category because Congress has already specified a two-part solution to the problem of aliens seeking entry from countries that do not share sufficient information with the

United States. First, Congress designed an individualized vetting system that places the burden on the alien to prove his admissibility. See § 1361. Second, instead of banning the entry of nationals from particular countries, Congress sought to encourage information sharing through a Visa Waiver Program offering fast-track admission for countries that cooperate with the United States. See § 1187.

We may assume that § 1182(f) does not allow the President to expressly override particular provisions of the INA. But plaintiffs have not identified any conflict between the statute and the Proclamation that would implicitly bar the President from addressing deficiencies in the Nation's vetting system.

To the contrary, the Proclamation supports Congress's individualized approach for determining admissibility. The INA sets forth various inadmissibility grounds based on connections to terrorism and criminal history, but those provisions can only work when the consular officer has sufficient (and sufficiently reliable) information to make that determination. The Proclamation promotes the effectiveness of the vetting process by helping to ensure the availability of such information.

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Plaintiffs suggest that the entry restrictions are unnecessary because consular officers can simply deny visas in individual cases when an alien fails to carry his burden of proving admissibility—for example, by failing to produce certified records regarding his criminal history. Brief for Respondents 48. But that misses the point: A critical finding of the Proclamation is that the failure of certain countries to provide reliable information prevents the Government from accurately determining whether an alien is inadmissible or poses a threat. Proclamation § 1(h). Unless consular officers are expected to apply categorical rules and deny entry from those countries across the board, fraudulent or unreliable documentation may thwart their review in individual cases. And at any rate, the INA certainly does not *require* that systemic problems such as the lack of reliable informa-

tion be addressed only in a progression of case-by-case admissibility determinations. One of the key objectives of the Proclamation is to encourage foreign governments to improve their practices, thus facilitating the Government's vetting process overall. *Ibid.*

Nor is there a conflict between the Proclamation and the Visa Waiver Program. The Program allows travel without a visa for short-term visitors from 38 countries that have entered into a "rigorous security partnership" with the United States. DHS, U. S. Visa Waiver Program (Apr. 6, 2016), http://www.dhs.gov/visa-waiver-program (as last visited June 25, 2018). Eligibility for that partnership involves "broad and consequential assessments of [the country's] foreign security standards and operations." *Ibid.* A foreign government must (among other things) undergo a comprehensive evaluation of its "counterterrorism, law enforcement, immigration enforcement, passport security, and border management capabilities," often including "operational site inspections of airports, seaports, land borders, and passport production and issuance facilities." *Ibid.*

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Congress's decision to authorize a benefit for "many of America's closest allies," *ibid.*, did not implicitly foreclose the Executive from imposing tighter restrictions on nationals of certain high-risk countries. The Visa Waiver Program creates a special exemption for citizens of countries that maintain exemplary security standards and offer "reciprocal [travel] privileges" to United States citizens. 8 U. S. C. § 1187(a)(2)(A). But in establishing a select partnership covering less than 20% of the countries in the world, Congress did not address what requirements should govern the entry of nationals from the vast majority of countries that fall short of that gold standard—particularly those nations presenting heightened terrorism concerns. Nor did Congress attempt to determine—as the multi-agency review process did—whether those high-risk countries provide a minimum baseline of information to adequately vet their na-

tionals. Once again, this is not a situation where "Congress has stepped into the space and solved the exact problem." Tr. of Oral Arg. 53.

Although plaintiffs claim that their reading preserves for the President a flexible power to "supplement" the INA, their understanding of the President's authority is remarkably cramped: He may suspend entry by classes of aliens "similar in nature" to the existing categories of inadmissibility—but not too similar—or only in response to "some exigent circumstance" that Congress did not already touch on in the INA. Brief for Respondents 31, 36, 50; see also Tr. of Oral Arg. 57 ("Presidents have wide berth in this area . . . if there's any sort of emergency."). In any event, no Congress that wanted to confer on the President only a residual authority to address emergency situations would ever use language of the sort in § 1182(f). Fairly read, the provision vests authority in the President to impose additional limitations on entry beyond the grounds for exclusion set forth in the INA—including in response to circumstances that might affect the vetting system or other "interests of the United States."

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Because plaintiffs do not point to any contradiction with another provision of the INA, the President has not exceeded his authority under § 1182(f).

2

Plaintiffs seek to locate additional limitations on the scope of § 1182(f) in the statutory background and legislative history. Given the clarity of the text, we need not consider such extra-textual evidence. See *State Farm Fire & Casualty Co.* v. *United States ex rel. Rigsby*, 580 U. S. 26, 36–37 (2016). At any rate, plaintiffs' evidence supports the plain meaning of the provision.

Drawing on legislative debates over § 1182(f), plaintiffs suggest that the President's suspension power should be limited to exigencies where it would be difficult for Congress

to react promptly. Precursor provisions enacted during the First and Second World Wars confined the President's exclusion authority to times of "war" and "national emergency." See Act of May 22, 1918, § 1(a), 40 Stat. 559; Act of June 21, 1941, ch. 210, § 1, 55 Stat. 252. When Congress enacted § 1182(f) in 1952, plaintiffs note, it borrowed "nearly verbatim" from those predecessor statutes, and one of the bill's sponsors affirmed that the provision would apply only during a time of crisis. According to plaintiffs, it therefore follows that Congress sought to delegate only a similarly tailored suspension power in § 1182(f). Brief for Respondents 39–40.

If anything, the drafting history suggests the opposite. In borrowing "nearly verbatim" from the pre-existing statute, Congress made one critical alteration—it removed the national emergency standard that plaintiffs now seek to reintroduce in another form. Weighing Congress's conscious departure from its wartime statutes against an isolated floor statement, the departure is far more probative. See *NLRB* v. *SW General, Inc.*, 580 U. S. 288, 307 (2017) ("[F]loor statements by individual legislators rank among the least illuminating forms of legislative history."). When Congress wishes to condition an exercise of executive authority on the President's finding of an exigency or crisis, it knows how to say just that. See, *e. g.*, 16 U. S. C. § 824*o*–1(b); 42 U. S. C. § 5192; 50 U. S. C. §§ 1701, 1702. Here, Congress instead chose to condition the President's exercise of the suspension authority on a different finding: that the entry of an alien or class of aliens would be "detrimental to the interests of the United States."

Plaintiffs also strive to infer limitations from executive practice. By their count, every previous suspension order under § 1182(f) can be slotted into one of two categories. The vast majority targeted discrete groups of foreign nationals engaging in conduct "deemed harmful by the immigration laws." And the remaining entry restrictions that focused on entire nationalities—namely, President Carter's response to the Iran hostage crisis and President Reagan's suspension

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of immigration from Cuba—were, in their view, designed as a response to diplomatic emergencies "that the immigration laws do not address." Brief for Respondents 40–41.

Even if we were willing to confine expansive language in light of its past applications, the historical evidence is more equivocal than plaintiffs acknowledge. Presidents have repeatedly suspended entry not because the covered nationals themselves engaged in harmful acts but instead to retaliate for conduct by their governments that conflicted with U. S. foreign policy interests. See, *e. g.*, Exec. Order No. 13662, 3 CFR 233 (2014) (President Obama) (suspending entry of Russian nationals working in the financial services, energy, mining, engineering, or defense sectors, in light of the Russian Federation's "annexation of Crimea and its use of force in Ukraine"); Presidential Proclamation No. 6958, 3 CFR 133 (1997) (President Clinton) (suspending entry of Sudanese governmental and military personnel, citing "foreign policy interests of the United States" based on Sudan's refusal to comply with United Nations resolution). And while some of these reprisals were directed at subsets of aliens from the countries at issue, others broadly suspended entry on the basis of nationality due to ongoing diplomatic disputes. For example, President Reagan invoked § 1182(f) to suspend entry "as immigrants" by almost all Cuban nationals, to apply pressure on the Cuban Government. Presidential Proclamation No. 5517, 3 CFR 102 (1986). Plaintiffs try to fit this latter order within their carveout for emergency action, but the proclamation was based in part on Cuba's decision to breach an immigration agreement some 15 months earlier.

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More significantly, plaintiffs' argument about historical practice is a double-edged sword. The more ad hoc their account of executive action—to fit the history into their theory—the harder it becomes to see such a refined delegation in a statute that grants the President sweeping authority to decide whether to suspend entry, whose entry to suspend, and for how long.

C

Plaintiffs' final statutory argument is that the President's entry suspension violates § 1152(a)(1)(A), which provides that "no person shall . . . be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." They contend that we should interpret the provision as prohibiting nationality-based discrimination throughout the *entire* immigration process, despite the reference in § 1152(a)(1)(A) to the act of visa issuance alone. Specifically, plaintiffs argue that § 1152(a)(1)(A) applies to the predicate question of a visa applicant's eligibility for admission and the subsequent question whether the holder of a visa may in fact enter the country. Any other conclusion, they say, would allow the President to circumvent the protections against discrimination enshrined in § 1152(a)(1)(A).

As an initial matter, this argument challenges only the validity of the entry restrictions on *immigrant* travel. Section 1152(a)(1)(A) is expressly limited to the issuance of "immigrant visa[s]" while § 1182(f) allows the President to suspend entry of "immigrants or nonimmigrants." At a minimum, then, plaintiffs' reading would not affect any of the limitations on nonimmigrant travel in the Proclamation.

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In any event, we reject plaintiffs' interpretation because it ignores the basic distinction between admissibility determinations and visa issuance that runs throughout the INA.[3]

[3] The Act is rife with examples distinguishing between the two concepts. See, *e. g.*, 8 U. S. C. § 1101(a)(4) ("The term 'application for admission' has reference to the application for admission into the United States and not to the application for the issuance of an immigrant or nonimmigrant visa."); § 1182(a) ("ineligible to receive visas and ineligible to be admitted"); § 1182(a)(3)(D)(iii) ("establishes to the satisfaction of the consular officer when applying for a visa . . . or to the satisfaction of the Attorney General when applying for admission"); § 1182(h)(1)(A)(i) ("alien's application for a visa, admission, or adjustment of status"); § 1187 (permitting entry without a visa); § 1361 (establishing burden of proof for when a person "makes

Section 1182 defines the pool of individuals who are admissible to the United States. Its restrictions come into play at two points in the process of gaining entry (or admission)[4] into the United States. First, any alien who is inadmissible under § 1182 (based on, for example, health risks, criminal history, or foreign policy consequences) is screened out as "ineligible to receive a visa." 8 U. S. C. § 1201(g). Second, even if a consular officer issues a visa, entry into the United States is not guaranteed. As every visa application explains, a visa does not entitle an alien to enter the United States "if, upon arrival," an immigration officer determines that the applicant is "inadmissible under this chapter, or any other provision of law"—including § 1182(f). § 1201(h).

Sections 1182(f) and 1152(a)(1)(A) thus operate in different spheres: Section 1182 defines the universe of aliens who are admissible into the United States (and therefore eligible to receive a visa). Once § 1182 sets the boundaries of admissibility into the United States, § 1152(a)(1)(A) prohibits discrimination in the allocation of immigrant visas based on nationality and other traits. The distinction between admissibility—to which § 1152(a)(1)(A) does not apply—and visa issuance—to which it does—is apparent from the text of the provision, which specifies only that its protections apply to the "issuance" of "immigrant visa[s]," without mentioning admissibility or entry. Had Congress instead intended in § 1152(a)(1)(A) to constrain the President's power to determine who may enter the country, it could easily have chosen language directed to that end. See, *e. g.*, §§ 1182(a)(3)(C)(ii), (iii) (providing that certain aliens "*shall not be excludable or subject to restrictions or conditions on entry* . . . because of the alien's past, current, or expected

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application for a visa . . . , or makes application for admission, or otherwise attempts to enter the United States").

[4] The concepts of entry and admission—but not issuance of a visa—are used interchangeably in the INA. See § 1101(a)(13)(A) (defining "admission" as the "lawful entry of the alien into the United States").

beliefs, statements, or associations" (emphasis added)). "The fact that [Congress] did not adopt [a] readily available and apparent alternative strongly supports" the conclusion that § 1152(a)(1)(A) does not limit the President's delegated authority under § 1182(f). *Knight* v. *Commissioner*, 552 U. S. 181, 188 (2008).

Common sense and historical practice confirm as much. Section 1152(a)(1)(A) has never been treated as a constraint on the criteria for admissibility in § 1182. Presidents have repeatedly exercised their authority to suspend entry on the basis of nationality. As noted, President Reagan relied on § 1182(f) to suspend entry "as immigrants by all Cuban nationals," subject to exceptions. Proclamation No. 5517, 51 Fed. Reg. 30470 (1986). Likewise, President Carter invoked § 1185(a)(1) to deny and revoke visas to all Iranian nationals. See Exec. Order No. 12172, 3 CFR 461 (1979), as amended by Exec. Order No. 12206, 3 CFR 249 (1980); Public Papers of the Presidents, Jimmy Carter, Sanctions Against Iran, Vol. 1, Apr. 7, 1980, pp. 611–612 (1980); see also n. 1, *supra*.

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On plaintiffs' reading, those orders were beyond the President's authority. The entry restrictions in the Proclamation on North Korea (which plaintiffs do not challenge in this litigation) would also be unlawful. Nor would the President be permitted to suspend entry from particular foreign states in response to an epidemic confined to a single region, or a verified terrorist threat involving nationals of a specific foreign nation, or even if the United States were on the brink of war.

In a reprise of their § 1182(f) argument, plaintiffs attempt to soften their position by falling back on an implicit exception for Presidential actions that are "closely drawn" to address "specific fast-breaking exigencies." Brief for Respondents 60–61. Yet the absence of any textual basis for such an exception more likely indicates that Congress did not intend for § 1152(a)(1)(A) to limit the President's flexible authority to suspend entry based on foreign policy interests. In addition, plaintiffs' proposed exigency test would require

courts, rather than the President, to determine whether a foreign government's conduct rises to the level that would trigger a supposed implicit exception to a federal statute. See *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U. S. 471, 491 (1999) (explaining that even if the Executive "disclose[d] its . . . reasons for deeming nationals of a particular country a special threat," courts would be "unable to assess their adequacy"). The text of § 1152(a)(1)(A) offers no standards that would enable courts to assess, for example, whether the situation in North Korea justifies entry restrictions while the terrorist threat in Yemen does not.

* * *

The Proclamation is squarely within the scope of Presidential authority under the INA. Indeed, neither dissent even attempts any serious argument to the contrary, despite the fact that plaintiffs' primary contention below and in their briefing before this Court was that the Proclamation violated the statute.

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IV

A

We now turn to plaintiffs' claim that the Proclamation was issued for the unconstitutional purpose of excluding Muslims. Because we have an obligation to assure ourselves of jurisdiction under Article III, we begin by addressing the question whether plaintiffs have standing to bring their constitutional challenge.

Federal courts have authority under the Constitution to decide legal questions only in the course of resolving "Cases" or "Controversies." Art. III, § 2. One of the essential elements of a legal case or controversy is that the plaintiff have standing to sue. Standing requires more than just a "keen interest in the issue." *Hollingsworth* v. *Perry*, 570 U. S. 693, 700 (2013). It requires allegations—and, eventually, proof—that the plaintiff "personal[ly]" suffered a concrete and particularized injury in connection with the conduct about which

he complains. *Spokeo, Inc.* v. *Robins*, 578 U. S. 330, 339 (2016). In a case arising from an alleged violation of the Establishment Clause, a plaintiff must show, as in other cases, that he is "directly affected by the laws and practices against which [his] complaints are directed." *School Dist. of Abington Township* v. *Schempp*, 374 U. S. 203, 224, n. 9 (1963). That is an issue here because the entry restrictions apply not to plaintiffs themselves but to others seeking to enter the United States.

Plaintiffs first argue that they have standing on the ground that the Proclamation "establishes a disfavored faith" and violates "their own right to be free from federal [religious] establishments." Brief for Respondents 27–28 (emphasis deleted). They describe such injury as "spiritual and dignitary." *Id.*, at 29.

We need not decide whether the claimed dignitary interest establishes an adequate ground for standing. The three individual plaintiffs assert another, more concrete injury: the alleged real-world effect that the Proclamation has had in keeping them separated from certain relatives who seek to enter the country. See *ibid.*; *Town of Chester* v. *Laroe Estates, Inc.*, 581 U. S. 433, 439 (2017) ("At least one plaintiff must have standing to seek each form of relief requested in the complaint."). We agree that a person's interest in being united with his relatives is sufficiently concrete and particularized to form the basis of an Article III injury in fact. This Court has previously considered the merits of claims asserted by United States citizens regarding violations of their personal rights allegedly caused by the Government's exclusion of particular foreign nationals. See *Kerry* v. *Din*, 576 U. S. 86, 101 (2015) (plurality opinion); *id.*, at 102 (KENNEDY, J., concurring in judgment); *Kleindienst* v. *Mandel*, 408 U. S. 753, 762 (1972). Likewise, one of our prior stay orders in this litigation recognized that an American individual who has "a bona fide relationship with a particular person seeking to enter the country . . . can legitimately

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claim concrete hardship if that person is excluded." *Trump* v. *IRAP*, 582 U. S., at 583.

The Government responds that plaintiffs' Establishment Clause claims are not justiciable because the Clause does not give them a legally protected interest in the admission of particular foreign nationals. But that argument—which depends upon the scope of plaintiffs' Establishment Clause rights—concerns the merits rather than the justiciability of plaintiffs' claims. We therefore conclude that the individual plaintiffs have Article III standing to challenge the exclusion of their relatives under the Establishment Clause.

B

The First Amendment provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Our cases recognize that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson* v. *Valente*, 456 U. S. 228, 244 (1982). Plaintiffs believe that the Proclamation violates this prohibition by singling out Muslims for disfavored treatment. The entry suspension, they contend, operates as a "religious gerrymander," in part because most of the countries covered by the Proclamation have Muslim-majority populations. And in their view, deviations from the information-sharing baseline criteria suggest that the results of the multi-agency review were "foreordained." Relying on Establishment Clause precedents concerning laws and policies applied domestically, plaintiffs allege that the primary purpose of the Proclamation was religious animus and that the President's stated concerns about vetting protocols and national security were but pretexts for discriminating against Muslims. Brief for Respondents 69–73.

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At the heart of plaintiffs' case is a series of statements by the President and his advisers casting doubt on the official objective of the Proclamation. For example, while a candi-

date on the campaign trail, the President published a "Statement on Preventing Muslim Immigration" that called for a "total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on." App. 158. That statement remained on his campaign website until May 2017. *Id.*, at 130–131. Then-candidate Trump also stated that "Islam hates us" and asserted that the United States was "having problems with Muslims coming into the country." *Id.*, at 120–121, 159. Shortly after being elected, when asked whether violence in Europe had affected his plans to "ban Muslim immigration," the President replied, "You know my plans. All along, I've been proven to be right." *Id.*, at 123.

One week after his inauguration, the President issued EO–1. In a television interview, one of the President's campaign advisers explained that when the President "first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'" *Id.*, at 125. The adviser said he assembled a group of Members of Congress and lawyers that "focused on, instead of religion, danger. . . . [The order] is based on places where there [is] substantial evidence that people are sending terrorists into our country." *Id.*, at 229.

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Plaintiffs also note that after issuing EO–2 to replace EO–1, the President expressed regret that his prior order had been "watered down" and called for a "much tougher version" of his "Travel Ban." Shortly before the release of the Proclamation, he stated that the "travel ban . . . should be far larger, tougher, and more specific," but "stupidly that would not be politically correct." *Id.*, at 132–133. More recently, on November 29, 2017, the President retweeted links to three anti-Muslim propaganda videos. In response to questions about those videos, the President's deputy press secretary denied that the President thinks Muslims are a threat to the United States, explaining that "the President has been talking about these security issues for years now,

from the campaign trail to the White House" and "has addressed these issues with the travel order that he issued earlier this year and the companion proclamation." *IRAP* v. *Trump*, 883 F. 3d 233, 267 (CA4 2018).

The President of the United States possesses an extraordinary power to speak to his fellow citizens and on their behalf. Our Presidents have frequently used that power to espouse the principles of religious freedom and tolerance on which this Nation was founded. In 1790 George Washington reassured the Hebrew Congregation of Newport, Rhode Island, that "happily the Government of the United States . . . gives to bigotry no sanction, to persecution no assistance [and] requires only that they who live under its protection should demean themselves as good citizens." 6 Papers of George Washington 285 (D. Twohig ed. 1996). President Eisenhower, at the opening of the Islamic Center of Washington, similarly pledged to a Muslim audience that "America would fight with her whole strength for your right to have here your own church," declaring that "[t]his concept is indeed a part of America." Public Papers of the Presidents, Dwight D. Eisenhower, June 28, 1957, p. 509 (1957). And just days after the attacks of September 11, 2001, President George W. Bush returned to the same Islamic Center to implore his fellow Americans—Muslims and non-Muslims alike—to remember during their time of grief that "[t]he face of terror is not the true faith of Islam," and that America is "a great country because we share the same values of respect and dignity and human worth." Public Papers of the Presidents, George W. Bush, Vol. 2, Sept. 17, 2001, p. 1121 (2001). Yet it cannot be denied that the Federal Government and the Presidents who have carried its laws into effect have—from the Nation's earliest days—performed unevenly in living up to those inspiring words.

Plaintiffs argue that this President's words strike at fundamental standards of respect and tolerance, in violation of our constitutional tradition. But the issue before us is not

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whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility. In doing so, we must consider not only the statements of a particular President, but also the authority of the Presidency itself.

The case before us differs in numerous respects from the conventional Establishment Clause claim. Unlike the typical suit involving religious displays or school prayer, plaintiffs seek to invalidate a national security directive regulating the entry of aliens abroad. Their claim accordingly raises a number of delicate issues regarding the scope of the constitutional right and the manner of proof. The Proclamation, moreover, is facially neutral toward religion. Plaintiffs therefore ask the Court to probe the sincerity of the stated justifications for the policy by reference to extrinsic statements—many of which were made before the President took the oath of office. These various aspects of plaintiffs' challenge inform our standard of review.

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C

For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a "fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo* v. *Bell*, 430 U. S. 787, 792 (1977); see *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 588–589 (1952) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [and] the war power."). Because decisions in these matters may implicate "relations with foreign powers," or involve "classifications . . . defined in the light of changing political and economic circumstances," such judgments "are frequently of a character more appropriate to either the Legislature or the Executive." *Mathews* v. *Diaz*, 426 U. S. 67, 81 (1976).

Nonetheless, although foreign nationals seeking admission have no constitutional right to entry, this Court has engaged in a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U. S. citizen. In *Kleindienst* v. *Mandel*, the Attorney General denied admission to a Belgian journalist and self-described "revolutionary Marxist," Ernest Mandel, who had been invited to speak at a conference at Stanford University. 408 U. S., at 756–757. The professors who wished to hear Mandel speak challenged that decision under the First Amendment, and we acknowledged that their constitutional "right to receive information" was implicated. *Id.*, at 764–765. But we limited our review to whether the Executive gave a "facially legitimate and bona fide" reason for its action. *Id.*, at 769. Given the authority of the political branches over admission, we held that "when the Executive exercises this [delegated] power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification" against the asserted constitutional interests of U. S. citizens. *Id.*, at 770.

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The principal dissent suggests that *Mandel* has no bearing on this case, *post*, at 740–741, and n. 5 (opinion of SOTOMAYOR, J.) (hereinafter the dissent), but our opinions have reaffirmed and applied its deferential standard of review across different contexts and constitutional claims. In *Din*, JUSTICE KENNEDY reiterated that "respect for the political branches' broad power over the creation and administration of the immigration system" meant that the Government need provide only a statutory citation to explain a visa denial. 576 U. S., at 106 (opinion concurring in judgment). Likewise in *Fiallo*, we applied *Mandel* to a "broad congressional policy" giving immigration preferences to mothers of illegitimate children. 430 U. S., at 795. Even though the statute created a "categorical" entry classification that discriminated on the basis of sex and legitimacy, *post*, at 740–741, n. 5, the Court

concluded that "it is not the judicial role in cases of this sort to probe and test the justifications" of immigration policies. 430 U. S., at 799 (citing *Mandel*, 408 U. S., at 770). Lower courts have similarly applied *Mandel* to broad executive action. See *Rajah* v. *Mukasey*, 544 F. 3d 427, 433, 438–439 (CA2 2008) (upholding National Security Entry-Exit Registration System instituted after September 11, 2001).

Mandel's narrow standard of review "has particular force" in admission and immigration cases that overlap with "the area of national security." *Din*, 576 U. S., at 104 (KENNEDY, J., concurring in judgment). For one, "[j]udicial inquiry into the national-security realm raises concerns for the separation of powers" by intruding on the President's constitutional responsibilities in the area of foreign affairs. *Ziglar* v. *Abbasi*, 582 U. S. 120, 142 (2017) (internal quotation marks omitted). For another, "when it comes to collecting evidence and drawing inferences" on questions of national security, "the lack of competence on the part of the courts is marked." *Humanitarian Law Project*, 561 U. S., at 34.

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The upshot of our cases in this context is clear: "Any rule of constitutional law that would inhibit the flexibility" of the President "to respond to changing world conditions should be adopted only with the greatest caution," and our inquiry into matters of entry and national security is highly constrained. *Mathews*, 426 U. S., at 81–82. We need not define the precise contours of that inquiry in this case. A conventional application of *Mandel*, asking only whether the policy is facially legitimate and bona fide, would put an end to our review. But the Government has suggested that it may be appropriate here for the inquiry to extend beyond the facial neutrality of the order. See Tr. of Oral Arg. 16–17, 25–27 (describing *Mandel* as "the starting point" of the analysis). For our purposes today, we assume that we may look behind the face of the Proclamation to the extent of applying rational basis review. That standard of review considers whether the entry policy is plausibly related to the Govern-

ment's stated objective to protect the country and improve vetting processes. See *Railroad Retirement Bd.* v. *Fritz*, 449 U. S. 166, 179 (1980). As a result, we may consider plaintiffs' extrinsic evidence, but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.[5]

D

Given the standard of review, it should come as no surprise that the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny. On the few occasions where we have done so, a common thread has been that the laws at issue lack any purpose other than a "bare . . . desire to harm a politically unpopular group." *Department of Agriculture* v. *Moreno*, 413 U. S. 528, 534 (1973). In one case, we invalidated a local zoning ordinance that required a special permit for group homes for the intellectually disabled, but not for other facilities such as fraternity houses or hospitals. We did so on the ground that the city's stated concerns about (among other things) "legal responsibility" and "crowded conditions" rested on "an irrational prejudice" against the intellectually disabled. *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 448–450 (1985) (internal quotation marks omitted). And in another case, this Court

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[5] The dissent finds "perplexing" the application of rational basis review in this context. *Post*, at 741. But what is far more problematic is the dissent's assumption that courts should review immigration policies, diplomatic sanctions, and military actions under the *de novo* "reasonable observer" inquiry applicable to cases involving holiday displays and graduation ceremonies. The dissent criticizes application of a more constrained standard of review as "throw[ing] the Establishment Clause out the window." *Post*, at 742, n. 6. But as the numerous precedents cited in this section make clear, such a circumscribed inquiry applies to any constitutional claim concerning the entry of foreign nationals. See Part IV–C, *supra*. The dissent can cite no authority for its proposition that the more free-ranging inquiry it proposes is appropriate in the national security and foreign affairs context.

overturned a state constitutional amendment that denied gays and lesbians access to the protection of antidiscrimination laws. The amendment, we held, was "divorced from any factual context from which we could discern a relationship to legitimate state interests," and "its sheer breadth [was] so discontinuous with the reasons offered for it" that the initiative seemed "inexplicable by anything but animus." *Romer* v. *Evans*, 517 U. S. 620, 632, 635 (1996).

The Proclamation does not fit this pattern. It cannot be said that it is impossible to "discern a relationship to legitimate state interests" or that the policy is "inexplicable by anything but animus." Indeed, the dissent can only attempt to argue otherwise by refusing to apply anything resembling rational basis review. But because there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification.

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The Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices. The text says nothing about religion. Plaintiffs and the dissent nonetheless emphasize that five of the seven nations currently included in the Proclamation have Muslim-majority populations. Yet that fact alone does not support an inference of religious hostility, given that the policy covers just 8% of the world's Muslim population and is limited to countries that were previously designated by Congress or prior administrations as posing national security risks. See 8 U. S. C. § 1187(a)(12)(A) (identifying Syria and state sponsors of terrorism such as Iran as "countr[ies] or area[s] of concern" for purposes of administering the Visa Waiver Program); Dept. of Homeland Security, DHS Announces Further Travel Restrictions for the Visa Waiver Program (Feb. 18, 2016) (designating Libya, Somalia, and Yemen as additional countries of concern); see also *Rajah*, 544 F. 3d, at 433, n. 3

(describing how nonimmigrant aliens from Iran, Libya, Somalia, Syria, and Yemen were covered by the National Security Entry-Exit Registration System).

The Proclamation, moreover, reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies. Plaintiffs seek to discredit the findings of the review, pointing to deviations from the review's baseline criteria resulting in the inclusion of Somalia and omission of Iraq. But as the Proclamation explains, in each case the determinations were justified by the distinct conditions in each country. Although Somalia generally satisfies the information-sharing component of the baseline criteria, it "stands apart . . . in the degree to which [it] lacks command and control of its territory." Proclamation §2(h)(i). As for Iraq, the Secretary of Homeland Security determined that entry restrictions were not warranted in light of the close cooperative relationship between the U. S. and Iraqi Governments and the country's key role in combating terrorism in the region. §1(g). It is, in any event, difficult to see how exempting one of the largest predominantly Muslim countries in the region from coverage under the Proclamation can be cited as evidence of animus toward Muslims.

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The dissent likewise doubts the thoroughness of the multiagency review because a recent Freedom of Information Act request shows that the final DHS report "was a mere 17 pages." *Post*, at 746. Yet a simple page count offers little insight into the actual substance of the final report, much less predecisional materials underlying it. See 5 U. S. C. §552(b)(5) (exempting deliberative materials from FOIA disclosure).

More fundamentally, plaintiffs and the dissent challenge the entry suspension based on their perception of its effectiveness and wisdom. They suggest that the policy is overbroad and does little to serve national security interests.

But we cannot substitute our own assessment for the Executive's predictive judgments on such matters, all of which "are delicate, complex, and involve large elements of prophecy." *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S. 103, 111 (1948); see also *Regan* v. *Wald*, 468 U. S. 222, 242–243 (1984) (declining invitation to conduct an "independent foreign policy analysis"). While we of course "do not defer to the Government's reading of the First Amendment," the Executive's evaluation of the underlying facts is entitled to appropriate weight, particularly in the context of litigation involving "sensitive and weighty interests of national security and foreign affairs." *Humanitarian Law Project*, 561 U. S., at 33–34.[6]

Three additional features of the entry policy support the Government's claim of a legitimate national security interest. First, since the President introduced entry restrictions in January 2017, three Muslim-majority countries—Iraq, Sudan, and Chad—have been removed from the list of covered countries. The Proclamation emphasizes that its "conditional restrictions" will remain in force only so long as necessary to "address" the identified "inadequacies and risks," Proclamation Preamble, and § 1(h), and establishes an ongoing process to engage covered nations and assess every 180 days whether the entry restrictions should be terminated, §§ 4(a), (b). In fact, in announcing the termination of restrictions on nationals of Chad, the President also described Libya's ongoing engagement with the State Department and the

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[6] The dissent recycles much of plaintiffs' § 1182(f) argument to assert that "Congress has already erected a statutory scheme that fulfills" the President's stated concern about deficient vetting. *Post*, at 746–748. But for the reasons set forth earlier, Congress has not in any sense "stepped into the space and solved the exact problem." Tr. of Oral Arg. 53. Neither the existing inadmissibility grounds nor the narrow Visa Waiver Program address the failure of certain high-risk countries to provide a minimum baseline of reliable information. See Part III–B–1, *supra*.

steps Libya is taking "to improve its practices." Proclamation No. 9723, 83 Fed. Reg. 15939.

Second, for those countries that remain subject to entry restrictions, the Proclamation includes significant exceptions for various categories of foreign nationals. The policy permits nationals from nearly every covered country to travel to the United States on a variety of nonimmigrant visas. See, *e. g.*, §§2(b)–(c), (g), (h) (permitting student and exchange visitors from Iran, while restricting only business and tourist nonimmigrant entry for nationals of Libya and Yemen, and imposing no restrictions on nonimmigrant entry for Somali nationals). These carveouts for nonimmigrant visas are substantial: Over the last three fiscal years—before the Proclamation was in effect—the majority of visas issued to nationals from the covered countries were nonimmigrant visas. Brief for Petitioners 57. The Proclamation also exempts permanent residents and individuals who have been granted asylum. §§3(b)(i), (vi).

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Third, the Proclamation creates a waiver program open to all covered foreign nationals seeking entry as immigrants or nonimmigrants. According to the Proclamation, consular officers are to consider in each admissibility determination whether the alien demonstrates that (1) denying entry would cause undue hardship; (2) entry would not pose a threat to public safety; and (3) entry would be in the interest of the United States. §3(c)(i); see also §3(c)(iv) (listing examples of when a waiver might be appropriate, such as if the foreign national seeks to reside with a close family member, obtain urgent medical care, or pursue significant business obligations). On its face, this program is similar to the humanitarian exceptions set forth in President Carter's order during the Iran hostage crisis. See Exec. Order No. 12206, 3 CFR 249; Public Papers of the Presidents, Jimmy Carter, Sanctions Against Iran, at 611–612 (1980) (outlining exceptions). The Proclamation also directs DHS and the State Depart-

ment to issue guidance elaborating upon the circumstances that would justify a waiver.[7]

Finally, the dissent invokes *Korematsu* v. *United States*, 323 U. S. 214 (1944). Whatever rhetorical advantage the dissent may see in doing so, *Korematsu* has nothing to do with this case. The forcible relocation of U. S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority. But it is wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission. See *post*, at 752–754. The entry suspension is an act that is well within executive authority and could have been taken by any other President—the only question is evaluating the actions of this particular President in promulgating an otherwise valid Proclamation.

The dissent's reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—"has no place in law under the Constitution." 323 U. S., at 248 (Jackson, J., dissenting).

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Under these circumstances, the Government has set forth a sufficient national security justification to survive rational basis review. We express no view on the soundness of the policy. We simply hold today that plaintiffs have not demonstrated a likelihood of success on the merits of their constitutional claim.

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[7] JUSTICE BREYER focuses on only one aspect of our consideration—the waiver program and other exemptions in the Proclamation. Citing selective statistics, anecdotal evidence, and a declaration from unrelated litigation, JUSTICE BREYER suggests that not enough individuals are receiving waivers or exemptions. *Post*, at 723–728 (dissenting opinion). Yet even if such an inquiry were appropriate under rational basis review, the evidence he cites provides "but a piece of the picture," *post*, at 726, and does not affect our analysis.

V

Because plaintiffs have not shown that they are likely to succeed on the merits of their claims, we reverse the grant of the preliminary injunction as an abuse of discretion. *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. 7, 32 (2008). The case now returns to the lower courts for such further proceedings as may be appropriate. Our disposition of the case makes it unnecessary to consider the propriety of the nationwide scope of the injunction issued by the District Court.

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 KENNEDY, concurring.

I join the Court's opinion in full.

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There may be some common ground between the opinions in this case, in that the Court does acknowledge that in some instances, governmental action may be subject to judicial review to determine whether or not it is "inexplicable by anything but animus," *Romer* v. *Evans*, 517 U. S. 620, 632 (1996), which in this case would be animosity to a religion. Whether judicial proceedings may properly continue in this case, in light of the substantial deference that is and must be accorded to the Executive in the conduct of foreign affairs, and in light of today's decision, is a matter to be addressed in the first instance on remand. And even if further proceedings are permitted, it would be necessary to determine that any discovery and other preliminary matters would not themselves intrude on the foreign affairs power of the Executive.

In all events, it is appropriate to make this further observation. There are numerous instances in which the statements and actions of Government officials are not subject to judicial scrutiny or intervention. That does not mean those officials are free to disregard the Constitution and the rights

it proclaims and protects. The oath that all officials take to adhere to the Constitution is not confined to those spheres in which the Judiciary can correct or even comment upon what those officials say or do. Indeed, the very fact that an official may have broad discretion, discretion free from judicial scrutiny, makes it all the more imperative for him or her to adhere to the Constitution and to its meaning and its promise.

The First Amendment prohibits the establishment of religion and promises the free exercise of religion. From these safeguards, and from the guarantee of freedom of speech, it follows there is freedom of belief and expression. It is an urgent necessity that officials adhere to these constitutional guarantees and mandates in all their actions, even in the sphere of foreign affairs. An anxious world must know that our Government remains committed always to the liberties the Constitution seeks to preserve and protect, so that freedom extends outward, and lasts.

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JUSTICE THOMAS, concurring.

I join the Court's opinion, which highlights just a few of the many problems with the plaintiffs' claims. There are several more. Section 1182(f) does not set forth any judicially enforceable limits that constrain the President. See *Webster* v. *Doe*, 486 U. S. 592, 600 (1988). Nor could it, since the President has *inherent* authority to exclude aliens from the country. See *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537, 542–543 (1950); accord, *Sessions* v. *Dimaya*, 584 U. S. 148, 217–218 (2018) (THOMAS, J., dissenting). Further, the Establishment Clause does not create an individual right to be free from all laws that a "reasonable observer" views as religious or antireligious. See *Town of Greece* v. *Galloway*, 572 U. S. 565, 609 (2014) (THOMAS, J., concurring in part and concurring in judgment); *Elk Grove Unified School Dist.* v. *Newdow*, 542 U. S. 1, 52–53 (2004) (THOMAS, J., concurring in judgment). The plaintiffs cannot raise any other First Amendment claim, since the al-

leged religious discrimination in this case was directed at aliens abroad. See *United States* v. *Verdugo-Urquidez*, 494 U. S. 259, 265 (1990). And, even on its own terms, the plaintiffs' proffered evidence of anti-Muslim discrimination is unpersuasive.

Merits aside, I write separately to address the remedy that the plaintiffs sought and obtained in this case. The District Court imposed an injunction that barred the Government from enforcing the President's Proclamation against anyone, not just the plaintiffs. Injunctions that prohibit the Executive Branch from applying a law or policy against anyone—often called "universal" or "nationwide" injunctions—have become increasingly common.[1] District courts, including the one here, have begun imposing universal injunctions without considering their authority to grant such sweeping relief. These injunctions are beginning to take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch.

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I am skeptical that district courts have the authority to enter universal injunctions. These injunctions did not emerge until a century and a half after the founding. And they appear to be inconsistent with longstanding limits on equitable relief and the power of Article III courts. If their popularity continues, this Court must address their legality.

I

If district courts have any authority to issue universal injunctions, that authority must come from a statute or the

[1] "Nationwide injunctions" is perhaps the more common term. But I use the term "universal injunctions" in this opinion because it is more precise. These injunctions are distinctive because they prohibit the Government from enforcing a policy with respect to anyone, including nonparties—not because they have wide geographic breadth. An injunction that was properly limited to the plaintiffs in the case would not be invalid simply because it governed the defendant's conduct nationwide.

Constitution. See *Missouri* v. *Jenkins*, 515 U. S. 70, 124 (1995) (THOMAS, J., concurring). No statute expressly grants district courts the power to issue universal injunctions.[2] So the only possible bases for these injunctions are a generic statute that authorizes equitable relief or the courts' inherent constitutional authority. Neither of those sources would permit a form of injunctive relief that is "[in]consistent with our history and traditions." *Ibid.*

A

This Court has never treated general statutory grants of equitable authority as giving federal courts a freewheeling power to fashion new forms of equitable remedies. Rather, it has read such statutes as constrained by "the body of law which had been transplanted to this country from the English Court of Chancery" in 1789. *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 105 (1945). As Justice Story explained, this Court's "settled doctrine" under such statutes is that "the remedies in equity are to be administered . . . according to the practice of courts of equity in [England]." *Boyle* v. *Zacharie & Turner*, 6 Pet. 648, 658 (1832). More recently, this Court reiterated that broad statutory grants of equitable authority give federal courts "'an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries.'" *Grupo Mexicano de Desarrollo, S. A.* v. *Alliance Bond Fund, Inc.*, 527 U. S. 308, 318 (1999) (Scalia, J., for the Court) (quoting *Atlas Life Ins. Co.* v. *W. I. Southern, Inc.*, 306 U. S. 563, 568 (1939)).

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[2] Even if Congress someday enacted a statute that clearly and expressly authorized universal injunctions, courts would need to consider whether that statute complies with the limits that Article III places on the authority of federal courts. See *infra*, at 718–719.

B

The same is true of the courts' inherent constitutional authority to grant equitable relief, assuming any such authority exists. See *Jenkins*, 515 U. S., at 124 (THOMAS, J., concurring). This authority is also limited by the traditional rules of equity that existed at the founding.

The scope of the federal courts' equitable authority under the Constitution was a point of contention at the founding, and the "more limited construction" of that power prevailed. *Id.*, at 126. The founding generation viewed equity "with suspicion." *Id.*, at 128. Several Anti-Federalists criticized the Constitution's extension of the federal judicial power to "Case[s] in . . . Equity," Art. III, § 2, as "giv[ing] the judge a discretionary power." Letters from The Federal Farmer No. XV (Jan. 18, 1788), in 2 The Complete Anti-Federalist 315, 322 (H. Storing ed. 1981). That discretionary power, the Anti-Federalists alleged, would allow courts to "explain the constitution according to the reasoning spirit of it, without being confined to the words or letter." Essays of Brutus No. XI (Jan. 31, 1788), in *id.*, at 417, 419–420. The Federalists responded to this concern by emphasizing the limited nature of equity. Hamilton explained that the judiciary would be "bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them." The Federalist No. 78, p. 471 (C. Rossiter ed. 1961) (Federalist). Although the purpose of a court of equity was "to give relief in extraordinary cases, which are exceptions to general rules," "the principles by which that relief is governed are now reduced to a regular system." *Id.*, No. 83, at 505, and n. (emphasis deleted).

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The Federalists' explanation was consistent with how equity worked in 18th-century England. English courts of equity applied established rules not only when they decided the merits, but also when they fashioned remedies. Like other aspects of equity, "the system of relief administered

by a court of equity" had been reduced "into a regular science." 3 W. Blackstone, Commentaries on the Laws of England 440–441 (1768) (Blackstone). As early as 1768, Blackstone could state that the "remedy a suitor is entitled to expect" could be determined "as readily and with as much precision, in a court of equity as in a court of law." *Id.*, at 441. Although courts of equity exercised remedial "discretion," that discretion allowed them to deny or tailor a remedy despite a demonstrated violation of a right, not to expand a remedy beyond its traditional scope. See G. Keeton, An Introduction to Equity 117–118 (1938).

In short, whether the authority comes from a statute or the Constitution, district courts' authority to provide equitable relief is meaningfully constrained. This authority must comply with longstanding principles of equity that predate this country's founding.

II

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Universal injunctions do not seem to comply with those principles. These injunctions are a recent development, emerging for the first time in the 1960s and dramatically increasing in popularity only very recently. And they appear to conflict with several traditional rules of equity, as well as the original understanding of the judicial role.

Equity originated in England as a means for the Crown to dispense justice by exercising its sovereign authority. See Adams, The Origin of English Equity, 16 Colum. L. Rev. 87, 91 (1916). Petitions for equitable relief were referred to the Chancellor, who oversaw cases in equity. See 1 S. Symons, Pomeroy's Equity Jurisprudence § 33 (5th ed. 1941) (Pomeroy); G. McDowell, Equity and the Constitution 24 (1982). The Chancellor's equitable jurisdiction was based on the "reserve of justice in the king." F. Maitland, Equity 3 (rev. 2d ed. 1936); see also 1 Pomeroy § 33, at 38 (describing the Chancellor's equitable authority as an "extraordinary jurisdiction—that of *Grace*—by delegation" from the King). Equity allowed the sovereign to afford discretionary relief to

parties where relief would not have been available under the "rigors of the common law." *Jenkins*, *supra*, at 127 (opinion of THOMAS, J.).

The English system of equity did not contemplate universal injunctions. As an agent of the King, the Chancellor had no authority to enjoin him. See Bray, Multiple Chancellors: Reforming the National Injunction, 131 Harv. L. Rev. 417, 425 (2017) (Bray). The Chancellor could not give "any relief against the king, or direct any act to be done by him, or make any decree disposing of or affecting his property; not even in cases where he is a royal trustee." 3 Blackstone 428. The Attorney General could be sued in Chancery, but not in cases that "'immediately concerned'" the interests of the Crown. Bray 425 (citing 1 E. Daniell, The Practice of the High Court of Chancery 138 (2d ed. 1845)). American courts inherited this tradition. See J. Story, Commentaries on Equity Pleadings § 69 (1838) (Story).

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Moreover, as a general rule, American courts of equity did not provide relief beyond the parties to the case. If their injunctions advantaged nonparties, that benefit was merely incidental. Injunctions barring public nuisances were an example. While these injunctions benefited third parties, that benefit was merely a consequence of providing relief to the plaintiff. Woolhandler & Nelson, Does History Defeat Standing Doctrine? 102 Mich. L. Rev. 689, 702 (2004) (Woolhandler & Nelson); see *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 13 How. 518, 564 (1852) (explaining that a private "injury makes [a public nuisance] a private nuisance to the injured party").

True, one of the recognized bases for an exercise of equitable power was the avoidance of "multiplicity of suits." Bray 426; accord, 1 Pomeroy § 243. Courts would employ "bills of peace" to consider and resolve a number of suits in a single proceeding. *Id.*, § 246. And some authorities stated that these suits could be filed by one plaintiff on behalf of a number of others. *Id.*, § 251. But the "general rule" was that

"all persons materially interested . . . in the subject-matter of a suit, are to be made *parties* to it . . . , however numerous they may be, so that there may be a complete decree, which shall bind them all." Story § 72, at 61 (emphasis added). And, in all events, these "proto-class action[s]" were limited to a small group of similarly situated plaintiffs having some right in common. Bray 426–427; see also Story § 120, at 100 (explaining that such suits were "always" based on "a common interest or a common right").

American courts' tradition of providing equitable relief only to parties was consistent with their view of the nature of judicial power. For most of our history, courts understood judicial power as "fundamentall[y] the power to render judgments in individual cases." *Murphy* v. *National Collegiate Athletic Assn.*, 584 U. S. 453, 488 (2018) (THOMAS, J., concurring). They did not believe that courts could make federal policy, and they did not view judicial review in terms of "striking down" laws or regulations. See *id.*, at 488–489. Misuses of judicial power, Hamilton reassured the people of New York, could not threaten "the general liberty of the people" because courts, at most, adjudicate the rights of "individual[s]." Federalist No. 78, at 466.

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The judiciary's limited role was also reflected in this Court's decisions about who could sue to vindicate certain rights. See *Spokeo, Inc.* v. *Robins*, 578 U. S. 330, 344–346 (2016) (THOMAS, J., concurring). A plaintiff could not bring a suit vindicating public rights—*i. e.*, rights held by the community at large—without a showing of some specific injury to himself. *Id.*, at 345–346. And a plaintiff could not sue to vindicate the private rights of someone else. See Woolhandler & Nelson 715–716. Such claims were considered to be beyond the authority of courts. *Id.*, at 711–717.

This Court has long respected these traditional limits on equity and judicial power. See, *e. g.*, *Scott* v. *Donald*, 165 U. S. 107, 115 (1897) (rejecting an injunction based on the theory that the plaintiff "so represents [a] class" whose rights were infringed by a statute as "too conjectural to fur-

nish a safe basis upon which a court of equity ought to grant an injunction"). Take, for example, this Court's decision in *Massachusetts* v. *Mellon*, 262 U. S. 447 (1923). There, a taxpayer sought to enjoin the enforcement of an appropriation statute. The Court noted that this kind of dispute "is essentially a matter of public and not of individual concern." *Id.*, at 487. A general interest in enjoining implementation of an illegal law, this Court explained, provides "no basis . . . for an appeal to the preventive powers of a court of equity." *Ibid.* Courts can review the constitutionality of an act only when "a justiciable issue" requires it to decide whether to "disregard an unconstitutional enactment." *Id.*, at 488. If the statute is unconstitutional, then courts enjoin "not the execution of the statute, but the acts of the official." *Ibid.* Courts cannot issue an injunction based on a mere allegation "that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional." *Ibid.* "To do so would be not to decide a judicial controversy." *Id.*, at 488–489.

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By the latter half of the 20th century, however, some jurists began to conceive of the judicial role in terms of resolving general questions of legality, instead of addressing those questions only insofar as they are necessary to resolve individual cases and controversies. See Bray 451. That is when what appears to be "the first [universal] injunction in the United States" emerged. *Id.*, at 438. In *Wirtz* v. *Baldor Elec. Co.*, 337 F. 2d 518 (CADC 1963), the Court of Appeals for the District of Columbia Circuit addressed a lawsuit challenging the Secretary of Labor's determination of the prevailing minimum wage for a particular industry. *Id.*, at 520. The D. C. Circuit concluded that the Secretary's determination was unsupported but remanded for the District Court to assess whether any of the plaintiffs had standing to challenge it. *Id.*, at 521–535. The D. C. Circuit also addressed the question of remedy, explaining that if a plaintiff had standing to sue then "the District Court should enjoin . . .

the Secretary's determination with respect to the *entire industry*." *Id.*, at 535 (emphasis added). To justify this broad relief, the D. C. Circuit explained that executive officers should honor judicial decisions "in all cases of essentially [the same] character." *Id.*, at 534. And it noted that, once a court has decided an issue, it "would ordinarily give the same relief to any individual who comes to it with an essentially similar cause of action." *Ibid.* The D. C. Circuit added that the case was "clearly a proceeding in which those who have standing are here to vindicate the public interest in having congressional enactments properly interpreted and applied." *Id.*, at 534–535.

Universal injunctions remained rare in the decades following *Wirtz*. See Bray 440–445. But recently, they have exploded in popularity. See *id.*, at 457–459. Some scholars have criticized the trend. See generally *id.*, at 457–465; Morley, Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts, 97 B. U. L. Rev. 615, 633–653 (2017); Morley, De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases, 39 Harv. J. L. & Pub. Pol'y 487, 521–538 (2016).

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No persuasive defense has yet been offered for the practice. Defenders of these injunctions contend that they ensure that individuals who did not challenge a law are treated the same as plaintiffs who did, and that universal injunctions give the Judiciary a powerful tool to check the Executive Branch. See Amdur & Hausman, Nationwide Injunctions and Nationwide Harm, 131 Harv. L. Rev. Forum 49, 51, 54 (2017); Malveaux, Class Actions, Civil Rights, and the National Injunction, 131 Harv. L. Rev. Forum 56, 57, 60–62 (2017). But these arguments do not explain how these injunctions are consistent with the historical limits on equity and judicial power. They at best "boi[l] down to a policy judgment" about how powers ought to be allocated among our three branches of government. *Perez* v. *Mortgage*

Bankers Assn., 575 U. S. 92, 132 (2015) (THOMAS, J., concurring in judgment). But the people already made that choice when they ratified the Constitution.

* * *

In sum, universal injunctions are legally and historically dubious. If federal courts continue to issue them, this Court is dutybound to adjudicate their authority to do so.

JUSTICE BREYER, with whom JUSTICE KAGAN joins, dissenting.

The question before us is whether Proclamation No. 9645 is lawful. If its promulgation or content was significantly affected by religious animus against Muslims, it would violate the relevant statute or the First Amendment itself. See 8 U. S. C. § 1182(f) (requiring "find[ings]" that persons denied entry "would be detrimental to the interests of the United States"); *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520 (1993) (First Amendment); *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 584 U. S. 617 (2018) (same); *post*, at 729–731 (SOTOMAYOR, J., dissenting). If, however, its sole *ratio decidendi* was one of national security, then it would be unlikely to violate either the statute or the Constitution. Which is it? Members of the Court principally disagree about the answer to this question, *i. e.*, about whether or the extent to which religious animus played a significant role in the Proclamation's promulgation or content.

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In my view, the Proclamation's elaborate system of exemptions and waivers can and should help us answer this question. That system provides for case-by-case consideration of persons who may qualify for visas despite the Proclamation's general ban. Those persons include lawful permanent residents, asylum seekers, refugees, students, children, and numerous others. There are likely many such persons, perhaps in the thousands. And I believe it appropriate to take

account of their Proclamation-granted status when considering the Proclamation's lawfulness. The Solicitor General asked us to consider the Proclamation "as" it is "written" and "as" it is "applied," waivers and exemptions included. Tr. of Oral Arg. 38. He warned us against considering the Proclamation's lawfulness "on the hypothetical situation that [the Proclamation] is what it isn't," *ibid.*, while telling us that its waiver and exemption provisions mean what they say: The Proclamation does not exclude individuals from the United States "if they meet the criteria" for a waiver or exemption, *id.*, at 33.

On the one hand, if the Government is applying the exemption and waiver provisions as written, then its argument for the Proclamation's lawfulness is strengthened. For one thing, the Proclamation then resembles more closely the two important Presidential precedents on point, President Carter's Iran order and President Reagan's Cuba proclamation, both of which contained similar categories of persons authorized to obtain case-by-case exemptions. *Ante*, at 709; Exec. Order No. 12172, 3 CFR 461 (1979), as amended by Exec. Order No. 12206, 3 CFR 249 (1980); Presidential Proclamation No. 5517, 3 CFR 102 (1986). For another thing, the Proclamation then follows more closely the basic statutory scheme, which provides for strict case-by-case scrutiny of applications. It would deviate from that system, not across the board, but where circumstances may require that deviation.

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Further, since the case-by-case exemptions and waivers apply without regard to the individual's religion, application of that system would help make clear that the Proclamation does not deny visas to numerous Muslim individuals (from those countries) who do not pose a security threat. And that fact would help to rebut the First Amendment claim that the Proclamation rests upon anti-Muslim bias rather than security need. Finally, of course, the very fact that Muslims from those countries would enter the United States

(under Proclamation-provided exemptions and waivers) would help to show the same thing.

On the other hand, if the Government is *not* applying the system of exemptions and waivers that the Proclamation contains, then its argument for the Proclamation's lawfulness becomes significantly weaker. For one thing, the relevant precedents—those of Presidents Carter and Reagan—would bear far less resemblance to the present Proclamation. Indeed, one might ask, if those two Presidents thought a case-by-case exemption system appropriate, what is different about present circumstances that would justify that system's absence?

For another thing, the relevant statute requires that there be "find[ings]" that the grant of visas to excluded persons would be "detrimental to the interests of the United States." § 1182(f). Yet there would be no such findings in respect to those for whom the Proclamation itself provides case-by-case examination (followed by the grant of a visa in appropriate cases).

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And, perhaps most importantly, if the Government is not applying the Proclamation's exemption and waiver system, the claim that the Proclamation is a "Muslim ban" rather than a "security-based" ban becomes much stronger. How could the Government successfully claim that the Proclamation rests on security needs if it is excluding Muslims who satisfy the Proclamation's own terms? At the same time, denying visas to Muslims who meet the Proclamation's own security terms would support the view that the Government excludes them for reasons based upon their religion.

Unfortunately there is evidence that supports the second possibility, *i. e.*, that the Government is not applying the Proclamation as written. The Proclamation provides that the Secretary of State and the Secretary of Homeland Security "shall coordinate to adopt guidance" for consular officers to follow when deciding whether to grant a waiver. § 3(c)(ii). Yet, to my knowledge, no guidance has issued. The only

potentially relevant document I have found consists of a set of State Department answers to certain Frequently Asked Questions, but this document simply restates the Proclamation in plain language for visa applicants. It does not provide guidance for consular officers as to how they are to exercise their discretion. See Dept. of State, FAQs on the Presidential Proclamation, https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/presidential-proclamation-archive/2017-12-04-Presidential-Proclamation.html (all Internet materials as last visited June 25, 2018).

An examination of publicly available statistics also provides cause for concern. The State Department reported that during the Proclamation's first month, two waivers were approved out of 6,555 eligible applicants. Letter from M. Waters, Assistant Secretary Legislative Affairs, to Sen. Van Hollen (Feb. 22, 2018). In its reply brief, the Government claims that number increased from 2 to 430 during the first four months of implementation. Reply Brief 17. That number, 430, however, when compared with the number of pre-Proclamation visitors, accounts for a miniscule percentage of those likely eligible for visas, in such categories as persons requiring medical treatment, academic visitors, students, family members, and others belonging to groups that, when considered as a group (rather than case by case), would not seem to pose security threats.

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Amici have suggested that there are numerous applicants who could meet the waiver criteria. For instance, the Proclamation anticipates waivers for those with "significant business or professional obligations" in the United States, § 3(c)(iv)(C), and *amici* identify many scholars who would seem to qualify. Brief for Colleges and Universities as *Amici Curiae* 25–27; Brief for American Council on Education et al. as *Amici Curiae* 20 (identifying more than 2,100 scholars from covered countries); see also Brief for Massachusetts Technology Leadership Council, Inc., as *Amicus Curiae*

14–15 (identifying technology and business leaders from covered countries). The Proclamation also anticipates waivers for those with a "close family member (*e. g.*, a spouse, child, or parent)" in the United States, § 3(c)(iv)(D), and *amici* identify many such individuals affected by the Proclamation. Brief for Labor Organizations as *Amici Curiae* 15–18 (identifying children and other relatives of U. S. citizens). The Pars Equality Center identified 1,000 individuals—including parents and children of U. S. citizens—who sought and were denied entry under the Proclamation, hundreds of whom seem to meet the waiver criteria. See Brief for Pars Equality Center et al. as *Amici Curiae* 12–28.

Other data suggest the same. The Proclamation does not apply to asylum seekers or refugees. §§ 3(b)(vi), 6(e). Yet few refugees have been admitted since the Proclamation took effect. While more than 15,000 Syrian refugees arrived in the United States in 2016, only 13 have arrived since January 2018. Dept. of State, Bureau of Population, Refugees, and Migration, Interactive Reporting, Refugee Processing Center, http://ireports.wrapsnet.org. Similarly few refugees have been admitted since January from Iran (3), Libya (1), Yemen (0), and Somalia (122). *Ibid.*

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The Proclamation also exempts individuals applying for several types of nonimmigrant visas: lawful permanent residents, parolees, those with certain travel documents, dual nationals of noncovered countries, and representatives of governments or international organizations. §§ 3(b)(i)–(v). It places no restrictions on the vast majority of student and exchange visitors, covering only those from Syria, which provided 8 percent of student and exchange visitors from the five countries in 2016. §§ 2(b)–(h); see Dept. of State, Report of the Visa Office 2016, Table XVII Nonimmigrant Visas Issued Fiscal Year 2016 (Visa Report 2016 Table XVII). Visitors from Somalia are eligible for any type of nonimmigrant visa, subject to "additional scrutiny." § 2(h)(ii). If nonim-

migrant visa applications under the Proclamation resemble those in 2016, 16 percent of visa applicants would be eligible for exemptions. See Visa Report 2016 Table XVII.

In practice, however, only 258 student visas were issued to applicants from Iran (189), Libya (29), Yemen (40), and Somalia (0) in the first three months of 2018. See Dept. of State, Nonimmigrant Visa Issuances by Nationality, Jan., Feb., and Mar. 2018. This is less than a quarter of the volume needed to be on track for 2016 student visa levels. And only 40 nonimmigrant visas have been issued to Somali nationals, a decrease of 65 percent from 2016. *Ibid.*; see Visa Report 2016 Table XVII. While this is but a piece of the picture, it does not provide grounds for confidence.

Anecdotal evidence further heightens these concerns. For example, one *amicus* identified a child with cerebral palsy in Yemen. The war had prevented her from receiving her medication, she could no longer move or speak, and her doctors said she would not survive in Yemen. Her visa application was denied. Her family received a form with a check mark in the box unambiguously confirming that "'a waiver will not be granted in your case.'" Letter from L. Blatt to S. Harris, Clerk of Court (May 1, 2018). But after the child's case was highlighted in an *amicus* brief before this Court, the family received an update from the consular officer who had initially denied the waiver. It turns out, according to the officer, that she had all along determined that the waiver criteria were met. But, the officer explained, she could not relay that information at the time because the waiver required review from a supervisor, who had since approved it. The officer said that the family's case was now in administrative processing and that she was attaching a "'revised refusal letter indicating the approval of the waiver.'" *Ibid.* The new form did not actually approve the waiver (in fact, the form contains no box saying "granted"). But a different box was now checked, reading: "'The consular officer is reviewing your eligibility for a waiver under

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the Proclamation. . . . This can be a lengthy process, and until the consular officer can make an individualized determination of [the relevant] factors, your visa application will remain refused under Section 212(f) [of the Proclamation].'" *Ibid.* One is left to wonder why this second box, indicating continuing review, had not been checked at the outset if in fact the child's case had remained under consideration all along. Though this is but one incident and the child was admitted after considerable international attention in this case, it provides yet more reason to believe that waivers are not being processed in an ordinary way.

Finally, in a pending case in the Eastern District of New York, a consular official has filed a sworn affidavit asserting that he and other officials do not, in fact, have discretion to grant waivers. According to the affidavit, consular officers "were not allowed to exercise that discretion" and "the waiver [process] is merely 'window dressing.'" See Decl. of Christopher Richardson in *Alharbi* v. *Miller*, No. 1:18–cv–2435, Doc. 24–2 (June 1, 2018), pp. 3–4. Another report similarly indicates that the U. S. Embassy in Djibouti, which processes visa applications for citizens of Yemen, received instructions to grant waivers "only in rare cases of imminent danger," with one consular officer reportedly telling an applicant that "'[e]ven for infants, we would need to see some evidence of a congenital heart defect or another medical issue of that degree of difficulty that . . . would likely lead to the child's developmental harm or death.'" Center for Constitutional Rights and the Rule of Law Clinic, Yale Law School, Window Dressing the Muslim Ban: Reports of Waivers and Mass Denials From Yemeni-American Families Stuck in Limbo 18 (2018).

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Declarations, anecdotal evidence, facts, and numbers taken from *amicus* briefs are not judicial factfindings. The Government has not had an opportunity to respond, and a court has not had an opportunity to decide. But, given the importance of the decision in this case, the need for assurance that

the Proclamation does not rest upon a "Muslim ban," and the assistance in deciding the issue that answers to the "exemption and waiver" questions may provide, I would send this case back to the District Court for further proceedings. And I would leave the injunction in effect while the matter is litigated. Regardless, the Court's decision today leaves the District Court free to explore these issues on remand.

If this Court must decide the question without this further litigation, I would, on balance, find the evidence of antireligious bias, including statements on a website taken down only after the President issued the two executive orders preceding the Proclamation, along with the other statements also set forth in JUSTICE SOTOMAYOR's opinion, a sufficient basis to set the Proclamation aside. And for these reasons, I respectfully dissent.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

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The United States of America is a Nation built upon the promise of religious liberty. Our Founders honored that core promise by embedding the principle of religious neutrality in the First Amendment. The Court's decision today fails to safeguard that fundamental principle. It leaves undisturbed a policy first advertised openly and unequivocally as a "total and complete shutdown of Muslims entering the United States" because the policy now masquerades behind a facade of national-security concerns. But this repackaging does little to cleanse Presidential Proclamation No. 9645 of the appearance of discrimination that the President's words have created. Based on the evidence in the record, a reasonable observer would conclude that the Proclamation was motivated by anti-Muslim animus. That alone suffices to show that plaintiffs are likely to succeed on the merits of their Establishment Clause claim. The majority holds otherwise by ignoring the facts, misconstruing our legal precedent, and turning a blind eye to the pain and suffering the

Proclamation inflicts upon countless families and individuals, many of whom are United States citizens. Because that troubling result runs contrary to the Constitution and our precedent, I dissent.

I

Plaintiffs challenge the Proclamation on various grounds, both statutory and constitutional. Ordinarily, when a case can be decided on purely statutory grounds, we strive to follow a "prudential rule of avoiding constitutional questions." *Zobrest* v. *Catalina Foothills School Dist.*, 509 U. S. 1, 8 (1993). But that rule of thumb is far from categorical, and it has limited application where, as here, the constitutional question proves far simpler than the statutory one. Whatever the merits of plaintiffs' complex statutory claims, the Proclamation must be enjoined for a more fundamental reason: It runs afoul of the Establishment Clause's guarantee of religious neutrality.

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A

The Establishment Clause forbids government policies "respecting an establishment of religion." U. S. Const., Amdt. 1. The "clearest command" of the Establishment Clause is that the government cannot favor or disfavor one religion over another. *Larson* v. *Valente*, 456 U. S. 228, 244 (1982); *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 532 (1993) ("[T]he First Amendment forbids an official purpose to disapprove of a particular religion"); *Edwards* v. *Aguillard*, 482 U. S. 578, 593 (1987) ("The Establishment Clause . . . forbids *alike* the preference of a religious doctrine *or* the prohibition of theory which is deemed antagonistic to a particular dogma" (internal quotation marks omitted)); *Lynch* v. *Donnelly*, 465 U. S. 668, 673 (1984) (noting that the Establishment Clause "forbids hostility toward any [religion]," because "such hostility would bring us into 'war with our national tradition as embodied in the First Amendmen[t]' "); *Epperson* v. *Arkansas*, 393 U. S. 97, 106 (1968)

("[T]he State may not adopt programs or practices . . . which aid or oppose any religion. This prohibition is absolute" (citation and internal quotation marks omitted)). Consistent with that clear command, this Court has long acknowledged that governmental actions that favor one religion "inevitabl[y]" foster "the hatred, disrespect and even contempt of those who [hold] contrary beliefs." *Engel* v. *Vitale*, 370 U. S. 421, 431 (1962). That is so, this Court has held, because such acts send messages to members of minority faiths "'that they are outsiders, not full members of the political community.'" *Santa Fe Independent School Dist.* v. *Doe*, 530 U. S. 290, 309 (2000). To guard against this serious harm, the Framers mandated a strict "principle of denominational neutrality." *Larson*, 456 U. S., at 246; *Board of Ed. of Kiryas Joel Village School Dist.* v. *Grumet*, 512 U. S. 687, 703 (1994) (recognizing the role of courts in "safeguarding a principle at the heart of the Establishment Clause, that government should not prefer one religion to another, or religion to irreligion").

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"When the government acts with the ostensible and predominant purpose" of disfavoring a particular religion, "it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides." *McCreary County* v. *American Civil Liberties Union of Ky.*, 545 U. S. 844, 860 (2005). To determine whether plaintiffs have proved an Establishment Clause violation, the Court asks whether a reasonable observer would view the government action as enacted for the purpose of disfavoring a religion. See *id.*, at 862, 866; accord, *Town of Greece* v. *Galloway*, 572 U. S. 565, 587 (2014) (plurality opinion).

In answering that question, this Court has generally considered the text of the government policy, its operation, and any available evidence regarding "the historical background of the decision under challenge, the specific series of events

leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by" the decisionmaker. *Lukumi*, 508 U. S., at 540 (opinion of KENNEDY, J.); *McCreary*, 545 U. S., at 862 (courts must evaluate "text, legislative history, and implementation . . . , or comparable official act" (internal quotation marks omitted)). At the same time, however, courts must take care not to engage in "any judicial psychoanalysis of a drafter's heart of hearts." *Id.*, at 862.

B

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Although the majority briefly recounts a few of the statements and background events that form the basis of plaintiffs' constitutional challenge, *ante*, at 699–701, that highly abridged account does not tell even half of the story. See Brief for The Roderick & Solange MacArthur Justice Center as *Amicus Curiae* 5–31 (outlining President Trump's public statements expressing animus toward Islam). The full record paints a far more harrowing picture, from which a reasonable observer would readily conclude that the Proclamation was motivated by hostility and animus toward the Muslim faith.

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During his Presidential campaign, then-candidate Donald Trump pledged that, if elected, he would ban Muslims from entering the United States. Specifically, on December 7, 2015, he issued a formal statement "calling for a total and complete shutdown of Muslims entering the United States." App. 119. That statement, which remained on his campaign website until May 2017 (several months into his Presidency), read in full:

> "Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on. According to Pew Research, among others,

> there is great hatred towards Americans by large segments of the Muslim population. Most recently, a poll from the Center for Security Policy released data showing '25% of those polled agreed that violence against Americans here in the United States is justified as a part of the global jihad' and 51% of those polled 'agreed that Muslims in America should have the choice of being governed according to Shariah.' Shariah authorizes such atrocities as murder against nonbelievers who won't convert, beheadings and more unthinkable acts that pose great harm to Americans, especially women.
>
> "Mr. Trum[p] stated, 'Without looking at the various polling data, it is obvious to anybody the hatred is beyond comprehension. Where this hatred comes from and why we will have to determine. Until we are able to determine and understand this problem and the dangerous threat it poses, our country cannot be the victims of the horrendous attacks by people that believe only in Jihad, and have no sense of reason or respect of human life. If I win the election for President, we are going to Make America Great Again.'—Donald J. Trump." *Id.*, at 158; see also *id.*, at 130–131.

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On December 8, 2015, Trump justified his proposal during a television interview by noting that President Franklin D. Roosevelt "did the same thing" with respect to the internment of Japanese Americans during World War II. *Id.*, at 120. In January 2016, during a Republican primary debate, Trump was asked whether he wanted to "rethink [his] position" on "banning Muslims from entering the country." *Ibid.* He answered, "No." *Ibid.* A month later, at a rally in South Carolina, Trump told an apocryphal story about United States General John J. Pershing killing a large group of Muslim insurgents in the Philippines with bullets dipped in pigs' blood in the early 1900's. *Id.*, at 163–164. In March 2016, he expressed his belief that "Islam hates us. . . . [W]e can't allow people coming into this country who have this

hatred of the United States . . . [a]nd of people that are not Muslim." *Id.*, at 120–121. That same month, Trump asserted that "[w]e're having problems with the Muslims, and we're having problems with Muslims coming into the country." *Id.*, at 121. He therefore called for surveillance of mosques in the United States, blaming terrorist attacks on Muslims' lack of "assimilation" and their commitment to "sharia law." *Ibid.*; *id.*, at 164. A day later, he opined that Muslims "do not respect us at all" and "don't respect a lot of the things that are happening throughout not only our country, but they don't respect other things." *Ibid.*

As Trump's Presidential campaign progressed, he began to describe his policy proposal in slightly different terms. In June 2016, for instance, he characterized the policy proposal as a suspension of immigration from countries "where there's a proven history of terrorism." *Id.*, at 121. He also described the proposal as rooted in the need to stop "importing radical Islamic terrorism to the West through a failed immigration system." *Id.*, at 121–122. Asked in July 2016 whether he was "pull[ing] back from" his pledged Muslim ban, Trump responded, "I actually don't think it's a rollback. In fact, you could say it's an expansion." *Id.*, at 122–123. He then explained that he used different terminology because "[p]eople were so upset when [he] used the word Muslim." *Id.*, at 123.

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A month before the 2016 election, Trump reiterated that his proposed "Muslim ban" had "morphed into a[n] extreme vetting from certain areas of the world." *Ibid.* Then, on December 21, 2016, President-elect Trump was asked whether he would "rethink" his previous "plans to create a Muslim registry or ban Muslim immigration." *Ibid.* He replied: "You know my plans. All along, I've proven to be right." *Ibid.*

On January 27, 2017, one week after taking office, President Trump signed Executive Order No. 13769, 82 Fed. Reg. 8977 (2017) (EO–1), entitled "Protecting the Nation From

Foreign Terrorist Entry Into the United States." As he signed it, President Trump read the title, looked up, and said "We all know what that means." App. 124. That same day, President Trump explained to the media that, under EO–1, Christians would be given priority for entry as refugees into the United States. In particular, he bemoaned the fact that in the past, "[i]f you were a Muslim [refugee from Syria] you could come in, but if you were a Christian, it was almost impossible." *Id.*, at 125. Considering that past policy "very unfair," President Trump explained that EO–1 was designed "to help" the Christians in Syria. *Ibid.* The following day, one of President Trump's key advisers candidly drew the connection between EO–1 and the "Muslim ban" that the President had pledged to implement if elected. *Ibid.* According to that adviser, "[W]hen [Donald Trump] first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'" *Ibid.*

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On February 3, 2017, the United States District Court for the Western District of Washington enjoined the enforcement of EO–1. See *Washington* v. *Trump*, 2017 WL 462040, *3. The Ninth Circuit denied the Government's request to stay that injunction. *Washington* v. *Trump*, 847 F. 3d 1151, 1169 (2017) (*per curiam*). Rather than appeal the Ninth Circuit's decision, the Government declined to continue defending EO–1 in court and instead announced that the President intended to issue a new executive order to replace EO–1.

On March 6, 2017, President Trump issued that new executive order, which, like its predecessor, imposed temporary entry and refugee bans. See Exec. Order No. 13780, 82 Fed. Reg. 13209 (EO–2). One of the President's senior advisers publicly explained that EO–2 would "have the same basic policy outcome" as EO–1, and that any changes would address "very technical issues that were brought up by the

court." App. 127. After EO–2 was issued, the White House Press Secretary told reporters that, by issuing EO–2, President Trump "continue[d] to deliver on . . . his most significant campaign promises." *Id.*, at 130. That statement was consistent with President Trump's own declaration that "I keep my campaign promises, and our citizens will be very happy when they see the result." *Id.*, at 127–128.

Before EO–2 took effect, Federal District Courts in Hawaii and Maryland enjoined the order's travel and refugee bans. See *Hawaii* v. *Trump*, 245 F. Supp. 3d 1227, 1239 (Haw. 2017); *International Refugee Assistance Project* (*IRAP*) v. *Trump*, 241 F. Supp. 3d 539, 566 (Md. 2017). The Fourth and Ninth Circuits upheld those injunctions in substantial part. *IRAP* v. *Trump*, 857 F. 3d 554, 606 (CA4 2017) (en banc); *Hawaii* v. *Trump*, 859 F. 3d 741, 789 (CA9 2017) (*per curiam*). In June 2017, this Court granted the Government's petition for certiorari and issued a *per curiam* opinion partially staying the District Courts' injunctions pending further review. In particular, the Court allowed EO–2's travel ban to take effect except as to "foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States." *Trump* v. *IRAP*, 582 U. S. 571, 582 (2017).

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While litigation over EO–2 was ongoing, President Trump repeatedly made statements alluding to a desire to keep Muslims out of the country. For instance, he said at a rally of his supporters that EO–2 was just a "watered down version of the first one" and had been "'tailor[ed]' at the behest of 'the lawyers.'" App. 131. He further added that he would prefer "to go back to the first [executive order] and go all the way" and reiterated his belief that it was "'very hard' for Muslims to assimilate into Western culture." *Id.*, at 131–132. During a rally in April 2017, President Trump recited the lyrics to a song called "The Snake," a song about a woman who nurses a sick snake back to health but then is attacked by the snake, as a warning about Syrian refugees

entering the country. *Id.*, at 132, 163. And in June 2017, the President stated on Twitter that the Justice Department had submitted a "watered down, politically correct version" of the "original Travel Ban" "to S[upreme] C[ourt]."[1] *Id.*, at 132. The President went on to tweet: "People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!" *Id.*, at 132–133. He added: "That's right, we need a TRAVEL BAN for certain DANGEROUS countries, not some politically correct term that won't help us protect our people!" *Id.*, at 133. Then, on August 17, 2017, President Trump issued yet another tweet about Islam, once more referencing the story about General Pershing's massacre of Muslims in the Philippines: "Study what General Pershing . . . did to terrorists when caught. There was no more Radical Islamic Terror for 35 years!" *IRAP* v. *Trump*, 883 F. 3d 233, 267 (CA4 2018) (*IRAP II*) (en banc) (alterations in original).

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In September 2017, President Trump tweeted that "[t]he travel ban into the United States should be far larger, tougher and more specific—but stupidly, that would not be politically correct!" App. 133. Later that month, on September 24, 2017, President Trump issued Presidential Proclamation No. 9645, 82 Fed. Reg. 45161 (Proclamation), which restricts entry of certain nationals from six Muslim-majority countries. On November 29, 2017, President Trump "retweeted" three anti-Muslim videos, entitled "Muslim Destroys a Statue of Virgin Mary!", "Islamist mob pushes teenage boy off roof and beats him to death!", and "Muslim migrant beats up Dutch boy on crutches!"[2] *IRAP II*,

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[1] According to the White House, President Trump's statements on Twitter are "official statements." App. 133.

[2] The content of these videos is highly inflammatory, and their titles are arguably misleading. For instance, the person depicted in the video entitled "Muslim migrant beats up Dutch boy on crutches!" was reportedly not a "migrant," and his religion is not publicly known. See Brief for

883 F. 3d, at 267. Those videos were initially tweeted by a British political party whose mission is to oppose "all alien and destructive politic[al] or religious doctrines, including . . . Islam." *Ibid.* When asked about these videos, the White House Deputy Press Secretary connected them to the Proclamation, responding that the "President has been talking about these security issues for years now, from the campaign trail to the White House," and "has addressed these issues with the travel order that he issued earlier this year and the companion proclamation." *Ibid.*

2

As the majority correctly notes, "the issue before us is not whether to denounce" these offensive statements. *Ante,* at 701–702. Rather, the dispositive and narrow question here is whether a reasonable observer, presented with all "openly available data," the text and "historical context" of the Proclamation, and the "specific sequence of events" leading to it, would conclude that the primary purpose of the Proclamation is to disfavor Islam and its adherents by excluding them from the country. *McCreary*, 545 U. S., at 862–863 (internal quotation marks omitted). The answer is unquestionably yes.

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Taking all the relevant evidence together, a reasonable observer would conclude that the Proclamation was driven primarily by anti-Muslim animus, rather than by the Government's asserted national-security justifications. Even before being sworn into office, then-candidate Trump stated that "Islam hates us," App. 399, warned that "[w]e're having problems with the Muslims, and we're having problems with Muslims coming into the country," *id.*, at 121, promised to

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Plaintiffs in *IRAP* v. *Trump* as *Amici Curiae* 12, n. 4; P. Baker & E. Sullivan, Trump Shares Inflammatory Anti-Muslim Videos, and Britain's Leader Condemns Them, N. Y. Times, Nov. 29, 2017 ("[A]ccording to local officials, both boys are Dutch"), https://www.nytimes.com/2017/11/29/us/politics/trump-anti-muslim-videos-jayda-fransen.html (all Internet materials as last visited June 25, 2018).

enact a "total and complete shutdown of Muslims entering the United States," *id.*, at 119, and instructed one of his advisers to find a "lega[l]" way to enact a Muslim ban, *id.*, at 125.[3] The President continued to make similar statements well after his inauguration, as detailed above, see *supra*, at 733–737.

Moreover, despite several opportunities to do so, President Trump has never disavowed any of his prior statements about Islam.[4] Instead, he has continued to make remarks

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[3] The Government urges us to disregard the President's campaign statements. Brief for Petitioners 66–67. But nothing in our precedent supports that blinkered approach. To the contrary, courts must consider "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history." *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 540 (1993) (opinion of KENNEDY, J.). Moreover, President Trump and his advisers have repeatedly acknowledged that the Proclamation and its predecessors are an outgrowth of the President's campaign statements. For example, just last November, the White House Deputy Press Secretary reminded the media that the Proclamation addresses "issues" the President has been talking about "for years," including on "the campaign trail." *IRAP II*, 883 F. 3d 233, 267 (CA4 2018). In any case, as the Fourth Circuit correctly recognized, even without relying on any of the President's campaign statements, a reasonable observer would conclude that the Proclamation was enacted for the impermissible purpose of disfavoring Muslims. *Id.*, at 266, 268.

[4] At oral argument, the Solicitor General asserted that President Trump "made crystal-clear on September 25 that he had no intention of imposing the Muslim ban" and "has praised Islam as one of the great countries [*sic*] of the world." Tr. of Oral Arg. 81. Because the record contained no evidence of any such statement made on September 25th, however, the Solicitor General clarified after oral argument that he actually intended to refer to President Trump's statement during a television interview on January 25, 2017. Letter from N. Francisco, Solicitor General, to S. Harris, Clerk of Court (May 1, 2018); Reply Brief 28, n. 8. During that interview, the President was asked whether EO–1 was "the Muslim ban," and answered, "no it's not the Muslim ban." See Transcript: ABC News Anchor David Muir Interviews President Trump, ABC News, Jan. 25, 2017, http://abcnews.go.com/Politics/transcript-abc-news-anchor-david-muir-interviews-president/story?id=45047602. But that lone asser-

that a reasonable observer would view as an unrelenting attack on the Muslim religion and its followers. Given President Trump's failure to correct the reasonable perception of his apparent hostility toward the Islamic faith, it is unsurprising that the President's lawyers have, at every step in the lower courts, failed in their attempts to launder the Proclamation of its discriminatory taint. See *United States* v. *Fordice*, 505 U. S. 717, 746–747 (1992) ("[G]iven an initially tainted policy, it is eminently reasonable to make the [Government] bear the risk of nonpersuasion with respect to intent at some future time, both because the [Government] has created the dispute through its own prior unlawful conduct, and because discriminatory intent does tend to persist through time" (citation omitted)). Notably, the Court recently found less pervasive official expressions of hostility and the failure to disavow them to be constitutionally significant. Cf. *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 584 U. S. 617, 639 (2018) ("The official expressions of hostility to religion in some of the commissioners' comments—comments that were not disavowed at the Commission or by the State at any point in the proceedings that led to affirmance of the order—were inconsistent with what the Free Exercise Clause requires"). It should find the same here.

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Ultimately, what began as a policy explicitly "calling for a total and complete shutdown of Muslims entering the United States" has since morphed into a "Proclamation" putatively based on national-security concerns. But this new window dressing cannot conceal an unassailable fact: The words of the

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tion hardly qualifies as a disavowal of the President's comments about Islam—some of which were spoken after January 25, 2017. Moreover, it strains credulity to say that President Trump's January 25th statement makes "crystal-clear" that he never intended to impose a Muslim ban given that, until May 2017, the President's website displayed the statement regarding his campaign promise to ban Muslims from entering the country.

President and his advisers create the strong perception that the Proclamation is contaminated by impermissible discriminatory animus against Islam and its followers.

II

Rather than defend the President's problematic statements, the Government urges this Court to set them aside and defer to the President on issues related to immigration and national security. The majority accepts that invitation and incorrectly applies a watered-down legal standard in an effort to short circuit plaintiffs' Establishment Clause claim.

The majority begins its constitutional analysis by noting that this Court, at times, "has engaged in a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U. S. citizen." *Ante*, at 703 (citing *Kleindienst* v. *Mandel*, 408 U. S. 753 (1972)). As the majority notes, *Mandel* held that when the Executive Branch provides "a facially legitimate and bona fide reason" for denying a visa, "courts will neither look behind the exercise of that discretion, nor test it by balancing its justification." *Id.*, at 770. In his controlling concurrence in *Kerry* v. *Din*, 576 U. S. 86 (2015), JUSTICE KENNEDY applied *Mandel*'s holding and elaborated that courts can "'look behind' the Government's exclusion of" a foreign national if there is "an affirmative showing of bad faith on the part of the consular officer who denied [the] visa." *Din*, 576 U. S., at 105 (opinion concurring in judgment). The extent to which *Mandel* and *Din* apply at all to this case is unsettled, and there is good reason to think they do not.[5] Indeed, even the Government

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[5] *Mandel* and *Din* are readily distinguishable from this case for a number of reasons. First, *Mandel* and *Din* each involved a constitutional challenge to an Executive Branch decision to exclude a single foreign national under a specific statutory ground of inadmissibility. *Mandel*, 408 U. S., at 767; *Din*, 576 U. S., at 102. Here, by contrast, President Trump is not exercising his discretionary authority to determine the admission or exclusion of a particular foreign national. He promulgated an executive order affecting millions of individuals on a categorical basis. Second,

agreed at oral argument that where the Court confronts a situation involving "all kinds of denigrating comments about" a particular religion and a subsequent policy that is designed with the purpose of disfavoring that religion but that "dot[s] all the i's and . . . cross[es] all the t's," *Mandel* would not "pu[t] an end to judicial review of that set of facts." Tr. of Oral Arg. 16.

In light of the Government's suggestion "that it may be appropriate here for the inquiry to extend beyond the facial neutrality of the order," the majority rightly declines to apply *Mandel*'s "narrow standard of review" and "assume[s] that we may look behind the face of the Proclamation." *Ante*, at 704. In doing so, however, the Court, without explanation or precedential support, limits its review of the Proclamation to rational-basis scrutiny. *Ante*, at 704–705. That approach is perplexing, given that in other Establishment Clause cases, including those involving claims of religious animus or discrimination, this Court has applied a more stringent standard of review. See, *e. g.*, *McCreary*, 545 U. S., at 860–863; *Larson*, 456 U. S., at 246; *Presbyterian Church in*

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Mandel and *Din* did not purport to establish the framework for adjudicating cases (like this one) involving claims that the Executive Branch violated the Establishment Clause by acting pursuant to an unconstitutional purpose. Applying *Mandel*'s narrow standard of review to such a claim would run contrary to this Court's repeated admonition that "[f]acial neutrality is not determinative" in the Establishment Clause context. *Lukumi*, 508 U. S., at 534. Likewise, the majority's passing invocation of *Fiallo* v. *Bell*, 430 U. S. 787 (1977), is misplaced. *Fiallo*, unlike this case, addressed a constitutional challenge to a statute enacted by Congress, not an order of the President. *Id.*, at 791. *Fiallo*'s application of *Mandel* says little about whether *Mandel*'s narrow standard of review applies to the unilateral executive proclamation promulgated under the circumstances of this case. Finally, even assuming that *Mandel* and *Din* apply here, they would not preclude us from looking behind the face of the Proclamation because plaintiffs have made "an affirmative showing of bad faith," *Din*, 576 U. S., at 105 (opinion of KENNEDY, J.), by the President who, among other things, instructed his subordinates to find a "lega[l]" way to enact a Muslim ban, App. 125; see *supra*, at 731–737.

U. S. v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U. S. 440, 449–452 (1969); see also *Colorado Christian Univ.* v. *Weaver*, 534 F. 3d 1245, 1266 (CA10 2008) (McConnell, J.) (noting that, under Supreme Court precedent, laws "involving discrimination on the basis of religion, including interdenominational discrimination, are subject to heightened scrutiny whether they arise under the Free Exercise Clause, the Establishment Clause, or the Equal Protection Clause" (citations omitted)).[6] As explained above,

[6] The majority chides as "problematic" the importation of Establishment Clause jurisprudence "in the national security and foreign affairs context." *Ante*, at 706, n. 5. As the majority sees it, this Court's Establishment Clause precedents do not apply to cases involving "immigration policies, diplomatic sanctions, and military actions." *Ibid.* But just because the Court has not confronted the precise situation at hand does not render these cases (or the principles they announced) inapplicable. Moreover, the majority's complaint regarding the lack of direct authority is a puzzling charge, given that the majority itself fails to cite any "authority for its proposition" that a more probing review is inappropriate in a case like this one, where United States citizens allege that the Executive has violated the Establishment Clause by issuing a sweeping executive order motivated by animus. *Ibid.*, see *supra*, at 740–741, and n. 5. In any event, even if there is no prior case directly on point, it is clear from our precedent that "[w]hatever power the United States Constitution envisions for the Executive" in the context of national security and foreign affairs, "it most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 536 (2004) (plurality opinion). This Court's Establishment Clause precedents require that, if a reasonable observer would understand an executive action to be driven by discriminatory animus, the action be invalidated. See *McCreary*, 545 U. S., at 860. That reasonable-observer inquiry includes consideration of the Government's asserted justifications for its actions. The Government's invocation of a national-security justification, however, does not mean that the Court should close its eyes to other relevant information. Deference is different from unquestioning acceptance. Thus, what is "far more problematic" in this case is the majority's apparent willingness to throw the Establishment Clause out the window and forgo any meaningful constitutional review at the mere mention of a national-security concern. *Ante*, at 706, n. 5.

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the Proclamation is plainly unconstitutional under that heightened standard. See *supra*, at 737–740.

But even under rational-basis review, the Proclamation must fall. That is so because the Proclamation is "'divorced from any factual context from which we could discern a relationship to legitimate state interests,' and 'its sheer breadth [is] so discontinuous with the reasons offered for it'" that the policy is "'inexplicable by anything but animus.'" *Ante*, at 706 (quoting *Romer* v. *Evans*, 517 U. S. 620, 632, 635 (1996)); see also *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 448 (1985) (recognizing that classifications predicated on discriminatory animus can never be legitimate because the Government has no legitimate interest in exploiting "mere negative attitudes, or fear" toward a disfavored group). The President's statements, which the majority utterly fails to address in its legal analysis, strongly support the conclusion that the Proclamation was issued to express hostility toward Muslims and exclude them from the country. Given the overwhelming record evidence of anti-Muslim animus, it simply cannot be said that the Proclamation has a legitimate basis. *IRAP II*, 883 F. 3d, at 352 (Harris, J., concurring) (explaining that the Proclamation contravenes the bedrock principle "that the government may not act on the basis of *animus* toward a disfavored religious minority" (emphasis in original)).

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The majority insists that the Proclamation furthers two interrelated national-security interests: "preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices." *Ante*, at 706. But the Court offers insufficient support for its view "that the entry suspension has a legitimate grounding in [those] national security concerns, quite apart from any religious hostility." *Ibid.*; see also *ante*, at 706–710, and n. 7. Indeed, even a cursory review of the Government's asserted national-security rationale reveals that the Proclamation is

nothing more than a "'religious gerrymander.'" *Lukumi*, 508 U. S., at 535.

The majority first emphasizes that the Proclamation "says nothing about religion." *Ante*, at 706. Even so, the Proclamation, just like its predecessors, overwhelmingly targets Muslim-majority nations. Given the record here, including all the President's statements linking the Proclamation to his apparent hostility toward Muslims, it is of no moment that the Proclamation also includes minor restrictions on two non-Muslim majority countries, North Korea and Venezuela, or that the Government has removed a few Muslim-majority countries from the list of covered countries since EO–1 was issued. Consideration of the entire record supports the conclusion that the inclusion of North Korea and Venezuela, and the removal of other countries, simply reflect subtle efforts to start "talking territory instead of Muslim," App. 123, precisely so the Executive Branch could evade criticism or legal consequences for the Proclamation's otherwise clear targeting of Muslims. The Proclamation's effect on North Korea and Venezuela, for example, is insubstantial, if not entirely symbolic. A prior sanctions order already restricts entry of North Korean nationals, see Exec. Order No. 13810, 82 Fed. Reg. 44705, and the Proclamation targets only a handful of Venezuelan Government officials and their immediate family members, 82 Fed. Reg. 45166. As such, the President's inclusion of North Korea and Venezuela does little to mitigate the anti-Muslim animus that permeates the Proclamation.

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The majority next contends that the Proclamation "reflects the results of a worldwide review process undertaken by multiple Cabinet officials." *Ante*, at 707. At the outset, there is some evidence that at least one of the individuals involved in that process may have exhibited bias against Muslims. As noted by one group of *amici*, the Trump administration appointed Frank Wuco to help enforce the President's travel bans and lead the multiagency review process. See Brief

for Plaintiffs in *IRAP* v. *Trump* as *Amici Curiae* 13–14, and n. 10. According to *amici*, Wuco has purportedly made several suspect public statements about Islam: He has "publicly declared that it was a 'great idea' to 'stop the visa application process into this country from Muslim nations in a blanket type of policy,'" "that Muslim populations 'living under other-than-Muslim rule' will 'necessarily' turn to violence, that Islam prescribes 'violence and warfare against unbelievers,' and that Muslims 'by-and-large . . . resist assimilation.'" *Id.*, at 14.

But, even setting aside those comments, the worldwide review does little to break the clear connection between the Proclamation and the President's anti-Muslim statements. For "[n]o matter how many officials affix their names to it, the Proclamation rests on a rotten foundation." Brief for Constitutional Law Scholars as *Amici Curiae* 7 (filed Apr. 2, 2018); see *supra*, at 731–737. The President campaigned on a promise to implement a "total and complete shutdown of Muslims" entering the country, translated that campaign promise into a concrete policy, and made several statements linking that policy (in its various forms) to anti-Muslim animus.

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Ignoring all this, the majority empowers the President to hide behind an administrative review process that the Government refuses to disclose to the public. See *IRAP II*, 883 F. 3d, at 268 ("[T]he Government chose not to make the review publicly available" even in redacted form); *IRAP* v. *Trump*, No. 17–2231 (CA4), Doc. 126 (Letter from S. Swingle, Counsel for Defendants-Appellants, to P. Connor, Clerk of the United States Court of Appeals for the Fourth Circuit (Nov. 24, 2017)) (resisting Fourth Circuit's request that the Government supplement the record with the reports referenced in the Proclamation). Furthermore, evidence of which we can take judicial notice indicates that the multi-agency review process could not have been very thorough. Ongoing litigation under the Freedom of Information Act

shows that the September 2017 report the Government produced after its review process was a mere 17 pages. See *Brennan Center for Justice* v. *United States Dept. of State*, No. 17–cv–7520 (SDNY), Doc. 31–1, pp. 2–3. That the Government's analysis of the vetting practices of hundreds of countries boiled down to such a short document raises serious questions about the legitimacy of the President's proclaimed national-security rationale.

Beyond that, Congress has already addressed the national-security concerns supposedly undergirding the Proclamation through an "extensive and complex" framework governing "immigration and alien status." *Arizona* v. *United States*, 567 U. S. 387, 395 (2012).[7] The Immigration and Nationality Act sets forth, in painstaking detail, a reticulated scheme regulating the admission of individuals to the United States. Generally, admission to the United States requires a valid visa or other travel document. 8 U. S. C. §§ 1181, 1182(a)(7)(A)(i)(I), 1182(a)(7)(B)(i)(II). To obtain a visa, an applicant must produce "certified cop[ies]" of documents proving her identity, background, and criminal history. §§ 1202(b), 1202(d). An applicant also must undergo an in-person interview with a State Department consular officer. §§ 1201(a)(1), 1202(h)(1), 22 CFR §§ 42.62(a)–(b) (2017); see also 8 U. S. C. §§ 1202(h)(2)(D), 1202(h)(2)(F) (requiring in-person interview if the individual "is a national of a country officially designated by the Secretary of State as a state sponsor of terrorism" or is "a member of a group or section that . . . poses a security threat to the United States"). "Any alien who . . . has engaged in a terrorist activity," "in-

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[7] It is important to note, particularly given the nature of this case, that many consider "using the term 'alien' to refer to other human beings" to be "offensive and demeaning." *Flores* v. *United States Citizenship & Immigration Servs.*, 718 F. 3d 548, 551–552, n. 1 (CA6 2013). I use the term here only where necessary "to be consistent with the statutory language" that Congress has chosen and "to avoid any confusion in replacing a legal term of art with a more appropriate term." *Ibid.*

cited terrorist activity," or been a representative, member, or endorser of a terrorist organization, or who "is likely to engage after entry in any terrorist activity," § 1182(a)(3)(B), or who has committed one or more of the many crimes enumerated in the statute is inadmissible and therefore ineligible to receive a visa. See § 1182(a)(2)(A) (crime of moral turpitude or drug offense); § 1182(a)(2)(C) (drug trafficking or benefiting from a relative who recently trafficked drugs); § 1182(a)(2)(D) (prostitution or "unlawful commercialized vice"); § 1182(a)(2)(H) (human trafficking); § 1182(a)(3) ("[s]ecurity and related grounds").

In addition to vetting rigorously any individuals seeking admission to the United States, the Government also rigorously vets the information-sharing and identity-management systems of other countries, as evidenced by the Visa Waiver Program, which permits certain nationals from a select group of countries to skip the ordinary visa-application process. See § 1187. To determine which countries are eligible for the Visa Waiver Program, the Government considers whether they can satisfy numerous criteria—*e. g.*, using electronic, fraud-resistant passports, § 1187(a)(3)(B), 24-hour reporting of lost or stolen passports, § 1187(c)(2)(D), and not providing a safe haven for terrorists, § 1187(a)(12)(D)(iii). The Secretary of Homeland Security, in consultation with the Secretary of State, also must determine that a country's inclusion in the program will not compromise "the law enforcement and security interests of the United States." § 1187(c)(2)(C). Eligibility for the program is reassessed on an annual basis. See §§ 1187(a)(12)(D)(iii), 1187(c)(12)(A). As a result of a recent review, for example, the Executive decided in 2016 to remove from the program dual nationals of Iraq, Syria, Iran, and Sudan. See Brief for Former National Security Officials as *Amici Curiae* 27.

Put simply, Congress has already erected a statutory scheme that fulfills the putative national-security interests the Government now puts forth to justify the Proclamation.

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Tellingly, the Government remains wholly unable to articulate any credible national-security interest that would go unaddressed by the current statutory scheme absent the Proclamation. The Government also offers no evidence that this current vetting scheme, which involves a highly searching consideration of individuals required to obtain visas for entry into the United States and a highly searching consideration of which countries are eligible for inclusion in the Visa Waiver Program, is inadequate to achieve the Proclamation's proclaimed objectives of "preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their [vetting and information-sharing] practices." *Ante,* at 706.

For many of these reasons, several former national-security officials from both political parties—including former Secretary of State Madeleine Albright, former State Department Legal Adviser John Bellinger III, former Central Intelligence Agency Director John Brennan, and former Director of National Intelligence James Clapper—have advised that the Proclamation and its predecessor orders "do not advance the national-security or foreign policy interests of the United States, and in fact do serious harm to those interests." Brief for Former National Security Officials as *Amici Curiae* 15 (boldface deleted).

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Moreover, the Proclamation purports to mitigate national-security risks by excluding nationals of countries that provide insufficient information to vet their nationals. 82 Fed. Reg. 45164. Yet, as plaintiffs explain, the Proclamation broadly denies immigrant visas to all nationals of those countries, including those whose admission would likely not implicate these information deficiencies (*e. g.*, infants, or nationals of countries included in the Proclamation who are long-term residents of and traveling from a country not covered by the Proclamation). See Brief for Respondents 72. In addition, the Proclamation permits certain nationals from the countries named in the Proclamation to obtain nonimmigrant

visas, which undermines the Government's assertion that it does not already have the capacity and sufficient information to vet these individuals adequately. See 82 Fed. Reg. 45165–45169.

Equally unavailing is the majority's reliance on the Proclamation's waiver program. *Ante*, at 709–710, and n. 7. As several *amici* thoroughly explain, there is reason to suspect that the Proclamation's waiver program is nothing more than a sham. See Brief for Pars Equality Center et al. as *Amici Curiae* 11, 13–28 (explaining that "waivers under the Proclamation are vanishingly rare" and reporting numerous stories of deserving applicants denied waivers). The remote possibility of obtaining a waiver pursuant to an ad hoc, discretionary, and seemingly arbitrary process scarcely demonstrates that the Proclamation is rooted in a genuine concern for national security. See *ante*, at 723–728 (BREYER, J., dissenting) (outlining evidence suggesting "that the Government is not applying the Proclamation as written," that "waivers are not being processed in an ordinary way," and that consular and other officials "do not, in fact, have discretion to grant waivers").

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In sum, none of the features of the Proclamation highlighted by the majority supports the Government's claim that the Proclamation is genuinely and primarily rooted in a legitimate national-security interest. What the unrebutted evidence actually shows is that a reasonable observer would conclude, quite easily, that the primary purpose and function of the Proclamation is to disfavor Islam by banning Muslims from entering our country.

III

As the foregoing analysis makes clear, plaintiffs are likely to succeed on the merits of their Establishment Clause claim. To obtain a preliminary injunction, however, plaintiffs must also show that they are "likely to suffer irreparable harm in the absence of preliminary relief," that "the balance of equities tips in [their] favor," and that "an injunction is in the

public interest." *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. 7, 20 (2008). Plaintiffs readily clear those remaining hurdles.

First, plaintiffs have shown a likelihood of irreparable harm in the absence of an injunction. As the District Court found, plaintiffs have adduced substantial evidence showing that the Proclamation will result in "a multitude of harms that are not compensable with monetary damages and that are irreparable—among them, prolonged separation from family members, constraints to recruiting and retaining students and faculty members to foster diversity and quality within the University community, and the diminished membership of the [Muslim] Association." 265 F. Supp. 3d 1140, 1159 (Haw. 2017).

Second, plaintiffs have demonstrated that the balance of the equities tips in their favor. Against plaintiffs' concrete allegations of serious harm, the Government advances only nebulous national-security concerns. Although national security is unquestionably an issue of paramount public importance, it is not "a talisman" that the Government can use "to ward off inconvenient claims—a 'label' used to 'cover a multitude of sins.'" *Ziglar* v. *Abbasi*, 582 U. S. 120, 143 (2017). That is especially true here, because, as noted, the Government's other statutory tools, including the existing rigorous individualized vetting process, already address the Proclamation's purported national-security concerns. See *supra*, at 746–749.

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Finally, plaintiffs and their *amici* have convincingly established that "an injunction is in the public interest." *Winter*, 555 U. S., at 20. As explained by the scores of *amici* who have filed briefs in support of plaintiffs, the Proclamation has deleterious effects on our higher education system;[8] national

[8] See Brief for American Council on Education et al. as *Amici Curiae*; Brief for Colleges and Universities as *Amici Curiae*; Brief for New York University as *Amicus Curiae*.

security;[9] healthcare;[10] artistic culture;[11] and the Nation's technology industry and overall economy.[12] Accordingly, the Court of Appeals correctly affirmed, in part, the District Court's preliminary injunction.[13]

IV

The First Amendment stands as a bulwark against official religious prejudice and embodies our Nation's deep commitment to religious plurality and tolerance. That constitutional promise is why, "[f]or centuries now, people have come to this country from every corner of the world to share in the blessing of religious freedom." *Town of Greece* v. *Galloway*, 572 U. S., at 615 (KAGAN, J., dissenting). Instead of vindicating those principles, today's decision tosses them aside. In holding that the First Amendment gives way to an executive policy that a reasonable observer would view as motivated by animus against Muslims, the majority opinion upends this Court's precedent, repeats tragic mistakes of the

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[9] See Brief for Retired Generals and Admirals of the U. S. Armed Forces as *Amici Curiae*; Brief for Former National Security Officials as *Amici Curiae*.

[10] See Brief for Association of American Medical Colleges as *Amicus Curiae*.

[11] See Brief for Association of Art Museum Directors et al. as *Amici Curiae*.

[12] See Brief for U. S. Companies as *Amici Curiae*; Brief for Massachusetts Technology Leadership Council, Inc., as *Amicus Curiae*.

[13] Because the majority concludes that plaintiffs have failed to show a likelihood of success on the merits, it takes no position on "the propriety of the nationwide scope of the injunction issued by the District Court." *Ante*, at 711. The District Court did not abuse its discretion by granting nationwide relief. Given the nature of the Establishment Clause violation and the unique circumstances of this case, the imposition of a nationwide injunction was "'necessary to provide complete relief to the plaintiffs.'" *Madsen* v. *Women's Health Center, Inc.*, 512 U. S. 753, 765 (1994); see *Califano* v. *Yamasaki*, 442 U. S. 682, 702 (1979) ("[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class").

past, and denies countless individuals the fundamental right of religious liberty.

Just weeks ago, the Court rendered its decision in *Masterpiece Cakeshop*, 584 U. S. 617, which applied the bedrock principles of religious neutrality and tolerance in considering a First Amendment challenge to government action. See *id.*, at 638–639 ("The Constitution 'commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures'" (quoting *Lukumi*, 508 U. S., at 547)); *Masterpiece*, 584 U. S., at 640 (KAGAN, J., concurring) ("[S]tate actors cannot show hostility to religious views; rather, they must give those views 'neutral and respectful consideration'"). Those principles should apply equally here. In both instances, the question is whether a government actor exhibited tolerance and neutrality in reaching a decision that affects individuals' fundamental religious freedom. But unlike in *Masterpiece*, where a state civil rights commission was found to have acted without "the neutrality that the Free Exercise Clause requires," *id.*, at 639, the government actors in this case will not be held accountable for breaching the First Amendment's guarantee of religious neutrality and tolerance. Unlike in *Masterpiece*, where the majority considered the state commissioners' statements about religion to be persuasive evidence of unconstitutional government action, *id.*, at 634–636, the majority here completely sets aside the President's charged statements about Muslims as irrelevant. That holding erodes the foundational principles of religious tolerance that the Court elsewhere has so emphatically protected, and it tells members of minority religions in our country "'that they are outsiders, not full members of the political community.'" *Santa Fe*, 530 U. S., at 309.

Today's holding is all the more troubling given the stark parallels between the reasoning of this case and that of *Kore-*

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matsu v. *United States*, 323 U. S. 214 (1944). See Brief for Japanese American Citizens League as *Amicus Curiae*. In *Korematsu*, the Court gave "a pass [to] an odious, gravely injurious racial classification" authorized by an executive order. *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 275 (1995) (GINSBURG, J., dissenting). As here, the Government invoked an ill-defined national-security threat to justify an exclusionary policy of sweeping proportion. See Brief for Japanese American Citizens League as *Amicus Curiae* 12–14. As here, the exclusion order was rooted in dangerous stereotypes about, *inter alia*, a particular group's supposed inability to assimilate and desire to harm the United States. See *Korematsu*, 323 U. S., at 236–240 (Murphy, J., dissenting). As here, the Government was unwilling to reveal its own intelligence agencies' views of the alleged security concerns to the very citizens it purported to protect. Compare *Korematsu* v. *United States*, 584 F. Supp. 1406, 1418–1419 (ND Cal. 1984) (discussing information the Government knowingly omitted from report presented to the courts justifying the executive order); Brief for Japanese American Citizens League as *Amicus Curiae* 17–19, with *IRAP II*, 883 F. 3d, at 268; Brief for Karen Korematsu et al. as *Amici Curiae* 35–36, and n. 5 (noting that the Government "has gone to great lengths to shield [the Secretary of Homeland Security's] report from view"). And as here, there was strong evidence that impermissible hostility and animus motivated the Government's policy.

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Although a majority of the Court in *Korematsu* was willing to uphold the Government's actions based on a barren invocation of national security, dissenting Justices warned of that decision's harm to our constitutional fabric. Justice Murphy recognized that there is a need for great deference to the Executive Branch in the context of national security, but cautioned that "it is essential that there be definite limits to [the government's] discretion," as "[i]ndividuals must not be left impoverished of their constitutional rights on a plea

of military necessity that has neither substance nor support." 323 U. S., at 234 (dissenting opinion). Justice Jackson lamented that the Court's decision upholding the Government's policy would prove to be "a far more subtle blow to liberty than the promulgation of the order itself," for although the executive order was not likely to be long lasting, the Court's willingness to tolerate it would endure. *Id.*, at 245–246.

In the intervening years since *Korematsu*, our Nation has done much to leave its sordid legacy behind. See, *e. g.*, Civil Liberties Act of 1988, 50 U. S. C. App. § 4211 *et seq.* (setting forth remedies to individuals affected by the executive order at issue in *Korematsu*); Non-Detention Act of 1971, 18 U. S. C. § 4001(a) (forbidding the imprisonment or detention by the United States of any citizen absent an Act of Congress). Today, the Court takes the important step of finally overruling *Korematsu*, denouncing it as "gravely wrong the day it was decided." *Ante*, at 710 (citing *Korematsu*, 323 U. S., at 248 (Jackson, J., dissenting)). This formal repudiation of a shameful precedent is laudable and long overdue. But it does not make the majority's decision here acceptable or right. By blindly accepting the Government's misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying *Korematsu* and merely replaces one "gravely wrong" decision with another. *Ante*, at 710.

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Our Constitution demands, and our country deserves, a Judiciary willing to hold the coordinate branches to account when they defy our most sacred legal commitments. Because the Court's decision today has failed in that respect, with profound regret, I dissent.

Syllabus

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, DBA NIFLA, ET AL. *v.* BECERRA, ATTORNEY GENERAL OF CALIFORNIA, ET AL.

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

No. 16–1140. Argued March 20, 2018—Decided June 26, 2018

The California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT Act) was enacted to regulate crisis pregnancy centers—pro-life centers that offer pregnancy-related services. The FACT Act requires clinics that primarily serve pregnant women to provide certain notices. Clinics that are licensed must notify women that California provides free or low-cost services, including abortions, and give them a phone number to call. Its stated purpose is to make sure that state residents know their rights and what healthcare services are available to them. Unlicensed clinics must notify women that California has not licensed the clinics to provide medical services. Its stated purpose is to ensure that pregnant women know when they are receiving healthcare from licensed professionals. Petitioners—two crisis pregnancy centers, one licensed and one unlicensed, and an organization of crisis pregnancy centers—filed suit. They alleged that both the licensed and the unlicensed notices abridge the freedom of speech protected by the First Amendment. The District Court denied their motion for a preliminary injunction, and the Ninth Circuit affirmed. Holding that petitioners could not show a likelihood of success on the merits, the court concluded that the licensed notice survived a lower level of scrutiny applicable to regulations of "professional speech," and that the unlicensed notice satisfied any level of scrutiny.

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Held:

1. The licensed notice likely violates the First Amendment. Pp. 765–775.

(a) Content-based laws "target speech based on its communicative content" and "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed* v. *Town of Gilbert*, 576 U. S. 155, 163. The licensed notice is a content-based regulation. By compelling petitioners to speak a particular message, it "alters the content of [their] speech." *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 795. For example, one of the state-sponsored services that the licensed notice requires petitioners to advertise is abortion—the very practice that petitioners are devoted to opposing. P. 766.

(b) Although the licensed notice is content based, the Ninth Circuit did not apply strict scrutiny because it concluded that the notice regulates "professional speech." But this Court has never recognized "professional speech" as a separate category of speech subject to different rules. Speech is not unprotected merely because it is uttered by professionals. The Court has afforded less protection for professional speech in two circumstances—where a law requires professionals to disclose factual, noncontroversial information in their "commercial speech," see, *e. g.*, *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, 651, and where States regulate professional conduct that incidentally involves speech, see, *e. g.*, *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456. Neither line of precedents is implicated here. Pp. 766–773.

(1) Unlike the rule in *Zauderer*, the licensed notice is not limited to "purely factual and uncontroversial information about the terms under which . . . services will be available," 471 U. S., at 651. California's notice requires covered clinics to disclose information about *state*-sponsored services—including abortion, hardly an "uncontroversial" topic. Accordingly, *Zauderer* has no application here. Pp. 768–769.

(2) Nor is the licensed notice a regulation of professional conduct that incidentally burdens speech. The Court's precedents have long drawn a line between speech and conduct. In *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, for example, the joint opinion rejected a free-speech challenge to an informed-consent law requiring physicians to "give a woman certain information as part of obtaining her consent to an abortion," *id.*, at 884. But the licensed notice is neither an informed-consent requirement nor any other regulation of professional conduct. It applies to all interactions between a covered facility and its clients, regardless of whether a medical procedure is ever sought, offered, or performed. And many other facilities providing the exact same services, such as general practice clinics, are not subject to the requirement. Pp. 769–770.

(3) Outside of these two contexts, the Court's precedents have long protected the First Amendment rights of professionals. The Court has applied strict scrutiny to content-based laws regulating the noncommercial speech of lawyers, see *Reed*, *supra*, at 167, professional fundraisers, see *Riley*, *supra*, at 798, and organizations providing specialized advice on international law, see *Holder* v. *Humanitarian Law Project*, 561 U. S. 1, 27–28. And it has stressed the danger of content-based regulations "in the fields of medicine and public health, where information can save lives." *Sorrell* v. *IMS Health Inc.*, 564 U. S. 552,

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566. Such dangers are also present in the context of professional speech, where content-based regulation poses the same "risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information," *Turner Broadcasting Systems, Inc.* v. *FCC*, 512 U. S. 622, 641. When the government polices the content of professional speech, it can fail to "'preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.'" *McCullen* v. *Coakley*, 573 U. S. 464, 476. Professional speech is also a difficult category to define with precision. See *Brown* v. *Entertainment Merchants Assn.*, 564 U. S. 786, 791. If States could choose the protection that speech receives simply by requiring a license, they would have a powerful tool to impose "invidious discrimination of disfavored subjects." *Cincinnati* v. *Discovery Network, Inc.*, 507 U. S. 410, 423, n. 19. Pp. 771–773.

(c) Although neither California nor the Ninth Circuit has advanced a persuasive reason to apply different rules to professional speech, the Court need not foreclose the possibility that some such reason exists because the licensed notice cannot survive even intermediate scrutiny. Assuming that California's interest in providing low-income women with information about state-sponsored service is substantial, the licensed notice is not sufficiently drawn to promote it. The notice is "wildly underinclusive," *Entertainment Merchants Assn.*, *supra*, at 802, because it applies only to clinics that have a "primary purpose" of "providing family planning or pregnancy-related services" while excluding several other types of clinics that also serve low-income women and could educate them about the State's services. California could also inform the women about its services "without burdening a speaker with unwanted speech," *Riley*, *supra*, at 800, most obviously through a public-information campaign. Petitioners are thus likely to succeed on the merits of their challenge. Pp. 773–775.

2. The unlicensed notice unduly burdens protected speech. It is unnecessary to decide whether *Zauderer*'s standard applies here, for even under *Zauderer*, a disclosure requirement cannot be "unjustified or unduly burdensome." 471 U. S., at 651. Disclosures must remedy a harm that is "potentially real not purely hypothetical," *Ibanez* v. *Florida Dept. of Business and Professional Regulation, Bd. of Accountancy*, 512 U. S. 136, 146, and can extend "no broader than reasonably necessary," *In re R. M. J.*, 455 U. S. 191, 203. California has not demonstrated any justification for the unlicensed notice that is more than "purely hypothetical." The only justification put forward by the state legislature was ensuring that pregnant women know when they are re-

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ceiving medical care from licensed professionals, but California denied that the justification for the law was that women did not know what kind of facility they are entering when they go to a crisis pregnancy center. Even if the State had presented a nonhypothetical justification, the FACT Act unduly burdens protected speech. It imposes a government-scripted, speaker-based disclosure requirement that is wholly disconnected from the State's informational interest. It requires covered facilities to post California's precise notice, no matter what the facilities say on site or in their advertisements. And it covers a curiously narrow subset of speakers: those that primarily provide pregnancy-related services, but not those that provide, *e. g.*, nonprescription birth control. Such speaker-based laws run the risk that "the State has left unburdened those speakers whose messages are in accord with its own views." *Sorrell*, *supra*, at 580. For these reasons, the unlicensed notice does not satisfy *Zauderer*, assuming that standard applies. Pp. 776–779.

839 F. 3d 823, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, ALITO, and GORSUCH, JJ., joined. KENNEDY, J., filed a concurring opinion, in which ROBERTS, C. J., and ALITO and GORSUCH, JJ., joined, *post*, p. 779. BREYER, J., filed a dissenting opinion, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 780.

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Michael P. Farris argued the cause for petitioners. With him on the briefs were *David A. Cortman*, *Kristen K. Waggoner*, *Kevin H. Theriot*, *James A. Campbell*, *Denise M. Harle*, *Elissa M. Graves*, *John C. Eastman*, *Anne O'Connor*, and *Dean R. Broyles.*

Deputy Solicitor General Wall argued the cause for the United States as *amicus curiae* in support of neither party. With him on the brief were *Solicitor General Francisco*, *Acting Assistant Attorney General Readler*, *Deputy Assistant Attorney General Mooppan*, *Jonathan C. Bond*, *Douglas N. Letter*, and *Mark R. Freeman.*

Joshua A. Klein, Deputy Solicitor General of California, argued the cause for respondents. With him on the brief for state respondents were *Xavier Becerra*, Attorney General, *pro se*, *Edward C. DuMont*, Solicitor General, *Janill L. Richards*, Principal Deputy Solicitor General, and *Kathleen*

Counsel

Vermazen Radez, *Anthony R. Hakl*, and *Jonathan M. Eisenberg*, Deputy Attorneys General. *Thomas D. Bunton* and *Darin L. Wessel* filed a brief for respondent Thomas E. Montgomery.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Texas et al. by *Ken Paxton*, Attorney General of Texas, *Scott A. Keller*, Solicitor General, *Jeffrey C. Mateer*, First Assistant Attorney General, and *Heather Gebelin Hacker* and *Beth Klusmann*, Assistant Solicitors General, by *M. Stephen Pitt*, General Counsel to Governor of Kentucky, and by the Attorneys General for their respective States as follows: *Steve Marshall* of Alabama, *Leslie Rutledge* of Arkansas, *Christopher M. Carr* of Georgia, *Lawrence G. Wasden* of Idaho, *Derek Schmidt* of Kansas, *Jeff Landry* of Louisiana, *Bill Schuette* of Michigan, *Joshua D. Hawley* of Missouri, *Tim Fox* of Montana, *Doug Peterson* of Nebraska, *Adam Paul Laxalt* of Nevada, *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, *Sean D. Reyes* of Utah, *Patrick Morrisey* of West Virginia, and *Brad Schimel* of Wisconsin; for the Alpha Center by *Harold J. Cassidy* and *Joseph R. Zakhary*; for the American Association of Pro-Life Obstetricians and Gynecologists et al. by *Steven H. Aden*; for the American Center for Law & Justice et al. by *Jay Alan Sekulow*, *Stuart J. Roth*, *Andrew J. Ekonomou*, *Jordan Sekulow*, *Walter M. Weber*, *Francis J. Manion*, *Geoffrey R. Surtees*, *Edward L. White III*, and *Erik M. Zimmerman*; for C12 Group et al. by *Michael Lee Francisco*; for Care Net by *John J. Bursch*; for the Cato Institute by *Ilya Shapiro*; for the Charlotte Lozier Institute et al. by *Dorinda C. Bordlee* and *Nikolas T. Nikas*; for the Conservative Legal Defense and Education Fund et al. by *Herbert W. Titus*, *William J. Olson*, *Jeremiah L. Morgan*, *Robert J. Olson*, and *Joseph W. Miller*; for First Resort, Inc., by *Mark L. Rienzi*, *Eric C. Rassbach*, *Joseph C. Davis*, *Kelly S. Biggins*, *W. Scott Hastings*, *Carl Scherz*, and *Andrew Buttaro*; for the Foundation for Moral Law by *John A. Eidsmoe* and *Matthew J. Clark*; for Freedom X et al. by *William J. Becker, Jr.*, and *Mitchell Keiter*; for Heartbeat International, Inc., by *James C. Rutten*, *Adam P. Barry*, and *Danielle M. White*; for Human Coalition by *Jonathan D. Christman*; for the Institute for Justice by *Robert J. McNamara*, *Paul M. Sherman*, and *Paul V. Avelar*; for Jews for Religious Liberty by *Howard N. Slugh* and *Andrew Pepper*; for the Justice and Freedom Fund by *James L. Hirsen* and *Deborah J. Dewart*; for Legal Scholars by *Kelly J. Shackelford* and *Kenneth A. Klukowski*; for Massachusetts Citizens for Life et al. by *Dwight G. Duncan*; for Mountain Right to Life et al. for *Mathew D. Staver*, *Anita L. Staver*, *Horatio G. Mihet*, and *Mary E. Mc-*

JUSTICE THOMAS delivered the opinion of the Court.

The California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT Act) re-

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Alister; for the National Association of Evangelicals et al. by *Frederick W. Claybrook, Jr., Steven W. Fitschen,* and *James A. Davids*; for Operation Outcry et al. by *Catherine W. Short*; for Pregnancy Care Centers in Texas by *Linda Boston Schlueter*; for the Scharpen Foundation, Inc., et al. by *Robert H. Tyler*; for Twenty-three Illinois Pregnancy Care Centers by *Noel W. Sterett, Whitman H. Brisky, Thomas Brejcha, Jr.,* and *Thomas G. Olp*; for the United States Conference of Catholic Bishops et al. by *Gene C. Schaerr, Anthony R. Picarello, Jr., Jeffrey Hunter Moon, Michael F. Moses, Hillary Byrnes, Lisa J. Gilden, Sherri C. Strand, James W. Erwin, Kim Colby, Abba Cohen,* and *David Zwiebel*; for 13 Women et al. by *Andrea Picciotti-Bayer*; for 41 Family Policy Organizations by *David French*; for 144 Members of Congress by *Patrick Strawbridge*; and for David Boyle by *Mr. Boyle, pro se.*

Briefs of *amici curiae* urging affirmance were filed for the State of New York et al. by *Eric T. Schneiderman,* Attorney General of New York, *Barbara D. Underwood,* Solicitor General, *Steven C. Wu,* Deputy Solicitor General, and *Judith N. Vale,* Senior Assistant Solicitor General, and by the Attorneys General for their respective jurisdictions as follows: *George Jepsen* of Connecticut, *Matthew P. Denn* of Delaware, *Karl A. Racine* of the District of Columbia, *Russell A. Suzuki* of Hawaii, *Lisa Madigan* of Illinois, *Thomas J. Miller* of Iowa, *Janet T. Mills* of Maine, *Brian E. Frosh* of Maryland, *Maura Healey* of Massachusetts, *Lori Swanson* of Minnesota, *Gurbir S. Grewal* of New Jersey, *Ellen F. Rosenblum* of Oregon, *Josh Shapiro* of Pennsylvania, *Thomas J. Donovan, Jr.,* of Vermont, *Mark R. Herring* of Virginia, and *Robert W. Ferguson* of Washington; for the City and County of San Francisco et al. by *Dennis J. Herrera, Christine Van Aken, Mollie M. Lee, Suzanne Sangree, Zachary W. Carter, James R. Williams, Michael N. Feuer, James P. Clark, Blithe Smith Bock,* and *Shaun Dabby Jacobs*; for the American Academy of Pediatrics et al. by *Simona G. Strauss*; for the American Medical Association by *Leonard A. Nelson*; for Black Women for Wellness et al. by *Thomas Bennigson* and *Seth E. Mermin*; for the California Women's Law Center by *Lois D. Thompson*; for Compassion & Choices by *Darin M. Sands, Peter D. Hawkes,* and *Kevin Diaz*; for Equal Rights Advocates et al. by *Sanford Jay Rosen, Gay Crosthwait Grunfeld,* and *Devin W. Mauney*; for Legal Ethicists for *Albert Giang*; for Members of Congress by *Brianne J. Gorod, Elizabeth B. Wydra, David H. Gans,* and *Ashwin P. Phatak*; for the National League of Cities et al. by *John M. Baker, Katherine M. Swenson,*

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quires clinics that primarily serve pregnant women to provide certain notices. Cal. Health & Safety Code Ann. §123470 *et seq.* (West 2018). Licensed clinics must notify women that California provides free or low-cost services, including abortions, and give them a phone number to call. Unlicensed clinics must notify women that California has not licensed the clinics to provide medical services. The question in this case is whether these notice requirements violate the First Amendment.

I

A

The California State Legislature enacted the FACT Act to regulate crisis pregnancy centers. Crisis pregnancy centers—according to a report commissioned by the California State Assembly, App. 86—are "pro-life (largely Christian belief-based) organizations that offer a limited range of free pregnancy options, counseling, and other services to individuals that visit a center." Watters et al., Pregnancy Resource Centers: Ensuring Access and Accuracy of Information 4 (2011). "[U]nfortunately," the author of the FACT Act stated, "there are nearly 200 licensed and unlicensed" crisis pregnancy centers in California. App. 84. These centers "aim to discourage and prevent women from seeking abortions." *Id.*, at 85. The author of the FACT Act observed that crisis pregnancy centers "are commonly affiliated with, or run by organizations whose stated goal" is to oppose abortion—including "the National Institute of Family and Life Advocates," one of the petitioners here. *Ibid.* To address this perceived problem, the FACT Act imposes two

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and *Lisa Soronen*; for Planned Parenthood Federation of America et al. by *Alan E. Schoenfeld, Charles C. Bridge*, and *Kimberly A. Parker*; for Public Citizen, Inc., by *Scott L. Nelson, Allison M. Zieve*, and *Julie A. Murray*; for Social Science Researchers by *Steven A. Zalesin*; and for 51 Reproductive Rights Organizations et al. by *Julie Rikelman, Autumn Katz, Fatima Goss Graves, Gretchen Borchelt, Sunu Chandy*, and *Heather Shumaker*.

notice requirements on facilities that provide pregnancy-related services—one for licensed facilities and one for unlicensed facilities.

1

The first notice requirement applies to "licensed covered facilit[ies]." Cal. Health & Safety Code Ann. § 123471(a). To fall under the definition of "licensed covered facility," a clinic must be a licensed primary care or specialty clinic or qualify as an intermittent clinic under California law. *Ibid.* (citing §§ 1204, 1206(h)). A licensed covered facility also must have the "primary purpose" of "providing family planning or pregnancy-related services." § 123471(a). And it must satisfy at least two of the following six requirements:

> "(1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women.
>
> "(2) The facility provides, or offers counseling about, contraception or contraceptive methods.
>
> "(3) The facility offers pregnancy testing or pregnancy diagnosis.
>
> "(4) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling.
>
> "(5) The facility offers abortion services.
>
> "(6) The facility has staff or volunteers who collect health information from clients." *Ibid.*

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The FACT Act exempts several categories of clinics that would otherwise qualify as licensed covered facilities. Clinics operated by the United States or a federal agency are excluded, as are clinics that are "enrolled as a Medi-Cal provider" and participate in "the Family Planning, Access, Care, and Treatment Program" (Family PACT program). § 123471(c). To participate in the Family PACT program, a clinic must provide "the full scope of family planning . . . services specified for the program," Cal. Welf. & Inst. Code

Ann. § 24005(c) (West 2018), including sterilization and emergency contraceptive pills, §§ 24007(a)(1), (2).

If a clinic is a licensed covered facility, the FACT Act requires it to disseminate a government-drafted notice on site. Cal. Health & Safety Code Ann. § 123472(a)(1). The notice states that "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]." *Ibid.* This notice must be posted in the waiting room, printed and distributed to all clients, or provided digitally at check-in. § 123472(a)(2). The notice must be in English and any additional languages identified by state law. § 123472(a). In some counties, that means the notice must be spelled out in 13 different languages. See State of Cal., Dept. of Health Care Services, Frequency of Threshold Language Speakers in the Medi-Cal Population by County for Jan. 2015, pp. 4–5 (Sept. 2016) (identifying the required languages for Los Angeles County as English, Spanish, Armenian, Mandarin, Cantonese, Korean, Vietnamese, Farsi, Tagalog, Russian, Cambodian, Other Chinese, and Arabic).

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The stated purpose of the FACT Act, including its licensed-notice requirement, is to "ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them." 2015 Cal. Legis. Serv., ch. 700, § 2 (A. B. 775) (West) (Cal. Legis. Serv.). The legislature posited that "thousands of women remain unaware of the public programs available to provide them with contraception, health education and counseling, family planning, prenatal care, abortion, or delivery." § 1(b). Citing the "time sensitive" nature of pregnancy-related decisions, § 1(c), the legislature concluded that requiring licensed facilities to inform patients them-

selves would be "[t]he most effective" way to convey this information, § 1(d).

2

The second notice requirement in the FACT Act applies to "unlicensed covered facilit[ies]." § 123471(b). To fall under the definition of "unlicensed covered facility," a facility must not be licensed by the State, not have a licensed medical provider on staff or under contract, and have the "primary purpose" of "providing pregnancy-related services." *Ibid.* An unlicensed covered facility also must satisfy at least two of the following four requirements:

> "(1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women.
>
> "(2) The facility offers pregnancy testing or pregnancy diagnosis.
>
> "(3) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling.
>
> "(4) The facility has staff or volunteers who collect health information from clients." *Ibid.*

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Clinics operated by the United States and licensed primary care clinics enrolled in Medi-Cal and Family PACT are excluded. § 123471(c).

Unlicensed covered facilities must provide a government-drafted notice stating that "[t]his facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services." Cal. Health & Safety Code Ann. § 123472(b)(1). This notice must be provided on site and in all advertising materials. §§ 123472(b)(2), (3). On site, the notice must be posted "conspicuously" at the entrance of the facility and in at least one waiting area. § 123472(b)(2). It must be "at least 8.5 inches by 11 inches and written in no less than 48-point type." *Ibid.* In advertisements, the notice must be in the same size or larger font than the sur-

rounding text, or otherwise set off in a way that draws attention to it. § 123472(b)(3). Like the licensed notice, the unlicensed notice must be in English and any additional languages specified by state law. § 123471(b). Its stated purpose is to ensure "that pregnant women in California know when they are getting medical care from licensed professionals." Cal. Legis. Serv. § 1(e).

B

After the Governor of California signed the FACT Act, petitioners—a licensed pregnancy center, an unlicensed pregnancy center, and an organization composed of crisis pregnancy centers—filed this suit. Petitioners alleged that the licensed and unlicensed notices abridge the freedom of speech protected by the First Amendment. The District Court denied their motion for a preliminary injunction.

The Court of Appeals for the Ninth Circuit affirmed. *National Institute of Family and Life Advocates* v. *Harris*, 839 F. 3d 823, 845 (2016). After concluding that petitioners' challenge to the FACT Act was ripe,[1] *id.*, at 833, the Ninth Circuit held that petitioners could not show a likelihood of success on the merits. It concluded that the licensed notice survives the "lower level of scrutiny" that applies to regulations of "professional speech." *Id.*, at 833–842. And it concluded that the unlicensed notice satisfies any level of scrutiny. See *id.*, at 843–844.

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We granted certiorari to review the Ninth Circuit's decision. 583 U. S. 972 (2017). We reverse with respect to both notice requirements.

II

We first address the licensed notice.[2]

---

[1] We agree with the Ninth Circuit's ripeness determination.

[2] Petitioners raise serious concerns that both the licensed and unlicensed notices discriminate based on viewpoint. Because the notices are unconstitutional either way, as explained below, we need not reach that issue.

A

The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits laws that abridge the freedom of speech. When enforcing this prohibition, our precedents distinguish between content-based and content-neutral regulations of speech. Content-based regulations "target speech based on its communicative content." *Reed* v. *Town of Gilbert*, 576 U. S. 155, 163 (2015). As a general matter, such laws "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Ibid.* This stringent standard reflects the fundamental principle that governments have "'no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Ibid.* (quoting *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 95 (1972)).

The licensed notice is a content-based regulation of speech. By compelling individuals to speak a particular message, such notices "alte[r] the content of [their] speech." *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 795 (1988); accord, *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 642 (1994); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, 256 (1974). Here, for example, licensed clinics must provide a government-drafted script about the availability of state-sponsored services, as well as contact information for how to obtain them. One of those services is abortion—the very practice that petitioners are devoted to opposing. By requiring petitioners to inform women how they can obtain state-subsidized abortions—at the same time petitioners try to dissuade women from choosing that option—the licensed notice plainly "alters the content" of petitioners' speech. *Riley*, *supra*, at 795.

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B

Although the licensed notice is content based, the Ninth Circuit did not apply strict scrutiny because it concluded that

the notice regulates "professional speech." 839 F. 3d, at 839. Some Courts of Appeals have recognized "professional speech" as a separate category of speech that is subject to different rules. See, *e. g.*, *King* v. *Governor of New Jersey*, 767 F. 3d 216, 232 (CA3 2014); *Pickup* v. *Brown*, 740 F. 3d 1208, 1227–1229 (CA9 2014); *Moore-King* v. *County of Chesterfield*, 708 F. 3d 560, 568–570 (CA4 2014). These courts define "professionals" as individuals who provide personalized services to clients and who are subject to "a generally applicable licensing and regulatory regime." *Id.*, at 569; see also *King*, *supra*, at 232; *Pickup*, *supra*, at 1230. "Professional speech" is then defined as any speech by these individuals that is based on "[their] expert knowledge and judgment," *King*, *supra*, at 232, or that is "within the confines of [the] professional relationship," *Pickup*, *supra*, at 1228. So defined, these courts except professional speech from the rule that content-based regulations of speech are subject to strict scrutiny. See *King*, *supra*, at 232; *Pickup*, *supra*, at 1053–1056; *Moore-King*, *supra*, at 569.

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But this Court has not recognized "professional speech" as a separate category of speech. Speech is not unprotected merely because it is uttered by "professionals." This Court has "been reluctant to mark off new categories of speech for diminished constitutional protection." *Denver Area Ed. Telecommunications Consortium, Inc.* v. *FCC*, 518 U. S. 727, 804 (1996) (KENNEDY, J., concurring in part, concurring in judgment in part, and dissenting in part). And it has been especially reluctant to "exemp[t] a category of speech from the normal prohibition on content-based restrictions." *United States* v. *Alvarez*, 567 U. S. 709, 722 (2012) (plurality opinion). This Court's precedents do not permit governments to impose content-based restrictions on speech without "'persuasive evidence . . . of a long (if heretofore unrecognized) tradition'" to that effect. *Ibid.* (quoting *Brown* v. *Entertainment Merchants Assn.*, 564 U. S. 786, 792 (2011)).

This Court's precedents do not recognize such a tradition for a category called "professional speech." This Court has afforded less protection for professional speech in two circumstances—neither of which turned on the fact that professionals were speaking. First, our precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their "commercial speech." See, *e. g.*, *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, 651 (1985); *Milavetz, Gallop & Milavetz, P. A.* v. *United States*, 559 U. S. 229, 250 (2010); *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 455–456 (1978). Second, under our precedents, States may regulate professional conduct, even though that conduct incidentally involves speech. See, *e. g.*, *id.*, at 456; *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 884 (1992) (joint opinion of O'Connor, KENNEDY, and Souter, JJ.). But neither line of precedents is implicated here.

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1

This Court's precedents have applied a lower level of scrutiny to laws that compel disclosures in certain contexts. In *Zauderer*, for example, this Court upheld a rule requiring lawyers who advertised their services on a contingency-fee basis to disclose that clients might be required to pay some fees and costs. 471 U. S., at 650–653. Noting that the disclosure requirement governed only "commercial advertising" and required the disclosure of "purely factual and uncontroversial information about the terms under which . . . services will be available," the Court explained that such requirements should be upheld unless they are "unjustified or unduly burdensome." *Id.*, at 651.

The *Zauderer* standard does not apply here. Most obviously, the licensed notice is not limited to "purely factual and uncontroversial information about the terms under which . . . services will be available." *Ibid.*; see also *Hurley*

v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 573 (1995) (explaining that *Zauderer* does not apply outside of these circumstances). The notice in no way relates to the services that licensed clinics provide. Instead, it requires these clinics to disclose information about *state*-sponsored services—including abortion, anything but an "uncontroversial" topic. Accordingly, *Zauderer* has no application here.

2

In addition to disclosure requirements under *Zauderer*, this Court has upheld regulations of professional conduct that incidentally burden speech. "[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech," *Sorrell* v. *IMS Health Inc.*, 564 U. S. 552, 567 (2011), and professionals are no exception to this rule, see *Ohralik*, *supra*, at 456. Longstanding torts for professional malpractice, for example, "fall within the traditional purview of state regulation of professional conduct." *NAACP* v. *Button*, 371 U. S. 415, 438 (1963); but cf. *id.*, at 439 ("[A] State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights"). While drawing the line between speech and conduct can be difficult, this Court's precedents have long drawn it, see, *e. g.*, *Sorrell*, *supra*, at 567; *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490, 502 (1949), and the line is "'long familiar to the bar,'" *United States* v. *Stevens*, 559 U. S. 460, 468 (2010) (quoting *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 127 (1991) (KENNEDY, J., concurring in judgment)).

In *Planned Parenthood of Southeastern Pa.* v. *Casey*, for example, this Court upheld a law requiring physicians to obtain informed consent before they could perform an abortion. 505 U. S., at 884 (joint opinion of O'Connor, KENNEDY, and Souter, JJ.). Pennsylvania law required physicians to inform their patients of "the nature of the procedure, the

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health risks of the abortion and of childbirth, and the 'probable gestational age of the unborn child.' " *Id.*, at 881. The law also required physicians to inform patients of the availability of printed materials from the State, which provided information about the child and various forms of assistance. *Ibid.*

The joint opinion in *Casey* rejected a free-speech challenge to this informed-consent requirement. *Id.*, at 884. It described the Pennsylvania law as "a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion," which "for constitutional purposes, [was] no different from a requirement that a doctor give certain specific information about any medical procedure." *Ibid.* The joint opinion explained that the law regulated speech only "as part of the *practice* of medicine, subject to reasonable licensing and regulation by the State." *Ibid.* (emphasis added). Indeed, the requirement that a doctor obtain informed consent to perform an operation is "firmly entrenched in American tort law." *Cruzan* v. *Director, Mo. Dept. of Health*, 497 U. S. 261, 269 (1990); see, *e. g.*, *Schloendorff* v. *Society of N. Y. Hospital*, 211 N. Y. 125, 129–130, 105 N. E. 92, 93 (1914) (Cardozo, J.) (explaining that "a surgeon who performs an operation without his patient's consent commits an assault").

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The licensed notice at issue here is not an informed-consent requirement or any other regulation of professional conduct. The notice does not facilitate informed consent to a medical procedure. In fact, it is not tied to a procedure at all. It applies to all interactions between a covered facility and its clients, regardless of whether a medical procedure is ever sought, offered, or performed. If a covered facility does provide medical procedures, the notice provides no information about the risks or benefits of those procedures. Tellingly, many facilities that provide the exact same services as covered facilities—such as general practice clinics, see § 123471(a)—are not required to provide the licensed notice. The licensed notice regulates speech as speech.

Outside of the two contexts discussed above—disclosures under *Zauderer* and professional conduct—this Court's precedents have long protected the First Amendment rights of professionals. For example, this Court has applied strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers, see *Reed*, 576 U. S., at 167 (discussing *Button*, *supra*, at 438); *In re Primus*, 436 U. S. 412, 432 (1978); professional fundraisers, see *Riley*, 487 U. S., at 798; and organizations that provided specialized advice about international law, see *Holder* v. *Humanitarian Law Project*, 561 U. S. 1, 27–28 (2010). And the Court emphasized that the lawyer's statements in *Zauderer* would have been "fully protected" if they were made in a context other than advertising. 471 U. S., at 637, n. 7. Moreover, this Court has stressed the danger of content-based regulations "in the fields of medicine and public health, where information can save lives." *Sorrell*, *supra*, at 566.

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The dangers associated with content-based regulations of speech are also present in the context of professional speech. As with other kinds of speech, regulating the content of professionals' speech "pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information." *Turner Broadcasting*, 512 U. S., at 641. Take medicine, for example. "Doctors help patients make deeply personal decisions, and their candor is crucial." *Wollschlaeger* v. *Governor of Florida*, 848 F. 3d 1293, 1328 (CA11 2017) (en banc) (W. Pryor, J., concurring). Throughout history, governments have "manipulat[ed] the content of doctor-patient discourse" to increase state power and suppress minorities:

> "For example, during the Cultural Revolution, Chinese physicians were dispatched to the countryside to convince peasants to use contraception. In the 1930s, the Soviet government expedited completion of a construc-

> tion project on the Siberian railroad by ordering doctors to both reject requests for medical leave from work and conceal this government order from their patients. In Nazi Germany, the Third Reich systematically violated the separation between state ideology and medical discourse. German physicians were taught that they owed a higher duty to the 'health of the Volk' than to the health of individual patients. Recently, Nicolae Ceausescu's strategy to increase the Romanian birth rate included prohibitions against giving advice to patients about the use of birth control devices and disseminating information about the use of condoms as a means of preventing the transmission of AIDS." Berg, Toward a First Amendment Theory of Doctor-Patient Discourse and the Right To Receive Unbiased Medical Advice, 74 B. U. L. Rev. 201, 201–202 (1994) (footnotes omitted).

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Further, when the government polices the content of professional speech, it can fail to "'preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.'" *McCullen* v. *Coakley*, 573 U. S. 464, 476 (2014). Professionals might have a host of good-faith disagreements, both with each other and with the government, on many topics in their respective fields. Doctors and nurses might disagree about the ethics of assisted suicide or the benefits of medical marijuana; lawyers and marriage counselors might disagree about the prudence of prenuptial agreements or the wisdom of divorce; bankers and accountants might disagree about the amount of money that should be devoted to savings or the benefits of tax reform. "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market," *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (Holmes, J., dissenting), and the people lose when the government is the one deciding which ideas should prevail.

"Professional speech" is also a difficult category to define with precision. See *Entertainment Merchants Assn.*, 564 U. S., at 791. As defined by the courts of appeals, the professional-speech doctrine would cover a wide array of individuals—doctors, lawyers, nurses, physical therapists, truck drivers, bartenders, barbers, and many others. See Smolla, Professional Speech and the First Amendment, 119 W. Va. L. Rev. 67, 68 (2016). One Court of Appeals has even applied it to fortunetellers. See *Moore-King*, 708 F. 3d, at 569. All that is required to make something a "profession," according to these courts, is that it involves personalized services and requires a professional license from the State. But that gives the States unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement. States cannot choose the protection that speech receives under the First Amendment, as that would give them a powerful tool to impose "invidious discrimination of disfavored subjects." *Cincinnati* v. *Discovery Network, Inc.*, 507 U. S. 410, 423–424, n. 19 (1993); see also *Riley*, *supra*, at 796 ("[S]tate labels cannot be dispositive of [the] degree of First Amendment protection" (citing *Bigelow* v. *Virginia*, 421 U. S. 809, 826 (1975))).

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C

In sum, neither California nor the Ninth Circuit has identified a persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles. We do not foreclose the possibility that some such reason exists. We need not do so because the licensed notice cannot survive even intermediate scrutiny. California asserts a single interest to justify the licensed notice: providing low-income women with information about state-sponsored services. Assuming that this is a substantial state interest, the licensed notice is not sufficiently drawn to achieve it.

If California's goal is to educate low-income women about the services it provides, then the licensed notice is "wildly underinclusive." *Entertainment Merchants Assn.*, *supra*, at 802. The notice applies only to clinics that have a "primary purpose" of "providing family planning or pregnancy-related services" and that provide two of six categories of specific services. § 123471(a). Other clinics that have another primary purpose, or that provide only one category of those services, also serve low-income women and could educate them about the State's services. According to the legislative record, California has "nearly 1,000 community clinics"—including "federally designated community health centers, migrant health centers, rural health centers, and frontier health centers"—that "serv[e] more than 5.6 million patients . . . annually through over 17 million patient encounters." App. 58. But most of those clinics are excluded from the licensed-notice requirement without explanation. Such "[u]nderinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Entertainment Merchants Assn.*, *supra*, at 802.

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The FACT Act also excludes, without explanation, federal clinics and Family PACT providers from the licensed-notice requirement. California notes that those clinics can enroll women in California's programs themselves, but California's stated interest is informing women that these services exist in the first place. California has identified no evidence that the exempted clinics are more likely to provide this information than the covered clinics. In fact, the exempted clinics have long been able to enroll women in California's programs, but the FACT Act was premised on the notion that "thousands of women remain unaware of [them]." Cal. Legis. Serv. § 1(b). If the goal is to maximize women's awareness of these programs, then it would seem that California would ensure that the places that can immediately enroll women also provide this information. The FACT Act's

exemption for these clinics, which serve many women who are pregnant or could become pregnant in the future, demonstrates the disconnect between its stated purpose and its actual scope. Yet "[p]recision . . . must be the touchstone" when it comes to regulations of speech, which "so closely touc[h] our most precious freedoms." *Button*, 371 U. S., at 438.

Further, California could inform low-income women about its services "without burdening a speaker with unwanted speech." *Riley*, 487 U. S., at 800. Most obviously, it could inform the women itself with a public-information campaign. See *ibid.* (concluding that a compelled disclosure was unconstitutional because the government could "itself publish the . . . disclosure"). California could even post the information on public property near crisis pregnancy centers. California argues that it has already tried an advertising campaign, and that many women who are eligible for publicly funded healthcare have not enrolled. But California has identified no evidence to that effect. And regardless, a "tepid response" does not prove that an advertising campaign is not a sufficient alternative. *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 816 (2000). Here, for example, individuals might not have enrolled in California's services because they do not want them, or because California spent insufficient resources on the advertising campaign. Either way, California cannot co-opt the licensed facilities to deliver its message for it. "[T]he First Amendment does not permit the State to sacrifice speech for efficiency." *Riley*, *supra*, at 795; accord, *Arizona Free Enterprise Club's Freedom Club PAC* v. *Bennett*, 564 U. S. 721, 747 (2011).

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In short, petitioners are likely to succeed on the merits of their challenge to the licensed notice. Contrary to the suggestion in the dissent, *post*, at 782–783 (opinion of BREYER, J.), we do not question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products.

III

We next address the unlicensed notice. The parties dispute whether the unlicensed notice is subject to deferential review under *Zauderer*.[3] We need not decide whether the *Zauderer* standard applies to the unlicensed notice. Even under *Zauderer*, a disclosure requirement cannot be "unjustified or unduly burdensome." 471 U. S., at 651. Our precedents require disclosures to remedy a harm that is "potentially real, not purely hypothetical," *Ibanez* v. *Florida Dept. of Business and Professional Regulation, Bd. of Accountancy*, 512 U. S. 136, 146 (1994), and to extend "no broader than reasonably necessary," *In re R. M. J.*, 455 U. S. 191, 203 (1982); accord, *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 772, n. 24 (1976); *Bates* v. *State Bar of Ariz.*, 433 U. S. 350, 384 (1977); cf. *Zauderer*, 471 U. S., at 649 (rejecting "broad prophylactic rules" in this area). Otherwise, they risk "chilling protected . . . speech." *Id.*, at 651. Importantly, California has the burden to prove that the unlicensed notice is neither unjustified nor unduly burdensome. See *Ibanez*, 512 U. S., at 146. It has not met its burden.

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We need not decide what type of state interest is sufficient to sustain a disclosure requirement like the unlicensed notice. California has not demonstrated any justification for the unlicensed notice that is more than "purely hypothetical." *Ibid.* The only justification that the California Legislature put forward was ensuring that "pregnant women in California know when they are getting medical care from licensed professionals." Cal. Legis. Serv. § 1(e). At oral argument, however, California denied that the justification for the FACT Act was that women "go into [crisis pregnancy centers] and they don't realize what they are."

[3] Other than a conclusory assertion that the unlicensed notice satisfies any standard of review, see Brief for Respondents 19, California does not explain how the unlicensed notice could satisfy any standard other than *Zauderer*.

Tr. of Oral Arg. 44–45. Indeed, California points to nothing suggesting that pregnant women do not already know that the covered facilities are staffed by unlicensed medical professionals. The services that trigger the unlicensed notice—such as having "volunteers who collect health information from clients," "advertis[ing] . . . pregnancy options counseling," and offering over-the-counter "pregnancy testing," § 123471(b)—do not require a medical license. And California already makes it a crime for individuals without a medical license to practice medicine. See Cal. Bus. & Prof. Code Ann. § 2052. At this preliminary stage of the litigation, we agree that petitioners are likely to prevail on the question whether California has proved a justification for the unlicensed notice.[4]

Even if California had presented a nonhypothetical justification for the unlicensed notice, the FACT Act unduly burdens protected speech. The unlicensed notice imposes a government-scripted, speaker-based disclosure requirement that is wholly disconnected from California's informational interest. It requires covered facilities to post California's precise notice, no matter what the facilities say on site or in their advertisements. And it covers a curiously narrow subset of speakers. While the licensed notice applies to facilities that provide "family planning" services and "contraception or contraceptive methods," § 123471(a), the California Legislature dropped these triggering conditions for the unlicensed notice. The unlicensed notice applies only to facilities that primarily provide "pregnancy-related" services. § 123471(b). Thus, a facility that advertises and provides pregnancy tests is covered by the unlicensed notice, but a facility across the street that advertises and provides nonprescription contraceptives is excluded—even though the latter is no less likely to make women think it is licensed. This Court's precedents are deeply skeptical of laws that

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[4] Nothing in our opinion should be read to foreclose the possibility that California will gather enough evidence in later stages of this litigation.

"distinguis[h] among different speakers, allowing speech by some but not others." *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 340 (2010). Speaker-based laws run the risk that "the State has left unburdened those speakers whose messages are in accord with its own views." *Sorrell*, 564 U. S., at 580.

The application of the unlicensed notice to advertisements demonstrates just how burdensome it is. The notice applies to all "print and digital advertising materials" by an unlicensed covered facility. § 123472(b). These materials must include a government-drafted statement that "[t]his facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services." § 123472(b)(1). An unlicensed facility must call attention to the notice, instead of its own message, by some method such as larger text or contrasting type or color. See §§ 123472(b)(2)–(3). This scripted language must be posted in English and as many other languages as California chooses to require. As California conceded at oral argument, a billboard for an unlicensed facility that says "Choose Life" would have to surround that two-word statement with a 29-word statement from the government, in as many as 13 different languages. In this way, the unlicensed notice drowns out the facility's own message. More likely, the "detail required" by the unlicensed notice "effectively rules out" the possibility of having such a billboard in the first place. *Ibanez*, *supra*, at 146.

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For all these reasons, the unlicensed notice does not satisfy *Zauderer*, assuming that standard applies. California has offered no justification that the notice plausibly furthers. It targets speakers, not speech, and imposes an unduly burdensome disclosure requirement that will chill their protected speech. Taking all these circumstances together, we conclude that the unlicensed notice is unjustified and unduly burdensome under *Zauderer*. We express no view on the

legality of a similar disclosure requirement that is better supported or less burdensome.

IV

We hold that petitioners are likely to succeed on the merits of their claim that the FACT Act violates the First Amendment. 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 KENNEDY, with whom THE CHIEF JUSTICE, JUSTICE ALITO, and JUSTICE GORSUCH join, concurring.

I join the Court's opinion in all respects.

This separate writing seeks to underscore that the apparent viewpoint discrimination here is a matter of serious constitutional concern. See *ante*, at 765, n. 2. The Court, in my view, is correct not to reach this question. It was not sufficiently developed, and the rationale for the Court's decision today suffices to resolve the case. And had the Court's analysis been confined to viewpoint discrimination, some legislators might have inferred that if the law were reenacted with a broader base and broader coverage it then would be upheld.

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It does appear that viewpoint discrimination is inherent in the design and structure of this Act. This law is a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression. For here the State requires primarily pro-life pregnancy centers to promote the State's own preferred message advertising abortions. This compels individuals to contradict their most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts, or all of these. And the history of the Act's passage and its underinclusive application suggest a real

possibility that these individuals were targeted because of their beliefs.

The California Legislature included in its official history the congratulatory statement that the Act was part of California's legacy of "forward thinking." App. 38–39. But it is not forward thinking to force individuals to "be an instrument for fostering public adherence to an ideological point of view [they] fin[d] unacceptable." *Wooley* v. *Maynard*, 430 U. S. 705, 715 (1977). It is forward thinking to begin by reading the First Amendment as ratified in 1791; to understand the history of authoritarian government as the Founders then knew it; to confirm that history since then shows how relentless authoritarian regimes are in their attempts to stifle free speech; and to carry those lessons onward as we seek to preserve and teach the necessity of freedom of speech for the generations to come. Governments must not be allowed to force persons to express a message contrary to their deepest convictions. Freedom of speech secures freedom of thought and belief. This law imperils those liberties.

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

The petitioners ask us to consider whether two sections of a California statute violate the First Amendment. The first section requires licensed medical facilities (that provide women with assistance involving pregnancy or family planning) to tell those women where they might obtain help, including financial help, with comprehensive family planning services, prenatal care, and abortion. The second requires *un*licensed facilities offering somewhat similar services to make clear that they are unlicensed. In my view both statutory sections are likely constitutional, and I dissent from the Court's contrary conclusions.

I

The first statutory section applies to licensed medical facilities dealing with pregnancy and which also provide specific

services such as prenatal care, contraception counseling, pregnancy diagnosis, or abortion-related services. Cal. Health & Safety Code Ann. §§ 123471(a), 1204, 1206(h) (West 2018) (covering "primary care clinics" that serve low-income women); Cal. Code Regs., tit. 22, § 75026 (2018) ("primary care clinics" are medical facilities that provide "services for the care and treatment of patients for whom the clinic accepts responsibility" with the "direction or supervision" of each "service" undertaken "by a person licensed, certified or registered to provide such service").

The statute requires these facilities to post a notice in their waiting rooms telling their patients:

> "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]." § 123472(a)(1).

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The petitioners here, a group of covered medical facilities that object to abortion for religious reasons, brought this case seeking an injunction against enforcement of the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act on the ground that it violates the First Amendment on its face. The District Court denied a preliminary injunction, and the Court of Appeals affirmed. The majority now reverses the Court of Appeals on the ground that the petitioners have shown a likelihood of success on the merits, *i. e.*, that the statute likely violates the petitioners' free speech rights and is unconstitutional on its face.

A

Before turning to the specific law before us, I focus upon the general interpretation of the First Amendment that the majority says it applies. It applies heightened scrutiny to

the Act because the Act, in its view, is "content based." *Ante,* at 766. "By compelling individuals to speak a particular message," it adds, "such notices 'alte[r] the content of [their] speech.'" *Ibid.* (quoting *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 795 (1988); alteration in original). "As a general matter," the majority concludes, such laws are "'presumptively unconstitutional'" and are subject to "stringent" review. *Ante*, at 766.

The majority recognizes exceptions to this general rule: It excepts laws that "require professionals to disclose factual, noncontroversial information in their 'commercial speech,'" *provided that* the disclosure "relates to the services that [the regulated entities] provide." *Ante,* at 768–769. It also excepts laws that "regulate professional conduct" *and* only "incidentally burden speech." *Ibid.*

This constitutional approach threatens to create serious problems. Because much, perhaps most, human behavior takes place through speech and because much, perhaps most, law regulates that speech in terms of its content, the majority's approach at the least threatens considerable litigation over the constitutional validity of much, perhaps most, government regulation. Virtually every disclosure law could be considered "content based," for virtually every disclosure law requires individuals "to speak a particular message." See *Reed* v. *Town of Gilbert*, 576 U. S. 155, 177–178 (2015) (BREYER, J., concurring in judgment) (listing regulations that inevitably involve content discrimination, ranging from securities disclosures to signs at petting zoos). Thus, the majority's view, if taken literally, could radically change prior law, perhaps placing much securities law or consumer protection law at constitutional risk, depending on how broadly its exceptions are interpreted.

Many ordinary disclosure laws would fall outside the majority's exceptions for disclosures related to the professional's own services or conduct. These include numerous commonly found disclosure requirements relating to the

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medical profession. See, *e. g.*, Cal. Veh. Code Ann. § 27363.5 (West 2014) (requiring hospitals to tell parents about child seatbelts); Cal. Health & Safety Code Ann. § 123222.2 (requiring hospitals to ask incoming patients if they would like the facility to give their family information about patients' rights and responsibilities); N. C. Gen. Stat. Ann. § 131E–79.2 (2017) (requiring hospitals to tell parents of newborns about pertussis disease and the available vaccine). These also include numerous disclosure requirements found in other areas. See, *e. g.*, N. Y. C. Rules & Regs., tit. 1, § 27–01 (2018) (requiring signs by elevators showing stair locations); San Francisco Dept. of Health, Director's Rules & Regs., Garbage and Refuse (July 8, 2010) (requiring property owners to inform tenants about garbage disposal procedures).

The majority, at the end of Part II of its opinion, perhaps recognizing this problem, adds a general disclaimer. It says that it does not "question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products." *Ante*, at 775. But this generally phrased disclaimer would seem more likely to invite litigation than to provide needed limitation and clarification. The majority, for example, does not explain why the Act here, which is justified in part by health and safety considerations, does not fall within its "health" category. *Ante*, at 773; see also *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 882–884 (1992) (joint opinion of O'Connor, KENNEDY, and Souter, JJ.) (reasoning that disclosures related to fetal development and childbirth are related to the health of a woman seeking an abortion). Nor does the majority opinion offer any reasoned basis that might help apply its disclaimer for distinguishing lawful from unlawful disclosures. In the absence of a reasoned explanation of the disclaimer's meaning and rationale, the disclaimer is unlikely to withdraw the invitation to litigation that the majority's general broad "content-based" test issues. That test invites courts around the Nation to apply

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an unpredictable First Amendment to ordinary social and economic regulation, striking down disclosure laws that judges may disfavor, while upholding others, all without grounding their decisions in reasoned principle.

Notably, the majority says nothing about limiting its language to the kind of instance where the Court has traditionally found the First Amendment wary of content-based laws, namely, in cases of viewpoint discrimination. "Content-based laws merit this protection because they present, albeit sometimes in a subtler form, the same dangers as laws that regulate speech based on viewpoint." *Reed*, 576 U. S., at 174 (ALITO, J., concurring). Accordingly, "[l]imiting speech based on its 'topic' or 'subject' " can favor "those who do not want to disturb the status quo." *Ibid.* But the mine run of disclosure requirements do nothing of that sort. They simply alert the public about child seatbelt laws, the location of stairways, and the process to have their garbage collected, among other things.

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Precedent does not require a test such as the majority's. Rather, in saying the Act is not a longstanding health and safety law, the Court substitutes its own approach—without a defining standard—for an approach that was reasonably clear. Historically, the Court has been wary of claims that regulation of business activity, particularly health-related activity, violates the Constitution. Ever since this Court departed from the approach it set forth in *Lochner* v. *New York*, 198 U. S. 45 (1905), ordinary economic and social legislation has been thought to raise little constitutional concern. As Justice Brandeis wrote, typically this Court's function in such cases "is only to determine the reasonableness of the Legislature's belief in the existence of evils and in the effectiveness of the remedy provided." *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 286–287 (1932) (dissenting opinion); see *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U. S. 483, 486–488 (1955) (adopting the approach of Justice Brandeis).

The Court has taken this same respectful approach to economic and social legislation when a First Amendment claim like the claim present here is at issue. See, *e. g.*, *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, 651 (1985) (upholding reasonable disclosure requirements for attorneys); *Milavetz, Gallop & Milavetz, P. A.* v. *United States*, 559 U. S. 229, 252–253 (2010) (same); cf. *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, 563–564 (1980) (applying intermediate scrutiny to other restrictions on commercial speech); *In re R. M. J.*, 455 U. S. 191, 203 (1982) (no First Amendment protection for misleading or deceptive commercial speech). But see *Sorrell* v. *IMS Health Inc.*, 564 U. S. 552 (2011) (striking down regulation of pharmaceutical drug-related information).

Even during the *Lochner* era, when this Court struck down numerous economic regulations concerning industry, this Court was careful to defer to state legislative judgments concerning the medical profession. The Court took the view that a State may condition the practice of medicine on any number of requirements, and physicians, in exchange for following those reasonable requirements, could receive a license to practice medicine from the State. Medical professionals do not, generally speaking, have a right to use the Constitution as a weapon allowing them rigorously to control the content of those reasonable conditions. See, *e. g.*, *Dent* v. *West Virginia*, 129 U. S. 114 (1889) (upholding medical licensing requirements); *Hawker* v. *New York*, 170 U. S. 189 (1898) (same); *Collins* v. *Texas*, 223 U. S. 288, 297–298 (1912) (recognizing the "right of the State to adopt a policy even upon medical matters concerning which there is difference of opinion and dispute"); *Lambert* v. *Yellowley*, 272 U. S. 581, 596 (1926) ("[T]here is no right to practice medicine which is not subordinate to the police power of the States"); *Graves* v. *Minnesota*, 272 U. S. 425, 429 (1926) (statutes "regulating the practice of medicine" involve "very different considera-

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tions" from those applicable to "trades [such as] locomotive engineers and barbers"); *Semler* v. *Oregon Bd. of Dental Examiners*, 294 U. S. 608, 612 (1935) (upholding state regulation of dentistry given the "vital interest of public health"). In the name of the First Amendment, the majority today treads into territory where the pre-New Deal, as well as the post-New Deal, Court refused to go.

The Court, in justification, refers to widely accepted First Amendment goals, such as the need to protect the Nation from laws that "'suppress unpopular ideas or information'" or inhibit the "'marketplace of ideas in which truth will ultimately prevail.'" *Ante*, at 771–772; see *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 269 (1964). The concurrence highlights similar First Amendment interests. *Ante*, at 780. I, too, value this role that the First Amendment plays—in an appropriate case. But here, the majority enunciates a general test that reaches far beyond the area where this Court has examined laws closely in the service of those goals. And in suggesting that heightened scrutiny applies to much economic and social legislation, the majority pays those First Amendment goals a serious disservice through dilution. Using the First Amendment to strike down economic and social laws that legislatures long would have thought themselves free to enact will, for the American public, obscure, not clarify, the true value of protecting freedom of speech.

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B

Still, what about this specific case? The disclosure at issue here concerns speech related to abortion. It involves health, differing moral values, and differing points of view. Thus, rather than set forth broad, new, First Amendment principles, I believe that we should focus more directly upon precedent more closely related to the case at hand. This Court has more than once considered disclosure laws relating to reproductive health. Though those rules or holdings

have changed over time, they should govern our disposition of this case.

I begin with *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416 (1983). In that case the Court considered a city ordinance requiring a doctor to tell a woman contemplating an abortion about the

> "status of her pregnancy, the development of her fetus, the date of possible viability, the physical and emotional complications that may result from an abortion, and the availability of agencies to provide her with assistance and information with respect to birth control, adoption, and childbirth[, and] 'the particular risks associated with her own pregnancy and the abortion technique to be employed.'" *Id.*, at 442 (quoting Akron Codified Ordinances § 1870.06(C) (1978)).

The ordinance further required a doctor to tell such a woman that "'the unborn child is a human life from the moment of conception.'" *Akron*, *supra*, at 444 (quoting Akron Codified Ordinances § 1870.06(B)(3)).

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The plaintiffs claimed that this ordinance violated a woman's constitutional right to obtain an abortion. And this Court agreed. The Court stated that laws providing for a woman's "informed consent" to an abortion were normally valid, for they helped to protect a woman's health. *Akron*, 462 U. S., at 443–444. Still, the Court held that the law at issue went "beyond permissible limits" because "much of the information required [was] designed not to inform the woman's consent but rather to persuade her to withhold it altogether." *Id.*, at 444. In the Court's view, the city had placed unreasonable "'obstacles in the path of the doctor upon whom [the woman is] entitled to rely for advice in connection with her decision.'" *Id.*, at 445 (quoting *Whalen* v. *Roe*, 429 U. S. 589, 604, n. 33 (1977); alteration in original).

Several years later, in *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747 (1986), the

Court considered a Pennsylvania statute that "prescribe[d] in detail the method for securing 'informed consent'" to an abortion. *Id.*, at 760. The statute required the doctor to tell the patient about health risks associated with abortion, possibly available benefits for prenatal care, childbirth, and neonatal care, and agencies offering alternatives to abortion. *Id.*, at 760–761. In particular it required the doctor to give the patient printed materials that, among other things, said:

> "'"There are many public and private agencies willing and able to help you to carry your child to term, and to assist you and your child after your child is born, whether you choose to keep your child or place her or him for adoption. The Commonwealth of Pennsylvania strongly urges you to contact them before making a final decision about abortion. The law requires that your physician or his agent give you the opportunity to call agencies like these before you undergo an abortion."'"
> *Id.*, at 761 (quoting 18 Pa. Cons. Stat. § 3208(a)(1) (1982)).

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The Court, as in *Akron*, held that the statute's information requirements violated the Constitution. They were designed "'not to inform the woman's consent but rather to persuade her to withhold it altogether.'" *Thornburgh*, *supra*, at 762 (quoting *Akron*, *supra*, at 444). In the Court's view, insistence on telling the patient about the availability of "medical assistance benefits" if she decided against an abortion was a "poorly disguised elemen[t] of discouragement for the abortion decision," and the law was the "antithesis of informed consent." *Thornburgh*, *supra*, at 763–764.

These cases, however, whatever support they may have given to the majority's view, are no longer good law. In *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, the Court again considered a state law that required doctors to provide information to a woman deciding whether to proceed with an abortion. That law required the doctor to tell the woman about the nature of the abortion procedure, the health risks of abortion and of childbirth, the

"'probable gestational age of the unborn child,'" and the availability of printed materials describing the fetus, medical assistance for childbirth, potential child support, and the agencies that would provide adoption services (or other alternatives to abortion). *Id.*, at 881 (joint opinion of O'Connor, KENNEDY, and Souter, JJ.) (quoting 18 Pa. Cons. Stat. § 3205 (1990)).

This time a joint opinion of the Court, in judging whether the State could impose these informational requirements, asked whether doing so imposed an "undue burden" upon women seeking an abortion. *Casey*, 505 U. S., at 882–883. It held that it did not. *Ibid.* Hence the statute was constitutional. *Id.*, at 874 (plurality opinion). The joint opinion stated that the statutory requirements amounted to "reasonable measure[s] to ensure an informed choice, one which might cause the woman to choose childbirth over abortion." *Id.*, at 883. And it "overruled" portions of the two cases, *Akron* and *Thornburgh*, that might indicate the contrary. 505 U. S., at 882.

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In respect to overruling the earlier cases, it wrote:

> "To the extent *Akron I* and *Thornburgh* find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus, those cases go too far, are inconsistent with *Roe*'s acknowledgment of an important interest in potential life, and are overruled." *Ibid.*

The joint opinion specifically discussed the First Amendment, the constitutional provision now directly before us. It concluded that the statute did not violate the First Amendment. It wrote:

> "All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the

> physician's First Amendment rights not to speak are implicated, see *Wooley* v. *Maynard*, 430 U. S. 705 (1977), but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State, cf. *Whalen* v. *Roe*, 429 U. S. 589, 603 (1977). We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here." *Id.*, at 884.

Thus, the Court considered the State's statutory requirements, including the requirement that the doctor must inform his patient about where she could learn how to have the newborn child adopted (if carried to term) and how she could find related financial assistance. *Id.*, at 881. To repeat the point, the Court then held that the State's requirements did *not* violate either the Constitution's protection of free speech or its protection of a woman's right to choose to have an abortion.

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C

Taking *Casey* as controlling, the law's demand for evenhandedness requires a different answer than that perhaps suggested by *Akron* and *Thornburgh*. If a State can lawfully require a doctor to tell a woman seeking an abortion about adoption services, why should it not be able, as here, to require a medical counselor to tell a woman seeking prenatal care or other reproductive healthcare about childbirth and abortion services? As the question suggests, there is no convincing reason to distinguish between information about adoption and information about abortion in this context. After all, the rule of law embodies evenhandedness, and "what is sauce for the goose is normally sauce for the gander." *Heffernan* v. *City of Paterson*, 578 U. S. 266, 272 (2016).

1

The majority tries to distinguish *Casey* as concerning a regulation of professional conduct that only incidentally bur-

dened speech. *Ante,* at 769–770. *Casey,* in its view, applies only when obtaining "informed consent" to a medical procedure is directly at issue.

This distinction, however, lacks moral, practical, and legal force. The individuals at issue here are all medical personnel engaging in activities that directly affect a woman's health—not significantly different from the doctors at issue in *Casey.* After all, the statute here applies only to "primary care clinics," which provide "services for the care and treatment of patients for whom the clinic accepts responsibility." Cal. Code Regs., tit. 22, § 75026(a); see Cal. Health & Safety Code Ann. §§ 123471(a), 1204, 1206(h). And the persons responsible for patients at those clinics are all persons "licensed, certified or registered to provide" pregnancy-related medical services. Cal. Code Regs., tit. 22, § 75026(c). The petitioners have not, either here or in the District Court, provided any example of a covered clinic that is not operated by licensed doctors or what the statute specifies are equivalent professionals. See, *e. g.,* App. to Pet. for Cert. 92a (identifying two obstetrician/gynecologists, a radiologist, an anesthesiologist, a certified nurse midwife, a nurse practitioner, 10 nurses, and two registered diagnostic medical sonographers on staff).

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The Act requires these medical professionals to disclose information about the possibility of abortion (including potential financial help) that is as likely helpful to granting "informed consent" as is information about the possibility of adoption and childbirth (including potential financial help). That is why I find it impossible to drive any meaningful legal wedge between the law, as interpreted in *Casey,* and the law as it should be applied in this case. If the law in *Casey* regulated speech "only 'as part of the *practice* of medicine,'" *ante,* at 770 (quoting *Casey, supra,* at 884), so too here.

The majority contends that the disclosure here is unrelated to a "medical procedure," unlike that in *Casey,* and so the State has no reason to inform a woman about alterna-

tives to childbirth (or, presumably, the health risks of childbirth). *Ante*, at 770. Really? No one doubts that choosing an abortion is a medical procedure that involves certain health risks. See *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. 582, 618 (2016) (identifying the mortality rate in Texas as 1 in 120,000 to 144,000 abortions). But the same is true of carrying a child to term and giving birth. That is why prenatal care often involves testing for anemia, infections, measles, chicken pox, genetic disorders, diabetes, pneumonia, urinary tract infections, preeclampsia, and hosts of other medical conditions. Childbirth itself, directly or through pain management, risks harms of various kinds, some connected with caesarean or surgery-related deliveries, some related to more ordinary methods of delivery. Indeed, nationwide "childbirth is 14 times more likely than abortion to result in" the woman's death. *Ibid.* Health considerations do not favor disclosure of alternatives and risks associated with the latter but not those associated with the former.

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In any case, informed consent principles apply more broadly than only to discrete "medical procedures." Prescription drug labels warn patients of risks even though taking prescription drugs may not be considered a "medical procedure." 21 CFR § 201.56 (2017). In California, clinics that screen for breast cancer must post a sign in their offices notifying patients that, if they are diagnosed with breast cancer, their doctor must provide "a written summary of alternative efficacious methods of treatment," a notification that does not relate to the *screening* procedure at issue. Cal. Health & Safety Code Ann. § 109277. If even these disclosures fall outside the majority's cramped view of *Casey* and informed consent, it undoubtedly would invalidate the many other disclosures that are routine in the medical context as well. *Supra*, at 782–783.

The majority also finds it "[t]ellin[g]" that general practice clinics—*i. e.*, paid clinics—are not required to provide the licensed notice. *Ante*, at 770. But the lack-of-information

problem that the statute seeks to ameliorate is a problem that the State explains is commonly found among low-income women. See Brief for State Respondents 5–6. That those with low income might lack the time to become fully informed and that this circumstance might prove disproportionately correlated with income is not intuitively surprising. Nor is it surprising that those with low income, whatever they choose in respect to pregnancy, might find information about financial assistance particularly useful. There is "nothing inherently suspect" about this distinction, *McCullen* v. *Coakley*, 573 U. S. 464, 483 (2014), which, is not "based on the content of [the advocacy] each group offers," *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 658–659 (1994), but upon the patients the group generally serves and the needs of that population.

2

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Separately, finding no First Amendment infirmity in the licensed notice is consistent with earlier Court rulings. For instance, in *Zauderer* we upheld a requirement that attorneys disclose in their advertisements that clients might be liable for significant litigation costs even if their lawsuits were unsuccessful. 471 U. S., at 650. We refused to apply heightened scrutiny, instead asking whether the disclosure requirements were "reasonably related to the State's interest in preventing deception of consumers." *Id.*, at 651.

The majority concludes that *Zauderer* does not apply because the disclosure "in no way relates to the services that licensed clinics provide." *Ante*, at 769. But information about state resources for family planning, prenatal care, and abortion *is* related to the services that licensed clinics provide. These clinics provide counseling about contraception (which is a family planning service), ultrasounds or pregnancy testing (which is prenatal care), or abortion. Cal. Health & Safety Code Ann. §123471(a). The required disclosure is related to the clinic's services because it provides

information about state resources for the very same services. A patient who knows that she can receive free prenatal care from the State may well prefer to forgo the prenatal care offered at one of the clinics here. And for those interested in family planning and abortion services, information about such alternatives is relevant information to patients offered prenatal care, just as *Casey* considered information about adoption to be relevant to the abortion decision.

Regardless, *Zauderer* is not so limited. *Zauderer* turned on the "material differences between disclosure requirements and outright prohibitions on speech." 471 U. S., at 650. A disclosure requirement does not prevent speakers "from conveying information to the public," but "only require[s] them to provide somewhat more information than they might otherwise be inclined to present." *Ibid.* Where a State's requirement to speak "purely factual and uncontroversial information" does not attempt "to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein,' " it does not warrant heightened scrutiny. *Id.*, at 651 (quoting *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 642 (1943)).

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In *Zauderer*, the Court emphasized the reason that the First Amendment protects commercial speech at all: "the value to consumers of the information such speech provides." 471 U. S., at 651. For that reason, a professional's "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." *Ibid.* But this rationale is not in any way tied to advertisements about a professional's own services. For instance, it applies equally to a law that requires doctors, when discharging a child under eight years of age, to "provide to and discuss with the parents . . . information on the current law requiring child passenger restraint systems, safety belts, and the transportation of children in rear seats." Cal. Veh. Code Ann. §27363.5(a). Even though child seatbelt laws do not

directly relate to the doctor's own services, telling parents about such laws does nothing to undermine the flow of factual information. Whether the context is advertising the professional's own services or other commercial speech, a doctor's First Amendment interest in not providing factual information to patients is the same: minimal, because his professional speech is protected precisely because of its informational value to patients. There is no reason to subject such laws to heightened scrutiny.

Accordingly, the majority's reliance on cases that prohibit rather than require speech is misplaced. *Ante*, at 771–773. I agree that "'in the fields of medicine and public heath, . . . information can save lives,'" but the licensed disclosure *serves* that informational interest by requiring clinics to notify patients of the availability of state resources for family planning services, prenatal care, and abortion, which—unlike the majority's examples of normative statements, *ante*, at 772—is truthful and nonmisleading information. Abortion is a controversial topic and a source of normative debate, but the availability of state resources is not a normative statement or a fact of debatable truth. The disclosure includes information about resources available should a woman seek to continue her pregnancy or terminate it, and it expresses no official preference for one choice over the other. Similarly, the majority highlights an interest that often underlies our decisions in respect to speech prohibitions—the marketplace of ideas. But that marketplace is fostered, not hindered, by providing information to patients to enable them to make fully informed medical decisions in respect to their pregnancies.

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Of course, one might take the majority's decision to mean that speech about abortion is special, that it involves in this case not only professional medical matters, but also views based on deeply held religious and moral beliefs about the nature of the practice. To that extent, arguably, the speech here is different from that at issue in *Zauderer*. But assum-

ing that is so, the law's insistence upon treating like cases alike should lead us to reject the petitioners' arguments that I have discussed. This insistence, the need for evenhandedness, should prove particularly weighty in a case involving abortion rights. That is because Americans hold strong, and differing, views about the matter. Some Americans believe that abortion involves the death of a live and innocent human being. Others believe that the ability to choose an abortion is "central to personal dignity and autonomy," *Casey*, 505 U. S., at 851, and note that the failure to allow women to choose an abortion involves the deaths of innocent women. We have previously noted that we cannot try to adjudicate who is right and who is wrong in this moral debate. But we can do our best to interpret American constitutional law so that it applies fairly within a Nation whose citizens strongly hold these different points of view. That is one reason why it is particularly important to interpret the First Amendment so that it applies evenhandedly as between those who disagree so strongly. For this reason too a Constitution that allows States to insist that medical providers tell women about the possibility of adoption should also allow States similarly to insist that medical providers tell women about the possibility of abortion.

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D

It is particularly unfortunate that the majority, through application of so broad and obscure a standard, see *supra*, at 781–786, declines to reach remaining arguments that the Act discriminates on the basis of viewpoint. *Ante*, at 765, n. 2. The petitioners argue that it unconstitutionally discriminates on the basis of viewpoint because it primarily covers facilities with supporters, organizers, and employees who are likely to hold strong pro-life views. They contend that the statute does not cover facilities likely to hold neutral or prochoice views, because it exempts facilities that enroll patients in publicly funded programs that include abortion. In doing so, they say, the statute unnecessarily imposes a dis-

proportionate burden upon facilities with pro-life views, the very facilities most likely to find the statute's references to abortion morally abhorrent. Brief for Petitioners 31–37.

The problem with this argument lies in the record. Numerous *amicus* briefs advance the argument. See, *e. g.*, Brief for Scharpen Foundation, Inc., et al. as *Amici Curiae* 6–10; Brief for American Center for Law & Justice et al. as *Amici Curiae* 7–13. Some add that women who use facilities that are exempt from the statute's requirements (because they enroll patients in two California state-run medical programs that provide abortions) may still need the information provided by the disclosure, Brief for CATO Institute as *Amicus Curiae* 15, a point the majority adopts in concluding that the Act is underinclusive, *ante*, at 774–775. But the key question is whether these exempt clinics are significantly more likely than are the pro-life clinics to tell or to have told their pregnant patients about the existence of these programs—in the absence of any statutory compulsion. If so, it may make sense—in terms of the statute's informational objective—to exempt them, namely, if there is no need to cover them. See FACT Act § 1(d) (suggesting in general terms that this is so). But, if there are not good reasons to exempt these clinics from coverage, *i. e.*, if, for example, they too frequently do not tell their patients about the availability of abortion services, the petitioners' claim of viewpoint discrimination becomes much stronger.

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The petitioners, however, did not develop this point in the record below. They simply stated in their complaint that the Act exempts "facilities which provide abortion services, freeing them from the Act's disclosure requirements, while leaving pro-life facilities subject to them." App. to Pet. for Cert. 104a. And in the District Court they relied solely on the allegations of their complaint, provided no supporting declarations, and contended that discovery was unnecessary. *Id.*, at 47a, 50a, 68a. The District Court concluded that the reason for the Act's exemptions was that those clinics "pro-

vide the entire spectrum of services required of the notice," and that absent discovery, "there is no evidence to suggest the Act burdens only" pro-life conduct. *Id.*, at 68a. Similarly, the petitioners pressed the claim in the Court of Appeals. *Id.*, at 20a–22a. But they did not supplement the record. Consequently, that court reached the same conclusion. Given the absence of evidence in the record before the lower courts, the "viewpoint discrimination" claim could not justify the issuance of a preliminary injunction.

II

The second statutory provision covers pregnancy-related facilities that provide women with certain medical-type services (such as obstetric ultrasounds or sonograms, pregnancy diagnosis, counseling about pregnancy options, or prenatal care), are not licensed as medical facilities by the State, and do not have a licensed medical provider on site. Cal. Health & Safety Code Ann. § 123471(b)(1). The statute says that such a facility must disclose that it is not "licensed as a medical facility." § 123472(b). And it must make this disclosure in a posted notice and in advertising. *Ibid.*

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The majority does not question that the State's interest (ensuring that "'pregnant women in California know when they are getting medical care from licensed professionals'") is the type of informational interest that *Zauderer* encompasses. *Ante*, at 765, 776. Nor could it. In *Riley*, 487 U. S. 781, the Court noted that the First Amendment would permit a requirement for "professional fundraisers to disclose their professional status"—nearly identical to the unlicensed disclosure at issue here. *Id.*, at 799, and n. 11; see also *id.*, at 804 (Scalia, J., concurring in part and concurring in judgment) (noting that this requirement was not aimed at combating deception). Such informational interests have long justified regulations in the medical context. See, *e. g.*, *Dent*, 129 U. S., at 122 (upholding medical licensing requirements that "tend to secure [a State's citizens] against the conse-

quences of ignorance and incapacity, as well as of deception and fraud"); *Semler*, 294 U. S., at 611 (upholding state dentistry regulation that "afford[ed] protection against ignorance, incapacity and imposition").

Nevertheless, the majority concludes that the State's interest is "'purely hypothetical'" because unlicensed clinics provide innocuous services that do not require a medical license. *Ante*, at 776. To do so, it applies a searching standard of review based on our precedents that deal with speech *restrictions*, not *disclosures*. *Ibid.* (citing, *e. g.*, *In re R. M. J.*, 455 U. S., at 203; *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 772, n. 24 (1976); *Bates* v. *State Bar of Ariz.*, 433 U. S. 350, 384 (1977); and *Zauderer*, 471 U. S., at 649 (portion of opinion considering speech restrictions, not disclosures)). This approach is incompatible with *Zauderer*. See *Zauderer*, *supra*, at 651 (upholding attorney disclosure requirements where "reasonably related to the State's interest"); *Milavetz*, 559 U. S., at 250–253 (same).

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There is no basis for finding the State's interest "hypothetical." The legislature heard that information-related delays in qualified healthcare negatively affect women seeking to terminate their pregnancies as well as women carrying their pregnancies to term, with delays in qualified prenatal care causing life-long health problems for infants. Reproductive FACT Act: Hearing on Assembly B. 775 before the Senate Health Committee, 2015 Cal. Leg. Sess. Even without such testimony, it is "self-evident" that patients might think they are receiving qualified medical care when they enter facilities that collect health information, perform obstetric ultrasounds or sonograms, diagnose pregnancy, and provide counseling about pregnancy options or other prenatal care. *Milavetz*, *supra*, at 251. The State's conclusion to that effect is certainly reasonable.

The majority also suggests that the Act applies too broadly, namely, to all unlicensed facilities "no matter what

the facilities say on site or in their advertisements." *Ante*, at 777. But the Court has long held that a law is not unreasonable merely because it is overinclusive. For instance, in *Semler* the Court upheld as reasonable a state law that prohibited licensed dentists from advertising that their skills were superior to those of other dentists. 294 U. S., at 609. A dentist complained that he was, in fact, better than other dentists. *Id.*, at 610. Yet the Court held that "[i]n framing its policy, the legislature was not bound to provide for determinations of the relative proficiency of particular practitioners." *Id.*, at 612. To the contrary, "[t]he legislature was entitled to consider the general effects of the practices which it described, and if these effects were injurious in facilitating unwarranted and misleading claims, to counteract them by a general rule, even though in particular instances there might be no actual deception or misstatement." *Id.*, at 613.

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Relatedly, the majority suggests that the Act is suspect because it covers some speakers but not others. *Ante*, at 777–778. I agree that a law's exemptions can reveal viewpoint discrimination (although the majority does not reach this point). "'[A]n exemption from an otherwise permissible regulation of speech may represent a governmental "attempt to give one side of a debatable public question an advantage in expressing its views to the people."'" *McCullen*, 573 U. S., at 483 (quoting *City of Ladue* v. *Gilleo*, 512 U. S. 43, 51 (1994)). Such speaker-based laws warrant heightened scrutiny "when they reflect the Government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say)." *Turner Broadcasting System, Inc.*, 512 U. S., at 658. Accordingly, where a law's exemptions "facilitate speech on only one side of the abortion debate," there is a "clear form of viewpoint discrimination." *McCullen*, *supra*, at 485.

There is no cause for such concern here. The Act does not, on its face, distinguish between facilities that favor

pro-life and those that favor pro-choice points of view. Nor is there any convincing evidence before us or in the courts below that discrimination was the purpose or the effect of the statute. Notably, California does not single out pregnancy-related facilities for this type of disclosure requirement. See, *e. g.*, Cal. Bus. & Prof. Code Ann. § 2053.6 (West 2012) (unlicensed providers of alternative health services must disclose that "he or she is not a licensed physician" and "the services to be provided are not licensed by the state"). And it is unremarkable that the State excluded the provision of family planning and contraceptive services as triggering conditions. *Ante*, at 777. After all, the State was seeking to ensure that "pregnant women in California know when they are getting medical care from licensed professionals," and pregnant women generally do not need contraceptive services.

Finally, the majority concludes that the Act is overly burdensome. *Ante*, at 778. I agree that "unduly burdensome disclosure requirements might offend the First Amendment." *Zauderer*, *supra*, at 651. But these and similar claims are claims that the statute could be applied unconstitutionally, not that it is unconstitutional on its face. Compare *New York State Club Assn., Inc.* v. *City of New York*, 487 U. S. 1, 14 (1988) (a facial overbreadth challenge must show "from actual fact" that a "substantial number of instances exist in which the Law cannot be applied constitutionally"), with *Chicago* v. *Morales*, 527 U. S. 41, 74 (1999) (Scalia, J., dissenting) (an as-applied challenge asks whether "the statute is unconstitutional as applied to *this* party, in the circumstances of *this* case"). And it will be open to the petitioners to make these claims if and when the State threatens to enforce the statute in this way. But facial relief is inappropriate here, where the petitioners "fail" even "to describe [these] instances of arguable overbreadth of the contested law," *Washington State Grange* v. *Washington State Republican Party*, 552 U. S. 442, 449–450, n. 6 (2008), where

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"[n]o record was made in this respect," and where the petitioners thus have not shown "from actual fact" that a "substantial number of instances exist in which the Law cannot be applied constitutionally," *New York State Club Assn.*, *supra*, at 14.

For instance, the majority highlights that the statute requires facilities to write their "medical license" disclaimers in 13 languages. *Ante*, at 778. As I understand the Act, it would require disclosure in no more than two languages—English and Spanish—in the vast majority of California's 58 counties. The exception is Los Angeles County, where, given the large number of different-language speaking groups, expression in many languages may prove necessary to communicate the message to those whom that message will help. Whether the requirement of 13 different languages goes too far and is unnecessarily burdensome in light of the need to secure the statutory objectives is a matter that concerns Los Angeles County alone, and it is a proper subject for a Los Angeles-based as-applied challenge in light of whatever facts a plaintiff finds relevant. At most, such facts might show a need for fewer languages, not invalidation of the statute.

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* * *

For these reasons I would not hold the California statute unconstitutional on its face, I would not require the District Court to issue a preliminary injunction forbidding its enforcement, and I respectfully dissent from the majority's contrary conclusions.

Syllabus

FLORIDA *v.* GEORGIA

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 142, Orig. Argued January 8, 2018—Decided June 27, 2018

This original action concerns the proper apportionment of water from an interstate river basin. Three rivers form the heart of the Basin. The Chattahoochee and Flint Rivers begin near Atlanta, flow south through Georgia, and ultimately converge at Lake Seminole, just north of Florida, where the Apalachicola River begins and flows 106 miles south into the Gulf of Mexico. In 2013, Florida, the downstream State, sued Georgia, the upstream State, asking the Court to issue a decree equitably apportioning the Basin's waters. The Court agreed to exercise its original jurisdiction and appointed a Special Master. The United States declined to waive its sovereign immunity from suit in the case. After conducting lengthy evidentiary proceedings, the Master submitted a Report recommending that the Court dismiss Florida's complaint. That recommendation, the parties agree, turns on a single issue—namely, whether Florida met its initial burden in respect to redressability. The Master concluded that Florida failed to make the requisite showing because it did not present clear and convincing evidence that its injuries could be redressed by a decree capping Georgia's upstream water consumption if the decree does not also bind the Army Corps of Engineers. Florida has filed exceptions to the Master's Report.

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Held:

1. The Special Master applied too strict a standard in concluding that Florida failed to meet its initial burden of demonstrating that the Court can eventually fashion an effective equitable decree. Pp. 814–823.

(a) Where, as here, the Court is asked to resolve an interstate water dispute raising questions beyond the interpretation of specific language of an interstate compact, the doctrine of equitable apportionment applies. In this realm, several related but more specific sets of principles guide the Court's review. First, both Georgia and Florida possess "an equal right to make a *reasonable use* of the waters of" the Flint River. *United States* v. *Willow River Power Co.*, 324 U. S. 499, 505. Second, when confronted with competing claims to interstate water, the Court's "effort always is to secure an equitable apportionment without quibbling over formulas." *New Jersey* v. *New York*, 283 U. S. 336, 343. Third, in light of the sovereign status and "equal dignity" of States, a complaining State's burden is "much greater" than the burden ordinarily shouldered by a private party seeking an injunction. *Connecticut* v.

Massachusetts, 282 U. S. 660, 669. Among other things, it must demonstrate, by "'clear and convincing evidence,'" that it has suffered a "'threatened invasion of rights'" that is "'of serious magnitude.'" *Washington* v. *Oregon*, 297 U. S. 517, 522. And to the extent the Court has addressed the "initial burden" a State bears in respect to redressability, the Court has said that "it should be clear that [the complaining] State has not merely some technical right, but also a right with a corresponding benefit" as a precondition to any equitable apportionment. *Kansas* v. *Colorado*, 206 U. S. 46, 102, 109. An effort to shape a decree cannot be "a vain thing." *Foster* v. *Mansfield, C. & L. M. R. Co.*, 146 U. S. 88, 101. Finally, because equitable apportionment is "'flexible,'" not "formulaic," this Court will seek to "arrive at a '"just and equitable" apportionment' of an interstate stream" by "consider[ing] '*all relevant factors*,'" *South Carolina* v. *North Carolina*, 558 U. S. 256, 271, including, *inter alia*, "'physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, [and] the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former,'" *Colorado* v. *New Mexico*, 459 U. S. 176, 183. Because all relevant factors must be weighed, extensive and specific factual findings are essential for the Court to properly apply the doctrine of equitable apportionment. See *Nebraska* v. *Wyoming*, 325 U. S. 589, 618. Pp. 814–819.

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(b) The Special Master applied too strict a standard when he determined that the Court would not be able to fashion an appropriate equitable decree. The Master referred to this as a "threshold" showing. But it is "threshold" only in the sense that the Master has not yet determined key remedy-related matters, including the approximate amount of water that must flow into the Apalachicola River in order for Florida to receive a significant benefit from a cap on Georgia's use of Flint River waters. Unless and until the Special Master makes the findings of fact necessary to determine the nature and scope of likely harm caused by the absence of water and the amount of additional water necessary to ameliorate that harm significantly, the complaining State should not have to prove with specificity the details of an eventually workable decree by "clear and convincing" evidence. Rather, the complaining State should have to show that, applying the principles of "flexibility" and "approximation," it is likely to prove possible to fashion such a decree. To require "clear and convincing evidence" about the workability of a decree before the Court or a Special Master has a view about likely harms and likely amelioration is, at least in this case, to put the cart before the horse. Pp. 820–823.

Syllabus

2. The Court reserves judgment as to the ultimate disposition of this case, addressing here only the narrow "threshold" question the Master addressed below—namely, whether Florida has shown that its "injur[ies can] effectively be redressed by limiting Georgia's consumptive use of water from the Basin without a decree binding the Corps." Report 30–31. Florida has made a legally sufficient showing as to the possibility of fashioning an effective remedial decree. Pp. 823–841.

(a) The Report makes several key assumptions. First, the Master assumed Florida has suffered harm as a result of decreased water flow into the Apalachicola River. Second, the Master further assumed that Florida has shown that Georgia, contrary to equitable principles, has taken too much water from the Flint River. Third, the Master assumed that Georgia's inequitable use of the water injured Florida. At this stage of the proceeding and in light of these assumptions, Florida made a sufficient showing that the extra water that would result from its proposed consumption cap would both lead to increased streamflow in Florida's Apalachicola River and significantly redress the economic and ecological harm that Florida has alleged. In addition, the United States has made clear that the Corps will cooperate in helping to implement any determinations and obligations the Court sets forth in a final decree in this case. While the Corps must take account of a variety of circumstances and statutory obligations when it allocates water, it cannot now be said that an effort to shape a decree here will prove "a vain thing," *Foster*, *supra*, at 101, since the record indicates that, if necessary and with the help of the United States, the Special Master, and the parties, the Court should be able to fashion a decree. Pp. 824–839.

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(b) Further findings, however, are needed on all of these evidentiary issues. Florida will be entitled to a decree only if it is shown that "the benefits of the [apportionment] substantially outweigh the harm that might result." *Colorado*, 459 U. S., at 187. On remand, before fashioning a remedy, the Special Master must address several evidentiary questions that are assumed or found plausible here. Pp. 839–841.

Case remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, and SOTOMAYOR, JJ., joined. THOMAS, J., filed a dissenting opinion, in which ALITO, KAGAN, and GORSUCH, JJ., joined, *post*, p. 843.

Gregory G. Garre argued the cause for plaintiff. With him on the briefs were *Pamela Jo Bondi*, Attorney General of Florida, *Amit Agarwal*, Solicitor General, *Jonathan L.*

Williams, Deputy Solicitor General, *Jonathan Glogau*, Special Counsel, *Philip J. Perry*, *Jamie L. Wine*, *Claudia M. O'Brien*, *Abid R. Qureshi*, *Benjamin W. Snyder*, *Frederick L. Aschauer*, *Paul N. Singarella*, *Christopher M. Kise*, *James A. McKee*, and *Matthew Z. Leopold*.

Craig S. Primis argued the cause for defendant. With him on the brief were *Christopher M. Carr*, Attorney General of Georgia, *Sarah Hawkins Warren*, Solicitor General, *Christopher Landau*, *K. Winn Allen*, *Devora W. Allon*, and *Andrew Pruitt*.

Deputy Solicitor General Kneedler argued the cause for the United States as *amicus curiae* supporting overruling plaintiff's Exception 2C. With him on the brief were *Acting Solicitor General Walls*, *Deputy Assistant Attorney General Grant*, *Ann O'Connell*, and *Michael T. Gray*.*

JUSTICE BREYER delivered the opinion of the Court.

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This case concerns the proper apportionment of the water of an interstate river basin. Florida, a downstream State, brought this lawsuit against Georgia, an upstream State, claiming that Georgia has denied it an equitable share of the basin's waters. We found that the dispute lies within our original jurisdiction, and we appointed a Special Master to take evidence and make recommendations.

After lengthy evidentiary proceedings, the Special Master submitted a report in which he recommends that the Court deny Florida's request for relief on the ground that "Florida has not proven by clear and convincing evidence that its injury can be redressed by an order equitably apportioning the waters of the Basin." Report of Special Master 3. The

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*Briefs of *amici curiae* were filed for the State of Colorado by *Cynthia H. Coffman*, Attorney General of Colorado, *Frederick R. Yarger*, Solicitor General, *Glenn E. Roper*, Deputy Solicitor General, *Karen M. Kwon*, First Assistant Attorney General, and *Scott Steinbrecher*, Assistant Solicitor General; and for the Atlanta Regional Commission et al. by *Chilton Davis Varner*, *Patricia T. Barmeyer*, and *Lewis B. Jones*.

case is before us on Florida's exceptions to the Special Master's Report.

In light of our examination of the Report and relevant portions of the record, we remand the case to the Master for further findings and such further proceedings as the Master believes helpful.

I

A

This original action arises out of a dispute over the division of water from an interstate river basin known as the Apalachicola-Chattahoochee-Flint River Basin. The Basin drains an area of more than 20,000 square miles across the southeastern United States. Three interstate rivers form the heart of the Basin and are central to this case. They are the Chattahoochee River, the Flint River, and the Apalachicola River. It is easiest to think of these three rivers as forming the capital letter "Y," with each branch starting at a different point in northeastern Georgia near Atlanta and the stem running through the Florida Panhandle and emptying into Apalachicola Bay in the Gulf of Mexico. See Appendix, *infra*.

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The Chattahoochee River is the western branch of this Y-shaped river system. It runs from the foothills of Georgia's Blue Ridge Mountains, through most of Georgia, down to Lake Seminole, just north of Florida. The United States Army Corps of Engineers operates several dams and reservoirs along the Chattahoochee where it both stores water and controls the amount of water that flows downstream to Florida in accordance with the terms of its recently revised Master Water Control Manual (Master Manual). As we shall discuss in more detail, Part IV, *infra*, the Corps' operations are important to the resolution of this case.

The Flint River, the eastern branch of the "Y," runs from just south of Atlanta down to the same lake, namely, Lake Seminole. Unlike the Chattahoochee, there are no dams

along the Flint River; it flows unimpeded through southern Georgia's farmland, where the greatest share of the Basin's water is consumed by agricultural irrigation.

After water from the Flint and Chattahoochee Rivers mixes at Lake Seminole, the mixed water (now forming the stem of the Y) continues its southward journey. At the southern end of Lake Seminole, it flows through the Woodruff Dam—a dam also controlled by the Corps. The mixed waters then change their name. They are called the Apalachicola River, and under that name they flow 106 miles through the Florida Panhandle and finally empty into the Gulf of Mexico. There, the fresh water of the Apalachicola River mixes with the Gulf's saltwater, forming Apalachicola Bay, which the United Nations, the United States, and the State of Florida have all recognized as one of the Northern Hemisphere's most productive estuaries. In total, the Apalachicola River accounts for 35% of the fresh water that flows along Florida's western coast. See Joint Exh. 168, p. 39.

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B

Florida and Georgia have long disputed the apportionment of the Basin's waters. Florida contends that Georgia is consuming more than its equitable share of Flint River water. It adds that, were Georgia to consume less water from the Flint River, more water would flow into Lake Seminole, pass through the Woodruff Dam and subsequently flow down the Apalachicola River (the Y's stem) and into Apalachicola Bay. The additional water that would result from a cap on Georgia's consumption would, Florida argues, help (among other things) to recover and maintain its oyster industry, which collapsed following a drought in 2012. Georgia believes that it should not have to cut back on its Flint River water consumption because, in its view, it consumes no more than its equitable share.

"This Court has recognized for more than a century its inherent authority, as part of the Constitution's grant of original jurisdiction, to equitably apportion interstate streams

between States." *Kansas* v. *Nebraska*, 574 U. S. 445, 454 (2015). But we have long noted our "preference" that States "settle their controversies by 'mutual accommodation and agreement.'" *Arizona* v. *California*, 373 U. S. 546, 564 (1963) (quoting *Colorado* v. *Kansas*, 320 U. S. 383, 392 (1943) (*Kansas II*)); see also *id.*, at 392 ("[Interstate] controversies may appropriately be composed by negotiation and agreement, pursuant to the compact clause of the federal Constitution"); *Kansas* v. *Nebraska*, *supra*, at 449 (describing codification of Republican River Compact); *Montana* v. *Wyoming*, 563 U. S. 368, 372 (2011) (interpreting Yellowstone River Compact); *Kansas* v. *Colorado*, 543 U. S. 86 (2004) (resolving dispute over Arkansas River Compact).

We recognize that Florida and Georgia (sometimes with the help of the Federal Government) have long tried to do so. But so far they have failed.

In 1992, for example, the States signed a memorandum of agreement in which they "committed to a process for cooperative management and development" of the three-river Basin and agreed to "participate fully as equal partners" in a "comprehensive, basin-wide study" of its waters. Joint Exh. 004, at 1. Five years later, the States signed—and Congress approved—a compact, the Apalachicola-Chattahoochee-Flint River Basin Compact, in which they agreed

> "to develop an allocation formula for equitably apportioning the surface waters of the ACF Basin among the states while protecting the water quality, ecology and biodiversity of the ACF." 111 Stat. 2222–2223.

But five years of negotiations under the Compact proved fruitless, and in 2003, the Compact expired.

More than a decade later, in 2014, Congress again recognized the need for an equitable apportionment of Basin waters. See Water Resources Reform and Development Act of 2014, Pub. L. 113–121, § 1051(a), 128 Stat. 1259. But once again, despite drought, expanding city populations, and a dramatic increase in acreage devoted to agricultural irriga-

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tion, no agreement has been reached. The "last effort to reach an amicable resolution of this complex equitable apportionment proceeding" in 2017 was "unsuccessful." Report 24. The States instead have come to this Court.

II

A

In 2013, Florida, the downstream State, sought to sue Georgia, the upstream State, asking us to exercise our "original and exclusive jurisdiction" and issue a decree equitably apportioning the waters of the Basin. 28 U. S. C. §1251(a); see U. S. Const., Art. III, §2; see also this Court's Rule 17. In its complaint, Florida alleged that Georgia's consumption of Flint River water "reduce[s] the amount of water flowing to the Apalachicola River at all times," and noted that "the effects are especially apparent during the low flow summer and fall periods." Complaint 9, ¶21; see also *id.*, at 17, ¶49 (complaining that the impact of Georgia's water consumption "is significant, particularly during dry periods"). In addition, Florida alleged that "[a]s Georgia's upstream storage and consumption grows over time, low flow events will become more frequent and increase in severity, diminishing the likelihood that key species will survive and precluding any chance of recovery over the long term." *Id.*, at 20, ¶59. To remedy these harms, Florida seeks a cap on Georgia's consumption of water from the Flint River. *Id.*, at 21.

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Georgia filed a brief in opposition, arguing that Florida failed to allege an injury sufficient to warrant this Court's exercise of original jurisdiction. See State of Georgia's Opposition to Florida's Motion for Leave To File a Complaint 31 ("Florida has not pleaded facts plausibly suggesting that it will be able to establish clear and convincing evidence that it suffers substantial injury as a result of Georgia's consumption of water"). At our request, the United States filed a brief in which it told us that "Florida has pleaded an interstate water dispute of sufficient importance to warrant this

Court's exercise of its original jurisdiction, and no other judicial forum is suitable for resolving the overall controversy." Brief for United States as *Amicus Curiae* 12 (Sept. 18, 2014). But, the United States also warned that "[p]ractical considerations . . . weigh against the Court's resolution of Florida's claims before the Corps has completed its process of updating the Master Manual for the federal projects in the ACF Basin." *Ibid.* It suggested that the Court could "grant Florida leave to file, but stay or provide for tailoring of any further proceedings until the Corps has issued the revised Master Manual" in March 2017, *id.*, at 13 (which Florida has now done, see Brief for United States as *Amicus Curiae* 3, n. 1, 10–12).

We subsequently agreed to exercise our original jurisdiction and appointed a Special Master "with authority to . . . direct subsequent proceedings," "take such evidence as may be introduced and such as he may deem it necessary to call for," and "submit Reports as he may deem appropriate." 574 U. S. 1021 (2014).

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At the outset, the United States declined to waive its sovereign immunity from suit in this case. And shortly thereafter, Georgia asked the Special Master to dismiss the case on the grounds that the United States was a necessary party but could not be forced to intervene. See Fed. Rule Civ. Proc. 19(b). The Master concluded that the motion to dismiss Florida's complaint should be denied. The Master reasoned that a decree binding the Corps might not prove necessary. Order on State of Georgia's Motion To Dismiss 14–15 (June 19, 2015). Rather, the Master concluded that "the few facts before me at this stage of the proceeding support the conclusion that" a cap on Georgia's Flint River water consumption could, at least in principle, redress Florida's injuries either by increasing the amount of water that flows into Florida's Apalachicola River or by "render[ing] periods of reduced flow releases [into the Apalachicola River] fewer and further between because of the increased reser-

voir levels that would result from Georgia's reduced consumption." *Id.*, at 14, and n. 5. The Special Master pointed out that Florida would have to show that "a consumption cap is justified and will afford adequate relief." *Id.*, at 13.

B

The Master then held lengthy discovery and evidentiary proceedings. See Brief for Georgia 11; *post*, at 864 (THOMAS, J., dissenting) ("During their 18 months of discovery, the parties produced 7.2 million pages of documents"). Ultimately, the Master submitted a 70-page Report to this Court in February 2017. He recommended that the Court dismiss Florida's complaint. In particular, despite the very large factual record amassed and "the extensive testimony bearing on numerous issues," the Special Master stated:

> "I have concluded that there is a *single*, discrete issue that resolves this case: *even assuming* that Florida has sustained injury as a result of unreasonable upstream water use by Georgia, can Florida's injury effectively be redressed by limiting Georgia's consumptive use of water from the Basin without a decree binding the [Army] Corps [of Engineers]? I conclude that Florida has not proven that its injury can be remedied without such a decree. The evidence does not provide sufficient certainty that an effective remedy is available without the presence of the Corps as a party in this case." Report 30–31 (emphasis added).

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For present purposes, we note that Florida and Georgia agree that the Master's recommendation "turned on a 'single, discrete issue'—whether Florida had shown that a cap on Georgia's consumption would redress its injury if the decree did not bind the Corps as well." Florida Brief in Support of Exceptions 23–24; see also Georgia's Reply to Florida's Exceptions 23 ("The Special Master reserved ruling on any issue other than effective redress"); Brief for United States as *Amicus Curiae* 19–20 (Aug. 7, 2017) (same).

In reviewing this determination, we do not agree with the dissent's view that the Master applied the "ordinary balance-of-harms test" that our equitable apportionment cases require. *Post*, at 855 (opinion of THOMAS, J.); see also Part III–A, *infra* (describing equitable apportionment doctrine). As we shall explain, the dissent's assertion that "the balance of harms cannot tip in Florida's favor" is, at best, premature. *Post*, at 877. That judgment may eventually prove right or it may prove wrong. Here, as we just said, we consider only the "single" and "threshold" question of "redressability" upon which the Master rested his conclusion and which the parties have now argued here. In determining precisely what we now review, we rely upon (and do not go beyond) the Report's specific and key statements, which include the following:

- "*As a threshold matter*, equitable apportionment is only available to a state that has suffered 'real and substantial injury' as a result of proposed or actual upstream water use" and "*the injury must be redressable by the Court.*" Report 24 (emphasis added).
- "Florida points to real harm and, at the very least, likely misuse of resources by Georgia. There is little question that Florida has suffered harm from decreased flows in the [Apalachicola] River," including "an unprecedented collapse of its oyster fisheries in 2012." *Id.*, at 31.
- "Much more could be said and would need to be said on these [and other] issues . . . ." *Id.*, at 34.
- "I need only address the *narrow question* of which party bears the burden of proving injury and *redressability.*" *Id.*, at 28–29 (emphasis added).
- "Florida bears the burden to prove that the proposed remedy will provide redress for Florida's injury." *Id.*, at 30.
- "Florida has not proven by clear and convincing evidence that *any additional streamflow* in the Flint River or

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in the Chattahoochee River would be released from Jim Woodruff Dam into the Apalachicola River *at a time that would provide a material benefit to Florida (i. e., during dry periods)*, thereby alleviating Florida's injury." *Id.*, at 47 (emphasis added).

- "Florida has provided no evidence that a decree in this case could provide an effective remedy during normal (*i. e.*, non-drought) periods." *Id.*, at 68.
- "[T]he Corps can *likely* offset increased streamflow in the Flint River by storing additional water in its reservoirs along the Chattahoochee River during dry periods [and so] . . . [t]here is no *guarantee* that the Corps will exercise its discretion to release or hold back water at any particular time." *Id.*, at 69 (emphasis added).
- "[W]ithout the Corps as a party, the Court cannot order the Corps to take any particular action." *Id.*, at 69–70.

C

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Florida has filed exceptions to the Special Master's Report. Florida first challenges the legal standard the Master applied in resolving what the Master called the "threshold" question whether Florida had "proven . . . that its injury can be redressed by an order equitably apportioning the waters of the Basin." *Id.*, at 24, 3. The Master wrote that Florida must meet a "clear and convincing evidence" evidentiary burden. *Id.*, at 3. Second, Florida argues that, in any event, its showing in respect to redressability was sufficient. We consider each of these exceptions in turn.

III

A

We note at the outset that our role in resolving disputes between sovereign States under our original jurisdiction "significantly differs from the one the Court undertakes in suits between private parties." *Kansas* v. *Nebraska*, 574 U. S., at 453 (internal quotation marks and alterations omit-

ted). "In this singular sphere," we have observed, "'the court may regulate and mould the process it uses in such manner as in its judgment will best promote the purposes of justice.'" *Id.*, at 454 (quoting *Kentucky* v. *Dennison*, 24 How. 66, 98 (1861)). We must approach interstate disputes "in the untechnical spirit proper for dealing with a quasi-international controversy, remembering that there is no municipal code governing the matter, and that this court may be called on to adjust differences that cannot be dealt with by Congress or disposed of by the legislature of either State alone." *Virginia* v. *West Virginia*, 220 U. S. 1, 27 (1911) (Holmes, J.).

Where, as here, the Court is asked to resolve an interstate water dispute raising questions beyond the interpretation of specific language of an interstate compact, the doctrine of equitable apportionment governs our inquiry. See *Colorado* v. *New Mexico*, 459 U. S. 176, 183 (1982) (*Colorado I*); *Virginia* v. *Maryland*, 540 U. S. 56, 74, n. 9 (2003) ("Federal common law governs interstate bodies of water, ensuring that the water is equitably apportioned between the States and that neither State harms the other's interest in the river"). In this realm, we have kept in mind several related but more specific sets of principles.

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First, as the Special Master pointed out, "the relevant guiding principle in this case" is a simple one. Report 26–27. Given the laws of the States, both Georgia and Florida possess "'an equal right to make a *reasonable use* of the waters of the stream'"—which, in this case, is the Flint River. *Id.*, at 26 (quoting *United States* v. *Willow River Power Co.*, 324 U. S. 499, 505 (1945)); see also *Colorado I*, *supra*, at 184 ("Our prior cases clearly establish that equitable apportionment will only protect those rights to water that are 'reasonably required and applied.' . . . [W]asteful or inefficient uses will not be protected (quoting *Wyoming* v. *Colorado*, 259 U. S. 419, 484 (1922))); *Idaho ex rel. Evans* v. *Oregon*, 462 U. S. 1017, 1025 (1983) (*Idaho II*) ("States have

an affirmative duty under the doctrine of equitable apportionment to take reasonable steps to conserve and even to augment the natural resources within their borders for the benefit of other States"); *Nebraska* v. *Wyoming*, 325 U. S. 589, 618 (1945); *Kansas II*, 320 U. S., at 394; *Washington* v. *Oregon*, 297 U. S. 517, 522, 527–528 (1936); *New Jersey* v. *New York*, 283 U. S. 336, 342–343 (1931); *North Dakota* v. *Minnesota*, 263 U. S. 365, 372 (1923) (reaffirming that an upstream State may not "burden his lower neighbor with more than is reasonable"); *Kansas* v. *Colorado*, 206 U. S. 46, 102 (1907) (*Kansas I*); *Tyler* v. *Wilkinson*, 24 F. Cas. 472, 474 (No. 14,312) (CC RI 1827) (Story, J.) (setting forth the principle of "reasonable use").

Second, our prior decisions emphasize that, when we are confronted with competing claims to interstate water, the Court's "effort always is to secure an equitable apportionment without quibbling over formulas." *New Jersey* v. *New York*, 283 U. S., at 343 (Holmes, J.). Where "[b]oth States have real and substantial interests in the River," those interests "must be reconciled as best they may be." *Id.*, at 342–343. We have added that "[u]ncertainties about the future . . . do not provide a basis for declining to fashion a decree." *Idaho II*, 462 U. S., at 1026; see also *ibid.* ("Reliance on reasonable predictions of future conditions is necessary"); *Colorado* v. *New Mexico*, 467 U. S. 310, 322 (1984) (*Colorado II*) (requiring "absolute precision in forecasts . . . would be unrealistic"); *North Dakota* v. *Minnesota*, *supra*, at 386 (emphasizing the need to "draw inferences as to the probabilities"); *Kansas I*, *supra*, at 97–98.

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Third, in light of the sovereign status and "equal dignity" of States, a complaining State must bear a burden that is "much greater" than the burden ordinarily shouldered by a private party seeking an injunction. *Connecticut* v. *Massachusetts*, 282 U. S. 660, 669 (1931); see *Kansas II*, *supra*, at 392 ("The reason for judicial caution in adjudicating the relative rights of States in such cases is that, while we have

jurisdiction of such disputes, they involve the interests of quasi-sovereigns, present complicated and delicate questions, and, due to the possibility of future change of conditions, necessitate expert administration rather than judicial imposition of a hard and fast rule" (footnote omitted)). In particular, "'[b]efore this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another,'" the complaining State must demonstrate that it has suffered a "'threatened invasion of rights'" that is "'of serious magnitude.'" *Washington* v. *Oregon*, *supra*, at 522 (quoting *New York* v. *New Jersey*, 256 U. S. 296, 309 (1921)). The State must make that showing by "'clear and convincing evidence.'" *Washington* v. *Oregon*, *supra*, at 522 (quoting *New York* v. *New Jersey*, *supra*, at 309); see also *Idaho II*, *supra*, at 1027 ("A State seeking equitable apportionment under our original jurisdiction must prove by clear and convincing evidence some real and substantial injury or damage"); *Colorado I*, *supra*, at 187–188, n. 13 ("[A] state seeking to prevent or enjoin [an upstream] diversion by another State" must "bear the *initial burden* of showing that a diversion by [the upstream State] will cause substantial injury to [the downstream State's] interests" (emphasis added)).

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In addition, to the extent the Court has addressed the "initial burden" a State bears in respect to redressability, our prior decisions make clear that, as a general matter, "[t]o constitute such a controversy, it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is asserting a right against the other State which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence." *Massachusetts* v. *Missouri*, 308 U. S. 1, 15 (1939); see also *Wyoming* v. *Oklahoma*, 502 U. S. 437, 447, 452 (1992) (same); *Maryland* v. *Louisiana*, 451 U. S. 725, 735–736 (1981). More specifically, we have said that "it should be

clear that [the complaining] state has not merely some technical right, but also a right with a corresponding benefit" as a precondition to any equitable apportionment. *Kansas I*, *supra*, at 109. An effort to shape a decree cannot be "a vain thing." *Foster* v. *Mansfield, C. & L. M. R. Co.*, 146 U. S. 88, 101 (1892). A State "will not be granted [relief] against something merely feared as liable to occur at some indefinite time in the future," *Connecticut* v. *Massachusetts*, *supra*, at 674, or when there is "no other or better purpose [at stake] than to vindicate a barren right," *Washington* v. *Oregon*, 297 U. S., at 523. Cf. *Idaho II*, *supra*, at 1026 (assessing whether "the formulation of a workable decree is impossible").

Fourth, in an interstate water matter, where a complaining State meets its "initial burden of showing 'real or substantial injury,'" *Colorado II*, *supra*, at 317 (quoting *Colorado I*, 459 U. S., at 188, n. 13), this Court, recalling that equitable apportionment is "'flexible,'" not "formulaic," will seek to "arrive at a '"just and equitable" apportionment' of an interstate stream" by "consider[ing] '*all relevant factors.*'" *South Carolina* v. *North Carolina*, 558 U. S. 256, 271 (2010) (quoting *Colorado I*, 459 U. S., at 183); see also *id.*, at 190 ("Whether [relief] should be permitted will turn on an examination of all factors relevant to a just apportionment"); *Kansas II*, 320 U. S., at 393–394 ("[I]n determining whether one State is using, or threatening to use, more than its equitable share of the benefits of a stream, *all* the factors which create equities in favor of one State or the other *must* be weighed" (emphasis added)). These factors include (but are not limited to):

> "physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, [and] the damage to upstream areas as compared to the benefits to down-

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stream areas if a limitation is imposed on the former." *Nebraska* v. *Wyoming*, 325 U. S., at 618.

Because "*all the factors* which create equities in favor of one State or the other *must* be weighed," *Kansas II*, *supra*, at 394 (emphasis added), extensive and "*specific* factual findings" are essential for the Court to properly apply the doctrine of equitable apportionment. *Colorado I*, *supra*, at 189–190 (emphasis added). And given the complexity of many water-division cases, the need to secure equitable solutions, the need to respect the sovereign status of the States, and the importance of finding flexible solutions to multifactor problems, we typically appoint a Special Master and benefit from detailed factual findings.

Without the full range of factual findings, we have said, the Court may lack an adequate basis on which to make "the delicate adjustment of interests" that the law requires. *Nebraska* v. *Wyoming*, *supra*, at 618; *Washington* v. *Oregon*, 297 U. S., at 519, 523–524 (emphasizing that "the Master's Report, which finds the facts fully"); see also *Colorado I*, *supra*, at 183, 189–190 (remanding "with instructions to the Special Master to make further findings of fact"); *Colorado II*, 467 U. S., at 312–315 (explaining that because "the Master's report [was] unclear," the Court remanded to the Special Master "for additional factual findings on five specific issues" even after "a lengthy trial at which both States presented extensive evidence" in order "to assist this Court in balancing the benefit and harm"); *Texas* v. *New Mexico*, 462 U. S. 554, 575–576, and n. 21 (1983) ("[W]e return this case to the Special Master for determination of the unresolved issues framed in his pretrial order"); 3 A. Kelley, Water and Water Rights § 45.02(c), p. 45–14 (3d ed. 2018) ("If the factual findings in the report are insufficient for the Court to decide whether the master correctly applied the doctrine of equitable apportionment, the Court may refer the case back to the master for additional findings").

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B

Applying the principles just described, we conclude that the Special Master applied too strict a standard when he determined that the Court would not be able to fashion an appropriate equitable decree. See Report 3 ("Florida has not proven by clear and convincing evidence that its injury can be redressed by an order equitably apportioning the waters of the Basin"); see also *id.*, at 31 ("The evidence does not provide sufficient certainty that an effective remedy is available without the presence of the Corps as a party in this case").

The Special Master referred to the relevant showing that Florida must make in this respect as a "threshold" showing. *Id.*, at 24. We agree that the matter is "threshold" in one particular sense—namely, the sense that the Master has not yet determined several key remedy-related matters, including the approximate amount of water that must flow into the Apalachicola River in order for Florida to receive a significant benefit from a cap on Georgia's use of Flint River waters. See *infra*, at 833. The Master also wrote that Florida had failed to show "with sufficient certainty that the Corps must (or will choose to) operate its projects so as to permit *all* additional flows in the Flint River" or "*the entire marginal increase* in streamflow" to reach Florida "without any substantial delay." Report 48 (emphasis added); see also *id.*, at 24, 70 (similar). He added that there "is no *guarantee*" that the Corps will exercise its relevant discretion. *Id.*, at 69 (emphasis added). And he said that Florida must show the existence of a workable remedy by "clear and convincing evidence." *Id.*, at 3; see also, *e. g.*, *id.*, at 28–29, 47, 51, 69–70.

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We believe the Master's standard, as indicated by these statements, is too strict. In our view, unless and until the Special Master makes the findings of fact necessary to determine the nature and scope of likely harm caused by the absence of water and the amount of additional water necessary

to ameliorate that harm significantly, the complaining State should not have to prove with specificity the details of an eventually workable decree by "clear and convincing" evidence. Rather, the complaining State should have to show that, applying the principles of "flexibility" and "approximation" we discussed above, it is likely to prove possible to fashion such a decree. See *supra*, at 818–819.

To require more definite proof at the outset may well (at least on some occasions) make little sense. Suppose, for example, downstream State A claims that upstream State B wastes at least 10,000 cubic feet per second (cfs) of water. And suppose further that no decree could enforce a 10,000 cfs consumption cap but that it may well prove possible to enforce a lesser requirement. If so, we would have to know at least approximately how much water will significantly ameliorate State A's water problem *before* we could know whether it is possible to shape a workable decree. And the workability of decrees themselves, approximate as they may be, may depend upon more precise findings in respect to the nature and scope of the range of likely harms and likely benefits that a Special Master finds are actually likely to exist. To require "clear and convincing evidence" about the workability of a decree before the Court or a Special Master has a view about likely harms and likely amelioration is, at least in this case, to put the cart before the horse. And that, we fear, is what the Master's statements, with their apparent references to a "clear and convincing" evidence standard in respect to "redressability" (where that refers to the availability of an eventual decree) have done here. Cf. *post*, at 860–863.

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That is also why our cases, while referring to the use of a "clear and convincing" evidentiary standard in respect to an initial showing of "invasion of rights" and "substantial injury," have never referred to that standard in respect to a showing of "remedy" or "redressability." See *Nebraska* v. *Wyoming*, 515 U. S. 1, 8 (1995) (repeating that as a threshold

matter, a "'threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence'" without addressing the required initial burden in respect to remedy (quoting *New York* v. *New Jersey*, 256 U. S., at 309)); *Colorado II*, *supra*, at 317 (describing the "initial burden" a State bears to show "'real or substantial injury'" (quoting *Colorado I*, 459 U. S., at 187–188, n. 13)); *Idaho II*, 462 U. S., at 1027; *Colorado I*, *supra*, at 187–188, and n. 13 ("[A] State seeking to prevent or enjoin [an upstream] diversion by another State" must "bear *the initial burden* of showing that a diversion by [the upstream State] will cause substantial injury to [the downstream State's] interests" (emphasis added)); *Washington* v. *Oregon*, 297 U. S., at 522; *Connecticut* v. *Massachusetts*, 282 U. S., at 672; *New Jersey* v. *New York*, 283 U. S., at 344–345; *Kansas II*, 320 U. S., at 393–394. The dissent does not dispute this. See *post*, at 856.

As discussed, *supra*, at 817–818, our prior decisions have said that the "right" a complaining State asserts must be more than "merely some technical right" and must be "a right with *a corresponding benefit*," *Kansas I*, 206 U. S., at 109 (emphasis added)—an effort to shape an equitable apportionment decree cannot be "a vain thing," *Foster*, 146 U. S., at 101. See also *Idaho II*, *supra*, at 1026 (assessing whether "the formulation of a workable decree is impossible"); *Washington* v. *Oregon*, *supra*, at 523. But these statements apply to the general *availability* of judicial relief—not to the *details* of a final decree or to the workability of a decree that will depend on those details. Cf. *Idaho ex rel. Evans* v. *Oregon*, 444 U. S. 380, 392 (1980) (*Idaho I*) (explaining that the question whether a State's proposed remedy will have an "appreciable effect" is a question that "goes to the merits" of the equitable apportionment inquiry). And, of course, to insist upon the use of such a strict standard, in respect to an *eventual* decree, runs directly contrary to the statements in, and holdings of, cases to which we have referred when dis-

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cussing the need for "approximation" and "flexibility." See *supra*, at 818–819.

IV

We next address Florida's exceptions to the Master's evidentiary determinations. In doing so, we recognize that the record in this case is long. It addresses a number of highly technical matters on a range of subjects—from biology to hydrology to the workings of the Corps' newly revised Master Manual governing the organization's complex operations in the Basin. Insofar as the Special Master made findings of fact, those findings "deserve respect and a tacit presumption of correctness." *Colorado II*, 467 U. S., at 317. But at the end of the day, "the ultimate responsibility for deciding what are correct findings of fact remains with us." *Ibid.* We have therefore read those portions of the record to which the parties, *amici*, or the Master refer, along with several other portions that we have found potentially relevant. Our "independent examination of the record," *Kansas* v. *Missouri*, 322 U. S. 213, 232 (1944), leads us to conclude that, at this stage, Florida has met its "initial burden" in respect to remedy. But, we also believe that a remand is necessary to conduct the equitable-balancing inquiry. Cf. *Colorado I*, *supra*, at 183–190.

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We reserve judgment as to the ultimate disposition of this case, addressing here only the narrow "threshold" question the Master addressed below—namely, whether Florida has shown that its "injur[ies can] effectively be redressed by limiting Georgia's consumptive use of water from the Basin without a decree binding the Corps." Report 30–31. This dispositive threshold question leads us, in turn, to focus upon five subsidiary questions:

First, has Florida suffered harm as a result of decreased water flow into the Apalachicola River? (The Special Master assumed "yes.")

Second, has Florida shown that Georgia, contrary to equitable principles, has taken too much water from the Flint

River (the eastern branch of the Y-shaped river system)? (Again, the Special Master assumed "yes.")

Third, if so, has Georgia's inequitable use of Basin waters injured Florida? (The Special Master assumed "yes.")

Fourth, if so, would an equity-based cap on Georgia's use of the Flint River lead to a significant increase in streamflow from the Flint River into Florida's Apalachicola River (the stem of the Y)? (This is the basic question before us.)

Fifth, if so, would the amount of extra water that reaches the Apalachicola River significantly redress the economic and ecological harm that Florida has suffered? (This question is mostly for remand.)

As our parentheticals suggest, the Special Master assumed that the answer to the first three questions was "yes." The fourth question is the question before us now. And the fifth question is partly for us now and partly for the Master to answer on remand.

A

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The Report indicates that the Special Master assumed the answer to the first question is "yes." The Report says that the Special Master reached his conclusion on the "single, discrete issue that resolves this case" by "*assuming* that Florida has sustained injury." *Id.*, at 30 (emphasis added); see also *id.*, at 2 (repeating Georgia's argument that "without an order binding the Corps, Florida will not be assured any relief—*assuming it has suffered any injury at all*—by a decree entered in this proceeding because the Corps has the ability to impound water in various reservoirs that it maintains in the Basin" (emphasis added)); *id.*, at 65 ("[e]ven if there were evidence of harm from other than low-flow conditions . . . ").

At the same time, the Report states that "Florida points to real harm." *Id.*, at 31. And the Master specified that there is "little question that Florida has suffered harm *from decreased flows* in the [Apalachicola] River." *Ibid.* (em-

phasis added). That harm—caused (at least in part) by increased salinity—includes "an unprecedented collapse of [Florida's] oyster fisheries in 2012." *Ibid.*; see *id.*, at 32 (stating that "the evidence presented tends to show that increased salinity . . . led to the collapse" of Apalachicola Bay's oysters and "greatly harmed the oystermen of the Apalachicola Region, threatening their longterm sustainability"). Cf. *New Jersey* v. *New York*, 283 U. S., at 343, 345 (finding redressable harm to oysters caused by diminished water flow and increased salinity). The harms of reduced streamflow may extend to other species in the Apalachicola Region, including in the river and its flood plain, which, as the Master noted, "is home to the highest species density of amphibians and reptiles in all of North America, and supports hundreds of endangered or threatened animal and plant species," including three "endangered" or "threatened" mussel species, the "[t]hreatened Gulf sturgeon," and the largest stand of tupelo trees—of Tupelo Honey fame—in the world. Report 7–8; see also Joint Exh. 168, at 193, 195–196.

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B

The Master also appears to have assumed the answer to the second question is "yes." The Report reached its key conclusion that Florida's (assumed) injuries cannot "effectively be redressed" by "*assuming* that Florida has sustained injury as a result of *unreasonable upstream water use by Georgia*." Report 30 (emphasis added). But, at the same time, the Master acknowledged that "Florida points to real harm and, at the very least, *likely* misuse of resources by Georgia." *Id.*, at 31 (emphasis added). And the Report "provide[s] the Court a brief descriptive background regarding . . . the unreasonableness of Georgia's consumptive water use." *Ibid.*; see, *e. g.*, *id.*, at 32 ("Georgia's upstream agricultural water use has been—and continues to be—largely unrestrained"); *id.*, at 33 ("Despite early warnings of oncoming

drought, Georgi[a] . . . chose not to declare a drought in 2011—apparently hoping for the best, and clearly not wishing to incur the cost of preventative action"); *id.*, at 34 ("Georgia's position—practically, politically, and legally—can be summarized as follows: Georgia's agricultural water use should be subject to no limitations, regardless of the long-term consequences for the Basin").

C

In respect to the third question, the Master again assumed the answer "yes." In particular, the Report "assume[s]" that "Florida has sustained injury *as a result of* unreasonable upstream water use by Georgia." *Id.*, at 30 (emphasis added). And as relevant to each of the first three questions, the Master added that "[m]uch more could be said and would need to be said about" Florida's injuries, the reasonableness of Georgia's water consumption, and "other issues, such as causation," if the case proceeds. *Id.*, at 34. As we have explained, our prior equitable apportionment decisions make clear that "*all factors* which create equities in favor of one State or the other *must be weighed*." *Kansas II*, 320 U. S., at 393–394 (emphasis added). Thus, a remand is necessary to consider each of the relevant factors, including those upon which the dissent focuses. See *infra*, at 835–836; *Nebraska* v. *Wyoming*, 325 U. S., at 618; cf. *Colorado II*, 467 U. S., at 323–324.

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D

We now turn to the fourth question, the basic question before us. Would an equity-based cap on Georgia's use of the Flint River lead to a significant increase in streamflow from the Flint River into Florida's Apalachicola River (the stem of the Y)? The answer depends upon (1) the amount of extra water that would flow into *Lake Seminole* as a result of a cap on Georgia's Flint River water consumption; and (2) the amount of water that could actually flow through

the Corps-controlled Woodruff Dam at Lake Seminole's southern end and into *Florida's Apalachicola River*.

1

The record shows that Florida's proposed cap on Georgia's water consumption could result in the release of considerable extra water into Lake Seminole. Florida's expert, Dr. David Sunding, testified that the cap would limit the average amount of water that Georgia could use annually and also reduce the amount of water that Georgia could use during drought years, which could "materially reduce [Georgia's] depletions of river flows . . . by 1,500 to over 2,000 cubic feet per second (cfs) in peak summer months of drought years." Updated Pre-Filed Direct Testimony (PFDT) of Sunding ¶8; see also *id.*, ¶¶88–90. Dr. Sunding added that it would cost Georgia roughly $35 million annually (less than 0.2% of Georgia's annual budget) to reduce streamflow depletions by 2,000 cfs. *Id.*, ¶113, Table 4. Georgia's expert, Dr. Robert Stavins, disputed these conclusions. See Direct Testimony of Stavins ¶¶4, 90, 136; see also Brief for Georgia 18. The Master did not make specific findings of fact regarding this aspect of Florida's proposed remedy. Rather than expressly making any findings, the Master apparently "accept[ed] Florida's estimates of the increased streamflow that would result from a consumption cap." Report 67, n. 43. At this stage, we shall do the same.

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And as we shall later discuss, the record suggests that an increase in streamflow of 1,500 to 2,000 cfs is reasonably likely to benefit Florida significantly. See *infra*, at 834–835 (citing record evidence of benefits); see also Updated PFDT of J. David Allan ¶¶3d, 26, 67 (Allan) (discussing ecological benefits of increasing streamflow by 300 to 500 cfs); 10 Tr. 2629:7–15 (Kondolf) (detailing benefits of increasing streamflow into the Apalachicola River from 5,000 to 7,000 cfs); 3 *id.*, at 591:6–593:4, 596:17–598:1 (Allan).

2

The key question, however, is whether the 1,500 to 2,000 cfs of extra water that will flow into Lake Seminole from the Flint River as a result of a cap on Georgia's water consumption will flow beyond Lake Seminole, through the Woodruff Dam, and into the Apalachicola River at the relevant times. That is where the Army Corps of Engineers enters the picture. And it is where Florida disagrees with the Special Master and with Georgia. The Special Master and Georgia believe that—at any relevant time—the Corps might "offset" any extra Flint River water that flows into Lake Seminole by simultaneously reducing the amount of water that flows into that lake from the Chattahoochee River. See Report 48–53. Thus, if the 1,500 to 2,000 cfs of *extra* water that would reach Lake Seminole from the Flint as a result of Florida's proposed consumption cap, the question is whether and to what extent the Corps will "offset" that extra streamflow by releasing 1,500 to 2,000 cfs *less* water into Lake Seminole from its upstream Chattahoochee reservoirs.

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Of course, the Corps might, under certain circumstances, be authorized to "offset" extra streamflow from the Flint River. As the Special Master wrote, "[t]here is no guarantee that the Corps will exercise its discretion to release or hold back water at a particular time." *Id.*, at 69. But as the United States has explained, increased streamflow into Lake Seminole (that is, increased Basin Inflow) "would generally benefit the ACF system by delaying the onset of drought operations, by allowing the Corps to meet the 5000 cfs minimum flow longer during extended drought, and by quickening the resumption of normal operations after drought." Brief for United States as *Amicus Curiae* 28 (Aug. 7, 2017). And our reading of the record convinces us it is highly unlikely that the Corps will always reduce the flow in this way; it leads us to believe that, acting in accordance with its own revised Master Manual, the Corps is likely to permit, and in some cases may be *required* to ensure

that, material amounts of additional Flint water to flow through the Woodruff Dam and into the Apalachicola River. At the very least, we believe that more proceedings are necessary to reach a definitive determination.

As an initial matter, the Master Manual makes clear that the amount of water the Corps will release turns in part on the amount of water stored in the Corps' Chattahoochee reservoirs. See U. S. Army Corps of Engineers, Master Manual, Apalachicola-Chattahoochee-Flint River Basin, Florida and Georgia, App. A, pp. 7–4 to 7–5, 7–7. More specifically, the amount of water storage in those reservoirs dictates whether the Corps is conducting one of two possible types of "operations"—namely, "drought operations" or "nondrought operations." These are technical terms. See *id.*, at 7–14 to 7–16. The term "drought operations" need not correspond to dry periods, nor need the term "nondrought operations" refer to wet periods. Rather their applicability depends in part upon the amount of water that is stored behind the Corps' Chattahoochee dams. As the United States explained, "[t]he term 'drought operations' refers to more conservative operations that [the Corps conducts, which] are intended to enable the Corps to preserve water and operate its reservoir projects more effectively as drought conditions arise." Brief for United States as *Amicus Curiae* 9 (Aug. 7, 2017). We therefore must clearly distinguish what the record tells us about the amount of extra water that could flow into Florida as a result of a consumption cap during each of these two distinct types of Corps operations.

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a

Nondrought Operations

When the Corps is conducting "nondrought operations," the Master Manual requires the Corps to release into Florida all or some of any extra water that flows from the Flint River into Lake Seminole, where it will then flow through the Woodruff Dam. See App. to Brief for United States as

Amicus Curiae 2a (Aug. 7, 2017) (detailing Corps operational protocol). As the United States has explained, when the total streamflow into Lake Seminole is between 5,000 and 10,000 cfs during "nondrought operations," the following facts are true:

> "[A]ny additional basin inflow . . . would generally be passed straight through to Florida. If, for example, the conservation measures advocated by Florida as part of a consumption cap actually resulted in an increased flow in the Flint River of 2,000 cfs, *see* Pre-Filed Direct Testimony of David Sunding, Ph. D. at 44, Table 4, then flows into Florida would also increase by roughly that amount." United States Post-Trial Brief 12–13 (Dec. 15, 2016).
>
> See also Brief for United States as *Amicus Curiae* 18 (Aug. 7, 2017) (reaffirming that under these circumstances "flows in the Apalachicola would increase by the amount of increased Flint River flows" including during summer months).

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As far as we can tell, under the Corps' current operational protocol, the Corps may remain in "nondrought operations" even during the driest summer months of the driest years. For example, in 2007 the Corps conducted "nondrought operations" not only during late autumn, winter, and spring months, but also during the hottest summer and early autumn months "when streamflow is at its lowest." See Direct Testimony of Phillip Bedient ¶¶48–53 (Bedient) (stating that "[i]f 2007's Basin Inflow were repeated today and Drought Operations were not triggered," the Corps would have had 92 days of "nondrought operations," including 19 days "during summer and fall months, when streamflow was at its lowest" on which 100% of extra water resulting from a consumption cap would reach Florida). We note that these 19 days fell during a period of severe drought in which no extra water (let alone 2,000 cfs of extra water) was flowing into Lake Seminole. And, unsurprisingly, the same trend ap-

pears to be true in dry summer months of other years: All or some of the extra water that would result from a consumption cap would also pass through to Florida. See, *e. g.*, Ga. Exh. 949 (reporting streamflow data indicating several days in 2009 on which extra Flint River water would have passed through to Florida); Joint Exh. 128 (providing link to U. S. Geological Survey data indicating a similar trend based on streamflow into the Apalachicola River, including in 2016 and 2017).

b

Drought Operations

The Corps' "drought operations" are different. Again, whether the Corps must initiate drought operations is not a matter of discretion; it depends, as we have said, upon the total amount of water the Corps has stored behind the dams it controls along the Chattahoochee River. The Master Manual requires that, when the total amount of water stored in pools behind the Corps' Chattahoochee dams drops below a certain level, the Corps must reduce the amount of water it releases from the Woodruff Dam to 5,000 cfs, or, in instances of extreme low water levels in the storage pools, to 4,500 cfs. Master Manual App. A, at 7–14 to 7–16. Accordingly, if additional water were to flow into Lake Seminole from the Flint River while the Corps is in *drought operations*, the Corps, pursuant to its Master Manual, must reduce the flow of its controlled upstream Chattahoochee water in order to maintain a defined water level in the pools behind its Chattahoochee dams, and no more than 4,500 cfs or 5,000 cfs can flow beyond the Woodruff Dam regardless. Brief for United States as *Amicus Curiae* 7.

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But even then, as we just said, the Corps must make certain that at least 4,500 cfs and more often 5,000 cfs flows though the Woodruff Dam. And, if more water flows from the Flint into Lake Seminole, and if the Corps uses that water to keep the water level high in its Chattahoochee reservoirs, then there will be fewer days in which the Corps is conducting either "drought operations" or "extreme drought

operations." Instead, there will be more "nondrought operations" days where the Corps must pass most or all additional streamflow that exceeds 5,000 cfs through the Woodruff (because there will be more days, given the added Flint water, when its upstream Chattahoochee reservoirs are sufficiently high). The United States adds that "a cap on Georgia's consumption" could, among other things, generate increased streamflow that

> "would provide a cushion during low-flow periods, so that it would be possible to maintain a flow rate of *greater than* 5,000 cfs for a longer period of time without any alteration of the Corps' operations." United States Post-Trial Brief 18–19 (Dec. 15, 2016) (emphasis added).
>
> See also Brief for United States as *Amicus Curiae* 18 (Aug. 7, 2017) (same).

We repeat this point with an example for purposes of clarity. Assume the following: (1) that it is August 13 and the Corps is conducting "drought operations"; (2) that as a result of a cap on Georgia's consumption, 2,000 cfs more water flows down the Flint and into Lake Seminole; and (3) that, consistent with the Master Manual, 5,000 cfs will flow from Lake Seminole, through the Woodruff Dam, and into Florida's Apalachicola River. On these three assumptions in all likelihood, as the dissent points out, *no extra water* will flow into Florida.

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But (and this "but" is key), the extra 2,000 cfs of water that flows into Lake Seminole on August 13 as a result of a cap on Georgia's from the Flint River water consumption will allow the Corps to store more water behind its upstream Chattahoochee dams (while still complying with the Master Manual's minimum release requirements). And that fact means that the Corps is likely to remain in "drought operations" for fewer days because whether the Corps remains in "drought operations" depends upon the water level behind the Chattahoochee dams. And the fewer days the Corps conducts "drought operations," the more days the Corps,

consistent with its Master Manual, will allow all (or some) of the 2,000 cfs extra water that would result from a consumption cap to flow through the Woodruff Dam and into Florida's Apalachicola River. Again, record evidence makes clear that this is not a fanciful possibility. For example, Florida points to record evidence that suggests a consumption cap could have prevented the Corps from entering drought operations in 2011–2012 without departing from the terms of its Master Manual. See, *e. g.*, Florida Brief in Support of Exceptions 48–49, and n. 12 (citing record evidence, including Ga. Exh. 924 and Fla. Exh. 811, that the Special Master did not address, suggesting that Florida's proposed consumption cap could have helped the Corps to "avoi[d] drought operations entirely" in 2011–2012 without departing from the Master Manual's requirements).

The upshot is that, even when the Corps conducts its operations in accordance with the Master Manual, Florida's proposed consumption cap would likely mean more water in the Apalachicola—as much as 2,000 cfs more water when the Corps is conducting normal or "nondrought operations," which could take place in dry periods, including the driest days of summer, and 500 cfs more on days when the Corps is conducting "drought operations." And a cap would likely allow the Corps to conduct "nondrought operations" (*i. e.*, reservoirs-sufficiently-full operations) more often as well.

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3

We cannot agree with the dissent's efforts to deny these conclusions. To begin with, the dissent says that our conclusion "depends on the premise that, during droughts, the natural streamflow into Florida is between '5,000 and 10,000 cubic feet per second.'" *Post*, at 869. If the dissent means by "droughts" simply dry days, or summer days, then it is obviously wrong, for pursuant to the Corps' Master Manual, the Corps must allow all or some of the 2,000 cfs extra water that would flow into Lake Seminole to continue through the

Woodruff Dam into Florida during dry summer days when the Corps is *not* conducting "drought operations." This was true, as the dissent concedes, even during 19 summer days in 2007, which was among the driest years in the Basin's history. Or, does the dissent mean by "droughts" days on which the Corps is conducting "drought operations"? If so, then we agree that on such days, the Corps will normally allow no more than 5,000 cfs to flow into Florida. But, for the reasons just stated in the last few paragraphs, Florida's proposed consumption cap—which could result in as much as 2,000 extra cubic feet of water per second flowing from the Flint into Lake Seminole—will mean (consistent with the testimony of the very Georgia expert that the dissent so frequently quotes) that there will be significantly fewer such days.

Is there a mistake then in the "concrete example" the dissent offers to support its point? See *post*, at 871–872. Invoking a hypothetical posed by Georgia's expert, the dissent says:

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> "[I]f the natural flows in the Apalachicola River were 2,600 cubic feet per second, then the Corps would release 2,400 cubic feet per second from its [Chattahoochee] reservoirs. . . . And if a cap on Georgia[']s Flint River consumption] increased the River's natural flow to 4,100 cubic feet per second, the Corps would release 900 cubic feet per second. . . . In either case, the total flow on the Apalachicola River would remain the same: 5,000 cubic feet per second. Thus, so long as the natural flows remain significantly less than 5,000 cubic feet per second, a cap on Georgia would only decrease the amount of water that the Corps releases from storage; it would not increase the overall amount of water flowing into the Apalachicola River." *Ibid.* (citing Bedient ¶¶45–47).

If, however, a consumption cap causes 1,500 cfs extra water (from the Flint) to flow into Lake Seminole (as we

assume Florida's proposed cap would), under the dissent's example, the Corps will *reduce* (or "offset") the amount of water it releases from its upstream Chattahoochee dams from 2,400 cfs to 900 cfs. That is because 2,400 cfs minus 900 cfs is 1,500 cfs. What happens to that 1,500 cfs extra water?

When the Corps is in drought operations, the answer according to the Master Manual is that the Corps must store that water in its upstream Chattahoochee reservoirs. And with that 1,500 cfs extra water each day, the water levels in those reservoirs will rise (or, at a minimum, deplete less rapidly) and allow the Corps to resume "nondrought operations" more quickly. The United States repeats precisely this point—namely, when more water flows into Lake Seminole, it benefits Florida by "quickening the [Corps'] resumption of normal [*i. e.*, 'nondrought'] operations." Brief for United States as *Amicus Curiae* 28 (Aug. 7, 2017). (That extra water also means that there will be more days when 5,000 cfs, rather than 4,500 cfs, flows from Lake Seminole into the Apalachicola River.) And it means, as no one denies, that on days when the Corps conducts "nondrought operations" (which, as Georgia's own expert report shows, occur even during dry summer months), more water will reach Florida when Florida needs it.

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What about the dissent's point that Georgia's expert, Dr. Bedient, said that the extra 2,000 cfs would mean more water for Florida "only 19 days 'during the summer and fall months when streamflow was at its lowest' "? *Post,* at 871. Dr. Bedient's exact words, as the dissent points out, were that in " 'dry years (*e. g.*, 2007 and 2011), . . . even significant changes in Georgia's consumptive use would lead to virtually no change in state-line flows during the low-flow months (*e. g.*, June, July, August, September).' " Bedient ¶78.

At this point, in our view, the dissent has pointed to record evidence with which other record evidence conflicts. It seems from record evidence, from the statements of the United States, from geological data, and from laws of me-

chanics, that 2,000 cfs extra water flowing into Lake Seminole when, in the dissent's words, "drought operations were not in effect" would have to mean more water in Florida. *Post*, at 871. And the dissent does not dispute that some of these days are in the summer. *Ibid.* Our own check of the record reinforces the point. In particular, data from the U. S. Geological Survey's website, which the parties entered into the record at Joint Exh. 128, indicates that between May 2016 and August 2016, streamflow into the Apalachicola River was above 6,000 cfs each day with the exception of two days: August 30, 2016, and August 31, 2016. Nothing in the record suggests that the Corps was in drought operations during these days, and so it appears that under these conditions, any additional streamflow resulting from a cap on Georgia's Flint River consumption would pass through into Florida. However, without explicit findings, it is neither possible nor prudent for us in the first instance to read through this voluminous record and discover who is right on this matter of how much extra water there will be, when, and how much Florida would benefit from the extra water that there might be. That is why we are sending this case back for more findings.

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Finally, while the dissent suggests that "[i]t is incredibly odd to conclude that a Special Master's merits determination is 'premature' after a full trial," *post*, at 858, this Court has repeatedly concluded that remand is "appropriate" to resolve certain issues in an equitable apportionment case even where, as here, there has already been a "lengthy trial at which both States presented extensive evidence," *Colorado II*, 467 U. S., at 313. See also *Wyoming* v. *Colorado*, 259 U. S., at 455–456 (explaining that "the evidence was taken" over the course of two years and presented to the Court two years later and that "[t]he case has been argued at bar three times" including because of the "importance of some of the questions involved"). Moreover, we note that adequate fact-

finding is especially important where, as here, no interstate compact guides our inquiry or sets forth a congressionally ratified water allocation formula. When such a compact exists, as it often does, our effort is relatively simple and focuses upon "declar[ing] rights under the Compact and enforc[ing] its terms." *Kansas* v. *Nebraska*, 574 U. S., at 455 (citing *Texas* v. *New Mexico*, 462 U. S., at 567); *id.*, at 567–568 ("If there is a compact, it is a law of the United States, . . . and our first and last order of business is interpreting the compact"). Here, no compact guides our inquiry and it would appear to be important that we approach this complex controversy with the care and thoroughness that our precedent requires.

E

Our final question is this: Would the amount of extra water that reaches the Apalachicola significantly redress the economic and ecological harm that Florida has suffered? There is evidence indicating that the answer to the question is in the affirmative. See, *e. g.*, Allan ¶¶3d, 26, 67 ("Even relatively modest increases in flows—on the order of 300 to 500 cfs during key periods of the year—could reduce harm to the [Apalachicola Region's] ecosystem and halt the cycle that is leading to irreversible harm" while "[g]reater increases could make even more dramatic improvements"); Updated PFDT of Patricia Glibert ¶¶5, 28–32, 58–60, and Table 1, Figs. 10, 19b; *supra*, at 827 (citing record evidence of benefits); see also 10 Tr. 2629:7–15 (Kondolf) (detailing benefits of increasing streamflow from 5,000 to 7,000 cfs); 3 *id.*, at 591:6–593:4, 596:17–598:1 (Allan). But the Master's Report does not explicitly answer this question. We consequently must remand the case to find the answer to this question (and others).

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* * *

In sum, in respect to the evidentiary questions at issue, the Master assumed that: (1) Florida has likely suffered harm as

a result of decreased water flow into the Apalachicola River; (2) Florida has made some showing that Georgia, contrary to equitable principles, has taken too much water from the Flint River; and (3) Georgia's inequitable use of the water may have injured Florida, but more findings are needed. And in light of the Master's assumptions, we conclude that: (4) An equity-based cap on Georgia's use of the Flint River would likely lead to a material increase in streamflow from the Flint River into Florida's Apalachicola River; and (5) the amount of extra water that reaches the Apalachicola may significantly redress the economic and ecological harm that Florida has suffered. Further findings, however, are needed on all of these evidentiary issues on remand.

We add the following: The United States has made clear that the Corps will work to accommodate any determinations or obligations the Court sets forth if a final decree equitably apportioning the Basin's waters proves justified in this case. It states in its brief here that if a decree results "in more water flowing to Florida . . . under existing Corps protocols, then the Corps would likely not need to change its operations." Brief for United States as *Amicus Curiae* 28 (Aug. 7, 2017). It has added that, in any event, a decree "would necessarily form part of the constellation of laws to be considered by the Corps when deciding how best to operate the federal projects." *Id.*, at 32. And in issuing its revised Master Manual, the Corps stated that it would "review any final decision from the U. S. Supreme Court and consider any operational adjustments that are appropriate in light of that decision, including modifications to the then-existing [Master Manual], if applicable." Record of Decision 18. The United States has "continually asserted its preparedness to implement, in accordance with federal law, any [agreed-upon] comprehensive water allocation formula." *Id.*, at 4; see also Joint Exh. 124, at 6–35. And, of course, the Administrative Procedure Act requires the Corps to make decisions that are

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reasonable, *i. e.*, not "arbitrary, capricious, an abuse of discretion," or "in excess of [the Corps'] statutory jurisdiction." 5 U. S. C. § 706(2).

We recognize that the Corps must take account of a variety of circumstances and statutory obligations when it allocates water. New circumstances may require the Corps to revise its Master Manual or devote more water from the Chattahoochee River to other uses. But given the considerations we have set forth, we cannot agree with the Special Master that the Corps' "inheren[t] discretio[n]" renders effective relief impermissibly "uncertain" or that meaningful relief is otherwise precluded. Report 56, n. 38. We cannot now say that Florida has "merely some technical right" without "a corresponding benefit," *Kansas I*, 206 U. S., at 109, or that an effort to shape a decree will prove "a vain thing." *Foster*, 146 U. S., at 101. Ordinarily "[u]ncertainties about the future" do not "provide a basis for declining to fashion a decree." See *Idaho II*, 462 U. S., at 1026. And in this case, the record leads us to believe that, if necessary and with the help of the United States, the Special Master, and the parties, we should be able to fashion one.

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V

We keep in mind what our prior decisions make clear: "'The difficulties of drafting and enforcing a decree'" do not necessarily provide a convincing "'justification for us to refuse to perform the important function entrusted to us by the Constitution.'" *Idaho I*, 444 U. S., at 390, n. 7 (quoting *Nebraska* v. *Wyoming*, 325 U. S., at 616); see also *Idaho II*, *supra*, at 1027 ("Although the computation is complicated and somewhat technical, that fact does not prevent the issuance of an equitable decree"). For this reason and the others we have discussed, we agree with Florida that it has made a legally sufficient showing as to the possibility of fashioning an effective remedial decree.

We repeat, however, that Florida will be entitled to a decree only if it is shown that "the benefits of the [apportionment] substantially outweigh the harm that might result." *Colorado I*, 459 U. S., at 187. In assessing whether that showing has been made, the Master may find it necessary to address in the first instance many of the evidentiary and legal questions the answers to which we have here assumed or found plausible enough to allow us to resolve the threshold remedial question. In order to determine whether Florida can eventually prove its right to cap Georgia's use of Flint River waters, it may find it necessary for the Special Master to make more specific factual findings and definitive recommendations regarding such questions as: To what extent does Georgia take too much water from the Flint River? To what extent has Florida sustained injuries as a result? To what extent would a cap on Georgia's water consumption increase the amount of water that flows from the Flint River into Lake Seminole? To what extent (under the Corps' revised Master Manual or under reasonable modifications that could be made to that Manual) would additional water resulting from a cap on Georgia's water consumption result in additional streamflow in the Apalachicola River? To what extent would that additional streamflow into the Apalachicola River ameliorate Florida's injuries? The Special Master may make other factual findings he believes necessary and hold hearings (or take additional evidence) as he believes necessary. Cf. *Colorado I*, 459 U. S., at 190, n. 14.

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Consistent with the principles that guide our inquiry in this context, answers need not be "mathematically precise or based on definite present and future conditions." *Idaho II*, 462 U. S., at 1026. Approximation and reasonable estimates may prove "necessary to protect the equitable rights of a State." *Ibid.* And the answers may change over time. Cf. *New Jersey* v. *New York*, 347 U. S. 995, 996–1005 (1954); *New Jersey* v. *New York*, 283 U. S., at 344–346. Flexibility and approximation are often the keys to success in our ef-

forts to resolve water disputes between sovereign States that neither Congress nor "the legislature of either State" has been able to resolve. *Virginia* v. *West Virginia*, 220 U. S., at 27.

We consequently do not dismiss this case. Rather, we remand the case to the Special Master for further proceedings consistent with this opinion.

It is so ordered.

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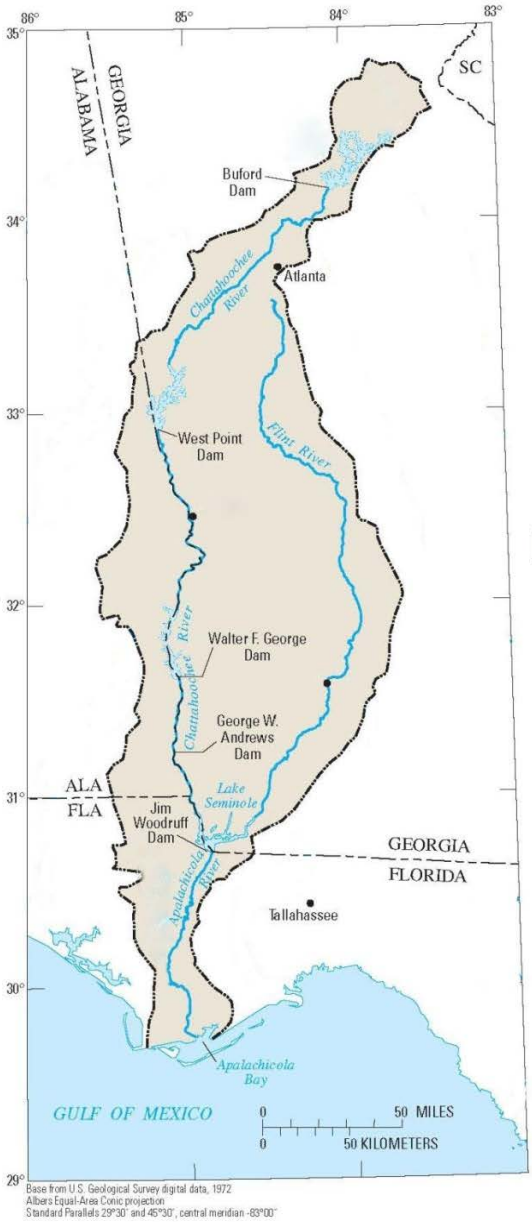
APPENDIX


86°
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GEORGIA
ALABAMA
SC
Buford Dam
Atlanta
Chattahoochee River
West Point Dam
Flint River
Walter F. George Dam
George W. Andrews Dam
ALA
FLA
Lake Seminole
Jim Woodruff Dam
GEORGIA
FLORIDA
Apalachicola River
Tallahassee
Apalachicola Bay
GULF OF MEXICO
0
50 MILES
0
50 KILOMETERS
Base from U.S. Geological Survey digital data, 1972
Albers Equal-Area Conic projection
Standard Parallels 29°30' and 45°30', central meridian -83°00'

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

Florida asks this Court to cap Georgia's use of water in the Apalachicola-Chattahoochee-Flint River Basin (Basin). Florida claims that such a cap would allow additional water to flow into the Apalachicola River and Bay, which would benefit Florida by alleviating certain ecological harms. To prevail under our precedents, Florida must present clear and convincing evidence that its proposed cap will benefit Florida more than it harms Georgia. See *Colorado* v. *New Mexico*, 459 U. S. 176, 187 (1982) (*Colorado I*). The Special Master applied this balance-of-harms standard and, after presiding over a 1-month trial involving 40 witnesses and more than 2,000 exhibits, found that Florida had not met its burden. Because that finding is well supported by the evidence, I would have overruled Florida's objections to the Special Master's Report (Report) and denied Florida's request for relief. I respectfully dissent.

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I

The Court's recitation of the facts focuses on the geography of the relevant rivers and the failed compact negotiations between Florida and Georgia, but does not provide any details about the respective interests of Florida and Georgia or the extensive operations of the United States Army Corps of Engineers (Corps). See *ante*, at 807–810. Because these missing details are crucial to determining whether equitable relief is warranted, I will supply them.

A

This case concerns Georgia's use of water in the Basin. Spanning Georgia, Alabama, and Florida, the Basin consists of three rivers—the Chattahoochee, the Flint, and the Apalachicola. The Chattahoochee River starts in northern Georgia, just north of Atlanta, and flows southwest along the Alabama-Georgia border until it reaches Florida. The Flint

River starts east of the Chattahoochee, just south of Atlanta, and flows south until it reaches Florida. The Chattahoochee and Flint Rivers meet at the border of Florida, forming Lake Seminole. From Lake Seminole, the Apalachicola River flows south through the Florida Panhandle and into the Gulf of Mexico at Apalachicola Bay.

Both Georgia and Florida depend on Basin water. The Chattahoochee River supplies most of the water for metropolitan Atlanta. And the Flint River supplies most of the water for southern Georgia's large agricultural industry. In Florida, the Apalachicola River sustains a unique ecosystem that is home to a number of species, including mussels, sturgeon, and tupelo trees. Flows from the Apalachicola River (or River) also support the Apalachicola Bay (or Bay) ecosystem—one of the most productive estuaries in the Northern Hemisphere. The Apalachicola Bay's low-salinity and high-nutrient waters make it an extraordinarily productive habitat for oysters and other sea life.

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Although both Georgia and Florida depend on the Basin, the Florida portion of the Basin is significantly less populated and productive. The Georgia portion has a population of more than 5 million and accounts for around $283 billion in gross regional product per year. Direct Testimony of Robert Stavins 2, 16 (Stavins). The Florida portion, by contrast, has a population of fewer than 100,000 people and generates around $2 billion in gross regional product per year. *Id.*, at 17. In relative terms, Georgia accounts for 98% of the population and 99% of the economic production. *Ibid.*

B

Florida and Georgia are not the only stakeholders in the Basin. The United States, through the Corps, operates five dams and four reservoirs on the Chattahoochee River. Only the three northernmost dams can store significant amounts of water. The two dams that are farthest south on the Chattahoochee—the George W. Andrews Dam and the Jim Wood-

ruff Dam—cannot store an appreciable amount of water. The Corps does not operate any dams on the Flint River, which flows unimpeded until it reaches the Jim Woodruff Dam at Lake Seminole.

The Corps operates its dams as a unit. It must do so in a way that achieves its congressionally authorized purposes, such as facilitating navigation, generating hydroelectric power, protecting the national defense, promoting recreation, maintaining the commercial value of riparian lands, and protecting the water supply for the surrounding metropolitan Atlanta area. See H. R. Doc. No. 342, 76th Cong., 1st Sess., 77 (1939); River and Harbor Act of 1945, 59 Stat. 17; *In re MDL–1824 Tri-State Water Rights Litigation*, 644 F. 3d 1160, 1167 (CA11 2011). The Corps also must ensure compliance with other federal laws, including laws governing the conservation of fish and wildlife, the quality of water, and the protection of threatened and endangered species. See, *e. g.*, Endangered Species Act of 1973, 16 U. S. C. § 1531 *et seq.*; Flood Control Act of 1944, 33 U. S. C. § 701 *et seq.*; Water Supply Act of 1958, 43 U. S. C. § 390b.

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Given these numerous demands, the Corps has long relied on water-control manuals to guide its operations of the dams. The current manual dictates the minimum amount of water that the Corps must provide to the Apalachicola River under various conditions. Three variables affect that minimum amount of water: the time of year, the amount of water in the Corps' storage reservoirs, and the amount of additional water entering the Basin.

The manual is very complex, spanning 1,190 pages, but only a few provisions are relevant here. The manual provides that, as a general rule, most additional water that enters the Basin will pass through to Florida via the Apalachicola River. But, in certain circumstances, the Corps will artificially increase or decrease the amount of water that passes through to ensure that 5,000 cubic feet per second flows into the Apalachicola River. For example, if the natu-

ral streamflow entering the Basin (Basin inflow) is less than 5,000 cubic feet per second, then the Corps will artificially augment the flow by releasing additional water from its reservoirs. Or, if the amount of water in the Corps' reservoirs falls below a certain amount, the Corps will trigger what it calls "drought operations." During drought operations, no matter how much water is entering the Basin, the Corps will generally release only 5,000 cubic feet per second into the Apalachicola River until its reservoirs are completely replenished.[1]

The Corps' current manual reflects many lessons that it has learned over the past decade. In March 2006, for example, the Corps created an interim operating plan, which set high flow requirements to protect endangered species in the Apalachicola River. Direct Testimony of Wei Zeng 44–45 (Zeng). But those high flow requirements prevented the Corps from saving enough water during droughts to refill its reservoirs, putting all its other projects at risk. *Id.*, at 45. So the Corps switched to more storage-friendly rules. *Id.*, at 45–46. In December 2006, the Corps modified its operating plan to require a portion of the water entering the Basin to be devoted to refilling the Corps' reservoirs. *Id.*, at 46. When this modification proved insufficient, the Corps created special rules for droughts, which saved even more water by decreasing the minimum flow into the Apalachicola River. *Id.*, at 46–47. Later, the Corps altered its operations to save still more water, by increasing the amount it could dedicate to refilling its reservoirs during nondroughts and lowering the threshold for triggering the special drought rules. *Id.*, at 47; Brief for United States as *Amicus Curiae* 11 (Brief

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[1] If the amount of water in the Corps' reservoirs falls to critically low levels, then the Corps will release only 4,500 cubic feet per second into the Apalachicola River. These extreme drought operations have not been triggered in recent droughts. See Direct Testimony of Phillip Bedient 14 (Bedient) (showing that flows remained around 5,000 cubic feet per second during the 2011 and 2012 droughts).

for United States). The Corps' current manual is a product of this decade of trial and error.

The current manual also reflects decades of litigation. The Corps' first manual went into effect in 1958, and the Corps did not propose a new one until 1989. As soon as it did, Alabama sued. Florida, Georgia, and other stakeholders eventually sued as well. For its part, Florida alleged that the Corps' operations under the proposed manual and subsequent interim operating plans violated the Endangered Species Act by injuring mussels and sturgeon, as well as non-covered species like oysters and tupelo trees.[2] The various lawsuits were eventually consolidated in the Middle District of Florida. Twenty years after Alabama first sued, the District Court ruled for Alabama but against Florida. The United States Court of Appeals for the Eleventh Circuit reversed with respect to Alabama. *In re MDL–1824 Tri-State Water Rights Litigation*, *supra*, at 1192, 1205. And Florida's case became moot in 2012, once the Corps issued the immediate predecessor to its current manual.

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II

A

Soon after the litigation against the Corps ended, Florida sought leave to file this lawsuit against Georgia, requesting an equitable apportionment of Basin water. This Court granted Florida leave to file its complaint in 2014. Florida's complaint alleged that Georgia was consuming more than its fair share of water in the Basin, causing economic and ecological harms to Florida. Florida sought relief only against Georgia and disclaimed seeking any "affirmative relief against the United States . . . with respect to the Corps'

[2] The U. S. Fish and Wildlife Service did not agree. It concluded that the minimum flows in the proposed manual and interim operating plans were sufficient to protect endangered species in the Apalachicola River. Zeng 46–47.

operation of the federally authorized dam and reservoir system." Complaint ¶15. The United States could not be joined as a party because it declined to waive its sovereign immunity.

Georgia moved to dismiss Florida's complaint for failure to join the United States as a necessary party. Florida opposed the motion, arguing that the United States was not necessary because Florida "'ha[d] no quarrel' with the Corps' operation of dams, and [its] lawsuit is not seeking to impose a 'minimum flow' regime on the Corps." Florida Brief in Opposition to Motion To Dismiss 26. Florida reiterated that it "is not seeking any relief whatsoever with respect to the operations of the dams" and is "not seeking any relief asking the Corps to control the dams or pull the levers in any specific way." Tr. of Oral Arg. on Motion To Dismiss 27. Florida conceded that "if [the Special Master] conclude[s] after a trial that caps on [Georgia's] consumption will not redress Florida's harm, then Florida will not have proved its case." *Id.*, at 29.

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Based on Florida's concessions, the Special Master denied Georgia's motion to dismiss. The Special Master recognized that Florida had "disclaimed any intention to seek a decree" binding the Corps in order to "sideste[p] the need to join the United States as a party." Order on Motion To Dismiss, p. 12. The Special Master warned Florida that this strategy was a "'two edged sword.'" *Id.*, at 13. "Having voluntarily narrowed its requested relief and shouldered the burden of proving that the requested relief is appropriate," the Special Master explained, "Florida's claim will live or die based on whether Florida can show that a consumption cap [on Georgia alone] is justified and will afford adequate relief." *Ibid.*

B

The parties proceeded to trial. Florida sought to cap Georgia's use of Basin water at its current levels through at least 2050. See Florida Pre-trial Brief 5; Updated Pre-Filed Direct Testimony (PFDT) of Dr. George M. Hornberger 58

(Hornberger). And, during drought years, Florida sought to reduce Georgia's use of Basin water by between 1,500 and 2,000 cubic feet per second. See Florida Pre-trial Brief 5; Hornberger 58; Updated PFDT of David Sunding 42 (Sunding); Florida Post-Trial Brief 18.

To support its proposed caps, Florida first presented testimony about how much additional water it would receive during droughts. According to Florida's evidence, Georgia is currently using enough water during droughts to decrease streamflow on the Apalachicola River by around 4,000 cubic feet per second. See Hornberger 2. Florida proposed cutting that amount by half. One of its experts opined that, by implementing several conservation measures, Georgia could increase flows in the Apalachicola River during droughts by 1,500 to 2,000 cubic feet per second. See Sunding 3; Hornberger 4. Florida estimated that these measures would cost Georgia an additional $35.2 million per year. Sunding 44.

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Florida next presented evidence about how this additional water would benefit various species in the Apalachicola River. It argued that additional flows could benefit mussels, which need consistent flows of at least 6,000 cubic feet per second in the summer; sturgeon, which need consistent flows of at least 7,000 cubic feet per second in the summer; and tupelo trees, which need consistent flows of at least 14,100 cubic feet per second in the summer. See Updated PFDT of J. David Allan 23–24, 26, 32–33, 41, 44–45 (Allan). Additional flows could also benefit the oysters in the Apalachicola Bay by lowering its salinity. See Updated PFDT of J. Wilson White 48 (White); PFDT of Marcia Greenblatt 15. All of Florida's evidence about these species, however, addressed the benefits of additional water during droughts. See Report 63. Florida presented no evidence of any benefits during nondroughts.

Finally, Florida attempted to prove that the additional water would actually reach Florida when it needs the water—*i. e.*, during droughts. To do this, Florida needed to show that the Corps would deviate from its normal operating

protocols, which specify that the Corps will generally release only 5,000 cubic feet per second during droughts. Florida relied on Dr. Peter Shanahan to make this showing. Dr. Shanahan testified that "the Corps would not . . . hold back water and thwart the additional flow benefits [that] Florida would receive from Georgia['s] conservation efforts." Updated PFDT of Dr. Peter Shanahan 1 (Nov. 15, 2016). He reasoned that the Corps would either choose to release the additional water in its discretion or be compelled to release the additional water because its upstream dams have limited storage capacity and it does not operate any dams on the Flint River. *Id.*, at 17–27.

In its defense, Georgia presented evidence that its current use has only a negligible impact on the amount of water that Florida receives through the Apalachicola River. Georgia's experts showed that the State's water use amounted to just 4% of Basin flows in an average year and 8% of Basin flows in a dry year, leaving anywhere from 92% to 96% of Basin water for Florida. See Stavins 16–18; Bedient 44–45. According to Georgia's experts, the primary factor that dictates flows in the Apalachicola River is precipitation, not consumption. See Direct Testimony of Charles A. Menzie 15.

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Georgia's experts also testified that Georgia's water use was entirely reasonable. Metropolitan Atlanta had taken substantial steps to conserve water, reducing its consumption to levels that even Florida's expert admitted demonstrated effective water conservation. Direct Testimony of Peter Mayer 2; see also *id.*, at 18 (showing that Florida's Basin residents used more water per capita than residents in metropolitan Atlanta). And, instead of Florida's estimate of 4,000 cubic feet per second, Georgia estimated that its water use had never decreased streamflow by more than 2,000 cubic feet per second, and only rarely by more than 1,400 cubic feet per second. See Zeng 2, 7.

Georgia also presented evidence that Florida's proposed caps would cost Georgia significantly more than they would

benefit Florida. Georgia's economic expert estimated that Florida's proposed caps would impose costs of more than "$2.1 billion for municipal and industrial water users and $335 million for Georgia farmers . . . every single year." Stavins 2. Georgia's expert also testified that Florida's expert had dramatically lowered his initial evaluation of the costs to Georgia, which was initially $191 million. *Id.*, at 31; see also 11 Trial Tr. 2787. That change apparently occurred because Florida's expert narrowed his definition of "cost" to exclude anything but additional, direct governmental expenditures. See *id.*, at 2791. But regardless of the precise cost, Georgia's expert testified that it would be inequitable to impose it on Georgia. "Georgia has 5 times the land area, 56 times the population, 80 times the number of employees, and 129 times the [gross regional product] of . . . Florida. [Yet it] consumes only 4 percent of the total waters available in the . . . Basin in an average year, and only 8 percent of the total waters available in the . . . Basin in a dry year, leaving the rest for Florida's use." Stavins 2. Further, Florida's own expert estimated that a cap on Georgia would produce only minimal benefits for Florida: Cutting Georgia's water use in half would increase the oyster biomass in Apalachicola Bay by less than 0.6% in most instances, and only 1.2% during the worst droughts. White 50–51. These additional oysters would be worth only a few hundred thousand dollars. Stavins 51–52.

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Finally, Georgia rebutted Florida's assertion that, despite the Corps' operations, Florida would actually receive the additional water that a cap on Georgia would create during droughts. Using models that accounted for the Corps' prior operations, Georgia's expert on the Corps, Dr. Philip Bedient, testified that Florida would receive only 5,000 cubic feet per second during droughts, no matter how much additional water was created by a cap on Georgia and regardless of whether that water flowed into the Flint or the Chattahoochee River. See Bedient 23–26, 28–30. The United States

filed an *amicus* brief to the same effect. It confirmed that, during droughts, "[t]he Corps expects . . . that Apalachicola River flows would be very similar with or without a consumption cap [on Georgia]." Post-Trial Brief 17–18 (United States Post-Trial Brief).[3]

C

All told, the trial lasted one month. After hearing the witnesses and reviewing the evidence, the Special Master recommended ruling against Florida. Report 70. The Special Master found that Florida likely had proved harm to its oysters,[4] and assumed that Georgia was using too much water for agricultural purposes.[5] *Id.*, at 31–34. But the Special Master did not decide whether Georgia's agricultural water use caused the harm to Florida's oysters. *Id.*, at 34. Instead, he concluded that Florida had failed to prove that a cap on Georgia would appreciably benefit it given the Corps' operations in the Basin. *Id.*, at 3, 31–34.

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Citing this Court's precedents requiring States to prove an appreciable benefit before they can obtain an equitable apportionment that interferes with established uses, the Special Master concluded that Florida could not prove that its injury was "redressable by the Court." See *id.*, at 24 (citing, *inter alia*, *Idaho ex rel. Evans* v. *Oregon*, 444 U. S. 380, 392 (1980) (*Idaho I*); *Washington* v. *Oregon*, 297 U. S. 517, 523 (1936)); Report 30 (same); see also *id.*, at 27 (citing *New Jersey* v. *New York*, 283 U. S. 336, 342–345 (1931); *Colo-*

[3] The United States has made similar representations to this Court. See, *e. g.*, Brief for United States 26–29 (explaining that the Corps "would not generally expect" flows into Florida to increase during droughts, even if Florida convinced this Court to cap Georgia's water use).

[4] The Special Master noted that Florida's alleged injuries to mussels, sturgeon, and tupelo trees were "less compelling." Report 64, n. 42.

[5] As for Georgia's municipal and industrial water use, the Special Master concluded that it was "less clear" that these uses were "unreasonable," given that Georgia had "taken significant steps to conserve water in the Atlanta metropolitan region." *Id.*, at 34, n. 28.

rado I, 459 U. S., at 187). According to the Special Master, Florida "ha[d] not proven by clear and convincing evidence that any additional streamflow in the Flint River or in the Chattahoochee River would be released from the Jim Woodruff Dam into the Apalachicola River at a time that would provide a material benefit to Florida (*i. e.*, during dry periods)." Report 47. The Special Master also found that "Florida ha[d] not met its requirement to show by clear and convincing evidence that its injury can be redressed by increased flows during non-drought conditions" because its "trial presentation did not address the benefits of increased flows during 'normal' periods" and Georgia's evidence showed "an absence of any significant benefit to Florida." *Id.*, at 63–65.

III

Before delving into the parties' arguments, it is helpful to have a basic understanding of the rules that govern this Court's equitable-apportionment jurisprudence—or at least what used to be the rules before the Court's opinion muddled them beyond recognition.

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First, in equitable-apportionment cases, as in all cases, this Court requires the complaining party to prove standing. *Maryland* v. *Louisiana*, 451 U. S. 725, 735–736 (1981); *Wyoming* v. *Oklahoma*, 502 U. S. 437, 447, 452 (1992); see also 3 A. Kelley, Water and Water Rights § 45.02(b), p. 45–12 (3d ed. 2018) (Kelley) (noting that standing is a justiciability requirement for equitable-apportionment cases). To prove standing, a complaining State must demonstrate that it has "'suffered a wrong through the action of the other State . . . which is susceptible of judicial enforcement according to the acceptable principles of the common law or equity systems of jurisprudence.'" *Maryland*, *supra*, at 735–736; *Wyoming*, *supra*, at 452.

Second, this Court requires the State seeking an apportionment to show by clear and convincing evidence a "threatened invasion of rights . . . of serious magnitude." *New*

York v. *New Jersey*, 256 U. S. 296, 309 (1921); accord, *Colorado I*, *supra*, at 187, n. 13; Kelley § 45.04. Our precedents do not clarify whether this requirement goes to the case's justiciability, the merits of the complaining State's claim, or the propriety of affording injunctive relief. See Kelley §45.04. But they are clear that such a showing must be made to obtain relief. See *Connecticut* v. *Massachusetts*, 282 U. S. 660, 669 (1931).

Third, the State seeking an apportionment must "demonstrat[e] by clear and convincing evidence that the benefits of the [apportionment] substantially outweigh the harm that might result." *Colorado I*, *supra*, at 187; accord, *Colorado* v. *New Mexico*, 467 U. S. 310, 316–317 (1984) (*Colorado II*); Kelley § 45.06, at 45–34 to 45–35. Since this Court's first equitable-apportionment case, this balance-of-harms test has been the basic merits inquiry that decides whether a State is entitled to an apportionment. See *id.*, § 45.06(c)(1), at 45–39 to 45–40 ("Harm-benefit comparison goes back to the Court's first equitable apportionment case, *Kansas* v. *Colorado*[, 206 U. S. 46, 113–114 (1907) (*Kansas I*)]"). As part of the balance-of-harms test, this Court has required the State seeking an apportionment to prove that it would appreciably benefit from the apportionment—otherwise, the State could not possibly prevail in the balance-of-harms analysis. *Idaho I*, *supra*, at 392; *Washington*, *supra*, at 523; see also Kelley § 45.06(c)(1), at 45–39 (explaining that this appreciable-benefit requirement is part of the "harm-benefit" balance).

Fourth, if the State seeking an apportionment makes all these showings, this Court must craft an equitable-apportionment decree. Our precedents hold that a State should not be denied a remedy merely because calculating the appropriate apportionment is difficult. See *Idaho ex rel. Evans* v. *Oregon*, 462 U. S. 1017, 1026 (1983) (*Idaho II*). Reasonable predictions about future conditions are sufficient. *Ibid.*

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This case is about the third rule: the balance-of-harms analysis and, specifically, its appreciable-benefit requirement. The Special Master found that Florida had not proved that its requested cap on Georgia's water use would appreciably benefit it, since Florida could not prove that it would receive more water when it needed it. That this case is about the third rule is important. Throughout its opinion, the Court mushes the requirements from our precedents together, merging cases and principles from one area with cases and principles from another—sometimes in the same sentence. But our precedents are not so convoluted. They articulate clear rules, and the Special Master correctly applied one of them when making his recommendation in this case. He did not err by failing to apply the unrecognizable mishmash of principles set out in the Court's opinion.

IV

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Florida raises three objections to the Special Master's Report. First, it argues that the Special Master required it to satisfy a legal standard that was too demanding. Second, Florida argues that it should prevail under the correct standard because, if this Court enters an equitable-apportionment decree, the Corps will likely allow more water to flow into Florida during droughts. And third, even if the Corps does not release more water into Florida during droughts, Florida argues that a cap on Georgia would still benefit it during nondroughts. None of these arguments has merit.

A

Florida's first objection fails because the Special Master applied the correct legal standard. A careful reading of his Report demonstrates that he applied the ordinary balance-of-harms test dictated by this Court's precedents. He did not, as the Court implies, deny Florida relief because calculating an appropriate apportionment was too difficult or be-

cause Florida failed to satisfy the "threshold" redressability requirement for Article III standing. And even if the Special Master did apply the wrong standard, his misstep would not justify a remand because his findings are plainly correct and establish that Georgia should prevail under the balance-of-harms test.

1

The Special Master applied the balance-of-harms test from this Court's precedents. A State seeking an equitable apportionment that interferes with established uses must "demonstrat[e] by clear and convincing evidence that the benefits of the [apportionment] substantially outweigh the harm that might result." *Colorado I*, 459 U. S., at 187; accord, *Colorado II*, *supra*, at 316–317. This heavy burden reflects the need for "judicial caution" before granting equitable apportionments, which "involve the interests of quasi-sovereigns, present complicated and delicate questions, and . . . necessitate expert administration." *Colorado* v. *Kansas*, 320 U. S. 383, 392 (1943) (*Kansas II*); accord, *Colorado II*, 467 U. S., at 316 (explaining that the clear-and-convincing-evidence burden "appropriately balance[s] the unique interests involved in water rights disputes between sovereigns"). It also reflects "this Court's long-held view that the proposed diverter should bear most, if not all, of the risks of erroneous decision" because the benefits he claims for proposed future uses are usually "'speculative and remote'" while the costs of disrupting established uses are "'typically certain and immediate.'" *Ibid.* (quoting *Colorado I*, *supra*, at 187).

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As part of the balance-of-harms analysis, this Court has repeatedly held that the State seeking to divert water from existing uses must show that it will obtain some appreciable benefit from an equitable apportionment. See, *e. g.*, *Idaho I*, 444 U. S., at 392; *New Jersey*, 283 U. S., at 345. This appreciable-benefit requirement reflects the fact that a minimal benefit cannot outweigh the heavy costs that inevitably accompany equitable-apportionment decrees. See *Colorado I*, *supra*, at 187 ("[T]he equities supporting the [status quo]

will usually be compelling"); *Kansas II*, *supra*, at 393 (expressing "great and serious caution" over granting equitable apportionments because they "interfer[e] with the action of a State"). Put another way, the Court will not "bring distress and even ruin to a long-established [water use] for no other or better purpose than to vindicate a barren right." *Washington*, 297 U. S., at 523; see also *Kansas I*, 206 U. S., at 109 ("[B]efore, at the instance of a sister state, [a State's water use] is destroyed or materially interfered with, it should be clear that such sister state has not merely some technical right, but also a right with a corresponding benefit"). Such an action would run contrary to "the high equity that moves the conscience of the court in giving judgment between states." *Washington*, 297 U. S., at 523.

For example, in *Washington* v. *Oregon*—a case with facts strikingly similar to this one—the Court refused to cap Oregon's water use because it "'would materially injure Oregon users without a compensating benefit to Washington users.'" *Ibid.* In that case, Washington complained about "temporary dams" that Oregon residents had erected to irrigate their crops during "seasons of [water] shortage." *Id.*, at 522. Removing the dams, however, would mean that, "[d]uring the period of water shortage, only a small quantity of water would go by" and "would be quickly absorbed and lost in the deep gravel beneath the channel." *Id.*, at 522–523. Because a cap on Oregon would not benefit Washington by supplying water when it most needed it, the Court declined to grant Washington's requested relief. *Id.*, at 520–523.

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The Special Master applied this appreciable-benefit requirement. As he explained, Florida "ha[d] not proven by clear and convincing evidence" that the Corps would release any additional water "at a time that would provide a material benefit to Florida (*i. e.*, during dry periods)." Report 47; see also *id.*, at 47–48 ("[T]he Corps' operation[s] . . . rende[r] any potential benefit to Florida from increased streamflow in the Flint River uncertain and speculative"). The Special Master likewise found "an absence of any significant

benefit to Florida" during nondrought conditions. *Id.*, at 65; see also *id.*, at 69 ("Florida has not shown that it would benefit from increased pass-through operations under normal conditions"); *id.*, at 62–63 ("[T]he potential benefits to Florida of increased flows . . . when the Corps is not in drought operations are uncertain, rendering the efficacy of any relief speculative"). Tellingly, the Special Master relied exclusively on this Court's precedents applying the appreciable-benefit requirement. See *id.*, at 24 (citing, *inter alia*, *Idaho I*, *supra*, at 392; *Washington*, *supra*, at 523); Report 30 (same); *id.*, at 27 (citing *New Jersey*, *supra*, at 345; *Colorado I*, *supra*, at 187). And Florida agreed that it had to present proof of some benefit. See, *e. g.*, Florida's Post-Trial Response Brief 63 (conceding that it had to "prove that additional flows from a . . . reduction in Georgia's consumption will result in meaningful benefits to the Bay and River"). In short, the Special Master correctly applied our precedents and required Florida to show that it would obtain some appreciable benefit from an equitable-apportionment decree.

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2

The Court does not disagree that Florida failed to prove an appreciable benefit. Instead, it simply asserts that a decision on that question is "premature." *Ante*, at 813. It is incredibly odd to conclude that a Special Master's merits determination is "premature" after a *full trial*. The Court can draw that strange conclusion only by conflating the rules that govern our equitable-apportionment jurisprudence and then faulting the Special Master for misapplying two rules that he never applied.

The Court criticizes the Special Master for applying "too strict a standard" when deciding the "'threshold'" question whether the Court would be "able to fashion an appropriate equitable decree." *Ante*, at 820. Although the Court's reasoning is far from clear, it appears to mean one of two things. The Court either means that the Special Master erred by denying relief on the ground that it was too difficult to calcu-

late the appropriate apportionment—the fourth rule mentioned above. Or the Court means that the Special Master erred by denying relief on the ground that Florida could not prove Article III standing—the first rule mentioned above. But the Special Master did not deny relief for either of these two reasons.

a

Both the Court and Florida suggest that the Special Master contravened this Court's statement in *Idaho II* that "'[u]ncertainties about the future . . . do not provide a basis for declining to fashion a decree.'" *Ante*, at 816, 839 (quoting *Idaho II*, 462 U. S., at 1026); see also *ante*, at 818, 822 (suggesting that the Special Master violated *Idaho II* by concluding that "'the formulation of a workable decree is impossible'"); Brief for Plaintiff 30–31. But the Special Master nowhere contradicted this rule.

The rule from *Idaho II* is a rule about fashioning an appropriate remedy when the complaining State has prevailed on the merits. In *Idaho II*, the Special Master concluded that he could not determine Idaho's entitlement to fish "for any past or future year" because "several unknown variables" made it too difficult to decide how many fish would be available to harvest at any given time. Special Master's Report, O. T. 1982, No. 67, Orig., p. 30. The Special Master rejected Idaho's proposed formula for calculating its entitlement because he could not understand the predictive models or mathematics involved in applying it. *Id.*, at 40–42. Before this Court, Idaho objected to the Special Master's conclusion, arguing that its proposed formula relied on procedures "that are either being currently employed by defendants or which involve simple mathematical computations." Brief for Plaintiffs in O. T. 1982, No. 67, Orig., p. 82. The Court accepted Idaho's argument, noting that a decree need not "always be mathematically precise or based on definite present and future conditions" and that "Idaho's proposed formula for apportioning the fish is one possible basis for a decree." *Idaho II*, 462 U. S., at 1026. "Uncertainties about the fu-

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ture," the Court explained, "do not provide a basis for declining to fashion a decree." *Ibid.*

Unlike the Special Master in *Idaho II*, the Special Master in this case did not conclude that it was too difficult to calculate the amount of water that Florida should receive. As the Court acknowledges, *ante*, at 827, the Special Master assumed it was feasible to impose Florida's requested cap on Georgia's water use and "accept[ed] Florida's estimates of the increased streamflow that would result from a consumption cap." Report 67, n. 43; see *id.*, at 34–35. But even if a cap on Georgia generated the additional water that Florida claimed it would (1,500 to 2,000 cubic feet per second), the Special Master concluded that it would not appreciably benefit Florida because it would not be passed through when Florida needed it. See *id.*, at 47–48, 62–65, 69. That is why the Special Master cited the appreciable-benefit rule from *Idaho I*, 444 U. S., at 392, and *Washington*, 297 U. S., at 523. He did not fail to make reasonable predictions in shaping a remedy or otherwise contravene the rule from *Idaho II*.

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b

Florida alternatively contends that the Special Master applied the "redressability" requirement of Article III standing. See Brief for Plaintiff 29–32. At some points, the Court appears to agree with this characterization, as it describes the appreciable-benefit rule as an Article III standing requirement. See *ante*, at 817–818 (quoting the Article III standing rule from *Wyoming* v. *Oklahoma*, 502 U. S., at 447, 452, *Maryland* v. *Louisiana*, 451 U. S., at 735–736, and *Massachusetts* v. *Missouri*, 308 U. S. 1, 15 (1939), and describing the appreciable-benefit rule from *Kansas I* and *Washington* as a "[m]ore specifi[c]" articulation of that rule). This argument is incorrect.

As explained, the Special Master applied the ordinary balance-of-harms analysis and found that Florida had not

demonstrated an appreciable benefit from a cap on Georgia's use. Tellingly, the Special Master relied exclusively on cases conducting the balance-of-harms analysis. His Report does not cite any standing cases, or even mention "standing" or "Article III." Neither do any of the pre-trial or post-trial briefs that the parties filed. True, the Special Master's Report sometimes describes the appreciable-benefit requirement as a question of "redressability"—a word that is also associated with Article III standing. But the Special Master was merely following the parties' lead, as they phrased the appreciable-benefit requirement in terms of "redress" throughout the litigation. See Tr. of Oral Arg. on Motion To Dismiss 29 (Florida admitting that it must show "that caps on consumption will . . . redress [its] harms" to "prov[e] its case"); Florida Pre-Trial Brief 37–39 (describing how a consumption cap "can redress Florida's worsening injuries" and "significantly benefit Florida's ecology"); Georgia Post-Trial Brief 80–88 (describing the appreciable-benefit aspect of the balance-of-harms test as a "redress" requirement); Georgia's Post-Trial Response Brief 3, 7 (same); see also United States Post-Trial Brief 19 (taking no position "on whether Florida has proved that a consumption cap would produce enough additional [B]asin inflow at the right times to *redress* Florida's alleged harm and justify the cost of imposing a consumption cap" (emphasis added)). That the parties and the Special Master adopted this shorthand does not change the Special Master's analysis, which focused squarely on the appreciable-benefit requirement.[6]

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[6] The Court places great weight on the fact that the Special Master referred to redressability as a "'threshold'" requirement. See *ante*, at 813–814, 820, 823. But showing an appreciable benefit *is* a "threshold" requirement for prevailing under the balance-of-harms test, as a State that cannot show an appreciable benefit obviously cannot show that the balance of harms tilts in its favor. In other words, the Court need not engage in a full-scale balancing of benefits and harms if the party that bears the burden of proof has nothing to place on its side of the scale; it

c

Because the Court wrongly assumes that the Special Master denied relief on the basis rejected in *Idaho II* or for lack of Article III standing, it faults the Special Master for imposing the higher burden of proof that governs the merits—*i. e.*, "'clear and convincing evidence.'" See *ante*, at 820–823.[7] Of course, the far simpler explanation for why the Special Master applied the merits standard is that he was, in fact, making a decision about the merits, not about remedies or standing.

The Court also appears to fault the Special Master for addressing the appreciable-benefit requirement without first making several preliminary findings. The Court asserts that Special Masters must make specific factual determinations in every case about the harm that the complaining State suffered, the exact amount of water needed to remedy that harm, and a host of other factors. See *ante*, at 817–821.

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The Court's suggested order of operations, which it appears to invent out of thin air, would fundamentally transform our equitable-apportionment jurisprudence. It will require States to litigate (and this Court to resolve) a host of complex factual questions, even where the State seeking the apportionment is obviously not entitled to relief because it cannot show an appreciable benefit—a requirement that Florida agrees is necessary for it to prevail, see Florida Post-Trial Response Brief 63 (agreeing it must "prove that addi-

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can reject that type of case at the "threshold." That the Special Master used the word "threshold" does not suggest that he was doing anything other than applying the ordinary balance-of-harms test.

[7] In faulting the Special Master for requiring clear and convincing evidence, the Court combines the rule from *Idaho II* with the balance-of-harms test from *Kansas I*, *Washington*, and *Idaho I*. See *ante*, at 822–823. The Court reconciles these precedents as follows: "[T]hese [cases] apply to the general *availability* of judicial relief—not to the *details* of a final decree or to the workability of a decree that will depend on those details." *Ibid.* I do not understand this sentence, and I pity the litigants and Special Masters who will be forced to decipher it.

tional flows from a . . . reduction in Georgia's consumption will result in meaningful benefits to the Bay and River"); Tr. of Oral Arg. on Motion To Dismiss 29 (admitting it must show "that caps on consumption will . . . redress [its] harms" to "prov[e] its case"). In no other area of the law do we require unnecessary findings and conclusions when a key element of the plaintiff's case is missing. And we have not applied this rule in equitable-apportionment cases either. See, *e. g.*, *Idaho II*, 462 U. S., at 1027–1029 (denying relief, despite the Special Master's erroneous ruling on the requested remedy, because his findings also supported the conclusion that Idaho could not show injury and thus was not entitled to relief on the merits). The inefficiencies that this would create, and the costs it would impose on States, are obvious. Yet the Court faults the Special Master for resolving the dispositive question in this case first, without jumping through a series of unnecessary hoops. This is precisely the opposite of what Special Masters should be doing and what this Court should be encouraging.

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Even if the Court is correct that the Special Master denied Florida relief for some reason other than the merits, there is no reason to send this case back for a do-over. As the Court acknowledges, " 'the ultimate responsibility for deciding what are correct findings of fact remains with us.' " *Ante*, at 823 (quoting *Colorado II*, 467 U. S., at 317). We must bring our independent judgment to bear based upon "our own independent examination of the record." *Kansas* v. *Missouri*, 322 U. S. 213, 232 (1944). An independent examination of the record confirms that the Special Master was correct to find that the Corps would not change its operations during droughts if this Court capped Georgia's water use and thus Florida would not benefit from a cap during droughts. See Part IV–B–1, *infra*. The Special Master also was correct to find that Florida presented no evidence of a benefit during nondroughts. See Part IV–B–2, *infra*. Those findings

support a judgment in Georgia's favor under the traditional balance-of-harms analysis.

It makes little sense to send this case back to the Special Master so that he can amend his Report to say "appreciable benefit" instead of "redress" and then send this case right back to this Court.[8] That pointless exercise will only needlessly prolong this litigation. The Court's subtle suggestion that Florida could present "additional evidence" on remand, *ante*, at 840, is not a satisfactory response. During their 18 months of discovery, the parties produced 7.2 million pages of documents, served 130 third-party subpoenas, issued more than 30 expert reports, and conducted nearly 100 depositions, including 29 expert depositions. Florida thus had a more-than-ample opportunity to gather its evidence and then present it at a 1-month trial. Giving Florida another bite at the apple will likely yield no additional evidence, but it will be unfair to Georgia, which has already spent the time and resources to defeat the case that Florida chose to present. In short, we have all the evidence we need to decide this case now. We should have done so.

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Florida's second and third objections—which challenge the Special Master's finding that Florida had not met its burden under the balance-of-harms test—also fail. As explained, a State seeking to interfere with established uses must prove its case by clear and convincing evidence—a "much greater" burden than the one normally imposed in civil cases. *Connecticut*, 282 U. S., at 669. To meet this burden, Florida

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[8] The Court concedes that Florida cannot prevail in this case unless it proves, by clear and convincing evidence, that it would obtain an appreciable benefit from an equitable apportionment. See *ante*, at 822 (noting that the appreciable-benefit test "'goes to the merits' of the equitable apportionment inquiry"); *ante*, at 823 (noting "a remand is necessary to conduct the equitable-balancing inquiry"); *ante*, at 840 (noting that Florida must ultimately prevail in the balance-of-harms test).

must present enough evidence to leave this Court with an "abiding conviction that the truth of its factual contentions are 'highly probable'" and to "instantly til[t] the evidentiary scales in the affirmative when weighed against the evidence . . . offered in opposition." *Colorado II*, *supra*, at 316. As the Special Master found, Florida has not met this burden. The evidence demonstrates that, if this Court imposed Florida's proposed cap on Georgia, Florida would not receive an appreciable amount of additional water during droughts. And Florida would not benefit from the additional water that it received during nondroughts.

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Florida did not demonstrate that, if this Court caps Georgia's water use, Florida would receive a meaningful amount of additional water during droughts. For Florida to receive more water, the Corps must change its current operating procedures. But the Corps is not a party, and it would not be bound by any decree issued by this Court. Because Florida cannot ask this Court to require the Corps to change its existing operations, it must prove by clear and convincing evidence that the Corps will voluntarily make the necessary changes. Florida cannot do so. The United States' representations in this litigation and the Corps' history and practice in the Basin all reveal that the Corps will not change its existing practices, even if this Court caps Georgia's water use.

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Throughout this litigation, the United States has consistently maintained that the Corps "would not generally expect" to release more water into Florida during droughts, even if Florida convinced this Court to cap Georgia's use. Brief for United States 28; see also United States Post-Trial Brief 17–18 ("The Corps expects [during drought operations] that Apalachicola River flows would be very similar with or without a consumption cap until enough water is stored to return the system to normal operations"). This is because

"[B]asin inflow . . . has historically not been the primary factor in the Corps' decisionmaking process for making additional releases above 5,000 [cubic feet per second] during drought operations." Brief for United States 28. The Corps' "overriding" priorities during droughts are preserving enough water "to comply with the [Endangered Species Act] while avoiding catastrophic depletion of storage and refilling [its] reservoirs as rapidly as possible." *Id.*, at 27. Deviations are made only "as needed to serve congressionally authorized project purposes" or "in emergency circumstances." *Ibid.* Since a general need to provide more water to Florida does not fall within either exception, the additional water that would flow into the Basin would not translate into additional flows for Florida. See *id.*, at 29.

The United States' representations are consistent with the Corps' historical practice. During droughts, the amount of water entering the Basin is almost always insufficient to meet the Corps' minimum-flow requirement of 5,000 cubic feet per second. See Bedient 24–27. Thus, a cap on Georgia would simply decrease the amount of water that the Corps must release from storage; it would not increase the amount of water flowing into the Apalachicola River. *Id.*, at 21, 25–26. And once drought operations are triggered, the Corps limits its releases to around 5,000 cubic feet per second regardless of the amount of water entering the Basin. See United States Post-Trial Brief 9; Brief for United States 24–28. Indeed, during past drought operations, even when Basin inflow varied by tens of thousands of cubic feet per second, the measured flow from the Jim Woodruff Dam into the Apalachicola River has consistently remained around 5,000 cubic feet per second. See Bedient 23, 62–63.[9] Further,

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[9] It makes no difference whether the additional water generated by a cap on Georgia would enter the Flint River. Contra, Brief for Plaintiff 26, 38–39. If additional water entered the Flint River during droughts, the Corps would release less water from its upstream reservoirs on the Chattahoochee River to maintain a consistent flow of around 5,000 cubic

the models presented by Georgia's expert showed that, if Florida's proposed caps had been in place during the drought years of 2007 and 2012, Florida would not have received appreciable additional flows when the water was most needed. Cutting Georgia's use in half would have produced additional flows for only 14 to 19 days in the summer and fall of 2007, and would not have produced any additional flows during the summer or fall of 2012. *Id.*, at 27–30; see also *id.*, at 38 (showing the same for 2011).

Florida argues that the Corps might exercise its discretion to ensure that additional water reaches Florida during droughts. Brief for Plaintiff 40–44. But Florida supports this claim with nothing more than speculation. See *Colorado II*, 467 U. S., at 320 (explaining that a State cannot carry its burden in an equitable-apportionment action except "with specific evidence" and that "[m]ere assertions . . . will not do"). All available evidence suggests that the Corps would not exercise its discretion to release more water into the Apalachicola River during droughts.

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Before this Court, the United States expressly rejected Florida's contention that "the Corps is likely to exercise its authority within existing operational protocols to provide Florida with additional flows produced by a cap on Georgia's consumption." Brief for United States 23. Basin inflows, it explained, simply do not dictate how much water the Corps releases into the Apalachicola River. *Ibid.* And the Corps could not make discretionary releases "that [are] not specifically provided for in the [water-control manual], not specifically authorized by Congress or mandated by general statute, [and not] required by a court order directed to the Corps," without raising "significant and difficult question[s]" about whether it had exceeded its authority. *Id.*, at 29.

Florida also suggests that the Corps might amend its water-control manual in response to an equitable decree from

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feet per second from the Jim Woodruff Dam at Lake Seminole. See Bedient 24–26; Brief for United States 24–25.

this Court. Florida's only support for this argument is a statement from the Corps that it will "'take . . . into account'" this Court's decision. Brief for Plaintiff 44 (quoting Record of Decision Adopting Proposed Action Alternative for Implementation of Updated Apalachicola-Chattahoochee-Flint River Basin Master Manual 18 (Mar. 30, 2017)). But this vague statement was not a promise that the Corps will change its procedures, and there are a host of reasons to doubt that the Corps would voluntarily change its procedures just because this Court capped Georgia's use.

For one, the Corps has already tried procedures that passed more water to Florida during droughts. The results were dreadful: Reservoir storage plummeted to dangerously low levels, putting all of the Corps' authorized project purposes at risk. Zeng 45–46. Since that time, the Corps' operating protocols have become increasingly protective of reservoir storage, particularly during droughts. As the Corps explained, it intends to pursue "'a more proactive approach to conserve reservoir storage as drier conditions develop in the [B]asin'" because the "[s]torage of water during drought operations is critically important to retain sufficient water in the system." Brief for United States 11.

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For another, the last time the Corps attempted to change its water-control manual, it required more than two decades of litigation and administrative review to finalize those changes. Indeed, the main reason that the United States chose not to participate in this case is because it wanted "to avoid being bound by a decree that could directly affect the Corps, operations before the Corps had a chance to finally complete its process of updating the [water-control manual]." *Id.*, at 32. Given this, there is no reason to think that the Corps will volunteer to undertake the process of updating its manual again—especially so soon after it completed this arduous task.

Florida's speculation is even more suspect in view of the changes that the Corps would have to make to benefit Florida during droughts. To even propose a new water-control

manual, the Corps must "examin[e] . . . the congressionally authorized purposes," "determin[e] . . . how providing additional flows will impact those purposes [and] other laws," and "supplemen[t] documentation of environmental impacts as required by [the National Environmental Policy Act]." *Id.*, at 31. Providing more water to Florida does not help the Corps satisfy any of these legal requirements. It is not one of the congressionally authorized purposes, see *id.*, at 29, 31–32, and, by dropping its lawsuit against the Corps, Florida now accepts that a minimum flow of 5,000 cubic feet per second is sufficient to comply with the Endangered Species Act. Florida cannot claim that the law requires the Corps to provide it with more water. And the idea that the Corps will change its operating protocols to serve an unauthorized purpose when doing so could jeopardize its authorized purposes is simply not plausible.

Taking a different tack, the Court suggests that additional water will pass through to Florida even if the Corps does not change its manual. Specifically, the Court concludes that the additional water will pass through to Florida during droughts so long as the Corps does not enter drought operations. See *ante*, at 829–831. According to the Court, the Corps will allow additional water to pass through to Florida whenever the natural flow of the Apalachicola River is between 5,000 and 10,000 cubic feet per second during normal or "nondrought" operations. See *ante*, at 829–830.

The Court's conclusion depends on the premise that, during droughts, the natural streamflow into Florida is "between 5,000 and 10,000" cubic feet per second. *Ibid.* That premise is false.[10] During droughts, the natural streamflow

[10] The Court contends that I have confused "droughts" and "drought operations." See *ante*, at 833–834. I have not, but the Court has. During droughts—periods in which there is a "lack of rain," 4 Oxford English Dictionary 1076 (2d ed. 1989)—the amount of water that naturally flows into the Basin rivers usually falls below 5,000 cubic feet per second, particularly in the summer and fall months. See *infra*, at 871–873. Since the Corps must ensure that the Apalachicola River always receives at least

in the Apalachicola River is usually less than 5,000 cubic feet per second. *Supra*, at 866; see also Bedient 23 (showing that Basin inflow in 2012 was generally below 5,000 cubic feet per second between June and December); *id.*, at 27 (same for 2007). To maintain a minimum flow of 5,000 cubic feet per second during droughts, the Corps must artificially augment the River's natural flow—even when the Corps is in nondrought operations. *Id.*, at 21.[11] For instance, during the 2011 drought (when the Corps was in nondrought operations), "Basin Inflow was below 5,000 [cubic feet per second] for most of th[e] period [between June and December], and the Corps was 'augmenting' streamflow by releasing water

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5,000 cubic feet per second, the Corps augments the natural streamflow during droughts—even when the Corps is not in drought operations. Bedient 21. Thus, any additional water that a cap on Georgia generates during droughts would only increase streamflow into the Apalachicola River if it caused the natural streamflow to exceed 5,000 cubic feet per second. If the additional water increased streamflow to some amount less than that, then it would not increase flows in the Apalachicola River; it would simply decrease the amount of water that the Corps must release from its reservoirs. See *ibid.* Thus, as Georgia's expert explained, "reducing Georgia's consumptive use would only lead to additional . . . flow into Florida under specific and limited circumstances. First, the Corps cannot be in Drought Operations or [Extreme Drought Operations]. Second, *Basin Inflow cannot be below 5,000 [cubic feet per second], even if the Corps is in normal operations*." *Id.*, at 26 (emphasis added).

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[11] The Court contends that additional water from a cap on Georgia likely would have passed through to Florida in the summer of 2009. See *ante*, at 830–831. But this evidence is irrelevant. As Florida's own expert testified, "[t]he year 2009 was a relatively wet year." Hornberger 49; accord, Bedient 45. And Florida has only asked this Court to reduce Georgia's consumption by 1,500 to 2,000 cubic feet per second during "severe drought years," which 2009 was not. Hornberger 58.

The Court also contends that additional water from a cap on Georgia likely would have passed through to Florida in the summers of 2016 and 2017. See *ante*, at 830–831, 836. The Court's data was generated simultaneously with or after most of the testimony in this case, so the experts do not speak to it. But even considering the data that the Court has found, I suspect that 2016 and 2017 are not "severe drought years" either and, thus, are irrelevant.

from the reservoirs to satisfy the 5,000 [cubic feet per second] minimum." *Id.*, at 15; see also *id.*, at 27 (same for 2007). Once the Corps adds enough water to reach 5,000 cubic feet per second, however, it generally adds no more than that. *Id.*, at 21. To give a concrete example, if the natural flows in the Apalachicola River were 2,600 cubic feet per second, then the Corps would release 2,400 cubic feet per second from its reservoirs. See *id.*, at 25–26. And if a cap on Georgia increased the River's natural flow to 4,100 cubic feet per second, the Corps would release 900 cubic feet per second. See *ibid.* In either case, the total flow on the Apalachicola River would remain the same: 5,000 cubic feet per second. Thus, so long as the natural flows remain significantly less than 5,000 cubic feet per second, a cap on Georgia would only decrease the amount of water that the Corps releases from storage; it would not increase the overall amount of water flowing into the Apalachicola River.

For this reason, even when the Corps is in nondrought operations, a cap on Georgia would generally not increase flows to Florida. Georgia's expert proved that fact with evidence about past droughts where drought operations were not in effect. Using data from the 2007 drought, Georgia's expert concluded that the additional water from a cap on Georgia would be passed through to Florida almost entirely during the winter and spring months "when water in the [Basin] would be relatively plentiful." *Id.*, at 28. Florida would receive the additional water from a cap on Georgia only 19 days "during the summer and fall months, when streamflow was at its lowest." *Ibid.*; accord, *id.*, at 40. Data from the 2011 drought showed similar results. See *id.*, at 37 ("[During] dry years (*e. g.*, 2007 and 2011), . . . even significant changes in Georgia's consumptive use would lead to virtually no change in state-line flows during the low-flow months (*e. g.*, June, July, August, September)").[12] Florida

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[12] The Court claims that "Florida's proposed consumption cap . . . will mean (consistent with the testimony of the very Georgia expert that the dissent so frequently quotes) that there will be significantly fewer such

has not shown that these infrequent and sporadic additional flows during droughts would appreciably benefit it.[13]

The Court hypothesizes that a cap on Georgia could benefit Florida by decreasing the length of drought operations and by increasing the number of days that the Corps can meet its minimum-flow requirements of 5,000 cubic feet per second (during normal drought operations) and 4,500 cubic feet per second (during extreme drought operations). *Ante*, at 828, 831–833. The Court cites the United States' assertion in its brief that increased Basin inflows "'would generally benefit the [Basin] system by delaying the onset of drought operations, by allowing the Corps to meet the 5000 [cubic feet per second] minimum flow longer during extended drought, and by quickening the resumption of normal operations.'" *Ante*, at 828 (quoting Brief for United States 28); see also *ante*, at 832 (quoting a similar statement in the United States Post-Trial Brief 18–19). Of course, statements in briefs are not evidence. And, as the United States recognizes in the very next sentence, Florida would have to show that these "benefits are of sufficient quantity to justify relief in this case." Brief for United States as *Amicus Curiae* 28 (Aug. 7, 2017); see also United States Post-Trial Brief 19 (Dec. 15, 2016) (taking "no position on whether Florida has proven that a consumption cap would produce enough additional [B]asin inflow at the right times to redress Florida's alleged harm and justify the cost of imposing a consumption cap").

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days [of drought operations]." *Ante*, at 834. I assume that the "Georgia expert" in this sentence is Dr. Philip Bedient. But I am aware of no testimony from Dr. Bedient that supports the Court's assertion, and the Court cites none.

[13] If the Corps had been in drought operations, the results would not have differed much, demonstrating that whether the Corps is in drought or nondrought operations is not dispositive. Had the Corps been in drought operations during 2007, for instance, Florida would have received the additional water from a cap on Georgia during 14 days in the summer and fall—a difference of only five days as compared to nondrought operations. Bedient 28.

Florida offered no proof that a cap on Georgia would produce any appreciable benefit of this kind. And the evidence presented at trial suggests that these proposed benefits are wholly speculative. As explained above, the benefits to Florida from a cap on Georgia do not meaningfully change, regardless of whether the Corps enters drought operations. And there is no evidence that the Corps has had trouble meeting its minimum-flow requirements during recent droughts, when Georgia's use remained uncapped. Even during the severe droughts of 2011 and 2012, the Corps consistently maintained flows of 5,000 cubic feet per second, never entered extreme drought operations, and never reduced flows on the Apalachicola River to 4,500 cubic feet per second. See Bedient 14. And the Corps is even more unlikely to run out of water during future droughts, given that its current manual is more proactive in conserving water during droughts. See Brief for United States 11–12.

In sum, Florida has not shown that it is "'highly probable'" that a cap on Georgia will result in meaningful additional flows in the Apalachicola River during droughts. *Colorado II*, 467 U. S., at 316. It is thus not entitled to an equitable apportionment on this basis.

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Because Florida will not receive additional water during droughts, it argues that it will benefit from additional water during nondroughts. As the Special Master correctly found, however, Florida presented no evidence to support such an assertion. That is because no such evidence exists. Florida would not benefit from additional water during nondroughts, because flows on the Apalachicola River during nondroughts are already plentiful.

The Court does not contend that Florida would benefit from additional water during nondroughts, and Florida all but conceded the point below. When framing its case before the Special Master, Florida requested only that the Court

order Georgia to reduce its water use during droughts; Florida did not ask the Court to reduce Georgia's current water use during nondroughts. See Florida Pre-trial Brief 5; Hornberger 58. Consistent with this request, Florida's evidence focused exclusively on the harms that it suffered during droughts. Florida's hydrology expert testified extensively about droughts. See *id.*, at 2–3, 15–26, 41–46, 49–50. He testified that the Basin usually receives "a rather good amount of rainfall," so "major problems arise" only during "the low rainfall years." *Id.*, at 13. That is why he limited his testimony to the "impacts of [Georgia's] consumption during drought." *Id.*, at 15; see also *id.*, at 20–22.

Florida's other experts followed this drought-centric approach. For instance, one of Florida's experts on the harm to Florida's oysters connected that harm to "severe drought," which "reduced the discharge of fresh water from the Apalachicola River." Updated PFDT of David Kimbro 14. Florida's expert on the harm to sturgeon, mussels, and tupelo trees in the Apalachicola River similarly emphasized "dry periods of episodically dry years." Allan 17; see also *id.*, at 25–27 (emphasizing the effects of sustained flows below 6,000 cubic feet per second). As one Florida expert put it, "[t]he discussions that [he] had, especially with the biologists and the hydrologists, were largely almost exclusively focused on dry years" and he "c[ould]n't think of any" "issues [that] other experts raised about average or wet-year problems." 11 Trial Tr. 2811.

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The other evidence presented at trial leaves little doubt that Florida would not benefit from additional water during nondroughts. For starters, when the Basin is not experiencing a drought, water is plentiful. Florida's expert testified that "[a]verage rainfall in the portion of the . . . Basin above [Lake Seminole] is 51.5 inches per year, a rather good amount of rainfall." Hornberger 13. As a result, average monthly flows in the Apalachicola River are nearly 20,000 cubic feet per second. Direct Testimony of Sorab Panday 30 (Panday). More than 95% of the time, Apalachicola River

flows exceed 6,000 cubic feet per second. Brief for United States 12. And it is not unusual for flows in the Apalachicola River to exceed 50,000 cubic feet per second in the wetter months. See Panday 30. Even during drought years, flows in nonsummer months are relatively high. For instance, in the severe drought year of 2012, flow in the late winter and early spring regularly exceeded 10,000 cubic feet per second. See Bedient 29.

Almost all of the additional water generated by a cap on Georgia would reach Florida during these high flow periods, when it would provide no benefit to Florida. See *id.*, at 27–30. Take, for instance, the oysters in Apalachicola Bay—the only harm to Florida that the Special Master found in this case. See Report 31–32. Florida's own experts testified that, even if Georgia cut its agricultural water use in half during droughts, the resulting increase in Apalachicola River flows would have a negligible effect during nondroughts. During years of normal rainfall and the wetter months of drought years, the effect of additional flows on the Bay's salinity is less than one part per thousand. See 7 Trial Tr. 1768–1775. This immeasurable effect on the Bay's salinity would have no appreciable impact on oyster biomass. See White 50–51 (showing a less than 0.6% impact on oyster biomass, except in drier months and drought years).

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Assuming Florida's claims of harm to mussels, sturgeon, and tupelo trees have merit—something the Special Master never found—the harm to those species also would not be remedied by increased flows during nondroughts. Florida's expert on these species opined that significant harm to mussels occurs when flows drop below a threshold of 6,000 cubic feet per second for more than seven consecutive days between June 1 and September 30, Allan 33; that significant harm to sturgeons occurs when flows drop below a threshold of 7,000 cubic feet per second for more than 60 total days between May 1 and September 30, *id.*, at 41; and that significant harm to tupelo trees occurs when flows drop below a threshold of 14,100 cubic feet per second for more than 90

consecutive days between March 20 and September 22, *id.*, at 33, 41, 44–45. Accepting these statements as true, passing more water through to Florida during nondroughts would not do these species any good. All would still suffer the same harms during the summers of drought years when flows remain fixed at 5,000 cubic feet per second because of the Corps' operations.

If we contrast the *de minimis* benefits that Florida might receive from small amounts of additional water during nondroughts with the massive harms that Georgia would suffer if this Court cut its water use in half during droughts, it is clear who should prevail in this case. Florida's expert estimated that a cap on Georgia would have an "[i]ncremental [f]iscal [c]ost" of $35.2 million per year. Sunding 44. This figure included only additional costs that would require "the [Georgia] legislature . . . to appropriate money." 11 Trial Tr. 2791. The real cost of such a cap, which includes nongovernmental costs like welfare losses, would range anywhere from $191 million, *id.*, at 2787; Stavins 31, to more than $2 billion per year, *id.*, at 2. And the cap would trigger resulting losses in Georgia's gross regional product and employment, totaling around $322 million and 4,173 jobs annually. *Id.*, at 40. Regardless of the measure used, this harm dwarfs the value of Florida's entire fishing industry in Apalachicola Bay, which produces annual revenues of $11.7 million. *Id.*, at 16. And it greatly outweighs the value of the additional oysters that a cap on Georgia's use might produce—*i. e.*, no more than a few hundred thousand dollars. *Id.*, at 52. Imposing an enormously high cost on one State so that another State can achieve a hollow victory is "not the high equity that moves the conscience of the court in giving judgment between states." *Washington*, 297 U. S., at 523.

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In the final analysis, Florida has not shown that it will appreciably benefit from a cap on Georgia's water use. Ab-

sent such a showing, the balance of harms cannot tip in Florida's favor. Accordingly, I would have overruled Florida's objections to the Special Master's Report and denied Florida's request for relief. I respectfully dissent.

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Syllabus

JANUS *v.* AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, ET AL.

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

No. 16–1466. Argued February 26, 2018—Decided June 27, 2018

Illinois law permits public employees to unionize. If a majority of the employees in a bargaining unit vote to be represented by a union, that union is designated as the exclusive representative of all the employees, even those who do not join. Only the union may engage in collective bargaining; individual employees may not be represented by another agent or negotiate directly with their employer. Nonmembers are required to pay what is generally called an "agency fee," *i. e.*, a percentage of the full union dues. Under *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209, 235–236, this fee may cover union expenditures attributable to those activities "germane" to the union's collective-bargaining activities (chargeable expenditures), but may not cover the union's political and ideological projects (nonchargeable expenditures). The union sets the agency fee annually and then sends nonmembers a notice explaining the basis for the fee and the breakdown of expenditures. Here, it was 78.06% of full union dues.

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Petitioner Mark Janus is a state employee whose unit is represented by a public-sector union (Union), one of the respondents. He refused to join the Union because he opposes many of its positions, including those taken in collective bargaining. Illinois' Governor, similarly opposed to many of these positions, filed suit challenging the constitutionality of the state law authorizing agency fees. The state attorney general, another respondent, intervened to defend the law, while Janus moved to intervene on the Governor's side. The District Court dismissed the Governor's challenge for lack of standing, but it simultaneously allowed Janus to file his own complaint challenging the constitutionality of agency fees. The District Court granted respondents' motion to dismiss on the ground that the claim was foreclosed by *Abood*. The Seventh Circuit affirmed.

Held:

1. The District Court had jurisdiction over petitioner's suit. Petitioner was undisputedly injured in fact by Illinois' agency-fee scheme and his injuries can be redressed by a favorable court decision. For jurisdictional purposes, the court permissibly treated his amended com-

plaint in intervention as the operative complaint in a new lawsuit. *United States ex rel. Texas Portland Cement Co.* v. *McCord*, 233 U. S. 157, distinguished. Pp. 890–891.

2. The State's extraction of agency fees from nonconsenting public-sector employees violates the First Amendment. *Abood* erred in concluding otherwise, and *stare decisis* cannot support it. *Abood* is therefore overruled. Pp. 891–929.

(a) *Abood*'s holding is inconsistent with standard First Amendment principles. Pp. 891–901.

(1) Forcing free and independent individuals to endorse ideas they find objectionable raises serious First Amendment concerns. *E. g.*, *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 633. That includes compelling a person to subsidize the speech of other private speakers. *E. g.*, *Knox* v. *Service Employees*, 567 U. S. 298, 309. In *Knox* and *Harris* v. *Quinn*, 573 U. S. 616, the Court applied an "exacting" scrutiny standard in judging the constitutionality of agency fees rather than the more traditional strict scrutiny. Even under the more permissive standard, Illinois' scheme cannot survive. Pp. 891–895.

(2) Neither of *Abood*'s two justifications for agency fees passes muster under this standard. First, agency fees cannot be upheld on the ground that they promote an interest in "labor peace." The *Abood* Court's fears of conflict and disruption if employees were represented by more than one union have proved to be unfounded: Exclusive representation of all the employees in a unit and the exaction of agency fees are not inextricably linked. To the contrary, in the Federal Government and the 28 States with laws prohibiting agency fees, millions of public employees are represented by unions that effectively serve as the exclusive representatives of all the employees. Whatever may have been the case 41 years ago when *Abood* was decided, it is thus now undeniable that "labor peace" can readily be achieved through less restrictive means than the assessment of agency fees.

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Second, avoiding "the risk of 'free riders,'" *Abood*, *supra*, at 224, is not a compelling state interest. Free-rider "arguments . . . are generally insufficient to overcome First Amendment objections," *Knox*, *supra*, at 311, and the statutory requirement that unions represent members and nonmembers alike does not justify different treatment. As is evident in non-agency-fee jurisdictions, unions are quite willing to represent nonmembers in the absence of agency fees. And their duty of fair representation is a necessary concomitant of the authority that a union seeks when it chooses to be the exclusive representative. In any event, States can avoid free riders through less restrictive means than the imposition of agency fees. Pp. 895–901.

(b) Respondents' alternative justifications for *Abood* are similarly unavailing. Pp. 901–909.

(1) The Union claims that *Abood* is supported by the First Amendment's original meaning. But neither founding-era evidence nor dictum in *Connick* v. *Myers*, 461 U. S. 138, 143, supports the view that the First Amendment was originally understood to allow States to force public employees to subsidize a private third party. If anything, the opposite is true. Pp. 902–905.

(2) Nor does *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, provide a basis for *Abood*. *Abood* was not based on *Pickering*, and for good reasons. First, *Pickering*'s framework was developed for use in cases involving "one employee's speech and its impact on that employee's public responsibilities," *United States* v. *Treasury Employees*, 513 U. S. 454, 467, while *Abood* and other agency-fee cases involve a blanket requirement that all employees subsidize private speech with which they may not agree. Second, *Pickering*'s framework was designed to determine whether a public employee's speech interferes with the effective operation of a government office, not what happens when the government compels speech or speech subsidies in support of third parties. Third, the categorization schemes of *Pickering* and *Abood* do not line up. For example, under *Abood*, nonmembers cannot be charged for speech that concerns political or ideological issues; but under *Pickering*, an employee's free speech interests on such issues could be overcome if outweighed by the employer's interests. Pp. 905–909.

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(c) Even under some form of *Pickering*, Illinois' agency-fee arrangement would not survive. Pp. 909–916.

(1) Respondents compare union speech in collective bargaining and grievance proceedings to speech "pursuant to [an employee's] official duties," *Garcetti* v. *Ceballos*, 547 U. S. 410, 421, which the State may require of its employees. But in those situations, the employee's words are really the words of the employer, whereas here the union is speaking on behalf of the employees. *Garcetti* therefore does not apply. Pp. 909–910.

(2) Nor does the union speech at issue cover only matters of private concern, which the State may also generally regulate under *Pickering*. To the contrary, union speech covers critically important and public matters such as the State's budget crisis, taxes, and collective bargaining issues related to education, child welfare, healthcare, and minority rights. Pp. 910–914.

(3) The government's proffered interests must therefore justify the heavy burden of agency fees on nonmembers' First Amendment

interests. They do not. The state interests asserted in *Abood*—promoting "labor peace" and avoiding free riders—clearly do not, as explained earlier. And the new interests asserted in *Harris* and here—bargaining with an adequately funded agent and improving the efficiency of the work force—do not suffice either. Experience shows that unions can be effective even without agency fees. Pp. 914–916.

(d) *Stare decisis* does not require retention of *Abood*. An analysis of several important factors that should be taken into account in deciding whether to overrule a past decision supports this conclusion. Pp. 916–929.

(1) *Abood* was poorly reasoned, and those arguing for retaining it have recast its reasoning, which further undermines its *stare decisis* effect, *e. g.*, *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 363. *Abood* relied on *Railway Employees* v. *Hanson*, 351 U. S. 225, and *Machinists* v. *Street*, 367 U. S. 740, both of which involved private-sector collective-bargaining agreements where the government merely authorized agency fees. *Abood* did not appreciate the very different First Amendment question that arises when a State *requires* its employees to pay agency fees. *Abood* also judged the constitutionality of public-sector agency fees using *Hanson*'s deferential standard, which is inappropriate in deciding free speech issues. Nor did *Abood* take into account the difference between the effects of agency fees in public- and private-sector collective bargaining, anticipate administrative problems with classifying union expenses as chargeable or nonchargeable, foresee practical problems faced by nonmembers wishing to challenge those decisions, or understand the inherently political nature of public-sector bargaining. Pp. 917–921.

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(2) *Abood*'s lack of workability also weighs against it. Its line between chargeable and nonchargeable expenditures has proved to be impossible to draw with precision, as even respondents recognize. See, *e. g.*, *Lehnert* v. *Ferris Faculty Assn.*, 500 U. S. 507, 519. What is more, a nonmember objecting to union chargeability determinations will have much trouble determining the accuracy of the union's reported expenditures, which are often expressed in extremely broad and vague terms. Pp. 921–924.

(3) Developments since *Abood*, both factual and legal, have "eroded" the decision's "underpinnings" and left it an outlier among the Court's First Amendment cases. *United States* v. *Gaudin*, 515 U. S. 506, 521. *Abood* relied on an assumption that "the principle of exclusive representation in the public sector is dependent on a union or agency shop," *Harris*, 573 U. S., at 638, but experience has shown otherwise. It was also decided when public-sector unionism was a relatively new phe-

nomenon. Today, however, public-sector union membership has surpassed that in the private sector, and that ascendency corresponds with a parallel increase in public spending. *Abood* is also an anomaly in the Court's First Amendment jurisprudence, where exacting scrutiny, if not a more demanding standard, generally applies. Overruling *Abood* will also end the oddity of allowing public employers to compel union support (which is not supported by any tradition) but not to compel party support (which is supported by tradition), see, *e. g.*, *Elrod* v. *Burns*, 427 U. S. 347. Pp. 924–926.

(4) Reliance on *Abood* does not carry decisive weight. The uncertain status of *Abood*, known to unions for years; the lack of clarity it provides; the short-term nature of collective-bargaining agreements; and the ability of unions to protect themselves if an agency-fee provision was crucial to its bargain undermine the force of reliance. Pp. 926–929.

3. For these reasons, States and public-sector unions may no longer extract agency fees from nonconsenting employees. The First Amendment is violated when money is taken from nonconsenting employees for a public-sector union; employees must choose to support the union before anything is taken from them. Accordingly, neither an agency fee nor any other form of payment to a public-sector union may be deducted from an employee, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. Pp. 929–930.

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851 F. 3d 746, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and GORSUCH, JJ., joined. SOTOMAYOR, J., filed a dissenting opinion, *post*, p. 930. KAGAN, J., filed a dissenting opinion, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined, *post*, p. 931.

William L. Messenger argued the cause for petitioner. With him on the briefs were *Aaron B. Solem*, *Dan K. Webb*, *Joseph J. Torres*, *Jacob H. Huebert*, and *Jeffrey M. Schwab.*

Solicitor General Francisco argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Deputy Solicitor General Wall*, *Nicholas C. Geale*, and *Arthur F. Rosenfeld.*

David L. Franklin, Solicitor General of Illinois, argued the cause for state respondents. With him on the brief were *Lisa Madigan*, Attorney General, *pro se*, *Brett E. Legner*, Deputy Solicitor General, and *Frank H. Bieszczat*, *Jane*

Counsel

Flanagan, *Sarah A. Hunger*, *Richard S. Huszagh*, *Lindsay Beyer Payne*, and *Andrew Tonelli*, Assistant Attorneys General.

David C. Frederick argued the cause for respondent AFSCME Council 31. With him on the brief were *Derek T. Ho*, *John M. West*, *Judith E. Rivlin*, and *Teague P. Paterson*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Michigan et al. by *Bill Schuette*, Attorney General of Michigan, *Aaron D. Lindstrom*, Solicitor General, and *Kathryn M. Dalzell*, Assistant Solicitor General, and by the Attorneys General for their respective States as follows: *Steve Marshall* of Alabama, *Mark Brnovich* of Arizona, *Leslie Rutledge* of Arkansas, *Pamela Jo Bondi* of Florida, *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, *Douglas J. Peterson* of Nebraska, *Adam Paul Laxalt* of Nevada, *Mike Hunter* of Oklahoma, *Alan Wilson* of South Carolina, *Herbert H. Slatery III* of Tennessee, *Ken Paxton* of Texas, *Sean D. Reyes* of Utah, *Patrick Morrisey* of West Virginia, and *Brad Schimel* of Wisconsin; for the American Center for Law and Justice by *Jay Alan Sekulow*, *Stuart J. Roth*, *Colby M. May*, and *Walter M. Weber*; for the Atlantic Legal Foundation by *Martin S. Kaufman*; for the Becket Fund for Religious Liberty by *Eric Baxter*, *Eric Rassbach*, *Adèle Auxier Keim*, and *Joseph C. Davis*; for the Buckeye Institute for Public Policy Solutions et al. by *John J. Park, Jr.*, *Robert Alt*, and *Kimberly S. Hermann*; for California Public-School Teachers by *Michael A. Carvin*, *Anthony J. Dick*, *William D. Coglianese*, *Terence J. Pell*, and *Michael E. Rosman*; for the Cato Institute et al. by *Ilya Shapiro*, *Karen R. Harned*, and *Luke Wake*; for the Center for Constitutional Jurisprudence by *John C. Eastman* and *Anthony T. Caso*; for the Center on National Labor Policy, Inc., et al. by *Michael E. Avakian*, *Michael J. Lotito*, and *Brendan J. Fitzgerald*; for the Competitive Enterprise Institute by *Andrew M. Grossman*, *Randal J. Meyer*, and *Sam Kazman*; for Employees of the State of Minnesota Court System by *J. Michael Connolly* and *Thomas R. McCarthy*; for the Freedom Foundation et al. by *James G. Abernathy*; for the James Madison Center for Free Speech by *James Bopp, Jr.*, and *Richard E. Coleson*; for the James Madison Institute by *Joshua M. Hawkes* and *Joseph W. Jacquot*; for the Landmark Legal Foundation by *Richard P. Hutchison*; for the Mackinac Center for Public Policy by *Patrick J. Wright*; for the Pacific Legal Foundation et al. by *Deborah J. La Fetra*; for The Rutherford Institute by *D. Alicia Hickok* and *John W. Whitehead*; for the 1851 Center for Constitutional Law by *Christopher P. Finney*; for Jason R. Barclay et al. by *David L. Applegate*;

JUSTICE ALITO delivered the opinion of the Court.

Under Illinois law, public employees are forced to subsidize a union, even if they choose not to join and strongly

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for Rebecca Friedrichs et al. by *James G. Abernathy* and *David M. S. Dewhirst*; for Gregory J. Hartnett et al. by *Nathan J. McGrath*; and for Jane Ladley et al. by *Mr. McGrath*.

Briefs of *amici curiae* urging affirmance were filed for the State of California by *Xavier Becerra*, Attorney General of California, *Edward C. DuMont*, Solicitor General, *Thomas S. Patterson*, Senior Assistant Attorney General, *Aimee Feinberg* and *Samuel P. Siegel*, Deputy Solicitors General, and *Alexandra Robert Gordon*, Deputy Attorney General; for the State of New York et al. by *Eric T. Schneiderman*, Attorney General of New York, *Barbara D. Underwood*, Solicitor General, *Anisha S. Dasgupta*, Deputy Solicitor General, and *Philip V. Tisne*, Assistant Solicitor General, and by the Attorneys General of their respective jurisdictions as follows: *Jahna Lindemuth* of Alaska, *George Jepsen* of Connecticut, *Matthew P. Denn* of Delaware, *Karl A. Racine* of the District of Columbia, *Douglas S. Chin* of Hawaii, *Thomas J. Miller* of Iowa, *Andy Beshear* of Kentucky, *Janet T. Mills* of Maine, *Brian E. Frosh* of Maryland, *Maura Healey* of Massachusetts, *Lori Swanson* of Minnesota, *Gurbir S. Grewal* of New Jersey, *Hector H. Balderas* of New Mexico, *Josh Stein* of North Carolina, *Ellen F. Rosenblum* of Oregon, *Josh Shapiro* of Pennsylvania, *Peter F. Kilmartin* of Rhode Island, *Thomas J. Donovan, Jr.*, of Vermont, *Mark R. Herring* of Virginia, and *Robert W. Ferguson* of Washington; for the City of New York by *Zachary W. Carter* and *Richard Dearing*; for the American Civil Liberties Union by *David D. Cole* and *Amanda W. Shanor*; for the American Federation of Government Employees by *Jeffrey A. Lamken*, *Michael G. Pattillo, Jr.*, *Eric R. Nitz*, *Justin B. Weiner*, *David A. Borer*, and *Andres M. Grajales*; for the American Federation of Labor and Congress of Industrial Organizations by *Lynn K. Rhinehart*, *Harold C. Becker*, *James B. Coppess*, and *Matthew J. Ginsburg*; for the American Federation of Teachers by *Kevin K. Russell*, *Erica Oleszczuk Evans*, *Rhonda Weingarten*, *David J. Strom*, and *Mark Richard*; for the Chabot Las-Positas Faculty Association et al. by *Robert J. Bezemek*; for Child Protective Service Workers et al. by *J. Carl Cecere*; for Constitutional Law Scholars by *Andrew J. Pincus*; for Crown Building Maintenance Co. & Crown Energy Services, Inc., et al. by *Michael P. Abate*; for Economists et al. by *Dan Jackson*; for Faith in Public Life et al. by *Eric Alan Isaacson*; for Fifteen Unions et al. by *Gregg McLean Adam*, *Gary M. Messing*, *Pamela S. Karlan*, *Jeffrey L. Fisher*, and *David T. Goldberg*; for the Human Rights Campaign et al. by *Steven E. Fineman*, *Jason L. Licht-*

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object to the positions the union takes in collective bargaining and related activities. We conclude that this arrangement violates the free speech rights of nonmembers by

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man, *Laura B. Heiman*, *Sharon McGowan*, and *Gregory R. Nevins*; for the International Association of Fire Fighters by *Thomas A. Woodley* and *Megan K. Mechak*; for the International Association of Machinists and Aerospace Workers, AFL–CIO, by *Mark Schneider*; for the International Brotherhood of Teamsters by *Stephen P. Berzon*, *Scott A. Kronland*, and *Bradley Raymond*; for Labor Law Professors et al. by *Charlotte Garden*; for the Laborers' International Union of North America by *Theodore T. Green*, *Lisa W. Pau*, and *Laurence E. Gold*; for Los Angeles County's Department of Health Services et al. by *Nicole G. Berner*, *Mary C. Wickham*, *Salvatore J. Russo*, *Daniel Rosenthal*, and *Walter Kamiat*; for the National Conference on Public Employee Retirement Systems by *Robert D. Klausner*, *Arthur Liou*, and *Mollie Simons*; for the National Education Association et al. by *Alice O'Brien*, *Jason Walta*, *Kristen L. Hollar*, *Risa L. Lieberwitz*, and *Aaron Nisenson*; for the National Fraternal Order of Police by *Joel A. D'Alba* and *Larry H. James*; for the National Women's Law Center et al. by *Matthew S. Hellman*, *David A. Strauss*, *Sarah M. Konsky*, *Fatima Goss Graves*, *Emily J. Martin*, *Sunu Chandy*, *Vanita Gupta*, and *Michael Zubrensky*; for the New York City Municipal Labor Committee by *Alan M. Klinger*, *David J. Kahne*, and *Harry Greenberg*; for the New York City Sergeants Benevolent Association by *Stephen P. Younger* and *Jonathan D. Schenker*; for Public Citizen, Inc., by *Scott L. Nelson* and *Allison M. Zieve*; for Republican Current and Former State and Local Officeholders by *Elizabeth B. Wydra*, *Brianne J. Gorod*, and *David H. Gans*; for the United States Conference of Catholic Bishops by *Anthony R. Picarello, Jr.*; for 24 Past Presidents of the D. C. Bar by *John W. Nields, Jr.*, and *Philip J. Levitz*; for Gov. Steve Bullock by *Deepak Gupta* and *Matthew W. H. Wessler*; for Cynthia L. Estlund et al. by *Samuel Estreicher*, *pro se*, and *Richard J. Brean*; for Eric Garcetti et al. by *Donald B. Verrilli, Jr.*; for Rasheedah Gray et al. by *Catherine K. Ruckelshaus*; for Benjamin I. Sachs by *Joseph M. Sellers*; for Eugene Volokh et al. by *Gregory Silbert* and *Adam B. Banks*; for Sen. Sheldon Whitehouse et al. by *Peter Karanjia*; and for Gov. Tom Wolfe et al. by *Samuel R. Bagenstos*, *Denise J. Smyler*, *Joshua Civin*, *Matthew Ruyak*, and *James R. Williams*.

Briefs of *amici curiae* were filed for Certified Public Accountants by *Virginia A. Seitz*; for Corporate Law Professors by *Anna-Rose Mathieson*; and for Charles Fried et al. by *Seth P. Waxman*, *Christopher E. Babbitt*, and *Albinas J. Prizgintas*.

compelling them to subsidize private speech on matters of substantial public concern.

We upheld a similar law in *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209 (1977), and we recognize the importance of following precedent unless there are strong reasons for not doing so. But there are very strong reasons in this case. Fundamental free speech rights are at stake. *Abood* was poorly reasoned. It has led to practical problems and abuse. It is inconsistent with other First Amendment cases and has been undermined by more recent decisions. Developments since *Abood* was handed down have shed new light on the issue of agency fees, and no reliance interests on the part of public-sector unions are sufficient to justify the perpetuation of the free speech violations that *Abood* has countenanced for the past 41 years. *Abood* is therefore overruled.

I

A

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Under the Illinois Public Labor Relations Act (IPLRA), employees of the State and its political subdivisions are permitted to unionize. See Ill. Comp. Stat., ch. 5, §315/6(a) (West 2016). If a majority of the employees in a bargaining unit vote to be represented by a union, that union is designated as the exclusive representative of all the employees. §§315/3(s)(1), 315/6(c), 315/9. Employees in the unit are not obligated to join the union selected by their co-workers, but whether they join or not, that union is deemed to be their sole permitted representative. See §§315/6(a), (c).

Once a union is so designated, it is vested with broad authority. Only the union may negotiate with the employer on matters relating to "pay, wages, hours[,] and other conditions of employment." §315/6(c). And this authority extends to the negotiation of what the IPLRA calls "policy matters," such as merit pay, the size of the work force, layoffs, privatization, promotion methods, and nondiscrimination policies. §315/4; see §315/6(c); see generally, *e. g.*, *Illinois Dept. of*

Central Management Servs. v. *AFSCME, Council 31*, No. S–CB–16–017 etc., 33 PERI ¶67 (ILRB Dec. 13, 2016) (Board Decision).

Designating a union as the employees' exclusive representative substantially restricts the rights of individual employees. Among other things, this designation means that individual employees may not be represented by any agent other than the designated union; nor may individual employees negotiate directly with their employer. §§315/6(c)–(d), 315/10(a)(4); see *Matthews* v. *Chicago Transit Authority*, 2016 IL 117638, 51 N. E. 3d 753, 782; accord, *Medo Photo Supply Corp.* v. *NLRB*, 321 U. S. 678, 683–684 (1944). Protection of the employees' interests is placed in the hands of the union, and therefore the union is required by law to provide fair representation for all employees in the unit, members and nonmembers alike. §315/6(d).

Employees who decline to join the union are not assessed full union dues but must instead pay what is generally called an "agency fee," which amounts to a percentage of the union dues. Under *Abood*, nonmembers may be charged for the portion of union dues attributable to activities that are "germane to [the union's] duties as collective-bargaining representative," but nonmembers may not be required to fund the union's political and ideological projects. 431 U. S., at 235; see *id.*, at 235–236. In labor-law parlance, the outlays in the first category are known as "chargeable" expenditures, while those in the latter are labeled "nonchargeable."

Illinois law does not specify in detail which expenditures are chargeable and which are not. The IPLRA provides that an agency fee may compensate a union for the costs incurred in "the collective bargaining process, contract administration[,] and pursuing matters affecting wages, hours[,] and conditions of employment." §315/6(e); see also §315/3(g). Excluded from the agency-fee calculation are union expenditures "related to the election or support of any candidate for political office." §315/3(g); see §315/6(e).

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Applying this standard, a union categorizes its expenditures as chargeable or nonchargeable and thus determines a nonmember's "proportionate share," §315/6(e); this determination is then audited; the amount of the "proportionate share" is certified to the employer; and the employer automatically deducts that amount from the nonmembers' wages. See *ibid.*; App. to Pet. for Cert. 37a; see also *Harris* v. *Quinn*, 573 U. S. 616, 636–638 (2014) (describing this process). Nonmembers need not be asked, and they are not required to consent before the fees are deducted.

After the amount of the agency fee is fixed each year, the union must send nonmembers what is known as a *Hudson* notice. See *Teachers* v. *Hudson*, 475 U. S. 292 (1986). This notice is supposed to provide nonmembers with "an adequate explanation of the basis for the [agency] fee." *Id.*, at 310. If nonmembers "suspect that a union has improperly put certain expenses in the [chargeable] category," they may challenge that determination. *Harris*, *supra*, at 637.

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As illustrated by the record in this case, unions charge nonmembers, not just for the cost of collective bargaining *per se*, but also for many other supposedly connected activities. See App. to Pet. for Cert. 28a–39a. Here, the nonmembers were told that they had to pay for "[l]obbying," "[s]ocial and recreational activities," "advertising," "[m]embership meetings and conventions," and "litigation," as well as other unspecified "[s]ervices" that "may ultimately inure to the benefit of the members of the local bargaining unit." *Id.*, at 28a–32a. The total chargeable amount for nonmembers was 78.06% of full union dues. *Id.*, at 34a.

B

Petitioner Mark Janus is employed by the Illinois Department of Healthcare and Family Services as a child support specialist. *Id.*, at 10a. The employees in his unit are among the 35,000 public employees in Illinois who are represented by respondent American Federation of State, County, and Municipal Employees, Council 31 (Union). *Ibid.* Janus

refused to join the Union because he opposes "many of the public policy positions that [it] advocates," including the positions it takes in collective bargaining. *Id.*, at 10a, 18a. Janus believes that the Union's "behavior in bargaining does not appreciate the current fiscal crises in Illinois and does not reflect his best interests or the interests of Illinois citizens." *Id.*, at 18a. Therefore, if he had the choice, he "would not pay any fees or otherwise subsidize [the Union]." *Ibid.* Under his unit's collective-bargaining agreement, however, he was required to pay an agency fee of $44.58 per month, *id.*, at 14a—which would amount to about $535 per year.

Janus's concern about Illinois' current financial situation is shared by the Governor of the State, and it was the Governor who initially challenged the statute authorizing the imposition of agency fees. The Governor commenced an action in federal court, asking that the law be declared unconstitutional, and the Illinois attorney general (a respondent here) intervened to defend the law. App. 41. Janus and two other state employees also moved to intervene—but on the Governor's side. *Id.*, at 60.

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Respondents moved to dismiss the Governor's challenge for lack of standing, contending that the agency fees did not cause him any personal injury. *E. g.*, *id.*, at 48–49. The District Court agreed that the Governor could not maintain the lawsuit, but it held that petitioner and the other individuals who had moved to intervene had standing because the agency fees unquestionably injured them. Accordingly, "in the interest of judicial economy," the court dismissed the Governor as a plaintiff, while simultaneously allowing petitioner and the other employees to file their own complaint. *Id.*, at 112. They did so, and the case proceeded on the basis of this new complaint.

The amended complaint claims that all "nonmember fee deductions are coerced political speech" and that "the First Amendment forbids coercing any money from the nonmembers." App. to Pet. for Cert. 23a. Respondents moved to

dismiss the amended complaint, correctly recognizing that the claim it asserted was foreclosed by *Abood*. The District Court granted the motion, *id.*, at 7a, and the Court of Appeals for the Seventh Circuit affirmed, 851 F. 3d 746 (2017).

Janus then sought review in this Court, asking us to overrule *Abood* and hold that public-sector agency-fee arrangements are unconstitutional. We granted certiorari to consider this important question. 582 U. S. 966 (2017).

II

Before reaching this question, however, we must consider a threshold issue. Respondents contend that the District Court lacked jurisdiction under Article III of the Constitution because petitioner "moved to intervene in [the Governor's] jurisdictionally defective lawsuit." Union Brief in Opposition 11; see also *id.*, at 13–17; State Brief in Opposition 6; Brief for Union Respondent i, 16–17; Brief for State Respondents 14, n. 1. This argument is clearly wrong.

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It rests on the faulty premise that petitioner intervened in the action brought by the Governor, but that is not what happened. The District Court did not grant petitioner's motion to intervene in that lawsuit. Instead, the court essentially treated petitioner's amended complaint as the operative complaint in a new lawsuit. App. 110–112. And when the case is viewed in that way, any Article III issue vanishes. As the District Court recognized—and as respondents concede—petitioner was injured in fact by Illinois' agency-fee scheme, and his injuries can be redressed by a favorable court decision. *Ibid.*; see Record 2312–2313, 2322–2323. Therefore, he clearly has Article III standing. *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992). It is true that the District Court docketed petitioner's complaint under the number originally assigned to the Governor's complaint, instead of giving it a new number of its own. But Article III jurisdiction does not turn on such trivialities.

The sole decision on which respondents rely, *United States ex rel. Texas Portland Cement Co.* v. *McCord*, 233 U. S. 157 (1914), actually works against them. That case concerned a statute permitting creditors of a government contractor to bring suit on a bond between 6 and 12 months after the completion of the work. *Id.*, at 162. One creditor filed suit before the 6-month starting date, but another intervened within the 6-to-12-month window. The Court held that "[t]he intervention [did] not cure th[e] vice in the original [prematurely filed] suit," but the Court also contemplated treating "intervention . . . as an original suit" in a case in which the intervenor met the requirements that a plaintiff must satisfy—*e. g.*, filing a separate complaint and properly serving the defendants. *Id.*, at 163–164. Because that is what petitioner did here, we may reach the merits of the question presented.

III

In *Abood*, the Court upheld the constitutionality of an agency-shop arrangement like the one now before us, 431 U. S., at 232, but in more recent cases we have recognized that this holding is "something of an anomaly," *Knox* v. *Service Employees*, 567 U. S. 298, 311 (2012), and that *Abood*'s "analysis is questionable on several grounds," *Harris*, 573 U. S., at 635; see *id.*, at 635–638 (discussing flaws in *Abood*'s reasoning). We have therefore refused to extend *Abood* to situations where it does not squarely control, see *Harris*, *supra*, at 645–647, while leaving for another day the question whether *Abood* should be overruled, *Harris*, *supra*, at 646, n. 19, n. 19); see *Knox*, *supra*, at 310–311.

We now address that question. We first consider whether *Abood*'s holding is consistent with standard First Amendment principles.

A

The First Amendment, made applicable to the States by the Fourteenth Amendment, forbids abridgment of the free-

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dom of speech. We have held time and again that freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley* v. *Maynard*, 430 U. S. 705, 714 (1977); see *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 796–797 (1988); *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U. S. 539, 559 (1985); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, 256–257 (1974); accord, *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n of Cal.*, 475 U. S. 1, 9 (1986) (plurality opinion). The right to eschew association for expressive purposes is likewise protected. *Roberts* v. *United States Jaycees*, 468 U. S. 609, 623 (1984) ("Freedom of association . . . plainly presupposes a freedom not to associate"); see *Pacific Gas & Elec.*, *supra*, at 12 ("[F]orced associations that burden protected speech are impermissible"). As Justice Jackson memorably put it: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or *force citizens to confess by word or act their faith therein.*" *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 642 (1943) (emphasis added).

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Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned. Suppose, for example, that the State of Illinois required all residents to sign a document expressing support for a particular set of positions on controversial public issues—say, the platform of one of the major political parties. No one, we trust, would seriously argue that the First Amendment permits this.

Perhaps because such compulsion so plainly violates the Constitution, most of our free speech cases have involved restrictions on what can be said, rather than laws compelling speech. But measures compelling speech are at least as threatening.

Free speech serves many ends. It is essential to our democratic form of government, see, *e. g.*, *Garrison* v. *Louisiana*, 379 U. S. 64, 74–75 (1964), and it furthers the search for truth, see, *e. g.*, *Thornhill* v. *Alabama*, 310 U. S. 88, 95 (1940). Whenever the Federal Government or a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends.

When speech is compelled, however, additional damage is done. In that situation, individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding "involuntary affirmation" of objected-to beliefs would require "even more immediate and urgent grounds" than a law demanding silence. *Barnette*, *supra*, at 633; see also *Riley*, *supra*, at 796–797 (rejecting "deferential test" for compelled speech claims).

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Compelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns. *Knox*, *supra*, at 309; *United States* v. *United Foods, Inc.*, 533 U. S. 405, 410 (2001); *Abood*, *supra*, at 222, 234–235. As Jefferson famously put it, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical." A Bill for Establishing Religious Freedom, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950) (emphasis deleted and footnote omitted); see also *Hudson*, 475 U. S., at 305, n. 15. We have therefore recognized that a "'significant impingement on First Amendment rights'" occurs when public employees are required to provide financial support for a union that "takes many positions during collective bargaining that have powerful political and civic consequences." *Knox*, *supra*, at 310–311 (quoting *Ellis* v. *Railway Clerks*, 466 U. S. 435, 455 (1984)).

Because the compelled subsidization of private speech seriously impinges on First Amendment rights, it cannot be casually allowed. Our free speech cases have identified "levels of scrutiny" to be applied in different contexts, and in three recent cases, we have considered the standard that should be used in judging the constitutionality of agency fees. See *Knox*, *supra*; *Harris*, *supra*; *Friedrichs* v. *California Teachers Assn.*, 578 U. S. 1 (2016) (*per curiam*) (affirming decision below by equally divided Court).

In *Knox*, the first of these cases, we found it sufficient to hold that the conduct in question was unconstitutional under even the test used for the compulsory subsidization of commercial speech. 567 U. S., at 309–310, 321–322. Even though commercial speech has been thought to enjoy a lesser degree of protection, see, *e. g.*, *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, 562–563 (1980), prior precedent in that area, specifically *United Foods*, *supra*, had applied what we characterized as "exacting" scrutiny, *Knox*, 567 U. S., at 310, a less demanding test than the "strict" scrutiny that might be thought to apply outside the commercial sphere. Under "exacting" scrutiny, we noted, a compelled subsidy must "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Ibid.* (internal quotation marks and alterations omitted).

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In *Harris*, the second of these cases, we again found that an agency-fee requirement failed "exacting scrutiny." 573 U. S., at 651. But we questioned whether that test provides sufficient protection for free speech rights, since "it is apparent that the speech compelled" in agency-fee cases "is not commercial speech." *Id.*, at 648.

Picking up that cue, petitioner in the present case contends that the Illinois law at issue should be subjected to "strict scrutiny." Brief for Petitioner 36. The dissent, on the other hand, proposes that we apply what amounts to rational-basis review, that is, that we ask only whether a

government employer could reasonably believe that the exaction of agency fees serves its interests. See *post*, at 934 (KAGAN, J., dissenting) ("A government entity could reasonably conclude that such a clause was needed"). This form of minimal scrutiny is foreign to our free speech jurisprudence, and we reject it here. At the same time, we again find it unnecessary to decide the issue of strict scrutiny because the Illinois scheme cannot survive under even the more permissive standard applied in *Knox* and *Harris*.

In the remainder of this part of our opinion (Parts III–B and III–C), we will apply this standard to the justifications for agency fees adopted by the Court in *Abood*. Then, in Parts IV and V, we will turn to alternative rationales proffered by respondents and their *amici*.

B

In *Abood*, the main defense of the agency-fee arrangement was that it served the State's interest in "labor peace," 431 U. S., at 224. By "labor peace," the *Abood* Court meant avoidance of the conflict and disruption that it envisioned would occur if the employees in a unit were represented by more than one union. In such a situation, the Court predicted, "inter-union rivalries" would foster "dissension within the work force," and the employer could face "conflicting demands from different unions." *Id.*, at 220–221. Confusion would ensue if the employer entered into and attempted to "enforce two or more agreements specifying different terms and conditions of employment." *Id.*, at 220. And a settlement with one union would be "subject to attack from [a] rival labor organizatio[n]." *Id.*, at 221.

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We assume that "labor peace," in this sense of the term, is a compelling state interest, but *Abood* cited no evidence that the pandemonium it imagined would result if agency fees were not allowed, and it is now clear that *Abood*'s fears were unfounded. The *Abood* Court assumed that designation of a union as the exclusive representative of all the em-

ployees in a unit and the exaction of agency fees are inextricably linked, but that is simply not true. *Harris*, *supra*, at 649.

The federal employment experience is illustrative. Under federal law, a union chosen by majority vote is designated as the exclusive representative of all the employees, but federal law does not permit agency fees. See 5 U. S. C. §§ 7102, 7111(a), 7114(a). Nevertheless, nearly a million federal employees—about 27% of the federal work force—are union members.[1] The situation in the Postal Service is similar. Although permitted to choose an exclusive representative, Postal Service employees are not required to pay an agency fee, 39 U. S. C. §§ 1203(a), 1209(c), and about 400,000 are union members.[2] Likewise, millions of public employees in the 28 States that have laws generally prohibiting agency fees are represented by unions that serve as the exclusive representatives of all the employees.[3] Whatever may have been the case 41 years ago when *Abood* was handed down, it is now undeniable that "labor peace" can readily be achieved "through means significantly less restrictive of associational freedoms" than the assessment of agency fees. *Harris*, *supra*, at 648–649 (internal quotation marks omitted).

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C

In addition to the promotion of "labor peace," *Abood* cited "the risk of 'free riders' " as justification for agency fees, 431 U. S., at 224. Respondents and some of their *amici* endorse this reasoning, contending that agency fees are needed to prevent nonmembers from enjoying the benefits of union

[1] See Bureau of Labor Statistics (BLS), Labor Force Statistics From the Current Population Survey (Table 42) (2017), https://www.bls.gov/cps/tables.htm (all Internet materials as visited June 26, 2018).

[2] See Union Membership and Coverage Database From the Current Population Survey (Jan. 21, 2018), http://www.unionstats.com.

[3] See National Conference of State Legislatures, Right-to-Work States (2018), http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx#chart; see also, *e. g.*, Brief for Mackinac Center for Public Policy as *Amicus Curiae* 27–28, 34–36.

representation without shouldering the costs. Brief for Union Respondent 34–36; Brief for State Respondents 41–45; see, *e. g.*, Brief for International Brotherhood of Teamsters as *Amicus Curiae* 3–5.

Petitioner strenuously objects to this free-rider label. He argues that he is not a free rider on a bus headed for a destination that he wishes to reach but is more like a person shanghaied for an unwanted voyage.

Whichever description fits the majority of public employees who would not subsidize a union if given the option, avoiding free riders is not a compelling interest. As we have noted, "free-rider arguments . . . are generally insufficient to overcome First Amendment objections." *Knox*, 567 U. S., at 311. To hold otherwise across the board would have startling consequences. Many private groups speak out with the objective of obtaining government action that will have the effect of benefiting nonmembers. May all those who are thought to benefit from such efforts be compelled to subsidize this speech?

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Suppose that a particular group lobbies or speaks out on behalf of what it thinks are the needs of senior citizens or veterans or physicians, to take just a few examples. Could the government require that all seniors, veterans, or doctors pay for that service even if they object? It has never been thought that this is permissible. "[P]rivate speech often furthers the interests of nonspeakers," but "that does not alone empower the state to compel the speech to be paid for." *Lehnert* v. *Ferris Faculty Assn.*, 500 U. S. 507, 556 (1991) (Scalia, J., concurring in judgment in part and dissenting in part). In simple terms, the First Amendment does not permit the government to compel a person to pay for another party's speech just because the government thinks that the speech furthers the interests of the person who does not want to pay.[4]

[4] The collective-action problem cited by the dissent, *post*, at 936, is not specific to the agency-fee context. And contrary to the dissent's suggestion, it is often not practical for an entity that lobbies or advocates on

Those supporting agency fees contend that the situation here is different because unions are statutorily required to "represen[t] the interests of all public employees in the unit," whether or not they are union members. § 315/6(d); see, *e. g.*, Brief for State Respondents 40–41, 45; *post*, at 936–937 (KAGAN, J., dissenting). Why might this matter?

We can think of two possible arguments. It might be argued that a State has a compelling interest in requiring the payment of agency fees because (1) unions would otherwise be unwilling to represent nonmembers or (2) it would be fundamentally unfair to require unions to provide fair representation for nonmembers if nonmembers were not required to pay. Neither of these arguments is sound.

First, it is simply not true that unions will refuse to serve as the exclusive representative of all employees in the unit if they are not given agency fees. As noted, unions represent millions of public employees in jurisdictions that do not permit agency fees. No union is ever compelled to seek that designation. On the contrary, designation as exclusive representative is avidly sought.[5] Why is this so?

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Even without agency fees, designation as the exclusive representative confers many benefits. As noted, that status gives the union a privileged place in negotiations over wages, benefits, and working conditions. See § 315/6(c). Not only is the union given the exclusive right to speak for all the employees in collective bargaining, but the employer is required by state law to listen to and to bargain in good

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behalf of the members of a group to tailor its message so that only its members benefit from its efforts. Consider how effective it would be for a group that advocates on behalf of, say, seniors, to argue that a new measure should apply only to its dues-paying members.

[5] In order to obtain that status, a union must petition to be recognized and campaign to win majority approval. Ill. Comp. Stat., ch. 5, § 315/9(a); see, *e. g.*, *County of Du Page* v. *Illinois Labor Relations Bd.*, 231 Ill. 2d 593, 597–600, 900 N. E. 2d 1095, 1098–1099 (2008). And unions eagerly seek this support. See, *e. g.*, Brief for Employees of State of Minnesota Court System as *Amici Curiae* 9–17.

faith with only that union. §315/7. Designation as exclusive representative thus "results in a tremendous increase in the power" of the union. *American Communications Assn.* v. *Douds*, 339 U. S. 382, 401 (1950).

In addition, a union designated as exclusive representative is often granted special privileges, such as obtaining information about employees, see §315/6(c), and having dues and fees deducted directly from employee wages, §§315/6(e)–(f). The collective-bargaining agreement in this case guarantees a long list of additional privileges. See App. 138–143.

These benefits greatly outweigh any extra burden imposed by the duty of providing fair representation for nonmembers. What this duty entails, in simple terms, is an obligation not to "act solely in the interests of [the union's] own members." Brief for State Respondents 41; see *Cintron* v. *AFSCME, Council 31*, No. S–CB–16–032, p. 1, 34 PERI ¶105 (ILRB Dec. 13, 2017) (union may not intentionally direct "animosity" toward nonmembers based on their "dissident union practices"); accord, *14 Penn Plaza LLC* v. *Pyett*, 556 U. S. 247, 271 (2009); *Vaca* v. *Sipes*, 386 U. S. 171, 177 (1967).

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What does this mean when it comes to the negotiation of a contract? The union may not negotiate a collective-bargaining agreement that discriminates against nonmembers, see *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 202–203 (1944), but the union's bargaining latitude would be little different if state law simply prohibited public employers from entering into agreements that discriminate in that way. And for that matter, it is questionable whether the Constitution would permit a public-sector employer to adopt a collective-bargaining agreement that discriminates against nonmembers. See *id.*, at 198–199, 202 (analogizing a private-sector union's fair-representation duty to the duty "the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates"); cf. *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 69 (2006) (recognizing that govern-

ment may not "impose penalties or withhold benefits based on membership in a disfavored group" where doing so "ma[kes] group membership less attractive"). To the extent that an employer would be barred from acceding to a discriminatory agreement anyway, the union's duty not to ask for one is superfluous. It is noteworthy that neither respondents nor any of the 39 *amicus* briefs supporting them—nor the dissent—has explained why the duty of fair representation causes public-sector unions to incur significantly greater expenses than they would otherwise bear in negotiating collective-bargaining agreements.

What about the representation of nonmembers in grievance proceedings? Unions do not undertake this activity solely for the benefit of nonmembers—which is why Illinois law gives a public-sector union the right to send a representative to such proceedings even if the employee declines union representation. §315/6(b). Representation of nonmembers furthers the union's interest in keeping control of the administration of the collective-bargaining agreement, since the resolution of one employee's grievance can affect others. And when a union controls the grievance process, it may, as a practical matter, effectively subordinate "the interests of [an] individual employee . . . to the collective interests of all employees in the bargaining unit." *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 58, n. 19 (1974); see *Stahulak* v. *Chicago*, 184 Ill. 2d 176, 180–181, 703 N. E. 2d 44, 46–47 (1998); *Mahoney* v. *Chicago*, 293 Ill. App. 3d 69, 73–74, 687 N. E. 2d 132, 135–137 (1997) (union has "'discretion to refuse to process'" a grievance, provided it does not act "arbitrar[ily]" or "in bad faith" (emphasis deleted)).

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In any event, whatever unwanted burden is imposed by the representation of nonmembers in disciplinary matters can be eliminated "through means significantly less restrictive of associational freedoms" than the imposition of agency fees. *Harris*, 573 U. S., at 648–649 (internal quotation marks omitted). Individual nonmembers could be required to pay

for that service or could be denied union representation altogether.[6] Thus, agency fees cannot be sustained on the ground that unions would otherwise be unwilling to represent nonmembers.

Nor can such fees be justified on the ground that it would otherwise be unfair to require a union to bear the duty of fair representation. That duty is a necessary concomitant of the authority that a union seeks when it chooses to serve as the exclusive representative of all the employees in a unit. As explained, designating a union as the exclusive representative of nonmembers substantially restricts the nonmembers' rights. *Supra*, at 886–887. Protection of their interests is placed in the hands of the union, and if the union were free to disregard or even work against those interests, these employees would be wholly unprotected. That is why we said many years ago that serious "constitutional questions [would] arise" if the union were *not* subject to the duty to represent all employees fairly. *Steele*, *supra*, at 198.

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In sum, we do not see any reason to treat the free-rider interest any differently in the agency-fee context than in any other First Amendment context. See *Knox*, 567 U. S., at 311, 321. We therefore hold that agency fees cannot be upheld on free-rider grounds.

IV

Implicitly acknowledging the weakness of *Abood*'s own reasoning, proponents of agency fees have come forward

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[6] There is precedent for such arrangements. Some States have laws providing that, if an employee with a religious objection to paying an agency fee "requests the [union] to use the grievance procedure or arbitration procedure on the employee's behalf, the [union] is authorized to charge the employee for the reasonable cost of using such procedure." *E. g.*, Cal. Govt. Code Ann. § 3546.3 (West 2010); cf. Ill. Comp. Stat., ch. 5, § 315/6(g). This more tailored alternative, if applied to other objectors, would prevent free ridership while imposing a lesser burden on First Amendment rights.

with alternative justifications for the decision, and we now address these arguments.

A

The most surprising of these new arguments is the Union respondent's originalist defense of *Abood*. According to this argument, *Abood* was correctly decided because the First Amendment was not originally understood to provide *any* protection for the free speech rights of public employees. Brief for Union Respondent 2–3, 17–20.

As an initial matter, we doubt that the Union—or its members—actually want us to hold that public employees have "*no* [free speech] rights." *Id.*, at 1. Cf., *e. g.*, Brief for National Treasury Employees Union as *Amicus Curiae* in *Garcetti* v. *Ceballos*, O. T. 2005, No. 04–473, p. 7 (arguing for "broa[d]" public-employee First Amendment rights); Brief for AFL–CIO as *Amicus Curiae* in No. 04–473 (similar).

It is particularly discordant to find this argument in a brief that trumpets the importance of *stare decisis*. See Brief for Union Respondent 47–57. Taking away free speech protection for public employees would mean overturning decades of landmark precedent. Under the Union's theory, *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563 (1968), and its progeny would fall. Yet *Pickering*, as we will discuss, is now the foundation for respondents' chief defense of *Abood*. And indeed, *Abood* itself would have to go if public employees have no free speech rights, since *Abood* holds that the First Amendment prohibits the exaction of agency fees for political or ideological purposes. 431 U. S., at 234–235 (finding it "clear" that "a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment"). Our political patronage cases would be doomed. See, *e. g.*, *Rutan* v. *Republican Party of Ill.*, 497 U. S. 62 (1990); *Branti* v. *Finkel*, 445 U. S. 507 (1980); *Elrod* v. *Burns*, 427 U. S. 347 (1976). Also imperiled would be older precedents like *Wieman* v. *Updegraff*, 344 U. S. 183

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(1952) (loyalty oaths), *Shelton* v. *Tucker*, 364 U. S. 479 (1960) (disclosure of memberships and contributions), and *Keyishian* v. *Board of Regents of Univ. of State of N. Y.*, 385 U. S. 589 (1967) (subversive speech). Respondents presumably want none of this, desiring instead that we apply the Constitution's supposed original meaning only when it suits them—to retain the part of *Abood* that they like. See Tr. of Oral Arg. 56–57. We will not engage in this halfway originalism.

Nor, in any event, does the First Amendment's original meaning support the Union's claim. The Union offers no persuasive founding-era evidence that public employees were understood to lack free speech protections. While it observes that restrictions on federal employees' activities have existed since the First Congress, most of its historical examples involved limitations on public officials' outside business dealings, not on their speech. See *Ex parte Curtis*, 106 U. S. 371, 372–373 (1882). The only early *speech* restrictions the Union identifies are an 1806 statute prohibiting military personnel from using "'contemptuous or disrespectful words against the President'" and other officials, and an 1801 directive limiting electioneering by top government employees. Brief for Union Respondent 3. But those examples at most show that the government was understood to have power to limit employee speech that threatened important governmental interests (such as maintaining military discipline and preventing corruption)—not that public employees' speech was entirely unprotected. Indeed, more recently this Court has upheld similar restrictions even while recognizing that government employees possess First Amendment rights. See, *e. g.*, *Brown* v. *Glines*, 444 U. S. 348, 353 (1980) (upholding military restriction on speech that threatened troop readiness); *Civil Service Comm'n* v. *Letter Carriers*, 413 U. S. 548, 556–557 (1973) (upholding limits on public employees' political activities).

Ultimately, the Union relies, not on founding-era evidence, but on dictum from a 1983 opinion of this Court stating that,

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"[f]or most of th[e 20th] century, the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." *Connick* v. *Myers*, 461 U. S. 138, 143; see Brief for Union Respondent 2, 17. Even on its own terms, this dictum about 20th-century views does not purport to describe how the First Amendment was understood in 1791. And a careful examination of the decisions by this Court that *Connick* cited to support its dictum, see 461 U. S., at 144, reveals that none of them rested on the facile premise that public employees are unprotected by the First Amendment. Instead, they considered (much as we do today) whether particular speech restrictions were "necessary to protect" fundamental government interests. *Curtis*, *supra*, at 374.

The Union has also failed to show that, even if public employees enjoyed free speech rights, the First Amendment was nonetheless originally understood to allow forced subsidies like those at issue here. We can safely say that, at the time of the adoption of the First Amendment, no one gave any thought to whether public-sector unions could charge nonmembers agency fees. Entities resembling labor unions did not exist at the founding, and public-sector unions did not emerge until the mid-20th century. The idea of public-sector unionization and agency fees would astound those who framed and ratified the Bill of Rights.[7] Thus, the Union can-

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[7] Indeed, under common law, "collective bargaining was unlawful," *Teamsters* v. *Terry*, 494 U. S. 558, 565–566 (1990) (plurality opinion); see N. Citrine, Trade Union Law 4–7, 9–10 (2d ed. 1960); Notes, Legality of Trade Unions at Common Law, 25 Harv. L. Rev. 465, 466 (1912), and into the 20th century, every individual employee had the "liberty of contract" to "sell his labor upon such terms as he deem[ed] proper," *Adair* v. *United States*, 208 U. S. 161, 174–175 (1908); see R. Morris, Government and Labor in Early America 208, 529 (1946). So even the concept of a private third-party entity with the power to bind employees on the terms of their employment likely would have been foreign to the Founders. We note this

not point to any accepted founding-era practice that even remotely resembles the compulsory assessment of agency fees from public-sector employees. We do know, however, that prominent members of the founding generation condemned laws requiring public employees to affirm or support beliefs with which they disagreed. As noted, Jefferson denounced compelled support for such beliefs as "'sinful and tyrannical,'" *supra*, at 893, and others expressed similar views.[8]

In short, the Union has offered no basis for concluding that *Abood* is supported by the original understanding of the First Amendment.

B

The principal defense of *Abood* advanced by respondents and the dissent is based on our decision in *Pickering*, 391 U. S. 563, which held that a school district violated the First Amendment by firing a teacher for writing a letter critical of the school administration. Under *Pickering* and later cases in the same line, employee speech is largely unprotected if it is part of what the employee is paid to do, see *Garcetti* v. *Ceballos*, 547 U. S. 410, 421–422 (2006), or if it involved a matter of only private concern, see *Connick*, *supra*, at 146–149. On the other hand, when a public employee speaks as a citizen on a matter of public concern, the employee's speech is protected unless "'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees' outweighs 'the interests of the [employee], as a citizen, in commenting upon matters of public concern.'" *Harris*, 573 U. S., at 653

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only to show the problems inherent in the Union respondent's argument; we are not in any way questioning the foundations of modern labor law.

[8] See, *e. g.*, Ellsworth, The Landholder, VII (1787), in Essays on the Constitution of the United States 167–171 (P. Ford ed. 1892); Webster, On Test Laws, Oaths of Allegiance and Abjuration, and Partial Exclusions From Office, in A Collection of Essays and Fugitiv[e] Writings 151–153 (1790).

(quoting *Pickering*, *supra*, at 568). *Pickering* was the centerpiece of the defense of *Abood* in *Harris*, see 573 U. S., at 673–676 (KAGAN, J., dissenting), and we found the argument unpersuasive, see *id.*, at 652–655. The intervening years have not improved its appeal.

1

As we pointed out in *Harris*, *Abood* was not based on *Pickering*. 573 U. S., at 652, and n. 26. The *Abood* majority cited the case exactly once—in a footnote—and then merely to acknowledge that "there may be limits on the extent to which an employee in a sensitive or policymaking position may freely criticize his superiors and the policies they espouse." 431 U. S., at 230, n. 27. That aside has no bearing on the agency-fee issue here.[9]

Respondents' reliance on *Pickering* is thus "an effort to find a new justification for the decision in *Abood*." *Harris*, *supra*, at 652. And we have previously taken a dim view of similar attempts to recast problematic First Amendment decisions. See, *e. g.*, *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 348–349, 363 (2010) (rejecting efforts to recast *Austin* v. *Michigan Chamber of Commerce*, 494 U. S. 652 (1990)); see also *Citizens United*, *supra*, at 382–385 (ROBERTS, C. J., concurring). We see no good reason, at this late date, to try to shoehorn *Abood* into the *Pickering* framework.

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Even if that were attempted, the shoe would be a painful fit for at least three reasons.

[9] Justice Powell's separate opinion did invoke *Pickering* in a relevant sense, but he did so only to acknowledge the State's relatively greater interest in regulating speech when it acts as employer than when it acts as sovereign. *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209, 259 (1977) (opinion concurring in judgment). In the very next sentence, he explained that "even in public employment, a significant impairment of First Amendment rights must survive exacting scrutiny." *Ibid.* (internal quotation marks omitted). That is the test we apply today.

First, the *Pickering* framework was developed for use in a very different context—in cases that involve "one employee's speech and its impact on that employee's public responsibilities." *United States* v. *Treasury Employees*, 513 U. S. 454, 467 (1995). This case, by contrast, involves a blanket requirement that all employees subsidize speech with which they may not agree. While we have sometimes looked to *Pickering* in considering general rules that affect broad categories of employees, we have acknowledged that the standard *Pickering* analysis requires modification in that situation. See 513 U. S., at 466–468, and n. 11. A speech-restrictive law with "widespread impact," we have said, "gives rise to far more serious concerns than could any single supervisory decision." *Id.*, at 468. Therefore, when such a law is at issue, the government must shoulder a correspondingly "heav[ier]" burden, *id.*, at 466, and is entitled to considerably less deference in its assessment that a predicted harm justifies a particular impingement on First Amendment rights, see *id.*, at 475–476, n. 21; accord, *id.*, at 482–483 (O'Connor, J., concurring in judgment in part and dissenting in part). The end product of those adjustments is a test that more closely resembles exacting scrutiny than the traditional *Pickering* analysis.

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The core collective-bargaining issue of wages and benefits illustrates this point. Suppose that a single employee complains that he or she should have received a 5% raise. This individual complaint would likely constitute a matter of only private concern and would therefore be unprotected under *Pickering*. But a public-sector union's demand for a 5% raise for the many thousands of employees it represents would be another matter entirely. Granting such a raise could have a serious impact on the budget of the government unit in question, and by the same token, denying a raise might have a significant effect on the performance of government services. When a large number of employees speak through their union, the category of speech that is of public

concern is greatly enlarged, and the category of speech that is of only private concern is substantially shrunk. By disputing this, *post*, at 943–944, the dissent denies the obvious.

Second, the *Pickering* framework fits much less well where the government compels speech or speech subsidies in support of third parties. *Pickering* is based on the insight that the speech of a public-sector employee may interfere with the effective operation of a government office. When a public employer does not simply restrict potentially disruptive speech but commands that its employees mouth a message on its own behalf, the calculus is very different. Of course, if the speech in question is part of an employee's official duties, the employer may insist that the employee deliver any lawful message. See *Garcetti*, 547 U. S., at 421–422, 425–426. Otherwise, however, it is not easy to imagine a situation in which a public employer has a legitimate need to demand that its employees recite words with which they disagree. And we have never applied *Pickering* in such a case.

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Consider our decision in *Connick*. In that case, we held that an assistant district attorney's complaints about the supervisors in her office were, for the most part, matters of only private concern. 461 U. S., at 148. As a result, we held, the district attorney could fire her for making those comments. *Id.*, at 154. Now, suppose that the assistant had not made any critical comments about the supervisors but that the district attorney, out of the blue, demanded that she circulate a memo praising the supervisors. Would her refusal to go along still be a matter of purely private concern? And if not, would the order be justified on the ground that the effective operation of the office demanded that the assistant voice complimentary sentiments with which she disagreed? If *Pickering* applies at all to compelled speech—a question that we do not decide—it would certainly require adjustment in that context.

Third, although both *Pickering* and *Abood* divided speech into two categories, the cases' categorization schemes do not line up. Superimposing the *Pickering* scheme on *Abood* would significantly change the *Abood* regime.

Let us first look at speech that is not germane to collective bargaining but instead concerns political or ideological issues. Under *Abood*, a public employer is flatly prohibited from permitting nonmembers to be charged for this speech, but under *Pickering*, the employees' free speech interests could be overcome if a court found that the employer's interests outweighed the employees'.

A similar problem arises with respect to speech that *is* germane to collective bargaining. The parties dispute how much of this speech is of public concern, but respondents concede that much of it falls squarely into that category. See Tr. of Oral Arg. 47, 65. Under *Abood*, nonmembers may be required to pay for all this speech, but *Pickering* would permit that practice only if the employer's interests outweighed those of the employees. Thus, recasting *Abood* as an application of *Pickering* would substantially alter the *Abood* scheme.

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For all these reasons, *Pickering* is a poor fit indeed.

V

Even if we were to apply some form of *Pickering*, Illinois' agency-fee arrangement would not survive.

A

Respondents begin by suggesting that union speech in collective-bargaining and grievance proceedings should be treated like the employee speech in *Garcetti*, *i. e.*, as speech "pursuant to [an employee's] official duties," 547 U. S., at 421. Many employees, in both the public and private sectors, are paid to write or speak for the purpose of furthering the interests of their employers. There are laws that protect pub-

lic employees from being compelled to say things that they reasonably believe to be untrue or improper, see *id.*, at 425–426, but in general when public employees are performing their job duties, their speech may be controlled by their employer. Trying to fit union speech into this framework, respondents now suggest that the union speech funded by agency fees forms part of the official duties of the union officers who engage in the speech. Brief for Union Respondent 22–23; see Brief for State Respondents 23–24.

This argument distorts collective bargaining and grievance adjustment beyond recognition. When an employee engages in speech that is part of the employee's job duties, the employee's words are really the words of the employer. The employee is effectively the employer's spokesperson. But when a union negotiates with the employer or represents employees in disciplinary proceedings, the union speaks for the *employees*, not the employer. Otherwise, the employer would be negotiating with itself and disputing its own actions. That is not what anybody understands to be happening.

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What is more, if the union's speech is really the employer's speech, then the employer could dictate what the union says. Unions, we trust, would be appalled by such a suggestion. For these reasons, *Garcetti* is totally inapposite here.

B

Since the union speech paid for by agency fees is not controlled by *Garcetti*, we move on to the next step of the *Pickering* framework and ask whether the speech is on a matter of public or only private concern. In *Harris*, the dissent's central argument in defense of *Abood* was that union speech in collective bargaining, including speech about wages and benefits, is basically a matter of only private interest. See 573 U. S., at 675–676 (KAGAN, J., dissenting). We squarely rejected that argument, see *id.*, at 653–654, and the facts of the present case substantiate what we said at that time: "[I]t is impossible to argue that the level of . . . state spend-

ing for employee benefits . . . is not a matter of great public concern," *id.*, at 654.

Illinois, like some other States and a number of counties and cities around the country, suffers from severe budget problems.[10] As of 2013, Illinois had nearly $160 billion in unfunded pension and retiree healthcare liabilities.[11] By 2017, that number had only grown, and the State was grappling with $15 billion in unpaid bills.[12] We are told that a "quarter of the budget is now devoted to paying down" those liabilities.[13] These problems and others led Moody's and S & P to downgrade Illinois' credit rating to "one step above junk"—the "lowest ranking on record for a U. S. state."[14]

The Governor, on one side, and public-sector unions, on the other, disagree sharply about what to do about these problems. The State claims that its employment-related debt is "'squeezing core programs in education, public safety, and human services, in addition to limiting [the State's] ability to pay [its] bills.'" Securities Act of 1933 Release No. 9389, 105 S. E. C. Docket 3381, 3383 (2013). It therefore "told the

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[10] See Brief for State of Michigan et al. as *Amici Curiae* 9–24. Nationwide, the cost of state and local employees' wages and benefits, for example, is nearly $1.5 trillion—more than half of those jurisdictions' total expenditures. See Dept. of Commerce, Bureau of Economic Analysis, National Data, GDP & Personal Income, Table 6.2D, line 92 (Aug. 3, 2017), and Table 3.3, line 37 (May 30, 2018), https://www.bea.gov/iTable/iTable.cfm?reqid=19&step=2#reqid=19&step=2&isuri=1&1921=survey. And many States and cities struggle with unfunded pension and retiree healthcare liabilities and other budget issues.

[11] PEW Charitable Trusts, Fiscal 50: State Trends and Analysis (updated May 17, 2016), http://www.pewtrusts.org/en/research-and-analysis/data-visualizations/2014/fiscal-50#ind4.

[12] See Brief for Jason R. Barclay et al. as *Amici Curiae* 9; M. Egan, How Illinois Became America's Most Messed-Up State, CNN Money (July 1, 2017), https://cnnmon.ie/2tp9NX5.

[13] Brief for Jason R. Barclay et al. as *Amici Curiae* 9.

[14] E. Campbell, S&P, Moody's Downgrade Illinois to Near Junk, Lowest Ever for a U. S. State, Bloomberg (June 1, 2017), https://bloom.bg/2roEJUc.

Union that it would attempt to address th[e financial] crisis, at least in part, through collective bargaining." Board Decision 12–13. And "the State's desire for savings" in fact "dr[o]ve [its] bargaining" positions on matters such as health-insurance benefits and holiday, overtime, and promotion policies. *Id.*, at 13; *Illinois Dept. of Central Management Servs.* v. *AFSCME, Council 31*, No. S–CB–16–017 etc., 33 PERI ¶67 (ILRB Dec. 13, 2016) (ALJ Decision), pp. 26–28, 63–66, 224. But when the State offered cost-saving proposals on these issues, the Union countered with very different suggestions. Among other things, it advocated wage and tax increases, cutting spending "to Wall Street financial institutions," and reforms to Illinois' pension and tax systems (such as closing "corporate tax loopholes," "[e]xpanding the base of the state sales tax," and "allowing an income tax that is adjusted in accordance with ability to pay"). *Id.*, at 27–28. To suggest that speech on such matters is not of great public concern—or that it is not directed at the "public square," *post*, at 945 (KAGAN, J., dissenting)—is to deny reality.

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In addition to affecting how public money is spent, union speech in collective bargaining addresses many other important matters. As the examples offered by respondents' own *amici* show, unions express views on a wide range of subjects—education, child welfare, healthcare, and minority rights, to name a few. See, *e. g.*, Brief for American Federation of Teachers as *Amicus Curiae* 15–27; Brief for Child Protective Service Workers et al. as *Amici Curiae* 5–13; Brief for Human Rights Campaign et al. as *Amici Curiae* 10–17; Brief for National Women's Law Center et al. as *Amici Curiae* 14–30. What unions have to say on these matters in the context of collective bargaining is of great public importance.

Take the example of education, which was the focus of briefing and argument in *Friedrichs*. The public importance of subsidized union speech is especially apparent in this field, since educators make up by far the largest cate-

gory of state and local government employees, and education is typically the largest component of state and local government expenditures.[15]

Speech in this area also touches on fundamental questions of education policy. Should teacher pay be based on seniority, the better to retain experienced teachers? Or should schools adopt merit-pay systems to encourage teachers to get the best results out of their students?[16] Should districts transfer more experienced teachers to the lower performing schools that may have the greatest need for their skills, or should those teachers be allowed to stay where they have put down roots?[17] Should teachers be given tenure protection and, if so, under what conditions? On what grounds and pursuant to what procedures should teachers be subject to discipline or dismissal? How should teacher performance and student progress be measured—by standardized tests or other means?

Unions can also speak out in collective bargaining on controversial subjects such as climate change,[18] the Confederacy,[19] sexual orientation and gender identity,[20] evolution,[21]

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[15] See National Association of State Budget Officers, Summary: Spring 2018 Fiscal Survey of States 2 (June 14, 2018), http://www.nasbo.org; ProQuest Statistical Abstract of the United States: 2018, p. 306, Table 476, p. 321, Table 489.

[16] See Rogers, School Districts 'Race to the Top' Despite Teacher Dispute, Marin Independent J., June 19, 2010.

[17] See Sawchuk, Transferring Top Teachers Has Benefits: Study Probes Moving Talent to Low-Performing Schools, Education Week, Nov. 13, 2013, pp. 1, 13.

[18] See Tucker, Textbooks Equivocate on Global Warming: Stanford Study Finds Portrayal 'Dishonest,' San Francisco Chronicle, Nov. 24, 2015, p. C1.

[19] See Reagan, Anti-Confederacy Movement Rekindles Texas Textbook Controversy, San Antonio Current, Aug. 4, 2015.

[20] See Watanabe, How To Teach Gay Issues in 1st Grade? A New Law Requiring California Schools To Have Lessons About LGBT Americans Raises Tough Questions, L. A. Times, Oct. 16, 2011, p. A1.

[21] See Goodstein, A Web of Faith, Law and Science in Evolution Suit, N. Y. Times, Sept. 26, 2005, p. A1.

and minority religions.[22] These are sensitive political topics, and they are undoubtedly matters of profound "'value and concern to the public.'" *Snyder* v. *Phelps*, 562 U. S. 443, 453 (2011). We have often recognized that such speech "'occupies the highest rung of the hierarchy of First Amendment values'" and merits "'special protection.'" *Id.*, at 452.

What does the dissent say about the prevalence of such issues? The most that it is willing to admit is that "some" issues that arise in collective bargaining "raise important non-budgetary disputes." *Post*, at 946. Here again, the dissent refuses to recognize what actually occurs in public-sector collective bargaining.

Even union speech in the handling of grievances may be of substantial public importance and may be directed at the "public square." *Post*, at 945. For instance, the Union respondent in this case recently filed a grievance seeking to compel Illinois to appropriate $75 million to fund a 2% wage increase. *State* v. *AFSCME, Council 31*, 2016 IL 118422, 51 N. E. 3d 738, 740–742, and n. 4. In short, the union speech at issue in this case is overwhelmingly of substantial public concern.

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C

The only remaining question under *Pickering* is whether the State's proffered interests justify the heavy burden that agency fees inflict on nonmembers' First Amendment interests. We have already addressed the state interests asserted in *Abood*—promoting "labor peace" and avoiding free riders, see *supra*, at 895–901—and we will not repeat that analysis.

In *Harris* and this case, defenders of *Abood* have asserted a different state interest—in the words of the *Harris* dissent, the State's "interest in bargaining with an adequately funded exclusive bargaining agent." 573 U. S., at 663

[22] See Golden, Defending the Faith: New Battleground in Textbook Wars: Religion in History, Wall St. J., Jan. 25, 2006, p. A1.

(KAGAN, J., dissenting); see also *post*, at 936–937 (same). This was not "the interest *Abood* recognized and protected," *Harris*, *supra*, at 663 (same), and, in any event, it is insufficient.

Although the dissent would accept without any serious independent evaluation the State's assertion that the absence of agency fees would cripple public-sector unions and thus impair the efficiency of government operations, see *post*, at 937–939, ample experience, as we have noted, *supra*, at 895–896, shows that this is questionable.

Especially in light of the more rigorous form of *Pickering* analysis that would apply in this context, see *supra*, at 906–909, the balance tips decisively in favor of the employees' free speech rights.[23]

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[23] Claiming that our decision will hobble government operations, the dissent asserts that it would prevent a government employer from taking action against disruptive non-unionized employees in two carefully constructed hypothetical situations. See *post*, at 946–947. Both hypotheticals are short on potentially important details, but in any event, neither would be affected by our decision in this case. Rather, both would simply call for the application of the standard *Pickering* test.

In one of the hypotheticals, teachers "protest merit pay in the school cafeteria." *Post*, at 947. If such a case actually arose, it would be important to know, among other things, whether the teachers involved were supposed to be teaching in their classrooms at the time in question and whether the protest occurred in the presence of students during the student lunch period. If both those conditions were met, the teachers would presumably be violating content-neutral rules regarding their duty to teach at specified times and places, and their conduct might well have a disruptive effect on the educational process. Thus, in the dissent's hypothetical, the school's interests might well outweigh those of the teachers, but in this hypothetical case, as in all *Pickering* cases, the particular facts would be very important.

In the other hypothetical, employees agitate for a better health plan "at various inopportune times and places." *Post*, at 947. Here, the lack of factual detail makes it impossible to evaluate how the *Pickering* balance would come out. The term "agitat[ion]" can encompass a wide range of conduct, as well as speech. *Post*, at 947. And the time and place of the agitation would also be important.

We readily acknowledge, as *Pickering* did, that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." 391 U. S., at 568. Our analysis is consistent with that principle. The exacting scrutiny standard we apply in this case was developed in the context of commercial speech, another area where the government has traditionally enjoyed greater-than-usual power to regulate speech. See *supra*, at 894. It is also not disputed that the State may require that a union serve as exclusive bargaining agent for its employees—itself a significant impingement on associational freedoms that would not be tolerated in other contexts. We simply draw the line at allowing the government to go further still and require all employees to support the union irrespective of whether they share its views. Nothing in the *Pickering* line of cases requires us to uphold every speech restriction the government imposes as an employer. See *Pickering*, *supra*, at 564–566 (holding teacher's dismissal for criticizing school board unconstitutional); *Rankin* v. *McPherson*, 483 U. S. 378, 392 (1987) (holding clerical employee's dismissal for supporting assassination attempt on President unconstitutional); *Treasury Employees*, 513 U. S., at 477 (holding federal-employee honoraria ban unconstitutional).

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VI

For the reasons given above, we conclude that public-sector agency-shop arrangements violate the First Amendment, and *Abood* erred in concluding otherwise. There remains the question whether *stare decisis* nonetheless counsels against overruling *Abood*. It does not.

"*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991).

We will not overturn a past decision unless there are strong grounds for doing so. *United States* v. *International Business Machines Corp.*, 517 U. S. 843, 855–856 (1996); *Citizens United*, 558 U. S., at 377 (ROBERTS, C. J., concurring). But as we have often recognized, *stare decisis* is "'not an inexorable command.'" *Pearson* v. *Callahan*, 555 U. S. 223, 233 (2009); see also *Lawrence* v. *Texas*, 539 U. S. 558, 577 (2003); *State Oil Co.* v. *Khan*, 522 U. S. 3, 20 (1997); *Agostini* v. *Felton*, 521 U. S. 203, 235 (1997); *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 63 (1996); *Payne*, *supra*, at 828.

The doctrine "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." *Agostini*, *supra*, at 235. And *stare decisis* applies with perhaps least force of all to decisions that wrongly denied First Amendment rights: "This Court has not hesitated to overrule decisions offensive to the First Amendment (a fixed star in our constitutional constellation, if there is one)." *Federal Election Comm'n* v. *Wisconsin Right to Life, Inc.*, 551 U. S. 449, 500 (2007) (Scalia, J., concurring in part and concurring in judgment) (internal quotation marks omitted); see also *Citizens United*, *supra*, at 362–365 (overruling *Austin*, 494 U. S. 652); *Barnette*, 319 U. S., at 642 (overruling *Minersville School Dist.* v. *Gobitis*, 310 U. S. 586 (1940)).

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Our cases identify factors that should be taken into account in deciding whether to overrule a past decision. Five of these are most important here: the quality of *Abood*'s reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision. After analyzing these factors, we conclude that *stare decisis* does not require us to retain *Abood*.

A

An important factor in determining whether a precedent should be overruled is the quality of its reasoning, see *Citi-*

zens United, 558 U. S., at 363–364; *id.*, at 382–385 (ROBERTS, C. J., concurring); *Lawrence*, 539 U. S., at 577–578, and as we explained in *Harris*, *Abood* was poorly reasoned, see 573 U. S., at 635–638. We will summarize, but not repeat, *Harris*'s lengthy discussion of the issue.

Abood went wrong at the start when it concluded that two prior decisions, *Railway Employees* v. *Hanson*, 351 U. S. 225 (1956), and *Machinists* v. *Street*, 367 U. S. 740 (1961), "appear[ed] to require validation of the agency-shop agreement before [the Court]." 431 U. S., at 226. Properly understood, those decisions did no such thing. Both cases involved Congress's "*bare authorization*" of *private-sector* union shops under the Railway Labor Act. *Street*, *supra*, at 749 (emphasis added).[24] *Abood* failed to appreciate that a very different First Amendment question arises when a State *requires* its employees to pay agency fees. See *Harris*, *supra*, at 636.

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Moreover, neither *Hanson* nor *Street* gave careful consideration to the First Amendment. In *Hanson*, the primary questions were whether Congress exceeded its power under the Commerce Clause or violated substantive due process by authorizing private union-shop arrangements under the Commerce and Due Process Clauses. 351 U. S., at 233–235.

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[24] No First Amendment issue could have properly arisen in those cases unless Congress's enactment of a provision allowing, but not requiring, private parties to enter into union-shop arrangements was sufficient to establish governmental action. That proposition was debatable when *Abood* was decided, and is even more questionable today. See *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U. S. 40, 53 (1999); *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 357 (1974). Compare, *e. g.*, *White* v. *Communications Workers of Am., AFL–CIO, Local 13000*, 370 F. 3d 346, 350 (CA3 2004) (no state action), and *Kolinske* v. *Lubbers*, 712 F. 2d 471, 477–478 (CADC 1983) (same), with *Beck* v. *Communications Workers of Am.*, 776 F. 2d 1187, 1207 (CA4 1985) (state action), and *Linscott* v. *Millers Falls Co.*, 440 F. 2d 14, 16, and n. 2 (CA1 1971) (same). We reserved decision on this question in *Communications Workers* v. *Beck*, 487 U. S. 735, 761 (1988), and do not resolve it here.

After deciding those questions, the Court summarily dismissed what was essentially a facial First Amendment challenge, noting that the record did not substantiate the challengers' claim. *Id.*, at 238; see *Harris*, *supra*, at 635–636. For its part, *Street* was decided as a matter of statutory construction, and so did not reach any constitutional issue. 367 U. S., at 749–750, 768–769. *Abood* nevertheless took the view that *Hanson* and *Street* "all but decided" the important free speech issue that was before the Court. *Harris*, 573 U. S., at 635. As we said in *Harris*, "[s]urely a First Amendment issue of this importance deserved better treatment." *Id.*, at 636.

Abood's unwarranted reliance on *Hanson* and *Street* appears to have contributed to another mistake: *Abood* judged the constitutionality of public-sector agency fees under a deferential standard that finds no support in our free speech cases. (As noted, *supra*, at 894–895, today's dissent makes the same fundamental mistake.) *Abood* did not independently evaluate the strength of the government interests that were said to support the challenged agency-fee provision; nor did it ask how well that provision actually promoted those interests or whether they could have been adequately served without impinging so heavily on the free speech rights of nonmembers. Rather, *Abood* followed *Hanson* and *Street*, which it interpreted as having deferred to "*the legislative assessment* of the important contribution of the union shop to the system of labor relations established by Congress." 431 U. S., at 222 (emphasis added). But *Hanson* deferred to that judgment in deciding the Commerce Clause and substantive due process questions that were the focus of the case. Such deference to legislative judgments is inappropriate in deciding free speech issues.

If *Abood* had considered whether agency fees were actually needed to serve the asserted state interests, it might not have made the serious mistake of assuming that one of those interests—"labor peace"—demanded, not only that a single union be designated as the exclusive representative of

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all the employees in the relevant unit but also that nonmembers be required to pay agency fees. Deferring to a perceived legislative judgment, *Abood* failed to see that the designation of a union as exclusive representative and the imposition of agency fees are not inextricably linked. See *supra*, at 895–896; *Harris*, *supra*, at 649.

Abood also did not sufficiently take into account the difference between the effects of agency fees in public-and private-sector collective bargaining. The challengers in *Abood* argued that collective bargaining with a government employer, unlike collective bargaining in the private sector, involves "inherently 'political' " speech. 431 U. S., at 226. The Court did not dispute that characterization, and in fact conceded that "decisionmaking by a public employer is above all a political process" driven more by policy concerns than economic ones. *Id.*, at 228; see *id.*, at 228–231. But (again invoking *Hanson*), the *Abood* Court asserted that public employees do not have "weightier First Amendment interest[s]" against compelled speech than do private employees. 431 U. S., at 229. That missed the point. Assuming for the sake of argument that the First Amendment applies at all to private-sector agency-shop arrangements, the individual interests at stake still differ. "In the public sector, core issues such as wages, pensions, and benefits are important political issues, but that is generally not so in the private sector." *Harris*, 573 U. S., at 636.

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Overlooking the importance of this distinction, "*Abood* failed to appreciate the conceptual difficulty of distinguishing in public-sector cases between union expenditures that are made for collective-bargaining purposes and those that are made to achieve political ends." *Ibid.* Likewise, "*Abood* does not seem to have anticipated the magnitude of the practical administrative problems that would result in attempting to classify public-sector union expenditures as either 'chargeable' . . . or nonchargeable." *Id.*, at 637. Nor did *Abood* "foresee the practical problems that would face objecting nonmembers." 573 U. S., at 637.

In sum, as detailed in *Harris*, *Abood* was not well reasoned.[25]

B

Another relevant consideration in the *stare decisis* calculus is the workability of the precedent in question, *Montejo* v. *Louisiana*, 556 U. S. 778, 792 (2009), and that factor also weighs against *Abood*.

1

Abood's line between chargeable and nonchargeable union expenditures has proved to be impossible to draw with precision. We tried to give the line some definition in *Lehnert*. There, a majority of the Court adopted a three-part test requiring that chargeable expenses (1) be "'germane'" to collective bargaining, (2) be "justified" by the government's labor-peace and free-rider interests, and (3) not add "significantly" to the burden on free speech, 500 U. S., at 519, but the Court splintered over the application of this test, see *id.*, at 519–522 (plurality opinion); *id.*, at 533–534 (Marshall, J., concurring in part and dissenting in part). That division was not surprising. As the *Lehnert* dissenters aptly observed, each part of the majority's test "involves a substantial judgment call," *id.*, at 551 (opinion of Scalia, J.), rendering the test "altogether malleable" and "no[t] principled," *id.*, at 563 (KENNEDY, J., concurring in judgment in part and dissenting in part).

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Justice Scalia presciently warned that *Lehnert*'s amorphous standard would invite "perpetua[l] give-it-a-try litigation," *id.*, at 551, and the Court's experience with union lobbying expenses illustrates the point. The *Lehnert* plurality held that money spent on lobbying for increased education

[25] Contrary to the dissent's claim, see *post*, at 948–949, and n. 4, the fact that "[t]he rationale of [*Abood*] does not withstand careful analysis" *is* a reason to overrule it, *e. g.*, *Lawrence* v. *Texas*, 539 U. S. 558, 577 (2003). And that is even truer when, as here, the defenders of the precedent do not attempt to "defen[d its actual] reasoning." *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 363 (2010); *id.*, at 382–385 (ROBERTS, C. J., concurring).

funding was not chargeable. *Id.*, at 519–522. But Justice Marshall—applying the same three-prong test—reached precisely the opposite conclusion. *Id.*, at 533–542. And *Lehnert* failed to settle the matter; States and unions have continued to "give it a try" ever since.

In *Knox*, for example, we confronted a union's claim that the costs of lobbying the legislature and the electorate about a ballot measure were chargeable expenses under *Lehnert*. See Brief for Respondent in *Knox* v. *Service Employees*, O. T. 2011, No. 10–1121, pp. 48–53. The Court rejected this claim out of hand, 567 U. S., at 320–321, but the dissent refused to do so, *id.*, at 336 (opinion of BREYER, J.). And in the present case, nonmembers are required to pay for unspecified "[l]obbying" expenses and for "[s]ervices" that "may ultimately inure to the benefit of the members of the local bargaining unit." App. to Pet. for Cert. 31a–32a. That formulation is broad enough to encompass just about anything that the union might choose to do.

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Respondents agree that *Abood*'s chargeable-nonchargeable line suffers from "a vagueness problem," that it sometimes "allows what it shouldn't allow," and that a "firm[er] line c[ould] be drawn." Tr. of Oral Arg. 47–48. They therefore argue that we should "consider revisiting" this part of *Abood*. Tr. of Oral Arg. 67; see Brief for Union Respondent 46–47; Brief for State Respondents 30. This concession only underscores the reality that *Abood* has proved unworkable: Not even the parties defending agency fees support the line that it has taken this Court over 40 years to draw.

2

Objecting employees also face a daunting and expensive task if they wish to challenge union chargeability determinations. While *Hudson* requires a union to provide nonmembers with "sufficient information to gauge the propriety of the union's fee," 475 U. S., at 306, the *Hudson* notice in the present case and in others that have come before us do not begin to permit a nonmember to make such a determination.

In this case, the notice lists categories of expenses and sets out the amount in each category that is said to be attributable to chargeable and nonchargeable expenses. Here are some examples regarding the Union respondent's expenditures:

Category	Total Expense	Chargeable Expense
Salary and Benefits	$14,718,708	$11,830,230
Office Printing, Supplies, and Advertising	$148,272	$127,959
Postage and Freight	$373,509	$268,107
Telephone	$214,820	$192,721
Convention Expense	$268,855	$268,855

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See App. to Pet. for Cert. 35a–36a.

How could any nonmember determine whether these numbers are even close to the mark without launching a legal challenge and retaining the services of attorneys and accountants? Indeed, even with such services, it would be a laborious and difficult task to check these figures.[26]

The Union respondent argues that challenging its chargeability determinations is not burdensome because the Union pays for the costs of arbitration, see Brief for Union Respondent 10–11, but objectors must still pay for the attorneys and experts needed to mount a serious challenge. And the attorney's fees incurred in such a proceeding can be substantial. See, *e. g.*, *Knox* v. *Chiang*, 2013 WL 2434606, *15 (ED Cal., June 5, 2013) (attorney's fees in *Knox* exceeded $1

[26] For this reason, it is hardly surprising that chargeability issues have not arisen in many Court of Appeals cases. See *post*, at 951 (KAGAN, J., dissenting).

million). The Union respondent's suggestion that an objector could obtain adequate review without even showing up at an arbitration, see App. to Pet. for Cert. 40a–41a, is therefore farfetched.

C

Developments since *Abood*, both factual and legal, have also "eroded" the decision's "underpinnings" and left it an outlier among our First Amendment cases. *United States* v. *Gaudin*, 515 U. S. 506, 521 (1995).

1

Abood pinned its result on the "unsupported empirical assumption" that "the principle of exclusive representation in the public sector is dependent on a union or agency shop." *Harris*, 573 U. S., at 638; *Abood*, 431 U. S., at 220–222. But, as already noted, experience has shown otherwise. See *supra*, at 895–896.

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It is also significant that the Court decided *Abood* against a very different legal and economic backdrop. Public-sector unionism was a relatively new phenomenon in 1977. The first State to permit collective bargaining by government employees was Wisconsin in 1959, R. Kearney & P. Mareschal, Labor Relations in the Public Sector 64 (5th ed. 2014), and public-sector union membership remained relatively low until a "spurt" in the late 1960's and early 1970's, shortly before *Abood* was decided, Freeman, Unionism Comes to the Public Sector, 24 J. Econ. Lit. 41, 45 (1986). Since then, public-sector union membership has come to surpass private-sector union membership, even though there are nearly four times as many total private-sector employees as public-sector employees. B. Hirsch & D. Macpherson, Union Membership and Earnings Data Book 9–10, 12, 16 (2013 ed.).

This ascendance of public-sector unions has been marked by a parallel increase in public spending. In 1970, total state and local government expenditures amounted to $646 per capita in nominal terms, or about $4,000 per capita in

2014 dollars. See Dept. of Commerce, Statistical Abstract of the United States: 1972, p. 419; CPI Inflation Calculator, BLS, http://data.bls.gov/cgi-bin/cpicalc.pl. By 2014, that figure had ballooned to approximately $10,238 per capita. ProQuest, Statistical Abstract of the United States: 2018, p. 17, Table 14, p. 300, Table 469. Not all that increase can be attributed to public-sector unions, of course, but the mounting costs of public-employee wages, benefits, and pensions undoubtedly played a substantial role. We are told, for example, that Illinois' pension funds are underfunded by $129 billion as a result of generous public-employee retirement packages. Brief for Jason R. Barclay et al. as *Amici Curiae* 9, 14. Unsustainable collective-bargaining agreements have also been blamed for multiple municipal bankruptcies. See Brief for State of Michigan et al. as *Amici Curiae* 10–19. These developments, and the political debate over public spending and debt they have spurred, have given collective-bargaining issues a political valence that *Abood* did not fully appreciate.

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2

Abood is also an "anomaly" in our First Amendment jurisprudence, as we recognized in *Harris* and *Knox*. *Harris*, *supra*, at 627; *Knox*, 567 U. S., at 311. This is not an altogether new observation. In *Abood* itself, Justice Powell faulted the Court for failing to perform the "'exacting scrutiny'" applied in other cases involving significant impingements on First Amendment rights. 431 U. S., at 259; see *id.*, at 259–260, and n. 14. Our later cases involving compelled speech and association have also employed exacting scrutiny, if not a more demanding standard. See, *e. g.*, *Roberts*, 468 U. S., at 623; *United Foods*, 533 U. S., at 414. And we have more recently refused, even in agency-fee cases, to extend *Abood* beyond circumstances where it directly controls. See *Knox*, *supra*, at 314; *Harris*, *supra*, at 646–647.

Abood particularly sticks out when viewed against our cases holding that public employees generally may not be

required to support a political party. See *Elrod*, 427 U. S. 347; *Branti*, 445 U. S. 507; *Rutan*, 497 U. S. 62; *O'Hare Truck Service, Inc.* v. *City of Northlake*, 518 U. S. 712 (1996). The Court reached that conclusion despite a "long tradition" of political patronage in government. *Rutan*, *supra*, at 95 (Scalia, J., dissenting); see also *Elrod*, 427 U. S., at 353 (plurality opinion); *id.*, at 377–378 (Powell, J., dissenting). It is an odd feature of our First Amendment cases that political patronage has been deemed largely unconstitutional, while forced subsidization of union speech (which has no such pedigree) has been largely permitted. As Justice Powell observed: "I am at a loss to understand why the State's decision to adopt the agency shop in the public sector should be worthy of *greater* deference, when challenged on First Amendment grounds, than its decision to adhere to the *tradition* of political patronage." *Abood*, *supra*, at 260, n. 14 (opinion concurring in judgment) (citing *Elrod*, *supra*, at 376–380, 382–387 (Powell, J., dissenting); emphasis added). We have no occasion here to reconsider our political patronage decisions, but Justice Powell's observation is sound as far as it goes. By overruling *Abood*, we end the oddity of privileging compelled union support over compelled party support and bring a measure of greater coherence to our First Amendment law.

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In some cases, reliance provides a strong reason for adhering to established law, see, *e. g.*, *Hilton* v. *South Carolina Public Railways Comm'n*, 502 U. S. 197, 202–203 (1991), and this is the factor that is stressed most strongly by respondents, their *amici*, and the dissent. They contend that collective-bargaining agreements now in effect were negotiated with agency fees in mind and that unions may have given up other benefits in exchange for provisions granting them such fees. Tr. of Oral Arg. 67–68; see Brief for State Respondents 54; Brief for Union Respondent 50; *post*, at 951–955 (KAGAN, J., dissenting). In this case, however, reliance does not carry decisive weight.

For one thing, it would be unconscionable to permit free speech rights to be abridged in perpetuity in order to preserve contract provisions that will expire on their own in a few years' time. "The fact that [public-sector unions] may view [agency fees] as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that [nonmembers] share in having their constitutional rights fully protected." *Arizona* v. *Gant*, 556 U. S. 332, 349 (2009).

For another, *Abood* does not provide "a clear or easily applicable standard, so arguments for reliance based on its clarity are misplaced." *South Dakota* v. *Wayfair, Inc.*, 585 U. S. 162, 186 (2018); see *supra*, at 921–924.

This is especially so because public-sector unions have been on notice for years regarding this Court's misgivings about *Abood*. In *Knox*, decided in 2012, we described *Abood* as a First Amendment "anomaly." 567 U. S., at 311. Two years later in *Harris*, we were asked to overrule *Abood*, and while we found it unnecessary to take that step, we cataloged *Abood*'s many weaknesses. In 2015, we granted a petition for certiorari asking us to review a decision that sustained an agency-fee arrangement under *Abood*. *Friedrichs* v. *California Teachers Assn.*, 576 U. S. 1082. After exhaustive briefing and argument on the question whether *Abood* should be overruled, we affirmed the decision below by an equally divided vote. 578 U. S. 1 (2016) (*per curiam*). During this period of time, any public-sector union seeking an agency-fee provision in a collective-bargaining agreement must have understood that the constitutionality of such a provision was uncertain.

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That is certainly true with respect to the collective-bargaining agreement in the present case. That agreement initially ran from July 1, 2012, until June 30, 2015. App. 331. Since then, the agreement has been extended pursuant to a provision providing for automatic renewal for an additional year unless either party gives timely notice that it desires to amend or terminate the contract. *Ibid.* Thus, for the

past three years, the Union could not have been confident about the continuation of the agency-fee arrangement for more than a year at a time.

Because public-sector collective-bargaining agreements are generally of rather short duration, a great many of those now in effect probably began or were renewed since *Knox* (2012) or *Harris* (2014). But even if an agreement antedates those decisions, the union was able to protect itself if an agency-fee provision was essential to the overall bargain. A union's attorneys undoubtedly understand that if one provision of a collective-bargaining agreement is found to be unlawful, the remaining provisions are likely to remain in effect. See *NLRB* v. *Rockaway News Supply Co.*, 345 U. S. 71, 76–79 (1953); see also 8 R. Lord, Williston on Contracts § 19:70 (4th ed. 2010). Any union believing that an agency-fee provision was essential to its bargain could have insisted on a provision giving it greater protection. The agreement in the present case, by contrast, provides expressly that the invalidation of any part of the agreement "shall not invalidate the remaining portions," which "shall remain in full force and effect." App. 328. Such severability clauses ensure that "entire contracts" are not "br[ought] down" by today's ruling. *Post*, at 952, n. 5 (KAGAN, J., dissenting).

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In short, the uncertain status of *Abood*, the lack of clarity it provides, the short-term nature of collective-bargaining agreements, and the ability of unions to protect themselves if an agency-fee provision was crucial to its bargain all work to undermine the force of reliance as a factor supporting *Abood*.[27]

[27] The dissent emphasizes another type of reliance, namely, that "[o]ver 20 States have by now enacted statutes authorizing [agency-fee] provisions." *Post*, at 952. But as we explained in *Citizens United*, "[t]his is not a compelling interest for *stare decisis*. If it were, legislative acts could prevent us from overruling our own precedents, thereby interfering with our duty 'to say what the law is.'" 558 U. S., at 365 (quoting *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803)). Nor does our decision "'require an extensive legislative response.'" *Post*, at 952. States can keep their labor-relations systems exactly as they are—only they cannot force

* * *

We recognize that the loss of payments from nonmembers may cause unions to experience unpleasant transition costs in the short term, and may require unions to make adjustments in order to attract and retain members. But we must weigh these disadvantages against the considerable windfall that unions have received under *Abood* for the past 41 years. It is hard to estimate how many billions of dollars have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment. Those unconstitutional exactions cannot be allowed to continue indefinitely.

All these reasons—that *Abood*'s proponents have abandoned its reasoning, that the precedent has proved unworkable, that it conflicts with other First Amendment decisions, and that subsequent developments have eroded its underpinnings—provide the "'special justification[s]'" for overruling *Abood*. *Post*, at 949 (KAGAN, J., dissenting) (quoting *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. 446, 456 (2015)).[28]

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VII

For these reasons, States and public-sector unions may no longer extract agency fees from nonconsenting employees.

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nonmembers to subsidize public-sector unions. In this way, these States can follow the model of the Federal Government and 28 other States.

[28] Unfortunately, the dissent sees the need to resort to accusations that we are acting like "black-robed rulers" who have shut down an "energetic policy debate." *Post*, at 956. We certainly agree that judges should not "overrid[e] citizens' choices" or "pick the winning side," *ibid.*—unless the Constitution commands that they do so. But when a federal or state law violates the Constitution, the American doctrine of judicial review requires us to enforce the Constitution. Here, States with agency-fee laws have abridged fundamental free speech rights. In holding that these laws violate the Constitution, we are simply enforcing the First Amendment as properly understood, "[t]he very purpose of [which] was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 638 (1943).

Under Illinois law, if a public-sector collective-bargaining agreement includes an agency-fee provision and the union certifies to the employer the amount of the fee, that amount is automatically deducted from the nonmember's wages. § 315/6(e). No form of employee consent is required.

This procedure violates the First Amendment and cannot continue. Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938); see also *Knox*, 567 U. S., at 312–313. Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence. *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 145 (1967) (plurality opinion); see also *College Savings Bank* v. *Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U. S. 666, 680–682 (1999). Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

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Abood was wrongly decided and is now overruled. The judgment of the United States Court of Appeals for the Seventh Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SOTOMAYOR, dissenting.

I join JUSTICE KAGAN's dissent in full. Although I joined the majority in *Sorrell* v. *IMS Health Inc.*, 564 U. S. 552 (2011), I disagree with the way that this Court has since interpreted and applied that opinion. See, *e. g.*, *National Institute of Family and Life Advocates* v. *Becerra*, 585 U. S. 755 (2018). Having seen the troubling development in First

Amendment jurisprudence over the years, both in this Court and in lower courts, I agree fully with JUSTICE KAGAN that *Sorrell*—in the way it has been read by this Court—has allowed courts to "wiel[d] the First Amendment in . . . an aggressive way" just as the majority does today. *Post*, at 956.

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

For over 40 years, *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209 (1977), struck a stable balance between public employees' First Amendment rights and government entities' interests in running their workforces as they thought proper. Under that decision, a government entity could require public employees to pay a fair share of the cost that a union incurs when negotiating on their behalf over terms of employment. But no part of that fair-share payment could go to any of the union's political or ideological activities.

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That holding fit comfortably with this Court's general framework for evaluating claims that a condition of public employment violates the First Amendment. The Court's decisions have long made plain that government entities have substantial latitude to regulate their employees' speech—especially about terms of employment—in the interest of operating their workplaces effectively. *Abood* allowed governments to do just that. While protecting public employees' expression about non-workplace matters, the decision enabled a government to advance important managerial interests—by ensuring the presence of an exclusive employee representative to bargain with. Far from an "anomaly," *ante*, at 891, the *Abood* regime was a paradigmatic example of how the government can regulate speech in its capacity as an employer.

Not any longer. Today, the Court succeeds in its 6-year campaign to reverse *Abood*. See *Friedrichs* v. *California Teachers Assn.*, 578 U. S. 1 (2016) (*per curiam*); *Harris* v. *Quinn*, 573 U. S. 616 (2014); *Knox* v. *Service Employees*, 567

U. S. 298 (2012). Its decision will have large-scale consequences. Public employee unions will lose a secure source of financial support. State and local governments that thought fair-share provisions furthered their interests will need to find new ways of managing their workforces. Across the country, the relationships of public employees and employers will alter in both predictable and wholly unexpected ways.

Rarely if ever has the Court overruled a decision—let alone one of this import—with so little regard for the usual principles of *stare decisis*. There are no special justifications for reversing *Abood*. It has proved workable. No recent developments have eroded its underpinnings. And it is deeply entrenched, in both the law and the real world. More than 20 States have statutory schemes built on the decision. Those laws underpin thousands of ongoing contracts involving millions of employees. Reliance interests do not come any stronger than those surrounding *Abood*. And likewise, judicial disruption does not get any greater than what the Court does today. I respectfully dissent.

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I

I begin with *Abood*, the 41-year-old precedent the majority overrules. That case involved a union that had been certified as the exclusive representative of Detroit's public school teachers. The union's collective-bargaining agreement with the city included an "agency shop" clause, which required teachers who had not joined the union to pay it "a service charge equal to the regular dues required of [u]nion members." *Abood*, 431 U. S., at 212. A group of non-union members sued over that clause, arguing that it violated the First Amendment.

In considering their challenge, the Court canvassed the purposes of the "agency shop" clause. It was rooted, the Court understood, in the "principle of exclusive union representation"—a "central element" in "industrial relations"

since the New Deal. *Id.*, at 220. Significant benefits, the Court explained, could derive from the "designation of a single [union] representative" for all similarly situated employees in a workplace. *Ibid.* In particular, such arrangements: "avoid[ ] the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment"; "prevent[ ] inter-union rivalries from creating dissension within the work force"; "free[ ] the employer from the possibility of facing conflicting demands from different unions"; and "permit[ ] the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations." *Id.*, at 220–221. As proof, the Court pointed to the example of exclusive-representation arrangements in the private-employment sphere: There, Congress had long thought that such schemes would promote "peaceful labor relations" and "labor stability." *Id.*, at 219, 229. A public employer like Detroit, the Court believed, could reasonably make the same calculation.

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But for an exclusive-bargaining arrangement to work, such an employer often thought, the union needed adequate funding. Because the "designation of a union as exclusive representative carries with it great responsibilities," the Court reasoned, it inevitably also entails substantial costs. *Id.*, at 221. "The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones." *Ibid.* Those activities, the Court noted, require the "expenditure of much time and money"—for example, payment for the "services of lawyers, expert negotiators, economists, and a research staff." *Ibid.* And there is no way to confine the union's services to union members alone (and thus to trim costs) because unions must by law fairly represent all employees in a given bargaining unit—union members and non-members alike. See *ibid.*

With all that in mind, the Court recognized why both a government entity and its union bargaining partner would gravitate toward an agency-fee clause. Those fees, the Court reasoned, "distribute fairly the cost" of collective bargaining "among those who benefit"—that is, *all* employees in the work unit. *Id.*, at 222. And they "counteract[ ] the incentive that employees might otherwise have to become 'free riders.'" *Ibid.* In other words, an agency-fee provision prevents employees from reaping all the "benefits of union representation"—higher pay, a better retirement plan, and so forth—while leaving it to others to bear the costs. *Ibid.* To the Court, the upshot was clear: A government entity could reasonably conclude that such a clause was needed to maintain the kind of exclusive-bargaining arrangement that would facilitate peaceful and stable labor relations.

But the Court acknowledged as well the "First Amendment interests" of dissenting employees. *Ibid.* It recognized that some workers might oppose positions the union takes in collective bargaining, or even "unionism itself." *Ibid.* And still more, it understood that unions often advance "political and ideological" views outside the collective-bargaining context—as when they "contribute to political candidates." *Id.*, at 232, 234. Employees might well object to the use of their money to support such "ideological causes." *Id.*, at 235.

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So the Court struck a balance, which has governed this area ever since. On the one hand, employees could be required to pay fees to support the union in "collective bargaining, contract administration, and grievance adjustment." *Id.*, at 225–226. There, the Court held, the "important government interests" in having a stably funded bargaining partner justify "the impingement upon" public employees' expression. *Id.*, at 225. But on the other hand, employees could not be compelled to fund the union's political and ideological activities. Outside the collective-bargaining sphere, the Court determined, an employee's First Amendment

rights defeated any conflicting government interest. See *id.*, at 234–235.

II

Unlike the majority, I see nothing "questionable" about *Abood*'s analysis. *Ante*, at 891 (quoting *Harris*, 573 U. S., at 635). The decision's account of why some government entities have a strong interest in agency fees (now often called fair-share fees) is fundamentally sound. And the balance *Abood* struck between public employers' interests and public employees' expression is right at home in First Amendment doctrine.

A

Abood's reasoning about governmental interests has three connected parts. First, exclusive-representation arrangements benefit some government entities because they can facilitate stable labor relations. In particular, such arrangements eliminate the potential for inter-union conflict and streamline the process of negotiating terms of employment. See 431 U. S., at 220–221. Second, the government may be unable to avail itself of those benefits unless the single union has a secure source of funding. The various tasks involved in representing employees cost money; if the union doesn't have enough, it can't be an effective employee representative and bargaining partner. See *id.*, at 221. And third, agency fees are often needed to ensure such stable funding. That is because without those fees, employees have every incentive to free ride on the union dues paid by others. See *id.*, at 222.

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The majority does not take issue with the first point. See *ante*, at 916 (It is "not disputed that the State may require that a union serve as exclusive bargaining agent for its employees" in order to advance the State's "interests as an employer"). The majority claims that the second point never appears in *Abood*, but is willing to assume it for the sake of argument. See *ante*, at 914–915; but see *Abood*, 431

U. S., at 221 (The tasks of an exclusive representative "often entail expenditure of much time and money"). So the majority stakes everything on the third point—the conclusion that maintaining an effective system of exclusive representation often entails agency fees. *Ante*, at 896 (It "is simply not true" that exclusive representation and agency fees are "inextricably linked"); see *ante*, at 898.

But basic economic theory shows why a government would think that agency fees are necessary for exclusive representation to work. What ties the two together, as *Abood* recognized, is the likelihood of free-riding when fees are absent. Remember that once a union achieves exclusive-representation status, the law compels it to fairly represent all workers in the bargaining unit, whether or not they join or contribute to the union. See *supra*, at 933. Because of that legal duty, the union cannot give special advantages to its own members. And that in turn creates a collective action problem of nightmarish proportions. Everyone—not just those who oppose the union, but also those who back it—has an economic incentive to withhold dues; only altruism or loyalty—as *against* financial self-interest—can explain why an employee would pay the union for its services. And so emerged *Abood*'s rule allowing fair-share agreements: That rule ensured that a union would receive sufficient funds, despite its legally imposed disability, to effectively carry out its duties as exclusive representative of the government's employees.

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The majority's initial response to this reasoning is simply to dismiss it. "[F]ree-rider arguments," the majority pronounces, "are generally insufficient to overcome First Amendment objections." *Ante*, at 897 (quoting *Knox*, 567 U. S., at 311). "To hold otherwise," it continues, "would have startling consequences" because "[m]any private groups speak out" in ways that will "benefit[ ] nonmembers." *Ante*, at 897. But that disregards the defining characteristic of *this* free-rider argument—that unions, unlike those many other

private groups, must serve members and non-members alike. Groups advocating for "senior citizens or veterans" (to use the majority's examples) have no legal duty to provide benefits to all those individuals: They can spur people to pay dues by conferring all kinds of special advantages on their dues-paying members. Unions are—by law—in a different position, as this Court has long recognized. See, *e. g.*, *Machinists* v. *Street*, 367 U. S. 740, 762 (1961). Justice Scalia, responding to the same argument as the majority's, may have put the point best. In a way that is true of no other private group, the "law *requires* the union to carry" non-members—"indeed, requires the union to *go out of its way* to benefit [them], even at the expense of its other interests." *Lehnert* v. *Ferris Faculty Assn.*, 500 U. S. 507, 556 (1991) (opinion concurring in judgment in part and dissenting in part). That special feature was what justified *Abood*: "Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them." 500 U. S., at 556.

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The majority's fallback argument purports to respond to the distinctive position of unions, but still misses *Abood*'s economic insight. Here, the majority delivers a four-page exegesis on why unions will seek to serve as an exclusive-bargaining representative even "if they are not given agency fees." *Ante*, at 898; see *ante*, at 898–900. The gist of the account is that "designation as the exclusive representative confers many benefits," which outweigh the costs of providing services to non-members. *Ante*, at 898. But that response avoids the key question, which is whether unions without agency fees will be *able to* (not whether they will *want to*) carry on as an effective exclusive representative. And as to that question, the majority again fails to reckon with how economically rational actors behave—in public as well as private workplaces. Without a fair-share agreement, the class of union non-members spirals upward. Employees (including those who love the union) realize that they

can get the same benefits even if they let their memberships expire. And as more and more stop paying dues, those left must take up the financial slack (and anyway, begin to feel like suckers)—so they too quit the union. See Ichniowski & Zax, Right-to-Work Laws, Free Riders, and Unionization in the Local Public Sector, 9 J. Labor Economics 255, 257 (1991).[1] And when the vicious cycle finally ends, chances are that the union will lack the resources to effectively perform the responsibilities of an exclusive representative—or, in the worst case, to perform them at all. The result is to frustrate the interests of every government entity that thinks a strong exclusive-representation scheme will promote stable labor relations.

Of course, not all public employers will share that view. Some would rather not bargain with an exclusive representative. Others would prefer that representative to be poorly funded—to serve more as a front than an effectual bargaining partner. But as reflected in the number of fair-share statutes and contracts across the Nation, see *supra*, at 932, many government entities think that effective exclusive representation makes for good labor relations—and recognize, just as *Abood* did, that representation of that kind often de-

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[1] The majority relies on statistics from the federal workforce (where agency fees are unlawful) to suggest that public employees do not act in accord with economic logic. See *ante*, at 896. But first, many fewer federal employees pay dues than have voted for a union to represent them, indicating that free-riding in fact pervades the federal sector. See, *e. g.*, R. Kearney & P. Mareschal, Labor Relations in the Public Sector 26 (5th ed. 2014). And second, that sector is not typical of other public workforces. Bargaining in the federal sphere is limited; most notably, it does not extend to wages and benefits. See *Fort Stewart Schools* v. *FLRA*, 495 U. S. 641, 649 (1990). That means union operating expenses are lower than they are elsewhere. And the gap further widens because the federal sector uses large, often national, bargaining units that provide unions with economies of scale. See Brief for International Brotherhood of Teamsters as *Amicus Curiae* 7. For those reasons, the federal workforce is the wrong place to look for meaningful empirical evidence on the issues here.

pends on agency fees. See, *e. g.*, *Harris*, 573 U. S., at 679–680 (KAGAN, J., dissenting) (describing why Illinois thought that bargaining with an adequately funded exclusive representative of in-home caregivers would enable the State to better serve its disabled citizens). *Abood* respected that state interest; today's majority fails even to understand it. Little wonder that the majority's First Amendment analysis, which involves assessing the government's reasons for imposing agency fees, also comes up short.

B

1

In many cases over many decades, this Court has addressed how the First Amendment applies when the government, acting not as sovereign but as employer, limits its workers' speech. Those decisions have granted substantial latitude to the government, in recognition of its significant interests in managing its workforce so as to best serve the public. *Abood* fit neatly with that caselaw, in both reasoning and result. Indeed, its reversal today creates a significant anomaly—an exception, applying to union fees alone, from the usual rules governing public employees' speech.

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"Time and again our cases have recognized that the Government has a much freer hand" in dealing with its employees than with "citizens at large." *NASA* v. *Nelson*, 562 U. S. 134, 148 (2011) (internal quotation marks omitted). The government, we have stated, needs to run "as effectively and efficiently as possible." *Engquist* v. *Oregon Dept. of Agriculture*, 553 U. S. 591, 598 (2008) (internal quotation marks omitted). That means it must be able, much as a private employer is, to manage its workforce as it thinks fit. A public employee thus must submit to "certain limitations on his or her freedom." *Garcetti* v. *Ceballos*, 547 U. S. 410, 418 (2006). Government workers, of course, do not wholly "lose their constitutional rights when they accept their positions."

Engquist, 553 U. S., at 600. But under our precedent, their rights often yield when weighed "against the realities of the employment context." *Ibid.* If it were otherwise—if every employment decision were to "bec[o]me a constitutional matter"—"the Government could not function." *NASA*, 562 U. S., at 149 (internal quotation marks omitted).

Those principles apply with full force when public employees' expressive rights are at issue. As we have explained: "Government employers, like private employers, need a significant degree of control over their employees' words" in order to "efficient[ly] provi[de] public services." *Garcetti*, 547 U. S., at 418. Again, significant control does not mean absolute authority. In particular, the Court has guarded against government efforts to "leverage the employment relationship" to shut down its employees' speech as private citizens. *Id.*, at 419. But when the government imposes speech restrictions relating to workplace operations, of the kind a private employer also would, the Court reliably upholds them. See, *e. g.*, *id.*, at 426; *Connick* v. *Myers*, 461 U. S. 138, 154 (1983).

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In striking the proper balance between employee speech rights and managerial interests, the Court has long applied a test originating in *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563 (1968). That case arose out of an individual employment action: the firing of a public school teacher. As we later described the *Pickering* inquiry, the Court first asks whether the employee "spoke as a citizen on a matter of public concern." *Garcetti*, 547 U. S., at 418. If she did not—but rather spoke as an employee on a workplace matter—she has no "possibility of a First Amendment claim": A public employer can curtail her speech just as a private one could. *Ibid.* But if she did speak as a citizen on a public matter, the public employer must demonstrate "an adequate justification for treating the employee differently from any other member of the general public." *Ibid.* The government, that is, needs to show

that legitimate workplace interests lay behind the speech regulation.

Abood coheres with that framework. The point here is not, as the majority suggests, that *Abood* is an overt, one-to-one "application of *Pickering*." *Ante*, at 909. It is not. *Abood* related to a municipality's labor policy, and so the Court looked to prior cases about unions, not to *Pickering*'s analysis of an employee's dismissal. (And truth be told, *Pickering* was not at that time much to look at: What the Court now thinks of as the two-step *Pickering* test, as the majority's own citations show, really emerged from *Garcetti* and *Connick*—two cases post-dating *Abood*. See *ante*, at 905.)[2] But *Abood* and *Pickering* raised variants of the same basic issue: the extent of the government's authority to make employment decisions affecting expression. And in both, the Court struck the same basic balance, enabling the government to curb speech when—but only when—the regulation was designed to protect its managerial interests. Consider the parallels:

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Like *Pickering*, *Abood* drew the constitutional line by analyzing the connection between the government's managerial interests and different kinds of expression. The Court first discussed the use of agency fees to subsidize the speech involved in "collective bargaining, contract administration, and grievance adjustment." 431 U. S., at 225–226. It understood that expression (really, who would not?) as intimately tied to the workplace and employment relationship. The speech was about "working conditions, pay, discipline, promotions, leave, vacations, and terminations," *Borough of Duryea* v. *Guarnieri*, 564 U. S. 379, 391 (2011); the speech

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[2] For those reasons, it is not surprising that the "categorization schemes" in *Abood* and *Pickering* are not precisely coterminous. *Ante*, at 909. The two cases are fraternal rather than identical twins—both standing for the proposition that the government receives great deference when it regulates speech as an employer rather than as a sovereign. See *infra* this page and 942.

occurred (almost always) in the workplace; and the speech was directed (at least mainly) to the employer. As noted earlier, *Abood* described the managerial interests of employers in channeling all that speech through a single union. See 431 U. S., at 220–222, 224–226; *supra*, at 932–933. And so *Abood* allowed the government to mandate fees for collective bargaining—just as *Pickering* permits the government to regulate employees' speech on similar workplace matters. But still, *Abood* realized that compulsion could go too far. The Court barred the use of fees for union speech supporting political candidates or "ideological causes." 431 U. S., at 235. That speech, it understood, was "unrelated to [the union's] duties as exclusive bargaining representative," but instead was directed at the broader public sphere. *Id.*, at 234. And for that reason, the Court saw no legitimate managerial interests in compelling its subsidization. The employees' First Amendment claims would thus prevail—as, again, they would have under *Pickering*.

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Abood thus dovetailed with the Court's usual attitude in First Amendment cases toward the regulation of public employees' speech. That attitude is one of respect—even solicitude—for the government's prerogatives as an employer. So long as the government is acting as an employer—rather than exploiting the employment relationship for other ends—it has a wide berth, comparable to that of a private employer. And when the regulated expression concerns the terms and conditions of employment—the very stuff of the employment relationship—the government really cannot lose. There, managerial interests are obvious and strong. And so government employees are . . . just employees, even though they work for the government. Except that today the government does lose, in a first for the law. Now, the government can constitutionally adopt all policies regulating core workplace speech in pursuit of managerial goals—save this single one.

The majority claims it is not making a special and unjustified exception. It offers two main reasons for declining to apply here our usual deferential approach, as exemplified in *Pickering*, to the regulation of public employee speech. First, the majority says, this case involves a "blanket" policy rather than an individualized employment decision, so *Pickering* is a "painful fit." *Ante*, at 906–907. Second, the majority asserts, the regulation here involves compelling rather than restricting speech, so the pain gets sharper still. See *ante*, at 908. And finally, the majority claims that even under the solicitous *Pickering* standard, the government should lose, because the speech here involves a matter of public concern and the government's managerial interests do not justify its regulation. See *ante*, at 910–914. The majority goes wrong at every turn.

First, this Court has applied the same basic approach whether a public employee challenges a general policy or an individualized decision. Even the majority must concede that "we have sometimes looked to *Pickering* in considering general rules that affect broad categories of employees." *Ante*, at 907. In fact, the majority cannot come up with any case in which we have *not* done so. All it can muster is one case in which *while* applying the *Pickering* test to a broad rule—barring any federal employee from accepting any payment for any speech or article on any topic—the Court noted that the policy's breadth would count against the government at the test's second step. See *United States* v. *Treasury Employees*, 513 U. S. 454 (1995). Which is completely predictable. The inquiry at that stage, after all, is whether the government has an employment-related interest in going however far it has gone—and in *Treasury Employees*, the government had indeed gone far. (The Court ultimately struck down the rule because it applied to speech in which the government had no identifiable managerial interest.

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See *id.*, at 470, 477.) Nothing in *Treasury Employees* suggests that the Court defers only to ad hoc actions, and not to general rules, about public employee speech. That would be a perverse regime, given the greater regularity of rulemaking and the lesser danger of its abuse. So I would wager a small fortune that the next time a general rule governing public employee speech comes before us, we will dust off *Pickering*.

Second, the majority's distinction between compelling and restricting speech also lacks force. The majority posits that compelling speech always works a greater injury, and so always requires a greater justification. See *ante*, at 893. But the only case the majority cites for that reading of our precedent is possibly (thankfully) the most exceptional in our First Amendment annals: It involved the state forcing children to swear an oath contrary to their religious beliefs. See *ibid.* (quoting *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943)). Regulations challenged as compelling expression do not usually look anything like that—and for that reason, the standard First Amendment rule is that the "difference between compelled speech and compelled silence" is "without constitutional significance." *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 796 (1988); see *Wooley* v. *Maynard*, 430 U. S. 705, 714 (1977) (referring to "[t]he right to speak and the right to refrain from speaking" as "complementary components" of the First Amendment). And if anything, the First Amendment scales tip the opposite way when (as here) the government is not compelling actual speech, but instead compelling a subsidy that others will use for expression. See Brief for Eugene Volokh et al. as *Amici Curiae* 4–5 (offering many examples to show that the First Amendment "simply do[es] not guarantee that one's hard-earned dollars will never be spent on speech one disapproves of").[3] So when a government mandates a speech

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[3] That's why this Court has blessed the constitutionality of compelled speech subsidies in a variety of cases beyond *Abood*, involving a variety of contexts beyond labor relations. The list includes mandatory fees im-

subsidy from a public employee—here, we might think of it as levying a tax to support collective bargaining—it should get at least as much deference as when it restricts the employee's speech. As this case shows, the former may advance a managerial interest as well as the latter—in which case the government's "freer hand" in dealing with its employees should apply with equal (if not greater) force. *NASA*, 562 U. S., at 148.

Third and finally, the majority errs in thinking that under the usual deferential approach, the government should lose this case. The majority mainly argues here that, at *Pickering*'s first step, "union speech in collective bargaining" is a "matter of great public concern" because it "affect[s] how public money is spent" and addresses "other important matters" like teacher merit pay or tenure. *Ante*, at 910–912 (internal quotation marks omitted). But to start, the majority misunderstands the threshold inquiry set out in *Pickering* and later cases. The question is not, as the majority seems to think, whether the public is, or should be, interested in a government employee's speech. Instead, the question is whether that speech is about and directed to the workplace—as contrasted with the broader public square. *Treasury Employees* offers the Court's fullest explanation. The Court held there that the government's policy prevented employees from speaking as "citizen[s]" on "matters of public concern." 513 U. S., at 466 (quoting *Pickering*, 391 U. S., at 568). Why? Because the speeches and articles "were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to their Government employment." 513 U. S., at 466; see *id.*, at 465, 470 (repeating that analysis twice more). The Court could not

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posed on state bar members (for professional expression); university students (for campus events); and fruit processors (for generic advertising). See *Keller* v. *State Bar of Cal.*, 496 U. S. 1, 14 (1990); *Board of Regents of Univ. of Wis. System* v. *Southworth*, 529 U. S. 217, 233 (2000); *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U. S. 457, 474 (1997); see also *infra*, at 949–950.

have cared less whether the speech at issue was "important." *Ante*, at 912. It instead asked whether the speech was truly *of* the workplace—addressed *to* it, made *in* it, and (most of all) *about* it.

Consistent with that focus, speech about the terms and conditions of employment—the essential stuff of collective bargaining—has never survived *Pickering*'s first step. This Court has rejected all attempts by employees to make a "federal constitutional issue" out of basic "employment matters, including working conditions, pay, discipline, promotions, leave, vacations, and terminations." *Guarnieri*, 564 U. S., at 391; see *Board of Comm'rs, Wabaunsee Cty.* v. *Umbehr*, 518 U. S. 668, 675 (1996) (stating that public employees' "speech on merely private employment matters is unprotected"). For that reason, even the Justices who originally objected to *Abood* conceded that the use of agency fees for bargaining on "economic issues" like "salaries and pension benefits" would not raise significant First Amendment questions. 431 U. S., at 263, n. 16 (Powell, J., concurring in judgment). Of course, most of those issues have budgetary consequences: They "affect[ ] how public money is spent." *Ante*, at 912. And some raise important non-budgetary disputes; teacher merit pay is a good example, see *ante*, at 913. But arguing about the terms of employment is still arguing about the terms of employment: The workplace remains both the context and the subject matter of the expression. If all that speech really counted as "of public concern," as the majority suggests, the mass of public employees' complaints (about pay and benefits and workplace policy and such) *would* become "federal constitutional issue[s]." *Guarnieri*, 564 U. S., at 391. And contrary to decades' worth of precedent, government employers would then have far less control over their workforces than private employers do. See *supra*, at 939–941.

Consider an analogy, not involving union fees: Suppose a government entity disciplines a group of (non-unionized) em-

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ployees for agitating for a better health plan at various inopportune times and places. The better health plan will of course drive up public spending; so according to the majority's analysis, the employees' speech satisfies *Pickering*'s "public concern" test. Or similarly, suppose a public employer penalizes a group of (non-unionized) teachers who protest merit pay in the school cafeteria. Once again, the majority's logic runs, the speech is of "public concern," so the employees have a plausible First Amendment claim. (And indeed, the majority appears to concede as much, by asserting that the results in these hypotheticals should turn on various "factual detail[s]" relevant to the interest balancing that occurs at the *Pickering* test's *second* step. *Ante*, at 915, n. 23.) But in fact, this Court has always understood such cases to end at *Pickering*'s *first* step: If an employee's speech is about, in, and directed to the workplace, she has no "possibility of a First Amendment claim." *Garcetti*, 547 U. S., at 418; see *supra*, at 940. So take your pick. Either the majority is exposing government entities across the country to increased First Amendment litigation and liability—and thus preventing them from regulating their workforces as private employers could. Or else, when actual cases of this kind come around, we will discover that today's majority has crafted a "unions only" carve-out to our employee-speech law.

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What's more, the government should prevail even if the speech involved in collective bargaining satisfies *Pickering*'s first part. Recall that the next question is whether the government has shown "an adequate justification for treating the employee differently from any other member of the general public." *Garcetti*, 547 U. S., at 418; *supra*, at 940. That inquiry is itself famously respectful of government interests. This Court has reversed the government only when it has tried to "leverage the employment relationship" to achieve an outcome unrelated to the workplace's "effective functioning." *Garcetti*, 547 U. S., at 419; *Rankin* v. *McPher-*

son, 483 U. S. 378, 388 (1987). Nothing like that is true here. As *Abood* described, many government entities have found agency fees the best way to ensure a stable and productive relationship with an exclusive-bargaining agent. See 431 U. S., at 220–221, 224–226; *supra*, at 933–934. And here, Illinois and many governmental *amici* have explained again how agency fees advance their workplace goals. See Brief for State Respondents 12, 36; Brief for Governor Tom Wolf et al. as *Amici Curiae* 21–33. In no other employee-speech case has this Court dismissed such work-related interests, as the majority does here. See *supra*, at 936–939 (discussing the majority's refusal to engage with the logic of the State's position). Time and again, the Court has instead respected and acceded to those interests—just as *Abood* did.

The key point about *Abood* is that it fit naturally with this Court's consistent teaching about the permissibility of regulating public employees' speech. The Court allows a government entity to regulate that expression in aid of managing its workforce to effectively provide public services. That is just what a government aims to do when it enforces a fair-share agreement. And so, the key point about today's decision is that it creates an unjustified hole in the law, applicable to union fees alone. This case is *sui generis* among those addressing public employee speech—and will almost surely remain so.

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III

But the worse part of today's opinion is where the majority subverts all known principles of *stare decisis*. The majority makes plain, in the first 33 pages of its decision, that it believes *Abood* was wrong.[4] But even if that were true (which it is not), it is not enough. "Respecting *stare decisis* means sticking to some wrong decisions." *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. 446, 455 (2015). Any departure

[4] And then, after ostensibly turning to *stare decisis*, the majority spends another four pages insisting that *Abood* was "not well reasoned," which is just more of the same. *Ante*, at 921; see *ante*, at 917–921.

from settled precedent (so the Court has often stated) demands a "special justification—over and above the belief that the precedent was wrongly decided." *Id.*, at 456 (internal quotation marks omitted); see, *e. g.*, *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984). And the majority does not have anything close. To the contrary: All that is "special" in this case—especially the massive reliance interests at stake—demands retaining *Abood*, beyond even the normal precedent.

Consider first why these principles about precedent are so important. *Stare decisis*—"the idea that today's Court should stand by yesterday's decisions—is a foundation stone of the rule of law." *Kimble*, 576 U. S., at 455 (quoting *Michigan* v. *Bay Mills Indian Community*, 572 U. S. 782, 798 (2014)). It "promotes the evenhanded, predictable, and consistent development" of legal doctrine. *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991). It fosters respect for and reliance on judicial decisions. See *ibid.* And it "contributes to the actual and perceived integrity of the judicial process," *ibid.*, by ensuring that decisions are "founded in the law rather than in the proclivities of individuals," *Vasquez* v. *Hillery*, 474 U. S. 254, 265 (1986).

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And *Abood* is not just any precedent: It is embedded in the law (not to mention, as I'll later address, in the world) in a way not many decisions are. Over four decades, this Court has cited *Abood* favorably many times, and has affirmed and applied its central distinction between the costs of collective bargaining (which the government can charge to all employees) and those of political activities (which it cannot). See, *e. g.*, *Locke* v. *Karass*, 555 U. S. 207, 213–214 (2009); *Lehnert*, 500 U. S., at 519; *Teachers* v. *Hudson*, 475 U. S. 292, 301–302 (1986); *Ellis* v. *Railway Clerks*, 466 U. S. 435, 455–457 (1984). Reviewing those decisions not a decade ago, this Court—unanimously—called the *Abood* rule "a general First Amendment principle." *Locke*, 555 U. S., at 213. And indeed, the Court has relied on that rule when deciding cases involving compelled speech subsidies outside the labor

sphere—cases today's decision does not question. See, *e. g.*, *Keller* v. *State Bar of Cal.*, 496 U. S. 1, 9–17 (1990) (state bar fees); *Board of Regents of Univ. of Wis. System* v. *Southworth*, 529 U. S. 217, 230–232 (2000) (public university student fees); *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U. S. 457, 471–473 (1997) (commercial advertising assessments); see also n. 3, *supra*.

Ignoring our repeated validation of *Abood*, the majority claims it has become "an outlier among our First Amendment cases." *Ante*, at 924. That claim fails most spectacularly for reasons already discussed: *Abood* coheres with the *Pickering* approach to reviewing regulation of public employees' speech. See *supra*, at 941–942. Needing to stretch further, the majority suggests that *Abood* conflicts with "our political patronage decisions." *Ante*, at 926. But in fact those decisions strike a balance much like *Abood*'s. On the one hand, the Court has enabled governments to compel policymakers to support a political party, because that requirement (like fees for collective bargaining) can reasonably be thought to advance the interest in workplace effectiveness. See *Elrod* v. *Burns*, 427 U. S. 347, 366–367 (1976); *Branti* v. *Finkel*, 445 U. S. 507, 517 (1980). On the other hand, the Court has barred governments from extending that rule to non-policymaking employees because that application (like fees for political campaigns) can't be thought to promote that interest, see *Elrod*, 427 U. S., at 366; the government is instead trying to "leverage the employment relationship" to achieve other goals, *Garcetti*, 547 U. S., at 419. So all that the majority has left is *Knox* and *Harris*. See *ante*, at 925. Dicta in those recent decisions indeed began the assault on *Abood* that has culminated today. But neither actually addressed the extent to which a public employer may regulate its own employees' speech. Relying on them is bootstrapping—and mocking *stare decisis*. Don't like a decision? Just throw some gratuitous criticisms into a couple of opinions and a few years later point to them as "special justifications."

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The majority is likewise wrong to invoke "workability" as a reason for overruling *Abood*. *Ante*, at 921. Does *Abood* require drawing a line? Yes, between a union's collective-bargaining activities and its political activities. Is that line perfectly and pristinely "precis[e]," as the majority demands? *Ante*, at 921. Well, not quite that—but as exercises of constitutional linedrawing go, *Abood* stands well above average. In the 40 years since *Abood*, this Court has had to resolve only a handful of cases raising questions about the distinction. To my knowledge, the circuit courts are not divided on any classification issue; neither are they issuing distress signals of the kind that sometimes prompt the Court to reverse a decision. See, *e. g.*, *Johnson* v. *United States*, 576 U. S. 591 (2015) (overruling precedent because of frequent splits and mass confusion). And that tranquility is unsurprising: There may be some gray areas (there always are), but in the mine run of cases, everyone knows the difference between politicking and collective bargaining. The majority cites some disagreement in two of the classification cases this Court decided—as if non-unanimity among Justices were something startling. And it notes that a dissenter in one of those cases called the Court's approach "malleable" and "not principled," *ante*, at 921—as though those weren't stock terms in dissenting vocabulary. See, *e. g.*, *Murr* v. *Wisconsin*, 582 U. S. 383, 407 (2017) (ROBERTS, C. J., dissenting); *Dietz* v. *Bouldin*, 579 U. S. 40, 55 (2016) (THOMAS, J., dissenting); *Alabama Legislative Black Caucus* v. *Alabama*, 575 U. S. 254, 294 (2015) (Scalia, J., dissenting). As I wrote in *Harris* a few Terms ago: "If the kind of handwringing about blurry lines that the majority offers were enough to justify breaking with precedent, we might have to discard whole volumes of the U. S. Reports." 573 U. S., at 671.

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And in any event, one *stare decisis* factor—reliance—dominates all others here and demands keeping *Abood*. *Stare decisis*, this Court has held, "has added force when the legislature, in the public sphere, and citizens, in the private

realm, have acted in reliance on a previous decision." *Hilton* v. *South Carolina Public Railways Comm'n*, 502 U. S. 197, 202 (1991). That is because overruling a decision would then "require an extensive legislative response" or "dislodge settled rights and expectations." *Ibid.* Both will happen here: The Court today wreaks havoc on entrenched legislative and contractual arrangements.

Over 20 States have by now enacted statutes authorizing fair-share provisions. To be precise, 22 States, the District of Columbia, and Puerto Rico—plus another two States for police and firefighter unions. Many of those States have multiple statutory provisions, with variations for different categories of public employees. See, *e. g.*, Brief for State of California as *Amicus Curiae* 24–25. Every one of them will now need to come up with new ways—elaborated in new statutes—to structure relations between government employers and their workers. The majority responds, in a footnote no less, that this is of no proper concern to the Court. See *ante*, at 928–929, n. 27. But in fact, we have weighed heavily against "abandon[ing] our settled jurisprudence" that "[s]tate legislatures have relied upon" it and would have to "reexamine [and amend] their statutes" if it were overruled. *Allied-Signal, Inc.* v. *Director, Div. of Taxation*, 504 U. S. 768, 785 (1992); *Hilton*, 502 U. S., at 203.

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Still more, thousands of current contracts covering millions of workers provide for agency fees. Usually, this Court recognizes that "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights." *Payne*, 501 U. S., at 828. Not today. The majority undoes bargains reached all over the country.[5] It prevents the parties from fulfilling other commitments they have made based on those agreements. It forces the parties—immediately—to renegotiate once-settled terms

[5] Indeed, some agency-fee provisions, if canceled, could bring down entire contracts because they lack severability clauses. See *ante*, at 928 (noting that unions could have negotiated for that result); Brief for Governor Tom Wolf et al. as *Amici Curiae* 11.

and create new tradeoffs. It does so knowing that many of the parties will have to revise (or redo) multiple contracts simultaneously. (New York City, for example, has agreed to agency fees in 144 contracts with 97 public-sector unions. See Brief for New York City Municipal Labor Committee as *Amicus Curiae* 4.) It does so knowing that those renegotiations will occur in an environment of legal uncertainty, as state governments scramble to enact new labor legislation. See *supra*, at 952. It does so with no real clue of what will happen next—of how its action will alter public-sector labor relations. It does so even though the government services affected—policing, firefighting, teaching, transportation, sanitation (and more)—affect the quality of life of tens of millions of Americans.

The majority asserts that no one should care much because the canceled agreements are "of rather short duration" and would "expire on their own in a few years' time." *Ante*, at 927, 928. But to begin with, that response ignores the substantial time and effort that state legislatures will have to devote to revamping their statutory schemes. See *supra*, at 952. And anyway, it misunderstands the nature of contract negotiations when the parties have a continuing relationship. The parties, in renewing an old collective-bargaining agreement, don't start on an empty page. Instead, various "long-settled" terms—like fair-share provisions—are taken as a given. Brief for Governor Tom Wolf et al. 11; see Brief for New York City Sergeants Benevolent Assn. as *Amicus Curiae* 18. So the majority's ruling does more than advance by a few years a future renegotiation (though even that would be significant). In most cases, it commands new bargaining over how to replace a term that the parties never expected to change. And not just new bargaining; given the interests at stake, complicated and possibly contentious bargaining as well. See Brief for Governor Tom Wolf et al. 11.[6]

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[6] In a single, cryptic sentence, the majority also claims that arguments about reliance "based on [*Abood*'s] clarity are misplaced" because *Abood* did not provide a "clear or easily applicable standard" to separate fees for

The majority, though, offers another reason for not worrying about reliance: The parties, it says, "have been on notice for years regarding this Court's misgivings about *Abood*." *Ante*, at 927. Here, the majority proudly lays claim to its 6-year crusade to ban agency fees. In *Knox*, the majority relates, it described *Abood* as an "anomaly." *Ante*, at 927 (quoting 567 U. S., at 311). Then, in *Harris*, it "cataloged *Abood*'s many weaknesses." *Ante*, at 927. Finally, in *Friedrichs*, "we granted a petition for certiorari asking us to" reverse *Abood*, but found ourselves equally divided. *Ante*, at 927. "During this period of time," the majority concludes, public-sector unions "must have understood that the constitutionality of [an agency-fee] provision was uncertain." *Ibid.* And so, says the majority, they should have structured their affairs accordingly.

But that argument reflects a radically wrong understanding of how *stare decisis* operates. Justice Scalia once confronted a similar argument for "disregard[ing] reliance interests" and showed how antithetical it was to rule-of-law principles. *Quill Corp.* v. *North Dakota*, 504 U. S. 298, 320 (1992) (opinion concurring in part and concurring in judgment). He noted first what we always tell lower courts: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [they] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id.*, at 321 (quoting *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477, 484 (1989); some alterations omitted). That instruction, Justice Scalia explained, was "incompatible" with an expectation that "pri-

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collective bargaining from those for political activities. *Ante*, at 927. But to begin, the standard for separating those activities was clear and workable, as I have already shown. See *supra*, at 951. And in any event, the reliance *Abood* engendered was based not on the clarity of that line, but on the clarity of its holding that governments and unions could generally agree to fair-share arrangements.

vate parties anticipate our overrulings." 504 U. S., at 321. He concluded: "[R]eliance upon a square, unabandoned holding of the Supreme Court is *always* justifiable reliance." *Ibid.* *Abood*'s holding was square. It was unabandoned before today. It was, in other words, the law—however much some were working overtime to make it not. Parties, both unions and governments, were thus justified in relying on it. And they did rely, to an extent rare among our decisions. To dismiss the overthrowing of their settled expectations as entailing no more than some "adjustments" and "unpleasant transition costs," *ante*, at 929, is to trivialize *stare decisis*.

IV

There is no sugarcoating today's opinion. The majority overthrows a decision entrenched in this Nation's law—and in its economic life—for over 40 years. As a result, it prevents the American people, acting through their state and local officials, from making important choices about workplace governance. And it does so by weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy.

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Departures from *stare decisis* are supposed to be "exceptional action[s]" demanding "special justification," *Rumsey*, 467 U. S., at 212—but the majority offers nothing like that here. In contrast to the vigor of its attack on *Abood*, the majority's discussion of *stare decisis* barely limps to the finish line. And no wonder: The standard factors this Court considers when deciding to overrule a decision all cut one way. *Abood*'s legal underpinnings have not eroded over time: *Abood* is now, as it was when issued, consistent with this Court's First Amendment law. *Abood* provided a workable standard for courts to apply. And *Abood* has generated enormous reliance interests. The majority has overruled *Abood* for no exceptional or special reason, but because it never liked the decision. It has overruled *Abood* because it wanted to.

Because, that is, it wanted to pick the winning side in what should be—and until now, has been—an energetic policy debate. Some state and local governments (and the constituents they serve) think that stable unions promote healthy labor relations and thereby improve the provision of services to the public. Other state and local governments (and their constituents) think, to the contrary, that strong unions impose excessive costs and impair those services. Americans have debated the pros and cons for many decades—in large part, by deciding whether to use fair-share arrangements. Yesterday, 22 States were on one side, 28 on the other (ignoring a couple of in-betweeners). Today, that healthy—that democratic—debate ends. The majority has adjudged who should prevail. Indeed, the majority is bursting with pride over what it has accomplished: Now those 22 States, it crows, "can follow the model of the federal government and 28 other States." *Ante,* at 928–929, n. 27.

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And maybe most alarming, the majority has chosen the winners by turning the First Amendment into a sword, and using it against workaday economic and regulatory policy. Today is not the first time the Court has wielded the First Amendment in such an aggressive way. See, *e. g.*, *National Institute of Family and Life Advocates* v. *Becerra*, 585 U. S. 755 (2018) (invalidating a law requiring medical and counseling facilities to provide relevant information to users); *Sorrell* v. *IMS Health Inc.*, 564 U. S. 552 (2011) (striking down a law that restricted pharmacies from selling various data). And it threatens not to be the last. Speech is everywhere—a part of every human activity (employment, health care, securities trading, you name it). For that reason, almost all economic and regulatory policy affects or touches speech. So the majority's road runs long. And at every stop are black-robed rulers overriding citizens' choices. The First Amendment was meant for better things. It was meant not to undermine but to protect democratic governance—including over the role of public-sector unions.

Syllabus

SAUSE *v.* BAUER ET AL.

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

No. 17–742. Decided June 28, 2018

Two police officers gained entry to petitioner's apartment while responding to a noise complaint. Petitioner alleged the officers engaged in abusive conduct and ordered her to stop when she knelt and began to pray. Petitioner filed a *pro se* complaint pursuant to 42 U. S. C. § 1983 asserting violations of her First and Fourth Amendment rights. The District Court granted defendants' motion to dismiss for failure to state a claim on which relief could be granted. Petitioner's sole argument on appeal was that her free exercise rights were violated by the two officers who entered her home. The Court of Appeals for the Tenth Circuit affirmed the dismissal, concluding that the officers were entitled to qualified immunity.

Held: Neither the free exercise issue nor the officers' entitlement to qualified immunity can be resolved against petitioner consistent with the requirement to liberally construe allegations in a *pro se* complaint. While the First Amendment protects the right to pray, a police officer may lawfully prevent a person from praying at a particular time and place. Here, the officer's order to stop praying is alleged to have occurred during the course of investigative conduct that implicates Fourth Amendment rights. Petitioner's complaint contains no express allegations regarding whether the police officers were in petitioner's apartment based on her consent, whether they had some other ground consistent with the Fourth Amendment for entering and remaining there, or whether their entry or continued presence was unlawful. Her complaint does not state what, if anything, the officers wanted her to do at the time when she was allegedly told to stop praying. The analysis of petitioner's free exercise claim depends on these issues. Although petitioner elected on appeal not to pursue an independent Fourth Amendment claim, her First Amendment claim demanded consideration of the ground on which the officers were present in the apartment and the nature of any legitimate law enforcement interests that might have justified an order to stop praying at the specific time in question. Without considering these matters, neither the free exercise issue nor the officers' entitlement to qualified immunity can be resolved.

Certiorari granted; 859 F. 3d 1270, reversed and remanded.

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PER CURIAM.

Petitioner Mary Ann Sause, proceeding *pro se*, filed this action under Rev. Stat. 1979, 42 U. S. C. § 1983, and named as defendants past and present members of the Louisburg, Kansas, police department, as well as the current mayor and a former mayor of the town. The centerpiece of her complaint was the allegation that two of the town's police officers visited her apartment in response to a noise complaint, gained admittance to her apartment, and then proceeded to engage in a course of strange and abusive conduct, before citing her for disorderly conduct and interfering with law enforcement. Among other things, she alleged that at one point she knelt and began to pray but one of the officers ordered her to stop. She claimed that a third officer refused to investigate her complaint that she had been assaulted by residents of her apartment complex and had threatened to issue a citation if she reported this to another police department. In addition, she alleged that the police chief failed to follow up on a promise to investigate the officers' conduct and that the present and former mayors were aware of unlawful conduct by the town's police officers.

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Petitioner's complaint asserted a violation of her First Amendment right to the free exercise of religion and her Fourth Amendment right to be free of any unreasonable search or seizure. The defendants moved to dismiss the complaint for failure to state a claim on which relief may be granted, arguing that the defendants were entitled to qualified immunity. Petitioner then moved to amend her complaint, but the District Court denied that motion and granted the motion to dismiss.

On appeal, petitioner, now represented by counsel, argued only that her free exercise rights were violated by the two officers who entered her home. The Court of Appeals for the Tenth Circuit affirmed the decision of the District Court, concluding that the officers were entitled to qualified immunity. 859 F. 3d 1270 (2017). Chief Judge Tymkovich filed a

concurring opinion. While agreeing with the majority regarding petitioner's First Amendment claim, he noted that petitioner's "allegations fit more neatly in the Fourth Amendment context." *Id.*, at 1279. He also observed that if the allegations in the complaint are true, the conduct of the officers "should be condemned," and that if the allegations are untrue, petitioner had "done the officers a grave injustice." *Ibid.*

The petition filed in this Court contends that the Court of Appeals erred in holding that the officers who visited petitioner's home are entitled to qualified immunity. The petition argues that it was clearly established that law enforcement agents violate a person's right to the free exercise of religion if they interfere, without any legitimate law enforcement justification, when a person is at prayer. The petition further maintains that the absence of a prior case involving the unusual situation alleged to have occurred here does not justify qualified immunity.

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There can be no doubt that the First Amendment protects the right to pray. Prayer unquestionably constitutes the "exercise" of religion. At the same time, there are clearly circumstances in which a police officer may lawfully prevent a person from praying at a particular time and place. For example, if an officer places a suspect under arrest and orders the suspect to enter a police vehicle for transportation to jail, the suspect does not have a right to delay that trip by insisting on first engaging in conduct that, at another time, would be protected by the First Amendment. When an officer's order to stop praying is alleged to have occurred during the course of investigative conduct that implicates Fourth Amendment rights, the First and Fourth Amendment issues may be inextricable.

That is the situation here. As the case comes before us, it is unclear whether the police officers were in petitioner's apartment at the time in question based on her consent, whether they had some other ground consistent with the

Fourth Amendment for entering and remaining there, or whether their entry or continued presence was unlawful. Petitioner's complaint contains no express allegations on these matters. Nor does her complaint state what, if anything, the officers wanted her to do at the time when she was allegedly told to stop praying. Without knowing the answers to these questions, it is impossible to analyze petitioner's free exercise claim.

In considering the defendants' motion to dismiss, the District Court was required to interpret the *pro se* complaint liberally, and when the complaint is read that way, it may be understood to state Fourth Amendment claims that could not properly be dismissed for failure to state a claim. We appreciate that petitioner elected on appeal to raise only a First Amendment argument and not to pursue an independent Fourth Amendment claim, but under the circumstances, the First Amendment claim demanded consideration of the ground on which the officers were present in the apartment and the nature of any legitimate law enforcement interests that might have justified an order to stop praying at the specific time in question. Without considering these matters, neither the free exercise issue nor the officers' entitlement to qualified immunity can be resolved. Thus, petitioner's choice to abandon her Fourth Amendment claim on appeal did not obviate the need to address these matters.

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For these reasons, we grant the petition for a writ of certiorari; we reverse the judgment of the Tenth Circuit; and we remand the case for further proceedings consistent with this opinion.

It is so ordered.

Per Curiam

SEXTON, WARDEN *v.* BEAUDREAUX

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

No. 17–1106. Decided June 28, 2018

A California jury found respondent Nicholas Beaudreaux guilty of first-degree murder in the 2006 shooting of Wayne Drummond. Beaudreaux's conviction was affirmed on direct appeal, and his first state habeas petition was denied. In 2013, Beaudreaux filed a second state habeas petition in which he claimed that his trial attorney was ineffective for failing to file a motion to suppress the identification testimony of Dayo Esho, one of the witnesses to Drummond's shooting. The California Court of Appeal summarily denied the petition, and the California Supreme Court denied review. Petitioner then filed a federal habeas petition, which the District Court denied. A split panel of the United States Court of Appeals for the Ninth Circuit reversed on the ground that the state court's rejection of respondent's claim of ineffective assistance of counsel was objectively unreasonable.

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Held: The Ninth Circuit's decision reversing the denial of habeas relief ignored well-established principles. The Court's precedents applying 28 U. S. C. §2254(d) require that when, as here, there is no reasoned state-court decision on the merits, the federal court "must determine what arguments or theories . . . could have supported 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." *Harrington* v. *Richter*, 562 U. S. 86, 102. If such disagreement is possible, then the petitioner's claim must be denied. *Ibid.* The Ninth Circuit failed to properly apply this standard. It did not consider reasonable grounds that could have supported the state court's summary decision, and it analyzed respondent's arguments without any meaningful deference to the state court.

Certiorari granted; 734 Fed. Appx. 387, reversed and remanded.

PER CURIAM.

In this case, the United States Court of Appeals for the Ninth Circuit reversed a denial of federal habeas relief, 28 U. S. C. §2254, on the ground that the state court had unreasonably rejected respondent's claim of ineffective assistance of counsel. The Court of Appeals' decision ignored well-

established principles. It did not consider reasonable grounds that could have supported the state court's summary decision, and it analyzed respondent's arguments without any meaningful deference to the state court. Accordingly, the petition for certiorari is granted, and the judgment of the Court of Appeals is reversed.

I

Respondent Nicholas Beaudreaux shot and killed Wayne Drummond during a late-night argument in 2006. Dayo Esho and Brandon Crowder were both witnesses to the shooting. The next day, Crowder told the police that he knew the shooter from middle school, but did not know the shooter's name. Esho described the shooter, but also did not know his name. Seventeen months later, Crowder was arrested for an unrelated crime. While Crowder was in custody, police showed him a middle-school yearbook with Beaudreaux's picture, as well as a photo lineup including Beaudreaux. Crowder identified Beaudreaux as the shooter in the Drummond murder.

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Officers interviewed Esho the next day. They first spoke with him during his lunch break. They showed him a display that included a recent picture of Beaudreaux and pictures of five other men. Esho tentatively identified Beaudreaux as the shooter, saying his picture "was 'closest' to the gunman." *Beaudreaux* v. *Soto*, 734 Fed. Appx. 387, 389 (CA9 2017). Later that day, one of the officers found another photograph of Beaudreaux that was taken "closer to the date" of the shooting. Record ER 263. Beaudreaux looked different in the two photographs. In the first, " 'his face [was] a little wider and his head [was] a little higher.' " *Id.*, at ER 262. Between four and six hours after the first interview, the officers returned to show Esho a second six-man photo lineup, which contained the older picture of Beaudreaux. Beaudreaux's photo was in a different position in the lineup than it had been in the first one. Esho again identified Beaudreaux as the shooter,

telling the officers that the second picture was "'very close.'" *Id.*, at ER 264. But he again declined to positively state that Beaudreaux was the shooter. Esho was hesitant because there were "a few things" he remembered about the shooter that would require seeing him in person. *Id.*, at ER 283–ER 284. At a preliminary hearing, Esho identified Beaudreaux as the shooter. At trial, Esho explained that it "clicked" when he saw Beaudreaux in person based on "the way that he walked." *Id.*, at ER 285. After seeing him in person, Esho was "sure" that Beaudreaux was the shooter. *Ibid.* At no time did any investigator or prosecutor suggest to Esho that Beaudreaux was the one who shot Drummond. *Ibid.*

Beaudreaux was tried in 2009 for first-degree murder and attempted second-degree robbery. Esho and Crowder both testified against Beaudreaux and both identified him as Drummond's shooter. The jury found Beaudreaux guilty, and the trial court sentenced him to a term of 50 years to life. Beaudreaux's conviction was affirmed on direct appeal, and his first state habeas petition was denied.

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In 2013, Beaudreaux filed a second state habeas petition. He claimed, among other things, that his trial attorney was ineffective for failing to file a motion to suppress Esho's identification testimony. The California Court of Appeal summarily denied the petition, and the California Supreme Court denied review. Beaudreaux then filed a federal habeas petition, which the District Court denied.

A divided panel of the Ninth Circuit reversed. The panel majority spent most of its opinion conducting a *de novo* analysis of the merits of the would-be suppression motion—relying in part on arguments and theories that Beaudreaux had not presented to the state court in his second state habeas petition. See 734 Fed. Appx. 387; Record ER 153–ER 154. It first determined that counsel's failure to file the suppression motion constituted deficient performance. See 734 Fed. Appx., at 389. The circumstances surround-

ing Esho's pretrial identification were "unduly suggestive," according to the Ninth Circuit, because only Beaudreaux's picture was in both photo lineups. *Ibid.* And, relying on Ninth Circuit precedent, the panel majority found that the preliminary hearing was unduly suggestive as well. *Ibid.* (quoting *Johnson* v. *Sublett*, 63 F. 3d 926, 929 (CA9 1995)). The panel majority next concluded that, under the totality of the circumstances, Esho's identification was not reliable enough to overcome the suggestiveness of the procedures. 734 Fed. Appx., at 389–390. The panel majority then determined that counsel's failure to file the suppression motion prejudiced Beaudreaux, given the weakness of the State's case. *Id.*, at 390. After conducting this *de novo* analysis of Beaudreaux's ineffectiveness claim, the panel majority asserted that the state court's denial of this claim was not just wrong, but objectively unreasonable under §2254(d). See *id.*, at 390–391. Judge Gould dissented. He argued that the state court could have reasonably concluded that Beaudreaux had failed to prove prejudice. *Id.*, at 391.

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The State of California petitioned for certiorari.

II

Under the Antiterrorism and Effective Death Penalty Act of 1996, a federal court cannot grant habeas relief "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court, or "a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." §2254(d). When, as here, there is no reasoned state-court decision on the merits, the federal court "must determine what arguments or theories . . . could have supported . . . the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those argu-

ments or theories are inconsistent with the holding in a prior decision of this Court." *Harrington* v. *Richter*, 562 U. S. 86, 102 (2011). If such disagreement is possible, then the petitioner's claim must be denied. *Ibid.* We have often emphasized that "this standard is difficult to meet" "because it was meant to be." *Ibid.*; *e. g.*, *Burt* v. *Titlow*, 571 U. S. 12, 20 (2013). The Ninth Circuit failed to properly apply this standard.

A

To prove ineffective assistance of counsel, a petitioner must demonstrate both deficient performance and prejudice. *Strickland* v. *Washington*, 466 U. S. 668, 687 (1984). The state court's denial of relief in this case was not an unreasonable application of *Strickland*. A fairminded jurist could conclude that counsel's performance was not deficient because counsel reasonably could have determined that the motion to suppress would have failed. See *Premo* v. *Moore*, 562 U. S. 115, 124 (2011).[1]

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This Court has previously described "the approach appropriately used to determine whether the Due Process Clause requires suppression of an eyewitness identification tainted by police arrangement." *Perry* v. *New Hampshire*, 565 U. S. 228, 238 (2012). In particular, the Court has said that "due process concerns arise only when law enforcement officers use[d] an identification procedure that is *both* suggestive and unnecessary." *Id.*, at 238–239 (citing *Manson* v. *Braithwaite*, 432 U. S. 98, 107, 109 (1977), and *Neil* v. *Biggers*, 409 U. S. 188, 198 (1972); emphasis added). To be " 'impermissibly suggestive,' " the procedure must " 'give rise to a very substantial likelihood of irreparable misidentification.' " *Id.*, at 197 (quoting *Simmons* v. *United States*, 390 U. S. 377, 384

[1] Judge Gould found that the state court could have reasonably concluded that Beaudreaux failed to prove prejudice because the weight of the evidence against him—even without Esho's identification—would have been sufficient to ensure his conviction. See *Beaudreaux* v. *Soto*, 734 Fed. Appx. 387, 391 (CA9 2017). We need not reach that issue.

(1968)). It is not enough that the procedure "may have in some respects fallen short of the ideal." *Id.*, at 385–386. Even when an unnecessarily suggestive procedure was used, "suppression of the resulting identification is not the inevitable consequence." *Perry*, 565 U. S., at 239. Instead, "the Due Process Clause requires courts to assess, on a case-by-case basis, whether improper police conduct created a 'substantial likelihood of misidentification.'" *Ibid.* (quoting *Biggers*, *supra*, at 201). "'[R]eliability [of the eyewitness identification] is the linchpin' of that evaluation." *Perry*, *supra*, at 239 (quoting *Manson*, 432 U. S., at 114; alterations in original). The factors affecting reliability include "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation." *Id.*, at 114. This Court has held that pretrial identification procedures violated the Due Process Clause only once, in *Foster* v. *California*, 394 U. S. 440 (1969). There, the police used two highly suggestive lineups and "a one-to-one confrontation," which "made it all but inevitable that [the witness] would identify [the defendant]." *Id.*, at 443.[2]

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In this case, there is at least one theory that could have led a fairminded jurist to conclude that the suppression motion would have failed. See *Richter*, *supra*, at 102.[3] The

[2] In the first lineup, the suspect was nearly six inches taller than the other two men in the lineup, and was the only one wearing a leather jacket like the one the witness described the robber as wearing. *Foster*, 394 U. S., at 441, 443. Police then arranged a "one-to-one confrontation" in which the witness sat in the same room as the suspect and spoke to him. *Id.*, at 441. And in the second lineup, the suspect was the only one in the five-man lineup who had been in the original lineup. *Id.*, at 441–442.

[3] Because our decision merely applies 28 U. S. C. § 2254(d)(1), it takes no position on the underlying merits and does not decide any other issue. See *Kernan* v. *Cuero*, 583 U. S. 1, 9 (2017) (*per curiam*); *Marshall* v. *Rodgers*, 569 U. S. 58, 64 (2013) (*per curiam*).

state court could have reasonably concluded that Beaudreaux failed to prove that, "under the 'totality of the circumstances,'" the identification was not "reliable." *Biggers*, *supra*, at 199. Beaudreaux's claim was facially deficient because his state habeas petition failed to even address this requirement. See Record ER 153–ER 154. And the state court could have reasonably concluded that the totality of the circumstances tipped against Beaudreaux. True, Esho gave a vague initial description of the shooter, see *Manson*, *supra*, at 115 (noting the detailed physical description the witness gave "minutes after"), and there was a 17-month delay between the shooting and the identification, see *Biggers*, *supra*, at 201 (determining that "a lapse of seven months . . . would be a seriously negative factor in most cases"). But, as the District Court found, Esho had a good opportunity to view the shooter, having talked to Beaudreaux immediately after the shooting. See App. to Pet. for Cert. 66a. He also was paying attention during the crime and even remembered Beaudreaux's distinctive walk. See *id.*, at 64a, 66a. Esho demonstrated a high overall level of certainty in his identification. He chose Beaudreaux's picture in both photo lineups, and he was "sure" about his identification once he saw Beaudreaux in person. Record ER 285; App. to Pet. for Cert. 63a–64a, 66a. There also was "little pressure" on Esho to make a particular identification. *Manson*, *supra*, at 116. It would not have been "'"objectively unreasonable"'" to weigh the totality of these circumstances against Beaudreaux. *White* v. *Woodall*, 572 U. S. 415, 419 (2014).

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B

The Ninth Circuit's opinion was not just wrong. It also committed fundamental errors that this Court has repeatedly admonished courts to avoid.

First, the Ninth Circuit effectively inverted the rule established in *Richter*. Instead of considering the "arguments or theories [that] could have supported" the state court's sum-

mary decision, 562 U. S., at 102, the Ninth Circuit considered arguments against the state court's decision that Beaudreaux never even made in his state habeas petition.

Additionally, the Ninth Circuit failed to assess Beaudreaux's ineffectiveness claim with the appropriate amount of deference. The Ninth Circuit essentially evaluated the merits *de novo*, only tacking on a perfunctory statement at the end of its analysis asserting that the state court's decision was unreasonable. But deference to the state court should have been near its apex in this case, which involves a *Strickland* claim based on a motion that turns on general, fact-driven standards such as suggestiveness and reliability. The Ninth Circuit's analysis did not follow this Court's repeated holding that, "'[t]he more general the rule . . . the more leeway [state] courts have.'" *Renico* v. *Lett*, 559 U. S. 766, 776 (2010) (brackets in original). Nor did it follow this Court's precedents stating that, "because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Knowles* v. *Mirzayance*, 556 U. S. 111, 123 (2009). The Ninth Circuit's essentially *de novo* analysis disregarded this deferential standard.

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* * *

The petition for a writ of certiorari and respondent's motion to proceed *in forma pauperis* are granted. The judgment of the United States Courts of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BREYER dissents.

Syllabus

NORTH CAROLINA ET AL. *v.* COVINGTON ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

No. 17–1364. Decided June 28, 2018

In earlier proceedings in this case, this Court summarily affirmed a District Court's judgment that the North Carolina General Assembly's 2011 redistricting plan resulted in racially gerrymandered districts. At the same time, the Court vacated the District Court's remedial order—which, among other things, directed the General Assembly to adopt new districting maps—finding the order was based on only the "most cursory" review of the equitable balance involved in court-ordered special elections. *North Carolina* v. *Covington*, 581 U. S. 486, 488 (*per curiam*). On remand, the District Court ordered the General Assembly to draw remedial maps for the State House and State Senate. Plaintiffs objected to the newly drawn maps, arguing that four legislative districts—Senate Districts 21 and 28 and House Districts 21 and 57—still segregated voters on the basis of race and that five State House districts in Wake and Mecklenburg Counties were revised in a manner that constituted mid-decade redistricting in violation of the North Carolina Constitution. The District Court appointed a Special Master to redraw the lines of the districts to which the plaintiffs objected. Upon receipt of the Special Master's report, the District Court sustained the plaintiffs' objections, adopted the Special Master's recommended reconfiguration, and directed the defendants to implement the Special Master's recommended district lines and to conduct elections accordingly. See 283 F. Supp. 3d 410, 414. With respect to Senate Districts 21 and 28 and House Districts 21 and 57, the District Court found that the General Assembly's remedial plans as to those districts were unconstitutional in part because they retained the core shape of districts the District Court had earlier found to be unconstitutional and perpetuated the effects of the racial gerrymander. *Id.*, at 438–439. The District Court then sustained the plaintiffs' remaining objection that several House districts in Wake and Mecklenburg Counties had been redrawn unnecessarily in violation of the North Carolina Constitution's prohibition on mid-decade redistricting. See *id.*, at 443. The defendants applied to the Court for a stay pending appeal, and the Court granted a stay with respect to implementation of the Special Master's remedial districts in Wake and Mecklenburg Counties, but otherwise denied the application. 583 U. S. 1109.

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Per Curiam

Held: The District Court's order is affirmed in part and reversed in part. The order is affirmed insofar as it provided a court-drawn remedy for Senate Districts 21 and 28 and House Districts 21 and 57. First, the District Court had jurisdiction to enter a remedial order in this case. The plaintiffs' racial gerrymandering claims did not cease to exist when the North Carolina General Assembly enacted remedial plans and repealed the old plans. Because plaintiffs assert that they continue to be racially segregated under the remedial plans, their claims remained the subject of a live dispute. Second, the District Court's conclusion that those four districts unconstitutionally sort voters on the basis of race is not undermined by the fact that the 2017 legislature instructed its map drawers not to look at race when crafting a remedial map. The District Court's detailed, district-by-district factfinding turned up sufficient circumstantial evidence that race was the predominant factor governing the shape of those four districts. See *Miller* v. *Johnson*, 515 U. S. 900, 916. Third, the District Court did not abuse its discretion by arranging for the Special Master to draw up an alternative remedial map instead of giving the General Assembly another chance. The District Court had its own duty to cure illegally gerrymandered districts through an orderly process in advance of the upcoming election cycle. See *Purcell* v. *Gonzalez*, 549 U. S. 1, 4–5 (*per curiam*).

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The District Court's order is reversed as to the legislature's redrawing of House districts in Wake and Mecklenburg Counties. The District Court redrew those districts because it found that the legislature's revision of them violated the North Carolina Constitution's ban on mid-decade redistricting. The District Court's decision to override the legislature's remedial map on that basis was clear error. See *Burns* v. *Richardson*, 384 U. S. 73, 85. The District Court's remedial authority was limited to ensuring that the plaintiffs were relieved of the burden of voting in racially gerrymandered legislative districts. Once the court ensured that the racial gerrymanders at issue were remedied, its proper role in the legislative districting process was at an end.

283 F. Supp. 3d 410, affirmed in part and reversed in part.

PER CURIAM.

This appeal arises from a remedial redistricting order entered by the District Court in a racial gerrymandering case we have seen before. The case concerns the redistricting of state legislative districts by the North Carolina General Assembly in 2011, in response to the 2010 census. A group of plaintiff voters, appellees here, alleged that the General

Assembly racially gerrymandered their districts when—in an ostensible effort to comply with the requirements of the Voting Rights Act of 1965—it drew 28 State Senate and State House of Representatives districts comprising majorities of black voters. The District Court granted judgment to the plaintiffs, and we summarily affirmed that judgment. See *Covington* v. *North Carolina*, 316 F. R. D. 117 (MDNC 2016), summarily aff'd, 581 U. S. 1015 (2017).

At the same time, however, we vacated the District Court's remedial order, which directed the General Assembly to adopt new districting maps, shortened by one year the terms of the legislators currently serving in the gerrymandered districts, called for special elections in those districts, and suspended two provisions of the North Carolina Constitution. See *North Carolina* v. *Covington*, 581 U. S. 486, 487 (2017) (*per curiam*). The District Court ordered all of this, we noted, after undertaking only the "most cursory" review of the equitable balance involved in court-ordered special elections. *Id.*, at 488. Having found that the District Court's discretion "'was barely exercised,'" we remanded the case for further remedial proceedings. *Id.*, at 489 (quoting *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. 7, 27 (2008)).

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On remand, the District Court ordered the General Assembly to draw remedial maps for the State House and State Senate within a month, and to file those maps in the District Court for approval. The General Assembly complied after directing its map drawers to, among other things, make "[r]easonable efforts . . . to avoid pairing incumbent members of the House [and] Senate" and not to use "[d]ata identifying the race of individuals or voters" in the drawing of the new districts. 283 F. Supp. 3d 410, 417–418 (MDNC 2018) (*per curiam*). The plaintiffs filed objections to the new maps. They argued that four legislative districts—Senate Districts 21 and 28 and House Districts 21 and 57—still segregated voters on the basis of race. The plaintiffs also objected to

the General Assembly's decision to redraw five State House districts situated in Wake and Mecklenburg Counties. They argued that those five districts "did not violate the [U. S.] Constitution, [and] did not abut a district violating the [U. S.] Constitution." *Id.*, at 443. Thus, they contended, the revision of the borders of those districts constituted mid-decade redistricting in violation of the North Carolina Constitution. See Art. II, §5(4); *Commissioners of Granville County* v. *Ballard*, 69 N. C. 18, 20–21 (1873).

After some consideration of these objections, the District Court appointed a Special Master to redraw the lines of the districts to which the plaintiffs objected, along with any nonadjacent districts to the extent "necessary" to comply with districting criteria specified by the District Court. App. to Juris. Statement 106–107. Those criteria included adherence to the "county groupings" used by the legislature in its remedial plan and to North Carolina's "Whole County Provision as interpreted by the North Carolina Supreme Court." *Id.*, at 108. The District Court further instructed the Special Master to make "reasonable efforts to adhere to . . . state policy objectives" by creating relatively compact districts and by avoiding split municipalities and precincts. *Id.*, at 108–109. The District Court also permitted the Special Master to "adjust district lines to avoid pairing any incumbents who have not publicly announced their intention not to run in 2018" and to "consider data identifying the race of individuals or voters to the extent necessary to ensure that his plan cures the unconstitutional racial gerrymanders." *Id.*, at 109–111.

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Upon receipt of the Special Master's report, the District Court sustained the plaintiffs' objections and adopted the Special Master's recommended reconfiguration of the state legislative maps. See 283 F. Supp. 3d, at 414. With respect to Senate Districts 21 and 28 and House Districts 21 and 57, the District Court found that those districts, as redrawn by the legislature, "retain[ed] the core shape" of districts that

it had earlier found to be unconstitutional. *Id.*, at 436; see *id.*, at 439–442. The District Court noted, for instance, that the legislature's remedial plan for Senate District 21 copied the prior plan's "horseshoe-shaped section of the city of Fayetteville," which "include[d] Fayetteville's predominantly black [voting districts] and blocks and exclude[d] Fayetteville's predominantly white [voting districts] and blocks." *Id.*, at 436. Although the defendants explained that the new district was designed to "'preserve the heart of Fayetteville,'" the District Court found that they had "fail[ed] to provide any explanation or evidence as to why 'preserving the heart of Fayetteville' required the exclusion of numerous majority-white precincts in downtown Fayetteville from the remedial district." *Ibid.* (alterations omitted). Likewise, the District Court found that the legislature's remedial version of Senate District 28, though it "encompasse[d] only a portion of [the city of] Greensboro," nevertheless "encompasse[d] *all* of the majority black [voting districts] within Greensboro," while "exclud[ing] predominantly white sections of Greensboro," and "reach[ing] out of Greensboro's city limits to capture predominantly African-American areas in eastern Guilford County." *Id.*, at 438. By choosing to preserve the shape of the district's "'anchor'" in eastern Greensboro, the District Court found, the General Assembly had "ensured that the district would retain a high [black voting age population], thereby perpetuating the effects of the racial gerrymander." *Id.*, at 438–439.

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The District Court made similar findings with respect to the legislature's remedial House Districts 21 and 57. House District 21, it found, "(1) preserve[d] the core shape of . . . the previously unconstitutional district, (2) include[d] all but one of the majority-black [voting districts] in the two counties through which it [ran], (3) divide[d] a municipality and precinct along racial lines, [and] (4) ha[d] an irregular shape that correspond[ed] to the racial make-up of the geographic area." *Id.*, at 439–440. In light of this and other evidence,

the District Court concluded that House District 21 "continue[d] to be a racial gerrymander." *Id.*, at 440. House District 57, the District Court found, likewise inexplicably "divide[d] the city of Greensboro along racial lines," *id.*, at 442, and otherwise preserved features of the previously invalidated 2011 maps. The District Court thus concluded that the General Assembly's remedial plans as to those districts were unconstitutional. *Ibid.*

The District Court then sustained the plaintiffs' remaining objection that several House districts in Wake and Mecklenburg Counties had been redrawn unnecessarily in violation of the North Carolina Constitution's prohibition on mid-decade redistricting. See *id.*, at 443 (citing Art. II, § 5(4)). The court reasoned that the prohibition "preclude[d] the General Assembly from engaging in mid-decade redistricting" except to the extent "required by federal law or a judicial order." 283 F. Supp. 3d, at 443. It noted further that, "[w]hen a court must draw remedial districts itself, this means that a court may redraw only those districts necessary to remedy the constitutional violation," *ibid.* (citing *Upham* v. *Seamon*, 456 U. S. 37, 40–41 (1982) (*per curiam*)), and that "*Upham* requires that a federal district court's remedial order not unnecessarily interfere with state redistricting choices," 283 F. Supp. 3d, at 443. This remedial principle informed the District Court's conclusion that "the General Assembly [had] exceeded its authority under [the District Court's remedial] order by disregarding the mid-decade redistricting prohibition," since the legislature had failed to "put forward any evidence showing that revising *any* of the five Wake and Mecklenburg County House districts challenged by Plaintiffs was necessary to remedy the racially gerrymandered districts in those two counties." *Id.*, at 444.

Finally, the District Court adopted the Special Master's recommended replacement plans for the districts to which the plaintiffs had objected. In adopting those recommenda-

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tions, the District Court turned away the defendants' argument that they were built on "specific . . . quota[s]" of black voters in each reconstituted district. *Id.*, at 448–449. The District Court instead credited the Special Master's submission that his "'remedial districts were drawn not with any racial target in mind, but in order to maximize compactness, preserve precinct boundaries, and respect political subdivision lines,'" and that the remedial map was the product of "'explicitly race-neutral criteria.'" *Id.*, at 449. The District Court directed the defendants to implement the Special Master's recommended district lines and to conduct elections accordingly.

The defendants applied to this Court for a stay of the District Court's order pending appeal. We granted a stay with respect to implementation of the Special Master's remedial districts in Wake and Mecklenburg Counties, but otherwise denied the application. See 583 U. S. 1109 (2018). The defendants timely appealed directly to this Court as provided under 28 U. S. C. § 1253. We have jurisdiction, and now summarily affirm in part and reverse in part the order of the District Court.

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* * *

The defendants first argue that the District Court lacked jurisdiction even to enter a remedial order in this case. In their view, "[w]here, as here, a lawsuit challenges the validity of a statute," the case becomes moot "when the statute is repealed." Juris. Statement 17. Thus, according to the defendants, the plaintiffs' racial gerrymandering claims ceased to exist when the North Carolina General Assembly enacted remedial plans for the State House and State Senate and repealed the old plans.

The defendants misunderstand the nature of the plaintiffs' claims. Those claims, like other racial gerrymandering claims, arise from the plaintiffs' allegations that they have been "separate[d] . . . into different districts on the basis of race." *Shaw* v. *Reno*, 509 U. S. 630, 649 (1993). Resolution

of such claims will usually turn upon "circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing" the lines of legislative districts. *Miller* v. *Johnson*, 515 U. S. 900, 913 (1995). But it is the segregation of the plaintiffs—not the legislature's line-drawing as such—that gives rise to their claims. It is for this reason, among others, that the plaintiffs have standing to challenge racial gerrymanders only with respect to those legislative districts in which they reside. See *Alabama Legislative Black Caucus* v. *Alabama*, 575 U. S. 254, 263 (2015). Here, in the remedial posture in which this case is presented, the plaintiffs' claims that they were organized into legislative districts on the basis of their race did not become moot simply because the General Assembly drew new district lines around them. To the contrary, they argued in the District Court that some of the new districts were mere continuations of the old, gerrymandered districts. Because the plaintiffs asserted that they remained segregated on the basis of race, their claims remained the subject of a live dispute, and the District Court properly retained jurisdiction.

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Second, the defendants argue that the District Court erred when it "conclu[ded] that the General Assembly engaged in racial gerrymandering by declining to consider race." Juris. Statement 20. They assert that "there is no dispute that the General Assembly did *not* consider race *at all* when designing the 2017 [remedial plans]—not as a predominant motive, a secondary motive, or otherwise," and that such "undisputed fact should have been the end of the plaintiffs' racial gerrymandering challenges." *Id.*, at 21–22.

This argument suffers from the same conceptual flaws as the first. While it may be undisputed that the 2017 legislature instructed its map drawers not to look at race when crafting a remedial map, what is also undisputed—because the defendants do not attempt to rebut it in their jurisdictional statement or in their brief opposing the plaintiffs'

motion to affirm—is the District Court's detailed, district-by-district factfinding respecting the legislature's remedial Senate Districts 21 and 28 and House Districts 21 and 57.

That factfinding, as discussed above, turned up sufficient circumstantial evidence that race was the predominant factor governing the shape of those four districts. See, *e. g.*, 283 F. Supp. 3d, at 436. As this Court has previously explained, a plaintiff can rely upon either "circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose" in proving a racial gerrymandering claim. *Miller*, *supra*, at 916. The defendants' insistence that the 2017 legislature did not look at racial data in drawing remedial districts does little to undermine the District Court's conclusion—based on evidence concerning the shape and demographics of those districts—that the districts unconstitutionally sort voters on the basis of race. 283 F. Supp. 3d, at 442.

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Third, the defendants argue that the District Court abused its discretion by arranging for the Special Master to draw up an alternative remedial map instead of giving the General Assembly—which "stood ready and willing to promptly carry out its sovereign duty"—another chance at a remedial map. Juris. Statement 33. Yet the District Court had its own duty to cure illegally gerrymandered districts through an orderly process in advance of elections. See *Purcell* v. *Gonzalez*, 549 U. S. 1, 4–5 (2006) (*per curiam*). Here the District Court determined that "providing the General Assembly with a second bite at the apple" risked "further draw-[ing] out these proceedings and potentially interfer[ing] with the 2018 election cycle." 283 F. Supp. 3d, at 448, n. 10. We conclude that the District Court's appointment of a Special Master in this case was not an abuse of discretion.

Neither was the District Court's decision to adopt the Special Master's recommended remedy for the racially gerrymandered districts. The defendants argue briefly that the District Court's adoption of that recommendation was error

because the Special Master's remedial plan was "expressly race-conscious" and succeeded in "compel[ling] the State to employ racial quotas of plaintiffs' choosing." Juris. Statement 34–35. Yet this Court has long recognized "[t]he distinction between being aware of racial considerations and being motivated by them." *Miller*, *supra*, at 916. The District Court's allowance that the Special Master could "consider data identifying the race of individuals or voters to the extent necessary to ensure that his plan cures the unconstitutional racial gerrymanders," App. to Juris. Statement 111, does not amount to a warrant for "racial quotas." In any event, the defendants' assertions on this question make no real attempt to counter the District Court's agreement with the Special Master that "'no racial targets were sought or achieved'" in drawing the remedial districts. 283 F. Supp. 3d, at 449.

All of the foregoing is enough to convince us that the District Court's order should be affirmed insofar as it provided a court-drawn remedy for Senate Districts 21 and 28 and House Districts 21 and 57. The same cannot be said, however, of the District Court's actions concerning the legislature's redrawing of House districts in Wake and Mecklenburg Counties. There the District Court proceeded from a mistaken view of its adjudicative role and its relationship to the North Carolina General Assembly.

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The only injuries the plaintiffs established in this case were that they had been placed in their legislative districts on the basis of race. The District Court's remedial authority was accordingly limited to ensuring that the plaintiffs were relieved of the burden of voting in racially gerrymandered legislative districts. See *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S. 332, 353 (2006). But the District Court's revision of the House districts in Wake and Mecklenburg Counties had nothing to do with that. Instead, the District Court redrew those districts because it found that the legislature's revision of them violated the North Carolina Consti-

tution's ban on mid-decade redistricting, not federal law. Indeed, the District Court understood that ban to apply unless such redistricting was "required by federal law or judicial order." 283 F. Supp. 3d, at 443. The District Court's enforcement of the ban was thus premised on the conclusion that the General Assembly's action was not "required" by federal law.

The District Court's decision to override the legislature's remedial map on that basis was clear error. "[S]tate legislatures have primary jurisdiction over legislative reapportionment," *White* v. *Weiser*, 412 U. S. 783, 795 (1973) (internal quotation marks omitted), and a legislature's "freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands" of federal law, *Burns* v. *Richardson*, 384 U. S. 73, 85 (1966). A district court is "not free . . . to disregard the political program of" a state legislature on other bases. *Upham*, 456 U. S., at 43. Once the District Court had ensured that the racial gerrymanders at issue in this case were remedied, its proper role in North Carolina's legislative districting process was at an end.

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The order of the District Court is affirmed in part and reversed in part.

It is so ordered.

JUSTICE THOMAS, dissenting.

I do not think the complicated factual and legal issues in this case should be disposed of summarily. I would have set this case for briefing and oral argument. I respectfully dissent.

REPORTER'S NOTE

The next page is purposely numbered 1001. The numbers between 979 and 1001 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

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ORDERS FOR JUNE 14 THROUGH
SEPTEMBER 28, 2018

JUNE 14, 2018

Dismissal Under Rule 46

No. 17–57. PACIFIC GAS & ELECTRIC CO. ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 838 F. 3d 1341.

JUNE 18, 2018

Dismissals Under Rule 46

No. 16–581. LEIDOS, INC., FKA SAIC, INC. *v.* INDIANA PUBLIC RETIREMENT SYSTEM ET AL. C. A. 2d Cir. [Certiorari granted, 580 U. S. 1216.] Writ of certiorari dismissed under this Court's Rule 46.1.

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No. 17–1327. DRAGON INTELLECTUAL PROPERTY, LLC *v.* DISH NETWORK LLC ET AL. C. A. Fed. Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 711 Fed. Appx. 993.

Certiorari Granted—Vacated and Remanded

No. 16–6259. GONZALEZ-LONGORIA *v.* UNITED STATES. C. A. 5th Cir. Petition for rehearing granted. The order entered May 14, 2018, [584 U. S. 976] denying petition for writ of certiorari vacated. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Sessions* v. *Dimaya*, 584 U. S. 148 (2018). Reported below: 831 F. 3d 670.

Certiorari Dismissed

No. 17–8955. JACKSON *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 703 Fed. Appx. 197.

Miscellaneous Orders

No. 17M129. KELLY *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari with supplemental appendix under seal granted.

No. 17M130. SEALED APPELLANT *v.* SEALED APPELLEE. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted.

No. 17–1285. ASSOCIATION DES ELEVEURS DE CANARDS ET D'OIES DU QUEBEC ET AL. *v.* BECERRA, ATTORNEY GENERAL OF CALIFORNIA. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 17–7817. WEI ZHOU *v.* MARQUETTE UNIVERSITY. C. A. 7th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [584 U. S. 948] denied.

No. 17–8278. BAMDAD *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [584 U. S. 957] denied.

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No. 17–1586. IN RE LYLES. Petition for writ of habeas corpus denied.

No. 17–1454. IN RE SCHEIDLER. Petition for writ of mandamus denied.

No. 17–8469. IN RE RAA. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 17–949. STURGEON *v.* FROST, ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 872 F. 3d 927.

No. 17–1026. GARZA *v.* IDAHO. Sup. Ct. Idaho. Certiorari granted. Reported below: 162 Idaho 791, 405 P. 3d 576.

No. 17–1077. LORENZO *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. D. C. Cir. Certiorari granted. Reported below: 872 F. 3d 578.

No. 17–1091. TIMBS *v.* INDIANA. Sup. Ct. Ind. Certiorari granted. Reported below: 84 N. E. 3d 1179.

No. 17–204. Apple Inc. *v.* Pepper et al. C. A. 9th Cir. Motions of ACT | The App Association and Washington Legal Foundation for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 846 F. 3d 313.

Certiorari Denied

No. 17–521. Lazar *v.* Kroncke, as Administrator of the Estate of Kroncke. C. A. 9th Cir. Certiorari denied. Reported below: 862 F. 3d 1186.

No. 17–931. Martinez Cazun *v.* Sessions, Attorney General. C. A. 3d Cir. Certiorari denied. Reported below: 856 F. 3d 249.

No. 17–955. Harkness *v.* Spencer, Secretary of the Navy. C. A. 6th Cir. Certiorari denied. Reported below: 858 F. 3d 437.

No. 17–970. Stanford *v.* Browne et al. Sup. Ct. Nev. Certiorari denied. Reported below: 133 Nev. 1076, 402 P. 3d 1253.

No. 17–975. Total Gas & Power North America, Inc., et al. *v.* Federal Energy Regulatory Commission et al. C. A. 5th Cir. Certiorari denied. Reported below: 859 F. 3d 325.

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No. 17–984. Garcia Garcia *v.* Sessions, Attorney General. C. A. 7th Cir. Certiorari denied. Reported below: 873 F. 3d 553.

No. 17–1007. Igartua et al. *v.* Trump, President of the United States, et al. C. A. 1st Cir. Certiorari denied. Reported below: 842 F. 3d 149.

No. 17–1061. Richmond *v.* Coleman Cable, LLC, et al. C. A. Fed. Cir. Certiorari denied. Reported below: 690 Fed. Appx. 682.

No. 17–1098. Parkinson *v.* Department of Justice. C. A. Fed. Cir. Certiorari denied. Reported below: 874 F. 3d 710.

No. 17–1105. American Commercial Lines, LLC *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 875 F. 3d 170.

No. 17–1142. Michigan Gaming Control Board et al. *v.* Moody et al. C. A. 6th Cir. Certiorari denied. Reported below: 871 F. 3d 420.

No. 17–1151. DUQUESNE LIGHT HOLDINGS, INC., ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 861 F. 3d 396.

No. 17–1154. COLEMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 706 Fed. Appx. 618.

No. 17–1212. GARCIA GARCIA *v.* SESSIONS, ATTORNEY GENERAL. C. A. 1st Cir. Certiorari denied. Reported below: 856 F. 3d 27.

No. 17–1225. CAMPANELLI *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 2017 IL 120997, 104 N. E. 3d 325.

No. 17–1287. ROBERTS ET AL. *v.* AT&T MOBILITY LLC. C. A. 9th Cir. Certiorari denied. Reported below: 877 F. 3d 833.

No. 17–1291. BOKF, N. A., AS FIRST LOAN TRUSTEE *v.* MOMENTIVE PERFORMANCE MATERIALS, INC., ET AL.; and

No. 17–1292. WILMINGTON TRUST, N. A., AS 1.5 LIEN TRUSTEE *v.* MOMENTIVE PERFORMANCE MATERIALS, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 874 F. 3d 787.

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No. 17–1392. H. A. S. ELECTRICAL CONTRACTORS, INC. *v.* HEMPHILL CONSTRUCTION CO., INC. Sup. Ct. Miss. Certiorari denied. Reported below: 232 So. 3d 117.

No. 17–1421. OPTA CORP. ET AL. *v.* DAEWOO ELECTRONICS AMERICA, INC. C. A. 9th Cir. Certiorari denied. Reported below: 875 F. 3d 1241.

No. 17–1425. M. H. *v.* J. K. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 17–1433. ELINZANO-GONZALES *v.* SESSIONS, ATTORNEY GENERAL. C. A. 2d Cir. Certiorari denied. Reported below: 716 Fed. Appx. 29.

No. 17–1444. ABERDEEN MARKETPLACE, INC. *v.* NANNI. C. A. 4th Cir. Certiorari denied. Reported below: 878 F. 3d 447.

No. 17–1450. BERGDOLL *v.* TORRES, ACTING PENNSYLVANIA SECRETARY OF STATE, ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 644 Pa. 613, 177 A. 3d 875.

No. 17–1452. DEN HOLLANDER *v.* CBS NEWS INC. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 710 Fed. Appx. 35.

No. 17–1495. ROBERTS *v.* FNB SOUTH OF ALMA, GEORGIA. C. A. 11th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 854.

No. 17–1502. MANN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 17–1504. RICE *v.* INTERFOOD, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 709 Fed. Appx. 415.

No. 17–1527. CRAMPTON *v.* COMMISSION FOR LAWYER DISCIPLINE OF THE STATE BAR OF TEXAS. Ct. App. Tex., 8th Dist. Certiorari denied. Reported below: 545 S. W. 3d 593.

No. 17–1531. HAGER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 879 F. 3d 550.

No. 17–1539. KINNEY *v.* CLARK. Ct. App. Cal., 2d App. Dist., Div. 1. Certiorari denied.

No. 17–1540. M. C., A MINOR, BY AND THROUGH HIS PARENT, D. C. *v.* OREGON DEPARTMENT OF EDUCATION. C. A. 9th Cir. Certiorari denied. Reported below: 695 Fed. Appx. 302.

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No. 17–1573. CRAZY HORSE SALOON & RESTAURANT, INC., DBA THEE NEW DOLLHOUSE *v.* DEGIDIO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED. C. A. 4th Cir. Certiorari denied. Reported below: 880 F. 3d 135.

No. 17–1579. BOUTTE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 17–7383. ROBERSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 864 F. 3d 1118.

No. 17–7420. HUGHES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 694 Fed. Appx. 463.

No. 17–7458. SWAGGERTY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 17–7542. NEDD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–7645. BOATWRIGHT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 713 Fed. Appx. 871.

No. 17–7734. MARTIN MENDOZA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 706 Fed. Appx. 620.

No. 17–7773. GRAFTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 672.

No. 17–7796. DUNCAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 914.

No. 17–7804. MCHALE *v.* CAIN, SUPERINTENDENT, SNAKE RIVER CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied.

No. 17–7879. ALEXANDER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 713 Fed. Appx. 919.

No. 17–8083. RUNNELS *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 664 Fed. Appx. 371.

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No. 17–8134. ZACK *v.* FLORIDA ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 228 So. 3d 41.

No. 17–8471. BLAIR *v.* YUM! BRANDS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 352.

No. 17–8473. SIMMONS *v.* JOHNSON, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 17–8484. PEREZ DUENAS *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 199 Wash. App. 1027.

No. 17–8489. OHIO EX REL. MCKINNEY *v.* SCHMENK, JUDGE, DEFIANCE COUNTY COURT OF COMMON PLEAS. Sup. Ct. Ohio. Certiorari denied. Reported below: 152 Ohio St. 3d 70, 2017-Ohio-9183, 92 N. E. 3d 871.

No. 17–8494. TYLER *v.* OCWEN LOAN SERVICING, LLC, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 423.

No. 17–8500. ALVARADO *v.* JOHNSON, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 17–8504. CARPENTER *v.* CITY OF CHICAGO, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 717 Fed. Appx. 630.

No. 17–8506. BRIDGES *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2017 IL App (1st) 143539–U.

No. 17–8513. VALDEZ PEREZ *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 17–8516. O'NEAL *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. Sup. Ct. Va. Certiorari denied.

No. 17–8518. RAMOS *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 178 Conn. App. 400, 175 A. 3d 1265.

No. 17–8532. SINGH ET AL. *v.* FERNANDES. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 16 Cal. App. 5th 932, 224 Cal. Rptr. 3d 751.

No. 17–8535. BIGGS *v.* FERRERO. C. A. 6th Cir. Certiorari denied.

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No. 17–8536. ARMAS *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 284 Ore. App. 557, 392 P. 3d 834.

No. 17–8537. BROADWAY *v.* VANNOY, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 17–8540. COLE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 234 So. 3d 644.

No. 17–8541. MCHENRY *v.* PARKING VIOLATION BUREAU. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 17–8548. CHILDRESS *v.* CITY OF CHARLESTON POLICE DEPARTMENT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 706 Fed. Appx. 814.

No. 17–8556. BONTRAGER *v.* COLORADO ATTORNEY REGULATION COUNSEL. Sup. Ct. Colo. Certiorari denied.

No. 17–8566. SANDIA *v.* WALMART STORES. C. A. 2d Cir. Certiorari denied. Reported below: 699 Fed. Appx. 64.

No. 17–8586. AHMED *v.* ARIZONA DEPARTMENT OF TRANSPORTATION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 687 Fed. Appx. 672.

No. 17–8635. VRH *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 17–8661. STANSELL *v.* EPPINGER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 17–8687. BROOKS *v.* JOHNSON, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 722 Fed. Appx. 180.

No. 17–8757. LEONARD *v.* OREGON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 714 Fed. Appx. 801.

No. 17–8776. JOHNSON *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 238 So. 3d 788.

No. 17–8791. RHINES *v.* SOUTH DAKOTA. Sup. Ct. S. D. Certiorari denied.

No. 17–8878. RAYBON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 867 F. 3d 625.

No. 17–8886. CASILLAS PRIETO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

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No. 17–8890. PHILLIPS *v.* TRUMP, PRESIDENT OF THE UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 17–8891. MCDUFF *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 393.

No. 17–8897. LEE *v.* BEASLEY, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 17–8904. HERRERA SANTA CRUZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 609 Fed. Appx. 265.

No. 17–8906. HICKS *v.* FEDERAL BUREAU OF PRISONS. C. A. 6th Cir. Certiorari denied.

No. 17–8912. SALAZAR-VALENCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 288.

No. 17–8914. RAMIREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 715 Fed. Appx. 663.

No. 17–8925. CLARK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 710 Fed. Appx. 418.

No. 17–8938. GILLS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 702 Fed. Appx. 367.

No. 17–8943. JONES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 714 Fed. Appx. 721.

No. 17–8944. LESCH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 717 Fed. Appx. 244.

No. 17–8945. MATHIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 710 Fed. Appx. 396.

No. 17–8946. MALDONADO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 731 Fed. Appx. 831.

No. 17–8950. BENITEZ-REYNOSO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 718 Fed. Appx. 278.

No. 17–8952. CHAPMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 720 Fed. Appx. 794.

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No. 17–8959. GIBSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 875 F. 3d 179.

No. 17–8974. BROWN *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 170 A. 3d 1208.

No. 17–8976. COLBY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 882 F. 3d 267.

No. 17–8984. ALMONTE, AKA ANTONIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 694 Fed. Appx. 35.

No. 17–8985. GAY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 724 Fed. Appx. 122.

No. 17–8986. BERGER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 193.

No. 17–8987. BERRY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–8993. BREEDLOVE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 842.

No. 17–9001. LEWIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 17–9003. MORREO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 690 Fed. Appx. 992.

No. 17–9006. CAZIMERO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 712 Fed. Appx. 670.

No. 17–9008. STANFORD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 689.

No. 17–9011. WASHINGTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 710 Fed. Appx. 161.

No. 17–9013. PASILLAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 713 Fed. Appx. 311.

No. 17–9017. ALLEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 714 Fed. Appx. 988.

No. 17–9020. BOGAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 246.

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No. 17–9021. COLON-RIVERA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 595.

No. 17–9026. JARAMILLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 17–1078. PAULY, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF PAULY, DECEASED, ET AL. *v.* WHITE ET AL. C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 874 F. 3d 1197.

No. 17–1274. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS *v.* POYSON. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 879 F. 3d 875.

No. 17–1501. INTEGRIS HEALTH, INC. *v.* CATES. Sup. Ct. Okla. Motion of American Hospital Association et al. for leave to file brief as *amici curiae* granted. Certiorari denied. Reported below: 2018 OK 9, 412 P. 3d 98.

No. 17–1521. FURBER, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF FURBER, DECEASED *v.* TAYLOR ET AL. C. A.

10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 685 Fed. Appx. 674.

No. 17–8148. KACZMAR *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 228 So. 3d 1.

JUSTICE SOTOMAYOR, dissenting.

Like a number of other capital defendants in Florida, petitioner Leo Louis Kaczmar has raised an important Eighth Amendment challenge to his death sentence that went unaddressed by the Florida Supreme Court. Specifically, he argues that the jury instructions in his case impermissibly diminished the jurors' sense of responsibility as to the ultimate determination of death, in violation of *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985). I have thrice dissented from this Court's unwillingness to intervene in the face of the Florida Supreme Court's failure to address this important question. See *Guardado* v. *Florida*, 584 U. S. 922, (2018); *Middleton* v. *Florida*, 583 U. S. 1162, (2018); *Truehill* v. *Florida*, 583 U. S. 938, 939 (2017). Recently, "[i]n light of the dissenting opinions to the denial of certiorari," the Florida Supreme Court in another capital case finally set out to "explicitly address" the *Caldwell* claim. *Reynolds* v. *State*, 251 So. 3d 811, 818, n. 8 (2018) (*per curiam*). The resulting opinion, however, gathered the support only of a plurality, so the issue remains without definitive resolution by the Florida Supreme Court. Thus, for the reasons previously stated in *Truehill*, *Middleton*, and *Guardado*, I again respectfully dissent from the denial of certiorari.

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No. 17–8486. RUIZ-RIVERA *v.* ASSURED GUARANTEE CORP. ET AL. C. A. 1st Cir. Certiorari before judgment denied.

No. 17–8487. RUIZ-RIVERA *v.* LEX CLAIMS, LLC, ET AL. C. A. 1st Cir. Certiorari before judgment denied.

No. 17–8992. DAVIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

Rehearing Granted. (See No. 16–6259, 585 U. S. 1001.)

Rehearing Denied

No. 17–1038. IN RE DOUCE, 584 U. S. 903;

No. 17–1075. SCOPELLITI *v.* CITY OF TAMPA, FLORIDA, 583 U. S. 1182;

No. 17–1199. WILSON *v.* HAWAII ET AL., 584 U. S. 932;
No. 17–1253. BEAVERS *v.* SCHNEIDER NATIONAL, INC., 584 U. S. 978;
No. 17–6978. FREDERICK *v.* PENNSYLVANIA, 583 U. S. 1125;
No. 17–7474. GOUCH-ONASSIS *v.* CALIFORNIA, 584 U. S. 906;
No. 17–7680. BURKE *v.* FURTADO, 584 U. S. 919;
No. 17–7943. STANLEY *v.* WASHINGTON, 584 U. S. 965; and
No. 17–8220. RUSSELL *v.* FLORIDA, 584 U. S. 955. Petitions for rehearing denied.

No. 17–7709. ALCORTA *v.* UNITED STATES, 583 U. S. 1207. Petition for rehearing denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition.

JUNE 25, 2018

Vacated and Remanded on Appeal

No. 17–1295. RUCHO ET AL. *v.* COMMON CAUSE ET AL. Appeal from D. C. M. D. N. C. Judgment vacated, and case remanded for further consideration in light of *Gill* v. *Whitford*, *ante*, p. 48. Reported below: 279 F. Supp. 3d 587.

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Certiorari Granted—Vacated and Remanded

No. 16–9541. CLARK *v.* LOUISIANA. Sup. Ct. La. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McCoy* v. *Louisiana*, 584 U. S. 414 (2018). Reported below: 2012–0508 (La. 12/19/16), 220 So. 3d 583.

No. 16–9608. RENTERIA-MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 847 F. 3d 297;
No. 17–6389. CRUZ-PENA *v.* UNITED STATES. C. A. 5th Cir. Reported below: 700 Fed. Appx. 338;
No. 17–6556. ANTHONY *v.* UNITED STATES. C. A. 5th Cir. Reported below: 693 Fed. Appx. 380;
No. 17–6805. AGUSTIN-GARCIA *v.* UNITED STATES. C. A. 5th Cir. Reported below: 699 Fed. Appx. 391; and
No. 17–7261. RUIZ-DOMINGUEZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 713 Fed. Appx. 273. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Rosales-Mireles* v. *United States*, *ante*, p. 129.

No. 17–108. ARLENE'S FLOWERS, INC., DBA ARLENE'S FLOWERS AND GIFTS, ET AL. *v.* WASHINGTON ET AL. Sup. Ct. Wash. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 584 U. S. 617 (2018). Reported below: 187 Wash. 2d 804, 389 P. 3d 543.

No. 17–7779. JOHNSON *v.* UNITED STATES. C. A. 6th Cir. Reported below: 876 F. 3d 812;

No. 17–7781. RAMIREZ GALVAN *v.* UNITED STATES. C. A. 5th Cir. Reported below: 699 Fed. Appx. 314;

No. 17–7793. RAMIREZ-HIDALGO *v.* UNITED STATES. C. A. 5th Cir. Reported below: 707 Fed. Appx. 850; and

No. 17–8109. RUBIO-SORTO *v.* UNITED STATES. C. A. 5th Cir. Reported below: 707 Fed. Appx. 239. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Sessions* v. *Dimaya*, 584 U. S. 148 (2018).

Certiorari Dismissed

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No. 17–8557. ROSE *v.* UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 17–8682. GILLESPIE *v.* REVERSE MORTGAGE SOLUTIONS. Sup. Ct. Fla. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 17–8689. GILLESPIE *v.* REVERSE MORTGAGE SOLUTIONS ET AL. Sup. Ct. Fla. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 17–9028. SCOTTON *v.* UNITED STATES (two judgments). C. A. 11th Cir. Certiorari denied. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. D–3013. IN RE DISBARMENT OF SIEGEL. Disbarment entered. [For earlier order herein, see 584 U. S. 912.]

No. D–3015. In re Disbarment of Bassi. Disbarment entered. [For earlier order herein, see 584 U. S. 912.]

No. D–3016. In re Disbarment of Brazil. Disbarment entered. [For earlier order herein, see 584 U. S. 912.]

No. D–3017. In re Disbarment of Crawford. Disbarment entered. [For earlier order herein, see 584 U. S. 913.]

No. D–3018. In re Disbarment of Gaskins. Disbarment entered. [For earlier order herein, see 584 U. S. 913.]

No. D–3019. In re Disbarment of Landry. Disbarment entered. [For earlier order herein, see 584 U. S. 913.]

No. D–3020. In re Disbarment of Denrich. Disbarment entered. [For earlier order herein, see 584 U. S. 913.]

No. D–3021. In re Disbarment of Smith. Disbarment entered. [For earlier order herein, see 584 U. S. 913.]

No. D–3023. In re Disbarment of Nyce. Disbarment entered. [For earlier order herein, see 584 U. S. 929.]

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No. D–3024. In re Disbarment of Terrell. Disbarment entered. [For earlier order herein, see 584 U. S. 913.]

No. D–3025. In re Disbarment of Andrews. Disbarment entered. [For earlier order herein, see 584 U. S. 913.]

No. D–3026. In re Disbarment of Harrell. Disbarment entered. [For earlier order herein, see 584 U. S. 914.]

No. D–3027. In re Disbarment of Loudon. Disbarment entered. [For earlier order herein, see 584 U. S. 914.]

No. 17M131. Kalin Thanh Dao *v.* United States. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 17–1165. de Csepel et al. *v.* Republic of Hungary et al. C. A. D. C. Cir.; and

No. 17–1301. Harvey et al. *v.* UTE Indian Tribe of the Uintah and Ouray Reservation et al. Sup. Ct. Utah. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 17–8084. KOCH *v.* CITY OF SARGENT, NEBRASKA. Ct. App. Neb. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [584 U. S. 949] denied.

No. 17–8616. HARNDEN *v.* MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until July 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. 17–9155. IN RE WILLIAMS. Petition for writ of habeas corpus denied.

No. 17–8811. IN RE MASON. Petition for writ of mandamus denied.

No. 17–8965. IN RE ALLAH. 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

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No. 16–1094. REPUBLIC OF SUDAN *v.* HARRISON ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 802 F. 3d 399.

No. 16–1498. WASHINGTON STATE DEPARTMENT OF LICENSING *v.* COUGAR DEN, INC. Sup. Ct. Wash. Certiorari granted. Reported below: 188 Wash. 2d 55, 392 P. 3d 1014.

No. 17–1094. NUTRACEUTICAL CORP. *v.* LAMBERT. C. A. 9th Cir. Certiorari granted. Reported below: 870 F. 3d 1170.

No. 17–1184. BIESTEK *v.* BERRYHILL, DEPUTY COMMISSIONER FOR OPERATIONS, SOCIAL SECURITY ADMINISTRATION. C. A. 6th Cir. Certiorari granted. Reported below: 880 F. 3d 778.

No. 17–1229. HELSINN HEALTHCARE S. A. *v.* TEVA PHARMACEUTICALS USA, INC., ET AL. C. A. Fed. Cir. Certiorari granted. Reported below: 855 F. 3d 1356.

No. 17–1272. HENRY SCHEIN, INC., ET AL. *v.* ARCHER & WHITE SALES, INC. C. A. 5th Cir. Certiorari granted. Reported below: 878 F. 3d 488.

No. 17–419. DAWSON ET UX. *v.* STEAGER, WEST VIRGINIA STATE TAX COMMISSIONER. Sup. Ct. App. W. Va. Certiorari

granted limited to the question presented by the Solicitor General in his brief for the United States as *amicus curiae*.

Certiorari Denied

No. 16–163. WYNN LAS VEGAS, LLC, ET AL. *v.* CESARZ ET AL.; and

No. 16–920. NATIONAL RESTAURANT ASSN. ET AL. *v.* DEPARTMENT OF LABOR ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 816 F. 3d 1080.

No. 17–528. STRANG *v.* FORD MOTOR COMPANY GENERAL RETIREMENT PLAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 693 Fed. Appx. 400.

No. 17–1041. SHERIDAN *v.* ORTEGA MELENDRES ET AL. C. A. 9th Cir. Certiorari denied.

No. 17–1058. SNR WIRELESS LICENSECO, LLC, ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 868 F. 3d 1021.

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No. 17–1060. UNITED STATES EX REL. CARTER *v.* HALLIBURTON CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 866 F. 3d 199.

No. 17–1093. REED *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 541 S. W. 3d 759.

No. 17–1134. ELLISON ET AL. *v.* UNITED STATES; and

No. 17–7809. SWENSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 616.

No. 17–1150. CHUNG HOU HSIAO *v.* HAZUDA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 869 F. 3d 1034.

No. 17–1153. SIERRA PACIFIC INDUSTRIES, INC., ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 862 F. 3d 1157.

No. 17–1172. DASSEY *v.* DITTMANN. C. A. 7th Cir. Certiorari denied. Reported below: 877 F. 3d 297.

No. 17–1180. UNION PACIFIC RAILROAD CO. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 7th Cir. Certiorari denied. Reported below: 867 F. 3d 843.

No. 17–1243. Specialty Fertilizer Products, LLC *v.* Shell Oil Co. et al. C. A. Fed. Cir. Certiorari denied. Reported below: 700 Fed. Appx. 1006.

No. 17–1251. Casey *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 881 F. 3d 232.

No. 17–1279. Bernstein, Shur, Sawyer & Nelson, P. A., et al. *v.* Snow. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 2017 ME 239, 176 A. 3d 729.

No. 17–1300. Findlay et al. *v.* Federal Housing Finance Agency; and

No. 17–1302. Nomura Securities International, Inc., et al. *v.* Federal Housing Finance Agency. C. A. 2d Cir. Certiorari denied. Reported below: 873 F. 3d 85.

No. 17–1304. Rodriguez Vazquez *v.* Sessions, Attorney General. C. A. 5th Cir. Certiorari denied. Reported below: 885 F. 3d 862.

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No. 17–1309. Universal Processing Services of Wisconsin, LLC *v.* Federal Trade Commission. C. A. 11th Cir. Certiorari denied. Reported below: 877 F. 3d 1234.

No. 17–1314. Raza et al. *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 876 F. 3d 604.

No. 17–1328. Preston et al. *v.* Acosta, Secretary of Labor. C. A. 11th Cir. Certiorari denied. Reported below: 873 F. 3d 877.

No. 17–1330. Sharp Image Gaming, Inc. *v.* Shingle Springs Band of Miwok Indians. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 15 Cal. App. 5th 391, 223 Cal. Rptr. 3d 362.

No. 17–1357. Five Star Senior Living Inc., fka Five Star Quality Care, Inc., et al. *v.* Mandviwala. C. A. 9th Cir. Certiorari denied. Reported below: 723 Fed. Appx. 415.

No. 17–1443. Security People, Inc. *v.* Ojmar US, LLC. C. A. Fed. Cir. Certiorari denied. Reported below: 702 Fed. Appx. 982.

No. 17–1457. MacDonald *v.* Lawyers Board of Professional Responsibility. Sup. Ct. Minn. Certiorari denied. Reported below: 906 N. W. 2d 238.

No. 17–1462. Reddi *v.* Hughes & Hughes LLP et al. C. A. 9th Cir. Certiorari denied. Reported below: 695 Fed. Appx. 279.

No. 17–1467. Geddes et al. *v.* People's Counsel of Baltimore County et al. Ct. Sp. App. Md. Certiorari denied. Reported below: 232 Md. App. 726 and 735.

No. 17–1468. Williston *v.* Vasterling et al. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 536 S. W. 3d 321.

No. 17–1475. Beason *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 17–1482. Woodhull *v.* Mascarella, Individually and as Personal Representative of the Estate of Falvo, et al. C. A. 11th Cir. Certiorari denied. Reported below: 699 Fed. Appx. 872.

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No. 17–1488. Timbes *v.* Deutsche Bank National Trust Co. et al. C. A. 11th Cir. Certiorari denied. Reported below: 708 Fed. Appx. 971.

No. 17–1489. Braddock *v.* Jolie et al. C. A. 9th Cir. Certiorari denied. Reported below: 691 Fed. Appx. 318.

No. 17–1496. Ringgold et al. *v.* Sankary et al. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 17–1500. Williams *v.* 21st Mortgage Corp. et al. C. A. 4th Cir. Certiorari denied. Reported below: 704 Fed. Appx. 302.

No. 17–1525. Segaline *v.* Washington Department of Labor and Industries et al. Ct. App. Wash. Certiorari denied. Reported below: 199 Wash. App. 748, 400 P. 3d 1281.

No. 17–1526. Davidson et al. *v.* Fairchild Controls Corp. C. A. 5th Cir. Certiorari denied. Reported below: 882 F. 3d 180.

No. 17–1558. Odom *v.* Adger et al. C. A. 4th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 185.

No. 17–1567. JENSEN *v.* OBENLAND, SUPERINTENDENT, MONROE CORRECTIONAL COMPLEX. C. A. 9th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 657.

No. 17–1577. BEST ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 702 Fed. Appx. 615.

No. 17–1583. BALES *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 77 M. J. 268.

No. 17–1585. BUGONI *v.* O'BRIEN ET AL. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 236 So. 3d 1094.

No. 17–1593. SUBWAY RESTAURANTS, INC. *v.* WARCIAK. C. A. 7th Cir. Certiorari denied. Reported below: 880 F. 3d 870.

No. 17–1597. MULLARKEY *v.* KAUFFMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 17–6790. WINGO *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 306 Kan. 995, 399 P. 3d 190.

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No. 17–7141. YOUNG *v.* OCASIO, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 17–7282. HUEY *v.* KANSAS (Reported below: 306 Kan. 1005, 399 P. 3d 211); WEIS *v.* KANSAS (306 Kan. xii, 399 P. 3d 872); GRIFFIN *v.* KANSAS (306 Kan. xi, 399 P. 3d 872); VILLA *v.* KANSAS (306 Kan. xii, 399 P. 3d 872); and WATKINS *v.* KANSAS (306 Kan. 1093, 401 P. 3d 607). Sup. Ct. Kan. Certiorari denied.

No. 17–7301. MEREDITH *v.* KANSAS (Reported below: 306 Kan. 906, 399 P. 3d 859); HILL *v.* KANSAS (306 Kan. 1043, 399 P. 3d 218); DONALDSON *v.* KANSAS (306 Kan. 998, 399 P. 3d 870); HIRSCHBERG *v.* KANSAS (306 Kan. 1002, 399 P. 3d 216); BURDICK *v.* KANSAS (306 Kan. 1036, 399 P. 3d 192); BROWN *v.* KANSAS (306 Kan. x, 399 P. 3d 872); RICHARDSON *v.* KANSAS (307 Kan. 2, 404 P. 3d 671); and SCUDERI *v.* KANSAS (306 Kan. 1267, 403 P. 3d 1206). Sup. Ct. Kan. Certiorari denied.

No. 17–7459. SCOTT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 160.

No. 17–7592. CHANEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 17–7785. STEVENS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 17–8003. SIMMONS *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 307 Kan. 38, 405 P. 3d 1190.

No. 17–8188. GROUP *v.* ROBINSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 17–8344. THARPE *v.* SELLERS, WARDEN. Sup. Ct. Ga. Certiorari denied.

No. 17–8428. REAVES *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 872 F. 3d 1137.

No. 17–8572. SUGHRUE *v.* FLORIDA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 722 Fed. Appx. 895.

No. 17–8574. JACOBS *v.* ESTEFAN. C. A. 11th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 829.

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No. 17–8575. LINEHAN *v.* PIPER. C. A. 8th Cir. Certiorari denied.

No. 17–8577. BAILEY *v.* GARDNER ET AL. C. A. 4th Cir. Certiorari denied.

No. 17–8578. BAILEY *v.* BLAKE ET AL. C. A. 4th Cir. Certiorari denied.

No. 17–8579. BRANNAN *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 54 Kan. App. 2d xviii, 394 P. 3d 155.

No. 17–8580. ADAMS *v.* BAILEY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 697 Fed. Appx. 294.

No. 17–8581. BICKHAM *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2017 IL App (1st) 142894–U.

No. 17–8582. BAILEY *v.* CUMBERLAND COUNTY, NORTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied.

No. 17–8589. RAFAY *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 17–8592. RODRIGUEZ *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE. CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 17–8593. BROOKS *v.* RAEMISCH, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF CORRECTIONS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 717 Fed. Appx. 766.

No. 17–8596. DEKOM *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA. C. A. D. C. Cir. Certiorari denied.

No. 17–8597. STEVENSON *v.* BISBEE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 696 Fed. Appx. 250.

No. 17–8609. MANUEL LOPEZ *v.* CITY OF SANTA ANA, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 698 Fed. Appx. 401.

No. 17–8610. LEPON *v.* IOWA. Ct. App. Iowa. Certiorari denied. Reported below: 908 N. W. 2d 880.

No. 17–8613. THOMAS *v.* FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 706 Fed. Appx. 653.

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No. 17–8620. K. H. *v.* WISCONSIN (Reported below: 2017 WI App 56, 377 Wis. 2d 729, 902 N. W. 2d 809); A. S. F. *v.* WISCONSIN (2017 WI App 56, 377 Wis. 2d 730, 902 N. W. 2d 810); and M. W. *v.* WISCONSIN (2017 WI App 56, 377 Wis. 2d 730, 902 N. W. 2d 810). Ct. App. Wis. Certiorari denied.

No. 17–8622. PAVON *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 17–8641. BOYD *v.* CITIMORTGAGE INC. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 17–8644. MARTIN *v.* SINCLAIR COMMUNITY COLLEGE ET AL. C. A. 6th Cir. Certiorari denied.

No. 17–8652. JONES *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 234 So. 3d 545.

No. 17–8656. BEACHEM *v.* FLORIDA DEPARTMENT OF REVENUE, ON BEHALF OF THOMAS. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 241 So. 3d 823.

No. 17–8657. BASSETT *v.* HORTON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 17–8685. BELL *v.* INOVA HEALTH CARE, DBA INOVA FAIRFAX HOSPITAL (two judgments). Sup. Ct. Va. Certiorari denied.

No. 17–8702. BRADLEY *v.* WISCONSIN DEPARTMENT OF CHILDREN AND FAMILIES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 715 Fed. Appx. 549.

No. 17–8741. LING ZHUANG *v.* APPELLATE DIVISION, SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY, ET AL. Ct. App. Cal., 2d App. Dist., Div. 5. Certiorari denied.

No. 17–8742. MORALES *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 710 Fed. Appx. 362.

No. 17–8758. KHALIL *v.* SESSIONS, ATTORNEY GENERAL. C. A. 6th Cir. Certiorari denied.

No. 17–8825. WALKER *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied.

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No. 17–8854. FISH *v.* ELON PROPERTY MANAGEMENT. Sup. Ct. Fla. Certiorari denied.

No. 17–8868. MATTISON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 17–8907. JEANBART *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 236 So. 3d 427.

No. 17–8929. ISOM *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 236 So. 3d 1054.

No. 17–8934. HAWKINS *v.* KAUFFMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 17–8941. KENNELL *v.* GRIFFITH, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 873 F. 3d 637.

No. 17–8964. BURTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 17–8966. AVILA-LUNA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 17–8969. Noe *v.* Daniels, Warden. C. A. 9th Cir. Certiorari denied.

No. 17–8975. Buxton *v.* Estock, Acting Superintendent, State Correctional Institution at Mercer, et al. C. A. 3d Cir. Certiorari denied.

No. 17–8978. Joseph *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 17–8979. Amodeo *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 17–8980. Blanchard *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 867 F. 3d 1.

No. 17–8982. Owens *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 711 Fed. Appx. 722.

No. 17–9009. Wilson *v.* Gaetz et al. C. A. 7th Cir. Certiorari denied. Reported below: 700 Fed. Appx. 540.

No. 17–9029. Smith *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 882 F. 3d 460.

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No. 17–9033. Riley *v.* Calloway, Warden. C. A. 7th Cir. Certiorari denied. Reported below: 882 F. 3d 738.

No. 17–9037. Gofphin *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 719 Fed. Appx. 971.

No. 17–9039. Plaketta *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 712 Fed. Appx. 677.

No. 17–9042. Jackson *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 17–9043. Fykes *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 17–9049. Sublett *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 729 Fed. Appx. 380.

No. 17–9050. Salvador *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 724 Fed. Appx. 670.

No. 17–9053. Tizoc *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 885 F. 3d 516.

No. 17–9055. OLIVIER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 716 Fed. Appx. 888.

No. 17–9057. AGUDO-MONROY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 705 Fed. Appx. 666.

No. 17–9059. RIVERA-CRUZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 878 F. 3d 404.

No. 17–9061. REYES-RAMIREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 715 Fed. Appx. 678.

No. 17–9065. CHAMBERS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 882 F. 3d 1305.

No. 17–9066. FLOYD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 17–9067. DAVIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 712 Fed. Appx. 578.

No. 17–9068. BOAZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 884 F. 3d 808.

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No. 17–9070. PINA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 713 Fed. Appx. 309.

No. 17–9083. COOKE *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 181 A. 3d 152.

No. 17–9129. MAGEE *v.* LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 2016–1074 (La. App. 1 Cir. 4/12/17).

No. 17–423. STERBA ET UX. *v.* PNC BANK. C. A. 9th Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 852 F. 3d 1175.

No. 17–1159. NORTHERN ARAPAHO TRIBE ET AL. *v.* WYOMING ET AL.; and

No. 17–1164. EASTERN SHOSHONE TRIBE *v.* WYOMING ET AL. C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of these petitions. Reported below: 875 F. 3d 505.

No. 17–1354. GELHAUS *v.* ESTATE OF LOPEZ, BY AND THROUGH SUCCESSOR IN INTEREST, LOPEZ, ET AL. C. A. 9th Cir. Motions of Peace Officers' Research Association of Califor-

nia et al., California State Sheriffs' Association et al., Force Litigation Consulting LLC et al., and International Municipal Lawyers Association et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 871 F. 3d 998.

No. 17–1439. VEY *v.* TYSKIEWIEZ. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 668 Fed. Appx. 427.

No. 17–7869. MARSHALL *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Motion of Promise of Justice Initiative for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 226 So. 3d 211.

No. 17–8491. PEEDE *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 715 Fed. Appx. 923.

Statement of JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, respecting the denial of certiorari.

In his petition for writ of habeas corpus under 28 U. S. C. § 2254, petitioner Robert Peede contended that he received ineffective assistance of counsel during his capital sentencing proceedings because his trial counsel did not present certain mitigating evidence concerning his mental health and difficult childhood. The District Court granted habeas relief on the basis that counsel's performance was deficient and that there was a reasonable probability that Peede would have received a different sentence had counsel introduced the mitigating evidence. On appeal from that decision, the Court of Appeals for the Eleventh Circuit reversed. In its view, Peede could not establish that he was prejudiced by any deficiency of counsel because the "new mitigation evidence . . . posed a doubled-edge-sword dilemma" in that "the new information could have hurt as much as it helped." *Peede* v. *Attorney General of Fla.*, 715 Fed. Appx. 923, 931 (2017). The Eleventh Circuit further noted that it "ha[s] repeatedly ruled that [such so-called double-edged] post-conviction evidence is usually insufficient to warrant habeas relief." *Id.*, at 931–932.

Such a blanket rule foreclosing a showing of prejudice because the new evidence is double edged flatly contradicts this Court's precedent. See *Rompilla* v. *Beard*, 545 U. S. 374, 393 (2005); *Wiggins* v. *Smith*, 539 U. S. 510, 534 (2003); *Williams* v. *Taylor*, 529

U. S. 362, 398 (2000). As I recently emphasized in dissent from the denial of certiorari in *Trevino* v. *Davis*, 584 U. S. 1019 (2018), "[w]here . . . new evidence presented during postconviction proceedings includes both mitigating and aggravating factors, a court still must consider all of the mitigating evidence alongside all of the aggravating evidence." *Id.*, at 1021. That is, "new evidence must not be evaluated in isolation," regardless of whether it is considered to be double edged. *Ibid.*

Considering the posture of this case, under which our review is constrained by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U. S. C. §§2254(d)(1)–(2), I cannot conclude the particular circumstances here warrant this Court's intervention. That said, the Eleventh Circuit's consideration of Peede's claim is deeply concerning. The ultimate question at issue in a case like this is whether "there is a reasonable probability that [the jury] would have struck a different balance." *Wiggins*, 539 U. S., at 537. A truncated consideration of new mitigating evidence that simply dismisses it as double edged does nothing to further that inquiry.

No. 17–8627. Arlotta *v.* Cook Moving System, Inc., et al. C. A. 2d Cir. Certiorari before judgment denied.

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No. 17–8643. Kersey *v.* Becton Dickinson & Co. et al. C. A. 1st Cir. Certiorari denied. Justice Alito took no part in the consideration or decision of this petition.

Rehearing Denied

No. 17–1362. Schneider *v.* Commissioner of Internal Revenue, 584 U. S. 963;

No. 17–6721. Ontiveros-Cedillo *v.* United States; and Bolanos-Galvan, aka Alvarad, aka Galvan Bolanos, aka Bolanos Galvan *v.* United States, 584 U. S. 980;

No. 17–7918. In re Colen, 584 U. S. 958;

No. 17–8167. Spalding *v.* United States, 584 U. S. 956; and

No. 17–8204. Said *v.* Commissioner of Internal Revenue, 584 U. S. 955. Petitions for rehearing denied.

June 27, 2018

Certiorari Denied

No. 17–9559 (17A1412). Bible *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions

DIVISION, ET AL. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Certiorari denied. Reported below: 739 Fed. Appx. 766.

JUNE 28, 2018

Affirmed on Appeal

No. 16–166. HARRIS ET AL. *v.* COOPER, GOVERNOR OF NORTH CAROLINA, ET AL. Affirmed on appeal from D. C. M. D. N. C.

Certiorari Granted—Reversed and Remanded. (See No. 17–742, *ante*, p. 957; and No. 17–1106, *ante*, p. 961.)

Certiorari Granted—Vacated and Remanded

No. 16–1146. A WOMAN'S FRIEND PREGNANCY RESOURCE CLINIC ET AL. *v.* BECERRA, ATTORNEY GENERAL OF CALIFORNIA. C. A. 9th Cir. Reported below: 669 Fed. Appx. 495;

No. 16–1153. LIVINGWELL MEDICAL CLINIC, INC., ET AL. *v.* BECERRA, ATTORNEY GENERAL OF CALIFORNIA, ET AL. C. A. 9th Cir. Reported below: 669 Fed. Appx. 493;

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No. 17–211. MOUNTAIN RIGHT TO LIFE, INC., DBA PREGNANCY AND FAMILY RESOURCE CENTER, ET AL. *v.* BECERRA, ATTORNEY GENERAL OF CALIFORNIA. C. A. 9th Cir. Reported below: 692 Fed. Appx. 807; and

No. 17–976. CTIA–THE WIRELESS ASSN. *v.* CITY OF BERKELEY, CALIFORNIA, ET AL. C. A. 9th Cir. Reported below: 854 F. 3d 1105. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *National Institute of Family and Life Advocates* v. *Becerra*, *ante*, p. 775.

No. 16–9187. SOLANO-HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 847 F. 3d 170; and

No. 16–9587. VILLARREAL-GARCIA *v.* UNITED STATES. C. A. 5th Cir. Reported below: 685 Fed. Appx. 297. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Rosales-Mireles* v. *United States*, *ante*, p. 129, and for consideration of question whether cases are moot.

No. 17–166. ZANDERS *v.* INDIANA. Sup. Ct. Ind. Certiorari granted, judgment vacated, and case remanded for further consid-

eration in light of *Carpenter* v. *United States*, *ante*, p. 296. Reported below: 73 N. E. 3d 178.

No. 17–981. RIFFEY ET AL. *v.* RAUNER, GOVERNOR OF ILLINOIS, ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Janus* v. *State, County, and Municipal Employees*, *ante*, p. 878. Reported below: 873 F. 3d 558.

No. 17–1050. SALDANA CASTILLO *v.* SESSIONS, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pereira* v. *Sessions*, *ante*, p. 198. Reported below: 693 Fed. Appx. 647.

No. 17–1194. INTERNATIONAL REFUGEE ASSISTANCE PROJECT ET AL. *v.* TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.; and

No. 17–1270. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL. *v.* INTERNATIONAL REFUGEE ASSISTANCE PROJECT ET AL. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Trump* v. *Hawaii*, *ante*, p. 667. Reported below: 883 F. 3d 233.

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No. 17–1356. KAUSHAL *v.* INDIANA. Ct. App. Ind. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Jae Lee* v. *United States*, 582 U. S. 357 (2017). Reported below: 87 N. E. 3d 56.

JUSTICE ALITO, with whom JUSTICE THOMAS joins, dissenting.

The Court grants, vacates, and remands this case in light of *Jae Lee* v. *United States*, 582 U. S. 357 (2017). But *Lee* was handed down on June 23, 2017—almost a month before the Indiana Court of Appeals issued its decision in this case. Moreover, petitioner admits that he cited and advanced arguments based on *Lee* in both his petition for rehearing before the Indiana Court of Appeals and his petition for transfer to the Indiana Supreme Court. Reply Brief 3. I would accordingly deny the petition for the reasons stated in Justice Scalia's dissenting opinion in *Webster* v. *Cooper*, 558 U. S. 1039, 1040 (2009).

No. 17–5402. REED *v.* VIRGINIA. Sup. Ct. Va.;

No. 17–5692. CHAMBERS, AKA SEALED DEFENDANT *v.* UNITED STATES. C. A. 2d Cir. Reported below: 681 Fed. Appx. 72;

No. 17–6213. HANKSTON *v.* TEXAS. Ct. Crim. App. Tex. Reported below: 517 S. W. 3d 112; and

No. 17–6704. BANKS *v.* UNITED STATES. C. A. 10th Cir. Reported below: 706 Fed. Appx. 455. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Carpenter* v. *United States*, *ante*, p. 296.

No. 17–5964. THOMPSON *v.* UNITED STATES. C. A. 10th 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 *Carpenter* v. *United States*, *ante*, p. 296. JUSTICE GORSUCH took no part in the consideration or decision of this motion and this petition. Reported below: 866 F. 3d 1149.

Certiorari Granted

No. 17–532. HERRERA *v.* WYOMING. Dist. Ct. Wyo., Sheridan County. Certiorari granted.

No. 17–571. FOURTH ESTATE PUBLIC BENEFIT CORP. *v.* WALL-STREET.COM, LLC, ET AL. C. A. 11th Cir. Certiorari granted. Reported below: 856 F. 3d 1338.

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No. 17–646. GAMBLE *v.* UNITED STATES. C. A. 11th Cir. Certiorari granted. Reported below: 694 Fed. Appx. 750.

No. 17–1174. NIEVES ET AL. *v.* BARTLETT. C. A. 9th Cir. Certiorari granted. Reported below: 712 Fed. Appx. 613.

No. 17–1299. FRANCHISE TAX BOARD OF CALIFORNIA *v.* HYATT. Sup. Ct. Nev. Certiorari granted. Reported below: 133 Nev. 826, 407 P. 3d 717.

No. 17–1307. OBDUSKEY *v.* MCCARTHY & HOLTHUS LLP. C. A. 10th Cir. Certiorari granted. Reported below: 879 F. 3d 1216.

No. 17–290. MERCK SHARP & DOHME CORP. *v.* ALBRECHT ET AL. C. A. 3d Cir. Certiorari granted. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 852 F. 3d 268.

Certiorari Denied

No. 16–6308. GRAHAM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 824 F. 3d 421.

No. 16–6761. CAIRA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 833 F. 3d 803.

No. 16–7314. ANTONIO RIOS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 830 F. 3d 403.

No. 16–9536. ALEXANDER *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 76 M. J. 336.

No. 17–243. ABDIRAHMAN *v.* UNITED STATES (Reported below: 76 M. J. 337); ALIRAD *v.* UNITED STATES (76 M. J. 343); AVERETT *v.* UNITED STATES (76 M. J. 345); AYERS *v.* UNITED STATES (76 M. J. 340); BAILON *v.* UNITED STATES (76 M. J. 345); BANKS *v.* UNITED STATES (76 M. J. 341); BARDIN *v.* UNITED STATES (76 M. J. 410); BARKSDALE *v.* UNITED STATES (76 M. J. 340); BENJAMIN *v.* UNITED STATES (76 M. J. 339); BENNETT *v.* UNITED STATES (76 M. J. 337); BERG *v.* UNITED STATES (76 M. J. 345); BICKERSTAFF *v.* UNITED STATES (76 M. J. 342); BIRDSONG *v.* UNITED STATES (76 M. J. 338); BLAKESLEY *v.* UNITED STATES (76 M. J. 338); BONILLA *v.* UNITED STATES (76 M. J. 335); BOYD *v.* UNITED STATES (76 M. J. 348); BRIGGS *v.* UNITED STATES (76 M. J. 338); BROOKSHIRE *v.* UNITED STATES (76 M. J. 341); BROWN *v.* UNITED STATES (76 M. J. 337); BUCKNER *v.* UNITED STATES (76 M. J. 341); BULLOCK *v.* UNITED STATES (76 M. J. 345); BUSTAMONTE *v.* UNITED STATES (76 M. J. 342); CARROLL *v.* UNITED STATES (76 M. J. 338); CHARLES *v.* UNITED STATES (76 M. J. 344); COKER *v.* UNITED STATES (76 M. J. 342); COLEMAN *v.* UNITED STATES (76 M. J. 338); COOPER *v.* UNITED STATES (76 M. J. 336); COTTNER *v.* UNITED STATES (76 M. J. 341); CREWS *v.* UNITED STATES (76 M. J. 350); CUELLAR *v.* UNITED STATES (76 M. J. 398); CURRY *v.* UNITED STATES (76 M. J. 339); DAVENPORT *v.* UNITED STATES (76 M. J. 340); DAVIS *v.* UNITED STATES (76 M. J. 344); DEJESUS *v.* UNITED STATES (76 M. J. 398); DELVALLE *v.* UNITED STATES (76 M. J. 342); DOHERTY *v.* UNITED STATES (76 M. J. 344); DONOHUE *v.* UNITED STATES (76 M. J. 337); DORRIS *v.* UNITED STATES (76 M. J. 343); DOUGLAS *v.* UNITED STATES (76 M. J. 342); DUNHAM *v.* UNITED STATES (76 M. J. 340); EARLE *v.* UNITED STATES (76 M. J. 403); ECHOLS *v.* UNITED STATES (76 M. J. 338); ENTZMINGER *v.* UNITED STATES (76 M. J. 345); ERIKSON *v.* UNITED STATES (76 M. J. 231); FLETCHER *v.* UNITED STATES (76 M. J. 338); FOGLE *v.* UNITED STATES (76 M. J. 341); FRANCISCO *v.* UNITED STATES (76 M. J. 339); GALVAN *v.* UNITED STATES (76 M. J. 344); GARCIA *v.* UNITED STATES (76 M. J. 344); GARMAN *v.* UNITED STATES (76 M. J. 403); GEORGE *v.* UNITED STATES (76 M. J. 345); GIRAU *v.*

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United States (76 M. J. 337); Gore *v.* United States (76 M. J. 398); Goss *v.* United States (76 M. J. 354); Greene *v.* United States (76 M. J. 352); Greytunkl *v.* United States (76 M. J. 339); Griffith *v.* United States (76 M. J. 338); Guice *v.* United States (76 M. J. 341); Hercules *v.* United States (76 M. J. 341); Hirsch *v.* United States (76 M. J. 345); Ho *v.* United States (76 M. J. 337); Hodge *v.* United States (76 M. J. 337); Huertalopez *v.* United States (76 M. J. 345); Hughes *v.* United States (76 M. J. 343); Humburd *v.* United States (76 M. J. 342); Jeffers *v.* United States (76 M. J. 339); Jewell *v.* United States (76 M. J. 336); Jiminez-Victoria *v.* United States (76 M. J. 354); Johnson *v.* United States (76 M. J. 340); Jones *v.* United States (76 M. J. 339); Kargbo *v.* United States (76 M. J. 403); Kelley *v.* United States (76 M. J. 342); Kidd *v.* United States (76 M. J. 343); Kissell *v.* United States (76 M. J. 335); Knoop *v.* United States (76 M. J. 349); Koenig *v.* United States (76 M. J. 411); Koth *v.* United States (76 M. J. 401); Kundradurham *v.* United States (76 M. J. 401); Land *v.* United States (76 M. J. 342); Lavasseur *v.* United States (76 M. J. 338); Layton *v.* United States (76 M. J. 338); LeRoy *v.* United States (76 M. J. 341); Lewis *v.* United States (76 M. J. 341); Lowrey *v.* United States (76 M. J. 340); Luna *v.* United States (76 M. J. 341); Maestre *v.* United States (76 M. J. 341); Maez *v.* United States (76 M. J. 354); Mairena *v.* United States (76 M. J. 345); Majetich *v.* United States (76 M. J. 345); Markley *v.* United States (76 M. J. 342); Martin *v.* United States (76 M. J. 344); Maston *v.* United States (76 M. J. 345); Maydoney *v.* United States (76 M. J. 338); Mazzie *v.* United States (76 M. J. 345); McFadden *v.* United States (76 M. J. 401); McGowan *v.* United States (76 M. J. 338); Mecker *v.* United States (76 M. J. 339); Medrano *v.* United States (76 M. J. 354); Melvin *v.* United States (76 M. J. 338); Millay *v.* United States (76 M. J. 342); Miner *v.* United States (76 M. J. 343); Montoya *v.* United States (76 M. J. 349); Morrill *v.* United States (76 M. J. 341); Murdorf *v.* United States (76 M. J. 345); Murphy *v.* United States (76 M. J. 336); Nataren *v.* United States (76 M. J. 342); Nealy *v.* United States (76 M. J. 341); Nyangau *v.* United States (76 M. J. 338); O'Connor *v.* United States (76 M. J. 341); Orage *v.* United States (76 M. J. 345); Oscar *v.* United States (76 M. J. 336); Ozoskey *v.* United States (76 M. J. 409); Patterson *v.* United States (76 M. J. 345); Perez *v.* United States (76 M. J.

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341); Perry *v.* United States (76 M. J. 401); Pimentel *v.* United States (76 M. J. 337); Piszcz *v.* United States (76 M. J. 344); Podobnik *v.* United States (76 M. J. 341); Pretlow *v.* United States (76 M. J. 340); Prewitt *v.* United States (76 M. J. 337); Ramirez *v.* United States (76 M. J. 336); Reed *v.* United States (76 M. J. 345); Rhodes *v.* United States (76 M. J. 341); Richardson-Hoeg *v.* United States (76 M. J. 336); Rich *v.* United States (76 M. J. 338); Riley *v.* United States (76 M. J. 342); Riley *v.* United States (76 M. J. 336); Rios *v.* United States (76 M. J. 341); Robinson *v.* United States (76 M. J. 401); Rochford *v.* United States (76 M. J. 338); Rosado Dejesus *v.* United States (76 M. J. 351); Sadler *v.* United States (76 M. J. 336); Sampson *v.* United States (76 M. J. 345); Sands *v.* United States (76 M. J. 338); Santucci *v.* United States (76 M. J. 341); Sharpe *v.* United States (76 M. J. 401); Shave *v.* United States (76 M. J. 345); Slater *v.* United States (76 M. J. 345); Smith *v.* United States (76 M. J. 342); Smith *v.* United States (76 M. J. 339); Smith *v.* United States (76 M. J. 345); Solt *v.* United States (76 M. J. 401); Soria *v.* United States (76 M. J. 341); Spriggs *v.* United States (76 M. J. 343); Stanford *v.* United States (76 M. J. 398); Stanley *v.* United States (76 M. J. 341); Strempler *v.* United States (76 M. J. 342); Sutton *v.* United States (76 M. J. 337); Taylor *v.* United States (76 M. J. 338); Thomas *v.* United States (76 M. J. 344); Thompson *v.* United States (76 M. J. 344); Threat *v.* United States (76 M. J. 345); Threet *v.* United States (76 M. J. 339); Toney *v.* United States (76 M. J. 402); Torres-Garza *v.* United States (76 M. J. 345); Trejo *v.* United States (76 M. J. 342); Tyson *v.* United States (76 M. J. 340); Viera *v.* United States (76 M. J. 339); Villar *v.* United States (76 M. J. 344); Warren *v.* United States (76 M. J. 341); Watford *v.* United States (76 M. J. 351); Watkins *v.* United States (76 M. J. 337); White *v.* United States (76 M. J. 341); Williams *v.* United States (76 M. J. 341); Williams *v.* United States (76 M. J. 344); and Wilson *v.* United States (76 M. J. 345). C. A. Armed Forces. Certiorari denied.

No. 17–425. Wass *v.* Idaho. Sup. Ct. Idaho. Certiorari denied. Reported below: 162 Idaho 361, 396 P. 3d 1243.

No. 17–701. Richards *v.* United States. C. A. Armed Forces. Certiorari denied. Reported below: 76 M. J. 365.

Not Subject to Copyright Publication

No. 17–840. CASH *v.* UNITED STATES (Reported below: 76 M. J. 438); GURCZYNSKI *v.* UNITED STATES (76 M. J. 441); and WILLIAMS *v.* UNITED STATES (77 M. J. 64). C. A. Armed Forces. Certiorari denied.

No. 17–950. ULBRICHT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 858 F. 3d 71.

No. 17–1002. UNITED STATES *v.* UNION PACIFIC RAILROAD CO. C. A. 8th Cir. Certiorari denied. Reported below: 865 F. 3d 1045.

No. 17–1087. FIRST RESORT, INC. *v.* HERRERA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 860 F. 3d 1263.

No. 17–1369. MAYOR AND CITY COUNCIL OF BALTIMORE ET AL. *v.* GREATER BALTIMORE CENTER FOR PREGNANCY CONCERNS, INC. C. A. 4th Cir. Certiorari denied. Reported below: 879 F. 3d 101.

No. 17–5943. RILEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 858 F. 3d 1012.

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No. 17–6256. PATRICK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 842 F. 3d 540.

No. 17–6892. WILFORD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 689 Fed. Appx. 727.

No. 17–7220. BORMUTH *v.* JACKSON COUNTY, MICHIGAN. C. A. 6th Cir. Certiorari denied. Reported below: 870 F. 3d 494.

No. 17–7769. GRAY *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 77 M. J. 5.

No. 16–1189. E. I. DU PONT DE NEMOURS & CO. ET AL. *v.* SMILEY ET AL. C. A. 3d Cir. Motions of Cato Institute and Pacific Legal Foundation et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of these motions and this petition. Reported below: 839 F. 3d 325.

Statement of JUSTICE GORSUCH, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, respecting the denial of certiorari.

Can an agency advance an interpretation of a statute for the first time in litigation and then demand deference for its view?

There is a well-defined circuit split on the question. The Court of Appeals in this case said yes, joining several other circuits who share that view. 839 F. 3d 325, 329, 333–334 (CA3 2016) (case below); *SEC* v. *Rosenthal*, 650 F. 3d 156, 160 (CA2 2011); *TVA* v. *Whitman*, 336 F. 3d 1236, 1250 (CA11 2003); *Dania Beach* v. *FAA*, 628 F. 3d 581, 586–587 (CADC 2010). But "[t]wo circuits, the Sixth and Ninth, expressly deny *Skidmore* deference to agency litigation interpretations, and the Seventh does so implicitly." Hubbard, Comment, Deference to Agency Statutory Interpretations First Advanced in Litigation? The *Chevron* Two-Step and the *Skidmore* Shuffle, 80 U. Chi. L. Rev. 447, 462 (2013) (footnotes omitted); *Smith* v. *Aegon Companies Pension Plan*, 769 F. 3d 922, 929 (CA6 2014); *Alaska* v. *Federal Subsistence Bd.*, 544 F. 3d 1089, 1095 (CA9 2008); *In re UAL Corp. (Pilots' Pension Plan Termination)*, 468 F. 3d 444, 449–450 (CA7 2006).

The issue surely qualifies as an important one. After all, *Skidmore* v. *Swift & Co.*, 323 U. S. 134 (1944), deference only makes a difference when the court would not otherwise reach the same interpretation as the agency. And a number of scholars and *amici* have raised thoughtful questions about the propriety of affording that kind of deference to agency litigation positions. For example, how are people to know if their conduct is permissible when they act if the agency will only tell them later during litigation? Don't serious equal protection concerns arise when an agency advances an interpretation only in litigation with full view of who would benefit and who would be harmed? Might the practice undermine the Administrative Procedure Act's structure by incentivizing agencies to regulate by *amicus* brief, rather than by rule? Should we be concerned that some agencies (including the one before us) have apparently become particularly aggressive in "attempt[ing] to mold statutory interpretation and establish policy by filing 'friend of the court' briefs in private litigation"? Eisenberg, Regulation by *Amicus*: The Department of Labor's Policy Making in the Courts, 65 Fla. L. Rev. 1223 (2013); see also, *e. g.*, Hickman & Krueger, In Search of the Modern *Skidmore* Standard, 107 Colum. L. Rev. 1235, 1303 (2007); Pierce, Democratizing the Administrative State, 48 Wm. & Mary L. Rev. 559, 606–607 (2006); Merrill, Judicial Deference to Executive Precedent, 101 Yale L. J. 969, 1010–1011 (1992).

Respectfully, I believe this circuit split and these questions warrant this Court's attention. If not in this case then, hopefully, soon.

No. 16–6694. JORDAN *v.* UNITED STATES. C. A. 4th Cir. Motion of respondent for leave to file brief in opposition under seal with redacted copies for the public record granted. Certiorari denied. Reported below: 824 F. 3d 421.

No. 17–475. SECURITIES AND EXCHANGE COMMISSION *v.* BANDIMERE. C. A. 10th Cir. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition. Reported below: 844 F. 3d 1168.

No. 17–565. ROWAN COUNTY, NORTH CAROLINA *v.* LUND ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 863 F. 3d 268.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, dissenting.

This Court's Establishment Clause jurisprudence is in disarray. Sometimes our precedents focus on whether a "reasonable observer" would think that a government practice endorses religion; other times our precedents focus on whether a government practice is supported by this country's history and tradition. See *Utah Highway Patrol Assn.* v. *American Atheists, Inc.*, 565 U. S. 994, 997–1001 (2011) (THOMAS, J., dissenting from denial of certiorari); *Van Orden* v. *Perry*, 545 U. S. 677, 694–697 (2005) (THOMAS, J., concurring). Happily, our precedents on legislative prayer tend to fall in the latter camp. See, *e. g.*, *Town of Greece* v. *Galloway*, 572 U. S. 565 (2014); *Marsh* v. *Chambers*, 463 U. S. 783 (1983).

Yet the decision below did not adhere to this historical approach. In ruling that Rowan County must change the prayers it uses to open its board meetings, the Court of Appeals for the Fourth Circuit emphasized that the county's prayers are led by the legislators themselves, not by paid chaplains or guest ministers. This analysis failed to appreciate the long history of legislator-led prayer in this country, and it squarely contradicted a recent decision of the Sixth Circuit. I would have granted Rowan County's petition for certiorari.

I

Rowan County, North Carolina, is governed by a five-member Board of Commissioners (Board). The Board convenes twice a month, in meetings that are open to the public. Each meeting begins with a prayer, which the commissioners take turns leading. Prayers usually begin with an invitation ("Let us pray," "Let's pray together," "Please pray with me") and end with a communal "Amen." Because the current commissioners are all Christians, their prayers tend to reference "Jesus," "Christ," or the "Savior." But the Board does not require the commissioners to profess any particular religion, or require the prayers to have any particular content. The content of the prayer is entirely up to the commissioner giving it.

Three residents of Rowan County, who were offended by the Board's prayers, sued the county, alleging violations of the Establishment Clause. The District Court entered summary judgment in the residents' favor, 103 F. Supp. 3d 712, 713 (MDNC 2015), but a divided panel of the Fourth Circuit reversed, 837 F. 3d 407, 411 (2016). On rehearing en banc, the full Fourth Circuit affirmed the District Court's initial decision. 863 F. 3d 268, 275 (2017).

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Disagreeing with the earlier panel, the en banc court began by distinguishing this Court's decision in *Town of Greece*, which upheld the prayer policy of the town of Greece in New York. The prayers in Greece were given by "guest ministers," the Fourth Circuit explained, while the prayers in Rowan County are given by the commissioners. See 863 F. 3d, at 277–278. The Fourth Circuit deemed legislator-led prayer more suspect under the Establishment Clause because it "identifies the government with religion more strongly" and "heightens the constitutional risks posed by requests to participate and by sectarian prayers." *Id.*, at 278. Since the prayers in Rowan County are legislator led, the Fourth Circuit concluded that *Town of Greece* does not apply and, thus, it "must decide whether [Rowan] [C]ounty's prayer practice, taken as a whole," is constitutional. 863 F. 3d, at 280.

The Fourth Circuit held that it was not, for a "combination" of four reasons. *Id.*, at 281. First, the prayers in Rowan County are given exclusively by the commissioners. *Id.*, at 281–282. Second, of the 143 prayers that the Fourth Circuit analyzed, 139 "invoked" Christianity, only four were nonsectarian, and at least

11 "'promote[d]'" Christianity. *Id.*, at 283–286. Third, the commissioners "told attendees to rise and often invited them to pray." *Id.*, at 286. Fourth, and finally, the prayers took place in "the intimate setting of a municipal board meeting," where the Board often exercises "quasi-adjudicatory power over such granular issues as zoning petitions, permit applications, and contract awards." *Id.*, at 287–288.

For these four reasons, the Fourth Circuit held that Rowan County's prayer practice violated the Establishment Clause. Five judges dissented, contending that the Fourth Circuit's decision was inconsistent with this Court's precedents and this country's "long and varied tradition of lawmaker-led prayer." See *id.*, at 301–323 (opinion of Agee, J.).

II

I would have granted certiorari in this case. The Fourth Circuit's decision is both unfaithful to our precedents and ahistorical. It also conflicts with a recent en banc decision of the Sixth Circuit.

While the Fourth Circuit stated that a "combination" of factors made the Board's prayers unconstitutional, *id.*, at 281, virtually all of the factors it identified were present in *Town of Greece*. The Fourth Circuit noted that the Board's prayers were typically Christian and occasionally promoted Christianity at the expense of other religions. But so did the prayers in *Town of Greece*. See 572 U. S., at 578–586. The Fourth Circuit stressed that the commissioners often asked attendees to rise and invited them to pray. But the prayergivers in *Town of Greece* made the same invitations. See *id.*, at 588–589 (plurality opinion). The Fourth Circuit thought that audience members would be pressured to participate in the prayers, given the intimate setting of Board meetings and its adjudicatory authority. But these same pressures were present in *Town of Greece*. See *id.*, at 586; *id.*, at 610 (THOMAS, J., concurring in part and concurring in judgment).

The only real difference between this case and *Town of Greece* is the person leading the prayer. Prayers in Rowan County are led by the commissioners, while prayers in Greece are led by guest ministers. The Fourth Circuit leaned heavily on this distinction to justify conducting its own free-floating evaluation of Rowan County's prayers. See 863 F. 3d, at 280. But what it should have done, under our precedents, is examine whether "his-

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tory shows that the specific practice [of legislator-led prayer] is permitted." *Town of Greece*, *supra*, at 577. If the Fourth Circuit had conducted that inquiry, it would have found a rich historical tradition of legislator-led prayer.

For as long as this country has had legislative prayer, legislators have led it. Prior to Independence, the South Carolina Provincial Congress appointed one of its members to lead the body in prayer. See Brief for State of West Virginia et al. as *Amici Curiae* 9 (States Brief). Several States, including West Virginia and Illinois, opened their constitutional conventions with prayers led by convention members instead of chaplains. See Brief for Members of Congress as *Amici Curiae* 10 (Congress Brief). The historical evidence shows that Congress and state legislatures have opened legislative sessions with legislator-led prayer for more than a century. See States Brief 8–19; Congress Brief 8–9. In short, the Founders simply "did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators." S. Rep. No. 376, 32d Cong., 2d Sess., 4 (1853).*

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The Sixth Circuit, also sitting en banc, recently surveyed this history and upheld a municipal prayer policy virtually identical to Rowan County's. See *Bormuth* v. *County of Jackson*, 870 F. 3d 494 (2017). The Sixth Circuit acknowledged that its decision was "in conflict with the Fourth Circuit's" but found the latter "unpersuasive," *id.*, at 509, n. 5—not least because the Fourth Circuit "apparently did not consider the numerous examples of [legislator-led] prayers" in our Nation's history, *id.*, at 510. Thus, the Sixth and Fourth Circuits are now split on the legality of legislator-led prayer. State and local lawmakers can lead prayers in Tennessee, Kentucky, Ohio, and Michigan, but not in South Carolina, North Carolina, Virginia, Maryland, or West Virginia. This Court should have stepped in to resolve this conflict.

I respectfully dissent.

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*In addition to having little basis in history, the Fourth Circuit's decision has little basis in logic. It is hard to see how prayers led by sectarian chaplains whose salaries are paid by taxpayers—a practice this Court has upheld, see *Marsh* v. *Chambers*, 463 U. S. 783 (1983)—could be *less* of a government establishment than prayers voluntarily given by legislators. See *Bormuth* v. *County of Jackson*, 870 F. 3d 494, 523 (CA6 2017) (en banc) (Sutton, J., concurring).

No. 17–7153. JORDAN *v.* MISSISSIPPI; and

No. 17–7245. EVANS *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: No. 17–7153, 224 So. 3d 1252; No. 17–7245, 226 So. 3d 1.

JUSTICE BREYER, dissenting.

In my dissenting opinion in *Glossip* v. *Gross*, 576 U. S. 863 (2015), I described how the death penalty, as currently administered, suffers from unconscionably long delays, arbitrary application, and serious unreliability. *Id.*, at 909. I write to underline the ways in which the two cases currently before us illustrate the first two of these problems and to highlight additional evidence that has accumulated over the past three years suggesting that the death penalty today lacks "requisite reliability." *Id.*, at 910.

I

The petitioner in the first case, Richard Gerald Jordan, was sentenced to death nearly 42 years ago. He argues that his execution after such a lengthy delay violates the Eighth Amendment's prohibition on "cruel and unusual punishments." I continue to believe this question merits the Court's attention. See *id.*, at 923–938; *Boyer* v. *Davis*, 578 U. S. 965 (2016) (BREYER, J., dissenting from denial of certiorari) ("Richard Boyer was initially sentenced to death 32 years ago"); *Ruiz* v. *Texas*, 580 U. S. 1191 (2017) (BREYER, J., dissenting from denial of stay of execution) ("Petitioner Rolando Ruiz has been on death row for 22 years, most of which he has spent in permanent solitary confinement"); *Lackey* v. *Texas*, 514 U. S. 1045, 1046 (1995) (Stevens, J., memorandum respecting denial of certiorari) (discussing petitioner's "17 years under a sentence of death").

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More than a century ago, the Court described a prisoner's 4-*week* wait prior to execution as "one of the most horrible feelings to which [a person] can be subjected." *In re Medley*, 134 U. S. 160, 172 (1890). What explains the more than 4-*decade* wait in this case? Between 1976 and 1986, each of Jordan's first three death sentences was vacated on constitutional grounds, including by this Court. See *Jordan* v. *Mississippi*, 476 U. S. 1101 (1986) (vacating death sentence and remanding case in light of *Skipper* v. *South Carolina*, 476 U. S. 1 (1986)); see also Brief in Opposition in No. 17–7153, pp. 4–5 ("Jordan was originally convicted and *automatically* sentenced to death" in July 1976—the same month that this Court held mandatory death sentences unconstitutional in *Woodson* v. *North Carolina*, 428 U. S. 280 (1976) (emphasis

added)). In 1998, Jordan was sentenced to death for the fourth time. (He had entered into a plea agreement providing for a sentence of life without parole, but the Mississippi Supreme Court invalidated that agreement and the prosecutor refused to reinstate it. See *Jordan* v. *Fisher*, 576 U. S. 1071 (2015) (SOTOMAYOR, J., dissenting from denial of certiorari).)

Jordan has lived more than half of his life on death row. He has been under a death sentence "longer than any other Mississippi inmate." 224 So. 3d 1252, 1253 (Miss. 2017). The petition states that since 1977, Jordan has been incarcerated in the Mississippi State Penitentiary and spent "most of that time on death row living in isolated, squalid conditions." Pet. for Cert. in No. 17–7153, p. 11; see also *ibid.* (citing *Gates* v. *Cook*, 376 F. 3d 323, 332–335 (CA5 2004) (holding that the conditions of confinement on Mississippi State Penitentiary's death row violate the Eighth Amendment)); Robles, The Marshall Project, Condemned to Death—and Solitary Confinement (July 23, 2017) (reporting based upon a nationwide survey of state corrections officials that Mississippi is 1 among 20 States that permit death row inmates "less than four hours of out-of-cell recreation time each day"), https://www.themarshallproject.org/2017/07/23/condemned-to-death-and-solitary-confinement (all Internet materials as last visited June 27, 2018); cf. *Davis* v. *Ayala*, 576 U. S. 257, 286–287 (2015) (KENNEDY, J., concurring) (noting that "the usual pattern" of solitary confinement involves "a windowless cell no larger than a typical parking spot" for up to "23 hours a day"). This Court has repeated that such conditions bear "'a further terror and peculiar mark of infamy' [that is] added to the punishment of death." *In re Medley*, 134 U. S., at 170. Such "additional punishment," the Court has said, is "of the most important and painful character." *Id.*, at 171. In my view, the conditions in which Jordan appears to have been confined over the past four decades reinforce the Eighth Amendment concern raised in his petition.

Jordan, now 72 years old, is one among an aging population of death row inmates who remain on death row for ever longer periods of time. Over the past decade, the percentage of death row prisoners aged 60 or older has increased more than twofold from around 7% in 2008 to more than 16% of the death row population by the most recent estimate. Compare Dept. of Justice, Bureau of Justice Statistics, T. Snell, Capital Punishment, 2008—Statistical Tables (rev. Jan. 2010) (Table 7), with Dept. of Justice, Bureau of Justice Statistics, E. Davis & T. Snell, Capital

Punishment, 2016, p. 7 (Apr. 2018) (Table 4) (Davis & Snell). Meanwhile, the average period of imprisonment between death sentence and execution has risen from a little over 6 years in 1988 to more than 11 years in 2008 to more than 19 years over the past year. See Dept. of Justice, Bureau of Justice Statistics, T. Snell, Capital Punishment, 2013—Statistical Tables, p. 14 (rev. Dec. 19, 2014) (Table 10); Death Penalty Information Center (DPIC), Execution List 2018, https://deathpenaltyinfo.org/execution-list-2018; DPIC, Execution List 2017, https://deathpenaltyinfo.org/execution-list-2017; see also F. Baumgartner et al., Deadly Justice: A Statistical Portrait of the Death Penalty 161, 168, Fig. 8.1 (2018) (analyzing recent data showing that "nationally, each passing year is associated with approximately 125 additional days of delay from crime to execution").

II

In addition, both Richard Jordan's case and that of Timothy Nelson Evans, the second petitioner here, illustrate the problem of arbitrariness. To begin with, both were sentenced to death in the Second Circuit Court District of Mississippi. Evans says that district accounts for "the largest number of death sentences" of any of the State's 22 districts since 1976. Pet. for Cert. in No. 17–7245, pp. 5–6; see also App. D to Pet. for Cert. (citing death sentencing data maintained by Mississippi's Office of the State Public Defender).

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This geographic concentration reflects a nationwide trend. Death sentences, while declining in number, have become increasingly concentrated in an ever-smaller number of counties. In the mid-1990's, more than 300 people were sentenced to death in roughly 200 counties each year. B. Garett, End of Its Rope: How Killing the Death Penalty Can Revive Criminal Justice 138–140 (2017). By comparison, these numbers have declined dramatically over the past three years. A recent study finds, for example, that in 2015, *all* of those who were sentenced to death nationwide (51 people in total) were sentenced in 38 of this Nation's more than 3,000 counties; in 2016, *all* death sentences (31 in total) were imposed in just 28 counties nationwide (fewer than 1% of counties). *Id.*, at 139–140, Fig. 6.2; see also Garrett, Jakubow, & Desai, The American Death Penalty Decline, 107 J. Crim. L. & C. 561, 564, 584 (2017); Fair Punishment Project, Too Broken To Fix: Part I: An In-Depth Look at America's Outlier Death Penalty

Counties 2 (2016) (citing data indicating there were 16 counties, or 0.5% of all counties nationwide, in which five or more death sentences were imposed from 2010 to 2015); cf. M. Radelet, History of the Death Penalty in Colorado 168 (2017) (explaining that Colorado's three death row inmates "[a]ll were prosecuted in the same judicial district, all the cases came from Aurora, all are young black men, and indeed all attended the same high school"); Joint State Government Commission, Capital Punishment in Pennsylvania: Report of the Task Force and Advisory Committee 90 (June 2018) ("[D]ifferences among counties in death penalty outcomes . . . were the largest and most prominent differences found in the study. In a very real sense, a given defendant's chance of having the death penalty sought, retracted, or imposed depends upon where that defendant is prosecuted and tried" (quotation altered)); *Glossip*, 576 U. S., at 918–920 (BREYER, J., dissenting).

This geographic arbitrariness is aggravated by the fact that definitions of death eligibility vary depending on the State. This Court has repeated that "[c]apital punishment must be limited to those offenders who commit a narrow category of the most serious crimes," *Roper* v. *Simmons*, 543 U. S. 551, 568 (2005) (internal quotation marks omitted), since "the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State," *Atkins* v. *Virginia*, 536 U. S. 304, 319 (2002). But the statutory criteria States enact to distinguish a non-death-eligible murder from a particularly heinous death-eligible murder and thus attempt to use to identify the "worst of the worst" murderers are far from uniform. See Baumgartner, *supra*, at 90–115 (reviewing data collected in a "host" of empirical studies showing "that nearly *all* homicides in a given state are death-eligible").

For instance, as Evans argues, Mississippi is one of a small number of States in which defendants may be (and, in Mississippi's Second Circuit Court District, routinely are) sentenced to death for, among other things, felony robbery murder without any finding or proof of intent to kill. Pet. for Cert. in No. 17–7245, at 4–5, and nn. 3–4; see also *id.*, at 8, n. 10; Miss. Code Ann. §§ 97–3–19(2)(e), (f), 99–19–101(5)(d) (2017); McCord & Harmon, Lethal Rejection: An Empirical Analysis of the Astonishing Plunge in Death Sentences in the United States From Their Post-*Furman* Peak, 81 Albany L. Rev. 1, 32–33, and n. 155, Table 10 (2018)

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(citing data indicating the general decline in robbery as an aggravating factor and research arguing that relying upon robbery as a sole aggravator is generally insufficient to identify the "worst of the worst"). And the Court recently considered a petition presenting "unrebutted" evidence that "about 98% of first-degree murder defendants in Arizona were eligible for the death penalty" under Arizona's death penalty statute, which allows for imposition of the death penalty for "felony murder based on 22 possible predicate felony offenses . . . including, for example, transporting marijuana for sale." *Hidalgo* v. *Arizona*, 583 U. S. 1196, 1198, 1201 (2018) (BREYER, J., statement respecting denial of certiorari).

I recognize that only a small fraction of the roughly 8,000 death sentences imposed since 1976 have resulted in executions. Executions continue to decline from the modern peak of 98 executions occurring across 72 counties and 20 States in 1999 to 28 executions in 22 counties across 6 States in 2015. Baumgartner, *supra*, at 328. In 2016, 20 people were executed. That number remains the fewest executions in more than a century, just below the 23 executions that took place in 2017. See Davis & Snell 8, 15. More than 700 people await execution on California's death row but the State, which has executed 13 people since 1976, has not carried out an execution since 2006. *Id.*, at 3; DPIC, State by State Database: California, https://deathpenaltyinfo.org/state_by_state. The State of Mississippi, which has executed a total of 21 people since 1976, has not carried out an execution in more than six years. DPIC, State by State Database: Mississippi, https://deathpenaltyinfo.org/state_by_state. This data suggests that the death penalty may eventually disappear. But it also shows that capital punishment is "unusual" (as well as "cruel").

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III

Finally, I note that in the past three years, further evidence has accumulated suggesting that the death penalty as it is applied today lacks "requisite reliability." *Glossip*, 576 U. S., at 910 (BREYER, J., dissenting). Four hours before Willie Manning was slated to die by lethal injection, the Mississippi Supreme Court stayed his execution and on April 21, 2015, he became the fourth person on Mississippi's death row to be exonerated. *Id.*, at 927; National Registry of Exonerations (June 25, 2018), https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx. Since January 2017, six death row inmates have been exonerated.

See DPIC, Description of Innocence, https://deathpenaltyinfo.org/innocence-cases#157. Among them are Rodricus Crawford, Rickey Dale Newman, Gabriel Solache, and Vicente Benavides Figueroa, whose exonerations were based upon evidence of actual innocence. See National Registry of Exonerations, *supra*.

* * *

In my view, many of the capital cases that come before this Court, often in the form of petitions for certiorari, involve, like the cases of Richard Jordan and Timothy Evans, special problems of cruelty or arbitrariness. Hence, I remain of the view that the Court should grant the petitions now before us to consider whether the death penalty as currently administered violates the Constitution's Eighth Amendment.

JULY 16, 2018

Rehearing Denied

No. 16–9318. MALDONADO-LANDAVERDE *v.* UNITED STATES, 584 U. S. 977;

No. 17–656. AUDATEX NORTH AMERICA, INC. *v.* MITCHELL INTERNATIONAL, INC., 584 U. S. 961;

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No. 17–1139. AAMES *v.* UNITED STATES ET AL., 584 U. S. 931;

No. 17–1192. TIRAT-GEFEN *v.* BATISTA ALMEIDA, 584 U. S. 962;

No. 17–1271. KANOFSKY *v.* COMMISSIONER OF INTERNAL REVENUE, 584 U. S. 950;

No. 17–1311. COULTER *v.* COULTER, 584 U. S. 993;

No. 17–1313. DEK–M NATIONWIDE, LTD. *v.* HILL ET AL., 584 U. S. 979;

No. 17–1315. COOPER *v.* COUNTRYWIDE HOME LOANS, INC., ET AL., 584 U. S. 993;

No. 17–1347. CASTILLO *v.* DORAL PARK COUNTRY CLUB VILLAS ET AL., 584 U. S. 979;

No. 17–7448. MARTINEZ-HERNANDEZ *v.* UNITED STATES, 583 U. S. 1137;

No. 17–7675. SORO *v.* KEYES CO., 584 U. S. 936;

No. 17–7738. COTTON *v.* COUNTY OF SAN BERNARDINO, CALIFORNIA, ET AL., 584 U. S. 937;

No. 17–7742. ONG VUE *v.* DOWLING, WARDEN, 584 U. S. 937;

No. 17–7746. MACKEY *v.* BERRYHILL, DEPUTY COMMISSIONER FOR OPERATIONS, SOCIAL SECURITY ADMINISTRATION, 584 U. S. 937;

No. 17–7921. WEIBLE *v.* CALIFORNIA, 584 U. S. 939;
No. 17–7922. WORTH *v.* NEW YORK, 584 U. S. 965;
No. 17–7951. AUSTIN *v.* JACKSONVILLE SHERIFF'S OFFICE, 584 U. S. 965;
No. 17–7956. TEDESCO *v.* PENNSYLVANIA, 584 U. S. 965;
No. 17–8017. ADAMSON *v.* GRIFFIN, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, 584 U. S. 982;
No. 17–8032. STEELE *v.* THOMAS, WARDEN, 584 U. S. 953;
No. 17–8036. ALSTON *v.* CITY OF MADISON, WISCONSIN, ET AL., 584 U. S. 941;
No. 17–8042. PEYTON *v.* BROWN ET AL., 584 U. S. 982;
No. 17–8069. BUXTON *v.* HILL ET AL., 584 U. S. 982;
No. 17–8111. KLUG *v.* ENGLISH, WARDEN, ET AL., 584 U. S. 944;
No. 17–8207. TROY-MCKOY *v.* UNIVERSITY OF ILLINOIS ET AL., 584 U. S. 995;
No. 17–8218. WASHINGTON *v.* DIAMOND, 584 U. S. 966;
No. 17–8239. BUXTON *v.* THOMPSON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT MERCER, ET AL., 584 U. S. 1005;
No. 17–8256. CROMARTIE *v.* ALABAMA STATE UNIVERSITY ET AL., 584 U. S. 1005;
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No. 17–8372. CERNY ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION, 584 U. S. 985;
No. 17–8513. VALDEZ PEREZ *v.* CALIFORNIA, *ante*, p. 1007; and
No. 17–8559. IN RE JONES, 584 U. S. 975. Petitions for rehearing denied.

No. 16–9660. LARIOS-VILLATORO *v.* UNITED STATES; and HERNANDEZ-HERNANDEZ *v.* UNITED STATES, 584 U. S. 973. Petition for rehearing as to Jaime A. Hernandez-Hernandez denied.

JULY 30, 2018

Miscellaneous Order

No. 18A65. UNITED STATES ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON ET AL. Application for stay, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. The Government's request for relief is premature and is denied without prejudice. The breadth of respondents' claims is striking, however, and justiciability of those claims presents substantial grounds for difference of opinion. The District Court should take these concerns into account in assessing

burdens of discovery and trial, as well as desirability of a prompt ruling on the Government's pending dispositive motions.

AUGUST 1, 2018

Miscellaneous Order. (For Court's order making allotment of Justices, see *ante*, p. III.)

AUGUST 6, 2018

Certiorari Granted—Vacated and Remanded

No. 17–243. ABDIRAHMAN *v.* UNITED STATES . . . BRIGGS *v.* UNITED STATES. Petition for rehearing granted. The order entered June 28, 2018, [*ante*, p. 1030] denying petition for writ of certiorari vacated as to petitioner Michael Briggs. Certiorari as to Michael Briggs granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Mangahas*, 77 M. J. 220 (2018).

Miscellaneous Orders

No. 17A1425. QORANE, AKA GAAS *v.* SESSIONS, ATTORNEY GENERAL. Application for stay, presented to JUSTICE SOTOMAYOR and referred to the Court, denied.

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No. 17–765. UNITED STATES *v.* STITT. C. A. 6th Cir.; and

No. 17–766. UNITED STATES *v.* SIMS. C. A. 8th Cir. [Certiorari granted, 584 U. S. 949.] Motion of petitioner to dispense with printing joint appendix granted.

Rehearing Granted. (See No. 17–243, *supra*.)

Rehearing Denied

No. 16–6777. MORTON *v.* PERRY, SECRETARY, NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, 580 U. S. 1072;

No. 17–1336. COULTER *v.* LINDSAY ET AL., 584 U. S. 1001;

No. 17–1407. ROEDER *v.* SCHMIDT, ATTORNEY GENERAL OF KANSAS, 584 U. S. 1032;

No. 17–1431. GRACE ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION, 584 U. S. 994;

No. 17–1435. O'LEARY *v.* OFFICE OF PERSONNEL MANAGEMENT ET AL., 584 U. S. 1014;

No. 17–1481. GREEN *v.* MNUCHIN, SECRETARY OF THE TREASURY, 584 U. S. 1033;

No. 17–6596. MILLER *v.* UNITED STATES, 584 U. S. 964;

No. 17–7328. ISAACSON *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 583 U. S. 1185;

No. 17–7832. DELGADO *v.* GODINEZ ET AL., 584 U. S. 952;

No. 17–7850. PHILLIP *v.* MCARDLE, 584 U. S. 964;

No. 17–7973. ROOSEVELT W. ET AL. *v.* LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, 584 U. S. 966;

No. 17–7978. LUCY *v.* GROW, 584 U. S. 981;

No. 17–8072. LIGGINS *v.* JPMORGAN CHASE BANK, N. A., 584 U. S. 982;

No. 17–8091. NELSON *v.* AMALGAMATED TRANSIT UNION LOCAL 1181–1061, AFL–CIO, ET AL., 584 U. S. 983;

No. 17–8098. KARABAJAKYAN *v.* BERRYHILL, DEPUTY COMMISSIONER FOR OPERATIONS, SOCIAL SECURITY ADMINISTRATION, 584 U. S. 983;

No. 17–8208. BURNETT *v.* BAC HOME LOANS SERVICING, LP, ET AL., 584 U. S. 1004;

No. 17–8225. IN RE CHRISTIAN, 584 U. S. 1000;

No. 17–8226. ECHOLS *v.* CSX TRANSPORTATION, INC., 584 U. S. 955;

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No. 17–8248. CIOTTA *v.* HOLLAND, WARDEN, 584 U. S. 1005;

No. 17–8257. SIVAK *v.* IDAHO, 584 U. S. 984;

No. 17–8262. WOODSON *v.* UNITED STATES, 584 U. S. 995;

No. 17–8263. WOODSON *v.* UNITED STATES, 584 U. S. 995;

No. 17–8264. WOODSON *v.* UNITED STATES, 584 U. S. 995;

No. 17–8265. WOODSON *v.* UNITED STATES, 584 U. S. 995;

No. 17–8266. WOODSON *v.* UNITED STATES, 584 U. S. 995;

No. 17–8267. WOODSON *v.* UNITED STATES, 584 U. S. 996;

No. 17–8268. WOODSON *v.* UNITED STATES, 584 U. S. 996;

No. 17–8269. WOODSON *v.* UNITED STATES, 584 U. S. 996;

No. 17–8276. ALEXANDER *v.* WILLIAMS, WARDEN, 584 U. S. 967;

No. 17–8290. WRIGHT *v.* BAYVIEW LOAN SERVICING, LLC, ET AL. (two judgments), 584 U. S. 1006;

No. 17–8422. DONAHUE *v.* PENNSYLVANIA, 584 U. S. 1035;

No. 17–8424. ABELA *v.* WASHINGTON, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS, 584 U. S. 1006;

No. 17–8425. IN RE SEVION-EL, 584 U. S. 958;

No. 17–8447. COATES, AKA SIMMONS, AKA THOMAS *v.* SESSIONS, ATTORNEY GENERAL, 584 U. S. 1036;

No. 17–8493. VIOLA *v.* UNITED STATES, 584 U. S. 997;

No. 17–8504. CARPENTER *v.* CITY OF CHICAGO, ILLINOIS, ET AL., *ante*, p. 1007;

No. 17–8505. BOZIC *v.* WETZEL, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, 584 U. S. 1037;

No. 17–8517. OKHIO *v.* UNITED STATES, 584 U. S. 988;

No. 17–8723. DUCKETT *v.* MARSH, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT BENNER TOWNSHIP, ET AL., 584 U. S. 1018;

No. 17–8754. JACKSON *v.* ALABAMA BOARD OF PARDON AND PAROLES, 584 U. S. 1038; and

No. 17–8890. PHILLIPS *v.* TRUMP, PRESIDENT OF THE UNITED STATES, *ante*, p. 1008. Petitions for rehearing denied.

No. 16–763. KE KAILANI DEVELOPMENT LLC ET AL. *v.* KE KAILANI PARTNERS, LLC, ET AL., 580 U. S. 1117. Motion for leave to file petition for rehearing denied.

No. 17–8334. CHON *v.* UNITED STATES ET AL., 584 U. S. 1010. Petition for rehearing denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition.

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AUGUST 9, 2018

Miscellaneous Orders

No. 18A142. IRICK *v.* TENNESSEE. Application for stay of execution of sentence of death, presented to JUSTICE KAGAN, and by her referred to the Court, denied.

JUSTICE SOTOMAYOR, dissenting.

Tonight the State of Tennessee intends to execute Billy Ray Irick using a procedure that he contends will amount to excruciating torture. During a recent 10-day trial in the state court, medical experts explained in painstaking detail how the three-drug cocktail Tennessee plans to inject into Irick's veins will cause him to experience sensations of drowning, suffocating, and being burned alive from the inside out. *Abdur'Rahman* v. *Parker*, No. 18–183–II(III) (Ch. Ct. Davidson Cty., Tenn., July 26, 2018), p. 21, and n. 7 (generally crediting the testimony of plaintiffs' experts); Application for Stay of Execution 8–11 (summarizing that testimony); see also *Arthur* v. *Dunn*, 580 U. S. 1141, 1142 (2017) (SOTOMAYOR, J., dissenting from denial of certiorari). The entire process will last at least 10 minutes, and perhaps as many as 18,

before the third drug (potassium chloride) finally induces fatal cardiac arrest. No. 18–183–II(III), at 25–26. Meanwhile, as a result of the second drug (vecuronium bromide), Irick will be "entirely paralyzed, unable to move or scream." *Arthur*, 580 U. S., at 1142 (opinion of SOTOMAYOR, J.).

But Irick may well be aware of what is happening to him. In theory, the first drug in the three-drug protocol, midazolam, is supposed to render a person unable to feel pain during an execution. But the medical experts who testified here explained that midazolam would not work, and the trial court credited that testimony. Application for Stay of Execution 8–11; No. 18–183–II(III), at 21; see also *Arthur*, 580 U. S., at 1145–1146 (opinion of SOTOMAYOR, J.) (describing similar evidence in that case). If the drug indeed fails, the consequences for Irick will be extreme: Although the midazolam may temporarily render Irick unconscious, the onset of pain and suffocation will rouse him. And it may do so just as the paralysis sets in, too late for him to alert bystanders that his execution has gone horribly (if predictably) wrong.

The State does not appear to have rebutted meaningfully any of this evidence.[1] See No. 18–183–II(III), at 21, n. 7 ("The Defendants'

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[1] I say "appear," and give only a general description of the evidence apparently introduced at trial, because in the rushed context of this emergency application, the trial record is not before this Court. I therefore rely on the state courts' orders and the parties' filings to discern what that record is likely to show.

The application comes to this Court in a hurried posture because Tennessee first adopted its current midazolam-based protocol only in January of this year. No. M1987–00131–SC–DPE–DD (Tenn., Aug. 6, 2018), p. 2. Irick, along with 32 coplaintiffs also under sentence of death, promptly challenged it. *Ibid.* With Irick's August 9 execution date looming, the parties and the court brought this complex case to trial in a matter of months. See *ibid.* The trial court issued its decision on July 26, Irick filed a notice of appeal and moved to vacate his execution date on July 30, and a divided Supreme Court of Tennessee denied Irick's motion August 6. *Id.*, at 3, 6. In the meantime, the Tennessee Court of Appeals issued an order advising that it would not have sufficient time to consider the issues raised by Irick's appeal before his scheduled execution. *Abdur'Rahman* v. *Parker*, No. M2018–01385–COA–R3–CV (July 30, 2018). Given the precipitous pace of proceedings, the Tennessee Supreme Court rendered its decision on Irick's motion to vacate without the benefit of the pleadings, trial transcripts, or exhibits on which the trial court relied in reaching its decision. No. M1987–00131–SC–DPE–DD, at 4 (Lee, J., dissenting).

two experts, while qualified, did not have the research knowledge and [e]minent publications that Plaintiffs' experts did"). As noted above, the trial court credited the evidence put on by Irick and his coplaintiffs, finding that they "established that midazolam does not elicit strong analgesic [*i. e.*, pain-inhibiting] effects," and that therefore Irick "may be able to feel pain from the administration of the second and third drugs." *Id.*, at 21. Those are the drugs that will paralyze him and create sensations of suffocation and of burning that "'may well be the chemical equivalent of being burned at the stake'" before eventually stopping his heart. *Arthur*, 580 U. S., at 1142 (opinion of SOTOMAYOR, J.) (quoting *Glossip* v. *Gross*, 576 U. S. 863, 949 (2015) (SOTOMAYOR, J., dissenting)). Accounts from other executions carried out using midazolam lend troubling credence to the trial court's finding. See No. 18–183–II(III), at 28 (noting testimony describing inmates' "grimaces, clenched fists, furrowed brows, and moans" during lethal injection executions, including by use of midazolam); *Glossip*, 576 U. S., at 966–968 (SOTOMAYOR, J., dissenting).

Given the Eighth Amendment's prohibition on "cruel and unusual punishments," one might think that such a finding would resolve this case in Irick's favor. And to stay or delay Irick's execution, the Tennessee Supreme Court needed only to conclude that it is likely (not certain) that Irick can persuade an appellate court that his claim has merit. See Tenn. Sup. Ct. Rule 12(4)(E) (2017); No. M1987–00131–SC–DPE–DD (Tenn., Aug. 6, 2018), p. 3.

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But the Tennessee Supreme Court did not find any such likelihood and declined to postpone Irick's execution to allow appellate review of his claims. *Id.*, at 3–5. The court instead effectively let stand the trial court's order, which held that Irick's extensive and persuasive evidence describing the ordeal that awaits him raised no constitutional concerns. The trial court offered two independent reasons for its holding: first, that Irick had not proved that another, less painful method of killing him was available to the State; and second, even assuming Irick had proved a readily available alternative, that this Court would not consider the painful ordeal that Irick faces sufficiently torturous to violate the Eighth Amendment. No. 18–183–II(III), at 9, 21–22. Thereafter, the Tennessee Supreme Court refused to postpone Irick's execution on the ground that he was unlikely to succeed in disturbing the trial court's no-available-alternative holding on appeal. No. M1987–00131–SC–DPE–DD, at 4. The court did not directly

address the trial court's second rationale, but implied that it agreed. See *id.*, at 5.

In *Glossip* v. *Gross*, 576 U. S. 863, this Court did impose the "perverse requirement that inmates offer alternative methods for their own executions." *McGehee* v. *Hutchinson*, 581 U. S. 933, 935 (2017) (SOTOMAYOR, J., dissenting from denial of application for stay and denial of certiorari). Without the trial court record before me, I cannot say definitively that the Tennessee courts are wrong that Irick failed to carry that burden. But Irick's contentions raise serious questions about the courts' conclusion.

Irick raised two different alternative methods in the trial court: a single-drug procedure using only a drug called pentobarbital or, alternatively, a modification of the current procedure to omit the administration of vecuronium bromide as a paralytic at its second step. Tennessee argued, and the trial court found, that pentobarbital was currently unavailable to the State notwithstanding its efforts to find a supplier. No. 18–183–II(III), at 9–19. Irick claims, however, that the court improperly ignored indirect evidence proving pentobarbital's availability. If that contention is accurate, then that could constitute legal error. Further, Irick maintains the trial court improperly refused to permit him to amend the pleadings to argue that simply omitting the paralytic drug would be a suitable alternative, see No. M1987–00131–SC–DPE–DD, at 4–5, even though it appears such an amendment might not have necessitated any additional testimony, see No. M1987–00131–SC–DPE–DD, at 5–6 (Lee, J., dissenting).[2] The record would shed light on the validity of Irick's contentions.

If Irick did fail to plead and prove at least one available alternative, this case further illustrates the error of this Court's "macabre challenge" to condemned prisoners that they must propose an alternative method for their own executions. *Arthur*, 580 U. S., at 1141 (opinion of SOTOMAYOR, J.). But given the life-or-death stakes of determining whether the trial court erred in concluding that Irick failed to prove an alternative means of execution, and because Irick makes a nonfrivolous contention that the trial court did so err, see No. M1987–00131–SC–DPE–DD, at 4–6 (Lee, J.,

[2] Irick contends that his evidence shows that omitting the paralytic would hasten his death and shorten his suffering. Application for Stay of Execution 12, 16.

dissenting), I would grant the stay to allow the state courts more time to consider Irick's claims. See *Barefoot* v. *Estelle*, 463 U. S. 880, 895 (1983).

As to the prediction that this Court would deem up to 18 minutes of needless torture anything less than cruel, unusual, and unconstitutional, I fervently hope the state courts were mistaken. At a minimum, their conclusion that the Constitution tolerates what the State plans to do to Irick is not compelled by *Glossip*, which did not categorically determine whether a lethal injection protocol using midazolam is a constitutional method of execution. See *Arthur*, 580 U. S., at 1150 (opinion of SOTOMAYOR, J.). *Glossip*'s majority concluded only that, based on the evidence presented in that case, there was no clear error in the District Court's factual finding that midazolam was highly likely to prevent a person from feeling pain. 580 U. S., at 1150 (opinion of SOTOMAYOR, J.) (citing *Glossip*, 576 U. S., at 881). As noted, the trial court here came to a different factual conclusion based on a different factual record, as have others. See *McGehee*, 581 U. S., at 935 (opinion of SOTOMAYOR, J.) (noting a District Court's "well-supported finding that midazolam creates a substantial risk of severe pain"); *Otte* v. *Morgan*, 582 U. S. 955, 956 (2017) (SOTOMAYOR, J., dissenting from denial of application for stay and denial of certiorari) (similar).

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If it turns out upon more sober appellate review that this case presents the question, I would grant certiorari to decide the important question whether the Constitution truly tolerates executions carried out by such quite possibly torturous means.

* * *

In refusing to grant Irick a stay, the Court today turns a blind eye to a proven likelihood that the State of Tennessee is on the verge of inflicting several minutes of torturous pain on an inmate in its custody, while shrouding his suffering behind a veneer of paralysis. I cannot in good conscience join in this "rush to execute" without first seeking every assurance that our precedent permits such a result. No. M1987–00131–SC–DPE–DD, at 1 (Lee, J., dissenting). If the law permits this execution to go forward in spite of the horrific final minutes that Irick may well experience, then we have stopped being a civilized nation and accepted barbarism. I dissent.

No. 142, Orig. FLORIDA *v.* GEORGIA. Ralph I. Lancaster, Esq., of Portland, Me., the Special Master in the case, is hereby dis-

charged with the thanks of the Court. It is ordered that the Honorable Paul J. Kelly, Jr., of Santa Fe, N. M., 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.*, *ante*, p. 803.]

No. 18–5495 (18A145). In re Irick. Application for stay of execution of sentence of death, presented to Justice Kagan, and by her referred to the Court, denied. Petition for writ of habeas corpus denied.

August 17, 2018

Dismissal Under Rule 46

No. 17–804. EVE–USA, Inc., et al. *v.* Mentor Graphics Corp. C. A. Fed. Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 851 F. 3d 1275.

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August 24, 2018

Miscellaneous Orders

No. 18A16. Chasson, aka Alias, aka Hason *v.* Sessions, Attorney General. Application for stay, addressed to The Chief Justice and referred to the Court, denied.

No. 17–71. Weyerhaeuser Co. *v.* United States Fish and Wildlife Service et al. C. A. 5th Cir. [Certiorari granted, 583 U. S. 1101.] Motion of respondents Markle Interests, LLC, et al. for divided argument denied.

No. 17–571. Fourth Estate Public Benefit Corp. *v.* Wall-Street.com, LLC, et al. C. A. 11th Cir. [Certiorari granted, *ante*, p. 1029.] Motion of petitioner to dispense with printing joint appendix granted.

No. 17–587. Mount Lemmon Fire District *v.* Guido et al. C. A. 9th Cir. [Certiorari granted, 583 U. S. 1155.] Motion of

*[Reporter's Note: For amendment of this order, see *post*, p. 1057.]

the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 17–1026. GARZA *v.* IDAHO. Sup. Ct. Idaho. [Certiorari granted, *ante*, p. 1002.] Motion of petitioner to dispense with printing joint appendix granted.

No. 17–1091. TIMBS *v.* INDIANA. Sup. Ct. Ind. [Certiorari granted, *ante*, p. 1002.] Motion of petitioner to dispense with printing joint appendix granted.

No. 17–1299. FRANCHISE TAX BOARD OF CALIFORNIA *v.* HYATT. Sup. Ct. Nev. [Certiorari granted, *ante*, p. 1029.] Motion of petitioner to dispense with printing joint appendix granted.

Rehearing Denied

No. 16–6308. GRAHAM *v.* UNITED STATES, *ante*, p. 1029;

No. 16–6694. JORDAN *v.* UNITED STATES, *ante*, p. 1035;

No. 17–565. ROWAN COUNTY, NORTH CAROLINA *v.* LUND ET AL., *ante*, p. 1035;

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No. 17–970. STANFORD *v.* BROWNE ET AL., *ante*, p. 1003;

No. 17–1467. GEDDES ET AL. *v.* PEOPLE'S COUNSEL OF BALTIMORE COUNTY ET AL., *ante*, p. 1018;

No. 17–1488. TIMBES *v.* DEUTSCHE BANK NATIONAL TRUST CO. ET AL., *ante*, p. 1018;

No. 17–1489. BRADDOCK *v.* JOLIE ET AL., *ante*, p. 1018;

No. 17–1495. ROBERTS *v.* FNB SOUTH OF ALMA, GEORGIA, *ante*, p. 1005;

No. 17–1527. CRAMPTON *v.* COMMISSION FOR LAWYER DISCIPLINE OF THE STATE BAR OF TEXAS, *ante*, p. 1005;

No. 17–7136. THOMAS *v.* PERRY, WARDEN, 583 U. S. 1130;

No. 17–7220. BORMUTH *v.* JACKSON COUNTY, MICHIGAN, *ante*, p. 1033;

No. 17–7664. WILLIAMS *v.* FLORIDA DEPARTMENT OF CORRECTIONS ET AL., 584 U. S. 936;

No. 17–7769. GRAY *v.* UNITED STATES, *ante*, p. 1033;

No. 17–7884. BADMUS *v.* MUTUAL OF OMAHA INSURANCE CO., 584 U. S. 1004;

No. 17–7889. DAVIS, AKA STRONG *v.* PENNSYLVANIA, 584 U. S. 939;

No. 17–7891. BLUEFELD *v.* COHEN ET AL., 584 U. S. 965;

No. 17–8000. BETHUNE *v.* METROPOLITAN TRANSPORTATION AUTHORITY/LONG ISLAND BUS ET AL., 584 U. S. 981;

No. 17–8081. PETTAWAY *v.* TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA ET AL., 584 U. S. 982;

No. 17–8273. BROWER *v.* MICHIGAN, 584 U. S. 1005;

No. 17–8350. MOHAJER *v.* JPMORGAN CHASE BANK, N. A., ET AL., 584 U. S. 1016;

No. 17–8469. IN RE RAA, *ante*, p. 1002;

No. 17–8548. CHILDRESS *v.* CITY OF CHARLESTON POLICE DEPARTMENT ET AL., *ante*, p. 1007;

No. 17–8575. LINEHAN *v.* PIPER, *ante*, p. 1020;

No. 17–8591. COAD *v.* UNITED STATES, 584 U. S. 1007;

No. 17–8609. MANUEL LOPEZ *v.* CITY OF SANTA ANA, CALIFORNIA, ET AL., *ante*, p. 1021;

No. 17–8698. CHUN HEI LAM *v.* UNITED STATES, 584 U. S. 1009;

No. 17–8702. BRADLEY *v.* WISCONSIN DEPARTMENT OF CHILDREN AND FAMILIES ET AL., *ante*, p. 1022;

No. 17–8757. LEONARD *v.* OREGON ET AL., *ante*, p. 1008;

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No. 17–8811. IN RE MASON, *ante*, p. 1015;

No. 17–8848. IN RE SMOTHERMAN, 584 U. S. 1031; and

No. 17–8946. MALDONADO *v.* UNITED STATES, *ante*, p. 1009. Petitions for rehearing denied.

AUGUST 29, 2018

Miscellaneous Order

No. 18A146. FOOD MARKETING INSTITUTE *v.* ARGUS LEADER MEDIA, DBA ARGUS LEADER. Application to recall and stay the mandate, presented to JUSTICE GORSUCH, and by him referred to the Court, granted, and the mandate of the United States Court of Appeals for the Eighth Circuit in case No. 17–1346 is recalled and stayed pending the timely filing and disposition of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court. JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN would deny the application.

AUGUST 30, 2018

Miscellaneous Order

No. 18A118. FULTON ET AL. *v.* CITY OF PHILADELPHIA, PENNSYLVANIA, ET AL. Application for injunctive relief, presented to JUSTICE ALITO, and by him referred to the Court, denied. JUSTICE THOMAS, JUSTICE ALITO, and JUSTICE GORSUCH would grant the application.

SEPTEMBER 4, 2018

Dismissal Under Rule 46

No. 17–8654. ALMIGHTY SUPREME BORN ALLAH *v.* MILLING ET AL. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 876 F. 3d 48.

SEPTEMBER 7, 2018

Miscellaneous Order

No. 18A240. MICHIGAN STATE A. PHILIP RANDOLPH INSTITUTE ET AL. *v.* JOHNSON, MICHIGAN SECRETARY OF STATE. C. A. 6th Cir. Application to vacate stay, presented to JUSTICE KAGAN, and by her referred to the Court, denied. JUSTICE GINSBURG and JUSTICE SOTOMAYOR would grant the application.

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SEPTEMBER 18, 2018

Miscellaneous Order

No. 18A274. CROSSROADS GRASSROOTS POLICY STRATEGIES *v.* CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON ET AL. D. C. D. C. Application for stay, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. The order heretofore entered by THE CHIEF JUSTICE is vacated.

SEPTEMBER 20, 2018

Dismissal Under Rule 46

No. 17–667. PIONEER CENTRES HOLDING COMPANY STOCK OWNERSHIP PLAN AND TRUST ET AL. *v.* ALERUS FINANCIAL, N. A. C. A. 10th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 858 F. 3d 1324.

September 24, 2018

Miscellaneous Orders

No. 17–647. Knick *v.* Township of Scott, Pennsylvania, et al. C. A. 3d Cir. [Certiorari granted, 583 U. S. 1166.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 17–765. United States *v.* Stitt. C. A. 6th Cir.; and

No. 17–766. United States *v.* Sims. C. A. 8th Cir. [Certiorari granted, 584 U. S. 949.] Joint motion of respondents for divided argument denied. Motion of respondent Jason D. Sims for appointment of counsel granted, and Jeffrey L. Fisher, of Stanford, Cal., is appointed to serve as counsel for respondent Jason D. Sims in No. 17–766.

September 25, 2018

Miscellaneous Order

No. 142, Orig. Florida *v.* Georgia. The August 9, 2018, order in this case is amended to provide that the compensation of a legal assistant for the Special Master shall be charged against and borne by the parties in such proportion as the Court may hereafter direct. The cost of printing the Special Master's reports, and all other proper expenses, including travel expenses, shall be submitted to the Court. [For earlier order herein, see, *e. g., ante,* p. 1052.]

Page Proof Pending Publication

September 27, 2018

Miscellaneous Order

No. 18–6086 (18A311). In re Acker. Application for stay of execution of sentence of death, presented to Justice Alito, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Granted

No. 17–1201. Thacker et ux. *v.* Tennessee Valley Authority. C. A. 11th Cir. Certiorari granted.* Reported below: 868 F. 3d 979.

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*[Reporter's Note: For amendment of this order, see, *post,* p. 1058.]

No. 18–96. TENNESSEE WINE AND SPIRITS RETAILERS ASSN. *v.* BYRD, EXECUTIVE DIRECTOR OF THE TENNESSEE ALCOHOLIC BEVERAGE COMMISSION, ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 883 F. 3d 608.

No. 17–1471. HOME DEPOT U. S. A., INC. *v.* JACKSON. C. A. 4th Cir. Certiorari granted. In addition to the questions presented by the petition, the parties are directed to brief and argue the following question: "Should this Court's holding in *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U. S. 100 (1941)—that an original plaintiff may not remove a counterclaim against it—extend to third-party counterclaim defendants?" Reported below: 880 F. 3d 165.

No. 17–1484. AZAR, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* ALLINA HEALTH SERVICES ET AL. C. A. D. C. Cir. Certiorari granted limited to the following question: "Whether 42 U. S. C. § 1395hh(a)(2) or § 1395hh(a)(4) required the Department of Health and Human Services to conduct notice-and-comment rulemaking before providing the challenged instructions to a Medicare Administrator Contractor making initial determinations of payments due under Medicare." Reported below: 863 F. 3d 937.

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No. 17–1625. RIMINI STREET, INC., ET AL. *v.* ORACLE USA, INC., ET AL. C. A. 9th Cir. Certiorari granted. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 879 F. 3d 948.

Certiorari Denied

No. 18–6075 (18A310). ACKER *v.* TEXAS. 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.

SEPTEMBER 28, 2018

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No. 17–1201. THACKER ET UX. *v.* TENNESSEE VALLEY AUTHORITY. C. A. 11th Cir. [Certiorari granted, *ante*, p. 1057.] Order granting petition for writ of certiorari amended as follows: Certiorari granted limited to Question 1 presented by the petition.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS 2015, 2016, AND 2017

	ORIGINAL			PAID			IN FORMA PAUPERIS			TOTALS		
	2015	**2016**	**2017**	**2015**	**2016**	**2017**	**2015**	**2016**	**2017**	**2015**	**2016**	**2017**
Number of cases on dockets	8	7	8	1,839	1,850	2,062	5,688	5,477	5,320	7,535	7,334	7,390
Number of cases disposed of during term	1	1	1	1,539	1,505	1,740	4,966	4,752	4,465	6,506	6,258	6,206
Number remaining on dockets	7	6	7	300	345	322	722	725	855	1,029	1,076	1,184

	TERMS		
	2015	**2016**	**2017**
Cases argued during term	82	71	69
Number disposed of by full opinions	70	68	63
Number disposed of by per curiam opinions	12	1	6
Number set for reargument	0	2	0
Cases granted review this term	81	75	78
Cases reviewed and decided without oral argument	140	66	103
Total cases to be available for argument at outset of following term	31	32	38

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