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OFFICIAL REPORTS

OF

THE SUPREME COURT

JUNE 24 THROUGH OCTOBER 6, 2019

END OF TERM

CHRISTINE LUCHOK FALLON
REPORTER OF DECISIONS

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Vol. 588 (Pp. 358–878; 903–948)
UNITED STATES REPORTS
Part 2

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

JOHN G. ROBERTS, JR., CHIEF 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.
BRETT M. KAVANAUGH, ASSOCIATE JUSTICE.

RETIRED

JOHN PAUL STEVENS, ASSOCIATE JUSTICE.*
SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.
ANTHONY M. KENNEDY, ASSOCIATE JUSTICE.
DAVID H. SOUTER, ASSOCIATE JUSTICE.

OFFICERS OF THE COURT

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SCOTT S. HARRIS, CLERK.
CHRISTINE LUCHOK FALLON, REPORTER OF DECISIONS.
PAMELA TALKIN, MARSHAL.
LINDA S. MASLOW, LIBRARIAN.

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*Justice Stevens, who retired effective June 29, 2010 (561 U. S. IX), died on July 16, 2019.

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 October 19, 2018, 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, SONIA SOTOMAYOR, Associate Justice.

For the Seventh Circuit, BRETT M. KAVANAUGH, Associate Justice.

For the Eighth Circuit, NEIL M. GORSUCH, Associate Justice.

For the Ninth Circuit, ELENA KAGAN, 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.

October 19, 2018.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2018

Syllabus

DUTRA GROUP *v.* BATTERTON

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

No. 18–266. Argued March 25, 2019—Decided June 24, 2019

Respondent Christopher Batterton was working on a vessel owned by petitioner Dutra Group when a hatch blew open and injured his hand. Batterton sued Dutra, asserting a variety of claims, including unseaworthiness, and seeking general and punitive damages. Dutra moved to dismiss the claim for punitive damages, arguing that they are not available on claims for unseaworthiness. The District Court denied Dutra's motion, and the Ninth Circuit affirmed.

Held: A plaintiff may not recover punitive damages on a claim of unseaworthiness. Pp. 369–377.

(a) This case is governed by *Miles* v. *Apex Marine Corp.*, 498 U. S. 19, and *Atlantic Sounding Co.* v. *Townsend*, 557 U. S. 404. *Miles* establishes that the Court "should look primarily to . . . legislative enactments for policy guidance" when exercising its inherent common-law authority over maritime and admiralty cases, while recognizing that such statutory remedies may be supplemented to "achieve the uniform vindication" of the policies served by the relevant statutes. 498 U. S., at 27. And in *Atlantic Sounding*, the Court allowed recovery of punitive damages but justified that departure from the statutory remedial scheme based on the established history of awarding punitive damages for certain maritime torts, including maintenance and cure. 557 U. S., at 413–414. P. 369.

(b) The overwhelming historical evidence suggests that punitive damages are not available for unseaworthiness claims. Neither *The Rolf*, 293 F. 269, nor *The Noddleburn*, 28 F. 855—on which Batterton relies—contains a relevant discussion of exemplary or punitive damages. And two other cases to which Batterton points—*The City of Carlisle*, 39 F. 807, and *The Troop*, 118 F. 769—both involve maintenance and cure, not unseaworthiness, claims. The lack of punitive damages in traditional maritime law cases is practically dispositive. Pp. 370–372.

(c) This Court cannot sanction a novel remedy here unless it is required to maintain uniformity with Congress's clearly expressed policies, particularly those in the Merchant Marine Act of 1920 (Jones Act)—which codified the rights of injured mariners by incorporating the rights provided to railway workers under the Federal Employers' Liability

Syllabus

Act (FELA). Early decisions held that FELA damages were strictly compensatory. See, *e. g.*, *American R. Co. of P. R.* v. *Didricksen*, 227 U. S. 145, 149. And the Federal Courts of Appeals have unanimously held that punitive damages are not available under FELA. This Court's early discussions of the Jones Act followed the same practices, see, *e. g.*, *Pacific S. S. Co.* v. *Peterson*, 278 U. S. 130, 135, and lower courts have uniformly held that punitive damages are not available under the Jones Act. Adopting Batterton's rule would be contrary to *Miles*'s command that federal courts should seek to promote a "uniform rule applicable to all actions" for the same injury, whether under the Jones Act or the general maritime law. 498 U. S., at 33. Pp. 372–374.

(d) Batterton argues that punitive damages are justified on policy grounds or as a regulatory measure. But unseaworthiness in its current strict-liability form is this Court's own invention and came after passage of the Jones Act, and a claim of unseaworthiness serves as a duplicate and substitute for a Jones Act claim. It would, therefore, exceed the Court's objectives of pursuing policies found in congressional enactments and promoting uniformity between maritime statutory law and maritime common law to introduce novel remedies contradictory to those provided by Congress in similar areas. Allowing punitive damages on unseaworthiness claims would also create bizarre disparities in the law. First, due to *Miles*'s holding, which limited recovery to compensatory damages in wrongful-death actions, a mariner could make a claim for punitive damages if he was injured onboard a ship, but his estate would lose the right to seek punitive damages if he died from his injuries. Second, because unseaworthiness claims run against the owner of the vessel, the owner could be liable for punitive damages while the ship's master or operator—who could be more culpable—would not be liable for such damages under the Jones Act. Finally, allowing punitive damages would place American shippers at a significant competitive disadvantage and discourage foreign-owned vessels from employing American seamen. The maritime doctrine mentioned by Batterton, which encourages special solicitude for the welfare of seamen, has its roots in the paternalistic approach taken toward mariners by 19th-century courts and has never been a commandment that maritime law must favor seamen whenever possible. Pp. 374–377.

880 F. 3d 1089, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, KAGAN, GORSUCH, and KAVANAUGH, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which BREYER and SOTOMAYOR, JJ., joined, *post*, p. 377.

Seth P. Waxman argued the cause for petitioner. With him on the briefs were *Paul R. Q. Wolfson*, *David M. Lehn*, *Christopher Asta*, *Edward Williams*, and *Barry W. Ponticello.*

David C. Frederick argued the cause for respondent. With him on the brief were *Brendan J. Crimmins*, *Benjamin S. Softness*, and *Preston Easley.**

JUSTICE ALITO delivered the opinion of the Court.

By granting federal courts jurisdiction over maritime and admiralty cases, the Constitution implicitly directs federal courts sitting in admiralty to proceed "in the manner of a common law court." *Exxon Shipping Co.* v. *Baker*, 554 U. S. 471, 489–490 (2008). Thus, where Congress has not prescribed specific rules, federal courts must develop the "amalgam of traditional common-law rules, modifications of those rules, and newly created rules" that forms the general mari-

*Briefs of *amici curiae* urging reversal were filed for Alaskan Leader Fisheries LLC et al. by *Michael A. Barcott* and *Robert J. Bocko*; for the American Waterways Operators by *Barbara L. Holland* and *Donald B. Scaramastra*; for the At-Sea Processors Association et al. by *Evan M. Tager* and *Matthew A. Waring*; for the Chamber of Commerce of the United States of America et al. by *Scott A. Keller*, *J. Mark Little*, and *Daryl Joseffer*; for Fishing Vessels' Reserve et al. by *Michael J. Cummins*; for the Inland River Harbor and Fleeting Coalition by *Neal W. Settergren* and *Giles B. Howard*; for the International Association of Drilling Contractors by *James T. Brown*, *Glenn R. Legge*, *Jeanie Tate Goodwin*, and *Marc E. Kutner*; and for Waterways Council Inc. by *Don K. Haycraft.*

Briefs of *amici curiae* urging affirmance were filed for the American Association for Justice by *Robert S. Peck*, *Elise Sanguinetti*, and *Jeffrey R. White*; for Claimant Seeking Recovery for Wrongful Death of Crewmember by *Erin Glenn Busby* and *Lisa R. Eskow*; for Injured Crewmembers by *Michael F. Sturley*, *James P. Jacobsen*, and *Lyle C. Cavin, Jr.*; and for the Sailors' Union of the Pacific by *John R. Hillsman.*

Briefs of *amici curiae* were filed for the American Maritime Association, Inc., by *Jane B. Jacobs*; for Atlantic Sounding Company, Inc., by *Kenneth G. Engerrand*; for Dredging Contractors of America et al. by *William P. Doyle*; and for Greater New Orleans Barge Fleeting Association, Inc., et al. by *George J. Fowler III* and *Jefferson R. Tillery.*

time law. *East River S. S. Corp.* v. *Transamerica Delaval Inc.*, 476 U. S. 858, 864–865 (1986). But maritime law is no longer solely the province of the Federal Judiciary. "Congress and the States have legislated extensively in these areas." *Miles* v. *Apex Marine Corp.*, 498 U. S. 19, 27 (1990). When exercising its inherent common-law authority, "an admiralty court should look primarily to these legislative enactments for policy guidance." *Ibid.* We may depart from the policies found in the statutory scheme in discrete instances based on long-established history, see, *e. g.*, *Atlantic Sounding Co.* v. *Townsend*, 557 U. S. 404, 424–425 (2009), but we do so cautiously in light of Congress's persistent pursuit of "'uniformity in the exercise of admiralty jurisdiction.'" *Miles*, *supra*, at 26 (quoting *Moragne* v. *States Marine Lines, Inc.*, 398 U. S. 375, 401 (1970)).

This case asks whether a mariner may recover punitive damages on a claim that he was injured as a result of the unseaworthy condition of the vessel. We have twice confronted similar questions in the past several decades, and our holdings in both cases were based on the particular claims involved. In *Miles*, which concerned a wrongful-death claim under the general maritime law, we held that recovery was limited to pecuniary damages, which did not include loss of society. 498 U. S., at 23. And in *Atlantic Sounding*, after examining centuries of relevant case law, we held that punitive damages are not categorically barred as part of the award on the traditional maritime claim of maintenance and cure. 557 U. S., at 407. Here, because there is no historical basis for allowing punitive damages in unseaworthiness actions, and in order to promote uniformity with the way courts have applied parallel statutory causes of action, we hold that punitive damages remain unavailable in unseaworthiness actions.

I

In order to determine the remedies for unseaworthiness, we must consider both the heritage of the cause of action

in the common law and its place in the modern statutory framework.

A

The seaman's right to recover damages for personal injury on a claim of unseaworthiness originates in the admiralty court decisions of the 19th century. At the time, "seamen led miserable lives." D. Robertson, S. Friedell, & M. Sturley, Admiralty and Maritime Law in the United States 163 (2d ed. 2008). Maritime law was largely judge-made, and seamen were viewed as "emphatically the wards of the admiralty." *Harden* v. *Gordon*, 11 F. Cas. 480, 485 (No. 6,047) (CC Me. 1823). In that era, the primary responsibility for protecting seamen lay in the courts, which saw mariners as "peculiarly entitled to"—and particularly in need of—judicial protection "against the effects of the superior skill and shrewdness of masters and owners of ships." *Brown* v. *Lull*, 4 F. Cas. 407, 409 (No. 2,018) (CC Mass. 1836) (Story, J.).[1]

Courts of admiralty saw it as their duty not to be "confined to the mere dry and positive rules of the common law" but to "act upon the enlarged and liberal jurisprudence of courts of equity; and, in short, so far as their powers extend[ed], they act[ed] as courts of equity." *Ibid.* This Court interpreted the Constitution's grant of admiralty jurisdiction to the Federal Judiciary as "the power to . . . dispose of [a case] as justice may require." *The Resolute*, 168 U. S. 437, 439 (1897).

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[1] Riding circuit, Justice Story described mariners in markedly paternalistic terms:

"Seamen are a class of persons remarkable for their rashness, thoughtlessness and improvidence. They are generally necessitous, ignorant of the nature and extent of their own rights and privileges, and for the most part incapable of duly appreciating their value. They combine, in a singular manner, the apparent anomalies of gallantry, extravagance, profusion in expenditure, indifference to the future, credulity, which is easily won, and confidence, which is readily surprised." *Brown*, 4 F. Cas., at 409.

Courts used this power to protect seamen from injury primarily through two causes of action. The first, maintenance and cure, has its roots in the medieval and renaissance law codes that form the ancient foundation of maritime common law.[2] The duty of maintenance and cure requires a ship's master "to provide food, lodging, and medical services to a seaman injured while serving the ship." *Lewis* v. *Lewis & Clark Marine, Inc.*, 531 U. S. 438, 441 (2001). This duty, "which arises from the contract of employment, does not rest upon negligence or culpability on the part of the owner or master, nor is it restricted to those cases where the seaman's employment is the cause of the injury or illness." *Calmar S. S. Corp.* v. *Taylor*, 303 U. S. 525, 527 (1938) (citations omitted).

The second claim, unseaworthiness, is a much more recent development and grew out of causes of action unrelated to personal injury. In its earliest forms, an unseaworthiness claim gave sailors under contract to sail on a ship the right to collect their wages even if they had refused to board an unsafe vessel after discovering its condition. See, *e. g.*, *Dixon* v. *The Cyrus*, 7 F. Cas. 755, 757 (No. 3,930) (DC Pa. 1789); *Rice* v. *The Polly & Kitty*, 20 F. Cas. 666, 667 (No. 11,754) (DC Pa. 1789). Similarly, unseaworthiness was a defense to criminal charges against seamen who refused to obey a ship master's orders. See, *e. g.*, *United States* v. *Nye*, 27 F. Cas. 210, 211 (No. 15,906) (CC Mass. 1855); *United States* v. *Ashton*, 24 F. Cas. 873, 874–875 (No. 14,470) (CC Mass. 1834). A claim of unseaworthiness could also be asserted by a shipper to

[2] A right resembling maintenance and cure appears in the Laws of Oleron, promulgated by Eleanor of Aquitaine around 1160, in the 13th-century Laws of Wisbuy, in the Laws of the Hanse Towns, published in 1597, and in the Marine Ordinances of Louis XIV, published in 1681. See 30 F. Cas. 1169 (collecting sources). The relevant passages are the Laws of Oleron, Arts. VI and VII, 30 F. Cas., at 1174–1175; the Laws of Wisbuy, Arts. XVIII, XIX, and XXXIII, 30 F. Cas., at 1191–1192; the Laws of the Hanse Towns, Arts. XXXIX and XLV, 30 F. Cas., at 1200; the Marine Ordinances of Louis XIV, Tit. IV, Arts. XI and XII, 30 F. Cas., at 1209.

recover damages or by an insurer to deny coverage when the poor condition of the ship resulted in damage to or loss of the cargo. See *The Caledonia*, 157 U. S. 124, 132–136 (1895) (cataloging cases).

Only in the latter years of the 19th century did unseaworthiness begin a long and gradual evolution toward remedying personal injury. Courts began to extend the cases about refusals to serve to allow recovery for mariners who were injured because of the unseaworthy condition of the vessel on which they had served.[3] These early cases were sparse, and they generally allowed recovery only when a vessel's owner failed to exercise due diligence to ensure that the ship left port in a seaworthy condition. See, *e. g.*, *The Robert C. McQuillen*, 91 F. 685, 686–687 (Conn. 1899); *The Lizzie Frank*, 31 F. 477, 480 (SD Ala. 1887); *The Tammerlane*, 47 F. 822, 824 (ND Cal. 1891).

Unseaworthiness remained a suspect basis for personal injury claims until 1903, when, in dicta, this Court concluded that "the vessel and her owner are . . . liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship." *The Osceola*, 189 U. S. 158, 175 (1903). Although this was the first recognition of unseaworthiness as a personal injury claim in this Court, we took pains to note that the claim was strictly cabined. *Ibid.*

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[3] Most of these cases allowed recovery for personal injury in "erroneous reliance" on certain passages in *Dixon* v. *The Cyrus*, 7 F. Cas. 755 (No. 3,930) (DC Pa. 1789). Tetreault, Seamen, Seaworthiness, and the Rights of Harbor Workers, 39 Cornell L. Q. 381, 390 (1954) (Tetreault). These cases misread *The Cyrus* as resting on an implied warranty of seaworthiness. Tetreault 390. But *The Cyrus* is more fairly read to turn on a theory of true implied condition. While a warranty would provide a basis for damages if the breach caused an injury, an implied condition would only allow the mariner to escape performance without surrendering the benefit of the contract. In other words, "[t]he manifest unseaworthiness of the vessel at the commencement of the voyage would excuse nonperformance by the mariners but did not constitute a basis for damages." Tetreault 390.

Some of the limitations on recovery were imported from the common law. The fellow-servant doctrine, in particular, prohibited recovery when an employee suffered an injury due to the negligent act of another employee without negligence on the part of the employer. *Ibid.*; see, *e. g.*, *The Sachem*, 42 F. 66 (EDNY 1890) (denying recovery based on fellow-servant doctrine). Because a claimant had to show that he was injured by some aspect of the ship's condition that rendered the vessel unseaworthy, a claim could not prevail based on "the negligence of the master, or any member of the crew." [4] *The Osceola*, *supra*, at 175; see also *The City of Alexandria*, 17 F. 390 (SDNY 1883) (no recovery based on negligence that does not render vessel unseaworthy). Instead, a seaman had to show that the owner of the vessel had failed to exercise due diligence in ensuring the ship was in seaworthy condition. See generally *Dixon* v. *United States*, 219 F. 2d 10, 12–14 (CA2 1955) (Harlan, J.) (cataloging evolution of the claim).

B

In the early 20th century, then, under "the general maritime law . . . a vessel and her owner . . . were liable to an indemnity for injuries received by a seaman in consequence of the unseaworthiness of the ship and her appliances; but a seaman was not allowed to recover an indemnity for injuries sustained through the negligence of the master or any member of the crew." *Pacific S. S. Co.* v. *Peterson*, 278 U. S. 130, 134 (1928); see also *Plamals* v. *S. S.* "*Pinar Del Rio*," 277

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[4] To be sure, in some instances the concept of "unseaworthiness" expanded to embrace conditions that resulted from the negligence of fellow servants, see, *e. g.*, *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255, 259 (1922) (vessel was rendered unseaworthy when it left port with gasoline in a container labeled "coal oil"); see also G. Robinson, Handbook of Admiralty Law in the United States § 37, pp. 305–307 (1st ed. 1939) (collecting cases). But it was only after the passage of the Jones Act that negligence by a fellow mariner provided a reliable basis for recovery. See Part I–B, *infra*.

U. S. 151, 155 (1928) (vessel was not unseaworthy when mate negligently selected defective rope but sound rope was available on board). Because of these severe limitations on recovery, "the seaman's right to recover damages for injuries caused by unseaworthiness of the ship was an obscure and relatively little used remedy." G. Gilmore & C. Black, The Law of Admiralty § 6–38, p. 383 (2d ed. 1975) (Gilmore & Black).

Tremendous shifts in mariners' rights took place between 1920 and 1950. First, during and after the First World War, Congress enacted a series of laws regulating maritime liability culminating in the Merchant Marine Act of 1920, § 33, 41 Stat. 1007 (Jones Act), which codified the rights of injured mariners and created new statutory claims that were freed from many of the common-law limitations on recovery. The Jones Act provides injured seamen with a cause of action and a right to a jury. 46 U. S. C. § 30104. Rather than create a new structure of substantive rights, the Jones Act incorporated the rights provided to railway workers under the Federal Employers' Liability Act (FELA), 45 U. S. C. § 51 *et seq.* 46 U. S. C. § 30104. In the 30 years after the Jones Act's passage, "the Act was the vehicle for almost all seamen's personal injury and death actions." Gilmore & Black § 6–20, at 327.

But the Jones Act was overtaken in the 1950s by the second fundamental change in personal injury maritime claims—and it was this Court, not Congress, that played the leading role. In a pair of decisions in the late 1940s, the Court transformed the old claim of unseaworthiness, which had demanded only due diligence by the vessel owner, into a strict-liability claim. In *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96 (1944), the Court stated that "the exercise of due diligence does not relieve the owner of his obligation" to provide a seaworthy ship and, in the same ruling, held that the fellow-servant doctrine did not provide a defense. *Id.*, at 100, 101. *Mahnich*'s interpretation of the early cases may

have been suspect, see Tetreault 397–398 (*Mahnich* rests on "startling misstatement" of relevant precedents), but its assertion triggered a sea-change in maritime personal injury. Less than two years later, we affirmed that the duty of seaworthiness was "essentially a species of liability without fault, . . . neither limited by conceptions of negligence nor contractual in character. It is a form of absolute duty owing to all within the range of its humanitarian policy." *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 94–95 (1946) (citations omitted). From *Mahnich* forward, "the decisions of this Court have undeviatingly reflected an understanding that the owner's duty to furnish a seaworthy ship is absolute and completely independent of his duty under the Jones Act to exercise reasonable care." *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 549 (1960). As a result of *Mahnich* and *Sieracki*, between the 1950s and 1970s "the unseaworthiness count [was] the essential basis for recovery with the Jones Act count preserved merely as a jury-getting device."[5] Gilmore & Black § 6–20, at 327–328.

The shifts in plaintiff preferences between Jones Act and unseaworthiness claims were possible because of the significant overlap between the two causes of action. See *id.*, § 6–38, at 383. One leading treatise goes so far as to describe the two claims as "alternative 'grounds' of recovery for a single cause of action." 2 R. Force & M. Norris, The Law of Seamen § 30:90, p. 30–369 (5th ed. 2003). The two claims are so similar that, immediately after the Jones Act's passage, we held that plaintiffs could not submit both to a jury. *Plamals*, *supra*, at 156–157 ("Seamen may invoke, at their election, the relief accorded by the old rules against the ship, or that provided by the new against the employer. But they

[5] The decline of Jones Act claims was arrested, although not reversed, by our holding that some negligent actions on a vessel may create Jones Act liability without rendering the vessel unseaworthy. See *Usner* v. *Luckenbach Overseas Corp.*, 400 U. S. 494 (1971); see also 1B Benedict on Admiralty § 23, p. 3–35 (7th rev. ed. 2018).

may not have the benefit of both"). We no longer require such election. See *McAllister* v. *Magnolia Petroleum Co.*, 357 U. S. 221, 222, n. 2 (1958). But a plaintiff still cannot duplicate his recovery by collecting full damages on both claims because, "whether or not the seaman's injuries were occasioned by the unseaworthiness of the vessel or by the negligence of the master or members of the crew, . . . there is but a single wrongful invasion of his primary right of bodily safety and but a single legal wrong." *Peterson*, *supra*, at 138; see also 2 Force, *supra*, §§ 26:73, 30:90.

II

Christopher Batterton worked as a deckhand and crew member on vessels owned and operated by the Dutra Group. According to Batterton's complaint, while working on a scow near Newport Beach, California, Batterton was injured when his hand was caught between a bulkhead and a hatch that blew open as a result of unventilated air accumulating and pressurizing within the compartment.

Batterton sued Dutra and asserted a variety of claims, including negligence, unseaworthiness, maintenance and cure, and unearned wages. He sought to recover general and punitive damages. Dutra moved to strike Batterton's claim for punitive damages, arguing that they are not available on claims for unseaworthiness. The District Court denied Dutra's motion, 2014 WL 12538172 (CD Cal., Dec. 15, 2014), but agreed to certify an interlocutory appeal on the question, 2015 WL 13752889 (CD Cal., Feb. 6, 2015).

The Court of Appeals affirmed. 880 F. 3d 1089 (CA9 2018). Applying Circuit precedent, see *Evich* v. *Morris*, 819 F. 2d 256, 258–259 (CA9 1987), the Court of Appeals held that punitive damages are available for unseaworthiness claims. 880 F. 3d, at 1096. This holding reaffirmed a division of authority between the Circuits. Compare *McBride* v. *Estis Well Serv., L. L. C.*, 768 F. 3d 382, 391 (CA5 2014) (en banc) (punitive damages are not recoverable), and *Horsley* v. *Mobil*

Oil Corp., 15 F. 3d 200, 203 (CA1 1994) (same), with *Self* v. *Great Lakes Dredge & Dock Co.*, 832 F. 2d 1540, 1550 (CA11 1987) ("Punitive damages should be available in cases where the shipowner willfully violated the duty to maintain a safe and seaworthy ship . . . "). We granted certiorari to resolve this division. 586 U. S. 1049 (2018).

III

Our resolution of this question is governed by our decisions in *Miles* and *Atlantic Sounding*. *Miles* establishes that we "should look primarily to . . . legislative enactments for policy guidance," while recognizing that we "may supplement these statutory remedies where doing so would achieve the uniform vindication" of the policies served by the relevant statutes. 498 U. S., at 27. In *Atlantic Sounding*, we allowed recovery of punitive damages, but we justified our departure from the statutory remedial scheme based on the established history of awarding punitive damages for certain maritime torts, including maintenance and cure. 557 U. S., at 411–414 (discussing cases of piracy and maintenance and cure awarding damages with punitive components). We were explicit that our decision represented a gloss on *Miles* rather than a departure from it. *Atlantic Sounding*, *supra*, at 420 ("The reasoning of *Miles* remains sound"). And we recognized the importance of viewing each claim in its proper historical context. "'[R]emedies for negligence, unseaworthiness, and maintenance and cure have different origins and may on occasion call for application of slightly different principles and procedures.'" 557 U. S., at 423.

In accordance with these decisions, we consider here whether punitive damages have traditionally been awarded for claims of unseaworthiness and whether conformity with parallel statutory schemes would require such damages. Finally, we consider whether we are compelled on policy grounds to allow punitive damages for unseaworthiness claims.

A

For claims of unseaworthiness, the overwhelming historical evidence suggests that punitive damages are not available. Batterton principally relies on two cases to establish that punitive damages were traditionally available for breach of the duty of seaworthiness. Upon close inspection, neither supports this argument.

The Rolph, 293 F. 269, 271 (ND Cal. 1923), involved a mate who brutally beat members of the crew, rendering one seaman blind and leaving another with impaired hearing. The central question in the case was not the form of damages, but rather whether the viciousness of the mate rendered the vessel unseaworthy. *The Rolph*, 299 F. 52, 54 (CA9 1924). The court concluded that the master, by staffing the vessel with such an unsuitable officer, had rendered it unseaworthy. *Id.*, at 55. To the extent the court described the basis for the damages awarded, it explained that the judgment was supported by testimony as to "the expectation of life and earnings of these men." 293 F., at 272. And the Court of Appeals discussed only the seamen's entitlement "to recover an indemnity" for their injuries. 299 F., at 56. These are discussions of compensatory damages—nowhere does the court speak in terms of an exemplary or punitive award.[6]

The Noddleburn, 28 F. 855, 857–858 (Ore. 1886), involved an injury to a British seaman serving on a British vessel and was decided under English law. The plaintiff in the case was injured when he fell to the deck after being ordered aloft and stepping on an inadequately secured line. *Id.*, at 855. After the injury, the master neglected the man's

[6] Even if this case did involve a *sub silentio* punitive award, we share the Fifth Circuit's reluctance to "rely on one dust-covered case to establish that punitive damages were generally available in unseaworthiness cases." *McBride* v. *Estis Well Serv., L. L. C.*, 768 F. 3d 382, 397 (2014) (Clement, J., concurring). Absent a clear historical pattern, *Miles* v. *Apex Marine Corp.*, 498 U. S. 19 (1990), commands us to seek conformity with the policy preferences the political branches have expressed in legislation.

wounds, thinking the injury a mere sprain. *Id.*, at 856. The leg failed to heal and the man had to insist on being discharged to a hospital, where he learned that he would be permanently disabled. *Ibid.* As damages, the court awarded him accrued wages, as well as $1,000 to compensate for the loss in future earnings from his disability and $500 for his pain and suffering. *Id.*, at 860. But these are purely compensatory awards—the only discussion of exemplary damages comes at the very close of the opinion, and it is clear that they were considered because of the master's failure to provide maintenance and cure. *Ibid.* (discussing additional award "in consideration of the neglect and indifference with which the libelant was treated by the master *after his injury*" (emphasis added)).

Finally, Batterton points to two other cases, *The City of Carlisle*, 39 F. 807 (Ore. 1889), and *The Troop*, 118 F. 769 (Wash. 1902). But these cases, like *The Noddleburn*, both involve maintenance and cure claims that rest on the willful failure of the master and mate to provide proper care for wounded sailors after they were injured. 39 F., at 812 ("master failed and neglected to procure or provide any medical aid or advice . . . and was contriving and intending to get rid of him as easily as possible"); 118 F., at 771 (assessing damages based on provision of Laws of Oleron requiring maintenance). Batterton characterizes these as unseaworthiness actions on the theory that the seamen *could have* pursued that claim. But, because courts award damages for the claims a plaintiff actually pleads rather than those he could have brought, these cases are irrelevant.

The lack of punitive damages in traditional maritime law cases is practically dispositive. By the time the claim of unseaworthiness evolved to remedy personal injury, punitive damages were a well-established part of the common law. *Exxon Shipping*, 554 U. S., at 491. American courts had awarded punitive (or exemplary) damages from the Republic's earliest days. See, *e. g.*, *Genay* v. *Norris*, 1 S. C. L. 6,

7 (1784); *Coryell* v. *Colbaugh*, 1 N. J. L. 77, 78 (1791). And yet, beyond the decisions discussed above, Batterton presents no decisions from the formative years of the personal injury unseaworthiness claim in which exemplary damages were awarded. From this we conclude that, unlike maintenance and cure, unseaworthiness did not traditionally allow recovery of punitive damages.

B

In light of this overwhelming historical evidence, we cannot sanction a novel remedy here unless it is required to maintain uniformity with Congress's clearly expressed policies. Therefore, we must consider the remedies typically recognized for Jones Act claims.

The Jones Act adopts the remedial provisions of FELA, and by the time of the Jones Act's passage, this Court and others had repeatedly interpreted the scope of damages available to FELA plaintiffs. These early decisions held that "[t]he damages recoverable [under FELA] are limited . . . strictly to the financial loss . . . sustained."[7] *American R. Co. of P. R.* v. *Didricksen*, 227 U. S. 145, 149 (1913); see also *Gulf, C. & S. F. R. Co.* v. *McGinnis*, 228 U. S. 173, 175 (1913) (FELA is construed "only to compensate . . . for the actual pecuniary loss resulting" from the worker's injury or death); *Michigan Central R. Co.* v. *Vreeland*, 227 U. S. 59, 68 (1913) (FELA imposes "a liability for the pecuniary damage resulting to [the worker] and for that only"). In one particularly illuminating case, in deciding whether a complaint alleged a claim under FELA or state law, the Court observed that if the complaint "were read as manifestly demanding

[7] Treatises from the same period lend further support to the view that "in all actions under [FELA], an award of exemplary damages is not permitted." 2 M. Roberts, Federal Liabilities of Carriers § 621, p. 1093 (1918); 1 *id.*, § 417, at 708; 5 J. Berryman, Sutherland on Damages § 1333, p. 5102 (4th ed. 1916) (FELA "provid[es] compensation for pecuniary loss or damage only").

exemplary damages, that would point to the state law." *Seaboard Air Line R. Co.* v. *Koennecke*, 239 U. S. 352, 354 (1915). And in the years since, Federal Courts of Appeals have unanimously held that punitive damages are not available under FELA. *Miller* v. *American President Lines, Ltd.*, 989 F. 2d 1450, 1457 (CA6 1993); *Wildman* v. *Burlington No. R. Co.*, 825 F. 2d 1392, 1395 (CA9 1987); *Kozar* v. *Chesapeake & Ohio R. Co.*, 449 F. 2d 1238, 1243 (CA6 1971).

Our early discussions of the Jones Act followed the same practices. We described the Act shortly after its passage as creating "an action for compensatory damages, on the ground of negligence."[8] *Peterson*, 278 U. S., at 135. And we have more recently observed that the Jones Act "limits recovery to pecuniary loss." *Miles*, 498 U. S., at 32. Looking to FELA and these decisions, the Federal Courts of Appeals have uniformly held that punitive damages are not available under the Jones Act. *McBride*, 768 F. 3d, at 388 ("[N]o cases have awarded punitive damages under the Jones Act"); *Guevara* v. *Maritime Overseas Corp.*, 59 F. 3d 1496, 1507, n. 9 (CA5 1995) (en banc); *Horsley*, 15 F. 3d, at 203; *Miller*, *supra*, at 1457 ("Punitive damages are not . . . recoverable under the Jones Act"); *Kopczynski* v. *The Jacqueline*, 742 F. 2d 555, 560 (CA9 1984).

Batterton argues that these cases are either inapposite or wrong, but because of the absence of historical evidence to support punitive damages—evidence that was central to our decision in *Atlantic Sounding*—we need not reopen this question of statutory interpretation. It is enough for us to note the general consensus that exists in the lower courts and to observe that the position of those courts conforms with the discussion and holding in *Miles*. Adopting the rule

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[8] We also note that Congress declined to allow punitive damages when it enacted the Death on the High Seas Act. 46 U. S. C. § 30303 (allowing "fair compensation for the pecuniary loss sustained" for a death on the high seas).

urged by Batterton would be contrary to *Miles*'s command that federal courts should seek to promote a "uniform rule applicable to all actions" for the same injury, whether under the Jones Act or the general maritime law. 498 U. S., at 33.

C

To the extent Batterton argues that punitive damages are justified on policy grounds or as a regulatory measure, we are unpersuaded. In contemporary maritime law, our overriding objective is to pursue the policy expressed in congressional enactments, and because unseaworthiness in its current strict-liability form is our own invention and came after passage of the Jones Act, it would exceed our current role to introduce novel remedies contradictory to those Congress has provided in similar areas. See *id.*, at 36 (declining to create remedy "that goes well beyond the limits of Congress' ordered system of recovery"). We are particularly loath to impose more expansive liabilities on a claim governed by strict liability than Congress has imposed for comparable claims based in negligence. *Ibid.* And with the increased role that legislation has taken over the past century of maritime law, we think it wise to leave to the political branches the development of novel claims and remedies.

We are also wary to depart from the practice under the Jones Act because a claim of unseaworthiness—more than a claim for maintenance and cure—serves as a duplicate and substitute for a Jones Act claim. The duty of maintenance and cure requires the master to provide medical care and wages to an injured mariner in the period after the injury has occurred. *Calmar S. S. Corp.*, 303 U. S., at 527–528. By contrast, both the Jones Act and unseaworthiness claims compensate for the injury itself and for the losses resulting from the injury. *Peterson*, *supra*, at 138. In such circumstances, we are particularly mindful of the rule that requires us to promote uniformity between maritime statutory law

and maritime common law.[9] See *Miles*, *supra*, at 27. See also *Mobil Oil Corp.* v. *Higginbotham*, 436 U. S. 618, 625 (1978) (declining to recognize loss-of-society damages under general maritime law because that would "rewrit[e the] rules that Congress has affirmatively and specifically enacted").

Unlike a claim of maintenance and cure, which addresses a situation where the vessel owner and master have "just about every economic incentive to dump an injured seaman in a port and abandon him to his fate," in the unseaworthiness context the interests of the owner and mariner are more closely aligned. *McBride*, *supra*, at 394, n. 12 (Clement, J., concurring). That is because there are significant economic incentives prompting owners to ensure that their vessels are seaworthy. Most obviously, an owner who puts an unseaworthy ship to sea stands to lose the ship and the cargo that it carries. And if a vessel's unseaworthiness threatens the crew or cargo, the owner risks losing the protection of his insurer (who may not cover losses incurred by the owner's negligence) and the work of the crew (who may refuse to

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[9] The dissent, *post*, at 385 and n. 7 (opinion of GINSBURG, J.), suggests that because of the existing differences between a Jones Act claim and an unseaworthiness claim, recognizing punitive damages would not be a cause of disparity. But, as the dissent acknowledges, much of the expanded reach of the modern unseaworthiness doctrine can be attributed to innovations made by this Court following the enactment of the Jones Act. See *post*, at 384–385, and n. 6; *supra*, at 366–367. Although Batterton and the dissent would continue this evolution by recognizing damages previously unavailable, *Miles* dictates that such innovation is the prerogative of the political branches, our past expansion of the unseaworthiness doctrine notwithstanding.

Of course, *Miles* recognized that the general maritime law need not be static. For example, our decision in *Moragne* v. *States Marine Lines, Inc.*, 398 U. S. 375 (1970), smoothed a disjunction created by the imperfect alignment of statutory claims with past decisions limiting maritime claims for wrongful death. But when there is no disjunction—as here, where traditional remedies align with modern statutory remedies—we are unwilling to endorse doctrinal changes absent legislative changes.

serve on an unseaworthy vessel). In some instances, the vessel owner may even face criminal penalties. See, *e. g.*, 46 U. S. C. § 10908.

Allowing punitive damages on unseaworthiness claims would also create bizarre disparities in the law. First, due to our holding in *Miles*, which limited recovery to compensatory damages in wrongful-death actions, a mariner could make a claim for punitive damages if he was injured on board a ship, but his estate would lose the right to seek punitive damages if he died from his injuries. Second, because unseaworthiness claims run against the owner of the vessel, the ship's owner could be liable for punitive damages while the master or operator of the ship—who has more control over onboard conditions and is best positioned to minimize potential risks—would not be liable for such damages under the Jones Act. See *Sieracki*, 328 U. S., at 100 (The duty of seaworthiness is "peculiarly and exclusively the obligation of the owner. It is one he cannot delegate").

Finally, because "[n]oncompensatory damages are not part of the civil-code tradition and thus unavailable in such countries," *Exxon Shipping*, 554 U. S., at 497, allowing punitive damages would place American shippers at a significant competitive disadvantage and would discourage foreign-owned vessels from employing American seamen. See Gotanda, Punitive Damages: A Comparative Analysis, 42 Colum. J. Transnat'l L. 391, 396, n. 24 (2004) (listing civil-law nations that restrict private plaintiffs to compensatory damages). This would frustrate another "fundamental interest" served by federal maritime jurisdiction: "the protection of maritime commerce." *Norfolk Southern R. Co.* v. *James N. Kirby, Pty Ltd.*, 543 U. S. 14, 25 (2004) (internal quotation marks omitted; emphasis deleted).

Against this, Batterton points to the maritime doctrine that encourages special solicitude for the welfare of seamen. But that doctrine has its roots in the paternalistic approach taken toward mariners by 19th-century courts. See, *e. g.*,

Harden, 11 F. Cas., at 485; *Brown*, 4 F. Cas., at 409. The doctrine has never been a commandment that maritime law must favor seamen whenever possible. Indeed, the doctrine's apex coincided with many of the harsh common-law limitations on recovery that were not set aside until the passage of the Jones Act. And, while sailors today face hardships not encountered by those who work on land, neither are they as isolated nor as dependent on the master as their predecessors from the age of sail. In light of these changes and of the roles now played by the Judiciary and the political branches in protecting sailors, the special solicitude to sailors has only a small role to play in contemporary maritime law. It is not sufficient to overcome the weight of authority indicating that punitive damages are unavailable.

IV

Punitive damages are not a traditional remedy for unseaworthiness. The rule of *Miles*—promoting uniformity in maritime law and deference to the policies expressed in the statutes governing maritime law—prevents us from recognizing a new entitlement to punitive damages where none previously existed. We hold that a plaintiff may not recover punitive damages on a claim of unseaworthiness.

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

It is so ordered.

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

In *Exxon Shipping Co.* v. *Baker*, 554 U. S. 471 (2008), the Court recognized that punitive damages normally are available in maritime cases. *Id.*, at 489–490, 502, 508, n. 21. Relying on *Miles* v. *Apex Marine Corp.*, 498 U. S. 19 (1990), the Court today holds that unseaworthiness claims are an

exception to that general rule. Respondent Christopher Batterton, defending the Ninth Circuit's decision in his favor, relies on the Court's more recent decision in *Atlantic Sounding Co.* v. *Townsend*, 557 U. S. 404 (2009). In my view, the Ninth Circuit correctly determined that *Atlantic Sounding* is the controlling precedent. See 880 F. 3d 1089, 1095–1096 (2018) (case below). I would therefore affirm the judgment of the Court of Appeals, cogently explained in Senior Circuit Judge Kleinfeld's opinion.

I

Batterton was employed as a deckhand for petitioner The Dutra Group, a dredging and marine construction company. As Batterton worked on a Dutra vessel, fellow crewmembers pumped pressurized air into a below-decks compartment. The build up of pressurized air blew open a hatch cover that crushed Batterton's hand, permanently disabling him. The accident could have been prevented, Batterton alleges, by a valve to vent excess air from the compartment, something to hold the hatch cover open, or simply better warnings or supervision.

Batterton filed a civil action asserting one claim of negligence under the Jones Act[1] and two claims under general maritime law: one for breach of the duty to provide a seaworthy vessel and one for breach of the duty to provide maintenance and cure.[2] As to his unseaworthiness claim,

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[1] The Jones Act provides: "A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman[,] may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section." 46 U. S. C. § 30104.

[2] "Maintenance and cure" is the right of "the seaman, ill or injured in the service of the ship without willful misbehavior on his part [to] wages to the end of the voyage and subsistence, lodging, and medical care to the point where the maximum cure attainable has been reached." 2 R. Force & M. Norris, The Law of Seamen § 26:1, p. 26–4 (5th ed. 2003).

Batterton sought punitive damages, alleging that Dutra's breach was wanton and willful.

Dutra moved to strike or dismiss Batterton's punitive damages request. The District Court denied the motion, 2014 WL 12538172, *2 (CD Cal., Dec. 15, 2014), and the Ninth Circuit, accepting an interlocutory appeal, affirmed, 880 F. 3d 1089. Longstanding Ninth Circuit precedent, the court observed, recognized the availability of punitive damages in seamen's actions for unseaworthiness. *Id.*, at 1091 (citing *Evich* v. *Morris*, 819 F. 2d 256, 258 (1987)). *Miles*, 498 U. S., at 29–33, which held that loss-of-society damages are not available in survivors' actions for unseaworthiness resulting in a seaman's wrongful death, the court observed, did not undermine that precedent. 880 F. 3d, at 1093–1096. "Whatever room might [have] be[en] left to support broadening *Miles* to cover punitive damages" sought by a seaman, the Ninth Circuit said, "was cut off by [this] Court's decision in *Atlantic Sounding*," in which this Court, recognizing that "historically, punitive damages have been available and awarded in general maritime actions," held that such damages are available in seamen's suits for maintenance and cure. *Id.*, at 1095 (quoting *Atlantic Sounding*, 557 U. S., at 407; alteration omitted). Punitive damages, the Ninth Circuit concluded, are similarly available when a seaman sues for unseaworthiness under general maritime law.

II

I turn now to an examination of *Miles* and *Atlantic Sounding* closer than the attention accorded those decisions by the Court.

Miles, decided in 1990, addressed this question: In a wrongful-death action premised on unseaworthiness, may a deceased seaman's parent recover damages for loss of society? 498 U. S., at 21. As the Court explained in *Miles*, historically, general maritime law did not recognize a cause of action for wrongful death. *Id.*, at 23 (citing *The Harrisburg*,

119 U. S. 199 (1886)). But since the late 19th century, every State had adopted a statutory wrongful-death cause of action. *Miles*, 498 U. S., at 23. And in two statutes, Congress had provided for wrongful-death recoveries in maritime cases. *Ibid.* First, the Jones Act, 46 U. S. C. § 30104, provided a right of action for the survivor of a seaman killed in the course of his employment. Second, the Death on the High Seas Act (DOHSA), 46 U. S. C. § 30301 *et seq.*, provided a right of action for the survivor of anyone killed "by wrongful act, neglect, or default . . . on the high seas." § 30302; *Miles*, 498 U. S., at 24. But the Jones Act and DOHSA left some wrongful deaths at sea without a remedy. See *Miles*, 498 U. S., at 25–26.[3] To fill gaps in this statutory regime, and in light of legislative abrogation of the common-law disallowance of wrongful-death claims, the Court in *Moragne* v. *States Marine Lines, Inc.*, 398 U. S. 375, 409 (1970), recognized a general maritime cause of action for the wrongful death of a longshoreman. See also *Miles*, 498 U. S., at 26–30 (claim for wrongful death is also available to seamen's survivors).

After recounting this history, the *Miles* Court addressed the damages relief available for maritime wrongful death. Because "Congress and the States ha[d] legislated extensively in" the field of maritime law, the Court stated, "admiralty court[s] should look primarily to these legislative en-

[3] These were the unprovided-for cases: "First, in territorial waters, general maritime law allowed a remedy for unseaworthiness resulting in injury, but not for death. Second, DOHSA allowed a remedy for death resulting from unseaworthiness on the high seas, but general maritime law did not allow such recovery for a similar death in territorial waters. Finally, . . . in those States whose statutes allowed a claim for wrongful death resulting from unseaworthiness, recovery was available for the death of a longshoreman due to unseaworthiness, but not for the death of a Jones Act seaman. This was because wrongful death actions under the Jones Act are limited to negligence, and the Jones Act pre-empts state law remedies for the death or injury of a seaman." *Miles* v. *Apex Marine Corp.*, 498 U. S. 19, 26 (1990) (citation omitted).

actments for policy guidance." *Id.*, at 27. Congress had expressly limited damages recoverable under DOHSA to "pecuniary loss" sustained by the decedent's survivor. *Id.*, at 31 (citing 46 U. S. C. App. § 762, recodified at § 30303; emphasis deleted). And the Jones Act adopted the substantive provisions of the Federal Employers Liability Act, 45 U. S. C. § 51 *et seq.*, which the Court construed to confine wrongful-death damages to "pecuniary loss." *Miles*, 498 U. S., at 32. The *Miles* Court reasoned that loss-of-society damages were nonpecuniary, that such damages could not be recovered under DOHSA or the Jones Act, and that it would "be inconsistent with [the Court's] place in the constitutional scheme . . . to sanction more expansive remedies" under general maritime law. *Miles*, 498 U. S., at 31–33.[4]

Some 19 years after *Mile*s, in *Atlantic Sounding*, this Court held that punitive damages are available in actions for maintenance and cure under general maritime law. 557 U. S., at 408. *Atlantic Sounding*'s reasoning had four components. First, the Court observed, punitive damages had a long common-law pedigree. *Id.*, at 409–410. Second, the "general rule that punitive damages were available at common law extended to claims arising under federal maritime law." *Id.*, at 411; see *id.*, at 411–412. Third, "[n]othing in maritime law undermine[d] the applicability of this general rule in the maintenance and cure context," notwithstanding slim evidence that punitive damages were historically awarded in maintenance and cure actions. *Id.*, at 412; see *id.*, at 412–415, and n. 4. Finally, neither the Jones Act nor

[4] The *Miles* Court relied on comparable reasoning in denying the deceased seaman's estate, which had brought a survival action, the right to recover future earnings. See *id.*, at 33–37. Under "the traditional maritime rule," "there [wa]s no survival of unseaworthiness claims." *Id.*, at 34. The Court declined to decide whether to recognize a general maritime survival right, however, because, even if such a right were recognized, it would not support recovery of lost future income. *Ibid.* This damages limitation followed from the Jones Act, DOHSA, and most States' laws, which did not permit recovery of such damages. See *id.*, at 35–36.

any other statute indicated that Congress sought to displace the presumption that remedies generally available under the common law are available for maritime claims. While the Jones Act armed seamen with a statutory action for negligence attributable to a vessel operator, that remedy, *Atlantic Sounding* noted, did not curtail pre-existing maritime causes of action and remedies. *Id.*, at 415–418. The *Atlantic Sounding* Court rejected as "far too broad" the argument that the remedies available under general maritime law were confined to those available under the Jones Act or DOHSA. *Id.*, at 418–419.

The *Atlantic Sounding* inquiries control this case. As in *Atlantic Sounding*, "both the general maritime cause of action"—here, unseaworthiness—"and the remedy (punitive damages) were well established before the passage of the Jones Act." 557 U. S., at 420; *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 544 (1960); *The Osceola*, 189 U. S. 158, 175 (1903). And, unlike the maritime wrongful-death action at issue in *Miles*, Batterton's claim of unseaworthiness resulting in personal injury was not created to fill gaps in a statutory scheme. See *Atlantic Sounding*, 557 U. S., at 420; *Miles*, 498 U. S., at 27, 36. The damages available for Batterton's unseaworthiness claim, *Atlantic Sounding* therefore signals, need not track those available under the Jones Act. See 557 U. S., at 424, n. 12.

III

Applying *Atlantic Sounding*'s test, see *supra*, at 381–382, punitive damages are not categorically barred in unseaworthiness actions. *Atlantic Sounding* itself answers the first two inquiries. See *supra*, at 381. "Punitive damages have long been an available remedy at common law for wanton, willful, or outrageous conduct." 557 U. S., at 409; see *id.*, at 409–410. And "[t]he general rule that punitive damages [are] available at common law extended to claims arising under federal maritime law." *Id.*, at 411; see *id.*, at 411–412. As

next explained, the third and fourth components of *Atlantic Sounding*'s test are also satisfied.

A

Atlantic Sounding asks, third, whether anything in maritime law "undermines the applicability [to the maritime action at issue] of th[e] general rule" that punitive damages are available under general maritime law. *Id.*, at 412. True, there is no evidence that courts awarded punitive damages for unseaworthiness before the mid-20th century. See *ante*, at 370–372. But neither is there evidence that punitive damages were *unavailable* in unseaworthiness actions. Tr. of Oral Arg. 17.

Contrary to the Court's assertion, evidence of the availability of punitive damages for maintenance and cure was not "central to our decision in *Atlantic Sounding*." *Ante*, at 373. Far from it. "[A] search for cases in which punitive damages were awarded for the willful denial of maintenance and cure . . . yields very little." *Atlantic Sounding*, 557 U. S., at 430 (ALITO, J., dissenting). The Court in *Atlantic Sounding* invoked historical evidence about punitive damages in maintenance and cure actions, "strikingly slim" though it was, *id.*, at 431, only to underscore this point: Without a showing that punitive damages were unavailable, the generally applicable common-law rule allowing punitive damages should not be displaced. See *id.*, at 412–415 (majority opinion). Here, too, the absence of evidence that punitive damages were unavailable in unseaworthiness cases supports adherence to the general common-law rule permitting punitive damages.

B

Atlantic Sounding asks fourth: Has Congress "enacted legislation departing from th[e] common-law understanding" that punitive damages are generally available? See *id.*, at 415. Dutra contends that unseaworthiness claims and claims under the Jones Act are "simply two paths to compen-

sation for the same injury." Brief for Petitioner 19–20 (emphasis deleted). Positing that punitive damages are unavailable under the Jones Act,[5] Dutra concludes they are likewise unavailable in unseaworthiness suits. *Id.*, at 17. See also *ante*, at 372–374. Dutra's argument is unavailing, for the Jones Act does not preclude the award of punitive damages in unseaworthiness cases.

As noted, the Jones Act provides a cause of action for a seaman injured by his or her employer's negligence. 46 U. S. C. § 30104. Congress passed the Act "primarily to overrule *The Osceola*, [189 U. S. 158,] in which this Court prohibited a seaman or his family from recovering for injuries or death suffered due to his employers' negligence." *Atlantic Sounding*, 557 U. S., at 415. The Jones Act was intended to "enlarge th[e] protection" afforded to seamen, "not to narrow it." *The Arizona* v. *Anelich*, 298 U. S. 110, 123 (1936). Accordingly, the Jones Act did not provide an "exclusive remedy" for seamen's injuries; instead, it "preserve[d]" and supplemented "common-law causes of action." *Atlantic Sounding*, 557 U. S., at 416–417. As *Miles* itself recognized, the Jones Act "d[id] not disturb seamen's general maritime claims for injuries resulting from unseaworthiness." 498 U. S., at 29.

When the Jones Act was enacted, unseaworthiness and negligence were "discrete concepts": Unseaworthiness related "to the structure of the ship and the adequacy of [its] equipment and furnishings," while negligence concerned "the direction and control of operations aboard ship." G. Gilmore & C. Black, Law of Admiralty § 6–3, p. 277 (2d ed. 1975). Because these actions were distinct, it is improbable that, by enacting the Jones Act, Congress meant to limit the remedies available in unseaworthiness cases. Though unseaworthiness and Jones Act negligence now "significant[ly]

[5] This Court has not decided whether punitive damages are available under the Jones Act. See *Atlantic Sounding Co.* v. *Townsend*, 557 U. S. 404, 424, n. 12 (2009) (reserving the question).

overlap," *ante*, at 367, that overlap resulted primarily from mid-20th-century judicial decisions expanding the scope of unseaworthiness liability. See *Mitchell*, 362 U. S., at 547–550.[6] Those decisions do not so much as hint that Congress, in enacting the Jones Act, intended to cabin the relief available for unseaworthiness. Even today, unseaworthiness and Jones Act negligence are "not identical." 2 R. Force & M. Norris, The Law of Seamen § 27:25, p. 27–61 (5th ed. 2003).[7] The persistent differences between unseaworthiness and Jones Act claims weigh against inserting into general maritime law damages limitations that may be applicable to Jones Act suits. See *supra*, at 384, n. 5.[8]

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[6] In particular, this Court held that a shipowner's duty to provide a seaworthy vessel was "absolute," thereby rendering unseaworthiness a strict-liability tort. *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 94–95 (1946); *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96, 100–101 (1944); see 1B Benedict on Admiralty § 23, pp. 3–12 to 3–16 (7th rev. ed. 2018). In addition, courts broadened the range of conditions that could render a vessel unseaworthy. *Id.*, § 23, at 3–16 to 3–19.

[7] Unseaworthiness is a strict-liability tort, *ante*, at 366–367; the Jones Act requires proof of negligence, *Lewis* v. *Lewis & Clark Marine, Inc.*, 531 U. S. 438, 441 (2001). Unseaworthiness claims run against the vessel's owner, *Mahnich*, 321 U. S., at 100; Jones Act claims are brought against the seaman's "employer," § 30104. Injury caused by the negligent act or omission of a fit fellow crewmember may be actionable under the Jones Act but is not ground for an unseaworthiness suit. 1B Benedict on Admiralty § 23, at 3–34 to 3–38; see *Usner* v. *Luckenbach Overseas Corp.*, 400 U. S. 494 (1971). And a vessel owner is liable for unseaworthiness only when the unseaworthy condition proximately caused the plaintiff's injury; under the Jones Act, a plaintiff can prevail upon showing the "slight[est]" causal connection between the defendant's conduct and the plaintiff's injury. 2 Force & Norris, The Law of Seamen § 27:25, at 27–62 to 27–63. See also *id.*, § 27:2, at 27–7, and n. 6 (the duty to provide a seaworthy vessel may run to "seamen" who do not qualify as such under the Jones Act).

[8] The Court recognizes "that the general maritime law need not be static," but would confine changes in that law to those needed to align it with statutory law. *Ante*, at 375, n. 9. As just stated, however, *supra*, at 384–385, the Jones Act was intended to augment, not to cabin, relief available to seamen.

The Court observes that a plaintiff may not recover twice for the same injury under the Jones Act and unseaworthiness. *Ante*, at 368. True enough. But the Court does not explain why a bar to double recovery of compensatory damages should affect the availability of a single award of punitive damages. Notably, punitive damages are not awarded to compensate the plaintiff; their office is to punish the defendant and deter misconduct. See *Exxon*, 554 U. S., at 492; W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 2, p. 9 (5th ed. 1984). There is thus no tension between preventing double recovery of compensatory damages and allowing the recovery, once, of punitive damages.

IV

Finally, the Court takes up policy arguments against the availability of punitive damages in unseaworthiness actions. *Ante*, at 374–377. The Court, however, has long recognized the general availability of punitive damages under maritime law. *E. g.*, *Atlantic Sounding*, 557 U. S., at 411–412; *Exxon*, 554 U. S., at 489–490; *The Amiable Nancy*, 3 Wheat. 546, 558 (1818).

Punitive damages serve to deter and punish "lawless misconduct." *Ibid.* The imperative of countering a "heightened threat of harm," *Exxon*, 554 U. S., at 490, is especially pressing with regard to sailors, who face unique "hazards in the ship's service," *Harden* v. *Gordon*, 11 F. Cas. 480, 483 (No. 6,047) (CC Me. 1823) (Story, J.). These dangers, more than paternalistic 19th-century attitudes towards sailors, see *ante*, at 376–377, account for the Court's "'special solicitude'" for "those who undertake to 'venture upon hazardous and unpredictable sea voyages.'" *Air & Liquid Systems Corp.* v. *DeVries*, 586 U. S. 446, 456 (2019) (quoting *American Export Lines, Inc.* v. *Alvez*, 446 U. S. 274, 285 (1980)).

Dutra and the Court warn that allowing punitive damages in unseaworthiness actions could impair maritime commerce. Brief for Petitioner 33–34; *ante*, at 376. But punitive

damages have been available in maintenance and cure cases in all Circuits for the last decade, *Atlantic Sounding*, 557 U. S. 404, and in unseaworthiness cases in some Circuits for longer, see *Self* v. *Great Lakes Dredge & Dock Co.*, 832 F. 2d 1540, 1550 (CA11 1987); *Evich*, 819 F. 2d, at 258. No tidal wave has overwhelmed commerce in those Circuits.

Permitting punitive damages for unseaworthiness, the Court further urges, would create "bizarre disparities." *Ante*, at 376. I see no "bizarre disparit[y]" in allowing an injured sailor to seek remedies unavailable to survivors of deceased seamen. See Keeton, *supra*, § 127, at 949, 951 (state wrongful-death statutes frequently limit survivors' recoveries to pecuniary damages). Nor is it "bizarre" to permit recovery of punitive damages against a shipowner "for injuries due to unseaworthiness of the vessel." *The Arizona*, 298 U. S., at 120. Exposure to such damages helps to deter wrongdoing, particularly when malfeasance is "hard to detect." *Exxon*, 554 U. S., at 494. If there is any "bizarre disparit[y]," it is the one the Court today creates: Punitive damages are available for willful and wanton breach of the duty to provide maintenance and cure, but not for similarly culpable breaches of the duty to provide a seaworthy vessel.

* * *

For the reasons stated, I would affirm the Court of Appeals' judgment.

Syllabus

IANCU, UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND DIRECTOR, PATENT AND TRADEMARK OFFICE *v.* BRUNETTI

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

No. 18–302. Argued April 15, 2019—Decided June 24, 2019

Respondent Erik Brunetti sought federal registration of the trademark FUCT. The Patent and Trademark Office (PTO) denied his application under a provision of the Lanham Act that prohibits registration of trademarks that "[c]onsist[ ] of or comprise[ ] immoral[ ] or scandalous matter," 15 U. S. C. § 1052(a). Brunetti brought a First Amendment challenge to the "immoral or scandalous" bar in the Federal Circuit, which invalidated the provision.

Held: The Lanham Act's prohibition on registration of "immoral[ ] or scandalous" trademarks violates the First Amendment.

In *Matal* v. *Tam*, 582 U. S. 218, this Court declared unconstitutional the Lanham Act's ban on registering marks that "disparage" any "person[ ], living or dead." § 1052(a). A divided Court agreed on two propositions. First, if a trademark registration bar is viewpoint-based, it is unconstitutional. And second, the disparagement bar was viewpoint-based.

The "immoral or scandalous" bar similarly discriminates on the basis of viewpoint and so collides with this Court's First Amendment doctrine. Expressive material is "immoral" when it is "inconsistent with rectitude, purity, or good morals"; "wicked"; or "vicious." So the Lanham Act permits registration of marks that champion society's sense of rectitude and morality, but not marks that denigrate those concepts. And material is "scandalous" when it "giv[es] offense to the conscience or moral feelings"; "excite[s] reprobation"; or "call[s] out condemnation." So the Lanham Act allows registration of marks when their messages accord with, but not when their messages defy, society's sense of decency or propriety. The statute, on its face, distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation. This facial viewpoint bias in the law results in viewpoint-discriminatory application. The PTO has refused to register marks communicating "immoral" or "scandalous" views about (among other things) drug use, religion, and terrorism.

Syllabus

But all the while, it has approved registration of marks expressing more accepted views on the same topics.

The Government says the statute is susceptible of a limiting construction that would remove its viewpoint bias. The Government's idea is to narrow the statutory bar to "marks that are offensive [or] shocking[ ] because of their mode of expression, independent of any views that they may express," which would mostly restrict the PTO to refusing marks that are lewd, sexually explicit, or profane. But this Court cannot accept the Government's proposal, because the statute says something markedly different. The "immoral or scandalous" bar does not draw the line at lewd, sexually explicit, or profane marks. Nor does it refer only to marks whose "mode of expression," independent of viewpoint, is particularly offensive. To cut the statute off where the Government urges is not to interpret the statute Congress enacted, but to fashion a new one. And once the "immoral or scandalous" bar is interpreted fairly, it must be invalidated. Pp. 392–399.

877 F. 3d 1330, affirmed.

KAGAN, J., delivered the opinion of the Court, in which THOMAS, GINSBURG, ALITO, GORSUCH, and KAVANAUGH, JJ., joined. ALITO, J., filed a concurring opinion, *post*, p. 399. ROBERTS, C. J., *post*, p. 400, and BREYER, J., *post*, p. 401, filed opinions concurring in part and dissenting in part. SOTOMAYOR, J., filed an opinion concurring in part and dissenting in part, in which BREYER, J., joined, *post*, p. 409.

Deputy Solicitor General Stewart argued the cause for petitioner. With him on the briefs were *Solicitor General Francisco*, *Assistant Attorney General Hunt*, *Frederick Liu*, *Mark R. Freeman*, *Daniel Tenny*, *Joshua M. Salzman*, *Sarah Harris*, *Thomas W. Krause*, *Christina J. Hieber*, *Thomas L. Casagrande*, *Mary Beth Walker*, and *Molly R. Silfen*.

John R. Sommer argued the cause for respondent. With him on the brief were *Megan E. Gray* and *Devon A. Beckwith*.*

**Kurt M. Anderson*, *pro se*, filed an *amicus curiae* brief urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *David D. Cole*, *Esha Bhandari*, and *Arthur B. Spitzer*; for the Cato Institute et al. by *Ilya Shapiro*; for the International Trademark Association by *David H. Bernstein*, *Jeremy Feigelson*,

JUSTICE KAGAN delivered the opinion of the Court.

Two Terms ago, in *Matal* v. *Tam*, 582 U. S. 218 (2017), this Court invalidated the Lanham Act's bar on the registration of "disparag[ing]" trademarks. 15 U. S. C. § 1052(a). Although split between two non-majority opinions, all Members of the Court agreed that the provision violated the First Amendment because it discriminated on the basis of viewpoint. Today we consider a First Amendment challenge to a neighboring provision of the Act, prohibiting the registration of "immoral[ ] or scandalous" trademarks. *Ibid.* We hold that this provision infringes the First Amendment for the same reason: It too disfavors certain ideas.

I

Respondent Erik Brunetti is an artist and entrepreneur who founded a clothing line that uses the trademark FUCT. According to Brunetti, the mark (which functions as the clothing's brand name) is pronounced as four letters, one after the other: F-U-C-T. See Brief for Respondent 1. But you might read it differently and, if so, you would hardly be alone. See Tr. of Oral Arg. 5 (describing the brand name as "the equivalent of [the] past participle form of a well-known word of profanity"). That common perception caused difficulties for Brunetti when he tried to register his mark with the U. S. Patent and Trademark Office (PTO).

Under the Lanham Act, the PTO administers a federal registration system for trademarks. See 15 U. S. C. §§ 1051,

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Pooja A. Boisture, and *Claudia Ray*; for the Pacific Legal Foundation by *Caleb R. Trotter*, *Joshua P. Thompson*, and *Daniel M. Ortner*; for The Rutherford Institute by *Megan L. Brown*, *Scott B. Wilkens*, and *John W. Whitehead*; and for Simon Tam by *Stuart Banner*.

Briefs of *amici curiae* were filed for the American Intellectual Property Law Association by *Theodore H. Davis, Jr.*, and *Sheldon H. Klein*; for the New York Intellectual Property Law Association by *Michael Carl Cannata*, *Frank Misiti*, *Stephen J. Smirti, Jr.*, *Dyan Finguerra-DuCharme*, *William Thomashower*, *Robert J. Rando*, and *Kathleen E. McCarthy*; and for Barton Beebe et al. by *William M. Jay* and *Joshua J. Bone*.

1052. Registration of a mark is not mandatory. The owner of an unregistered mark may still use it in commerce and enforce it against infringers. See *Tam*, 582 U. S., at 225. But registration gives trademark owners valuable benefits. For example, registration constitutes "prima facie evidence" of the mark's validity. § 1115(a). And registration serves as "constructive notice of the registrant's claim of ownership," which forecloses some defenses in infringement actions. § 1072. Generally, a trademark is eligible for registration, and receipt of such benefits, if it is "used in commerce." § 1051(a)(1). But the Act directs the PTO to "refuse[ ] registration" of certain marks. § 1052. For instance, the PTO cannot register a mark that "so resembles" another mark as to create a likelihood of confusion. § 1052(d). It cannot register a mark that is "merely descriptive" of the goods on which it is used. § 1052(e). It cannot register a mark containing the flag or insignia of any nation or State. See § 1052(b). There are five or ten more (depending on how you count). And until we invalidated the criterion two years ago, the PTO could not register a mark that "disparage[d]" a "person[ ], living or dead." § 1052(a); see *Tam*, 582 U. S. 218.

This case involves another of the Lanham Act's prohibitions on registration—one applying to marks that "[c]onsist[ ] of or comprise[ ] immoral[ ] or scandalous matter." § 1052(a). The PTO applies that bar as a "unitary provision," rather than treating the two adjectives in it separately. *In re Brunetti*, 877 F. 3d 1330, 1336 (CA Fed. 2017); Brief for Petitioner 6 (stating that the PTO "has long treated the two terms as composing a single category"). To determine whether a mark fits in the category, the PTO asks whether a "substantial composite of the general public" would find the mark "shocking to the sense of truth, decency, or propriety"; "giving offense to the conscience or moral feelings"; "calling out for condemnation"; "disgraceful"; "offensive"; "disreputable"; or "vulgar." 877 F. 3d, at 1336 (internal quo-

tation marks omitted); see Brief for Petitioner 6 (agreeing that the PTO "generally defines" the category in that way).

Both a PTO examining attorney and the PTO's Trademark Trial and Appeal Board decided that Brunetti's mark flunked that test. The attorney determined that FUCT was "a total vulgar" and "therefore[ ] unregistrable." App. 27–28. On review, the Board stated that the mark was "highly offensive" and "vulgar," and that it had "decidedly negative sexual connotations." App. to Pet. for Cert. 59a, 64a–65a. As part of its review, the Board also considered evidence of how Brunetti used the mark. It found that Brunetti's website and products contained imagery, near the mark, of "extreme nihilism" and "anti-social" behavior. *Id.*, at 64a. In that context, the Board thought, the mark communicated "misogyny, depravity, [and] violence." *Ibid.* The Board concluded: "Whether one considers [the mark] as a sexual term, or finds that [Brunetti] has used [the mark] in the context of extreme misogyny, nihilism or violence, we have no question but that [the term is] extremely offensive." *Id.*, at 65a.

Brunetti then brought a facial challenge to the "immoral or scandalous" bar in the Court of Appeals for the Federal Circuit. That court found the prohibition to violate the First Amendment. As usual when a lower court has invalidated a federal statute, we granted certiorari. 586 U. S. 1063 (2019).

II

This Court first considered a First Amendment challenge to a trademark registration restriction in *Tam*, just two Terms ago. There, the Court declared unconstitutional the Lanham Act's ban on registering marks that "disparage" any "person[ ], living or dead." § 1052(a). The eight-Justice Court divided evenly between two opinions and could not agree on the overall framework for deciding the case. (In particular, no majority emerged to resolve whether a Lanham Act bar is a condition on a government benefit or a simple restriction on speech.) But all the Justices agreed on

two propositions. First, if a trademark registration bar is viewpoint-based, it is unconstitutional. See 582 U. S., at 223, 243–244 (opinion of ALITO, J.); *id.*, at 247–248, 251 (opinion of Kennedy, J.). And second, the disparagement bar was viewpoint-based. See *id.*, at 223, 243–244 (opinion of ALITO, J.); *id.*, at 248–251 (opinion of Kennedy, J.).

The Justices thus found common ground in a core postulate of free speech law: The government may not discriminate against speech based on the ideas or opinions it conveys. See *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829–830 (1995) (explaining that viewpoint discrimination is an "egregious form of content discrimination" and is "presumptively unconstitutional"). In Justice Kennedy's explanation, the disparagement bar allowed a trademark owner to register a mark if it was "positive" about a person, but not if it was "derogatory." *Tam*, 582 U. S., at 249. That was the "essence of viewpoint discrimination," he continued, because "[t]he law thus reflects the Government's disapproval of a subset of messages it finds offensive." *Ibid.* JUSTICE ALITO emphasized that the statute "denie[d] registration to any mark" whose disparaging message was "offensive to a substantial percentage of the members of any group." *Id.*, at 243. The bar thus violated the "bedrock First Amendment principle" that the government cannot discriminate against "ideas that offend." *Id.*, at 223. Slightly different explanations, then, but a shared conclusion: Viewpoint discrimination doomed the disparagement bar.

If the "immoral or scandalous" bar similarly discriminates on the basis of viewpoint, it must also collide with our First Amendment doctrine. The Government does not argue otherwise. In briefs and oral argument, the Government offers a theory for upholding the bar if it is viewpoint-neutral (essentially, that the bar would then be a reasonable condition on a government benefit). See Brief for Petitioner 14–26. But the Government agrees that under *Tam* it may not

"deny registration based on the views expressed" by a mark. Tr. of Oral Arg. 24. "As the Court's *Tam* decision establishes," the Government says, "the criteria for federal trademark registration" must be "viewpoint-neutral to survive Free Speech Clause review." Pet. for Cert. 19. So the key question becomes: Is the "immoral or scandalous" criterion in the Lanham Act viewpoint-neutral or viewpoint-based?

It is viewpoint-based. The meanings of "immoral" and "scandalous" are not mysterious, but resort to some dictionaries still helps to lay bare the problem. When is expressive material "immoral"? According to a standard definition, when it is "inconsistent with rectitude, purity, or good morals"; "wicked"; or "vicious." Webster's New International Dictionary 1246 (2d ed. 1949). Or again, when it is "opposed to or violating morality"; or "morally evil." Shorter Oxford English Dictionary 961 (3d ed. 1947). So the Lanham Act permits registration of marks that champion society's sense of rectitude and morality, but not marks that denigrate those concepts. And when is such material "scandalous"? Says a typical definition, when it "giv[es] offense to the conscience or moral feelings"; "excite[s] reprobation"; or "call[s] out condemnation." Webster's New International Dictionary, at 2229. Or again, when it is "shocking to the sense of truth, decency, or propriety"; "disgraceful"; "offensive"; or "disreputable." Funk & Wagnalls New Standard Dictionary 2186 (1944). So the Lanham Act allows registration of marks when their messages accord with, but not when their messages defy, society's sense of decency or propriety. Put the pair of overlapping terms together and the statute, on its face, distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation. The statute favors the former, and disfavors the latter. "Love rules"? "Always be good"? Registration follows. "Hate rules"? "Always be cruel"? Not according to the Lanham Act's "immoral or scandalous" bar.

The facial viewpoint bias in the law results in viewpoint-discriminatory application. Recall that the PTO itself describes the "immoral or scandalous" criterion using much the same language as in the dictionary definitions recited above. See *supra*, at 391–392. The PTO, for example, asks whether the public would view the mark as "shocking to the sense of truth, decency, or propriety"; "calling out for condemnation"; "offensive"; or "disreputable." Brief for Petitioner 6 (internal quotation marks omitted). Using those guideposts, the PTO has refused to register marks communicating "immoral" or "scandalous" views about (among other things) drug use, religion, and terrorism. But all the while, it has approved registration of marks expressing more accepted views on the same topics. See generally Gilson & LaLonde, Trademarks Laid Bare, 101 Trademark Reporter 1476, 1510–1513, 1518–1522 (2011); Brief for Barton Beebe et al. as *Amici Curiae* 28–29.

Here are some samples. The PTO rejected marks conveying approval of drug use (YOU CAN'T SPELL HEALTHCARE WITHOUT THC for pain-relief medication, MARIJUANA COLA and KO KANE for beverages) because it is scandalous to "inappropriately glamoriz[e] drug abuse." PTO, Office Action of Aug. 28, 2010, Serial No. 85038867; see Office Action of Dec. 24, 2009, Serial No. 77833964; Office Action of Nov. 17, 2009, Serial No. 77671304. But at the same time, the PTO registered marks with such sayings as D.A.R.E. TO RESIST DRUGS AND VIOLENCE and SAY NO TO DRUGS—REALITY IS THE BEST TRIP IN LIFE. See PTO, Reg. No. 2975163 (July 26, 2005); Reg. No. 2966019 (July 12, 2005). Similarly, the PTO disapproved registration for the mark BONG HITS 4 JESUS because it "suggests that people should engage in an illegal activity [in connection with] worship" and because "Christians would be morally outraged by a statement that connects Jesus Christ with illegal drug use." Office Action of Mar. 15, 2008, Serial No. 77305946. And the PTO refused to register trademarks associating religious references with products (AGNUS DEI

for safes and MADONNA for wine) because they would be "offensive to most individuals of the Christian faith" and "shocking to the sense of propriety." *Ex parte Summit Brass & Bronze Works*, 59 USPQ 22, 23 (Dec. Com. Pat. 1943); *In re Riverbank Canning Co.*, 95 F. 2d 327, 329 (CCPA 1938). But once again, the PTO approved marks—PRAISE THE LORD for a game and JESUS DIED FOR YOU on clothing—whose message suggested religious faith rather than blasphemy or irreverence. See Reg. No. 5265121 (Aug. 15, 2017); Reg. No. 3187985 (Dec. 19, 2006). Finally, the PTO rejected marks reflecting support for al-Qaeda (BABY AL QAEDA and AL-QAEDA on t-shirts) "because the bombing of civilians and other terrorist acts are shocking to the sense of decency and call out for condemnation." Office Action of Nov. 22, 2004, Serial No. 78444968; see Office Action of Feb. 23, 2005, Serial No. 78400213. Yet it approved registration of a mark with the words WAR ON TERROR MEMORIAL. Reg. No. 5495362 (June 19, 2018). Of course, all these decisions are understandable. The rejected marks express opinions that are, at the least, offensive to many Americans. But as the Court made clear in *Tam*, a law disfavoring "ideas that offend" discriminates based on viewpoint, in violation of the First Amendment. 582 U. S., at 223 (opinion of ALITO, J.); see *id.*, at 243–244; *id.*, at 248–249 (opinion of Kennedy, J.).

How, then, can the Government claim that the "immoral or scandalous" bar is viewpoint-neutral? The Government basically asks us to treat decisions like those described above as PTO examiners' mistakes. See Brief for Petitioner 46. Still more, the Government tells us to ignore how the Lanham Act's language, on its face, disfavors some ideas. In urging that course, the Government does not dispute that the statutory language—and words used to define it—have just that effect. At oral argument, the Government conceded: "[I]f you just looked at the words like 'shocking' and 'offensive' on their face and gave them their ordinary meanings[,] they could easily encompass material that was shock-

ing [or offensive] because it expressed an outrageous point of view or a point of view that most members" of society reject. Tr. of Oral Arg. 6. But no matter, says the Government, because the statute is "susceptible of" a limiting construction that would remove this viewpoint bias. *Id.*, at 7 (arguing that the Court should "attempt to construe [the] statute in a way that would render it constitutional"). The Government's idea, abstractly phrased, is to narrow the statutory bar to "marks that are offensive [or] shocking to a substantial segment of the public because of their *mode* of expression, independent of any views that they may express." *Id.*, at 11 (emphasis added); see Brief for Petitioner 27–28. More concretely, the Government explains that this reinterpretation would mostly restrict the PTO to refusing marks that are "vulgar"—meaning "lewd," "sexually explicit or profane." *Id.*, at 27, 30. Such a reconfigured bar, the Government says, would not turn on viewpoint, and so we could uphold it.

But we cannot accept the Government's proposal, because the statute says something markedly different. This Court, of course, may interpret "ambiguous statutory language" to "avoid serious constitutional doubts." *FCC* v. *Fox Television Stations, Inc.*, 556 U. S. 502, 516 (2009). But that canon of construction applies only when ambiguity exists. "We will not rewrite a law to conform it to constitutional requirements." *United States* v. *Stevens*, 559 U. S. 460, 481 (2010) (internal quotation marks and alteration omitted). So even assuming the Government's reading would eliminate First Amendment problems, we may adopt it only if we can see it in the statutory language. And we cannot. The "immoral or scandalous" bar stretches far beyond the Government's proposed construction. The statute as written does not draw the line at lewd, sexually explicit, or profane marks. Nor does it refer only to marks whose "mode of expression," independent of viewpoint, is particularly offensive. Brief for Petitioner 28 (internal quotation marks omitted). It cov-

ers the universe of immoral or scandalous—or (to use some PTO synonyms) offensive or disreputable—material. Whether or not lewd or profane. Whether the scandal and immorality comes from mode or instead from viewpoint. To cut the statute off where the Government urges is not to interpret the statute Congress enacted, but to fashion a new one.*

And once the "immoral or scandalous" bar is interpreted fairly, it must be invalidated. The Government just barely argues otherwise. In the last paragraph of its brief, the Government gestures toward the idea that the provision is salvageable by virtue of its constitutionally permissible applications (in the Government's view, its applications to lewd, sexually explicit, or profane marks). See *id.*, at 47. In other words, the Government invokes our First Amendment overbreadth doctrine, and asks us to uphold the statute against facial attack because its unconstitutional applications are not "substantial" relative to "the statute's plainly legitimate sweep." *Stevens*, 559 U. S., at 473 (internal quotation marks omitted). But to begin with, this Court has never applied that kind of analysis to a viewpoint-discriminatory

*We reject the dissent's statutory surgery for the same reason. Although conceding that the term "immoral" cannot be saved, the dissent thinks that the term "scandalous" can be read as the Government proposes. See *post*, at 409–410 (SOTOMAYOR, J., concurring in part and dissenting in part). But that term is not "ambiguous," as the dissent argues, *post*, at 411; it is just broad. Remember that the dictionaries define it to mean offensive, disreputable, exciting reprobation, and so forth. See *supra*, at 394; *post*, at 410–411 (accepting those definitions). Even if hived off from "immoral" marks, the category of scandalous marks thus includes *both* marks that offend by the ideas they convey *and* marks that offend by their mode of expression. And its coverage of the former means that it discriminates based on viewpoint. We say nothing at all about a statute that covers only the latter—or, in the Government's more concrete description, a statute limited to lewd, sexually explicit, and profane marks. Nor do we say anything about how to evaluate viewpoint-neutral restrictions on trademark registration, see *post*, at 421–424—because the "scandalous" bar (whether or not attached to the "immoral" bar) is not one.

law. In *Tam*, for example, we did not pause to consider whether the disparagement clause might admit some permissible applications (say, to certain libelous speech) before striking it down. The Court's finding of viewpoint bias ended the matter. And similarly, it seems unlikely we would compare permissible and impermissible applications if Congress outright banned "offensive" (or to use some other examples, "divisive" or "subversive") speech. Once we have found that a law "aim[s] at the suppression of" views, why would it matter that Congress could have captured some of the same speech through a viewpoint-neutral statute? *Tam*, 582 U. S., at 248 (opinion of Kennedy, J.). But in any event, the "immoral or scandalous" bar is substantially overbroad. There are a great many immoral and scandalous ideas in the world (even more than there are swearwords), and the Lanham Act covers them all. It therefore violates the First Amendment.

We accordingly affirm the judgment of the Court of Appeals.

It is so ordered.

JUSTICE ALITO, concurring.

For the reasons explained in the opinion of the Court, the provision of the Lanham Act at issue in this case violates the Free Speech Clause of the First Amendment because it discriminates on the basis of viewpoint and cannot be fixed without rewriting the statute. Viewpoint discrimination is poison to a free society. But in many countries with constitutions or legal traditions that claim to protect freedom of speech, serious viewpoint discrimination is now tolerated, and such discrimination has become increasingly prevalent in this country. At a time when free speech is under attack, it is especially important for this Court to remain firm on the principle that the First Amendment does not tolerate viewpoint discrimination. We reaffirm that principle today.

Our decision is not based on moral relativism but on the recognition that a law banning speech deemed by government officials to be "immoral" or "scandalous" can easily be exploited for illegitimate ends. Our decision does not prevent Congress from adopting a more carefully focused statute that precludes the registration of marks containing vulgar terms that play no real part in the expression of ideas. The particular mark in question in this case could be denied registration under such a statute. The term suggested by that mark is not needed to express any idea and, in fact, as commonly used today, generally signifies nothing except emotion and a severely limited vocabulary. The registration of such marks serves only to further coarsen our popular culture. But we are not legislators and cannot substitute a new statute for the one now in force.

CHIEF JUSTICE ROBERTS, concurring in part and dissenting in part.

The Lanham Act directs the Patent and Trademark Office to refuse registration to marks that consist of or comprise "immoral, deceptive, or scandalous matter." 15 U. S. C. § 1052(a). Although the statute lists "immoral" and "scandalous" separately, the PTO has long read those terms together to constitute a unitary bar on "immoral or scandalous" marks.

The Government concedes that the provision so read is broad enough to reach not only marks that offend because of their mode of expression (such as vulgarity and profanity) but also marks that offend because of the ideas they convey. The Government urges, however, that the provision can be given a narrowing construction—it can be understood to cover only marks that offend because of their mode of expression.

The Court rejects that proposal on the ground that it would in effect rewrite the statute. I agree with the majority that the "immoral" portion of the provision is not suscep-

tible of a narrowing construction that would eliminate its viewpoint bias. As JUSTICE SOTOMAYOR explains, however, the "scandalous" portion of the provision is susceptible of such a narrowing construction. Standing alone, the term "scandalous" need not be understood to reach marks that offend because of the ideas they convey; it can be read more narrowly to bar only marks that offend because of their mode of expression—marks that are obscene, vulgar, or profane. That is how the PTO now understands the term, in light of our decision in *Matal* v. *Tam*, 582 U. S. 218 (2017). See Tr. of Oral Arg. 4–5. I agree with JUSTICE SOTOMAYOR that such a narrowing construction is appropriate in this context.

I also agree that, regardless of how exactly the trademark registration system is best conceived under our precedents—a question we left open in *Tam*—refusing registration to obscene, vulgar, or profane marks does not offend the First Amendment. Whether such marks can be registered does not affect the extent to which their owners may use them in commerce to identify goods. No speech is being restricted; no one is being punished. The owners of such marks are merely denied certain additional benefits associated with federal trademark registration. The Government, meanwhile, has an interest in not associating itself with trademarks whose content is obscene, vulgar, or profane. The First Amendment protects the freedom of speech; it does not require the Government to give aid and comfort to those using obscene, vulgar, and profane modes of expression. For those reasons, I concur in part and dissent in part.

JUSTICE BREYER, concurring in part and dissenting in part.

Our precedents warn us against interpreting statutes in ways that would likely render them unconstitutional. *Virginia* v. *American Booksellers Assn., Inc.*, 484 U. S. 383, 397 (1988) (noting that a law "will be upheld" if it is "'readily susceptible' to a narrowing construction that would make it

constitutional"); *United States* v. *12 200-ft. Reels of Super 8MM. Film*, 413 U. S. 123, 130, n. 7 (1973) (noting our "duty" to adopt a "'fairly possible'" construction by which constitutional doubts "'may be avoided'" (quoting *United States* v. *Thirty-seven Photographs*, 402 U. S. 363, 369 (1971))). Following these precedents, I agree with JUSTICE SOTOMAYOR that, for the reasons she gives, we should interpret the word "scandalous" in the present statute to refer only to certain highly "vulgar" or "obscene" modes of expression. See *post*, at 413–415 (opinion concurring in part and dissenting in part).

The question, then, is whether the First Amendment permits the Government to rely on this statute, as narrowly construed, to deny the benefits of federal trademark registration to marks like the one at issue here, which involves the use of the term "FUCT" in connection with a clothing line that includes apparel for children and infants. Like JUSTICE SOTOMAYOR, I believe the answer is "yes," though my reasons differ slightly from hers.

I

A

In my view, a category-based approach to the First Amendment cannot adequately resolve the problem before us. I would place less emphasis on trying to decide whether the statute at issue should be categorized as an example of "viewpoint discrimination," "content discrimination," "commercial speech," "government speech," or the like. Rather, as I have written before, I believe we would do better to treat this Court's speech-related categories not as outcome-determinative rules, but instead as rules of thumb. See *Reed* v. *Town of Gilbert*, 576 U. S. 155, 175–176 (2015) (opinion concurring in judgment).

After all, these rules are not absolute. The First Amendment is not the Tax Code. Indeed, even when we consider a regulation that is ostensibly "viewpoint discriminatory" or that is subject to "strict scrutiny," we sometimes find the regulation to be constitutional after weighing the competing

interests involved. See, *e. g.*, *Morse* v. *Frederick*, 551 U. S. 393, 397 (2007) ("[S]chools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use"); *Williams-Yulee* v. *Florida Bar*, 575 U. S. 433, 444 (2015) (explaining that although "'it is the rare case'" when a statute satisfies strict scrutiny, "those cases do arise" (quoting *Burson* v. *Freeman*, 504 U. S. 191, 211 (1992) (plurality opinion))).

Unfortunately, the Court has sometimes applied these rules—especially the category of "content discrimination"—too rigidly. In a number of cases, the Court has struck down what I believe are ordinary, valid regulations that pose little or no threat to the speech interests that the First Amendment protects. See *Janus* v. *State, County, and Municipal Employees*, 585 U. S. 878, 956 (2018) (KAGAN, J., dissenting); *Sorrell* v. *IMS Health Inc.*, 564 U. S. 552, 589–592 (2011) (BREYER, J., dissenting); see generally *Reed*, 576 U. S., at 176–178 (opinion of BREYER, J.).

Rather than deducing the answers to First Amendment questions strictly from categories, as the Court often does, I would appeal more often and more directly to the values the First Amendment seeks to protect. As I have previously written, I would ask whether the regulation at issue "works speech-related harm that is out of proportion to its justifications." *United States* v. *Alvarez*, 567 U. S. 709, 730 (2012) (opinion concurring in judgment); see *Reed*, 576 U. S., at 179 (opinion concurring in judgment) (discussing the matter further, particularly in respect to the category of content discrimination).

B

This case illustrates the limits of relying on rigid First Amendment categories, for the statute at issue does not fit easily into any of these categories.

The Court has not decided whether the trademark statute is simply a method of regulating pure "commercial speech." See *Matal* v. *Tam*, 582 U. S. 218, 244–245 (2017) (opinion of ALITO, J.) (leaving open the question whether trademarks

are commercial speech); *id.*, at 251 (opinion of Kennedy, J.) (same). There may be reasons for doubt on that score. Trademarks, after all, have an expressive component in addition to a commercial one, and the statute does not bar anyone from speaking. To be sure, the statute does regulate the commercial function of trademarks. But it does so in a limited way designed primarily to ensure that a mark identifies the product's source. See *Wal-Mart Stores, Inc.* v. *Samara Brothers, Inc.*, 529 U. S. 205, 212 (2000).

The trademark statute cannot easily be described as a regulation of "government speech," either. *Tam*, 582 U. S., at 233–239. The Government, however, may be loosely associated with the mark because it registers the mark and confers certain benefits upon the owner.

What about the concept of a "public forum"? Trademark registration has little in common with a traditional public forum, as the register of trademarks is not a public park, a street, or a similar forum for public debate. See *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 45 (1983). But one can find some vague resemblance between trademark registration and what this Court refers to as a "limited public forum" created by the government for private speech. See *post*, at 422 (opinion of SOTOMAYOR, J.); *Christian Legal Soc. Chapter of Univ. of Cal., Hastings College of Law* v. *Martinez*, 561 U. S. 661, 679, n. 11 (2010). The trademark registration system also bears some resemblance to cases involving government subsidies for private speech, as such programs—like trademark registration—may grant a benefit to some forms of speech without prohibiting other forms of speech. See *post*, at 422 (opinion of SOTOMAYOR, J.); *Legal Services Corporation* v. *Velazquez*, 531 U. S. 533, 543–544 (2001) (noting that the First Amendment rules applicable to limited public forums may be "instruc[tive]" "when the government establishes a subsidy for specified ends").

As for the concepts of "viewpoint discrimination" and "content discrimination," I agree with JUSTICE SOTOMAYOR that the boundaries between them may be difficult to discern. *Post*, at 417–418; see *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 831 (1995) ("[T]he distinction is not a precise one"). Even so, it is hard to see how a statute prohibiting the registration of only highly vulgar or obscene words discriminates based on "viewpoint." Of course, such words often evoke powerful emotions. Standing by themselves, however, these words do not typically convey any particular viewpoint. See *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 746, n. 22 (1978) (noting that the Government's regulation of vulgar words was based not on "point of view," but on "the way in which [speech] is expressed"). Moreover, while a restriction on the registration of highly vulgar words arguably places a content-based limit on trademark registration, it is hard to see why that label should be outcome-determinative here, for regulations governing trademark registration "inevitably involve content discrimination." *Reed*, 576 U. S., at 177 (opinion of BREYER, J.); see *Tam*, 582 U. S., at 252 (opinion of Kennedy, J.) (noting that the constitutionality of some content-based trademark restrictions is "well settled"); Katyal, Trademark Intersectionality, 57 UCLA L. Rev. 1601, 1602 (2010) (noting that trademark law is "indelibly rooted in content-based considerations").

In short, the trademark statute does not clearly fit within any of the existing outcome-determinative categories. Why, then, should we rigidly adhere to these categories? Rather than puzzling over categorization, I believe we should focus on the interests the First Amendment protects and ask a more basic proportionality question: Does "the regulation at issue wor[k] harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives"? *Reed*, 576 U. S., at 179 (opinion of BREYER, J.).

II

Based on this proportionality analysis, I would conclude that the statute at issue here, as interpreted by JUSTICE SOTOMAYOR, does not violate the First Amendment.

How much harm to First Amendment interests does a bar on registering highly vulgar or obscene trademarks work? Not much. The statute leaves businesses free to use highly vulgar or obscene words on their products, and even to use such words directly next to other registered marks. Indeed, a business owner might even use a vulgar word as a trademark, provided that he or she is willing to forgo the benefits of registration. See *post*, at 409–410 (opinion of SOTOMAYOR, J.); *Tam*, 582 U. S., at 225–227.

Moreover, the field at issue here, trademark law, is a highly regulated one with a specialized mission: to "hel[p] consumers identify goods and services that they wish to purchase, as well as those they want to avoid." *Id.*, at 224. As I have noted, that mission, by its very nature, requires the Government to impose limitations on speech. *Supra*, at 405. Trademark law therefore forbids the registration of certain types of words—for example, those that will likely "cause confusion," or those that are "merely descriptive." 15 U. S. C. §§ 1052(d), (e). For that reason, an applicant who seeks to register a mark should not expect complete freedom to say what she wishes, but should instead expect linguistic regulation.

Now consider, by way of contrast, the Government's interests in barring the registration of highly vulgar or obscene trademarks. For one thing, when the Government registers a mark, it is necessarily "involv[ed] in promoting" that mark. *Post*, at 424–425 (opinion of SOTOMAYOR, J.). The Government has at least a reasonable interest in ensuring that it is not involved in promoting highly vulgar or obscene speech, and that it will not be associated with such speech.

For another, scientific evidence suggests that certain highly vulgar words have a physiological and emotional im-

pact that makes them different in kind from most other words. See M. Mohr, Holy S***: A Brief History of Swearing 252 (2013) (Mohr) (noting the "emotional impact" of certain profane words that "excite the lower-brain circuitry responsible for emotion," resulting in "electrical impulses that can be measured in the skin"). These vulgar words originate in a different part of our brains than most other words. *Id.*, at 250. And these types of swear words tend to attract more attention and are harder to forget than other words. See Jay, Caldwell-Harris, & King, Recalling Taboo and Nontaboo Words, 121 Am. J. Psych. 83, 83–86 (2008) (collecting research). Notably, that has remained true even as the list of offensive swear words has changed over time: In the last few centuries, the list has evolved away from words of religious disrespect and toward words that are sexually explicit or that crudely describe bodily functions. Mohr 253. And the list of swear words may be evolving yet again, perhaps in the direction of including race-based epithets. *Id.*, at 254, 256.

These attention-grabbing words, though financially valuable to some businesses that seek to attract interest in their products, threaten to distract consumers and disrupt commerce. And they may lead to the creation of public spaces that many will find repellant, perhaps on occasion creating the risk of verbal altercations or even physical confrontations. (Just think about how you might react if you saw someone wearing a t-shirt or using a product emblazoned with an odious racial epithet.) The Government thus has an interest in seeking to disincentivize the use of such words in commerce by denying the benefit of trademark registration. Cf. *Brandenburg* v. *Ohio*, 395 U. S. 444, 447 (1969) (*per curiam*) (permitting regulation of words "directed to inciting or producing imminent lawless action" and "likely to incite or produce such action").

Finally, although some consumers may be attracted to products labeled with highly vulgar or obscene words, others

may believe that such words should not be displayed in public spaces where goods are sold and where children are likely to be present. They may believe that trademark registration of such words could make it more likely that children will be exposed to public displays involving such words. To that end, the Government may have an interest in protecting the sensibilities of children by barring the registration of such words. See *Denver Area Ed. Telecommunications Consortium, Inc.* v. *FCC*, 518 U. S. 727, 743 (1996) (plurality opinion) (noting the Government's interest in "protec[ting] children from exposure to patently offensive sex-related material"); *Ginsberg* v. *New York*, 390 U. S. 629, 640 (1968) (noting the government's "interest in the well-being of its youth").

The upshot of this analysis is that the narrowing construction articulated by JUSTICE SOTOMAYOR risks some harm to First Amendment interests, but not very much. And applying that interpretation seems a reasonable way—perhaps the only way—to further legitimate government interests. Of course, there is a risk that the statute might be applied in a manner that stretches it beyond the few vulgar words that are encompassed by the narrow interpretation JUSTICE SOTOMAYOR sets forth. That risk, however, could be mitigated by internal agency review to ensure that agency officials do not stray beyond their mandate. In any event, I do not believe that this risk alone warrants the facial invalidation of this statute.

I would conclude that the prohibition on registering "scandalous" marks does not "wor[k] harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives." *Reed*, 576 U. S., at 179 (opinion of BREYER, J.). I would therefore uphold this part of the statute. I agree with the Court, however, that the bar on registering "immoral" marks violates the First Amendment. Because JUSTICE SOTOMAYOR reaches the same conclusions, using roughly similar reasoning, I join her opinion insofar as it is consistent with the views set forth here.

JUSTICE SOTOMAYOR, with whom JUSTICE BREYER joins, concurring in part and dissenting in part.

The Court's decision today will beget unfortunate results. With the Lanham Act's scandalous-marks provision, 15 U. S. C. § 1052(a), struck down as unconstitutional viewpoint discrimination, the Government will have no statutory basis to refuse (and thus no choice but to begin) registering marks containing the most vulgar, profane, or obscene words and images imaginable.

The coming rush to register such trademarks—and the Government's immediate powerlessness to say no—is eminently avoidable. Rather than read the relevant text as the majority does, it is equally possible to read that provision's bar on the registration of "scandalous" marks to address only obscenity, vulgarity, and profanity. Such a narrowing construction would save that duly enacted legislative text by rendering it a reasonable, viewpoint-neutral restriction on speech that is permissible in the context of a beneficial governmental initiative like the trademark-registration system. I would apply that narrowing construction to the term "scandalous" and accordingly reject respondent Erik Brunetti's facial challenge.

I

Trademark registration, as the majority notes, is not required for using, owning, or suing others for infringing a trademark. Rather, the trademark-registration system is an ancillary system set up by the Government that confers a small number of noncash benefits on trademark-holders who register their marks. See *ante*, at 391.

The Government need not provide this largely commercial benefit at all. Once the Government does provide the benefit, however, it may not restrict access on the basis of the viewpoint expressed by the relevant mark. See *ante*, at 393–394. For that reason, the Court concluded in *Matal* v. *Tam*, 582 U. S. 218 (2017), that § 1052(a)'s provision directing the U. S. Patent and Trademark Office (PTO) to deny regis-

tration to "disparag[ing]" trademarks was unconstitutional. This case centers on a neighboring set of restrictions: § 1052(a)'s provision barring registration of marks featuring "immoral . . . or scandalous matter."

The majority finds viewpoint discrimination here by treating the terms "scandalous" and "immoral" as comprising a unified standard that allows messages "aligned with conventional moral standards" but forbids messages "hostile to" such standards. See *ante*, at 394. While the majority's interpretation of the statute is a reasonable one, it is not the only reasonable one.

A

As the majority notes, there are dictionary definitions for both "immoral" and "scandalous" that do suggest a viewpoint-discriminatory meaning. See *ibid.* And as for the word "immoral," I agree with the majority that there is no tenable way to read it that would ameliorate the problem. The word clearly connotes a preference for "rectitude and morality" over its opposite. See *ibid.*

It is with regard to the word "scandalous" that I part ways with the majority. Unquestionably, "scandalous" can mean something similar to "immoral" and thus favor some viewpoints over others. See *ante*, at 395. But it does not have to be read that way. To say that a word or image is "scandalous" can instead mean that it is simply indecent, shocking, or generally offensive. See Funk & Wagnalls New Standard Dictionary 2186 (1944) (Funk & Wagnalls) ("shocking to the sense of truth, decency, *or* propriety; disgraceful, offensive" (emphasis added)); Webster's New International Dictionary 2229 (1942) ("exciting reprobation; calling out condemnation"); 9 Oxford English Dictionary 175 (1933) ("Of the nature of, or causing, a 'stumbling-block' or occasion of offence"); 8 Century Dictionary and Cyclopedia 5374 (1911) (Century Dictionary) ("Causing scandal or offense; exciting reproach or reprobation; extremely offensive to the sense of duty or propriety; shameful; shocking"); see also Webster's

New College Dictionary 1008 (3d ed. 2005) ("shocking or offensive"). That offensiveness could result from the views expressed, but it could also result from the way in which those views are expressed: using a manner of expression that is "shocking to [one's] sense of . . . decency," Funk & Wagnalls 2186, or "extremely offensive to the sense of . . . propriety," 8 Century Dictionary 5374.

The word "scandalous" on its own, then, is ambiguous: It can be read broadly (to cover both offensive ideas and offensive manners of expressing ideas), or it can be read narrowly (to cover only offensive modes of expression). That alone raises the possibility that a limiting construction might be appropriate. But the broader text confirms the reasonableness of the narrower reading, because the word "scandalous" appears in the statute alongside other words that can, and should, be read to constrain its scope.

It is foundational "that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King* v. *St. Vincent's Hospital*, 502 U. S. 215, 221 (1991) (citation omitted). "'Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used.'" *Ibid.* (quoting *NLRB* v. *Federbush Co.*, 121 F. 2d 954, 957 (CA2 1941) (L. Hand, J.)). Accordingly, and relatedly, courts should, to the extent possible, read statutes so that "'no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc.* v. *Andrews*, 534 U. S. 19, 31 (2001).[1]

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[1] For example, *McDonnell* v. *United States*, 579 U. S. 550 (2016), involved a statute that defined an "'official act'" as "'any decision or action on any question, matter, cause, suit, proceeding or controversy.'" *Id.*, at 566. The Court declined to read "'question'" and "'matter'" as covering "a typical meeting, call, or event arranged by a public official" because doing so would deprive the words "'cause, suit, proceeding or controversy'" of meaning. *Id.*, at 569.

Here, Congress used not only the word "scandalous," but also the words "immoral" and "disparage," in the same block of statutory text—each as a separate feature that could render a mark unregistrable. See § 1052(a). *Tam* already decided that "disparage" served to prohibit marks that were offensive because they derided a particular person or group. See 582 U. S., at 243 (opinion of ALITO, J.) ("It denies registration to any mark that is offensive to a substantial percentage of the members of any group"); *id.*, at 249 (opinion of Kennedy, J.) ("[A]n applicant may register a positive or benign mark but not a derogatory one"). That defines one of the three words. Meanwhile, as the majority explains, the word "immoral" prohibits marks that are offensive because they transgress widely held moral beliefs. See *ante*, at 394. That defines a second of the three words.

With marks that are offensive because they are disparaging and marks that are offensive because they are immoral already covered, what work did Congress intend for "scandalous" to do? A logical answer is that Congress meant for "scandalous" to target a third and distinct type of offensiveness: offensiveness in the mode of communication rather than the idea. The other two words cover marks that are offensive because of the ideas they express; the "scandalous" clause covers marks that are offensive because of the mode of expression, apart from any particular message or idea.

To be sure, there are situations in which it makes sense to treat adjoining words as expressing the same or highly similar concepts (even at the risk of some redundancy). Cf. *Swearingen* v. *United States*, 161 U. S. 446, 450 (1896) (construing "'obscene, lewd or lascivious'" to have a unified meaning). That is essentially the approach that the majority takes. See *ante*, at 395.[2] But that is not the approach

[2] That interpretive move appears to accord with the Federal Circuit and the PTO's past practice. *Ante*, at 391–392. Nevertheless, it is by no means the only reasonable way to read this text, and indeed some courts have

that Congress appears to have intended here. For example, "scandalous" does not serve as a broader catchall at the end of a list of similar words that all point in one direction. *E. g.*, *Washington State Dept. of Social and Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U. S. 371, 384 (2003). Nor is "scandalous" simply grouped among a number of closely related terms that help define its meaning. *E. g.*, *Gustafson* v. *Alloyd Co.*, 513 U. S. 561, 575 (1995).

The text of § 1052, instead, is a grab bag: It bars the registration of marks featuring "immoral, deceptive, or scandalous matter," as well as, *inter alia*, disparaging marks, flags, insignias, mislabeled wines, and deceased Presidents. See §§ 1052(a)–(e). This is not, in other words, a situation in which Congress was simply being "verbos[e] and proli[x]," *Bruesewitz* v. *Wyeth LLC*, 562 U. S. 223, 236 (2011), using two synonyms in rapid-fire succession when one would have done fine. Instead, "scandalous" and "immoral" are separated by an unrelated word ("deceptive") and mixed in with a lengthy series of other, unrelated concepts. The two therefore need not be interpreted as mutually reinforcing under the Court's precedents. See *Graham County Soil and Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U. S. 280, 288 (2010).

For that reason, while the majority offers a reasonable reading of "scandalous," it also unnecessarily and ill-advisedly collapses the words "scandalous" and "immoral." Instead, it should treat them as each holding a distinct, nonredundant meaning, with "immoral" covering marks that are offensive because they transgress social norms, and "scandalous" covering marks that are offensive because of the mode in which they are expressed.

What would it mean for "scandalous" in § 1052(a) to cover only offensive modes of expression? The most obvious

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suggested that "scandalous" can and should be applied independently of "immoral," see, *e. g.*, *In re McGinley*, 660 F. 2d 481, 485, n. 6 (CCPA 1981).

ways—indeed, perhaps the only conceivable ways—in which a trademark can be expressed in a shocking or offensive manner are when the speaker employs obscenity, vulgarity, or profanity.[3] Obscenity has long been defined by this Court's decision in *Miller* v. *California*, 413 U. S. 15 (1973). See *id.*, at 24–26. As for what constitutes "scandalous" vulgarity or profanity, I do not offer a list, but I do interpret the term to allow the PTO to restrict (and potentially promulgate guidance to clarify) the small group of lewd words or "swear" words that cause a visceral reaction, that are not commonly used around children, and that are prohibited in comparable settings.[4] Cf. 18 U. S. C. § 1464 (prohibiting "obscene, indecent, or profane language" in radio communications); *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 746, and n. 22 (1978) (opinion of Stevens, J.) (regulator's objection to a monologue containing various "four-letter words" was not to its "point of view, but to the way in which it [wa]s expressed"); 46 CFR § 67.117(b)(3) (2018) (Coast Guard regulation prohibiting vessel names that "contain" or are "phonetically identical to obscene, indecent, or profane language, or to racial or ethnic epithets"); see also Jacobs, The Public

[3] Other modes of expression, such as fighting words or extremely loud noises, could also be called shocking or offensive in certain contexts, see *R. A. V.* v. *St. Paul*, 505 U. S. 377, 386 (1992), but it is hard to see how they would apply in the context of a trademark.

[4] Although the Government represents, and case law and scholarship appear to confirm, that "scandalous" in § 1052(a) has often been applied to cover this kind of content, see Brief for Petitioner 27; *In re Boulevard Entertainment, Inc.*, 334 F. 3d 1336, 1340 (CA Fed. 2003); Snow, Denying Trademark for Scandalous Speech, 51 U. C. D. L. Rev. 2331, 2339 (2018) (Snow), the majority notes that the PTO has hardly amassed a perfect track record of consistency, see *ante*, at 395–396. Be that as it may, the Government undeniably receives a large volume of trademark applications that easily would fit under this rubric (examples of which I will spare the reader). See *In re Brunetti*, 877 F. 3d 1330, 1355 (CA Fed. 2017) (noting an appendix containing marks denied registration "whose offensiveness cannot be reasonably questioned"). As a result of today's ruling, all of those marks will now presumably have to be registered.

Sensibilities Forum, 95 Nw. U. L. Rev. 1357, 1416–1417, and n. 432 (2001) (noting that "swear words" are "perhaps more than any other categor[y] capable of specific articulation" and citing one state agency's list). Of course, "scandalous" offers its own limiting principle: If a word, though not exactly polite, cannot be said to be "scandalous"—*e. g.*, "shocking" or "extremely offensive," 8 Century Dictionary 5374—it is clearly not the kind of vulgarity or profanity that Congress intended to target. Everyone can think of a small number of words (including the apparent homonym of Brunetti's mark) that would, however, plainly qualify.[5]

B

A limiting construction like the one just discussed is both appropriate in this context and consistent with past precedent. First, while a limiting construction must always be at least reasonable, there are contexts in which imposing such a construction is more appropriate than others. The most obvious example of a setting where more caution is required is in the realm of criminal statutes, where considerations such as the prohibition against vagueness and the rule of lenity come into play. See *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 872 (1997) (noting that "[t]he severity of criminal sanctions" can increase First Amendment concerns); *Board of Airport Comm'rs of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U. S. 569, 575–576 (1987) (declining to apply a limiting construction to a provision that banned "'First Amendment activities'" from an airport and noting that the

[5] There is at least one particularly egregious racial epithet that would fit this description as well. While *Matal* v. *Tam*, 582 U. S. 218 (2017), removed a statutory basis to deny the registration of racial epithets in general, the Government represented at oral argument that it is holding in abeyance trademark applications that use that particular epithet. See Tr. of Oral Arg. 61. As a result of today's ruling, the Government will now presumably be compelled to register marks containing that epithet as well rather than treating it as a "scandalous" form of profanity under § 1052(a).

limiting construction proposed would "'confe[r] on police a virtually unrestrained power to arrest and charge persons with a violation,'" leading to "'self-evident'" "'opportunity for abuse'"). Here, however, the question is only whether the Government must be forced to provide the ancillary benefit of trademark registration to pre-existing trademarks that use even the most extreme obscenity, vulgarity, or profanity. The stakes are far removed from a situation in which, say, Brunetti was facing a threat to his liberty, or even his right to use and enforce his trademark in commerce.

Second, the Court has in the past accepted or applied similarly narrow constructions to avoid constitutional infirmities. In *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942), for example, the Court accepted the New Hampshire Supreme Court's narrowing of a state statute covering "'any offensive, derisive or annoying word,'" *id.*, at 569, to reach only those words that would strike the average person as being "plainly likely to cause a breach of the peace by the addressee," *id.*, at 573. "[T]hus construed," this Court decided, the statute did not violate the right to free speech. *Ibid.*; see also *Boos* v. *Barry*, 485 U. S. 312, 329–330 (1988) (accepting Court of Appeals' construction of a statute making it illegal "'to congregate within 500 feet of any [embassy, legation, or consulate] and refuse to disperse after having been ordered so to do by the police'" to reach only "congregations that are directed at an embassy" and "'only when the police reasonably believe that a threat to the security or peace of the embassy is present'").

In *Frisby* v. *Schultz*, 487 U. S. 474 (1988), the Court addressed an ordinance that prohibited "'picketing before or about the residence or dwelling of any individual.'" *Id.*, at 477. The Court construed the statute to reach only "focused picketing taking place solely in front of a particular residence." *Id.*, at 483. Given that "narrow scope," the statute was not facially unconstitutional. *Id.*, at 488; see also *In re Brunetti*, 877 F. 3d 1330, 1358 (CA Fed. 2017) (Dyk, J., con-

curring in judgment) (noting this Court's narrow constructions of federal obscenity statutes).

Taking the word "scandalous" to target only those marks that employ an offensive mode of expression follows a similar practice. To be sure, the word could be read more broadly, thereby sweeping unconstitutionally into viewpoint discrimination. And imposing a limiting construction is, of course, "not a license for the judiciary to rewrite language enacted by the legislature." *United States* v. *Albertini*, 472 U. S. 675, 680 (1985). But where the Court can reasonably read a statute like this one to save it, the Court should do so. See *Stern* v. *Marshall*, 564 U. S. 462, 477–478 (2011); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 30 (1937).

II

Adopting a narrow construction for the word "scandalous"—interpreting it to regulate only obscenity, vulgarity, and profanity—would save it from unconstitutionality. Properly narrowed, "scandalous" is a viewpoint-neutral form of content discrimination that is permissible in the kind of discretionary governmental program or limited forum typified by the trademark-registration system.

A

Content discrimination occurs whenever a government regulates "particular speech because of the topic discussed or the idea or message expressed." *Reed* v. *Town of Gilbert*, 576 U. S. 155, 163 (2015); see also *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989) ("Government regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech' "). Viewpoint discrimination is "an egregious form of content discrimination" in which "the government targets not subject matter, but particular views taken by speakers on a subject." *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829 (1995).

While the line between viewpoint-based and viewpoint-neutral content discrimination can be "slippery," see Corbin, Mixed Speech: When Speech Is Both Private and Governmental, 83 N. Y. U. L. Rev. 605, 651 (2008), it is in any event clear that a regulation is not viewpoint discriminatory (or even content discriminatory) simply because it has an "incidental effect" on a certain subset of views. *Ward*, 491 U. S., at 791. Some people, for example, may have the viewpoint that society should be more sexually liberated and feel that they cannot express that view sufficiently without the use of pornographic words or images. That does not automatically make a restriction on pornography into viewpoint discrimination, despite the fact that such a restriction limits communicating one's views on sexual liberation in that way. See *ibid.*; *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 48 (1986).

Restrictions on particular modes of expression do not inherently qualify as viewpoint discrimination; they are not by nature examples of "the government target[ing] . . . particular views taken by speakers on a subject." *Rosenberger*, 515 U. S., at 829. For example, a ban on lighting fires in the town square does not facially violate the First Amendment simply because it makes it marginally harder for would-be flag burners to express their views in that place. See *R. A. V.* v. *St. Paul*, 505 U. S. 377, 385 (1992). By the same token, "fighting words are categorically excluded from the protection of the First Amendment" not because they have no content or express no viewpoint (often quite the opposite), but because "their content embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey." *Id.*, at 393; see *id.*, at 385–386; cf. *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 84 (1983) (Stevens, J., concurring in judgment) ("It matters whether a law regulates communications for their ideas or for their style").

A restriction on trademarks featuring obscenity, vulgarity, or profanity is similarly viewpoint neutral, though it is natu-

rally content based.[6] See *R. A. V.*, 505 U. S., at 383 (kinds of speech like "obscenity, defamation, etc." may "be regulated because of their constitutionally proscribable content" (emphasis deleted)); see also *Bethel School Dist. No. 403* v. *Fraser*, 478 U. S. 675, 685 (1986) (treating punishment of "offensively lewd and indecent speech" as viewpoint neutral); *Pacifica*, 438 U. S., at 745–746, and n. 22 (treating regulation of profane monologue as viewpoint neutral). Indeed, the statute that the Court upheld in *Chaplinsky* itself had been construed to cover, among other kinds of "disorderly words," "profanity, obscenity and threats," 315 U. S., at 573, despite the fact that such words had been used in that case to communicate an expressive message, *id.*, at 574. To treat a restriction on vulgarity, profanity, or obscenity as viewpoint discrimination would upend decades of precedent.[7]

Brunetti invokes *Cohen* v. *California*, 403 U. S. 15 (1971), to argue that the restriction at issue here is viewpoint discriminatory. But *Cohen*—which did not employ the precise taxonomy that is more common today—does not reach as far as Brunetti wants. *Cohen* arose in the criminal context: Cohen had been arrested and imprisoned under a California

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[6] Of course, obscenity itself is subject to a longstanding exception to First Amendment protection, see *Brown* v. *Entertainment Merchants Assn.*, 564 U. S. 786, 791 (2011), so it is proscribable in any event. As for vulgarity and profanity, however, they are not subject to any such exception, and a regulation like § 1052(a)'s ban on the registration of scandalous marks is not "'justified without reference to the content of the regulated speech'" in the way that a simple regulation of time, place, or manner is. *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989) (emphasis deleted).

[7] It would also risk destabilizing government practice in a number of other contexts. Governments regulate vulgarity and profanity, for example, on city-owned buses and billboards, *e. g.*, *American Freedom Defense Initiative* v. *Massachusetts Bay Transp. Auth.*, 989 F. Supp. 2d 182, 183 (Mass. 2013) (noting such a prohibition), on registered vessels, 46 CFR § 67.117(b)(3) (Coast Guard regulations), and at school events, *e. g.*, *Bethel School Dist. No. 403* v. *Fraser*, 478 U. S. 675, 677–678, 685 (1986) (upholding discipline of high school student).

criminal statute targeting disturbances of the peace because he was "wearing a jacket bearing the words 'F[***] the Draft.'" *Id.*, at 16. The Court held that applying that statute to Cohen because of his jacket violated the First Amendment. *Id.*, at 26. But the Court did not suggest that the State had targeted Cohen to suppress his view itself (*i. e.*, his sharp distaste for the draft), such that it would have accepted an equally colorful statement of praise for the draft (or hostility toward war protesters). Rather, the Court suggested that the State had simply engaged in what later courts would more precisely call viewpoint-neutral content discrimination—it had regulated "the form or content of individual expression." *Id.*, at 24; see *id.*, at 25–26.

Cohen also famously recognized that "words are often chosen as much for their emotive as their cognitive force," *id.*, at 26, and that "one man's vulgarity is another's lyric," *id.*, at 25. That is all consistent with observing that a plain, blanket restriction on profanity (regardless of the idea to which it is attached) is a viewpoint-neutral form of content discrimination. The essence of *Cohen*'s discussion is that profanity can serve to tweak (or amplify) the viewpoint that a message expresses, such that it can be hard to disentangle the profanity from the underlying message—without the profanity, the message is not quite the same. See *id.*, at 25–26. But those statements merely reinforce that profanity is still properly understood as protected First Amendment content. See also *R. A. V.*, 505 U. S., at 384–385. *Cohen*'s discussion does not also go further to declare, as Brunetti suggests, that a provision that treats all instances of profanity equally is nevertheless by nature an instance of "the government target[ing] . . . particular views taken by speakers on a subject." *Rosenberger*, 515 U. S., at 829. To be sure, such a restriction could have the incidental effect of tamping down the overall volume of debate on all sides. But differential effects alone, as explained above, do not render a re-

striction viewpoint (or even content) discriminatory. See *Ward*, 491 U. S., at 791–792.[8]

Cohen therefore does not resolve this case in Brunetti's favor. Yes, Brunetti has been, as Cohen was, subject to content discrimination, but that content discrimination is properly understood as viewpoint neutral. And whereas even viewpoint-neutral content discrimination is (in all but the most compelling cases, such as threats) impermissible in the context of a criminal prosecution like the one that Cohen faced, Brunetti is subject to such regulation only in the context of the federal trademark-registration system. I discuss next why that distinction matters.

B

While the Court has often subjected even viewpoint-neutral content discrimination to strict constitutional scrutiny, see, *e. g.*, *Reed*, 576 U. S., at 163–164, there are contexts in which it does not, see, *e. g.*, *Rosenberger*, 515 U. S., at 829–830. When that is the case, the difference between viewpoint-based and viewpoint-neutral content discrimination can be decisive. The federal trademark-registration system is such a context.

Rights to a trademark itself arise through use, not registration. Regardless of whether a trademark is registered,

[8] That does not mean, of course, that a government may elude harsher scrutiny or invalidation of a regulation by simply claiming disinterest in a speaker's message, see *United States* v. *Eichman*, 496 U. S. 310, 315–317 (1990), or by concealing an attempt to favor some views over others in superficially neutral garb, see *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 46–49 (1986); cf. *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 533–534 (1993). But there is no evidence in the record from which to conclude that Congress enacted the scandalous-marks provision in order to advantage certain views over others. And where a denial of trademark registration by the PTO raises such a concern, it would be proper for an applicant to bring an as-applied challenge. See *infra*, at 426.

it can be used, owned, and enforced against would-be infringers. See *B&B Hardware, Inc.* v. *Hargis Industries, Inc.*, 575 U. S. 138, 142, 144 (2015). Trademark registration, meanwhile, confers several ancillary benefits on trademark-holders who meet Congress' specifications, including, for example, additional protections against infringers. See *ante*, at 391; *Tam*, 582 U. S., at 226–227. Registering a mark in the Government's searchable register puts the world on notice (whether actual or constructive) that a party is asserting ownership of that mark.[9] Registration, in short, is a helpful system, but it is one that the Government is under no obligation to establish and that is collateral to the existence and use of trademarks themselves. There is no evidence that speech or commerce would be endangered if the Government were not to provide it at all.

When the Court has talked about governmental initiatives like this one before, it has usually used one of two general labels. In several cases, the Court has treated such initiatives as a limited public (or nonpublic) forum. See, *e. g.*, *Christian Legal Soc. Chapter of Univ. of Cal., Hastings College of Law* v. *Martinez*, 561 U. S. 661, 669–670, 682 (2010) ("'Registered Student Organization'" program providing various financial and nonfinancial benefits to recognized law-school student groups); *Rosenberger*, 515 U. S., at 823–824, 829–830 ("Student Activities Fund" for registered campus student groups); *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 790–791, 799–801, 806 (1985) ("Combined Federal Campaign" literature enabling approved charitable organizations to solicit donations from federal employees). In other situations, the Court has discussed similar initiatives as government programs or subsidies. See, *e. g.*, *Legal Services Corporation* v. *Velazquez*, 531 U. S. 533, 536, 543–544 (2001) (government program dis-

[9] See 15 U. S. C. § 1072; U. S. Patent & Trademark Office, Search Trademark Database, https://www.uspto.gov/trademarks-application-process/search-trademark-database (as last visited June 20, 2019).

tributing funds to legal-services organizations); *National Endowment for Arts* v. *Finley*, 524 U. S. 569, 573, 585–587 (1998) (competitive government grantmaking program to support the arts).[10] In each of these situations, a governmental body established an initiative that supported some forms of expression without restricting others. Some speakers were better off, but no speakers were worse off.

Regardless of the finer distinctions between these labels, reasonable, viewpoint-neutral content discrimination is generally permissible under either framework. See *Christian Legal Soc.*, 561 U. S., at 679 ("Any access barrier must be reasonable and viewpoint neutral"); *Velazquez*, 531 U. S., at 543–544, 548–549 (analogizing to limited-forum cases and explaining that "[w]here private speech is involved, even Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest"); see also *Ysursa* v. *Pocatello Ed. Assn.*, 555 U. S. 353, 355 (2009) (finding government conduct that did not restrict speech but simply "decline[d] to promote" it valid where it was "reasonable in light of the State's interest"). Perhaps for that reason, the Court has often discussed the two frameworks as at least closely related. See, *e. g.*, *Christian Legal Soc.*, 561 U. S., at 682 ("[T]his case fits comfortably within the limited-public-forum category, for [the plaintiff], in seeking what is effectively a state subsidy,

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[10] In *Tam*, four Justices concluded that cash-subsidy programs like the one in *Finley* were "not instructive in analyzing" trademark registration. 582 U. S., at 241 (opinion of ALITO, J.). Trademark registration differs, of course, because any "subsidy" comes in the form of a noncash benefit, but that difference does not foreclose understanding the registration system as a beneficial, noncash governmental program. No Justice, meanwhile, rejected the limited-public-forum analogy, see *id.*, at 243–244, and n. 16 (calling such cases "[p]otentially more analogous" and reserving the question), and scholars have noted arguments for adopting it. See Snow 2364–2366; Katyal, Trademark Intersectionality, 57 UCLA L. Rev. 1601, 1676–1681 (2010); Lefstin, Note, Does the First Amendment Bar Cancellation of REDSKINS? 52 Stan. L. Rev. 665, 706–707 (2000).

faces only indirect pressure . . . "); *Velazquez*, 531 U. S., at 544 ("As this suit involves a subsidy, limited forum cases . . . may not be controlling in a strict sense, yet they do provide some instruction").

Whichever label one chooses here, the federal system of trademark registration fits: It is, in essence, an opportunity to include one's trademark on a list and thereby secure the ancillary benefits that come with registration.[11] Just as in the limited-forum and government-program cases, some speakers benefit, but no speakers are harmed. Brunetti, for example, can use, own, and enforce his mark regardless of whether it has been registered. Whether he may register his mark can therefore turn on reasonable, viewpoint-neutral content regulations.[12]

C

Prohibiting the registration of obscene, profane, or vulgar marks qualifies as reasonable, viewpoint-neutral, content-based regulation. Apart from any interest in regulating commerce itself, the Government has an interest in not promoting certain kinds of speech, whether because such speech could be perceived as suggesting governmental favoritism or simply because the Government does not wish to involve itself with that kind of speech. See, *e. g.*, *Ysursa*, 555 U. S., at 359–360; *Cornelius*, 473 U. S., at 809. While "there is no evidence that the public associates the contents of trademarks with the Federal Government," *Tam*, 582 U. S., at 238, registration nevertheless entails Government involvement in

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[11] Not every registration system would necessarily fit the same bill, whether because not every such system invites expressive content like trademarks or simply because other forms of registration may not be so ancillary as to qualify solely as a "benefit."

[12] Though I do not address the constitutionality of provisions not before the Court, I note as well that the "scandalous" bar in § 1052(a) is hardly the only provision in § 1052 that could be characterized as content discriminatory. See, *e. g.*, § 1052(b) (no flags or insignias); § 1052(c) (no unapproved markers of deceased U. S. Presidents during the lives of their spouses).

promoting a particular mark. Registration requires the Government to publish the mark, as well as to take steps to combat international infringement. See 15 U. S. C. §§ 1062, 1124; see also Brief for Petitioner 35. The Government has a reasonable interest in refraining from lending its ancillary support to marks that are obscene, vulgar, or profane. Cf. *Hustler Magazine, Inc.* v. *Falwell*, 485 U. S. 46, 56 (1988) ("[S]peech that is vulgar, offensive, and shocking is not entitled to absolute constitutional protection under all circumstances" (internal quotation marks omitted)).

III

"The cardinal principle of statutory construction is to save and not to destroy." *Jones & Laughlin Steel Corp.*, 301 U. S., at 30; see also *Hooper* v. *California*, 155 U. S. 648, 657 (1895) ("The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality"). In directing the PTO to deny the ancillary benefit of registration to trademarks featuring "scandalous" content, Congress used a word that is susceptible of different meanings. The majority's reading would render the provision unconstitutional; mine would save it. Under these circumstances, the Court ought to adopt the narrower construction, rather than permit a rush to register trademarks for even the most viscerally offensive words and images that one can imagine.[13]

That said, I emphasize that Brunetti's challenge is a facial one. That means that he must show that "'a substantial number of [the scandalous-marks provision's] applications are

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[13] As noted above, I agree with the majority that § 1052(a)'s bar on the registration of "immoral" marks is unconstitutional viewpoint discrimination. See *supra*, at 410. I would simply sever that provision and uphold the bar on "scandalous" marks. See *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 882–883 (1997); *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 504–507 (1985); see also *Tam*, 582 U. S., at 247 (striking down only the disparagement clause).

unconstitutional, judged in relation to the [provision's] plainly legitimate sweep.'" *United States* v. *Stevens*, 559 U. S. 460, 473 (2010). With "scandalous" narrowed to reach only obscene, profane, and vulgar content, the provision would not be overly broad. Cf. *Frisby*, 487 U. S., at 488 (rejecting a facial challenge after adopting a limiting construction); *Boos*, 485 U. S., at 331 (same). Even so, hard cases would remain, and I would expect courts to take seriously as-applied challenges demonstrating a danger that the provision had been used to restrict speech based on the views expressed rather than the mode of expression.[14] Cf. *Finley*, 524 U. S., at 587 (reserving the possibility of as-applied challenges).

Freedom of speech is a cornerstone of our society, and the First Amendment protects Brunetti's right to use words like the one at issue here. The Government need not, however, be forced to confer on Brunetti's trademark (and some more extreme) the ancillary benefit of trademark registration, when "scandalous" in § 1052(a) can reasonably be read to bar the registration of only those marks that are obscene, vulgar, or profane. Though I concur as to the unconstitutionality of the term "immoral" in § 1052(a), I respectfully dissent as to the term "scandalous" in the same statute and would instead uphold it under the narrow construction discussed here.

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[14] The majority adverts to details in the record that could call into question whether the PTO engaged in viewpoint discrimination in this very case. See *ante*, at 392. Because a facial challenge is the only challenge before the Court, I do not address whether an as-applied challenge could have merit here.

Syllabus

FOOD MARKETING INSTITUTE *v.* ARGUS LEADER MEDIA, DBA ARGUS LEADER

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

No. 18–481. Argued April 22, 2019—Decided June 24, 2019

Respondent Argus Leader Media filed a Freedom of Information Act (FOIA) request with the United States Department of Agriculture (USDA), seeking the names and addresses of all retail stores that participate in the national food-stamp program—known as the Supplemental Nutrition Assistance Program (SNAP)—and each store's annual SNAP redemption data from fiscal years 2005 to 2010. The USDA declined to disclose the store-level SNAP data, invoking FOIA's Exemption 4, which shields from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential," 5 U. S. C. § 552(b)(4). Argus Leader sued the USDA. Following circuit precedent, the District Court employed the "competitive harm" test, under which commercial information cannot be deemed "confidential" unless disclosure is "likely . . . to cause substantial harm to the competitive position of the person from whom the information was obtained." The court agreed that revealing store-level SNAP data could work some competitive harm, but it could not say that disclosure would cause "substantial competitive harm," and thus ordered disclosure. Petitioner Food Marketing Institute, a trade association representing grocery retailers, intervened and filed an appeal. The Eighth Circuit affirmed, rejecting the Institute's argument that the court should discard the "substantive competitive harm" test in favor of the ordinary public meaning of the statutory term "confidential."

Held:

1. The Institute has standing to appeal. Disclosure of the contested data would cause its members some financial injury in the highly competitive grocery industry; this concrete injury is directly traceable to the judgment ordering disclosure; and a favorable ruling from this Court would redress the retailers' injury by reversing that judgment. Pp. 432–433.

2. Where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is "confidential" within Exemption 4's meaning. Pp. 433–440.

Syllabus

(a) At the time of FOIA's enactment, the term "confidential" meant "private" or "secret." Contemporary dictionaries suggest two conditions that might be required for information communicated to another to be considered confidential: when the information is customarily kept private, or at least closely held, by the person imparting it; and when the party receiving the information provides some assurance that it will remain secret. At least the first of these conditions must be met; it is hard to see how information could be deemed confidential if its owner shares it freely. But the Court need not resolve whether both conditions are necessary because both conditions are clearly met here. Uncontested testimony established that the Institute's retailers customarily do not disclose store-level SNAP data or make it publicly available. And to induce retailers to participate in SNAP and provide store-level information, the government has long promised retailers that it will keep their information private. Early courts of appeals confronting Exemption 4 interpreted its terms in ways consistent with these understandings. Pp. 433–435.

(b) Argus Leader pins its hopes on the "substantial competitive harm" requirement from the D. C. Circuit's decision in *National Parks & Conservation Assn.* v. *Morton*, 498 F. 2d 765. There, the court inappropriately resorted to legislative history before consulting the statute's text and structure and relied heavily on statements from witnesses in congressional hearings years earlier on a different bill that was never enacted into law. Unsurprisingly, *National Parks* has drawn considerable criticism over the years, and even the D. C. Circuit has distanced itself from the decision. Pp. 435–438.

(c) Argus Leader's attempt to salvage *National Parks* is unpersuasive. First, it rearranges the text of Exemption 4 to create a phrase that does not appear in the statute: "confidential commercial information." It suggests that this synthetic term mirrors a preexisting common law term of art that covers only information whose release would lead to substantial competitive harm, but points to no treatise or case decided before Exemption 4's adoption that assigned any such meaning to the terms actually before the Court. Nor will this Court ordinarily imbue statutory terms with a specialized common law meaning when Congress has not itself invoked the common law terms of art associated with that meaning. See, *e. g.*, *Bruesewitz* v. *Wyeth LLC*, 562 U. S. 223, 233–235. Alternatively, the company suggests that Congress effectively ratified its understanding of the term "confidential" by enacting similar phrases in other statutes in the years since *National Parks* was decided. But the ratification canon applies when Congress re-enacts the same statute using the same language, and Congress has never re-enacted Exemption 4. Finally, Argus Leader urges the Court to adopt

a "substantial competitive harm" requirement as a matter of policy because it believes FOIA exemptions should be narrowly construed. But the Court cannot arbitrarily constrict Exemption 4 by adding limitations found nowhere in its terms. Pp. 438–440.

889 F. 3d 914, reversed and remanded.

GORSUCH, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, ALITO, KAGAN, and KAVANAUGH, JJ., joined. BREYER, J., filed an opinion concurring in part and dissenting in part, in which GINSBURG and SOTOMAYOR, JJ., joined, *post*, p. 440.

Evan A. Young argued the cause for petitioner. With him on the briefs were *Thomas R. Phillips*, *Gavin R. Villareal*, *Scott A. Keller*, *Stephanie F. Cagniart*, and *Ellen Springer*.

Anthony A. Yang argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Francisco*, *Assistant Attorney General Hunt*, *Deputy Solicitor General Kneedler*, and *H. Thomas Byron III*.

Robert M. Loeb argued the cause for respondent. With him on the brief were *Thomas M. Bondy*, *Randall C. Smith*, and *Jon E. Arneson*.*

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*Briefs of *amici curiae* urging reversal were filed for the Alliance of Marine Mammal Parks & Aquariums et al. by *Ira Kasdan* and *Bezalel Stern*; for the Chamber of Commerce of the United States of America et al. by *John P. Elwood*, *Joshua S. Johnson*, *Daryl L. Joseffer*, *Karen R. Harned*, and *Luke A. Wake*; for the National Association of Convenience Stores et al. by *Shannen W. Coffin*; and for Retail Litigation Center, Inc., by *Adam G. Unikowsky* and *Deborah R. White*.

Briefs of *amici curiae* urging affirmance were filed for the AI Now Institute et al. by *Lucinda M. Finley*, *Jason M. Schultz*, *David D. Cole*, *Brett Max Kaufman*, *Nathan Freed Wessler*, *Deborah N. Archer*, *Vincent M. Southerland*, *David L. Sobel*, and *Alex Abdo*; for American Small Business League by *Karl Olson*; for Bioscience Advisors, Inc., by *Robert S. Clark* and *Chad S. Pehrson*; for the Cause of Action Institute et al. by *Ryan P. Mulvey*, *R. James Valvo III*, *Anne Weismann*, and *Allan Blutstein*; for the Electronic Privacy Information Center et al. by *Marc Rotenberg* and *Alan Butler*; for Freedom of Information Act Scholars et al. by *Michael C. Dorf, pro se*; for New Hampshire Right to Life by *Michael J. Tierney*, *John J. Bursch*, *David A. Cortman*, and *Rory T. Gray*;

JUSTICE GORSUCH delivered the opinion of the Court.

Congress has instructed that the disclosure requirements of the Freedom of Information Act do "not apply" to "confidential" private-sector "commercial or financial information" in the government's possession. But when does information provided to a federal agency qualify as "confidential"? The Food Marketing Institute says it's enough if the owner keeps the information private rather than releasing it publicly. The government suggests that an agency's promise to keep information from disclosure may also suffice to render it confidential. But the courts below imposed a different requirement yet, holding that information can never be deemed confidential unless disclosing it is likely to result in "substantial competitive harm" to the business that provided it. Finding at least this "competitive harm" requirement inconsistent with the terms of the statute, we reverse.

I

This case began when Argus Leader, a South Dakota newspaper, filed a FOIA request for data collected by the United States Department of Agriculture. The USDA administers the national food-stamp program, known as the Supplemental Nutrition Assistance Program. Argus Leader asked the USDA for the names and addresses of all retail stores that participate in SNAP and each store's annual SNAP redemption data from fiscal years 2005 to 2010, which we refer to as "store-level SNAP data." The USDA

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for Public Citizen et al. by *Allison M. Zieve*, *Adina H. Rosenbaum*, and *Scott L. Nelson*; and for the Reporters Committee for Freedom of the Press et al. by *Bruce D. Brown*, *Kevin M. Goldberg*, *David M. Giles*, *David Bralow*, *Kurt Wimmer*, *George Freeman*, *James Cregan*, *Tonda F. Rush*, *Mickey H. Osterreicher*, *Jonathan Hart*, *Micah Ratner*, *Robert A. Bertsche*, *Barbara L. Camens*, *Laura R. Handman*, *Alison Schary*, *Thomas R. Burke*, *Richard J. Tofel*, and *Bruce W. Sanford*.

Ghita Schwarz and *Jennifer B. Condon* filed a brief of *amicus curiae* for the Detention Watch Network et al.

tried to meet the paper halfway. It released the names and addresses of the participating stores but declined to disclose the requested store-level SNAP data. As relevant here, the USDA invoked FOIA's Exemption 4, which shields from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U. S. C. § 552(b)(4).

Unsatisfied by the agency's disclosure, Argus sued the USDA in federal court to compel release of the store-level SNAP data. Like several other courts of appeals, the Eighth Circuit has engrafted onto Exemption 4 a so-called "competitive harm" test, under which commercial information cannot be deemed "confidential" unless disclosure is "likely . . . to cause substantial harm to the competitive position of the person from whom the information was obtained." *Argus Leader Media* v. *United States Dept. of Agriculture*, 889 F. 3d 914, 915 (2018) (internal quotation marks omitted). So the district court held a 2-day bench trial to determine whether disclosure of the store-level SNAP data would cause substantial competitive harm to participating retailers.

At trial, witnesses for the USDA testified that retailers closely guard store-level SNAP data and that disclosure would threaten stores' competitive positions. They explained that retailers use models of consumer behavior to help choose new store locations and to plan sales strategies. Competitors' estimated sales volumes represent an important component of these models and can be time consuming and expensive to generate. And a model's accuracy and utility increase significantly if it includes a rival's actual sales data rather than mere estimates. So disclosure of store-level SNAP data could create a windfall for competitors: Stores with high SNAP redemptions could see increased competition for SNAP customers from existing competitors, new market entrants could use SNAP data to determine where to build their stores, and SNAP-redemption data could be used to discern a rival retailer's overall sales and

develop strategies to win some of that business too. For its part, Argus Leader offered no fact witnesses and did not dispute that retailers customarily keep this data private or that it bears competitive significance. Instead, the company contended that any competitive harm associated with disclosure would not be substantial. In the end, the district court agreed; while "[c]ompetition in the grocery business is fierce," and while the record supported the conclusion that revealing store-level SNAP data could work some competitive harm, the court could not say that disclosure would rise to the level of causing "*substantial* competitive harm," and thus ordered disclosure. *Argus Leader Media* v. *United States Dept. of Agriculture*, 224 F. Supp. 3d 827, 833–835 (SD 2016) (emphasis added).

The USDA declined to appeal, but it alerted the retailers who had provided the data so that they could consider intervening to pursue the case further. The Food Marketing Institute, a trade association representing grocery retailers, answered the call. It successfully moved to intervene under Federal Rule of Civil Procedure 24(a) and then filed its own appeal. Meanwhile, the USDA assured the district court that it would not disclose the retailers' data pending appeal. Before the Eighth Circuit, the Institute argued that the court should discard the "substantial competitive harm" test and apply instead the ordinary public meaning of the statutory term "confidential." The court rejected that argument and affirmed. We granted the Institute a stay of the Eighth Circuit's mandate and, later, its petition for certiorari. 585 U. S. 1055 (2018); 586 U. S. 1112 (2019).

II

Before turning to the merits, we confront a threshold challenge to our jurisdiction: Argus Leader questions whether the Institute has standing to pursue this appeal. To show standing under Article III, an appealing litigant must demonstrate that it has suffered an actual or imminent injury

that is "fairly traceable" to the judgment below and that could be "redress[ed] by a favorable ruling." *Monsanto Co.* v. *Geertson Seed Farms*, 561 U. S. 139, 149–150 (2010).

The Institute satisfies each of these criteria. Whether or not disclosure of the contested data would cause its member retailers "substantial competitive harm," the record before us reveals (and Argus Leader does not meaningfully dispute) that disclosure likely would cause them *some* financial injury. As the Eighth Circuit observed, the grocery industry is "highly competitive," and disclosure of store-level SNAP data likely would help competitors win business from the Institute's members. 889 F. 3d, at 916. This concrete injury is, as well, directly traceable to the judgment ordering disclosure. And a favorable ruling from this Court would redress the retailers' injury by reversing that judgment.

Argus Leader insists that the Institute's injury is not redressable because a favorable ruling would merely restore the government's *discretion* to withhold the requested data under Exemption 4, and it might just as easily choose to provide the data anyway. But the government has represented unequivocally that, consistent with its longstanding policy and past assurances of confidentiality to retailers, it "will not disclose" the contested data unless compelled to do so by the district court's order. Brief for United States as *Amicus Curiae* 35; accord, Tr. of Oral Arg. 18–22. A reversal here thus would ensure exactly the relief the Institute requests. That is enough to satisfy Article III. *Monsanto*, 561 U. S., at 152–153.

III

A

As we've seen, Exemption 4 shields from mandatory disclosure "commercial or financial information obtained from a person and privileged or confidential." 5 U. S. C. § 552(b)(4). But FOIA nowhere defines the term "confidential." So, as usual, we ask what that term's "ordinary, contemporary, com-

mon meaning" was when Congress enacted FOIA in 1966. *Perrin* v. *United States*, 444 U. S. 37, 42 (1979). We've done the same with other undefined terms in FOIA. See, *e. g.*, *Milner* v. *Department of Navy*, 562 U. S. 562, 569 (2011); *United States* v. *Weber Aircraft Corp.*, 465 U. S. 792, 804 (1984).

The term "confidential" meant then, as it does now, "private" or "secret." Webster's Seventh New Collegiate Dictionary 174 (1963). Contemporary dictionaries suggest two conditions that might be required for information communicated to another to be considered confidential. In one sense, information communicated to another remains confidential whenever it is customarily kept private, or at least closely held, by the person imparting it. See, *e. g.*, Webster's Third New International Dictionary 476 (1961) ("known only to a limited few" or "not publicly disseminated"); Black's Law Dictionary 370 (rev. 4th ed. 1968) ("intended to be held in confidence or kept secret"). In another sense, information might be considered confidential only if the party receiving it provides some assurance that it will remain secret. See, *e. g.*, 1 Oxford Universal Dictionary Illustrated 367 (3d ed. 1961) ("spoken or written in confidence"); Webster's New World Dictionary 158 (1960) ("told in confidence").

Must both of these conditions be met for information to be considered confidential under Exemption 4? At least the first condition has to be; it is hard to see how information could be deemed confidential if its owner shares it freely. And there's no question that the Institute's members satisfy this condition; uncontested testimony established that the Institute's retailers customarily do not disclose store-level SNAP data or make it publicly available "in any way." See, *e. g.*, App. 93–94. Even within a company, witnesses testified, only small groups of employees usually have access to it. But what about the second condition: Can privately held information *lose* its confidential character for purposes of Exemption 4 if it's communicated to the government without

assurances that the government will keep it private? As it turns out, there's no need to resolve that question in this case because the retailers before us clearly satisfy this condition too. Presumably to induce retailers to participate in SNAP and provide store-level information it finds useful to its adminstration of the program, the government has long promised them that it will keep their information private. See, *e. g.*, 43 Fed. Reg. 43275 (1978); see also Brief for United States as *Amicus Curiae* 27–30.

Early courts of appeals confronting Exemption 4 interpreted its terms in ways consistent with these understandings. In *GSA* v. *Benson*, 415 F. 2d 878, 881 (1969), for example, the Ninth Circuit concluded that Exemption 4 would "'protect information that a private individual wishes to keep confidential for his own purposes, but reveals to the government under the express or implied promise'" of confidentiality. The D. C. Circuit similarly held that Exemption 4 covered sales documents "'which would customarily not be released to the public'" and which the government "agreed to treat . . . as confidential." *Sterling Drug Inc.* v. *FTC*, 450 F. 2d 698, 709 (1971); see also *Grumman Aircraft Eng. Corp.* v. *Renegotiation Bd.*, 425 F. 2d 578, 580, 582 (1970) (information a private party "submitted 'in confidence'" or "would not reveal to the public [is] exempt from disclosure").

B

Notably lacking from dictionary definitions, early case law, or any other usual source that might shed light on the statute's ordinary meaning is any mention of the "substantial competive harm" requirement that the courts below found unsatisfied and on which Argus Leader pins its hopes. Indeed, when called on some years ago to interpret the similar phrase "information furnished by a confidential source" in FOIA Exemption 7(D), § 552(b)(7)(D), this Court looked, as we do now, to "common usage" and never suggested that the government must prove that the disclosure of a source's

information would result in substantial harm. *Department of Justice* v. *Landano*, 508 U. S. 165, 173–174 (1993).

So where *did* the "substantial competitive harm" requirement come from? In 1974, the D. C. Circuit declared that, in addition to the requirements actually set forth in Exemption 4, a "court must also be satisfied that non-disclosure is justified by the legislative purpose which underlies the exemption." *National Parks & Conservation Assn.* v. *Morton*, 498 F. 2d 765, 767. Then, after a selective tour through the legislative history, the court concluded that "commercial or financial matter is 'confidential' [only] if disclosure of the information is likely . . . (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *Id.*, at 770 (footnote omitted). Without much independent analysis, a number of courts of appeals eventually fell in line and adopted variants of the *National Parks* test. See *Contract Freighters, Inc.* v. *Secretary of U. S. Dept. of Transp.*, 260 F. 3d 858, 861 (CA8 2001) (collecting cases).

We cannot approve such a casual disregard of the rules of statutory interpretation. In statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself. *Schindler Elevator Corp.* v. *United States ex rel. Kirk*, 563 U. S. 401, 407 (2011). Where, as here, that examination yields a clear answer, judges must stop. *Hughes Aircraft Co.* v. *Jacobson*, 525 U. S. 432, 438 (1999). Even those of us who sometimes consult legislative history will never allow it to be used to "muddy" the meaning of "clear statutory language." *Milner*, 562 U. S., at 572. Indeed, this Court has repeatedly refused to alter FOIA's plain terms on the strength only of arguments from legislative history. See, *e. g.*, *Landano*, 508 U. S., at 178 (refusing to expand the plain meaning of Exemption 7(D) based on legislative history); *Weber Aircraft*, 465 U. S., at 800–803 (refusing to restrict Exemption 5 based on legislative history).

National Parks' contrary approach is a relic from a "bygone era of statutory construction." Brief for United States as *Amicus Curiae* 19. Not only did *National Parks* inappropriately resort to legislative history before consulting the statute's text and structure, once it did so it went even further astray. The court relied heavily on statements from witnesses in congressional hearings years earlier on a different bill that was never enacted into law. 498 F. 2d, at 767–769. Yet we can all agree that "excerpts from committee hearings" are "'among the least illuminating forms of legislative history.'" *Advocate Health Care Network* v. *Stapleton*, 581 U. S. 468, 481 (2017); see also *Kelly* v. *Robinson*, 479 U. S. 36, 51, n. 13 (1986) (declining to "accord any significance" to "comments in [legislative] hearings"). Perhaps especially so in cases like this one, where the witness statements do not comport with official committee reports that are consistent with the plain and ordinary meaning of the statute's terms. See S. Rep. No. 813, 89th Cong., 1st Sess., 9 (1965) (Exemption 4 protects information "which would customarily not be released to the public by the person from whom it was obtained" such as "business sales statistics" and "customer lists"); H. R. Rep. No. 1497, 89th Cong., 2d Sess., 10 (1966) (Exemption 4 exempts material "if it would not customarily be made public by the person from whom it was obtained by the Government" and "information which is given to an agency in confidence" such as "business sales statistics").

Unsurprisingly, *National Parks* has drawn considerable criticism over the years. See, *e. g.*, *Critical Mass Energy Project* v. *NRC*, 931 F. 2d 939, 947 (CADC 1991) (Randolph, J., concurring) (*National Parks* was "'fabricated . . . out of whole cloth'"); *New Hampshire Right to Life* v. *Department of Health and Human Servs.*, 577 U. S. 994 (2015) (THOMAS, J., joined by Scalia, J., dissenting from denial of certiorari). Even the D. C. Circuit has distanced itself from the decision. While retaining *National Parks* principally as a matter of *stare decisis* in the context of information a private entity is *required* to provide to the government, the court has

pointedly declined to extend the *National Parks* test to information provided *voluntarily* to the government under Exemption 4. There, the court has adhered to a much more traditional understanding of the statutory term "confidential," holding that information qualifies as confidential "if it is of a kind that would customarily not be released to the public by the person from whom it was obtained." *Critical Mass Energy Project* v. *NRC*, 975 F. 2d 871, 879–880 (CADC 1992) (en banc); see also *id.*, at 880–882 (Randolph, J., concurring). Nor, unbound by D. C. Circuit precedent, can we discern a persuasive reason to afford the *same* statutory term two such radically different constructions. *Ratzlaf* v. *United States*, 510 U. S. 135, 143 (1994).

C

That leaves Argus Leader to try to salvage the result, if not the reasoning, of *National Parks*. But here its arguments prove no more persuasive. The company begins by rearranging the text of Exemption 4 to create a phrase that does not appear in the statute: "confidential commercial information." Then, it suggests this synthetic term mirrors a preexisting common law term of art. And finally it asserts that the common law term covers only information whose release would lead to substantial competitive harm. But Argus Leader points to no treatise or case decided before Exemption 4's adoption that assigned any such meaning to the terms actually before us: "commercial or financial information [that is] privileged or confidential." So even accepting (without granting) that *other* phrases may carry the specialized common law meaning Argus Leader supposes, the parties have mustered no evidence that the terms of Exemption 4 did at the time of their adoption. Nor will this Court ordinarily imbue statutory terms with a specialized common law meaning when Congress hasn't itself invoked the common law terms of art associated with that meaning. See, *e. g.*, *Bruesewitz* v. *Wyeth LLC*, 562 U. S. 223, 233–235 (2011).

Alternatively, the company suggests that, whatever the merits of *National Parks* as an initial matter, Congress effectively ratified its understanding of the term "confidential" by enacting similar phrases in other statutes in the years since that case was decided. To be sure, the ratification canon can sometimes prove a useful interpretive tool. But it derives from the notion that Congress is aware of a definitive judicial interpretation of a statute when it reenacts the *same* statute using the same language. *Helsinn Healthcare S. A.* v. *Teva Pharmaceuticals USA, Inc.*, 586 U. S. 123, 131 (2019). And Congress has never reenacted Exemption 4. So whether Congress's use of similar language in other statutes after *National Parks* might (or might not) tell us what later Congresses understood those other statutes to mean, it tells us nothing about Congress's understanding of the language it enacted in Exemption 4 in 1966.

Finally, Argus urges us to adopt a "substantial competitive harm" requirement as a matter of policy because it believes FOIA exemptions should be narrowly construed. But as we have explained in connection with another federal statute, we normally "have no license to give [statutory] exemption[s] anything but a fair reading." *Encino Motorcars, LLC* v. *Navarro*, 584 U. S. 79, 89 (2018). Nor do we discern a reason to depart from that rule here: FOIA expressly recognizes that "important interests [are] served by [its] exemptions," *FBI* v. *Abramson*, 456 U. S. 615, 630–631 (1982), and "[t]hose exemptions are as much a part of [FOIA's] purpose[s and policies] as the [statute's disclosure] requirement," *Encino Motorcars*, 584 U. S., at 89. So, just as we cannot properly *expand* Exemption 4 beyond what its terms permit, see, *e. g.*, *Milner*, 562 U. S., at 570–571, we cannot arbitrarily *constrict* it either by adding limitations found nowhere in its terms.

Our dissenting colleagues appear to endorse something like this final argument. They seem to agree that the law doesn't demand proof of "substantial" or "competitive" harm,

but they think it would be a good idea to require a showing of *some* harm. Neither side, however, has advocated for such an understanding of the statute's terms. And our colleagues' brief brush with the statutory text doesn't help; they cite exclusively from specialized dictionary definitions lifted from the national security classification context that have no bearing on Exemption 4. Really, our colleagues' submission boils down to a policy argument about the benefits of broad disclosure. But as JUSTICE BREYER has noted, when Congress enacted FOIA it sought a "workable balance" between disclosure and other governmental interests—interests that may include providing private parties with sufficient assurances about the treatment of their proprietary information so they will cooperate in federal programs and supply the government with information vital to its work. See *Milner*, 562 U. S., at 589 (dissenting opinion) (arguing for a broad exemption from FOIA disclosure obligations to honor a "workable balance" between disclosure and privacy).

*

At least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is "confidential" within the meaning of Exemption 4. Because the store-level SNAP data at issue here is confidential under that construction, the judgment of the court of appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BREYER, with whom JUSTICE GINSBURG and JUSTICE SOTOMAYOR join, concurring in part and dissenting in part.

The Freedom of Information Act (FOIA) requires the government to make information available to the public upon

request. 5 U. S. C. § 552(a)(3)(A). It also contains a list of exemptions. § 552(b). Exemption 4 says that the Act does "not apply" to "commercial or financial information obtained from a person and . . . confidential." § 552(b)(4). The Court holds that "commercial or financial information" is "confidential" and consequently falls within the scope of this exemption "[a]t least" where it is "[1] both customarily and actually treated as private by its owner and [2] provided to the government under an assurance of privacy." *Ante,* at 440. The majority spells out two conditions, but in my view there is a third: Release of such information must also cause genuine harm to the owner's economic or business interests.

Since 1974, when the District of Columbia Circuit decided *National Parks and Conservation Assn.* v. *Morton*, 498 F. 2d 765, nearly every lower court has imposed some kind of harm requirement. See *New Hampshire Right to Life* v. *Department of Health and Human Servs.*, 577 U. S. 994, 996 (2015) (THOMAS, J., dissenting from denial of certiorari) (noting that "every Court of Appeals to consider Exemption 4 has interpreted it [using] *National Park[s]*"); *Critical Mass Energy Project* v. *NRC*, 975 F. 2d 871, 876 (CADC 1992) (en banc) (collecting cases). One way to satisfy that requirement is by showing that disclosure is "likely" to "cause substantial harm to the competitive position of the person from whom the information was obtained." *National Parks*, 498 F. 2d, at 770, and n. 17. The Eighth Circuit, in this case, applied the same standard. *Argus Leader Media* v. *United States Dept. of Agriculture*, 889 F. 3d 914, 915 (2018). And, like the majority, I believe that *National Parks*' harm requirement goes too far.

For one thing, *National Parks* held that the only form of private harm that can warrant nondisclosure is "*competitive*" harm. 498 F. 2d, at 770–771 (emphasis added). Later courts took this to mean that harm from "future or potential competition" does not suffice, *Niagara Mohawk Power Corp.* v. *Department of Energy*, 169 F. 3d 16, 19 (CADC 1999), and

even that harm must "flo[w] from the *affirmative use* of proprietary information *by competitors*," *Public Citizen Health Research Group* v. *FDA*, 704 F. 2d 1280, 1291, n. 30 (CADC 1983) (some emphasis added). But disclosure of confidential information can cause a business serious harm in ways not so directly linked to competition. Disclosure, for example, might discourage customers from using a firm's products, but without substantial effect on its rivals. It could mean increased potential competition, which may, or may not, materialize. It could, by revealing buying habits, undermine a regulated firm that has no competitors. The list goes on. I can discern no basis in the statute for categorically excluding these other types of harm from the scope of Exemption 4.

Similarly, the need to prove "substantial" competitive harm can sometimes produce complex debates about the nature of competition and the degree of injury. *National Parks*, 498 F. 2d, at 770. And those debates can mean long, onerous court proceedings concerning issues far removed from the genuine fear of harm that leads firms to keep information secret in the first place. The *National Parks* decision itself led to a remand for days of hearings, a second appeal, and yet another remand, so that more evidence about the competitive conditions facing two particular park concessionaires could be heard. *National Parks and Conservation Assn.* v. *Kleppe*, 547 F. 2d 673, 675 (CADC 1976). Like the majority, I can find nothing in FOIA's language, purposes, or history that imposes so stringent a requirement. Accordingly, I would clarify that a private harm need not be "substantial" so long as it is genuine.

On the other hand, I cannot agree with the majority's decision to jump to the opposite conclusion, namely, that Exemption 4 imposes no "harm" requirement whatsoever. After all, the word "confidential" sometimes refers, at least in the national security context, to information the disclosure of which would cause harm. See, *e. g.*, Webster's Third New International Dictionary 476 (1966) (defining "confidential" to

mean "characterized by or relating to information considered prejudicial to a country's interests"); Webster's New Collegiate Dictionary 237 (1974) (defining "confidential" to mean "containing information whose unauthorized disclosure could be prejudicial to the national interest"). And a speaker can more sensibly refer to his Social Security number as "confidential" than his favorite color, in part because release of the former is more likely to cause harm. "Confidential," in this sense, conveys something about the nature of the information itself, not just (as the majority suggests) how it is kept by those who possess it.

Reading "confidential" in this more restrictive sense is more faithful to FOIA's purpose and how we have interpreted the Act in the past. This Court has made clear that the "mandate of the FOIA" is "broad disclosure of Government records." *CIA* v. *Sims*, 471 U. S. 159, 166 (1985). Its purpose is to "permit access to official information long shielded unnecessarily from public view" and "to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *EPA* v. *Mink*, 410 U. S. 73, 80 (1973). To that end, we have continuously held that FOIA's enumerated exemptions "must be narrowly construed." *Department of Air Force* v. *Rose*, 425 U. S. 352, 361 (1976); see, *e. g.*, *Milner* v. *Department of Navy*, 562 U. S. 562, 565 (2011); *FBI* v. *Abramson*, 456 U. S. 615, 630 (1982) (noting our "oft-repeated caveat that FOIA exemptions are to be narrowly construed").

The majority's reading of Exemption 4 is at odds with these principles. The whole point of FOIA is to give the public access to information it cannot otherwise obtain. So the fact that private actors have "customarily and actually treated" commercial information as secret, *ante*, at 440, cannot be enough to justify nondisclosure. After all, where information is already publicly available, people do not submit FOIA requests—they use Google. Nor would a statute designed to take from the government the power to unilater-

ally decide what information the public can view, see *Mink*, 410 U. S., at 80, put such determinative weight on the government's preference for secrecy (what the majority calls the government's "assurance of privacy"), *ante*, at 440.

For the majority, a business holding information as private and submitting it under an assurance of privacy is enough to deprive the public of access. But a tool used to probe the relationship between government and business should not be unavailable whenever government and business wish it so. And given the temptation, common across the private and public sectors, to regard as secret all information that need not be disclosed, I fear the majority's reading will deprive the public of information for reasons no better than convenience, skittishness, or bureaucratic inertia. The Exemption's focus on "commercial" or "financial" information, for instance, implies that the harm caused by disclosure must do more than, say, simply embarrass the information's owner. It must cause some genuine harm to an owner's economic or business interests.

In sum, the language permits, and the purpose, precedent, and context all suggest, an interpretation that insists upon some showing of harm. And I believe we should say just that. Exemption 4 can be satisfied where, in addition to the conditions set out by the majority, release of commercial or financial information will cause genuine harm to an owner's economic or business interests. (Because it is not at issue, I express no opinion whether genuine harm to a *government* interest would suffice.) I would remand the case for a determination whether, in this instance, release of the information at issue will cause that genuine harm. To that extent, I dissent from the majority's decision.

Syllabus

UNITED STATES *v.* DAVIS ET AL.

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

No. 18–431. Argued April 17, 2019—Decided June 24, 2019

Respondents Maurice Davis and Andre Glover were charged with multiple counts of Hobbs Act robbery and one count of conspiracy to commit Hobbs Act robbery. They were also charged under 18 U. S. C. § 924(c), which authorizes heightened criminal penalties for using, carrying, or possessing a firearm in connection with any federal "crime of violence or drug trafficking crime." § 924(c)(1)(A). "Crime of violence" is defined in two subparts: the elements clause, § 924(c)(3)(A), and the residual clause, § 924(c)(3)(B). The residual clause in turn defines a "crime of violence" as a felony "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." *Ibid.* A jury convicted the men on most of the underlying charges and on two separate § 924(c) charges for brandishing a firearm in connection with their crimes. The Fifth Circuit initially rejected their argument that § 924(c)'s residual clause is unconstitutionally vague, but on remand in light of *Sessions* v. *Dimaya*, 584 U. S. 148, the court reversed course and held § 924(c)(3)(B) unconstitutional. It then held that Mr. Davis's and Mr. Glover's convictions on the § 924(c) count charging robbery as the predicate crime of violence could be sustained under the elements clause, but that the other count—which charged conspiracy as a predicate crime of violence—could not be upheld because it depended on the residual clause.

Held: Section 924(c)(3)(B) is unconstitutionally vague. Pp. 451–470.

(a) In our constitutional order, a vague law is no law at all. The vagueness doctrine rests on the twin constitutional pillars of due process and separation of powers. This Court has recently applied the doctrine in two cases involving statutes that bear more than a passing resemblance to § 924(c)(3)(B)'s residual clause—*Johnson* v. *United States*, 576 U. S. 591, which addressed the residual clause of the Armed Career Criminal Act (ACCA), and *Sessions* v. *Dimaya*, which addressed the residual clause of 18 U. S. C. § 16. The residual clause in each case required judges to use a "categorical approach" to determine whether an offense qualified as a violent felony or crime of violence. Judges had to disregard how the defendant actually committed the offense and instead imagine the degree of risk that would attend the idealized " 'ordinary case' " of the offense. *Johnson*, 576 U. S., at 596. The Court held in each case that the imposition of criminal punishments cannot be made

to depend on a judge's estimation of the degree of risk posed by a crime's imagined "ordinary case." The government and lower courts have long understood § 924(c)(3)(B) to require the same categorical approach. Now, the government asks this Court to abandon the traditional categorical approach and hold that the statute commands a case-specific approach that would look at the defendant's actual conduct in the predicate crime. The government's case-specific approach would avoid the vagueness problems that doomed the statutes in *Johnson* and *Dimaya* and would not yield to the same practical and Sixth Amendment complications that a case-specific approach under the ACCA and § 16 would, but this approach finds no support in § 924(c)'s text, context, and history. Pp. 451–455.

(b) This Court has already read the nearly identical language of § 16(b) to mandate a categorical approach. See *Leocal* v. *Ashcroft*, 543 U. S. 1, 7. And what is true of § 16(b) seems at least as true of § 924(c)(3)(B). The government claims that the singular term "offense" carries the "generic" meaning in connection with the elements clause but a "specific act" meaning in connection with the residual clause, but nothing in § 924(c)(3)(B) rebuts the presumption that the single term "offense" bears a consistent meaning. This reading is reinforced by the language of the residual clause itself, which speaks of an offense that, "by its nature," involves a certain type of risk. Pp. 455–458.

(c) The categorical reading is also reinforced by § 924(c)(3)(B)'s role in the broader context of the federal criminal code. Dozens of federal statutes use the phrase "crime of violence" to refer to presently charged conduct. Some cross-reference § 924(c)(3)'s definition, while others are governed by the virtually identical definition in § 16. The choice appears completely random. To hold that § 16(b) requires the categorical approach while § 924(c)(3)(B) requires the case-specific approach would make a hash of the federal criminal code. Pp. 458–459.

(d) Section 924(c)(3)(B)'s history provides still further evidence that it carries the same categorical-approach command as § 16(b). When Congress enacted the definition of "crime of violence" in § 16 in 1984, it also employed the term in numerous places in the Act, including § 924(c). The two statutes, thus, were originally designed to be read together. And when Congress added a definition of "crime of violence" to § 924(c) in 1986, it copied the definition from § 16 without making any material changes to the language of the residual clause, which would have been a bizarre way of suggesting that the two clauses should bear drastically different meanings. Moreover, § 924(c) originally prohibited the use of a firearm in connection with *any* federal felony, before Congress narrowed § 924(c) in 1984 by limiting its predicate offenses to "crimes of violence." The case-specific reading would go a long way toward nullifying that limitation and restoring the statute's original breadth. Pp. 459–462.

(e) Relying on the canon of constitutional avoidance, the government insists that if the case-specific approach does not represent the best reading of the statute, it is nevertheless the Court's duty to adopt any "fairly possible" reading to save the statute from being unconstitutional. But it is doubtful the canon could play a proper role in this case even if the government's reading were "possible." This Court has sometimes adopted the *narrower* construction of a criminal statute to avoid having to hold it unconstitutional if it were construed more broadly, but it has not invoked the canon to *expand* the reach of a criminal statute in order to save it. To do so would risk offending the very same due process and separation of powers principles on which the vagueness doctrine itself rests and would sit uneasily with the rule of lenity's teaching that ambiguities about a criminal statute's breadth should be resolved in the defendant's favor. Pp. 462–465.

903 F. 3d 483, affirmed in part, vacated in part, and remanded.

GORSUCH, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. KAVANAUGH, J., filed a dissenting opinion, in which THOMAS and ALITO, JJ., joined, and in which ROBERTS, C. J., joined as to all but Part II–C, *post*, p. 470.

Eric J. Feigin argued the cause for the United States. With him on the briefs were *Solicitor General Francisco*, *Assistant Attorney General Benczkowski*, *Erica L. Ross*, *Robert A. Parker*, and *John P. Taddei*.

Brandon E. Beck argued the cause for respondents. With him on the brief were *J. Matthew Wright*, *K. Joel Page*, *Jason Hawkins*, *J. Joseph Mongaras*, *Tiffany Talamantez*, *Jeffrey T. Green*, *Tobias S. Loss-Eaton*, and *Sarah O'Rourke Schrup*.*

JUSTICE GORSUCH delivered the opinion of the Court.

In our constitutional order, a vague law is no law at all. Only the people's elected representatives in Congress have

*Briefs of *amici curiae* urging affirmance were filed for FAMM by *David Debold*, *Kellam M. Conover*, *Mary Price*, and *Peter Goldberger*; for the National Association of Criminal Defense Lawyers by *Jonathan L. Marcus* and *Barbara E. Bergman*; and for the National Association of Federal Defenders by *Amy Baron-Evans*, *Daniel T. Hansmeier*, *Donna F. Coltharp*, and *Daniel L. Kaplan*.

the power to write new federal criminal laws. And when Congress exercises that power, it has to write statutes that give ordinary people fair warning about what the law demands of them. Vague laws transgress both of those constitutional requirements. They hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges, and they leave people with no sure way to know what consequences will attach to their conduct. When Congress passes a vague law, the role of courts under our Constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite Congress to try again.

Today we apply these principles to 18 U. S. C. § 924(c). That statute threatens long prison sentences for anyone who uses a firearm in connection with certain other federal crimes. But *which* other federal crimes? The statute's residual clause points to those felonies "that by [their] nature, involv[e] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." § 924(c)(3)(B). Even the government admits that this language, read in the way nearly everyone (including the government) has long understood it, provides no reliable way to determine which offenses qualify as crimes of violence and thus is unconstitutionally vague. So today the government attempts a new and alternative reading designed to save the residual clause. But this reading, it turns out, cannot be squared with the statute's text, context, and history. Were we to adopt it, we would be effectively stepping outside our role as judges and writing a new law rather than applying the one Congress adopted.

I

After Maurice Davis and Andre Glover committed a string of gas station robberies in Texas, a federal prosecutor charged both men with multiple counts of robbery affecting

interstate commerce in violation of the Hobbs Act, 18 U. S. C. § 1951(a), and one count of conspiracy to commit Hobbs Act robbery. The prosecutor also charged Mr. Davis with being a felon in possession of a firearm. In the end, a jury acquitted Mr. Davis of one robbery charge and otherwise found the men guilty on all counts. And these convictions, none of which are challenged here, authorized the court to impose prison sentences of up to 70 years for Mr. Davis and up to 100 years for Mr. Glover.

But that was not all. This appeal concerns *additional* charges the government pursued against the men under § 924(c). That statute authorizes heightened criminal penalties for using or carrying a firearm "during and in relation to," or possessing a firearm "in furtherance of," any federal "crime of violence or drug trafficking crime." § 924(c)(1)(A). The statute proceeds to define the term "crime of violence" in two subparts—the first known as the elements clause, and the second the residual clause. According to § 924(c)(3), a crime of violence is "an offense that is a felony" and

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

Violators of § 924(c) face a mandatory minimum sentence of five years in prison, over and above any sentence they receive for the underlying crime of violence or drug trafficking crime. The minimum sentence rises to 7 years if the defendant brandishes the firearm and 10 years if he discharges it. Certain types of weapons also trigger enhanced penalties—for example, a defendant who uses a short-barreled shotgun

faces a minimum sentence of 10 years. And repeat violations of § 924(c) carry a minimum sentence of 25 years.[1]

At trial, the government argued that Mr. Davis and Mr. Glover had each committed two separate § 924(c) violations by brandishing a short-barreled shotgun in connection with their crimes. Here, too, the jury agreed. These convictions yielded a mandatory minimum sentence for each man of 35 years, which had to run consecutively to their other sentences. Adding the § 924(c) mandatory minimums to its discretionary sentences for their other crimes, the district court ultimately sentenced Mr. Glover to more than 41 years in prison and Mr. Davis to more than 50 years.

On appeal, both defendants argued that § 924(c)'s residual clause is unconstitutionally vague. At first, the Fifth Circuit rejected the argument. *United States* v. *Davis*, 677 Fed. Appx. 933, 936 (2017) (*per curiam*). But after we vacated its judgment and remanded for further consideration in light of our decision in *Sessions* v. *Dimaya*, 584 U. S. 148 (2018), striking down a different, almost identically worded statute, the court reversed course and held § 924(c)(3)(B) unconstitutional. 903 F. 3d 483, 486 (2018) (*per curiam*). It then held that Mr. Davis's and Mr. Glover's convictions on one of the two § 924(c) counts, the one that charged *robbery* as a predicate crime of violence, could be sustained under the elements clause. But it held that the other count, which charged *conspiracy* as a predicate crime of violence, depended on the residual clause; and so it vacated the men's convictions and sentences on that count.

Because the Fifth Circuit's ruling deepened a dispute among the lower courts about the constitutionality of

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[1] When this case was tried, a defendant convicted of two § 924(c) violations in a single prosecution faced a 25-year minimum for the second violation. See *Deal* v. *United States*, 508 U. S. 129, 132 (1993); § 1(a)(1), 112 Stat. 3469. In 2018, Congress changed the law so that, going forward, only a second § 924(c) violation committed "after a prior [§ 924(c)] conviction . . . has become final" will trigger the 25-year minimum. Pub. L. 115–391, § 403(a), 132 Stat. 5221–5222.

§ 924(c)'s residual clause, we granted certiorari to resolve the question. 586 U. S. 1063 (2018).[2]

II

Our doctrine prohibiting the enforcement of vague laws rests on the twin constitutional pillars of due process and separation of powers. See *Dimaya*, 584 U. S., at 155–156 (plurality opinion); *id.*, at 175–183 (GORSUCH, J., concurring in part and concurring in judgment). Vague laws contravene the "first essential of due process of law" that statutes must give people "of common intelligence" fair notice of what the law demands of them. *Connally* v. *General Constr. Co.*, 269 U. S. 385, 391 (1926); see *Collins* v. *Kentucky*, 234 U. S. 634, 638 (1914). Vague laws also undermine the Constitution's separation of powers and the democratic self-governance it aims to protect. Only the people's elected representatives in the legislature are authorized to "make an act a crime." *United States* v. *Hudson*, 7 Cranch 32, 34 (1812). Vague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide. See *Kolender* v. *Lawson*, 461 U. S. 352, 357–358, and n. 7 (1983); *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81, 89–91 (1921); *United States* v. *Reese*, 92 U. S. 214, 221 (1876).

In recent years, this Court has applied these principles to two statutes that bear more than a passing resemblance to § 924(c)(3)(B)'s residual clause. In *Johnson* v. *United States*, 576 U. S. 591 (2015), the Court addressed the residual clause of the Armed Career Criminal Act (ACCA), which defined

[2] Compare *United States* v. *Simms*, 914 F. 3d 229, 236–246 (CA4 2019) (en banc), *United States* v. *Salas*, 889 F. 3d 681, 685–686 (CA10 2018), and *United States* v. *Eshetu*, 898 F. 3d 36, 37–38 (CADC 2018) (*per curiam*) (holding that § 924(c)(3)(B) is vague), with *United States* v. *Douglas*, 907 F. 3d 1, 11–16 (CA1 2018), *Ovalles* v. *United States*, 905 F. 3d 1231, 1240–1252 (CA11 2018) (en banc), and *United States* v. *Barrett*, 903 F. 3d 166, 178–184 (CA2 2018) (taking the opposite view).

a "violent felony" to include offenses that presented a "serious potential risk of physical injury to another." § 924(e)(2)(B)(ii). The ACCA's residual clause required judges to use a form of what we've called the "categorical approach" to determine whether an offense qualified as a violent felony. Following the categorical approach, judges had to disregard how the defendant actually committed his crime. Instead, they were required to imagine the idealized "'ordinary case'" of the defendant's crime and then guess whether a "'serious potential risk of physical injury to another'" would attend its commission. *Id.*, at 596. *Johnson* held this judicial inquiry produced "more unpredictability and arbitrariness" when it comes to specifying unlawful conduct than the Constitution allows. *Id.*, at 598.

Next, in *Sessions* v. *Dimaya*, we considered the residual clause of 18 U. S. C. § 16, which defines a "crime of violence" for purposes of many federal statutes. Like § 924(c)(3), § 16 contains an elements clause and a residual clause. The only difference is that § 16's elements clause, unlike § 924(c)(3)'s elements clause, isn't limited to felonies; but there's no material difference in the language or scope of the statutes' residual clauses.[3] As with the ACCA, our precedent under § 16's residual clause required courts to use the categorical approach to determine whether an offense qualified as a crime of violence. *Dimaya*, 584 U. S., at 153–154; see *Leocal* v. *Ashcroft*, 543 U. S. 1, 7, 10 (2004). And, again as with the ACCA, we held that § 16's residual clause was unconstitutionally vague because it required courts "to picture the kind of conduct that the crime involves in the ordinary case, and to judge whether that abstraction presents some not-well-specified-yet-sufficiently-large degree of

[3] Section 16 provides that the term "crime of violence" means "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

risk." *Dimaya*, 584 U. S., at 162 (internal quotation marks omitted).

What do *Johnson* and *Dimaya* have to say about the statute before us? Those decisions teach that the imposition of criminal punishment can't be made to depend on a judge's estimation of the degree of risk posed by a crime's imagined "ordinary case." But does § 924(c)(3)(B) require that sort of inquiry? The government and lower courts have long thought so. For years, almost everyone understood § 924(c)(3)(B) to require exactly the same categorical approach that this Court found problematic in the residual clauses of the ACCA and § 16.[4] Today, the government acknowledges that, if this understanding is correct, then § 924(c)(3)(B) must be held unconstitutional too.

But the government thinks it has now found a way around the problem. In the aftermath of our decisions holding the residual clauses of the ACCA and § 16(b) unconstitutionally vague, the government "abandon[ed] its longstanding position" that § 924(c)(3)(B) requires a categorical analysis and began urging lower courts to "adopt a new 'case specific' method" that would look to "the 'defendant's actual conduct' in the predicate offense." 903 F. 3d, at 485. Now, the government tries the same strategy in this Court, asking us to abandon the traditional categorical approach and hold that the statute actually commands the government's new case-

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[4] See, *e. g.*, *United States* v. *Acosta*, 470 F. 3d 132, 134–135 (CA2 2006); *United States* v. *Butler*, 496 Fed. Appx. 158, 161 (CA3 2012); *United States* v. *Fuertes*, 805 F. 3d 485, 498 (CA4 2015); *United States* v. *Williams*, 343 F. 3d 423, 431 (CA5 2003); *Evans* v. *Zych*, 644 F. 3d 447, 453 (CA6 2011); *United States* v. *Jackson*, 865 F. 3d 946, 952 (CA7 2017), vacated and remanded, 584 U. S. 973 (2018); *United States* v. *Moore*, 38 F. 3d 977, 979–980 (CA8 1994); *United States* v. *Amparo*, 68 F. 3d 1222, 1225–1226 (CA9 1995); *United States* v. *Munro*, 394 F. 3d 865, 870 (CA10 2005); *United States* v. *McGuire*, 706 F. 3d 1333, 1336–1337 (CA11 2013); *United States* v. *Kennedy*, 133 F. 3d 53, 56 (CADC 1998); see also *Ovalles*, 905 F. 3d, at 1295 (J. Pryor, J., dissenting) ("For years, and even after *Johnson*, the government consistently has urged that we apply a categorical approach to § 924(c)").

specific approach. So, while the consequences in this case may be of constitutional dimension, the real question before us turns out to be one of pure statutory interpretation.

In approaching the parties' dispute over the statute's meaning, we begin by acknowledging that the government is right about at least two things. First, a case-specific approach would avoid the vagueness problems that doomed the statutes in *Johnson* and *Dimaya*. In those cases, we recognized that there would be no vagueness problem with asking a jury to decide whether a defendant's " 'real-world conduct' " created a substantial risk of physical violence. *Dimaya*, 584 U. S., at 161; see *Johnson*, 576 U. S., at 598, 603–604. Second, a case-specific approach wouldn't yield the same practical and Sixth Amendment complications under § 924(c) that it would have under the ACCA or § 16. Those other statutes, in at least some of their applications, required a *judge* to determine whether a defendant's *prior conviction* was for a "crime of violence" or "violent felony." In that context, a case-specific approach would have entailed "reconstruct[ing], long after the original conviction, the conduct underlying that conviction." *Id.*, at 605. And having a judge, not a jury, make findings about that underlying conduct would have "raise[d] serious Sixth Amendment concerns." *Descamps* v. *United States*, 570 U. S. 254, 269–270 (2013). By contrast, a § 924(c) prosecution focuses on the conduct with which the defendant is *currently charged*. The government already has to prove to a jury that the defendant committed all the acts necessary to punish him for the underlying crime of violence or drug trafficking crime. So it wouldn't be that difficult to ask the jury to make an additional finding about whether the defendant's conduct also created a substantial risk that force would be used.

But all this just tells us that it might have been a good idea for Congress to have written a residual clause for § 924(c) using a case-specific approach. It doesn't tell us whether Congress actually wrote such a clause. To answer

that question, we need to examine the statute's text, context, and history. And when we do that, it becomes clear that the statute simply cannot support the government's newly minted case-specific theory.

III

A

Right out of the gate, the government faces a challenge. This Court, in a unanimous opinion, has already read the nearly identical language of 18 U. S. C. § 16(b) to mandate a categorical approach. And, importantly, the Court did so without so much as mentioning the practical and constitutional concerns described above. Instead, the Court got there based entirely on the text. In *Leocal*, the Court wrote:

> "In determining whether petitioner's conviction falls within the ambit of § 16, the statute directs our focus to the 'offense' of conviction. See § 16(a) (defining a crime of violence as '*an offense* that has *as an element* the use . . . of physical force against the person or property of another' (emphasis added)); § 16(b) (defining the term as '*any other offense* that is a felony and that, *by its nature*, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense' (emphasis added)). This language requires us to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime." 543 U. S., at 7.

Leocal went on to suggest that burglary would always be a crime of violence under § 16(b) "because burglary, *by its nature*, involves a substantial risk that the burglar will use force against a victim in completing the crime," regardless of how any *particular* burglar might act on a specific occasion. *Id.*, at 10 (emphasis added); see also *Dimaya*, 584

U. S., at 164 (plurality opinion) (reaffirming that "§ 16(b)'s text . . . demands a categorical approach"). And what was true of § 16(b) seems to us at least as true of § 924(c)(3)(B): It's not even close; the statutory text commands the categorical approach.

Consider the word "offense." It's true that, "in ordinary speech," this word can carry at least two possible meanings. It can refer to "a generic crime, say, the crime of fraud or theft in general," or it can refer to "the specific acts in which an offender engaged on a specific occasion." *Nijhawan* v. *Holder*, 557 U. S. 29, 33–34 (2009). But the word "offense" appears just once in § 924(c)(3), in the statute's prefatory language. And everyone agrees that, in connection with the elements clause, the term "offense" carries the first, "generic" meaning. Cf. *id.*, at 36 (similar language of the ACCA's elements clause "refers directly to generic crimes"). So reading this statute most naturally, we would expect "offense" to retain that same meaning in connection with the residual clause. After all, "[i]n all but the most unusual situations, a single use of a statutory phrase must have a fixed meaning." *Cochise Consultancy, Inc.* v. *United States ex rel. Hunt*, 587 U. S. 262, 268 (2019).

To prevail, the government admits it must persuade us that the singular term "offense" bears a split personality in § 924(c), carrying the "generic" meaning in connection with the elements clause but then taking on the "specific act" meaning in connection with the residual clause. And, the government suggests, this isn't quite as implausible as it may sound; sometimes the term "offense" *can* carry both meanings simultaneously. To illustrate its point, the government posits a statute defining a "youthful gun crime" as "an offense that has as an element the use of a gun and is committed by someone under the age of 21." Tr. of Oral Arg. 16. This statute, the government suggests, would leave us little choice but to understand the single word "offense" as encompassing both the generic crime and the manner of its

commission on a specific occasion. To which we say: Fair enough. It's *possible* for surrounding text to make clear that "offense" carries a double meaning. But absent evidence to the contrary, we presume the term is being used consistently. And nothing in § 924(c)(3)(B) comes close to rebutting that presumption.

Just the opposite. The language of the residual clause itself reinforces the conclusion that the term "offense" carries the same "generic" meaning throughout the statute. Section 924(c)(3)(B), just like § 16(b), speaks of an offense that, "by its nature," involves a certain type of risk. And that would be an exceedingly strange way of referring to the circumstances of a specific offender's conduct. As both sides agree, the "nature" of a thing typically denotes its " 'normal and characteristic quality,' " *Dimaya*, 584 U. S., at 165 (quoting Webster's Third New International Dictionary 1507 (2002)), or its " 'basic or inherent features,' " *United States* v. *Barrett*, 903 F. 3d 166, 182 (CA2 2018) (quoting Oxford Dictionary of English 1183 (A. Stevenson ed., 3d ed. 2010)). So in plain English, when we speak of the nature of an offense, we're talking about "what an offense normally—or, as we have repeatedly said, 'ordinarily'—entails, not what happened to occur on one occasion." *Dimaya*, 584 U. S., at 165; see *Leocal*, 543 U. S., at 7 (contrasting the "nature of the offense" with "the particular facts [of] petitioner's crime").[5]

Once again, the government asks us to overlook this obvious reading of the text in favor of a strained one. It sug-

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[5] The government's own regulations reflect this understanding of the ordinary meaning of "by its nature." A Department of Justice regulation provides that an inmate is not eligible for early release if he was convicted of an offense "that, by its nature *or conduct*, presents a serious potential risk of physical force." 28 CFR § 550.55(b)(5)(iii) (2017) (emphasis added); see *Bush* v. *Pitzer*, 133 F. 3d 455, 458 (CA7 1997) (denying early release because "[c]onspiracy does not by its 'nature' present a serious risk; but Bush's 'conduct' did so").

gests that the statute might be referring to the "nature" of the defendant's conduct on a particular occasion. But while this reading may be linguistically feasible, we struggle to see why, if it had intended this meaning, Congress would have used the phrase "by its nature" at all. The government suggests that "by its nature" keeps the focus on the offender's *conduct* and excludes evidence about his *personality*, such as whether he has violent tendencies. But even without the words "by its nature," nothing in the statute remotely suggests that courts are allowed to consider character evidence—a type of evidence usually off limits during the guilt phase of a criminal trial. Cf. Fed. Rule Evid. 404.

B

Things become clearer yet when we consider § 924(c)(3)(B)'s role in the broader context of the federal criminal code. As we've explained, the language of § 924(c)(3)(B) is almost identical to the language of § 16(b), which this Court has read to mandate a categorical approach. And we normally presume that the same language in related statutes carries a consistent meaning. See, *e. g.*, *Sullivan* v. *Stroop*, 496 U. S. 478, 484 (1990).

This case perfectly illustrates why we do that. There are dozens of federal statutes that use the phrase "crime of violence" to refer to presently charged conduct rather than a past conviction. Some of those statutes cross-reference the definition of "crime of violence" in § 924(c)(3), while others are governed by the virtually identical definition in § 16. The choice appears completely random. Reading the similar language in § 924(c)(3)(B) and § 16(b) similarly yields sensibly congruent applications across all these other statutes. But if we accepted the government's invitation to reinterpret § 924(c)(3)(B) as alone endorsing a case-specific approach, we would produce a series of seemingly inexplicable results.

Take just a few examples. If the government were right, Congress would have mandated the case-specific approach in a prosecution for providing explosives to facilitate a crime of

violence, 18 U. S. C. § 844(*o*), but the (now-invalidated) categorical approach in a prosecution for providing *information about* explosives to facilitate a crime of violence, § 842(p)(2). It would have mandated the case-specific approach in a prosecution for using false identification documents in connection with a crime of violence, § 1028(b)(3)(B), but the categorical approach in a prosecution for using confidential phone records in connection with a crime of violence, § 1039(e)(1). It would have mandated the case-specific approach in a prosecution for giving someone a firearm to use in a crime of violence, § 924(h), but the categorical approach in a prosecution for giving a minor a handgun to use in a crime of violence, § 924(a)(6)(B)(ii). It would have mandated the case-specific approach in a prosecution for traveling to another State to acquire a firearm for use in a crime of violence, § 924(g), but the categorical approach in a prosecution for traveling to another State to *commit* a crime of violence, § 1952(a)(2). And it would have mandated the case-specific approach in a prosecution for carrying armor-piercing ammunition in connection with a crime of violence, § 924(c)(5), but the categorical approach in a prosecution for carrying a firearm while "in possession of armor piercing ammunition capable of being fired in that firearm" in connection with a crime of violence, § 929(a)(1).

There would be no rhyme or reason to any of this. Nor does the government offer any plausible account why Congress would have wanted courts to take such dramatically different approaches to classifying offenses as crimes of violence in these various provisions. To hold, as the government urges, that § 16(b) requires the categorical approach while § 924(c)(3)(B) requires the case-specific approach would make a hash of the federal criminal code.

C

Section 924(c)(3)(B)'s history provides still further evidence that it carries the same categorical-approach command as § 16(b). It's no accident that the language of the two laws

is almost exactly the same. The statutory term "crime of violence" traces its origins to the Comprehensive Crime Control Act of 1984. There, Congress enacted the definition of "crime of violence" in § 16. § 1001(a), 98 Stat. 2136. It also "employed the term 'crime of violence' in numerous places in the Act," *Leocal*, 543 U. S., at 6, including in § 924(c). § 1005(a), 98 Stat. 2138. At that time, Congress didn't provide a separate definition of "crime of violence" in § 924(c) but relied on § 16's general definition. The two statutes, thus, were originally designed to be read together.

Admittedly, things changed a bit over time. Eventually, Congress expanded § 924(c)'s predicate offenses to include drug trafficking crimes as well as crimes of violence. §§ 104(a)(2)(B)–(C), 100 Stat. 457. When it did so, Congress added a subsection-specific definition of "drug trafficking crime" in § 924(c)(2)—and, perhaps thinking that both terms should be defined in the same place, it also added a subsection-specific definition of "crime of violence" in § 924(c)(3). § 104(a)(2)(F), *id.*, at 457. But even then, Congress didn't write a new definition of that term. Instead, it copied and pasted the definition from § 16 without making any material changes to the language of the residual clause. The government suggests that, in doing so, Congress "intentionally separated" and "decoupled" the two definitions. Brief for United States 34, 37. But importing the residual clause from § 16 into § 924(c)(3) almost word for word would have been a bizarre way of suggesting that the two clauses should bear drastically different meanings. Usually when statutory language "'is obviously transplanted from . . . other legislation,'" we have reason to think "'it brings the old soil with it.'" *Sekhar* v. *United States*, 570 U. S. 729, 733 (2013).

What's more, when Congress copied § 16(b)'s language into § 924(c) in 1986, it proceeded on the premise that the language *required* a categorical approach. By then courts had, as the government puts it, "beg[u]n to settle" on the view

that § 16(b) demanded a categorical analysis. Brief for United States 36–37. Of particular significance, the Second Circuit, along with a number of district courts, had relied on the categorical approach to hold that selling drugs could *never* qualify as a crime of violence because "[w]hile the traffic in drugs is often accompanied by violence," it can also be carried out through consensual sales and thus "does not *by its nature* involve substantial risk that physical violence will be used." *United States* v. *Diaz*, 778 F. 2d 86, 88 (1985) (*per curiam*) (emphasis added). Congress moved quickly to abrogate those decisions. But, notably, it didn't do so by directing a case-specific approach or changing the language courts had read to require thecategorical approach. Instead, it accepted the categorical approach as given and simply declared that certain drug trafficking crimes automatically trigger § 924 penalties, regardless of the risk of violence that attends them. §§ 104(a)(2)(B)–(C), 100 Stat. 457.

The government's reply to this development misses the mark. The government argues that § 16(b) had not acquired such a well-settled judicial construction by 1986 that the reenactment of its language in § 924(c)(3)(B) should be presumed to have incorporated the same construction. We agree. See *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich, L. P. A.*, 559 U. S. 573, 590 (2010) (interpretations of three courts of appeals "may not have 'settled' the meaning" of a statute for purposes of the reenactment canon). But Congress in 1986 did more than just reenact language that a handful of courts had interpreted to require the categorical approach. It amended § 924(c) specifically to abrogate the *results* of those decisions, without making any attempt to overturn the categorical *reading* on which they were based. And *that* would have been an odd way of proceeding if Congress had thought the categorical reading erroneous.

There's yet one further and distinct way in which § 924(c)'s history undermines the government's case-specific reading of the residual clause. As originally enacted in 1968, § 924(c)

prohibited the use of a firearm in connection with *any* federal felony. § 102, 82 Stat. 1224. The 1984 amendments *narrowed* § 924(c) by limiting its predicate offenses to "crimes of violence." But the case-specific reading would go a long way toward nullifying that limitation and restoring the statute's original breadth. After all, how many felonies don't involve a substantial risk of physical force when they're committed using a firearm—let alone when the defendant brandishes or discharges the firearm?

Recognizing this difficulty, the government assures us that a jury wouldn't be allowed to find a felony to be a crime of violence *solely* because the defendant used a firearm, although it could consider the firearm as a "factor." Tr. of Oral Arg. 8. But the government identifies no textual basis for this rule, and exactly how it would work in practice is anyone's guess. The government says, for example, that "selling counterfeit handbags" while carrying a gun wouldn't be a crime of violence under its approach. *Id.*, at 9. But why not? Because the counterfeit-handbag trade is so inherently peaceful that there's no substantial risk of a violent confrontation with dissatisfied customers, territorial competitors, or dogged police officers? And how are jurors supposed to determine that? The defendant presumably knew the risks of his trade, and he chose to arm himself. See *United States* v. *Simms*, 914 F. 3d 229, 247–248 (CA4 2019) (en banc) (refusing to "condem[n] jurors to such an ill-defined inquiry"). Even granting the government its handbag example, we suspect its approach would result in the vast majority of federal felonies becoming potential predicates for § 924(c) charges, contrary to the limitation Congress deliberately imposed when it restricted the statute's application to crimes of violence.

D

With all this statutory evidence now arrayed against it, the government answers that it should prevail anyway because of the canon of constitutional avoidance. Maybe the

case-specific approach doesn't represent the best reading of the statute—but, the government insists, it is our duty to adopt any "'fairly possible'" reading of a statute to save it from being held unconstitutional. Brief for United States 45.[6]

We doubt, however, the canon could play a proper role in this case even if the government's reading were "possible." True, when presented with two "fair alternatives," this Court has sometimes adopted the *narrower* construction of a criminal statute to avoid having to hold it unconstitutional if it were construed more broadly. *United States* v. *Rumely*, 345 U. S. 41, 45, 47 (1953); see, *e. g.*, *Skilling* v. *United States*, 561 U. S. 358, 405–406, and n. 40 (2010); *United States* v. *Lanier*, 520 U. S. 259, 265–267, and n. 6 (1997). But no one before us has identified a case in which this Court has invoked the canon to *expand* the reach of a criminal statute in order to save it. Yet that is exactly what the government seeks here. Its case-specific reading would cause § 924(c)(3)(B)'s penalties to apply to conduct they have not previously been understood to reach: categorically nonviolent felonies committed in violent ways. See *Simms*, 914 F. 3d, at 256–257 (Wynn, J., concurring).[7]

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[6] There are at least two different canons of construction that sometimes go by the name "constitutional avoidance." The one the government invokes here is perhaps better termed the presumption of constitutionality. Of long lineage, it holds that courts should, if possible, interpret ambiguous statutes to avoid rendering them unconstitutional, see, *e. g.*, *Parsons* v. *Bedford*, 3 Pet. 433, 448–449 (1830) (Story, J.), and it is distinct from the more modern (and more debated) constitutional doubt canon, which suggests courts should construe ambiguous statutes to avoid the need even to address serious questions about their constitutionality, see *Rust* v. *Sullivan*, 500 U. S. 173, 190–191 (1991).

[7] The government claims to have found cases invoking the canon to expand a statute's reach, but none actually stands for that proposition. Each simply remarks in passing that a construction the Court arrived at for other reasons had the additional benefit of avoiding vagueness concerns; none suggests that a narrower construction was available. See *United States* v. *Grace*, 461 U. S. 171, 176 (1983) (accepting government's

Employing the avoidance canon to expand a criminal statute's scope would risk offending the very same due process and separation-of-powers principles on which the vagueness doctrine itself rests. See *supra*, at 451–453. Everyone agrees that Mr. Davis and Mr. Glover did many things that Congress had declared to be crimes; and no matter how we rule today, they will face substantial prison sentences for those offenses. But does § 924(c)(3)(B) require them to suffer additional punishment, on top of everything else? Even if you think it's *possible* to read the statute to impose such additional punishment, it's *impossible* to say that Congress surely intended that result, or that the law gave Mr. Davis and Mr. Glover fair warning that § 924(c)'s mandatory penalties would apply to their conduct. Respect for due process and the separation of powers suggests a court may not, in order to save Congress the trouble of having to write a new law, construe a criminal statute to penalize conduct it does not clearly proscribe.

Employing the canon as the government wishes would also sit uneasily with the rule of lenity's teaching that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor. That rule is "perhaps not much less old than" the task of statutory "construction itself." *United States* v. *Wiltberger*, 5 Wheat. 76, 95 (1820) (Marshall, C. J.). And much like the vagueness doctrine, it is founded on "the tenderness of the law for the rights of individuals" to fair notice of the law "and on the plain principle that the power of punishment is vested in the legislative, not in the judicial

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construction, which was "not contested by appellees"); *United States* v. *Culbert*, 435 U. S. 371, 379 (1978) (finding statute clear and refusing to "manufacture ambiguity where none exists"); *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 82–83 (1932) (finding statute unambiguous and construing it according to "the natural import of its terms"). And the dissent, despite compiling a page-long list of constitutional avoidance cases spanning "more than 200 years," *post*, at 494–495, has been unable to find any better examples. See *post*, at 497 (opinion of KAVANAUGH, J.).

department." *Ibid.*; see *Lanier*, 520 U. S., at 265–266, and n. 5. Applying constitutional avoidance to narrow a criminal statute, as this Court has historically done, accords with the rule of lenity. By contrast, using the avoidance canon instead to adopt a more expansive reading of a criminal statute would place these traditionally sympathetic doctrines at war with one another.[8]

IV

What does the dissent have to say about all this? It starts by emphasizing that § 924(c)(3)(B) has been used in "tens of thousands of federal prosecutions" since its enactment 33 years ago. *Post*, at 472 (opinion of KAVANAUGH, J.). And the dissent finds it "surprising" and "extraordinary" that, after all those prosecutions over all that time, the statute could "suddenly" be deemed unconstitutional. *Ibid.* But the government *concedes* that § 924(c)(3)(B) is unconstitutional if it means what everyone has understood it to mean in nearly all of those prosecutions over all those years. So the only way the statute can be saved is if we were "suddenly" to give it a new meaning different from the one it has borne for the last three decades. And if we could do *that*, it would indeed be "surprising" and "extraordinary."

The dissent defends giving this old law a new meaning by appealing to intuition. It suggests that a categorical reading of § 924(c)(3)(B) is "unnatural" because "[i]f you were to ask John Q. Public whether a particular crime posed a substantial risk of violence, surely he would respond, 'Well, tell me how it went down—*what happened*?' " *Post*, at 482 (some internal quotation marks omitted). Maybe so. But the lan-

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[8] Admittedly, abandoning the categorical approach in favor of the case-specific approach would also have the effect of excluding from the statute's coverage defendants who commit categorically *violent* felonies in *nonviolent* ways, and in that respect would be more "lenient" for some defendants. Regardless, the constitutional principles underlying the rule of lenity counsel caution before invoking constitutional avoidance to construe the statute to punish conduct that it does not unambiguously proscribe.

guage in the statute before us isn't the language posited in the dissent's push poll. Section 924(c)(3)(B) doesn't ask about the risk that "a particular crime posed" but about the risk that an "offense . . . by its nature, involves." And a categorical reading of this categorical language seemed anything but "unnatural" to the unanimous Court in *Leocal* or the plurality in *Dimaya*.[9] Nor did the government think the categorical reading of § 924(c)(3)(B) "unnatural" when it embraced that reading for decades. The dissent asks us to overlook the government's prior view, explaining that the government only defended a categorical reading of the statute "when it did not matter for constitutional vagueness purposes"—that is, before *Johnson* and *Dimaya* identified constitutional problems with the categorical approach. *Post*, at 502. But isn't that exactly the point? Isn't it at least a little revealing that, when the government had no motive to concoct an alternative reading, even it thought the best reading of § 924(c)(3)(B) demanded a categorical analysis?

If this line of attack won't work, the dissent tries another by telling us that we have "not fully account[ed] for the long tradition of substantial-risk criminal statutes." *Post*, at 502. The dissent proceeds to offer a lengthy bill of particulars, citing dozens of state and federal laws that do not use the categorical approach. *Post*, at 476–479, and nn. 4–17. But what does this prove? Most of the statutes the dissent cites impose penalties on whoever "creates," or "engages in conduct that creates," or acts under "circumstances that create" a substantial risk of harm; others employ similar language. Not a single one imposes penalties for committing certain acts during "an offense . . . that by its nature, involves" a

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[9] To be sure, the dissent suggests that *Leocal* and *Dimaya* adopted a categorical reading simply to avoid practical and constitutional problems. *Post*, at 484, 491–492, and n. 23. But, as we have seen, this too is mistaken. *Leocal* did not even mention those problems, and *Dimaya* held that the text demanded a categorical approach. See *supra*, at 455–456.

substantial risk, or anything similar. Marching through the dissent's own catalog thus only winds up confirming that legislatures know how to write risk-based statutes that require a case-specific analysis—and that § 924(c)(3)(B) is not a statute like that.

When the dissent finally turns to address the words Congress actually wrote in § 924(c)(3)(B), its main argument seems to be that a categorical reading violates the canon against superfluity. On this account, reading "offense" generically in connection with the residual clause makes the residual clause "duplicate" the elements clause and leaves it with "virtually nothing" to do. *Post*, at 489. But that is a surprising assertion coming from the dissent, which devotes several pages to describing the "many" offenders who have been convicted under the residual clause using the categorical approach but who "might not" be prosecutable under the elements clause. *Post*, at 498–501. It is also wrong. As this Court has long understood, the residual clause, read categorically, "sweeps more broadly" than the elements clause—potentially reaching offenses, like burglary, that do not have violence as an *element* but that arguably create a substantial *risk* of violence. *Leocal*, 543 U. S., at 10. So even under the categorical reading, the residual clause is far from superfluous.

Without its misplaced reliance on the superfluity canon, there is little left of the dissent's textual analysis. The dissent asserts that the phrase "by its nature" must "focu[s] on the defendant's actual conduct"—but only because this "follows" from the dissent's earlier (and mistaken) superfluity argument. *Post*, at 490. Next, the dissent claims that "the word 'involves' " and "the phrase 'in the course of committing the offense' " both support a case-specific approach. *Post*, at 490–491. But these words do not favor either reading: It is just as natural to ask whether the offense of robbery *ordinarily* "involves" a substantial risk that violence will be used "in the course of committing the offense" as it is to ask whether a *particular* robbery "involved" a substantial risk

that violence would be used "in the course of committing the offense." If anything, the statute's use of the present and not the past tense lends further support to the categorical reading.[10] The dissent thinks it significant, too, that the statute before us "does not use the term 'conviction,'" *post*, at 491; but that word is hardly a prerequisite for the categorical approach, as *Dimaya* makes clear. Remarkably, the dissent has nothing at all to say about § 924(c)(3)'s history or its relationship with other criminal statutes; it just ignores those arguments. And when it comes to the constitutional avoidance canon, the dissent does not even try to explain how using that canon to criminalize conduct that *isn't* criminal under the fairest reading of a statute might be reconciled with traditional principles of fair notice and separation of powers. Instead, the dissent seems willing to consign "'thousands'" of defendants to prison for "years—potentially decades," not because it is certain or even likely that Congress ordained those penalties, but because it is merely "possible" Congress might have done so. *Post*, at 498, 501. In our republic, a speculative possibility that a man's conduct violated the law should never be enough to justify taking his liberty.

In the end, the dissent is forced to argue that holding § 924(c)(3)(B) unconstitutional would invite "bad" social policy consequences. *Post*, at 502. In fact, the dissent's legal

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[10] The dissent claims that *Taylor* v. *United States*, 495 U. S. 575 (1990), and *Nijhawan* v. *Holder*, 557 U. S. 29 (2009), pointed to "the *absence* of the word 'involved'" as one reason to adopt a categorical approach. *Post*, at 490. Not true. *Taylor* explained that the ACCA's elements clause requires a categorical approach in part because it refers to a crime "that 'has as an element'—not any crime that, in a particular case, involves—the use or threat of force." 495 U. S., at 600. All the work in that sentence was being done by the phrase "in a particular case," not by the word "involves." And *Nijhawan* noted that the Court had construed the ACCA's residual clause, which refers to crimes "that '*involv[e] conduct* that presents a serious potential risk of physical injury,'" to require the categorical approach. 557 U. S., at 36.

analysis only comes sandwiched between a lengthy paean to laws that impose severe punishments for gun crimes and a rogue's gallery of offenses that may now be punished somewhat less severely. See *post*, at 470–472, 498–501. The dissent acknowledges that "the consequences cannot change our understanding of the law." *Post*, at 502. But what's the point of all this talk of "bad" consequences if not to suggest that judges should be tempted into reading the law to satisfy their policy goals? Even taken on their own terms, too, the dissent's policy concerns are considerably overblown. While the dissent worries that our ruling may elicit challenges to past § 924(c) convictions, *post*, at 500–501, the dissent's preferred approach—saving § 924(c)(3)(B) by changing its meaning—would also call into question countless convictions premised on the categorical reading. And defendants whose § 924(c) convictions are overturned by virtue of today's ruling will not even necessarily receive lighter sentences: As this Court has noted, when a defendant's § 924(c) conviction is invalidated, courts of appeals "routinely" vacate the defendant's entire sentence on all counts "so that the district court may increase the sentences for any remaining counts" if such an increase is warranted. *Dean* v. *United States*, 581 U. S. 62, 68 (2017).

Of course, too, Congress always remains free to adopt a case-specific approach to defining crimes of violence for purposes of § 924(c)(3)(B) going forward. As Mr. Davis and Mr. Glover point out, one easy way of achieving that goal would be to amend the statute so it covers any felony that, "based on the facts underlying the offense, involved a substantial risk" that physical force against the person or property of another would be used in the course of committing the offense. Brief for Respondents 46 (quoting H. R. 7113, 115th Cong., 2d Sess. (2018); emphasis deleted); see also Tr. of Oral Arg. 19 (government's counsel agreeing that this language would offer "clearer" support for the case-specific approach than the current version of the statute does). The

dissent's catalog of case-specific, risk-based criminal statutes supplies plenty of other models Congress could follow. Alternatively still, Congress might choose to retain the categorical approach but avoid vagueness in other ways, such as by defining crimes of violence to include certain enumerated offenses or offenses that carry certain minimum penalties. All these options and more are on the table. But these are options that belong to Congress to consider; no matter how tempting, this Court is not in the business of writing new statutes to right every social wrong it may perceive.

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We agree with the court of appeals' conclusion that § 924(c)(3)(B) is unconstitutionally vague. At the same time, exactly what that holding means for Mr. Davis and Mr. Glover remains to be determined. After the Fifth Circuit vacated their convictions and sentences on one of the two § 924(c) counts at issue, both men sought rehearing and argued that the court should have vacated their sentences on all counts. In response, the government conceded that, if § 924(c)(3)(B) is held to be vague, then the defendants are entitled to a full resentencing, not just the more limited remedy the court had granted them. The Fifth Circuit has deferred ruling on the rehearing petitions pending our decision, so we remand the case to allow the court to address those petitions. The judgment below is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KAVANAUGH, with whom JUSTICE THOMAS and JUSTICE ALITO join, and with whom THE CHIEF JUSTICE joins as to all but Part II–C, dissenting.

Crime and firearms form a dangerous mix. From the 1960s through the 1980s, violent gun crime was rampant in America. The wave of violence destroyed lives and devastated communities, particularly in America's cities. Be-

tween 1963 and 1968, annual murders with firearms rose by a staggering 87 percent, and annual aggravated assaults with firearms increased by more than 230 percent.

Faced with an onslaught of violent gun crime and its debilitating effects, the American people demanded action. In 1968, Congress passed and President Lyndon Johnson signed the Gun Control Act. That law made it a separate federal crime to use or carry a firearm during a federal felony. Despite that and other efforts, violent crime with firearms continued at extraordinarily dangerous levels. In 1984 and again in 1986, in legislation signed by President Reagan, Congress reenacted that provision of the 1968 Act, with amendments. The law now prohibits, among other things, using or carrying a firearm during and in relation to a federal "crime of violence." 18 U. S. C. § 924(c)(1)(A). The law mandates substantial prison time for violators.

Over the last 33 years, tens of thousands of § 924(c) cases have been prosecuted in the federal courts. Meanwhile, violent crime with firearms has decreased significantly. Over the last 25 years, the annual rate of murders with firearms has dropped by about 50 percent, and the annual rate of nonfatal violent crimes (robberies, aggravated assaults, and sex crimes) with firearms has decreased by about 75 percent. Violent crime in general (committed with or without a firearm) has also declined. During that same time period, both the annual rate of overall violent crime and the annual rate of murders have dropped by almost 50 percent.

Although the level of violent crime in America is still very high, especially in certain cities, Americans under the age of 40 probably cannot fully appreciate how much safer most American cities and towns are now than they were in the 1960s, 1970s, and 1980s. Many factors have contributed to the decline of violent crime in America. But one cannot dismiss the effects of state and federal laws that impose steep punishments on those who commit violent crimes with firearms.

Yet today, after 33 years and tens of thousands of federal prosecutions, the Court suddenly finds a key provision of § 924(c) to be unconstitutional because it is supposedly too vague. That is a surprising conclusion for the Court to reach about a federal law that has been applied so often for so long with so little problem. The Court's decision today will make it harder to prosecute violent gun crimes in the future. The Court's decision also will likely mean that thousands of inmates who committed violent gun crimes will be released far earlier than Congress specified when enacting § 924(c). The inmates who will be released early are not nonviolent offenders. They are not drug offenders. They are offenders who committed violent crimes with firearms, often brutally violent crimes.

A decision to strike down a 33-year-old, often-prosecuted federal criminal law because it is all of a sudden unconstitutionally vague is an extraordinary event in this Court. The Constitution's separation of powers authorizes this Court to declare Acts of Congress unconstitutional. That is an awesome power. We exercise that power of judicial review in justiciable cases to, among other things, ensure that Congress acts within constitutional limits and abides by the separation of powers. But when we overstep our role in the name of enforcing limits on Congress, we do not uphold the separation of powers, we transgress the separation of powers.

I fully understand how the Court has arrived at its conclusion given the Court's recent precedents in *Johnson* v. *United States*, 576 U. S. 591 (2015), and *Sessions* v. *Dimaya*, 584 U. S. 148 (2018). But this case presents an entirely different question. Those cases involved statutes that imposed additional penalties based on *prior* convictions. This case involves a statute that focuses on the defendant's current conduct during the charged crime. The statute here operates entirely in the present. Under our precedents, this statute therefore is not unconstitutionally vague. It is a serious mistake, in my respectful view, to follow *Johnson* and

Dimaya off the constitutional cliff in this case. I respectfully dissent.[1]

I

Section 924(c) prohibits using or carrying a firearm during and in relation to a federal "crime of violence," or possessing a firearm in furtherance of a federal "crime of violence."[2] Section 924(c) is a substantive criminal offense, not a sentence enhancement. The Government therefore charges a § 924(c) offense in the indictment. Ordinarily, when charged under § 924(c), a defendant will be charged with both an underlying federal crime and then also a § 924(c) offense. For example, Davis was charged with both conspiracy to commit robbery and a § 924(c) offense. Glover was likewise charged with both conspiracy to commit robbery and a § 924(c) offense.

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[1] The statistics contained in the introduction are drawn from: Dept. of Justice, Federal Bureau of Investigation, Uniform Crime Reports 6–7, 8–9 (1963) (rise in violent crime with firearms in the 1960s); *id.*, at 1, 6–7, 9 (1968) (same); Pew Research Center, Gun Homicide Rate Down 49% Since 1993 Peak; Public Unaware 6, n. 5, and 36, 50 (2013) (decrease in violent crime with firearms over about the past 25 years); N. James, Congressional Research Service, Recent Violent Crime Trends in the United States 25–26 (Rep. No. R45236) (June 20, 2018) (decrease in violent crime over about the past 25 years).

[2] Section 924(c)(1)(A) provides: "Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—(i) be sentenced to a term of imprisonment of not less than 5 years; (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years." Section 924(c)(1)(B) imposes heightened penalties for certain types of firearms and firearm devices, and § 924(c)(1)(C) imposes heightened penalties for subsequent § 924(c) convictions.

By any measure, Davis and Glover's conduct during the conspiracy was violent. Davis and Glover committed multiple armed robberies of convenience stores in the early morning hours. Those armed robberies followed a pattern: Davis and Glover (or Glover and a co-conspirator)—usually covering their faces—would arrive at a convenience store in the early morning hours in a car with no plates. One of them would point a short-barreled shotgun at a female employee and order her around. Sometimes, he would point the short-barreled shotgun in her face. Sometimes, he would put the short-barreled shotgun in her side. While one of them was aiming the short-barreled shotgun at the store employee, another would take cigarettes and demand money. Davis and Glover's crime spree ended with still more dangerous behavior: a high-speed car chase in wet and dangerous driving conditions that culminated in a crash.

Section 924(c)(3) lays out the definition of "crime of violence" for purposes of § 924(c). That definition has two prongs, either of which can bring a defendant within the scope of § 924(c).[3]

The first prong of § 924(c)(3) is the elements prong. That prong, the Government concedes here, asks whether the underlying crime *categorically* fits within § 924(c) because of the elements of the crime. The judge makes that determination. If the answer is yes, then the judge instructs the jury on the § 924(c) offense to simply find whether the defendant used or carried a firearm during and in relation to that underlying crime, or possessed a firearm in furtherance of that underlying crime.

The Fifth Circuit concluded that Davis and Glover's conspiracy offenses did not fit within the elements prong of

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[3] Section 924(c)(3) provides: "For purposes of this subsection the term 'crime of violence' means an offense that is a felony and—(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

§ 924(c)(3). So the question was whether Davis and Glover were covered by the second prong.

The second prong of § 924(c)(3) is the substantial-risk prong. That prong covers cases beyond those covered by the first prong, the elements prong. Congress sensibly wanted to cover defendants who committed crimes that are not necessarily violent by definition under the elements prong, but who committed crimes with firearms in a way that created a substantial risk that violent force would be used. To that end, the substantial-risk prong, properly read, focuses not on the elements of the underlying crime, but rather on the defendant's conduct during that crime. If a defendant used or carried a firearm during and in relation to the crime, *and* the defendant's conduct during the crime created a substantial risk that physical force may be used, then the defendant may be guilty of a § 924(c) offense. In that instance, the jury makes the finding: Did the defendant's conduct during the underlying crime create a substantial risk that violent force would be used?

In other words, as relevant here, a defendant can fall within the scope of § 924(c) either (1) because of the elements of the underlying crime or (2) because of the defendant's conduct in committing the underlying crime. Either (1) the judge finds that an element of the underlying crime entail the use of physical force or (2) the jury finds that the defendant's actual conduct involved a substantial risk that physical force may be used. Put another way, the underlying crime itself may automatically bring the defendant within the scope of § 924(c). Or if the underlying crime does not automatically qualify as a crime of violence, then the defendant's conduct during the crime may still bring the defendant within the scope of § 924(c). Sensible enough.

The basic question in this case is whether the substantial-risk prong of § 924(c)(3)'s definition of "crime of violence" is unconstitutionally vague. It is not.

As this Court has explained multiple times, criminal laws that apply a risk standard to a defendant's conduct are not

too vague, but instead are perfectly constitutional. Writing for the Court in *Johnson*, for example, Justice Scalia stated that "we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct." 576 U. S., at 603–604. The following year in *Welch* v. *United States*, Justice Kennedy confirmed that *Johnson* "cast no doubt on the many laws that 'require gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*.'" 578 U. S. 120, 124 (2016) (quoting *Johnson*, 576 U. S., at 603). Two years later in *Dimaya*, JUSTICE KAGAN wrote for the Court and echoed Justice Scalia and Justice Kennedy: "In *Johnson*'s words, 'we do not doubt' the constitutionality of applying § 16(b)'s 'substantial risk [standard] to real-world conduct.'" 584 U. S., at 161 (quoting *Johnson*, 576 U. S., at 603–604).

That kind of risk-based criminal statute is not only constitutional, it is very common. As the Court has recognized, "dozens of federal and state criminal laws use terms like 'substantial risk,' 'grave risk,' and 'unreasonable risk,'" and almost all of those statutes "require gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*." *Johnson*, 576 U. S., at 603. Indeed, the Government's brief in *Johnson* collected more than 200 state and federal statutes that imposed criminal penalties for conduct that created a risk of injury to others. App. to Supp. Brief for United States in *Johnson* v. *United States*, O. T. 2014, No. 13–7120, pp. 1a–99a.

Take a few examples from federal law: It is a federal crime to create "a *substantial risk* of harm to human life" while illegally "manufacturing a controlled substance." 21 U. S. C. § 858 (emphasis added). Under certain circumstances, it is a federal crime to create "a *substantial risk* of serious bodily injury to any other person by destroying or damaging any structure, conveyance, or other real or personal property within the United States or by attempting or conspiring to"

do so. 18 U. S. C. §2332b(a)(1)(B) (emphasis added). And for purposes of the chapter of the federal criminal code dealing with sexual abuse crimes, "serious bodily injury" is defined as "bodily injury that involves a *substantial risk* of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty." §2246(4) (emphasis added).

The States' criminal codes are similar. Among the crimes that the States define by using qualitative risk standards are resisting arrest,[4] kidnaping,[5] assault,[6] battery,[7] criminal recklessness,[8] endangerment,[9] unlawful re-

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[4] See, *e. g.*, Colo. Rev. Stat. §18–8–103(1)(b) (2018) ("substantial risk of causing bodily injury"); Ind. Code §35–44.1–3–1(b)(1)(B) (2019) ("substantial risk of bodily injury"); Mo. Rev. Stat. §575.150 (2016) ("substantial risk of serious physical injury or death"); Neb. Rev. Stat. §28–904(1)(b) (2016) ("substantial risk of causing physical injury"); Ore. Rev. Stat. §162.315(2)(c) (2017) ("substantial risk of physical injury").

[5] See, *e. g.*, Alaska Stat. §11.41.300(a)(2)(B) (2018) ("substantial risk of serious physical injury"); Ohio Rev. Code Ann. §2905.01(B) (Lexis Supp. 2019) ("substantial risk of serious physical harm").

[6] See, *e. g.*, Ala. Code §13A–6–20(a)(3) (2015) ("grave risk of death"); Del. Code Ann., Tit. 11, §613(a)(3) (2015) ("substantial risk of death"); D. C. Code §22–404.01(a)(2) (2018 Cum. Supp.) ("grave risk of serious bodily injury"); Mo. Rev. Stat. §565.056(1)(4) (2016) ("substantial risk of death or serious physical injury"); Utah Code §76–5–102(1)(b) (2017) ("substantial risk of bodily injury").

[7] See, *e. g.*, Ind. Code §35–42–2–1.5 (Supp. 2018) ("substantial risk of death"); Wis. Stat. §940.19(6) (2016) ("substantial risk of great bodily harm").

[8] See, *e. g.*, Me. Rev. Stat. Ann., Tit. 17–A, §211(1) (2006) ("substantial risk of serious bodily injury"), §213(1) (same); Okla. Stat., Tit. 21, §1289.11 (2011) ("unreasonable risk and probability of death or great bodily harm"); Wis. Stat. Ann. §939.24(1) (2016) ("unreasonable and substantial risk of death or great bodily harm").

[9] See, *e. g.*, Ariz. Rev. Stat. Ann. §§13–1201(A), (B) (2010) ("substantial risk of imminent death or physical injury" and "substantial risk of imminent death"); N. D. Cent. Code Ann. §12.1–17–03 (2012) ("substantial risk of serious bodily injury or death"); Ore. Rev. Stat. §163.195(1) (2017) ("sub-

straint,[10] theft,[11] hazing,[12] abuse,[13] neglect,[14] arson,[15] homicide,[16] and weapons offenses.[17]

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stantial risk of serious physical injury"); Wash. Rev. Code § 9A.36.050(1) (2018) ("substantial risk of death or serious physical injury").

[10] See, *e. g.*, Ark. Code § 5–11–103(a) (2013) ("substantial risk of serious physical injury"); Conn. Gen. Stat. § 53a–95(a) (2017) ("substantial risk of physical injury"); Tex. Penal Code Ann. § 20.02(c)(2)(A) (2019) ("substantial risk of serious bodily injury").

[11] See, *e. g.*, Ind. Code § 35–43–4–2(a)(2)(B) (2018) ("substantial risk of bodily injury"); Minn. Stat. § 609.52(3a) (2016) ("reasonably foreseeable risk of bodily harm").

[12] See, *e. g.*, Ind. Code § 35–42–2–2.5(a) (2018) ("substantial risk of bodily injury"); Miss. Code Ann. §§ 97–3–105(1), (3) (2014) ("substantial risk of physical injury"); Mo. Rev. Stat. §§ 578.365(1), (5) (2016) ("probable risk of the loss of life or probable bodily or psychological harm" and "substantial risk to the life of the student or prospective member"); Ohio Rev. Code Ann. § 2903.31(A) (Lexis 2014) ("substantial risk of causing mental or physical harm"); Ore. Rev. Stat. §§ 163.197(4)(a)(B), (C) (2017) ("unreasonable risk of harm").

[13] See, *e. g.*, Iowa Code § 709.3(1)(a) (2019) ("substantial risk of death or serious injury"); N. C. Gen. Stat. Ann. § 14–318.2(a) (2017) ("substantial risk of physical injury"); W. Va. Code Ann. §§ 61–8D–3(c), (d)(1) (2014) ("substantial risk of death or serious bodily injury" and "substantial risk of bodily injury"); Wis. Stat. §§ 948.03(1), (4)(a), (b) (2016) ("unreasonable risk of harm," "unreasonable risk of great bodily harm," and "unreasonable risk of bodily harm").

[14] See, *e. g.*, Fla. Stat. § 825.102(3)(a) (2018) ("substantial risk of death"), § 827.03(1)(e) (same); W. Va. Code Ann. §§ 61–8D–4(c), (d)(1) (2014) ("substantial risk of death or serious bodily injury" and "substantial risk of bodily injury").

[15] See, *e. g.*, Kan. Stat. Ann. §§ 21–5812(c)(2)(A)(i), (ii) (2018 Cum. Supp.) ("substantial risk of bodily harm"); R. I. Gen. Laws § 11–4–2 (2002) ("substantial risk of serious physical harm"); Wis. Stat. §§ 941.11(1), (2) (2016) ("unreasonable risk of death or great bodily harm").

[16] See, *e. g.*, Ala. Code § 13A–6–2(a)(2) (2015) ("grave risk of death"); Kan. Stat. Ann. § 21–5406(a) (2018 Cum. Supp.) ("unreasonable risk of injury"); N. Y. Penal Law Ann. § 125.20(4) (West 2009) ("grave risk of serious physical injury"), §§ 125.25(2), (4) ("grave risk of death" and "grave risk of serious physical injury or death").

[17] See, *e. g.*, Alaska Stat. § 11.61.190(a)(2) (2018) ("substantial and unjustifiable risk of physical injury"); Ark. Code Ann. § 5–74–107(b)(1) (Supp. 2017) ("substantial risk of physical injury"); Ohio Rev. Code

Consider a few specific examples: In Pennsylvania, a person resists arrest "if, with the intent of preventing a public servant from effecting a lawful arrest or discharging any other duty, the person creates a *substantial risk* of bodily injury to the public servant or anyone else." 18 Pa. Cons. Stat. § 5104 (2015) (emphasis added). In Tennessee, kidnaping is defined as false imprisonment "under circumstances exposing the other person to *substantial risk* of bodily injury." Tenn. Code Ann. § 39–13–303(a) (2018) (emphasis added). In New York, reckless endangerment occurs when a person "recklessly engages in conduct which creates a *substantial risk* of serious physical injury to another person." N. Y. Penal Law Ann. § 120.20 (emphasis added). And in Maryland, neglect of a minor is defined as "the intentional failure to provide necessary assistance and resources for the physical needs or mental health of a minor that creates a *substantial risk* of harm to the minor's physical health or a *substantial risk* of mental injury to the minor." Md. Crim. Law Code Ann. § 3–602.1(a)(5)(i) (2012) (emphasis added).

The above examples demonstrate that substantial-risk standards like the one in § 924(c)(3)(B) are a traditional and common feature of criminal statutes. As the Eleventh Circuit succinctly stated, there "is nothing remarkable about asking jurors to make that sort of risk determination—and, if necessary, requiring judges to instruct jurors on the meaning of terms like 'substantial' and 'physical force.'" *Ovalles* v. *United States*, 905 F. 3d 1231, 1250, n. 8 (2018) (en banc). That is "exactly how similar questions have been resolved for centuries and are resolved every day in courts throughout the country." *Ibid.*

Ann. § 2923.162(C)(2) (Lexis 2014) ("substantial risk of physical harm"); R. I. Gen. Laws § 11–47–61 (2002) ("substantial risk of death or serious injury"); Wash. Rev. Code § 9A.36.045(1) (2018) ("substantial risk of death or serious physical injury"); W. Va. Code Ann. § 61–7–12 (2014) ("substantial risk of death or serious bodily injury").

A statute is unconstitutionally vague only if "it fails to give ordinary people fair notice of the conduct it punishes," or is "so standardless that it invites arbitrary enforcement." *Johnson*, 576 U. S., at 595. Section 924(c)(3)(B) is not unconstitutionally vague. To reiterate, § 924(c)(3)(B) defines "crime of violence" as "an offense that is a felony and . . . that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." Section 924(c)(3)(B) affords people of ordinary intelligence ample notice that they may be punished if they carry or use a gun while engaging in criminal conduct that presents a risk that physical force may be used. There "is a whole range of conduct that anyone with at least a semblance of common sense would know" is covered by § 924(c)(3)(B). *Chicago* v. *Morales*, 527 U. S. 41, 114 (1999) (THOMAS, J., dissenting) (internal quotation marks omitted). And prosecutors, defense attorneys, judges, and juries are well equipped to enforce and defend § 924(c)(3)(B) prosecutions in a principled and predictable way—just as they have for decades with many other substantial-risk criminal statutes. As Judge Niemeyer wrote in his separate opinion in the Fourth Circuit, "the parties in those cases had little difficulty understanding, enforcing, or defending the § 924(c)(1) charges at issue." *United States* v. *Simms*, 914 F. 3d 229, 264 (2019).[18]

In short, § 924(c)(3)(B) is a garden-variety, substantial-risk criminal law. Section 924(c)(3)(B) is not unconstitutionally vague.

II

This case therefore should be straightforward. But the Court complicates things by engaging in a two-step dance that ends with the Court concluding that § 924(c)(3)(B) is unconstitutionally vague.

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[18] Judge Niemeyer's opinion was joined by Judges Wilkinson, Duncan, Agee, Keenan, and Quattlebaum.

The Court's first step is to construe § 924(c)(3)'s substantial-risk prong to require an ordinary-case categorical approach rather than a conduct-specific approach. In other words, the Court says that a defendant's guilt or innocence under § 924(c)(3)'s substantial-risk prong hinges on a judge's assessment of how a *hypothetical defendant* would ordinarily commit the underlying crime. In the Court's view, a defendant's guilt or innocence under § 924(c)(3)'s substantial-risk prong does not depend on a jury's finding about how the *actual defendant* actually committed the underlying crime.

The Court's second step is based on the Court's decisions in *Johnson* and *Dimaya*. The Court says that the ordinary-case categorical approach makes § 924(c)(3)(B) unconstitutionally vague.

For purposes of this case, the Court's error is its first step—that is, in construing the substantial-risk prong of § 924(c)(3) to require an ordinary-case categorical approach. For three reasons, I disagree with the Court's analysis. First, the Court's justifications in *Johnson* and *Dimaya* for adopting the categorical approach do not apply in the context of § 924(c). Second, the text of § 924(c)(3)(B) is best read to focus on the actual defendant's actual conduct during the underlying crime, not on a hypothetical defendant's imagined conduct during an ordinary case of the underlying crime. Third, even if the text were ambiguous, the constitutional avoidance canon requires that we interpret the statute to focus on the actual defendant's actual conduct.

I will address those three points in Parts II–A, II–B, and II–C.

A

According to the Court, if § 924(c)(3)(B) focused on the defendant's conduct during the underlying crime, then it would *not* be unconstitutionally vague. But § 924(c)(3)(B), as the Court reads it, focuses on a hypothetical defendant's conduct during an ordinary case of the underlying crime. As a re-

sult, the Court says that § 924(c)(3)(B) *is* unconstitutionally vague.

But it makes little sense, as I see it, to say that § 924(c)(3)(B)'s substantial-risk inquiry focuses on whether *a hypothetical defendant's imagined conduct* during an ordinary case of the crime creates a substantial risk that physical force may be used, rather than on whether *the actual defendant's actual conduct* during the actual crime created a substantial risk that physical force may be used. Why would we interpret a federal law that criminalizes current-offense conduct to focus on a hypothetical defendant rather than on the actual defendant? As Judge Newsom cogently wrote for the Eleventh Circuit en banc majority, "If you were to ask John Q. Public whether a particular crime posed a substantial risk of violence, surely he would respond, 'Well, tell me how it went down—*what happened*?'" *Ovalles*, 905 F. 3d, at 1241.[19]

Why does the Court read the substantial-risk prong in such an unnatural way? The Court explains that *Johnson* interpreted similar substantial-risk language to require the ordinary-case categorical approach. See 576 U. S., at 603–605. A plurality of the Court did the same in *Dimaya*. See 584 U. S., at 160–162. And the Court today casts this case as the third installment in a trilogy with a predictable ending, one that was supposedly foreordained by *Johnson* and *Dimaya*.

The gaping hole in the Court's analysis, in my view, is that *Johnson* and *Dimaya* addressed statutes that imposed penalties based on a defendant's *prior* criminal convictions.

In *Johnson*, the Court interpreted a definition of "violent felony" that was used in sentencing proceedings to classify prior convictions as predicates for stricter sentences. See §§ 924(e)(1), (e)(2)(B). In *Dimaya*, the Court interpreted a

[19] Judge Newsom's majority opinion was joined by Chief Judge Ed Carnes and Judges Tjoflat, Marcus, William Pryor, Rosenbaum, Branch, and Hull.

definition of "crime of violence" that was used in immigration proceedings to classify prior convictions as predicates for more severe immigration consequences. See § 16 (defining "crime of violence"); 8 U. S. C. § 1101(a)(43)(F) (incorporating 18 U. S. C. § 16); 8 U. S. C. § 1227(a)(2)(A)(iii) (deportation); §§ 1229b(a)(3), (b)(1)(C) (ineligibility for cancellation of removal and adjustment of status).

In interpreting those statutes, the Court employed the ordinary-case categorical approach to assess an individual's *past* convictions. And application of that categorical approach, the Court then said, rendered the statutes at issue in those cases unconstitutionally vague. See *Dimaya*, 584 U. S., at 160–162; *Johnson*, 576 U. S., at 597–598.[20]

Two important principles drove the Court's adoption of the categorical approach in the *prior*-conviction context in *Johnson* and *Dimaya*.

First, in the prior-conviction cases, the Court emphasized that the categorical approach avoids the difficulties and inequities of relitigating "past convictions in minitrials conducted long after the fact." *Moncrieffe* v. *Holder*, 569 U. S. 184, 200–201 (2013). Without the categorical approach, courts would have to determine the underlying conduct from years-old or even decades-old documents with varying levels of factual detail. See *Taylor* v. *United States*, 495 U. S. 575, 601–602 (1990). The factual statements that are contained in those documents are often "prone to error." *Mathis* v. *United States*, 579 U. S. 500, 512 (2016). The categorical approach avoids the unfairness of allowing inaccuracies to "come back to haunt the defendant many years down the

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[20] Tellingly, the Government in *Johnson* and *Dimaya* did not dispute that the categorical approach was the proper method of interpreting the statutes at issue. See *Sessions* v. *Dimaya*, 584 U. S. 148, 163–164 (2018) (plurality opinion); *Johnson* v. *United States*, 576 U. S. 591, 604–605 (2015). In this case, the Government strenuously disputes the applicability of the categorical approach precisely because the inquiry is not about past convictions.

road." *Ibid.* The Court has echoed that reasoning time and again. See, *e. g.*, *Dimaya*, 584 U. S., at 166 (plurality opinion); *Johnson*, 576 U. S., at 604–605; *Descamps* v. *United States*, 570 U. S. 254, 270 (2013); *Chambers* v. *United States*, 555 U. S. 122, 125 (2009).

Second, in the prior-conviction cases, the Court insisted on the categorical approach to avoid "Sixth Amendment concerns." *Descamps*, 570 U. S., at 269. The Sixth Amendment, as interpreted by this Court's precedents, does not allow a judge (rather than a jury) to make factual determinations that increase the maximum penalty. See *Apprendi* v. *New Jersey*, 530 U. S. 466, 490 (2000). The Court has read its Sixth Amendment precedents to require the categorical approach. Under the categorical approach, the judge looks only to the fact of conviction and the statutory definition of the prior offense. The Court has reiterated those Sixth Amendment concerns in countless categorical-approach cases. See, *e. g.*, *Dimaya*, 584 U. S., at 164 (plurality opinion); *Mathis*, 579 U. S., at 511–512; *Shepard* v. *United States*, 544 U. S. 13, 24–25 (2005) (plurality opinion); *Taylor*, 495 U. S., at 601.

In short, the Court in *Johnson* and *Dimaya* employed something akin to the constitutional avoidance doctrine to read the statutes at issue to avoid practical and Sixth Amendment problems. In the words of JUSTICE THOMAS, the "categorical approach was never really about the best reading of the text." *Dimaya*, 584 U. S., at 230–231 (dissenting opinion). As Judge Raggi has perceptively stated: "[C]onstitutional avoidance informed the original categorical-approach mandate." *United States* v. *Barrett*, 903 F. 3d 166, 179 (CA2 2018).

But neither of the two reasons identified in *Johnson* and *Dimaya* applies to 18 U. S. C. § 924(c)(3)(B)—not even a little.

First, § 924(c) does not require examination of old conduct underlying a *prior* conviction. Section 924(c) operates entirely in the present. In a § 924(c) prosecution, there are

ordinarily two charged crimes: the underlying crime and the § 924(c) offense. Here, for example, the defendants were charged with conspiracy to commit robbery and with the § 924(c) offense. The defendant's conduct during the underlying crime is part of the § 924(c) offense. The conduct charged in the § 924(c) offense is in front of the jury (if the case goes to trial) or accepted by the defendant in the plea agreement (if the defendant pleads guilty). The indictment must allege specific offense conduct, and that conduct must be proved with real-world facts in order to obtain a conviction. There is no need to worry about stale evidence or unavailable witnesses. Nor is there any need to worry about inaccuracies in years-old or decades-old documents coming back to haunt the defendant.

Second, § 924(c) likewise raises no Sixth Amendment concerns. A jury will find the facts or, if the case ends in a guilty plea, the defendant will accept the facts in the plea agreement. For the § 924(c) charge, as relevant here, a jury must find that the defendant's conduct "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." The defendant has the opportunity to contest the relevant facts either at the trial or in plea negotiations. No Sixth Amendment issue arises in a § 924(c) prosecution.

No practical or Sixth Amendment problems exist with § 924(c)(3)(B). Indeed, the Court itself acknowledges that "a case-specific approach wouldn't yield the same practical and Sixth Amendment complications" that arose in *Johnson* and *Dimaya*. *Ante*, at 454.

We should recognize that *Johnson* and *Dimaya* dealt with an entirely different context: *prior* convictions. There is no need to follow *Johnson* and *Dimaya* off the cliff here. We should read § 924(c)(3)(B) like the dozens of other substantial-risk statutes in federal and state criminal law: to focus on the actual defendant's actual conduct during the actual un-

derlying crime, not on a hypothetical defendant's imagined conduct during an ordinary case of that crime.

B

Now to the statutory text of § 924(c)(3)(B). Even though the context here is current-offense conduct, not past convictions, the Court says that the statutory language nonetheless compels a focus on a hypothetical defendant's imagined conduct, not on the actual defendant's actual conduct. I disagree. Criminal defendants are usually punished based on what they actually did, not based on what a hypothetical defendant might have done.

To begin with, the text of § 924(c)(3)(B) must be interpreted against the backdrop of traditional criminal-law practice. As described above, substantial-risk statutes are commonplace in federal and state criminal law. Those statutes ordinarily call for examination of the actual defendant's actual conduct during the actual crime. The Court does not identify a single self-contained federal or state law that defines the *actus reus* of the crime based on the imagination of the judge about a hypothetical defendant, rather than on the evidence before the jury about the actual defendant.

This Court applied an exception in *Johnson* and *Dimaya* for substantial-risk statutes that impose sentencing and other penalties based on *past* convictions. But that is an exception for past convictions, not a rule for current-offense conduct. Section 924(c)(3)(B) must be read in line with the traditional, common practice of focusing on the actual defendant's actual conduct during the underlying crime.

With that background, I turn to the precise text of § 924(c)(3). To repeat, the text of § 924(c)(3) provides: A defendant may not use or carry a firearm during and in relation to, or possess a firearm in furtherance of, "an offense that is a felony and" that either (A) "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," or (B) "by its nature,

involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

I will focus on four particular aspects of the statutory text of § 924(c)(3)(B).

First, start with the term "offense." Section 924(c)(3) has two prongs under which a defendant might qualify for a § 924(c) conviction: first, if the underlying crime automatically qualifies as a crime of violence based on its elements; and, second, if the defendant's conduct during the underlying crime created a substantial risk that physical force may be used, even if the underlying crime by its elements does not constitute a crime of violence.

The term "offense" applies to both prongs. In the elements prong, the term refers to the elements of the underlying crime. In the substantial-risk prong, the term refers to the defendant's conduct during the underlying crime. That is entirely commonplace and sensible.

Reading "offense" in that commonsense way follows from the Court's precedents interpreting the term "offense." As the Court has explained many times, the term "offense" may "sometimes refer to a generic crime" and may "sometimes refer to the specific acts in which an offender engaged on a specific occasion." *Nijhawan* v. *Holder*, 557 U. S. 29, 33–34 (2009).[21] Indeed, the single term "offense" can refer to both in the same statutory scheme. See, *e. g.*, *id.*, at 40; *id.*, at 38 (listing other examples); *United States* v. *Hayes*, 555 U. S. 415, 421–422 (2009).

In *United States* v. *Hayes*, for example, the Court interpreted the term "misdemeanor crime of domestic violence." That term was defined as "an offense" that (1) "has, as an element, the use or attempted use of physical force, or the

[21] More generally, this Court has often said that "identical language may convey varying content" in the same statute, based on context. *Yates* v. *United States*, 574 U. S. 528, 537 (2015) (plurality opinion); see also *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 319–320 (2014).

threatened use of a deadly weapon," and (2) was "committed by" a person who has a particular relationship with the victim. § 921(a)(33)(A). The Court interpreted the "offense that . . . has, as an element" language in that provision to focus on the legal prohibition, and interpreted the "offense . . . committed by" language to focus on the defendant's conduct. See *Hayes*, 555 U. S., at 421–422. In other words, the term "offense" was used once but had two different meanings as applied to the two different parts of the statutory provision.

Another example is the Immigration and Nationality Act. That statute defines "aggravated felony" in part as "an offense" (1) that "involves fraud or deceit" and (2) "in which the loss to the victim or victims exceeds $10,000." 8 U. S. C. § 1101(a)(43)(M)(i). The Court interpreted the "offense that . . . involves fraud or deceit" language to focus on the legal prohibition. See *Kawashima* v. *Holder*, 565 U. S. 478, 483 (2012). And the Court interpreted the "offense . . . in which the loss" language to focus on the individual's conduct. See *Nijhawan*, 557 U. S., at 40. Again, the term "offense" was used once, but had two different meanings as applied to the two different parts of the statutory provision.

Section 924(c)(3) is the same kind of statutory provision. It likewise encompasses both the legal prohibition (in subpart (A)) and the defendant's actual conduct (in subpart (B)). The term "offense" was read in *Hayes*, *Kawashima*, and *Nijhawan* to encompass both the legal prohibition and the defendant's conduct. The term should be read that same way here.

Moreover, if the substantial-risk prong of § 924(c)(3) requires assessing a hypothetical defendant's conduct rather than the actual defendant's conduct, then there would be little daylight between the elements prong and the substantial-risk prong. After all, a crime is defined by its elements. The elements tell you what happens in an ordinary case of a crime. To imagine how a hypothetical defendant would

have committed an ordinary case of the crime, you would presumably look back to the elements of the crime. But doing that under the substantial-risk prong—as the Court would do—would just duplicate the inquiry that already occurs under the elements prong. That would defeat Congress' purpose in adding the substantial-risk prong to § 924(c)(3)—namely, covering defendants who committed crimes that are not violent by definition but that are committed by particular defendants in ways that create a risk of violence. There is no reason to think that Congress meant to duplicate the elements prong in the substantial-risk prong.[22]

The Court usually tries to avoid an interpretation of a statutory provision that would make the provision redundant and accomplish virtually nothing. See, *e. g.*, *Republic of Sudan* v. *Harrison*, 587 U. S. 1, 11–12 (2019); *Dastar Corp.* v. *Twentieth Century Fox Film Corp.*, 539 U. S. 23, 35 (2003); *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U. S. 825, 837 (1988); A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 174–179 (2012); W. Eskridge, Interpreting Law: A Primer on How to Read Statutes and the Constitution 112–114 (2016). We should heed that principle here, and recognize that the term "offense" in the substantial-risk prong refers to the actual defendant's conduct during the underlying crime.

In short, the term "offense" in § 924(c)(3), as applied to the substantial-risk prong, focuses on the actual defendant's actual conduct, not on a hypothetical defendant's imagined conduct.

Second, § 924(c)(3)(B) asks whether the defendant's offense "by its nature" involves a risk that physical force may be used. In a vacuum, the "nature" of an offense could be

[22] This duplication point is icing on a textual cake already frosted. In other words, our interpretation of the term "offense" is informed by the text and by our precedents. Our interpretation stands with or without the duplication argument.

either "the metaphysical 'nature' of the offense" or "the underlying facts of the offense." *Dimaya*, 584 U. S., at 227 (THOMAS, J., dissenting). But that is because the term "offense" could refer to a legal prohibition or to the defendant's actual conduct. As explained above, however, the term "offense" as applied to the substantial-risk prong refers to the actual defendant's conduct during the underlying crime. It follows that "by its nature" focuses on the nature of the actual defendant's conduct during the crime. The phrase "by its nature" is linked to the term "offense." If the term "offense" refers to the defendant's actual conduct, then "by its nature" also focuses on the defendant's actual conduct.

Under the conduct-specific approach to the substantial-risk prong, the "by its nature" language simply means that the Government has to show more than a defendant's proclivity for crime and more than the mere fact that the defendant was carrying a gun. The Government has to show that the defendant's conduct by its nature *during the crime* created a substantial risk that physical force may be used.

In short, as JUSTICE THOMAS has pointed out, it "is entirely natural to use words like 'nature' and 'offense' to refer to an offender's actual underlying conduct." *Ibid.* So it is here.

Third, § 924(c)(3)(B) asks whether the defendant's conduct "involves" a substantial risk that physical force may be used. In *Taylor* v. *United States*, a case involving a prior-conviction statutory provision, the Court pointed to the *absence* of the word "involved" in adopting a categorical approach. 495 U. S., at 600. And in *Nijhawan* v. *Holder*, another case involving a prior-conviction statutory provision, the Court explained that the word "involves" did not support a categorical approach. 557 U. S., at 36. Here, unlike in *Taylor*, the statute does use the word "involves." Under *Taylor*'s reasoning, the inclusion of the word "involves" in § 924(c)(3)(B) supports the conclusion that § 924(c)(3)(B) employs a conduct-specific approach rather than a categorical approach.

Fourth, § 924(c)(3)(B)'s use of the phrase "in the course of committing the offense" indicates that the proper focus is on the actual defendant's actual conduct, not on a hypothetical defendant's imagined conduct. After all, the underlying offense was committed by the actual defendant, not by a hypothetical defendant. It strains common sense to think that the "in the course of committing the offense" language in § 924(c)(3)(B) contemplates an inquiry into a hypothetical defendant's conduct during an ordinary case of the crime.

Importantly, the law at issue in *Johnson* did not have the "in the course of committing the offense" language. § 924(e)(2)(B)(ii). That is a major textual difference between the law in *Johnson* on the one hand and § 924(c)(3)(B) on the other hand. And that textual distinction further shows that § 924(c)(3)(B) focuses on the actual defendant's actual conduct.

In short, those four textual indicators, while not all entirely one-sided, together strongly suggest that § 924(c)(3)(B) focuses on the actual defendant's actual conduct during the actual crime, not on a hypothetical defendant's imagined conduct during an ordinary case of the crime.

On top of all the language in the statute, § 924(c)(3)(B) does *not* contain the critical term that ordinarily marks a categorical approach.

Section 924(c)(3)(B) does not use the term "conviction." This Court has historically recognized the term "conviction" as a key textual driver of the categorical approach. In cases such as *Taylor* and *Johnson*, the Court zeroed in on the word "convictions." See *Johnson*, 576 U. S., at 604–605; *Taylor*, 495 U. S., at 600; see also *Mathis*, 579 U. S., at 511; *Moncrieffe*, 569 U. S., at 191; *Ovalles*, 905 F. 3d, at 1245. So too, the Court in *Leocal* v. *Ashcroft* emphasized that the text of the INA that incorporated § 16(b) used the term "convicted." 543 U. S. 1, 4, 7 (2004).[23]

[23] In *Leocal*, the Court interpreted § 16(b) to require a categorical approach. But unlike § 924(c)(3)(B), that statutory provision applied in the context of past convictions. See 8 U. S. C. §§ 1101(a)(43)(F), 1227(a)(2)

The term "conviction" is nowhere to be found in the text of § 924(c)(3)(B). That should not come as a surprise, given that § 924(c)(3)(B) is a substantive criminal offense concerned with the defendant's current-offense conduct. The absence of the term "conviction" in § 924(c)(3)(B) strongly supports a conduct-specific approach.

Put simply, the textual clues—both the words that are used and the words that are not used—point strongly to the conclusion that § 924(c)(3)(B) requires a jury to assess the actual defendant's actual conduct during the underlying crime. The conclusion becomes overwhelming when considered against the general background of substantial-risk statutes. To be sure, a statute can always be written more clearly. But here, the textual toolkit leads decisively to that conclusion.

C

But after all of that, suppose that you are not convinced. Suppose that you think that this case is still a close call on the text, even with the background of substantial-risk statutes and the Court's precedents. Indeed, suppose you ultimately disagree with the above analysis of the text. Even so, the Government still wins—unless it can be said that § 924(c)(3)(B) *unambiguously* requires a categorical approach. Under the constitutional avoidance canon, the precise question before us is not whether § 924(c)(3)(B) is best read to require a conduct-specific approach, but rather (as the Court's cases say) whether § 924(c)(3)(B) can reasonably, plausibly, or fairly possibly be interpreted to require a conduct-specific approach. The answer to that question is easy. Yes. See *Hooper* v. *California*, 155 U. S. 648, 657

(A)(iii); Sentencing Reform Act of 1984, § 217(a), 98 Stat. 2021; Comprehensive Crime Control Act of 1984, § 1202, 98 Stat. 2151. To be sure, § 16(b) was once incorporated into § 924(c). But in 1986, Congress severed the two provisions and included a standalone "crime of violence" definition in § 924(c). For those two reasons, § 924(c)(3)(B) need not and should not be interpreted in the same way as § 16(b).

(1895) ("reasonable"); *Clark* v. *Martinez*, 543 U. S. 371, 380 (2005) ("plausible"); *Skilling* v. *United States*, 561 U. S. 358, 406 (2010) ("fairly possible" (internal quotation marks omitted)).

The Court says that if § 924(c)(3)(B) requires the categorical approach, then it is unconstitutionally vague. But the Court also says that if § 924(c)(3)(B) focuses on the defendant's actual conduct, then it is constitutionally permissible. As the Court puts it, "a case-specific approach would avoid the vagueness problems that doomed the statutes in *Johnson* and *Dimaya*." *Ante*, at 454. So the entire ball game is whether it is fairly possible to interpret § 924(c)(3)(B) to require a conduct-specific approach. It surely is at least fairly possible.

It is an elementary principle of statutory interpretation that an ambiguous statute must be interpreted, whenever possible, to avoid unconstitutionality. See generally Scalia, Reading Law: The Interpretation of Legal Texts, at 247–251; Eskridge, Interpreting Law: A Primer on How to Read Statutes and the Constitution, at 317–322. That uncontroversial principle of statutory interpretation dates back to the Founding era. See *Mossman* v. *Higginson*, 4 Dall. 12, 14 (1800). As JUSTICE THOMAS has explained, the traditional doctrine of constitutional avoidance commands "courts, when faced with two plausible constructions of a statute—one constitutional and the other unconstitutional—to choose the constitutional reading." *Clark*, 543 U. S., at 395 (dissenting opinion). This Court's duty is "not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations." *Civil Service Comm'n* v. *Letter Carriers*, 413 U. S. 548, 571 (1973). In discharging that duty, "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Hooper*, 155 U. S., at 657.

This Court's longstanding practice of saving ambiguous statutes from unconstitutionality where fairly possible af-

fords proper respect for the representative branches of our Government. The Court has explained that "a presumption never ought to be indulged, that congress meant to exercise or usurp any unconstitutional authority, unless that conclusion is forced upon the Court by language altogether unambiguous." *United States* v. *Coombs*, 12 Pet. 72, 76 (1838).

In countless cases for more than 200 years, this Court has recognized the principle that courts should construe ambiguous laws to be consistent with the Constitution. See, *e. g.*, *McDonnell* v. *United States*, 579 U. S. 550, 576–577 (2016); *Skilling*, 561 U. S., at 405–409; *Clark*, 543 U. S., at 380–382; *Edmond* v. *United States*, 520 U. S. 651, 658 (1997); *Concrete Pipe & Products of Cal., Inc.* v. *Construction Laborers Pension Trust for Southern Cal.*, 508 U. S. 602, 628–630 (1993); *New York* v. *United States*, 505 U. S. 144, 170 (1992); *Rust* v. *Sullivan*, 500 U. S. 173, 190–191 (1991); *Public Citizen* v. *Department of Justice*, 491 U. S. 440, 465–467 (1989); *Communications Workers* v. *Beck*, 487 U. S. 735, 762 (1988); *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575–578 (1988); *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U. S. 772, 780–781 (1981); *Letter Carriers*, 413 U. S., at 571; *Machinists* v. *Street*, 367 U. S. 740, 749–750 (1961); *Ashwander* v. *TVA*, 297 U. S. 288, 348 (1936) (Brandeis, J., concurring); *ICC* v. *Oregon-Washington R. & Nav. Co.*, 288 U. S. 14, 40–42 (1933); *Crowell* v. *Benson*, 285 U. S. 22, 62–63 (1932); *Lucas* v. *Alexander*, 279 U. S. 573, 577–578 (1929); *Richmond Screw Anchor Co.* v. *United States*, 275 U. S. 331, 345–346 (1928); *Blodgett* v. *Holden*, 275 U. S. 142, 148–149 (1927) (opinion of Holmes, J.); *Missouri Pacific R. Co.* v. *Boone*, 270 U. S. 466, 471–472 (1926); *Linder* v. *United States*, 268 U. S. 5, 17–18 (1925); *Panama R. Co.* v. *Johnson*, 264 U. S. 375, 390 (1924); *Texas* v. *Eastern Texas R. Co.*, 258 U. S. 204, 217 (1922); *Baender* v. *Barnett*, 255 U. S. 224, 225–226 (1921); *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401 (1916); *United States ex rel. Attorney General* v. *Delaware & Hud-*

son Co., 213 U. S. 366, 407–408 (1909); *Hooper*, 155 U. S., at 657; *Grenada County Supervisors* v. *Brogden*, 112 U. S. 261, 268–269 (1884); *Coombs*, 12 Pet., at 76; *Parsons* v. *Bedford*, 3 Pet. 433, 448–449 (1830); *Mossman*, 4 Dall., at 14.

To be clear, the case before us is not a case of avoiding *possible* unconstitutionality. This is a case of avoiding *actual* unconstitutionality. There is a debate about the former practice. There is no real debate about the latter rule. And it is the latter rule of statutory interpretation at issue here.

Section 924(c)(3)(B) is best read to focus on the defendant's actual conduct. But at a minimum—given the text, the background of substantial-risk laws, and the relevant precedents—it is fairly possible to interpret § 924(c)(3)(B) to focus on the defendant's actual conduct. Because that reasonable interpretation would save § 924(c)(3)(B) from unconstitutionality, this case should be very straightforward, as Judge Newsom explained in his thorough majority opinion in the Eleventh Circuit and as Judge Niemeyer and Judge Richardson explained in their persuasive separate opinions in the Fourth Circuit. *Ovalles*, 905 F. 3d, at 1251; *Simms*, 914 F. 3d, at 272 (opinion of Niemeyer, J.); *id.*, at 272–277 (opinion of Richardson, J.). We should prefer the constitutional reading over the unconstitutional reading.

The Court did not apply constitutional avoidance in *Johnson* and *Dimaya*. Why not? In those two cases, the Court explained, the canon of constitutional avoidance was essentially rendered a nullity. That is because, as the Court described the situation, the Court was between a rock and a hard place. The categorical approach would have led to Fifth Amendment vagueness concerns, whereas applying the conduct-specific approach would have led to Sixth Amendment jury-trial concerns. See *Dimaya*, 584 U. S., at 164 (plurality opinion).

Here, by contrast, the Court is not between a rock and a hard place. Applying the categorical approach to

§ 924(c)(3)(B) would lead to vagueness concerns, whereas applying the conduct-specific approach would lead to no constitutional concerns.

Faced with a choice between a rock and constitutionality, the Court chooses the rock. I do not understand that choice.

The Court offers two related reasons for its choice to run the statute into a rock. Neither reason holds up.

First, the Court concludes that the constitutional avoidance canon must yield to the rule of lenity. That argument disregards the Court's oft-repeated statements that the rule of lenity is a tool of last resort that applies "only when, after consulting traditional canons of statutory construction," grievous ambiguity remains. *Hayes*, 555 U. S., at 429 (internal quotation marks omitted); see also, *e. g.*, *Ocasio* v. *United States*, 578 U. S. 282, 295, n. 8 (2016) ("after seizing everything from which aid can be derived" (internal quotation marks omitted)); *Muscarello* v. *United States*, 524 U. S. 125, 138 (1998) (same); *United States* v. *Wells*, 519 U. S. 482, 499 (1997) (same); *Reno* v. *Koray*, 515 U. S. 50, 65 (1995) (same); *United States* v. *Shabani*, 513 U. S. 10, 17 (1994) ("after consulting traditional canons of statutory construction"); *Smith* v. *United States*, 508 U. S. 223, 239 (1993) ("after seizing every thing from which aid can be derived" (internal quotation marks and alterations omitted)); *Moskal* v. *United States*, 498 U. S. 103, 108 (1990) ("*after* resort to the language and structure, legislative history, and motivating policies of the statute" (internal quotation marks omitted)); *Callanan* v. *United States*, 364 U. S. 587, 596 (1961) ("at the end of the process of construing what Congress has expressed").

The constitutional avoidance canon is a traditional canon of statutory interpretation. The constitutional avoidance canon is employed to reach a reasonable interpretation of an ambiguous statute. Where, as here, that canon applies and yields such a reasonable interpretation, no grievous ambiguity remains. The rule of lenity has no role to play. Contrary to the Court's assertion, the canon of constitutional

avoidance is not "at war" with the rule of lenity. *Ante*, at 465. The canon of constitutional avoidance precedes the rule of lenity because the rule of lenity comes into play (this Court has said countless times) only "*after* consulting traditional canons of statutory construction." *Hayes*, 555 U. S., at 429 (emphasis added; internal quotation marks omitted). The rule of lenity "comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Callanan*, 364 U. S., at 596.

In addition, the rule of lenity is triggered only in the face of "grievous ambiguity." *Muscarello*, 524 U. S., at 139 (internal quotation marks omitted). To reiterate, § 924(c)(3)(B) is best read to focus on the actual defendant's actual conduct. But to the extent that there is any ambiguity in § 924(c)(3)(B), that ambiguity is far from grievous.

Second, and relatedly, the Court claims that the canon of constitutional avoidance, as a general matter, cannot be relied upon to broaden the scope of a criminal statute, as opposed to narrowing the scope of a criminal statute. And the Court says that the canon cannot be used here because, in the Court's view, relying on the constitutional avoidance canon in this case would expand the scope of § 924(c)(3)(B). I disagree for two independent reasons.

To begin with, that theory seems to come out of nowhere. The Court's novel cabining of the constitutional avoidance canon is not reflected in this Court's precedents. On the contrary, it contradicts several precedents. This Court has applied the constitutional avoidance canon even when avoiding the constitutional problems would have broadened the statute's scope. For example, in *United States* v. *Culbert*, this Court rejected a narrowing construction of the Hobbs Act because that construction would have raised vagueness concerns. 435 U. S. 371, 374 (1978); see also *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 82 (1932); cf. *United States* v. *Grace*, 461 U. S. 171, 176 (1983).

Moreover, the premise of this novel broadening/narrowing theory is flawed. A categorical approach to § 924(c)(3)(B) would not be inherently narrower than a conduct-specific approach. Each approach would sweep in some crimes that the other would not. On the one hand, some crimes that might be deemed categorically violent sometimes may be committed in nonviolent ways. Those crimes would be covered by the categorical approach but not by a conduct-specific approach. On the other hand, some categorically nonviolent crimes are committed in violent ways. Those crimes would not be covered by the categorical approach but would be covered by a conduct-specific approach. See *Johnson*, 576 U. S., at 634–635 (ALITO, J., dissenting).

In sum, the constitutional avoidance canon makes this an especially straightforward case. It is at least fairly possible to read § 924(c)(3)(B) to focus on the actual defendant's actual conduct during the actual crime. End of case.

III

The consequences of the Court's decision today will be severe. By invalidating the substantial-risk prong of § 924(c)(3), the Court's decision will thwart Congress' law enforcement policies, destabilize the criminal justice system, and undermine safety in American communities. If the law required those results, we would have to swallow the consequences. But the law, in my respectful view, does no such thing.

The Court's decision means that people who in the future commit violent crimes with firearms may be able to escape conviction under § 924(c). In enacting § 924(c), Congress sought to keep firearms away from violent criminal situations. Today, the Court invalidates a critical provision designed to achieve that goal. To be sure, many violent crimes still might fall within § 924(c)(3)'s elements clause. But many others might not. When defendants use firearms during conspiracies to commit robbery, arsons, attempted carjackings, and kidnapings, to name just a few, they might

no longer be subject to prosecution under § 924(c). See, *e. g.*, *Simms*, 914 F. 3d, at 233–234 (conspiracy to commit robbery); *United States* v. *Salas*, 889 F. 3d 681, 683–684 (CA10 2018) (arson); *United States* v. *Jenkins*, 849 F. 3d 390, 393 (CA7 2017) (kidnaping).

To get a flavor of the offenders who will now potentially avoid conviction under § 924(c), consider a sample of those offenders who have been convicted under § 924(c)(3)'s substantial-risk prong:

- One defendant committed assault with intent to commit murder. The defendant shot his wife multiple times while the couple was camping in Buffalo River National Park. See *United States* v. *Prickett*, 839 F. 3d 697, 698 (CA8 2016).
- One defendant committed arson. The defendant used a molotov cocktail to firebomb the Irish Ink Tattoo Shop. See *Salas*, 889 F. 3d, at 683; *United States* v. *Salazar*, 2014 WL 12788997, *1 (NM, Aug. 14, 2014).
- One defendant and others kidnaped a man who they believed had stolen money and an Xbox from the defendant. They beat the man severely and threatened to kill him. See Pet. for Cert. in *United States* v. *Jenkins*, O. T. 2017, No. 17–97, p. 2.
- One defendant committed conspiracy to commit robbery. The defendant and his co-conspirators planned to steal Percocet and cash from a man they thought was a drug dealer. Armed with a pistol and a crowbar, they broke into the man's home by shattering a sliding glass door and found three men there. One of the defendant's co-conspirators attacked all three men with the crowbar, and the defendant threatened the men with a pistol multiple times. See *United States* v. *Douglas*, 907 F. 3d 1, 4–5 (CA1 2018).
- One defendant committed attempted carjacking. Armed with guns and baseball bats, the defendant and her co-conspirators robbed a grocery store and carjacked two

vehicles, pistol whipping the owner of one of the vehicles in the process. They then attempted to carjack a third vehicle. They approached a family getting out of a minivan and demanded the keys. One of the defendant's co-conspirators hit a 13-year-old girl in the mouth with a baseball bat. Another shot an AK–47 at the girl's family. See *Ovalles*, 905 F. 3d, at 1235.

- One defendant operated multiple houses of prostitution in Annapolis. The defendant threatened perceived competitors with violence. He also beat and threatened women, sometimes to compel them to engage in prostitution. See *United States* v. *Fuertes*, 805 F. 3d 485, 490–492 (CA4 2015).
- One defendant committed conspiracy to commit robbery. In the middle of the night, the defendant and a co-conspirator crawled into a McDonald's through the drive-through window. The defendant pointed a gun at the restaurant's manager and attempted to hit another employee. The defendant demanded money, and the manager complied. The defendant then removed the money from the cash drawer, pistol whipped the manager, threw the cash drawer at the other employee, and fled the scene along with his co-conspirators and $1,100. See *Simms*, 914 F. 3d, at 232.
- One defendant committed conspiracy to commit robbery. The defendant and his co-conspirators committed a string of armed robberies of small businesses. During the robberies, they wore masks and gloves. They were armed with guns, knives, and baseball bats. They injured several people during the course of their robberies, breaking bones, drawing blood, and knocking people out. They also shot and killed one of their victims point blank. See *Barrett*, 903 F. 3d, at 170, 184.

Those real-life stories highlight a second unfortunate consequence of the Court's decision. Many offenders who have

already committed violent crimes with firearms—and who have already been convicted under § 924(c)—may be released early from prison. The Court's decision will apply to all defendants whose convictions are not yet final on direct review and who preserved the argument. With the benefit of this Court's decision, many dangerous offenders who received lengthy prison sentences as a result of their violent conduct might walk out of prison early. And who knows whether the ruling will be retroactive? Courts will be inundated with collateral-review petitions from some of the most dangerous federal offenders in America. As Judge Niemeyer wrote in his separate opinion in the Fourth Circuit, "thousands of § 924(c)(1) convictions will unnecessarily be challenged as premised on what the majority today concludes is an unconstitutionally vague provision, even though the parties in those cases had little difficulty understanding, enforcing, or defending the § 924(c)(1) charges at issue." *Simms*, 914 F. 3d, at 264.

Moreover, defendants who successfully challenge their § 924(c) convictions will not merely be resentenced. Rather, their § 924(c) convictions will be thrown out altogether. That is because, to restate an obvious point, § 924(c) defines a substantive criminal offense. To be sure, the § 924(c) defendants may also be serving other sentences for other convictions (for instance, if they were convicted of and sentenced for the underlying crime of violence). But with the benefit of the Court's decision, they may be able to get their § 924(c) convictions tossed and lop off years—potentially decades—from their total prison time.

All because the Court thinks that § 924(c)(3)(B) *unambiguously* compels a focus on the imagined conduct of a hypothetical defendant rather than on the actual conduct of the actual defendant. That analysis is not persuasive, especially in light of the constitutional avoidance doctrine. It is true that the Government once advocated for a categorical approach. But in the early years after Congress added a "crime of vio-

lence" definition to § 924(c), before courts settled on a categorical approach, the Government correctly argued for a conduct-specific approach to the substantial-risk prong. See, *e. g.*, *United States* v. *Cruz*, 805 F. 2d 1464, 1469 (CA11 1986). The Government later changed its tune only after the courts settled on a categorical approach—at a time when it did not matter for constitutional vagueness purposes, before *Johnson* and *Dimaya*. In any event, the question is what to do now after *Johnson* and *Dimaya*. The answer should not be hard. To quote Judge William Pryor, writing for five judges in the Eleventh Circuit, how "did we ever reach the point where" we "must debate whether a carjacking in which an assailant struck a 13-year-old girl in the mouth with a baseball bat and a cohort fired an AK–47 at her family is a crime of violence? It's nuts." *Ovalles*, 905 F. 3d, at 1253 (concurring opinion).

To be sure, the consequences cannot change our understanding of the law. But when the consequences are this bad, it is useful to double-check the work. And double-checking here, in my view, reveals several problems: relying on cases from the prior-conviction context whose rationales do not apply in this current-offense context; not fully accounting for the long tradition of substantial-risk criminal statutes; not reading the words of the statute in context and consistent with precedents such as *Hayes*; and then, perhaps most problematically, misapplying the longstanding constitutional avoidance canon. After double-checking, it should be evident that the law does not compel those serious consequences. I am not persuaded that the Court can blame this decision on Congress. The Court has a way out, if it wants a way out.

* * *

The Court usually reads statutes with a presumption of rationality and a presumption of constitutionality. Instead of reading § 924(c)(3)(B) to ensure that it is constitutional, the Court reads § 924(c)(3)(B) in a way that makes it unconstitu-

tional. The bedrock principle that the Court interprets ambiguous statutes to avoid unconstitutionality is seemingly transformed into a principle of interpreting ambiguous statutes to lead to unconstitutionality.

I respect and entirely understand how the Court got here. *Johnson* and *Dimaya* were earth-rattling decisions. But we should not follow *Johnson* and *Dimaya* off the constitutional cliff in this different § 924(c) context. Unlike the statutes at issue in *Johnson* and *Dimaya*, this statute is not a prior-conviction statute. This statute operates entirely in the present and is not remotely vague. I respectfully dissent.

Syllabus

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION *v.* THOMAS, EXECUTIVE DIRECTOR OF THE TENNESSEE ALCOHOLIC BEVERAGE COMMISSION, ET AL.

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

No. 18–96. Argued January 16, 2019—Decided June 26, 2019

Tennessee law imposes durational-residency requirements on persons and companies wishing to operate retail liquor stores, requiring applicants for an initial license to have resided in the State for the prior two years; requiring an applicant for renewal of a license to reside in the State for 10 consecutive years; and providing that a corporation cannot obtain a license unless all of its stockholders are residents. Following the state attorney general's opinion that the residency requirements discriminated against out-of-state economic interests in violation of the Commerce Clause, the Tennessee Alcoholic Beverage Commission (TABC) declined to enforce the requirements.

Two businesses that did not meet the residency requirements (both respondents here) applied for licenses to own and operate liquor stores in Tennessee. Petitioner Tennessee Wine and Spirits Retailers Association (Association)—a trade association of in-state liquor stores—threatened to sue the TABC if it granted the licenses, so the TABC's executive director (also a respondent) filed a declaratory judgment action in state court to settle the question of the residency requirements' constitutionality. The case was removed to Federal District Court, which found the requirements unconstitutional. The State declined to appeal, but the Association took the case to the Sixth Circuit. It affirmed, concluding that the provisions violated the Commerce Clause. The Association petitioned for certiorari only with respect to the Sixth Circuit's decision to invalidate the 2-year residency requirement applicable to initial liquor store license applicants.

Held: Tennessee's 2-year durational-residency requirement applicable to retail liquor store license applicants violates the Commerce Clause and is not saved by the Twenty-first Amendment. Pp. 514–543.

(a) The Commerce Clause by its own force restricts state protectionism. Removing state trade barriers was a principal reason for the adoption of the Constitution, and at this point no provision other than the Commerce Clause could easily do that job. The Court has long

emphasized the connection between the trade barriers that prompted the call for a new Constitution and its dormant Commerce Clause jurisprudence. See *Guy* v. *Baltimore*, 100 U. S. 434, 440; *Granholm* v. *Heald*, 544 U. S. 460, 472. Pp. 514–518.

(b) Under the dormant Commerce Clause cases, a state law that discriminates against out-of-state goods or nonresident economic actors can be sustained only on a showing that it is narrowly tailored to "advanc[e] a legitimate local purpose." *Department of Revenue of Ky.* v. *Davis*, 553 U. S. 328, 338. Tennessee's 2-year residency requirement plainly favors Tennesseans over nonresidents. P. 518.

(c) Because the 2-year residency requirement applies to the sale of alcohol, however, it must be evaluated in light of § 2 of the Twenty-first Amendment. Pp. 518–528.

(1) Section 2's broad text—the "transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited"—could be read to prohibit the transportation or importation of alcoholic beverages in violation of *any* state law. But the Court has declined to adopt that reading, instead interpreting § 2 as one part of a unified constitutional scheme and in light of the provision's history. History teaches that § 2's thrust is to "constitutionaliz[e]" the basic structure of federal-state alcohol regulatory authority that prevailed prior to the Eighteenth Amendment's adoption. *Craig* v. *Boren*, 429 U. S. 190, 206. Pp. 518–520.

(2) This Court invalidated many state liquor regulations before the Eighteenth Amendment's ratification, and by the late 19th century it had concluded that the Commerce Clause both prevented States from discriminating "against citizens and products of other States," *Walling* v. *Michigan*, 116 U. S. 446, 460, and "prevented States from passing facially neutral laws that placed an impermissible burden on interstate commerce," *Granholm*, 544 U. S., at 477. State bans on the production and sale of alcohol within state borders were rendered ineffective by the "original-package doctrine," which made "goods shipped in interstate commerce . . . immune from state regulation while in their original package." *Ibid.* Congress responded by passing the Wilson Act, which provided that all alcoholic beverages "transported into any State or Territory" were subject "upon arrival" to the same restrictions imposed by the State "in the exercise of its police powers" over alcohol produced in the State, *i. e.*, bona fide health and safety measures. This Court, however, narrowly construed the term "arrival" in the Wilson Act as arrival to the consignee rather than arrival within the State's borders, which allowed consumers to continue to receive direct shipments of alcohol from out of State. Congress passed the Webb-Kenyon Act to close that

loophole. But, as this Court's decision in *Granholm* determined, the Webb-Kenyon Act was not intended to override the rule barring States from discriminating against out-of-state citizens and products, nor the traditional limits on state police power. Thereafter, the Eighteenth Amendment was ratified, prohibiting the manufacture, sale, transportation, and importation of alcoholic beverages across the country. Pp. 520–528.

(d) Section 2 of the Twenty-first Amendment grants the States latitude with respect to the regulation of alcohol, but it does not allow the States to violate the "nondiscrimination principle" that was a central feature of the regulatory regime that the provision was meant to constitutionalize. *Granholm*, *supra*, at 487. Pp. 528–538.

(1) The Twenty-first Amendment ended nationwide Prohibition, but § 2 gave each State the option of banning alcohol if its citizens so chose. Its text "closely follow[ed]" the Webb-Kenyon Act's operative language, suggesting that it was meant to have a similar meaning. *Craig* v. *Boren*, 429 U. S., at 205–206. The provision was meant to "constitutionaliz[e]" the basic understanding of the extent of the States' power to regulate alcohol that prevailed before Prohibition. *Id.*, at 206. And during that period, the Commerce Clause did not permit the States to impose protectionist measures clothed as police-power regulations. Pp. 528–529.

(2) At first, the Court did not take account of this history. But it has since recognized that § 2 cannot be interpreted to override all previously adopted constitutional provisions, scrutinizing state alcohol laws for compliance with, *e. g.*, the Free Speech Clause, *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S. 484; the Establishment Clause, *Larkin* v. *Grendel's Den, Inc.*, 459 U. S. 116; the Equal Protection Clause, *Craig* v. *Boren*, *supra*; the Due Process Clause, *Wisconsin* v. *Constantineau*, 400 U. S. 433; and the Import-Export Clause, *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U. S. 341. Section 2 also does not entirely supersede Congress's power to regulate commerce, see, *e. g.*, *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324, 333–334, nor is its aim to permit States to restrict the importation of alcohol for purely protectionist purposes, see, *e. g.*, *Granholm*, *supra*, at 486–487. Pp. 529–531.

(3) Protectionism is not a legitimate § 2 interest shielding state alcohol laws that burden interstate commerce. *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263, 276. The Court has applied that principle to invalidate state alcohol laws aimed at giving a competitive advantage to in-state businesses. See, *e. g.*, *id.*, at 274. Pp. 531–533.

(4) The Association and the dissent's overly broad understanding of § 2 is unpersuasive. They claim that, while § 2 does not give the

States the power to discriminate against out-of-state alcohol *products and producers*, a different rule applies to state laws regulating in-state alcohol distribution. There is no sound basis for this distinction. The Association and the dissent also claim that discriminatory distribution laws, including in-state residency requirements, long predate Prohibition and were adopted by many States following the Twenty-first Amendment's ratification. State laws adopted soon after ratification, however, may have been based on an overly expansive interpretation of § 2 that can no longer be defended, and many state laws adopted before Prohibition were never tested in this Court. Nor have States historically enjoyed absolute authority to police alcohol within their borders. Section 2 allows each State leeway to enact measures to address the public health and safety effects of alcohol use and other legitimate interests, but it does not license the States to adopt protectionist measures with no demonstrable connection to those interests. Pp. 533–538.

(e) Applying the appropriate § 2 analysis here, Tennessee's 2-year residency requirement cannot be sustained. The provision expressly discriminates against nonresidents and has at best a highly attenuated relationship to public health or safety. The Association claims that the requirement ensures that retailers are subject to process in state courts, but does not explain why that objective could not easily be achieved by, *e. g.*, requiring a nonresident to designate an agent to receive process. Similarly unpersuasive is its claim that the requirement allows the State to ensure that only law-abiding and responsible applicants receive licenses. The State can thoroughly investigate applicants without requiring them to reside in the State for two years, and in any event the requirement poorly serves that goal since the TABC would have no reason to investigate a nonresident who moves to the State with the intention of applying for a license once the 2-year period ends. Nor is the residency requirement needed to enable the State to maintain oversight over liquor store operators; they can be monitored through any number of nondiscriminatory means, including on-site inspections, audits, and the like. There is also no evidence to support the claim that the requirement would promote responsible alcohol consumption because retailers who know the communities they serve will be more likely to engage in responsible sales practices. The residency requirement is poorly designed for such a purpose, and the State could better serve the goal without discriminating against nonresidents by, *e. g.*, limiting both the number of retail licenses and the amount of alcohol that may be sold to an individual, mandating more extensive training for managers and employees, or monitoring retailer practices and taking action against those who violate the law. Pp. 539–543.

883 F. 3d 608, affirmed.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, SOTOMAYOR, KAGAN, and KAVANAUGH, JJ., joined. GORSUCH, J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 544.

Shay Dvoretzky argued the cause for petitioner. With him on the briefs were *Jeffrey R. Johnson*, *Amanda K. Rice*, *Richard L. Colbert*, and *Benjamin M. Flowers*.

David L. Franklin, Solicitor General of Illinois, argued the cause for Illinois et al. as *amici curiae* in support of petitioner. With him on the brief were *Lisa Madigan*, Attorney General of Illinois, *Brett E. Legner*, Deputy Solicitor General, and *Sarah A. Hunger* and *Benjamin F. Jacobson*, Assistant Attorneys General, and by the Attorneys General for their respective jurisdictions as follows: *Steve Marshall* of Alabama, *Leslie Rutledge* of Arkansas, *Cynthia H. Coffman* of Colorado, *George Jepsen* of Connecticut, *Matthew P. Denn* of Delaware, *Karl A. Racine* of the District of Columbia, *Pamela Jo Bondi* of Florida, *Christopher M. Carr* of Georgia, *Lawrence G. Wasden* of Idaho, *Curtis T. Hill, Jr.*, of Indiana, *Tom Miller* of Iowa, *Derek Schmidt* of Kansas, *Andy Beshear* of Kentucky, *Jeff Landry* of Louisiana, *Maura Healey* of Massachusetts, *Bill Schuette* of Michigan, *Jim Hood* of Mississippi, *Tim Fox* of Montana, *Doug Peterson* of Nebraska, *Barbara D. Underwood* of New York, *Joshua H. Stein* of North Carolina, *Wayne Stenehjem* of North Dakota, *Michael DeWine* of Ohio, *Mike Hunter* of Oklahoma, *Josh Shapiro* of Pennsylvania, *Peter F. Kilmartin* of Rhode Island, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Ken Paxton* of Texas, *Sean D. Reyes* of Utah, *Thomas J. Donovan, Jr.*, of Vermont, *Mark R. Herring* of Virginia, *Robert W. Ferguson* of Washington, *Patrick Morrisey* of West Virginia, and *Brad Schimel* of Wisconsin.

Carter G. Phillips argued the cause for respondents. With him on the brief for respondent Tennessee Fine Wines and Spirits, LLC, were *Jacqueline G. Cooper*, *William J. Murphy*, and *John J. Connolly*. On the brief for respondent

Affluere Investments, Inc., were *Michael E. Bindas*, *Dana Berliner*, and *Jeffrey H. Redfern*.*

JUSTICE ALITO delivered the opinion of the Court.

The State of Tennessee imposes demanding durational-residency requirements on all individuals and businesses seeking to obtain or renew a license to operate a liquor store. One provision precludes the renewal of a license unless the applicant has resided in the State for 10 consecutive years. Another provides that a corporation cannot obtain a license unless all of its stockholders are residents. The Court of Appeals for the Sixth Circuit struck down these provisions as blatant violations of the Commerce Clause, and neither petitioner—an association of Tennessee liquor retailers—nor the State itself defends them in this Court.

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*Briefs of *amici curiae* urging reversal were filed for American Beverage Licensees by *Scott A. Keller*; for the Center for Alcohol Policy by *John C. Nieman, Jr.*; for Consumer Action by *David Balto*; for KHBC Partners II, Ltd., by *Harry Herzog*; for Major Brands, Inc., by *Richard B. Walsh, Jr.*; for the Michigan Beer and Wine Wholesalers Association by *Anthony S. Kogut* and *Curtis R. Hadley*; for the National Alcohol Beverage Control Association et al. by *Rachel Bloomekatz* and *J. Neal Insley*; for the National Beer Wholesalers Association by *Michael D. Madigan*, *Brandt Erwin*, and *Paul E. Pisano*; for the National Conference of State Legislatures et al. by *Richard A. Simpson*, *Tara L. Ward*, and *Lisa E. Soronen*; for the Open Markets Institute by *John Laughlin Carter*; for the U. S. Alcohol Policy Alliance et al. by *Allison L. Ehlert*; for Wine and Spirits Wholesalers of America, Inc., by *Miguel A. Estrada*, *Lucas C. Townsend*, *Jo Moak*, and *Jacob Hegeman*; and for Wine and Spirits Wholesalers of Tennessee, Inc., by *Henry E. Hildebrand III*.

Briefs of *amici curiae* urging affirmance were filed for the Cato Institute by *Ilya Shapiro*; for Law and Economics Scholars by *Andrew M. Grossman*; for Law Professors by *Jeremy M. Bylund*; for the National Association of Wine Retailers by *Paul D. Clement*, *Erin E. Murphy*, and *Matthew D. Rowen*; for the Pacific Legal Foundation by *Deborah J. La Fetra*; for the Retail Litigation Center, Inc., by *Kelsi Brown Corkran* and *Deborah R. White*; for Alan B. Morrison by *Mr. Morrison*, *pro se*; and for 81 Wine Consumers by *James A. Tanford* and *Robert D. Epstein*.

The Sixth Circuit also invalidated a provision requiring applicants for an initial license to have resided in the State for the prior two years, and petitioner does challenge that decision. But while this requirement is less extreme than the others that the Sixth Circuit found to be unconstitutional, we now hold that it also violates the Commerce Clause and is not shielded by § 2 of the Twenty-first Amendment. Section 2 was adopted as part of the scheme that ended prohibition on the national level. It gives each State leeway in choosing the alcohol-related public health and safety measures that its citizens find desirable. But § 2 is not a license to impose all manner of protectionist restrictions on commerce in alcoholic beverages. Because Tennessee's 2-year residency requirement for retail license applicants blatantly favors the State's residents and has little relationship to public health and safety, it is unconstitutional.

I

A

Tennessee, like many other States, requires alcoholic beverages distributed in the State to pass through a specified three-tiered system.[1] Acting through the Tennessee Alcoholic Beverage Commission (TABC), the State issues different types of licenses to producers, wholesalers, and retailers of alcoholic beverages. See Tenn. Code Ann. § 57–3–201 (2018). Producers may sell only to licensed wholesalers; wholesalers may sell only to licensed retailers or other wholesalers; and only licensed retailers may sell to consumers.

[1] For purposes of the provisions at issue here, Tennessee law defines "alcoholic beverage[s]" to include "spirits, liquor, wine, high alcohol content beer," and "any liquid product containing distilled alcohol capable of being consumed by a human being, manufactured or made with distilled alcohol, regardless of alcohol content," Tenn. Code Ann. § 57–3–101(a)(1)(A) (2018). This definition excludes "beer," which is defined and regulated by separate statutory provisions, see § 57–5–101(b).

§ 57–3–404. No person may lawfully participate in the sale of alcohol without the appropriate license. See, *e. g.*, § 57–3–406.

Included in the Tennessee scheme are onerous durational-residency requirements for all persons and companies wishing to operate "retail package stores" that sell alcoholic beverages for off-premises consumption (hereinafter liquor stores). See § 57–3–204(a). To obtain an initial retail license, an individual must demonstrate that he or she has "been a bona fide resident" of the State for the previous two years. § 57–3–204(b)(2)(A). And to renew such a license—which Tennessee law requires after only one year of operation—an individual must show continuous residency in the State for a period of 10 consecutive years. *Ibid.*

The rule for corporations is also extraordinarily restrictive. A corporation cannot get a retail license unless all of its officers, directors, and owners of capital stock satisfy the durational-residency requirements applicable to individuals. § 57–3–204(b)(3). In practice, this means that no corporation whose stock is publicly traded may operate a liquor store in the State.

In 2012, the Tennessee attorney general was asked whether the State's durational-residency requirements violate the Commerce Clause, and his answer was that the requirements constituted "trade restraints and barriers that impermissibly discriminate against interstate commerce." App. to Brief in Opposition 11a; see also *id.*, at 12a (citing *Jelovsek* v. *Bredesen*, 545 F. 3d 431, 435 (CA6 2008)). In light of that opinion, the TABC stopped enforcing the requirements against new applicants. See App. 51, ¶9; *id.*, at 76, ¶10.

The Tennessee General Assembly responded by amending the relevant laws to include a statement of legislative intent. Citing the alcohol content of the beverages sold in liquor stores, the Assembly found that protection of "the health, safety and welfare" of Tennesseans called for "a higher degree of oversight, control and accountability for individuals

involved in the ownership, management and control" of such outlets. § 57–3–204(b)(4).

After the amendments became law, the attorney general was again asked about the constitutionality of the durational-residency requirements, but his answer was the same as before. See App. to Brief in Opposition 13a. Consequently, the TABC continued its practice of nonenforcement.

B

In 2016, respondents Tennessee Fine Wines and Spirits, LLC, dba Total Wine Spirits Beer & More (Total Wine), and Affluere Investments, Inc., dba Kimbrough Fine Wine & Spirits (Affluere), applied for licenses to own and operate liquor stores in Tennessee. At the time, neither Total Wine nor Affluere satisfied the durational-residency requirements. Total Wine was formed as a Tennessee limited liability company but is owned by residents of Maryland, Brief for Respondent Total Wine 10; App. 51, ¶¶4–5, and Affluere was owned and controlled by two individuals who, by the time their application was considered, had only recently moved to the State, see *id.*, at 11–12, 20, 22.

TABC staff recommended approval of the applications, but petitioner Tennessee Wine and Spirits Retailers Association (Association)—a trade association of in-state liquor stores—threatened to sue the TABC if it granted them. *Id.*, at 15, ¶17. The TABC's executive director (a respondent here) filed a declaratory judgment action in state court to settle the question of the residency requirements' constitutionality. *Id.*, at 17.

The case was removed to the United States District Court for the Middle District of Tennessee, and that court, relying on our decision in *Granholm* v. *Heald*, 544 U. S. 460 (2005), concluded that the requirements are unconstitutional. *Byrd* v. *Tennessee Wine and Spirits Retailers Assn.*, 259 F. Supp. 3d 785, 797 (2017). The State declined to appeal, and Total Wine and Affluere were issued licenses.

The Association, however, took the case to the Court of Appeals for the Sixth Circuit, where a divided panel affirmed. See *Byrd* v. *Tennessee Wine and Spirits Retailers Assn.*, 883 F. 3d 608 (2018). All three judges acknowledged that the Tennessee residency requirements facially discriminate against out-of-state economic interests. See *id.*, at 624; *id.*, at 634 (Sutton, J., concurring in part and dissenting in part). And all three also agreed that neither the 10-year residency requirement for license renewals nor the 100-percent-resident shareholder requirement is constitutional under this Court's Twenty-first Amendment and dormant Commerce Clause precedents. See *id.*, at 625–626; *id.*, at 635 (opinion of Sutton, J.).

The panel divided, however, over the constitutionality of the 2-year residency requirement for individuals seeking initial retail licenses, as well as the provision applying those requirements to officers and directors of corporate applicants. Applying standard dormant Commerce Clause scrutiny, the majority struck down the challenged restrictions, reasoning that they facially discriminate against interstate commerce and that the interests they are claimed to further can be adequately served through reasonable, nondiscriminatory alternatives. *Id.*, at 623–626. The dissent disagreed, reading §2 of the Twenty-first Amendment to grant States "'virtually' limitless" authority to regulate the in-state distribution of alcohol, the only exception being for laws that "serve no purpose besides 'economic protectionism.'" *Id.*, at 633 (quoting *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263, 276 (1984)). Applying that highly deferential standard, the dissent would have upheld the 2-year residency requirement, as well as the provision applying that requirement to all officers and directors of corporate applicants. The dissent argued that these provisions help to promote the State's interests in "responsible consumption" of alcohol and "orderly liquor markets." 883 F. 3d, at 633.

The Association filed a petition for a writ of certiorari challenging the decision on the 2-year residency requirement for

initial licenses. Tennessee declined to seek certiorari but filed a letter with the Court expressing agreement with the Association's position.[2] We granted certiorari, 585 U. S. 1058 (2018), in light of the disagreement among the Courts of Appeals about how to reconcile our modern Twenty-first Amendment and dormant Commerce Clause precedents. See 883 F. 3d, at 616 (collecting cases).

II

A

The Court of Appeals held that Tennessee's 2-year residency requirement violates the Commerce Clause, which provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, cl. 3. "Although the Clause is framed as a positive grant of power to Congress," *Comptroller of Treasury of Md.* v. *Wynne*, 575 U. S. 542, 548 (2015), we have long held that this Clause also prohibits state laws that unduly restrict interstate commerce. See, *e. g.*, *id.*, at 548–549; *Philadelphia* v. *New Jersey*, 437 U. S. 617, 623–624 (1978); *Cooley* v. *Board of Wardens of Port of Philadelphia ex rel. Soc. for Relief of Distressed Pilots*, 12 How. 299, 318–319 (1852); *Willson* v. *Black Bird Creek Marsh Co.*, 2 Pet. 245, 252 (1829). "This 'negative' aspect of the Commerce Clause" prevents the States from adopting protectionist measures and thus preserves a national market for goods and services. *New Energy Co. of Ind.* v. *Limbach*, 486 U. S. 269, 273 (1988).

This interpretation, generally known as "the dormant Commerce Clause," has a long and complicated history. Its roots go back as far as *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824), where Chief Justice Marshall found that a version of the dormant Commerce Clause argument had "great force." *Id.*, at

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[2] See Letter from H. Slatery III, Tenn. Atty. Gen., to S. Harris, Clerk of Court (Nov. 13, 2018).

209. His successor disagreed, see *License Cases*, 5 How. 504, 578–579 (1847) (Taney, C. J.), but by the latter half of the 19th century the dormant Commerce Clause was firmly established, see, *e. g.*, *Case of the State Freight Tax*, 15 Wall. 232, 279–280 (1873), and it played an important role in the economic history of our Nation, see Cushman, Formalism and Realism in Commerce Clause Jurisprudence, 67 U. Chi. L. Rev. 1089, 1107 (2000).

In recent years, some Members of the Court have authored vigorous and thoughtful critiques of this interpretation. See, *e. g.*, *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U. S. 564, 609–620 (1997) (THOMAS, J., dissenting); *Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, 483 U. S. 232, 259–265 (1987) (Scalia, J., concurring in part and dissenting in part); cf. *post*, at 545 (GORSUCH, J., dissenting) (deeming doctrine "peculiar"). But the proposition that the Commerce Clause by its own force restricts state protectionism is deeply rooted in our case law. And without the dormant Commerce Clause, we would be left with a constitutional scheme that those who framed and ratified the Constitution would surely find surprising.

That is so because removing state trade barriers was a principal reason for the adoption of the Constitution. Under the Articles of Confederation, States notoriously obstructed the interstate shipment of goods. "Interference with the arteries of commerce was cutting off the very life-blood of the nation." M. Farrand, The Framing of the Constitution of the United States 7 (1913). The Annapolis Convention of 1786 was convened to address this critical problem, and it culminated in a call for the Philadelphia Convention that framed the Constitution in the summer of 1787.[3]

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[3] See, *e. g.*, R. Beeman, Plain, Honest Men: The Making of the American Constitution 18–20 (2009); D. Stewart, The Summer of 1787: The Men Who Invented the Constitution 9–10 (2007); M. Farrand, The Framing of the Constitution of the United States 7–10 (1913).

At that Convention, discussion of the power to regulate interstate commerce was almost uniformly linked to the removal of state trade barriers, see Abel, The Commerce Clause in the Constitutional Convention and in Contemporary Comment, 25 Minn. L. Rev. 432, 470–471 (1941), and when the Constitution was sent to the state conventions, fostering free trade among the States was prominently cited as a reason for ratification. In The Federalist No. 7, Hamilton argued that state protectionism could lead to conflict among the States, see The Federalist No. 7, pp. 62–63 (C. Rossiter ed. 1961), and in No. 11, he touted the benefits of a free national market, *id.*, at 88–89. In The Federalist No. 42, Madison sounded a similar theme. *Id.*, at 267–268.

In light of this background, it would be strange if the Constitution contained no provision curbing state protectionism, and at this point in the Court's history, no provision other than the Commerce Clause could easily do the job. The only other provisions that the Framers might have thought would fill that role, at least in part, are the Import-Export Clause, Art. I, § 10, cl. 2, which generally prohibits a State from "lay-[ing] any Imposts or Duties on Imports or Exports," and the Privileges and Immunities Clause, Art. IV, § 2, which provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." But the Import-Export Clause was long ago held to refer only to international trade. See *Woodruff* v. *Parham*, 8 Wall. 123, 136–137 (1869). And the Privileges and Immunities Clause has been interpreted not to protect corporations, *Western & Southern Life Ins. Co.* v. *State Bd. of Equalization of Cal.*, 451 U. S. 648, 656 (1981) (citing *Hemphill* v. *Orloff*, 277 U. S. 537, 548–550 (1928)), and may not guard against certain discrimination scrutinized under the dormant Commerce Clause, see Denning, Why the Privileges and Immunities Clause of Article IV Cannot Replace the Dormant Commerce Clause Doctrine, 88 Minn. L. Rev. 384, 393–397 (2003). So if we accept the Court's estab-

lished interpretation of those provisions, that leaves the Commerce Clause as the primary safeguard against state protectionism.[4]

It is not surprising, then, that our cases have long emphasized the connection between the trade barriers that prompted the call for a new Constitution and our dormant Commerce Clause jurisprudence. In *Guy* v. *Baltimore*, 100 U. S. 434, 440 (1880), for example, the Court wrote that state protectionist measures, "if maintained by this court, would ultimately bring our commerce to that 'oppressed and degraded state,' existing at the adoption of the present Constitution, when the helpless, inadequate Confederation was abandoned and a national government instituted." More recently, we observed that our dormant Commerce Clause cases reflect 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.'"

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[4] Before *Woodruff*, there was authority suggesting that the Import-Export Clause applied to trade between States. See *Brown* v. *Maryland*, 12 Wheat. 419, 449 (1827) (Marshall, C. J.); *Almy* v. *California*, 24 How. 169 (1861). And more recently *Woodruff* has been questioned. See *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U. S. 564, 624–636 (1997) (THOMAS, J., dissenting). But one way or the other, it would grossly distort the Constitution to hold that it provides no protection against a broad swath of state protectionist measures. Even at the time of the adoption of the Constitution, it would have been asking a lot to require that Congress pass a law striking down every protectionist measure that a State or unit of local government chose to enact. Cf. Friedman & Deacon, A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause, 97 Va. L. Rev. 1877, 1898–1903 (2011); 3 The Records of the Federal Convention of 1787, p. 549 (M. Farrand ed. 1911) (the Virginia Plan's proposal of a congressional negative was "justly abandoned, as, apart from other objections, it was not practicable among so many States, increasing in number, and enacting, each of them, so many laws").

Granholm, 544 U. S., at 472 (quoting *Hughes* v. *Oklahoma*, 441 U. S. 322, 325–326 (1979)).

In light of this history and our established case law, we reiterate that the Commerce Clause by its own force restricts state protectionism.

B

Under our dormant Commerce Clause cases, if a state law discriminates against out-of-state goods or nonresident economic actors, the law can be sustained only on a showing that it is narrowly tailored to "'advanc[e] a legitimate local purpose.'" *Department of Revenue of Ky.* v. *Davis*, 553 U. S. 328, 338 (2008). See also, *e. g.*, *Oregon Waste Systems, Inc.* v. *Department of Environmental Quality of Ore.*, 511 U. S. 93, 100–101 (1994); *Maine* v. *Taylor*, 477 U. S. 131, 138 (1986).

Tennessee's 2-year durational-residency requirement plainly favors Tennesseans over nonresidents, and neither the Association nor the dissent below defends that requirement under the standard that would be triggered if the requirement applied to a person wishing to operate a retail store that sells a commodity other than alcohol. See 883 F. 3d, at 626. Instead, their arguments are based on §2 of the Twenty-first Amendment, to which we will now turn.

III

A

Section 2 of the Twenty-first Amendment provides as follows:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Although the interpretation of any provision of the Constitution must begin with a consideration of the literal meaning of that particular provision, reading §2 to prohibit the transportation or importation of alcoholic beverages in violation

of *any* state law[5] would lead to absurd results that the provision cannot have been meant to produce. Under the established rule that a later adopted provision takes precedence over an earlier, conflicting provision of equal stature, see, *e. g.*, *United States* v. *Tynen*, 11 Wall. 88, 92 (1871); *Posadas* v. *National City Bank*, 296 U. S. 497, 503 (1936); A. Scalia & B. Garner, Reading Law 327–328 (2012); 1A N. Singer & J. Singer, Sutherland on Statutory Construction § 23:9 (7th ed. 2009), such a reading of § 2 would mean that the provision would trump any irreconcilable provision of the original Constitution, the Bill of Rights, the Fourteenth Amendment, and every other constitutional provision predating ratification of the Twenty-first Amendment in 1933. This would mean, among other things, that a state law prohibiting the importation of alcohol for sale to persons of a particular race, religion, or sex would be immunized from challenge under the Equal Protection Clause. Similarly, if a state law prohibited the importation of alcohol for sale by proprietors who had expressed an unpopular point of view on an important public issue, the First Amendment would provide no protection. If a State imposed a duty on the importation of foreign wine or spirits, the Import-Export Clause would have to give way. If a state law retroactively made it a crime to have bought or sold imported alcohol under specified conditions, the *Ex Post Facto* Clause would provide no barrier to conviction. The list goes on.

Despite the ostensibly broad text of § 2, no one now contends that the provision must be interpreted in this way. Instead, we have held that § 2 must be viewed as one part

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[5] As we will explain, § 2 followed the wording of the 1913 Webb-Kenyon Act, ch. 90, 37 Stat. 699, see *Craig* v. *Boren*, 429 U. S. 190, 205–206 (1976), and, given this Court's case law at the time, it went without saying that the only state laws that Congress could protect from constitutional challenge were those that represented the valid exercise of the police power, which was not understood to authorize purely protectionist measures with no bona fide relation to public health or safety. See *infra*, at 521–522, 525–526.

of a unified constitutional scheme. See *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97, 109 (1980); *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324, 331–332 (1964); cf. Scalia & Garner, *supra*, at 167–169, 180–182. In attempting to understand how § 2 and other constitutional provisions work together, we have looked to history for guidance, and history has taught us that the thrust of § 2 is to "constitutionaliz[e]" the basic structure of federal-state alcohol regulatory authority that prevailed prior to the adoption of the Eighteenth Amendment. *Craig* v. *Boren*, 429 U. S. 190, 206 (1976). We therefore examine that history.

B

Throughout the 19th century, social problems attributed to alcohol use prompted waves of state regulation, and these measures were often challenged as violations of various provisions of the Federal Constitution.

One wave of state regulation occurred during the first half of the century. The country's early years were a time of notoriously hard drinking, see D. Okrent, Last Call: The Rise and Fall of Prohibition 7 (2010),[6] and the problems that this engendered prompted States to enact a variety of regulations, including licensing requirements, age restrictions, and Sunday-closing laws. See Byse, Alcoholic Beverage Control Before Repeal, 7 Law & Contemp. Prob. 544, 546–551 (1940).

Three States' alcohol licensing laws came before this Court in 1847 in the *License Cases*, 5 How. 504. The principal claim in those cases was similar to the one now before us; licensing laws enacted in three States were challenged under the Commerce Clause. The Court unanimously rejected those claims, but six Justices authored opinions; no opinion

[6] Between 1780 and 1830, Americans consumed "more alcohol, on an individual basis, than at any other time in the history of the nation," with per capita consumption double that of the modern era. R. Mendelson, From Demon to Darling: A Legal History of Wine in America 11 (2009).

commanded a majority; and the general status of dormant Commerce Clause claims was left uncertain. See 5 C. Swisher, The Taney Period, 1836–64, History of the Supreme Court of the United States 373–374 (1974).

Following the Civil War, the Court considered a steady stream of alcohol-regulation cases. The postwar period saw a great proliferation of saloons,[7] and myriad social problems were attributed to this development. In response, many States passed laws restricting the sale of alcohol. By 1891, six States had banned alcohol production and sale completely. R. Hamm, Shaping the Eighteenth Amendment 25 (1995) (Hamm).

During this period, state laws regulating the alcohol trade were unsuccessfully challenged in this Court on a variety of constitutional grounds. See, *e. g.*, *Mugler* v. *Kansas*, 123 U. S. 623 (1887) (Privileges or Immunities and Due Process Clauses of Fourteenth Amendment); *Beer Co.* v. *Massachusetts*, 97 U. S. 25 (1878) (Contracts Clause); *Bartemeyer* v. *Iowa*, 18 Wall. 129 (1874) (Privileges or Immunities and Due Process Clauses of Fourteenth Amendment). In those decisions, the Court staunchly affirmed the "right of the States," in exercising their "police power," to "protect the health, morals, and safety of their people," but the Court also cautioned that this objective could be pursued only "by regulations that do not interfere with the execution of the powers

[7] By 1872, about 100,000 had sprung up across the country, and by the end of the century, that number had climbed to almost 300,000. *Id.*, at 31. This increase has been linked to the introduction of the English "tied-house" system. Under the tied-house system, an alcohol producer, usually a brewer, would set up saloonkeepers, providing them with premises and equipment, and the saloonkeepers, in exchange, agreed to sell only that producer's products and to meet set sales requirements. *Ibid.*; T. Pegram, Battling Demon Rum: The Struggle for a Dry America, 1800–1933, p. 95 (1998). To meet those requirements, saloonkeepers often encouraged irresponsible drinking. *Id.*, at 97. The three-tiered distribution model was adopted by States at least in large part to preclude this system. See *Arnold's Wines, Inc.* v. *Boyle*, 571 F. 3d 185, 187 (CA2 2009).

of the general government, or violate rights secured by the Constitution of the United States." *Mugler*, 123 U. S., at 659. For that reason, the Court continued, "mere pretences" could not sustain a law regulating alcohol; rather, if "a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." *Id.*, at 661.

Dormant Commerce Clause challenges also reached the Court. States that banned the production and sale of alcohol within their borders found that these laws did not stop residents from consuming alcohol shipped in from other States. To curb that traffic, States passed laws regulating or prohibiting the importation of alcohol, and these enactments were quickly challenged.

By the late 19th century, the Court was firmly of the view that the Commerce Clause by its own force restricts state regulation of interstate commerce. See *Bowman* v. *Chicago & Northwestern R. Co.*, 125 U. S. 465 (1888); *Leisy* v. *Hardin*, 135 U. S. 100 (1890). Dormant Commerce Clause cases from that era "advanced two distinct principles," an understanding of which is critical to gauging the States' pre-Prohibition power to regulate alcohol. *Granholm*, 544 U. S., at 476.

First, the Court held that the Commerce Clause prevented States from discriminating "against the citizens and products of other States," *Walling* v. *Michigan*, 116 U. S. 446, 460 (1886). See also *Scott* v. *Donald*, 165 U. S. 58 (1897); *Tiernan* v. *Rinker*, 102 U. S. 123 (1880). Applying that rule, the *Walling* Court struck down a discriminatory state fee that applied only to those in the business of selling imported alcohol. 116 U. S., at 454, 458. Similarly, in *Scott*, the Court invalidated a law that gave an "unjust preference [to] the

products of the enacting State as against similar products of the other States." 165 U. S., at 101. The Court did not question the States' use of the police power to regulate the alcohol trade but stressed that such regulation must have a "*bona fide*" relation to protecting "'the public health, the public morals or the public safety,'" *id.*, at 91 (quoting *Mugler*, *supra*, at 661), and could not encroach upon Congress's "power to regulate commerce among the several States," *Walling*, *supra*, at 458.

Second, the Court "held that the Commerce Clause prevented States from passing facially neutral laws that placed an impermissible burden on interstate commerce." *Granholm*, 544 U. S., at 477. At the time of these decisions, the "original-package doctrine" defined the outer limits of Congress's authority to regulate interstate commerce. *Ibid.* See *Brown* v. *Maryland*, 12 Wheat. 419 (1827). Under that doctrine, "goods shipped in interstate commerce were immune from state regulation while in their original package," because at that point they had not yet been comingled with the mass of domestic property subject to state jurisdiction. *Granholm*, 544 U. S., at 477; see *id.*, at 477–478 (citing *Vance* v. *W. A. Vandercook Co.*, 170 U. S. 438, 444–445 (1898)). Applying this doctrine to state alcohol laws, the Court struck down an Iowa statute that required importers to obtain special certificates, *Bowman*, 125 U. S., at 499–500, as well as another Iowa law that, with limited exceptions, banned the importation of liquor, *Leisy*, 135 U. S., at 125.

These decisions left dry States "in a bind." *Granholm*, *supra*, at 478. See Rogers, Interstate Commerce in Intoxicating Liquors Before the Webb-Kenyon Act, 4 Va. L. Rev. 174 (1916), 288 (1917) (noting "practical nullification of state laws" by original-package decisions). States could ban the production and sale of alcohol within their borders, but those bans "were ineffective because out-of-state liquor was immune from any state regulation as long as it remained in its

original package." *Granholm*, *supra*, at 478. In effect, the Court's interpretation of the dormant Commerce Clause conferred favored status on out-of-state alcohol, and that hamstrung the dry States' efforts to enforce local prohibition laws. Representatives of those States and temperance advocates thus turned to Congress, which passed two laws to solve the problem.

The first of these was the Wilson Act, enacted in 1890. Ch. 728, 26 Stat. 313, 27 U. S. C. § 121. Named for Senator James F. Wilson of Iowa, whose home State's laws had fallen in *Bowman* and *Leisy*, the Wilson Act aimed to obviate the problem presented by the "original-package" rule. Dormant Commerce Clause restrictions apply only when Congress has not exercised its Commerce Clause power to regulate the matter at issue, cf. *Bowman*, *supra*, at 485; *Leisy*, *supra*, at 123–124, and the strategy of those who favored the Wilson Act was for Congress to eliminate the problem that had surfaced in *Bowman* and *Leisy* by regulating the interstate shipment of alcohol, see Hamm 77–80; Rogers, *supra*, at 194–195. During the late 19th century and early 20th century, Congress enacted laws that entirely prohibited the transportation of certain goods and persons across state lines, and some but not all of these measures were held to be valid exercises of the commerce power. See *Lottery Case*, 188 U. S. 321 (1903) (upholding law prohibiting interstate shipment of lottery tickets); *Hoke* v. *United States*, 227 U. S. 308 (1913) (sustaining Mann Act prohibition on bringing women across state lines for prostitution); *Hammer* v. *Dagenhart*, 247 U. S. 251 (1918) (striking down provision banning interstate shipment of goods produced by child labor).

Unlike these laws, the Wilson Act did not attempt to ban all interstate shipment of alcohol. Its goal was more modest: to leave it up to each State to decide whether to admit alcohol. Its critical provision specified that all alcoholic beverages "transported into any State or Territory" were sub-

ject "upon arrival" to the same restrictions imposed by the State "in the exercise of its police powers" over alcohol produced in the State.[8] Thus, the Wilson Act mandated equal treatment for alcohol produced within and outside a State, not favorable treatment for local products. See *Granholm*, *supra*, at 479 (discussing *Scott*, 165 U. S., at 100–101). And the only state laws that it attempted to shield were those enacted by a State "in the exercise of its police powers," which, as we have seen, applied only to bona fide health and safety measures. See, *e. g.*, *id.*, at 91 (citing *Mugler*, 123 U. S., at 661).

Despite Congress's clear aim, the Wilson Act failed to relieve the dry States' predicament. In *Rhodes* v. *Iowa*, 170 U. S. 412 (1898), and *Vance* v. *W. A. Vandercook Co.*, *supra*, the Court read the Act's reference to the "arrival" of alcohol in a State to mean delivery to the consignee, not arrival within the State's borders. *Granholm*, 544 U. S., at 480. The upshot was that residents of dry States could continue to order and receive imported alcohol. *Ibid.* See also Hamm 178. In 1913, Congress tried to patch this hole by passing the Webb-Kenyon Act, ch. 90, 37 Stat. 699, 27 U. S. C. § 122.

The aim of the Webb-Kenyon Act was to give each State a measure of regulatory authority over the importation of alcohol, but this created a drafting problem. There were those who thought that a federal law giving the States this authority would amount to an unconstitutional delegation of

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[8] The provision read as follows:

"That all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." Ch. 728, 26 Stat. 313, 27 U. S. C. § 121.

Congress's legislative power over interstate commerce.[9] So the Act was framed not as a measure conferring power on the States but as one prohibiting conduct that violated state law. The Act provided that the shipment of alcohol into a State for use in any manner, "either in the original package or otherwise," "in violation of any law of such State," was prohibited.[10] This formulation is significant for present purposes because it would provide a model for § 2 of the Twenty-first Amendment.

The Webb-Kenyon Act attempted to fix the hole in the Wilson Act and thus to "eliminate the regulatory advantage . . . afforded imported liquor," *Granholm*, *supra*, at 482; see also *Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311, 324 (1917), but its wording, unlike the Wilson Act's, did not explicitly mandate equal treatment for imported and domestically produced alcohol. And it referred to "*any* law of such State," 37 Stat. 700 (emphasis added), whereas the Wilson Act referred to "the laws of such State or Territory *enacted in the exercise of its police powers*," 26 Stat. 313 (emphasis added). But despite these differences, *Granholm* held, over a strenuous dissent, 544 U. S., at 505–514 (opinion of THOMAS, J.), that the Webb-Kenyon Act did not purport to authorize States to enact protectionist measures.

There is good reason for this holding. As we have noted, the Court's pre-Webb-Kenyon Act decisions upholding state

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[9] That was the position expressed in an opinion issued by Attorney General Wickersham, 30 Op. Atty. Gen. 88 (1913), and President Taft's veto, which Congress overrode, was based on exactly this ground. 49 Cong. Rec. 4291 (1913) (Veto Message of the President).

[10] The Act provided:

"That the shipment or transportation . . . of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State . . . into any other State . . . which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State . . . is hereby prohibited." Ch. 90, 37 Stat. 699–700.

liquor laws against challenges based on constitutional provisions other than the Commerce Clause had cautioned that protectionist laws disguised as exercises of the police power would not escape scrutiny. See *supra*, at 521–522.[11] The Webb-Kenyon Act, by regulating commerce, could obviate dormant Commerce Clause problems, but it could not override the limitations imposed by these other constitutional provisions and the traditional understanding regarding the bounds of the States' inherent police powers. Therefore the Wilson Act's reference to laws "enacted in the exercise of [a State's] police powers," 26 Stat. 313, merely restated what this Court had already found to be a constitutional necessity, and consequently, there was no need to include such language in the Webb-Kenyon Act. Even without limiting language like that in the Wilson Act, the shelter given by the Webb-Kenyon Act applied only where "the States treated in-state and out-of-state liquor on the same terms." *Granholm*, *supra*, at 481.[12]

Following passage of the Webb-Kenyon Act, temperance advocates began the final push for nationwide Prohibition, and with the ratification of the Eighteenth Amendment in 1919, their goal was achieved. The manufacture, sale, trans-

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[11] This principle was also invoked in dormant Commerce Clause cases involving other products. See, *e. g.*, *Minnesota* v. *Barber*, 136 U. S. 313, 319, 323 (1890); *Railroad Co.* v. *Husen*, 95 U. S. 465, 472 (1878).

[12] Lower court decisions issued between the enactment of the Webb-Kenyon Act and the ratification of the Eighteenth Amendment interpreted the Act this way. See *Evansville Brewing Assn.* v. *Excise Comm'n of Jefferson Cty., Ala.*, 225 F. 204 (ND Ala. 1915); *Southern Express Co.* v. *Whittle*, 194 Ala. 406, 69 So. 652 (1915); *Brennen* v. *Southern Express Co.*, 106 S. C. 102, 90 S. E. 402 (1916); *Charleston & W. C. R. Co.* v. *Gosnell*, 106 S. C. 84, 90 S. E. 264 (1916) (Hydrick, J., concurring); *Monumental Brewing Co.* v. *Whitlock*, 111 S. C. 198, 97 S. E. 56 (1918). See also *Pacific Fruit & Produce Co.* v. *Martin*, 16 F. Supp. 34, 39–40 (WD Wash. 1936); Friedman, Constitutional Law: State Regulation of Importation of Intoxicating Liquor Under Twenty-first Amendment, 21 Cornell L. Q. 504, 509 (1936).

portation, and importation of alcoholic beverages anywhere in the country were prohibited.

IV

A

By 1933, support for Prohibition had substantially diminished but not vanished completely. Thirty-eight state conventions eventually ratified the Twenty-first Amendment, but 10 States either rejected or took no action on the Amendment. Section 1 of the Twenty-first Amendment repealed the Eighteenth Amendment and thus ended nationwide Prohibition, but § 2, the provision at issue here, gave each State the option of banning alcohol if its citizens so chose.

As we have previously noted, the text of § 2 "closely follow[ed]" the operative language of the Webb-Kenyon Act, and this naturally suggests that § 2 was meant to have a similar meaning. *Craig*, 429 U. S., at 205–206. The decision to follow that unusual formulation is especially revealing since the drafters of § 2, unlike those who framed the Webb-Kenyon Act, had no need to worry that a more straightforward wording might trigger a constitutional challenge. Accordingly, we have inferred that § 2 was meant to "constitutionaliz[e]" the basic understanding of the extent of the States' power to regulate alcohol that prevailed before Prohibition. *Id.*, at 206. See also *Granholm*, *supra*, at 484. And as recognized during that period, the Commerce Clause did not permit the States to impose protectionist measures clothed as police-power regulations. See *supra*, at 521–522. See also, *e. g.*, *Railroad Co.* v. *Husen*, 95 U. S. 465, 472 (1878) (a State "may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce").

This understanding is supported by the debates on the Amendment in Congress[13] and the state ratifying conven-

[13] See, *e. g.*, 76 Cong. Rec. 4172 (1933) (statement of Sen. Borah) (§ 2 of Twenty-first Amendment would "incorporat[e] [Webb-Kenyon] permanently in the Constitution of the United States"); *id.*, at 4168 (statement

tions. The records of the state conventions provide no evidence that §2 was understood to give States the power to enact protectionist laws,[14] "a privilege [the States] had not enjoyed at any earlier time." *Granholm*, 544 U. S., at 485.

B

Although our later cases have recognized that §2 cannot be given an interpretation that overrides all previously adopted constitutional provisions, the Court's earliest cases interpreting §2 seemed to feint in that direction. In 1936, the Court found that §2's text was "clear" and saw no need to consider whether history supported a more modest interpretation, *State Bd. of Equalization of Cal.* v. *Young's Market Co.*, 299 U. S. 59, 63–64 (1936)—an approach even the dissent rejects, see *infra*, at 531, n. 16; *post*, at 544–545.[15] The Court

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of Sen. Fess) ("[T]he second section of the joint resolution . . . is designed to permit the Federal authority to assist the States that want to be dry to remain dry"); *id.*, at 4518 (statement of Rep. Robinson) ("Section 2 attempts to protect dry states").

[14] See Nielson, No More "Cherry-Picking": The Real History of the 21st Amendment's §2, 28 Harv. J. L. & Pub. Pol'y 281, 286, n. 21 (2004). See generally E. Brown, Ratification of the Twenty-first Amendment to the Constitution of the United States; State Convention Records and Laws (1938).

[15] The dissent characterizes the Court as a "committee of nine" that has "[s]tray[ed] from the text" of the Twenty-first Amendment and "impose[d] [its] own free-trade rules" on the States. *Post*, at 550, 556–557 (opinion of GORSUCH, J.). This is empty rhetoric. The dissent itself strays from a blinkered reading of the Amendment. The dissent interprets §2 of the Amendment to mean more than it literally says, arguing that §2 covers the residency requirements at issue even though they are not tied in any way to what the Amendment actually addresses, namely, "the transportation or importation" of alcohol across state lines. See *post*, at 545, n. 1. And the dissent agrees that §2 cannot be read as broadly as one might think if its language were read in isolation and not as part of an integrated constitutional scheme. See *post*, at 545. The dissent asserts that §2 does not abrogate all previously adopted constitutional provisions, just the dormant Commerce Clause. But the dissent does not say whether it thinks §2 allows the States to adopt alcohol regulations that serve no conceivable purpose other than protectionism. Even the dissent below did not go that

read §2 as granting each State plenary "power to forbid all importations which do not comply with the conditions which it prescribes," *Young's Market*, *supra*, at 62; see also *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132, 138–139 (1939), including laws that discriminated against out-of-state products, see, *e. g.*, *Young's Market*, *supra*, at 62; *Mahoney* v. *Joseph Triner Corp.*, 304 U. S. 401, 403 (1938); *Indianapolis Brewing Co.* v. *Liquor Control Comm'n*, 305 U. S. 391, 394 (1939). The Court went so far as to assume that the Fourteenth Amendment imposed no barrier to state legislation in the field of alcohol regulation. See *Young's Market*, *supra*, at 64 ("A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth").

With subsequent cases, however, the Court saw that §2 cannot be read that way, and it therefore scrutinized state alcohol laws for compliance with many constitutional provisions. See, *e. g.*, *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S. 484 (1996) (Free Speech Clause); *Larkin* v. *Grendel's Den, Inc.*, 459 U. S. 116 (1982) (Establishment Clause); *Craig* v. *Boren*, *supra* (Equal Protection Clause); *Wisconsin* v. *Constantineau*, 400 U. S. 433 (1971) (Due Process Clause); *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U. S. 341 (1964) (Import-Export Clause).

The Court also held that §2 does not entirely supersede Congress's power to regulate commerce. Instead, after evaluating competing federal and state interests, the Court has ruled against state alcohol laws that conflicted with federal regulation of the export of alcohol, *Hostetter*, 377 U. S., at 333–334, federal antitrust law, *Midcal Aluminum*, 445 U. S., at 110–111, 113–114; *324 Liquor Corp.* v. *Duffy*, 479 U. S. 335, 346–347, 350–351 (1987), and federal regulation of

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far. See n. 18, *infra*. If §2 gives the States *carte blanche* to engage in protectionism, we suppose that Tennessee could restrict licenses to persons who can show that their lineal ancestors have lived in the State since 1796 when the State entered the Union. Does the dissent really think that this is what §2 was meant to permit?

the airwaves, *Capital Cities Cable, Inc.* v. *Crisp*, 467 U. S. 691, 713, 716 (1984).

As for the dormant Commerce Clause, the developments leading to the adoption of the Twenty-first Amendment have convinced us that the aim of §2 was not to give States a free hand to restrict the importation of alcohol for purely protectionist purposes. See *Granholm*, *supra*, at 486–487; *Bacchus*, 468 U. S., at 276.

C

Although some Justices have argued that §2 shields all state alcohol regulation—including discriminatory laws—from any application of dormant Commerce Clause doctrine,[16] the Court's modern §2 precedents have repeatedly rejected that view. We have examined whether state alcohol laws that burden interstate commerce serve a State's legitimate §2 interests. And protectionism, we have stressed, is not such an interest. *Ibid.*

Applying that principle, we have invalidated state alcohol laws aimed at giving a competitive advantage to in-state businesses. The Court's decision in *Bacchus* "provides a particularly telling example." *Granholm*, *supra*, at 487. There, the Court was confronted with a tax exemption that

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[16] See, *e. g.*, *Granholm* v. *Heald*, 544 U. S. 460, 497–498 (2005) (THOMAS, J., dissenting); *Healy* v. *Beer Institute*, 491 U. S. 324, 349 (1989) (Rehnquist, C. J., dissenting); *324 Liquor Corp.* v. *Duffy*, 479 U. S. 335, 352–353 (1987) (O'Connor, J., dissenting); *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263, 281–282 (1984) (Stevens, J., dissenting).

The dissent rehashes this debate, see *post*, at 547–550, 555–556, asserting that the Webb-Kenyon Act, and thus §2, were "understood" to repudiate not only the original-package cases, but also the antidiscrimination rule articulated in cases including *Scott* v. *Donald*, 165 U. S. 58 (1897). But this Court's modern §2 decisions—not simply the lower court decisions at which the dissent takes aim, see *post*, at 548, n. 3—establish that those enactments, though no doubt aimed at granting States additional "discretion to calibrate alcohol regulations to local preferences," *post*, at 544, did not exempt States from "the nondiscrimination principle of the Commerce Clause." *Granholm*, *supra*, at 487.

favored certain in-state alcohol producers. In defending the law, the State argued that even if the discriminatory exemption violated "ordinary Commerce Clause principles, it [was] saved by the Twenty-first Amendment." *Bacchus*, 468 U. S., at 274. We rejected that argument and held instead that the relevant question was "whether the principles underlying the Twenty-first Amendment are sufficiently implicated by the [discriminatory] exemption . . . to outweigh the Commerce Clause principles that would otherwise be offended." *Id.*, at 275. Ultimately, we held that §2 did not save the disputed tax because it clearly aimed "'to promote a local industry'" rather than "to promote temperance or to carry out any other purpose of the Twenty-first Amendment." *Id.*, at 276.

The same went for the state law in *Healy* v. *Beer Institute*, 491 U. S. 324 (1989), which required out-of-state shippers of beer to affirm that their wholesale price for products sold in Connecticut was no higher than the prices they charged to wholesalers in bordering States. Connecticut argued that the "Twenty-first Amendment sanction[ed]" this law "regardless of its effect on interstate commerce," *id.*, at 341, but we held that the law violated the Commerce Clause, noting that it "discriminate[d] against brewers and shippers of beer engaged in interstate commerce" without justification "by a valid factor unrelated to economic protectionism," *id.*, at 340–341.[17]

Most recently, in *Granholm*, we struck down a set of discriminatory direct-shipment laws that favored in-state wineries over out-of-state competitors. After surveying the history of §2, we affirmed that "the Twenty-first Amendment does not immunize all laws from Commerce Clause

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[17] Justice Scalia, for his part, thought the "statute's invalidity [was] fully established by its facial discrimination against interstate commerce"—discrimination that in his view "eliminate[d] the immunity afforded by the Twenty-first Amendment." *Healy*, *supra*, at 344 (opinion concurring in part and concurring in judgment) (citing *Bacchus*, *supra*, at 275–276).

challenge." 544 U. S., at 488. We therefore examined whether the challenged laws were reasonably necessary to protect the States' asserted interests in policing underage drinking and facilitating tax collection. *Id.*, at 489–493. Concluding that the answer to that question was no, we invalidated the laws as inconsistent with the dormant Commerce Clause's nondiscrimination principle. *Id.*, at 492–493.

To summarize, the Court has acknowledged that §2 grants States latitude with respect to the regulation of alcohol, but the Court has repeatedly declined to read §2 as allowing the States to violate the "nondiscrimination principle" that was a central feature of the regulatory regime that the provision was meant to constitutionalize. *Id.*, at 487.

D

The Association resists this reading. Although it concedes (as it must under *Granholm*) that §2 does not give the States the power to discriminate against out-of-state alcohol *products and producers*, the Association presses the argument, echoed by the dissent, that a different rule applies to state laws that regulate in-state alcohol distribution. There is no sound basis for this distinction.[18]

1

The Association's argument encounters a problem at the outset. The argument concedes that §2 does not shield state laws that discriminate against interstate commerce with respect to the very activity that the provision explicitly addresses—the importation of alcohol. But at the same time, the Association claims that §2 protects something that

[18] The Association's argument is more extreme than that of the dissent below, which recognized that in-state distribution laws that "serve no purpose besides 'economic protectionism'" remain subject to dormant Commerce Clause scrutiny. *Byrd* v. *Tennessee Wine and Spirits Retailers Assn.*, 883 F. 3d 608, 633 (CA6 2018) (Sutton, J., concurring in part and dissenting in part) (quoting *Bacchus*, *supra*, at 276).

§ 2's text, if read literally, does not cover—laws restricting the licensing of domestic retail alcohol stores. That reading is implausible. Surely if § 2 granted States the power to discriminate in the field of alcohol regulation, that power would be at its apex when it comes to regulating the activity to which the provision expressly refers.

The Association and the dissent point out that *Granholm* repeatedly spoke of discrimination against out-of-state products and producers, but there is an obvious explanation: The state laws at issue in *Granholm* discriminated against out-of-state producers. See 883 F. 3d, at 621. And *Granholm* never said that its reading of history or its Commerce Clause analysis was limited to discrimination against products or producers. On the contrary, the Court stated that the Clause prohibits state discrimination against all "'out-of-state economic *interests*,'" *Granholm*, 544 U. S., at 472 (emphasis added), and noted that the direct-shipment laws in question "contradict[ed]" dormant Commerce Clause principles because they "deprive[d] *citizens* of their right to have access to the markets of other States on equal terms," *id.*, at 473 (emphasis added). *Granholm* also described its analysis as consistent with the rule set forth in *Bacchus*, *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U. S. 573 (1986), and *Healy* that "'[w]hen a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic *interests* over out-of-state *interests*, we have generally struck down the statute without further inquiry.'" *Granholm*, *supra*, at 487 (quoting *Brown-Forman*, *supra*, at 579; emphasis added).

The Association counters that even if the *Granholm* Court did not explicitly limit its holding to products and producers, the Court implicitly did so when it rejected the argument that its analysis would call into question the constitutionality of state laws setting up three-tiered alcohol distribution sys-

tems. See *Granholm*, *supra*, at 488–489. This argument, which the dissent also advances, see *post*, at 554–555, reads far too much into *Granholm*'s discussion of the three-tiered model. Although *Granholm* spoke approvingly of that basic model, it did not suggest that § 2 sanctions every discriminatory feature that a State may incorporate into its three-tiered scheme. At issue in the present case is not the basic three-tiered model of separating producers, wholesalers, and retailers, but the durational-residency requirement that Tennessee has chosen to impose on new applicants for liquor store licenses. Such a requirement is not an essential feature of a three-tiered scheme. Many such schemes do not impose durational-residency requirements—or indeed any residency requirements—on individual or corporate liquor store owners. See, *e. g.*, Brief for State of Illinois et al. as *Amici Curiae* 24–25, 27 (identifying States that have either "dispos[ed] with the durational aspect of the [residency] requirement" or "d[o] not regulate the residency of the applicant corporation or partnership"). Other three-tiered schemes differ in other ways. See, *e. g.*, *id.*, at 24–28 (noting variations); FTC, Possible Anticompetitive Barriers to E-Commerce: Wine 7–9 (July 2003), https://www.ftc.gov/sites/default/files/documents/reports/possible-anticompetitive-barriers-e-commerce-wine/winereport2_0.pdf (as last visited June 24, 2019) (same). Because we agree with the dissent that, under § 2, States "remai[n] free to pursue" their legitimate interests in regulating the health and safety risks posed by the alcohol trade, *post*, at 554, each variation must be judged based on its own features.

2

In support of the argument that the Tennessee scheme is constitutional, the Association and its *amici* claim that discriminatory distribution laws, including in-state presence and residency requirements, long predate Prohibition and

were adopted by many States following ratification of the Twenty-first Amendment.[19] Indeed, the Association notes that the 2-year durational-residency requirement now before us dates back to 1939 and is consistent with durational-residency regimes adopted by several other States around the same time.[20] According to the Association, that history confirms that § 2 was intended to broadly exempt all in-state distribution laws from dormant Commerce Clause scrutiny. The dissent relies heavily on this same argument.

This argument fails for several reasons. Insofar as it relies on state laws enacted shortly after the ratification of the Twenty-first Amendment and this Court's early decisions interpreting it, the Association and the dissent's argument does not take into account the overly expansive interpretation of § 2 that took hold for a time in the immediate aftermath of its adoption. See *supra*, at 530–531. Thus, some state laws adopted soon after the ratification of the Twenty-first Amendment may have been based on an understanding of § 2 that can no longer be defended. It is telling that an argument similar to the one now made by the Association would have dictated a contrary result in *Granholm*, since state laws disfavoring imported products were passed during this same period. See, *e. g.*, *Young's Market Co.*, 299 U. S., at 62 (discriminatory license fee on imported beer); *Mahoney*, 304 U. S., at 403 (prohibition on import of certain liquors); *Indianapolis Brewing Co.*, 305 U. S., at 394 (same).

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[19] See *Granholm*, 544 U. S., at 518, and n. 6 (THOMAS, J., dissenting) (licensing schemes adopted by three-tier States following ratification of Twenty-first Amendment discriminated "by requiring in-state residency or physical presence as a condition of obtaining licenses") (collecting statutes); Brief for Petitioner 33–34 (collecting residency-requirement statutes). See also Brief for State of Illinois et al. as *Amici Curiae* 7–8 (referencing 19th-century state statutes that required "retailers to reside in-state or to maintain an in-state presence").

[20] See 1939 Tenn. Pub. Acts, ch. 49, §§ 5–8; Brief for Petitioner 34 (collecting durational-residency-requirement statutes); Brief for State of Illinois et al. as *Amici Curiae* 24 (same).

But our later cases have rejected this interpretation of § 2. See *Granholm*, 544 U. S., at 487.

Insofar as the Association's argument is based on state laws adopted prior to Prohibition, it infers too much from the existence of laws that were never tested in this Court. Had they been tested here, there is no reason to conclude that they would have been sustained. During that time, the Court repeatedly invalidated, on dormant Commerce Clause grounds, a variety of state and local efforts to license those engaged in interstate business,[21] and as noted, pre-Prohibition decisions of this Court and the lower courts held that state alcohol laws that discriminated against interstate commerce were unconstitutional, see *supra*, at 523.

Contrary to the Association's contention, not all of these decisions involved discrimination against alcohol produced out of State or alcohol importers. The tax in *Walling*, for

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[21] *Real Silk Hosiery Mills* v. *Portland*, 268 U. S. 325, 335–336 (1925) (license tax on solicitors of orders to be filled by an out-of-state manufacturer); *Shafer* v. *Farmers Grain Co. of Embden*, 268 U. S. 189, 197–201 (1925) (license requirement for the purchase of grain shipped immediately out of the State); *Stewart* v. *Michigan*, 232 U. S. 665, 669–670 (1914) (state law requiring a license for catalog sales); *Crenshaw* v. *Arkansas*, 227 U. S. 389, 399–401 (1913) (state law requiring a foreign corporation actively soliciting sales in State to obtain a license); *Dozier* v. *Alabama*, 218 U. S. 124, 127–128 (1910) (licensing requirement on the solicitors of photography enlargement services and frames manufactured out of State); *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 107–111 (1910) (state law requiring an out-of-state educational publishing company to pay a license fee for exchanging materials with customers); *Rearick* v. *Pennsylvania*, 203 U. S. 507, 510–511 (1906) (ordinance requiring license to solicit orders for out-of-state goods); *Norfolk & Western R. Co.* v. *Sims*, 191 U. S. 441, 449–451 (1903) (state licensing requirement on express company acting as agent for importer of a sewing machine); *Brennan* v. *Titusville*, 153 U. S. 289, 306–308 (1894) (licensing tax on persons engaged in trade on behalf of firms doing business outside the State); *Corson* v. *Maryland*, 120 U. S. 502, 505–506 (1887) (state licensing requirement as applied to agent of out-of-state firm soliciting sales); *Welton* v. *Missouri*, 91 U. S. 275, 278, 282–283 (1876) (state law requiring payment of license tax by sellers of out-of-state goods).

example, applied to those engaged in the business of selling imported alcohol within the State. 116 U. S. 446. And in concluding that the law violated the Commerce Clause, the Court affirmed that, without the dormant Commerce Clause, there would "be no security against conflicting regulations of different states, each discriminating in favor of its own products *and citizens*, and against the products *and citizens* of other states." *Id.*, at 456–457 (emphasis added). So too, the dispensary law in *Scott* was challenged on the ground that it discriminated "against products of other States *and against citizens* of other States." 165 U. S., at 62 (emphasis added); see also *id.*, at 94.

Nor have States historically enjoyed absolute authority to police alcohol within their borders. As discussed earlier, far from granting the States plenary authority to adopt domestic regulations, the Court's police-power precedents required an examination of the actual purpose and effect of a challenged law. See, *e. g.*, *Mugler*, 123 U. S., at 661 ("It does not at all follow that every statute enacted ostensibly for the promotion" of "the public health, the public morals, or the public safety" is "to be accepted as a legitimate exertion of the police powers of the State"); see also *Husen*, 95 U. S., at 472; *Welton* v. *Missouri*, 91 U. S. 275, 278 (1876). Cf. H. Black, Intoxicating Liquors § 30, p. 40 (1892) (stating that certain 19th-century licensing and residency requirements were valid because their "purpose and effect" was to prevent "the unlawful selling of liquors, *and not to discriminate against citizens of other states*" (emphasis added)).

For these reasons, we reject the Association's overly broad understanding of § 2. That provision allows each State leeway to enact the measures that its citizens believe are appropriate to address the public health and safety effects of alcohol use and to serve other legitimate interests, but it does not license the States to adopt protectionist measures with no demonstrable connection to those interests.

V

Having concluded that § 2 does not confer limitless authority to regulate the alcohol trade, we now apply the § 2 analysis dictated by the provision's history and our precedents.

If we viewed Tennessee's durational-residency requirements as a package, it would be hard to avoid the conclusion that their overall purpose and effect is protectionist. Indeed, two of those requirements—the 10-year residency requirement for license renewal and the provision that shuts out all publicly traded corporations—are so plainly based on unalloyed protectionism that neither the Association nor the State is willing to come to their defense. The provision that the Association and the State seek to preserve—the 2-year residency requirement for initial license applicants—forms part of that scheme. But we assume that it can be severed from its companion provisions, see 883 F. 3d, at 626–628, and we therefore analyze that provision on its own.

Since the 2-year residency requirement discriminates on its face against nonresidents, it could not be sustained if it applied across the board to all those seeking to operate any retail business in the State. Cf. *C & A Carbone, Inc.* v. *Clarkstown*, 511 U. S. 383, 391–392 (1994); *Lewis* v. *BT Investment Managers, Inc.*, 447 U. S. 27, 39 (1980). But because of § 2, we engage in a different inquiry. Recognizing that § 2 was adopted to give each State the authority to address alcohol-related public health and safety issues in accordance with the preferences of its citizens, we ask whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground. Section 2 gives the States regulatory authority that they would not otherwise enjoy, but as we pointed out in *Granholm*, "mere speculation" or "unsupported assertions" are insufficient to sustain a law that would otherwise violate the Commerce Clause. 544 U. S., at 490, 492. Where the predominant effect of a law is protectionism, not

the protection of public health or safety, it is not shielded by § 2.

The provision at issue here expressly discriminates against nonresidents and has at best a highly attenuated relationship to public health or safety. During the course of this litigation, the Association relied almost entirely on the argument that Tennessee's residency requirements are simply "not subject to Commerce Clause challenge," 259 F. Supp. 3d, at 796, and the State itself mounted no independent defense. As a result, the record is devoid of any "concrete evidence" showing that the 2-year residency requirement actually promotes public health or safety; nor is there evidence that nondiscriminatory alternatives would be insufficient to further those interests. *Granholm*, *supra*, at 490; see 883 F. 3d, at 625–626.

In this Court, the Association has attempted to defend the 2-year residency requirement on public health and safety grounds, but this argument is implausible on its face. The Association claims that the requirement ensures that retailers are "amenable to the direct process of state courts," Brief for Petitioner 48 (internal quotation marks omitted), but the Association does not explain why this objective could not easily be achieved by ready alternatives, such as requiring a nonresident to designate an agent to receive process or to consent to suit in the Tennessee courts. See *Cooper* v. *McBeath*, 11 F. 3d 547, 554 (CA5 1994).

Similarly unpersuasive is the Association's claim that the 2-year requirement gives the State a better opportunity to determine an applicant's fitness to sell alcohol and guards against "undesirable nonresidents" moving into the State for the purpose of operating a liquor store. Brief for Petitioner 10 (internal quotation marks omitted). The State can thoroughly investigate applicants without requiring them to reside in the State for two years before obtaining a license. Tennessee law already calls for criminal background checks on all applicants, see Tenn. Code Ann. § 57–3–208, and more

searching checks could be demanded if necessary. As the Fifth Circuit observed in a similar case, "[i]f [the State] desires to scrutinize its applicants thoroughly, as is its right, it can devise nondiscriminatory means short of saddling applicants with the 'burden' of residing" in the State. *Cooper*, *supra*, at 554.

The 2-year residency requirement, in any event, poorly serves the goal of enabling the State to ensure that only law-abiding and responsible applicants receive licenses. As the Tennessee attorney general explained, if a nonresident moves to the State with the intention of applying for a license once the 2-year period ends, the TABC will not necessarily have any inkling of the future applicant's intentions until that individual applies for a license, and consequently, the TABC will have no reason to begin an investigation until the 2-year period has ended. App. to Brief in Opposition 17a. And all that the 2-year requirement demands is residency. A prospective applicant is not obligated during that time "to be educated about liquor sales, submit to inspections, or report to the State." *Ibid.*

The 2-year residency requirement is not needed to enable the State to maintain oversight over liquor store operators. In *Granholm*, it was argued that the prohibition on the shipment of wine from out-of-state sources was justified because the State could not adequately monitor the activities of nonresident entities. Citing "improvements in technology," we found that argument insufficient. 544 U. S., at 492. See also *Cooper*, *supra*, at 554 ("In this age of split-second communications by means of computer networks . . . there is no shortage of less burdensome, yet still suitable, options"). In this case, the argument is even less persuasive since the stores at issue are physically located within the State. For that reason, the State can monitor the stores' operations through on-site inspections, audits, and the like. See § 57–3–104. Should the State conclude that a retailer has "fail[ed] to comply with state law," it may revoke its operat-

ing license. *Granholm*, 544 U. S., at 490. This "provides strong incentives not to sell alcohol" in a way that threatens public health or safety. *Ibid.*

In addition to citing the State's interest in regulatory control, the Association argues that the 2-year residency requirement would promote responsible alcohol consumption. According to the Association, the requirement makes it more likely that retailers will be familiar with the communities served by their stores, and this, it is suggested, will lead to responsible sales practices. Brief for Petitioner 48–49. The idea, it seems, is that a responsible neighborhood proprietor will counsel or cut off sales to patrons who are known to be abusing alcohol, who manifest the effects of alcohol abuse, or who perhaps appear to be purchasing too much alcohol. No evidence has been offered that durational-residency requirements actually foster such sales practices, and in any event, the requirement now before us is very poorly designed to do so.

For one thing, it applies to those who hold a license, not to those who actually make sales. For another, it requires residence in the State, not in the community that a store serves. The Association cannot explain why a proprietor who lives in Bristol, Virginia, will be less knowledgeable about the needs of his neighbors right across the border in Bristol, Tennessee, than someone who lives 500 miles away in Memphis. And the rationale is further undermined by other features of Tennessee law, particularly the lack of durational-residency requirements for owners of bars and other establishments that sell alcohol for on-premises consumption. § 57–4–201.

Not only is the 2-year residency requirement ill suited to promote responsible sales and consumption practices (an interest that we recognize as legitimate, contrary to the dissent's suggestion, *post*, at 551–552, 554, 556), but there are obvious alternatives that better serve that goal without dis-

criminating against nonresidents. State law empowers the relevant authorities to limit both the number of retail licenses and the amount of alcohol that may be sold to an individual. Cf. § 57–3–208(c) (permitting local governments to "limit . . . the number of licenses issued within their jurisdictions"); § 57–3–204(d)(7)(C) (imposing volume limits on certain sales of alcohol to patrons); Rules of TABC, ch. 0100–01, § 0100–01–.03(15) (2018) (same). The State could also mandate more extensive training for managers and employees and could even demand that they demonstrate an adequate connection with and knowledge of the local community. Cf., *e. g.*, Tenn. Code Ann. § 57–3–221 (requiring managers of liquor stores to obtain permits, satisfy background checks, and undergo "alcohol awareness" training). And the State of course remains free to monitor the practices of retailers and to take action against those who violate the law.

Given all this, the Association has fallen far short of showing that the 2-year durational-residency requirement for license applicants is valid. Like the other discriminatory residency requirements that the Association is unwilling to defend, the predominant effect of the 2-year residency requirement is simply to protect the Association's members from out-of-state competition. We therefore hold that this provision violates the Commerce Clause and is not saved by the Twenty-first Amendment.[22]

* * *

The judgment of the Court of Appeals for the Sixth Circuit is affirmed.

It is so ordered.

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[22] Our analysis and conclusion apply as well to the provision requiring all officers and directors of corporate applicants to satisfy the 2-year residency requirement. See 883 F. 3d, at 623.

JUSTICE GORSUCH, with whom JUSTICE THOMAS joins, dissenting.

Alcohol occupies a complicated place in this country's history. Some of the founders were enthusiasts; Benjamin Franklin thought wine was "proof that God loves us." Letter from B. Franklin to A. Morellet (July 1779), in 7 Writings of Benjamin Franklin 437 (A. Smyth ed. 1907). Many in the Prohibition era were decidedly less enamored; they saw "liquor [a]s a lawlessness unto itself." *Duckworth* v. *Arkansas*, 314 U. S. 390, 398 (1941) (Jackson, J., concurring in result). Over time, the people have adopted two separate constitutional Amendments to adjust and then readjust alcohol's role in our society. But through it all, one thing has always held true: States may impose residency requirements on those who seek to sell alcohol within their borders to ensure that retailers comply with local laws and norms. In fact, States have enacted residency requirements for at least 150 years, and the Tennessee law at issue before us has stood since 1939. Today and for the first time, the Court claims to have discovered a duty and power to strike down laws like these as unconstitutional. Respectfully, I do not see it.

Start with the text of the Constitution. After the Nation's failed experiment with Prohibition, the people assembled in conventions in each State to adopt the Twenty-first Amendment. In § 1, they repealed the Eighteenth Amendment's nationwide prohibition on the sale of alcohol. But in § 2, they provided that "[t]he transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The Amendment thus embodied a classically federal compromise: Nationwide prohibition ended, but States gained broad discretion to calibrate alcohol regulations to local preferences. And under the terms of this compromise, Tennessee's law imposing a two-year residency requirement

on those who seek to sell liquor within its jurisdiction would seem perfectly permissible.[1]

Of course, § 2 does not immunize state laws from *all* constitutional claims. Everyone agrees that state laws must still comply with, say, the First Amendment or the Equal Protection Clause. *Ante*, at 518–520. But the challenge before us isn't based on any constitutional provision like that. Instead, we are asked to decide whether Tennessee's residency requirement impermissibly discriminates against out-of-state residents and recent arrivals in violation of the "dormant Commerce Clause" doctrine. And that doctrine is a peculiar one. Unlike most constitutional rights, the dormant Commerce Clause doctrine cannot be found in the text of any constitutional provision but is (at best) an implication from one. Under its banner, this Court has sometimes asserted the power to strike down state laws that discriminate against nonresidents on the ground that they usurp the authority to regulate interstate commerce that the Constitution assigns in Article I to Congress. But precisely because the Constitution assigns *Congress* the power to regulate interstate commerce, that body is free to rebut any implication of unconstitutionality that might otherwise arise under the dormant Commerce Clause doctrine by authorizing States to adopt laws favoring in-state residents. *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, 434–436 (1946).

And that's exactly what happened here. In the Webb-Kenyon Act of 1913, Congress gave the States wide latitude

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[1] The Court suggests that Tennessee's residency requirement may fall outside the terms of the Amendment because retailers may not be involved in the "transportation or importation" of liquor into the State. *Ante*, at 534. But the parties do not dispute that "transportation or importation" into the State is involved here. And understandably so: Unless the liquor stores intend to sell only Tennessee-made liquor (and no one so alleges), it is hard to see how transportation or importation would not be involved.

to restrict the sale of alcohol within their borders. See 37 Stat. 699 (codified at 27 U. S. C. § 122). Not only is that law still on the books today, § 2 of the Twenty-first Amendment closely "followed the wording of the 1913 Webb-Kenyon Act." *Ante*, at 519, n. 5. Accordingly, the people who adopted the Amendment naturally would have understood it to constitutionalize an "exception to the normal operation of the [dormant] Commerce Clause." *Craig* v. *Boren*, 429 U. S. 190, 206 (1976). After all, what Congress can do by statute "surely the people may do . . . through the process of amending our Constitution." *Granholm* v. *Heald*, 544 U. S. 460, 494 (2005) (Stevens, J., dissenting). So in this area, at least, we should not be in the business of imposing our own judge-made "dormant Commerce Clause" limitations on state powers.

What the relevant constitutional and statutory texts suggest, history confirms. Licensing requirements for the sale of liquor are older than the Nation itself. Byse, Alcoholic Beverage Control Before Repeal, 7 Law & Contemp. Prob. 544, 544–547 (1940). Colonial authorities generally allowed sales only by those who were deemed " 'fit and suitable' " and who agreed to post a bond conditioned upon compliance with local regulations. *Id.*, at 545. States started adopting residency requirements as early as 1834, when New Hampshire began requiring any person who sold liquor "in any quantity less than one gallon" to obtain a license "from the selectmen of the town or place where such person resides." *State* v. *Adams*, 6 N. H. 532, 533 (1834). In 1845, Missouri adopted a law nearly identical to the Tennessee statute now before us, requiring those seeking to sell liquor to have resided in the State for two years. Mo. Rev. Stat. app., p. 1099. In the decades that followed, several other States and Territories followed suit and enacted laws like Tennessee's.[2]

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[2] See, *e. g.*, 1859 Neb. Terr. Laws p. 256; Iowa Code § 1575 (1860); 1875 Pa. Laws p. 42; N. Y. Rev. Stat., ch. 29, § 23 (1896); S. C. Code Ann. § 562 (1902); Minn. Stat. § 1529 (1905); R. I. Gen. Laws, ch. 123, § 2 (1909); 1911 Ala. Acts no. 259; Neb. Rev. Stat. § 3844 (1913); Ind. Code § 8323(e) (1914).

At the time these residency requirements were adopted they were widely understood to be constitutional, and courts generally upheld them against legal challenges. H. Black, Laws Regulating the Manufacture and Sale of Intoxicating Liquors § 30, pp. 39–40, and n. 33 (1892) (collecting cases). Indeed, in the mid-19th century this Court "recognized a broad authority in state governments to regulate the trade of alcoholic beverages within their borders free from implied restrictions under the Commerce Clause." *Craig*, 429 U. S., at 205 (citing the *License Cases*, 5 How. 504, 579 (1847)).

Things became more contentious only toward the end of the 19th century. By then, this Court had begun to take a more muscular approach to the dormant Commerce Clause and started using that implied doctrine to strike down state laws that restricted the sale of imported liquor. See *Bowman* v. *Chicago & Northwestern R. Co.*, 125 U. S. 465 (1888); *Leisy* v. *Hardin*, 135 U. S. 100 (1890). But this judicial activism did not go unnoticed, and in 1890 Congress responded by passing the Wilson Act. Ch. 728, 26 Stat. 313 (codified at 27 U. S. C. § 121). That law sought to bolster the authority of States to regulate the distribution of liquor within their borders by providing that liquor shipped into a State would "upon arrival in such State . . . be subject to the operation and effect of the laws of such State . . . to the same extent and in the same manner as though such [liquor] had been produced in such State."

Still, the Court did not seem to get the message. A second wave of dormant Commerce Clause attacks on state laws soon followed, and in the process they highlighted some of the Wilson Act's limitations. In *Scott* v. *Donald*, 165 U. S. 58 (1897), the Court addressed South Carolina's state monopoly system for the sale of liquor, which required state agents to favor domestic products and prohibited consumers from receiving out-of-state shipments for personal use. The Court held that this system unconstitutionally discriminated in favor of domestic products "as against similar products of

the other States." *Id.*, at 101. Citing the text of the Wilson Act, including the phrase "to the same extent and in the same manner," the Court emphasized that the Act did not go so far as to authorize States to "discriminate injuriously against the products of other States." *Id.*, at 100. Then, in *Rhodes* v. *Iowa*, 170 U. S. 412 (1898), the Court further curbed the States' authority to restrict liquor distribution by construing the Wilson Act's phrase "upon arrival in such State" to mean arrival at the purchaser's address, rather than arrival within the State's borders. *Id.*, at 421, 426; see also *Vance* v. *W. A. Vandercook* Co., 170 U. S. 438 (1898).

Once more, however, Congress stepped in to repudiate this Court's decisions, this time in unmistakably sweeping language. In the Webb-Kenyon Act of 1913, Congress went so far as to "[take] the protection of interstate commerce *away*" from the distribution of liquor within a State's borders. *Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311, 325 (1917) (emphasis added). The language Congress used could not have been plainer: The Act "prohibited" any "shipment or transportation" of alcoholic beverages "into any State" when they are "intended, by any person interested therein, to be received, possessed, sold, or in any manner used . . . in violation of any law of such State." 27 U. S. C. § 122. Within a few years, the Court conceded the Webb-Kenyon Act's constitutionality, acknowledging along the way that the law was designed to—and did—"prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws." *Clark Distilling*, 242 U. S., at 324.[3]

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[3] The Court cites a few pre-Prohibition cases—from one federal district court and two state courts—that, it says, construed Webb-Kenyon to preserve a rule against discrimination. *Ante*, at 527, n. 12. But these cases offer negligible support. True, two cases construed the Act's authorization of "any laws" as limited to "valid laws," a category from which these courts excluded laws discriminating against the products of other States.

This history bears special relevance because everyone agrees that, whatever other powers § 2 grants the States, at a minimum it "'constitutionaliz[ed]'" the similarly worded Webb-Kenyon Act. *Ante*, at 519, n. 5, 528. Nor can there be much doubt how most everyone understood the terms of the Act and the Amendment that embodied it. Because "centralized regulation did not work," the Twenty-first Amendment both ended nationwide prohibition in § 1 and authorized local control in § 2. Yablon, The Prohibition Hangover: Why We Are Still Feeling the Effects of Prohibition, 13 Va. J. Soc. Pol'y & L. 552, 584 (2006). As a leading study noted at the time, "it was a mistake to regard the United States as a single community in which a uniform policy of liquor control could be enforced." R. Fosdick & A. Scott, Toward Liquor Control 10 (1933) (Fosdick & Scott). Ours is a vast and diverse Nation, and those who adopted the Amendment believed that what works for one State may not work for another. Consistent with this widespread public understanding of the Amendment's terms, at least 18 States adopted residency requirements for retailers within the first 15 years after its ratification.[4]

See *Evansville Brewing Assn.* v. *Excise Comm'n of Jefferson Cty., Ala.*, 225 F. 204, 208 (ND Ala. 1915); *Brennen* v. *Southern Express Co.*, 106 S. C. 102, 108–111, 90 S. E. 402, 404 (1916). But there is little reason to think courts would have considered residency requirements for liquor retailers "invalid," as those laws had generally been upheld prior to Webb-Kenyon. And at least one of the cited cases appears to support the opposite view: "[A]ll commands or prohibitions ancillary and reasonably related to the state's purpose to promote temperance . . . cannot be thwarted or annulled on any idea that constitutional rights are thereby violated." *Southern Express Co.* v. *Whittle*, 194 Ala. 406, 436, 69 So. 652, 661 (1915). At any rate, a few scattered, thinly reasoned state and district court cases hardly settle anything.

[4] *Granholm* v. *Heald*, 544 U. S. 460, 518, and n. 6 (2005) (THOMAS, J., dissenting) (collecting state statutes); Brief for Petitioner 33–34 (same). See also Note, Economic Localism in State Alcoholic Beverage Laws—Experience Under the Twenty-first Amendment, 72 Harv. L. Rev. 1145, 1148–1149, and n. 25 (1959). At least 10 States, including Tennessee, re-

This Court's initial cases also reflected the same understanding of the Amendment's effect. Just a few years after ratification, a unanimous Court upheld discriminatory state liquor laws against a dormant Commerce Clause attack, explaining that "to construe the Amendment as saying, in effect: [the State] must let imported liquors compete with the domestic on equal terms . . . would involve not a construction of the Amendment, but a rewriting of it." *State Bd. of Equalization of Cal.* v. *Young's Market Co.*, 299 U. S. 59, 62 (1936). Other early cases reached similar conclusions. See, *e. g.*, *Mahoney* v. *Joseph Triner Corp.*, 304 U. S. 401, 403 (1938) ("[D]iscrimination against imported liquor is permissible"); *Indianapolis Brewing Co.* v. *Liquor Control Comm'n*, 305 U. S. 391, 394 (1939) ("Whether the Michigan law should not more properly be described as a protective measure, we have no occasion to consider," for "whatever its character, the law is valid"). In short, this Court "recognized from the start" that the Twenty-first Amendment allowed the States to regulate alcohol "'unfettered by the Commerce Clause.'" *Granholm*, 544 U. S., at 517 (THOMAS, J., dissenting).[5]

Straying from the text, state practice, and early precedent, and leaning instead on the Amendment's famously sparse legislative history, the Court says it can find no evi-

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quired a fixed period of residency of one year or more. Brief for Petitioner 34 (collecting statutes).

[5] The Court discounts the compelling evidence of postratification practice because, it suggests, States may have been relying on the Court's expansive interpretation of §2 in *State Bd. of Equalization of Cal.* v. *Young's Market Co.*, 299 U. S. 59 (1936), rather than their own independent understanding of the Amendment. *Ante*, at 536. But most of the residency requirements were enacted *before* that November 1936 decision. Although many of the statutes were *codified* after *Young's Market*, a large majority were *enacted* earlier. Compare, *e. g.*, Wyo. Stat. Ann. §53–204 (1945); Idaho Code Ann. §18–130 (1940); R. I. Gen. Laws, ch. 163 §4 (1938); N. J. Rev. Stat. §33:1–25 (1937), with 1935 Wyo. Sess. Laws ch. 87; 1935 Idaho Sess. Laws ch. 103; 1934 R. I. Laws p. 52; 1933 N. J. Laws p. 1193.

dence that § 2 was *intended* to authorize "protectionist" state laws. *Ante*, at 528, 529–530, n. 15. But even there plenty of evidence can be found that those who ratified the Amendment wanted the States to be able to regulate the sale of liquor free of judicial meddling under the dormant Commerce Clause—and there is no evidence they wanted judges to have the power to decide that state laws restricted competition "too much."[6] After all, both before Prohibition and after repeal, robust competition in the liquor industry was far from universally considered an unalloyed good; lower prices enabled higher consumption and invited social problems along the way. T. Pegram, Battling Demon Rum 94–96 (1998); Fosdick & Scott 43–44, 81. The point of § 2 was to allow each State the opportunity to assess for itself the costs and benefits of free trade in alcohol. Reduced competition and increased prices were foreseeable consequences of allowing such unfettered state regulation, but they were conse-

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[6] See, *e. g.*, 76 Cong. Rec. 4143 (1933) (statement of Sen. Blaine) ("The purpose of section 2 is to restore to the States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors"); *id.*, at 4225 (statement of Sen. Swanson) ("[I]t is left entirely to the States to determine in what manner intoxicating liquors shall be sold or used and to what places such liquors may be transported"); Ratification of the Twenty-First Amendment to the Constitution of the United States: State Convention Records and Laws 50 (E. Brown ed. 1938) (statement of President Robinson of the Connecticut convention) ("[F]undamentally our fight has been . . . for the return to the peoples of the several states of their constitutional right to govern themselves in their internal affairs"); *id.*, at 174 (statement of Del. Simmons to the Kentucky convention) ("The regulation of the sale of liquor is a state concern"); *id.*, at 247 (statement of Mme. Chairman Gaylord of the Missouri convention) ("We have never been in favor of a National Regulation to take the place of the 18th Amendment . . . . We believe that each state should work out sane and sensible liquor control measures, responsive to the sentiment of the people of each state"); *id.*, at 322 (statement of Gov. White of Ohio) ("[T]he control of intoxicating liquors presents a problem of first magnitude," and "[t]he solution of the problem will be returned to the several states").

quences the people willingly accepted with the compromise of the Twenty-first Amendment.[7]

That leaves only our modern precedent to consider—and even here the initial returns support Tennessee. In *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324 (1964), for example, this Court addressed a New York law that interfered with the federally regulated sale of alcohol to passengers departing from an airport, which the passengers would not receive until they arrived at their "foreign destination." *Id.*, at 325. Emphasizing that "ultimate delivery and use" was "in a foreign country," this Court held that the Twenty-first Amendment did not permit New York to "prevent transactions carried on under the aegis of a law passed by Congress in the exercise of its explicit power under the Constitution to regulate commerce with foreign nations." *Id.*, at 333–334. But at the same time, the Court took pains to reassure everyone that the States' core authority to "restrict, regulate, or prevent the traffic and distribution of intoxicants within [their] borders" remained "unquestioned" and "unconfined" by the dormant Commerce Clause. *Id.*, at 330; see also *Capital Cities Cable, Inc.* v. *Crisp*, 467 U. S. 691, 713 (1984) (describing "the core §2 power" as a State's authority "directly to regulate the sale or use of liquor within its borders").

Consistent with that understanding, this Court in *Heublein, Inc.* v. *South Carolina Tax Comm'n*, 409 U. S. 275 (1972), unanimously upheld a South Carolina law permitting

[7] The majority worries that giving full effect to §2 might allow a State to pass a statute restricting licenses to persons whose ancestors have resided in the State for 200 years. *Ante*, at 529–530, n. 15. But under parts of the Constitution that §2 left intact, such as the Equal Protection and Due Process Clauses, any state law must bear a rational relationship to a legitimate state interest. Besides and understandably, the evidence before us suggests that the people who ratified §2 weren't as concerned with States adopting fanciful laws like the majority's as they were with eliminating a very real threat—that judges would continue to use the dormant Commerce Clause to meddle with state regulatory authority.

producers to transfer liquor to in-state wholesalers only through "resident representative[s]." *Id.*, at 277. Because the requirement was an "appropriate element in the State's system" of regulating the sale of alcohol "'within its borders,'" this Court held that the State could enforce it "'unconfined by traditional Commerce Clause limitations.'" *Id.*, at 283 (quoting *Hostetter*, 377 U. S., at 330). To be sure, in even later cases the Court declined to uphold state laws that, in substantial effect, regulated the sale of alcohol in *other* States. *E. g.*, *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U. S. 573 (1986); *Healy* v. *Beer Institute*, 491 U. S. 324 (1989). But those decisions merely tracked the text of the Twenty-first Amendment, which grants States the power to regulate liquor only "for delivery or use *therein*."

The truth is, things have begun to shift only in very recent years. Bending to the same impulses that moved it at the beginning of the 20th century, this Court has lately begun flexing its dormant Commerce Clause muscles once more to strike down state laws even in core areas of state authority under §2. So, for example, in *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263 (1984), the Court considered Hawaii's tax exemption for certain liquor products manufactured in State. As the Court described it, Hawaii's sole "purpose" in adopting its tax exemption was "'to promote a local industry,'" not "to promote temperance." *Id.*, at 276. And a narrow majority considered this fact fatal because the law, in its judgment, did not implicate "any clear concern" of the Amendment—even though the Amendment was adopted to insulate state regulation from judicial charges of unduly interfering with interstate commerce. *Ibid.*

Yet, even under as bold a decision as *Bacchus*, Tennessee's residency requirement should survive—and easily. A residency requirement may not be the only way to ensure retailers will be amenable to state regulatory oversight, but it is surely one reasonable way of accomplishing that admittedly

legitimate goal.[8] Residency also increases the odds that retailers will have a stake in the communities they serve.[9] As Judge Sutton observed in the proceedings below, this same commonsense rationale may explain why Congress requires federal court of appeals judges to live within their circuits, 28 U. S. C. § 44(c), and district court judges to live within their districts, § 134(b). *Byrd* v. *Tennessee Wine and Spirits Retailers Assn.*, 883 F. 3d 608, 633 (CA6 2018). Surely, Tennessee cannot be faulted for sharing a similar view. Of course, Tennessee's residency requirement reduces competition in the liquor market by excluding nonresidents or recent arrivals. But even that effect might serve a legitimate state purpose by increasing the price of alcohol and thus moderating its use, an objective States have always remained free to pursue under the bargain of the Twenty-first Amendment.[10]

To defend its judgment today, the Court is thus left to try to wring support from our 2005 decision in *Granholm*. *Granholm* extended *Bacchus* and its reasoning to strike down on dormant Commerce Clause grounds a state law for disfavoring out-of-state wine producers, holding that "Section 2 does not allow States to regulate the direct shipment of wine on terms that discriminate in favor of in-state *producers*." 544 U. S., at 476 (emphasis added). But even this

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[8] See *Southern Wine & Spirits of Am., Inc.* v. *Division of Alcohol and Tobacco Control*, 731 F. 3d 799, 811 (CA8 2013) (Colloton, J.); *Hinebaugh* v. *James*, 119 W. Va. 162, 164, 192 S. E. 177, 179 (1937); *Welsh* v. *State*, 126 Ind. 71, 78, 25 N. E. 883, 885 (1890); Note, 72 Harv. L. Rev., at 1148.

[9] See *Byrd* v. *Tennessee Wine and Spirits Retailers Assn.*, 883 F. 3d 608, 633 (CA6 2018) (Sutton, J., concurring in part and dissenting in part); *Southern Wine & Spirits*, 731 F. 3d, at 811.

[10] See Brief for U. S. Alcohol Policy Alliance et al. as *Amici Curiae* 5–24; Lawson, The Future of The Three-Tiered System as a Control of Marketing Alcoholic Beverages, in Social and Economic Control of Alcohol 32–34 (C. Jurkiewicz & M. Painter eds. 2008); 883 F. 3d, at 634 (opinion of Sutton, J.); cf. *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S. 484, 504 (1996) (plurality opinion) (acknowledging a State's legitimate interest in "reducing alcohol consumption").

holding doesn't spell doom for Tennessee's retailer residency requirements. As even the Court today acknowledges, "*Granholm* repeatedly spoke of discrimination against out-of-state products and producers" and did not refer more generally to discrimination against nonresidents. *Ante*, at 534.[11]

To claim *Granholm*'s support, the majority is thus forced to characterize *Granholm*'s framing of the issue before it as purely incidental—the state laws at issue there happened to discriminate against out-of-state products, so the Court just happened to talk a lot about products. As the Court seems to read *Granholm*, then, it really meant to disapprove *any* discrimination against out-of-staters. But this badly misreads *Granholm*. The distinction between producers and other levels of the distribution system was integral to its reasoning and result—in fact, it was precisely how *Granholm* sought to reconcile its result with the longstanding tradition of state residency requirements. So yes, *Granholm* held that the Twenty-first Amendment does not protect laws that discriminate against out-of-state products, but it *also* expressly reaffirmed the "'unquestionabl[e] legitima[cy]'" of state laws that require "'all liquor sold for use in the State [to] be purchased from a licensed in-state wholesaler.'" 544 U. S., at 489 (quoting *North Dakota* v. *United States*, 495 U. S. 423, 432 (1990); *id.*, at 447 (Scalia, J., concurring in judgment)). And I would have thought that restatement of the law more than enough to resolve today's case.

Having now effectively abandoned *Granholm*'s distinction between products and their distribution and promising to subject both to dormant Commerce Clause scrutiny, it's hard not to wonder what's left of Webb-Kenyon and §2. For its part, the Court assures us that it will still allow each State

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[11] See also *Granholm*, 544 U. S., at 486 ("States may not give a discriminatory preference to their own producers"); *id.*, at 484–485 ("The Amendment did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods, a privilege they had not enjoyed at any earlier time").

"leeway to enact the measures that *its citizens believe* are appropriate" to address public health and safety. *Ante*, at 538 (emphasis added). Yet the Court then proceeds to turn around and dismantle the longstanding judgment of the citizens of Tennessee on just these questions, dismissing them as "protectionist measures with no demonstrable connection" to public health and safety. *Ibid.* And it promises it will not sustain any state law whose protectionist "effect[s] . . . predomina[te]." *Ante*, at 539.

What are lower courts supposed to make of this? How much public health and safety benefit must there be to overcome this Court's worries about protectionism "predominat-[ing]"? Does reducing competition in the liquor market, raising prices, and thus reducing demand still count as a public health benefit, as many States have long supposed? And if residency requirements are problematic, what about simple physical *presence* laws? After all, can't States "thoroughly investigate applicants" for liquor licenses without requiring them to have a brick-and-mortar store in the State? *Ante*, at 540. The Court offers lower courts no more guidance than to proclaim delphically that "each variation must be judged based on its own features." *Ante*, at 535.

As judges, we may be sorely tempted to "rationalize" the law and impose our own free-trade rules for all goods and services in interstate commerce. Certainly, that temptation seems to have proven nearly irresistible for this Court when it comes to alcohol. And as Justice Cardozo once observed, "an intellectual passion . . . for symmetry of form and substance" is "an ideal which can never fail to exert some measure of attraction upon the professional experts who make up the lawyer class." B. Cardozo, The Nature of the Judicial Process 34 (1921). But real life is not always so tidy and satisfactory, and neither are the democratic compromises we are bound to respect as judges. Like it or not, those who adopted the Twenty-first Amendment took the view that reasonable people can disagree about the costs and benefits of

free trade in alcohol. They left us with clear instructions that the free-trade rules this Court has devised for "cabbages and candlesticks" should not be applied to alcohol. *Carter* v. *Virginia*, 321 U. S. 131, 139 (1944) (Frankfurter, J., concurring). Under the terms of the compromise they hammered out, the regulation of alcohol wasn't left to the imagination of a committee of nine sitting in Washington, D. C., but to the judgment of the people themselves and their local elected representatives. State governments were supposed to serve as "laborator[ies]" of democracy, *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting), with "broad power to regulate liquor under §2," *Granholm*, 544 U. S., at 493. If the people wish to alter this arrangement, that is their sovereign right. But until then, I would enforce the Twenty-first Amendment as they wrote and originally understood it.

Syllabus

KISOR *v.* WILKIE, SECRETARY OF VETERANS AFFAIRS

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

No. 18–15. Argued March 27, 2019—Decided June 26, 2019

Petitioner James Kisor, a Vietnam War veteran, first sought disability benefits from the Department of Veterans Affairs (VA) in 1982, alleging that he had developed post-traumatic stress disorder from his military service. The agency denied his initial request, but in 2006, Kisor moved to reopen his claim. The VA this time agreed he was eligible for benefits, but it granted those benefits only from the date of his motion to reopen, not (as Kisor had requested) from the date of his first application. The Board of Veterans' Appeals—a part of the VA—affirmed that retroactivity decision, based on its interpretation of an agency rule governing such claims. The Court of Appeals for Veterans Claims affirmed.

The Federal Circuit also affirmed, but it did so by applying a doctrine called *Auer* (or sometimes, *Seminole Rock*) deference. See *Auer* v. *Robbins*, 519 U. S. 452; *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410. Under that doctrine, this Court has long deferred to an agency's reasonable reading of its own genuinely ambiguous regulations. The Court of Appeals concluded that the VA regulation at issue was ambiguous, and it therefore deferred to the Board's interpretation of the rule. Kisor now asks the Court to overrule *Auer*, as well as its predecessor *Seminole Rock*, discarding the deference those decisions give to agencies.

Held: The judgment is vacated and remanded.

869 F. 3d 1360, vacated and remanded.

JUSTICE KAGAN delivered the opinion of the Court with respect to Parts I, II–B, III–B, and IV, holding that *Auer* and *Seminole Rock* are not overruled. Pp. 573–580, 586–590.

(a) This Court's deference doctrine is rooted in a presumption that Congress intended for courts to defer to agencies when they interpret their own ambiguous rules. The Court adopts that presumption for a set of reasons related to the comparative attributes of courts and agencies in answering interpretive questions. But when the reasons for the presumption do not hold up, or when countervailing reasons outweigh them, courts should not give deference to an agency's reading. The Court has thus cabined *Auer*'s scope in varied and critical ways.

Syllabus

First and foremost, a court should not afford *Auer* deference unless, after exhausting all the "traditional tools" of construction, *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843, n. 9, the regulation is genuinely ambiguous. A court must carefully consider the text, structure, history, and purpose of a regulation before resorting to deference. If genuine ambiguity remains, the agency's reading must still fall "within the bounds of reasonable interpretation." *Arlington* v. *FCC*, 569 U. S. 290, 296.

And even then, not every reasonable agency reading of a genuinely ambiguous rule should receive *Auer* deference. Rather, a court must also make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight. See, *e. g.*, *Christopher* v. *SmithKline Beecham Corp.*, 567 U. S. 142, 155. The inquiry along this dimension does not reduce to an exhaustive test, but the Court has laid out some especially important markers for identifying when *Auer* deference is and is not appropriate. To begin with, the regulatory interpretation must be the agency's authoritative or official position, rather than any more *ad hoc* statement not reflecting the agency's views. Next, the agency's interpretation must in some way implicate its substantive expertise, as the basis for deference ebbs when the subject matter of a dispute is distant from the agency's ordinary duties. Finally, an agency's reading of a rule must reflect its "fair and considered judgment." *Auer*, 519 U. S., at 462. A court should decline to defer, for example, to a merely "'convenient litigating position,'" *Christopher*, 567 U. S., at 155, or to a new interpretation that creates "unfair surprise" to regulated parties, *Long Island Care at Home, Ltd.* v. *Coke*, 551 U. S. 158, 170. Pp. 573–580.

(b) *Stare decisis* cuts strongly against overruling *Auer*. Adherence to precedent is "a foundation stone of the rule of law," *Michigan* v. *Bay Mills Indian Community*, 572 U. S. 782, 798, and any departure from the doctrine demands "special justification," *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U. S. 258, 266. That is even more than usually so in the circumstances here. First, Kisor asks the Court to overrule a "long line of precedents"—each one reaffirming the rest and going back 75 years or more. *Bay Mills*, 572 U. S., at 798. Second, because *Auer* deference pervades the whole corpus of administrative law, abandoning it would cast doubt on many settled constructions of rules. And third, even if the Court is wrong about *Auer*, "Congress remains free to alter what [the Court has] done." *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172–173. For approaching a century, Congress has let this deference regime work side-by-side with both the Administrative Procedure Act (APA) and the many statutes delegating rulemaking

power to agencies. This Court would thus need a particularly "special justification" to now reverse *Auer*.

Kisor offers nothing of that ilk. Nearly all of his arguments relate to whether the doctrine is wrong or poorly reasoned. He does not claim that *Auer* deference is "unworkable," a traditional basis for overruling a case, *Patterson*, 491 U. S., at 173, or point to changes in legal rules that make *Auer* a "doctrinal dinosaur," *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. 446, 458. Instead, his lone special justification is that the administrative state has evolved substantially since this Court decided *Seminole Rock* in 1945. It is true that agencies have far-reaching influence today; that is one reason the Court has taken care to reinforce the limits of *Auer* deference. But it is no answer to the growth of agencies for courts to take over their expertise-based, policymaking functions. Pp. 586–589.

(c) Turning to Kisor's own case, a remand is necessary for two reasons. First, the Federal Circuit jumped the gun in declaring the VA's regulation ambiguous before bringing all its interpretive tools to bear on the question. Second, the Federal Circuit assumed too fast that *Auer* deference should apply in the event of genuine ambiguity, rather than assessing whether the interpretation is of the sort that Congress would want to receive deference. On remand, the Court of Appeals must reconsider whether *Auer* deference is warranted, bearing in mind the principles outlined in this opinion. Pp. 589–590.

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

(a) *Auer* deference is rooted in a presumption that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities. See *Martin* v. *Occupational Safety and Health Review Comm'n*, 499 U. S. 144, 151–153. In part, the presumption arises because the agency that promulgated a rule is in the "better position [to] reconstruct" its original meaning. *Id.*, at 152. In still greater measure, the presumption stems from an awareness that resolving genuine regulatory ambiguities often "'entail[s] the exercise of judgment grounded in policy concerns,'" an area where agencies have a comparative advantage over courts. *Thomas Jefferson Univ.* v. *Shalala*, 512 U. S. 504, 512. Finally, the presumption reflects the well-known benefits of uniformity in interpreting ambiguous rules. *Auer* deference promotes "resolving interpretive issues by uniform administrative decision, rather than piecemeal by litigation," *Ford Motor Credit Co.* v. *Milhollin*, 444 U. S. 555, 568. Pp. 566–573.

(b) None of Kisor's arguments provide good reason to reconsider *Auer* deference. First, he claims that *Auer* is inconsistent with the APA's judicial review provision, which instructs reviewing courts to

"determine the meaning" of an agency action. 5 U. S. C. § 706. Even when a court defers to a regulatory reading, however, it acts consistently with Section 706. That provision does not specify the standard of review a court should use in "determin[ing] the meaning" of an ambiguous rule. This Court thus presumes that Congress would want courts to do so by reviewing agency interpretations for reasonableness. That is especially so because Section 706, when enacted, was understood to restate the present law of judicial review—which would have included deference under *Seminole Rock*. Nor does *Auer* circumvent the APA's rulemaking requirements, which require regulations to go through notice and comment before they can bind third parties. Even though a court might defer to an agency's interpretation of a regulation, the agency's interpretation itself never forms the basis for an enforcement action. Rather, an agency bringing an enforcement action must always rely on a rule that went through notice and comment. And courts, in turn, always retain the final authority to approve—or not—an agency's reading of that notice-and-comment rule. See *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 104, n. 4.

Kisor's policy and constitutional arguments fail just as roundly. As a policy matter, he contends that *Auer* encourages agencies to issue vague and open-ended regulations, confident that they can later impose whatever interpretation of those rules they prefer. But no real evidence backs up that assertion and strong incentives cut in the opposite direction. Finally, Kisor asserts that *Auer* deference violates "separation-of-powers principles" by vesting both legislative and judicial functions in one branch. If that objection is to agencies' usurping the interpretive role of courts, *Auer*—when properly understood and applied—does no such thing. And if the objection is instead to the supposed commingling of functions within an agency, this Court has explained that even when agency "activities take 'legislative' and 'judicial' forms," they continue to be "exercises of the 'executive Power,'" and thus raise no constitutional concerns. *Arlington*, 569 U. S., at 304–305, n. 4. Pp. 580–586.

KAGAN, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–B, III–B, and IV, in which ROBERTS, C. J., and GINSBURG, BREYER, and SOTOMAYOR, JJ., joined, and an opinion with respect to Parts II–A and III–A, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. ROBERTS, C. J., filed an opinion concurring in part, *post*, p. 590. GORSUCH, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined, in which KAVANAUGH, J., joined as to Parts I, II, III, IV, and V, and in which ALITO, J., joined as to Parts I, II, and III, *post*, p. 592. KAVANAUGH, J., filed an opinion concurring in the judgment, in which ALITO, J., joined, *post*, p. 631.

Counsel

Paul W. Hughes argued the cause for petitioner. With him on the briefs were *Michael B. Kimberly*, *Andrew J. Pincus*, *Charles A. Rothfeld*, *E. Brantley Webb*, *Kenneth M. Carpenter*, and *Eugene R. Fidell*.

Solicitor General Francisco argued the cause for respondent. With him on the brief were *Assistant Attorney General Hunt*, *Deputy Solicitor General Wall*, *Deputy Assistant Attorney General Mooppan*, *Matthew Guarnieri*, *Mark B. Stern*, and *Daniel Aguilar*.*

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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, *Kevin G. Clarkson* of Alaska, *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, *Eric S. Schmitt* of Missouri, *Doug Peterson* of Nebraska, *Dave Yost* of Ohio, *Mike Hunter* of Oklahoma, *Alan Wilson* of South Carolina, *Ken Paxton* of Texas, and *Patrick Morrisey* of West Virginia; for the American Federation of Labor and Congress of Industrial Organizations by *Harold C. Becker* and *Matthew J. Ginsburg*; for the Atlantic Legal Foundation by *Martin S. Kaufman*; for the Cato Institute et al. by *Ilya Shapiro* and *John J. Vecchione*; for the Center for Constitutional Jurisprudence by *John C. Eastman* and *Anthony T. Caso*; for the Center for Workplace Compliance by *Rae T. Vann* and *Michael P. Bracken*; for the Chamber of Commerce of the United States of America et al. by *Mark W. Mosier*, *Kevin F. King*, and *Daniel Saphire*; for the National Association of Home Builders et al. by *Evan A. Young*, *Megan Berge*, *Jared Wigginton*, *Amy Chai*, *Thomas J. Ward*, *Karen R. Harned*, *Elizabeth Milito*, *Scott Yager*, *Ellen Steen*, *Travis Cushman*, *Peter C. Tolsdorf*, and *Richard Moskowitz*; for the National Immigrant Justice Center et al. by *Jean-Claude André* and *Charles Roth*; for the National Organization of Veterans' Advocates, Inc., et al. by *Roman Martinez*, *Benjamin W. Snyder*, *Kevin J. Bartlett*, *Christopher J. Clay*, *Leonard J. Selfon*, and *Linda E. Blauhut*; for the National Right to Work Legal Defense Foundation, Inc., by *Raymond J. LaJeunesse, Jr.*; for the National Veterans Legal Services Program et al. by *Amy Mason Saharia*, *Liam J. Montgomery*, *William T. Marks*, and *Barton F. Stichman*; for the New Civil Liberties Alliance by *Jonathan F. Mitchell* and *Steve Simpson*; for the Pacific Legal Foundation et al. by *Anthony L. François*, *Damien M. Schiff*, *Daniel M. Ortner*, and *Todd F.*

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

This Court has often deferred to agencies' reasonable readings of genuinely ambiguous regulations. We call that practice *Auer* deference, or sometimes *Seminole Rock* deference, after two cases in which we employed it. See *Auer* v. *Robbins*, 519 U. S. 452 (1997); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410 (1945). The only question presented here is whether we should overrule those decisions, discarding the deference they give to agencies. We answer that question no. *Auer* deference retains an important role in construing agency regulations. But even as we uphold it, we reinforce its limits. *Auer* deference is sometimes appropriate and sometimes not. Whether to apply it depends on a range of considerations that we have noted now and again, but compile and further develop today. The deference doc-

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Gaziano; for the Southeastern Legal Foundation et al. by *Kimberly S. Hermann*, *Braden Boucek*, *Robert Henneke*, *Jonathan Riches*, and *Aditya Dynar*; for State and Local Government Associations by *Allyson N. Ho*, *Kathryn Cherry*, *Bradley G. Hubbard*, and *Lisa E. Soronen*; for the Utility Air Regulatory Group by *Elbert Lin*, *F. William Brownell*, *Henry V. Nickel*, and *Nash E. Long III*; for the Washington Legal Foundation by *Corbin K. Barthold* and *Cory L. Andrews*; for Ronald A. Cass et al. by *Mr. Cass*, *pro se*; for Stephen C. Connaker et al. by *William J. Brown*, *Jr.*, and *Matthew K. Wegner*; for Jeremy C. Doerre by *Mr. Doerre*, *pro se*; for Jeff S. Howard by *Shawn T. Welch*; and for Thomas Merrill by *William M. Jay* and *Mr. Merrill*, *pro se*.

Briefs of *amici curiae* urging affirmance were filed for Administrative Law Scholars by *Donald B. Verrilli, Jr.*, and *Ronald M. Levin* and *Gillian E. Metzger*, both *pro se*; and for Sen. Sheldon Whitehouse by *Mr. Whitehouse*, *pro se*, and *Jason P. Steed*.

Briefs of *amici curiae* were filed for Professors of Administrative Law and Federal Regulation by *Vincent Levy*, *Daniel M. Sullivan*, *Gregory Dubinsky*, and *Samuel Estreicher*, *pro se*; and for Public Citizen by *Scott L. Nelson* and *Allison M. Zieve*.

trine we describe is potent in its place, but cabined in its scope. On remand, the Court of Appeals should decide whether it applies to the agency interpretation at issue.

I

We begin by summarizing how petitioner James Kisor's case made its way to this Court. Truth be told, nothing recounted in this Part has much bearing on the rest of our decision. The question whether to overrule *Auer* does not turn on any single application, whether right or wrong, of that decision's deference doctrine. But a recitation of the facts and proceedings below at least shows how the question presented arose.

Kisor is a Vietnam War veteran seeking disability benefits from the Department of Veterans Affairs (VA). He first applied in 1982, alleging that he had developed post-traumatic stress disorder (PTSD) as a result of his participation in a military action called Operation Harvest Moon. The report of the agency's evaluating psychiatrist noted Kisor's involvement in that battle, but found that he "d[id] not suffer from PTSD." App. 12, 14. The VA thus denied Kisor benefits. There matters stood until 2006, when Kisor moved to reopen his claim. Based on a new psychiatric report, the VA this time agreed that Kisor suffered from PTSD. But it granted him benefits only from the date of his motion to reopen, rather than (as he requested) from the date of his first application.

The Board of Veterans' Appeals—a part of the VA, represented in Kisor's case by a single administrative judge—affirmed that timing decision, based on its interpretation of an agency rule. Under the VA's regulation, the agency could grant Kisor retroactive benefits if it found there were "relevant official service department records" that it had not considered in its initial denial. See 38 CFR § 3.156(c)(1) (2013). The Board acknowledged that Kisor had come up with two new service records, both confirming his participa-

tion in Operation Harvest Moon. But according to the Board, those records were not "relevant" because they did not go to the reason for the denial—that Kisor did not have PTSD. See App. to Pet. for Cert. 43a ("[The] documents were not relevant to the decision in May 1983 because the basis of the denial was that a diagnosis of PTSD was not warranted, not a dispute as to whether or not the Veteran engaged in combat"). The Court of Appeals for Veterans Claims, an independent Article I court that initially reviews the Board's decisions, affirmed for the same reason.

The Court of Appeals for the Federal Circuit also affirmed, but it did so based on deference to the Board's interpretation of the VA rule. See *Kisor* v. *Shulkin*, 869 F. 3d 1360, 1368 (2017). Kisor had argued to the Federal Circuit that to count as "relevant," a service record need not (as the Board thought) "counter[ ] the basis of the prior denial"; instead, it could relate to some other criterion for obtaining disability benefits. *Id.*, at 1366 (internal quotation marks omitted). The Federal Circuit found the regulation "ambiguous" as between the two readings. *Id.*, at 1367. The rule, said the court, does not specifically address "whether 'relevant' records are those casting doubt on the agency's prior [rationale or] those relating to the veteran's claim more broadly." *Ibid.* So how to choose between the two views? The court continued: "Both parties insist that the plain regulatory language supports their case, and neither party's position strikes us as unreasonable." *Id.*, at 1368. Because that was so, the court believed *Auer* deference appropriate: The agency's construction of its own regulation would govern unless "plainly erroneous or inconsistent with the VA's regulatory framework." *Ibid.* (internal quotation marks omitted). Applying that standard, the court upheld the Board's reading—and so approved the denial of retroactive benefits.

We then granted certiorari to decide whether to overrule *Auer* and (its predecessor) *Seminole Rock*. 586 U. S. 1050 (2018).

II

Before addressing that question directly, we spend some time describing what *Auer* deference is, and is not, for. You might view this Part as "just background" because we have made many of its points in prior decisions. But even if so, it is background that matters. For our account of why the doctrine emerged—and also how we have limited it—goes a long way toward explaining our view that it is worth preserving.

A

Begin with a familiar problem in administrative law: For various reasons, regulations may be genuinely ambiguous. They may not directly or clearly address every issue; when applied to some fact patterns, they may prove susceptible to more than one reasonable reading. Sometimes, this sort of ambiguity arises from careless drafting—the use of a dangling modifier, an awkward word, an opaque construction. But often, ambiguity reflects the well-known limits of expression or knowledge. The subject matter of a rule "may be so specialized and varying in nature as to be impossible"—or at any rate, impracticable—to capture in its every detail. *SEC* v. *Chenery Corp.*, 332 U. S. 194, 203 (1947). Or a "problem[ ] may arise" that the agency, when drafting the rule, "could not [have] reasonably foresee[n]." *Id.*, at 202. Whichever the case, the result is to create real uncertainties about a regulation's meaning.

Consider these examples:

- In a rule issued to implement the Americans with Disabilities Act (ADA), the Department of Justice requires theaters and stadiums to provide people with disabilities "lines of sight comparable to those for members of the general public." 28 CFR pt. 36, App. A, p. 563 (1996). Must the Washington Wizards construct wheelchair seating to offer lines of sight over spectators when they rise to their feet? Or is it enough that the facility offers

comparable views so long as everyone remains seated? See *Paralyzed Veterans of Am.* v. *D. C. Arena L. P.*, 117 F. 3d 579, 581–582 (CADC 1997).

- The Transportation Security Administration (TSA) requires that liquids, gels, and aerosols in carry-on baggage be packed in containers smaller than 3.4 ounces and carried in a clear plastic bag. Does a traveler have to pack his jar of truffle pâté in that way? See *Laba* v. *Copeland*, 2016 WL 5958241, *1 (WDNC, Oct. 13, 2016).
- The Mine Safety and Health Administration issues a rule requiring employers to report occupational diseases within two weeks after they are "diagnosed." 30 CFR § 50.20(a) (1992). Do chest X-ray results that "scor[e]" above some level of opacity count as a "diagnosis"? What level, exactly? See *American Min. Congress* v. *Mine Safety and Health Admin.*, 995 F. 2d 1106, 1107–1108 (CADC 1993).
- An FDA regulation gives pharmaceutical companies exclusive rights to drug products if they contain "no active moiety that has been approved by FDA in any other" new drug application. 21 CFR § 314.108(a) (2010). Has a company created a new "active moiety" by joining a previously approved moiety to lysine through a non-ester covalent bond? See *Actavis Elizabeth LLC* v. *FDA*, 625 F. 3d 760, 762–763 (CADC 2010); Tr. of Oral Arg. 12, 35.[1]
- Or take the facts of *Auer* itself. An agency must decide whether police captains are eligible for overtime under the Fair Labor Standards Act. According to the agency's regulations, employees cannot receive overtime

[1] In case you're wondering, the regulatory definition of active moiety is "[t]he molecule or ion, excluding those appended portions of the molecule that cause the drug to be an ester, salt (including a salt with hydrogen or coordination bonds), or the noncovalent derivative (such as a complex, chelate, or clathrate) of the molecule, responsible for the physiological or pharmacological action of the drug substance." 21 CFR § 314.3(b) (2018).

> if they are paid on a "salary basis." 29 CFR § 541.118(a) (1996). And in deciding whether an employee is salaried, one question is whether his pay is "subject to reduction" based on performance. *Ibid.* A police department's manual informs its officers that their pay might be docked if they commit a disciplinary infraction. Does that fact alone make them "subject to" pay deductions? Or must the department have a practice of docking officer pay, so that the possibility of that happening is more than theoretical? 519 U. S., at 459–462.

In each case, interpreting the regulation involves a choice between (or among) more than one reasonable reading. To apply the rule to some unanticipated or unresolved situation, the court must make a judgment call. How should it do so?

In answering that question, we have often thought that a court should defer to the agency's construction of its own regulation. For the last 20 or so years, we have referred to that doctrine as *Auer* deference, and applied it often.[2] But the name is something of a misnomer. Before the doctrine was called *Auer* deference, it was called *Seminole Rock* deference—for the 1945 decision in which we declared that when "the meaning of [a regulation] is in doubt," the agency's interpretation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." 325 U. S., at 414.[3] And *Seminole Rock* itself was not built on

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[2] See, *e. g.*, *PLIVA, Inc.* v. *Mensing*, 564 U. S. 604, 613 (2011); *Chase Bank USA, N. A.* v. *McCoy*, 562 U. S. 195, 208–210 (2011); *Coeur Alaska, Inc.* v. *Southeast Alaska Conservation Council*, 557 U. S. 261, 274–275 (2009); *Riegel* v. *Medtronic, Inc.*, 552 U. S. 312, 328 (2008); *Long Island Care at Home, Ltd.* v. *Coke*, 551 U. S. 158, 171 (2007); *Washington State Dept. of Social and Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U. S. 371, 387–388 (2003).

[3] Our (pre-*Auer*) decisions applying *Seminole Rock* deference are legion. See, *e. g.*, *Shalala* v. *Guernsey Memorial Hospital*, 514 U. S. 87, 94–95 (1995); *Thomas Jefferson Univ.* v. *Shalala*, 512 U. S. 504, 512 (1994); *Stinson* v. *United States*, 508 U. S. 36, 44–45 (1993); *INS* v. *National Center for Immigrants' Rights, Inc.*, 502 U. S. 183, 189–190 (1991); *Robertson* v.

sand. Deference to administrative agencies traces back to the late nineteenth century, and perhaps beyond. See *United States* v. *Eaton*, 169 U. S. 331, 343 (1898) ("The interpretation given to the regulations by the department charged with their execution . . . is entitled to the greatest weight"); see Brief for Administrative Law Scholars as *Amici Curiae* 5, n. 3 (collecting early cases); Brief for AFL–CIO as *Amicus Curiae* 8 (same).

We have explained *Auer* deference (as we now call it) as rooted in a presumption about congressional intent—a presumption that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities. See *Martin* v. *Occupational Safety and Health Review Comm'n*, 499 U. S. 144, 151–153 (1991). Congress, we have pointed out, routinely delegates to agencies the power to implement statutes by issuing rules. See *id.*, at 151. In doing so, Congress knows (how could it not?) that regulations will sometimes contain ambiguities. See *supra*, at 566. But Congress almost never explicitly assigns responsibility to deal with that problem, either to agencies or to courts. Hence the need to presume, one way or the other, what Congress would want. And as between those two choices, agencies have gotten the nod. We have adopted the presumption—though it is always rebuttable—that "the power authoritatively to interpret its own regulations is a component of the

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Methow Valley Citizens Council, 490 U. S. 332, 358–359 (1989); *Mullins Coal Co. of Va.* v. *Director, Office of Workers' Compensation Programs*, 484 U. S. 135, 159 (1987); *Lyng* v. *Payne*, 476 U. S. 926, 939 (1986); *Fidelity Fed. Sav. & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141, 158, n. 13 (1982); *Blanding* v. *DuBose*, 454 U. S. 393, 401 (1982) (*per curiam*); *Ford Motor Credit Co.* v. *Milhollin*, 444 U. S. 555, 566 (1980); *United States* v. *Larionoff*, 431 U. S. 864, 872 (1977); *Northern Indiana Public Service Co.* v. *Porter County Chapter of Izaak Walton League of America, Inc.*, 423 U. S. 12, 15 (1975) (*per curiam*); *Ehlert* v. *United States*, 402 U. S. 99, 105 (1971); *INS* v. *Stanisic*, 395 U. S. 62, 72 (1969); *Thorpe* v. *Housing Authority of Durham*, 393 U. S. 268, 276 (1969); *Udall* v. *Tallman*, 380 U. S. 1, 16–17 (1965).

agency's delegated lawmaking powers." *Martin*, 499 U. S., at 151. Or otherwise said, we have thought that when granting rulemaking power to agencies, Congress usually intends to give them, too, considerable latitude to interpret the ambiguous rules they issue.

In part, that is because the agency that promulgated a rule is in the "better position [to] reconstruct" its original meaning. *Id.*, at 152. Consider that if you don't know what some text (say, a memo or an e-mail) means, you would probably want to ask the person who wrote it. And for the same reasons, we have thought, Congress would too (though the person is here a collective actor). The agency that "wrote the regulation" will often have direct insight into what that rule was intended to mean. *Mullins Coal Co. of Va.* v. *Director, Office of Workers' Compensation Programs*, 484 U. S. 135, 159 (1987). The drafters will know what it was supposed to include or exclude or how it was supposed to apply to some problem. To be sure, this justification has its limits. It does not work so well, for example, when the agency failed to anticipate an issue in crafting a rule (*e. g.*, if the agency never thought about whether and when chest X-rays would count as a "diagnosis"). See *supra*, at 567. Then, the agency will not be uncovering a specific intention; at most (though this is not nothing), it will be offering insight into the analogous issues the drafters considered and the purposes they designed the regulation to serve. And the defense works yet less well when lots of time has passed between the rule's issuance and its interpretation—especially if the interpretation differs from one that has come before. All that said, the point holds good for a significant category of "contemporaneous" readings. *Lyng* v. *Payne*, 476 U. S. 926, 939 (1986). Want to know what a rule means? Ask its author.

In still greater measure, the presumption that Congress intended *Auer* deference stems from the awareness that resolving genuine regulatory ambiguities often "entail[s] the exercise of judgment grounded in policy concerns."

Thomas Jefferson Univ. v. *Shalala*, 512 U. S. 504, 512 (1994) (internal quotation marks omitted). Return to our TSA example. See *supra*, at 567. In most of their applications, terms like "liquids" and "gels" are clear enough. (Traveler checklist: Pretzels OK; water not.) But resolving the uncertain issues—the truffle pâtés or olive tapenades of the world—requires getting in the weeds of the rule's policy: Why does TSA ban liquids and gels in the first instance? What makes them dangerous? Can a potential hijacker use pâté jars in the same way as soda cans? Or take the less specialized-seeming ADA example. See *supra*, at 566–567. It is easy enough to know what "comparable lines of sight" means in a movie theater—but more complicated when, as in sports arenas, spectators sometimes stand up. How costly is it to insist that the stadium owner take that sporadic behavior into account, and is the viewing value received worth the added expense? That cost-benefit calculation, too, sounds more in policy than in law. Or finally, take the more technical "moiety" example. See *supra*, at 567. Or maybe, don't. If you are a judge, you probably have no idea of what the FDA's rule means, or whether its policy is implicated when a previously approved moiety is connected to lysine through a non-ester covalent bond.

And Congress, we have thought, knows just that: It is attuned to the comparative advantages of agencies over courts in making such policy judgments. Agencies (unlike courts) have "unique expertise," often of a scientific or technical nature, relevant to applying a regulation "to complex or changing circumstances." *Martin*, 499 U. S., at 151; see *Thomas Jefferson*, 512 U. S., at 512. Agencies (unlike courts) can conduct factual investigations, can consult with affected parties, can consider how their experts have handled similar issues over the long course of administering a regulatory program. See *Long Island Care at Home, Ltd.* v. *Coke*, 551 U. S. 158, 167–168 (2007). And agencies (again unlike courts) have political accountability, because they are subject to the

supervision of the President, who in turn answers to the public. See *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 499 (2010); *Pauley* v. *BethEnergy Mines, Inc.*, 501 U. S. 680, 696 (1991) (discussing as a matter of democratic accountability the "proper roles of the political and judicial branches" in filling regulatory gaps). It is because of those features that Congress, when first enacting a statute, assigns rulemaking power to an agency and thus authorizes it to fill out the statutory scheme. And so too, when new issues demanding new policy calls come up within that scheme, Congress presumably wants the same agency, rather than any court, to take the laboring oar.

Finally, the presumption we use reflects the well-known benefits of uniformity in interpreting genuinely ambiguous rules. We have noted Congress's frequent "preference for resolving interpretive issues by uniform administrative decision, rather than piecemeal through litigation." *Ford Motor Credit Co.* v. *Milhollin*, 444 U. S. 555, 568 (1980). That preference may be strongest when the interpretive issue arises in the context of a "complex and highly technical regulatory program." *Thomas Jefferson*, 512 U. S., at 512. After all, judges are most likely to come to divergent conclusions when they are least likely to know what they are doing. (Is there anything to be said for courts all over the country trying to figure out what makes for a new active moiety?) But the uniformity justification retains some weight even for more accessible rules, because their language too may give rise to more than one eminently reasonable reading. Consider *Auer* itself. See *supra*, at 567–568. There, four Circuits held that police captains were "subject to" pay deductions for disciplinary infractions if a police manual said they were, even if the department had never docked anyone. Two other Circuits held that captains were "subject to" pay deductions only if the department's actual practice made that punishment a realistic possibility. See *Auer*, 519 U. S., at 460. Had the agency issued an interpretation before all those rulings

(rather than, as actually happened, in a brief in this Court), a deference rule would have averted most of that conflict and uncertainty. See *Christopher* v. *SmithKline Beecham Corp.*, 567 U. S. 142, 158, n. 17 (2012) (noting for this reason that *Auer* deference imparts "predictability to the administrative process" (internal quotation marks omitted)). *Auer* deference thus serves to ensure consistency in federal regulatory law, for everyone who needs to know what it requires.

B

But all that said, *Auer* deference is not the answer to every question of interpreting an agency's rules. Far from it. As we explain in this section, the possibility of deference can arise only if a regulation is genuinely ambiguous. And when we use that term, we mean it—genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation. Still more, not all reasonable agency constructions of those truly ambiguous rules are entitled to deference. As just explained, we presume that Congress intended for courts to defer to agencies when they interpret their own ambiguous rules. See *supra*, at 566–573. But when the reasons for that presumption do not apply, or countervailing reasons outweigh them, courts should not give deference to an agency's reading, except to the extent it has the "power to persuade." *Christopher*, 567 U. S., at 159 (quoting *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944)). We have thus cautioned that *Auer* deference is just a "general rule"; it "does not apply in all cases." *Christopher*, 567 U. S., at 155. And although the limits of *Auer* deference are not susceptible to any rigid test, we have noted various circumstances in which such deference is "unwarranted." *Ibid.* In particular, that will be so when a court concludes that an interpretation does not reflect an agency's authoritative, expertise-based, "fair[, or] considered judgment." *Ibid.* (quoting *Auer*, 519 U. S., at 462); cf. *United States* v.

Mead Corp., 533 U. S. 218, 229–231 (2001) (adopting a similar approach to *Chevron* deference).

We take the opportunity to restate, and somewhat expand on, those principles here to clear up some mixed messages we have sent. At times, this Court has applied *Auer* deference without significant analysis of the underlying regulation. See, *e. g.*, *United States* v. *Larionoff*, 431 U. S. 864, 872 (1977) (stating that the Court "need not tarry" over the regulation's language given *Seminole Rock*). At other times, the Court has given *Auer* deference without careful attention to the nature and context of the interpretation. See, *e. g.*, *Thorpe* v. *Housing Authority of Durham*, 393 U. S. 268, 276, and nn. 22–23 (1969) (deferring to an agency's view as expressed in letters to third parties). And in a vacuum, our most classic formulation of the test—whether an agency's construction is "plainly erroneous or inconsistent with the regulation," *Seminole Rock*, 325 U. S., at 414—may suggest a caricature of the doctrine, in which deference is "reflexive." *Pereira* v. *Sessions*, 585 U. S. 198, 221 (2018) (Kennedy, J., concurring). So we cannot deny that Kisor has a bit of grist for his claim that *Auer* "bestows on agencies expansive, unreviewable" authority. Brief for Petitioner 25. But in fact *Auer* does no such thing: It gives agencies their due, while also allowing—indeed, obligating—courts to perform their reviewing and restraining functions. So before we turn to Kisor's specific grievances, we think it worth reinforcing some of the limits inherent in the *Auer* doctrine.[4]

First and foremost, a court should not afford *Auer* deference unless the regulation is genuinely ambiguous. See *Christensen* v. *Harris County*, 529 U. S. 576, 588 (2000); *Seminole Rock*, 325 U. S., at 414 (deferring only "if the meaning of the words used is in doubt"). If uncertainty does not

[4] The proper understanding of the scope and limits of the *Auer* doctrine is, of course, not set out in any of the opinions that concur only in the judgment.

exist, there is no plausible reason for deference. The regulation then just means what it means—and the court must give it effect, as the court would any law. Otherwise said, the core theory of *Auer* deference is that sometimes the law runs out, and policy-laden choice is what is left over. See *supra*, at 570–572. But if the law gives an answer—if there is only one reasonable construction of a regulation—then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense. Deference in that circumstance would "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." See *Christensen*, 529 U. S., at 588. *Auer* does not, and indeed could not, go that far.

And before concluding that a rule is genuinely ambiguous, a court must exhaust all the "traditional tools" of construction. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843, n. 9 (1984) (adopting the same approach for ambiguous statutes). For again, only when that legal toolkit is empty and the interpretive question still has no single right answer can a judge conclude that it is "more [one] of policy than of law." *Pauley*, 501 U. S., at 696. That means a court cannot wave the ambiguity flag just because it found the regulation impenetrable on first read. Agency regulations can sometimes make the eyes glaze over. But hard interpretive conundrums, even relating to complex rules, can often be solved. See *id.*, at 707 (Scalia, J., dissenting) (A regulation is not ambiguous merely because "discerning the only possible interpretation requires a taxing inquiry"). To make that effort, a court must "carefully consider[ ]" the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on. *Ibid.* Doing so will resolve many seeming ambiguities out of the box, without resort to *Auer* deference.

If genuine ambiguity remains, moreover, the agency's reading must still be "reasonable." *Thomas Jefferson*, 512

U. S., at 515. In other words, it must come within the zone of ambiguity the court has identified after employing all its interpretive tools. (Note that serious application of those tools therefore has use even when a regulation turns out to be truly ambiguous. The text, structure, history, and so forth at least establish the outer bounds of permissible interpretation.) Some courts have thought (perhaps because of *Seminole Rock*'s "plainly erroneous" formulation) that at this stage of the analysis, agency constructions of rules receive greater deference than agency constructions of statutes. See, *e. g.*, *Ohio Dept. of Medicaid* v. *Price*, 864 F. 3d 469, 477 (CA6 2017). But that is not so. Under *Auer*, as under *Chevron*, the agency's reading must fall "within the bounds of reasonable interpretation." *Arlington* v. *FCC*, 569 U. S. 290, 296 (2013). And let there be no mistake: That is a requirement an agency can fail.

Still, we are not done—for not every reasonable agency reading of a genuinely ambiguous rule should receive *Auer* deference. We have recognized in applying *Auer* that a court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight. See *Christopher*, 567 U. S., at 155; see also *Mead*, 533 U. S., at 229–231, 236–237 (requiring an analogous though not identical inquiry for *Chevron* deference). As explained above, we give *Auer* deference because we presume, for a set of reasons relating to the comparative attributes of courts and agencies, that Congress would have wanted us to. See *supra*, at 569–573. But the administrative realm is vast and varied, and we have understood that such a presumption cannot always hold. Cf. *Mead*, 533 U. S., at 236 ("tailor[ing] deference to [the] variety" of administrative action); *Arlington*, 569 U. S., at 309–310 (BREYER, J., concurring in part and concurring in judgment) (noting that "context-specific[ ] factors" may show that "Congress would [not] have intended the agency to resolve [some] ambiguity"). The inquiry on this dimension does not reduce to any exhaustive test. But we have laid out some especially important mark-

ers for identifying when *Auer* deference is and is not appropriate.

To begin with, the regulatory interpretation must be one actually made by the agency. In other words, it must be the agency's "authoritative" or "official position," rather than any more ad hoc statement not reflecting the agency's views. *Mead*, 533 U. S., at 257–259, and n. 6 (Scalia, J., dissenting). That constraint follows from the logic of *Auer* deference—because Congress has delegated rulemaking power, and all that typically goes with it, to the agency alone. Of course, the requirement of "authoritative" action must recognize a reality of bureaucratic life: Not everything the agency does comes from, or is even in the name of, the Secretary or his chief advisers. So, for example, we have deferred to "official staff memoranda" that were "published in the Federal Register," even though never approved by the agency head. *Ford Motor Credit*, 444 U. S., at 566, n. 9, 567, n. 10 (declining to "draw a radical distinction between" agency heads and staff for *Auer* deference). But there are limits. The interpretation must at the least emanate from those actors, using those vehicles, understood to make authoritative policy in the relevant context. See, *e. g., Paralyzed Veterans*, 117 F. 3d, at 587 (refusing to consider a "speech of a mid-level official" as an "authoritative departmental position"); *N. Y. State Dept. of Social Servs.* v. *Bowen*, 835 F. 2d 360, 365–366 (CADC 1987) (rejecting the idea that an "informal memorandum" recounting a telephone conversation between employees could count as an "authoritative pronouncement"); *Exelon Generation Co.* v. *Local 15, Int'l Brotherhood of Elec. Workers, AFL–CIO*, 676 F. 3d 566, 576–578 (CA7 2012) (declining deference when the agency had itself "disclaimed the use of regulatory guides as authoritative"). If the interpretation does not do so, a court may not defer.

Next, the agency's interpretation must in some way implicate its substantive expertise. Administrative knowledge and experience largely "account [for] the presumption that Congress delegates interpretive lawmaking power to the

agency." *Martin*, 499 U. S., at 153. So the basis for deference ebbs when "[t]he subject matter of the [dispute is] distan[t] from the agency's ordinary" duties or "fall[s] within the scope of another agency's authority." *Arlington*, 569 U. S., at 309 (opinion of BREYER, J.). This Court indicated as much when it analyzed a "split enforcement" scheme, in which Congress divided regulatory power between two entities. *Martin*, 499 U. S., at 151. To decide "*whose* reasonable interpretation" of a rule controlled, we "presum[ed] Congress intended to invest interpretive power" in whichever actor was "best position[ed] to develop" expertise about the given problem. *Id.*, at 149, 153. The same idea holds good as between agencies and courts. "Generally, agencies have a nuanced understanding of the regulations they administer." Brief for Respondent 33. That point is most obvious when a rule is technical; think back to our "moiety" or "diagnosis" examples. See *supra*, at 567. But more prosaic-seeming questions also commonly implicate policy expertise; consider the TSA assessing the security risks of pâté or a disabilities office weighing the costs and benefits of an accommodation. See *supra*, at 566–567. Once again, though, there are limits. Some interpretive issues may fall more naturally into a judge's bailiwick. Take one requiring the elucidation of a simple common-law property term, see *Jicarilla Apache Tribe* v. *FERC*, 578 F. 2d 289, 292–293 (CA10 1978), or one concerning the award of an attorney's fee, see *West Va. Highlands Conservancy, Inc.* v. *Norton*, 343 F. 3d 239 (CA4 2003). Cf. *Adams Fruit Co.* v. *Barrett*, 494 U. S. 638, 649–650 (1990) (declining to award *Chevron* deference when an agency interprets a judicial-review provision). When the agency has no comparative expertise in resolving a regulatory ambiguity, Congress presumably would not grant it that authority.[5]

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[5] For a similar reason, this Court has denied *Auer* deference when an agency interprets a rule that parrots the statutory text. See *Gonzales* v. *Oregon*, 546 U. S. 243, 257 (2006). An agency, we explained, gets no "spe-

Finally, an agency's reading of a rule must reflect "fair and considered judgment" to receive *Auer* deference. *Christopher*, 567 U. S., at 155 (quoting *Auer*, 519 U. S., at 462). That means, we have stated, that a court should decline to defer to a merely "convenient litigating position" or "*post hoc* rationalizatio[n] advanced" to "defend past agency action against attack." *Christopher*, 567 U. S., at 155 (quoting *Bowen* v. *Georgetown Univ. Hospital*, 488 U. S. 204, 213 (1988), and *Auer*, 519 U. S., at 462).[6] And a court may not defer to a new interpretation, whether or not introduced in litigation, that creates "unfair surprise" to regulated parties. *Long Island Care*, 551 U. S., at 170. That disruption of expectations may occur when an agency substitutes one view of a rule for another. We have therefore only rarely given *Auer* deference to an agency construction "conflict[ing] with a prior" one. *Thomas Jefferson*, 512 U. S., at 515. Or the upending of reliance may happen without such an explicit interpretive change. This Court, for example, recently refused to defer to an interpretation that would have imposed retroactive liability on parties for longstanding conduct that the agency had never before addressed. See *Christopher*, 567 U. S., at 155–156. Here too the lack of "fair warning" outweighed the reasons to apply *Auer*. *Id.*, at 156 (internal quotation marks omitted).

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cial authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language." *Ibid.*

[6] The general rule, then, is not to give deference to agency interpretations advanced for the first time in legal briefs. See *Bowen*, 488 U. S., at 212–213. But we have not entirely foreclosed that practice. *Auer* itself deferred to a new regulatory interpretation presented in an *amicus curiae* brief in this Court. There, the agency was not a party to the litigation, and had expressed its views only in response to the Court's request. "[I]n the circumstances," the Court explained, "[t]here [was] simply no reason to suspect that the interpretation [did] not reflect the agency's fair and considered judgment on the matter in question." *Auer*, 519 U. S., at 462.

* * *

The upshot of all this goes something as follows. When it applies, *Auer* deference gives an agency significant leeway to say what its own rules mean. In so doing, the doctrine enables the agency to fill out the regulatory scheme Congress has placed under its supervision. But that phrase "when it applies" is important—because it often doesn't. As described above, this Court has cabined *Auer*'s scope in varied and critical ways—and in exactly that measure, has maintained a strong judicial role in interpreting rules. What emerges is a deference doctrine not quite so tame as some might hope, but not nearly so menacing as they might fear.

III

That brings us to the lone question presented here—whether we should abandon the longstanding doctrine just described. In contending that we should, Kisor raises statutory, policy, and constitutional claims (in that order). But he faces an uphill climb. He must first convince us that *Auer* deference is wrong. And even then, he must overcome *stare decisis*—the special care we take to preserve our precedents. In the event, Kisor fails at the first step: None of his arguments provide good reason to doubt *Auer* deference. And even if that were not so, Kisor does not offer the kind of special justification needed to overrule *Auer*, and *Seminole Rock*, and all our many other decisions deferring to reasonable agency constructions of ambiguous rules.

A

Kisor first attacks *Auer* as inconsistent with the judicial review provision of the Administrative Procedure Act (APA). See 5 U. S. C. §706. As Kisor notes, Congress enacted the APA in 1946—the year after *Seminole Rock*—to serve as "the fundamental charter of the administrative state." Brief for Petitioner 26 (internal quotation marks omitted). Section 706 of the Act, governing judicial review of agency

action, states (among other things) that reviewing courts shall "determine the meaning or applicability of the terms of an agency action" (including a regulation). According to Kisor, *Auer* violates that edict by thwarting "meaningful judicial review" of agency rules. Brief for Petitioner 29. Courts under *Auer*, he asserts (now in the language of Section 706), "abdicate their office of determining the meaning" of a regulation. *Id.*, at 27 (internal quotation marks omitted).

To begin with, that argument ignores the many ways, discussed above, that courts exercise independent review over the meaning of agency rules. See *supra*, at 574–579. As we have explained, a court must apply all traditional methods of interpretation to any rule, and must enforce the plain meaning those methods uncover. There can be no thought of deference unless, after performing that thoroughgoing review, the regulation remains genuinely susceptible to multiple reasonable meanings and the agency's interpretation lines up with one of them. And even if that is the case, courts must on their own determine whether the nature or context of the agency's construction reverses the usual presumption of deference. Most notably, a court must consider whether the interpretation is authoritative, expertise-based, considered, and fair to regulated parties. All of that figures as "meaningful judicial review." Brief for Petitioner 29.

And even when a court defers to a regulatory reading, it acts consistently with Section 706. That provision does not specify the standard of review a court should use in "determin[ing] the meaning" of an ambiguous rule. 5 U. S. C. § 706. One possibility, as Kisor says, is to review the issue *de novo*. But another is to review the agency's reading for reasonableness. To see the point, assume that a regulatory (say, an employment) statute expressly instructed courts to apply *Auer* deference when reviewing an agency's interpretations of its ambiguous rules. Nothing in that statute would conflict with Section 706. Instead, the em-

ployment law would simply make clear *how* a court is to "determine the meaning" of such a rule—by deferring to an agency's reasonable reading. *Ibid.* Of course, that is not the world we know: Most substantive statutes do not say anything about *Auer* deference, one way or the other. But for all the reasons spelled out above, we have long presumed (subject always to rebuttal) that the Congress delegating regulatory authority to an agency intends as well to give that agency considerable latitude to construe its ambiguous rules. See *supra*, at 569–573. And that presumption operates just like the hypothesized statute above. Because of it, once again, courts do not violate Section 706 by applying *Auer*. To the contrary, they fulfill their duty to "determine the meaning" of a rule precisely by deferring to the agency's reasonable reading. See Sunstein & Vermeule, The Unbearable Rightness of *Auer*, 84 U. Chi. L. Rev. 297, 306 (2017) (If Congress intends "that the meaning of a regulation turns on the agency's interpretation of its meaning," then courts comply with Section 706's command to " 'determine the meaning' [of the regulation] by deferring to that view"); cf. *Arlington*, 569 U. S., at 317 (ROBERTS, C. J., dissenting) (similarly addressing why *Chevron* deference comports with Section 706). Section 706 and *Auer* thus go hand in hand.

That is especially so given the practice of judicial review at the time of the APA's enactment. Section 706 was understood when enacted to "restate[ ] the present law as to the scope of judicial review." See Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act 108 (1947); see also *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 546 (1978) (noting that this Court gives some deference to the Manual "because of the role played by the Department of Justice in drafting the legislation"). We have thus interpreted the APA not to "significantly alter the common law of judicial review of agency action." *Heckler* v. *Chaney*, 470 U. S. 821, 832 (1985) (internal quotation marks omitted).

That pre-APA common law included *Seminole Rock* itself (decided the year before) along with prior decisions foretelling that ruling. See *supra*, at 568–569. Even assume that the deference regime laid out in those cases had not yet fully taken hold. At a minimum, nothing in the law of that era required all judicial review of agency interpretations to be *de novo*. Cf. Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612, 635–636 (1996) (arguing that courts before the APA used "flexible, common law methods to review administrative action"). And so nothing suggests that Section 706 imposes that requirement. Or otherwise said: If Section 706 did not change the law of judicial review (as we have long recognized), then it did not proscribe a deferential standard then known and in use.

Kisor next claims that *Auer* circumvents the APA's rulemaking requirements. Section 553, as Kisor notes, mandates that an agency use notice-and-comment procedures before issuing legislative rules. See 5 U. S. C. §§ 553(b), (c). But the section allows agencies to issue "interpret[ive]" rules without notice and comment. See § 553(b)(A). A key feature of those rules is that (unlike legislative rules) they are not supposed to "have the force and effect of law"—or, otherwise said, to bind private parties. *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 97 (2015) (internal quotation marks omitted). Instead, interpretive rules are meant only to "advise the public" of how the agency understands, and is likely to apply, its binding statutes and legislative rules. *Ibid.* But consider, Kisor argues, what happens when a court gives *Auer* deference to an interpretive rule. The result, he asserts, is to make a rule that has never gone through notice and comment binding on the public. See Brief for Petitioner 21, 29. Or put another way, the interpretive rule ends up having the "force and effect of law" without ever paying the procedural cost. *Mortgage Bankers*, 575 U. S., at 97.

But this Court rejected the identical argument just a few years ago, and for good reason. In *Mortgage Bankers*, we held that interpretive rules, even when given *Auer* deference, do *not* have the force of law. See 575 U. S., at 104, and n. 4. An interpretive rule itself never forms "the basis for an enforcement action"—because, as just noted, such a rule does not impose any "legally binding requirements" on private parties. *National Min. Assn.* v. *McCarthy*, 758 F. 3d 243, 251 (CADC 2014). An enforcement action must instead rely on a legislative rule, which (to be valid) must go through notice and comment. And in all the ways discussed above, the meaning of a legislative rule remains in the hands of courts, even if they sometimes divine that meaning by looking to the agency's interpretation. See *supra*, at 574–579. Courts first decide whether the rule is clear; if it is not, whether the agency's reading falls within its zone of ambiguity; and even if the reading does so, whether it should receive deference. In short, courts retain the final authority to approve—or not—the agency's reading of a notice-and-comment rule. See *Mortgage Bankers*, 575 U. S., at 104, n. 4 ("[I]t is the court that ultimately decides whether a given regulation means what the agency says"). No binding of anyone occurs merely by the agency's say-so.

And indeed, a court deciding whether to give *Auer* deference must heed the same procedural values as Section 553 reflects. Remember that a court may defer to only an agency's authoritative and considered judgments. See *supra*, at 576–579. No *ad hoc* statements or *post hoc* rationalizations need apply. And recall too that deference turns on whether an agency's interpretation creates unfair surprise or upsets reliance interests. See *supra*, at 579. So an agency has a strong incentive to circulate its interpretations early and widely. In such ways, the doctrine of *Auer* deference reinforces, rather than undermines, the ideas of fairness and informed decisionmaking at the core of the APA.

To supplement his two APA arguments, Kisor turns to policy, leaning on a familiar claim about the incentives *Auer* creates. According to Kisor, *Auer* encourages agencies to issue vague and open-ended regulations, confident that they can later impose whatever interpretation of those rules they prefer. See Brief for Petitioner 37–41. That argument received its fullest elaboration in a widely respected law review article pre-dating *Auer*. See Manning, 96 Colum. L. Rev., at 654–669. More recently, the concern about such self-delegation has appeared in opinions from this Court, starting with several from Justice Scalia calling for *Auer*'s reconsideration. See, *e. g.*, *Christopher*, 567 U. S., at 158 (citing Manning, *supra*, at 655–668); *Decker* v. *Northwest Environmental Defense Center*, 568 U. S. 597, 620–621 (2013) (Scalia, J., concurring in part and dissenting in part) (citing Manning, *supra*); *Talk America, Inc.* v. *Michigan Bell Telephone Co.*, 564 U. S. 50, 69 (2011) (Scalia, J., concurring) (principally relying on Manning, *supra*).

But the claim has notable weaknesses, empirical and theoretical alike. First, it does not survive an encounter with experience. No real evidence—indeed, scarcely an anecdote—backs up the assertion. As two noted scholars (one of whom reviewed thousands of rules during four years of government service) have written: "[W]e are unaware of, and no one has pointed to, any regulation in American history that, because of *Auer*, was designed vaguely." Sunstein & Vermeule, 84 U. Chi. L. Rev., at 308. And even the argument's theoretical allure dissipates upon reflection. For strong (almost surely stronger) incentives and pressures cut in the opposite direction. "[R]egulators want their regulations to be effective, and clarity promotes compliance." Brief for Administrative Law Scholars as *Amici Curiae* 18–19. Too, regulated parties often push for precision from an agency, so that they know what they can and cannot do. And ambiguities in rules pose risks to the long-run survival of agency policy. Vagueness increases the chance of adverse

judicial rulings. And it enables future administrations, with different views, to reinterpret the rules to their own liking. Add all of that up and Kisor's ungrounded theory of incentives contributes nothing to the case against *Auer*.

Finally, Kisor goes big, asserting (though fleetingly) that *Auer* deference violates "separation-of-powers principles." See Brief for Petitioner 43. In his view, those principles prohibit "vest[ing] in a single branch the law-making and law-interpreting functions." *Id.*, at 45. If that objection is to agencies' usurping the interpretive role of courts, this opinion has already met it head-on. Properly understood and applied, *Auer* does no such thing. In all the ways we have described, courts retain a firm grip on the interpretive function. See *supra*, at 574–579; *Mortgage Bankers*, 575 U. S., at 104, n. 4. If Kisor's objection is instead to the supposed commingling of functions (that is, the legislative and judicial) within an agency, this Court has answered it often before. See, *e. g.*, *Withrow* v. *Larkin*, 421 U. S. 35, 54 (1975) (permitting such a combination of functions); *FTC* v. *Cement Institute*, 333 U. S. 683, 702 (1948) (same). That sort of mixing is endemic in agencies, and has been "since the beginning of the Republic." *Arlington*, 569 U. S., at 304–305, n. 4. It does not violate the separation of powers, we have explained, because even when agency "activities take 'legislative' and 'judicial' forms," they continue to be "exercises of[ ] the 'executive Power' "—or otherwise said, ways of executing a statutory plan. *Ibid.* (quoting U. S. Const., Art. II, § 1, cl. 1). So Kisor's last argument to dispatch *Auer* deference fails as roundly as the rest.

B

If all that were not enough, *stare decisis* cuts strongly against Kisor's position. "Overruling precedent is never a small matter." *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. 446, 455 (2015). Adherence to precedent is "a foundation stone of the rule of law." *Michigan* v. *Bay Mills Indian Community*, 572 U. S. 782, 798 (2014). "[I]t 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). To be sure, *stare decisis* is "not an inexorable command." *Id.*, at 828. But any departure from the doctrine demands "special justification"—something more than "an argument that the precedent was wrongly decided." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U. S. 258, 266 (2014).

And that is even more than usually so in the circumstances here. First, Kisor asks us to overrule not a single case, but a "long line of precedents"—each one reaffirming the rest and going back 75 years or more. *Bay Mills*, 572 U. S., at 798; see nn. 2, 3, *supra*. This Court alone has applied *Auer* or *Seminole Rock* in dozens of cases, and lower courts have done so thousands of times. Deference to reasonable agency interpretations of ambiguous rules pervades the whole corpus of administrative law. Second, because that is so, abandoning *Auer* deference would cast doubt on many settled constructions of rules. As Kisor acknowledged at oral argument, a decision in his favor would allow relitigation of any decision based on *Auer*, forcing courts to "wrestle [with] whether or not *Auer*" had actually made a difference. Tr. of Oral Arg. 30; see *id.*, at 47 (Solicitor General agreeing that "every single regulation that's currently on the books whose interpretation has been established under *Seminole Rock* now [would have] to be relitigated anew"). It is the rare overruling that introduces so much instability into so many areas of law, all in one blow.

And third, even if we are wrong about *Auer*, "Congress remains free to alter what we have done." *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172–173 (1989) (stating that when that is so, "[c]onsiderations of *stare decisis* have special force"). In a constitutional case, only we can correct our error. But that is not so here. Our deference decisions are "balls tossed into Congress's court, for acceptance or not

as that branch elects." *Kimble*, 576 U. S., at 456. And so far, at least, Congress has chosen acceptance. It could amend the APA or any specific statute to require the sort of *de novo* review of regulatory interpretations that Kisor favors. Instead, for approaching a century, it has let our deference regime work side-by-side with both the APA and the many statutes delegating rulemaking power to agencies. It has done so even after we made clear that our deference decisions reflect a presumption about congressional intent. See *Martin*, 499 U. S., at 151; *supra*, at 569–570. And it has done so even after Members of this Court began to raise questions about the doctrine. See, *e. g.*, *Talk America*, 564 U. S., at 67–69 (Scalia, J., concurring). Given that history—and Congress's continuing ability to take up Kisor's arguments—we would need a particularly "special justification" to now reverse *Auer*.

Kisor offers nothing of that ilk. Nearly all his arguments about abandoning precedent are variants of his merits claims. We hear again, if in different parts of his briefs, that *Auer* deference frustrates "the policies embodied in the APA" and violates the separation of powers. Reply Brief 13, and n. 5; Brief for Petitioner 47–48. More generally, we learn that *Seminole Rock* was "wrong on its own terms" and "badly reasoned." *Id.*, at 47 (internal quotation marks omitted). Of course, it is good—and important—for our opinions to be right and well-reasoned. But that is not the test for overturning precedent. Kisor does not claim that *Auer* deference is "unworkable," a traditional basis for overruling a case. *Patterson*, 491 U. S., at 173. Nor does he point to changes in legal rules that make *Auer* a "doctrinal dinosaur." *Kimble*, 576 U. S., at 458. All he can muster is that "[t]he administrative state has evolved substantially since 1945." Brief for Petitioner 53. We do not doubt the point (although we note that *Auer* and other key deference decisions came along after most of that evolution took place). Still more,

we agree with Kisor that administrative law doctrines must take account of the far-reaching influence of agencies and the opportunities such power carries for abuse. That is one reason we have taken care today to reinforce the limits of *Auer* deference, and to emphasize the critical role courts retain in interpreting rules. But it is no answer to the growth of agencies for courts to take over their expertise-based, policymaking functions. Who knows? Maybe in 1945, the FDA was not thinking about "active moieties." See *supra*, at 567. But still, today—just as *Seminole Rock* and *Auer* held—it should have leeway to say what that term means.

IV

With that, we can finally return to Kisor's own case. You may remember that his retroactive benefits depend on the meaning of the term "relevant" records in a VA regulation. See *supra*, at 564–565. The Board of Veterans' Appeals, through a single judge's opinion, understood records to be relevant only if they relate to the basis of the VA's initial denial of benefits. By contrast, Kisor argued that records are relevant if they go to any benefits criterion, even one that was uncontested. The Federal Circuit upheld the Board's interpretation based on *Auer* deference.

Applying the principles outlined in this opinion, we hold that a redo is necessary for two reasons. First, the Federal Circuit jumped the gun in declaring the regulation ambiguous. We have insisted that a court bring all its interpretive tools to bear before finding that to be so. See *supra*, at 574–575. It is not enough to casually remark, as the court did here, that "[b]oth parties insist that the plain regulatory language supports their case, and neither party's position strikes us as unreasonable." 869 F. 3d, at 1368; see *supra*, at 574–575. Rather, the court must make a conscientious effort to determine, based on indicia like text, structure, history, and purpose, whether the regulation really has more

than one reasonable meaning. The Solicitor General argued in this Court that the Board's reading is the only reasonable one. See Brief for Respondent 49–50. Perhaps Kisor will make the converse claim below. Before even considering deference, the court must seriously think through those positions.

And second, the Federal Circuit assumed too fast that *Auer* deference should apply in the event of genuine ambiguity. As we have explained, that is not always true. A court must assess whether the interpretation is of the sort that Congress would want to receive deference. See *supra*, at 576–579. The Solicitor General suggested at oral argument that the answer in this case might be no. He explained that all 100 or so members of the VA Board act individually (rather than in panels) and that their roughly 80,000 annual decisions have no "precedential value." Tr. of Oral Arg. 64. He thus questioned whether a Board member's ruling "reflects the considered judgment of the agency as a whole." *Ibid.*; cf. *Mead*, 533 U. S., at 233 (declining to give *Chevron* deference to rulings "being churned out at a rate of 10,000 a year at an agency's 46 scattered offices"). We do not know what position the Government will take on that issue below. But the questions the Solicitor General raised are exactly the kind the court must consider in deciding whether to award *Auer* deference to the Board's interpretation.

We accordingly vacate the judgment below and remand the case for further proceedings.

It is so ordered.

CHIEF JUSTICE ROBERTS, concurring in part.

I join Parts I, II–B, III–B, and IV of the Court's opinion. We took this case to consider whether to overrule *Auer* v. *Robbins*, 519 U. S. 452 (1997), and *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410 (1945). For the reasons the Court discusses in Part III–B, I agree that overruling those

precedents is not warranted. I also agree with the Court's treatment in Part II–B of the bounds of *Auer* deference.

I write separately to suggest that the distance between the majority and JUSTICE GORSUCH is not as great as it may initially appear. The majority catalogs the prerequisites for, and limitations on, *Auer* deference: The underlying regulation must be genuinely ambiguous; the agency's interpretation must be reasonable and must reflect its authoritative, expertise-based, and fair and considered judgment; and the agency must take account of reliance interests and avoid unfair surprise. JUSTICE GORSUCH, meanwhile, lists the reasons that a court might be persuaded to adopt an agency's interpretation of its own regulation: The agency thoroughly considered the problem, offered a valid rationale, brought its expertise to bear, and interpreted the regulation in a manner consistent with earlier and later pronouncements. Accounting for variations in verbal formulation, those lists have much in common.

That is not to say that *Auer* deference is just the same as the power of persuasion discussed in *Skidmore* v. *Swift & Co.*, 323 U. S. 134 (1944); there is a difference between holding that a court ought to be persuaded by an agency's interpretation and holding that it should defer to that interpretation under certain conditions. But it is to say that the cases in which *Auer* deference is warranted largely overlap with the cases in which it would be unreasonable for a court not to be persuaded by an agency's interpretation of its own regulation.

One further point: Issues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). I do not regard the Court's decision today to touch upon the latter question.

JUSTICE GORSUCH, with whom JUSTICE THOMAS joins, with whom JUSTICE KAVANAUGH joins as to Parts I, II, III, IV, and V, and with whom JUSTICE ALITO joins as to Parts I, II, and III, concurring in the judgment.

It should have been easy for the Court to say goodbye to *Auer* v. *Robbins*.[1] In disputes involving the relationship between the government and the people, *Auer* requires judges to accept an executive agency's interpretation of its own regulations even when that interpretation doesn't represent the best and fairest reading. This rule creates a "systematic judicial bias in favor of the federal government, the most powerful of parties, and against everyone else."[2] Nor is *Auer*'s biased rule the product of some congressional mandate we are powerless to correct: This Court invented it, almost by accident and without any meaningful effort to reconcile it with the Administrative Procedure Act or the Constitution. A legion of academics, lower court judges, and Members of this Court—even *Auer*'s author—has called on us to abandon *Auer*. Yet today a bare majority flinches, and *Auer* lives on.

Still, today's decision is more a stay of execution than a pardon. The Court cannot muster even five votes to say that *Auer* is lawful or wise. Instead, a majority retains *Auer* only because of *stare decisis*. And yet, far from standing by that precedent, the majority proceeds to impose so many new and nebulous qualifications and limitations on *Auer* that THE CHIEF JUSTICE claims to see little practical difference between keeping it on life support in this way and overruling it entirely. So the doctrine emerges maimed and enfeebled—in truth, zombified.

Respectfully, we owe our colleagues on the lower courts more candid and useful guidance than this. And judges owe the people who come before them nothing less than a fair

[1] 519 U. S. 452 (1997).

[2] Larkin & Slattery, The World After *Seminole Rock* and *Auer*, 42 Harv. J. L. & Pub. Pol'y 625, 641 (2019) (internal quotation marks omitted).

contest, where every party has an equal chance to persuade the court of its interpretation of the law's demands. One can hope that THE CHIEF JUSTICE is right, and that whether we formally overrule *Auer* or merely neuter it, the results in most cases will prove the same. But means, not just ends, matter, and retaining even this debilitated version of *Auer* threatens to force litigants and lower courts to jump through needless and perplexing new hoops and in the process deny the people the independent judicial decisions they deserve. All to what end? So that we may *pretend* to abide *stare decisis*?

Consider this case. Mr. Kisor is a Marine who lost out on benefits for post-traumatic stress disorder when the court of appeals deferred to a regulatory interpretation advanced by the Department of Veterans Affairs. The court of appeals was guilty of nothing more than faithfully following *Auer*. But the majority today invokes *stare decisis*, of all things, to vacate that judgment and tell the court of appeals to try again using its newly retooled, multi-factored, and far less determinate version of *Auer*. Respectfully, I would stop this business of making up excuses for judges to abdicate their job of interpreting the law, and simply allow the court of appeals to afford Mr. Kisor its best independent judgment of the law's meaning.

The Court's failure to be done with *Auer*, and its decision to adorn *Auer* with so many new and ambiguous limitations, all but guarantees we will have to pass this way again. When that day comes, I hope this Court will find the nerve it lacks today and inter *Auer* at last. Until then, I hope that our judicial colleagues on other courts will take courage from today's ruling and realize that it has transformed *Auer* into a paper tiger.

I. How We Got Here

Where did *Auer* come from? Not from the Constitution, some ancient common law tradition, or even a modern statute. Instead, it began as an unexplained aside in a decision

about emergency price controls at the height of the Second World War. Even then, the dictum sat on the shelf, little noticed, for years. Only in the last few decades of the 20th century did lawyers and courts really begin to dust it off and shape it into the reflexive rule of deference to regulatory agencies we know today. And they did so without ever pausing to consider whether a rule like that could be legally justified or even made sense. *Auer* is really little more than an accident.

A

Before the mid-20th century, few federal agencies engaged in extensive rulemaking, and those that did rarely sought deference for their regulatory interpretations.[3] But when the question arose, this Court did not hesitate to say that judges reviewing administrative action should decide all questions of law, including questions concerning the meaning of regulations. As Justice Brandeis put it, "[t]he inexorable safeguard which the due process clause assures is . . . that there will be opportunity for a court to determine whether the applicable rules of law . . . were observed."[4] Unsurprisingly, the government's early, longstanding, and consistent interpretation of a statute, regulation, or other legal instrument could count as powerful *evidence* of its original public meaning.[5] But courts respected executive interpretations only because and to the extent "they embodied understandings made roughly contemporaneously with . . . enactment

[3] See Knudsen & Wildermuth, Unearthing the Lost History of *Seminole Rock*, 65 Emory L. J. 47, 55, 65, 68 (2015) (Lost History).

[4] *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 73 (1936) (concurring opinion). See also *FTC* v. *Gratz*, 253 U. S. 421, 427 (1920); *ICC* v. *Union Pacific R. Co.*, 222 U. S. 541, 547 (1912); *Belden* v. *Chase*, 150 U. S. 674, 698 (1893); *Decatur* v. *Paulding*, 14 Pet. 497, 515 (1840); accord, Woolhandler, Judicial Deference to Administrative Action—A Revisionist History, 43 Admin. L. Rev. 197, 206–207 (1991).

[5] Bamzai, The Origins of Judicial Deference to Executive Interpretation, 126 Yale L. J. 908, 930–947 (2017) (Origins).

and stably maintained and practiced since that time," not "because they were executive as such."[6]

Writing for four Members of the Court, JUSTICE KAGAN suggests that *Auer*'s very different approach to the interpretation of agency regulations was foreshadowed as early as this Court's 1898 decision in *United States* v. *Eaton*.[7] *Ante*, at 569. But this is mistaken. The question in that case was whether Mr. Eaton's appointment as temporary vice-consul to Siam was consistent with State Department regulations. After several pages of careful and independent legal analysis, the Court held that the regulations did authorize the appointment. That conclusion, the Court explained, was "rendered necessary by a consideration of the text."[8] Only *after* reaching this conclusion did the Court observe that the State Department had previously adopted the same construction, noting along the way that the Department's views were "entitled to the greatest weight" and that the Court saw "no reason in this case to doubt [their] correctness."[9] *Eaton* thus simply followed the well-worn path of acknowledging that an agency's interpretation of a regulation can supply *evidence* of its meaning.[10] Nowhere did the Court even hint that it would have deferred to the State Depart-

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[6] *Id.*, at 943, 962; cf. *NLRB* v. *Noel Canning*, 573 U. S. 513, 572–573 (2014) (Scalia, J., concurring in judgment) (an "open, widespread, and unchallenged" governmental practice can "guide [courts'] interpretation" of an ambiguous text, but it cannot "alter" the meaning of that text); *Edwards' Lessee* v. *Darby*, 12 Wheat. 206, 210 (1827) ("In the construction of a doubtful and ambiguous law, the cotemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect").

[7] 169 U. S. 331.

[8] *Id.*, at 342.

[9] *Id.*, at 342–343.

[10] Cf. Newman, How Courts Interpret Regulations, 35 Cal. L. Rev. 509, 521, and n. 78 (1947) (noting that *Eaton* suggested administrative interpretations could be " 'persuasive' but not binding").

ment's views about the meaning of the law if its own independent textual analysis had not led it to the same conclusion.

All this is borne out by the Court's later teachings in *Skidmore* v. *Swift & Co.* in 1944.[11] The question there was whether the time overnight employees spent waiting to respond to fire alarms could amount to compensable overtime under the Fair Labor Standards Act. The lower courts had held as a matter of law that it could not. In an opinion by Justice Jackson, this Court reversed. The Court first held, based on its own independent analysis, that "no principle of law found either in the statute or in Court decisions precludes waiting time from also being working time."[12] Only then did the Court consider "what, if any, deference courts should pay" to the views of the Administrator of the Labor Department's Wage and Hour Division.[13] And on that question the Court reaffirmed the traditional rule that an agency's interpretation of the law is "not controlling upon the courts" and is entitled only to a weight proportional to "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade."[14] At the time, the influential administrative law scholar Kenneth Culp Davis considered this "[a]n entirely reliable statement" of the law.[15]

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[11] 323 U. S. 134.

[12] *Id.*, at 136–137. Much of the legal analysis supporting this conclusion was contained in the companion case, *Armour & Co.* v. *Wantock*, 323 U. S. 126 (1944), which made no mention of any administrative interpretations. *Id.*, at 129–134; see *Skidmore*, 323 U. S., at 136 (citing the "reasons set forth in the *Armour* case decided herewith").

[13] *Id.*, at 139.

[14] *Id.*, at 140; see also *id.*, at 139 (the agency's views "are not, of course, conclusive, even in the cases with which they directly deal" and do not "bin[d] a district court's processes, as an authoritative pronouncement of a higher court might do").

[15] Davis, Administrative Rules—Interpretative, Legislative, and Retroactive, 57 Yale L. J. 919, 936–939, and n. 86 (1948); see also K. Davis, Administrative Law § 249, p. 901 (1951) ("[S]ubstitution of judicial judg-

B

In truth, the seeds of the *Auer* doctrine were first planted only in 1945, in *Bowles* v. *Seminole Rock & Sand Co.*[16] That case involved regulations issued by the Office of Price Administration (OPA), which Congress had tasked with stabilizing the national economy during the Second World War through the use of emergency price controls. It was in that context that the Court declared—for the first time and without citing any authority—that "if the meaning of [the regulation were] in doubt," the agency's interpretation would merit "controlling weight unless it is plainly erroneous or inconsistent with the regulation."[17]

Yet even then it was far from clear how much weight the Court really placed on the agency's interpretation. As it had in *Eaton*, the Court in *Seminole Rock* began with an extended discussion of "the plain words of the regulation," which led it to conclude that the text "clearly" supported the government's position.[18] Only after reaching that conclusion based on its own independent analysis did the Court proceed to add that "[a]ny doubts . . . are removed by reference to the administrative construction."[19]

So confused was all this that readers at the time didn't perceive *Seminole Rock*'s dictum as changing anything. Professor Davis observed that the Court's discussion about giving "controlling weight" to the agency's interpretation was an unexplained aside that made no difference to the case's outcome.[20] The dictum, too, was readily explained as reflecting the unusual factual context in which the case

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ment on the content of interpretative rules is always permissible, even though the reviewing court may give 'weight' or 'great weight' to the rule. The best guide may be the Court's formula in *Skidmore* . . . ").

[16] 325 U. S. 410.

[17] *Id.*, at 414.

[18] *Id.*, at 414–417.

[19] *Id.*, at 417.

[20] See Davis, Scope of Review of Federal Administrative Action, 50 Colum. L. Rev. 559, 597 (1950).

arose, involving an emergency government program created to deal with "unique circumstances of war and economic depression."[21] And the Court decided *Seminole Rock* the same Term it issued *Skidmore*, where it reaffirmed the traditional rule that an agency's views about the law may *persuade* a court but can never *control* its judgment. In fact, the Court in *Seminole Rock* was careful to note that the OPA interpretation before it bore many of the characteristics *Skidmore* would have recognized as increasing its persuasive force: It had been announced concurrently with the regulation, disseminated widely to the regulated community, and adhered to consistently by the agency.[22]

No wonder, then, that for many years after the decision, courts "connected *Seminole Rock* more closely with the deference framework . . . under *Skidmore*" and generally engaged in a *Skidmore*-type analysis, accepting the agency's interpretation "only after independently examining the regulation and concluding that the agency interpretation was sound."[23] If *Seminole Rock*'s "controlling weight" dictum was afforded any force, it was usually only in the price control context; even then it was ordinarily extended only to "official" agency interpretations that were published contemporaneously with the regulation and widely distributed.[24] The Fourth Circuit exemplified the early understanding of *Seminole Rock* when it observed—citing both *Seminole Rock* and *Skidmore*—that "under settled principles" an official agency interpretation in an opinion letter was entitled only to "respectful consideration."[25] The letter, the court stressed,

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[21] Lost History 60; see also Anthony, The Supreme Court and the APA: Sometimes They Just Don't Get It, 10 Admin. L. J. Am. U. 1, 12 (1996).

[22] 325 U. S., at 417–418; see Pojanowski, Revisiting *Seminole Rock*, 16 Geo. J. L. & Pub. Pol'y 87, 88 (2018) ("A closer look at *Seminole Rock* suggests an unremarkable application of the less-deferential standard of review of *Skidmore*").

[23] Lost History 94–97; see Pojanowski, *supra*, at 92–96.

[24] Lost History 65–68.

[25] *Southern Goods Corp.* v. *Bowles*, 158 F. 2d 587, 590 (1946).

did not "have the effect of law," and "[i]t would be absurd to hold that the courts must subordinate their judgment as to the meaning of a . . . regulation to the mere unsupported opinion of an associate counsel in an administrative department."[26]

C

This Court did not cite *Seminole Rock*'s "controlling weight" dictum again until 1965, in *Udall* v. *Tallman*.[27] And though *Tallman* "did very little to advance the jurisprudential understanding of *Seminole Rock*," it certainly helped fuel the expansion of so-called "*Seminole Rock* deference."[28] From the 1960s on, this Court and lower courts began to cite the *Seminole Rock* dictum with increasing frequency and in a wider variety of circumstances, but still without much explanation. They also increasingly divorced *Seminole Rock* from *Skidmore*.[29]

Auer represents the apotheosis of this line of cases. In the name of what some now call the *Auer* doctrine, courts have in recent years "mechanically applied and reflexively treated" *Seminole Rock*'s dictum "as a constraint upon the careful inquiry that one might ordinarily expect of courts engaged in textual analysis."[30] Under *Auer*, judges are forced to subordinate their own views about what the law means to those of a political actor, one who may even be a party to the litigation before the court. After all, if the court agrees that the agency's reading is the best one, *Auer* does no real work; the doctrine matters only when a court would conclude that the agency's interpretation is *not* the best or fairest reading of the regulation.

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[26] *Ibid.*

[27] 380 U. S. 1, 4, 17–18 (accepting a regulatory interpretation by the Secretary of the Interior that was consistent, widely disseminated, and heavily relied upon, while not suggesting any disagreement with the Secretary's interpretation).

[28] Lost History 80.

[29] See generally *id.*, at 68–92, 98.

[30] *Id.*, at 53.

To be sure, JUSTICE KAGAN paints a very different picture of *Auer*, asking us to imagine it riding to the rescue only in cases where the scales of justice are evenly balanced between two equally persuasive readings. But that's a fantasy: "If nature knows of such equipoise in legal arguments, the courts at least do not."[31] In the real world the judge uses his traditional interpretive toolkit, full of canons and tie-breaking rules, to reach a decision about the best and fairest reading of the law. Of course, there are close cases and reasonable judges will sometimes disagree. But every day, in courts throughout this country, judges manage with these traditional tools to reach conclusions about the meaning of statutes, rules of procedure, contracts, and the Constitution. Yet when it comes to interpreting federal regulations, *Auer* displaces this process and requires judges instead to treat the agency's interpretation as controlling even when it is "not . . . the best one."[32]

If that were not troubling enough, *Auer* has also become "a doctrine of uncertain scope and application."[33] This Court has never offered meaningful guidance on how to decide whether the agency's reading is "reasonable" enough to demand judicial deference—and lower courts have drawn that line in wildly different places.[34] Deepening the confusion, this Court and lower courts have, over time, tried to soften *Auer*'s rigidity by declaring that it "might" not apply

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[31] Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L. J. 511, 520.

[32] *Decker* v. *Northwest Environmental Defense Center*, 568 U. S. 597, 613 (2013); see *Pauley* v. *BethEnergy Mines, Inc.*, 501 U. S. 680, 702 (1991) (the agency's interpretation "need not be the best or most natural one by grammatical or other standards").

[33] Hickman & Thomson, The *Chevron*ization of *Auer*, 103 Minn. L. Rev. Headnotes 103, 105 (2019).

[34] See Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118, 2134–2144 (2016).

in some ill-defined circumstances, such as when the agency's interpretation "conflicts with a prior interpretation" or reflects a "convenient litigating position" or a "*post hoc* rationalization" for past agency action.[35] All this has resulted in "widespread confusion" about when and how to apply *Auer* deference.[36]

In light of *Auer*'s many problems, it should come as no surprise that several Members of this Court,[37] along with a great many lower court judges[38] and members of the legal

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[35] *Christopher* v. *SmithKline Beecham Corp.*, 567 U. S. 142, 155 (2012) (alterations and internal quotation marks omitted).

[36] Leske, Splits in the *Rock*: The Conflicting Interpretations of the *Seminole Rock* Deference Doctrine by the U. S. Courts of Appeals, 66 Admin. L. Rev. 787, 832 (2014); see Hickman & Thomson, *supra*, at 111 (noting a "glut of recent cases in which members of the same court are openly divided on the proper application of *Auer*").

[37] See *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 107–108 (2015) (ALITO, J., concurring in part and concurring in judgment); *id.*, at 108–112 (Scalia, J., concurring in judgment); *id.*, at 119–133 (THOMAS, J., concurring in judgment); *Decker*, 568 U. S., at 615–616 (ROBERTS, C. J., joined by ALITO, J., concurring); *id.*, at 616–621 (Scalia, J., concurring in part and dissenting in part); *Talk America, Inc.* v. *Michigan Bell Telephone Co.*, 564 U. S. 50, 67–69 (2011) (Scalia, J., concurring); see also Kavanaugh, Keynote Address: Justice Scalia and Deference 19:06 (June 2, 2016), http://vimeo.com/169758593 (predicting "that *Auer* will someday be overruled and that Justice Scalia's dissent in *Decker* will be the law of the land").

[38] See, *e. g.*, *Forrest Gen. Hospital* v. *Azar*, 926 F. 3d 221, 229–230 (CA5 2019); *San Diego Gas & Elec. Co.* v. *FERC*, 913 F. 3d 127, 145, n. 4 (CADC 2019) (Randolph, J., dissenting); *United States* v. *Havis*, 907 F. 3d 439, 450–452 (CA6 2018) (Thapar, J., concurring), vacated, 921 F. 3d 628, on reh'g en banc, 927 F. 3d 382 (CA6 2019); *Marsh* v. *J. Alexander's LLC*, 905 F. 3d 610, 652–653 (CA9 2018) (Ikuta, J., dissenting); *Egan* v. *Delaware River Port Auth.*, 851 F. 3d 263, 279 (CA3 2017) (Jordan, J., concurring in judgment); *Perez* v. *Loren Cook Co.*, 803 F. 3d 935, 938, n. 2 (CA8 2015) (en banc); *Johnson* v. *McDonald*, 762 F. 3d 1362, 1366–1368 (CA Fed. 2014) (O'Malley, J., concurring); *Exelon Generation Co.* v. *Local 15, Int'l Brotherhood of Elec. Workers, AFL–CIO*, 676 F. 3d 566, 576, n. 5 (CA7 2012).

academy,[39] have questioned *Auer*'s validity and pleaded with this Court to reconsider it.

D

That's where things stood when James Kisor asked the Department of Veterans Affairs to reopen his disability benefits claim. Mr. Kisor served as a United States Marine from 1962 through 1966 and saw combat in Vietnam. In the early 1980s, a VA counselor observed that Mr. Kisor was battling depression and suicidal thoughts and suggested he might be suffering from post-traumatic stress disorder. In light of this, Mr. Kisor filed a claim for disability benefits in 1982. But, in the end, the VA denied the claim.

In 2006, Mr. Kisor sought to reopen the matter. In connection with that request, he presented new evidence, including a psychiatrist's report diagnosing him with PTSD and additional records documenting his service in Vietnam. The VA reopened Mr. Kisor's claim and granted him disability benefits effective June 5, 2006, the date he had submitted his new request. Mr. Kisor argued that a VA regulation entitled him to an earlier effective date for disability benefits, one tracing back to his original submission in 1982. But the Board of Veterans Appeals concluded that the applicable regulation didn't authorize that relief.

Mr. Kisor appealed the Board's ruling all the way to the Federal Circuit, arguing that the Board had misinterpreted the relevant regulation. The Federal Circuit affirmed. Relying on the *Auer* doctrine, the court held that it had no

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[39] See, *e. g.*, Hickman & Thomson, *supra*, at 111–113; Adler, *Auer* Evasions, 16 Geo. J. L. & Pub. Pol'y 1, 26 (2018); Pojanowski, 16 Geo. J. L. & Pub. Pol'y, at 99; Knudsen & Wildermuth, Lessons From the Lost History of *Seminole Rock*, 22 Geo. Mason L. Rev. 647, 667 (2015); Leske, *supra*, at 789–793; Molot, The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role, 53 Stan. L. Rev. 1, 108–110 (2000); Anthony, 10 Admin. L. J., at 4–12; Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612, 696 (1996).

choice but to treat the Board's interpretation as "'controlling'" unless that interpretation was "'plainly erroneous or inconsistent with the regulatio[n].'"[40] Without even trying to determine who had the better reading of the regulation, the Board or Mr. Kisor, the court declared that "[t]he Board's interpretation does not strike us as either plainly erroneous or inconsistent with the VA's regulatory framework."[41] Case closed.

Mr. Kisor sought and was denied rehearing en banc. Three judges dissented and joined those who have questioned "the logic behind continued adherence to the [*Auer*] doctrine"; they argued that, without *Auer* deference, Mr. Kisor's reading of the regulation would likely prevail.[42] Mr. Kisor then asked us to grant certiorari to reconsider *Auer*. Thinking it past time to do so, we granted the petition.[43]

II. The Administrative Procedure Act

When this Court speaks about the rules governing judicial review of federal agency action, we are not (or shouldn't be) writing on a blank slate or exercising some common-law-making power. We are supposed to be applying the Administrative Procedure Act. The APA is a "seminal" statute that Congress wrote to define the relationship between courts and agencies.[44] Some have even described it as a kind of constitution for our "administrative state." Yet, remarkably, until today this Court has never made any serious effort to square the *Auer* doctrine with the APA. Even now, only four Justices make the attempt. And for at least two reasons, their arguments are wholly unpersuasive.

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[40] *Kisor* v. *Shulkin*, 869 F. 3d 1360, 1367 (2017).

[41] *Id.*, at 1368.

[42] *Kisor* v. *Shulkin*, 880 F. 3d 1378, 1379 (CA Fed. 2018) (opinion of O'Malley, J.).

[43] 586 U. S. 1050 (2018).

[44] *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140 (1967).

A

The first problem lies in § 706. That provision instructs reviewing courts to "decide all relevant questions of law" and "set aside agency action . . . found to be . . . not in accordance with law."[45] Determining the meaning of a statute or regulation, of course, presents a classic legal question. But in case these directives were not clear enough, the APA further directs courts to "determine the meaning" of any relevant "agency action," including any rule issued by the agency.[46] The APA thus requires a reviewing court to resolve for itself any dispute over the proper interpretation of an agency regulation. A court that, in deference to an agency, adopts something other than the best reading of a regulation isn't "decid[ing]" the relevant "questio[n] of law" or "determin-[ing] the meaning" of the regulation. Instead, it's allowing the agency to dictate the answer to that question. In doing so, the court is abdicating the duty Congress assigned to it in the APA.[47]

JUSTICE KAGAN seeks to address the glaring inconsistency between our judge-made rule and the controlling statute this way. On her account, the APA tells a reviewing court to "determine the meaning" of regulations, but it does not tell the court "*how*" to do that. Thus, we are told, reading the regulation for itself and deferring to the agency's reading are just two equally valid ways for a court to fulfill its statutory duty to "determine the meaning" of the regulation. *Ante*, at 581–582.

But the APA isn't as anemic as that. Its unqualified command requires the court to determine legal questions—including questions about a regulation's meaning—by its own

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[45] 5 U. S. C. § 706.

[46] *Ibid.*; see § 551(13) (defining "agency action").

[47] The case before us doesn't arise under the APA, but the statute that governs here is plainly modeled on the APA and contains essentially the same commands. It directs a reviewing court to "decide all relevant questions of law" and to "set aside any regulation or any interpretation thereof " that is "not in accordance with law." 38 U. S. C. § 7292(d)(1).

lights, not by those of political appointees or bureaucrats who may even be self-interested litigants in the case at hand. Nor can there be any doubt that, when Congress wrote the APA, it knew perfectly well how to require judicial deference to an agency when it wished—in fact, Congress repeatedly specified deferential standards for judicial review *elsewhere* in the statute.[48] But when it comes to the business of interpreting regulations, no such command exists; instead, Congress told courts to "determine" those matters for themselves. Though one hardly needs to be an academic to recognize the point, "commentators in administrative law have 'generally acknowledged' that Section 706 seems to require de novo review on questions of law."[49]

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[48] See, *e. g.*, § 706(2)(A) (arbitrary and capricious, abuse of discretion); § 706(2)(E) (substantial evidence); see also *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 482, n. 14 (1951) (noting that as originally proposed, the APA's judicial review provision would have included an explicit requirement for courts to accord "due weight" to "the experience, technical competence, specialized knowledge, and legislative policy of the agency involved as well as the discretionary authority conferred upon it" (internal quotation marks omitted)).

[49] Duffy, Administrative Common Law in Judicial Review, 77 Texas L. Rev. 113, 194–195 (1998); see Merrill, Capture Theory and the Courts: 1967–1983, 72 Chi.-Kent L. Rev. 1039, 1085–1086 (1997) (noting the "embarrassing" fact that "the APA appears to compel th[e] conclusion" that "courts should decide all questions of law de novo"). See also, *e. g.*, Origins 985; Mashaw, Rethinking Judicial Review of Administrative Action: A Nineteenth Century Perspective, 32 Cardozo L. Rev. 2241, 2243 (2011); Garrett, Legislating *Chevron*, 101 Mich. L. Rev. 2637, 2640 (2003); Molot, Reexamining *Marbury* in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation, 96 Nw. U. L. Rev. 1239, 1249 (2002); Anthony, 10 Admin. L. J. Am. U., at 9–10; Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 Colum. L. Rev. 452, 473, and n. 85 (1989); Starr, Sunstein, Willard, & Morrison, Judicial Review of Administrative Action in a Conservative Era, 39 Admin. L. Rev. 353, 368 (1987) (remarks of Prof. Sunstein); Pierce & Shapiro, Political and Judicial Review of Agency Action, 59 Texas L. Rev. 1175, 1182 (1981); 4 K. Davis, Administrative Law § 30.01, pp. 190–191 (1958).

What the statutory language suggests, experience confirms. If *Auer* deference were really just another way for courts to "determine the meaning" of regulations under § 706, you might expect that a final judicial "determination" would at least settle, as a matter of precedent, the question of what the regulation "means." Of course, even after one court has spoken on a regulation's meaning, that court or another might properly give weight to a new agency interpretation as part of the court's own decisionmaking process. See *supra*, at 597. But in light of *National Cable & Telecommunications Assn.* v. *Brand X Internet Services*,[50] courts have interpreted *Auer* as forbidding a court from ever "determin[ing] the meaning" of a regulation with the force that normally attaches to precedent, because an agency is always free to adopt a different view and insist on judicial deference to its new judgment.[51] And if an agency can not only control the court's initial decision but also revoke that decision at any time, how can anyone honestly say the court, rather than the agency, ever really "determine[s]" what the regulation means?

To test the point further, consider a statute that tells a court to "determin[e]" an appropriate sentence in a criminal case.[52] If the judge said he was sending a defendant to prison for longer than he believed appropriate only in deference to the government's "reasonable" sentencing recommendation, would anyone really think that complied with the law? Or take a statute that instructs a court to "determine" whether a consent judgment proposed by the government in a civil antitrust case "is in the public interest."[53] If a court thought the proposed judgment harmful to the public but decided to defer to the government's "reasonable" contrary

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[50] 545 U. S. 967 (2005).

[51] See, *e. g.*, *In re Lovin*, 652 F. 3d 1349, 1353–1354 (CA Fed. 2011); *Levy* v. *Sterling Holding Co.*, 544 F. 3d 493, 502–503 (CA3 2008).

[52] 18 U. S. C. § 3553(a).

[53] 15 U. S. C. § 16(e)(1).

view anyway, would anyone suggest the court had complied with Congress's instruction?

Nor does JUSTICE KAGAN's reading of § 706 offer any logical stopping point. If courts can "determine the meaning" of a regulation by deferring to any "reasonable" agency reading, then why not by deferring to *any* agency reading? If it were really true that the APA has nothing to say about *how* courts decide what regulations mean, then it would follow that the APA tolerates a rule that "the agency is always right." And if you find yourself in a place as absurd as that, you might want to consider whether you've taken a wrong turn along the way.

B

The problems don't end there. *Auer* is also incompatible with the APA's instructions in § 553. That provision requires agencies to follow notice-and-comment procedures when issuing or amending legally binding regulations (what the APA calls "substantive rules"), but not when offering mere interpretations of those regulations.[54] An agency wishing to adopt or amend a binding regulation thus must publish a proposal in the Federal Register, give interested members of the public an opportunity to submit written comments on the proposal, and consider those comments before issuing the final regulation. Under the APA, that regulation then carries the force of law unless and until it is amended or repealed.[55] By contrast, an agency can announce an interpretation of an existing substantive regulation without advance warning and in pretty much whatever form it chooses.

Auer effectively nullifies the distinction Congress drew here. Under *Auer*, courts must treat as "controlling" not only an agency's duly promulgated rules but also its mere interpretations—even ones that appear only in a legal brief,

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[54] See *Perez*, 575 U. S., at 95–96.

[55] *United States* v. *Nixon*, 418 U. S. 683, 695–696 (1974).

press release, or guidance document issued without affording the public advance notice or a chance to comment. For all practical purposes, "the new interpretation might as well be a new regulation."[56] *Auer* thus obliterates a distinction Congress thought vital and supplies agencies with a shortcut around the APA's required procedures for issuing and amending substantive rules that bind the public with the full force and effect of law.[57]

Think of it this way. We've held that the Constitution's specification of a "single, finely wrought" procedure for the enactment of statutes (bicameralism and presentment) necessarily implies that Congress cannot amend an enacted statute without following that procedure—say, by allowing a single House to change what the law requires.[58] By the same logic, Congress's specification in the APA of procedures for the creation of new substantive rules (like notice and comment) necessarily implies that an agency cannot amend a substantive rule without following those procedures. To hold otherwise, as *Auer* demands, subverts the APA's design.

Certain *amici* contend this argument is "out of place" in this particular case because the VA happened to issue the interpretation challenged here in an adjudicative proceeding.[59] But the premise on which they proceed—that the APA permits agencies to issue "controlling" amendments to their regulations in adjudicative proceedings—is not correct. Once an agency issues a substantive rule through notice and comment, it can amend that rule only by following the same notice-and-comment procedures.[60] Whether an agency is-

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[56] *Perez*, 575 U. S., at 127 (THOMAS, J., concurring in judgment).

[57] *Ibid.*; see *id.*, at 110 (Scalia, J., concurring in judgment) (*Auer* lets agencies "use [interpretive] rules not just to advise the public, but also to bind them").

[58] See *INS* v. *Chadha*, 462 U. S. 919, 951, 954 (1983).

[59] Brief for Administrative Law Scholars as *Amici Curiae* 9–10, n. 4.

[60] See *Perez*, 575 U. S., at 101; *Marseilles Land & Water Co.* v. *FERC*, 345 F. 3d 916, 920 (CADC 2003).

sues its interpretation in a press release or something it chooses to call an "adjudication," all we have is the agency's opinion about what an existing rule means, something that the APA tells us is *not* binding in a court of law or on the American people.

If that won't work, JUSTICE KAGAN tries an alternative argument from nearly the opposite direction. She replies that affording *Auer* deference to an agency's interpretation of its own rules never offends the APA because the agency's interpretation lacks "the force of law" associated with substantive rules. Agency interpretations lack this force, we are told, because a court always retains the power to decide at least whether the interpretation is entitled to deference. *Ante*, at 583–584. But this argument rests on an implausibly narrow understanding of what it means for an agency action to bear the force of law. Under JUSTICE KAGAN's logic, even a binding substantive rule would lack the force of law because a court retains the power to decide whether the rule is arbitrary and capricious and thus invalid under the APA. But no one believes that. While an agency interpretation, just like a substantive rule, "must meet certain conditions before it gets deference," "once it does so [*Auer* makes it] every bit as binding as a substantive rule."[61] To suggest that *Auer* does not make an agency's interpretive guidance "binding o[n] anyone," *ante*, at 584, is linguistic hocus-pocus.

C

If *Auer* cannot be squared with the text of the APA, JUSTICE KAGAN suggests it at least conforms to a reasonable "presumption about congressional intent." *Ante*, at 569. The theory seems to be that whenever Congress grants an agency "rulemaking power," it *also* implicitly gives the agency " 'the power authoritatively to interpret' " whatever rules the agency chooses to adopt. *Ante*, at 569–570. But against

[61] *Perez*, 575 U. S., at 110–111 (Scalia, J., concurring in judgment).

the clear statutory commands Congress gave us in the APA, what sense does it make to "presume" that Congress really, secretly, wanted courts to treat agency interpretations as binding? Normally, this Court does not allow hidden legislative intentions to "muddy" such plainly expressed statutory directives.[62]

Even on its own terms, too, this argument proves pretty muddy. It goes something like this: The drafters of the APA did not intend to "'significantly alter'" established law governing judicial review of agency action as of 1946; the *Auer* doctrine was part of that established law; therefore, the APA implicitly requires courts to afford agencies *Auer* deference. *Ante*, at 582–583. But neither of this syllogism's essential premises stands on solid ground.

Take the major premise—that those who adopted the APA intended to work no change in the established law of judicial review of agency action. JUSTICE KAGAN is right, of course, that Attorney General Clark claimed as much shortly after the APA's passage. *Ante*, at 582. But his view, which reflected the interests of the executive branch, was far from universally shared. Others, including many members of Congress, thought the APA would clarify, if not expand, the scope of judicial review. For example, Senator McCarran, the Chairman of the Judiciary Committee, wrote that it would be "hard . . . for anyone to argue that this Act did anything other than cut down the 'cult of discretion' so far as federal law is concerned."[63] And both the House and Senate reports on the APA said it was intended to "provid[e] that questions of law are for courts rather than agencies to decide in the last analysis."[64]

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[62] *Milner* v. *Department of Navy*, 562 U. S. 562, 572 (2011).

[63] McCarran, Improving "Administrative Justice": Hearings and Evidence; Scope of Judicial Review, 32 A. B. A. J. 827, 893 (1946).

[64] H. R. Rep. No. 1980, 79th Cong., 2d Sess., 44 (1946); accord, S. Rep. No. 752, 79th Cong., 1st Sess., 28 (1945); 92 Cong. Rec. 5654 (1946) (statement of Rep. Walter). See also Shepherd, Fierce Compromise: The Ad-

Just five years after the APA's passage, this Court seemed to side with those who thought the APA was intended to do more than just summarize existing law. In an opinion by Justice Frankfurter, the Court opined that the APA required courts to assume "*more* responsibility" for reviewing agency decisions "than some courts ha[d] shown in the past."[65] One early commentator likewise observed that the APA seemed designed to eliminate all doubt that questions of law "shall be decided by the reviewing Court for itself, and in the exercise of its own independent judgment"; "[m]ore explicit words to impose this mandate," he thought, "could hardly be found."[66]

JUSTICE KAGAN's syllogism runs into even more trouble with its minor premise—that the *Auer* doctrine was a well-established part of the common law background when Congress enacted the APA in 1946. As we've seen, this Court planted the seeds of *Auer* deference for the first time in dictum in *Seminole Rock*, just a year before Congress passed the APA. See Part I–B, *supra*. And that dictum did not somehow immediately become an entrenched part of the common law: For years following *Seminole Rock*, courts and "commentators largely ignored" it,[67] and those who took notice weren't sure what to make of it. Professor Davis, for example, doubted that the dictum could be "taken at face value" given that it seemed "irreconcilable" with the Court's approach in other cases.[68] In truth, when Congress passed

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ministrative Procedure Act Emerges from New Deal Politics, 90 Nw. U. L. Rev. 1557, 1662–1666 (1996).

[65] *Universal Camera*, 340 U. S., at 490 (emphasis added).

[66] Dickinson, Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review, 33 A. B. A. J. 434, 516 (1947). See also Origins 990–991 (critiquing the Attorney General's characterization of the APA as "inherently question begging" and unsupported by any analysis).

[67] Adler, 16 Geo. J. L. & Pub. Pol'y, at 7; see Lost History 63; Pojanowski, 16 Geo. J. L. & Pub. Pol'y, at 95–96.

[68] Davis, 50 Colum. L. Rev., at 597–598; see also Davis, 57 Yale L. J., at 936, n. 72; Newman, 35 Cal. L. Rev., at 521–522.

the APA the law of judicial review of agency action was in a confused state. During the congressional hearings on the bill, one witness's suggestion that Congress should leave the scope of judicial review "as it now is" drew this fair reply from Representative Walter, chairman of the House Subcommittee on Administrative Law and author of the House Report on the APA: "You say 'as it now is.' Frankly, I do not know what it now is . . . . [T]he Supreme Court apparently changes its mind daily."[69]

III. The Constitution

Not only is *Auer* incompatible with the APA; it also sits uneasily with the Constitution. Article III, §1, provides that the "judicial Power of the United States" is vested exclusively in this Court and the lower federal courts. A core component of that judicial power is "'the duty of interpreting [the laws] and applying them in cases properly brought before the courts.'"[70] As Chief Justice Marshall put it, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[71] And never, this Court has warned, should the "judicial power . . . be shared with [the] Executive Branch."[72] Yet that seems to be exactly what *Auer* requires.

A

Our Nation's founders were painfully aware of the dangers of executive and legislative intrusion on judicial decisionmaking. One of the abuses of royal power that led to the

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[69] Hearings on H. R. 184 et al. before the House Committee on the Judiciary, 79th Cong., 1st Sess., 38 (1945); see Origins 988–989.

[70] *Patchak* v. *Zinke*, 583 U. S. 244, 249 (2018) (plurality opinion) (quoting *Massachusetts* v. *Mellon*, 262 U. S. 447, 488 (1923)).

[71] *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803); see also *Wayman* v. *Southard*, 10 Wheat. 1, 46 (1825) ("[T]he legislature makes, the executive executes, and the judiciary construes the law"); The Federalist No. 78, p. 467 (C. Rossiter ed. 1961) (A. Hamilton).

[72] *Miller* v. *Johnson*, 515 U. S. 900, 922 (1995).

American Revolution was King George's attempt to gain influence over colonial judges.[73] Colonial legislatures, too, had interfered with the courts' independence "at the behest of private interests and factions."[74] These experiences had taught the founders that "'there is no liberty if the power of judging be not separated from the legislative and executive powers.'"[75] They knew that when political actors are left free not only to adopt and enforce written laws, but also to control the interpretation of those laws, the legal rights of "litigants with unpopular or minority causes or . . . who belong to despised or suspect classes" count for little.[76] Maybe the powerful, well-heeled, popular, and connected can wheedle favorable outcomes from a system like that—but what about everyone else? They are left always a little unsure what the law is, at the mercy of political actors and the shifting winds of popular opinion, and without the chance for a fair hearing before a neutral judge. The rule of law begins to bleed into the rule of men.

Experiencing all this in their own time, the founders sought to ensure that those who came after them would not.

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[73] See Declaration of Independence ¶11.

[74] *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S. 211, 220–221 (1995).

[75] The Federalist No. 78, at 466.

[76] *Palmore* v. *United States*, 411 U. S. 389, 412 (1973) (Douglas, J., dissenting); see *Oil States Energy Services, LLC* v. *Greene's Energy Group, LLC*, 584 U. S. 325, 348 (2018) (GORSUCH, J., dissenting) ("[W]hen an independent Judiciary gives ground to bureaucrats in the adjudication of cases, the losers will often prove the unpopular and vulnerable"); *United States* v. *Hatter*, 532 U. S. 557, 568–569 (2001) (quoting John Marshall's admonition that a judge who may be called on to decide a dispute "'between the most powerful individual in the community, and the poorest and most unpopular,'" must be "'perfectly and completely independent, with nothing to influence or control him but God and his conscience'" (alterations omitted)); Jackson, The Meaning of Statutes: What Congress Says or What the Court Says, 34 A. B. A. J. 535, 536 (1948) ("[T]he interpretation of [the laws'] fair meaning . . . should be made by judges as independent of politics as humanly possible and not serving the interests of the class for whom, or a majority by whom, legislation is enacted").

Believing that "[n]o maxim was better established" than "that the power of making ought to be kept distinct from that of expounding, the laws,"[77] they designed a judiciary that would be able to interpret the laws "free from potential domination by other branches of government."[78] To that end, they resisted proposals that would have subjected judicial decisions to review by political actors.[79] And they rejected the British tradition of using the upper house of the legislature as a court of last resort, out of fear that a body with "even a partial agency in passing bad laws" would operate under the "same spirit" in "interpreting them."[80] Instead, they gave federal judges life tenure, subject only to removal by impeachment; and they guaranteed that the other branches could not reduce judges' compensation so long as they remained in office.

The founders afforded these extraordinary powers and protections not for the comfort of judges, but so that an independent judiciary could better guard the people from the arbitrary use of governmental power. And sitting atop the judicial branch, this Court has always carried a special duty to "jealously guar[d]" the Constitution's promise of judicial independence.[81] So we have long resisted any effort by the other branches to "'usurp a court's power to interpret and apply the law to the circumstances before it.'"[82] The judicial power to interpret the law, this Court has held, "can no more be shared with another branch than the Chief Executive, for example, can share with the Judiciary the veto

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[77] 2 Records of the Federal Convention of 1787, p. 75 (M. Farrand ed. 1911); see also Manning, 96 Colum. L. Rev., at 640–648.

[78] *United States* v. *Will*, 449 U. S. 200, 218 (1980).

[79] See The Federalist No. 81, at 482 (A. Hamilton).

[80] *Id.*, at 483.

[81] *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 60 (1982) (plurality opinion).

[82] *Bank Markazi* v. *Peterson*, 578 U. S. 212, 225 (2016) (alterations omitted).

power, or the Congress share with the Judiciary the power to override a Presidential veto."[83]

Auer represents no trivial threat to these foundational principles. Under the APA, substantive rules issued by federal agencies through notice-and-comment procedures bear "the 'force and effect of law'"[84] and are part of the body of federal law, binding on private individuals, that the Constitution charges federal judges with interpreting. Yet *Auer* tells the judge that he must interpret these binding laws to mean not what he thinks they mean, but what an executive agency says they mean. Unlike Article III judges, executive officials are not, nor are they supposed to be, "wholly impartial."[85] They have their own interests, their own constituencies, and their own policy goals—and when interpreting a regulation, they may choose to "press the case for the side [they] represen[t]" instead of adopting the fairest and best reading.[86] *Auer* thus means that, far from being "kept distinct," the powers of making, enforcing, and interpreting laws are united in the same hands—and in the process a cornerstone of the rule of law is compromised.

Consider an analogy. The Court has long held that Congress cannot "'indirectly control the action of the courts, by requiring of them a construction of the law according to its

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[83] *Stern* v. *Marshall*, 564 U. S. 462, 483 (2011) (internal quotation marks omitted).

[84] *Perez*, 575 U. S., at 96; see *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 295–296 (1979). To be sure, our precedent allowing executive agencies to issue legally binding regulations to govern private conduct may raise constitutional questions of its own. See, *e. g.*, *Department of Transportation* v. *Association of American Railroads*, 575 U. S. 43, 70–76 (2015) (THOMAS, J., concurring in judgment).

[85] Cox, Judge Learned Hand and the Interpretation of Statutes, 60 Harv. L. Rev. 370, 390 (1947).

[86] *Id.*, at 390–391, and n. 58; see also Kavanaugh, 129 Harv. L. Rev., at 2151 (in pursuing their policy goals, "[e]xecutive branch agencies often think they can take a particular action unless it is *clearly forbidden*").

own views.'"[87] If Congress disagrees with how courts are interpreting an existing statute, it is free to amend the statute to establish a different rule going forward. What it cannot do is issue "a mandate . . . to compel the courts to construe and apply [existing law], not according to the judicial, but according to the legislative judgment."[88] As early as 1804, when a lawyer argued before this Court that an Act of the North Carolina legislature could not control the Court's construction of an earlier North Carolina statute because "[t]o declare what the law is, or has been, is a judicial power," not a legislative power, the Court stopped him, deeming the point too plain for argument.[89]

But if the legislature can't control a judge's interpretation of an existing statute, how can an executive agency control a judge's interpretation of an existing and equally binding regulation? *Auer* allows an agency to do exactly what this Court has always said a legislature cannot do: "compel the courts to construe and apply" a law on the books, "not according to the judicial . . . judgment," but according to the judgment of another branch.[90] When we defer to an agency interpretation that differs from what we believe to be the best interpretation of the law, we compromise our judicial independence and deny the people who come before us the impartial judgment that the Constitution guarantees them. And we mislead those whom we serve by placing a judicial *imprimatur* on what is, in fact, no more than an exercise of raw political executive power.[91]

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[87] *Plaut*, 514 U. S., at 225 (quoting T. Cooley, Constitutional Limitations 95 (1868)).

[88] *Id.*, at 95; see also *Bank Markazi*, 578 U. S., at 225, n. 17.

[89] *Ogden* v. *Blackledge*, 2 Cranch 272, 277.

[90] Cooley, *supra*, at 95.

[91] Cf. *Cary* v. *Curtis*, 3 How. 236, 253, 257 (1845) (Story, J., dissenting) (if the "right to interpret the laws" is taken away from courts and "confided to an executive functionary," then "the judicial power, designed by the Constitution to be the final and appellate jurisdiction to interpret our laws, is superseded in its most vital and important functions").

B

What do our colleagues have to say about these concerns? A majority has nothing to offer, and JUSTICE KAGAN dismisses them out of hand. In fact, she barely mentions the Constitution, other than to assure us that *Auer* does not allow agencies to "usur[p] the interpretive role of courts" because "courts retain a firm grip on the interpretive function" through their ability to decide whether *Auer* deference applies. *Ante*, at 586. But that is no assurance at all. The judicial power has always been understood to provide the people with a neutral arbiter who bears the responsibility and duty to "expound and interpret" the governing law, not just the power to say whether *someone else's* interpretation, let alone the interpretation of a self-interested political actor, is "reasonable."[92]

To be sure, it's conceivable that Congress might seek to limit the ability of judges to remedy an adverse agency action. It might, for example, provide that a court shall have power to set aside agency action pursuant to a regulation only if the action was based on an unreasonable interpretation of the regulation. But even assuming the constitutionality of a hypothetical statute like that, *Auer* is different. It does not *limit* the scope of the judicial power; instead, it seeks to *coopt* the judicial power by requiring an Article III judge to decide a case before him according to principles that he believes do not accurately reflect the law. Under *Auer*, a judge is required to lay aside his independent judgment and declare affirmatively that a regulation *means* what the agency *says* it means—and, thus, that the law *is* what the agency *says* it is. Then the judge is compelled to exercise his judicial authority to adjust private rights and obligations based on the agency's (mis)understanding of the law. If *Auer* were a statute, it would not be an exercise of Congress's "power (within limits) to tell the courts what *classes*

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[92] *Marbury*, 1 Cranch, at 177.

of cases they may decide," or what relief they may supply, but a forbidden attempt "to prescribe or superintend *how* they decide those cases."[93] And in the absence of any statute like that, this Court surely should not so freely give away to the executive branch its assigned responsibility to interpret the laws. "Abdication of responsibility is not part of the constitutional design."[94]

In the end, JUSTICE KAGAN's only real reply is this: However misguided it may be to hand over our interpretive powers to executive agencies, at least there isn't a mountain of empirical evidence showing that agencies have used this power to deliberately write "vague and open-ended" regulations to maximize their interpretive leeway. *Ante*, at 585. But even this misses the point. Whether or not regulations are "'designed'" to be vague, *ibid.*, many can be read in different ways, especially when new and unanticipated applications arise; cases like that come before the courts all the time. Without *Auer*'s shadow hanging over them, parties would receive a fair hearing before an impartial judge. The agency's interpretation would sometimes be rejected; and that, in turn, might lead it to solicit public comment on possible amendments to the regulation, which would provide an opportunity for public input that might produce better policy. But with *Auer*, there is no fair hearing and no need for the agency to amend the regulation through notice and comment. Whether purposeful or not, the agency's failure to write a clear regulation winds up increasing its power, allowing it to both write and interpret rules that bear the force of law—in the process uniting powers the Constitution deliberately separated and denying the people their right to an independent judicial determination of the law's meaning.

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[93] *Arlington* v. *FCC*, 569 U. S. 290, 297 (2013) (emphasis added).

[94] *Clinton* v. *City of New York*, 524 U. S. 417, 452 (1998) (Kennedy, J., concurring).

IV. Policy Arguments

Lacking support elsewhere, JUSTICE KAGAN is forced to resort to policy arguments to defend *Auer*. But even the most sensible policy argument would not empower us to ignore the plain language of the APA or the demands of the Constitution. And as we've seen, those documents reflect a very different "policy" judgment by the people and their representatives. Besides, the policy arguments offered today are not just unpersuasive, they are troubling.

Take the first and boldest offering. JUSTICE KAGAN suggests that determining the meaning of a regulation is largely a matter of figuring out what the "person who wrote it . . . intended." *Ante*, at 570. In this way, we're told, a legally binding regulation isn't all that different from "a memo or an e-mail"—if you "[w]ant to know what [it] means," you'd better "[a]sk its author." *Ibid.* But the federal government's substantive rules are not like memos or e-mails; they are binding edicts that carry the force of law for all citizens. And if the rule of law means anything, it means that we are governed by the public meaning of the words found in statutes and regulations, not by their authors' private intentions. This is a vital part of what it means to have "a government of laws, and not of men."[95] When judges interpret a regulation, what we are trying to get at, as Justice Holmes explained long ago, is not the "particular intent" of those who wrote it, but "what [its] words would mean [to] a normal speaker of English . . . in the circumstances in which they were used."[96] If the best reading of the regulation turns out to be something other than what

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[95] *Marbury*, 1 Cranch, at 163.

[96] Holmes, The Theory of Legal Interpretation, 12 Harv. L. Rev. 417, 417–418 (1899); see *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 452–453 (1987) (Scalia, J., concurring in judgment) ("Judges interpret laws rather than reconstruct legislators' intentions"); H. Hart & A. Sacks, The Legal Process 1375 (1994) ("Unenacted intentions or wishes cannot be given effect as law").

the agency claims to have intended, the agency is free to rewrite the regulation; but its secret intentions are not the law.

Nor does JUSTICE KAGAN's account of the interpretive process even wind up supporting *Auer*. If a court's goal in interpreting a regulation really were to determine what its author "intended," *Auer* would be an almost complete mismatch with the goal. Agency personnel change over time, and an agency's policy priorities may shift dramatically from one presidential administration to another. Yet *Auer* tells courts that they must defer to the agency's *current* view of what the regulation ought to mean, which may or may not correspond to the views of those who actually wrote it. If interpreting a regulation really were just like reading an e-mail, *Auer* would be like seeking guidance about the e-mail's meaning, years or decades later, from the latest user of the computer from which the e-mail was sent. We've repeatedly rejected that approach in the context of statutory interpretation. While Members of this Court sometimes disagree about the usefulness of *pre-enactment* legislative history, we all agree that legislators' statements about the meaning of an already-enacted statute are not " 'a legitimate tool of statutory interpretation,' " much less a controlling one.[97] So why on earth would we give "controlling weight" to an agency's statements about the meaning of an already-promulgated regulation?

Proceeding farther down this doubtful path, JUSTICE KAGAN asserts that resolving ambiguities in a regulation "sounds more in policy than in law" and is thus a task more suited to executive officials than judges. *Ante*, at 571. But this claim, too, contradicts a basic premise of our legal order: that we are governed not by the shifting whims of politicians and bureaucrats, but by written laws whose meaning is fixed and ascertainable—if not by all members of the public, then

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[97] *United States* v. *Woods*, 571 U. S. 31, 48 (2013).

at least by lawyers who can advise them and judges who must apply the law to individual cases guided by the neutral principles found in our traditional tools of interpretation. The text of the regulation is treated *as* the law, and the agency's policy judgment has the force of law *only* insofar as it is embodied in the regulatory text. If "new issues demanding new policy calls" arise that aren't addressed in existing regulations, *ante*, at 572, the solution is for the agency to promulgate new regulations using the notice-and-comment procedures set forth in the APA. But an agency has no warrant to compel judges to change the law to conform with the agency's current policy preferences.

To be sure, during the period of *Auer*'s ascendancy some suggested that the meaning of written law is always "radically indeterminate" and that judges expounding it are, "for the most part, guided by policy—not text."[98] And in an environment like that it was perhaps thought a small step to conclude that, if legal disputes are going to be resolved on political grounds, then they ought to be resolved by real politicians in the executive branch rather than ersatz politicians on the bench. But the proposed cure proved worse than the disease. Arguments like these surrendered the judgment embodied in our Constitution and the APA that courts owe the people they serve their independent legal judgment about the law's meaning. Besides, we've long since come to realize that the real cure doesn't lie in turning judges into rubber stamps for politicians, but in redirecting the judge's interpretive task back to its roots, away from open-ended policy appeals and speculation about legislative intentions and toward the traditional tools of interpretation judges have employed for centuries to elucidate the law's original

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[98] O'Scannlain, "We Are All Textualists Now": The Legacy of Justice Antonin Scalia, 91 St. John's L. Rev. 303, 304–305 (2017) (contesting the radical indeterminacy of legal texts).

public meaning. Today it is even said that we judges are, to one degree or another, "all textualists now."[99]

Pursuing a more modest tack, JUSTICE KAGAN next suggests that *Auer* is justified by the respect due agencies' "technical" expertise. *Ante*, at 571. But no one doubts that courts should pay close attention to an expert agency's views on technical questions in its field. Just as a court "would want to know what John Henry Wigmore said about an issue of evidence law [or] what Arthur Corbin thought about a matter of contract law," so too should courts carefully consider what the Food and Drug Administration thinks about how its prescription drug safety regulations operate.[100] The fact remains, however, that even agency experts "can be wrong; even Homer nodded."[101] *Skidmore* and the traditional approach it embodied recognized both of these facts of life long ago, explaining that, while courts should of course afford respectful consideration to the expert agency's views, they must remain open to competing expert and other evidence supplied in an adversarial setting. Respect for an agency's technical expertise demands no more.

JUSTICE KAGAN's final policy argument is that *Auer* promotes "consistency" and "uniformity" in the interpretation of regulations. *Ante*, at 572–573. If we let courts decide what regulations mean, she warns, they might disagree, and it might take some time for higher courts to resolve those disagreements. But consistency and uniformity are hardly grounds on which *Auer*'s advocates should wish to fight. The judicial process is how we settle disputes about the meaning of written law, and our judicial system is more than capable of producing a single, uniform, and stable interpretation that will last until the regulation is amended or repealed. Meanwhile, under *Auer* courts often disagree about

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[99] *Id.*, at 313; see Siegel, Textualism and Contextualism in Administrative Law, 78 B. U. L. Rev. 1023, 1057 (1998).

[100] Larkin & Slattery, 42 Harv. J. L. & Pub. Pol'y, at 647.

[101] *Ibid.*

whether deference is warranted, see *supra*, at 600–601, and a regulation's "meaning" can be transformed with the stroke of a pen any time there is a new presidential administration. "Consistency," "uniformity," and stability in the law are hardly among *Auer*'s crowning achievements.

V. *Stare Decisis*

In the end, a majority declines to endorse JUSTICE KAGAN's arguments and insists only that, even if *Auer* is not "right and well-reasoned," we're stuck with it because of the respect due precedent. *Ante*, at 588.

But notice: While pretending to bow to *stare decisis*, the majority goes about reshaping our precedent in new and experimental ways. True, the majority admits, this Court has in the past accorded *Auer* deference "'reflexive[ly],'" "without significant analysis of the underlying regulation" or "careful attention to [its] nature and context," and encouraged lower courts to do the same. *Ante*, at 574. But no more. From now on, the majority says, not only must judges "exhaust all the 'traditional tools' of construction" to decide whether the agency's interpretation is "reasonable," they must also make "an independent inquiry into whether the character and context of the agency interpretation" justifies deference. *Ante*, at 575–576. The majority candidly admits that it finds it impossible to "reduce" this new inquiry "to any exhaustive test," so it settles for laying out some "markers." *Ante*, at 576–577. What are the markers? We are told that courts should often—but not always—withhold deference from an interpretation offered by mid-level agency staff; often—but not always—withhold deference from a nontechnical, "prosaic-seeming" interpretation; often—but not always—withhold deference from an interpretation advanced for the first time in an *amicus* brief; and often—but not always—withhold deference from an interpretation that conflicts with an earlier one. See *ante*, at 576–579. The only certainty in all this is that the majority isn't really much

moved by *stare decisis*; everyone recognizes, to one degree or another, that *Auer* cannot stand. And between our remaining choices—continuing to make up new deference rules, or returning to the text of the APA and the approach to judicial review that prevailed for most of our history—the answer should have been easy.

A

There are serious questions about whether *stare decisis* should apply here at all. To be sure, *Auer*'s narrow holding about the meaning of the regulation at issue in that case may be entitled to *stare decisis* effect. The same may be true for the specific holdings in other cases where this Court has applied *Auer* deference. But does *stare decisis* extend beyond those discrete holdings and bind future Members of this Court to apply *Auer*'s broader deference framework?

It seems doubtful that *stare decisis* demands that much. We are not dealing with a precedent that purported to settle the meaning of a single statute or regulation or resolve a particular case. The *Auer* doctrine claims to do much more than that—to prescribe an interpretive methodology governing every future dispute over the meaning of every regulation. In other contexts, we do not regard statements in our opinions about such generally applicable interpretive methods, like the proper weight to afford historical practice in constitutional cases or legislative history in statutory cases, as binding future Justices with the full force of horizontal *stare decisis*.[102] Why, then, should we regard as binding *Auer*'s statements about the weight to afford agencies' interpretations in regulatory cases? To the extent *Auer* purports to dictate "the interpretive inferences that future Justices must draw in construing statutes and regulations

[102] See Criddle & Staszewski, Against Methodological Stare Decisis, 102 Geo. L. J. 1573, 1577, and n. 12 (2014); C. Oldfather, Methodological Stare Decisis and Constitutional Interpretation, in Precedent in the United States Supreme Court 135, 135–136 (C. Peters ed. 2013).

that the Court has never engaged," it may well "exceed the limits of stare decisis."[103]

Even if our past expressions of support for *Auer* deference bear *some* precedential force, they certainly are not entitled (as the majority suggests, *ante*, at 587–588) to the special, heightened form of *stare decisis* we reserve for narrow statutory decisions. In contrast to precedents that fix the meaning of *particular* statutes and generate reliance interests in the process, the *Auer* doctrine is an abstract default rule of interpretive methodology that settles nothing of its own force. And this Court has recognized that it is "inconsistent with the Court's proper role" to insist that Congress exercise its legislative power to overturn such erroneous and judicially invented "default rule[s]."[104] That should be especially so here because *Auer*'s default rule undermines judicial independence, which this Court has a special responsibility to defend.

Nor is it entirely clear that Congress *could* overturn the *Auer* doctrine legislatively. The majority describes *Auer* as a "presumption" about how courts should interpret statutes granting rulemaking power to agencies. *Ante*, at 573. Congress can, of course, *rebut* the presumption on a statute-by-statute basis, or even for all past statutes. But can Congress *eliminate* the *Auer* presumption for future statutes? Perhaps—but legislation like that would raise questions, which the majority does not address, about the ability of one Congress to entrench its preferences by attempting to control the interpretation of legislation enacted by future Con-

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[103] Kozel, Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis, 97 Texas L. Rev. 1125, 1159 (2019); see Raso & Eskridge, *Chevron* as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases, 110 Colum. L. Rev. 1727, 1765–1766 (2010) (concluding that in practice, this Court has not treated administrative-deference regimes such as *Chevron* and *Auer* as binding precedents).

[104] *South Dakota* v. *Wayfair, Inc.*, 585 U. S. 162, 183 (2018).

gresses.[105] We should not be in the business of tossing "'balls . . . into Congress's court,'" *ante*, at 587, that would explode with constitutional questions if Congress tried to pick them up.

B

Even assuming for argument's sake that standard *stare decisis* considerations apply, they still do not require us to retain *Auer*. Even the majority implicitly recognizes this much, as it proceeds to vacate a lower court judgment that faithfully applied *Auer* and instruct that court to try again using the majority's new directions. If *stare decisis* allows us so freely to remodel *Auer*, it's hard to see on what account it might require us to retain it.

We do not lightly overturn precedents, and we seek always to honor the thoughtful guidance of those who have preceded us. At the same time, everyone agrees that *stare decisis* is not an "'inexorable command,'"[106] and this Court should not always remain bound to decisions whose "rationale no longer withstands 'careful analysis.'"[107] Recognizing the need for balance in this area, the Court has, over time, fashioned principles to guide our treatment of precedent. Those principles call on us to consider factors such as "the quality of [the precedent'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."[108] As applied to *Auer*, all of these considera-

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[105] See, *e. g.*, Alexander & Prakash, Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation, 20 Const. Comment. 97 (2003); Elhauge, Preference-Estimating Statutory Default Rules, 102 Colum. L. Rev. 2027, 2109–2110, and nn. 231–233 (2002).

[106] *Pearson* v. *Callahan*, 555 U. S. 223, 233 (2009).

[107] *Arizona* v. *Gant*, 556 U. S. 332, 348 (2009) (quoting *Lawrence* v. *Texas*, 539 U. S. 558, 577 (2003)).

[108] *Janus* v. *State, County, and Municipal Employees*, 585 U. S. 878, 917 (2018).

tions weigh strongly in favor of bidding farewell to the doctrine rather than keeping it on life support.

First, we've already seen that no persuasive rationale supports *Auer*. From its humble origins as an unexplained bit of dictum in a wartime case about emergency price controls, the *Auer* doctrine evolved into a rigid rule of deference—all without any serious attempt by this Court to rationalize it or reconcile it with the APA, the Constitution, or traditional modes of judicial review. See Part I, *supra*. Even its fiercest defenders acknowledge that "*Auer* deference has not remained static over time" and urge the Court to continue to "shape" and "refin[e]" the doctrine.[109] Today's decision attempts just such a "refinement" by hedging *Auer* with new qualifications and limitations. See *ante*, at 573–579. This shifting ground "undermin[es] the force of *stare decisis*."[110]

Second, today's ruling all but admits that *Auer* has not proved to be a workable standard. Even before this latest overhaul, uncertainty surrounding *Auer*'s scope and application had caused many to question whether there was any "practical benefit" in continuing to apply *Auer* "rather than a less deferential but more flexible and open-ended standard like *Skidmore*."[111] See *supra*, at 600–601. Nor does the majority's kinder, gentler version of *Auer* promise to solve the problem. On the contrary, its newly mandated inquiry into the "character and context of the agency interpretation," which it admits cannot be reduced "to any exhaustive test," *ante*, at 576, seems destined only to compound the confusion. See *supra*, at 625–626. Many words come to mind to describe the tasks we assign lower court judges today, but "workable" is not among them.

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[109] Brief for Administrative Law Scholars as *Amici Curiae* 13.

[110] *Knick* v. *Township of Scott*, 588 U. S. 180, 204 (2019); see *Janus*, 585 U. S., at 928. See also Lost History 54–92; Knudsen & Wildermuth, 22 Geo. Mason L. Rev., at 658–664.

[111] Hickman & Thomson, 103 Minn. L. Rev. Headnotes, at 110.

Third, the *Auer* doctrine is, as we have also already seen, out of step with how courts normally interpret written laws. When we interpret a regulation, we typically (at least when there is no agency say-so) proceed in the same way we would when interpreting any other written law: We "begin our interpretation of the regulation with its text" and, if the text is unclear, we "turn to other canons of interpretation" and tie-breaking rules to resolve the ambiguity.[112] And when we interpret an ambiguous *statute*, we never ask what current members of Congress think it means; in fact, we've held unanimously that legislators' post-enactment views about a statute's meaning are not even a "'legitimate tool of statutory interpretation.'"[113] Affording "controlling weight" to regulators' post-promulgation views about the meaning of an ambiguous regulation is hard to square with these usual judicial practices.[114]

Fourth, the explosive growth of the administrative state over the last half-century has exacerbated *Auer*'s potential for mischief. When the Court first uttered its dictum in *Seminole Rock*, the administrative state was new and the APA was only a gleam in Congress's eye. Even 20 years

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[112] *Green* v. *Brennan*, 578 U. S. 547, 553–554 (2016); see, *e. g.*, *National Assn. of Home Builders* v. *Defenders of Wildlife*, 551 U. S. 644, 668–669 (2007) (construing regulation in light of text, history, and canon against surplusage).

[113] *Woods*, 571 U. S., at 48; see also *Bruesewitz* v. *Wyeth LLC*, 562 U. S. 223, 242 (2011); *Jones* v. *United States*, 526 U. S. 227, 238 (1999); *United States* v. *Mine Workers*, 330 U. S. 258, 281–282 (1947).

[114] To be sure, under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), we sometimes defer to an agency's construction of a *statute*. But there are serious questions, too, about whether *that* doctrine comports with the APA and the Constitution. See, *e. g.*, *Pereira* v. *Sessions*, 585 U. S. 198, 219–221 (2018) (Kennedy, J., concurring); *Michigan* v. *EPA*, 576 U. S. 743, 760–764 (2015) (THOMAS, J., concurring); *Perez*, 575 U. S., at 109–110 (Scalia, J., concurring in judgment). Regardless, it would be a mistake to suppose that *Auer* is in any way a "logical corollary to *Chevron*." *Decker*, 568 U. S., at 620 (Scalia, J., concurring in part and dissenting in part).

later, when the Court began reviving the *Seminole Rock* dictum and turning it into a new deference doctrine, it was not yet apparent how pervasive the administrative state would become in the lives of ordinary Americans. Now, in the 21st century, "[t]he administrative state wields vast power and touches almost every aspect of daily life."[115] Among other things, it produces "'reams of regulations'"[116]—so many that they dwarf the statutes enacted by Congress. As of 2018, the Code of Federal Regulations filled 242 volumes and was about 185,000 pages long, almost quadruple the length of the most recent edition of the U. S. Code.[117] And agencies add thousands more pages of regulations every year. Whether you think this administrative fecundity is a good or a bad thing, it surely means that the cost of continuing to deny citizens an impartial judicial hearing on the meaning of disputed regulations has increased dramatically since this Court started down this road.

Fifth, *Auer* has generated no serious reliance interests. The only parties that might have relied on *Auer*'s promise of deference are agencies that use *post hoc* interpretations to bypass the APA's notice-and-comment procedures. But this Court has never suggested that the convenience of government officials should count in the balance of *stare decisis*, especially when weighed against the interests of citizens in a fair hearing before an independent judge and a stable and knowable set of laws. In short, "'[t]he fact that [agencies] may view [*Auer* deference] as an entitlement does not establish the sort of reliance interest that could outweigh the

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[115] *Arlington*, 569 U. S., at 313 (ROBERTS, C. J., dissenting) (internal quotation marks omitted).

[116] *Federal Maritime Comm'n* v. *South Carolina Ports Authority*, 535 U. S. 743, 755 (2002).

[117] See Office of the Federal Register, Code of Federal Regulations: Total Pages 1938–1949, and Total Volumes and Pages 1950–2018, http://www.federalregister.gov/uploads/2019/04/cfrTotalPages2018.pdf; *United States* v. *Secretary, Fla. Dept. of Corrections*, 778 F. 3d 1223, 1225 (CA11 2015).

countervailing interest' " of all citizens " 'in having their constitutional rights fully protected.' " [118]

Coming closer to the mark, the majority worries that "abandoning *Auer* deference would cast doubt on many settled constructions" of regulations on which regulated parties might have relied. *Ante*, at 587. But, again, decisions construing particular regulations might retain *stare decisis* effect even if the Court announced that it would no longer adhere to *Auer*'s interpretive methodology. After all, decisions construing particular statutes continue to command respect even when the interpretive methods that led to those constructions fall out of favor. Besides, if the majority is correct that abandoning *Auer* would require revisiting regulatory constructions that were upheld based on *Auer* deference, the majority's revision of *Auer* will yield exactly the same result. There are innumerable lower court decisions that have followed this Court's lead and afforded *Auer* deference mechanically, without conducting the inquiry the Court now holds is required. Today's ruling casts no less doubt on the continuing validity of those decisions than we would if we simply moved on from *Auer*.

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Overruling *Auer* would have taken us directly back to *Skidmore*, liberating courts to decide cases based on their independent judgment and "follow [the] agency's [view] only to the extent it is persuasive." [119] By contrast, the majority's attempt to remodel *Auer*'s rule into a multi-step, multi-factor inquiry guarantees more uncertainty and much litigation. Proceeding in this convoluted way burdens our colleagues on the lower courts, who will have to spend time debating deference that they could have spent interpreting

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[118] *Janus*, 585 U. S., at 927 (quoting *Gant*, 556 U. S., at 349).

[119] *Gonzales* v. *Oregon*, 546 U. S. 243, 269 (2006); see *Christopher*, 567 U. S., at 159 (applying *Skidmore* after concluding that agency's interpretation did not merit *Auer* deference).

disputed regulations. It also continues to deny the people who come before us the neutral forum for their disputes that they rightly expect and deserve.

But this cloud may have a silver lining: The majority leaves *Auer* so riddled with holes that, when all is said and done, courts may find that it does not constrain their independent judgment any more than *Skidmore*. As reengineered, *Auer* requires courts to "exhaust all the 'traditional tools' of construction" before they even consider deferring to an agency. *Ante*, at 575. And those tools include all sorts of tie-breaking rules for resolving ambiguity even in the closest cases. Courts manage to make do with these tools in many other areas of the law, so one might hope they will hardly ever find them inadequate here. And if they do, they will now have to conduct a further inquiry that includes so few firm guides and so many cryptic "markers" that they will rarely, if ever, have to defer to an agency regulatory interpretation that differs from what they believe is the best and fairest reading.

But whatever happens, this case hardly promises to be this Court's last word on *Auer*. If today's opinion ends up reducing *Auer* to the role of a tin god—officious, but ultimately powerless—then a future Court should candidly admit as much and stop requiring litigants and lower courts to pay token homage to it. Alternatively, if *Auer* proves more resilient, this Court should reassert its responsibility to say what the law is and afford the people the neutral forum for their disputes that they expect and deserve.

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

I agree with JUSTICE GORSUCH's conclusion that the *Auer* deference doctrine should be formally retired. I write separately to emphasize two points.

First, I agree with THE CHIEF JUSTICE that "the distance between the majority and JUSTICE GORSUCH is not as great

as it may initially appear." *Ante*, at 591 (opinion concurring in part). The majority's approach in Part II–B of its opinion closely resembles the argument advanced by the Solicitor General to "clarif[y] and narro[w]" *Auer*. Brief for Respondent 15. Importantly, the majority borrows from footnote 9 of this Court's opinion in *Chevron* to say that a reviewing court must "exhaust all the 'traditional tools' of construction" before concluding that an agency rule is ambiguous and deferring to an agency's reasonable interpretation. *Ante*, at 575 (quoting *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843, n. 9 (1984)). If a reviewing court employs all of the traditional tools of construction, the court will almost always reach a conclusion about the best interpretation of the regulation at issue. After doing so, the court then will have no need to adopt or defer to an agency's contrary interpretation. In other words, the footnote 9 principle, taken seriously, means that courts will have no reason or basis to put a thumb on the scale in favor of an agency when courts interpret agency regulations.

Formally rejecting *Auer* would have been a more direct approach, but rigorously applying footnote 9 should lead in most cases to the same general destination. Umpires in games at Wrigley Field do not defer to the Cubs manager's in-game interpretation of Wrigley's ground rules. So too here.

To be sure, some cases involve regulations that employ broad and open-ended terms like "reasonable," "appropriate," "feasible," or "practicable." Those kinds of terms afford agencies broad policy discretion, and courts allow an agency to reasonably exercise its discretion to choose among the options allowed by the text of the rule. But that is more *State Farm* than *Auer*. See *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29 (1983).

In short, after today's decision, a judge should engage in appropriately rigorous scrutiny of an agency's interpretation of a regulation, and can simultaneously be appropriately deferential to an agency's reasonable policy choices within the discretion allowed by a regulation.

Second, I also agree with THE CHIEF JUSTICE that "[i]ssues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress." *Ante*, at 591. Like THE CHIEF JUSTICE, "I do not regard the Court's decision" not to formally overrule *Auer* "to touch upon the latter question." *Ibid.*

Syllabus

UNITED STATES *v.* HAYMOND

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

No. 17–1672. Argued February 26, 2019—Decided June 26, 2019

Respondent Andre Haymond was convicted of possessing child pornography, a crime that carries a prison term of zero to 10 years. After serving a prison sentence of 38 months, and while on supervised release, Mr. Haymond was again found with what appeared to be child pornography. The government sought to revoke his supervised release and secure a new and additional prison sentence. A district judge, acting without a jury, found by a preponderance of the evidence that Mr. Haymond knowingly downloaded and possessed child pornography. Under 18 U. S. C. § 3583(e)(3), the judge could have sentenced him to a prison term of between zero and two additional years. But because possession of child pornography is an enumerated offense under § 3583(k), the judge instead imposed that provision's 5-year mandatory minimum. On appeal, the Tenth Circuit observed that whereas a jury had convicted Mr. Haymond beyond a reasonable doubt of a crime carrying a prison term of zero to 10 years, this new prison term included a new and higher mandatory minimum resting on facts found only by a judge by a preponderance of the evidence. The Tenth Circuit therefore held that § 3583(k) violated the right to trial by jury guaranteed by the Fifth and Sixth Amendments.

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

869 F. 3d 1153, vacated and remanded.

JUSTICE GORSUCH, joined by JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN, concluded that the application of § 3583(k) in this case violated Mr. Haymond's right to trial by jury. Pp. 640–657.

(a) As at the time of the Fifth and Sixth Amendments' adoption, a judge's sentencing authority derives from, and is limited by, the jury's factual findings of criminal conduct. A jury must find beyond a reasonable doubt every fact "'which the law makes essential to [a] punishment'" that a judge might later seek to impose. *Blakely* v. *Washington*, 542 U. S. 296, 304. Historically, that rule's application proved straightforward, but recent legislative innovations have raised difficult questions. In *Apprendi* v. *New Jersey*, 530 U. S. 466, for example, this Court held unconstitutional a sentencing scheme that allowed a judge to increase a defendant's sentence beyond the statutory maximum based on the judge's finding of new facts by a preponderance of the evidence.

And in *Alleyne* v. *United States*, 570 U. S. 99, the Court held that *Apprendi*'s principle "applies with equal force to facts increasing the mandatory minimum." 570 U. S., at 111–112. The lesson for this case is clear: Based solely on the facts reflected in the jury's verdict, Mr. Haymond faced a lawful prison term of between zero and 10 years. But just like the facts the judge found at the defendant's sentencing hearing in *Alleyne*, the facts the judge found here increased "the legally prescribed range of allowable sentences" in violation of the Fifth and Sixth Amendments. *Id.*, at 115. Pp. 640–646.

(b) The government's various replies are unpersuasive. First, it stresses that *Alleyne* arose in a different procedural posture, but this Court has repeatedly rejected efforts to dodge the demands of the Fifth and Sixth Amendments by the simple expedient of relabeling a criminal prosecution. And this Court has already recognized that punishments for revocation of supervised release arise from and are "treat[ed] . . . as part of the penalty for the initial offense." *Johnson* v. *United States*, 529 U. S. 694, 700. Because a defendant's final sentence includes any revocation sentence he may receive, § 3583(k)'s 5-year mandatory minimum mirrors the unconstitutional sentencing enhancement in *Alleyne*. Second, the government suggests that Mr. Haymond's sentence for violating the terms of his supervised release was actually fully authorized by the jury's verdict, because his supervised release was from the outset always subject to the possibility of judicial revocation and § 3583(k)'s mandatory prison sentence. But what is true in *Apprendi* and *Alleyne* can be no less true here: A mandatory minimum 5-year sentence that comes into play *only* as a result of additional judicial factual findings by a preponderance of the evidence cannot stand. Finally, the government contends that § 3583(k)'s supervised release revocation procedures are practically identical to historic parole and probation revocation procedures, which have usually been understood to comport with the Fifth and Sixth Amendments. That argument overlooks a critical difference between § 3583(k) and traditional parole and probation practices. Where parole and probation violations traditionally exposed a defendant only to the *remaining* prison term authorized for his crime of conviction, § 3583(k) exposes a defendant to an *additional* mandatory minimum prison term *beyond* that authorized by the jury's verdict—all based on facts found by a judge by a mere preponderance of the evidence. Pp. 646–652.

(c) The Tenth Circuit may address on remand the question whether its remedy—declaring the last two sentences of § 3583(k) "unconstitutional and unenforceable"—sweeps too broadly, including any question concerning whether the government's argument to that effect was adequately preserved. Pp. 656–657.

Syllabus

JUSTICE BREYER agreed that the particular provision at issue, 18 U. S. C. § 3583(k), is unconstitutional. Three features of § 3583(k), considered together, make it less like ordinary supervised-release revocation and more like punishment for a new offense, to which the jury right would typically attach. First, § 3583(k) applies only when a defendant commits a discrete set of criminal offenses specified in the statute. Second, § 3583(k) takes away the judge's discretion to decide whether violation of the conditions of supervised release should result in imprisonment and for how long. Third, § 3583(k) limits the judge's discretion in a particular manner: by imposing a mandatory minimum term of imprisonment of "not less than 5 years" upon a judge's finding that a defendant has committed a listed offense. But because the role of the judge in a typical supervised-release proceeding is consistent with traditional parole and because Congress clearly did not intend the supervised-release system to differ from parole in this respect, JUSTICE BREYER would not transplant the *Apprendi* line of cases to the supervised-release context. Pp. 657–659.

GORSUCH, J., announced the judgment of the Court and delivered an opinion, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. BREYER, J., filed an opinion concurring in the judgment, *post*, p. 657. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS and KAVANAUGH, JJ., joined, *post*, p. 659.

Eric J. Feigin argued the cause for the United States. With him on the briefs were *Solicitor General Francisco*, *Assistant Attorney General Benczkowski*, *Christopher G. Michel*, and *William A. Glaser*.

William D. Lunn argued the cause for respondent. With him on the brief were *Jeffrey T. Green*, *Matthew J. Letten*, and *Sarah O'Rourke Schrup*.*

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*A brief of *amici curiae* urging reversal was filed for the State of Utah et al. by *Sean D. Reyes*, Attorney General of Utah, *Tyler R. Green*, Solicitor General, *Thomas B. Brunker*, Deputy Solicitor General, and *John J. Nielsen*, Assistant Solicitor General, and by the Attorneys General for their respective States as follows: *Steve Marshall* of Alabama, *Leslie Rutledge* of Arkansas, *Pamela Jo Bondi* of Florida, *Christopher M. Carr* of Georgia, *Russell A. Suzuki* of Hawaii, *Curtis T. Hill, Jr.*, of Indiana, *Derek Schmidt* of Kansas, *Jeff Landry* of Louisiana, *Bill Schuette* of Michigan, *Timothy C. Fox* of Montana, *Doug Peterson* of Nebraska, *Gurbir S. Grewal* of New Jersey, *Michael DeWine* of Ohio, *Mike Hunter* of Oklahoma, *Alan Wilson*

JUSTICE GORSUCH announced the judgment of the Court and delivered an opinion, in which JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN joined.

Only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty. That promise stands as one of the Constitution's most vital protections against arbitrary government. Yet in this case a congressional statute compelled a federal judge to send a man to prison for a minimum of five years without empaneling a jury of his peers or requiring the government to prove his guilt beyond a reasonable doubt. As applied here, we do not hesitate to hold that the statute violates the Fifth and Sixth Amendments.

I

After a jury found Andre Haymond guilty of possessing child pornography in violation of federal law, the question turned to sentencing. The law authorized the district judge to impose a prison term of between zero and 10 years, 18 U. S. C. § 2252(b)(2), and a period of supervised release of between 5 years and life, § 3583(k). Because Mr. Haymond had no criminal history and was working to help support his mother who had suffered a stroke, the judge concluded that Mr. Haymond was "not going to get much out of being in prison" and sentenced him to a prison term of 38 months, followed by 10 years of supervised release.

After completing his prison sentence, however, Mr. Haymond encountered trouble on supervised release. He sat for multiple polygraph tests in which he denied possessing or viewing child pornography, and each time the test indicated

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of South Carolina, *Ken Paxton* of Texas, *Patrick Morrisey* of West Virginia, and *Peter K. Michael* of Wyoming.

Briefs of *amici curiae* urging affirmance were filed for the Due Process Institute by *David T. Goldberg* and *Shana-Tara O'Toole*; for FAMM et al. by *Rakesh N. Kilaru*, *Peter Goldberger*, *Mary Price*, *Barbara E. Bergman*, and *Chanakya A. Sethi*; and for Social Science and Law Scholars by *Daniel E. Gustafson*.

no deception. But when the government conducted an unannounced search of his computers and cellphone, it turned up 59 images that appeared to be child pornography. Based on that discovery, the government sought to revoke Mr. Haymond's supervised release and secure a new and additional prison sentence.

A hearing followed before a district judge acting without a jury, and under a preponderance of the evidence rather than a reasonable doubt standard. In light of expert testimony regarding the manner in which cellphones can "cache" images without the user's knowledge, the judge found insufficient evidence to show that Mr. Haymond knowingly possessed 46 of the images. At the same time, the judge found it more likely than not that Mr. Haymond knowingly downloaded and possessed the remaining 13 images.

With that, the question turned once more to sentencing. Under 18 U. S. C. § 3583(e)(3), enacted as part of the Sentencing Reform Act of 1984, a district judge who finds that a defendant has violated the conditions of his supervised release normally may (but is not required to) impose a new prison term up to the maximum period of supervised release authorized by statute for the defendant's original crime of conviction, subject to certain limits.[1] Under that provision, the judge in this case would have been free to sentence

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[1] Section 3583(e)(3) states in pertinent part: "The court may, after considering the factors set forth in section 3553(a)(1), . . . (3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court . . . finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case . . . ."

Mr. Haymond to between zero and two additional years in prison.

But there was a complication. Under § 3583(k), added to the Act in 2003 and amended in 2006, if a judge finds by a preponderance of the evidence that a defendant on supervised release committed one of several enumerated offenses, including the possession of child pornography, the judge *must* impose an additional prison term of at least five years and up to life without regard to the length of the prison term authorized for the defendant's initial crime of conviction.[2]

Because Mr. Haymond had committed an offense covered by § 3583(k), the judge felt bound to impose an additional prison term of at least five years. He did so, though, with reservations. It's one thing, Judge Terence Kern said, for a judge proceeding under a preponderance of the evidence standard to revoke a defendant's supervised release and order him to serve additional time in prison within the range already authorized by the defendant's original conviction; after all, the jury's verdict, reached under the reasonable doubt standard, permitted that much punishment. But the judge found it "'repugnant'" that a statute might impose a new and additional "mandatory five-year" punishment without those traditional protections. Were it not for § 3583(k)'s mandatory minimum, the judge added, he "probably would have sentenced in the range of two years or less."

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[2] Section 3583(k) provides: "Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 involving a minor victim, and for any offense under section 1591, 1594(c), 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425, is any term of years not less than 5, or life. If a defendant required to register under the Sex Offender Registration and Notification Act [(SORNA)] commits any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. Such term shall be not less than 5 years."

On appeal to the Tenth Circuit, Mr. Haymond challenged both the factual support for his new punishment and its constitutionality. On the facts, the court of appeals held that the district court's findings against Mr. Haymond were clearly erroneous in certain respects. Even so, the court concluded, just enough evidence remained to sustain a finding that Mr. Haymond had knowingly possessed the 13 images at issue, in violation of § 3583(k). That left the question of the statute's constitutionality, and there the Tenth Circuit concluded that § 3583(k) violated the Fifth and Sixth Amendments. The court explained that a jury had convicted Mr. Haymond beyond a reasonable doubt of a crime carrying a prison term of zero to 10 years. Yet now Mr. Haymond faced a new potential prison term of five years to life. Because this new prison term included a new and higher mandatory minimum resting only on facts found by a judge by a preponderance of the evidence, the court held, the statute violated Mr. Haymond's right to trial by jury.

By way of remedy, the court held the last two sentences of § 3583(k), which mandate a 5-year minimum prison term, "unconstitutional and unenforceable." 869 F. 3d 1153, 1168 (2017). The court then vacated Mr. Haymond's revocation sentence and remanded the case to the district court for resentencing without regard to those provisions. In effect, the court of appeals left the district court free to issue a new sentence under the preexisting statute governing most every other supervised release violation, § 3583(e). Following the Tenth Circuit's directions, the district court proceeded to resentence Mr. Haymond to time served, as he had already been detained by that point for approximately 28 months. We granted review to consider the Tenth Circuit's constitutional holding. 586 U. S. 960 (2018).

II

Together with the right to vote, those who wrote our Constitution considered the right to trial by jury "the heart and

lungs, the main spring and the center wheel" of our liberties, without which "the body must die; the watch must run down; the government must become arbitrary." Letter from Clarendon to W. Pym (Jan. 27, 1766), in 1 Papers of John Adams 169 (R. Taylor ed. 1977). Just as the right to vote sought to preserve the people's authority over their government's executive and legislative functions, the right to a jury trial sought to preserve the people's authority over its judicial functions. J. Adams, Diary Entry (Feb. 12, 1771), in 2 Diary and Autobiography of John Adams 3 (L. Butterfield ed. 1961); see also 2 J. Story, Commentaries on the Constitution § 1779, pp. 540–541 (4th ed. 1873).

Toward that end, the Framers adopted the Sixth Amendment's promise that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." In the Fifth Amendment, they added that no one may be deprived of liberty without "due process of law." Together, these pillars of the Bill of Rights ensure that the government must prove to a jury every criminal charge beyond a reasonable doubt, an ancient rule that has "extend[ed] down centuries." *Apprendi* v. *New Jersey*, 530 U. S. 466, 477 (2000).

But when does a "criminal prosecution" arise implicating the right to trial by jury beyond a reasonable doubt? At the founding, a "prosecution" of an individual simply referred to "the manner of [his] formal accusation." 4 W. Blackstone, Commentaries on the Laws of England 298 (1769) (Blackstone); see also N. Webster, An American Dictionary of the English Language (1828) (defining "prosecution" as "the process of exhibiting formal charges against an offender before a legal tribunal"). And the concept of a "crime" was a broad one linked to punishment, amounting to those "acts to which the law affixes . . . punishment," or, stated differently, those "element[s] in the wrong upon which the punishment is based." 1 J. Bishop, Criminal Procedure §§ 80–84, pp. 51–53 (2d ed. 1872) (Bishop); see also J. Archbold, Plead-

ing and Evidence in Criminal Cases *106 (Archbold) (discussing a crime as including any fact that "annexes a higher degree of punishment"); *Blakely* v. *Washington*, 542 U. S. 296, 309 (2004); *Apprendi*, 530 U. S., at 481.

Consistent with these understandings, juries in our constitutional order exercise supervisory authority over the judicial function by limiting the judge's power to punish. A judge's authority to issue a sentence derives from, and is limited by, the jury's factual findings of criminal conduct. In the early Republic, if an indictment or "accusation . . . lack[ed] any particular fact which the law ma[de] essential to the punishment," it was treated as "no accusation" at all. 1 Bishop § 87, at 55; see also 2 M. Hale, History of the Pleas of the Crown 170 (1736); Archbold *106. And the "truth of every accusation" that was brought against a person had to "be confirmed by the unanimous suffrage of twelve of his equals and neighbours." 4 Blackstone 343. Because the Constitution's guarantees cannot mean less today than they did the day they were adopted, it remains the case today that a jury must find beyond a reasonable doubt every fact "'which the law makes essential to [a] punishment'" that a judge might later seek to impose. *Blakely*, 542 U. S., at 304 (quoting 1 Bishop § 87, at 55).

For much of our history, the application of this rule of jury supervision proved pretty straightforward. At common law, crimes tended to carry with them specific sanctions, and "once the facts of the offense were determined by the jury, the judge was meant simply to impose the prescribed sentence." *Alleyne* v. *United States*, 570 U. S. 99, 108 (2013) (plurality opinion) (internal quotation marks and brackets omitted). Even when judges did enjoy discretion to adjust a sentence based on judge-found aggravating or mitigating facts, they could not "'swell the penalty above what the law ha[d] provided for the acts charged'" and found by the jury. *Apprendi*, 530 U. S., at 519 (THOMAS, J., concurring) (quoting 1 Bishop § 85, at 54); see also 1 J. Bishop, Criminal Law

§§ 933–934(1), p. 690 (9th ed. 1923) ("[T]he court determines in each case what *within the limits of the law* shall be the punishment" (emphasis added)). In time, of course, legislatures adopted new laws allowing judges or parole boards to suspend part (parole) or all (probation) of a defendant's prescribed prison term and afford him a period of conditional liberty as an "act of grace," subject to revocation. *Escoe* v. *Zerbst*, 295 U. S. 490, 492 (1935); see *Anderson* v. *Corall*, 263 U. S. 193, 196–197 (1923). But here, too, the prison sentence a judge or parole board could impose for a parole or probation violation normally could not exceed the remaining balance of the term of imprisonment already authorized by the jury's verdict. So even these developments did not usually implicate the historic concerns of the Fifth and Sixth Amendments. See *Blakely*, 542 U. S., at 309; *Apprendi*, 530 U. S., at 498 (Scalia, J., concurring); 4 Atty. Gen.'s Survey of Release Proc. 22 (1939); 2 *id.*, at 333.

More recent legislative innovations have raised harder questions. In *Apprendi*, for example, a jury convicted the defendant of a gun crime that carried a maximum prison sentence of 10 years. But then a judge sought to impose a longer sentence pursuant to a statute that authorized him to do so if he found, by a preponderance of the evidence, that the defendant had committed the crime with racial bias. *Apprendi* held this scheme unconstitutional. "[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum," this Court explained, "must be submitted to a jury, and proved beyond a reasonable doubt" or admitted by the defendant. 530 U. S., at 490. Nor may a State evade this traditional restraint on the judicial power by simply calling the process of finding new facts and imposing a new punishment a judicial "sentencing enhancement." *Id.*, at 495. "[T]he relevant inquiry is one not of form, but of effect—does the required [judicial] finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.*, at 494.

While "trial practices ca[n] change in the course of centuries and still remain true to the principles that emerged from the Framers' " design, *id.*, at 483, in the years since *Apprendi* this Court has not hesitated to strike down other innovations that fail to respect the jury's supervisory function. See, *e. g.*, *Ring* v. *Arizona*, 536 U. S. 584 (2002) (imposition of death penalty based on judicial factfinding); *Blakely*, 542 U. S., at 303 (mandatory state sentencing guidelines); *Cunningham* v. *California*, 549 U. S. 270 (2007) (same); *United States* v. *Booker*, 543 U. S. 220 (2005) (mandatory federal sentencing guidelines); *Southern Union Co.* v. *United States*, 567 U. S. 343 (2012) (imposition of criminal fines based on judicial factfinding).[3]

Still, these decisions left an important gap. In *Apprendi*, this Court recognized that " '[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties.' " 530 U. S., at 490. But by definition, a range of punishments includes not only a maximum but a minimum. And logically it would seem to follow that any facts necessary to increase a person's minimum punishment (the "floor") should be found by the jury no less than facts necessary to increase his maximum punishment (the "ceiling"). Before *Apprendi*, however, this Court had held that facts elevating the minimum punishment need not be proven to a jury beyond a reasonable doubt. *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986); see also *Harris* v. *United States*, 536 U. S. 545 (2002) (adhering to *McMillan*).

Eventually, the Court confronted this anomaly in *Alleyne*. There, a jury convicted the defendant of a crime that ordi-

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[3] The Court has recognized two narrow exceptions to *Apprendi*'s general rule, neither of which is implicated here: Prosecutors need not prove to a jury the fact of a defendant's prior conviction, *Almendarez-Torres* v. *United States*, 523 U. S. 224 (1998), or facts that affect whether a defendant with multiple sentences serves them concurrently or consecutively, *Oregon* v. *Ice*, 555 U. S. 160 (2009).

narily carried a sentence of five years to life in prison. But a separate statutory "sentencing enhancement" increased the mandatory minimum to seven years if the defendant "brandished" a gun. At sentencing, a judge found by a preponderance of the evidence that the defendant had indeed brandished a gun and imposed the mandatory minimum 7-year prison term.

This Court reversed. Finding no basis in the original understanding of the Fifth and Sixth Amendments for *McMillan* and *Harris*, the Court expressly overruled those decisions and held that "the principle applied in *Apprendi* applies with equal force to facts increasing the mandatory minimum" as it does to facts increasing the statutory maximum penalty. *Alleyne*, 570 U. S., at 112. Nor did it matter to *Alleyne*'s analysis that, even without the mandatory minimum, the trial judge would have been free to impose a 7-year sentence because it fell within the statutory sentencing range authorized by the jury's findings. Both the "floor" and "ceiling" of a sentencing range "define the legally prescribed penalty." *Ibid.* And under our Constitution, when "a finding of fact alters the legally prescribed punishment so as to aggravate it" that finding must be made by a jury of the defendant's peers beyond a reasonable doubt. *Id.*, at 114. Along the way, the Court observed that there can be little doubt that "[e]levating the low end of a sentencing range heightens the loss of liberty associated with the crime: The defendant's expected punishment has increased as a result of the narrowed range and the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish." *Id.*, at 113 (internal quotation marks omitted).

By now, the lesson for our case is clear. Based on the facts reflected in the jury's verdict, Mr. Haymond faced a lawful prison term of between zero and 10 years under § 2252(b)(2). But then a judge—acting without a jury and based only on a preponderance of the evidence—found that

Mr. Haymond had engaged in additional conduct in violation of the terms of his supervised release. Under § 3583(k), that judicial factfinding triggered a new punishment in the form of a prison term of at least five years and up to life. So just like the facts the judge found at the defendant's sentencing hearing in *Alleyne*, the facts the judge found here increased "the legally prescribed range of allowable sentences" in violation of the Fifth and Sixth Amendments. *Id.*, at 115. In this case, that meant Mr. Haymond faced a minimum of five years in prison instead of as little as none. Nor did the absence of a jury's finding beyond a reasonable doubt only infringe the rights of the accused; it also divested the "'people at large'"—the men and women who make up a jury of a defendant's peers—of their constitutional authority to set the metes and bounds of judicially administered criminal punishments. *Blakely*, 542 U. S., at 306 (quoting Letters From The Federal Farmer XV (Jan. 18, 1788), in 2 The Complete Anti-Federalist 315, 320 (H. Storing ed. 1981)).[4]

III

In reply, the government and the dissent offer many and sometimes competing arguments, but we find none persuasive.

A

The government begins by pointing out that *Alleyne* arose in a different procedural posture. There, the trial judge applied a "sentencing enhancement" based on his own factual findings at the defendant's initial sentencing hearing; meanwhile, Mr. Haymond received his new punishment from a judge at a hearing to consider the revocation of his term of

[4] Because we hold that this mandatory minimum rendered Mr. Haymond's sentence unconstitutional in violation of *Alleyne* v. *United States*, 570 U. S. 99 (2013), we need not address the constitutionality of the statute's effect on his maximum sentence under *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000).

supervised release. This procedural distinction makes all the difference, we are told, because the Sixth Amendment's jury trial promise applies only to "criminal prosecutions," which end with the issuance of a sentence and do not extend to "postjudgment sentence-administration proceedings." Brief for United States 24; see also *post*, at 671–675 (ALITO, J., dissenting) (echoing this argument).

But we have been down this road before. Our precedents, *Apprendi*, *Blakely*, and *Alleyne* included, have repeatedly rejected efforts to dodge the demands of the Fifth and Sixth Amendments by the simple expedient of relabeling a criminal prosecution a "sentencing enhancement." Calling part of a criminal prosecution a "sentence modification" imposed at a "postjudgment sentence-administration proceeding" can fare no better. As this Court has repeatedly explained, any "increase in a defendant's authorized punishment contingent on the finding of a fact" requires a jury and proof beyond a reasonable doubt "no matter" what the government chooses to call the exercise. *Ring*, 536 U. S., at 602.

To be sure, and as the government and dissent emphasize, founding-era prosecutions traditionally ended at final judgment. But at that time, generally, "questions of guilt and punishment both were resolved in a single proceeding" subject to the Fifth and Sixth Amendment's demands. Douglass, Confronting Death: Sixth Amendment Rights at Capital Sentencing, 105 Colum. L. Rev. 1967, 2011 (2005); see also *supra*, at 642–643. Over time, procedures changed as legislatures sometimes bifurcated criminal prosecutions into separate trial and penalty phases. But none of these developments licensed judges to sentence individuals to punishments beyond the legal limits fixed by the facts found in the jury's verdict. See *ibid.* To the contrary, we recognized in *Apprendi* and *Alleyne*, a "criminal prosecution" continues and the defendant remains an "accused" with all the rights provided by the Sixth Amendment, until a final sentence is imposed. See *Apprendi*, 530 U. S., at 481–482.

Today, we merely acknowledge that an accused's final sentence includes any supervised release sentence he may receive. Nor in saying that do we say anything new: This Court has already recognized that supervised release punishments arise from and are "[t]reat[ed] . . . as part of the penalty for the initial offense." *Johnson* v. *United States*, 529 U. S. 694, 700 (2000). The defendant receives a term of supervised release thanks to his initial offense, and whether that release is later revoked or sustained, it constitutes a part of the final sentence for his crime. As at the initial sentencing hearing, that does not mean a jury must find every fact in a revocation hearing that may affect the judge's exercise of discretion within the range of punishments authorized by the jury's verdict. But it does mean that a jury must find any facts that trigger a *new* mandatory minimum prison term.[5]

This logic respects not only our precedents, but the original meaning of the jury trial right they seek to protect. The Constitution seeks to safeguard the people's control over the business of judicial punishments by ensuring that any accusation triggering a new and additional punishment is proven to the satisfaction of a jury beyond a reasonable doubt. By contrast, the view the government and dissent espouse would demote the jury from its historic role as "circuit-breaker in the State's machinery of justice," *Blakely*, 542 U. S., at 306, to "'low-level gatekeeping,'" *Booker*, 543 U. S., at 230. If the government and dissent were correct, Congress could require anyone convicted of even a modest crime to serve a sentence of supervised release for the rest of his

[5] The dissent asserts that "a sentence is 'imposed' at final judgment, not again and again every time a convicted criminal . . . violates a condition of his release." *Post*, at 675 (opinion of ALITO, J.) (citation omitted). But saying it does not make it so. As *Johnson* recognized, when a defendant is penalized for violating the terms of his supervised release, what the court is really doing is adjusting the defendant's sentence for his original crime. Even the dissent recognizes that the sword of Damocles hangs over a defendant "every time [he] wakes up to serve a day of supervised release." *Post*, at 675.

life. At that point, a judge could try and convict him of any violation of the terms of his release under a preponderance of the evidence standard, and then sentence him to pretty much anything. At oral argument, the government even conceded that, under its theory, a defendant on supervised release would have no Sixth Amendment right to a jury trial when charged with an infraction carrying the death penalty. We continue to doubt whether even *Apprendi*'s fiercest critics "would advocate" such an "absurd result." *Blakely*, 542 U. S., at 306.[6]

B

Where it previously suggested that Mr. Haymond's supervised release revocation proceeding was entirely divorced from his criminal prosecution, the government next turns around and suggests that Mr. Haymond's sentence for violating the terms of his supervised release was actually fully authorized by the jury's verdict. See also *post*, at 665–666 (ALITO, J., dissenting) (proposing a similar theory). After all, the government observes, on the strength of the jury's findings the judge was entitled to impose as punishment a term of supervised release; and, in turn, that term of supervised release was from the outset always subject to the possibility of judicial revocation and § 3583(k)'s mandatory prison sentence. Presto: Sixth Amendment problem solved.

But we have been down this road too. In *Apprendi* and *Alleyne*, the jury's verdict triggered a statute that authorized a judge at sentencing to increase the defendant's term of imprisonment based on judge-found facts. This Court

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[6] But perhaps we underestimate their fervor. While not openly embracing that result, the dissent fails to articulate any meaningful limiting principle to avoid it. If, as the dissent suggests, a term of supervised release is interchangeable with whatever sanction is prescribed for a violation, why stop at life in prison? The dissent replies that we might discover some relevant limitation in the Eighth Amendment, which does not mention jury trials, but is unwilling to find that limitation in the Sixth Amendment, which does. *Post*, at 666, n. 4.

had no difficulty rejecting that scheme as an impermissible evasion of the historic rule that a jury must find *all* of the facts necessary to authorize a judicial punishment. See *Alleyne*, 570 U. S., at 117; *Apprendi*, 530 U. S., at 483. And what was true there can be no less true here: A mandatory minimum 5-year sentence that comes into play *only* as a result of additional judicial factual findings by a preponderance of the evidence cannot stand. This Court's observation that "postrevocation sanctions" are "[t]reat[ed] . . . as part of the penalty for the initial offense," *Johnson*, 529 U. S., at 700, only highlights the constitutional infirmity of § 3583(k): Treating Mr. Haymond's 5-year mandatory minimum prison term as part of his sentence for his original offense makes clear that it mirrors the unconstitutional sentencing enhancement in *Alleyne*. See *supra*, at 647–648.

Notice, too, that following the government down this road would lead to the same destination as the last: If the government were right, a jury's conviction on one crime would (again) permit perpetual supervised release and allow the government to evade the need for another jury trial on any other offense the defendant might commit, no matter how grave the punishment. And if there's any doubt about the incentives such a rule would create, consider this case. Instead of seeking a revocation of supervised release, the government could have chosen to prosecute Mr. Haymond under a statute mandating a term of imprisonment of 10 to 20 years for repeat child-pornography offenders. 18 U. S. C. § 2252(b)(2). But why bother with an old-fashioned jury trial for a new crime when a quick-and-easy "supervised release revocation hearing" before a judge carries a penalty of five years to life? This displacement of the jury's traditional supervisory role, under cover of a welter of new labels, exemplifies the "Framers' fears that the jury right could be lost not only by gross denial, but by erosion." *Apprendi*, 530 U. S., at 483 (internal quotation marks omitted).

C

Pivoting once more, the government and the dissent seem to accept for argument's sake that "postjudgment sentence-administration proceedings" *can* implicate the Fifth and Sixth Amendments. See *post*, at 663–669. But, they contend, § 3583(k)'s supervised release revocation procedures are practically identical to historic parole and probation revocation procedures. See, *e. g.*, *Gagnon* v. *Scarpelli*, 411 U. S. 778 (1973); *Morrissey* v. *Brewer*, 408 U. S. 471 (1972). And, because those other procedures have usually been understood to comport with the Fifth and Sixth Amendments, they submit, § 3583(k)'s procedures must do so as well.

But this argument, too, rests on a faulty premise, overlooking a critical difference between § 3583(k) and traditional parole and probation practices. Before the Sentencing Reform Act of 1984, a federal criminal defendant could serve as little as a third of his assigned prison term before becoming eligible for release on parole. See 18 U. S. C. § 4205(a) (1982 ed.). Or he might avoid prison altogether in favor of probation. See § 3561 (1982 ed.). If the defendant violated the terms of his parole or probation, a judge could send him to prison. But either way and as we've seen, a judge generally could sentence the defendant to serve *only* the remaining prison term authorized by statute for his original crime of conviction. See *supra*, at 642–643; *Morrissey*, 408 U. S., at 477 ("The essence of parole is release from prison, *before* the completion of sentence" (emphasis added)). Thus, a judge could not imprison a defendant for any longer than the jury's factual findings allowed—a result entirely harmonious with the Fifth and Sixth Amendments. See *Apprendi*, 530 U. S., at 498 (Scalia, J., concurring); *Blakely*, 542 U. S., at 309.

All that changed beginning in 1984. That year, Congress overhauled federal sentencing procedures to make prison terms more determinate and abolish the practice of parole. Now, when a defendant is sentenced to prison he generally

must serve the great bulk of his assigned term. In parole's place, Congress established the system of supervised release. But "[u]nlike parole," supervised release wasn't introduced to replace a portion of the defendant's prison term, only to encourage rehabilitation *after* the completion of his prison term. United States Sentencing Commission, Guidelines Manual ch. 7, pt. A(2)(b) (Nov. 2012); see Doherty, Indeterminate Sentencing Returns: The Invention of Supervised Release, 88 N. Y. U. L. Rev. 958, 1024 (2013).

In this case, that structural difference bears constitutional consequences. Where parole and probation violations generally exposed a defendant only to the *remaining* prison term authorized for his crime of conviction, as found by a unanimous jury under the reasonable doubt standard, supervised release violations subject to § 3583(k) can, at least as applied in cases like ours, expose a defendant to an additional mandatory minimum prison term well *beyond* that authorized by the jury's verdict—all based on facts found by a judge by a mere preponderance of the evidence. In fact, § 3583(k) differs in this critical respect not only from parole and probation; it also represents a break from the supervised release practices that Congress authorized in § 3583(e)(3) and that govern most federal criminal proceedings today. Unlike all those procedures, § 3583(k) alone requires a substantial increase in the minimum sentence to which a defendant may be exposed based only on judge-found facts under a preponderance standard. And, as we explained in *Alleyne* and reaffirm today, that offends the Fifth and Sixth Amendments' ancient protections.[7]

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[7] Just as we have no occasion to decide whether § 3583(k) implicates *Apprendi* by raising the ceiling of permissible punishments beyond those authorized by the jury's verdict, see n. 4, *supra*, we do not pass judgment one way or the other on § 3583(e)'s consistency with *Apprendi*. Nor do we express a view on the mandatory revocation provision for certain drug and gun violations in § 3583(g), which requires courts to impose "a term of imprisonment" of unspecified length.

D

The dissent suggests an analogy between revocation under § 3583(k) and prison disciplinary procedures that do not normally require the involvement of a jury. *Post*, at 677–678. But the analogy is a strained one: While the Sixth Amendment surely does not require a jury to find every fact that the government relies on to adjust the terms of a prisoner's confinement (say, by reducing some of his privileges as a sanction for violating the prison rules), that does not mean the government can send a free man back to prison for years based on judge-found facts.

Again, practice in the early Republic confirms this. At that time, a term of imprisonment may have been understood as encompassing a degree of summary discipline for alleged infractions of prison regulations without the involvement of a jury. See F. Gray, Prison Discipline in America 22–23, 48–49 (1848). But that does not mean any sanction, no matter how serious, would have been considered part and parcel of the original punishment. On the contrary, the few courts that grappled with this issue seem to have recognized that "infamous" punishments, such as a substantial additional term in prison, might implicate the right to trial by jury. See, *e. g.*, *Gross* v. *Rice*, 71 Me. 241, 246–252 (1880); *In re Edwards*, 43 N. J. L. 555, 557–558 (1881).

What's more, a tradition of summary process in prison, where administrators face the "formidable task" of controlling a large group of potentially unruly prisoners, does not necessarily support the use of such summary process outside the prison walls. *O'Lone* v. *Estate of Shabazz*, 482 U. S. 342, 353 (1987); cf. *Morrissey*, 408 U. S., at 482. We have long held that prison regulations that impinge on the constitutional rights inmates would enjoy outside of prison must be "reasonably related to legitimate penological interests" in managing the prison. *Turner* v. *Safley*, 482 U. S. 78, 89 (1987). That approach, we have said, ensures that corrections officials can " 'anticipate security problems' " and ad-

dress "'the intractable problems of prison administration.'" *O'Lone*, 482 U. S., at 349; see also *Dahne* v. *Richey*, 587 U. S. 997, 998 (2019) (ALITO, J., dissenting from denial of certiorari) ("To maintain order, prison authorities may insist on compliance with rules that would not be permitted in the outside world"). Whether or not the *Turner* test applies to prisoners' jury trial rights, we certainly have never extended it to the jury rights of persons out in the world who retain the core attributes of liberty. Cf. *Griffin* v. *Wisconsin*, 483 U. S. 868, 874, n. 2 (1987) (reserving question whether *Turner* applies to probation). Even the government has not asked us to do so today.[8]

E

Finally, much of the dissent is consumed by what it calls the "potentially revolutionary" consequences of our opinion. *Post*, at 659; see also *post*, at 672, 682 (calling our opinion "inexcusable," "unpardonabl[e]," and "dangerous"); *post*, at 663 (our opinion threatens to bring "the whole concept of supervised release . . . crashing down"); *post*, at 667 (under our opinion, "the whole system of supervised release would be like a 40-ton truck speeding down a steep mountain road with no brakes"). But what agitates the dissent so much is an issue not presented here: whether *all* supervised release proceedings comport with *Apprendi*. As we have emphasized, our decision is limited to § 3583(k)—an unusual provision enacted little more than a decade ago—and the *Alleyne* problem raised by its 5-year mandatory minimum term of imprisonment. See n. 7, *supra*. Section § 3583(e), which governs supervised release revocation proceedings generally, does not

[8] Contrary to the dissent's characterization, we do not suggest that any prison discipline that is "too harsh" triggers the right to a jury trial. *Post*, at 678, n. 9 (emphasis deleted). Instead, we distinguish between altering a prisoner's conditions of confinement, which generally does not require a jury trial, and sentencing a free man to substantial additional time in prison, which generally does.

contain any similar mandatory minimum triggered by judge-found facts.

Besides, even if our opinion could be read to cast doubts on § 3583(e) and its consistency with *Apprendi*, the practical consequences of a holding to that effect would not come close to fulfilling the dissent's apocalyptic prophecy. In most cases (including this one), combining a defendant's initial and post-revocation sentences issued under § 3583(e) will not yield a term of imprisonment that exceeds the statutory maximum term of imprisonment the jury has authorized for the original crime of conviction. That's because "courts rarely sentence defendants to the statutory maxima," *United States* v. *Caso*, 723 F. 3d 215, 224–225 (CADC 2013) (citing Sentencing Commission data indicating that only about 1% of defendants receive the maximum), and revocation penalties under § 3583(e)(3) are only a small fraction of those available under § 3583(k). So even if § 3583(e)(3) turns out to raise Sixth Amendment issues in a small set of cases, it hardly follows that "as a practical matter supervised-release revocation proceedings cannot be held" or that "the whole idea of supervised release must fall." *Post*, at 662–663. Indeed, the vast majority of supervised release revocation proceedings under subsection (e)(3) would likely be unaffected.

In the end, the dissent is left only to echo an age-old criticism: Jury trials are inconvenient for the government. Yet like much else in our Constitution, the jury system isn't designed to promote efficiency but to protect liberty. In what now seems a prescient passage, Blackstone warned that the true threat to trial by jury would come less from "open attacks," which "none will be so hardy as to make," as from subtle "machinations, which may sap and undermine i[t] by introducing new and arbitrary methods." 4 Blackstone 343. This Court has repeatedly sought to guard the historic role of the jury against such incursions. For "however *convenient* these may appear at first, (as doubtless all arbitrary powers, well executed, are the most *convenient*) yet let it be

again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters." *Id.*, at 344.[9]

IV

Having concluded that the application of § 3583(k)'s mandatory minimum in this case violated Mr. Haymond's right to trial by jury, we face the question of remedy. Recall that the Tenth Circuit declared the last two sentences of § 3583(k) "unconstitutional and unenforceable." Those two sentences provide in relevant part that "[i]f a defendant required to register under [SORNA]" commits certain specified offenses, "the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment [of] not less than 5 years."

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[9] JUSTICE BREYER agrees that a jury was required here for three reasons "considered in combination." *Post*, at 659 (opinion concurring in judgment). Two of the reasons seem to amount to the same thing—a worry that § 3583(k) imposes a new mandatory minimum sentence without a jury. And for the reasons we've already given, we can agree that this is indeed a problem under *Alleyne*. But JUSTICE BREYER's remaining reason is another story. He stresses that § 3583(k)'s mandatory minimum applies only to a "discrete set of federal criminal offenses." *Post*, at 659. But why should *that* matter? Whether the Sixth Amendment is violated in "discrete" instances or vast numbers, our duty to enforce the Constitution remains the same. Besides, any attempt to draw lines based on when an erosion of the jury trial right goes "too far" would prove inherently subjective and depend on judges' intuitions about the proper role of the juries that are supposed to supervise them. As we have previously explained, "[w]hether the Sixth Amendment incorporates [such a] manipulable standard rather than *Apprendi*'s bright-line rule depends on the plausibility of the claim that the Framers would have left definition of the scope of jury power up to judges' intuitive sense of how far is *too far*." *Blakely* v. *Washington*, 542 U. S. 296, 308 (2004). And we continue to think that claim is "not plausible at all, because the very reason the Framers put a jury-trial guarantee in the Constitution" was to ensure the jury trial right would limit the power of judges and not be ground down to nothing through a balancing of interests by judges themselves. *Ibid.*

Before us, the government suggests that the Tenth Circuit erred in declaring those two sentences "unenforceable." That remedy, the government says, sweeps too broadly. In the government's view, any constitutional infirmity can be cured simply by requiring juries acting under the reasonable doubt standard, rather than judges proceeding under the preponderance of the evidence standard, to find the facts necessary to trigger § 3583(k)'s mandatory minimum. This remedy would be consistent with the statute's terms, the government assures us, because "the court" authorized to revoke a term of supervised release in § 3583(k) can and should be construed as embracing not only judges but also juries. And, the government insists, that means we should direct the court of appeals to send this case back to the district court so a jury may be empaneled to decide whether Mr. Haymond violated § 3583(k). Unsurprisingly, Mr. Haymond contests all of this vigorously.

We decline to tangle with the parties' competing remedial arguments today. The Tenth Circuit did not address these arguments; it appears the government did not even discuss the possibility of empaneling a jury in its brief to that court; and this Court normally proceeds as a "court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005). Given all this, we believe the wiser course lies in returning the case to the court of appeals for it to have the opportunity to address the government's remedial argument in the first instance, including any question concerning whether that argument was adequately preserved in this case.

*

The judgment of the court of appeals is vacated, and the case is remanded for further proceedings.

It is so ordered.

JUSTICE BREYER, concurring in the judgment.

I agree with much of the dissent, in particular that the role of the judge in a supervised-release proceeding is con-

sistent with traditional parole. See *post*, at 667–669 (opinion of ALITO, J.). As 18 U. S. C. § 3583 makes clear, Congress did not intend the system of supervised release to differ from parole in this respect. And in light of the potentially destabilizing consequences, I would not transplant the *Apprendi* line of cases to the supervised-release context. See *post*, at 662–663; cf. *Alleyne* v. *United States*, 570 U. S. 99, 122 (2013) (BREYER, J., concurring in part and concurring in judgment); *United States* v. *Booker*, 543 U. S. 220, 327 (2005) (BREYER, J., dissenting in part); *Blakely* v. *Washington*, 542 U. S. 296, 329–330 (2004) (BREYER, J., dissenting); *Harris* v. *United States*, 536 U. S. 545, 569–570 (2002) (BREYER, J., concurring in part and concurring in judgment); *Apprendi* v. *New Jersey*, 530 U. S. 466, 555 (2000) (BREYER, J., dissenting).

Nevertheless, I agree with the plurality that this specific provision of the supervised-release statute, § 3583(k), is unconstitutional. Revocation of supervised release is typically understood as "part of the penalty for the initial offense." *Johnson* v. *United States*, 529 U. S. 694, 700 (2000). The consequences that flow from violation of the conditions of supervised release are first and foremost considered sanctions for the defendant's "breach of trust"—his "failure to follow the court-imposed conditions" that followed his initial conviction—not "for the particular conduct triggering the revocation as if that conduct were being sentenced as new federal criminal conduct." United States Sentencing Commission, Guidelines Manual ch. 7, pt. A, intro. 3(b) (Nov. 2018); see *post*, at 670–671. Consistent with that view, the consequences for violation of conditions of supervised release under § 3583(e), which governs most revocations, are limited by the severity of the original crime of conviction, not the conduct that results in revocation. See § 3583(e)(3) (specifying that a defendant may as a consequence of revocation serve no "more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, [no] more than 3 years in prison if . . . a class B felony," and so on).

Section 3583(k) is difficult to reconcile with this understanding of supervised release. In particular, three aspects of this provision, considered in combination, lead me to think it is less like ordinary revocation and more like punishment for a new offense, to which the jury right would typically attach. *First*, § 3583(k) applies only when a defendant commits a discrete set of federal criminal offenses specified in the statute. *Second*, § 3583(k) takes away the judge's discretion to decide whether violation of a condition of supervised release should result in imprisonment and for how long. *Third*, § 3583(k) limits the judge's discretion in a particular manner: by imposing a mandatory minimum term of imprisonment of "not less than 5 years" upon a judge's finding that a defendant has "commit[ted] any" listed "criminal offense."

Taken together, these features of § 3583(k) more closely resemble the punishment of new criminal offenses, but without granting a defendant the rights, including the jury right, that attend a new criminal prosecution. And in an ordinary criminal prosecution, a jury must find facts that trigger a mandatory minimum prison term. *Alleyne*, 570 U. S., at 103.

Accordingly, I would hold that § 3583(k) is unconstitutional and remand for the Court of Appeals to address the question of remedy. Because this is the course adopted by the plurality, I concur in the judgment.

JUSTICE ALITO, with whom THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE KAVANAUGH join, dissenting.

I do not think that there is a constitutional basis for today's holding, which is set out in JUSTICE BREYER's opinion, but it is narrow and has saved our jurisprudence from the consequences of the plurality opinion, which is not based on the original meaning of the Sixth Amendment, is irreconcilable with precedent, and sports rhetoric with potentially revolutionary implications. The plurality opinion appears to have been carefully crafted for the purpose of laying the groundwork for later decisions of *much* broader scope.

I

A

What do I mean by this? Many passages in the opinion suggest that the entire system of supervised release, which has been an integral part of the federal criminal justice system for the past 35 years, is fundamentally flawed in ways that cannot be fixed. Under the Sentencing Reform Act of 1984 (SRA), whenever a federal court sentences a criminal defendant to a term of imprisonment, the court may include in the sentence a term of supervised release, and under some circumstances supervised release is mandatory. 18 U. S. C. § 3583. When a court imposes a term of supervised release, the order must specify the conditions with which the defendant is required to comply, § 3583(d), and a judge may revoke supervised release and send a defendant back to prison if the judge finds by a preponderance of the evidence that the defendant violated one of those conditions, § 3583(e)(3).

Many statements and passages in the plurality opinion strongly suggest that the Sixth Amendment right to a jury trial applies to *any* supervised-release revocation proceeding. Take the opinion's opening line: "Only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty." *Ante*, at 637. In a supervised-release revocation proceeding, a judge, based on the preponderance of the evidence, may make a finding that "take[s] a person's liberty," *ibid.*, in the sense that the defendant is sent back to prison. Later, after noting that the Sixth Amendment applies to a "criminal prosecution," the plurality gives that term a broad definition that appears to encompass any supervised-release revocation proceeding. The plurality defines a "crime" as any "'ac[t] to which the law affixes . . . punishment,'" and says that a "prosecution" is "'the process of exhibiting formal charges against an offender before a legal tribunal.'" *Ante*, at 641. These definitions explain what the terms in question mean in general use, but they were not formulated for the purpose

of specifying what "criminal prosecution" means in the specific context of the Sixth Amendment. The plurality, however, uses them for precisely that purpose, and in so doing boldly suggests that every supervised-release revocation proceeding is a criminal prosecution. See *ante*, at 647–648 ("[A] 'criminal prosecution' continues and the defendant remains an 'accused' with all the rights provided by the Sixth Amendment, until a final sentence is imposed. . . . [A]n accused's final sentence includes any supervised release sentence he may receive").

Later statements are even more explicit. Quoting *Blakely* v. *Washington*, 542 U. S. 296, 304 (2004), out of context, the plurality states that "a jury must find beyond a reasonable doubt every fact which the law makes essential to a punishment that a judge might later seek to impose." *Ante*, at 642 (internal quotation marks and alteration omitted). If sending a defendant found to have violated supervised release back to prison is "punishment," then the thrust of the plurality's statement is that any factual finding needed to bring that about must be made by a jury, not by a judge, as is currently done.

Also telling is the plurality's response to the Government's argument that *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), *Blakely*, and *Alleyne* v. *United States*, 570 U. S. 99 (2013), apply only to a defendant's sentencing proceeding and not to a supervised-release revocation proceeding, which the Government describes as a "postjudgment sentence-administration proceedin[g]." Brief for United States 24. Rejecting this argument, the plurality huffs that "the demands of the Fifth and Sixth Amendments" cannot be "dodge[d]" "by the simple expedient of relabeling a criminal prosecution a . . . 'sentence modification' imposed at a 'postjudgment sentence-administration proceeding.'" *Ante*, at 647. The meaning of this statement is unmistakable and cannot have been inadvertent: A supervised-release revocation proceeding is a criminal prosecution and is therefore gov-

erned by the Sixth Amendment (and the Fifth Amendment to boot). And there is more. See *ante*, at 648 ("[A]ny accusation triggering a new and additional punishment [must be] proven to the satisfaction of a jury beyond a reasonable doubt"); *ante*, at 650 ("[A] jury must find *all* of the facts necessary to authorize a judicial punishment").

Finally, while the plurality appears to say that the Sixth Amendment does not apply to parole revocation proceedings, see *ante*, at 651–652,[1] the plurality characterizes supervised release as "critical[ly] differen[t]," *ante*, at 651. This is so, the plurality explains, because parole relieved a prisoner from serving part of the prison sentence originally imposed, whereas a term of supervised release is added to the term of imprisonment specified by the sentencing judge. As I will explain, this difference is purely formal and should have no constitutional consequences. But for now the important point is the plain implication of what the plurality says: Parole was constitutional, but supervised release . . . well, that is an entirely different animal.

The intimation in all these statements is clear enough: All supervised-release revocation proceedings must be conducted in compliance with the Sixth Amendment—which means that the defendant is entitled to a jury trial, which means that as a practical matter supervised-release revocation proceedings cannot be held. In 2018, federal district courts completed 1,809 criminal jury trials. Administrative Office of the U. S. Courts, Judicial Business of the United States Courts (2018) (Table T–1). During that same year, they adjudicated 16,946 revocations of supervised release, *ibid.* (Table E–7A), and there is simply no way that the federal courts could empanel enough juries to adjudicate all those proceedings, let alone try all those proceedings in accordance with

[1] But even on this point, the plurality hedges, saying that "historic parole and probation revocation procedures . . . have *usually* been understood to comport with the Fifth and Sixth Amendments." *Ante*, at 651 (emphasis added).

the Sixth Amendment's Confrontation Clause. So, if every supervised-release revocation proceeding is a criminal prosecution, as the plurality suggests, the whole concept of supervised release will come crashing down.[2]

Where the plurality is headed is demonstrated—ironically—by its insistence that it is not going all the way—for now. The plurality writes: "[O]ur opinion," *ante*, at 654, 655, does "not pass judgment one way or the other on §3583(e)'s consistency with *Apprendi*," *ante*, at 652, n. 7. Section 3583(e) sets out the procedure to be followed in *all* supervised-release revocation proceedings, so if that provision is not consistent with *Apprendi*, the whole idea of supervised release must fall. The strategy of the plurality opinion is only thinly veiled. It provides the framework to be used in ending supervised release. It provides no clear ground for limiting the rationale of the opinion so that it does not lead to that result. And then it says: We are not doing that *today*.

B

Is it possible to read the plurality opinion more narrowly? Can it be understood to condemn only one narrow statutory provision, namely, §3583(k), which *required* the judge to send respondent Haymond back to prison for at least five years once the judge found that he had violated a condition of his supervised release by again possessing child pornography? On this reading, the only Sixth Amendment defect would be the mandatory minimum period of additional confinement that the statute imposes. There would be no problem if the judge had been free to choose the term, if any, of

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[2] The plurality casts this argument as "echo[ing] an age-old criticism: Jury trials are inconvenient for the government." *Ante*, at 655. Not at all. My only point is to say that if a questionable interpretation of the Sixth Amendment, see *infra*, at 669–683, would potentially lead to absurd results, that is an additional reason to suspect that something has gone awry.

additional confinement. Does the plurality mean to go no further than this?

There are passages in the opinion that hint at this narrower interpretation. The plurality analogizes the mandatory minimum term of additional confinement required by § 3583(k) to the mandatory minimum term of initial imprisonment found to violate the Sixth Amendment in *Alleyne*, see *ante*, at 644–646. But the previously quoted statements pointing to a broader understanding remain, and the plurality does nothing to disavow that reading. To the contrary, the plurality doubles down, assuring us that this broader understanding would not be *too* disruptive. See *ante*, at 654–656.

A narrower interpretation of the plurality opinion is also contradicted by another important statement in the opinion. The plurality says that the maximum "lawful prison term" "reflected in the jury's verdict" in respondent's case was "10 years." *Ante*, at 645. This statement is full of meaning because if 10 years is the maximum amount of time that respondent could lawfully be required to spend in prison on the basis of the jury's verdict, there is a serious constitutional defect in the very design of the supervised-release system. That is so because the concept of supervised release is based on a fundamentally different conception of the maximum term of confinement authorized by a guilty verdict.

To understand this, it is important to understand the relationship between the system of supervised release and the old federal parole system it replaced. By abolishing parole and substituting supervised release, the SRA sought to retain the chief benefit of parole, *i. e.*, providing a transition period of monitoring to ensure that a prisoner who leaves prison has been sufficiently reformed so that he is able to lead a law-abiding life. At the same time, the SRA aimed to promote truth in sentencing and thus to eliminate a much-derided feature of the old parole system. See United States Sentencing Commission, Guidelines Manual ch. 1, pt. A (Nov.

2018) (USSG). Under the parole system, a defendant who was convicted of a serious crime and given what seemed to be a stiff sentence could be and not infrequently was set free after serving only a fraction of the sentence originally pronounced. A prisoner was generally eligible for parole after serving only one-third of his sentence, and a sentence of life was treated as a sentence of 30 years.[3] Therefore, a defendant sentenced to imprisonment for life could be out on the streets after only 10 years.

The SRA changed this, and now a defendant must serve the full term of imprisonment imposed at sentencing minus only a small deduction for good behavior in prison. USSG ch. 1, pt. A.1(3); 18 U. S. C. §3624(b); *Barber* v. *Thomas*, 560 U. S. 474, 481–482 (2010). But to provide the same sort of transition period as was furnished under parole, a sentencing court may, and in some cases must, add a period of supervised release. See §3583. The replacement of parole with supervised release changed the form of federal sentences but not their substance. Here is an example: A pre-SRA sentence of nine years' imprisonment meant three years of certain confinement and six years of possible confinement depending on the defendant's conduct in the outside world after release from prison. At least for present purposes, such a sentence is the substantive equivalent of a post-SRA sentence of three years' imprisonment followed by six years of supervised release. In both situations, the period of certain confinement (three years) and the maximum term of possible confinement (nine years) are the same. If anything, the defendant in the post-SRA case is treated more favorably because he is guaranteed release from prison after three years; his release at that point is not dependent on a decision by a parole board.

As this example shows, the concept of supervised release rests on the idea that a defendant sentenced to x years of

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[3] See O'Hara, Parole, 79 Geo. L. J. 1162, 1164–1165 (1991).

imprisonment followed by y years of supervised release is really sentenced to a maximum punishment of x + y years of confinement, with the proviso that any time beyond x years will be excused if the defendant abides by the terms of supervised release. And on this understanding, the maximum term reflected in the jury's verdict in respondent's case was not 10 years, as the plurality claims, but 10 years plus the maximum period of supervised release that the statute authorized.[4]

None of this matters in respondent's case because the sum of his original sentence (38 months) and the additional time imposed for violating supervised release (60 months) is less than 120 months, but adoption of the rule toward which the plurality opinion seems to point would make a big difference in many cases. Under that rule, a term of supervised release could never be ordered for a defendant who is sentenced to the statutory maximum term of imprisonment, and only a short period of supervised release could be ordered for a defendant sentenced to a term of imprisonment that is close to the statutory maximum. Moreover, in many cases, a judge, before beginning a supervised-release revocation proceeding, would have to anticipate the period of additional confinement that the judge would find appropriate if a partic-

[4] In respondent's case that was life. See § 3583(k). Anything approaching that maximum would have been very harsh, but the judge in respondent's case did not impose such a term, and there are statutory restraints on the imposition of excessive additional terms. In determining the additional period to be ordered as a result of a supervised-release violation, a judge is required to take into account almost all of the factors that must be considered at sentencing. See § 3583(e). The Sentencing Guidelines provide recommended terms for particular violations. See USSG ch. 1, pt. B; *id.*, ch. 7. And the additional terms imposed in such cases are subject to review on appeal. See, *e. g.*, *United States* v. *Wheeler*, 814 F. 3d 856 (CA7 2016); *United States* v. *Cordova*, 461 F. 3d 1184 (CA10 2006). If the Constitution restricts the length of additional imprisonment that may be imposed based on a violation of supervised release, the relevant provision is the Eighth Amendment, not the Sixth. Cf. *Lewis* v. *United States*, 518 U. S. 322 (1996).

ular violation or set of violations was shown. For example, suppose that the statutory maximum term of certain confinement authorized by the offense of conviction is 10 years and that a prisoner is sentenced to and serves 8 years. Suppose that the term of supervised release imposed at the time of sentencing is five years. Before starting a supervised-release revocation proceeding in this hypothetical case, the judge would have to decide whether to rule out the possibility of sending the defendant back to prison for more than two years. Unless the judge was willing to do this—without knowing all the facts—the judge would have to convene a jury. It would be strange to put judges in that predicament.

The plurality appreciates the implication of its understanding of the maximum term of imprisonment authorized by a jury verdict in the post-SRA era. In footnote 4, the plurality says that it need not decide whether its interpretation of the Sixth Amendment leads to the results I have just outlined. See *ante*, at 646, n. 4. But here again, while formally reserving decision on this question, the opinion provides no theory that might permit what the SRA contemplates.

In short, under the plurality opinion, the whole system of supervised release would be like a 40-ton truck speeding down a steep mountain road with no brakes.

II

This should not have been a difficult or complicated case. I start with the proposition that the old federal parole system did not implicate the Sixth Amendment's jury trial right. A parole revocation proceeding was not a "criminal prosecution" within the meaning of the Sixth Amendment, and revocation did not result in a new sentence. See, *e. g.*, *United States* v. *Williams*, 558 F. 2d 224, 226 (CA5 1977); *Hyser* v. *Reed*, 318 F. 2d 225, 237 (CADC 1963). When a prisoner was paroled, the Executive was simply exercising the authority conferred by law to grant the defendant a conditional release

from serving part of the sentence imposed after a guilty verdict. *Mistretta* v. *United States*, 488 U. S. 361, 364–365 (1989).

Supervised release, for reasons already explained, is not fundamentally different and therefore should not be treated any differently for Sixth Amendment purposes. When a jury finds a federal defendant guilty of violating a particular criminal statute, the maximum period of confinement authorized is the maximum term of imprisonment plus the maximum term of supervised release. If a prisoner does not end up spending this full period in confinement, that is because service of part of the period is excused due to satisfactory conduct during the period of supervised release. Any other reading exalts form over substance in a way that has enormous consequences that cannot be justified on constitutional grounds.

Once this is understood, it follows that the procedures that must be followed at a supervised-release revocation proceeding are the same that had to be followed at a parole revocation proceeding, and these were settled long ago. At a parole revocation hearing, the fundamental requisites of due process had to be observed, but a parolee did not have a right to a jury trial. See, *e. g.*, *United States* v. *Carlton*, 442 F. 3d 802, 807 (CA2 2006); *United States* v. *Huerta-Pimental*, 445 F. 3d 1220, 1225 (CA9 2006). Neither the Confrontation Clause nor the formal rules of evidence had to be followed. See, *e. g.*, *Morrissey* v. *Brewer*, 408 U. S. 471, 488–489 (1972); *Gagnon* v. *Scarpelli*, 411 U. S. 778, 782, n. 5 (1973). Due process did not require proof beyond a reasonable doubt as is necessary at trial, see, *e. g.*, *DeWitt* v. *Ventetoulo*, 6 F. 3d 32, 36–37 (CA1 1993); *Whitehead* v. *United States Parole Comm'n*, 755 F. 2d 1536, 1537 (CA11 1985); *Mack* v. *McCune*, 551 F. 2d 251, 254 (CA10 1977), and the Double Jeopardy Clause did not apply, see, *e. g.*, *Kell* v. *United States Parole Comm'n*, 26 F. 3d 1016, 1020 (CA10 1994) (citing cases).

For the past 35 years, it has been understood that the same rules apply at a supervised-release revocation proceeding. There is no good reason to depart from that understanding.

III

The plurality tries to suggest a reason by sprinkling its opinion with quotations from venerable sources, but all are far afield. (John Adams was not writing about the Sixth Amendment when he made a diary entry in 1771 or when he wrote to William Pym in 1766. See *ante*, at 640–641.) And the plurality makes no real effort to show that the Sixth Amendment was originally understood to require a jury trial in a proceeding like a supervised-release revocation proceeding. Of course, nothing like supervised release—or for that matter, parole—existed when the Sixth Amendment was ratified, so I will not attempt to make the affirmative case that the Sixth Amendment was specifically understood *not to apply* to such proceedings. But there is a strong case for the proposition that the terms of the Sixth Amendment and the original understanding of the scope of the jury trial right do not require the plurality's interpretation. And our prior precedents emphatically refute that interpretation.

The Sixth Amendment limits the scope of the jury trial right in three significant ways: It provides "*who* may assert the right ('the accused'); *when* the right may be asserted ('[i]n all criminal prosecutions'); and *what* the right guarantees" ("the right to a . . . trial, by an impartial jury"). *Rothgery* v. *Gillespie County*, 554 U. S. 191, 214 (2008) (ALITO, J., concurring). The plurality can reach its conclusion only by ignoring these limitations.

A

I begin with who may assert the jury trial right. The text of the Sixth Amendment makes clear that this is "a right of the 'accused' and only the 'accused.'" A. Amar, The Bill of Rights 111 (1998). The "accused" is an individual

"[c]harged with a crime, by a legal process." N. Webster, An American Dictionary of the English Language (1828); see also 1 J. Bouvier, Law Dictionary 50 (10th ed. 1860) (Bouvier Law Dictionary) ("[o]ne who is charged with a crime or misdemeanor").

"At the founding, 'accused' described a status preceding 'convicted.'" *Betterman* v. *Montana*, 578 U. S. 437, 443 (2016). Blackstone, for example, spoke of "the accused" in outlining the beginning of a criminal prosecution, see 4 W. Blackstone, Commentaries on the Laws of England 313 (1769), and spoke of "the offender" and "the criminal" after conviction, see *id.*, at 370, 371, 373, 378, 379. See also *id.*, at 279 (referring to "the party accused before he is condemned"). And "[t]his understanding of the Sixth Amendment language—'accused' as distinct from 'convicted' . . . — endures today." *Betterman*, 578 U. S., at 443 (citing Black's Law Dictionary 26 (10th ed. 2014) (defining "accused" as "a person who has been *arrested* and brought before a magistrate or who has been formally *charged*" (emphasis added))).

Despite the plurality's suggestion otherwise, see *ante*, at 647–648, respondent was no longer the "accused" while he served his term of supervised release. To be sure, he was *formerly* the accused—at the time when he was duly indicted and tried for possession of child pornography. But after a jury convicted him and authorized the judge to sentence him to terms of imprisonment and supervised release, respondent was transformed into the convicted. And his status as such remained the same while he served his sentences, including during the proceeding to determine whether he had adhered to the conditions attached to the term of supervised release that was permitted by law and thus implicitly authorized by the jury's verdict.

This is especially so given that respondent's reimprisonment was not primarily a punishment for new criminal conduct. The principal reason for assigning a penalty to a supervised-release violation is not that the violative act is a

crime (indeed, under other provisions in § 3583, the act need not even be criminal); rather, it is that the violative act is a breach of trust. USSG ch. 7, pt. A, intro. 3(b) (recommended reimprisonment terms are designed to "sanction primarily the defendant's breach of trust," not "new criminal conduct"). In other words, it makes little sense to treat respondent as the accused—*i. e.*, one charged with a crime—when he has been charged not with a crime, but with violating the terms of a jury-authorized sentence that flowed from his original conviction. The plurality's extension of the jury trial right to respondent's supervised-release revocation proceeding thus flounders from the start for the simple reason that respondent cannot easily be viewed as an "accused" in the conventional sense of the term.

B

It is similarly awkward to characterize a supervised-release revocation proceeding as part of the defendant's "criminal prosecution." A supervised-release revocation proceeding is not part of the criminal prosecution that landed a defendant in prison in the first place because "[a] 'criminal prosecution' . . . ends when sentence has been pronounced on the convicted or a verdict of 'Not guilty' has cleared the defendant of the charge." F. Heller, Sixth Amendment to the Constitution of the United States 54 (1951). This follows from the early understanding that a "prosecution" concludes when a court enters final judgment. See, *e. g.*, Webster, An American Dictionary of the English Language (defining a prosecution as the "process of exhibiting formal charges against an offender before a legal tribunal, and pursuing them *to final judgment*" (emphasis added)); 2 The Universal English Dictionary 465 (J. Craig ed. 1869) ("the institution of legal proceedings against a person; the process of exhibiting formal charges against an offender before a legal tribunal, and *pursuing them to final judgment*" (emphasis added)); H. Holthouse, New Law Dictionary 344 (1847) (de-

fining prosecution as "the means adopted to bring a supposed offender to justice and punishment by due course of law"); 2 Bouvier Law Dictionary 396 ("[t]he means adopted to bring a supposed offender to justice and punishment by due course of law").

Our precedents reflect this understanding by defining the end of criminal prosecutions to be the entry of final judgment and imposition of sentence. In the Sixth Amendment context, for example, the Court has explained that "[c]riminal proceedings generally unfold in three discrete phases": a pre-arrest phase, a charging phase that extends through trial, and a sentencing phase. *Betterman*, 578 U. S., at 441. As the Court described the final phase, the criminal proceeding ends "[a]fter conviction, [when] the court imposes sentence." *Ibid.*; see also *id.*, at 443 ("And 'trial' meant a discrete episode after which judgment (*i. e.*, sentencing) would follow"). That description echoed the Court's earlier characterization of the process, beginning to end: "criminal indictment, trial by jury, and judgment by court." *Apprendi*, 530 U. S., at 478; see also *ibid.*, n. 4 (citing Blackstone to explain that "'judgment' by the court" was "the stage approximating in modern terms the *imposition* of sentence" (emphasis added)). And even outside the Sixth Amendment context, we have said that "[t]he general rule is that finality in the context of a criminal prosecution is defined by a judgment of conviction and the imposition of a sentence." *Fort Wayne Books, Inc.* v. *Indiana*, 489 U. S. 46, 54 (1989).

In fact, two prior precedents—which the plurality effectively ignores—drew this exact line in stating that parole- and probation-revocation proceedings are not part of a criminal prosecution. Unless the plurality is willing to own up to attempting to overrule these precedents, its failure to engage with them is inexcusable.

The first is *Morrissey*, 408 U. S., at 472, a landmark case in which the Court held that due process requires a State to afford a parolee "some opportunity to be heard" before

revoking parole. In considering that question, the Court "beg[an] with the proposition that the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply in parole revocations." *Id.*, at 480. The Court made clear that "[p]arole arises *after* the end of the criminal prosecution, including imposition of sentence." *Ibid.* (emphasis added).

The second is *Gagnon*, 411 U. S. 778, where the Court considered whether a probationer has a right to appointed counsel prior to the revocation of probation. There, the Court reasoned that "[p]robation revocation, like parole revocation, is not a stage of a criminal prosecution." *Id.*, at 782. Thus, in both contexts, the Court emphasized that parole- and probation-revocation proceedings are not part of a criminal prosecution. And that understanding carried significant consequences: It denied parolees and probationers the "full panoply of rights" to which a defendant is entitled in a criminal prosecution. *Morrissey*, 408 U. S., at 480.

Supervised-release revocation proceedings are not part of the defendant's criminal prosecution for the same reasons. As we said in *United States* v. *Johnson*, 529 U. S. 53, 59 (2000), which the plurality all but ignores, "[s]upervised release has no statutory function until confinement ends," which itself has no function until the criminal prosecution has ended. It follows, then, that "the revocation of [supervised release] is not part of a criminal prosecution." *Morrissey*, 408 U. S., at 480.

The fact that *Morrissey* and *Gagnon* involved parole and probation, not supervised release, does not matter for present purposes. Cf. *ante*, at 642–643, 651–652. These cases did not turn on any features of parole or probation that might distinguish them from supervised release. Rather, those decisions recognized an obvious fact: The *administration* of a sentence occurs after a court *imposes* that sentence—*i. e.*, after the criminal prosecution has ended. That fact is

equally true here. No matter what penalties flow from the revocation of parole, probation, or supervised release, the related proceedings are not part of the criminal prosecution.

In recognition of this, the courts of appeals for the past 35 years have overwhelmingly declined to apply the Sixth Amendment in supervised-release revocation proceedings, and they have done so precisely on the ground that these proceedings are not part of criminal prosecutions. This is true as to the jury trial right;[5] the Speedy Trial Clause;[6] the Confrontation Clause;[7] and the right to counsel.[8] As then-Judge Gorsuch succinctly put it not too long ago, "settled precedent" dictates that Sixth Amendment rights "d[o] not apply to supervised release revocation proceedings and the due process guarantees associated with these proceedings are 'minimal.'" *United States* v. *Henry*, 852 F. 3d 1204, 1206–1207 (CA10 2017) (quoting *Morrissey*, 408 U. S., at 485, 489). And even the court below agreed: "Revocation of supervised release is not part of a criminal prosecution, so defendants accused of a violation of the conditions of supervised release have no right to a jury determination of the facts constituting that violation." 869 F. 3d 1153, 1163 (CA10 2017).

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[5] See, *e. g.*, *United States* v. *Carlton*, 442 F. 3d 802, 806–810 (CA2 2006); *United States* v. *Dees*, 467 F. 3d 847, 854–855 (CA3 2006); *United States* v. *Ward*, 770 F. 3d 1090, 1096–1099 (CA4 2014); *United States* v. *Hinson*, 429 F. 3d 114, 117–119 (CA5 2005); *United States* v. *McIntosh*, 630 F. 3d 699, 703 (CA7 2011); *United States* v. *Gavilanes-Ocaranza*, 772 F. 3d 624, 628–629 (CA9 2014); *Cordova*, 461 F. 3d, at 1186.

[6] See, *e. g.*, *Gavilanes-Ocaranza*, 772 F. 3d, at 628; *United States* v. *House*, 501 F. 3d 928, 931 (CA8 2007).

[7] See, *e. g.*, *United States* v. *Rondeau*, 430 F. 3d 44, 47–48 (CA1 2005); *United States* v. *Kelley*, 446 F. 3d 688, 690–692 (CA7 2006); *United States* v. *Hall*, 419 F. 3d 980, 985–986 (CA9 2005); *United States* v. *Ray*, 530 F. 3d 666, 667–668 (CA8 2008); *United States* v. *Ojudun*, 915 F. 3d 875, 888 (CA2 2019).

[8] See, *e. g.*, *United States* v. *Boultinghouse*, 784 F. 3d 1163, 1171 (CA7 2015); *United States* v. *Owen*, 854 F. 3d 536, 541 (CA8 2017); *United States* v. *Spangle*, 626 F. 3d 488, 494 (CA9 2010).

Attempting to claim that a criminal prosecution actually extends through any period of supervised release, the plurality appears to arrive at an unintended destination. The plurality says (while mischaracterizing *Apprendi* and *Alleyne*, see *infra* this page and 676 that "a 'criminal prosecution' continues and the defendant remains an 'accused' with all the rights provided by the Sixth Amendment, until a final sentence is imposed." *Ante*, at 647. That is exactly right. And the Court's precedents emphatically say that a sentence is "imposed" at final judgment, *supra*, at 671–672, not again and again every time a convicted criminal wakes up to serve a day of supervised release and violates a condition of his release. That postjudgment conduct during the administration of supervised release, and any proceedings to adjudicate violations of the release conditions, necessarily occurs "after the end of the criminal prosecution, including *imposition* of sentence." *Morrissey*, 408 U. S., at 480 (emphasis added).

C

The plurality attempts to pass off its reasoning as nothing more than the logical outgrowth of the *Apprendi* line of cases, but that is untrue. The plurality invokes these cases to support the idea that the Sixth Amendment cannot be evaded by "relabeling" of a criminal prosecution as a "'sentence modification'" imposed at a "'postjudgment sentence-administration proceeding.'" *Ante*, at 647; see also *ibid.* (claiming that *Apprendi* "recognized" how long a criminal prosecution continues). But nothing like that was involved in *Apprendi* or later related cases. Instead, the Court in those cases rejected what it saw as attempts to place the label "sentencing enhancement" on what, in its view, were essentially elements of charged offenses. See, *e. g.*, *Blakely*, 542 U. S., at 306 (rejecting the idea that "the jury need only find whatever facts the legislature chooses to label elements of the crime, and that those it labels sentencing factors—no matter how much they may increase the punishment—may

be found by the judge"). All of the cases in the *Apprendi* line involved actual sentencing proceedings, and thus there was never any question whether they arose in a "criminal prosecution." That is not this case.

The plurality insists that it is simply applying *Apprendi*'s understanding of the jury trial right when it says that "a jury must find beyond a reasonable doubt every fact which the law makes essential to a punishment that a judge might later seek to impose." *Ante*, at 642 (internal quotation marks and alteration omitted). But that is wrong.

1

Since *Apprendi* itself, the Court has time and again endeavored to draw its understanding of the jury trial right from historical practices that existed at the founding and soon afterward. See *Apprendi*, 530 U. S., at 495 (looking to the "historical pedigree of the jury"); *Alleyne*, 570 U. S., at 111 (emphasizing that *Apprendi* looked to "common-law and early American practice"). As JUSTICES GINSBURG and SOTOMAYOR recently explained, courts applying *Apprendi* must "examine the historical record, because 'the scope of the constitutional jury right must be informed by the historical role of the jury at common law.' " *Southern Union Co.* v. *United States*, 567 U. S. 343, 353 (2012) (quoting *Oregon* v. *Ice*, 555 U. S. 160, 170 (2009)); see also *id.*, at 167–168 ("Our application of *Apprendi*'s rule must honor the 'longstanding common-law practice' in which the rule is rooted" (quoting *Cunningham* v. *California*, 549 U. S. 270, 281 (2007))). Thus, where "[t]he historical record demonstrates that the jury played no role" in a particular context, *Ice*, 555 U. S., at 168, there is "no encroachment . . . by the judge upon facts historically found by the jury," *id.*, at 169, and *Apprendi* does not govern.

In this case, the plurality can muster no support for the proposition that the jury trial right was extended to anything like a supervised-release or parole revocation proceed-

ing at the time of the adoption of the Sixth Amendment. Supervised release was not instituted until 1984, and parole was unknown until the 19th century, so close historic analogues are lacking. But the nearest practices that can be found do not support the plurality.

Prior to and at the time of the adoption of the Sixth Amendment, convicted criminals were often released on bonds and recognizances that made their continued liberty contingent on good behavior. See L. Friedman, Crime and Punishment in American History 38–39 (1993); A. Hirsch, The Rise of the Penitentiary 7 (1992) ("Since courts in the eighteenth-century frequently demanded that offenders provide monetary sureties for future good behavior, convicts stayed put until they scraped together the requisite funds"). If a prisoner released on such a bond did not exhibit good behavior, the courts had discretion to forfeit the bond (a loss of property) or to turn the individual over to the sheriff (a loss of liberty) until new conditions could be arranged. See Friedman, *supra*, at 39. There is no evidence that there was a right to a jury trial at such proceedings, and the plurality does not even attempt to prove otherwise.

Corporal punishment of prisoners is also inconsistent with the plurality's suggestion that a convicted criminal has the right to a jury trial before a punishment is imposed for legally proscribed conduct. See *ante*, at 641–642. Well into the 19th century, prisoners were whipped for misbehavior. See Friedman, *supra*, at 37, 77, n. *; M. Kann, Punishment, Prisons, and Patriarchy 120, 182 (2005). Virginia law, for example, provided that a prisoner could be punished "by stripes" if he were guilty of "profanity, indecent behaviour, idleness, neglect or willful mismanagement of work, insubordination, an assault not amounting to felony, or a violation of any of the rules prescribed by the governor." Va. Code, Tit. 56, ch. 213, § 22 (1849). Massachusetts law gave the warden "all necessary means" "to suppress insurrection, enforce obedience, and maintain order in the prison," provided however

"that no convict shall be punished . . . by more than ten stripes" without meeting certain conditions. 1828 Mass. Acts, ch. CXVIII, § 21, p. 829. And even at the turn of the century, courts entertained imposition of reasonable corporal punishment provided that it was authorized by lawfully adopted rule or regulation. See, *e. g.*, *State* v. *Nipper*, 166 N. C. 272, 277–280, 81 S. E. 164, 167–168 (1914); *Davis* v. *State*, 81 Miss. 56, 33 So. 286 (1902); *Werner* v. *State*, 44 Ark. 122, 131–132 (1884); *Cornell* v. *State*, 74 Tenn. 624, 624–631 (1881). There is no suggestion in these authorities that a jury finding of a violation was needed.[9]

Later, when parole and probation were introduced, courts, with the assistance of parole and probation officials, supervised the conditional release of parolees and probationers, and juries played no part in this process. See 4 Atty. Gen.'s Survey of Release Proc. 1 (1939) (Parole Survey); 2 *id.*, at 2 (Probation Survey).

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[9] The plurality offers only a few tepid responses. First, the plurality appears to concede that a jury trial is unnecessary where penalties for postjudgment conduct are not *too* harsh. *Ante*, at 653. I suspect that the prisoners who endured corporal punishment would have challenged the plurality's suggestion that their punishment was not that harsh. But in any event, a too-harsh standard—something that would appear to be more at home in an Eighth Amendment analysis—is hardly a principled way of determining whether a jury trial is constitutionally required. Second, the plurality suggests that my reasoning amounts to an extension of *Turner* v. *Safley*, 482 U. S. 78 (1987), because *Turner* addresses only the relaxation of a prisoner's constitutional rights and the Court has "never extended it to the jury rights of persons out in the world who retain the core attributes of liberty." *Ante*, at 654. But a convicted criminal on supervised release does not "retain the core attributes of liberty," *ibid.*, and *Turner* is not implicated here because, as I have shown, the Sixth Amendment does not apply and thus the criminal has no jury trial right that *Turner* might relax. And once again, more notable than the plurality's lack of real answers is its inability to point to any affirmative evidence that the jury ever played a historical role in the administration of previously imposed sentences.

The well-settled revocation power wielded by courts and other officials brings this point home. A violation of the conditions permitted not only the defendant's reimprisonment, see Parole Survey 4; Probation Survey 2, but several other penalties as well. In the parole context, these penalties most often included the forfeiture of good time credits—a reduction in prison time based on good behavior—that the parolees had accrued prior to their release on parole, as well as the forfeiture of any time served for the duration of their parole. Parole Survey 249–253; see also Friedman, *supra*, at 159 (stating in the context of 19th century good time laws that "[t]o forfeit 'good time' was a terrible penalty"). Many States also conditioned the future availability of parole on mandatory minimum terms of reimprisonment, and others even rendered certain parole violators ineligible for future parole. Parole Survey 255–258. And in the probation context, several courts refused to give credit for time spent on probation. Probation Survey 334–335, and n. 52. Thus, courts and parole boards could not only revoke conditional liberty but they could also subject violators to longer periods of imprisonment and erase the fact that the violators had served a substantial portion of their lives on the streets under strict conditions.

From each of the foregoing examples, a clear historical fact emerges: American juries have simply played "no role" in the administration of previously imposed sentences. *Ice*, 555 U. S., at 168. As a result, it is impossible to say with a straight face that the "application of *Apprendi*'s rule" to supervised-release revocation proceedings "honor[s] the 'longstanding common-law practice' in which the rule is rooted." *Id.*, at 167–168 (quoting *Cunningham*, 549 U. S., at 281).

2

The plurality's extension of the jury trial right to the administration of previously imposed sentences also sidelines

what has until now been the core feature of the *Apprendi* line of cases—a meaningful connection to the trial for the charged offense. "The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an 'element' or 'ingredient' of the charged offense." *Alleyne*, 570 U. S., at 107 (plurality opinion); see also *Southern Union Co.*, 567 U. S., at 349 ("*Apprendi*'s 'core concern' is to reserve to the jury 'the determination of facts that warrant punishment for a specific statutory offense' " (quoting *Ice*, 555 U. S., at 170)); *id.*, at 168 (noting the jury's historic role as a "bulwark" between the government and the accused "*at the trial for an alleged offense*" (emphasis added)). The Court's rationale has been that "the core crime and the fact triggering [an increased maximum or] mandatory minimum sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury." *Alleyne*, 570 U. S., at 113. And this rationale, of course, is key to the *Apprendi* line of cases, because the Sixth Amendment protects only the rights of "the accused," that is, those charged with a particular crime. See *supra*, at 669–670.

In *Apprendi* itself, the Court emphasized the relevance of the charged offense when distinguishing *Almendarez-Torres* v. *United States*, 523 U. S. 224 (1998). The Court explained that the "reasons supporting [a recidivism] exception" in *Almendarez-Torres* did not apply in *Apprendi* because, "[w]hereas recidivism 'does not relate to the commission of the offense' itself, . . . New Jersey's biased purpose inquiry goes precisely to what happened in the 'commission of the offense.' " *Apprendi*, 530 U. S., at 496 (quoting *Almendarez-Torres*, 523 U. S., at 230, 244).

Here, the factual basis for revoking respondent's supervised release did not "g[o] precisely to what happened in the 'commission of the offense' "; it did not even "relate to the commission of the offense." *Apprendi*, 530 U. S., at 496. It had virtually nothing to do with the child-pornography of-

fense that led to respondent's conviction, incarceration, and supervised release. The same would be true of a defendant convicted of burglary, arson, or any other crime: His failure to attend an employment class or to pass a drug test while on supervised release would have nothing to do with how he carried out those offenses. And it would be impossible for "the core crime" and a postjudgment fact affecting respondent's sentence to be submitted "together" as one "new, aggravated crime" for proof to a jury. *Alleyne*, 570 U. S., at 113. Thus, no reasonable person would describe such postjudgment facts that go only to the administration of a previously imposed sentence as "ingredients" or "elements" of the charged offense. Insofar as the charged statutory offense has been part and parcel of "*Apprendi*'s core concern," that concern "is inapplicable to the issue at hand," and thus, "so too is the Sixth Amendment's restriction on judge-found facts." *Ice*, 555 U. S., at 170.

It is telling that the plurality never brings itself to acknowledge this clear departure from the *Apprendi* line of cases. For nearly two decades now, the Court has insisted that these cases turn on "a specific statutory offense," and its "ingredients" and "elements." Yet today we learn that—at least as far as the plurality is concerned—none of that really mattered.

3

The plurality also errs by failing to distinguish between the unconditional liberty interests with which *Apprendi* is concerned and the conditional liberty interests at issue in cases like this one. Cf. *ante*, at 637 ("Only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty"). When a person is indicted and faces the threat of prison and supervised release, his unconditional liberty hangs in the balance. See *Apprendi*, 530 U. S., at 476 ("At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without 'due process of law,' Amdt. 14 . . . "); *id.*, at 484

("If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened"); *id.*, at 495 ("The degree of criminal culpability the legislature chooses to associate with particular, factually distinct conduct has significant implications both for a defendant's very liberty, and for the heightened stigma associated with an offense the legislature has selected as worthy of greater punishment").

But convictions have consequences. "[G]iven a valid conviction, the criminal defendant [may be] constitutionally deprived of his liberty." *Meachum* v. *Fano*, 427 U. S. 215, 224 (1976). To this end, "[s]upervised release is 'a form of post-confinement monitoring' that permits a defendant a kind of conditional liberty by allowing him to serve part of his sentence outside of prison." *Mont* v. *United States*, 587 U. S. 514, 523 (2019) (quoting *Johnson* v. *United States*, 529 U. S. 694, 697 (2000)). Convicts like respondent on supervised release thus enjoy only conditional liberty. He most certainly was not "a free man." *Ante*, at 653. This means, then, that "[r]evocation" of supervised release "deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of . . . conditional liberty." *Morrissey*, 408 U. S., at 480. It is perhaps for that reason that the decisions of this Court that mention "conditional liberty" speak only of general due process rights, not other constitutional protections that unaccused and unconvicted individuals enjoy. See, *e. g.*, *Connecticut Bd. of Pardons* v. *Dumschat*, 452 U. S. 458 (1981); *Vitek* v. *Jones*, 445 U. S. 480 (1980); *Wolff* v. *McDonnell*, 418 U. S. 539 (1974); *Morrissey*, 408 U. S. 471.

* * *

Today's decision is based in part on an opinion that is unpardonably vague and suggestive in dangerous ways. It is not grounded on any plausible interpretation of the original

meaning of the Sixth Amendment, and it is contradicted by precedents that are unceremoniously overruled. It represents one particular view about crime and punishment that is ascendant in some quarters today but is not required by the Constitution. If the Court eventually takes the trip that this opinion proposes, the consequences will be far reaching and unfortunate.

For these reasons, I respectfully dissent.

Syllabus

RUCHO ET AL. *v.* COMMON CAUSE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

No. 18–422. Argued March 26, 2019—Decided June 27, 2019*

Voters and other plaintiffs in North Carolina and Maryland filed suits challenging their States' congressional districting maps as unconstitutional partisan gerrymanders. The North Carolina plaintiffs claimed that the State's districting plan discriminated against Democrats, while the Maryland plaintiffs claimed that their State's plan discriminated against Republicans. The plaintiffs alleged violations of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Elections Clause, and Article I, § 2. The District Courts in both cases ruled in favor of the plaintiffs, and the defendants appealed directly to this Court.

Held: Partisan gerrymandering claims present political questions beyond the reach of the federal courts. Pp. 695–721.

(a) In these cases, the Court is asked to decide an important question of constitutional law. Before it does so, the Court "must find that the question is presented in a 'case' or 'controversy' that is . . . 'of a Judiciary Nature.'" *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S. 332, 342. While it is "the province and duty of the judicial department to say what the law is," *Marbury* v. *Madison*, 1 Cranch 137, 177, sometimes the law is that the Judiciary cannot entertain a claim because it presents a nonjusticiable "political question," *Baker* v. *Carr*, 369 U. S. 186, 217. Among the political question cases this Court has identified are those that lack "judicially discoverable and manageable standards for resolving [them]." *Ibid.* This Court's partisan gerrymandering cases have left unresolved the question whether such claims are claims of *legal* right, resolvable according to *legal* principles, or political questions that must find their resolution elsewhere. See *Gill* v. *Whitford*, 585 U. S. 48, 60.

Partisan gerrymandering was known in the Colonies prior to Independence, and the Framers were familiar with it at the time of the drafting and ratification of the Constitution. They addressed the election of Representatives to Congress in the Elections Clause, Art. I, § 4, cl. 1, assigning to state legislatures the power to prescribe the "Times, Places and Manner of holding Elections" for Members of Congress,

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*Together with No. 18–726, *Lamone et al.* v. *Benisek et al.*, on appeal from the United States District Court for the District of Maryland.

while giving Congress the power to "make or alter" any such regulations. Congress has regularly exercised its Elections Clause power, including to address partisan gerrymandering. But the Framers did not set aside all electoral issues as questions that only Congress can resolve. In two areas—one-person, one-vote and racial gerrymandering—this Court has held that there is a role for the courts with respect to at least some issues that could arise from a State's drawing of congressional districts. But the history of partisan gerrymandering is not irrelevant. Aware of electoral districting problems, the Framers chose a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress, with no suggestion that the federal courts had a role to play.

Courts have nonetheless been called upon to resolve a variety of questions surrounding districting. The claim of population inequality among districts in *Baker* v. *Carr*, for example, could be decided under basic equal protection principles. 369 U. S., at 226. Racial discrimination in districting also raises constitutional issues that can be addressed by the federal courts. See *Gomillion* v. *Lightfoot*, 364 U. S. 339, 340. Partisan gerrymandering claims have proved far more difficult to adjudicate, in part because "a jurisdiction may engage in constitutional political gerrymandering." *Hunt* v. *Cromartie*, 526 U. S. 541, 551. To hold that legislators cannot take their partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities. The "central problem" is "determining when political gerrymandering has gone too far." *Vieth* v. *Jubelirer*, 541 U. S. 267, 296 (plurality opinion). Despite considerable efforts in *Gaffney* v. *Cummings*, 412 U. S. 735, 753; *Davis* v. *Bandemer*, 478 U. S. 109, 116–117; *Vieth*, 541 U. S., at 272–273; and *League of United Latin American Citizens* v. *Perry*, 548 U. S. 399, 414 (*LULAC*), this Court's prior cases have left "unresolved whether . . . claims [of legal right] may be brought in cases involving allegations of partisan gerrymandering," *Gill*, 585 U. S., at 65. Two "threshold questions" remained: standing, which was addressed in *Gill*, and "whether [such] claims are justiciable." *Ibid.* Pp. 695–703.

(b) Any standard for resolving partisan gerrymandering claims must be grounded in a "limited and precise rationale" and be "clear, manageable, and politically neutral." *Vieth*, 541 U. S., at 306–308 (Kennedy, J., concurring in judgment). The question is one of degree: How to "provid[e] a standard for deciding how much partisan dominance is too much." *LULAC*, 548 U. S., at 420 (opinion of Kennedy, J.). Partisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence. Such claims invariably sound in a desire for pro-

portional representation, but the Constitution does not require proportional representation, and federal courts are neither equipped nor authorized to apportion political power as a matter of fairness. It is not even clear what fairness looks like in this context. It may mean achieving a greater number of competitive districts by undoing packing and cracking so that supporters of the disadvantaged party have a better shot at electing their preferred candidates. But it could mean engaging in cracking and packing to ensure each party its "appropriate" share of "safe" seats. Or perhaps it should be measured by adherence to "traditional" districting criteria. Deciding among those different visions of fairness poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments. And it is only after determining how to define fairness that one can even begin to answer the determinative question: "How much is too much?"

The fact that the Court can adjudicate one-person, one-vote claims does not mean that partisan gerrymandering claims are justiciable. This Court's one-person, one-vote cases recognize that each person is entitled to an equal say in the election of representatives. It hardly follows from that principle that a person is entitled to have his political party achieve representation commensurate to its share of statewide support. Vote dilution in the one-person, one-vote cases refers to the idea that each vote must carry equal weight. That requirement does not extend to political parties; it does not mean that each party must be influential in proportion to the number of its supporters. The racial gerrymandering cases are also inapposite: They call for the elimination of a racial classification, but a partisan gerrymandering claim cannot ask for the elimination of partisanship. Pp. 703–710.

(c) None of the proposed "tests" for evaluating partisan gerrymandering claims meets the need for a limited and precise standard that is judicially discernible and manageable. Pp. 710–718.

(1) The *Common Cause* District Court concluded that all but one of the districts in North Carolina's 2016 Plan violated the Equal Protection Clause by intentionally diluting the voting strength of Democrats. It applied a three-part test, examining intent, effects, and causation. The District Court's "predominant intent" prong is borrowed from the test used in racial gerrymandering cases. However, unlike race-based decisionmaking, which is "inherently suspect," *Miller* v. *Johnson*, 515 U. S. 900, 915, districting for some level of partisan advantage is not unconstitutional. Determining that lines were drawn on the basis of partisanship does not indicate that districting was constitutionally impermissible. The *Common Cause* District Court also required the plaintiffs to show that vote dilution is "likely to persist" to such a degree that the

elected representatives will feel free to ignore the concerns of the supporters of the minority party. Experience proves that accurately predicting electoral outcomes is not simple, and asking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise. The District Court's third prong—which gave the defendants an opportunity to show that discriminatory effects were due to a "legitimate redistricting objective"—just restates the question asked at the "predominant intent" prong. Pp. 710–713.

(2) The District Courts also found partisan gerrymandering claims justiciable under the First Amendment, coalescing around a basic three-part test: proof of intent to burden individuals based on their voting history or party affiliation, an actual burden on political speech or associational rights, and a causal link between the invidious intent and actual burden. But their analysis offers no "clear" and "manageable" way of distinguishing permissible from impermissible partisan motivation. Pp. 713–715.

(3) Using a State's own districting criteria as a baseline from which to measure how extreme a partisan gerrymander is would be indeterminate and arbitrary. Doing so would still leave open the question of how much political motivation and effect is too much. Pp. 715–716.

(4) The North Carolina District Court further held that the 2016 Plan violated Article I, §2, and the Elections Clause, Art. I, §4, cl. 1. But the *Vieth* plurality concluded—without objection from any other Justice—that neither §2 nor §4 "provides a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting." 541 U. S., at 305. Any assertion that partisan gerrymanders violate the core right of voters to choose their representatives is an objection more likely grounded in the Guarantee Clause of Article IV, §4, which "guarantee[s] to every State in [the] Union a Republican Form of Government." This Court has several times concluded that the Guarantee Clause does not provide the basis for a justiciable claim. See, *e. g.*, *Pacific States Telephone & Telegraph Co.* v. *Oregon*, 223 U. S. 118. Pp. 717–718.

(d) The conclusion that partisan gerrymandering claims are not justiciable neither condones excessive partisan gerrymandering nor condemns complaints about districting to echo into a void. Numerous States are actively addressing the issue through state constitutional amendments and legislation placing power to draw electoral districts in the hands of independent commissions, mandating particular districting criteria for their mapmakers, or prohibiting drawing district lines for partisan advantage. The Framers also gave Congress the power to do something about partisan gerrymandering in the Elections Clause.

Syllabus

That avenue for reform established by the Framers, and used by Congress in the past, remains open. Pp. 718–721.

318 F. Supp. 3d 777 and 348 F. Supp. 3d 493, vacated and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which THOMAS, ALITO, GORSUCH, and KAVANAUGH, JJ., joined. KAGAN, J., filed a dissenting opinion, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined, *post*, p. 721.

Paul D. Clement argued the cause for appellants in No. 18–422. With him on the briefs were *Erin E. Murphy*, *Andrew C. Lawrence*, and *Michael D. McKnight*.

Steven M. Sullivan, Solicitor General of Maryland, argued the cause for appellants in No. 18–726. With him on the briefs were *Brian E. Frosh*, Attorney General, *Julia Doyle Bernhardt*, Chief of Litigation, and *Sarah W. Rice*, *Jennifer L. Katz*, and *Andrea W. Trento*, Assistant Attorneys General.

Emmet J. Bondurant argued the cause for appellees Common Cause et al. in No. 18–422. With him on the brief were *Benjamin W. Thorpe*, *Gregory L. Diskant*, *Jonah M. Knobler*, *Peter A. Nelson*, *Edwin M. Speas, Jr.*, *Steven B. Epstein*, *Caroline P. Mackie*, and *Richard H. Pildes*. *Allison J. Riggs* argued the cause for appellees League of Women Voters of North Carolina et al. With her on the brief were *Paul M. Smith*, *Ruth M. Greenwood*, and *Nicholas Stephanopoulos*.

Michael B. Kimberly argued the cause for appellees in No. 18–726. With him on the brief were *Paul W. Hughes*, *Stephen M. Medlock*, *E. Brantley Webb*, *Micah D. Stein*, *Eugene R. Fidell*, and *Eugene Volokh*.†

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†*Adam K. Motara* and *Kevin St. John* filed briefs for the Wisconsin State Senate et al. as *amici curiae* urging reversal in both cases.

Briefs of *amici curiae* urging reversal in No. 18–422 were filed for the State of Texas et al. by *Ken Paxton*, Attorney General of Texas, *Jeffrey C. Mateer*, First Assistant Attorney General, *Kyle D. Hawkins*, Solicitor General, *Matthew H. Frederick*, Deputy Solicitor General, and *Kristofer S. Monson*, Assistant Solicitor General, and by the Attorneys General for their respective States as follows: *Steve Marshall* of Alabama, *Leslie Rut-*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Voters and other plaintiffs in North Carolina and Maryland challenged their States' congressional districting maps as un-

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ledge of Arkansas, *Christopher M. Carr* of Georgia, *Curtis T. Hill, Jr.*, of Indiana, *Jeff Landry* of Louisiana, *Dave Yost* of Ohio, *Mike Hunter* of Oklahoma, *Alan Wilson* of South Carolina, and *Sean D. Reyes* of Utah; for the American Civil Rights Union et al. by *John J. Park, Jr.*, and *Kimberly S. Hermann*; for Judicial Watch, Inc., et al. by *Robert D. Popper*; for Members of Congress from the North Carolina Delegation by *Misha Tseytlin*; for the National Republican Redistricting Trust by *Edward D. Greim*; for the Public Interest Legal Foundation by *J. Christian Adams* and *Kaylan Phillips*; for the Republican National Committee et al. by *Jason Torchinsky*; for Texas House Rep. Carl Isett by *Joseph M. Nixon* and *James E. Trainor III*; and for Rep. Michael C. Turzai by *E. Mark Braden*, *Katherine L. McKnight*, and *Richard B. Raile*.

William J. Murphy and *John J. Connolly* filed a brief for Rep. David Trone urging reversal in No. 18–726.

Briefs of *amici curiae* urging affirmance were filed in both cases for the American Civil Liberties Union et al. by *Adriel I. Cepeda Derieux*, *Dale E. Ho*, *David D. Cole*, *Perry M. Grossman*, *Arthur N. Eisenberg*, *Christopher Brook*, *Samuel Issacharoff*, and *Deborah A. Jeon*; for the American Jewish Committee by *Richard A. Rosen*, *Peter Sandel*, and *Marc D. Stern*; for the Anti-Defamation League et al. by *David Leit* and *Natalie J. Kraner*; for Bipartisan Group of Current and Former Members of the House of Representatives by *Seth P. Waxman*, *Jonathan G. Cedarbaum*, and *Ari Savitzky*; for the Brennan Center for Justice at N. Y. U. School of Law by *Anton Metlitsky*, *Bradley N. Garcia*, *Samantha M. Goldstein*, *Wendy R. Weiser*, *Michael C. Li*, *Daniel I. Weiner*, and *Thomas P. Wolf*; for the Constitutional Accountability Center by *Elizabeth B. Wydra*, *Brianne J. Gorod*, and *David H. Gans*; for First Amendment Scholars et al. by *Bradley S. Phillips*; for the Floyd Abrams Institute for Freedom of Expression by *Floyd Abrams*, *David Schulz*, and *Charles Sims*; for Governor Arnold Schwarzenegger et al. by *David A. Schwarz*; for Historians by *Richard W. Clary*; for the International Municipal Lawyers Association et al. by *G. Michael Parsons, Jr.*, *Charles W. Thompson, Jr.*, and *Amanda Kellar Karras*; for the Lawyers' Committee for Civil Rights Under Law by *Kristen Clarke*, *Jon M. Greenbaum*, *Ezra D. Rosenberg*, *Robert E. Harrington*, *Erik R. Zimmerman*, and *John Dragseth*; for Mathematicians et al. by *Deepak Gupta*; for the NAACP Legal Defense & Educational Fund, Inc., et al. by *Justin Levitt*, *Sherrilyn A. Ifill*, *Janai S. Nelson*,

constitutional partisan gerrymanders. The North Carolina plaintiffs complained that the State's districting plan discriminated against Democrats; the Maryland plaintiffs complained that their State's plan discriminated against Republicans. The plaintiffs alleged that the gerrymandering violated the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Elections Clause, and Article I, § 2, of the Constitution. The District Courts in both cases ruled in favor of the plaintiffs, and the defendants appealed directly to this Court.

Samuel Spital, *Leah C. Aden*, and *Laura W. Brill*; for Political Science Professors by *Brian A. Sutherland*; for Sen. Sheldon Whitehouse by *Mark W. Mosier*; for Michael Kang by *James P. Rouhandeh* and *David B. Toscano;* and for Stephen M. Shapiro by *Michael R. Geroe* and *Alan B. Morrison*.

Briefs of *amici curiae* urging affirmance in No. 18–422 were filed for the State of Oregon et al. by *Ellen F. Rosenblum*, Attorney General of Oregon, *Benjamin Gutman*, Solicitor General, and *Jordan R. Silk*, Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Xavier Becerra* of California, *Philip J. Weiser* of Colorado, *William Tong* of Connecticut, *Kathleen Jennings* of Delaware, *Karl A. Racine* of the District of Columbia, *Clare E. Connors* of Hawaii, *Thomas J. Miller* of Iowa, *Andy Beshear* of Kentucky, *Aaron M. Frey* of Maine, *Maura Healey* of Massachusetts, *Dana Nessel* of Michigan, *Keith Ellison* of Minnesota, *Jim Hood* of Mississippi, *Gurbir S. Grewal* of New Jersey, *Letitia James* of New York, *Aaron D. Ford* of Nevada, *Hector Balderas* of New Mexico, *Josh Shapiro* of Pennsylvania, *Peter F. Neronha* of Rhode Island, *Thomas J. Donovan*, *Jr.*, of Vermont, and *Robert W. Ferguson* of Washington; for Colleagues of Norman Dorsen by *Burt Neuborne*, *pro se*; for Democracy North Carolina et al. by *Jonathan K. Youngwood*; for the First Amendment Clinic at Duke Law by *H. Jefferson Powell*; for Christopher Elmendorf et al. by *Mark A. Packman* and *Jenna A. Hudson*; for Eric S. Lander by *H. Reed Witherby*; for Wesley Pegden et al. by *Tacy F. Flint*; for D. Theodore Rave III by *Mr. Rave*, *pro se*; and for 27 Election Law Scholars et al. by *Andrew Chin*, *pro se.*

Briefs of *amici curiae* urging affirmance in No. 18–726 were filed for Michael C. Dorf et al. by *Anne M. Voigts*; and for Robert Lee Stone, Jr., et al. by *Glenn E. Bushel.*

Briefs of *amici curiae* were filed in both cases for Bernard Grofman et al. by *E. Joshua Rosenkranz* and *Thomas M. Bondy*; and for David Orentlicher by *Mr. Orentlicher*, *pro se.*

These cases require us to consider once again whether claims of excessive partisanship in districting are "justiciable"—that is, properly suited for resolution by the federal courts. This Court has not previously struck down a districting plan as an unconstitutional partisan gerrymander, and has struggled without success over the past several decades to discern judicially manageable standards for deciding such claims. The districting plans at issue here are highly partisan, by any measure. The question is whether the courts below appropriately exercised judicial power when they found them unconstitutional as well.

I

A

The first case involves a challenge to the congressional redistricting plan enacted by the Republican-controlled North Carolina General Assembly in 2016. *Rucho* v. *Common Cause*, No. 18–422. The Republican legislators leading the redistricting effort instructed their mapmaker to use political data to draw a map that would produce a congressional delegation of ten Republicans and three Democrats. 318 F. Supp. 3d 777, 807–808 (MDNC 2018). As one of the two Republicans chairing the redistricting committee stated, "I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country." *Id.*, at 809. He further explained that the map was drawn with the aim of electing ten Republicans and three Democrats because he did "not believe it [would be] possible to draw a map with 11 Republicans and 2 Democrats." *Id.*, at 808. One Democratic state senator objected that entrenching the 10–3 advantage for Republicans was not "fair, reasonable, [or] balanced" because, as recently as 2012, "Democratic congressional candidates had received more votes on a statewide basis than Republican candidates." *Ibid.* The General Assembly was not swayed by that objection and approved the 2016 Plan by a party-line vote. *Id.*, at 809.

In November 2016, North Carolina conducted congressional elections using the 2016 Plan, and Republican candidates won 10 of the 13 congressional districts. *Id.*, at 810. In the 2018 elections, Republican candidates won nine congressional districts, while Democratic candidates won three. The Republican candidate narrowly prevailed in the remaining district, but the State Board of Elections called a new election after allegations of fraud.

This litigation began in August 2016, when the North Carolina Democratic Party, Common Cause (a nonprofit organization), and 14 individual North Carolina voters sued the two lawmakers who had led the redistricting effort and other state defendants in Federal District Court. Shortly thereafter, the League of Women Voters of North Carolina and a dozen additional North Carolina voters filed a similar complaint. The two cases were consolidated.

The plaintiffs challenged the 2016 Plan on multiple constitutional grounds. First, they alleged that the Plan violated the Equal Protection Clause of the Fourteenth Amendment by intentionally diluting the electoral strength of Democratic voters. Second, they claimed that the Plan violated their First Amendment rights by retaliating against supporters of Democratic candidates on the basis of their political beliefs. Third, they asserted that the Plan usurped the right of "the People" to elect their preferred candidates for Congress, in violation of the requirement in Article I, § 2, of the Constitution that Members of the House of Representatives be chosen "by the People of the several States." Finally, they alleged that the Plan violated the Elections Clause by exceeding the State's delegated authority to prescribe the "Times, Places and Manner of holding Elections" for Members of Congress.

After a four-day trial, the three-judge District Court unanimously concluded that the 2016 Plan violated the Equal Protection Clause and Article I of the Constitution. The court further held, with Judge Osteen dissenting, that the

Plan violated the First Amendment. *Common Cause* v. *Rucho*, 279 F. Supp. 3d 587 (MDNC 2018). The defendants appealed directly to this Court under 28 U. S. C. § 1253.

While that appeal was pending, we decided *Gill* v. *Whitford*, 585 U. S. 48 (2018), a partisan gerrymandering case out of Wisconsin. In that case, we held that a plaintiff asserting a partisan gerrymandering claim based on a theory of vote dilution must establish standing by showing he lives in an allegedly "cracked" or "packed" district. *Id.*, at 69. A "cracked" district is one in which a party's supporters are divided among multiple districts, so that they fall short of a majority in each; a "packed" district is one in which a party's supporters are highly concentrated, so they win that district by a large margin, "wasting" many votes that would improve their chances in others. *Id.*, at 55–56.

After deciding *Gill*, we remanded the present case for further consideration by the District Court. 585 U. S. 1012 (2018). On remand, the District Court again struck down the 2016 Plan. 318 F. Supp. 3d 777. It found standing and concluded that the case was appropriate for judicial resolution. On the merits, the court found that "the General Assembly's predominant intent was to discriminate against voters who supported or were likely to support non-Republican candidates," and to "entrench Republican candidates" through widespread cracking and packing of Democratic voters. *Id.*, at 883–884. The court rejected the defendants' arguments that the distribution of Republican and Democratic voters throughout North Carolina and the interest in protecting incumbents neutrally explained the 2016 Plan's discriminatory effects. *Id.*, at 896–899. In the end, the District Court held that 12 of the 13 districts constituted partisan gerrymanders that violated the Equal Protection Clause. *Id.*, at 923.

The court also agreed with the plaintiffs that the 2016 Plan discriminated against them because of their political speech and association, in violation of the First Amendment. *Id.*,

at 935. Judge Osteen dissented with respect to that ruling. *Id.*, at 954–955. Finally, the District Court concluded that the 2016 Plan violated the Elections Clause and Article I, § 2. *Id.*, at 935–941. The District Court enjoined the State from using the 2016 Plan in any election after the November 2018 general election. *Id.*, at 942.

The defendants again appealed to this Court, and we postponed jurisdiction. 586 U. S. 1062 (2019).

B

The second case before us is *Lamone* v. *Benisek*, No. 18–726. In 2011, the Maryland Legislature—dominated by Democrats—undertook to redraw the lines of that State's eight congressional districts. The Governor at the time, Democrat Martin O'Malley, led the process. He appointed a redistricting committee to help redraw the map, and asked Congressman Steny Hoyer, who has described himself as a "serial gerrymanderer," to advise the committee. 348 F. Supp. 3d 493, 502 (Md. 2018). The Governor later testified that his aim was to "use the redistricting process to change the overall composition of Maryland's congressional delegation to 7 Democrats and 1 Republican by flipping" one district. *Ibid.* "[A] decision was made to go for the Sixth," *ibid.* (emphasis deleted), which had been held by a Republican for nearly two decades. To achieve the required equal population among districts, only about 10,000 residents needed to be removed from that district. *Id.*, at 498. The 2011 Plan accomplished that by moving roughly 360,000 voters out of the Sixth District and moving 350,000 new voters in. Overall, the Plan reduced the number of registered Republicans in the Sixth District by about 66,000 and increased the number of registered Democrats by about 24,000. *Id.*, at 499–501. The map was adopted by a party-line vote. *Id.*, at 506. It was used in the 2012 election and succeeded in flipping the Sixth District. A Democrat has held the seat ever since.

In November 2013, three Maryland voters filed this lawsuit. They alleged that the 2011 Plan violated the First

Amendment, the Elections Clause, and Article I, §2, of the Constitution. After considerable procedural skirmishing and litigation over preliminary relief, the District Court entered summary judgment for the plaintiffs. 348 F. Supp. 3d 493. It concluded that the plaintiffs' claims were justiciable, and that the Plan violated the First Amendment by diminishing their "ability to elect their candidate of choice" because of their party affiliation and voting history, and by burdening their associational rights. *Id.*, at 498. On the latter point, the court relied upon findings that Republicans in the Sixth District "were burdened in fundraising, attracting volunteers, campaigning, and generating interest in voting in an atmosphere of general confusion and apathy." *Id.*, at 524.

The District Court permanently enjoined the State from using the 2011 Plan and ordered it to promptly adopt a new plan for the 2020 election. *Id.*, at 525. The defendants appealed directly to this Court under 28 U. S. C. §1253. We postponed jurisdiction. 586 U. S. 1063 (2019).

II

A

Article III of the Constitution limits federal courts to deciding "Cases" and "Controversies." We have understood that limitation to mean that federal courts can address only questions "historically viewed as capable of resolution through the judicial process." *Flast* v. *Cohen*, 392 U. S. 83, 95 (1968). In these cases we are asked to decide an important question of constitutional law. "But before we do so, we must find that the question is presented in a 'case' or 'controversy' that is, in James Madison's words, 'of a Judiciary Nature.'" *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S. 332, 342 (2006) (quoting 2 Records of the Federal Convention of 1787, p. 430 (M. Farrand ed. 1966)).

Chief Justice Marshall famously wrote that it is "the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). Some-

times, however, "the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights." *Vieth* v. *Jubelirer*, 541 U. S. 267, 277 (2004) (plurality opinion). In such a case the claim is said to present a "political question" and to be nonjusticiable—outside the courts' competence and therefore beyond the courts' jurisdiction. *Baker* v. *Carr*, 369 U. S. 186, 217 (1962). Among the political question cases the Court has identified are those that lack "judicially discoverable and manageable standards for resolving [them]." *Ibid.*

Last Term in *Gill* v. *Whitford*, we reviewed our partisan gerrymandering cases and concluded that those cases "leave unresolved whether such claims may be brought." 585 U. S., at 65. This Court's authority to act, as we said in *Gill*, is "grounded in and limited by the necessity of resolving, according to legal principles, a plaintiff's particular claim of legal right." *Ibid.* The question here is whether there is an "appropriate role for the Federal Judiciary" in remedying the problem of partisan gerrymandering—whether such claims are claims of *legal* right, resolvable according to *legal* principles, or political questions that must find their resolution elsewhere. *Id.*, at 60.

B

Partisan gerrymandering is nothing new. Nor is frustration with it. The practice was known in the Colonies prior to Independence, and the Framers were familiar with it at the time of the drafting and ratification of the Constitution. See *Vieth*, 541 U. S., at 274 (plurality opinion). During the very first congressional elections, George Washington and his Federalist allies accused Patrick Henry of trying to gerrymander Virginia's districts against their candidates—in particular James Madison, who ultimately prevailed over fellow future President James Monroe. Hunter, The First Ger-

rymander? 9 Early Am. Studies 792–794, 811 (2011). See 5 Writings of Thomas Jefferson 71 (P. Ford ed. 1895) (Letter to W. Short (Feb. 9, 1789)) ("Henry has so modelled the districts for representatives as to tack Orange [county] to counties where he himself has great influence that Madison may not be elected into the lower federal house").

In 1812, Governor of Massachusetts and future Vice President Elbridge Gerry notoriously approved congressional districts that the legislature had drawn to aid the Democratic-Republican Party. The moniker "gerrymander" was born when an outraged Federalist newspaper observed that one of the misshapen districts resembled a salamander. See *Vieth*, 541 U. S., at 274 (plurality opinion); E. Griffith, The Rise and Development of the Gerrymander 17–19 (1907). "By 1840 the gerrymander was a recognized force in party politics and was generally attempted in all legislation enacted for the formation of election districts. It was generally conceded that each party would attempt to gain power which was not proportionate to its numerical strength." *Id.*, at 123.

The Framers addressed the election of Representatives to Congress in the Elections Clause. Art. I, § 4, cl. 1. That provision assigns to state legislatures the power to prescribe the "Times, Places and Manner of holding Elections" for Members of Congress, while giving Congress the power to "make or alter" any such regulations. Whether to give that supervisory authority to the National Government was debated at the Constitutional Convention. When those opposed to such congressional oversight moved to strike the relevant language, Madison came to its defense:

> "[T]he State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local coveniency or prejudices. . . . Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the

> candidates they wished to succeed." 2 Records of the Federal Convention of 1787, at 240–241.

During the subsequent fight for ratification, the provision remained a subject of debate. Antifederalists predicted that Congress's power under the Elections Clause would allow Congress to make itself "omnipotent," setting the "time" of elections as never or the "place" in difficult to reach corners of the State. Federalists responded that, among other justifications, the revisionary power was necessary to counter state legislatures set on undermining fair representation, including through malapportionment. M. Klarman, The Framers' Coup: The Making of the United States Constitution 340–342 (2016). The Federalists were, for example, concerned that newly developing population centers would be deprived of their proper electoral weight, as some cities had been in Great Britain. See 6 The Documentary History of the Ratification of the Constitution: Massachusetts 1278–1279 (J. Kaminski & G. Saladino eds. 2000).

Congress has regularly exercised its Elections Clause power, including to address partisan gerrymandering. The Apportionment Act of 1842, which required single-member districts for the first time, specified that those districts be "composed of contiguous territory," Act of June 25, 1842, ch. 47, 5 Stat. 491, in "an attempt to forbid the practice of the gerrymander," Griffith, *supra*, at 12. Later statutes added requirements of compactness and equality of population. Act of Jan. 16, 1901, ch. 93, § 3, 31 Stat. 734; Act of Feb. 2, 1872, ch. 11, § 2, 17 Stat. 28. (Only the single-member district requirement remains in place today. 2 U. S. C. § 2c.) See *Vieth*, 541 U. S., at 276 (plurality opinion). Congress also used its Elections Clause power in 1870, enacting the first comprehensive federal statute dealing with elections as a way to enforce the Fifteenth Amendment. Force Act of 1870, ch. 114, 16 Stat. 140. Starting in the 1950s, Congress enacted a series of laws to protect the right to vote through measures such as the suspension of literacy tests and the

prohibition of English-only elections. See, *e. g.*, 52 U. S. C. § 10101 *et seq.*

Appellants suggest that, through the Elections Clause, the Framers set aside electoral issues such as the one before us as questions that only Congress can resolve. See *Baker*, 369 U. S., at 217. We do not agree. In two areas—one-person, one-vote and racial gerrymandering—our cases have held that there is a role for the courts with respect to at least some issues that could arise from a State's drawing of congressional districts. See *Wesberry* v. *Sanders*, 376 U. S. 1 (1964); *Shaw* v. *Reno*, 509 U. S. 630 (1993) (*Shaw I*).

But the history is not irrelevant. The Framers were aware of electoral districting problems and considered what to do about them. They settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress. As Alexander Hamilton explained, "it will . . . not be denied that a discretionary power over elections ought to exist somewhere. It will, I presume, be as readily conceded that there were only three ways in which this power could have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter, and ultimately in the former." The Federalist No. 59, p. 362 (C. Rossiter ed. 1961). At no point was there a suggestion that the federal courts had a role to play. Nor was there any indication that the Framers had ever heard of courts doing such a thing.

C

Courts have nevertheless been called upon to resolve a variety of questions surrounding districting. Early on, doubts were raised about the competence of the federal courts to resolve those questions. See *Wood* v. *Broom*, 287 U. S. 1 (1932); *Colegrove* v. *Green*, 328 U. S. 549 (1946).

In the leading case of *Baker* v. *Carr*, voters in Tennessee complained that the State's districting plan for state repre-

sentatives "debase[d]" their votes, because the plan was predicated on a 60-year-old census that no longer reflected the distribution of population in the State. The plaintiffs argued that votes of people in overpopulated districts held less value than those of people in less-populated districts, and that this inequality violated the Equal Protection Clause of the Fourteenth Amendment. The District Court dismissed the action on the ground that the claim was not justiciable, relying on this Court's precedents, including *Colegrove*. *Baker* v. *Carr*, 179 F. Supp. 824, 825, 826 (MD Tenn. 1959) (*per curiam*). This Court reversed. It identified various considerations relevant to determining whether a claim is a nonjusticiable political question, including whether there is "a lack of judicially discoverable and manageable standards for resolving it." 369 U. S., at 217. The Court concluded that the claim of population inequality among districts did not fall into that category, because such a claim could be decided under basic equal protection principles. *Id.*, at 226. In *Wesberry* v. *Sanders*, the Court extended its ruling to malapportionment of congressional districts, holding that Article I, § 2, required that "one man's vote in a congressional election is to be worth as much as another's." 376 U. S., at 8.

Another line of challenges to districting plans has focused on race. Laws that explicitly discriminate on the basis of race, as well as those that are race neutral on their face but are unexplainable on grounds other than race, are of course presumptively invalid. The Court applied those principles to electoral boundaries in *Gomillion* v. *Lightfoot*, concluding that a challenge to an "uncouth twenty-eight-sided" municipal boundary line that excluded black voters from city elections stated a constitutional claim. 364 U. S. 339, 340 (1960). In *Wright* v. *Rockefeller*, 376 U. S. 52 (1964), the Court extended the reasoning of *Gomillion* to congressional districting. See *Shaw I*, 509 U. S., at 645.

Partisan gerrymandering claims have proved far more difficult to adjudicate. The basic reason is that, while it is

illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, "a jurisdiction may engage in constitutional political gerrymandering." *Hunt* v. *Cromartie*, 526 U. S. 541, 551 (1999) (citing *Bush* v. *Vera*, 517 U. S. 952, 968 (1996); *Shaw* v. *Hunt*, 517 U. S. 899, 905 (1996) (*Shaw II*); *Miller* v. *Johnson*, 515 U. S. 900, 916 (1995); *Shaw I*, 509 U. S., at 646). See also *Gaffney* v. *Cummings*, 412 U. S. 735, 753 (1973) (recognizing that "[p]olitics and political considerations are inseparable from districting and apportionment").

To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities. The "central problem" is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is "determining when political gerrymandering has gone too far." *Vieth*, 541 U. S., at 296 (plurality opinion). See *League of United Latin American Citizens* v. *Perry*, 548 U. S. 399, 420 (2006) (*LULAC*) (opinion of Kennedy, J.) (difficulty is "providing a standard for deciding how much partisan dominance is too much").

We first considered a partisan gerrymandering claim in *Gaffney* v. *Cummings* in 1973. There we rejected an equal protection challenge to Connecticut's redistricting plan, which "aimed at a rough scheme of proportional representation of the two major political parties" by "wiggl[ing] and joggl[ing] boundary lines" to create the appropriate number of safe seats for each party. 412 U. S., at 738, 752, n. 18 (internal quotation marks omitted). In upholding the State's plan, we reasoned that districting "inevitably has and is intended to have substantial political consequences." *Id.*, at 753.

Thirteen years later, in *Davis* v. *Bandemer*, we addressed a claim that Indiana Republicans had cracked and packed Democrats in violation of the Equal Protection Clause. 478 U. S. 109, 116–117 (1986) (plurality opinion). A majority of

the Court agreed that the case was justiciable, but the Court splintered over the proper standard to apply. Four Justices would have required proof of "intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." *Id.*, at 127. Two Justices would have focused on "whether the boundaries of the voting districts have been distorted deliberately and arbitrarily to achieve illegitimate ends." *Id.*, at 165 (Powell, J., concurring in part and dissenting in part). Three Justices, meanwhile, would have held that the Equal Protection Clause simply "does not supply judicially manageable standards for resolving purely political gerrymandering claims." *Id.*, at 147 (O'Connor, J., concurring in judgment). At the end of the day, there was "no 'Court' for a standard that properly should be applied in determining whether a challenged redistricting plan is an unconstitutional partisan political gerrymander." *Id.*, at 185, n. 25 (opinion of Powell, J.). In any event, the Court held that the plaintiffs had failed to show that the plan violated the Constitution.

Eighteen years later, in *Vieth*, the plaintiffs complained that Pennsylvania's legislature "ignored all traditional redistricting criteria, including the preservation of local government boundaries," in order to benefit Republican congressional candidates. 541 U. S., at 272–273 (plurality opinion) (brackets omitted). Justice Scalia wrote for a four-Justice plurality. He would have held that the plaintiffs' claims were nonjusticiable because there was no "judicially discernible and manageable standard" for deciding them. *Id.*, at 306. Justice Kennedy, concurring in the judgment, noted "the lack of comprehensive and neutral principles for drawing electoral boundaries [and] the absence of rules to limit and confine judicial intervention." *Id.*, at 306–307. He nonetheless left open the possibility that "in another case a standard might emerge." *Id.*, at 312. Four Justices dissented.

In *LULAC*, the plaintiffs challenged a mid-decade redistricting map approved by the Texas Legislature. Once again a majority of the Court could not find a justiciable standard for resolving the plaintiffs' partisan gerrymandering claims. See 548 U. S., at 414 (noting that the "disagreement over what substantive standard to apply" that was evident in *Bandemer* "persists").

As we summed up last Term in *Gill*, our "considerable efforts in *Gaffney*, *Bandemer*, *Vieth*, and *LULAC* leave unresolved whether . . . claims [of legal right] may be brought in cases involving allegations of partisan gerrymandering." 585 U. S., at 65. Two "threshold questions" remained: standing, which we addressed in *Gill*, and "whether [such] claims are justiciable." *Ibid.*

III

A

In considering whether partisan gerrymandering claims are justiciable, we are mindful of Justice Kennedy's counsel in *Vieth*: Any standard for resolving such claims must be grounded in a "limited and precise rationale" and be "clear, manageable, and politically neutral." 541 U. S., at 306–308 (opinion concurring in judgment). An important reason for those careful constraints is that, as a Justice with extensive experience in state and local politics put it, "[t]he opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States." *Bandemer*, 478 U. S., at 145 (opinion of O'Connor, J.). See *Gaffney*, 412 U. S., at 749 (observing that districting implicates "fundamental 'choices about the nature of representation' " (quoting *Burns* v. *Richardson*, 384 U. S. 73, 92 (1966))). An expansive standard requiring "the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American

political process," *Vieth*, 541 U. S., at 306 (opinion of Kennedy, J.).

As noted, the question is one of degree: How to "provid[e] a standard for deciding how much partisan dominance is too much." *LULAC*, 548 U. S., at 420 (opinion of Kennedy, J.). And it is vital in such circumstances that the Court act only in accord with especially clear standards: "With uncertain limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust." *Vieth*, 541 U. S., at 307 (opinion of Kennedy, J.). If federal courts are to "inject [themselves] into the most heated partisan issues" by adjudicating partisan gerrymandering claims, *Bandemer*, 478 U. S., at 145 (opinion of O'Connor, J.), they must be armed with a standard that can reliably differentiate unconstitutional from "constitutional political gerrymandering," *Cromartie*, 526 U. S., at 551.

B

Partisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence. Explicitly or implicitly, a districting map is alleged to be unconstitutional because it makes it too difficult for one party to translate statewide support into seats in the legislature. But such a claim is based on a "norm that does not exist" in our electoral system—"statewide elections for representatives along party lines." *Bandemer*, 478 U. S., at 159 (opinion of O'Connor, J.).

Partisan gerrymandering claims invariably sound in a desire for proportional representation. As Justice O'Connor put it, such claims are based on "a conviction that the greater the departure from proportionality, the more suspect an apportionment plan becomes." *Ibid.* "Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reappor-

tioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be." *Id.*, at 130 (plurality opinion). See *Mobile* v. *Bolden*, 446 U. S. 55, 75–76 (1980) (plurality opinion) ("The Equal Protection Clause of the Fourteenth Amendment does not require proportional representation as an imperative of political organization.").

The Founders certainly did not think proportional representation was required. For more than 50 years after ratification of the Constitution, many States elected their congressional representatives through at-large or "general ticket" elections. Such States typically sent single-party delegations to Congress. See E. Engstrom, Partisan Gerrymandering and the Construction of American Democracy 43–51 (2013). That meant that a party could garner nearly half of the vote statewide and wind up without any seats in the congressional delegation. The Whigs in Alabama suffered that fate in 1840: "their party garnered 43 percent of the statewide vote, yet did not receive a single seat." *Id.*, at 48. When Congress required single-member districts in the Apportionment Act of 1842, it was not out of a general sense of fairness, but instead a (mis)calculation by the Whigs that such a change would improve their electoral prospects. *Id.*, at 43–44.

Unable to claim that the Constitution requires proportional representation outright, plaintiffs inevitably ask the courts to make their own political judgment about how much representation particular political parties *deserve*—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end. But federal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so. As Justice Scalia put it for the plurality in *Vieth*:

> "'Fairness' does not seem to us a judicially manageable standard. . . . Some criterion more solid and more

> demonstrably met than that seems to us necessary to enable the state legislatures to discern the limits of their districting discretion, to meaningfully constrain the discretion of the courts, and to win public acceptance for the courts' intrusion into a process that is the very foundation of democratic decisionmaking." 541 U. S., at 291.

The initial difficulty in settling on a "clear, manageable and politically neutral" test for fairness is that it is not even clear what fairness looks like in this context. There is a large measure of "unfairness" in any winner-take-all system. Fairness may mean a greater number of competitive districts. Such a claim seeks to undo packing and cracking so that supporters of the disadvantaged party have a better shot at electing their preferred candidates. But making as many districts as possible more competitive could be a recipe for disaster for the disadvantaged party. As Justice White has pointed out, "[i]f all or most of the districts are competitive . . . even a narrow statewide preference for either party would produce an overwhelming majority for the winning party in the state legislature." *Bandemer*, 478 U. S., at 130 (plurality opinion).

On the other hand, perhaps the ultimate objective of a "fairer" share of seats in the congressional delegation is most readily achieved by yielding to the gravitational pull of proportionality and engaging in cracking and packing, to ensure each party its "appropriate" share of "safe" seats. See *id.*, at 130–131 ("To draw district lines to maximize the representation of each major party would require creating as many safe seats for each party as the demographic and predicted political characteristics of the State would permit."); *Gaffney*, 412 U. S., at 735–738. Such an approach, however, comes at the expense of competitive districts and of individuals in districts allocated to the opposing party.

Or perhaps fairness should be measured by adherence to "traditional" districting criteria, such as maintaining political subdivisions, keeping communities of interest together,

and protecting incumbents. See Brief for Bipartisan Group of Current and Former Members of the House of Representatives as *Amici Curiae*; Brief for Professor Wesley Pegden et al. as *Amici Curiae* in No. 18–422. But protecting incumbents, for example, enshrines a particular partisan distribution. And the "natural political geography" of a State—such as the fact that urban electoral districts are often dominated by one political party—can itself lead to inherently packed districts. As Justice Kennedy has explained, traditional criteria such as compactness and contiguity "cannot promise political neutrality when used as the basis for relief. Instead, it seems, a decision under these standards would unavoidably have significant political effect, whether intended or not." *Vieth*, 541 U. S., at 308–309 (opinion concurring in judgment). See *id.*, at 298 (plurality opinion) ("[P]acking and cracking, whether intentional or no, are quite consistent with adherence to compactness and respect for political subdivision lines").

Deciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral. Any judicial decision on what is "fair" in this context would be an "unmoored determination" of the sort characteristic of a political question beyond the competence of the federal courts. *Zivotofsky* v. *Clinton*, 566 U. S. 189, 196 (2012).

And it is only after determining how to define fairness that you can even begin to answer the determinative question: "How much is too much?" At what point does permissible partisanship become unconstitutional? If compliance with traditional districting criteria is the fairness touchstone, for example, how much deviation from those criteria is constitutionally acceptable and how should mapdrawers prioritize competing criteria? Should a court "reverse gerrymander"

other parts of a State to counteract "natural" gerrymandering caused, for example, by the urban concentration of one party? If a districting plan protected half of the incumbents but redistricted the rest into head to head races, would that be constitutional? A court would have to rank the relative importance of those traditional criteria and weigh how much deviation from each to allow.

If a court instead focused on the respective number of seats in the legislature, it would have to decide the ideal number of seats for each party and determine at what point deviation from that balance went too far. If a 5–3 allocation corresponds most closely to statewide vote totals, is a 6–2 allocation permissible, given that legislatures have the authority to engage in a certain degree of partisan gerrymandering? Which seats should be packed and which cracked? Or if the goal is as many competitive districts as possible, how close does the split need to be for the district to be considered competitive? Presumably not all districts could qualify, so how to choose? Even assuming the court knew which version of fairness to be looking for, there are no discernible and manageable standards for deciding whether there has been a violation. The questions are "unguided and ill suited to the development of judicial standards," *Vieth*, 541 U. S., at 296 (plurality opinion), and "results from one gerrymandering case to the next would likely be disparate and inconsistent," *id.*, at 308 (opinion of Kennedy, J.).

Appellees contend that if we can adjudicate one-person, one-vote claims, we can also assess partisan gerrymandering claims. But the one-person, one-vote rule is relatively easy to administer as a matter of math. The same cannot be said of partisan gerrymandering claims, because the Constitution supplies no objective measure for assessing whether a districting map treats a political party fairly. It hardly follows from the principle that each person must have an equal say in the election of representatives that a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support.

More fundamentally, "vote dilution" in the one-person, one-vote cases refers to the idea that each vote must carry equal weight. In other words, each representative must be accountable to (approximately) the same number of constituents. That requirement does not extend to political parties. It does not mean that each party must be influential in proportion to its number of supporters. As we stated unanimously in *Gill*, "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." 585 U. S., at 72. See also *Bandemer*, 478 U. S., at 150 (opinion of O'Connor, J.) ("[T]he Court has not accepted the argument that an 'asserted entitlement to group representation' . . . can be traced to the one person, one vote principle." (quoting *Bolden*, 446 U. S., at 77)).*

Nor do our racial gerrymandering cases provide an appropriate standard for assessing partisan gerrymandering. "[N]othing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny. In fact, our country's long and persistent history of racial discrimination in voting—as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race—would seem to compel the opposite conclusion." *Shaw I*, 509 U. S., at 650 (citation omitted). Unlike partisan gerrymandering claims, a racial gerrymandering claim does not ask for a fair share of political power and influence, with all the justiciability conundrums that entails. It asks instead for the elimination of a racial classification.

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*The dissent's observation that the Framers viewed political parties "with deep suspicion, as fomenters of factionalism and symptoms of disease in the body politic," *post*, at 728, n. 1 (opinion of KAGAN, J.) (internal quotation marks and alteration omitted), is exactly right. Its inference from that fact is exactly wrong. The Framers would have been amazed at a constitutional theory that guarantees a certain degree of representation to political parties.

A partisan gerrymandering claim cannot ask for the elimination of partisanship.

IV

Appellees and the dissent propose a number of "tests" for evaluating partisan gerrymandering claims, but none meets the need for a limited and precise standard that is judicially discernible and manageable. And none provides a solid grounding for judges to take the extraordinary step of reallocating power and influence between political parties.

A

The *Common Cause* District Court concluded that all but one of the districts in North Carolina's 2016 Plan violated the Equal Protection Clause by intentionally diluting the voting strength of Democrats. 318 F. Supp. 3d, at 923. In reaching that result the court first required the plaintiffs to prove "that a legislative mapdrawer's predominant purpose in drawing the lines of a particular district was to 'subordinate adherents of one political party and entrench a rival party in power.'" *Id.*, at 865 (quoting *Arizona State Legislature* v. *Arizona Independent Redistricting Comm'n*, 576 U. S. 787, 791 (2015)). The District Court next required a showing "that the dilution of the votes of supporters of a disfavored party in a particular district—by virtue of cracking or packing—is likely to persist in subsequent elections such that an elected representative from the favored party in the district will not feel a need to be responsive to constituents who support the disfavored party." 318 F. Supp. 3d, at 867. Finally, after a prima facie showing of partisan vote dilution, the District Court shifted the burden to the defendants to prove that the discriminatory effects are "attributable to a legitimate state interest or other neutral explanation." *Id.*, at 868.

The District Court's "predominant intent" prong is borrowed from the racial gerrymandering context. In racial gerrymandering cases, we rely on a "predominant intent"

inquiry to determine whether race was, in fact, the reason particular district boundaries were drawn the way they were. If district lines were drawn for the purpose of separating racial groups, then they are subject to strict scrutiny because "race-based decisionmaking is inherently suspect." *Miller*, 515 U. S., at 915. See *Bush*, 517 U. S., at 959 (principal opinion). But determining that lines were drawn on the basis of partisanship does not indicate that the districting was improper. A permissible intent—securing partisan advantage—does not become constitutionally impermissible, like racial discrimination, when that permissible intent "predominates."

The District Court tried to limit the reach of its test by requiring plaintiffs to show, in addition to predominant partisan intent, that vote dilution "is likely to persist" to such a degree that the elected representative will feel free to ignore the concerns of the supporters of the minority party. 318 F. Supp. 3d, at 867. But "[t]o allow district courts to strike down apportionment plans on the basis of their prognostications as to the outcome of future elections . . . invites 'findings' on matters as to which neither judges nor anyone else can have any confidence." *Bandemer*, 478 U. S., at 160 (opinion of O'Connor, J.). See *LULAC*, 548 U. S., at 420 (opinion of Kennedy, J.) ("[W]e are wary of adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs."). And the test adopted by the *Common Cause* court requires a far more nuanced prediction than simply who would prevail in future political contests. Judges must forecast with unspecified certainty whether a prospective winner will have a margin of victory sufficient to permit him to ignore the supporters of his defeated opponent (whoever that may turn out to be). Judges not only have to pick the winner—they have to beat the point spread.

Appellees assure us that "the persistence of a party's advantage may be shown through sensitivity testing: prob-

ing how a plan would perform under other plausible electoral conditions." Brief for Appellees League of Women Voters of North Carolina et al. in No. 18–422, p. 55. See also 318 F. Supp. 3d, at 885. Experience proves that accurately predicting electoral outcomes is not so simple, either because the plans are based on flawed assumptions about voter preferences and behavior or because demographics and priorities change over time. In our two leading partisan gerrymandering cases themselves, the predictions of durability proved to be dramatically wrong. In 1981, Republicans controlled both Houses of the Indiana Legislature as well as the governorship. Democrats challenged the state legislature districting map enacted by the Republicans. This Court in *Bandemer* rejected that challenge, and just months later the Democrats increased their share of House seats in the 1986 elections. Two years later the House was split 50–50 between Democrats and Republicans, and the Democrats took control of the chamber in 1990. Democrats also challenged the Pennsylvania congressional districting plan at issue in *Vieth*. Two years after that challenge failed, they gained four seats in the delegation, going from a 12–7 minority to an 11–8 majority. At the next election, they flipped another Republican seat.

Even the most sophisticated districting maps cannot reliably account for some of the reasons voters prefer one candidate over another, or why their preferences may change. Voters elect individual candidates in individual districts, and their selections depend on the issues that matter to them, the quality of the candidates, the tone of the candidates' campaigns, the performance of an incumbent, national events or local issues that drive voter turnout, and other considerations. Many voters split their tickets. Others never register with a political party, and vote for candidates from both major parties at different points during their lifetimes. For all of those reasons, asking judges to predict how a particular districting map will perform in future elections risks basing

constitutional holdings on unstable ground outside judicial expertise.

It is hard to see what the District Court's third prong—providing the defendant an opportunity to show that the discriminatory effects were due to a "legitimate redistricting objective"—adds to the inquiry. 318 F. Supp. 3d, at 861. The first prong already requires the plaintiff to prove that partisan advantage predominates. Asking whether a legitimate purpose other than partisanship was the motivation for a particular districting map just restates the question.

B

The District Courts also found partisan gerrymandering claims justiciable under the First Amendment, coalescing around a basic three-part test: proof of intent to burden individuals based on their voting history or party affiliation; an actual burden on political speech or associational rights; and a causal link between the invidious intent and actual burden. See *Common Cause*, 318 F. Supp. 3d, at 929; *Benisek*, 348 F. Supp. 3d, at 522. Both District Courts concluded that the districting plans at issue violated the plaintiffs' First Amendment right to association. The District Court in North Carolina relied on testimony that, after the 2016 Plan was put in place, the plaintiffs faced "difficulty raising money, attracting candidates, and mobilizing voters to support the political causes and issues such Plaintiffs sought to advance." 318 F. Supp. 3d, at 932. Similarly, the District Court in Maryland examined testimony that "revealed a lack of enthusiasm, indifference to voting, a sense of disenfranchisement, a sense of disconnection, and confusion," and concluded that Republicans in the Sixth District "were burdened in fundraising, attracting volunteers, campaigning, and generating interest in voting." 348 F. Supp. 3d, at 523–524.

To begin, there are no restrictions on speech, association, or any other First Amendment activities in the districting plans at issue. The plaintiffs are free to engage in those

activities no matter what the effect of a plan may be on their district.

The plaintiffs' argument is that partisanship in districting should be regarded as simple discrimination against supporters of the opposing party on the basis of political viewpoint. Under that theory, any level of partisanship in districting would constitute an infringement of their First Amendment rights. But as the Court has explained, "[i]t would be idle . . . to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it." *Gaffney*, 412 U. S., at 752. The First Amendment test simply describes the act of districting for partisan advantage. It provides no standard for determining when partisan activity goes too far.

As for actual burden, the slight anecdotal evidence found sufficient by the District Courts in these cases shows that this too is not a serious standard for separating constitutional from unconstitutional partisan gerrymandering. The District Courts relied on testimony about difficulty drumming up volunteers and enthusiasm. How much of a decline in voter engagement is enough to constitute a First Amendment burden? How many door knocks must go unanswered? How many petitions unsigned? How many calls for volunteers unheeded? The *Common Cause* District Court held that a partisan gerrymander places an unconstitutional burden on speech if it has more than a "*de minimis*" "chilling effect or adverse impact" on any First Amendment activity. 318 F. Supp. 3d, at 930. The court went on to rule that there would be an adverse effect "even if the speech of [the plaintiffs] was not *in fact* chilled"; it was enough that the districting plan "makes it easier for supporters of Republican candidates to translate their votes into seats," thereby "enhanc[ing] the[ir] relative voice." *Id.*, at 933 (internal quotation marks omitted).

These cases involve blatant examples of partisanship driving districting decisions. But the First Amendment

analysis below offers no "clear" and "manageable" way of distinguishing permissible from impermissible partisan motivation. The *Common Cause* court embraced that conclusion, observing that "a judicially manageable framework for evaluating partisan gerrymandering claims need not distinguish an 'acceptable' level of partisan gerrymandering from 'excessive' partisan gerrymandering" because "the Constitution does not authorize state redistricting bodies to engage in such partisan gerrymandering." *Id.*, at 851. The decisions below prove the prediction of the *Vieth* plurality that "a First Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in districting," 541 U. S., at 294, contrary to our established precedent.

C

The dissent proposes using a State's own districting criteria as a neutral baseline from which to measure how extreme a partisan gerrymander is. The dissent would have us line up all the possible maps drawn using those criteria according to the partisan distribution they would produce. Distance from the "median" map would indicate whether a particular districting plan harms supporters of one party to an unconstitutional extent. *Post*, at 737–738, 743–744 (opinion of KAGAN, J.).

As an initial matter, it does not make sense to use criteria that will vary from State to State and year to year as the baseline for determining whether a gerrymander violates the Federal Constitution. The degree of partisan advantage that the Constitution tolerates should not turn on criteria offered by the gerrymanderers themselves. It is easy to imagine how different criteria could move the median map toward different partisan distributions. As a result, the same map could be constitutional or not depending solely on what the mapmakers said they set out to do. That possibility illustrates that the dissent's proposed constitutional test is indeterminate and arbitrary.

Even if we were to accept the dissent's proposed baseline, it would return us to "the original unanswerable question (How much political motivation and effect is too much?)." *Vieth*, 541 U. S., at 296–297 (plurality opinion). Would twenty percent away from the median map be okay? Forty percent? Sixty percent? Why or why not? (We appreciate that the dissent finds all the unanswerable questions annoying, see *post*, at 741, but it seems a useful way to make the point.) The dissent's answer says it all: "This much is too much." *Post*, at 744–745. That is not even trying to articulate a standard or rule.

The dissent argues that there are other instances in law where matters of degree are left to the courts. See *post*, at 745–746. True enough. But those instances typically involve constitutional or statutory provisions or common law confining and guiding the exercise of judicial discretion. For example, the dissent cites the need to determine "substantial anticompetitive effect[s]" in antitrust law. *Ibid.* (citing *Ohio* v. *American Express Co.*, 585 U. S. 529 (2018)). That language, however, grew out of the Sherman Act, understood from the beginning to have its "origin in the common law" and to be "familiar in the law of this country prior to and at the time of the adoption of the [A]ct." *Standard Oil Co. of N. J.* v. *United States*, 221 U. S. 1, 51 (1911). Judges began with a significant body of law about what constituted a legal violation. In other cases, the pertinent statutory terms draw meaning from related provisions or statutory context. Here, on the other hand, the Constitution provides no basis whatever to guide the exercise of judicial discretion. Common experience gives content to terms such as "substantial risk" or "substantial harm," but the same cannot be said of substantial deviation from a median map. There is no way to tell whether the prohibited deviation from that map should kick in at 25 percent or 75 percent or some other point. The only provision in the Constitution that specifically addresses the matter assigns it to the political branches. See Art. I, § 4, cl. 1.

D

The North Carolina District Court further concluded that the 2016 Plan violated the Elections Clause and Article I, § 2. We are unconvinced by that novel approach.

Article I, § 2, provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States." The Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." Art. I, § 4, cl. 1.

The District Court concluded that the 2016 Plan exceeded the North Carolina General Assembly's Elections Clause authority because, among other reasons, "the Elections Clause did not empower State legislatures to disfavor the interests of supporters of a particular candidate or party in drawing congressional districts." 318 F. Supp. 3d, at 937. The court further held that partisan gerrymandering infringes the right of "the People" to select their representatives. *Id.*, at 938–940. Before the District Court's decision, no court had reached a similar conclusion. In fact, the plurality in *Vieth* concluded—without objection from any other Justice—that neither § 2 nor § 4 of Article I "provides a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting." 541 U. S., at 305.

The District Court nevertheless asserted that partisan gerrymanders violate "the core principle of [our] republican government" preserved in Article I, § 2, "namely, that the voters should choose their representatives, not the other way around." 318 F. Supp. 3d, at 940 (quoting *Arizona State Legislature*, 576 U. S., at 824; internal quotation marks omitted). That seems like an objection more properly grounded in the Guarantee Clause of Article IV, § 4, which "guarantee[s] to every State in [the] Union

a Republican Form of Government." This Court has several times concluded, however, that the Guarantee Clause does not provide the basis for a justiciable claim. See, *e. g.*, *Pacific States Telephone & Telegraph Co.* v. *Oregon*, 223 U. S. 118 (1912).

V

Excessive partisanship in districting leads to results that reasonably seem unjust. But the fact that such gerrymandering is "incompatible with democratic principles," *Arizona State Legislature*, 576 U. S., at 791 (brackets omitted), does not mean that the solution lies with the Federal Judiciary. We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions. "[J]udicial action must be governed by *standard*, by *rule*," and must be "principled, rational, and based upon reasoned distinctions" found in the Constitution or laws. *Vieth*, 541 U. S., at 278, 279 (plurality opinion). Judicial review of partisan gerrymandering does not meet those basic requirements.

Today the dissent essentially embraces the argument that the Court unanimously rejected in *Gill*: "this Court *can* address the problem of partisan gerrymandering because it *must*." 585 U. S., at 64. That is not the test of our authority under the Constitution; that document instead "confines the federal courts to a properly judicial role." *Town of Chester* v. *Laroe Estates, Inc.*, 581 U. S. 433, 438 (2017).

What appellees and the dissent seek is an unprecedented expansion of judicial power. We have never struck down a partisan gerrymander as unconstitutional—despite various requests over the past 45 years. The expansion of judicial authority would not be into just any area of controversy, but into one of the most intensely partisan aspects of American

political life. That intervention would be unlimited in scope and duration—it would recur over and over again around the country with each new round of districting, for state as well as federal representatives. Consideration of the impact of today's ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role. See *post*, at 750–751.

Our conclusion does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void. The States, for example, are actively addressing the issue on a number of fronts. In 2015, the Supreme Court of Florida struck down that State's congressional districting plan as a violation of the Fair Districts Amendment to the Florida Constitution. *League of Women Voters of Florida* v. *Detzner*, 172 So. 3d 363 (2015). The dissent wonders why we can't do the same. See *post*, at 749. The answer is that there is no "Fair Districts Amendment" to the Federal Constitution. Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply. (We do not understand how the dissent can maintain that a provision saying that no districting plan "shall be drawn with the intent to favor or disfavor a political party" provides little guidance on the question. See *ibid.*, n. 6.) Indeed, numerous other States are restricting partisan considerations in districting through legislation. One way they are doing so is by placing power to draw electoral districts in the hands of independent commissions. For example, in November 2018, voters in Colorado and Michigan approved constitutional amendments creating multimember commissions that will be responsible in whole or in part for creating and approving district maps for congressional and state legislative districts. See Colo. Const., Art. V, §§44, 46; Mich. Const., Art. IV, §6. Missouri is trying a different tack. Voters there overwhelmingly approved the creation of a new

position—state demographer—to draw state legislative district lines. Mo. Const., Art. III, § 3.

Other States have mandated at least some of the traditional districting criteria for their mapmakers. Some have outright prohibited partisan favoritism in redistricting. See Fla. Const., Art. III, § 20(a) ("No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent."); Mo. Const., Art. III, § 3 ("Districts shall be designed in a manner that achieves both partisan fairness and, secondarily, competitiveness. 'Partisan fairness' means that parties shall be able to translate their popular support into legislative representation with approximately equal efficiency."); Iowa Code § 42.4(5) (2016) ("No district shall be drawn for the purpose of favoring a political party, incumbent legislator or member of Congress, or other person or group."); Del. Code Ann., Tit. 29, § 804 (2017) (providing that in determining district boundaries for the state legislature, no district shall "be created so as to unduly favor any person or political party").

As noted, the Framers gave Congress the power to do something about partisan gerrymandering in the Elections Clause. The first bill introduced in the 116th Congress would require States to create 15-member independent commissions to draw congressional districts and would establish certain redistricting criteria, including protection for communities of interest, and ban partisan gerrymandering. H. R. 1, 116th Cong., 1st Sess., §§ 2401, 2411 (2019).

Dozens of other bills have been introduced to limit reliance on political considerations in redistricting. In 2010, H. R. 6250 would have required States to follow standards of compactness, contiguity, and respect for political subdivisions in redistricting. It also would have prohibited the establishment of congressional districts "with the major purpose of diluting the voting strength of any person, or group, including any political party," except when necessary to comply with the Voting Rights Act of 1965. H. R. 6250, 111th Cong., 2d Sess., § 2 (referred to Committee).

Another example is the Fairness and Independence in Redistricting Act, which was introduced in 2005 and has been reintroduced in every Congress since. That bill would require every State to establish an independent commission to adopt redistricting plans. The bill also set forth criteria for the independent commissions to use, such as compactness, contiguity, and population equality. It would prohibit consideration of voting history, political party affiliation, or incumbent Representative's residence. H. R. 2642, 109th Cong., 1st Sess., § 4 (referred to Committee).

We express no view on any of these pending proposals. We simply note that the avenue for reform established by the Framers, and used by Congress in the past, remains open.

* * *

No one can accuse this Court of having a crabbed view of the reach of its competence. But we have no commission to allocate political power and influence in the absence of a constitutional directive or legal standards to guide us in the exercise of such authority. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 1 Cranch, at 177. In this rare circumstance, that means our duty is to say "this is not law."

The judgments of the United States District Court for the Middle District of North Carolina and the United States District Court for the District of Maryland are vacated, and the cases are remanded with instructions to dismiss for lack of jurisdiction.

It is so ordered.

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

For the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities.

And not just any constitutional violation. The partisan gerrymanders in these cases deprived citizens of the most

fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives. In so doing, the partisan gerrymanders here debased and dishonored our democracy, turning upside-down the core American idea that all governmental power derives from the people. These gerrymanders enabled politicians to entrench themselves in office as against voters' preferences. They promoted partisanship above respect for the popular will. They encouraged a politics of polarization and dysfunction. If left unchecked, gerrymanders like the ones here may irreparably damage our system of government.

And checking them is *not* beyond the courts. The majority's abdication comes just when courts across the country, including those below, have coalesced around manageable judicial standards to resolve partisan gerrymandering claims. Those standards satisfy the majority's own benchmarks. They do not require—indeed, they do not permit—courts to rely on their own ideas of electoral fairness, whether proportional representation or any other. And they limit courts to correcting only egregious gerrymanders, so judges do not become omnipresent players in the political process. But yes, the standards used here do allow—as well they should—judicial intervention in the worst-of-the-worst cases of democratic subversion, causing blatant constitutional harms. In other words, they allow courts to undo partisan gerrymanders of the kind we face today from North Carolina and Maryland. In giving such gerrymanders a pass from judicial review, the majority goes tragically wrong.

I

Maybe the majority errs in these cases because it pays so little attention to the constitutional harms at their core. After dutifully reciting each case's facts, the majority leaves them forever behind, instead immersing itself in everything that could conceivably go amiss if courts became involved.

So it is necessary to fill in the gaps. To recount exactly what politicians in North Carolina and Maryland did to entrench their parties in political office, whatever the electorate might think. And to elaborate on the constitutional injury those politicians wreaked, to our democratic system and to individuals' rights. All that will help in considering whether courts confronting partisan gerrymandering claims are really so hamstrung—so unable to carry out their constitutional duties—as the majority thinks.

A

The plaintiffs here challenge two congressional districting plans—one adopted by Republicans in North Carolina and the other by Democrats in Maryland—as unconstitutional partisan gerrymanders. As I relate what happened in those two States, ask yourself: Is this how American democracy is supposed to work?

Start with North Carolina. After the 2010 census, the North Carolina General Assembly, with Republican majorities in both its House and its Senate, enacted a new congressional districting plan. That plan governed the two next national elections. In 2012, Republican candidates won 9 of the State's 13 seats in the U. S. House of Representatives, although they received only 49% of the statewide vote. In 2014, Republican candidates increased their total to 10 of the 13 seats, this time based on 55% of the vote. Soon afterward, a District Court struck down two districts in the plan as unconstitutional racial gerrymanders. See *Harris* v. *McCrory*, 159 F. Supp. 3d 600 (MDNC 2016), aff'd *sub nom. Cooper* v. *Harris*, 581 U. S. 285 (2017). The General Assembly, with both chambers still controlled by Republicans, went back to the drawing board to craft the needed remedial state map. And here is how the process unfolded:

- The Republican co-chairs of the Assembly's redistricting committee, Rep. David Lewis and Sen. Robert Rucho,

instructed Dr. Thomas Hofeller, a Republican districting specialist, to create a new map that would maintain the 10–3 composition of the State's congressional delegation come what might. Using sophisticated technological tools and precinct-level election results selected to predict voting behavior, Hofeller drew district lines to minimize Democrats' voting strength and ensure the election of 10 Republican Congressmen. See *Common Cause* v. *Rucho*, 318 F. Supp. 3d 777, 805–806 (MDNC 2018).

- Lewis then presented for the redistricting committee's (retroactive) approval a list of the criteria Hofeller had employed—including one labeled "Partisan Advantage." That criterion, endorsed by a party-line vote, stated that the committee would make all "reasonable efforts to construct districts" to "maintain the current [10–3] partisan makeup" of the State's congressional delegation. *Id.*, at 807.
- Lewis explained the Partisan Advantage criterion to legislators as follows: We are "draw[ing] the maps to give a partisan advantage to 10 Republicans and 3 Democrats because [I] d[o] not believe it['s] possible to draw a map with 11 Republicans and 2 Democrats." *Id.*, at 808 (internal quotation marks omitted).
- The committee and the General Assembly later enacted, again on a party-line vote, the map Hofeller had drawn. See *id.*, at 809.
- Lewis announced: "I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country." *Ibid.* (internal quotation marks omitted).

You might think that judgment best left to the American people. But give Lewis credit for this much: The map has worked just as he planned and predicted. In 2016, Republican congressional candidates won 10 of North Carolina's 13 seats, with 53% of the statewide vote. Two years later, Re-

publican candidates won 9 of 12 seats though they received only 50% of the vote. (The 13th seat has not yet been filled because fraud tainted the initial election.)

Events in Maryland make for a similarly grisly tale. For 50 years, Maryland's 8-person congressional delegation typically consisted of 2 or 3 Republicans and 5 or 6 Democrats. After the 2000 districting, for example, the First and Sixth Districts reliably elected Republicans, and the other districts as reliably elected Democrats. See R. Cohen & J. Barnes, Almanac of American Politics 2016, p. 836 (2015). But in the 2010 districting cycle, the State's Democratic leaders, who controlled the governorship and both houses of the General Assembly, decided to press their advantage.

- Governor Martin O'Malley, who oversaw the process, decided (in his own later words) "to create a map that was more favorable for Democrats over the next ten years." Because flipping the First District was geographically next-to-impossible, "a decision was made to go for the Sixth." *Benisek* v. *Lamone*, 348 F. Supp. 3d 493, 502 (Md. 2018) (quoting O'Malley; emphasis deleted).
- O'Malley appointed an advisory committee as the public face of his effort, while asking Congressman Steny Hoyer, a self-described "serial gerrymanderer," to hire and direct a mapmaker. *Ibid.* Hoyer retained Eric Hawkins, an analyst at a political consulting firm providing services to Democrats. See *id.*, at 502–503.
- Hawkins received only two instructions: to ensure that the new map produced 7 reliable Democratic seats, and to protect all Democratic incumbents. See *id.*, at 503.
- Using similar technologies and election data as Hofeller, Hawkins produced a map to those specifications. Although new census figures required removing only 10,000 residents from the Sixth District, Hawkins proposed a large-scale population transfer. The map moved about 360,000 voters out of the district and an-

other 350,000 in. That swap decreased the number of registered Republicans in the district by over 66,000 and increased the number of registered Democrats by about 24,000, all to produce a safe Democratic district. See *id.*, at 499, 501.

- After the advisory committee adopted the map on a party-line vote, State Senate President Thomas Miller briefed the General Assembly's Democratic caucuses about the new map's aims. Miller told his colleagues that the map would give "Democrats a real opportunity to pick up a seventh seat in the delegation" and that "[i]n the face of Republican gains in redistricting in other states[,] we have a serious obligation to create this opportunity." *Id.*, at 506 (internal quotation marks omitted).
- The General Assembly adopted the plan on a party-line vote. See *id.*, at 506.

Maryland's Democrats proved no less successful than North Carolina's Republicans in devising a voter-proof map. In the four elections that followed (from 2012 through 2018), Democrats have never received more than 65% of the statewide congressional vote. Yet in each of those elections, Democrats have won (you guessed it) 7 of 8 House seats—including the once-reliably-Republican Sixth District.

B

Now back to the question I asked before: Is that how American democracy is supposed to work? I have yet to meet the person who thinks so.

"Governments," the Declaration of Independence states, "deriv[e] their just powers from the consent of the governed." The Constitution begins: "We the People of the United States." The Gettysburg Address (almost) ends: "[G]overnment of the people, by the people, for the people." If there is a single idea that made our Nation (and that our

Nation commended to the world), it is this one: The people are sovereign. The "power," James Madison wrote, "is in the people over the Government, and not in the Government over the people." 4 Annals of Cong. 934 (1794).

Free and fair and periodic elections are the key to that vision. The people get to choose their representatives. And then they get to decide, at regular intervals, whether to keep them. Madison again: "[R]epublican liberty" demands "not only, that all power should be derived from the people; but, that those entrusted with it should be kept in dependence on the people." 2 The Federalist No. 37, p. 4 (J. & A. McLean eds. 1788). Members of the House of Representatives, in particular, are supposed to "recollect[ ] [that] dependence" every day. *Id.*, No. 57, at 155. To retain an "intimate sympathy with the people," they must be "compelled to anticipate the moment" when their "exercise of [power] is to be reviewed." *Id.*, Nos. 52, 57, at 124, 155. Election day—next year, and two years later, and two years after that—is what links the people to their representatives, and gives the people their sovereign power. That day is the foundation of democratic governance.

And partisan gerrymandering can make it meaningless. At its most extreme—as in North Carolina and Maryland—the practice amounts to "rigging elections." *Vieth* v. *Jubelirer*, 541 U. S. 267, 317 (2004) (Kennedy, J., concurring in judgment) (internal quotation marks omitted). By drawing districts to maximize the power of some voters and minimize the power of others, a party in office at the right time can entrench itself there for a decade or more, no matter what the voters would prefer. Just ask the people of North Carolina and Maryland. The "core principle of republican government," this Court has recognized, is "that the voters should choose their representatives, not the other way around." *Arizona State Legislature* v. *Arizona Independent Redistricting Comm'n*, 576 U. S. 787, 824 (2015) (internal quotation marks omitted). Partisan gerrymandering turns

it the other way around. By that mechanism, politicians can cherry-pick voters to ensure their reelection. And the power becomes, as Madison put it, "in the Government over the people." 4 Annals of Cong. 934.

The majority disputes none of this. I think it important to underscore that fact: The majority disputes none of what I have said (or will say) about how gerrymanders undermine democracy. Indeed, the majority concedes (really, how could it not?) that gerrymandering is "incompatible with democratic principles." *Ante,* at 718 (quoting *Arizona State Legislature*, 576 U. S., at 791). And therefore what? That recognition would seem to demand a response. The majority offers two ideas that might qualify as such. One is that the political process can deal with the problem—a proposition so dubious on its face that I feel secure in delaying my answer for some time. See *ante,* at 719–721*; infra,* at 748–749. The other is that political gerrymanders have always been with us. See *ante,* at 696, 712. To its credit, the majority does not frame that point as an originalist constitutional argument. After all (as the majority rightly notes), racial and residential gerrymanders were also once with us, but the Court has done something about that fact. See *ante,* at 699.[1] The majority's idea instead seems to be that if we have lived with partisan gerrymanders so long, we will survive.

That complacency has no cause. Yes, partisan gerrymandering goes back to the Republic's earliest days. (As does vociferous opposition to it.) But big data and modern technology—of just the kind that the mapmakers in North Carolina and Maryland used—make today's gerrymandering altogether different from the crude linedrawing of the past.

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[1] And even putting that aside, any originalist argument would have to deal with an inconvenient fact. The Framers originally viewed political parties themselves (let alone their most partisan actions) with deep suspicion, as fomenters of factionalism and "symptom[s] of disease in the body politic." G. Wood, Empire of Liberty: A History of the Early Republic, 1789–1815, p. 140 (2009).

Old-time efforts, based on little more than guesses, sometimes led to so-called dummymanders—gerrymanders that went spectacularly wrong. Not likely in today's world. Mapmakers now have access to more granular data about party preference and voting behavior than ever before. County-level voting data has given way to precinct-level or city-block-level data; and increasingly, mapmakers avail themselves of data sets providing wide-ranging information about even individual voters. See Brief for Political Science Professors as *Amici Curiae* 20–22. Just as important, advancements in computing technology have enabled mapmakers to put that information to use with unprecedented efficiency and precision. See *id.*, at 22–25. While bygone mapmakers may have drafted three or four alternative districting plans, today's mapmakers can generate thousands of possibilities at the touch of a key—and then choose the one giving their party maximum advantage (usually while still meeting traditional districting requirements). The effect is to make gerrymanders far more effective and durable than before, insulating politicians against all but the most titanic shifts in the political tides. These are not your grandfather's—let alone the Framers'—gerrymanders.

The proof is in the 2010 pudding. That redistricting cycle produced some of the most extreme partisan gerrymanders in this country's history. I've already recounted the results from North Carolina and Maryland, and you'll hear even more about those. See *supra*, at 723–726; *infra*, at 738–740. But the voters in those States were not the only ones to fall prey to such districting perversions. Take Pennsylvania. In the three congressional elections occurring under the State's original districting plan (before the State Supreme Court struck it down), Democrats received between 45% and 51% of the statewide vote, but won only 5 of 18 House seats. See *League of Women Voters* v. *Commonwealth*, 645 Pa. 1, 35–36, 178 A. 3d 737, 764 (2018). Or go next door to Ohio. There, in four congressional elections, Democrats tallied between

39% and 47% of the statewide vote, but never won more than 4 of 16 House seats. See *Ohio A. Philip Randolph Inst.* v. *Householder*, 373 F. Supp. 3d 978, 1074 (SD Ohio 2019). (Nor is there any reason to think that the results in those States stemmed from political geography or non-partisan districting criteria, rather than from partisan manipulation. See *infra*, at 734, 749.) And gerrymanders will only get worse (or depending on your perspective, better) as time goes on—as data becomes ever more fine-grained and data analysis techniques continue to improve. What was possible with paper and pen—or even with Windows 95—doesn't hold a candle (or an LED bulb?) to what will become possible with developments like machine learning. And someplace along this road, "we the people" become sovereign no longer.

C

Partisan gerrymandering of the kind before us not only subverts democracy (as if that weren't bad enough). It violates individuals' constitutional rights as well. That statement is not the lonesome cry of a dissenting Justice. This Court has recognized extreme partisan gerrymandering as such a violation for many years.

Partisan gerrymandering operates through vote dilution—the devaluation of one citizen's vote as compared to others. A mapmaker draws district lines to "pack" and "crack" voters likely to support the disfavored party. See generally *Gill* v. *Whitford*, 585 U. S. 48, 66–68 (2018). He packs supermajorities of those voters into a relatively few districts, in numbers far greater than needed for their preferred candidates to prevail. Then he cracks the rest across many more districts, spreading them so thin that their candidates will not be able to win. Whether the person is packed or cracked, his vote carries less weight—has less consequence—than it would under a neutrally drawn (nonpartisan) map. See *id.*, at 76 (KAGAN, J., concurring). In short, the mapmaker has made some votes count for less, because they are likely to go for the other party.

That practice implicates the Fourteenth Amendment's Equal Protection Clause. The Fourteenth Amendment, we long ago recognized, "guarantees the opportunity for equal participation by all voters in the election" of legislators. *Reynolds* v. *Sims*, 377 U. S. 533, 566 (1964). And that opportunity "can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.*, at 555. Based on that principle, this Court in its one-person-one-vote decisions prohibited creating districts with significantly different populations. A State could not, we explained, thus "dilut[e] the weight of votes because of place of residence." *Id.*, at 566. The constitutional injury in a partisan gerrymandering case is much the same, except that the dilution is based on party affiliation. In such a case, too, the districters have set out to reduce the weight of certain citizens' votes, and thereby deprive them of their capacity to "full[y] and effective[ly] participat[e] in the political process[ ]." *Id.*, at 565. As Justice Kennedy (in a controlling opinion) once hypothesized: If districters declared that they were drawing a map "so as most to burden [the votes of] Party X's" supporters, it would violate the Equal Protection Clause. *Vieth*, 541 U. S., at 312. For (in the language of the one-person-one-vote decisions) it would infringe those voters' rights to "equal [electoral] participation." *Reynolds*, 377 U. S., at 566; see *Gray* v. *Sanders*, 372 U. S. 368, 379–380 (1963) ("The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications").

And partisan gerrymandering implicates the First Amendment too. That Amendment gives its greatest protection to political beliefs, speech, and association. Yet partisan gerrymanders subject certain voters to "disfavored treatment"—again, counting their votes for less—precisely because of "their voting history [and] their expression of political views." *Vieth*, 541 U. S., at 314 (opinion of Kennedy, J.). And added to that strictly personal harm is an

associational one. Representative democracy is "unimaginable without the ability of citizens to band together in [support of] candidates who espouse their political views." *California Democratic Party* v. *Jones*, 530 U. S. 567, 574 (2000). By diluting the votes of certain citizens, the State frustrates their efforts to translate those affiliations into political effectiveness. See *Gill*, 585 U. S., at 81 (KAGAN, J., concurring) ("Members of the disfavored party[,] deprived of their natural political strength[,] may face difficulties fundraising, registering voters, [and] eventually accomplishing their policy objectives"). In both those ways, partisan gerrymanders of the kind we confront here undermine the protections of "democracy embodied in the First Amendment." *Elrod* v. *Burns*, 427 U. S. 347, 357 (1976) (internal quotation marks omitted).

Though different Justices have described the constitutional harm in diverse ways, nearly all have agreed on this much: Extreme partisan gerrymandering (as happened in North Carolina and Maryland) violates the Constitution. See, *e. g.*, *Vieth*, 541 U. S., at 293 (plurality opinion) ("[A]n excessive injection of politics [in districting] is unlawful" (emphasis deleted)); *id.*, at 316 (opinion of Kennedy, J.) ("[P]artisan gerrymandering that disfavors one party is [im]permissible"); *id.*, at 362 (BREYER, J., dissenting) (Gerrymandering causing political "entrenchment" is a "violat[ion of] the Constitution's Equal Protection Clause"); *Davis* v. *Bandemer*, 478 U. S. 109, 132 (1986) (plurality opinion) ("[U]nconstitutional discrimination" occurs "when the electoral system is arranged in a manner that will consistently degrade [a voter's] influence on the political process"); *id.*, at 165 (Powell, J., concurring in part and dissenting in part) ("[U]nconstitutional gerrymandering" occurs when "the boundaries of the voting districts have been distorted deliberately" to deprive voters of "an equal opportunity to participate in the State's legislative processes"). Once again, the majority never disagrees; it appears to accept the "principle that each person must have an equal say

in the election of representatives." *Ante*, at 708. And indeed, without this settled and shared understanding that cases like these inflict constitutional injury, the question of whether there are judicially manageable standards for resolving them would never come up.

II

So the only way to understand the majority's opinion is as follows: In the face of grievous harm to democratic governance and flagrant infringements on individuals' rights—in the face of escalating partisan manipulation whose compatibility with this Nation's values and law no one defends—the majority declines to provide any remedy. For the first time in this Nation's history, the majority declares that it can do nothing about an acknowledged constitutional violation because it has searched high and low and cannot find a workable legal standard to apply.

The majority gives two reasons for thinking that the adjudication of partisan gerrymandering claims is beyond judicial capabilities. First and foremost, the majority says, it cannot find a neutral baseline—one not based on contestable notions of political fairness—from which to measure injury. See *ante*, at 704–707. According to the majority, "[p]artisan gerrymandering claims invariably sound in a desire for proportional representation." *Ante*, at 704. But the Constitution does not mandate proportional representation. So, the majority contends, resolving those claims "inevitably" would require courts to decide what is "fair" in the context of districting. *Ante*, at 705. They would have "to make their own political judgment about how much representation particular political parties *deserve*" and "to rearrange the challenged districts to achieve that end." *Ibid.* (emphasis in original). And second, the majority argues that even after establishing a baseline, a court would have no way to answer "the determinative question: 'How much is too much?'" *Ante*, at 707. No "discernible and manageable" standard is available, the

majority claims—and so courts could willy-nilly become embroiled in fixing every districting plan. *Ante*, at 708; see *ante*, at 703–704.

I'll give the majority this one—and important—thing: It identifies some dangers everyone should want to avoid. Judges should not be apportioning political power based on their own vision of electoral fairness, whether proportional representation or any other. And judges should not be striking down maps left, right, and center, on the view that every smidgen of politics is a smidgen too much. Respect for state legislative processes—and restraint in the exercise of judicial authority—counsels intervention in only egregious cases.

But in throwing up its hands, the majority misses something under its nose: What it says can't be done *has* been done. Over the past several years, federal courts across the country—including, but not exclusively, in the decisions below—have largely converged on a standard for adjudicating partisan gerrymandering claims (striking down both Democratic and Republican districting plans in the process). See also *Ohio A. Philip Randolph Inst.*, 373 F. Supp. 3d 978; *League of Women Voters of Michigan* v. *Benson*, 373 F. Supp. 3d 867 (ED Mich. 2019). And that standard does what the majority says is impossible. The standard does not use any judge-made conception of electoral fairness—either proportional representation or any other; instead, it takes as its baseline a State's *own* criteria of fairness, apart from partisan gain. And by requiring plaintiffs to make difficult showings relating to both purpose and effects, the standard invalidates the most extreme, but only the most extreme, partisan gerrymanders.

Below, I first explain the framework courts have developed, and describe its application in these two cases. Doing so reveals in even starker detail than before how much these partisan gerrymanders deviated from democratic norms. As I lay out the lower courts' analyses, I consider two specific criticisms the majority levels—each of which reveals a

saddening nonchalance about the threat such districting poses to self-governance. All of that lays the groundwork for then assessing the majority's more general view, described above, that judicial policing in this area cannot be either neutral or restrained. The lower courts' reasoning, as I'll show, proves the opposite.

A

Start with the standard the lower courts used. The majority disaggregates the opinions below, distinguishing the one from the other and then chopping up each into "a number of 'tests.'" *Ante*, at 710; see *ante*, at 710–718. But in doing so, it fails to convey the decisions' most significant—and common—features. Both courts focused on the harm of vote dilution, see *supra*, at 730, though the North Carolina court mostly grounded its analysis in the Fourteenth Amendment and the Maryland court in the First. And both courts (like others around the country) used basically the same three-part test to decide whether the plaintiffs had made out a vote dilution claim. As many legal standards do, that test has three parts: (1) intent; (2) effects; and (3) causation. First, the plaintiffs challenging a districting plan must prove that state officials' "predominant purpose" in drawing a district's lines was to "entrench [their party] in power" by diluting the votes of citizens favoring its rival. *Rucho*, 318 F. Supp. 3d, at 864 (quoting *Arizona State Legislature*, 576 U. S., at 791). Second, the plaintiffs must establish that the lines drawn in fact have the intended effect by "substantially" diluting their votes. *Lamone*, 348 F. Supp. 3d, at 498. And third, if the plaintiffs make those showings, the State must come up with a legitimate, non-partisan justification to save its map. See *Rucho*, 318 F. Supp. 3d, at 867.[2] If you

[2] Neither North Carolina nor Maryland offered much of an alternative explanation for the evidence that the plaintiffs put forward. Presumably, both States had trouble coming up with something. Like the majority, see *ante*, at 713, I therefore pass quickly over this part of the test.

are a lawyer, you know that this test looks utterly ordinary. It is the sort of thing courts work with every day.

Turn now to the test's application. First, did the North Carolina and Maryland districters have the predominant purpose of entrenching their own party in power? Here, the two District Courts catalogued the overwhelming direct evidence that they did. To remind you of some highlights, see *supra*, at 723–726: North Carolina's redistricting committee used "Partisan Advantage" as an official criterion for drawing district lines. And from the first to the last, that committee's chair (along with his mapmaker) acted to ensure a 10–3 partisan split, whatever the statewide vote, because he thought that "electing Republicans is better than electing Democrats." For their part, Maryland's Democrats—the Governor, senior Congressman, and State Senate President alike—openly admitted to a single driving purpose: flip the Sixth District from Republican to Democratic. They did not blanch from moving some 700,000 voters into new districts (when one-person-one-vote rules required relocating just 10,000) for that reason and that reason alone.

The majority's response to the District Courts' purpose analysis is discomfiting. The majority does not contest the lower courts' findings; how could it? Instead, the majority says that state officials' intent to entrench their party in power is perfectly "permissible," even when it is the predominant factor in drawing district lines. *Ante*, at 711. But that is wrong. True enough, that the intent to inject "political considerations" into districting may not raise any constitutional concerns. In *Gaffney* v. *Cummings*, 412 U. S. 735 (1973), for example, we thought it non-problematic when state officials used political data to ensure rough proportional representation between the two parties. And true enough that even the naked purpose to gain partisan advantage may not rise to the level of constitutional notice when it is not the driving force in mapmaking or when the intended gain is slight. See *Vieth*, 541 U. S., at 286 (plurality

opinion). But when political actors have a specific and predominant intent to entrench themselves in power by manipulating district lines, that goes too far. Consider again Justice Kennedy's hypothetical of mapmakers who set out to maximally burden (*i. e.*, make count for as little as possible) the votes going to a rival party. See *supra*, at 731. Does the majority really think that goal is permissible? But why even bother with hypotheticals? Just consider the purposes here. It cannot be permissible and thus irrelevant, as the majority claims, that state officials have as their purpose the kind of grotesquely gerrymandered map that, according to all this Court has ever said, violates the Constitution. See *supra*, at 732–733.

On to the second step of the analysis, where the plaintiffs must prove that the districting plan substantially dilutes their votes. The majority fails to discuss most of the evidence the District Courts relied on to find that the plaintiffs had done so. See *ante*, at 711–712. But that evidence—particularly from North Carolina—is the key to understanding both the problem these cases present and the solution to it they offer. The evidence reveals just how bad the two gerrymanders were (in case you had any doubts). And it shows how the same technologies and data that today facilitate extreme partisan gerrymanders also enable courts to discover them, by exposing just how much they dilute votes. See *Vieth*, 541 U. S., at 312–313 (opinion of Kennedy, J.) (predicting that development).

Consider the sort of evidence used in North Carolina first. There, the plaintiffs demonstrated the districting plan's effects mostly by relying on what might be called the "extreme outlier approach." (Here's a spoiler: the State's plan was one.) The approach—which also has recently been used in Michigan and Ohio litigation—begins by using advanced computing technology to randomly generate a large collection of districting plans that incorporate the State's physical and political geography and meet its declared districting cri-

teria, *except for* partisan gain. For each of those maps, the method then uses actual precinct-level votes from past elections to determine a partisan outcome (*i. e.*, the number of Democratic and Republican seats that map produces). Suppose we now have 1,000 maps, each with a partisan outcome attached to it. We can line up those maps on a continuum—the most favorable to Republicans on one end, the most favorable to Democrats on the other.[3] We can then find the median outcome—that is, the outcome smack dab in the center—in a world with no partisan manipulation. And we can see where the State's actual plan falls on the spectrum—at or near the median or way out on one of the tails? The further out on the tail, the more extreme the partisan distortion and the more significant the vote dilution. See generally Brief for Eric S. Lander as *Amicus Curiae* 7–22.

Using that approach, the North Carolina plaintiffs offered a boatload of alternative districting plans—all showing that the State's map was an out-out-out-outlier. One expert produced 3,000 maps, adhering in the way described above to the districting criteria that the North Carolina redistricting committee had used, other than partisan advantage. To calculate the partisan outcome of those maps, the expert also used the same election data (a composite of seven elections) that Hofeller had employed when devising the North Carolina plan in the first instance. The results were, shall we say, striking. Every single one of the 3,000 maps would have produced at least one more Democratic House Member than the State's actual map, and 77% would have elected three or four more. See *Rucho*, 318 F. Supp. 3d, at 875–876, 894; App. 276. A second expert obtained essentially the

[3] As I'll discuss later, this distribution of outcomes provides what the majority says does not exist—a neutral comparator for the State's own plan. See *ante*, at 704–707; *supra*, at 733; *infra*, at 741–744. It essentially answers the question: In a State with these geographic features and this distribution of voters and this set of districting criteria—but without partisan manipulation—what would happen?

same results with maps conforming to more generic districting criteria (*e. g.*, compactness and contiguity of districts). Over 99% of that expert's 24,518 simulations would have led to the election of at least one more Democrat, and over 70% would have led to two or three more. See *Rucho*, 318 F. Supp. 3d, at 893–894. Based on those and other findings, the District Court determined that the North Carolina plan substantially dilutes the plaintiffs' votes.[4]

Because the Maryland gerrymander involved just one district, the evidence in that case was far simpler—but no less powerful for that. You've heard some of the numbers before. See *supra*, at 725–726. The 2010 census required only a minimal change in the Sixth District's population—the subtraction of about 10,000 residents from more than 700,000. But instead of making a correspondingly minimal adjustment, Democratic officials reconfigured the entire district. They moved 360,000 residents out and another 350,000 in, while splitting some counties for the first time in almost two centuries. The upshot was a district with 66,000 fewer Republican voters and 24,000 more Democratic ones. In the old Sixth, 47% of registered voters were Republicans and only 36% Democrats. But in the new Sixth, 44% of registered voters were Democrats and only 33% Republicans. That reversal of the district's partisan composition translated into four consecutive Democratic victories, including in a wave election year for Republicans (2014). In what was once a party stronghold, Republicans now have little or

[4] The District Court also relied on actual election results (under both the new plan and the similar one preceding it) and on mathematical measurements of the new plan's "partisan asymmetry." See *Rucho*, 318 F. Supp. 3d, at 884–895. Those calculations assess whether supporters of the two parties can translate their votes into representation with equal ease. See Stephanopoulos & McGhee, The Measure of a Metric, 70 Stan. L. Rev. 1503, 1505–1507 (2018). The court found that the new North Carolina plan led to extreme asymmetry, compared both to plans used in the rest of the country and to plans previously used in the State. See *Rucho*, 318 F. Supp. 3d, at 886–887, 892–893.

no chance to elect their preferred candidate. The District Court thus found that the gerrymandered Maryland map substantially dilutes Republicans' votes. See *Lamone*, 348 F. Supp. 3d, at 519–520.

The majority claims all these findings are mere "prognostications" about the future, in which no one "can have any confidence." *Ante*, at 711 (internal quotation marks omitted). But the courts below did not gaze into crystal balls, as the majority tries to suggest. Their findings about these gerrymanders' effects on voters—both in the past and predictably in the future—were evidence-based, data-based, statistics-based. Knowledge-based, one might say. The courts did what anyone would want a decisionmaker to do when so much hangs in the balance. They looked hard at the facts, and they went where the facts led them. They availed themselves of all the information that mapmakers (like Hofeller and Hawkins) and politicians (like Lewis and O'Malley) work so hard to amass and then use to make every districting decision. They refused to content themselves with unsupported and out-of-date musings about the unpredictability of the American voter. See *ante*, at 712–713; but see Brief for Political Science Professors as *Amici Curiae* 14–20 (citing chapter and verse to the contrary). They did not bet America's future—as today the majority does—on the idea that maps constructed with so much expertise and care to make electoral outcomes impervious to voting would somehow or other come apart. They looked at the evidence—at the facts about how these districts operated—and they could reach only one conclusion. By substantially diluting the votes of citizens favoring their rivals, the politicians of one party had succeeded in entrenching themselves in office. They had beat democracy.

B

The majority's broadest claim, as I've noted, is that this is a price we must pay because judicial oversight of partisan gerrymandering cannot be "politically neutral" or "manage-

able." *Ante,* at 707; see *supra,* at 733. Courts, the majority argues, will have to choose among contested notions of electoral fairness. (Should they take as the ideal mode of districting proportional representation, many competitive seats, adherence to traditional districting criteria, or so forth?) See *ante,* at 704–707. And even once courts have chosen, the majority continues, they will have to decide "[h]ow much is too much?"—that is, how much deviation from the chosen "touchstone" to allow? *Ante,* at 707–708. In answering that question, the majority surmises, they will likely go far too far. See *ante,* at 703–704. So the whole thing is impossible, the majority concludes. To prove its point, the majority throws a bevy of question marks on the page. (I count nine in just two paragraphs. See *ante,* at 707–708.) But it never tries to analyze the serious question presented here—whether the kind of standard developed below falls prey to those objections, or instead allows for neutral and manageable oversight. The answer, as you've already heard enough to know, is the latter. That kind of oversight is not only possible; it's been done.

Consider neutrality first. Contrary to the majority's suggestion, the District Courts did not have to—and in fact did not—choose among competing visions of electoral fairness. That is because they did not try to compare the State's actual map to an "ideally fair" one (whether based on proportional representation or some other criterion). Instead, they looked at the difference between what the State did and what the State would have done if politicians hadn't been intent on partisan gain. Or put differently, the comparator (or baseline or touchstone) is the result not of a judge's philosophizing but of the State's own characteristics and judgments. The effects evidence in these cases accepted as a given the State's physical geography (*e. g.,* where does the Chesapeake run?) and political geography (*e. g.,* where do the Democrats live on top of each other?). So the courts did not, in the majority's words, try to "counteract 'natural' gerry-

mandering caused, for example, by the urban concentration of one party." *Ante*, at 708. Still more, the courts' analyses used the State's own criteria for electoral fairness—except for naked partisan gain. Under their approach, in other words, the State selected its own fairness baseline in the form of its other districting criteria. All the courts did was determine how far the State had gone off that track because of its politicians' effort to entrench themselves in office.

The North Carolina litigation well illustrates the point. The thousands of randomly generated maps I've mentioned formed the core of the plaintiffs' case that the North Carolina plan was an "extreme[ ] outlier." *Rucho*, 318 F. Supp. 3d, at 852 (internal quotation marks omitted); see *supra*, at 737–739. Those maps took the State's political landscape as a given. In North Carolina, for example, Democratic voters are highly concentrated in cities. That fact was built into all the maps; it became part of the baseline. See *Rucho*, 318 F. Supp. 3d, at 896–897. On top of that, the maps took the State's legal landscape as a given. They incorporated the State's districting priorities, excluding partisanship. So in North Carolina, for example, all the maps adhered to the traditional criteria of contiguity and compactness. See *supra*, at 738–739. But the comparator maps in another State would have incorporated different objectives—say, the emphasis Arizona places on competitive districts or the requirement Iowa imposes that counties remain whole. See Brief for Mathematicians et al. as *Amici Curiae* 19–20. The point is that the assemblage of maps, reflecting the characteristics and judgments of the State itself, creates a neutral baseline from which to assess whether partisanship has run amok. Extreme outlier as to what? As to the other maps the State could have produced given its unique political geography and its chosen districting criteria. *Not* as to the maps a judge, with his own view of electoral fairness, could have dreamed up.

The Maryland court lacked North Carolina's fancy evidence, but analyzed the gerrymander's effects in much the

same way—not as against an ideal goal, but as against an *ex ante* baseline. To see the difference, shift gears for a moment and compare Maryland and Massachusetts—both of which (aside from Maryland's partisan gerrymander) use traditional districting criteria. In those two States alike, Republicans receive about 35% of the vote in statewide elections. See Almanac of American Politics 2016, at 836, 880. But the political geography of the States differs. In Massachusetts, the Republican vote is spread evenly across the State; because that is so, districting plans (using traditional criteria of contiguity and compactness) consistently lead to an all-Democratic congressional delegation. By contrast, in Maryland, Republicans are clumped—into the Eastern Shore (the First District) and the Northwest Corner (the old Sixth). Claims of partisan gerrymandering in those two States could come out the same way if judges, à la the majority, used their own visions of fairness to police districting plans; a judge in each State could then insist, in line with proportional representation, that 35% of the vote share entitles citizens to around that much of the delegation. But those suits would not come out the same if courts instead asked: What would have happened, given the State's natural political geography and chosen districting criteria, had officials not indulged in partisan manipulation? And that is what the District Court in Maryland inquired into. The court did not strike down the new Sixth District because a judicial ideal of proportional representation commanded another Republican seat. It invalidated that district because the quest for partisan gain made the State override *its own* political geography and districting criteria. So much, then, for the impossibility of neutrality.

The majority's sole response misses the point. According to the majority, "it does not make sense to use" a State's own (non-partisan) districting criteria as the baseline from which to measure partisan gerrymandering because those criteria "will vary from State to State and year to year." *Ante*, at 715. But that is a virtue, not a vice—a feature, not a bug.

Using the criteria the State itself has chosen at the relevant time prevents any judicial predilections from affecting the analysis—exactly what the majority claims it wants. At the same time, using those criteria enables a court to measure just what it should: the extent to which the pursuit of partisan advantage—by these legislators at this moment—has distorted the State's districting decisions. Sure, different non-partisan criteria could result, as the majority notes, in different partisan distributions to serve as the baseline. *Ibid.* But that in itself raises no issue: Everyone agrees that state officials using non-partisan criteria (*e. g.*, must counties be kept together? should districts be compact?) have wide latitude in districting. The problem arises only when legislators or mapmakers substantially deviate from the baseline distribution by manipulating district lines for partisan gain. So once again, the majority's analysis falters because it equates the demand to eliminate partisan gerrymandering with a demand for a single partisan distribution—the one reflecting proportional representation. See *ante*, at 704–705. But those two demands are different, and only the former is at issue here.

The majority's "how much is too much" critique fares no better than its neutrality argument. How about the following for a first-cut answer: This much is too much. By any measure, a map that produces a greater partisan skew than any of 3,000 randomly generated maps (all with the State's political geography and districting criteria built in) reflects "too much" partisanship. Think about what I just said: The absolute worst of 3,001 possible maps. The *only one* that could produce a 10–3 partisan split even as Republicans got a bare majority of the statewide vote. And again: How much is too much? This much is too much: A map that without any evident non-partisan districting reason (to the contrary) shifted the composition of a district from 47% Republicans and 36% Democrats to 33% Republicans and 42% Democrats. A map that in 2011 was responsible for the

largest partisan swing of a congressional district in the country. See *Lamone*, 348 F. Supp. 3d, at 519. Even the majority acknowledges that "[t]hese cases involve blatant examples of partisanship driving districting decisions." *Ante*, at 714. If the majority had done nothing else, it could have set the line here. How much is too much? At the least, any gerrymanders as bad as these.

And if the majority thought that approach too case-specific, see *ante*, at 716, it could have used the lower courts' general standard—focusing on "predominant" purpose and "substantial" effects—without fear of indeterminacy. I do not take even the majority to claim that courts are incapable of investigating whether legislators mainly intended to seek partisan advantage. See *ante*, at 707–708 (focusing on the difficulty of measuring effects). That is for good reason. Although purpose inquiries carry certain hazards (which courts must attend to), they are a common form of analysis in constitutional cases. See, *e. g.*, *Miller* v. *Johnson*, 515 U. S. 900, 916 (1995); *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 533 (1993); *Washington* v. *Davis*, 426 U. S. 229, 239 (1976). Those inquiries would be no harder here than in other contexts.

Nor is there any reason to doubt, as the majority does, the competence of courts to determine whether a district map "substantially" dilutes the votes of a rival party's supporters from the everything-but-partisanship baseline described above. (Most of the majority's difficulties here really come from its idea that ideal visions set the baseline. But that is double-counting—and, as already shown, wrong to boot.) As this Court recently noted, "the law is full of instances" where a judge's decision rests on "estimating rightly . . . some matter of degree"—including the "substantial[ity]" of risk or harm. *Johnson* v. *United States*, 576 U. S. 591, 604 (2015) (internal quotation marks omitted); see, *e. g.*, *Ohio* v. *American Express Co.*, 585 U. S. 529, 541 (2018) (determining "substantial anticompetitive effect[s]" when applying the

Sherman Act); *United States* v. *Davis*, 588 U. S. 445, 476–479 (2019) (KAVANAUGH, J., dissenting) (cataloging countless statutes requiring a "substantial" risk of harm). The majority is wrong to think that these laws typically (let alone uniformly) further "confine[ ] and guide[ ]" judicial decisionmaking. *Ante*, at 716. They do not, either in themselves or through "statutory context." *Ibid.* To the extent additional guidance has developed over the years (as under the Sherman Act), courts themselves have been its author—as they could be in this context too. And contrary to the majority's suggestion, see *ibid.*, courts all the time make judgments about the substantiality of harm without reducing them to particular percentages. If courts are no longer competent to do so, they will have to relinquish, well, substantial portions of their docket.

And the combined inquiry used in these cases set the bar high, so that courts could intervene in the worst partisan gerrymanders, but no others. Or to say the same thing, so that courts could intervene in the kind of extreme gerrymanders that nearly every Justice for decades has thought to violate the Constitution. See *supra*, at 732–733. Illicit purpose was simple to show here only because politicians and mapmakers thought their actions could not be attacked in court. See *Rucho*, 318 F. Supp. 3d, at 808 (quoting Lewis's statements to that effect). They therefore felt free to openly proclaim their intent to entrench their party in office. See *supra*, at 723–726. But if the Court today had declared that behavior justiciable, such smoking guns would all but disappear. Even assuming some officials continued to try implementing extreme partisan gerrymanders,[5] they would not

[5] A decision of this Court invalidating the North Carolina and Maryland gerrymanders would of course have curbed much of that behavior. In districting cases no less than others, officials respond to what this Court determines the law to sanction. See, *e. g.*, Charles & Fuentes-Rohwer, Judicial Intervention as Judicial Restraint, 132 Harv. L. Rev. 236, 269 (2018) (discussing how the Court's prohibition of racial gerrymanders affected districting).

brag about their efforts. So plaintiffs would have to prove the intent to entrench through circumstantial evidence—essentially showing that no other explanation (no geographic feature or non-partisan districting objective) could explain the districting plan's vote dilutive effects. And that would be impossible unless those effects were even more than substantial—unless mapmakers had packed and cracked with abandon in unprecedented ways. As again, they did here. That the two courts below found constitutional violations does not mean their tests were unrigorous; it means that the conduct they confronted was constitutionally appalling—by even the strictest measure, inordinately partisan.

The majority, in the end, fails to understand both the plaintiffs' claims and the decisions below. Everything in today's opinion assumes that these cases grew out of a "desire for proportional representation" or, more generally phrased, a "fair share of political power." *Ante*, at 704, 709. And everything in it assumes that the courts below had to (and did) decide what that fair share would be. But that is not so. The plaintiffs objected to one specific practice—the extreme manipulation of district lines for partisan gain. Elimination of that practice could have led to proportional representation. Or it could have led to nothing close. What was left after the practice's removal could have been fair, or could have been unfair, by any number of measures. That was not the crux of this suit. The plaintiffs asked only that the courts bar politicians from entrenching themselves in power by diluting the votes of their rivals' supporters. And the courts, using neutral and manageable—and eminently legal—standards, provided that (and only that) relief. This Court should have cheered, not overturned, that restoration of the people's power to vote.

III

This Court has long understood that it has a special responsibility to remedy violations of constitutional rights re-

sulting from politicians' districting decisions. Over 50 years ago, we committed to providing judicial review in that sphere, recognizing as we established the one-person-one-vote rule that "our oath and our office require no less." *Reynolds*, 377 U. S., at 566. Of course, our oath and our office require us to vindicate all constitutional rights. But the need for judicial review is at its most urgent in cases like these. "For here, politicians' incentives conflict with voters' interests, leaving citizens without any political remedy for their constitutional harms." *Gill*, 585 U. S., at 85–86 (KAGAN, J., concurring). Those harms arise because politicians want to stay in office. No one can look to them for effective relief.

The majority disagrees, concluding its opinion with a paean to congressional bills limiting partisan gerrymanders. "Dozens of [those] bills have been introduced," the majority says. *Ante*, at 720. One was "introduced in 2005 and has been reintroduced in every Congress since." *Ante*, at 721. And might be reintroduced until the end of time. Because what all these *bills* have in common is that they are not *laws*. The politicians who benefit from partisan gerrymandering are unlikely to change partisan gerrymandering. And because those politicians maintain themselves in office through partisan gerrymandering, the chances for legislative reform are slight.

No worries, the majority says; it has another idea. The majority notes that voters themselves have recently approved ballot initiatives to put power over districting in the hands of independent commissions or other non-partisan actors. See *ante*, at 719. Some Members of the majority, of course, once thought such initiatives unconstitutional. See *Arizona State Legislature*, 576 U. S., at 824–825 (ROBERTS, C. J., dissenting). But put that aside. Fewer than half the States offer voters an opportunity to put initiatives to direct vote; in all the rest (including North Carolina and Maryland), voters are dependent on legislators to make electoral

changes (which for all the reasons already given, they are unlikely to do). And even when voters have a mechanism they can work themselves, legislators often fight their efforts tooth and nail. Look at Missouri. There, the majority touts a voter-approved proposal to turn districting over to a state demographer. See *ante*, at 719–720. But before the demographer had drawn a single line, Members of the state legislature had introduced a bill to start undoing the change. See Mo. H. J. Res. 48, 100th Gen. Assembly, 1st Reg. Sess. (2019). I'd put better odds on that bill's passage than on all the congressional proposals the majority cites.

The majority's most perplexing "solution" is to look to state courts. *Ante*, at 719. "[O]ur conclusion," the majority states, does not "condemn complaints about districting to echo into a void": Just a few years back, "the Supreme Court of Florida struck down that State's congressional districting plan as a violation" of the State Constitution. *Ibid.*; see *League of Women Voters of Florida* v. *Detzner*, 172 So. 3d 363 (2015). And indeed, the majority might have added, the Supreme Court of Pennsylvania last year did the same thing. See *League of Women Voters*, 645 Pa., at 123–124, 178 A. 3d, at 818. But what do those courts know that this Court does not? If they can develop and apply neutral and manageable standards to identify unconstitutional gerrymanders, why couldn't we?[6]

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[6] Contrary to the majority's suggestion, state courts do not typically have more specific "standards and guidance" to apply than federal courts have. *Ante*, at 31. The Pennsylvania Supreme Court based its gerrymandering decision on a constitutional clause providing only that "[e]lections shall be free and equal" and no one shall "interfere to prevent the free exercise of the right of suffrage." *League of Women Voters*, 645 Pa., at 100, 178 A. 3d, at 803–804 (quoting Pa. Const., Art. I, § 5). And even the Florida "Fair Districts Amendment," which the majority touts, says nothing more than that no districting plan "shall be drawn with the intent to favor or disfavor a political party." Fla. Const., Art. III, § 20(a). If the majority wants the kind of guidance that will keep courts from

We could have, and we should have. The gerrymanders here—and they are typical of many—violated the constitutional rights of many hundreds of thousands of American citizens. Those voters (Republicans in the one case, Democrats in the other) did not have an equal opportunity to participate in the political process. Their votes counted for far less than they should have because of their partisan affiliation. When faced with such constitutional wrongs, courts must intervene: "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). That is what the courts below did. Their decisions are worth a read. They (and others that have recently remedied similar violations) are detailed, thorough, painstaking. They evaluated with immense care the factual evidence and legal arguments the parties presented. They used neutral and manageable and strict standards. They had not a shred of politics about them. Contra the majority, see *ante*, at 721, this *was* law.

That is not to deny, of course, that these cases have great political consequence. They do. Among the *amicus* briefs here is one from a bipartisan group of current and former Members of the House of Representatives. They describe all the ways partisan gerrymandering harms our political system—what they call "a cascade of negative results." Brief as *Amicus Curiae* 5. These artificially drawn districts shift influence from swing voters to party-base voters who participate in primaries; make bipartisanship and pragmatic compromise politically difficult or impossible; and drive voters away from an ever more dysfunctional political process. See *id.*, at 5–6. Last year, we heard much the same from current and former state legislators. In their view,

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intervening too far in the political sphere, see *ante*, at 704, that Amendment does not provide it: The standard is in fact a good deal less exacting than the one the District Courts below applied. In any event, only a few States have a constitutional provision like Florida's, so the majority's state-court solution does not go far.

partisan gerrymandering has "sounded the death-knell of bipartisanship," creating a legislative environment that is "toxic" and "tribal." Brief as *Amicus Curiae* in *Gill* v. *Whitford*, O. T. 2016, No. 16–1161, pp. 6, 25. Gerrymandering, in short, helps create the polarized political system so many Americans loathe.

And gerrymandering is, as so many Justices have emphasized before, anti-democratic in the most profound sense. See *supra*, at 726–727. In our government, "all political power flows from the people." *Arizona State Legislature*, 576 U. S., at 824. And that means, as Alexander Hamilton once said, "that the people should choose whom they please to govern them." 2 Debates on the Constitution 257 (J. Elliot ed. 1891). But in Maryland and North Carolina they cannot do so. In Maryland, election in and election out, there are 7 Democrats and 1 Republican in the congressional delegation. In North Carolina, however the political winds blow, there are 10 Republicans and 3 Democrats. Is it conceivable that someday voters will be able to break out of that prefabricated box? Sure. But everything possible has been done to make that hard. To create a world in which power does not flow from the people because they do not choose their governors.

Of all times to abandon the Court's duty to declare the law, this was not the one. The practices challenged in these cases imperil our system of government. Part of the Court's role in that system is to defend its foundations. None is more important than free and fair elections. With respect but deep sadness, I dissent.

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DEPARTMENT OF COMMERCE ET AL. *v.* NEW YORK ET AL.

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

No. 18–966. Argued April 23, 2019—Decided June 27, 2019

In order to apportion congressional representatives among the States, the Constitution requires an "Enumeration" of the population every 10 years, to be made "in such Manner" as Congress "shall by Law direct," Art. I, § 2, cl. 3; Amdt. 14, § 2. In the Census Act, Congress delegated to the Secretary of Commerce the task of conducting the decennial census "in such form and content as he may determine." 13 U. S. C. § 141(a). The Secretary is aided by the Census Bureau, a statistical agency in the Department of Commerce. The population count is also used to allocate federal funds to the States and to draw electoral districts. The census additionally serves as a means of collecting demographic information used for a variety of purposes. There have been 23 decennial censuses since 1790. All but one between 1820 and 2000 asked at least some of the population about their citizenship or place of birth. The question was asked of all households until 1950, and was asked of a fraction of the population on an alternative long-form questionnaire between 1960 and 2000. In 2010, the citizenship question was moved from the census to the American Community Survey, which is sent each year to a small sample of households.

In March 2018, Secretary of Commerce Wilbur Ross announced in a memo that he had decided to reinstate a citizenship question on the 2020 census questionnaire at the request of the Department of Justice (DOJ), which sought census block level citizenship data to use in enforcing the Voting Rights Act (VRA). The Secretary's memo explained that the Census Bureau initially analyzed, and the Secretary considered, three possible courses of action before he chose a fourth option that combined two of the proposed options: reinstate a citizenship question on the decennial census, and use administrative records from other agencies, *e. g.*, the Social Security Administration, to provide additional citizenship data. The Secretary "carefully considered" the possibility that reinstating a citizenship question would depress the response rate, the long history of the citizenship question on the census, and several other factors before concluding that "the need for accurate citizenship data and the limited burden of the question" outweighed fears about a lower response rate.

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Here, two separate suits filed in Federal District Court in New York were consolidated: one filed by a group of States, counties, cities, and others, alleging that the Secretary's decision violated the Enumeration Clause and the requirements of the Administrative Procedure Act; the other filed by non-governmental organizations, adding an equal protection claim. The District Court dismissed the Enumeration Clause claim but allowed the other claims to proceed. In June 2018, the Government submitted the Commerce Department's "administrative record"—materials that Secretary Ross considered in making his decision—including DOJ's letter requesting reinstatement of the citizenship question. Shortly thereafter, at DOJ's urging, the Government supplemented the record with a new memo from the Secretary, which stated that he had begun considering the addition of a citizenship question in early 2017 and had asked whether DOJ would formally request its inclusion. Arguing that the supplemental memo indicated that the record was incomplete, respondents asked the District Court to compel the Government to complete the administrative record. The court granted that request, and the parties jointly stipulated to the inclusion of additional materials that confirmed that the Secretary and his staff began exploring reinstatement of a citizenship question shortly after his 2017 confirmation, attempted to elicit requests for citizenship data from other agencies, and eventually persuaded DOJ to make the request. The court also authorized discovery outside the administrative record, including compelling a deposition of Secretary Ross, which this Court stayed pending further review. After a bench trial, the District Court determined that respondents had standing to sue. On the merits, it ruled that the Secretary's action was arbitrary and capricious, based on a pretextual rationale, and violated the Census Act, and held that respondents had failed to show an equal protection violation.

Held:

1. At least some respondents have Article III standing. For a legal dispute to qualify as a genuine case or controversy, at least one plaintiff must "present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling." *Davis* v. *Federal Election Comm'n*, 554 U. S. 724, 733. The District Court concluded that the evidence at trial established a sufficient likelihood that reinstating a citizenship question would result in noncitizen households responding to the census at lower rates than other groups, which would cause them to be undercounted and lead to many of the injuries respondents asserted—diminishment of political representation, loss of federal funds, degradation of census data, and diversion of resources. For purposes

of standing, these findings of fact were not so suspect as to be clearly erroneous. Several state respondents have shown that if noncitizen households are undercounted by as little as 2%, they will lose out on federal funds that are distributed on the basis of state population. That is a sufficiently concrete and imminent injury to satisfy Article III, and there is no dispute that a ruling in favor of respondents would redress that harm. Pp. 766–768.

2. The Enumeration Clause permits Congress, and by extension the Secretary, to inquire about citizenship on the census questionnaire. That conclusion follows from Congress's broad authority over the census, as informed by long and consistent historical practice that "has been open, widespread, and unchallenged since the early days of the Republic." *NLRB* v. *Noel Canning*, 573 U. S. 513, 572 (Scalia, J., concurring in judgment). Pp. 768–770.

3. The Secretary's decision is reviewable under the Administrative Procedure Act. The APA instructs reviewing courts to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U. S. C. § 706(2)(A), but it makes review unavailable "to the extent that" the agency action is "committed to agency discretion by law," § 701(a)(2). The Census Act confers broad authority on the Secretary, but it does not leave his discretion unbounded. The § 701(a)(2) exception is generally limited to "certain categories of administrative decisions that courts traditionally have regarded as 'committed to agency discretion,'" *Lincoln* v. *Vigil*, 508 U. S. 182, 191. The taking of the census is not one of those areas. Nor is the statute drawn so that it furnishes no meaningful standard by which to judge the Secretary's action, which is amenable to review for compliance with several Census Act provisions according to the general requirements of reasoned agency decisionmaking. Because this is not a case in which there is "no law to apply," *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402, 410, the Secretary's decision is subject to judicial review. Pp. 770–773.

4. The Secretary's decision was supported by the evidence before him. He examined the Bureau's analysis of various ways to collect improved citizenship data and explained why he thought the best course was to both reinstate a citizenship question and use citizenship data from administrative records to fill in the gaps. He then weighed the value of obtaining more complete and accurate citizenship data against the uncertain risk that reinstating a citizenship question would result in a materially lower response rate, and explained why he thought the benefits of his approach outweighed the risk. That decision was reasonable and reasonably explained, particularly in light of the long history of the citizenship question on the census. Pp. 773–777.

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5. The District Court also erred in ruling that the Secretary violated two particular provisions of the Census Act, § 6(c) and § 141(f). Section 6's first two subsections authorize the Secretary to acquire administrative records from other federal agencies and state and local governments, while subsection (c) requires the Secretary, to the maximum extent possible, to use that information "instead of conducting direct inquiries." Assuming that § 6(c) applies, the Secretary complied with it for essentially the same reasons that his decision was not arbitrary and capricious: Administrative records would not, in his judgment, provide the more complete and accurate data that DOJ sought. The Secretary also complied with § 141(f), which requires him to make a series of reports to Congress about his plans for the census. And even if he had violated that provision, the error would be harmless because he fully informed Congress of, and explained, his decision. Pp. 777–780.

6. In order to permit meaningful judicial review, an agency must "'disclose the basis'" of its action. *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156, 167–169. A court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record, *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, but it may inquire into "the mental processes of administrative decisionmakers" upon a "strong showing of bad faith or improper behavior," *Overton Park*, 401 U. S., at 420. While the District Court prematurely invoked that exception in ordering extra-record discovery here, it was ultimately justified in light of the expanded administrative record. Accordingly, the District Court's ruling on pretext will be reviewed in light of all the evidence in the record, including the extra-record discovery.

It is hardly improper for an agency head to come into office with policy preferences and ideas, discuss them with affected parties, sound out other agencies for support, and work with staff attorneys to substantiate the legal basis for a preferred policy. Yet viewing the evidence as a whole, this Court shares the District Court's conviction that the decision to reinstate a citizenship question cannot adequately be explained in terms of DOJ's request for improved citizenship data to better enforce the VRA. Several points, taken together, reveal a significant mismatch between the Secretary's decision and the rationale he provided. The record shows that he began taking steps to reinstate the question a week into his tenure, but gives no hint that he was considering VRA enforcement. His director of policy attempted to elicit requests for citizenship data from the Department of Homeland Security and DOJ's Office of Immigration Review before turning to the VRA rationale and DOJ's Civil Rights Division. For its part, DOJ's actions suggest that it was more interested in helping the Commerce Depart-

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ment than in securing the data. Altogether, the evidence tells a story that does not match the Secretary's explanation for his decision. Unlike a typical case in which an agency may have both stated and unstated reasons for a decision, here the VRA enforcement rationale—the sole stated reason—seems to have been contrived. The reasoned explanation requirement of administrative law is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. The explanation provided here was more of a distraction. In these unusual circumstances, the District Court was warranted in remanding to the agency. See *Florida Power & Light Co.* v. *Lorion*, 470 U. S. 729, 744. Pp. 780–785.

351 F. Supp. 3d 502, affirmed in part, reversed in part, and remanded.

ROBERTS, C. J., delivered the opinion for a unanimous Court with respect to Parts I and II, and the opinion of the Court with respect to Parts III, IV–B, and IV–C, in which THOMAS, ALITO, GORSUCH, and KAVANAUGH, JJ., joined; with respect to Part IV–A, in which THOMAS, GINSBURG, BREYER, SOTOMAYOR, KAGAN, and KAVANAUGH, JJ., joined; and with respect to Part V, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed an opinion concurring in part and dissenting in part, in which GORSUCH and KAVANAUGH, JJ., joined, *post*, p. 786. BREYER, J., filed an opinion concurring in part and dissenting in part, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 800. ALITO, J., filed an opinion concurring in part and dissenting in part, *post*, p. 821.

Solicitor General Francisco argued the cause for petitioners. With him on the briefs were *Assistant Attorney General Hunt*, *Deputy Solicitor General Wall*, *Deputy Assistant Attorney General Mooppan*, *Sopan Joshi*, *Mark B. Stern*, *Gerard J. Sinzdak*, and *David Dewhirst*.

Barbara D. Underwood, Solicitor General of New York, argued the cause for respondents State of New York et al. With her on the brief were *Letitia James*, Attorney General of New York, *Steven C. Wu*, Deputy Solicitor General, *Judith N. Vale*, Senior Assistant Solicitor General, *Scott A. Eisman*, Assistant Solicitor General, *Matthew Colangelo*, *Elena Goldstein*, *Zachary W. Carter*, *Dennis J. Herrera*, *Rolando L. Rios*, *John Daniel Reaves*, and *Peter S. Holmes*, and by the Attorneys General for their respective jurisdictions as follows: *Phil Weiser* of Colorado, *William Tong* of Connecticut,

Counsel

Kathleen Jennings of Delaware, *Karl A. Racine* of the District of Columbia, *Kwame Raoul* of Illinois, *Thomas J. Miller* of Iowa, *Brian E. Frosh* of Maryland, *Maura Healey* of Massachusetts, *Keith Ellison* of Minnesota, *Gurbir S. Grewal* of New Jersey, *Hector H. Balderas* of New Mexico, *Joshua H. Stein* of North Carolina, *Ellen F. Rosenblum* of Oregon, *Josh Shapiro* of Pennsylvania, *Peter F. Neronha* of Rhode Island, *Thomas J. Donovan, Jr.*, of Vermont, and *Robert W. Ferguson* of Washington.

Dale E. Ho argued the cause for respondents New York Immigration Coalition et al. With him on the brief were *Adriel I. Cepeda Derieux*, *Cecillia D. Wang*, *David D. Cole*, *Sarah Brannon*, *Davin M. Rosborough*, *Ceridwen Cherry*, *John A. Freedman*, *David J. Weiner*, *Elisabeth S. Theodore*, *Christopher Dunn*, and *Perry M. Grossman*.

Douglas N. Letter argued the cause for the United States House of Representatives as *amicus curiae* urging affirmance. With him on the brief were *Brooks M. Hanner*, *Neal Kumar Katyal*, *Joshua A. Geltzer*, *Amy L. Marshak*, and *Mary B. McCord*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Oklahoma et al. by *Mike Hunter*, Attorney General of Oklahoma, and *Mithun Mansinghani*, Solicitor General, and by the Attorneys General for their respective States as follows: *Steve Marshall* of Alabama, *Leslie Rutledge* of Arkansas, *Ashley Moody* of Florida, *Chris Carr* of Georgia, *Curtis T. Hill, Jr.*, of Indiana, *Derek Schmidt* of Kansas, *Jeff Landry* of Louisiana, *Eric S. Schmitt* of Missouri, *Tim Fox* of Montana, *Doug Peterson* of Nebraska, *Alan Wilson* of South Carolina, *Jason R. Ravnsborg* of South Dakota, *Ken Paxton* of Texas, and *Patrick Morrisey* of West Virginia; for Citizens United et al. by *William J. Olson*, *Herbert W. Titus*, *Jeremiah L. Morgan*, *Robert J. Olson*, and *Joseph W. Miller*; for the Eagle Forum Education & Legal Defense Fund by *Lawrence J. Joseph*; for the Immigration Reform Law Institute by *Christopher J. Hajec*; for Judicial Watch, Inc., et al. by *Robert D. Popper*; for the Project on Fair Representation by *William S. Consovoy* and *Bryan K. Weir*; for the Public Interest Legal Foundation by *J. Christian Adams* and *Kaylan Phillips*; for the Republican National Committee et al. by *Jason Torchinsky*; and for Ronald A. Cass et al. by *Mr. Cass*, *pro se*.

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Secretary of Commerce decided to reinstate a question about citizenship on the 2020 census questionnaire. A

Briefs of *amici curiae* urging affirmance were filed for the State of California by *Xavier Becerra*, Attorney General, *Edward C. DuMont*, Solicitor General, *Michael J. Mongan*, Deputy Solicitor General, *Anthony R. Hakl III*, Supervising Deputy Attorney General, *Gabrielle D. Boutin* and *R. Matthew Wise*, Deputy Attorneys General, and *Kristin A. Liska*, Associate Deputy Solicitor General; for Harris County, Texas, et al. by *Susan Hays*, *Terence O'Rourke*, and *Scott Lemond*; for Santa Clara County, California, et al. by *James R. Williams*, *Greta S. Hansen*, *Danielle L. Goldstein*, *Raphael N. Rajendra*, *Michael N. Feuer*, *James P. Clark*, *Kathleen Kenealy*, *Valerie Flores*, *Michael Dundas*, *Dan Satterberg*, *H. Kevin Wright*, *Laurie Webb Daniel*, *Charles L. Coleman III*, *David I. Holtzman*, *Sue Ann Salmon Evans*, and *Keith A. Yeomans*; for San Jose, California, et al. by *Kristen Clarke*, *Jon M. Greenbaum*, *Ezra D. Rosenberg*, *John F. Libby*, *Barry S. Landsberg*, *David L. Shapiro*, *Mark Rosenbaum*, and *Richard Doyle*; for the American Statistical Association et al. by *Ira M. Feinberg*; for the Arab American Institute by *Jason C. Beekman* and *Harsh K. Voruganti*; for Businesses and Business Organizations by *Stuart F. Delery* and *Joshua M. Wesneski*; for the California Legislature by *Robin B. Johansen*; for Catholic Charities of the Archdiocese of New York et al. by *Eamon P. Joyce*; for the Central Valley Immigrant Integration Collaborative et al. by *Nicholas Espiritu*; for Common Cause et al. by *Gregory L. Diskant*; for the Council of the Great City Schools by *John W. Borkowski*, *Aleksandra O. Rushing*, and *Julie Wright Halbert*; for Current Members of Congress et al. by *Elizabeth B. Wydra*, *Brianne J. Gorod*, and *David H. Gans*; for the Electronic Privacy Information Center et al. by *Marc Rotenberg* and *Alan Butler*; for Former Census Bureau Directors by *Andrew J. Pincus* and *Michael B. Kimberly*; for Former Federal District Judges by *Derek T. Ho*; for Foundations and Philanthropy-Serving Organizations by *Edward A. Friedman*, *Bruce S. Kaplan*, *Anne E. Beaumont*, and *John N. Orsini*; for Historians and Social Scientists by *Brian A. Sutherland*; for the International Municipal Lawyers Association et al. by *John J. Korzen*; for the KIPP Foundation et al. by *Deborah N. Archer* and *Vincent M. Southerland*; for LatinoJustice PRLDEF et al. by *Ernesto R. Palomo*, *Hugh S. Balsam*, *Wasim K. Bleibel*, *Juan Cartagena*, and *Donald E. Frechette*; for Lawyers for Civil Rights et al. by *Yalonda T. Howze*; for the Leadership Conference on Civil and Human Rights et al. by *Alan E. Schoenfeld*, *Vanita Gupta*, *Corrine Yu*, *Michael Zubrensky*, *Wendy R.*

group of plaintiffs challenged that decision on constitutional and statutory grounds. We now decide whether the Secretary violated the Enumeration Clause of the Constitution, the Census Act, or otherwise abused his discretion.

I

A

In order to apportion Members of the House of Representatives among the States, the Constitution requires an "Enumeration" of the population every 10 years, to be made "in such Manner" as Congress "shall by Law direct." Art. I, § 2, cl. 3; Amdt. 14, § 2. In the Census Act, Congress delegated to the Secretary of Commerce the task of conducting the decennial census "in such form and content as he may determine." 13 U. S. C. § 141(a). The Secretary is aided in that task by the Census Bureau, a statistical agency housed within the Department of Commerce. See §§ 2, 21.

The population count derived from the census is used not only to apportion representatives but also to allocate federal

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Weiser, *Thomas P. Wolf*, and *Kelly M. Percival*; for Legal Services NYC et al. by *Adam Burrowbridge*, *Gideon A. Schor*, and *Chul Pak*; for the NAACP Legal Defense & Educational Fund, Inc., by *David J. Zimmer*, *Joshua J. Bone*, *Sherrilyn A. Ifill*, *Janai S. Nelson*, *Samuel Spital*, *Leah C. Aden*, *Aaron Sussman*, and *J. Zachery Morris*; for the National Asian Pacific American Bar Association et al. by *Albert Giang*, *Navdeep Singh*, *Meredith Higashi*, and *Rachana Pathak*; for the National Council of Nonprofits et al. by *Tim Delaney* and *Tiffany Gourley Carter*; for the National Resources Defense Council by *Ian Fein* and *Michael E. Wall*; for the National School Boards Association et al. by *Richard P. Bress* and *Francisco M. Negrón, Jr.*; for Nielsen Co. (US), LLC, by *Ishan K. Bhabha*; for Plaintiffs in *Kravitz* v. *Department of Commerce*, No. 18–1041 (D. Md.), by *P. Benjamin Duke*; for Nicholas Bagley et al. by *Roberta A. Kaplan*, *Julie E. Fink*, and *Joshua Matz*; for John R. Dunne et al. by *Samuel R. Bagenstos* and *Justin Levitt*; for Norman Y. Mineta et al. by *Pratik A. Shah*, *Z. W. Julius Chen*, *Robert S. Chang*, *Lena F. Masri*, and *Robert H. Pees;* and for 190 Bipartisan Elected Officials et al. by *Robert A. Atkins* and *Jeffrey M. Wice.*

Eric S. Baxter and *Joseph C. Davis* filed a brief for the Becket Fund for Religious Liberty as *amicus curiae.*

funds to the States and to draw electoral districts. *Wisconsin* v. *City of New York*, 517 U. S. 1, 5–6 (1996). The census additionally serves as a means of collecting demographic information, which "is used for such varied purposes as computing federal grant-in-aid benefits, drafting of legislation, urban and regional planning, business planning, and academic and social studies." *Baldrige* v. *Shapiro*, 455 U. S. 345, 353–354, n. 9 (1982). Over the years, the census has asked questions about (for example) race, sex, age, health, education, occupation, housing, and military service. It has also asked about radio ownership, age at first marriage, and native tongue. The Census Act obliges everyone to answer census questions truthfully and requires the Secretary to keep individual answers confidential, including from other Government agencies. §§ 221, 8(b), 9(a).

There have been 23 decennial censuses from the first census in 1790 to the most recent in 2010. Every census between 1820 and 2000 (with the exception of 1840) asked at least some of the population about their citizenship or place of birth. Between 1820 and 1950, the question was asked of all households. Between 1960 and 2000, it was asked of about one-fourth to one-sixth of the population. That change was part of a larger effort to simplify the census by asking most people a few basic demographic questions (such as sex, age, race, and marital status) on a short-form questionnaire, while asking a sample of the population more detailed demographic questions on a long-form questionnaire. In explaining the decision to move the citizenship question to the long-form questionnaire, the Census Bureau opined that "general census information on citizenship had become of less importance compared with other possible questions to be included in the census, particularly in view of the recent statutory requirement for annual alien registration which could provide the Immigration and Naturalization Service, the principal user of such data, with the information it

needed." Dept. of Commerce, Bureau of Census, 1960 Censuses of Population and Housing 194 (1966).[1]

In 2010, the year of the latest census, the format changed again. All households received the same questionnaire, which asked about sex, age, race, Hispanic origin, and living arrangements. The more detailed demographic questions previously asked on the long-form questionnaire, including the question about citizenship, were instead asked in the American Community Survey (or ACS), which is sent each year to a rotating sample of about 2.6% of households.

The Census Bureau and former Bureau officials have resisted occasional proposals to resume asking a citizenship question of everyone, on the ground that doing so would discourage noncitizens from responding to the census and lead to a less accurate count of the total population. See, *e. g.*, *Federation of Am. Immigration Reform* v. *Klutznick*, 486 F. Supp. 564, 568 (DC 1980) ("[A]ccording to the Bureau[,] any effort to ascertain citizenship will inevitably jeopardize the overall accuracy of the population count"); Brief for Former Directors of the U. S. Census Bureau as *Amici Curiae* in *Evenwel* v. *Abbott*, O. T. 2015, No. 14–940, p. 25 (inquiring about citizenship would "invariably lead to a lower response rate").

B

In March 2018, Secretary of Commerce Wilbur Ross announced in a memo that he had decided to reinstate a question about citizenship on the 2020 decennial census questionnaire. The Secretary stated that he was acting at the request of the Department of Justice (DOJ), which sought improved data about citizen voting-age population for purposes of enforcing the Voting Rights Act (or VRA)—specifically the Act's ban on diluting the influence of minority

[1] The annual alien registration requirement was repealed in 1981. See § 11, 95 Stat. 1617 (1981).

voters by depriving them of single-member districts in which they can elect their preferred candidates. App. to Pet. for Cert. 548a. DOJ explained that federal courts determine whether a minority group could constitute a majority in a particular district by looking to the citizen voting-age population of the group. According to DOJ, the existing citizenship data from the American Community Survey was not ideal: It was not reported at the level of the census block, the basic component of legislative districting plans; it had substantial margins of error; and it did not align in time with the census-based population counts used to draw legislative districts. DOJ therefore formally requested reinstatement of the citizenship question on the census questionnaire. *Id.*, at 565a–569a.

The Secretary's memo explained that the Census Bureau initially analyzed, and the Secretary considered, three possible courses of action. The first was to continue to collect citizenship information in the American Community Survey and attempt to develop a data model that would more accurately estimate citizenship at the census block level. The Secretary rejected that option because the Bureau "did not assert and could not confirm" that such ACS-based data modeling was possible "with a sufficient degree of accuracy." *Id.*, at 551a.

The second option was to reinstate a citizenship question on the decennial census. The Bureau predicted that doing so would discourage some noncitizens from responding to the census. That would necessitate increased "non-response follow up" operations—procedures the Bureau uses to attempt to count people who have not responded to the census—and potentially lead to a less accurate count of the total population.

Option three was to use administrative records from other agencies, such as the Social Security Administration and Citizenship and Immigration Services, to provide DOJ with citizenship data. The Census Bureau recommended this op-

tion, and the Secretary found it a "potentially appealing solution" because the Bureau has long used administrative records to supplement and improve census data. *Id.*, at 554a. But the Secretary concluded that administrative records alone were inadequate because they were missing for more than 10% of the population.

The Secretary ultimately asked the Census Bureau to develop a fourth option that would combine options two and three: reinstate a citizenship question on the census questionnaire, and also use the time remaining until the 2020 census to "further enhance" the Bureau's "administrative record data sets, protocols, and statistical models." *Id.*, at 555a. The memo explained that, in the Secretary's judgment, the fourth option would provide DOJ with the "most complete and accurate" citizen voting-age population data in response to its request. *Id.*, at 556a.

The Secretary "carefully considered" the possibility that reinstating a citizenship question would depress the response rate. *Ibid.* But after evaluating the Bureau's "limited empirical evidence" on the question—evidence drawn from estimated non-response rates to previous American Community Surveys and census questionnaires—the Secretary concluded that it was not possible to "determine definitively" whether inquiring about citizenship in the census would materially affect response rates. *Id.*, at 557a, 562a. He also noted the long history of the citizenship question on the census, as well as the facts that the United Nations recommends collecting census-based citizenship information, and other major democracies such as Australia, Canada, France, Indonesia, Ireland, Germany, Mexico, Spain, and the United Kingdom inquire about citizenship in their censuses. Altogether, the Secretary determined that "the need for accurate citizenship data and the limited burden that the reinstatement of the citizenship question would impose outweigh fears about a potentially lower response rate." *Id.*, at 557a.

C

Shortly after the Secretary announced his decision, two groups of plaintiffs filed suit in Federal District Court in New York, challenging the decision on several grounds. The first group of plaintiffs included 18 States, the District of Columbia, various counties and cities, and the United States Conference of Mayors. They alleged that the Secretary's decision violated the Enumeration Clause of the Constitution and the requirements of the Administrative Procedure Act. The second group of plaintiffs consisted of several non-governmental organizations that work with immigrant and minority communities. They added an equal protection claim. The District Court consolidated the two cases. Both groups of plaintiffs are respondents here.

The Government moved to dismiss the lawsuits, arguing that the Secretary's decision was unreviewable and that respondents had failed to state cognizable claims under the Enumeration Clause and the Equal Protection Clause. The District Court dismissed the Enumeration Clause claim but allowed the other claims to proceed. 315 F. Supp. 3d 766 (SDNY 2018).

In June 2018, the Government submitted to the District Court the Commerce Department's "administrative record": the materials that Secretary Ross considered in making his decision. That record included DOJ's December 2017 letter requesting reinstatement of the citizenship question, as well as several memos from the Census Bureau analyzing the predicted effects of reinstating the question. Shortly thereafter, at DOJ's urging, the Government supplemented the record with a new memo from the Secretary, "intended to provide further background and context regarding" his March 2018 memo. App. to Pet. for Cert. 546a. The supplemental memo stated that the Secretary had begun considering whether to add the citizenship question in early 2017, and had inquired whether DOJ "would support, and if so would request, inclusion of a citizenship question as consistent with and useful for enforcement of the Voting Rights

Act." *Ibid.* According to the Secretary, DOJ "formally" requested reinstatement of the citizenship question after that inquiry. *Ibid.*

Respondents argued that the supplemental memo indicated that the Government had submitted an incomplete record of the materials considered by the Secretary. They asked the District Court to compel the Government to complete the administrative record. The court granted that request, and the parties jointly stipulated to the inclusion of more than 12,000 pages of additional materials in the administrative record. Among those materials were emails and other records confirming that the Secretary and his staff began exploring the possibility of reinstating a citizenship question shortly after he was confirmed in early 2017, attempted to elicit requests for citizenship data from other agencies, and eventually persuaded DOJ to request reinstatement of the question for VRA enforcement purposes.

In addition, respondents asked the court to authorize discovery outside the administrative record. They claimed that such an unusual step was warranted because they had made a strong preliminary showing that the Secretary had acted in bad faith. See *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402, 420 (1971). The court also granted that request, authorizing expert discovery and depositions of certain DOJ and Commerce Department officials.

In August and September 2018, the District Court issued orders compelling depositions of Secretary Ross and of the Acting Assistant Attorney General for DOJ's Civil Rights Division. We granted the Government's request to stay the Secretary's deposition pending further review, but we declined to stay the Acting AAG's deposition or the other extra-record discovery that the District Court had authorized.

The District Court held a bench trial and issued findings of fact and conclusions of law on respondents' statutory and equal protection claims. After determining that respond-

ents had standing to sue, the District Court ruled that the Secretary's action was arbitrary and capricious, based on a pretextual rationale, and violated certain provisions of the Census Act. On the equal protection claim, however, the District Court concluded that respondents had not met their burden of showing that the Secretary was motivated by discriminatory animus. The court granted judgment to respondents on their statutory claims, vacated the Secretary's decision, and enjoined him from reinstating the citizenship question until he cured the legal errors the court had identified. 351 F. Supp. 3d 502 (SDNY 2019).

The Government appealed to the Second Circuit, but also filed a petition for writ of certiorari before judgment, asking this Court to review the District Court's decision directly because the case involved an issue of imperative public importance, and the census questionnaire needed to be finalized for printing by the end of June 2019. We granted the petition. 586 U. S. 1140 (2019). At the Government's request, we later ordered the parties to address whether the Enumeration Clause provided an alternative basis to affirm. 586 U. S. 1219 (2019).

II

We begin with jurisdiction. Article III of the Constitution limits federal courts to deciding "Cases" and "Controversies." For a legal dispute to qualify as a genuine case or controversy, at least one plaintiff must have standing to sue. The doctrine of standing "limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong" and "confines the federal courts to a properly judicial role." *Spokeo, Inc.* v. *Robins*, 578 U. S. 330, 338 (2016). To have standing, a plaintiff must "present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling." *Davis* v. *Federal Election Comm'n*, 554 U. S. 724, 733 (2008).

Respondents assert a number of injuries—diminishment of political representation, loss of federal funds, degradation

of census data, and diversion of resources—all of which turn on their expectation that reinstating a citizenship question will depress the census response rate and lead to an inaccurate population count. Several States with a disproportionate share of noncitizens, for example, anticipate losing a seat in Congress or qualifying for less federal funding if their populations are undercounted. These are primarily future injuries, which "may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *Susan B. Anthony List* v. *Driehaus*, 573 U. S. 149, 158 (2014) (internal quotation marks omitted).

The District Court concluded that the evidence at trial established a sufficient likelihood that the reinstatement of a citizenship question would result in noncitizen households responding to the census at lower rates than other groups, which in turn would cause them to be undercounted and lead to many of respondents' asserted injuries. For purposes of standing, these findings of fact were not so suspect as to be clearly erroneous.

We therefore agree that at least some respondents have Article III standing. Several state respondents here have shown that if noncitizen households are undercounted by as little as 2%—lower than the District Court's 5.8% prediction—they will lose out on federal funds that are distributed on the basis of state population. That is a sufficiently concrete and imminent injury to satisfy Article III, and there is no dispute that a ruling in favor of respondents would redress that harm.

The Government contends, however, that any harm to respondents is not fairly traceable to the Secretary's decision, because such harm depends on the independent action of third parties choosing to violate their legal duty to respond to the census. The chain of causation is made even more tenuous, the Government argues, by the fact that such intervening, unlawful third-party action would be motivated by unfounded fears that the Federal Government will itself break the law by using noncitizens' answers against them for

law enforcement purposes. The Government invokes our steady refusal to "endorse standing theories that rest on speculation about the decisions of independent actors," *Clapper* v. *Amnesty Int'l USA*, 568 U. S. 398, 414 (2013), particularly speculation about future unlawful conduct, *Los Angeles* v. *Lyons*, 461 U. S. 95, 105 (1983).

But we are satisfied that, in these circumstances, respondents have met their burden of showing that third parties will likely react in predictable ways to the citizenship question, even if they do so unlawfully and despite the requirement that the Government keep individual answers confidential. The evidence at trial established that noncitizen households have historically responded to the census at lower rates than other groups, and the District Court did not clearly err in crediting the Census Bureau's theory that the discrepancy is likely attributable at least in part to noncitizens' reluctance to answer a citizenship question. Respondents' theory of standing thus does not rest on mere speculation about the decisions of third parties; it relies instead on the predictable effect of Government action on the decisions of third parties. Cf. *Bennett* v. *Spear*, 520 U. S. 154, 169–170 (1997); *Davis*, 554 U. S., at 734–735. Because Article III "requires no more than *de facto* causality," *Block* v. *Meese*, 793 F. 2d 1303, 1309 (CADC 1986) (Scalia, J.), traceability is satisfied here. We may therefore consider the merits of respondents' claims, at least as far as the Constitution is concerned.

III

The Enumeration Clause of the Constitution does not provide a basis to set aside the Secretary's decision. The text of that Clause "vests Congress with virtually unlimited discretion in conducting the decennial 'actual Enumeration,'" and Congress "has delegated its broad authority over the census to the Secretary." *Wisconsin*, 517 U. S., at 19. Given that expansive grant of authority, we have rejected challenges to the conduct of the census where the Secretary's

decisions bore a "reasonable relationship to the accomplishment of an actual enumeration." *Id.*, at 20.

Respondents ask us to evaluate the Secretary's decision to reinstate a citizenship question under that "reasonable relationship" standard, but we agree with the District Court that a different analysis is needed here. Our cases applying that standard concerned decisions about the population count itself—such as a postcensus decision not to use a particular method to adjust an undercount, *id.*, at 4, and a decision to allocate overseas military personnel to their home States, *Franklin* v. *Massachusetts*, 505 U. S. 788, 790–791 (1992). We have never applied the standard to decisions about what kinds of demographic information to collect in the course of taking the census. Indeed, as the District Court recognized, applying the "reasonable relationship" standard to *every* census-related decision "would lead to the conclusion that it is unconstitutional to ask *any* demographic question on the census" because "asking such questions bears no relationship whatsoever to the goal of an accurate headcount." 315 F. Supp. 3d, at 804–805. Yet demographic questions have been asked in *every* census since 1790, and questions about citizenship in particular have been asked for nearly as long. Like the District Court, we decline respondents' invitation to measure the constitutionality of the citizenship question by a standard that would seem to render every census since 1790 unconstitutional.

We look instead to Congress's broad authority over the census, as informed by long and consistent historical practice. All three branches of Government have understood the Constitution to allow Congress, and by extension the Secretary, to use the census for more than simply counting the population. Since 1790, Congress has sought, or permitted the Secretary to seek, information about matters as varied as age, sex, marital status, health, trade, profession, literacy, and value of real estate owned. See *id.*, at 801. Since 1820, it has sought, or permitted the Secretary to seek, infor-

mation about citizenship in particular. Federal courts have approved the practice of collecting demographic data in the census. See, *e. g.*, *United States* v. *Moriarity*, 106 F. 886, 891 (CC SDNY 1901) (duty to take a census of population "does not prohibit the gathering of other statistics, if 'necessary and proper,' for the intelligent exercise of other powers enumerated in the constitution"). While we have never faced the question directly, we have assumed that Congress has the power to use the census for information-gathering purposes, see *Legal Tender Cases*, 12 Wall. 457, 536 (1871), and we have recognized the role of the census as a "linchpin of the federal statistical system by collecting data on the characteristics of individuals, households, and housing units throughout the country," *Department of Commerce* v. *United States House of Representatives*, 525 U. S. 316, 341 (1999) (internal quotation marks omitted).

That history matters. Here, as in other areas, our interpretation of the Constitution is guided by a Government practice that "has been open, widespread, and unchallenged since the early days of the Republic." *NLRB* v. *Noel Canning*, 573 U. S. 513, 572 (2014) (Scalia, J., concurring in judgment); see also *Wisconsin*, 517 U. S., at 21 (noting "importance of historical practice" in census context). In light of the early understanding of and long practice under the Enumeration Clause, we conclude that it permits Congress, and by extension the Secretary, to inquire about citizenship on the census questionnaire. We need not, and do not, decide the constitutionality of any other question that Congress or the Secretary might decide to include in the census.

IV

The District Court set aside the Secretary's decision to reinstate a citizenship question on the grounds that the Secretary acted arbitrarily and violated certain provisions of the Census Act. The Government contests those rulings, but also argues that the Secretary's decision was not judi-

cially reviewable under the Administrative Procedure Act in the first place. We begin with that contention.

A

The Administrative Procedure Act embodies a "basic presumption of judicial review," *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140 (1967), and instructs reviewing courts to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U. S. C. § 706(2)(A). Review is not available, however, "to the extent that" a relevant statute precludes it, § 701(a)(1), or the agency action is "committed to agency discretion by law," § 701(a)(2). The Government argues that the Census Act commits to the Secretary's unreviewable discretion decisions about what questions to include on the decennial census questionnaire.

We disagree. To be sure, the Act confers broad authority on the Secretary. Section 141(a) instructs him to take "a decennial census of population" in "such form and content as he may determine, including the use of sampling procedures and special surveys." 13 U. S. C. § 141. The Act defines "census of population" to mean "a census of population, housing, and matters relating to population and housing," § 141(g), and it authorizes the Secretary, in "connection with any such census," to "obtain such other census information as necessary," § 141(a). It also states that the "Secretary shall prepare questionnaires, and shall determine the inquiries, and the number, form, and subdivisions thereof, for the statistics, surveys, and censuses provided for in this title." § 5. And it authorizes him to acquire materials, such as administrative records, from other federal, state, and local agencies in aid of conducting the census. § 6. Those provisions leave much to the Secretary's discretion. See *Wisconsin*, 517 U. S., at 19 ("Through the Census Act, Congress has delegated its broad authority over the census to the Secretary.").

But they do not leave his discretion unbounded. In order to give effect to the command that courts set aside agency action that is an abuse of discretion, and to honor the presumption of judicial review, we have read the § 701(a)(2) exception for action committed to agency discretion "quite narrowly, restricting it to 'those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Weyerhaeuser Co.* v. *United States Fish and Wildlife Serv.*, 586 U. S. 9, 23 (2018) (quoting *Lincoln* v. *Vigil*, 508 U. S. 182, 191 (1993)). And we have generally limited the exception to "certain categories of administrative decisions that courts traditionally have regarded as 'committed to agency discretion,'" *id.*, at 191, such as a decision not to institute enforcement proceedings, *Heckler* v. *Chaney*, 470 U. S. 821, 831–832 (1985), or a decision by an intelligence agency to terminate an employee in the interest of national security, *Webster* v. *Doe*, 486 U. S. 592, 600–601 (1988).

The taking of the census is not one of those areas traditionally committed to agency discretion. We and other courts have entertained both constitutional and statutory challenges to census-related decisionmaking. See, *e. g.*, *Department of Commerce*, 525 U. S. 316; *Wisconsin*, 517 U. S. 1; *Carey* v. *Klutznick*, 637 F. 2d 834 (CA2 1980).

Nor is the statute here drawn so that it furnishes no meaningful standard by which to judge the Secretary's action. In contrast to the National Security Act in *Webster*, which gave the Director of Central Intelligence discretion to terminate employees whenever he "deem[ed]" it "advisable," 486 U. S., at 594, the Census Act constrains the Secretary's authority to determine the form and content of the census in a number of ways. Section 195, for example, governs the extent to which he can use statistical sampling. Section 6(c), which will be considered in more detail below, circumscribes his power in certain circumstances to collect information

through direct inquiries when administrative records are available. More generally, by mandating a population count that will be used to apportion representatives, see § 141(b), 2 U. S. C. § 2a, the Act imposes "a duty to conduct a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the apportionment." *Franklin*, 505 U. S., at 819–820 (Stevens, J., concurring in part and concurring in judgment).

The Secretary's decision to reinstate a citizenship question is amenable to review for compliance with those and other provisions of the Census Act, according to the general requirements of reasoned agency decisionmaking. Because this is not a case in which there is "no law to apply," *Overton Park*, 401 U. S., at 410, the Secretary's decision is subject to judicial review.

B

At the heart of this suit is respondents' claim that the Secretary abused his discretion in deciding to reinstate a citizenship question. We review the Secretary's exercise of discretion under the deferential "arbitrary and capricious" standard. See 5 U. S. C. § 706(2)(A). Our scope of review is "narrow": We determine only whether the Secretary examined "the relevant data" and articulated "a satisfactory explanation" for his decision, "including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43 (1983) (internal quotation marks omitted). We may not substitute our judgment for that of the Secretary, *ibid.*, but instead must confine ourselves to ensuring that he remained "within the bounds of reasoned decisionmaking," *Baltimore Gas & Elec. Co.* v. *Natural Resources Defense Council, Inc.*, 462 U. S. 87, 105 (1983).

The District Court set aside the Secretary's decision for two independent reasons: His course of action was not supported by the evidence before him, and his stated rationale

was pretextual. We focus on the first point here and take up the question of pretext later.

The Secretary examined the Bureau's analysis of various ways to collect improved citizenship data and explained why he thought the best course was to both reinstate a citizenship question and use citizenship data from administrative records to fill in the gaps. He considered but rejected the Bureau's recommendation to use administrative records alone. As he explained, records are lacking for about 10% of the population, so the Bureau would still need to estimate citizenship for millions of voting-age people. Asking a citizenship question of everyone, the Secretary reasoned, would eliminate the need to estimate citizenship for many of those people. And supplementing census responses with administrative record data would help complete the picture and allow the Bureau to better estimate citizenship for the smaller set of cases where it was still necessary to do so.

The evidence before the Secretary supported that decision. As the Bureau acknowledged, each approach—using administrative records alone, or asking about citizenship and using records to fill in the gaps—entailed tradeoffs between accuracy and completeness. Without a citizenship question, the Bureau would need to estimate the citizenship of about 35 million people; with a citizenship question, it would need to estimate the citizenship of only 13.8 million. Under either approach, there would be some errors in both the administrative records and the Bureau's estimates. With a citizenship question, there would also be some erroneous self-responses (about 500,000) and some conflicts between responses and administrative record data (about 9.5 million).

The Bureau explained that the "relative quality" of the citizenship data generated by each approach would depend on the "relative importance of the errors" in each, but it was not able to "quantify the relative magnitude of the errors across the alternatives." App. 148. The Bureau nonetheless recommended using administrative records alone be-

cause it had "high confidence" that it could develop an accurate model for estimating the citizenship of the 35 million people for whom administrative records were not available, and it thought the resulting citizenship data would be of superior quality. *Id.*, at 146, 158–159. But when the time came for the Secretary to make a decision, the model did not yet exist, and even if it had, there was no way to gauge its relative accuracy. As the Bureau put it, "we will most likely never possess a fully adequate truth deck to benchmark" the model—which appears to be bureaucratese for "maybe, maybe not." *Id.*, at 146. The Secretary opted instead for the approach that would yield a more complete set of data at an acceptable rate of accuracy, and would require estimating the citizenship of fewer people.

The District Court overruled that choice, agreeing with the Bureau's assessment that its recommended approach would yield higher quality citizenship data on the whole. But the choice between reasonable policy alternatives in the face of uncertainty was the Secretary's to make. He considered the relevant factors, weighed risks and benefits, and articulated a satisfactory explanation for his decision. In overriding that reasonable exercise of discretion, the court improperly substituted its judgment for that of the agency.

The Secretary then weighed the benefit of collecting more complete and accurate citizenship data against the risk that inquiring about citizenship would depress census response rates, particularly among noncitizen households. In the Secretary's view, that risk was difficult to assess. The Bureau predicted a 5.1% decline in response rates among noncitizen households if the citizenship question were reinstated.[2] It relied for that prediction primarily on studies showing that, while noncitizens had responded at lower rates than citizens to the 2000 short-form and 2010 censuses, which

[2] Several months after the Secretary made his decision, the Bureau updated its prediction to 5.8%, the figure the District Court later relied on in its standing analysis. See 351 F. Supp. 3d 502, 579 (SDNY 2019).

did not ask about citizenship, they responded at even lower rates than citizens to the 2000 long-form census and the 2010 American Community Survey, which did ask about citizenship. The Bureau thought it was reasonable to infer that the citizenship question accounted for the differential decline in noncitizen responses. But, the Secretary explained, the Bureau was unable to rule out other causes. For one thing, the evidence before the Secretary suggested that noncitizen households tend to be more distrustful of, and less likely to respond to, *any* government effort to collect information. For another, both the 2000 long-form census and 2010 ACS asked over 45 questions on a range of topics, including employment, income, and housing characteristics. Noncitizen households might disproportionately fail to respond to a lengthy and intrusive Government questionnaire for a number of reasons besides reluctance to answer a citizenship question—reasons relating to education level, socioeconomic status, and less exposure to Government outreach efforts. See App. to Pet. for Cert. 553a–554a, 557a–558a.

The Secretary justifiably found the Bureau's analysis inconclusive. Weighing that uncertainty against the value of obtaining more complete and accurate citizenship data, he determined that reinstating a citizenship question was worth the risk of a potentially lower response rate. That decision was reasonable and reasonably explained, particularly in light of the long history of the citizenship question on the census.

JUSTICE BREYER would conclude otherwise, but only by subordinating the Secretary's policymaking discretion to the Bureau's technocratic expertise. JUSTICE BREYER's analysis treats the Bureau's (pessimistic) prediction about response rates and (optimistic) assumptions about its data modeling abilities as touchstones of substantive reasonableness rather than simply evidence for the Secretary to consider. He suggests that the Secretary should have deferred to the Bureau or at least offered some special justification for draw-

ing his own inferences and adopting his own assumptions. But the Census Act authorizes the Secretary, not the Bureau, to make policy choices within the range of reasonable options. And the evidence before the Secretary hardly led ineluctably to just one reasonable course of action. It called for value-laden decisionmaking and the weighing of incommensurables under conditions of uncertainty. The Secretary was required to consider the evidence and give reasons for his chosen course of action. He did so. It is not for us to ask whether his decision was "the best one possible" or even whether it was "better than the alternatives." *FERC* v. *Electric Power Supply Assn.*, 577 U. S. 260, 292 (2016). By second-guessing the Secretary's weighing of risks and benefits and penalizing him for departing from the Bureau's inferences and assumptions, JUSTICE BREYER—like the District Court—substitutes his judgment for that of the agency.

C

The District Court also ruled that the Secretary violated two particular provisions of the Census Act, § 6(c) and § 141(f).

Section 6 has three subsections. Subsections (a) and (b) authorize the Secretary to acquire administrative records from other federal agencies and from state and local governments.[3] Subsection (c) states:

> "To the maximum extent possible and consistent with the kind, timeliness, quality and scope of the statistics

[3] The full text of subsections (a) and (b) provides:

"(a) The Secretary, whenever he considers it advisable, may call upon any other department, agency, or establishment of the Federal Government, or of the government of the District of Columbia, for information pertinent to the work provided for in this title.

"(b) The Secretary may acquire, by purchase or otherwise, from States, counties, cities, or other units of government, or their instrumentalities, or from private persons and agencies, such copies of records, reports, and other material as may be required for the efficient and economical conduct of the censuses and surveys provided for in this title." 13 U. S. C. § 6.

> required, the Secretary shall acquire and use information available from any source referred to in subsection (a) or (b) of this section instead of conducting direct inquiries." 13 U. S. C. § 6(c).

The District Court held, and respondents argue, that the Secretary failed to comply with § 6(c) because he opted to collect citizenship data using direct inquiries when it was possible to provide DOJ with data from administrative records alone.

At the outset, § 6(c) may not even apply here. It governs the Secretary's choices with respect to "statistics required." The parties have assumed that phrase refers to census-related data that the Secretary wishes to acquire, but it may instead refer to particular kinds of statistics that other provisions of the Census Act actually do *require* the Secretary to collect and publish. See, *e. g.*, § 41 ("The Secretary shall collect and publish statistics concerning [cotton and cotton production]."); § 61 ("The Secretary shall collect, collate, and publish monthly statistics concerning [vegetable and animal oils and the like]."); § 91 ("The Secretary shall collect and publish quarterly financial statistics of business operations, organization, practices, management, and relation to other businesses."). If so, § 6(c) would seem to have nothing to say about the Secretary's collection of census-related citizenship data, which is not a "statistic" he is "required" to collect.

Regardless, assuming the provision applies, the Secretary complied with it, for essentially the same reasons that his decision was not arbitrary and capricious. As he explained, administrative records would not, in his judgment, provide the more complete and accurate data that DOJ sought. He thus could not, "consistent with" the kind and quality of the "statistics required," use administrative records instead of asking about citizenship directly. Respondents' arguments to the contrary rehash their disagreement with the Secretary's policy judgment about which approach would yield the most complete and accurate citizenship data. For the rea-

sons already discussed, we may not substitute our judgment for that of the Secretary here.

We turn now to § 141(f), which requires the Secretary to report to Congress about his plans for the census. Paragraph (1) instructs him to submit, at least three years before the census date, a report containing his "determination of the subjects proposed to be included, and the types of information to be compiled," in the census. Paragraph (2) then tells him to submit, at least two years before the census date, a report containing his "determination of the questions proposed to be included" in the census. Paragraph (3) provides:

> "[A]fter submission of a report under paragraph (1) or (2) of this subsection and before the appropriate census date, if the Secretary finds new circumstances exist which necessitate that the subjects, types of information, or questions contained in reports so submitted be modified, [he shall submit] a report containing the Secretary's determination of the subjects, types of information, or questions as proposed to be modified."

The Secretary timely submitted his paragraph (1) report in March 2017. It did not mention citizenship. In December 2017, he received DOJ's formal request. Three months later, in March 2018, he timely submitted his paragraph (2) report. It did propose asking a question about citizenship.

The District Court held that the Secretary's failure to mention citizenship in his March 2017 report violated § 141(f)(1) and provided an independent basis to set aside his action. Assuming without deciding that the Secretary's compliance with the reporting requirement is for courts—rather than Congress—to police, we disagree. The Secretary's March 2018 report satisfied the requirements of paragraph (3): By informing Congress that he proposed to include a citizenship question, the Secretary necessarily also informed Congress that he proposed to modify the original list of subjects that he submitted in the March 2017 report.

Nothing in § 141(f) suggests that the same report cannot simultaneously fulfill the requirements of paragraphs (2) and (3). And to the extent paragraph (3) requires the Secretary to explain his finding of new circumstances, he did so in his March 2018 memo, which described DOJ's intervening request.

In any event, even if we agreed with the District Court that the Secretary technically violated § 141(f) by submitting a paragraph (2) report that doubled as a paragraph (3) report, the error would surely be harmless in these circumstances, where the Secretary nonetheless fully informed Congress of, and explained, his decision. See 5 U. S. C. § 706 (in reviewing agency action, "due account shall be taken of the rule of prejudicial error").

V

We now consider the District Court's determination that the Secretary's decision must be set aside because it rested on a pretextual basis, which the Government conceded below would warrant a remand to the agency.

We start with settled propositions. First, in order to permit meaningful judicial review, an agency must "disclose the basis" of its action. *Burlington Truck Lines*, *Inc.* v. *United States*, 371 U. S. 156, 167–169 (1962) (internal quotation marks omitted); see also *SEC* v. *Chenery Corp.*, 318 U. S. 80, 94 (1943) ("[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.").

Second, in reviewing agency action, a court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, *Inc.*, 435 U. S. 519, 549 (1978); *Camp* v. *Pitts*, 411 U. S. 138, 142–143 (1973) (*per curiam*). That principle re-

flects the recognition that further judicial inquiry into "executive motivation" represents "a substantial intrusion" into the workings of another branch of Government and should normally be avoided. *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 268, n. 18 (1977); see *Overton Park*, 401 U. S., at 420.

Third, a court may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons. See *Jagers* v. *Federal Crop Ins. Corp.*, 758 F. 3d 1179, 1185–1186 (CA10 2014) (rejecting argument that "the agency's subjective desire to reach a particular result must necessarily invaslidate the result, regardless of the objective evidence supporting the agency's conclusion"). Relatedly, a court may not set aside an agency's policymaking decision solely because it might have been influenced by political considerations or prompted by an Administration's priorities. Agency policymaking is not a "rarified technocratic process, unaffected by political considerations or the presence of Presidential power." *Sierra Club* v. *Costle*, 657 F. 2d 298, 408 (CADC 1981). Such decisions are routinely informed by unstated considerations of politics, the legislative process, public relations, interest group relations, foreign relations, and national security concerns (among others).

Finally, we have recognized a narrow exception to the general rule against inquiring into "the mental processes of administrative decisionmakers." *Overton Park*, 401 U. S., at 420. On a "strong showing of bad faith or improper behavior," such an inquiry may be warranted and may justify extra-record discovery. *Ibid.*

The District Court invoked that exception in ordering extra-record discovery here. Although that order was premature, we think it was ultimately justified in light of the expanded administrative record. Recall that shortly after this litigation began, the Secretary, prodded by DOJ, filed a

supplemental memo that added new, pertinent information to the administrative record. The memo disclosed that the Secretary had been considering the citizenship question for some time and that Commerce had inquired whether DOJ would formally request reinstatement of the question. That supplemental memo prompted respondents to move for both completion of the administrative record and extra-record discovery. The District Court granted both requests at the same hearing, agreeing with respondents that the Government had submitted an incomplete administrative record and that the existing evidence supported a prima facie showing that the VRA rationale was pretextual.

The Government did not challenge the court's conclusion that the administrative record was incomplete, and the parties stipulated to the inclusion of more than 12,000 pages of internal deliberative materials as part of the administrative record, materials that the court later held were sufficient on their own to demonstrate pretext. The Government did, however, challenge the District Court's order authorizing extra-record discovery, as well as the court's later orders compelling depositions of the Secretary and of the Acting Assistant Attorney General for DOJ's Civil Rights Division.

We agree with the Government that the District Court should not have ordered extra-record discovery when it did. At that time, the most that was warranted was the order to complete the administrative record. But the new material that the parties stipulated should have been part of the administrative record—which showed, among other things, that the VRA played an insignificant role in the decision-making process—largely justified such extra-record discovery as occurred (which did not include the deposition of the Secretary himself). We accordingly review the District Court's ruling on pretext in light of all the evidence in the record before the court, including the extra-record discovery.

That evidence showed that the Secretary was determined to reinstate a citizenship question from the time he entered

office; instructed his staff to make it happen; waited while Commerce officials explored whether another agency would request census-based citizenship data; subsequently contacted the Attorney General himself to ask if DOJ would make the request; and adopted the Voting Rights Act rationale late in the process. In the District Court's view, this evidence established that the Secretary had made up his mind to reinstate a citizenship question "well before" receiving DOJ's request, and did so for reasons unknown but unrelated to the VRA. 351 F. Supp. 3d, at 660.

The Government, on the other hand, contends that there was nothing objectionable or even surprising in this. And we agree—to a point. It is hardly improper for an agency head to come into office with policy preferences and ideas, discuss them with affected parties, sound out other agencies for support, and work with staff attorneys to substantiate the legal basis for a preferred policy. The record here reflects the sometimes involved nature of Executive Branch decisionmaking, but no particular step in the process stands out as inappropriate or defective.

And yet, viewing the evidence as a whole, we share the District Court's conviction that the decision to reinstate a citizenship question cannot be adequately explained in terms of DOJ's request for improved citizenship data to better enforce the VRA. Several points, considered together, reveal a significant mismatch between the decision the Secretary made and the rationale he provided.

The record shows that the Secretary began taking steps to reinstate a citizenship question about a week into his tenure, but it contains no hint that he was considering VRA enforcement in connection with that project. The Secretary's Director of Policy did not know why the Secretary wished to reinstate the question, but saw it as his task to "find the best rationale." *Id.*, at 551. The Director initially attempted to elicit requests for citizenship data from the Department of Homeland Security and DOJ's Executive Office

for Immigration Review, neither of which is responsible for enforcing the VRA. After those attempts failed, he asked Commerce staff to look into whether the Secretary could reinstate the question without receiving a request from another agency. The possibility that DOJ's Civil Rights Division might be willing to request citizenship data for VRA enforcement purposes was proposed by Commerce staff along the way and eventually pursued.

Even so, it was not until the Secretary contacted the Attorney General directly that DOJ's Civil Rights Division expressed interest in acquiring census-based citizenship data to better enforce the VRA. And even then, the record suggests that DOJ's interest was directed more to helping the Commerce Department than to securing the data. The December 2017 letter from DOJ drew heavily on contributions from Commerce staff and advisors. Their influence may explain why the letter went beyond a simple entreaty for better citizenship data—what one might expect of a typical request from another agency—to a specific request that Commerce collect the data by means of reinstating a citizenship question on the census. Finally, after sending the letter, DOJ declined the Census Bureau's offer to discuss alternative ways to meet DOJ's stated need for improved citizenship data, further suggesting a lack of interest on DOJ's part.

Altogether, the evidence tells a story that does not match the explanation the Secretary gave for his decision. In the Secretary's telling, Commerce was simply acting on a routine data request from another agency. Yet the materials before us indicate that Commerce went to great lengths to elicit the request from DOJ (or any other willing agency). And unlike a typical case in which an agency may have both stated and unstated reasons for a decision, here the VRA enforcement rationale—the sole stated reason—seems to have been contrived.

We are presented, in other words, with an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decisionmaking process. It is rare to review a record as extensive as the one before us when evaluating informal agency action—and it should be. But having done so for the sufficient reasons we have explained, we cannot ignore the disconnect between the decision made and the explanation given. Our review is deferential, but we are "not required to exhibit a naiveté from which ordinary citizens are free." *United States* v. *Stanchich*, 550 F. 2d 1294, 1300 (CA2 1977) (Friendly, J.). The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise. If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case.

In these unusual circumstances, the District Court was warranted in remanding to the agency, and we affirm that disposition. See *Florida Power & Light Co.* v. *Lorion*, 470 U. S. 729, 744 (1985). We do not hold that the agency decision here was substantively invalid. But agencies must pursue their goals reasonably. Reasoned decisionmaking under the Administrative Procedure Act calls for an explanation for agency action. What was provided here was more of a distraction.

* * *

The judgment of the United States District Court for the Southern District of New York is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, with whom JUSTICE GORSUCH and JUSTICE KAVANAUGH join, concurring in part and dissenting in part.

In March 2018, the Secretary of Commerce exercised his broad discretion over the administration of the decennial census to resume a nearly unbroken practice of asking a question relating to citizenship. Our only role in this case is to decide whether the Secretary complied with the law and gave a reasoned explanation for his decision. The Court correctly answers these questions in the affirmative. *Ante*, at 768–780. That ought to end our inquiry.

The Court, however, goes further. For the first time ever, the Court invalidates an agency action solely because it questions the sincerity of the agency's otherwise adequate rationale. Echoing the din of suspicion and distrust that seems to typify modern discourse, the Court declares the Secretary's memorandum "pretextual" because, "viewing the evidence as a whole," his explanation that including a citizenship question on the census would help enforce the Voting Rights Act (VRA) "seems to have been contrived." *Ante*, at 780, 783, 784. The Court does not hold that the Secretary merely had *additional*, unstated reasons for reinstating the citizenship question. Rather, it holds that the Secretary's stated rationale did not factor *at all* into his decision.

The Court's holding reflects an unprecedented departure from our deferential review of discretionary agency decisions. And, if taken seriously as a rule of decision, this holding would transform administrative law. It is not difficult for political opponents of executive actions to generate controversy with accusations of pretext, deceit, and illicit motives. Significant policy decisions are regularly criticized as products of partisan influence, interest-group pressure, corruption, and animus. Crediting these accusations on evidence as thin as the evidence here could lead judicial review of administrative proceedings to devolve into an endless mo-

rass of discovery and policy disputes not contemplated by the Administrative Procedure Act (APA).

Unable to identify any legal problem with the Secretary's reasoning, the Court imputes one by concluding that he must not be telling the truth. The Court therefore upholds the decision of the District Court—which, in turn, was transparently based on the application of an administration-specific standard. App. to Pet. for Cert. 527a (crediting respondents' allegations that "the *current* Department of Justice has shown little interest in enforcing the" VRA (emphasis added)).

The law requires a more impartial approach. Even assuming we are authorized to engage in the review undertaken by the Court—which is far from clear—we have often stated that courts reviewing agency action owe the Executive a "presumption of regularity." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402, 415 (1971). The Court pays only lipservice to this principle. But, the evidence falls far short of supporting its decision. The Court, I fear, will come to regret inventing the principles it uses to achieve today's result. I respectfully dissent from Part V of the opinion of the Court.[1]

I

As the Court explains, federal law directs the Secretary of Commerce to "take a decennial census." 13 U. S. C. § 141(a); see U. S. Const., Art. I, § 2, cl. 3; Amdt. 14, § 2; *ante*, at 759–760. The discretion afforded the Secretary is extremely broad. Subject only to constitutional limitations and a handful of inapposite statutory requirements, the Secretary is expressly authorized to "determine the inquiries" on the census questionnaire and to conduct the census "in such form and content as he may determine." §§ 5, 141(a);

[1] JUSTICE KAVANAUGH and I join Parts I, II, III, and IV of the opinion of the Court. JUSTICE GORSUCH joins Parts I, II, III, IV–B, and IV–C.

see *ante*, at 771–773, 777–780.[2] Prior census questionnaires have included questions ranging from sex, age, and race to commute, education, and radio ownership. And between 1820 and 2010, every decennial census questionnaire but one asked some segment of the population a question related to citizenship. The 2010 census was the first since 1840 that did not include any such question.

In March 2018, the Secretary issued a memorandum reinstating a citizenship question on the 2020 census. He explained that the Department of Justice (DOJ) had formally requested reinstatement of the question because the data obtained would help enforce § 2 of the VRA. He further explained that the question had been well tested in light of its extensive previous use, that he had consulted with the Census Bureau on the proposal, and that his final decision incorporated feedback from the Bureau. He recognized that staff at the Bureau believed that better data could be obtained through modeling and reliance on existing records, but he disagreed with that assessment, explaining that the data were inconclusive and that he thought it preferable to ask the question directly of the entire population. Respondents brought suit, seeking judicial review of the Secretary's decision under the APA, 5 U. S. C. § 706.

II

As relevant here, the APA requires courts to "hold unlawful and set aside" agency action that is "arbitrary, capricious,

[2] JUSTICE ALITO has made a strong argument that the specific decision at issue here—whether to include a citizenship question on the census—is a matter "committed to agency discretion by law." 5 U. S. C. § 701(a)(2); see *post*, at 823 (opinion concurring in part and dissenting in part). As he explains, the Secretary's decision plainly falls within the scope of the Secretary's constitutional authority, does not implicate any statutory prohibition, and is among the "inquiries" and "content[s]" of the census that the Secretary is expressly directed to "determine" for himself. §§ 5, 141(a); see *post*, at 825–834. Nevertheless, I assume, for the purpose of this opinion, that the Secretary's decision is subject to judicial review.

an abuse of discretion, or otherwise not in accordance with law." § 706(2)(A). We have emphasized that "[r]eview under the arbitrary and capricious standard is deferential." *National Assn. of Home Builders* v. *Defenders of Wildlife*, 551 U. S. 644, 658 (2007); see *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U. S. 457, 466, n. 8 (1997). It requires the reviewing court to determine whether the agency "'examine[d] the relevant data and articulate[d] a satisfactory explanation for its action.'" *FCC* v. *Fox Television Stations, Inc.*, 556 U. S. 502, 513 (2009). We have described this as a "'narrow' standard of review" under which the reviewing court cannot "'substitute its judgment for that of the agency,' and should 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.'" *Id.*, at 513–514 (citation omitted); accord, *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43 (1983).[3]

Part IV–B of the opinion of the Court correctly applies this standard to conclude that the Secretary's decision survives ordinary arbitrary-and-capricious review. That holding should end our inquiry.

But the opinion continues. Acknowledging that "no particular step" in the proceedings here "stands out as inappropriate or defective," even after reviewing "all the evidence in the record . . . , including the extra-record discovery," *ante*, at 782–783, the Court nevertheless agrees with the District Court that the Secretary's rationale for reinstating the citizenship question was "pretextual—that is, that the real reason for his decision was something other than the sole reason he put forward in his Memorandum, namely

[3] Deferential review of the agency's discretionary choices and reasoning under the arbitrary-and-capricious standard stands in marked contrast to a court's plenary review of the agency's interpretation and application of the law. See §§ 706(2)(A)–(D) (court must review agency action to ensure that it complies with all "constitutional," "statutory," and "procedur[al]" requirements, and is otherwise "in accordance with law").

enhancement of DOJ's VRA enforcement efforts," 351 F. Supp. 3d 502, 660 (SDNY 2019); see *ante*, at 784–785. According to the Court, something just "seems" wrong. *Ante*, at 784.

This conclusion is extraordinary. The Court engages in an unauthorized inquiry into evidence not properly before us to reach an unsupported conclusion. Moreover, each step of the inquiry offends the presumption of regularity we owe the Executive. The judgment of the District Court should be reversed.

A

Section 706(2) of the APA contemplates review of the administrative "record" to determine whether an agency's "action, findings, and conclusions" satisfy six specified standards. See §§ 706(2)(A)–(F). None instructs the Court to inquire into pretext. Consistent with this statutory text, we have held that a court is "ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record." *Ante*, at 780 (citing *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 549 (1978)); see *SEC* v. *Chenery Corp.*, 318 U. S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based"). If an agency's stated findings and conclusions withstand scrutiny, the APA does not permit a court to set aside the decision solely because the agency had "other unstated reasons" for its decision, such as "political considerations" or the "Administration's priorities." *Ante*, at 781.

Unsurprisingly, then, this Court has never held an agency decision arbitrary and capricious on the ground that its supporting rationale was "pretextual." Nor has it previously suggested that this was even a possibility. Under "settled propositions" of administrative law, *ante*, at 780, pretext is virtually never an appropriate or relevant inquiry for a reviewing court to undertake.

Respondents conceptualize pretext as a subset of "arbitrary and capricious" review. It is far from clear that they are correct. But even if they were, an agency action is not arbitrary or capricious merely because the decisionmaker has other, unstated reasons for the decision. *Ante*, at 781. Nor is an agency action arbitrary and capricious merely because the decisionmaker was "inclined" to accomplish it before confirming that the law and facts supported that inclination. *In re Department of Commerce*, 586 U. S. 956, 958 (2018) (GORSUCH, J., concurring in part and dissenting in part).

Accordingly, even under respondents' approach, a showing of pretext could render an agency action arbitrary and capricious only in the infinitesimally small number of cases in which the administrative record establishes that an agency's stated rationale did not factor *at all* into the decision, thereby depriving the action of an adequate supporting rationale.[4] This showing is extremely difficult to make because the administrative record will rarely, if ever, contain evidence sufficient to show that an agency's stated rationale did not actually factor into its decision. And we have stated that a "strong showing of bad faith or improper behavior" is necessary to venture beyond the agency's "administrative findings" and inquire into "the mental processes of administrative decisionmakers." *Overton Park*, 401 U. S., at 420.[5]

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[4] We do not have before us a claim that information outside the administrative record calls into question the legality of an agency action based on an unstated, unlawful bias or motivation (*e. g.*, a claim of religious discrimination under the Free Exercise Clause). But to the extent such a claim is viable, the analysis would have nothing to do with the arbitrary-and-capricious review pressed by respondents. See §§ 706(2)(A)–(C) (addressing agency actions that violate "constitutional" or "statutory" requirements, or that "otherwise [are] not in accordance with law").

[5] Insofar as *Overton Park* authorizes an exception to review on the administrative record, it has been criticized as having "no textual grounding in the APA" and as "created by the Court, without citation or explanation, to facilitate Article III review." Gavoor & Platt, Administrative

We have never before found *Overton Park*'s exception satisfied, much less invalidated an agency action based on "pretext."

Undergirding our arbitrary-and-capricious analysis is our longstanding precedent affording the Executive a "presumption of regularity." *Id.*, at 415; see *United States* v. *Chemical Foundation, Inc.*, 272 U. S. 1, 14–15 (1926). This presumption reflects respect for a coordinate branch of Government whose officers not only take an oath to support the Constitution, as we do, Art. VI, but also are charged with "faithfully execut[ing]" our laws, Art. II, § 3. See *United States* v. *Morgan*, 313 U. S. 409, 422 (1941) (presumption of regularity ensures that the "integrity of the administrative process" is appropriately respected). In practice, then, we give the benefit of the doubt to the agency.

B

The Court errs at the outset by proceeding beyond the administrative record to evaluate pretext. Respondents have not made a "strong showing of bad faith or improper behavior." *Overton Park*, *supra*, at 420.

The District Court's initial order granting extra-record discovery relied on four categories of evidence:

> "evidence that [the Secretary] was predisposed to reinstate the citizenship question when he took office; that the [DOJ] hadn't expressed a desire for more detailed citizenship data until the Secretary solicited its views; that he overruled the objections of his agency's career

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Records and the Courts, 67 U. Kan. L. Rev. 1, 44 (2018); see *id.*, at 22 (further arguing that the exception was "neither presented by the facts of the case nor briefed by the parties"). The legitimacy and scope of the exception—which by its terms contemplates only "administrative officials who participated in the decision . . . giv[ing] testimony explaining their action," *Overton Park*, 401 U. S., at 420—is an important question that may warrant future consideration. But because the Court's holding is incorrect regardless of the validity of the *Overton Park* exception, I will apply it here.

> staff; and that he declined to order more testing of the question given its long history." *Department of Commerce*, 586 U. S., at 958 (opinion of GORSUCH, J.).

None of this comes close to showing bad faith or improper behavior. Indeed, there is nothing even "unusual about a new cabinet secretary coming to office inclined to favor a different policy direction, soliciting support from other agencies to bolster his views, disagreeing with staff, or cutting through red tape." *Ibid.* Today all Members of the Court who reach the question agree that the District Court abused its discretion in ordering extra-record discovery based on this evidence. *Ante*, at 782 ("We agree with the Government that the District Court should not have ordered extra-record discovery when it did").

Nevertheless, the Court excuses the error because, in its view, "the new material that the parties [later] stipulated should have been part of the administrative record . . . largely justified such extra-record discovery as occurred." *Ibid.* Given the requirement that respondents make a "strong showing" of bad faith, one would expect the Court to identify which "new material" supported such a showing. It does not. Nor does the Court square its suggestion that some of the extra-record discovery was *not* "justified" with its consideration of "all . . . the extra-record discovery." *Ibid.* Regardless, I assume that the Court has in mind the administrative-record materials that the District Court would later rely on to establish pretext:

> "evidence that [the Secretary] had made the decision to add the citizenship question well before DOJ requested its addition in December 2017; the absence of any mention, *at all*, of VRA enforcement in the discussions of adding the question that preceded the [DOJ] Letter; unsuccessful attempts by Commerce Department staff to shop around for a request by another agency regarding citizenship data; and [the Secretary's] personal outreach

> to Attorney General Sessions, followed by the [DOJ] Letter; not to mention the conspicuous procedural irregularities that accompanied the decision to add the question." 351 F. Supp. 3d, at 661 (citations omitted).

This evidence fails to make a strong showing of bad faith or improper behavior. Taken together, it proves at most that the Secretary was predisposed to add a citizenship question to the census and took steps to achieve that end before settling on the VRA rationale he included in his memorandum. Perhaps he had reasons for adding the citizenship question other than the VRA, but by the Court's own telling, that does not amount to evidence of bad faith or improper behavior. *Ante*, at 781; see *Department of Commerce*, *supra*, at 957–958 (opinion of GORSUCH, J.).

The Court thus errs in relying on materials outside the record to support its holding. And the Court does not claim that the evidence in the administrative record alone would prove that the March 2018 memorandum was a pretext. Given the presumption of regularity, the evidence discussed above falls far short of establishing that the VRA rationale did not factor at all into the Secretary's decision.

C

Even if it were appropriate for the Court to rely on evidence outside the administrative record, that evidence still fails to establish pretext. None of the evidence cited by the Court or the District Court comes close to showing that the Secretary's stated rationale—that adding a citizenship question to the 2020 census questionnaire would "provide . . . data that are not currently available" and "permit more effective enforcement of the [VRA]," App. to Pet. for Cert. 548a—did not factor *at all* into his decision.

Once again, the evidence cited by the Court suggests at most that the Secretary had "other unstated reasons" for reinstating the citizenship question. *Ante*, at 781. For ex-

ample, the Court states that the Secretary's Director of Policy "initially attempted to elicit requests for citizenship data from the Department of Homeland Security and DOJ's Executive Office for Immigration Review." *Ante*, at 783–784. But this hardly shows pretext. It simply suggests that the Director believed that citizenship information could be useful in tackling problems related to national security and illegal immigration—a view that would also explain why the Secretary might not have been "considering VRA enforcement" early on. *Ante*, at 783; see also American Community Survey, Why We Ask: Place of Birth, Citizenship and Year of Entry (2016) (explaining that inquiries about "place of birth, citizenship, and year of entry" provide statistics that are "essential for agencies and policy makers setting and evaluating immigration policies and laws, understanding how different immigrant groups are assimilated, and monitoring against discrimination"), https://www2.census.gov/programs-surveys/acs/about/qbyqfact/2016/Citizenship.pdf (as last visited June 25, 2019).

The Court emphasizes that the VRA rationale for the citizenship question originated in the Department of Commerce, and suggests that DOJ officials unthinkingly fell in line after the Attorney General was looped into the process. See *ante*, at 783–784. But the Court ignores that the letter was drafted by the then-Acting Assistant Attorney General for Civil Rights and reviewed by five other DOJ attorneys, including the Chief of the DOJ's Voting Section. 351 F. Supp. 3d, at 554–556. Given the DOJ's multilayer review process and its explanation for requesting citizenship data, the Court's suggestion that the DOJ's letter was inadequately vetted or improperly "influence[d]" by the Department of Commerce is entirely unsupported. *Ante*, at 784. In any event, none of this suggests, much less proves, that the Secretary harbored an unstated belief that adding the citizenship question would *not* help enforce the VRA, or that the

VRA rationale otherwise did not factor at all into his decision. It simply suggests that a number of executive officials agreed that adding a citizenship question would support VRA enforcement.

The Court's other evidence is even further afield. The Court thinks it telling that the DOJ's letter included "a specific request that Commerce collect the [citizenship] data by means of reinstating a citizenship question on the census," rather than a more open-ended "entreaty for better citizenship data." *Ibid.* I do not understand how the specificity of the DOJ's letter bears on whether the Secretary's rationale was pretextual—particularly since the letter specifically explained why "census questionnaire data regarding citizenship, if available, would be more appropriate for use in redistricting and in [VRA] litigation" than existing data. App. to Pet. for Cert. 568a; see *id.*, at 567a–568a. Unless the Court is now suggesting that agency correspondence must comply with the Court's subjective, unsupported view of what "might" constitute a "typical request from another agency," *ante*, at 784, the specificity of the DOJ's letter is irrelevant. The Court also points to the DOJ's decision not to meet with the Census Bureau "to discuss alternative ways to meet DOJ's stated need for improved citizenship data." *Ibid.* But the Court does not explain how the DOJ's refusal bears on the *Secretary's* rationale. Besides, it is easy to understand why DOJ officials would not be interested in meeting with the Census Bureau. The meeting would have been with career employees whose acknowledged purpose was to talk the DOJ out of its request. See 351 F. Supp. 3d, at 557. Having already considered the issue and explained the rationale behind the request, it seems at least plausible that the DOJ officials believed such a meeting would be unproductive.

In short, the evidence cited by the Court establishes, at most, that leadership at both the Department of Commerce and the DOJ believed it important—for a vari-

ety of reasons—to include a citizenship question on the census.

The Court also fails to give credit where it is due. The Secretary initiated this process inclined to favor what he called "Option B"—that is, simply "add[ing] a citizenship question to the decennial census." App. to Pet. for Cert. 552a. But the Census Bureau favored "Option C"—relying solely on "administrative records" to supply the information needed by the DOJ. *Id.*, at 554a. The Secretary considered this view and found it a "potentially appealing solution," *ibid.*, but concluded that it had shortcomings. Rather than revert to his original inclination, however, he "asked the Census Bureau to develop a fourth alternative, Option D, which would combine Options B and C." *Id.*, at 555a. And he settled on that solution. Whatever one thinks of the Secretary's choice, his willingness to change his mind in light of the Bureau's feedback belies the idea that his rationale or decisionmaking process was a pretext.

The District Court's lengthy opinion pointed to other facts that, in its view, supported a finding of pretext. 351 F. Supp. 3d, at 567–572, 660–664 (discussing the statements, e-mails, acts, and omissions of numerous people involved in the process). I do not deny that a judge predisposed to distrust the Secretary or the administration could arrange those facts on a corkboard and—with a jar of pins and a spool of string—create an eye-catching conspiracy web. Cf. *id.*, at 662 (inferring "from the various ways in which [the Secretary] and his aides acted like people with something to hide that they *did* have something to hide"). But the Court does not rely on this evidence, and rightly so: It casts no doubt on whether the Secretary's stated rationale factored into his decision. The evidence suggests, at most, that the Secretary had *multiple* reasons for wanting to include the citizenship question on the census.

Finally, if there could be any doubt about this conclusion, the presumption of regularity resolves it. Where there are

equally plausible views of the evidence, one of which involves attributing bad faith to an officer of a coordinate branch of Government, the presumption compels giving the benefit of the doubt to that officer.

III

The Court's erroneous decision in this case is bad enough, as it unjustifiably interferes with the 2020 census. But the implications of today's decision are broader. With today's decision, the Court has opened a Pandora's box of pretext-based challenges in administrative law.

Today's decision marks the first time the Court has ever invalidated an agency action as "pretextual." Having taken that step, one thing is certain: This will not be the last time it is asked to do so. Virtually every significant agency action is vulnerable to the kinds of allegations the Court credits today. These decisions regularly involve coordination with numerous stakeholders and agencies, involvement at the highest levels of the Executive Branch, opposition from reluctant agency staff, and—perhaps most importantly—persons who stand to gain from the action's demise. Opponents of future executive actions can be expected to make full use of the Court's new approach.

The 2015 "Open Internet Order" provides a case in point. In 2015, the Federal Communications Commission (FCC) adopted a controversial order reclassifying broadband Internet access service as a "telecommunications service" subject to regulation under Title II of the Communications Act. See *In re Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601, 5618 (2015). According to a dissenting Commissioner, the FCC "flip-flopp[ed]" on its previous policy not because of a change in facts or legal understanding, but based on "one reason and one reason alone. President Obama told us to do so." *Id.*, at 5921 (statement of Comm'r Pai). His view was supported by a 2016 congressional Report in which Republican Senate staff concluded that "the FCC bent to the political pressure of the White House" and

"failed to live up to standards of transparency." Majority Staff Report, Senate Committee on Homeland Security and Governmental Affairs, Regulating the Internet: How the White House Bowled Over FCC Independence, 114th Cong., 2d Sess., 29 (Comm. Print 2016). The Report cited evidence strikingly similar to that relied upon by the Court here—including agency-initiated "meetings with certain outside groups to support" the new result, *id.*, at 3; "apparen[t] . . . concern from the career staff that there was insufficient notice to the public and affected stakeholders," *id.*, at 4; and "regula[r] communicatio[n]" between the FCC Chairman and "presidential advisors," *id.*, at 25.

Under the malleable standard applied by the Court today, a serious case could be made that the Open Internet Order should have been invalidated as "pretextual," regardless of whether any "particular step in the process stands out as inappropriate or defective." *Ante*, at 783. It is enough, according to the Court, that a judge believes that the ultimate rationale "seems to have been contrived" when the evidence is considered "as a whole." *Ante*, at 783, 784.

Now that the Court has opened up this avenue of attack, opponents of executive actions have strong incentives to craft narratives that would derail them. Moreover, even if the effort to invalidate the action is ultimately unsuccessful, the Court's decision enables partisans to use the courts to harangue executive officers through depositions, discovery, delay, and distraction. The Court's decision could even implicate separation-of-powers concerns insofar as it enables judicial interference with the enforcement of the laws.

In short, today's decision is a departure from traditional principles of administrative law. Hopefully it comes to be understood as an aberration—a ticket good for this day and this train only.

* * *

Because the Secretary's decision to reinstate a citizenship question on the 2020 census was legally sound and a reasoned

exercise of his broad discretion, I respectfully dissent from Part V of the opinion of the Court.

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

I join Parts I, II, IV–A, and V of the Court's opinion (except as otherwise indicated in this opinion). I dissent, however, from the conclusion the Court reaches in Part IV–B. To be more specific, I agree with the Court that the Secretary of Commerce provided a pretextual reason for placing a question about citizenship on the short-form census questionnaire and that a remand to the agency is appropriate on that ground. But I write separately because I also believe that the Secretary's decision to add the citizenship question was arbitrary and capricious and therefore violated the Administrative Procedure Act (APA).

There is no serious dispute that adding a citizenship question would diminish the accuracy of the enumeration of the population—the sole constitutional function of the census and a task of great practical importance. The record demonstrates that the question would likely cause a disproportionate number of noncitizens and Hispanics to go uncounted in the upcoming census. That, in turn, would create a risk that some States would wrongfully lose a congressional representative and funding for a host of federal programs. And, the Secretary was told, the adverse consequences would fall most heavily on minority communities. The Secretary decided to ask the question anyway, citing a need for more accurate citizenship data. But the evidence indicated that asking the question would produce citizenship data that is *less* accurate, not more. And the reason the Secretary gave for needing better citizenship data in the first place—to help enforce the Voting Rights Act of 1965—was not convincing.

In short, the Secretary's decision to add a citizenship question created a severe risk of harmful consequences, yet he

did not adequately consider whether the question was necessary or whether it was an appropriate means of achieving his stated goal. The Secretary thus failed to "articulate a satisfactory explanation" for his decision, "failed to consider . . . important aspect[s] of the problem," and "offered an explanation for [his] decision that runs counter to the evidence," all in violation of the APA. *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43 (1983). These failures, in my view, risked undermining public confidence in the integrity of our democratic system itself. I would therefore hold that the Secretary's decision—whether pretextual or not—was arbitrary, capricious, and an abuse of discretion.

I

A

Three sets of laws determine the legal outcome of this case. First, the Constitution requires an "actual Enumeration" of the "whole number of persons in each State" every 10 years. Art. I, § 2, cl. 3; Amdt. 14, § 2. It does so in order to "provide a basis for apportioning representatives among the states in the Congress." *Baldrige* v. *Shapiro*, 455 U. S. 345, 353 (1982); see also Art. I, § 2, cl. 3. The inclusion of this provision in the Constitution itself underscores the importance of conducting an accurate census. See *Utah* v. *Evans*, 536 U. S. 452, 478 (2002) (recognizing "a strong constitutional interest in [the] accuracy" of the enumeration).

Second, the Census Act contains two directives that constrain the Secretary's ability to add questions to the census. Section 195 says that the Secretary "shall, if he considers it feasible," authorize the use of statistical "sampling" in collecting demographic information. That means the Secretary must, if feasible, obtain demographic information through a survey sent to a *sample* of households, rather than through the short-form census questionnaire to which *every* household must respond. The other relevant provision, § 6(c), says that "*[t]o the maximum extent possible* and con-

sistent with the kind, timeliness, quality and scope of the statistics required, the Secretary shall acquire and use information available" from administrative sources "instead of conducting direct inquiries." (Emphasis added.) These provisions, taken together, reflect a congressional preference for keeping the short form short, so that it does not burden recipients and thereby discourage them from responding.

Third, the APA prohibits administrative agencies from making choices that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U. S. C. § 706(2)(A). We have said that courts, in applying this provision, must decide "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402, 416 (1971). The agency must have "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action[,] including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U. S., at 43. An agency ordinarily fails to meet this standard if it has "failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Ibid.*

Courts do not apply these principles of administrative law mechanically. Rather, they take into account, for example, the nature and importance of the particular decision, the relevance and importance of missing information, and the inadequacies of a particular explanation in light of their importance. The Federal Government makes tens of thousands, perhaps millions, of administrative decisions each year. And courts would be wrong to expect or insist upon administrative perfection. But here, the Enumeration Clause, the Census Act, and the nature of the risks created by the agency's decision all make clear that the decision before us is highly important to the proper functioning of our democratic

system. It is therefore particularly important that courts here not overlook an agency's (1) failure to consider serious risks of harm, (2) failure to explain its refusal to minimize those risks, or (3) failure to link its conclusion to available evidence. My view, like that of the District Court, is that the agency here failed on all three counts.

B

A brief history of how the census has worked over the years will help the reader understand some of the shortcomings of the Secretary's decisionmaking process. The Framers wrote into the Constitution a mandate to conduct an "actual Enumeration" of the population every 10 years. Art. I, §2, cl. 3. They did so for good reason. The purpose of the census is to "provide a basis for apportioning representatives among the states in the Congress," *Baldrige*, 455 U. S., at 353, ensuring that "comparative state political power in the House . . . reflect[s] comparative population," *Evans*, 536 U. S., at 477. The Framers required an actual count of every resident to "limit political chicanery" and to prevent the census count from being "skewed for political . . . purposes." *Id.*, at 500 (THOMAS, J., concurring in part and dissenting in part).

Throughout most of the Nation's history, the Federal Government used enumerators, often trained census takers, to conduct the census by going door to door. The enumerators would ask a host of questions, including place of birth, citizenship, and others. But after the 1950 census, the Bureau began to change its approach. Post-census studies revealed that the census had failed to count more than 5 million people and that the undercount disproportionately affected members of minority groups. See M. Anderson, The American Census: A Social History 201–202 (1988); Brief for Historians and Social Scientists as *Amici Curiae* 15. Studies showed that statistical sampling would produce higher quality data. Anderson, American Census, at 201.

Beginning with the 1960 census, the Bureau consequently divided its questioning into a short form and a long form. The short form contained a list of questions—a short list—that the census would ask of every household. That list included basic demographic questions like sex, age, race, and marital status. The short form did not include, and has never included, a question about citizenship. See *ibid.*; Dept. of Commerce, U. S. Census Bureau, Measuring America: The Decennial Censuses From 1790 to 2000, p. 128 (2002). By way of contrast, the long form set forth a host of questions that would be asked of only a sample of households. In 1960, the long form was sent to one in every four households; in subsequent years, it was sent to approximately one in every six. See 351 F. Supp. 3d 502, 520 (SDNY 2019). And it was more recently replaced by the American Community Survey (ACS), which is sent to approximately 1 in 38 households each year. The long form (and now the ACS) has often included a question about citizenship.

In 1970, the Census Bureau made another important change to the census. It significantly reduced its reliance upon in-person enumerators. See Anderson, *supra*, at 206. Instead, it sent nearly all households a questionnaire by mail. Most households received the short form, and a small sample received the long form. Instructions on the form told each household to fill out the questionnaire and return it to the Census Bureau by mail. Enumerators would follow up with households that did not return the questionnaire.

To maximize accuracy and minimize cost, the Bureau tried to bring about the highest possible "self-response" rate, *i. e.*, to encourage as many households as possible to respond by mail. For that reason, it tried to keep the short form as short as possible. And it consistently opposed placing a citizenship question on that form. It feared that adding a question about citizenship would "inevitably jeopardize the overall accuracy of the population count," partly because of added

response burden but also because, as it explained, noncitizens faced with a citizenship question would be less likely to respond due to fears of "the information being used against them." *Federation for Am. Immigration Reform* v. *Klutznick*, 486 F. Supp. 564, 568 (DC 1980).

Likely for similar reasons, Congress amended the Census Act in 1976, enacting the two statutory provisions to which I previously referred. These two provisions, 13 U. S. C. § 6(c) and § 195, together encourage the Secretary not to ask demographic questions on the short form if the information can be obtained either through the long form or through administrative records.

II

With this statutory and historical background, we can more easily consider the agency decision directly under review. That decision "reinstate[s a] citizenship question on the 2020 decennial census." App. to Pet. for Cert. 549a–550a (Memorandum from Wilbur L. Ross, Jr., Secretary of Commerce, to Karen Dunn Kelley, Under Secretary for Economic Affairs (Mar. 26, 2018)). The agency's decision memorandum provided one and only one reason for making that decision—namely, that the question was "necessary to provide complete and accurate data in response to" a request from the Department of Justice (DOJ). *Id.*, at 562a. The DOJ had requested the citizenship question for "use [in] determining violations of Section 2 of the Voting Rights Act." *Id.*, at 548a.

The decision memorandum adds that the agency had not been able to "determine definitively how inclusion of a citizenship question on the decennial census will impact responsiveness. However, even if there is some impact on responses, the value of more complete and accurate data derived from surveying the entire population outweighs such concerns." *Id.*, at 562a. The Secretary's decision thus rests upon a weighing of potentially adverse consequences (diminished responses and a less accurate census count)

against potentially offsetting advantages (better citizenship data). In my view, however, the Secretary did not make reasonable decisions about these potential costs and benefits in light of the administrative record.

A

Consider first the Secretary's conclusion that he was "not able to determine definitively how inclusion of a citizenship question on the decennial census will impact responsiveness." *Ibid.* Insofar as this statement implies that adding the citizenship question is unlikely to affect "responsiveness" very much (or perhaps at all), the evidence in the record indicates the contrary.

1

The administrative record includes repeated Census Bureau statements that adding the question would produce a less accurate count because noncitizens and Hispanics would be less likely to respond to the questionnaire. See App. 105, 109–112, 158. The Census Bureau's chief scientist said specifically that adding the question would have "an adverse impact on self-response and, as a result, on the accuracy and quality of the 2020 Census." *Id.*, at 109. And the chief scientist backed this statement up by pointing to "[t]hree distinct analyses." *Ibid.*

The first analysis compared nonresponse rates for the short-form census questionnaire (which did not include a citizenship question) to nonresponse rates for the ACS (which did). Obviously, more people fail to respond to the ACS than to the short form. Yet taking into account the fact that the nonresponse rate will be greater for the ACS than for the short form, the Bureau found that the difference between the two is yet greater for noncitizen households than for citizen households (by 5.1%, according to the Bureau). *Id.*, at 111. This led the Bureau to say that it was a "reasonable inference" that the presence of the citizenship question accounted for the difference. *Ibid.*

The Bureau conducted two additional studies, both analyzing data from the ACS. One study looked at response rates for particular questions on the ACS. It showed that the "no answer" rate for the citizenship question was "much greater than the comparable rates" for other census questions (for example, questions about age, sex, race, and ethnicity). *Id.*, at 110. And it showed that the "no answer" rate for the citizenship question was significantly higher among Hispanics. *Id.*, at 109–110. The last study examined "break-off" rates, *i. e.*, the rate at which respondents stopped answering the questionnaire upon reaching a particular question. It found that Hispanics were significantly more likely than were non-Hispanics to stop answering at the point they reached the citizenship question. *Id.*, at 112. Together, these two studies provided additional support for the Census Bureau's determination that the citizenship question is likely to mean disproportionately fewer responses from noncitizens and Hispanics than from others. *Ibid.*

Putting numbers upon these study results, the Census Bureau estimated that adding the question to the short form would lead to 630,000 additional nonresponding households. *Id.*, at 114. That is to say, the question would cause households covering more than 1 million additional people to decline to respond to the census. When the Bureau does not receive a response, it follows up with in-person interviews in an effort to obtain the missing information. The Bureau often interviews what it calls "proxies," such as family members and neighbors. But this followup process is subject to error; and the error rate is much greater than the error rate for self-responses. *Ibid.* The Bureau thus explained that lower self-response rates "degrade data quality" by increasing the risk of error and leading to hundreds of thousands of fewer correct enumerations. *Id.*, at 113–115. The Bureau added that its estimate was "conservative." *Id.*, at 115. It expected "differences between citizen and noncitizen response rates and data quality" to be "amplified" in the 2020

census "compared to historical levels." *Ibid.* Thus, it explained, "the decrease in self-response for citizen households in 2020 could be much greater than the 5.1 percentage points [it] observed during the 2010 Census." *Id.*, at 115–116. Its conclusion in light of this evidence was clear. Adding the citizenship question to the short form was "very likely to reduce the self-response rate" and thereby "har[m] the quality of the census count." *Id.*, at 105, 158.

The Census Bureau's analysis received support from other submissions. Several States pointed out that noncitizens and racial minorities had been undercounted in every prior census. Administrative Record 1091–1092. They also drew attention to recent surveys indicating that noncitizens had significant concerns about the confidentiality of census responses. *Ibid.* Former directors of the Census Bureau wrote that adding the citizenship question so late in the process "would put the accuracy of the enumeration and success of the census in all communities at grave risk." *Id.*, at 1057. The American Sociological Association and Census Scientific Advisory Committee echoed these warnings. See *id.*, at 787, 794–795. On the other hand, the Secretary received submissions by other groups that supported adding the question. See, *e. g.*, *id.*, at 1178–1179, 1206, 1276. But as far as I can tell (or as far as the arguments made here and in the District Court inform the matter), none of these latter submissions significantly added to, or detracted from, the Census Bureau's submissions in respect to the question's likely impact on response rates.

2

The Secretary's decision memorandum reached a quite different conclusion from the Census Bureau. The memorandum conceded that "a lower response rate would lead to . . . less accurate responses." App. to Pet. for Cert. 556a. But it concluded that neither the Census Bureau nor any stakeholders had provided "definitive, empirical support" for the proposition that the citizenship question would reduce response rates. *Id.*, at 554a. The memorandum relied for

that conclusion upon a number of considerations, but each is contradicted by the record.

The memorandum first pointed to perceived shortcomings in the Census Bureau's analysis of nonresponse rates. It noted that response rates are generally lower overall for the long form and the ACS than they are for the short form. *Id.*, at 552a–554a. But the Bureau explained that its analysis accounted for this consideration, see App. 111, and no one has given us reason to think the contrary. The Secretary also noted that the Bureau "was not able to isolate what percentage of [the] decline was caused by the inclusion of a citizenship question rather than some other aspect of the long form survey." App. to Pet. for Cert. 554a. But the Bureau said attributing the decline to the citizenship question was a "reasonable inference," App. 111, and again, nothing in the record contradicted the Bureau's judgment. And later analyses have borne out the Bureau's judgment that the citizenship question contributes to the decline in self-response. See, *e. g.*, *id.*, at 1002–1006, 1008 (August 2018 Census Bureau study).

The memorandum next cast doubt on the Census Bureau's analysis of the rate at which people responded to particular questions on the ACS. It noted that the "no answer" rate to the citizenship question was comparable to the "no answer" rate for other questions on the ACS, including educational attainment, income, and property insurance. App. to Pet. for Cert. 553a. But as discussed above, the Bureau found it significant that the "no answer" rate for the citizenship question was "much greater" than the "no answer" rate for the other questions that appear on the *short form*—that is, the form on which the citizenship question would appear. App. 110, 124. The Secretary offered no reason why the demographic variables to which he pointed provided a better point of comparison.

Finally, the memorandum relied on information provided by two outside stakeholders. The first was a study conducted by the private survey company Nielsen, in which

questions about place of birth and time of arrival had not led to any appreciable decrease in the response rate. App. to Pet. for Cert. 552a. But Nielsen, which in fact urged the Secretary *not* to add the question, stated that its respondents (unlike census respondents) were *paid* to respond, and it is consequently not surprising that they did so. Administrative Record 1276. The memorandum also cited statements by former Census Bureau officials suggesting that empirical evidence about the question's potential impact on response rates was "limited." App. to Pet. for Cert. 558a–559a; see also *id.*, at 552a. But there was no reason to expect the former officials to provide more extensive empirical evidence as to a citizenship question when they were not privy to the internal Bureau analyses on this question. And, like Nielsen, the former officials strongly urged the Secretary *not* to ask the question. See Administrative Record 1057.

The upshot is that the Secretary received evidence of a likely drop in census accuracy by a number somewhere in the hundreds of thousands, and he received nothing significant to the contrary. The Secretary pointed out that the Census Bureau's information was uncertain, *i. e.*, not "definitive." But that is not a satisfactory answer. Few public-policy-related statistical studies of risks (say, of many health or safety matters) are definitive. As the Court explained in *State Farm*, "[i]t is not infrequent that the available data do not settle a regulatory issue, and the agency must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion." 463 U. S., at 52. But an agency confronted with this situation cannot "merely recite the terms 'substantial uncertainty' as a justification for its actions." *Ibid.* Instead, it "must explain the evidence which is available" and typically must offer a reasoned explanation for taking action without "engaging in a search for further evidence." *Ibid.*

The Secretary did not do so here. He did not explain why he made the decision to add the question without following the Bureau's ordinary practice of extensively testing proposed changes to the census questionnaire. See App. 624–630, 641 (discussing testing process); see also, *e. g.*, Brief for Former Census Bureau Directors as *Amici Curiae* 17–21 (discussing prior examples of questions that the Bureau decided not to add after many years of pretesting). Without that testing, the Secretary could not treat the Bureau's expert opinions and its experience with the relevant surveys as worthless merely because its conclusions were not precise. The Bureau's opinions were properly considered as evidence of likelihoods, probabilities, or risks.

As noted above, the consequences of mistakes in the census count, of even a few hundred thousand, are grave. Differences of a few thousand people, as between one State and another, can mean a loss or gain of a congressional seat—a matter of great consequence to a State. See 351 F. Supp. 3d, at 594. And similar small differences can make a large difference to the allocation of federal funds among competing state programs. *Id.*, at 596–597; see also *Baldrige*, 455 U. S., at 353–354, n. 9. If near-absolute certainty is what the Secretary meant by "definitive," that insistence would itself be arbitrary in light of the constitutional and statutory consequences at stake. And if the Secretary instead meant that the evidence does not indicate a serious risk of a less accurate count, that conclusion does not find support in the record.

B

Now consider the Secretary's conclusion that, even if adding a citizenship question diminishes the accuracy of the enumeration, "the value of more complete and accurate data derived from surveying the entire population *outweighs* . . . concerns" about diminished accuracy. App. to Pet. for Cert. 562a (emphasis added). That conclusion was also arbitrary.

The administrative record indicates that adding a citizenship question to the short form would produce less "complete and accurate data," not more.

1

The Census Bureau informed the Secretary that, for about 90% of the population, accurate citizenship data is available from administrative records maintained by the Social Security Administration and Internal Revenue Service. App. 146. The Bureau further informed the Secretary that it had "high confidence" that it could develop a statistical model that would accurately impute citizenship status for the remaining 10% of the population. *Ibid.* The Bureau stated that these methods alone—using existing administrative records for 90% of the population and statistical modeling for the remaining 10%—would yield more accurate citizenship data than also asking a citizenship question. *Id.*, at 159. How could that be so? The answer is somewhat technical but readily understandable.

First, consider the 90% of the population (about 295 million people) as to whom administrative records are available. The Government agrees that using these administrative records would provide highly reliable information about citizenship, because the records "require proof of citizenship." *Id.*, at 117. By contrast, if responses to a citizenship question were used for this group, the Census Bureau predicted without contradiction that about one-third of the noncitizens in this group who respond would answer the question untruthfully, claiming to be citizens when they are not. *Id.*, at 147. Those incorrect answers—about 9.5 million in total—would conflict with the administrative records on file for those noncitizens. And what would the Census Bureau do with the conflicting data? If it accepts the answer to the citizenship question as determinative, it will have less accurate data. If it accepts the citizenship data from administrative records as determinative, asking the question will have served no purpose.

Thus, as to 295 million people—the overwhelming majority of the population—asking the citizenship question would at best add nothing at all. I say "at best" because, for one thing, the Census Bureau informed the Secretary that asking the question would produce 1 million more people who could not be linked to administrative records, which in turn would require the Census Bureau to resort to a less accurate source of citizenship data for these people. See *id.*, at 147–149; see also 351 F. Supp. 3d, at 538–539. For another, the policy of the Census Bureau has always been to use census responses rather than administrative records in cases where the two conflict. App. 147. In this case, that practice would mean accepting 9.5 million inaccurate responses even though accurate administrative records are available. See *ibid.* The Census Bureau could perhaps change that practice, but the Secretary's decision memorandum said nothing about the matter. It did not address the problem.

Second, consider the remaining 10% of the population (about 35 million people) for whom the Government lacks administrative records. The question here is which approach would yield the most "complete and accurate" citizenship data for this group—adding a citizenship question or using statistical modeling alone? To answer this question, we must further divide this group into two categories—those who would respond to the citizenship question if it were asked and those who would not.

Start with the category of about 22 million people who would answer a citizenship question if it were asked. Would their answers regarding citizenship be more accurate than citizenship data produced by statistical modeling? The Census Bureau said no. That is because many of the noncitizens in this group would answer the question falsely, resulting in an estimated 500,000 inaccurate answers. See *id.*, at 148. And those who answer the question falsely would be commingled, perhaps randomly, with those who answer it correctly, thereby casting doubt on the answers of all 22 million,

with no way of knowing which answers are correct and which are false. By contrast, the Bureau believed that it could develop a statistical model that would produce more accurate citizenship data than these census responses. The Bureau therefore informed the Secretary that it could do better. As the Bureau's chief scientist explained, although "[o]ne might think" that asking the question "could help fill the . . . gaps" in the administrative records, the data did not support that assumption. *Id.*, at 157. Instead, he explained, responses to the citizenship question "may not be reliable," which "calls into question their ability to improve upon" the Bureau's statistical modeling process. *Ibid.*

Next, turn to the more than 13 million remaining people who would not answer the citizenship question even if it were asked. As to this category, the Census Bureau would *still need to use statistical modeling* to obtain citizenship data, because there would be no census response to use instead. Hence, asking the citizenship question would add nothing at all as to this group. To the contrary, as the Government concedes, asking the question would *reduce* the accuracy of the citizenship data for this group, because the relatively inaccurate answers to the citizenship question would diminish the overall accuracy of the Census Bureau's statistical model. See Brief for Petitioners 34 (conceding that the Census Bureau model will be "highe[r] quality" without the question than with it); 351 F. Supp. 3d, at 640 (explaining that asking the question would "corrup[t] . . . the data generated by extrapolating from self-responses through imputation").

In sum, in respect to the 295 million persons for whom administrative records exist, asking the question on the short form would, at best, be no improvement over using administrative records alone. And in respect to the remaining 35 million people for whom no administrative records exist, asking the question would be no better, and in some respects would be worse, than using statistical modeling.

The Census Bureau therefore told the Secretary that asking the citizenship question, even in addition to using administrative records, "would result in poorer quality citizenship data" than using administrative records alone, and would "still have all the negative cost and quality implications" of asking the citizenship question. App. 159. I could find no evidence contradicting that prediction.

2

If my description of the record is correct, it raises a serious legal problem. How can an agency support the decision to add a question to the short form, thereby risking a significant undercount of the population, on the ground that it will *improve* the accuracy of citizenship data, when in fact the evidence indicates that adding the question will *harm* the accuracy of citizenship data? Of course it cannot. But, as I have just said, I have not been able to find evidence to suggest that adding the question would result in more accurate citizenship data. Neither could the District Court. After reviewing the record in detail, the District Court found that "all of the relevant evidence before Secretary Ross—*all* of it—demonstrated that using administrative records . . . would actually produce more accurate [citizenship] data than adding a citizenship question to the census." 351 F. Supp. 3d, at 650.

What consideration did the Secretary give to this problem? He stated simply that "[a]sking the citizenship question of 100 percent of the population gives each respondent the opportunity to provide an answer," which "may eliminate the need for the Census Bureau to have to impute an answer for millions of people." App. to Pet. for Cert. 556a. He therefore must have assumed, *sub silentio*, exactly what the Census Bureau experts urged him not to assume—that answers to the citizenship question would be more accurate than statistical modeling. And he ignored the undisputed respects in which asking the question would make the exist-

ing data less accurate. Other than his assumption, the Secretary said nothing, absolutely nothing, to suggest a reasoned basis for disagreeing with the Bureau's expert statistical judgment.

The Government now maintains that the Secretary reasonably discounted the Census Bureau's recommendation because it was based on an untested prediction about the accuracy of its model. But this is not a case in which the Secretary was presented with a policy choice between two reasonable but uncertain options. For one thing, the record is much less uncertain than the Government acknowledges. Although it is true that the Census Bureau at one point told the Secretary that it could not "quantify the relative magnitude of the errors across the alternatives at this time," App. 148, it unequivocally stated that asking the question "*would result in poorer quality citizenship data*" than omitting it, *id.*, at 159 (emphasis added). Thus, even if the Bureau could not "quantify" the relative accuracy of the options, it could and did conclude that one option was likely more accurate than the other. Even in the face of some uncertainty, where all available evidence indicates that one option is better than the other, it is unreasonable to choose the worse option without explanation.

For another thing, to the extent the record reflects some uncertainty regarding the accuracy of the Census Bureau's statistical model, that is because the model needed to be "developed and tested" before it could be employed. *Id.*, at 146. But the Secretary made his decision before any such development or testing could be completed. Having decided to make an immediate decision rather than wait for testing, the Secretary could not dismiss the Bureau's prediction about the inadvisability of that decision on the ground that the prediction reflected likelihoods, probabilities, and risks rather than certainties.

Finally, recall that the Census Act requires the Secretary to use administrative records rather than direct inquiries to

"the maximum extent possible." 13 U. S. C. § 6(c). That statutory requirement highlights what should be obvious: Whether adding a citizenship question to the short form would produce more accurate citizenship data is a relevant factor—indeed, a critically important factor—that the Secretary was required to consider. Here, the Secretary did not adequately explain why he rejected the evidence that adding the question would yield less accurate data. He did not even acknowledge that the Census Act obliged him to use administrative records rather than asking a question to the extent possible. And he did not explain how obtaining citizenship data that is no better or worse than the data otherwise available could justify jeopardizing the accuracy of the census count.

In these respects, the Secretary failed to consider "important aspect[s] of the problem" and "offered an explanation for [his] decision that runs counter to the evidence before the agency." *State Farm*, 463 U. S., at 43.

C

The Secretary's failure to consider this evidence—that adding the question would harm the census count in the interest of obtaining less accurate citizenship data—provides a sufficient basis for setting the decision aside. But there is more. The reason that the Secretary provided for needing more accurate citizenship information in the first place—to help the DOJ enforce the Voting Rights Act—is unconvincing.

The Secretary stated that adding the citizenship question was "necessary to provide complete and accurate data in response to the DOJ request." App. to Pet. for Cert. 562a. The DOJ's request in turn asserted that the citizenship data currently available from the ACS was not "ideal" for enforcing the Voting Rights Act. *Id.*, at 567a. One of the DOJ's principal complaints was that ACS data is reported for *groups* of census blocks rather than for each census block itself. The DOJ letter stated that adding a citizenship ques-

tion could provide it with individual block-by-block data which, the DOJ maintained, would allow it to better enforce the Voting Rights Act's protections for minority voters. *Id.*, at 568a.

This rationale is difficult to accept. One obvious problem is that the DOJ provided no basis to believe that more precise data would in fact help with Voting Rights Act enforcement. Congress enacted the Voting Rights Act in 1965—15 years after the census last asked every household about citizenship. Actions to enforce the Act have therefore *always* used citizenship data derived from sampling. Yet I am aware of no one—not in the Department of Commerce proceeding, in the District Court, or in this Court—who has provided a single example in which enforcement of the Act has suffered due to lack of more precise citizenship data. Organizations with expertise in this area tell us that asking the citizenship question will not help enforce the Act. See, *e. g.*, Brief for NAACP Legal Defense & Educational Fund, Inc., as *Amicus Curiae* 30–36. Rather, the question will, by depressing the count of minority groups, hurt those whom the Act seeks to help. See, *e. g.*, Brief for Leadership Conference on Civil and Human Rights et al. as *Amici Curiae* 21–29.

Another problem with the Secretary's rationale is that, even assuming the DOJ needed more detailed citizenship data, there were better ways of obtaining the needed data. The Census Bureau offered to provide the DOJ with data using administrative records, which, as I have pointed out, are likely just as accurate, if not more accurate, than responses to a citizenship question. The Census Bureau offered to provide this data at the census block level, which would resolve each of the DOJ's complaints about the existing ACS data. See Administrative Record 3289. But the Secretary rejected this alternative without explaining why it would not fully respond to the DOJ's request. That failure was particularly problematic given that the Census Act requires the Secretary to use other methods of obtaining demographic information if at all possible. See §§ 6(c), 195.

Normally, the Secretary would be entitled to place considerable weight upon the DOJ's expertise in matters involving the Voting Rights Act, but there are strong reasons for discounting that expertise here. The administrative record shows that DOJ's request to add a citizenship question originated not with the DOJ, but with the Secretary himself. See Administrative Record 3710. The Voting Rights Act rationale was in fact first proposed by Commerce Department officials. See *ibid.* DOJ officials, for their part, were initially uninterested in obtaining more detailed citizenship data, App. 414, and they agreed to request the data only after the Secretary personally spoke to the Attorney General about the matter, see Administrative Record 2651. And when the acting director of the Census Bureau proposed alternative means of obtaining better citizenship data, DOJ officials declined to meet to discuss the proposal. See *id.*, at 3460.

Taken as a whole, the evidence in the administrative record indicates that the Voting Rights Act rationale offered by the Secretary was not just unconvincing, but pretextual. And, as the Court concludes, further evidence outside the administrative record but present in the trial record supports the finding of pretext. See Part V, *ante.* Among other things, that evidence reveals that the DOJ official who wrote the letter agreed that adding the question "is not necessary for DOJ's VRA enforcement efforts." App. 1113. And that official further acknowledged that he did not "know whether or not [citizenship] data produced from responses to the citizenship question . . . will, in fact, be more precise than the [citizenship] data on which DOJ is currently relying for purposes of VRA enforcement." *Id.*, at 1102.

The Court explains, and I agree, that a court normally should not "reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons." *Ante*, at 781. But in this case, "the evidence tells a story that does not match the explanation the Secretary gave for his decision." *Ante*, at 784. This evidence strongly

suggests that the Secretary's stated rationale was pretextual. I consequently join Part V of the Court's opinion (except insofar as it concludes that the Secretary's decision was reasonable apart from the question of pretext). And I agree that the pretextual nature of the Secretary's decision provides a sufficient basis to affirm the District Court's decision to send the matter back to the agency.

* * *

I agree with the Court that the APA gives agencies broad leeway to carry out their legislatively delegated duties. And I recognize that Congress has specifically delegated to the Secretary of Commerce the authority to conduct a census of the population "in such form and content as he may determine." § 141(a). But although this delegation is broad, it is not without limits. The APA supplies one such limit. In an effort to ensure rational decisionmaking, the APA prohibits an agency from making decisions that are "arbitrary, capricious, [or] an abuse of discretion." 5 U. S. C. § 706(2)(A).

This provision, of course, does not insist that decisionmakers think through every minor aspect of every problem that they face. But here, the Secretary's decision was a major one, potentially affecting the proper workings of our democratic government and the proper allocation of hundreds of billions of dollars in federal funds. Cf. *ante*, at 767. Yet the decision was ill considered in a number of critically important respects. The Secretary did not give adequate consideration to issues that should have been central to his judgment, such as the high likelihood of an undercount, the low likelihood that a question would yield more accurate citizenship data, and the apparent lack of any need for more accurate citizenship data to begin with. The Secretary's failures in considering those critical issues make his decision unreasonable. They are the kinds of failures for which, in my view, the APA's arbitrary and capricious provision was written.

As I have said, I agree with the Court's conclusion as to pretext and with the decision to send the matter back to the agency. I do not agree, however, with several of the Court's conclusions concerning application of the arbitrary and capricious standard. In my view, the Secretary's decision—whether pretextual or not—was arbitrary, capricious, and an abuse of his lawfully delegated discretion. I consequently concur in the Court's judgment to the extent that it affirms the judgment of the District Court.

JUSTICE ALITO, concurring in part and dissenting in part.

It is a sign of our time that the inclusion of a question about citizenship on the census has become a subject of bitter public controversy and has led to today's regrettable decision. While the decision to place such a question on the 2020 census questionnaire is attacked as racist, there is a broad international consensus that inquiring about citizenship on a census is not just appropriate but advisable. No one disputes that it is important to know how many inhabitants of this country are citizens.[1] And the most direct way to gather this information is to ask for it in a census. The United Nations recommends that a census inquire about citizenship,[2] and many countries do so.[3]

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[1] As a 2016 Census Bureau guidance document explained, obtaining citizenship statistics is "essential for agencies and policy makers setting and evaluating immigration policies and laws, understanding how different immigrant groups are assimilated, and monitoring against discrimination." Dept. of Commerce, Census Bureau, American Community Survey, Why We Ask: Place of Birth, Citizenship and Year of Entry, www2.census.gov/programs-surveys/acs/about/qbyqfact/2016/Citizenship.pdf (all Internet materials as last visited June 25, 2019).

[2] United Nations, Dept. of Economic and Social Affairs Statistics Div., Principles and Recommendations for Population and Housing Censuses 163, 191 (rev. 3, 2017).

[3] See, *e. g.*, Brief for Petitioners 29 ("'[O]ther major democracies inquire about citizenship on their census, including Australia, Canada, France, Germany, Indonesia, Ireland, Mexico, Spain, and the United Kingdom, to name a few'" (quoting App. to Pet. for Cert. 561a)).

Asking about citizenship on the census also has a rich history in our country. Every census, from the very first one in 1790 to the most recent in 2010, has sought not just a count of the number of inhabitants but also varying amounts of additional demographic information. In 1800, Thomas Jefferson, as president of the American Philosophical Society, signed a letter to Congress asking for the inclusion on the census of questions regarding "'the respective numbers of native citizens, citizens of foreign birth, and of aliens'" "'for the purpose . . . of more exactly distinguishing the increase of population by birth and immigration.'" C. Wright, History and Growth of the United States Census (prepared for the Senate Committee on the Census), S. Doc. No. 194, 56th Cong., 1st Sess., 19 (1900). In 1820, John Quincy Adams, as Secretary of State, was responsible for conducting the census, and consistent with the 1820 Census Act, he instructed the marshals who were charged with gathering the information to ask about citizenship.[4] In 1830, when Martin Van Buren was Secretary of State, a question about citizenship was again included.[5] With the exception of the census of 1840, at least some portion of the population was asked a question about citizenship as part of the census through 2000, after which the question was moved to the American Community Survey, which is sent to only a small fraction of the population. All these census inquiries were made by the Executive pursuant to congressional authorization. None were reviewed by the courts.

Now, for the first time, this Court has seen fit to claim a role with respect to the inclusion of a citizenship question on

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[4] See Act of Mar. 14, 1820, ch. 24, 3 Stat. 550; Wright, History and Growth of the United States Census, S. Doc. No. 194, 56th Cong., 1st Sess., 133–137.

[5] See Dept. of Commerce, Census Bureau, History: 1830 Census Questionnaire, https://www.census.gov/history/www/through_the_decades/questionnaires/1830_2.html.

the census, and in doing so, the Court has set a dangerous precedent, both with regard to the census itself and with regard to judicial review of all other executive agency actions. For the reasons ably stated by JUSTICE THOMAS, see *ante*, p. 786 (opinion concurring in part and dissenting in part), today's decision is either an aberration or a license for widespread judicial inquiry into the motivations of Executive Branch officials. If this case is taken as a model, then any one of the approximately 1,000 district court judges in this country, upon receiving information that a controversial agency decision might have been motivated by some unstated consideration, may order the questioning of Cabinet officers and other high-ranking Executive Branch officials, and the judge may then pass judgment on whether the decision was pretextual. What Bismarck is reputed to have said about laws and sausages comes to mind. And that goes for decisionmaking by all three branches.

To put the point bluntly, the Federal Judiciary has no authority to stick its nose into the question whether it is good policy to include a citizenship question on the census or whether the reasons given by Secretary Ross for that decision were his only reasons or his real reasons. Of course, we may determine whether the decision is constitutional. But under the considerations that typically guide this Court in the exercise of its power of judicial review of agency action, we have no authority to decide whether the Secretary's decision was rendered in compliance with the Administrative Procedure Act (APA).

I

The APA authorizes judicial review of "agency action" taken in violation of law, 5 U. S. C. §§ 706(2)(A)–(D), but § 701(a)(2) of the APA bars judicial review of agency actions that are "committed to agency discretion by law." Although we have characterized the scope of § 701(a)(2) as "'narrow,'" *Heckler* v. *Chaney*, 470 U. S. 821, 830 (1985), there are cir-

cumstances in which it applies. And while our cases recognize a strong presumption in favor of judicial review of agency action, see, *e. g.*, *Weyerhaeuser Co.* v. *United States Fish and Wildlife Serv.*, 586 U. S. 9, 22 (2018), this "is 'just' a presumption," and like all real presumptions, it may be (and has been) rebutted, *Lincoln* v. *Vigil*, 508 U. S. 182, 190 (1993).[6]

In considering whether the general presumption in favor of judicial review has been rebutted in specific cases, we have identified factors that are relevant to the inquiry: whether the text and structure of the relevant statutes leave a court with any "'meaningful standard against which to judge the agency's exercise of discretion,'" *Webster* v. *Doe*, 486 U. S. 592, 600 (1988) (quoting *Heckler*, *supra*, at 830); whether the matter at hand has traditionally been viewed as committed to agency discretion, see *ICC* v. *Locomotive Engineers*, 482 U. S. 270, 282 (1987); whether the challenged action manifests a "general unsuitability" for judicial review because it involves a "complicated balancing of a number of factors," including judgments regarding the allocation of agency resources or matters otherwise committed to another branch, *Heckler*, *supra*, at 831–832; and whether judicial review would produce "disruptive practical consequences," *Southern R. Co.* v. *Seaboard Allied Milling Corp.*, 442 U. S. 444, 457 (1979) (applying this factor to the reviewability inquiry under § 701(a)(1)).

Applying those factors, I conclude that the decision of the Secretary of Commerce to add core demographic questions to the decennial census questionnaire is committed to agency

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[6] Because the § 701(a)(2) analysis dictates *whether* APA review may be had, JUSTICE BREYER's assertion that the APA "supplies [a] limit" on the Secretary's otherwise "broad" delegation, *ante*, at 820 (opinion concurring in part and dissenting in part), mistakenly assumes the answer to the reviewability question. Cf. *Heckler* v. *Chaney*, 470 U. S. 821, 828 (1985) ("[B]efore any review at all may be had, a party must first clear the hurdle of § 701(a)").

discretion by law and therefore may not be challenged under the APA.[7]

II

A

I start with the question whether the relevant statutory provisions provide any standard that courts can apply in reviewing the Secretary's decision to restore a citizenship question to the census. The provision that directly addresses this question is 13 U. S. C. § 141(a), the statute that vests the Secretary with authority to administer the decennial census. This provision gives the Secretary unfettered discretion to include on the census questions about basic demographic characteristics like citizenship. It begins by providing that the Secretary

> "shall, in the year 1980 and every 10 years thereafter, take a decennial *census of population . . . in such form and content as he may determine*, including the use of sampling procedures and special surveys." *Ibid.* (emphasis added).

The two phrases I have highlighted—"census of population" and "in such form and content as he may determine"—are of immediate importance. A "census of population" is broader than a mere head count. The term is defined as "a census of population . . . *and matters relating to population*." § 141(g) (emphasis added). Because this definition refers to both "a census of population" and "matters relating to population," the latter concept must include more than a "census of population" in the strict sense of a head

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[7] The Government concedes that courts may review constitutional challenges to the Secretary's actions. Cf. *Webster* v. *Doe*, 486 U. S. 592, 603 (1988). For the reasons given in the Court's opinion, see *ante*, at 768–770, I agree that the only remaining constitutional claim at issue—respondents' Enumeration Clause claim—lacks merit and thus does not constitute a basis for enjoining the addition of the citizenship question.

count. And it seems obvious that what this additional information must include is the sort of basic demographic information that has long been sought in the census. So the statute clearly authorizes the Secretary to gather such information.

The second phrase, "in such form and content as he may determine," specifies how this information is to be gathered, namely, by a method having the "form and content" that the Secretary "may determine." In other words, this is left purely to the Secretary's discretion. A clearer and less restricted conferral of discretion is hard to imagine.

It is instructive to compare this delegation of authority to the statutory language at issue in one of our most well-known § 701(a)(2) cases, *Webster* v. *Doe*, 486 U. S. 592. There, the relevant statute allowed termination of a Central Intelligence Agency employee whenever the Director "shall deem such termination necessary or advisable in the interests of the United States." *Id.*, at 600 (internal quotation marks omitted and emphasis deleted). Reasoning that the statute's "shall *deem*" standard "fairly exudes deference to the Director," the Court concluded that the text of the statute "appear[ed] . . . to foreclose the application of any meaningful judicial standard of review." *Ibid.*

The § 141(a) language discussed above is even more sweeping than that of the statute in *Webster*. Unlike the Census Act, the statute in *Webster* placed a condition on the Director's action—in particular, the requirement that he terminate an employee only after concluding that doing so would further the "interests of the United States." No such condition applies to the Secretary's determination about the form and content of the decennial census, a fact that distinguishes the statute at issue here from others this Court has found to fall outside § 701(a)(2) and thus within courts' power to review. See, *e. g.*, *Weyerhaeuser Co.*, 586 U. S., at 15 (statute conditioning agency power to exclude land from critical habitat designation on agency's consideration of "'economic impact'" of designation and "'determin[ation] that the benefits

of such exclusion outweigh the benefits of specifying such area as part of the critical habitat' ").

B

Those arguing in favor of judicial review contend that the § 141(a) language that I have discussed so far is limited by language that follows immediately after. That part of § 141(a) states:

> "In connection with any such census [*i. e.*, the decennial 'census of population'], the Secretary is authorized to obtain such other census information as *necessary.*" (Emphasis added.)

This means, it is argued, that information about citizenship may be obtained by means of the census only if that is "necessary." But this argument is clearly wrong. The information that must be "necessary" (whatever that means in this context) is "*other* census information." That refers to information other than that obtained in the "census of population," and as explained, the term "census of population" includes not just a head count but other "matters relating to population," a category that encompasses basic demographic information such as citizenship. Accordingly, this argument is definitively refuted by the text of § 141. And although it is not necessary to look beyond that text, it is worth noting that this argument, if accepted, would require that the term "necessary" be given a less than strictly literal meaning; otherwise, it would run contrary to the broad delegation effected by the first portion of § 141(a) by making it all but impossible for the Secretary to include on the census anything other than questions relating to the number of persons living at a particular address. That would be so because it will often not be "necessary" to obtain this information via the census rather than by some other means.

C

Another argument in favor of review relies on 13 U. S. C. § 195, which states:

> "Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title."

JUSTICE BREYER, for example, interprets this provision to mean that "the Secretary must, if feasible, obtain demographic information through a survey sent to a *sample* of households, rather than through the short-form census questionnaire to which *every* household must respond." *Ante*, at 801 (opinion concurring in part and dissenting in part). Under that reading of § 195, it is asserted, the provision sets forth a judicially reviewable limit on the Secretary's authority to obtain information through direct inquiries.

This argument fails to take into account that the current version of § 195 was enacted as part of the same Act of Congress that included the present version of § 141[8] and that the two provisions are both parts of a unified scheme regarding the use of sampling. Section 141, a provision concerned exclusively with the census, addresses the use of sampling in that particular context. I previously quoted the relevant language, but I repeat it now so that it is clearly in mind. Section 141(a) provides that the Secretary

> "shall, in the year 1980 and every 10 years thereafter, take a decennial census of population . . . *in such form and content as he may determine, including the use of sampling procedures and special surveys*." (Emphasis added.)

What this means is that the Secretary, in conducting the "census of population," has discretion to choose the form and content of the vehicles used in that project, and among the methods that he may employ, if he sees fit, are sampling and special surveys.

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[8] See 90 Stat. 2459.

Section 195 is not a census-specific provision, but it does have one (important) thing to say specifically about the census: It prohibits the use of sampling "for the determination of population for purposes of apportionment of Representatives in Congress." In this one way, it qualifies the Secretary's discretion regarding the "form and content" of the vehicles used in conducting the "census of population." And that is what we meant in *Department of Commerce* v. *United States House of Representatives*, 525 U. S. 316, 338 (1999), when we said that § 141(a)'s "broad grant of authority . . . is informed . . . by the narrower and more specific § 195." Otherwise, the text of § 195 does not deal specifically with the census. It addresses all the many information-gathering activities conducted by the Commerce Department, and as to these, it says that the Secretary shall use sampling if he deems it "feasible."

If § 195 were read to mean that no information other than a head count can be sought by means of a census questionnaire unless it is not "feasible" to get that information by sampling, then there would be little if anything left of the broad discretion "to use sampling techniques" conferred on the Secretary by § 141(a). 525 U. S., at 338. "Feasible" means "capable of being done, executed, or effected," Webster's Third New International Dictionary 831 (1961), and it is not clear that the gathering of *any* core demographic information is not "capable of being done" by sampling. So if that were what § 195 means, then Congress, in the same Act, would have given the Secretary discretion to use sampling in the census "as he may determine" but also compelled him to use sampling in almost all instances. That is no way to read the provisions of a single Act. A law's provisions should be read to work together. See A. Scalia & B. Garner, Reading Law 180 (2012) ("The provisions of a text should be interpreted in a way that renders them compatible, not contradictory"). See also, *e. g.*, *Parker Drilling Management Services, Ltd.* v. *Newton*, 587 U. S. 601, 607–608 (2019); *Star Athletica*,

L. L. C. v. *Varsity Brands, Inc.*, 580 U. S. 405, 413–414 (2017); *Kawasaki Kisen Kaisha Ltd.* v. *Regal-Beloit Corp.*, 561 U. S. 89, 108 (2010). And if there is tension between a specific provision, like § 141's instruction regarding the use of sampling in the decennial census, and a general one, like § 195's directive regarding the use of sampling in all data-collection activities, the specific provision must take precedence. Cf. *NLRB* v. *SW General, Inc.*, 580 U. S. 288, 305 (2017).

When §§ 141 and 195 are read in this way, it is easy to see how they fit together. In using the census to gather information "relating to population" for any use other than the actual enumeration, the Secretary may use sampling "as he may determine." In conducting all the Department's efforts to collect data by other means, he may authorize the use of sampling if he thinks that is "feasible." The upshot for present purposes is that § 195 does not require the "counterintuitive resul[t]" of barring the Secretary from including on the census questionnaire the kinds of basic demographic questions that have been asked as part of every census in U. S. history. *RJR Nabisco, Inc.* v. *European Community*, 579 U. S. 325, 342 (2016).

D

One additional provision, 13 U. S. C. § 6(c),[9] requires close consideration. This provision, which was enacted in 1976

[9] Section 6 states:

"(a) The Secretary, whenever he considers it advisable, may call upon any other department, agency, or establishment of the Federal Government, or of the government of the District of Columbia, for information pertinent to the work provided for in this title.

"(b) The Secretary may acquire, by purchase or otherwise, from States, counties, cities, or other units of government, or their instrumentalities, or from private persons and agencies, such copies of records, reports, and other material as may be required for the efficient and economical conduct of the censuses and surveys provided for in this title.

"(c) To the maximum extent possible and consistent with the kind, timeliness, quality and scope of the statistics required, the Secretary shall acquire and use information available from any source referred to in subsection (a) or (b) of this section instead of conducting direct inquiries."

in the same Act as §§ 141(a) and 195, has three subsections. Subsection (a) provides that the Secretary may call on other components of the Federal Government to obtain information that is "pertinent to" the Department's work. Subsection (b) authorizes the Secretary to "acquire, by purchase or otherwise" from state and local governments and private sources "such copies of records, reports, and other material as may be required for the efficient and economical conduct of the censuses and surveys provided for in this title." Finally, subsection (c) provides:

> "To the maximum extent possible and consistent with the kind, timeliness, quality and scope of the statistics required, the Secretary shall acquire and use information available from any source referred to in subsection (a) or (b) of this section instead of conducting direct inquiries."

The District Court interpreted subsection (c) to mean that the Secretary must turn to another federal agency or outside source for demographic information (rather than seeking the information on the census) unless doing so would not be "possible" or "consistent with the kind, timeliness, quality and scope of the statistics required." This argument fails for reasons similar to those that sank the § 195 argument just discussed. Section 6(c) is not a census-specific provision but instead applies generally to all the Commerce Department's information-gathering activities. If it is read to apply to the "census of population," it cannot be reconciled with § 141(a), which, as noted, broadly authorizes the Secretary to use that vehicle for obtaining information "relating to population," *i. e.*, core demographic information. If § 6(c) applied to the gathering of such information, it would make it hard to justify the inclusion of *any* demographic questions on the census, even though this has been done since 1790. (Is it not possible to get information about age and sex, for example, from any outside source (or combination of sources), even if the Department offers to acquire it from a private source by

purchase?) Reading § 6(c) to mean what the District Court thought would turn it into the proverbial elephant stuffed into a mouse hole. Section 6(c), however, is a decidedly mouse-like provision. It was enacted with no fanfare and no real explanation,[10] and remained in the shadows, virtually unused and unnoticed, for more than 40 years.

E

Respondents and the Court cite two other provisions in support of reviewability, but neither has anything to do with the issue of putting a citizenship question on the census. In determining whether statutory provisions include standards that could provide a basis for judicial review, it is necessary to focus on the precise claims at issue, see, *e. g.*, *Webster*, 486 U. S., at 601–602 (distinguishing between statutory and constitutional claims); *Locomotive Engineers*, 482 U. S., at 277–279 (parsing claims under different prongs of reopener statute); *Heckler*, 470 U. S., at 836 (rejecting as "irrelevant" to the agency decision at issue two statutory provisions that were argued to provide "'law to apply'"). And when viewed in this way, the remaining statutory provisions cited in support of reviewability are of no value.

Respondents point to § 141(b), which requires the Secretary to complete the tabulation of total population by States "within 9 months after the census date" and then to report the results to the President. That provision sets out an easily administered deadline, and it has nothing to do with the content of the census questionnaire.

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[10] The most respondents can muster are snippets from the legislative history of the 1976 Census Act indicating that § 6(c) was enacted to decrease the Secretary's use of "direct inquiries" in the interest of "reducing respondent burden." H. R. Conf. Rep. No. 94–1719, p. 10 (1976). Even accepting that premise, it simply raises the same question just discussed—namely, whether Congress's desire to reduce respondent burden, as reflected by § 6(c), yields to the Secretary's broad authorization in § 141(a) to "determine" the "form and content" of any direct inquiries on the census. Cf. *id.*, at 11 (characterizing § 141 as a "provisio[n] directly related to decennial . . . census").

Respondents also claim that § 141(f) is relevant to the question of judicial review, but that provision concerns *congressional* review. It directs the Secretary to report to Congress, at specified times, the subjects and questions that he intends to include on the census. According to respondents, the Secretary's compliance with those requirements is judicially reviewable, and that, they contend, takes the Secretary's decision to include a citizenship question out from under § 701(a)(2).

Respondents fundamentally misunderstand the significance of congressional reporting requirements in evaluating whether a particular agency action is subject to judicial review. Congressional reporting requirements are "legion in federal law," *Natural Resources Defense Council, Inc.* v. *Hodel*, 865 F. 2d 288, 317 (CADC 1988), and their purpose is to permit Congress to monitor and, if it sees fit, to correct Executive Branch actions to which it objects. When a congressional reporting requirement "[l]ack[s] a provision for judicial review," compliance "by its nature seems singularly committed to *congressional* discretion in measuring the fidelity of the Executive Branch actor to legislatively mandated requirements." *Id.*, at 318. In other words, it is Congress, not the Judiciary, that is best situated to determine whether an agency's responses to Congress are sufficient and, if not, to "take what it deems to be the appropriate action." *Id.*, at 319.

In that respect, § 141(f) actually cuts against judicial review. The Constitution gives Congress the authority to "direct" the "Manner" in which the census is conducted, and by imposing the § 141(f) reporting requirements, Congress retained some of that supervisory authority. It did not transfer it to the courts.[11]

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[11] It is notable that Congress, pursuant to its supervisory authority, has in some cases limited the particular demographic characteristics about which the Secretary may require information through census questionnaires. In § 221(c), for example, Congress has dictated that "no person shall be compelled to disclose information relative to his religious beliefs

Respondents protest that congressional review may not be enough to guard against a Secretary's abuses, especially when the party in control of Congress stands to benefit. But that complaint simply expresses disagreement with the Framers' choice to vest power over the census in a political body, cf. *Baldrige* v. *Shapiro*, 455 U. S. 345, 347–348 (1982) ("Under [the] Constitution, responsibility for conducting the decennial census rests with Congress"), and the manner in which Congress has chosen to exercise that power, see *Wisconsin* v. *City of New York*, 517 U. S. 1, 19 (1996) (Congress has delegated its "virtually unlimited discretion" in conducting the census to the Secretary). In any event, the ability to press constitutional challenges to the Secretary's decisions, see n. 7, *supra*, answers many of the examples in respondents' parade of horribles.

In short, the relevant text of § 141(a) "fairly exudes deference" to the Secretary. *Webster*, 486 U. S., at 600. And no other provision of law cited by respondents or my colleagues provides any "meaningful judicial standard" for reviewing the Secretary's selection of demographic questions for inclusion on the census. *Ibid.*

III

In addition to requiring an examination of the text and structure of the relevant statutes, our APA § 701(a)(2) cases look to whether the agency action in question is a type that has traditionally been viewed as committed to agency discretion or whether it is instead one that "federal courts

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or to membership in a religious body." Similarly, in a series of appropriation Acts, Congress has specified that "none of the funds provided in this or any other Act for any fiscal year may be used for the collection of census data on race identification that does not include 'some other race' as a category." 123 Stat. 3115, note following 13 U. S. C. § 5. Those examples highlight that when Congress wishes to limit the Secretary's authority to require responses to particular demographic questions, it "knows precisely how to do so." *Limelight Networks, Inc.* v. *Akamai Technologies, Inc.*, 572 U. S. 915, 923 (2014).

regularly review." *Weyerhaeuser Co.*, 586 U. S., at 23. In cases where the Court has found that agency action is committed to agency discretion by law, an important factor has been the absence of an established record of judicial review prior to the adoption of the APA. See *Heckler*, 470 U. S., at 832–833 (agency nonenforcement); *Locomotive Engineers*, 482 U. S., at 282 (agency decision not to reopen final decision based on material error); *Lincoln*, 508 U. S., at 192 (agency use of lump-sum appropriations).

Here, there is no relevant record of judicial review. We are confronted with a practice that reaches back two centuries. The very first census went beyond a mere head count and gathered additional demographic information, and during virtually the entire period prior to the enactment of the APA, a citizenship question was asked of everyone. Notably absent from that long record is any practice of judicial review of the content of the census. Indeed, this Court has never before encountered a direct challenge to a census question. App. to Pet. for Cert. 416a. And litigation in the lower courts about the census is sparse and generally of relatively recent vintage.

Not only is this sort of history significant in all § 701(a)(2) cases, see *Locomotive Engineers*, *supra*, at 282, but we have previously stressed the particular "importance of historical practice" when it comes to evaluating the Secretary's authority over the census. *Wisconsin*, *supra*, at 21; see also *ante*, at 770 (opinion of the Court). Moreover, where the relevant question is not whether review may be had at all, but rather the branch with the authority to exercise review, the absence of any substantial record of judicial review is especially revealing. See, *e. g.*, *NLRB* v. *Noel Canning*, 573 U. S. 513, 525 (2014) (it is "neither new nor controversial" that "longstanding practice of the government can inform our determination of what the law is" (internal quotation marks and citation omitted)); *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 473 (1915) ("in determining . . . the existence of a power,

weight [is] given to . . . usage"). Thus, the absence of any real tradition of judicial review of decisions regarding the content of the census counsels against review in this case.

In an attempt to show that there is no relevant "tradition of nonreviewability," *Locomotive Engineers*, *supra*, at 282, respondents contend that this Court has recently engaged in review of the "conduct of the census," Brief for Government Respondents 26–27. But in none of the cases they cite did the Court address an APA challenge to the content of census questions.[12] Some involved constitutional claims about enumeration and apportionment. See *Franklin* v. *Massachusetts*, 505 U. S. 788, 790, 801 (1992) (constitutional challenge to "method used for counting federal employees serving overseas" as part of "reapportionment determination"); *Wisconsin*, *supra*, at 20 (constitutional challenge to Secretary's decision not to adjust count). Others concerned enforcement of statutes with specific directives. See *Department of Commerce*, 525 U. S., at 343 (holding that § 195 bars use of "sampling" to reach actual enumeration for apportionment); *Utah* v. *Evans*, 536 U. S. 452, 464–465 (2002) (considering whether statistical method violated § 195's bar on use of "sampling" in apportionment enumeration). According to respondents, these cases mean that *all* the Secretary's census-related decisions are suitable for judicial review and thus fall outside of § 701(a)(2), and the Court apparently agrees, rejecting the Government's § 701(a)(2) argument in part because "[w]e and other courts have entertained both constitutional and statutory challenges to census-related decisionmaking." *Ante*, at 772.

This argument misses the point of § 701(a)(2). The question under that provision is whether *the challenged action* "is committed to agency discretion by law," not whether a

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[12] The same can be said for the lower court cases on which respondents rely. See, *e. g.*, Brief for Government Respondents 26, and n. 6 (collecting cases, none of which "involved the census questionnaire" or the Secretary's selection of questions).

different action by the same agency is reviewable under the APA, much less whether an action taken by the same agency can be challenged under the Constitution. Take the example of *Heckler* v. *Chaney*, *supra*, where the Court considered whether a particular Food and Drug Administration (FDA) decision was reviewable under the APA. Many FDA actions are subject to APA review, see, *e. g.*, *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U. S. 609, 627 (1973), but that did not prevent the *Heckler* Court from holding that the particular FDA decision at issue there fell within § 701(a)(2). See also, *e. g.*, *Heckler*, *supra*, at 836–837.

Respondents and some of their *amici* contend that the Secretary's decision is at least amenable to judicial review for consistency with the APA's reasoned-explanation requirement. See *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43 (1983) (describing requirement). Thus, the argument goes, even if no statute sets out a standard that can be used in reviewing the particular agency action in question, a court may review an agency's explanation of the reasons for its action and set it aside if the court finds those reasons to be arbitrary or irrational.

This argument would obliterate § 701(a)(2). Even if a statute expressly gave an agency absolute, unrestricted, unfettered, unlimited, and unqualified discretion with respect to a particular decision, a court could still review the agency's explanation of the reasons for its decision. That is not what § 701(a)(2) means. As we put it previously in answering a similar argument against application of § 701(a)(2), it is "fals[e]" to suggest "that if the agency gives a 'reviewable' reason for otherwise unreviewable action, the action becomes reviewable." *Locomotive Engineers*, 482 U. S., at 283. That is because when an action "is committed to agency discretion by law," the Judiciary has no role to play, even when an agency sets forth "an eminently 'reviewable' proposition." *Id.*, at 282–283.

IV

In sum, neither respondents nor my colleagues have been able to identify any relevant, judicially manageable limits on the Secretary's decision to put a core demographic question back on the census. And without an "adequate standard of review for such agency action," *id.*, at 282, courts reviewing decisions about the "form and content" of the census would inevitably be drawn into second-guessing the Secretary's assessment of complicated policy tradeoffs,[13] another indicator of "general unsuitability" for judicial review. *Heckler*, 470 U. S., at 831.

Indeed, if this litigation is any indication, widespread judicial review of the Secretary's conduct of the census will usher in an era of "disruptive practical consequences," and this too weighs against review. *Seaboard Allied Milling Corp.*, 442 U. S., at 457. Cf. *Tucker* v. *United States Dept. of Commerce*, 958 F. 2d 1411, 1418 (CA7 1992) (expressing doubt about "both the provenance and the practicability" of allowing judicial review of census-related decisions).

Respondents protest that the importance of the census provides a compelling reason to allow APA review. See also *ante*, at 820–821 (opinion of BREYER, J.). But this argument overlooks the fact that the Secretary is accountable in other ways for census-related decisionmaking.[14] If the Secretary

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[13] In determining how the census is to be conducted, the Secretary must make decisions about a bevy of matters, such as the best way to count particular persons or categories of persons with an adequate degree of accuracy (*e. g.*, by face-to-face interviews, telephone calls, questionnaires to be mailed back, contacts with neighbors, or use of existing records); the use of followup procedures and other quality control measures; which persons should be included in which households; and issues concerning where a person should be enumerated. These and countless other factors may affect whether an individual receives or responds to the census questionnaire.

[14] Since the time Secretary Ross publicly announced his intent to add the citizenship question, "Congress has questioned the Secretary about his decision in public hearings on several occasions." Brief for Petitioners 50 (collecting examples).

violates the Constitution or any applicable statutory provision related to the census, his action is reviewable. The Secretary is also accountable to Congress with respect to the administration of the census since he has that power only because Congress has found it appropriate to entrust it to him. And the Secretary is always answerable to the President, who is, in turn, accountable to the people.

* * *

Throughout our Nation's history, the Executive Branch has decided without judicial supervision or interference whether and, if so, in what form the decennial census should inquire about the citizenship of the inhabitants of this country. Whether to put a citizenship question on the 2020 census questionnaire is a question that is committed by law to the discretion of the Secretary of Commerce and is therefore exempt from APA review. The District Court had the authority to decide respondents' constitutional claims, but the remainder of their complaint should have been dismissed.

I join Parts I, II, III, IV–B, and IV–C[15] of the opinion of the Court. I do not join the remainder, and insofar as the Court holds that the Secretary's decision is reviewable under the APA, I respectfully dissent.

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[15] Although I would hold that the Secretary's decision is not reviewable under the APA, in the alternative I would conclude that the decision survives review under the applicable standards. I join Parts IV–B and IV–C on that understanding.

Syllabus

MITCHELL *v.* WISCONSIN

CERTIORARI TO THE SUPREME COURT OF WISCONSIN

No. 18–6210. Argued April 23, 2019—Decided June 27, 2019

Petitioner Gerald Mitchell was arrested for operating a vehicle while intoxicated after a preliminary breath test registered a blood-alcohol concentration (BAC) that was triple Wisconsin's legal limit for driving. As is standard practice, the arresting officer drove Mitchell to a police station for a more reliable breath test using evidence-grade equipment. By the time Mitchell reached the station, he was too lethargic for a breath test, so the officer drove him to a nearby hospital for a blood test. Mitchell was unconscious by the time he arrived at the hospital, but his blood was drawn anyway under a state law that presumes that a person incapable of withdrawing implied consent to BAC testing has not done so. The blood analysis showed Mitchell's BAC to be above the legal limit, and he was charged with violating two drunk-driving laws. Mitchell moved to suppress the results of the blood test on the ground that it violated his Fourth Amendment right against "unreasonable searches" because it was conducted without a warrant. The trial court denied the motion, and Mitchell was convicted. On certification from the intermediate appellate court, the Wisconsin Supreme Court affirmed the lawfulness of Mitchell's blood test.

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

2018 WI 84, 383 Wis. 2d 192, 914 N. W. 2d 151, vacated and remanded.

JUSTICE ALITO, joined by THE CHIEF JUSTICE, JUSTICE BREYER, and JUSTICE KAVANAUGH, concluded that when a driver is unconscious and cannot be given a breath test, the exigent-circumstances doctrine generally permits a blood test without a warrant. Pp. 846–857.

(a) BAC tests are Fourth Amendment searches. See *Birchfield* v. *North Dakota*, 579 U. S. 438, 455. A warrant is normally required for a lawful search, but there are well-defined exceptions to this rule, including the "exigent circumstances" exception, which allows warrantless searches "to prevent the imminent destruction of evidence." *Missouri* v. *McNeely*, 569 U. S. 141, 149. In *McNeely*, this Court held that the fleeting nature of blood-alcohol evidence alone was not enough to bring BAC testing within the exigency exception. *Id.*, at 156. But in *Schmerber* v. *California*, 384 U. S. 757, the dissipation of BAC did justify a blood test of a drunk driver whose accident gave police other pressing duties, for then the *further* delay caused by a warrant application would indeed have threatened the destruction of evidence. Like

Schmerber, unconscious-driver cases will involve a heightened degree of urgency for several reasons. And when the driver's stupor or unconsciousness deprives officials of a reasonable opportunity to administer a breath test using evidence-grade equipment, a blood test will be essential for achieving the goals of BAC testing. Pp. 846–849.

(b) Under the exigent-circumstances exception, a warrantless search is allowed when "'there is compelling need for official action and no time to secure a warrant.'" *McNeely*, 569 U. S., at 149. Pp. 849–857.

(1) There is clearly a "compelling need" for a blood test of drunk-driving suspects whose condition deprives officials of a reasonable opportunity to conduct a breath test. First, highway safety is a vital public interest—a "compelling" and "paramount" interest, *Mackey* v. *Montrym*, 443 U. S. 1, 17–18. Second, when it comes to promoting that interest, federal and state lawmakers have long been convinced that legal limits on a driver's BAC make a big difference. And there is good reason to think that such laws have worked. *Birchfield*, 579 U. S., at 448. Third, enforcing BAC limits obviously requires a test that is accurate enough to stand up in court. *Id.*, at 445–447. And such testing must be prompt because it is "a biological certainty" that "[a]lcohol dissipates from the bloodstream," "literally disappearing by the minute." *McNeely*, 569 U. S., at 169 (ROBERTS, C. J., concurring). Finally, when a breath test is unavailable to promote the interests served by legal BAC limits, "a blood draw becomes necessary." *Id.*, at 170. Pp. 851–853.

(2) *Schmerber* demonstrates that an exigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application. Because both conditions are met when a drunk-driving suspect is unconscious, *Schmerber* controls. A driver's unconsciousness does not just create pressing needs; it is *itself* a medical emergency. In such a case, as in *Schmerber*, an officer could "reasonably have believed that he was confronted with an emergency." 384 U. S., at 771. And in many unconscious-driver cases, the exigency will be *especially* acute. A driver so drunk as to lose consciousness is quite likely to crash, giving officers a slew of urgent tasks beyond that of securing medical care for the suspect—tasks that would require them to put off applying for a warrant. The time needed to secure a warrant may have shrunk over the years, but it has not disappeared; and forcing police to put off other urgent tasks for even a relatively short period of time may have terrible collateral costs. Pp. 853–857.

(c) On remand, Mitchell may attempt to show that his was an unusual case, in which his blood would not have been drawn had police not been seeking BAC information and police could not have reasonably judged

Syllabus

that a warrant application would interfere with other pressing needs or duties. P. 857.

JUSTICE THOMAS would apply a *per se* rule, under which the natural metabolization of alcohol in the blood stream "creates an exigency once police have probable cause to believe the driver is drunk," regardless of whether the driver is conscious. *Missouri* v. *McNeely*, 569 U. S. 141, 178 (THOMAS, J., dissenting). Pp. 858–861.

ALITO, J., announced the judgment of the Court and delivered an opinion, in which ROBERTS, C. J., and BREYER and KAVANAUGH, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment, *post*, p. 858. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG and KAGAN, JJ., joined, *post*, p. 861. GORSUCH, J., filed a dissenting opinion, *post*, p. 878.

Andrew R. Hinkel argued the cause for petitioner. With him on the briefs were *Ginger D. Anders* and *Celia R. Choy.*

Hannah S. Jurss, Assistant Attorney General of Wisconsin, argued the cause for respondent. With her on the brief were *Joshua L. Kaul*, Attorney General, and *Anthony D. Russomanno* and *Michael C. Sanders*, Assistant Attorneys General.*

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *David D. Cole*, *Ezekiel R. Edwards*, *Brandon J. Buskey*, and *Nathan Freed Wessler*; for the California DUI Lawyers Association by *Donald J. Bartell* and *Lara J. Gressley*; for the DKT Liberty Project et al. by *Jessica Ring Amunson*; for the DUI Defense Lawyers Association by *Gregory A. Willis* and *D. Timothy Huey*; for the National College for DUI Defense by *Fleming Kanan Whited III*, *Andrew Mishlove*, *Donald J. Ramsell*, and *Michelle Behan*; for Restore the Fourth, Inc., by *Mahesha P. Subbaraman*; and for The Rutherford Institute et al. by *D. Alicia Hickok*, *John W. Whitehead*, *Ilya Shapiro*, *Clark M. Neily III*, and *Jay R. Schweikert.*

Briefs of *amici curiae* urging affirmance were filed for the State of Colorado et al. by *Philip J. Weiser*, Attorney General of Colorado, *Eric R. Olson*, Solicitor General, and *L. Andrew Cooper*, Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Ashley Moody* of Florida, *Christopher M. Carr* of Georgia, *Lawrence G. Wasden* of Idaho, *Kwame Raoul* of Illinois, *Curtis T. Hill, Jr.*, of Indiana, *Thomas J. Miller* of Iowa, *Andy Beshear* of Kentucky, *Jeff Landry* of Louisiana, *Brian E. Frosh* of Maryland, *Keith Ellison* of Minnesota, *Timothy C. Fox* of Montana, *Joshua H. Stein* of North Carolina, *Dave Yost* of

JUSTICE ALITO announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE BREYER, and JUSTICE KAVANAUGH join.

In this case, we return to a topic that we have addressed twice in recent years: the circumstances under which a police officer may administer a warrantless blood-alcohol-concentration (BAC) test to a motorist who appears to have been driving under the influence of alcohol. We have previously addressed what officers may do in two broad categories of cases. First, an officer may conduct a BAC test if the facts of a particular case bring it within the exigent-circumstances exception to the Fourth Amendment's general requirement of a warrant. Second, if an officer has probable cause to arrest a motorist for drunk driving, the officer may conduct a breath test (but not a blood test) under the rule allowing warrantless searches of a person incident to arrest.

Today, we consider what police officers may do in a narrow but important category of cases: those in which the driver is unconscious and therefore cannot be given a breath test. In such cases, we hold, the exigent-circumstances rule almost always permits a blood test without a warrant. When a breath test is impossible, enforcement of the drunk-driving laws depends upon the administration of a blood test. And when a police officer encounters an unconscious driver, it is very likely that the driver would be taken to an emergency room and that his blood would be drawn for diagnostic purposes even if the police were not seeking BAC information. In addition, police officers most frequently come upon unconscious drivers when they report to the scene of an accident, and under those circumstances, the officers' many

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Ohio, *Mike Hunter* of Oklahoma, *Ellen F. Rosenblum* of Oregon, *Alan Wilson* of South Carolina, and *Jason R. Ravnsborg* of South Dakota; for the League of Wisconsin Municipalities et al. by *Douglas Hoffer*; for the National Conference of State Legislatures et al. by *Lauren S. Kuley*, *Keith Bradley*, and *Lisa Soronen*; and for Mothers Against Drunk Driving by *Theane Evangelis* and *Lauren M. Blas*.

responsibilities—such as attending to other injured drivers or passengers and preventing further accidents—may be incompatible with the procedures that would be required to obtain a warrant. Thus, when a driver is unconscious, the general rule is that a warrant is not needed.

I

A

In *Birchfield* v. *North Dakota*, 579 U. S. 438 (2016), we recounted the country's efforts over the years to address the terrible problem of drunk driving. Today, "all States have laws that prohibit motorists from driving with a [BAC] that exceeds a specified level." *Id.*, at 444. And to help enforce BAC limits, every State has passed what are popularly called implied-consent laws. *Ibid.* As "a condition of the privilege of" using the public roads, these laws require that drivers submit to BAC testing "when there is sufficient reason to believe they are violating the State's drunk-driving laws." *Id.*, at 444, 447.

Wisconsin's implied-consent law is much like those of the other 49 States and the District of Columbia. It deems drivers to have consented to breath or blood tests if an officer has reason to believe they have committed one of several drug- or alcohol-related offenses.[1] See Wis. Stat. §§ 343.305(2), (3). Officers seeking to conduct a BAC test must read aloud a statement declaring their intent to administer the test and advising drivers of their options and the implications of their choice. § 343.305(4). If a driver's BAC level proves too high, his license will be suspended; but if he refuses testing, his license will be *revoked* and his refusal may be used against him in court. See *ibid.* No test will

[1] Wisconsin also authorizes BAC testing of drivers involved in accidents that cause significant bodily harm, with or without probable cause of drunk driving. See Wis. Stat. § 343.305(3)2 (2016). We do not address those provisions. And while Wisconsin's and other implied-consent laws permit urine tests, those tests are less common, see *Birchfield* v. *North Dakota*, 579 U. S. 438, 447, n. 1 (2016), and we do not consider them here.

be administered if a driver refuses—or, as the State would put it, "withdraws" his statutorily presumed consent. But "[a] person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have" withdrawn it. § 343.305(3)(b). See also §§ 343.305(3)(ar)1–2. More than half the States have provisions like this one regarding unconscious drivers.

B

The sequence of events that gave rise to this case began when Officer Alexander Jaeger of the Sheboygan Police Department received a report that petitioner Gerald Mitchell, appearing to be very drunk, had climbed into a van and driven off. Jaeger soon found Mitchell wandering near a lake. Stumbling and slurring his words, Mitchell could hardly stand without the support of two officers. Jaeger judged a field sobriety test hopeless, if not dangerous, and gave Mitchell a preliminary breath test. It registered a BAC level of 0.24%, triple the legal limit for driving in Wisconsin. Jaeger arrested Mitchell for operating a vehicle while intoxicated and, as is standard practice, drove him to a police station for a more reliable breath test using better equipment.

On the way, Mitchell's condition continued to deteriorate—so much so that by the time the squad car had reached the station, he was too lethargic even for a breath test. Jaeger therefore drove Mitchell to a nearby hospital for a blood test; Mitchell lost consciousness on the ride over and had to be wheeled in. Even so, Jaeger read aloud to a slumped Mitchell the standard statement giving drivers a chance to refuse BAC testing. Hearing no response, Jaeger asked hospital staff to draw a blood sample. Mitchell remained unconscious while the sample was taken, and analysis of his blood showed that his BAC, about 90 minutes after his arrest, was 0.222%.

Mitchell was charged with violating two related drunk-driving provisions. See §§ 346.63(1)(a), (b). He moved to suppress the results of the blood test on the ground that it

violated his Fourth Amendment right against "unreasonable searches" because it was conducted without a warrant. Wisconsin chose to rest its response on the notion that its implied-consent law (together with Mitchell's free choice to drive on its highways) rendered the blood test a consensual one, thus curing any Fourth Amendment problem. In the end, the trial court denied Mitchell's motion to suppress, and a jury found him guilty of the charged offenses. The intermediate appellate court certified two questions to the Wisconsin Supreme Court: first, whether compliance with the State's implied-consent law was sufficient to show that Mitchell's test was consistent with the Fourth Amendment and, second, whether a warrantless blood draw from an unconscious person violates the Fourth Amendment. See 2018 WI 84, ¶15, 383 Wis. 2d 192, 202–203, 914 N. W. 2d 151, 155–156. The Wisconsin Supreme Court affirmed Mitchell's convictions, and we granted certiorari, 586 U. S. 1113 (2019), to decide "[w]hether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement," Pet. for Cert. ii.

II

In considering Wisconsin's implied-consent law, we do not write on a blank slate. "Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." *Birchfield*, 579 U. S., at 476–477. But our decisions have not rested on the idea that these laws do what their popular name might seem to suggest—that is, create actual consent to all the searches they authorize. Instead, we have based our decisions on the precedent regarding the specific constitutional claims in each case, while keeping in mind the wider regulatory scheme developed over the years to combat drunk driving. That scheme is centered on legally specified BAC limits for driv-

ers—limits enforced by the BAC tests promoted by implied-consent laws.

Over the last 50 years, we have approved many of the defining elements of this scheme. We have held that forcing drunk-driving suspects to undergo a blood test does not violate their constitutional right against self-incrimination. See *Schmerber* v. *California*, 384 U. S. 757, 765 (1966). Nor does using their refusal against them in court. See *South Dakota* v. *Neville*, 459 U. S. 553, 563 (1983). And punishing that refusal with automatic license revocation does not violate drivers' due process rights if they have been arrested upon probable cause, *Mackey* v. *Montrym*, 443 U. S. 1 (1979); on the contrary, this kind of summary penalty is "unquestionably legitimate," *Neville*, *supra*, at 560.

These cases generally concerned the Fifth and Fourteenth Amendments, but motorists charged with drunk driving have also invoked the Fourth Amendment's ban on "unreasonable searches" since BAC tests are "searches." See *Birchfield*, 579 U. S., at 455. Though our precedent normally requires a warrant for a lawful search, there are well-defined exceptions to this rule. In *Birchfield*, we applied precedent on the "search-incident-to-arrest" exception to BAC testing of conscious drunk-driving suspects. We held that their drunk-driving arrests, taken alone, justify warrantless breath tests but not blood tests, since breath tests are less intrusive, just as informative, and (in the case of conscious suspects) readily available. *Id.*, at 476.

We have also reviewed BAC tests under the "exigent circumstances" exception—which, as noted, allows warrantless searches "to prevent the imminent destruction of evidence." *Missouri* v. *McNeely*, 569 U. S. 141, 149 (2013). In *McNeely*, we were asked if this exception covers BAC testing of drunk-driving suspects in light of the fact that blood-alcohol evidence is always dissipating due to "natural metabolic processes." *Id.*, at 152. We answered that the fleeting quality of BAC evidence alone is not enough. *Id.*,

at 156. But in *Schmerber* it *did* justify a blood test of a drunk driver who had gotten into a car accident that gave police other pressing duties, for then the "*further* delay" caused by a warrant application really "*would* have threatened the destruction of evidence." *McNeely*, *supra*, at 152 (emphasis added).

Like *Schmerber*, this case sits much higher than *McNeely* on the exigency spectrum. *McNeely* was about the minimum degree of urgency common to all drunk-driving cases. In *Schmerber*, a car accident heightened that urgency. And here Mitchell's medical condition did just the same.

Mitchell's stupor and eventual unconsciousness also deprived officials of a reasonable opportunity to administer a breath test. To be sure, Officer Jaeger managed to conduct "a preliminary breath test" using a portable machine when he first encountered Mitchell at the lake. App. to Pet. for Cert. 60a. But he had no reasonable opportunity to give Mitchell a breath test using "evidence-grade breath testing machinery." *Birchfield*, 579 U. S., at 487 (SOTOMAYOR, J., concurring in part and dissenting in part). As a result, it was reasonable for Jaeger to seek a better breath test at the station; he acted with reasonable dispatch to procure one; and when Mitchell's condition got in the way, it was reasonable for Jaeger to pursue a blood test. As JUSTICE SOTOMAYOR explained in her partial dissent in *Birchfield*:

> "There is a common misconception that breath tests are conducted roadside, immediately after a driver is arrested. While some preliminary testing is conducted roadside, reliability concerns with roadside tests confine their use in most circumstances to establishing probable cause for an arrest. . . . The standard evidentiary breath test is conducted after a motorist is arrested and transported to a police station, governmental building, or mobile testing facility where officers can access reliable, evidence-grade breath testing machinery." *Ibid.*

Because the "standard evidentiary breath test is conducted after a motorist is arrested and transported to a police station" or another appropriate facility, *ibid.*, the important question here is what officers may do when a driver's unconsciousness (or stupor) eliminates any reasonable opportunity for *that* kind of breath test.

III

The Fourth Amendment guards the "right of the people to be secure in their persons . . . against unreasonable searches" and provides that "no Warrants shall issue, but upon probable cause." A blood draw is a search of the person, so we must determine if its administration here without a warrant was reasonable. See *id.*, at 455 (majority opinion). Though we have held that a warrant is normally required, we have also "made it clear that there are exceptions to the warrant requirement." *Illinois* v. *McArthur*, 531 U. S. 326, 330 (2001). And under the exception for exigent circumstances, a warrantless search is allowed when "'there is compelling need for official action and no time to secure a warrant.'" *McNeely*, *supra*, at 149 (quoting *Michigan* v. *Tyler*, 436 U. S. 499, 509 (1978)). In *McNeely*, we considered how the exigent-circumstances exception applies to the broad category of cases in which a police officer has probable cause to believe that a motorist was driving under the influence of alcohol, and we do not revisit that question. Nor do we settle whether the exigent-circumstances exception covers the specific facts of this case.[2] Instead, we address how the ex-

[2] JUSTICE SOTOMAYOR's dissent argues that Wisconsin waived the argument that we now adopt, but the dissent paints a misleading picture of both the proceedings below and the ground for our decision.

First, as to the proceedings below, the dissent contends that the sole question certified to the Wisconsin Supreme Court was "'whether the warrantless blood draw of an unconscious motorist pursuant to Wisconsin's implied consent law, where no exigent circumstances exist or have been argued, violates the Fourth Amendment.'" *Post*, at 863 (quoting App. 61). That is indeed how the intermediate appellate court understood the issue

ception bears on the category of cases encompassed by the question on which we granted certiorari—those involving unconscious drivers.[3] In those cases, the need for a blood

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in the case, but the State Supreme Court took a broader view, as was its right. It regarded the appeal as presenting two questions, one of which was "whether a warrantless blood draw from an unconscious person pursuant to Wis. Stat. § 343.305(3)(b) violates the Fourth Amendment." See 383 Wis. 2d 192, 202–203, 914 N. W. 2d 151, 155–156 (2018). This broad question easily encompasses the rationale that we adopt today.

Second, after noting that the State did not attempt below to make a case-specific showing of exigent circumstances, the dissent claims that our decision is based on this very ground. But that is not at all the basis for our decision. We do not hold that the State established that the facts of this particular case involve exigent circumstances under *McNeely*. Rather, we adopt a rule for an entire category of cases—those in which a motorist believed to have driven under the influence of alcohol is unconscious and thus cannot be given a breath test. This rule is not based on what happened in petitioner's particular case but on the circumstances generally present in cases that fall within the scope of the rule. Those are just the sorts of features of unconscious-driver cases that Wisconsin brought to our attention, see Brief for Respondent 54–55; Tr. of Oral Arg. 32–34, 48–51, which petitioner addressed, see Reply Brief 14–15; Tr. of Oral Arg. 15–20, 23–24, 29–31, 63–66. So it is entirely proper for us to decide the case on this ground. See *Thigpen* v. *Roberts*, 468 U. S. 27, 29–30 (1984).

[3] While our exigent-circumstances precedent requires a "'totality of the circumstances'" analysis, "the circumstances in drunk driving cases are often typical, and the Court should be able to offer guidance on how police should handle cases like the one before us." *McNeely*, 569 U. S., at 166 (ROBERTS, C. J., concurring in part and dissenting in part). Indeed, our exigency case law is full of general rules providing such guidance. Thus, we allow police to proceed without a warrant when an occupant of a home requires "emergency assistance," *Brigham City* v. *Stuart*, 547 U. S. 398, 403 (2006); when a building is on fire, see *Michigan* v. *Tyler*, 436 U. S. 499, 509 (1978); and when an armed robber has just entered a home, see *United States* v. *Santana*, 427 U. S. 38 (1976). "In each of these cases, the requirement that we base our decision on the 'totality of the circumstances' has not prevented us from spelling out a general rule for the police to follow." *McNeely*, *supra*, at 168 (opinion of ROBERTS, C. J.). Neither does it prevent us here.

test is compelling, and an officer's duty to attend to more pressing needs may leave no time to seek a warrant.

A

The importance of the needs served by BAC testing is hard to overstate. The bottom line is that BAC tests are needed for enforcing laws that save lives. The specifics, in short, are these: Highway safety is critical; it is served by laws that criminalize driving with a certain BAC level; and enforcing these legal BAC limits requires efficient testing to obtain BAC evidence, which naturally dissipates. So BAC tests are crucial links in a chain on which vital interests hang. And when a breath test is unavailable to advance those aims, a blood test becomes essential. Here we add a word about each of these points.

First, highway safety is a vital public interest. For decades, we have strained our vocal chords to give adequate expression to the stakes. We have called highway safety a "compelling interest," *Mackey*, 443 U. S., at 19; we have called it "paramount," *id.*, at 17. Twice we have referred to the effects of irresponsible driving as "slaughter" comparable to the ravages of war. *Breithaupt* v. *Abram*, 352 U. S. 432, 439 (1957); *Perez* v. *Campbell*, 402 U. S. 637, 657, 672 (1971) (Blackmun, J., concurring in result in part and dissenting in part). We have spoken of "carnage," *Neville*, 459 U. S., at 558–559, and even "frightful carnage," *Tate* v. *Short*, 401 U. S. 395, 401 (1971) (Blackmun, J., concurring). The frequency of preventable collisions, we have said, is "tragic," *Neville*, *supra*, at 558, and "astounding," *Breithaupt*, *supra*, at 439. And behind this fervent language lie chilling figures, all captured in the fact that from 1982 to 2016, alcohol-related accidents took roughly 10,000 to 20,000 lives in this Nation *every single year*. See National Highway Traffic Safety Admin. (NHTSA), Traffic Safety Facts 2016, p. 40 (May 2018). In the best years, that would add up to more than one fatality per hour.

Second, when it comes to fighting these harms and promoting highway safety, federal and state lawmakers have long been convinced that specified BAC limits make a big difference. States resorted to these limits when earlier laws that included no "statistical definition of intoxication" proved ineffectual or hard to enforce. *Birchfield*, 579 U. S., at 444–445. The maximum permissible BAC, initially set at 0.15%, was first lowered to 0.10% and then to 0.08%. *Id.*, at 445, 448. Congress encouraged this process by conditioning the award of federal highway funds on the establishment of a BAC limit of 0.08%, see 23 U. S. C. § 163(a); 23 CFR § 1225.1 (2012), and every State has adopted this limit.[4] Not only that, many States, including Wisconsin, have passed laws imposing increased penalties for recidivists or for drivers with a BAC level that exceeds a higher threshold. See Wis. Stat. § 346.65(2)(am); *Birchfield*, 579 U. S., at 448–449.

There is good reason to think this strategy has worked. As we noted in *Birchfield*, these tougher measures corresponded with a dramatic drop in highway deaths and injuries: From the mid-1970's to the mid-1980's, "the number of annual fatalities averaged 25,000; by 2014 . . . , the number had fallen to below 10,000." *Id.*, at 448.

Third, enforcing BAC limits obviously requires a test that is accurate enough to stand up in court, *id.*, at 445–447; see also *McNeely*, 569 U. S., at 159–160 (plurality opinion). And we have recognized that "[e]xtraction of blood samples for testing is a highly effective means of" measuring "the influence of alcohol." *Schmerber*, 384 U. S., at 771.

Enforcement of BAC limits also requires prompt testing because it is "a biological certainty" that "[a]lcohol dissipates from the bloodstream at a rate of 0.01 percent to 0.025 percent per hour. . . . Evidence is literally disappearing by the minute." *McNeely*, 569 U. S., at 169 (opinion of ROBERTS, C. J.). As noted, the ephemeral nature of BAC was "essen-

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[4] See NHTSA, Alcohol and Highway Safety: A Review of the State of Knowledge 167 (DOT HS 811 374, Mar. 2011).

tial to our holding in *Schmerber*," which itself allowed a warrantless blood test for BAC. *Id.*, at 152 (opinion of the Court). And even when we later held that the exigent-circumstances exception would not permit a warrantless blood draw in *every* drunk-driving case, we acknowledged that delays in BAC testing can "raise questions about . . . accuracy." *Id.*, at 156.

It is no wonder, then, that the implied-consent laws that incentivize prompt BAC testing have been with us for 65 years and now exist in all 50 States. *Birchfield*, *supra*, at 448. These laws and the BAC tests they require are tightly linked to a regulatory scheme that serves the most pressing of interests.

Finally, when a breath test is unavailable to promote those interests, "a blood draw becomes necessary." *McNeely*, 569 U. S., at 170 (opinion of ROBERTS, C. J.). Thus, in the case of unconscious drivers, who cannot blow into a breathalyzer, blood tests are essential for achieving the compelling interests described above.

Indeed, not only is the link to pressing interests here tighter; the interests themselves are greater: Drivers who are drunk enough to pass out at the wheel or soon afterward pose a much greater risk. It would be perverse if the more wanton behavior were rewarded—if the more harrowing threat were harder to punish.

For these reasons, there clearly is a "compelling need" for a blood test of drunk-driving suspects whose condition deprives officials of a reasonable opportunity to conduct a breath test. *Id.*, at 149 (opinion of the Court) (internal quotation marks omitted). The only question left, under our exigency doctrine, is whether this compelling need justifies a warrantless search because there is, furthermore, "'no time to secure a warrant.'" *Ibid.*

B

We held that there was no time to secure a warrant before a blood test of a drunk-driving suspect in *Schmerber* because

the officer there could "reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence." 384 U. S., at 770 (internal quotation marks omitted). So even if the constant dissipation of BAC evidence *alone* does not create an exigency, see *McNeely*, *supra*, at 150–151, *Schmerber* shows that it does so when combined with other pressing needs:

> "We are told that [1] the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where [2] time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case [without a warrant] was . . . appropriate . . . ." 384 U. S., at 770–771.

Thus, exigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application. Both conditions are met when a drunk-driving suspect is unconscious, so *Schmerber* controls: With such suspects, too, a warrantless blood draw is lawful.

1

In *Schmerber*, the extra factor giving rise to urgent needs that would only add to the delay caused by a warrant application was a car accident; here it is the driver's unconsciousness. Indeed, unconsciousness does not just create pressing needs; it is *itself* a medical emergency.[5] It means that the

[5] See National Institutes of Health, U. S. National Library of Medicine, MedlinePlus, Unconsciousness (June 3, 2019), https://medlineplus.gov/ency/article/000022.htm (all Internet materials as last visited June 25, 2019).

suspect will have to be rushed to the hospital or similar facility not just for the blood test itself but for urgent medical care.[6] Police can reasonably anticipate that such a driver might require monitoring, positioning, and support on the way to the hospital;[7] that his blood may be drawn anyway, for diagnostic purposes, immediately on arrival;[8] and that immediate medical treatment could delay (or otherwise distort the results of) a blood draw conducted later, upon receipt of a warrant, thus reducing its evidentiary value. See *McNeely*, *supra*, at 156 (plurality opinion). All of that sets this case apart from the uncomplicated drunk-driving scenarios addressed in *McNeely*. Just as the ramifications of a car accident pushed *Schmerber* over the line into exigency, so does the condition of an unconscious driver bring his blood draw under the exception. In such a case, as in *Schmerber*, an officer could "reasonably have believed that he was confronted with an emergency." 384 U. S., at 770.

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[6] D. Limmer & M. O'Keefe, Emergency Care 598 (13th ed. 2016).

[7] See *id.*, at 593–594.

[8] See J. Kwasnoski, G. Partridge, & J. Stephen, Officer's DUI Handbook 142 (6th ed. 2013) ("[M]ost hospitals routinely withdraw blood from the driver immediately upon admittance"); see also E. Mitchell & R. Medzon, Introduction to Emergency Medicine 269 (2005) ("Serum glucose and blood alcohol concentrations are two pieces of information that are of paramount importance when an apparently intoxicated patient arrives at the [emergency room]"); Mayo Clinic, Alcohol Poisoning: Diagnosis & Treatment (2019), https://www.mayoclinic.org/diseases-conditions/alcohol-poisoning/diagnosis-treatment/drc-20354392. In this respect, the case for allowing a blood draw is stronger here than in *Schmerber* v. *California*, 384 U. S. 757 (1966). In the latter, it gave us pause that blood draws involve piercing a person's skin. See *id.*, at 762, 770. But since unconscious suspects will often have their skin pierced and blood drawn for diagnostic purposes, allowing law enforcement to use blood taken from that initial piercing would not increase the bodily intrusion. In fact, dispensing with the warrant rule could *lessen* the intrusion. It could enable authorities to use blood obtained by hospital staff when the suspect is admitted rather than having to wait to hear back about a warrant and then order what might be a second blood draw.

Indeed, in many unconscious-driver cases, the exigency will be *more* acute, as elaborated in the briefing and argument in this case. A driver so drunk as to lose consciousness is quite likely to crash, especially if he passes out before managing to park. And then the accident might give officers a slew of urgent tasks beyond that of securing (and working around) medical care for the suspect. Police may have to ensure that others who are injured receive prompt medical attention; they may have to provide first aid themselves until medical personnel arrive at the scene. In some cases, they may have to deal with fatalities. They may have to preserve evidence at the scene and block or redirect traffic to prevent further accidents. These pressing matters, too, would require responsible officers to put off applying for a warrant, and that would only exacerbate the delay—and imprecision—of any subsequent BAC test.

In sum, all these rival priorities would put officers, who must often engage in a form of triage, to a dilemma. It would force them to choose between prioritizing a warrant application, to the detriment of critical health and safety needs, and delaying the warrant application, and thus the BAC test, to the detriment of its evidentiary value and all the compelling interests served by BAC limits. This is just the kind of scenario for which the exigency rule was born—just the kind of grim dilemma it lives to dissolve.

2

Mitchell objects that a warrantless search is unnecessary in cases involving unconscious drivers because warrants these days can be obtained faster and more easily. But even in our age of rapid communication,

> "[w]arrants inevitably take some time for police officers or prosecutors to complete and for magistrate judges to review. Telephonic and electronic warrants may still require officers to follow time-consuming formalities de-

> signed to create an adequate record, such as preparing a duplicate warrant before calling the magistrate judge. . . . And improvements in communications technology do not guarantee that a magistrate judge will be available when an officer needs a warrant after making a late-night arrest." *McNeely*, 569 U. S., at 155.

In other words, with better technology, the time required has shrunk, but it has not disappeared. In the emergency scenarios created by unconscious drivers, forcing police to put off other tasks for even a relatively short period of time may have terrible collateral costs. That is just what it means for these situations to *be* emergencies.

IV

When police have probable cause to believe a person has committed a drunk-driving offense and the driver's unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, they may almost always order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment. We do not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties. Because Mitchell did not have a chance to attempt to make that showing, a remand for that purpose is necessary.

* * *

The judgment of the Supreme Court of Wisconsin is vacated, and the case is remanded for further proceedings.

It is so ordered.

JUSTICE THOMAS, concurring in the judgment.

Today, the plurality adopts a difficult-to-administer rule: Exigent circumstances are generally present when police encounter a person suspected of drunk driving—except when they aren't. Compare *ante*, at 854, with *ante*, at 857. The plurality's presumption will rarely be rebutted, but it will nevertheless burden both officers and courts who must attempt to apply it. "The better (and far simpler) way to resolve" this case is to apply "the *per se* rule" I proposed in *Missouri* v. *McNeely*, 569 U. S. 141, 176 (2013) (dissenting opinion). *Birchfield* v. *North Dakota*, 579 U. S. 438, 498 (2016) (THOMAS, J., concurring in judgment in part and dissenting in part). Under that rule, the natural metabolization of alcohol in the bloodstream "'creates an exigency once police have probable cause to believe the driver is drunk,'" regardless of whether the driver is conscious. *Ibid.* Because I am of the view that the Wisconsin Supreme Court should apply that rule on remand, I concur only in the judgment.

I

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Although the Fourth Amendment does not, by its text, require that searches be supported by a warrant, see *Groh* v. *Ramirez*, 540 U. S. 551, 571–573 (2004) (THOMAS, J., dissenting), "this Court has inferred that a warrant must generally be secured" for a search to comply with the Fourth Amendment, *Kentucky* v. *King*, 563 U. S. 452, 459 (2011). We have also recognized, however, that this warrant presumption "may be overcome in some circumstances because 'the ultimate touchstone of the Fourth Amendment is "reasonableness."'" *Ibid.* Accordingly, we have held that "the warrant requirement is subject to certain reasonable exceptions." *Ibid.*

In recent years, this Court has twice considered whether warrantless blood draws fall within an exception to the warrant requirement. First, in *McNeely*, a divided court held that the natural metabolization of alcohol in the bloodstream does not present a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement. 569 U. S., at 145. Then, in *Birchfield*, we held that blood draws may not be administered as a search incident to a lawful arrest for drunk driving. 579 U. S., at 476. The question we face in this case is whether the blood draw here fell within one of the "reasonable exceptions" to the warrant requirement.

II

The "exigent circumstances" exception applies when "the needs of law enforcement [are] so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment." *King*, 563 U. S., at 460 (internal quotation marks omitted). Applying this doctrine, the Court has held that officers may conduct a warrantless search when failure to act would result in "the imminent destruction of evidence." *Ibid.* (internal quotation marks omitted).

As I have explained before, "the imminent destruction of evidence" is a risk in every drunk-driving arrest and thus "implicates the exigent-circumstances doctrine." *McNeely*, 569 U. S., at 178 (dissenting opinion). "Once police arrest a suspect for drunk driving, each passing minute eliminates probative evidence of the crime" as alcohol dissipates from the bloodstream. *Id.*, at 177. In many States, this "rapid destruction of evidence," *id.*, at 178, is particularly problematic because the penalty for drunk driving depends in part on the driver's blood alcohol concentration, see *ante*, at 852. Because the provisions of Wisconsin law at issue here allow blood draws only when the driver is suspected of impaired driving, *ante*, at 844–845, they fit easily within the exigency exception to the warrant requirement.

Instead of adopting this straightforward rule, the plurality makes a flawed distinction between ordinary drunk-driving cases in which blood-alcohol concentration evidence "is dissipating" and those that also include "some other [pressing] factor." *Ante*, at 847, 854, 857. But whether "some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application" is irrelevant. *Ante*, at 854. When police have probable cause to conclude that an individual was driving drunk, probative evidence is dissipating by the minute. And that evidence dissipates regardless of whether police had another reason to draw the driver's blood or whether "a warrant application would interfere with other pressing needs or duties." *Ante*, at 857. The destruction of evidence alone is sufficient to justify a warrantless search based on exigent circumstances. See generally *McNeely*, 569 U. S., at 176–179 (opinion of THOMAS, J.).

Presumably, the plurality draws these lines to avoid overturning *McNeely*. See *id.*, at 156 (majority opinion) (holding that "the natural dissipation of alcohol in the blood" does not "categorically" support a finding of exigency). But *McNeely* was wrongly decided, see *id.*, at 176–183 (opinion of THOMAS, J.), and our decision in *Birchfield* has already undermined its rationale. Specifically, the Court determined in *McNeely* that "[t]he context of blood testing is different in critical respects from other destruction-of-evidence cases in which the police are truly confronted with a now or never situation." 569 U. S., at 153 (majority opinion) (internal quotation marks omitted). But the Court stated in *Birchfield* that a distinction between "an arrestee's active destruction of evidence and the loss of evidence due to a natural process makes little sense." 579 U. S., at 471; see also *ante*, at 852–853. Moreover, to the extent *McNeely* was grounded in the belief that a *per se* rule was inconsistent with the "case by case," "totality of the circumstances" analysis ordinarily applied in exigent-circumstances cases, see 569 U. S., at 156, that rationale was

suspect from the start. That the exigent-circumstances exception might ordinarily require "an evaluation of the particular facts of each case," *Birchfield*, *supra*, at 473, does not foreclose us from recognizing that a certain, dispositive fact is always present in some categories of cases. In other words, acknowledging that destruction of evidence is at issue in every drunk-driving case does not undermine the general totality-of-the-circumstances approach that *McNeely* and *Birchfield* endorsed. Cf. *ante*, at 850, n. 3.

* * *

The Court has consistently held that police officers may perform searches without a warrant when destruction of evidence is a risk. *United States* v. *Banks*, 540 U. S. 31, 38 (2003); *Richards* v. *Wisconsin*, 520 U. S. 385, 395 (1997); *Cupp* v. *Murphy*, 412 U. S. 291, 295–296 (1973); *Schmerber* v. *California*, 384 U. S. 757, 770–772 (1966). The rule should be no different in drunk-driving cases. Because the plurality instead adopts a rule more likely to confuse than clarify, I concur only in the judgment.

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

The plurality's decision rests on the false premise that today's holding is necessary to spare law enforcement from a choice between attending to emergency situations and securing evidence used to enforce state drunk-driving laws. Not so. To be sure, drunk driving poses significant dangers that Wisconsin and other States must be able to curb. But the question here is narrow: What must police do before ordering a blood draw of a person suspected of drunk driving who has become unconscious? Under the Fourth Amendment, the answer is clear: If there is time, get a warrant.

The State of Wisconsin conceded in the state courts that it had time to get a warrant to draw Gerald Mitchell's blood, and that should be the end of the matter. Because the plurality needlessly casts aside the established protections of

the warrant requirement in favor of a brand new presumption of exigent circumstances that Wisconsin does not urge, that the state courts did not consider, and that contravenes this Court's precedent, I respectfully dissent.

I

In May 2013, Wisconsin police received a report that Gerald Mitchell, seemingly intoxicated, had driven away from his apartment building. A police officer later found Mitchell walking near a lake, slurring his speech and walking with difficulty. His van was parked nearby. The officer administered a preliminary breath test, which revealed a blood-alcohol concentration (BAC) of 0.24%. The officer arrested Mitchell for operating a vehicle while intoxicated.

Once at the police station, the officer placed Mitchell in a holding cell, where Mitchell began to drift into either sleep or unconsciousness. At that point, the officer decided against administering a more definitive breath test and instead took Mitchell to the hospital for a blood test. Mitchell became fully unconscious on the way. At the hospital, the officer read Mitchell a notice, required by Wisconsin's so-called implied-consent law, which gave him the opportunity to refuse BAC testing. See Wis. Stat. § 343.305 (2016). But Mitchell was too incapacitated to respond. The officer then asked the hospital to test Mitchell's blood. Mitchell's blood was drawn about 90 minutes after his arrest, and the test revealed a BAC of 0.22%.[1] At no point did the officer attempt to secure a warrant.

Mitchell was charged with violating two Wisconsin drunk-driving laws. See §§ 346.63(1)(a), (b). He moved to suppress the blood-test results, arguing that the warrantless blood draw was an unreasonable search under the Fourth

[1] Although the Wisconsin Supreme Court referred to the lapse in time between the arrest and the blood draw as lasting "approximately one hour," 2018 WI 84, ¶10, 383 Wis. 2d 192, 201, 914 N. W. 2d 151, 155, the state appellate court explained that Mitchell was arrested around 4:26 p.m. and that the blood draw took place at 5:59 p.m., App. 63–64.

Amendment. In response, Wisconsin conceded that exigent circumstances did not justify the warrantless blood draw. As the State's attorney told the trial court, "There is nothing to suggest that this is a blood draw on a[n] exigent circumstances situation when there has been a concern for exigency. This is not that case." App. 134. Instead, Wisconsin argued that the warrantless blood draw was lawful because of Wisconsin's implied-consent statute. *Id.*, at 133.

The trial court denied Mitchell's motion to suppress, and a jury convicted him of the charged offenses. On appeal, the State Court of Appeals noted that Wisconsin had "expressly disclaimed that it was relying on exigent circumstances to justify the draw," *id.*, at 64, and that this case offered a chance to clarify the law on implied consent because the case "is not susceptible to resolution on the ground of exigent circumstances," *id.*, at 66. The Court of Appeals then certified the appeal to the Wisconsin Supreme Court, identifying the sole issue on appeal as "whether the warrantless blood draw of an unconscious motorist pursuant to Wisconsin's implied consent law, where no exigent circumstances exist or have been argued, violates the Fourth Amendment." *Id.*, at 61.

On certification from the state appellate court, the Supreme Court of Wisconsin upheld the search.[2] The Court granted certiorari to decide whether a statute like Wisconsin's, which allows police to draw blood from an unconscious drunk-driving suspect, provides an exception to the Fourth Amendment's warrant requirement.

II

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons . . . against unreasonable

[2] The Wisconsin Supreme Court rephrased the certified question, but, like the Court of Appeals, it recognized the State's concession that the exigency exception did not apply and, accordingly, did not consider the issue in reaching its decision. See 383 Wis. 2d, at 202, 914 N. W. 2d, at 155.

searches and seizures." When the aim of a search is to uncover evidence of a crime, the Fourth Amendment generally requires police to obtain a warrant. *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646, 653 (1995).

The warrant requirement is not a mere formality; it ensures that necessary judgment calls are made "'by a neutral and detached magistrate,'" not "'by the officer engaged in the often competitive enterprise of ferreting out crime.'" *Schmerber* v. *California*, 384 U. S. 757, 770 (1966). A warrant thus serves as a check against searches that violate the Fourth Amendment by ensuring that a police officer is not made the sole interpreter of the Constitution's protections. Accordingly, a search conducted without a warrant is "*per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz* v. *United States*, 389 U. S. 347, 357 (1967) (footnote omitted); see *Riley* v. *California*, 573 U. S. 373, 382 (2014) ("In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement").

The carefully circumscribed exceptions to the warrant requirement, as relevant here, include the exigent-circumstances exception, which applies when "'the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable," *Kentucky* v. *King*, 563 U. S. 452, 460 (2011) (some internal quotation marks omitted); the consent exception for cases where voluntary consent is given to the search, see, *e. g.*, *Georgia* v. *Randolph*, 547 U. S. 103, 109 (2006); and the exception for "searches incident to arrest," see, *e. g.*, *Riley*, 573 U. S., at 382.

A

Blood draws are "searches" under the Fourth Amendment. The act of drawing a person's blood, whether or not he is unconscious, "involve[s] a compelled physical intrusion be-

neath [the] skin and into [a person's] veins," all for the purpose of extracting evidence for a criminal investigation. *Missouri* v. *McNeely*, 569 U. S. 141, 148 (2013). The blood draw also "places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading," *Birchfield* v. *North Dakota*, 579 U. S. 438, 464 (2016), such as whether a person is pregnant, is taking certain medications, or suffers from an illness. That "invasion of bodily integrity" disturbs "an individual's 'most personal and deep-rooted expectations of privacy.'" *McNeely*, 569 U. S., at 148.

For decades, this Court has stayed true to the Fourth Amendment's warrant requirement and the narrowness of its exceptions, even in the face of attempts categorically to exempt blood testing from its protections. In *Schmerber*, a man was hospitalized following a car accident. 384 U. S., at 758. At the scene of the accident and later at the hospital, a police officer noticed signs of intoxication, and he arrested Schmerber for drunk driving. *Id.*, at 768–769. Without obtaining a warrant, the officer ordered a blood draw to measure Schmerber's BAC, and Schmerber later challenged the blood test as an unreasonable search under the Fourth Amendment. *Id.*, at 758–759. The Court reinforced that search warrants are "ordinarily required . . . where intrusions into the human body are concerned," *id.*, at 770, but it ultimately held that exigent circumstances justified the particular search at issue because certain "special facts"—namely, an unusual delay caused by the investigation at the scene and the subsequent hospital trip—left the police with "no time to seek out a magistrate and secure a warrant" before losing the evidence. *Id.*, at 770–771.

More recently, in *McNeely*, the Court held that blood tests are not categorically exempt from the warrant requirement, explaining that exigency "must be determined case by case based on the totality of the circumstances." 569 U. S., at

156. "[T]he natural dissipation of alcohol in the blood may support a finding of exigency in a specific case," but "it does not do so categorically." *Ibid.* If officers "can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search," the Court made clear, "the Fourth Amendment mandates that they do so." *Id.*, at 152; see *id.*, at 167 (ROBERTS, C. J., concurring in part and dissenting in part) ("The natural dissipation of alcohol in the bloodstream . . . would qualify as an exigent circumstance, except that there may be time to secure a warrant before blood can be drawn. If there is, an officer must seek a warrant").

In *Birchfield*, the Court rejected another attempt categorically to exempt blood draws from the warrant requirement. 579 U. S., at 474. The Court considered whether warrantless breath and blood tests to determine a person's BAC level were permissible as searches incident to arrest. The Court held that warrantless breath tests were permitted because they are insufficiently intrusive to outweigh the State's need for BAC testing. See *ibid.* As to blood tests, however, the Court held the opposite: Because they are significantly more intrusive than breath tests, the warrant requirement applies unless particular exigent circumstances prevent officers from obtaining a warrant. *Ibid.*; see *id.*, at 474–475 ("Nothing prevents the police from seeking a warrant for a blood test when there is sufficient time to do so in the particular circumstances or from relying on the exigent circumstances exception . . . when there is not").[3]

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[3] The Court in *Birchfield* concluded as much even while acknowledging that, in some cases, the suspect would be unconscious and thus unable to perform a breath test. 579 U. S., at 475 ("It is true that a blood test, unlike a breath test, may be administered to a person who is unconscious (perhaps as a result of a crash) or who is unable to do what is needed to take a breath test due to profound intoxication or injuries. But we have no reason to believe that such situations are common in drunk-driving arrests, and when they arise, the police may apply for a warrant if need be").

B

Those cases resolve this one. *Schmerber* and *McNeely* establish that there is no categorical exigency exception for blood draws, although exigent circumstances might justify a warrantless blood draw on the facts of a particular case. And from *Birchfield*, we know that warrantless blood draws cannot be justified as searches incident to arrest. The lesson is straightforward: Unless there is too little time to do so, police officers must get a warrant before ordering a blood draw. See 579 U. S., at 474–475; *McNeely*, 569 U. S., at 152.

Against this precedential backdrop, Wisconsin's primary argument has always been that Mitchell consented to the blood draw through the State's "implied-consent law." Under that statute, a motorist who drives on the State's roads is "deemed" to have consented to a blood draw, breath test, and urine test, and that supposed consent allows a warrantless blood draw from an unconscious motorist as long as the police have probable cause to believe that the motorist has violated one of the State's impaired driving statutes. See Wis. Stat. §343.305.

The plurality does not rely on the consent exception here. See *ante*, at 846. With that sliver of the plurality's reasoning I agree. I would go further and hold that the state statute, however phrased, cannot itself create the actual and informed consent that the Fourth Amendment requires. See *Randolph*, 547 U. S., at 109 (describing the "voluntary consent" exception to the warrant requirement as "'jealously and carefully drawn'"); *Bumper* v. *North Carolina*, 391 U. S. 543, 548 (1968) (stating that consent must be "freely and voluntarily given"); see also *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 226–227 (1973) (explaining that the existence of consent must "be determined from the totality of all the circumstances"). That should be the end of this case.

III

Rather than simply applying this Court's precedents to address—and reject—Wisconsin's implied-consent theory,

the plurality today takes the extraordinary step of relying on an issue, exigency, that Wisconsin has affirmatively waived.[4] Wisconsin has not once, in any of its briefing before this Court or the state courts, argued that exigent circumstances were present here. In fact, in the state proceedings, Wisconsin "conceded" that the exigency exception does not justify the warrantless blood draw in this case. App. 66; see 2018 WI 84, ¶12, 383 Wis. 2d 192, 202, 914 N. W. 2d 151, 155 ("The State expressly stated that it was not relying on exigent circumstances to justify the blood draw"). Accordingly, the state courts proceeded on the acknowledgment that no exigency is at issue here. As the Wisconsin Court of Appeals put it:

> "In particular, this case is not susceptible to resolution on the ground of exigent circumstances. No testimony was received that would support the conclusion that exigent circumstances justified the warrantless blood draw. [The officer] expressed agnosticism as to how long it would have taken to obtain a warrant, and he never once testified (or even implied) that there was no time to get a warrant." App. 66.

The exigency issue is therefore waived—that is, knowingly and intentionally abandoned, see *Wood* v. *Milyard*, 566 U. S. 463, 474 (2012)—and the Court should not have considered

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[4] The plurality criticizes me for supposedly suggesting that today's decision is based on a "case-specific showing of exigent circumstances." *Ante*, at 850, n. 2. But I acknowledge that the plurality does not go so far as to decide that exigent circumstances justify the search in Mitchell's case, perhaps because the facts here support no such conclusion. See *infra*, at 875–876. Indeed, rather than confine itself to the facts and legal issues actually presented in this case, the plurality instead creates a new *de facto* categorical rule out of thin air. The plurality does so without any evidence that such a rule is necessary in all, or even most, cases. See *infra*, at 875–877. That the plurality reaches out to determine the rights of all drivers, rather than just Mitchell, makes today's decision more misguided, not less.

it. See, *e. g.*, *Heckler* v. *Campbell*, 461 U. S. 458, 468, n. 12 (1983); cf. *Alabama* v. *Shelton*, 535 U. S. 654, 674 (2002) ("We confine our review to the ruling the Alabama Supreme Court made in the case as presented to it").

Rather than hold Wisconsin to a concession from which it has never wavered, the plurality takes on the waived theory. As "'a court of review, not of first view,'" however, this Court is not in the business of volunteering new rationales neither raised nor addressed below, and even less ones that no party has raised here. *Timbs* v. *Indiana*, 586 U. S. 146, 155 (2019); see, *e. g.*, *Star Athletica, L. L. C.* v. *Varsity Brands, Inc.*, 580 U. S. 405, 413 (2017); cf. *Kentucky* v. *Stincer*, 482 U. S. 730, 747–748, n. 22 (1987) (declining to review a respondent's previously unraised claim "[b]ecause the judgment [was] that of a state court" and no "exceptional" circumstances were present).

There are good reasons for this restraint. Ensuring that an issue has been fully litigated allows the Court "the benefit of developed arguments on both sides and lower court opinions squarely addressing the question." *Yee* v. *Escondido*, 503 U. S. 519, 538 (1992). It also reflects a central "'premise of our adversarial system'": Courts sit to resolve disputes among the parties, not "'as self-directed boards of legal inquiry and research.'" *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374, 408 (1995) (O'Connor, J., dissenting) (quoting *Carducci* v. *Regan*, 714 F. 2d 171, 177 (CADC 1983) (Scalia, J.)).

These rules, in other words, beget more informed decisionmaking by the Court and ensure greater fairness to litigants, who cannot be expected to respond pre-emptively to arguments that live only in the minds of the Justices. Cf. *Granite Rock Co.* v. *Teamsters*, 561 U. S. 287, 306, and n. 14 (2010); *Yee*, 503 U. S., at 535–536. These principles should apply with greater force when the issues were not merely forfeited but affirmatively "conceded" below, App. 66, and where, as here, the question is one of constitutional dimension. The

plurality acts recklessly in failing to honor these fundamental principles here.[5]

IV

There are good reasons why Wisconsin never asked any court to consider applying any version of the exigency exception here: This Court's precedents foreclose it. According to the plurality, when the police attempt to obtain a blood sample from a person suspected of drunk driving, there will "almost always" be exigent circumstances if the person falls unconscious. *Ante*, at 843. As this case demonstrates, however, the fact that a suspect fell unconscious at some point before the blood draw does not mean that there was insufficient time to get a warrant. And if the police have time to secure a warrant before the blood draw, "the Fourth Amendment mandates that they do so." *McNeely*, 569 U. S., at 152. In discarding that rule for its own, the plurality may not "revisit" *McNeely*, *ante*, at 849, but the plurality does ignore it.

A

The exigent-circumstances exception to the Fourth Amendment warrant requirement applies if the State can

[5] A related but distinct point: The issue on which the plurality resolves this case is not "fairly included" in the question on which the Court granted certiorari. See this Court's Rule 14.1(a). The Court granted certiorari to answer "[w]hether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement." Pet. for Cert. ii; accord, *ante*, at 846. The answer to that question is no. Whether exigent circumstances nevertheless require that the warrantless blood draw be upheld is an independent issue. True, that issue might affect the same "category of cases," *ante*, at 850, n. 2, but that would be true of all sorts of matters not fairly included in the question on which this Court granted certiorari. "Both [issues] might be subsidiary to a question embracing both—[Was suppression appropriate?]—but they exist side by side, neither encompassing the other." *Yee* v. *Escondido*, 503 U. S. 519, 537 (1992). This Court applies a "heavy presumption against" venturing beyond the question presented, even when the parties ask it to do so. *Ibid.* Here, of course, the plurality ventures forth to provide guidance entirely of its own accord. One wonders why the Court asked for briefing and oral argument at all.

demonstrate a "compelling need for official action and no time to secure a warrant." *Michigan* v. *Tyler*, 436 U. S. 499, 509 (1978); see also *King*, 563 U. S., at 460 (The exception applies "when 'the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable" (some internal quotation marks omitted)). The Court has identified exigencies when officers need to enter a home without a warrant to provide assistance to a "seriously injured" occupant or one facing an imminent threat of such injury, *Brigham City* v. *Stuart*, 547 U. S. 398, 403 (2006); when officers are in "hot pursuit" of a fleeing suspect, *United States* v. *Santana*, 427 U. S. 38, 42–43 (1976); and when officers need to enter a burning building to extinguish a fire, *Tyler*, 436 U. S., at 509.

Blood draws implicate a different type of exigency. The Court has "recognized that in some circumstances law enforcement officers may conduct a search without a warrant to prevent the imminent destruction of evidence." *McNeely*, 569 U. S., at 149. To determine whether exigent circumstances justify a warrantless search, the Court "looks to the totality of circumstances" in the particular case. *Ibid.* "The critical point is that . . . the exigent circumstances exception requires a court to examine whether an emergency justified a warrantless search in each particular case." *Riley*, 573 U. S., at 402.

In *McNeely*, Missouri urged the Court to adopt a categorical rule that the natural dissipation of alcohol from a person's bloodstream will always create exigent circumstances that allow police officers to order a blood draw without obtaining a warrant. 569 U. S., at 149–150. The Court declined. Even though the gradual dissipation of a person's BAC means that "a significant delay in testing will negatively affect the probative value" of a blood test, eight Justices hewed to the traditional, "case-by-case assessment of exigency," given that police will at least in some instances have time to get a warrant. *Id.*, at 152; see *id.*, at 166–167 (opinion of

ROBERTS, C. J.); *id.*, at 175 ("The majority answers 'It depends,' and so do I").

In that way, cases involving blood draws are "different in critical respects" from the typical destruction-of-evidence case that presents police officers with a "'"now or never"'" situation. *Id.*, at 153 (opinion of the Court). Unlike situations in which "police are just outside the door to a home" and "evidence is about to be destroyed, a person is about to be injured, or a fire has broken out," some delay is inherent when officers seek a blood test regardless of whether officers are required to obtain a warrant first. *Id.*, at 171 (opinion of ROBERTS, C. J.); see *id.*, at 153 (opinion of the Court). In the typical situation, the police cannot test a person's blood as soon as the person is arrested; police officers do not draw blood roadside. Rather, they generally must transport the drunk-driving suspect to a hospital or other medical facility and wait for a medical professional to draw the blood. That built-in delay may give police officers time to seek a warrant, especially if the suspect is brought to the hospital by an officer or emergency-response professional other than the one who applies for the warrant.

Moreover, although "the alcohol level in a person's blood begins to dissipate once the alcohol is fully absorbed," *id.*, at 152, it does so "over time in a gradual and relatively predictable manner," *id.*, at 153. Thus, even though BAC evidence is of course critical for law enforcement purposes, "the fact that the dissipation persists for some time means that the police—although they may not be able to do anything about it right away—may still be able to respond to the ongoing destruction of evidence later on." *Id.*, at 172 (opinion of ROBERTS, C. J.). For one, there may well be time for police officers to get a warrant before a person's BAC drops significantly. See *id.*, at 172–173. In addition, assuming delays do not stretch so long as to cause accuracy concerns, "experts can work backwards from the BAC at the time the sample was taken to determine the BAC at the time of the

alleged offense." *Id.*, at 156 (opinion of the Court). Contrary to the plurality's fear mongering, in other words, a small delay to obtain a warrant is hardly a recipe for lawless roadways.

Meanwhile, as the Court has observed, significant technological advances have allowed for "more expeditious processing of warrant applications." *Id.*, at 154; see *Riley*, 573 U. S., at 401. In the federal system, magistrate judges can issue warrants based on sworn testimony communicated over the phone or through "'other reliable electronic means.'" *McNeely*, 569 U. S., at 154 (quoting Fed. Rule Crim. Proc. 4.1). In a sizable majority of States, police officers can apply for warrants "remotely through various means, including telephonic or radio communication, electronic communication such as e-mail, and video conferencing." *McNeely*, 569 U. S., at 154; see *ibid.*, n. 4 (collecting state statutes). And the use of "standard-form warrant applications" has streamlined the warrant process in many States as well, especially in this context. *Id.*, at 154–155. As a result, judges can often issue warrants in 5 to 15 minutes. *Id.*, at 173 (opinion of ROBERTS, C. J.). Of course, securing a warrant will always take some time, and that time will vary case to case. But "[t]here might . . . be time to obtain a warrant in many cases." *Id.*, at 172. Thus, as *McNeely* made clear, the exigency exception is appropriate only in those cases in which time is not on the officer's side.

B

The reasons the Court gave for rejecting a categorical exigency exception in *McNeely* apply with full force when the suspected drunk driver is (or becomes) unconscious.

In these cases, there is still a period of delay during which a police officer might take steps to secure a warrant. Indeed, as the plurality observes, see *ante*, at 854–855, that delay is guaranteed because an unconscious person will need to be transported to the hospital for medical attention. Such a

delay occurred in Mitchell's case, even more so than it did in McNeely's. See *McNeely*, 569 U. S., at 145–146 (explaining that the police officer transported McNeely first to the police station and then to the hospital for blood testing, taking approximately 25 minutes); App. 63–64 (explaining that the police officer arrested Mitchell, drove him to the police station, placed him in a holding cell, and then transported him to the hospital and obtained a blood sample over the course of 90 minutes).

Likewise, an unconscious person's BAC dissipates just as gradually and predictably as a conscious person's does. Furthermore, because unconsciousness is more likely to occur at higher BACs, see Martin, Measuring Acute Alcohol Impairment, in Forensic Issues in Alcohol Testing 1, 8 (S. Karch ed. 2008), the BACs of suspected drunk drivers who are unconscious will presumably be higher above the legal limit—and thus remain above the legal limit for longer—than is true for suspects who are conscious and close to sobering up. And, of course, the process for getting a warrant remains the same.

All told, the mere fact that a person is unconscious does not materially change the calculation that the Court made in *McNeely* when it rejected a categorical exigency exception for blood draws. In many cases, even when the suspect falls unconscious, police officers will have sufficient time to secure a warrant—meaning that the Fourth Amendment requires that they do so.

C

The plurality distinguishes unconscious drunk-driving suspects from others based on the fact that their unconsciousness means that they will, invariably, need urgent medical attention due to their loss of consciousness. See *ante*, at 854–855. But the need for medical care is not unique to unconscious suspects. "Drunk drivers often end up in an emergency room," whether or not they are unconscious when the police encounter them. *McNeely*, 569 U. S., at 171

(opinion of ROBERTS, C. J.). The defendant in *Schmerber* was hospitalized, yet the Court did not, in that case or in *McNeely* decades later, promulgate a categorical exception for every warrantless blood draw. That Mitchell was hospitalized is likewise insufficient here. Even if the plurality is right that every suspect who loses consciousness will need medical care, not every medical response will interfere with law enforcement's ability to secure a warrant before ordering a blood draw. See *McNeely*, 569 U. S., at 153–154 (opinion of the Court); *id.*, at 171–172 (opinion of ROBERTS, C. J.).[6]

Because the precedent is so squarely against it, the plurality devotes much of its opinion instead to painting a dire picture: the scene of a drunk-driving-related accident, where police officers must tend to the unconscious person, others who need medical attention, oncoming traffic, and investigatory needs. See *ante*, at 856. There is no indication, however, in the record or elsewhere that the tableau of horribles the plurality depicts materializes in most cases. Such circumstances are certainly not present in this case, in which

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[6] The plurality's new rule, in addition to requiring a defendant to prove that the officer had time to get a warrant, also appears to require the defendant to show that his blood would not have been drawn absent law enforcement's need for a blood sample. See *ante*, at 857. That is, a suspect can never prevail under the new rule if the hospital staff draws his blood for its own noninvestigatory medical reasons. But, again, the relevant question is whether the evidence is likely to dissipate before the police can obtain a warrant. This particular aspect of the plurality's approach offers no help in answering that question. The plurality separately suggests that, because an unconscious person may well undergo a blood test for medical purposes regardless, its *de facto* categorical exception "could *lessen* the intrusion" of a blood draw. See *ante*, at 855, n. 8. But the fact that "people voluntarily submit to the taking of blood samples as part of a physical examination," *Birchfield* v. *North Dakota*, 579 U. S. 438, 463–464 (2016), does not make the process any less intrusive when performed at the behest of law enforcement. Although one piercing is of course less cumbersome than two, the privacy interests at stake go well beyond physical discomfort. See *supra*, at 864–865; *Birchfield*, 579 U. S., at 464; *McNeely*, 569 U. S., at 148.

the police encountered Mitchell alone, after he had parked and left his car; indeed, Mitchell lost consciousness over an hour after he was found walking along the lake. The potential variation in circumstances is a good reason to decide each case on its own facts, as *McNeely* instructs and as the Court did in *Schmerber*. See *McNeely*, 569 U. S., at 149–151, 156. The plurality instead bases its *de facto* categorical exigency exception on nothing more than a "'considerable overgeneralization,'" *id.*, at 153, as well as empirical assumptions that the parties not only lacked a chance to address, but that are also belied by Wisconsin's concession in this case.[7]

If and when a case like the one the plurality imagines does arise, however, the police officers would not be "force[d] . . . to choose between" the "rival priorities" of getting a warrant and attending to "critical health and safety needs." *Ante*, at 856. Of course, the police and other first responders must dutifully attend to any urgent medical needs of the driver and any others at the scene; no one suggests that the warrant process should interfere with medical care. The point is that, in many cases, the police will have enough time to address medical needs and still get a warrant before the putative evidence (*i. e.*, any alcohol in the suspect's blood) dissipates. And if police officers "are truly confronted with a 'now or never' situation," they will be able to rely on the exigent-circumstances exception to order the blood draw immediately. *McNeely*, 569 U. S., at 153 (some internal quotation marks omitted); *Riley*, 573 U. S., at 391. In any other

[7] In addition to offering a justification for Wisconsin's warrantless search that the State itself has disavowed, the plurality also relieves all States of their burden to justify similar warrantless searches. Until now, the Court has said that "the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches." *Welsh* v. *Wisconsin*, 466 U. S. 740, 749–750 (1984); see *Coolidge* v. *New Hampshire*, 403 U. S. 443, 455 (1971). Today, the plurality turns that presumption on its head in favor of a new one that "almost always" authorizes the police to conduct warrantless blood draws even in the absence of an actual emergency. See *ante*, at 843.

situation, though—such as in Mitchell's and in many others—the officers can secure a warrant.

V

The Fourth Amendment, as interpreted by our precedents, requires police officers seeking to draw blood from a person suspected of drunk driving to get a warrant if possible. That rule should resolve this case.

The plurality misguidedly departs from this rule, setting forth its own convoluted counterpresumption instead. But the Fourth Amendment is not as pliable as the plurality suggests. The warrant requirement safeguards privacy and physical autonomy by "assuring citizens" that searches "are not the random or arbitrary acts of government agents." *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 621–622 (1989); see *id.*, at 621.

There is no doubt that drunk drivers create grave danger on our roads. It is, however, "[p]recisely because the need for action . . . is manifest" in such cases that "the need for vigilance against unconstitutional excess is great." *Id.*, at 635 (Marshall, J., dissenting). "Requiring a warrant whenever practicable helps ensure that when blood draws occur, they are indeed justified." *McNeely*, 569 U. S., at 174 (opinion of ROBERTS, C. J.). For that reason, "the police bear a heavy burden" to justify a warrantless search like the one here based on "urgent need." *Welsh* v. *Wisconsin*, 466 U. S. 740, 749–750 (1984).

The plurality today carries that burden for a State that never asked it to do so, not only here but also in a scattershot mass of future cases. Acting entirely on its own freewheeling instincts—with no briefing or decision below on the question—the plurality permits officers to order a blood draw of an unconscious person in all but the rarest cases, even when there is ample time to obtain a warrant. The plurality may believe it is helping to ameliorate the scourge of drunk driving, but what it really does is to strike another

needless blow at the protections guaranteed by the Fourth Amendment. With respect, I dissent.

JUSTICE GORSUCH, dissenting.

We took this case to decide whether Wisconsin drivers impliedly consent to blood alcohol tests thanks to a state statute. That law says that anyone driving in Wisconsin agrees—by the very act of driving—to testing under certain circumstances. But the Court today declines to answer the question presented. Instead, it upholds Wisconsin's law on an entirely different ground—citing the exigent circumstances doctrine. While I do not doubt that the Court may affirm for any reason supported by the record, the application of the exigent circumstances doctrine in this area poses complex and difficult questions that neither the parties nor the courts below discussed. Rather than proceeding solely by self-direction, I would have dismissed this case as improvidently granted and waited for a case presenting the exigent circumstances question.

Reporter's Note

Orders commencing with June 24, 2019, begin with page 903. The preceding orders in 588 U. S., from June 20, 2019, were reported in Part 1, at 901–902. These page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of the preliminary prints of the United States Reports.

JUNE 24, 2019

Certiorari Granted—Vacated and Remanded

No. 17–1693. BLUE WATER NAVY VIETNAM VETERANS ASSN., INC. *v.* WILKIE, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded with instructions to dismiss the case as moot. See *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950). Reported below: 875 F. 3d 1102.

Vacated and Remanded After Certiorari Granted

No. 17–1679. GRAY *v.* WILKIE, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. [Certiorari granted, 586 U. S. 985.] Judgment vacated, and case remanded with instructions to dismiss the case as moot. See *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950)

Certiorari Dismissed

No. 18–8953. MORRIS *v.* FRANCISCO, SOLICITOR GENERAL OF THE UNITED STATES, ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 18A1104. FORD *v.* UNITED STATES. D. C. E. D. Cal. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. 18A1238. PRICE *v.* DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. Motion of National Public Radio, Inc., et al. for leave to intervene to file motion to unseal granted, and motion to unseal granted.

No. 18M173. HOLMES *v.* ALABAMA DEPARTMENT OF HUMAN RESOURCES; and

No. 18M174. DOE *v.* COLGATE UNIVERSITY. Motions to direct the Clerk to file petitions for writ of certiorari out of time denied.

No. 150, Orig. ARIZONA *v.* CALIFORNIA. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 17–1678. HERNANDEZ ET AL. *v.* MESA. C. A. 5th Cir. [Certiorari granted, 587 U. S. 1025.] Motion of petitioners to dispense with printing joint appendix granted.

No. 18–877. ALLEN ET AL. *v.* COOPER, GOVERNOR OF NORTH CAROLINA, ET AL. C. A. 4th Cir. [Certiorari granted, 587 U. S. 1039.] Motion of petitioners to dispense with printing joint appendix granted.

No. 18–921. ROMAN CATHOLIC ARCHDIOCESE OF SAN JUAN, PUERTO RICO, ET AL. *v.* ACEVEDO FELICIANO ET AL. Sup. Ct. P. R.; and

No. 18–1140. AVCO CORP. *v.* SIKKELEE, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SIKKELEE, DECEASED, ET AL. C. A. 3d Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 18–7988. FORNEY *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [587 U. S. 935] denied.

No. 18–8930. GURVEY *v.* COWAN, LIEBOWITZ & LATMAN, P. C., ET AL. C. A. 2d Cir.; and

No. 18–8934. MILLER *v.* GAUJOT, JUDGE, MONONGALIA COUNTY CIRCUIT COURT, ET AL. C. A. 4th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until July 15, 2019, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 18–9476. IN RE ANDERSON. Petition for writ of habeas corpus denied.

Certiorari Granted

No. 18–1150. GEORGIA ET AL. *v.* PUBLIC.RESOURCE.ORG, INC. C. A. 11th Cir. Certiorari granted. Reported below: 906 F. 3d 1229.

No. 18–776. GUERRERO-LASPRILLA *v.* BARR, ATTORNEY GENERAL; and

No. 18–1015. OVALLES *v.* BARR, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari in No. 18–776 granted. Certiorari in No. 18–1015 granted limited to Question 2 presented by the petition.

Cases consolidated, and a total of one hour is allotted for oral argument. Reported below: No. 18–776, 737 Fed. Appx. 230; No. 18–1015, 741 Fed. Appx. 259.

No. 18–916. DEX MEDIA, INC. *v.* CLICK-TO-CALL TECHNOLOGIES, LP, ET AL. C. A. Fed. Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 899 F. 3d 1321.

No. 18–1023. MAINE COMMUNITY HEALTH OPTIONS *v.* UNITED STATES;

No. 18–1028. MODA HEALTH PLAN, INC. *v.* UNITED STATES; and BLUE CROSS AND BLUE SHIELD OF NORTH CAROLINA *v.* UNITED STATES; and

No. 18–1038. LAND OF LINCOLN MUTUAL HEALTH INSURANCE CO. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari granted, cases consolidated, and a total of one hour is allotted for oral argument. Reported below: No. 18–1023 and No. 18–1028 (second judgment), 729 Fed. Appx. 939; No. 18–1028 (first judgment), 892 F. 3d 1311; No. 18–1038, 892 F. 3d 1184.

No. 18–6943. BANISTER *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted, and certiorari granted limited to the following question: "Whether and under what circumstances a timely Rule 59(e) motion should be recharacterized as a second or successive habeas petition under *Gonzalez* v. *Crosby*, 545 U. S. 524 (2005)."

Certiorari Denied

No. 17–1175. POARCH BAND OF CREEK INDIANS ET AL. *v.* WILKES ET AL. Sup. Ct. Ala. Certiorari denied.

No. 17–1183. AIRLINE SERVICE PROVIDERS ASSN. ET AL. *v.* LOS ANGELES WORLD AIRPORTS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 873 F. 3d 1074.

No. 17–5503. OCHOA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 687 Fed. Appx. 305.

No. 17–6680. EATON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 692 Fed. Appx. 321.

No. 17–6856. BEARCOMESOUT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 696 Fed. Appx. 241.

No. 17–7177. GORDILLO-ESCANDON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 706 Fed. Appx. 119.

No. 17–8002. SANDERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 712 Fed. Appx. 956.

No. 17–8475. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 18–106. TURNER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 885 F. 3d 949.

No. 18–109. ARIOSA DIAGNOSTICS, INC. *v.* ILLUMINA, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 705 Fed. Appx. 1002.

No. 18–164. FIRST SOLAR, INC., ET AL. *v.* MINEWORKERS' PENSION SCHEME ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 881 F. 3d 750.

No. 18–447. ALABAMA DEPARTMENT OF REVENUE ET AL. *v.* CSX TRANSPORTATION, INC.; and

No. 18–612. CSX TRANSPORTATION, INC. *v.* ALABAMA DEPARTMENT OF REVENUE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 888 F. 3d 1163.

No. 18–486. TOSHIBA CORP. *v.* AUTOMOTIVE INDUSTRIES PENSION TRUST FUND ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 896 F. 3d 933.

No. 18–575. YPF S. A. *v.* PETERSEN ENERGIA INVERSORA S. A U. ET AL.; and

No. 18–581. ARGENTINE REPUBLIC *v.* PETERSEN ENERGIA INVERSORA S. A. U. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 895 F. 3d 194.

No. 18–600. TEXAS ADVANCED OPTOELECTRONIC SOLUTIONS, INC. *v.* RENESAS ELECTRONICS AMERICA, INC., FKA INTERSIL CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 895 F. 3d 1304.

No. 18–762. PINA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 746 Fed. Appx. 440.

No. 18–821. WILLS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 887.

No. 18–866. Illinois Central Railroad Co. *v.* Tennessee Department of Revenue et al. C. A. 6th Cir. Certiorari denied. Reported below: 748 Fed. Appx. 26.

No. 18–987. McKesson Corp. et al. *v.* True Health Chiropractic, Inc., et al. C. A. 9th Cir. Certiorari denied. Reported below: 896 F. 3d 923.

No. 18–1054. Jackson *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 909 F. 3d 228.

No. 18–1055. Mauricio-Benitez *v.* Barr, Attorney General. C. A. 5th Cir. Certiorari denied. Reported below: 908 F. 3d 144.

No. 18–1062. Love Terminal Partners, L. P., et al. *v.* United States. C. A. Fed. Cir. Certiorari denied. Reported below: 889 F. 3d 1331.

No. 18–1092. Associated Builders and Contractors of California Cooperation Committee, Inc. *v.* Becerra, Attorney General of California, et al. C. A. 9th Cir. Certiorari denied. Reported below: 898 F. 3d 879.

No. 18–1097. SkyWest, Inc., et al. *v.* Hirst et al.; and
No. 18–1419. Hirst et al. *v.* SkyWest, Inc., et al. C. A. 7th Cir. Certiorari denied. Reported below: 910 F. 3d 961.

No. 18–1120. Riffey et al. *v.* Pritzker, Governor of Illinois, et al. C. A. 7th Cir. Certiorari denied. Reported below: 910 F. 3d 314.

No. 18–1122. Alpenglow Botanicals, LLC, et al. *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 894 F. 3d 1187.

No. 18–1145. Minerva Dairy, Inc., et al. *v.* Pfaff, Secretary-designee of the Wisconsin Department of Agriculture, et al. C. A. 7th Cir. Certiorari denied. Reported below: 905 F. 3d 1047.

No. 18–1166. Sievers *v.* Nebraska. Sup. Ct. Neb. Certiorari denied. Reported below: 300 Neb. 26, 911 N. W. 2d 607.

No. 18–1191. Davenport *v.* Estate of Cummings. C. A. 11th Cir. Certiorari denied. Reported below: 906 F. 3d 934.

No. 18–1198. ALBRIGHT *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 564 S. W. 3d 809.

No. 18–1199. INVESTPIC, LLC *v.* SAP AMERICA, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 898 F. 3d 1161.

No. 18–1220. FRANKLIN *v.* AMERICAN ELEVATOR INSPECTIONS, INC. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 18–1260. COOKE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 918 F. 3d 77.

No. 18–1300. OBUSKOVIC *v.* WOOD ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 761 Fed. Appx. 144.

No. 18–1318. MARQUETTE TRANSPORTATION CO., L. L. C. *v.* DUNN. C. A. 5th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 888.

No. 18–1327. SIMS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 569 S. W. 3d 634.

No. 18–1328. GILMORE ET AL. *v.* HOLLAND ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 756 Fed. Appx. 147.

No. 18–1331. BOLTON *v.* DEPARTMENT OF THE NAVY BOARD FOR CORRECTION OF NAVAL RECORDS. C. A. 6th Cir. Certiorari denied. Reported below: 914 F. 3d 401.

No. 18–1332. ALBERTO RECINOS *v.* BOARD OF TRUSTEES, POLICE AND FIREMEN'S RETIREMENT SYSTEM. Super. Ct. N. J., App. Div. Certiorari denied.

No. 18–1335. CONTINENTAL MOTORS, INC. *v.* SNIDER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 758 Fed. Appx. 283.

No. 18–1337. RAEL ET AL. *v.* LAYNG, UNITED STATES TRUSTEE, REGION 19. C. A. 10th Cir. Certiorari denied. Reported below: 753 Fed. Appx. 649.

No. 18–1340. FOWLER *v.* UTAH ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 744 Fed. Appx. 590.

No. 18–1348. ORION INSURANCE GROUP ET AL. *v.* WASHINGTON STATE OFFICE OF MINORITY & WOMEN'S BUSINESS ENTERPRISES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 754 Fed. Appx. 556.

No. 18–1352. COMMERCE BANK *v.* WILLIAMSON ET AL. C. A. 8th Cir. Certiorari denied.

No. 18–1360. THORNTON *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied.

No. 18–1361. STILLWELL ET VIR *v.* EAGLE-KIRKPATRICK MANAGEMENT CO., INC., ET AL. Ct. App. Ind. Certiorari denied. Reported below: 107 N. E. 3d 1113.

No. 18–1377. GYAMFI *v.* ACOSTA, SECRETARY OF LABOR, ET AL. C. A. 11th Cir. Certiorari denied.

No. 18–1378. LEDET *v.* LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 2017–1457 (La. App. 1 Cir. 9/24/18), 259 So. 3d 348.

No. 18–1391. BAMBA *v.* FENTON ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 758 Fed. Appx. 8.

No. 18–1396. PELLETIER *v.* KELLEY, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, ET AL. Sup. Ct. Ark. Certiorari denied. Reported below: 2018 Ark. 347, 561 S. W. 3d 730.

No. 18–1403. MIR *v.* LEVINE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 726.

No. 18–1408. WASHEK *v.* VERMONT. Sup. Ct. Vt. Certiorari denied.

No. 18–1420. BURNS *v.* ALABAMA. C. A. 11th Cir. Certiorari denied. Reported below: 748 Fed. Appx. 272.

No. 18–1453. RANGARAJAN *v.* JOHNS HOPKINS UNIVERSITY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 917 F. 3d 218.

No. 18–1463. MAHER *v.* IOWA STATE UNIVERSITY. C. A. 8th Cir. Certiorari denied. Reported below: 915 F. 3d 1210.

No. 18–1464. JIRICKO *v.* FRANKENBURG JENSEN LAW FIRM ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 764 Fed. Appx. 664.

No. 18–1467. CLEVENGER *v.* LAWRENCE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 746 Fed. Appx. 645.

No. 18–1478. STECK *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 239 Md. App. 440, 197 A. 3d 531.

No. 18–1483. BARRY *v.* FRESHOUR ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 905 F. 3d 912.

No. 18–7038. OWENS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 18–7449. PATTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 750 Fed. Appx. 259.

No. 18–7696. WALTON *v.* BALLARD, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 738 Fed. Appx. 159.

No. 18–7721. CARTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 754 Fed. Appx. 534 and 907 F. 3d 1199.

No. 18–8046. PAULMIER *v.* HAWAII. Int. Ct. App. Haw. Certiorari denied. Reported below: 143 Haw. 100, 423 P. 3d 419.

No. 18–8224. DICKERSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 735 Fed. Appx. 349.

No. 18–8270. HETTINGA *v.* LOUMENA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 18–8432. FOUST *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 153 Ohio St. 3d 553, 2018-Ohio-3154, 108 N. E. 3d 1082.

No. 18–8456. MIRAMONTES ROMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 746 Fed. Appx. 743.

No. 18–8524. TSHIANSI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 559.

No. 18–8666. WOOD *v.* CARPENTER, INTERIM WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 907 F. 3d 1279.

No. 18–8844. MORRIS *v.* TENNESSEE. C. A. 6th Cir. Certiorari denied.

No. 18–8857. WEISHEIT *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 109 N. E. 3d 978.

No. 18–8887. Soler *v.* Capital One Auto Finance. C. A. 11th Cir. Certiorari denied. Reported below: 745 Fed. Appx. 137.

No. 18–8890. Jones *v.* Smith, Warden, et al. C. A. 6th Cir. Certiorari denied.

No. 18–8899. Eleson *v.* Lizarraga, Warden, et al. C. A. 9th Cir. Certiorari denied.

No. 18–8901. Jones *v.* Goodwin, Judge, Criminal Court for Sullivan County, Tennessee. C. A. 6th Cir. Certiorari denied.

No. 18–8903. Barnaby *v.* Witkowski et al. C. A. 6th Cir. Certiorari denied. Reported below: 758 Fed. Appx. 431.

No. 18–8904. Matthews *v.* Ratliff (TR Motors). Ct. Civ. App. Ala. Certiorari denied. Reported below: 292 So. 3d 370.

No. 18–8905. Bryant *v.* Army Corps of Engineers et al. C. A. 4th Cir. Certiorari denied. Reported below: 754 Fed. Appx. 206.

No. 18–8914. Cazares *v.* Cassady, Warden. C. A. 8th Cir. Certiorari denied.

No. 18–8916. Wright *v.* California. Ct. App. Cal., 2d App. Dist., Div. 6. Certiorari denied.

No. 18–8918. Wiley *v.* Wiley. Ct. App. Wash. Certiorari denied. Reported below: 4 Wash. App. 2d 1003.

No. 18–8921. Tellez *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 18–8925. Cooks *v.* Superior Court of California, Los Angeles County, et al. Sup. Ct. Cal. Certiorari denied.

No. 18–8926. Jackson *v.* Mukoro et al. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 18–8927. Gillard *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2018 IL App (1st) 173035–U.

No. 18–8933. Stevenson *v.* Pennsylvania Board of Probation and Parole et al. C. A. 3d Cir. Certiorari denied.

No. 18–8939. Daisy T. *v.* Arizona Department of Child Safety et al. Ct. App. Ariz. Certiorari denied.

No. 18–8945. Black *v.* Life Unlimited, Inc. C. A. 8th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 110.

No. 18–8947. Palma *v.* Harris County Appraisal Review Board; and Palma *v.* Harris County Appraisal District. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 18–8950. Manuel Moran *v.* Arizona. Ct. App. Ariz. Certiorari denied.

No. 18–8954. Millhouse *v.* Davis et al. C. A. 3d Cir. Certiorari denied. Reported below: 733 Fed. Appx. 32.

No. 18–8955. Butler *v.* Johnson, Administrator, New Jersey State Prison, et al. C. A. 3d Cir. Certiorari denied.

No. 18–8959. Arlotta *v.* McKesson Corp. et al. C. A. 2d Cir. Certiorari denied.

No. 18–8962. Collins *v.* Keller. C. A. 4th Cir. Certiorari denied. Reported below: 748 Fed. Appx. 572.

No. 18–8966. Drake *v.* United States District Court for the Eastern District of Texas. C. A. 5th Cir. Certiorari denied.

No. 18–8969. Lunsford *v.* Indiana. Ct. App. Ind. Certiorari denied. Reported below: 122 N. E. 3d 461.

No. 18–8973. Johnson *v.* Clarke, Director, Virginia Department of Corrections. Sup. Ct. Va. Certiorari denied.

No. 18–8974. Roberson *v.* Texas. Ct. App. Tex., 6th Dist. Certiorari denied.

No. 18–8976. Sheppard *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 18–8979. Jacobs *v.* MacDonald et al. Sup. Ct. N. H. Certiorari denied. Reported below: 171 N. H. 668, 201 A. 3d 1253.

No. 18–8981. Bowling *v.* Maryland. Ct. Sp. App. Md. Certiorari denied. Reported below: 239 Md. App. 716.

No. 18–8984. CAETANO *v.* PEERY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 18–9004. ARCHER *v.* PARAMO, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 749 Fed. Appx. 637.

No. 18–9012. ENDSLEY *v.* BROWN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 764 Fed. Appx. 582.

No. 18–9047. SWECKER ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 743 Fed. Appx. 65.

No. 18–9048. BOYKINS *v.* NAPEL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–9054. FORQUER *v.* WELLS FARGO BANK, N. A. Cir. Ct. Harford County, Md. Certiorari denied.

No. 18–9065. ROSA *v.* FLORIDA ET AL. C. A. 11th Cir. Certiorari denied.

No. 18–9072. MCBRIDE *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 740 Fed. Appx. 575.

No. 18–9078. BRADFORD *v.* WORKERS' COMPENSATION APPEALS BOARD ET AL. Ct. App. Cal., 2d App. Dist., Div. 7. Certiorari denied.

No. 18–9083. GRYDER *v.* RUDY ET AL. Sup. Ct. Va. Certiorari denied.

No. 18–9112. BRONSON *v.* JACKSON-MITCHELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 18–9136. J. T. *v.* FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 274 So. 3d 374.

No. 18–9226. SEARS *v.* BOTTORFF ET AL. Ct. App. Tenn. Certiorari denied.

No. 18–9230. KENNEDY *v.* BARR, ATTORNEY GENERAL. C. A. 2d Cir. Certiorari denied.

No. 18–9257. RARDEN *v.* OHIO. Ct. App. Ohio, Butler County. Certiorari denied. Reported below: 2018-Ohio-4487.

No. 18–9260. BRAXTON *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 18–9279. PREETORIUS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 753 Fed. Appx. 875.

No. 18–9314. PIERCE *v.* SHERMAN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 749 Fed. Appx. 655.

No. 18–9329. BARNHILL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 18–9335. ILLARRAMENDI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 906 F. 3d 268.

No. 18–9336. ELIAS CAMILO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 18–9340. SUBASIC *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 742 Fed. Appx. 775.

No. 18–9352. RIDLEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 18–9357. BRADLEY *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 18–9362. RING *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 18–9368. BLACKSTONE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 903 F. 3d 1020.

No. 18–9371. ADKINSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 916 F. 3d 605.

No. 18–9394. EVANS *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 207 A. 3d 166.

No. 18–9413. ROYAL *v.* GREWAL, ATTORNEY GENERAL OF NEW JERSEY, ET AL. C. A. 3d Cir. Certiorari denied.

No. 18–9445. VASSOR *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 244 So. 3d 1121.

No. 18–9474. MADDEN *v.* MELVIN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 17–5410. TYLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

No. 18–1065. INTERPIPE CONTRACTING, INC. *v.* BECERRA, ATTORNEY GENERAL OF CALIFORNIA, ET AL. C. A. 9th Cir. Motion of Associated General Contractors of America for leave to file brief as *amicus curiae* out of time denied. Certiorari denied. Reported below: 898 F. 3d 879.

No. 18–1074. PERRYMAN *v.* ROMERO ET AL. C. A. 9th Cir. Motion of Center for Individual Rights for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 906 F. 3d 747.

No. 18–1084. MINNESOTA *v.* JOHNSON. Sup. Ct. Minn. Motion of respondent for leave to proceed *in forma pauperis* granted. Motion of Mothers Against Drunk Driving for leave to file brief as *amicus curiae* granted. Certiorari denied.

No. 18–1317. AMERICAN INSTITUTE FOR INTERNATIONAL STEEL, INC., ET AL. *v.* UNITED STATES ET AL. C. A. Fed. Cir. Certiorari before judgment denied.

No. 18–1371. MORLEY *v.* CENTRAL INTELLIGENCE AGENCY. C. A. D. C. Cir. Certiorari denied. JUSTICE KAVANAUGH took no part in the consideration or decision of this petition. Reported below: 894 F. 3d 389.

No. 18–1430. REDIGI INC. ET AL. *v.* CAPITOL RECORDS, LLC, ET AL. C. A. 2d Cir. Motion of OmniQ for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 910 F. 3d 649.

No. 18–1468. UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND ET AL. *v.* TOFFEL, AS CHAPTER 7 TRUSTEE FOR WALTER ENERGY INC., ET AL. C. A. 11th Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 911 F. 3d 1121.

No. 18–8440. RUNNELS *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Motion of respondent for leave to file brief in opposition under seal with redacted copies for the public record granted. Motion of petitioner for leave to file reply brief under seal with redacted copies for the public record granted. Certiorari denied. Reported below: 746 Fed. Appx. 308.

No. 18–8982. WARREN *v.* SHAPIRO, ATTORNEY GENERAL OF PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. JUSTICE

ALITO took no part in the consideration or decision of this petition. Reported below: 651 Pa. 85, 202 A. 3d 682.

No. 18–9250. DREVALEVA *v.* ALAMEDA HEALTH SYSTEM ET AL. C. A. 9th Cir. Certiorari before judgment denied.

Rehearing Denied

No. 18–1060. WEISS, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF MARSH, DECEASED *v.* MARSH, AS EXECUTOR OF THE ESTATE OF MARSH, DECEASED, ET AL. (two judgments), 587 U. S. 939;

No. 18–1153. RIZZO *v.* APPLIED MATERIALS, INC., ET AL., 587 U. S. 971;

No. 18–7409. LEONARD *v.* FLORIDA ET AL., 586 U. S. 1231;

No. 18–7724. JOHNSON *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 587 U. S. 923;

No. 18–7850. HOWARD *v.* LESATZ, WARDEN, 587 U. S. 943;

No. 18–7852. HUG *v.* CONLEY, WARDEN, 587 U. S. 943;

No. 18–7908. HAYNES *v.* WALMART ET AL., 587 U. S. 945;

No. 18–7932. HAMER *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 587 U. S. 945;

No. 18–7934. FARTHING *v.* WATSON, WARDEN, 587 U. S. 945;

No. 18–7945. WATTS *v.* MICHIGAN, 587 U. S. 945;

No. 18–7956. IBEABUCHI *v.* PENZONE, 587 U. S. 946;

No. 18–7987. IBEABUCHI *v.* PENZONE ET AL., 587 U. S. 946;

No. 18–7999. GALAN *v.* GEGENHEIMER ET AL., 587 U. S. 947;

No. 18–8018. KENDRICK *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 587 U. S. 962;

No. 18–8105. HERRIOTT *v.* HERRIOTT, 587 U. S. 974;

No. 18–8193. ALBORS GONZALEZ *v.* STERN ET AL., 587 U. S. 975;

No. 18–8200. BOONE *v.* TEXAS, 587 U. S. 975;

No. 18–8206. CLARK *v.* CARR, ATTORNEY GENERAL OF GEORGIA, 587 U. S. 949;

No. 18–8335. CHAPMAN *v.* OBAMA, 587 U. S. 964;

No. 18–8585. BLOODYWONE *v.* BELLNIER, SUPERINTENDENT, MARCY CORRECTIONAL FACILITY, ET AL., 587 U. S. 966; and

No. 18–8716. DONAHUE *v.* PENNSYLVANIA DEPARTMENT OF LABOR AND INDUSTRY ET AL., 587 U. S. 995. Petitions for rehearing denied.

No. 18–6700. DePietro *v.* Allstate Insurance Co. et al., 586 U. S. 1089. Motion for leave to file petition for rehearing denied.

June 28, 2019

Certiorari Granted—Vacated and Remanded

No. 17–8390. Sperling *v.* United States. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Haymond*, 588 U. S. 634 (2019). Reported below: 699 Fed. Appx. 636.

No. 17–9221. Hall *v.* United States. C. A. 4th Cir. Reported below: 725 Fed. Appx. 210;

No. 18–7123. Allen *v.* United States. C. A. 4th Cir. Reported below: 734 Fed. Appx. 898;

No. 18–7490. Reed *v.* United States. C. A. 11th Cir. Reported below: 752 Fed. Appx. 851; and

No. 18–9071. Moody *v.* United States. C. A. 5th Cir. Reported below: 749 Fed. Appx. 310. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Rehaif* v. *United States*, 588 U. S. 225 (2019).

No. 18–294. Honchariw *v.* County of Stanislaus, California, et al. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Knick* v. *Township of Scott*, 588 U. S. 180 (2019). Reported below: 715 Fed. Appx. 760.

No. 18–351. City of Pensacola, Florida, et al. *v.* Kondrat'yev et al. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *American Legion* v. *American Humanist Assn.*, 588 U. S. 29 (2019). Reported below: 903 F. 3d 1169.

No. 18–1214. Ross, Secretary of Commerce, et al. *v.* California et al. C. A. 9th Cir. Motion of Fair Lines America Foundation for leave to file brief as *amicus curiae* granted. Certiorari before judgment granted, judgment of the District Court vacated, and case remanded to the Court of Appeals for further consideration in light of *Department of Commerce* v. *New York*, 588 U. S. 752 (2019).

No. 18–5234. RODRIGUEZ *v.* UNITED STATES. C. A. 2d Cir. Reported below: 862 F. 3d 223;

No. 18–5306. JEFFERSON *v.* UNITED STATES. C. A. 6th Cir. Reported below: 726 Fed. Appx. 393;

No. 18–6985. BARRETT, AKA SEALED DEFENDANT *v.* UNITED STATES. C. A. 2d Cir. Reported below: 903 F. 3d 166;

No. 18–7166. MANN *v.* UNITED STATES. C. A. 11th Cir. Reported below: 754 Fed. Appx. 812;

No. 18–7331. DOUGLAS *v.* UNITED STATES. C. A. 1st Cir. Reported below: 907 F. 3d 1; and

No. 18–7996. WATKINS *v.* UNITED STATES. C. A. 2d Cir. Reported below: 744 Fed. Appx. 27. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *United States* v. *Davis*, 588 U. S. 445 (2019).

No. 18–7439. WARD *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the position asserted by the Solicitor General in his letter for the United States filed on June 18, 2019.

Remanded After Certiorari Granted

No. 18–557. DEPARTMENT OF COMMERCE ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK ET AL. (two judgments). C. A. 2d Cir. [Certiorari granted *sub nom. In re Department of Commerce*, 586 U. S. 1018.] Case remanded to the Court of Appeals with instructions to vacate that court's orders dated September 25 and October 9, 2018. See *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950)

Miscellaneous Order

No. 18–7739. HOLGUIN-HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. [Certiorari granted, 587 U. S. 1039.] K. Winn Allen, Esq., of Washington, D. C., is invited to brief and argue this case as *amicus curiae* in support of judgment below.

Certiorari Granted

No. 18–1048. GE ENERGY POWER CONVERSION FRANCE SAS, CORP., FKA CONVERTEAM SAS *v.* OUTOKUMPU STAINLESS USA, LLC, ET AL. C. A. 11th Cir. Certiorari granted. Reported below: 902 F. 3d 1316.

No. 18–1059. KELLY *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted. Reported below: 909 F. 3d 550.

No. 18–1086. LUCKY BRAND DUNGAREES, INC., ET AL. *v.* MARCEL FASHIONS GROUP, INC. C. A. 2d Cir. Certiorari granted. Reported below: 898 F. 3d 232.

No. 18–1233. ROMAG FASTENERS, INC. *v.* FOSSIL GROUP, INC., FKA FOSSIL, INC., ET AL. C. A. Fed. Cir. Certiorari granted.

No. 18–1269. RODRIGUEZ, AS CHAPTER 7 TRUSTEE FOR THE BANKRUPTCY ESTATE OF UNITED WESTERN BANCORP, INC. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR UNITED WESTERN BANK. C. A. 10th Cir. Certiorari granted. Reported below: 914 F. 3d 1262.

No. 17–1268. OPATI, IN HER OWN RIGHT, AND AS EXECUTRIX OF THE ESTATE OF OPATI, DECEASED, ET AL. *v.* REPUBLIC OF SUDAN ET AL. C. A. D. C. Cir. Certiorari granted limited to Question 2 presented by the petition. JUSTICE KAVANAUGH took no part in the consideration or decision of this petition. Reported below: 864 F. 3d 751.

No. 17–1712. THOLE ET AL. *v.* U. S. BANK N. A. ET AL. C. A. 8th Cir. Certiorari granted. In addition to the questions presented by the petition, the parties are directed to brief and argue the following question: "Whether petitioners have demonstrated Article III standing." Reported below: 873 F. 3d 617.

No. 18–587. DEPARTMENT OF HOMELAND SECURITY ET AL. *v.* REGENTS OF THE UNIVERSITY OF CALIFORNIA ET AL. C. A. 9th Cir.;

No. 18–588. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL. *v.* NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. C. A. D. C. Cir.; and

No. 18–589. MCALEENAN, ACTING SECRETARY OF HOMELAND SECURITY, ET AL. *v.* BATALLA VIDAL ET AL. C. A. 2d Cir. Certiorari in No. 18–587 granted. Certiorari before judgment in Nos. 18–588 and 18–589 granted. Cases consolidated, and a total of one hour is allotted for oral argument. Reported below: No. 18–587, 908 F. 3d 476.

No. 18–882. BABB *v.* WILKIE, SECRETARY OF VETERANS AFFAIRS. C. A. 11th Cir. Certiorari granted limited to the follow-

ing question: "Whether the federal-sector provision of the Age Discrimination in Employment Act of 1967, which provides that personnel actions affecting agency employees aged 40 years or older shall be made free from any 'discrimination based on age,' 29 U. S. C. § 633a(a), requires a plaintiff to prove that age was a but-for cause of the challenged personnel action." Reported below: 743 Fed. Appx. 280.

No. 18–1195. Espinoza et al. *v.* Montana Department of Revenue et al. Sup. Ct. Mont. Motions of Cato Institute, Liberty Justice Center et al., Georgia Goal Scholarship Program, Inc., and Pioneer Institute, Inc., for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 393 Mont. 446, 435 P. 3d 603.

No. 18–6662. Shular *v.* United States. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 736 Fed. Appx. 876.

Certiorari Denied

No. 18–664. Bauerly, Commissioner, Minnesota Department of Revenue *v.* Fielding, Trustee of the Reid and Ann MacDonald Irrevocable GST Trust for Macdonald, et al. Sup. Ct. Minn. Certiorari denied. Reported below: 916 N. W. 2d 323.

No. 18–832. Petersen *v.* NCL (Bahamas) Ltd., dba Norwegian Cruise Line. C. A. 11th Cir. Certiorari denied. Reported below: 748 Fed. Appx. 246.

No. 18–954. Speelman *v.* Ohio. Ct. App. Ohio, 6th App. Dist., Lucas County. Certiorari denied. Reported below: 2017-Ohio-9306, 102 N. E. 3d 1185.

No. 18–1013. Winstead et al. *v.* Johnson; and

No. 18–1186. Johnson *v.* Winstead et al. C. A. 7th Cir. Certiorari denied. Reported below: 900 F. 3d 428.

No. 18–6286. Chamberlin *v.* Hall, Commissioner, Mississippi Department of Corrections. C. A. 5th Cir. Certiorari denied. Reported below: 885 F. 3d 832.

No. 18–6755. Lacy *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 904 F. 3d 889.

No. 18–7094. SMITH *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 4 Cal. 5th 1134, 417 P. 3d 662.

No. 18–7594. ROGERS *v.* FORD, WARDEN. Sup. Ct. Ga. Certiorari denied.

No. 18–428. UNITED STATES *v.* SALAS. C. A. 10th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE GORSUCH took no part in the consideration or decision of this motion and this petition. Reported below: 889 F. 3d 681.

No. 18–837. HARRIS, STATE HEALTH OFFICER, ET AL. *v.* WEST ALABAMA WOMEN'S CENTER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 900 F. 3d 1310.

JUSTICE THOMAS, concurring.

In 2016, Alabama adopted a law prohibiting "dismemberment abortion[s]." Ala. Code §26–23G–3(a). The law does not prohibit women from obtaining an abortion, but it does prevent abortion providers from purposefully "dismember[ing] a living unborn child and extract[ing] him or her one piece at a time from the uterus through use of clamps, grasping forceps, tongs, scissors, or similar instruments" that "slice, crush, or grasp . . . a portion of the unborn child's body to cut or rip it off." §26–23G–2(3). As the Court of Appeals explained, this method of abortion is particularly gruesome:

> "In this type of abortion the unborn child dies the way anyone else would if dismembered alive. It bleeds to death as it is torn limb from limb. It can, however, survive for a time while its limbs are being torn off. . . . At the end of the abortion—after the larger pieces of the unborn child have been torn off with forceps and the remaining pieces sucked out with a vacuum—the abortionist is left with a tray full of pieces." *West Alabama Women's Center* v. *Williamson*, 900 F. 3d 1310, 1319–1320 (CA11 2018) (citations and internal quotation marks omitted).

Dismembering a child alive is—in respondents' words—"the most commonly used second-trimester abortion method," and it "account[s] for 99% of abortions in the state from [15 weeks] onward." Brief in Opposition 1. Put differently, the more developed the child, the more likely an abortion will involve dismembering it.

The notion that anything in the Constitution prevents States from passing laws prohibiting the dismembering of a living child is implausible. But under the "undue burden" standard adopted by this Court, a restriction on abortion—even one limited to prohibiting gruesome methods—is unconstitutional if "the 'purpose or effect' of the provision 'is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'" *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. 582, 589–590 (2016) (quoting *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 878 (1992) (plurality opinion); emphasis deleted). Here, abortion providers persuaded the District Court—despite mixed medical evidence—that other abortion methods were too risky, and the lower courts therefore held that Alabama's law had the *effect* of burdening abortions even though it did not prevent them. Ordinarily, balancing moral concerns against the risks and costs of alternatives is a quintessentially legislative function. But as the Court of Appeals suggested, the undue-burden standard is an "aberration of constitutional law." 900 F. 3d, at 1314; *Stenberg* v. *Carhart*, 530 U. S. 914, 982 (2000) (THOMAS, J., dissenting) (explaining that the standard "was constructed by its authors out of whole cloth").

This case serves as a stark reminder that our abortion jurisprudence has spiraled out of control. Earlier this Term, we were confronted with lower court decisions *requiring* States to allow abortions based solely on the race, sex, or disability of the child. *Box* v. *Planned Parenthood of Ind. and Ky., Inc.*, 587 U. S. 490, 494 (2019) (THOMAS, J., concurring). Today, we are confronted with decisions *requiring* States to allow abortion via live dismemberment. None of these decisions is supported by the text of the Constitution. *Gonzales* v. *Carhart*, 550 U. S. 124, 169 (2007) (THOMAS, J., concurring). Although this case does not present the opportunity to address our demonstrably erroneous "undue burden" standard, we cannot continue blinking the reality of what this Court has wrought.

No. 18–989. UNITED STATES *v.* LEWIS. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 907 F. 3d 891.

No. 18–1093. CITY OF JOLIET, ILLINOIS, ET AL. *v.* MANUEL. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 903 F. 3d 667.

No. 18–7277. McGee *v.* McFadden, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 733 Fed. Appx. 134.

Justice Sotomayor, dissenting.

Pro se petitioner Shannon McGee has a strong argument that his trial and resulting life sentence were fundamentally unfair because the State withheld material exculpatory evidence. See *Brady* v. *Maryland*, 373 U. S. 83, 87 (1963). The state courts offered flawed rationales for rejecting that claim. Nevertheless, the District Court denied McGee federal habeas relief, and both the District Court and the U. S. Court of Appeals for the Fourth Circuit summarily declined to grant McGee a "certificate of appealability" (COA), 28 U. S. C. § 2253(c), concluding that his claim was not even debatable. Without a COA, McGee cannot obtain appellate review on the merits of his claim. See *ibid.* Because the COA procedure should facilitate, not frustrate, fulsome review of potentially meritorious claims like McGee's, I would grant the petition for writ of certiorari and reverse the denial of a COA.

I

McGee is serving a life sentence without possibility of parole in a South Carolina state prison, having been convicted in 2006 of sexually abusing his minor stepdaughter. The State's case at his trial featured testimony from a jailhouse informant named Aaron Kinloch, who claimed that McGee confessed the abuse to him while the two men were incarcerated together. The prosecutor trumpeted Kinloch's apparent altruism in his closing argument:

> "[N]ormally you will hear a defendant—a defense lawyer get up here and scream about a deal, what he got out of it, or, you know, some kind of expectation of reward for this lie, but again, the defense is really going to have to search for a really, sort of hidden agenda of this Aaron Kinloch. . . . I don't know what motive he would have to come in here and fabricate this awful story." App. in *McGee* v. *State*, No. 2014–000297 (S. C.), pp. 152–153.

As it turns out, that was not the full story. Shortly after the trial ended, the prosecutor turned over a letter from Kinloch not previously disclosed to the defense in which Kinloch volunteered his testimony in exchange for the prosecutor's "help" with pending charges. Kinloch wrote: "I'm willing to help, if you are cause

I do need your help. . . . P.S. If Need Be I WILL Testify!" *Id.*, at 524. Kinloch sent the letter three days after learning of the charges against him.[1]

Ever since the belated disclosure of the letter, McGee has persistently but unsuccessfully argued that he is entitled to a new trial at which he could use the letter to call into question Kinloch's testimony. See generally App. to Pet. for Cert. 57–61. The state courts denied McGee's claim on both direct and postconviction review. The District Court denied McGee's *pro se* petition for federal habeas corpus relief under 28 U. S. C. § 2254 and declined to issue a COA. The Court of Appeals likewise denied a COA. McGee, still *pro se*, petitioned for a writ of certiorari to review that denial.

II

Withholding Kinloch's letter could be a classic violation of the prosecutor's constitutional duty to disclose material evidence favorable to the defense. See *Kyles* v. *Whitley*, 514 U. S. 419, 432–433 (1995); *Giglio* v. *United States*, 405 U. S. 150, 153–155 (1972); *Brady*, 373 U. S., at 87. The trial court said unequivocally that the letter should have been turned over. See App. C to Brief in Opposition 4 (describing the prosecutor's decision as showing "clear disregard for his responsibility as a prosecutor to seek justice"). The main question throughout the history of McGee's case has been whether the letter was "material" to the jury's guilty verdict. See, *e. g.*, *Wearry* v. *Cain*, 577 U. S. 385, 392 (2016) (*per curiam*).

To establish that the letter was "material" (and thus to prevail in the state courts), McGee had to show only that the letter would "'undermine confidence' in the verdict," not that he would have been acquitted with it. *Ibid.* That is, he had to show a "'"reasonable likelihood"'" that the letter "could have '"affected the judgment of the jury."'" *Ibid.*; see also *Kyles*, 514 U. S., at 434–435. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), McGee must further show on federal habeas review that the state court's adjudication of his *Brady* claim was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined, by the Supreme Court," or (2) "based on an unreasonable determination of the facts

[1] Although the letter shows that Kinloch had in mind a *quid pro quo* when he first approached the prosecutor with his account of McGee's confession, there is no indication that any deal was ever struck.

in light of the evidence presented in the State court proceeding." 28 U. S. C. § 2254(d).

The lower courts should have granted McGee a COA to allow review of the District Court's conclusion that the AEDPA standard was not met, because McGee has at least made "a substantial showing of the denial of a constitutional right." § 2253(c)(2). "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Buck* v. *Davis*, 580 U. S. 100, 115 (2017) (quoting *Miller-El* v. *Cockrell*, 537 U. S. 322, 327 (2003)). This "threshold" inquiry is more limited and forgiving than "'adjudication of the actual merits.'" *Buck*, 580 U. S., at 116–117 (quoting *Miller-El*, 537 U. S., at 337); see also *id.*, at 336 (noting that "full consideration of the factual or legal bases adduced in support of the claims" is not appropriate in evaluating a request for a COA).

Indications abound that McGee's *Brady* claim "deserve[d] encouragement to proceed further." *Miller-El*, 537 U. S., at 327. First, Kinloch's letter evinces a particularized motive to lie, one distinct from and potentially more probative than any generalized doubts about Kinloch's credibility that McGee was able to sow without it. See *Davis* v. *Alaska*, 415 U. S. 308, 316–318 (1974).

Second, the state-court determinations that Kinloch's letter was immaterial rested on dubious premises. The state trial court saw no likelihood that the letter would have impacted the outcome of McGee's trial because, "while this evidence could have been favorable to [McGee], it did not indicate that in fact a deal for the testimony had been reached." App. C to Brief in Opposition 4.[2] The State Court of Appeals affirmed that conclusion without further analysis. But the trial court's reasoning was doubtful, given that this Court has said that "a witness' attempt to obtain a deal before testifying" can be material "even though the State had made no binding promises." *Wearry*, 577 U. S., at 394 (citing *Napue* v. *Illinois*, 360 U. S. 264, 270 (1959)).

When McGee again raised his *Brady* claim on state collateral review, the state postconviction court rejected it primarily be-

[2] See also App. C to Brief in Opposition ("In light of all the evidence and testimony, and in particular, the lack of any facts indicating any deal struck between the witness and the [prosecutor], it is this court's finding that the defendant received 'a fair trial resulting in a verdict worthy of confidence'").

cause the claim had been addressed already on direct review. In the alternative, however, the court offered the new ground that the claim lacked merit because McGee's counsel had attacked Kinloch's credibility in other ways and the "jury was aware of Kinloch's prior conviction and pending charges." App. D to Brief in Opposition 14. That rationale appears to rest in part on an "unreasonable determination of the facts," 28 U. S. C. § 2254(d)(2); I see no indication in the trial transcript that the jury was in fact made aware of the pending charges.

Third, the federal-court decisions reviewing McGee's claims were thinly reasoned. The Magistrate Judge offered little explanation beyond reciting the state courts' reasoning, describing the relevant legal standards, and stating that the "state courts reviewed the standard by which materiality must be judged" and "correctly applied the standard." App. to Pet. for Cert. 76. The District Court for its part recognized that McGee had put forth "a strong argument as to the *Brady* issue," but adopted the Magistrate Judge's recommendation anyway. *Id.*, at 48. It deferred to the state postconviction court's statement that the jury was aware of Kinloch's pending charges, then reasoned that the postconviction court's factual findings "completely undermine[d]" McGee's argument. *Ibid.* Yet, as noted above, the postconviction court's conclusion that the jury was aware of the pending charges appears to have been unreasonable. The District Court offered only a conclusory statement that deference on that point was appropriate, and only careful review of the trial record could permit the Court of Appeals meaningfully to evaluate McGee's contrary assertion that he could not, in fact, "effectively cross-examine Kinloch concerning pending charges," Informal Brief for Appellant in No. 18–6211 (CA4), pp. 5–6.

Finally, the District Court's was the last of four opinions (two state and, including the Magistrate Judge's recommendation, two federal) to discuss the merits of McGee's *Brady* claim. Not one of those decisions discussed the evidence against McGee apart from Kinloch's testimony or concluded that the other evidence was so overwhelming that discrediting Kinloch would not have called the jury's verdict into doubt.[3]

[3] The other evidence came from three witnesses: (1) McGee's teenage stepdaughter, who offered a detailed account of McGee's alleged molestations, but who also admitted to having previously recanted her allegations; (2) her 9-year-old brother, who generally corroborated that his sister had told him

For all these reasons, the District Court's decision was certainly "debatable." The Court of Appeals' resolution of the case in an unreasoned order denying a COA compounded the error. This case instead should have gone to a merits panel of the Fourth Circuit for closer review.

III

The federal courts handle thousands of noncapital habeas petitions each year, only a tiny fraction of which ultimately yield relief. See N. King, Non-Capital Habeas Cases After Appellate Review: An Empirical Analysis, 24 Fed. Sentencing Reporter 308, 309 (2012) (Table 2) (less than 1% of randomly selected cases in an empirical study). While the volume is high, the stakes are as well. Federal judges grow accustomed to reviewing convictions with sentences measured in lifetimes, or in hundreds of months. Such spans of time are difficult to comprehend, much less to imagine spending behind bars. And any given filing—though it may feel routine to the judge who plucks it from the top of a large stack—could be the petitioner's last, best shot at relief from an unconstitutionally imposed sentence. Sifting through the haystack of often uncounseled filings is an unglamorous but vitally important task.

COA inquiries play an important role in the winnowing process. The percentage of COA requests granted is not high, see *id.*, at 308 (study finding that "more than 92 percent of all COA rulings were denials"), but once that hurdle is cleared, a nontrivial fraction of COAs lead to relief on the merits, see *id.*, at 309 (Table 2) (approximately 6%). At its best, this triage process focuses judicial resources on processing the claims most likely to be meritorious. Cf. *Miller-El*, 537 U. S., at 337 (AEDPA's COA requirement "confirmed the necessity and the requirement of differential treatment for those appeals deserving of attention from those that plainly do not").

Unless judges take care to carry out the limited COA review with the requisite open mind, the process breaks down. A court of appeals might inappropriately decide the merits of an appeal, and in doing so overstep the bounds of its jurisdiction. See *Buck*,

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that "somebody did something nasty" to her but did not name McGee, App. in No. 2014–000297 (S. C.), p. 87; and (3) a doctor who diagnosed the stepdaughter with a partially torn hymen but could not say "what caused that injury," *id.*, at 131.

580 U. S., at 115; *Miller-El*, 537 U. S., at 336–337. A district court might fail to recognize that reasonable minds could differ. Or, worse, the large volume of COA requests, the small chance that any particular petition will lead to further review, and the press of competing priorities may turn the circumscribed COA standard of review into a rubber stamp, especially for *pro se* litigants. We have periodically had to remind lower courts not to unduly restrict this pathway to appellate review. See, *e. g.*, *Tharpe* v. *Sellers*, 583 U. S. 33 (2018) (*per curiam*); *Buck*, 580 U. S. 100; *Tennard* v. *Dretke*, 542 U. S. 274 (2004).

This case provides an illustration of what can be lost when COA review becomes hasty. It is not without complications: There may be good arguments, yet unexplored, why McGee's claim may fall short of meeting AEDPA's strict requirements. See § 2254(d). And of course, even a finding that McGee's constitutional rights clearly were violated would not necessarily imply that he is innocent of the serious crimes of which he was convicted; McGee could be reconvicted after a fairer proceeding. See *Kyles*, 514 U. S., at 434–435. But the weighty question whether McGee is "in custody in violation of the Constitution," § 2254(a), appears to have gotten short shrift here. With a lifetime of lost liberty hanging in the balance, this claim was ill suited to snap judgment.

July 1, 2019

Miscellaneous Order. (For revisions to the Rules of this Court effective this date, see 587 U. S. 1201.)

July 15, 2019

Miscellaneous Order

No. 18A1197. Pearson *v.* United States. Application for bail, addressed to Justice Sotomayor and referred to the Court, denied.

Rehearing Denied

No. 18–1113. Thomas *v.* Zelon et al., 587 U. S. 970;

No. 18–1274. In re Bhagat, 587 U. S. 985;

No. 18–6823. Williams *v.* County of Los Angeles, California, et al., 587 U. S. 920;

No. 18–6907. Kulick *v.* Leisure Village Assn., Inc., 587 U. S. 1016;

No. 18–7033. JACKSON *v.* UNITED STATES, 587 U. S. 941;

No. 18–7248. ANTHONY *v.* BOYD, WARDEN, ET AL., 586 U. S. 1227;

No. 18–7320. FORD *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 586 U. S. 1169;

No. 18–7584. MARBERRY *v.* STATE BAR OF CALIFORNIA, 587 U. S. 988;

No. 18–7625. FLORENCE *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 587 U. S. 921;

No. 18–7628. BEVAN *v.* FLORIDA, 586 U. S. 1234;

No. 18–7640. HOCKMAN *v.* BASKERVILLE, WARDEN, 587 U. S. 922;

No. 18–7867. BRADLEY *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 587 U. S. 944;

No. 18–7871. VENNINGS *v.* BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, 586 U. S. 1239;

No. 18–7873. SIERRA *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 587 U. S. 944;

No. 18–7926. BABB *v.* SMITH ET AL., 587 U. S. 945;

No. 18–7959. MAZE *v.* TERRELL ET AL., 587 U. S. 946;

No. 18–8078. WALKER *v.* CALDWELL, WARDEN, 587 U. S. 947;

No. 18–8147. HORN *v.* KANSAS, 587 U. S. 948;

No. 18–8159. CAMILLO-AMISANO *v.* UNITED STATES, 587 U. S. 925;

No. 18–8196. TART *v.* HOOKS, SECRETARY, NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, 587 U. S. 975;

No. 18–8229. CHINN *v.* NOETH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY, 587 U. S. 976;

No. 18–8237. BRISCOE *v.* EPPINGER, WARDEN, 587 U. S. 949;

No. 18–8280. WILLIAMS *v.* REYNOLDS, WARDEN, 587 U. S. 927;

No. 18–8290. WARE BEY *v.* PONTE ET AL., 587 U. S. 976;

No. 18–8296. ALEXANDER *v.* GILMORE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GREENE, 587 U. S. 990;

No. 18–8334. GONZALEZ *v.* ERNESTO GONZALEZ, 587 U. S. 990;

No. 18–8351. FRESSADI *v.* ARIZONA MUNICIPAL RISK RETENTION POOL ET AL., 587 U. S. 991;

No. 18–8443. OLIVEIRA *v.* COYNE-FAGUE ET AL., 587 U. S. 977;

No. 18–8474. HENNEBERRY *v.* COUNTY OF ALAMEDA, CALIFORNIA, ET AL., 587 U. S. 993;

No. 18–8493. SMITH *v.* UNITED STATES, 587 U. S. 965;

No. 18–8523. REINERIO, NKA AAEBO *v.* BANK OF AMERICA, N. A., ET AL., 587 U. S. 977;

No. 18–8535. HELEVA *v.* CLARK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ALBION, ET AL., 587 U. S. 993;

No. 18–8542. S. N. ET AL. *v.* SAN DIEGO HEALTH AND HUMAN SERVICES AGENCY ET AL., 587 U. S. 1018;

No. 18–8551. IBEABUCHI *v.* ARIZONA, 587 U. S. 1029;

No. 18–8595. WALLACE *v.* LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, 587 U. S. 1030;

No. 18–8637. ARLOTTA *v.* NIAGARA FRONTIER TRANSPORTATION AUTHORITY ET AL., 587 U. S. 1042;

No. 18–8669. ARLOTTA *v.* HERATY ET AL., 587 U. S. 1053;

No. 18–8678. CAMPBELL *v.* FLORIDA BAR, 587 U. S. 994;

No. 18–8691. BOISVERT *v.* UNITED STATES, 587 U. S. 995;

No. 18–8854. ZINNEL *v.* UNITED STATES, 587 U. S. 1032;

No. 18–8940. CHI *v.* UNITED STATES, 587 U. S. 1033; and

No. 18–8960. IN RE WINKEL, 587 U. S. 984. Petitions for rehearing denied.

JULY 19, 2019

Dismissal Under Rule 46

No. 18–1256. BP WEST COAST PRODUCTS, LLC *v.* SCHARFSTEIN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL. Ct. App. Ore. Certiorari dismissed under this Court's Rule 46.1. Reported below: 292 Ore. App. 69, 423 P. 3d 757.

JULY 26, 2019

Miscellaneous Order

No. 19A60. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL. *v.* SIERRA CLUB ET AL. D. C. N. D. Cal. Application for stay, presented to JUSTICE KAGAN, and by her referred to the Court, granted. Among the reasons is that the Government has made a sufficient showing at this stage that plaintiffs have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005 [of the Department of Defense Appropriations Act, 132 Stat. 2999]. The District Court's June 28, 2019, order granting permanent injunction is stayed pending disposition of the Government's appeal in the United States Court of Appeals

for the Ninth Circuit and disposition of the Government's petition for writ of certiorari, if such writ is timely sought. 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 when the Court enters its judgment. JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN would deny the application.

JUSTICE BREYER, concurring in part and dissenting in part.

To warrant this stay, the Government must show not just (1) a reasonable probability that the Court will grant certiorari and (2) a fair prospect that the Court [will] reverse, but also (3) "'a likelihood that irreparable harm will result from the denial of a stay.'" *Maryland* v. *King*, 567 U. S. 1301, 1302 (2012) (ROBERTS, C. J., in chambers). This case raises novel and important questions about the ability of private parties to enforce Congress' appropriations power. I would express no other view now on the merits of those questions.

Before granting a stay, however, we must still assess the competing claims of harm and balance the equities. *Barnes* v. *E-Systems, Inc. Group Hospital Medical & Surgical Ins. Plan*, 501 U. S. 1301, 1305 (1991) (Scalia, J., in chambers). This Court may, and sometimes does, "tailor a stay so that it operates with respect to only 'some portion of the proceeding.'" *Trump* v. *International Refugee Assistance Project*, 582 U. S. 571, 580 (2017) (*per curiam*) (quoting *Nken* v. *Holder*, 556 U. S. 418, 428 (2009)). In my view, this is an appropriate case to do so.

If we grant the stay, the Government may begin construction of a border barrier that would cause irreparable harm to the environment and to respondents, according to both respondents and the District Court. The Government's only response to this claim of irreparable harm is that, if respondents ultimately prevail, the border barrier may be taken down (with what funding, the Government does not say). But this is little comfort because it is not just the barrier, but the construction itself (and presumably its later destruction) that contributes to respondents' injury.

If we instead deny the stay, however, it is the Government that may be irreparably harmed. The Government has represented that, if it is unable to finalize the contracts by September 30, then the funds at issue will be returned to the Treasury and the injunc-

tion will have operated, in effect, as a final judgment. Respondents suggest a court could still award the Government relief after an appropriation lapses, though that proposition has yet to be endorsed by this Court.

But there is a straightforward way to avoid harm to both the Government and respondents while allowing the litigation to proceed. Allowing the Government to finalize the contracts at issue, but not to begin construction, would alleviate the most pressing harm claimed by the Government without risking irreparable harm to respondents. Respondents do not suggest that they will be harmed by finalization of the contracts alone, and there is reason to believe they would not be. See, *e. g.*, 36 OLC 11 (2012) (noting that, because of the Anti-Deficiency Act, "the government [is] legally incapable of incurring a contractual obligation to pay more money than Congress had appropriated"), online at https://www.justice.gov/file/20596/download (as last visited July 26, 2019); see also *Leiter* v. *United States*, 271 U. S. 204, 206–207 (1926); *Sutton* v. *United States*, 256 U. S. 575, 580–581 (1921); *Hooe* v. *United States*, 218 U. S. 322, 332–334 (1910); *Bradley* v. *United States*, 98 U. S. 104, 116–117 (1878).

I can therefore find no justification for granting the stay in full, as the majority does. I would grant the Government's application to stay the injunction only to the extent that the injunction prevents the Government from finalizing the contracts or taking other preparatory administrative action, but leave it in place insofar as it precludes the Government from disbursing those funds or beginning construction. I accordingly would grant the stay in part and deny it in part.

July 29, 2019

Dismissal Under Rule 46

No. 18–505. In re United States et al. Petition for writ of mandamus dismissed under this Court's Rule 46.2.

August 2, 2019

Dismissal Under Rule 46

No. 18–1265. September Ends Co. et al. *v.* Pension Benefit Guaranty Corporation. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 902 F. 3d 597.

AUGUST 5, 2019

Miscellaneous Orders

No. D–3042. IN RE DISCIPLINE OF SMITH. Micah Jared Smith, of Wilmington, Del., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–3043. IN RE DISCIPLINE OF LYNCH. John T. Lynch, Jr., of Scottsdale, Ariz., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–3044. IN RE DISCIPLINE OF SMITH. Arthur Jay Smith, of Pittsburgh, Pa., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–3045. IN RE DISCIPLINE OF MCLEOD. Bruce B. McLeod III, of Dallas, Tex., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–3046. IN RE DISCIPLINE OF UGWUONYE. Ephraim Chukwuemeka Ugwuonye, of Silver Spring, Md., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–3047. IN RE DISCIPLINE OF SILBERMAN. Marc Norman Silberman, of Cleveland, Ohio, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–3048. IN RE DISCIPLINE OF PACKARD. Jerry Steven Packard, of Wooster, Ohio, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–3049. In re Discipline of Stovell. Leicester Bryce Stovell, of Washington, D. C., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–3050. In re Discipline of Moran. Mark Brian Moran, of Aviston, Ill., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–3051. In re discipline of Lang. Steven Anthony Lang, of Chicago, Ill., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 18–565. CITGO Asphalt Refining Co. et al. *v.* Frescati Shipping Co., Ltd., et al. C. A. 3d Cir. [Certiorari granted, 587 U. S. 960.] Motion of petitioners to dispense with printing joint appendix granted.

Rehearing Denied

No. 17–1471. Home Depot U. S. A., Inc. *v.* Jackson, 587 U. S. 435;

No. 17–6680. Eaton *v.* United States, 588 U. S. 905;

No. 17–9421. Obeginski *v.* Georgia, 586 U. S. 859;

No. 17–9491. McKissick *v.* Deal, Governor of Georgia, et al., 586 U. S. 863;

No. 17–9578. McClinton *v.* Arkansas, 586 U. S. 868;

No. 18–1223. Villena et al. *v.* Iancu, Director, United States Patent and Trademark Office, 587 U. S. 1052;

No. 18–1237. Gounder *v.* Grippa et al., 587 U. S. 1016;

No. 18–1238. Gounder *v.* Progressive Credit Union et al., 587 U. S. 1026;

No. 18–1322. Alliance to End Chickens as Kaporos et al. *v.* New York City Police Department et al., 587 U. S. 1027;

No. 18–1339. Fornesa et al. *v.* Fifth Third Mortgage Co., 587 U. S. 1064;

No. 18–5259. Nowlin *v.* Shannon et al., 586 U. S. 891;

No. 18–7449. Patton *v.* United States, 588 U. S. 910;
No. 18–7825. Jenkins *v.* Ohio, 587 U. S. 1041;
No. 18–7851. Young *v.* Asuncion, Warden, 587 U. S. 943;
No. 18–7891. Haymond *v.* Helmand Investment, LLC, 587 U. S. 1041;
No. 18–8013. Pieczynski *v.* Wells Fargo & Co., N. A., 587 U. S. 962;
No. 18–8149. Fries *v.* Becerra, Attorney General of California, et al., 587 U. S. 974;
No. 18–8170. In re Cloninger, 587 U. S. 969;
No. 18–8180. Lucy, Personal Representative of Fox, Deceased *v.* Dialysis Associates et al., 587 U. S. 975;
No. 18–8214. Raby *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division, 587 U. S. 1053;
No. 18–8271. Hernandez *v.* Sims et al., 587 U. S. 989;
No. 18–8342. Spears *v.* R&R Cleaning Services et al., 587 U. S. 964;
No. 18–8413. Avoki *v.* Carolinas Telco Federal Credit Union et al., 587 U. S. 992;
No. 18–8465. Kunsman *v.* Wall, 587 U. S. 1017;
No. 18–8483. Agosto *v.* Miller, Superintendent, Great Meadow Correctional Facility, 587 U. S. 1017;
No. 18–8497. Lynch *v.* Idaho, 587 U. S. 993;
No. 18–8548. Belser *v.* Woods et al., 587 U. S. 1018;
No. 18–8606. Smith *v.* Dozier et al., 587 U. S. 994;
No. 18–8609. Clark *v.* Carroll County Sheriff's Department et al., 587 U. S. 1042;
No. 18–8613. Magee *v.* Walt Disney Co. et al., 587 U. S. 1042;
No. 18–8626. Murray *v.* United States, 587 U. S. 979;
No. 18–8657. Ibeabuchi *v.* Maricopa Commissioners, 587 U. S. 1043;
No. 18–8658. Ibeabuchi *v.* Penzone et al., 587 U. S. 1043;
No. 18–8659. Ibeabuchi *v.* Wood, 587 U. S. 1043;
No. 18–8679. Bell *v.* South Carolina, 587 U. S. 1043;
No. 18–8688. McShan *v.* United States, 587 U. S. 994;
No. 18–8690. Ontiveros *v.* Pacheco, Warden, et al., 587 U. S. 994;
No. 18–8724. In re Cabello, 587 U. S. 985;
No. 18–8811. King *v.* United States, 587 U. S. 1031;

No. 18–8836. WOODSON *v.* UNITED STATES, 587 U. S. 1055;
No. 18–8837. WOODSON *v.* UNITED STATES, 587 U. S. 1055;
No. 18–8838. WOODSON *v.* UNITED STATES, 587 U. S. 1055;
No. 18–8839. WOODSON *v.* UNITED STATES, 587 U. S. 1055;
No. 18–8840. WOODSON *v.* UNITED STATES, 587 U. S. 1055;
No. 18–8841. WOODSON *v.* BRENNAN, POSTMASTER GENERAL, 587 U. S. 1055;
No. 18–8910. FISHER *v.* UNITED STATES, 587 U. S. 1032;
No. 18–8947. PALMA *v.* HARRIS COUNTY APPRAISAL REVIEW BOARD; and PALMA *v.* HARRIS COUNTY APPRAISAL DISTRICT, 588 U. S. 912;
No. 18–8959. ARLOTTA *v.* MCKESSON CORP. ET AL., 588 U. S. 912;
No. 18–8976. SHEPPARD *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 588 U. S. 912;
No. 18–8996. DYAB *v.* UNITED STATES, 587 U. S. 1034; and
No. 18–9036. BROWN *v.* VIRGINIA ET AL., 587 U. S. 1056. Petitions for rehearing denied.

No. 18–6290. SOLGADO *v.* BRAUN, WARDEN, 586 U. S. 1080. Motion for leave to file petition for rehearing denied.

AUGUST 14, 2019

Dismissal Under Rule 46

No. 18–969. GOSPEL FOR ASIA, INC., ET AL. *v.* MURPHY ET AL. C. A. 8th Cir. Certiorari dismissed under this Court's Rule 46.1.

AUGUST 15, 2019

Certiorari Denied

No. 19–5561 (19A161). WEST *v.* PARKER, COMMISSIONER, TENNESSEE DEPARTMENT OF CORRECTION, ET AL. C. A. 6th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SOTOMAYOR, and by her referred to the Court, denied. Certiorari denied. Reported below: 783 Fed. Appx. 506.

AUGUST 19, 2019

Miscellaneous Order

No. 19A153. CANNON, SHERIFF *v.* SEAY. Application for stay of mandate, presented to THE CHIEF JUSTICE, and by him re-

ferred to the Court, granted. Issuance of the mandate of the United States Court of Appeals for the Fourth Circuit, case No. 18–7242, is stayed pending filing and disposition of a petition for writ of certiorari, if such petition is filed on or before September 3, 2019. 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 issuance of the judgement of this Court. If no petition for writ of certiorari is filed on or before September 3, 2019, the stay shall terminate.

August 21, 2019

Miscellaneous Order

No. 19–5640 (19A200). In re Swearingen. 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.

August 22, 2019

Miscellaneous Order

No. 19–5682 (19A217). In re Bowles. Application for stay of execution of sentence of death, presented to Justice Thomas, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 19–5617 (19A183). Bowles *v.* Florida et al. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to Justice Thomas, and by him referred to the Court, denied. Certiorari denied. Reported below: 276 So. 3d 791.

Statement of Justice Sotomayor respecting the denial of certiorari.

This case implicates important questions related to this Court's decision in *Hall* v. *Florida*, 572 U. S. 701 (2014). *Hall* invalidated a Florida law categorically prohibiting intellectually disabled death-row prisoners with IQs above 70 from raising successful claims under *Atkins* v. *Virginia*, 536 U. S. 304 (2002). Later, the Florida Supreme Court held that *Hall* was retroactive. *Walls* v. *State*, 213 So. 3d 340, 346 (2016). With one hand, the Florida Supreme Court recognized that such intellectually disabled pris-

oners sentenced before *Hall* have a right to challenge their executions on collateral review. With the other hand, however, the Florida Supreme Court has turned away prisoners seeking to vindicate this retroactive constitutional rule for the first time, by requiring them to have brought their *Hall* claims in 2004—a full decade before *Hall* itself was decided. See, *e. g.*, 276 So. 3d 791, 794 (2019) (*per curiam*) (case below); *Harvey* v. *State*, 260 So. 3d 906, 907 (2018); *Blanco* v. *State*, 249 So. 3d 536, 537 (2018); *Rodriguez* v. *State*, 250 So. 3d 616 (2016). This Kafkaesque procedural rule is at odds with another Florida rule requiring counsel raising an intellectual-disability claim to have a "good faith" basis to believe that a death-sentenced client is intellectually disabled (presumably under the limited definition of intellectual disability that Florida had then imposed). Fla. Rule Crim. Proc. 3.203(d)(4)(A) (Supp. 2004). The time-bar rule also creates grave tension with this Court's guidance in *Montgomery* v. *Louisiana*, 577 U. S. 190 (2016).

This petition, however, does not squarely present the concerns addressed in *Montgomery*. Instead, the questions presented challenge Florida's procedural rule requiring certain post-*Hall* claims to have been brought in 2004 solely under the Eighth Amendment. Because I do not believe that the questions as presented merit this Court's review at this time, I do not disagree with the denial of certiorari. In an appropriate case, however, I would be prepared to revisit a challenge to Florida's procedural rule.

No. 19–5651 (19A203). BOWLES *v.* DESANTIS, GOVERNOR OF FLORIDA, ET AL. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied. Reported below: 934 F. 3d 1230.

No. 19–5672 (19A213). BOWLES *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied. Reported below: 935 F. 3d 1176.

AUGUST 23, 2019

Miscellaneous Orders

No. D–3052. IN RE DISCIPLINE OF FRANKS. Maurice Rudolph Franks, of Baker, La., is suspended from the practice of law in

this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–3053. IN RE DISCIPLINE OF BRUNER. Ben Elton Bruner, of Opelika, Ala., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 18–260. COUNTY OF MAUI, HAWAII *v.* HAWAII WILDLIFE FUND ET AL. C. A. 9th Cir. [Certiorari granted, 586 U. S. 1144.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 18–328. ROTKISKE *v.* KLEMM ET AL. C. A. 3d Cir. [Certiorari granted, 586 U. S. 1190.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 18–916. THRYV, INC., FKA DEX MEDIA, INC. *v.* CLICK-TO-CALL TECHNOLOGIES, LP, ET AL. C. A. Fed. Cir. [Certiorari granted *sub nom. Dex Media, Inc.* v. *Click-To-Call Technologies, LP*, 588 U. S. 905.] Motion of petitioner to dispense with printing joint appendix granted.

Rehearing Denied

No. 18–1199. INVESTPIC, LLC *v.* SAP AMERICA, INC., 588 U. S. 908;

No. 18–1288. COULTER *v.* ADT SECURITY SERVICES ET AL., 587 U. S. 1052;

No. 18–1392. BARONE *v.* WELLS FARGO BANK, N. A., 587 U. S. 1064;

No. 18–7094. SMITH *v.* CALIFORNIA, 588 U. S. 921;

No. 18–7581. ERWIN *v.* WARDEN, FEDERAL CORRECTIONAL INSTITUTION COLEMAN-LOW, 587 U. S. 1027;

No. 18–7652. ANDERSON *v.* COLORADO, 587 U. S. 1027;

No. 18–8133. MINGO *v.* UNITED STATES, 587 U. S. 925;

No. 18–8452. IN RE MASON, 587 U. S. 985;

No. 18–8553. HICKS *v.* DALLAS COUNTY COMMUNITY COLLEGES, 587 U. S. 1018;

No. 18–8597. BROWN *v.* BURTON ET AL., 587 U. S. 1042;

No. 18–8611. Bailey *v.* Gasaway, 587 U. S. 1042;

No. 18–8667. Anson *v.* United States, 587 U. S. 1030;

No. 18–8668. Teague *v.* North Carolina, 587 U. S. 1043;

No. 18–8764. Drevaleva *v.* Department of Veterans Affairs et al., 587 U. S. 1044;

No. 18–8765. Young *v.* Duncan et al., 587 U. S. 1054;

No. 18–8791. Bissonette *v.* Dooley, Warden, et al., 587 U. S. 1031;

No. 18–8800. Winn *v.* Metzger, Warden, et al., 587 U. S. 1065;

No. 18–8813. Bultman *v.* Cigna Group Insurance Co. et al., 587 U. S. 1055;

No. 18–8815. Reich *v.* Slagle, Correctional Administrator, Mountain View Correctional Institution, 587 U. S. 1065;

No. 18–8823. Al Obaidy *v.* McAleenan, Acting Secretary of Homeland Security, et al., 587 U. S. 1055;

No. 18–8828. Overby *v.* Pennsylvania (two judgments), 587 U. S. 1031;

No. 18–8859. Borden *v.* Cheaha Regional Mental Health Center, Inc., 587 U. S. 1066;

No. 18–8878. Jara *v.* Standard Parking et al., 587 U. S. 1066;

No. 18–8881. Coleman *v.* Inch, Secretary, Florida Department of Corrections, et al., 587 U. S. 1055;

No. 18–8905. Bryant *v.* Army Corps of Engineers et al., 588 U. S. 911;

No. 18–8926. Jackson *v.* Mukoro et al., 588 U. S. 911;

No. 18–8949. Muhammad *v.* Taylor, Warden, 587 U. S. 1033;

No. 18–8966. Drake *v.* United States District Court for the Eastern District of Texas, 588 U. S. 912;

No. 18–9052. Grenning *v.* Key, Superintendent, Airway Heights Corrections Center, et al., 587 U. S. 1056;

No. 18–9065. Rosa *v.* Florida et al., 587 U. S. 913;

No. 18–9078. Bradford *v.* Workers' Compensation Appeals Board et al., 588 U. S. 913;

No. 18–9151. Sandlain *v.* United States, 587 U. S. 1047;

No. 18–9154. Smith *v.* Clarke, Director, Virginia Department of Corrections, 587 U. S. 1067;

No. 18–9181. Askia *v.* United States, 587 U. S. 1057; and

No. 18–9192. Balice *v.* United States, 587 U. S. 1068. Petitions for rehearing denied.

SEPTEMBER 4, 2019

Certiorari Denied

No. 19–5715 (19A226). CRUTSINGER *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.

No. 19–5755 (19A237). CRUTSINGER *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied. Certiorari denied. Reported below: 936 F. 3d 265.

Statement of JUSTICE SOTOMAYOR respecting the denial of certiorari.

Petitioner Billy Jack Crutsinger seeks to reopen his petition for habeas corpus under Federal Rule of Civil Procedure 60(b)(6). This Rule requires that the movant "show 'extraordinary circumstances' justifying the reopening of a final judgment." *Gonzalez* v. *Crosby*, 545 U. S. 524, 535 (2005) (quoting *Ackermann* v. *United States*, 340 U. S. 193, 199 (1950)). The District Court denied Crutsinger's Rule 60(b) motion and the Court of Appeals for the Fifth Circuit denied a certificate of appealability. See 936 F. 3d 265 (2019); 28 U. S. C. § 2253(c). Because I agree that Crutsinger has not made the requisite showings for relief, I concur in the denial of certiorari.

I write separately to note potential tension between this Court's decision in *Gonzalez* and the Fifth Circuit's approach to Rule 60(b)(6). *Gonzalez* left open the possibility that in an appropriate case, a change in decisional law, alone, may supply an extraordinary circumstance justifying Rule 60(b)(6) relief. Although this Court observed that "not every interpretation of the federal statutes setting forth the requirements for habeas provides cause for reopening cases long since final," the Court also noted that "[a] change in the interpretation of a *substantive* statute may have consequences for cases that have already reached final judgment, particularly in the criminal context." 545 U. S., at 536, and n. 9.

Several Circuits recognize that a change in decisional law, by itself, may justify Rule 60(b)(6) relief. See, *e. g.*, *Cox* v. *Horn*, 757 F. 3d 113, 121 (CA3 2014) ("[W]e have not foreclosed the

possibility that a change in controlling precedent, even standing alone, might give reason for 60(b)(6) relief'"); *Ramirez* v. *United States*, 799 F. 3d 845, 850 (CA7 2015) (endorsing the Third Circuit's approach).

Others, including the Fifth Circuit, appear to have announced a contrary, categorical rule: "A 'change in decisional law after entry of judgment does not constitute extraordinary circumstances and is not alone grounds for relief from a final judgment.'" *Raby* v. *Davis*, 907 F. 3d 880, 884 (CA5 2018) (quoting *Adams* v. *Thaler*, 679 F. 3d 312, 319 (CA5 2012); alterations omitted); see also, *e. g.*, *Zagorski* v. *Mays*, 907 F. 3d 901, 905 (CA6 2018) ("[W]e have determined that changes in decisional law alone do not establish grounds for Rule 60(b)(6) relief'"); *Moses* v. *Joyner*, 815 F. 3d 163, 168 (CA4 2016) ("We too have held that 'a change in decisional law subsequent to a final judgment provides no basis for relief under Rule 60(b)(6)'" (quoting *Dowell* v. *State Farm Fire & Cas. Auto Ins. Co.*, 993 F. 2d 46, 48 (CA4 1993))).

The lower courts' decisions in Crutsinger's case did not pivot on a categorical rule. In other circumstances, however, such a rule may be dispositive, see *Adams*, 679 F. 3d, at 318–320, and may cause friction with *Gonzalez*. In an appropriate case, this issue could warrant the Court's review.

September 11, 2019

Miscellaneous Orders

No. 19A230. Barr, Attorney General, et al. *v.* East Bay Sanctuary Covenant et al. D. C. N. D. Cal. Application for stay, presented to Justice Kagan, and by her referred to the Court, granted. The District Court's July 24, 2019, order granting preliminary injunction and September 9, 2019, order restoring the nationwide scope of the injunction are stayed in full pending disposition of the Government's appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the Government's petition for writ of certiorari, if such writ is sought. If a writ of certiorari is sought and the Court denies the petition, this order shall terminate automatically. If the Court grants the petition for writ of certiorari, this order shall terminate when the Court enters its judgment.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

Once again the Executive Branch has issued a rule that seeks to upend longstanding practices regarding refugees who seek shelter from persecution. Although this Nation has long kept its doors open to refugees—and although the stakes for asylum seekers could not be higher—the Government implemented its rule without first providing the public notice and inviting the public input generally required by law. After several organizations representing immigrants sued to stop the rule from going into effect, a Federal District Court found that the organizations were likely to prevail and preliminarily enjoined the rule nationwide. A federal appeals court narrowed the injunction to run only circuitwide, but denied the Government's motion for a complete stay.

Now the Government asks this Court to intervene and to stay the preliminary decisions below. This is an extraordinary request. Unfortunately, the Court acquiesces. Because I do not believe the Government has met its weighty burden for such relief, I would deny the stay.

The Attorney General and Secretary of Homeland Security promulgated the rule at issue here on July 16, 2019. See 84 Fed. Reg. 33829. In effect, the rule forbids almost all Central Americans—even unaccompanied children—to apply for asylum in the United States if they enter or seek to enter through the southern border, unless they were first denied asylum in Mexico or another third country. *Id.*, at 33835, 33840; see also 385 F. Supp. 3d 922, 929–930 (ND Cal. 2019).

The District Court found that the rule was likely unlawful for at least three reasons. See *id.*, at 938–957. First, the court found it probable that the rule was inconsistent with the asylum statute, 94 Stat. 105, as amended, 8 U. S. C. § 1158. See § 1158(b)(2)(C) (requiring that any regulation like the rule be "consistent" with the statute). Section 1158 generally provides that *any* noncitizen "physically present in the United States or who arrives in the United States . . . may apply for asylum." § 1158(a)(1). And unlike the rule, the District Court explained, the statute provides narrow, carefully calibrated exceptions to asylum eligibility. As relevant here, Congress restricted asylum based on the possibility that a person could safely resettle in a third country. See §§ 1158(a)(2)(A), (b)(2)(A)(vi). The rule, by

contrast, does not consider whether refugees were safe or resettled in Mexico—just whether they traveled through it. That blunt approach, according to the District Court, rewrote the statute. See 385 F. Supp. 3d, at 939–947, 959.

Second, the District Court found that the challengers would likely prevail because the Government skirted typical rulemaking procedures. *Id.*, at 947–951. The District Court noted "serious questions" about the rule's validity because the Government effected a sea change in immigration law without first providing advance notice and opportunity for public comment. *Id.*, at 930; see also 5 U. S. C. § 553. The District Court found the Government's purported justifications unpersuasive at the preliminary-injunction stage. 385 F. Supp. 3d, at 948–951 (discussing statutory exceptions to notice-and-comment procedures).

Last, the District Court found the explanation for the rule so poorly reasoned that the Government's action was likely arbitrary and capricious. See *id.*, at 951–957; 5 U. S. C. § 706. On this score, the District Court addressed the Government's principal justifications for the rule: that failing to seek asylum while fleeing through more than one country "raises questions about the validity and urgency" of the asylum seeker's claim, 84 Fed. Reg. 33839; and that Mexico, the last port of entry before the United States, offers a feasible alternative for persons seeking protection from persecution, *id.*, at 33835, 33839–33840. The District Court examined the evidence in the administrative record and explained why it flatly refuted the Government's assumptions. 385 F. Supp. 3d, at 951–957. A "mountain of evidence points one way," the District Court observed, yet the Government "went the other—*with no explanation*." *Id.*, at 955.

After the District Court issued the injunction, the Ninth Circuit declined the Government's request for a complete stay, reasoning that the Government did not make the required "'strong showing'" that it would likely succeed on the merits of each issue. 934 F. 3d 1026, 1028 (2019) (quoting *Hilton* v. *Braunskill*, 481 U. S. 770, 776 (1987)). Narrowing the injunction to the Circuit's borders, the Ninth Circuit expedited the appeal and permitted the District Court to consider whether additional facts would warrant a broader injunction. 934 F. 3d, at 1029–1030.

The lower courts' decisions warrant respect. A stay pending appeal is "extraordinary" relief. *Williams* v. *Zbaraz*, 442 U. S. 1309, 1311 (1979) (Stevens, J., in chambers); see also *Maryland* v.

King, 567 U. S. 1301, 1302 (2012) (ROBERTS, C. J., in chambers) (listing stay factors). Given the District Court's thorough analysis, and the serious questions that court raised, I do not believe the Government has carried its "especially heavy" burden. *Packwood* v. *Senate Select Comm. on Ethics*, 510 U. S. 1319, 1320 (1994) (Rehnquist, C. J., in chambers). The rule here may be, as the District Court concluded, in significant tension with the asylum statute. It may also be arbitrary and capricious for failing to engage with the record evidence contradicting its conclusions. It is especially concerning, moreover, that the rule the Government promulgated topples decades of settled asylum practices and affects some of the most vulnerable people in the Western Hemisphere—without affording the public a chance to weigh in.

Setting aside the merits, the unusual history of this case also counsels against our intervention. This lawsuit has been proceeding on three tracks: In this Court, the parties have litigated the Government's stay request. In the Ninth Circuit, the parties are briefing the Government's appeal. And in the District Court, the parties recently participated in an evidentiary hearing to supplement the record. Indeed, just two days ago the District Court reinstated a nationwide injunction based on new facts. See *East Bay Sanctuary Covenant* v. *Barr*, No. 4:19–cv–4073 (ND Cal., Sept. 9, 2019), ECF Doc. 73. Notably, the Government moved to stay the newest order in both the District Court and the Ninth Circuit. (Neither court has resolved that request, though the Ninth Circuit granted an administrative stay to allow further deliberation.) This Court has not considered the new evidence, nor does it pause for the lower courts to resolve the Government's pending motions. By granting a stay, the Court simultaneously lags behind and jumps ahead of the courts below. And in doing so, the Court sidesteps the ordinary judicial process to allow the Government to implement a rule that bypassed the ordinary rulemaking process. I fear that the Court's precipitous action today risks undermining the interbranch governmental processes that encourage deliberation, public participation, and transparency.

* * *

In sum, granting a stay pending appeal should be an "extraordinary" act. *Williams*, 442 U. S., at 1311. Unfortunately, it appears the Government has treated this exceptional mechanism as a new normal. Historically, the Government has made this kind

of request rarely; now it does so reflexively. See, *e. g.*, Vladeck, The Solicitor General and the Shadow Docket, 133 Harv. L. Rev. 123 (2019). Not long ago, the Court resisted the shortcut the Government now invites. See *Trump* v. *East Bay Sanctuary Covenant*, 586 U. S. 1062 (2018). I regret that my colleagues have not exercised the same restraint here. I respectfully dissent.

No. 17–834. KANSAS *v.* GARCIA; KANSAS *v.* MORALES; and KANSAS *v.* OCHOA-LARA. Sup. Ct. Kan. [Certiorari granted, 586 U. S. 1221.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 17–1618. BOSTOCK *v.* CLAYTON COUNTY, GEORGIA. C. A. 11th Cir.; and

No. 17–1623. ALTITUDE EXPRESS, INC., ET AL. *v.* ZARDA, AS EXECUTOR OF THE ESTATE OF ZARDA, ET AL. C. A. 2d Cir. [Certiorari granted, 587 U. S. 960.] Joint motion of petitioner in No. 17–1618 and respondents in No. 17–1623 for divided argument denied. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 18–107. R. G. & G. R. HARRIS FUNERAL HOMES, INC. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL. C. A. 6th Cir. [Certiorari granted, 587 U. S. 960.] Motion of the Solicitor General for divided argument granted.

No. 18–217. MATHENA, WARDEN *v.* MALVO. C. A. 4th Cir. [Certiorari granted, 586 U. S. 1221.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 18–1334. FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO *v.* AURELIUS INVESTMENT, LLC, ET AL.;

No. 18–1475. AURELIUS INVESTMENT, LLC, ET AL. *v.* COMMONWEALTH OF PUERTO RICO ET AL.;

No. 18–1496. OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF ALL TITLE III DEBTORS OTHER THAN COFINA *v.* AURELIUS INVESTMENT, LLC, ET AL.;

No. 18–1514. UNITED STATES *v.* AURELIUS INVESTMENT, LLC, ET AL.; and

No. 18–1521. Unión de Trabajadores de la Industria Eléctrica y Riego, Inc. *v.* Financial Oversight and Management Board for Puerto Rico et al. C. A. 1st Cir. [Certiorari granted, 588 U. S. 901.] Upon consideration of the August 29, 2019, motions for divided argument, a total of 80 minutes is allotted for consolidated oral argument on both questions presented, and the time is divided as follows: 20 minutes to the Financial Oversight and Management Board, 20 minutes to the Solicitor General, 30 minutes to Aurelius Investment, LLC, et al., and 10 minutes to Unión de Trabajadores de la Industria Eléctrica y Riego, Inc.

No. 18–6135. Kahler *v.* Kansas. Sup. Ct. Kan. [Certiorari granted, 586 U. S. 1221.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

September 23, 2019

Dismissal Under Rule 46

No. 18–1307. Tennessee Clean Water Network et al. *v.* Tennessee Valley Authority. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 46.2. Reported below: 905 F. 3d 436.

September 25, 2019

Certiorari Denied

No. 18–9227 (19A109). Sparks *v.* Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to Justice Alito, and by him referred to the Court, denied. Certiorari denied. Reported below: 756 Fed. Appx. 397.

Statement of Justice Sotomayor respecting the denial of certiorari.

The allegations presented in this petition are disturbing. On the day the jury began punishment deliberations in petitioner Robert Sparks' capital murder trial, one of the bailiffs on duty in the courtroom wore a black tie embroidered with a white syringe—a tie that he admitted he wore to express his support for the death penalty.

That an officer of the court conducted himself in such a manner is deeply troubling. Undoubtedly, such "distinctive, identifiable

attire may affect a juror's judgment." *Estelle* v. *Williams*, 425 U. S. 501, 504–505 (1976). The state habeas court, however, conducted an evidentiary hearing but did not find sufficient evidence to conclude that the jury saw the tie. I therefore do not disagree with the denial of certiorari. I nevertheless hope that presiding judges aware of this kind of behavior would see fit to intervene in future cases by completely removing the offending item or court officer from the jury's presence. Only this will ensure the "very dignity and decorum of judicial proceedings" they are entrusted to uphold. *Illinois* v. *Allen*, 397 U. S. 337, 344 (1970). The stakes—life in this case, liberty in many others—are too high to allow anything less.

September 30, 2019

Dismissal Under Rule 46

No. 19–5514. In re Rosa. Petition for writ of habeas corpus dismissed under this Court's Rule 46.

October 4, 2019

Certiorari Granted

No. 19–67. United States *v.* Sineneng-Smith. C. A. 9th Cir. Certiorari granted. Reported below: 910 F. 3d 461.

No. 18–1323. June Medical Services L. L. C. et al. *v.* Gee, Secretary, Louisiana Department of Health and Hospitals; and

No. 18–1460. Gee, Secretary, Louisiana Department of Health and Hospitals *v.* June Medical Services L. L. C. et al. C. A. 5th Cir. Certiorari granted, cases consolidated, and a total of one hour is allotted for oral argument. Reported below: 905 F. 3d 787.

No. 18–1584. United States Forest Service et al. *v.* Cowpasture River Preservation Assn. et al.; and

No. 18–1587. Atlantic Coast Pipeline, LLC *v.* Cowpasture River Preservation Assn. et al. C. A. 4th Cir. Certiorari granted, cases consolidated, and a total of one hour is allotted for oral argument. Reported below: 911 F. 3d 150.