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OFFICIAL REPORTS

OF

THE SUPREME COURT

JUNE 30 THROUGH OCTOBER 2, 2020

END OF TERM

CHRISTINE LUCHOK FALLON
REPORTER OF DECISIONS

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Vol. 591 (Pp. 464–986; 1024–1081)
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.[1]
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

SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.
ANTHONY M. KENNEDY, ASSOCIATE JUSTICE.
DAVID H. SOUTER, ASSOCIATE JUSTICE.

OFFICERS OF THE COURT

WILLIAM P. BARR, ATTORNEY GENERAL.
NOEL J. FRANCISCO, SOLICITOR GENERAL.[2]
JEFFREY B. WALL, ACTING SOLICITOR GENERAL.[3]
SCOTT S. HARRIS, CLERK.
CHRISTINE LUCHOK FALLON, REPORTER OF DECISIONS.[4]
DERRICK LINDSEY, ACTING REPORTER OF DECISIONS.[5]
PAMELA TALKIN, MARSHAL.[6]
RICHARD NELSON, ACTING MARSHAL.[7]
LINDA S. MASLOW, LIBRARIAN.

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* For notes, see p. II.

NOTES

[1] JUSTICE GINSBURG died at her home in Washington, D. C. on September 18, 2020. A private interment service was held at the Arlington National Cemetary in Arlington, VA., on September 29, 2020.

[2] Solicitor General Francisco resigned effective July 3, 2020

[3] Mr. Wall became Acting Solicitor effective July 3, 2020.

[4] Ms. Fallon retired as Reporter of Decisions on September 25, 2020. See post, p. v.

[5] Mr. Lindsey was appointed Acting Reporter of Decisions effective September 25, 2020.

[6] Ms. Talkin retired as Marshal effective July 31, 2020. See post, p. VII.

[7] Mr. Nelson was appointed Acting Marshal effective August 30, 2020.

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.

(For next previous allotment, see 586 U. S., Pt. 1, p. III.)

RETIREMENT OF REPORTER OF DECISIONS

SUPREME COURT OF THE UNITED STATES

THURSDAY, JULY 9, 2020

Present: CHIEF JUSTICE ROBERTS, JUSTICE THOMAS, JUSTICE GINSBURG, JUSTICE BREYER, JUSTICE ALITO, JUSTICE SOTOMAYOR, JUSTICE KAGAN, JUSTICE GORSUCH, and JUSTICE KAVANAUGH.

THE CHIEF JUSTICE said:

I also note that our Reporter of Decisions, Christine Luchok Fallon, has announced her retirement, effective September 25th of this year. Ms. Fallon has served as Reporter for nine years and is the first woman to hold the position. She has overseen the publication of nearly 30 volumes of the Supreme Court Reports. Ms. Fallon, we thank you for your service, which you have performed with exemplary diligence and skill.

RETIREMENT OF MARSHAL

Supreme Court of the United States

THURSDAY, JULY 9, 2020

Present: Chief Justice Roberts, Justice Thomas, Justice Ginsburg, Justice Breyer, Justice Alito, Justice Sotomayor, Justice Kagan, Justice Gorsuch, and Justice Kavanaugh.

The Chief Justice said:

Our Marshal, Pamela Talkin, who has sat next to the Bench for the past 19 years and has heard more than 1,300 arguments, has announced her retirement, effective July 31st of this year. Marshal Talkin also is the first woman to hold the position. The Marshal of the Court is responsible for supervising 260 employees and managing many critical functions of the Court, including overseeing security and maintaining the Building and grounds. Marshal Talkin, we thank you for your exceptional service to the Court.

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(Vol. 591 U. S., Part 2)

CUMULATIVE TABLE OF CASES REPORTED

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NOTES:

This volume provides the permanent United States Reports citation for all reported cases. Cases reported before page 1001 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 1001 *et seq.* are those in which orders were entered. Although the Table of Cases Reported does not list orders denying a petition for writ of certiorari, such orders are included chronologically in this volume.

The syllabus in a case constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337 (1906).

A list of counsel who argued or filed briefs in a reported case, and who were members of the Court's Bar at the time the case was argued, are included in the United States Reports along with the Court's opinion in the case.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2019

Syllabus

ESPINOZA ET AL. *v.* MONTANA DEPARTMENT OF REVENUE ET AL.

CERTIORARI TO THE SUPREME COURT OF MONTANA

No. 18–1195. Argued January 22, 2020—Decided June 30, 2020

The Montana Legislature established a program that grants tax credits to those who donate to organizations that award scholarships for private school tuition. To reconcile the program with a provision of the Montana Constitution that bars government aid to any school "controlled in whole or in part by any church, sect, or denomination," Art. X, § 6(1), the Montana Department of Revenue promulgated "Rule 1," which prohibited families from using the scholarships at religious schools. Three mothers who were blocked by Rule 1 from using scholarship funds for their children's tuition at Stillwater Christian School sued the Department in state court, alleging that the Rule discriminated on the basis of their religious views and the religious nature of the school they had chosen. The trial court enjoined Rule 1. Reversing, the Montana Supreme Court held that the program, unmodified by Rule 1, aided religious schools in violation of the Montana Constitution's no-aid provision. The Court further held that the violation required invalidating the entire program.

Held: The application of the no-aid provision discriminated against religious schools and the families whose children attend or hope to attend them in violation of the Free Exercise Clause of the Federal Constitution. Pp. 473–489.

(a) The Free Exercise Clause "protects religious observers against unequal treatment" and against "laws that impose special disabilities on the basis of religious status." *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U. S. 449, 458, 461. In *Trinity Lutheran*, this Court held that disqualifying otherwise eligible recipients from a public benefit "solely because of their religious character" imposes "a penalty on the free exercise of religion that triggers the most exacting scrutiny." *Id.*, at 462. Here, the application of Montana's no-aid provision excludes religious schools from public benefits solely because of religious status. As a result, strict scrutiny applies. Pp. 473–479.

(b) Contrary to the Department's contention, this case is not governed by *Locke* v. *Davey*, 540 U. S. 712. The plaintiff in *Locke* was denied a scholarship "because of what he proposed *to do*—use the funds to prepare for the ministry," an essentially religious endeavor. *Trinity Lutheran*, 582 U. S., at 464. By contrast, Montana's no-aid provision

does not zero in on any essentially religious course of instruction but rather bars aid to a religious school "simply because of what it is"—a religious school. *Ibid.* *Locke* also invoked a "historic and substantial" state interest in not funding the training of clergy, 540 U. S., at 725, but no comparable tradition supports Montana's decision to disqualify religious schools from government aid. Pp. 479–483.

(c) The proposed alternative approach involving a flexible case-by-case analysis is inconsistent with *Trinity Lutheran*. The protections of the Free Exercise Clause do not depend on a varying case-by-case analysis regarding whether discrimination against religious adherents would serve ill-defined interests. Pp. 483–484.

(d) To satisfy strict scrutiny, government action "must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests." *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 546. Montana's interest in creating greater separation of church and state than the Federal Constitution requires "cannot qualify as compelling" in the face of the infringement of free exercise here. *Trinity Lutheran*, 582 U. S., at 466. The Department's argument that the no-aid provision actually promotes religious freedom is unavailing because an infringement of First Amendment rights cannot be justified by a State's alternative view that the infringement advances religious liberty. The Department's argument is especially unconvincing because the infringement here broadly burdens not only religious schools but also the families whose children attend them. The Department suggests that the no-aid provision safeguards public education by ensuring that government support is not diverted to private schools, but that interest does not justify a no-aid provision that requires only religious private schools to bear its weight. Pp. 484–487.

(e) Because the Free Exercise Clause barred the application of the no-aid provision here, the Montana Supreme Court had no authority to invalidate the program on the basis of that provision. The Department argues that the invalidation of the entire program prevented a free exercise violation, but the Department overlooks the Montana Supreme Court's threshold error of federal law. Had the Montana Supreme Court recognized that the application of the no-aid provision was barred by the Free Exercise Clause, the Court would have had no basis for invalidating the program. The Court was obligated to disregard the no-aid provision and decide this case consistent with the Federal Constitution. Pp. 487–489.

393 Mont. 446, 435 P. 3d 603, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which THOMAS, ALITO, GORSUCH, and KAVANAUGH, JJ., joined. THOMAS, J., filed a concur-

ring opinion, in which GORSUCH, J., joined, *post*, p. 489. ALITO, J., *post*, p. 497, and GORSUCH, J., *post*, p. 508, filed concurring opinions. GINSBURG, J., filed a dissenting opinion, in which KAGAN, J., joined, *post*, p. 515. BREYER, J., filed a dissenting opinion, in which KAGAN, J., joined as to Part I, *post*, p. 520. SOTOMAYOR, J., filed a dissenting opinion, *post*, p. 538.

Richard D. Komer argued the cause for petitioners. With him on the briefs were *Erica J. Smith*, *William W. Mercer*, *Michael Bindas*, and *Timothy D. Keller*.

Deputy Solicitor General Wall argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Francisco*, *Assistant Attorney General Dreiband*, *Vivek Suri*, *Thomas E. Chandler*, and *Eric W. Treene*.

Adam G. Unikowsky argued the cause for respondents. With him on the brief were *James Dawson*, *Daniel J. Whyte*, and *Anthony Johnstone*.*

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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, *Mithun Mansinghani*, Solicitor General, and *Zach West* and *Bryan Cleveland*, Assistant Solicitors General, by *Christopher M. Carr*, Attorney General of Georgia, *Andrew A. Pinson*, Solicitor General, and *Kurtis G. Anderson*, Assistant Attorney General, by *Mark Brnovich*, Attorney General of Arizona, *O. H. Skinner*, Solicitor General, and *Andrew G. Pappas*, Deputy Solicitor General, and by the Attorneys General for their respective States as follows: *Steve Marshall* of Alabama, *Kevin G. Clarkson* of Alaska, *Leslie Rutledge* of Arkansas, *Derek Schmidt* of Kansas, *Jeff Landry* of Louisiana, *Eric Schmitt* of Missouri, *Doug Peterson* of Nebraska, *Dave Yost* of Ohio, *Jason R. Ravnsborg* of South Dakota, *Herbert H. Slatery III* of Tennessee, *Ken Paxton* of Texas, *Sean D. Reyes* of Utah, and *Patrick Morrisey* of West Virginia; for the Alliance for Choice in Education by *Ian Speir* and *L. Martin Nussbaum*; for the American Center for Law and Justice by *Jay Alan Sekulow*, *Stuart J. Roth*, *Colby M. May*, and *Walter M. Weber*; for Americans for Prosperity et al. by *Cynthia F. Crawford*; for the Arizona Christian School Tuition Organization et al. by *Allyson N. Ho*, *Bradley G. Hubbard*, *Kristen K. Waggoner*, *David A. Cortman*, *John J. Bursch*, *Brett B. Harvey*, *Rory T. Gray*, and *Christopher P. Schandevel*; for the Becket Fund for Religious Liberty by *Diana M. Verm*, *Eric S. Baxter*, and *Eric S. Rassbach*; for the Billy Graham Evangelistic Association et al. by *Frederick W. Claybrook, Jr.*, *James A. Davids*, and *David*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Montana Legislature established a program to provide tuition assistance to parents who send their children to

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A. Bruce; for the Cato Institute by *Ilya Shapiro*; for the Center for Constitutional Jurisprudence by *John C. Eastman* and *Anthony T. Caso*; for the Center for Education Reform et al. by *Paul D. Clement*, *George W. Hicks, Jr.*, and *Erin M. Hawley*; for the Christian Legal Society et al. by *Kimberlee Wood Colby*, *Reed N. Smith*, *Douglas Laycock*, and *Thomas C. Berg*; for EdChoice et al. by *Leslie Davis Hiner*, *Russell Menyhart*, and *Manuel S. Klausner*; for Forge Youth Mentoring by *Joshua D. Davey* and *Kelly J. Shackelford*; for the Foundation for Moral Law by *John A. Eidsmoe*; for the Georgia Goal Scholarship Program, Inc., by *James P. Kelly III* and *Harry W. MacDougald*; for the Independence Institute by *David B. Kopel*; for the Jewish Coalition for Religious Liberty by *Parker Douglas* and *Howard Slugh*; for the Justice and Freedom Fund et al. by *James L. Hirsen*, *Deborah J. Dewart*, and *B. Tyler Brooks*; for the Liberty Justice Center et al. by *Brian K. Kelsey*, *Jeffrey M. Schwab*, and *Daniel R. Suhr*; for the Mackinac Center for Public Policy by *Patrick J. Wright*; for Montana Catholic School Parents et al. by *Andrea Picciotti-Bayer*; for the Montana Family Foundation by *Anita Y. Milanovich*; for the Opportunity Scholarship Fund by *Fred A. Leibrock*; for the Pioneer Institute, Inc., by *Dwight G. Duncan* and *Michael C. Gilleran*; for The Rutherford Institute by *Jason P. Gosselin* and *John W. Whitehead*; for Jerry Armstrong et al. by *Ethan W. Blevins*, *Wencong Fa*, and *Joshua P. Thompson*; for Rusty Bowers et al. by *John J. Park, Jr.*; for Sen. Steve Daines et al. by *Sarah M. Harris*; for the Hon. Scott Walker by *Richard M. Esenberg*; and for 131 Current and Former State Legislators by *Steven W. Fitschen.*

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, *Christopher Johnson*, Assistant Attorney General, and *Grant T. Sullivan*, Assistant Solicitor General, and by the Attorneys General for their respective jurisdictions as follows: *Xavier Becerra* of California, *Clare E. Connors* of Hawaii, *Maura Healey* of Massachusetts, *Dana Nessel* of Michigan, *Keith Ellison* of Minnesota, *Letitia James* of New York, *Ellen F. Rosenblum* of Oregon, and *Robert F. Ferguson* of Washington; for the State of Maine by *Aaron M. Frey*, Attorney General of Maine, *Susan P. Herman*, Deputy Attorney General, and *Sarah A. Forster* and *Christopher C. Taub*, Assistant Attorneys General; for the American Federation of Teachers et al. by *Kevin K. Russell*, *Erica Oleszczuk Evans*, *John M. West*, *Ramya Ravindran*, *Alice O'Brien*, *Kristen Hollar*,

private schools. The program grants a tax credit to anyone who donates to certain organizations that in turn award scholarships to selected students attending such schools. When petitioners sought to use the scholarships at a religious school, the Montana Supreme Court struck down the program. The Court relied on the "no-aid" provision of the State Constitution, which prohibits any aid to a school controlled by a "church, sect, or denomination." The question presented is whether the Free Exercise Clause of the United States Constitution barred that application of the no-aid provision.

I

A

In 2015, the Montana Legislature sought "to provide parental and student choice in education" by enacting a scholarship program for students attending private schools. 2015 Mont. Laws p. 2168, § 7. The program grants a tax credit of up to $150 to any taxpayer who donates to a participating "student scholarship organization." Mont. Code Ann. §§ 15–

Rhonda Weingarten, and *David J. Strom*; for the Baptist Joint Committee for Religious Liberty et al. by *Steven K. Green*, *K. Hollyn Hollman*, and *Jennifer L. Hawks*; for the Freedom From Religion Foundation et al. by *Andrew Seidel* and *Patrick Elliott*; for the Montana Association of Rabbis by *Charles A. Rothfeld*, *Andrew J. Pincus*, *Michael B. Kimberly*, *Paul W. Hughes*, and *Eugene R. Fidell*; for Montana Constitutional Convention Delegates by *Hyland Hunt* and *Ruthanne M. Deutsch*; for the Montana-Northern Wyoming Conference, United Church of Christ, by *Tillman J. Breckenridge* and *Patricia E. Roberts*; for the National Disability Rights Network et al. by *Gregory M. Lipper*, *Ronald M. Hager*, *Shira Wakschlag*, and *Selene Almazan-Altobelli*; for the National School Boards Association et al. by *Francisco M. Negrón, Jr.*, and *Sonja H. Trainor*; for Public Funds Public Schools by *Tamerlin J. Godley* and *Jessica Reich Baril*; for Religion Law Scholars by *Kirti Datla*; for Religious and Civil-Rights Organizations by *Richard B. Katskee*, *Alex J. Luchenitser*, *Daniel Mach*, *Heather L. Weaver*, *David D. Cole*, *Steven M. Freeman*, and *Elliot M. Mincberg*; and for the Tennessee Education Association by *Richard L. Colbert*.

30–3103(1), –3111(1) (2019). The scholarship organizations then use the donations to award scholarships to children for tuition at a private school. §§ 15–30–3102(7)(a), –3103(1)(c).[1]

So far only one scholarship organization, Big Sky Scholarships, has participated in the program. Big Sky focuses on providing scholarships to families who face financial hardship or have children with disabilities. Scholarship organizations like Big Sky must, among other requirements, maintain an application process for awarding the scholarships; use at least 90% of all donations on scholarship awards; and comply with state reporting and monitoring requirements. §§ 15–30–3103(1), –3105(1), –3113(1).

A family whose child is awarded a scholarship under the program may use it at any "qualified education provider"—that is, any private school that meets certain accreditation, testing, and safety requirements. See § 15–30–3102(7). Virtually every private school in Montana qualifies. Upon receiving a scholarship, the family designates its school of choice, and the scholarship organization sends the scholarship funds directly to the school. § 15–30–3104(1). Neither the scholarship organization nor its donors can restrict awards to particular types of schools. See §§ 15–30–3103(1)(b), –3111(1).

The Montana Legislature allotted $3 million annually to fund the tax credits, beginning in 2016. § 15–30–3111(5)(a). If the annual allotment is exhausted, it increases by 10% the following year. *Ibid.* The program is slated to expire in 2023. 2015 Mont. Laws p. 2186, § 33.

The Montana Legislature also directed that the program be administered in accordance with Article X, section 6, of the Montana Constitution, which contains a "no-aid" provision barring government aid to sectarian schools. See

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[1] The Legislature provided the same tax credit to taxpayers who donate to public schools for the purpose of supporting innovative educational programs or curing technology deficiencies at such schools. See Mont. Code Ann. § 15–30–3110 (2019).

Mont. Code Ann. § 15–30–3101. In full, that provision states:

> "**Aid prohibited to sectarian schools**. . . . The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination." Mont. Const., Art. X, § 6(1).

Shortly after the scholarship program was created, the Montana Department of Revenue promulgated "Rule 1," over the objection of the Montana Attorney General. That administrative rule prohibited families from using scholarships at religious schools. Mont. Admin. Rule § 42.4.802(1)(a) (2015). It did so by changing the definition of "qualified education provider" to exclude any school "owned or controlled in whole or in part by any church, religious sect, or denomination." *Ibid.* The Department explained that the Rule was needed to reconcile the scholarship program with the no-aid provision of the Montana Constitution.

The Montana Attorney General disagreed. In a letter to the Department, he advised that the Montana Constitution did not require excluding religious schools from the program, and if it did, it would "very likely" violate the United States Constitution by discriminating against the schools and their students. See Complaint in No. DV–15–1152A (Dist. Ct. Flathead Cty.), Exh. 3, pp. 2, 5–6. The Attorney General is not representing the Department in this case.

B

This suit was brought by three mothers whose children attend Stillwater Christian School in northwestern Montana. Stillwater is a private Christian school that meets the statu-

tory criteria for "qualified education providers." It serves students in prekindergarten through 12th grade, and petitioners chose the school in large part because it "teaches the same Christian values that [they] teach at home." App. to Pet. for Cert. 152; see *id.*, at 138, 167. The child of one petitioner has already received scholarships from Big Sky, and the other petitioners' children are eligible for scholarships and planned to apply. While in effect, however, Rule 1 blocked petitioners from using scholarship funds for tuition at Stillwater. To overcome that obstacle, petitioners sued the Department of Revenue in Montana state court. Petitioners claimed that Rule 1 conflicted with the statute that created the scholarship program and could not be justified on the ground that it was compelled by the Montana Constitution's no-aid provision. Petitioners further alleged that the Rule discriminated on the basis of their religious views and the religious nature of the school they had chosen for their children.

The trial court enjoined Rule 1, holding that it was based on a mistake of law. The court explained that the Rule was not required by the no-aid provision, because that provision prohibits only "appropriations" that aid religious schools, "not tax credits." *Id.*, at 94.

The injunctive relief freed Big Sky to award scholarships to students regardless of whether they attended a religious or secular school. For the school year beginning in fall 2017, Big Sky received 59 applications and ultimately awarded 44 scholarships of $500 each. The next year, Big Sky received 90 applications and awarded 54 scholarships of $500 each. Several families, most with incomes of $30,000 or less, used the scholarships to send their children to Stillwater Christian.

In December 2018, the Montana Supreme Court reversed the trial court. 393 Mont. 446, 435 P. 3d 603. The Court first addressed the scholarship program unmodified by Rule 1, holding that the program aided religious schools in

violation of the no-aid provision of the Montana Constitution. In the Court's view, the no-aid provision "broadly and strictly prohibits aid to sectarian schools." *Id.*, at 459, 435 P. 3d, at 609. The scholarship program provided such aid by using tax credits to "subsidize tuition payments" at private schools that are "religiously affiliated" or "controlled in whole or in part by churches." *Id.*, at 464–467, 435 P. 3d, at 612–613. In that way, the scholarship program flouted the State Constitution's "guarantee to all Montanans that their government will not use state funds to aid religious schools." *Id.*, at 467, 435 P. 3d, at 614.

The Montana Supreme Court went on to hold that the violation of the no-aid provision required invalidating the entire scholarship program. The Court explained that the program provided "no mechanism" for preventing aid from flowing to religious schools, and therefore the scholarship program could not "under *any* circumstance" be construed as consistent with the no-aid provision. *Id.*, at 466–468, 435 P. 3d, at 613–614. As a result, the tax credit is no longer available to support scholarships at either religious or secular private schools.

The Montana Supreme Court acknowledged that "an overly-broad" application of the no-aid provision "could implicate free exercise concerns" and that "there may be a case" where "prohibiting the aid would violate the Free Exercise Clause." *Id.*, at 468, 435 P. 3d, at 614. But, the Court concluded, "this is not one of those cases." *Ibid.*

Finally, the Court agreed with petitioners that the Department had exceeded its authority in promulgating Rule 1. The Court explained that the statute creating the scholarship program had broadly defined qualifying schools to include all private schools, including religious ones, and the Department lacked authority to "transform" that definition with an administrative rule. *Id.*, at 468–469, 435 P. 3d, at 614–615.

Several Justices wrote separately. All agreed that Rule 1 was invalid, but they expressed differing views on whether the scholarship program was consistent with the Montana and United States Constitutions. Justice Gustafson's concurrence argued that the program violated not only Montana's no-aid provision but also the Federal Establishment and Free Exercise Clauses. *Id.*, at 475–479, 435 P. 3d, at 619–621. Justice Sandefur echoed the majority's conclusion that applying the no-aid provision was consistent with the Free Exercise Clause, and he dismissed the "modern jurisprudence" of that Clause as "unnecessarily complicate[d]" due to "increasingly value-driven hairsplitting and overstretching." *Id.*, at 482–484, 435 P. 3d, at 623–624.

Two Justices dissented. Justice Rice would have held that the scholarship program was permissible under the no-aid provision. He criticized the majority for invalidating the program "*sua sponte*," contending that no party had challenged it under the State Constitution. *Id.*, at 495, 435 P. 3d, at 631. Justice Baker also would have upheld the program. In her view, the no-aid provision did not bar the use of scholarships at religious schools, and free exercise concerns could arise under the Federal Constitution if it did. *Id.*, at 493–494, 435 P. 3d, at 630.

We granted certiorari. 588 U. S. 920 (2019).

II

A

The Religion Clauses of the First Amendment provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." We have recognized a "'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels." *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U. S. 449, 458 (2017) (quoting *Locke* v. *Davey*, 540 U. S. 712, 718 (2004)). Here, the parties do not dispute that

the scholarship program is permissible under the Establishment Clause. Nor could they. We have repeatedly held that the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs. See, *e. g.*, *Locke*, 540 U. S., at 719; *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 839 (1995). See also *Trinity Lutheran*, 582 U. S., at 458 (noting the parties' agreement that the Establishment Clause was not violated by including churches in a playground resurfacing program). Any Establishment Clause objection to the scholarship program here is particularly unavailing because the government support makes its way to religious schools only as a result of Montanans independently choosing to spend their scholarships at such schools. See *Locke*, 540 U. S., at 719; *Zelman* v. *Simmons-Harris*, 536 U. S. 639, 649–653 (2002). The Montana Supreme Court, however, held as a matter of state law that even such indirect government support qualified as "aid" prohibited under the Montana Constitution.

The question for this Court is whether the Free Exercise Clause precluded the Montana Supreme Court from applying Montana's no-aid provision to bar religious schools from the scholarship program. For purposes of answering that question, we accept the Montana Supreme Court's interpretation of state law—including its determination that the scholarship program provided impermissible "aid" within the meaning of the Montana Constitution—and we assess whether excluding religious schools and affected families from that program was consistent with the Federal Constitution.[2]

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[2] JUSTICE SOTOMAYOR argues that the Montana Supreme Court "expressly declined to reach any federal issue." *Post*, at 543 (dissenting opinion). Not so. As noted, *supra*, at 472, the Montana Supreme Court recognized that certain applications of the no-aid provision could "violate the Free Exercise Clause." 393 Mont. 446, 468, 435 P. 3d 603, 614 (2018). But the Court expressly concluded that "this is not one of those cases." *Ibid.*

The Free Exercise Clause, which applies to the States under the Fourteenth Amendment, "protects religious observers against unequal treatment" and against "laws that impose special disabilities on the basis of religious status." *Trinity Lutheran*, 582 U. S., at 458, 461 (internal quotation marks and alterations omitted); see *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940). Those "basic principle[s]" have long guided this Court. *Trinity Lutheran*, 582 U. S., at 458–462. See, *e. g.*, *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1, 16 (1947) (a State "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation"); *Lyng* v. *Northwest Indian Cemetery Protective Assn.*, 485 U. S. 439, 449 (1988) (the Free Exercise Clause protects against laws that "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens").

Most recently, *Trinity Lutheran* distilled these and other decisions to the same effect into the "unremarkable" conclusion that disqualifying otherwise eligible recipients from a public benefit "solely because of their religious character" imposes "a penalty on the free exercise of religion that triggers the most exacting scrutiny." 582 U. S., at 462. In *Trinity Lutheran*, Missouri provided grants to help nonprofit organizations pay for playground resurfacing, but a state policy disqualified any organization "owned or controlled by a church, sect, or other religious entity." *Id.*, at 455. Because of that policy, an otherwise eligible church-owned preschool was denied a grant to resurface its playground. Missouri's policy discriminated against the Church "simply because of what it is—a church," and so the policy was subject to the "strictest scrutiny," which it failed. *Id.*, at 464–466. We acknowledged that the State had not "criminalized" the way in which the Church worshipped or

"told the Church that it cannot subscribe to a certain view of the Gospel." *Id.*, at 463. But the State's discriminatory policy was "odious to our Constitution all the same." *Id.*, at 467.

Here too Montana's no-aid provision bars religious schools from public benefits solely because of the religious character of the schools. The provision also bars parents who wish to send their children to a religious school from those same benefits, again solely because of the religious character of the school. This is apparent from the plain text. The provision bars aid to any school "controlled in whole or in part by any church, sect, or denomination." Mont. Const., Art. X, § 6(1). The provision's title—"Aid prohibited to sectarian schools"—confirms that the provision singles out schools based on their religious character. *Ibid.* And the Montana Supreme Court explained that the provision forbids aid to any school that is "sectarian," "religiously affiliated," or "controlled in whole or in part by churches." 393 Mont., at 464–467, 435 P. 3d, at 612–613. The provision plainly excludes schools from government aid solely because of religious status. See *Trinity Lutheran*, 582 U. S., at 462.

The Department counters that *Trinity Lutheran* does not govern here because the no-aid provision applies not because of the religious character of the recipients, but because of how the funds would be used—for "religious education." Brief for Respondents 38. In *Trinity Lutheran*, a majority of the Court concluded that the Missouri policy violated the Free Exercise Clause because it discriminated on the basis of religious status. A plurality declined to address discrimination with respect to "religious uses of funding or other forms of discrimination." 582 U. S., at 465, n. 3. The plurality saw no need to consider such concerns because Missouri had expressly discriminated "based on religious identity," *ibid.*, which was enough to invalidate the state policy without addressing how government funds were used.

This case also turns expressly on religious status and not religious use. The Montana Supreme Court applied the no-aid provision solely by reference to religious status. The Court repeatedly explained that the no-aid provision bars aid to "schools controlled in whole or in part by churches," "sectarian schools," and "religiously-affiliated schools." 393 Mont., at 463–467, 435 P. 3d, at 611–613. Applying this provision to the scholarship program, the Montana Supreme Court noted that most of the private schools that would benefit from the program were "religiously affiliated" and "controlled by churches," and the Court ultimately concluded that the scholarship program ran afoul of the Montana Constitution by aiding "schools controlled by churches." *Id.*, at 466–467, 435 P. 3d, at 613–614. The Montana Constitution discriminates based on religious status just like the Missouri policy in *Trinity Lutheran*, which excluded organizations "owned or controlled by a church, sect, or other religious entity." 582 U. S., at 455.

The Department points to some language in the decision below indicating that the no-aid provision has the goal or effect of ensuring that government aid does not end up being used for "sectarian education" or "religious education." 393 Mont., at 460, 466–467, 435 P. 3d, at 609, 613–614. The Department also contrasts what it characterizes as the "completely non-religious" benefit of playground resurfacing in *Trinity Lutheran* with the unrestricted tuition aid at issue here. Tr. of Oral Arg. 31. General school aid, the Department stresses, could be used for religious ends by some recipients, particularly schools that believe faith should "*permeate*[ ]" everything they do. Brief for Respondents 39 (quoting *State ex rel. Chambers* v. *School Dist. No. 10*, 155 Mont. 422, 438, 472 P. 2d 1013, 1021 (1970)). See also *post*, at 526–527, 531–532 (BREYER, J., dissenting).

Regardless, those considerations were not the Montana Supreme Court's basis for applying the no-aid provision to

exclude religious schools; that hinged solely on religious status. Status-based discrimination remains status based even if one of its goals or effects is preventing religious organizations from putting aid to religious uses.

Undeterred by *Trinity Lutheran*, the Montana Supreme Court applied the no-aid provision to hold that religious schools could not benefit from the scholarship program. 393 Mont., at 464–468, 435 P. 3d, at 612–614. So applied, the provision "impose[s] special disabilities on the basis of religious status" and "condition[s] the availability of benefits upon a recipient's willingness to surrender [its] religiously impelled status." *Trinity Lutheran*, 582 U. S., at 461–462 (quoting *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 533 (1993), and *McDaniel* v. *Paty*, 435 U. S. 618, 626 (1978) (plurality opinion); alterations omitted). To be eligible for government aid under the Montana Constitution, a school must divorce itself from any religious control or affiliation. Placing such a condition on benefits or privileges "inevitably deters or discourages the exercise of First Amendment rights." *Trinity Lutheran*, 582 U. S., at 463 (quoting *Sherbert* v. *Verner*, 374 U. S. 398, 405 (1963); alterations omitted). The Free Exercise Clause protects against even "indirect coercion," and a State "punishe[s] the free exercise of religion" by disqualifying the religious from government aid as Montana did here. *Trinity Lutheran*, 582 U. S., at 462–463 (internal quotation marks omitted). Such status-based discrimination is subject to "the strictest scrutiny." *Id.*, at 463.

None of this is meant to suggest that we agree with the Department, Brief for Respondents 36–40, that some lesser degree of scrutiny applies to discrimination against religious uses of government aid. See *Lukumi*, 508 U. S., at 546 (striking down law designed to ban religious practice involving alleged animal cruelty, explaining that a law "target[ing] religious conduct for distinctive treatment or advanc[ing] legitimate governmental interests only against conduct with a

religious motivation will survive strict scrutiny only in rare cases"). Some Members of the Court, moreover, have questioned whether there is a meaningful distinction between discrimination based on use or conduct and that based on status. See *Trinity Lutheran*, 582 U. S., at 468–470 (GORSUCH, J., joined by THOMAS, J., concurring in part) (citing, *e. g.*, *Lukumi*, 508 U. S. 520, and *Thomas* v. *Review Bd. of Ind. Employment Security Div.*, 450 U. S. 707 (1981)). We acknowledge the point but need not examine it here. It is enough in this case to conclude that strict scrutiny applies under *Trinity Lutheran* because Montana's no-aid provision discriminates based on religious status.

B

Seeking to avoid *Trinity Lutheran*, the Department contends that this case is instead governed by *Locke* v. *Davey*, 540 U. S. 712. See also *post*, at 524 (BREYER, J., dissenting); *post*, at 546–547 (SOTOMAYOR, J., dissenting). *Locke* also involved a scholarship program. The State of Washington provided scholarships paid out of the State's general fund to help students pursuing postsecondary education. The scholarships could be used at accredited religious and nonreligious schools alike, but Washington prohibited students from using the scholarships to pursue devotional theology degrees, which prepared students for a calling as clergy. This prohibition prevented Davey from using his scholarship to obtain a degree that would have enabled him to become a pastor. We held that Washington had not violated the Free Exercise Clause.

Locke differs from this case in two critical ways. First, *Locke* explained that Washington had "merely chosen not to fund a distinct category of instruction": the "essentially religious endeavor" of training a minister "to lead a congregation." 540 U. S., at 721. Thus, Davey "was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry." *Trinity Lutheran*, 582 U. S., at 464.

Apart from that narrow restriction, Washington's program allowed scholarships to be used at "pervasively religious schools" that incorporated religious instruction throughout their classes. *Locke*, 540 U. S., at 724–725. By contrast, Montana's Constitution does not zero in on any particular "essentially religious" course of instruction at a religious school. Rather, as we have explained, the no-aid provision bars all aid to a religious school "simply because of what it is," putting the school to a choice between being religious or receiving government benefits. *Trinity Lutheran*, 582 U. S., at 464. At the same time, the provision puts families to a choice between sending their children to a religious school or receiving such benefits.

Second, *Locke* invoked a "historic and substantial" state interest in not funding the training of clergy, 540 U. S., at 725, explaining that "opposition to . . . funding 'to support church leaders' lay at the historic core of the Religion Clauses." *Trinity Lutheran*, 582 U. S., at 465 (quoting *Locke*, 540 U. S., at 722). As evidence of that tradition, the Court in *Locke* emphasized that the propriety of state-supported clergy was a central subject of founding-era debates, and that most state constitutions from that era prohibited the expenditure of tax dollars to support the clergy. See *id.*, at 722–723.

But no comparable "historic and substantial" tradition supports Montana's decision to disqualify religious schools from government aid. In the founding era and the early 19th century, governments provided financial support to private schools, including denominational ones. "Far from prohibiting such support, the early state constitutions and statutes actively encouraged this policy." L. Jorgenson, The State and the Non-Public School, 1825–1925, p. 4 (1987); *e. g.*, R. Gabel, Public Funds for Church and Private Schools 210, 217–218, 221, 241–243 (1937); C. Kaestle, Pillars of the Republic: Common Schools and American Society, 1760–1860, pp. 166–167 (1983). Local governments provided grants to private schools, including religious ones, for the education

of the poor. M. McConnell et al., Religion and the Constitution 318–319 (4th ed. 2016). Even States with bans on government-supported clergy, such as New Jersey, Pennsylvania, and Georgia, provided various forms of aid to religious schools. See Kaestle, *supra*, at 166–167; Gabel, *supra*, at 215–218, 241–245, 372–374; cf. *Locke*, 540 U. S., at 723. Early federal aid (often land grants) went to religious schools. McConnell, *supra*, at 319. Congress provided support to denominational schools in the District of Columbia until 1848, *ibid.*, and Congress paid churches to run schools for American Indians through the end of the 19th century, see *Quick Bear* v. *Leupp*, 210 U. S. 50, 78 (1908); Gabel, *supra*, at 521–523. After the Civil War, Congress spent large sums on education for emancipated freedmen, often by supporting denominational schools in the South through the Freedmen's Bureau. McConnell, *supra*, at 323.[3]

[3] Justice Breyer sees "no meaningful difference" between concerns animating bans on support for clergy and bans on support for religious schools. *Post*, at 526–528. But evidently early American governments did. See *supra*, at 480 and this page. Justice Breyer contests particular examples but acknowledges that some bans on clergy support did not bar certain "sponsorship" of religious schools. *Post*, at 528. And, central to the issue here, he certainly does not identify a consistent early tradition, of the sort invoked in *Locke*, *against* support for religious schools. Virginia's opposition to establishing university theology professorships and chartering theological seminaries, see *post*, at 529, do not fit the bill. Buckley, After Disestablishment: Thomas Jefferson's Wall of Separation in Antebellum Virginia, 61 J. So. Hist. 445, 452–453 (1995). Justice Breyer also invokes Madison's objections to the Virginia Assessment Bill, *post*, at 527, but Madison objected in part because the Bill provided special support to certain churches and clergy, thereby "violat[ing] equality by subjecting some to peculiar burdens." Memorial and Remonstrance Against Religious Assessments, Art. 4, reprinted in *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1, 66 (1947) (appendix to dissenting opinion of Rutledge, J.); see V. Muñoz, God and the Founders: Madison, Washington, and Jefferson 21–22, 27 (2009). It is far from clear that the same objections extend to programs that provide equal support to all private primary and secondary schools. If anything, excluding religious schools from such programs would appear to impose the "peculiar burdens" feared by Madison.

The Department argues that a tradition *against* state support for religious schools arose in the second half of the 19th century, as more than 30 States—including Montana—adopted no-aid provisions. See Brief for Respondents 40–42 and App. D. Such a development, of course, cannot by itself establish an early American tradition. JUSTICE SOTOMAYOR questions our reliance on aid provided during the same era by the Freedmen's Bureau, *post*, at 547 (dissenting opinion), but we see no inconsistency in recognizing that such evidence may reinforce an early practice but cannot create one. In addition, many of the no-aid provisions belong to a more checkered tradition shared with the Blaine Amendment of the 1870s. That proposal—which Congress nearly passed—would have added to the Federal Constitution a provision similar to the state no-aid provisions, prohibiting States from aiding "sectarian" schools. See *Mitchell* v. *Helms*, 530 U. S. 793, 828 (2000) (plurality opinion). "[I]t was an open secret that 'sectarian' was code for 'Catholic.'" *Ibid.*; see Jorgenson, *supra*, at 70. The Blaine Amendment was "born of bigotry" and "arose at a time of pervasive hostility to the Catholic Church and to Catholics in general"; many of its state counterparts have a similarly "shameful pedigree." *Mitchell*, 530 U. S., at 828–829 (plurality opinion); see Jorgenson, *supra*, at 69–70, 216; Jeffries & Ryan, A Political History of the Establishment Clause, 100 Mich. L. Rev. 279, 301–305 (2001). The no-aid provisions of the 19th century hardly evince a tradition that should inform our understanding of the Free Exercise Clause.

The Department argues that several States have rejected referendums to overturn or limit their no-aid provisions, and that Montana even re-adopted its own in the 1970s, for reasons unrelated to anti-Catholic bigotry. See Brief for Respondents 20, 42. But, on the other side of the ledger, many States today—including those with no-aid provisions—provide support to religious schools through vouchers, scholarships, tax credits, and other measures. See Brief for Okla-

homa et al. as *Amici Curiae* 29–31, 33–35; Brief for Petitioners 5. According to petitioners, 20 of 37 States with no-aid provisions allow religious options in publicly funded scholarship programs, and almost all allow religious options in tax credit programs. Reply Brief 22, n. 9.

All to say, we agree with the Department that the historical record is "complex." Brief for Respondents 41. And it is true that governments over time have taken a variety of approaches to religious schools. But it is clear that there is no "historic and substantial" tradition against aiding such schools comparable to the tradition against state-supported clergy invoked by *Locke*.

C

Two dissenters would chart new courses. JUSTICE SOTOMAYOR would grant the government "some room" to "single . . . out" religious entities "for exclusion," based on what she views as "the interests embodied in the Religion Clauses." *Post*, at 545, 546 (quoting *Trinity Lutheran*, 582 U. S., at 478, 479 (SOTOMAYOR, J., dissenting)). JUSTICE BREYER, building on his solo opinion in *Trinity Lutheran*, would adopt a "flexible, context-specific approach" that "may well vary" from case to case. *Post*, at 533, 534–535; see *Trinity Lutheran*, 582 U. S., at 470–471 (BREYER, J., concurring in judgment). As best we can tell, courts applying this approach would contemplate the particular benefit and restriction at issue and discern their relationship to religion and society, taking into account "context and consequences measured in light of [the] purposes" of the Religion Clauses. *Post*, at 534–536, 538 (opinion of BREYER, J.) (quoting *Van Orden* v. *Perry*, 545 U. S. 677, 700 (2005) (BREYER, J., concurring in judgment)). What is clear is that JUSTICE BREYER would afford much freer rein to judges than our current regime, arguing that "there is 'no test-related substitute for the exercise of legal judgment.'" *Post*, at 538 (quoting *Van Orden*, 545 U. S., at 700 (opinion of BREYER, J.)).

The simplest response is that these dissents follow from prior separate writings, not from the Court's decision in

Trinity Lutheran or the decades of precedent on which it relied. These precedents have "repeatedly confirmed" the straightforward rule that we apply today: When otherwise eligible recipients are disqualified from a public benefit "solely because of their religious character," we must apply strict scrutiny. *Trinity Lutheran*, 582 U. S., at 458–462. This rule against express religious discrimination is no "doctrinal innovation." *Post*, at 532 (opinion of BREYER, J.). Far from it. As *Trinity Lutheran* explained, the rule is "unremarkable in light of our prior decisions." 582 U. S., at 462.

For innovation, one must look to the dissents. Their "room[y]" or "flexible" approaches to discrimination against religious organizations and observers would mark a significant departure from our free exercise precedents. The protections of the Free Exercise Clause do not depend on a "judgment-by-judgment analysis" regarding whether discrimination against religious adherents would somehow serve ill-defined interests. Cf. *Medellín* v. *Texas*, 552 U. S. 491, 514 (2008).

D

Because the Montana Supreme Court applied the no-aid provision to discriminate against schools and parents based on the religious character of the school, the "strictest scrutiny" is required. *Supra*, at 475, 478 (quoting *Trinity Lutheran*, 582 U. S., at 463). That "stringent standard," *id.*, at 466, is not "watered down but really means what it says," *Lukumi*, 508 U. S., at 546 (internal quotation marks and alterations omitted). To satisfy it, government action "must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests." *Ibid.* (quoting *McDaniel*, 435 U. S., at 628).

The Montana Supreme Court asserted that the no-aid provision serves Montana's interest in separating church and state "more fiercely" than the Federal Constitution. 393 Mont., at 467, 435 P. 3d, at 614. But "that interest cannot qualify as compelling" in the face of the infringement of free

exercise here. *Trinity Lutheran*, 582 U. S., at 466. A State's interest "in achieving greater separation of church and State than is already ensured under the Establishment Clause . . . is limited by the Free Exercise Clause." *Ibid.* (quoting *Widmar* v. *Vincent*, 454 U. S. 263, 276 (1981)).

The Department, for its part, asserts that the no-aid provision actually *promotes* religious freedom. In the Department's view, the no-aid provision protects the religious liberty of taxpayers by ensuring that their taxes are not directed to religious organizations, and it safeguards the freedom of religious organizations by keeping the government out of their operations. See Brief for Respondents 17–23. An infringement of First Amendment rights, however, cannot be justified by a State's alternative view that the infringement advances religious liberty. Our federal system prizes state experimentation, but not "state experimentation in the suppression of free speech," and the same goes for the free exercise of religion. *Boy Scouts of America* v. *Dale*, 530 U. S. 640, 660 (2000).

Furthermore, we do not see how the no-aid provision promotes religious freedom. As noted, this Court has repeatedly upheld government programs that spend taxpayer funds on equal aid to religious observers and organizations, particularly when the link between government and religion is attenuated by private choices. A school, concerned about government involvement with its religious activities, might reasonably decide for itself not to participate in a government program. But we doubt that the school's liberty is enhanced by eliminating any option to participate in the first place.

The Department's argument is especially unconvincing because the infringement of religious liberty here broadly affects both religious schools and adherents. Montana's no-aid provision imposes a categorical ban—"broadly and strictly" prohibiting "*any* type of aid" to religious schools. 393 Mont., at 462–463, 435 P. 3d, at 611. This prohibition is

far more sweeping than the policy in *Trinity Lutheran*, which barred churches from one narrow program for playground resurfacing—causing "in all likelihood" only "a few extra scraped knees." 582 U. S., at 467.

And the prohibition before us today burdens not only religious schools but also the families whose children attend or hope to attend them. Drawing on "enduring American tradition," we have long recognized the rights of parents to direct "the religious upbringing" of their children. *Wisconsin* v. *Yoder*, 406 U. S. 205, 213–214, 232 (1972). Many parents exercise that right by sending their children to religious schools, a choice protected by the Constitution. See *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534–535 (1925). But the no-aid provision penalizes that decision by cutting families off from otherwise available benefits if they choose a religious private school rather than a secular one, and for no other reason.

The Department also suggests that the no-aid provision advances Montana's interests in public education. According to the Department, the no-aid provision safeguards the public school system by ensuring that government support is not diverted to private schools. See Brief for Respondents 19, 25. But, under that framing, the no-aid provision is fatally underinclusive because its "proffered objectives are not pursued with respect to analogous nonreligious conduct." *Lukumi*, 508 U. S., at 546. On the Department's view, an interest in public education is undermined by diverting government support to *any* private school, yet the no-aid provision bars aid only to *religious* ones. A law does not advance "an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id.*, at 547 (internal quotation marks and alterations omitted). Montana's interest in public education cannot justify a no-aid provision that requires only religious private schools to "bear [its] weight." *Ibid.*

A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious.

III

The Department argues that, at the end of the day, there is no free exercise violation here because the Montana Supreme Court ultimately eliminated the scholarship program altogether. According to the Department, now that there is no program, religious schools and adherents cannot complain that they are excluded from any generally available benefit.

Two dissenters agree. JUSTICE GINSBURG reports that the State of Montana simply chose to "put all private school parents in the same boat" by invalidating the scholarship program, *post*, at 519, and JUSTICE SOTOMAYOR describes the decision below as resting on state law grounds having nothing to do with the federal Free Exercise Clause, see *post*, at 538, 543.

The descriptions are not accurate. The Montana Legislature created the scholarship program; the legislature never chose to end it, for policy or other reasons. The program was eliminated by a court, and not based on some innocuous principle of state law. Rather, the Montana Supreme Court invalidated the program pursuant to a state law provision that expressly discriminates on the basis of religious status. The Court applied that provision to hold that religious schools were barred from participating in the program. Then, seeing no other "mechanism" to make absolutely sure that religious schools received no aid, the court chose to invalidate the entire program. 393 Mont., at 466–468, 435 P. 3d, at 613–614.

The final step in this line of reasoning eliminated the program, to the detriment of religious and non-religious schools alike. But the Court's error of federal law occurred at the beginning. When the Court was called upon to apply a state

law no-aid provision to exclude religious schools from the program, it was obligated by the Federal Constitution to reject the invitation. Had the Court recognized that this was, indeed, "one of those cases" in which application of the no-aid provision "would violate the Free Exercise Clause," *id.*, at 468, 435 P. 3d, at 614, the Court would not have proceeded to find a violation of that provision. And, in the absence of such a state law violation, the Court would have had no basis for terminating the program. Because the elimination of the program flowed directly from the Montana Supreme Court's failure to follow the dictates of federal law, it cannot be defended as a neutral policy decision, or as resting on adequate and independent state law grounds.[4]

The Supremacy Clause provides that "the Judges in every State shall be bound" by the Federal Constitution, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2. "[T]his Clause creates a rule of decision" directing state courts that they "must not give effect to state laws that conflict with federal law[ ]." *Armstrong* v. *Exceptional Child Center, Inc.*, 575 U. S. 320, 324 (2015). Given the conflict between the Free Exercise Clause and the application of the no-aid provision here, the Montana Supreme Court should have "disregard[ed]" the no-aid provision and decided this case "conformably to the [C]onstitution" of the United States. *Marbury* v. *Madison*, 1 Cranch 137, 178 (1803). That "*supreme* law of the land" condemns discrimination against religious schools and the families whose children attend them. *Id.*, at 180. They are

[4] JUSTICE SOTOMAYOR worries that, in light of our decision, the Montana Supreme Court must "order the State to recreate" a scholarship program that "no longer exists." *Post*, at 544 (dissenting opinion). But it was the Montana Supreme Court that eliminated the program, in the decision below, which remains under review. Our reversal of that decision simply restores the status quo established by the Montana Legislature before the Court's error of federal law. We do not consider any alterations the Legislature may choose to make in the future.

"member[s] of the community too," and their exclusion from the scholarship program here is "odious to our Constitution" and "cannot stand." *Trinity Lutheran*, 582 U. S., at 463, 467.[5]

* * *

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

It is so ordered.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, concurring.

The Court correctly concludes that Montana's no-aid provision expressly discriminates against religion in violation of the Free Exercise Clause. And it properly provides relief to Montana religious schools and the petitioners who wish to use Montana's scholarship program to send their children to such schools. I write separately to explain how this Court's interpretation of the Establishment Clause continues to hamper free exercise rights. Until we correct course on that interpretation, individuals will continue to face needless obstacles in their attempts to vindicate their religious freedom.

I

A

This case involves the Free Exercise Clause, not the Establishment Clause. But as in all cases involving a state actor, the modern understanding of the Establishment Clause is a "brooding omnipresence," *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 222 (1917) (Holmes, J., dissenting), ever ready to be used to justify the government's infringement on religious freedom. Under the modern, but erroneous, view

[5] In light of this holding, we do not address petitioners' claims that the no-aid provision, as applied, violates the Equal Protection Clause or the Establishment Clause.

of the Establishment Clause, the government must treat all religions equally and treat religion equally to nonreligion. As this Court stated in its first case applying the Establishment Clause to the States, the government cannot "pass laws which aid one religion, aid all religions, or prefer one religion over another." *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1, 15 (1947); see also *post*, at 521–522 (BREYER, J., dissenting). This "equality principle," the theory goes, prohibits the government from expressing any preference for religion—or even permitting any signs of religion in the governmental realm. Thus, when a plaintiff brings a free exercise claim, the government may defend its law, as Montana did here, on the ground that the law's restrictions are *required* to prevent it from "establishing" religion.

This understanding of the Establishment Clause is unmoored from the original meaning of the First Amendment. As I have explained in previous cases, at the founding, the Clause served only to "protec[t] States, and by extension their citizens, from the imposition of an established religion by the *Federal* Government." *Zelman* v. *Simmons-Harris*, 536 U. S. 639, 678 (2002) (concurring opinion) (emphasis added); see also, *e. g.*, *Town of Greece* v. *Galloway*, 572 U. S. 565, 604–607 (2014) (opinion concurring in part and concurring in judgment); *Elk Grove Unified School Dist.* v. *Newdow*, 542 U. S. 1, 49–50 (2004) (opinion concurring in judgment). Under this view, the Clause resists incorporation against the States. See *Town of Greece*, 572 U. S., at 604 (opinion of THOMAS, J.).

There is mixed historical evidence concerning whether the Establishment Clause was understood as an individual right at the time of the Fourteenth Amendment's ratification. *Id.*, at 607–608. Even assuming that the Clause creates a right and that such a right could be incorporated, however, it would only protect against an "establishment" of religion as understood at the founding, *i. e.*, "'coercion of religious orthodoxy and of financial support by force of law and threat

of penalty.'" *Id.*, at 608 (quoting *Lee* v. *Weisman*, 505 U. S. 577, 640 (1992) (Scalia, J., dissenting); emphasis deleted); *American Legion* v. *American Humanist Assn.*, 588 U. S. 29, 75–76 (2019) (THOMAS, J., concurring in judgment); see also McConnell, Establishment and Disestablishment at the Founding, Part I: Establishment of Religion, 44 Wm. & Mary L. Rev. 2105, 2131–2181 (2003); McConnell, Coercion: The Lost Element of Establishment, 27 Wm. & Mary L. Rev. 933, 936–939 (1986).[1]

Thus, the modern view, which presumes that States must remain both completely separate from and virtually silent on matters of religion to comply with the Establishment Clause, is fundamentally incorrect. Properly understood, the Establishment Clause does not prohibit States from favoring religion. They can legislate as they wish, subject only to the limitations in the State and Federal Constitutions. See Muñoz, The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation, 8 U. Pa. J. Const. L. 585, 632 (2006).

B

I have previously made these points in Establishment Clause cases to show that the Clause likely has no application to the States or, if it is capable of incorporation, that the Court employs a far broader test than the Clause's original meaning. See, *e. g.*, *American Legion*, 588 U. S., at 73–74 (opinion concurring in judgment); *Town of Greece*, 572 U. S., at 604 (opinion concurring in part and concurring in judgment). But the Court's wayward approach to the Establishment Clause also impacts its free exercise jurisprudence. Specifically, its overly expansive understanding of the former

[1] A party wishing to expand the scope of the Establishment Clause beyond its meaning at the founding carries the burden of demonstrating that this broader reading is historically sound. *Town of Greece* v. *Galloway*, 572 U. S. 565, 607–608 (2014) (THOMAS, J., concurring in part and concurring in judgment).

Clause has led to a correspondingly cramped interpretation of the latter.

Under this Court's current approach, state and local governments may rely on the Establishment Clause to justify policies that others wish to challenge as violations of the Free Exercise Clause. Once the government demonstrates that its policy is *required* for compliance with the Constitution, any claim that the policy infringes on free exercise cannot survive. A few examples suffice to illustrate this practice.

Of most relevance to this case is *Locke* v. *Davey*, 540 U. S. 712 (2004), which Montana principally relies on to justify its discriminatory law. In *Locke*, the Court held that prohibiting a student from using a generally available state scholarship to pursue a degree in devotional theology did not violate the student's free exercise rights. This was so, the Court said, in part because it furthered the State's "antiestablishment interests" in avoiding the education of religious ministers. *Id.*, at 722. But no antiestablishment interests, properly understood, were at issue in *Locke*. The State neither coerced students to study devotional theology nor conscripted taxpayers into supporting any form of orthodoxy. Thus, as I have explained, *Locke* incorrectly interpreted the Establishment Clause and should not impact free exercise challenges. *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U. S. 449, 468 (2017) (opinion concurring in part). Yet, as Montana's proffered justification for its law shows, governments continue to rely on *Locke*'s improper understanding of "antiestablishment interests" to defend against free exercise challenges. See Brief for State of Colorado et al. as *Amici Curiae* 3, 10–12 (arguing that *Locke* justifies the 38 state constitutional provisions that are similar to Montana's); see also *Trinity Lutheran Church of Columbia, Inc.* v. *Pauley*, 788 F. 3d 779, 785 (CA8 2015), rev'd and remanded, 582 U. S. 449; *Eulitt* v. *Maine*, 386 F. 3d 344, 354 (CA1 2004); *post*, at 524–527 (BREYER, J., dissenting); *post*, at 546–548 (SOTOMAYOR, J., dissenting).

The Court has also repeatedly stated that a government has a compelling interest in avoiding an Establishment Clause violation altogether, which "may justify" abridging other First Amendment freedoms. See *Good News Club* v. *Milford Central School*, 533 U. S. 98, 112 (2001); *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384, 394 (1993); *Widmar* v. *Vincent*, 454 U. S. 263, 271 (1981). Unsurprisingly, governmental employers have relied on these pronouncements to defeat challenges from employees who alleged violations of their First Amendment rights. See, *e. g.*, *Berry* v. *Department of Social Servs.*, 447 F. 3d 642, 650–651 (CA9 2006); *Knight* v. *Connecticut Dept. of Public Health*, 275 F. 3d 156, 166 (CA2 2001); *Marchi* v. *Board of Cooperative Ed. Servs. of Albany*, 173 F. 3d 469, 475 (CA2 1999).

Finally, this Court's infamous test in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), has sometimes been understood to prohibit governmental practices that have the effect of endorsing religion. See *Lynch* v. *Donnelly*, 465 U. S. 668, 692 (1984) (O'Connor, J., concurring). This, too, presupposes that the Establishment Clause prohibits the government from favoring religion or taking steps to promote it. But as described *supra*, at 490–491, the Establishment Clause does nothing of the sort. The concern with avoiding endorsement has nevertheless been used to prohibit voluntary practices that potentially implicate free exercise rights, with courts and governments going so far as to make the "remarkable" suggestion "that even while off duty, a teacher or coach cannot engage in any outward manifestation of religious faith." *Kennedy* v. *Bremerton School Dist.*, 586 U. S. 1130, 1133 (2019) (ALITO, J., statement respecting denial of certiorari); see *Santa Fe Independent School Dist.* v. *Doe*, 530 U. S. 290, 308 (2000) (voluntary decision to begin football games with a prayer violated the Establishment Clause); see also *Kennedy* v. *Bremerton School Dist.*, 869 F. 3d 813, 831 (CA9 2017) (M. Smith, J., concurring) (coach's decision to lead voluntary

prayer after football games); *Walz* v. *Egg Harbor Twp. Bd. of Ed.*, 342 F. 3d 271, 280 (CA3 2003) (student's decision to distribute small gifts with religious messages to classmates).

II

The Court's current understanding of the Establishment Clause actually thwarts, rather than promotes, equal treatment of religion. Under a proper understanding of the Establishment Clause, robust and lively debate about the role of religion in government is permitted, even encouraged, at the state and local level. The Court's distorted view of the Establishment Clause, however, removes the entire subject of religion from the realm of permissible governmental activity, instead mandating strict separation.

This interpretation of the Establishment Clause operates as a type of content-based restriction on the government. The Court has interpreted the Free Speech Clause to prohibit content-based restrictions because they "value some forms of speech over others," *City of Ladue* v. *Gilleo*, 512 U. S. 43, 60 (1994) (O'Connor, J., concurring), thus tending to "tilt public debate in a preferred direction," *Sorrell* v. *IMS Health Inc.*, 564 U. S. 552, 578–579 (2011). The content-based restriction imposed by this Court's Establishment Clause jurisprudence operates no differently. It communicates a message that religion is dangerous and in need of policing, which in turn has the effect of tilting society in favor of devaluing religion.

Historical evidence suggests that many advocates for this separationist view were originally motivated by hostility toward certain disfavored religions. See P. Hamburger, Separation of Church and State 391–454 (2002). And this Court's adoption of a separationist interpretation has itself sometimes bordered on religious hostility. Justice Black, well known for his role in formulating the Court's modern Establishment Clause jurisprudence, once described Catholic petitioners as "powerful sectarian religious propagandists"

"looking toward complete domination and supremacy" of their "preferences and prejudices." *Board of Ed. of Central School Dist. No. 1* v. *Allen*, 392 U. S. 236, 251 (1968) (dissenting opinion). Other Members of the Court have characterized religions as "divisive forces." *Edwards* v. *Aguillard*, 482 U. S. 578, 584 (1987) (internal quotation marks omitted); *Board of Ed. of Westside Community Schools (Dist. 66)* v. *Mergens*, 496 U. S. 226, 287 (1990) (Stevens, J., dissenting) (internal quotation marks omitted); *Illinois ex rel. McCollum* v. *Board of Ed. of School Dist. No. 71, Champaign Cty.*, 333 U. S. 203, 231 (1948) (Frankfurter, J., concurring). And the Court once described a statute permitting employees to request accommodations to avoid work on the Sabbath as "arm[ing]" religious employees with the "absolute and unqualified right" to pursue their religion "over all other interests." *Estate of Thornton* v. *Caldor, Inc.*, 472 U. S. 703, 709–711 (1985). The siren song of religion is apparently so strong that we once held that public school teachers cannot provide assistance at parochial schools, lest they "subtly (or overtly) conform their instruction to the environment in which they teach." *School Dist. of Grand Rapids* v. *Ball*, 473 U. S. 373, 388 (1985), overruled by *Agostini* v. *Felton*, 521 U. S. 203, 235 (1997). In the Court's view, "[t]he 'atmosphere' of a Catholic school ha[d] such power to influence the unsuspecting mind that it may move even public school . . . specialists to 'conform'—though their only contact with the school is to walk down its halls." McConnell, Religious Freedom at a Crossroads, 59 U. Chi. L. Rev. 115, 122 (1992).

Although such hostility may not be overtly expressed by the Court any longer, manifestations of this "trendy disdain for deep religious conviction" assuredly live on. *Locke*, 540 U. S., at 733 (Scalia, J., dissenting). They are evident in the fact that, unlike other constitutional rights, the mere exposure to religion can render an "'offended observer'" sufficiently injured to bring suit against the government, *American Legion*, 588 U. S., at 80 (GORSUCH, J., concurring in

judgment), even if he has not been coerced in any way to participate in a religious practice, *Lee*, 505 U. S., at 584; *Engel* v. *Vitale*, 370 U. S. 421, 430 (1962).[2] We also see them in the special privilege of taxpayer standing in Establishment Clause challenges, even though such suits directly contravene Article III's restrictions on standing. See *Hein* v. *Freedom From Religion Foundation, Inc.*, 551 U. S. 587, 618 (2007) (Scalia, J., concurring in judgment); see also *Bowen* v. *Kendrick*, 487 U. S. 589, 618–620 (1988); *Flast* v. *Cohen*, 392 U. S. 83, 102–104 (1968). And they persist in the repeated denigration of those who continue to adhere to traditional moral standards, as well as laws even remotely influenced by such standards, as outmoded at best and bigoted at worst. See *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 584 U. S. 617, 667 (2018) (THOMAS, J., concurring in part and concurring in judgment); *Obergefell* v. *Hodges*, 576 U. S. 644, 712 (2015) (ROBERTS, C. J., dissenting). So long as this hostility remains, fostered by our distorted understanding of the Establishment Clause, free exercise rights will continue to suffer.

* * *

As I have recently explained, this Court has an unfortunate tendency to prefer certain constitutional rights over others. See *United States* v. *Sineneng-Smith*, 590 U. S. 371, 387–388 (2020) (THOMAS, J., concurring). The Free Exercise Clause, although enshrined explicitly in the Constitution, rests on the lowest rung of the Court's ladder of rights, and precariously so at that. Returning the Establishment Clause to its proper scope will not completely rectify the Court's disparate treatment of constitutional rights, but it will go a long

[2] This stands in striking contrast to the Court's view in the free speech context that "the burden normally falls upon the viewer" to avoid offense "simply by averting his eyes." *Hill* v. *Colorado*, 530 U. S. 703, 753, n. 3 (2000) (Scalia, J., dissenting) (quoting *Erznoznik* v. *Jacksonville*, 422 U. S. 205, 210–211 (1975) (quotation altered)).

way toward allowing free exercise of religion to flourish as the Framers intended. I look forward to the day when the Court takes up this task in earnest.

JUSTICE ALITO, concurring.

I join the opinion of the Court in full. The basis of the decision below was a Montana constitutional provision that, according to the Montana Supreme Court, prohibits parents from participating in a publicly funded scholarship program simply because they send their children to religious schools. Regardless of the motivation for this provision or its predecessor, its application here violates the Free Exercise Clause.

Nevertheless, the provision's origin is relevant under the decision we issued earlier this Term in *Ramos* v. *Louisiana*, 590 U. S. 83 (2020). The question in *Ramos* was whether Louisiana and Oregon laws allowing non-unanimous jury verdicts in criminal trials violated the Sixth Amendment. The Court held that they did, emphasizing that the States originally adopted those laws for racially discriminatory reasons. See *id.*, at 87–89. The role of the Ku Klux Klan was highlighted. See *ibid.*; see also *id.*, at 114–115 (SOTOMAYOR, J., concurring in part); *id.*, at 126–127 (KAVANAUGH, J., concurring in part).

I argued in dissent that this original motivation, though deplorable, had no bearing on the laws' constitutionality because such laws can be adopted for non-discriminatory reasons, and "both States readopted their rules under different circumstances in later years." *Id.*, at 142. But I lost, and *Ramos* is now precedent. If the original motivation for the laws mattered there, it certainly matters here.

The origin of Montana's "no-aid" provision, Mont. Const., Art. X, § 6(1) (1972), is emphasized in petitioners' brief and in the briefs of numerous supporting *amici*. See Brief for Petitioners 31–45; Brief for United States as *Amicus Curiae* 1–2, 25; Brief for Center for Constitutional Jurisprudence as *Amicus Curiae* 10–12; Brief for Pioneer Institute, Inc., as *Amicus Curiae* 5–17; Brief for Cato Institute as *Amicus Cu-*

riae 2; Brief for State of Oklahoma et al. as *Amici Curiae* 16; Brief for Montana Catholic School Parents et al. as *Amici Curiae* 21–25; Brief for Senator Steve Daines et al. as *Amici Curiae* 1–27 (Sen. Daines Brief); Brief for Becket Fund for Religious Liberty as *Amicus Curiae* 4–20 (Becket Fund Brief); Brief for the Rutherford Institute as *Amicus Curiae* 2–10; Brief for Georgia Goal Scholarship Program, Inc., as *Amicus Curiae* 1–5, 16–21; Brief for Liberty Justice Center et al. as *Amici Curiae* 16–17; Brief for Alliance for Choice in Education as *Amicus Curiae* 4–8; Brief for Independence Institute as *Amicus Curiae* 4–26 (Independence Institute Brief); Brief for Jewish Coalition for Religious Liberty as *Amicus Curiae* 1–5; Brief for Rusty Bowers et al. as *Amici Curiae* 8–9; Brief for Center for Education Reform et al. as *Amici Curiae* 21–27 (CER Brief); Brief for Montana Family Foundation as *Amicus Curiae* 9–13; Brief for Arizona Christian School Tuition Organization et al. as *Amici Curiae* 14–22; Brief for Justice and Freedom Fund et al. as *Amici Curiae* 22–23; Brief for 131 Current and Former State Legislators as *Amici Curiae* 2–10.

These briefs, most of which were not filed by organizations affiliated with the Catholic Church, point out that Montana's provision was modeled on the failed Blaine Amendment to the Constitution of the United States. Named after House Speaker James Blaine, the Congressman who introduced it in 1875, the amendment was prompted by virulent prejudice against immigrants, particularly Catholic immigrants. In effect, the amendment would have "bar[red] any aid" to Catholic and other "sectarian" schools. *Mitchell* v. *Helms*, 530 U. S. 793, 828 (2000) (plurality opinion). As noted in a publication from the United States Commission on Civil Rights, a prominent supporter of this ban was the Ku Klux Klan.[1]

The Blaine Amendment was narrowly defeated, passing in the House but falling just short of the two-thirds majority

[1] See U. S. Commission on Civil Rights, School Choice: The Blaine Amendments & Anti-Catholicism 36 (2007).

needed in the Senate to refer the amendment to the States. See 4 Cong. Rec. 5191–5192 (1876) (House vote); *id.*, at 5595 (28 yeas, 16 nays in the Senate). Afterwards, most States adopted provisions like Montana's to achieve the same objective at the state level, often as a condition of entering the Union. Thirty-eight States still have these "little Blaine Amendments" today. See App. D to Brief for Respondents.

This history is well-known and has been recognized in opinions of this Court. See, *e. g.*, *Locke* v. *Davey*, 540 U. S. 712, 723, n. 7 (2004); *Mitchell*, 530 U. S., at 828–829 (plurality opinion); see also *ante*, at 482; *Zelman* v. *Simmons-Harris*, 536 U. S. 639, 720–721 (2002) (BREYER, J., dissenting). But given respondents' and one dissent's efforts to downplay it in contravention of *Ramos*, see Brief for Respondents 16–23; *post*, at 542, n. 2 (SOTOMAYOR, J., dissenting), it deserves a brief retelling.

A wave of immigration in the mid-19th century, spurred in part by potato blights in Ireland and Germany, significantly increased this country's Catholic population.[2] Nativist fears increased with it. An entire political party, the Know Nothings, formed in the 1850s "to decrease the political influence of immigrants and Catholics," gaining hundreds of seats in Federal and State Government.[3]

Catholics were considered by such groups not as citizens of the United States, but as "soldiers of the Church of Rome,"[4] who "would attempt to subvert representative government."[5] Catholic education was a particular concern. As one series of newspaper articles argued, "'Popery is the natural enemy of *general* education. . . . If it is establishing schools, it is to make them *prisons* of the youthful intellect

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[2] See T. Anbinder, Nativism and Slavery: The Northern Know Nothings and the Politics of the 1850s, pp. 6–8 (1992).

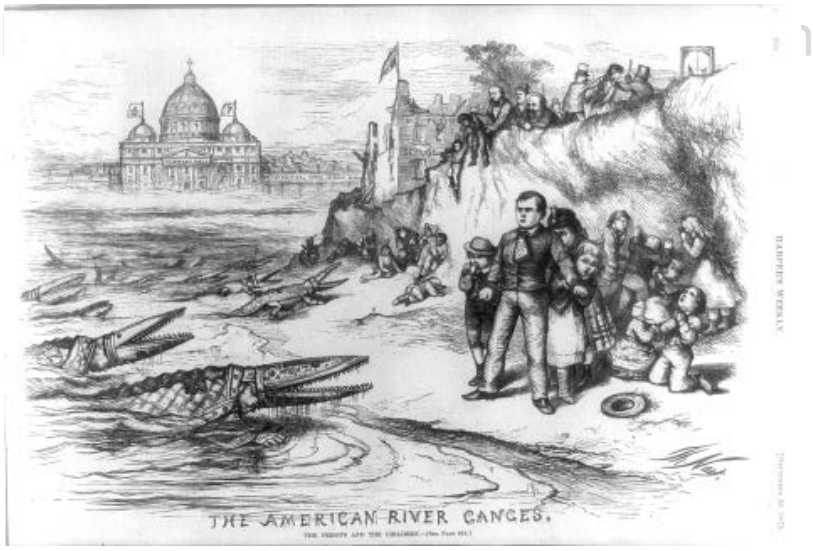
[3] *Id.*, at 127–128, 135.

[4] *Id.*, at 110 (emphasis deleted).

[5] P. Hamburger, Separation of Church and State 206 (2002).

of the country.'" C. Glenn, The Myth of the Common School 69 (1988) (Glenn) (quoting S. Morse, Foreign Conspiracy Against the Liberties of the United States (1835)). With a Catholic school breaking ground in New York City, the New York Times ran an article titled "Sectarian Education. Anti-Public School Crusade. Aggressive Attitude of the Roman Catholic Clergy—The Terrors of the Church Threatened." N. Y. Times, Aug. 24, 1873, p. 8. The project, the article concluded, would cause "intense anxiety by all who are interested in upholding the admirable system of public school education." *Ibid.*

The feelings of the day are perhaps best encapsulated by this famous cartoon, published in Harper's Weekly in 1871, which depicts Catholic priests as crocodiles slithering hungrily toward American children as a public school crumbles in the background:



The resulting wave of state laws withholding public aid from "sectarian" schools cannot be understood outside this context. Indeed, there are stronger reasons for considering

original motivations here than in *Ramos* because, unlike the neutral language of Louisiana's and Oregon's nonunanimity rules, Montana's no-aid provision retains the bigoted code language used throughout State Blaine Amendments.

The failed Blaine Amendment would have prohibited any public funds or lands devoted to schooling from "ever be[ing] under the control of any religious sect." 4 Cong. Rec. 205 (1875). As originally adopted, Montana's Constitution prohibited the state and local governments from "ever mak[ing,] directly or indirectly, any appropriation" for "any sectarian purpose" or "to aid in the support of any school . . . controlled in whole or in part by any church, sect or denomination whatever." Mont. Const., Art. XI, § 8 (1889). At the time, "it was an open secret that 'sectarian' was code for 'Catholic.'" *Mitchell*, 530 U. S., at 828 (plurality opinion). Dictionaries defined a "sectarian" as a member "of a party in religion which has separated itself from the established church, or which holds tenets different from those of the prevailing denomination in a kingdom or state"—a heretic. N. Webster, An American Dictionary of the English Language (1828); see also Independence Institute Brief 9–16 (collecting several similar definitions). Newspapers throughout the country, including in Montana, used the word in similarly pejorative fashion. See *id.*, at 17–26 (collecting several articles). The term was likewise used against Mormons and Jews.[6]

Backers of the Blaine Amendment either held nativist views or capitalized on them. When Blaine introduced the amendment, The Nation reported that it was "a Constitutional amendment directed against the Catholics"—while surmising that Blaine, whose Presidential ambitions were known, sought "to use it in the campaign to catch anti-

[6] See Natelson, Why Nineteenth Century Bans on "Sectarian" Aid Are Facially Unconstitutional: New Evidence on Plain Meaning, 19 Federalist Soc. Rev. 98, 104 (2018).

Catholic votes."[7] The amendment had its intended galvanizing effect. "Its popularity was so great" that "even congressional Democrats," who depended on Catholic votes, "were expected to support it," and the congressional floor debates were rife with anti-Catholic sentiment, including "a tirade against Pope Pius IX."[8]

Montana's no-aid provision was the result of this same prejudice. When Congress allowed Montana into the Union in 1889, it still included prominent supporters of the failed Blaine Amendment. See Sen. Daines Brief 10–13. The Act enabling Montana to become a State required "[t]hat provision shall be made for the establishment and maintenance of systems of public schools . . . free from sectarian control." Act of Feb. 22, 1889, § 4, 25 Stat. 677; see also Becket Fund Brief 17–18 (quoting one Senator's description of the Act as "'completing the unfinished work of the failed Blaine Amendment'"). Montana thereafter adopted its constitutional rule against public funding for any school "controlled" by a "sect." Mont. Const., Art. XI, § 8 (1889). There appears to have been no doubt which schools that meant. As petitioners show, Montana's religious schools—and its private schools in general—were predominantly Catholic, see Brief for Petitioners 42, and n. 41, and anti-Catholicism was alive in Montana too. See, *e. g.*, Sen. Daines Brief 1–3 (describing a riot over an anti-Catholic sign hung over a Butte saloon on Independence Day, 1894).

Respondents argue that Montana's no-aid provision merely reflects a state interest in "preserv[ing] funding for public schools," Brief for Respondents 7, known as common schools during the Blaine era. Yet just as one cannot separate the Blaine Amendment from its context, "[o]ne cannot

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[7] Green, The Blaine Amendment Reconsidered, 36 Am. J. Legal Hist. 38, 54 (1992) (quoting article; internal quotation marks omitted).

[8] DeForrest, An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns, 26 Harv. J. L. & Pub. Pol'y 551, 566, 570 (2003); see also, *e. g.*, Becket Fund Brief 5–11.

separate the founding of the American common school and the strong nativist movement."[9]

Spearheaded by Horace Mann, Secretary of the Massachusetts Board of Education from 1837 to 1848, the common-school movement did not aim to establish a system that was scrupulously neutral on matters of religion. (In a country like ours, that would have been exceedingly difficult, if not impossible.) Instead the aim was to establish a system that would inculcate a form of "least-common-denominator Protestantism."[10] This was accomplished with daily reading from the King James Bible, a curriculum that, Mann said, let the book "speak for itself." 4 Life and Works of Horace Mann 312 (1891) (Mann's 12th annual report on the Massachusetts schools; emphasis deleted). Yet it was an affront to many Christians and especially Catholics, not to mention non-Christians.[11]

Mann's goal was to "Americanize" the incoming Catholic immigrants. In fact, he and other proponents of the common-school movement used language and made insinuations that today would be considered far more inflammatory. In his 10th annual report on the Massachusetts schools, Mann described the State as "parental," assuming the responsibility of weaning children "[f]or the support of the poor, nine-tenths of whose cost originate with foreigners or come from one prolific vice," meaning alcohol. *Id.*, at 132, 134 (emphasis deleted). In other writing, he described the common-school movement as "'laboring to elevate mankind into the upper and purer re-

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[9] Viteritti, Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law, 21 Harv. J. L. & Pub. Pol'y 657, 667 (1998) (Viteritti, Blaine's Wake).

[10] Jeffries & Ryan, A Political History of the Establishment Clause, 100 Mich. L. Rev. 279, 298 (2001) (Jeffries & Ryan); see also, *e. g.*, CER Brief 23–26.

[11] See Glenn 166; Lain, God, Civic Virtue, and the American Way: Reconstructing *Engel*, 67 Stan. L. Rev. 479, 487–488 (2015).

gions of civilization, Christianity, and the worship of the true God; all those who are obstructing the progress of this cause are impelling the race backwards into barbarism and idolatry.'" Glenn 171–172 (quoting an 1846 article by Mann in the Common School Journal).

These "obstructers" were Catholic and other religious groups and families who objected to the common schools' religious programming, which, as just seen, was not neutral on matters of religion. Objections met violent response. In Massachusetts and elsewhere, Catholic students were beaten and expelled for refusing to read from the King James Bible.[12] In New York, a mob destroyed the residence of Bishop John Hughes, who had argued that, if the State was going to fund religious public education, it should also support church schools. The militia needed to be called to protect St. Patrick's Cathedral.[13] Most notorious were the Philadelphia Bible Riots. In 1844, a rumor circulated in the city's nativist newspapers that a school director, who was Catholic, had ordered that Bible reading be stopped.[14] Months of scaremongering broke out into riots that left two of the city's Catholic churches burned and several people dead. Only by calling out the militia and positioning a cannon in front of a Catholic church—which itself had been taking cannon fire—were the riots ultimately quelled.[15]

Catholic and Jewish schools sprang up because the common schools were not neutral on matters of religion. "Faced with public schools that were culturally Protestant and with curriculum[s] and textbooks that were, consequently, rife with material that Catholics and Jews found offensive, many

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[12] See Jeffries & Ryan 300.

[13] See Viteritti, Choosing Equality: School Choice, the Constitution, and Civil Society 151 (1999).

[14] See Sekulow & Tedesco, The Story Behind *Vidal* v. *Girard*'s Executors: Joseph Story, the Philadelphia Bible Riots, and Religious Liberty, 32 Pepperdine L. Rev. 605, 630 (2005).

[15] See *id.*, at 633–638.

Catholics and Orthodox Jews created separate schools," and those "who could afford to do so sent their children to" those schools.[16]

But schools require significant funding, and when religious organizations requested state assistance, Mann and others labeled them "sectarian"—that is, people who had separated from the prevailing orthodoxy. See, *e. g.*, Jeffries & Ryan 298, 301. The Blaine movement quickly followed. In 1854, the Know Nothing party, in many ways a forerunner of the Ku Klux Klan,[17] took control of the legislature in Mann's Commonwealth of Massachusetts and championed one of the first constitutional bans on aid to "sectarian" schools (along with attempting to limit the franchise to native-born people). See Viteritti, Blaine's Wake 669–670.

Respondents and one dissent argue that Montana's no-aid provision was cleansed of its bigoted past because it was readopted for non-bigoted reasons in Montana's 1972 constitutional convention. See *post*, at 541–542, n. 2 (opinion of SOTOMAYOR, J.); see also Brief for Respondents 18; Tr. of Oral Arg. 22–23. They emphasize that the convention included Catholics, just as the constitutional convention that readopted Louisiana's purportedly racist non-unanimous jury provision included black delegates. As noted, a virtually identical argument was rejected in *Ramos*, even though "'no mention was made of race'" during the Louisiana convention debates. 590 U. S., at 142 (ALITO, J., dissenting) (quoting *State* v. *Hankton*, 2012–0375, p. 19 (La. App. 4 Cir. 8/2/13), 122 So. 3d 1028, 1038). Under *Ramos*, it emphatically does not matter whether Montana readopted the no-aid provision for benign reasons. The provision's "uncomfortable past"

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[16] Brief for Union of Orthodox Jewish Congregations of America as *Amicus Curiae* in *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, O. T. 2016, No. 15–577, p. 15 (internal quotation marks, citation, and brackets omitted).

[17] See generally Myers, Know Nothing and Ku Klux Klan, 219 North Am. Rev. 1 (Jan. 1924).

must still be "[e]xamined." 590 U. S., at 99, n. 44 (opinion of the Court). And here, it is not so clear that the animus was scrubbed.

Delegates at Montana's constitutional convention in 1972 acknowledged that the no-aid provision was "a badge of bigotry," with one Catholic delegate recalling "being let out of school in the fourth grade to erase three 'Ks' on the front doors of the Catholic church in Billings."[18] Nevertheless the convention proposed, and the State adopted, a provision with the *same* material language, prohibiting public aid "for any *sectarian* purpose or to aid any . . . school . . . controlled in whole or in part by any church, *sect*, or denomination." Mont. Const., Art. X, § 6(1) (1972) (emphasis added). A leading definition of "sect" at the time, as during the Blaine era, was "a dissenting religious body; *esp: one that is heretical in the eyes of other members within the same communion.*" Webster's Third New International Dictionary 2052 (1971) (some emphasis added).

Given the history above, the terms "sect" and "sectarian" are disquieting remnants. And once again, there appears to have been little doubt which schools this provision would predominantly affect. In 1970, according to the National Center for Educational Statistics, Montana had 61 religiously affiliated schools. Forty-five were Roman Catholic.[19] Not only did the convention delegates acknowledge the no-aid provision's original anti-Catholic intent, but the Montana Su-

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[18] 6 Montana Constitutional Convention 1971–1972, Proceedings and Transcript, p. 2012 (Mont. Legislature and Legislative Council) (Convention Tr.) (statement of Delegate Schiltz); see also, *e. g.*, *id.*, at 2010 (statement of Delegate Harbaugh) (recognizing the provision as a Blaine Amendment, which "espoused the purpose of the Know-nothing Party"); *id.*, at 2011 (statement of Delegate Toole) (recognizing the provision as a Blaine Amendment); *id.*, at 2013 (statement of Chairman Graybill) (same); *id.*, at 2027 (statement of Delegate Campbell) (same); *id.*, at 2030 (statement of Delegate Champoux) (same).

[19] See Nat. Center for Educational Statistics, Statistics of Nonpublic Elementary and Secondary Schools 1970–71, pp. 32–33 (1973) (Table 1).

preme Court had only ever applied the provision once—to a Catholic school, and one that had "carrie[d] a sizeable portion of the total educational load" in Anaconda, Montana. *State ex rel. Chambers* v. *School Dist. No. 10 of Deer Lodge Cty.*, 155 Mont. 422, 430, 472 P. 2d 1013, 1017 (1970) (*per curiam*). The Montana Catholic Conference also voiced concerns about access to school funds, and a convention delegate proposed removing the no-aid provision's restriction on "indirect" aid. See Convention Tr. 2010, 2027. That amendment was rejected.

Thus, the no-aid provision's terms keep it "[t]ethered" to its original "bias," and it is not clear at all that the State "actually confront[ed]" the provision's "tawdry past in reenacting it." *Ramos*, 590 U. S., at 507 (SOTOMAYOR, J., concurring in part). After all, whereas the no-aid provision had originally been foisted on Montana, the State readopted it voluntarily—"sectarian" references included. Whether or not the State did so for any reason that could be called legitimate, the convention delegates recognized that the provision would "continue to mean and do whatever it does now," Convention Tr. 2014 (statement of Delegate Loendorf), and the discrimination in this case shows that the provision continues to have its originally intended effect. And even if Montana had done more to address its no-aid provision's past, that would of course do nothing to resolve the bias inherent in the Blaine Amendments among the 17 States, by respondents' count, that have not readopted or amended them since around the turn of the 20th century.[20]

[20] Ala. Const., Art. XIV, §263 (1901); Ariz. Const., Art. II, §12, Art. IX, §10 (1912); Colo. Const., Art. V, §34, Art. IX, §7 (1876); Del. Const., Art. X, §3 (1897); Ind. Const., Art. I, §6 (1851); Ky. Const. §189 (1891); Miss. Const., Art. 8, §208 (1890); Nev. Const., Art. XI, §10 (1880); N. H. Const., Pt. II, Art. 83 (1877); N. M. Const., Art. XII, §3 (1911); N. D. Const., Art. VIII, §152 (1889); Ohio Const., Art. VI, §2 (1851); Okla. Const., Art. II, §5 (1907); Ore. Const., Art. I, §5 (1857); S. D. Const., Art. VIII, §16 (1889); Wis. Const., Art. I, §18, Art. X, §3 (1848); Wyo. Const., Art. I, §19, Art. VII, §8 (1889).

Today's public schools are quite different from those envisioned by Horace Mann, but many parents of many different faiths still believe that their local schools inculcate a worldview that is antithetical to what they teach at home. Many have turned to religious schools, at considerable expense, or have undertaken the burden of homeschooling. The tax-credit program adopted by the Montana Legislature but overturned by the Montana Supreme Court provided necessary aid for parents who pay taxes to support the public schools but who disagree with the teaching there. The program helped parents of modest means do what more affluent parents can do: send their children to a school of their choice. The argument that the decision below treats everyone the same is reminiscent of Anatole France's sardonic remark that "'[t]he law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.'" J. Cournos, A Modern Plutarch 35 (1928).

JUSTICE GORSUCH, concurring.

The people of Montana, acting through their legislature, adopted a school choice program. It provided a modest tax credit to individuals and businesses who donated to nonprofit scholarship organizations. As the program began to take root, Montana had just one scholarship organization. It granted scholarships to families who were struggling financially or had children with disabilities. Recipients were free to use the scholarships at the schools of their choice. Some families chose secular schools, others religious ones.

Kendra Espinoza, the lead petitioner in this case, is a single mother who works three jobs. She planned to use scholarships to help keep her daughters at an accredited religious school. That is, until the Montana Supreme Court struck down the tax credit program. Those seeking a tax credit were free to choose whether to direct their donations to the independent scholarship organization; the organization was

then free to choose scholarship recipients; and, after that, parents were free to choose where to use those scholarships. But, the Montana Supreme Court held, this arrangement impermissibly allowed state funds to find their way to religious schools, in violation of a state constitutional provision. By way of remedy, the court ordered an end to the tax credit program, effectively killing Montana's school choice experiment: Without tax credits, donations dry up, and so do the scholarships enabling school choice.

Today, the Court explains how the Montana Constitution, as interpreted by the State Supreme Court, violates the First Amendment by discriminating against parents and schools based on their religious status or identity. The Court explains, too, why the State Supreme Court's decision to eliminate the tax credit program fails to mask the discrimination. But for the Montana Constitution's impermissible discrimination, after all, the legislature's tax credit and scholarship program would be still operating for the benefit of Ms. Espinoza and everyone else. I agree with all the Court says on these scores and join its opinion in full. I write separately only to address an additional point.

The Court characterizes the Montana Constitution as discriminating against parents and schools based on "religious status and not religious use." *Ante*, at 477. No doubt, the Court proceeds as it does to underscore how the outcome of this case follows from *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U. S. 449 (2017), where the Court struck down a similar public benefits restriction that, it held, discriminated on the basis of religious status. No doubt, too, discrimination on the basis of religious status raises grave constitutional questions for the reasons the Court describes. But I was not sure about characterizing the State's discrimination in *Trinity Lutheran* as focused only on religious status, and I am even less sure about characterizing the State's discrimination here that way. See *id.*, at 469 (GORSUCH, J., concurring in part).

In the first place, discussion of religious activity, uses, and conduct—not just status—pervades this record. The Montana Constitution forbids the use of public funds "for any sectarian purpose," including to "aid" sectarian schools. Art. X, § 6(1). Tracking this directive, the State Supreme Court reasoned that the legislature's tax credit program could be used to "subsidiz[e] the sectarian school's educational program" and thereby "strengthen . . . religious education." 393 Mont. 446, 466, 467, 435 P. 3d 603, 613, 614 (2018). Meanwhile, Ms. Espinoza admits that she would like to use scholarship funds to enable her daughters to be taught in school the "same Christian values" they are taught at home. App. to Pet. for Cert. 152. Finally, in its briefing before this Court, Montana has represented that its Constitution focuses on preventing the use of tax credits to subsidize religious activity.

Not only is the record replete with discussion of activities, uses, and conduct, any jurisprudence grounded on a status-use distinction seems destined to yield more questions than answers. Does Montana seek to prevent religious parents and schools from participating in a public benefits program (status)? Or does the State aim to bar public benefits from being employed to support religious education (use)? Maybe it's possible to describe what happened here as status-based discrimination. But it seems equally, and maybe more, natural to say that the State's discrimination focused on what religious parents and schools *do*—teach religion. Nor are the line-drawing challenges here unique; they have arisen before and will again. See *Trinity Lutheran*, 582 U. S., at 469 (opinion of GORSUCH, J.).

Most importantly, though, it is not as if the First Amendment cares. The Constitution forbids laws that prohibit the free exercise of religion. That guarantee protects not just the right to *be* a religious person, holding beliefs inwardly and secretly; it also protects the right to *act* on those beliefs outwardly and publicly. At the time of the First Amendment's adoption, the word "exercise" meant (much as it

means today) some "[l]abour of the body," a "[u]se," as in the "actual application of any thing," or a "[p]ractice," as in some "outward performance." 1 S. Johnson, A Dictionary of the English Language (4th ed. 1773); see also *ibid.* (5th ed. 1784). By speaking of a right to "free exercise," rather than a right "of conscience," an alternative the framers considered and rejected, our Constitution "extended the broader freedom of action to all believers." McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1490 (1989). So whether the Montana Constitution is better described as discriminating against religious status or use makes no difference: It is a violation of the right to free exercise either way, unless the State can show its law serves some compelling and narrowly tailored governmental interest, conditions absent here for reasons the Court thoroughly explains.

Our cases have long recognized the importance of protecting religious actions, not just religious status. In its very first decision applying the Free Exercise Clause to the States, the Court explained that the First Amendment protects the "freedom to act" as well as the "freedom to believe." *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940). The Court then reversed a criminal conviction against Newton Cantwell and his sons, Jehovah's Witnesses who were prosecuted not because of who they were but because of what they did—proselytize door to door without a license. See *id.*, at 300–301, 307, 311. In fact, this Court has already recognized that parents' decisions about the education of their children—the very conduct at issue here—can constitute protected religious activity. In *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972), the Court held that Amish parents could not be compelled to send their children to a public high school if doing so would conflict with the dictates of their faith. See *id.*, at 214–215, 220, 234–235.

Even cases that seemingly focus on religious status do so with equal respect for religious actions. In *McDaniel* v.

Paty, 435 U. S. 618 (1978) (plurality opinion), for example, a State had barred the clergy from serving in the state legislature or at the state constitutional convention. See *id.*, at 620–622. Some have described the discrimination there as focused on religious "'status.'" *Trinity Lutheran*, 582 U. S., at 459 (quoting *McDaniel*, 435 U. S., at 627) (emphasis deleted). But no one can question that conduct lurked just beneath the surface. After all, the State identified clergy based on their "conduct and activity," and the plurality opinion concluded that the State's prohibition was based on "status, acts, and conduct." *Id.*, at 627; see also *id.*, at 630–633 (Brennan, J., concurring in judgment); *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520 (1993).

Consistently, too, we have recognized the First Amendment's protection for religious conduct in public benefits cases. When the government chooses to offer scholarships, unemployment benefits, or other affirmative assistance to its citizens, those benefits necessarily affect the "baseline against which burdens on religion are measured." *Locke* v. *Davey*, 540 U. S. 712, 726 (2004) (Scalia, J., dissenting) (citing *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1, 16 (1947)). So, as we have long explained, the government "penalize[s] religious activity" whenever it denies to religious persons an "equal share of the rights, benefits, and privileges enjoyed by other citizens." *Lyng* v. *Northwest Indian Cemetery Protective Assn.*, 485 U. S. 439, 449 (1988). What benefits the government decides to give, whether meager or munificent, it must give without discrimination against religious conduct.

Our cases illustrate the point. In *Sherbert* v. *Verner*, 374 U. S. 398 (1963), for example, a State denied unemployment benefits to Adell Sherbert not because she was a Seventh-day Adventist but because she had put her faith into practice by refusing to labor on the day she believed God had set aside for rest. See *id.*, at 399–401. Recognizing her right to exercise her religion freely, the Court held that Ms. Sher-

bert was entitled to benefits. See *id.*, at 410. Similarly, in *Thomas* v. *Review Bd. of Ind. Employment Security Div.*, 450 U. S. 707 (1981), the Court held that Eddie Thomas had the right to resign from his job and still collect an unemployment check after he decided he could not assemble military tank turrets consistent with the teachings of his faith. See *id.*, at 709–712, 720. In terms that speak equally to our case, the Court explained that the government tests the Free Exercise Clause whenever it "conditions receipt of an important benefit upon conduct proscribed by a religious faith, or . . . denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Id.*, at 717–718.

The First Amendment protects religious uses and actions for good reason. What point is it to tell a person that he is free to *be* Muslim but he may be subject to discrimination for *doing* what his religion commands, attending Friday prayers, living his daily life in harmony with the teaching of his faith, and educating his children in its ways? What does it mean to tell an Orthodox Jew that she may have her religion but may be targeted for observing her religious calendar? Often, governments lack effective ways to control what lies in a person's heart or mind. But they can bring to bear enormous power over what people say and do. The right to *be* religious without the right to *do* religious things would hardly amount to a right at all.

If the government could intrude so much in matters of faith, too, winners and losers would soon emerge. Those apathetic about religion or passive in its practice would suffer little in a world where only inward belief or status is protected. But what about those with a deep faith that requires them to do things passing legislative majorities might find unseemly or uncouth—like knocking on doors to spread their beliefs, refusing to build tank turrets during wartime, or teaching their children at home? "[T]hose who take their

religion seriously, who think that their religion should affect the whole of their lives," and those whose religious beliefs and practices are least popular, would face the greatest disabilities. *Mitchell* v. *Helms*, 530 U. S. 793, 827–828 (2000) (plurality opinion). A right meant to protect minorities instead could become a cudgel to ensure conformity.

It doesn't take a long or searching look through history or around the world to see how this can go. In the century before our Nation's founding, Oliver Cromwell promised to Catholics in Ireland: "'As to freedom of conscience, I meddle with no man's conscience; but if you mean by that, liberty to celebrate the Mass, I would have you understand that in no place where the power of the Parliament of England prevails shall that be permitted.'" *McDaniel*, 435 U. S., at 631, n. 2 (opinion of Brennan, J.) (quoting S. Hook, Paradoxes of Freedom 23 (1962)); see also 1 T. Carlyle, Oliver Cromwell's Letters and Speeches 395 (1845) (recording Cromwell's October 19, 1649, letter to the Governor of Ross). Even today, in fiefdoms small and large, people of faith are made to choose between receiving the protection of the State and living lives true to their religious convictions.

Of course, in public benefits cases like the one before us the stakes are not so dramatic. Individuals are forced only to choose between forgoing state aid or pursuing some aspect of their faith. The government does not put a gun to the head, only a thumb on the scale. But, as so many of our cases explain, the Free Exercise Clause doesn't easily tolerate either; any discrimination against religious exercise must meet the demands of strict scrutiny. In this way, the Clause seeks to ensure that religion remains "a matter of voluntary choice by individuals and their associations, [where] each sect . . . 'flourish[es] according to the zeal of its adherents and the appeal of its dogma,'" influenced by neither where the government points its gun nor where it places its thumb. *McDaniel*, 435 U. S., at 640 (opinion of Brennan J.) (quoting *Zorach* v. *Clauson*, 343 U. S. 306, 313 (1952)).

Montana's Supreme Court disregarded these foundational principles. Effectively, the court told the state legislature and parents of Montana like Ms. Espinoza: You can have school choice, but if anyone dares to choose to send a child to an accredited religious school, the program will be shuttered. That condition on a public benefit discriminates against the free exercise of religion. Calling it discrimination on the basis of religious status or religious activity makes no difference: It is unconstitutional all the same.

JUSTICE GINSBURG, with whom JUSTICE KAGAN joins, dissenting.

The Montana Legislature enacted a scholarship program to fund tuition for students attending private secondary schools. See Mont. Code Ann. § 15–30–3111 (2019). In the decision below, the Montana Supreme Court struck down that program in its entirety. The program, the state court ruled, conflicted with the State Constitution's no-aid provision, which forbids government appropriations to religious schools. Mont. Const., Art. X, § 6(1). Parents who sought to use the program's scholarships to fund their children's religious education challenged the state court's ruling. They argue in this Court that the Montana court's application of the no-aid provision violated the Free Exercise Clause of the Federal Constitution. Importantly, the parents, petitioners here, disclaim any challenge to the no-aid provision on its face. They instead argue—and this Court's majority accepts—that the provision is unconstitutional as applied because the First Amendment prohibits discrimination in tuition-benefit programs based on a school's religious status. Because the state court's decision does not so discriminate, I would reject petitioners' free exercise claim.

The First Amendment prohibits the government from "mak[ing a] law . . . prohibiting the free exercise" of religion. U. S. Const., Amdt. 1. This Court's decisions have recognized that a burden on religious exercise may occur both

when a State proscribes religiously motivated activity and when a law pressures an adherent to abandon her religious faith or practice. *Sherbert* v. *Verner*, 374 U. S. 398, 406 (1963); *Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U. S. 136, 140–141 (1987). The Free Exercise Clause thus protects against "indirect coercion or penalties on the free exercise of religion." *Lyng* v. *Northwest Indian Cemetery Protective Assn.*, 485 U. S. 439, 450 (1988). Invoking that principle in *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U. S. 449 (2017), the Court observed that disqualifying an entity from a public benefit "solely because of [the entity's] religious character" can impose "a penalty on the free exercise of religion." *Id.*, at 462. The Court then concluded that a Missouri law making churches ineligible for a government playground-refurbishing grant impermissibly burdened the church's religious exercise by "put[ting it] to the choice between being a church and receiving a government benefit." *Id.*, at 465.

Petitioners argue that the Montana Supreme Court's decision fails when measured against *Trinity Lutheran*. I do not see how. Past decisions in this area have entailed *differential treatment* occasioning a burden on a plaintiff's religious exercise. *Lyng*, 485 U. S., at 450–451; *Trinity Lutheran*, 582 U. S., at 463. This case is missing that essential component. Recall that the Montana court remedied the state constitutional violation by striking the scholarship program in its entirety. Under that decree, secular and sectarian schools alike are ineligible for benefits, so the decision cannot be said to entail differential treatment based on petitioners' religion. Put somewhat differently, petitioners argue that the Free Exercise Clause requires a State to treat institutions and people neutrally when doling out a benefit—and neutrally is how Montana treats them in the wake of the state court's decision.

Accordingly, the Montana Supreme Court's decision does not place a burden on petitioners' religious exercise. Peti-

tioners may still send their children to a religious school. And the Montana Supreme Court's decision does not pressure them to do otherwise. Unlike the law in *Trinity Lutheran*, the decision below puts petitioners to no "choice": Neither giving up their faith, nor declining to send their children to sectarian schools, would affect their entitlement to scholarship funding. 582 U. S., at 462. There simply are no scholarship funds to be had.

True, petitioners expected to be eligible for scholarships under the legislature's program, and to use those scholarships at a religious school. And true, the Montana court's decision disappointed those expectations along with those of parents who send their children to secular private schools. But, as JUSTICE SOTOMAYOR observes, see *post*, at 540 (dissenting opinion), this Court has consistently refused to treat neutral government action as unconstitutional solely because it fails to benefit religious exercise. See *Sherbert*, 374 U. S., at 412 (Douglas, J., concurring) ("[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.").

These considerations should be fatal to petitioners' free exercise claim, yet the Court does not confront them. Instead, the Court decides a question that, in my view, this case does not present: "[W]hether excluding religious schools and affected families from [the scholarship] program was consistent with the Federal Constitution." *Ante*, at 474 (majority opinion). The Court goes on to hold that the Montana Supreme Court's application of the no-aid provision violates the Free Exercise Clause because it "'condition[s] the availability of benefits upon a recipient's willingness to surrender [its] religiously impelled status.'" *Ante*, at 478 (quoting *Trinity Lutheran*, 582 U. S., at 461–462; some alterations omitted). As I see it, the decision below—which maintained neutrality between sectarian and nonsectarian private schools—did no such thing.

Finding the "beginning" of the Montana Supreme Court's decision erroneous, this Court regards the state court's ultimate judgment as irrelevant. *Ante*, at 487–489. In the Court's recounting, the Montana court first held that religious schools must be excluded from the scholarship program—necessarily determining that the Free Exercise Clause permitted that result—and only subsequently struck the entire program as a way of carrying out its holding. See *ante*, at 487–488 ("When the [Montana Supreme] Court was called upon to apply a state law no-aid provision to exclude religious schools from the program, it was obligated by the Federal Constitution to reject the invitation."). But the initial step described by this Court is imaginary. The Montana court determined that the scholarship program violated the no-aid provision because it resulted in aid to religious schools. Declining to rewrite the statute to exclude those schools, the state court struck the program in full. 393 Mont. 446, 463–468, 435 P. 3d 603, 612–614 (2018). In doing so, the court never made religious schools ineligible for an otherwise available benefit, and it never decided that the Free Exercise Clause would allow that outcome.[1]

Thus, contrary to this Court's assertion, see *ante*, at 488, the no-aid provision did not require the Montana Supreme Court to "exclude" religious schools from the scholarship program. The provision mandated only that the state treasury not be used to fund religious schooling. As this case demonstrates, that mandate does not necessarily require differential treatment. The no-aid provision can be imple-

[1] In its opinion, Montana's highest court stated without explanation that this case is not one in which application of the no-aid provision violates the Free Exercise Clause. 393 Mont., at 468, 435 P. 3d, at 614. When the court made that statement, it had already invalidated the entire scholarship program. *Ibid.* Accordingly, the court's statement cannot be understood to have approved of excluding religious schools from an otherwise available scholarship. Instead, the statement is most fairly read to convey that the Free Exercise Clause allows a State to decline to fund any private schools, an outcome that avoids state aid to religious schools.

mented in two ways. A State may distinguish within a benefit program between secular and sectarian schools, or it may decline to fund all private schools. The Court agrees that the First Amendment permits the latter course. See *ante*, at 487. Because that is the path the Montana Supreme Court took in this case, there was no reason for this Court to address the alternative.

By urging that it is impossible to apply the no-aid provision in harmony with the Free Exercise Clause, the Court seems to treat the no-aid provision itself as unconstitutional. See *ante*, at 487–488. Petitioners, however, disavowed a facial First Amendment challenge, and the state courts were never asked to address the constitutionality of the no-aid provision divorced from its application to a specific government benefit. See, *e. g.*, Reply Brief 8, 20, 21–22. This Court therefore had no call to reach that issue. See *Adams* v. *Robertson*, 520 U. S. 83, 90 (1997) (*per curiam*) ("'[I]t would be unseemly in our dual system of government' to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." (quoting *Webb* v. *Webb*, 451 U. S. 493, 500 (1981))). The only question properly raised is whether application of the no-aid provision to bar all state-sponsored private-school funding violates the Free Exercise Clause. For the reasons stated, *supra*, at 516–517, it does not.

Nearing the end of its opinion, the Court writes: "A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious." *Ante*, at 487. Because Montana's Supreme Court did not make such a decision—its judgment put all private-school parents in the same boat—this Court had no occasion to address the matter.[2] On that sole

[2]The Montana Supreme Court's decision leaves parents where they would be had the State never enacted a scholarship program. In that event, no one would argue that Montana was obliged to provide such a program solely for parents who send their children to religious

ground, and reaching no other issue, I dissent from the Court's judgment.

JUSTICE BREYER, with whom JUSTICE KAGAN joins as to Part I, dissenting.

The First Amendment's Free Exercise Clause guarantees the right to practice one's religion. At the same time, its Establishment Clause forbids government support for religion. Taken together, the Religion Clauses have helped our Nation avoid religiously based discord while securing liberty for those of all faiths.

This Court has long recognized that an overly rigid application of the Clauses could bring their mandates into conflict and defeat their basic purpose. See, *e. g.*, *Walz* v. *Tax Comm'n of City of New York*, 397 U. S. 664, 668–669 (1970). And this potential conflict is nowhere more apparent than in cases involving state aid that serves religious purposes or institutions. In such cases, the Court has said, there must be constitutional room, or "'play in the joints,'" between "what the Establishment Clause permits and the Free Exercise Clause compels." *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U. S. 449, 458 (2017) (quoting *Locke* v. *Davey*, 540 U. S. 712, 718 (2004)). Whether a particular state program falls within that space depends upon the nature of the aid at issue, considered in light of the Clauses' objectives.

The majority barely acknowledges the play-in-the-joints doctrine here. It holds that the Free Exercise Clause forbids a State to draw any distinction between secular and religious uses of government aid to private schools that is not required by the Establishment Clause. The majority's approach and its conclusion in this case, I fear, risk the kind of entanglement and conflict that the Religion Clauses are intended to prevent. I consequently dissent.

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schools. But cf. *ante*, at 508 (ALITO, J., concurring) (inapt reference to Anatole France's remark).

I

In 2015, Montana's Legislature enacted a statute giving a $150 tax credit to any person who contributes at least that amount to an organization that provides scholarships for students who attend nonpublic schools. See Mont. Code Ann. § 15–30–3111 (2019). The overwhelming majority of these schools are religious. (In 2018, 94% of the scholarships awarded helped to pay religious-school tuition. 393 Mont. 446, 466, 478–479, and n. 6, 435 P. 3d 603, 613, 621, and n. 6; App to Pet. for Cert. 123, 125.) The Montana Supreme Court held that this program violated a state constitutional provision that forbids the legislature to make "any direct or indirect appropriation or payment" for "any sectarian purpose or to aid any church, school, academy . . . controlled in whole or in part by any church, sect, or denomination." Mont. Const., Art. X, § 6.

Petitioners are the parents of students who attend one of Montana's Christian private schools. They believe that the tenets of their faith require them to send their children to a religious school. And they claim that, by preventing them from using state-supported scholarships at those schools, the Montana Supreme Court's interpretation of Montana's Constitution violates their First Amendment right to free exercise. I shall assume, for purposes of this opinion, that petitioners' free exercise claim survived the Montana Supreme Court's wholesale invalidation of the tax credit program. Cf. *ante*, at 516 (GINSBURG, J., dissenting); *post*, at 539–540 (SOTOMAYOR, J., dissenting).

A

We all recognize that the First Amendment prohibits discrimination against religion. At the same time, our history and federal constitutional precedent reflect a deep concern that state funding for religious teaching, by stirring fears of preference or in other ways, might fuel religious discord and division and thereby threaten religious freedom itself. See,

e. g., *Committee for Public Ed. & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 794–796 (1973). The Court has consequently made it clear that the Constitution commits the government to a "position of neutrality" in respect to religion. *School Dist. of Abington Township* v. *Schempp*, 374 U. S. 203, 226 (1963).

The inherent tension between the Establishment and Free Exercise Clauses means, however, that the "course of constitutional neutrality in this area cannot be an absolutely straight line." *Walz*, 397 U. S., at 669. Indeed, "rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited." *Ibid.*

That, in significant part, is why the Court has held that "there is room for play in the joints" between the Clauses' express prohibitions that is "productive of a benevolent neutrality," allowing "religious exercise to exist without sponsorship and without interference." *Ibid.* It has held that there "are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Locke*, 540 U. S., at 719; see *Cutter* v. *Wilkinson*, 544 U. S. 709, 719 (2005). And that "play in the joints" should, in my view, play a determinative role here.

It may be that, under our precedents, the Establishment Clause does not *forbid* Montana to subsidize the education of petitioners' children. But the question here is whether the Free Exercise Clause *requires* it to do so. The majority believes that the answer to that question is "yes." It writes that "once a State decides" to support nonpublic education, "it cannot disqualify some private schools solely because they are religious." *Ante*, at 487. I shall explain why I disagree.

B

As the majority acknowledges, two cases are particularly relevant: *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U. S. 449, and *Locke* v. *Davey*, 540 U. S. 712. In

Trinity Lutheran, we considered whether Missouri could exclude a church-owned preschool from applying for a grant to renovate its playground. The Court assumed that the Establishment Clause *permitted* the State to make grants of this kind to church-affiliated schools. See 582 U. S., at 458. But, the Court added, this did not "answer the question" because there is "'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels." *Ibid.* The Court therefore went on to consider the burdens that Missouri's law imposed upon the church's right to free exercise.

By excluding schools with ties to churches, the Court wrote, the State's law put the church "to a choice: It may participate in an otherwise available benefit program or remain a religious institution." *Id.*, at 462. That kind of "'indirect coercion,'" the Court explained, "imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny." *Id.*, at 462, 463. Finding that a State's "policy preference for skating as far as possible from religious establishment concerns" could not satisfy that standard, the Court held that the Free Exercise Clause *required* Missouri to include church-affiliated schools as candidates for playground renovation grants. *Id.*, at 466.

We confronted a different kind of aid program, and came to a different conclusion, in *Locke*. There, we reviewed a Washington law that offered taxpayer-funded scholarships to college students on the express condition that they not pursue degrees that were "'devotional in nature or designed to induce religious belief.'" 540 U. S., at 716; see *id.*, at 719, n. 2 (quoting Wash. Const., Art. II, § 11). Again, the Court assumed that the Establishment Clause *permitted* the State to support students seeking such degrees. 540 U. S., at 719. But the Court concluded that the Free Exercise Clause did not *require* it to do so.

The Court observed that the State's decision not to fund devotional degrees did not penalize religious exercise or re-

quire anyone to choose between their faith and a "government benefit." *Id.*, at 721. Rather, the State had "merely chosen not to fund a distinct category of instruction" that was "essentially religious." *Ibid.* Although Washington's Constitution drew "a more stringent line than that drawn by the United States Constitution," the Court found that the State's position was consistent with the widely shared view, dating to the founding of the Republic, that taxpayer-supported religious indoctrination poses a threat to individual liberty. *Id.*, at 722. Given this "historic and substantial state interest," the Court concluded, it would be inappropriate to subject Washington's law to a "presumption of unconstitutionality." *Id.*, at 725. And, without such a presumption, the claim that the exclusion of devotional studies violated the Free Exercise Clause "must fail," for "[i]f any room exists between the two Religion Clauses, it must be here." *Ibid.*; see *id.*, at 720, n. 3.

C

The majority finds that the school-playground case, *Trinity Lutheran*, and not the religious-studies case, *Locke*, controls here. I disagree. In my view, the program at issue here is strikingly similar to the program we upheld in *Locke* and importantly different from the program we found unconstitutional in *Trinity Lutheran*. Like the State of Washington in *Locke*, Montana has chosen not to fund (at a distance) "an essentially religious endeavor"—an education designed to "'induce religious faith.'" *Locke*, 540 U. S., at 716, 721. That kind of program simply cannot be likened to Missouri's decision to exclude a church school from applying for a grant to resurface its playground.

The Court in *Locke* recognized that the study of devotional theology can be "akin to a religious calling as well as an academic pursuit." *Id.*, at 721. Indeed, "the shaping, through primary education, of the next generation's minds and spirits" may be as critical as training for the ministry,

which itself, after all, is but one of the activities necessary to help ensure a religion's survival. *Zelman* v. *Simmons-Harris*, 536 U. S. 639, 725 (2002) (BREYER, J., dissenting). That is why many faith leaders emphasize the central role of schools in their religious missions. See, *e. g.*, Southern Baptist Convention, Resolution on the Importance of Christ-Centered Education (2014) (underscoring the power of Christian schools to "win students to salvation through evangelism, make disciples, and foster spiritual development"); The Holy See, John Paul II, Catechesi Tradendae ¶69 (Oct. 16, 1979) (explaining that "the underlying reason for" the Catholic school "is precisely the quality of the religious instruction integrated into the education of the pupils"). It is why at least some teachers at religious schools see their work as a form of ministry. See, *e. g.*, *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. 171, 192 (2012). And petitioners have testified that it is a "major reason" why they chose religious schools for their children. App. to Pet. for Cert. 152 (the school teaches "the same Christian values that I teach at home").

Nothing in the Constitution discourages this type of instruction. To the contrary, the Free Exercise Clause draws upon a history that places great value upon the freedom of parents to teach their children the tenets of their faith. Cf. *Wisconsin* v. *Yoder*, 406 U. S. 205, 213–214 (1972). The leading figures of America's Enlightenment followed in the footsteps of those who, after the English civil wars, came to believe "with a passionate conviction that they were entitled to worship God in their own way and to teach their children and to form their characters in the way that seemed to them calculated to impress the stamp of the God-fearing man." C. Radcliffe, The Law & Its Compass 71 (1960). But the bitter lesson of religious conflict also inspired the Establishment Clause and the state-law bans on compelled support the Court cited in *Locke*. Cf., *e. g.*, J. Madison, Memorial and Remonstrance Against Religious Assessments, reprinted in

Everson v. *Board of Ed. of Ewing*, 330 U. S. 1, 69 (1947) (appendix to dissent of Rutledge, J.) (recalling the "[t]orrents of blood" shed in efforts to establish state religion).

What, then, is the difference between *Locke* and the present case? And what is it that leads the majority to conclude that funding the study of religion is more like paying to fix up a playground (*Trinity Lutheran*) than paying for a degree in theology (*Locke*)? The majority's principal argument appears to be that, as in *Trinity Lutheran*, Montana has excluded religious schools from its program "solely because of the religious character of the schools." *Ante*, at 476. The majority seeks to contrast this *status*-based discrimination with the program at issue in *Locke*, which it says denied scholarships to divinity students based on the religious *use* to which they put the funds—*i. e.*, training for the ministry, as opposed to secular professions. See *ante*, at 478 (citing *Trinity Lutheran*, 582 U. S., at 461–462).

It is true that Montana's no-aid provision broadly bars state aid to schools based on their religious affiliation. But this case does not involve a claim of status-based discrimination. The schools do not apply or compete for scholarships, they are not parties to this litigation, and no one here purports to represent their interests. We are instead faced with a suit by *parents* who assert that *their* free exercise rights are violated by the application of the no-aid provision to prevent them from *using* taxpayer-supported scholarships to attend the schools of their choosing. In other words, the problem, as in *Locke*, is what petitioners "'propos[e] *to do*—use the funds to'" obtain a religious education. *Ante*, at 479 (quoting *Trinity Lutheran*, 582 U. S., at 464).

Even if the schools' status were relevant, I do not see what bearing the majority's distinction could have here. There is no dispute that religious schools seek generally to inspire religious faith and values in their students. How else could petitioners claim that barring them from using state aid to attend these schools violates their free exercise rights?

Thus, the question in this case—unlike in *Trinity Lutheran*—boils down to what the schools would *do* with state support. And the upshot is that here, as in *Locke*, we confront a State's decision not to fund the inculcation of religious truths.

The majority next contends that there is no " 'historic and substantial' tradition against aiding" religious schools "comparable to the tradition against state-supported clergy invoked by *Locke*." *Ante*, at 483. But the majority ignores the reasons for the founding era bans that we relied upon in *Locke*.

"Perhaps the most famous example," *Locke*, 540 U. S., at 722, n. 6, is the 1786 defeat of a Virginia bill (often called the Assessment Bill) that would have levied a tax in support of "learned teachers" of "the Christian Religion." A Bill Establishing a Provision for Teachers of the Christian Religion, reprinted in *Everson*, 330 U. S., at 72 (supplemental appendix to dissent of Rutledge, J.). In his Memorial and Remonstrance against that proposal, James Madison argued that compelling state sponsorship of religion in this way was "a signal of persecution" that "degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority." *Id.*, at 68–69. Even among those who might benefit from such a tax, Madison warned, the bill threatened to "destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced amongst its several sects." *Id.*, at 69.

The opposition galvanized by Madison's Remonstrance not only scuttled the Assessment Bill; it spurred Virginia's Assembly to enact a very different law, the Bill for Religious Liberty drafted by Thomas Jefferson. See Brant, Madison: On the Separation of Church and State, 8 Wm. & Mary Q. 3, 11 (1951); Drakeman, Religion and the Republic: James Madison and the First Amendment, 25 J. Church & St. 427, 436 (1983); *Everson*, 330 U. S., at 12.

Like the Remonstrance, Jefferson's bill emphasized the risk to religious liberty that state-supported religious indoctrination threatened. "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves," the preamble declared, "is sinful and tyrannical." A Bill for Establishing Religious Freedom (1779), in 2 The Papers of Thomas Jefferson 545 (J. Boyd ed. 1950). The statute accordingly provided "that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever." *Id.*, at 546. Similar proscriptions were included in the early constitutions of many States. See *Locke*, 540 U. S., at 723 (collecting examples).

I see no meaningful difference between the concerns that Madison and Jefferson raised and the concerns inevitably raised by taxpayer support for scholarships to religious schools. In both instances state funds are sought for those who would "instruc[t] such citizens, as from their circumstances and want of education, cannot otherwise attain such knowledge" in the tenets of religious faith. A Bill Establishing a Provision for Teachers of the Christian Religion, reprinted in *Everson*, 330 U. S., at 72. In both cases, that would compel taxpayers to support "the propagation of opinions" on matters of religion with which they may disagree, by teachers whom they have not chosen. A Bill for Establishing Religious Freedom, *supra*, at 545. And, in both cases, the allocation of state aid to such purposes threatens to "destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced amongst its several sects." Memorial and Remonstrance, reprinted in *Everson*, 330 U. S., at 69.

The majority argues that at least some early American governments saw no contradiction between bans on compelled support for clergy and taxpayer support for religious schools or universities. See *ante*, at 481, n. 3. That some States appear not to have read their prohibitions on compelled support to bar this kind of sponsorship, however, does

not require us to blind ourselves to the obvious contradiction between the *reasons* for prohibiting compelled support and the effect of taxpayer funding for religious education. Madison and Jefferson saw it clearly. They opposed including theological professorships in their plans for the public University of Virginia and the Commonwealth hesitated even to grant charters to religiously affiliated schools. See Buckley, After Disestablishment: Thomas Jefferson's Wall of Separation in Antebellum Virginia, 61 J. So. Hist. 445, 453 (1995); Brant, *supra*, at 19–20.

As for the majority's examples, it suffices to say that the record is not so simple. In Georgia, the Governor advocated for school funding legislation in terms that mirrored the language of Virginia's Assessment Bill. See R. Gabel, Public Funds for Church and Private Schools 241–242 (1937). And the general levies the majority cites from Pennsylvania and New Jersey were not adopted until after the founding. See *id.*, at 215–216; see C. Kaestle, Pillars of the Republic: Common Schools and American Society, 1780–1860, pp. 166–167 (1983).

That is not to deny that the history of state support for denominational schools is "'complex.'" *Ante*, at 483. But founding era attitudes toward compelled support of clergy were no less complex. Many prominent members of the founding generation, including George Washington, Patrick Henry, and John Marshall, supported Virginia's Assessment Bill. See Dreisbach, George Mason's Pursuit of Religious Liberty in Revolutionary Virginia, 108 Va. Mag. Hist. & Biography 5, 31 (2000). Some who supported this kind of government aid thought it posed no threat to freedom of conscience; others denied that provisions for aid to religion amounted to an "establishment" at all. See *id.*, at 34–35; D. Drakeman, Church, State, and Original Intent 224–225 (2010). Indeed, at least one historian has persuasively argued that it is next to impossible to attribute to the Founders any uniform understanding as to what constitutes, in the

Constitution's phrase, "an establishment of religion." *Id.*, at 216–229, 260–262.

This diversity of opinion made no difference in *Locke* and it makes no difference here. For our purposes it is enough to say that, among those who gave shape to the young Republic were people, including Madison and Jefferson, who perceived a grave threat to individual liberty and communal harmony in tax support for the teaching of religious truths. These "historic and substantial" concerns have consistently guided the Court's application of the Religion Clauses since. *Locke*, 540 U. S., at 725; see, *e. g.*, *Nyquist*, 413 U. S., at 794–798; *Walz*, 397 U. S., at 695 (Harlan, J., concurring); *Schempp*, 374 U. S., at 307 (Goldberg, J., joined by Harlan, J., concurring). The Court's special attention to these views should come as no surprise, for the risks the Founders saw have only become more apparent over time. In the years since the Civil War, the number of religions practiced in our country has grown to scores. And that has made it more difficult to avoid suspicions of favoritism—or worse—when government becomes entangled with religion.

Nor can I see how it could make a difference that the Establishment Clause might *permit* the State to subsidize religious education through a program like Montana's. The tax benefit here inures to donors, who choose to support a particular scholarship organization. That organization, in turn, awards scholarships to students for the qualifying school of their choice. The majority points to cases in which we have upheld programs where, as here, state funds make their way to religious schools by means of private choices. *Ante*, at 474 (citing *Zelman*, 536 U. S., at 649–653). As the Court acknowledged in *Trinity Lutheran*, however, that does not answer the question whether providing such aid is *required*. 582 U. S., at 458.

Neither does it address related concerns that I have previously described. Private choice cannot help the taxpayer who does not want to finance the propagation of religious

beliefs, whether his own or someone else's. It will not help religious minorities too few in number to support a school that teaches their beliefs. And it will not satisfy those whose religious beliefs preclude them from participating in a government-sponsored program. Some or many of the persons who fit these descriptions may well feel ignored—or worse—when public funds are channeled to religious schools. See *Zelman*, 536 U. S., at 728 (BREYER, J., dissenting). These feelings may, in turn, sow religiously inspired political conflict and division—a risk that is considerably greater where States are *required* to include religious schools in programs like the one before us here. And it is greater still where, as here, those programs benefit only a handful of a State's many religious denominations. See *ibid.*; Big Sky Scholarships, Schools (2019), www.bigskyscholarships.org/schools.

Indeed, the records of Montana's constitutional convention show that these concerns were among the reasons that a religiously diverse group of delegates, including faith leaders of different denominations, supported the no-aid provision. See Brief for Respondents 18–23; Brief for Montana Constitutional Convention Delegates as *Amici Curiae* 19–21, 22, 24–25 (noting support for the provision from a Congregationalist minister, the Roman Catholic priest responsible for Catholic schools in the Diocese of Great Falls, a Methodist pastor, a Presbyterian minister, and the Montana Catholic Conference, among others).

In an effort to downplay this risk and further distinguish this case from *Locke*, the majority contends that "Montana's Constitution does not zero in on any particular 'essentially religious' course of instruction." *Ante,* at 480 (quoting *Locke*, 540 U. S., at 721). But this is not a facial challenge to the no-aid provision. See Reply Brief 8. As applied, the provision affects only a scholarship program that, in effect, uses taxpayer funds to help pay for student tuition at religious schools. We have long recognized that unrestricted cash

payments of this kind raise special establishment concerns. Cf. *Mitchell* v. *Helms*, 530 U. S. 793, 818–819 (2000) (plurality opinion); see *id.*, at 848–849 (O'Connor, J., concurring in judgment). And for good reason: The subsidy petitioners demand would go to pay for, among other things, the salaries of teachers and administrators who have been found in at least some instances to so "personify [the] beliefs" of the churches that employ them that they are quite literally "ministers" within the meaning of the First Amendment. *Hosanna-Tabor*, 565 U. S., at 188.

If, for 250 years, we have drawn a line at forcing taxpayers to pay the salaries of those who teach their faith from the pulpit, I do not see how we can today require Montana to adopt a different view respecting those who teach it in the classroom.

II

In reaching its conclusion that the Free Exercise Clause requires Montana to allow petitioners to use taxpayer-supported scholarships to pay for their children's religious education, the majority makes several doctrinal innovations that, in my view, are misguided and threaten adverse consequences.

Although the majority refers in passing to the "play in the joints" between that which the Establishment Clause forbids and that which the Free Exercise Clause requires, its holding leaves that doctrine a shadow of its former self. See, *e. g.*, *Cutter*, 544 U. S., at 719; *Walz*, 397 U. S., at 669. Having concluded that there is no obstacle to subsidizing a religious education under our Establishment Clause precedents, the majority says little more about Montana's antiestablishment interests or the reasoning that underlies them. It does not engage with the State's concern that its funds not be used to support religious teaching. Instead, the Court holds that it need not consider how Montana's funds would be used because, in its view, all distinctions on the basis of religion—whether in respect to playground grants or devotional teach-

ing—are similarly and presumptively unconstitutional. See *ante*, at 476–477.

Setting aside the problems with the majority's characterization of this case, *supra*, at 526, I think the majority is wrong to replace the flexible, context-specific approach of our precedents with a test of "strict" or "rigorous" scrutiny. And it is wrong to imply that courts should use that same heightened scrutiny whenever a government benefit is at issue. See *ante*, at 476, 478.

Experience has taught us that "we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication." *Tilton* v. *Richardson*, 403 U. S. 672, 678 (1971) (plurality opinion); see also *Schempp*, 374 U. S., at 306 (opinion of Goldberg, J., joined by Harlan, J.) (there is "no simple and clear measure which by precise application can readily and invariably demark the permissible from the impermissible"); *Walz*, 397 U. S., at 669 ("[R]igidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited"). If the Court has found it possible to walk what we have called the "'tight rope'" between the two Religion Clauses, it is only by "preserving doctrinal flexibility and recognizing the need for a sensible and realistic application" of those provisions. *Yoder*, 406 U. S., at 221.

The Court proceeded in just this way in *Locke*. It considered the same precedents the majority today cites in support of its presumption of unconstitutionality. But it found that applying the presumption set forth in those cases to Washington's decision not to fund devotional degrees would "extend" them "well beyond not only their facts but their reasoning." 540 U. S., at 720. In my view, that analysis applies equally to this case.

Montana's law does not punish religious exercise. Cf. *Locke*, 540 U. S., at 720 (citing *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 535 (1993)); see *ante*,

at 478. It does not deny anyone, because of their faith, the right to participate in political affairs of the community. Cf. *Locke*, 540 U. S., at 720–721 (citing *McDaniel* v. *Paty*, 435 U. S. 618, 626 (1978)); see *ante*, at 478. And it does not require students to choose between their religious beliefs and receiving secular government aid such as unemployment benefits. Cf. *Locke*, 540 U. S., at 720 (citing *Sherbert* v. *Verner*, 374 U. S. 398, 403–404 (1963)); see *ante*, at 478. The State has simply chosen not to fund programs that, in significant part, typically involve the teaching and practice of religious devotion. And "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540, 549 (1983); see also *Lyng* v. *Automobile Workers*, 485 U. S. 360, 368 (1988).

I disagree, then, with what I see as the majority's doctrinal omission, its misplaced application of a legal presumption, and its suggestion that this presumption is appropriate in many, if not all, cases involving government benefits. As I see the matter, our differences run deeper than a simple disagreement about the application of prior case law.

The Court's reliance in our prior cases on the notion of "play in the joints," our hesitation to apply presumptions of unconstitutionality, and our tendency to confine benefit-related holdings to the context in which they arose all reflect a recognition that great care is needed if we are to realize the Religion Clauses' basic purpose "to promote and assure the fullest scope of religious liberty and religious tolerance for all and to nurture the conditions which secure the best hope of attainment of that end." *Schempp*, 374 U. S., at 305 (opinion of Goldberg, J., joined by Harlan, J.); see *Van Orden* v. *Perry*, 545 U. S. 677, 698 (2005) (BREYER, J., concurring in judgment).

For one thing, government benefits come in many shapes and sizes. The appropriate way to approach a State's benefit-

related decision may well vary depending upon the relation between the Religion Clauses and the specific benefit and restriction at issue. For another, disagreements that concern religion and its relation to a particular benefit may prove unusually difficult to resolve. They may involve small but important details of a particular benefit program. Does one detail affect one religion negatively and another positively? What about a religion that objects to the particular way in which the government seeks to enforce mandatory (say, qualification-related) provisions of a particular benefit program? See, *e. g.*, *New Life Baptist Church Academy* v. *East Longmeadow*, 885 F. 2d 940 (CA1 1989) (BREYER, J., for the court). Or the religious group that for religious reasons cannot accept government support? See Brief for Respondents 20–21 (noting, *inter alia*, Seventh-day Adventists' support for Montana's no-aid provision on this ground). And what happens when qualification requirements mean that government money flows to one religion rather than another? Courts are ill equipped to deal with such conflicts. Yet, in a Nation with scores of different religions, many such disagreements are possible. And I have only scratched the surface.

The majority claims that giving weight to these considerations would be a departure from our precedent and give courts too much discretion to interpret the Religion Clauses. See *ante*, at 483–484. But we have long understood that the "application" of the First Amendment's mandate of neutrality "requires interpretation of a delicate sort." *Schempp*, 374 U. S., at 226. "Each value judgment under the Religion Clauses," we have explained, must "turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so." *Walz*, 397 U. S., at 669.

Nor does the majority's approach avoid judicial entanglement in difficult and sensitive questions. To the contrary, as I have just explained, it burdens courts with the still more

complex task of untangling disputes between religious organizations and state governments, instead of giving deference to state legislators' choices to avoid such issues altogether. At the same time, it puts States in a legislative dilemma, caught between the demands of the Free Exercise and Establishment Clauses, without "breathing room" to help ameliorate the problem.

I agree with the majority that it is preferable in some areas of the law to develop generally applicable tests. The problem, as our precedents show, is that the interaction of the Establishment and Free Exercise Clauses makes it particularly difficult to design a test that vindicates the Clauses' competing interests in all—or even most—cases. That is why, far from embracing mechanical formulas, our precedents repeatedly and frankly acknowledge the need for precisely the kind of "'judgment-by-judgment analysis'" the majority rejects. *Ante*, at 484; see, *e. g.*, *Walz*, 397 U. S., at 669. "The standards" of our prior decisions, we have said, "should rather be viewed as guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired." *Tilton*, 403 U. S., at 678 (plurality opinion); accord, *Nyquist*, 413 U. S., at 773, n. 31.

The Court's occasional efforts to declare rules in spite of this experience have failed to produce either coherence or consensus in our First Amendment jurisprudence. See *Van Orden*, 545 U. S., at 697 (opinion of BREYER, J.) (listing examples). The persistence of such disagreements bears out what I have said—namely, that rigid, bright-line rules like the one the Court adopts today too often work against the underlying purposes of the Religion Clauses. And a test that fails to advance the Clauses' purposes is, in my view, far worse than no test at all.

Consider some of the practical problems that may arise from the Court's holding. The States have taken advantage of the "play in the joints" between the Religion Clauses to craft programs of public aid to education that address their

local needs. Many provide assistance to families with students in nonpublic schools, ranging from scholarships to tax credits and deductions that reimburse tuition expenses. See Dept. of Ed., A. Duncan et al., Education Options in the States 3–6 (2009). Although most state constitutions today have no-aid provisions like Montana's, those provisions are only one part of a broader system of local regulation. See App. D to Brief for Respondents. Some States have concluded that their no-aid provisions do not bar scholarships to students at religious schools, while others without such clauses have nevertheless chosen not to fund religious education. See Brief for State of Colorado et al. as *Amici Curiae* 6–7; Brief for State of Maine as *Amicus Curiae* 10–15. Today's decision upends those arrangements without stopping to ask whether they might actually further the objectives of the Religion Clauses in some or even many cases.

And what are the limits of the Court's holding? The majority asserts that States "need not subsidize private education." *Ante*, at 487. But it does not explain why that is so. If making scholarships available to only secular nonpublic schools exerts "coercive" pressure on parents whose faith impels them to enroll their children in religious schools, then how is a State's decision to fund only secular *public* schools any less coercive? Under the majority's reasoning, the parents in both cases are put to a choice between their beliefs and a taxpayer-sponsored education.

Accepting the majority's distinction between public and nonpublic schools does little to address the uncertainty that its holding introduces. What about charter schools? States vary widely in how they permit charter schools to be structured, funded, and controlled. See Mead, Devilish Details: Exploring Features of Charter School Statutes That Blur the Public/Private Distinction, 40 Harv. J. Legis. 349, 353–357, 367–368 (2003). How would the majority's rule distinguish between those States in which support for charter schools is akin to public school funding and those in which it

triggers a constitutional obligation to fund private religious schools? The majority's rule provides no guidance, even as it sharply limits the ability of courts and legislatures to balance the potentially competing interests that underlie the Free Exercise and Antiestablishment Clauses.

* * *

It is not easy to discern "the boundaries of the neutral area between" the two Religion Clauses "within which the legislature may legitimately act." *Tilton*, 403 U. S., at 677 (plurality opinion). And it is more difficult still in cases, such as this one, where the Constitution's policy in favor of free exercise, on one hand, and against state sponsorship, on the other, are in conflict. In such cases, I believe there is "no test-related substitute for the exercise of legal judgment." *Van Orden*, 545 U. S., at 700 (opinion of BREYER, J.). That judgment "must reflect and remain faithful to the underlying purposes of the Clauses, and it must take account of context and consequences measured in light of those purposes." *Ibid.* Here, those purposes, along with the examples set by our decisions in *Locke* and *Trinity Lutheran*, lead me to believe that Montana's differential treatment of religious schools is constitutional. "If any room exists between the two Religion Clauses, it must be here." *Locke*, 540 U. S., at 725. For these reasons, I respectfully dissent from the Court's contrary conclusion.

JUSTICE SOTOMAYOR, dissenting.

The majority holds that a Montana scholarship program unlawfully discriminated against religious schools by excluding them from a tax benefit. The threshold problem, however, is that such tax benefits no longer exist for anyone in the State. The Montana Supreme Court invalidated the program on state-law grounds, thereby foreclosing the as-applied challenge petitioners raise here. Indeed, nothing required the state court to uphold the program or the state

legislature to maintain it. The Court nevertheless reframes the case and appears to ask whether a longstanding Montana constitutional provision is facially invalid under the Free Exercise Clause, even though petitioners disavowed bringing such a claim. But by resolving a constitutional question not presented, the Court fails to heed Article III principles older than the Religion Clause it expounds. *Coleman* v. *Thompson*, 501 U. S. 722, 730 (1991) (forbidding "resolution of a federal question" that "cannot affect" a state-court judgment).

Not only is the Court wrong to decide this case at all, it decides it wrongly. In *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U. S. 449 (2017), this Court held, "for the first time, that the Constitution requires the government to provide public funds directly to a church." *Id.*, at 472 (SOTOMAYOR, J., dissenting). Here, the Court invokes that precedent to require a State to subsidize religious schools if it enacts an education tax credit. Because this decision further "slights both our precedents and our history" and "weakens this country's longstanding commitment to a separation of church and state beneficial to both," *ibid.*, I respectfully dissent.

I

A

The Montana Supreme Court invalidated a state tax-credit program because it was inconsistent with the Montana Constitution's "no-aid provision," Art. X, § 6(1), which forbids government appropriations for sectarian purposes, including funding religious schools. 393 Mont. 446, 467–468, 435 P. 3d 603, 614 (2018). In so doing, the court expressly declined to resolve federal constitutional issues. "Having concluded the Tax Credit Program violates" the no-aid provision, the court held, "it is not necessary to consider federal precedent interpreting the First Amendment's less-restrictive Establishment Clause." *Ibid.* So too the court declined to ground its holding on the Free Exercise Clause. *Ibid.* The court

also remedied the only potential harm of discriminatory treatment by striking down the program altogether. After the state court's decision, neither secular nor sectarian schools receive the program's tax benefits.

Petitioners' free exercise claim is not cognizable. The Free Exercise Clause, the Court has said, protects against "indirect coercion or penalties on the free exercise of religion." *Lyng* v. *Northwest Indian Cemetery Protective Assn.*, 485 U. S. 439, 450 (1988). Accordingly, this Court's cases have required not only differential treatment, cf. *ante*, at 477–478, but also a resulting burden on religious exercise, *Lyng*, 485 U. S., at 450–451.

Neither differential treatment nor coercion exists here because the Montana Supreme Court invalidated the tax-credit program entirely. 393 Mont., at 467–468, 435 P. 3d, at 614. Because no secondary school (secular or sectarian) is eligible for benefits, the state court's ruling neither treats petitioners differently based on religion nor burdens their religious exercise. See *ante*, at 516–520 (GINSBURG, J., dissenting). Petitioners remain free to send their children to the religious school of their choosing and to exercise their faith.

To be sure, petitioners may want to apply for scholarships and would prefer that Montana subsidize their children's religious education. But this Court had never before held unconstitutional government action that merely failed to benefit religious exercise. "The crucial word in the constitutional text is 'prohibit': 'For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.' " *Lyng*, 485 U. S., at 451 (quoting *Sherbert* v. *Verner*, 374 U. S. 398, 412 (1963) (Douglas, J., concurring)). Put another way, the Constitution does not compel Montana to create or maintain a tax subsidy.

Notably, petitioners did not allege that the no-aid provision itself caused their harm or that invalidating the entire tax-credit scheme would create independent constitutional

concerns. Even now, petitioners disclaim a facial challenge to the no-aid provision. Reply Brief 8, 20–22. Petitioners thus have no cognizable as-applied claim arising from the disparate treatment of religion, because there is no longer a program to which Montana's no-aid provision can apply.

Nor is it enough that petitioners might wish that Montana's no-aid provision were no longer good law. Petitioners identify no disparate treatment traceable to the state constitutional provision that they challenge because the tax-credit program no longer operates. See *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U. S. 26, 41–42, 44–46 (1976).[1] Short of ordering Montana to create a religious subsidy that Montana law does not permit, there is nothing for this Court to do.[2]

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[1] To revive their as-applied challenge, petitioners rely on *Griffin* v. *School Bd. of Prince Edward Cty.*, 377 U. S. 218 (1964), for the proposition that eliminating a public benefit does not always remedy discrimination. See Reply Brief 5. But *Griffin* is inapposite. There, a Virginia county closed its public schools and so-called "private schools" were set up in their place to avoid a court desegregation order. See 377 U. S., at 223. These so-called private schools "were open to whites only and . . . were in fact run by a practical partnership between State and county, designed to preserve segregated education." *Palmer* v. *Thompson*, 403 U. S. 217, 221–222 (1971). That is nothing like what the Montana Supreme Court's remedy achieved here. Nor have petitioners said otherwise; there is no allegation that Montana confers clandestine tax credits solely to secular schools.

[2] Petitioners here have not asserted a free exercise claim on a theory that they were victims of religious animus, either. Cf. *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 533 (1993). Instead, one concurrence seeks to make the argument for them while attempting to compare the state constitutional provision here with a nonunanimous jury rule rooted in racial animus. *Ante*, at 497 (opinion of ALITO, J.) (citing the dissent in *Ramos* v. *Louisiana*, 590 U. S. 83 (2020)). But those questions are not before the Court.

In any case, the concurrence's arguments are as misguided as they are misplaced. Citing the Court's opinion in *Ramos*, the concurrence maintains that a law's "'uncomfortable past' must still be '[e]xamined.'" *Ante*, at 505–506 (opinion of ALITO, J.). But as previously explained: "Where a law

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As another dissenting opinion observes, see *ante*, at 517 (opinion of GINSBURG, J.), the Court sidesteps these obstacles by asking a question that this case does not raise and that the Montana Supreme Court did not answer: whether by excluding "religious schools and affected families from [a scholarship] program," Montana's no-aid provision was "consistent with the Federal Constitution," *ante*, at 474 (majority opinion). In so doing, the Court appears to transform petitioners' as-applied challenge into a facial one. *Ante*, at 477; see also *ante*, at 489 (THOMAS, J., concurring).

This approach lacks support in our case law. The Court typically declines to read state-court decisions as impliedly resolving federal questions, especially ones not raised by the parties. See, *e. g.*, *Adams* v. *Robertson*, 520 U. S. 83, 88–89 (1997) (*per curiam*). Indeed, to honor principles of comity, this Court generally dismisses writs of certiorari from a State's highest court where, as is true here of the Court's

otherwise is untethered to [discriminatory] bias—and perhaps also where a legislature actually confronts a law's tawdry past in reenacting it—the new law may well be free of discriminatory taint." *Ramos*, 590 U. S., at 115 (SOTOMAYOR, J., concurring in part). That could not "be said of the laws at issue" in *Ramos*. *Ibid.* It can be here. See Part II, *infra*.

The concurrence overlooks the starkly different histories of these state laws. Also missing from the concurrence (and the *amicus* briefs it repeats) is the stubborn fact that the constitutional provision at issue here was adopted in 1972 at a convention where it was met with overwhelming support by religious leaders (Catholic and non-Catholic), even those who examined the history of prior no-aid provisions. See Brief for Respondents 16–27; 6 Montana Constitutional Convention 1971–1972 Proceedings and Transcript, pp. 2012–2013, 2016–2017 (Mont. Legislature and Legislative Council); see also *ante*, at 531 (BREYER, J., dissenting); Brief for Public Funds Public Schools as *Amicus Curiae* 5–11; Brief for Montana Constitutional Convention Delegates as *Amici Curiae* 19–25. These supporters argued that it would be wrong to put taxpayer dollars to religious purposes and that it would invite unwelcome entanglement between church and state. See, *e. g.*, U. S. Const., Amdt. 1; Brief for Respondents 20.

bespoke inquiry, "the sole federal question" the Court seeks to decide was not "raised, preserved, or passed upon in the state courts below." *Cardinale* v. *Louisiana*, 394 U. S. 437, 438 (1969); see also *Webb* v. *Webb*, 451 U. S. 493, 499 (1981).

That rule respects not only federalism but also the separation of powers. Article III confines this Court's authority to adjudicating actual "[c]ases" or "[c]ontroversies." See also *Allen* v. *Wright*, 468 U. S. 737, 750 (1984) (case-or-controversy requirement reflects "the idea of separation of powers on which the Federal Government is founded"). Federal courts thus lack power "to decide questions that cannot affect the rights of litigants in the case before them" and may resolve only "real and substantial controvers[ies] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Lewis* v. *Continental Bank Corp.*, 494 U. S. 472, 477 (1990) (alteration in original; internal quotation marks omitted). Consonant with that limitation, the Court has declined to "'"formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."'" *Washington State Grange* v. *Washington State Republican Party*, 552 U. S. 442, 450 (2008) (quoting *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring)). By answering an apparent hypothetical question, today's Court subverts these longstanding practices.

True, on occasion this Court has resolved federal constitutional questions when it was unclear whether the state-court judgment rested on an adequate and independent state-law ground. See, *e. g.*, *Michigan* v. *Long*, 463 U. S. 1032, 1043 (1983). But that is not this case. Recall that the Montana Supreme Court remedied a state constitutional violation by invalidating a state program on state-law grounds, having expressly declined to reach any federal issue. See 393 Mont., at 467–468, 435 P. 3d, at 614; see also *ante*, at 518–519 (GINSBURG, J., dissenting).

These principles exist to prevent this Court from issuing advisory opinions, sowing confusion, and muddying the law. This is case in point. Having held that petitioners may not be "exclu[ded] from the scholarship program" that no longer exists, the Court remands to the Montana Supreme Court for "further proceedings not inconsistent with this opinion." *Ante*, at 489. But it is hard to tell what this Court wishes the state court to do. There is no program from which petitioners are currently "exclu[ded]," so must the Montana Supreme Court order the State to recreate one? Has this Court just announced its authority to require a state court to order a state legislature to fund religious exercise, overruling centuries of contrary precedent and historical practice? See *Cutter* v. *Wilkinson*, 544 U. S. 709 (2005); *Locke* v. *Davey*, 540 U. S. 712 (2004); see also *Trinity Lutheran*, 582 U. S., at 482–489, and nn. 7–11 (SOTOMAYOR, J., dissenting) (describing States' religious disestablishment movements near the founding and cataloging state constitutional provisions declining to aid religious ministry). Indeed, it appears that the Court has declared that once Montana created a tax subsidy, it forfeited the right to eliminate it if doing so would harm religion. This is a remarkable result, all the more so because the Court strains to reach it.

The Court views its decision as "simply restor[ing] the status quo established by the Montana Legislature." *Ante* at 488, n. 4. But it overlooks how that status quo allowed the State Supreme Court to cure any disparate treatment of religion while still giving effect to a state constitutional provision ratified by the citizens of Montana. Today's decision replaces a remedy chosen by representatives of Montanans and designed to honor the will of the electorate with one that the Court prefers instead.

In sum, the decision below neither upheld a program that "disqualif[ies] some private schools solely because they are religious," *ante*, at 487, nor otherwise decided the case on fed-

eral grounds. The Court's opinion thus turns on a counterfactual hypothetical it is powerless (and unwise) to decide.

II

Even on its own terms, the Court's answer to its hypothetical question is incorrect. The Court relies principally on *Trinity Lutheran*, which found that disqualifying an entity from a public benefit "solely because of [the entity's] religious character" could impose "a penalty on the free exercise of religion." 582 U. S., at 462. *Trinity Lutheran* held that ineligibility for a government benefit impermissibly burdened a church's religious exercise by "put[ting it] to the choice between being a church and receiving a government benefit." *Id.*, at 465. Invoking that precedent, the Court concludes that Montana must subsidize religious education if it also subsidizes nonreligious education.[3]

The Court's analysis of Montana's defunct tax program reprises the error in *Trinity Lutheran*. Contra the Court's current approach, our free exercise precedents had long granted the government "some room to recognize the unique status of religious entities and to single them out on that basis for exclusion from otherwise generally applicable laws." *Id.*, at 479 (SOTOMAYOR, J., dissenting).

Until *Trinity Lutheran*, the right to exercise one's religion did not include a right to have the State pay for that religious practice. See *School Dist. of Abington Township* v. *Schempp*, 374 U. S. 203, 226 (1963). That is because a contrary rule risks reading the Establishment Clause out of the Constitution. Although the Establishment Clause "permit[s] some government funding of secular functions per-

[3] Petitioners' as-applied challenge fails under *Trinity Lutheran* for the reasons stated above: The Montana Supreme Court's remedy does not put petitioners to any "choice" at all. Rather, petitioners are free to send their children to any secondary school they wish while practicing their religious beliefs, and no one receives a tax credit for their school choice.

formed by sectarian organizations," the Court's decisions "provide[d] no precedent for the use of public funds to finance religious activities." *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 847 (1995) (O'Connor, J., concurring). After all, the government must avoid "an unlawful fostering of religion." *Cutter*, 544 U. S., at 714 (internal quotation marks omitted). Thus, to determine the constitutionality of government action that draws lines based on religion, our precedents "carefully considered whether the interests embodied in the Religion Clauses justify that line." *Trinity Lutheran*, 582 U. S., at 478 (SOTOMAYOR, J., dissenting). The relevant question had always been not whether a State singles out religious entities but why it did so.

Here, a State may refuse to extend certain aid programs to religious entities when doing so avoids "historic and substantial" antiestablishment concerns. *Locke*, 540 U. S., at 725. Properly understood, this case is no different from *Locke* because petitioners seek to procure what the plaintiffs in *Locke* could not: taxpayer funds to support religious schooling.[4] Indeed, one of the concurrences lauds petitioners' spiritual pursuit, acknowledging that they seek state funds for manifestly religious purposes like "teach[ing] religion" so that petitioners may "outwardly and publicly" live out their religious tenets. *Ante*, at 510 (opinion of GORSUCH, J.). But those deeply religious goals confirm why Montana may properly decline to subsidize religious education. Involvement in such spiritual matters implicates both the Establishment Clause, see *Cutter*, 544 U. S., at 714, and the free exercise rights of taxpayers, "denying them the chance

[4] *Locke* confirms that a facial challenge to no-aid provisions must fail. But cf. *ante*, at 479–480 (majority opinion). In *Locke*, this Court upheld the application of a materially similar no-aid provision in Washington State, concluding that the Free Exercise Clause permitted Washington to forbid state-scholarship funds for students pursuing devotional theology degrees. 540 U. S., at 721.

to decide for themselves whether and how to fund religion," *Trinity Lutheran*, 582 U. S., at 487 (SOTOMAYOR, J., dissenting). Previously, this Court recognized that a "prophylactic rule against the use of public funds" for "religious activities" appropriately balanced the Religion Clauses' differing but equally weighty interests. *Ibid.*

The Court maintains that this case differs from *Locke* because no pertinent "'historic and substantial'" tradition supports Montana's decision. *Ante*, at 480. But the Court's historical analysis is incomplete at best. For one thing, the Court discounts anything beyond the 1850s as failing to "establish an early American tradition," *ante*, at 482, while itself relying on examples from around that time, *ante*, at 480–481. For another, although the States may have had "rich diversity of experience" at the founding, "the story relevant here is one of consistency." *Trinity Lutheran*, 582 U. S., at 481 (SOTOMAYOR, J., dissenting); see also *id.*, at 482–489 (chronicling state histories). The common thread was that "those who lived under the laws and practices that formed religious establishments made a considered decision that civil government should not fund ministers and their houses of worship." *Id.*, at 486. And as the Court's recent precedent holds, at least some teachers in religiously affiliated schools are ministers who inculcate the faith. See *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. 171, 178, 196 (2012); see also *ante*, at 510 (GORSUCH, J., concurring); *ante*, at 525, 532 (BREYER, J., dissenting).

The Court further suggests that by abstaining from funding religious activity, the State is "'suppress[ing]'" and "penaliz[ing]" religious activity. *Ante*, at 485–486. But a State's decision not to fund religious activity does not "disfavor religion; rather, it represents a valid choice to remain secular in the face of serious establishment and free exercise concerns." *Trinity Lutheran*, 582 U. S., at 493 (SOTOMAYOR, J., dissenting). That is, a "legislature's decision not

to subsidize the exercise of a fundamental right does not infringe the right." *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540, 549 (1983).

Finally, it is no answer to say that this case involves "discrimination." *Ante*, at 477–478. A "decision to treat entities differently based on distinctions that the Religion Clauses make relevant does not amount to discrimination." *Trinity Lutheran*, 582 U. S., at 492 (SOTOMAYOR, J., dissenting). So too here.

* * *

Today's ruling is perverse. Without any need or power to do so, the Court appears to require a State to reinstate a tax-credit program that the Constitution did not demand in the first place. We once recognized that "[w]hile the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs." *Schempp*, 374 U. S., at 226 (emphasis deleted). Today's Court, by contrast, rejects the Religion Clauses' balanced values in favor of a new theory of free exercise, and it does so only by setting aside well-established judicial constraints.

I respectfully dissent.

Syllabus

UNITED STATES PATENT AND TRADEMARK OFFICE ET AL. *v.* BOOKING.COM B. V.

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

No. 19–46. Argued May 4, 2020—Decided June 30, 2020

A generic name—the name of a class of products or services—is ineligible for federal trademark registration. Respondent Booking.com, an enterprise that maintains a travel-reservation website by the same name, sought federal registration of marks including the term "Booking.com." Concluding that "Booking.com" is a generic name for online hotel-reservation services, the U. S. Patent and Trademark Office (PTO) refused registration. Booking.com sought judicial review, and the District Court determined that "Booking.com"—unlike the term "booking" standing alone—is not generic. The Court of Appeals affirmed, finding no error in the District Court's assessment of how consumers perceive the term "Booking.com." The appellate court also rejected the PTO's contention that, as a rule, combining a generic term like "booking" with ".com" yields a generic composite.

Held: A term styled "generic.com" is a generic name for a class of goods or services only if the term has that meaning to consumers. Pp. 556–564.

(a) Whether a compound term is generic turns on whether that term, taken as a whole, signifies to consumers a class of goods or services. The courts below determined, and the PTO no longer disputes, that consumers do not in fact perceive the term "Booking.com" that way. Because "Booking.com" is not a generic name to consumers, it is not generic. Pp. 556–557.

(b) Opposing that determination, the PTO urges a nearly *per se* rule: When a generic term is combined with a generic Internet-domain-name suffix like ".com," the resulting combination is generic. The rule the PTO proffers is not borne out by the PTO's own past practice and lacks support in trademark law or policy. Pp. 557–564.

(1) The PTO's proposed rule does not follow from *Goodyear's India Rubber Glove Mfg. Co.* v. *Goodyear Rubber Co.*, 128 U. S. 598. *Goodyear*, the PTO maintains, established that adding a generic corporate designation like "Company" to a generic term does not confer trademark eligibility. According to the PTO, adding ".com" to a generic term—like adding "Company"—can convey no source-identifying meaning. That premise is faulty, for only one entity can occupy a particular Internet domain name at a time, so a "generic.com" term could convey to consum-

ers an association with a particular website. Moreover, an unyielding legal rule that entirely disregards consumer perception is incompatible with a bedrock principle of the Lanham Act: The generic (or nongeneric) character of a particular term depends on its meaning to consumers, *i. e.*, do consumers in fact perceive the term as the name of a class or, instead, as a term capable of distinguishing among members of the class. Pp. 558–561.

(2) The PTO's policy concerns do not support a categorical rule against registration of "generic.com" terms. The PTO asserts that trademark protection for "Booking.com" would give the mark owner undue control over similar language that others should remain free to use. That concern attends any descriptive mark. Guarding against the anticompetitive effects the PTO identifies, several doctrines ensure that registration of "Booking.com" would not yield its holder a monopoly on the term "booking." The PTO also doubts that owners of "generic .com" brands need trademark protection in addition to existing competitive advantages. Such advantages, however, do not inevitably disqualify a mark from federal registration. Finally, the PTO urges that Booking.com could seek remedies outside trademark law, but there is no basis to deny Booking.com the same benefits Congress accorded other marks qualifying as nongeneric. Pp. 561–564.

915 F. 3d 171, affirmed.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, ALITO, SOTOMAYOR, KAGAN, GORSUCH, and KAVANAUGH, JJ., joined. SOTOMAYOR, J., filed a concurring opinion, *post*, p. 564. BREYER, J., filed a dissenting opinion, *post*, p. 565.

Erica L. Ross argued the cause for petitioners. With her on the briefs were *Solicitor General Francisco*, *Assistant Attorney General Hunt*, *Deputy Solicitor General Stewart*, *Mark R. Freeman*, *Daniel Tenny*, *Sarah T. Harris*, *Thomas W. Krause*, *Christina J. Hieber*, and *Molly R. Silfen*.

Lisa S. Blatt argued the cause for respondent. With her on the brief were *Sarah M. Harris*, *Eden Schiffmann*, *David H. Bernstein*, *Jared I. Kagan*, and *Jonathan E. Moskin*.*

**Alexandra H. Moss* and *Corynne McSherry* filed a brief for the Electronic Frontier Foundation as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the Boston Patent Law Association by *Erik Paul Belt*, *Lori Jane Shyavitz*, and *Alexander L. Ried*; for the Coalition of .com Brand Owners by *Thad Chaloem-*

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns eligibility for federal trademark registration. Respondent Booking.com, an enterprise that maintains a travel-reservation website by the same name, sought to register the mark "Booking.com." Concluding that "Booking.com" is a generic name for online hotel-reservation services, the U. S. Patent and Trademark Office (PTO) refused registration.

A generic name—the name of a class of products or services—is ineligible for federal trademark registration. The word "booking," the parties do not dispute, is generic for hotel-reservation services. "Booking.com" must also be generic, the PTO maintains, under an encompassing rule the PTO currently urges us to adopt: The combination of a generic word and ".com" is generic.

In accord with the first- and second-instance judgments in this case, we reject the PTO's sweeping rule. A term styled "generic.com" is a generic name for a class of goods or services only if the term has that meaning to consumers. Consumers, according to lower court determinations uncontested here by the PTO, do not perceive the term "Booking.com" to

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tiarana, *Phillip Barengolts*, and *Jacquelyn R. Prom*; for the Intellectual Property Law Association of Chicago by *Margaret M. Duncan*; for the Internet Commerce Association by *Megan L. Brown*; for Salesforce.com, Inc., et al. by *Thomas G. Hungar*, *Howard S. Hogan*, and *Joshua M. Wesneski*; for Survey Scholars et al. by *Mark D. Harris*; and for Trademark and Internet Law Professors by *J. Michael Jakes*.

Briefs of *amici curiae* were filed for the American Intellectual Property Law Association by *Craig B. Whitney* and *Barbara A. Fiacco*; for the Association of Amicus Counsel by *Charles E. Miller*, *Robert J. Rando*, and *Alan M. Sack*; for the Intellectual Property Owners Association by *Eric R. Moran*, *Nicole E. Grimm*, and *Kevin H. Rhodes*; for the International Trademark Association by *Lawrence K. Nodine*, *A. Justin Ourso III*, *Martin Schwimmer*, and *Jennifer L. Gregor*; for the New York Intellectual Property Law Association by *Michael Carl Cannata*, *Frank Misiti*, *Stephen J. Smirti*, *Jr.*, *Kathleen E. McCarthy*, *Robert M. Isackson*, *William Thornashower*, and *Ronald D. Coleman*; for Trademark Scholars by *Rebecca Tushnet*, *pro se*; and for Peter N. Golder et al. by *R. Charles Henn*, *Jr.*

signify online hotel-reservation services as a class. In circumstances like those this case presents, a "generic.com" term is not generic and can be eligible for federal trademark registration.

I

A

A trademark distinguishes one producer's goods or services from another's. Guarding a trademark against use by others, this Court has explained, "secure[s] to the owner of the mark the goodwill" of her business and "protect[s] the ability of consumers to distinguish among competing producers." *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U. S. 189, 198 (1985); see S. Rep. No. 1333, 79th Cong., 2d Sess., 3 (1946) (trademark statutes aim to "protect the public so it may be confident that, in purchasing a product bearing a particular trade-mark which it favorably knows, it will get the product which it asks for and wants to get"). Trademark protection has roots in common law and equity. *Matal* v. *Tam*, 582 U. S. 218, 224 (2017). Today, the Lanham Act, enacted in 1946, provides federal statutory protection for trademarks. 60 Stat. 427, as amended, 15 U. S. C. § 1051 *et seq.* We have recognized that federal trademark protection, supplementing state law, "supports the free flow of commerce" and "foster[s] competition." *Matal*, 582 U. S., at 225–226 (internal quotation marks omitted).

The Lanham Act not only arms trademark owners with federal claims for relief; importantly, it establishes a system of federal trademark registration. The owner of a mark on the principal register enjoys "valuable benefits," including a presumption that the mark is valid. *Iancu* v. *Brunetti*, 588 U. S. 388, 391 (2019); see §§ 1051, 1052. The supplemental register contains other product and service designations, some of which could one day gain eligibility for the principal register. See § 1091. The supplemental register accords more modest benefits; notably, a listing on that register

announces one's use of the designation to others considering a similar mark. See 3 J. McCarthy, Trademarks and Unfair Competition § 19:37 (5th ed. 2019) (hereinafter McCarthy). Even without federal registration, a mark may be eligible for protection against infringement under both the Lanham Act and other sources of law. See *Matal*, 582 U. S., at 225–226.

Prime among the conditions for registration, the mark must be one "by which the goods of the applicant may be distinguished from the goods of others." § 1052; see § 1091(a) (supplemental register contains "marks capable of distinguishing . . . goods or services"). Distinctiveness is often expressed on an increasing scale: Word marks "may be (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5) fanciful." *Two Pesos, Inc.* v. *Taco Cabana, Inc.*, 505 U. S. 763, 768 (1992).

The more distinctive the mark, the more readily it qualifies for the principal register. The most distinctive marks—those that are "'arbitrary' ('Camel' cigarettes), 'fanciful' ('Kodak' film), or 'suggestive' ('Tide' laundry detergent)"—may be placed on the principal register because they are "inherently distinctive." *Wal-Mart Stores, Inc.* v. *Samara Brothers, Inc.*, 529 U. S. 205, 210–211 (2000). "Descriptive" terms, in contrast, are not eligible for the principal register based on their inherent qualities alone. *E. g.*, *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 718 F. 2d 327, 331 (CA9 1983) ("Park 'N Fly" airport parking is descriptive), rev'd on other grounds, 469 U. S. 189 (1985). The Lanham Act, "liberaliz-[ing] the common law," "extended protection to descriptive marks." *Qualitex Co.* v. *Jacobson Products Co.*, 514 U. S. 159, 171 (1995). But to be placed on the principal register, descriptive terms must achieve significance "in the minds of the public" as identifying the applicant's goods or services—a quality called "acquired distinctiveness" or "secondary meaning." *Wal-Mart Stores*, 529 U. S., at 211 (internal quotation marks omitted); see § 1052(e), (f). Without secondary

meaning, descriptive terms may be eligible only for the supplemental register. § 1091(a).

At the lowest end of the distinctiveness scale is "the generic name for the goods or services." §§ 1127, 1064(3), 1065(4). The name of the good itself (*e. g.*, "wine") is incapable of "distinguish[ing] [one producer's goods] from the goods of others" and is therefore ineligible for registration. § 1052; see § 1091(a). Indeed, generic terms are ordinarily ineligible for protection as trademarks at all. See Restatement (Third) of Unfair Competition § 15, p. 142 (1993); *Otokoyama Co.* v. *Wine of Japan Import, Inc.*, 175 F. 3d 266, 270 (CA2 1999) ("[E]veryone may use [generic terms] to refer to the goods they designate.").

B

Booking.com is a digital travel company that provides hotel reservations and other services under the brand "Booking.com," which is also the domain name of its website.[1] Booking.com filed applications to register four marks in connection with travel-related services, each with different visual features but all containing the term "Booking.com."[2]

Both a PTO examining attorney and the PTO's Trademark Trial and Appeal Board concluded that the term "Booking.com" is generic for the services at issue and is therefore unregistrable. "Booking," the Board observed, means making travel reservations, and ".com" signifies a

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[1] A domain name identifies an address on the Internet. The rightmost component of a domain name—".com" in "Booking.com"—is known as the top-level domain. Domain names are unique; that is, a given domain name is assigned to only one entity at a time.

[2] For simplicity, this opinion uses the term "trademark" to encompass the marks whose registration Booking.com seeks. Although Booking.com uses the marks in connection with services, not goods, rendering the marks "service marks" rather than "trademarks" under 15 U. S. C. § 1127, that distinction is immaterial to the issue before us.

commercial website. The Board then ruled that "customers would understand the term BOOKING.COM primarily to refer to an online reservation service for travel, tours, and lodgings." App. to Pet. for Cert. 164a, 176a. Alternatively, the Board held that even if "Booking.com" is descriptive, not generic, it is unregistrable because it lacks secondary meaning.

Booking.com sought review in the U. S. District Court for the Eastern District of Virginia, invoking a mode of review that allows Booking.com to introduce evidence not presented to the agency. See § 1071(b). Relying in significant part on Booking.com's new evidence of consumer perception, the District Court concluded that "Booking.com"—unlike "booking"—is not generic. The "consuming public," the court found, "primarily understands that BOOKING.COM does not refer to a genus, rather it is descriptive of services involving 'booking' available at that domain name." *Booking.com B.V.* v. *Matal*, 278 F. Supp. 3d 891, 918 (2017). Having determined that "Booking.com" is descriptive, the District Court additionally found that the term has acquired secondary meaning as to hotel-reservation services. For those services, the District Court therefore concluded, Booking.com's marks meet the distinctiveness requirement for registration.

The PTO appealed only the District Court's determination that "Booking.com" is not generic. Finding no error in the District Court's assessment of how consumers perceive the term "Booking.com," the Court of Appeals for the Fourth Circuit affirmed the court of first instance's judgment. In so ruling, the appeals court rejected the PTO's contention that the combination of ".com" with a generic term like "booking" "is *necessarily* generic." 915 F. 3d 171, 184 (2019). Dissenting in relevant part, Judge Wynn concluded that the District Court mistakenly presumed that "generic .com" terms are usually descriptive, not generic.

We granted certiorari, 589 U. S. 1055 (2019), and now affirm the Fourth Circuit's decision.

II

Although the parties here disagree about the circumstances in which terms like "Booking.com" rank as generic, several guiding principles are common ground. First, a "generic" term names a "class" of goods or services, rather than any particular feature or exemplification of the class. Brief for Petitioners 4; Brief for Respondent 6; see §§ 1127, 1064(3), 1065(4) (referring to "the generic name for the goods or services"); *Park 'N Fly*, 469 U. S., at 194 ("A generic term is one that refers to the genus of which the particular product is a species."). Second, for a compound term, the distinctiveness inquiry trains on the term's meaning as a whole, not its parts in isolation. Reply Brief 9; Brief for Respondent 2; see *Estate of P. D. Beckwith, Inc.* v. *Commissioner of Patents*, 252 U. S. 538, 545–546 (1920). Third, the relevant meaning of a term is its meaning to consumers. Brief for Petitioners 43–44; Brief for Respondent 2; see *Bayer Co.* v. *United Drug Co.*, 272 F. 505, 509 (SDNY 1921) (Hand, J.) ("What do the buyers understand by the word for whose use the parties are contending?"). Eligibility for registration, all agree, turns on the mark's capacity to "distinguis[h]" goods "in commerce." § 1052. Evidencing the Lanham Act's focus on consumer perception, the section governing cancellation of registration provides that "[t]he primary significance of the registered mark to the relevant public . . . shall be the test for determining whether the registered mark has become the generic name of goods or services." § 1064(3).[3]

[3] The U. S. Patent and Trademark Office (PTO) suggests that the primary-significance test might not govern outside the context of § 1064(3), which subjects to cancellation marks previously registered that have "become" generic. See Reply Brief 11; Tr. of Oral Arg. 19. To so confine the primary-significance test, however, would upset the understanding, shared by Courts of Appeals and the PTO's own manual for trademark examiners, that the same test governs whether a mark is registrable in the first place. See, *e. g.*, *In re Cordua Restaurants, Inc.*, 823 F. 3d 594, 599 (CA Fed. 2016); *Nartron Corp.* v. *STMicroelectronics, Inc.*, 305 F. 3d 397, 404 (CA6 2002); *Genesee Brewing Co.* v. *Stroh Brewing Co.*, 124 F. 3d 137, 144 (CA2 1997); Trademark Manual of Examining Procedure

Under these principles, whether "Booking.com" is generic turns on whether that term, taken as a whole, signifies to consumers the class of online hotel-reservation services. Thus, if "Booking.com" were generic, we might expect consumers to understand Travelocity—another such service—to be a "Booking.com." We might similarly expect that a consumer, searching for a trusted source of online hotel-reservation services, could ask a frequent traveler to name her favorite "Booking.com" provider.

Consumers do not in fact perceive the term "Booking.com" that way, the courts below determined. The PTO no longer disputes that determination. See Pet. for Cert. I; Brief for Petitioners 17–18 (contending only that a consumer-perception inquiry was unnecessary, not that the lower courts' consumer-perception determination was wrong). That should resolve this case: Because "Booking.com" is not a generic name to consumers, it is not generic.

III

Opposing that conclusion, the PTO urges a nearly *per se* rule that would render "Booking.com" ineligible for registration regardless of specific evidence of consumer perception. In the PTO's view, which the dissent embraces, when a generic term is combined with a generic top-level domain like ".com," the resulting combination is generic. In other words, every "generic.com" term is generic according to the PTO, absent exceptional circumstances.[4]

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§ 1209.01(c)(i), p. 1200–267 (Oct. 2018), http://tmep.uspto.gov. We need not address today the scope of the primary-significance test's application, for our analysis does not depend on whether one meaning among several is "primary." Sufficient to resolve this case is the undisputed principle that consumer perception demarcates a term's meaning.

[4] The PTO notes only one possible exception: Sometimes adding a generic term to a generic top-level domain results in wordplay (for example, "tennis.net"). That special case, the PTO acknowledges, is not presented here and does not affect our analysis. See Brief for Petitioners 25, n. 6; Tr. of Oral Arg. 25–26.

The PTO's own past practice appears to reflect no such comprehensive rule. See, *e. g.*, Trademark Registration No. 3,601,346 ("ART.COM" on principal register for, *inter alia*, "[o]nline retail store services" offering "art prints, original art, [and] art reproductions"); Trademark Registration No. 2,580,467 ("DATING.COM" on supplemental register for "dating services"). Existing registrations inconsistent with the rule the PTO now advances would be at risk of cancellation if the PTO's current view were to prevail. See § 1064(3). We decline to adopt a rule essentially excluding registration of "generic.com" marks. As explained below, we discern no support for the PTO's current view in trademark law or policy.

A

The PTO urges that the exclusionary rule it advocates follows from a common-law principle, applied in *Goodyear's India Rubber Glove Mfg. Co.* v. *Goodyear Rubber Co.*, 128 U. S. 598 (1888), that a generic corporate designation added to a generic term does not confer trademark eligibility. In *Goodyear*, a decision predating the Lanham Act, this Court held that "Goodyear Rubber Company" was not "capable of exclusive appropriation." *Id.*, at 602. Standing alone, the term "Goodyear Rubber" could not serve as a trademark because it referred, in those days, to "well-known classes of goods produced by the process known as Goodyear's invention." *Ibid.* "[A]ddition of the word 'Company' " supplied no protectable meaning, the Court concluded, because adding "Company" "only indicates that parties have formed an association or partnership to deal in such goods." *Ibid.* Permitting exclusive rights in "Goodyear Rubber Company" (or "Wine Company, Cotton Company, or Grain Company"), the Court explained, would tread on the right of all persons "to deal in such articles, and to publish the fact to the world." *Id.*, at 602–603.

"Generic.com," the PTO maintains, is like "Generic Company" and is therefore ineligible for trademark protection,

let alone federal registration. According to the PTO, adding ".com" to a generic term—like adding "Company"—"conveys no additional meaning that would distinguish [one provider's] services from those of other providers." Brief for Petitioners 44. The dissent endorses that proposition: "Generic .com" conveys that the generic good or service is offered online "and nothing more." *Post*, at 565.

That premise is faulty. A "generic.com" term might also convey to consumers a source-identifying characteristic: an association with a particular website. As the PTO and the dissent elsewhere acknowledge, only one entity can occupy a particular Internet domain name at a time, so "[a] consumer who is familiar with that aspect of the domain-name system can infer that BOOKING.COM refers to *some* specific entity." Brief for Petitioners 40. See also Tr. of Oral Arg. 5 ("Because domain names are one of a kind, a significant portion of the public will always understand a generic '.com' term to refer to a specific business . . . ."); *post*, at 7 (the "exclusivity" of "generic.com" terms sets them apart from terms like "Wine, Inc." and "The Wine Company"). Thus, consumers could understand a given "generic.com" term to describe the corresponding website or to identify the website's proprietor. We therefore resist the PTO's position that "generic.com" terms are capable of signifying only an entire class of online goods or services and, hence, are categorically incapable of identifying a source.[5]

[5] In passing, the PTO urges us to disregard that a domain name is assigned to only one entity at a time. That fact, the PTO suggests, stems from "a functional characteristic of the Internet and the domain-name system," and functional features cannot receive trademark protection. Brief for Petitioners 32. "[A] product feature is functional, and cannot serve as a trademark," we have held, "if it is essential to the use or purpose of the article or if it affects the cost or quality of the article." *TrafFix Devices, Inc.* v. *Marketing Displays, Inc.*, 532 U. S. 23, 32 (2001) (internal quotation marks omitted); see § 1052(e) (barring from the principal registrar "any matter that, as a whole, is functional"). This case, however, does not concern trademark protection for a feature of the Internet or the domain-

The PTO's reliance on *Goodyear* is flawed in another respect. The PTO understands *Goodyear* to hold that "Generic Company" terms "are ineligible for trademark protection *as a matter of law*"—regardless of how "consumers would understand" the term. Brief for Petitioners 38. But, as noted, whether a term is generic depends on its meaning to consumers. *Supra*, at 556–557. That bedrock principle of the Lanham Act is incompatible with an unyielding legal rule that entirely disregards consumer perception. Instead, *Goodyear* reflects a more modest principle harmonious with Congress' subsequent enactment: A compound of generic elements is generic if the combination yields no additional meaning *to consumers* capable of distinguishing the goods or services.

The PTO also invokes the oft-repeated principle that "no matter how much money and effort the user of a generic term has poured into promoting the sale of its merchandise . . . , it cannot deprive competing manufacturers of the product of the right to call an article by its name." *Abercrombie & Fitch Co.* v. *Hunting World, Inc.*, 537 F. 2d 4, 9 (CA2 1976). That principle presupposes that a generic term is at issue. But the PTO's only legal basis for deeming "generic .com" terms generic is its mistaken reliance on *Goodyear*.

While we reject the rule proffered by the PTO that "generic.com" terms are generic names, we do not embrace a rule automatically classifying such terms as nongeneric. Whether any given "generic.com" term is generic, we hold, depends on whether consumers in fact perceive that term as

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name system; Booking.com lays no claim to the use of unique domain names generally. Nor does the PTO contend that the particular domain name "Booking.com" is essential to the use or purpose of online hotel-reservation services, affects these services' cost or quality, or is otherwise necessary for competitors to use. In any event, we have no occasion to decide the applicability of § 1052(e)'s functionality bar, for the sole ground on which the PTO refused registration, and the sole claim before us, is that "Booking.com" is generic.

the name of a class or, instead, as a term capable of distinguishing among members of the class.[6]

B

The PTO, echoed by the dissent, *post*, at 574–576, objects that protecting "generic.com" terms as trademarks would disserve trademark law's animating policies. We disagree.

The PTO's principal concern is that trademark protection for a term like "Booking.com" would hinder competitors. But the PTO does not assert that others seeking to offer online hotel-reservation services need to call their services "Booking.com." Rather, the PTO fears that trademark protection for "Booking.com" could exclude or inhibit competitors from using the term "booking" or adopting domain names like "ebooking.com" or "hotel-booking.com." Brief for Petitioners 27–28. The PTO's objection, therefore, is not to exclusive use of "Booking.com" as a mark, but to undue

[6] Evidence informing that inquiry can include not only consumer surveys, but also dictionaries, usage by consumers and competitors, and any other source of evidence bearing on how consumers perceive a term's meaning. Surveys can be helpful evidence of consumer perception but require care in their design and interpretation. See Brief for Trademark Scholars as *Amici Curiae* 18–20 (urging that survey respondents may conflate the fact that domain names are exclusive with a conclusion that a given "generic.com" term has achieved secondary meaning). Moreover, difficult questions may be presented when a term has multiple concurrent meanings to consumers or a meaning that has changed over time. See, *e. g.*, 2 J. McCarthy, Trademarks and Unfair Competition § 12:51 (5th ed. 2019) (discussing terms that are "a generic name to some, a trademark to others"); *id.*, § 12:49 ("Determining the distinction between generic and trademark usage of a word . . . when there are no other sellers of [the good or service] is one of the most difficult areas of trademark law."). Such issues are not here entailed, for the PTO does not contest the lower courts' assessment of consumer perception in this case. See Pet. for Cert. I; Brief for Petitioners 17–18. For the same reason, while the dissent questions the evidence on which the lower courts relied, *post*, at 571–572, 573, we have no occasion to reweigh that evidence. Cf. *post*, at 565 (Sotomayor, J., concurring).

control over similar language, *i. e.*, "booking," that others should remain free to use.

That concern attends any descriptive mark. Responsive to it, trademark law hems in the scope of such marks short of denying trademark protection altogether. Notably, a competitor's use does not infringe a mark unless it is likely to confuse consumers. See §§ 1114(1), 1125(a)(1)(A); 4 McCarthy § 23:1.50 (collecting state law). In assessing the likelihood of confusion, courts consider the mark's distinctiveness: "The weaker a mark, the fewer are the junior uses that will trigger a likelihood of consumer confusion." 2 *id.*, § 11:76. When a mark incorporates generic or highly descriptive components, consumers are less likely to think that other uses of the common element emanate from the mark's owner. *Ibid.* Similarly, "[i]n a 'crowded' field of look-alike marks" (*e. g.*, hotel names including the word "grand"), consumers "may have learned to carefully pick out" one mark from another. *Id.*, § 11:85. And even where some consumer confusion exists, the doctrine known as classic fair use, see *id.*, § 11:45, protects from liability anyone who uses a descriptive term, "fairly and in good faith" and "otherwise than as a mark," merely to describe her own goods. 15 U. S. C. § 1115(b)(4); see *KP Permanent Make-Up, Inc.* v. *Lasting Impression I, Inc.*, 543 U. S. 111, 122–123 (2004).

These doctrines guard against the anticompetitive effects the PTO identifies, ensuring that registration of "Booking .com" would not yield its holder a monopoly on the term "booking." Booking.com concedes that "Booking.com" would be a "weak" mark. Tr. of Oral Arg. 66. See also *id.*, at 42–43, 55. The mark is descriptive, Booking.com recognizes, making it "harder . . . to show a likelihood of confusion." *Id.*, at 43. Furthermore, because its mark is one of many "similarly worded marks," Booking.com accepts that close variations are unlikely to infringe. *Id.*, at 66. And Booking.com acknowledges that federal registration of "Booking.com" would not prevent competitors from

using the word "booking" to describe their own services. *Id.*, at 55.

The PTO also doubts that owners of "generic.com" brands need trademark protection in addition to existing competitive advantages. Booking.com, the PTO argues, has already seized a domain name that no other website can use and is easy for consumers to find. Consumers might enter "the word 'booking' in a search engine," the PTO observes, or "proceed directly to 'booking.com' in the expectation that [online hotel-booking] services will be offered at that address." Brief for Petitioners 32. Those competitive advantages, however, do not inevitably disqualify a mark from federal registration. All descriptive marks are intuitively linked to the product or service and thus might be easy for consumers to find using a search engine or telephone directory. The Lanham Act permits registration nonetheless. See § 1052(e), (f). And the PTO fails to explain how the exclusive connection between a domain name and its owner makes the domain name a generic term all should be free to use. That connection makes trademark protection more appropriate, not less. See *supra*, at 558–559.

Finally, even if "Booking.com" is generic, the PTO urges, unfair-competition law could prevent others from passing off their services as Booking.com's. Cf. *Genesee Brewing Co.* v. *Stroh Brewing Co.*, 124 F. 3d 137, 149 (CA2 1997); *Blinded Veterans Assn.* v. *Blinded Am. Veterans Foundation*, 872 F. 2d 1035, 1042–1048 (CADC 1989). But federal trademark registration would offer Booking.com greater protection. See, *e. g.*, *Genesee Brewing*, 124 F. 3d, at 151 (unfair-competition law would oblige competitor at most to "make more of an effort" to reduce confusion, not to cease marketing its product using the disputed term); *Matal*, 582 U. S., at 226–227 (federal registration confers valuable benefits); Brief for Respondent 26 (expressing intention to seek protections available to trademark owners under the Anticybersquatting Consumer Protection Act, 15 U. S. C. § 1125(d)); Brief for Co-

alition of .Com Brand Owners as *Amici Curiae* 14–19 (trademark rights allow mark owners to stop domain-name abuse through private dispute resolution without resorting to litigation). We have no cause to deny Booking.com the same benefits Congress accorded other marks qualifying as nongeneric.

* * *

The PTO challenges the judgment below on a sole ground: It urges that, as a rule, combining a generic term with ".com" yields a generic composite. For the above-stated reasons, we decline a rule of that order, one that would largely disallow registration of "generic.com" terms and open the door to cancellation of scores of currently registered marks. Accordingly, the judgment of the Court of Appeals for the Fourth Circuit regarding eligibility for trademark registration is

Affirmed.

JUSTICE SOTOMAYOR, concurring.

The question before the Court here is simple: whether there is a nearly *per se* rule against trademark protection for a "generic.com" term. See *ante*, at 557–558; *post*, at 574 (BREYER, J., dissenting). I agree with the Court that there is no such rule, a holding that accords with how the U. S. Patent and Trademark Office (PTO) has treated such terms in the past. See *ante*, at 558 (noting that the "PTO's own past practice appears to reflect no such comprehensive rule"). I add two observations.

First, the dissent wisely observes that consumer-survey evidence "may be an unreliable indicator of genericness." *Post*, at 573. Flaws in a specific survey design, or weaknesses inherent in consumer surveys generally, may limit the probative value of surveys in determining whether a particular mark is descriptive or generic in this context. But I do not read the Court's opinion to suggest that surveys are the be-all and end-all. As the Court notes, sources such as "dic-

tionaries, usage by consumers and competitors, and any other source of evidence bearing on how consumers perceive a term's meaning" may also inform whether a mark is generic or descriptive. *Ante*, at 561, n. 6.

Second, the PTO may well have properly concluded, based on such dictionary and usage evidence, that Booking.com is in fact generic for the class of services at issue here, and the District Court may have erred in concluding to the contrary. But that question is not before the Court. With these understandings, I concur in the Court's opinion.

JUSTICE BREYER, dissenting.

What is Booking.com? To answer this question, one need only consult the term itself. Respondent provides an online booking service. The company's name informs the consumer of the basic nature of its business and nothing more. Therein lies the root of my disagreement with the majority.

Trademark law does not protect generic terms, meaning terms that do no more than name the product or service itself. This principle preserves the linguistic commons by preventing one producer from appropriating to its own exclusive use a term needed by others to describe their goods or services. Today, the Court holds that the addition of ".com" to an otherwise generic term, such as "booking," can yield a protectable trademark. Because I believe this result is inconsistent with trademark principles and sound trademark policy, I respectfully dissent.

I

A

Trademark law protects those "'distinctive marks—words, names, symbols, and the like'" that "'distinguish a particular artisan's goods from those of others.'" *Matal* v. *Tam*, 582 U. S. 218, 223 (2017) (quoting *B&B Hardware, Inc.* v. *Hargis Industries, Inc.*, 575 U. S. 138, 142 (2015)). To determine whether a given term is sufficiently distinctive to serve as a

trademark, courts generally place it in one of five categories. The first four kinds of terms are eligible for federal trademark registration. The fifth is not.

I list the first three only to give context and allow comparisons. They are: (1) "'fanciful'" terms, such as "Kodak" (film); (2) "'arbitrary'" terms, such as "Camel" (cigarettes); and (3) "'suggestive'" terms, such as "Tide" (laundry detergent). *Ante*, at 553. These kinds of terms are "'inherently distinctive.'" *Ibid.* The public can readily understand that they identify and distinguish the goods or services of one firm from those of all others. See *Two Pesos, Inc.* v. *Taco Cabana, Inc.*, 505 U. S. 763, 768 (1992). By preventing others from copying a distinctive mark, trademark law "protect[s] the ability of consumers to distinguish among competing producers" and "secure[s] to the owner of the mark the goodwill of his business." *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U. S. 189, 198 (1985). Ultimately, the purpose of trademark law is to "foster competition" and "suppor[t] the free flow of commerce." *Matal*, 582 U. S., at 225 (internal quotation marks omitted).

This case concerns two further categories. There are "descriptive" terms, such as "Best Buy" (electronics) or "First National Bank" (banking services), that "immediately conve[y] information concerning a feature, quality, or characteristic" of the producer's goods or services. *In re North Carolina Lottery*, 866 F. 3d 1363, 1367 (CA Fed. 2017). A descriptive term can be registered as a trademark only if it acquires "secondary meaning"—*i. e.*, the public has come to associate it with a particular firm or its product. *Two Pesos*, 505 U. S., at 769.

There are also "generic" terms, such as "wine" or "haircuts." They do nothing more than inform the consumer of the kind of product that the firm sells. We have called generic terms "descriptive of a class of goods." *Goodyear's India Rubber Glove Mfg. Co.* v. *Goodyear Rubber Co.*, 128 U. S. 598, 602 (1888). And we have said that they simply

convey the "genus of which the particular product is a species." *Park 'N Fly*, 469 U. S., at 194. A generic term is not eligible for use as a trademark. That principle applies even if a particular generic term "ha[s] become identified with a first user" in the minds of the consuming public. *CES Publishing Corp.* v. *St. Regis Publications, Inc.*, 531 F. 2d 11, 13 (CA2 1975) (Friendly, J.). The reason is simple. To hold otherwise "would grant the owner of the mark a monopoly, since a competitor could not describe his goods as what they are." *Ibid.*

Courts have recognized that it is not always easy to distinguish generic from descriptive terms. See, *e. g.*, *Abercrombie & Fitch Co.* v. *Hunting World, Inc.*, 537 F. 2d 4, 9 (CA2 1976) (Friendly, J.). It is particularly difficult to do so when a firm wishes to string together two or more generic terms to create a compound term. Despite the generic nature of its component parts, the term as a whole is not necessarily generic. In such cases, courts must determine whether the combination of generic terms conveys some distinctive, source-identifying meaning that each term, individually, lacks. See 2 J. McCarthy, Trademarks and Unfair Competition § 12:39 (5th ed. Supp. 2020) (McCarthy). If the meaning of the whole is no greater than the sum of its parts, then the compound is itself generic. See *Princeton Vanguard, LLC* v. *Frito-Lay North Am., Inc.*, 786 F. 3d 960, 966–967 (CA Fed. 2015); *In re Gould Paper Corp.*, 834 F. 2d 1017, 1018 (CA Fed. 1987) (registration is properly denied if "the separate words joined to form a compound have a meaning identical to the meaning common usage would ascribe to those words as a compound"); see also 2 McCarthy § 12:39 (collecting examples of compound terms held to be generic).

In *Goodyear*, 128 U. S. 598, we held that appending the word "'Company'" to the generic name for a class of goods does not yield a protectable compound term. *Id.*, at 602–603. The addition of a corporate designation, we explained, "only indicates that parties have formed an association or

partnership to deal in such goods." *Id.*, at 602. For instance, "parties united to produce or sell wine, or to raise cotton or grain," may well "style themselves Wine Company, Cotton Company, or Grain Company." *Ibid.* But they would not thereby gain the right to exclude others from the use of those terms "for the obvious reason that all persons have a right to deal in such articles, and to publish the fact to the world." *Id.*, at 603. "[I]ncorporation of a company in the name of an article of commerce, without other specification," we concluded, does not "create any exclusive right to the use of the name." *Ibid.*

I cannot agree with respondent that the 1946 Lanham Act "repudiate[d] *Goodyear* and its ilk." Brief for Respondent 39. It is true that the Lanham Act altered the common law in certain important respects. Most significantly, it extended trademark protection to descriptive marks that have acquired secondary meaning. See *Qualitex Co.* v. *Jacobson Products Co.*, 514 U. S. 159, 171 (1995). But it did not disturb the basic principle that *generic* terms are ineligible for trademark protection, and nothing in the Act suggests that Congress intended to overturn *Goodyear*. We normally assume that Congress did not overturn a common-law principle absent some indication to the contrary. See *Astoria Fed. Sav. & Loan Assn.* v. *Solimino*, 501 U. S. 104, 108 (1991). I can find no such indication here. Perhaps that is why the lower courts, the Trademark Trial and Appeal Board (TTAB), the U. S. Patent and Trademark Office's (PTO) Trademark Manual of Examining Procedure (TMEP), and leading treatises all recognize *Goodyear*'s continued validity. See, *e. g.*, *In re Detroit Athletic Co.*, 903 F. 3d 1297, 1304 (CA Fed. 2018); *In re Katch, LLC*, 2019 WL 2560528, *10 (TTAB 2019); TMEP § 1209.03(d) (Oct. 2018); 2 McCarthy § 12:39; 4 L. Altman & M. Pollack, Callmann on Unfair Competition, Trademarks and Monopolies § 18:11 (4th ed. Supp. 2020).

More fundamentally, the *Goodyear* principle is sound as a matter of law and logic. *Goodyear* recognized that designations such as "Company," "Corp.," and "Inc." merely indicate corporate form and therefore do nothing to distinguish one firm's goods or services from all others'. 128 U. S., at 602. It follows that the addition of such a corporate designation does not "magically transform a generic name for a product or service into a trademark, thereby giving a right to exclude others." 2 McCarthy § 12:39. In other words, where a compound term consists simply of a generic term plus a corporate designation, the whole is *necessarily* no greater than the sum of its parts.

B

This case requires us to apply these principles in the novel context of internet domain names. Respondent seeks to register a term, "Booking.com," that consists of a generic term, "booking" (known as the second-level domain) plus ".com" (known as the top-level domain). The question at issue here is whether a term that takes the form "generic.com" is generic in the ordinary course. In my view, appending ".com" to a generic term ordinarily yields no meaning beyond that of its constituent parts. Because the term "Booking.com" is just such an ordinary "generic.com" term, in my view, it is not eligible for trademark registration.

Like the corporate designations at issue in *Goodyear*, a top-level domain such as ".com" has no capacity to identify and distinguish the source of goods or services. It is merely a necessary component of any web address. See 1 McCarthy § 7:17.50. When combined with the generic name of a class of goods or services, ".com" conveys only that the owner operates a website related to such items. Just as "Wine Company" expresses the generic concept of a company that deals in wine, "wine.com" connotes only a website that does the same. The same is true of "Booking.com." The combination of "booking" and ".com" does not serve to "identify a

particular characteristic or quality of some thing; it *connotes the basic nature of that thing*"—the hallmark of a generic term. *Blinded Veterans Assn.* v. *Blinded Am. Veterans Foundation*, 872 F. 2d 1035, 1039 (CADC 1989) (R. Ginsburg, J., for the court) (emphasis added; internal quotation marks omitted).

When a website uses an inherently distinctive second-level domain, it is obvious that adding ".com" merely denotes a website associated with that term. Any reasonably well-informed consumer would understand that "post-it.com" is the website associated with Post-its. See *Minnesota Min. & Mfg. Co.* v. *Taylor*, 21 F. Supp. 2d 1003, 1005 (Minn. 1998). Likewise, "plannedparenthood.com" is obviously just the website of Planned Parenthood. See *Planned Parenthood Federation of Am., Inc.* v. *Bucci*, 1997 WL 133313, *8 (SDNY, Mar. 24, 1997). Recognizing this feature of domain names, courts generally ignore the top-level domain when analyzing likelihood of confusion. See *Brookfield Communications, Inc.* v. *West Coast Entertainment Corp.*, 174 F. 3d 1036, 1055 (CA9 1999).

Generic second-level domains are no different. The meaning conveyed by "Booking.com" is no more and no less than a website associated with its generic second-level domain, "booking." This will ordinarily be true of any generic term plus ".com" combination. The term as a whole is just as generic as its constituent parts. See 1 McCarthy § 7:17.50; 2 *id.*, § 12:39.50.

There may be exceptions to this rule in rare cases where the top-level domain interacts with the generic second-level domain in such a way as to produce meaning distinct from that of the terms taken individually. See *ante*, at 557, n. 4. Likewise, the principles discussed above may apply differently to the newly expanded universe of top-level domains, such as ".guru," ".club," or ".vip," which may "conve[y] information concerning a feature, quality, or characteristic" of the website at issue. *In re North Carolina Lottery*, 866 F. 3d,

at 1367; see also Brief for International Trademark Association as *Amicus Curiae* 10–11; TMEP §1209.03(m). These scenarios are not presented here, as "Booking.com" conveys only a website associated with booking.

C

The majority believes that *Goodyear* is inapposite because of the nature of the domain name system. Because only one entity can hold the contractual rights to a particular domain name at a time, it contends, consumers may infer that a "generic.com" domain name refers to some specific entity. *Ante*, at 558–559.

That fact does not distinguish *Goodyear*. A generic term may suggest that it is associated with a specific entity. That does not render it nongeneric. For example, "Wine, Inc." implies the existence of a specific legal entity incorporated under the laws of some State. Likewise, consumers may perceive "The Wine Company" to refer to some specific company rather than a genus of companies. But the addition of the definite article "the" obviously does not transform the generic nature of that term. See *In re The Computer Store, Inc.*, 211 USPQ 72, 74–75 (TTAB 1981). True, these terms do not carry the exclusivity of a domain name. But that functional exclusivity does not negate the principle animating *Goodyear*: Terms that merely convey the nature of the producer's business should remain free for all to use. See 128 U. S., at 603.

This case illustrates the difficulties inherent in the majority's fact-specific approach. The lower courts determined (as the majority highlights), that consumers do not use the term "Booking.com" to refer to the class of hotel reservation websites in ordinary speech. 915 F. 3d 171, 181–183 (CA4 2019); *ante*, at 557. True, few would call Travelocity a "Booking.com." *Ibid.* But literal use is not dispositive. See 915 F. 3d, at 182; *H. Marvin Ginn Corp.* v. *International Assn. of Fire Chiefs, Inc.*, 782 F. 2d 987, 989–990 (CA Fed.

1986). Consumers do not use the term "Wine, Incs." to refer to purveyors of wine. Still, the term "Wine, Inc." is generic because it signifies only a company incorporated for that purpose. See *Goodyear*, 128 U. S., at 602–603. Similarly, "Booking, Inc." may not be trademarked because it signifies only a booking company. The result should be no different for "Booking.com," which signifies only a booking website.

More than that, many of the facts that the Court supposes may distinguish some "generic.com" marks as descriptive and some as generic are unlikely to vary from case to case. There will never be evidence that consumers literally refer to the relevant class of online merchants as "generic.coms." Nor are "generic.com" terms likely to appear in dictionaries. And the key fact that, in the majority's view, distinguishes this case from *Goodyear*—that only one entity can own the rights to a particular domain name at a time—is present in every "generic.com" case. See *ante*, at 558–559.

What, then, stands in the way of automatic trademark eligibility for every "generic.com" domain? Much of the time, that determination will turn primarily on survey evidence, just as it did in this case. See 915 F. 3d, at 183–184.

However, survey evidence has limited probative value in this context. Consumer surveys often test whether consumers associate a term with a single source. See 2 McCarthy §§ 12:14–12:16 (describing types of consumer surveys). But it is possible for a generic term to achieve such an association—either because that producer has enjoyed a period of exclusivity in the marketplace, *e. g.*, *Kellogg Co.* v. *National Biscuit Co.*, 305 U. S. 111, 118–119 (1938), or because it has invested money and effort in securing the public's identification, *e. g.*, *Abercrombie*, 537 F. 2d, at 9. Evidence of such an association, no matter how strong, does not negate the generic nature of the term. *Ibid.* For that reason, some courts and the TTAB have concluded that survey evidence is generally of little value in separating generic from descrip-

tive terms. See *Schwan's IP, LLC* v. *Kraft Pizza Co.*, 460 F. 3d 971, 975–976 (CA8 2006); *Hunt Masters, Inc.* v. *Landry's Seafood Restaurant, Inc.*, 240 F. 3d 251, 254–255 (CA4 2001); *A. J. Canfield Co.* v. *Honickman*, 808 F. 2d 291, 301–303 (CA3 1986); *Miller Brewing Co.* v. *Jos. Schlitz Brewing Co.*, 605 F. 2d 990, 995 (CA7 1979); *In re Hikari Sales USA, Inc.*, 2019 WL 1453259, *13 (TTAB, Mar. 29, 2019). Although this is the minority viewpoint, see 2 McCarthy § 12:17.25, I nonetheless find it to be the more persuasive one.

Consider the survey evidence that respondent introduced below. Respondent's survey showed that 74.8% of participants thought that "Booking.com" is a brand name, whereas 23.8% believed it was a generic name. App. 66. At the same time, 33% believed that "Washingmachine.com"—which does not correspond to any company—is a brand, and 60.8% thought it was generic. *Ibid.*

What could possibly account for that difference? "Booking.com" is not *inherently* more descriptive than "Washingmachine.com" or any other "generic.com." The survey participants who identified "Booking.com" as a brand likely did so because they had heard of it, through advertising or otherwise. If someone were to start a company called "Washingmachine.com," it could likely secure a similar level of consumer identification by investing heavily in advertising. Would that somehow transform the nature of the term itself? Surely not. This hypothetical shows that respondent's survey tested consumers' association of "Booking.com" with a particular company, not anything about the term itself. But such association does not establish that a term is nongeneric. See *Kellogg*, 305 U. S., at 118–119; *Abercrombie*, 537 F. 2d, at 9.

Under the majority's approach, a "generic.com" mark's eligibility for trademark protection turns primarily on survey data, which, as I have explained, may be an unreliable indicator of genericness. As the leading treatise writer in this field has observed, this approach "[d]iscard[s] the predictable

and clear line rule of the [PTO] and the Federal Circuit" in favor of "a nebulous and unpredictable zone of generic name and top level domain combinations that somehow become protectable marks when accompanied by favorable survey results." 1 McCarthy § 7:17.50. I would heed this criticism. In my view, a term that takes the form "generic.com" is not eligible for federal trademark registration, at least not ordinarily. There being no special circumstance here, I believe that "Booking.com" is a generic term not eligible for federal registration as a trademark.

II

In addition to the doctrinal concerns discussed above, granting trademark protection to "generic.com" marks threatens serious anticompetitive consequences in the online marketplace.

The owners of short, generic domain names enjoy all the advantages of doing business under a generic name. These advantages exist irrespective of the trademark laws. Generic names are easy to remember. Because they immediately convey the nature of the business, the owner needs to expend less effort and expense educating consumers. See Meystedt, What Is My URL Worth? Placing a Value on Premium Domain Names, 19 Valuation Strategies 10, 12 (2015) (Meystedt) (noting "ability to advertise a single URL and convey exactly what business a company operates"); cf. Folsom & Teply, Trademarked Generic Words, 89 Yale L. J. 1323, 1337–1338 (1980) (Folsom & Teply) (noting " 'free advertising' effect"). And a generic business name may create the impression that it is the most authoritative and trustworthy source of the particular good or service. See Meystedt 12 (noting that generic domain names inspire "[i]nstant trust and credibility" and "[a]uthority status in an industry"); cf. Folsom & Teply 1337, n. 79 (noting that consumers may believe that "no other product is the 'real thing' ").

vantages make it harder for distinctively named businesses to compete.

Owners of generic domain names enjoy additional competitive advantages unique to the internet—again, regardless of trademark protection. Most importantly, domain name ownership confers automatic exclusivity. Multiple brick-and-mortar companies could style themselves "The Wine Company," but there can be only one "wine.com." And unlike the trademark system, that exclusivity is worldwide.

Generic domains are also easier for consumers to find. A consumer who wants to buy wine online may perform a keyword search and be directed to "wine.com." Or he may simply type "wine.com" into his browser's address bar, expecting to find a website selling wine. See Meystedt 12 (noting "ability to rank higher on search engines" and "ability to use existing type-in traffic to generate additional sales"); see also 915 F. 3d, at 189 (Wynn, J., concurring in part and dissenting in part). The owner of a generic domain name enjoys these benefits not because of the quality of her products or the goodwill of her business, but because she was fortunate (or savvy) enough to be the first to appropriate a particularly valuable piece of online real estate.

Granting trademark protection to "generic.com" marks confers additional competitive benefits on their owners by allowing them to exclude others from using *similar* domain names. Federal registration would allow respondent to threaten trademark lawsuits against competitors using domains such as "Bookings.com," "eBooking.com," "Booker.com," or "Bookit.com." Respondent says that it would not do so. See Tr. of Oral Arg. 55–56. But other firms may prove less restrained.

Indeed, why would a firm want to register its domain name as a trademark unless it wished to extend its area of exclusivity beyond the domain name itself? The domain name system, after all, already ensures that competitors can-

not appropriate a business' actual domain name. And unfair-competition law will often separately protect businesses from passing off and false advertising. See *Genesee Brewing Co.* v. *Stroh Brewing Co.*, 124 F. 3d 137, 149 (CA2 1997); 2 McCarthy § 12:2.

Under the majority's reasoning, many businesses could obtain a trademark by adding ".com" to the generic name of their product (*e. g.*, pizza.com, flowers.com, and so forth). As the internet grows larger, as more and more firms use it to sell their products, the risk of anticompetitive consequences grows. Those consequences can nudge the economy in an anticompetitive direction. At the extreme, that direction points toward one firm per product, the opposite of the competitive multifirm marketplace that our basic economic laws seek to achieve.

Not to worry, the Court responds, infringement doctrines such as likelihood of confusion and fair use will restrict the scope of protection afforded to "generic.com" marks. *Ante*, at 561–563. This response will be cold comfort to competitors of "generic.com" brands. Owners of such marks may seek to extend the boundaries of their marks through litigation, and may, at times, succeed. See, *e. g.*, *Advertise.com* v. *AOL, LLC*, 2010 WL 11507594 (CD Cal.) (owner of "Advertising.com" obtained preliminary injunction against competitor's use of "Advertise.com"), vacated in part, 616 F. 3d 974 (CA9 2010). Even if ultimately unsuccessful, the threat of costly litigation will no doubt chill others from using variants on the registered mark and privilege established firms over new entrants to the market. See Brief for Electronic Frontier Foundation as *Amicus Curiae* 19–20.

* * *

In sum, the term "Booking.com" refers to an internet booking service, which is the generic product that respondent and its competitors sell. No more and no less. The

same is true of "generic.com" terms more generally. By making such terms eligible for trademark protection, I fear that today's decision will lead to a proliferation of "generic.com" marks, granting their owners a monopoly over a zone of useful, easy-to-remember domains. This result would tend to inhibit, rather than to promote, free competition in online commerce. I respectfully dissent.

Syllabus

CHIAFALO ET AL. *v.* WASHINGTON

CERTIORARI TO THE SUPREME COURT OF WASHINGTON

No. 19–465. Argued May 13, 2020—Decided July 6, 2020

When Americans cast ballots for presidential candidates, their votes actually go toward selecting members of the Electoral College, whom each State appoints based on the popular returns. The States have devised mechanisms to ensure that the electors they appoint vote for the presidential candidate their citizens have preferred. With two partial exceptions, every State appoints a slate of electors selected by the political party whose candidate has won the State's popular vote. Most States also compel electors to pledge to support the nominee of that party. Relevant here, 15 States back up their pledge laws with some kind of sanction. Almost all of these States immediately remove a so-called "faithless elector" from his position, substituting an alternate whose vote the State reports instead. A few States impose a monetary fine on any elector who flouts his pledge.

Three Washington electors, Peter Chiafalo, Levi Guerra, and Esther John (the Electors), violated their pledges to support Hillary Clinton in the 2016 presidential election. In response, the State fined the Electors $1,000 apiece for breaking their pledges to support the same candidate its voters had. The Electors challenged their fines in state court, arguing that the Constitution gives members of the Electoral College the right to vote however they please. The Washington Superior Court rejected that claim, and the State Supreme Court affirmed, relying on *Ray* v. *Blair*, 343 U. S. 214. In *Ray*, this Court upheld a pledge requirement—though one without a penalty to back it up. *Ray* held that pledges were consistent with the Constitution's text and our Nation's history, *id.*, at 225–230; but it reserved the question whether a State can enforce that requirement through legal sanctions.

Held: A State may enforce an elector's pledge to support his party's nominee—and the state voters' choice—for President. Pp. 587–597.

(a) Article II, §1 gives the States the authority to appoint electors "in such Manner as the Legislature thereof may direct." This Court has described that clause as "conveying the broadest power of determination" over who becomes an elector. *McPherson* v. *Blacker*, 146 U. S. 1, 27. And the power to appoint an elector (in any manner) includes power to condition his appointment, absent some other constitutional constraint. A State can require, for example, that an elector live in the State or qualify as a regular voter during the relevant time period. Or

more substantively, a State can insist (as *Ray* allowed) that the elector pledge to cast his Electoral College ballot for his party's presidential nominee, thus tracking the State's popular vote. Or—so long as nothing else in the Constitution poses an obstacle—a State can add an associated condition of appointment: It can demand that the elector actually live up to his pledge, on pain of penalty. Which is to say that the State's appointment power, barring some outside constraint, enables the enforcement of a pledge like Washington's.

Nothing in the Constitution expressly prohibits States from taking away presidential electors' voting discretion as Washington does. Article II includes only the instruction to each State to appoint electors, and the Twelfth Amendment only sets out the electors' voting procedures. And while two contemporaneous State Constitutions incorporated language calling for the exercise of elector discretion, no language of that kind made it into the Federal Constitution. Contrary to the Electors' argument, Article II's use of the term "electors" and the Twelfth Amendment's requirement that the electors "vote," and that they do so "by ballot," do not establish that electors must have discretion. The Electors and their *amici* object that the Framers using those words expected the Electors' votes to reflect their own judgments. But even assuming that outlook was widely shared, it would not be enough. Whether by choice or accident, the Framers did not reduce their thoughts about electors' discretion to the printed page. Pp. 588–592.

(b) "Long settled and established practice" may have "great weight in a proper interpretation of constitutional provisions." *The Pocket Veto Case*, 279 U. S. 655, 689. The Electors make an appeal to that kind of practice in asserting their right to independence, but "our whole experience as a Nation" points in the opposite direction. *NLRB* v. *Noel Canning*, 573 U. S. 513, 557. From the first elections under the Constitution, States sent electors to the College to vote for pre-selected candidates, rather than to use their own judgment. The electors rapidly settled into that non-discretionary role. See *Ray*, 343 U. S., at 228–229. Ratified at the start of the 19th century, the Twelfth Amendment both acknowledged and facilitated the Electoral College's emergence as a mechanism not for deliberation but for party-line voting. Courts and commentators throughout that century recognized the presidential electors as merely acting on other people's preferences. And state election laws evolved to reinforce that development, ensuring that a State's electors would vote the same way as its citizens. Washington's law is only another in the same vein. It reflects a longstanding tradition in which electors are not free agents; they are to vote for the candidate whom the State's voters have chosen. Pp. 592–597.

Syllabus

193 Wash. 2d 380, 441 P. 3d 807, affirmed.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, ALITO, SOTOMAYOR, GORSUCH, and KAVANAUGH, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment, in which GORSUCH, J., joined as to Part II, *post*, p. 597.

L. Lawrence Lessig argued the cause for petitioners. With him on the briefs were *Jason Harrow*, *Sumeer Singla*, *Daniel A. Brown*, *Hunter M. Abell*, *Jonah O. Harrison*, *J. Max Rosen*, and *Jason B. Wesoky*.

Noah G. Purcell, Solicitor General of Washington, argued the cause for respondent. With him on the brief were *Robert W. Ferguson*, Attorney General of Washington, *Tera Heintz* and *Alan D. Copsey*, Deputy Solicitors General, and *Cristina Sepe*, Assistant Attorney General.*

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*Briefs of *amici curiae* urging reversal were filed for the Independence Institute by *David B. Kopel* and *Joseph G. S. Greenlee*; for Jerry H. Goldfeder by *Mr. Goldfeder, pro se*; and for Michael L. Rosin et al. by *Peter K. Stris*, *Michael N. Donofrio*, and *Bridget C. Asay*.

Briefs of *amici curiae* urging affirmance were filed for the State of South Dakota et al. by *Jason R. Ravnsborg*, Attorney General of South Dakota, and *Paul S. Swedlund*, Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Steve Marshall* of Alabama, *Kevin G. Clarkson* of Alaska, *Mark Brnovich* of Arizona, *Xavier Becerra* of California, *William Tong* of Connecticut, *Kathy Jennings* of Delaware, *Karl A. Racine* of the District of Columbia, *Ashley Moody* of Florida, *Christopher M. Carr* of Georgia, *Clare E. Connors* of Hawaii, *Lawrence Wasden* of Idaho, *Kwame Raoul* of Illinois, *Curtis T. Hill, Jr.*, of Indiana, *Tom Miller* of Iowa, *Daniel Cameron* of Kentucky, *Jeff Landry* of Louisiana, *Aaron M. Frey* of Maine, *Brian E. Frosh* of Maryland, *Maura Healey* of Massachusetts, *Dana Nessel* of Michigan, *Keith Ellison* of Minnesota, *Lynn Fitch* of Mississippi, *Eric S. Schmitt* of Missouri, *Timothy C. Fox* of Montana, *Doug J. Peterson* of Nebraska, *Aaron D. Ford* of Nevada, *Gordon MacDonald* of New Hampshire, *Gurbir S. Grewal* of New Jersey, *Hector Balderas* of New Mexico, *Letitia James* of New York, *Josh Stein* of North Carolina, *Wayne Stenehjem* of North Dakota, *Dave Yost* of Ohio, *Mike Hunter* of Oklahoma, *Ellen Rosenblum* of Oregon, *Josh D. Shapiro* of Pennsylvania, *Peter F. Neronha* of Rhode Island, *Alan Wilson* of South Carolina, *Herbert H. Slatery III* of Tennessee, *Sean D. Reyes* of Utah, *Thomas J. Donovan* of Vermont, *Mark R. Her-*

JUSTICE KAGAN delivered the opinion of the Court.

Every four years, millions of Americans cast a ballot for a presidential candidate. Their votes, though, actually go toward selecting members of the Electoral College, whom each State appoints based on the popular returns. Those few "electors" then choose the President.

The States have devised mechanisms to ensure that the electors they appoint vote for the presidential candidate their citizens have preferred. With two partial exceptions, every State appoints a slate of electors selected by the political party whose candidate has won the State's popular vote. Most States also compel electors to pledge in advance to support the nominee of that party. This Court upheld such a pledge requirement decades ago, rejecting the argument that the Constitution "demands absolute freedom for the elector to vote his own choice." *Ray* v. *Blair*, 343 U. S. 214, 228 (1952).

Today, we consider whether a State may also penalize an elector for breaking his pledge and voting for someone other than the presidential candidate who won his State's popular vote. We hold that a State may do so.

I

Our Constitution's method of picking Presidents emerged from an eleventh-hour compromise. The issue, one delegate

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ring of Virginia, *Patrick Morrisey* of West Virginia, *Josh L. Kaul* of Wisconsin, and *Bridget Hill* of Wyoming; for the Campaign Legal Center et al. by *Tobias S. Loss-Eaton*, *Paul M. Smith*, *Adav Noti*, and *David Kolker*; for Public Citizen by *Scott L. Nelson* and *Allison M. Zieve*; for the Republican National Committee by *Michael E. Toner*, *Lee E. Goodman*, and *Stephen J. Obermeier*; for Robert W. Bennett by *J. Samuel Tenenbaum*, *Jeffrey T. Green*, and *Sarah O'Rourke Schrup*; and for Michael T. Morley by *Mr. Morley*, *pro se*.

Briefs of *amici curiae* were filed for Citizens for Self-Governance by *Rita M. Dunaway*; for the Making Every Vote Count Foundation by *Jerrold J. Ganzfried*, *Reed E. Hundt*, and *Thea A. Cohen*; for Edward B. Foley by *Jessica Ring Amunson* and *Zachary C. Schauf*; for Vinz Koller by *Andrew J. Dhuey*; and for Derek T. Muller by *Ian Speir*.

to the Convention remarked, was "the most difficult of all [that] we have had to decide." 2 Records of the Federal Convention of 1787, p. 501 (M. Farrand rev. 1966) (Farrand). Despite long debate and many votes, the delegates could not reach an agreement. See generally N. Peirce & L. Longley, The People's President 19–22 (rev. 1981). In the dying days of summer, they referred the matter to the so-called Committee of Eleven to devise a solution. The Committee returned with a proposal for the Electoral College. Just two days later, the delegates accepted the recommendation with but a few tweaks. James Madison later wrote to a friend that the "difficulty of finding an unexceptionable [selection] process" was "deeply felt by the Convention." Letter to G. Hay (Aug. 23, 1823), in 3 Farrand 458. Because "the final arrangement of it took place in the latter stage of the Session," Madison continued, "it was not exempt from a degree of the hurrying influence produced by fatigue and impatience in all such Bodies: tho' the degree was much less than usually prevails in them." *Ibid.* Whether less or not, the delegates soon finished their work and departed for home.

The provision they approved about presidential electors is fairly slim. Article II, § 1, cl. 2 says:

> "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."

The next clause (but don't get attached: it will soon be superseded) set out the procedures the electors were to follow in casting their votes. In brief, each member of the College would cast votes for two candidates in the presidential field. The candidate with the greatest number of votes, assuming he had a majority, would become President. The runner-up

would become Vice President. If no one had a majority, the House of Representatives would take over and decide the winner.

That plan failed to anticipate the rise of political parties, and soon proved unworkable. The Nation's first contested presidential election occurred in 1796, after George Washington's retirement. John Adams came in first among the candidates, and Thomas Jefferson second. That meant the leaders of the era's two warring political parties—the Federalists and the Republicans—became President and Vice President respectively. (One might think of this as fodder for a new season of Veep.) Four years later, a different problem arose. Jefferson and Aaron Burr ran that year as a Republican Party ticket, with the former meant to be President and the latter meant to be Vice. For that plan to succeed, Jefferson had to come in first and Burr just behind him. Instead, Jefferson came in first and Burr . . . did too. Every elector who voted for Jefferson also voted for Burr, producing a tie. That threw the election into the House of Representatives, which took no fewer than 36 ballots to elect Jefferson. (Alexander Hamilton secured his place on the Broadway stage—but possibly in the cemetery too—by lobbying Federalists in the House to tip the election to Jefferson, whom he loathed but viewed as less of an existential threat to the Republic.) By then, everyone had had enough of the Electoral College's original voting rules.

The result was the Twelfth Amendment, whose main part provided that electors would vote separately for President and Vice President. The Amendment, ratified in 1804, says:

> "The Electors shall meet in their respective states and vote by ballot for President and Vice-President . . . ; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each,

> which lists they shall sign and certify, and transmit sealed to [Congress, where] the votes shall then be counted."

The Amendment thus brought the Electoral College's voting procedures into line with the Nation's new party system.

Within a few decades, the party system also became the means of translating popular preferences within each State into Electoral College ballots. In the Nation's earliest elections, state legislatures mostly picked the electors, with the majority party sending a delegation of its choice to the Electoral College. By 1832, though, all States but one had introduced popular presidential elections. See Peirce & Longley, The People's President, at 45. At first, citizens voted for a slate of electors put forward by a political party, expecting that the winning slate would vote for its party's presidential (and vice presidential) nominee in the Electoral College. By the early 20th century, citizens in most States voted for the presidential candidate himself; ballots increasingly did not even list the electors. See Albright, The Presidential Short Ballot, 34 Am. Pol. Sci. Rev. 955, 955–957 (1940). After the popular vote was counted, States appointed the electors chosen by the party whose presidential nominee had won statewide, again expecting that they would vote for that candidate in the Electoral College.[1]

In the 20th century, many States enacted statutes meant to guarantee that outcome—that is, to prohibit so-called

[1] Maine and Nebraska (which, for simplicity's sake, we will ignore after this footnote) developed a more complicated system in which two electors go to the winner of the statewide vote and one goes to the winner of each congressional district. See Me. Rev. Stat. Ann., Tit. 21–A, §802 (2006); Neb. Rev. Stat. §32–710 (2016). So, for example, if the Republican candidate wins the popular vote in Nebraska as a whole but loses to the Democratic candidate in one of the State's three congressional districts, the Republican will get four electors and the Democrat will get one. Here too, though, the States use party slates to pick the electors, in order to reflect the relevant popular preferences (whether in the State or in an individual district).

faithless voting. Rather than just assume that party-picked electors would vote for their party's winning nominee, those States insist that they do so. As of now, 32 States and the District of Columbia have such statutes on their books. They are typically called pledge laws because most demand that electors take a formal oath or pledge to cast their ballot for their party's presidential (and vice presidential) candidate. Others merely impose that duty by law. Either way, the statutes work to ensure that the electors vote for the candidate who got the most statewide votes in the presidential election.

Most relevant here, States began about 60 years ago to back up their pledge laws with some kind of sanction. By now, 15 States have such a system.[2] Almost all of them immediately remove a faithless elector from his position, substituting an alternate whose vote the State reports instead. A few States impose a monetary fine on any elector who flouts his pledge.

Washington is one of the 15 States with a sanctions-backed pledge law designed to keep the State's electors in line with its voting citizens. As all States now do, Washington requires political parties fielding presidential candidates to nominate a slate of electors. See Wash. Rev. Code §29A.56.320(1). On Election Day, the State gives voters a ballot listing only the candidates themselves. See 29A.56.320(2). When the vote comes in, Washington moves toward appointing the electors chosen by the party whose candidate won the statewide count. See *ibid.* But

[2] Ariz. Rev. Stat. Ann. §16–212 (2019 Cum. Supp.); Cal. Elec. Code Ann. §§6906, 18002 (West 2019); Colo. Rev. Stat. §1–4–304 (2019); Ind. Code §3–10–4–9 (2019); Mich. Comp. Laws §168.47 (2008); Minn. Stat. §§208.43, 208.46 (2020 Cum. Supp.); Mont. Code Ann. §§13–25–304, 13–25–307 (2019); Neb. Rev. Stat. §§32–713, 32–714; Nev. Rev. Stat. §§298.045, 298.075 (2017); N. M. Stat. Ann. §1–15–9 (Supp. 2011); N. C. Gen. Stat. Ann. §163–212 (2019); Okla. Stat., Tit. 26, §§10–102, 10–109 (2019); S. C. Code Ann. §7–19–80 (2018); Utah Code §20A–13–304 (2020); Wash. Rev. Code §§29A.56.084, 29A.56.090 (2019).

before the appointment can go into effect, each elector must "execute [a] pledge" agreeing to "mark [her] ballots" for the presidential (and vice presidential) candidate of the party nominating her. § 29A.56.084. And the elector must comply with that pledge, or else face a sanction. At the time relevant here, the punishment was a civil fine of up to $1,000. See § 29A.56.340 (2016).[3]

This case involves three Washington electors who violated their pledges in the 2016 presidential election. That year, Washington's voters chose Hillary Clinton over Donald Trump for President. The State thus appointed as its electors the nominees of the Washington State Democratic Party. Among those Democratic electors were petitioners Peter Chiafalo, Levi Guerra, and Esther John (the Electors). All three pledged to support Hillary Clinton in the Electoral College. But as that vote approached, they decided to cast their ballots for someone else. The three hoped they could encourage other electors—particularly those from States Donald Trump had carried—to follow their example. The idea was to deprive him of a majority of electoral votes and throw the election into the House of Representatives. So the three Electors voted for Colin Powell for President. But their effort failed. Only seven electors across the Nation cast faithless votes—the most in a century, but well short of the goal. Candidate Trump became President Trump. And, more to the point here, the State fined the Electors $1,000 apiece for breaking their pledges to support the same candidate its voters had.

The Electors challenged their fines in state court, arguing that the Constitution gives members of the Electoral College the right to vote however they please. The Washington Superior Court rejected the Electors' claim in an oral decision, and the State's Supreme Court affirmed that judgment. See

[3] Since the events in this case, Washington has repealed the fine. It now enforces pledges only by removing and replacing faithless electors. See Wash. Rev. Code § 29A.56.090(3) (2019).

In re Guerra, 193 Wash. 2d 380, 441 P. 3d 807 (2019). The court relied heavily on our decision in *Ray* v. *Blair* upholding a pledge requirement—though one without a penalty to back it up. See 193 Wash. 2d, at 393–399, 441 P. 3d, at 813–816. In the state court's view, Washington's penalty provision made no difference. Article II of the Constitution, the court noted, grants broad authority to the States to appoint electors, and so to impose conditions on their appointments. See *id.*, at 393, 395, 441 P. 3d, at 813, 814. And nothing in the document "suggests that electors have discretion to cast their votes without limitation or restriction by the state legislature." *Id.*, at 396, 441 P. 3d, at 814.

A few months later, the United States Court of Appeals for the Tenth Circuit reached the opposite conclusion in a case involving another faithless elector. See *Baca* v. *Colorado Dept. of State*, 935 F. 3d 887 (2019). The Circuit Court held that Colorado could not remove the elector, as its pledge law directs, because the Constitution "provide[s] presidential electors the right to cast a vote" for President "with discretion." *Id.*, at 955.

We granted certiorari to resolve the split. 589 U. S. 1165 (2020). We now affirm the Washington Supreme Court's judgment that a State may enforce its pledge law against an elector.

II

As the state court recognized, this Court has considered elector pledge requirements before. Some seventy years ago Edmund Blair tried to become a presidential elector in Alabama. Like all States, Alabama lodged the authority to pick electors in the political parties fielding presidential candidates. And the Alabama Democratic Party required a pledge phrased much like Washington's today. No one could get on the party's slate of electors without agreeing to vote in the Electoral College for the Democratic presidential candidate. Blair challenged the pledge mandate. He argued that the "intention of the Founders was that [presidential]

electors should exercise their judgment in voting." *Ray*, 343 U. S., at 225. The pledge requirement, he claimed, "interfere[d] with the performance of this constitutional duty to select [a president] according to the best judgment of the elector." *Ibid.*

Our decision in *Ray* rejected that challenge. "Neither the language of Art. II, § 1, nor that of the Twelfth Amendment," we explained, prohibits a State from appointing only electors committed to vote for a party's presidential candidate. *Ibid.* Nor did the Nation's history suggest such a bar. To the contrary, "[h]istory teaches that the electors were expected to support the party nominees" as far back as the earliest contested presidential elections. *Id.*, at 228. "[L]ongstanding practice" thus "weigh[ed] heavily" against Blair's claim. *Id.*, at 228–230. And current voting procedures did too. The Court noted that by then many States did not even put electors' names on a presidential ballot. See *id.*, at 229. The whole system presupposed that the electors, because of either an "implied" or an "oral pledge," would vote for the candidate who had won the State's popular election. *Ibid.*

Ray, however, reserved a question not implicated in the case: Could a State enforce those pledges through legal sanctions? See *id.*, at 230. Or would doing so violate an elector's "constitutional freedom" to "vote as he may choose" in the Electoral College? *Ibid.* Today, we take up that question. We uphold Washington's penalty-backed pledge law for reasons much like those given in *Ray*. The Constitution's text and the Nation's history both support allowing a State to enforce an elector's pledge to support his party's nominee—and the state voters' choice—for President.

A

Article II, § 1's appointments power gives the States far-reaching authority over presidential electors, absent some

other constitutional constraint.[4] As noted earlier, each State may appoint electors "in such Manner as the Legislature thereof may direct." Art. II, § 1, cl. 2; see *supra*, at 582. This Court has described that clause as "conveying the broadest power of determination" over who becomes an elector. *McPherson* v. *Blacker*, 146 U. S. 1, 27 (1892).[5] And the power to appoint an elector (in any manner) includes power to condition his appointment—that is, to say what the elector must do for the appointment to take effect. A State can require, for example, that an elector live in the State or qualify as a regular voter during the relevant time period. Or more substantively, a State can insist (as *Ray* allowed) that the elector pledge to cast his Electoral College ballot for his party's presidential nominee, thus tracking the State's popular vote. See *Ray*, 343 U. S., at 227 (A pledge requirement "is an exercise of the state's right to appoint electors in such manner" as it chooses). Or—so long as nothing else in the Constitution poses an obstacle—a State can add, as Washington did, an associated condition of appointment: It can demand that the elector actually live up to his pledge, on pain of penalty. Which is to say that the State's appointment power, barring some outside constraint, enables the enforcement of a pledge like Washington's.[6]

[4] Checks on a State's power to appoint electors, or to impose conditions on an appointment, can theoretically come from anywhere in the Constitution. A State, for example, cannot select its electors in a way that violates the Equal Protection Clause. And if a State adopts a condition on its appointments that effectively imposes new requirements on presidential candidates, the condition may conflict with the Presidential Qualifications Clause, see Art. II, § 1, cl. 5.

[5] See also *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, 805 (1995) (describing Article II, § 1 as an "express delegation[ ] of power to the States"); but see *post*, at 597–598 (THOMAS, J., concurring in judgment) (continuing to press the view, taken in the *Thornton* dissent, that Article II, § 1 grants the States no power at all).

[6] The concurring opinion would have us make fine distinctions among state laws punishing faithless voting—treating some as conditions of ap-

And nothing in the Constitution expressly prohibits States from taking away presidential electors' voting discretion as Washington does. The Constitution is barebones about electors. Article II includes only the instruction to each State to appoint, in whatever way it likes, as many electors as it has Senators and Representatives (except that the State may not appoint members of the Federal Government). The Twelfth Amendment then tells electors to meet in their States, to vote for President and Vice President separately, and to transmit lists of all their votes to the President of the United States Senate for counting. Appointments and procedures and . . . that is all. See *id.*, at 225.

The Framers could have done it differently; other constitutional drafters of their time did. In the founding era, two States—Maryland and Kentucky—used electoral bodies selected by voters to choose state senators (and in Kentucky's case, the Governor too). The Constitutions of both States, Maryland's drafted just before and Kentucky's just after the U. S. Constitution, incorporated language that would have made this case look quite different. Both State Constitutions required all electors to take an oath "to elect without favour, affection, partiality, or prejudice, such persons for Senators, as they, in their judgment and conscience, believe best qualified for the office." Md. Declaration of Rights, Art. XVIII (1776); see Ky. Const., Art. I, § 14 (1792) (using identical language except adding "[and] for Governor"). The emphasis on independent "judgment and conscience" called for the exercise of elector discretion. But although

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pointment and others not, depending on small semantic differences. See *post*, at 602–605 (distinguishing, for example, between Oklahoma's law fining an elector for violating his oath (to vote for his party's candidate) and Washington's law fining an elector for not voting for his party's candidate (whom he took an oath to support)). The Electors themselves raised no such argument, and they were right not to do so. No matter the precise phrasing, a law penalizing faithless voting (like a law merely barring that practice) is an exercise of the State's power to impose conditions on the appointment of electors. See *Ray* v. *Blair*, 343 U. S. 214, 227 (1952).

the Framers knew of Maryland's Constitution, no language of that kind made it into the document they drafted. See 1 Farrand 218, 289 (showing that Madison and Hamilton referred to the Maryland system at the Convention).

The Electors argue that three simple words stand in for more explicit language about discretion. Article II, § 1 first names the members of the Electoral College: "electors." The Twelfth Amendment then says that electors shall "vote" and that they shall do so by "ballot." The "plain meaning" of those terms, the Electors say, requires electors to have "freedom of choice." Brief for Petitioners 29, 31. If the States could control their votes, "the electors would not be 'Electors,' and their 'vote by Ballot' would not be a 'vote.'" *Id.*, at 31.

But those words need not always connote independent choice. Suppose a person always votes in the way his spouse, or pastor, or union tells him to. We might question his judgment, but we would have no problem saying that he "votes" or fills in a "ballot." In those cases, the choice is in someone else's hands, but the words still apply because they can signify a mechanical act. Or similarly, suppose in a system allowing proxy voting (a common practice in the founding era), the proxy acts on clear instructions from the principal, with no freedom of choice. Still, we might well say that he cast a "ballot" or "voted," though the preference registered was not his own. For that matter, some elections give the voter no real choice because there is only one name on a ballot (consider an old Soviet election, or even a down-ballot race in this country). Yet if the person in the voting booth goes through the motions, we consider him to have voted. The point of all these examples is to show that although voting and discretion are usually combined, voting is still voting when discretion departs. Maybe most telling, switch from hypotheticals to the members of the Electoral College. For centuries now, as we'll later show, almost all have considered themselves bound to vote for their party's (and the state vot-

ers') preference. See *infra* this page and 593–597. Yet there is no better description for what they do in the Electoral College than "vote" by "ballot." And all these years later, everyone still calls them "electors"—and not wrongly, because even though they vote without discretion, they do indeed elect a President.

The Electors and their *amici* object that the Framers using those words expected the Electors' votes to reflect their own judgments. See Brief for Petitioners 18–19; Brief for Independence Institute as *Amicus Curiae* 11–15. Hamilton praised the Constitution for entrusting the Presidency to "men most capable of analyzing the qualities" needed for the office, who would make their choices "under circumstances favorable to deliberation." The Federalist No. 68, p. 410 (C. Rossiter ed. 1961). So too, John Jay predicted that the Electoral College would "be composed of the most enlightened and respectable citizens," whose choices would reflect "discretion and discernment." *Id.*, No. 64, at 389.

But even assuming other Framers shared that outlook, it would not be enough. Whether by choice or accident, the Framers did not reduce their thoughts about electors' discretion to the printed page. All that they put down about the electors was what we have said: that the States would appoint them, and that they would meet and cast ballots to send to the Capitol. Those sparse instructions took no position on how independent from—or how faithful to—party and popular preferences the electors' votes should be. On that score, the Constitution left much to the future. And the future did not take long in coming. Almost immediately, presidential electors became trusty transmitters of other people's decisions.

B

"Long settled and established practice" may have "great weight in a proper interpretation of constitutional provi-

sions." *The Pocket Veto Case*, 279 U. S. 655, 689 (1929). As James Madison wrote, "a regular course of practice" can "liquidate & settle the meaning of" disputed or indeterminate "terms & phrases." Letter to S. Roane (Sept. 2, 1819), in 8 Writings of James Madison 450 (G. Hunt ed. 1908); see The Federalist No. 37, at 229. The Electors make an appeal to that kind of practice in asserting their right to independence. But "our whole experience as a Nation" points in the opposite direction. *NLRB* v. *Noel Canning*, 573 U. S. 513, 557 (2014) (internal quotation marks omitted). Electors have only rarely exercised discretion in casting their ballots for President. From the first, States sent them to the Electoral College—as today Washington does—to vote for pre-selected candidates, rather than to use their own judgment. And electors (or at any rate, almost all of them) rapidly settled into that non-discretionary role. See *Ray*, 343 U. S., at 228–229.

Begin at the beginning—with the Nation's first contested election in 1796. Would-be electors declared themselves for one or the other party's presidential candidate. (Recall that in this election Adams led the Federalists against Jefferson's Republicans. See *supra*, at 583.) In some States, legislatures chose the electors; in others, ordinary voters did. But in either case, the elector's declaration of support for a candidate—essentially a pledge—was what mattered. Or said differently, the selectors of an elector knew just what they were getting—not someone who would deliberate in good Hamiltonian fashion, but someone who would vote for their party's candidate. "[T]he presidential electors," one historian writes, "were understood to be instruments for expressing the will of those who selected them, not independent agents authorized to exercise their own judgment." Whittington, Originalism, Constitutional Construction, and the Problem of Faithless Electors, 59 Ariz. L. Rev. 903, 911 (2017). And when the time came to vote in the Electoral

College, all but one elector did what everyone expected, faithfully representing their selectors' choice of presidential candidate.[7]

The Twelfth Amendment embraced this new reality—both acknowledging and facilitating the Electoral College's emergence as a mechanism not for deliberation but for party-line voting. Remember that the Amendment grew out of a pair of fiascos—the election of two then-bitter rivals as President and Vice President, and the tie vote that threw the next election into the House. See *supra*, at 583. Both had occurred because the Constitution's original voting procedures gave electors two votes for President, rather than one apiece for President and Vice President. Without the capacity to vote a party ticket for the two offices, the electors had foundered, and could do so again. If the predominant party's electors used both their votes on their party's two candidates, they would create a tie (see 1800). If they intentionally cast fewer votes for the intended vice president, they risked the opposite party's presidential candidate sneaking into the second position (see 1796). By allowing the electors to vote separately for the two offices, the Twelfth Amendment made party-line voting safe. The Amendment thus advanced, rather than resisted, the practice that had arisen in the Na-

[7] The reaction to even that single elector goes to prove the point that the system was non-discretionary. In the 1796 election, Pennsylvania held a statewide vote for electors under a winner-take-all rule (as all but two States have today). The people voted narrowly for the slate of electors supporting Jefferson. But Federalist chicanery led to the Governor's inclusion of two Federalist electors in the State's delegation to the Electoral College. One of them, Samuel Miles, agreed to cast his vote for Jefferson, in line with the winner-take-all expectation on which the race had been run. If he thought other Federalists would forgive him for acting with honor, he was wrong. An irate voter reacted: "[W]hen I voted for the [Federalist] ticket, I voted for John Adams. . . . What! do I chuse Samuel Miles to determine for me whether John Adams or Thomas Jefferson is the fittest man for President of the United States? No—I chuse him to *act*, not to *think*." See Gazette of the United States, Dec. 15, 1796, p. 3, col. 1 (emphasis in original).

tion's first elections. An elector would promise to legislators or citizens to vote for their party's presidential and vice presidential candidates—and then follow through on that commitment. Or as the Court wrote in *Ray*, the new procedure allowed an elector to "vote the regular party ticket" and thereby "carry out the desires of the people" who had sent him to the Electoral College. *Ray*, 343 U. S., at 224, n. 11. No independent electors need apply.

Courts and commentators throughout the 19th century recognized the electors as merely acting on other people's preferences. Justice Story wrote that "the electors are now chosen wholly with reference to particular candidates," having either "silently" or "publicly pledge[d]" how they will vote. 3 Commentaries on the Constitution of the United States § 1457, p. 321 (1833). "[N]othing is left to the electors," he continued, "but to register [their] votes, which are already pledged." *Id.*, at 321–322. Indeed, any "exercise of an independent judgment would be treated[ ] as a political usurpation, dishonourable to the individual, and a fraud upon his constituents." *Id.*, at 322. Similarly, William Rawle explained how the Electoral College functioned: "[T]he electors do not assemble in their several states for a free exercise of their own judgments, but for the purpose of electing" the nominee of "the predominant political party which has chosen those electors." A View of the Constitution of the United States of America 57 (2d ed. 1829). Looking back at the close of the century, this Court had no doubt that Story's and Rawle's descriptions were right. The electors, the Court noted, were chosen "simply to register the will of the appointing power in respect of a particular candidate." *McPherson*, 146 U. S., at 36.

State election laws evolved to reinforce that development, ensuring that a State's electors would vote the same way as its citizens. As noted earlier, state legislatures early dropped out of the picture; by the mid-1800s, ordinary voters chose electors. See *supra*, at 584. Except that increasingly,

they did not do so directly. States listed only presidential candidates on the ballot, on the understanding that electors would do no more than vote for the winner. Usually, the State could ensure that result by appointing electors chosen by the winner's party. But to remove any doubt, States began in the early 1900s to enact statutes requiring electors to pledge that they would squelch any urge to break ranks with voters. See *supra*, at 584–585. Washington's law, penalizing a pledge's breach, is only another in the same vein. It reflects a tradition more than two centuries old. In that practice, electors are not free agents; they are to vote for the candidate whom the State's voters have chosen.

The history going the opposite way is one of anomalies only. The Electors stress that since the founding, electors have cast some 180 faithless votes for either President or Vice President. See Brief for Petitioners 7. But that is 180 out of over 23,000. See Brief for Republican National Committee as *Amicus Curiae* 19. And more than a third of the faithless votes come from 1872, when the Democratic Party's nominee (Horace Greeley) died just after Election Day.[8] Putting those aside, faithless votes represent just one-half of one percent of the total. Still, the Electors counter, Congress has counted all those votes. See Brief for Petitioners 46. But because faithless votes have never come close to affecting an outcome, only one has ever been challenged. True enough, that one was counted. But the Electors cannot rest a claim of historical tradition on one counted vote in

[8] The Electors contend that elector discretion is needed to deal with the possibility that a future presidential candidate will die between Election Day and the Electoral College vote. See Reply Brief 20–22. We do not dismiss how much turmoil such an event could cause. In recognition of that fact, some States have drafted their pledge laws to give electors voting discretion when their candidate has died. See, *e. g.*, Cal. Elec. Code Ann. § 6906; Ind. Code § 3–10–4–1.7. And we suspect that in such a case, States without a specific provision would also release electors from their pledge. Still, we note that because the situation is not before us, nothing in this opinion should be taken to permit the States to bind electors to a deceased candidate.

over 200 years. And anyway, the State appointing that elector had no law requiring a pledge or otherwise barring his use of discretion. Congress's deference to a state decision to tolerate a faithless vote is no ground for rejecting a state decision to penalize one.

III

The Electors' constitutional claim has neither text nor history on its side. Article II and the Twelfth Amendment give States broad power over electors, and give electors themselves no rights. Early in our history, States decided to tie electors to the presidential choices of others, whether legislatures or citizens. Except that legislatures no longer play a role, that practice has continued for more than 200 years. Among the devices States have long used to achieve their object are pledge laws, designed to impress on electors their role as agents of others. A State follows in the same tradition if, like Washington, it chooses to sanction an elector for breaching his promise. Then too, the State instructs its electors that they have no ground for reversing the vote of millions of its citizens. That direction accords with the Constitution—as well as with the trust of a Nation that here, We the People rule.

The judgment of the Supreme Court of Washington is

Affirmed.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins as to Part II, concurring in the judgment.

The Court correctly determines that States have the power to require Presidential electors to vote for the candidate chosen by the people of the State. I disagree, however, with its attempt to base that power on Article II. In my view, the Constitution is silent on States' authority to bind electors in voting. I would resolve this case by simply recognizing that "[a]ll powers that the Constitution neither delegates to the Federal Government nor prohibits to the States are controlled by the people of each State." *U. S. Term*

Limits, Inc. v. *Thornton*, 514 U. S. 779, 848 (1995) (THOMAS, J., dissenting).

I

A

The Constitution does not address—expressly or by necessary implication—whether States have the power to require that Presidential electors vote for the candidates chosen by the people. Article II, § 1, and the Twelfth Amendment provide for the election of the President through a body of electors. But neither speaks directly to a State's power over elector voting.

The only provision in the Constitution that arguably addresses a State's power over Presidential electors is Clause 2 of Article II, § 1. That Clause provides, in relevant part, that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors." As I have previously explained, this language "imposes an affirmative obligation on the States" to establish the manner for appointing electors. *U. S. Term Limits*, 514 U. S., at 864 (dissenting opinion). By using the term "shall," "the Clause expressly requires action by the States." *Id.*, at 862 (internal quotation marks omitted); see also *Maine Community Health Options* v. *United States*, 590 U. S. 296, 310 (2020) ("The first sign that the statute imposed an obligation is its mandatory language: 'shall' "); *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U. S. 26, 35 (1998) (recognizing that " 'shall' . . . normally creates an obligation"). This obligation to provide the manner of appointing electors does not expressly delegate power to States; it simply imposes an affirmative duty. See *U. S. Term Limits*, *supra*, at 862–863 (THOMAS, J., dissenting).

B

In a somewhat cursory analysis, the Court concludes that the States' duty to appoint electors "in such Manner as the Legislature thereof may direct," Art. II, § 1, cl. 2, provides

an express grant of "power to appoint an elector." *Ante*, at 589. As explained above, this interpretation erroneously conflates the imposition of a duty with the granting of a power. But even setting that issue aside, I cannot agree with the Court's analysis. The Court appears to misinterpret Article II, § 1, by overreading its language as authorizing the broad power to impose and enforce substantive conditions on appointment. The Court then misconstrues the State of Washington's law as enforcing a condition of appointment.

1

The Court's conclusion that the text of Article II, § 1, expressly grants States the power to impose substantive conditions or qualifications on electors is highly questionable. Its interpretation appears to strain the plain meaning of the text, ignore historical evidence, and give the term "Manner" different meanings in parallel provisions of Article I and Article II.

First, the Court's attempt to root its analysis in Article II, § 1, seems to stretch the plain meaning of the Constitution's text. Article II, § 1, provides that States shall appoint electors "in such Manner as the Legislature thereof may direct." At the time of the founding, the term "manner" referred to a "[f]orm" or "method." 1 S. Johnson, A Dictionary of the English Language (6th ed. 1785); see also 1 J. Ash, The New and Complete Dictionary of the English Language (2d ed. 1795). These definitions suggest that Article II requires state legislatures merely to set the approach for selecting Presidential electors, not to impose substantive limitations on whom may become an elector. And determining the "Manner" of appointment certainly does not include the power to impose requirements as to how the electors vote *after they are appointed*, which is what the Washington law addresses. See *infra*, at 604–605.

Historical evidence from the founding also suggests that the "Manner" of appointment refers to the method for select-

ing electors, rather than the substantive limitations placed on the position. At the Convention, the Framers debated whether Presidential electors should be selected by the state legislatures or by other electors chosen by the voters of each State. Oliver Ellsworth and Luther Martin, for example, thought the President should be chosen by electors selected by state legislatures. *McPherson* v. *Blacker*, 146 U. S. 1, 28 (1892). Alexander Hamilton, however, preferred a system in which the President would be chosen "by electors chosen by electors chosen by the people." *Ibid.* The final language of Article II "seems to have reconciled [the] contrariety of views by leaving it to the state legislatures" to set the manner of elector appointment. *Ibid.* In context, it is clear that the Framers understood "Manner" in Article II, § 1, to refer to the mode of appointing electors—consistent with the plain meaning of the term.

This understanding of "Manner" was seemingly shared by those at the ratifying conventions. For instance, at the North Carolina ratifying convention, John Steele stated that "[t]he power over the *manner* of elections [under Article I, § 4] does not include that of saying who shall vote." 4 Debates on the Constitution 71 (J. Elliot ed. 1863) (emphasis added). Rather "the power over the *manner* only enables [States] to determine how these electors shall elect." *Ibid.* (emphasis added and deleted). In short, the historical context and contemporaneous use of the term "Manner" seem to indicate that the Framers and the ratifying public both understood the term in accordance with its plain meaning.

Finally, the Court's interpretation gives the same term—"Manner"—different meanings in two parallel provisions of the Constitution. Article I, § 4, states that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." In *U. S. Term Limits*, the Court concluded that the term "Manner" in Article I includes only "a grant of authority to issue procedural regulations," not "the

broad power to set qualifications." 514 U. S., at 832–833 (majority opinion); see also *id.*, at 861–864 (THOMAS, J., dissenting). Yet, today, the Court appears to take the exact opposite view. The Court interprets the term "Manner" in Article II, § 1, to include the power to impose conditions or qualifications on the appointment of electors. *Ante*, at 589.

With respect, I demur. "When seeking to discern the meaning of a word in the Constitution, there is no better dictionary than the rest of the Constitution itself." *Arizona State Legislature* v. *Arizona Independent Redistricting Comm'n*, 576 U. S. 787, 829 (2015) (ROBERTS, C. J., dissenting); cf. *Scialabba* v. *Cuellar de Osorio*, 573 U. S. 41, 60 (2014) (KAGAN, J., for the Court) ("'[W]ords repeated in different parts of the same statute generally have the same meaning'" (quoting *Law* v. *Siegel*, 571 U. S. 415, 422 (2014))). While terms may not always have the exact same meaning throughout the Constitution, here we are interpreting the same word ("Manner") in two provisions that the Court has already stated impose "paralle[l]" duties—setting the "'Manner of holding Elections'" and setting the "'Manner'" of "'appoint-[ing] a Number of Electors.'" *U. S. Term Limits*, 514 U. S., at 804–805 (majority opinion). Nothing in the Constitution's text or history indicates that the Court should take the strongly disfavored step of concluding that the term "Manner" has two different meanings in these closely aligned provisions.

All the Court can point to in support of its position is a single sentence in *Ray* v. *Blair*, 343 U. S. 214 (1952), which suggested that a State's power to impose a requirement that electors pledge to vote for their party's nominee comes from Article II, § 1, *id.*, at 227. But this statement is simply made in passing in response to one of the parties' arguments. It is curiously bereft of reasoning or analysis of Article II. We generally look to the text to govern our analysis rather than insouciantly follow stray, "incomplete" statements in our prior opinions, see *Thryv, Inc.* v. *Click-To-Call Technologies*,

LP, 590 U. S. 45, 59 (2020). In my view, we should be guided by the text here.

2

Even accepting the Court's broad interpretation of Clause 2 of Article II, § 1, I cannot agree with its determination that this Clause expressly authorizes the Washington law at issue here. In an attempt to tie Washington's law to the State's "power to appoint an elector," see *ante*, at 589, the Court construes Wash. Rev. Code § 29A.56.340 (2016) as "enforc-[ing] a pledge." See *ante*, at 589; see also *ante*, at 581, 587–588, 597. But § 29A.56.340 did not involve the enforcement of a pledge or relate to the appointment process at all.[1] It simply regulated electors' votes, unconnected to the appointment process.

To understand the Court's error, a brief summary of its theory is necessary. According to the Court, Article II, § 1, grants States "the power to appoint" Presidential electors "in such Manner as the Legislature thereof may direct." *Ante*, at 589. That "power to appoint an elector," the Court states, "includes power to condition his appointment." *Ibid.* The power to condition appointment in turn allows the State to insist that an "elector pledge to cast his Electoral College ballot for his party's presidential nominee." *Ibid.* And finally, "the State's appointment power . . . enables the enforcement of a pledge." *Ibid.* The Court's theory is entirely premised on the State exercising a power to *appoint*.

Assuming the Court has correctly interpreted Article II, § 1, there are certain circumstances in which this theory could stand. Some States expressly require electors to pledge to vote for a party nominee as a condition of appointment and then impose a penalty if electors violate that

[1] In 2019, Washington revised its laws addressing Presidential electors, eliminating the provision imposing a civil penalty on faithless electors. See 2019 Wash. Sess. Laws pp. 755–758.

pledge. For example, under Oklahoma law, "[e]very party nominee for Presidential Elector shall subscribe to an oath, stating that said nominee, if elected, will cast a ballot for the persons nominated for the offices of President and Vice President by the nominee's party." Okla. Stat., Tit. 26, § 10–102 (2019). Oklahoma then penalizes the violation of that oath: "Any Presidential Elector *who violates his oath* as a Presidential Elector shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than One Thousand Dollars ($1,000.00)." § 10–109 (emphasis added). Other States have similar laws, first requiring a pledge as a condition of appointment and then penalizing the violation of that pledge. See, *e. g.*, Ind. Code § 3–10–4–1.7(a) (2019) (imposing pledge requirement); § 3–10–4–9(d) (stating that "[a] presidential elector who . . . presents a ballot *marked in violation of the presidential elector's pledge executed under section 1.7 . . . of this chapter*, vacates the office of presidential elector" (emphasis added)); Minn. Stat. § 208.43 (2020 Cum. Supp.) (imposing pledge requirement); § 208.46(c) (stating that "[a]n elector who . . . presents a ballot *marked in violation of the elector's pledge executed under section 208.43* . . . vacates the office of elector" (emphasis added)).[2]

But not all States attempt to bind electors' votes through the appointment process. Some States simply impose a legal duty that has no connection to elector appointment. See *ante*, at 585. For example, New Mexico imposes a legal duty on its electors: "All presidential electors shall cast their ballots in the electoral college for the candidates of the political party which nominated them as presidential electors." N. M. Stat. Ann. § 1–15–9(A) (Supp. 2011). And "[a]ny presidential elector who casts his ballot in violation of [this duty] is guilty of a fourth degree felony." § 1–15–9(B). California

[2] See also Mont. Code Ann. §§ 13–25–304, 13–25–307(4) (2019); Neb. Rev. Stat. §§ 32–713(2), 32–714(4) (2016); Wash. Rev. Code §§29A.56.084, 29A.56.090(3) (2019).

has a similar system. It first imposes a legal duty on electors to vote for the nominated candidates of the political party they represent if those candidates are alive. Cal. Elec. Code Ann. § 6906 (West 2019). It then imposes a punishment on "[e]very person charged with the performance of any duty under any law of this state relating to elections, who willfully neglects or refuses to perform it." § 18002.[3] These laws penalize electors for their faithless votes. But they do not attempt to regulate the votes of electors through the appointment process. In fact, these laws have nothing to do with elector appointment.

The Court recognizes the distinction between these two types of laws, *i. e.*, laws enforcing appointment conditions and laws that regulate electors outside of the appointment process. See *ante*, at 585 (recognizing that some States "merely impose [a] duty by law"). But it claims this is merely a "small semantic differenc[e]." *Ante*, at 590, n. 6. Far from being semantic, the difference between the power to impose a "condition of appointment" and the power to impose restrictions on electors *that have nothing to do with appointment* is fundamental to the Court's textual argument. The Court's entire analysis is premised on States' purported Article II "power to appoint an elector" and "to condition his appointment." *Ante*, at 589. The Court does not, and cannot, claim that the text of Article II provides States power over anything other than the *appointment* of electors. See *ante*, at 589–590.

Here, the challenged Washington law did not enforce any appointment condition. It provided that "[a]ny elector who

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[3] Michigan likewise does not regulate electors through the appointment process. Under Michigan law, the failure of an already appointed elector to resign "signifies" that the elector "consent[s] to serve and to cast his vote for the candidates for president and vice-president appearing on the Michigan ballot of the political party which nominated him." Mich. Comp. Laws § 168.47 (2008). Attempting to cast a vote for another candidate "constitutes a resignation from the office of elector." *Ibid.*

votes for a person or persons not nominated by the party of which he or she is an elector is subject to a civil penalty of up to one thousand dollars." Wash. Rev. Code § 29A.56.340 (2016). Unlike the laws of Oklahoma, Indiana, Minnesota and the other States discussed above, a violation of § 29A.56.340 was not predicated on violating a pledge or any other condition of appointment. In fact, it did not even mention a pledge, which was set forth in a separate, unreferenced provision. See § 29A.56.320. Thus, § 29A.56.340 had no connection to the appointment process and could be enforced independent of the existence of any pledge requirement. While the Court's description of § 29A.56.340 as a law enforcing a condition of appointment may be helpful for the Court's claim that Washington's law was rooted in Article II, § 1's "power to appoint," it is simply not accurate. Thus, even accepting the Court's strained reading of Article II, § 1's text, I cannot agree with the Court's effort to reconcile Washington's law with its desired theory.

In short, the Constitution does not speak to States' power to require Presidential electors to vote for the candidates chosen by the people. The Court's attempt to ground such a power in Article II's text falls short. Rather than contort the language of both Article II and the state statute, I would acknowledge that the Constitution simply says nothing about the States' power in this regard.

II

When the Constitution is silent, authority resides with the States or the people. This allocation of power is both embodied in the structure of our Constitution and expressly required by the Tenth Amendment. The application of this fundamental principle should guide our decision here.

A

"The ultimate source of the Constitution's authority is the consent of the people of each individual State." *U. S. Term*

Limits, 514 U. S., at 846 (THOMAS, J., dissenting). When the States ratified the Federal Constitution, the people of each State acquiesced in the transfer of limited power to the Federal Government. They ceded only those powers granted to the Federal Government by the Constitution. "The Federal Government and the States thus face different default rules: Where the Constitution is silent about the exercise of a particular power[,] the Federal Government lacks that power and the States enjoy it." *Id.*, at 848; see also *United States* v. *Comstock*, 560 U. S. 126, 159 (2010) (THOMAS, J., dissenting).

This allocation of power is apparent in the structure of our Constitution. The Federal Government "is acknowledged by all to be one of enumerated powers." *McCulloch* v. *Maryland*, 4 Wheat. 316, 405 (1819). "[T]he powers delegated by the . . . Constitution to the federal government are few and defined," while those that belong to the States "remain . . . numerous and indefinite." The Federalist No. 45, p. 292 (C. Rossiter ed. 1961) (J. Madison). Article I, for example, enumerates various legislative powers in § 8, but it specifically limits Congress' authority to the "legislative Powers herein granted," § 1. States face no such constraint because the Constitution does not delineate the powers of the States. Article I, § 10, contains a brief list of powers removed from the States, but States are otherwise "free to exercise all powers that the Constitution does not withhold from them." *Comstock*, *supra*, at 159 (THOMAS, J., dissenting).

This structural principle is explicitly enshrined in the Tenth Amendment. That Amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." As Justice Story explained, "[t]his amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting

the constitution. Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities." 3 J. Story, Commentaries on the Constitution of the United States § 1900, p. 752 (1833); see also *Alden* v. *Maine*, 527 U. S. 706, 714 (1999); *New York* v. *United States*, 505 U. S. 144, 156 (1992). In other words, the Tenth Amendment "states but a truism that all is retained which has not been surrendered," *United States* v. *Darby*, 312 U. S. 100, 124 (1941), "mak[ing] clear that powers reside at the state level except where the Constitution removes them from that level," *U. S. Term Limits*, *supra*, at 848 (THOMAS, J., dissenting); see also *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 549 (1985).

Thus, "[w]here the Constitution is silent about the exercise of a particular power[,] that is, where the Constitution does not speak either expressly or by necessary implication," the power is "either delegated to the state government or retained by the people." *U. S. Term Limits*, *supra*, at 847–848 (THOMAS, J., dissenting); cf. *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 326 (1816) (stating that the Federal Government's powers under the Constitution must be "expressly given, or given by necessary implication").

B

This fundamental allocation of power applies in the context of the electoral college. Article II, § 1, and the Twelfth Amendment address the election of the President through a body of electors. These sections of the Constitution provide the Federal Government with limited powers concerning the election, set various requirements for the electors, and impose an affirmative obligation on States to appoint electors. Art. II, § 1; Amdt. 12. Each of these directives is consistent with the general structure of the Constitution and the principle of reserved powers. See *supra*, at 605–607; *U. S. Term*

Limits, *supra*, at 863 (THOMAS, J., dissenting). Put simply, nothing in the text or structure of Article II and the Twelfth Amendment contradicts the fundamental distribution of power preserved by the Tenth Amendment.

Of course, the powers reserved to the States concerning Presidential electors cannot "be exercised in such a way as to violate express constitutional commands." *Williams* v. *Rhodes*, 393 U. S. 23, 29 (1968). That is, powers related to electors reside with States to the extent that the Constitution does not remove or restrict that power. Thus, to invalidate a state law, there must be "something in the Federal Constitution that deprives the [States of] the power to enact such [a] measur[e]." *U. S. Term Limits*, *supra*, at 850 (THOMAS, J., dissenting).

As the Court recognizes, nothing in the Constitution prevents States from requiring Presidential electors to vote for the candidate chosen by the people. Petitioners ask us to infer a constitutional right to elector independence by interpreting the terms "appoint," "Electors," "vote," and "by Ballot" to align with the Framers' *expectations* of discretion in elector voting. But the Framers' expectations aid our interpretive inquiry only to the extent that they provide evidence of the original public meaning of the Constitution. They cannot be used to change that meaning. As the Court explains, the plain meaning of the terms relied on by petitioners does not appear to "connote independent choice." *Ante*, at 591. Thus, "the original expectation[s]" of the Framers as to elector discretion provide "no reason for holding that the power confided to the States by the Constitution has ceased to exist." *McPherson*, 146 U. S., at 36; see also *ante*, at 592.

* * *

"The people of the States, from whom all governmental powers stem, have specified that all powers not prohibited to the States by the Federal Constitution are reserved 'to

the States respectively, or to the people.'" *U. S. Term Limits*, 514 U. S., at 852 (THOMAS, J., dissenting). Because I would decide this case based on that fundamental principle, I concur only in the judgment.

Syllabus

BARR, ATTORNEY GENERAL, ET AL. *v.* AMERICAN ASSOCIATION OF POLITICAL CONSULTANTS, INC., ET AL.

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

No. 19–631. Argued May 6, 2020—Decided July 6, 2020

In response to consumer complaints, Congress passed the Telephone Consumer Protection Act of 1991 (TCPA) to prohibit, *inter alia*, almost all robocalls to cell phones. 47 U. S. C. §227(b)(1)(A)(iii). In 2015, Congress amended the robocall restriction, carving out a new government-debt exception that allows robocalls made solely to collect a debt owed to or guaranteed by the United States. 129 Stat. 588. The American Association of Political Consultants and three other organizations that participate in the political system filed a declaratory judgment action, claiming that §227(b)(1)(A)(iii) violated the First Amendment. The District Court determined that the robocall restriction with the government-debt exception was content-based but that it survived strict scrutiny because of the Government's compelling interest in collecting debt. The Fourth Circuit vacated the judgment, agreeing that the robocall restriction with the government-debt exception was a content-based speech restriction, but holding that the law could not withstand strict scrutiny. The court invalidated the government-debt exception and applied traditional severability principles to sever it from the robocall restriction.

Held: The judgment is affirmed.

923 F. 3d 159, affirmed.

JUSTICE KAVANAUGH, joined by THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE ALITO, concluded in Part II that the 2015 government-debt exception violates the First Amendment. Pp. 618–621.

(a) The Free Speech Clause provides that government generally "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 95. Under this Court's precedents, content-based laws are subject to strict scrutiny. See *Reed* v. *Town of Gilbert*, 576 U. S. 155, 165. Section 227(b)(1)(A)(iii)'s robocall restriction, with the government-debt exception, is content-based because it favors speech made for the purpose of collecting government debt over political and other speech. Pp. 618–619.

Syllabus

(b) The Government's arguments for deeming the statute content-neutral are unpersuasive. First, § 227(b)(1)(A)(iii) does not draw distinctions based on speakers, and even if it did, that would not "automatically render the distinction content neutral." *Reed*, 576 U. S., at 170. Second, the law here focuses on whether the caller is *speaking* about a particular topic and not, as the Government contends, simply on whether the caller is engaged in a particular economic activity. See *Sorrell* v. *IMS Health Inc.*, 564 U. S. 552, 563–564. Third, while "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech," this law "does not simply have an effect on speech, but is directed at certain content and is aimed at particular speakers." *Id.*, at 567. Pp. 619–620.

(c) As the Government concedes, the robocall restriction with the government-debt exception cannot satisfy strict scrutiny. The Government has not sufficiently justified the differentiation between government-debt collection speech and other important categories of robocall speech, such as political speech, issue advocacy, and the like. P. 621.

JUSTICE KAVANAUGH, joined by THE CHIEF JUSTICE and JUSTICE ALITO, concluded in Part III that the 2015 government-debt exception is severable from the underlying 1991 robocall restriction. The TCPA is part of the Communications Act, which has contained an express severability clause since 1934. Even if that clause did not apply to the exception, the presumption of severability would still apply. See, *e. g.*, *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477. The remainder of the law is capable of functioning independently and would be fully operative as a law. Severing this relatively narrow exception to the broad robocall restriction fully cures the First Amendment unequal-treatment problem and does not raise any other constitutional problems. Pp. 621–636.

JUSTICE SOTOMAYOR concluded that the government-debt exception fails under intermediate scrutiny and is severable from the rest of the Act. Pp. 636–637.

JUSTICE BREYER, joined by JUSTICE GINSBURG and JUSTICE KAGAN, would have upheld the government-debt exception, but given the contrary majority view, agreed that the provision is severable from the rest of the statute. P. 648.

JUSTICE GORSUCH concluded that content-based restrictions on speech are subject to strict scrutiny, that the Telephone Consumer Protection Act's rule against cell phone robocalls is a content-based restriction, and that this rule fails strict scrutiny and therefore cannot be constitutionally enforced. Pp. 648–651.

KAVANAUGH, J., announced the judgment of the Court and delivered an opinion, in which ROBERTS, C. J., and ALITO, J., joined, and in which THOMAS, J., joined as to Parts I and II. SOTOMAYOR, J., filed an opinion concurring in the judgment, *post*, p. 636. BREYER, J., filed an opinion concurring in the judgment with respect to severability and dissenting in part, in which GINSBURG and KAGAN, JJ., joined, *post*, p. 637. GORSUCH, J., filed an opinion concurring in the judgment in part and dissenting in part, in which THOMAS, J., joined as to Part II, *post*, p. 648.

Deputy Solicitor General Stewart argued the cause for petitioners. With him on the briefs were *Solicitor General Francisco*, *Assistant Attorney General Hunt*, *Frederick Liu*, *Mark B. Stern*, and *Michael S. Raab*.

Roman Martinez argued the cause for respondents. With him on the brief were *Andrew B. Clubok*, *Susan E. Engel*, and *William E. Raney*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Indiana et al. by *Curtis T. Hill, Jr.*, Attorney General of Indiana, *Thomas M. Fisher*, Solicitor General, *Kian J. Hudson*, Deputy Solicitor General, and *Julia C. Payne*, Deputy Attorney General, by *Joshua H. Stein*, Attorney General of North Carolina, *Matthew W. Sawchak*, Solicitor General, *Ryan Y. Park*, Deputy Solicitor General, and *Nicholas S. Brod*, Assistant Solicitor General, by *Eric J. Wilson*, Deputy Attorney General of Wisconsin, and by the Attorneys General for their respective jurisdictions as follows: *Steve Marshall* of Alabama, *Kevin G. Clarkson* of Alaska, *Leslie Rutledge* of Arkansas, *William Tong* of Connecticut, *Kathleen Jennings* of Delaware, *Clare E. Connors* of Hawaii, *Lawrence G. Wasden* of Idaho, *Kwame Raoul* of Illinois, *Tom Miller* of Iowa, *Derek Schmidt* of Kansas, *Jeffrey M. Landry* of Louisiana, *Aaron M. Frey* of Maine, *Brian E. Frosh* of Maryland, *Maura Healey* of Massachusetts, *Dana Nessel* of Michigan, *Keith Ellison* of Minnesota, *Eric Schmitt* of Missouri, *Timothy C. Fox* of Montana, *Aaron Ford* of Nevada, *Gordon MacDonald* of New Hampshire, *Wayne Stenehjem* of North Dakota, *Mike Hunter* of Oklahoma, *Ellen F. Rosenblum* of Oregon, *Josh Shapiro* of Pennsylvania, *Jason R. Ravnsborg* of South Dakota, *Herbert H. Slatery III* of Tennessee, *Sean Reyes* of Utah, *Mark R. Herring* of Virginia, *Robert W. Ferguson* of Washington, and *Patrick Morrisey* of West Virginia; for the Chamber of Commerce of the United States of America by *Shay Dvoretzky* and *Jeffrey R. Johnson*; for the Electronic Privacy Information Center et al. by *Marc Rotenberg* and *Alan Butler*; for Facebook, Inc., by *Paul D. Clement*, *Kasdin M. Mitchell*, and *Lauren N. Beebe*; for Healthcare Companies by *Michael D. Roth* and

JUSTICE KAVANAUGH announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE and JUSTICE ALITO join, and in which JUSTICE THOMAS joins as to Parts I and II.

Americans passionately disagree about many things. But they are largely united in their disdain for robocalls. The Federal Government receives a staggering number of complaints about robocalls—3.7 million complaints in 2019 alone. The States likewise field a constant barrage of complaints.

For nearly 30 years, the people's representatives in Congress have been fighting back. As relevant here, the Telephone Consumer Protection Act of 1991, known as the TCPA, generally prohibits robocalls to cell phones and home phones. But a 2015 amendment to the TCPA allows robocalls that are made to collect debts owed to or guaranteed by the Federal Government, including robocalls made to collect many student loan and mortgage debts.

This case concerns robocalls to cell phones. Plaintiffs in this case are political and nonprofit organizations that want to make political robocalls to cell phones. Invoking the First Amendment, they argue that the 2015 government-

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Maxwell V. Pritt; for the Institute for Free Speech by *Parker Douglas*; for the National League of Cities et al. by *John M. Baker*, *Katherine M. Swenson*, and *Lisa Soronen*; for Portfolio Recovery Associates, LLC, by *Misha Tseytlin*; for Public Citizen et al. by *Scott L. Nelson* and *Allison M. Zieve*; and for the Student Loan Servicing Alliance by *Jessica L. Ellsworth* and *Mark W. Brennan*.

Briefs of *amici curiae* urging affirmance were filed for the Cato Institute by *Robert Corn-Revere*, *Ronald G. London*, and *Ilya Shapiro*; and for the Retail Energy Supply Association by *Michael P. Daly*.

Briefs of *amici curiae* were filed for Fifteen Members of Congress by *Keith J. Keogh*; for the Institute of Justice by *Robert J. McNamara* and *Paul M. Sherman*; for Midland Credit Management, Inc., by *Zachary C. Schauf* and *Amy M. Gallegos*; for the National Consumer Law Center et al. by *Tara Twomey*, *Christopher M. Miller*, and *Leigh R. Schachter*; and for the Retail Litigation Center, Inc., et al. by *Joseph R. Palmore* and *Deborah R. White*.

debt exception unconstitutionally favors debt-collection speech over political and other speech. As relief from that unconstitutional law, they urge us to invalidate the entire 1991 robocall restriction, rather than simply invalidating the 2015 government-debt exception.

Six Members of the Court today conclude that Congress has impermissibly favored debt-collection speech over political and other speech, in violation of the First Amendment. See *infra*, at 618–621; *post*, at 636–637 (SOTOMAYOR, J., concurring in judgment); *post*, at 648, 650 (GORSUCH, J., concurring in judgment in part and dissenting in part). Applying traditional severability principles, seven Members of the Court conclude that the entire 1991 robocall restriction should not be invalidated, but rather that the 2015 government-debt exception must be invalidated and severed from the remainder of the statute. See *infra*, at 621–636; *post*, at 637 (SOTOMAYOR, J., concurring in judgment); *post*, at 648 (BREYER, J., concurring in judgment with respect to severability and dissenting in part). As a result, plaintiffs still may not make political robocalls to cell phones, but their speech is now treated equally with debt-collection speech. The judgment of the U. S. Court of Appeals for the Fourth Circuit is affirmed.

I

A

In 1991, Congress passed and President George H. W. Bush signed the Telephone Consumer Protection Act. The Act responded to a torrent of vociferous consumer complaints about intrusive robocalls. A growing number of telemarketers were using equipment that could automatically dial a telephone number and deliver an artificial or prerecorded voice message. At the time, more than 300,000 solicitors called more than 18 million Americans every day. TCPA, §2, ¶¶3, 6, 105 Stat. 2394, note following 47 U. S. C. §227. Consumers were "outraged" and considered robocalls

an invasion of privacy "regardless of the content or the initiator of the message." ¶¶6, 10.

A leading Senate sponsor of the TCPA captured the zeitgeist in 1991, describing robocalls as "the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall." 137 Cong. Rec. 30821 (1991).

In enacting the TCPA, Congress found that banning robocalls was "the only effective means of protecting telephone consumers from this nuisance and privacy invasion." TCPA §2, ¶12. To that end, the TCPA imposed various restrictions on the use of automated telephone equipment. §3(a), 105 Stat. 2395. As relevant here, one restriction prohibited "any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice" to "any telephone number assigned to a paging service, *cellular telephone service*, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call." *Id.*, at 2395–2396 (emphasis added). That provision is codified in §227(b)(1)(A)(iii) of Title 47 of the U. S. Code.

In plain English, the TCPA prohibited almost all robocalls to cell phones.[1]

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[1] The robocall restriction, as implemented by the Federal Communications Commission, bars both automated voice calls and automated text messages. See *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14115 (2003). The robocall restriction applies to "persons," which does not include the Government itself. See 47 U. S. C. §153(39). Congress has also authorized the FCC to promulgate regulatory exceptions to the robocall restriction. See §227(b)(2)(C). The FCC has authorized various exceptions over the years, such as exceptions for package-delivery notifications and certain healthcare-related calls. In this case, plaintiffs do not separately challenge the validity of the FCC's regulatory exceptions.

Twenty-four years later, in 2015, Congress passed and President Obama signed the Bipartisan Budget Act. In addition to making other unrelated changes to the U. S. Code, that Act amended the TCPA's restriction on robocalls to cell phones. It stated:

> "(a) IN GENERAL.—Section 227(b) of the Communications Act of 1934 (47 U. S. C. 227(b)) is amended—
>
> (1) in paragraph (1)—
>
> (A) in subparagraph (A)(iii), by inserting ', unless such call is made solely to collect a debt owed to or guaranteed by the United States' after 'charged for the call.'" 129 Stat. 588.[2]

In other words, Congress carved out a new government-debt exception to the general robocall restriction.

The TCPA imposes tough penalties for violating the robocall restriction. Private parties can sue to recover up to $1,500 per violation or three times their actual monetary losses, which can add up quickly in a class action. §227(b)(3). States may bring civil actions against robocallers on behalf of their citizens. §227(g)(1). And the Federal Communications Commission can seek forfeiture penalties for willful or repeated violations of the statute. §503(b).

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[2] After the 2015 amendment, §227(b)(1) now provides:

"It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—

. . . . . .

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call, *unless such call is made solely to collect a debt owed to or guaranteed by the United States.*" (Emphasis added.)

B

Plaintiffs in this case are the American Association of Political Consultants and three other organizations that participate in the political system. Plaintiffs and their members make calls to citizens to discuss candidates and issues, solicit donations, conduct polls, and get out the vote. Plaintiffs believe that their political outreach would be more effective and efficient if they could make robocalls to cell phones.[3] But because plaintiffs are not in the business of collecting government debt, § 227(b)(1)(A)(iii) prohibits them from making those robocalls.

Plaintiffs filed a declaratory judgment action against the U. S. Attorney General and the FCC, claiming that § 227(b)(1)(A)(iii) violated the First Amendment. The U. S. District Court for the Eastern District of North Carolina determined that the robocall restriction with the government-debt exception was a content-based speech regulation, thereby triggering strict scrutiny. But the court concluded that the law survived strict scrutiny, even with the content-based exception, because of the Government's compelling interest in collecting debt.

The U. S. Court of Appeals for the Fourth Circuit vacated the judgment. *American Assn. of Political Consultants, Inc.* v. *FCC*, 923 F. 3d 159 (2019). The Court of Appeals agreed with the District Court that the robocall restriction with the government-debt exception was a content-based speech restriction. But the court held that the law could not withstand strict scrutiny and was therefore unconstitutional. The Court of Appeals then applied traditional severability principles and concluded that the government-debt exception was severable from the underlying robocall restriction. The Court of Appeals therefore invalidated the government-debt exception and severed it from the robocall restriction.

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[3] Plaintiffs have not challenged the TCPA's separate restriction on robocalls to home phones. See 47 U. S. C. § 227(b)(1)(B).

The Government petitioned for a writ of certiorari because the Court of Appeals invalidated part of a federal statute—namely, the government-debt exception. Plaintiffs supported the petition, arguing from the other direction that the Court of Appeals did not go far enough in providing relief and should have invalidated the entire 1991 robocall restriction rather than simply invalidating the 2015 government-debt exception. We granted certiorari. 589 U. S. 1127 (2020).

II

Ratified in 1791, the First Amendment provides that Congress shall make no law "abridging the freedom of speech." Above "all else, the First Amendment means that government" generally "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 95 (1972).

The Court's precedents allow the government to "constitutionally impose reasonable time, place, and manner regulations" on speech, but the precedents restrict the government from discriminating "in the regulation of expression on the basis of the content of that expression." *Hudgens* v. *NLRB*, 424 U. S. 507, 520 (1976). Content-based laws are subject to strict scrutiny. See *Reed* v. *Town of Gilbert*, 576 U. S. 155, 163–164 (2015). By contrast, content-neutral laws are subject to a lower level of scrutiny. *Id.*, at 166.

Section 227(b)(1)(A)(iii) generally bars robocalls to cell phones. Since the 2015 amendment, the law has exempted robocalls to collect government debt. The initial First Amendment question is whether the robocall restriction, with the government-debt exception, is content-based. The answer is yes.

As relevant here, a law is content-based if "a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Reed*, 576 U. S., at 163. That descrip-

tion applies to a law that "singles out specific subject matter for differential treatment." *Id.*, at 169. For example, "a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed." *Ibid.*; see, *e. g.*, *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 116 (1991); *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221, 229–230 (1987); *Widmar* v. *Vincent*, 454 U. S. 263, 265, 276–277 (1981); *Carey* v. *Brown*, 447 U. S. 455, 459–463 (1980); *Erznoznik* v. *Jacksonville*, 422 U. S. 205, 211–212 (1975); *Mosley*, 408 U. S., at 95–96.

Under § 227(b)(1)(A)(iii), the legality of a robocall turns on whether it is "made solely to collect a debt owed to or guaranteed by the United States." A robocall that says, "Please pay your government debt" is legal. A robocall that says, "Please donate to our political campaign" is illegal. That is about as content-based as it gets. Because the law favors speech made for collecting government debt over political and other speech, the law is a content-based restriction on speech.

The Government advances three main arguments for deeming the statute content-neutral, but none is persuasive.

First, the Government suggests that § 227(b)(1)(A)(iii) draws distinctions based on speakers (authorized debt collectors), not based on content. But that is not the law in front of us. This statute singles out calls "made solely to collect a debt owed to or guaranteed by the United States," not all calls from authorized debt collectors.

In any event, "the fact that a distinction is speaker based" does not "automatically render the distinction content neutral." *Reed*, 576 U. S., at 170; *Sorrell* v. *IMS Health Inc.*, 564 U. S. 552, 563–564 (2011). Indeed, the Court has held that "'laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference re-

flects a content preference.'" *Reed*, 576 U. S., at 170 (quoting *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 658 (1994)).

Second, the Government argues that the legality of a robocall under the statute depends simply on whether the caller is engaged in a particular economic activity, not on the content of speech. We disagree. The law here focuses on whether the caller is *speaking* about a particular topic. In *Sorrell*, this Court held that a law singling out pharmaceutical marketing for unfavorable treatment was content-based. 564 U. S., at 563–564. So too here.

Third, according to the Government, if this statute is content-based because it singles out debt-collection speech, then so are statutes that *regulate* debt collection, like the Fair Debt Collection Practices Act. See 15 U. S. C. § 1692 *et seq.*[4] That slippery-slope argument is unpersuasive in this case. As we explained in *Sorrell*, "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." 564 U. S., at 567. The law here, like the Vermont law in *Sorrell*, "does not simply have an effect on speech, but is directed at certain content and is aimed at particular speakers." *Ibid.* The Government's concern is understandable, but the courts have generally been able to distinguish impermissible content-based speech restrictions from traditional or ordinary economic regulation of commercial activity that imposes incidental burdens on speech. The issue before us concerns only robocalls to cell phones. Our decision today on that issue fits comfortably within existing First Amendment precedent. Our decision is not intended to expand existing First Amendment doctrine or to otherwise affect traditional or ordinary economic regulation of commercial activity.

[4] This opinion uses the term "debt-collection speech" and "debt-collection robocalls" as shorthand for *government*-debt collection speech and robocalls.

In short, the robocall restriction with the government-debt exception is content-based. Under the Court's precedents, a "law that is content based" is "subject to strict scrutiny." *Reed*, 576 U. S., at 165. The Government concedes that it cannot satisfy strict scrutiny to justify the government-debt exception. We agree. The Government's stated justification for the government-debt exception is collecting government debt. Although collecting government debt is no doubt a worthy goal, the Government concedes that it has not sufficiently justified the differentiation between government-debt collection speech and other important categories of robocall speech, such as political speech, charitable fundraising, issue advocacy, commercial advertising, and the like.[5]

III

Having concluded that the 2015 government-debt exception created an unconstitutional exception to the 1991 robocall restriction, we must decide whether to invalidate the entire 1991 robocall restriction, or instead to invalidate and sever the 2015 government-debt exception. Before we apply ordinary severability principles, we must address plaintiffs' broader initial argument for why the entire 1991 robocall restriction is unconstitutional.

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[5] In his scholarly separate opinion, JUSTICE BREYER explains how he would apply freedom of speech principles. But the Court's longstanding precedents, which we carefully follow here, have not adopted that approach. In essence, therefore, JUSTICE BREYER argues for overruling several of the Court's First Amendment cases, including the recent 2015 decision in *Reed* v. *Town of Gilbert*, 576 U. S. 155 (2015). Before overruling precedent, the Court usually requires that a party ask for overruling, or at least obtains briefing on the overruling question, and then the Court carefully evaluates the traditional *stare decisis* factors. Here, no party has asked for overruling, and JUSTICE BREYER's opinion does not analyze the usual *stare decisis* factors. JUSTICE BREYER's opinion therefore discounts both the Court's precedent and the Court's precedent on precedent.

A

Plaintiffs correctly point out that the Government's asserted interest for the 1991 robocall restriction is consumer privacy. But according to plaintiffs, Congress's willingness to enact the government-debt exception in 2015 betrays a newfound lack of genuine congressional concern for consumer privacy. As plaintiffs phrase it, the 2015 exception "undermines the credibility" of the Government's interest in consumer privacy. Tr. of Oral Arg. 39. Plaintiffs further contend that if Congress no longer has a genuine interest in consumer privacy, then the underlying 1991 robocall restriction is no longer justified (presumably under any level of heightened scrutiny) and is therefore now unconstitutional.

Plaintiffs' argument is not without force, but we ultimately disagree with it. It is true that the Court has recognized that exceptions to a speech restriction "may diminish the credibility of the government's rationale for restricting speech in the first place." *City of Ladue* v. *Gilleo*, 512 U. S. 43, 52 (1994). But here, Congress's addition of the government-debt exception in 2015 does not cause us to doubt the credibility of Congress's continuing interest in protecting consumer privacy.

After all, the government-debt exception is only a slice of the overall robocall landscape. This is not a case where a restriction on speech is littered with exceptions that substantially negate the restriction. On the contrary, even after 2015, Congress has retained a very broad restriction on robocalls. The pre-1991 statistics on robocalls show that a variety of organizations collectively made a huge number of robocalls. And there is no reason to think that the incentives for those organizations—and many others—to make robocalls has diminished in any way since 1991. The continuing robocall restriction proscribes *tens of millions* of would-be robocalls that would otherwise occur *every day*. Congress's continuing broad prohibition of robocalls amply

demonstrates Congress's continuing interest in consumer privacy.

The simple reality, as we assess the legislative developments, is that Congress has competing interests. Congress's growing interest (as reflected in the 2015 amendment) in collecting government debt does not mean that Congress suddenly lacks a genuine interest in restricting robocalls. Plaintiffs seem to argue that Congress must be interested either in debt collection or in consumer privacy. But that is a false dichotomy, as we see it. As is not infrequently the case with either/or questions, the answer to this either/or question is "both." Congress is interested both in collecting government debt and in protecting consumer privacy.

Therefore, we disagree with plaintiffs' broader initial argument for holding the entire 1991 robocall restriction unconstitutional.

B

Plaintiffs next focus on ordinary severability principles. Applying those principles, the question before the Court is whether (i) to invalidate the entire 1991 robocall restriction, as plaintiffs want, or (ii) to invalidate just the 2015 government-debt exception and sever it from the remainder of the statute, as the Government wants.

We agree with the Government that we must invalidate the 2015 government-debt exception and sever that exception from the remainder of the statute. To explain why, we begin with general severability principles and then apply those principles to this case.

1

When enacting a law, Congress sometimes expressly addresses severability. For example, Congress may include a *severability* clause in the law, making clear that the unconstitutionality of one provision does not affect the rest of the law. See, *e. g.*, 12 U. S. C. §5302; 15 U. S. C. §78gg; 47

U. S. C. § 608. Alternatively, Congress may include a *nonseverability* clause, making clear that the unconstitutionality of one provision means the invalidity of some or all of the remainder of the law, to the extent specified in the text of the nonseverability clause. See, *e. g.*, 4 U. S. C. § 125; note following 42 U. S. C. § 300aa–1; 94 Stat. 1797.

When Congress includes an express severability or nonseverability clause in the relevant statute, the judicial inquiry is straightforward. At least absent extraordinary circumstances, the Court should adhere to the text of the severability or nonseverability clause. That is because a severability or nonseverability clause leaves no doubt about what the enacting Congress wanted if one provision of the law were later declared unconstitutional. A severability clause indicates "that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision." *Alaska Airlines, Inc.* v. *Brock*, 480 U. S. 678, 686 (1987). And a nonseverability clause does the opposite.

On occasion, a party will nonetheless ask the Court to override the text of a severability or nonseverability clause on the ground that the text does not reflect Congress's "actual intent" as to severability. That kind of argument may have carried some force back when courts paid less attention to statutory text as the definitive expression of Congress's will. But courts today zero in on the precise statutory text and, as a result, courts hew closely to the text of severability or nonseverability clauses. See *Seila Law LLC* v. *Consumer Financial Protection Bureau*, 591 U. S. 197, 234 (2020) (plurality opinion); cf. *Milner* v. *Department of Navy*, 562 U. S. 562, 569–573 (2011).[6]

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[6] When Congress enacts a law with a severability clause and later adds new provisions to that statute, the severability clause applies to those new provisions to the extent dictated by the text of the severability clause. Likewise, when Congress has *not* included a severability clause in initial legislation, Congress can subsequently enact a severability clause that ap-

Of course, when enacting a law, Congress often does not include either a severability clause or a nonseverability clause.

In those cases, it is sometimes said that courts applying severability doctrine should search for other indicia of congressional intent. For example, some of the Court's cases declare that courts should sever the offending provision unless "the statute created in its absence is legislation that Congress would not have enacted." *Alaska Airlines*, 480 U. S., at 685. But experience shows that this formulation often leads to an analytical dead end. That is because courts are not well equipped to imaginatively reconstruct a prior Congress's hypothetical intent. In other words, absent a severability or nonseverability clause, a court often cannot really know what the two Houses of Congress and the President from the time of original enactment of a law would have wanted if one provision of a law were later declared unconstitutional.

The Court's cases have instead developed a strong presumption of severability. The Court presumes that an unconstitutional provision in a law is severable from the remainder of the law or statute. For example, in *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, the Court set forth the "normal rule": "Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact." 561 U. S. 477, 508 (2010) (internal quotation marks omitted); see also *Seila Law*, 591 U. S., at 234 (same). In *Regan* v. *Time, Inc.*, the plurality opinion likewise described a "presumption" in "favor of severability" and stated that the Court should "refrain from invalidating more of the statute than is necessary." 468 U. S. 641, 652–653 (1984).

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plies to the existing statute to the extent dictated by the text of the later-added severability clause. In both scenarios, the text of the severability clause remains central to the severability inquiry.

The Court's power and preference to partially invalidate a statute in that fashion has been firmly established since *Marbury* v. *Madison*. There, the Court invalidated part of § 13 of the Judiciary Act of 1789. 1 Cranch 137, 179–180 (1803). The Judiciary Act did not contain a severability clause. But the Court did not proceed to invalidate the entire Judiciary Act. As Chief Justice Marshall later explained, if any part of an Act is "unconstitutional, the provisions of that part may be disregarded while full effect will be given to such as are not repugnant to the constitution of the United States." *Bank of Hamilton* v. *Lessee of Dudley*, 2 Pet. 492, 526 (1829); see also *Dorchy* v. *Kansas*, 264 U. S. 286, 289–290 (1924) ("A statute bad in part is not necessarily void in its entirety. Provisions within the legislative power may stand if separable from the bad"); *Loeb* v. *Columbia Township Trustees*, 179 U. S. 472, 490 (1900) ("one section of a statute may be repugnant to the Constitution without rendering the whole act void").

From *Marbury* v. *Madison* to the present, apart from some isolated detours mostly in the late 1800s and early 1900s, the Court's remedial preference after finding a provision of a federal law unconstitutional has been to salvage rather than destroy the rest of the law passed by Congress and signed by the President. The Court's precedents reflect a decisive preference for surgical severance rather than wholesale destruction, even in the absence of a severability clause.

The Court's presumption of severability supplies a workable solution—one that allows courts to avoid judicial policymaking or *de facto* judicial legislation in determining just how much of the remainder of a statute should be invalidated.[7] The presumption also reflects the confined role of

[7] If courts had broad license to invalidate more than just the offending provision, a reviewing court would have to consider what other provisions to invalidate: the whole section, the chapter, the statute, the public law, or something else altogether. Courts would be largely at sea in making that

the Judiciary in our system of separated powers—stated otherwise, the presumption manifests the Judiciary's respect for Congress's legislative role by keeping courts from unnecessarily disturbing a law apart from invalidating the provision that is unconstitutional. Furthermore, the presumption recognizes that plaintiffs who successfully challenge one provision of a law may lack standing to challenge *other* provisions of that law. See *Murphy* v. *National Collegiate Athletic Assn.*, 584 U. S. 453, 490–491 (2018) (THOMAS, J., concurring).

Those and other considerations, taken together, have steered the Court to a presumption of severability. Applying the presumption, the Court invalidates and severs unconstitutional provisions from the remainder of the law rather than razing whole statutes or Acts of Congress. Put in common parlance, the tail (one unconstitutional provision) does not wag the dog (the rest of the codified statute or the Act as passed by Congress). Constitutional litigation is not a game of gotcha against Congress, where litigants can ride a discrete constitutional flaw in a statute to take down the whole, otherwise constitutional statute. If the rule were otherwise, the entire Judiciary Act of 1789 would be invalid as a consequence of *Marbury* v. *Madison*.[8]

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determination, and usually could not do it in a principled way. Here, for example, would a court invalidate all or part of the Bipartisan Budget Act of 2015 rather than all or part of the 1991 TCPA? After all, that 2015 Bipartisan Budget Act, not the 1991 TCPA, added the constitutionally problematic government-debt exception. That is the kind of free-wheeling policy question that the Court's presumption of severability avoids.

[8] The term "invalidate" is a common judicial shorthand when the Court holds that a particular provision is unlawful and therefore may not be enforced against a plaintiff. To be clear, however, when it "invalidates" a law as unconstitutional, the Court of course does not formally repeal the law from the U. S. Code or the Statutes at Large. Instead, in Chief Justice Marshall's words, the Court recognizes that the Constitution is a "superior, paramount law," and that "a legislative act contrary to the constitu-

Before severing a provision and leaving the remainder of a law intact, the Court must determine that the remainder of the statute is "capable of functioning independently" and thus would be "fully operative" as a law. *Seila Law*, 591 U. S., at 235; see *Murphy*, 584 U. S., at 481–486. But it is fairly unusual for the remainder of a law not to be operative.[9]

2

We next apply those general severability principles to this case.

Recall how this statute came together. Passed by Congress and signed by President Franklin Roosevelt in 1934,

tion is not law" at all. *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). The Court's authority on this front "amounts to little more than the negative power to disregard an unconstitutional enactment." *Massachusetts* v. *Mellon*, 262 U. S. 447, 488 (1923).

JUSTICE THOMAS's thoughtful approach to severability as outlined in *Murphy* v. *National Collegiate Athletic Assn.*, 584 U. S. 453, 486–491 (2018), and *Seila Law LLC* v. *Consumer Financial Protection Bureau*, 591 U. S. 197, 251–261 (2020) (joined by JUSTICE GORSUCH in the latter) would simply enjoin enforcement of a law as applied to the particular plaintiffs in a case. Under either the Court's approach or JUSTICE THOMAS's approach, an offending provision formally remains on the statute books (at least unless Congress also formally repeals it). Under either approach, the formal remedy afforded to the plaintiff is an injunction, declaration, or damages. One difference between the two approaches is this: Under the Court's approach, a provision is declared invalid and cannot be lawfully enforced against others. Under JUSTICE THOMAS's approach, the Court's ruling that a provision cannot be enforced against the plaintiff, plus executive respect in its enforcement policies for controlling decisional law, plus vertical and horizontal *stare decisis* in the courts, will mean that the provision will not and cannot be lawfully enforced against others. The Court and JUSTICE THOMAS take different analytical paths, but in many cases, the different paths lead to the same place.

[9] On occasion, of course, it may be that a particular surrounding or connected provision is not operative in the absence of the unconstitutional provision, even though the rest of the law would be operative. That scenario may require severance of somewhat more than just the offending provision, albeit not of the entire law. Courts address that scenario as it arises.

the Communications Act is codified in Title 47 of the U. S. Code. The TCPA of 1991 amended the Communications Act by adding the robocall restriction, which is codified at § 227(b)(1)(A)(iii) of Title 47. The Bipartisan Budget Act of 2015 then amended the Communications Act by adding the government-debt exception, which is codified along with the robocall restriction at § 227(b)(1)(A)(iii) of Title 47.

Since 1934, the Communications Act has contained an express severability clause: "If any provision of *this chapter* or the application thereof to any person or circumstance is held invalid, the remainder of the chapter and the application of such provision to other persons or circumstances shall not be affected thereby." 47 U. S. C. § 608 (emphasis added). The "chapter" referred to in the severability clause is Chapter 5 of Title 47. And Chapter 5 in turn encompasses § 151 to § 700 of Title 47, and therefore covers § 227 of Title 47, the provision with the robocall restriction and the government-debt exception.[10]

Enacted in 2015, the government-debt exception added an unconstitutional discriminatory exception to the robocall restriction. The text of the severability clause squarely covers the unconstitutional government-debt exception and requires that we sever it.

To get around the text of the severability clause, plaintiffs point out that the Communications Act's severability clause was enacted in 1934, long before the TCPA's 1991 robocall restriction and the 2015 government-debt exception. But a severability clause must be interpreted according to its terms, regardless of when Congress enacted it. See n. 6, *supra*.

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[10] A codifier's note explains a change in wording from the original Public Law: "This chapter, referred to in text, was in the original 'this Act', meaning act June 19, 1934, ch. 652, 48 Stat. 1064, known as the Communications Act of 1934, which is classified principally to this chapter." Note following 47 U. S. C. § 608.

Even if the severability clause did not apply to the government-debt provision at issue in this case (or even if there were no severability clause in the Communications Act), we would apply the presumption of severability as described and applied in cases such as *Free Enterprise Fund*. And under that presumption, we likewise would sever the 2015 government-debt exception, the constitutionally offending provision.

With the government-debt exception severed, the remainder of the law is capable of functioning independently and thus would be fully operative as a law. Indeed, the remainder of the robocall restriction did function independently and fully operate as a law for 20-plus years before the government-debt exception was added in 2015.

The Court's precedents further support severing the 2015 government-debt exception. The Court has long applied severability principles in cases like this one, where Congress added an unconstitutional amendment to a prior law. In those cases, the Court has treated the original, pre-amendment statute as the "valid expression of the legislative intent." *Frost* v. *Corporation Comm'n of Okla.*, 278 U. S. 515, 526–527 (1929). The Court has severed the "exception introduced by amendment," so that "the original law stands without the amendatory exception." *Truax* v. *Corrigan*, 257 U. S. 312, 342 (1921).

For example, in *Eberle* v. *Michigan*, the Court held that "discriminatory wine-and-cider amendments" added in 1899 and 1903 were severable from the underlying 1889 state law generally prohibiting the manufacture of alcohol. 232 U. S. 700, 704–705 (1914). In *Truax*, the Court ruled that a 1913 amendment prohibiting Arizona courts from issuing injunctions in labor disputes was invalid and severable from the underlying 1901 law authorizing Arizona courts to issue injunctions generally. 257 U. S., at 341–342. In *Frost*, the Court concluded that a 1925 amendment exempting certain

corporations from making a showing of "public necessity" in order to obtain a cotton gin license was invalid and severable from the 1915 law that required that showing. 278 U. S., at 525–528. Echoing *Marbury*, the Court in *Frost* explained that an unconstitutional statutory amendment "is a nullity" and "void" when enacted, and for that reason has no effect on the original statute. 278 U. S., at 526–527 (internal quotation marks omitted).[11]

Similarly, in 1932, Congress enacted the Federal Kidnaping Act, and then in 1934, added a death penalty provision to the Act. The death penalty provision was later declared unconstitutional by this Court. In considering severability, the Court stated that the "law as originally enacted in 1932 contained no capital punishment provision." *United States* v. *Jackson*, 390 U. S. 570, 586 (1968). And when Congress amended the Act in 1934 to add the death penalty, "the statute was left substantially unchanged in every other respect." *Id.*, at 587–588. The Court found it "difficult to imagine a more compelling case for severability." *Id.*, at 589. So too here.

In sum, the text of the Communications Act's severability clause requires that the Court sever the 2015 government-debt exception from the remainder of the statute. And even if the text of the severability clause did not apply here, the presumption of severability would require that the Court sever the 2015 government-debt exception from the remainder of the statute.

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[11] The cases cited in the text above are pre-*Erie* decisions involving the constitutionality of state laws. See *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938). In that era, the Court often treated severability of state laws and federal laws in the same general way. In the post-*Erie* era, severability of state laws can potentially pose different questions than severability of federal laws. We need not address post-*Erie* severability of state laws. See, *e. g.*, *Ayotte* v. *Planned Parenthood of Northern New Eng.*, 546 U. S. 320, 328–331 (2006); *Leavitt* v. *Jane L.*, 518 U. S. 137, 139 (1996) (*per curiam*) ("Severability is of course a matter of state law").

3

One final severability wrinkle remains. This is an equal-treatment case, and equal-treatment cases can sometimes pose complicated severability questions.

The "First Amendment is a kind of Equal Protection Clause for ideas." *Williams-Yulee* v. *Florida Bar*, 575 U. S. 433, 470 (2015) (Scalia, J., dissenting). And Congress violated that First Amendment equal-treatment principle in this case by favoring debt-collection robocalls and discriminating against political and other robocalls.

When the constitutional violation is unequal treatment, as it is here, a court theoretically can cure that unequal treatment either by extending the benefits or burdens to the exempted class, or by nullifying the benefits or burdens for all. See, *e. g.*, *Heckler* v. *Mathews*, 465 U. S. 728, 740 (1984). Here, for example, the Government would prefer to cure the unequal treatment by extending the robocall restriction and thereby proscribing nearly all robocalls to cell phones. By contrast, plaintiffs want to cure the unequal treatment by nullifying the robocall restriction and thereby allowing all robocalls to cell phones.

When, as here, the Court confronts an equal-treatment constitutional violation, the Court generally applies the same commonsense severability principles described above. If the statute contains a severability clause, the Court typically severs the discriminatory exception or classification, and thereby extends the relevant statutory benefits or burdens to those previously exempted, rather than nullifying the benefits or burdens for all. In light of the presumption of severability, the Court generally does the same even in the absence of a severability clause. The Court's precedents reflect that preference for extension rather than nullification. See, *e. g.*, *Sessions* v. *Morales-Santana*, 582 U. S. 47, 74 (2017); *Califano* v. *Westcott*, 443 U. S. 76, 89–91 (1979); *Califano* v. *Goldfarb*, 430 U. S. 199, 202–204, 213–217 (1977) (plurality opinion); *Jimenez* v. *Weinberger*, 417 U. S. 628, 637–638

(1974); *Department of Agriculture* v. *Moreno*, 413 U. S. 528, 529, 537–538 (1973); *Frontiero* v. *Richardson*, 411 U. S. 677, 678–679, 690–691 (1973) (plurality opinion); *Welsh* v. *United States*, 398 U. S. 333, 361–367 (1970) (Harlan, J., concurring in result).

To be sure, some equal-treatment cases can raise complex questions about whether it is appropriate to extend benefits or burdens, rather than nullifying the benefits or burdens. See, *e. g.*, *Morales-Santana*, 582 U. S., at 75–76. For example, there can be due process, fair notice, or other independent constitutional barriers to extension of benefits or burdens. Cf. *Miller* v. *Albright*, 523 U. S. 420, 458–459 (1998) (Scalia, J., concurring in judgment); see generally Ginsburg, Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation, 28 Clev. St. L. Rev. 301 (1979). There also can be knotty questions about what is the exception and what is the rule. But here, we need not tackle all of the possible hypothetical applications of severability doctrine in equal-treatment cases. The government-debt exception is a relatively narrow exception to the broad robocall restriction, and severing the government-debt exception does not raise any other constitutional problems.

Plaintiffs insist, however, that a *First Amendment* equal-treatment case is different. According to plaintiffs, a court should not cure "a First Amendment violation by outlawing more speech." Brief for Respondents 34. The implicit premise of that argument is that extending the robocall restriction to debt-collection robocalls would be unconstitutional. But that is wrong. A generally applicable robocall restriction would be permissible under the First Amendment. Extending the robocall restriction to those robocalls raises no First Amendment problem. So the First Amendment does not tell us which way to cure the unequal treatment in this case. Therefore, we apply traditional severability principles. And as we have explained, severing the 2015 government-debt exception cures the unequal treatment and

constitutes the proper result under the Court's traditional severability principles. In short, the correct result in this case is to sever the 2015 government-debt exception and leave in place the longstanding robocall restriction.[12]

4

JUSTICE GORSUCH's well-stated separate opinion makes a number of important points that warrant this respectful response.

JUSTICE GORSUCH suggests that our decision provides "no relief" to plaintiffs. *Post*, at 653. We disagree. Plaintiffs want to be able to make political robocalls to cell phones, and they have not received *that* relief. But the First Amendment complaint at the heart of their suit was unequal treatment. Invalidating and severing the government-debt exception fully addresses that First Amendment injury.[13] JUSTICE GORSUCH further suggests that plaintiffs may lack standing to challenge the government-debt exception, because that exception merely favors others. See *ibid.* But the Court has squarely held that a plaintiff who suffers unequal treatment has standing to challenge a discriminatory exception that favors others. See *Heckler* v. *Mathews*, 465 U. S., at 737–740 (a plaintiff who suffers unequal treatment has standing to seek "withdrawal of benefits from the fa-

[12] As the Government acknowledges, although our decision means the end of the government-debt exception, no one should be penalized or held liable for making robocalls to collect government debt after the effective date of the 2015 government-debt exception and before the entry of final judgment by the District Court on remand in this case, or such date that the lower courts determine is appropriate. See Reply Brief 24. On the other side of the ledger, our decision today does not negate the liability of parties who made robocalls covered by the robocall restriction.

[13] Plaintiffs suggest that parties will not have incentive to sue if the cure for challenging an unconstitutional exception to a speech restriction is to eliminate the exception and extend the restriction. But many individuals and organizations often have incentive to challenge unequal treatment of speech, especially when a competitor is regulated less heavily.

vored class"); see also *Northeastern Fla. Chapter, Associated Gen. Contractors of America* v. *Jacksonville*, 508 U. S. 656, 666 (1993) ("The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit").

JUSTICE GORSUCH also objects that our decision today "harms strangers to this suit" by eliminating favorable treatment for debt collectors. *Post*, at 653. But that is necessarily true in many cases where a court cures unequal treatment by, for example, extending a burden or nullifying a benefit. See, *e. g.*, *Morales-Santana*, 582 U. S., at 77 (curing unequal treatment of children born to unwed U. S.-citizen fathers by extending a burden to children of unwed U. S.-citizen mothers); *Orr* v. *Orr*, 374 So. 2d 895, 896–897 (Ala. Civ. App. 1979) (extending alimony obligations to women after a male plaintiff successfully challenged Alabama's discriminatory alimony statute in this Court).

Moreover, JUSTICE GORSUCH's approach to this case would not solve the problem of harming strangers to this suit; it would just create a different and much bigger problem. His proposed remedy of injunctive relief, plus *stare decisis*, would in effect allow all robocalls to cell phones—notwithstanding Congress's decisive choice to prohibit most robocalls to cell phones. That is not a judicially modest approach but is more of a wolf in sheep's clothing. That approach would disrespect the democratic process, through which the people's representatives have made crystal clear that robocalls must be restricted. JUSTICE GORSUCH's remedy would end up harming a different and far larger set of strangers to this suit—the tens of millions of consumers who would be bombarded every day with nonstop robocalls notwithstanding Congress's clear prohibition of those robocalls.

JUSTICE GORSUCH suggests more broadly that severability doctrine may need to be reconsidered. But when and how? As the saying goes, John Marshall is not walking through

that door. And this Court, in this and other recent decisions, has clarified and refined severability doctrine by emphasizing firm adherence to the text of severability clauses, and underscoring the strong presumption of severability. The doctrine as so refined is constitutionally well-rooted, see, *e. g.*, *Marbury* v. *Madison*, 1 Cranch 137 (Marshall, C. J.), and can be predictably applied. True, there is no magic solution to severability that solves every conundrum, especially in equal-treatment cases, but the Court's current approach as reflected in recent cases such as *Free Enterprise Fund* and *Seila Law* is constitutional, stable, predictable, and commonsensical.

* * *

In 1991, Congress enacted a general restriction on robocalls to cell phones. In 2015, Congress carved out an exception that allowed robocalls made to collect government debt. In doing so, Congress favored debt-collection speech over plaintiffs' political speech. We hold that the 2015 government-debt exception added an unconstitutional exception to the law. We cure that constitutional violation by invalidating the 2015 government-debt exception and severing it from the remainder of the statute. The judgment of the U. S. Court of Appeals for the Fourth Circuit is affirmed.

It is so ordered.

JUSTICE SOTOMAYOR, concurring in the judgment.

I agree with much of the partial dissent's explanation that strict scrutiny should not apply to all content-based distinctions. Cf. *post*, at 641–645 (BREYER, J., concurring in judgment with respect to severability and dissenting in part). In my view, however, the government-debt exception in 47 U. S. C. § 227(b) still fails intermediate scrutiny because it is not "narrowly tailored to serve a significant governmental interest." *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989) (internal quotation marks omitted). Even under in-

termediate scrutiny, the Government has not explained how a debt-collection robocall about a government-backed debt is any less intrusive or could be any less harassing than a debt-collection robocall about a privately backed debt. As the Fourth Circuit noted, the government-debt exception is seriously underinclusive because it permits "many of the intrusive calls that the automated call ban was enacted to prohibit." *American Assn. of Political Consultants, Inc.* v. *FCC*, 923 F. 3d 159, 168 (2019) (case below). The Government could have employed far less restrictive means to further its interest in collecting debt, such as "secur[ing] consent from the debtors to make debt-collection calls" or "plac[ing] the calls itself." *Id.*, at 169, n. 10; see also § 227(b)(1)(A). Nor has the Government "sufficiently justified the differentiation between government-debt collection speech and other important categories of robocall speech, such as political speech, charitable fundraising, issue advocacy, commercial advertising, and the like." *Ante*, at 621.

Nevertheless, I agree that the offending provision is severable. See *ante*, at 614; *post*, at 648 (opinion of BREYER, J.); see also *City of Ladue* v. *Gilleo*, 512 U. S. 43, 51–53 (1994) (explaining that an appropriate "solution" to a law that covers "too little speech because its exemptions discriminate on the basis of [the speaker's] messages" could be to "remove" the discrimination).

With those understandings, I concur in the judgment.

JUSTICE BREYER, with whom JUSTICE GINSBURG and JUSTICE KAGAN join, concurring in the judgment with respect to severability and dissenting in part.

A federal statute forbids, with some exceptions, making automatically dialed or prerecorded telephone calls (called robocalls) to cell phones. This case concerns one of these exceptions, which applies to calls "made solely to collect a debt owed to or guaranteed by the United States." 47 U. S. C. § 227(b)(1)(A)(iii). A majority of the Court holds

that the exception violates the Constitution's First Amendment. In my view, it does not.

I

This case concerns the Telephone Consumer Protection Act of 1991. That Act was designed to "protec[t] telephone consumers from th[e] nuisance and privacy invasion" caused by automated and prerecorded phone calls. § 2(12), 105 Stat. 2395. The Act, among other things, bans almost all robocalls made to cell phones. In particular, it forbids "any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a . . . cellular telephone service." § 3(a) (codified at 47 U. S. C. § 227(b)(1)(A)(iii)). The Act delegates authority to the Federal Communications Commission to make certain additional exceptions from that general cell phone robocall restriction. § 227(b)(2)(C).

More than 20 years later, Congress enacted another statute, which created the government-debt exception. The Office of Management and Budget had reported to Congress that in "this time of fiscal constraint . . . the Federal Government should ensure that all debt owed to the United States is collected as quickly and efficiently as possible." Office of Management and Budget, Analytical Perspectives, Budget of the U. S. Government, Fiscal Year 2016, p. 128 (2015), https://www.govinfo.gov/content/pkg/BUDGET-2016-PER/pdf/BUDGET-2016-PER.pdf. It recommended that Congress permit "the use of automatic dialing systems and prerecorded voice messages" to contact "wireless phones in the collection of debt owed to or granted [*sic*] by the United States." *Ibid.*

Congress adopted that recommendation. It enacted a provision that excepts from the general cell phone robocall restriction any call "made solely to collect a debt owed to or

guaranteed by the United States." 129 Stat. 588; see also *ibid.* (categorizing the exception as a "debt collection improvemen[t]" measure). The question here is whether the First Amendment prohibits the Federal Government from enacting that government-debt collection measure.

II

The plurality finds the government-debt exception unconstitutional primarily by applying a logical syllogism: (1) "Content-based laws are subject to strict scrutiny." *Ante*, at 618 (citing *Reed* v. *Town of Gilbert*, 576 U. S. 155, 163–164 (2015)). (2) The exception is based on "content." *Ante*, at 619. (3) Hence, the exception is subject to "strict scrutiny." *Ante*, at 621. (4) And the Government concedes that the exception cannot survive "strict scrutiny" examination. *Ibid.*

The problem with that approach, which reflexively applies strict scrutiny to all content-based speech distinctions, is that it is divorced from First Amendment values. This case primarily involves commercial regulation—namely, debt collection. And, in my view, there is no basis here to apply "strict scrutiny" based on "content-discrimination."

To appreciate why, it is important to understand at least one set of values that underlie the First Amendment and the related reasons why courts scrutinize some speech restrictions strictly. The concept is abstract but simple: "We the People of the United States" have created a government of laws enacted by elected representatives. For our government to remain a *democratic* republic, the people must be free to generate, debate, and discuss both general and specific ideas, hopes, and experiences. The people must then be able to transmit their resulting views and conclusions to their elected representatives, which they may do directly, or indirectly through the shaping of public opinion. The object of that transmission is to influence the public policy enacted by elected representatives. As this Court has explained, "[t]he First Amendment was fashioned to assure unfettered

interchange of ideas for the bringing about of political and social changes desired by the people." *Meyer* v. *Grant*, 486 U. S. 414, 421 (1988) (internal quotation marks omitted). See generally R. Post, Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State 1–25 (2012).

In other words, the free marketplace of ideas is not simply a debating society for expressing thought in a vacuum. It is in significant part an instrument for "bringing about . . . political and social chang[e]." *Meyer*, 486 U. S., at 421. The representative democracy that "We the People" have created insists that this be so. See *Sorrell* v. *IMS Health Inc.*, 564 U. S. 552, 583 (2011) (BREYER, J., dissenting). See generally, *e. g.*, B. Neuborne, Madison's Music: On Reading the First Amendment (2015).

It is thus no surprise that our First Amendment jurisprudence has long reflected these core values. This Court's cases have provided heightened judicial protection for political speech, public forums, and the expression of all viewpoints on any given issue. See, *e. g.*, *Buckley* v. *American Constitutional Law Foundation, Inc.*, 525 U. S. 182, 186–187 (1999) (heightened protection for "core political speech"); *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829–830 (1995) (government discrimination on basis of "particular views taken by speakers on a subject" presumptively unconstitutional); *Boos* v. *Barry*, 485 U. S. 312, 321 (1988) ("content-based restriction[s] on political speech in a public forum" subject to "most exacting scrutiny" (emphasis deleted)); *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 45–46 (1983) (content-based exclusions in public forums subject to strict scrutiny). These cases reflect the straightforward principle that "governments must not be allowed to choose which issues are worth discussing or debating." *Reed*, 576 U. S., at 182 (KAGAN, J., concurring in judgment) (internal quotation marks omitted).

From a democratic perspective, however, it is equally important that courts not use the First Amendment in a way that would threaten the workings of ordinary regulatory programs posing little threat to the free marketplace of ideas enacted as a result of that public discourse. As a general matter, the strictest scrutiny should not apply indiscriminately to the very "political and social changes desired by the people"—that is, to those government programs which the "unfettered interchange of ideas" has sought to achieve. *Meyer*, 486 U. S., at 421 (internal quotation marks omitted). Otherwise, our democratic system would fail, not through the inability of the people to speak or to transmit their views to government, but because of an elected government's inability to translate those views into action.

Thus, once again, it is not surprising that this Court has applied less strict standards when reviewing speech restrictions embodied in government regulatory programs. This Court, for example, has applied a "rational basis" standard for reviewing those restrictions when they have only indirect impacts on speech. See *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U. S. 457, 469–470, 477 (1997). And it has applied a mid-level standard of review—often termed "intermediate scrutiny"—when the government directly restricts protected commercial speech. See *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, 561–564 (1980).

This account of well-established principles at the core of the First Amendment demonstrates the problem with the plurality's approach. To reflexively treat all content-based distinctions as subject to strict scrutiny regardless of context or practical effect is to engage in an analysis untethered from the First Amendment's objectives. And in this case, strict scrutiny is inappropriate. Recall that the exception at issue here concerns debt collection—specifically a method for collecting government-owned or -backed debt. Regulation of debt collection does not fall on the first side of the democratic

equation. It has next to nothing to do with the free marketplace of ideas or the transmission of the people's thoughts and will to the government. It has everything to do with the second side of the equation, that is, with government response to the public will through ordinary commercial regulation. To apply the strictest level of scrutiny to the economically based exemption here is thus remarkable.

I recognize that the underlying cell phone robocall restriction primarily concerns a means of communication. And that fact, as I discuss below, triggers some heightened scrutiny, reflected in an intermediate scrutiny standard. Strict scrutiny and its strong presumption of unconstitutionality, however, have no place here.

The plurality claims that its approach, which categorically applies strict scrutiny to content-based distinctions, will not "affect traditional or ordinary economic regulation of commercial activity." *Ante*, at 620. But how is that so? Much of human life involves activity that takes place through speech. And much regulatory activity turns upon speech content. See, *e. g.*, *Reed*, 576 U. S., at 177–178 (BREYER, J., concurring in judgment) (giving examples). Consider, for example, the regulation of securities sales, drug labeling, food labeling, false advertising, workplace safety warnings, automobile airbag instructions, consumer electronic labels, tax forms, debt collection, and so on. All of those regulations necessarily involve content-based speech distinctions. What are the differences between regulatory programs themselves other than differences based on content? After all, the regulatory spheres in which the Securities and Exchange Commission or the Federal Trade Commission operate are defined by content. Put simply, treating all content-based distinctions on speech as presumptively unconstitutional is unworkable and would obstruct the ordinary workings of democratic governance.

That conclusion is true here notwithstanding the plurality's effort to bring political speech into the First Amend-

ment analysis. See *ante*, at 619, 636 (characterizing Congress as having "favored debt-collection speech over plaintiffs' political speech"). It is true that the underlying cell phone robocall restriction generally prohibits political speakers from making robocalls. But that has little to do with the government-debt exception or *its* practical effect. Nor does it justify the application of strict scrutiny.

Consider prescription drug labels, securities forms, and tax statements. A government agency might reasonably specify just what information the form or label must contain and further provide that the form or label may not contain other information (thereby excluding political statements). No one would think that the exclusion of political speech, say, from a drug label, means that courts must examine all other regulatory exceptions with strict scrutiny. Put differently, it is hard to imagine that such exceptions threaten political speech in the marketplace of ideas, or have any significant impact on the free exchange of ideas. To treat those exceptions as presumptively unconstitutional would work a significant transfer of authority from legislatures and agencies to courts, potentially inhibiting the creation of the very government programs for which the people (after debate) have voiced their support, despite those programs' minimal speech-related harms. See *Sorrell*, 564 U. S., at 584–585 (BREYER, J., dissenting). Given the values at the heart of the First Amendment, see *supra*, at 639–642, that interpretation threatens to stand that Amendment on its head. It could also lead the Court to water down the strict scrutiny standard, which would limit speech protections in situations where strict scrutiny's strong protections should properly apply. *Reed*, 576 U. S., at 178 (BREYER, J., concurring in judgment).

If, as I have argued, the First Amendment does not support the mechanical conclusion that content discrimination automatically triggers strict scrutiny, what role might content discrimination play? The plurality is correct when it quotes this Court as having said that the government may

not discriminate "'in the regulation of expression on the basis of the content of that expression.'" *Ante*, at 618 (quoting *Hudgens* v. *NLRB*, 424 U. S. 507, 520 (1976)). If, however, this Court is to apply the First Amendment consistently with the democratic values embodied within that Amendment, that kind of statement must reflect a rule of thumb applicable only in certain circumstances. See *Reed*, 576 U. S., at 176 (BREYER, J., concurring in judgment); *id.*, at 183 (KAGAN, J., concurring in judgment) ("We can administer our content-regulation doctrine with a dose of common sense, so as to leave standing laws that in no way implicate its intended function").

Indeed, that must be so given that this Court's First Amendment jurisprudence itself ties the constitutional protection speech receives to the content or purpose of that speech. The Court has held that entire categories of speech—for example, obscenity, fraud, and speech integral to criminal conduct—are generally unprotected by the First Amendment entirely because of their content. See *Miller* v. *California*, 413 U. S. 15, 23 (1973) (obscenity); *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 771 (1976) (fraud); *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490, 498 (1949) (speech integral to criminal conduct). As Justice Stevens pointed out, "our entire First Amendment jurisprudence creates a regime based on the content of speech." *R. A. V.* v. *St. Paul*, 505 U. S. 377, 420 (1992) (opinion concurring in judgment); see *id.*, at 420–422 (providing examples). Given that this Court looks to the nature and content of speech to determine whether, or to what extent, the First Amendment protects it, it makes little sense to treat *every* content-based distinction Congress has made as presumptively unconstitutional.

Moreover, it is no answer to claim that this Court's precedents categorically require such an analysis. See *ante*, at 621, n. 5 (plurality opinion). Our First Amendment jurisprudence has always been contextual and has defied straightfor-

ward reduction to unyielding categorical rules. The idea that broad language in any one case (even *Reed*) has categorically determined how content discrimination should be applied in *every single context* is both wrong and reflects an oversimplification and overreading of our precedent. The diversity of approaches in this very case underscores the point that the law here is far from settled. Indeed, the plurality itself disclaims the idea that its rule would apply to unsettle "traditional or ordinary economic regulation of commercial activity," indicating that the plurality presumably thinks there are some outer bounds to its broad language. *Ante*, at 620. The question here is whether the Court's general statements about content discrimination triggering strict scrutiny, including in *Reed*, make sense as applied in *this* context. As I have explained, they do not.

That said, I am not arguing for the abolition of the concept of "content discrimination." There are times when using content discrimination to trigger scrutiny is eminently reasonable. Specifically, when content-based distinctions are used as a method for suppressing particular viewpoints or threatening the neutrality of a traditional public forum, content discrimination triggering strict scrutiny is generally appropriate. See *Reed*, 576 U. S., at 176 (BREYER, J., concurring in judgment); *id.*, at 182–183 (KAGAN, J., concurring in judgment).

Neither of those situations is present here. Outside of these circumstances, content discrimination can at times help determine the strength of a government justification or identify a potential interference with the free marketplace of ideas. See *id.*, at 176–177 (BREYER, J., concurring in judgment). But, as I have explained, this case is not about protecting the marketplace of ideas. It is not about the formation of public opinion or the transmission of the people's will to elected representatives. It is fundamentally about a method of regulating debt collection.

III

I would examine the validity of the regulation at issue here using a First Amendment standard that (unlike strict scrutiny) does not strongly presume that a regulation that affects speech is unconstitutional. However, given that the government-debt exception does directly impact a means of communication, the appropriate standard requires a closer look at the restriction than does a traditional "rational basis" test. A proper inquiry should examine the seriousness of the speech-related harm, the importance of countervailing objectives, the likelihood that the restriction will achieve those objectives, and whether there are other, less restrictive ways of doing so. Narrow tailoring in this context, however, does not necessarily require the use of the least-restrictive means of furthering those objectives. Cf. *Ward* v. *Rock Against Racism*, 491 U. S. 781, 797–799, and n. 6 (1989) (explaining that outside of strict scrutiny review, narrow tailoring does not require the use of least-restrictive-means analysis). That inquiry ultimately evaluates a restriction's speech-related harms in light of its justifications. We have typically called this approach "intermediate scrutiny," though we have sometimes referred to it as an assessment of "fit," sometimes called it "proportionality," and sometimes just applied it without using a label. See *United States* v. *Alvarez*, 567 U. S. 709, 730–731 (2012) (BREYER, J., concurring in judgment); *Reed*, 576 U. S., at 179 (same).

Applying this Court's intermediate scrutiny analysis, I would begin by asking just what the First Amendment harm is here. As JUSTICE KAVANAUGH notes, the government-debt exception provides no basis for undermining the general cell phone robocall restriction. *Ante*, at 622–623. Indeed, looking at the government-debt exception in context, we can see that the practical effect of the exception, taken together with the rest of the statute, is to put *non-*

government debt collectors at a disadvantage. Their speech operates in the same sphere as government-debt collection speech, communicates comparable messages, and yet does not have the benefit of a particular instrument of communication (robocalls). While this is a speech-related harm, debt-collection speech is both commercial and highly regulated. See Brief for Petitioners 20–21 (describing multiple restrictions imposed by the Fair Debt Collection Practices Act on communications by debt collectors in the course of debt collection). The speech-related harm at issue here—and any related effect on the marketplace of ideas—is modest.

What, then, is the justification for this harm? The purpose of the exception is to further the protection of the public fisc. See *supra*, at 638. That protection is an important governmental interest. Private debt typically involves private funds; public debt typically involves funds that, in principle, belong to all of us, and help to implement numerous governmental policies that the people support.

Finally, is the exception narrowly tailored? Its limited scope shows that it is. Congress has minimized any speech-related harm by tying the exception directly to the Government's interest in preserving the public fisc. The statutory text makes clear that calls will only fall within the bounds of that exception if they are "made *solely* to collect" Government debt. 47 U. S. C. §227(b)(1)(A)(iii) (emphasis added). Thus, the exception cannot be used to permit communications unrelated or less directly related to that public fiscal interest.

The upshot is that the government-debt exception, taken in context, inflicts some speech-related harm. But the harm, as I have explained, is related not to public efforts to develop ideas or transmit them to the Government, but to the Government's response to those efforts, which here takes the form of highly regulated commercial communications. Moreover, there is an important justification for that harm,

and the exception is narrowly tailored to further that goal. Given those facts, the government-debt exception should survive intermediate First Amendment scrutiny.

IV

For the reasons described above, I would find that the government-debt exception does not violate the First Amendment. A majority of the Court, however, has concluded the contrary. It must thus decide whether that provision is severable from the rest of the statute. As to that question, I agree with JUSTICE KAVANAUGH's conclusion that the provision is severable. Accordingly, I respectfully concur in the judgment with respect to severability and dissent in part.

JUSTICE GORSUCH, with whom JUSTICE THOMAS joins as to Part II, concurring in the judgment in part and dissenting in part.

I agree with JUSTICE KAVANAUGH that the provision of the Telephone Consumer Protection Act before us violates the First Amendment. Respectfully, however, I disagree about why that is so and what remedial consequences should follow.

I

The TCPA is full of regulations on robocalls. The statute limits robocalls to residential landlines, hospitals, emergency numbers, and business lines. The only provision before us today, however, concerns robocalls to cell phones, mobile devices, or "any service for which the called party is charged for the call." 47 U. S. C. § 227(b)(1)(A)(iii). Before the law's enactment, many cell phone users had to pay for each call, so they suffered not only the pleasure of robocalls, but also the privilege of paying for them. In 1991, Congress sought to address the problem by banning nearly all unsolicited robocalls to cell phones.

But much has changed since then. Now, cell phone users often pay a flat monthly fee for unlimited minutes, reducing the cost (if not the annoyance) of hearing from robocallers. New weapons in the fight against robocallers have emerged, too—including tools that allow consumers to more easily screen and block unwanted calls. Perhaps in recognition of these changes, Congress relaxed the ban on cell phone robocallers in 2015. Today, unsolicited calls are permitted if they are "made solely to collect a debt owed to or guaranteed by the United States." *Ibid.*

That leaves robocallers no shortage of material. The government backs millions upon millions of loans—student loans, home mortgages, veterans' loans, farm loans, business loans. When it comes to student loans alone, the government guarantees more than $150 billion in private loans involving over 7 million individuals. And, to be clear, it's not just the government that's allowed to call about these loans. Private lenders and debt collectors are free to send in the robots too, so long as the debt at issue is ultimately guaranteed by the government.

Today's plaintiffs wish to use robocalls for something different: to campaign and solicit donations for political causes. The plaintiffs allege that the law's continuing ban on calls like theirs violates the First Amendment, and on the main points of their argument the parties agree. First, no one doubts the TCPA regulates speech. Second, everyone accepts that restrictions on speech—no matter how evenhanded—must be justified by at least a "'significant governmental interest.'" *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989). And, third, the parties agree that laws that go further by regulating speech on the basis of content invite still greater scrutiny. When the government seeks to censor speech based on its content, favoring certain voices and punishing others, its restrictions must satisfy "strict scrutiny"—meaning they must be justified by interests that are "compelling," not just significant. After all, a

constitutional right would hardly be needed to protect popular speakers; the First Amendment does its real work in giving voice to those a majority would silence. See *McCullen* v. *Coakley*, 573 U. S. 464, 477–478 (2014); but see *ante*, at 642 (BREYER, J., concurring in judgment with respect to severability and dissenting in part) (seeking to overturn precedent and allow the government sometimes to impose content-based restrictions to "respon[d] to the public will").

In my view, the TCPA's rule against cellphone robocalls is a content-based restriction that fails strict scrutiny. The statute is content-based because it allows speech on a subject the government favors (collecting its debts) while banning speech on other disfavored subjects (including political matters). Cf. *ante*, at 646–648 (opinion of BREYER, J.) (mistakenly characterizing the content discrimination as "not about" political activities). The statute fails strict scrutiny because the government offers no compelling justification for its prohibition against the plaintiffs' political speech. In fact, the government does not dispute that, if strict scrutiny applies, its law must fall.

It's easy enough to see why the government makes no effort to satisfy strict scrutiny. Now that most cell phone plans do not charge by the call, the only justification the government cites for its robocall ban is its interest in protecting consumer privacy. No one questions that protecting consumer privacy qualifies as a legitimate and "genuine" interest for the government to pursue. *Ante*, at 614–615, 622. But before the government may censor the plaintiffs' speech based on its content, it must point to a *compelling* interest. And if the government thinks consumer privacy interests are insufficient to overcome its interest in collecting debts, it's hard to see how the government might invoke consumer privacy interests to justify banning private political speech. Especially when consumers seem to find debt collection efforts particularly intrusive: Year after year, the Federal Trade

Commission receives more complaints about the debt collection industry than any other. The nature and breadth of the law's exception calls into question the necessity of its rule.

Much precedent supports this course. As this Court has long explained, a law's failure to address a wide swath of conduct implicating its supposed concern "diminish[es] the credibility of the government's [stated] rationale for [its] restrict[ion]." *City of Ladue* v. *Gilleo*, 512 U. S. 43, 52 (1994). Or, as the Court has elsewhere put it, the compellingness of the government's putative interest is undermined when its law "leaves appreciable damage to [the] supposedly vital interest unprohibited." *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 547 (1993) (internal quotation marks omitted); see also *Gonzales* v. *O Centro Espírita Beneficente União do Vegetal*, 546 U. S. 418, 433 (2006). The insight is simple: A law's failure to cover "significant tracts of conduct implicating [its] putatively compelling interes[t] can raise . . . the inference that the . . . claimed interest isn't . . . so compelling after all." *Yellowbear* v. *Lampert*, 741 F. 3d 48, 60 (CA10 2014).

That's not to say the inference is irrebuttable. The government might, for example, show that the apparent inconsistency in its law is justified by some qualitative or quantitative difference between the speech it favors and the speech it disfavors. See *id.*, at 61. So if debt collection robocalls were less invasive of consumer privacy than other kinds of robocalls, or if they were inherently rare, an exception permitting debt collection calls might not undermine the government's claimed interest in banning other calls. But the government, a party with every incentive and ample resources, has not even tried to suggest conditions like those are present here, and understandably so: The government-debt exception allows a seemingly *infinite* number of robocalls of the type consumers appear to find *most* invasive.

II

With a First Amendment violation proven, the question turns to remedy. Because the challenged robocall ban unconstitutionally infringes on their speech, I would hold that the plaintiffs are entitled to an injunction preventing its enforcement against them. This is the traditional remedy for proven violations of legal rights likely to work irreparable injury in the future. Preventing the law's enforcement against the plaintiffs would fully address their injury. And going this far, but no further, would avoid "short circuit[ing] the democratic process" by interfering with the work of Congress any more than necessary. *Washington State Grange* v. *Washington State Republican Party*, 552 U. S. 442, 451 (2008).

JUSTICE KAVANAUGH's opinion pursues a different course. Invoking "severability doctrine," it declares the government-debt exception void and severs it from the statute. As revised by today's decision, the law prohibits nearly all robocalls to cell phones, just as it did back in 1991. In support of this remedy, we are asked to consider cases involving equal protection violations, where courts have sometimes solved the problem of unequal treatment by leveling others "down" to the plaintiff's status rather than by leveling the plaintiff "up" to the status others enjoy.

I am doubtful of our authority to rewrite the law in this way. Many have questioned the propriety of modern severability doctrine,* and today's case illustrates some of the reasons why. To start, it's hard to see how today's use of severability doctrine qualifies as a remedy at all: The plaintiffs have not challenged the government-debt exception, they

*See, *e. g.*, *Seila Law LLC* v. *Consumer Financial Protection Bureau*, 591 U. S. 197, 251–261 (2020) (THOMAS, J., concurring in part and dissenting in part); Harrison, Severability, Remedies, and Constitutional Adjudication, 83 Geo. Wash. L. Rev. 56 (2014); see also Movsesian, Severability in Statutes and Contracts, 30 Ga. L. Rev. 41, 41–42 (1995) (collecting academic criticism of severability doctrine).

have not sought to have it severed and stricken, and far from placing "unequal treatment" at the "heart of their suit," they have never complained of unequal treatment as such. *Ante*, at 634. The plaintiffs point to the government-debt exception only to show that the government lacks a compelling interest in restricting their speech. It isn't even clear the plaintiffs would have standing to challenge the government-debt exception. They came to court asserting a right to speak, not a right to be free from other speakers. Severing and voiding the government-debt exception does nothing to address the injury they claim; after today's ruling, federal law bars the plaintiffs from using robocalls to promote political causes just as stoutly as it did before. What is the point of fighting this long battle, through many years and all the way to the Supreme Court, if the prize for winning is no relief at all?

A severance remedy not only fails to help the plaintiffs, it harms strangers to this suit. Just five years ago, Congress expressly authorized robocalls to cell phones to collect government-backed debts. Yet, today, the Court reverses that decision and outlaws the entire industry. It is highly unusual for judges to render unlawful conduct that Congress has explicitly made lawful—let alone to take such an extraordinary step without warning to those who have ordered their lives and livelihoods in reliance on the law, and without affording those individuals any opportunity to be heard. This assertion of power strikes me as raising serious separation of powers questions, and it marks no small departure from our usual reliance on the adversarial process.

Nor does the analogy to equal protection doctrine solve the problem. That doctrine promises equality of treatment, whatever that treatment may be. The First Amendment isn't so neutral. It pushes, always, in one direction: against governmental restrictions on speech. Yet, somehow, in the name of vindicating the First Amendment, our remedial course today leads to the unlikely result that not a single

person will be allowed to speak more freely and, instead, more speech will be banned.

In an effort to mitigate at least some of these problems, JUSTICE KAVANAUGH suggests that the ban on government-debt collection calls announced today might be applied only prospectively. See *ante*, at 634, n. 13. But prospective decisionmaking has never been easy to square with the judicial power. See, *e. g.*, *James B. Beam Distilling Co.* v. *Georgia*, 501 U. S. 529, 548–549 (1991) (Scalia, J., concurring in judgment) (judicial power is limited to "discerning what the law *is*, rather than decreeing . . . what it will *tomorrow* be"). And a holding that shields *only* government-debt collection callers from past liability under an admittedly unconstitutional law would wind up endorsing the very same kind of content discrimination we say we are seeking to eliminate.

Unable to solve the problems associated with its preferred severance remedy, today's decision seeks at least to identify "harm[s]" associated with mine. Cf. *ante*, at 635 (opinion of KAVANAUGH, J.). In particular, we are reminded that granting an injunction in this case would allow the plaintiffs' (unpopular) speech, and that could induce others to seek injunctions of their own, resulting in still more (unpopular) speech. But this "harm" is hardly comparable to the problems associated with using severability doctrine: Having to tolerate unwanted speech imposes no cognizable constitutional injury on anyone; it is life under the First Amendment, which is almost always invoked to protect speech some would rather not hear.

* * *

In the end, I agree that 47 U. S. C. §227(b)(1)(A)(iii) violates the First Amendment, though not for the reasons JUSTICE KAVANAUGH offers. Nor am I able to support the remedy the Court endorses today. Respectfully, if this is what modern "severability doctrine" has become, it seems to me all the more reason to reconsider our course.

Syllabus

COLORADO DEPARTMENT OF STATE *v.* BACA ET AL.

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

No. 19–518. Argued May 13, 2020—Decided July 6, 2020

Held: The judgment of the Court of Appeals, which held that Colorado's faithless elector law violates the Constitution, is reversed for the reasons stated in *Chiafalo* v. *Washington*, 591 U. S. 578 (2020).

935 F. 3d 887, reversed.

Philip J. Weiser, Attorney General of Colorado, argued the cause for petitioner. With him on the brief were *Eric R. Olson*, Solicitor General, *Grant T. Sullivan* and *Michael D. McMaster*, Assistant Solicitors General, *LeeAnn Morrill*, First Assistant Attorney General, and *Michael Kotlarczyk*, Assistant Attorney General.

Jason Harrow argued the cause for respondents. With him on the briefs were *L. Lawrence Lessig*, *Sumeer Singla*, *Daniel A. Brown*, *Hunter M. Abell*, *Jonah O. Harrison*, *J. Max Rosen*, and *Jason B. Wesoky*.*

*Briefs of *amici curiae* urging reversal were filed for the State of South Dakota et al. by *Jason R. Ravnsborg*, Attorney General of South Dakota, and *Paul S. Swedlund*, Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Steve Marshall* of Alabama, *Kevin G. Clarkson* of Alaska, *Mark Brnovich* of Arizona, *Xavier Becerra* of California, *William Tong* of Connecticut, *Kathy Jennings* of Delaware, *Karl A. Racine* of the District of Columbia, *Ashley Moody* of Florida, *Christopher M. Carr* of Georgia, *Clare E. Connors* of Hawaii, *Lawrence Wasden* of Idaho, *Kwame Raoul* of Illinois, *Curtis T. Hill, Jr.*, of Indiana, *Tom Miller* of Iowa, *Daniel Cameron* of Kentucky, *Jeff Landry* of Louisiana, *Aaron M. Frey* of Maine, *Brian E. Frosh* of Maryland, *Maura Healey* of Massachusetts, *Dana Nessel* of Michigan, *Keith Ellison* of Minnesota, *Lynn Fitch* of Mississippi, *Eric S. Schmitt* of Missouri, *Timothy C. Fox* of Montana, *Doug J. Peterson* of Nebraska, *Aaron D. Ford* of Nevada, *Gordon MacDonald* of New Hampshire, *Gurbir S. Grewal* of New Jersey, *Hector Balderas* of New Mexico, *Letitia James* of New York, *Josh Stein* of North Carolina, *Wayne Stenehjem* of North Dakota, *Dave Yost* of

PER CURIAM.

The judgment of the United States Court of Appeals for the Tenth Circuit is reversed for the reasons stated in *Chiafalo* v. *Washington*, 591 U. S. 578 (2020).

It is so ordered.

JUSTICE SOTOMAYOR took no part in the decision of this case.

JUSTICE THOMAS concurs in the judgment for the reasons stated in his separate opinion in *Chiafalo* v. *Washington*, 591 U. S. 578, 597–609 (2020).

Ohio, *Mike Hunter* of Oklahoma, *Ellen Rosenblum* of Oregon, *Josh D. Shapiro* of Pennsylvania, *Peter F. Neronha* of Rhode Island, *Alan Wilson* of South Carolina, *Herbert H. Slatery III* of Tennessee, *Sean D. Reyes* of Utah, *Thomas J. Donovan* of Vermont, *Mark R. Herring* of Virginia, *Patrick Morrisey* of West Virginia, *Josh L. Kaul* of Wisconsin, and *Bridget Hill* of Wyoming; for the Campaign Legal Center et al. by *Tobias S. Loss-Eaton*, *Paul M. Smith*, *Adav Noti*, and *David Kolker*; for the Eagle Forum Education & Legal Defense Fund by *Andrew L. Schlafly*; for the National Conference of Commissioners on Uniform State Laws by *James Bopp, Jr.*, *Richard E. Coleson*, *Peter F. Langrock*, *Daniel Robbins*, *Susan Kelly Nichols*, and *Timothy J. Berg*; for the Republican National Committee by *Michael E. Toner*, *Lee E. Goodman*, and *Stephen J. Obermeier*; for Robert W. Bennett by *J. Samuel Tenenbaum*, *Jeffrey T. Green*, and *Sarah O'Rourke Schrup*; for Mary Beth Corsentino et al. by *James G. Sawtelle* and *Christopher M. Jackson*; for Robert M. Hardaway by *Jennifer Gilbert*; and for Michael T. Morley by *Mr. Morley*, *pro se*.

Briefs of *amici curiae* urging affirmance were filed for the Independence Institute by *David B. Kopel* and *Joseph G. S. Greenlee*; for Jerry H. Goldfeder by *Mr. Goldfeder*, *pro se*; and for Michael L. Rosin et al. by *Peter K. Stris*, *Michael N. Donofrio*, and *Bridget C. Asay*.

Briefs of *amici curiae* were filed for Citizens for Self-Governance by *Rita M. Dunaway*; for the Colorado Democratic Party by *Paul R. Franke III*; for the Colorado Republican Committee by *Julian R. Ellis, Jr.*; for the Making Every Vote Count Foundation by *Jerrold J. Ganzfried*, *Reed E. Hundt*, and *Thea A. Cohen;* for Edward B. Foley by *Jessica Ring Amunson* and *Zachary C. Schauf*; for Vinz Koller by *Andrew J. Dhuey*; and for Derek T. Muller by *Ian Speir*.

Syllabus

LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME *v.* PENNSYLVANIA ET AL.

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

No. 19–431. Argued May 6, 2020—Decided July 8, 2020*

The Patient Protection and Affordable Care Act of 2010 (ACA) requires covered employers to provide women with "preventive care and screenings" without "any cost sharing requirements," and relies on Preventive Care Guidelines (Guidelines) "supported by the Health Resources and Services Administration" (HRSA) to determine what "preventive care and screenings" includes. 42 U. S. C. §300gg–13(a)(4). Those Guidelines mandate that health plans provide coverage for all Food and Drug Administration approved contraceptive methods. When the Departments of Health and Human Services, Labor, and the Treasury (Departments) incorporated the Guidelines, they also gave HRSA the discretion to exempt religious employers, such as churches, from providing contraceptive coverage. Later, the Departments also promulgated a rule accommodating qualifying religious organizations that allowed them to opt out of coverage by self-certifying that they met certain criteria to their health insurance issuer, which would then exclude contraceptive coverage from the employer's plan and provide participants with separate payments for contraceptive services without imposing any cost-sharing requirements.

Religious entities challenged the rules under the Religious Freedom Restoration Act of 1993 (RFRA). In *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U. S. 682, this Court held that the contraceptive mandate substantially burdened the free exercise of closely held corporations with sincerely held religious objections to providing their employees with certain methods of contraception. And in *Zubik* v. *Burwell*, 578 U. S. 403, the Court opted to remand without deciding the RFRA question in cases challenging the self-certification accommodation so that the parties could develop an approach that would accommodate employers' concerns while providing women full and equal coverage.

Under *Zubik*'s direction and in light of *Hobby Lobby*'s holding, the Departments promulgated two interim final rules (IFRs). The first significantly expanded the church exemption to include an employer that

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*Together with 19–454, *Trump, President of the United States, et al.* v. *Pennsylvania et al.*, on certiorari to the same Court.

"objects . . . , based on its sincerely held religious beliefs," "to its establishing, maintaining, providing, offering, or arranging [for] coverage or payments for some or all contraceptive services." 82 Fed. Reg. 47812. The second created a similar "moral exemption" for employers with sincerely held moral objections to providing some or all forms of contraceptive coverage. The Departments requested post-promulgation comments on both IFRs.

Pennsylvania sued, alleging that the IFRs were procedurally and substantively invalid under the Administrative Procedure Act (APA). After the Departments issued final rules, responding to post-promulgation comments but leaving the IFRs largely intact, New Jersey joined Pennsylvania's suit. Together they filed an amended complaint, alleging that the rules were substantively unlawful because the Departments lacked statutory authority under either the ACA or RFRA to promulgate the exemptions. They also argued that the rules were procedurally defective because the Departments failed to comply with the APA's notice and comment procedures. The District Court issued a preliminary nationwide injunction against the implementation of the final rules, and the Third Circuit affirmed.

Held:

1. The Departments had the authority under the ACA to promulgate the religious and moral exemptions. Pp. 675–683.

(a) As legal authority for both exemptions, the Departments invoke § 300gg–13(a)(4), which states that group health plans must provide women with "preventive care and screenings . . . as provided for in comprehensive guidelines supported by [HRSA]." The pivotal phrase, "as provided for," grants sweeping authority to HRSA to define the preventive care that applicable health plans must cover. That same grant of authority empowers it to identify and create exemptions from its own Guidelines. The "fundamental principle of statutory interpretation that 'absent provision[s] cannot be supplied by the courts,'" *Rotkiske* v. *Klemm*, 589 U. S. 8, 14, applies not only to adding terms not found in the statute, but also to imposing limits on an agency's discretion that are not supported by the text, see *Watt* v. *Energy Action Ed. Foundation*, 454 U. S. 151, 168. Concerns that the exemptions thwart Congress' intent by making it significantly harder for interested women to obtain seamless access to contraception without cost sharing cannot justify supplanting the text's plain meaning. Even if such concerns are legitimate, they are more properly directed at the regulatory mechanism that Congress put in place. Pp. 675–680.

(b) Because the ACA provided a basis for both exemptions, the Court need not decide whether RFRA independently compelled the De-

partments' solution. However, the argument that the Departments could not consider RFRA at all is without merit. It is clear from the face of the statute that the contraceptive mandate is capable of violating RFRA. The ACA does not explicitly exempt RFRA, and the regulations implementing the contraceptive mandate qualify as "Federal law" or "the implementation of [Federal] law" under RFRA. § 2000bb–3(a). Additionally, this Court stated in *Hobby Lobby* that the mandate violated RFRA as applied to entities with complicity-based objections. And both *Hobby Lobby* and *Zubik* instructed the Departments to consider RFRA going forward. Moreover, in light of the basic requirements of the rulemaking process, the Departments' failure to discuss RFRA at all when formulating their solution would make them susceptible to claims that the rules were arbitrary and capricious for failing to consider an important aspect of the problem. Pp. 680–683.

2. The rules promulgating the exemptions are free from procedural defects. Pp. 683–687.

(a) Respondents claim that because the final rules were preceded by a document entitled "Interim Final Rules with Request for Comments" instead of "General Notice of Proposed Rulemaking," they are procedurally invalid under the APA. The IFRs' request for comments readily satisfied the APA notice requirements. And even assuming that the APA requires an agency to publish a document entitled "notice of proposed rulemaking," there was no "prejudicial error" here, 5 U. S. C. § 706. Pp. 683–684.

(b) Pointing to the fact that the final rules made only minor alterations to the IFRs, respondents also contend that the final rules are procedurally invalid because nothing in the record suggests that the Departments maintained an open mind during the post-promulgation process. The "open-mindedness" test has no basis in the APA. Each of the APA's procedural requirements was satisfied: The IFRs provided sufficient notice, § 553(b); the Departments "g[a]ve interested persons an opportunity to participate in the rule making through submission of written data, views or arguments," § 553(c); the final rules contained "a concise general statement of their basis and purpose," *ibid.*; and they were published more than 30 days before they became effective, § 553(d). Pp. 684–687.

930 F. 3d 543, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and ALITO, GORSUCH, and KAVANAUGH, JJ., joined. ALITO, J., filed a concurring opinion, in which GORSUCH, J., joined, *post*, p. 687. KAGAN, J., filed an opinion concurring in the judgment, in which BREYER, J., joined,

post, p. 704. GINSBURG, J., filed a dissenting opinion, in which SOTOMAYOR, J., joined, *post*, p. 710.

Solicitor General Francisco argued the cause for petitioners in No. 19–454. With him on the briefs were *Assistant Attorney General Hunt*, *Deputy Solicitor General Wall*, *Deputy Assistant Attorney General Mooppan*, *Christopher G. Michel*, *Benjamin W. Snyder*, *Sharon Swingle*, *Lowell V. Sturgill, Jr.*, and *Karen Schoen*. *Paul D. Clement* argued the cause for petitioner in No. 19–431. With him on the briefs were *Erin E. Murphy*, *Andrew C. Lawrence*, *Mark L. Rienzi*, *Eric C. Rassbach*, *Lori H. Windham*, and *Diana M. Verm*.

Michael J. Fischer, Chief Deputy Attorney General of Pennsylvania, argued the cause for respondents in both cases. With him on the brief were *Josh Shapiro*, Attorney General of Pennsylvania, and *Aimee D. Thomson* and *Jacob B. Boyer*, Deputy Attorneys General, *Gurbir S. Grewal*, Attorney General of New Jersey, *Glenn J. Moramarco*, Assistant Attorney General, and *Elspeth Hans* and *Eric L. Apar*, Deputy Attorneys General.†

†Briefs of *amici curiae* urging reversal in both cases 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, *Jason R. LaFond*, Assistant Solicitor General, and *Bethany C. Spare*, Assistant Attorney 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, *Ashley Moody* of Florida, *Christopher M. Carr* of Georgia, *Derek Schmidt* of Kansas, *Daniel Cameron* of Kentucky, *Jeff Landry* of Louisiana, *Lynn Fitch* of Mississippi, *Eric Schmitt* of Missouri, *Timothy C. Fox* of Montana, *Douglas J. Peterson* of Nebraska, *Mike Hunter* of Oklahoma, *Alan Wilson* of South Carolina, *Jason Ravnsborg* of South Dakota, *Herbert Slatery III* of Tennessee, *Sean Reyes* of Utah, and *Patrick Morrisey* of West Virginia; for the American Center for Law and Justice by *Jay Alan Sekulow*, *Stuart J. Roth*, *Jordan Sekulow*, *Walter M. Weber*, *Francis J. Manion*, *Geoffrey R. Surtees*, *Edward L. White III*, and *Erik M. Zimmerman*; for the Catholic Association Foundation et al. by *Andrea Picciotti-Bayer*; for the Catholic Benefit Association by *L. Martin Nussbaum* and

JUSTICE THOMAS delivered the opinion of the Court.

In these consolidated cases, we decide whether the Government created lawful exemptions from a regulatory re-

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Ian Speir; for the Cato Institute et al. by *Ilya Shapiro*, *Josh Blackman*, and *Howard Slugh*; for the Center for Constitutional Jurisprudence by *John C. Eastman* and *Anthony T. Caso*; for Christian Business Owners Supporting Religious Freedom by *Erin Elizabeth Mersino*, *William Wagner*, and *Katherine Henry*; for the Christian Legal Society et al. by *Matthew T. Martens* and *Daniel P. Kearney, Jr.*; for Constitutional Law Scholars by *Miles E. Coleman*; for the First Liberty Institute by *Thomas R. McCarthy*, *Kelly J. Shackelford*, *Hiram S. Sasser III*, and *Michael D. Berry*; for the Foundation for Moral Law by *Matthew J. Clark*; for the Independent Women's Law Center by *David H. Thompson* and *Nicole Frazer Reaves*; for Inner Life Fund et al. by *James L. Hirsen*, *Deborah J. Dewart*, and *Tami Fitzgerald*; for the International Society for Krishna Consciousness, Inc., et al. by *Gene C. Schaerr* and *Erik S. Jaffe*; for the Knights of Columbus by *Eric N. Kniffin*; for the March for Life et al. by *Kristen K. Waggoner*, *John J. Bursch*, *David A. Cortman*, *Rory T. Gray*, and *Kevin H. Theriot*; for the New Civil Liberties Alliance by *Richard A. Samp* and *John J. Vecchione*; for Residents and Families of Residents at Homes of the Little Sisters of the Poor by *Dwight G. Duncan* and *Colbe Mazzarella*; for the United States Conference of Catholic Bishops et al. by *Alexander Dushku* and *R. Shawn Gunnarson*; for Women Scholars by *Helen M. Alvaré*, *pro se*; for Nicholas Bagley et al. by *Donald Burke*; for Douglas Laycock by *Scott A. Keller*; for Michael Stokes Paulsen et al. by *John D. Adams*, *Brian D. Schmalzbach*, and *John P. O'Herron*; and for 161 Members of Congress by *Blaine H. Evanson*.

Briefs of *amici curiae* urging affirmance in both cases were filed for the Commonwealth of Massachusetts et al. by *Maura Healey*, Attorney General of Massachusetts, *Elizabeth N. Dewar*, State Solicitor, and *Julia E. Kobick* and *Jon Burke*, Assistant Attorneys General, *Xavier Becerra*, Attorney General of California, *Michael J. Mongan*, Solicitor General, *Aimee Feinberg*, Deputy Solicitor General, *Kathleen Boergers*, Supervising Deputy Attorney General, *Karli Eisenberg*, Deputy Attorney General, and *Kristin A. Liska*, Associate Deputy Solicitor General, and by the Attorneys General for their respective jurisdictions as follows: *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, *Kwame Raoul* of Illinois, *Aaron M. Frey* of Maine, *Brian E. Frosh* of Maryland, *Dana Nessel* of Michigan, *Keith Ellison* of Minnesota, *Aaron D. Ford* of Nevada, *Hector Balderas* of New Mexico, *Letitia James*

quirement implementing the Patient Protection and Affordable Care Act of 2010 (ACA), 124 Stat. 119. The requirement at issue obligates certain employers to provide contraceptive coverage to their employees through their

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of New York, *Joshua H. Stein* of North Carolina, *Ellen F. Rosenblum* of Oregon, *Peter F. Neronha* of Rhode Island, *Thomas J. Donovan, Jr.,* of Vermont, *Mark R. Herring* of Virginia, and *Robert W. Ferguson* of Washington; for the City of Oakland et al. by *Jonathan B. Miller*, *Lyndsey Olson*, *Mark A. Flessner*, *Paula Boggs Muething*, *Jessica M. Scheller*, *Ronald C. Lewis*, *Michael P. May*, *Leslie J. Girard*, *Dennis J. Herrera*, *James R. Williams*, *Peter S. Holmes*, *John Marshall Jones*, and *Michael Jenkins*; for Administrative Law Scholars by *Elliott Schulder* and *Anna Kraus*; for the American Academy of Pediatrics by *Devi M. Rao*; for the American Association of University Women et al. by *James R. Sigel* and *Jamie A. Levitt*; for the American Civil Liberties Union et al. by *Brigitte Amiri*, *Louise Melling*, *David D. Cole*, *Daniel Mach*, *Witold J. Walczak*, and *Jeanne LoCicero*; for the American College of Obstetricians and Gynecologists et al. by *Bruce H. Schneider*; for Catholics for Choice et al. by *B. Jesse Hill*; for the Center for Health Law and Policy Innovation of Harvard Law School et al. by *Kevin Costello*; for the Center for Inquiry, Inc., et al. by *Edward Tabash*, *Monica L. Miller*, and *Geoffrey T. Blackwell*; for Child USA et al. by *Leslie C. Griffin* and *Marci A. Hamilton*; for Church-State Scholars by *Joshua Matz*; for the Guttmacher Institute by *M. Duncan Grant*; for Howard University School of Law, Civil and Human Rights Clinic by *Ajmel Quereshi*; for the Lambda Legal Defense and Education Fund, Inc., et al. by *Jennifer C. Pizer*, *Omar Gonzalez-Pagan*, *Camilla B. Taylor*, and *Jamie Gliksberg*; for Legal Scholars by *Michael B. Kimberly*, *Matthew A. Waring*, and *Sarah P. Hogarth*; for Military Historians by *Elizabeth B. Wydra*, *Brianne J. Gorod*, and *David H. Gans*; for the National League of Cities et al. by *Lisa E. Soronen*; for the National Women's Law Center et al. by *Jeffrey Blumenfeld*, *Fatima Goss Graves*, *Gretchen Borchelt*, *Sunu Chandy*, *Michelle Banker*, and *Candace Gibson*; for Planned Parenthood Federation of America et al. by *Claudia Hammerman*; for Professors of Criminal Law et al. by *Wesley R. Powell*; for Public Citizen by *Nandan M. Joshi*, *Scott L. Nelson*, and *Allison M. Zieve*; for Religious and Civil-Rights Organizations by *Richard B. Katskee*, *Steven M. Freeman*, *Elliot M. Mincberg*, *Diana Kasdan*, and *Joel Dodge*; for the U. S. Women's Chamber of Commerce et al. by *Leah R. Bruno*; for the Yale Law School Program for the Study of Reproductive Justice by *Priscilla J. Smith*; for Phyllis C. Borzi et al. by *Elizabeth*

group health plans. Though contraceptive coverage is not required by (or even mentioned in) the ACA provision at issue, the Government mandated such coverage by promulgating interim final rules (IFRs) shortly after the ACA's passage. This requirement is known as the contraceptive mandate.

After six years of protracted litigation, the Departments of Health and Human Services, Labor, and the Treasury (Departments)—which jointly administer the relevant ACA provision[1]—exempted certain employers who have religious and conscientious objections from this agency-created mandate. The Third Circuit concluded that the Departments lacked statutory authority to promulgate these exemptions and affirmed the District Court's nationwide preliminary injunction. This decision was erroneous. We hold that the Departments had the authority to provide exemptions from the regulatory contraceptive requirements for employers with religious and conscientious objections. We accordingly reverse the Third Circuit's judgment and remand with instructions to dissolve the nationwide preliminary injunction.

I

The ACA's contraceptive mandate—a product of agency regulation—has existed for approximately nine years. Litigation surrounding that requirement has lasted nearly as long. In light of this extensive history, we begin by summarizing the relevant background.

Hopkins and *Karen L. Handorf*; for Martin S. Lederman by *Mr. Lederman, pro se*; and for 186 Members of the United States Congress by *David A. O'Neil*.

Briefs of *amici curiae* were filed for Professors of Civil Procedure by *Jon Loevy* and *Steven Art*; for the Public Interest Law Center et al. by *William Alden McDaniel, Jr.*, and *Thomas W. Hazlett*; and for Mila Sohoni by *Christopher M. Egleson.*

[1] See 42 U. S. C. § 300gg–92; 29 U. S. C. § 1191c; 26 U. S. C. § 9833.

A

The ACA requires covered employers to offer "a group health plan or group health insurance coverage" that provides certain "minimum essential coverage." 26 U. S. C. § 5000A(f)(2); §§ 4980H(a), (c)(2). Employers who do not comply face hefty penalties, including potential fines of $100 per day for each affected employee. §§ 4980D(a)–(b); see also *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U. S. 682, 696–697 (2014). These cases concern regulations promulgated under a provision of the ACA that requires covered employers to provide women with "preventive care and screenings" without "any cost sharing requirements." 42 U. S. C. § 300gg–13(a)(4).[2]

The statute does not define "preventive care and screenings," nor does it include an exhaustive or illustrative list of such services. Thus, the statute itself does not explicitly require coverage for any specific form of "preventive care." *Hobby Lobby*, 573 U. S., at 697. Instead, Congress stated that coverage must include "such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration" (HRSA), an agency of the Department of Health and Human Services (HHS). § 300gg–13(a)(4). At the time of the ACA's enactment, these guidelines were not yet written. As a result, no specific forms of preventive care or screenings were (or could be) referred to or incorporated by reference.

Soon after the ACA's passage, the Departments began promulgating rules related to § 300gg–13(a)(4). But in doing so, the Departments did not proceed through the notice and

[2] The ACA exempts "grandfathered" plans from 42 U. S. C. § 300gg–13(a)(4)—*i. e.*, "those [plans] that existed prior to March 23, 2010, and that have not made specified changes after that date." *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U. S. 682, 699 (2014). See §§ 18011(a), (e); 29 CFR § 2590.715–1251 (2019). As of 2018, an estimated 16 percent of employees "with employer-sponsored coverage were enrolled in a grandfathered group health plan." 84 Fed. Reg. 5971 (2019).

comment rulemaking process, which the Administrative Procedure Act (APA) often requires before an agency's regulation can "have the force and effect of law." *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 96 (2015) (internal quotation marks omitted); see also 5 U. S. C. § 553. Instead, the Departments invoked the APA's good cause exception, which permits an agency to dispense with notice and comment and promulgate an IFR that carries immediate legal force. § 553(b)(3)(B).

The first relevant IFR, promulgated in July 2010, primarily focused on implementing other aspects of § 300gg–13. 75 Fed. Reg. 41728. The IFR indicated that HRSA planned to develop its Preventive Care Guidelines (Guidelines) by August 2011. *Ibid.* However, it did not mention religious exemptions or accommodations of any kind.

As anticipated, HRSA released its first set of Guidelines in August 2011. The Guidelines were based on recommendations compiled by the Institute of Medicine (now called the National Academy of Medicine), "a nonprofit group of volunteer advisers." *Hobby Lobby*, 573 U. S., at 697. The Guidelines included the contraceptive mandate, which required health plans to provide coverage for all contraceptive methods and sterilization procedures approved by the Food and Drug Administration as well as related education and counseling. 77 Fed. Reg. 8725 (2012).

The same day the Guidelines were issued, the Departments amended the 2010 IFR. 76 Fed. Reg. 46621 (2011). When the 2010 IFR was originally published, the Departments began receiving comments from numerous religious employers expressing concern that the Guidelines would "impinge upon their religious freedom" if they included contraception. *Id.*, at 46623. As just stated, the Guidelines ultimately did contain contraceptive coverage, thus making the potential impact on religious freedom a reality. In the amended IFR, the Departments determined that "it [was] appropriate that HRSA . . . tak[e] into account the [mandate's] effect on . . . certain religious employers" and concluded

that HRSA had the discretion to do so through the creation of an exemption. *Ibid.* The Departments then determined that the exemption should cover religious employers, and they set out a four-part test to identify which employers qualified. The last criterion required the entity to be a church, an integrated auxiliary, a convention or association of churches, or "the exclusively religious activities of any religious order." *Ibid.* HRSA created an exemption for these employers the same day. 78 Fed. Reg. 39871 (2013). Because of the narrow focus on churches, this first exemption is known as the church exemption.

The Guidelines were scheduled to go into effect for plan years beginning on August 1, 2012. 77 Fed. Reg. 8725–8726. But in February 2012, before the Guidelines took effect, the Departments promulgated a final rule that temporarily prevented the Guidelines from applying to certain religious nonprofits. Specifically, the Departments stated their intent to promulgate additional rules to "accommodat[e] nonexempted, non-profit organizations' religious objections to covering contraceptive services." *Id.*, at 8727. Until that rulemaking occurred, the 2012 rule also provided a temporary safe harbor to protect such employers. *Ibid.* The safe harbor covered nonprofits "whose plans have consistently not covered all or the same subset of contraceptive services for religious reasons."[3] Thus, the nonprofits who availed themselves of this safe harbor were not subject to the contraceptive mandate when it first became effective.

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[3] Dept. of Health and Human Servs., Center for Consumer Information and Insurance Oversight, Centers for Medicare & Medicaid Services, Guidance on the Temporary Enforcement Safe Harbor for Certain Employers, Group Health Plans and Group Health Insurance Issuers With Respect to the Requirement To Cover Contraceptive Services Without Cost Sharing Under Section 2713 of the Public Health Service Act, Section 715(a)(1) of the Employee Retirement Income Security Act, and Section 9815(a)(1) of the Internal Revenue Code, p. 2 (2013).

The Departments promulgated another final rule in 2013 that is relevant to these cases in two ways. First, after reiterating that § 300gg–13(a)(4) authorizes HRSA "to issue guidelines in a manner that exempts group health plans established or maintained by religious employers," the Departments "simplif[ied]" and "clarif[ied]" the definition of a religious employer. 78 Fed. Reg. 39873.[4] Second, pursuant to that same authority, the Departments provided the anticipated accommodation for eligible religious organizations, which the regulation defined as organizations that "(1) [o]ppos[e] providing coverage for some or all of the contraceptive services . . . on account of religious objections; (2) [are] organized and operat[e] as . . . nonprofit entit[ies]; (3) hol[d] [themselves] out as . . . religious organization[s]; and (4) self-certif[y] that [they] satisf[y] the first three criteria." *Id.*, at 39874. The accommodation required an eligible organization to provide a copy of the self-certification form to its health insurance issuer, which in turn would exclude contraceptive coverage from the group health plan and provide payments to beneficiaries for contraceptive services separate from the health plan. *Id.*, at 39878. The Departments stated that the accommodation aimed to "protec[t]" religious organizations "from having to contract, arrange, pay, or refer for [contraceptive] coverage" in a way that was consistent with and did not violate the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U. S. C. § 2000bb *et seq.* 78 Fed. Reg. 39871, 39886–39887. This accommodation is referred to as the self-certification accommodation.

[4] The Departments took this action to prevent an unduly narrow interpretation of the church exemption, in which "an otherwise exempt plan [was] disqualified because the employer's purposes extend[ed] beyond the inculcation of religious values or because the employer . . . serve[d] people of different religious faiths." 78 Fed. Reg. 39874. But see *post*, at 721–722 (GINSBURG, J., dissenting) (arguing that the church exemption only covered houses of worship).

B

Shortly after the Departments promulgated the 2013 final rule, two religious nonprofits run by the Little Sisters of the Poor (Little Sisters) challenged the self-certification accommodation. The Little Sisters "are an international congregation of Roman Catholic women religious" who have operated homes for the elderly poor in the United States since 1868. See Mission Statement: Little Sisters of the Poor, http://www.littlesistersofthepoor.org/mission-statement. They feel called by their faith to care for their elderly residents regardless of "faith, finances, or frailty." Brief for Residents and Families of Residents at Homes of the Little Sisters of the Poor as *Amici Curiae* 14. The Little Sisters endeavor to treat all residents "as if they were Jesus [Christ] himself, cared for as family, and treated with dignity until God calls them to his home." Complaint ¶14 in *Little Sisters of the Poor Home for the Aged, Denver, Colo.* v. *Sebelius*, No. 1:13–cv–02611 (D Colo.), p. 5 (Complaint).

Consistent with their Catholic faith, the Little Sisters hold the religious conviction "that deliberately avoiding reproduction through medical means is immoral." *Little Sisters of the Poor Home for the Aged, Denver, Colo.* v. *Burwell*, 794 F. 3d 1151, 1167 (CA10 2015). They challenged the self-certification accommodation, claiming that completing the certification form would force them to violate their religious beliefs by "tak[ing] actions that directly cause others to provide contraception or appear to participate in the Departments' delivery scheme." *Id.*, at 1168. As a result, they alleged that the self-certification accommodation violated RFRA. Under RFRA, a law that substantially burdens the exercise of religion must serve "a compelling governmental interest" and be "the least restrictive means of furthering that compelling governmental interest." §§ 2000bb–1(a)–(b). The Court of Appeals disagreed that the self-certification accommodation substantially burdened the Little Sisters' free exercise rights and thus rejected their RFRA claim. *Little Sisters*, 794 F. 3d, at 1160.

The Little Sisters were far from alone in raising RFRA challenges to the self-certification accommodation. Religious nonprofit organizations and educational institutions across the country filed a spate of similar lawsuits, most resulting in rulings that the accommodation did not violate RFRA. See, *e. g.*, *East Texas Baptist Univ.* v. *Burwell*, 793 F. 3d 449 (CA5 2015); *Geneva College* v. *Secretary, U. S. Dept. of Health and Human Servs.*, 778 F. 3d 422 (CA3 2015); *Priests for Life* v. *United States Dept. of Health and Human Servs.*, 772 F. 3d 229 (CADC 2014); *Michigan Catholic Conference* v. *Burwell*, 755 F. 3d 372 (CA6 2014); *University of Notre Dame* v. *Sebelius*, 743 F. 3d 547 (CA7 2014); but see *Sharpe Holdings, Inc.* v. *United States Dept. of Health and Human Servs.*, 801 F. 3d 927 (CA8 2015); *Dordt College* v. *Burwell*, 801 F. 3d 946 (CA8 2015). We granted certiorari in cases from four Courts of Appeals to decide the RFRA question. *Zubik* v. *Burwell*, 578 U. S. 403, 410 (2016) (*per curiam*). Ultimately, however, we opted to remand the cases without deciding that question. In supplemental briefing, the Government had "confirm[ed]" that "'contraceptive coverage could be provided to petitioners' employees, through petitioners' insurance companies, without any . . . notice from petitioners.'" *Id.*, at 407. Petitioners, for their part, had agreed that such an approach would not violate their free exercise rights. *Ibid.* Accordingly, because all parties had accepted that an alternative approach was "feasible," *ibid.*, we directed the Government to "accommodat[e] petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans receive full and equal health coverage, including contraceptive coverage," *id.*, at 408 (internal quotation marks omitted).

C

Zubik was not the only relevant ruling from this Court about the contraceptive mandate. As the Little Sisters and numerous others mounted their challenges to the self-certification accommodation, a host of other entities chal-

lenged the contraceptive mandate itself as a violation of RFRA. See, *e. g.*, *Hobby Lobby Stores*, *Inc.* v. *Sebelius*, 723 F. 3d 1114 (CA10 2013) (en banc); *Korte* v. *Sebelius*, 735 F. 3d 654 (CA7 2013); *Gilardi* v. *United States Dept. of Health and Human Servs.*, 733 F. 3d 1208 (CADC 2013); *Conestoga Wood Specialties Corp.* v. *Secretary of U. S. Dept. of Health and Human Servs.*, 724 F. 3d 377 (CA3 2013); *Autocam Corp.* v. *Sebelius*, 730 F. 3d 618 (CA6 2013). This Court granted certiorari in two cases involving three closely held corporations to decide whether the mandate violated RFRA. *Hobby Lobby*, 573 U. S. 682.

The individual respondents in *Hobby Lobby* opposed four methods of contraception covered by the mandate. They sincerely believed that human life begins at conception and that, because the challenged methods of contraception risked causing the death of a human embryo, providing those methods of contraception to employees would make the employers complicit in abortion. *Id.*, at 691, 720. We held that the mandate substantially burdened respondents' free exercise, explaining that "[if] the owners comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price." *Id.*, at 691. "If these consequences do not amount to a substantial burden," we stated, "it is hard to see what would." *Ibid.* We also held that the mandate did not utilize the least restrictive means, citing the self-certification accommodation as a less burdensome alternative. *Id.*, at 730–731.

Thus, as the Departments began the task of reformulating rules related to the contraceptive mandate, they did so not only under *Zubik*'s direction to accommodate religious exercise, but also against the backdrop of *Hobby Lobby*'s pronouncement that the mandate, standing alone, violated RFRA as applied to religious entities with complicity-based objections.

D

In 2016, the Departments attempted to strike the proper balance a third time, publishing a request for information

on ways to comply with *Zubik*. 81 Fed. Reg. 47741. This attempt proved futile, as the Departments ultimately concluded that "no feasible approach" had been identified. Dept. of Labor, FAQs About Affordable Care Act Implementation Part 36, p. 4 (2017). The Departments maintained their position that the self-certification accommodation was consistent with RFRA because it did not impose a substantial burden and, even if it did, it utilized the least restrictive means of achieving the Government's interests. *Id.*, at 4–5.

In 2017, the Departments tried yet again to comply with *Zubik*, this time by promulgating the two IFRs that served as the impetus for this litigation. The first IFR significantly broadened the definition of an exempt religious employer to encompass an employer that "objects . . . , based on its sincerely held religious beliefs," "to its establishing, maintaining, providing, offering, or arranging [for] coverage or payments for some or all contraceptive services." 82 Fed. Reg. 47812 (2017). Among other things, this definition included for-profit and publicly traded entities. Because they were exempt, these employers did not need to participate in the accommodation process, which nevertheless remained available under the IFR. *Id.*, at 47806.

As with their previous regulations, the Departments once again invoked §300gg–13(a)(4) as authority to promulgate this "religious exemption," stating that it "include[d] the ability to exempt entities from coverage requirements announced in HRSA's Guidelines." *Id.*, at 47794. Additionally, the Departments announced for the first time that RFRA compelled the creation of, or at least provided the discretion to create, the religious exemption. *Id.*, at 47800–47806. As the Departments explained: "We know from *Hobby Lobby* that, in the absence of any accommodation, the contraceptive-coverage requirement imposes a substantial burden on certain objecting employers. We know from other lawsuits and public comments that many religious entities have objections to complying with the [self-certification] accommodation based on their sincerely held religious be-

liefs." *Id.*, at 47806. The Departments "believe[d] that the Court's analysis in *Hobby Lobby* extends, for the purposes of analyzing a substantial burden, to the burdens that an entity faces when it religiously opposes participating in the [self-certification] accommodation process." *Id.*, at 47800. They thus "conclude[d] that it [was] appropriate to expand the exemption to other . . . organizations with sincerely held religious beliefs opposed to contraceptive coverage." *Id.*, at 47802; see also *id.*, at 47810–47811.

The second IFR created a similar "moral exemption" for employers—including nonprofits and for-profits with no publicly traded components—with "sincerely held moral" objections to providing some or all forms of contraceptive coverage. *Id.*, at 47850, 47861–47862. Citing congressional enactments, precedents from this Court, agency practice, and state laws that provided for conscience protections, *id.*, at 47844–47847, the Departments invoked their authority under the ACA to create this exemption, *id.*, at 47844. The Departments requested post-promulgation comments on both IFRs. *Id.*, at 47813, 47854.

E

Within a week of the 2017 IFRs' promulgation, the Commonwealth of Pennsylvania filed an action seeking declaratory and injunctive relief. Among other claims, it alleged that the IFRs were procedurally and substantively invalid under the APA. The District Court held that the Commonwealth was likely to succeed on both claims and granted a preliminary nationwide injunction against the IFRs. The Federal Government appealed.

While that appeal was pending, the Departments issued rules finalizing the 2017 IFRs. See 83 Fed. Reg. 57536 (2018); 83 Fed. Reg. 57592, codified at 45 CFR pt. 147 (2018). Though the final rules left the exemptions largely intact, they also responded to post-promulgation comments, explaining their reasons for neither narrowing nor expanding

the exemptions beyond what was provided for in the IFRs. See 83 Fed. Reg. 57542–57545, 57598–57603. The final rule creating the religious exemption also contained a lengthy analysis of the Departments' changed position regarding whether the self-certification process violated RFRA. *Id.*, at 57544–57549. And the Departments explained that, in the wake of the numerous lawsuits challenging the self-certification accommodation and the failed attempt to identify alternative accommodations after the 2016 request for information, "an expanded exemption rather than the existing accommodation is the most appropriate administrative response to the substantial burden identified by the Supreme Court in *Hobby Lobby*." *Id.*, at 57544–57545.

After the final rules were promulgated, the State of New Jersey joined Pennsylvania's suit and, together, they filed an amended complaint. As relevant, the States—respondents here—once again challenged the rules as substantively and procedurally invalid under the APA. They alleged that the rules were substantively unlawful because the Departments lacked statutory authority under either the ACA or RFRA to promulgate the exemptions. Respondents also asserted that the IFRs were not adequately justified by good cause, meaning that the Departments impermissibly used the IFR procedure to bypass the APA's notice and comment procedures. Finally, respondents argued that the purported procedural defects of the IFRs likewise infected the final rules.

The District Court issued a nationwide preliminary injunction against the implementation of the final rules the same day the rules were scheduled to take effect. The Federal Government appealed, as did one of the homes operated by the Little Sisters, which had in the meantime intervened in the suit to defend the religious exemption.[5] The appeals

[5] The Little Sisters moved to intervene in the District Court to defend the 2017 religious-exemption IFR, but the District Court denied that motion. The Third Circuit reversed. After that reversal, the Little Sisters appealed the District Court's preliminary injunction of the 2017

were consolidated with the previous appeal, which had been stayed.

The Third Circuit affirmed. In its view, the Departments lacked authority to craft the exemptions under either statute. The Third Circuit read 42 U. S. C. § 300gg–13(a)(4) as empowering HRSA to determine which services should be included as preventive care and screenings, but not to carve out exemptions from those requirements. It also concluded that RFRA did not compel or permit the religious exemption because, under Third Circuit precedent that was vacated and remanded in *Zubik*, the Third Circuit had concluded that the self-certification accommodation did not impose a substantial burden on free exercise. As for respondents' procedural claim, the court held that the Departments lacked good cause to bypass notice and comment when promulgating the 2017 IFRs. In addition, the court determined that, because the IFRs and final rules were "virtually identical," "[t]he notice and comment exercise surrounding the Final Rules [did] not reflect any real open-mindedness." *Pennsylvania* v. *President of United States*, 930 F. 3d 543, 568–569 (2019). Though it rebuked the Departments for their purported attitudinal deficiencies, the Third Circuit did not identify any specific public comments to which the agency did not appropriately respond. *Id.*, at 569, n. 24.[6] We granted certiorari. 589 U. S. 1165 (2020).

IFRs, and that appeal was consolidated with the Federal Government's appeal.

[6] The Third Circuit also determined *sua sponte* that the Little Sisters lacked appellate standing to intervene because a District Court in Colorado had permanently enjoined the contraceptive mandate as applied to plans in which the Little Sisters participate. This was error. Under our precedents, at least one party must demonstrate Article III standing for each claim for relief. An intervenor of right must independently demonstrate Article III standing if it pursues relief that is broader than or different from the party invoking a court's jurisdiction. See *Town of Chester* v. *Laroe Estates, Inc.*, 581 U. S. 433, 439 (2017). Here, the Federal Government clearly had standing to invoke the Third Circuit's appellate juris-

II

Respondents contend that the 2018 final rules providing religious and moral exemptions to the contraceptive mandate are both substantively and procedurally invalid. We begin with their substantive argument that the Departments lacked statutory authority to promulgate the rules.

A

The Departments invoke 42 U. S. C. §300gg–13(a)(4) as legal authority for both exemptions. This provision of the ACA states that, "with respect to women," "[a] group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide . . . such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by [HRSA]." The Departments maintain, as they have since 2011, that the phrase "as provided for" allows HRSA both to identify what preventive care and screenings must be covered and to exempt or accommodate certain employers' religious objections. See 83 Fed. Reg. 57540–57541; see also *post*, at 706 (KAGAN, J., concurring in judgment). They also argue that, as with the church exemption, their role as the administering agencies permits them to guide HRSA in its discretion by "defining the scope of permissible exemptions and accommodations for such guidelines." 82 Fed. Reg. 47794. Respondents, on the other hand, contend that §300gg–13(a)(4) permits HRSA to only list the preventive care and screenings that health plans "shall . . . provide," not to exempt entities from covering those identified services. Because that asserted limitation is found nowhere in the statute, we agree with the Departments.

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diction, and both the Federal Government and the Little Sisters asked the court to dissolve the injunction against the religious exemption. The Third Circuit accordingly erred by inquiring into the Little Sisters' independent Article III standing.

"Our analysis begins and ends with the text." *Octane Fitness, LLC* v. *ICON Health & Fitness, Inc.*, 572 U. S. 545, 553 (2014). Here, the pivotal phrase is "as provided for." To "provide" means to supply, furnish, or make available. See Webster's Third New International Dictionary 1827 (2002) (Webster's Third); American Heritage Dictionary 1411 (4th ed. 2000); 12 Oxford English Dictionary 713 (2d ed. 1989). And, as the Departments explained, the word "as" functions as an adverb modifying "provided," indicating "the manner in which" something is done. 83 Fed. Reg. 57540. See also Webster's Third 125; 1 Oxford English Dictionary, at 673; American Heritage Dictionary 102 (5th ed. 2011).

On its face, then, the provision grants sweeping authority to HRSA to craft a set of standards defining the preventive care that applicable health plans must cover. But the statute is completely silent as to *what* those "comprehensive guidelines" must contain, or how HRSA must go about creating them. The statute does not, as Congress has done in other statutes, provide an exhaustive or illustrative list of the preventive care and screenings that must be included. See, *e. g.*, 18 U. S. C. § 1961(1); 28 U. S. C. § 1603(a). It does not, as Congress did elsewhere in the same section of the ACA, set forth any criteria or standards to guide HRSA's selections. See, *e. g.*, 42 U. S. C. § 300gg–13(a)(3) (requiring "*evidence-informed* preventive care and screenings" (emphasis added)); § 300gg–13(a)(1) ("evidence-based items or services"). It does not, as Congress has done in other contexts, require that HRSA consult with or refrain from consulting with any party in the formulation of the Guidelines. See, *e. g.*, 16 U. S. C. § 1536(a)(1); 23 U. S. C. § 138. This means that HRSA has virtually unbridled discretion to decide what counts as preventive care and screenings. But the same capacious grant of authority that empowers HRSA to make these determinations leaves its discretion equally unchecked in other areas, including the ability to identify and create exemptions from its own Guidelines.

Congress could have limited HRSA's discretion in any number of ways, but it chose not to do so. See *Ali* v. *Federal Bureau of Prisons*, 552 U. S. 214, 227 (2008); see also *Rotkiske* v. *Klemm*, 589 U. S. 8, 14 (2019); *Husted* v. *A. Philip Randolph Institute*, 584 U. S. 756, 774 (2018). Instead, it enacted "'expansive language offer[ing] no indication whatever'" that the statute limits what HRSA can designate as preventive care and screenings or who must provide that coverage. *Ali*, 552 U. S., at 219–220 (quoting *Harrison* v. *PPG Industries, Inc.*, 446 U. S. 578, 589 (1980)). "It is a fundamental principle of statutory interpretation that 'absent provision[s] cannot be supplied by the courts.'" *Rotkiske*, 589 U. S., at 14 (quoting A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 94 (2012)); *Nichols* v. *United States*, 578 U. S. 104, 110 (2016). This principle applies not only to adding terms not found in the statute, but also to imposing limits on an agency's discretion that are not supported by the text. See *Watt* v. *Energy Action Ed. Foundation*, 454 U. S. 151, 168 (1981). By introducing a limitation not found in the statute, respondents ask us to alter, rather than to interpret, the ACA. See *Nichols*, 578 U. S., at 110.

By its terms, the ACA leaves the Guidelines' content to the exclusive discretion of HRSA. Under a plain reading of the statute, then, we conclude that the ACA gives HRSA broad discretion to define preventive care and screenings and to create the religious and moral exemptions.[7]

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[7] Though not necessary for this analysis, our decisions in *Zubik* v. *Burwell*, 578 U. S. 403 (2016) (*per curiam*), and *Hobby Lobby*, 573 U. S. 682, implicitly support the conclusion that § 300gg–13(a)(4) empowered HRSA to create the exemptions. As respondents acknowledged at oral argument, accepting their interpretation of the ACA would require us to conclude that the Departments had no authority under the ACA to promulgate the initial church exemption, see Tr. of Oral Arg. 69–71, 91, which by extension would mean that the Departments lacked authority for the 2013 self-certification accommodation. That reading of the ACA would create serious tension with *Hobby Lobby*, which pointed to the self-certification

The dissent resists this conclusion, asserting that the Departments' interpretation thwarts Congress' intent to provide contraceptive coverage to the women who are interested in receiving such coverage. See *post*, at 711, 730 (opinion of GINSBURG, J.). It also argues that the exemptions will make it significantly harder for interested women to obtain seamless access to contraception without cost sharing, *post*, at 724–726, which we have previously "assume[d]" is a compelling governmental interest, *Hobby Lobby*, 573 U. S., at 728; but see *post*, at 696–698 (ALITO, J., concurring). The Departments dispute that women will be adversely impacted by the 2018 exemptions. 82 Fed. Reg. 47805. Though we express no view on this disagreement, it bears noting that such a policy concern cannot justify supplanting the text's plain meaning. See *Gitlitz* v. *Commissioner*, 531 U. S. 206, 220 (2001). "It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended." *Lewis* v. *Chicago*, 560 U. S. 205, 215 (2010).

Moreover, even assuming that the dissent is correct as an empirical matter, its concerns are more properly directed at the regulatory mechanism that Congress put in place to protect this assumed governmental interest. As even the dissent recognizes, contraceptive coverage is mentioned nowhere in § 300gg–13(a)(4), and no language in the statute itself even hints that Congress intended that contraception should or must be covered. See *post*, at 713–714 (citing legisla-

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accommodation as an example of a less restrictive means available to the Government, 573 U. S., at 730–731, and *Zubik*, which expressly directed the Departments to "accommodat[e]" petitioners' religious exercise, 578 U. S., at 408. It would be passing strange for this Court to direct the Departments to make such an accommodation if it thought the ACA did not authorize one. In addition, we are not aware of, and the dissent does not point to, a single case predating *Hobby Lobby* or *Zubik* in which the Departments took the position that they could not adopt a different approach because they lacked the statutory authority under the ACA to do so.

tive history and *amicus* briefs). Thus, contrary to the dissent's protestations, it was Congress, not the Departments, that declined to expressly require contraceptive coverage in the ACA itself. See 83 Fed. Reg. 57540. And, it was Congress' deliberate choice to issue an extraordinarily "broad general directiv[e]" to HRSA to craft the Guidelines, without any qualifications as to the substance of the Guidelines or whether exemptions were permissible. *Mistretta* v. *United States*, 488 U. S. 361, 372 (1989). Thus, it is Congress, not the Departments, that has failed to provide the protection for contraceptive coverage that the dissent seeks.[8]

No party has pressed a constitutional challenge to the breadth of the delegation involved here. Cf. *Gundy* v. *United States*, 588 U. S. 128 (2019). The only question we face today is what the plain language of the statute authorizes. And the plain language of the statute clearly allows the Departments to create the preventive care standards as well as the religious and moral exemptions.[9]

[8] HRSA has altered its Guidelines multiple times since 2011, always proceeding without notice and comment. See 82 Fed. Reg. 47813–47814; 83 Fed. Reg. 8487; 85 Fed. Reg. 722–723 (2020). Accordingly, if HRSA chose to exercise that discretion to remove contraceptive coverage from the next iteration of its Guidelines, it would arguably nullify the contraceptive mandate altogether without proceeding through notice and comment. The combination of the agency practice of proceeding without notice and comment and HRSA's discretion to alter the Guidelines, though not necessary for our analysis, provides yet another indication of Congress' failure to provide strong protections for contraceptive coverage.

[9] The dissent does not attempt to argue that the self-certification accommodation can coexist with its interpretation of the ACA. As for the church exemption, the dissent claims that it is rooted in the First Amendment's respect for church autonomy. See *post*, at 721–722. But the dissent points to no case, brief, or rule in the nine years since the church exemption's implementation in which the Departments defended its validity on that ground. The most the dissent can point to is a stray comment in the rule that expanded the self-certification accommodation to closely held corporations in the wake of *Hobby Lobby*. See *post*, at 722 (quoting 80 Fed. Reg. 41325 (2015)).

B

The Departments also contend, consistent with the reasoning in the 2017 IFR and the 2018 final rule establishing the religious exemption, that RFRA independently compelled the Departments' solution or that it at least authorized it.[10] In light of our holding that the ACA provided a basis for both exemptions, we need not reach these arguments.[11] We do, however, address respondents' argument that the Departments could not even consider RFRA as they formulated the religious exemption from the contraceptive mandate. Particularly in the context of these cases, it was appropriate for the Departments to consider RFRA.

As we have explained, RFRA "provide[s] very broad protection for religious liberty." *Hobby Lobby*, 573 U. S., at 693. In RFRA's congressional findings, Congress stated that "governments should not substantially burden religious exercise," a right described by RFRA as "unalienable." 42 U. S. C. §§2000bb(a)(1), (3). To protect this right, Congress provided that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless "it demonstrates that application of the burden . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest." §§2000bb–1(a)–(b). Placing Congress' intent beyond dispute, RFRA specifies that it "applies to all Federal law, and

[10] The dissent claims that "all agree" that the exemption is not supported by the Free Exercise Clause. *Post*, at 711. A constitutional claim is not presented in these cases, and we express no view on the merits of that question.

[11] The dissent appears to agree that the Departments had authority under RFRA to "cure" any RFRA violations caused by its regulations. See *post*, at 723, n. 17 (disclaiming the view that agencies must wait for courts to determine a RFRA violation); see also *supra*, at 666 (explaining that the safe harbor and commitment to developing an accommodation occurred prior to the Guidelines going into effect). The dissent also does not—as it cannot—dispute our directive in *Zubik*.

the implementation of that law, whether statutory or otherwise." § 2000bb–3(a). RFRA also permits Congress to exclude statutes from RFRA's protections. § 2000bb–3(b).

It is clear from the face of the statute that the contraceptive mandate is capable of violating RFRA. The ACA does not explicitly exempt RFRA, and the regulations implementing the contraceptive mandate qualify as "Federal law" or "the implementation of [Federal] law." § 2000bb–3(a); cf. *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 297–298 (1979). Additionally, we expressly stated in *Hobby Lobby* that the contraceptive mandate violated RFRA as applied to entities with complicity-based objections. 573 U. S., at 736. Thus, the potential for conflict between the contraceptive mandate and RFRA is well settled. Against this backdrop, it is unsurprising that RFRA would feature prominently in the Departments' discussion of exemptions that would not pose similar legal problems.

Moreover, our decisions all but instructed the Departments to consider RFRA going forward. For instance, though we held that the mandate violated RFRA in *Hobby Lobby*, we left it to the Federal Government to develop and implement a solution. At the same time, we made it abundantly clear that, under RFRA, the Departments must accept the sincerely held complicity-based objections of religious entities. That is, they could not "tell the plaintiffs that their beliefs are flawed" because, in the Departments' view, "the connection between what the objecting parties must do . . . and the end that they find to be morally wrong . . . is simply too attenuated." *Hobby Lobby*, 573 U. S., at 723–724. Likewise, though we did not decide whether the self-certification accommodation ran afoul of RFRA in *Zubik*, we directed the parties on remand to "accommodat[e]" the free exercise rights of those with complicity-based objections to the self-certification accommodation. 578 U. S., at 408. It is hard to see how the Departments could promulgate rules consistent with these decisions if

they did not overtly consider these entities' rights under RFRA.

This is especially true in light of the basic requirements of the rulemaking process. Our precedents require final rules to "articulate a satisfactory explanation for [the] action 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). This requirement allows courts to assess whether the agency has promulgated an arbitrary and capricious rule by "entirely fail[ing] to consider an important aspect of the problem [or] offer[ing] an explanation for its decision that runs counter to the evidence before [it]." *Ibid.*; see also *Department of Commerce* v. *New York*, 588 U. S. 752, 802 (2019) (BREYER, J., concurring in part and dissenting in part); *Genuine Parts Co.* v. *EPA*, 890 F. 3d 304, 307 (CADC 2018); *Pacific Coast Federation of Fishermen's Assns.* v. *United States Bur. of Reclamation*, 426 F. 3d 1082, 1094 (CA9 2005). Here, the Departments were aware that *Hobby Lobby* held the mandate unlawful as applied to religious entities with complicity-based objections. 82 Fed. Reg. 47799; 83 Fed. Reg. 57544–57545. They were also aware of *Zubik*'s instructions. 82 Fed. Reg. 47799. And, aside from our own decisions, the Departments were mindful of the RFRA concerns raised in "public comments and . . . court filings in dozens of cases—encompassing hundreds of organizations." *Id.*, at 47802; see also *id.*, at 47806. If the Departments did not look to RFRA's requirements or discuss RFRA at all when formulating their solution, they would certainly be susceptible to claims that the rules were arbitrary and capricious for failing to consider an important aspect of the problem.[12] Thus, respondents' argument that the Departments

[12] Here, too, the Departments have consistently taken the position that their rules had to account for RFRA in response to comments that the rules would violate that statute. See Dept. of Labor, FAQs About Afford-

erred by looking to RFRA as a guide when framing the religious exemption is without merit.

III

Because we hold that the Departments had authority to promulgate the exemptions, we must next decide whether the 2018 final rules are procedurally invalid. Respondents present two arguments on this score. Neither is persuasive.

A

Unless a statutory exception applies, the APA requires agencies to publish a notice of proposed rulemaking in the Federal Register before promulgating a rule that has legal force. See 5 U. S. C. § 553(b). Respondents point to the fact that the 2018 final rules were preceded by a document entitled "Interim Final Rules with Request for Comments," not a document entitled "General Notice of Proposed Rulemaking." They claim that since this was insufficient to satisfy § 553(b)'s requirement, the final rules were procedurally invalid. Respondents are incorrect. Formal labels aside, the rules contained all of the elements of a notice of proposed rulemaking as required by the APA.

The APA requires that the notice of proposed rulemaking contain "reference to the legal authority under which the rule is proposed" and "either the terms or substance of the proposed rule or a description of the subjects and issues involved." §§ 553(b)(2)–(3). The request for comments in the 2017 IFRs readily satisfies these requirements. That request detailed the Departments' view that they had legal

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able Care Act Implementation Part 36, pp. 4–5 (2017) (2016 Request for Information); 78 Fed. Reg. 39886–39887 (2013 rule); 77 Fed. Reg. 8729 (2012 final rule). As the 2017 IFR explained, the Departments simply reached a different conclusion on whether the accommodation satisfied RFRA. See 82 Fed. Reg. 47800–47806 (summarizing the previous ways in which the Departments accounted for RFRA and providing a lengthy explanation for the changed position).

authority under the ACA to promulgate both exemptions, 82 Fed. Reg. 47794, 47844, as well as authority under RFRA to promulgate the religious exemption, *id.*, at 47800–47806. And respondents do not—and cannot—argue that the IFRs failed to air the relevant issues with sufficient detail for respondents to understand the Departments' position. See *supra*, at 671–672. Thus, the APA notice requirements were satisfied.

Even assuming that the APA requires an agency to publish a document entitled "notice of proposed rulemaking" when the agency moves from an IFR to a final rule, there was no "prejudicial error" here. § 706. We have previously noted that the rule of prejudicial error is treated as an "administrative law . . . harmless error rule," *National Assn. of Home Builders* v. *Defenders of Wildlife*, 551 U. S. 644, 659–660 (2007) (internal quotation marks omitted). Here, the Departments issued an IFR that explained its position in fulsome detail and "provide[d] the public with an opportunity to comment on whether [the] regulations . . . should be made permanent or subject to modification." 82 Fed. Reg. 47815; see also *id.*, at 47852, 47855. Respondents thus do not come close to demonstrating that they experienced any harm from the title of the document, let alone that they have satisfied this harmless error rule. "The object [of notice and comment], in short, is one of fair notice," *Long Island Care at Home, Ltd.* v. *Coke*, 551 U. S. 158, 174 (2007), and respondents certainly had such notice here. Because the IFR complied with the APA's requirements, this claim fails.[13]

B

Next, respondents contend that the 2018 final rules are procedurally invalid because "nothing in the record signal[s]"

[13] We note as well that the Departments promulgated many other IFRs in addition to the three related to the contraceptive mandate. See, *e. g.*, 75 Fed. Reg. 27122 (dependent coverage); *id.*, at 34538 (grandfathered health plans); *id.*, at 37188 (pre-existing conditions).

that the Departments "maintained an open mind throughout the [post-promulgation] process." Brief for Respondents 27. As evidence for this claim, respondents point to the fact that the final rules made only minor alterations to the IFRs, leaving their substance unchanged. The Third Circuit applied this "open-mindedness" test, concluding that because the final rules were "virtually identical" to the IFRs, the Departments lacked the requisite "flexible and open-minded attitude" when they promulgated the final rules. 930 F. 3d, at 569 (internal quotation marks omitted).

We decline to evaluate the final rules under the open-mindedness test. We have repeatedly stated that the text of the APA provides the "'maximum procedural requirements'" that an agency must follow in order to promulgate a rule. *Perez*, 575 U. S., at 100 (quoting *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 524 (1978)). Because the APA "sets forth the full extent of judicial authority to review executive agency action for procedural correctness," *FCC* v. *Fox Television Stations, Inc.*, 556 U. S. 502, 513 (2009), we have repeatedly rejected courts' attempts to impose "judge-made procedur[es]" in addition to the APA's mandates, *Perez*, 575 U. S., at 102; see also *Pension Benefit Guaranty Corporation* v. *LTV Corp.*, 496 U. S. 633, 654–655 (1990); *Vermont Yankee*, 435 U. S., at 549. And like the procedures that we have held invalid, the open-mindedness test violates the "general proposition that courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA." *LTV Corp.*, 496 U. S., at 654. Rather than adopting this test, we focus our inquiry on whether the Departments satisfied the APA's objective criteria, just as we have in previous cases. We conclude that they did.

Section 553(b) obligated the Departments to provide adequate notice before promulgating a rule that has legal force. As explained *supra*, at 683–684, the IFRs provided sufficient notice. Aside from these notice requirements, the APA

mandates that agencies "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments," § 553(c); states that the final rules must include "a concise general statement of their basis and purpose," *ibid.*; and requires that final rules must be published 30 days before they become effective, § 553(d).

The Departments complied with each of these statutory procedures. They "request[ed] and encourage[d] public comments on all matters addressed" in the rules—*i. e.*, the basis for the Departments' legal authority, the rationales for the exemptions, and the detailed discussion of the exemptions' scope. 82 Fed. Reg. 47813, 47854. They also gave interested parties 60 days to submit comments. *Id.*, at 47792, 47838. The final rules included a concise statement of their basis and purpose, explaining that the rules were "necessary to protect sincerely held" moral and religious objections and summarizing the legal analysis supporting the exemptions. 83 Fed. Reg. 57592; see also *id.*, at 57537–57538. Lastly, the final rules were published on November 15, 2018, but did not become effective until January 14, 2019—more than 30 days after being published. *Id.*, at 57536, 57592. In sum, the rules fully complied with "'the maximum procedural requirements [that] Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures.'" *Perez*, 575 U. S., at 102 (quoting *Vermont Yankee*, 435 U. S., at 524). Accordingly, respondents' second procedural challenge also fails.[14]

* * *

For over 150 years, the Little Sisters have engaged in faithful service and sacrifice, motivated by a religious calling

[14] Because we conclude that the IFRs' request for comment satisfies the APA's rulemaking requirements, we need not reach respondents' additional argument that the Departments lacked good cause to promulgate the 2017 IFRs.

to surrender all for the sake of their brother. "[T]hey commit to constantly living out a witness that proclaims the unique, inviolable dignity of every person, particularly those whom others regard as weak or worthless." Complaint ¶14. But for the past seven years, they—like many other religious objectors who have participated in the litigation and rulemakings leading up to today's decision—have had to fight for the ability to continue in their noble work without violating their sincerely held religious beliefs. After two decisions from this Court and multiple failed regulatory attempts, the Federal Government has arrived at a solution that exempts the Little Sisters from the source of their complicity-based concerns—the administratively imposed contraceptive mandate.

We hold today that the Departments had the statutory authority to craft that exemption, as well as the contemporaneously issued moral exemption. We further hold that the rules promulgating these exemptions are free from procedural defects. Therefore, we reverse the judgment of the Court of Appeals and remand the cases for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE ALITO, with whom JUSTICE GORSUCH joins, concurring.

In these cases, the Court of Appeals held, among other things, (1) that the Little Sisters of the Poor lacked standing to appeal, (2) that the Affordable Care Act (ACA) does not permit any exemptions from the so-called contraceptive mandate, (3) that the Departments responsible for issuing the challenged rule[1] violated the Administrative Procedure

[1] The Health Resources and Services Administration (HRSA), a division of the Department of Health and Human Services, creates the "comprehensive guidelines" on "coverage" for "additional preventive care and screenings" for women, 42 U. S. C. §300gg–13(a)(4), but the statute is

Act (APA) by failing to provide notice of proposed rulemaking, and (4) that the final rule creating the current exemptions is invalid because the Departments did not have an open mind when they considered comments to the rule. Based on this analysis, the Court of Appeals affirmed the nationwide injunction issued by the District Court.

This Court now concludes that all the holdings listed above were erroneous, and I join the opinion of the Court in full. We now send these cases back to the lower courts, where the Commonwealth of Pennsylvania and the State of New Jersey are all but certain to pursue their argument that the current rule is flawed on yet another ground, namely, that it is arbitrary and capricious and thus violates the APA. This will prolong the legal battle in which the Little Sisters have now been engaged for seven years—even though during all this time no employee of the Little Sisters has come forward with an objection to the Little Sisters' conduct.

I understand the Court's desire to decide no more than is strictly necessary, but under the circumstances here, I would decide one additional question: whether the Court of Appeals erred in holding that the Religious Freedom Restoration Act (RFRA), 42 U. S. C. §§2000bb to 2000bb–4, does not compel the religious exemption granted by the current rule. If RFRA requires this exemption, the Departments did not act in an arbitrary and capricious manner in granting it. And in my judgment, RFRA compels an exemption for the Little Sisters and any other employer with a similar objection to what has been called the accommodation to the contraceptive mandate.

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jointly administered and enforced by the Departments of Health and Human Services, Labor, and Treasury (collectively Departments), see §300gg–92; 29 U. S. C. §1191c; 26 U. S. C. §9833. The Departments promulgated the exemptions at issue here, which were subsequently incorporated into the guidelines by HRSA. See 83 Fed. Reg. 57536 (2018); *id.*, at 57592.

I

Because the contraceptive mandate has been repeatedly modified, a brief recapitulation of this history may be helpful. The ACA itself did not require that insurance plans include coverage for contraceptives. Instead, the Act provided that plans must cover those preventive services found to be appropriate by HRSA, an agency of the Department of Health and Human Services. 42 U. S. C. § 300gg–13(a)(4). In 2011, HRSA recommended that plans be required to cover "'[a]ll . . . contraceptive methods'" approved by the Food and Drug Administration. 77 Fed. Reg. 8725 (2012). (I will use the term "contraceptive mandate" or simply "mandate" to refer to the obligation to provide coverage for contraceptives under any of the various regimes that have existed since the promulgation of this original rule.) At the direction of the relevant Departments, HRSA simultaneously created an exemption from the mandate for "churches, their integrated auxiliaries, and conventions or associations of churches," as well as "the exclusively religious activities of any religious order." 76 Fed. Reg. 46623 (2011); see 77 Fed. Reg. 8726. (I will call this the "church exemption.") This narrow exemption was met with strong objections on the ground that it furnished insufficient protection for religious groups opposed to the use of some or all of the listed contraceptives.

The Departments responded by issuing a new regulation that created an accommodation for certain religious nonprofit employers. See 78 Fed. Reg. 39892–39898 (2013). (I will call this the "accommodation.") Under this accommodation, a covered employer could certify its objection to its insurer (or, if its plan was self-funded, to its third-party plan administrator), and the insurer or third-party administrator would then proceed to provide contraceptive coverage to the objecting entity's employees. Unlike the earlier church exemption, the accommodation did not exempt these religious employers from the contraceptive mandate, but the Depart-

ments construed invocation of the accommodation as compliance with the mandate.

Meanwhile, the contraceptive mandate was challenged by various employers who had religious objections to providing coverage for at least some of the listed contraceptives but were not covered by the church exemption or the accommodation. In *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U. S. 682 (2014), we held that RFRA prohibited the application of the regulation to closely held, for-profit corporations that fell into this category. The Departments responded by issuing a new regulation that attempted to codify our holding by allowing closely held corporations to utilize the accommodation. See 80 Fed. Reg. 41343–41347 (2015).[2]

Although this modification solved one RFRA problem, the contraceptive mandate was still objectionable to some religious employers, including the Little Sisters. We considered those objections in *Zubik* v. *Burwell*, 578 U. S. 403 (2016) (*per curiam*), but instead of resolving the legal dispute, we vacated the decisions below and remanded, instructing the parties to attempt to come to an agreement. Unfortunately, after strenuous efforts, the outgoing administration reported on January 9, 2017, that no reconciliation could be reached.[3] The Little Sisters and other employers objected to engaging in any conduct that had the effect of making contraceptives available to their employees under their insurance plans, and no way of providing such coverage to their employees without using their plans could be found.

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[2] In the regulation, the Departments also responded to our holding in *Wheaton College* v. *Burwell*, 573 U. S. 958 (2014), by allowing employers who invoked the accommodation to notify the Government of their objection rather than by filing the objection with their insurer or third-party administrator. See 80 Fed. Reg. 41337.

[3] Dept. of Labor, FAQs About Affordable Care Act Implementation Part 36 (Jan. 9, 2017), https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/aca-part-36.pdf.

In 2017, the new administration took up the task of attempting to find a solution. After receiving more than 56,000 comments, it issued the rule now before us, which made the church exemption available to non-governmental employers who object to the provision of some or all contraceptive services based on sincerely held religious beliefs.[4] 45 CFR § 147.132; see 83 Fed. Reg. 57540, 57590. (The "religious exemption.") The Court of Appeals, as noted, held that RFRA did not require this new rule.

II

A

RFRA broadly prohibits the Federal Government from violating religious liberty. See 42 U. S. C. § 2000bb–1(a). It applies to every "branch, department, agency, [and] instrumentality" of the Federal Government, as well as any "person acting under color of" federal law. § 2000bb–2(1). And this prohibition applies to the "implementation" of federal law. § 2000bb–3(a). Thus, unless the ACA or some other subsequently enacted statute made RFRA inapplicable to the contraceptive mandate, the Departments responsible for administering that mandate are obligated to do so in a manner that complies with RFRA.

No provision of the ACA abrogates RFRA, and our decision in *Hobby Lobby*, 573 U. S., at 736, established that application of the contraceptive mandate must conform to RFRA's demands. Thus, it was incumbent on the Departments to ensure that the rules implementing the mandate were consistent with RFRA, as interpreted in our decision.

B

Under RFRA, the Federal Government may not "substantially burden a person's exercise of religion even if the bur-

[4] A similar exemption was provided for employers with moral objections. See 45 CFR § 147.33 (2019).

den results from a rule of general applicability," unless it "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." §§ 2000bb–1(a), (b). Applying RFRA to the contraceptive mandate thus presents three questions. First, would the mandate substantially burden an employer's exercise of religion? Second, if the mandate would impose such a burden, would it nevertheless serve a "compelling interest"? And third, if it serves such an interest, would it represent "the least restrictive means of furthering" that interest?

Substantial burden. Under our decision in *Hobby Lobby*, requiring the Little Sisters or any other employer with a similar religious objection to comply with the mandate would impose a substantial burden. Our analysis of this question in *Hobby Lobby* can be separated into two parts. First, would non-compliance have substantial adverse practical consequences? 573 U. S., at 720–723. Second, would compliance cause the objecting party to violate its religious beliefs, *as it sincerely understands them*? *Id.*, at 723–726.

The answer to the first question is indisputable. If a covered employer does not comply with the mandate (by providing contraceptive coverage or invoking the accommodation), it faces penalties of $100 per day for each of its employees. 26 U. S. C. § 4980D(b)(1). "And if the employer decides to stop providing health insurance altogether and at least one full-time employee enrolls in a health plan and qualifies for a subsidy on one of the government-run ACA exchanges, the employer must pay $2,000 per year for each of its full-time employees. §§ 4980H(a), (c)(1)." 573 U. S., at 697. In *Hobby Lobby*, we found these "severe" financial consequences sufficient to show that the practical effect of non-compliance would be "substantial."[5] *Id.*, at 720.

[5] This is one of the differences between these cases and *Bowen* v. *Roy*, 476 U. S. 693 (1986). See *post*, at 727 (GINSBURG, J., dissenting) (relying on *Bowen* to conclude that accommodation was unnecessary). In *Bowen*,

Our answer to the second question was also perfectly clear. If an employer has a religious objection to the use of a covered contraceptive, and if the employer has a sincere religious belief that compliance with the mandate makes it complicit in that conduct, then RFRA requires that the belief be honored. *Id.*, at 724–725. We noted that the objection raised by the employers in *Hobby Lobby* "implicate[d] a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another." *Id.*, at 724. We noted that different individuals have different beliefs on this question, but we were clear that "federal courts have no business addressing . . . whether the religious belief asserted in a RFRA case is reasonable." *Ibid.* Instead, the "'function'" of a court is "'narrow'": "'to determine' whether the line drawn reflects 'an honest conviction.'" *Id.*, at 725 (quoting *Thomas* v. *Review Bd. of Ind. Employment Security Div.*, 450 U. S. 707, 716 (1981)).

Applying this holding to the Little Sisters yields an obvious answer. It is undisputed that the Little Sisters have a sincere religious objection to the use of contraceptives and that they also have a sincere religious belief that utilizing the accommodation would make them complicit in this conduct. As in *Hobby Lobby*, "it is not for us to say that their religious beliefs are mistaken or insubstantial." 573 U. S., at 725.

In reaching a contrary conclusion, the Court of Appeals adopted the reasoning of a prior Third Circuit decision holding that "'the submission of the self-certification form'" required by the mandate would not "'trigger or facilitate the provision of contraceptive coverage'" and would not make the Little Sisters "'"complicit" in the provision'" of

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the objecting individuals were not faced with penalties or "coerced by the Governmen[t] into violating their religious beliefs." *Lyng* v. *Northwest Indian Cemetery Protective Assn.*, 485 U. S. 439, 449 (1988).

objected-to services. 930 F. 3d 543, 573 (2019) (quoting *Geneva College* v. *Secretary of U. S. Dept. of Health and Human Servs.*, 778 F. 3d 422, 437–438 (CA3 2015), vacated and remanded *sub nom. Zubik*, 578 U. S. 403).

The position taken by the Third Circuit was similar to that of the Government when *Zubik* was before us. Opposing the position taken by the Little Sisters and others, the Government argued that what the accommodation required was not materially different from simply asking that an objecting party opt out of providing contraceptive coverage with the knowledge that by doing so it would cause a third party to provide that coverage. According to the Government, everything that occurred following the opt-out was a result of governmental action.[6]

Petitioners disagreed. Their concern was not with notifying the Government that they wished to be exempted from complying with the mandate *per se*,[7] but they objected to two requirements that they sincerely believe would make them complicit in conduct they find immoral. First, they took strong exception to the requirement that they maintain and pay for a plan under which coverage for contraceptives would be provided. As they explained, if they "were willing to incur ruinous penalties by dropping their health plans, their insurance companies would have no authority or obligation to provide or procure the objectionable coverage for [their] plan beneficiaries."[8] Second, they also objected to submission of the self-certification form required by the accommodation because without that certification their plan could not be used to provide contraceptive coverage.[9] At

[6] See Brief for Respondents in *Zubik* v. *Burwell*, O. T. 2015, Nos. 14–1418, 14–1453, 14–1505, 15–35, 15–105, 15–119, 15–191, pp. 35–41.

[7] See Brief for Petitioners in *Zubik* v. *Burwell*, O. T. 2015, Nos. 15–35, 15–105, 15–119, 15–191, p. 45.

[8] Brief for Petitioners in *Zubik* v. *Burwell*, O. T. 2015, Nos. 14–1418, 14–1453, 14–1505, p. 49.

[9] Brief for Petitioners in *Zubik*, O. T. 2015, Nos. 15–35, 15–105, 15–119, 15–191, at 44.

bottom, then, the Government and the religious objectors disagreed about the relationship between what the accommodation demanded and the provision of contraceptive coverage.

Our remand in *Zubik* put these two conflicting interpretations to the test. In response to our request for supplemental briefing, petitioners explained their position in the following terms. "[T]heir religious exercise" would not be "infringed" if they did not have to do anything "'more than contract for a plan that does not include coverage for some or all forms of contraception,' even if their employees receive[d] cost-free contraceptive coverage from the same insurance company." 578 U. S., at 407–408. At the time, the Government thought that it might be possible to achieve this result under the ACA, *id.*, at 408, but subsequent attempts to find a way to do this failed. After great effort, the Government was forced to conclude that it was "not aware of the authority, or of a practical mechanism," for providing contraceptive coverage "specifically to persons covered by an objecting employer, other than by using the employer's plan, issuer, or third party administrator." 83 Fed. Reg. 57545–57546.

The inescapable bottom line is that the accommodation demanded that parties like the Little Sisters engage in conduct that was a necessary cause of the ultimate conduct to which they had strong religious objections. Their situation was the same as that of the conscientious objector in *Thomas*, 450 U. S., at 715, who refused to participate in the manufacture of tanks but did not object to assisting in the production of steel used to make the tanks. Where to draw the line in a chain of causation that leads to objectionable conduct is a difficult moral question, and our cases have made it clear that courts cannot override the sincere religious beliefs of an objecting party on that question. See *Hobby Lobby*, 573 U. S., at 723–726; *Thomas*, 450 U. S., at 715–716.

For these reasons, the contraceptive mandate imposes a substantial burden on any employer who, like the Little Sisters, has a sincere religious objection to the use of a listed

contraceptive and a sincere religious belief that compliance with the mandate (through the accommodation or otherwise) makes it complicit in the provision to the employer's workers of a contraceptive to which the employer has a religious objection.

Compelling interest. In *Hobby Lobby*, the Government asserted and we assumed for the sake of argument that the Government had a compelling interest in "ensuring that all women have access to all FDA-approved contraceptives without cost sharing." 573 U. S., at 727. Now, the Government concedes that it lacks a compelling interest in providing such access, Reply Brief in No. 19–454, p. 10, and this time, the Government is correct.

In order to show that it has a "compelling interest" within the meaning of RFRA, the Government must clear a high bar. In *Sherbert* v. *Verner*, 374 U. S. 398 (1963), the decision that provides the foundation for the rule codified in RFRA, we said that "'[o]nly the gravest abuses, endangering paramount interests,'" could "'give occasion for [a] permissible limitation'" on the free exercise of religion. *Id.*, at 406. Thus, in order to establish that it has a "compelling interest" in providing free contraceptives to all women, the Government would have to show that it would commit one of "the gravest abuses" of its responsibilities if it did not furnish free contraceptives to all women.

If we were required to exercise our own judgment on the question whether the Government has an obligation to provide free contraceptives to all women, we would have to take sides in the great national debate about whether the Government should provide free and comprehensive medical care for all. Entering that policy debate would be inconsistent with our proper role, and RFRA does not call on us to express a view on that issue. We can answer the compelling interest question simply by asking whether *Congress* has treated the provision of free contraceptives to all women as a compelling interest.

"'[A] law cannot be regarded as protecting an interest "of the highest order" . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.'" *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 547 (1993). Thus, in considering whether Congress has manifested the view that it has a compelling interest in providing free contraceptives to all women, we must take into account "exceptions" to this asserted "'rul[e] of general applicability.'" *Gonzales* v. *O Centro Espírita Beneficente União do Vegetal*, 546 U. S. 418, 436 (2006) (quoting §2000bb–1(a)). And here, there are exceptions aplenty. The ACA—which fails to ensure that millions of women have access to free contraceptives—unmistakably shows that Congress, at least to date, has not regarded this interest as compelling.

First, the ACA does not provide contraceptive coverage for women who do not work outside the home. If Congress thought that there was a compelling need to make free contraceptives available for all women, why did it make no provision for women who do not receive a paycheck? Some of these women may have a greater need for free contraceptives than do women in the work force.

Second, if Congress thought that there was a compelling need to provide cost-free contraceptives for all working women, why didn't Congress mandate that coverage in the ACA itself? Why did it leave it to HRSA to decide whether to require such coverage *at all*?

Third, the ACA's very incomplete coverage speaks volumes. The ACA "exempts a great many employers from most of its coverage requirements." *Hobby Lobby*, 573 U. S., at 699. "[E]mployers with fewer than 50 employees are not required to provide" any form of health insurance, and a number of large employers with "'grandfathered'" plans need not comply with the contraceptive mandate. *Ibid.*; see 26 U. S. C. §4980H(c)(2); 42 U. S. C. §18011. According to a recent survey, 13% of the 153 million Americans with employer-sponsored health insurance are enrolled in a grand-

fathered plan, while only 56% of small firms provide health insurance. Kaiser Family Foundation, Employer Health Benefits: 2019 Annual Survey 7, 44, 209 (2019). In *Hobby Lobby*, we wrote that "the contraceptive mandate 'presently does not apply to tens of millions of people,'" 573 U. S., at 700, and it appears that this is still true apart from the religious exemption.[10]

Fourth, the Court's recognition in today's decision that the ACA authorizes the creation of exemptions that go beyond anything required by the Constitution provides further evidence that Congress did not regard the provision of cost-free contraceptives to all women as a compelling interest.

Moreover, the regulatory exemptions created by the Departments and HRSA undermine any claim that the agencies themselves viewed the provision of contraceptive coverage as sufficiently compelling. From the outset, the church exemption has applied to churches, their integrated auxiliaries, and associations. 76 Fed. Reg. 46623. And because of the way the accommodation operates under the Employee Retirement Income Security Act of 1974, the Departments treated a number of self-insured non-profit organizations established by churches or associations of churches, including religious universities and hospitals, as "effectively exempted" from the contraceptive mandate as well. Brief for Petitioners in No. 19–454, p. 4. The result was a complex and sometimes irrational pattern of exemptions.

The dissent frames the allegedly compelling interest served by the mandate in different terms—as an interest in providing "seamless" cost-free coverage, *post*, at 710–711, 723, 729 (opinion of GINSBURG, J.)—but this is an even weaker argument. What "seamless" coverage apparently means is cov-

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[10] In contrast, the Departments estimated that plans covering 727,000 people would take advantage of the religious exemption, and thus that between 70,500 and 126,400 women of childbearing age would be affected by the religious exemption. 83 Fed. Reg. 57578, 57581.

erage under the insurance plan furnished by a woman's employer. So as applied to the Little Sisters, the dissent thinks that it would be a grave abuse if an employee wishing to obtain contraceptives had to take any step that would not be necessary if she wanted to obtain any other medical service. See *post*, at 725–726. Apparently, it would not be enough if the Government sent her a special card that could be presented at a pharmacy to fill a prescription for contraceptives without any out-of-pocket expense. Nor would it be enough if she were informed that she could obtain free contraceptives by going to a conveniently located government clinic. Neither of those alternatives would provide "seamless coverage," and thus, according to the dissent, both would be insufficient. Nothing short of capitulation on the part of the Little Sisters would suffice.

This argument is inconsistent with any reasonable understanding of the concept of a "compelling interest." It is undoubtedly convenient for employees to obtain all types of medical care and all pharmaceuticals under their general health insurance plans, and perhaps there are women whose personal situation is such that taking any additional steps to secure contraceptives would be a notable burden. But can it be said that all women or all working women have a compelling need for this convenience?

The ACA does not provide "seamless" coverage for all forms of medical care. Take the example of dental care. Although lack of dental care can cause great pain and may lead to serious health problems, the ACA does not require that a plan cover dental services. Millions of employees must secure separate dental insurance or pay dentist bills out of their own pockets.

In short, it is undoubtedly true that the contraceptive mandate provides a benefit that many women may find highly desirable, but Congress's enactments show that it has not regarded the provision of free contraceptives or the furnishing of "seamless" coverage as "compelling."

Least restrictive means. Even if the mandate served a compelling interest, the accommodation still would not satisfy the "exceptionally demanding" least-restrictive-means standard. *Hobby Lobby*, 573 U. S., at 728. To meet this standard, the Government must "sho[w] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion." *Ibid.*; see also *Holt* v. *Hobbs*, 574 U. S. 352, 365 (2015) ("'[I]f a less restrictive means is available for the Government to achieve its goals, the Government must use it'").

In *Hobby Lobby*, we observed that the Government has "other means" of providing cost-free contraceptives to women "without imposing a substantial burden on the exercise of religion by the objecting parties." 573 U. S., at 728. "The most straightforward way," we noted, "would be for the Government to assume the cost of providing the . . . contraceptives . . . to any women who are unable to obtain them under their health-insurance policies." *Ibid.* In the context of federal funding for health insurance, the cost of such a program would be "minor." *Id.*, at 729.[11]

The Government argued that we should not take this option into account because it lacked statutory authority to create such a program, see *ibid.*, but we rejected that argument,

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[11] In 2019, the Government is estimated to have spent $737 billion subsidizing health insurance for individuals under the age of 65; $287 billion of that went to employment-related coverage. CBO, Federal Subsidies for Health Insurance for People Under Age 65: 2019 to 2029, pp. 15–16 (2019). While the cost of contraceptive methods varies, even assuming the most expensive options, which range around $1,000 a year, the cost of providing this coverage to the 126,400 women who are estimated to be impacted by the religious exemption would be $126.4 million. See Kosova, National Women's Health Network, How Much Do Different Kinds of Birth Control Cost Without Insurance? (Nov. 17, 2017), http://nwhn.org/much-different-kinds-birth-control-cost-without-insurance/ (discussing contraceptive methods ranging from $240 to $1,000 per year); 83 Fed. Reg. 57581 (estimating that up to 126,400 women will be affected by the religious exemption).

id., at 729–730. Certainly, Congress could create such a program if it thought that providing cost-free contraceptives to all women was a matter of "paramount" concern.

As the Government now points out, Congress has taken steps in this direction. "[E]xisting federal, state, and local programs," including Medicaid, Title X, and Temporary Assistance for Needy Families, already "provide free or subsidized contraceptives to low-income women." Brief for Petitioners in No. 19–454, at 27; see also 83 Fed. Reg. 57548, 57551 (discussing programs).[12] And many women who work for employers who have religious objections to the contraceptive mandate may be able to receive contraceptive coverage through a family member's health insurance plan.

In sum, the Departments were right to conclude that applying the accommodation to sincere religious objectors violates RFRA. See *id.*, at 57546. All three prongs of the RFRA analysis—substantial burden, compelling interest, and least restrictive means—necessitate this answer.

III

Once it was apparent that the accommodation ran afoul of RFRA, the Government was required to eliminate the violation. RFRA does not specify the precise manner in which a violation must be remedied; it simply instructs the Government to avoid "substantially burden[ing]" the "exercise of religion"—*i. e.*, to eliminate the violation. § 2000bb–1(a); see also § 2000bb–1(c) (providing for "appropriate relief " in judicial suit). Thus, in *Hobby Lobby*, once we held that applica-

[12] The Government recently amended the definitions for Title X's family planning program to help facilitate access to contraceptives for women who work for an employer invoking the religious and moral exemptions. See 84 Fed. Reg. 7734 (2019). These definitions now provide that "[f]or the purpose of considering payment for contraceptive services only," a "low income family" "includes members of families whose annual income" would otherwise exceed the threshold "where a woman has health insurance coverage through an employer [with] a sincerely held religious or moral objection to providing such [contraceptive] coverage." 42 CFR § 59.2(2) (2019).

tion of the mandate to the objecting parties violated RFRA, we left it to the Departments to decide how best to rectify this problem. See 573 U. S., at 736; 79 Fed. Reg. 51118 (2014) (proposing to modify the accommodation to extend it to closely held corporations in light of *Hobby Lobby*); 80 Fed. Reg. 41324 (final rule explaining that "[t]he Departments believe that the definition adopted in these regulations complies with and goes beyond what is required by RFRA and *Hobby Lobby*").

The same principle applies here. Once it is recognized that the prior accommodation violated RFRA in some of its applications, it was incumbent on the Departments to eliminate those violations, and they had discretion in crafting what they regarded as the best solution.

The solution they devised cures the problem, and it is not clear that any narrower exemption would have been sufficient with respect to parties with religious objections to the accommodation. As noted, after great effort, the Government concluded that it was not possible to solve the problem without using an "employer's plan, issuer, or third party administrator." 83 Fed. Reg. 57546. As a result, the Departments turned to the current rule, under which an objecting party must certify that it "objects, based on its sincerely held religious beliefs, to its establishing, maintaining, providing, offering, or arranging for (as applicable)" either "[c]overage or payments for some or all contraceptive services" or "[a] plan, issuer, or third party administrator that provides or arranges such coverage or payments." 45 CFR §§ 147.132(a)(2)(i)–(ii).

The States take exception to the new religious rule on several grounds. First, they complain that it grants an exemption to some employers who were satisfied with the prior accommodation, but there is little basis for this argument. An employer who is satisfied with the accommodation may continue to operate under that regime. See §§ 147.131(c)–(d); 83 Fed. Reg. 57569–57571. And unless an employer has a religious objection to the accommodation, it is unclear why

an employer would give it up. The accommodation does not impose any cost on an employer, and it provides an added benefit for the employer's work force.

The States also object to the new rule because it makes exemptions available to publicly traded corporations, but the Government is "not aware" of any publicly traded corporations that object to compliance with the mandate. *Id.*, at 57562. For all practical purposes, therefore, it is not clear that the new rule's provisions concerning entities that object to the mandate on religious grounds go any further than necessary to bring the mandate into compliance with RFRA.

In any event, while RFRA requires the Government to employ the least restrictive means of furthering a compelling interest that burdens religious belief, it does not require the converse—that an accommodation of religious belief be narrowly tailored to further a compelling interest. The latter approach, which is advocated by the States, gets RFRA entirely backwards. See Brief for Respondents 45 ("RFRA could require the religious exemption only if it was the least restrictive means of furthering [the Government's compelling interest]"). Nothing in RFRA requires that a violation be remedied by the narrowest permissible corrective.

Needless to say, the remedy for a RFRA problem cannot violate the Constitution, but the new rule does not have that effect. The Court has held that there is a constitutional right to purchase and use contraceptives. *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); *Carey* v. *Population Services Int'l*, 431 U. S. 678 (1977). But the Court has never held that there is a constitutional right to free contraceptives.

The dissent and the court below suggest that the new rule is improper because it imposes burdens on the employees of entities that the rule exempts, see *post*, at 723–726; 930 F. 3d, at 573–574,[13] but the rule imposes no such burden. A

[13] Both the dissent and the court below refer to the statement in *Cutter* v. *Wilkinson*, 544 U. S. 709, 720 (2005), that "courts must take adequate account of the burdens a requested accommodation may impose on nonben-

woman who does not have the benefit of contraceptive coverage under her employer's plan is not the victim of a burden imposed by the rule or her employer. She is simply not the beneficiary of something that federal law does not provide. She is in the same position as a woman who does not work outside the home or a woman whose health insurance is provided by a grandfathered plan that does not pay for contraceptives or a woman who works for a small business that may not provide any health insurance at all.

* * *

I would hold not only that it was appropriate for the Departments to consider RFRA but also that the Departments were required by RFRA to create the religious exemption (or something very close to it). I would bring the Little Sisters' legal odyssey to an end.

JUSTICE KAGAN, with whom JUSTICE BREYER joins, concurring in the judgment.

I would uphold HRSA's statutory authority to exempt certain employers from the contraceptive-coverage mandate, but for different reasons than the Court gives. I also write separately because I question whether the exemptions can survive administrative law's demand for reasoned decisionmaking. That issue remains open for the lower courts to address.

The majority and dissent dispute the breadth of the delegation in the Women's Health Amendment to the ACA. The

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eficiaries," but that statement was made in response to the argument that RFRA's twin, the Religious Land Use and Institutionalized Persons Act, 42 U. S. C. §2000cc *et seq.*, violated the Establishment Clause. The only case cited by *Cutter* in connection with this statement, *Estate of Thornton* v. *Caldor, Inc.*, 472 U. S. 703 (1985), involved a religious accommodation that the Court held violated the Establishment Clause. Before this Court, the States do not argue—and there is no basis for an argument—that the new rule violates that Clause.

Amendment states that a health plan or insurer must offer coverage for "preventive care and screenings . . . as provided for in comprehensive guidelines supported by [HRSA] for purposes of this paragraph." 42 U. S. C. §300gg–13(a)(4). The disputed question is just what HRSA can "provide for." Both the majority and the dissent agree that HRSA's guidelines can differentiate among preventive services, mandating coverage of some but not others. The opinions disagree about whether those guidelines can also differentiate among health plans, exempting some but not others from the contraceptive-coverage requirement. On that question, all the two opinions have in common is equal certainty they are right. Compare *ante*, at 677 (majority opinion) (Congress "enacted expansive language offer[ing] no indication whatever that the statute limits what HRSA can designate as preventive care and screenings or who must provide that coverage" (internal quotation marks omitted)), with *post*, at 718 (GINSBURG, J., dissenting) ("Nothing in [the statute] accord[s] HRSA authority" to decide "*who* must provide coverage" (internal quotation marks omitted; emphasis in original)).

Try as I might, I do not find that kind of clarity in the statute. Sometimes when I squint, I read the law as giving HRSA discretion over all coverage issues: The agency gets to decide who needs to provide what services to women. At other times, I see the statute as putting the agency in charge of only the "what" question, and not the "who." If I had to, I would of course decide which is the marginally better reading. But *Chevron* deference was built for cases like these. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984); see also *Arlington* v. *FCC*, 569 U. S. 290, 301 (2013) (holding that *Chevron* applies to questions about the scope of an agency's statutory authority). *Chevron* instructs that a court facing statutory ambiguity should accede to a reasonable interpretation by the implementing agency. The court should do so because

the agency is the more politically accountable actor. See 467 U. S., at 865–866. And it should do so because the agency's expertise often enables a sounder assessment of which reading best fits the statutory scheme. See *id.*, at 865.

Here, the Departments have adopted the majority's reading of the statutory delegation ever since its enactment. Over the course of two administrations, the Departments have shifted positions on many questions involving the Women's Health Amendment and the ACA more broadly. But not on whether the Amendment gives HRSA the ability to create exemptions to the contraceptive-coverage mandate. HRSA adopted the original church exemption on the same capacious understanding of its statutory authority as the Departments endorse today. See 76 Fed. Reg. 46623 (2011) ("In the Departments' view, it is appropriate that HRSA, in issuing these Guidelines, takes into account the effect on the religious beliefs of certain religious employers if coverage of contraceptive services were required").[1] While the exemption itself has expanded, the Departments' reading of the statutory delegation—that the law gives HRSA discretion over the "who" question—has remained the same. I would defer to that longstanding and reasonable interpretation.

[1] The First Amendment cannot have separately justified the church exemption, as the dissent suggests. See *post*, at 721–722 (opinion of GINSBURG, J.). That exemption enables a religious institution to decline to provide contraceptive coverage to *all* its employees, from a minister to a building custodian. By contrast, the so-called ministerial exception of the First Amendment (which the dissent cites, see *post*, at 722) extends only to *select* employees, having ministerial status. See *Our Lady of Guadalupe School* v. *Morrissey-Berru*, 591 U. S. 732, 749–751 (2020); *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. 171, 190 (2012). (Too, this Court has applied the ministerial exception only to protect religious institutions from employment discrimination suits, expressly reserving whether the exception excuses their noncompliance with other laws. See *id.*, at 196.) And there is no general constitutional immunity, over and above the ministerial exception, that can protect a religious institution from the law's operation.

But that does not mean the Departments should prevail when these cases return to the lower courts. The States challenged the exemptions not only as outside HRSA's statutory authority, but also as "arbitrary [and] capricious." 5 U. S. C. § 706(2)(A). Because the courts below found for the States on the first question, they declined to reach the second. That issue is now ready for resolution, unaffected by today's decision. An agency acting within its sphere of delegated authority can of course flunk the test of "reasoned decisionmaking." *Michigan* v. *EPA*, 576 U. S. 743, 750 (2015). The agency does so when it has not given "a satisfactory explanation for its action"—when it has failed to draw a "rational connection" between the problem it has identified and the solution it has chosen, or when its thought process reveals "a clear error of judgment." *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). Assessed against that standard of reasonableness, the exemptions HRSA and the Departments issued give every appearance of coming up short.[2]

Most striking is a mismatch between the scope of the religious exemption and the problem the agencies set out to address. In the Departments' view, the exemption was "necessary to expand the protections" for "certain entities and individuals" with "religious objections" to contraception. 83 Fed. Reg. 57537 (2018). Recall that under the old system, an employer objecting to the contraceptive mandate for religious reasons could avail itself of the "self-certification accommodation." *Ante*, at 667. Upon making the certification, the employer no longer had "to contract, arrange, [or] pay" for contraceptive coverage; instead, its insurer would bear the services' cost. 78 Fed. Reg. 39874 (2013). That device dispelled some employers' objections—but not all. The Lit-

[2] I speak here only of the substantive validity of the exemptions. I agree with the Court that the final rules issuing the exemptions were procedurally valid.

tle Sisters, among others, maintained that the accommodation itself made them complicit in providing contraception. The measure thus failed to "assuage[ ]" their "sincere religious objections." 82 Fed. Reg. 47799 (2017). Given that fact, the Departments might have chosen to exempt the Little Sisters and other still-objecting groups from the mandate. But the Departments went further still. Their rule exempted all employers with objections to the mandate, even if the accommodation met their religious needs. In other words, the Departments exempted employers who had no religious objection to the status quo (because they did not share the Little Sisters' views about complicity). The rule thus went beyond what the Departments' justification supported—raising doubts about whether the solution lacks a "rational connection" to the problem described. *State Farm*, 463 U. S., at 43.[3]

And the rule's overbreadth causes serious harm, by the Departments' own lights. In issuing the rule, the Departments chose to retain the contraceptive mandate itself. See 83 Fed. Reg. 57537. Rather than dispute HRSA's prior finding that the mandate is "necessary for women's health and well-being," the Departments left that determination in place. HRSA, Women's Preventive Services Guidelines

[3] At oral argument, the Solicitor General argued that the rule's overinclusion is harmless because the accommodation remains available to all employers who qualify for the exemption. See Tr. of Oral Arg. 20–23. But in their final rule, the Departments themselves acknowledged the prospect that some employers without a religious objection to the accommodation would switch to the exemption. See 83 Fed. Reg. 57576–57577 ("Of course, some of the[ ] religious" institutions that "do not conscientiously oppose participating" in the accommodation "may opt for the expanded exemption[,] but others might not"); *id.*, at 57561 ("[I]t is not clear to the Departments" how many of the religious employers who had used the accommodation without objection "will choose to use the expanded exemption instead"). And the Solicitor General, when pressed at argument, could offer no evidence that, since the rule took effect, employers without the Little Sisters' complicity beliefs had declined to avail themselves of the new exemption. Tr. of Oral Arg. 22.

(Dec. 2019), www.hrsa.gov/womens-guidelines-2019; see 83 Fed. Reg. 57537. The Departments thus committed themselves to minimizing the impact on contraceptive coverage, even as they sought to protect employers with continuing religious objections. But they failed to fulfill that commitment to women. Remember that the accommodation preserves employees' access to cost-free contraceptive coverage, while the exemption does not. See *ante*, at 666–667. So the Departments (again, according to their own priorities) should have exempted only employers who had religious objections to the accommodation—not those who viewed it as a religiously acceptable device for complying with the mandate. The Departments' contrary decision to extend the exemption to those without any religious need for it yielded all costs and no benefits. Once again, that outcome is hard to see as consistent with reasoned judgment. See *State Farm*, 463 U. S., at 43.[4]

Other aspects of the Departments' handiwork may also prove arbitrary and capricious. For example, the Departments allow even publicly traded corporations to claim a religious exemption. See 83 Fed. Reg. 57562–57563. That option is unusual enough to raise a serious question about whether the Departments adequately supported their choice. Cf. *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U. S. 682, 717 (2014) (noting the oddity of "a publicly traded corporation asserting RFRA rights"). Similarly, the Departments offer an exemption to employers who have moral, rather than religious, objections to the contraceptive mandate. Perhaps

[4] In a brief passage in the interim final rule, the Departments suggested that an exemption is "more workable" than the accommodation in addressing religious objections to the mandate. 82 Fed. Reg. 47806. But the Departments continue to provide the accommodation to any religious employers who request that option, thus maintaining a two-track system. See *ante*, at 671; n. 3, *supra*. So ease of administration cannot support, at least without more explanation, the Departments' decision to offer the exemption more broadly than needed.

there are sufficient reasons for that decision—for example, a desire to stay neutral between religion and non-religion. See 83 Fed. Reg. 57603–57604. But RFRA cast a long shadow over the Departments' rulemaking, see *ante*, at 680–683, and that statute does not apply to those with only moral scruples. So a careful agency would have weighed anew, in this different context, the benefits of exempting more employers from the mandate against the harms of depriving more women of contraceptive coverage. In the absence of such a reassessment, it seems a close call whether the moral exemption can survive.

None of this is to say that the Departments could not issue a valid rule expanding exemptions from the contraceptive mandate. As noted earlier, I would defer to the Departments' view of the scope of Congress's delegation. See *supra*, at 706. That means the Departments (assuming they act hand-in-hand with HRSA) have wide latitude over exemptions, so long as they satisfy the requirements of reasoned decisionmaking. But that "so long as" is hardly nothing. Even in an area of broad statutory authority—maybe especially there—agencies must rationally account for their judgments.

JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR joins, dissenting.

In accommodating claims of religious freedom, this Court has taken a balanced approach, one that does not allow the religious beliefs of some to overwhelm the rights and interests of others who do not share those beliefs. See, *e. g.*, *Estate of Thornton* v. *Caldor, Inc.*, 472 U. S. 703, 708–710 (1985); *United States* v. *Lee*, 455 U. S. 252, 258–260 (1982). Today, for the first time, the Court casts totally aside countervailing rights and interests in its zeal to secure religious rights to the *n*th degree. Specifically, in the Women's Health Amendment to the Patient Protection and Affordable

Care Act (ACA), 124 Stat. 119; 155 Cong. Rec. 28841 (2009), Congress undertook to afford gainfully employed women comprehensive, seamless, no-cost insurance coverage for preventive care protective of their health and well-being. Congress delegated to a particular agency, the Health Resources and Services Administration (HRSA), authority to designate the preventive-care insurance should cover. HRSA included in its designation all contraceptives approved by the Food and Drug Administration (FDA).

Destructive of the Women's Health Amendment, this Court leaves women workers to fend for themselves, to seek contraceptive coverage from sources other than their employer's insurer, and, absent another available source of funding, to pay for contraceptive services out of their own pockets. The Constitution's Free Exercise Clause, all agree, does not call for that imbalanced result.[1] Nor does the Religious Freedom Restoration Act of 1993 (RFRA), 42 U. S. C. §2000bb *et seq.*, condone harm to third parties occasioned by entire disregard of their needs. I therefore dissent from the Court's judgment, under which, as the Government estimates, between 70,500 and 126,400 women would immediately lose access to no-cost contraceptive services. On the merits, I would affirm the judgment of the U. S. Court of Appeals for the Third Circuit.

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[1] In *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990), the Court explained that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id.*, at 879 (internal quotation marks omitted). The requirement that insurers cover FDA-approved methods of contraception "applies generally, . . . trains on women's well-being, not on the exercise of religion, and any effect it has on such exercise is incidental." *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U. S. 682, 745 (2014) (GINSBURG, J., dissenting). *Smith* forecloses "[a]ny First Amendment Free Exercise Clause claim [one] might assert" in opposition to that requirement. 573 U. S., at 744.

I

A

Under the ACA, an employer-sponsored "group health plan" must cover specified "preventive health services" without "cost sharing," 42 U. S. C. § 300gg–13, *i. e.*, without such out-of-pocket costs as copays or deductibles.[2] Those enumerated services did not, in the original draft bill, include preventive care specific to women. "To correct this oversight, Senator Barbara Mikulski introduced the Women's Health Amendment," now codified at § 300gg–13(a)(4). *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U. S. 682, 741 (2014) (GINSBURG, J., dissenting); see also 155 Cong. Rec. 28841. This provision was designed "to promote equality in women's access to health care," countering gender-based discrimination and disparities in such access. Brief for 186 Members of the United States Congress as *Amici Curiae* 6 (hereinafter Brief for 186 Members of Congress). Its proponents noted, *inter alia*, that "[w]omen paid significantly more than men for preventive care," and that "cost barriers operated to block many women from obtaining needed care at all." *Hobby Lobby*, 573 U. S., at 742 (GINSBURG, J., dissenting); see, *e. g.*, 155 Cong. Rec. 28844 (statement of Sen. Hagan) ("When . . . women had to choose between feeding their children, paying the rent, and meeting other financial obligations, they skipped important preven-

[2] This requirement does not apply to employers with fewer than 50 employees, 26 U. S. C. § 4980H(c)(2), or "grandfathered health plans"—plans in existence on March 23, 2010 that have not thereafter made specified changes in coverage, 42 U. S. C. § 18011(a), (e); 45 CFR § 147.140(g) (2018). "Federal statutes often include exemptions for small employers, and such provisions have never been held to undermine the interests served by these statutes." *Hobby Lobby*, 573 U. S., at 763 (GINSBURG, J., dissenting). "[T]he grandfathering provision," "far from ranking as a categorical exemption, . . . is temporary, intended to be a means for gradually transitioning employers into mandatory coverage." *Id.*, at 764 (internal quotation marks omitted).

tive screenings and took a chance with their personal health.").

Due to the Women's Health Amendment, the preventive health services that group health plans must cover include, "with respect to women," "preventive care and screenings . . . provided for in comprehensive guidelines supported by [HRSA]." §300gg–13(a)(4). Pursuant to this instruction, HRSA undertook, after consulting the Institute of Medicine,[3] to state "what preventive services are necessary for women's health and well-being and therefore should be considered in the development of comprehensive guidelines for preventive services for women."[4] The resulting "Women's Preventive Services Guidelines" issued in August 2011.[5] Under these guidelines, millions of women who previously had no, or poor quality, health insurance gained cost-free access, not only to contraceptive services but as well to, *inter alia*, annual checkups and screenings for breast cancer, cervical cancer, postpartum depression, and gestational diabetes.[6] As to contraceptive services, HRSA directed that, to implement §300gg–13(a)(4), women's preventive services encompass "all [FDA-]approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity."[7]

[3] "The [Institute of Medicine] is an arm of the National Academy of Sciences, an organization Congress established for the explicit purpose of furnishing advice to the Government." *Id.*, at 742, n. 3 (internal quotation marks omitted).

[4] HRSA, U. S. Dept. of Health and Human Services (HHS), Women's Preventive Services Guidelines, www.hrsa.gov/womens-guidelines/index.html.

[5] 77 Fed. Reg. 8725 (2012).

[6] HRSA, HHS, Women's Preventive Services Guidelines, *supra*.

[7] 77 Fed. Reg. 8725 (alterations and internal quotation marks omitted). Proponents of the Women's Health Amendment specifically anticipated that HRSA would require coverage of family planning services. See, *e. g.*, 155 Cong. Rec. 28841 (2009) (statement of Sen. Boxer); *id.*, at 28843 (statement of Sen. Gillibrand); *id.*, at 28844 (statement of Sen. Mikulski); *id.*, at 28869 (statement of Sen. Franken); *id.*, at 28876 (statement of Sen. Cardin);

Ready access to contraceptives and other preventive measures for which Congress set the stage in § 300gg–13(a)(4) both safeguards women's health and enables women to chart their own life's course. Effective contraception, it bears particular emphasis, "improves health outcomes for women and [their] children," as "women with unintended pregnancies are more likely to receive delayed or no prenatal care" than women with planned pregnancies. Brief for 186 Members of Congress 5 (internal quotation marks omitted); Brief for American College of Obstetricians and Gynecologists et al. as *Amici Curiae* 10 (hereinafter ACOG Brief) (similar). Contraception is also "critical for individuals with underlying medical conditions that would be further complicated by pregnancy" "has . . . health benefits unrelated to preventing pregnancy," (*e. g.*, it can reduce the risk of endometrial and ovarian cancer), Brief for National Women's Law Center et al. as *Amici Curiae* 23–24, 26 (hereinafter NWLC Brief), and "improves women's social and economic status," by "allow[ing] [them] to invest in higher education and a career with far less risk of an unplanned pregnancy," Brief for 186 Members of Congress 5–6 (internal quotation marks omitted).

B

For six years, the Government took care to protect women employees' access to critical preventive health services while accommodating the diversity of religious opinion on contraception. The Internal Revenue Service (IRS), the Employee Benefits Security Administration (EBSA), and the Center for Medicare and Medicaid Services (CMS) crafted a narrow exemption relieving houses of worship, "their integrated auxiliaries," "conventions or associations of churches," and "religious order[s]" from the contraceptive-coverage requirement. 76 Fed. Reg. 46623 (2011). For

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ibid. (statement of Sen. Feinstein); *id.*, at 29307 (statement of Sen. Murray).

other nonprofit and closely held for-profit organizations opposed to contraception on religious grounds, the agencies made available an accommodation rather than an exemption. See 78 Fed. Reg. 39874 (2013); *Hobby Lobby*, 573 U. S., at 730–731.

> "Under th[e] accommodation, [an employer] can self-certify that it opposes providing coverage for particular contraceptive services. See 45 CFR §§ 147.131(b)(4), (c)(1) [(2013)]; 26 CFR §§ 54.9815–2713A(a)(4), (b). If [an employer] makes such a certification, the [employer's] insurance issuer or third-party administrator must '[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan' and '[p]rovide separate payments for any contraceptive services required to be covered' without imposing 'any cost-sharing requirements . . . on the [employer], the group health plan, or plan participants or beneficiaries.' 45 CFR § 147.131(c)(2); 26 CFR § 54.9815–2713A(c)(2)." *Id.*, at 731 (some alterations in original).[8]

The self-certification accommodation, the Court observed in *Hobby Lobby*, "does not impinge on [an employer's] belief that providing insurance coverage for . . . contraceptives . . . violates [its] religion." *Ibid.* It serves "a Government interest of the highest order," *i. e.*, providing women employees "with cost-free access to all FDA-approved methods of contraception." *Id.*, at 729. And "it serves [that] stated interes[t] . . . well." *Id.*, at 731; see *id.*, at 693 (Government properly accommodated employer's religion-based objection

[8] This opinion refers to the contraceptive-coverage accommodation made in 2013 as the "self-certification accommodation." See *ante*, at 667 (opinion of the Court). Although this arrangement "requires the issuer to bear the cost of [contraceptive] services, HHS has determined that th[e] obligation will not impose any net expense on issuers because its cost will be less than or equal to the cost savings resulting from th[ose] services." *Hobby Lobby*, 573 U. S., at 698–699.

to covering contraceptives under employer's health insurance plan when the harm to women of doing so "would be precisely zero"). Since the ACA's passage, "[gainfully employed] [w]omen, particularly in lower-income groups, have reported greater affordability of coverage, access to health care, and receipt of preventive services." Brief for 186 Members of Congress 21.

C

Religious employers, including petitioner Little Sisters of the Poor Saints Peter and Paul Home (Little Sisters), nonetheless urge that the self-certification accommodation renders them "complicit in providing [contraceptive] coverage to which they sincerely object." Brief for Little Sisters 35. In 2017, responsive to the pleas of such employers, the Government abandoned its effort to both end discrimination against employed women in access to preventive services and accommodate religious exercise. Under new rules drafted not by HRSA, but by the IRS, EBSA, and CMS, *any* "non-governmental employer"—even a publicly traded for-profit company—can avail itself of the religious exemption previously reserved for houses of worship. 82 Fed. Reg. 47792 (2017) (interim final rule); 45 CFR § 147.132(a)(1)(i)(E) (2018).[9] More than 2.9 million Americans—including approximately 580,000 women of childbearing age—receive insurance through organizations newly eligible for this blanket exemption. 83 Fed. Reg. 57577–57578 (2018). Of cardinal significance, the exemption contains no alternative mechanism to ensure affected women's continued access to contraceptive coverage. See 45 CFR § 147.132.

Pennsylvania and New Jersey, respondents here, sued to enjoin the exemption. Their lawsuit posed this core ques-

[9] Nonprofit and closely held for-profit organizations with "sincerely held moral convictions" against contraception also qualify for the exemption. 45 CFR § 147.133(a)(1)(i), (a)(2). Unless otherwise noted, this opinion refers to the religious and moral exemptions together as "the exemption" or "the blanket exemption."

tion: May the Government jettison an arrangement that promotes women workers' well-being while accommodating employers' religious tenets and, instead, defer entirely to employers' religious beliefs, although that course harms women who do not share those beliefs? The District Court answered "no," and preliminarily enjoined the blanket exemption nationwide. 281 F. Supp. 3d 553, 585 (ED Pa. 2017). The Court of Appeals affirmed. 930 F. 3d 543, 576 (CA3 2019). The same question is now presented for ultimate decision by this Court.

II

Despite Congress' endeavor, in the Women's Health Amendment to the ACA, to redress discrimination against women in the provision of healthcare, the exemption the Court today approves would leave many employed women just where they were before insurance issuers were obliged to cover preventive services for them, cost free. The Government urges that the ACA itself authorizes this result, by delegating to HRSA authority to exempt employers from the contraceptive-coverage requirement. This argument gains the Court's approbation. It should not.

A

I begin with the statute's text. But see *ante*, at 678 (opinion of the Court) (overlooking my starting place). The ACA's preventive-care provision, 42 U. S. C. §300gg–13(a), reads in full:

> "A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for—
>
> "(1) evidence-based items or services that have in effect a rating of 'A' or 'B' in the current recommendations of the United States Preventive Services Task Force;
>
> "(2) immunizations that have in effect a recommendation from the Advisory Committee on Immunization

> Practices of the Centers for Disease Control and Prevention with respect to the individual involved; . . .
>
> "(3) with respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in the comprehensive guidelines supported by [HRSA; and]
>
> "(4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by [HRSA] for purposes of this paragraph."

At the start of this provision, Congress instructed who is to "provide coverage for" the specified preventive health services: "group health plan[s]" and "health insurance issuer[s]." § 300gg–13(a). As the Court of Appeals explained, paragraph (a)(4), added by the Women's Health Amendment, granted HRSA "authority to issue 'comprehensive guidelines' concern[ing] the *type* of services" group health plans and health insurance issuers must cover with respect to women. 930 F. 3d, at 570 (emphasis added). Nothing in paragraph (a)(4) accorded HRSA "authority to undermine Congress's [initial] directive," stated in subsection (a), "concerning *who* must provide coverage for these services." *Ibid.* (emphasis added).

The Government argues otherwise, asserting that "[t]he sweeping authorization for HRSA to 'provide[ ] for' and 'support[ ]' guidelines 'for purposes of ' the women's preventive-services mandate clearly grants HRSA the power not just to specify what services should be covered, but also to provide appropriate exemptions." Brief for HHS et al. 15.[10] This terse statement—the entirety of the Government's textual case—slights the language Congress employed. Most visibly, the Government does not endeavor to explain how any

[10] This opinion uses "Brief for HHS et al." to refer to the Brief for Petitioners in No. 19–454, filed on behalf of the Departments of HHS, Treasury, and Labor, the Secretaries of those Departments, and the President.

language in paragraph (a)(4) counteracts Congress' opening instruction in § 300gg–13(a) that group health plans "shall . . . provide" specified services. See *supra*, at 717–718.

The Court embraces, and the opinion concurring in the judgment adopts, the Government's argument. The Court correctly acknowledges that HRSA has broad discretion to determine *what* preventive services insurers should provide for women. *Ante*, at 678. But it restates that HRSA's "discretion [is] equally unchecked in other areas, including the ability to identify and create exemptions from its own Guidelines." *Ibid.* See also *ante*, at 705–706 (KAGAN, J., concurring in judgment) (agreeing with this interpretation). Like the Government, the Court and the opinion concurring in the judgment shut from sight § 300gg–13(a)'s overarching direction that group health plans and health insurance issuers "shall" cover the specified services. See *supra*, at 717–718 and this page. That " 'absent provision[s] cannot be supplied by the courts,' " *ante*, at 677 (quoting *Rotkiske* v. *Klemm*, 589 U. S. 8, 14 (2019), militates *against* the Court's conclusion, not in favor of it. Where Congress wanted to exempt certain employers from the ACA's requirements, it said so expressly. See, *e. g.*, *supra*, at 712, n. 2. Section 300gg–13(a)(4) includes no such exemption. See *supra*, at 717–718 and this page.[11]

B

The position advocated by the Government and endorsed by the Court and the opinion concurring in the judgment encounters further obstacles.

Most saliently, the language in § 300gg–13(a)(4) mirrors that in § 300gg–13(a)(3), the provision addressing *children's* preventive health services. Not contesting here that HRSA

[11] The only language to which the Court points in support of its contrary conclusion is the phrase "as provided for." See *ante*, at 676. This phrase modifies "additional preventive care and screenings." § 300gg–13(a)(4). It therefore speaks to *what* services shall be provided, not *who* must provide them.

lacks authority to exempt group health plans from the children's preventive-care guidelines, the Government attempts to distinguish paragraph (a)(3) from paragraph (a)(4). Brief for HHS et al. 16–17. The attempt does not withstand inspection.

The Government first observes that (a)(4), unlike (a)(3), contemplates guidelines created "*for purposes of this paragraph*." (Emphasis added.) This language does not speak to the scope of the guidelines HRSA is charged to create. Moreover, the Government itself accounts for this textual difference: The children's preventive-care guidelines described in paragraph (a)(3) were "preexisting guidelines . . . developed for purposes unrelated to the ACA." Brief for HHS et al. 16. The guidelines on women's preventive care, by contrast, did not exist before the ACA; they had to be created "for purposes of" the preventive-care mandate. § 300gg–13(a)(4). The Government next points to the modifier "evidence-informed" placed in (a)(3), but absent in (a)(4). This omission, however it may bear on the kind of preventive services for women HRSA can require group health insurance to cover, does not touch or concern *who* is required to cover those services.[12]

HRSA's role within HHS also tugs against the Government's, the Court's, and the opinion concurring in the judgment's construction of § 300gg–13(a)(4). That agency was a logical choice to determine *what* women's preventive services should be covered, as its mission is to "improve health care access" and "eliminate health disparities."[13] First and foremost, § 300gg–13(a)(4) is directed at eradicating gender-based disparities in access to preventive care. See *supra*, at 712–713. Overlooked by the Court, see *ante*, at 675–679, and the

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[12] The Court does not say whether, in its view, the exemption authority it claims for women's preventive care exists as well for HRSA's children's preventive-care guidelines.

[13] HRSA, HHS, Organization, www.hrsa.gov/about/organization/index.html.

opinion concurring in the judgment, see *ante*, at 705–706 (opinion of KAGAN, J.), HRSA's expertise does not include any proficiency in delineating religious and moral exemptions. One would not, therefore, expect Congress to delegate to HRSA the task of crafting such exemptions. See *King* v. *Burwell*, 576 U. S. 473, 486 (2015) ("It is especially unlikely that Congress would have delegated this decision to [an agency] which has no expertise in . . . policy of this sort.").[14]

In fact, HRSA *did not* craft the blanket exemption. As earlier observed, see *supra*, at 716, that task was undertaken by the IRS, EBSA, and CMS. See also 45 CFR §147.132(a)(1), 147.133(a)(1) (direction by the IRS, EBSA, and CMS that HRSA's guidelines "*must not* provide for" contraceptive coverage in the circumstances described in the blanket exemption (emphasis added)). Nowhere in 42 U. S. C. §300gg–13(a)(4) are those agencies named, as earlier observed, see *supra*, at 717–718, an absence the Government, the Court, and the opinion concurring in the judgment do not deign to acknowledge. See Brief for HHS et al. 15–20; *ante*, at 675–679 (opinion of the Court); *ante*, at 705–706 (opinion of KAGAN, J.).

C

If the ACA does not authorize the blanket exemption, the Government urges, then the exemption granted to houses of worship in 2011 must also be invalid. Brief for HHS et al. 19–20. As the Court of Appeals explained, however, see 930 F. 3d, at 570, n. 26, the latter exemption is not attributable to the ACA's text; it was justified on First Amend-

[14] A more logical choice would have been HHS's Office for Civil Rights (OCR), which "enforces . . . conscience and religious freedom laws" with respect to HHS programs. HHS, OCR, About Us, www.hhs.gov/ocr/about-us/index.html. Indeed, when the Senate introduced an amendment to the ACA similar in character to the blanket exemption, a measure that failed to pass, the Senate instructed that OCR administer the exemption. 158 Cong. Rec. 1415 (2012) (proposed amendment); *id.*, at 2634 (vote tabling amendment).

ment grounds. See *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. 171, 188 (2012) (the First Amendment's "ministerial exception" protects "the internal governance of [a] church"); 80 Fed. Reg. 41325 (2015) (the exemption "recogni[zes] [the] particular sphere of autonomy [afforded to] houses of worship . . . consistent with their special status under longstanding tradition in our society").[15] Even if the house-of-worship exemption extends beyond what the First Amendment would require, see *ante*, at 706, n. 1 (opinion of KAGAN, J.), that extension, as just explained, cannot be extracted from the ACA's text.[16]

III

Because I conclude that the blanket exemption gains no aid from the ACA, I turn to the Government's alternative argument. The *religious* exemption, if not the moral exemption, the Government urges, is necessary to protect religious freedom. The Government does not press a free exercise argument, see *supra*, at 711, and n. 1, instead invoking RFRA. Brief for HHS et al. 20–31. That statute instructs that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless doing so "is the least

[15] On the broad scope the Court today attributes to the "ministerial exception," see *Our Lady of Guadalupe School* v. *Morrissey-Berru*, 591 U. S. 732 (2020).

[16] The Government does not argue that my view of the limited compass of §300gg–13(a)(4) imperils the self-certification accommodation. Brief for HHS et al. 19–20. But see *ante*, at 679, n. 9 (opinion of the Court). That accommodation aligns with the Court's decisions under the Religious Freedom Restoration Act of 1993 (RFRA). See *infra*, at 723–724. It strikes a balance between women's health and religious opposition to contraception, preserving women's access to seamless, no-cost contraceptive coverage, but imposing the obligation to provide such coverage directly on insurers, rather than on the objecting employer. See *supra*, at 715–716; *infra*, at 727–729. The blanket exemption, in contrast, entirely disregards women employees' preventive-care needs.

restrictive means of furthering [a] compelling governmental interest." 42 U. S. C. § 2000bb–1(a), (b).

A

1

The parties here agree that federal agencies may craft accommodations and exemptions to cure violations of RFRA. See, *e. g.*, Brief for Respondents 36.[17] But that authority is not unbounded. *Cutter* v. *Wilkinson*, 544 U. S. 709, 720 (2005) (construing Religious Land Use and Institutionalized Persons Act of 2000, the Court cautioned that "adequate account" must be taken of "the burdens a requested accommodation may impose on nonbeneficiaries" of the Act); *Caldor*, 472 U. S., at 708–710 (invalidating state statute requiring employers to accommodate an employee's religious observance for failure to take into account the burden such an accommodation would impose on the employer and other employees). "[O]ne person's right to free exercise must be kept in harmony with the rights of her fellow citizens." *Hobby Lobby*, 573 U. S., at 765, n. 25 (GINSBURG, J., dissenting). See also *id.*, at 746 ("[Y]our right to swing your arms ends just where the other man's nose begins." (quoting Chafee, Freedom of Speech in War Time, 32 Harv. L. Rev. 932, 957 (1919))).

In this light, the Court has repeatedly assumed that any religious accommodation to the contraceptive-coverage requirement would preserve women's continued access to seamless, no-cost contraceptive coverage. See *Zubik* v. *Burwell*, 578 U. S. 403, 408 (2016) (*per curiam*) ("[T]he parties on remand should be afforded an opportunity to arrive

[17] But see, *e. g.*, Brief for Professors of Criminal Law et al. as *Amici Curiae* 8–11 (RFRA does not grant agencies independent rulemaking authority; instead, laws allegedly violating RFRA must be challenged in court). No party argues that agencies can act to cure violations of RFRA only after a court has found a RFRA violation, and this opinion does not adopt any such view.

at an approach . . . that accommodates petitioners' religious exercise while . . . ensuring that women covered by petitioners' health plans receive full and equal health coverage, including contraceptive coverage." (internal quotation marks omitted)); *Wheaton College* v. *Burwell*, 573 U. S. 958, 959 (2014) ("Nothing in this interim order affects the ability of applicant's employees and students to obtain, without cost, the full range of [FDA] approved contraceptives."); *Hobby Lobby*, 573 U. S., at 692 ("There are other ways in which Congress or HHS could equally ensure that every woman has cost-free access to . . . all [FDA]-approved contraceptives. In fact, HHS has already devised and implemented a system that seeks to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of [other] companies.").

The assumption made in the above-cited cases rests on the basic principle just stated, one on which this dissent relies: While the Government may "accommodate religion beyond free exercise requirements," *Cutter*, 544 U. S., at 713, when it does so, it may not benefit religious adherents at the expense of the rights of third parties. See, *e. g.*, *id.*, at 722 ("[A]n accommodation must be measured so that it does not override other significant interests."); *Caldor*, 472 U. S., at 710 (religious exemption was invalid for its "unyielding weighting in favor of" interests of religious adherents "over all other interests"). Holding otherwise would endorse "the regulatory equivalent of taxing non-adherents to support the faithful." Brief for Church-State Scholars as *Amici Curiae* 3.

2

The expansive religious exemption at issue here imposes significant burdens on women employees. Between 70,500 and 126,400 women of childbearing age, the Government estimates, will experience the disappearance of the contracep-

tive coverage formerly available to them, 83 Fed. Reg. 57578–57580; indeed, the numbers may be even higher.[18] Lacking any alternative insurance coverage mechanism, see *supra*, at 716, the exemption leaves women two options, neither satisfactory.

The first option—the one suggested by the Government in its most recent rulemaking, 82 Fed. Reg. 47803—is for women to seek contraceptive care from existing government-funded programs. Such programs, serving primarily low-income individuals, are not designed to handle an influx of tens of thousands of previously insured women.[19] Moreover, as the Government has acknowledged, requiring women "to take steps to learn about, and to sign up for, a new health benefit" imposes "additional barriers," "mak[ing] that coverage accessible to fewer women." 78 Fed. Reg. 39888. Finally, obtaining care from a government-funded program instead of one's regular care provider creates a continuity-of-

[18] The Government notes that 2.9 million people were covered by the 209 plans that previously utilized the self-certification accommodation. 83 Fed. Reg. 57577. One hundred nine of those plans covering 727,000 people, the Government estimates, will use the religious exemption, while 100 plans covering more than 2.1 million people will continue to use the self-certification accommodation. *Id.*, at 57578. If more plans, or plans covering more people, use the new exemption, more women than the Government estimates will be affected.

[19] Title X "is the only federal grant program dedicated solely to providing individuals with comprehensive family planning and related preventive health services." HHS, About Title X Grants, www.hhs.gov/opa/title-x-family-planning/about-title-x-grants/index.html. A recent rule makes women who lose contraceptive coverage due to the religious exemption eligible for Title X services. See 84 Fed. Reg. 7734 (2019). Expanding *eligibility*, however, "does nothing to ensure Title X providers actually have capacity to meet the expanded client population." Brief for National Women's Law Center et al. as *Amici Curiae* 22. Moreover, that same rule forced 1,041 health providers, serving more than 41% of Title X patients, out of the Title X provider network due to their affiliation with abortion providers. 84 Fed. Reg. 7714; Brief for Planned Parenthood Federation of America et al. as *Amici Curiae* 18–19.

care problem, "forc[ing those] who lose coverage away from trusted providers who know their medical histories." NWLC Brief 18.

The second option for women losing insurance coverage for contraceptives is to pay for contraceptive counseling and devices out of their own pockets. Notably, however, "the most effective contraception is also the most expensive." ACOG Brief 14–15. "[T]he cost of an IUD [intrauterine device]," for example, "is nearly equivalent to a month's full-time pay for workers earning the minimum wage." *Hobby Lobby*, 573 U. S., at 762 (GINSBURG, J., dissenting). Faced with high out-of-pocket costs, many women will forgo contraception, Brief for 186 Members of Congress 11, or resort to less effective contraceptive methods, 930 F. 3d, at 563.

As the foregoing indicates, the religious exemption "reintroduce[s] the very health inequities and barriers to care that Congress intended to eliminate when it enacted the women's preventive services provision of the ACA." NWLC Brief 5. "No tradition, and no prior decision under RFRA, allows a religion-based exemption when [it] would be harmful to others—here, the very persons the contraceptive coverage requirement was designed to protect." *Hobby Lobby*, 573 U. S., at 764 (GINSBURG, J., dissenting).[20] I would therefore hold the religious exemption neither required nor permitted by RFRA.[21]

B

Pennsylvania and New Jersey advance an additional argument: The exemption is not authorized by RFRA, they main-

[20] Remarkably, JUSTICE ALITO maintains that stripping women of insurance coverage for contraceptive services imposes no burden. See *ante*, at 703–704 (concurring opinion). He reaches this conclusion because, in his view, federal law does not require the contraceptive coverage denied to women under the exemption. *Ante*, at 703. Congress, however, called upon HRSA to specify contraceptive and other preventive services for women in order to ensure equality in women employees' access to healthcare, thus safeguarding their health and well-being. See *supra*, at 712–714.

[21] As above stated, the Government does not defend the moral exemption under RFRA. See *supra*, at 722.

tain, because the self-certification accommodation it replaced was sufficient to alleviate any substantial burden on religious exercise. Brief for Respondents 36–42. That accommodation, I agree, further indicates the religious exemption's flaws.

1

For years, religious organizations have challenged the self-certification accommodation as insufficiently protective of their religious rights. See, *e. g.*, *Zubik*, 578 U. S., at 406–407. While I do not doubt the sincerity of these organizations' opposition to that accommodation, *Hobby Lobby*, 573 U. S., at 758–759 (GINSBURG, J., dissenting), I agree with Pennsylvania and New Jersey that the accommodation does not substantially burden objectors' religious exercise.

As Senator Hatch observed, "[RFRA] does not require the Government to justify every action that has some effect on religious exercise." 139 Cong. Rec. 26180 (1993). *Bowen* v. *Roy*, 476 U. S. 693 (1986), is instructive in this regard. There, a Native American father asserted a sincere religious belief that his daughter's spirit would be harmed by the Government's use of her social security number. *Id.*, at 697. The Court, while casting no doubt on the sincerity of this religious belief, explained:

> "Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family. The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Id.*, at 699.[22]

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[22] JUSTICE ALITO disputes the relevance of *Roy*, asserting that the religious adherent in that case faced no penalty for noncompliance with the legal requirement under consideration. See *ante*, at 692–693, n. 5. As JUSTICE ALITO acknowledges, however, the critical inquiry has two parts. See *ante*, at 692–693. It is not enough to ask whether noncompliance entails "substantial adverse practical consequences." *Ante*, at 692. One must also ask

Roy signals a critical distinction in the Court's religious exercise jurisprudence: A religious adherent may be entitled to religious accommodation with regard to her own conduct, but she is not entitled to "'insist that . . . *others* must conform *their* conduct to [her] own religious necessities.'" *Caldor*, 472 U. S., at 710 (quoting *Otten* v. *Baltimore & Ohio R. Co.*, 205 F. 2d 58, 61 (CA2 1953) (Hand, J.); emphasis added).[23] Counsel for the Little Sisters acknowledged as much when he conceded that religious "employers could [not] object at all" to a "government obligation" to provide contraceptive coverage "imposed directly on the insurers." Tr. of Oral Arg. 41.[24]

But that is precisely what the self-certification accommodation does. As the Court recognized in *Hobby Lobby*: "When a group-health-insurance issuer receives notice that [an employer opposes coverage for some or all contraceptive services for religious reasons], the issuer must then exclude [that] coverage from the employer's plan and provide separate payments for contraceptive services for plan participants." 573 U. S., at 698–699; see also *id.*, at 738 (Kennedy, J., concurring) ("The accommodation works by requiring *insurance companies* to cover . . . contraceptive coverage for female employees who wish it." (emphasis added)). Under the self-certification accommodation, then, the objecting employer is absolved of any obligation to provide the contracep-

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whether compliance substantially burdens religious exercise. Like *Roy*, my dissent homes in on the latter question.

[23] Even if RFRA sweeps more broadly than the Court's pre-*Smith* jurisprudence in some respects, see *Hobby Lobby*, 573 U. S., at 695, n. 3; but see *id.*, at 749–750 (GINSBURG, J., dissenting), there is no cause to believe that Congress jettisoned this fundamental distinction.

[24] JUSTICE ALITO ignores the distinction between (1) a request for an accommodation with regard to one's own conduct, and (2) an attempt to require others to conform their conduct to one's own religious beliefs. This distinction is fatal to JUSTICE ALITO's argument that the self-certification accommodation violates RFRA. See *ante*, at 692–696.

tive coverage to which it objects; that obligation is transferred to the insurer. This arrangement "furthers the Government's interest [in women's health] but does not impinge on the [employer's] religious beliefs." *Ibid.*; see *supra*, at 727–729.

2

The Little Sisters, adopting the arguments made by religious organizations in *Zubik*, resist this conclusion in two ways. First, they urge that contraceptive coverage provided by an insurer under the self-certification accommodation forms "part of the same plan as the coverage provided by the employer." Brief for Little Sisters 12 (internal quotation marks omitted). See also Tr. of Oral Arg. 29 (Little Sisters object "to having their plan hijacked"); *ante*, at 694 (ALITO, J., concurring) (Little Sisters object to "maintain[ing] and pay[ing] for a plan under which coverage for contraceptives would be provided"). This contention is contradicted by the plain terms of the regulation establishing that accommodation: To repeat, an insurance issuer "must . . . *[e]xpressly exclude* contraceptive coverage from the group health insurance coverage provided in connection with the group health plan." 45 CFR § 147.131(c)(2)(i)(A) (2013) (emphasis added); see *supra*, at 715.[25]

Second, the Little Sisters assert that "tak[ing] affirmative steps to execute paperwork . . . necessary for the provision of 'seamless' contraceptive coverage to their employees" implicates them in providing contraceptive services to women in violation of their religious beliefs. Little Sisters Reply Brief 7. At the same time, however, they have been ada-

[25] Religious organizations have observed that, under the self-certification accommodation, insurers need not, and do not, provide contraceptive coverage under a separate policy number. Supp. Brief for Petitioners in *Zubik* v. *Burwell*, O. T. 2015, No. 14–1418, p. 1. This objection does not relate to a religious employer's own conduct; instead, it concerns the *insurer's* conduct. See *supra*, at 727–729.

mant that they do not oppose merely "register[ing] their objections" to the contraceptive-coverage requirement. *Ibid.* See also Tr. of Oral Arg. 29, 42–43 (Little Sisters have "no objection to objecting"); *ante*, at 694 (ALITO, J., concurring) (Little Sisters' "concern was not with notifying the Government that they wished to be exempted from complying with the mandate *per se*"). These statements, taken together, reveal that the Little Sisters do not object to what the self-certification accommodation asks of *them*, namely, attesting to their religious objection to contraception. See *supra*, at 715–716. They object, instead, to the particular use insurance issuers make of that attestation. See *supra*, at 727–729.[26] But that use originated from the ACA and its once-implementing regulation, not from religious employers' self-certification or alternative notice.

* * *

The blanket exemption for religious and moral objectors to contraception formulated by the IRS, EBSA, and CMS is inconsistent with the text of, and Congress' intent for, both the ACA and RFRA. Neither law authorizes it.[27] The original administrative regulation accommodating religious objections to contraception appropriately implemented the ACA and RFRA consistent with Congress' staunch determination to afford women employees equal access to preventive services, thereby advancing public health and welfare and

[26] JUSTICE ALITO asserts that the Little Sisters' "situation [is] the same as that of the conscientious objector in *Thomas* [v. *Review Bd. of Ind. Employment Security Div.*, 450 U. S. 707, 715 (1981)]." *Ante*, at 695. I disagree. In *Thomas*, a Jehovah's Witness objected to "work[ing] on weapons," 450 U. S., at 710, which is what his employer required of him. As above stated, however, the Little Sisters have no objection to objecting, the only other action the self-certification accommodation requires of them.

[27] Given this conclusion, I need not address whether the exemption is procedurally invalid. See *ante*, at 683–686 (opinion of the Court).

women's well-being. I would therefore affirm the judgment of the Court of Appeals.[28]

[28] Although the Court does not reach the issue, the District Court did not abuse its discretion in issuing a nationwide injunction. The Administrative Procedure Act contemplates nationwide relief from invalid agency action. See 5 U. S. C. § 706(2) (empowering courts to "hold unlawful and set aside agency action"). Moreover, the nationwide reach of the injunction "was 'necessary to provide complete relief to the plaintiffs.'" *Trump* v. *Hawaii*, 585 U. S. 667, 751, n. 13 (2018) (SOTOMAYOR, J., dissenting) (quoting *Madsen* v. *Women's Health Center, Inc.*, 512 U. S. 753, 765 (1994)). Harm to Pennsylvania and New Jersey, the Court of Appeals explained, occurs because women who lose benefits under the exemption "will turn to state-funded services for their contraceptive needs and for the unintended pregnancies that may result from the loss of coverage." 930 F. 3d, at 562. This harm is not bounded by state lines. The Court of Appeals noted, for example, that some 800,000 residents of Pennsylvania and New Jersey work—and thus receive their health insurance—out of State. *Id.*, at 576. Similarly, many students who attend colleges and universities in Pennsylvania and New Jersey receive their health insurance from their parents' out-of-state health plans. *Ibid.*

Syllabus

OUR LADY OF GUADALUPE SCHOOL *v.* MORRISSEY-BERRU

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

No. 19–267. Argued May 11, 2020—Decided July 8, 2020*

The First Amendment protects the right of religious institutions "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff* v. *Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U. S. 94, 116. Applying this principle, this Court held in *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. 171, that the First Amendment barred a court from entertaining an employment discrimination claim brought by an elementary school teacher, Cheryl Perich, against the religious school where she taught. Adopting the so-called "ministerial exception" to laws governing the employment relationship between a religious institution and certain key employees, the Court found relevant Perich's title as a "Minister of Religion, Commissioned," her educational training, and her responsibility to teach religion and participate with students in religious activities. *Id.*, at 190–191.

In these cases, two elementary school teachers at Roman Catholic schools in the Archdiocese of Los Angeles had teaching responsibilities similar to Perich's. Agnes Morrissey-Berru taught at Our Lady of Guadalupe School (OLG), and Kristen Biel taught at St. James School. Both were employed under nearly identical agreements that set out the schools' mission to develop and promote a Catholic school faith community; imposed commitments regarding religious instruction, worship, and personal modeling of the faith; and explained that teachers' performance would be reviewed on those bases. Each was also required to comply with her school's faculty handbook, which set out similar expectations. Each taught religion in the classroom, worshipped with her students, prayed with her students, and had her performance measured on religious bases.

Both teachers sued their schools after their employment was terminated. Morrissey-Berru claimed that OLG had demoted her and had failed to renew her contract in order to replace her with a younger teacher in violation of the Age Discrimination in Employment Act of

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*Together with No. 19–348, *St. James School* v. *Biel, as Personal Representative of the Estate of Biel*, on certiorari to the same Court.

Syllabus

1967. OLG invoked *Hosanna-Tabor*'s "ministerial exception" and successfully moved for summary judgment, but the Ninth Circuit reversed, holding that Morrissey-Berru did not fall within the exception because she did not have the formal title of "minister," had limited formal religious training, and did not hold herself out publicly as a religious leader. Biel alleged that St. James discharged her because she had requested a leave of absence to obtain breast cancer treatment. Like OLG, St. James obtained summary judgment under the "ministerial exception." But the Ninth Circuit reversed, reasoning that Biel lacked Perich's credentials, religious training, and ministerial background.

Held: The First Amendment's Religion Clauses foreclose the adjudication of Morrissey-Berru's and Biel's employment discrimination claims. Pp. 746–762.

(a) The independence of religious institutions in matters of "faith and doctrine" is closely linked to independence in what the Court has termed "'matters of church government.'" *Hosanna-Tabor*, 565 U. S., at 186. For this reason, courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions. Pp. 746–747.

(b) When the "ministerial exception" reached this Court in *Hosanna-Tabor*, the Court looked to precedent and the "background" against which "the First Amendment was adopted," 565 U. S., at 183, and unanimously recognized that the Religion Clauses foreclose certain employment discrimination claims brought against religious organizations, *id.*, at 188. Pp. 747–749.

(c) In *Hosanna-Tabor*, the Court applied the "ministerial exception" but declined "to adopt a rigid formula for deciding when an employee qualifies as a minister." 565 U. S., at 190. Instead, the Court identified four relevant circumstances of Perich's employment at an Evangelical Lutheran school. First, Perich's church had given her the title of "minister, with a role distinct from that of most of its members." *Id.*, at 191. Second, her position "reflected a significant degree of religious training followed by a formal process of commissioning." *Ibid.* Third, she "held herself out as a minister of the Church" and claimed certain tax benefits. *Id.*, at 191–192. Fourth, her "job duties reflected a role in conveying the Church's message and carrying out its mission." *Id.*, at 192. Pp. 749–751.

(d) A variety of factors may be important in determining whether a particular position falls within the ministerial exception. The circumstances that informed the Court's decision in *Hosanna-Tabor* were relevant because of their relationship to Perich's "role in conveying the Church's message and carrying out its mission." 565 U. S., at 192. But

the recognition of the significance of those factors in Perich's case did not mean that they must be met in all other cases. What matters is what an employee does. Implicit in the *Hosanna-Tabor* decision was a recognition that educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of a private religious school's mission. Pp. 751–756.

(e) Applying this understanding of the Religion Clauses here, it is apparent that Morrissey-Berru and Biel qualify for the exception recognized in *Hosanna-Tabor*. There is abundant record evidence that they both performed vital religious duties, such as educating their students in the Catholic faith and guiding their students to live their lives in accordance with that faith. Their titles did not include the term "minister" and they had less formal religious training than Perich, but their core responsibilities were essentially the same. And their schools expressly saw them as playing a vital role in carrying out the church's mission. A religious institution's explanation of the role of its employees in the life of the religion in question is important. Pp. 756–757.

(f) The Ninth Circuit mistakenly treated the circumstances the Court found relevant in *Hosanna-Tabor* as a checklist of items to be assessed and weighed against each other. That rigid test produced a distorted analysis. First, it invested undue significance in the fact that Morrissey-Berru and Biel did not have clerical titles. Second, it assigned too much weight to the fact that Morrissey-Berru and Biel had less formal religious schooling that Perich. Third, the *St. James* panel inappropriately diminished the significance of Biel's duties. Respondents would make *Hosanna-Tabor*'s governing test even more rigid. And they go further astray in suggesting that an employee can never come within the *Hosanna-Tabor* exception unless the employee is a "practicing" member of the religion with which the employer is associated. Deciding such questions risks judicial entanglement in religious issues. Pp. 757–762.

No. 19–267, 769 Fed. Appx. 460; No. 19–348, 911 F. 3d 603, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, BREYER, KAGAN, GORSUCH, and KAVANAUGH, JJ., joined. THOMAS, J., filed a concurring opinion, in which GORSUCH, J., joined, *post*, p. 762. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 766.

Eric C. Rassbach argued the cause for petitioners. With him on the briefs were *Daniel H. Blomberg*, *Diana M. Verm*, *Adèle Auxier Keim*, *Margaret G. Graf*, *John J. Manier*,

Linda Miller Savitt, *Stephanie Kantor*, and *Jack S. Sholkoff*.

Morgan L. Ratner argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General Francisco*, *Assistant Attorney General Dreiband*, *Deputy Solicitor General Wall*, *Deputy Assistant Attorney General Maugeri*, *Michael R. Huston*, *Eric W. Treene*, *Sharon Fast Gustafson*, and *Rachel N. Morrison*.

Jeffrey L. Fisher argued the cause for respondents. With him on the brief were *Jennifer A. Lipski*, *Joseph M. Lovretovich*, *Cathryn G. Fund*, *Bradley N. Garcia*, and *Yaira Dubin*.†

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†A brief of *amici curiae* urging reversal in No. 19–267 was filed for the State of Alaska et al. by *Kevin G. Clarkson*, Attorney General of Alaska, *Dario Borghesan*, Chief Assistant Attorney General, and *Katherine Demarest* and *Anna Jay*, Assistant Attorneys General, and by the Attorneys General for their respective jurisdictions as follows: *Steve Marshall* of Alabama, *Mark Brnovich* of Arizona, *Leslie Rutledge* of Arkansas, *Christopher M. Carr* of Georgia, *Curtis T. Hill, Jr.*, of Indiana, *Daniel Cameron* of Kentucky, *Jeff Landry* of Louisiana, *Eric S. Schmitt* of Missouri, *Timothy C. Fox* of Montana, *Douglas J. Peterson* of Nebraska, *Dave Yost* of Ohio, *Mike Hunter* of Oklahoma, *Alan Wilson* of South Carolina, *Herbert H. Slatery III* of Tennessee, *Ken Paxton* of Texas, and *Sean D. Reyes* of Utah.

Briefs of *amici curiae* urging reversal in both cases were filed for the American Center for Law and Justice by *Jay Alan Sekulow*, *Stuart J. Roth*, *Colby M. May*, and *Laura B. Hernandez*; for the American Jewish Committee et al. by *Michael H. McGinley* and *Steven B. Feirson*; for the Association of Classical Christian Schools et al. by *Misha Tseytlin*, *Kristen K. Waggoner*, *David A. Cortman*, *John J. Bursch*, *Gregory Baylor*, *Rory T. Gray*, and *Brett B. Harvey*; for the Billy Graham Evangelistic Association et al. by *Frederick W. Claybrook, Jr.*, *Steven W. Fitschen*, *James A. Davids*, and *David A. Bruce*; for the Christian and Missionary Alliance et al. by *Stuart J. Lark*; for the Christian Legal Society et al. by *Reed N. Smith*, *Kimberlee Wood Colby*, and *Thomas C. Berg*; for Church of God in Christ, Inc., et al., by *Thomas H. Dupree, Jr.*, and *Nathan J. Diament*; for the Church of Jesus Christ of Latter-day Saints et al. by *Alexander Dushku* and *R. Shawn Gunnarson*; for COLPA et al. by *Nathan Lewin*, *Alyza D. Lewin*, and *Dennis Rapps*; for Columbia International University et al. by *Christian M. Poland*; for the Council for Christian Colleges

JUSTICE ALITO delivered the opinion of the Court.

These cases require us to decide whether the First Amendment permits courts to intervene in employment disputes involving teachers at religious schools who are entrusted with the responsibility of instructing their students

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Heather L. Weaver, *Daniel Mach*, *David D. Cole*, *Louise Melling*, *Joshua A. Block*, *Melissa Goodman*, *Richard B. Katskee*, *Kenneth D. Upton, Jr.*, and *Steven M. Freeman* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal in No. 19–267 and affirmance in No. 19–348.

Briefs of *amici curiae* urging affirmance in both cases were filed for the Commonwealth of Virginia et al. by *Toby J. Heytens*, Solicitor General of Virginia, *Mark R. Herring*, Attorney General, *Martine E. Cicconi* and *Michelle S. Kallen*, Deputy Solicitors General, *Jessica Merry Samuels*, Assistant Solicitor General, and *Keonna Carter Austin* and *Samuel T. Towell*, Deputy Attorneys General, and by the Attorneys General for their respective jurisdictions as follows: *Xavier Becerra* of California, *Phil Weiser* of Colorado, *William Tong* of Connecticut, *Kathleen Jennings* of Delaware, *Karl A. Ra-*

in the faith. The First Amendment protects the right of religious institutions "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff* v. *Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U. S. 94, 116 (1952). Applying this principle, we held in *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. 171 (2012), that the First Amendment barred a court from entertaining an employment discrimination claim brought by an elementary school teacher, Cheryl Perich, against the religious school where she taught. Our decision built on a line of lower court cases adopting what was dubbed the "ministerial exception" to laws governing the employment relationship between a religious institution and certain key employees. We did not announce "a rigid formula" for determining whether an employee falls within this exception, but we identified circumstances that we found relevant in that case, including Perich's title as a "Minister of Religion, Commissioned," her educational training, and her responsibility to teach religion and participate with students in religious activities. *Id.*, at 190–191.

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cine of the District of Columbia, *Kwame Raoul* of Illinois, *Maura Healey* of Massachusetts, *Dana Nessel* of Michigan, *Keith Ellison* of Minnesota, *Aaron D. Ford* of Nevada, *Gurbir Singh Grewal* of New Jersey, *Letitia James* of New York, *Ellen F. Rosenblum* of Oregon, *Peter F. Neronha* of Rhode Island, *Thomas J. Donovan, Jr.*, of Vermont, and *Robert W. Ferguson* of Washington; for the Center for Inquiry, Inc., et al., by *Edward Tabash* and *Monica L. Miller*; for Child USA et al. by *Leslie C. Griffin*; for Clergy and Laity United for Economic Justice et al. by *Ryan H. Wu*; for the Freedom From Religion Foundation et al. by *Patrick Elliott*; for the National Employment Lawyers Association et al. by *Michael L. Foreman*; and for the National Women's Law Center et al. by *Kevin K. Russell*, *Fatima Goss Graves*, *Emily Martin*, *Sunu P. Chandy*, *Vanita Gupta*, and *Michael Zubrensky*.

Briefs of *amici curiae* in both cases were filed for the Center for Constitutional Jurisprudence *by John C. Eastman* and *Anthony T. Caso*; for The Rutherford Institute by *Nathan A. Adams IV* and *John W. Whitehead*; and for Torah Umesorah by *Igor V. Timofeyev*, *Michael S. Wise*, and *Joanne Joseph*.

In the cases now before us, we consider employment discrimination claims brought by two elementary school teachers at Catholic schools whose teaching responsibilities are similar to Perich's. Although these teachers were not given the title of "minister" and have less religious training than Perich, we hold that their cases fall within the same rule that dictated our decision in *Hosanna-Tabor*. The religious education and formation of students is the very reason for the existence of most private religious schools, and therefore the selection and supervision of the teachers upon whom the schools rely to do this work lie at the core of their mission. Judicial review of the way in which religious schools discharge those responsibilities would undermine the independence of religious institutions in a way that the First Amendment does not tolerate.

I

A

1

The first of the two cases we now decide involves Agnes Morrissey-Berru, who was employed at Our Lady of Guadalupe School (OLG), a Roman Catholic primary school in the Archdiocese of Los Angeles. Excerpts of Record (ER) 58 in No. 17–56624 (CA9) (OLG).[1] For many years, Morrissey-

[1] A major theme of the dissent is that we do not heed the rule that, in deciding whether summary judgment is proper, a court must view the facts in the light most favorable to the party against whom summary judgment is sought. See *post*, at 766, 772, 774–775, 779 (opinion of SOTOMAYOR, J.). But the dissent, which approves of the Ninth Circuit's reasoning, seems to forget that the Ninth Circuit in effect granted summary judgment *in favor of the teachers* on the issue of the applicability of the so-called ministerial exception. It did not remand for a trial on that issue but instead held that the exception did not apply. 769 Fed. Appx. 460, 460–461 (2019); 911 F. 3d 603, 605, 611, n. 6 (2018). Therefore, if any material facts were genuinely in dispute, the relevant parts of the record would have to be

Berru was employed at OLG as a lay fifth or sixth grade teacher. Like most elementary school teachers, she taught all subjects, and since OLG is a Catholic school, the curriculum included religion. App. 23, 75. As a result, she was her students' religion teacher.

Morrissey-Berru earned a B. A. in English Language Arts, with a minor in secondary education, and she holds a California teaching credential. *Id.*, at 21–22. While on the faculty at OLG, she took religious education courses at the school's request, ER 41–ER 42, ER 44–ER 45, ER 276, and was expected to attend faculty prayer services, App. to Pet. for Cert. in No. 19–267, p. 87a.[2]

Each year, Morrissey-Berru and OLG entered into an employment agreement, App. 21,[3] that set out the school's "mission" and Morrissey-Berru's duties. See, *e. g.*, *id.*, at 154–164.[4] The agreement stated that the school's mission was

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viewed in the light most favorable to the schools. The dissent, however, does exactly the opposite.

In any event, the dissent's comments about summary judgment are so much smoke. It does not identify any disputed fact that is essential to our holding, and, although there are differences of opinion on certain facts, neither party takes the position that any *material* fact is genuinely in dispute.

[2] After bringing suit, Morrissey-Berru filed a declaration stating that she is "not currently a practicing Catholic." ER 248. It is unclear what Morrissey-Berru means by "practicing." There is, however, no hint in the record that Morrissey-Berru considered herself a non-practicing Catholic during her employment at OLG. See *infra*, at 740–741 (describing religious observation).

[3] This appears to have been a standard contract used within the Archdiocese of Los Angeles. See App. 154; cf. *id.*, at 230.

[4] It is not entirely clear from the record whether teachers at OLG must be Catholic. *Id.*, at 113 ("[Q.] Is it a requirement that a teacher be Catholic in order to teach at OLG School? Yes or no? [A.] Yes"); but see *ibid.* ("Exceptions can be made"); *id.*, at 154 ("*If* you are Roman Catholic[,] you must be in good standing with the Church" (emphasis added)). But it is clearly preferred. *Id.*, at 110.

"to develop and promote a Catholic School Faith Community," *id.*, at 154, and it informed Morrissey-Berru that "[a]ll [her] duties and responsibilities as a Teache[r were to] be performed within this overriding commitment," *ibid.*

The agreement explained that the school's hiring and retention decisions would be guided by its Catholic mission, and the agreement made clear that teachers were expected to "model and promote" Catholic "faith and morals." *Id.*, at 155. Under the agreement, Morrissey-Berru was required to participate in "[s]chool liturgical activities, as requested," *ibid.*, and the agreement specified that she could be terminated "for 'cause' " for failing to carry out these duties or for "conduct that brings discredit upon the School or the Roman Catholic Church," *id.*, at 155–157. The agreement required compliance with the faculty handbook, which sets out similar expectations. *Id.*, at 156; App. to Pet. for Cert. in No. 19–267, at 52a–55a. The pastor of the parish, a Catholic priest, had to approve Morrissey-Berru's hiring each year. *Id.*, at 14a; see also App. 164.

Like all teachers in the Archdiocese of Los Angeles, Morrissey-Berru was "considered a catechist," *i. e.*, "a teacher of religio[n]." App. to Pet. for Cert. in No. 19–267, at 56a, 60a. Catechists are "responsible for the faith formation of the students in their charge each day." *Id.*, at 56a. Morrissey-Berru provided religious instruction every day using a textbook designed for use in teaching religion to young Catholic students. *Id.*, at 45a–51a, 90a–92a; see App. 79–80. Under the prescribed curriculum, she was expected to teach students, among other things, "to learn and express belief that Jesus is the son of God and the Word made flesh"; to "identify the ways" the church "carries on the mission of Jesus"; to "locate, read and understand stories from the Bible"; to "know the names, meanings, signs and symbols of each of the seven sacraments"; and to be able to "explain the communion of saints." App. to Pet. for Cert. in No. 19–267,

at 91a–92a. She tested her students on that curriculum in a yearly exam. *Id.*, at 87a. She also directed and produced an annual passion play. *Id.*, at 26a.

Morrissey-Berru prepared her students for participation in the Mass and for communion and confession. *Id.*, at 68a, 81a, 88a–89a. She also occasionally selected and prepared students to read at Mass. *Id.*, at 83a, 89a. And she was expected to take her students to Mass once a week and on certain feast days (such as the Feast Day of St. Juan Diego, All Saints Day, and the Feast of Our Lady), and to take them to confession and to pray the Stations of the Cross. *Id.*, at 68a–69a, 83a, 88a. Each year, she brought them to the Catholic Cathedral in Los Angeles, where they participated as altar servers. *Id.*, at 95a–96a. This visit, she explained, was "an important experience" because "[i]t is a big honor" for children to "serve the altar" at the cathedral. *Id.*, at 96a.

Morrissey-Berru also prayed with her students. Her class began or ended every day with a Hail Mary. *Id.*, at 87a. She led the students in prayer at other times, such as when a family member was ill. *Id.*, at 21a, 81a, 86a–87a. And she taught them to recite the Apostle's Creed and the Nicene Creed, as well as prayers for specific purposes, such as in connection with the sacrament of confession. *Id.*, at 20a–21a, 92a.

The school reviewed Morrissey-Berru's performance under religious standards. The "'Classroom Observation Report'" evaluated whether Catholic values were "infused through all subject areas" and whether there were religious signs and displays in the classroom. *Id.*, at 94a, 95a; App. 59. Morrissey-Berru testified that she tried to instruct her students "in a manner consistent with the teachings of the Church," App. to Pet. for Cert. in No. 19–267, at 96a, and she said that she was "committed to teaching children Catholic values" and providing a "faith-based education," *id.*, at 82a.

And the school principal confirmed that Morrissey-Berru was expected to do these things.[5]

2

In 2014, OLG asked Morrissey-Berru to move from a full-time to a part-time position, and the next year, the school declined to renew her contract. She filed a claim with the Equal Employment Opportunity Commission (EEOC), received a right-to-sue letter, App. 169, and then filed suit under the Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U. S. C. § 621 *et seq.*, claiming that the school had demoted her and had failed to renew her contract so that it could replace her with a younger teacher, App. 168–169. The school maintains that it based its decisions on classroom performance—specifically, Morrissey-Berru's difficulty in administering a new reading and writing program, which had been introduced by the school's new principal as part of an effort to maintain accreditation and improve the school's academic program. App. to Pet. for Cert. in No. 19–267, at 66a–67a, 70a, 73a.

Invoking the "ministerial exception" that we recognized in *Hosanna-Tabor*, OLG successfully moved for summary judgment, but the Ninth Circuit reversed in a brief opinion. 769 Fed. Appx. 460, 461 (2019). The court acknowledged that Morrissey-Berru had "significant religious responsibilities" but reasoned that "an employee's duties alone are not dispositive under *Hosanna-Tabor*'s framework." *Ibid.* Unlike Perich, the court noted, Morrissey-Berru did not have the formal title of "minister," had limited formal religious training, and "did not hold herself out to the public as a religious leader or minister." *Ibid.* In the court's view, these "factors" outweighed the fact that she was invested with significant religious responsibilities. *Ibid.* The court therefore held that Morrissey-Berru did not fall within the "ministerial

[5] Record in No. 2:16–CV–09353 (CD Cal.), Doc. 33, ¶9.

exception." OLG filed a petition for certiorari, and we granted review.

B

1

The second case concerns the late Kristen Biel, who worked for about a year and a half as a lay teacher at St. James School, another Catholic primary school in Los Angeles. For part of one academic year, Biel served as a long-term substitute teacher for a first grade class, and for one full year she was a full-time fifth grade teacher. App. 336–337. Like Morrissey-Berru, she taught all subjects, including religion. *Id.*, at 288; ER 588 in No. 17–55180 (CA9) (St. James).[6]

Biel had a B. A. in liberal studies and a teaching credential. App. 244. During her time at St. James, she attended a religious conference that imparted "[d]ifferent techniques on teaching and incorporating God" into the classroom. *Id.*, at 260–262. Biel was Catholic.[7]

Biel's employment agreement was in pertinent part nearly identical to Morrissey-Berru's. Compare *id.*, at 154–164, with *id.*, at 320–329. The agreement set out the same religious mission; required teachers to serve that mission; imposed commitments regarding religious instruction, worship, and personal modeling of the faith; and explained that teachers' performance would be reviewed on those bases.

Biel's agreement also required compliance with the St. James faculty handbook, which resembles the OLG handbook. *Id.*, at 322. Compare ER 641–ER 651 (OLG) with ER 565–ER 597 (St. James). The St. James handbook defines "religious development" as the school's first goal and

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[6] Biel died during the pendency of this suit, which has subsequently been litigated by her husband as representative of her estate. Record in No. 17–55180 (CA9), Docs. 112, 113.

[7] The school principal stated that she prefers that teachers at the school be Catholic. ER 32 (St. James).

provides that teachers must "mode[l] the faith life," "exemplif[y] the teachings of Jesus Christ," "[i]ntegrat[e] Catholic thought and principles into secular subjects," and "[p]repar[e] students to receive the sacraments." ER 570–ER 572. The school principal confirmed these expectations.[8]

Like Morrissey-Berru, Biel instructed her students in the tenets of Catholicism. She was required to teach religion for 200 minutes each week, App. 257–258, and administered a test on religion every week, *id.*, at 256–257. She used a religion textbook selected by the school's principal, a Catholic nun. *Id.*, at 255; ER 37 (St. James). The religious curriculum covered "the norms and doctrines of the Catholic Faith, including . . . the sacraments of the Catholic Church, social teachings according to the Catholic Church, morality, the history of Catholic saints, [and] Catholic prayers." App. to Pet. for Cert. in No. 19–348, p. 83a.

Biel worshipped with her students. At St. James, teachers are responsible for "prepar[ing] their students to be active participants at Mass, with particular emphasis on Mass responses," ER 587, and Biel taught her students about "Catholic practices like the Eucharist and confession," ER 226–ER 227. At monthly Masses, she prayed with her students. App. to Pet. for Cert. in No. 19–348, at 82a, 94a–96a. Her students participated in the liturgy on some occasions by presenting the gifts (bringing bread and wine to the priest). *Ibid.*

Teachers at St. James were "required to pray with their students every day," *id.*, at 80a–81a, 110a, and Biel observed this requirement by opening and closing each school day with prayer, including the Lord's Prayer or a Hail Mary, *id.*, at 81a–82a, 93a, 110a.

As at OLG, teachers at St. James are evaluated on their fulfillment of the school's religious mission. *Id.*, at 83a–84a.

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[8] Record in No. 2:15–CV–04248 (CD Cal.), Doc. 67–1, ¶¶4–7.

St. James used the same classroom observation standards as OLG and thus examined whether teachers "infus[ed]" Catholic values in all their teaching and included religious displays in their classrooms. *Id.*, at 83a–84a, 92a. The school's principal, a Catholic nun, evaluated Biel on these measures. *Id.*, at 106a.

2

St. James declined to renew Biel's contract after one full year at the school. She filed charges with the EEOC, and after receiving a right-to-sue letter, brought this suit, alleging that she was discharged because she had requested a leave of absence to obtain treatment for breast cancer. App. 337–338. The school maintains that the decision was based on poor performance—namely, a failure to observe the planned curriculum and keep an orderly classroom. See *id.*, at 303; App. to Pet. for Cert. in No. 19–348, at 85a–89a, 114a–115a, 120a–121a.

Like OLG, St. James obtained summary judgment under the ministerial exception, *id.*, at 74a, but a divided panel of the Ninth Circuit reversed, reasoning that Biel lacked Perich's "credentials, training, [and] ministerial background," 911 F. 3d 603, 608 (2018).

Judge D. Michael Fisher, sitting by designation, dissented. Considering the totality of the circumstances, he would have held that the ministerial exception applied "because of the substance reflected in [Biel's] title and the important religious functions she performed" as a "stewar[d] of the Catholic faith to the children in her class." *Id.*, at 621, 622.

An unsuccessful petition for rehearing en banc ensued. Judge Ryan D. Nelson, joined by eight other judges, dissented. 926 F. 3d 1238, 1239 (2019). Judge Nelson faulted the panel majority for "embrac[ing] the narrowest construction" of the ministerial exception, departing from "the consensus of our sister circuits that the employee's ministerial function should be the key focus," and demanding nothing

less than a "carbon copy" of the specific facts in *Hosanna-Tabor*. 926 F. 3d, at 1249 (dissenting opinion). We granted review and consolidated the case with OLG's. 589 U. S. 1126 (2019).

II

A

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Among other things, the Religion Clauses protect the right of churches and other religious institutions to decide matters "'of faith and doctrine'" without government intrusion. *Hosanna-Tabor*, 565 U. S., at 186 (quoting *Kedroff*, 344 U. S., at 116). State interference in that sphere would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion. The First Amendment outlaws such intrusion.

The independence of religious institutions in matters of "faith and doctrine" is closely linked to independence in what we have termed "'matters of church government.'" 565 U. S., at 186. This does not mean that religious institutions enjoy a general immunity from secular laws, but it does protect their autonomy with respect to internal management decisions that are essential to the institution's central mission. And a component of this autonomy is the selection of the individuals who play certain key roles.

The "ministerial exception" was based on this insight. Under this rule, courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions. The rule appears to have acquired the label "ministerial exception" because the individuals involved in pioneering cases were described as "ministers." See *McClure* v. *Salvation Army*, 460 F. 2d 553, 558–559 (CA5 1972); *Rayburn* v. *General Conference of Seventh-day Adventists*, 772 F. 2d 1164, 1168 (CA4

1985). Not all pre-*Hosanna-Tabor* decisions applying the exception involved "ministers" or even members of the clergy. See, *e. g.*, *EEOC* v. *Southwestern Baptist Theological Seminary*, 651 F. 2d 277, 283–284 (CA5 1981); *EEOC* v. *Roman Catholic Diocese of Raleigh, N. C.*, 213 F. 3d 795, 800–801 (CA4 2000). But it is instructive to consider why a church's independence on matters of "faith and doctrine" requires the authority to select, supervise, and if necessary, remove a minister without interference by secular authorities. Without that power, a wayward minister's preaching, teaching, and counseling could contradict the church's tenets and lead the congregation away from the faith.[9] The ministerial exception was recognized to preserve a church's independent authority in such matters.

B

When the so-called ministerial exception finally reached this Court in *Hosanna-Tabor*, we unanimously recognized that the Religion Clauses foreclose certain employment discrimination claims brought against religious organizations. 565 U. S., at 188. The constitutional foundation for our holding was the general principle of church autonomy to which we have already referred: independence in matters of faith and doctrine and in closely linked matters of internal government. The three prior decisions on which we primarily relied drew on this broad principle, and none was exclusively concerned with the selection or supervision of clergy. *Watson* v. *Jones*, 13 Wall. 679 (1872), involved a dispute about the control of church property, and both *Kedroff*, 344 U. S. 94, and *Serbian Eastern Orthodox Diocese for United States and Canada* v. *Milivojevich*, 426 U. S. 696 (1976), also con-

[9] Cf. McConnell, Establishment and Disestablishment at the Founding, Part I: Establishment of Religion, 44 Wm. & Mary L. Rev. 2105, 2141 (2003) (politically appointed ministers in colonial Virginia were, in the view of the faithful, often "less than zealous in their spiritual responsibilities and less than irreproachable in their personal morals").

cerned the control of property, as well as the appointment and authority of bishops.

In addition to these precedents, we looked to the "background" against which "the First Amendment was adopted." *Hosanna-Tabor*, 565 U. S., at 183. We noted that 16th-century British statutes had given the Crown the power to fill high "religious offices" and to control the exercise of religion in other ways, and we explained that the founding generation sought to prevent a repetition of these practices in our country. *Ibid.* Because Cheryl Perich, the teacher in *Hosanna-Tabor*, had a title that included the word "minister," we naturally concentrated on historical events involving clerical offices, but the abuses we identified were not limited to the control of appointments.

We pointed to the various Acts of Uniformity, *id.*, at 182, which dictated what ministers could preach and imposed penalties for non-compliance. Under the 1549 Act, a minister who "preache[d,] declare[d,] or [spoke] any thin[g]" in derogation of any part of the Book of Common Prayer could be sentenced to six months in jail for a first offense and life imprisonment for a third violation. Act of Uniformity, 2 & 3 Edw. 6, ch. 1. In addition, all other English subjects were forbidden to say anything against the Book of Common Prayer in "[i]nterludes[,] play[s,] song[s,] r[h]ymes, or by other open [w]ord[s]." *Ibid.* A 1559 law contained similar prohibitions. See Act of Uniformity, 1 Eliz., ch. 2.

After the Restoration, Parliament enacted a new law with a similar aim. Ministers and "Lecturer[s]" were required to pledge "unfeigned assent and consent" to the Book of Common Prayer, and all schoolmasters, private tutors, and university professors were required to "conforme to the Liturgy of the Church of England" and not "to endeavour any change or alteration" of the church. Act of Uniformity, 1662, 14 Car. 2, ch. 4.

British law continued to impose religious restrictions on education in the 18th century and past the time of the adop-

tion of the First Amendment. The Schism or Established Church Act of 1714, 13 Ann., ch. 7, required that schoolmasters and tutors be licensed by a bishop. Non-conforming Protestants, as well as Catholics and Jews, could not teach at or attend the two universities, and as Blackstone wrote, "[p]ersons professing the popish religion [could] not keep or teach any school under pain of perpetual imprisonment." 4 W. Blackstone, Commentaries on the Laws of England 55 (8th ed. 1778). The law also imposed penalties on "any person [who] sen[t] another abroad to be educated in the popish religion . . . or [who] contribute[d] to their maintenance when there." *Id.*, at 55–56.

British colonies in North America similarly controlled both the appointment of clergy, see *Hosanna-Tabor*, 565 U. S., at 183, and the teaching of students. A Maryland law "prohibited any Catholic priest or lay person from keeping school, or taking upon himself the education of youth." 2 T. Hughes, History of the Society of Jesus in North America: Colonial and Federal 443–444 (1917). In 1771, the Governor of New York was instructed to require that all schoolmasters arriving from England obtain a license from the Bishop of London. 3 C. Lincoln, The Constitutional History of New York 485, 745 (1906). New York law also required an oath and license for any "'vagrant Preacher, Moravian, or disguised Papist'" to "'Preach or Teach, Either in Public or Private.'" S. Cobb, The Rise of Religious Liberty in America 358 (1902).

C

In *Hosanna-Tabor*, Cheryl Perich, a kindergarten and fourth grade teacher at an Evangelical Lutheran school, filed suit in federal court, claiming that she had been discharged because of a disability, in violation of the Americans with Disabilities Act of 1990 (ADA), 42 U. S. C. § 12112(a). The school responded that the real reason for her dismissal was her violation of the Lutheran doctrine that disputes should be resolved internally and not by going to outside authori-

ties. We held that her suit was barred by the "ministerial exception" and noted that it "concern[ed] government interference with an internal church decision that affects the faith and mission of the church." 565 U. S., at 190. We declined "to adopt a rigid formula for deciding when an employee qualifies as a minister," and we added that it was "enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers Perich, given all the circumstances of her employment." *Id.*, at 190. We identified four relevant circumstances but did not highlight any as essential.

First, we noted that her church had given Perich the title of "minister, with a role distinct from that of most of its members." *Id.*, at 191. Although she was not a minister in the usual sense of the term—she was not a pastor or deacon, did not lead a congregation, and did not regularly conduct religious services—she was classified as a "called" teacher, as opposed to a lay teacher, and after completing certain academic requirements, was given the formal title "'Minister of Religion, Commissioned.'" *Id.*, at 177–178, 191.

Second, Perich's position "reflected a significant degree of religious training followed by a formal process of commissioning." *Id.*, at 191.

Third, "Perich held herself out as a minister of the Church by accepting the formal call to religious service, according to its terms," and by claiming certain tax benefits. *Id.*, at 191–192.

Fourth, "Perich's job duties reflected a role in conveying the Church's message and carrying out its mission." *Id.*, at 192. The church charged her with "'lead[ing] others toward Christian maturity'" and "'teach[ing] faithfully the Word of God, the Sacred Scriptures, in its truth and purity and as set forth in all the symbolical books of the Evangelical Lutheran Church.'" *Ibid.* Although Perich also provided instruction in secular subjects, she taught religion four days a week, led her students in prayer three times a day, took her students to a chapel service once a week, and participated in

the liturgy twice a year. "As a source of religious instruction," we explained, "Perich performed an important role in transmitting the Lutheran faith to the next generation." *Ibid.*

The case featured two concurrences. In the first, JUSTICE THOMAS stressed that courts should "defer to a religious organization's good-faith understanding of who qualifies as its minister." *Id.*, at 196. That is so, JUSTICE THOMAS explained, because "[a] religious organization's right to choose its ministers would be hollow . . . if secular courts could second-guess" the group's sincere application of its religious tenets. *Id.*, at 197.

The second concurrence argued that application of the "ministerial exception" should "focus on the function performed by persons who work for religious bodies" rather than labels or designations that may vary across faiths. *Id.*, at 198 (opinion of ALITO, J., joined by KAGAN, J.). This opinion viewed the title of "minister" as "relevant" but "neither necessary nor sufficient." *Id.*, at 202. It noted that "most faiths do not employ the term 'minister'" and that some "consider the ministry to consist of all or a very large percentage of their members." *Ibid.* The opinion concluded that the "'ministerial' exception" "should apply to any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith." *Id.*, at 199.

D

1

In determining whether a particular position falls within the *Hosanna-Tabor* exception, a variety of factors may be important.[10] The circumstances that informed our decision

[10] In considering the circumstances of any given case, courts must take care to avoid "resolving underlying controversies over religious doctrine." *Presbyterian Church in U. S.* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U. S. 440, 449 (1969); *ibid.* ("First Amendment values are plainly jeopardized when . . . litigation is made to turn on the

in *Hosanna-Tabor* were relevant because of their relationship to Perich's "role in conveying the Church's message and carrying out its mission," *id.*, at 192, but the other noted circumstances also shed light on that connection. In a denomination that uses the term "minister," conferring that title naturally suggests that the recipient has been given an important position of trust. In Perich's case, the title that she was awarded and used demanded satisfaction of significant academic requirements and was conferred only after a formal approval process, *id.*, at 191, and those circumstances also evidenced the importance attached to her role, *ibid.* But our recognition of the significance of those factors in Perich's case did not mean that they must be met—or even that they are necessarily important—in all other cases.

Take the question of the title "minister." Simply giving an employee the title of "minister" is not enough to justify the exception. And by the same token, since many religious traditions do not use the title "minister," it cannot be a necessary requirement. Requiring the use of the title would constitute impermissible discrimination, and this problem cannot be solved simply by including positions that are thought to be the counterparts of a "minister," such as priests, nuns, rabbis, and imams. See Brief for Respondents 21. Nuns are not the same as Protestant ministers. A brief submitted by Jewish organizations makes the point that "Judaism has many 'ministers,' " that is, "the term 'minister' encompasses an extensive breadth of religious functionaries in Judaism."[11] For Muslims, "an inquiry into whether imams or other leaders bear a title equivalent to 'minister'

resolution by civil courts of controversies over religious doctrine and practice"); see also *Serbian Eastern Orthodox Diocese for United States and Canada* v. *Milivojevich*, 426 U. S. 696, 715, n. 8 (1976) (" 'It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own' " (quoting *Watson* v. *Jones*, 13 Wall. 679, 729 (1872))); cf. *Thomas* v. *Review Bd. of Ind. Employment Security Div.*, 450 U. S. 707, 714–716 (1981).

[11] Brief for COLPA et al. as *Amici Curiae* i, 3 (quotation modified).

can present a troubling choice between denying a central pillar of Islam—*i.e.*, the equality of all believers—and risking loss of ministerial exception protections." [12]

If titles were all-important, courts would have to decide which titles count and which do not, and it is hard to see how that could be done without looking behind the titles to what the positions actually entail. Moreover, attaching too much significance to titles would risk privileging religious traditions with formal organizational structures over those that are less formal.

For related reasons, the academic requirements of a position may show that the church in question regards the position as having an important responsibility in elucidating or teaching the tenets of the faith. Presumably the purpose of such requirements is to make sure that the person holding the position understands the faith and can explain it accurately and effectively. But insisting in every case on rigid academic requirements could have a distorting effect. This is certainly true with respect to teachers. Teaching children in an elementary school does not demand the same formal religious education as teaching theology to divinity students. Elementary school teachers often teach secular subjects in which they have little if any special training. In addition, religious traditions may differ in the degree of formal religious training thought to be needed in order to teach. See, *e. g.*, Brief for Ethics and Religious Liberty Commission of the Southern Baptist Convention et al. as *Amici Curiae* 12 ("many Protestant groups have historically rejected any requirement of formal theological training"). In short, these circumstances, while instructive in *Hosanna-Tabor*, are not inflexible requirements and may have far less significance in some cases.

What matters, at bottom, is what an employee does. And implicit in our decision in *Hosanna-Tabor* was a recognition that educating young people in their faith, inculcating its

[12] Brief for Asma T. Uddin as *Amicus Curiae* 2.

teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school. As we put it, Perich had been entrusted with the responsibility of "transmitting the Lutheran faith to the next generation." 565 U. S., at 192. One of the concurrences made the same point, concluding that the exception should include "any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or *teacher of its faith*." *Id.*, at 199 (opinion of ALITO, J.) (emphasis added).

Religious education is vital to many faiths practiced in the United States. This point is stressed by briefs filed in support of OLG and St. James by groups affiliated with a wide array of faith traditions. In the Catholic tradition, religious education is "'intimately bound up with the whole of the Church's life.'" Catechism of the Catholic Church 8 (1994). Under canon law, local bishops must satisfy themselves that "those who are designated teachers of religious instruction in schools . . . are outstanding in correct doctrine, the witness of a Christian life, and teaching skill." Code of Canon Law, Canon 804, §2 (Eng. transl. 1998).

Similarly, Protestant churches, from the earliest settlements in this country, viewed education as a religious obligation. A core belief of the Puritans was that education was essential to thwart the "chief project of that old deluder, Satan, to keep men from the knowledge of the Scriptures."[13] Thus, in 1647, the Massachusetts General Court passed what has been called the Old Deluder Satan Act, requiring every sizable town to establish a school.[14] Most of the oldest educational institutions in this country were originally established by or affiliated with churches, and in recent years, non-

[13] Old Deluder Satan Act of 1647, in The Laws and Liberties of Massachusetts 47 (M. Farrand ed. 1929).

[14] *Ibid.*

denominational Christian schools have proliferated with the aim of inculcating Biblical values in their students.[15] Many such schools expressly set themselves apart from public schools that they believe do not reflect their values.[16]

Religious education is a matter of central importance in Judaism. As explained in briefs submitted by Jewish organizations, the Torah is understood to require Jewish parents to ensure that their children are instructed in the faith.[17] One brief quotes Maimonides's statement that religious instruction "is an obligation of the highest order, entrusted only to a schoolteacher possessing 'fear of Heaven.' "[18] "The contemporary American Jewish community continues to place the education of children in its faith and rites at the center of its communal efforts."[19]

Religious education is also important in Islam. "[T]he acquisition of at least rudimentary knowledge of religion and its duties [is] mandatory for the Muslim individual."[20] This precept is traced to the Prophet Muhammad, who proclaimed that "'[t]he pursuit of knowledge is incumbent on every Muslim.' "[21] "[T]he development of independent private Islamic

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[15] See P. Parsons, Inside America's Christian Schools (1987); see also Association of Christian Schools International, Why Christian Schooling?, https://www.acsi.org/membership/why-christian-schooling; Association of Classical Christian Schools, What is CCE?, https://classicalchristian.org/what-is-cce/?v=a44707111a05.

[16] R. Dreher, The Benedict Option 146, 155, 160 (2017); see, *e. g.*, J. Ekeland & B. Walton, Discover Christian Schools: Ten Differences, https://discoverchristianschools.com/wp-content/uploads/2019/02/DCS_TenDifferences.pdf.

[17] See Deuteronomy 6:7, 11:19.

[18] Brief for General Conference of Seventh-day Adventists et al. as *Amici Curiae* 7–9 (quoting Maimonides, Mishne Torah, Hilkhot Talmud Torah 1:2; 2:1, 3).

[19] Brief for Church of God in Christ, Inc., et al. as *Amici Curiae* 15.

[20] Afsaruddin, Muslim Views on Education: Parameters, Purview, and Possibilities, 44 J. Cath. Legal Studies 143, 143–144 (2005).

[21] *Id.*, at 143.

schools ha[s] become an important part of the picture of Muslim education in America."[22]

The Church of Jesus Christ of Latter-day Saints has a long tradition of religious education, with roots in revelations given to Joseph Smith. See Doctrine and Covenants of the Church of Jesus Christ of Latter-day Saints § 93:36 (2013). "[T]he Church Board of Education has established elementary, middle, or secondary schools in which both secular and religious instruction is offered."[23]

Seventh-day Adventists "trace the importance of education back to the Garden of Eden."[24] Seventh-day Adventist formation "restore[s] human beings into the image of God as revealed by the life of Jesus Christ" and focuses on the development of "knowledge, skills, and understandings to serve God and humanity."[25]

This brief survey does not do justice to the rich diversity of religious education in this country, but it shows the close connection that religious institutions draw between their central purpose and educating the young in the faith.

2

When we apply this understanding of the Religion Clauses to the cases now before us, it is apparent that Morrissey-Berru and Biel qualify for the exemption we recognized in *Hosanna-Tabor*. There is abundant record evidence that they both performed vital religious duties. Educating and forming students in the Catholic faith lay at the core of the mission of the schools where they taught, and their employ-

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[22] Haddad & Smith, Introduction: The Challenge of Islamic Education in North America, in Educating the Muslims of America 3, 6, 11 (Y. Haddad, F. Senzai, & J. Smith eds. 2009).

[23] Berrett, Church Educational System (CES), in 1 Encyclopedia of Mormonism 274, 275 (D. Ludlow ed. 1992).

[24] Brief for General Conference of Seventh-day Adventists et al. as *Amici Curiae* 7.

[25] Seventh-day Adventist Church, About Us, https://adventisteducation.org/abt.html.

ment agreements and faculty handbooks specified in no uncertain terms that they were expected to help the schools carry out this mission and that their work would be evaluated to ensure that they were fulfilling that responsibility. As elementary school teachers responsible for providing instruction in all subjects, including religion, they were the members of the school staff who were entrusted most directly with the responsibility of educating their students in the faith. And not only were they obligated to provide instruction about the Catholic faith, but they were also expected to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith. They prayed with their students, attended Mass with the students, and prepared the children for their participation in other religious activities. Their positions did not have all the attributes of Perich's. Their titles did not include the term "minister," and they had less formal religious training, but their core responsibilities as teachers of religion were essentially the same. And both their schools expressly saw them as playing a vital part in carrying out the mission of the church, and the schools' definition and explanation of their roles is important. In a country with the religious diversity of the United States, judges cannot be expected to have a complete understanding and appreciation of the role played by every person who performs a particular role in every religious tradition. A religious institution's explanation of the role of such employees in the life of the religion in question is important.

III

In holding that Morrissey-Berru and Biel did not fall within the *Hosanna-Tabor* exception, the Ninth Circuit misunderstood our decision. Both panels treated the circumstances that we found relevant in that case as checklist items to be assessed and weighed against each other in every case, and the dissent does much the same. That approach is contrary to our admonition that we were not imposing any

"rigid formula." 565 U. S., at 190. Instead, we called on courts to take all relevant circumstances into account and to determine whether each particular position implicated the fundamental purpose of the exception.[26]

The Ninth Circuit's rigid test produced a distorted analysis. First, it invested undue significance in the fact that Morrissey-Berru and Biel did not have clerical titles. 769 Fed. Appx., at 460; 911 F. 3d, at 608–609; *post*, at 779–780. It is true that Perich's title included the term "minister," but we never said that her title (or her reference to herself as

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[26] The dissent charges that we transform the holding in *Hosanna-Tabor*, but that is what the dissent does. *Post*, at 772–773. According to the dissent: "*Hosanna-Tabor* charted a way to separate leaders who 'personify' a church's 'beliefs' [and] 'minister to the faithful' from individuals who may simply relay religious tenets." *Post*, at 772 (quoting 565 U. S., at 188, 195).

The dissent cobbles together this new test by taking phrases out of context from separate passages and inserting a proposition never suggested in *Hosanna-Tabor*, namely, that an individual cannot qualify for the exception if he or she "simply relay[s] religious tenets" without "'minister[ing] to the faithful.'" *Post*, at 772. *Hosanna-Tabor* never adopted this unworkable test. It did not suggest that the exception it recognized applied only to "leaders." *Post*, at 769, and n. 1. The term is never used in the opinion of the Court. Insisting on leadership as a qualification would shrink the exception even more than respondents advocate. For example, they agree that it should apply to nuns, see Brief for Respondents 21, but, under the dissent's test, is every cloistered nun—or every cloistered monk—disqualified? And even if leadership were a requirement, why couldn't a religious teacher be regarded as a leader of the students in the class?

Nor did our opinion in *Hosanna-Tabor* draw a critical distinction between a person who "simply relay[s] religious tenets" and one who relays such tenets while also "'minister[ing] to the faithful.'" *Post*, at 772. A teacher, such as an instructor in a class on world religions, who merely provides a description of the beliefs and practices of a religion without making any effort to inculcate those beliefs could not qualify for the exception, but otherwise the distinction makes no sense. If a member of the Christian clergy or a rabbi spends almost all of his or her time studying Scripture or theology and writing instead of ministering to a congregation, would that individual fall outside the exception as understood by the dissent?

a "minister") was necessary to trigger the *Hosanna-Tabor* exception. Instead, "those considerations . . . merely made Perich's case an especially easy one." Brief for United States as *Amicus Curiae* 19. Moreover, both Morrissey-Berru and Biel had titles. They were Catholic elementary school *teachers*, which meant that they were their students' primary teachers of religion. The concept of a teacher of religion is loaded with religious significance. The term "rabbi" means teacher, and Jesus was frequently called rabbi.[27] And if a more esoteric title is needed, they were both regarded as "catechists."[28]

Second, the Ninth Circuit assigned too much weight to the fact that Morrissey-Berru and Biel had less formal religious schooling than Perich. 769 Fed. Appx., at 460–461; 911 F. 3d, at 608; *post*, at 780–781. The significance of formal training must be evaluated in light of the age of the students taught and the judgment of a religious institution regarding the need for formal training. The schools in question here thought that Morrissey-Berru and Biel had a sufficient understanding of Catholicism to teach their students,[29] and judges have no warrant to second-guess that judgment or to impose their own credentialing requirements.

Third, the *St. James* panel inappropriately diminished the significance of Biel's duties because they did not evince "close guidance and involvement" in "students' spiritual lives." 911 F. 3d, at 609; *post*, at 776, 781–782. Specifically, the panel majority suggested that Biel merely taught "religion from a

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[27] See, *e. g.*, Mark 9:5, 11:21; John 1:38, 3:26, 4:31, 6:25, 9:2.

[28] See App. to Pet. for Cert. in No. 19–267, at 56a, 60a; ER 593 (St. James) ("[T]eachers are expected to . . . engage in catechetical . . . development"); Record in No. 2:15–CV–04248 (CD Cal.), Doc. 67–1, ¶10 ("requir[ing]" attendance at "Catholic education conference" to "prepare teachers as religious educators").

[29] The record also makes clear (contrary to the Ninth Circuit's and dissent's conclusion, *post*, at 781) that Morrissey-Berru and Biel "held themselves out" as authorities on religion to their students, and, by extension, their families. See *supra*, at 738–745.

book required by the school," "joined" students in prayer, and accompanied students to Mass in order to keep them "'quiet and in their seats.'" 911 F. 3d, at 609. This misrepresents the record and its significance. For better or worse, many primary school teachers tie their instruction closely to textbooks, and many faith traditions prioritize teaching from authoritative texts. See Brief for InterVarsity Christian Fellowship USA et al. as *Amici Curiae* 26; Brief for Senator Mike Lee et al. as *Amici Curiae* 24–27. As for prayer, Biel prayed with her students, taught them prayers, and supervised the prayers led by students. She prepared them for Mass, accompanied them to Mass, and prayed with them there. See *supra*, at 744.

In Biel's appeal, the Ninth Circuit suggested that the *Hosanna-Tabor* exception should be interpreted narrowly because the ADA, 42 U. S. C. § 12101 *et seq.*, and Title VII, § 2000e–2, contain provisions allowing religious employers to give preference to members of a particular faith in employing individuals to do work connected with their activities. 911 F. 3d, at 611, n. 5; *post*, at 767. But the *Hosanna-Tabor* exception serves an entirely different purpose. Think of the quintessential case where a church wants to dismiss its minister for poor performance. The church's objection in that situation is not that the minister has gone over to some other faith but simply that the minister is failing to perform essential functions in a satisfactory manner.

While the Ninth Circuit treated the circumstances that we cited in *Hosanna-Tabor* as factors to be assessed and weighed in every case, respondents would make the governing test even more rigid. In their view, courts should begin by deciding whether the first three circumstances—a ministerial title, formal religious education, and the employee's self-description as a minister—are met and then, in order to check the conclusion suggested by those factors, ask whether the employee performed a religious function. Brief for Respondents 20–24. For reasons already explained, there is

no basis for treating the circumstances we found relevant in *Hosanna-Tabor* in such a rigid manner.

Respondents go further astray in suggesting that an employee can never come within the *Hosanna-Tabor* exception unless the employee is a "practicing" member of the religion with which the employer is associated. Brief for Respondents 12–13, 21. In hiring a teacher to provide religious instruction, a religious school is very likely to try to select a person who meets this requirement, but insisting on this as a necessary condition would create a host of problems. As pointed out by petitioners, determining whether a person is a "co-religionist" will not always be easy. See Reply Brief 14 ("Are Orthodox Jews and non-Orthodox Jews coreligionists? . . . Would Presbyterians and Baptists be similar enough? Southern Baptists and Primitive Baptists?"). Deciding such questions would risk judicial entanglement in religious issues.

Expanding the "co-religionist" requirement, Brief for Respondents 28–29, 44, to exclude those who no longer practice the faith would be even worse, *post*, at 777–778. Would the test depend on whether the person in question no longer considered himself or herself to be a member of a particular faith? Or would the test turn on whether the faith tradition in question still regarded the person as a member in some sense?

Respondents argue that Morrissey-Berru cannot fall within the *Hosanna-Tabor* exception because she said in connection with her lawsuit that she was not "a practicing Catholic," but acceptance of that argument would require courts to delve into the sensitive question of what it means to be a "practicing" member of a faith, and religious employers would be put in an impossible position. Morrissey-Berru's employment agreements required her to attest to "good standing" with the church. See App. 91, 144, 154. Beyond insisting on such an attestation, it is not clear how religious groups could monitor whether an employee is abiding by all religious obligations when away from the job. Was OLG

supposed to interrogate Morrissey-Berru to confirm that she attended Mass every Sunday?

Respondents argue that the *Hosanna-Tabor* exception is not workable unless it is given a rigid structure, but we declined to adopt a "rigid formula" in *Hosanna-Tabor*, and the lower courts have been applying the exception for many years without such a formula. Here, as in *Hosanna-Tabor*, it is sufficient to decide the cases before us. When a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow.

* * *

For these reasons, the judgment of the Court of Appeals in each case is reversed, and the cases are remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, concurring.

I agree with the Court that Morrissey-Berru's and Biel's positions fall within the "ministerial exception,"[1] because, as Catholic school teachers, they are charged with "carry[ing] out [the religious] mission" of the parish schools. *Ante*, at 757. The Court properly notes that "judges have no warrant to second-guess [the schools'] judgment" of who should hold such a position "or to impose their own credentialing require-

[1] As the Court acknowledges, the term "ministerial exception" is somewhat of a misnomer. See *ante*, at 747. The First Amendment's protection of religious organizations' employment decisions is not limited to members of the clergy or others holding positions akin to that of a "minister." *Ibid.* Rather, as these cases demonstrate, such protection extends to the laity, provided they are entrusted with carrying out the religious mission of the organization. *Ante*, at 738, 756–757.

ments." *Ante*, at 759. Accordingly, I join the Court's opinion in full. I write separately, however, to reiterate my view that the Religion Clauses require civil courts to defer to religious organizations' good-faith claims that a certain employee's position is "ministerial." See *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. 171, 196 (2012) (THOMAS, J., concurring).

This deference is necessary because, as the Court rightly observes, judges lack the requisite "understanding and appreciation of the role played by every person who performs a particular role in every religious tradition." *Ante*, at 757. What qualifies as "ministerial" is an inherently theological question, and thus one that cannot be resolved by civil courts through legal analysis. See *Hosanna-Tabor*, *supra*, at 197 (THOMAS, J., concurring); see also Memorial and Remonstrance Against Religious Assessments, in Selected Writings of James Madison 21, 24 (R. Ketcham ed. 2006) (the idea that a "Civil Magistrate is a competent Judge of Religious truth" is "an arrogant pretension" that has been "falsified"). Contrary to the dissent's claim, judges do not shirk their judicial duty or provide a mere "rubber stamp" when they defer to a religious organization's sincere beliefs. *Post*, at 773 (opinion of SOTOMAYOR, J.). Rather, they heed the First Amendment, which "commands civil courts to decide [legal] disputes without resolving underlying controversies over religious doctrine." *Presbyterian Church in U. S.* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U. S. 440, 449 (1969); see also *ante*, at 751, n. 10.

Moreover, because the application of the exception turns on religious beliefs, the duties that a given religious organization will deem "ministerial" are sure to vary. Although the functions recognized as ministerial by the Lutheran school in *Hosanna-Tabor* are similar to those considered ministerial by the Catholic schools here, such overlap will not necessarily exist with other religious organizations, particularly those "outside of the 'mainstream.'" 565 U. S.,

at 197 (THOMAS, J., concurring). To avoid disadvantaging these minority faiths and interfering in "a religious group's right to shape its own faith and mission," *id.*, at 188 (majority opinion), courts should defer to a religious organization's sincere determination that a position is "ministerial." *Id.*, at 197 (THOMAS, J., concurring).

The Court's decision today is a step in the right direction. The Court properly declines to consider whether an employee shares the religious organization's beliefs when determining whether that employee's position falls within the "ministerial exception," explaining that to "determin[e] whether a person is a 'co-religionist' . . . would risk judicial entanglement in religious issues." *Ante*, at 761. But the same can be said about the broader inquiry whether an employee's position is "ministerial." This Court usually goes to great lengths to avoid governmental "entanglement" with religion, particularly in its Establishment Clause cases. See, *e. g.*, *Lemon* v. *Kurtzman*, 403 U. S. 602, 613 (1971).[2] For example, the Court has held that a public school became impermissibly "entangle[d]" with religion by simply *permitting* students to say a prayer before football games and overseeing a class election for whom would deliver the prayer. *Santa Fe Independent School Dist.* v. *Doe*, 530 U. S. 290, 305–307 (2000). And, in *Locke* v. *Davey*, 540 U. S. 712 (2004), the Court concluded that it would violate States' "antiestablishment interests" if tax dollars even indirectly supported the education of ministers, *id.*, at 722. But, when it comes to the autonomy of religious organizations in our ministerial-

[2] As I have previously explained, this Court's Establishment Clause jurisprudence "is unmoored from the original meaning of the First Amendment." *Espinoza* v. *Montana Dept. of Revenue*, 591 U. S. 464, 490 (2020) (concurring opinion). Properly understood, the Establishment Clause proscribes governmental "'coercion of religious orthodoxy and of financial support by force of law and threat of penalty.'" *American Legion* v. *American Humanist Assn.*, 588 U. S. 29, 75 (2019) (THOMAS, J., concurring in judgment) (quoting *Lee* v. *Weisman*, 505 U. S. 577, 640 (1992) (Scalia, J., dissenting)).

exception cases, these concerns of entanglement have not prevented the Court from weighing in on the theological questions of which positions qualify as "ministerial."

As this Court has explained, the Religion Clauses do not permit governmental "interfere[nce] with . . . a religious group's right to shape its own faith and mission through its appointments." *Hosanna-Tabor*, *supra*, at 188. To avoid such interference, we should defer to these groups' good-faith understandings of which individuals are charged with carrying out the organizations' religious missions.

Here, the record confirms the sincerity of petitioners' claims that, as lay teachers, Morrissey-Berru and Biel held ministerial roles in these parish schools. For example, the Our Lady of Guadalupe Faculty Handbook states that lay teachers serve "special *pastoral* administrative roles . . . in the service of the people of God." App. to Pet. for Cert. in No. 19–267, p. 52a (emphasis added). Moreover, their "essential job duties" include "[m]odeling, teaching of and commitment to Catholic religious and moral values." *Id.*, at 55a (boldface deleted); see also *id.*, at 32a (Morrissey-Berru's teaching contract); App. to Pet. for Cert. in No. 19–348, p. 96a (Biel's teaching contract). And both Morrissey-Berru's and Biel's teaching contracts required that their "duties and responsibilities . . . be performed [with an] overriding commitment" to "develop[ing] . . . a Catholic School Faith Community" in accordance with "the doctrines, laws and norms of the Catholic Church." *Ibid.*; App. to Pet. for Cert. in No. 19–267, at 32a. Finally, *amicus curiae* United States Conference of Catholic Bishops confirms that petitioners' understanding is consistent with the Church's view that "Catholic teachers play a critical role" in the Church's ministry. Brief for United States Conference of Catholic Bishops 10–11; see also Catechism of the Catholic Church 8 (2d ed. 1994) (noting that the goal of "education in the faith of children [is] to initiat[e] the hearers into the fullness of Christian life" (emphasis deleted; internal quotation marks omitted)).

The foregoing is more than enough to sustain the sincerity of petitioners' claims that Morrissey-Berru and Biel held ministerial roles in the parish schools. Their claims thus warrant this Court's deference and serve as a sufficient basis for applying the ministerial exception.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

Two employers fired their employees allegedly because one had breast cancer and the other was elderly. Purporting to rely on this Court's decision in *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. 171 (2012), the majority shields those employers from disability and age-discrimination claims. In the Court's view, because the employees taught short religion modules at Catholic elementary schools, they were "ministers" of the Catholic faith and thus could be fired for any reason, whether religious or nonreligious, benign or bigoted, without legal recourse. The Court reaches this result even though the teachers taught primarily secular subjects, lacked substantial religious titles and training, and were not even required to be Catholic. In foreclosing the teachers' claims, the Court skews the facts, ignores the applicable standard of review, and collapses *Hosanna-Tabor*'s careful analysis into a single consideration: whether a church thinks its employees play an important religious role. Because that simplistic approach has no basis in law and strips thousands of schoolteachers of their legal protections, I respectfully dissent.

I

A

Our pluralistic society requires religious entities to abide by generally applicable laws. *E.g.*, *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872, 879–882 (1990). Consistent with the First Amendment (and over sincerely held religious objections), the Government may

compel religious institutions to pay Social Security taxes for their employees, *United States* v. *Lee*, 455 U. S. 252, 256–261 (1982), deny nonprofit status to entities that discriminate because of race, *Bob Jones Univ.* v. *United States*, 461 U. S. 574, 603–605 (1983), require applicants for certain public benefits to register with Social Security numbers, *Bowen* v. *Roy*, 476 U. S. 693, 699–701 (1986), enforce child-labor protections, *Prince* v. *Massachusetts*, 321 U. S. 158, 166–170 (1944), and impose minimum-wage laws, *Tony and Susan Alamo Foundation* v. *Secretary of Labor*, 471 U. S. 290, 303–306 (1985).

Congress, however, has crafted exceptions to protect religious autonomy. Some antidiscrimination laws, like the Americans with Disabilities Act, permit a religious institution to consider religion when making employment decisions. 42 U. S. C. § 12113(d)(1). Under that Act, a religious organization may also "require that all applicants and employees conform" to the entity's "religious tenets." § 12113(d)(2). Title VII further permits a school to prefer "hir[ing] and employ[ing]" people "of a particular religion" if its curriculum "propagat[es]" that religion. § 2000e–2(e); see also § 2000e–1(a). These statutory exceptions protect a religious entity's ability to make employment decisions—hiring or firing—for religious reasons.

The "ministerial exception," by contrast, is a judge-made doctrine. This Court first recognized it eight years ago in *Hosanna-Tabor*, concluding that the First Amendment categorically bars certain antidiscrimination suits by religious leaders against their religious employers. 565 U. S., at 188–190. When it applies, the exception is extraordinarily potent: It gives an employer free rein to discriminate because of race, sex, pregnancy, age, disability, or other traits protected by law when selecting or firing their "ministers," even when the discrimination is wholly unrelated to the employer's religious beliefs or practices. *Id.*, at 194–195. That is, an employer need not cite or possess a religious reason at all; the ministerial exception even condones animus.

When this Court adopted the ministerial exception, it affirmed the holdings of virtually every federal appellate court that had embraced the doctrine. *Id.*, at 188, and n. 2. Those courts had long understood that the exception's stark departure from antidiscrimination law is narrow. Wary of the exception's "potential for abuse," federal courts treaded "case-by-case" in determining which employees are ministers exposed to discrimination without recourse. *Scharon* v. *St. Luke's Episcopal Presbyterian Hospitals*, 929 F. 2d 360, 363, n. 3 (CA8 1991). Thus, their analysis typically trained on whether the putative minister was a "spiritual leade[r]" within a congregation such that "he or she should be considered clergy." *Rayburn* v. *General Conference of Seventh-day Adventists*, 772 F. 2d 1164, 1168–1169 (CA4 1985) (internal quotation marks omitted); see also *Hankins* v. *Lyght*, 441 F. 3d 96, 117–118, and n. 13 (CA2 2006) (Sotomayor, J., dissenting) (cataloging Circuit consensus). That approach recognized that a religious entity's ability to choose its faith leaders—rabbis, priests, nuns, imams, ministers, to name a few—should be free from government interference, but that generally applicable laws still protected most employees.

This focus on leadership led to a consistent conclusion: Lay faculty, even those who teach religion at church-affiliated schools, are not "ministers." In *Geary* v. *Visitation of Blessed Virgin Mary Parish School*, 7 F. 3d 324 (1993), for instance, the Third Circuit rejected a Catholic school's view that "[t]he unique and important role of the elementary school teacher in the Catholic education system" barred a teacher's discrimination claim under the First Amendment. *Id.*, at 331. In *Dole* v. *Shenandoah Baptist Church*, 899 F. 2d 1389 (1990), the Fourth Circuit found a materially similar statutory ministerial exception inapplicable to teachers who taught "all classes" "from a pervasively religious perspective," "le[d]" their "students in prayer," and were "required to subscribe to [a church] statement of faith as a condition of employment." *Id.*, at 1396. Similar examples

abound. See, *e. g.*, *EEOC* v. *Mississippi College*, 626 F. 2d 477, 479, 485 (CA5 1980) (ministerial exception inapplicable to faculty members of a Baptist college that "conceive[d] of education as an integral part of its Christian mission" and "expected" faculty "to serve as exemplars of practicing Christians"); *EEOC* v. *Fremont Christian School*, 781 F. 2d 1362, 1369–1370 (CA9 1986) (ministerial exception inapplicable to teachers whom a church considered as performing "an integral part of the religious mission of the Church to its children"); cf. *Rayburn*, 772 F. 2d, at 1168 ("Lay ministries, even in leadership roles within a congregation, do not compare to the institutional selection for hire of one member with special theological training to lead others").

Hosanna-Tabor did not upset this consensus. Instead, it recognized the ministerial exception's roots in protecting religious "elections" for "ecclesiastical offices" and guarding the freedom to "select" titled "clergy" and churchwide leaders. 565 U. S., at 182, 184, 186–187 (internal quotation marks omitted). To be sure, the Court stated that the "ministerial exception is not limited to the head of a religious congregation." *Id.*, at 190. Nevertheless, this Court explained that the exception applies to someone with a leadership role "distinct from that of most of [the organization's] members," someone in whom "[t]he members of a religious group put their faith," or someone who "personif[ies]" the organization's "beliefs" and "guide[s] it on its way." *Id.*, at 188, 191, 196.[1]

This analysis is context specific. It necessarily turns on, among other things, the structure of the religious organization at issue. Put another way (and as the Court repeats throughout today's opinion), *Hosanna-Tabor* declined to

[1] While jettisoning most of *Hosanna-Tabor*'s majority opinion and insisting on "implicit" rationales that featured in a two-Justice concurrence, *ante*, at 753, today's Court curiously accuses this dissent of "cobb[ling] together" a standard focused on leadership, *ante*, at 758, n. 26. But leadership was central in *Hosanna-Tabor*, just as it was explicit in the appellate court consensus that *Hosanna-Tabor* embraced. See *supra*, at 767–769.

adopt a "rigid formula for deciding when an employee qualifies as a minister." *Id.*, at 190. Rather, *Hosanna-Tabor* focused on four "circumstances" to determine whether a fourth-grade teacher, Cheryl Perich, was employed at a Lutheran school as a "minister": (1) "the formal title given [her] by the Church," (2) "the substance reflected in that title," (3) "her own use of that title," and (4) "the important religious functions she performed for the Church." *Id.*, at 190, 192. Confirming that the ministerial exception applies to a circumscribed subcategory of faith leaders, the Court analyzed those four "factors," *ante*, at 752, to situate Perich as a minister within the Lutheran Church's structure.

B

Those considerations showed that Perich had a unique leadership role within her church. First, the Court noted that the school had "held Perich out as a minister, with a role distinct from that of most of its members." 565 U. S., at 191. When the school fired her, Perich was in the role of a "called teacher," as opposed to her prior position of "lay teacher." *Id.*, at 178. When the church "extended [Perich] a call," it also "issued her a 'diploma of vocation' according her the title 'Minister of Religion, Commissioned.'" *Id.*, at 191. And "[i]n a supplement to the diploma, the congregation undertook to periodically review Perich's 'skills of ministry' and 'ministerial responsibilities,' and to provide for her 'continuing education as a professional person in the ministry of the Gospel.'" *Ibid.*

Second, the Court observed that Perich's job title "reflected a significant degree of religious training followed by a formal process of commissioning." *Ibid.* Further distinguishing Perich from the rest of her faith community, the Court explained that Perich's "eligib[ility] to become a commissioned minister" turned on her completion of a 6-year process requiring "eight college-level courses in subjects including biblical interpretation, church doctrine, and the ministry of the Lutheran teacher," obtaining "the endorsement

of her local Synod district," and passing "an oral examination by a faculty committee at a Lutheran college." *Ibid.*

Third, the Court observed that Perich "held herself out as a minister of the Church by accepting the formal call to religious service" and "in other ways as well." *Ibid.* Unlike the lay teachers, for example, Perich claimed a tax exemption available only to employees earning compensation "in the exercise of the ministry." *Id.*, at 192 (internal quotation marks omitted).

Finally, the Court looked to function, finding that Perich's "job duties reflected a role in conveying the Church's message and carrying out its mission" notably different from other members of the church. *Ibid.*; see also *id.*, at 188, 191. Perich was "expressly charged" with "lead[ing] others" in their faith and did so by teaching "her students religion four days a week" and "le[ading] them in prayer three times a day." *Id.*, at 192 (internal quotation marks omitted). About twice a year, Perich led the schoolwide chapel service by "choosing the liturgy, selecting the hymns, and delivering a short message based on verses from the Bible." *Ibid.* Perich also "led" her students "in a brief devotional exercise each morning." *Ibid.* The Court thus observed that, "[a]s a source of religious instruction, Perich performed an important role in transmitting the Lutheran faith to the next generation." *Ibid.*

Because this inquiry is holistic, the Court warned that it is "wrong" to "say that an employee's title does not matter." *Id.*, at 193. The Court was careful not to give religious functions undue weight in identifying church leaders. And the "amount of time an employee spends on particular activities," the Court added, "is relevant in assessing that employee's status" when measured against "the nature of the religious functions performed and the other considerations," like titles, training, and how the employee held herself out to the public. *Id.*, at 194.

Hosanna-Tabor's well-rounded approach ensured that a church could not categorically disregard generally applicable

antidiscrimination laws for nonreligious reasons. By analyzing objective and easily discernable markers like titles, training, and public-facing conduct, *Hosanna-Tabor* charted a way to separate leaders who "personify" a church's "beliefs" or who "minister to the faithful" from individuals who may simply relay religious tenets. *Id.*, at 188, 195.[2] This balanced First Amendment concerns of state-church entanglement while avoiding an overbroad carveout from employment protections.

II

Until today, no court had held that the ministerial exception applies with disputed facts like these and lay teachers like respondents, let alone at the summary-judgment stage. See 911 F. 3d 603, 610 (CA9 2018) (case below in No. 19–348); see also *supra*, at 768–769.

Only by rewriting *Hosanna-Tabor* does the Court reach a different result. The Court starts with an unremarkable view: that *Hosanna-Tabor*'s "recognition of the significance of" the first three "factors" in that case "did not mean that they must be met—or even that they are necessarily important—in all other cases." *Ante*, at 752. True enough. One can easily imagine religions incomparable to those at issue in *Hosanna-Tabor* and here. But then the Court recasts *Hosanna-Tabor* itself: Apparently, the touchstone all along was a two-Justice concurrence. To that concurrence,

[2] Today's Court resists this commonsense approach, warning that it might mean that "a member of the Christian clergy or a rabbi" who "spends almost all of his or her time studying Scripture or theology and writing" would not fall within the ministerial exception. *Ante*, at 758, n. 26. Those examples betray the Court's holding: As the Court intuits (but does not recognize), the examples likely fall within the ministerial exception not just because of the functions involved but also because of the titles ("clergy" and "rabbi"), the training required to obtain those titles, and the time spent on religious activity ("almost all" of one's time). *Ibid.* It should be equally obvious that someone who spends a sliver of time reading, writing, or teaching about religion does not automatically become a minister of that religion.

"[w]hat matter[ed]" was "the religious function that [Perich] performed" and her "functional status." *Hosanna-Tabor*, 565 U. S., at 206 (opinion of ALITO, J.). Today's Court yields to the concurrence's view with identical rhetoric. "What matters," the Court echoes, "is what an employee does." *Ante*, at 753.

But this vague statement is no easier to comprehend today than it was when the Court declined to adopt it eight years ago. It certainly does not sound like a legal framework. Rather, the Court insists that a "religious institution's explanation of the role of [its] employees in the life of the religion in question is important." *Ante*, at 757; see also *ante*, at 762–763 (THOMAS, J., concurring) (urging complete deference to a religious institution in determining which employees are exempt from antidiscrimination laws). But because the Court's new standard prizes a functional importance that it appears to deem churches in the best position to explain, one cannot help but conclude that the Court has just traded legal analysis for a rubber stamp.[3]

Indeed, the Court reasons that "judges cannot be expected to have a complete understanding and appreciation" of the law and facts in ministerial-exception cases, *ante*, at 757, and all but abandons judicial review. Although today's decision is limited to certain "teachers of religion," *ante*, at 757–759, its reasoning risks rendering almost every Catholic parishioner and parent in the Archdiocese of Los Angeles a Catholic min-

[3] Elsewhere, the Court hints at a comparative inquiry, noting that Biel and Morrissey-Berru were the school staff "entrusted most directly" with "educating their students in the faith." *Ante*, at 757. Setting aside the Court's factual assumptions, one must ask: "[M]ost directly" compared to what (or whom)? The Court does not say. Perhaps the Court means to embrace the predominant Circuit approach, which looked at whether a putative minister "serv[ed] primarily religious roles." *Hankins* v. *Lyght*, 441 F. 3d 96, 117, 118, n. 13 (CA2 2006) (Sotomayor, J., dissenting) (identifying seven Circuits); see also, *e. g.*, *Petruska* v. *Gannon University*, 462 F. 3d 294, 304, n. 6, 307 (CA3 2006). But were that the case, the teachers would have undoubtedly prevailed here.

ister.[4] That is, the Court's apparent deference here threatens to make nearly anyone whom the schools might hire "ministers" unprotected from discrimination in the hiring process. That cannot be right. Although certain religious functions may be important to a church, a person's performance of some of those functions does not mechanically trigger a categorical exemption from generally applicable antidiscrimination laws.

Today's decision thus invites the "potential for abuse" against which courts of appeals have long warned. *Scharon*, 929 F. 2d, at 363, n. 3. Never mind that the Court renders almost all of the Court's opinion in *Hosanna-Tabor* irrelevant. It risks allowing employers to decide for themselves whether discrimination is actionable. Indeed, today's decision reframes the ministerial exception as broadly as it can, without regard to the statutory exceptions tailored to protect religious practice. As a result, the Court absolves religious institutions of any animus completely irrelevant to their religious beliefs or practices and all but forbids courts to inquire further about whether the employee is in fact a leader of the religion. Nothing in *Hosanna-Tabor* (or at least its majority opinion) condones such judicial abdication.

III

Faithfully applying *Hosanna-Tabor*'s approach and common sense confirms that the teachers here are not Catholic "ministers" as a matter of law. This is especially so because

[4] See, *e. g.*, Archdiocese of Los Angeles, Administrative Handbook § 2.3.1 ("[P]arishioners are vital to parish life as volunteers. They participate as catechists in religious education, organize youth ministry and adult events, assist in charitable and social outreach activities in the community, and serve as extraordinary ministers of the Eucharist, lectors, altar servers, and ushers, as well as in other supporting ministerial roles"); Pope Francis, Post-Synodal Apostolic Exhortation on Love in the Family 13–14 (2016) ("The family is . . . the place where parents become their children's first teachers in the faith . . . . Parents have a serious responsibility for this work of education").

the employers seek summary judgment, meaning the Court must "view the facts and draw reasonable inferences in the light most favorable to" the teachers. *Scott* v. *Harris*, 550 U. S. 372, 378 (2007) (internal quotation marks omitted).[5]

A

1

Respondent Kristen Biel was a teacher at St. James School, a Catholic school in the Archdiocese of Los Angeles.[6] Biel initially served as a substitute teacher, teaching first grade two days a week. App. 248–249. At the end of the 2013 school year, the school hired Biel as a full-time fifth-grade teacher. 911 F. 3d, at 605; App. 250.

Biel's employment contract identified her position as just that: "Grade 5 Teacher." App. to Pet. for Cert. in No. 19–348, p. 103a; App. 328–329. The contract referred to Biel throughout as "teacher," and directed her to the benefits guide for "Lay Employees." App. to Pet. for Cert. in No. 19–348, at 105a; App. 320, 325, 327–329. The contract also stated that Biel would work "within [St. James's] overriding commitment" to church "doctrines, laws, and norms" and would "model, teach, and promote behavior in conform-

[5] The Court maintains that the Court of Appeals erred by "in effect" granting summary judgment to the teachers on the ministerial exception instead of "remand[ing] for a trial." *Ante*, at 738, n. 1. Yet today's decision commits the exact error it claims to diagnose: The Court views the facts in the light most favorable to the schools and "in effect" grants summary judgment to the movants instead of remanding for a trial. As explained below, the Court is also wrong to assert that there is no material fact genuinely in dispute. Compare *ante*, at 739, n. 1 (asserting that "neither party takes the position that any *material* fact is genuinely in dispute") with, *e. g.*, Brief for Respondents 12–13, n. 4, 40–41 (taking the position that material facts are genuinely in dispute).

[6] Unlike the Court, I begin with Biel's case because it was the first one decided and the only one deemed precedential below. Biel passed away last year, losing her life to the same cancer that allegedly lost her a job at St. James. Biel's husband now represents her estate.

ity to the teaching of the Roman Catholic Church." 911 F. 3d, at 605 (internal quotation marks omitted). According to the faculty handbook, all faculty (religion teachers or not) "participate in the Church's mission" of providing "quality Catholic education to . . . students, educating them in academic areas and in . . . Catholic faith and values." *Id.*, at 605–606 (internal quotation marks omitted). The faculty handbook further instructs teachers to follow California's public school curricular requirements. *Id.*, at 606.

Although St. James School "recommended" that teachers be Catholic, the school did not require it. App. 289. Nor did the school require teachers to have experience, training, or schooling in religious pedagogy. 911 F. 3d, at 605. Biel had no such credentials when the school hired her, as she had received her bachelor's degree in liberal arts and a teaching credential from a public university. *Ibid.* Even after she began working at St. James School, Biel's "only" training in religious pedagogy was "a single half-day conference where topics ranged from the incorporation of religious themes into lesson plans to techniques for teaching art classes." *Ibid.*; see also App. 242–244, 261–263.

Biel taught her fifth-grade class all its academic subjects, including English, spelling, reading, literature, mathematics, science, and social studies. 911 F. 3d, at 605; Excerpts of Record in No. 17–55180 (CA9), p. 588. This also involved a standard religion curriculum, which Biel taught for about 30 minutes four days a week. 911 F. 3d, at 605. When teaching religion, Biel followed instructions in a workbook that the school administration had prescribed. *Ibid.*; App. 254–255. Twice a day, Biel would pray with her students, but she "did not lead them." 911 F. 3d, at 605. Rather, the class had student "prayer leaders" and "[t]he prayers that were said in the classroom were said mostly by the students." App to Pet. for Cert. in No. 19–348, at 93a. As Biel explained, she "didn't need to teach" her students any prayers, either, because "[t]hey already kn[e]w them" and "had prayer leaders." *Ibid.*; contra, *ante*, at 760 (assert-

ing without citation that Biel "taught [her students] prayers"). Once a month, Biel joined her students in the school's multipurpose room for mass, which were always officiated by a Catholic priest or a nun. App. 258. The record does not show that Biel taught her students what to do at mass. *Ibid.* Rather, Biel's "sole responsibility" during liturgy was "to keep her class quiet and orderly." 911 F. 3d, at 605; App. 258–259.

Near the end of the school year, Biel learned that she had breast cancer and would need surgery and chemotherapy. Biel informed the school and explained that her condition would require her to take time off from work. 911 F. 3d, at 606; App. 266–269, 309. The school responded that she would not be welcomed back. 911 F. 3d, at 606; App. 270–273. At no point has St. James School suggested a religious reason for terminating Biel's employment.

2

In 1998, after a 20-year career in newspaper advertising and copywriting, respondent Agnes Deirdre Morrissey-Berru began working as a substitute teacher at Our Lady of Guadalupe School, another Catholic school in Southern California. App. to Pet. for Cert. in No. 19–267, p. 80a; App. 74. More recently, she taught fifth and sixth grade full time. *Id.*, at 73–75.

Each year, Morrissey-Berru signed an employment contract with the school. Like Biel's contracts, these agreements referred to Morrissey-Berru as "Teacher" and directed her to the benefits guide for "Lay Employees." *Id.*, at 91–100, 127–164; App. to Pet. for Cert. in No. 19–267, at 32a–42a. Notably, the faculty handbook promised not to discriminate on the basis of any protected characteristic, including "race," "sex," "disability," or "age." Excerpts of Record in No. 17–56624 (CA9), p. 648.

"At no time" during her employment did Morrissey-Berru "feel God was leading [her] to serve in the ministry," nor did she "believe [she] was accepting a formal . . . call to religious

service by working at Our Lady of Guadalupe as a fifth and sixth grade teacher." App. to Brief in Opposition in No. 19–267, p. 2a. Morrissey-Berru, in fact, is not a practicing Catholic. *Ibid.* Although Our Lady of Guadalupe School "preferred" its teachers to be Catholic, there is a factual dispute whether the school insisted on that prerequisite without exception (and thus, for summary-judgment purposes, the Court must assume there was no absolute requirement). App. 110–111; *Scott*, 550 U. S., at 378. Nor did the school require teachers to have any background or training in Catholic pedagogy (or even religion). Morrissey-Berru had no such credentials when the school hired her, as she held a bachelor's degree in English language arts with a minor in secondary education. App. 73–74. Many years after Morrissey-Berru had begun teaching at the school, though, the school did ask her to attend a catechist course on the history of the Catholic Church. 769 Fed. Appx. 460, 461 (CA9 2019) (*per curiam*) (case below in No. 19–267); App. to Pet. for Cert. in No. 19–267, at 85a. The record does not disclose whether Morrissey-Berru ever completed the full catechism-certification program, and in fact suggests that she did not. *E. g.*, Excerpts of Record in No. 17–56624, at 41–42, 44–45, 67.

Morrissey-Berru taught her class a range of subjects: reading, writing, math, grammar, vocabulary, science, social studies, and religion. App. 75. When teaching religion, Morrissey-Berru followed the contents of a preselected workbook. *Id.*, at 79–80. Morrissey-Berru also "led her students in daily prayer" and assisted with planning a monthly mass. 769 Fed. Appx., at 461. But she did not recall "lead[ing her] students in any devotional exercises." App. to Pet. for Cert. in No. 19–267, at 89a.

In 2014, when Morrissey-Berru was in her sixties, the school did not renew Morrissey-Berru's contract. *Id.*, at 30a–31a. Like St. James, Our Lady of Guadalupe School has neither cited nor asserted a religious reason for the termination.

B

On these records, the Ninth Circuit correctly concluded that neither school had shown that the ministerial exception barred the teachers' claims for disability and age discrimination. At the very least, these cases should have proceeded to trial. Viewed in the light most favorable to the teachers, the facts do not entitle the employers to summary judgment.

First, and as the Ninth Circuit explained, neither school publicly represented that either teacher was a Catholic spiritual leader or "minister." Neither conferred a title reflecting such a position. Rather, the schools referred to both Biel and Morrissey-Berru as "lay" teachers, which the courts of appeals have long recognized as a mark of nonministerial, as opposed to "ministerial," status. See *supra*, at 768–769; App. to Pet. for Cert. in No. 19–267, at 32a–42a; App. 91–100, 127–164, 244–246, 320–329.

In response, the Court worries that "attaching too much significance to titles would risk privileging religious traditions with formal organizational structures over those that are less formal." *Ante*, at 753. That may or may not be true, but it is irrelevant here. These cases are not about "less formal" religions; they are about the Catholic Church and its publicized and undisputedly "formal organizational structur[e]." *Ibid.* After all, the right to free exercise has historically "allow[ed] churches and other religious institutions to define" their own "membership" and internal "organization." McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1464–1465 (1990). But that freedom of choice should carry consequences in litigation. And here, like the faith at issue in *Hosanna-Tabor*, the Catholic Church uses formal titles.

The Court then turns to irrelevant or disputed facts. The Court notes, for example, that a religiously significant term "rabbi" translates to "teacher," *ante*, at 759, suggesting that Biel's and Morrissey-Berru's positions as lay teachers conferred religious titles after all. But that wordplay unravels

when one imagines the Court's logic as applied to a math or gym or computer "teacher" at either school. The title "teacher" does not convey ministerial status. Nor does the Court gain purchase from the disputed fact that Biel and Morrissey-Berru were "regarded as 'catechists'" "'responsible for the faith formation of the[ir] students.'" *Ante*, at 740, 759. For one thing, the Court discusses evidence from only Morrissey-Berru's case (not Biel's).[7] For another, the Court invokes the disputed deposition testimony of a school administrator while ignoring record evidence refuting that characterization and suggesting that Morrissey-Berru never completed the full catechist training program. See, *e. g.*, Excerpts of Record in No. 17–56624, at 41–42, 44–45, 67. Although the Archdiocese does confer titles and holds a formal "Catechist Commissioning" every September, *id.*, at 42, 45, the record does not suggest that either teacher here was so commissioned. In relying on disputed factual assertions, the Court's blinkered approach completely disregards the summary-judgment standard.

Second (and further undermining the schools' claims), neither teacher had a "significant degree of religious training" or underwent a "formal process of commissioning." *Hosanna-Tabor*, 565 U. S., at 191; cf. Excerpts of Record in No. 17–56624, at 42 (identifying similarly formal training and commissioning process within the Catholic Church). Nor did either school require such training or commissioning as a prerequisite to gaining (or keeping) employment. In Biel's case, the record reflects that she attended a single conference that lasted "four or five hours," briefly discussed "how to incorporate God into . . . lesson plans," and other-

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[7] In Biel's case, the Court cites a page from St. James School's "Staff Guidelines and Responsibilities" setting out "'expect[ations]'" and a declaration by the school principal about required attendance at a teacher conference. See *ante*, at 759, n. 28. Neither shows as a matter of law that Biel was a "catechist" or that formal religious training was a prerequisite to her position. See *infra* this page and 781.

wise "showed [teachers] how to do art and make little pictures or things like that." App. 262, 263. Notably, all elementary school faculty attended the conference, including the computer teacher. *Id.*, at 261–263. In turn, Our Lady of Guadalupe did not ask Morrissey-Berru to undergo any religious training for her first 13 years of teaching, until it asked her to attend the uncompleted program described above. See *id.*, at 76–77. This consideration instructs that the teachers here did not fall within the ministerial exception.

Third, neither Biel nor Morrissey-Berru held herself out as having a leadership role in the faith community. Neither claimed any benefits (tax, governmental, ceremonial, or administrative) available only to spiritual leaders. Cf. *Hosanna-Tabor*, 565 U. S., at 191–192. Nor does it matter that all teachers signed contracts agreeing to model and impart Catholic values. This component of the *Hosanna-Tabor* inquiry focuses on outward-facing behavior, and neither Biel nor Morrissey-Berru publicly represented herself as anything more than a fifth-grade teacher. App. to Brief in Opposition in No. 19–267, at 1a–2a; App. 249–250. The Court does not grapple with this third component of *Hosanna-Tabor*'s inquiry, which seriously undermines the schools' cases.

That leaves only the fourth consideration in *Hosanna-Tabor*: the teachers' function. To be sure, Biel and Morrissey-Berru taught religion for a part of some days in the week. But that should not transform them automatically into ministers who "guide" the faith "on its way." *Hosanna-Tabor*, 565 U. S., at 196; see also *supra*, at 767–769. Although the Court does not resolve this functional question with "a stopwatch," it still considers the "amount of time an employee spends on particular activities" in "assessing that employee's status." *Hosanna-Tabor*, 565 U. S., at 193–194. Here, the time Biel and Morrissey-Berru spent on secular instruction far surpassed their time teaching religion. For the vast majority of class, they taught subjects like reading,

writing, spelling, grammar, vocabulary, math, science, social studies, and geography. In so doing, both were like any public school teacher in California, subject to the same statewide curriculum guidelines. 911 F. 3d, at 606. In other words, both Biel and Morrissey-Berru had almost exclusively secular duties, making it especially improper to deprive them of all legal protection when their employers have not offered any religious reason for the alleged discrimination.

Nor is it dispositive that both teachers prayed with their students. Biel did not lead devotionals in her classroom, did not teach prayers, and had a minor role in monitoring student behavior during a once-a-month mass. App. 79, 252–253, 256–259. Morrissey-Berru did lead classroom prayers, bring her students to a cathedral once a year, direct the school Easter play, and sign a contract directing her to "assist with Liturgy Planning." App. to Pet. for Cert. in No. 19–267, at 42a, 68a–69a, 95a–96a. But these occasional tasks should not trigger as a matter of law the ministerial exception. Morrissey-Berru did not lead mass, deliver sermons, or select hymns. *Id.*, at 89a. And unlike the teacher in *Hosanna-Tabor*, there is no evidence that Morrissey-Berru led devotional exercises. App. to Pet. for Cert. in No. 19–267, at 89a. Her limited religious role does not fit *Hosanna-Tabor*'s description of a "minister to the faithful." 565 U. S., at 189.

Nevertheless, the Court insists that the teachers are ministers because "implicit in our decision in *Hosanna-Tabor* was a recognition that educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school." *Ante*, at 753–754. But teaching religion in school alone cannot dictate ministerial status. If it did, then *Hosanna-Tabor* wasted precious pages discussing titles, training, and other objective indicia to examine whether Cheryl Perich was a minister. Not surprisingly, the Government made this same point earlier in Biel's case: "If teaching religion to elementary school students for a half-

hour each day, praying with them daily, and accompanying them to weekly or monthly religious services were sufficient to establish a teacher as a minister of the church within the meaning of the ministerial exception, the Supreme Court would have had no need for most of its discussion in *Hosanna-Tabor*." Brief for EEOC as *Amicus Curiae* in No. 17–55180 (CA9), p. 21. Rather, "the Court made clear in *Hosanna-Tabor* that context matters." *Ibid.* Indeed.[8]

Were there any doubt left about the proper result here, recall that neither school has shown that it required its religion teachers to be Catholic. The Court does not explain how the schools here can show, or have shown, that a non-Catholic "personif[ies]" Catholicism or leads the faith. *Hosanna-Tabor*, 565 U. S., at 188. Instead, the Court remarks that a "rigid" coreligionist requirement might "not always be easy" to apply to faiths like Judaism or variations of Protestantism. *Ante*, at 761. Perhaps. But that has nothing to do with Catholicism.

Pause, for a moment, on the Court's conclusion: Even if the teachers were not Catholic, and even if they were forbidden to participate in the church's sacramental worship, they would nonetheless be "ministers" of the Catholic faith simply because of their supervisory role over students in a religious school. That stretches the law and logic past their breaking points. (Indeed, it is ironic that Our Lady of Guadalupe School seeks complete immunity for age discrimination when its teacher handbook promised not to discriminate on that basis.) As the Government once put it, even when a school has a "pervasively religious atmosphere," its faculty are unlikely ministers when "there is no requirement that its teachers even be members of [its] religious denomination." Brief

[8] Although the Government supported Biel below, it has since switched sides without explanation. Odder still, the Government's brief to this Court faults the Ninth Circuit for having embraced the Government's prior views. Compare Brief for EEOC as *Amicus Curiae* in No. 17–55180 (CA9), p. 21, with Brief for United States as *Amicus Curiae* 16–17.

for Appellee in No. 84–2779 (CA9 1986), pp. 11, 29, n. 17. It is hard to imagine a more concrete example than these cases.

* * *

The Court's conclusion portends grave consequences. As the Government (arguing for Biel at the time) explained to the Ninth Circuit, "thousands of Catholic teachers" may lose employment-law protections because of today's outcome. Recording of Oral Arg. in No. 17–55180 (July 11, 2018), at 25:15–25:30, https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000014022. Other sources tally over a hundred thousand secular teachers whose rights are at risk. See, *e. g.*, Brief for Virginia et al. as *Amici Curiae* 33, n. 25. And that says nothing of the rights of countless coaches, camp counselors, nurses, social-service workers, in-house lawyers, media-relations personnel, and many others who work for religious institutions. All these employees could be subject to discrimination for reasons completely irrelevant to their employers' religious tenets.

In expanding the ministerial exception far beyond its historic narrowness, the Court overrides Congress' carefully tailored exceptions for religious employers. Little if nothing appears left of the statutory exemptions after today's constitutional broadside. So long as the employer determines that an employee's "duties" are "vital" to "carrying out the mission of the church," *ante*, at 756–757, then today's laissez-faire analysis appears to allow that employer to make employment decisions because of a person's skin color, age, disability, sex, or any other protected trait for reasons having nothing to do with religion.

This sweeping result is profoundly unfair. The Court is not only wrong on the facts, but its error also risks upending antidiscrimination protections for many employees of religious entities. Recently, this Court has lamented a perceived "discrimination against religio[n]." *E. g.*, *Espinoza* v. *Montana Dept. of Revenue*, 591 U. S. 464, 478 (2020). Yet here it swings

the pendulum in the extreme opposite direction, permitting religious entities to discriminate widely and with impunity for reasons wholly divorced from religious beliefs. The inherent injustice in the Court's conclusion will be impossible to ignore for long, particularly in a pluralistic society like ours. One must hope that a decision deft enough to remold *Hosanna-Tabor* to fit the result reached today reflects the Court's capacity to cabin the consequences tomorrow.

I respectfully dissent.

Syllabus

TRUMP *v.* VANCE, DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK, ET AL.

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

No. 19–635. Argued May 12, 2020—Decided July 9, 2020

In 2019, the New York County District Attorney's Office—acting on behalf of a grand jury—served a subpoena *duces tecum* on Mazars USA, LLP, the personal accounting firm of President Donald J. Trump, for financial records relating to the President and his businesses. The President, acting in his personal capacity, sued the district attorney and Mazars in Federal District Court to enjoin enforcement of the subpoena, arguing that a sitting President enjoys absolute immunity from state criminal process under Article II and the Supremacy Clause. The District Court dismissed the case under the abstention doctrine of *Younger* v. *Harris*, 401 U. S. 37, and, in the alternative, held that the President was not entitled to injunctive relief. The Second Circuit rejected the District Court's dismissal under *Younger* but agreed with the court's denial of injunctive relief, concluding that presidential immunity did not bar enforcement of the subpoena and rejecting the argument of the United States as *amicus curiae* that a state grand jury subpoena seeking the President's documents must satisfy a heightened showing of need.

Held: Article II and the Supremacy Clause do not categorically preclude, or require a heightened standard for, the issuance of a state criminal subpoena to a sitting President. Pp. 793–811.

(a) In 1807, John Marshall, presiding as Circuit Justice for Virginia over the treason trial of Aaron Burr, granted Burr's motion for a subpoena *duces tecum* directed at President Jefferson. In rejecting the prosecution's argument that a President was not subject to such a subpoena, Marshall held that a President does not "stand exempt" from the Sixth Amendment's guarantee that the accused have compulsory process for obtaining witnesses for their defense. *United States* v. *Burr*, 25 F. Cas. 30, 33–34. The sole argument for an exemption was that a President's "duties as chief magistrate demand his whole time for national objects." *Id.*, at 34. But, in Marshall's assessment, those duties were "not unremitting," *ibid.*, and any conflict could be addressed by the court upon return of the subpoena. Marshall also concluded that the Sixth Amendment's guarantee extended to the production of papers. "[T]he propriety of introducing any papers," he explained, would "depend on the character of the paper, not the character of the person who holds it," and would have "due consideration" upon the return of the

subpoena. *Id.*, at 34, 37. Jefferson agreed to furnish whatever justice required, subject to the prerogative to decide whether particular executive communications should be withheld.

In the two centuries since *Burr*, successive Presidents from Monroe to Clinton have accepted Marshall's ruling that the Chief Executive is subject to subpoena and have uniformly agreed to testify when called in criminal proceedings.

In 1974, the question whether to compel the disclosure of official communications over the President's objection came to a head when the Watergate Special Prosecutor secured a subpoena *duces tecum* directing President Nixon to produce, among other things, tape recordings of Oval Office meetings. This Court rejected Nixon's claim of an absolute privilege of confidentiality for all presidential communications. Recognizing that "compulsory process" was imperative for both the prosecution and the defense, the Court held that the President's "generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial." *United States* v. *Nixon*, 418 U. S. 683, 713. President Nixon dutifully released the tapes. Pp. 793–799.

(b) This history all involved *federal* criminal proceedings. Here, the President claims that the Supremacy Clause gives a sitting President absolute immunity from *state* criminal subpoenas because compliance with such subpoenas would categorically impair the performance of his Article II functions. The Solicitor General, arguing on behalf of the United States, claims that a state grand jury subpoena for a sitting President's personal records must, at the very least, meet a heightened standard of need. Pp. 799–811.

(1) The President's unique duties as head of the Executive Branch come with protections that safeguard his ability to perform his vital functions. The Constitution also guarantees "the entire independence of the General Government from any control by the respective States." *Farmers and Mechanics Sav. Bank of Minneapolis* v. *Minnesota*, 232 U. S. 516, 521. Marshall's ruling in *Burr*, entrenched by 200 years of practice and this Court's decision in *Nixon*, confirms that federal criminal subpoenas do not "rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions." *Clinton* v. *Jones*, 520 U. S. 681, 702–703. But the President claims that state criminal subpoenas necessarily pose a unique threat of impairment and thus require absolute immunity. His categorical argument focuses on three burdens: diversion, stigma, and harassment. Pp. 799–807.

(i) The President contends that complying with state criminal subpoenas would necessarily distract the Chief Executive from his duties. He grounds that concern on *Nixon* v. *Fitzgerald*, which recognized a President's "absolute immunity from damages liability predicated on his

official acts." 457 U. S. 731, 749. But, contrary to the President's suggestion, that case did not hold that distraction was sufficient to confer absolute immunity. Indeed, the Court expressly rejected immunity based on distraction alone 15 years later in *Clinton* v. *Jones*, when President Clinton sought absolute immunity from civil liability for private acts. As the Court explained, *Fitzgerald*'s "dominant concern" was not mere distraction but the distortion of the Executive's "decisionmaking process." 520 U. S., at 694, n. 19. The prospect that a President may become "preoccupied by pending litigation" did not ordinarily implicate constitutional concerns. *Id.*, at 705, n. 40. Two centuries of experience likewise confirm that a properly tailored criminal subpoena will not normally hamper the performance of a President's constitutional duties.

The President claims this case is different. He believes that he is under investigation and argues that the toll will necessarily be heavier in that circumstance. But the President is not seeking immunity from the diversion occasioned by the prospect of future criminal *liability*. He concedes that he may be investigated while in office. His objection is instead limited to the *additional* distraction caused by the subpoena itself. That argument, however, runs up against the 200 years of precedent establishing that Presidents, and their official communications, are subject to judicial process, see *Burr*, 25 F. Cas., at 34, even when the President is under investigation, see *Nixon*, 418 U. S., at 706. Pp. 801–803.

(ii) The President next claims that the stigma of being subpoenaed will undermine his leadership at home and abroad. But even if a tarnished reputation were a cognizable impairment, there is nothing inherently stigmatizing about a President performing "the citizen's normal duty of . . . furnishing information relevant" to a criminal investigation. *Branzburg* v. *Hayes*, 408 U. S. 665, 691. Nor can the risk of association with persons or activities under criminal investigation absolve a President of such an important public duty. The consequences for a President's public standing will likely increase if he is the one under investigation, but the President concedes that such investigations are permitted under Article II and the Supremacy Clause. And the receipt of a subpoena would not seem to categorically magnify the harm to the President's reputation. Additionally, in the grand jury context longstanding secrecy rules aim to prevent the very stigma the President anticipates. Pp. 803–804.

(iii) Finally, the President argues that subjecting Presidents to state criminal subpoenas will make them "easily identifiable target[s]" for harassment. *Fitzgerald*, 457 U. S., at 753. The Court rejected a nearly identical argument in *Clinton*, concluding that the risk posed by harassing civil litigation was not "serious" because federal courts have the

tools to deter and dismiss vexatious lawsuits. 520 U. S., at 708. Harassing state criminal subpoenas could, under certain circumstances, threaten the independence or effectiveness of the Executive. But here again the law already seeks to protect against such abuse. First, grand juries are prohibited from engaging in "arbitrary fishing expeditions" or initiating investigations "out of malice or an intent to harass," *United States* v. *R. Enterprises, Inc.*, 498 U. S. 292, 299, and federal courts may intervene in state proceedings that are motivated by or conducted in bad faith. Second, because the Supremacy Clause prohibits state judges and prosecutors from interfering with a President's official duties, any effort to manipulate a President's policy decisions or to retaliate against a President for official acts through issuance of a subpoena would be an unconstitutional attempt to "influence" a superior sovereign "exempt" from such obstacles, see *McCulloch* v. *Maryland*, 4 Wheat. 316, 417. And federal law allows a President to challenge any such allegedly unconstitutional influence in a federal forum. Pp. 804–807.

(2) A state grand jury subpoena seeking a President's private papers need not satisfy a heightened need standard, for three reasons. First, although a President cannot be treated as an "ordinary individual" when executive communications are sought, *Burr* teaches that, with regard to private papers, a President stands in "nearly the same situation with any other individual." 25 F. Cas., at 191–192. Second, there has been no showing here that heightened protection against state subpoenas is necessary for the Executive to fulfill his Article II functions. Finally, absent a need to protect the Executive, the public interest in fair and effective law enforcement cuts in favor of comprehensive access to evidence.

Rejecting a heightened need standard does not leave Presidents without recourse. A President may avail himself of the same protections available to every other citizen, including the right to challenge the subpoena on any grounds permitted by state law, which usually include bad faith and undue burden or breadth. When the President invokes such protections, "[t]he high respect that is owed to the office of the Chief Executive . . . should inform the conduct of the entire proceeding, including the timing and scope of discovery." *Clinton*, 520 U. S., at 707. In addition, a President can raise subpoena-specific constitutional challenges in either a state or a federal forum. As noted above, he can challenge the subpoena as an attempt to influence the performance of his official duties, in violation of the Supremacy Clause. And he can argue that compliance with a particular subpoena would impede his constitutional duties. Pp. 807–810.

941 F. 3d 631, affirmed and remanded.

Syllabus

ROBERTS, C. J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. KAVANAUGH, J., filed an opinion concurring in the judgment, in which GORSUCH, J., joined, *post*, p. 811. THOMAS, J., *post*, p. 815, and ALITO, J., *post*, p. 825, filed dissenting opinions.

Jay Alan Sekulow argued the cause for petitioner. With him on the briefs were *Stuart J. Roth*, *Jordan Sekulow*, *William S. Consovoy*, and *Patrick Strawbridge*.

Solicitor General Francisco argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Assistant Attorney General Hunt*, *Deputy Solicitor General Wall*, *Deputy Assistant Attorney General Mooppan*, *Vivek Suri*, *Mark R. Freeman*, and *Gerard J. Sinzdak*.

Carey R. Dunne argued the cause for respondents. With him on the brief were *Christopher Conroy*, *Solomon B. Shinerock*, *James H. Graham*, *Sarah Walsh*, *Allen J. Vickey*, *Caitlin Halligan*, and *Walter Dellinger*.*

*Briefs of *amici curiae* urging reversal were filed for the Christian Family Coalition Florida, Inc., by *Dennis Grossman*; and for the Eagle Forum Education & Legal Defense Fund by *Lawrence J. Joseph*.

Briefs of *amici curiae* urging affirmance were filed for the Commonwealth of Virginia et al. by *Mark R. Herring*, Attorney General of Virginia, *Victoria N. Pearson*, Deputy Attorney General, *Toby J. Heytens*, Solicitor General, *Martine E. Cicconi* and *Michelle S. Kallen*, Deputy Solicitors General, and *Jessica Merry Samuels*, Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Xavier Becerra* of California, *William Tong* of Connecticut, *Kathleen Jennings* of Delaware, *Karl A. Racine* of the District of Columbia, *Clare E. Connors* of Hawaii, *Kwame Raoul* of Illinois, *Brian E. Frosh* of Maryland, *Maura Healey* of Massachusetts, *Dana Nessel* of Michigan, *Keith Ellison* of Minnesota, *Aaron D. Ford* of Nevada, *Gurbir Singh Grewal* of New Jersey, *Hector Balderas* of New Mexico, *Ellen F. Rosenblum* of Oregon, and *Bob Ferguson* of Washington; for the American Civil Liberties Union et al. by *David D. Cole*, *Steven R. Shapiro*, *Jennesa Calvo-Friedman*, *Arthur Eisenberg*, and *Christopher Dunn*; for the Electronic Privacy Information Center et al. by *Marc Rotenberg* and *Alan Butler*; for Former Department of Justice Officials by *Elizabeth B. Wydra*, *Brianne J. Gorod*, and *Ashwin P. Phatak*; for Former Republican Members of Con-

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

In our judicial system, "the public has a right to every man's evidence."[1] Since the earliest days of the Republic, "every man" has included the President of the United States. Beginning with Jefferson and carrying on through Clinton, Presidents have uniformly testified or produced documents in criminal proceedings when called upon by federal courts. This case involves—so far as we and the parties can tell—the first *state* criminal subpoena directed to a President. The President contends that the subpoena is unenforceable. We granted certiorari to decide whether Article II and the Supremacy Clause categorically preclude, or require a heightened standard for, the issuance of a state criminal subpoena to a sitting President.

I

In the summer of 2018, the New York County District Attorney's Office opened an investigation into what it opaquely describes as "business transactions involving multiple individuals whose conduct may have violated state law." Brief for Respondent Vance 2. A year later, the office—acting on behalf of a grand jury—served a subpoena *duces tecum* (essentially a request to produce evidence) on Mazars USA, LLP, the personal accounting firm of President Donald J. Trump. The subpoena directed Mazars to produce financial records relating to the President and business organizations

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gress et al. by *Jamila G. Benkato*, *Cameron O. Kistler*, *Justin Florence*, *Benjamin L. Berwick*, and *Steven A. Hirsch*; and for Washington State Tax Practitioners by *Dirk Giseburt*, *pro se*, and for Sean J. Kealy et al. by *James J. Wheaton* and *Mr. Kealy*, both *pro se*.

Briefs of *amici curiae* were filed for David Boyle by *Mr. Boyle*, *pro se*; for Claire Finklestein et al. by *Richard W. Painter*; and for Eugene H. Goldberg by *Mr. Goldberg*, *pro se*.

[1] This maxim traces at least as far back as Lord Chancellor Hardwicke, in a 1742 parliamentary debate. See 12 Parliamentary History of England 693 (1812).

affiliated with him, including "[t]ax returns and related schedules," from "2011 to the present." App. to Pet. for Cert. 119a.[2]

The President, acting in his personal capacity, sued the district attorney and Mazars in Federal District Court to enjoin enforcement of the subpoena. He argued that, under Article II and the Supremacy Clause, a sitting President enjoys absolute immunity from state criminal process. He asked the court to issue a "declaratory judgment that the subpoena is invalid and unenforceable while the President is in office" and to permanently enjoin the district attorney "from taking any action to enforce the subpoena." Amended Complaint in No. 1:19–cv–8694 (SDNY, Sept. 25, 2019), p. 19. Mazars, concluding that the dispute was between the President and the district attorney, took no position on the legal issues raised by the President.

The District Court abstained from exercising jurisdiction and dismissed the case based on *Younger* v. *Harris*, 401 U. S. 37 (1971), which generally precludes federal courts from intervening in ongoing state criminal prosecutions. 395 F. Supp. 3d 283, 290 (SDNY 2019). In an alternative holding, the court ruled that the President was not entitled to injunctive relief. *Ibid.*

The Second Circuit met the District Court halfway. As to the dismissal, the Court of Appeals held that *Younger* abstention was inappropriate because that doctrine's core justification—"preventing friction" between States and the Federal Government—is diminished when state and federal actors are already in conflict, as the district attorney and the President were. 941 F. 3d 631, 637, 639 (2019).

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[2] The grand jury subpoena essentially copied a subpoena issued to Mazars in April 2019 by the Committee on Oversight and Reform of the U. S. House of Representatives, which is at issue in *Trump* v. *Mazars USA, LLP*, 591 U. S. 848 (2020). The principal difference is that the instant subpoena expressly requests tax returns.

On the merits, the Court of Appeals agreed with the District Court's denial of a preliminary injunction. Drawing on the 200-year history of Presidents being subject to federal judicial process, the Court of Appeals concluded that "presidential immunity does not bar the enforcement of a state grand jury subpoena directing a third party to produce nonprivileged material, even when the subject matter under investigation pertains to the President." *Id.*, at 640. It also rejected the argument raised by the United States as *amicus curiae* that a state grand jury subpoena must satisfy a heightened showing of need. The court reasoned that the proposed test, derived from cases addressing privileged Executive Branch communications, "ha[d] little bearing on a subpoena" seeking "information relating solely to the President in his private capacity and disconnected from the discharge of his constitutional obligations." *Id.*, at 645–646.

We granted certiorari. 589 U. S. 1120 (2019).

II

In the summer of 1807, all eyes were on Richmond, Virginia. Aaron Burr, the former Vice President, was on trial for treason.[3] Fallen from political grace after his fatal duel with Alexander Hamilton, and with a murder charge pending in New Jersey, Burr followed the path of many down-and-out Americans of his day—he headed West in search of new opportunity. But Burr was a man with outsized ambitions. Together with General James Wilkinson, the Governor of the Louisiana Territory, he hatched a plan to establish a new territory in Mexico, then controlled by Spain.[4] Both men

[3] See generally N. Isenberg, Fallen Founder: The Life of Aaron Burr 271–365 (2007); J. Smith, John Marshall: Definer of a Nation 348–374 (1996); M. Lomask, Aaron Burr: The Conspiracy and Years of Exile, 1805–1836, pp. 222–298 (1982).

[4] Wilkinson was secretly being paid by Spain for information and influence. In the wake of Burr's trial, he was investigated by Congress and

anticipated that war between the United States and Spain was imminent, and when it broke out they intended to invade Spanish territory at the head of a private army.

But while Burr was rallying allies to his cause, tensions with Spain eased and rumors began to swirl that Burr was conspiring to detach States by the Allegheny Mountains from the Union. Wary of being exposed as the principal co-conspirator, Wilkinson took steps to ensure that any blame would fall on Burr. He sent a series of letters to President Jefferson accusing Burr of plotting to attack New Orleans and revolutionize the Louisiana Territory.

Jefferson, who despised his former running mate Burr for trying to steal the 1800 presidential election from him, was predisposed to credit Wilkinson's version of events. The President sent a special message to Congress identifying Burr as the "prime mover" in a plot "against the peace and safety of the Union." 16 Annals of Cong. 39–40 (1807). According to Jefferson, Burr contemplated either the "severance of the Union" or an attack on Spanish territory. *Id.*, at 41. Jefferson acknowledged that his sources contained a "mixture of rumors, conjectures, and suspicions" but, citing Wilkinson's letters, he assured Congress that Burr's guilt was "beyond question." *Id.*, at 39–40.

The trial that followed was "the greatest spectacle in the short history of the republic," complete with a Founder-studded cast. N. Isenberg, Fallen Founder: The Life of Aaron Burr 351 (2007). People flocked to Richmond to watch, massing in tents and covered wagons along the banks of the James River, nearly doubling the town's population of 5,000. Burr's defense team included Edmund Randolph and Luther Martin, both former delegates at the Constitutional Convention and renowned advocates. Chief Justice John Marshall, who had recently squared off with the Jefferson administration in *Marbury* v. *Madison*, 1 Cranch 137 (1803),

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later court-martialed. But he was acquitted for want of evidence, and his duplicity was not confirmed until decades after his death, when Spanish archival material came to light.

presided as Circuit Justice for Virginia. Meanwhile Jefferson, intent on conviction, orchestrated the prosecution from afar, dedicating Cabinet meetings to the case, peppering the prosecutors with directions, and spending nearly $100,000 from the Treasury on the five-month proceedings.

In the lead-up to trial, Burr, taking aim at his accusers, moved for a subpoena *duces tecum* directed at Jefferson. The draft subpoena required the President to produce an October 21, 1806 letter from Wilkinson and accompanying documents, which Jefferson had referenced in his message to Congress. The prosecution opposed the request, arguing that a President could not be subjected to such a subpoena and that the letter might contain state secrets. Following four days of argument, Marshall announced his ruling to a packed chamber.

The President, Marshall declared, does not "stand exempt from the general provisions of the constitution" or, in particular, the Sixth Amendment's guarantee that those accused have compulsory process for obtaining witnesses for their defense. *United States* v. *Burr*, 25 F. Cas. 30, 33–34 (No. 14,692d) (CC Va. 1807). At common law the "single reservation" to the duty to testify in response to a subpoena was "the case of the king," whose "dignity" was seen as "incompatible" with appearing "under the process of the court." *Id.*, at 34. But, as Marshall explained, a king is born to power and can "do no wrong." *Ibid.* The President, by contrast, is "of the people" and subject to the law. *Ibid.* According to Marshall, the sole argument for exempting the President from testimonial obligations was that his "duties as chief magistrate demand his whole time for national objects." *Ibid.* But, in Marshall's assessment, those demands were "not unremitting." *Ibid.* And should the President's duties preclude his attendance at a particular time and place, a court could work that out upon return of the subpoena. *Ibid.*

Marshall also rejected the prosecution's argument that the President was immune from a subpoena *duces tecum* because

executive papers might contain state secrets. "A subpoena duces tecum," he said, "may issue to any person to whom an ordinary subpoena may issue." *Ibid.* As he explained, no "fair construction" of the Constitution supported the conclusion that the right "to compel the attendance of witnesses[ ] does not extend" to requiring those witnesses to "bring[ ] with them such papers as may be material in the defence." *Id.*, at 35. And, as a matter of basic fairness, permitting such information to be withheld would "tarnish the reputation of the court." *Id.*, at 37. As for "[t]he propriety of introducing any paper[s]," that would "depend on the character of the paper, not on the character of the person who holds it." *Id.*, at 34. Marshall acknowledged that the papers sought by Burr could contain information "the disclosure of which would endanger the public safety," but stated that, again, such concerns would have "due consideration" upon the return of the subpoena. *Id.*, at 37.

While the arguments unfolded, Jefferson, who had received word of the motion, wrote to the prosecutor indicating that he would—subject to the prerogative to decide which executive communications should be withheld—"furnish on all occasions, whatever the purposes of justice may require." Letter from T. Jefferson to G. Hay (June 12, 1807), in 10 Works of Thomas Jefferson 398, n. (P. Ford ed. 1905). His "personal attendance," however, was out of the question, for it "would leave the nation without" the "sole branch which the constitution requires to be always in function." Letter from T. Jefferson to G. Hay (June 17, 1807), in *id.*, at 400–401, n.

Before Burr received the subpoenaed documents, Marshall rejected the prosecution's core legal theory for treason and Burr was accordingly acquitted. Jefferson, however, was not done. Committed to salvaging a conviction, he directed the prosecutors to proceed with a misdemeanor (yes, misdemeanor) charge for inciting war against Spain. Burr then renewed his request for Wilkinson's October 21 letter, which

he later received a copy of, and subpoenaed a second letter, dated November 12, 1806, which the prosecutor claimed was privileged. Acknowledging that the President may withhold information to protect public safety, Marshall instructed that Jefferson should "state the particular reasons" for withholding the letter. *United States* v. *Burr*, 25 F. Cas. 187, 192 (No. 14,694) (CC Va. 1807). The court, paying "all proper respect" to those reasons, would then decide whether to compel disclosure. *Ibid.* But that decision was averted when the misdemeanor trial was cut short after it became clear that the prosecution lacked the evidence to convict.

In the two centuries since the Burr trial, successive Presidents have accepted Marshall's ruling that the Chief Executive is subject to subpoena. In 1818, President Monroe received a subpoena to testify in a court-martial against one of his appointees. See Rotunda, Presidents and Ex-Presidents as Witnesses: A Brief Historical Footnote, 1975 U. Ill. L. Forum 1, 5. His Attorney General, William Wirt—who had served as a prosecutor during Burr's trial—advised Monroe that, per Marshall's ruling, a subpoena to testify may "be properly awarded to the President." *Id.*, at 5–6. Monroe offered to sit for a deposition and ultimately submitted answers to written interrogatories.

Following Monroe's lead, his successors have uniformly agreed to testify when called in criminal proceedings, provided they could do so at a time and place of their choosing. In 1875, President Grant submitted to a three-hour deposition in the criminal prosecution of a political appointee embroiled in a network of tax-evading whiskey distillers. See 1 R. Rotunda & J. Nowak, Constitutional Law § 7.1(b)(ii), p. 996 (5th ed. 2012) (Rotunda & Nowak). A century later, President Ford's attempted assassin subpoenaed him to testify in her defense. See *United States* v. *Fromme*, 405 F. Supp. 578 (ED Cal. 1975). Ford obliged—from a safe distance—in the first videotaped deposition of a President. President Carter testified via the same means in the trial of

two local officials who, while Carter was Governor of Georgia, had offered to contribute to his campaign in exchange for advance warning of any state gambling raids. See Carter's Testimony, on Videotape, Is Given to Georgia Gambling Trial, N. Y. Times, Apr. 20, 1978, p. A20 (Carter recounted that he "rejected the proposition instantly."). Two years later, Carter gave videotaped testimony to a federal grand jury investigating whether a fugitive financier had entreated the White House to quash his extradition proceedings. See Rotunda & Nowak § 7.1(b)(vi), at 997. President Clinton testified three times, twice via deposition pursuant to subpoenas in federal criminal trials of associates implicated during the Whitewater investigation, and once by video for a grand jury investigating possible perjury. See *id.*, § 7.1(c)(viii), at 1007–1008.

The bookend to Marshall's ruling came in 1974 when the question he never had to decide—whether to compel the disclosure of official communications over the objection of the President—came to a head. That spring, the Special Prosecutor appointed to investigate the break-in of the Democratic National Committee Headquarters at the Watergate complex filed an indictment charging seven defendants associated with President Nixon and naming Nixon as an unindicted co-conspirator. As the case moved toward trial, the Special Prosecutor secured a subpoena *duces tecum* directing Nixon to produce, among other things, tape recordings of Oval Office meetings. Nixon moved to quash the subpoena, claiming that the Constitution provides an absolute privilege of confidentiality to all presidential communications. This Court rejected that argument in *United States* v. *Nixon*, 418 U. S. 683 (1974), a decision we later described as "unequivocally and emphatically endors[ing] Marshall's" holding that Presidents are subject to subpoena. *Clinton* v. *Jones*, 520 U. S. 681, 704 (1997).

The *Nixon* Court readily acknowledged the importance of preserving the confidentiality of communications "between high Government officials and those who advise and assist

them." 418 U. S., at 705. "Human experience," the Court explained, "teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." *Ibid.* Confidentiality thus promoted the "public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking." *Id.*, at 708.

But, like Marshall two centuries prior, the Court recognized the countervailing interests at stake. Invoking the common law maxim that "the public has a right to every man's evidence," the Court observed that the public interest in fair and accurate judicial proceedings is at its height in the criminal setting, where our common commitment to justice demands that "guilt shall not escape" nor "innocence suffer." *Id.*, at 709 (internal quotation marks and alteration omitted). Because these dual aims would be "defeated if judgments" were "founded on a partial or speculative presentation of the facts," the *Nixon* Court recognized that it was "imperative" that "compulsory process be available for the production of evidence needed either by the prosecution or the defense." *Ibid.*

The Court thus concluded that the President's "generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial." *Id.*, at 713. Two weeks later, President Nixon dutifully released the tapes.

III

The history surveyed above all involved *federal* criminal proceedings. Here we are confronted for the first time with a subpoena issued to the President by a local grand jury operating under the supervision of a *state* court.[5]

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[5] While the subpoena was directed to the President's accounting firm, the parties agree that the papers at issue belong to the President and that Mazars is merely the custodian. Thus, for purposes of immunity, it is functionally a subpoena issued to the President.

In the President's view, that distinction makes all the difference. He argues that the Supremacy Clause gives a sitting President absolute immunity from state criminal subpoenas because compliance with those subpoenas would categorically impair a President's performance of his Article II functions. The Solicitor General, arguing on behalf of the United States, agrees with much of the President's reasoning but does not commit to his bottom line. Instead, the Solicitor General urges us to resolve this case by holding that a state grand jury subpoena for a sitting President's personal records must, at the very least, "satisfy a heightened standard of need," which the Solicitor General contends was not met here. Brief for United States as *Amicus Curiae* 26, 29.

A

We begin with the question of absolute immunity. No one doubts that Article II guarantees the independence of the Executive Branch. As the head of that branch, the President "occupies a unique position in the constitutional scheme." *Nixon* v. *Fitzgerald*, 457 U. S. 731, 749 (1982). His duties, which range from faithfully executing the laws to commanding the Armed Forces, are of unrivaled gravity and breadth. Quite appropriately, those duties come with protections that safeguard the President's ability to perform his vital functions. See, *e. g.*, *ibid.* (concluding that the President enjoys "absolute immunity from damages liability predicated on his official acts"); *Nixon*, 418 U. S., at 708 (recognizing that presidential communications are presumptively privileged).

In addition, the Constitution guarantees "the entire independence of the General Government from any control by the respective States." *Farmers and Mechanics Sav. Bank of Minneapolis* v. *Minnesota*, 232 U. S. 516, 521 (1914). As we have often repeated, "States have no power . . . to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress." *McCulloch*

v. *Maryland*, 4 Wheat. 316, 436 (1819). It follows that States also lack the power to impede the President's execution of those laws.

Marshall's ruling in *Burr*, entrenched by 200 years of practice and our decision in *Nixon*, confirms that *federal* criminal subpoenas do not "rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions." *Clinton*, 520 U. S., at 702–703. But the President, joined in part by the Solicitor General, argues that *state* criminal subpoenas pose a unique threat of impairment and thus demand greater protection. To be clear, the President does not contend here that *this* subpoena, in particular, is impermissibly burdensome. Instead he makes a *categorical* argument about the burdens generally associated with state criminal subpoenas, focusing on three: diversion, stigma, and harassment. We address each in turn.

1

The President's primary contention, which the Solicitor General supports, is that complying with state criminal subpoenas would necessarily divert the Chief Executive from his duties. He grounds that concern in *Nixon* v. *Fitzgerald*, which recognized a President's "absolute immunity from damages liability predicated on his official acts." 457 U. S., at 749. In explaining the basis for that immunity, this Court observed that the prospect of such liability could "distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve." *Id.*, at 753. The President contends that the diversion occasioned by a state criminal subpoena imposes an equally intolerable burden on a President's ability to perform his Article II functions.

But *Fitzgerald* did not hold that distraction was sufficient to confer absolute immunity. We instead drew a careful analogy to the common law absolute immunity of judges and prosecutors, concluding that a President, like those officials,

must "deal fearlessly and impartially with the duties of his office"—not be made "unduly cautious in the discharge of [those] duties" by the prospect of civil liability for official acts. *Id.*, at 751–752, and n. 32 (internal quotation marks omitted). Indeed, we expressly rejected immunity based on distraction alone 15 years later in *Clinton* v. *Jones*. There, President Clinton argued that the risk of being "distracted by the need to participate in litigation" entitled a sitting President to absolute immunity from civil liability, not just for official acts, as in *Fitzgerald*, but for private conduct as well. 520 U. S., at 694, n. 19. We disagreed with that rationale, explaining that the "dominant concern" in *Fitzgerald* was not mere distraction but the distortion of the Executive's "decisionmaking process" with respect to official acts that would stem from "worry as to the possibility of damages." 520 U. S., at 694, n. 19. The Court recognized that Presidents constantly face myriad demands on their attention, "some private, some political, and some as a result of official duty." *Id.*, at 705, n. 40. But, the Court concluded, "[w]hile such distractions may be vexing to those subjected to them, they do not ordinarily implicate constitutional . . . concerns." *Ibid.*

The same is true of criminal subpoenas. Just as a "properly managed" civil suit is generally "unlikely to occupy any substantial amount of" a President's time or attention, *id.*, at 702, two centuries of experience confirm that a properly tailored criminal subpoena will not normally hamper the performance of the President's constitutional duties. If anything, we expect that in the mine run of cases, where a President is subpoenaed during a proceeding targeting someone else, as Jefferson was, the burden on a President will ordinarily be lighter than the burden of defending against a civil suit.

The President, however, believes the district attorney is investigating him and his businesses. In such a situation, he contends, the "toll that criminal process . . . exacts from

the President is even heavier" than the distraction at issue in *Fitzgerald* and *Clinton*, because "criminal litigation" poses unique burdens on the President's time and will generate a "considerable if not overwhelming degree of mental preoccupation." Brief for Petitioner 16–18, 30 (internal quotation marks omitted).

But the President is not seeking immunity from the diversion occasioned by the prospect of future criminal *liability*. Instead he concedes—consistent with the position of the Department of Justice—that state grand juries are free to investigate a sitting President with an eye toward charging him after the completion of his term. See Reply Brief 19 (citing Memorandum from Randolph D. Moss, Assistant Atty. Gen., Office of Legal Counsel, to the Atty. Gen.: A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. OLC 222, 257, n. 36 (Oct. 16, 2000)). The President's objection therefore must be limited to the *additional* distraction caused by the subpoena itself. But that argument runs up against the 200 years of precedent establishing that Presidents, and their official communications, are subject to judicial process, see *Burr*, 25 F. Cas., at 34, even when the President is under investigation, see *Nixon*, 418 U. S., at 706.

2

The President next claims that the stigma of being subpoenaed will undermine his leadership at home and abroad. Notably, the Solicitor General does not endorse this argument, perhaps because we have twice denied absolute immunity claims by Presidents in cases involving allegations of serious misconduct. See *Clinton*, 520 U. S., at 685; *Nixon*, 418 U. S., at 687. But even if a tarnished reputation were a cognizable impairment, there is nothing inherently stigmatizing about a President performing "the citizen's normal duty of . . . furnishing information relevant" to a criminal investigation. *Branzburg* v. *Hayes*, 408 U. S. 665, 691 (1972). Nor can we accept that the risk of association with persons

or activities under criminal investigation can absolve a President of such an important public duty. Prior Presidents have weathered these associations in federal cases, *supra*, at 795–799, and there is no reason to think any attendant notoriety is necessarily greater in state court proceedings.

To be sure, the consequences for a President's public standing will likely increase if he is the one under investigation. But, again, the President concedes that such investigations are permitted under Article II and the Supremacy Clause, and receipt of a subpoena would not seem to categorically magnify the harm to the President's reputation.

Additionally, while the current suit has cast the Mazars subpoena into the spotlight, longstanding rules of grand jury secrecy aim to prevent the very stigma the President anticipates. See S. Beale et al., Grand Jury Law and Practice § 5:1, p. 5–3 (2d ed. 2018) ("[T]he federal system and most states have adopted statutes or court rules" that "impose sharp restrictions on the extent to which matters occurring before a grand jury may be divulged" to outside persons.). Of course, disclosure restrictions are not perfect. See *Nixon*, 418 U. S., at 687, n. 4 (observing that news media reporting made the protective order shielding the fact that the President had been named as an unindicted coconspirator "no longer meaningful"). But those who make unauthorized disclosures regarding a grand jury subpoena do so at their peril. See, *e. g.*, N. Y. Penal Law Ann. § 215.70 (West 2010) (designating unlawful grand jury disclosure as a felony).

3

Finally, the President and the Solicitor General warn that subjecting Presidents to state criminal subpoenas will make them "easily identifiable target[s]" for harassment. *Fitzgerald*, 457 U. S., at 753. But we rejected a nearly identical argument in *Clinton*, where then-President Clinton argued that permitting civil liability for unofficial acts would "generate a large volume of politically motivated harassing and

frivolous litigation." *Clinton*, 520 U. S., at 708. The President and the Solicitor General nevertheless argue that state criminal subpoenas pose a heightened risk and could undermine the President's ability to "deal fearlessly and impartially" with the States. *Fitzgerald*, 457 U. S., at 752 (internal quotation marks omitted). They caution that, while federal prosecutors are accountable to and removable by the President, the 2,300 district attorneys in this country are responsive to local constituencies, local interests, and local prejudices, and might "use criminal process to register their dissatisfaction with" the President. Brief for Petitioner 16. What is more, we are told, the state courts supervising local grand juries may not exhibit the same respect that federal courts show to the President as a coordinate branch of Government.

We recognize, as does the district attorney, that harassing subpoenas could, under certain circumstances, threaten the independence or effectiveness of the Executive. See Tr. of Oral Arg. 73. Even so, in *Clinton* we found that the risk of harassment was not "serious" because federal courts have the tools to deter and, where necessary, dismiss vexatious civil suits. 520 U. S., at 708. And, while we cannot ignore the possibility that state prosecutors may have political motivations, see *post*, at 839 (ALITO, J., dissenting), here again the law already seeks to protect against the predicted abuse.

First, grand juries are prohibited from engaging in "arbitrary fishing expeditions" and initiating investigations "out of malice or an intent to harass." *United States* v. *R. Enterprises, Inc.*, 498 U. S. 292, 299 (1991). See also, *e. g.*, *Virag* v. *Hynes*, 54 N. Y. 2d 437, 442–443, 430 N. E. 2d 1249, 1252 (1981) (recognizing that grand jury subpoenas can be "challenged by an affirmative showing of impropriety," including "bad faith" (internal quotation marks omitted)). These protections, as the district attorney himself puts it, "apply with special force to a President, in light of the office's unique position as the head of the Executive Branch." Brief for

Respondent Vance 43. And, in the event of such harassment, a President would be entitled to the protection of federal courts. The policy against federal interference in state criminal proceedings, while strong, allows "intervention in those cases where the District Court properly finds that the state proceeding is motivated by a desire to harass or is conducted in bad faith." *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592, 611 (1975).

Second, contrary to JUSTICE ALITO's characterization, our holding does not allow States to "run roughshod over the functioning of [the Executive B]ranch." *Post*, at 846. The Supremacy Clause prohibits state judges and prosecutors from interfering with a President's official duties. See, *e. g.*, *Tennessee* v. *Davis*, 100 U. S. 257, 263 (1880) ("No State government can . . . obstruct [the] authorized officers" of the Federal Government.). Any effort to manipulate a President's policy decisions or to "retaliat[e]" against a President for official acts through issuance of a subpoena, Brief for Respondent Vance 15, 43, would thus be an unconstitutional attempt to "influence" a superior sovereign "exempt" from such obstacles, see *McCulloch*, 4 Wheat., at 427. We generally "assume[ ] that state courts and prosecutors will observe constitutional limitations." *Dombrowski* v. *Pfister*, 380 U. S. 479, 484 (1965). Failing that, federal law allows a President to challenge any allegedly unconstitutional influence in a federal forum, as the President has done here. See 42 U. S. C. § 1983; *Ex parte Young*, 209 U. S. 123, 155–156 (1908) (holding that federal courts may enjoin state officials to conform their conduct to federal law).

Given these safeguards and the Court's precedents, we cannot conclude that absolute immunity is necessary or appropriate under Article II or the Supremacy Clause. Our dissenting colleagues agree. JUSTICE THOMAS reaches the same conclusion based on the original understanding of the Constitution reflected in Marshall's decision in *Burr*. *Post*, at 816, 818–819. And JUSTICE ALITO, also persuaded by

Burr, "agree[s]" that "not all" state criminal subpoenas for a President's records "should be barred." *Post*, at 840. On that point the Court is unanimous.

B

We next consider whether a state grand jury subpoena seeking a President's private papers must satisfy a heightened need standard. The Solicitor General would require a threshold showing that the evidence sought is "critical" for "specific charging decisions" and that the subpoena is a "last resort," meaning the evidence is "not available from any other source" and is needed "now, rather than at the end of the President's term." Brief for United States as *Amicus Curiae* 29, 32 (internal quotation marks and alteration omitted). JUSTICE ALITO, largely embracing those criteria, agrees that a state criminal subpoena to a President "should not be allowed unless a heightened standard is met." *Post*, at 840–842 (asking whether the information is "critical" and "necessary . . . now").

We disagree, for three reasons. First, such a heightened standard would extend protection designed for official documents to the President's private papers. As the Solicitor General and JUSTICE ALITO acknowledge, their proposed test is derived from executive privilege cases that trace back to *Burr*. Brief for United States as *Amicus Curiae* 26–28; *post*, at 840–841. There, Marshall explained that if Jefferson invoked presidential privilege over executive communications, the court would not "proceed against the president as against an ordinary individual" but would instead require an affidavit from the defense that "would clearly show the paper to be essential to the justice of the case." *Burr*, 25 F. Cas., at 192. The Solicitor General and JUSTICE ALITO would have us apply a similar standard to a President's personal papers. But this argument does not account for the relevant passage from *Burr*: "If there be a paper in the possession of the executive, which is *not of an official nature*, he must

stand, as respects that paper, in nearly the same situation with any other individual." *Id.*, at 191 (emphasis added). And it is only "nearly"—and not "entirely"—because the President retains the right to assert privilege over documents that, while ostensibly private, "partake of the character of an official paper." *Id.*, at 191–192.

Second, neither the Solicitor General nor JUSTICE ALITO has established that heightened protection against state subpoenas is necessary for the Executive to fulfill his Article II functions. Beyond the risk of harassment, which we addressed above, the only justification they offer for the heightened standard is protecting Presidents from "unwarranted burdens." Brief for United States as *Amicus Curiae* 28; see *post*, at 840 (asking whether "there is an urgent and critical need for the subpoenaed information"). In effect, they argue that even if federal subpoenas to a President are warranted whenever evidence is material, state subpoenas are warranted "only when [the] evidence is essential." Brief for United States as *Amicus Curiae* 28; see *post*, at 840. But that double standard has no basis in law. For if the state subpoena is not issued to manipulate, *supra*, at 805–806, the documents themselves are not protected, *supra*, at 807–808, and the Executive is not impaired, *supra*, at 801–804, then nothing in Article II or the Supremacy Clause supports holding state subpoenas to a higher standard than their federal counterparts.

Finally, in the absence of a need to protect the Executive, the public interest in fair and effective law enforcement cuts in favor of comprehensive access to evidence. Requiring a state grand jury to meet a heightened standard of need would hobble the grand jury's ability to acquire "all information that might possibly bear on its investigation." *R. Enterprises, Inc.*, 498 U. S., at 297. And, even assuming the evidence withheld under that standard were preserved until the conclusion of a President's term, in the interim the State would be deprived of investigative leads that the evidence

might yield, allowing memories to fade and documents to disappear. This could frustrate the identification, investigation, and indictment of third parties (for whom applicable statutes of limitations might lapse). More troubling, it could prejudice the innocent by depriving the grand jury of *exculpatory* evidence.

Rejecting a heightened need standard does not leave Presidents with "no real protection." *Post*, at 843 (opinion of ALITO, J.). To start, a President may avail himself of the same protections available to every other citizen. These include the right to challenge the subpoena on any grounds permitted by state law, which usually include bad faith and undue burden or breadth. See, *e. g.*, *Virag*, 54 N. Y. 2d, at 442–445, 430 N. E. 2d, at 1252–1253; *In re Grand Jury Subpoenas*, 72 N. Y. 2d 307, 315–316, 528 N. E. 2d 1195, 1200 (1988) (recognizing that grand jury subpoenas can be challenged as "overly broad" or "unreasonably burdensome" (internal quotation marks omitted)). And, as in federal court, "[t]he high respect that is owed to the office of the Chief Executive . . . should inform the conduct of the entire proceeding, including the timing and scope of discovery." *Clinton*, 520 U. S., at 707. See *id.*, at 724 (BREYER, J., concurring in judgment) (stressing the need for courts presiding over suits against the President to "schedule proceedings so as to avoid significant interference with the President's ongoing discharge of his official responsibilities"); *Nixon*, 418 U. S., at 702 ("[W]here a subpoena is directed to a President . . . appellate review . . . should be particularly meticulous.").

Furthermore, although the Constitution does not entitle the Executive to absolute immunity or a heightened standard, he is not "relegate[d]" only to the challenges available to private citizens. *Post*, at 841 (opinion of ALITO, J.). A President can raise subpoena-specific constitutional challenges, in either a state or federal forum. As previously noted, he can challenge the subpoena as an attempt to influence the performance of his official duties, in violation of the

Supremacy Clause. See *supra*, at 806. This avenue protects against local political machinations "interposed as an obstacle to the effective operation of a federal constitutional power." *United States* v. *Belmont*, 301 U. S. 324, 332 (1937).

In addition, the Executive can—as the district attorney concedes—argue that compliance with a particular subpoena would impede his constitutional duties. Brief for Respondent Vance 42. Incidental to the functions confided in Article II is "the power to perform them, without obstruction or impediment." 3 J. Story, Commentaries on the Constitution of the United States § 1563, pp. 418–419 (1833). As a result, "once the President sets forth and explains a conflict between judicial proceeding and public duties," or shows that an order or subpoena would "significantly interfere with his efforts to carry out" those duties, "the matter changes." *Clinton*, 520 U. S., at 710, 714 (opinion of BREYER, J.). At that point, a court should use its inherent authority to quash or modify the subpoena, if necessary to ensure that such "interference with the President's duties would not occur." *Id.*, at 708 (opinion of the Court).

* * *

Two hundred years ago, a great jurist of our Court established that no citizen, not even the President, is categorically above the common duty to produce evidence when called upon in a criminal proceeding. We reaffirm that principle today and hold that the President is neither absolutely immune from state criminal subpoenas seeking his private papers nor entitled to a heightened standard of need. The "guard[ ] furnished to this high officer" lies where it always has—in "the conduct of a court" applying established legal and constitutional principles to individual subpoenas in a manner that preserves both the independence of the Executive and the integrity of the criminal justice system. *Burr*, 25 F. Cas., at 34.

The arguments presented here and in the Court of Appeals were limited to absolute immunity and heightened

need. The Court of Appeals, however, has directed that the case be returned to the District Court, where the President may raise further arguments as appropriate. 941 F. 3d, at 646, n. 19.[6]

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

It is so ordered.

JUSTICE KAVANAUGH, with whom JUSTICE GORSUCH joins, concurring in the judgment.

The Court today unanimously concludes that a President does not possess absolute immunity from a state criminal subpoena, but also unanimously agrees that this case should be remanded to the District Court, where the President may raise constitutional and legal objections to the subpoena as appropriate. See *ante*, at 810–811, and n. 6; *post*, at 825 (THOMAS, J., dissenting); *post*, at 840–843 (ALITO, J., dissenting). I agree with those two conclusions.

* * *

The dispute over this grand jury subpoena reflects a conflict between a State's interest in criminal investigation and a President's Article II interest in performing his or her duties without undue interference. Although this case involves personal information of the President and is therefore not an executive privilege case, the majority opinion correctly concludes based on precedent that Article II and the Supremacy Clause of the Constitution supply some protec-

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[6] The daylight between our opinion and JUSTICE THOMAS's "dissent" is not as great as that label might suggest. *Post*, at 825. We agree that Presidents are neither absolutely immune from state criminal subpoenas nor insulated by a heightened need standard. *Post*, at 819, 824–825, n. 3. We agree that Presidents may challenge specific subpoenas as impeding their Article II functions. *Post*, at 820. And, although we affirm while JUSTICE THOMAS would vacate, we agree that this case will be remanded to the District Court. *Post*, at 825.

tion for the Presidency against state criminal subpoenas of this sort.

In our system of government, as this Court has often stated, no one is above the law. That principle applies, of course, to a President. At the same time, in light of Article II of the Constitution, this Court has repeatedly declared—and the Court indicates again today—that a court may not proceed against a President as it would against an ordinary litigant. See *Cheney* v. *United States Dist. Court for D. C.*, 542 U. S. 367, 381–382 (2004) ("In no case would a court be required to proceed against the president as against an ordinary individual" (internal quotation marks and alterations omitted)); *Clinton* v. *Jones*, 520 U. S. 681, 704, n. 39 (1997) (a court may not "proceed against the president as against an ordinary individual" (internal quotation marks omitted)); *United States* v. *Nixon*, 418 U. S. 683, 715 (1974) ("In no case of this kind would a court be required to proceed against the president as against an ordinary individual" (internal quotation marks and alterations omitted)); *United States* v. *Burr*, 25 F. Cas. 187, 192 (No. 14,694) (CC Va. 1807) (Marshall, C. J.) ("In no case of this kind would a court be required to proceed against the president as against an ordinary individual").

The question here, then, is how to balance the State's interests and the Article II interests. The longstanding precedent that has applied to federal criminal subpoenas for official, privileged Executive Branch information is *United States* v. *Nixon*, 418 U. S. 683 (1974). That landmark case requires that a prosecutor establish a "demonstrated, specific need" for the President's information. *Id.*, at 713; see also *In re Sealed Case*, 121 F. 3d 729, 753–757 (CADC 1997); cf. *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 498 F. 2d 725, 730–731 (CADC 1974) (en banc) (similar standard for congressional subpoenas to the Executive Branch).

The *Nixon* "demonstrated, specific need" standard is a tried-and-true test that accommodates both the interests of

the criminal process and the Article II interests of the Presidency. The *Nixon* standard ensures that a prosecutor's interest in subpoenaed information is sufficiently important to justify an intrusion on the Article II interests of the Presidency. The *Nixon* standard also reduces the risk of subjecting a President to unwarranted burdens, because it provides that a prosecutor may obtain a President's information only in certain defined circumstances.

Although the Court adopted the *Nixon* standard in a different Article II context—there, involving the confidentiality of official, privileged information—the majority opinion today recognizes that there are also important Article II (and Supremacy Clause) interests at stake here. A state criminal subpoena to a President raises Article II and Supremacy Clause issues because of the potential for a state prosecutor to use the criminal process and issue subpoenas in a way that interferes with the President's duties, through harassment or diversion. Cf. *Nixon* v. *Fitzgerald*, 457 U. S. 731, 751–753 (1982).

Because this case again entails a clash between the interests of the criminal process and the Article II interests of the Presidency, I would apply the longstanding *Nixon* "demonstrated, specific need" standard to this case. The majority opinion does not apply the *Nixon* standard in this distinct Article II context, as I would have done. That said, the majority opinion appropriately takes account of some important concerns that also animate *Nixon* and the Constitution's balance of powers. The majority opinion explains that a state prosecutor may not issue a subpoena for a President's personal information out of bad faith, malice, or an intent to harass a President, *ante*, at 805–806; as a result of prosecutorial impropriety, *ibid.*; to seek information that is not relevant to an investigation, *ante*, at 805–806, 809; that is overly broad or unduly burdensome, *ante*, at 809; to manipulate, influence, or retaliate against a President's official acts or policy decisions, *ante*, at 806, 809–810; or in a way that would impede, conflict

with, or interfere with a President's official duties, *ante*, at 809–810. All nine Members of the Court agree, moreover, that a President may raise objections to a state criminal subpoena not just in state court but also in federal court.[1] And the majority opinion indicates that, in light of the "high respect that is owed to the office of the Chief Executive," courts "should be particularly meticulous" in assessing a subpoena for a President's personal records. *Ante*, at 809 (quoting *Clinton*, 520 U. S., at 707, and *Nixon*, 418 U. S., at 702).

In the end, much may depend on how the majority opinion's various standards are applied in future years and decades.[2] It will take future cases to determine precisely how much difference exists between (i) the various standards articulated by the majority opinion, (ii) the overarching *Nixon* "demonstrated, specific need" standard that I would adopt, and (iii) JUSTICE THOMAS's and JUSTICE ALITO's other proposed standards. In any event, in my view, lower courts in cases of this sort involving a President will almost invariably have to begin by delving into why the State wants the information; why and how much the State needs the information, including whether the State could obtain the information elsewhere; and whether compliance with the subpoena would unduly burden or interfere with a President's official duties.

* * *

I agree that the case should be remanded to the District Court for further proceedings, where the President may raise constitutional and legal objections to the state grand jury subpoena as appropriate.

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[1] As I see it, the standards identified by the majority opinion should be considered, in this context, Article II requirements, not just statutory or state-law requirements. Cf. *Cheney* v. *United States Dist. Court for D. C.*, 542 U. S. 367, 385–392 (2004); *Clinton* v. *Jones*, 520 U. S. 681, 707 (1997); *Nixon* v. *Fitzgerald*, 457 U. S. 731, 749–757 (1982); *United States* v. *Nixon*, 418 U. S. 683, 714–716 (1974).

[2] The same point—namely, that much may depend on future application—is also true of the four considerations articulated by the Court today in *Trump* v. *Mazars USA, LLP*, 591 U. S. 848, 869–871 (2020).

JUSTICE THOMAS, dissenting.

Respondent Cyrus Vance, Jr., the district attorney for the County of New York, served a grand jury subpoena on the President's personal accounting firm. The subpoena, which is nearly identical to a subpoena issued by a congressional Committee, requests nearly 10 years of the President's personal financial records. *Ante*, at 791–792, and n. 2. In response to this troublingly broad request, the President, in his personal capacity, sought a declaration in federal court " 'that the subpoena is invalid and unenforceable' " and an injunction preventing respondent " 'from taking any action to enforce the subpoena.' " *Ante*, at 792. The District Court denied the President's motion for a preliminary injunction, and the Second Circuit affirmed in relevant part. *Ante*, at 792–793.

The President argues that he is absolutely immune from the issuance of any subpoena, but that if the Court disagrees, we should remand so that the District Court can develop a record about this particular subpoena. I agree with the majority that the President is not entitled to absolute immunity from *issuance* of the subpoena. But he may be entitled to relief against its *enforcement*. I therefore agree with the President that the proper course is to vacate and remand. If the President can show that "his duties as chief magistrate demand his whole time for national objects," *United States* v. *Burr*, 25 F. Cas. 30, 34 (No. 14,692d) (CC Va. 1807) (Marshall, C. J.), he is entitled to relief from enforcement of the subpoena.

I

The President first argues that he has absolute immunity from the issuance of grand jury subpoenas during his term in office. This Court has recognized absolute immunity for the President from "damages liability predicated on his official acts." *Nixon* v. *Fitzgerald*, 457 U. S. 731, 749 (1982). But we have rejected absolute immunity from damages actions for a President's nonofficial conduct, *Clinton* v. *Jones*, 520 U. S. 681, 684 (1997), and we have never addressed the question of immunity from a grand jury subpoena.

I agree with the majority that the President does not have absolute immunity from the issuance of a grand jury subpoena. Unlike the majority, however, I do not reach this conclusion based on a primarily functionalist analysis. Instead, I reach it based on the text of the Constitution, which, as understood by the ratifying public and incorporated into an early circuit opinion by Chief Justice Marshall, does not support the President's claim of absolute immunity.[1]

A

1

The text of the Constitution explicitly addresses the privileges of some federal officials, but it does not afford the President absolute immunity. Members of Congress are "privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same," except for "Treason, Felony and Breach of the Peace." Art. I, § 6, cl. 1. The Constitution further specifies that, "for any Speech or Debate in either House, they shall not be questioned in any other Place." *Ibid.* By contrast, the text of the Constitution contains no explicit grant of absolute immunity from legal process for the President. As a Federalist essayist noted during ratification, the President's "person is not so much protected as that of a member of the House of Representatives" because he is subject to the issuance of judicial process "like any other man in the ordinary course of law." An American Citizen I (Sept. 26, 1787), in 2 Documentary History of the Ratification of the Constitution 141 (M. Jensen ed. 1976) (emphasis deleted).

Prominent defenders of the Constitution confirmed the lack of absolute Presidential immunity. James Wilson, a signer of the Constitution and future Justice of this Court, explained to his fellow Pennsylvanians that "far from being

[1] I do not address the continuing validity of *Nixon* v. *Fitzgerald*, 457 U. S. 731 (1982), which no party asks us to revisit.

above the laws, [the President] is amenable to them in his private character as a citizen, and in his public character by *impeachment*." 2 Debates on the Constitution 480 (J. Elliot ed. 1891) (emphasis in original). James Iredell, another future Justice, observed in the North Carolina ratifying convention that "[i]f [the President] commits any crime, he is punishable by the laws of his country." 4 *id.*, at 109. A fellow North Carolinian similarly argued that, "[w]ere it possible to suppose that the President should give wrong instructions to his deputies, . . . citizens . . . would have redress in the ordinary courts of common law." *Id.*, at 47; see also Americanus No. 2, in 19 Documentary History of the Ratification of the Constitution 288–289 (J. Kaminski & G. Saladino eds. 2003); Americanus No. 4, in *id.*, at 359.

2

The sole authority that the President cites from the drafting or ratification process is The Federalist No. 69, but it provides him no real support. Alexander Hamilton stated that "[t]he President of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law." The Federalist No. 69, p. 416 (C. Rossiter ed. 1961). Hamilton did not say that the President was temporarily immune from judicial process. Moreover, he made this comment to reassure readers that the President was "amenable to personal punishment and disgrace." *Id.*, at 422. For the President, this is at best ambiguous evidence that cannot overcome the clear evidence discussed above.

The President further relies on a private letter written by President Jefferson. In the letter, Jefferson worried that the Executive would lose his independence "if he were subject to the *commands* of the [judiciary], & to imprisonment for disobedience; if the several courts could bandy him from

pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties." 10 Works of Thomas Jefferson 404, n. (P. Ford ed. 1905) (emphasis in original). But President Jefferson never squarely argued for absolute immunity. Yoo, The First Claim: The Burr Trial, *United States v. Nixon*, and Presidential Power, 83 Minn. L. Rev. 1435, 1450 (1999). And, the concern Jefferson had about demands on the President's time is addressed by the standard that Chief Justice Marshall articulated in *Burr*. See *infra*, at 820.

The President also quotes the views of Vice President John Adams and then-Senator Oliver Ellsworth in 1789. The record of the conversation we have from a fellow Senator's diary is brief. Adams or Ellsworth (or perhaps both) stated that "you could only impeach [the President], and no other process whatever lay against him." Journal of William Maclay 167 (E. Maclay ed. 1890). The only reason given was that it would "stop the whole machine of Government." *Ibid.* Senator Philip Schuyler joined the conversation and gave his own reason: "'I think the President [is] a kind of sacred person.'" *Ibid.* Schuyler's theory clearly has no basis in the Constitution, and the view held by Adams and Ellsworth seems to be grounds for relief from enforcement rather than a basis for absolute immunity from issuance of a subpoena.

B

This original understanding is reflected in an early circuit decision by Chief Justice Marshall, on which the majority partially relies. In 1805, disgraced former Vice President Aaron Burr began a murky series of negotiations to raise a volunteer army in the Western Territories. *Ante*, at 793–794. One of his contacts, General James Wilkinson, was not only commander of the Army and Governor of Louisiana, but also a Spanish spy. *Ibid.*, n. 4; Yoo, *supra*, at 1440. After Burr set out with his army—perhaps to attack Spanish forces or perhaps to separate Western Territories from the

United States—Wilkinson wrote to President Jefferson and accused Burr of the latter. *Ante*, at 794; Yoo, *supra*, at 1440. Burr was arrested for treason and brought before a grand jury in Richmond, where Chief Justice Marshall presided.

During the grand jury proceedings, Burr moved for a subpoena *duces tecum* ordering President Jefferson to produce the correspondence concerning Burr. *Burr*, 25 F. Cas., at 30. Chief Justice Marshall pre-emptively rejected any notion of absolute immunity, despite the fact that the Government did not so much as suggest it in court. He distinguished the President from the British monarch, who did have immunity, calling it an "essentia[l] . . . difference" in our system that the President "is elected from the mass of the people, and, on the expiration of the time for which he is elected, returns to the mass of the people again." *Id.*, at 34. Thus, the President was more like a state governor or a member of the British cabinet than a king. Chief Justice Marshall found no authority suggesting that these officials were immune from judicial process. *Ibid.*; see also *ante*, at 795–796.

Based on the evidence of original meaning and Chief Justice Marshall's early interpretation in *Burr*, the better reading of the text of the Constitution is that the President has no absolute immunity from the issuance of a grand jury subpoena.

II

In addition to contesting the issuance of the subpoena, the President also seeks injunctive and declaratory relief against its enforcement. The majority recognizes that the President can seek relief from enforcement, but it does not vacate and remand for the lower courts to address this question. I would do so and instruct them to apply the standard articulated by Chief Justice Marshall in *Burr*: If the President is unable to comply because of his official duties, then he is entitled to injunctive and declaratory relief.

A

In *Burr*, after explaining that the President was not absolutely immune from issuance of a subpoena, Chief Justice Marshall proceeded to explain that the President might be excused from the enforcement of one. As he put it, "[t]he guard, furnished to this high officer, to protect him from being harassed by vexatious and unnecessary subpoenas, is to be looked for in the conduct of a court *after those subpoenas have issued*; not in any circumstance which is to precede their being issued." 25 F. Cas., at 34 (emphasis added). Chief Justice Marshall set out the pertinent standard: To avoid enforcement of the subpoena, the President must "sho[w]" that "his duties as chief magistrate demand his whole time for national objects." *Ibid.*[2]

Although *Burr* involved a federal subpoena, the same principle applies to a state subpoena. The ability of the President to discharge his duties until his term expires or he is removed from office by the Senate is "integral to the structure of the Constitution." *Franchise Tax Bd. of Cal.* v. *Hyatt*, 587 U. S. 230, 246 (2019). The Constitution is the "supreme Law of the Land," Art. VI, cl. 2, so a state court can no more enforce a subpoena when national concerns demand the President's entire time than a federal court can. Accordingly, a federal court may provide injunctive and declaratory relief to stay enforcement of a state subpoena when the President meets the *Burr* standard.

B

The *Burr* standard places the burden on the President but also requires courts to take pains to respect the demands on

[2] This standard appears to be something that Chief Justice Marshall and President Jefferson, who were often at odds, could agree on. President Jefferson's concern was that the Executive would lose his independence if courts could "'withdraw him entirely from his constitutional duties.'" 10 Works of Thomas Jefferson 404, n. (P. Ford ed. 1905). Relief from enforcement when those duties preclude the President's compliance addresses these concerns.

the President's time. The Constitution vests the President with extensive powers and responsibilities, and courts are poorly situated to conduct a searching review of the President's assertion that he is unable to comply.

1

The President has vast responsibilities both abroad and at home. The Founders gave the President "primary responsibility—along with the necessary power—to protect the national security and to conduct the Nation's foreign relations." *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 580 (2004) (THOMAS, J., dissenting). The Constitution "expressly identifies certain foreign affairs powers and vests them" in his office. *Zivotofsky* v. *Kerry*, 576 U. S. 1, 32 (2015) (THOMAS, J., concurring in judgment in part and dissenting in part). He is "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." Art. II, § 2, cl. 1. He has "Power, by and with the Advice and Consent of the Senate, to make Treaties." Cl. 2. He has the power to "nominate, and by and with the Advice and Consent of the Senate [to] appoint Ambassadors [and] other public Ministers and Consuls." *Ibid.* He has the power to fill vacancies that arise during a Senate recess until "the End of [the Senate's] next Session." Cl. 3. And he is responsible for "receiv[ing] Ambassadors and other public Ministers" from foreign countries. § 3.

The President also has residual powers granted by Article II's Vesting Clause. "By omitting the words 'herein granted' in [the Vesting Clause of] Article II, the Constitution indicates that the 'executive Power' vested in the President is not confined to those powers expressly identified in the document." *Zivotofsky*, 576 U. S., at 34–35 (opinion of THOMAS, J.). Rather, the Constitution "vests the residual foreign affairs powers of the Federal Government—*i. e.*, those not specifically enumerated in the Constitution—in the

President." *Id.*, at 33. Evidence from both the founding and the early years of the Constitution confirms that the residual foreign affairs powers of the Government were part of the "executive Power." *Id.*, at 35–40.

The President has extensive domestic responsibilities as well. He is given "[t]he executive Power," Art. II, § 1, cl. 1, and is directed to "take Care that the Laws be faithfully executed," § 3. "The vesting of the executive power in the President was essentially a grant of the power to execute the laws." *Myers* v. *United States*, 272 U. S. 52, 117 (1926). Even under a proper understanding of the scope of federal power, the President could not possibly execute all of the laws himself. The President must accordingly appoint subordinates "to act for him under his direction in the execution of the laws." *Ibid.* Once officers are selected, the President must "supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone." *Id.*, at 135. And, of course, the President has the power to remove officers as he sees fit. *Id.*, at 176; see also *Seila Law LLC* v. *Consumer Financial Protection Bureau*, 591 U. S. 197, 238–251 (2020) (THOMAS, J., concurring in part and dissenting in part).

In addition, the President has several specifically enumerated domestic powers. He has the "Power to Grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." Art. II, § 2, cl. 1. He also has the power to "nominate, and by and with the Advice and Consent of the Senate [to] appoint . . . Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law." Cl. 2. And he must "give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient." § 3.

The founding generation debated whether it was prudent to vest so many powers in a single person. Supporters of ratification responded that the design of the Presidency was necessary to the success of the Constitution. As Alexander Hamilton wrote:

> "Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy. . . . A feeble Executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government." The Federalist No. 70, at 423.

In sum, the demands on the President's time and the importance of his tasks are extraordinary, and the office of the President cannot be delegated to subordinates. A subpoena imposes both demands on the President's limited time and a mental burden, even when the President is not directly engaged in complying. This understanding of the Presidency should guide courts in deciding whether to enforce a subpoena for the President's documents.

2

Courts must also recognize their own limitations. When the President asserts that matters of foreign affairs or national defense preclude his compliance with a subpoena, the Judiciary will rarely have a basis for rejecting that assertion. Judges "simply lack the relevant information and expertise to second-guess determinations made by the President based

on information properly withheld." *Hamdi*, 542 U. S., at 583 (THOMAS, J., dissenting).

"[E]ven if the courts could compel the Executive to produce the necessary information" to understand the demands on his time, decisions about that information "are simply not amenable to judicial determination because '[t]hey are delicate, complex, and involve large elements of prophecy.'" *Ibid.* (quoting *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S. 103, 111 (1948)). The President has at his disposal enormous amounts of classified intelligence regarding the Government's concerns around the globe. His decisionmaking is further informed by experience in matters of foreign affairs, national defense, and intelligence that judges almost always will not have. And his decisionmaking takes into account the full spectrum of the Government's operations, not just the matters directly related to a particular case. Even with perfect information, courts lack the institutional competence to engage in a searching review of the President's reasons for not complying with a subpoena.

Here, too, Chief Justice Marshall was correct. A court should "fee[l] many, perhaps, peculiar motives for manifesting as guarded a respect for the chief magistrate of the Union as is compatible with its official duties." *Burr*, 25 F. Cas., at 37. Courts should have the same "circumspection" as Chief Justice Marshall before "tak[ing] any step which would in any manner relate to that high personage." *Id.*, at 35.[3]

[3] The President and the Solicitor General argue that the grand jury must make a showing of heightened need. I agree with the majority's decision not to adopt this standard, *ante*, at 807–809, but for different reasons. The constitutional question in this case is whether the President is able to perform the duties of his office, whereas a heightened need standard addresses a logically independent issue. Under a heightened need standard, a grand jury with only the usual need for particular information would be refused it when the President is perfectly able to comply, while a grand jury with a heightened need would be entitled to it even if compliance

* * *

I agree with the majority that the President has no absolute immunity from the issuance of this subpoena. The President also sought relief from enforcement of the subpoena, however, and he asked this Court to allow further proceedings on that question if we rejected his claim of absolute immunity. The Court inexplicably fails to address this request, although its decision leaves the President free to renew his request for an injunction against enforcement immediately on remand.

I would vacate and remand to allow the District Court to determine whether enforcement of this subpoena should be enjoined because the President's "duties as chief magistrate demand his whole time for national objects." *Id.*, at 34. Accordingly, I respectfully dissent.

JUSTICE ALITO, dissenting.

This case is almost certain to be portrayed as a case about the current President and the current political situation, but the case has a much deeper significance. While the decision will of course have a direct effect on President Trump, what the Court holds today will also affect all future Presidents—which is to say, it will affect the Presidency, and that is a matter of great and lasting importance to the Nation.

The event that precipitated this case is unprecedented. Respondent Vance, an elected state prosecutor, launched a criminal investigation of a sitting President and obtained a grand jury subpoena for his records. The specific question before us—whether the subpoena may be enforced—cannot be answered adequately without considering the broader question that frames it: whether the Constitution imposes restrictions on a State's deployment of its criminal law enforcement powers against a sitting President. If the Consti-

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would place undue obligations on the President. This result makes little sense and lacks any basis in the original understanding of the Constitution. I would leave questions of the grand jury's need to state law.

tution sets no such limits, then a local prosecutor may prosecute a sitting President. And if that is allowed, it follows *a fortiori* that the subpoena at issue can be enforced. On the other hand, if the Constitution does not permit a State to prosecute a sitting President, the next logical question is whether the Constitution restrains any other prosecutorial or investigative weapons.

These are important questions that go to the very structure of the Government created by the Constitution. In evaluating these questions, two important structural features must be taken into account.

I

A

The first is the nature and role of the Presidency. The Presidency, like Congress and the Supreme Court, is a permanent institution created by the Constitution. All three of these institutions are distinct from the human beings who serve in them at any point in time. In the case of Congress or the Supreme Court, the distinction is easy to perceive, since they have multiple Members. But because "[t]he President is the only person who alone composes a branch of government. . . . , there is not always a clear line between his personal and official affairs." *Trump* v. *Mazars USA, LLP*, 591 U. S. 848, 868 (2020). As a result, the law's treatment of the person who serves as President can have an important effect on the institution, and the institution of the Presidency plays an indispensable role in our constitutional system.

The Constitution entrusts the President with responsibilities that are essential to the country's safety and well-being. The President is Commander in Chief of the Armed Forces. Art. II, § 2, cl. 1. He is responsible for the defense of the country from the moment he enters office until the moment he leaves.

The President also has the lead role in foreign relations. He "make[s]" treaties with the advice and consent of the Sen-

ate, Art. II, § 2, cl. 2, decides whether to recognize foreign governments, *Zivotofsky* v. *Kerry*, 576 U. S. 1 (2015), enters into and rescinds executive agreements with other countries,[1] meets with foreign leaders, appoints ambassadors, Art. II, § 2, cl. 2, oversees the work of the State Department and intelligence agencies, and exercises important foreign-relations powers under statutes and treaties that give him broad discretion in matters relating to subjects such as terrorism, trade, and immigration.[2]

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[1] See, *e. g.*, *American Ins. Assn.* v. *Garamendi*, 539 U. S. 396, 415 (2003); *Dames & Moore* v. *Regan*, 453 U. S. 654, 679–683 (1981); *United States* v. *Pink*, 315 U. S. 203, 229–230 (1942); *United States* v. *Belmont*, 301 U. S. 324, 330–331 (1937).

[2] Foreign Assistance Act of 1961, 22 U. S. C. § 2318(a)(1) (permitting the President to order "the drawdown of defense articles from the stocks of the Department of Defense" in the event of "an unforeseen emergency . . . which requires immediate military assistance to a foreign country or international organization"); National Emergencies Act, 50 U. S. C. § 1621 (authorizing the President to declare a national emergency and activate over 100 statutory emergency powers); International Emergency Economic Powers Act, 50 U. S. C. § 1701(a) (granting Presidential emergency power "to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States"); Trading with the Enemy Act, 50 U. S. C. § 4305(b)(1)(B) (authorizing the President, "[d]uring the time of war," to prohibit "transactions involvin[g] any property in which any foreign country or a national thereof has any interest," among other things); Trade Expansion Act of 1962, 19 U. S. C. § 1862(c)(3)(A) (authorizing "actions as the President deems necessary to adjust the imports of" certain articles of trade "so that such imports will not threaten to impair the national security"); Trade Act of 1974, 19 U. S. C. § 2132(a) (authorizing the President, among other things, to impose temporary duty surcharges or quotas in order to address "large and serious United States balance-of-payments deficits," "an imminent and significant depreciation of the dollar in foreign exchange markets," or "to cooperate with other countries in correcting an international balance-of-payments disequilibrium"), § 2133(a) (authorizing the President, whenever a specified event "increases or imposes any duty or other import restriction," to "enter into trade agreements with foreign countries or instrumentalities for the purpose of granting new concessions as compensation

The Constitution vests the President with "the executive Power" of the United States, Art. II, § 1, cl. 1, and entrusts him with the responsibility to "take Care that the Laws be faithfully executed," § 3. As the head of the Executive Branch, the President is ultimately responsible for everything done by all the departments and agencies of the Federal Government and a federal civilian work force that includes millions of employees. These weighty responsibilities impose enormous burdens on the time and energy of any occupant of the Presidency.

"Constitutionally speaking, the President never sleeps. The President must be ready, at a moment's notice, to do whatever it takes to preserve, protect, and defend the Constitution and the American people." Amar & Katyal, Executive Privileges and Immunities: The *Nixon* and *Clinton* Cases, 108 Harv. L. Rev. 701, 713 (1995). Without a President who is able at all times to carry out the responsibilities of the office, our constitutional system could not operate, and the country would be at risk. That is why the Twenty-fifth Amendment created a mechanism for temporarily transfer-

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in order to maintain the general level of reciprocal and mutually advantageous concessions" and to take actions "to carry out any such agreement"), § 2411(a) (mandating the U. S. Trade Representative, subject to the President's direction, to modify tariff rates if "the rights of the United States under any trade agreement are being denied" or if a foreign country's actions are "unjustifiable and burde[n] or restric[t] United States commerce"), § 2461 (authorizing the President to "provide duty-free treatment for any eligible article from any beneficiary developing country"); Bipartisan Congressional Trade Priorities and Accountability Act of 2015, 19 U. S. C. §§ 4201–4210 (most recent delegation of trade-promotion authority, authorizing the President to negotiate and enter trade agreements); Immigration and Nationality Act of 1952, 8 U. S. C. § 1182(f) (authorizing the President, "for such period as he shall deem necessary," to "suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate," "[w]henever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States").

ring the responsibilities of the office to the Vice President if the President is incapacitated for even a brief time. The Amendment has been explicitly invoked on only two occasions, each time for a period of about two hours.[3] This mechanism reflects an appreciation that the Nation cannot be safely left without a functioning President for even a brief time.

B

The second structural feature is the relationship between the Federal Government and the States. Just as our Constitution balances power against power among the branches of the Federal Government, it also divides power between the Federal Government and the States. The Constitution permitted the States to retain many of the sovereign powers that they previously possessed, see, *e. g.*, *Murphy* v. *National Collegiate Athletic Assn.*, 584 U. S. 453 (2018), but it gave the Federal Government powers that were deemed essential for the Nation's well-being and, indeed, its survival. And it provided for the Federal Government to be independent of and, within its allotted sphere, supreme over the States. Art. VI, cl. 2. Accordingly, a State may not block or interfere with the lawful work of the National Government.

This was an enduring lesson of Chief Justice Marshall's landmark opinion for the Court in *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819). As is well known, the case concerned the attempt by the State of Maryland to regulate and tax the federally chartered Second Bank of the United States. After holding that Congress had the authority to establish

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[3] See Letter from G. Bush to Congressional Leaders on Temporary Transfer of the Powers and Duties of President of the United States (June 29, 2002), www.presidency.ucsb.edu/node/213575; Letter from G. Bush to Congressional Leaders on the Temporary Transfer of the Powers and Duties of the President of the United States (July 21, 2007), www.presidency.ucsb.edu/node/276172; see also Stolberg, For a Short While Today, It Will Be President Cheney, N. Y. Times, July 21, 2007, p. A11, col. 1.

the bank, *id.*, at 425, Marshall's opinion went on to conclude that the State could not tax it. Marshall recognized that the States retained the "sovereign" power to tax persons and entities within their jurisdiction, *id.*, at 429, but this power, he explained, "is subordinate to, and may be controlled by the constitution of the United States." *Id.*, at 427. Noting the potency of the taxing power ("[a] right to tax without limit or control, is essentially a power to destroy," *id.*, at 391), he concluded that a State's power to tax had to give way to Congress's authority to charter the bank. In his words, the state power to tax could not be used to "defeat the legitimate operations," *id.*, at 427, of the Federal Government or "to retard, impede, burden, or in any manner control" it, *id.*, at 436. Marshall thus held, not simply that Maryland was barred from assessing a crushing tax that threatened the bank's ability to operate, but that the State could not tax the bank at all. He wrote:

> "We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government of the Union, in pursuance of the constitution, is itself an abuse." *Id.*, at 430.

Even a rule allowing a state tax that did not discriminate between the federally chartered bank and state banks was ruled out. Instead, he concluded that preservation of the Constitution's federal structure demanded that any state effort to tax a federal instrumentality be nipped in the bud.

Building on this principle of federalism, two centuries of case law prohibit the States from taxing,[4] regulating, or oth-

[4] *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110, 117 (1954) (noting that "recognition of the constitutional immunity of the Federal Government from state exactions rests, of course, upon unquestioned authority"); *Mayo* v. *United States*, 319 U. S. 441, 447 (1943) ("These inspection fees are laid directly upon the United States. They are money exactions the payment of which, if they are enforceable, would be required before executing a

erwise interfering with the lawful work of federal agencies, instrumentalities, and officers.[5] The Court premised these

function of government. Such a requirement is prohibited by the supremacy clause"); *Clallam County* v. *United States*, 263 U. S. 341, 344 (1923) (holding that property owned by the United States is immune from state taxation); see also *Weston* v. *City Council of Charleston*, 2 Pet. 449, 469 (1829) ("The tax on government stock is thought by this Court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the constitution"); *Osborn* v. *Bank of United States*, 9 Wheat. 738, 867 (1824) ("If the trade of the Bank be essential to its character, as a machine for the fiscal operations of the government, that trade must be as exempt from State control as the actual conveyance of the public money. Indeed, a tax bears upon the whole machine; as well upon the faculty of collecting and transmitting the money of the nation, as on that of discounting the notes of individuals. No distinction is taken between them"); *Dawson* v. *Steager*, 586 U. S. 171, 174 (2019) (surveying Court precedent on intergovernmental tax immunity).

[5] *Goodyear Atomic Corp.* v. *Miller*, 486 U. S. 174, 180 (1988) ("It is well settled that the activities of federal installations are shielded by the Supremacy Clause from direct state regulation unless Congress provides 'clear and unambiguous' authorization for such regulation"); *id.*, at 181 (concluding that "a federally owned facility performing a federal function is shielded from direct state regulation, even though the federal function is carried out by a private contractor, unless Congress clearly authorizes such regulation"); *Hancock* v. *Train*, 426 U. S. 167, 178–179 (1976) (rejecting state agency's bid to regulate a federal installation and surveying doctrines that establish that "'the federal function must be left free' of [state] regulation"); see also *Leslie Miller, Inc.* v. *Arkansas*, 352 U. S. 187, 189–190 (1956) (*per curiam*) (concluding that federal contractors cannot be forced to submit to state licensing procedures that would add to the qualifications required to receive the federal contract); *Johnson* v. *Maryland*, 254 U. S. 51, 57 (1920) (concluding that federal postal officials may not be required to get a state driver's license to perform their duties and explaining that "the immunity of the instruments of the United States from state control in the performance of their duties extends to . . . requirement[s] that they desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them"); *In re Neagle*, 135 U. S. 1, 75 (1890) (concluding that a federal official may not be "held in the state court to answer for an act which he [or she] was authorized to do by the law of the United States"); *id.*, at 62 ("To cite all the cases in which this principle of the supremacy of the government of the

cases on the principle that "the activities of the Federal Government are free from regulation by any state. No other adjustment of competing enactments or legal principles is possible." *Mayo* v. *United States*, 319 U. S. 441, 445 (1943) (footnote omitted).

II

A

In *McCulloch*, Maryland's sovereign taxing power had to yield, and in a similar way, a State's sovereign power to enforce its criminal laws must accommodate the indispensable role that the Constitution assigns to the Presidency. This must be the rule with respect to a state prosecution of a sitting President. Both the structure of the Government established by the Constitution and the Constitution's provisions on the impeachment and removal of a President make it clear that the prosecution of a sitting President is out of the question. It has been aptly said that the President is the "sole indispensable man in government,"[6] and subjecting a sitting President to criminal prosecution would severely

United States, in the exercise of all the powers conferred upon it by the Constitution, is maintained, would be an endless task"); *Tarble's Case*, 13 Wall. 397, 404 (1872) (explaining that States have no authority to "interfere with the authority of the United States, whether that authority be exercised by a Federal officer or be exercised by a Federal tribunal"); *Crosby* v. *National Foreign Trade Council*, 530 U. S. 363, 376–382 (2000) (explaining harm caused by state statutes that would "compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments"); *EPA* v. *California ex rel. State Water Resources Control Bd.*, 426 U. S. 200, 211 (1976) ("Federal installations are subject to state regulation only when and to the extent that congressional authorization is clear and unambiguous"); *Arizona* v. *California*, 283 U. S. 423, 451 (1931) ("The United States may perform its functions without conforming to the police regulations of a State"); *Hunt* v. *United States*, 278 U. S. 96, 100–101 (1928) (recognizing that the United States was entitled to an injunction against state officers interfering with private citizens killing deer in national forest under authority of the United States).

[6] P. Kurland, Watergate and the Constitution 135 (1978).

hamper his ability to carry out the vital responsibilities that the Constitution puts in his hands.

Justice Joseph Story endorsed this reasoning in his famous treatise. He wrote that a President's responsibilities necessarily entail "the power to perform [those duties], without any obstruction or impediment whatsoever," and that, as a result, a President is not "liable to arrest, imprisonment, or detention" while in office. 3 Commentaries on the Constitution of the United States § 1563, pp. 418–419 (1833).

The constitutional provisions on impeachment provide further support for the rule that a President may not be prosecuted while in office. The Framers foresaw the need to provide for the possibility that a President might be implicated in the commission of a serious offense, and they did not want the country to be forced to endure such a President for the remainder of his term in office. But when a President has been elected by the people pursuant to the procedures set out in the Constitution, it is no small thing to overturn that choice. The Framers therefore crafted a special set of procedures to deal with that contingency. They put the charging decision in the hands of a body that represents all the people (the House of Representatives), not a single prosecutor or the members of a local grand jury. And they entrusted the weighty decision whether to remove a President to a supermajority of Senators, who were expected to exercise reasoned judgment and not the political passions of the day or the sentiments of a particular region.

The Constitution not only sets out the procedures for dealing with a President who is suspected of committing a serious offense; it also specifies the consequences of a judgment adverse to the President. After providing that the judgment cannot impose any punishment beyond removal from the Presidency and disqualification from holding any other federal office, the Constitution states that "the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." Art.

I, § 3, cl. 7. The plain implication is that criminal prosecution, like removal from the Presidency and disqualification from other offices, is a consequence that can come about only after the Senate's judgment, not during or prior to the Senate trial.

This was how Hamilton explained the impeachment provisions in the Federalist Papers. He wrote that a President may "be impeached, tried, and, upon conviction . . . *would afterwards be liable to prosecution and punishment in the ordinary course of law.*" The Federalist No. 69, p. 416 (C. Rossiter ed. 1961) (emphasis added); see also *id.*, No. 77, at 464 (A. Hamilton) (a President is "at all times liable to impeachment, trial, [and] dismission from office," but any other punishment must come only "by *subsequent prosecution* in the common course of law" (emphasis added)).

In the proceedings below, neither respondent, nor the District Court, nor the Second Circuit was willing to concede the fundamental point that a sitting President may not be prosecuted by a local district attorney. Respondent has said that he is investigating the President and, until oral argument in this Court, he never foreswore an intention to charge the President while he is still in office.[7] The District

[7] During oral argument in the Second Circuit, respondent's attorney said the following:

"It's hard for me to say that there could be no circumstance under which a President could ever imaginably be criminally charged or perhaps tried . . . . You can invent scenarios where you can imagine that it would be necessary or at least perhaps a good idea for a sitting President to be subject to a criminal charge even by a state while in office." Recording of Oral Arg. in No. 19–3204 (CA2, Oct. 23, 2019), at 28:20–28:40; 36:35–36:45, https://www.ca2.uscourts.gov/decisions/oral_arguments.html.

Respondent's brief in this case says only that "[f]or the purpose of this case, the Court may assume . . . that a sitting President is not amenable to criminal prosecution." Brief for Respondent Vance 24–25. During oral argument in this Court, however, counsel for respondent stated: "We're mindful that as a state actor our office cannot investigate a president for any official acts and that we cannot prosecute a president while in office." Tr. of Oral Arg. 54.

Court conceded only that "perhaps" a sitting President could not be prosecuted for an offense punishable by "lengthy imprisonment" but that an offense requiring only a short trial would be another matter. 395 F. Supp. 3d 283, 289, 311 (SDNY 2019). And the Second Circuit was silent on the question.

The scenario apparently contemplated by the District Court is striking. If a sitting President were charged in New York County, would he be arrested and fingerprinted? He would presumably be required to appear for arraignment in criminal court, where the judge would set the conditions for his release. Could he be sent to Rikers Island or be required to post bail? Could the judge impose restrictions on his travel? If the President were scheduled to travel abroad—perhaps to attend a G–7 meeting—would he have to get judicial approval? If the President were charged with a complicated offense requiring a long trial, would he have to put his Presidential responsibilities aside for weeks on end while sitting in a Manhattan courtroom? While the trial was in progress, would aides be able to approach him and whisper in his ear about pressing matters? Would he be able to obtain a recess whenever he needed to speak with an aide at greater length or attend to an urgent matter, such as speaking with a foreign leader? Could he effectively carry out all his essential Presidential responsibilities after the trial day ended and at the same time adequately confer with his trial attorneys regarding his defense? Or should he be expected to give up the right to attend his own trial and be tried in absentia? And if he were convicted, could he be imprisoned? Would aides be installed in a nearby cell?

This entire imagined scene is farcical. The "right of all the People to a functioning government" would be sacrificed. Amar & Kalt, The Presidential Privilege Against Prosecution, 2 Nexus 11, 14 (1997). "Does anyone really think, in a country where common crimes are usually brought before state grand juries by state prosecutors, that it is feasible to

subject the president—and thus the country—to every district attorney with a reckless mania for self-promotion?" C. Black & P. Bobbitt, Impeachment: A Handbook 112 (2018). See also R. Moss, Asst. Atty. Gen., A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. Office of Legal Counsel (OLC) 222, 260 (2000) (Moss Memo); Memorandum from R. Dixon, Asst. Atty. Gen., OLC, Re: Amenability of the President, Vice President and Other Civil Officers to Federal Criminal Prosecution While in Office (Sept. 24, 1973).

B

While the prosecution of a sitting President provides the most dramatic example of a clash between the indispensable work of the Presidency and a State's exercise of its criminal law enforcement powers, other examples are easy to imagine. Suppose state officers obtained and sought to execute a search warrant for a sitting President's private quarters in the White House. Suppose a state court authorized surveillance of a telephone that a sitting President was known to use. Or suppose that a sitting President was subpoenaed to testify before a state grand jury and, as is generally the rule, no Presidential aides, even those carrying the so-called "nuclear football,"[8] were permitted to enter the grand jury room. What these examples illustrate is a principle that this Court has recognized: legal proceedings involving a sitting President must take the responsibilities and demands of the office into account. See *Clinton* v. *Jones*, 520 U. S. 681, 707 (1997).

It is not enough to recite sayings like "no man is above the law" and "'the public has a right to every man's evidence.'" *Ante*, at 791, 812. These sayings are true—and important—but they beg the question. The law applies equally to all

[8] Atomic Heritage Foundation, Nuclear Briefcases (June 12, 2018), www.atomicheritage.org/history/nuclear-briefcases.

persons, including a person who happens for a period of time to occupy the Presidency. But there is no question that the nature of the office demands in some instances that the application of laws be adjusted at least until the person's term in office ends.

C

I now come to the specific investigative weapon at issue in the case before us—a subpoena for a sitting President's records. This weapon is less intrusive in an immediate sense than those mentioned above. Since the records are held by, and the subpoena was issued to, a third party, compliance would not require much work on the President's part. And after all, this is just one subpoena.

But we should heed the "great jurist," *ante*, at 810, who rejected a similar argument in *McCulloch*. If we say that a subpoena to a third party is insufficient to undermine a President's performance of his duties, what about a subpoena served on the President himself? Surely in that case, the President could turn over the work of gathering the requested documents to attorneys or others recruited to perform the task. And if one subpoena is permitted, what about two? Or three? Or ten? Drawing a line based on such factors would involve the same sort of "perplexing inquiry, so unfit for the judicial department" that Marshall rejected in *McCulloch*, 4 Wheat., at 430.

The Court faced a similar issue when it considered whether a President can be sued for an allegedly unlawful act committed in the performance of official duties. See *Nixon* v. *Fitzgerald*, 457 U. S. 731 (1982). We did not ask whether the particular suit before us would have interfered with the carrying out of Presidential duties. (It could not have had that effect because President Nixon had already left office.)

Instead, we adopted a rule for all such suits, and we should take a similar approach here. The rule should take into

account both the effect of subpoenas on the functioning of the Presidency and the risk that they will be used for harassment.

I turn first to the question of the effect of a state grand jury subpoena for a President's records. When the issuance of such a subpoena is part of an investigation that regards the President as a "target" or "subject,"[9] the subpoena can easily impair a President's "energetic performance of [his] constitutional duties." *Cheney* v. *United States Dist. Court for D. C.*, 542 U. S. 367, 382 (2004). Few individuals will simply brush off an indication that they may be within a prosecutor's crosshairs. Few will put the matter out of their minds and go about their work unaffected. For many, the prospect of prosecution will be the first and last thing on their minds every day.

We have come to expect our Presidents to shoulder burdens that very few people could bear, but it is unrealistic to think that the prospect of possible criminal prosecution will not interfere with the performance of the duties of the office. "[C]riminal litigation uniquely requires [a] President's personal time and energy, and will inevitably entail a considerable if not overwhelming degree of mental preoccupation." Moss Memo 254 (emphasis deleted). See also Kavanaugh,

[9] Respondent asserts that his office has never characterized President Trump as a "target" of the investigation, Brief for Respondent Vance 29, n. 10, but by the same token, respondent has never said that the President is not a "target." Moreover, the terms "target" and "subject" have no consistent legal meaning. The United States Attorney's Manual defines a "target" as "a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant." Dept. of Justice, Justice Manual, Section 9–11.151 (Jan. 2020), https://www.justice.gov/jm/jm-9-11000-grand-jury#9-11.151/. "A 'subject' of an investigation" is defined as "a person whose conduct is within the scope of the grand jury's investigation." *Ibid.* Of course, these definitions are not binding on the State of New York, but under them, it is apparent that the President is at least a "subject."

Separation of Powers During the Forty-Fourth Presidency and Beyond, 93 Minn. L. Rev. 1454, 1461 (2009) ("[A] President who is concerned about an ongoing criminal investigation is almost inevitably going to do a worse job as President").

As for the potential use of subpoenas to harass, we need not "'exhibit a naiveté from which ordinary citizens are free.'" *Department of Commerce* v. *New York*, 588 U. S. 752, 785 (2019). As we have recognized, a President is "an easily identifiable target." *Fitzgerald*, 457 U. S., at 752–753. There are more than 2,300 local prosecutors and district attorneys in the country.[10] Many local prosecutors are elected, and many prosecutors have ambitions for higher elected office. (Respondent's famous predecessor Thomas E. Dewey used the office of District Attorney for New York County as a springboard to the governorship of New York and to the Republican nomination for President in 1944 and 1948.) If a sitting President is intensely unpopular in a particular district—and that is a common condition—targeting the President may be an alluring and effective electoral strategy. But it is a strategy that would undermine our constitutional structure.

The Framers understood the importance of protecting the Presidency from interference by the States. At the Constitutional Convention, James Wilson argued that the President should be "as independent as possible . . . of the States." 1 Records of the Federal Convention of 1787, p. 69 (M. Farrand ed. 1911). He and James Madison successfully opposed a proposal to vest the impeachment power in state legislatures, contending that this "would open a door for intrigues agst. [the President] in States where his administration tho' just might be unpopular, and might tempt him to pay court to particular States whose leading partizans he might fear." *Id.*, at 86. And to prevent a State from compromising a

[10] Dept. of Justice, Bureau of Justice Statistics, Prosecutors in State Courts, 2007—Statistical Tables 1 (Dec. 2011).

President's independence, the Convention adopted a provision barring a President from receiving an "Emolument" from any State, U. S. Const., Art. II, § 1, cl. 7. See The Federalist No. 73, at 494 (J. Cooke ed. 1961) (A. Hamilton).

Two centuries later, the Court's decision in *Clinton* reflected a similar concern. The Court held that a sitting President could be sued in federal court, but the Court took pains to reserve judgment on the question whether "a comparable claim might succeed in a state tribunal." 520 U. S., at 691. "[A]ny direct control by a state court over the President," the Court observed, might raise concerns about "protecting federal officials from possible local prejudice." *Ibid.*, and n. 13.

D

In light of the above, a subpoena like the one now before us should not be enforced unless it meets a test that takes into account the need to prevent interference with a President's discharge of the responsibilities of the office. I agree with the Court that not all such subpoenas should be barred. There may be situations in which there is an urgent and critical need for the subpoenaed information. The situation in the Burr trial, where the documents at issue were sought by a criminal defendant to defend against a charge of treason, is a good example. But in a case like the one at hand, a subpoena should not be allowed unless a heightened standard is met.

Prior cases involving Presidential subpoenas have always applied special, heightened standards. In the Burr trial, Chief Justice Marshall was careful to note that "[i]n no case of this kind would a court be required to proceed against the president as against an ordinary individual," and he held that the subpoena to President Jefferson was permissible only because the prosecutor had shown that the materials sought were "essential to the justice of the [pending criminal] case." *United States* v. *Burr*, 25 F. Cas. 187, 192 (No. 14,694) (CC Va. 1807) (brackets omitted).

In *United States* v. *Nixon*, 418 U. S. 683 (1974), where the Watergate Special Prosecutor subpoenaed tape recordings and documents under the control of President Nixon, this Court refused to quash the subpoena because there was a "demonstrated, specific need for [the] evidence in a pending criminal trial." *Id.*, at 713. In an earlier Watergate-related case where a Senate Committee subpoenaed President Nixon's White House tapes, the D. C. Circuit refused to order their production because the Committee had failed to show that "the subpoenaed evidence [wa]s demonstrably critical to the responsible fulfillment of the Committee's functions." *Senate Select Comm. on Presidential Campaign Activities* v. *Nixon*, 498 F. 2d 725, 731 (1974). Later, when an independent counsel investigating a Cabinet officer wanted to enforce a federal grand jury subpoena for privileged materials held by the White House counsel, the D. C. Circuit explained that enforcement demanded a "'demonstrated, specific need'" for the materials sought. *In re Sealed Case*, 121 F. 3d 729, 736 (1997) (*per curiam*).

The important point is not that the subpoena in this case should necessarily be governed by the particular tests used in these cases, most of which involved official records that were claimed to be privileged. Rather, the point is that we should not treat this subpoena like an ordinary grand jury subpoena and should not relegate a President to the meager defenses that are available when an ordinary grand jury subpoena is challenged. But that, at bottom, is the effect of the Court's decision.

The Presidency deserves greater protection. Thus, in a case like this one, a prosecutor should be required (1) to provide at least a general description of the possible offenses that are under investigation, (2) to outline how the subpoenaed records relate to those offenses, and (3) to explain why it is important that the records be produced and why it is necessary for production to occur while the President is still in office.

In the present case, the district attorney made a brief proffer, but important questions were left hanging. It would not be unduly burdensome to insist on answers before enforcing the subpoena.

One obvious question concerns the scope of the subpoena. The subpoena issued by the grand jury is largely a copy of the subpoenas issued by Committees of the House of Representatives, and it would be quite a coincidence if the records relevant to an investigation of possible violations of New York criminal law just so happened to be almost identical to the records thought by congressional Committees to be useful in considering federal legislation. It is therefore appropriate to ask the district attorney to explain the need for the various items that the subpoena covers.

The district attorney should also explain why it is important that the information in question be obtained from the President's records rather than another source. See, *e. g.*, *Nixon*, 418 U. S., at 702; *Sealed Case*, 121 F. 3d, at 755. And the district attorney should set out why he finds it necessary that the records be produced now as opposed to when the President leaves office. At argument, respondent's counsel told us that his office's concern is the expiration of the statute of limitations,[11] but there are potential solutions to that problem. Even if New York law does not automatically suspend the statute of limitations for prosecuting a President until he leaves office,[12] it may be possible to eliminate the problem by waiver.[13] And if the prosecutor's statute-of-

[11] Tr. of Oral Arg. 77, 102.

[12] See N. Y. Crim. Proc. Law Ann. § 30.10(4)(a) (West 2010) (statute tolled when defendant outside the jurisdiction); see also *People* v. *Knobel*, 94 N. Y. 2d 226, 230, 723 N. E. 2d 550, 552 (1999) (explaining New York rule for tolling the limitations period when a defendant is "continuously outside" the State and concluding that "all periods of a day or more that a nonresident defendant is out-of-State should be totaled and toll the Statute of Limitations").

[13] See *People* v. *Parilla*, 8 N. Y. 3d 654, 659, 870 N. E. 2d 142, 145 (2007); R. Davis & T. Muskus, New York Practice With Forms, 33A Carmody-Wait 2d § 186:34 (June 2020).

limitations concerns relate to parties other than the President, he should be required to spell that out.

There may be other good reasons why immediate enforcement is important, such as the risk that evidence or important leads will be lost, but if a prosecutor believes that immediate enforcement is needed for such a reason, the prosecutor should be required to provide a reasonably specific explanation why that is so and why alternative means, such as measures to preserve evidence and prevent spoliation, would not suffice.

E

Unlike this rule, which would not undermine any legitimate state interests, the opinion of the Court provides no real protection for the Presidency. The Court discounts the risk of harassment and assumes that state prosecutors will observe constitutional limitations, *ante*, at 805–808, and I also assume that the great majority of state prosecutors will carry out their responsibilities responsibly. But for the reasons noted, there is a very real risk that some will not.

The Court emphasizes the protection afforded by "longstanding rules of grand jury secrecy," *ante*, at 804, but that is no answer to the burdens that subpoenas may inflict, and in any event, grand jury secrecy rules are of limited value as safeguards against harassment. State laws on grand jury secrecy vary and often do not set out disclosure restrictions with the same specificity as federal law.[14]

Under New York law, the decision whether to disclose grand jury evidence is committed to the discretion of the supervising judge under a test that simply balances the need for secrecy against "the public interest." *In re District Attorney of Suffolk Cty.*, 58 N. Y. 2d 436, 444, 448 N. E. 2d 440, 443–444 (1983); see also *People* v. *Fetcho*, 91 N. Y. 2d 765, 769, 698 N. E. 2d 935, 938 (1998). That test provides no solid protection for the Presidency. Reported New York decisions do not deal with whether this test restricts disclosure

[14] S. Beale et al., Grand Jury Law and Practice §§ 5:3–5:4 (2d ed. 2018).

to, among others, a congressional committee, the state legislature, or the state attorney general and her staff for the purpose of civil litigation. Indeed, since New York legislators have attempted to enact laws to force the disclosure of some of the subpoenaed information, it is not impossible to imagine a trial judge's finding that public disclosure is in the "public interest." And even where grand jury information is not lawfully disclosed, confidential law enforcement information is avidly sought by the media in high-profile cases, leaks of such information are not uncommon, and those responsible are seldom called to account.

The Court notes that "grand juries are prohibited from engaging" in "'fishing expeditions,'" *ante*, at 805, but an objection on that ground is a very long shot under New York law. In New York, a grand jury subpoena need not be supported by probable cause, *In re Nassau Cty. Grand Jury Subpoena Duces Tecum Dated June 24, 2003*, 4 N. Y. 3d 665, 677–678, 830 N. E. 2d 1118, 1126 (2005), and a party seeking to quash a subpoena must show that the documents sought "'"can have no conceivable relevance to any legitimate object of investigation."'" *In re Grand Jury Subpoenas for Locals 17, 135, and 608*, 72 N. Y. 2d 307, 317, 528 N. E. 2d 1195, 1201 (1988) (quoting *Virag* v. *Hynes*, 54 N. Y. 2d 437, 444, 430 N. E. 2d 1249, 1253 (1981)).

The Court says that a President can "*argue* that compliance with a particular subpoena would impede his constitutional duties," *ante*, at 810 (emphasis added), but under the Court's opinions in this case and *Mazars*, it is not easy to see how such an argument could prevail. The Court makes clear that any stigma or damage to a President's reputation does not count, *ante*, at 803–804, and in *Mazars*, the Court states that "burdens on the President's time and attention" are generally not of constitutional concern, 591 U. S., at 871. Elsewhere in its opinion in this case, the Court takes the position that when a President's non-official records are subpoenaed, his treatment should be little different from that of any other

subpoena recipient. *Ante*, at 807–808. The most that the Court holds out is the possibility that there might be some unspecified extraordinary circumstances under which a President might obtain relief.

Finally, the Court touts the ability of a President to challenge a subpoena by "'an affirmative showing of impropriety,' including 'bad faith'" or retaliation for official acts. *Ante*, at 805. But "such objections are almost universally overruled." S. Beale et al., Grand Jury Law and Practice § 6:23, p. 6–243 (2d ed. 2014). Direct evidence of impropriety is rarely obtainable, and it will be a challenge to make a circumstantial case unless the prosecutor is required to provide the sort of showing outlined above.

For all practical purposes, the Court's decision places a sitting President in the same unenviable position as any other person whose records are subpoenaed by a grand jury. See *ante*, at 807–808.

Attempting to justify this approach, the Court relies on Marshall's ruling in the Burr trial, but the Court ignores important differences between the situation in that case and the situation here. First, the subpoena in *Burr* was not issued by a grand jury at the behest of a prosecutor who was investigating the President. Instead, a defendant who was initially on trial for his life sought to obtain exculpatory evidence from the very man who was orchestrating the prosecution. *Ante*, at 795. Marshall's ruling took note of the context in which the evidence was sought. He stated: "If there be a paper in the possession of the executive, which is not of an official nature, he must stand, as respects that paper, in nearly the same situation with any other individual who possesses a paper *which might be required for the defence*." *Burr*, 25 F. Cas., at 191 (emphasis added).

Second, it is significant that Burr, unlike the prosecutor in the present case, did not have the option of postponing his request for information until the President's term ended. Burr had not chosen to be charged or tried while Jefferson

was in office, and by the time Jefferson's tenure ended, his trial was history. Third, because the case was prosecuted in federal court under federal law, it entirely lacked the federalism concerns that lie at the heart of the present case.

The lesson we should take from Marshall's jurisprudence is the lesson of *McCulloch*—the importance of preventing a State from undermining the lawful exercise of authority conferred by the Constitution on the Federal Government. There is considerable irony in the Court's invocation of Marshall to defend a decision allowing a State's prosecutorial power to run roughshod over the functioning of a branch of the Federal Government.

The Court's other examples of Presidential subpoenas, far from supporting the Court's holding, actually show that usual procedures have been substantially altered in cases involving Presidents. In every one of the examples, a President did not testify in person, as is almost always required when a witness is subpoenaed to testify at a criminal trial or before a grand jury, but instead was deposed. *Ante*, at 797–798. The examples involving Presidents Ford and Carter occurred under modern federal rules of procedure, and allowing them to testify by deposition represented a sharp departure from conventional practice.[15]

[15] When President Ford was subpoenaed as a defense witness in the trial of a woman who had attempted to assassinate him, the District Court ruled that Federal Rule of Criminal Procedure 15 allowed him to be deposed at a place of his choosing, instead of testifying in person, and provided for defense counsel but not the defendant herself to be present. Then, as now, Rule 15 permits a witness to be deposed under "exceptional circumstances" in order "to preserve testimony for trial." This Rule is generally used when a witness may not be available to testify at trial, not simply when it would be burdensome or inconvenient for the witness to appear. The judge's application of the Rule in this case was innovative. In addition, the defendant was not present when President Ford was deposed. Repeating such a practice today might run into other obstacles. See *Coy* v. *Iowa*, 487 U. S. 1012, 1020–1021 (1988); see also Rule 15(c) (providing for the defendant's presence during the deposition).

A similar procedure appears to have been followed when President Carter testified as a prosecution witness in a criminal trial. No reported case

The Court turns to *United States* v. *Nixon*, 418 U. S. 683, but that case arose under markedly different circumstances. Because the trial was in federal court, there was no issue of federalism, and the Court refused to order that the subpoena be quashed because of "the demonstrated, specific need for evidence in a pending criminal trial." *Id.*, at 713. In the case now before us, a "demonstrated, specific need" is precisely what is lacking.

This Court's decision in *Clinton* v. *Jones*, 520 U. S. 681, provides no greater support for today's decision. In that case, as noted, the lawsuit was brought in federal, not state, court, and while the subject of that particular civil suit was embarrassing, the Court addressed the broad question whether a President is immune from civil suits "'in all but the most exceptional cases.'" *Id.*, at 692. There is no question that a criminal prosecution holds far greater potential for distracting a President and diminishing his ability to carry out his responsibilities than does the average civil suit.

* * *

The subpoena at issue here is unprecedented. Never before has a local prosecutor subpoenaed the records of a sitting President. The Court's decision threatens to impair the functioning of the Presidency and provides no real protection against the use of the subpoena power by the Nation's 2,300+ local prosecutors. Respect for the structure of Government created by the Constitution demands greater protection for an institution that is vital to the Nation's safety and well-being.

I therefore respectfully dissent.

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explains the legal authority cited as justification for excusing live testimony, but Rule 15 may have been invoked. As for President Carter's testimony by deposition before a grand jury, although neither the Federal Rules of Evidence nor the Confrontation Clause apply to federal grand jury proceedings, testimony by deposition is nevertheless not the norm.

Syllabus

TRUMP ET AL. *v.* MAZARS USA, LLP, ET AL.

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

No. 19–715. Argued May 12, 2020—Decided July 9, 2020*

In April 2019, three committees of the U. S. House of Representatives issued four subpoenas seeking information about the finances of President Donald J. Trump, his children, and affiliated businesses. The House Committee on Financial Services issued a subpoena to Deutsche Bank seeking any document related to account activity, due diligence, foreign transactions, business statements, debt schedules, statements of net worth, tax returns, and suspicious activity identified by Deutsche Bank. It issued a second subpoena to Capital One for similar information. The Permanent Select Committee on Intelligence issued a subpoena to Deutsche Bank that mirrored the subpoena issued by the Financial Services Committee. And the House Committee on Oversight and Reform issued a subpoena to the President's personal accounting firm, Mazars USA, LLP, demanding information related to the President and several affiliated businesses. Although each of the committees sought overlapping sets of financial documents, each supplied different justifications for the requests, explaining that the information would help guide legislative reform in areas ranging from money laundering and terrorism to foreign involvement in U. S. elections. Petitioners—the President in his personal capacity, along with his children and affiliated businesses—contested the subpoena issued by the Oversight Committee in the District Court for the District of Columbia (*Mazars*, No. 19–715) and the subpoenas issued by the Financial Services and Intelligence Committees in the Southern District of New York (*Deutsche Bank*, No. 19–760). In both cases, petitioners contended that the subpoenas lacked a legitimate legislative purpose and violated the separation of powers. The President did not, however, argue that any of the requested records were protected by executive privilege.

In *Mazars*, the District Court granted judgment for the House and the D. C. Circuit affirmed, finding that the subpoena issued by the Oversight Committee served a valid legislative purpose because the requested information was relevant to reforming financial disclosure requirements for Presidents and presidential candidates. In *Deutsche*

*Together with No. 19–760, *Trump et al.* v. *Deutsche Bank AG et al.*, on certiorari to the United States Court of Appeals for the Second Circuit.

Bank, the District Court denied a preliminary injunction and the Second Circuit affirmed in substantial part, holding that the Intelligence Committee properly issued its subpoena to Deutsche Bank as part of an investigation into alleged foreign influence in the U. S. political process, which could inform legislation to strengthen national security and combat foreign meddling. The court also concluded that the subpoenas issued by the Financial Services Committee to Deutsche Bank and Capital One were adequately related to potential legislation on money laundering, terrorist financing, and the global movement of illicit funds through the real estate market.

Held: The courts below did not take adequate account of the significant separation of powers concerns implicated by congressional subpoenas for the President's information. Pp. 858–871.

(a) Historically, disputes over congressional demands for presidential documents have been resolved by the political branches through negotiation and compromise without involving this Court. The Court recognizes that this dispute is the first of its kind to reach the Court; that such disputes can raise important issues concerning relations between the branches; that similar disputes recur on a regular basis, including in the context of deeply partisan controversy; and that Congress and the Executive have nonetheless managed for over two centuries to resolve these disputes among themselves without Supreme Court guidance. Such longstanding practice "'is a consideration of great weight'" in cases concerning "the allocation of power between [the] two elected branches of Government," and it imposes on the Court a duty of care to ensure that it does not needlessly disturb "the compromises and working arrangements" reached by those branches. *NLRB* v. *Noel Canning*, 573 U. S. 513, 524–526 (quoting *The Pocket Veto Case*, 279 U. S. 655, 689). Pp. 858–862.

(b) Each House of Congress has the power "to secure needed information" in order to legislate. *McGrain* v. *Daugherty*, 273 U. S. 135, 161. This power is "indispensable" because, without information, Congress would be unable to legislate wisely or effectively. *Watkins* v. *United States*, 354 U. S. 178, 215. Because this power is "justified solely as an adjunct to the legislative process," it is subject to several limitations. *Id.*, at 197. Most importantly, a congressional subpoena is valid only if it is "related to, and in furtherance of, a legitimate task of the Congress." *Id.*, at 187. The subpoena must serve a "valid legislative purpose." *Quinn* v. *United States*, 349 U. S. 155, 161. Furthermore, Congress may not issue a subpoena for the purpose of "law enforcement," because that power is assigned to the Executive and the Judiciary. *Ibid.* Finally, recipients of congressional subpoenas retain their consti-

tutional rights and various privileges throughout the course of an investigation. Pp. 862–863.

(c) The President contends, as does the Solicitor General on behalf of the United States, that congressional subpoenas for the President's information should be evaluated under the standards set forth in *United States* v. *Nixon*, 418 U. S. 683, and *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 498 F. 2d 725, which would require the House to show that the requested information satisfies a "demonstrated, specific need," 418 U. S., at 713, and is "demonstrably critical" to a legislative purpose, 498 F. 2d, at 731. *Nixon* and *Senate Select Committee*, however, involved subpoenas for communications between the President and his close advisers, over which the President asserted executive privilege. Because executive privilege safeguards the public interest in candid, confidential deliberations within the Executive Branch, information subject to the privilege deserves "the greatest protection consistent with the fair administration of justice." 418 U. S., at 715. That protection should not be transplanted root and branch to cases involving nonprivileged, private information, which by definition does not implicate sensitive Executive Branch deliberations. The standards proposed by the President and the Solicitor General—if applied outside the context of privileged information—would risk seriously impeding Congress in carrying out its responsibilities, giving short shrift to its important interests in conducting inquiries to obtain information needed to legislate effectively. Pp. 863–865.

(d) The approach proposed by the House, which relies on precedents that did not involve the President's papers, fails to take adequate account of the significant separation of powers issues raised by congressional subpoenas for the President's information. The House's approach would leave essentially no limits on the congressional power to subpoena the President's personal records. A limitless subpoena power could transform the established practice of the political branches and allow Congress to aggrandize itself at the President's expense. These separation of powers concerns are unmistakably implicated by the subpoenas here, which represent not a run-of-the-mill legislative effort but rather a clash between rival branches of government over records of intense political interest for all involved. The interbranch conflict does not vanish simply because the subpoenas seek personal papers or because the President sued in his personal capacity. Nor are separation of powers concerns less palpable because the subpoenas were issued to third parties. Pp. 865–868.

(e) Neither side identifies an approach that adequately accounts for these weighty separation of powers concerns. A balanced approach is

necessary, one that takes a "considerable impression" from "the practice of the government," *McCulloch* v. *Maryland*, 4 Wheat. 316, 401, and "resist[s]" the "pressure inherent within each of the separate Branches to exceed the outer limits of its power," *INS* v. *Chadha*, 462 U. S. 919, 951. In assessing whether a subpoena directed at the President's personal information is "related to, and in furtherance of, a legitimate task of the Congress," *Watkins*, 354 U. S., at 187, courts must take adequate account of the separation of powers principles at stake, including both the significant legislative interests of Congress and the unique position of the President.

Several special considerations inform this analysis. First, courts should carefully assess whether the asserted legislative purpose warrants the significant step of involving the President and his papers. "'[O]ccasion[s] for constitutional confrontation between the two branches' should be avoided whenever possible." *Cheney* v. *United States Dist. Court for D. C.*, 542 U. S. 367, 389–390 (quoting *Nixon*, 418 U. S., at 692). Congress may not rely on the President's information if other sources could reasonably provide Congress the information it needs in light of its particular legislative objective. Second, to narrow the scope of possible conflict between the branches, courts should insist on a subpoena no broader than reasonably necessary to support Congress's legislative objective. The specificity of the subpoena's request "serves as an important safeguard against unnecessary intrusion into the operation of the Office of the President." *Cheney*, 542 U. S., at 387. Third, courts should be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose. The more detailed and substantial, the better. That is particularly true when Congress contemplates legislation that raises sensitive constitutional issues, such as legislation concerning the Presidency. Fourth, courts should assess the burdens imposed on the President by a subpoena, particularly because they stem from a rival political branch that has an ongoing relationship with the President and incentives to use subpoenas for institutional advantage. Other considerations may be pertinent as well; one case every two centuries does not afford enough experience for an exhaustive list. Pp. 869–871.

No. 19–715, 940 F. 3d 710; No. 19–760, 943 F. 3d 627, vacated and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, KAGAN, GORSUCH, and KAVANAUGH, JJ., joined. THOMAS, J., *post*, p. 871, and ALITO, J., *post*, p. 891, filed dissenting opinions.

Counsel

Patrick Strawbridge argued the cause for petitioners. With him on the briefs were *William S. Consovoy*, *Thomas R. McCarthy*, *Jay Alan Sekulow*, *Stuart J. Roth*, *Jordan Sekulow*, and *Stefan C. Passantino*.

Deputy Solicitor General Wall argued the cause for the United States as *amicus curiae* urging reversal. With him on the briefs were *Solicitor General Francisco*, *Assistant Attorney General Hunt*, *Deputy Assistant Attorney General Mooppan*, *Sopan Joshi*, *Mark R. Freeman*, and *Gerard J. Sinzdak*.

Douglas N. Letter argued the cause for the Committees of the United States House of Representatives respondents. With him on the briefs were *Megan Barbero*, *Adam A. Grogg*, *Lawrence S. Robbins*, *Roy T. Englert, Jr.*, *Alan D. Strasser*, *Jennifer S. Windom*, and *Brandon L. Arnold*.†

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†Briefs of *amici curiae* urging reversal in both cases were filed for Christian Family Coalition Florida, Inc., by *Dennis Grossman*; for the Eagle Forum Education & Legal Defense Fund by *Lawrence J. Joseph*; for the Foundation for Moral Law by *Matthew J. Clark*; and for W. Burlette Carter, by *Ms. Carter*, *pro se*.

Briefs of *amici curiae* urging affirmance in both cases were filed for the American Civil Liberties Union et al. by *Donald B. Verrilli, Jr.*, *David D. Cole*, *Arthur B. Spitzer*, *Scott Michelman*, and *Jennesa Calvo-Friedman*; for Bipartisan Former Members of Congress by *Andre M. Mura*; for the Center for Media and Democracy et al. by *Andrew J. Goodman* and *Benjamin J. Hodges*; for Congressional Scholars by *Gregory M. Lipper* and *Susan M. Simpson*; for the Constitutional Accountability Center by *Elizabeth B. Wydra*, *Brianne J. Gorod*, *Brian R. Frazelle*, and *Ashwin P. Phatak*; for Former Federal Ethics Officials by *Dwayne D. Sam* and *Patricia E. Roberts*; for Former House General Counsels et al. by *John A. Freedman* and *Andrew T. Tutt*; for Former National Security Officials by *Harold Hongju Koh*; for Former Senior Department of Justice Officials by *Rakesh N. Kilaru* and *Chanakya A. Sethi*; for the Lugar Center et al. by *William Pittard*; for the Niskanen Center et al. by *Gregory Edwin Wolff* and *Ben Feuer*; for Public Citizen by *Allison M. Zieve*, *Adam R. Pulver*, *Scott L. Nelson*, and *Kaitlin E. Leary*; for Separation-of-Powers Law Professors by *Zachary D. Tripp*, *Martin S. Lederman*, *pro se*, and *Gregory Silbert*; and for Sean J. Kealy et al. by *Mr. Kealy* and *James J. Wheaton*, both *pro se*. *Steven E. Fineman*, *Daniel*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Over the course of five days in April 2019, three committees of the U. S. House of Representatives issued four subpoenas seeking information about the finances of President Donald J. Trump, his children, and affiliated businesses. We have held that the House has authority under the Constitution to issue subpoenas to assist it in carrying out its legislative responsibilities. The House asserts that the financial information sought here—encompassing a decade's worth of transactions by the President and his family—will help guide legislative reform in areas ranging from money laundering and terrorism to foreign involvement in U. S. elections. The President contends that the House lacked a valid legislative aim and instead sought these records to harass him, expose personal matters, and conduct law enforcement activities beyond its authority. The question presented is whether the subpoenas exceed the authority of the House under the Constitution.

We have never addressed a congressional subpoena for the President's information. Two hundred years ago, it was established that Presidents may be subpoenaed during a federal criminal proceeding, *United States* v. *Burr*, 25 F. Cas. 30 (No. 14,692d) (CC Va. 1807) (Marshall, Cir. J.), and earlier today we extended that ruling to state criminal proceedings, *Trump* v. *Vance*, 591 U. S. 786 (2020). Nearly fifty years ago, we held that a federal prosecutor could obtain information from a President despite assertions of executive privilege, *United States* v. *Nixon*, 418 U. S. 683 (1974), and more recently we ruled that a private litigant could subject a President to a damages suit and appropriate discovery obligations in federal court, *Clinton* v. *Jones*, 520 U. S. 681 (1997).

P. Chiplock, and *Jonathan J. Rusch*, *pro se*, filed a brief for Financial Investigation and Money Laundering Experts as *amici curiae* in No. 19–760 urging affirmance.

Victor Williams, *pro se*, filed a brief of *amicus curiae*.

This case is different. Here the President's information is sought not by prosecutors or private parties in connection with a particular judicial proceeding, but by committees of Congress that have set forth broad legislative objectives. Congress and the President—the two political branches established by the Constitution—have an ongoing relationship that the Framers intended to feature both rivalry and reciprocity. See The Federalist No. 51, p. 349 (J. Cooke ed. 1961) (J. Madison); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952) (Jackson, J., concurring). That distinctive aspect necessarily informs our analysis of the question before us.

I

A

Each of the three committees sought overlapping sets of financial documents, but each supplied different justifications for the requests.

The House Committee on Financial Services issued two subpoenas, both on April 11, 2019. App. 128, 154, 226. The first, issued to Deutsche Bank, seeks the financial information of the President, his children, their immediate family members, and several affiliated business entities. Specifically, the subpoena seeks any document related to account activity, due diligence, foreign transactions, business statements, debt schedules, statements of net worth, tax returns, and suspicious activity identified by Deutsche Bank. The second, issued to Capital One, demands similar financial information with respect to more than a dozen business entities associated with the President. The Deutsche Bank subpoena requests materials from "2010 through the present," and the Capital One subpoena covers "2016 through the present," but both subpoenas impose no time limitations for certain documents, such as those connected to account openings and due diligence. *Id.*, at 128, 155.

According to the House, the Financial Services Committee issued these subpoenas pursuant to House Resolution 206,

which called for "efforts to close loopholes that allow corruption, terrorism, and money laundering to infiltrate our country's financial system." H. Res. 206, 116th Cong., 1st Sess., 5 (Mar. 13, 2019). Such loopholes, the resolution explained, had allowed "illicit money, including from Russian oligarchs," to flow into the United States through "anonymous shell companies" using investments such as "luxury high-end real estate." *Id.*, at 3. The House also invokes the oversight plan of the Financial Services Committee, which stated that the Committee intends to review banking regulation and "examine the implementation, effectiveness, and enforcement" of laws designed to prevent money laundering and the financing of terrorism. H. R. Rep. No. 116–40, p. 84 (2019). The plan further provided that the Committee would "consider proposals to prevent the abuse of the financial system" and "address any vulnerabilities identified" in the real estate market. *Id.*, at 85.

On the same day as the Financial Services Committee, the Permanent Select Committee on Intelligence issued an identical subpoena to Deutsche Bank—albeit for different reasons. According to the House, the Intelligence Committee subpoenaed Deutsche Bank as part of an investigation into foreign efforts to undermine the U. S. political process. Committee Chairman Adam Schiff had described that investigation in a previous statement, explaining that the Committee was examining alleged attempts by Russia to influence the 2016 election; potential links between Russia and the President's campaign; and whether the President and his associates had been compromised by foreign actors or interests. Press Release, House Permanent Select Committee on Intelligence, Chairman Schiff Statement on House Intelligence Committee Investigation (Feb. 6, 2019). Chairman Schiff added that the Committee planned "to develop legislation and policy reforms to ensure the U. S. government is better positioned to counter future efforts to undermine our political process and national security." *Ibid.*

Four days after the Financial Services and Intelligence Committees, the House Committee on Oversight and Reform issued another subpoena, this time to the President's personal accounting firm, Mazars USA, LLP. The subpoena demanded information related to the President and several affiliated business entities from 2011 through 2018, including statements of financial condition, independent auditors' reports, financial reports, underlying source documents, and communications between Mazars and the President or his businesses. The subpoena also requested all engagement agreements and contracts "[w]ithout regard to time." App. to Pet. for Cert. in 19–715, p. 230.

Chairman Elijah Cummings explained the basis for the subpoena in a memorandum to the Oversight Committee. According to the chairman, recent testimony by the President's former personal attorney Michael Cohen, along with several documents prepared by Mazars and supplied by Cohen, raised questions about whether the President had accurately represented his financial affairs. Chairman Cummings asserted that the Committee had "full authority to investigate" whether the President: (1) "may have engaged in illegal conduct before and during his tenure in office," (2) "has undisclosed conflicts of interest that may impair his ability to make impartial policy decisions," (3) "is complying with the Emoluments Clauses of the Constitution," and (4) "has accurately reported his finances to the Office of Government Ethics and other federal entities." App. in No. 19–5142 (CADC), p. 107. "The Committee's interest in these matters," Chairman Cummings concluded, "informs its review of multiple laws and legislative proposals under our jurisdiction." *Ibid.*

B

Petitioners—the President in his personal capacity, along with his children and affiliated businesses—filed two suits challenging the subpoenas. They contested the subpoena issued by the Oversight Committee in the District Court for

the District of Columbia (*Mazars*, No. 19–715), and the subpoenas issued by the Financial Services and Intelligence Committees in the Southern District of New York (*Deutsche Bank*, No. 19–760). In both cases, petitioners contended that the subpoenas lacked a legitimate legislative purpose and violated the separation of powers. The President did not, however, resist the subpoenas by arguing that any of the requested records were protected by executive privilege. For relief, petitioners asked for declaratory judgments and injunctions preventing Mazars and the banks from complying with the subpoenas. Although named as defendants, Mazars and the banks took no positions on the legal issues in these cases, and the House committees intervened to defend the subpoenas.

Petitioners' challenges failed. In *Mazars*, the District Court granted judgment for the House, 380 F. Supp. 3d 76 (DC 2019), and the D. C. Circuit affirmed, 940 F. 3d 710 (2019). In upholding the subpoena issued by the Oversight Committee to Mazars, the Court of Appeals found that the subpoena served a "valid legislative purpose" because the requested information was relevant to reforming financial disclosure requirements for Presidents and presidential candidates. *Id.*, at 726–742 (internal quotation marks omitted). Judge Rao dissented. As she saw it, the "gravamen" of the subpoena was investigating alleged illegal conduct by the President, and the House must pursue such wrongdoing through its impeachment powers, not its legislative powers. *Id.*, at 773–774. Otherwise, the House could become a "roving inquisition over a co-equal branch of government." *Id.*, at 748. The D. C. Circuit denied rehearing en banc over several more dissents. 941 F. 3d 1180, 1180–1182 (2019).

In *Deutsche Bank*, the District Court denied a preliminary injunction, 2019 WL 2204898 (SDNY, May 22, 2019), and the Second Circuit affirmed "in substantial part," 943 F. 3d 627, 676 (2019). While acknowledging that the subpoenas are "surely broad in scope," the Court of Appeals held that the

Intelligence Committee properly issued its subpoena to Deutsche Bank as part of an investigation into alleged foreign influence over petitioners and Russian interference with the U. S. political process. *Id.*, at 650, 658–659. That investigation, the court concluded, could inform legislation to combat foreign meddling and strengthen national security. *Id.*, at 658–659, and n. 59.

As to the subpoenas issued by the Financial Services Committee to Deutsche Bank and Capital One, the Court of Appeals concluded that they were adequately related to potential legislation on money laundering, terrorist financing, and the global movement of illicit funds through the real estate market. *Id.*, at 656–659. Rejecting the contention that the subpoenas improperly targeted the President, the court explained in part that the President's financial dealings with Deutsche Bank made it "appropriate" for the House to use him as a "case study" to determine "whether new legislation is needed." *Id.*, at 662–663, n. 67.[1]

Judge Livingston dissented, seeing no "clear reason why a congressional investigation aimed generally at closing regulatory loopholes in the banking system need focus on over a decade of financial information regarding this President, his family, and his business affairs." *Id.*, at 687.

We granted certiorari in both cases and stayed the judgments below pending our decision. 589 U. S. 1120 (2019).

II

A

The question presented is whether the subpoenas exceed the authority of the House under the Constitution. Histori-

[1] The Court of Appeals directed a "limited" remand for the District Court to consider whether it was necessary to disclose certain "sensitive personal details" (such as documents reflecting medical services received by employees of the Trump business entities) and a "few" documents that might not relate to the committees' legislative purposes. 943 F. 3d 627, 667–668, 675 (2019). The Court of Appeals ordered that all other documents be "promptly transmitted" to the committees. *Id.*, at 669.

cally, disputes over congressional demands for presidential documents have not ended up in court. Instead, they have been hashed out in the "hurly-burly, the give-and-take of the political process between the legislative and the executive." Hearings on S. 2170 et al. before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 94th Cong., 1st Sess., 87 (1975) (A. Scalia, Assistant Attorney General, Office of Legal Counsel).

That practice began with George Washington and the early Congress. In 1792, a House committee requested Executive Branch documents pertaining to General St. Clair's campaign against the Indians in the Northwest Territory, which had concluded in an utter rout of federal forces when they were caught by surprise near the present-day border between Ohio and Indiana. See T. Taylor, Grand Inquest: The Story of Congressional Investigations 19–23 (1955). Since this was the first such request from Congress, President Washington called a Cabinet meeting, wishing to take care that his response "be rightly conducted" because it could "become a precedent." 1 Writings of Thomas Jefferson 189 (P. Ford ed. 1892).

The meeting, attended by the likes of Alexander Hamilton, Thomas Jefferson, Edmund Randolph, and Henry Knox, ended with the Cabinet of "one mind": The House had authority to "institute inquiries" and "call for papers" but the President could "exercise a discretion" over disclosures, "communicat[ing] such papers as the public good would permit" and "refus[ing]" the rest. *Id.*, at 189–190. President Washington then dispatched Jefferson to speak to individual congressmen and "bring them by persuasion into the right channel." *Id.*, at 190. The discussions were apparently fruitful, as the House later narrowed its request and the documents were supplied without recourse to the courts. See 3 Annals of Cong. 536 (1792); Taylor, *supra*, at 24.

Jefferson, once he became President, followed Washington's precedent. In early 1807, after Jefferson had disclosed

that "sundry persons" were conspiring to invade Spanish territory in North America with a private army, 16 Annals of Cong. 686–687, the House requested that the President produce any information in his possession touching on the conspiracy (except for information that would harm the public interest), *id.*, at 336, 345, 359. Jefferson chose not to divulge the entire "voluminous" correspondence on the subject, explaining that much of it was "private" or mere "rumors" and "neither safety nor justice" permitted him to "expos[e] names" apart from identifying the conspiracy's "principal actor": Aaron Burr. *Id.*, at 39–40. Instead of the entire correspondence, Jefferson sent Congress particular documents and a special message summarizing the conspiracy. *Id.*, at 39–43; see generally *Vance*, 591 U. S., at 793–794. Neither Congress nor the President asked the Judiciary to intervene.[2]

Ever since, congressional demands for the President's information have been resolved by the political branches without involving this Court. The Reagan and Clinton presidencies provide two modern examples:

During the Reagan administration, a House subcommittee subpoenaed all documents related to the Department of the Interior's decision whether to designate Canada a reciprocal country for purposes of the Mineral Lands Leasing Act. President Reagan directed that certain documents be withheld because they implicated his confidential relationship with subordinates. While withholding those documents, the administration made "repeated efforts" at accommodation through limited disclosures and testimony over a period of several months. 6 Op. of Office of Legal Counsel 751, 780 (1982). Unsatisfied, the subcommittee and its parent committee eventually voted to hold the Secretary of the Interior

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[2] By contrast, later that summer, the Judiciary *was* called on to resolve whether President Jefferson could be issued a subpoena *duces tecum* arising from Burr's criminal trial. See *United States* v. *Burr*, 25 F. Cas. 30 (No. 14,692d) (CC Va. 1807); see also *Trump* v. *Vance*, 591 U. S. 786, 795–797 (2020).

in contempt, and an innovative compromise soon followed: All documents were made available, but only for one day with no photocopying, minimal notetaking, and no participation by non-Members of Congress. *Id.*, at 780–781; see H. R. Rep. No. 97–898, pp. 3–8 (1982).

In 1995, a Senate committee subpoenaed notes taken by a White House attorney at a meeting with President Clinton's personal lawyers concerning the Whitewater controversy. The President resisted the subpoena on the ground that the notes were protected by attorney-client privilege, leading to "long and protracted" negotiations and a Senate threat to seek judicial enforcement of the subpoena. S. Rep. No. 104–204, pp. 16–17 (1996). Eventually the parties reached an agreement, whereby President Clinton avoided the threatened suit, agreed to turn over the notes, and obtained the Senate's concession that he had not waived any privileges. *Ibid.*; see L. Fisher, Congressional Research Service, Congressional Investigations: Subpoenas and Contempt Power 16–18 (2003).

Congress and the President maintained this tradition of negotiation and compromise—without the involvement of this Court—until the present dispute. Indeed, from President Washington until now, we have never considered a dispute over a congressional subpoena for the President's records. And, according to the parties, the appellate courts have addressed such a subpoena only once, when a Senate committee subpoenaed President Nixon during the Watergate scandal. See *infra*, at 864 (discussing *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 498 F. 2d 725 (CADC 1974) (en banc)). In that case, the court refused to enforce the subpoena, and the Senate did not seek review by this Court.

This dispute therefore represents a significant departure from historical practice. Although the parties agree that this particular controversy is justiciable, we recognize that it is the first of its kind to reach this Court; that disputes

of this sort can raise important issues concerning relations between the branches; that related disputes involving congressional efforts to seek official Executive Branch information recur on a regular basis, including in the context of deeply partisan controversy; and that Congress and the Executive have nonetheless managed for over two centuries to resolve such disputes among themselves without the benefit of guidance from us. Such longstanding practice "'is a consideration of great weight'" in cases concerning "the allocation of power between [the] two elected branches of Government," and it imposes on us a duty of care to ensure that we not needlessly disturb "the compromises and working arrangements that [those] branches . . . themselves have reached." *NLRB* v. *Noel Canning*, 573 U. S. 513, 524–526 (2014) (quoting *The Pocket Veto Case*, 279 U. S. 655, 689 (1929)). With that in mind, we turn to the question presented.

B

Congress has no enumerated constitutional power to conduct investigations or issue subpoenas, but we have held that each House has power "to secure needed information" in order to legislate. *McGrain* v. *Daugherty*, 273 U. S. 135, 161 (1927). This "power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." *Id.*, at 174. Without information, Congress would be shooting in the dark, unable to legislate "wisely or effectively." *Id.*, at 175. The congressional power to obtain information is "broad" and "indispensable." *Watkins* v. *United States*, 354 U. S. 178, 187, 215 (1957). It encompasses inquiries into the administration of existing laws, studies of proposed laws, and "surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them." *Id.*, at 187.

Because this power is "justified solely as an adjunct to the legislative process," it is subject to several limitations. *Id.*, at 197. Most importantly, a congressional subpoena is valid

only if it is "related to, and in furtherance of, a legitimate task of the Congress." *Id.*, at 187. The subpoena must serve a "valid legislative purpose," *Quinn* v. *United States*, 349 U. S. 155, 161 (1955); it must "concern[ ] a subject on which legislation 'could be had,' " *Eastland* v. *United States Servicemen's Fund*, 421 U. S. 491, 506 (1975) (quoting *McGrain*, 273 U. S., at 177).

Furthermore, Congress may not issue a subpoena for the purpose of "law enforcement," because "those powers are assigned under our Constitution to the Executive and the Judiciary." *Quinn*, 349 U. S., at 161. Thus Congress may not use subpoenas to "try" someone "before [a] committee for any crime or wrongdoing." *McGrain*, 273 U. S., at 179. Congress has no "'general' power to inquire into private affairs and compel disclosures," *id.*, at 173–174, and "there is no congressional power to expose for the sake of exposure," *Watkins*, 354 U. S., at 200. "Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible." *Id.*, at 187.

Finally, recipients of legislative subpoenas retain their constitutional rights throughout the course of an investigation. See *id.*, at 188, 198. And recipients have long been understood to retain common law and constitutional privileges with respect to certain materials, such as attorney-client communications and governmental communications protected by executive privilege. See, *e. g.*, Congressional Research Service, *supra*, at 16–18 (attorney-client privilege); *Senate Select Committee*, 498 F. 2d, at 727, 730–731 (executive privilege).

C

The President contends, as does the Solicitor General appearing on behalf of the United States, that the usual rules for congressional subpoenas do not govern here because the President's papers are at issue. They argue for a more demanding standard based in large part on cases involving the Nixon tapes—recordings of conversations between President

Nixon and close advisers discussing the break-in at the Democratic National Committee's headquarters at the Watergate complex. The tapes were subpoenaed by a Senate committee and the Special Prosecutor investigating the break-in, prompting President Nixon to invoke executive privilege and leading to two cases addressing the showing necessary to require the President to comply with the subpoenas. See *Nixon*, 418 U. S. 683; *Senate Select Committee*, 498 F. 2d 725.

Those cases, the President and the Solicitor General now contend, establish the standard that should govern the House subpoenas here. Quoting *Nixon*, the President asserts that the House must establish a "demonstrated, specific need" for the financial information, just as the Watergate Special Prosecutor was required to do in order to obtain the tapes. 418 U. S., at 713. And drawing on *Senate Select Committee*—the D. C. Circuit case refusing to enforce the Senate subpoena for the tapes—the President and the Solicitor General argue that the House must show that the financial information is "demonstrably critical" to its legislative purpose. 498 F. 2d, at 731.

We disagree that these demanding standards apply here. Unlike the cases before us, *Nixon* and *Senate Select Committee* involved Oval Office communications over which the President asserted executive privilege. That privilege safeguards the public interest in candid, confidential deliberations within the Executive Branch; it is "fundamental to the operation of Government." *Nixon*, 418 U. S., at 708. As a result, information subject to executive privilege deserves "the greatest protection consistent with the fair administration of justice." *Id.*, at 715. We decline to transplant that protection root and branch to cases involving nonprivileged, private information, which by definition does not implicate sensitive Executive Branch deliberations.

The standards proposed by the President and the Solicitor General—if applied outside the context of privileged information—would risk seriously impeding Congress in carrying

out its responsibilities. The President and the Solicitor General would apply the same exacting standards to *all* subpoenas for the President's information, without recognizing distinctions between privileged and nonprivileged information, between official and personal information, or between various legislative objectives. Such a categorical approach would represent a significant departure from the longstanding way of doing business between the branches, giving short shrift to Congress's important interests in conducting inquiries to obtain the information it needs to legislate effectively. Confounding the legislature in that effort would be contrary to the principle that:

> "It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served." *United States* v. *Rumely*, 345 U. S. 41, 43 (1953) (internal quotation marks omitted).

Legislative inquiries might involve the President in appropriate cases; as noted, Congress's responsibilities extend to "every affair of government." *Ibid.* (internal quotation marks omitted). Because the President's approach does not take adequate account of these significant congressional interests, we do not adopt it.

D

The House meanwhile would have us ignore that these suits involve the President. Invoking our precedents concerning investigations that did not target the President's papers, the House urges us to uphold its subpoenas because they "relate[ ] to a valid legislative purpose" or "concern[ ] a subject on which legislation could be had." Brief for Re-

spondent 46 (quoting *Barenblatt* v. *United States*, 360 U. S. 109, 127 (1959), and *Eastland*, 421 U. S., at 506). That approach is appropriate, the House argues, because the cases before us are not "momentous separation-of-powers disputes." Brief for Respondent 1.

Largely following the House's lead, the courts below treated these cases much like any other, applying precedents that do not involve the President's papers. See 943 F. 3d, at 656–670; 940 F. 3d, at 724–742. The Second Circuit concluded that "this case does not concern separation of powers" because the House seeks personal documents and the President sued in his personal capacity. 943 F. 3d, at 669. The D. C. Circuit, for its part, recognized that "separation-of-powers concerns still linger in the air," and therefore it did not afford deference to the House. 940 F. 3d, at 725–726. But, because the House sought only personal documents, the court concluded that the case "present[ed] no direct inter-branch dispute." *Ibid.*

The House's approach fails to take adequate account of the significant separation of powers issues raised by congressional subpoenas for the President's information. Congress and the President have an ongoing institutional relationship as the "opposite and rival" political branches established by the Constitution. The Federalist No. 51, at 349. As a result, congressional subpoenas directed at the President differ markedly from congressional subpoenas we have previously reviewed, *e. g.*, *Barenblatt*, 360 U. S., at 127; *Eastland*, 421 U. S., at 506, and they bear little resemblance to criminal subpoenas issued to the President in the course of a specific investigation, see *Vance*, 591 U. S. 786; *Nixon*, 418 U. S. 683. Unlike those subpoenas, congressional subpoenas for the President's information unavoidably pit the political branches against one another. Cf. *In re Sealed Case*, 121 F. 3d 729, 753 (CADC 1997) ("The President's ability to withhold information from Congress implicates different constitu-

tional considerations than the President's ability to withhold evidence in judicial proceedings.").

Far from accounting for separation of powers concerns, the House's approach aggravates them by leaving essentially no limits on the congressional power to subpoena the President's personal records. Any personal paper possessed by a President could potentially "relate to" a conceivable subject of legislation, for Congress has broad legislative powers that touch a vast number of subjects. Brief for Respondent 46. The President's financial records could relate to economic reform, medical records to health reform, school transcripts to education reform, and so on. Indeed, at argument, the House was unable to identify *any* type of information that lacks some relation to potential legislation. See Tr. of Oral Arg. 52–53, 62–65.

Without limits on its subpoena powers, Congress could "exert an imperious controul" over the Executive Branch and aggrandize itself at the President's expense, just as the Framers feared. The Federalist No. 71, at 484 (A. Hamilton); see *id.*, No. 48, at 332–333 (J. Madison); *Bowsher* v. *Synar*, 478 U. S. 714, 721–722, 727 (1986). And a limitless subpoena power would transform the "established practice" of the political branches. *Noel Canning*, 573 U. S., at 524 (internal quotation marks omitted). Instead of negotiating over information requests, Congress could simply walk away from the bargaining table and compel compliance in court.

The House and the courts below suggest that these separation of powers concerns are not fully implicated by the particular subpoenas here, but we disagree. We would have to be "blind" not to see what "[a]ll others can see and understand": that the subpoenas do not represent a run-of-the-mill legislative effort but rather a clash between rival branches of government over records of intense political interest for all involved. *Rumely*, 345 U. S., at 44 (quoting *Child Labor Tax Case*, 259 U. S. 20, 37 (1922) (Taft, C. J.)).

The interbranch conflict here does not vanish simply because the subpoenas seek personal papers or because the President sued in his personal capacity. The President is the only person who alone composes a branch of government. As a result, there is not always a clear line between his personal and official affairs. "The interest of the man" is often "connected with the constitutional rights of the place." The Federalist No. 51, at 349. Given the close connection between the Office of the President and its occupant, congressional demands for the President's papers can implicate the relationship between the branches regardless whether those papers are personal or official. Either way, a demand may aim to harass the President or render him "complaisan[t] to the humors of the Legislature." *Id.*, No. 71, at 483. In fact, a subpoena for personal papers may pose a heightened risk of such impermissible purposes, precisely because of the documents' personal nature and their less evident connection to a legislative task. No one can say that the controversy here is less significant to the relationship between the branches simply because it involves personal papers. Quite the opposite. That appears to be what makes the matter of such great consequence to the President and Congress.

In addition, separation of powers concerns are no less palpable here simply because the subpoenas were issued to third parties. Congressional demands for the President's information present an interbranch conflict no matter where the information is held—it is, after all, the President's information. Were it otherwise, Congress could sidestep constitutional requirements any time a President's information is entrusted to a third party—as occurs with rapidly increasing frequency. Cf. *Carpenter* v. *United States*, 585 U. S. 296, 313–314, 315 (2018). Indeed, Congress could declare open season on the President's information held by schools, archives, internet service providers, e-mail clients, and financial institutions. The Constitution does not tolerate such ready evasion; it "deals with substance, not shadows." *Cummings* v. *Missouri*, 4 Wall. 277, 325 (1867).

E

Congressional subpoenas for the President's personal information implicate weighty concerns regarding the separation of powers. Neither side, however, identifies an approach that accounts for these concerns. For more than two centuries, the political branches have resolved information disputes using the wide variety of means that the Constitution puts at their disposal. The nature of such interactions would be transformed by judicial enforcement of either of the approaches suggested by the parties, eroding a "[d]eeply embedded traditional way[] of conducting government." *Youngstown Sheet & Tube Co.*, 343 U. S., at 610 (Frankfurter, J., concurring).

A balanced approach is necessary, one that takes a "considerable impression" from "the practice of the government," *McCulloch* v. *Maryland*, 4 Wheat. 316, 401 (1819); see *Noel Canning*, 573 U. S., at 524–526, and "resist[s]" the "pressure inherent within each of the separate Branches to exceed the outer limits of its power," *INS* v. *Chadha*, 462 U. S. 919, 951 (1983). We therefore conclude that, in assessing whether a subpoena directed at the President's personal information is "related to, and in furtherance of, a legitimate task of the Congress," *Watkins*, 354 U. S., at 187, courts must perform a careful analysis that takes adequate account of the separation of powers principles at stake, including both the significant legislative interests of Congress and the "unique position" of the President, *Clinton*, 520 U. S., at 698 (internal quotation marks omitted). Several special considerations inform this analysis.

First, courts should carefully assess whether the asserted legislative purpose warrants the significant step of involving the President and his papers. "'[O]ccasion[s] for constitutional confrontation between the two branches' should be avoided whenever possible." *Cheney* v. *United States Dist. Court for D. C.*, 542 U. S. 367, 389–390 (2004) (quoting *Nixon*, 418 U. S., at 692). Congress may not rely on the President's information if other sources could reasonably provide Con-

gress the information it needs in light of its particular legislative objective. The President's unique constitutional position means that Congress may not look to him as a "case study" for general legislation. Cf. 943 F. 3d, at 662–663, n. 67.

Unlike in criminal proceedings, where "[t]he very integrity of the judicial system" would be undermined without "full disclosure of all the facts," *Nixon*, 418 U. S., at 709, efforts to craft legislation involve predictive policy judgments that are "not hamper[ed] . . . in quite the same way" when every scrap of potentially relevant evidence is not available, *Cheney*, 542 U. S., at 384; see *Senate Select Committee*, 498 F. 2d, at 732. While we certainly recognize Congress's important interests in obtaining information through appropriate inquiries, those interests are not sufficiently powerful to justify access to the President's personal papers when other sources could provide Congress the information it needs.

Second, to narrow the scope of possible conflict between the branches, courts should insist on a subpoena no broader than reasonably necessary to support Congress's legislative objective. The specificity of the subpoena's request "serves as an important safeguard against unnecessary intrusion into the operation of the Office of the President." *Cheney*, 542 U. S., at 387.

Third, courts should be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose. The more detailed and substantial the evidence of Congress's legislative purpose, the better. See *Watkins*, 354 U. S., at 201, 205 (preferring such evidence over "vague" and "loosely worded" evidence of Congress's purpose). That is particularly true when Congress contemplates legislation that raises sensitive constitutional issues, such as legislation concerning the Presidency. In such cases, it is "impossible" to conclude that a subpoena is designed to advance a valid legislative purpose unless Con-

gress adequately identifies its aims and explains why the President's information will advance its consideration of the possible legislation. *Id.*, at 205–206, 214–215.

Fourth, courts should be careful to assess the burdens imposed on the President by a subpoena. We have held that burdens on the President's time and attention stemming from judicial process and litigation, without more, generally do not cross constitutional lines. See *Vance*, 591 U. S., at 801–803. *Clinton*, 520 U. S., at 704–705. But burdens imposed by a congressional subpoena should be carefully scrutinized, for they stem from a rival political branch that has an ongoing relationship with the President and incentives to use subpoenas for institutional advantage.

Other considerations may be pertinent as well; one case every two centuries does not afford enough experience for an exhaustive list.

When Congress seeks information "needed for intelligent legislative action," it "unquestionably" remains "the duty of *all* citizens to cooperate." *Watkins*, 354 U. S., at 187 (emphasis added). Congressional subpoenas for information from the President, however, implicate special concerns regarding the separation of powers. The courts below did not take adequate account of those concerns. The judgments of the Courts of Appeals for the D. C. Circuit and the Second Circuit are vacated, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, dissenting.

Three Committees of the U. S. House of Representatives issued subpoenas to several accounting and financial firms to obtain the personal financial records of the President, his family, and several of his business entities. The Committees do not argue that these subpoenas were issued pursuant to the House's impeachment power. Instead, they argue that the subpoenas are a valid exercise of their legislative powers.

Petitioners challenge the validity of these subpoenas. In doing so, they call into question our precedents to the extent that they allow Congress to issue legislative subpoenas for the President's private, nonofficial documents. I would hold that Congress has no power to issue a legislative subpoena for private, nonofficial documents—whether they belong to the President or not. Congress may be able to obtain these documents as part of an investigation of the President, but to do so, it must proceed under the impeachment power. Accordingly, I would reverse the judgments of the Courts of Appeals.

I

I begin with the Committees' claim that the House's legislative powers include the implied power to issue legislative subpoenas. Although the Founders understood that the enumerated powers in the Constitution included implied powers, the Committees' test for the scope of those powers is too broad.

"The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury* v. *Madison*, 1 Cranch 137, 176 (1803). The structure of limited and enumerated powers in our Constitution denotes that "[o]ur system of government rests on one overriding principle: All power stems from the consent of the people." *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, 846 (1995) (THOMAS, J., dissenting). As a result, Congress may exercise only those powers given by the people of the States through the Constitution.

The Founders nevertheless understood that an enumerated power could necessarily bring with it implied powers. The idea of implied powers usually arises in the context of the Necessary and Proper Clause, which gives Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Offi-

cer thereof." Art. I, §8, cl. 18. As I have previously explained, the Necessary and Proper Clause simply "made explicit what was already implicit in the grant of each enumerated power." *United States* v. *Comstock*, 560 U. S. 126, 161 (2010) (dissenting opinion). That is, "the grant of a general power includes the grant of incidental powers for carrying it out." Bray, "Necessary and Proper" and "Cruel and Unusual": Hendiadys in the Constitution, 102 Va. L. Rev. 687, 741 (2016).

The scope of these implied powers is very limited. The Constitution does not sweep in powers "of inferior importance, merely because they are inferior." *McCulloch* v. *Maryland*, 4 Wheat. 316, 408 (1819). Instead, Congress "can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication." *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 326 (1816). In sum, while the Committees' theory of an implied power is not categorically wrong, that power must be necessarily implied from an enumerated power.

II

At the time of the founding, the power to subpoena private, nonofficial documents was not included by necessary implication in any of Congress' legislative powers. This understanding persisted for decades and is consistent with the Court's first decision addressing legislative subpoenas, *Kilbourn* v. *Thompson*, 103 U. S. 168 (1881). The test that this Court created in *McGrain* v. *Daugherty*, 273 U. S. 135 (1927), and the majority's variation on that standard today, are without support as applied to private, nonofficial documents.[1]

A

The Committees argue that Congress wields the same investigatory powers that the British Parliament did at the

[1] I express no opinion about the constitutionality of legislative subpoenas for other kinds of evidence.

time of the founding. But this claim overlooks one of the fundamental differences between our Government and the British Government: Parliament was supreme. Congress is not.

I have previously explained that "the founding generation did not subscribe to Blackstone's view of parliamentary supremacy." *Department of Transportation* v. *Association of American Railroads*, 575 U. S. 43, 74 (2015) (opinion concurring in judgment). "Parliament's violations of the law of the land had been a significant complaint of the American Revolution." *Id.*, at 74–75. "And experiments in legislative supremacy in the States had confirmed the idea that even the legislature must be made subject to the law." *Id.*, at 75.

James Wilson, signer of the Constitution and future Justice, explained this difference to the Pennsylvania ratifying convention: "Blackstone will tell you, that in Britain [the supreme power] is lodged in the British Parliament; and I believe there is no writer . . . on the other side of the Atlantic" who thought otherwise. 2 Documentary History of the Ratification of the Constitution 471 (M. Jensen ed. 1976) (Documentary History). In the United States, however, "the supreme, absolute, and uncontrollable authority, *remains* with the people." *Id.*, at 472. And "[t]he Constitution plainly sets forth the 'few and defined' powers that Congress may exercise." *Comstock*, 560 U. S., at 159 (THOMAS, J., dissenting); see also *McCulloch*, 4 Wheat., at 405; *Marbury*, 1 Cranch, at 176. This significant difference means that Parliament's powers and Congress' powers are not necessarily the same.

In fact, the plain text of the Constitution makes clear that they are not. The Constitution expressly denies to Congress some of the powers that Parliament exercised. Article I, for example, prohibits bills of attainder, § 9, cl. 3, which Parliament used to "sentenc[e] to death one or more specific persons." *United States* v. *Brown*, 381 U. S. 437, 441 (1965). A legislature can hardly be considered supreme if it lacks

the power to pass bills of attainder, which Justice Story called the "highest power of sovereignty." 3 Commentaries on the Constitution of the United States § 1338, p. 210 (1833). Relatedly, the Constitution prohibits *ex post facto* laws, § 9, cl. 3, reinforcing the fact that Congress' power to punish is limited.[2] And in a system in which Congress is not supreme, the individual protections in the Bill of Rights, such as the prohibition on unreasonable searches and seizures, meaningfully constrain Congress' power to compel documents from private citizens. Cf. 1 St. George Tucker, Blackstone's Commentaries 203–205, n. § (1803); see also D. Currie, The Constitution in Congress: The Federalist Period, 1789–1801, p. 268 (1997).

Furthermore, *Kilbourn*—this Court's first decision on the constitutionality of legislative subpoenas—emphasized that Parliament had more powers than Congress. There, the congressional respondents relied on Parliament's investigatory power to support a legislative subpoena for testimony and documents. The Court rejected the analogy because the judicial powers of the House of Commons—the lower house of Parliament—exceeded the judicial functions of the House of Representatives. *Kilbourn*, *supra*, at 189. At bottom, *Kilbourn* recognized that legislative supremacy was decisively rejected in the framing and ratification of our Constitution, which casts doubt on the Committees' claim that they have power to issue legislative subpoenas to private parties.

B

The subpoenas in these cases also cannot be justified based on the practices of 18th-century American legislatures.

[2] The Constitution also enumerates a limited set of congressional privileges. Although I express no opinion on the question, at least one early commentator thought the canon of *expressio unius* meant that Congress had no unenumerated privileges, such as the power to hold nonmembers in contempt. 1 St. George Tucker, Blackstone's Commentaries 200, n. § (1803).

Amici supporting the Committees resist this conclusion, but the examples they cite materially differ from the legislative subpoenas at issue here.

First, *amici* cite investigations in which legislatures sought to compel testimony from government officials on government matters. The subjects included military affairs, taxes, government finances, and the judiciary. Potts, Power of Legislative Bodies To Punish for Contempt, 74 U. Pa. L. Rev. 691, 708, 709, 710, 716–717 (1926) (Potts); see also E. Eberling, Congressional Investigations: A Study of the Origin and Development of the Power of Congress To Investigate and Punish for Contempt 18 (1928) (Eberling). But the information sought in these examples was official, not private. Underscoring this distinction, at least one revolutionary-era State Constitution permitted the legislature to "call for all *public or official* papers and records, and send for persons, whom they may judge necessary in the course of their inquiries, concerning affairs relating to the public interest." Md. Const., Art. X (1776) (emphasis added).

Second, 18th-century legislatures conducted nonlegislative investigations. For example, the New York colonial legislature tasked one committee with investigating a nuisance complaint and gave it the "power to send for persons, papers and records." Eberling 18; see also *id.*, at 19 (investigation of a government contract obtained by alleged wrongdoing); Potts 716 (investigation of armed resistance). But to describe this category is to distinguish it. Here, the Committees assert only a legislative purpose.

Third, colonial and state legislatures investigated and punished insults, libels, and bribery of members. For example, the Pennsylvania colonial assembly investigated "injurious charges, and slanderous Aspersions against the Conduct of the late Assembly" made by two individuals. *Id.*, at 710 (internal quotation marks omitted); see also *id.*, at 717; Eberling 20–21. But once again, to describe this category is to

distinguish it because the subpoenas here are justified only as incidental to the power to legislate, not the power to punish libels or bribery. In short, none of the examples from 18th-century colonial and state history support a power to issue a legislative subpoena for private, nonofficial documents.

C

Given that Congress has no exact precursor in England or colonial America, founding-era congressional practice is especially informative about the scope of implied legislative powers. Thus, it is highly probative that no founding-era Congress issued a subpoena for private, nonofficial documents. Although respondents could not identify the first such legislative subpoena at oral argument, Tr. of Oral Arg. 56, Congress began issuing them by the end of the 1830s. However, the practice remained controversial in Congress and this Court throughout the first century of the Republic.

1

In an attempt to establish the power of Congress to issue legislative subpoenas, the Committees point to an investigation of Government affairs and an investigation under one of Congress' enumerated privileges. Both precedents are materially different from the subpoenas here.

In 1792, the House authorized a Committee to investigate a failed military expedition led by General Arthur St. Clair. 3 Hinds' Precedents of the House of Representatives of the United States § 1725, pp. 79–80 (1907) (Hinds). The Committee was "empowered to call for such persons, papers and records as may be necessary to assist their inquiries." *Ibid.* But the Committee never subpoenaed private, nonofficial documents, which is telling. Whereas a subpoena for Government documents does not implicate concerns about property rights or the Fourth Amendment "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," a subpoena for

private, nonofficial documents raises those questions. Thus, the power to subpoena private documents, which the Committee did not exercise, is a far greater power and much less likely to be implied in Congress' legislative powers.

In 1832, the House investigated Representative Samuel Houston for assaulting Representative William Stanberry. Stanberry had accused Houston of collusion with Secretary of War John Eaton in connection with a bid for a Government contract, and the House initiated an investigation into the truthfulness of Stanberry's accusation. 8 Cong. Deb. 2550, 3022–3023 (1832). The House subpoenaed witnesses to testify, and one of them brought official correspondence between the Secretary of War and the President. H. R. Rep. No. 502, 22d Cong., 1st Sess. 64, 66–67 (1832). But official documents are obviously different from nonofficial documents. Moreover, the subpoenas were issued pursuant to the House's enumerated privilege of punishing its own Members, Art. I, § 5, not as part of its legislative powers. Because these subpoenas were not issued pursuant to a legislative power, they do not aid the Committees' case.

2

As late as 1827, a majority of the House declined to authorize the Committee on Manufactures to subpoena documents, amid concerns that it was unprecedented. During the debate over the resolution, one opponent remarked that "[t]here is no instance under this Government, within my recollection, where this power has been given for the mere purpose of enabling a committee of this House to adjust the details of an ordinary bill." 4 Cong. Deb. 865–866 (Rep. Strong); see also *id.*, at 862 (referring to "authority to bring any citizens of the United States . . . whom they might choose to send for, and compel them to give answers to every inquiry which should be addressed to them" as "very extraordinary"). Another opponent stated that the Committee had requested a power that had "not heretofore been thought

necessary to enable that Committee to acquire correct information." *Id.*, at 866 (Rep. Storrs). A third called it "not only novel and extraordinary, but wholly unnecessary." *Id.*, at 874 (Rep. Stewart); see also *id.*, at 884–885 (Rep. Wright). No supporter of the resolution offered a specific precedent for doing so, and the House ultimately authorized the Committee to send for persons only. *Id.*, at 889–890.

This debate is particularly significant because of the arguments made by both sides. Proponents made essentially the same arguments the Committees raise here—that the power to send for persons and papers was necessary to inform Congress as it legislated. *Id.*, at 871 (Rep. Livingston). Opponents argued that this power was not part of any legislative function. *Id.*, at 865–866 (Rep. Strong). They also argued that the House of Commons provided no precedent because Congress was a body of limited and enumerated powers. *Id.*, at 882 (Rep. Wood). And in the end, the opponents prevailed. Thus, through 1827, the idea that Congress had the implied power to issue subpoenas for private documents was considered "novel," "extraordinary," and "unnecessary." *Id.*, at 874.

3

By the end of the 1830s, Congress began issuing legislative subpoenas for private, nonofficial documents. See Eberling 123–126. Still, the power to demand information from private parties during legislative investigations remained controversial.

In 1832, the House authorized a Committee to "inspect the books, and to examine into the proceedings of the Bank of the United States, to report thereon, and to report whether the provisions of its charter have been violated or not." 8 Cong. Deb. 2160, 2164. The House gave the Committee "power to send for persons and papers." *Id.*, at 2160. The power to inspect the books of the Bank of the United States is not itself a clear example of a legislative subpoena for private, nonofficial documents, because the Bank was a federally

chartered corporation and was required to allow Congress to inspect its books. App. to 8 Cong. Deb. 54 (1833). The investigation itself appears to have ranged more widely, however, leading Congressman John Quincy Adams to criticize

> "investigations which must necessarily implicate not only the president and directors of the bank, and their proceedings, but the rights, the interests, the fortunes, and the reputation of individuals not responsible for those proceedings, and whom neither the committee nor the House had the power to try, or even accuse before any other tribunal." *Ibid.*

Adams continued that such an investigation "bears all the exceptionable and odious properties of general warrants and domiciliary visits." *Ibid.* He also objected that the Committee's investigation of the Bank was tantamount to punishment and thus was in tension with the constitutional prohibitions on "passing any bill of attainder [or] *ex post facto* law." *Id.*, at 60. Thus, even when Congress authorized a Committee to send for private papers, the constitutionality of doing so was questioned.

An 1859 Senate investigation, which the Court of Appeals cited as precedent, underscores that legislative subpoenas to private parties were a 19th-century innovation. Following abolitionist John Brown's raid at Harper's Ferry, Senate Democrats opened an investigation apparently designed to embarrass opponents of slavery. As part of the investigation, they called private individuals to testify. Senator Charles Sumner, a leading opponent of slavery, railed against the proceedings:

> "I know it is said that this power is necessary *in aid of legislation*. I deny the necessity. *Convenient*, at times, it may be; but *necessary*, *never*. We do not drag the members of the Cabinet or the President to testify before a committee *in aid of legislation*; but I say, without hesitation, they can claim no immunity which does

> not belong equally to the humblest citizen." Cong. Globe, 36th Cong., 1st Sess., 3007 (1860).

Sumner also addressed the matter of Parliament's powers, calling them "more or less inapplicable" because "[w]e live under a written Constitution, with certain specified powers; and all these are restrained by the tenth amendment." *Ibid.* For Sumner, as for Adams, the power to issue legislative subpoenas to private parties was a "dangerous absurdity" with no basis in the text or history of the Constitution. *Ibid.*[3]

4

When this Court first addressed a legislative subpoena, it refused to uphold it. After casting doubt on legislative subpoenas generally, the Court in *Kilbourn* v. *Thompson*, 103 U. S. 168, held that the subpoena at issue was unlawful because it sought to investigate private conduct.

In 1876, the House created a special Committee to investigate the failure of a major bank, which caused the loss of federal funds and related to financial speculation in the District of Columbia. *Id.*, at 171. The Committee issued a subpoena to Kilbourn, an employee of the bank. *Id.*, at 172. When he refused to answer questions or produce documents, the House held him in contempt and arrested him. *Id.*, at 173. After his release, he sued the Speaker, several Committee members, and the Sergeant at Arms for damages.

The Court discussed the arguments for an "impli[ed]" power to issue legislative subpoenas. *Id.*, at 183. As the Court saw it, there were two arguments: "1, its exercise by the House of Commons of England . . . and, 2d, the necessity of such a power to enable the two Houses of Congress to

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[3] I note as well that Sumner expressly distinguished legislative subpoenas from subpoenas issued during "those inquiries which are in their nature preliminary to an impeachment." Cong. Globe, 36th Cong., 1st Sess., 3007 (1860).

perform the duties and exercise the powers which the Constitution has conferred on them." *Ibid.*

The Court rejected the first argument. It found "no difference of opinion as to [the] origin" of the House of Commons' subpoena power:

> "[T]he two Houses of Parliament were each courts of judicature originally, which, though divested by usage, and by statute, probably, of many of their judicial functions, have yet retained so much of that power as enables them, like any other court, to punish for a contempt of these privileges and authority that the power rests." *Id.*, at 184.

Even after the division of Parliament into two houses, "[t]o the Commons was left the power of impeachment, and, perhaps, others of a judicial character, and jointly they exercised, until a very recent period, the power of passing bills of attainder for treason and other high crimes which are in their nature punishment for crime declared judicially by the High Court of Parliament." *Ibid.* By contrast, the House of Representatives "is in no sense a court, . . . exercises no functions derived from its once having been a part of the highest court of the realm," and has no judicial functions beyond "punishing its own members and determining their election." *Id.*, at 189. The Court thus rejected the notion that Congress inherited from Parliament an implied power to issue legislative subpoenas.

The Court did not reach a conclusion on the second theory that a legislative subpoena power was necessary for Congress to carry out its legislative duties. But it observed that, based on British judicial opinions, not "much aid [is] given to the doctrine, that this power exists as one necessary to enable either House of Congress to exercise successfully their function of legislation." *Ibid.* The Court referred to a collection of 18th- and 19th-century English decisions grounding the Parliamentary subpoena power in that body's judicial origins. *Id.*, at 184–189 (citing *Burdett* v. *Abbott*,

104 Eng. Rep. 501 (K. B. 1811); *Brass Crosby's Case*, 95 Eng. Rep. 1005 (C. P. 1771); *Stockdale* v. *Hansard*, 112 Eng. Rep. 1112 (K. B. 1839); and *Kielley* v. *Carson*, 13 Eng. Rep. 225 (P. C. 1841)). The Court placed particular emphasis on *Kielley*, in which the Privy Council held that the Legislative Assembly of Newfoundland lacked a power to punish for contempt. The Privy Council expressly stated that the House of Commons could punish for contempt

> "'not because it is a representative body with legislative functions, but by virtue of ancient usage and prescription . . . which forms a part of the common law of the land, and according to which the High Court of Parliament before its division, and the Houses of Lords and Commons since, are invested with many privileges, that of punishment for contempt being one.'" *Kilbourn*, 103 U. S., at 188–189.

This Court also noted that the Privy Council "discusse[d] at length the necessity of this power in a legislative body for its protection, and to enable it to discharge its law-making functions, and decide[d] against the proposition." *Id.*, at 189. Although the Court did not have occasion to decide whether the legislative subpoena in that case was necessary to the exercise of Congress' legislative powers, its discussion strongly suggests the subpoena was unconstitutional.[4]

The Court instead based its decision on the fact that the subpoena at issue "ma[de] inquiry into the private affairs of the citizen." *Id.*, at 190. Such a power, the Court reasoned, "is judicial and not legislative," *id.*, at 193, and "no judicial power is vested in the Congress or either branch

[4] According to Justice Miller's private letters, "a majority of the Court, including Miller himself, were of the opinion that neither House nor Senate had power to punish for contempt witnesses who refused to testify before investigating committees." T. Taylor, Grand Inquest: The Story of Congressional Investigations 49 (1955). Only Justice Miller's desire to "'decid[e] no more than is necessary'" caused the Court to avoid the broader question. *Ibid.*

of it, save in the cases" of punishing Members, compelling Members' attendance, judging elections and qualifications, and impeachment and trial, *id.*, at 192–193. Notably, the Court found no indication that the House "avowed to impeach the secretary," or else "the whole aspect of the case would have been changed." *Id.*, at 193. Even though the Court decided *Kilbourn* narrowly, it clearly entertained substantial doubts about the constitutionality of legislative subpoenas for private documents.

D

Nearly half a century later, in *McGrain* v. *Daugherty*, the Court reached the question reserved in *Kilbourn*—whether Congress has the power to issue legislative subpoenas. It rejected *Kilbourn*'s reasoning and upheld the power to issue legislative subpoenas as long as they were relevant to a legislative power. Although *McGrain* involved oral testimony, the Court has since extended this test to subpoenas for private documents. The Committees rely on *McGrain*, but this line of cases misunderstands both the original meaning of Article I and the historical practice underlying it.

1

Shortly before Attorney General Harry Daugherty resigned in 1924, the Senate opened an investigation into his "'alleged failure'" to prosecute monopolists, the protagonists of the Teapot Dome scandal, and "'many others.'" *McGrain*, 273 U. S., at 151. The investigating Committee issued subpoenas to Daugherty's brother, Mally, who refused to comply and was arrested in Ohio for failure to testify. *Id.*, at 152–154. Mally petitioned for a writ of habeas corpus, and the District Court discharged him, based largely on *Kilbourn*. *Ex parte Daugherty*, 299 F. 620 (SD Ohio 1924). The Deputy Sergeant at Arms who arrested Mally directly appealed to this Court, which reversed.

The Court concluded that, "[i]n actual legislative practice[,] power to secure needed information by [investigating

and compelling testimony] has long been treated as an attribute of the power to legislate." *McGrain*, 273 U. S., at 161. The Court specifically found that "[i]t was so regarded in the British Parliament and in the Colonial legislatures before the American Revolution" and that "a like view has prevailed and been carried into effect in both houses of Congress and in most of the state legislatures." *Ibid.* But the authority cited by the Court did not support that proposition. The Court cited the 1792 investigation of St. Clair's defeat, in which it appears no subpoena was issued, *supra*, at 877–878, and the 1859 Senate investigation of John Brown's raid on Harper's Ferry, which led to an impassioned debate. 273 U. S., at 162–164. Thus, for the reasons explained above, the examples relied on in *McGrain* are materially different from issuing a legislative subpoena for private, nonofficial documents. See *supra*, at 877–878, 880–881.[5]

The Court acknowledged *Kilbourn*, but erroneously distinguished its discussion regarding the constitutionality of legislative subpoenas as immaterial dicta. *McGrain*, *supra*, at 170–171 (quoting *Kilbourn*, *supra*, at 189). The Court concluded that "the two houses of Congress, in their separate relations, possess not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective." *McGrain*, *supra*, at 173.

Instead of relying on *Kilbourn*'s analysis, *McGrain* developed a test that rested heavily on functional considerations. The Court wrote that "[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change." 273 U. S., at 175. Because "mere requests for such information often are unavailing, and also that informa-

[5] The Court also cited decisions between 1858 and 1913 from state courts and a Canadian court, none of which are persuasive evidence about the original meaning of the U. S. Constitution. *McGrain*, 273 U. S., at 165–167.

tion which is volunteered is not always accurate or complete," "some means of compulsion are essential to obtain what is needed." *Ibid.*

The Court thus concluded that Congress could issue legislative subpoenas, provided that "the purpose for which the witness's testimony was sought was to obtain information in aid of the legislative function." *Id.*, at 176. The Court has since applied this test to subpoenas for papers without any further analysis of the text or history of the Constitution. See *Eastland* v. *United States Servicemen's Fund*, 421 U. S. 491, 504–505 (1975). The majority today modifies that test for cases involving the President, but it leaves the core of the power untouched. *Ante*, at 869–871.

2

The opinion in *McGrain* lacks any foundation in text or history with respect to subpoenas for private, nonofficial documents. It fails to recognize that Congress, unlike Parliament, is not supreme. It does not cite any specific precedent for issuing legislative subpoenas for private documents from 18th-century colonial or state practice. And it identifies no founding-era legislative subpoenas for private documents.[6]

Since *McGrain*, the Court has pared back Congress' authority to compel testimony and documents. It has held that certain convictions of witnesses for contempt of Congress violated the Fifth Amendment. See *Watkins* v. *United States*, 354 U. S. 178 (1957) (Due Process Clause);

[6] The Court further observed that Congress has long exercised the power to hold nonmembers in contempt for reasons other than failure to comply with a legislative subpoena. *McGrain*, *supra*, at 168–169. The earliest case it cited, *Anderson* v. *Dunn*, 6 Wheat. 204 (1821), relied on arguments about Congress' power of self-protection, *id.*, at 226–227. Members of Congress defending the use of contempt for these other purposes made similar arguments about self-protection. 5 Annals of Cong. 181–182 (1795) (Rep. W. Smith); *id.*, at 189 (Rep. I. Smith). But the failure to respond to a subpoena does not pose a fundamental threat to Congress' ability to exercise its powers.

Quinn v. *United States*, 349 U. S. 155 (1955) (Self-Incrimination Clause); see also *Barenblatt* v. *United States*, 360 U. S. 109, 153–154 (1959) (Black, J., dissenting). It has also affirmed the reversal of a conviction on the ground that the Committee lacked authority to issue the subpoena. See *United States* v. *Rumely*, 345 U. S. 41 (1953). And today, it creates a new four-part, nonexhaustive test for cases involving the President. *Ante*, at 869–871. Rather than continue our trend of trying to compensate for *McGrain*, I would simply decline to apply it in these cases because it is readily apparent that the Committees have no constitutional authority to subpoena private, nonofficial documents.

III

If the Committees wish to investigate alleged wrongdoing by the President and obtain documents from him, the Constitution provides Congress with a special mechanism for doing so: impeachment.[7]

A

It is often acknowledged, "if only half-heartedly honored," that one of the motivating principles of our Constitution is the separation of powers. *Association of American Railroads*, 575 U. S., at 74 (THOMAS, J., concurring in judgment). The Framers recognized that there are three forms of governmental power: legislative, executive, and judicial. The Framers also created three branches: Congress, the President, and the Judiciary. The three powers largely align with the three branches. To a limited extent, however, the Constitution contains "a partial intermixture of those departments for special purposes." The Federalist No. 66, p. 401 (C. Rossiter ed. 1961) (A. Hamilton). One of those special purposes is the system of checks and balances, and impeachment is one of those checks.

[7] I express no view on whether there are any limitations on the impeachment power that would prevent the House from subpoenaing the documents at issue.

The Constitution grants the House "the sole Power of Impeachment," Art. I, § 2, cl. 5, and it specifies that the President may be impeached for "Treason, Bribery, or other high Crimes and Misdemeanors," Art. II, § 4. The founding generation understood impeachment as a check on Presidential abuses. In response to charges that impeachment "confounds legislative and judiciary authorities in the same body," Alexander Hamilton called it "an essential check in the hands of [Congress] upon the encroachments of the executive." The Federalist No. 66, at 401–402. And, in the Virginia ratifying convention, James Madison identified impeachment as a check on Presidential abuse of the treaty power. 10 Documentary History 1397.

B

The power to impeach includes a power to investigate and demand documents. Impeachments in the States often involved an investigation. In 1781, the Virginia Legislature began what Edmund Randolph called an "impeachment" of then-Governor Thomas Jefferson. P. Hoffer & N. Hull, Impeachment in America, 1635–1805, p. 85 (1984). This "most publicized and far-reaching impeachment inquiry for incompetence" included an " 'inquir[y] into the conduct of the executive of this state for the last two months.' " *Ibid.* The Legislatures of New Jersey, *id.*, at 92, and Pennsylvania, *id.*, at 93–95, similarly investigated officials through impeachment proceedings.

Reinforcing this understanding, the founding generation repeatedly referred to impeachment as an "inquest." See 4 Debates on the Constitution 44 (J. Elliot ed. 1854) (speech of A. Maclaine) (referring to the House as "the grand inquest of the Union at large"); The Federalist No. 65, at 397 (Hamilton) (referring to the House as "a method of NATIONAL INQUEST"); 2 Records of the Federal Convention 154 (M. Farrand ed. 1911) (record from the Committee of Detail stating that "[t]he House of Representatives shall be the grand Inquest of this Nation; and all Impeachments shall be made by

them"); see also Mass. Const., ch. 1, § 3, Art. VI (1780) (referring to the Massachusetts House of Representatives as "the Grand Inquest of this Commonwealth"). At the time, an "inquest" referred to an "[i]nquiry, especially that made by a Jury" or "the Jury itself." N. Bailey, Universal Etymological English Dictionary (22d ed. 1770).

The Founders were also aware of the contemporaneous impeachment of Warren Hastings in England, in which the House of Commons heard witnesses before voting to impeach. P. Marshall, The Impeachment of Warren Hastings 40–41, 58 (1965). In the first impeachment under the new Constitution, Congressmen cited the Hastings impeachment as precedent for several points, including the power to take testimony before impeaching. 7 Annals of Cong. 456 (1797) (Rep. Rutledge); *id.*, at 459 (Rep. Sitgreaves); *id.*, at 460 (Rep. Gallatin).

Other evidence from the 1790s confirms that the power to investigate includes the power to demand documents. When the House of Representatives sought documents related to the Jay Treaty from President George Washington, he refused to provide them on the ground that the House had no legislative powers relating to the ratification of treaties. 5 Annals of Cong. 760–762 (1796). But he carefully noted that "[i]t does not occur that the inspection of the papers asked for can be relative to any purpose under the cognizance of the House of Representatives, except that of an impeachment; which the resolution has not expressed." *Id.*, at 760. In other words, he understood that the House can demand documents as part of its power to impeach.

This Court has also long recognized the power of the House to demand documents. Even as it questioned the power to issue legislative subpoenas, the Court in *Kilbourn* acknowledged the ability to "compel the attendance of witnesses, and their answer to proper questions" when "the question of . . . impeachment is before either body acting in its appropriate sphere on that subject." 103 U. S., at 190.

I express no view today on the boundaries of the power to demand documents in connection with impeachment proceedings. But the power of impeachment provides the House with authority to investigate and hold accountable Presidents who commit high crimes or misdemeanors. That is the proper path by which the Committees should pursue their demands.

IV

For nearly two centuries, until the 1970s, Congress never attempted to subpoena documents to investigate wrongdoing by the President outside the context of impeachment. Congress investigated Presidents without opening impeachment proceedings. See, *e. g.*, 2 Hinds § 1596, at 1043–1045 (President James Buchanan). But it never issued a subpoena for private, nonofficial documents as part of those non-impeachment inquiries. Perhaps most strikingly, one proposed request for official documents from the President was amended after objection so that it "'requested'" them rather than "'direct[ing]'" the President to provide them. 3 *id.*, § 1895, at 193.

Insisting that the House proceed through its impeachment power is not a mere formality. Unlike contempt, which is governed by the rules of each chamber, impeachment and removal constitutionally requires a majority vote by the House and a two-thirds vote by the Senate. Art. I, § 2, cl. 5; § 3, cl. 6. In addition, Congress has long thought it necessary to provide certain procedural safeguards to officials facing impeachment and removal. See, *e. g.*, 3 Annals of Cong. 903 (1793) (Rep. W. Smith). Finally, initiating impeachment proceedings signals to the public the gravity of seeking the removal of a constitutional officer at the head of a coordinate branch. 940 F. 3d 710, 776 (CADC 2019) (Rao, J., dissenting).

* * *

Congress' legislative powers do not authorize it to engage in a nationwide inquisition with whatever resources it

chooses to appropriate for itself. The majority's solution—a nonexhaustive four-factor test of uncertain origin—is better than nothing. But the power that Congress seeks to exercise here has even less basis in the Constitution than the majority supposes. I would reverse in full because the power to subpoena private, nonofficial documents is not a necessary implication of Congress' legislative powers. If Congress wishes to obtain these documents, it should proceed through the impeachment power. Accordingly, I respectfully dissent.

JUSTICE ALITO, dissenting.

JUSTICE THOMAS makes a valuable argument about the constitutionality of congressional subpoenas for a President's personal documents. In these cases, however, I would assume for the sake of argument that such subpoenas are not categorically barred. Nevertheless, legislative subpoenas for a President's personal documents are inherently suspicious. Such documents are seldom of any special value in considering potential legislation, and subpoenas for such documents can easily be used for improper non-legislative purposes. Accordingly, courts must be very sensitive to separation of powers issues when they are asked to approve the enforcement of such subpoenas.

In many cases, disputes about subpoenas for Presidential documents are fought without judicial involvement. If Congress attempts to obtain such documents by subpoenaing a President directly, those two heavyweight institutions can use their considerable weapons to settle the matter. See *ante*, at 861 (opinion of the Court) ("Congress and the President maintained this tradition of negotiation and compromise—without the involvement of this Court—until the present dispute"). But when Congress issues such a subpoena to a third party, Congress must surely appreciate that the Judiciary may be pulled into the dispute, and Congress should not expect that the courts will allow the subpoena to be enforced without seriously examining its legitimacy.

Whenever such a subpoena comes before a court, Congress should be required to make more than a perfunctory showing that it is seeking the documents for a legitimate legislative purpose and not for the purpose of exposing supposed Presidential wrongdoing. See *ante*, at 862–863. The House can inquire about possible Presidential wrongdoing pursuant to its impeachment power, see *ante*, at 887–890 (THOMAS, J., dissenting), but the Committees do not defend these subpoenas as ancillary to that power.

Instead, they claim that the subpoenas were issued to gather information that is relevant to legislative issues, but there is disturbing evidence of an improper law enforcement purpose. See 940 F. 3d 710, 767–771 (CADC 2019) (Rao, J., dissenting). In addition, the sheer volume of documents sought calls out for explanation. See 943 F. 3d 627, 676–681 (CA2 2019) (Livingston, J., concurring in part and dissenting in part).

The Court recognizes that the decisions below did not give adequate consideration to separation of powers concerns. Therefore, after setting out a non-exhaustive list of considerations for the lower courts to take into account, *ante*, at 869–871, the Court vacates the judgments of the Courts of Appeals and sends the cases back for reconsideration. I agree that the lower courts erred and that these cases must be remanded, but I do not think that the considerations outlined by the Court can be properly satisfied unless the House is required to show more than it has put forward to date.

Specifically, the House should provide a description of the type of legislation being considered, and while great specificity is not necessary, the description should be sufficient to permit a court to assess whether the particular records sought are of any special importance. The House should also spell out its constitutional authority to enact the type of legislation that it is contemplating, and it should justify the scope of the subpoenas in relation to the articulated legislative needs. In addition, it should explain why the subpoe-

naed information, as opposed to information available from other sources, is needed. Unless the House is required to make a showing along these lines, I would hold that enforcement of the subpoenas cannot be ordered. Because I find the terms of the Court's remand inadequate, I must respectfully dissent.

Syllabus

McGIRT *v.* OKLAHOMA

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

No. 18–9526. Argued May 11, 2020—Decided July 9, 2020

The Major Crimes Act (MCA) provides that, within "the Indian country," "[a]ny Indian who commits" certain enumerated offenses "shall be subject to the same law and penalties as all other persons committing any of [those] offenses, within the exclusive jurisdiction of the United States." 18 U. S. C. § 1153(a). "Indian country" includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government." § 1151. Petitioner Jimcy McGirt was convicted by an Oklahoma state court of three serious sexual offenses. He unsuccessfully argued in state postconviction proceedings that the State lacked jurisdiction to prosecute him because he is an enrolled member of the Seminole Nation and his crimes took place on the Creek Reservation. He seeks a new trial, which, he contends, must take place in federal court.

Held: For MCA purposes, land reserved for the Creek Nation since the 19th century remains "Indian country." Pp. 899–938.

(a) Congress established a reservation for the Creek Nation. An 1833 Treaty fixed borders for a "permanent home to the whole Creek Nation of Indians," 7 Stat. 418, and promised that the United States would "grant a patent, in fee simple, to the Creek nation of Indians for the [assigned] land" to continue "so long as they shall exist as a nation, and continue to occupy the country hereby assigned to them," *id.*, at 419. The patent formally issued in 1852.

Though the early treaties did not refer to the Creek lands as a "reservation," similar language in treaties from the same era has been held sufficient to create a reservation, see, *e. g.*, *Menominee Tribe* v. *United States*, 391 U. S. 404, 405, and later Acts of Congress—referring to the "Creek reservation"—leave no room for doubt, see, *e. g.*, 17 Stat. 626. In addition, an 1856 Treaty promised that "no portion" of Creek lands "would ever be embraced or included within, or annexed to, any Territory or State," 11 Stat. 700, and that the Creeks would have the "unrestricted right of self-government," with "full jurisdiction" over enrolled Tribe members and their property, *id.*, at 704. Pp. 899–902.

(b) Congress has since broken more than a few promises to the Tribe. Nevertheless, the Creek Reservation persists today. Pp. 902–924.

Syllabus

(1) Once a federal reservation is established, only Congress can diminish or disestablish it. Doing so requires a clear expression of congressional intent. Pp. 902–904.

(2) Oklahoma claims that Congress ended the Creek Reservation during the so-called "allotment era"—a period when Congress sought to pressure many tribes to abandon their communal lifestyles and parcel their lands into smaller lots owned by individual tribal members. Missing from the allotment-era agreement with the Creek, see 31 Stat. 862–864, however, is any statute evincing anything like the "present and total surrender of all tribal interests" in the affected lands. And this Court has already rejected the argument that allotments automatically ended reservations. Pp. 904–908.

(3) Oklahoma points to other ways Congress intruded on the Creeks' promised right to self-governance during the allotment era, including abolishing the Creeks' tribal courts, 30 Stat. 504–505, and requiring Presidential approval for certain tribal ordinances, 31 Stat. 872. But these laws fall short of eliminating all tribal interest in the contested lands. Pp. 909–913.

(4) Oklahoma ultimately claims that historical practice and demographics are enough by themselves to prove disestablishment. This Court has consulted contemporaneous usages, customs, and practices to the extent they shed light on the meaning of ambiguous statutory terms, but Oklahoma points to no ambiguous language in any of the relevant statutes that could plausibly be read as an act of cession. Such extratextual considerations are of "'limited interpretive value,'" *Nebraska* v. *Parker*, 577 U. S. 481, 493, and the "least compelling" form of evidence, *South Dakota* v. *Yankton Sioux Tribe*, 522 U. S. 329, 356. In the end, Oklahoma resorts to the State's long historical practice of prosecuting Indians in state court for serious crimes on the contested lands, various statements made during the allotment era, and the speedy and persistent movement of white settlers into the area. But these supply little help with the law's meaning and much potential for mischief. Pp. 913–924.

(c) In the alternative, Oklahoma contends that Congress never established a reservation but instead created a "dependent Indian community." To hold that the Creek never had a reservation would require willful blindness to the statutory language and a belief that the land patent the Creek received somehow made their tribal sovereignty easier to divest. Congress established a reservation, not a dependent Indian community, for the Creek Nation. Pp. 924–927.

(d) Even assuming that the Creek land is a reservation, Oklahoma argues that the MCA has never applied in eastern Oklahoma. It claims that the Oklahoma Enabling Act, which transferred all nonfederal cases

pending in the territorial courts to Oklahoma's state courts, made the State's courts the successors to the federal territorial courts' sweeping authority to try Indians for crimes committed on reservations. That argument, however, rests on state prosecutorial practices that defy the MCA, rather than on the law's plain terms. Pp. 927–932.

(e) Finally, Oklahoma warns of the potential consequences that will follow a ruling against it, such as unsettling an untold number of convictions and frustrating the State's ability to prosecute crimes in the future. This Court is aware of the potential for cost and conflict around jurisdictional boundaries. But Oklahoma and its tribes have proven time and again that they can work successfully together as partners, and Congress remains free to supplement its statutory directions about the lands in question at any time. Pp. 932–937.

Reversed.

GORSUCH, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C. J., filed a dissenting opinion, in which ALITO and KAVANAUGH, JJ., joined, and in which THOMAS, J., joined except as to footnote 9, *post*, p. 938. THOMAS, J., filed a dissenting opinion, *post*, p. 973.

Ian Heath Gershengorn argued the cause for petitioner. With him on the briefs was *Zachary C. Schauf*.

Riyaz A. Kanji argued the cause for Muscogee (Creek) Nation as *amicus curiae* urging reversal. With him on the brief were *David A. Giampetroni*, *Cory J. Albright*, and *Kyle Haskins*.

Mithun Mansinghani, Solicitor General of Oklahoma, argued the cause for respondent. With him on the brief were *Mike Hunter*, Attorney General of Oklahoma, *Jennifer Crabb*, Assistant Attorney General, *Bryan Cleveland* and *Randall Yates*, Assistant Solicitors General, *R. Reeves Anderson*, *Allon Kedem*, *Sally L. Pei*, and *Stephen K. Wirth*.

Deputy Solicitor General Kneedler argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Francisco*, *Assistant Attorney General Clark*, *Erica L. Ross*, *William B. Lazarus*, and *James A. Maysonett*.*

*Briefs of *amici curiae* urging reversal were filed for Historians et al. by *L. Susan Work* and *Chrissi Ross Nimmo;* for the National Association of Criminal Defense Lawyers by *Jon M. Sands*, *Keith J. Hilzendeger*, and

JUSTICE GORSUCH delivered the opinion of the Court.

On the far end of the Trail of Tears was a promise. Forced to leave their ancestral lands in Georgia and Alabama, the Creek Nation received assurances that their new lands in the West would be secure forever. In exchange for ceding "all their land, East of the Mississippi river," the U. S. government agreed by treaty that "[t]he Creek country west of the Mississippi shall be solemnly guarantied to the Creek Indians." Treaty With the Creeks, Arts. I, XIV, Mar. 24, 1832, 7 Stat. 366, 368 (1832 Treaty). Both parties settled on boundary lines for a new and "permanent home to the whole Creek nation," located in what is now Oklahoma. Treaty With the Creeks, preamble, Feb. 14, 1833, 7 Stat. 418 (1833 Treaty). The government further promised that "[no] State or Territory [shall] ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves." 1832 Treaty, Art. XIV, 7 Stat. 368.

Today we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal

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Barbara Bergman; for the National Indigenous Women's Resource Center et al. by *Mary Kathryn Nagle*; and for Tom Cole et al. by *Robert H. Henry*, *Michael Burrage*, *Stephen H. Greetham*, *Frank S. Holleman IV*, *Douglas B. Endreson*, and *Brad Mallett*.

Briefs of *amici curiae* urging affirmance were filed for the State of Kansas et al. by *Derek Schmidt*, Attorney General of Kansas, *Toby Crouse*, Solicitor General, *Brant M. Laue*, Deputy Solicitor General, *Kurtis K. Wiard*, Assistant Solicitor General, and *Jeffrey A. Chanay*, Chief Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Jeff Landry* of Louisiana, *Timothy C. Fox* of Montana, *Douglas J. Peterson* of Nebraska, and *Ken Paxton* of Texas; for the City of Tulsa by *Blaine H. Evanson*; for the Environmental Federation of Oklahoma, Inc., et al. by *Lynn H. Slade* and *Sarah M. Stevenson*; for the International Municipal Lawyers Association et al. by *Charles W. Thompson, Jr.*, *Amanda Kellar Karras*, and *Paul Koster*; for the National Congress of American Indians Fund by *John E. Echohawk* and *Colette Routel*; for Troy A. Eid et al. by *Dominic E. Draye*, *Jennifer H. Weddle*, and *Mr. Eid*, *pro se*; and for Seventeen Oklahoma District Attorneys et al. by *Robert D. Cheren*.

criminal law. Because Congress has not said otherwise, we hold the government to its word.

I

At one level, the question before us concerns Jimcy McGirt. Years ago, an Oklahoma state court convicted him of three serious sexual offenses. Since then, he has argued in postconviction proceedings that the State lacked jurisdiction to prosecute him because he is an enrolled member of the Seminole Nation of Oklahoma and his crimes took place on the Creek Reservation. A new trial for his conduct, he has contended, must take place in federal court. The Oklahoma state courts hearing Mr. McGirt's arguments rejected them, so he now brings them here.

Mr. McGirt's appeal rests on the federal Major Crimes Act (MCA). The statute provides that, within "the Indian country," "[a]ny Indian who commits" certain enumerated offenses "against the person or property of another Indian or other person" "shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States." 18 U. S. C. § 1153(a). By subjecting Indians to federal trials for crimes committed on tribal lands, Congress may have breached its promises to tribes like the Creek that they would be free to govern themselves. But this particular incursion has its limits—applying only to certain enumerated crimes and allowing only the federal government to try Indians. State courts generally have no jurisdiction to try Indians for conduct committed in "Indian country." *Negonsott* v. *Samuels*, 507 U. S. 99, 102–103 (1993).

The key question Mr. McGirt faces concerns that last qualification: Did he commit his crimes in Indian country? A neighboring provision of the MCA defines the term to include, among other things, "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any pat-

ent, and, including rights-of-way running through the reservation." §1151(a). Mr. McGirt submits he can satisfy this condition because he committed his crimes on land reserved for the Creek since the 19th century.

The Creek Nation has joined Mr. McGirt as *amicus curiae*. Not because the Tribe is interested in shielding Mr. McGirt from responsibility for his crimes. Instead, the Creek Nation participates because Mr. McGirt's personal interests wind up implicating the Tribe's. No one disputes that Mr. McGirt's crimes were committed on lands described as the Creek Reservation in an 1866 treaty and federal statute. But, in seeking to defend the state-court judgment below, Oklahoma has put aside whatever procedural defenses it might have and asked us to confirm that the land once given to the Creeks is no longer a reservation today.

At another level, then, Mr. McGirt's case winds up as a contest between State and Tribe. The scope of their dispute is limited; nothing we might say today could unsettle Oklahoma's authority to try non-Indians for crimes against non-Indians on the lands in question. See *United States* v. *McBratney*, 104 U. S. 621, 624 (1882). Still, the stakes are not insignificant. If Mr. McGirt and the Tribe are right, the State has no right to prosecute Indians for crimes committed in a portion of Northeastern Oklahoma that includes most of the city of Tulsa. Responsibility to try these matters would fall instead to the federal government and Tribe. Recently, the question has taken on more salience too. While Oklahoma state courts have rejected any suggestion that the lands in question remain a reservation, the Tenth Circuit has reached the opposite conclusion. *Murphy* v. *Royal*, 875 F. 3d 896, 907–909, 966 (2017). We granted certiorari to settle the question. 589 U. S. 1119 (2019).

II

Start with what should be obvious: Congress established a reservation for the Creeks. In a series of treaties, Con-

gress not only "solemnly guarantied" the land but also "establish[ed] boundary lines which will secure a country and permanent home to the whole Creek nation of Indians." 1832 Treaty, Art. XIV, 7 Stat. 368; 1833 Treaty, preamble, 7 Stat. 418. The government's promises weren't made gratuitously. Rather, the 1832 Treaty acknowledged that "[t]he United States are desirous that the Creeks should remove to the country west of the Mississippi" and, in service of that goal, required the Creeks to cede all lands in the East. Arts. I, XII, 7 Stat. 366, 367. Nor were the government's promises meant to be delusory. Congress twice assured the Creeks that "[the] Treaty shall be obligatory on the contracting parties, as soon as the same shall be ratified by the United States." 1832 Treaty, Art. XV, *id.*, at 368; see 1833 Treaty, Art. IX, 7 Stat. 420 ("agreement shall be binding and obligatory" upon ratification). Both treaties were duly ratified and enacted as law.

Because the Tribe's move west was ostensibly voluntary, Congress held out another assurance as well. In the statute that precipitated these negotiations, Congress authorized the President "to assure the tribe . . . that the United States will forever secure and guaranty to them . . . the country so exchanged with them." Indian Removal Act of 1830, § 3, 4 Stat. 412. "[A]nd if they prefer it," the bill continued, "the United States will cause a patent or grant to be made and executed to them for the same; *Provided always*, That such lands shall revert to the United States, if the Indians become extinct, or abandon the same." *Ibid.* If agreeable to all sides, a tribe would not only enjoy the government's solemn treaty promises; it would hold legal title to its lands.

It was an offer the Creek accepted. The 1833 Treaty fixed borders for what was to be a "permanent home to the whole Creek nation of Indians." 1833 Treaty, preamble, 7 Stat. 418. It also established that the "United States will grant a patent, in fee simple, to the Creek nation of Indians for the land assigned said nation by this treaty." Art. III, *id.*, at

419. That grant came with the caveat that "the right thus guaranteed by the United States shall be continued to said tribe of Indians, so long as they shall exist as a nation, and continue to occupy the country hereby assigned them." *Ibid.* The promised patent formally issued in 1852. See *Woodward* v. *De Graffenried*, 238 U. S. 284, 293–294 (1915).

These early treaties did not refer to the Creek lands as a "reservation"—perhaps because that word had not yet acquired such distinctive significance in federal Indian law. But we have found similar language in treaties from the same era sufficient to create a reservation. See *Menominee Tribe* v. *United States*, 391 U. S. 404, 405–406 (1968) (grant of land "'for a home, to be held as Indian lands are held,'" established a reservation). And later Acts of Congress left no room for doubt. In 1866, the United States entered yet another treaty with the Creek Nation. This agreement reduced the size of the land set aside for the Creek, compensating the Tribe at a price of 30 cents an acre. Treaty Between the United States and the Creek Nation of Indians, Art. III, June 14, 1866, 14 Stat. 786. But Congress explicitly restated its commitment that the remaining land would "be forever set apart as a home for said Creek Nation," which it now referred to as "the reduced Creek reservation." Arts. III, IX, *id.*, at 786, 788.[1] Throughout the late 19th century,

[1] The dissent by THE CHIEF JUSTICE (hereinafter the dissent) suggests that the Creek's intervening alliance with the Confederacy "'unsettled'" and "'forfeit[ed]'" the longstanding promises of the United States. *Post*, at 940. But the Treaty of 1866 put an end to any Civil War hostility, promising mutual amnesty, "perpetual peace and friendship," and guaranteeing the Tribe the "quiet possession of their country." Art. I, 14 Stat. 786. Though this treaty expressly reduced the size of the Creek Reservation, the Creek were compensated for the lost territory, and otherwise "retained" their unceded portion. Art. III, *ibid.* Contrary to the dissent's implication, nothing in the Treaty of 1866 purported to repeal prior treaty promises. Cf. Art. XII, *id.*, at 790 (the United States expressly "reaffirms and reassumes all obligations of treaty stipulations with the Creek nation entered into before" the Civil War).

many other federal laws also expressly referred to the Creek Reservation. See, *e. g.*, Treaty Between United States and Cherokee Nation of Indians, Art. IV, July 19, 1866, 14 Stat. 800 ("Creek reservation"); Act of Mar. 3, 1873, ch. 322, 17 Stat. 626 (multiple references to the "Creek reservation" and "Creek India[n] Reservation"); 11 Cong. Rec. 2351 (1881) (discussing "the dividing line between the Creek reservation and their ceded lands"); Act of Feb. 13, 1891, 26 Stat. 750 (describing a cession by referencing the "West boundary line of the Creek Reservation").

There is a final set of assurances that bear mention, too. In the Treaty of 1856, Congress promised that "no portion" of the Creek Reservation "shall ever be embraced or included within, or annexed to, any Territory or State." Art. IV, 11 Stat. 700. And within their lands, with exceptions, the Creeks were to be "secured in the unrestricted right of self-government," with "full jurisdiction" over enrolled Tribe members and their property. Art. XV, *id.*, at 704. So the Creek were promised not only a "permanent home" that would be "forever set apart"; they were also assured a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any State. Under any definition, this was a reservation.

III

A

While there can be no question that Congress established a reservation for the Creek Nation, it's equally clear that Congress has since broken more than a few of its promises to the Tribe. Not least, the land described in the parties' treaties, once undivided and held by the Tribe, is now fractured into pieces. While these pieces were initially distributed to Tribe members, many were sold and now belong to persons unaffiliated with the Nation. So in what sense, if any, can we say that the Creek Reservation persists today?

To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress. This Court long ago held that the Legislature wields significant constitutional authority when it comes to tribal relations, possessing even the authority to breach its own promises and treaties. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 566–568 (1903). But that power, this Court has cautioned, belongs to Congress alone. Nor will this Court lightly infer such a breach once Congress has established a reservation. *Solem* v. *Bartlett*, 465 U. S. 463, 470 (1984).

Under our Constitution, States have no authority to reduce federal reservations lying within their borders. Just imagine if they did. A State could encroach on the tribal boundaries or legal rights Congress provided, and, with enough time and patience, nullify the promises made in the name of the United States. That would be at odds with the Constitution, which entrusts Congress with the authority to regulate commerce with Native Americans, and directs that federal treaties and statutes are the "supreme Law of the Land." Art. I, § 8; Art. VI, cl. 2. It would also leave tribal rights in the hands of the very neighbors who might be least inclined to respect them.

Likewise, courts have no proper role in the adjustment of reservation borders. Mustering the broad social consensus required to pass new legislation is a deliberately hard business under our Constitution. Faced with this daunting task, Congress sometimes might wish an inconvenient reservation would simply disappear. Short of that, legislators might seek to pass laws that tiptoe to the edge of disestablishment and hope that judges—facing no possibility of electoral consequences themselves—will deliver the final push. But wishes don't make for laws, and saving the political branches the embarrassment of disestablishing a reservation is not one of our constitutionally assigned prerogatives. "[O]nly Congress can divest a reservation of its land and diminish its boundaries." *Solem*, 465 U. S., at 470. So it's no matter

how many other promises to a tribe the federal government has already broken. If Congress wishes to break the promise of a reservation, it must say so.

History shows that Congress knows how to withdraw a reservation when it can muster the will. Sometimes, legislation has provided an "[e]xplicit reference to cession" or an "unconditional commitment . . . to compensate the Indian tribe for its opened land." *Ibid.* Other times, Congress has directed that tribal lands shall be "'restored to the public domain.'" *Hagen* v. *Utah*, 510 U. S. 399, 412 (1994) (emphasis deleted). Likewise, Congress might speak of a reservation as being "'discontinued,'" "'abolished,'" or "'vacated.'" *Mattz* v. *Arnett*, 412 U. S. 481, 504, n. 22 (1973). Disestablishment has "never required any particular form of words," *Hagen*, 510 U. S., at 411. But it does require that Congress clearly express its intent to do so, "[c]ommon[ly with an] '[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests.'" *Nebraska* v. *Parker*, 577 U. S. 481, 488 (2016).

B

In an effort to show Congress has done just that with the Creek Reservation, Oklahoma points to events during the so-called "allotment era." Starting in the 1880s, Congress sought to pressure many tribes to abandon their communal lifestyles and parcel their lands into smaller lots owned by individual tribe members. See 1 F. Cohen, Handbook of Federal Indian Law § 1.04 (2012) (Cohen), discussing General Allotment Act of 1887, ch. 119, 24 Stat. 388. Some allotment advocates hoped that the policy would create a class of assimilated, landowning, agrarian Native Americans. See Cohen § 1.04; F. Hoxie, A Final Promise: The Campaign To Assimilate 18–19 (2001). Others may have hoped that, with lands in individual hands and (eventually) freely alienable, white settlers would have more space of their own. See *id.*, at 14–15; cf. General Allotment Act of 1887, § 5, 24 Stat. 389–390.

The Creek were hardly exempt from the pressures of the allotment era. In 1893, Congress charged the Dawes Commission with negotiating changes to the Creek Reservation. Congress identified two goals: Either persuade the Creek to cede territory to the United States, as it had before, or agree to allot its lands to Tribe members. Act of Mar. 3, 1893, ch. 209, § 16, 27 Stat. 645–646. A year later, the Commission reported back that the Tribe "would not, under any circumstances, agree to cede any portion of their lands." S. Misc. Doc. No. 24, 53d Cong., 3d Sess., 7 (1894). At that time, before this Court's decision in *Lone Wolf*, Congress may not have been entirely sure of its power to terminate an established reservation unilaterally. Perhaps for that reason, perhaps for others, the Commission and Congress took this report seriously and turned their attention to allotment rather than cession.[2]

The Commission's work culminated in an allotment agreement with the Tribe in 1901. Creek Allotment Agreement, ch. 676, 31 Stat. 861. With exceptions for certain preexisting town sites and other special matters, the agreement established procedures for allotting 160-acre parcels to individual Tribe members who could not sell, transfer, or otherwise encumber their allotments for a number of years. §§ 3, 7, *id.*, at 862–864 (5 years for any portion, 21 years for the designated "homestead" portion). Tribe members were given deeds for their parcels that "convey[ed] to [them] all right, title, and interest of the Creek Nation." § 23, *id.*, at 867–868. In 1908, Congress relaxed these alienation restrictions in some ways, and even allowed the Secretary of the Interior to waive them. Act of May 27, 1908, ch. 199, § 1, 35 Stat. 312. One way or the other, individual Tribe members

[2] The dissent stresses, repeatedly, that the Dawes Commission was charged with seeking to extinguish the reservation. *Post*, at 954–955, 961. Yet, the dissent fails to mention the Commission's various reports acknowledging that those efforts were unsuccessful precisely because the Creek refused to cede their lands.

were eventually free to sell their land to Indians and non-Indians alike.

Missing in all this, however, is a statute evincing anything like the "present and total surrender of all tribal interests" in the affected lands. Without doubt, in 1832 the Creek "cede[d]" their original homelands east of the Mississippi for a reservation promised in what is now Oklahoma. 1832 Treaty, Art. I, 7 Stat. 366. And in 1866, they "cede[d] and convey[ed]" a portion of that reservation to the United States. Treaty With the Creek, Art. III, 14 Stat. 786. But because there exists no equivalent law terminating what remained, the Creek Reservation survived allotment.

In saying this we say nothing new. For years, States have sought to suggest that allotments automatically ended reservations, and for years courts have rejected the argument. Remember, Congress has defined "Indian country" to include "all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent, and, including any rights-of-way running through the reservation." 18 U. S. C. § 1151(a). So the relevant statute expressly contemplates private land ownership within reservation boundaries. Nor under the statute's terms does it matter whether these individual parcels have passed hands to non-Indians. To the contrary, this Court has explained repeatedly that Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others. See *Mattz*, 412 U. S., at 497 ("[A]llotment under the . . . Act is completely consistent with continued reservation status"); *Seymour* v. *Superintendent of Wash. State Penitentiary*, 368 U. S. 351, 356–358 (1962) (holding that allotment Act "did no more than open the way for non-Indian settlers to own land on the reservation"); *Parker*, 577 U. S., at 489 ("[T]he 1882 Act falls into another category of surplus land Acts: those that merely opened reservation land to settlement . . . . Such schemes allow non-Indian settlers to own land on the reservation" (internal quotation marks omitted)).

It isn't so hard to see why. The federal government issued its own land patents to many homesteaders throughout the West. These patents transferred legal title and are the basis for much of the private land ownership in a number of States today. But no one thinks any of this diminished the United States's claim to sovereignty over any land. To accomplish that would require an act of cession, the transfer of a sovereign claim from one nation to another. 3 E. Washburn, American Law of Real Property *521–*524. And there is no reason why Congress cannot reserve land for tribes in much the same way, allowing them to continue to exercise governmental functions over land even if they no longer own it communally. Indeed, such an arrangement seems to be contemplated by § 1151(a)'s plain terms. Cf. *Seymour*, 368 U. S., at 357–358.[3]

Oklahoma reminds us that allotment was often the first step in a plan ultimately aimed at disestablishment. As this Court explained in *Mattz*, Congress's expressed policy at the time "was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing." 412 U. S., at 496. Then, "[w]hen all the lands had been allotted and the trust expired, the reservation could be abolished." *Ibid.* This plan was set in motion nationally in the General Allotment Act of 1887, and for the Creek specifically in 1901. No doubt, this is why Congress at the turn of the 20th century "believed to a man" that "the reservation system would cease" "within a generation at most." *Solem*, 465 U. S., at 468. Still, just as wishes are not laws, future plans aren't either. Congress may have passed allotment laws to create the conditions for

[3] The dissent not only fails to acknowledge these features of the statute and our precedents. It proceeds in defiance of them, suggesting that by moving to eliminate communal title and relaxing restrictions on alienation, "Congress destroyed the foundation of [the Creek Nation's] sovereignty." *Post*, at 954. But this Court long ago rejected the notion that the purchase of lands by non-Indians is inconsistent with reservation status. See *Seymour*, 368 U. S., at 357–358.

disestablishment. But to equate allotment with disestablishment would confuse the first step of a march with arrival at its destination.[4]

Ignoring this distinction would run roughshod over many other statutes as well. In some cases, Congress chose not to wait for allotment to run its course before disestablishing a reservation. When it deemed that approach appropriate, Congress included additional language expressly ending reservation status. So, for example, in 1904, Congress allotted reservations belonging to the Ponca and Otoe Tribes, reservations also lying within modern-day Oklahoma, and then provided "further, That the reservation lines of the said . . . reservations . . . are hereby . . . abolished." Act of Apr. 21, 1904, § 8, 33 Stat. 217–218 (emphasis deleted); see also *DeCoteau* v. *District County Court for Tenth Judicial Dist.*, 420 U. S. 425, 439–440, n. 22 (1975) (collecting other examples). Tellingly, however, nothing like that can be found in the nearly contemporary 1901 Creek Allotment Agreement or the 1908 Act. That doesn't make these laws special. Rather, in using the language that they did, these allotment laws tracked others of the period, parceling out individual tracts, while saving the ultimate fate of the land's reservation status for another day.[5]

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[4] The dissent seemingly conflates these steps in other ways, too, by implying that the passage of an allotment Act *itself* extinguished title. *Post*, at 955. The reality proved more complicated. Allotment of the Creek lands did not occur overnight, but dragged on for years, well past Oklahoma's statehood, until Congress finally prohibited any further allotments more than 15 years later. Act of Mar. 2, 1917, 39 Stat. 986.

[5] The dissent doesn't purport to find any of the hallmarks of diminishment in the Creek Allotment Agreement. Instead, the dissent tries to excuse their absence by saying that it would have made "little sense" to find such language in an Act transferring the Tribe's lands to private owners. *Post*, at 951. But the dissent's account is impossible to reconcile with history and precedent. As we have noted, plenty of allotment agreements during this era included precisely the language of cession and com-

C

If allotment by itself won't work, Oklahoma seeks to prove disestablishment by pointing to other ways Congress intruded on the Creek's promised right to self-governance during the allotment era. It turns out there were many. For example, just a few years before the 1901 Creek Allotment Agreement, and perhaps in an effort to pressure the Tribe to the negotiating table, Congress abolished the Creeks' tribal courts and transferred all pending civil and criminal cases to the U. S. Courts of the Indian Territory. Curtis Act of 1898, §28, 30 Stat. 504–505. Separately, the Creek Allotment Agreement provided that tribal ordinances "affecting the lands of the tribe, or of individuals after allotment, or the moneys or other property of the tribe, or of the citizens thereof" would not be valid until approved by the President of the United States. §42, 31 Stat. 872.

Plainly, these laws represented serious blows to the Creek. But, just as plainly, they left the Tribe with significant sovereign functions over the lands in question. For example, the Creek Nation retained the power to collect taxes, operate schools, legislate through tribal ordinances, and, soon, oversee the federally mandated allotment process. §§39, 40, 42, *id.*, at 871–872; *Buster* v. *Wright*, 135 F. 947, 949–950, 953–954 (CA8 1905). And, in its own way, the congressional incursion on tribal legislative processes only served to prove the power: Congress would have had no need to subject

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pensation that the dissent says it would make "little sense" to find there. And this Court has confirmed time and again that allotment agreements without such language do not necessarily disestablish or diminish the reservation at issue. See *Mattz* v. *Arnett*, 412 U. S. 481, 497 (1973); *Seymour* v. *Superintendent* of *Wash. State Penitentiary*, 368 U. S. 351, 358 (1962). The dissent's only answer is to suggest that allotment combined with *other* statutes limiting the Creek Nation's governing authority amounted to disestablishment—in other words that it's the arguments in the *next* section that really do the work.

tribal legislation to Presidential review if the Tribe lacked any authority to legislate. Grave though they were, these congressional intrusions on pre-existing treaty rights fell short of eliminating all tribal interests in the land.

Much more ominously, the 1901 allotment agreement ended by announcing that the Creek tribal government "shall not continue" past 1906, although the agreement quickly qualified that statement, adding the proviso "subject to such further legislation as Congress may deem proper." § 46, 31 Stat. 872. Thus, while suggesting that the tribal government *might* end in 1906, Congress also necessarily understood it had not ended in 1901. All of which was consistent with the Legislature's general practice of taking allotment as a first, not final, step toward disestablishment and dissolution.

When 1906 finally arrived, Congress adopted the Five Civilized Tribes Act. But instead of dissolving the tribal government as some may have expected, Congress "deem[ed] proper" a different course, simply cutting away further at the Tribe's autonomy. Congress empowered the President to remove and replace the principal chief of the Creek, prohibited the tribal council from meeting more than 30 days a year, and directed the Secretary of the Interior to assume control of tribal schools. §§ 6, 10, 28, 34 Stat. 139–140, 148. The Act also provided for the handling of the Tribe's funds, land, and legal liabilities in the event of dissolution. §§ 11, 27, *id.*, at 141, 148. Despite these additional incursions on tribal authority, however, Congress expressly recognized the Creek's "tribal existence and present tribal governmen[t]" and "continued [them] in full force and effect for all purposes authorized by law." § 28, *id.*, at 148.

In the years that followed, Congress continued to adjust its arrangements with the Tribe. For example, in 1908, the Legislature required Creek officials to turn over all "tribal properties" to the Secretary of the Interior. Act of May 27,

1908, § 13, 35 Stat. 316. The next year, Congress sought the Creek National Council's release of certain money claims against the U. S. government. Act of Mar. 3, 1909, ch. 263, 35 Stat. 781, 805. And, further still, Congress offered the Creek Nation a one-time opportunity to file suit in the federal Court of Claims for "any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation." Act of May 24, 1924, ch. 181, 43 Stat. 139; see, *e. g.*, *United States* v. *Creek Nation*, 295 U. S. 103 (1935). But Congress never withdrew its recognition of the tribal government, and none of its adjustments would have made any sense if Congress thought it had already completed that job.

Indeed, with time, Congress changed course completely. Beginning in the 1920s, the federal outlook toward Native Americans shifted "away from assimilation policies and toward more tolerance and respect for traditional aspects of Indian culture." 1 Cohen § 1.05. Few in 1900 might have foreseen such a profound "reversal of attitude" was in the making or expected that "new protections for Indian rights," including renewed "support for federally defined tribalism," lurked around the corner. *Ibid.*; see also M. Scherer, Imperfect Victories: The Legal Tenacity of the Omaha Tribe, 1945–1995, pp. 2–4 (1999). But that is exactly what happened. Pursuant to this new national policy, in 1936, Congress authorized the Creek to adopt a constitution and bylaws, see Act of June 26, 1936, § 3, 49 Stat. 1967, enabling the Creek government to resume many of its previously suspended functions. *Muscogee (Creek) Nation* v. *Hodel*, 851 F. 2d 1439, 1442–1447 (CADC 1988).[6]

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[6] The dissent calls it "fantasy" to suggest that Congress evinced "any unease about extinguishing the Creek domain" because Congress "did what it set out to do: transform a reservation into a State." *Post*, at 959. The dissent stresses, too, that the Creek were afforded U. S. citizenship and the right to vote. *Post*, at 958. But the only thing implausible here

The Creek Nation has done exactly that. In the intervening years, it has ratified a new constitution and established three separate branches of government. *Ibid.*; see Muscogee Creek Nation (MCN) Const., Arts. V, VI, and VII. Today the Nation is led by a democratically elected Principal Chief, Second Chief, and National Council; operates a police force and three hospitals; commands an annual budget of more than $350 million; and employs over 2,000 people. Brief for Muscogee (Creek) Nation as *Amicus Curiae* 36–39. In 1982, the Nation passed an ordinance reestablishing the criminal and civil jurisdiction of its courts. See *Hodel*, 851 F. 2d, at 1442, 1446–1447 (confirming Tribe's authority to do so). The territorial jurisdiction of these courts extends to any Indian country within the Tribe's territory as defined by the Treaty of 1866. MCN Stat. 27, §1–102(A). And the State of Oklahoma has afforded full faith and credit to its judgments since at least 1994. See *Barrett* v. *Barrett*, 878 P. 2d 1051, 1054 (Okla. 1994); Full Faith and Credit of Tribal Courts, Okla. State Cts. Network (Apr. 18, 2019), https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=458214.

Maybe some of these changes happened for altruistic reasons, maybe some for other reasons. It seems, for example, that at least certain Members of Congress hesitated about disestablishment in 1906 because they feared any reversion of the Creek lands to the public domain would trigger a stat-

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is the suggestion that "creat[ing] a new State" or enfranchising Native Americans implies an "intent to terminate" any and all reservations within a State's boundaries. *Post*, at 951. This Court confronted—and rejected—that sort of argument long ago in *United States* v. *Sandoval*, 231 U. S. 28, 47–48 (1913). The dissent treats that case as a one-off: special because "the tribe in *Sandoval*, the Pueblo Indians of New Mexico, retained a rare communal title to their lands." *Post*, at 957, n. 4. But *Sandoval* is not only a case about the Pueblos; it is a foundational precedent recognizing that Congress can welcome Native Americans to participate in a broader political community without sacrificing their tribal sovereignty.

utory commitment to hand over portions of these lands to already powerful railroad interests. See, *e. g.*, 40 Cong. Rec. 2976 (1906) (Sen. McCumber); *id.*, at 3053 (Sen. Aldrich). Many of those who advanced the reorganization efforts of the 1930s may have done so more out of frustration with efforts to assimilate Native Americans than any disaffection with assimilation as the ultimate goal. See 1 Cohen § 1.05; Scherer, Imperfect Victories, at 2–4. But whatever the confluence of reasons, in all this history there simply arrived no moment when any Act of Congress dissolved the Creek Tribe or disestablished its reservation. In the end, Congress moved in the opposite direction.[7]

D

Ultimately, Oklahoma is left to pursue a very different sort of argument. Now, the State points to historical practices and demographics, both around the time of and long after the enactment of all the relevant legislation. These facts, the State submits, are enough by themselves to prove disestablishment. Oklahoma even classifies and categorizes how we should approach the question of disestablishment into three "steps." It reads *Solem* as requiring us to examine the laws passed by Congress at the first step, contemporary events at the second, and even later events and demographics at the third. On the State's account, we have so far finished only the first step; two more await.

This is mistaken. When interpreting Congress's work in this arena, no less than any other, our charge is usually to ascertain and follow the original meaning of the law before

[7] The dissent ultimately concedes what Oklahoma will not: that no "individual congressional action or piece of evidence, standing alone, disestablished the Creek reservation." *Post*, at 946. Instead we're told we must consider "all of the relevant Acts of Congress together, viewed in light of contemporaneous and subsequent contextual evidence." *Ibid.* So, once again, the dissent seems to suggest that it's the arguments in the *next* section that will get us across the line to disestablishment.

us. *New Prime Inc.* v. *Oliveira*, 586 U. S. 105, 113 (2019). That is the only "step" proper for a court of law. To be sure, if during the course of our work an ambiguous statutory term or phrase emerges, we will sometimes consult contemporaneous usages, customs, and practices to the extent they shed light on the meaning of the language in question at the time of enactment. *Ibid.* But Oklahoma does not point to any ambiguous language in any of the relevant statutes that could plausibly be read as an Act of disestablishment. Nor may a court favor contemporaneous or later practices *instead of* the laws Congress passed. As *Solem* explained, "[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." 465 U. S., at 470 (citing *United States* v. *Celestine*, 215 U. S. 278, 285 (1909)).

Still, Oklahoma reminds us that *other* language in *Solem* isn't so constrained. In particular, the State highlights a passage suggesting that "[w]here non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred." 465 U. S., at 471. While acknowledging that resort to subsequent demographics was "an unorthodox and potentially unreliable method of statutory interpretation," the Court seemed nonetheless taken by its "obvious practical advantages." *Id.*, at 472, n. 13, 471.

Out of context, statements like these might suggest historical practices or current demographics can suffice to disestablish or diminish reservations in the way Oklahoma envisions. But, in the end, *Solem* itself found these kinds of arguments provided "no help" in resolving the dispute before it. *Id.*, at 478. Notably, too, *Solem* suggested that whatever utility historical practice or demographics might have was "demonstrated" by this Court's earlier decision in *Rosebud Sioux Tribe* v. *Kneip*, 430 U. S. 584 (1977). See *Solem*,

465 U. S., at 470, n. 10. And *Rosebud Sioux* hardly endorsed the use of such sources to find disestablishment. Instead, based on the statute at issue there, the Court came "to the firm conclusion that congressional intent" was to diminish the reservation in question. 430 U. S., at 603. At that point, the Tribe sought to cast doubt on the clear import of the text by citing subsequent historical events—and the Court rejected the Tribe's argument *exactly because* this kind of evidence could not overcome congressional intent as expressed in a statute. *Id.*, at 604–605.

This Court has already sought to clarify that extratextual considerations hardly supply the blank check Oklahoma supposes. In *Parker*, for example, we explained that "[e]vidence of the subsequent treatment of the disputed land . . . has 'limited interpretive value.'" 577 U. S., at 493 (quoting *South Dakota* v. *Yankton Sioux Tribe*, 522 U. S. 329, 355 (1998)).[8] *Yankton Sioux* called it the "least compelling" form of evidence. *Id.*, at 356. Both cases emphasized that what value such evidence has can only be *interpretative*—evidence that, at best, might be used to the extent it sheds light on what the terms found in a statute meant at

[8] The dissent suggests *Parker* meant to say only that evidence of subsequent treatment had limited interpretative value "*in that case*." *Post*, at 949. But the dissent includes just a snippet of the relevant passage. Read in full, there is little room to doubt *Parker* invoked a general rule:

"This subsequent demographic history cannot overcome our conclusion that Congress did not intend to diminish the reservation in 1882. And it is not our rule to 'rewrite' the 1882 Act in light of this subsequent demographic history. *DeCoteau*, 420 U. S., at 447. After all, evidence of the changing demographics of disputed land is 'the least compelling' evidence in our diminishment analysis, for '[e]very surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the "Indian character" of the reservation, yet we have repeatedly stated that not every surplus land Act diminished the affected reservation.' *Yankton Sioux*, 522 U. S., at 356. . . . Evidence of the subsequent treatment of the disputed land by Government officials likewise has 'limited interpretive value.' *Id.*, at 355." 577 U. S., at 493.

the time of the law's adoption, not as an alternative means of proving disestablishment or diminishment.

To avoid further confusion, we restate the point. There is no need to consult extratextual sources when the meaning of a statute's terms is clear. Nor may extratextual sources overcome those terms. The only role such materials can properly play is to help "clear up . . . not create" ambiguity about a statute's original meaning. *Milner* v. *Department of Navy*, 562 U. S. 562, 574 (2011). And, as we have said time and again, once a reservation is established, it retains that status "until Congress explicitly indicates otherwise." *Solem*, 465 U. S., at 470 (citing *Celestine*, 215 U. S., at 285); see also *Yankton Sioux*, 522 U. S., at 343 ("[O]nly Congress can alter the terms of an Indian treaty by diminishing a reservation, and its intent to do so must be clear and plain" (citation and internal quotation marks omitted)).

The dissent charges that we have failed to take account of the "compelling reasons" for considering extratextual evidence as a matter of course. *Post*, at 948. But Oklahoma and the dissent have cited no case in which this Court has found a reservation disestablished without first concluding that a statute required that result. Perhaps they wish this case to be the first. To follow Oklahoma and the dissent down that path, though, would only serve to allow States and courts to finish work Congress has left undone, usurp the legislative function in the process, and treat Native American claims of statutory right as less valuable than others. None of that can be reconciled with our normal interpretive rules, let alone our rule that disestablishment may not be lightly inferred and treaty rights are to be construed in favor of, not against, tribal rights. *Solem*, 465 U. S., at 472.[9]

[9] In an effort to support its very different course, the dissent stitches together quotes from *Rosebud Sioux Tribe* v. *Knelp*, 430 U. S. 584 (1977), and *South Dakota* v. *Yankton Sioux Tribe*, 522 U. S. 329 (1998). *Post*, at 947. But far from supporting the dissent, both cases emphasize that "[t]he focus of our inquiry is congressional intent," *Rosebud*, 430 U. S., at

To see the perils of substituting stories for statutes, we need look no further than the stories we are offered in the case before us. Put aside that the Tribe could tell more than a few stories of its own: Take just the evidence on which Oklahoma and the dissent wish to rest their case. First, they point to Oklahoma's long historical prosecutorial practice of asserting jurisdiction over Indians in state court, even for serious crimes on the contested lands. If the Creek lands really were part of a reservation, the argument goes, all of these cases should have been tried in federal court pursuant to the MCA. Yet, until the Tenth Circuit's *Murphy* decision a few years ago, no court embraced that possibility. See *Murphy*, 875 F. 3d 896. Second, they offer statements from various sources to show that "everyone" in the late 19th and early 20th century thought the reservation system—and the Creek Nation—would be disbanded soon. Third, they stress that non-Indians swiftly moved on to the reservation in the early part of the last century, that Tribe members today constitute a small fraction of those now residing on the land, and that the area now includes a "vibrant city with expanding aerospace, healthcare, technology, manufacturing, and transportation sectors." Brief for Petitioner in *Sharp* v. *Murphy*, O. T. 2018, No. 17–1107, p. 15. All this history, we are told, supplies "compelling" evidence about the lands in question.

Maybe so, but even taken on its own terms none of this evidence tells the story we are promised. Start with the State's argument about its longstanding practice of asserting jurisdiction over Native Americans. Oklahoma proceeds on the implicit premise that its historical practices are unlikely

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588, n. 4; see also *Yankton Sioux*, 522 U. S., at 343, and merely acknowledge that extratextual sources may help resolve ambiguity about Congress's directions. The dissent's appeal to *Solem* fares no better. As we have seen, the extratextual sources in S*olem* only confirmed what the relevant statute already suggested—that the reservation in question was not diminished or disestablished. 465 U. S., at 475–476.

to have defied the mandates of the federal MCA. That premise, though, appears more than a little shaky. In conjunction with the MCA, § 1151(a) not only sends to federal court certain major crimes committed by Indians on reservations. Two doors down, in § 1151(c), the statute does the same for major crimes committed by Indians on "Indian allotments, the Indian titles to which have not been extinguished." Despite this direction, however, Oklahoma state courts erroneously entertained prosecutions for major crimes by Indians on Indian allotments for *decades*, until state courts finally disavowed the practice in 1989. See *State* v. *Klindt*, 782 P. 2d 401, 404 (Okla. Crim. App. 1989) (overruling *Ex parte Nowabbi*, 60 Okla. Crim. III, 61 P. 2d 1139 (1936)); see also *United States* v. *Sands*, 968 F. 2d 1058, 1062–1063 (CA10 1992). And if the State's prosecution practices disregarded § 1151(c) for so long, it's unclear why we should take those same practices as a reliable guide to the meaning and application of § 1151(a).

Things only get worse from there. Why did Oklahoma historically think it could try Native Americans for any crime committed on restricted allotments or anywhere else? Part of the explanation, Oklahoma tells us, is that it thought the eastern half of the State was always categorically exempt from the terms of the federal MCA. So whether a crime was committed on a restricted allotment, a reservation, or land that wasn't Indian country at all, to Oklahoma it just didn't matter. In the State's view, when Congress adopted the Oklahoma Enabling Act that paved the way for its admission to the Union, it carved out a special exception to the MCA for the eastern half of the State where the Creek lands can be found. By Oklahoma's own admission, then, for decades its historical practices in the area in question didn't even *try* to conform to the MCA, all of which makes the State's past prosecutions a meaningless guide for determining what counted as Indian country. As it turns out, too, Oklahoma's claim to a special exemption was itself mistaken,

yet one more error in historical practice that even the dissent does not attempt to defend. See Part V, *infra*.[10]

To be fair, Oklahoma is far from the only State that has overstepped its authority in Indian country. Perhaps often in good faith, perhaps sometimes not, others made similar mistakes in the past. But all that only underscores further the danger of relying on state practices to determine the meaning of the federal MCA. See, *e. g.*, *Negonsott*, 507 U. S., at 106–107 ("[I]n practice, Kansas had exercised jurisdiction over all offenses committed on Indian reservations involving Indians" (citing memorandum from Secretary of the Interior, H. R. Rep. No. 1999, 76th Cong., 3d Sess., 4 (1940))); Scherer, Imperfect Victories, at 18 (describing "nationwide jurisdictional confusion" as a result of the MCA); Cohen § 6.04(4)(a) ("Before 1942, the state of New York regularly exercised or claimed the right to exercise jurisdiction over the New York reservations, but a federal court decision in that year raised questions about the validity of state jurisdiction" (footnote omitted)); Brief for United States as *Amicus Curiae* in *Sharp* v. *Murphy*, O. T. 2018, No. 17–1107, pp. 7a–8a (Letter from Secretary of the Interior, Mar. 27, 1963) (noting that many States have asserted criminal jurisdiction over Indians without an apparent basis in a federal law).[11]

[10] The dissent tries to avoid this inconvenient history by distinguishing fee allotments from reservations, noting that the two categories are legally distinct and geographically incommensurate. *Post*, at 964. But this misses the point: The *reason* that Oklahoma thought it could prosecute Indians for crimes on restricted allotments applied with equal force to reservations. And it hardly "stretches the imagination" to think that reason was wrong, *post*, at 965, when the dissent itself does not dispute our rejection of it in Part V.

[11] Unable to answer Oklahoma's admitted error about the very federal criminal statute before us, the dissent travels far afield, pointing to the fact an Oklahoma court heard a civil case in 1915 about an inheritance—involving members of a different Tribe—as "evidence" Congress disestablished the Creek Reservation. See *post*, at 957 (citing *Palmer* v. *Cully*, 52 Okla. 454, 463–469, 153 P. 154, 157–158 (1915) (*per curiam*)). But even assuming that Oklahoma courts exercised civil jurisdiction over Creek

Oklahoma next points to various statements during the allotment era which, it says, show that even the Creek understood their reservation was under threat. And there's no doubt about that. By 1893, the leadership of the Creek Nation saw what the federal government had in mind: "They [the federal government] do not deny any of our rights under treaty, but say they will go to the people themselves and confer with them and urge upon them the necessity of a change in their present condition, and upon their refusal will force a change upon them." P. Porter & A. McKellop, Printed Statement of Creek Delegates, reprinted in Creek Delegation Documents 8–9 (Feb. 9, 1893). Not a decade later, and as a result of these forced changes, the leadership recognized that "'[i]t would be difficult, if not impossible to successfully operate the Creek government now.'" App. to Brief for Respondent 8a (Message to Creek National Council (May 7, 1901), reprinted in The Indian Journal (May 10, 1901)). Surely, too, the future looked even bleaker: "'[T]he remnant of a government now accorded to us can be expected to be maintained only until all settlements of our landed and other interests growing out of treaty stipulations with the government of the United States shall have been settled.'" *Ibid.*

But note the nature of these statements. The Creek Nation recognized that the federal government *will* seek to get popular support or otherwise *would* force change. Likewise, the Tribe's government *would* continue for only so long. These were prophesies, and hardly groundbreaking ones at that. After all, the 1901 Creek Allotment Agreement explicitly said that the tribal government "shall not

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members, too, the dissent never explains why this jurisdiction implies the Creek Reservation must have been disestablished. After all, everyone agrees that the Creeks were prohibited from having their own courts at the time. So it should be no surprise that some Creek might have resorted to state courts in hope of resolving their disputes.

continue" past 1906. §46, 31 Stat. 872. So what might statements like these tell us that isn't already evident from the statutes themselves? Oklahoma doesn't suggest they shed light on the meaning of some disputed and ambiguous statutory direction. More nearly, the State seeks to render the Creek's fears self-fulfilling.[12]

We are also asked to consider commentary from those outside the Tribe. In particular, the dissent reports that the federal government "operated" on the "understanding" that the reservation was disestablished. *Post*, at 968. In support of its claim, the dissent highlights a 1941 statement from Felix Cohen. Then serving as an official at the Interior Department, Cohen opined that "'all offenses by or against Indians' in the former Indian Territory 'are subject to State laws.'" *Ibid.* (quoting App. to Supp. Reply Brief for Petitioner in *Sharp* v. *Murphy*, O. T. 2018, No. 17–1107, p. 1a (Memorandum for Commissioner of Indian Affairs (July 11, 1941)). But that statement is incorrect. As we have just seen, Oklahoma's courts acknowledge that the State lacks jurisdiction over Indian crimes on Indian allotments. See *Klindt*, 782 P. 2d, at 403–404. And the dissent does not dispute that Oklahoma is without authority under the MCA to try Indians for crimes committed on restricted allotments and any reservation. All of which highlights the pitfalls of elevating commentary over the law.[13]

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[12] The dissent finds the statements of the Creek leadership so probative that it cites them not just as evidence about the meaning of treaties the Tribe signed but even as evidence about the meaning of general purpose laws the Creek had no hand in. See *post*, at 962 (citing Chief Porter's views on the legal effects of the Oklahoma Enabling Act). That is quite a stretch from using tribal statements as "historical evidence of 'the manner in which [treaties were] negotiated' with the . . . Tribe." *Parker*, 577 U. S., at 491 (quoting *Solem* v. *Bartlett*, 465 U. S. 463, 471 (1984)).

[13] Part of the reason for Cohen's error might be explained by a portion of the memorandum the dissent leaves unquoted. Cohen concluded that Oklahoma was free to try Indians anywhere in the State because, among

Finally, Oklahoma points to the speedy and persistent movement of white settlers onto Creek lands throughout the late 19th and early 20th centuries. But this history proves no more helpful in discerning statutory meaning. Maybe, as Oklahoma supposes, it suggests that some white settlers in good faith thought the Creek lands no longer constituted a reservation. But maybe, too, some didn't care and others never paused to think about the question. Certain historians have argued, for example, that the loss of Creek land ownership was accelerated by the discovery of oil in the region during the period at issue here. A number of the federal officials charged with implementing the laws of Congress were apparently openly conflicted, holding shares or board positions in the very oil companies who sought to deprive Indians of their lands. A. Debo, And Still the Waters Run 86–87, 117–118 (1940). And for a time Oklahoma's courts appear to have entertained sham competency and guardianship proceedings that divested Tribe members of oil rich allotments. *Id.*, at 104–106, 233–234; Brief for Historians et al. as *Amici Curiae* 26–30. Whatever else might be

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other things, the Oklahoma Enabling Act "transfer[red] . . . jurisdiction from the Federal courts to the State courts upon the establishment of the State of Oklahoma." App. to Supp. Reply Brief for Petitioner in *Sharp* v. *Murphy*, O. T. 2018, No. 17–1107, p. 1a (Memorandum for Commissioner of Indian Affairs (July 11, 1941)). Yet, as we explore below, the Oklahoma Enabling Act did *not* send cases covered by the federal MCA to state court. See Part V, *infra*. Other, contemporaneous Interior Department memoranda acknowledged that Oklahoma state courts had simply "assumed jurisdiction" over cases arising on restricted allotments without any clear authority in the Oklahoma Enabling Act or the MCA, and much the same appears to have occurred here. App. to Supp. Reply Brief for Respondent in *Sharp* v. *Murphy*, O. T. 2018, No. 17–1107, p. 1a (Memorandum from N. Gray, Dept. of Interior, for Mr. Flanery (Aug. 12, 1942)). So rather than Oklahoma and the United States having a "shared understanding" that Congress had disestablished the Creek Reservation, *post*, at 963, it seems more accurate to say that for many years much uncertainty remained about whether the MCA applied in eastern Oklahoma.

said about the history and demographics placed before us, they hardly tell a story of unalloyed respect for tribal interests.[14]

In the end, only one message rings true. Even the carefully selected history Oklahoma and the dissent recite is not nearly as tidy as they suggest. It supplies us with little help in discerning the law's meaning and much potential for mischief. If anything, the persistent if unspoken message here seems to be that we should be taken by the "practical advantages" of ignoring the written law. How much easier it would be, after all, to let the State proceed as it has always assumed it might. But just imagine what it would mean to indulge that path. A State exercises jurisdiction over Native Americans with such persistence that the practice seems normal. Indian landowners lose their titles by fraud or otherwise in sufficient volume that no one remembers whose land it once was. All this continues for long enough that a reservation that was once beyond doubt becomes questionable, and then even farfetched. Sprinkle in a few predictions here, some contestable commentary there, and the job

[14] The dissent asks us to examine a hodge-podge of other, but no more compelling, material. For example, the dissent points to later statutes that do no more than confirm there are former reservations in the State of Oklahoma. *Post*, at 966–967. It cites legislative history to show that Congress had the Creek Nation—or, at least, its neighbors—in mind when it added these in 1988. *Post*, at 967, n. 7. The dissent cites a Senate Report from 1989 and post-1980 statements made by representatives of other tribes. *Post*, at 966, 968–969. It highlights three occasions on which this Court referred to something like a "former Creek Nation," though it neglects to add that in each the Court was referring to the loss of the Nation's communal fee title, not its sovereignty. *Grayson* v. *Harris*, 267 U. S. 352, 353, 357 (1925); *Woodward* v. *De Graffenreid*, 238 U. S. 284, 289–290 (1915); *Washington* v. *Miller*, 235 U. S. 422, 423–425 (1914). The dissent points as well to a single instance in which the Creek Nation disclaimed reservation boundaries for purposes of litigation in a lower court, *post*, at 969, but ignores that the Creek Nation has repeatedly filed briefs in this Court to the contrary. This is thin gruel to set against treaty promises enshrined in statutes.

is done, a reservation is disestablished. None of these moves would be permitted in any other area of statutory interpretation, and there is no reason why they should be permitted here. That would be the rule of the strong, not the rule of law.

IV

Unable to show that Congress disestablished the Creek Reservation, Oklahoma next tries to turn the tables in a completely different way. Now, it contends, Congress never established a reservation in the first place. Over all the years, from the federal government's first guarantees of land and self-government in 1832 and through the litany of promises that followed, the Tribe never received a reservation. Instead, what the Tribe has had all this time qualifies only as a "dependent Indian community."

Even if we were to accept Oklahoma's bold feat of reclassification, however, it's hardly clear the State would win this case. "Reservation[s]" and "Indian allotments, the Indian titles to which have not been extinguished," qualify as Indian country under subsections (a) and (c) of § 1151. But "dependent Indian communities" *also* qualify as Indian country under subsection (b). So Oklahoma lacks jurisdiction to prosecute Mr. McGirt whether the Creek lands happen to fall in one category or another.

About this, Oklahoma is at least candid. It admits the entire point of its reclassification exercise is to avoid *Solem*'s rule that only Congress may disestablish a reservation. And to achieve that, the State has to persuade us not only that the Creek lands constitute a "dependent Indian community" rather than a reservation. It *also* has to convince us that we should announce a rule that dependent Indian community status can be lost more easily than reservation status, maybe even by the happenstance of shifting demographics.

To answer this argument, it's enough to address its first essential premise. Holding that the Creek never had a res-

ervation would require us to stand willfully blind before a host of federal statutes. Perhaps that is why the Solicitor General, who supports Oklahoma's disestablishment argument, refuses to endorse this alternative effort. It also may be why Oklahoma introduced this argument for affirmance only for the first time in this Court. And it may be why the dissent makes no attempt to defend Oklahoma here. What are we to make of the federal government's repeated treaty promises that the land would be "solemnly guarantied to the Creek Indians," that it would be a "permanent home," "forever set apart," in which the Creek would be "secured in the unrestricted right of self-government"? What about Congress's repeated references to a "Creek reservation" in its statutes? No one doubts that this kind of language normally suffices to establish a federal reservation. So what could possibly make this case different?

Oklahoma's answer only gets more surprising. *The* reason that the Creek's lands are not a reservation, we're told, is that the Creek Nation originally held fee title. Recall that the Indian Removal Act authorized the President not only to "solemnly . . . assure the tribe . . . that the United States will forever secure and guaranty to them . . . the country so exchanged with them," but also, "if they prefer it, . . . the United States will cause a patent or grant to be made and executed to them for the same." 4 Stat. 412. Recall that the Creek insisted on this additional protection when negotiating the Treaty of 1833, and in fact received a land patent pursuant to that treaty some 19 years later. In the eyes of Oklahoma, the Tribe's choice on this score was a fateful one. By asking for (and receiving) fee title to their lands, the Creek inadvertently made their tribal sovereignty easier to divest rather than harder.

The core of Oklahoma's argument is that a reservation must be land "reserved from sale." *Celestine*, 215 U. S., at 285. Often, that condition is satisfied when the federal government promises to hold aside a particular piece of federally

owned land in trust for the benefit of the Tribe. And, admittedly, the Creek's arrangement was different, because the Tribe held "fee simple title, not the usual Indian right of occupancy." *United States* v. *Creek Nation*, 295 U. S. 103, 109 (1935). Still, as we explained in Part II, the land *was* reserved from sale in the very real sense that the government could not "give the tribal lands to others, or to appropriate them to its own purposes," without engaging in "'an act of confiscation.'" *Id.*, at 110.

It's hard to see, too, how any difference between these two arrangements might work to the detriment of the Tribe. Just as we have never insisted on any particular form of words when it comes to disestablishing a reservation, we have never done so when it comes to establishing one. See *Minnesota* v. *Hitchcock*, 185 U. S. 373, 390 (1902) ("[I]n order to create a reservation it is not necessary that there should be a formal cession or a formal act setting apart a particular tract. It is enough that from what has been done there results a certain defined tract appropriated to certain purposes"). As long as 120 years ago, the federal court for the Indian Territory recognized all this and rightly rejected the notion that fee title is somehow inherently incompatible with reservation status. *Maxey* v. *Wright*, 54 S. W. 807, 810 (Indian Terr. 1900).

By now, Oklahoma's next move will seem familiar. Seeking to sow doubt around express treaty promises, it cites some stray language from a statute that does not control here, a piece of congressional testimony there, and the scattered opinions of agency officials everywhere in between. See, *e. g.*, Act of July 31, 1882, ch. 360, 22 Stat. 179 (referring to Creek land as "Indian country" as opposed to an "Indian reservation"); S. Doc. No. 143, 59th Cong., 1st. Sess., 33 (1906) (Chief of Choctaw Nation—which had an arrangement similar to the Creek's—testified that both Tribes "object to being classified with the reservation Indians"); Dept. of Interior, Census Office, Report on Indians Taxed and Indians

Not Taxed in the U. S. 284 (1894) (Creeks and neighboring Tribes were "not on the ordinary Indian reservation, but on lands patented to them by the United States"). Oklahoma stresses that this Court even once called the Creek lands a "dependent Indian community," though it used that phrase in passing and only to show that the Tribe's "property and affairs were subject to the control and management of that government"—a point that would also be true if the lands were a reservation. *Creek Nation*, 295 U. S., at 109. Unsurprisingly given the Creek Nation's nearly 200-year occupancy of these lands, both sides have turned up a few clues suggesting the label "reservation" either did or did not apply. One thing everyone can agree on is this history is long and messy.

But the most authoritative evidence of the Creek's relationship to the land lies not in these scattered references; it lies in the treaties and statutes that promised the land to the Tribe in the first place. And, if not for the Tribe's fee title to its land, no one would question that these treaties and statutes created a reservation. So the State's argument inescapably boils down to the untenable suggestion that, when the federal government agreed to offer more protection for tribal lands, it really provided less. All this time, fee title was nothing more than another trap for the wary.

V

That leaves Oklahoma to attempt yet another argument in the alternative. We alluded to it earlier in Part III. Now, the State accepts for argument's sake that the Creek land is a reservation and thus "Indian country" for purposes of the Major Crimes Act. It accepts, too, that this would normally mean serious crimes by Indians on the Creek Reservation would have to be tried in federal court. But, the State tells us, none of that matters; everything the parties have briefed and argued so far is beside the point. It's all irrelevant because it turns out the MCA just doesn't apply to the eastern

half of Oklahoma, and it never has. That federal law may apply to other States, even to the western half of Oklahoma itself. But eastern Oklahoma is and has always been exempt. So whether or not the Creek have a reservation, the State's historic practices have always been correct and it remains free to try individuals like Mr. McGirt in its own courts.

Notably, the dissent again declines to join Oklahoma in its latest twist. And, it turns out, for good reason. In support of its argument, Oklahoma points to statutory artifacts from its territorial history. The State of Oklahoma was formed from two territories: the Oklahoma Territory in the west and Indian Territory in the east. Originally, it seems criminal prosecutions in the Indian Territory were split between tribal and federal courts. See Act of May 2, 1890, § 30, 26 Stat. 94. But, in 1897, Congress abolished that scheme, granting the U. S. Courts of the Indian Territory "exclusive jurisdiction" to try "all criminal causes for the punishment of any offense." Act of June 7, 1897, 30 Stat. 83. These federal territorial courts applied federal law and state law borrowed from Arkansas "to all persons . . . irrespective of race." *Ibid.* A year later, Congress abolished tribal courts and transferred all pending criminal cases to U. S. courts of the Indian Territory. Curtis Act of 1898, § 28, 30 Stat. 504–505. And, Oklahoma says, sending Indians to federal court and all others to state court would be inconsistent with this established and enlightened policy of applying the same law in the same courts to everyone.

Here again, however, arguments along these and similar lines have been "frequently raised" but rarely "accepted." *United States* v. *Sands*, 968 F. 2d 1058, 1061 (CA10 1992) (Kelly, J.). "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice* v. *Olson*, 324 U. S. 786, 789 (1945). Chief Justice Marshall, for example, held that Indian Tribes were "distinct political communities, having territorial boundaries, within which their authority is exclusive, . . . which is not

only acknowledged, but guarantied by the United States," a power dependent on and subject to no state authority. *Worcester* v. *Georgia*, 6 Pet. 515, 557 (1832); see also *McClanahan* v. *Arizona Tax Comm'n*, 411 U. S. 164, 168–169 (1973). And in many treaties, like those now before us, the federal government promised Indian Tribes the right to continue to govern themselves. For all these reasons, this Court has long "require[d] a clear expression of the intention of Congress" before the state or federal government may try Indians for conduct on their lands. *Ex parte Crow Dog*, 109 U. S. 556, 572 (1883).

Oklahoma cannot come close to satisfying this standard. In fact, the only law that speaks expressly here speaks *against* the State. When Oklahoma won statehood in 1907, the MCA applied immediately according to its plain terms. That statute, as phrased at the time, provided exclusive federal jurisdiction over qualifying crimes by Indians in "*any Indian reservation*" located within "the boundaries of *any State*." Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 385 (emphasis added); see also 18 U. S. C. § 1151 (defining "Indian country" even more broadly). By contrast, every one of the statutes the State directs us to merely discusses the assignment of cases among courts in the *Indian Territory*. They say nothing about the division of responsibilities between federal and state authorities after Oklahoma entered the Union. And however enlightened the State may think it was for territorial law to apply to all persons irrespective of race, some Tribe members may see things differently, given that the same policy entailed the forcible closure of tribal courts in defiance of treaty terms.

Left to hunt for some statute that might have rendered the MCA inapplicable in Oklahoma after statehood, the best the State can find is the Oklahoma Enabling Act. Congress adopted that law in preparation for Oklahoma's admission in 1907. Among its many provisions sorting out the details associated with Oklahoma's transition to statehood, the Enabling Act transferred all nonfederal cases pending in terri-

torial courts to Oklahoma's new state courts. Act of June 16, 1906, § 20, 34 Stat. 277; see also Act of Mar. 4, 1907, § 3, 34 Stat. 1287 (clarifying treatment of cases to which United States was a party). The State says this transfer made its courts the inheritors of the federal territorial courts' sweeping authority to try Indians for crimes committed on reservations.

But, at best, this tells only half the story. The Enabling Act not only sent all nonfederal cases pending in territorial courts to state court. It *also* transferred pending cases that arose "under the Constitution, laws, or treaties of the United States" to federal district courts. § 16, 34 Stat. 276. Pending criminal cases were thus transferred to federal court if the prosecution would have belonged there had the Territory been a State at the time of the crime. § 1, 34 Stat. 1287 (amending the Enabling Act). Nor did the statute make any distinction between cases arising in the former eastern (Indian) and western (Oklahoma) territories. So, simply put, the Enabling Act sent state-law cases to state court and federal-law cases to federal court. And serious crimes by Indians in Indian country were matters that arose under the federal MCA and thus properly belonged in federal court from day one, wherever they arose within the new State.

Maybe that's right, Oklahoma acknowledges, but that's not what happened. Instead, for many years the State continued to try Indians for crimes committed anywhere within its borders. But what can that tell us? The State identifies not a single ambiguous statutory term in the MCA that its actions might illuminate. And, as we have seen, its own courts have acknowledged that the State's historic practices deviated in meaningful ways from the MCA's terms. See *supra*, at 918–919. So, once more, it seems Oklahoma asks us to defer to its usual practices *instead of* federal law, something we will not and may never do.

That takes Oklahoma down to its last straw when it comes to the MCA. If Oklahoma lacks the jurisdiction to try Na-

tive Americans it has historically claimed, that means at the time of its entry into the Union *no one* had the power to try minor Indian-on-Indian crimes committed in Indian country. This much follows, Oklahoma reminds us, because the MCA provides federal jurisdiction only for major crimes, and no tribal forum existed to try lesser cases after Congress abolished the tribal courts in 1898. Curtis Act, § 28, 30 Stat. 504–505. Whatever one thinks about the plausibility of other discontinuities between federal law and state practice, the State says, it is unthinkable that Congress would have allowed such a significant "jurisdictional gap" to open at the moment Oklahoma achieved statehood.

But what the State considers unthinkable turns out to be easily imagined. Jurisdictional gaps are hardly foreign to this area of the law. See, *e. g.*, *Duro* v. *Reina*, 495 U. S. 676, 704–706 (1990) (Brennan, J., dissenting). Many tribal courts across the country were absent or ineffective during the early part of the last century, yielding just the sort of gaps Oklahoma would have us believe impossible. Indeed, this might be why so many States joined Oklahoma in prosecuting Indians without proper jurisdiction. The judicial mind abhors a vacuum, and the temptation for state prosecutors to step into the void was surely strong. See *supra*, at 919.

With time, too, Congress has filled many of the gaps Oklahoma worries about. One way Congress has done so is by reauthorizing tribal courts to hear minor crimes in Indian country. Congress chose exactly this course for the Creeks and others in 1936. Act of June 26, 1936, § 3, 49 Stat. 1967; see also *Hodel*, 851 F. 2d, at 1442–1446. Another option Congress has employed is to allow affected Indian tribes to consent to state criminal jurisdiction. 25 U. S. C. §§ 1321(a), 1326. Finally, Congress has sometimes expressly expanded state criminal jurisdiction in targeted bills addressing specific States. See, *e. g.*, 18 U. S. C. § 3243 (creating jurisdiction for Kansas); Act of May 31, 1946, ch. 279, 60 Stat. 229 (same for a reservation in North Dakota); Act of June 30,

1948, ch. 759, 62 Stat. 1161 (same for certain reservations in Iowa); 18 U. S. C. § 1162 (creating jurisdiction for six additional States). But Oklahoma doesn't claim to have complied with the requirements to assume jurisdiction voluntarily over Creek lands. Nor has Congress ever passed a law conferring jurisdiction on Oklahoma. As a result, the MCA applies to Oklahoma according to its usual terms: Only the federal government, not the State, may prosecute Indians for major crimes committed in Indian country.

VI

In the end, Oklahoma abandons any pretense of law and speaks openly about the potentially "transform[ative]" effects of a loss today. Brief for Respondent 43. Here, at least, the State is finally rejoined by the dissent. If we dared to recognize that the Creek Reservation was never disestablished, Oklahoma and the dissent warn, our holding might be used by other tribes to vindicate similar treaty promises. Ultimately, Oklahoma fears that perhaps as much as half its land and roughly 1.8 million of its residents could wind up within Indian country.

It's hard to know what to make of this self-defeating argument. Each tribe's treaties must be considered on their own terms, and the only question before us concerns the Creek. Of course, the Creek Reservation alone is hardly insignificant, taking in most of Tulsa and certain neighboring communities in Northeastern Oklahoma. But neither is it unheard of for significant non-Indian populations to live successfully in or near reservations today. See, *e. g.*, Brief for National Congress of American Indians Fund as *Amicus Curiae* 26–28 (describing success of Tacoma, Washington, and Mount Pleasant, Michigan); see also *Parker*, 577 U. S., at 492–494 (holding Pender, Nebraska, to be within Indian country despite tribe's absence from the disputed territory for more than 120 years). Oklahoma replies that its situation is different because the affected population here is large

and many of its residents will be surprised to find out they have been living in Indian country this whole time. But we imagine some members of the 1832 Creek Tribe would be just as surprised to find them there.

What are the consequences the State and dissent worry might follow from an adverse ruling anyway? Primarily, they argue that recognizing the continued existence of the Creek Reservation could unsettle an untold number of convictions and frustrate the State's ability to prosecute crimes in the future. But the MCA applies only to certain crimes committed in Indian country by Indian defendants. A neighboring statute provides that federal law applies to a broader range of crimes by or against Indians in Indian country. See 18 U. S. C. § 1152. States are otherwise free to apply their criminal laws in cases of non-Indian victims and defendants, including within Indian country. See *McBratney*, 104 U. S., at 624. And Oklahoma tells us that somewhere between 10% and 15% of its citizens identify as Native American. Given all this, even Oklahoma admits that the vast majority of its prosecutions will be unaffected whatever we decide today.

Still, Oklahoma and the dissent fear, "[t]housands" of Native Americans like Mr. McGirt "wait in the wings" to challenge the jurisdictional basis of their state-court convictions. Brief for Respondent 3. But this number is admittedly speculative, because many defendants may choose to finish their state sentences rather than risk reprosecution in federal court where sentences can be graver. Other defendants who do try to challenge their state convictions may face significant procedural obstacles, thanks to well-known state and federal limitations on postconviction review in criminal proceedings.[15]

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[15] For example, Oklahoma appears to apply a general rule that "issues that were not raised previously on direct appeal, but which could have been raised, are waived for further review." *Logan* v. *State*, 2013 OK CR 2, ¶ 1, 293 P. 3d 969, 973. Indeed, JUSTICE THOMAS contends that this

In any event, the magnitude of a legal wrong is no reason to perpetuate it. When Congress adopted the MCA, it broke many treaty promises that had once allowed tribes like the Creek to try their own members. But, in return, Congress allowed only the federal government, not the States, to try tribal members for major crimes. All our decision today does is vindicate that replacement promise. And if the threat of unsettling convictions cannot save a precedent of this Court, see *Ramos* v. *Louisiana*, 590 U. S. 83, 109–111 (2020) (plurality opinion), it certainly cannot force us to ignore a statutory promise when no precedent stands before us at all.

What's more, a decision for *either* party today risks upsetting some convictions. Accepting the State's argument that the MCA never applied in Oklahoma would preserve the state-court convictions of people like Mr. McGirt, but simultaneously call into question every *federal* conviction obtained for crimes committed on trust lands and restricted Indian allotments since Oklahoma recognized its jurisdictional error more than 30 years ago. See *supra*, at 918. It's a consequence of their own arguments that Oklahoma and the dissent choose to ignore, but one which cannot help but illustrate the difficulty of trying to guess how a ruling one way or the other might affect past cases rather than simply proceeding to apply the law as written.

Looking to the future, Oklahoma warns of the burdens federal and tribal courts will experience with a wider juris-

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state-law limitation on collateral review prevents us from considering even the case now before us. *Post*, at 974 (dissenting opinion). But while that state-law rule may often bar our way, it doesn't in this case. After noting a potential state-law obstacle, the Oklahoma Court of Criminal Appeals (OCCA) proceeded to address the merits of Mr. McGirt's federal MCA claim anyway. Because the OCCA's opinion "fairly appears to rest primarily on federal law, or to be interwoven with the federal law," and lacks any "plain statement" that it was relying on a state-law ground, we have jurisdiction to consider the federal-law question presented to us. See *Michigan* v. *Long*, 463 U. S. 1032, 1040–1041, 1044 (1983).

diction and increased caseload. But, again, for every jurisdictional reaction there seems to be an opposite reaction: recognizing that cases like Mr. McGirt's belong in federal court simultaneously takes them out of state court. So while the federal prosecutors might be initially understaffed and Oklahoma prosecutors initially overstaffed, it doesn't take a lot of imagination to see how things could work out in the end.

Finally, the State worries that our decision will have significant consequences for civil and regulatory law. The only question before us, however, concerns the statutory definition of "Indian country" as it applies in federal criminal law under the MCA, and often nothing requires other civil statutes or regulations to rely on definitions found in the criminal law. Of course, many federal civil laws and regulations do currently borrow from § 1151 when defining the scope of Indian country. But it is far from obvious why this collateral drafting choice should be allowed to skew our interpretation of the MCA, or deny its promised benefits of a federal criminal forum to tribal members.

It isn't even clear what the real upshot of this borrowing into civil law may be. Oklahoma reports that recognizing the existence of the Creek Reservation for purposes of the MCA might potentially trigger a variety of federal civil statutes and rules, including ones making the region eligible for assistance with homeland security, 6 U. S. C. §§ 601, 606, historical preservation, 54 U. S. C. § 302704, schools, 20 U. S. C. § 1443, highways, 23 U. S. C. § 120, roads, § 202, primary care clinics, 25 U. S. C. § 1616e–1, housing assistance, § 4131, nutritional programs, 7 U. S. C. §§ 2012, 2013, disability programs, 20 U. S. C. § 1411, and more. But what are we to make of this? Some may find developments like these unwelcome, but from what we are told others may celebrate them.

The dissent isn't so sanguine—it assures us, without further elaboration, that the consequences will be "drastic precisely because they depart from . . . more than a century [of] settled understanding." *Post*, at 973. The prediction is a

familiar one. Thirty years ago the Solicitor General warned that "[l]aw enforcement would be rendered very difficult" and there would be "grave uncertainty regarding the application" of state law if courts departed from decades of "long-held understanding" and recognized that the federal MCA applies to restricted allotments in Oklahoma. Brief for United States as *Amicus Curiae* in *Oklahoma* v. *Brooks*, O. T. 1988, No. 88–1147, pp. 2, 9, 18, 19. Yet, during the intervening decades none of these predictions panned out, and that fact stands as a note of caution against too readily crediting identical warnings today.

More importantly, dire warnings are just that, and not a license for us to disregard the law. By suggesting that our interpretation of Acts of Congress adopted a century ago should be inflected based on the costs of enforcing them today, the dissent tips its hand. Yet again, the point of looking at subsequent developments seems not to be determining the meaning of the laws Congress wrote in 1901 or 1906, but emphasizing the costs of taking them at their word.

Still, we do not disregard the dissent's concern for reliance interests. It only seems to us that the concern is misplaced. Many other legal doctrines—procedural bars, res judicata, statutes of repose, and laches, to name a few—are designed to protect those who have reasonably labored under a mistaken understanding of the law. And it is precisely because those doctrines exist that we are "fre[e] . . . to say what we know to be true . . . today, while leaving questions about . . . reliance interest[s] . . . for later proceedings crafted to account for them." *Ramos*, 590 U. S., at 109–110 (plurality opinion).

In reaching our conclusion about what the law demands of us today, we do not pretend to foretell the future and we proceed well aware of the potential for cost and conflict around jurisdictional boundaries, especially ones that have gone unappreciated for so long. But it is unclear why pessimism should rule the day. With the passage of time, Oklahoma and its Tribes have proven they can work successfully

together as partners. Already, the State has negotiated hundreds of intergovernmental agreements with tribes, including many with the Creek. See Okla. Stat., Tit. 74, § 1221 (2019 Cum. Supp.); Oklahoma Secretary of State, Tribal Compacts and Agreements, www.sos.ok.gov/tribal.aspx. These agreements relate to taxation, law enforcement, vehicle registration, hunting and fishing, and countless other fine regulatory questions. See Brief for Tom Cole et al. as *Amici Curiae* 13–19. No one before us claims that the spirit of good faith, "comity and cooperative sovereignty" behind these agreements, *id.*, at 20, will be imperiled by an adverse decision for the State today any more than it might be by a favorable one.[16] And, of course, should agreement prove elusive, Congress remains free to supplement its statutory directions about the lands in question at any time. It has no shortage of tools at its disposal.

*

The federal government promised the Creek a reservation in perpetuity. Over time, Congress has diminished that reservation. It has sometimes restricted and other times expanded the Tribe's authority. But Congress has never withdrawn the promised reservation. As a result, many of the arguments before us today follow a sadly familiar pattern. Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye. We reject that thinking. If Congress wishes to withdraw its promises, it must say so. Unlawful acts, performed long

[16] This sense of cooperation and a shared future is on display in this very case. The Creek Nation is supported by an array of leaders of other Tribes and the State of Oklahoma, many of whom had a role in negotiating exactly these agreements. See Brief for Tom Cole et al. as *Amici Curiae* 1 ("Amici are a former Governor, state Attorney General, cabinet members, and legislators of the State of Oklahoma, and two federally recognized Indian tribes, the Chickasaw Nation and Choctaw Nation of Oklahoma") (brief authored by Robert H. Henry, also a former State Attorney General and Chief Judge of the Tenth Circuit).

enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.

The judgment of the Court of Criminal Appeals of Oklahoma is

Reversed.

CHIEF JUSTICE ROBERTS, with whom JUSTICE ALITO and JUSTICE KAVANAUGH join, and with whom JUSTICE THOMAS joins except as to footnote 9, dissenting.

In 1997, the State of Oklahoma convicted petitioner Jimcy McGirt of molesting, raping, and forcibly sodomizing a four-year-old girl, his wife's granddaughter. McGirt was sentenced to 1,000 years plus life in prison. Today, the Court holds that Oklahoma lacked jurisdiction to prosecute McGirt—on the improbable ground that, unbeknownst to anyone for the past century, a huge swathe of Oklahoma is actually a Creek Indian reservation, on which the State may not prosecute serious crimes committed by Indians like McGirt. Not only does the Court discover a Creek reservation that spans three million acres and includes most of the city of Tulsa, but the Court's reasoning portends that there are four more such reservations in Oklahoma. The rediscovered reservations encompass the entire eastern half of the State—19 million acres that are home to 1.8 million people, only 10%–15% of whom are Indians.

Across this vast area, the State's ability to prosecute serious crimes will be hobbled and decades of past convictions could well be thrown out. On top of that, the Court has profoundly destabilized the governance of eastern Oklahoma. The decision today creates significant uncertainty for the State's continuing authority over any area that touches Indian affairs, ranging from zoning and taxation to family and environmental law.

None of this is warranted. What has gone unquestioned for a century remains true today: A huge portion of Oklahoma is not a Creek Indian reservation. Congress disestablished any reservation in a series of statutes leading up to Oklahoma statehood at the turn of the 19th century. The Court reaches the opposite conclusion only by disregarding the "well settled" approach required by our precedents. *Nebraska* v. *Parker*, 577 U. S. 481, 487 (2016).

Under those precedents, we determine whether Congress intended to disestablish a reservation by examining the relevant Acts of Congress and "all the [surrounding] circumstances," including the "contemporaneous and subsequent understanding of the status of the reservation." *Id.*, at 488 (internal quotation marks omitted). Yet the Court declines to consider such understandings here, preferring to examine only individual statutes in isolation.

Applying the broader inquiry our precedents require, a reservation did not exist when McGirt committed his crimes, so Oklahoma had jurisdiction to prosecute him. I respectfully dissent.

I

The Creek Nation once occupied what is now Alabama and Georgia. In 1832, the Creek were compelled to cede these lands to the United States in exchange for land in present day Oklahoma. The expanse set aside for the Creek and the other Indian nations that composed the "Five Civilized Tribes"—the Cherokees, Chickasaws, Choctaws, and Seminoles—became known as Indian Territory. See F. Cohen, Handbook of Federal Indian Law § 4.07(1)(a), pp. 289–290 (N. Newton ed. 2012) (Cohen). Each of the Five Tribes formed a tripartite system of government. See *Marlin* v. *Lewallen*, 276 U. S. 58, 60 (1928). They "enact[ed] and execut[ed] their own laws," "punish[ed] their own criminals," and "rais[ed] and expend[ed] their own revenues." *Atlantic & Pacific R. Co.* v. *Mingus*, 165 U. S. 413, 436 (1897).

The Five Tribes also enjoyed unique property rights. While many tribes held only a "right of occupancy" on lands owned by the United States, *United States* v. *Creek Nation*, 295 U. S. 103, 109 (1935), each of the Five Tribes possessed title to its lands in communal fee simple, meaning the lands were "considered the property of the whole." *E. g.*, Treaty with the Creeks, Arts. III and IV, Feb. 14, 1833, 7 Stat. 419; see *Marlin*, 276 U. S., at 60. Congress promised the Tribes that their lands would never be "included within, or annexed to, any Territory or State," see, *e. g.*, Treaty with Creeks and Seminoles, Art. IV, Aug. 7, 1856, 11 Stat. 700 (1856 Treaty), and that their new homes would be "forever secure," Indian Removal Act, § 3, 4 Stat. 412; see also Treaty with the Creeks, Arts. I and XIV, Mar. 24, 1832, 7 Stat. 368.

Forever, it turns out, did not last very long, because the Civil War disrupted both relationships and borders. The Five Tribes, whose members collectively held at least 8,000 slaves, signed treaties of alliance with the Confederacy and contributed forces to fight alongside Rebel troops. See Gibson, Native Americans and the Civil War, 9 Am. Indian Q. 4, 385, 388–389, 393 (1985); Doran, Negro Slaves of the Five Civilized Tribes, 68 Annals Assn. Am. Geographers 335, 346–347, and Table 3 (1978); Cohen § 4.07(1)(a), at 289. After the war, the United States and the Tribes formed new treaties, which required each Tribe to free its slaves and allow them to become tribal citizens. *E. g.*, Treaty with the Creek Indians, Art. II, June 14, 1866, 14 Stat. 786 (1866 Treaty); see Cohen § 4.07(1)(a), at 289, and n. 9. The treaties also stated that the Tribes had "ignored their allegiance to the United States" and "unsettled the [existing] treaty relations," thereby rendering themselves "liable to forfeit" all "benefits and advantages enjoyed by them"—including their lands. *E. g.*, 1866 Treaty, Preamble, 14 Stat. 785. Due to "said liabilities," the treaties departed from prior promises and required each Tribe to give up the "west half" of its "entire domain." *E. g.*, Preamble and Art. III, *id.*, at 785–786.

These western lands became the Oklahoma Territory. As before, the new treaties promised that the reduced Indian Territory would be "forever set apart as a home" for the Tribes. *E. g.*, Art. III, *id.*, at 786.[1]

Again, however, it was not to last. In the wake of the war, a renewed "determination to thrust the nation westward" gripped the country. Cohen § 1.04, at 71. Spurred by new railroads and protected by the repurposed Union Army, settlers rapidly transformed vast stretches of territorial wilderness into farmland and ranches. See *id.*, at 71–74. The Indian Territory was no exception. By 1900, over 300,000 settlers had poured in, outnumbering members of the Five Tribes by over 3 to 1. See H. R. Rep. No. 1762, 56th Cong., 1st Sess., 1 (1900). There to stay, the settlers founded "[f]lourishing towns" along the railway lines that crossed the territory. S. Rep. No. 377, 53d Cong., 2d Sess., 6 (1894).

Coexistence proved complicated. The new towns had no municipal governments or the things that come with them—laws, taxes, police, and the like. See H. R. Doc. No. 5, 54th Cong., 1st Sess., 89 (1895). No one had meaningful access to private property ownership, as the unique communal titles of the Five Tribes precluded ownership by Indians and non-Indians alike. Despite the millions of dollars that had been invested in the towns and farmlands, residents had no durable claims to their improvements. *Ibid.* Members of the Tribes were little better off, as the Tribes failed to hold the communal lands for the "equal benefit" of all members.

[1] I assume that the Creek Nation's territory constituted a "reservation" at this time. See *ante*, at 901–902. The State contends that no reservation existed in the first place because the territory instead constituted a "dependent Indian communit[y]." Brief for Respondent 8 (quoting 18 U. S. C. § 1151(b)). The United States disagrees and states that defining the territory as a dependent Indian community could disrupt the application of various federal statutes. Tr. of Oral Arg. 79–80. I do not address this debate because, regardless, I conclude that any reservation was disestablished.

Woodward v. *De Graffenried*, 238 U. S. 284, 297 (1915). Instead, a few "enterprising citizens" of the Tribes "appropriate[d] to their exclusive use almost the entire property of the Territory that could be rendered profitable." *Id.*, at 297, 299, n. 1 (internal quotation marks omitted). As a result, "the poorer class of Indians [were] unable to secure enough lands for houses and farms," and "the great body of the tribe derive[d] no more benefit from their title than the neighbors in Kansas, Arkansas, or Missouri." *Id.*, at 299–301, n. 1 (emphasis deleted; internal quotation marks omitted).

Attuned to these new realities, Congress decided that it could not maintain an Indian Territory predicated on "exclusion of the Indians from the whites." S. Rep. No. 377, at 6. Congress therefore set about transforming the Indian Territory into a State.

Congress began by establishing a uniform body of law applicable to all occupants of the territory, regardless of race. To apply these laws, Congress established the U. S. Courts for the Indian Territory. Next Congress systematically dismantled the tribal governments. It abolished tribal courts, hollowed out tribal lawmaking power, and stripped tribal taxing authority. Congress also eliminated the foundation of tribal sovereignty, extinguishing the Creek Nation's title to the lands. Finally, Congress made the tribe members citizens of the United States and incorporated them in the drafting and ratification of the constitution for their new State, Oklahoma.

In taking these transformative steps, Congress made no secret of its intentions. It created a commission tasked with extinguishing the Five Tribes' territory and, in one report after another, explained that it was creating a homogenous population led by a common government. That contemporaneous understanding was shared by the tribal leadership and the State of Oklahoma. The tribal leadership acknowledged that its only remaining power was to parcel out the last of

its land, and the State assumed jurisdiction over criminal cases that, if a reservation had continued to exist, would have belonged in federal court.

A century of practice confirms that the Five Tribes' prior domains were extinguished. The State has maintained unquestioned jurisdiction for more than 100 years. Tribe members make up less than 10%–15% of the population of their former domain, and until a few years ago the Creek Nation itself acknowledged that it no longer possessed the reservation the Court discovers today. This on-the-ground reality is enshrined throughout the U. S. Code, which repeatedly terms the Five Tribes' prior holdings the "former" Indian reservations in Oklahoma. As the Tribes, the State, and Congress have recognized from the outset, those "reservations were destroyed" when "Oklahoma entered the union." S. Rep. No. 101–216, pt. 2, p. 47 (1989).

II

Much of this important context is missing from the Court's opinion, for the Court restricts itself to viewing each of the statutes enacted by Congress in a vacuum. That approach is wholly inconsistent with our precedents on reservation disestablishment, which require a highly contextual inquiry. Our "touchstone" is congressional "purpose" or "intent." *South Dakota* v. *Yankton Sioux Tribe*, 522 U. S. 329, 343 (1998). To "decipher Congress' intention" in this specialized area, we are instructed to consider three categories of evidence: the relevant Acts passed by Congress; the contemporaneous understanding of those Acts and the historical context surrounding their passage; and the subsequent understanding of the status of the reservation and the pattern of settlement there. *Solem* v. *Bartlett*, 465 U. S. 463, 470–472 (1984). The Court resists calling these "steps," because "the only 'step' proper for a court of law" is interpreting the laws enacted by Congress. *Ante*, at 913–914. Any

label is fine with us. What matters is that these are categories of evidence that our precedents "direct[ ] us" to examine *in determining* whether the laws enacted by Congress disestablished a reservation. *Hagen* v. *Utah*, 510 U. S. 399, 410–411 (1994). Because those precedents are not followed by the Court today, it is necessary to describe several at length.[2]

In *Solem* v. *Bartlett*, 465 U. S. 463 (1984), a unanimous Court summarized the appropriate methodology. "Congress [must] clearly evince an intent to change boundaries before diminishment will be found." *Id.*, at 470 (internal quotation marks and alterations omitted). This inquiry first considers the "statutory language used to open the Indian lands," which is the "most probative evidence of congressional intent." *Ibid.* "Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands." *Ibid.* But "explicit language of cession and unconditional compensation are not prerequisites" for a finding of disestablishment. *Id.*, at 471.

Second, we consider "events surrounding the passage of [an] Act—particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress." *Ibid.* When such materials "unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation," we will "infer that Congress shared the understanding that its action

[2] Our precedents have generally considered whether Congress disestablished or diminished a reservation by enacting "surplus land Acts" that opened land to non-Indian settlement. Here Congress did much more than that, as I will explain. Even so, there is broad agreement among the parties, the United States, the Creek Nation, and even the Court that our precedents on surplus land Acts provide the governing framework for this case, so I proceed on the same course. See Brief for Petitioner 1; Brief for Respondent 29, 35, 40; Brief for United States as *Amicus Curiae* 4–5; Brief for Muscogee (Creek) Nation as *Amicus Curiae* 1–2; *ante*, at 903–904, 914–915.

would diminish the reservation," even in the face of "statutory language that would otherwise suggest reservation boundaries remained unchanged." *Ibid.*

Third, to a "lesser extent," we examine "events that occurred after the passage of [an] Act to decipher Congress' intentions." *Ibid.* "Congress' own treatment of the affected areas, particularly in the years immediately following the opening, has some evidentiary value, as does the manner in which the Bureau of Indian Affairs and local judicial authorities dealt with [the areas]." *Ibid.* In addition, "we have recognized that who actually moved onto opened reservation lands is also relevant." *Ibid.* "Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred." *Ibid.* This "subsequent demographic history" provides an "additional clue as to what Congress expected would happen." *Id.*, at 471–472.

Fifteen years later, another unanimous Court described the same methodology more pithily in *South Dakota* v. *Yankton Sioux Tribe*, 522 U. S. 329 (1998). First, the Court reiterated that the "most probative evidence of diminishment is, of course, the statutory language." *Id.*, at 344 (internal quotation marks omitted). The Court continued that it would also consider, second, "the historical context surrounding the passage of the . . . Acts," and third, "the subsequent treatment of the area in question and the pattern of settlement there." *Ibid.* (quoting *Hagen*, 510 U. S., at 411).

The Court today treats these precedents as aging relics in need of "clarif[ication]." *Ante*, at 915. But these precedents have been clear enough for some time. Just a few Terms ago, the same inquiry was described as "well settled" by the unanimous Court in *Nebraska* v. *Parker*, 577 U. S. 481, 487 (2016). First, the Court explained, "we start with the statutory text." *Id.*, at 488. "Under our precedents," the Court continued, "we also 'examine all the circumstances surrounding the opening of a reservation.'" *Ibid.* (quoting *Hagen*,

510 U. S., at 412). Thus, second and third, we "look to any unequivocal evidence of the contemporaneous and subsequent understanding of the status of the reservation by members and nonmembers, as well as the United States and the State." 577 U. S., at 488 (internal quotation marks omitted). These inquiries include, respectively, the "history surrounding the passage of the [relevant] Act" as well as the subsequent "demographic history" and "treatment" of the lands at issue. *Id.*, at 490, 492.

Today the Court does not even discuss the governing approach reiterated throughout these precedents. The Court briefly recites the general rule that disestablishment requires clear congressional "intent," *ante*, at 904, but the Court then declines to examine the categories of evidence that our precedents demand we consider. Instead, the Court argues at length that allotment alone is not enough to disestablish a reservation. *Ante*, at 904–908. Then the Court argues that the "many" "serious blows" dealt by Congress to tribal governance, and the creation of the new State of Oklahoma, are each insufficient for disestablishment. *Ante*, at 909–913. Then the Court emphasizes that "historical practices or current demographics" do not "by themselves" "suffice" to disestablish a reservation. *Ante*, at 913–914.

This is a school of red herrings. No one here contends that any individual congressional action or piece of evidence, standing alone, disestablished the Creek reservation. Rather, Oklahoma contends that all of the relevant Acts of Congress together, viewed in light of contemporaneous and subsequent contextual evidence, demonstrate Congress's intent to disestablish the reservation. "[O]ur traditional approach . . . *requires* us" to determine Congress's intent by "examin[ing] *all* the circumstances surrounding the opening of a reservation." *Hagen*, 510 U. S., at 412 (emphasis added). Yet the Court refuses to confront the cumulative import of all of Congress's actions here.

The Court instead announces a new approach sharply restricting consideration of contemporaneous and subsequent

evidence of congressional intent. The Court states that such "extratextual sources" may be considered in "only" one narrow circumstance: to help "'clear up'" ambiguity in a particular "statutory term or phrase." *Ante*, at 914, 916 (quoting *Milner* v. *Department of Navy*, 562 U. S. 562, 574 (2011), and citing *New Prime Inc.* v. *Oliveira*, 586 U. S. 105, 113 (2019)).

But, if that is the right approach, what have we been doing all these years? Every single one of our disestablishment cases has considered extratextual sources, and in doing so, none has required the identification of ambiguity in a particular term. That is because, while it is well established that Congress's "intent" must be "clear," *ante*, at 916 (quoting *Yankton Sioux Tribe*, 522 U. S., at 343), in this area we have expressly held that the appropriate inquiry does not focus on the statutory text alone.

Today the Court suggests that only the text can satisfy the longstanding requirement that Congress "explicitly indicate[ ]" its intent. *Ante*, at 916 (quoting *Solem*, 465 U. S., at 470). The Court reiterates that a reservation persists unless Congress "said otherwise," *ante*, at 898; if Congress wishes to disestablish a reservation, "it must say so," with the right "language." *Ante*, at 904, 914; see *ante*, at 937 (same). Our precedents disagree. They explain that disestablishment can occur "[e]ven in the absence of a clear expression of congressional purpose in the text of [the] Act." *Yankton Sioux Tribe*, 522 U. S., at 351. The "notion" that "express language in an Act is the *only* method by which congressional action may result in disestablishment" is "quite inconsistent" with our precedents. *Rosebud Sioux Tribe* v. *Kneip*, 430 U. S. 584, 586, 588, n. 4 (1977); see *Solem*, 465 U. S., at 471 (intent may be discerned from a "widely held, contemporaneous understanding," "notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remained unchanged"); see also *DeCoteau* v. *District County Court for Tenth Judicial Dist.*, 420 U. S. 425, 444 (1975); *Mattz* v. *Arnett*, 412 U. S. 481, 505 (1973).

These are not "stitche[d] together quotes" but rather plain language reflecting a consistent theme running through our precedents. *Ante*, at 916, n. 9. They make clear that the Court errs in focusing on whether "a statute" alone "required" disestablishment, *ante*, at 916; under these precedents, we cannot determine what Congress "required" without first considering evidence in addition to the relevant statutes. Oddly, the Court claims these precedents actually support its new approach because they "emphasize that '[t]he focus of our inquiry is congressional intent.' " *Ante*, at 916–917, n. 9 (quoting *Rosebud Sioux Tribe*, 430 U. S., at 588, n. 4, and citing *Yankton Sioux Tribe*, 522 U. S., at 343). But in this context that intent is determined by examining a broad array of evidence—"all the circumstances." *Parker*, 577 U. S., at 488 (quoting *Hagen*, 510 U. S., at 412). Unless the Court is prepared to overrule these precedents, it should follow them.

The Court appears skeptical of these precedents, but does not address the compelling reasons they give for considering extratextual evidence. At the turn of the century, the possibility that a reservation might persist in the absence of "tribal ownership" of the underlying lands was "unfamiliar," and the prevailing "assumption" was that "Indian reservations were a thing of the past." *Solem*, 465 U. S., at 468. Congress believed "to a man" that "within a short time" the "Indian tribes would enter traditional American society and the reservation system would cease to exist." *Ibid.* As a result, Congress—while intending disestablishment—did not always "detail" precise changes to reservation boundaries. *Ibid.* Recognizing this distinctive backdrop, our precedents determine Congress's intent by considering a broader variety of evidence than we might for more run-of-the-mill questions of statutory interpretation. See *id.*, at 468–469; *Parker*, 577 U. S., at 488; *Yankton Sioux Tribe*, 522 U. S., at 343. See also Cohen § 2.02(1), at 113 ("The theory and prac-

tice of interpretation in federal Indian law differs from that of other fields of law.").

The Court next claims that *Parker* "clarif[ied]" that evidence of the subsequent treatment of the disputed land by government officials "'has limited interpretive value.'" *Ante*, at 915 (quoting *Parker*, 577 U. S., at 493). But *Parker* held that the subsequent evidence *in that case* "ha[d] 'limited interpretive value,'" as in the case that *Parker* relied on. *Id.*, at 493 (quoting *Yankton Sioux Tribe*, 522 U. S., at 355). The adequacy of evidence in a particular case says nothing about whether our precedents require us to consider such evidence in others.[3]

The Court finally resorts to torching strawmen. No one relying on our precedents contends that "practical advantages" require "ignoring the written law." *Ante*, at 923. No one claims a State has "authority to reduce federal reservations." *Ante*, at 903. No one says the role of courts is to "sav[e] the political branches" from "embarrassment." *Ibid.* No one argues that courts can "adjust[]" reservation borders. *Ibid.* Such notions have nothing to do with our precedents. What our precedents do provide is the settled approach for determining whether Congress disestablished a

[3] The Court rejects this reading of *Parker* based on a quotation that ends with what sounds like a general principle that "[e]vidence of the subsequent treatment of the disputed land by Government officials likewise has 'limited interpretive value.'" *Ante*, at 915, n. 8 (quoting *Parker*, 577 U. S., at 493). But that sentence was actually the topic sentence of a new paragraph that addressed the *particular* evidence of subsequent treatment of the *particular* land by the *particular* government officials in that case. *Id.*, at 493. It is clear that *Parker* merely concluded that the evidence cited by the parties provided a "mixed record of subsequent treatment" that did not move the needle either way. *Ibid.* (internal quotation marks omitted). *Parker* did not silently overturn our precedents requiring us to consider—and accord "weight" to—subsequent evidence that plainly favors, or undermines, disestablishment. *Rosebud Sioux Tribe* v. *Kneip*, 430 U. S. 584, 604 (1977); see *supra*, at 943–946.

reservation, and the Court starkly departs from that approach here.

III

Applied properly, our precedents demonstrate that Congress disestablished any reservation possessed by the Creek Nation through a relentless series of statutes leading up to Oklahoma statehood.

A

The statutory texts are the "most probative evidence" of congressional intent. *Parker*, 577 U. S., at 488 (quoting *Hagen*, 510 U. S., at 411). The Court appropriately examines the Original Creek Agreement of 1901 and a subsequent statute for language of disestablishment, such as "cession," "abolish[ing]" the reservation, "restor[ing]" land to the "public domain," or an "unconditional commitment" to "compensate" the Tribe. *Ante*, at 904–908 (internal quotation marks omitted). But that is only the beginning of the analysis; there is no "magic words" requirement for disestablishment, and each individual statute may not be considered in isolation. See *supra*, at 947–948; *Hagen*, 510 U. S., at 411, 415–416 (when two statutes "buil[d]" on one another in this area, "[both] statutes—as well as those that came in between—must therefore be read together"); see also *Rosebud Sioux Tribe*, 430 U. S., at 592 (recognizing that a statute "cannot, and should not, be read as if it were the first time Congress had addressed itself to" disestablishment when prior statutes also indicate congressional intent). In this area, "we are not free to say to Congress: 'We see what you are driving at, but you have not said it, and therefore we shall go on as before.' " *Id.*, at 597 (quoting *Johnson* v. *United States*, 163 F. 30, 32 (CA1 1908) (Holmes, J.)). Rather, we recognize that the language Congress uses to accomplish its objective is adapted to the circumstances it confronts.

For example, "cession" is generally what a tribe does when it conveys land to a fellow sovereign, such as the United States or another tribe. See *Mitchel* v. *United States*, 9 Pet. 711, 734 (1835); *e. g.*, 1856 Treaty, Art. I, 11 Stat. 699. But

here, given that Congress sought direct allotment to tribe members in order to enable private ownership by both Indians and the 300,000 settlers in the territory, it would have made little sense to "cede" the lands to the United States or "restore" the lands to the "public domain," as Congress did on other occasions. So too with a "commitment" to "compensate" the Tribe. Rather than buying land from the Creek, Congress provided for allotment to tribe members who could then "sell their land to Indians and non-Indians alike." *Ante*, at 905–906; see *Hagen*, 510 U. S., at 412 (a "definite payment" is not required for disestablishment). That other allotment statutes have contained various "hallmarks" of disestablishment tells us little about Congress's intent here. Contra, *ante*, at 908, and n. 5. "[W]e have never required any particular form of words" to disestablish a reservation. *Hagen*, 510 U. S., at 411. There are good reasons the statutes here do not include the language the Court looks for, and those reasons have nothing to do with a failure to disestablish the reservation. Respect for Congress's work requires us to look at what it actually did, not search in vain for what it might have done or did on other occasions.

What Congress actually did here was enact a series of statutes beginning in 1890 and culminating with Oklahoma statehood that (1) established a uniform legal system for Indians and non-Indians alike; (2) dismantled the Creek government; (3) extinguished the Creek Nation's title to the lands at issue; and (4) incorporated the Creek members into a new political community—the State of Oklahoma. These statutes evince Congress's intent to terminate the reservation and create a new State in its place.

First, Congress supplanted the Creek legal system with a legal code and court system that applied equally to Indians and non-Indians. In 1890, Congress subjected the Indian Territory to specified federal criminal laws. Act of May 2, 1890, § 31, 26 Stat. 96. For offenses not covered by federal law, Congress did what it often did when establishing a new territorial government. It provided that the criminal laws

from a neighboring State, here Arkansas, would apply. § 33, *id.*, at 96–97. Seven years later, Congress provided that the laws of the United States and Arkansas "shall apply to *all* persons" in Indian Territory, "*irrespective of race.*" Act of June 7, 1897 (1897 Act), 30 Stat. 83 (emphasis added). In the same Act, Congress conferred on the U. S. Courts for the Indian Territory "exclusive jurisdiction" over "all civil causes in law and equity" and "all criminal causes" for the punishment of offenses committed by "any person" in the Indian Territory. *Ibid.*

The following year, the 1898 Curtis Act "abolished" all tribal courts, prohibited all officers of such courts from exercising "any authority" to perform "any act" previously authorized by "any law," and transferred "all civil and criminal causes then pending" to the U. S. Courts for the Indian Territory. Act of June 27, 1898 (Curtis Act), § 28, *id.*, at 504–505. In the same Act, Congress completed the shift to a uniform legal order by banning the enforcement of tribal law in the newly exclusive jurisdiction of the U. S. Courts. See § 26, *id.*, at 504 ("[T]he laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory."). Congress reiterated yet again in 1904 that Arkansas law "continued" to "embrace *all* persons and estates" in the territory—"whether Indian, freedmen, or otherwise." Act of Apr. 28, 1904, ch. 1824, § 2, 33 Stat. 573 (emphasis added). In this way, Congress replaced tribal law with local law in matters at the core of tribal governance, such as inheritance and marital disputes. See, *e. g.*, *George* v. *Robb*, 4 Ind. T. 61, 64 S. W. 615, 615–616 (1901); *Colbert* v. *Fulton*, 74 Okla. 293, 157 P. 1151, 1152 (1916).

In addition, the Curtis Act established municipalities to govern both Indians and non-Indians. It authorized "any city or town" with at least 200 residents to incorporate. § 14, 30 Stat. 499. The Act gave incorporated towns "all the powers" and "all the rights" of municipalities under Arkan-

sas law. *Ibid.* "All male inhabitants," including Indians, were deemed qualified to vote in town elections. *Ibid.* And "all inhabitants"—"*without regard to race*"—were made subject to "all" town laws and were declared to possess "*equal* rights, privileges, and protection." *Id.*, at 499–500 (emphasis added). These changes reorganized the approximately 150 towns in the territory—including Tulsa, Muskogee, and 23 others within the Creek Nation's former territory—that were home to tens of thousands of people and nearly one third of the territory's population at the time, laying the foundation for the state governance that was to come. See H. R. Doc. No. 5, 57th Cong., 2d Sess., pt. 2, pp. 299–300, Table 1 (1903); Depts. of Commerce and Labor, Bureau of Census, Population of Oklahoma and Indian Territory 1907, pp. 8, 30–33.

Second, Congress systematically dismantled the governmental authority of the Creek Nation, targeting all three branches. As noted, Congress dissolved the Tribe's judicial system. Congress also specified in the Original Creek Agreement that the Creek government would "not continue" past March 1906, essentially preserving it only as long as Congress thought necessary for the Tribe to wind up its affairs. §46, 31 Stat. 872. In the meantime, Congress radically curtailed tribal legislative authority, providing that no statute passed by the council of the Creek Nation affecting the Nation's lands, money, or property would be valid unless approved by the President of the United States. §42, *id.*, at 872. When 1906 came around, the Five Tribes Act provided for the "final disposition of the affairs of the Five Civilized Tribes." Act of Apr. 26, 1906, ch. 1876, 34 Stat. 137. Along with "abolish[ing]" all tribal taxes, the Act directed the Secretary of the Interior to assume control over the collection of the Nation's remaining revenues and to distribute them among tribe members on a per capita basis. §§11, 17, *id.*, at 141, 143–144. Thus, by the time Oklahoma became the 46th State in 1907, there was little left of the Creek Na-

tion's authority: No tribal courts. No tribal law. No tribal fisc. And any lingering authority was further reduced in 1908, when Congress amended the Five Tribes Act to require tribal officers and members to surrender all remaining tribal property, money, and records. Act of May 27, 1908, § 13, 35 Stat. 316.

The Court stresses that the Five Tribes Act separately stated that the Creek government was "continued" in "full force and effect for all purposes authorized by law." *Ante*, at 910 (quoting § 28, 34 Stat. 148). By that point, however, such "authorized" purposes were nearly nonexistent, and the Act's statement is readily explained by the need to maintain a tribal body to wrap up the distribution of Creek lands. Indeed, the Court does not cite any examples of the Creek Nation exercising significant government authority in the wake of the statutes discussed above. Instead, the Court alludes to subsequent changes in the 1920s to the general "federal outlook toward Native Americans," and it observes that in the 1930s Congress authorized the Creek Nation to reconstitute its tribal courts and adopt a constitution and bylaws. *Ante*, at 911. That, however, simply highlights the drastic extent to which Congress erased the Nation's authority at the turn of the century.

Third, Congress destroyed the foundation of sovereignty by stripping the Creek Nation of its territory. The communal title held by the Creek Nation, which "did not recognize private property in land," "presented a serious obstacle to the creation of [a] State." *Choate* v. *Trapp*, 224 U. S. 665, 667 (1912). Well aware of this impediment, Congress established the Dawes Commission and directed it to negotiate with the Five Tribes for "the extinguishment of the national or tribal title to any lands" within the Indian Territory. Act of Mar. 3, 1893, § 16, 27 Stat. 645. That extinguishment could be accomplished through "cession" of the tribal lands to the United States, "allotment" of the lands among the Indians, or any other agreed upon method. *Ibid.* The Com-

mission initially sought cession, but ultimately sought to extinguish the title through allotment. See *ante*, at 905.

In the Original Creek Agreement of 1901, Congress did just that. The agreement provided that "*[a]ll lands* belonging to the Creek tribe," except town sites and lands reserved for schools and public buildings, "shall be allotted among the citizens of the tribe." §§2, 3, 31 Stat. 862 (emphasis added). Town sites, rather than being allotted, were made available for purchase by the non-Indians residing there. §§11–16, *id.*, at 866–867. Unclaimed lots were to be sold at public auction, with the proceeds divvied up among the Creeks. §§11, 14, *id.*, at 866. The agreement required that the deeds for the allotments and town site purchases convey "all right, title, and interest of the Creek Nation and of all other [Creek] citizens," and that the deeds be executed by the leader of the Creek Nation (the "principal chief"). §23, *id.*, at 867–868. The conveyances were then approved by the Secretary of the Interior, who in turn "relinquish[ed] to the grantee . . . all the right, title, and interest of the United States" in the land. *Id.*, at 868. In this way, Congress provided for the complete termination of the Creek Nation's interest in the lands, as well as the interests of individual Creek members apart from their personal allotments. Indeed, the language Congress used in the Original Creek Agreement resembles what the Court regards as model disestablishment language. See *ante*, at 904, 906 (looking for language evincing "the present and total surrender of all tribal interests in the affected lands" (internal quotation marks omitted)). And, making even more clear its intent to place Indian-held land under the same laws as all other property, Congress subsequently eliminated restrictions on the alienation of allotments, freeing tribe members "to sell their land to Indians and non-Indians alike." *Ante*, at 905–906.

In addition, while the Original Creek Agreement did not allot lands reserved for schools and tribal buildings, the Creek Nation's interest in those lands was subsequently ter-

minated by the Five Tribes Act. That Act directed the Secretary of the Interior to take possession of—and sell off—"all" tribal buildings and underlying lands, whether used for "governmental" or "other tribal purposes." § 15, 34 Stat. 143. The Secretary was also ordered to assume control of all tribal schools and the underlying property until the federal or state governments established a public school system. See § 10, *id.*, at 140–141.

These statutes evince a clear intent to leave the Creek Nation with no communally held land and no meaningful governing authority to exercise over the newly distributed parcels. Contrary to the Court's portrayal, this is not a scenario in which Congress allowed a tribe to "continue to exercise governmental functions over land" that it "no longer own[ed] communally." *Ante*, at 907. From top to bottom, these statutes, which divested the Tribes and the United States of their interests while displacing tribal governance, "strongly suggest[ ] that Congress meant to divest" the lands of reservation status. *Solem*, 465 U. S., at 470.

Finally, having stripped the Creek Nation of its laws, its powers of self-governance, and its land, Congress incorporated the Nation's members into a new political community. Congress made "every Indian" in the Oklahoma Territory a citizen of the United States in 1901—decades before conferring citizenship on all native born Indians elsewhere in the country. Act of Mar. 3, 1901, ch. 868, 31 Stat. 1447. In the Oklahoma Enabling Act of 1906—the gateway to statehood—Congress confirmed that members of the Five Tribes would participate in equal measure alongside non-Indians in the choice regarding statehood. The Act gave Indians the right to vote on delegates to a constitutional convention and ultimately on the state constitution that the delegates proposed. §§ 2, 4, 34 Stat. 268, 271. Fifteen members of the Five Tribes were elected as convention delegates, many of them served on significant committees, and a member of the Chickasaw Nation even served as president of the conven-

tion. See Brief for Seventeen Oklahoma District Attorneys et al. as *Amici Curiae* 9–13.

The Enabling Act also ensured that Indians and non-Indians would be subject to uniform laws and courts. It replaced Arkansas law, which had applied to all persons "irrespective of race," 1897 Act, 30 Stat. 83, with the laws of the adjacent Oklahoma Territory until the new state legislature provided otherwise. Enabling Act §§ 2, 13, 21, 34 Stat. 268–269, 275, 277–278; see *Jefferson* v. *Fink*, 247 U. S. 288, 294 (1918). All of the pending cases in the territorial courts arising under federal law were transferred to the newly created U. S. District Courts of Oklahoma. See § 16, 34 Stat. 276. Pending cases not involving federal law, including those that involved Indians on Indian land and had arisen under Arkansas law, were transferred to the new Oklahoma state courts. §§ 16, 17, 20, *id.*, at 276–277. To dispel any potential confusion about the distribution of criminal cases, Congress amended the Enabling Act the following year, clarifying that all cases for crimes that would have fallen under federal jurisdiction had they been committed in a State would be transferred to the U. S. District Courts. Act of Mar. 4, 1907, § 1, *id.*, at 1286–1287. All other pending criminal cases would be "prosecuted to a final determination in the State courts of Oklahoma." § 3, *id.*, at 1287. As for civil cases, the new state courts were immediately empowered to resolve even disputes that previously lay at the core of tribal self-governance. *E. g.*, *Palmer* v. *Cully*, 52 Okla. 454, 463–469, 153 P. 154, 157–158 (1915) (*per curiam*) (marital dispute).[4]

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[4] The Court, citing *United States* v. *Sandoval*, 231 U. S. 28, 47–48 (1913), argues that including a tribe within a new State is not necessarily incompatible with the continuing existence of a reservation. *Ante*, at 911–912, n. 6. But the tribe in *Sandoval*, the Pueblo Indians of New Mexico, retained a rare communal title to their lands—which Congress explicitly extinguished here. 231 U. S., at 47. More fundamentally, the Court's argument suffers from the same flaw that runs through its entire approach,

In sum, in statute after statute, Congress made abundantly clear its intent to disestablish the Creek territory. The Court, for purposes of the disestablishment question before us, defines the Creek territory as "lands that would lie outside both the legal jurisdiction and geographic boundaries of any State" and on which a tribe was "assured a right to self-government." *Ante*, at 902. That territory was eliminated. By establishing uniform laws for Indians and non-Indians alike in the new State of Oklahoma, Congress brought Creek members and the land on which they resided under state jurisdiction. By stripping the Creek Nation of its courts, lawmaking authority, and taxing power, Congress dismantled the tribal government. By extinguishing the Nation's title, Congress erased the geographic boundaries that once defined Creek territory. And, by conferring citizenship on tribe members and giving them a vote in the formation of the State, Congress incorporated them into a new political community. "Under any definition," that was disestablishment. *Ibid.*

In the face of all this, the Court claims that recognizing Congress's intent would permit disestablishment in the absence of "a statute requir[ing] that result." *Ante*, at 916. Hardly. The numerous statutes discussed above demonstrate Congress's plain intent to terminate the reservation. The Court resists the cumulative force of these statutes by attacking each in isolation, first asking whether allotment alone disestablished the reservation, then whether restricting tribal governance was sufficient, and so on. But the Court does not consider the full picture of what Congress accomplished. Far from justifying its blinkered approach, the Court repeatedly tells the reader to wait until the "*next* section" of the opinion—where the Court will again nitpick discrete aspects of Congress's disestablishment effort while

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which maintains that each of Congress's actions alone would not be enough for disestablishment but never confronts the import of all of them.

ignoring the full picture our precedents require us to honor. *Ante*, at 908–909, n. 5, 913, n. 7; see *supra*, at 948, 950.

The Court also hypothesizes that Congress may have taken significant steps toward disestablishment but ultimately could not "complete[ ]" it; perhaps Congress just couldn't "muster the will" to finish the job. *Ante*, at 904, 911. The Court suggests that Congress sought to "tiptoe to the edge of disestablishment," fearing the "embarrassment of disestablishing a reservation" but hoping that judges would "deliver the final push." *Ante*, at 903. This is fantasy. The congressional Acts detailed above do not evince any unease about extinguishing the Creek domain, or any shortage of "will." Quite the opposite. Through an open and concerted effort, Congress did what it set out to do: transform a reservation into a State. "Mustering the broad social consensus required to pass new legislation is a deliberately hard business," as the Court reminds us. *Ibid.* Congress did that hard work here, enacting not one but a steady progression of major statutes. The Court today does not give effect to the cumulative significance of Congress's actions, because Congress did not use explicit words of the sort the Court insists upon. But Congress had no reason to suppose that such words would be required of it, and this Court has held that they were not. See *Hagen*, 510 U. S., at 411–412; *Yankton Sioux Tribe*, 522 U. S., at 351; *Solem*, 465 U. S., at 471.

B

Under our precedents, we next consider the contemporaneous understanding of the statutes enacted by Congress and the subsequent treatment of the lands at issue. The Court, however, declines to consider such evidence because, in the Court's view, the statutes clearly do not disestablish any reservation, and there is no "ambiguity" to "clear up." *Ante*, at 916 (internal quotation marks omitted). That is not the approach demanded by our precedent, *supra*, at 946–950, and, in any event, the Court's argument fails on its own

terms here. I find it hard to see how anyone can come away from the statutory texts detailed above with *certainty* that Congress had no intent to disestablish the territorial reservation. At the very least, the statutes leave some ambiguity, and thus "extratextual sources" ought to be consulted. *Ante*, at 916.

Turning to such sources, our precedents direct us to "examine all the circumstances" surrounding Congress's actions. *Parker*, 577 U. S., at 488 (quoting *Hagen*, 510 U. S., at 412). This includes evidence of the "contemporaneous understanding" of the status of the reservation and the "history surrounding the passage" of the relevant Acts. *Parker*, 577 U. S., at 490 (internal quotation marks omitted); see *Yankton Sioux Tribe*, 522 U. S., at 351–354; *Solem*, 465 U. S., at 471. The available evidence overwhelmingly confirms that Congress eliminated any Creek reservation. That was the purpose identified by Congress, the Dawes Commission, and the Creek Nation itself. And that was the understanding demonstrated by the actions of Oklahoma, the United States, and the Creek.

According to reports published by Congress leading up to Oklahoma statehood, the Five Tribes had failed to hold the lands for the equal benefit of all Indians, and the tribal governments were ill equipped to handle the largescale settlement of non-Indians in the territories. See *supra*, at 941–942; *Woodward*, 238 U. S., at 296–297. The Senate Select Committee on the Five Tribes explained that it was "imperative[ ]" to "establish a government over [non-Indians] and Indians" in the territory "in accordance with the principles of our constitution and laws." S. Rep. No. 377, at 12–13. On the eve of the Original Creek Agreement, the House Committee on Indian Affairs emphasized that "[t]he independent self-government of the Five Tribes ha[d] practically ceased," "[t]he policy of the Government to abolish classes in Indian Territory and make a homogeneous population [wa]s being rapidly carried out," and all Indians "should at once be

put upon a level and equal footing with the great population with whom they [were] intermingled." H. R. Rep. No. 1188, 56th Cong., 1st Sess., 1 (1900).

The Dawes Commission understood Congress's intent in the same way. The Commission explained that the "object of Congress from the beginning has been the dissolution of the tribal governments, the extinguishment of the communal or tribal title to the land, the vesting of possession and title in severalty among the citizens of the tribes, and the assimilation of the peoples and institutions of this Territory to our prevailing American standard." H. R. Doc. No. 5, 58th Cong., 2d Sess., pt. 2, p. 5 (1903). Accordingly, the Commission's aim—"in all [its] endeavors"—was a "uniformity of political institutions to lay the foundation for an ultimate common government." H. R. Doc. No. 5, 56th Cong., 2d Sess., 163 (1900).

The Creek shared the same understanding. In 1893, the year Congress formed the Dawes Commission, the Creek delegation to Washington recognized that Congress's "unwavering aim" was to " 'wipe out the line of political distinction between an Indian citizen and other citizens of the Republic' " so that the Tribe could be " 'absorbed and become a part of the United States.' " P. Porter & A. McKellop, Printed Statement of Creek Delegates, reprinted in Creek Delegation Documents 8–9 (Feb. 9, 1893) (quoting Senate Committee Report); see also S. Doc. No. 111, 54th Cong., 2d Sess., 5, 8 (1897) (resolution of the Creek Nation "recogniz[ing]" that Congress proposed to "disintegrat[e] the land of our people" and "transform[ ]" "our domestic dependent states" "into a State of the Union").

Particularly probative is the understanding of Pleasant Porter, the principal Chief of the Creek Nation. He described Congress's decisions to the Creek people and legislature in messages published in territorial newspapers during the run-up to statehood. Following the extinguishment of the Nation's title, dissolution of tribal courts, and curtail-

ment of lawmaking authority, he told his people that "[i]t would be difficult, if not impossible to successfully operate the Creek government now." App. to Brief for Respondent 8a (Message to Creek National Council (May 7, 1901), reprinted in The Indian Journal (May 10, 1901)). The "remnant of a government" had been reduced to a land office for finalizing the distribution of allotments and would be "maintained only until" the Tribe's "landed and other interests . . . have been settled." App. to Brief for Respondent 8a. He reiterated this understanding following the Five Tribes Act of 1906, which stated that the tribal government would "continue[ ] in full force and effect for all purposes authorized by law." §28, 34 Stat. 148. While the Court believes that meant Congress decided against disestablishing the reservation, see *ante*, at 910, Chief Porter saw things differently. From his vantage point as the contemporaneous leader of the government at issue, Congress had temporarily continued the tribal government but left it with only "limited and circumscribed" authority: The council could "pass[ ] resolutions respecting our wishes" regarding the property "now in the process of distribution," but the council no longer had any authority to "mak[e] laws for our government." App. to Brief for Respondent 14a (Message to Creek National Council (Oct. 18, 1906), reprinted in The New State Tribune (Oct. 18, 1906)). Apart from distributing the Nation's property, Chief Porter maintained that "all powers over the governing even of our landed property will cease" once the new state government was established. App. to Brief for Respondent 15a; see also S. Rep. No. 5013, 59th Cong., 2d Sess., pt. 1, p. 885 (1907) (Choctaw governor mourning that his "only" remaining authority was "to sign deeds").

The Creek remained of that view after Oklahoma was officially made a State through the Enabling Act. At that point, the new principal Chief confirmed that it was "utterly impossible" to resume "our old tribal government." App. to Brief for Respondent 16a–17a (Address by Moty Tiger to

Creek National Council (Oct. 8, 1908), reprinted in The Indian Journal (Oct. 9, 1908)). And any "appeal to the government at Washington to alter its purpose to wipe out all tribal government among the five civilized tribes" would "be to no purpose." App. to Brief for Respondent 16a. "[C]ontributions" for such efforts would be "just that much money thrown away," and "all attorneys at Washington or elsewhere who encourage and receive any part of such contributions do it knowing that they can give no return or service for same and that they take such money fraudulently and dishonestly." *Id.*, at 17a.[5]

In addition to their words, the contemporaneous actions of Oklahoma, the Creek, and the United States in criminal matters confirm their shared understanding that Congress did not intend a reservation to persist. Had the land been a reservation, the federal government—not the new State—would have had jurisdiction over serious crimes committed by Indians under the Major Crimes Act of 1885. See § 9, 23 Stat. 385. Yet, at statehood, Oklahoma immediately began prosecuting serious crimes committed by Indians in the new state courts, and the federal government immediately ceased prosecuting such crimes in federal court. At argument, McGirt's counsel acknowledged that he could not cite a single example of federal prosecutions for such crimes. Tr. of Oral Arg. 17–18. Rather, the record demonstrates that case after case was transferred to state court or filed there outright by Oklahoma after 1907—without objection by anyone. See,

[5] The Court discounts the views of the principal chiefs as mere predictions about what Congress "*would*" do, *ante*, at 920, but the Court ignores statements made after statehood, describing what Congress *did* do. The Court also asserts that the chiefs' views cannot serve as "evidence" of the "meaning" of laws enacted by Congress. *Ante*, at 921, n. 12. That is inconsistent with our precedent, which specifically instructs us to determine Congress's intent by considering the "understanding of the status of the reservation by members" of the affected tribe. *Parker*, 577 U. S., at 488. The contemporaneous understanding of the leaders of the tribe is highly probative.

e. g., *Bigfeather* v. *State*, 7 Okla. Crim. 364, 123 P. 1026 (1912) (manslaughter); *Rollen* v. *State*, 7 Okla. Crim. 673, 125 P. 1087 (1912) (assault with intent to kill); *Jones* v. *State*, 3 Okla. Crim. 593, 107 P. 738 (1910) (murder); see also Brief for Petitioner in *Sharp* v. *Murphy*, O. T. 2018, No. 17–1107, pp. 40–41 (collecting more cases). These prosecutions were lawful, the Oklahoma Supreme Court recognized at the time, because Congress had not intended to "except out of [Oklahoma] an Indian reservation" upon its admission as a State. *Higgins* v. *Brown*, 20 Okla. 355, 425, 94 P. 703, 730 (1908).

Instead of explaining how everyone at the time somehow missed that a reservation still existed, the Court resorts to misdirection. It observes that Oklahoma state courts have held that they erroneously entertained prosecutions for crimes committed by Indians on the small number of remaining restricted allotments and tribal trust lands from the 1930s until 1989. But this Court has not addressed that issue, and regardless, it would not tell us whether the State properly prosecuted major crimes committed by Indians on the lands at issue here—the unrestricted fee lands that make up more than 95% of the Creek Nation's former territory. Perhaps most telling is that the State's jurisdiction over crimes on Indian allotments was hotly contested from an early date, whereas nobody raised objections based on a surviving reservation. See, *e. g.*, *Ex parte Nowabbi*, 60 Okla. Crim. 111, 61 P. 2d 1139 (1936), overruled by *State* v. *Klindt*, 782 P. 2d 401, 404 (Okla. Crim. App. 1989); see also *ante*, at 917 ("no court" suggested the "possibility" that "the Creek lands really were part of a reservation" until 2017).[6]

[6] The Court claims that the Oklahoma courts' reasons for treating restricted allotments as Indian country must apply with "equal force" to the unrestricted fee lands at issue here, but the Court ultimately admits the two types of land are "legally distinct." *Ante*, at 919, n. 10. And any misstep with regard to the small number of restricted allotments hardly means the Oklahoma courts made the far more extraordinary mistake of failing to notice that the Five Tribes' reservations—encompassing 19 million acres—continued to exist.

Lacking any other arguments, the Court suspects uniform lawlessness: The State must have "overstepped its authority" in prosecuting thousands of cases for over a century. *Ante*, at 919. Perhaps, the Court suggests, the State lacked "good faith." *Ibid.* In the Court's telling, the federal government acquiesced in this extraordinary alleged power grab, abdicating its responsibilities over the purported reservation. And, all the while, the state and federal courts turned a blind eye.

But we normally presume that government officials exercise their duties in accordance with the law. Certainly the presumption may be strained from time to time in this area, but not so much as to justify the Court's speculations, which posit that government officials at every level either conspired to violate the law or uniformly misunderstood the fundamental structure of their society and government. Whatever the imperfections of our forebears, neither option seems tenable. And it is downright inconceivable that this could occur without prompting objections—from anyone, including from the Five Tribes themselves. Indians frequently asserted their rights during this period. The cases above, for example, involve criminal appeals brought by Indians, and Indians raised numerous objections to land graft in the former Territory. See Brief for Historians et al. as *Amici Curiae* 28–31. Yet, according to the extensive record compiled over several years for this case and a similar case, *Sharp* v. *Murphy*, 591 U. S. 977 (2020) (*per curiam*), Indians and their counsel did not raise a single objection to state prosecutions on the theory that the lands at issue were still a reservation. It stretches the imagination to suggest they just missed it.

C

Finally, consider "the subsequent treatment of the area in question and the pattern of settlement there." *Yankton Sioux Tribe*, 522 U. S., at 344. This evidence includes the "subsequent understanding of the status of the reservation by members and nonmembers as well as the United States

and the [relevant] State," and the "subsequent demographic history" of the area. *Parker*, 577 U. S., at 488, 492; see *Solem*, 465 U. S., at 471. Each of the indicia from our precedents—subsequent treatment by Congress, the State's unquestioned exercise of jurisdiction, and demographic evidence—confirms that the Creek reservation did not survive statehood.

First, "Congress' own treatment of the affected areas" strongly supports disestablishment. *Id.*, at 471. After statehood, Congress enacted several statutes progressively eliminating restrictions on the alienation and taxation of Creek allotments, and Congress subjected even restricted lands to state jurisdiction. Since Congress had already destroyed nearly all tribal authority, these statutes rendered Creek parcels little different from other plots of land in the State. See Act of May 27, 1908, 35 Stat. 312; Act of June 14, 1918, 40 Stat. 606; Act of Apr. 10, 1926, 44 Stat. 239. This is not a scenario where Congress merely opened land for "purchase . . . by non-Indians" while allowing the Tribe to "continue to exercise governmental functions over [the] land," *ante*, at 907, and n. 3; rather, Congress eliminated both restrictions on the lands here and the Creek Nation's authority over them. Such developments would be surprising if Congress intended for all of the former Indian Territory to be reservation land insulated from state jurisdiction in significant ways. The simpler and more likely explanation is that they reflect Congress's understanding through the years that "all Indian reservations as such have ceased to exist" in Oklahoma, S. Rep. No. 1232, 74th Cong., 1st Sess., 6 (1935), and that "Indian reservations [in the Indian Territory] were destroyed" when "Oklahoma entered the union," S. Rep. No. 101–216, p. 47 (1989).

That understanding is now woven throughout the U. S. Code, which applies numerous statutes to the land here by extending them to the "*former* reservation[s]" "in

Oklahoma"—underscoring that no reservation exists today. 25 U. S. C. § 2719(a)(2)(A)(i) (emphasis added) (Indian Gaming Regulatory Act); see Brief for United States as *Amicus Curiae* 23; 23 U. S. C. § 202(b)(1)(B)(v) (road grants; "former Indian reservations in the State of Oklahoma"); 25 U. S. C. § 1452(d) (Indian Financing Act; "former Indian reservations in Oklahoma"); § 2020(d) (education grants; "former Indian reservations in Oklahoma"); § 3103(12) (National Indian Forest Resources Management Act; "former Indian reservations in Oklahoma"); 29 U. S. C. § 741(d) (American Indian Vocational Rehabilitation Services Act; "former Indian reservations in Oklahoma"); 33 U. S. C. § 1377(c)(3)(B) (waste treatment grants; "former Indian reservations in Oklahoma"); 42 U. S. C. § 5318(n)(2) (urban development grants; "former Indian reservations in Oklahoma").[7]

Second, consider the State's "exercis[e] [of] unquestioned jurisdiction over the disputed area since the passage of" the Enabling Act, which deserves "weight" as "an indication of

[7] The Court suggests that these statutes only show that there are some "former reservations" in Oklahoma, not that the Five Tribes' former domains are necessarily among them. *Ante*, at 923, n. 14. History says otherwise. For example, the Five Tribes actively lobbied for inclusion of this language in the Indian Gaming Regulatory Act. See Hearing on S. 902 et al. before the Senate Select Committee on Indian Affairs, 99th Cong., 2d Sess., 299–300 (1986). They observed that the term "reservation," as originally defined, did not pertain to the "eastern Oklahoma tribes, including the Five Civilized Tribes." *Ibid.* (statement of Charles Blackwell, representative of the Chickasaw Nation of Oklahoma). Accordingly, they "recommend[ed] inclu[ding] . . . the wording 'or in the case of Oklahoma tribes, their *former* jurisdictional and/or reservation boundaries in Oklahoma.'" *Id.*, at 300 (emphasis added). The National Indian Gaming Association, which proposed the language on which the final act was ultimately modeled, made the same point, observing that in Oklahoma "reservation boundaries have been extinguished for most purposes" so the statute should refer to "former reservation[s] in Oklahoma." *Id.*, at 312 (Memorandum from the National Indian Gaming Assn. to the Senate Select Committee on Indian Affairs (June 17, 1986)).

the intended purpose of the Act." *Rosebud Sioux Tribe*, 430 U. S., at 599, n. 20, 604. As discussed above, for 113 years, Oklahoma has asserted jurisdiction over the former Indian Territory on the understanding that it is not a reservation, without any objection by the Five Tribes until recently (or by McGirt for the first 20 years after his convictions). See Brief for Respondent 4, 40. The same goes for major cities in Oklahoma. Tulsa, for example, has exercised jurisdiction over both Indians and non-Indians for more than a century on the understanding that it is not a reservation. See Brief for City of Tulsa as *Amicus Curiae* 27–28.

All the while, the federal government has operated on the same understanding. Brief for United States as *Amicus Curiae* 24. No less than Felix Cohen, whose authoritative treatise the Court repeatedly cites, agreed while serving as Acting Solicitor of the Interior in 1941 that "all offenses by or against Indians" in the former Indian Territory "are subject to State laws." App. to Supp. Reply Brief for Petitioner in *Sharp* v. *Murphy*, O. T. 2018, No. 17–1107, p. 1a (Memorandum for Commissioner of Indian Affairs (July 11, 1941)). In the view of the Department of the Interior, such state jurisdiction was appropriate because the reservations in the Territory "lost their character as Indian country" by the time Oklahoma became a State. App. to Brief for United States as *Amicus Curiae* 4a (Letter from O. Chapman, Assistant Secretary of the Interior, to the Attorney General (Aug. 17, 1942)); see also *supra*, at 964, n. 6.

Indeed, far from disputing Oklahoma's jurisdiction, the Five Tribes themselves have repeatedly and emphatically agreed that no reservation exists. After statehood, tribal leaders and members frequently informed Congress that "there are no reservations in Oklahoma." App. to Brief for Respondent 19a (Testimony of Hon. Bill Anoatubby, Governor, Chickasaw Nation, Hearings before the Subcommittee on Indian, Insular and Alaska Native Affairs of the House

Committee on Natural Resources (Feb. 24, 2016)).[8] They took the same position before federal courts. Before this litigation started, the Creek Nation represented to the Tenth Circuit that there is only "'checkerboard' Indian country within its *former* reservation boundaries." Reply Brief in No. 09–5123, p. 5 (emphasis added). And the Nation never once contended in this Court that a sprawling reservation still existed in the more than a century that preceded the present disputes.

Like the Creek, this Court has repeatedly described the area in question as the "former" lands of the Creek Nation. See *Grayson* v. *Harris*, 267 U. S. 352, 353 (1925) (lands "lying within the former Creek Nation"); *Woodward*, 238 U. S., at 285 (lands "formerly part of the domain of the Creek Nation"); *Washington* v. *Miller*, 235 U. S. 422, 423 (1914) (lands "within what until recently was the Creek Nation"). Yet today the Court concludes that the lands have been a Creek reservation all along—contrary to the position shared for the past century by this Court, the United States, Oklahoma, and the Creek Nation itself.

Under our precedent, Oklahoma's unquestioned, century-long exercise of jurisdiction supports the conclusion that no reservation persisted past statehood. See *Yankton Sioux Tribe*, 522 U. S., at 357; *Hagen*, 510 U. S., at 421; *Rosebud Sioux Tribe*, 430 U. S., at 604–605. "Since state jurisdiction over the area within a reservation's boundaries is quite limited, the fact that neither Congress nor the Department of

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[8] See App. to Brief for Respondent 18a–19a (excerpting various statements before Congress, including: "[w]e are not a reservation tribe" (Principal Cherokee Chief, 1982), "Oklahoma, . . . of course, is not a reservation State" (Chickasaw Governor, 1988), "Oklahoma is not [a reservation State]" and "[w]e have no surface reservations in Oklahoma" (Chickasaw advisor, 2011), as well as references to the boundaries and lands of "former reservation[s]" (Chickasaw nominee for Assistant Secretary of Indian Affairs, 2012; Inter-Tribal Council of the Five Civilized Tribes, 2016)).

Indian Affairs has sought to exercise its authority over this area, or to challenge the State's exercise of authority is a factor entitled to weight as a part of the 'jurisdictional history.'" *Id.*, at 603–604 (citations omitted).

Third, consider the "subsequent demographic history" of the lands at issue, which provides an "'additional clue'" as to the meaning of Congress's actions. *Parker*, 577 U. S., at 492 (quoting *Solem*, 465 U. S., at 472). Continuing from statehood to the present, the population of the lands has remained approximately 85%–90% non-Indian. See Brief for Respondent 43; *Murphy* v. *Royal*, 875 F. 3d 896, 965 (CA10 2017). "[T]hose demographics signify a diminished reservation." *Yankton Sioux Tribe*, 522 U. S., at 357. The Court questions whether the consideration of demographic history is appropriate, *ante*, at 914–915, 922–923, but we have determined that it is a "*necessary* expedient." *Solem*, 465 U. S., at 472, and n. 13 (emphasis added); see *Parker*, 577 U. S., at 492. And for good reason. Our precedents recognize that disestablishment cases call for a wider variety of tools than more workaday questions of statutory interpretation. *Supra*, at 948. In addition, the use of demographic data addresses the practical concern that "[w]hen an area is predominately populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian country seriously burdens the administration of state and local governments." *Solem*, 465 U. S., at 471–472, n. 12.

Here those burdens—the product of a century of settled understanding—are extraordinary. Most immediately, the Court's decision draws into question thousands of convictions obtained by the State for crimes involving Indian defendants or Indian victims across several decades. This includes convictions for serious crimes such as murder, rape, kidnapping, and maiming. Such convictions are now subject to jurisdictional challenges, leading to the potential release of numerous individuals found guilty under state law of the most

grievous offenses.[9] Although the federal government may be able to reprosecute some of these crimes, it may lack the resources to reprosecute all of them, and the odds of convicting again are hampered by the passage of time, stale evidence, fading memories, and dead witnesses. See Brief for United States as *Amicus Curiae* 37–39. No matter, the Court says, these concerns are speculative because "many defendants may choose to finish their state sentences rather than risk reprosecution in federal court." *Ante*, at 933. Certainly defendants like McGirt—convicted of serious crimes and sentenced to 1,000 years plus life in prison—will not adopt a strategy of running out the clock on their state sentences. At the end of the day, there is no escaping that today's decision will undermine numerous convictions obtained by the State, as well as the State's ability to prosecute serious crimes committed in the future.

Not to worry, the Court says, only about 10%–15% of Oklahoma citizens are Indian, so the "majority" of prosecutions will be unaffected. *Ibid.* But the share of serious crimes committed by 10%–15% of the 1.8 million people in eastern Oklahoma, or of the 400,000 people in Tulsa, is no small number.

Beyond the criminal law, the decision may destabilize the governance of vast swathes of Oklahoma. The Court, despite briefly suggesting that its decision concerns only a narrow question of criminal law, ultimately acknowledges that "many" federal laws, triggering a variety of rules, spring into effect when land is declared a reservation. *Ante*, at 935.

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[9] The Court suggests that "well-known" "procedural obstacles" could prevent challenges to state convictions. *Ante*, at 933. But, under Oklahoma law, it appears that there may be little bar to state habeas relief because "issues of subject matter jurisdiction are never waived and can therefore be raised on a collateral appeal." *Murphy* v. *Royal*, 875 F. 3d 896, 907, n. 5 (CA10 2017) (quoting *Wallace* v. *State*, 935 P. 2d 366, 372 (Okla. Crim. App. 1997)).

State and tribal authority are also transformed. As to the State, its authority is clouded in significant respects when land is designated a reservation. Under our precedents, for example, state regulation of even non-Indians is preempted if it runs afoul of federal Indian policy and tribal sovereignty based on a nebulous balancing test. This test lacks any "rigid rule"; it instead calls for a "particularized inquiry into the nature of the state, federal, and tribal interests at stake," contemplated in light of the "broad policies that underlie" relevant treaties and statutes and "notions of sovereignty that have developed from historical traditions of tribal independence." *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, 142, 144–145 (1980). This test mires state efforts to regulate on reservation lands in significant uncertainty, guaranteeing that many efforts will be deemed permissible only after extensive litigation, if at all.[10]

In addition to undermining state authority, reservation status adds an additional, complicated layer of governance over the massive territory here, conferring on tribal government power over numerous areas of life—including powers over non-Indian citizens and businesses. Under our precedents, tribes may regulate non-Indian conduct on reservation land, so long as the conduct stems from a "consensual relationship[ ] with the tribe or its members" or directly affects "the political integrity, the economic security, or the health or welfare of the tribe." *Montana* v. *United States*, 450

[10] See, *e. g.*, *White Mountain Apache Tribe*, 448 U. S., at 148–151 (barring State from imposing motor carrier license tax and fuel use taxes on non-Indian logging companies that harvested timber on a reservation); *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U. S. 685, 690–692 (1965) (barring State from taxing income earned by a non-Indian who operated a trading post on a reservation); *New Mexico* v. *Mescalero Apache Tribe*, 462 U. S. 324, 325 (1983) (barring State from regulating hunting and fishing by non-Indians on a reservation); see also *Brendale* v. *Confederated Tribes and Bands of Yakima Nation*, 492 U. S. 408, 448 (1989) (opinion of Stevens, J.) (arguing that it is "impossible to articulate precise rules that will govern whenever a tribe asserts that a land use approved by a county board is pre-empted by federal law").

U. S. 544, 565–566 (1981); see Cohen § 6.02(2)(a), at 506–507. Tribes may also impose certain taxes on non-Indians on reservation land, see *Kerr-McGee Corp.* v. *Navajo Tribe*, 471 U. S. 195, 198 (1985), and in this litigation, the Creek Nation contends that it retains the power to tax nonmembers doing business within its borders. Brief for Muscogee (Creek) Nation as *Amicus Curiae* 18, n. 6. No small power, given that those borders now embrace three million acres, the city of Tulsa, and hundreds of thousands of Oklahoma citizens. Recognizing the significant "potential for cost and conflict" caused by its decision, the Court insists any problems can be ameliorated if the citizens of Oklahoma just keep up the "spirit" of cooperation behind existing intergovernmental agreements between Oklahoma and the Five Tribes. *Ante*, at 936–937. But those agreements are small potatoes compared to what will be necessary to address the disruption inflicted by today's decision.

The Court responds to these and other concerns with the truism that significant consequences are no "license for us to disregard the law." *Ante*, at 936. Of course not. But when those consequences are drastic precisely because they depart from how the law has been applied for more than a century—a settled understanding that our precedents demand we consider—they are reason to think the Court may have taken a wrong turn in its analysis.

* * *

As the Creek, the State of Oklahoma, the United States, and our judicial predecessors have long agreed, Congress disestablished any Creek reservation more than 100 years ago. Oklahoma therefore had jurisdiction to prosecute McGirt. I respectfully dissent.

JUSTICE THOMAS, dissenting.

I agree with THE CHIEF JUSTICE that the former Creek Nation Reservation was disestablished at statehood and Oklahoma therefore has jurisdiction to prosecute petitioner

for sexually assaulting his wife's granddaughter. *Ante*, at 938–939 (dissenting opinion). I write separately to note an additional defect in the Court's decision: It reverses a state-court judgment that it has no jurisdiction to review. "[W]e have long recognized that 'where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.'" *Michigan* v. *Long*, 463 U. S. 1032, 1038, n. 4 (1983) (quoting *Fox Film Corp.* v. *Muller*, 296 U. S. 207, 210 (1935)). Under this well-settled rule, we lack jurisdiction to review the Oklahoma Court of Criminal Appeals' decision, because it rests on an adequate and independent state ground.

In his application for state postconviction relief, petitioner claimed that Oklahoma lacked jurisdiction to prosecute him because his crime was committed on Creek Nation land and thus was subject to the exclusive jurisdiction of the Federal Government under the Major Crimes Act, 18 U. S. C. § 1153. In support of his argument, petitioner cited the Tenth's Circuit's decision in *Murphy* v. *Royal*, 875 F. 3d 896 (2017).

The Oklahoma Court of Criminal Appeals concluded that petitioner's claim was procedurally barred under state law because it was "not raised previously on direct appeal" and thus was "waived for further review." App. A to Pet. for Cert. 2 (citing Okla. Stat., Tit. 22, § 1086 (2011)). The court found no grounds for excusing this default, explaining that "[p]etitioner [had] not established any sufficient reason why his current grounds for relief were not previously raised." App. A to Pet. for Cert. 2. This state procedural bar was applied independent of any federal law, and it is adequate to support the decision below. We therefore lack jurisdiction to disturb the state court's judgment.

There are two possible arguments in favor of jurisdiction, neither of which hold water. First, one might claim that the state procedural bar is not an "adequate" ground for decision

in this case. In *Murphy*, the Tenth Circuit suggested that Oklahoma law permits jurisdictional challenges to be raised for the first time on collateral review. 875 F. 3d, at 907, n. 5 (citing *Wallace* v. *State*, 1997 OK CR 18, 935 P. 2d 366). But the Oklahoma Court of Criminal Appeals did not even hint at such grounds for excusing petitioner's default here. More importantly, however, we may not go beyond "the four corners of the opinion" and delve into background principles of Oklahoma law to determine the adequacy of the independent state ground. *Long*, 463 U. S., at 1040. This Court put an end to that approach in *Long*, noting that "[t]he process of examining state law is unsatisfactory because it requires us to interpret state laws with which we are generally unfamiliar, and which often, as in this case, have not been discussed at length by the parties." *Id.*, at 1039. Moreover, such second-guessing disrespects "the independence of state courts," *id.*, at 1040, and the State itself, *Coleman* v. *Thompson*, 501 U. S. 722, 738–739 (1991).

Second, one might argue, as the Court does, that we have jurisdiction because the decision below rests on federal, not state, grounds. See *ante*, at 933–934, n. 15. It is true that the Oklahoma Court of Criminal Appeals briefly recited the procedural history of *Murphy* and recognized that the Tenth Circuit's decision—which we granted certiorari to review—is not yet final. But contrary to the Court's assertion that brief discussion of federal case law did not come close to "address[ing] the merits of [petitioner's] federal [Major Crimes Act] claim." *Ante*, at 934, n. 15. The state court did not analyze the relevant statutory text or this Court's decisions in *Solem* v. *Bartlett*, 465 U. S. 463 (1984), and *Nebraska* v. *Parker*, 577 U. S. 481 (2016). It reads far too much into the opinion to claim that the court's brief reference to the Tenth Circuit's decision in *Murphy* transformed the state court's decision into one that "fairly appears to rest primarily on federal law or to be interwoven with federal law," *Long*, *supra*, at 1040–1041; see also *ante*, at 934, n. 15. Nothing in

the court's opinion suggests that its judgment was at all based on federal law. Thus, even if we were to set aside the fact that the state court "clearly and expressly state[d] that [its decision] was based on state procedural grounds," we could not presume jurisdiction here. *Coleman*, *supra*, at 735–736 (internal quotation marks omitted).

The Court might think that, in the grand scheme of things, this jurisdictional defect is fairly insignificant. After all, we were bound to resolve this federal question sooner or later. See *Royal* v. *Murphy*, 584 U. S. 992 (2018). But our desire to decisively "settle [important disputes] for the sake of convenience and efficiency" must yield to the "overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere." *Hollingsworth* v. *Perry*, 570 U. S. 693, 704–705 (2013) (internal quotation marks omitted). Because the Oklahoma court's "judgment does not depend upon the decision of any federal question[,] we have no power to disturb it." *Enterprise Irrigation Dist.* v. *Farmers Mut. Canal Co.*, 243 U. S. 157, 164 (1917).

I agree with THE CHIEF JUSTICE that the Court misapplies our precedents in granting petitioner relief. *Ante*, at 943–973 (dissenting opinion). But in doing so, the Court also overrides Oklahoma's statutory procedural bar, upsetting a violent sex offender's conviction without the power to do so. The State of Oklahoma deserves more respect under our Constitution's federal system. Therefore, I respectfully dissent.

Syllabus

SHARP, WARDEN *v.* MURPHY

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

No. 17–1107. Argued November 27, 2018—Decided July 9, 2020

Held: The judgment of the Court of Appeals—which held that Congress has not disestablished the Creek Reservation and thus Mr. Murphy's crime is subject to exclusive federal jurisdiction because Mr. Murphy is an Indian and the crime occurred in Indian country—is affirmed for the reasons stated in *McGirt* v. *Oklahoma*, 591 U. S. 894 (2020).

875 F. 3d 896, affirmed.

Lisa S. Blatt argued the cause for petitioner. With her on the briefs were *Mike Hunter*, Attorney General of Oklahoma, *Mithun Mansinghani*, Solicitor General, *Jennifer Crabb*, Assistant Attorney General, *Michael K. Velchik* and *Randall Yates*, Assistant Solicitors General, *Sally L. Pei*, *Stephen K. Wirth*, and *R. Reeves Anderson*.

Deputy Solicitor General Kneedler argued the cause for the United States as *amicus curiae* urging reversal. With him on the briefs were *Solicitor General Francisco*, *Assistant Attorney General Clark*, *Acting Assistant Attorney General Wood*, *Erica L. Ross*, *William B. Lazarus*, *Elizabeth Ann Peterson*, and *James A. Maysonett*.

Ian Heath Gershengorn argued the cause for respondent. With him on the briefs were *Patti Palmer Ghezzi*, *Emma Rolls*, *Michael Lieberman*, *Zachary C. Schauf*, *David A. Strauss*, and *Sarah M. Konsky*.

Riyaz A. Kanji argued the cause for Muscogee (Creek) Nation as *amicus curiae* urging affirmance. With him on the briefs were *David A. Giampetroni* and *Cory J. Albright*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Nebraska et al. by *Douglas J. Peterson*, Attorney General of Nebraska, *James D. Smith*, Solicitor General, *David A. Lopez*, Deputy Solicitor General, and *Ryan S. Post*, Assistant Attorney General, by *Derek Schmidt*,

PER CURIAM.

The judgment of the United States Court of Appeals for the Tenth Circuit is affirmed for the reasons stated in *McGirt* v. *Oklahoma*, 591 U. S. 894 (2020).

It is so ordered.

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

JUSTICE THOMAS and JUSTICE ALITO dissent.

Attorney General of Kansas, *Jeffrey A. Chanay*, Chief Deputy Attorney General, *Toby Crouse*, Solicitor General, and *Bryan C. Clark* and *Dwight R. Carswell*, Assistant Solicitors General, and by the Attorneys General of their respective States as follows: *Jeff Landry* of Louisiana, *Bill Schuette* of Michigan, *Tim Fox* of Montana, *Marty J. Jackley* of South Dakota, *Ken Paxton* of Texas, *Sean D. Reyes* of Utah, and *Peter K. Michael* of Wyoming; for the Environmental Federation of Oklahoma, Inc., et al. by *Lynn H. Slade* and *Sarah M. Stevenson*; for the International Municipal Lawyers Association et al. by *Charles W. Thompson, Jr.*, *Amanda Kellar Karras*, and *Sarah M. Shalf*; for the Oklahoma Independent Petroleum Association by *Blaine H. Evanson* and *Anthony J. Ferate*; and for the Oklahoma Sheriffs' Association et al. by *Kyle T. Cutts* and *Robert D. Cheren*.

Briefs of *amici curiae* urging affirmance were filed for Historians et al. by *L. Susan Work*, *Todd Hembree*, and *Chrissi Ross Nimmo*; for the National Congress of American Indians by *Colette Routel*; for the National Indigenous Women's Resource Center et al. by *Mary Kathryn Nagle*; for David Boren et al. by *Robert H. Henry*, *Michael Burrage*, *Stephen H. Greetham*, *Brad Mallett*, *Douglas B. L. Endreson*, and *Frank S. Holleman IV*; and for Troy A. Eid et al. by *Mr. Eid*, *pro se*, and *Jennifer H. Weddle*.

Per Curiam

BARR, ATTORNEY GENERAL, ET AL. *v.* LEE ET AL.

ON APPLICATION FOR STAY OR VACATUR

No. 20A8. Decided July 14, 2020

The District Court preliminarily enjoined four federal executions—hours before the first was scheduled—on the ground that the single drug protocol of pentobarbital the Government plans to use to carry out the executions likely constitutes cruel and unusual punishment prohibited by the Eighth Amendment. The Government presented an application for stay or vacatur to THE CHIEF JUSTICE, which was referred by him to the Court.

Held: Vacatur of the District Court's injunction is appropriate because the prisoners have not established a likelihood of success on the merits of their Eighth Amendment claim. The Court has never concluded that a State's execution method qualifies as cruel and unusual. *Bucklew* v. *Precythe*, 587 U. S. 119, 133. The Federal Government here selected a lethal injection execution protocol that has become a mainstay of state executions and has been used to carry out more than 100 executions. Pentobarbital has been thought to be less painful and more humane than traditional methods of execution, and "does not carry the risks" of pain that some have associated with other lethal injection protocols. *Zagorski* v. *Parker*, 586 U. S. 938, 939 (SOTOMAYOR, J., dissenting from denial of application for stay and denial of certiorari). The drug's use has been upheld by numerous Courts of Appeals against Eighth Amendment challenges similar to the one presented here. Against this backdrop, the federal prisoners present new expert declarations suggesting that pentobarbital will cause the sensation of drowning or asphyxiation, a suggestion challenged by the Government's experts. No justification exists here for last-minute intervention by a federal court.

Preliminary injunction vacated.

PER CURIAM.

The application for stay or vacatur presented to THE CHIEF JUSTICE and by him referred to the Court is granted. The District Court's July 13, 2020 order granting a preliminary injunction is vacated.

The plaintiffs in this case are all federal prisoners who have been sentenced to death for murdering children. The plaintiffs committed their crimes decades ago and have long

exhausted all avenues for direct and collateral review. The first of their executions was scheduled to take place this afternoon, with others to follow this week and next month. To carry out these sentences, the Federal Government plans to use a single drug—pentobarbital sodium—that "is widely conceded to be able to render a person fully insensate" and "does not carry the risks" of pain that some have associated with other lethal injection protocols. *Zagorski* v. *Parker*, 586 U. S. 938, 939 (2018) (SOTOMAYOR, J., dissenting from denial of application for stay and denial of certiorari).

Hours before the first execution was set to take place, the District Court preliminarily enjoined all four executions on the ground that the use of pentobarbital likely constitutes cruel and unusual punishment prohibited by the Eighth Amendment. Vacatur of that injunction is appropriate because, among other reasons, the plaintiffs have not established that they are likely to succeed on the merits of their Eighth Amendment claim. That claim faces an exceedingly high bar. "This Court has yet to hold that a State's method of execution qualifies as cruel and unusual." *Bucklew* v. *Precythe*, 587 U. S. 119, 133 (2019). For good reason—"[f]ar from seeking to superadd terror, pain, or disgrace to their executions, the States have often sought more nearly the opposite," developing new methods, such as lethal injection, thought to be less painful and more humane than traditional methods, like hanging, that have been uniformly regarded as constitutional for centuries. *Ibid.* The Federal Government followed this trend by selecting a lethal injection protocol—single-dose pentobarbital—that has become a mainstay of state executions. Pentobarbital:

- Has been adopted by five of the small number of States that currently implement the death penalty.
- Has been used to carry out over 100 executions, without incident.
- Has been repeatedly invoked by prisoners as a *less* painful and risky alternative to the lethal injection protocols of other jurisdictions.

- Was upheld by this Court last year, as applied to a prisoner with a unique medical condition that could only have increased any baseline risk of pain associated with pentobarbital as a general matter. See *Bucklew*, 587 U. S. 119.
- Has been upheld by numerous Courts of Appeals against Eighth Amendment challenges similar to the one presented here. See, *e. g.*, *Whitaker* v. *Collier*, 862 F. 3d 490 (CA5 2017); *Zink* v. *Lombardi*, 783 F. 3d 1089 (CA8 2015); *Gissendaner* v. *Commissioner*, 779 F. 3d 1275 (CA11 2015).

Against this backdrop, the plaintiffs cite new expert declarations suggesting that pentobarbital causes prisoners to experience "flash pulmonary edema," a form of respiratory distress that temporarily produces the sensation of drowning or asphyxiation. But the Government has produced competing expert testimony of its own, indicating that any pulmonary edema occurs only *after* the prisoner has died or been rendered fully insensate. The plaintiffs in this case have not made the showing required to justify last-minute intervention by a Federal Court. "Last-minute stays" like that issued this morning "should be the extreme exception, not the norm." *Bucklew*, 587 U. S., at 150. It is our responsibility "to ensure that method-of-execution challenges to lawfully issued sentences are resolved fairly and expeditiously," so that "the question of capital punishment" can remain with "the people and their representatives, not the courts, to resolve." *Ibid.* In keeping with that responsibility, we vacate the District Court's preliminary injunction so that the plaintiffs' executions may proceed as planned.

It is so ordered.

JUSTICE BREYER, with whom JUSTICE GINSBURG joins, dissenting.

Today, for the first time in 17 years, the Federal Government will execute an inmate, Daniel Lewis Lee. I have pre-

viously described how various features of the death penalty as currently administered show that it may well violate the Constitution. See *Glossip* v. *Gross*, 576 U. S. 863, 908–946 (2015) (dissenting opinion). The Federal Government's decision to resume executions renders the question of the death penalty's constitutionality yet more pressing.

Given the finality and seriousness of a death sentence, it is particularly important to ensure that the individuals sentenced to death are guilty, that they received full and fair procedures, and that they do not spend excessively long periods of time on death row. Courts must also ensure that executions take place through means that are not inhumane.

This case illustrates at least some of the problems the death penalty raises in light of the Constitution's prohibition against "cruel and unusual punishmen[t]." Amdt. 8. Mr. Lee was sentenced to death in 1999 and has now spent over 20 years on death row. Such lengthy delays inflict severe psychological suffering on inmates and undermine the penological rationale for the death penalty. See *Glossip*, 576 U. S., at 923–935 (BREYER, J., dissenting). Moreover, the death penalty is often imposed arbitrarily. *Id.*, at 915–923. Mr. Lee's codefendant in his capital case was sentenced to life imprisonment despite committing the same crime. Amended Judgment in *Lee* v. *United States*, No. 20–2351 (CA 8), pp. 3–4 (July 12, 2020) (Kelly, J., dissenting from denial of stay of execution); *id.*, at 5–7 (explaining that Mr. Lee's execution "raises real concerns about the arbitrary application of the death penalty").

Moreover, there are significant questions regarding the constitutionality of the method the Federal Government will use to execute him. The Government announced on July 25, 2019, that it planned to resume federal executions, after nearly two decades, pursuant to a new single-drug protocol using pentobarbital. See Press Release, Dept. of Justice, Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse, https://www.justice.gov/opa/pr/federal-

government-resume-capital-punishment-after-nearly-two-decade-lapse. In an opinion preliminarily enjoining the execution of Mr. Lee and three other plaintiffs, the U. S. District Court for the District of Columbia explained that the "scientific evidence before [it] overwhelmingly indicates that the [Government's] 2019 Protocol is very likely to cause Plaintiffs extreme pain and needless suffering during their executions." Memorandum Opinion in No. 19–mc–145, *In the Matter of the Federal Bureau of Prisons' Execution Protocol Cases*, Doc. 135, pp. 9, 11 (July 13, 2020). That court also explained that Mr. Lee and the other plaintiffs had "identified two available and readily implementable alternative methods of execution that would significantly reduce the risk of serious pain." *Id.*, at 18.

In short, the resumption of federal executions promises to provide examples that illustrate the difficulties of administering the death penalty consistent with the Constitution. As I have previously written, the solution may be for this Court to directly examine the question whether the death penalty violates the Constitution. See *Glossip* v. *Gross*, 576 U. S., at 946 (dissenting opinion).

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

The Court hastily disposes of respondents' Eighth Amendment challenge to the use of pentobarbital in the Federal Government's single-drug execution protocol. In doing so, the Court accepts the Government's artificial claim of urgency to truncate ordinary procedures of judicial review. This sets a dangerous precedent. The Government is poised to carry out the first federal executions in nearly two decades. Yet because of the Court's rush to dispose of this litigation in an emergency posture, there will be no meaningful judicial review of the grave, fact-heavy challenges respondents bring to the way in which the Government plans to execute them.

I

Respondents' original complaint in this case dates back to 2005. Since then, the Government has modified its execution protocol in significant part, most recently in July 2019 when it replaced the three-drug protocol with a single drug: pentobarbital sodium. App. to Application for Stay or Vacatur 5a. In light of this change, respondents alleged that the Government's planned use of pentobarbital could result in needless pain and suffering in violation of the Eighth Amendment. Among other things, respondents proffered expert evidence that the majority of those injected with pentobarbital suffer flash pulmonary edema, which can lead to a sensation akin to drowning and "'extreme pain, terror, and panic.'" *Id.*, at 10a. Respondents first focused their litigation efforts on the claim that the 2019 protocol exceeds statutory authority, although they also alleged that the protocol violated the Administrative Procedure Act, the Controlled Substances Act, the Food, Drug, and Cosmetic Act, and the Constitution. The Court of Appeals issued a final ruling on the statutory-authority claim in April 2020, expressly declining to rule on respondents' remaining claims on the ground that they were "'neither addressed by the district court nor fully briefed.'" *Id.*, at 7a. This Court denied review two weeks ago.

On June 15, 2020, the Government announced respondents' new execution dates. Four days later, respondents filed a joint motion for a preliminary injunction on their remaining claims and filed a motion for expedited discovery the following day. The parties submitted hundreds of pages of briefing and exhibits over two weeks. The District Court decided this record-heavy motion within two weeks, and during a time when two sister courts independently stayed two of the executions. The District Court evaluated respondents' Eighth Amendment challenge and stayed their executions to permit full consideration by the District Court and the Court of Appeals of their claims. The Court of Appeals

denied the Government's motion for a stay, noting that respondents' claims involve "novel and difficult constitutional questions" that require the benefit of "further factual and legal development." The court *sua sponte* set an expedited briefing schedule to resolve the appeal. Mere hours later, however, this Court now grants the Government's last-minute application to vacate the stay, allowing death-sentenced inmates to be executed before any court can properly consider whether their executions are unconstitutionally cruel and unusual.

II

That outcome is hard to square with this Court's denial of a similar request by the Government seven months ago in this very litigation. See *Barr* v. *Roane*, 589 U. S. 1097 (2019). That order prohibited the Government to proceed with executions before the Court of Appeals could address respondents' different, but equally serious statutory challenge to the federal execution protocol. And in a separate statement, three Members of this Court contemplated that respondents here would not be executed before "the merits of their Administrative Procedure Act [APA] claim [are] adjudicated." *Id.*, at 1098 (statement of ALITO, J., respecting denial of stay or vacatur). They maintained that "in light of what is at stake, it would be preferable for the District Court's decision to be reviewed on the merits by the Court of Appeals for the District of Columbia Circuit before the executions are carried out." *Ibid.*

These statements now ring hollow. By overriding the lower court's stay, this Court forecloses any review of respondents' APA claims and bypasses the appellate court's review of a novel challenge to the federal execution protocol. It does so despite the fact that, whatever may have been true on the records presented in previous cases, see, *e. g.*, *Zagorski* v. *Parker*, 586 U. S. 938 (2018), the parties here introduced conflicting expert evidence about the likelihood that pentobarbital causes pain and suffering before ren-

dering a person insensate, which no factfinder has adjudicated.

III

Once again, the Court has chosen to grant an emergency application from the Government for extraordinary relief. *Wolf* v. *Cook County*, 589 U. S. 1190, 1194 (2020) (SOTOMAYOR, J., dissenting from grant of stay). The dangers of that practice are particularly severe here, where the grant of the Government's emergency application inflicts the most irreparable of harms without the deliberation such an action warrants. See *id.*, at 1195 (entertaining last-minute stay applications from the Government "upend[s] the normal appellate process" and "force[s] the Court to consider important statutory and constitutional questions that have not been ventilated fully in the lower courts, on abbreviated timetables and without oral argument").

* * *

Today's decision illustrates just how grave the consequences of such accelerated decisionmaking can be. The Court forever deprives respondents of their ability to press a constitutional challenge to their lethal injections, and prevents lower courts from reviewing that challenge. All of that is at sharp odds with this Court's own ruling mere months earlier. In its hurry to resolve the Government's emergency motions, I fear the Court has overlooked not only its prior ruling, but also its role in safeguarding robust federal judicial review. I respectfully dissent.

REPORTER'S NOTE

Orders commencing with July 2, 2020, begin with page 1024. The preceding orders in 591 U. S., from June 18, 2020, through June 29, 2020, were reported in Part 1, at 1001–1023. 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.

JULY 2, 2020

Certiorari Granted—Vacated and Remanded

No. 18–1019. BOX, COMMISSIONER, INDIANA DEPARTMENT OF HEALTH, ET AL. *v.* PLANNED PARENTHOOD OF INDIANA & KENTUCKY, INC. C. A. 7th Cir. Reported below: 896 F. 3d 809; and

No. 19–816. BOX ET AL. *v.* PLANNED PARENTHOOD OF INDIANA & KENTUCKY, INC. C. A. 7th Cir. Reported below: 937 F. 3d 973. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *June Medical Services L. L. C.* v. *Russo*, 591 U. S. 299 (2020).

No. 18–1151. ST. AUGUSTINE SCHOOL ET AL. *v.* TAYLOR, SUPERINTENDENT OF PUBLIC INSTRUCTION, ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Espinoza* v. *Montana Dept. of Revenue*, 591 U. S. 464 (2020). Reported below: 906 F. 3d 591.

No. 18–1309. BOOKING.COM B. V. *v.* UNITED STATES PATENT AND TRADEMARK OFFICE ET AL. C. A. 4th Cir. Motion of New York Intellectual Property Law Association for leave to file brief as *amicus curiae* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Peter* v. *NantKwest, Inc.*, 589 U. S. 23 (2019). Reported below: 915 F. 3d 171.

No. 19–978. TEAM RESOURCES INC. ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Liu* v. *SEC*, 591 U. S. 71 (2020). Reported below: 942 F. 3d 272.

No. 19–7714. DE MAISON *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d 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 *Liu* v. *SEC*, 591 U. S. 71 (2020). Reported below: 785 Fed. Appx. 3.

Miscellaneous Orders

No. 19A1063. MERRILL, ALABAMA SECRETARY OF STATE, ET AL. *v.* PEOPLE FIRST OF ALABAMA ET AL. D. C. N. D. Ala. Application for stay, presented to JUSTICE THOMAS, and by him referred to the Court, granted, and the District Court's June 15,

2020, order granting preliminary injunction is stayed pending disposition of the appeal in the in the United States Court of Appeals for the Eleventh Circuit and disposition of the 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 upon the sending down of the judgment of this Court. JUSTICE GINSBURG, JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN would deny the application.

No. 19–1389. TEXAS DEMOCRATIC PARTY ET AL. *v.* ABBOTT, GOVERNOR OF TEXAS, ET AL. C. A. 5th Cir. Motion to expedite consideration of petition for writ of certiorari before judgment denied.

Certiorari Granted

No. 19–351. FEDERAL REPUBLIC OF GERMANY ET AL. *v.* PHILIPP ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 894 F. 3d 406.

No. 19–1328. DEPARTMENT OF JUSTICE *v.* HOUSE COMMITTEE ON THE JUDICIARY. C. A. D. C. Cir. Certiorari granted. Reported below: 951 F. 3d 589.

No. 18–1447. REPUBLIC OF HUNGARY ET AL. *v.* SIMON ET AL. C. A. D. C. Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 911 F. 3d 1172.

No. 19–416. NESTLE USA, INC. *v.* DOE ET AL.; and
No. 19–453. CARGILL, INC. *v.* DOE ET AL. C. A. 9th Cir. Certiorari granted, cases consolidated, and a total of one hour is allotted for oral argument. Reported below: 929 F. 3d 623.

Certiorari Denied

No. 19–294. HAMAMA ET AL. *v.* ADDUCCI ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 912 F. 3d 869.

No. 19–520. PHILIPP ET AL. *v.* FEDERAL REPUBLIC OF GERMANY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 894 F. 3d 406.

No. 19–677. YOST ET AL. *v.* PLANNED PARENTHOOD SOUTHWEST OHIO REGION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 931 F. 3d 530.

No. 19–743. HILL, ATTORNEY GENERAL OF INDIANA, ET AL. *v.* WHOLE WOMAN'S HEALTH ALLIANCE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 937 F. 3d 864.

No. 19–983. REILLY ET AL. *v.* CITY OF HARRISBURG, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 790 Fed. Appx. 468.

No. 19–1176. YOVINO, FRESNO COUNTY SUPERINTENDENT OF SCHOOLS *v.* RIZO. C. A. 9th Cir. Certiorari denied. Reported below: 950 F. 3d 1217.

No. 19–7369. KEEN *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 19–7745. SMITH *v.* DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 924 F. 3d 1330.

No. 18–1516. PRICE ET AL. *v.* CITY OF CHICAGO, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE THOMAS would grant the petition for writ of certiorari. Reported below: 915 F. 3d 1107.

No. 19–1106. SHARP, INTERIM WARDEN *v.* SMITH. C. A. 10th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 935 F. 3d 1064.

JULY 6, 2020

Miscellaneous Order

No. 19A1053. UNITED STATES ARMY CORPS OF ENGINEERS ET AL. *v.* NORTHERN PLAINS RESOURCE COUNCIL ET AL. D. C. Mont. Application for stay, presented to JUSTICE KAGAN, and by her referred to the Court, granted in part and denied in part. The District Court's May 11, 2020, order granting partial vacatur and an injunction is stayed, except as it applies to the Keystone XL pipeline, pending disposition of the appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the 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 upon the sending down of the judgment of this Court.

JULY 8, 2020

Certiorari Denied

No. 19–8712 (19A1064). WARDLOW *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. 19–8835 (19A1065). WARDLOW *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. 19–8850 (19A1069). WARDLOW *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.

JULY 9, 2020

Certiorari Granted—Vacated and Remanded

No. 18–6098. JOHNSON *v.* OKLAHOMA. Ct. Crim. App. Okla.;

No. 18–8801. TERRY *v.* OKLAHOMA. Ct. Crim. App. Okla.;

No. 19–5417. BENTLEY *v.* OKLAHOMA. Ct. Crim. App. Okla.; and

No. 19–6428. DAVIS *v.* OKLAHOMA. Ct. Crim. App. Okla. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *McGirt* v. *Oklahoma*, 591 U. S. 894 (2020).

No. 19–1038. DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL. *v.* CALIFORNIA ET AL.;

No. 19–1040. MARCH FOR LIFE EDUCATION AND DEFENSE FUND *v.* CALIFORNIA ET AL.; and

No. 19–1053. LITTLE SISTERS OF THE POOR JEANNE JUGAN RESIDENCE *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *Little Sisters of the Poor Saints Peter and Paul Home* v. *Pennsylvania*, 591 U. S. 657 (2020). Reported below: 941 F. 3d 410.

Certiorari Granted

No. 19–968. UZUEGBUNAM ET AL. *v.* PRECZEWSKI ET AL. C. A. 11th Cir. Certiorari granted. Reported below: 781 Fed. Appx. 824.

No. 19–422. COLLINS ET AL. *v.* MNUCHIN, SECRETARY OF THE TREASURY, ET AL.; and

No. 19–563. MNUCHIN, SECRETARY OF THE TREASURY, ET AL. *v.* COLLINS ET AL. C. A. 5th Cir. Certiorari granted, cases consolidated, and a total of one hour is allotted for oral argument. Reported below: 938 F. 3d 553.

No. 19–508. AMG CAPITAL MANAGEMENT, LLC, ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 9th Cir.; and

No. 19–825. FEDERAL TRADE COMMISSION *v.* CREDIT BUREAU CENTER, LLC, ET AL. C. A. 7th Cir. Certiorari granted, cases consolidated, and a total of one hour is allotted for oral argument. Reported below: No. 19–508, 910 F. 3d 417; No. 19–825, 937 F. 3d 764.

No. 19–511. FACEBOOK, INC. *v.* DUGUID ET AL. C. A. 9th Cir. Certiorari granted limited to Question 2 presented by the petition. Reported below: 926 F. 3d 1146.

Certiorari Denied

No. 19–914. CREDIT BUREAU CENTER, LLC, ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 7th Cir. Certiorari denied. Reported below: 937 F. 3d 764.

No. 19–1201. BRIGHT, TENNESSEE COMMISSIONER OF TRANSPORTATION *v.* THOMAS. C. A. 6th Cir. Certiorari denied. Reported below: 937 F. 3d 721.

No. 19–575. CHARTER COMMUNICATIONS, INC., ET AL. *v.* GALLION ET AL. C. A. 9th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 772 Fed. Appx. 604.

JULY 10, 2020

Dismissal Under Rule 46

No. 18–1401. PETERSON *v.* LINEAR CONTROLS, INC. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 757 Fed. Appx. 370.

JULY 14, 2020

Miscellaneous Order

No. 20A6. PETERSON ET AL. *v.* BARR, ATTORNEY GENERAL, ET AL. C. A. 7th Cir. Application for stay, presented to JUSTICE KAVANAUGH, and by him referred to the Court, denied.

Certiorari Denied

No. 20–5032 (20A7). LEE *v.* WATSON, WARDEN, ET AL. Application for stay of execution of sentence of death, presented to JUSTICE KAVANAUGH, and by him referred to the Court, denied. Certiorari denied. Reported below: 964 F. 3d 663.

JULY 15, 2020

Miscellaneous Order

No. 20A4. UNITED STATES ET AL. *v.* PURKEY. Application to vacate stay of execution entered by the United States Court of Appeals for the Seventh Circuit on July 2, 2020, presented to JUSTICE KAVANAUGH, and by him referred to the Court, granted. JUSTICE GINSBURG, JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN would deny the application.

JULY 16, 2020

Miscellaneous Orders

No. 19A1071. RAYSOR ET AL. *v.* DESANTIS, GOVERNOR OF FLORIDA, ET AL. C. A. 11th Cir. Application to vacate stay, presented to JUSTICE THOMAS, and by him referred to the Court, denied.

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

This Court's order prevents thousands of otherwise eligible voters from participating in Florida's primary election simply because they are poor. And it allows the Court of Appeals for the Eleventh Circuit to disrupt Florida's election process just days before the July 20 voter-registration deadline for the August primary, even though a preliminary injunction had been in place for nearly a year and a Federal District Court had found the State's pay-to-vote scheme unconstitutional after an 8-day trial. I would grant the application to vacate the Eleventh Circuit's stay.

I

This case implicates the "'fundamental political right' to vote." *Purcell* v. *Gonzalez*, 549 U. S. 1, 4 (2006) (*per curiam*). In 2018, the citizens of Florida amended their State Constitution to restore this basic right to persons with felony convictions who had completed "'all terms'" of their sentences. See *Jones* v. *Governor of Fla.*, 950 F. 3d 795, 800 (CA11 2020) (*Jones I*). Florida's Legislature and high court have interpreted the amendment to condition voting eligibility on payment of all fines, fees, and restitution imposed as part of a sentence. *Id.*, at 800, 803–804; see also Fla. Stat. § 98.0751 (2020 Cum. Supp.); *Advisory Opinion to Governor re: Implementation of Amdt. 4, The Voting Restoration Amdt.*, 288 So. 3d 1070, 1081 (Fla. 2020). Under this scheme, nearly a million otherwise-eligible citizens cannot vote unless they pay money.

Well before the August 18, 2020, Florida primary, several indigent persons with felony convictions challenged the constitutionality of Florida's voter paywall. Among other things, they claimed that this system violates the Equal Protection Clause, the Due Process Clause, and the Twenty-fourth Amendment.

In October 2019, the United States District Court for the Northern District of Florida issued a preliminary injunction, concluding that the plaintiffs were likely to show that Florida's pay-to-vote scheme constitutes wealth discrimination in violation of the Equal Protection Clause. See *Jones I*, 950 F. 3d, at 805. The court enjoined state officials from preventing the plaintiffs from registering to vote, or from voting, simply because they are unable to pay their outstanding legal financial obligations (LFOs). See *ibid.*

Months later, the Eleventh Circuit affirmed. It too determined that the plaintiffs were likely to succeed on their equal protection claims. *Id.*, at 817. The Eleventh Circuit further found that Florida's pay-to-vote scheme would fail rational-basis review as applied to indigent persons, *id.*, at 810–813, and may also fail as applied to all persons with felony convictions if "a substantial enough proportion" of them genuinely "cannot pay," *id.*, at 814. The Eleventh Circuit declined to rehear the case en banc. For months, then, the Eleventh Circuit's decision in *Jones I* has set out the legal rights of indigent would-be voters like the plaintiffs here.

With the preliminary injunction still in place, the District Court certified a class of prospective voters on the equal protection and Twenty-fourth Amendment claims and held a bench trial. The 8-day trial included thousands of records and testimony from the plaintiffs, state and county officials, public defenders, and experts. On May 24, 2020, the District Court entered a permanent injunction and issued its factual findings and legal conclusions in a 125-page opinion. See generally *Jones* v. *DeSantis*, 462 F. Supp. 3d 1196 (ND Fla. 2020) (*Jones II*).

The District Court first found an equal protection violation. Guided by the Eleventh Circuit's controlling analysis in *Jones I*, the District Court concluded that Florida's pay-to-vote system creates an unconstitutional wealth barrier to voting. *Jones II*, 462 F. Supp. 3d, at 1217. The court held that the system lacks any rational basis, finding "as a fact" that "the overwhelming majority of felons who have not paid their LFOs in full, but who are otherwise eligible to vote, are genuinely unable to pay the required amount." *Id.*, at 1219. There was no sound reason, the District Court concluded, for Florida's decision to bar ballot access on the basis of indigence. *Ibid.*

Next, the District Court held that Florida's scheme violates due process. Crediting expert testimony, the court determined that "many felons do not know, and some have no way to find out, the amount of LFOs included in a judgment." *Id.*, at 1220. Not only does Florida provide individuals inconsistent information, but the State's own records are incomplete and unreliable; the District Court even found that Florida lacks records of restitution payments it has received. *Id.*, at 1220–1224. Based on the State's estimates, moreover, the District Court noted that Florida officials would need about six years to determine how much (if anything) currently registered voters (to say nothing of those who seek to register) must pay to vote. *Id.*, at 1228. Compounding the problem, the District Court found, is that Florida law puts the risk of error on the prospective voter, suggesting on its registration forms that a false affirmation of voting eligibility is a felony "regardless of willfulness." *Id.*, at 1229.

Last, the District Court concluded that Florida's payment requirement is a tax abridging the right to vote in violation of the

Twenty-fourth Amendment. *Id.*, at 1233–1234. In the District Court's view, the required payments are taxes because Florida assesses them "regardless of " a defendant's "culpability," and for the "sole" or "primary purpose of raising revenue to pay for government operations—for things the state must provide, such as a criminal-justice system, or things the state chooses to provide, such as a victim-compensation fund." *Id.*, at 1233–1234.

Having found several grounds for awarding relief, the District Court prescribed remedies tailored to the State's existing procedures. In effect, the District Court's remedies created a rebuttable presumption of inability to pay for any person who the State had already determined was indigent. *Id.*, at 1248. At the State's suggestion, *id.*, at *ibid.*, the District Court required the Secretary of State to permit voters to seek an advisory opinion from Florida's Division of Elections regarding the amount owed or their inability to pay, *id.*, at 1250–1252. The court also ordered that a person could register and vote without being prosecuted if the division did not provide a timely advisory opinion within 21 days. *Id.*, at 1250–1251.

On July 1, 2020—over a month after the District Court's judgment and 19 days before the voter-registration deadline—the Eleventh Circuit stayed the permanent injunction pending appeal. The Court of Appeals provided no reasons for its order.

II

This Court errs in refusing to vacate that stay. The Court may vacate an appellate court stay where (1) the case "could and very likely would be reviewed here upon final disposition in the court of appeals," (2) "the rights of the parties . . . may be seriously and irreparably injured by the stay," and (3) "the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay." *Coleman* v. *Paccar Inc.*, 424 U. S. 1301, 1304 (1976) (Rehnquist, J., in chambers). Although the Court exercises this power sparingly, it has done so in voting-rights cases like this one. See, *e. g.*, *Frank* v. *Walker*, 574 U. S. 929 (2014) (vacating Court of Appeals stay of permanent injunction).

This case easily meets the first two *Coleman* prongs. By the District Court's count, "nearly a million" persons are barred from voting because of Florida's alleged wealth discrimination, inscru-

table processes, and tax. See *Jones II*, 462 F. Supp. 3d, at 1203. A case implicating the franchise of almost a million people is exceptionally important and likely to warrant review. See this Court's Rule 10. And there is no question that these people would suffer irreparable harm were they denied the vote or "incentiv[ized] to remain away from the polls" because of the Eleventh Circuit's conflicting orders or Florida's threat of prosecution. *Purcell*, 549 U. S., at 5. By contrast, the State has not shown comparable injury, especially because the District Court's remedies employ existing state procedures that the State itself proposed. *Jones II*, 462 F. Supp. 3d, at 1248–1249.

As for the third prong, the Eleventh Circuit was "demonstrably wrong in its application of accepted standards in deciding to issue the stay." *Coleman*, 424 U. S., at 1304. The Court of Appeals not only failed to defer to the District Court's factual findings, but it also appears to contradict its prior view of the plaintiffs' equal protection claims. For starters, the District Court made extensive "factual findings to which the Court of Appeals owed deference," *Purcell*, 549 U. S., at 5, including that Florida's pay-to-vote scheme overwhelmingly affects the indigent and is intended to fund state services regardless of any person's criminal culpability, *Jones II*, 462 F. Supp. 3d, at 1219, 1233. The Eleventh Circuit's "bare order" staying the District Court's decision does not "provide any factual findings or indeed any reasoning of its own," and "[t]here has been no explanation given by the Court of Appeals showing the ruling and findings of the District Court to be incorrect." *Purcell*, 549 U. S., at 5. The law required the Eleventh Circuit to "give deference to the discretion of the District Court," but there is "no indication that it did so." *Ibid.* That is the precise error this Court corrected in *Purcell*.

Equally important, the Eleventh Circuit has created the very "confusion" and voter chill that *Purcell* counsels courts to avoid. *Ibid.* Precisely because the District Court's decision in *Jones II* tracked the Eleventh Circuit's decision in *Jones I*, the stay upends the legal status quo nearly a year after the preliminary injunction took effect. Moreover, the Eleventh Circuit did not vacate *Jones I*—a point that further obfuscates the state of the law for would-be voters just 19 days before the voter-registration deadline. No doubt tens of thousands of Floridians with felony convictions have

already registered to vote: That is precisely what *Jones I* said they could do. The State even admitted at trial that 85,000 registrations needed screening based on prior felony convictions (including eligibility involving LFOs). *Jones II*, 462 F. Supp. 3d, at 1228. Those who registered in reliance on the preliminary and permanent injunctions will remain on the voter rolls despite the Eleventh Circuit's stay. See *ibid.* (finding that it would take the State about six years to review these records). Yet because of the Eleventh Circuit's decision, these voters will have no notice of their potential ineligibility or the resulting criminal prosecution they may face for failing to follow the abrupt change in law. Making matters worse, the Eleventh Circuit will not hear argument on this case until August 18, the day of the primary election.

In short, the plaintiffs have raised serious claims, some of which the Eleventh Circuit already found likely to succeed. Because the parties' rights and the legal framework had been well established, it was error for the Eleventh Circuit to reverse course in an unexplained stay order right before an election.

* * *

This Court's inaction continues a trend of condoning disfranchisement. Ironically, this Court has wielded *Purcell* as a reason to forbid courts to make voting safer during a pandemic, overriding two federal courts because any safety-related changes supposedly came too close to election day. See *Republican National Committee* v. *Democratic National Committee*, 589 U. S. 423 (2020) (*per curiam*). Now, faced with an appellate court stay that disrupts a legal status quo and risks immense disfranchisement—a situation that *Purcell* sought to avoid—the Court balks.

I respectfully dissent.

No. 20A9. BARR, ATTORNEY GENERAL, ET AL. *v.* PURKEY. D. C. D. C. Application for stay or vacatur, presented to THE CHIEF JUSTICE, and by him referred to the Court, granted. The District Court's July 15, 2020, order granting preliminary injunction is vacated.

JUSTICE BREYER, with whom JUSTICE GINSBURG joins, dissenting.

Two days ago, the Federal Government conducted its first execution in nearly two decades. Today, it will conduct its second.

Both cases have come before us with the defendants pointing to what I believe are serious legal defects of a kind that have long plagued the administration of the death penalty in the United States. See *Glossip* v. *Gross*, 576 U. S. 863, 908–948 (2015) (BREYER, J., dissenting).

The first case, that of Daniel Lewis Lee, revealed the inherent arbitrariness of the death penalty. Lee was sentenced to death and his codefendant to life even though the two men committed the same crime. See *Barr* v. *Lee*, 591 U. S. 979, 982 (2020) (BREYER, J., dissenting); see also *Glossip*, 576 U. S., at 917 ("40 years of further experience [since *Gregg* v. *Georgia*, 429 U. S. 1301 (1976)] make it increasingly clear that the death penalty is imposed arbitrarily"). Lee's case also implicated the problem of excessive delay and the risk of severe and unnecessary suffering brought about by the Government's chosen method of execution. *Lee*, 591 U. S., at 981 (BREYER, J., dissenting). Today's case, that of Wesley Purkey, raises similar problems.

Consider the problem of delay. See *Lackey* v. *Texas*, 514 U. S. 1045 (1995) (Stevens, J., memorandum respecting denial of certiorari). Daniel Lee's execution took place more than 20 years after his trial. See *Lee*, 591 U. S., at 982 (BREYER, J., dissenting). Wesley Purkey was sentenced to death over 16 years ago for a crime committed six years before that. See *United States* v. *Purkey*, No. 4:01–cr–00308, Doc. No. 505 (WD Mo., Jan. 23, 2004); *United States* v. *Purkey*, 428 F. 3d 738, 745 (CA8 2005). Purkey is now 68 years old, frail, and suffering from Alzheimer's disease and other psychiatric conditions. See Report of Dr. Bhushan Agharkar, in No. 1:19–cv–03570, Doc. 1–1, p. 2 (D DC, Nov. 26, 2019); Report of Dr. Jonathan DeRight, in No. 1:19–cv–03570, Doc. 1–1, at 23 (D DC, filed Nov. 26, 2019). He has undergone many years of what this Court has called the "immense mental anxiety" of confinement on death row awaiting an uncertain date of execution. *In re Medley*, 134 U. S. 160, 172 (1890) (referring to period of *four weeks*); see also *Glossip*, 576 U. S., at 926–929 (BREYER, J., dissenting).

The delay itself undermines the penological rationales for the death penalty: deterrence and retribution. *Id.*, at 929–933; see also *Lee*, 591 U. S., at 982 (BREYER, J., dissenting). I have previously explained that prolonged delays likely reduce the death penalty's deterrent effect. See *Glossip*, 576 U. S., at 930–932 (dissenting opinion). And after so many years have passed, executing the

offender may not serve the interest in retribution either. In Lee's case, for example, the victims' relatives explained that Lee's execution would only "'bring [the] family more pain.'" Demillo, Victims' Relatives Most Vocal Opponents of Man's Execution, Washington Post, July 13, 2020; see also Robertson, She Doesn't Want Her Daughter's Killer To Be Put To Death. Should the Government Listen? N. Y. Times, Oct. 29, 2019. And Purkey alleges that, in the years since his sentencing, his mental condition has deteriorated to the point where he no longer understands why he is being executed. See Complaint in No. 1:19–cv–03570, Doc. 1, ¶¶ 20–108 (D DC, Nov. 26, 2019). We have "question[ed] the retributive value of executing a person" under such circumstances. *Ford* v. *Wainwright*, 477 U. S. 399, 409 (1986).

Purkey's case also raises serious problems of proper procedure. See *Purkey* v. *United States*, 964 F. 3d 603 (CA7 2020). Simplifying the problem, imagine that a death-sentenced defendant's trial or sentencing suffered from his lawyer's constitutionally inadequate performance. Suppose too that his lawyer in his initial habeas proceeding was himself inadequate because he failed to raise the trial lawyer's initial constitutional inadequacy. Can the defendant bring the matter up in a later habeas proceeding, say, a proceeding where he now has a better lawyer? He can sometimes do so where a state conviction is at issue. See *Martinez* v. *Ryan*, 566 U. S. 1 (2012); *Trevino* v. *Thaler*, 569 U. S. 413 (2013). But can he do so where, as here, a federal conviction is at issue? In my view, the question, as presented here, is difficult. On the one hand, we ought not to have a procedural system where challenges to a conviction can go on endlessly. On the other hand, is it consistent with criminal justice principles to allow the execution of a defendant whose conviction rests upon the constitutional inadequacy of a lawyer, when no court has ever adjudicated that inadequacy?

The question reflects the heightened need for reliability in the death penalty context. See *Glossip*, 576 U. S., at 909–910 (BREYER, J., dissenting). The risk of error that we may accept as necessary to the functioning of the system more generally is less tolerable when the punishment is, by definition, irreparable. Yet the requisite opportunities to challenge and then correct errors necessarily entail delay that, in turn, undercuts the penological rationale for the death penalty. In this context, it is espe-

cially difficult to reconcile the competing values of finality and accuracy.

I have written about these matters before. See, *e. g.*, *Price* v. *Dunn*, 587 U. S. 1036 (2019) (opinion dissenting from denial of application for stay); *Jordan* v. *Mississippi*, 585 U. S. 1039 (2018) (opinion dissenting from denial of certiorari); *McGehee* v. *Hutchinson*, 581 U. S. 933, 934 (2017) (opinion dissenting from denial of application for stay of execution); *Reed* v. *Louisiana*, 580 U. S. 1166 (2017) (opinion dissenting from denial of certiorari); *Sireci* v. *Florida*, 580 U. S. 1036 (2016) (same); *Tucker* v. *Louisiana*, 578 U. S. 1018 (2016) (same); *Boyer* v. *Davis*, 578 U. S. 965 (2016) (same). I repeat them here in summary form because the Federal Government has resumed executions after a 17-year hiatus. And the very first cases reveal the same basic flaws that have long been present in many state cases. That these problems have emerged so quickly suggests that they are the product not of any particular jurisdiction or the work of any particular court, prosecutor, or defense counsel, but of the punishment itself. A modern system of criminal justice must be reasonably accurate, fair, humane, and timely. Our recent experience with the Federal Government's resumption of executions adds to the mounting body of evidence that the death penalty cannot be reconciled with those values. I remain convinced of the importance of reconsidering the constitutionality of the death penalty itself.

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

In a matter of hours, the Government plans to put to death Wesley Purkey, a 68-year-old federal inmate who has Alzheimer's disease and, according to a recent in-person evaluation by a forensic psychiatrist, "lack[s] a rational understanding of the basis for his execution." Complaint in No. 1:19–cv–03570 (D DC), Doc. 1–1, p. 13 (Purkey Psychiatric Report). Due to these developments and rapid deteriorations in Purkey's mental state, his counsel filed an action in the United States District Court for the District of Columbia. The complaint alleges that under *Ford* v. *Wainwright*, 477 U. S. 399 (1986), Purkey is mentally incompetent to be executed and, at minimum, is entitled to an evidentiary hearing to evaluate his mental competence before the Government proceeds with his execution. The District Court below preliminarily enjoined Purkey's execution, finding that the evidence

Purkey has put forth thus far established a likelihood of success on the merits of his claims. The Government now seeks a stay or vacatur of that preliminary injunction.

Such a stay is available "only under extraordinary circumstances." *Ruckelshaus* v. *Monsanto Co.*, 463 U. S. 1315, 1316 (1983) (Blackmun, J., in chambers); see also *Maryland* v. *King*, 567 U. S. 1301, 1302 (2012) (ROBERTS, C. J., in chambers) (listing stay factors). Accordingly, "[w]hen a matter is pending before a court of appeals, it long has been the practice of Members of this Court to grant stay applications only 'upon the weightiest considerations.'" *Fargo Women's Health Org.* v. *Schafer*, 507 U. S. 1013, 1014 (1993) (O'Connor, J., concurring) (quoting *O'Rourke* v. *Levine*, 80 S. Ct. 623, 624, 4 L. Ed. 2d 615 (1960) (Harlan, J., in chambers)). 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 here. *Packwood* v. *Senate Select Comm. on Ethics*, 510 U. S. 1319, 1320 (1994) (Rehnquist, C. J., in chambers).

The Government devotes much of its application to arguing that Purkey's complaint alleges "core habeas" claims that he was required to bring in his district of confinement, the Southern District of Indiana, rather than the district in which several federal officers responsible for his execution are located, the District of Columbia. See, *e. g.*, Application for Stay or Vacatur 22. That is not clearly correct: When an individual advances a *Ford* claim, "the only question raised is not whether, but when, his execution may take place." *Ford*, 477 U. S., at 425 (Powell, J., concurring in part and concurring in judgment) (emphasis deleted). That seems to make Purkey's allegations more akin to a method-of-execution claim than a "core habeas" claim challenging the validity of his death sentence. In any event, the Government's objection here is not that Purkey failed to raise a valid claim prohibiting his execution. Instead, the Government quibbles principally with the venue in which Purkey filed that claim. In this posture, that protest does not reflect an "extraordinary circumstanc[e]" that justifies overturning a preliminary injunction. *Ruckelshaus*, 463 U. S., at 1316. Nor does it support this Court's decision to shortcut judicial review and permit the execution of an individual who may well be incompetent.

Importantly, the Government does not appear to dispute that Purkey may advance his competency claims in a 28 U. S. C. § 2241 proceeding filed in the Southern District of Indiana. It identifies no procedural barriers to such a suit. Indeed, the Government proposed that the District Court below transfer the case to the

Southern District of Indiana because, in the Government's view, that is "the appropriate forum for [Purkey's] habeas action." Defendants' Motion to Dismiss in No. 1:19–cv–03570 (D DC), Doc. 18, p. 46; see also Defendants' Opposition to Plaintiff's Renewed Motion in No. 1:19–cv–03570, Doc. 26, p. 10 (noting the Governments' argument to "transfer the case to the Southern District of Indiana").* It is thus undisputed that there is a District Court in which Purkey may properly pursue his *Ford* claim and his request for a competency hearing.

Even if Purkey's suit advanced habeas claims properly pursued through a § 2241 petition in his district of confinement, it would be far from clear that the District Court below lacked authority to issue a preliminary injunction while it considered Purkey's arguments more fully. As the District Court explained, it appears that "the question of the proper location for a habeas petition is best understood as a question of personal jurisdiction or venue" rather than of subject-matter jurisdiction. *Rumsfeld* v. *Padilla*, 542 U. S. 426, 451 (2004) (Kennedy, J., concurring); see also Order in No. 1:19–cv–03570, Doc. 36, p. 9. Whether Purkey should have filed in the District of Columbia or the Southern District of Indiana, it would be passingly strange to maintain, in the final hours before his capital sentence is to be carried out, that his selection of venue should automatically prevent him from developing what the District Court found to be a likely meritorious *Ford* claim and request for a competency hearing. At a minimum, the Government has not carried its "especially heavy" burden of demonstrating that its "core habeas" argument presents a jurisdictional impediment to the District Court's preliminary injunction.

The Government's remaining contentions are even less persuasive. In particular, the Government has not come close to showing that the District Court erred in finding Purkey likely to

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*To be sure, the Government maintains that if Purkey's claims sounded in habeas, the District Court below would have lacked jurisdiction over a necessary party to the habeas proceeding: the warden of the federal prison in Indiana where he is confined. Application for Stay or Vacatur 16–17. But the Government does not argue that any such jurisdictional problem would have persisted had Purkey simply filed his complaint in the Southern District of Indiana or if his case were to be transferred to that District. And the Government acknowledged below that "[a]t least one of the John Doe defendants" in this litigation was "the warden of [Purkey's] prison." Defendants' Motion to Dismiss in No. 1:19–cv–03570, Doc. 18, at 43.

succeed on the merits of his *Ford* claim and his request for a competency hearing. As noted, a forensic psychiatrist who conducted an in-person evaluation of Purkey in late 2019 averred that "[i]n [his] opinion, to a reasonable degree of medical certainty, at the time of the evaluation, Mr. Purkey lacked a rational understanding of the basis for his execution." Purkey Psychiatric Report 12–13; see also *id.*, at 13 ("He lacks a true understanding or rationality that the murder is the basis for his execution"). There is extensive evidence that Purkey earnestly and steadfastly believes that the Government plans to execute him not as punishment for murder, but in retaliation for his "protracted jailhouse lawyering" to expose prison abuses. Complaint in No. 1:19–cv–03570, Doc. 1–18, p. 12; see also, *e. g.*, Purkey Psychiatric Report 13 ("Mr. Purkey has a fixed belief that he is going to be executed in retaliation for his legal work, to prevent him from being a hassle for the government. This prevents him from having a rational understanding of the purpose of his execution"). Purkey even believes his counsel to be "part of the conspiracy against him and his efforts to litigate against the prison." Complaint in No. 1:19–cv–03570, Doc. 1–1, at 59. Consistent with such evidence, individuals have described Purkey's history of delusions, hallucinations, and paranoia. See, *e. g.*, Purkey Psychiatric Report 10. And in 2019, Purkey was diagnosed with Alzheimer's disease. Complaint in No. 1:19–cv–03570, Doc. 1–1, at 23, 30–31. That is just a small snapshot of the thousands of pages of evidence Purkey has already put forth.

Against that extensive body of evidence, the Government principally maintains that the forensic psychiatrist, who unequivocally opined that Purkey lacked a rational understanding of the basis for his execution, was confused. See Application for Stay or Vacatur 24. According to the Government, the psychiatrist misinterpreted Purkey's failure to understand the reason for the scheduling of his execution as an inability to grasp the basis for his execution altogether. But even a cursory review of the psychiatrist's report reveals no such muddling of concepts. While the psychiatrist acknowledged that Purkey could "recite the fact that his execution is for the murder of Jennifer Long," the psychiatrist continued that Purkey "lacks rational understanding of that fact" and can only "parro[t]" it "rather than hav[e] a rational understanding" of it. Purkey Psychiatric Report 13.

The Government then insists that, even accepting as true Purkey's evidence of "a history of mental illness" and "paranoid delusional thinking," such evidence "does not demonstrate incompetency under *Ford*." Application for Stay or Vacatur 27 (internal quotation marks omitted). But the question before the District Court at the preliminary-injunction stage was not whether Purkey conclusively is unable to comprehend the basis for his punishment. Instead, the District Court needed only conclude that Purkey would be likely to succeed in establishing a "'substantial threshold showing'" of incompetence to warrant a competency hearing, *Panetti* v. *Quarterman*, 551 U. S. 930, 949 (2007) (quoting *Ford*, 477 U. S., at 426 (opinion of Powell, J.)), or his actual incompetence to be executed. On this record, the District Court correctly concluded that Purkey met this preliminary burden. The Government's cursory arguments regarding the ultimate merits of Purkey's claims do not reveal this case to be an "extraordinary" one justifying the Court's second-guessing of the District Court's highly factbound assessment. *Ruckelshaus*, 463 U. S., at 1316.

Finally, there can be no serious dispute that the remaining equitable considerations at issue heavily favor Purkey. Although the Government and the family members of the victim have a legitimate interest in punishing the guilty, that interest must be measured against Purkey's and the public's interest in ensuring that such punishment comports with the Constitution. At the same time, proceeding with Purkey's execution now, despite the grave questions and factual findings regarding his mental competency, casts a shroud of constitutional doubt over the most irrevocable of injuries.

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Because the Government has not satisfied its "especially heavy" burden of showing justification for staying or vacating the District Court's preliminary injunction, *Packwood*, 510 U. S., at 1320 (Rehnquist, C. J., in chambers), I respectfully dissent.

No. 20A10. BARR, ATTORNEY GENERAL, ET AL. *v.* PURKEY ET AL. D. C. D. C. Application for stay or vacatur, presented to THE CHIEF JUSTICE, and by him referred to the Court, granted. The District Court's July 15, 2020, order granting preliminary injunction is vacated.

Certiorari Denied

No. 20–23 (20A11). HARTKEMEYER ET AL. *v.* BARR, ATTORNEY GENERAL, ET AL. C. A. 7th Cir. Application for stay of execu-

tion of sentences of death for Wesley Purkey and Dustin Honken, presented to JUSTICE KAVANAUGH, and by him referred to the Court, denied. Certiorari denied.

No. 20–26 (20A12). PURKEY *v.* UNITED STATES ET AL. C. A. 7th Cir. Application for stay of execution of sentence of death, presented to JUSTICE KAVANAUGH, and by him referred to the Court, denied. Certiorari denied. Reported below: 964 F. 3d 603.

JULY 20, 2020

Miscellaneous Orders

No. 20A15 (19–715). COMMITTEES OF THE UNITED STATES HOUSE OF REPRESENTATIVES *v.* TRUMP ET AL. Application for order to issue the judgment forthwith, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. JUSTICE SOTOMAYOR would grant the application.

No. 20A16 (19–760). COMMITTEES OF THE UNITED STATES HOUSE OF REPRESENTATIVES *v.* TRUMP ET AL. Application for order to issue the judgment forthwith, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. JUSTICE SOTOMAYOR would grant the application.

JULY 24, 2020

Miscellaneous Order

No. 19A1070. CALVARY CHAPEL DAYTON VALLEY *v.* SISOLAK, GOVERNOR OF NEVADA, ET AL. D. C. Nev. Application for injunctive relief, presented to JUSTICE KAGAN, and by her referred to the Court, denied.

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

The Constitution guarantees the free exercise of religion. It says nothing about the freedom to play craps or blackjack, to feed tokens into a slot machine, or to engage in any other game of chance. But the Governor of Nevada apparently has different priorities. Claiming virtually unbounded power to restrict constitutional rights during the COVID–19 pandemic, he has issued a directive that severely limits attendance at religious services. A church, synagogue, or mosque, regardless of its size, may not

admit more than 50 persons, but casinos and certain other favored facilities may admit 50% of their maximum occupancy—and in the case of gigantic Las Vegas casinos, this means that thousands of patrons are allowed.

That Nevada would discriminate in favor of the powerful gaming industry and its employees may not come as a surprise, but this Court's willingness to allow such discrimination is disappointing. We have a duty to defend the Constitution, and even a public health emergency does not absolve us of that responsibility.

I

Calvary Chapel Dayton Valley is a church located in rural Nevada. It wishes to host worship services for about 90 congregants, a figure that amounts to 50% of its fire-code capacity. In conducting these services, Calvary Chapel plans to take many precautions that go beyond anything that the State requires. In addition to asking congregants to adhere to proper social distancing protocols, it intends to cut the length of services in half. It also plans to require six feet of separation between families seated in the pews, to prohibit items from being passed among the congregation, to guide congregants to designated doorways along one-way paths, and to leave sufficient time between services so that the church can be sanitized. According to an infectious disease expert, these measures are "equal to or more extensive than those recommended by the CDC." Electronic Court Filing in No. 3:20–CV–00303, Doc. 38–31 (D Nev., June 4, 2020), p. 6 (ECF).

Yet hosting even this type of service would violate Directive 21, Nevada Governor Steve Sisolak's phase-two reopening plan, which limits indoor worship services to "no more than fifty persons." ECF Doc. 38–2, § 11. Meanwhile, the directive caps a variety of secular gatherings at 50% of their operating capacity, meaning that they are welcome to exceed, and in some cases far exceed, the 50-person limit imposed on places of worship.

Citing this disparate treatment, Calvary Chapel brought suit in Federal District Court and sought an injunction allowing it to conduct services, in accordance with its plan, for up to 50% of maximum occupancy. The District Court refused to grant relief, the Ninth Circuit denied Calvary Chapel's application for an injunction pending appeal, and now this Court likewise denies relief.

I would grant an injunction pending appeal. Calvary Chapel is very likely to succeed on its claim that the directive's discrimi-

natory treatment of houses of worship violates the First Amendment. In addition, unconstitutionally preventing attendance at worship services inflicts irreparable harm on Calvary Chapel and its congregants, and the State has made no effort to show that conducting services in accordance with Calvary Chapel's plan would pose any greater risk to public health than many other activities that the directive allows, such as going to the gym. The State certainly has not shown that church attendance under Calvary Chapel's plan is riskier than what goes on in casinos.

For months now, States and their subdivisions have responded to the pandemic by imposing unprecedented restrictions on personal liberty, including the free exercise of religion. This initial response was understandable. In times of crisis, public officials must respond quickly and decisively to evolving and uncertain situations. At the dawn of an emergency—and the opening days of the COVID–19 outbreak plainly qualify—public officials may not be able to craft precisely tailored rules. Time, information, and expertise may be in short supply, and those responsible for enforcement may lack the resources needed to administer rules that draw fine distinctions. Thus, at the outset of an emergency, it may be appropriate for courts to tolerate very blunt rules. In general, that is what has happened thus far during the COVID–19 pandemic.

But a public health emergency does not give Governors and other public officials *carte blanche* to disregard the Constitution for as long as the medical problem persists. As more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights. Governor Sisolak issued the directive in question on May 28, more than two months after declaring a state of emergency on March 12. Now four months have passed since the original declaration. The problem is no longer one of exigency, but one of considered yet discriminatory treatment of places of worship.

II

Calvary Chapel argues that the Governor's directive violates both the Free Exercise Clause and the Free Speech Clause of the First Amendment, and I agree that Calvary Chapel has a very high likelihood of success on these claims.

A

Under the Free Exercise Clause, restrictions on religious exercise that are not "neutral and of general applicability" must survive strict scrutiny. *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 531 (1993). "[T]he minimum requirement of neutrality is that a law not discriminate on its face," *id.*, at 533, and "[t]he Free Exercise Clause bars even 'subtle departures from neutrality' on matters of religion." *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 584 U. S. 617, 638 (2018) (quoting *Church of Lukumi*, 508 U. S., at 534). Here, the departure is hardly subtle. The Governor's directive specifically treats worship services differently from other activities that involve extended, indoor gatherings of large groups of people.

The face of the directive provides many examples. While "houses of worship" may admit "no more than fifty persons," ECF Doc. 38–2, § 11, many favored facilities that host indoor activities may operate at 50% capacity. Privileged facilities include bowling alleys, § 20, breweries, § 26, fitness facilities, § 28, and most notably, casinos, which have operated at 50% capacity for over a month, § 35; ECF Doc. 38–3, p. 5, sometimes featuring not only gambling but live circus acts and shows.

For Las Vegas casinos, 50% capacity often means thousands of patrons, and the activities that occur in casinos frequently involve far less physical distancing and other safety measures than the worship services that Calvary Chapel proposes to conduct. Patrons at a craps or blackjack table do not customarily stay six feet apart. Casinos are permitted to serve alcohol, which is well known to induce risk taking, and drinking generally requires at least the temporary removal of masks. Casinos attract patrons from all over the country. In anticipation of reopening, one casino owner gave away 2,000 one-way airline tickets to Las Vegas. ECF Doc. 38–9, p. 4. And when the Governor announced that casinos would be permitted to reopen, he invited visitors to come to the State.[1] The average visitor to Las Vegas visits more than six different casinos, potentially gathering with far more than 50 persons in each one. ECF Doc. 38–6, p. 44. Visitors to Las Vegas who gamble do so for more than two hours per day on

[1] See Jones, Nevada Governor Green-Lights June 4 Reopening of Casinos; Las Vegas Gets Ready, L. A. Times (May 26, 2020), www.latimes.com/travel/story/2020-05-26/nevada-governor-oks-reopening-vegas-prepares.

average, *id.*, at 43, and gamblers in a casino often move from one spot to another, trying their luck at different games or at least at different slot machines.

Houses of worship can—and have—adopted rules that provide far more protection. Family groups can be given places in the pews that are more than six feet away from others. Worshippers can be required to wear masks throughout the service or for all but a very brief time. Worshippers do not customarily travel from distant spots to attend a particular church; nor do they generally hop from church to church to sample different services on any given Sunday. Few worship services last two hours. (Calvary Chapel now limits its services to 45 minutes.) And worshippers do not generally mill around the church while a service is in progress.

The idea that allowing Calvary Chapel to admit 90 worshippers presents a greater public health risk than allowing casinos to operate at 50% capacity is hard to swallow, and the State's efforts to justify the discrimination are feeble. It notes that patrons at gaming tables are supposed to wear masks and that the service of food at casinos is now limited, but congregants in houses of worship are also required to wear masks, and they do not consume meals during services.

The State notes that facilities other than houses of worship, such as museums, art galleries, zoos, aquariums, trade schools, and technical schools, are also treated less favorably than casinos, but obviously that does not justify preferential treatment for casinos.

Finally, the State argues that preferential treatment for casinos is justified because the State is in a better position to enforce compliance by casinos, which are under close supervision by state officials and subject to penalties if they violate state rules. By contrast, the State notes, rules for houses of worship must be enforced by local authorities.

This argument might make some sense if enforcing the 50% capacity rule were materially harder than enforcing a flat 50-person rule. But there is no reason to think that is so, let alone that it would be compelling enough to justify differential treatment of religion. Local officials responsible for enforcing maximum occupancy limits during normal times presumably know or can easily ascertain the limit for particular churches, and the State does not claim that these officials have any trouble enforcing

those limits. In many jurisdictions, buildings that host gatherings are required to post their maximum occupancy figure in a prominent location. Enforcing a 50% limit would not require local officials to do anything more than divide that figure in half, and there is no reason to think that enforcing that limit would be any harder than enforcing a 50-person maximum.

Moreover, even if the State's special regulatory power over casinos could justify different rules for those facilities, the State would still have no explanation why facilities like bowling alleys, arcades, and fitness centers are also given the benefit of the 50% rule. And while the State suggests that it strictly enforces the rules applicable to casinos, photos and videos taken in casinos after they were allowed to reopen show widespread and blatant safety violations. Patrons without masks are seen at close quarters, and the State has not brought to our attention any evidence that it has cracked down on non-complying casinos. The sharp spike in COVID–19 cases since the casinos reopened belies the State's strict enforcement claims.

While the directive's treatment of casinos stands out, other facilities are also given more favorable treatment than houses of worship. Take the example of bowling alleys. Some Las Vegas bowling alleys where tournaments are held can seat hundreds of spectators, and under the directive, these facilities may admit up to 50% of capacity. Not only that, the State tolerates seating arrangements at these facilities that pose far more danger than the plan Calvary Chapel proposes. An official state guidance document states that groups of up to 50 people may sit together in the grandstands of a bowling alley provided that they maintain social distancing from other groups. ECF Doc. 38–5, p. 9. Thus, while Calvary Chapel cannot admit more than 50 congregants even if families sit six feet apart, spectators at a bowling tournament can *sit together in groups of 50* provided that each group maintains social distancing *from other groups*.

In sum, the directive blatantly discriminates against houses of worship and thus warrants strict scrutiny under the Free Exercise Clause.

B

The directive fares no better under the Free Speech Clause. Laws that restrict speech based on the viewpoint it expresses are presumptively unconstitutional, see, *e. g.*, *Iancu* v. *Brunetti*, 588 U. S. 388, 393 (2019), and under our cases religion counts as

a viewpoint, *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 831 (1995). Here, the directive plainly discriminates on the basis of viewpoint. Compare the directive's treatment of casino entertainment and church services. Both involve expression, but the directive favors the secular expression in casino shows over the religious expression in houses of worship.

Calvary Chapel has also brought to our attention evidence that the Governor has favored certain speakers over others. When large numbers of protesters openly violated provisions of the directive, such as the rule against groups of more than 50 people, the Governor not only declined to enforce the directive but publicly supported and participated in a protest. Cf. *Masterpiece Cakeshop*, 584 U. S., at 636–638. He even shared a video of protesters standing shoulder to shoulder. The State's response to news that churches might violate the directive was quite different. The attorney general of Nevada is reported to have said, "'You can't spit . . . in the face of law and expect law not to respond.'"[2]

Public protests, of course, are themselves protected by the First Amendment, and any efforts to restrict them would be subject to judicial review. But respecting some First Amendment rights is not a shield for violating others. The State defends the Governor on the ground that the protests expressed a viewpoint on important issues, and that is undoubtedly true, but favoring one viewpoint over others is anathema to the First Amendment.

C

Once it is recognized that the directive's treatment of houses of worship must satisfy strict scrutiny, it is apparent that this discriminatory treatment cannot survive. Indeed, Nevada does not even try to argue that the directive can withstand strict scrutiny.

Having allowed thousands to gather in casinos, the State cannot claim to have a compelling interest in limiting religious gatherings to 50 people—regardless of the size of the facility and the measures adopted to prevent the spread of the virus. "[A] law cannot be regarded as protecting an interest of the highest

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[2] Application 8, and n. 6 (quoting Lochhead, Sisolak, Elected Nevada Officials Discuss Systemic Racism, Reform, Las Vegas Review-Journal (June 5, 2020), www.reviewjournal.com/news/politics-and-government/nevada/sisolak-elected-nevada-officials-discuss-systemic-racism-reform-2045833/).

order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of Lukumi*, 508 U. S., at 547 (internal quotation marks omitted). And even if the 50-person limit served a compelling interest, the State has not shown that public safety could not be protected at least as well by measures such as those Calvary Chapel proposes to implement.

D

The State's primary defense of the directive's treatment of houses of worship is based on two decisions of this Court. Quoting certain language in *Jacobson* v. *Massachusetts*, 197 U. S. 11 (1905), Nevada argues that "when a state exercises emergency police powers to enact an emergency public health measure, courts will uphold it unless (1) there is no real or substantial relation to public health, or (2) the measures are 'beyond all question' a 'plain[,] palpable [invasion] of rights secured by the fundamental law.'" Response to Application 11 (quoting *Jacobson*, 197 U. S., at 31).

Even under this test, the directive's discriminatory treatment would likely fail for the reasons already explained. And in any event, it is a mistake to take language in *Jacobson* as the last word on what the Constitution allows public officials to do during the COVID–19 pandemic. Language in *Jacobson* must be read in context, and it is important to keep in mind that *Jacobson* primarily involved a substantive due process challenge to a local ordinance requiring residents to be vaccinated for small pox.[3] It is a considerable stretch to read the decision as establishing the test to be applied when statewide measures of indefinite duration are challenged under the First Amendment or other provisions not at issue in that case.

The State also points to the Court's recent refusal to issue a temporary injunction against enforcement of a California law that

[3] The Court brushed aside Jacobson's claims that the challenged law violated the Preamble and the spirit of the Constitution. *Jacobson*, 197 U. S., at 22. His claim under the Privileges or Immunities Clause of the Fourteenth Amendment was doomed by the *Slaughter-House Cases*, 16 Wall. 36, 76–80 (1873), and was not addressed by the Court. Finally, the Court quickly rejected his equal protection claim, *Jacobson*, 197 U. S., at 30, which was based on the law's exemption for children and persons under guardianship, see *Commonwealth* v. *Jacobson*, decided with *Commonwealth* v. *Pear*, 183 Mass. 242, 248, 66 N. E. 719, 722 (1903).

limited the number of persons allowed to attend church services. See *South Bay United Pentecostal Church* v. *Newsom*, 590 U. S. 965 (2020). I dissented from that decision, see 966; see also *id.*, at 967 (KAVANAUGH, J., dissenting), but even if it is accepted, that case is different from the one now before us. In *South Bay*, a church relied on the fact that the California law treated churches less favorably than certain other facilities, such as factories, offices, supermarkets, restaurants, and retail stores. But the law was defended on the ground that in these facilities, unlike in houses of worship, "people neither congregate in large groups nor remain in close proximity for extended periods." *Id.*, at 966 (ROBERTS, C. J., concurring). That cannot be said about the facilities favored in Nevada. In casinos and other facilities granted preferential treatment under the directive, people congregate in large groups and remain in close proximity for extended periods.

E

An injunction pending appeal is warranted in this case. Calvary Chapel's First Amendment claims are very likely to succeed. Indeed, it can be said that its "legal rights . . . are indisputably clear," *Turner Broadcasting System, Inc.* v. *FCC*, 507 U. S. 1301, 1303 (1993) (Rehnquist, C. J., in chambers) (internal quotation marks omitted), and the equities also favor Calvary Chapel. Preventing congregants from worshipping will cause irreparable harm, and the State has made no effort to show that Calvary Chapel's plans would create a serious public health risk.

* * *

I would issue an injunction barring the State, pending appeal, from interfering with worship services conducted at Calvary Chapel in accordance with its stated plan and the general face-mask requirement. I therefore respectfully dissent.

JUSTICE GORSUCH, dissenting.

This is a simple case. Under the Governor's edict, a 10-screen "multiplex" may host 500 moviegoers at any time. A casino, too, may cater to hundreds at once, with perhaps six people huddled at each craps table here and a similar number gathered around every roulette wheel there. Large numbers and close quarters

are fine in such places. But churches, synagogues, and mosques are banned from admitting more than 50 worshippers—no matter how large the building, how distant the individuals, how many wear face masks, no matter the precautions at all. In Nevada, it seems, it is better to be in entertainment than religion. Maybe that is nothing new. But the First Amendment prohibits such obvious discrimination against the exercise of religion. The world we inhabit today, with a pandemic upon us, poses unusual challenges. But there is no world in which the Constitution permits Nevada to favor Caesars Palace over Calvary Chapel.

JUSTICE KAVANAUGH, dissenting.

I join JUSTICE ALITO's dissent in full and respectfully add these further comments.

Under its current reopening plan, Nevada allows restaurants, bars, casinos, and gyms to grant entrance to up to 50% of their total occupancy limit—no matter how many people that may be. For example, a casino with a 500-person occupancy limit may let in up to 250 people. By contrast, places of worship may only take in a maximum of 50 people, without exception, regardless of the occupancy cap. So unlike a casino next door, a church with a 500-person occupancy limit may let in only 50 people, not 250 people. Nevada has offered no persuasive justification for that overt discrimination against places of worship. The risk of COVID–19 transmission is at least as high at restaurants, bars, casinos, and gyms as it is at religious services. Indeed, people congregating in restaurants, bars, casinos, and gyms often linger at least as long as they do at religious services. And given the safety measures that Calvary Chapel and other places of worship are following—including social distancing, mask wearing, and certain additional voluntary measures—it is evident that people interact with others at restaurants, bars, casinos, and gyms at least as closely as they do at religious services.

In my view, Nevada's discrimination against religious services violates the Constitution. To be clear, a State's closing or reopening plan may subject religious organizations to the *same* limits as secular organizations. And in light of the devastating COVID–19 pandemic, those limits may be very strict. But a State may not impose strict limits on places of worship and looser limits on

restaurants, bars, casinos, and gyms, at least without sufficient justification for the differential treatment of religion. As I will explain, Nevada has thus far failed to provide a sufficient justification, and its current reopening plan therefore violates the First Amendment.

In Part I, I will explain how this case fits into the Court's broader religion jurisprudence. In Part II, I will explain why Nevada's treatment of religious organizations is unconstitutional under the Court's precedents.

I

Religion cases are among the most sensitive and challenging in American law. Difficulties can arise at the outset because the litigants in religion cases often disagree about how to characterize a law. They may disagree about whether a law favors religion or discriminates against religion. They may disagree about whether a law treats religion equally or treats religion differently. They may disagree about what it means for a law to be neutral toward religion.

The definitional battles over what constitutes favoritism, discrimination, equality, or neutrality can influence, if not decide, the outcomes of religion cases. But the parties to religion cases and the judges deciding those cases often do not share a common vocabulary or common background principles. And that disconnect can muddy the analysis, build resentment, and lead to litigants and judges talking past one another.

In my view, some of the confusion and disagreement can be averted by first identifying and distinguishing four categories of laws: (1) laws that expressly discriminate against religious organizations; (2) laws that expressly favor religious organizations; (3) laws that do not classify on the basis of religion but apply to secular and religious organizations alike; and (4) laws that expressly treat religious organizations equally to some secular organizations but better or worse than other secular organizations. As I will explain, this case involving Nevada's reopening plan falls into the fourth category.

First are laws that expressly discriminate against religious organizations because of religion. The recent *Espinoza* case fell into that category. *Espinoza* v. *Montana Dept. of Revenue*, 591 U. S. 464 (2020). The State of Montana provided tax credits to those who contributed to private school scholarship organizations. But there was a significant catch: Families eligible for scholarship

funds could use those funds only at secular private schools, not religious private schools. Cases like that are straightforward examples of religious discrimination. And as a general rule, laws that discriminate against religion are, in the Court's words, "odious to our Constitution." *Espinoza*, *id.*, at 489 (internal quotation marks omitted); see *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U. S. 449 (2017); *Good News Club* v. *Milford Central School*, 533 U. S. 98 (2001); *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995); *Larson* v. *Valente*, 456 U. S. 228 (1982); *McDaniel* v. *Paty*, 435 U. S. 618, 629 (1978) (Brennan, J., concurring in judgment); see also *Murphy* v. *Collier*, 587 U. S. 901 (2019) (KAVANAUGH, J., concurring in grant of application for stay); cf. *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520 (1993).

Second are laws that expressly favor religious organizations over secular organizations. Examples include cases where a legislature affords religious organizations certain accommodations, exemptions, or benefits that are not available to secular organizations. The legislature might, for example, grant religious organizations a property tax exemption that is not available to secular organizations. Cf. *Walz* v. *Tax Comm'n of City of New York*, 397 U. S. 664 (1970). Or the legislature might authorize accommodations for certain religious individuals (but not secular individuals) that relieve them from the burdens of otherwise-applicable laws, such as the draft. See *Gillette* v. *United States*, 401 U. S. 437 (1971). Those kinds of accommodations or exemptions can sometimes trigger Establishment Clause challenges because of the apparent favoritism of religion. See generally *American Legion* v. *American Humanist Assn.*, 588 U. S. 29, 68 (2019) (KAVANAUGH, J., concurring); see also *Cutter* v. *Wilkinson*, 544 U. S. 709 (2005); *Board of Ed. of Kiryas Joel Village School Dist.* v. *Grumet*, 512 U. S. 687, 722 (1994) (Kennedy, J., concurring in judgment); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327 (1987).

Third are laws that apply to religious and secular organizations alike without making any classification on the basis of religion. For example, a city fire code may require sprinklers in all buildings that can hold more than 100 people. A law like that would cover buildings owned by religious organizations and buildings owned by secular organizations. Those kinds of laws on their face present no impermissible discrimination or favoritism.

To be sure, those kinds of laws, although not differentiating between religious and secular organizations, can still sometimes impose substantial burdens on religious exercise. If so, a religious organization may seek an exemption in court (if not also in the legislature) to the extent available under federal or state law and permissible under the Establishment Clause. See, *e. g.*, *Our Lady of Guadalupe School* v. *Morrissey-Berru*, 591 U. S. 732 (2020); *Gonzales* v. *O Centro Espírita Beneficente União do Vegetal*, 546 U. S. 418 (2006). Or a religious organization may contend that the facially neutral law was actually motivated by animus against religion and is unconstitutional on that ground. See *Lukumi*, 508 U. S. 520.

Fourth are laws—like Nevada's in this case—that supply no criteria for government benefits or action, but rather divvy up organizations into a favored or exempt category and a disfavored or non-exempt category. Those laws provide benefits only to organizations in the favored or exempt category and not to organizations in the disfavored or non-exempt category.

For example, consider a zoning law that places some secular organizations (apartment buildings, small retail businesses, restaurants, banks, etc.) in a favored or exempt zoning category, and places some secular organizations (office buildings, large retail businesses, movie theaters, music venues, etc.) in a disfavored or non-exempt zoning category. Suppose that religious properties arguably could be considered similar to some of the secular properties in *both* categories. What, then, are the constitutional limits and requirements with respect to how the legislature may categorize religious organizations?

In those circumstances, the Court's precedents make clear that the legislature *may* place religious organizations in the favored or exempt category rather than in the disfavored or non-exempt category without causing an Establishment Clause problem. See, *e. g.*, *Walz*, 397 U. S., at 696 (opinion of Harlan, J.) ("[T]he critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter"); *Texas Monthly, Inc.* v. *Bullock*, 489 U. S. 1, 14 (1989) (plurality opinion) (expressing approval of subsidies "conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end"); *Concerned Citizens of Carderock* v. *Hubbard*, 84 F. Supp. 2d 668 (Md. 2000) (State may

place religious organizations in favored zoning category along with some secular organizations).

The converse free-exercise or equal-treatment question is whether the legislature is *required* to place religious organizations in the favored or exempt category rather than in the disfavored or non-exempt category. The Court's free-exercise and equal-treatment precedents also supply an answer to that question: Unless the State provides a sufficient justification otherwise, it must place religious organizations in the favored or exempt category. See Laycock, The Remnants of Free Exercise, 1990 S. Ct. Rev. 1, 49–50 (explaining how this Court's precedents grant "something analogous to most-favored nation status" to religious organizations).

In *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990), for example, the Court explained that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship *without compelling reason*." *Id.*, at 884 (internal quotation marks omitted; emphasis added); see also *Lukumi*, 508 U. S., at 537–538. Likewise, then-Judge Alito stated that the First Amendment required a police department to exempt Sunni Muslims from its no-beard policy because the police department made "exemptions from its policy for secular reasons and has not offered *any substantial justification* for refusing to provide similar treatment for officers who are required to wear beards for religious reasons." *Fraternal Order of Police Newark Lodge No. 12* v. *Newark*, 170 F. 3d 359, 360 (CA3 1999) (emphasis added).

Put simply, under the Court's religion precedents, when a law on its face favors or exempts some secular organizations as opposed to religious organizations, a court entertaining a constitutional challenge by the religious organizations must determine whether the State has sufficiently justified the basis for the distinction.

To be clear, the Court's precedents do *not* require that religious organizations be treated *more favorably* than all secular organizations. Rather, the First Amendment requires that religious organizations be treated *equally* to the favored or exempt secular organizations, unless the State can sufficiently justify the differentiation.

Stated otherwise, in these kinds of cases, the Court's religion precedents require a basic two-step inquiry. First, does the law

create a favored or exempt class of organizations and, if so, do religious organizations fall outside of that class? That threshold question does not require judges to decide whether a church is more akin to a factory or more like a museum, for example. Rather, the only question at the start is whether a given law on its face favors certain organizations and, if so, whether religious organizations are part of that favored group. If the religious organizations are not, the second question is whether the government has provided a sufficient justification for the differential treatment and disfavoring of religion. Cf. *Smith*, 494 U. S., at 884.

In seeking to justify the differential treatment in those kinds of cases, it is not enough for the government to point out that other secular organizations or individuals are also treated *unfavorably*. The point "is not whether one or a few secular analogs are regulated. The question is whether a single secular analog is *not* regulated." Laycock & Collis, Generally Applicable Law and the Free Exercise of Religion, 95 Neb. L. Rev. 1, 22 (2016). To that end, the government must articulate a sufficient justification for treating some secular organizations or individuals *more favorably* than religious organizations or individuals. See *Smith*, 494 U. S., at 884. That point is subtle but absolutely critical. And if that point is not fully understood, then cases of this kind will be wrongly decided.

II

I turn then to analyzing Nevada's rules under the Court's precedents. As JUSTICE ALITO explains in his dissent, Nevada has now had more than four months to respond to the initial COVID–19 crisis and adjust its line-drawing as circumstances change. Yet Nevada is still discriminating against religion. Nevada applies a strict 50-person attendance cap to religious worship services, but applies a looser 50% occupancy cap to secular organizations like restaurants, bars, casinos, and gyms.

Nevada has gestured at two possible justifications for that discrimination: public health and the economy. But neither argument is persuasive on this record.

First is the State's public health rationale. Nevada undoubtedly has a compelling interest in combating the spread of COVID–19 and protecting the health of its citizens. But it does not have a persuasive public health reason for treating churches differently from restaurants, bars, casinos, and gyms. Calvary Chapel is

happy to abide by the same 50% occupancy cap or some stricter across-the-board standard, as the State sees fit, so long as the same standard applies to those secular businesses. And the Church has committed to social distancing, mask requirements, and certain voluntary safety measures.

The State has not explained why a 50% occupancy cap is good enough for secular businesses where people congregate in large groups or remain in close proximity for extended periods—such as at restaurants, bars, casinos, and gyms—but is not good enough for places of worship. Again, it does not suffice to point out that *some* secular businesses, such as movie theaters, are subject to the lesser of a 50-person or 50% occupancy cap. The legal question is not whether religious worship services are all alone in a disfavored category, but why they are in the disfavored category to begin with. See *Smith*, 494 U. S., at 884. And Nevada has not advanced a sufficient public health rationale for that decision. To reiterate, the State has substantial room to draw lines, especially in an emergency or crisis. But Nevada has not demonstrated that public health justifies taking a looser approach with restaurants, bars, casinos, and gyms and a stricter approach with places of worship.

Second is the State's economic rationale. The State wants to jump-start business activity and preserve the economic well-being of its citizens. The State has loosened restrictions on restaurants, bars, casinos, and gyms in part because many Nevada jobs and livelihoods, as well as other connected Nevada businesses, depend on those restaurants, bars, casinos, and gyms being open and busy. It is understandable for the State to balance public health concerns against individual economic hardship. Almost every State and municipality in America is struggling with that balance. After all, if preventing transmission of COVID–19 were the *sole* concern, a State would presumably order almost all of its businesses to stay closed indefinitely. But the economic devastation and the economic, physical, intellectual, and psychological harm to families and individuals that would ensue (and has already ensued, to some extent) requires States to make tradeoffs that can be unpleasant to openly discuss.

With respect to those tradeoffs, however, no precedent suggests that a State may discriminate against religion simply because a religious organization does not generate the economic benefits that a restaurant, bar, casino, or gym might provide. Nevada's

rules reflect an implicit judgment that for-profit assemblies are important and religious gatherings are less so; that moneymaking is more important than faith during the pandemic. But that rationale "devalues religious reasons" for congregating "by judging them to be of lesser import than nonreligious reasons," in violation of the Constitution. *Lukumi*, 508 U. S., at 537–538. The Constitution does not tolerate discrimination against religion merely because religious services do not yield a profit.

More broadly, the State insists that it is in the midst of an emergency and that it should receive deference from the courts and not be bogged down in litigation. If the courts simply enforce the constitutional prohibition against religious discrimination, however, the floodgates will not open. I agree that courts should be very deferential to the States' line-drawing in opening businesses and allowing certain activities during the pandemic. For example, courts should be extremely deferential to the States when considering a substantive due process claim by a secular business that it is being treated worse than another business. Cf. *Jacobson* v. *Massachusetts*, 197 U. S. 11, 25–28 (1905). Under the Constitution, state and local governments, not the federal courts, have the primary responsibility for addressing COVID–19 matters such as quarantine requirements, testing plans, mask mandates, phased reopenings, school closures, sports rules, adjustment of voting and election procedures, state court and correctional institution practices, and the like.

But COVID–19 is not a blank check for a State to discriminate against religious people, religious organizations, and religious services. There are certain constitutional red lines that a State may not cross even in a crisis. Those red lines include racial discrimination, religious discrimination, and content-based suppression of speech. This Court's history is littered with unfortunate examples of overly broad judicial deference to the government when the government has invoked emergency powers and asserted crisis circumstances to override equal-treatment and free-speech principles. The court of history has rejected those jurisprudential mistakes and cautions us against an unduly deferential judicial approach, especially when questions of racial discrimination, religious discrimination, or free speech are at stake.

Finally, the State relies on the Court's recent temporary injunction decision in *South Bay United Pentecostal Church* v. *Newsom*, 590 U. S. 965 (2020). There, the Court considered a California

limitation on crowd size at religious services. California treated religious organizations better than some secular organizations, like movie theaters, but worse than other secular organizations, such as restaurants, supermarkets, retail stores, pharmacies, hair salons, offices, factories, and the like. In my view, the State of California's explanation, at least on that record, did not persuasively distinguish religious services from several of the favored secular organizations, particularly restaurants and supermarkets. But the Court ultimately denied the church's request for an emergency injunction. In his concurrence, THE CHIEF JUSTICE appropriately emphasized both the high standard for obtaining injunctive relief in this Court and the ongoing and rapidly changing public health emergency. THE CHIEF JUSTICE also noted that the favored secular activities did not involve people who "congregate in large groups" or "remain in close proximity for extended periods." *Id.*, at 966 (opinion concurring in denial of application for injunctive relief).

I continue to think that the restaurants and supermarkets at issue in *South Bay* (and especially the restaurants) pose similar health risks to socially distanced religious services in terms of proximity to others and duration of visit. I suspect that many who have frequented all three kinds of establishments in recent weeks and months would agree. So I continue to respectfully disagree with *South Bay*.

But accepting *South Bay* as a precedent, this case is much different because it involves bars, casinos, and gyms. Nevada's COVID–19-based health distinction between (i) bars, casinos, and gyms on the one hand, and (ii) religious services on the other hand, defies common sense. As I see it, the State cannot plausibly maintain that those large secular businesses are categorically safer than religious services, or that only religious services—and not bars, casinos, and gyms—entail people congregating in large groups or remaining in close proximity for extended periods of time. In any event, the State has not yet supplied a sufficient justification for its counterintuitive distinction.

* * *

The Constitution "protects religious observers against unequal treatment." *Trinity Lutheran*, 582 U. S., at 458 (internal quotation marks and alterations omitted). Nevada's 50-person attendance cap on religious worship services puts praying

at churches, synagogues, temples, and mosques on worse footing than eating at restaurants, drinking at bars, gambling at casinos, or biking at gyms. In other words, Nevada is discriminating against religion. And because the State has not offered a sufficient justification for doing so, that discrimination violates the First Amendment. I would grant the Church's application for a temporary injunction. I respectfully dissent.

JULY 30, 2020

Miscellaneous Order

No. 20A18. LITTLE, GOVERNOR OF IDAHO, ET AL. *v.* RECLAIM IDAHO ET AL. D. C. Idaho. Application for stay, presented to JUSTICE KAGAN, and by her referred to the Court, granted. The District Court's June 23, June 26, and June 30, 2020, orders are stayed pending disposition of the appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the 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 upon the sending down of the judgment of this Court.

CHIEF JUSTICE ROBERTS, with whom JUSTICE ALITO, JUSTICE GORSUCH, and JUSTICE KAVANAUGH join, concurring.

The District Court in this case ordered Idaho either to certify an initiative for inclusion on the ballot without the requisite number of signatures, or to allow the initiative sponsor additional time to gather digital signatures through an online process of solicitation and submission never before used by the State. When the State chose neither option, the District Court authorized the sponsor to join with a third-party vendor to develop and implement a new online system over the course of nine days. The Ninth Circuit subsequently denied the State's request for a stay pending appeal, and Idaho now seeks the same relief from this Court.

Under the well-settled standard for this form of relief, the State must show (1) a "reasonable probability" that this Court will grant certiorari, (2) a "fair prospect" that the Court will reverse

the judgment below, and (3) a "likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth* v. *Perry*, 558 U. S. 183, 190 (2010) (*per curiam*). In my view, the State has satisfied each requirement for a stay.

First, the Court is reasonably likely to grant certiorari to resolve the split presented by this case on an important issue of election administration. States retain "considerable leeway to protect the integrity and reliability of the initiative process." *Buckley* v. *American Constitutional Law Foundation, Inc.*, 525 U. S. 182, 191 (1999). In exercising this discretionary authority, the States depend on clear and administrable guidelines from the courts. Yet the Circuits diverge in fundamental respects when presented with challenges to the sort of state laws at issue here. According to the Sixth and Ninth Circuits, the First Amendment requires scrutiny of the interests of the State whenever a neutral, procedural regulation inhibits a person's ability to place an initiative on the ballot. See *Thompson* v. *DeWine*, 959 F. 3d 804, 808 (CA6 2020) (*per curiam*); *Angle* v. *Miller*, 673 F. 3d 1122, 1133 (CA9 2012). Other Circuits, by contrast, have held that regulations that may make the initiative process more challenging do not implicate the First Amendment so long as the State does not restrict political discussion or petition circulation. See, *e. g.*, *Jones* v. *Markiewicz-Qualkinbush*, 892 F. 3d 935, 938 (CA7 2018); *Initiative and Referendum Institute* v. *Walker*, 450 F. 3d 1082, 1099–1100 (CA10 2006) (en banc); *Dobrovolny* v. *Moore*, 126 F. 3d 1111, 1113 (CA8 1997). Since the onset of the pandemic, the Circuits have applied their conflicting frameworks to reach predictably contrary conclusions as to whether and to what extent States must adapt the initiative process to account for new obstacles to collecting signatures. Compare, *e. g.*, *Miller* v. *Thurston*, 967 F. 3d 727, 741 (CA8 2020), and *Morgan* v. *White*, 964 F. 3d 649, 652 (CA7 2020) (*per curiam*), with, *e. g.*, *SawariMedia, LLC* v. *Whitmer*, 963 F. 3d 595, 597 (CA6 2020).

Second, there is a fair prospect that the Court will set aside the District Court order. *INS* v. *Legalization Assistance Project of Los Angeles County Federation of Labor*, 510 U. S. 1301, 1304 (1993) (O'Connor, J., in chambers). This is not a case about the right to vote, but about how items are placed on the ballot in the first place. Nothing in the Constitution requires Idaho or any

other State to provide for ballot initiatives. See *Meyer* v. *Grant*, 486 U. S. 414, 424 (1988). And the claims at issue here challenge the application of only the most typical sort of neutral regulations on ballot access. Even assuming that the state laws at issue implicate the First Amendment, such reasonable, nondiscretionary restrictions are almost certainly justified by the important regulatory interests in combating fraud and ensuring that ballots are not cluttered with initiatives that have not demonstrated sufficient grassroots support. See *Buckley*, 525 U. S., at 204–205. The State's established verification procedure is no empty formality. In Idaho's largest county, clerks reject about 30 to 40 percent of signatures at this stage.

Third, the State is likely to suffer irreparable harm absent a stay. Right now, the preliminary injunction disables Idaho from vindicating its sovereign interest in the enforcement of initiative requirements that are likely consistent with the First Amendment. See *Abbott* v. *Perez*, 585 U. S. 579, 602, and n. 17 (2018). The dissent does not regard the burden on the State as significant, but in my view that judgment fails to appreciate that the initiative process is just one aspect of a primary and general election system facing a wide variety of challenges in the face of the pandemic. The Governor and Secretary of State here, for example, have suspended some limits on absentee voting and processed requests for absentee ballots through online channels. In addition to preparing for elections with a record number of absentee ballot requests, the county clerks must now also learn, under extraordinary time pressures, how to verify digital signatures through an entirely new system mandated by the District Court. The District Court did not accord sufficient weight to the State's discretionary judgments about how to prioritize limited state resources across the election system as a whole.

The pending appeal in the Ninth Circuit does not eliminate the present strain imposed by this structural injunction on the time and resources of state and local officials, and the costs to the State will continue to add up over the coming weeks. Nor does the balance of equities counsel in favor of denying relief at this point. See *Hollingsworth*, 558 U. S., at 190. While a stay may preclude this particular initiative from appearing on the ballot this November, that consequence is attributable at least in part to Reclaim Idaho, which "delayed unnecessarily" its pursuit of relief until more than a month after the deadline for submitting

signatures. *Fishman* v. *Schaffer*, 429 U. S. 1325, 1330 (1976) (Marshall, J., in chambers); see also *Benisek* v. *Lamone*, 585 U. S. 155, 159, 160 (2018) (*per curiam*). Finally, the dissent is wrong to criticize this Court for supposedly offering the "first view" on this matter. The District Court and the Court of Appeals have already acted on the State's request for a stay, which is now before us.

"A preliminary injunction is an extraordinary remedy." *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. 7, 24 (2008). And the injunction here is all the more extraordinary given the extent to which the District Court recast the initiative process. See *Lewis* v. *Casey*, 518 U. S. 343, 349 (1996). No one has overlooked that the State bears an "especially heavy burden" in justifying a stay pending its appeal to the Ninth Circuit. *Packwood* v. *Senate Select Comm. on Ethics*, 510 U. S. 1319, 1320 (1994) (Rehnquist, C. J., in chambers). But in my view that burden has been met, especially in light of the transformative and intrusive nature of this preliminary injunction.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

Yet again, this Court intervenes to grant a stay pending appeal, in this case less than two weeks before the Court of Appeals for the Ninth Circuit is poised to hear an expedited appeal on a preliminary injunction entered by the District Court.[1] That injunction requires the State of Idaho to accommodate delays and risks introduced by the COVID–19 pandemic by extending the deadline for accepting ballot-initiative signatures and permitting digital collection of signatures. The State claims that it requires immediate intervention from this Court because, absent a stay, it must expend time and resources verifying digital signatures in advance of the extended signature-submission deadline.

[1] Although an applicant seeking a stay pending appeal "has an especially heavy burden," *Packwood* v. *Senate Select Comm. on Ethics*, 510 U. S. 1319, 1320 (1994) (Rehnquist, C. J., in chambers), this Court has begun to grant such stays with notable frequency. See, *e. g.*, *Department of Homeland Security* v. *New York*, 589 U. S. 1173 (2020); *Republican National Committee* v. *Democratic National Committee*, 589 U. S. 423 (2020) (*per curiam*); *Barr* v. *Lee*, 591 U. S. 979 (2020) (*per curiam*); *Barr* v. *Purkey*, 591 U. S. 1034 (2020); *Merrill* v. *People First of Alabama*, 591 U. S. 1024 (2020); *Wolf* v. *Cook County*, 589 U. S. 1190 (2020); *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 589 U. S. 1170 (2020). It is beginning to look like such an applicant has nearly no burden at all.

But the equities do not favor the State, at least not yet. The Ninth Circuit will hear Idaho's case on August 11, almost a month before Idaho's Secretary of State must certify ballot questions to county clerks (on September 7), and almost three months before election day. If the District Court's preliminary injunction turns out to have been improper, Idaho will still have time to omit respondents' initiative from the November ballot. Respondents, on the other hand, are in a far more precarious position. Cf. *Barnes* v. *E-Systems, Inc. Group Hospital Medical & Surgical Ins. Plan*, 501 U. S. 1301, 1304–1305 (1991) (Scalia, J., in chambers) (even where an injunction bars enforcement of a State's laws, "sound equitable discretion" requires balancing harms to stay applicant against harms to respondent). The stay granted today puts a halt to their signature-collection efforts, meaning that even if respondents ultimately prevail on appeal, it will be extremely difficult, if not impossible, for them to collect enough qualifying signatures by any reasonable deadline for the November ballot.[2] In other words, the delay occasioned by this Court's stay likely dooms to mootness respondents' First Amendment claims before any appellate court has had the chance to consider their merits (and, indeed, before this Court has had the chance to consider any potential petition for certiorari).

To be sure, as the concurrence points out, the District Court's preliminary injunction burdens Idaho's county clerks with the task of verifying digital signatures during an already busy election year. But Idaho's undeniable interest in vacatur of the preliminary injunction should be considered in the first instance by the Ninth Circuit, which must weigh the State's temporary expenditure of resources against the significant First Amendment questions raised by respondents. It is premature to assume, based only on that court's (necessarily quick) resolution of Idaho's emergency motion for a stay, that the Ninth Circuit will strike that balance incorrectly upon consideration of the parties' full briefing and oral argument.

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[2] As the concurrence notes, the fact that respondents are short on time is attributable, at least in part, to their delay in filing suit. But given the difficulties of securing legal counsel during a pandemic, I cannot agree with THE CHIEF JUSTICE's conclusion that their delay was "'unnecessar[y].'" *Ante*, at 1062–1063 (quoting *Fishman* v. *Schaffer*, 429 U. S. 1325, 1330 (1976) (Marshall, J., in chambers) (concluding that applicants seeking to challenge a years' old statute had "delayed unnecessarily in commencing . . . suit")).

Nonetheless, based on only the chance that Idaho will not prevail on appeal, that Idaho will seek certiorari in this Court, and that this Court will grant that petition and reverse the (hypothetical) judgment below, this Court takes the extraordinary step of staying the District Court's preliminary injunction pending appeal. In doing so, the Court dispenses liberally a "rare and exceptional" remedy, one that this Court traditionally has granted "only 'upon the weightiest considerations,'" merely to address alleged harms that would exist in the mine-run of similar cases. *Fargo Women's Health Organization* v. *Schafer*, 507 U. S. 1013, 1014 (1993) (O'Connor, J., concurring in denial of application) (quoting *O'Rourke* v. *Levine*, 80 S. Ct. 623, 624, 4 L. Ed. 2d 615, 616 (1960) (Harlan, J., in chambers)). And it deprives itself of the benefit of the appellate court's full consideration and review of the important constitutional issues at the heart of this case. See *Wolf* v. *Cook County*, 589 U. S. 1190, 1195 (2020) (SOTOMAYOR, J., dissenting from grant of stay). Especially given that the Ninth Circuit has signaled its intent to act expeditiously, there is no cause for this Court to usurp the Court of Appeals' responsibility "to review the District Court's decision . . . in the first instance." *McLane Co.* v. *EEOC*, 581 U. S. 72, 85 (2017).

Today, by jumping ahead of the Court of Appeals, this Court once again forgets that it is "'a court of review, not of first view,'" *ibid.*, and undermines the public's expectation that its highest court will act only after considered deliberation. I respectfully dissent from the grant of stay.

JULY 31, 2020

Miscellaneous Orders

No. 19A60. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL. *v.* SIERRA CLUB ET AL. D. C. N. D. Cal. Motion to lift stay denied.

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

Just over a year ago, I suggested "a straightforward way" to avoid irreparable harm to the parties in this litigation: stay the District Court's injunction "only to the extent" that it "prevents the Government from finalizing [relevant] contracts or taking other preparatory administrative action, but leave [the injunction]

in place insofar as it precludes the Government from disbursing those funds or beginning construction." *Trump* v. *Sierra Club*, 588 U. S. 930, 932 (2019) (opinion concurring in part and dissenting in part from grant of stay).

Now, the Government has apparently finalized its contracts, avoiding the irreparable harm it claimed in first seeking a stay. The Court's decision to let construction continue nevertheless, I fear, may "operat[e], in effect, as a final judgment." *Ibid.* I would therefore lift the Court's stay of the District Court's injunction.

AUGUST 3, 2020

Miscellaneous Order

No. 19A1058. LOPEZ BELLO ET AL. *v.* STANSELL ET AL. D. C. S. D. Fla. Application for stay, addressed to JUSTICE SOTOMAYOR, and by her referred to the Court, denied.

Rehearing Denied

No. 19–682. KELSAY *v.* ERNST, 590 U. S. 942;

No. 19–737. DOUSE *v.* UNITED STATES ET AL., 590 U. S. 970;

No. 19–1021. JESSOP ET AL. *v.* CITY OF FRESNO, CALIFORNIA, ET AL., 590 U. S. 955;

No. 19–1095. BEGGS ET UX. *v.* STORY ET AL., 590 U. S. 943;

No. 19–1122. HONG TANG *v.* UNIVERSITY OF BALTIMORE ET AL., 590 U. S. 943;

No. 19–1128. MENDES DA COSTA *v.* PEREIRA ET AL., 590 U. S. 944;

No. 19–1164. JOHNSON *v.* WORKERS' COMPENSATION APPEALS BOARD ET AL., 590 U. S. 959;

No. 19–1238. WATSON *v.* MCCARTHY, SECRETARY OF THE ARMY, 590 U. S. 960;

No. 19–1243. ARMSTRONG *v.* WILSON COUNTY, NORTH CAROLINA, ET AL., 591 U. S. 1004;

No. 19–1245. KWUSHUE *v.* UNITED STATES, 590 U. S. 960;

No. 19–5921. MONTGOMERY *v.* UNITED STATES, 590 U. S. 965;

No. 19–7050. IN RE ROSA, 589 U. S. 1201;

No. 19–7127. TOMLIN *v.* PATTERSON, WARDEN, 590 U. S. 971;

No. 19–7401. HOCKADAY *v.* CHRISTNER ET AL., 589 U. S. 1296;

No. 19–7612. SIMS *v.* WELLS FARGO BANK, N. A., ET AL., 590 U S. 908;

No. 19–7641. YUSONG GONG *v.* UNIVERSITY OF MICHIGAN ET AL., 590 U. S. 908;

No. 19–7690. SHORT *v.* SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GREENSBURG, ET AL., 589 U. S. 1299;

No. 19–7691. IN RE STARKS, 590 U. S. 903;

No. 19–7717. WILSON *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 590 U. S. 909;

No. 19–7721. PARSONS *v.* MCDANIEL ET AL., 590 U. S. 924;

No. 19–7725. CONRAD *v.* UNITED STATES, 590 U. S. 909;

No. 19–7728. ENGLISH *v.* ENERGY FUTURE HOLDINGS CORP. ET AL., 590 U. S. 909;

No. 19–7737. WOLFE *v.* UNITED STATES, 589 U. S. 1288;

No. 19–7858. BALLARD *v.* CLARK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ALBION, ET AL., 590 U. S. 911;

No. 19–7888. BANKS *v.* WAFFLE HOUSE, INC., 590 U. S. 946;

No. 19–7897. WEBSTER *v.* CORVEL ENTERPRISE CO., INC., ET AL., 590 U. S. 932;

No. 19–7906. OSBORNE *v.* GEORGIADES, 590 U. S. 946;

No. 19–7925. O'ROURKE *v.* LASHBROOK, WARDEN, 590 U. S. 946;

No. 19–7936. ZAVAGLIA *v.* BOSTON UNIVERSITY SCHOOL OF MEDICINE, 590 U. S. 947;

No. 19–7937. YANEY ET AL. *v.* MASON ET AL., 590 U. S. 947;

No. 19–8001. VINAROV *v.* CITIMORTGAGE, INC., 590 U. S. 948;

No. 19–8012. DREVALEVA *v.* ALAMEDA HEALTH SYSTEM ET AL., 590 U. S. 948;

No. 19–8167. TALBERT *v.* CARNEY ET AL., 590 U. S. 973;

No. 19–8171. DAWSON *v.* BANK OF NEW YORK MELLON ET AL., 590 U. S. 950;

No. 19–8172. CARSON *v.* UNITED STATES, 590 U. S. 934;

No. 19–8180. M. H. *v.* INDIANA DEPARTMENT OF CHILD SERVICES, 590 U. S. 973;

No. 19–8248. WILMORE *v.* UNITED STATES, 590 U. S. 963;

No. 19–8284. IN RE YOUNG, 590 U. S. 958;

No. 19–8311. DALEN *v.* FEDERAL NATIONAL MORTGAGE ASSOCIATION ET AL., 590 U. S. 982; and

No. 19–8316. TROY-MCKOY *v.* NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, 590 U. S. 963. Petitions for rehearing denied.

No. 19–8156. STANCU *v.* HYATT CORP., 590 U. S. 976. Petition for rehearing denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

AUGUST 5, 2020

Miscellaneous Order

No. 20A19. BARNES, SHERIFF, ORANGE COUNTY, CALIFORNIA, ET AL. *v.* AHLMAN ET AL. D. C. C. D. Cal. Application for stay, presented to JUSTICE KAGAN, and by her referred to the Court, granted, and the District Court's May 26, 2020, order granting preliminary injunction is stayed pending disposition of the appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the 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 upon the sending down of the judgment of this Court. JUSTICE BREYER and JUSTICE KAGAN would deny the application.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

Today, this Court steps in to stay a preliminary injunction requiring Sheriff Don Barnes and Orange County (collectively, the Orange County Jail, or Jail) to implement certain safety measures to protect their inmates during the unprecedented COVID–19 pandemic. The injunction's requirements are not remarkable. In fact, the Jail initially claimed that it had already implemented each and every one of them. Yet, apparently disregarding the District Court's detailed factual findings, its application of established law, and the fact that the Court of Appeals for the Ninth Circuit has twice denied a stay pending its review of the District Court's order, this Court again intervenes to grant a stay before the Circuit below has heard and decided the case on the merits. See *Little* v. *Reclaim Idaho*, 591 U. S. 1060, and n. 1 (2020) (SOTOMAYOR, J., dissenting from grant of stay) (noting the frequency with which the Court has begun granting such stays). The Jail's application does not warrant such extraordinary intervention. Indeed, this Court stays the District Court's preliminary injunction even though the Jail recently reported 15 new cases of COVID–19 in a single week (even with the injunction in place), even though the Jail misrepresented under oath to the District Court the measures it was taking to combat the virus' spread, and even though the Jail's central rationale for a stay (that the injunction goes beyond

federal guidelines) ignores the lower courts' conclusion that the Jail's measures fell "well short" of the Centers for Disease Control and Prevention (CDC Guidelines). 2020 WL 3547960, *4 (CA9, June 17, 2020).

I

The Orange County Jail currently houses a population of over 3,000 pretrial detainees and inmates. At the time of the District Court's injunction, the Jail had witnessed an increase of more than 300 confirmed COVID–19 cases in a little over a month. The Jail, moreover, was well aware of the risk that the virus could spread rapidly through its congregate population and that addressing that risk would require certain precautionary measures. The District Court found that several organizations, including a group of Orange County Sheriff deputies, had "repeatedly warned . . . of the dangers from COVID–19 in the Jail." 445 F. Supp. 3d 671, 691 (CD Cal. 2020). Indeed, the Jail claims that it sprang into action as soon as the Jail's first documented case of COVID–19 appeared in March of 2020, collaborating closely with local health officials on preventative measures to contain the virus' spread. When respondents brought suit, seeking an injunction that would require the Jail to implement a number of safety measures to protect inmates against the virus, the Jail told the District Court that such relief was not needed because it had, "at a minimum, already implemented all of the mitigation efforts" requested. Decl. of Joseph Balicki in No. 8:20–cv–00835, Doc. 44–10, ¶2 (CD Cal., May 12, 2020) (Balicki Decl.); see also *id.*, ¶9 ("There is not a single 'mitigation effort' outlined in Plaintiffs' Complaint that has not already been implemented in the jails"). The Jail claimed that it had already achieved proper social distancing, provided inmates enough soap for frequent handwashing, and isolated and tested all symptomatic individuals.

Dozens of inmate declarations told a different story. Although the Jail had been warned that "social distancing is the cornerstone of reducing transmission of COVID–19," Exh. B to Balicki Decl., Doc. 44–12, inmates described being transported back and forth to the jail in crammed buses, socializing in dayrooms with no space to distance physically, lining up next to each other to wait for the phone, sleeping in bunk beds two to three feet apart, and even being ordered to stand closer than six feet apart when inmates tried to socially distance. Moreover, although the Jail told

its inmates that they could "best protect" themselves by washing their hands with "soap and water throughout the day," Exh. C to Balicki Decl., Doc. 44–13, numerous inmates reported receiving just one small, hotel-sized bar of soap per week. And after symptomatic inmates were removed from their units, other inmates were ordered to dispose of their belongings without gloves or other protective equipment. Finally, despite the Jail's stated policy to test and isolate individuals who reported or exhibited symptoms consistent with COVID–19, multiple symptomatic detainees described being denied tests, and others recounted sharing common spaces with infected or symptomatic inmates.

II

Based on detailed factual findings, which the Ninth Circuit credited, the District Court concluded that the risk of harm in the Jail was "undeniably high." 445 F. Supp. 3d, at 668. The court further determined that while the Jail may have formally adopted a policy to mitigate that risk, its actual compliance was "piecemeal and inadequate." *Ibid.* On this evidence, the District Court held that respondents were likely to succeed in showing that the Jail was deliberately indifferent to the health and safety of its inmates and that it had violated federal disability rights law. In response, the court imposed a preliminary injunction that closely followed the CDC Guidelines for correctional and detention facilities.

This Court now stays that injunction, even though this case presents none of the typical indicia warranting certiorari. See *Maryland* v. *King*, 567 U. S. 1301, 1302 (2012) (ROBERTS, C. J., in chambers) (an applicant for a stay "must demonstrate (1) 'a reasonable probability' that this Court will grant certiorari, (2) 'a fair prospect' that the Court will then reverse the decision below, and (3) 'a likelihood that irreparable harm [will] result from the denial of a stay'" (quoting *Conkright* v. *Frommert*, 556 U. S. 1401, 1402 (2009) (GINSBURG, J., in chambers))). The District Court and Ninth Circuit applied well-established law to the particular facts of this case to conclude that the Jail knew of and disregarded an "excessive risk to inmate health or safety." *Farmer* v. *Brennan*, 511 U. S. 825, 837 (1994). That conclusion is not clearly wrong. The Jail argues that, because it voluntarily released 53 percent of its population, it necessarily could not have been deliberately indifferent to the needs of its inmates. But the release

of even a large number of inmates does not absolve the Jail of its responsibility for the health and safety of the roughly 3,000 individuals left behind. And while the Jail claims that it largely implemented the CDC Guidelines and radically increased hygiene and cleaning within its walls, the District Court, whose factual findings are owed deference, found the reality to be very different.[1] The District Court concluded that by demonstrating the Jail's failure to implement basic safety measures of which it was well aware, respondents had established a likelihood of success on their claim that the Jail had been deliberately indifferent to the serious risk COVID–19 posed to the health of its inmates.

Even if this Court disagrees with the District Court's conclusion, "error correction . . . is outside the mainstream of the Court's functions and . . . not among the 'compelling reasons' . . . that govern the grant of certiorari." S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice § 5.12(c)(3), p. 5–45 (11th ed. 2019); see also *Farmer*, 511 U. S., at 842 (noting that deliberate indifference is a "question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence"). That is especially true where, as here, the Jail fails to contest an entirely independent and sufficient ground for the District Court's injunction: respondents' claims under federal disability rights law.

The Jail nonetheless argues that the Ninth Circuit created a certworthy circuit split because, in the Jail's view, it endorsed a preliminary injunction that went beyond the CDC Guidelines. But no circuit split exists. Like other Circuits, the Ninth Circuit considered the Jail's request for a stay by applying established law to the facts and equities before it. Its decision turned on the conclusion that, in practice, the Jail's measures fell "well short" of the CDC Guidelines, not on whether the District Court's injunction exceeded them. Indeed, in a case presenting different facts and equities, the Ninth Circuit recently stayed an injunction to the extent it exceeded the CDC Guidelines. See *Roman* v. *Wolf*, 2020 WL 2188048, *1 (CA9, May 5, 2020). Moreover, the Jail's claim that "most of" the injunction's requirements exceed the CDC Guidelines is greatly exaggerated. Application for Stay 10. The Jail points to just two alleged discrepancies: first, that the

[1] Notably, the Jail has since resisted respondents' attempts to verify the Jail's compliance with the District Court's preliminary injunction.

District Court ordered the Jail to provide adequate spacing of six feet or more between incarcerated people, whereas the CDC Guidelines suggest only that six feet of space is "'idea[l]'"; and second, that the injunction requires daily temperature checks and screening questions. *Id.*, at 10–11. As to the former, the CDC Guidelines acknowledge that social distancing can be difficult in a correctional facility, but the Jail has not argued that its physical layout does not permit it.[2] And as to the latter, as the Jail itself admits, the Guidelines provide for daily temperature checks in housing units where COVID–19 has been identified. Indeed, updated CDC Guidelines now recommend daily symptom and temperature screening in any correctional facility with a reported case.

The Jail also faces an uphill battle in its claim of irreparable harm. The measures it now decries as vexatious judicial micromanagement are the same measures that just months ago it claimed were, "at a minimum," already being implemented. If the Jail is already doing everything required by the injunction, then what irreparable harm does the injunction pose? And if it is not, and the Jail misrepresented its actions under oath to the District Court, then why should the Jail benefit from this Court's equitable discretion? See *Trump* v. *International Refugee Assistance Project*, 582 U. S. 571, 580 (2017) (*per curiam*) ("In assessing the lower courts' exercise of equitable discretion, we bring to bear an equitable judgment of our own"). This Court normally does not reward bad behavior, and certainly not with extraordinary equitable relief.[3] And while "[c]ourts must be sensitive to

[2] Moreover, the injunction directs the Jail to "provide adequate spacing of six feet or more between incarcerated people so that social distancing can be accomplished in accordance with CDC guidelines," 445 F. Supp. 3d 671, 694 (CD Cal. 2020), and therefore arguably requires the Jail to implement social distancing only to the extent required by the Guidelines.

[3] Given the nature of the "rare and exceptional" relief the Jail seeks, *Fargo Women's Health Organization* v. *Schafer*, 507 U. S. 1013, 1014 (1993) (O'Connor, J., concurring in denial of application), this Court has an independent obligation to weigh the equities. The Jail's misrepresentations to the District Court are one factor to consider. Another is that on the very same day it asked this Court to intervene in its pending appellate proceedings, the Jail requested from the Ninth Circuit a 1-month extension to file its opening brief. One might wonder, then, whether the Jail's need for relief is quite as urgent as the Jail makes out.

the . . . need for deference to experienced and expert prison administrators," they "may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration." *Brown* v. *Plata*, 563 U. S. 493, 511 (2011).

* * *

At the time of the injunction, there were nearly 3,000 inmates still in the Jail's care, 488 of whom were medically vulnerable to COVID–19. "[H]aving stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials" must "'take reasonable measures to guarantee the[ir] safety.'" *Farmer*, 511 U. S., at 832–833; see also *Valentine* v. *Collier*, 590 U. S. 935, 940 (2020) (statement of SOTOMAYOR, J.) ("It has long been said that a society's worth can be judged by taking stock of its prisons. That is all the truer in this pandemic, where inmates everywhere have been rendered vulnerable and often powerless to protect themselves from harm"). The District Court found that, despite knowing the severe threat posed by COVID–19 and contrary to its own apparent policies, the Jail exposed its inmates to significant risks from a highly contagious and potentially deadly disease. Yet this Court now intervenes, leaving to its own devices a jail that has misrepresented its actions to the District Court and failed to safeguard the health of the inmates in its care. I respectfully dissent.

AUGUST 11, 2020

Miscellaneous Order

No. 20A21. CLARNO, OREGON SECRETARY OF STATE *v.* PEOPLE NOT POLITICIANS OREGON ET AL. D. C. Ore. Application for stay, presented to JUSTICE KAGAN, and by her referred to the Court, granted. The District Court's July 10 and July 13, 2020, orders granting preliminary injunction are stayed pending disposition of the appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the 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 upon the sending down of the judgment of this Court. JUSTICE GINSBURG and JUSTICE SOTOMAYOR would deny the application.

August 13, 2020

Miscellaneous Order

No. 20A28. Republican National Committee et al. *v.* Common Cause Rhode Island et al. D. C. R. I. Application for stay, presented to Justice Breyer, and by him referred to the Court, denied. Unlike *Merrill* v. *People First of Alabama*, 591 U. S. 1024 (2020), and other similar cases where a State defends its own law, here the state election officials support the challenged decree, and no state official has expressed opposition. Under these circumstances, the applicants lack a cognizable interest in the State's ability to "enforce its duly enacted" laws. *Abbott* v. *Perez*, 585 U. S. 579 (2018). The status quo is one in which the challenged requirement has not been in effect, given the rules used in Rhode Island's last election, and many Rhode Island voters may well hold that belief. Justice Thomas, Justice Alito, and Justice Gorsuch would grant the application.

August 17, 2020

Miscellaneous Order

No. 19–422. Collins et al. *v.* Mnuchin, Secretary of the Treasury, et al.; and

No. 19–563. Mnuchin, Secretary of the Treasury, et al. *v.* Collins et al. C. A. 5th Cir. [Certiorari granted, 591 U. S. 1028.] Aaron Nielson, Esq., of Provo, Utah, is invited to brief and argue as *amicus curiae* in support of the position that the structure of the Federal Housing Finance Agency does not violate the separation of powers.

August 18, 2020

Miscellaneous Order

No. 19–422. Collins et al. *v.* Mnuchin, Secretary of the Treasury, et al.; and

No. 19–563. Mnuchin, Secretary of the Treasury, et al. *v.* Collins et al. C. A. 5th Cir. [Certiorari granted, 591 U. S. 1028.] Mnuchin et al. shall file an opening brief on the questions presented by the petition in No. 19–563, limited to 13,000 words, by Monday, August 17, 2020. Collins et al. shall file a consolidated response in No. 19–563 and opening brief in No. 19–422, limited to 20,000 words, by Wednesday, September 16, 2020.

That brief shall bear a light red cover. Court-appointed *amicus curiae* shall file a brief, limited to 13,000 words, by Friday, October 16, 2020. That brief shall bear a dark green cover. Mnuchin et al shall file a consolidated reply and response brief, limited to 13,000 words, by Friday, October 23, 2020. Collins et al. shall file a consolidated reply and response brief to brief for Court-appointed *amicus curiae*, limited to 6,000 words, by Monday, November 23, 2020. That brief shall bear a tan cover.

Brief for any *amicus curiae* in support of Collins et al. or in support of neither set of parties, shall be filed by Wednesday, September 23, 2020. Those briefs shall bear a light green cover. Brief for any *amicus curiae* in support of Mnuchin et al. or in support of Court-appointed *amicus curiae*, shall be filed by Friday, October 30, 2020. Those briefs shall bear a dark green cover.

August 24, 2020

Miscellaneous Orders

No. 19–840. California et al. *v.* Texas et al.; and

No. 19–1019. Texas et al. *v.* California et al. C. A. 5th Cir. [Certiorari granted, 589 U. S. 1251.] Motions of the Solicitor General for divided argument and of the U. S. House of Representatives for enlargement of time for oral argument and for divided argument granted, and the time is allotted as follows: 30 minutes for California et al., 10 minutes for U. S. House of Representatives, 20 minutes for the Solicitor General, and 20 minutes for Texas et al. Motion of Ohio et al. for leave to participate in oral argument as *amici curiae*, for enlargement of time for oral argument, and for divided argument denied.

No. 19–930. CIC Services, LLC *v.* Internal Revenue Service et al. C. A. 6th Cir. [Certiorari granted, 590 U. S. 929.] Motion of petitioner to dispense with printing joint appendix granted.

No. 19–5165. Yaney *v.* Superior Court of California, San Bernardino County. Sup. Ct. Cal. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [589 U. S. 907] denied.

No. 19–7935. Ball *v.* City of Marion, Illinois. Sup. Ct. Ill. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [590 U. S. 940] denied.

No. 19–8133. MARTINEZ *v.* UNITED STATES. C. A. 6th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [590 U. S. 921] denied.

Rehearing Denied

No. 19–1224. MANNING *v.* KIM, 591 U. S. 1003;
No. 19–1229. MULCAHY *v.* ASPEN SKIING CO., 591 U. S. 1003;
No. 19–1297. COLLINS ET AL. *v.* D. R. HORTON-TEXAS, LTD., 590 U. S. 993;
No. 19–5989. VICTOR *v.* LOUISIANA, 590 U. S. 920;
No. 19–6701. LABAT *v.* VANNOY, WARDEN, 590 U. S. 945;
No. 19–6957. METAYER *v.* FLORIDA, 589 U. S. 1216;
No. 19–7043. TOTH *v.* INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 590 U. S. 971;
No. 19–7709. TOTH *v.* ANTONACCI ET AL., 590 U. S. 924;
No. 19–7712. JARAMILLO *v.* DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 590 U. S. 909;
No. 19–7840. JONES *v.* ERRINGTON, 590 U. S. 925;
No. 19–7841. IN RE JOHNSON, 590 U. S. 928;

No. 19–7877. ROGERS *v.* GASTELO, WARDEN, 590 U. S. 932;
No. 19–7921. SCOTT *v.* SUPERIOR COURT OF CALIFORNIA, MONTEREY COUNTY, 590 U. S. 946;
No. 19–8021. JACKSON *v.* UTAH ET AL., 590 U. S. 949;
No. 19–8037. RUTTKAMP *v.* BANK OF NEW YORK MELLON, FKA BANK OF NEW YORK, 591 U. S. 1005;
No. 19–8086. JACKSON *v.* TAYLOR, INTERIM COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, 590 U. S. 962;
No. 19–8174. MATA *v.* MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION, 590 U. S. 981;
No. 19–8236. BROOKS *v.* FOSTER, 590 U. S. 994;
No. 19–8272. TATE *v.* FORD, WARDEN, 591 U. S. 1005;
No. 19–8288. TRUONG ET AL. *v.* BARNARD ET AL., 591 U. S. 1005;
No. 19–8299. PATTIOAY *v.* HAWAII, 591 U. S. 1005;
No. 19–8312. CANDELARIA *v.* UNITED STATES, 590 U. S. 952;
No. 19–8356. LOGAN ET AL. *v.* LOGAN, 591 U. S. 1019;
No. 19–8366. CABEZAS *v.* UNITED STATES, 590 U. S. 973;
No. 19–8369. HOSKINS *v.* GE AVIATION, 591 U. S. 1007;
No. 19–8469. VIENGXAY CHANTHARATH *v.* UNITED STATES, 590 U. S. 983;

No. 19–8485. BELL *v.* UNITED STATES, 590 U. S. 996;

No. 19–8520. MOHN *v.* PROGRESSIVE INSURANCE, 591 U. S. 1021; and

No. 19–8603. WHITE *v.* INTERNAL REVENUE SERVICE, 591 U. S. 1022. Petitions for rehearing denied.

No. 19–7915. DEATLEY *v.* WILLIAMS, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF CORRECTIONS, ET AL., 590 U. S. 955. Petition for rehearing denied. JUSTICE GORSUCH took no part in the consideration or decision of this petition.

AUGUST 25, 2020

Miscellaneous Order

No. 20A32. MITCHELL *v.* UNITED STATES. Application for stay of execution of sentence of death, presented to JUSTICE KAGAN, and by her referred to the Court, denied.

Statement of JUSTICE SOTOMAYOR respecting the denial of the application for stay.

The Federal Death Penalty Act of 1994 (FDPA) requires that the Federal Government implement death sentences "in the manner prescribed by the law of the State in which the sentence is imposed." 18 U. S. C. § 3596(a). Considerable uncertainty exists about the scope of this provision. In the most detailed analysis provided by a lower court to date, three judges offered three different views on how to define the "manner" of implementing a death sentence and where to locate the relevant "law of the State." See *In re Federal Bureau of Prisons' Execution Protocol Cases*, 955 F. 3d 106, 108 (CADC 2020) (*per curiam*) ("Each member of the panel takes a different view of what the FDPA requires"). Thus far, this Court has declined to provide definitive guidance on these important questions. See *Barr* v. *Roane*, 589 U. S. 1097 (2019) (application for stay or vacatur denied); *Bourgeois* v. *Barr*, 591 U. S. 1022 (2020) (cert. denied).

Because these questions are not adequately presented for our review in the pending case, I agree with this Court's decision to deny a stay. Here, the Ninth Circuit did not need to resolve the key issue on which the D. C. Circuit panel split because it assumed an answer favorable to Mitchell and still denied relief. See *United States* v. *Mitchell*, 971 F. 3d 993, 996–999 (CA9 2020) (*per curiam*). This case, therefore, does not turn on the question

most in need of this Court's guidance: whether the "manner prescribed by the law of the State" includes procedures set forth in a state agency's execution protocol. But with additional federal executions scheduled in the coming months, the importance of clarifying the FDPA's meaning remains. I believe that this Court should address this issue in an appropriate case.

Certiorari Denied

No. 20–5398 (20A30). MITCHELL *v.* UNITED STATES. C. A. 9th Cir. Application for stay of execution of sentence of death, presented to JUSTICE KAGAN, and by her referred to the Court, denied. Certiorari denied. Reported below: 958 F. 3d 775.

SEPTEMBER 11, 2020

Miscellaneous Orders

No. 20A13 (19–8665). JACKSON *v.* SUPREME COURT OF ILLINOIS. Sup. Ct. Ill. Application for stay, addressed to JUSTICE SOTOMAYOR and referred to the Court, denied.

No. D–3049. IN RE DISBARMENT OF STOVELL. Disbarment entered. [For earlier order herein, see 588 U. S. 934.]

No. D–3054. IN RE DISBARMENT OF HANOVER. Disbarment entered. [For earlier order herein, see 589 U. S. 1129.]

No. D–3055. IN RE DISBARMENT OF FRANK. Disbarment entered. [For earlier order herein, see 589 U. S. 1129.]

No. D–3056. IN RE DISBARMENT OF JAMES. Disbarment entered. [For earlier order herein, see 589 U. S. 1129.]

No. D–3057. IN RE DISBARMENT OF BLAHER. Disbarment entered. [For earlier order herein, see 589 U. S. 1129.]

No. D–3059. IN RE DISBARMENT OF HANNAH. Disbarment entered. [For earlier order herein, see 589 U. S. 1197.]

No. D–3060. IN RE DISBARMENT OF TORRES. Disbarment entered. [For earlier order herein, see 589 U. S. 1197.]

No. D–3061. IN RE DISBARMENT OF DESANTIS. Disbarment entered. [For earlier order herein, see 589 U. S. 1197.]

No. D–3062. IN RE DISBARMENT OF WATT. Disbarment entered. [For earlier order herein, see 589 U. S. 1197.]

No. D–3063. In re Disbarment of Erwin. Disbarment entered. [For earlier order herein, see 589 U. S. 1198.]

No. D–3064. In re Disbarment of Vanderburg. Disbarment entered. [For earlier order herein, see 589 U. S. 1198.]

No. D–3065. In re Disbarment of Farthing. Disbarment entered. [For earlier order herein, see 589 U. S. 1198.]

No. D–3066. In re Disbarment of Carr. Disbarment entered. [For earlier order herein, see 589 U. S. 1198.]

No. 19–930. CIC Services, LLC *v.* Internal Revenue Service et al. C. A. 6th Cir. Motion of Institute for Free Speech for leave to file brief as *amicus curiae* granted. Motion of Partnership for Conservation for leave to file brief as *amicus curiae* out of time granted.

Rehearing Denied

No. 19–1262. Greer *v.* Mehiel et al., 591 U. S. 1004;
No. 19–7872. Wilder *v.* Krebs, 590 U. S. 980;
No. 19–8185. Scott *v.* California, 590 U. S. 981;
No. 19–8202. Gough *v.* Bankers Life & Casualty Co., 590 U. S. 981;
No. 19–8234. Davis *v.* Eppinger, Warden, 590 U. S. 994;
No. 19–8242. Weatherspoon *v.* Bagahpour et al., 590 U. S. 994; and
No. 19–8355. Ray *v.* Stitt, Governor of Oklahoma, 591 U. S. 1019. Petitions for rehearing denied.

No. 19–1251. Armstrong *v.* School District of Philadelphia et al., 591 U. S. 1022. Petition for rehearing denied. Justice Alito took no part in the consideration or decision of this petition.

September 17, 2020

Dismissal Under Rule 46

No. 19–1379. McKinley *v.* Bey. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 946 F. 3d 304.

September 22, 2020

Certiorari Denied

No. 20–5767 (20A52). LeCroy *v.* United States. C. A. 11th Cir. Application for stay of execution of sentence of death, pre-

sented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied. Reported below: 975 F. 3d 1192.

SEPTEMBER 24, 2020

Certiorari Denied

No. 20–5766 (20A49). VIALVA *v.* UNITED STATES. 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: 976 F. 3d 458.

SEPTEMBER 30, 2020

Miscellaneous Order

No. 20–366. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL. *v.* NEW YORK ET AL. Appeal from D. C. S. D N. Y. Appellants' motion to expedite consideration of jurisdictional statement granted in part, and appellees are directed to file a response to the jurisdictional statement on or before 5 p.m. on Wednesday, October 7, 2020.

OCTOBER 2, 2020

Certiorari Granted

No. 19–1155. BARR, ATTORNEY GENERAL *v.* MING DAI.; and

No. 19–1156. BARR, ATTORNEY GENERAL *v.* ALCARAZ-ENRIQUEZ. C. A. 9th Cir. Certiorari granted, cases consolidated, and a total of one hour is allotted for oral argument. Reported below: No. 19–1155, 884 F. 3d 858; No. 19–1156, 727 Fed. Appx. 260.

No. 19–1189. BP P.L.C. ET AL. *v.* MAYOR AND CITY COUNCIL OF BALTIMORE. C. A. 4th Cir. Certiorari granted. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 952 F. 3d 452.

No. 19–1231. FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* PROMETHEUS RADIO PROJECT ET AL.; and

No. 19–1241. NATIONAL ASSOCIATION OF BROADCASTERS ET AL. *v.* PROMETHEUS RADIO PROJECT ET AL. C. A. 3d Cir. Certiorari granted, cases consolidated, and a total of one hour is allotted for oral argument. Reported below: 939 F. 3d 567.

No. 19–1257. BRNOVICH, ATTORNEY GENERAL OF ARIZONA, ET AL. *v.* DEMOCRATIC NATIONAL COMMITTEE ET AL.; and

No. 19–1258. ARIZONA REPUBLICAN PARTY ET AL. *v.* DEMOCRATIC NATIONAL COMMITTEE ET AL. C. A. 9th Cir. Certiorari granted, cases consolidated, and a total of one hour is allotted for oral argument. Reported below: 948 F. 3d 989.