UNITED STATES

REPORTS

579

OCT. TERM 2015

UNITED STATES REPORTS

VOLUME 579

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 2015

JUNE 9 THROUGH SEPTEMBER 30, 2016

END OF TERM

CHRISTINE LUCHOK FALLON

REPORTER OF DECISIONS

WASHINGTON : 2024

Printed on Uncoated Permanent Printing Paper

For sale by the Superintendent of Documents, U. S. Government Publishing Office

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

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[1] Solicitor General Verrilli resigned effective June 24, 2016.

[2] Mr. Gershengorn became Acting Solicitor General effective June 25, 2016.

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 February 25, 2016, 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, Clarence Thomas, Associate Justice.

For the Sixth Circuit, Elena Kagan, Associate Justice.

For the Seventh Circuit, Elena Kagan, Associate Justice.

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

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

For the Tenth Circuit, Sonia Sotomayor, Associate Justice.

For the Eleventh Circuit, Clarence Thomas, Associate Justice.

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

February 25, 2016.

(For next previous allotment, see 577 U. S., Pt. 2, p. II.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2015

WILLIAMS *v.* PENNSYLVANIA

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

No. 15–5040. Argued February 29, 2016—Decided June 9, 2016

Petitioner Williams was convicted of the 1984 murder of Amos Norwood and sentenced to death. During the trial, the then-district attorney of Philadelphia, Ronald Castille, approved the trial prosecutor's request to seek the death penalty against Williams. Over the next 26 years, Williams's conviction and sentence were upheld on direct appeal, state postconviction review, and federal habeas review. In 2012, Williams filed a successive petition pursuant to Pennsylvania's Post Conviction Relief Act (PCRA), arguing that the prosecutor had obtained false testimony from his codefendant and suppressed material, exculpatory evidence in violation of *Brady* v. *Maryland*, 373 U. S. 83. Finding that the trial prosecutor had committed *Brady* violations, the PCRA court stayed Williams's execution and ordered a new sentencing hearing. The Commonwealth asked the Pennsylvania Supreme Court, whose chief justice was former District Attorney Castille, to vacate the stay. Williams filed a response, along with a motion asking Chief Justice Castille to recuse himself or, if he declined to do so, to refer the motion to the full court for decision. Without explanation, the chief justice denied Williams's motion for recusal and the request for its referral. He then joined the State Supreme Court opinion vacating the PCRA court's grant of penalty-phase relief and reinstating Williams's death sentence. Two weeks later, Chief Justice Castille retired from the bench.

Syllabus

Held:

1. Chief Justice Castille's denial of the recusal motion and his subsequent judicial participation violated the Due Process Clause of the Fourteenth Amendment. Pp. 8–14.

(a) The Court's due process precedents do not set forth a specific test governing recusal when a judge had prior involvement in a case as a prosecutor; but the principles on which these precedents rest dictate the rule that must control in the circumstances here: Under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case. The Court applies an objective standard that requires recusal when the likelihood of bias on the part of the judge "is too high to be constitutionally tolerable." *Caperton* v. *A. T. Massey Coal Co.*, 556 U. S. 868, 872. A constitutionally intolerable probability of bias exists when the same person serves as both accuser and adjudicator in a case. See *In re Murchison*, 349 U. S. 133, 136–137. No attorney is more integral to the accusatory process than a prosecutor who participates in a major adversary decision. As a result, a serious question arises as to whether a judge who has served as an advocate for the State in the very case the court is now asked to adjudicate would be influenced by an improper, if inadvertent, motive to validate and preserve the result obtained through the adversary process. In these circumstances, neither the involvement of multiple actors in the case nor the passage of time relieves the former prosecutor of the duty to withdraw in order to ensure the neutrality of the judicial process in determining the consequences his or her own earlier, critical decision may have set in motion. Pp. 8–11.

(b) Because Chief Justice Castille's authorization to seek the death penalty against Williams amounts to significant, personal involvement in a critical trial decision, his failure to recuse from Williams's case presented an unconstitutional risk of bias. The decision to pursue the death penalty is a critical choice in the adversary process, and Chief Justice Castille had a significant role in this decision. Without his express authorization, the Commonwealth would not have been able to pursue a death sentence against Williams. Given the importance of this decision and the profound consequences it carries, a responsible prosecutor would deem it to be a most significant exercise of his or her official discretion. The fact that many jurisdictions, including Pennsylvania, have statutes and professional codes of conduct that already require recusal under the circumstances of this case suggests that today's decision will not occasion a significant change in recusal practice. Pp. 11–14.

2. An unconstitutional failure to recuse constitutes structural error that is "not amenable" to harmless-error review, regardless of whether

the judge's vote was dispositive, *Puckett* v. *United States*, 556 U. S. 129, 141. Because an appellate panel's deliberations are generally confidential, it is neither possible nor productive to inquire whether the jurist in question might have influenced the views of his or her colleagues during the decisionmaking process. Indeed, one purpose of judicial confidentiality is to ensure that jurists can reexamine old ideas and suggest new ones, while both seeking to persuade and being open to persuasion by their colleagues. It does not matter whether the disqualified judge's vote was necessary to the disposition of the case. The fact that the interested judge's vote was not dispositive may mean only that the judge was successful in persuading most members of the court to accept his or her position—an outcome that does not lessen the unfairness to the affected party. A multimember court must not have its guarantee of neutrality undermined, for the appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part. Because Chief Justice Castille's participation in Williams's case was an error that affected the State Supreme Court's whole adjudicatory framework below, Williams must be granted an opportunity to present his claims to a court unburdened by any "possible temptation . . . not to hold the balance nice, clear and true between the State and the accused," *Tumey* v. *Ohio*, 273 U. S. 510, 532. Pp. 14–17.

629 Pa. 533, 105 A. 3d 1234, vacated and remanded.

KENNEDY, 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, J., joined, *post*, p. 17. THOMAS, J., filed a dissenting opinion, *post*, p. 24.

Stuart B. Lev argued the cause for petitioner. With him on the briefs were *Leigh M. Skipper*, *Shawn Nolan*, *Matthew C. Lawry*, and *Timothy P. Kane*.

Ronald Eisenberg argued the cause for respondent. With him on the brief were *Hugh J. Burns, Jr.*, and *R. Seth Williams*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Academy of Appellate Lawyers by *Wendy Cole Lascher* and *Charles A. Bird*; for the American Bar Association by *Paulette Brown*; for the American Civil Liberties Union et al. by *Anna Arceneaux*, *Cassandra Stubbs*, *Steven R. Shapiro*, *Mary Catherine Roper*, and *Witold J. Walczak*; for the Constitutional Accountability Center by *Elizabeth B. Wydra* and *Brianne*

JUSTICE KENNEDY delivered the opinion of the Court.

In this case, the Supreme Court of Pennsylvania vacated the decision of a postconviction court, which had granted relief to a prisoner convicted of first-degree murder and sentenced to death. One of the justices on the State Supreme Court had been the district attorney who gave his official approval to seek the death penalty in the prisoner's case. The justice in question denied the prisoner's motion for recusal and participated in the decision to deny relief. The question presented is whether the justice's denial of the recusal motion and his subsequent judicial participation violated the Due Process Clause of the Fourteenth Amendment.

This Court's precedents set forth an objective standard that requires recusal when the likelihood of bias on the part of the judge "'is too high to be constitutionally tolerable.'" *Caperton* v. *A. T. Massey Coal Co.*, 556 U. S. 868, 872 (2009) (quoting *Withrow* v. *Larkin*, 421 U. S. 35, 47 (1975)). Applying this standard, the Court concludes that due process compelled the justice's recusal.

I

Petitioner is Terrance Williams. In 1984, soon after Williams turned 18, he murdered 56-year-old Amos Norwood in Philadelphia. At trial, the Commonwealth presented evidence that Williams and a friend, Marc Draper, had been standing on a street corner when Norwood drove by. Williams and Draper requested a ride home from Norwood, who agreed. Draper then gave Norwood false directions that led him to drive toward a cemetery. Williams and Draper ordered Norwood out of the car and into the cemetery. There,

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J. Gorod; for Former Appellate Court Jurists by *Jeffrey T. Green*, *David E. Kronenberg*, and *Virginia E. Sloan*; and for Former Judges with Prosecutorial Experience by *Alan P. Solow.*

Briefs of *amici curiae* were filed for the Brennan Center for Justice at NYU School of Law et al. by *Daniel F. Kolb*, *David B. Toscano*, and *Matthew Menendez*; and for the Ethics Bureau at Yale et al. by *Lawrence J. Fox*, *pro se.*

the two men tied Norwood in his own clothes and beat him to death. Testifying for the Commonwealth, Draper suggested that robbery was the motive for the crime. Williams took the stand in his own defense, stating that he was not involved in the crime and did not know the victim.

During the trial, the prosecutor requested permission from her supervisors in the district attorney's office to seek the death penalty against Williams. To support the request, she prepared a memorandum setting forth the details of the crime, information supporting two statutory aggravating factors, and facts in mitigation. After reviewing the memorandum, the then-district attorney of Philadelphia, Ronald Castille, wrote this note at the bottom of the document: "Approved to proceed on the death penalty." App. 426a.

During the penalty phase of the trial, the prosecutor argued that Williams deserved a death sentence because he killed Norwood " 'for no other reason but that a kind man offered him a ride home.' " Brief for Petitioner 7. The jurors found two aggravating circumstances: that the murder was committed during the course of a robbery and that Williams had a significant history of violent felony convictions. That criminal history included a previous conviction for a murder he had committed at age 17. The jury found no mitigating circumstances and sentenced Williams to death. Over a period of 26 years, Williams's conviction and sentence were upheld on direct appeal, state postconviction review, and federal habeas review.

In 2012, Williams filed a successive petition pursuant to Pennsylvania's Post Conviction Relief Act (PCRA), 42 Pa. Cons. Stat. § 9541 *et seq.* (2007). The petition was based on new information from Draper, who until then had refused to speak with Williams's attorneys. Draper told Williams's counsel that he had informed the Commonwealth before trial that Williams had been in a sexual relationship with Norwood and that the relationship was the real motive for Norwood's murder. According to Draper, the Commonwealth

had instructed him to give false testimony that Williams killed Norwood to rob him. Draper also admitted he had received an undisclosed benefit in exchange for his testimony: The trial prosecutor had promised to write a letter to the state parole board on his behalf. At trial, the prosecutor had elicited testimony from Draper indicating that his only agreement with the prosecution was to plead guilty in exchange for truthful testimony. No mention was made of the additional promise to write the parole board.

The Philadelphia Court of Common Pleas, identified in the proceedings below as the PCRA court, held an evidentiary hearing on Williams's claims. Williams alleged in his petition that the prosecutor had procured false testimony from Draper and suppressed evidence regarding Norwood's sexual relationship with Williams. At the hearing, both Draper and the trial prosecutor testified regarding these allegations. The PCRA court ordered the district attorney's office to produce the previously undisclosed files of the prosecutor and police. These documents included the trial prosecutor's sentencing memorandum, bearing then-District Attorney Castille's authorization to pursue the death penalty. Based on the Commonwealth's files and the evidentiary hearing, the PCRA court found that the trial prosecutor had suppressed material, exculpatory evidence in violation of *Brady* v. *Maryland*, 373 U. S. 83 (1963), and engaged in "prosecutorial gamesmanship." App. 168a. The court stayed Williams's execution and ordered a new sentencing hearing.

Seeking to vacate the stay of execution, the Commonwealth submitted an emergency application to the Pennsylvania Supreme Court. By this time, almost three decades had passed since Williams's prosecution. Castille had been elected to a seat on the State Supreme Court and was serving as its chief justice. Williams filed a response to the Commonwealth's application. The disclosure of the trial prosecutor's sentencing memorandum in the PCRA proceedings had alerted Williams to Chief Justice Castille's involvement in the decision to seek a death sentence in his case.

For this reason, Williams also filed a motion asking Chief Justice Castille to recuse himself or, if he declined to do so, to refer the recusal motion to the full court for decision. The Commonwealth opposed Williams's recusal motion. Without explanation, Chief Justice Castille denied the motion for recusal and the request for its referral. Two days later, the Pennsylvania Supreme Court denied the application to vacate the stay and ordered full briefing on the issues raised in the appeal. The State Supreme Court then vacated the PCRA court's order granting penalty-phase relief and reinstated Williams's death sentence. Chief Justice Castille and Justices Baer and Stevens joined the majority opinion written by Justice Eakin. Justices Saylor and Todd concurred in the result without issuing a separate opinion. See 629 Pa. 533, 551, 105 A. 3d 1234, 1245 (2014).

Chief Justice Castille authored a concurrence. He lamented that the PCRA court had "lost sight of its role as a neutral judicial officer" and had stayed Williams's execution "for no valid reason." *Id.*, at 552, 105 A. 3d, at 1245. "[B]efore condemning officers of the court," the chief justice stated, "the tribunal should be aware of the substantive status of *Brady* law," which he believed the PCRA court had misapplied. *Ibid.*, 105 A. 3d, at 1246. In addition, Chief Justice Castille denounced what he perceived as the "obstructionist anti-death penalty agenda" of Williams's attorneys from the Federal Community Defender Office. *Id.*, at 553, 105 A. 3d, at 1246. PCRA courts "throughout Pennsylvania need to be vigilant and circumspect when it comes to the activities of this particular advocacy group," he wrote, lest Defender Office lawyers turn postconviction proceedings "into a circus where [they] are the ringmasters, with their parrots and puppets as a sideshow." *Id.*, at 554, 105 A. 3d, at 1247.

Two weeks after the Pennsylvania Supreme Court decided Williams's case, Chief Justice Castille retired from the bench. This Court granted Williams's petition for certiorari. 576 U. S. 1095 (2015).

II

A

Williams contends that Chief Justice Castille's decision as district attorney to seek a death sentence against him barred the chief justice from later adjudicating Williams's petition to overturn that sentence. Chief Justice Castille, Williams argues, violated the Due Process Clause of the Fourteenth Amendment by acting as both accuser and judge in his case.

The Court's due process precedents do not set forth a specific test governing recusal when, as here, a judge had prior involvement in a case as a prosecutor. For the reasons explained below, however, the principles on which these precedents rest dictate the rule that must control in the circumstances here. The Court now holds that under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case.

Due process guarantees "an absence of actual bias" on the part of a judge. *In re Murchison*, 349 U. S. 133, 136 (1955). Bias is easy to attribute to others and difficult to discern in oneself. To establish an enforceable and workable framework, the Court's precedents apply an objective standard that, in the usual case, avoids having to determine whether actual bias is present. The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, "the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.' " *Caperton*, 556 U. S., at 881. Of particular relevance to the instant case, the Court has determined that an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case. See *Murchison*, 349 U. S., at 136–137. This objective risk of bias is reflected in the due process maxim that "no man can

be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *Id.*, at 136.

The due process guarantee that "no man can be a judge in his own case" would have little substance if it did not disqualify a former prosecutor from sitting in judgment of a prosecution in which he or she had made a critical decision. This conclusion follows from the Court's analysis in *In re Murchison*. That case involved a "one-man judge-grand jury" proceeding, conducted pursuant to state law, in which the judge called witnesses to testify about suspected crimes. *Id.*, at 134. During the course of the examinations, the judge became convinced that two witnesses were obstructing the proceeding. He charged one witness with perjury and then, a few weeks later, tried and convicted him in open court. The judge charged the other witness with contempt and, a few days later, tried and convicted him as well. This Court overturned the convictions on the ground that the judge's dual position as accuser and decisionmaker in the contempt trials violated due process: "Having been a part of [the accusatory] process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused." *Id.*, at 137.

No attorney is more integral to the accusatory process than a prosecutor who participates in a major adversary decision. When a judge has served as an advocate for the State in the very case the court is now asked to adjudicate, a serious question arises as to whether the judge, even with the most diligent effort, could set aside any personal interest in the outcome. There is, furthermore, a risk that the judge "would be so psychologically wedded" to his or her previous position as a prosecutor that the judge "would consciously or unconsciously avoid the appearance of having erred or changed position." *Withrow*, 421 U. S., at 57. In addition, the judge's "own personal knowledge and impression" of the case, acquired through his or her role in the prosecution, may

carry far more weight with the judge than the parties' arguments to the court. *Murchison*, *supra*, at 138; see also *Caperton*, *supra*, at 881.

Pennsylvania argues that *Murchison* does not lead to the rule that due process requires disqualification of a judge who, in an earlier role as a prosecutor, had significant involvement in making a critical decision in the case. The facts of *Murchison*, it should be acknowledged, differ in many respects from a case like this one. In *Murchison*, over the course of several weeks, a single official (the so-called judge-grand jury) conducted an investigation into suspected crimes; made the decision to charge witnesses for obstruction of that investigation; heard evidence on the charges he had lodged; issued judgments of conviction; and imposed sentence. See 349 U. S., at 135 (petitioners objected to "trial before the judge who was at the same time the complainant, indicter and prosecutor"). By contrast, a judge who had an earlier involvement in a prosecution might have been just one of several prosecutors working on the case at each stage of the proceedings; the prosecutor's immediate role might have been limited to a particular aspect of the prosecution; and decades might have passed before the former prosecutor, now a judge, is called upon to adjudicate a claim in the case.

These factual differences notwithstanding, the constitutional principles explained in *Murchison* are fully applicable where a judge had a direct, personal role in the defendant's prosecution. The involvement of other actors and the passage of time are consequences of a complex criminal justice system, in which a single case may be litigated through multiple proceedings taking place over a period of years. This context only heightens the need for objective rules preventing the operation of bias that otherwise might be obscured. Within a large, impersonal system, an individual prosecutor might still have an influence that, while not so visible as the one-man grand jury in *Murchison*, is nevertheless significant. A prosecutor may bear responsibility for any number

of critical decisions, including what charges to bring, whether to extend a plea bargain, and which witnesses to call. Even if decades intervene before the former prosecutor revisits the matter as a jurist, the case may implicate the effects and continuing force of his or her original decision. In these circumstances, there remains a serious risk that a judge would be influenced by an improper, if inadvertent, motive to validate and preserve the result obtained through the adversary process. The involvement of multiple actors and the passage of time do not relieve the former prosecutor of the duty to withdraw in order to ensure the neutrality of the judicial process in determining the consequences that his or her own earlier, critical decision may have set in motion.

B

This leads to the question whether Chief Justice Castille's authorization to seek the death penalty against Williams amounts to significant, personal involvement in a critical trial decision. The Court now concludes that it was a significant, personal involvement; and, as a result, Chief Justice Castille's failure to recuse from Williams's case presented an unconstitutional risk of bias.

As an initial matter, there can be no doubt that the decision to pursue the death penalty is a critical choice in the adversary process. Indeed, after a defendant is charged with a death-eligible crime, whether to ask a jury to end the defendant's life is one of the most serious discretionary decisions a prosecutor can be called upon to make.

Nor is there any doubt that Chief Justice Castille had a significant role in this decision. Without his express authorization, the Commonwealth would not have been able to pursue a death sentence against Williams. The importance of this decision and the profound consequences it carries make it evident that a responsible prosecutor would deem it to be a most significant exercise of his or her official discretion and professional judgment.

Pennsylvania nonetheless contends that Chief Justice Castille in fact did not have significant involvement in the decision to seek a death sentence against Williams. The chief justice, the Commonwealth points out, was the head of a large district attorney's office in a city that saw many capital murder trials. Tr. of Oral Arg. 36. According to Pennsylvania, his approval of the trial prosecutor's request to pursue capital punishment in Williams's case amounted to a brief administrative act limited to "the time it takes to read a one-and-a-half-page memo." *Ibid.* In this Court's view, that characterization cannot be credited. The Court will not assume that then-District Attorney Castille treated so major a decision as a perfunctory task requiring little time, judgment, or reflection on his part.

Chief Justice Castille's own comments while running for judicial office refute the Commonwealth's claim that he played a mere ministerial role in capital sentencing decisions. During the chief justice's election campaign, multiple news outlets reported his statement that he "sent 45 people to death rows" as district attorney. Seelye, Castille Keeps His Cool in Court Run, Philadelphia Inquirer, Apr. 30, 1993, p. B1; see also, *e. g.*, Brennan, State Voters Must Choose Next Supreme Court Member, Legal Intelligencer, Oct. 28, 1993, pp. 1, 12. Chief Justice Castille's willingness to take personal responsibility for the death sentences obtained during his tenure as district attorney indicate that, in his own view, he played a meaningful role in those sentencing decisions and considered his involvement to be an important duty of his office.

Although not necessary to the disposition of this case, the PCRA court's ruling underscores the risk of permitting a former prosecutor to be a judge in what had been his or her own case. The PCRA court determined that the trial prosecutor—Chief Justice Castille's former subordinate in the district attorney's office—had engaged in multiple, intentional *Brady* violations during Williams's prosecution. App.

131–145, 150–154. While there is no indication that Chief Justice Castille was aware of the alleged prosecutorial misconduct, it would be difficult for a judge in his position not to view the PCRA court's findings as a criticism of his former office and, to some extent, of his own leadership and supervision as district attorney.

The potential conflict of interest posed by the PCRA court's findings illustrates the utility of statutes and professional codes of conduct that "provide more protection than due process requires." *Caperton*, 556 U. S., at 890. It is important to note that due process "demarks only the outer boundaries of judicial disqualifications." *Aetna Life Ins. Co.* v. *Lavoie*, 475 U. S. 813, 828 (1986). Most questions of recusal are addressed by more stringent and detailed ethical rules, which in many jurisdictions already require disqualification under the circumstances of this case. See Brief for American Bar Association as *Amicus Curiae* 5, 11–14; see also ABA Model Code of Judicial Conduct Rules 2.11(A)(1), (A)(6)(b) (2011) (no judge may participate "in any proceeding in which the judge's impartiality might reasonably be questioned," including where the judge "served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding"); ABA Center for Professional Responsibility Policy Implementation Comm., Comparison of ABA Model Judicial Code and State Variations (Dec. 14, 2015), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2_11.authcheckdam.pdf (as last visited June 7, 2016) (28 States have adopted language similar to ABA Model Judicial Code Rule 2.11); 28 U. S. C. § 455(b)(3) (recusal required where judge "has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding"). At the time Williams filed his recusal motion with the Pennsylvania Supreme Court, for example, Pennsylvania's Code of Judicial Conduct disqualified judges from any

proceeding in which "they served as a lawyer in the matter in controversy, or a lawyer with whom they previously practiced law served during such association as a lawyer concerning the matter . . . ." Pa. Code of Judicial Conduct, Canon 3C (1974, as amended). The fact that most jurisdictions have these rules in place suggests that today's decision will not occasion a significant change in recusal practice.

Chief Justice Castille's significant, personal involvement in a critical decision in Williams's case gave rise to an unacceptable risk of actual bias. This risk so endangered the appearance of neutrality that his participation in the case "must be forbidden if the guarantee of due process is to be adequately implemented." *Withrow*, 421 U. S., at 47.

III

Having determined that Chief Justice Castille's participation violated due process, the Court must resolve whether Williams is entitled to relief. In past cases, the Court has not had to decide the question whether a due process violation arising from a jurist's failure to recuse amounts to harmless error if the jurist is on a multimember court and the jurist's vote was not decisive. See *Lavoie*, *supra*, at 827–828 (addressing "the question whether a decision of a multimember tribunal must be vacated because of the participation of one member who had an interest in the outcome of the case," where that member's vote was outcome determinative). For the reasons discussed below, the Court holds that an unconstitutional failure to recuse constitutes structural error even if the judge in question did not cast a deciding vote.

The Court has little trouble concluding that a due process violation arising from the participation of an interested judge is a defect "not amenable" to harmless-error review, regardless of whether the judge's vote was dispositive. *Puckett* v. *United States*, 556 U. S. 129, 141 (2009) (emphasis deleted). The deliberations of an appellate panel, as a gen-

eral rule, are confidential. As a result, it is neither possible nor productive to inquire whether the jurist in question might have influenced the views of his or her colleagues during the decisionmaking process. Indeed, one purpose of judicial confidentiality is to assure jurists that they can reexamine old ideas and suggest new ones, while both seeking to persuade and being open to persuasion by their colleagues. As Justice Brennan wrote in his *Lavoie* concurrence:

> "The description of an opinion as being 'for the court' connotes more than merely that the opinion has been joined by a majority of the participating judges. It reflects the fact that these judges have exchanged ideas and arguments in deciding the case. It reflects the collective process of deliberation which shapes the court's perceptions of which issues must be addressed and, more importantly, how they must be addressed. And, while the influence of any single participant in this process can never be measured with precision, experience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition." 475 U. S., at 831.

These considerations illustrate, moreover, that it does not matter whether the disqualified judge's vote was necessary to the disposition of the case. The fact that the interested judge's vote was not dispositive may mean only that the judge was successful in persuading most members of the court to accept his or her position. That outcome does not lessen the unfairness to the affected party. See *id.*, at 831–832 (Blackmun, J., concurring in judgment).

A multimember court must not have its guarantee of neutrality undermined, for the appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part. An insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an

essential means of ensuring the reality of a fair adjudication. Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself. When the objective risk of actual bias on the part of a judge rises to an unconstitutional level, the failure to recuse cannot be deemed harmless.

The Commonwealth points out that ordering a rehearing before the Pennsylvania Supreme Court may not provide complete relief to Williams because judges who were exposed to a disqualified judge may still be influenced by their colleague's views when they rehear the case. Brief for Respondent 51, 62. An inability to guarantee complete relief for a constitutional violation, however, does not justify withholding a remedy altogether. Allowing an appellate panel to reconsider a case without the participation of the interested member will permit judges to probe lines of analysis or engage in discussions they may have felt constrained to avoid in their first deliberations.

Chief Justice Castille's participation in Williams's case was an error that affected the State Supreme Court's whole adjudicatory framework below. Williams must be granted an opportunity to present his claims to a court unburdened by any "possible temptation . . . not to hold the balance nice, clear and true between the State and the accused." *Tumey* v. *Ohio*, 273 U. S. 510, 532 (1927).

* * *

Where a judge has had an earlier significant, personal involvement as a prosecutor in a critical decision in the defendant's case, the risk of actual bias in the judicial proceeding rises to an unconstitutional level. Due process entitles Terrance Williams to "a proceeding in which he may present his case with assurance" that no member of the court is "predisposed to find against him." *Marshall* v. *Jerrico, Inc.*, 446 U. S. 238, 242 (1980).

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

It is so ordered.

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

In 1986, Ronald Castille, then District Attorney of Philadelphia, authorized a prosecutor in his office to seek the death penalty against Terrance Williams. Almost 30 years later, as Chief Justice of the Pennsylvania Supreme Court, he participated in deciding whether Williams's fifth habeas petition—which raised a claim unconnected to the prosecution's decision to seek the death penalty—could be heard on the merits or was instead untimely. This Court now holds that because Chief Justice Castille made a "critical" decision as a prosecutor in Williams's case, there is a risk that he "would be so psychologically wedded" to his previous decision that it would violate the Due Process Clause for him to decide the distinct issues raised in the habeas petition. *Ante*, at 9 (internal quotation marks omitted). According to the Court, that conclusion follows from the maxim that "no man can be a judge in his own case." *Ibid.* (internal quotation marks omitted).

The majority opinion rests on proverb rather than precedent. This Court has held that there is "a presumption of honesty and integrity in those serving as adjudicators." *Withrow* v. *Larkin*, 421 U. S. 35, 47 (1975). To overcome that presumption, the majority relies on *In re Murchison*, 349 U. S. 133 (1955). We concluded there that the Due Process Clause is violated when a judge adjudicates the same question—based on the same facts—that he had already considered as a grand juror in the same case. Here, however, Williams does not allege that Chief Justice Castille had *any* previous knowledge of the contested facts at issue in the ha-

beas petition, or that he had previously made *any* decision on the questions raised by that petition. I would accordingly hold that the Due Process Clause did not require Chief Justice Castille's recusal.

I

In 1986, petitioner Terrance Williams stood trial for the murder of Amos Norwood. Prosecutors believed that Williams and his friend Marc Draper had asked Norwood for a ride, directed him to a cemetery, and then beat him to death with a tire iron after robbing him. Andrea Foulkes, the Philadelphia Assistant District Attorney prosecuting the case, prepared a one-and-a-half page memo for her superiors—Homicide Unit Chief Mark Gottlieb and District Attorney Ronald Castille—"request[ing] that we actively seek the death penalty." App. 424a. The memo briefly described the facts of the case and Williams's prior felonies, including a previous murder conviction. Gottlieb read the memo and then passed it to Castille with a note recommending the death penalty. *Id.*, at 426a. Castille wrote at the bottom of the memo, "Approved to proceed on the death penalty," and signed his name. *Ibid.*

At trial, Williams testified that he had never met Norwood and that someone else must have murdered him. After hearing extensive evidence linking Williams to the crime, the jury convicted him of murder and sentenced him to death. 524 Pa. 218, 227, 570 A. 2d 75, 79–80 (1990).

In 1995, Williams filed a habeas petition in Pennsylvania state court, alleging that his trial counsel had been ineffective for failing to present mitigating evidence of his childhood sexual abuse, among other claims. At a hearing related to that petition, Williams acknowledged that he knew Norwood and claimed that Norwood had sexually abused him. 629 Pa. 533, 543, 105 A. 3d 1234, 1240 (2014). The petition was denied. Williams filed two more state habeas petitions, which were both dismissed as untimely, and a fed-

eral habeas petition, which was also denied. See *Williams* v. *Beard*, 637 F. 3d 195, 238 (CA3 2011).

This case arises out of Williams's fifth habeas petition, which he filed in state court in 2012. In that petition, Williams argued that he was entitled to a new sentencing proceeding because the prosecution at trial had failed to turn over certain evidence suggesting that "Norwood was sexually involved with boys around [Williams's] age at the time of his murder." Crim. No. CP–51–CR–0823621–1984 (Phila. Ct. Common Pleas, Nov. 27, 2012), App. 80a.

It is undisputed that Williams's fifth habeas petition is untimely under Pennsylvania law. In order to overcome that time bar, Pennsylvania law required Williams to show that "(1) the failure to previously raise [his] claim was the result of interference by government officials and (2) the information on which he relies could not have been obtained earlier with the exercise of due diligence." 629 Pa., at 542, 105 A. 3d, at 1240. The state habeas court held that Williams met that burden because "the government withheld multiple statements from [Williams's] trial counsel, all of which strengthened the inference that Amos Norwood was sexually inappropriate with a number of teenage boys," and Williams was unable to access those statements until an evidentiary proceeding ordered by the court. App. 95a.

The Commonwealth appealed to the Pennsylvania Supreme Court, and Williams filed a motion requesting that Chief Justice Castille recuse himself on the ground that he had "personally authorized his Office to seek the death penalty" nearly 30 years earlier. *Id.*, at 181a (emphasis deleted). Chief Justice Castille summarily denied the recusal motion, and the six-member Pennsylvania Supreme Court proceeded to hear the case. The court unanimously reinstated Williams's sentence.

According to the Pennsylvania Supreme Court, Williams failed to make the threshold showing necessary to overcome the time bar because there was "abundant evidence" that

Williams "knew of Norwood's homosexuality and conduct with teenage boys well before trial, sufficient to present [Norwood] as unsympathetic before the jury." 629 Pa., at 545, 105 A. 3d, at 1241. The court pointed out that Williams was, of course, personally aware of Norwood's abuse and could have raised the issue at trial, but instead chose to disclaim having ever met Norwood. The court also noted that Williams had raised similar claims of abuse in his first state habeas proceeding. *Ibid.* Chief Justice Castille concurred separately, criticizing the lower court for failing to dismiss Williams's petition as "time-barred and frivolous." *Id.*, at 551, 105 A. 3d, at 1245.

II

A

In the context of a criminal proceeding, the Due Process Clause requires States to adopt those practices that are fundamental to principles of liberty and justice, and which inhere "in the very idea of free government" and are "the inalienable right of a citizen of such a government." *Twining* v. *New Jersey*, 211 U. S. 78, 106 (1908). A fair trial and appeal is one such right. See *Lisenba* v. *California*, 314 U. S. 219, 236 (1941); *Aetna Life Ins. Co.* v. *Lavoie*, 475 U. S. 813, 825 (1986). In ensuring that right, "it is normally within the power of the State to regulate procedures under which its laws are carried out," unless a procedure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.*, at 821 (internal quotation marks omitted).

It is clear that a judge with "a direct, personal, substantial, pecuniary interest" in a case may not preside over that case. *Tumey* v. *Ohio*, 273 U. S. 510, 523 (1927). We have also held that a judge may not oversee a criminal contempt proceeding where the judge has previously served as grand juror in the same case, or where the party charged with contempt has conducted "an insulting attack upon the integrity of the

judge carrying such potential for bias as to require disqualification." *Mayberry* v. *Pennsylvania*, 400 U. S. 455, 465–466 (1971) (internal quotation marks omitted); see *Murchison*, 349 U. S., at 139.

Prior to this Court's decision in *Caperton* v. *A. T. Massey Coal Co.*, 556 U. S. 868 (2009), we had declined to require judicial recusal under the Due Process Clause beyond those defined situations. In *Caperton*, however, the Court adopted a new standard that requires recusal "when the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Id.*, at 872 (internal quotation marks omitted). The Court framed the inquiry as "whether, under a realistic appraisal of psychological tendencies and human weakness, the interest poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Id.*, at 883–884 (internal quotation marks omitted).

B

According to the majority, the Due Process Clause required Chief Justice Castille's recusal because he had "significant, personal involvement in a critical trial decision" in Williams's case. *Ante*, at 11. Otherwise, the majority explains, there is "an unacceptable risk of actual bias." *Ante*, at 14. In the majority's view, "[t]his conclusion follows from the Court's analysis in *In re Murchison*." *Ante*, at 9. But *Murchison* does not support the majority's new rule—far from it.

Murchison involved a peculiar Michigan law that authorized the same person to sit as both judge and "one-man grand jury" in the same case. 349 U. S., at 133 (internal quotation marks omitted). Pursuant to that law, a Michigan judge—serving as grand jury—heard testimony from two witnesses in a corruption case. The testimony "persuaded" the judge that one of the witnesses "had committed perjury"; the second witness refused to answer questions. *Id.*, at 134–135.

The judge accordingly charged the witnesses with criminal contempt, presided over the trial, and convicted them. *Ibid.* We reversed, holding that the trial had violated the Due Process Clause. *Id.*, at 139.

The Court today, acknowledging that *Murchison* "differ[s] in many respects from a case like this one," *ante*, at 10, earns full marks for understatement. The Court in fact fails to recognize the differences that are critical.

First, *Murchison* found a due process violation because the judge (sitting as grand jury) accused the witnesses of contempt, and then (sitting as judge) presided over their trial on that charge. As a result, the judge had made up his mind about the only issue in the case before the trial had even begun. We held that such prejudgment violated the Due Process Clause. 349 U. S., at 137.

Second, *Murchison* expressed concern that the judge's recollection of the testimony he had heard as grand juror was "likely to weigh far more heavily with him than any testimony given" at trial. *Id.*, at 138. For that reason, the Court found that the judge was at risk of calling "on his own personal knowledge and impression of what had occurred in the grand jury room," rather than the evidence presented to him by the parties. *Ibid.*

Neither of those due process concerns is present here. Chief Justice Castille was involved in the decision to seek the death penalty, and perhaps it would be reasonable under *Murchison* to require him to recuse himself from any challenge casting doubt on that recommendation. But that is not this case.

This case is about whether Williams may overcome the procedural bar on filing an untimely habeas petition, which required him to show that the government interfered with his ability to raise his habeas claim, and that "the information on which he relies could not have been obtained earlier with the exercise of due diligence." 629 Pa., at 542, 105 A. 3d, at 1240. Even if Williams were to overcome the timeli-

ness bar, moreover, the only claim he sought to raise on the merits was that the prosecution had failed to turn over certain evidence at trial. The problem in *Murchison* was that the judge, having been "part of the accusatory process" regarding the guilt or innocence of the defendants, could not then be "wholly disinterested" when called upon to decide that very same issue. 349 U. S., at 137. In this case, in contrast, neither the procedural question nor Williams's merits claim in any way concerns the pretrial decision to seek the death penalty.

It is abundantly clear that, unlike in *Murchison*, Chief Justice Castille had *not* made up his mind about either the contested evidence or the legal issues under review in Williams's fifth habeas petition. How could he have? Neither the contested evidence nor the legal issues were ever before him as prosecutor. The one-and-a-half page memo prepared by Assistant District Attorney Foulkes in 1986 did not discuss the evidence that Williams claims was withheld by the prosecution at trial. It also did not discuss Williams's allegation that Norwood sexually abused young men. It certainly did not discuss whether Williams could have obtained that evidence of abuse earlier through the exercise of due diligence.

Williams does not assert that Chief Justice Castille had any prior knowledge of the alleged failure of the prosecution to turn over such evidence, and he does not argue that Chief Justice Castille had previously made any decision with respect to that evidence in his role as prosecutor. Even assuming that Chief Justice Castille remembered the contents of the memo almost 30 years later—which is doubtful—the memo could not have given Chief Justice Castille any special "impression" of facts or issues not raised in that memo. *Id.*, at 138.

The majority attempts to justify its rule based on the "risk" that a judge "would be so psychologically wedded to his or her previous position as a prosecutor that the judge would consciously or unconsciously avoid the appearance of

having erred or changed position." *Ante*, at 9 (internal quotation marks omitted). But as a matter of simple logic, nothing about how Chief Justice Castille might rule on Williams's fifth habeas petition would suggest that the judge had erred or changed his position on the distinct question whether to seek the death penalty prior to trial. In sum, there was not such an "objective risk of actual bias," *ante*, at 16, that it was fundamentally unfair for Chief Justice Castille to participate in the decision of an issue having nothing to do with his prior participation in the case.

* * *

The Due Process Clause did not prohibit Chief Justice Castille from hearing Williams's case. That does not mean, however, that it was appropriate for him to do so. Williams cites a number of state court decisions and ethics opinions that prohibit a prosecutor from later serving as judge in a case that he has prosecuted. Because the Due Process Clause does not mandate recusal in cases such as this, it is up to state authorities—not this Court—to determine whether recusal should be required.

I would affirm the judgment of the Pennsylvania Supreme Court, and respectfully dissent from the Court's contrary conclusion.

JUSTICE THOMAS, dissenting.

The Court concludes that it violates the Due Process Clause for the chief justice of the Supreme Court of Pennsylvania, a former district attorney who was not the trial prosecutor in petitioner Terrance Williams' case, to review Williams' fourth petition for state postconviction review. *Ante*, at 10–11, 16. That conclusion is flawed. The specter of bias alone in a judicial proceeding is not a deprivation of due process. Rather than constitutionalize every judicial disqualification rule, the Court has left such rules to legislatures, bar associations, and the judgment of individual ad-

judicators. Williams, moreover, is not a criminal defendant. His complaint is instead that the due process protections in his state postconviction proceedings—an altogether new civil matter, not a continuation of his criminal trial—were lacking. Ruling in Williams' favor, the Court ignores this posture and our precedents commanding less of state postconviction proceedings than of criminal prosecutions involving defendants whose convictions are not yet final. I respectfully dissent.

I

A reader of the majority opinion might mistakenly think that the prosecution against Williams is ongoing, for the majority makes no mention of the fact that Williams' sentence has been final for more than 25 years. Because the postconviction posture of this case is of crucial importance in considering the question presented, I begin with the protracted procedural history of Williams' repeated attempts to collaterally attack his sentence.

A

Thirty-two years ago, Williams and his accomplice beat their victim to death with a tire iron and a socket wrench. *Commonwealth* v. *Williams*, 524 Pa. 218, 222–224, 570 A. 2d 75, 77–78 (1990) (*Williams I*). Williams later returned to the scene of the crime, a cemetery, soaked the victim's body in gasoline, and set it on fire. *Id.*, at 224, 570 A. 2d, at 78. After the trial against Williams commenced, both the Chief of the Homicide Unit and the District Attorney, Ronald Castille, approved the trial prosecutor's decision to seek the death penalty by signing a piece of paper. See App. 426. That was Castille's only involvement in Williams' criminal case. Thereafter, a Pennsylvania jury convicted Williams of first-degree murder, and he was sentenced to death. *Williams I*, 524 Pa., at 221–222, 570 A. 2d, at 77. The Supreme Court of Pennsylvania affirmed his conviction and sentence. *Id.*, at 235, 570 A. 2d, at 84.

Five years later, Williams filed his first petition for state postconviction relief. *Commonwealth* v. *Williams*, 581 Pa. 57, 65, 863 A. 2d 505, 509 (2004) (*Williams II*). The postconviction court denied the petition. *Ibid.*, 863 A. 2d, at 510. Williams appealed, raising 23 alleged errors. *Ibid.* The Supreme Court of Pennsylvania, which included Castille in his new capacity as a justice of that court, affirmed the denial of relief. *Id.*, at 88, 863 A. 2d, at 523. The court rejected some claims on procedural grounds and denied the remaining claims on the merits. *Id.*, at 68–88, 863 A. 2d, at 511–523. The court's lengthy opinion did not mention the possibility of Castille's bias, and Williams apparently never asked for his recusal.

Then in 2005, Williams filed two more petitions for state postconviction relief. Both petitions were dismissed as untimely, and the Supreme Court of Pennsylvania affirmed. *Commonwealth* v. *Williams*, 589 Pa. 355, 909 A. 2d 297 (2006) (*per curiam*) (*Williams III*); *Commonwealth* v. *Williams*, 599 Pa. 495, 962 A. 2d 609 (2009) (*per curiam*) (*Williams IV*). Castille also presumably participated in those proceedings, but, again, Williams apparently did not ask for him to recuse.[1]

Williams then made a fourth attempt to vacate his sentence in state court in 2012. 629 Pa. 533, 537, 105 A. 3d 1234, 1237 (2014) (*Williams VI*). Williams alleged that the prosecution violated *Brady* v. *Maryland*, 373 U. S. 83 (1963), by failing to disclose exculpatory evidence. The allegedly exculpatory evidence was information about Williams' motive. According to Williams, the prosecution should have disclosed to his counsel that it knew that Williams and the victim had previously engaged in a sexual relationship when Williams was a minor. *Williams VI*, 629 Pa., at 538, 105

[1] In 2005, Williams also filed a federal habeas petition, which the federal courts ultimately rejected. *Williams* v. *Beard*, 637 F. 3d 195, 238 (CA3 2011) (*Williams V*), cert. denied, *Williams* v. *Wetzel*, 567 U. S. 952 (2012).

A. 3d, at 1237.[2] The state postconviction court agreed and vacated his sentence. *Id.*, at 541, 105 A. 3d, at 1239.

The Commonwealth appealed to the Supreme Court of Pennsylvania. Only then—the *fourth* time that Williams appeared before Castille—did Williams ask him to recuse. App. 181. Castille denied the recusal motion and declined to refer it to the full court. *Id.*, at 171. Shortly thereafter, the court vacated the postconviction court's order and reinstated Williams' sentence. The court first noted that Williams' fourth petition "was filed over 20 years after [Williams'] judgment of sentence became final" and "was untimely on its face." *Williams VI*, 629 Pa., at 542, 105 A. 3d, at 1239. The court rejected the trial court's conclusion that an exception to Pennsylvania's timeliness rule applied and reached "the inescapable conclusion that [Williams] is not entitled to relief." *Id.*, at 541–545, 105 A. 3d, at 1239–1241; see also *id.*, at 551, 105 A. 3d, at 1245 (Castille, J., concurring) (writing separately "to address the important responsibilities of the [state postconviction] trial courts in serial capital [state postconviction] matters").

Finally, Williams filed an application for reargument. App. 9. The court denied the application *without* Castille's

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[2] Setting aside how a prosecutor could violate *Brady* by failing to disclose information to the defendant about the defendant's motive to kill, it is worth noting that this allegation merely repackaged old arguments. During a state postconviction hearing in 1998, Williams had presented evidence of his prior sexual abuse, including "multiple sexual victimizations (including sodomy) during his childhood," to support his ineffective assistance claim. *Williams II*, 581 Pa. 57, 98, 863 A. 2d 505, 530 (2004) (Saylor, J., dissenting). And he had "argued [that the victim] engaged in homosexual acts with him." *Williams VI*, 629 Pa., at 536, 105 A. 3d, at 1236. Then, in his federal habeas proceedings, Williams admitted that his plan on the night of the murder was to threaten to reveal to the victim's wife that the victim was a homosexual, and he contended that his attorney should have presented related evidence of the victim's prior sexual relationship with him. *Williams V*, *supra*, at 200, 225–226, 229–230.

participation. *Id.*, at 8. Castille had retired from the bench nearly two months before the court ruled.

B

As this procedural history illustrates, the question presented is hardly what the majority makes it out to be. The majority incorrectly refers to the case before us and Williams' criminal case (that ended in 1990) as a decades-long "single case" or "matter." *Ante*, at 10; see also *ante*, at 10–11. The majority frames the issue as follows: whether the Due Process Clause permits Castille to "ac[t] as both accuser and judge in [Williams'] case." *Ante*, at 8. The majority answers: "When a judge has served as an advocate for the State *in the very case* the court is now asked to adjudicate, a serious question arises as to whether the judge, even with the most diligent effort, could set aside any personal interest in the outcome." *Ante*, at 9 (emphasis added). Accordingly, the majority holds that "[w]here a judge has had an earlier significant, personal involvement as a prosecutor in a critical decision *in the defendant's case*, the risk of actual bias in the judicial proceeding rises to an unconstitutional level." *Ante*, at 16 (emphasis added). That is all wrong.

There has been, however, no "single case" in which Castille acted as both prosecutor and adjudicator. Castille was still serving in the district attorney's office when Williams' criminal proceedings ended and his sentence of death became final. Williams' filing of a petition for state postconviction relief did not continue (or resurrect) that already final criminal proceeding. A postconviction proceeding "is not part of the criminal proceeding itself" but "is in fact considered to be civil in nature," *Pennsylvania* v. *Finley*, 481 U. S. 551, 556–557 (1987), and brings with it fewer procedural protections. See, *e. g.*, *District Attorney's Office for Third Judicial Dist.* v. *Osborne*, 557 U. S. 52, 68 (2009).

Williams' case therefore presents a much different question from that posited by the majority. It is more accurately

characterized as whether a judge may review a petition for postconviction relief when that judge previously served as district attorney while the petitioner's criminal case was pending. For the reasons that follow, that different question merits a different answer.

II

The "settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors" are the touchstone of due process. *Tumey* v. *Ohio*, 273 U. S. 510, 523 (1927); see also *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 277 (1856). What due process requires of the judicial proceedings in the Pennsylvania postconviction courts, therefore, is guided by the historical treatment of judicial disqualification. And here, neither historical practice nor this Court's case law constitutionalizing that practice requires a former prosecutor to recuse from a prisoner's postconviction proceedings.

A

At common law, a fair tribunal meant that "no man shall be a judge in his own case." 1 E. Coke, Institutes of the Laws of England § 212, *141a ("*[A]liquis non debet esse judex in propiâ causâ*"). That common-law conception of a fair tribunal was a narrow one. A judge could not decide a case in which he had a direct and personal financial stake. For example, a judge could not reap the fine paid by a defendant. See, *e. g.*, *Dr. Bonham's Case*, 8 Co. Rep. 107a, 114a, 118a, 77 Eng. Rep. 638, 647, 652 (K. B. 1610) (opining that a panel of adjudicators could not all at once serve as "judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture"). Nor could he adjudicate a case in which he was a party. See, *e. g.*, *Earl of Derby's Case*, 12 Co. Rep. 114, 77 Eng. Rep. 1390 (K. B. 1614). But mere bias—without any financial stake in a case—was not grounds for disqualification. The biases of

judges "cannot be challenged," according to Blackstone, "[f]or the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea." 3 W. Blackstone, Commentaries on the Laws of England 361 (1768) (Blackstone); see also, *e. g.*, *Brookes* v. *Earl of Rivers*, Hardres 503, 145 Eng. Rep. 569 (Exch. 1668) (deciding that a judge's "favour shall not be presumed" merely because his brother-in-law was involved).

The early American conception of judicial disqualification was in keeping with the "clear and simple" common-law rule—"a judge was disqualified for direct pecuniary interest and for nothing else." Frank, Disqualification of Judges, 56 Yale L. J. 605, 609 (1947) (Frank); see also R. Flamm, Judicial Disqualification: Recusal and Disqualification of Judges § 1.4, p. 7 (2d ed. 2007). Most jurisdictions required judges to recuse when they stood to profit from their involvement or, more broadly, when their property was involved. See *Moses* v. *Julian*, 45 N. H. 52, 55–56 (1863); see also, *e. g.*, *Jim* v. *State*, 3 Mo. 147, 155 (1832) (deciding that a judge was unlawfully interested in a criminal case in which his slave was the defendant). But the judge's pecuniary interest had to be directly implicated in the case. See, *e. g.*, *Davis* v. *State*, 44 Tex. 523, 524 (1876) (deciding that a judge, who was the victim of a theft, was not disqualified in the prosecution of the theft); see also T. Cooley, Constitutional Limitations 594 (7th ed. 1903) (rejecting a financial stake "so remote, trifling, and insignificant that it may fairly be supposed to be incapable of affecting the judgment"); *Moses*, *supra*, at 57 ("[A] creditor, lessee, or debtor, may be judge in the case of his debtor, landlord, or creditor, except in cases where the amount of the party's property involved in the suit is so great that his ability to meet his engagements with the judge may depend upon the success of his suit"); *Inhabitants of Readington Twp. Hunterdon County* v. *Dilley*, 24 N. J. L. 209, 212–213 (1853) (deciding that a judge, who had pre-

viously been paid to survey the roadway at issue in the case, was not disqualified).

Shortly after the founding, American notions of judicial disqualification expanded in important respects. Of particular relevance here, the National and State Legislatures enacted statutes and constitutional provisions that diverged from the common law by requiring disqualification when the judge had served as counsel for one of the parties. The first federal recusal statute, for example, required disqualification not only when the judge was "concerned in interest," but also when he "ha[d] been of counsel for either party." Act of May 8, 1792, § 11, 1 Stat. 278–279. Many States followed suit by enacting similar disqualification statutes or constitutional provisions expanding the common-law rule. See, *e. g.*, *Wilks* v. *State*, 27 Tex. App. 381, 385, 11 S. W. 415, 416 (1889); *Fechheimer* v. *Washington*, 77 Ind. 366, 368 (1881) (*per curiam*); *Sjoberg* v. *Nordin*, 26 Minn. 501, 503, 5 N. W. 677, 678 (1880); *Whipple* v. *Saginaw Circuit Court Judge*, 26 Mich. 342, 343 (1873); *Mathis* v. *State*, 50 Tenn. 127, 128 (1871); but see *Owings* v. *Gibson*, 9 Ky. 515, 517–518 (1820) (deciding that it was for the judge to choose whether he could fairly adjudicate a case in which he had served as a lawyer for the plaintiff in the same action). Courts applied this expanded view of disqualification not only in cases involving judges who had previously served as counsel for private parties but also for those who previously served as former attorneys general or district attorneys. See, *e. g.*, *Terry* v. *State*, 24 S. W. 510, 510–511 (Tex. Crim. App. 1893); *Mathis*, *supra*, at 128.

This expansion was modest: disqualification was required only when the newly appointed judge had served as counsel in the *same case*. In *Carr* v. *Fife*, 156 U. S. 494 (1895), for example, this Court rejected the argument that a judge was required to recuse because he had previously served as counsel for some of the defendants in another matter. *Id.*, at 497–498. The Court left it to the judge "to decide for him-

self whether it was improper for him to sit in trial of the suit." *Id.*, at 498. Likewise, in *Taylor* v. *Williams*, 26 Tex. 583 (1863), the Supreme Court of Texas acknowledged that a judge was not, "by the common law, disqualified from sitting in a cause in which he had been of counsel" and concluded "that the fact that the presiding judge had been of counsel in the case did not necessarily render him interested in it." *Id.*, at 585–586. *A fortiori*, the Texas court held, a judge was not "interested" in a case "merely from his having been of counsel in *another cause* involving the same title." *Id.*, at 586 (emphasis added); see also *The Richmond*, 9 F. 863, 864 (CC ED La. 1881) ("The decisions, so far as I have been able to find, are unanimous that 'of counsel' means 'of counsel for a party in that cause and in that controversy,' and if either the cause or controversy is not identical the disqualification does not exist"); *Wolfe* v. *Hines*, 93 Ga. 329, 20 S. E. 322 (1894) (same); *Cleghorn* v. *Cleghorn*, 66 Cal. 309, 5 P. 516 (1885) (same).

This limitation—that the same person must act as counsel and adjudicator in *the same case*—makes good sense. At least one of the States' highest courts feared that any broader rule would wreak havoc: "If the circumstance of the judge having been of counsel, for some parties in some case involving some of the issues which had been theretofore tried[,] disqualified him from acting in every case in which any of those parties, or those issues should be subsequently involved, the most eminent members of the bar, would, by reason of their extensive professional relations and their large experience be rendered ineligible, or useless as judges." *Blackburn* v. *Craufurd*, 22 Md. 447, 459 (1864). Indeed, any broader rule would be at odds with this Court's historical practice. Past Justices have decided cases involving their former clients in the private sector or their former offices in the public sector. See Frank 622–625. The examples are legion; chief among them is *Marbury* v. *Madison*, 1 Cranch 137 (1803), in which then–Secretary of State John

Marshall sealed but failed to deliver William Marbury's commission and then, as newly appointed Chief Justice, Marshall decided whether mandamus was an available remedy to require James Madison to finish the job. See Paulsen, Marbury's Wrongness, 20 Constitutional Commentary 343, 350 (2003).

Over the next century, this Court entered the fray of judicial disqualifications only a handful of times. Drawing from longstanding historical practice, the Court announced that the Due Process Clause compels judges to disqualify in the narrow circumstances described below. But time and again, the Court cautioned that "[a]ll questions of judicial qualification may not involve constitutional validity." *Tumey*, 273 U. S., at 523. And "matters of kinship, personal bias, state policy, remoteness of interest would seem generally to be matters merely of legislative discretion." *Ibid.*; see also *Aetna Life Ins. Co.* v. *Lavoie*, 475 U. S. 813, 828 (1986) ("The Due Process Clause demarks only the outer boundaries of judicial disqualifications").

First, in *Tumey*, the Court held that due process would not tolerate an adjudicator who would profit from the case if he convicted the defendant. The Court's holding paralleled the common-law rule: "[I]t certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court, the judge of which has a *direct, personal, substantial pecuniary interest* in reaching a conclusion against him in his case." 273 U. S., at 523 (emphasis added); see also *Ward* v. *Monroeville*, 409 U. S. 57, 59, 61 (1972) (deciding that a mayor could not adjudicate traffic violations if revenue from convictions constituted a substantial portion of the municipality's revenue). Later, applying *Tumey*'s rule in *Aetna Life Ins.*, the Court held that a judge who decided a case involving an insurance company had a "direct, personal, substantial, and pecuniary" interest because he had brought a similar case against an insurer and

his opinion for the court "had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case." 475 U. S., at 824 (alterations and internal quotation marks omitted).

Second, in *In re Murchison*, 349 U. S. 133 (1955), the Court adopted a constitutional rule resembling the historical practice for disqualification of former counsel. *Id.*, at 139. There, state law empowered a trial judge to sit as a "'one-man judge-grand jury,'" meaning that he could "compel witnesses to appear before him in secret to testify about suspected crimes." *Id.*, at 133–134. During those secret proceedings, the trial judge suspected that one of the witnesses, Lee Roy Murchison, had committed perjury, and he charged another, John White, with contempt after he refused to answer the judge's questions without counsel present. See *id.*, at 134–135. The judge then tried both men in open court and convicted and sentenced them based, in part, on his interrogation of them in the secret proceedings. See *id.*, at 135, 138–139. The defendants appealed, arguing that the "trial before the judge who was at the same time the complainant, indicter and prosecutor, constituted a denial of fair and impartial trial required by" due process. *Id.*, at 135. This Court agreed: "It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations." *Id.*, at 137. Broadly speaking, *Murchison*'s rule constitutionalizes the early American statutes requiring disqualification when a single person acts as both counsel and judge in a single civil or criminal proceeding.[3]

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[3] The Court has applied *Murchison* in later cases involving contempt proceedings in which a litigant's contemptuous conduct is so egregious that the judge "become[s] so 'personally embroiled'" in the controversy that it is as if the judge is a party himself. *Mayberry* v. *Pennsylvania*, 400 U. S. 455, 465 (1971); see also *Taylor* v. *Hayes*, 418 U. S. 488, 501–503 (1974).

Both *Tumey* and *Murchison* arguably reflect historical understandings of judicial disqualification. Traditionally, judges disqualified themselves when they had a direct and substantial pecuniary interest or when they served as counsel in the same case.

B

Those same historical understandings of judicial disqualification resolve Williams' case. Castille did not serve as both prosecutor and judge in the case before us. Even assuming Castille's supervisory role as district attorney was tantamount to serving as "counsel" in Williams' criminal case, that case ended nearly five years before Castille joined the Supreme Court of Pennsylvania. Castille then participated in a separate proceeding by reviewing Williams' petition for postconviction relief.

As discussed above, see Part I–B, *supra*, this postconviction proceeding is not an extension of Williams' criminal case but is instead a new civil proceeding. See *Finley*, 481 U. S., at 556–557. Our case law bears out the many distinctions between the two proceedings. In his criminal case, Williams was presumed innocent, *Coffin* v. *United States*, 156 U. S. 432, 453 (1895), and the Constitution guaranteed him counsel, *Gideon* v. *Wainwright*, 372 U. S. 335, 344–345 (1963); *Powell* v. *Alabama*, 287 U. S. 45, 68–69 (1932), a public trial by a jury of his peers, *Duncan* v. *Louisiana*, 391 U. S. 145, 149 (1968), and empowered him to confront the witnesses against him, *Crawford* v. *Washington*, 541 U. S. 36, 68 (2004), as well as all the other requirements of a criminal proceeding. But in postconviction proceedings, "the presumption of innocence [has] disappear[ed]." *Herrera* v. *Collins*, 506 U. S. 390, 399 (1993). The postconviction petitioner has no constitutional right to counsel. *Finley*, *supra*, at 555–557; see also *Johnson* v. *Avery*, 393 U. S. 483, 488 (1969). Nor has this Court ever held that he has a right to demand that his postconviction court consider a freestanding claim of ac-

tual innocence, *Herrera, supra,* at 417–419, or to demand the State to turn over exculpatory evidence, *Osborne*, 557 U. S., at 68–70; see also *Wright* v. *West*, 505 U. S. 277, 293 (1992) (plurality opinion) (cataloging differences between direct and collateral review and concluding that "[t]hese differences simply reflect the fact that habeas review entails significant costs" (internal quotation marks omitted)). And, under the Court's precedents, his due process rights are "not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in postconviction relief." *Osborne*, *supra*, at 69.

Because Castille did not act as both counsel and judge in the same case, Castille's participation in the postconviction proceedings did not violate the Due Process Clause. Castille might have been "personal[ly] involve[d] in a critical trial decision," *ante,* at 11, but that "trial" was Williams' criminal trial, not the postconviction proceedings before us now. Perhaps Castille's participation in Williams' postconviction proceeding was unwise, but it was within the bounds of historical practice. That should end this case, for it "is not for Members of this Court to decide from time to time whether a process approved by the legal traditions of our people is 'due' process." *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1, 28 (1991) (Scalia, J., concurring in judgment).

C

Today's holding departs both from common-law practice and this Court's prior precedents by ignoring the critical distinction between criminal and postconviction proceedings. Chief Justice Castille had no "direct, personal, substantial, pecuniary interest" in the adjudication of Williams' fourth postconviction petition. *Tumey*, 273 U. S., at 523. And although the majority invokes *Murchison*, *ante,* at 8–11, it wrongly relies on that decision too. In *Murchison*, the judge acted as both the accuser and judge in the *same* pro-

ceeding. 349 U. S., at 137–139. But here, Castille did not. See Part II–B, *supra*.

The perceived bias that the majority fears is instead outside the bounds of the historical expectations of judicial recusal. Perceived bias (without more) was not recognized as a constitutionally compelled ground for disqualification until the Court's recent decision in *Caperton* v. *A. T. Massey Coal Co.*, 556 U. S. 868 (2009). In *Caperton*, the Court decided that due process demanded disqualification when "extreme facts" proved "the probability of actual bias." *Id.*, at 886–887. *Caperton*, of course, elicited more questions than answers. *Id.*, at 893–898 (ROBERTS, C. J., dissenting). And its conclusion that bias alone could be grounds for disqualification as a constitutional matter "represents a complete departure from common law principles." Frank 618–619; see Blackstone 361 ("[T]he law will not suppose a possibility of bias or favor in a judge").

The Court, therefore, should not so readily extend *Caperton*'s "probability of actual bias" rule to state postconviction proceedings. This Court's precedents demand far less "process" in postconviction proceedings than in a criminal prosecution. See *Osborne*, *supra*, at 69; see also *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U. S. 886, 895 (1961) (concluding that the Due Process Clause does not demand "inflexible procedures universally applicable to every imaginable situation"). If a state habeas petitioner is not entitled to counsel as a constitutional matter in state postconviction proceedings, *Finley*, 481 U. S., at 555–557, it is not unreasonable to think that he is likewise not entitled to demand, as a constitutional matter, that a state postconviction court consider his case anew because a judge, who had no direct and substantial pecuniary interest and had not served as counsel in this case, failed to recuse himself.

The bias that the majority fears is a problem for the state legislature to resolve, not the Federal Constitution. See, *e. g.*, *Aetna Life Ins.*, 475 U. S., at 821 ("We need not decide

whether allegations of bias or prejudice by a judge of the type we have here would ever be sufficient under the Due Process Clause to force recusal"). And, indeed, it appears that Pennsylvania has set its own standard by requiring a judge to disqualify if he "served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding" in its Code of Judicial Conduct. See Pa. Code of Judicial Conduct Rule 2.11(A)(6)(b) (West 2016). Officials in Pennsylvania are fully capable of deciding when their judges have "participated personally and substantially" in a manner that would require disqualification without this Court's intervention. Due process requires no more, especially in state postconviction review where the States "ha[ve] more flexibility in deciding what procedures are needed." *Osborne*, *supra*, at 69.

III

Even if I were to assume that an error occurred in Williams' state postconviction proceedings, the question remains whether there is anything left for the Pennsylvania courts to remedy. There is not.

The majority remands the case to "[a]llo[w] an appellate panel to reconsider a case without the participation of the interested member," which it declares "will permit judges to probe lines of analysis or engage in discussions they may have felt constrained to avoid in their first deliberations." *Ante*, at 16. The majority neglects to mention that the Supreme Court of Pennsylvania might have done just that. It entertained Williams' motion for reargument without Castille, who had retired months before the court denied the motion. The Supreme Court of Pennsylvania is free to decide on remand that it cured any alleged deprivation of due process in Williams' postconviction proceeding by considering his motion for reargument without Castille's participation.

* * *

This is not a case about the "'accused.'" *Ibid.* (quoting *Tumey*, *supra*, at 532). It is a case about the due process rights of the already convicted. Whatever those rights might be, they do not include policing alleged violations of state codes of judicial ethics in postconviction proceedings. The Due Process Clause does not require any and all conceivable procedural protections that Members of this Court think "Western liberal democratic government ought to guarantee to its citizens." Monaghan, Our Perfect Constitution, 56 N. Y. U. L. Rev. 353, 358 (1981) (emphasis deleted). I respectfully dissent.

Syllabus

DIETZ *v.* BOULDIN

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

No. 15–458. Argued April 26, 2016—Decided June 9, 2016

Petitioner Rocky Dietz sued respondent Hillary Bouldin for negligence for injuries suffered in an automobile accident. Bouldin removed the case to Federal District Court. At trial, Bouldin admitted liability and stipulated to damages of $10,136 for Dietz' medical expenses. The only disputed issue remaining was whether Dietz was entitled to more. During deliberations, the jury sent the judge a note asking whether Dietz' medical expenses had been paid and, if so, by whom. Although the judge was concerned that the jury may not have understood that a verdict of less than the stipulated amount would require a mistrial, the judge, with the parties' consent, responded only that the information being sought was not relevant to the verdict. The jury returned a verdict in Dietz' favor but awarded him $0 in damages.

After the verdict, the judge discharged the jury, and the jurors left the courtroom. Moments later, the judge realized the error in the $0 verdict and ordered the clerk to bring back the jurors, who were all in the building—including one who may have left for a short time and returned. Over the objection of Dietz' counsel and in the interest of judicial economy and efficiency, the judge decided to recall the jury. After questioning the jurors as a group, the judge was satisfied that none had spoken about the case to anyone and ordered them to return the next morning. After receiving clarifying instructions, the reassembled jury returned a verdict awarding Dietz $15,000 in damages. On appeal, the Ninth Circuit affirmed.

Held: A federal district court has a limited inherent power to rescind a jury discharge order and recall a jury in a civil case for further deliberations after identifying an error in the jury's verdict. The District Court did not abuse that power here. Pp. 45–54.

(a) The inherent powers that district courts possess "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases," *Link* v. *Wabash R. Co.*, 370 U. S. 626, 630–631, have certain limits. The exercise of an inherent power must be a "reasonable response to the problems and needs" confronting the court's fair administration of justice and cannot be contrary to any express grant of, or limitation on, the district court's power contained in a rule or statute. *Degen* v. *United States*, 517 U. S. 820, 823–824. These two principles support the conclusion here.

Syllabus

First, rescinding a discharge order and recalling the jury can be a reasonable response to correcting an error in the jury's verdict in certain circumstances, and is similar in operation to a district court's express power under Federal Rule of Civil Procedure 51(b)(3) to give the jury a curative instruction and order them to continue deliberating to correct an error in the verdict before discharge. Other inherent powers possessed by district courts, *e. g.*, a district court's inherent power to modify or rescind its orders before final judgment in a civil case, see *Marconi Wireless Telegraph Co. of America* v. *United States*, 320 U. S. 1, 47–48, or to manage its docket and courtroom with a view toward the efficient and expedient resolution of cases, see *Landis* v. *North American Co.*, 299 U. S. 248, 254, also support this conclusion.

Second, rescinding a discharge order to recall a jury does not violate any other rule or statute. No implicit limitation in Rule 51(b)(3) prohibits a court from rescinding its discharge order and reassembling the jury. Nor are such limits imposed by other rules dealing with post-verdict remedies. See, *e. g.*, Fed. Rules Civ. Proc. 50(b), 59(a)(1)(A). Pp. 45–48

(b) This inherent power must be carefully circumscribed, especially in light of the guarantee of an impartial jury. Because discharge releases a juror from the obligations to avoid discussing the case outside the jury room and to avoid external prejudicial information, the potential that a jury reassembled after being discharged might be tainted looms large. Thus, any suggestion of prejudice should counsel a district court not to exercise its inherent power. The court should determine whether any juror has been directly tainted and should also take into account additional factors that can indirectly create prejudice, which, at a minimum, include the length of delay between discharge and recall, whether the jurors have spoken to anyone about the case after discharge, and any emotional reactions to the verdict witnessed by the jurors. Courts should also ask to what extent just-dismissed jurors accessed their smartphones or the Internet.

Applying those factors here, the District Court did not abuse its discretion. The jury was out for only a few minutes, and, with the exception of one juror, remained inside the courthouse. The jurors did not speak to any person about the case after discharge. And, there is no indication in the record that the verdict generated any kind of emotional reaction or electronic exchanges or searches that could have tainted the jury. Pp. 48–51.

(c) Dietz' call for a categorical bar on reempaneling a jury after discharge is rejected. Even assuming that at common law a discharged jury could never be brought back, the advent of modern federal trial practice limits the common law's relevance as to the specific question raised here. There is no benefit to imposing a rule that says that as

soon as a jury is free to go a judge categorically cannot rescind that order to correct an easily identified and fixable mistake. And Dietz' "functional" discharge test, which turns on whether the jurors remain within the district court's "presence and control," *i. e.*, within the courtroom, raises similar problems. Pp. 51–54.

794 F. 3d 1093, affirmed.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, ALITO, and KAGAN, JJ., joined. THOMAS, J., filed a dissenting opinion, in which KENNEDY, J., joined, *post*, p. 54.

Kannon K. Shanmugam argued the cause for petitioner. With him on the briefs were *Allison B. Jones* and *Geoffrey C. Angel.*

Neal Kumar Katyal argued the cause for respondent. With him on the brief were *Frederick Liu* and *Jesse Beaudette.*

John F. Bash argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Caldwell*, and *Deputy Solicitor General Kneedler.*

JUSTICE SOTOMAYOR delivered the opinion of the Court.

In this case, a jury returned a legally impermissible verdict. The trial judge did not realize the error until shortly after he excused the jury. He brought the jury back and ordered them to deliberate again to correct the mistake. The question before us is whether a federal district court can recall a jury it has discharged, or whether the court can remedy the error only by ordering a new trial.

This Court now holds that a federal district court has the inherent power to rescind a jury discharge order and recall a jury for further deliberations after identifying an error in the jury's verdict. Because the potential of tainting jurors and the jury process after discharge is extraordinarily high, however, this power is limited in duration and scope, and must be exercised carefully to avoid any potential prejudice.

I

Petitioner Rocky Dietz was driving through an intersection in Bozeman, Montana, when Hillary Bouldin ran the red light and T-boned Dietz. As a result of the accident, Dietz suffered injuries to his lower back that caused him severe pain. He sought physical therapy, steroid injections, and other medications to treat his pain. Dietz sued Bouldin for negligence. Bouldin removed the case to Federal District Court. See 28 U. S. C. §§ 1332, 1441.

At trial, Bouldin admitted that he was at fault for the accident and that Dietz was injured as a result. Bouldin also stipulated that Dietz' medical expenses of $10,136 were reasonable and necessary as a result of the collision. The only disputed issue at trial for the jury to resolve was whether Dietz was entitled to damages above $10,136.

During deliberations, the jury sent the judge a note asking: " 'Has the $10,136 medical expenses been paid; and if so, by whom?' " App. 36. The court discussed the note with the parties' attorneys and told them he was unsure whether the jurors understood that their verdict could not be less than that stipulated amount, and that a mistrial would be required if the jury did not return a verdict of at least $10,136. The judge, however, with the consent of both parties, told the jury that the information they sought was not relevant to the verdict.

The jury returned a verdict in Dietz' favor but awarded him $0 in damages. The judge thanked the jury for its service and ordered them "discharged," telling the jurors they were "free to go." App. to Pet. for Cert. 25a. The jurors gathered their things and left the courtroom.

A few minutes later, the court ordered the clerk to bring the jurors back. Speaking with counsel outside the jury's presence, the court explained that it had "just stopped the jury from leaving the building," after realizing that the $0 verdict was not "legally possible in view of stipulated damages exceeding $10,000." *Id.*, at 26a. The court suggested

two alternatives: (1) order a new trial or (2) reempanel the jurors, instructing them to award at least the stipulated damages and ordering them to deliberate anew.

Dietz' attorney objected to reempaneling the discharged jurors, arguing that the jury was no longer capable of returning a fair and impartial verdict. The court reiterated that none of the jurors had left the building, and asked the clerk whether any had even left the floor where the courtroom was located. The clerk explained that only one juror had left the building to get a hotel receipt and bring it back.

Before the jurors returned, the judge told the parties that he planned to order the jury to deliberate again and reach a different verdict. The judge explained that he would "hate to just throw away the money and time that's been expended in this trial." *Id.*, at 28a. When the jurors returned to the courtroom, the judge questioned them as a group and confirmed that they had not spoken to anyone about the case.

The judge explained to the jurors the mistake in not awarding the stipulated damages. He informed the jurors that he was reempaneling them and would ask them to start over with clarifying instructions. He asked the jurors to confirm that they understood their duty and to return the next morning to deliberate anew. The next day, the reassembled jury returned a verdict awarding Dietz $15,000 in damages.

On appeal, the Ninth Circuit affirmed. 794 F. 3d 1093 (2015). The court held that a district court could reempanel the jury shortly after dismissal as long as during the period of dismissal, the jurors were not exposed to any outside influences that would compromise their ability to reconsider the verdict fairly. This Court granted Dietz' petition for a writ of certiorari to resolve confusion in the Courts of Appeals on whether and when a federal district court has the authority to recall a jury after discharging it. 577 U. S. 1101 (2016). See *Wagner* v. *Jones*, 758 F. 3d 1030, 1034–1035 (CA8 2014), cert. denied, 575 U. S. 902 (2015); *United States*

v. *Figueroa*, 683 F. 3d 69, 72–73 (CA3 2012); *United States* v. *Rojas*, 617 F. 3d 669, 677–678 (CA2 2010); *United States* v. *Marinari*, 32 F. 3d 1209, 1214 (CA7 1994); *Summers* v. *United States*, 11 F. 2d 583, 585–587 (CA4 1926).

II

A

The Federal Rules of Civil Procedure set out many of the specific powers of a federal district court. But they are not all encompassing. They make no provision, for example, for the power of a judge to hear a motion *in limine*,[1] a motion to dismiss for *forum non conveniens*,[2] or many other standard procedural devices trial courts around the country use every day in service of Rule 1's paramount command: the just, speedy, and inexpensive resolution of disputes.

Accordingly, this Court has long recognized that a district court possesses inherent powers that are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link* v. *Wabash R. Co.*, 370 U. S. 626, 630–631 (1962); see also *United States* v. *Hudson*, 7 Cranch 32, 34 (1812). Although this Court has never precisely delineated the outer boundaries of a district court's inherent powers, the Court has recognized certain limits on those powers.

First, the exercise of an inherent power must be a "reasonable response to the problems and needs" confronting the court's fair administration of justice. *Degen* v. *United States*, 517 U. S. 820, 823–824 (1996). Second, the exercise of an inherent power cannot be contrary to any express grant of or limitation on the district court's power contained in a rule or statute. See *id.*, at 823; Fed. Rule Civ. Proc. 83(b) (district courts can "regulate [their] practice in any manner

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[1] *Luce* v. *United States*, 469 U. S. 38, 41, n. 4 (1984).

[2] *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 507–508 (1947).

consistent with federal law"); see, *e. g., Bank of Nova Scotia* v. *United States*, 487 U. S. 250, 254 (1988) (holding that a district court cannot invoke its inherent power to "circumvent the harmless-error inquiry prescribed by Federal Rule of Criminal Procedure 52(a)"). These two principles—an inherent power must be a reasonable response to a specific problem and the power cannot contradict any express rule or statute—support the conclusion that a district judge has a limited inherent power to rescind a discharge order and recall a jury in a civil case where the court discovers an error in the jury's verdict.

First, rescinding a discharge order and recalling the jury can be a reasonable response to correcting an error in the jury's verdict in certain circumstances. In the normal course, when a court recognizes an error in a verdict before it discharges the jury, it has the express power to give the jury a curative instruction and order them to continue deliberating. See Fed. Rule Civ. Proc. 51(b)(3) ("The court . . . may instruct the jury at any time before the jury is discharged"); 4 L. Sand et al., Modern Federal Jury Instructions–Civil ¶78.01, Instruction 78–10, p. 78–31 (2015) (Sand) (when a jury returns an inconsistent verdict, "[r]esubmitting the verdict . . . to resolve the inconsistencies is often the preferable course"). The decision to recall a jury to give them what would be an identical predischarge curative instruction could be, depending on the circumstances, similarly reasonable.

This conclusion is buttressed by this Court's prior cases affirming a district court's inherent authority in analogous circumstances. For example, the Court has recognized that a district court ordinarily has the power to modify or rescind its orders at any point prior to final judgment in a civil case. *Marconi Wireless Telegraph Co. of America* v. *United States*, 320 U. S. 1, 47–48 (1943); see also Fed. Rule Civ. Proc. 54(b) (district court can revise partial final judgment order absent certification of finality); *Fernandez* v. *United States*, 81 S. Ct.

642, 644, 5 L. Ed. 2d 683, 686 (1961) (Harlan, J., in chambers) (district court has inherent power to revoke order granting bail).

Here, the District Court rescinded its order discharging the jury before it issued a final judgment. Rescinding the discharge order restores the legal status quo before the court dismissed the jury. The District Court is thus free to reinstruct the jury under Rule 51(b)(3).

This Court has also held that district courts have the inherent authority to manage their dockets and courtrooms with a view toward the efficient and expedient resolution of cases. See, *e. g.*, *Landis* v. *North American Co.*, 299 U. S. 248, 254 (1936) (district court has inherent power to stay proceedings pending resolution of parallel actions in other courts); *Link*, 370 U. S., at 631–632 (district court has inherent power to dismiss case *sua sponte* for failure to prosecute); *Chambers* v. *NASCO, Inc.*, 501 U. S. 32, 44 (1991) (district court has inherent power to vacate judgment procured by fraud); *United States* v. *Morgan*, 307 U. S. 183, 197–198 (1939) (district court has inherent power to stay disbursement of funds until revised payments are finally adjudicated).

This Court's recognition of these other inherent powers designed to resolve cases expeditiously is consistent with recognizing an inherent power to recall a discharged jury and reempanel the jurors with curative instructions. Compared to the alternative of conducting a new trial, recall can save the parties, the court, and society the costly time and litigation expense of conducting a new trial with a new set of jurors.

Second, rescinding a discharge order to recall a jury does not violate any other rule or statute. Rule 51(b)(3) states that a court "may instruct the jury at any time before the jury is discharged." A judge obviously cannot instruct a jury that is discharged—it is no longer there. But there is no implicit limitation in Rule 51(b)(3) that prohibits a court from rescinding its discharge order and reassembling the

jury. See *Link*, 370 U. S., at 630 (holding that Rule 41(b)'s allowance for a party to move to dismiss for failure to prosecute did not implicitly abrogate the court's power to dismiss *sua sponte*). Other rules dealing with postverdict remedies such as a motion for a new trial or a motion for judgment notwithstanding the verdict, see Fed. Rules Civ. Proc. 50(b), 59(a)(1)(A), similarly do not place limits on a court's ability to rescind a prior order discharging a jury. Accordingly, a federal district court can rescind a discharge order and recall a jury in a civil case as an exercise of its inherent powers.

B

Just because a district court has the inherent power to rescind a discharge order does not mean that it is appropriate to use that power in every case. Because the exercise of an inherent power in the interest of promoting efficiency may risk undermining other vital interests related to the fair administration of justice, a district court's inherent powers must be exercised with restraint. See *Chambers*, 501 U. S., at 44 ("Because of their very potency, inherent powers must be exercised with restraint and discretion").

The inherent power to rescind a discharge order and recall a dismissed jury, therefore, must be carefully circumscribed, especially in light of the guarantee of an impartial jury that is vital to the fair administration of justice. This Court's precedents implementing this guarantee have noted various external influences that can taint a juror. *E. g.*, *Remmer* v. *United States*, 347 U. S. 227, 229 (1954) ("In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial"). Parties can accordingly ask that a juror be excused during trial for good cause, Fed. Rule Civ. Proc. 47(c), or challenge jury verdicts based on improper extraneous influences such as prejudicial information not admitted into evidence, comments from a court employee about

the defendant, or bribes offered to a juror, *Warger* v. *Shauers*, 574 U. S. 40, 51 (2014) (citing *Tanner* v. *United States*, 483 U. S. 107, 117 (1987)); see also *Mattox* v. *United States*, 146 U. S. 140, 149–150 (1892) (external prejudicial information); *Parker* v. *Gladden*, 385 U. S. 363, 365 (1966) (*per curiam*) (bailiff comments on defendant); *Remmer*, 347 U. S., at 228–230 (bribe offered to juror).

The potential for taint looms even larger when a jury is reassembled after being discharged. While discharged, jurors are freed from instructions from the court requiring them not to discuss the case with others outside the jury room and to avoid external prejudicial information. See, *e. g.*, 4 Sand ¶71.02 (standard instruction to avoid extraneous influences); see also *id.*, ¶71.01, Instructions 71–12 to 71–14 (avoid publicity). For example, it is not uncommon for attorneys or court staff to talk to jurors postdischarge for their feedback on the trial. See 1 K. O'Malley, J. Grenig, and W. Lee, Federal Jury Practice and Instructions § 9:8 (6th ed. 2006) (debating appropriateness of practice).

Any suggestion of prejudice in recalling a discharged jury should counsel a district court not to exercise its inherent power. A district court that is considering whether it should rescind a discharge order and recall a jury to correct an error or instead order a new trial should, of course, determine whether any juror has been directly tainted—for example, if a juror discusses the strength of the evidence with nonjurors or overhears others talking about the strength of the evidence. But the court should also take into account at least the following additional factors that can indirectly create prejudice in this context, any of which standing alone could be dispositive in a particular case.

First, the length of delay between discharge and recall. The longer the jury has been discharged, the greater the likelihood of prejudice. Freed from the crucible of the jury's group decisionmaking enterprise, discharged jurors may begin to forget key facts, arguments, or instructions from

the court. In taking off their juror "hats" and returning to their lives, they may lose sight of the vital collective role they played in the impartial administration of justice. And they are more likely to be exposed to potentially prejudicial sources of information or discuss the case with others, even if they do not realize they have done so or forget when questioned after being recalled by the court. How long is too long is left to the discretion of the district court, but it could be as short as even a few minutes, depending on the case.

Second, whether the jurors have spoken to anyone about the case after discharge. This could include court staff, attorneys and litigants, press and sketch artists, witnesses, spouses, friends, and so on. Even apparently innocuous comments about the case from someone like a courtroom deputy such as "job well done" may be sufficient to taint a discharged juror who might then resist reconsidering her decision.

Third, the reaction to the verdict. Trials are society's way of channeling disputes into fair and impartial resolutions. But these disputes can be bitter and emotional. And, depending on the case, those emotions may be broadcasted to the jury in response to their verdict. Shock, gasps, crying, cheers, and yelling are common reactions to a jury verdict—whether as a verdict is announced in the courtroom or seen in the corridors after discharge.

In such a case, there is a high risk that emotional reactions will cause jurors to begin to reconsider their decision and ask themselves, "Did I make the right call?" Of course, this concern would be present even in a decision to reinstruct the jury to fix an error after the verdict is announced but before they are discharged. See Fed. Rule Civ. Proc. 51(b)(3). Even so, after discharging jurors from their obligations and the passage of time, a judge should be reluctant to reempanel a jury that has witnessed emotional reactions to its verdict.

In considering these and any other relevant factors, courts should also ask to what extent just-dismissed jurors accessed their smartphones or the Internet, which provide other avenues for potential prejudice. It is a now-ingrained instinct to check our phones whenever possible. Immediately after discharge, a juror could text something about the case to a spouse, research an aspect of the evidence on Google, or read reactions to a verdict on Twitter. Prejudice can come through a whisper or a byte.

Finally, we caution that our recognition here of a court's inherent power to recall a jury is limited to civil cases only. Given additional concerns in criminal cases, such as attachment of the double jeopardy bar, we do not address here whether it would be appropriate to recall a jury after discharge in a criminal case. See *Smith* v. *Massachusetts*, 543 U. S. 462, 473–474 (2005).

Applying these factors, the District Court here did not abuse its discretion by rescinding its discharge order and recalling the jury to deliberate further. The jury was out for only a few minutes after discharge. Only one juror may have left the courthouse, apparently to retrieve a hotel receipt. The jurors did not speak to any person about the case after discharge. There is no indication in the record that this run-of-the-mill civil case—where the parties agreed that the defendant was liable and disputed damages only—generated any kind of emotional reaction or electronic exchanges or searches that could have tainted the jury. There was no apparent potential for prejudice by recalling the jury here.

III

Dietz asks us to impose a categorical bar on reempaneling a jury after it has been discharged. He contends that, at common law, a jury once discharged could never be brought back together again. Accordingly, he argues, without a "'long unquestioned' power" of courts recalling juries, a fed-

eral district court lacks the inherent power to rescind a discharge order. See *Carlisle* v. *United States*, 517 U. S. 416, 426–427 (1996) (district court lacked inherent authority to grant untimely motion for judgment of acquittal).

We disagree. Even assuming that the common-law tradition is as clear as Dietz contends, but see, *e. g.*, *Prussel* v. *Knowles*, 5 Miss. 90, 95–97 (1839) (allowing postdischarge recall), the common law is less helpful to understanding modern civil trial practice. At common law, any error in the process of rendering a verdict, no matter how technical or inconsequential, could be remedied only by ordering a new trial. But modern trial practice did away with this system, replacing it with the harmless-error standard now embodied in Rule 61. See *Kotteakos* v. *United States*, 328 U. S. 750, 758, 760 (1946) (recognizing predecessor statute to Rule 61 codified the "salutary policy" of "substitut[ing] judgment for automatic . . . rules").

Jury practice itself no longer follows the strictures of the common law. The common law required that juries be sequestered from the rest of society until they reached a verdict. Tellier, Separation or Dispersal of Jury in Civil Case After Submission, 77 A. L. R. 2d 1086 (1961). This generally meant no going home at night, no lunch breaks, no dispersing at all until they reached a verdict. *Id.*, § 2; see also *Lester* v. *Stanley*, 15 F. Cas. 396, 396–397 (No. 8,277) (Conn. 1808) (Livingston, Circuit Justice) (following common law). Courts are no longer required to impose these requirements on juries in order to prevent possible prejudice. See *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 554 (1976) (cases requiring sequestration to avoid trial publicity "are relatively rare"); *Drake* v. *Clark*, 14 F. 3d 351, 358 (CA7 1994) ("Sequestration is an extreme measure, one of the most burdensome tools of the many available to assure a fair trial"). Accordingly, while courts should not think they are generally free to discover new inherent powers that are contrary to civil practice as recognized in the common law, see *Carlisle*,

517 U. S., at 426–427, the advent of modern federal trial practice limits the common law's relevance as to the specific question whether a judge can recall a just-discharged jury.

Dietz also argues that the nature of a jury's deliberative process means that something about the jury is irrevocably broken once the jurors are told they are free to go. According to Dietz, with their bond broken, the jurors cannot be brought back together again as a "jury." In other words, once a jury is discharged, a court can never put the jury back together again by rescinding its discharge order—legally or metaphysically.

We reject this "Humpty Dumpty" theory of the jury. Juries are of course an integral and special part of the American system of civil justice. Our system cannot function without the dedication of citizens coming together to perform their civic duty and resolve disputes.

But there is nothing about the jury as an entity that ceases to exist simply because the judge tells the jury that they are excused from further service. A discharge order is not a magical invocation. It is an order, like any other order.

And, like any order, it can be issued by mistake. All judges make mistakes. (Even us.) See *Brown* v. *Allen*, 344 U. S. 443, 540 (1953) (Jackson, J., concurring in judgment) ("We are not final because we are infallible, but we are infallible only because we are final"). There is no benefit to imposing a rule that says that as soon as a jury is free to go a judge categorically cannot rescind that order to correct an easily identified and fixable mistake, even as the jurors are still in the courtroom collecting their things.

Dietz does not suggest the Court adopt a magic-words rule, but instead urges the adoption of a "functional" discharge test based on whether the jurors remain within the "presence and control" of the district court, where control is limited to the courtroom itself. Tr. of Oral Arg. 5–7. Similarly, the dissent suggests that it is the chance "to mingle with the bystanders" that creates a discharge that cannot

be undone. *Post*, at 55 (opinion of THOMAS, J.) (internal quotation marks and brackets omitted). These tests do not avoid the problems that Dietz and the dissent identify with a prejudice inquiry. Under a courtroom test, what if a juror has one foot over the line? What if she just stepped out to use the restroom? Under a courthouse test, what if she is just outside the doors? Reached her car in the parking lot? Under a bystander test, is a courtroom deputy in the jury room a mingling bystander? There is no good reason to prefer a test based on geography or identity over an inquiry focused on potential prejudice.

Finally, Dietz argues that the District Court in this case erred by questioning the discharged jurors as a group before reempaneling them instead of questioning each and every juror individually. While individual questioning could be the better practice in many circumstances, Dietz' attorney raised no objection to this part of the court's process. We decline to review this forfeited objection. See Fed. Rule Civ. Proc. 46.

* * *

Federal district courts have a limited inherent power to rescind a discharge order and recall a jury in a civil case. District courts should exercise this power cautiously and courts of appeals should review its invocation carefully. That was done here. The judgment of the Court of Appeals for the Ninth Circuit is therefore

Affirmed.

JUSTICE THOMAS, with whom JUSTICE KENNEDY joins, dissenting.

Justice Holmes famously quipped, "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV." The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897). But old rules often stand the test of time because wisdom underlies them. The common-law rule prohibiting a judge from recalling the jury after it

is discharged is one such rule. Even though contemporary jurors are not formally sequestered as they were at common law, they are still subject to significant restrictions designed to prevent undue influence. And in today's world of cellphones, wireless Internet, and 24/7 news coverage, the rationale that undergirds the bright-line rule supplied by the common law is even more relevant: Jurors may easily come across prejudicial information when, after trial, the court lifts their restrictions on outside information. I would therefore hew to that rule rather than adopt the majority's malleable multifactor test for prejudice. I respectfully dissent.

At common law, once the judge discharged the jury and the jury could interact with the public, the judge could not recall the jury to amend the verdict. See *Sargent* v. *State*, 11 Ohio 472, 473 (1842); *Mills* v. *Commonwealth*, 34 Va. 751, 752 (1836); *Little* v. *Larrabee*, 2 Me. 37, 40 (1822). It was not "'the mere announcement'" that the jury was discharged, but rather the chance to "'mingl[e] with the bystanders'" that triggered the prohibition against recalling them. *Summers* v. *United States*, 11 F. 2d 583, 586 (CA4 1926) (quoting A. Abbott, A Brief for the Trial of Criminal Cases 730 (2d ed. 1902)). At that point, the court could not fix a substantive error made by the jury, including "returning a verdict against the *wrong party*; or, if not so, for a *larger* or *smaller* sum than they intended." *Little*, *supra*, at 39; see also *Jackson* v. *Williamson*, 2 T. R. 281, 281–282, 100 Eng. Rep. 153 (K. B. 1788) (refusing to allow an amendment to the verdict after the jury was discharged even though all jurors signed an affidavit explaining that they intended to award more in damages).*

The theory underpinning this rule was simple: Jurors, as the judges of fact, must avoid the possibility of prejudice.

*Although courts could not fix substantive errors by recalling the jury, they could correct clerical errors in the reporting of the verdict. See *Little* v. *Larrabee*, 2 Me. 37, 38 (1822).

They have long been prohibited from having *ex parte* communications with the parties during a trial or receiving evidence in private. 3 W. Blackstone, Commentaries *375–*376. But once the jury is discharged, the jurors "become accessible to the parties and subject to their influence." *Little*, *supra*, at 39. In drawing the line at the *opportunity* to mingle, the common-law rule was prophylactic. But that is a desirable feature when public confidence in the judicial system is at stake.

It is true, as the Court explains, that jurors are no longer sequestered from the public. *Ante*, at 52. But remnants of sequestration remain. Jurors are prohibited from *ex parte* contact with the parties and the judge. They are not allowed to gather outside information about the case. And courthouses have private rooms for jurors, to shield them from *ex parte* information during recesses and deliberations.

Even without full sequestration, the common-law rule remains sensible and administrable. After discharge, the court has no power to impose restrictions on jurors, and jurors are no longer under oath to obey them. Jurors may access their cellphones and get public information about the case. They may talk to counsel or the parties. They may overhear comments in the hallway as they leave the courtroom. And they may reflect on the case—away from the pressure of the jury room—in a way that could induce them to change their minds. The resulting prejudice can be hard to detect. And a litigant who suddenly finds himself on the losing end of a materially different verdict may be left to wonder what may have happened in the interval between the jury's discharge and its new verdict. Granting a new trial may be inconvenient, but at least litigants and the public will be more confident that the verdict was not contaminated by improper influence after the trial has ended. And under this bright-line rule, district courts would take greater care in discharging the jury.

In contrast, the only thing that is clear about the majority's multifactor test is that it will produce more litigation.

This multifactor test may aid in identifying relevant facts for analysis, but—like most multifactor tests—it leaves courts adrift once those facts have been identified. The majority instructs district judges to look at "the length of delay between discharge and recall," "whether the jurors have spoken to anyone about the case after discharge," "the reaction to the verdict," and whether jurors have had access to their cellphones or the Internet. *Ante*, at 49–50. But in collecting these factors, the majority offers little guidance on how courts should apply them. Is one hour too long? How about two hours or two days? Does a single Internet search by a juror preclude recalling the entire jury? How many factors must be present to shift the balance against recalling the jury? All the majority says is that any factor "standing alone *could* be dispositive in a particular case." *Ante*, at 49 (emphasis added).

The majority's factors thus raise more questions than they answer. Parties will expend enormous effort litigating and appealing these questions. And when the Courts of Appeals inevitably fail to agree on what constitutes prejudice, we will be called on again to sort it out. As the Court of King's Bench recognized over two centuries ago, "it was better that the present plaintiff should suffer an inconvenience" than to head down this murky path. *Jackson*, *supra*, at 282, 100 Eng. Rep., at 153.

All rules have their drawbacks. The common-law rule, on occasion, may unnecessarily force a district court to redo a trial for a minor substantive mistake in the verdict. But the majority's multifactor test will only create more confusion. It would be much simpler to instruct the district courts, when they find a mistake in the verdict after the jury is dismissed, to hold a new trial.

The jurors here had the chance to mingle with the outside world after the District Court's discharge order released them from their oaths. After the announcement of discharge, the jurors entered public spaces in which interaction with nonjurors was possible. At that point, the jurors no

longer were within the court's control and, therefore, were in fact discharged. Although the record does not indicate one way or the other, it is also possible that the jurors had access to cellphones or other wireless devices in circumstances where they understood themselves to have been released from any directions or limitations the judge had imposed on the use of those devices during trial.

Because the District Court reconvened the jury after discharge to deliberate anew, I would reverse the Court of Appeals' judgment affirming the verdict and remand for a new trial. I respectfully dissent.

Syllabus

COMMONWEALTH OF PUERTO RICO *v.* SANCHEZ VALLE ET AL.

CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

No. 15–108. Argued January 13, 2016—Decided June 9, 2016

Respondents Luis Sánchez Valle and Jaime Gómez Vázquez each sold a gun to an undercover police officer. Puerto Rican prosecutors indicted them for illegally selling firearms in violation of the Puerto Rico Arms Act of 2000. While those charges were pending, federal grand juries also indicted them, based on the same transactions, for violations of analogous U. S. gun trafficking statutes. Both defendants pleaded guilty to the federal charges and moved to dismiss the pending Commonwealth charges on double jeopardy grounds. The trial court in each case dismissed the charges, rejecting prosecutors' arguments that Puerto Rico and the United States are separate sovereigns for double jeopardy purposes and so could bring successive prosecutions against each defendant. The Puerto Rico Court of Appeals consolidated the cases and reversed. The Supreme Court of Puerto Rico granted review and held, in line with the trial court, that Puerto Rico's gun sale prosecutions violated the Double Jeopardy Clause.

Held: The Double Jeopardy Clause bars Puerto Rico and the United States from successively prosecuting a single person for the same conduct under equivalent criminal laws. Pp. 66–78.

(a) Ordinarily, a person cannot be prosecuted twice for the same offense. But under the dual-sovereignty doctrine, the Double Jeopardy Clause does not bar successive prosecutions if they are brought by separate sovereigns. See, *e. g.*, *United States* v. *Lanza*, 260 U. S. 377, 382. Yet "sovereignty" in this context does not bear its ordinary meaning. This Court does not examine the extent of control that one prosecuting entity wields over the other, the degree to which an entity exercises self-governance, or a government's more particular ability to enact and enforce its own criminal laws. Rather, the test hinges on a single criterion: the "ultimate source" of the power undergirding the respective prosecutions. *United States* v. *Wheeler*, 435 U. S. 313, 320. If two entities derive their power to punish from independent sources, then they may bring successive prosecutions. Conversely, if those entities draw their power from the same ultimate source, then they may not.

Under that approach, the States are separate sovereigns from the Federal Government and from one another. Because States rely on

"authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment," state prosecutions have their roots in an "inherent sovereignty" unconnected to the U. S. Congress. *Heath* v. *Alabama*, 474 U. S. 82, 89. For similar reasons, Indian tribes also count as separate sovereigns. A tribe's power to punish pre-existed the Union, and so a tribal prosecution, like a State's, is "attributable in no way to any delegation . . . of federal authority." *Wheeler*, 435 U. S., at 328. Conversely, a municipality cannot count as a sovereign distinct from a State, because it receives its power, in the first instance, from the State. See, *e. g.*, *Waller* v. *Florida*, 397 U. S. 387, 395. And most pertinent here, this Court concluded in the early 20th century that U. S. territories—including an earlier incarnation of Puerto Rico itself—are not sovereigns distinct from the United States. *Grafton* v. *United States*, 206 U. S. 333. The Court reasoned that "the territorial and federal laws [were] creations emanating from the same sovereignty," *Puerto Rico* v. *Shell Co. (P. R.), Ltd.*, 302 U. S. 253, 264, and so federal and territorial prosecutors do not derive their powers from independent sources of authority. Pp. 66–72.

(b) The *Grafton* and *Shell Co.* decisions, in and of themselves, do not control here. In the mid-20th century, Puerto Rico became a new kind of political entity, still closely associated with the United States but governed in accordance with, and exercising self-rule through, a popularly ratified constitution. The magnitude of that change requires consideration of the dual-sovereignty question anew. Yet the result reached, given the historical test applied, ends up the same. Going back as far as the doctrine demands—to the "ultimate source" of Puerto Rico's prosecutorial power—reveals, once again, the U. S. Congress. *Wheeler*, 435 U. S., at 320. Pp. 73–78.

(1) In 1950, Congress enacted Public Law 600, which authorized the people of Puerto Rico to organize a government pursuant to a constitution of their own adoption. The Puerto Rican people capitalized on that opportunity, calling a constitutional convention and overwhelmingly approving the charter it drafted. Once Congress approved that proposal—subject to several important conditions accepted by the convention—the Commonwealth of Puerto Rico, a new political entity, came into being.

Those constitutional developments were of great significance—and, indeed, made Puerto Rico "sovereign" in one commonly understood sense of that term. At that point, Congress granted Puerto Rico a degree of autonomy comparable to that possessed by the States. If the dual-sovereignty doctrine hinged on measuring an entity's self-governance, the emergence of the Commonwealth would have resulted

as well in the capacity to bring the kind of successive prosecutions attempted here. Pp. 73–74.

(2) But the dual-sovereignty test focuses not on the fact of self-rule, but on where it first came from. And in identifying a prosecuting entity's wellspring of authority, the Court has insisted on going all the way back—beyond the immediate, or even an intermediate, locus of power to what is termed the "ultimate source." On this settled approach, Puerto Rico cannot benefit from the dual-sovereignty doctrine. True enough, that the Commonwealth's power to enact and enforce criminal law now proceeds, just as petitioner says, from the Puerto Rico Constitution as "ordain[ed] and establish[ed]" by "the people." P. R. Const., Preamble. But back of the Puerto Rican people and their Constitution, the "ultimate" source of prosecutorial power remains the U. S. Congress. Congress, in Public Law 600, authorized Puerto Rico's constitution-making process in the first instance, and Congress, in later legislation, both amended the draft charter and gave it the indispensable stamp of approval. Put simply, Congress conferred the authority to create the Puerto Rico Constitution, which in turn confers the authority to bring criminal charges. That makes Congress the original source of power for Puerto Rico's prosecutors—as it is for the Federal Government's. The island's Constitution, significant though it is, does not break the chain. Pp. 74–78.

Affirmed.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, and ALITO, JJ., joined. GINSBURG, J., filed a concurring opinion, in which THOMAS, J., joined, *post*, p. 78. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 79. BREYER, J., filed a dissenting opinion, in which SOTOMAYOR, J., joined, *post*, p. 80.

Christopher Landau argued the cause for petitioner. With him on the briefs were *César Miranda Rodríguez*, Attorney General of Puerto Rico, *Margarita Mercado Echegaray*, Solicitor General, and *Jason M. Wilcox*.

Adam G. Unikowsky argued the cause for respondents. With him on the brief were *R. Trent McCotter*, *Wanda T. Castro Alemán*, and *Victor A. Meléndez Lugo*.

Nicole A. Saharsky argued the cause for the United States as *amicus curiae* urging affirmance. With her on the brief were *Solicitor General Verrilli*, *Assistant Attorney General*

Caldwell, *Deputy Solicitor General Dreeben*, and *Robert A. Parker*.*

JUSTICE KAGAN delivered the opinion of the Court.

The Double Jeopardy Clause of the Fifth Amendment prohibits more than one prosecution for the "same offence." But under what is known as the dual-sovereignty doctrine, a single act gives rise to distinct offenses—and thus may subject a person to successive prosecutions—if it violates the laws of separate sovereigns. To determine whether two prosecuting authorities are different sovereigns for double jeopardy purposes, this Court asks a narrow, historically focused question. The inquiry does not turn, as the term "sovereignty" sometimes suggests, on the degree to which the second entity is autonomous from the first or sets its own political course. Rather, the issue is only whether the prosecutorial powers of the two jurisdictions have independent origins—or, said conversely, whether those powers derive from the same "ultimate source." *United States* v. *Wheeler*, 435 U. S. 313, 320 (1978).

In this case, we must decide if, under that test, Puerto Rico and the United States may successively prosecute a single defendant for the same criminal conduct. We hold they may not, because the oldest roots of Puerto Rico's power to prosecute lie in federal soil.

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*Briefs of *amici curiae* urging affirmance were filed for Colegio de Abogados y Abogadas de Puerto Rico et al. by *Brian D. Netter*, *Betty Lugo*, and *Carmen A. Pacheco*; for Current and Former Senior Puerto Rico Officials by *Pratik A. Shah*, *Hyland Hunt*, and *Z. W. Julius Chen*; for the Florida Association of Criminal Defense Lawyers—Miami Chapter by *Howard Srebnick*, *Joshua Shore*, *Terrance G. Reed*, and *A. Margot Moss*; for the Virgin Islands Bar Association by *Dana M. Hrelic*, *Wesley W. Horton*, *Brendon P. Levesque*, *J. Russell B. Pate*, *Edward L. Barry*, and *Joseph A. DiRuzzo III*; and for Christina Duffy Ponsa et al. by *Fred A. Rowley, Jr.*

I

A

Puerto Rico became a territory of the United States in 1898, as a result of the Spanish-American War. The treaty concluding that conflict ceded the island, then a Spanish colony, to the United States, and tasked Congress with determining "[t]he civil rights and political status" of its inhabitants. Treaty of Paris, Art. 9, Dec. 10, 1898, 30 Stat. 1759. In the ensuing hundred-plus years, the United States and Puerto Rico have forged a unique political relationship, built on the island's evolution into a constitutional democracy exercising local self-rule.

Acting pursuant to the U. S. Constitution's Territory Clause, Congress initially established a "civil government" for Puerto Rico possessing significant authority over internal affairs. Organic Act of 1900, ch. 191, 31 Stat. 77; see U. S. Const., Art. IV, § 3, cl. 2 (granting Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"). The U. S. President, with the advice and consent of the Senate, appointed the governor, supreme court, and upper house of the legislature; the Puerto Rican people elected the lower house themselves. See §§ 17–35, 31 Stat. 81–85. Federal statutes generally applied (as they still do) in Puerto Rico, but the newly constituted legislature could enact local laws in much the same way as the then-45 States. See §§ 14–15, 32, *id.*, at 80, 83–84; *Puerto Rico* v. *Shell Co. (P. R.), Ltd.*, 302 U. S. 253, 261 (1937).

Over time, Congress granted Puerto Rico additional autonomy. A federal statute passed in 1917, in addition to giving the island's inhabitants U. S. citizenship, replaced the upper house of the legislature with a popularly elected senate. See Organic Act of Puerto Rico, ch. 145, §§ 5, 26, 39 Stat. 953, 958. And in 1947, an amendment to that law em-

powered the Puerto Rican people to elect their own governor, a right never before accorded in a U. S. territory. See Act of Aug. 5, 1947, ch. 490, § 1, 61 Stat. 770.

Three years later, Congress enabled Puerto Rico to embark on the project of constitutional self-governance. Public Law 600, "recognizing the principle of government by consent," authorized the island's people to "organize a government pursuant to a constitution of their own adoption." Act of July 3, 1950, § 1, 64 Stat. 319. Describing itself as "in the nature of a compact," the statute submitted its own terms to an up-or-down referendum of Puerto Rico's voters. *Ibid.* According to those terms, the eventual constitution had to "provide a republican form of government" and "include a bill of rights"; all else would be hashed out in a constitutional convention. § 2, *ibid.* The people of Puerto Rico would be the first to decide, in still another referendum, whether to adopt that convention's proposed charter. See § 3, *ibid.* But Congress would cast the dispositive vote: The constitution, Public Law 600 declared, would become effective only "[u]pon approval by the Congress." *Ibid.*

Thus began two years of constitution-making for the island. The Puerto Rican people first voted to accept Public Law 600, thereby triggering a constitutional convention. And once that body completed its work, the island's voters ratified the draft constitution. Congress then took its turn on the document: Before giving its approval, Congress removed a provision recognizing various social welfare rights (including entitlements to food, housing, medical care, and employment); added a sentence prohibiting certain constitutional amendments, including any that would restore the welfare-rights section; and inserted language guaranteeing children's freedom to attend private schools. See Act of July 3, 1952, 66 Stat. 327; Draft Constitution of the Commonwealth of Puerto Rico (1952), in Documents on the Constitutional Relationship of Puerto Rico and the United States 199 (M. Ramirez Lavandero ed., 3d ed. 1988). Finally, the constitution became law, in the manner Congress had specified,

when the convention formally accepted those conditions and the Governor "issue[d] a proclamation to that effect." Ch. 567, 66 Stat. 328.

The Puerto Rico Constitution created a new political entity, the Commonwealth of Puerto Rico—or, in Spanish, Estado Libre Asociado de Puerto Rico. See P. R. Const., Art. I, § 1. Like the U. S. Constitution, it divides political power into three branches—the "legislative, judicial and executive." Art. I, § 2. And again resonant of American founding principles, the Puerto Rico Constitution describes that tripartite government as "republican in form" and "subordinate to the sovereignty of the people of Puerto Rico." *Ibid.* The Commonwealth's power, the Constitution proclaims, "emanates from the people and shall be exercised in accordance with their will, within the terms of the compact agreed upon between the people of Puerto Rico and the United States." Art. I, § 1.

B

We now leave the lofty sphere of constitutionalism for the grittier precincts of criminal law. Respondents Luis Sánchez Valle and Jaime Gómez Vázquez (on separate occasions) each sold a gun to an undercover police officer. Commonwealth prosecutors indicted them for, among other things, selling a firearm without a permit in violation of the Puerto Rico Arms Act of 2000. See 25 Laws P. R. Ann. § 458 (2008). While those charges were pending, federal grand juries indicted Sánchez Valle and Gómez Vázquez, based on the same transactions, for violations of analogous U. S. gun trafficking statutes. See 18 U. S. C. §§ 922(a)(1)(A), 923(a), 924(a)(1)(D), 924(a)(2). Both defendants pleaded guilty to those federal charges.

Following their pleas, Sánchez Valle and Gómez Vázquez moved to dismiss the pending Commonwealth charges on double jeopardy grounds. The prosecutors in both cases opposed those motions, arguing that Puerto Rico and the United States are different sovereigns for double jeopardy purposes, and so could bring successive prosecutions against

each of the two defendants. The trial courts rejected that view and dismissed the charges. See App. to Pet. for Cert. 307a–352a. But the Puerto Rico Court of Appeals, after consolidating the two cases, reversed those decisions. See *id.*, at 243a–306a.

The Supreme Court of Puerto Rico granted review and held that Puerto Rico's gun sale prosecutions violated the Double Jeopardy Clause. See *id.*, at 1a–70a. The majority reasoned that, under this Court's dual-sovereignty doctrine, "what is crucial" is "[t]he ultimate source" of Puerto Rico's power to prosecute. *Id.*, at 19a; see *id.*, at 20a ("The use of the word 'sovereignty' in other contexts and for other purposes is irrelevant"). Because that power originally "derived from the United States Congress"—*i. e.*, the same source on which federal prosecutors rely—the Commonwealth could not retry Sánchez Valle and Gómez Vázquez for unlawfully selling firearms. *Id.*, at 66a. Three justices disagreed, believing that the Commonwealth and the United States are separate sovereigns. See *id.*, at 71a–242a.

We granted certiorari, 576 U. S. 1095 (2015), to determine whether the Double Jeopardy Clause bars the Federal Government and Puerto Rico from successively prosecuting a defendant on like charges for the same conduct. We hold that it does, and so affirm.

II

A

This case involves the dual-sovereignty carve-out from the Double Jeopardy Clause. The ordinary rule under that Clause is that a person cannot be prosecuted twice for the same offense. See U. S. Const., Amdt. 5 ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb").[1] But two prosecutions, this Court has

[1] Because the parties in this case agree that the Double Jeopardy Clause applies to Puerto Rico, we have no occasion to consider that question here. See Brief for Petitioner 19–21; Brief for Respondents 20, n. 4; see also Brief for United States as *Amicus Curiae* 10, n. 1 (concurring).

long held, are not for the same offense if brought by different sovereigns—even when those actions target the identical criminal conduct through equivalent criminal laws. See, *e. g.*, *United States* v. *Lanza*, 260 U. S. 377, 382 (1922). As we have put the point: "[W]hen the same act transgresses the laws of two sovereigns, it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences." *Heath* v. *Alabama*, 474 U. S. 82, 88 (1985) (internal quotation marks omitted). The Double Jeopardy Clause thus drops out of the picture when the "entities that seek successively to prosecute a defendant for the same course of conduct [are] separate sovereigns." *Ibid.*

Truth be told, however, "sovereignty" in this context does not bear its ordinary meaning. For whatever reason, the test we have devised to decide whether two governments are distinct for double jeopardy purposes overtly disregards common indicia of sovereignty. Under that standard, we do not examine the "extent of control" that "one prosecuting authority [wields] over the other." *Wheeler*, 435 U. S., at 320. The degree to which an entity exercises self-governance—whether autonomously managing its own affairs or continually submitting to outside direction—plays no role in the analysis. See *Shell Co.*, 302 U. S., at 261–262, 264–266. Nor do we care about a government's more particular ability to enact and enforce its own criminal laws. See *Waller* v. *Florida*, 397 U. S. 387, 391–395 (1970). In short, the inquiry (despite its label) does not probe whether a government possesses the usual attributes, or acts in the common manner, of a sovereign entity.[2]

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[2] The dissent, ignoring our longstanding precedent to the contrary, see *supra* this page; *infra*, at 68–72, advances an approach of just this stripe: Its seven considerations all go to the question whether the Commonwealth, by virtue of Public Law 600, gained "the sovereign authority to enact and enforce" its own criminal laws. *Post*, at 84 (opinion of BREYER, J.). Our disagreement with the dissent arises entirely from its use of this test. If

Rather, as Puerto Rico itself acknowledges, our test hinges on a single criterion: the "ultimate source" of the power undergirding the respective prosecutions. *Wheeler*, 435 U. S., at 320; see Brief for Petitioner 26. Whether two prosecuting entities are dual sovereigns in the double jeopardy context, we have stated, depends on "whether [they] draw their authority to punish the offender from distinct sources of power." *Heath*, 474 U. S., at 88. The inquiry is thus historical, not functional—looking at the deepest wellsprings, not the current exercise, of prosecutorial authority. If two entities derive their power to punish from wholly independent sources (imagine here a pair of parallel lines), then they may bring successive prosecutions. Conversely, if those entities draw their power from the same ultimate source (imagine now two lines emerging from a common point, even if later diverging), then they may not.[3]

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the question is whether, after the events of 1950–1952, Puerto Rico had authority to enact and enforce its own criminal laws (or, slightly differently phrased, whether Congress then decided that it should have such autonomy), the answer (all can and do agree) is yes. See *infra*, at 74. But as we now show, that is not the inquiry our double jeopardy law has made relevant: To the contrary, we have rejected that approach again and again—and so reached results inconsistent with its use. See, *e. g.*, *Heath* v. *Alabama*, 474 U. S. 82, 88–91 (1985); *Waller* v. *Florida*, 397 U. S. 387, 391–395 (1970); see *infra* this page and 69–72.

[3] The Court has never explained its reasons for adopting this historical approach to the dual-sovereignty doctrine. It may appear counterintuitive, even legalistic, as compared to an inquiry focused on a governmental entity's functional autonomy. But that alternative would raise serious problems of application. It would require deciding exactly how much autonomy is sufficient for separate sovereignty and whether a given entity's exercise of self-rule exceeds that level. The results, we suspect, would often be uncertain, introducing error and inconsistency into our double jeopardy law. By contrast, as we go on to show, the Court has easily applied the "ultimate source" test to classify broad classes of governments as either sovereign or not for purposes of barring retrials. See *infra*, at 69–72.

Under that approach, the States are separate sovereigns from the Federal Government (and from one another). See *Abbate* v. *United States*, 359 U. S. 187, 195 (1959); *Bartkus* v. *Illinois*, 359 U. S. 121, 132–137 (1959); *Heath*, 474 U. S., at 88. The States' "powers to undertake criminal prosecutions," we have explained, do not "derive[ ] . . . from the Federal Government." *Id.*, at 89. Instead, the States rely on "authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment." *Ibid.*; see U. S. Const., Amdt. 10 ("The powers not delegated to the United States by the Constitution . . . are reserved to the States"); *Blatchford* v. *Native Village of Noatak*, 501 U. S. 775, 779 (1991) (noting that the States "entered the [Union] with their sovereignty intact"). Said otherwise: Prior to forming the Union, the States possessed "separate and independent sources of power and authority," which they continue to draw upon in enacting and enforcing criminal laws. *Heath*, 474 U. S., at 89. State prosecutions therefore have their most ancient roots in an "inherent sovereignty" unconnected to, and indeed pre-existing, the U. S. Congress. *Ibid.*[4]

[4] Literalists might object that only the original 13 States can claim such an independent source of authority; for the other 37, Congress played some role in establishing them as territories, authorizing or approving their constitutions, or (at the least) admitting them to the Union. See U. S. Const., Art. IV, § 3, cl. 1 ("New States may be admitted by the Congress into this Union"). And indeed, that is the tack the dissent takes. See *post*, at 82 (claiming that for this reason the Federal Government is "the 'source' of [later-admitted] States' legislative powers"). But this Court long ago made clear that a new State, upon entry, necessarily becomes vested with all the legal characteristics and capabilities of the first 13. See *Coyle* v. *Smith*, 221 U. S. 559, 566 (1911) (noting that the very meaning of " 'a State' is found in the powers possessed by the original States which adopted the Constitution"). That principle of "equal footing," we have held, is essential to ensure that the nation remains "a union of States [alike] in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States." *Id.*, at 567; see

For similar reasons, Indian tribes also count as separate sovereigns under the Double Jeopardy Clause. Originally, this Court has noted, "the tribes were self-governing sovereign political communities," possessing (among other capacities) the "inherent power to prescribe laws for their members and to punish infractions of those laws." *Wheeler*, 435 U. S., at 322–323. After the formation of the United States, the tribes became "domestic dependent nations," subject to plenary control by Congress—so hardly "sovereign" in one common sense. *United States* v. *Lara*, 541 U. S. 193, 204 (2004) (quoting *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17 (1831)); see *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 56 (1978) ("Congress has plenary authority to limit, modify or eliminate the [tribes'] powers of local self-government"). But unless and until Congress withdraws a tribal power—including the power to prosecute—the Indian community retains that authority in its earliest form. See *Wheeler*, 435 U. S., at 323. The "ultimate source" of a tribe's "power to punish tribal offenders" thus lies in its "primeval" or, at any rate, "pre-existing" sovereignty: A tribal prosecution, like a State's, is "attributable in no way to any delegation . . . of federal authority." *Id.*, at 320, 322, 328; *Santa Clara Pueblo*, 436 U. S., at 56. And that alone is what matters for the double jeopardy inquiry.

Northwest Austin Municipal Util. Dist. No. One v. *Holder*, 557 U. S. 193, 203 (2009) (referring to the "fundamental principle of equal sovereignty" among the States). Thus, each later-admitted State exercises its authority to enact and enforce criminal laws by virtue not of congressional grace, but of the independent powers that its earliest counterparts both brought to the Union and chose to maintain. See *Coyle*, 221 U. S., at 573 ("[W]hen a new State is admitted into the Union, it is so admitted with all the powers of sovereignty and jurisdiction which pertain to the original States"). The dissent's contrary view—that, say, Texas's or California's powers (including the power to make and enforce criminal law) derive from the Federal Government—contradicts the most fundamental conceptual premises of our constitutional order, indeed the very bedrock of our Union.

Conversely, this Court has held that a municipality cannot qualify as a sovereign distinct from a State—no matter how much autonomy over criminal punishment the city maintains. See *Waller*, 397 U. S., at 395. Florida law, we recognized in our pivotal case on the subject, treated a municipality as a "separate sovereign entit[y]" for all relevant real-world purposes: The city possessed broad home-rule authority, including the power to enact criminal ordinances and prosecute offenses. *Id.*, at 391. But that functional control was not enough to escape the double jeopardy bar; indeed, it was wholly beside the point. The crucial legal inquiry was backward-looking: Did the city and State ultimately "derive their powers to prosecute from independent sources of authority"? *Heath*, 474 U. S., at 90 (describing *Waller*'s reasoning). Because the municipality, in the first instance, had received its power from the State, those two entities could not bring successive prosecutions for a like offense.

And most pertinent here, this Court concluded in the early decades of the last century that U. S. territories—including an earlier incarnation of Puerto Rico itself—are not sovereigns distinct from the United States. In *Grafton* v. *United States*, 206 U. S. 333, 355 (1907), we held that the Philippine Islands (then a U. S. territory, also acquired in the Spanish-American War) could not prosecute a defendant for murder after a federal tribunal had acquitted him of the same crime. We reasoned that whereas "a State does not derive its powers from the United States," a territory does: The Philippine courts "exert[ed] all their powers by authority of" the Federal Government. *Id.*, at 354. And then, in *Shell Co.*, we stated that "[t]he situation [in Puerto Rico] was, in all essentials, the same." 302 U. S., at 265. Commenting on a Puerto Rican statute that overlapped with a federal law, we explained that this "legislative duplication [gave] rise to no danger of a second prosecution" because "the territorial and federal laws [were] creations emanating from the same sovereignty." *Id.*, at 264; see also *Heath*, 474 U. S., at 90 (noting

that federal and territorial prosecutors "d[o] not derive their powers to prosecute from independent sources of authority").[5]

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[5] The dissent's theory, see *supra*, at 67, n. 2, cannot explain any of these (many) decisions, whether involving States, Indian tribes, cities, or territories. We have already addressed the dissent's misunderstanding with respect to the States, including the later-admitted ones. See *supra*, at 69, and n. 4. This Court's reasoning could not have been plainer: The States (*all* of them) are separate sovereigns for double jeopardy purposes not (as the dissent claims) because they exercise authority over criminal law, but instead because that power derives from a source independent of the Federal Government. See *Heath*, 474 U. S., at 89. So too for the tribes, see *supra*, at 70; and, indeed, here the dissent's contrary reasoning is deeply disturbing. According to the dissent, Congress is in fact "the 'source' of the Indian tribes' criminal-enforcement power" because it has elected not to disturb the exercise of that authority. *Post*, at 84. But beginning with Chief Justice Marshall and continuing for nearly two centuries, this Court has held firm and fast to the view that Congress's power over Indian affairs does nothing to gainsay the profound importance of the tribes' preexisting sovereignty. See *Worcester* v. *Georgia*, 6 Pet. 515, 559–561 (1832); *Talton* v. *Mayes*, 163 U. S. 376, 384 (1896); *Michigan* v. *Bay Mills Indian Community*, 572 U. S. 782, 788 (2014). And once again, we have stated in no uncertain terms that the tribes are separate sovereigns precisely because of that inherent authority. See *Wheeler*, 435 U. S., at 328. Next, the dissent cannot (and does not even try to) explain our rule that a municipality is not a separate sovereign from a State. See *supra*, at 71. As this Court has explicitly recognized, many cities have (in the words of the dissent's test) wide-ranging "authority to enact and enforce [their] own criminal laws," *post*, at 84; still, they cannot undertake successive prosecutions—because they received that power from state governments, see *Waller*, 397 U. S., at 395. And likewise (finally), the dissent fails to face up to our decisions that the territories are not distinct sovereigns from the United States because the powers they exercise are delegations from Congress. See *Grafton* v. *United States*, 206 U. S. 333, 355 (1907); *supra*, at 71 and this page. That, of course, is what makes them different from the current Philippines, see *post*, at 81, whose relevance here is hard to fathom. As an independent nation, the Philippines wields prosecutorial power that is not traceable to any congressional conferral of authority. And that, to repeat, is what matters: If an entity's capacity to make and enforce criminal law ultimately comes from another government, then the two are not separate sovereigns for double jeopardy purposes.

B

With that background established, we turn to the question presented: Do the prosecutorial powers belonging to Puerto Rico and the Federal Government derive from wholly independent sources? See Brief for Petitioner 26–28 (agreeing with that framing of the issue). If so, the criminal charges at issue here can go forward; but if not, not. In addressing that inquiry, we do not view our decisions in *Grafton* and *Shell Co.* as, in and of themselves, controlling. Following 1952, Puerto Rico became a new kind of political entity, still closely associated with the United States but governed in accordance with, and exercising self-rule through, a popularly ratified constitution. The magnitude of that change requires us to consider the dual-sovereignty question anew. And yet the result we reach, given the legal test we apply, ends up the same. Puerto Rico today has a distinctive, indeed exceptional, status as a self-governing Commonwealth. But our approach is historical. And if we go back as far as our doctrine demands—to the "ultimate source" of Puerto Rico's prosecutorial power, *Wheeler*, 435 U. S., at 320—we once again discover the U. S. Congress.

Recall here the events of the mid-20th century—when Puerto Rico, just as petitioner contends, underwent a profound change in its political system. See Brief for Petitioner 1–2 ("[T]he people of Puerto Rico[ ] engaged in an exercise of popular sovereignty . . . by adopting their *own* Constitution establishing their *own* government to enact their *own* laws"); *supra*, at 64–65. At that time, Congress enacted Public Law 600 to authorize Puerto Rico's adoption of a constitution, designed to replace the federal statute that then structured the island's governance. The people of Puerto Rico capitalized on that opportunity, calling a constitutional convention and overwhelmingly approving the charter it drafted. Once Congress approved that proposal—subject to several important conditions accepted by the

convention—the Commonwealth, a new political entity, came into being.

Those constitutional developments were of great significance—and, indeed, made Puerto Rico "sovereign" in one commonly understood sense of that term. As this Court has recognized, Congress in 1952 "relinquished its control over [the Commonwealth's] local affairs[,] grant[ing] Puerto Rico a measure of autonomy comparable to that possessed by the States." *Examining Bd. of Engineers, Architects and Surveyors* v. *Flores de Otero*, 426 U. S. 572, 597 (1976); see *id.*, at 594 ("[T]he purpose of Congress in the 1950 and 1952 legislation was to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union"); *Rodriguez* v. *Popular Democratic Party*, 457 U. S. 1, 8 (1982) ("Puerto Rico, like a state, is an autonomous political entity, sovereign over matters not ruled by the [Federal] Constitution" (internal quotation marks omitted)). That newfound authority, including over local criminal laws, brought mutual benefit to the Puerto Rican people and the entire United States. See Brief for United States as *Amicus Curiae* 3. And if our double jeopardy decisions hinged on measuring an entity's self-governance, the emergence of the Commonwealth would have resulted as well in the capacity to bring the kind of successive prosecutions attempted here.

But as already explained, the dual-sovereignty test we have adopted focuses on a different question: not on the fact of self-rule, but on where it came from. See *supra*, at 68–69. We do not care, for example, that the States presently exercise autonomous control over criminal law and other local affairs; instead, we treat them as separate sovereigns because they possessed such control as an original matter, rather than deriving it from the Federal Government. See *supra*, at 69. And in identifying a prosecuting entity's wellspring of authority, we have insisted on going all the way back—beyond the immediate, or even an intermediate, locus

of power to what we have termed the "ultimate source." *Wheeler*, 435 U. S., at 320. That is why we have emphasized the "inherent," "primeval," and "pre-existing" capacities of the tribes and States—the power they enjoyed prior to the Union's formation. *Id.*, at 322–323, 328; *Heath*, 474 U. S., at 90; *Santa Clara Pueblo*, 436 U. S., at 56; see *supra*, at 69–70. And it is why cities fail our test even when they enact and enforce their own criminal laws under their own, popularly ratified charters: Because a State must initially authorize any such charter, the State is the furthest-back source of prosecutorial power. See *Waller*, 397 U. S., at 391–394; *supra*, at 71.

On this settled approach, Puerto Rico cannot benefit from our dual-sovereignty doctrine. For starters, no one argues that when the United States gained possession of Puerto Rico, its people possessed independent prosecutorial power, in the way that the States or tribes did upon becoming part of this country. Puerto Rico was until then a colony "under Spanish sovereignty." Treaty of Paris, Art. 2, 30 Stat. 1755. And local prosecutors in the ensuing decades, as petitioner itself acknowledges, exercised only such power as was "delegated by Congress" through federal statutes. Brief for Petitioner 28; see *Shell Co.*, 302 U. S., at 264–265; *supra*, at 71–72. Their authority derived from, rather than preexisted association with, the Federal Government.

And contrary to petitioner's claim, Puerto Rico's transformative constitutional moment does not lead to a different conclusion. True enough, that the Commonwealth's power to enact and enforce criminal law now proceeds, just as petitioner says, from the Puerto Rico Constitution as "ordain[ed] and establish[ed]" by "the people." P. R. Const., Preamble; see Brief for Petitioner 28–30. But that makes the Puerto Rican populace only the most immediate source of such authority—and that is not what our dual-sovereignty decisions make relevant. Back of the Puerto Rican people and their Constitution, the "ultimate" source of prosecutorial

power remains the U. S. Congress, just as back of a city's charter lies a state government. *Wheeler*, 435 U. S., at 320. Congress, in Public Law 600, authorized Puerto Rico's constitution-making process in the first instance; the people of a territory could not legally have initiated that process on their own. See, *e. g.*, *Simms* v. *Simms*, 175 U. S. 162, 168 (1899). And Congress, in later legislation, both amended the draft charter and gave it the indispensable stamp of approval; popular ratification, however meaningful, could not have turned the convention's handiwork into law.[6] Put simply, Congress conferred the authority to create the Puerto Rico Constitution, which in turn confers the authority to bring criminal charges. That makes Congress the original source of power for Puerto Rico's prosecutors—as it is for the Federal Government's. The island's Constitution, significant though it is, does not break the chain.

Petitioner urges, in support of its different view, that Congress itself recognized the new Constitution as "a democratic manifestation of the [people's] will," Brief for Petitioner 2—but far from disputing that point, we readily acknowledge it to be so. As petitioner notes, Public Law 600 affirmed the "principle of government by consent" and offered the Puerto Rican public a "compact," under which they could "organize a government pursuant to a constitution of their own adoption." § 1, 64 Stat. 319; see Brief for Petitioner 2, 29; *supra*, at 64. And the Constitution that Congress approved, as petitioner again underscores, declares that "[w]e, the people" of Puerto Rico, "create" the Commonwealth—a new political entity, "republican in form," in which the people's will is "sovereign[ ]" over the government. P. R. Const., Preamble

[6] Petitioner's own statements are telling as to the role Congress necessarily played in this constitutional process. See, *e. g.*, Reply Brief 1–2 ("Pursuant to Congress' invitation, and with Congress' consent, the people of Puerto Rico engaged in an exercise of popular sovereignty"); *id.*, at 7 ("The Commonwealth's legal cornerstone is Public Law 600"); Tr. of Oral Arg. 19 (describing the adoption of the Puerto Rico Constitution as "pursuant to the invitation of Congress and with the blessing of Congress").

and Art. I, §§ 1–2; see Brief for Petitioner 2, 29–30; *supra*, at 65. With that consented-to language, Congress "allow[ed] the people of Puerto Rico," in petitioner's words, to begin a new chapter of democratic self-governance. Reply Brief 20.

All that separates our view from petitioner's is what that congressional recognition means for Puerto Rico's ability to bring successive prosecutions. We agree that Congress has broad latitude to develop innovative approaches to territorial governance, see U. S. Const., Art. IV, § 3, cl. 2; that Congress may thus enable a territory's people to make large-scale choices about their own political institutions; and that Congress did exactly that in enacting Public Law 600 and approving the Puerto Rico Constitution—prime examples of what Felix Frankfurter once termed "inventive statesmanship" respecting the island. Memorandum for the Secretary of War, in Hearings on S. 4604 before the Senate Committee on Pacific Islands and Porto Rico, 63d Cong., 2d Sess., 22 (1914); see Reply Brief 18–20. But one power Congress does not have, just in the nature of things: It has no capacity, no magic wand or airbrush, to erase or otherwise rewrite its own foundational role in conferring political authority. Or otherwise said, the delegator cannot make itself any less so—no matter how much authority it opts to hand over. And our dual-sovereignty test makes this historical fact dispositive: If an entity's authority to enact and enforce criminal law ultimately comes from Congress, then it cannot follow a federal prosecution with its own. That is true of Puerto Rico, because Congress authorized and approved its Constitution, from which prosecutorial power now flows. So the Double Jeopardy Clause bars both Puerto Rico and the United States from prosecuting a single person for the same conduct under equivalent criminal laws.

III

Puerto Rico boasts "a relationship to the United States that has no parallel in our history." *Examining Bd.*, 426

U. S., at 596. And since the events of the early 1950's, an integral aspect of that association has been the Commonwealth's wide-ranging self-rule, exercised under its own Constitution. As a result of that charter, Puerto Rico today can avail itself of a wide variety of futures. But for purposes of the Double Jeopardy Clause, the future is not what matters—and there is no getting away from the past. Because the ultimate source of Puerto Rico's prosecutorial power is the Federal Government—because when we trace that authority all the way back, we arrive at the doorstep of the U. S. Capitol—the Commonwealth and the United States are not separate sovereigns. That means the two governments cannot "twice put" respondents Sánchez Valle and Gómez Vázquez "in jeopardy" for the "same offence." U. S. Const., Amdt. 5. We accordingly affirm the judgment of the Supreme Court of Puerto Rico.

It is so ordered.

JUSTICE GINSBURG, with whom JUSTICE THOMAS joins, concurring.

I join in full the Court's opinion, which cogently applies long prevailing doctrine. I write only to flag a larger question that bears fresh examination in an appropriate case. The double jeopardy proscription is intended to shield individuals from the harassment of multiple prosecutions for the same misconduct. *Green* v. *United States*, 355 U. S. 184, 187 (1957). Current "separate sovereigns" doctrine hardly serves that objective. States and Nation are "kindred systems," yet "parts of ONE WHOLE." The Federalist No. 82, p. 245 (J. Hopkins ed., 2d ed. 1802) (reprint 2008). Within that whole is it not "an affront to human dignity," *Abbate* v. *United States*, 359 U. S. 187, 203 (1959) (Black, J., dissenting), "inconsistent with the spirit of [our] Bill of Rights," Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 968 (1959), to try or punish a person twice for the same offense? Several jurists and commentators have suggested

that the question should be answered with a resounding yes: Ordinarily, a final judgment in a criminal case, just as a final judgment in a civil case, should preclude renewal of the fray any place in the Nation. See *Bartkus* v. *Illinois*, 359 U. S. 121, 150 (1959) (Black, J., dissenting); *United States* v. *All Assets of G. P. S. Automotive Corp.*, 66 F. 3d 483 (CA2 1995) (Calabresi, J.); Franck, An International Lawyer Looks at the *Bartkus* Rule, 34 N. Y. U. L. Rev. 1096 (1959); Grant, Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons, 4 UCLA L. Rev. 1 (1956); Grant, The *Lanza* Rule of Successive Prosecutions, 32 Colum. L. Rev. 1309 (1932). See also 6 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 25.5(a), p. 851 (4th ed. 2015) ("Criticism of *Abbate*['s separate sovereign exception] intensified after the Supreme Court held that the Double Jeopardy Clause of the Fifth Amendment was also applicable to the states . . . ." (citing, *inter alia*, Braun, Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism, 20 Am. J. Crim. L. 1 (1992))). The matter warrants attention in a future case in which a defendant faces successive prosecutions by parts of the whole USA.

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

The Court today concludes that the Commonwealth of Puerto Rico and the United States are not separate sovereigns because the Federal Government is the ultimate source of Puerto Rico's authority to prosecute crimes. *Ante*, at 76. I agree with that holding, which hews to the Court's precedents concerning the Double Jeopardy Clause and U. S. Territories. But I continue to have concerns about our precedents regarding Indian law, see *United States* v. *Lara*, 541 U. S. 193, 214–226 (2004) (opinion concurring in judgment), and I cannot join the portions of the opinion concerning the application of the Double Jeopardy Clause to successive

prosecutions involving Indian tribes. Aside from this caveat, I join the Court's opinion.

JUSTICE BREYER, with whom JUSTICE SOTOMAYOR joins, dissenting.

I agree with the Court that this case poses a special, not a general, question about Puerto Rico's sovereignty. It asks whether "the prosecutorial powers belonging to Puerto Rico and the Federal Government derive from wholly independent sources." *Ante,* at 73. I do not agree, however, with the majority's answer to that question. I do not believe that "if we go back [through history] as far as our doctrine demands" (*i. e.*, "all the way back" to the "furthest-back source of prosecutorial power"), we will "discover" that Puerto Rico and the Federal Government share the same source of power, namely, "the U. S. Congress." *Ante,* at 73, 74–75. My reasons for disagreeing with the majority are in part conceptual and in part historical.

I

Conceptually speaking, the Court does not mean literally that to find the "source" of an entity's criminal law, we must seek the "*furthest-back* source of . . . power." *Ante,* at 75 (emphasis added). We do not trace Puerto Rico's source of power back to Spain or to Rome or to Justinian, nor do we trace the Federal Government's source of power back to the English Parliament or to William the Conqueror or to King Arthur. Rather the Court's statement means that we should trace the source of power back to a time when a previously nonexistent entity, or a previously dependent entity, became independent—at least, sufficiently independent to be considered "sovereign" for purposes of the Double Jeopardy Clause.

As so viewed, this approach explains the Court's decisions fairly well. The Federal Government became an independent entity when the Constitution first took effect. That document gave to the Federal Government the authority to

enact criminal laws. And the Congress that the document created is consequently the source of those laws. The original 13 States, once dependents of Britain, became independent entities perhaps at the time of the Declaration of Independence, perhaps at the signing of the Treaty of Paris, perhaps with the creation of the Articles of Confederation. (I need not be precise.) See G. Wood, Creation of the American Republic 1776–1787, p. 354 (1969) ("The problem of sovereignty was not solved by the Declaration of Independence. It continued to be the most important theoretical question of politics throughout the following decade"). And an independent colony's legislation-creating system is consequently the source of those original State's criminal laws.

But the "source" question becomes more difficult with respect to other entities because Congress had an active role to play with respect to their creation (and thus congressional activity appears to be highly relevant to the double jeopardy question). Consider the Philippines. No one could doubt the Philippines' current possession of sovereign authority to enact criminal laws. Yet if we trace that power back through history, we must find the "furthest-back" source of the islands' lawmaking authority, not in any longstanding independent Philippine institutions (for until 1946 the Philippines was dependent, not independent), but in a decision by Congress and the President (as well as by the Philippines) to change the Philippines' status to one of independence. In 1934 Congress authorized the President to "withdraw and surrender all right of . . . sovereignty" over the Philippines. 48 Stat. 463, codified at 22 U. S. C. § 1394. That authorization culminated in the Treaty of Manila, signed in 1946 and approved by Congress that same year, which formally recognized the Philippines as an independent, self-governing nation-state. See 61 Stat. 1174. In any obvious sense of the term, then, the "source" of the Philippines' independence (and its ability to enact and enforce its own criminal laws) was the U. S. Congress.

The same is true for most of the States. In the usual course, a U. S. Territory becomes a State within our Union at the invitation of Congress. In fact, the parallels between admission of new States and the creation of the Commonwealth in this case are significant. Congress passes a law allowing "the inhabitants of the territory . . . to form for themselves a constitution and state government, and to assume such name as they shall deem proper." Act of Apr. 16, 1818, ch. 67, 3 Stat. 428–429 (Illinois); see also Act of June 20, 1910, ch. 310, 36 Stat. 557 (New Mexico) ("[T]he qualified electors of the Territory . . . are hereby authorized to vote for and choose delegates to form a constitutional convention for said Territory for the purpose of framing a constitution for the proposed State of New Mexico"). And after the Territory develops and proposes a constitution, Congress and the President review and approve it before allowing the Territory to become a full-fledged State. See, *e. g.*, Res. 1, 3 Stat. 536 (Illinois); Pub. Res. 8, 37 Stat. 39 (New Mexico); Presidential Proclamation No. 62, 37 Stat. 1723 ("I WILLIAM HOWARD TAFT, . . . declare and proclaim the fact that the fundamental conditions imposed by Congress on the State of New Mexico to entitle that State to admission have been ratified and accepted"). The Federal Government thus is in an important sense the "source" of these States' legislative powers.

One might argue, as this Court has argued, that the source of new States' sovereign authority to enact criminal laws lies in the Constitution's equal-footing doctrine—the doctrine under which the Constitution treats new States the same as it does the original 13. See *ante*, at 69, n. 4. It is difficult, however, to characterize a constitutional insistence upon equality of the States as (in any here relevant sense) the "*source*" of those States' independent legislative powers. For one thing, the equal-footing doctrine is a requirement imposed by the U. S. Constitution. See *Coyle* v. *Smith*, 221 U. S. 559, 566–567 (1911). For that reason, the *Constitution*

is ultimately the source of even these new States' equal powers (just as it is the source of Congress' powers). This is not to suggest that we are not a "'union of States [alike] in power, dignity and authority.'" *Ante*, at 69, n. 4 (quoting *Coyle*, *supra*, at 567). Of course I recognize that we are. It is merely to ask: Without the Constitution (*i. e.*, a *federal* "source"), what claim would new States have to a lawmaking power equal to that of their "earliest counterparts"? *Ante*, at 70, n. 4.

For another thing, the equal-footing doctrine means that, going forward, new States must enjoy the same rights and obligations as the original States—they are, for example, equally restricted by the First Amendment and equally "competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself." *Coyle*, *supra*, at 567. But this current and future equality does not destroy the fact that there is a federal "source" from which those rights and obligations spring: the Congress which agreed to admit those new States into the Union in accordance with the Constitution's terms. See, *e. g.*, 37 Stat. 39 ("The Territor[y] of New Mexico [is] hereby admitted into the Union upon an equal footing with the original States").

In respect to the Indian tribes, too, congressional action is relevant to the double jeopardy analysis. This Court has explained that the tribes possess an independent authority to enact criminal laws by tracing the source of power back to a time of "'primeval'" tribal existence when "'the tribes were self-governing sovereign political communities.'" *Ante*, at 70 (quoting *United States* v. *Wheeler*, 435 U. S. 313, 322–323 (1978)). But as the Court today recognizes, this prelapsarian independence must be read in light of congressional action—or, as it were, inaction. That is because—whatever a tribe's history—Congress maintains "plenary authority to limit, modify or eliminate the [tribes'] powers of local self-government," *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 56 (1978), and thus the tribes remain

sovereign for purposes of the Double Jeopardy Clause only "until" Congress chooses to withdraw that power, *ante*, at 70. In this sense, Congress' pattern of inaction (*i. e.*, its choice to refrain from withdrawing dual sovereignty) amounts to an implicit decision to *grant* such sovereignty to the tribes. Is not Congress then, in this way, the "source" of the Indian tribes' criminal-enforcement power?

These examples illustrate the complexity of the question before us. I do not believe, as the majority seems to believe, that the double jeopardy question can be answered simply by tracing Puerto Rico's current legislative powers back to Congress' enactment of Public Law 600 and calling the Congress that enacted that law the "source" of the island's criminal-enforcement authority. That is because—as with the Philippines, new States, and the Indian tribes—congressional activity and other historic circumstances can combine to establish a *new* source of power. We therefore must consider Public Law 600 in the broader context of Puerto Rico's history. Only through that lens can we decide whether the Commonwealth, between the years 1950 and 1952, gained sufficient sovereign authority to become the "source" of power behind its own criminal laws.

II

The Treaty of Paris, signed with Spain in 1898, said that "[t]he civil rights and political status" of Puerto Rico's "inhabitants . . . shall be determined by the Congress." Art. 9, 30 Stat. 1759. In my view, Congress, in enacting the Puerto Rican Federal Relations Act (*i. e.*, Public Law 600), determined that the "political status" of Puerto Rico would for double jeopardy purposes subsequently encompass the sovereign authority to enact and enforce—pursuant to its *own* powers—its own criminal laws. Several considerations support this conclusion.

First, the timing of Public Law 600's enactment suggests that Congress intended it to work a significant change in the

nature of Puerto Rico's political status. Prior to 1950 Puerto Rico was initially subject to the Foraker Act, which provided the Federal Government with virtually complete control of the island's affairs. In 1917 Puerto Rico became subject to the Jones Act, which provided for United States citizenship and permitted Puerto Ricans to elect local legislators but required submission of local laws to Congress for approval. In 1945 the United States, when signing the United Nations Charter, promised change. It told the world that it would "develop self-government" in its Territories. Art. 73(b), June 26, 1945, 59 Stat. 1048, T. S. No. 993 (U. N. Charter). And contemporary observers referred to Public Law 600 as taking a significant step in the direction of change by granting Puerto Rico a special status carrying with it considerable autonomy. See, *e. g.*, Magruder, The Commonwealth Status of Puerto Rico, 15 U. Pitt. L. Rev. 1, 14–16 (1953); see also L. Kalman, Abe Fortas: A Biography 170–171 (1990) ("[After the 1950 'compact,'] Puerto Rico was self-ruling, according to [Fortas], although the federal government retained the same power it would have over states in a union").

Second, Public Law 600 uses language that says or implies a significant shift in the legitimacy-conferring source of many local laws. The Act points out that the United States "has progressively recognized the right of self-government of the people of Puerto Rico." 64 Stat. 319. It "[f]ully recogniz[es] the principle of government by consent." 48 U. S. C. § 731b. It describes itself as being "in the nature of a compact so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption." *Ibid.* It specifies that the island's new constitution must "provide a republican form of government," § 731c; and this Court has characterized that form of government as including "the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative

bodies, whose legitimate acts may be said to be those of the people themselves," *In re Duncan*, 139 U. S. 449, 461 (1891).

Third, Public Law 600 created a constitution-writing process that led Puerto Rico to convene a constitutional convention and to write a constitution that, in assuring Puerto Rico independent authority to enact many local laws, specifies that the legitimacy-conferring source of much local lawmaking shall henceforth be the "people of Puerto Rico." The Constitution begins by stating:

> "We, the people of Puerto Rico, in order to organize ourselves politically on a fully democratic basis, to promote the general welfare, and to secure for ourselves and our posterity the complete enjoyment of human rights, placing our trust in Almighty God, do ordain and establish this Constitution for the commonwealth . . . .
>
> . . . . . .
>
> "We understand that the democratic system of government is one in which the will of the people is the source of public power." P. R. Const., Preamble (1952).

The Constitution adds that the Commonwealth's "political power emanates from the people and shall be exercised in accordance with their will," Art. I, § 1; that the "government of the Commonwealth of Puerto Rico shall be republican in form and its legislative, judicial and executive branches . . . shall be equally subordinate to the sovereignty of the people of Puerto Rico," Art. I, § 2; and that "[a]ll criminal actions in the courts of the Commonwealth shall be conducted in the name and by the authority of 'The People of Puerto Rico,'" Art. VI, § 18.

At the same time, the constitutional convention adopted a resolution stating that Puerto Rico should be known officially as "'The Commonwealth of Puerto Rico'" in English and "'El Estado Libre Asociado de Puerto Rico'" in Spanish. Resolution 22, in Documents on the Constitutional Relationship of Puerto Rico and the United States 192 (M. Ramirez

Lavandero ed., 3d ed. 1988). The resolution explained that these names signified "a politically organized community . . . in which political power resides ultimately in the people, hence a free state, but one which is at the same time linked to a broader political system in a federal or other type of association and therefore does not have independent and separate existence." *Id.*, at 191.

Fourth, both Puerto Rico and the United States ratified Puerto Rico's Constitution. Puerto Rico did so initially through a referendum held soon after the Constitution was written and then by a second referendum held after the convention revised the Constitution in minor ways (ways that Congress insisted upon, but which are not relevant here). See 66 Stat. 327; see also *ante*, at 64 (describing these revisions). Congress did so too by enacting further legislation that said that the "constitution of the Commonwealth of Puerto Rico . . . shall become effective when the Constitutional Convention of Puerto Rico shall have declared in a formal resolution its acceptance . . . of the conditions of approval herein contained." 66 Stat. 327–328. And, as I have just said, the convention, having the last word, made the minor amendments and Puerto Rico ratified the Constitution through a second referendum.

Fifth, all three branches of the Federal Government subsequently recognized that Public Law 600, the Puerto Rican Constitution, and related congressional actions granted Puerto Rico considerable autonomy in local matters, sometimes akin to that of a State. See, *e. g.*, S. Rep. No. 1720, 82d Cong., 2d Sess., 6 (1952) ("As regards local matters, the sphere of action and the methods of government bear a resemblance to that of any State of the Union"). Each branch of the Federal Government subsequently took action consistent with that view.

As to the Executive Branch, President Truman wrote to Congress that the Commonwealth's Constitution, when enacted and ratified, "vest[s] in the people of Puerto

Rico" complete "authority and responsibility for local self-government." Public Papers of the Presidents, Apr. 22, 1952, p. 287 (1952–1953). Similarly, President Kennedy in 1961 circulated throughout the Executive Branch a memorandum that said:

> "The Commonwealth structure, and its relationship to the United States which is in the nature of a compact, provide for self-government in respect of internal affairs and administration, subject only to the applicable provisions of the Federal Constitution, the Puerto Rican Federal Relations Act [*i. e.*, Public Law 600], and the acts of Congress authorizing and approving the constitution.
>
> . . . . .
>
> "All departments, agencies, and officials of the executive branch of the Government should faithfully and carefully observe and respect this arrangement in relation to all matters affecting the Commonwealth of Puerto Rico." 26 Fed. Reg. 6695.

Subsequent administrations made similar statements. See Liebowitz, The Application of Federal Law to the Commonwealth of Puerto Rico, 56 Geo. L. J. 219, 233, n. 60 (1967) (citing message from President Johnson).

The Department of State, acting for the President and for the Nation, wrote a memorandum to the United Nations explaining that the United States would no longer submit special reports about the "economic, social, and educational conditions" in Puerto Rico because Puerto Rico was no longer a non-self-governing Territory. U. N. Charter, Art. 73(e) (requiring periodic reports concerning such Territories). Rather, the memorandum explained that Puerto Rico had achieved "the full measure of self-government." Memorandum by the Government of the United States of America Concerning the Cessation of Transmission of Information Under Article 73(e) of the Charter With Regard to the Commonwealth of Puerto Rico, in A. Fernós-Isern, Original In-

tent in the Constitution of Puerto Rico 154 (2d ed. 2002). The memorandum added that "Congress has agreed that Puerto Rico shall have, under [its] Constitution, freedom from control or interference by the Congress in respect to internal government and administration." *Id.*, at 153.

The United Nations accepted this view of the matter, the General Assembly noting in a resolution that "the people of the Commonwealth of Puerto Rico . . . have achieved a new constitutional status." Resolution 748 VIII, in *id.*, at 142. The General Assembly added that "the people of the Commonwealth of Puerto Rico have been invested with attributes of political sovereignty which clearly identify the status of self-government attained by the Puerto Rican people as that of an autonomous political entity." *Ibid.*; see also United Nations and Decolonization, Trust and Non-Self-Governing Territories (1945–1999) (noting that Puerto Rico underwent a "Change in Status" in 1952, "after which information was no longer submitted to the United Nations" concerning this former "[t]rusteeship"), online at http://www.un.org/en/decolonization/nonselfgov.shtml (as last visited June 3, 2016).

The Department of Justice, too, we add, until this case, argued that Puerto Rico is, for Double Jeopardy Clause purposes, an independently sovereign source of its criminal laws. See, *e. g.*, *United States* v. *Lopez Andino*, 831 F. 2d 1164, 1168 (CA1 1987) (accepting the Government's position that "Puerto Rico is to be treated as a state for purposes of the double jeopardy clause"), cert. denied, 486 U. S. 1034 (1988).

As to the Judicial Branch, this Court has held that Puerto Rico's laws are "state statutes" within the terms of the Three-Judge Court Act. See *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663 (1974). In doing so, we wrote that the 1952 events had led to "significant changes in Puerto Rico's governmental structure"; that the Commonwealth had been "'organized as a body politic by the people

of Puerto Rico under their own constitution' "; and that these differences distinguish Puerto Rico's laws from those of other Territories, which are " 'subject to congressional regulation.' " *Id.*, at 672–673; see also, *e. g.*, *Examining Bd. of Engineers, Architects and Surveyors* v. *Flores de Otero*, 426 U. S. 572, 597 (1976) (Congress granted Puerto Rico "a measure of autonomy comparable to that possessed by the States"); *Rodriguez* v. *Popular Democratic Party*, 457 U. S. 1, 8 (1982) ("Puerto Rico, like a State, is an autonomous political entity, sovereign over matters not ruled by the [Federal] Constitution" (internal quotation marks omitted)).

Finally, as to the Legislative Branch, to my knowledge since 1950 Congress has never—I repeat, *never*—vetoed or modified a local criminal law enacted in Puerto Rico.

Sixth, Puerto Rico's Supreme Court has consistently held, over a period of more than 50 years, that Puerto Rico's people (and not Congress) are the "source" of Puerto Rico's local criminal laws. See, *e. g.*, *Pueblo* v. *Castro Garcia*, 20 P. R. Offic. Trans. 775, 807–808 (1988) ("Puerto Rico's . . . criminal laws . . . emanate from a different source than the federal laws"); *R. C. A. Communications, Inc.* v. *Government of the Capital*, 91 P. R. R. 404, 415 (1964) (transl.) (Puerto Rico's "governmental powers . . . flow from itself and from its own authority" and are not "merely delegated by Congress"); *Ramirez de Ferrer* v. *Mari Bras*, 144 D. P. R. 141, 158 (1997) (Puerto Rico's "governmental powers . . . emanate from the will of the people of Puerto Rico"); see also *Pueblo* v. *Figueroa*, 77 P. R. R. 175, 183 (1954) (finding that it was "impossible to believe that" the Puerto Rican Constitution is "in legal effect" simply "a Federal law"); cf. *Figueroa* v. *Puerto Rico*, 232 F. 2d 615, 620 (CA1 1956) ("[T]he constitution of the Commonwealth is not just another Organic Act of Congress" "though congressional approval was necessary to launch it forth").

Seventh, insofar as Public Law 600 (and related events) grants Puerto Rico local legislative autonomy, it is particu-

larly likely to have done so in respect to local criminal law. That is because Puerto Rico's legal system arises out of, and reflects, not traditional British common law (which underlies the criminal law in 49 of our 50 States), but a tradition stemming from European civil codes and Roman law. In 1979 Chief Justice Trías Monge wrote for a unanimous Puerto Rico Supreme Court that the Commonwealth's laws were to be "governed . . . by the civil law system," with roots in the Spanish legal tradition, not by the "common-law principles" inherent in "'American doctrines and theories'" of the law. *Valle* v. *American Int'l Ins. Co.*, 8 P. R. Offic. Trans. 735, 736–738. Considerations of knowledge, custom, habit, and convention argue with special force for autonomy in the area of criminal law. Cf. *Diaz* v. *Gonzalez*, 261 U. S. 102, 105–106 (1923) (Holmes, J., for the Court) (cautioning that federal courts should not apply "common law conceptions" in Puerto Rico, because the island "inherit[ed]" and was "brought up in a different system from that which prevails here").

I would add that the practices, actions, statements, and attitudes just described are highly relevant here, for this Court has long made clear that, when we face difficult questions of the Constitution's structural requirements, longstanding customs and practices can make a difference. See *NLRB* v. *Noel Canning*, 573 U. S. 513, 525 (2014) ("[I]t is equally true that the longstanding practice of the government can inform our determination of what the law is" (citation and internal quotation marks omitted)); see also, *e. g.*, *Mistretta* v. *United States*, 488 U. S. 361, 401 (1989); *Dames & Moore* v. *Regan*, 453 U. S. 654, 686 (1981); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 610–611 (1952) (Frankfurter, J., concurring); *The Pocket Veto Case*, 279 U. S. 655, 689–690 (1929); *Ex parte Grossman*, 267 U. S. 87, 118–119 (1925); *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 472–474 (1915); *McPherson* v. *Blacker*, 146 U. S. 1, 27 (1892); *McCulloch* v. *Maryland*, 4 Wheat. 316, 401 (1819); *Stuart* v. *Laird*, 1 Cranch 299 (1803). Here, longstanding

customs, actions, and attitudes, both in Puerto Rico and on the mainland, uniformly favor Puerto Rico's position (*i. e.*, that it is sovereign—and has been since 1952—for purposes of the Double Jeopardy Clause).

This history of statutes, language, organic acts, traditions, statements, and other actions, taken by all three branches of the Federal Government and by Puerto Rico, convinces me that the United States has entered into a compact one of the terms of which is that the "source" of Puerto Rico's criminal law ceased to be the U. S. Congress and became Puerto Rico itself, its people, and its Constitution. The evidence of that grant of authority is far stronger than the evidence of congressional silence that led this Court to conclude that Indian tribes maintained a similar sovereign authority. Indeed, it is difficult to see how we can conclude that the tribes do possess this authority but Puerto Rico does not. Regardless, for the reasons given, I would hold for Double Jeopardy Clause purposes that the criminal law of Puerto Rico and the criminal law of the Federal Government do not find their legitimacy-conferring origin in the same "source."

I respectfully dissent.

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HALO ELECTRONICS, INC. *v.* PULSE ELECTRONICS, INC., ET AL.

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

No. 14–1513. Argued February 23, 2016—Decided June 13, 2016*

Section 284 of the Patent Act provides that, in a case of infringement, courts "may increase the damages up to three times the amount found or assessed." 35 U. S. C. § 284. The Federal Circuit has adopted a two-part test for determining whether damages may be increased pursuant to § 284. First, a patent owner must "show by clear and convincing evidence that the infringer acted despite an objectively high likelihood that its actions constituted infringement of a valid patent." *In re Seagate Technology, LLC*, 497 F. 3d 1360, 1371. Second, the patentee must demonstrate, also by clear and convincing evidence, that the risk of infringement "was either known or so obvious that it should have been known to the accused infringer." *Ibid.* Under Federal Circuit precedent, an award of enhanced damages is subject to trifurcated appellate review. The first step of *Seagate*—objective recklessness—is reviewed *de novo*; the second—subjective knowledge—for substantial evidence; and the ultimate decision—whether to award enhanced damages—for abuse of discretion.

In each of these cases, petitioners were denied enhanced damages under the *Seagate* framework.

Held: The *Seagate* test is not consistent with § 284. Pp. 103–110.

(a) The pertinent language of § 284 contains no explicit limit or condition on when enhanced damages are appropriate, and this Court has emphasized that the "word 'may' clearly connotes discretion." *Martin* v. *Franklin Capital Corp.*, 546 U. S. 132, 136. At the same time, however, "[d]iscretion is not whim." *Id.*, at 139. Although there is "no precise rule or formula" for awarding damages under § 284, a district court's "discretion should be exercised in light of the considerations" underlying the grant of that discretion. *Octane Fitness, LLC* v. *ICON Health & Fitness, Inc.*, 572 U. S. 545, 554. Here, 180 years of enhanced damages awards under the Patent Act establish that they are not to be meted out in a typical infringement case, but are instead designed as a sanction for egregious infringement behavior. Pp. 103–104.

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*Together with No. 14–1520, *Stryker Corp. et al.* v. *Zimmer, Inc., et al.*, also on certiorari to the same court.

(b) In many respects, the *Seagate* test rightly reflects this historic guidance. It is, however, "unduly rigid, and . . . impermissibly encumbers the statutory grant of discretion to district courts." *Octane Fitness,* 572 U. S., at 553. Pp. 104–108.

(1) By requiring an objective recklessness finding in every case, the *Seagate* test excludes from discretionary punishment many of the most culpable offenders, including the "wanton and malicious pirate" who intentionally infringes a patent—with no doubts about its validity or any notion of a defense—for no purpose other than to steal the patentee's business. *Seymour* v. *McCormick*, 16 How. 480, 488. Under *Seagate*, a district court may not even consider enhanced damages for such a pirate, unless the court first determines that his infringement was "objectively" reckless. In the context of such deliberate wrongdoing, however, it is not clear why an independent showing of objective recklessness should be a prerequisite to enhanced damages. *Octane Fitness* arose in a different context but is instructive here. There, a two-part test for determining when a case was "exceptional"—and therefore eligible for an award of attorney's fees—was rejected because a claim of "subjective bad faith" alone could "warrant a fee award." 572 U. S., at 555. So too here: A patent infringer's subjective willfulness, whether intentional or knowing, may warrant enhanced damages, without regard to whether his infringement was objectively reckless. The *Seagate* test further errs by making dispositive the ability of the infringer to muster a reasonable defense at trial, even if he did not act on the basis of that defense or was even aware of it. Culpability, however, is generally measured against the actor's knowledge at the time of the challenged conduct. In sum, § 284 allows district courts to punish the full range of culpable behavior. In so doing, they should take into account the particular circumstances of each case and reserve punishment for egregious cases typified by willful misconduct. Pp. 104–106.

(2) *Seagate*'s requirement that recklessness be proved by clear and convincing evidence is also inconsistent with § 284. Once again, *Octane Fitness* is instructive. There, a clear and convincing standard for awards of attorney's fees was rejected because the statute at issue supplied no basis for imposing a heightened standard. Here, too, § 284 "imposes no specific evidentiary burden, much less such a high one," 572 U. S., at 557. And the fact that Congress erected a higher standard of proof elsewhere in the Patent Act, but not in § 284, is telling. "[P]atent-infringement litigation has always been governed by a preponderance of the evidence standard." *Ibid.* Enhanced damages are no exception. P. 107.

(3) Having eschewed any rigid formula for awarding enhanced damages under § 284, this Court likewise rejects the Federal Circuit's

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tripartite appellate review framework. In *Highmark Inc.* v. *Allcare Health Management System, Inc.*, 572 U. S. 559, the Court built on the *Octane Fitness* holding—which confirmed district court discretion to award attorney's fees—and rejected a similar multipart standard of review in favor of abuse of discretion review. The same conclusion follows naturally from the holding here: Because § 284 "commits the determination" whether enhanced damages are appropriate to the district court's discretion, "that decision is to be reviewed on appeal for abuse of discretion." 572 U. S., at 563. Nearly two centuries of enhanced damages awards have given substance to the notion that district courts' discretion is limited, and the Federal Circuit should review their exercise of that discretion in light of longstanding considerations that have guided both Congress and the courts. Pp. 107–108.

(c) Respondents' additional arguments are unpersuasive. They claim that Congress ratified the *Seagate* test when it reenacted § 284 in 2011 without pertinent change, but the reenacted language unambiguously confirmed discretion in the district courts. Neither isolated snippets of legislative history nor a reference to willfulness in another recently enacted section reflects an endorsement of *Seagate*'s test. Respondents are also concerned that allowing district courts unlimited discretion to award enhanced damages could upset the balance between the protection of patent rights and the interest in technological innovation. That concern—while serious—cannot justify imposing an artificial construct such as the *Seagate* test on the limited discretion conferred under § 284. Pp. 108–109.

No. 14–1513, 769 F. 3d 1371; No. 14–1520, 782 F. 3d 649, vacated and remanded.

ROBERTS, C. J., delivered the opinion for a unanimous Court. BREYER, J., filed a concurring opinion, in which KENNEDY and ALITO, JJ., joined, *post*, p. 110.

Jeffrey B. Wall argued the cause for petitioners in both cases. With him on the briefs for petitioners in No. 14–1520 were *Garrard R. Beeney*, *Robert J. Giuffra, Jr.*, *Sharon A. Hwang*, *Deborah A. Laughton*, and *Stephanie F. Samz. Craig E. Countryman*, *Michael J. Kane*, *William R. Woodford*, and *John A. Dragseth* filed briefs for petitioner in No. 14–1513.

Roman Martinez argued the cause for the United States as *amicus curiae* urging vacatur. With him on the brief

were *Solicitor General Verrilli*, *Principal Deputy Assistant Attorney General Mizer*, *Deputy Solicitor General Stewart*, *Mark R. Freeman*, *Sarah Harris*, *Thomas W. Krause*, and *Scott C. Weidenfeller*.

Carter G. Phillips argued the cause for respondents in both cases. With him on the brief for respondents in No. 14–1513 were *Mark L. Hogge*, *Victor H. Boyajian*, *Shailendra K. Maheshwari*, *Charles R. Bruton*, *Rajesh C. Noronha*, *Constantine L. Trela, Jr.*, and *Steven J. Horowitz*. *Seth P. Waxman*, *Thomas G. Saunders*, *Jason D. Hirsch*, *Mark C. Fleming*, and *Donald R. Dunner* filed a brief for respondents in No. 14–1520.†

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†Briefs of *amici curiae* urging reversal in both cases were filed for Innovention Toys, LLC, by *James C. Otteson*, *David A. Caine*, and *Thomas T. Carmack*; for Nokia Technologies Oy et al. by *John D. Haynes*; and for Small Inventors by *Andrew S. Baluch* and *Robert N. Schmidt*.

Briefs of *amici curiae* urging affirmance in both cases were filed for BSA|The Software Alliance by *Andrew J. Pincus* and *Paul W. Hughes*; for Dell Inc. et al. by *John Thorne*, *Gregory G. Rapawy*, *Anthony Peterman*, and *Michele K. Connors*; for EMC Corp. by *Thomas G. Hungar*, *Matthew D. McGill*, *Alexander N. Harris*, *Paul T. Dacier*, and *Thomas A. Brown*; for Google Inc. et al. by *Paul D. Clement* and *D. Zachary Hudson*; for Huawei Technologies Co. by *Aaron M. Streett*; for Intel Corp. et al. by *Kannon K. Shanmugam*, *David M. Krinsky*, and *Allison B. Jones*; for Internet Companies by *Mark A. Lemley*, *Daralyn J. Durie*, and *Michael A. Feldman*; for Marvell Semiconductor, Inc., by *Kathleen M. Sullivan*, *Susan Estrich*, *Michael T. Zeller*, and *Derek L. Shaffer*; for Members of Congress by *Daniel M. Lechleiter*, *Brian J. Paul*, *Joel D. Sayres*, and *Aaron D. Van Oort*; and for Yahoo! Inc. et al. by *Jeffrey A. Lamken*, *Michael G. Pattillo, Jr.*, and *Kevin T. Kramer*.

Briefs of *amici curiae* were filed in both cases for the American Intellectual Property Law Association by *Peter A. Sullivan*, *Donald R. Ware*, and *Lisa K. Jorgenson*; for Askeladden LLC by *Kevin J. Culligan*, *William M. Jay*, and *Brian T. Burgess*; for Ericsson Inc. by *Mike McKool, Jr.*, *Joel L. Thollander*, and *John B. Campbell*; for the Intellectual Property Owners Association by *Paul H. Berghoff*, *Philip S. Johnson*, and *Kevin H. Rhodes*; for Intellectual Property Professors by *Christopher B. Seaman, pro se*; for Licensing Executives Society (U. S. A. and Canada), Inc., by *Daniel S. Stringfield*; for Mentor Graphics Corp. et al. by *John D. Vandenberg*; for Public Knowledge et al. by *Charles Duan* and *Daniel Nazer*; and for Adam

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Section 284 of the Patent Act provides that, in a case of infringement, courts "may increase the damages up to three times the amount found or assessed." 35 U. S. C. § 284. In *In re Seagate Technology, LLC*, 497 F. 3d 1360 (2007) (en banc), the United States Court of Appeals for the Federal Circuit adopted a two-part test for determining when a district court may increase damages pursuant to § 284. Under *Seagate*, a patent owner must first "show by clear and convincing evidence that the infringer acted despite an objectively high likelihood that its actions constituted infringement of a valid patent." *Id.*, at 1371. Second, the patentee must demonstrate, again by clear and convincing evidence, that the risk of infringement "was either known or so obvious that it should have been known to the accused infringer." *Ibid.* The question before us is whether this test is consistent with § 284. We hold that it is not.

I

A

Enhanced damages are as old as U. S. patent law. The Patent Act of 1793 mandated treble damages in any successful infringement suit. See § 5, 1 Stat. 322. In the Patent Act of 1836, however, Congress changed course and made enhanced damages discretionary, specifying that "it shall be in the power of the court to render judgment for any sum above the amount found by [the] verdict . . . not exceeding three times the amount thereof, according to the circumstances of the case." § 14, 5 Stat. 123. In construing that new provision, this Court explained that the change was prompted by the "injustice" of subjecting a "defendant who acted in ignorance or good faith" to the same treatment as

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Mossoff by *Matthew J. Dowd*. *Robert E. Freitas* and *Jessica N. Leal* filed a brief for Mykey Technology, Inc., as *amicus curiae* in No. 14–1513.

the "wanton and malicious pirate." *Seymour* v. *McCormick*, 16 How. 480, 488 (1854). There "is no good reason," we observed, "why taking a man's property in an invention should be trebly punished, while the measure of damages as to other property is single and actual damages." *Id.*, at 488–489. But "where the injury is wanton or malicious, a jury may inflict vindictive or exemplary damages, not to recompense the plaintiff, but to punish the defendant." *Id.*, at 489.

The Court followed the same approach in other decisions applying the 1836 Act, finding enhanced damages appropriate, for instance, "where the wrong [had] been done, under aggravated circumstances," *Dean* v. *Mason*, 20 How. 198, 203 (1858), but not where the defendant "appeared in truth to be ignorant of the existence of the patent right, and did not intend any infringement," *Hogg* v. *Emerson*, 11 How. 587, 607 (1850). See also *Livingston* v. *Woodworth*, 15 How. 546, 560 (1854) ("no ground" to inflict "penalty" where infringers were not "wanton").

In 1870, Congress amended the Patent Act, but preserved district court discretion to award up to treble damages "according to the circumstances of the case." § 59, 16 Stat. 207. We continued to describe enhanced damages as "vindictive or punitive," which the court may "inflict" when "the circumstances of the case appear to require it." *Tilghman* v. *Proctor*, 125 U. S. 136, 143–144 (1888); *Topliff* v. *Topliff*, 145 U. S. 156, 174 (1892) (infringer knowingly sold copied technology of his former employer). At the same time, we reiterated that there was no basis for increased damages where "[t]here is no pretence of any wanton and wilful breach" and "nothing that suggests punitive damages, or that shows wherein the defendant was damnified other than by the loss of the profits which the plaintiff received." *Cincinnati Siemens-Lungren Gas Illuminating Co.* v. *Western Siemens-Lungren Co.*, 152 U. S. 200, 204 (1894).

Courts of Appeals likewise characterized enhanced damages as justified where the infringer acted deliberately or

willfully, see, *e. g.*, *Baseball Display Co.* v. *Star Ballplayer Co.*, 35 F. 2d 1, 3–4 (CA3 1929) (increased damages award appropriate "because of the deliberate and willful infringement"); *Power Specialty Co.* v. *Connecticut Light & Power Co.*, 80 F. 2d 874, 878 (CA2 1936) ("wanton, deliberate, and willful" infringement); *Brown Bag Filling Mach. Co.* v. *Drohen*, 175 F. 576, 577 (CA2 1910) ("a bald case of piracy"), but not where the infringement "was not wanton and deliberate," *Rockwood* v. *General Fire Extinguisher Co.*, 37 F. 2d 62, 66 (CA2 1930), or "conscious and deliberate," *Goodyear Tire & Rubber Co.* v. *Overman Cushion Tire Co.*, 95 F. 2d 978, 986 (CA6 1938).

Some early decisions did suggest that enhanced damages might serve to compensate patentees as well as to punish infringers. See, *e. g.*, *Clark* v. *Wooster*, 119 U. S. 322, 326 (1886) (noting that "[t]here may be damages beyond" licensing fees "but these are more properly the subjects" of enhanced damages awards). Such statements, however, were not for the ages, in part because the merger of law and equity removed certain procedural obstacles to full compensation absent enhancement. See generally 7 Chisum on Patents § 20.03[4][b][iii], pp. 20–343 to 20–344 (2011). In the main, moreover, the references to compensation concerned costs attendant to litigation. See *Clark*, 119 U. S., at 326 (identifying enhanced damages as compensation for "the expense and trouble the plaintiff has been put to"); *Day* v. *Woodworth*, 13 How. 363, 372 (1852) (enhanced damages appropriate when defendant was "stubbornly litigious" or "caused unnecessary expense and trouble to the plaintiff"); *Teese* v. *Huntingdon*, 23 How. 2, 8–9 (1860) (discussing enhanced damages in the context of "counsel fees"). That concern dissipated with the enactment in 1952 of 35 U. S. C. § 285, which authorized district courts to award reasonable attorney's fees to prevailing parties in "exceptional cases" under the Patent Act. See *Octane Fitness, LLC* v. *ICON Health & Fitness, Inc.*, 572 U. S. 545, 553 (2014).

It is against this backdrop that Congress, in the 1952 codification of the Patent Act, enacted § 284. "The stated purpose" of the 1952 revision "was merely reorganization in language to clarify the statement of the statutes." *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 377 U. S. 476, 505, n. 20 (1964) (internal quotation marks omitted). This Court accordingly described § 284—consistent with the history of enhanced damages under the Patent Act—as providing that "punitive or 'increased' damages" could be recovered "in a case of willful or bad-faith infringement." *Id.*, at 508; see also *Dowling* v. *United States*, 473 U. S. 207, 227, n. 19 (1985) ("willful infringement"); *Florida Prepaid Postsecondary Ed. Expense Bd.* v. *College Savings Bank*, 527 U. S. 627, 648, n. 11 (1999) (describing § 284 damages as "punitive").

B

In 2007, the Federal Circuit decided *Seagate* and fashioned the test for enhanced damages now before us. Under *Seagate*, a plaintiff seeking enhanced damages must show that the infringement of his patent was "willful." 497 F. 3d, at 1368. The Federal Circuit announced a two-part test to establish such willfulness: First, "a patentee must show by clear and convincing evidence that the infringer acted despite an objectively high likelihood that its actions constituted infringement of a valid patent," without regard to "[t]he state of mind of the accused infringer." *Id.*, at 1371. This objectively defined risk is to be "determined by the record developed in the infringement proceedings." *Ibid.* "Objective recklessness will not be found" at this first step if the accused infringer, during the infringement proceedings, "raise[s] a 'substantial question' as to the validity or noninfringement of the patent." *Bard Peripheral Vascular, Inc.* v. *W. L. Gore & Assoc., Inc.*, 776 F. 3d 837, 844 (CA Fed. 2015). That categorical bar applies even if the defendant was unaware of the arguable defense when he acted. See *Seagate*, 497 F. 3d, at 1371; *Spine Solutions, Inc.* v. *Med-*

tronic Sofamor Danek USA, Inc., 620 F. 3d 1305, 1319 (CA Fed. 2010).

Second, after establishing objective recklessness, a patentee must show—again by clear and convincing evidence—that the risk of infringement "was either known or so obvious that it should have been known to the accused infringer." *Seagate*, 497 F. 3d, at 1371. Only when both steps have been satisfied can the district court proceed to consider whether to exercise its discretion to award enhanced damages. *Ibid.*

Under Federal Circuit precedent, an award of enhanced damages is subject to trifurcated appellate review. The first step of *Seagate*—objective recklessness—is reviewed *de novo*; the second—subjective knowledge—for substantial evidence; and the ultimate decision—whether to award enhanced damages—for abuse of discretion. See *Bard Peripheral Vascular, Inc.* v. *W. L. Gore & Assoc., Inc.*, 682 F. 3d 1003, 1005, 1008 (CA Fed. 2012); *Spectralytics, Inc.* v. *Cordis Corp.*, 649 F. 3d 1336, 1347 (CA Fed. 2011).

C

1

Petitioner Halo Electronics, Inc., and respondents Pulse Electronics, Inc., and Pulse Electronics Corporation (collectively, Pulse) supply electronic components. 769 F. 3d 1371, 1374–1375 (CA Fed. 2014). Halo alleges that Pulse infringed its patents for electronic packages containing transformers designed to be mounted to the surface of circuit boards. *Id.*, at 1374. In 2002, Halo sent Pulse two letters offering to license Halo's patents. *Id.*, at 1376. After one of its engineers concluded that Halo's patents were invalid, Pulse continued to sell the allegedly infringing products. *Ibid.*

In 2007, Halo sued Pulse. *Ibid.* The jury found that Pulse had infringed Halo's patents, and that there was a high probability it had done so willfully. *Ibid.* The District Court, however, declined to award enhanced damages under

§ 284, after determining that Pulse had at trial presented a defense that "was not objectively baseless, or a 'sham.'" App. to Pet. for Cert. in No. 14–1513, p. 64a (quoting *Bard*, 682 F. 3d, at 1007). Thus, the court concluded, Halo had failed to show objective recklessness under the first step of *Seagate*. App. to Pet. for Cert. in No. 14–1513, at 65a. The Federal Circuit affirmed. 769 F. 3d 1371 (2014).

2

Petitioners Stryker Corporation, Stryker Puerto Rico, Ltd., and Stryker Sales Corporation (collectively, Stryker) and respondents Zimmer, Inc., and Zimmer Surgical, Inc. (collectively, Zimmer), compete in the market for orthopedic pulsed lavage devices. App. to Pet. for Cert. in No. 14–1520, p. 49a. A pulsed lavage device is a combination spray gun and suction tube, used to clean tissue during surgery. *Ibid.* In 2010, Stryker sued Zimmer for patent infringement. 782 F. 3d 649, 653 (CA Fed. 2015). The jury found that Zimmer had willfully infringed Stryker's patents and awarded Stryker $70 million in lost profits. *Ibid.* The District Court added $6.1 million in supplemental damages and then trebled the total sum under § 284, resulting in an award of over $228 million. App. in No. 14–1520, pp. 483–484.

Specifically, the District Court noted, the jury had heard testimony that Zimmer had "all-but instructed its design team to copy Stryker's products," App. to Pet. for Cert. in No. 14–1520, at 77a, and had chosen a "high-risk/high-reward strategy of competing immediately and aggressively in the pulsed lavage market," while "opt[ing] to worry about the potential legal consequences later," *id.*, at 52a. "[T]reble damages [were] appropriate," the District Court concluded, "[g]iven the one-sidedness of the case and the flagrancy and scope of Zimmer's infringement." *Id.*, at 119a.

The Federal Circuit affirmed the judgment of infringement but vacated the award of treble damages. 782 F. 3d, at 662. Applying *de novo* review, the court concluded that enhanced

damages were unavailable because Zimmer had asserted "reasonable defenses" at trial. *Id.*, at 661–662.

We granted certiorari in both cases, 577 U. S. 938 (2015), and now vacate and remand.

II

A

The pertinent text of § 284 provides simply that "the court may increase the damages up to three times the amount found or assessed." 35 U. S. C. § 284. That language contains no explicit limit or condition, and we have emphasized that the "word 'may' clearly connotes discretion." *Martin* v. *Franklin Capital Corp.*, 546 U. S. 132, 136 (2005) (quoting *Fogerty* v. *Fantasy, Inc.*, 510 U. S. 517, 533 (1994)).

At the same time, "[d]iscretion is not whim." *Martin*, 546 U. S., at 139. "[I]n a system of laws discretion is rarely without limits," even when the statute "does not specify any limits upon the district courts' discretion." *Flight Attendants* v. *Zipes*, 491 U. S. 754, 758 (1989). "'[A] motion to a court's discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'" *Martin*, 546 U. S., at 139 (quoting *United States* v. *Burr*, 25 F. Cas. 30, 35 (No. 14,692d) (CC Va. 1807) (Marshall, C. J.); alteration omitted). Thus, although there is "no precise rule or formula" for awarding damages under § 284, a district court's "discretion should be exercised 'in light of the considerations'" underlying the grant of that discretion. *Octane Fitness*, 572 U. S., at 554 (quoting *Fogerty*, 510 U. S., at 534).

Awards of enhanced damages under the Patent Act over the past 180 years establish that they are not to be meted out in a typical infringement case, but are instead designed as a "punitive" or "vindictive" sanction for egregious infringement behavior. The sort of conduct warranting enhanced damages has been variously described in our cases as willful, wanton, malicious, bad-faith, deliberate, consciously

wrongful, flagrant, or—indeed—characteristic of a pirate. See *supra*, at 97–100. District courts enjoy discretion in deciding whether to award enhanced damages, and in what amount. But through nearly two centuries of discretionary awards and review by appellate tribunals, "the channel of discretion ha[s] narrowed," Friendly, Indiscretion About Discretion, 31 Emory L. J. 747, 772 (1982), so that such damages are generally reserved for egregious cases of culpable behavior.

B

The *Seagate* test reflects, in many respects, a sound recognition that enhanced damages are generally appropriate under § 284 only in egregious cases. That test, however, "is unduly rigid, and it impermissibly encumbers the statutory grant of discretion to district courts." *Octane Fitness*, 572 U. S., at 553 (construing § 285 of the Patent Act). In particular, it can have the effect of insulating some of the worst patent infringers from any liability for enhanced damages.

1

The principal problem with *Seagate*'s two-part test is that it requires a finding of objective recklessness in every case before district courts may award enhanced damages. Such a threshold requirement excludes from discretionary punishment many of the most culpable offenders, such as the "wanton and malicious pirate" who intentionally infringes another's patent—with no doubts about its validity or any notion of a defense—for no purpose other than to steal the patentee's business. *Seymour*, 16 How., at 488. Under *Seagate*, a district court may not even consider enhanced damages for such a pirate, unless the court first determines that his infringement was "objectively" reckless. In the context of such deliberate wrongdoing, however, it is not clear why an independent showing of objective recklessness—by clear and convincing evidence, no less—should be a prerequisite to enhanced damages.

Our recent decision in *Octane Fitness* arose in a different context but points in the same direction. In that case we considered § 285 of the Patent Act, which allows district courts to award attorney's fees to prevailing parties in "exceptional" cases. 35 U. S. C. § 285. The Federal Circuit had adopted a two-part test for determining when a case qualified as exceptional, requiring that the claim asserted be both objectively baseless and brought in subjective bad faith. We rejected that test on the ground that a case presenting "subjective bad faith" alone could "sufficiently set itself apart from mine-run cases to warrant a fee award." 572 U. S., at 555. So too here. The subjective willfulness of a patent infringer, intentional or knowing, may warrant enhanced damages, without regard to whether his infringement was objectively reckless.

The *Seagate* test aggravates the problem by making dispositive the ability of the infringer to muster a reasonable (even though unsuccessful) defense at the infringement trial. The existence of such a defense insulates the infringer from enhanced damages, even if he did not act on the basis of the defense or was even aware of it. Under that standard, someone who plunders a patent—infringing it without any reason to suppose his conduct is arguably defensible—can nevertheless escape any comeuppance under § 284 solely on the strength of his attorney's ingenuity.

But culpability is generally measured against the knowledge of the actor at the time of the challenged conduct. See generally Restatement (Second) of Torts § 8A (1965) ("intent" denotes state of mind in which "the actor desires to cause consequences of his act" or "believes" them to be "substantially certain to result from it"); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 34, p. 212 (5th ed. 1984) (describing willful, wanton, and reckless as "look[ing] to the actor's real or supposed state of mind"); see also *Kolstad* v. *American Dental Assn.*, 527 U. S. 526, 538 (1999) ("Most often . . . eligibility for punitive awards

is characterized in terms of a defendant's motive or intent"). In *Safeco Ins. Co. of America* v. *Burr*, 551 U. S. 47 (2007), we stated that a person is reckless if he acts "*knowing* or *having reason to know* of facts which would lead a reasonable man to realize" his actions are unreasonably risky. *Id.*, at 69 (emphasis added and internal quotation marks omitted). The Court found that the defendant had not recklessly violated the Fair Credit Reporting Act because the defendant's interpretation had "a foundation in the statutory text" and the defendant lacked "the benefit of guidance from the courts of appeals or the Federal Trade Commission" that "might have warned it away from the view it took." *Id.*, at 69–70. Nothing in *Safeco* suggests that we should look to facts that the defendant neither knew nor had reason to know at the time he acted.*

Section 284 allows district courts to punish the full range of culpable behavior. Yet none of this is to say that enhanced damages must follow a finding of egregious misconduct. As with any exercise of discretion, courts should continue to take into account the particular circumstances of each case in deciding whether to award damages, and in what amount. Section 284 permits district courts to exercise their discretion in a manner free from the inelastic constraints of the *Seagate* test. Consistent with nearly two centuries of enhanced damages under patent law, however, such punishment should generally be reserved for egregious cases typified by willful misconduct.

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*Respondents invoke a footnote in *Safeco* where we explained that in considering whether there had been a knowing or reckless violation of the Fair Credit Reporting Act, a showing of bad faith was not relevant absent a showing of objective recklessness. See 551 U. S., at 70, n. 20. But our precedents make clear that "bad-faith infringement" *is* an independent basis for enhancing patent damages. *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 377 U. S. 476, 508 (1964); see *supra*, at 97–100, 104–105; see also *Safeco*, 551 U. S., at 57 (noting that "'willfully' is a word of many meanings whose construction is often dependent on the context in which it appears" (some internal quotation marks omitted)).

2

The *Seagate* test is also inconsistent with § 284 because it requires clear and convincing evidence to prove recklessness. On this point *Octane Fitness* is again instructive. There too the Federal Circuit had adopted a clear and convincing standard of proof for awards of attorney's fees under § 285 of the Patent Act. Because that provision supplied no basis for imposing such a heightened standard of proof, we rejected it. See *Octane Fitness*, 572 U. S., at 557–558. We do so here as well. Like § 285, § 284 "imposes no specific evidentiary burden, much less such a high one." *Id.*, at 557. And the fact that Congress expressly erected a higher standard of proof elsewhere in the Patent Act, see 35 U. S. C. § 273(b), but not in § 284, is telling. Furthermore, nothing in historical practice supports a heightened standard. As we explained in *Octane Fitness*, "patent-infringement litigation has always been governed by a preponderance of the evidence standard." 572 U. S., at 557. Enhanced damages are no exception.

3

Finally, because we eschew any rigid formula for awarding enhanced damages under § 284, we likewise reject the Federal Circuit's tripartite framework for appellate review. In *Highmark Inc.* v. *Allcare Health Management System, Inc.*, 572 U. S. 559 (2014), we built on our *Octane Fitness* holding to reject a similar multipart standard of review. Because *Octane Fitness* confirmed district court discretion to award attorney's fees, we concluded that such decisions should be reviewed for abuse of discretion. *Highmark*, 572 U. S., at 560–561.

The same conclusion follows naturally from our holding here. Section 284 gives district courts discretion in meting out enhanced damages. It "commits the determination" whether enhanced damages are appropriate "to the discretion of the district court" and "that decision is to be reviewed on appeal for abuse of discretion." *Id.*, at 563.

That standard allows for review of district court decisions informed by "the considerations we have identified." *Octane Fitness*, 572 U. S., at 554 (internal quotation marks omitted). The appellate review framework adopted by the Federal Circuit reflects a concern that district courts may award enhanced damages too readily, and distort the balance between the protection of patent rights and the interest in technological innovation. Nearly two centuries of exercising discretion in awarding enhanced damages in patent cases, however, has given substance to the notion that there are limits to that discretion. The Federal Circuit should review such exercises of discretion in light of the longstanding considerations we have identified as having guided both Congress and the courts.

III

For their part, respondents argue that Congress ratified the *Seagate* test when it passed the America Invents Act of 2011 and reenacted § 284 without pertinent change. See Brief for Respondents in No. 14–1520, p. 27 (citing *Lorillard* v. *Pons*, 434 U. S. 575, 580 (1978)). But the language Congress reenacted unambiguously confirmed discretion in the district courts. Congress's retention of § 284 could just as readily reflect an intent that enhanced damages be awarded as they had been for nearly two centuries, through the exercise of such discretion, informed by settled practices. Respondents point to isolated snippets of legislative history referring to *Seagate* as evidence of congressional endorsement of its framework, but other morsels—such as Congress's failure to adopt a proposed codification similar to *Seagate*—point in the opposite direction. See, *e. g.*, H. R. 1260, 111th Cong., 1st Sess. § 5(e) (2009).

Respondents also seize on an addition to the Act addressing opinions of counsel. Section 298 provides that "[t]he failure of an infringer to obtain the advice of counsel," or "the failure of the infringer to present such advice to the court or jury, may not be used to prove that the accused infringer

willfully infringed." 35 U. S. C. § 298. Respondents contend that the reference to willfulness reflects an endorsement of *Seagate*'s willfulness test. But willfulness has always been a part of patent law, before and after *Seagate*. Section 298 does not show that Congress ratified *Seagate*'s particular conception of willfulness. Rather, it simply addressed the fallout from the Federal Circuit's opinion in *Underwater Devices Inc.* v. *Morrison-Knudsen Co.*, 717 F. 2d 1380 (1983), which had imposed an "affirmative duty" to obtain advice of counsel prior to initiating any possible infringing activity, *id.*, at 1389–1390. See, *e. g.*, H. R. Rep. No. 112–98, pt. 1, p. 53 (2011).

At the end of the day, respondents' main argument for retaining the *Seagate* test comes down to a matter of policy. Respondents and their *amici* are concerned that allowing district courts unlimited discretion to award up to treble damages in infringement cases will impede innovation as companies steer well clear of any possible interference with patent rights. They also worry that the ready availability of such damages will embolden "trolls." Trolls, in the patois of the patent community, are entities that hold patents for the primary purpose of enforcing them against alleged infringers, often exacting outsized licensing fees on threat of litigation.

Respondents are correct that patent law reflects "a careful balance between the need to promote innovation" through patent protection, and the importance of facilitating the "imitation and refinement through imitation" that are "necessary to invention itself and the very lifeblood of a competitive economy." *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U. S. 141, 146 (1989). That balance can indeed be disrupted if enhanced damages are awarded in garden-variety cases. As we have explained, however, they should not be. The seriousness of respondents' policy concerns cannot justify imposing an artificial construct such as the *Seagate* test on the discretion conferred under § 284.

* * *

Section 284 gives district courts the discretion to award enhanced damages against those guilty of patent infringement. In applying this discretion, district courts are "to be guided by [the] sound legal principles" developed over nearly two centuries of application and interpretation of the Patent Act. *Martin*, 546 U. S., at 139 (internal quotation marks omitted). Those principles channel the exercise of discretion, limiting the award of enhanced damages to egregious cases of misconduct beyond typical infringement. The *Seagate* test, in contrast, unduly confines the ability of district courts to exercise the discretion conferred on them. Because both cases before us were decided under the *Seagate* framework, we vacate the judgments of the Federal Circuit and remand the cases for proceedings consistent with this opinion.

It is so ordered.

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

I agree with the Court that *In re Seagate Technology, LLC*, 497 F. 3d 1360 (CA Fed. 2007) (en banc), takes too mechanical an approach to the award of enhanced damages. But, as the Court notes, the relevant statutory provision, 35 U. S. C. §284, nonetheless imposes limits that help produce uniformity in its application and maintain its consistency with the basic objectives of patent law. See U. S. Const., Art. I, §8, cl. 8 ("To promote the Progress of Science and useful Arts"). I write separately to express my own understanding of several of those limits.

First, the Court's references to "willful misconduct" do not mean that a court may award enhanced damages simply because the evidence shows that the infringer knew about the patent *and nothing more*. *Ante*, at 106. "'[W]illfu[l]' is a 'word of many meanings whose construction is often dependent on the context in which it appears.'" *Safeco Ins. Co. of*

America v. *Burr*, 551 U. S. 47, 57 (2007). Here, the Court's opinion, read as a whole and in context, explains that "enhanced damages are generally appropriate . . . *only in egregious cases*." *Ante*, at 104 (emphasis added); *ante*, at 106 (Enhanced damages "should generally be reserved for *egregious cases* typified by willful misconduct" (emphasis added)). They amount to a "'punitive'" sanction for engaging in conduct that is either "deliberate" or "wanton." *Ante*, at 103; compare *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 377 U. S. 476, 508 (1964) ("bad-faith infringement"), and *Seymour* v. *McCormick*, 16 How. 480, 488 (1854) ("malicious pirate"), with *ante*, at 105–106, and n. ("objective recklessness"). The Court refers, by way of example, to a "'wanton and malicious pirate' who intentionally infringes another's patent—with no doubts about its validity or any notion of a defense—for no purpose other than to steal the patentee's business." *Ante*, at 104. And while the Court explains that "intentional or knowing" infringement "may" warrant a punitive sanction, the word it uses is *may*, not *must*. *Ante*, at 105. It is "circumstanc[e]" that transforms simple knowledge into such egregious behavior, and that makes all the difference. *Ante*, at 106.

Second, the Court writes against a statutory background specifying that the "failure of an infringer to obtain the advice of counsel . . . may not be used to prove that the accused infringer wilfully infringed." §298. The Court does not weaken this rule through its interpretation of §284. Nor should it. It may well be expensive to obtain an opinion of counsel. See Brief for Public Knowledge et al. as *Amici Curiae* 9 ("[O]pinion[s] [of counsel] could easily cost up to $100,000 per patent"); Brief for Internet Companies as *Amici Curiae* 13 (such opinions cost "tens of thousands of dollars"). Such costs can prevent an innovator from getting a small business up and running. At the same time, an owner of a small firm, or a scientist, engineer, or technician working there, might, without being "wanton" or "reckless," reason-

ably determine that its product does not infringe a particular patent, or that that patent is probably invalid. Cf. *Association for Molecular Pathology* v. *Myriad Genetics, Inc.*, 569 U. S. 576, 591 (2013) (The "patent['s] [own] descriptions highlight the problem[s] with its claims"). I do not say that a lawyer's informed opinion would be unhelpful. To the contrary, consulting counsel may help draw the line between infringing and noninfringing uses. But on the other side of the equation lie the costs and the consequent risk of discouraging lawful innovation. Congress has thus left it to the potential infringer to decide whether to consult counsel—without the threat of treble damages influencing that decision. That is, Congress has determined that where both "advice of counsel" and "increased damages" are at issue, insisting upon the legal game is not worth the candle. Compare § 298 with § 284.

Third, as the Court explains, enhanced damages may not "serve to compensate patentees" for infringement-related costs or litigation expenses. *Ante*, at 99. That is because § 284 provides for the former *prior* to any enhancement. § 284 (enhancement follows award of "damages adequate to compensate for the infringement"); see *ante*, at 99–100. And a different statutory provision, § 285, provides for the latter. *Ibid.*; *Octane Fitness, LLC* v. *ICON Health & Fitness, Inc.*, 572 U. S. 545, 554 (2014) (fee awards may be appropriate in a case that is "'exceptional'" in respect to "the unreasonable manner in which [it] was litigated").

I describe these limitations on enhanced damages awards for a reason. Patent infringement, of course, is a highly undesirable and unlawful activity. But stopping infringement is a means to patent law's ends. Through a complex system of incentive-based laws, patent law helps to encourage the development of, disseminate knowledge about, and permit others to benefit from useful inventions. Enhanced damages have a role to play in achieving those objectives, but, as described above, that role is limited.

Consider that the U. S. Patent and Trademark Office estimates that more than 2,500,000 patents are currently in force. See Dept. of Commerce, Patent and Trademark Office, A. Marco, M. Carley, S. Jackson, & A. Myers, The USPTO Historical Patent Files: Two Centuries of Invention, No. 2015–1, p. 32, fig. 6 (June 2015). Moreover, Members of the Court have noted that some "firms use patents . . . primarily [to] obtai[n] licensing fees." *eBay Inc.* v. *MercExchange, L. L. C.*, 547 U. S. 388, 396 (2006) (KENNEDY, J., concurring). *Amici* explain that some of those firms generate revenue by sending letters to "'tens of thousands of people asking for a license or settlement'" on a patent "'that may in fact not be warranted.'" Brief for Internet Companies as *Amici Curiae* 12; cf. Letter to Dr. Thomas Cooper (Jan. 16, 1814), in 6 Writings of Thomas Jefferson 295 (H. Washington ed. 1854) (lamenting "abuse of the frivolous patents"). How is a growing business to react to the arrival of such a letter, particularly if that letter carries with it a serious risk of treble damages? Does the letter put the company "on notice" of the patent? Will a jury find that the company behaved "recklessly," simply for failing to spend considerable time, effort, and money obtaining expert views about whether some or all of the patents described in the letter apply to its activities (and whether those patents are even valid)? These investigative activities can be costly. Hence, the risk of treble damages can encourage the company to settle, or even abandon any challenged activity.

To say this is to point to a risk: The more that businesses, laboratories, hospitals, and individuals adopt this approach, the more often a patent will reach beyond its lawful scope to discourage lawful activity, and the more often patent-related demands will frustrate, rather than "promote," the "Progress of Science and useful Arts." U. S. Const., Art. I, §8, cl. 8; see, *e. g.*, *Eon-Net LP* v. *Flagstar Bancorp*, 653 F. 3d 1314, 1327 (CA Fed. 2011) (patent holder "acted in bad faith by exploiting the high cost to defend [patent] litigation to

extract a nuisance value settlement"); *In re MPHJ Technology Invs., LLC*, 159 F. T. C. 1004, 1007–1012 (2015) (patent owner sent more than 16,000 letters demanding settlement for using "common office equipment" under a patent it never intended to litigate); Brief for Internet Companies as *Amici Curiae* 15 (threat of enhanced damages hinders "collaborative efforts" to set "industry-wide" standards for matters such as internet protocols); Brief for Public Knowledge et al. as *Amici Curiae* 6 (predatory patent practices undermined "a new and highly praised virtual-reality glasses shopping system"). Thus, in the context of enhanced damages, there are patent-related risks on both sides of the equation. That fact argues, not for abandonment of enhanced damages, but for their careful application, to ensure that they only target cases of egregious misconduct.

One final point: The Court holds that awards of enhanced damages should be reviewed for an abuse of discretion. *Ante*, at 107–108. I agree. But I also believe that, in applying that standard, the Federal Circuit may take advantage of its own experience and expertise in patent law. Whether, for example, an infringer truly had "no doubts about [the] validity" of a patent may require an assessment of the reasonableness of a defense that may be apparent from the face of that patent. See *ante*, at 104. And any error on such a question would be an abuse of discretion. *Highmark Inc.* v. *Allcare Health Management System, Inc.*, 572 U. S. 559, 563, n. 2 (2014) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law" (internal quotation marks omitted)).

Understanding the Court's opinion in the ways described above, I join its opinion.

Syllabus

COMMONWEALTH OF PUERTO RICO ET AL. *v.* FRANKLIN CALIFORNIA TAX-FREE TRUST ET AL.

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

No. 15–233. Argued March 22, 2016—Decided June 13, 2016*

In response to an ongoing fiscal crisis, petitioner Puerto Rico enacted the Puerto Rico Public Corporation Debt Enforcement and Recovery Act. Portions of the Recovery Act mirror Chapters 9 and 11 of the Federal Bankruptcy Code and enable Puerto Rico's public utility corporations to restructure their climbing debt. Respondents, a group of investment funds and utility bondholders, sought to enjoin the Act. They contended, among other things, that a Bankruptcy Code provision explicitly pre-empts the Recovery Act, see 11 U. S. C. § 903(1). The District Court enjoined the Act's enforcement, and the First Circuit affirmed, concluding that the Bankruptcy Code's definition of "State" to include Puerto Rico, except for purposes of defining who may be a debtor under Chapter 9, § 101(52), did not remove Puerto Rico from the scope of the pre-emption provision.

Held: Section 903(1) of the Bankruptcy Code pre-empts Puerto Rico's Recovery Act. Pp. 121–130.

(a) Three federal municipal bankruptcy provisions are relevant here. First, the "gateway" provision, § 109(c), requires a Chapter 9 debtor to be an insolvent municipality that is "specifically authorized" by a State "to be a debtor." Second, the pre-emption provision, § 903(1), expressly bars States from enacting municipal bankruptcy laws. Third, the definition of "State," § 101(52), as amended in 1984, "includes . . . Puerto Rico, except for the purpose of defining who may be a debtor under chapter 9." Pp. 121–124.

(b) If petitioners are correct that the amended definition of "State" excludes Puerto Rico altogether from Chapter 9, then the pre-emption provision does not apply. But if respondents' narrower reading is correct and the definition only precludes Puerto Rico from authorizing its municipalities to seek Chapter 9 relief, then Puerto Rico is barred from implementing its Recovery Act. Pp. 124–130.

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*Together with No. 15–255, *Acosta-Febo et al.* v. *Franklin California Tax-Free Trust et al.*, also on certiorari to the same court.

Syllabus

(1) The Bankruptcy Code's plain text supports respondents' reading. The unambiguous language of the pre-emption provision "contains an express pre-emption clause," the plain wording of which "necessarily contains the best evidence of Congress' pre-emptive intent." *Chamber of Commerce of United States of America* v. *Whiting*, 563 U. S. 582, 594. The definition provision excludes Puerto Rico for the single purpose of defining who may be a Chapter 9 debtor, an unmistakable reference to the § 109 gateway provision. This conclusion is reinforced by the definition's use of the phrase "defining who may be a debtor under chapter 9," § 101(52), which is tantamount to barring Puerto Rico from "specifically authorizing" which municipalities may file Chapter 9 petitions under the gateway provision, § 903(1). The text of the exclusion thus extends no further. Had Congress intended to exclude Puerto Rico from Chapter 9 altogether, including Chapter 9's pre-emption provision, Congress would have said so. Pp. 125–127.

(2) The amended definition of "State" does not exclude Puerto Rico from all of Chapter 9's provisions. First, Puerto Rico's exclusion as a "State" for purposes of the gateway provision does not also remove Puerto Rico from Chapter 9's separate pre-emption provision. A State that chooses under the gateway provision not to authorize a municipality to file is still bound by the pre-emption provision. Likewise, Puerto Rico is bound by the pre-emption provision, even though Congress has removed its authority under the gateway provision to authorize its municipalities to seek Chapter 9 relief. Second, because Puerto Rico was not "by definition" excluded from Chapter 9, both § 903's introductory clause and its proviso, the pre-emption provision, continue to apply in Puerto Rico. Finally, the argument that the Recovery Act is not a "State law" that can be pre-empted is based on technical amendments to the terms "creditor" and "debtor" that are too "subtle" to support such a "[f]undamental chang[e] in the scope" of Chapter 9's pre-emption provision. *Kellogg Brown & Root Services, Inc.* v. *United States ex rel. Carter*, 575 U. S. 650, 660. Pp. 127–130.

805 F. 3d 322, affirmed.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, BREYER, and KAGAN, JJ., joined. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 131. ALITO, J., took no part in the consideration or decision of the cases.

Christopher Landau argued the cause for petitioners in both cases. With him on the briefs for petitioners in No. 15–233 were *Claire McCusker Murray*, *César Miranda*

Rodríguez, and *Margarita Mercado Echegaray*. *Martin J. Bienenstock*, *Mark D. Harris*, *Sigal Mandelker*, *Philip M. Abelson*, *Ehud Barak*, *John E. Roberts*, *Andrea G. Miller*, *Laura Stafford*, and *José R. Coleman-Tió* filed briefs for petitioners in No. 15–255.

Matthew D. McGill argued the cause for respondents in both cases. With him on the brief for respondent Blue Mountain Capital Management, LLC, were *Theodore B. Olson*, *Jonathan C. Bond*, *Russell B. Balikian*, *David C. Indiano*, *Jeffrey M. Williams*, and *Leticia Casalduc-Rabell*. *Thomas Moers Mayer*, *Philip Bentley*, *Amy Caton*, and *David E. Blabey, Jr.*, filed a brief for the Franklin respondents.†

JUSTICE THOMAS delivered the opinion of the Court.

The Federal Bankruptcy Code pre-empts state bankruptcy laws that enable insolvent municipalities to restructure their debts over the objections of creditors and instead requires municipalities to restructure such debts under Chapter 9 of the Code. 11 U. S. C. §903(1). We must decide whether

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†Briefs of *amici curiae* urging reversal in both cases were filed for Colegio de Abogados y Abogadas de Puerto Rico et al. by *Betty Lugo*, *Carmen A. Pacheco*, and *Mark Anthony Bimbela*; for LatinoJustice PRLDEF et al. by *Edward H. Tillinghast III*, *Jennifer A. Trusso*, *Robert J. Stumpf, Jr.*, and *Juan Cartagena*; for the Puerto Rico Electric Power Authority by *Lewis J. Liman*, *Lawrence B. Friedman*, *Richard J. Cooper*, and *Sean A. O'Neal*; for Puerto Rico Manufacturers Association by *Luis Sánchez Betances*; and for Clayton P. Gillette et al. by *Randy A. Hertz*.

Briefs of *amici curiae* urging reversal were filed in No. 15–233 for Fundación Ángel Ramos, Inc., et al. by *José L. Nieto-Mingo*; and for Gregorio Igartua by *Mr. Igartua, pro se*.

Briefs of *amici curiae* urging affirmance in both cases were filed for the Association of Financial Guaranty Insurers by *Marc E. Kasowitz*, *Daniel R. Benson*, *Joseph I. Lieberman*, *Clarine Nardi Riddle*, and *Andrew K. Glenn*; for the Chamber of Commerce of the United States of America by *William S. Consovoy*, *Bryan K. Weir*, and *Kate Comerford Todd*; and for Scotiabank de Puerto Rico by *George T. Conway III*, *Richard G. Mason*, *Emil A. Kleinhaus*, and *Antonio A. Arias-Larcada*.

Puerto Rico is a "State" for purposes of this pre-emption provision. We hold that it is.

The Bankruptcy Code has long included Puerto Rico as a "State," but in 1984 Congress amended the definition of "State" to exclude Puerto Rico "for the purpose of defining who may be a debtor under chapter 9." Bankruptcy Amendments and Federal Judgeship Act, § 421(j)(6), 98 Stat. 368–369, now codified at 11 U. S. C. § 101(52). Puerto Rico interprets this amended definition to mean that Chapter 9 no longer applies to it, so it is no longer a "State" for purposes of Chapter 9's pre-emption provision. We hold that Congress' exclusion of Puerto Rico from the definition of a "State" in the amended definition does not sweep so broadly. By excluding Puerto Rico "for the purpose of *defining who may be a debtor under chapter 9*," § 101(52) (emphasis added), the Code prevents Puerto Rico from authorizing its municipalities to seek Chapter 9 relief. Without that authorization, Puerto Rico's municipalities cannot qualify as Chapter 9 debtors. § 109(c)(2). But Puerto Rico remains a "State" for other purposes related to Chapter 9, including that chapter's pre-emption provision. That provision bars Puerto Rico from enacting its own municipal bankruptcy scheme to restructure the debt of its insolvent public utilities companies.

I

A

Puerto Rico and its instrumentalities are in the midst of a fiscal crisis. More than $20 billion of Puerto Rico's climbing debt is shared by three government-owned public utilities companies: the Puerto Rico Electric Power Authority, the Puerto Rico Aqueduct and Sewer Authority, and the Puerto Rico Highways and Transportation Authority. For the fiscal year ending in 2013, the three public utilities operated with a combined deficit of $800 million. The Government Development Bank for Puerto Rico (Bank)—the Common-

wealth's government-owned bank and fiscal agent—has previously provided financing to enable the utilities to continue operating without defaulting on their debt obligations. But the Bank now faces a fiscal crisis of its own. As of fiscal year 2013, it had loaned nearly half of its assets to Puerto Rico and its public utilities. Puerto Rico's access to capital markets has also been severely compromised since ratings agencies downgraded Puerto Rican bonds, including the utilities', to noninvestment grade in 2014.

Puerto Rico responded to the fiscal crisis by enacting the Puerto Rico Corporation Debt Enforcement and Recovery Act (Recovery Act) in 2014, which enables the Commonwealth's public utilities to implement a recovery or restructuring plan for their debt. 2014 Laws P. R. p. 371. See generally McGowen, Puerto Rico Adopts a Debt Recovery Act for Its Public Corporations, 10 Pratt's J. Bkrtcy. Law 453 (2014). Chapter 2 of the Recovery Act creates a "consensual" debt modification procedure that permits the public utilities to propose changes to the terms of the outstanding debt instruments, for example, changing the interest rate or the maturity date of the debt. 2014 Laws P. R., at 428–429. In conjunction with the debt modification, the public utility must also propose a Bank-approved recovery plan to bring it back to financial self-sufficiency. *Ibid.* The debt modification binds all creditors so long as those holding at least 50% of affected debt participate in (or consent to) a vote regarding the modifications, and the participating creditors holding at least 75% of affected debt approve the modifications. *Id.*, at 430. Chapter 3 of the Recovery Act, on the other hand, mirrors Chapters 9 and 11 of the Federal Bankruptcy Code by creating a court-supervised restructuring process intended to offer the best solution for the broadest group of creditors. See *id.*, at 448–449. Creditors holding two-thirds of an affected class of debt must participate in the vote to approve the restructuring plan, and half of those participants must agree to the plan. *Id.*, at 449.

B

A group of investment funds, including the Franklin California Tax-Free Trust, and BlueMountain Capital Management, LLC, brought separate suits against Puerto Rico and various government officials, including agents of the Bank, to enjoin the enforcement of the Recovery Act. Collectively, the plaintiffs hold nearly $2 billion in bonds issued by the Electric Power Authority, one of the distressed utilities. The complaints alleged, among other claims, that the Federal Bankruptcy Code prohibited Puerto Rico from implementing its own municipal bankruptcy scheme.

The District Court consolidated the suits and ruled in the plaintiffs' favor on their pre-emption claim. 85 F. Supp. 3d 577 (PR 2015). The court concluded that the pre-emption provision in Chapter 9 of the Federal Bankruptcy Code, 11 U. S. C. § 903(1), precluded Puerto Rico from implementing the Recovery Act and enjoined its enforcement. 85 F. Supp. 3d, at 601, 614.

The First Circuit affirmed. 805 F. 3d 322 (2015). The court examined the 1984 amendment to the definition of "State" in the Federal Bankruptcy Code, which includes Puerto Rico as a "State" for purposes of the Code "'*except* for the purpose of defining who may be a debtor under chapter 9.'" *Id.*, at 330–331 (quoting § 101(52); emphasis added). The court concluded that the amendment did not remove Puerto Rico from the scope of the pre-emption provision and held that the pre-emption provision barred the Recovery Act. *Id.*, at 336–337. The court opined that it was up to Congress, not Puerto Rico, to decide when the government-owned companies could seek bankruptcy relief. *Id.*, at 345.

We granted the Commonwealth's petitions for writs of certiorari. 577 U. S. 1025 (2015).*

*After the parties briefed and argued these cases, Members of Congress introduced a bill in the House of Representatives to establish an oversight board to assist Puerto Rico and its instrumentalities. See H. 5278, 114th Cong., 2d Sess. (2016). The bill does not amend the Federal

II

These cases require us to parse three provisions of the Bankruptcy Code: the "who may be a debtor" provision requiring States to authorize municipalities to seek Chapter 9 relief, § 109(c), the pre-emption provision barring States from enacting their own municipal bankruptcy schemes, § 903(1), and the definition of "State," § 101(52). We first explain the text and history of these provisions. We then conclude that Puerto Rico is still a "State" for purposes of the pre-emption provision and hold that this provision pre-empts the Recovery Act.

A

The Constitution empowers Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States." Art. I, § 8, cl. 4. Congress first exercised that power by enacting a series of temporary bankruptcy Acts beginning in 1800, which gave way to a permanent federal bankruptcy scheme in 1898. See An Act To Establish a Uniform System of Bankruptcy Throughout the United States, 30 Stat. 544; *Hanover Nat. Bank* v. *Moyses*, 186 U. S. 181, 184 (1902). But Congress did not enter the field of municipal bankruptcy until 1933 when it enacted the precursor to Chapter 9, a chapter of the Code enabling an insolvent "municipality," meaning a "political subdivision or public agency or instrumentality of a State," 11 U. S. C. § 101(40), to restructure municipal debts. See McConnell & Picker, When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy, 60 U. Chi. L. Rev. 425, 427, 450–451 (1993).

Congress has tailored the federal municipal bankruptcy laws to preserve the States' reserved powers over their municipalities. This Court struck down Congress' first attempt to enable the States' political subdivisions to file for federal bankruptcy relief after concluding that it infringed the

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Bankruptcy Code; it instead proposes adding a chapter to Title 48, governing the Territories. *Id.*, § 6.

States' powers "to manage their own affairs." *Ashton* v. *Cameron County Water Improvement Dist. No. One*, 298 U. S. 513, 531 (1936). Congress tried anew in 1937, and the Court upheld the amended statute as an appropriate balance of federal and state power. See *United States* v. *Bekins*, 304 U. S. 27, 49–53 (1938). Critical to the Court's constitutional analysis was that the State had first authorized its instrumentality to seek relief under the federal bankruptcy laws. See *id.*, at 47–49, 53–54.

Still today, the provision of the Bankruptcy Code defining who may be a debtor under Chapter 9, which we refer to here as the "gateway" provision, requires the States to authorize their municipalities to seek relief under Chapter 9 before the municipalities may file a Chapter 9 petition:

> "§ 109. Who may be a debtor
>
> . . . . .
>
> "(c) An entity may be a debtor under chapter 9 of this title if and only if such entity—
>
> "(1) is a municipality;
>
> "(2) is specifically authorized, in its capacity as a municipality or by name, to be a debtor under such chapter by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor under such chapter . . . ."

The States' powers are not unlimited, however. The federal bankruptcy laws changed again in 1946 to bar the States from enacting their own municipal bankruptcy schemes. The amendment overturned this Court's holding in *Faitoute Iron & Steel Co.* v. *Asbury Park*, 316 U. S. 502, 507–509 (1942) (rejecting contention that Congress occupied the field of municipal bankruptcy law). In *Faitoute*, the Court held that federal bankruptcy laws did not pre-empt New Jersey's municipal bankruptcy scheme, which required municipalities to seek relief under state law before resorting to the

federal municipal bankruptcy scheme. *Ibid.* To override *Faitoute*, Congress enacted a provision expressly pre-empting state municipal bankruptcy laws. Act of July 1, 1946, 60 Stat. 415.

The express pre-emption provision, central to these cases, is now codified with some stylistic changes in § 903(1):

> "§ 903. Reservation of State power to control municipalities
>
> "This chapter does not limit or impair the power of a State to control, by legislation or otherwise, a municipality of or in such State in the exercise of the political or governmental powers of such municipality, including expenditures for such exercise, but—
>
> "(1) a State law prescribing a method of composition of indebtedness of such municipality may not bind any creditor that does not consent to such composition; and
>
> "(2) a judgment entered under such a law may not bind a creditor that does not consent to such composition."

The third provision of the Bankruptcy Code at issue is the definition of "State," which has included Puerto Rico since it became a Territory of the United States in 1898. The first Federal Bankruptcy Act, also enacted in 1898, defined "States" to include "the Territories, the Indian Territory, Alaska, and the District of Columbia." 30 Stat. 545. When Congress recodified the bankruptcy laws to form the Federal Bankruptcy Code in 1978, the definition of "State" dropped out of the definitional section. See generally Bankruptcy Reform Act, 92 Stat. 2549–2554. Congress then amended the Code to reincorporate the definition of "State" in 1984. § 421, 98 Stat. 368–369, now codified at § 101(52). The amended definition includes Puerto Rico as a State for purposes of the Code with one exception:

"§ 101. Definitions

. . . . .

"(52) The term 'State' includes the District of Columbia and Puerto Rico, except for the purpose of defining who may be a debtor under chapter 9 of this title."

B

It is our task to determine the effect of the amended definition of "State" on the Code's other provisions governing Chapter 9 proceedings. We must decide whether, in light of the amended definition, Puerto Rico is no longer a "State" only for purposes of the gateway provision, which requires States to authorize their municipalities to seek Chapter 9 relief, or whether Puerto Rico is also no longer a "State" for purposes of the pre-emption provision.

The parties do not dispute that, before 1984, Puerto Rico was a "State" for purposes of Chapter 9's pre-emption provision. Accordingly, before 1984, federal law would have pre-empted the Recovery Act because it is a "State law prescribing a method of composition of indebtedness" for Puerto Rico's instrumentalities that would bind nonconsenting creditors, § 903(1).

The parties part ways, however, in deciphering how the 1984 amendment to the definition of "State" affected the pre-emption provision. Petitioners interpret the amended definition of "State" to exclude Puerto Rico altogether from Chapter 9. If petitioners are correct, then the pre-emption provision does not apply to them. Puerto Rico, in other words, may enact its own municipal bankruptcy scheme without running afoul of the Code. Respondents, on the other hand, read the amended definition narrowly. They contend that the definition precludes Puerto Rico from "specifically authoriz[ing]" its municipalities to seek relief, as required by the gateway provision, § 109(c)(2), but that Puerto Rico is no less a "State" for purposes of the pre-emption provision than the other "State[s]," as that term is defined in

the Code. If respondents are correct, then the pre-emption provision applies to Puerto Rico and bars it from enacting the Recovery Act.

Respondents have the better reading. We hold that Puerto Rico is still a "State" for purposes of the pre-emption provision. The 1984 amendment precludes Puerto Rico from authorizing its municipalities to seek relief under Chapter 9, but it does not remove Puerto Rico from the reach of Chapter 9's pre-emption provision.

1

The plain text of the Bankruptcy Code begins and ends our analysis. Resolving whether Puerto Rico is a "State" for purposes of the pre-emption provision begins "with the language of the statute itself," and that "is also where the inquiry should end," for "the statute's language is plain." *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235, 241 (1989). And because the statute "contains an express pre-emption clause," we do not invoke any presumption against preemption but instead "focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." *Chamber of Commerce of United States of America* v. *Whiting*, 563 U. S. 582, 594 (2011) (internal quotation marks omitted); see also *Gobeille* v. *Liberty Mut. Ins. Co.*, 577 U. S. 312, 325 (2016).

The amended definition of "State" excludes Puerto Rico for the single "purpose of defining *who may be a debtor* under chapter 9 of this title." § 101(52) (emphasis added). That exception unmistakably refers to the gateway provision in § 109, titled "who may be a debtor." Section 109(c) begins, "An entity may be a debtor under chapter 9 of this title if and only if . . . ." We interpret Congress' use of the "who may be a debtor" language in the amended definition of "State" to mean that Congress intended to exclude Puerto Rico from this gateway provision delineating who may be a debtor under Chapter 9. See, *e. g.*, *Sullivan* v. *Stroop*, 496

U. S. 478, 484 (1990) (reading same term used in different parts of the same Act to have the same meaning); see also *Northcross* v. *Board of Ed. of Memphis City Schools*, 412 U. S. 427, 428 (1973) (*per curiam*) ("[S]imilarity of language . . . is . . . a strong indication that the two statutes should be interpreted *pari passu*"). Puerto Rico, therefore, is not a "State" for purposes of the gateway provision, so it cannot perform the single function of the "State[s]" under that provision: to "specifically authoriz[e]" municipalities to seek Chapter 9 relief. § 109(c). As a result, Puerto Rico's municipalities cannot satisfy the requirements of Chapter 9's gateway provision until Congress intervenes.

The amended definition's use of the term "defining" also confirms our conclusion that the amended definition excludes Puerto Rico as a "State" for purposes of the gateway provision. The definition specifies that Puerto Rico is not a "'State . . . for the purpose of *defining* who may be a debtor under chapter 9." § 101(52) (emphasis added). To "define" is "to decide upon," 4 Oxford English Dictionary 383 (2d ed. 1989), or "to settle" or "to establish or prescribe authoritatively," Black's Law Dictionary 380 (5th ed. 1979). As discussed, a State's role under the gateway provision is to do just that: The State must define (or "decide upon") which entities may seek Chapter 9 relief. Barring Puerto Rico from "*defining* who may be a debtor under chapter 9" is tantamount to barring Puerto Rico from "specifically authorizing" which municipalities may file Chapter 9 petitions under the gateway provision. The amended definition of "State" unequivocally excludes Puerto Rico as a "State" for purposes of the gateway provision.

The text of the definition extends no further. The exception excludes Puerto Rico *only* for purposes of the gateway provision. Puerto Rico is no less a "State" for purposes of the pre-emption provision than it was before Congress amended the definition. The Code's pre-emption provision has prohibited States and Territories defined as "States"

from enacting their own municipal bankruptcy schemes for 70 years. See 60 Stat. 415 (overturning *Faitoute*, 316 U. S., at 507–509). Had Congress intended to "alter th[is] fundamental detai[l]" of municipal bankruptcy, we would expect the text of the amended definition to say so. *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001). Congress "does not, one might say, hide elephants in mouseholes." *Ibid.*

2

The dissent, adopting many of petitioners' arguments, reads the amended definition to say what it does not—that "for the purpose of . . . chapter 9," Puerto Rico is not a State. The arguments in support of that capacious reading are unavailing.

First, the dissent agrees with petitioners' view that the exclusion of Puerto Rico as a "State" for purposes of the gateway provision effectively removed Puerto Rico from all of Chapter 9. See *post*, at 136–137 (opinion of SOTOMAYOR, J.). To be sure, § 109(c) and the surrounding subsections serve an important gatekeeping role. Those provisions "specify who qualifies—and who does not qualify—as a debtor under the various chapters of the Code." *Toibb* v. *Radloff*, 501 U. S. 157, 161 (1991). For instance, a railroad must file under Chapter 11, not Chapter 7, §§ 109(b)(1), (d), whereas only "family farmer[s] or family fisherm[e]n" may file under Chapter 12, § 109(f). The provision delineating who may be a debtor under Chapter 9 is no exception. Only municipalities may file under Chapter 9, and only if the State has "specifically authorized" the municipality to do so. §§ 109(c)(1)–(2); see also McConnell & Picker, 60 Chi. L. Rev., at 455–461 (discussing the gatekeeping requirements for Chapter 9).

That Puerto Rico is not a "State" for purposes of the gateway provision, however, says nothing about whether Puerto Rico is a "State" for the other provisions of Chapter 9 involving the States. The States do not "pass through" the gateway provision. *Post*, at 137. The gateway provision is in-

stead directed at the debtors themselves—the municipalities, in the case of Chapter 9 bankruptcy. A *municipality* that cannot secure state authorization to file a Chapter 9 petition is excluded from Chapter 9 entirely. But the same cannot be said about the *State* in which that municipality is located. A State's only role under the gateway provision is to provide that "authoriz[ation]" to file. § 109(c)(2). The pre-emption provision then imposes an additional requirement: The States may not enact their own municipal bankruptcy schemes. A State that chooses not to authorize its municipalities to seek Chapter 9 relief under the gateway provision is no less bound by that pre-emption provision. Here too, Puerto Rico is no less bound by the pre-emption provision even though Congress has removed its authority to provide authorization for its municipalities to file Chapter 9 petitions. Again, if it were Congress' intent to also exclude Puerto Rico as a "State" for purposes of that pre-emption provision, it would have said so.

Second, both petitioners and the dissent place great weight on the introductory clause of § 903. *Post*, at 135–136. The pre-emption provision cannot apply to Puerto Rico, so goes the argument, because it is a proviso to § 903's introductory clause, which they posit is inapplicable to Puerto Rico. The introductory clause affirms that Chapter 9 "does not limit or impair the power of a State to control" its "municipalit[ies]." § 903. The dissent surmises that this clause "is irrelevant" and "meaningless" in Puerto Rico. *Post*, at 136. Because Puerto Rico's municipalities are ineligible for Chapter 9 relief, Chapter 9 cannot "affec[t] Puerto Rico's control over its municipalities," according to the dissent. *Ibid.* In other words, "there is no power" for the introductory clause to "reserve" for Puerto Rico's use. *Ibid.* Petitioners likewise contend that "it would be nonsensical for Congress to provide Puerto Rico with a shield against intrusion by a Chapter that, by definition, can have no effect on Puerto Rico." Brief for Petitioner Commonwealth of Puerto Rico et al. in

No. 15–233, p. 25. So "it follows" that the pre-emption provision, the proviso to that clause, cannot apply either. *Ibid.*

This reading rests on the faulty assumption that Puerto Rico is, "by definition," excluded from Chapter 9. *Ibid.* For all of the reasons already explained, see Part II–B–1, *supra*, it is not. The amended definition of "State" precludes Puerto Rico from authorizing its municipalities to seek Chapter 9 relief. But Puerto Rico is no less a "State" for purposes of §903's introductory clause and its proviso. Both continue to apply in Puerto Rico. They are neither "irrelevant" nor "meaningless." *Post*, at 136. If, for example, Congress created a path for the Puerto Rican municipalities to restructure their debts under Chapter 9, then §903 would assure Puerto Rico, no less a "State" for purposes of this section, of its continued power to "control, by legislation or otherwise, [its] municipalit[ies] . . . in the exercise of the political or governmental powers of such municipalit[ies]."

Third, the Government Development Bank contends that the Recovery Act does not run afoul of the pre-emption provision because the Recovery Act does not bind nonconsenting "creditors," as the Bankruptcy Code now defines that term. In 1978, Congress redefined "creditor" to mean an "entity that has a claim against the *debtor* . . . ." 92 Stat. 2550, now codified at §101(10) (emphasis added). A "debtor," in turn, is a "person or municipality concerning which a case under this title has been *commenced*." *Id.*, at 2551, now codified at §101(13) (emphasis added). In light of these definitions, the Bank contends that the Puerto Rican municipalities are not "debtor[s]" as the Code defines the term because they cannot "commenc[e]" an action under Chapter 9 without authorization from Puerto Rico. Brief for Petitioner Acosta-Febo et al. 31–33. And because respondents cannot be "creditors" of a nonexistent "debtor," the Recovery Act is

not a "State law" that binds "any creditor." § 903(1). *Id.*, at 31–33.

Tellingly, the dissent does not adopt this reading. The Bank's interpretation would nullify the pre-emption provision. Applying the Bank's logic, a municipality that fails to meet any one of the requirements of Chapter 9's gatekeeping provision is not a "debtor" and would have no "creditors." So a State could refuse to "specifically authoriz[e]" its municipalities to seek relief under Chapter 9, § 109(c)(2), required to commence a case under that chapter. That State would be free to enact its own municipal bankruptcy scheme because its municipalities would have no "creditors" under federal law. The technical amendments to the definitions of "creditor" and "debtor" are too "subtle a move" to support such a "[f]undamental chang[e] in the scope" of Chapter 9's pre-emption provision. *Kellogg Brown & Root Services, Inc.* v. *United States ex rel. Carter*, 575 U. S. 650, 660 (2015).

* * *

The dissent concludes that "the government and people of Puerto Rico should not have to wait for possible congressional action to avert the consequences" of the Commonwealth's fiscal crisis. *Post*, at 139. But our constitutional structure does not permit this Court to "rewrite the statute that Congress has enacted." *Dodd* v. *United States*, 545 U. S. 353, 359 (2005); see also *Electric Storage Battery Co.* v. *Shimadzu*, 307 U. S. 5, 14 (1939). That statute precludes Puerto Rico from authorizing its municipalities to seek relief under Chapter 9. But it does not remove Puerto Rico from the scope of Chapter 9's pre-emption provision. Federal law, therefore, pre-empts the Recovery Act. The judgment of the Court of Appeals for the First Circuit is affirmed.

It is so ordered.

JUSTICE ALITO took no part in the consideration or decision of these cases.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

Chapter 9 of the Federal Bankruptcy Code allows States' "municipalities"—cities, utilities, levee boards, and the like—to file for federal bankruptcy with their State's authorization. But the Code excludes Puerto Rican municipalities from accessing federal bankruptcy. 11 U. S. C. §§ 101(52), 109(c)(2). Because of this bar, Puerto Rico enacted its own law in 2014—the Recovery Act—to allow its utilities to restructure their significant debts outside the federal bankruptcy process.

The Court today holds that Puerto Rico's Recovery Act is barred by § 903(1) of Chapter 9 of the Bankruptcy Code, which prohibits States from creating their own bankruptcy processes for their insolvent municipalities. Because Puerto Rican municipalities cannot access Chapter 9's federal bankruptcy process, however, a nonfederal bankruptcy solution is not merely a parallel option; it is the only existing legal option for Puerto Rico to restructure debts that could cripple its citizens. The structure of the Code and the language and purpose of § 903 demonstrate that Puerto Rico's municipal debt restructuring law should not be read to be prohibited by Chapter 9.

I respectfully dissent.

I

The Commonwealth of Puerto Rico and its municipalities are in the middle of a fiscal crisis. *Ante*, at 118. The combined debt of Puerto Rico's three main public utilities exceeds $20 billion. These utilities provide power, water, sewer, and transportation to residents of the island. With rising interest rates and limited access to capital markets, their debts are proving unserviceable. Soon, Puerto Rico and the utilities contend, they will be unable to pay for things like fuel to generate electricity, which will lead to rolling blackouts. Other vital public services will be imperiled, including the utilities' ability to provide safe drinking water, maintain roads, and operate public transportation.

When debtors face untenable debt loads, bankruptcy is the primary tool the law uses to forge workable long-term solutions. By requiring a debtor and creditors to negotiate together and forcing both sides to make concessions within the limits set by law, bankruptcy gives the debtor a "fresh start," discourages creditors from racing each other to sue the debtor, prohibits a small number of holdout creditors from blocking a compromise, protects important creditor rights such as the prioritization of debts, and allows all parties to find equitable and efficient solutions to fiscal problems. See *Marrama* v. *Citizens Bank of Mass.*, 549 U. S. 365, 367 (2007); *Young* v. *Higbee Co.*, 324 U. S. 204, 210 (1945).

These concerns are starkly presented in the context of municipal entities like public utilities. While a business corporation can use bankruptcy to reorganize, and, if that fails, fold up shop and liquidate all of its assets, governments cannot shut down powerplants, water, hospitals, sewers, and trains and leave citizens to fend for themselves. A "fresh start" can help not only the unfortunate individual debtor but also—and perhaps especially—the unfortunate municipality and its people. See *United States* v. *Bekins*, 304 U. S. 27, 53–54 (1938).

Congress has excluded the municipalities of Puerto Rico and the District of Columbia from the federal municipal bankruptcy scheme in Chapter 9 of the Bankruptcy Code. See 11 U. S. C. §§ 101(52), 109(c). So, in 2014, the Puerto Rican Government enacted the Puerto Rico Public Corporation Debt Enforcement and Recovery Act (Recovery Act or Act). 2014 Laws P. R. p. 371. The Act authorizes Puerto Rico's public utilities to restructure their debts while continuing to provide essential public services like electricity and water. Portions of the Act mirror Chapter 9 of the Bankruptcy Code and allow Puerto Rico's utilities to renegotiate their debts with their creditors. See *ante*, at 119. Like a restructuring plan filed under Chapter 9, a restructuring plan under the Recovery Act that is approved by at least a

majority of creditors and a court would be binding on all creditors, including objecting holdouts.

After the Recovery Act was signed into law, mutual funds and hedge funds holding bonds of the Puerto Rico Electric Power Authority filed two lawsuits seeking to enjoin Puerto Rico's enforcement of the Act. The District Court held that the Recovery Act could not be enforced because, *inter alia*, it was prohibited by § 903(1) of the Bankruptcy Code. The First Circuit agreed that § 903(1) pre-empted the Act and did not address whether some provisions of the Act might be unlawful for other reasons. This Court now affirms.

II

Bankruptcy is not a one-size-fits-all process. The Federal Bankruptcy Code sets out specific procedures and governing law for each type of entity that seeks bankruptcy protection. To see how this approach works, consider the structure of the Code in more depth.

Chapter 1 is the starting point. It sets out how to read the Code. See 11 U. S. C. § 101 *et seq.* For example, § 101 sets out general definitions, and § 102 provides rules of construction. Now skip ahead to § 109, titled, "Who may be a debtor." That section tells would-be debtors and the interested parties in their bankruptcy which specific bankruptcy laws apply to them. For example, § 109 tells an ordinary person seeking to restructure her debts to do so using the rules outlined in Chapter 7, § 109(b), or those enumerated in Chapter 13, § 109(e). It tells a family farm or fisherman to use the rules outlined in Chapter 12. § 109(f). Certain corporations can use Chapter 7, § 109(b), or Chapter 11, § 109(d). And a municipality's bankruptcy is governed by the rules in Chapter 9. § 109(c)(1).

Because § 109 tells different kinds of debtors which bodies of bankruptcy law apply to them, the Court has described that section as a "'gateway'" provision. *Ante,* at 122. Once an entity meets the eligibility requirements for a spe-

cific "gateway" set out in § 109 and elects to pass through that gateway, it becomes subject to the relevant chapter of the Code—7, 9, 11, 12, or 13. The debtor, its creditors, and any other interested parties are governed only by that chapter and the chapters of the Bankruptcy Code—like Chapter 1—that apply to all cases. See § 103; 1 Collier Pamphlet Edition, Bankruptcy Code 2016, p. 59 ("[A]s a general rule, the provisions of the particular chapter apply only in that chapter").

Interpreting statutory provisions in the context of the operative chapters in the Bankruptcy Code in which they appear is not unusual—it is how the Code is designed to work. For example, both Chapter 9 and Chapter 13 require the debtor to "file a plan" proposing how the court should reorganize its debts. Compare §§ 941–946 ("The Plan" under Chapter 9) with §§ 1321–1330 ("The Plan" under Chapter 13). But no bankruptcy court or practitioner would suggest that a Chapter 9 "plan" also has to satisfy the requirements of Chapter 13. The Code is read in context.

These cases concern § 109's "gateway" for municipalities. That provision says that a municipality may file for bankruptcy under Chapter 9 if and only if it meets five eligibility criteria. The debtor must (1) be "a municipality," § 109(c)(1); (2) be "specifically authorized . . . by State law" to seek bankruptcy restructuring, § 109(c)(2); (3) be "insolvent," § 109(c)(3); (4) have a "desir[e] to effect a plan to adjust" its debts, § 109(c)(4); and (5) have attempted to negotiate with its creditors, with some exceptions, § 109(c)(5).

The second eligibility requirement is relevant here. Only a municipality "authorized . . . by *State* law" may pass through the "gateway" and file for bankruptcy under Chapter 9's provisions. But Chapter 1's definitional provision, which applies throughout the Code, provides that the "term 'State' includes the District of Columbia and Puerto Rico, except for the purpose of defining who may be a debtor under chapter 9 of this title." § 101(52). It is undisputed

that the "except for the purpose of defining who may be a debtor under chapter 9" clause is referring to the second eligibility prerequisite in § 109's gateway provision. *Ante*, at 124. So, in short, Puerto Rico cannot "specifically authoriz[e]" any of its municipalities to apply for Chapter 9 bankruptcy. No Puerto Rican municipality will thus satisfy the state authorization requirement of § 109's gateway for municipalities, and so no Puerto Rican municipality can access Chapter 9.[1]

The question in these cases is whether § 903(1), a preemption provision in Chapter 9, still applies to Puerto Rico even though its municipalities are not eligible to pass through the "gateway" into Chapter 9. It should not. Section 903 by its terms presupposes that Chapter 9 applies only to States who have the power to authorize their municipalities to invoke its protection.

Section 903 delineates the balance of power between the States that can authorize their municipalities to access Chapter 9 protection and the bankruptcy court that would preside over any municipal bankruptcy commenced under Chapter 9. To understand that interplay, and why § 903(1) does not preempt the Recovery Act, it is important to consider that statutory provision in context.

Section 903, titled "Reservation of State power to control municipalities," reads in full:

> "This chapter [Chapter 9] does not limit or impair the power of a State to control, by legislation or otherwise, a municipality of or in such State in the exercise of the political or governmental powers of such municipality, including expenditures for such exercise, but—

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[1] Puerto Rico was initially included in the scope of Chapter 9. § 1(29), 52 Stat. 842. But in 1984, Congress amended the Bankruptcy Code, without comment, to bar Puerto Rico and the District of Columbia from authorizing their municipalities to access Chapter 9. § 421(j)(6), 98 Stat. 368–369, codified at 11 U. S. C. § 101(52).

> "(1) a State law prescribing a method of composition of indebtedness of such municipality may not bind any creditor that does not consent to such composition; and
>
> "(2) a judgment entered under such a law may not bind a creditor that does not consent to such composition."

This "reservation" of power to the States was added to the Code in response to this Court's earlier recognition that States possess plenary control over their municipalities, particularly in fiscal matters. *Faitoute Iron & Steel Co.* v. *Asbury Park*, 316 U. S. 502, 509 (1942), overruled in part by Act of July 1, 1946, 60 Stat. 415. Section 903 says that States continue to possess those powers not implicated by the bankruptcy itself by noting that "[t]his chapter," *i. e.*, Chapter 9, "does not limit or impair the power of a State to control" its municipalities. § 903. For example, even if a municipality is in Chapter 9 bankruptcy, a State could still revoke its charter.

Section 903, however, also subjects that broad reservation to an exception articulated in the pre-emption provision that the Court now says bars Puerto Rico's Recovery Act. States may control their municipalities, but they may not "prescrib[e] a method of composition of indebtedness of [a] municipality" that "bind[s] any creditor that does not consent to such composition." § 903(1).

But this distribution of power between the State and the bankruptcy court is irrelevant to Puerto Rico. Because Puerto Rico's municipalities cannot pass through the § 109(c) gateway to Chapter 9, nothing in the operation of a Chapter 9 case affects Puerto Rico's control over its municipalities. The "reservation" preamble is therefore meaningless to Puerto Rico—there is no power to reserve from Chapter 9's operation. And if this preamble does not and cannot apply to Puerto Rico, it follows that § 903(1)'s proviso qualifying that reservation of power to the States does not apply to

Puerto Rico either. See, *e. g.*, *United States* v. *Morrow*, 266 U. S. 531, 534–535 (1925).

This understanding of § 903 is fundamentally confirmed by the careful gateway structure the Code sets out for understanding how its chapters work together. See *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 320 (2014) ("'"[W]ords of a statute must be read in their context and with a view to their place in the overall statutory scheme"'" (quoting *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 133 (2000))). Chapter 1's definitions section prevents Puerto Rico from defining "who may be a debtor under chapter 9" under § 109(c)'s gateway. Because of the structure of the Code, that change to Chapter 1's definition has ripple effects. By amending the definition of State to exclude Puerto Rico, the District of Columbia, and their municipalities from § 109(c)'s gateway, Congress excluded Puerto Rico from Chapter 9 for all purposes—it shut the gate and barred it tight. And because Chapter 9's process and rules by their terms can only affect municipalities and States eligible to pass through the gateway in § 109(c), that must mean that none of Chapter 9's provisions—including § 903's pre-emption provision—apply to Puerto Rico and its municipalities.

III

The Court rejects contextual analysis in favor of a syllogism. According to the Court, § 903(1) pre-empts all "State" composition laws like Puerto Rico's that bind nonconsenting municipal creditors. "State" includes Puerto Rico, "except for the purpose of defining who may be a debtor under chapter 9 of this title," § 101(52), which is a reference to § 109(c). Thus, according to the Court, while the definition of "State" prevents Puerto Rico from authorizing its municipalities to seek Chapter 9 protection under § 109(c), it has no effect on the pre-emption clause in § 903(1).

The majority's plain meaning syllogism is not without force. But it ignores this Court's repeated exhortations to

read statutes in context of the overall statutory scheme. *Utility Air*, 573 U. S., at 320. In context, for the reasons discussed, § 903 is directed to States that can approve their municipalities for Chapter 9 bankruptcy. Moreover, in an attempt to buttress its syllogism, the majority's analysis makes an additional critical misstep.

The majority argues that, in light of the longstanding nature of the § 903(1)'s pre-emption provision to preclude state municipal bankruptcy laws, "[h]ad Congress intended to 'alter this fundamental detail' of municipal bankruptcy" to not apply to Puerto Rico, "we would expect the text of the amended definition to say so. Congress 'does not, one might say, hide elephants in mouseholes.'" *Ante*, at 127 (quoting *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001); citation and brackets omitted). But the Court ignores that Congress already altered the fundamental details of municipal bankruptcy when it amended the definition of "State" to exclude Puerto Rico from authorizing its municipalities to take advantage of Chapter 9. Nobody has presented a compelling reason for why Congress would have done so, and the legislative history of the amendment is unhelpful.[2] Under either interpretation the scheme has been fundamentally altered by Congress. And, in context, the proper understanding of that alteration is that Puerto Rico and its municipalities have been removed entirely from Chapter 9—both from the benefits it provides and from the burden of the pre-emption clause in § 903(1).

Pre-emption cases may seem like abstract discussions of the appropriate balance between state and federal power.

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[2] The only comment on excluding Puerto Rico from Chapter 9 came from Professor Frank Kennedy, former Executive Director of the Commission on Bankruptcy Laws, who said: "I do not understand why the municipal corporations of Puerto Rico are denied by the proposed definition of 'State' of the right to seek relief under Chapter 9." Bankruptcy Improvements Act, Hearing on S. 333 et al. before the Senate Committee on the Judiciary, 98th Cong., 1st Sess., 326 (1983).

But they have real-world consequences. Finding pre-emption here means that a government is left powerless and with no legal process to help its 3.5 million citizens.

Congress could step in to resolve Puerto Rico's crisis. But, in the interim, the government and people of Puerto Rico should not have to wait for possible congressional action to avert the consequences of unreliable electricity, transportation, and safe water—consequences that members of the Executive and Legislative Branches have described as a looming "humanitarian crisis." The White House, Addressing Puerto Rico's Economic and Fiscal Crisis and Creating a Path to Recovery, p. 1 (Oct. 26, 2015) (italics deleted); Letter from Sen. Richard Blumenthal et al. to Charles Grassley, Chair, Senate Committee on the Judiciary (Sept. 30, 2015). Statutes should not easily be read as removing the power of a government to protect its citizens.

* * *

For the foregoing reasons, I would hold that § 903(1) of the Bankruptcy Code does not pre-empt Puerto Rico's Recovery Act. I respectfully dissent.

Syllabus

UNITED STATES *v.* BRYANT

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

No. 15–420. Argued April 19, 2016—Decided June 13, 2016

In response to the high incidence of domestic violence against Native American women, Congress enacted a felony offense of domestic assault in Indian country by a habitual offender. 18 U. S. C. § 117(a). Section 117(a)(1) provides that any person who "commits a domestic assault within . . . Indian country" and who has at least two prior final convictions for domestic violence rendered "in Federal, State, or Indian tribal court proceedings . . . shall be fined . . . , imprisoned for a term of not more than 5 years, or both . . . ." Having two prior tribal-court convictions for domestic violence crimes is thus a predicate of the new offense.

This case raises the question whether § 117(a)'s inclusion of tribal-court convictions as predicate offenses is compatible with the Sixth Amendment's right to counsel. The Sixth Amendment guarantees indigent defendants appointed counsel in any state or federal criminal proceeding in which a term of imprisonment is imposed, *Scott* v. *Illinois*, 440 U. S. 367, 373–374, but it does not apply in tribal-court proceedings, see *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U. S. 316, 337. The Indian Civil Rights Act of 1968 (ICRA), which governs tribal-court proceedings, accords a range of procedural safeguards to tribal-court defendants "similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment," *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 57. In particular, ICRA provides indigent defendants with a right to appointed counsel only for sentences exceeding one year. 25 U. S. C. § 1302(c)(2). ICRA's right to counsel therefore is not coextensive with the Sixth Amendment right.

This Court has held that a conviction obtained in state or federal court in violation of a defendant's Sixth Amendment right to counsel cannot be used in a subsequent proceeding "to support guilt or enhance punishment for another offense." *Burgett* v. *Texas*, 389 U. S. 109, 115. Use of a constitutionally infirm conviction would cause "the accused in effect [to] suffe[r] anew from the [prior] deprivation of [his] Sixth Amendment right." *Ibid.* *Burgett*'s principle was limited by the Court's holding in *Nichols* v. *United States*, 511 U. S. 738, that "an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction," *id.*, at 748–749.

Syllabus

Respondent Michael Bryant, Jr., has multiple tribal-court convictions for domestic assault. When convicted, Bryant was indigent and was not appointed counsel. For most of his convictions, he was sentenced to terms of imprisonment not exceeding one year's duration. Because of his short prison terms, the prior tribal-court proceedings complied with ICRA, and his convictions were therefore valid when entered. Based on domestic assaults he committed in 2011, Bryant was indicted on two counts of domestic assault by a habitual offender, in violation of § 117(a). Represented in federal court by appointed counsel, he contended that the Sixth Amendment precluded use of his prior, uncounseled, tribal-court misdemeanor convictions to satisfy § 117(a)'s predicate-offense element and moved to dismiss the indictment. The District Court denied the motion; Bryant pleaded guilty, reserving the right to appeal. The Ninth Circuit reversed the conviction and directed dismissal of the indictment. It comprehended that Bryant's uncounseled tribal-court convictions were valid when entered because the Sixth Amendment right to counsel does not apply in tribal-court proceedings. It held, however, that Bryant's tribal-court convictions could not be used as predicate convictions within § 117(a)'s compass because they would have violated the Sixth Amendment had they been rendered in state or federal court.

Held: Because Bryant's tribal-court convictions occurred in proceedings that complied with ICRA and were therefore valid when entered, use of those convictions as predicate offenses in a § 117(a) prosecution does not violate the Constitution.

Nichols instructs that convictions valid when entered retain that status when invoked in a subsequent proceeding. *Nichols* reasoned that "[e]nhancement statutes . . . do not change the penalty imposed for the earlier conviction"; rather, repeat-offender laws "penaliz[e] only the last offense committed by the defendant." 511 U. S., at 747. Bryant's sentence for violating § 117(a) punishes his most recent acts of domestic assault, not his prior crimes prosecuted in tribal court. He was denied no right to counsel in tribal court, and his Sixth Amendment right was honored in federal court. Bryant acknowledges that *Nichols* would have allowed reliance on uncounseled tribal-court convictions resulting in fines to satisfy § 117(a)'s prior-crimes predicate. But there is no cause to distinguish for § 117(a) purposes between fine-only tribal-court convictions and valid but uncounseled tribal-court convictions resulting in imprisonment for a term not exceeding one year. Neither violates the Sixth Amendment. Bryant is not aided by *Burgett*. A defendant convicted in tribal court suffered no Sixth Amendment violation in the first instance, so he cannot "suffe[r] anew" from a prior deprivation in his federal prosecution.

Bryant also invokes the Due Process Clause of the Fifth Amendment to support his assertion that tribal-court judgments should not be used as predicate offenses under § 117(a). ICRA, however, guarantees "due process of law," accords other procedural safeguards, and permits a prisoner to challenge the fundamental fairness of tribal-court proceedings in federal habeas corpus proceedings. Because proceedings in compliance with ICRA sufficiently ensure the reliability of tribal-court convictions, the use of those convictions in a federal prosecution does not violate a defendant's due process right. Pp. 154–157.

769 F. 3d 671, reversed and remanded.

GINSBURG, J., delivered the opinion for a unanimous Court. THOMAS, J., filed a concurring opinion, *post*, p. 157.

Elizabeth B. Prelogar argued the cause for the United States. With her on the briefs were *Solicitor General Verrilli*, *Assistant Attorney General Caldwell*, *Deputy Solicitor General Dreeben*, and *Demetra Lambros.*

Steven C. Babcock argued the cause for respondent. With him on the brief were *Anthony R. Gallagher*, *Michael Donahoe*, and *Joslyn Hunt.**

JUSTICE GINSBURG delivered the opinion of the Court.

In response to the high incidence of domestic violence against Native American women, Congress, in 2005, enacted 18 U. S. C. § 117(a), which targets serial offenders. Section 117(a) makes it a federal crime for any person to "commi[t] a

*Briefs of *amici curiae* urging reversal were filed for the National Congress of American Indians by *Joshua M. Segal* and *Mark P. Gaber*; for the National Indigenous Women's Resource Center et al. by *Mary Kathryn Nagle*; and for Dennis K. Burke et al. by *Eric J. Magnuson* and *Katherine S. Barrett Wiik*.

Briefs of *amici curiae* urging affirmance were filed for the Citizens Equal Rights Foundation by *James J. Devine, Jr.*; for Criminal Justice Organizations et al. by *Gene C. Schaerr*, *S. Kyle Duncan*, *Sara B. Thomas*, *David J. Euchner*, *Mikel P. Steinfeld*, *Talmage E. Newton IV*, *Rankin Johnson IV*, and *Thomas E. Weaver*; for the National Association of Criminal Defense Lawyers et al. by *Daniel L. Kaplan* and *Barbara E. Bergman*; and for Barbara L. Creel et al. by *Ms. Creel*, *pro se*, and *John P. LaVelle.*

domestic assault within . . . Indian country" if the person has at least two prior final convictions for domestic violence rendered "in Federal, State, or Indian tribal court proceedings." See Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA Reauthorization Act), Pub. L. 109–162, §§ 901, 909, 119 Stat. 3077, 3084.[1] Respondent Michael Bryant, Jr., has multiple tribal-court convictions for domestic assault. For most of those convictions, he was sentenced to terms of imprisonment, none of them exceeding one year's duration. His tribal-court convictions do not count for § 117(a) purposes, Bryant maintains, because he was uncounseled in those proceedings.

The Sixth Amendment guarantees indigent defendants, in state and federal criminal proceedings, appointed counsel in any case in which a term of imprisonment is imposed. *Scott* v. *Illinois*, 440 U. S. 367, 373–374 (1979). But the Sixth Amendment does not apply to tribal-court proceedings. See *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U. S. 316, 337 (2008). The Indian Civil Rights Act of 1968 (ICRA), Pub. L. 90–284, 82 Stat. 77, 25 U. S. C. § 1301 *et seq.*, which governs criminal proceedings in tribal courts, requires appointed counsel only when a sentence of more than one year's imprisonment is imposed. § 1302(c)(2). Bryant's tribal-court convictions, it is undisputed, were valid when entered. This case presents the question whether those convictions, though uncounseled, rank as predicate offenses within the compass of § 117(a). Our answer is yes. Bryant's tribal-court convictions did not violate the Sixth Amendment when obtained, and they retain their validity when invoked in a § 117(a) prosecution. That proceeding generates no Sixth Amendment defect where none previously existed.

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[1] "Indian country" is defined in 18 U. S. C. § 1151 to encompass all land within any Indian reservation under federal jurisdiction, all dependent Indian communities, and all Indian allotments, the Indian titles to which have not been extinguished.

I

A

"[C]ompared to all other groups in the United States," Native American women "experience the highest rates of domestic violence." 151 Cong. Rec. 9061 (2005) (remarks of Sen. McCain). According to the Centers for Disease Control and Prevention, as many as 46% of American Indian and Alaska Native women have been victims of physical violence by an intimate partner. Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, M. Black et al., National Intimate Partner and Sexual Violence Survey 2010 Summary Report 40 (2011) (Table 4.3), online at http://www.cdc.gov/ViolencePrevention/pdf/NISVS_report2010-a.pdf (all Internet materials as last visited June 9, 2016). American Indian and Alaska Native women "are 2.5 times more likely to be raped or sexually assaulted than women in the United States in general." Dept. of Justice, Attorney General's Advisory Committee on American Indian and Alaska Native Children Exposed to Violence, Ending Violence So Children Can Thrive 38 (Nov. 2014), online at https://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2015/03/23/ending_violence_so_children_can_thrive.pdf. American Indian women experience battery "at a rate of 23.2 per 1,000, compared with 8 per 1,000 among Caucasian women," and they "experience 7 sexual assaults per 1,000, compared with 4 per 1,000 among Black Americans, 3 per 1,000 among Caucasians, 2 per 1,000 among Hispanic women, and 1 per 1,000 among Asian women." VAWA Reauthorization Act, § 901, 119 Stat. 3077.

As this Court has noted, domestic abusers exhibit high rates of recidivism, and their violence "often escalates in severity over time." *United States* v. *Castleman*, 572 U. S. 157, 160 (2014). Nationwide, over 75% of female victims of intimate-partner violence have been previously victimized by the same offender, Dept. of Justice, Bureau of Justice Sta-

tistics, S. Catalano, Intimate Partner Violence 1993–2010, p. 4 (rev. 2015) (Figure 4), online at http://www.bjs.gov/content/pub/pdf/ipv9310.pdf, often multiple times, Dept. of Justice, National Institute of Justice, P. Tjaden & N. Thoennes, Extent, Nature, and Consequences of Intimate Partner Violence, p. iv (2000), online at https://www.ncjrs.gov/pdffiles1/nij/181867.pdf ("[W]omen who were physically assaulted by an intimate partner averaged 6.9 physical assaults by the same partner."). Incidents of repeating, escalating abuse more than occasionally culminate in a fatal attack. See VAWA Reauthorization Act, § 901, 119 Stat. 3077–3078 ("[D]uring the period 1979 through 1992, homicide was the third leading cause of death of Indian females aged 15 to 34, and 75 percent were killed by family members or acquaintances.").

The "complex patchwork of federal, state, and tribal law" governing Indian country, *Duro* v. *Reina*, 495 U. S. 676, 680, n. 1 (1990), has made it difficult to stem the tide of domestic violence experienced by Native American women. Although tribal courts may enforce the tribe's criminal laws against Indian defendants, Congress has curbed tribal courts' sentencing authority. At the time of § 117(a)'s passage, ICRA limited sentences in tribal court to a maximum of one year's imprisonment. 25 U. S. C. § 1302(a)(7) (2006 ed.).[2] Congress has since expanded tribal courts' sentencing authority, allowing them to impose up to three years' imprisonment, contingent on adoption of additional procedural safeguards. 124 Stat. 2279–2280 (codified at 25 U. S. C. § 1302(a)(7)(C), (c)).[3] To date, however, few tribes have employed this enhanced sentencing authority. See Tribal Law and Policy Inst., Implementation Chart: VAWA

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[2] Until 1986, ICRA permitted sentences of imprisonment up to only six months. See 100 Stat. 3207–146.

[3] Among the additional safeguards attending longer sentences is the unqualified right of an indigent defendant to appointed counsel. 25 U. S. C. § 1302(c)(1), (2).

Enhanced Jurisdiction and TLOA Enhanced Sentencing, online at http://www.tribal-institute.org/download/VAWA/VAWAImplementationChart.pdf.[4]

States are unable or unwilling to fill the enforcement gap. Most States lack jurisdiction over crimes committed in Indian country against Indian victims. See *United States* v. *John*, 437 U. S. 634, 651 (1978). In 1953, Congress increased the potential for state action by giving six States "jurisdiction over specified areas of Indian country within the States and provid[ing] for the [voluntary] assumption of jurisdiction by other States." *California* v. *Cabazon Band of Mission Indians*, 480 U. S. 202, 207 (1987) (footnote omitted). See Act of Aug. 15, 1953, Pub. L. 280, 67 Stat. 588 (codified, as amended, at 18 U. S. C. § 1162 and 25 U. S. C. §§ 1321–1328, 1360). States so empowered may apply their own criminal laws to "offenses committed by or against Indians within all Indian country within the State." *Cabazon Band of Mission Indians*, 480 U. S., at 207; see 18 U. S. C. § 1162(a). Even when capable of exercising jurisdiction, however, States have not devoted their limited criminal justice resources to crimes committed in Indian country. Jimenez & Song, Concurrent Tribal and State Jurisdiction Under Public Law 280, 47 Am. U. L. Rev. 1627, 1636–1637 (1998); Tribal Law and Policy Inst., S. Deer, C. Goldberg, H. Valdez Singleton, & M. White Eagle, Final Report: Focus Group on

[4] Tribal governments generally lack criminal jurisdiction over non-Indians who commit crimes in Indian country. See *Oliphant* v. *Suquamish Tribe*, 435 U. S. 191, 195 (1978). In the Violence Against Women Reauthorization Act of 2013, Congress amended ICRA to authorize tribal courts to "exercise special domestic violence criminal jurisdiction" over certain domestic violence offenses committed by a non-Indian against an Indian. Pub. L. 113–4, § 904, 127 Stat. 120–122 (codified at 25 U. S. C. § 1304). Tribal courts' exercise of this jurisdiction requires procedural safeguards similar to those required for imposing on Indian defendants sentences in excess of one year, including the unqualified right of an indigent defendant to appointed counsel. See § 1304(d). We express no view on the validity of those provisions.

Public Law 280 and the Sexual Assault of Native Women 7–8 (2007), online at http://www.tribal-institute.org/download/Final%20280%20FG%20Report.pdf.

That leaves the Federal Government. Although federal law generally governs in Indian country, Congress has long excluded from federal-court jurisdiction crimes committed by an Indian against another Indian. 18 U. S. C. § 1152; see *Ex parte Crow Dog*, 109 U. S. 556, 572 (1883) (requiring "a clear expression of the intention of Congress" to confer federal jurisdiction over crimes committed by an Indian against another Indian). In the Major Crimes Act, Congress authorized federal jurisdiction over enumerated grave criminal offenses when the perpetrator is an Indian and the victim is "another Indian or other person," including murder, manslaughter, and felony assault. § 1153. At the time of § 117(a)'s enactment, felony assault subject to federal prosecution required "serious bodily injury," § 113(a)(6) (2006 ed.), meaning "a substantial risk of death," "extreme physical pain," "protracted and obvious disfigurement," or "protracted loss or impairment of the function of a bodily member, organ, or mental faculty." § 1365(h)(3) (incorporated through § 113(b)(2)).[5] In short, when § 117(a) was before Congress, Indian perpetrators of domestic violence "escape[d] felony charges until they seriously injure[d] or kill[ed] someone." 151 Cong. Rec. 9062 (2005) (remarks of Sen. McCain).

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[5] Congress has since expanded the definition of felony assault to include "[a]ssault resulting in substantial bodily injury to a spouse[,] . . . intimate partner, [or] dating partner" and "[a]ssault of a spouse, intimate partner, or dating partner by strangling, suffocating, or attempting to strangle or suffocate." Violence Against Women Reauthorization Act of 2013, § 906, 127 Stat. 124 (codified at 18 U. S. C. § 113(a)(7), (8)). The "substantial bodily injury" requirement remains difficult to satisfy, as it requires "a temporary but substantial disfigurement" or "a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty." § 113(b)(1).

As a result of the limitations on tribal, state, and federal jurisdiction in Indian country, serial domestic violence offenders, prior to the enactment of § 117(a), faced at most a year's imprisonment per offense—a sentence insufficient to deter repeated and escalating abuse. To ratchet up the punishment of serial offenders, Congress created the federal felony offense of domestic assault in Indian country by a habitual offender. § 117(a); see 792 F. 3d 1042, 1045 (2015) (Owens, J., dissenting from denial of rehearing en banc) ("Tailored to the unique problems . . . that American Indian and Alaska Native Tribes face, § 117(a) provides felony-level punishment for serial domestic violence offenders, and it represents the first true effort to remove these recidivists from the communities that they repeatedly terrorize."). The section provides in pertinent part:

> "Any person who commits a domestic assault within . . . Indian country and who has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction any assault, sexual abuse, or serious violent felony against a spouse or intimate partner . . . shall be fined . . . , imprisoned for a term of not more than 5 years, or both . . . ." § 117(a)(1).[6]

Having two prior convictions for domestic violence crimes—including tribal-court convictions—is thus a predicate of the new offense.

B

This case requires us to determine whether § 117(a)'s inclusion of tribal-court convictions is compatible with the Sixth

[6] Section 117(a) has since been amended to include as qualifying predicate offenses, in addition to intimate-partner crimes, "assault, sexual abuse, [and] serious violent felony" offenses committed "against a child of or in the care of the person committing the domestic assault." 18 U. S. C. § 117(a) (2012 ed., Supp. II).

Amendment's right to counsel. The Sixth Amendment to the U. S. Constitution guarantees a criminal defendant in state or federal court "the Assistance of Counsel for his defence." See *Gideon* v. *Wainwright*, 372 U. S. 335, 339 (1963). This right, we have held, requires appointment of counsel for indigent defendants whenever a sentence of imprisonment is imposed. *Argersinger* v. *Hamlin*, 407 U. S. 25, 37 (1972). But an indigent defendant has no constitutional right to appointed counsel if his conviction results in a fine or other noncustodial punishment. *Scott*, 440 U. S., at 373–374.

"As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 56 (1978). The Bill of Rights, including the Sixth Amendment right to counsel, therefore, does not apply in tribal-court proceedings. See *Plains Commerce Bank*, 554 U. S., at 337.

In ICRA, however, Congress accorded a range of procedural safeguards to tribal-court defendants "similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment." *Martinez*, 436 U. S., at 57; see *id.*, at 62–63 (ICRA "modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments"). In addition to other enumerated protections, ICRA guarantees "due process of law," 25 U. S. C. § 1302(a)(8), and allows tribal-court defendants to seek habeas corpus review in federal court to test the legality of their imprisonment, § 1303.

The right to counsel under ICRA is not coextensive with the Sixth Amendment right. If a tribal court imposes a sentence in excess of one year, ICRA requires the court to accord the defendant "the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution," including appointment of counsel for an indigent defendant at the tribe's expense. § 1302(c)(1), (2). If

the sentence imposed is no greater than one year, however, the tribal court must allow a defendant only the opportunity to obtain counsel "at his own expense." § 1302(a)(6). In tribal court, therefore, unlike in federal or state court, a sentence of imprisonment up to one year may be imposed without according indigent defendants the right to appointed counsel.

The question here presented: Is it permissible to use uncounseled tribal-court convictions—obtained in full compliance with ICRA—to establish the prior-crimes predicate of § 117(a)? It is undisputed that a conviction obtained in violation of a defendant's Sixth Amendment right to counsel cannot be used in a subsequent proceeding "either to support guilt or enhance punishment for another offense." *Burgett* v. *Texas*, 389 U. S. 109, 115 (1967). In *Burgett*, we held that an uncounseled felony conviction obtained in state court in violation of the right to counsel could not be used in a subsequent proceeding to prove the prior-felony element of a recidivist statute. To permit such use of a constitutionally infirm conviction, we explained, would cause "the accused in effect [to] suffe[r] anew from the [prior] deprivation of [his] Sixth Amendment right." *Ibid.*; see *United States* v. *Tucker*, 404 U. S. 443, 448 (1972) (invalid, uncounseled prior convictions could not be relied upon at sentencing to impose a longer term of imprisonment for a subsequent conviction); cf. *Loper* v. *Beto*, 405 U. S. 473, 483–484 (1972) (plurality opinion) ("use of convictions constitutionally invalid under *Gideon* v. *Wainwright* to impeach a defendant's credibility deprives him of due process of law" because the prior convictions "lac[k] reliability").

In *Nichols* v. *United States*, 511 U. S. 738 (1994), we stated an important limitation on the principle recognized in *Burgett*. In the case under review, Nichols pleaded guilty to a federal felony drug offense. 511 U. S., at 740. Several years earlier, unrepresented by counsel, he had been convicted of driving under the influence (DUI), a state-law mis-

demeanor, and fined $250 but not imprisoned. *Ibid.* Nichols' DUI conviction, under the then-mandatory Sentencing Guidelines, effectively elevated by about two years the sentencing range for Nichols' federal drug offense. *Ibid.* We rejected Nichols' contention that, as his later sentence for the federal drug offense involved imprisonment, use of his uncounseled DUI conviction to elevate that sentence violated the Sixth Amendment. *Id.*, at 746–747. "[C]onsistent with the Sixth and Fourteenth Amendments of the Constitution," we held, "an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction." *Id.*, at 748–749.

C

Respondent Bryant's conduct is illustrative of the domestic violence problem existing in Indian country. During the period relevant to this case, Bryant, an enrolled member of the Northern Cheyenne Tribe, lived on that Tribe's reservation in Montana. He has a record of over 100 tribal-court convictions, including several misdemeanor convictions for domestic assault. Specifically, between 1997 and 2007, Bryant pleaded guilty on at least five occasions in Northern Cheyenne Tribal Court to committing domestic abuse in violation of the Northern Cheyenne Tribal Code. On one occasion, Bryant hit his live-in girlfriend on the head with a beer bottle and attempted to strangle her. On another, Bryant beat a different girlfriend, kneeing her in the face, breaking her nose, and leaving her bruised and bloodied.

For most of Bryant's repeated brutal acts of domestic violence, the Tribal Court sentenced him to terms of imprisonment, never exceeding one year. When convicted of these offenses, Bryant was indigent and was not appointed counsel. Because of his short prison terms, Bryant acknowledges, the prior tribal-court proceedings complied with ICRA, and his convictions were therefore valid when entered. Bryant has

never challenged his tribal-court convictions in federal court under ICRA's habeas corpus provision.

In 2011, Bryant was arrested yet again for assaulting women. In February of that year, Bryant attacked his then girlfriend, dragging her off the bed, pulling her hair, and repeatedly punching and kicking her. During an interview with law enforcement officers, Bryant admitted that he had physically assaulted this woman five or six times. Three months later, he assaulted another woman with whom he was then living, waking her by yelling that he could not find his truck keys and then choking her until she almost lost consciousness. Bryant later stated that he had assaulted this victim on three separate occasions during the two months they dated.

Based on the 2011 assaults, a federal grand jury in Montana indicted Bryant on two counts of domestic assault by a habitual offender, in violation of § 117(a). Bryant was represented in federal court by appointed counsel. Contending that the Sixth Amendment precluded use of his prior, uncounseled, tribal-court misdemeanor convictions to satisfy § 117(a)'s predicate-offense element, Bryant moved to dismiss the indictment. The District Court denied the motion, App. to Pet. for Cert. 32a, and Bryant entered a conditional guilty plea, reserving the right to appeal that decision. Bryant was sentenced to concurrent terms of 46 months' imprisonment on each count, to be followed by three years of supervised release.

The Court of Appeals for the Ninth Circuit reversed the conviction and directed dismissal of the indictment. 769 F. 3d 671 (2014). Bryant's tribal-court convictions were not themselves constitutionally infirm, the Ninth Circuit comprehended, because "the Sixth Amendment right to appointed counsel does not apply in tribal court proceedings." *Id.*, at 675. But, the court continued, had the convictions been obtained in state or federal court, they would have violated the Sixth Amendment because Bryant had received sentences of

imprisonment although he lacked the aid of appointed counsel. Adhering to its prior decision in *United States* v. *Ant*, 882 F. 2d 1389 (CA9 1989),[7] the Court of Appeals held that, subject to narrow exceptions not relevant here, "tribal court convictions may be used in subsequent [federal] prosecutions only if the tribal court guarantees a right to counsel that is, at minimum, coextensive with the Sixth Amendment right." 769 F. 3d, at 677. Rejecting the Government's argument that our decision in *Nichols* required the opposite result, the Ninth Circuit concluded that *Nichols* applies only when the prior conviction *did* comport with the Sixth Amendment, *i. e.*, when no sentence of imprisonment was imposed for the prior conviction. 769 F. 3d, at 677–678.

Judge Watford concurred, agreeing that *Ant* controlled the outcome of this case, but urging reexamination of *Ant* in light of *Nichols*. 769 F. 3d, at 679. This Court's decision in *Nichols*, Judge Watford wrote, "undermines the notion that uncounseled convictions are, as a categorical matter, too unreliable to be used as a basis for imposing a prison sentence in a subsequent case." 769 F. 3d, at 679. The Court of Appeals declined to rehear the case en banc over vigorous dissents by Judges Owens and O'Scannlain.

In disallowing the use of an uncounseled tribal-court conviction to establish a prior domestic violence conviction within § 117(a)'s compass, the Ninth Circuit created a Circuit split. The Eighth and Tenth Circuits have both held that tribal-court "convictions, valid at their inception, and not alleged to be otherwise unreliable, may be used to prove the elements of § 117." *United States* v. *Cavanaugh*, 643 F. 3d

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[7] In *United States* v. *Ant*, 882 F. 2d 1389 (1989), the Ninth Circuit proscribed the use of an uncounseled tribal-court guilty plea as evidence of guilt in a subsequent federal prosecution arising out of the same incident. Use of the plea was impermissible, the Court of Appeals reasoned, "because the tribal court guilty plea was made under circumstances which would have violated the United States Constitution were it applicable to tribal proceedings." *Id.*, at 1390.

592, 594 (CA8 2011); see *United States* v. *Shavanaux*, 647 F. 3d 993, 1000 (CA10 2011). To resolve this disagreement, we granted certiorari, 577 U. S. 1048 (2016), and now reverse.

II

Bryant's tribal-court convictions, he recognizes, infringed no constitutional right because the Sixth Amendment does not apply to tribal-court proceedings. Brief for Respondent 5. Those prior convictions complied with ICRA, he concedes, and therefore were valid when entered. But, had his convictions occurred in state or federal court, Bryant observes, *Argersinger* and *Scott* would have rendered them invalid because he was sentenced to incarceration without representation by court-appointed counsel. Essentially, Bryant urges us to treat tribal-court convictions, for § 117(a) purposes, as though they had been entered by a federal or state court. We next explain why we decline to do so.

As earlier recounted, we held in *Nichols* that "an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction." 511 U. S., at 749. "Enhancement statutes," we reasoned, "do not change the penalty imposed for the earlier conviction"; rather, repeat-offender laws "penaliz[e] only the last offense committed by the defendant." *Id.*, at 747; see *United States* v. *Rodriquez*, 553 U. S. 377, 386 (2008) ("When a defendant is given a higher sentence under a recidivism statute . . . 100% of the punishment is for the offense of conviction. None is for the prior convictions or the defendant's 'status as a recidivist.'"). *Nichols* thus instructs that convictions valid when entered—that is, those that, when rendered, did not violate the Constitution—retain that status when invoked in a subsequent proceeding.

Nichols' reasoning steers the result here. Bryant's 46-month sentence for violating § 117(a) punishes his most recent acts of domestic assault, not his prior crimes prosecuted

in tribal court. Bryant was denied no right to counsel in tribal court, and his Sixth Amendment right was honored in federal court, when he was "adjudicated guilty of the felony offense for which he was imprisoned." *Alabama* v. *Shelton*, 535 U. S. 654, 664 (2002). It would be "odd to say that a conviction untainted by a violation of the Sixth Amendment triggers a violation of that same amendment when it's used in a subsequent case where the defendant's right to appointed counsel is fully respected." 769 F. 3d, at 679 (Watford, J., concurring).[8]

Bryant acknowledges that had he been punished only by fines in his tribal-court proceedings, *Nichols* would have allowed reliance on his uncounseled convictions to satisfy § 117(a)'s prior-crimes predicate. Brief for Respondent 50. We see no cause to distinguish for § 117(a) purposes between valid but uncounseled convictions resulting in a fine and valid but uncounseled convictions resulting in imprisonment not exceeding one year. "Both Nichols's and Bryant's uncounseled convictions 'comport' with the Sixth Amendment, and for *the same reason*: the Sixth Amendment right to appointed counsel did not apply to either conviction." 792 F. 3d, at 1048 (O'Scannlain, J., dissenting from denial of rehearing en banc).

In keeping with *Nichols*, we resist creating a "hybrid" category of tribal-court convictions, "good for the punishment actually imposed but not available for sentence enhancement

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[8] True, as Bryant points out, we based our decision in *Nichols* v. *United States*, 511 U. S. 738, 747 (1994), in part on the "less exacting" nature of sentencing, compared with the heightened burden of proof required for determining guilt. But, in describing the rule we adopted, we said that it encompasses both "criminal history provisions," applicable at sentencing, and "recidivist statutes," of which § 117(a) is one. *Ibid.* Moreover, *Nichols*' two primary rationales—the validity of the prior conviction and the sentence's punishment of "only the last offense"—do not rely on a distinction between guilt adjudication and sentencing. Indeed, it is the validity of the prior conviction that distinguishes *Nichols* from *United States* v. *Tucker*, 404 U. S. 443, 448 (1972), in which we found impermissible the use at sentencing of an *invalid*, uncounseled prior conviction.

in a later prosecution." 511 U. S., at 744. *Nichols* indicates that use of Bryant's uncounseled tribal-court convictions in his § 117(a) prosecution did not "transform his prior, valid, tribal court convictions into new, invalid, federal ones." 792 F. 3d, at 1048 (opinion of O'Scannlain, J.).

Our decision in *Burgett*, which prohibited the subsequent use of a conviction obtained in violation of the right to counsel, does not aid Bryant. Reliance on an invalid conviction, *Burgett* reasoned, would cause the accused to "suffe[r] anew from the deprivation of [his] Sixth Amendment right." 389 U. S., at 115. Because a defendant convicted in tribal court suffers no Sixth Amendment violation in the first instance, "[u]se of tribal convictions in a subsequent prosecution cannot violate [the Sixth Amendment] 'anew.' " *Shavanaux*, 647 F. 3d, at 998.

Bryant observes that reliability concerns underlie our right-to-counsel decisions and urges that those concerns remain even if the Sixth Amendment itself does not shelter him. *Scott* and *Nichols*, however, counter the argument that uncounseled misdemeanor convictions are categorically unreliable, either in their own right or for use in a subsequent proceeding. Bryant's recognition that a tribal-court conviction resulting in a fine would qualify as a § 117(a) predicate offense, we further note, diminishes the force of his reliability-based argument. There is no reason to suppose that tribal-court proceedings are less reliable when a sentence of a year's imprisonment is imposed than when the punishment is merely a fine. No evidentiary or procedural variation turns on the sanction—fine only or a year in prison—ultimately imposed.

Bryant also invokes the Due Process Clause of the Fifth Amendment in support of his assertion that tribal-court judgments should not be used as predicate offenses. But, as earlier observed, ICRA itself requires tribes to ensure "due process of law," § 1302(a)(8), and it accords defendants specific procedural safeguards resembling those contained in

the Bill of Rights and the Fourteenth Amendment. See *supra*, at 149. Further, ICRA makes habeas review in federal court available to persons incarcerated pursuant to a tribal-court judgment. § 1303. By that means, a prisoner may challenge the fundamental fairness of the proceedings in tribal court. Proceedings in compliance with ICRA, Congress determined, and we agree, sufficiently ensure the reliability of tribal-court convictions. Therefore, the use of those convictions in a federal prosecution does not violate a defendant's right to due process. See *Shavanaux*, 647 F. 3d, at 1000; cf. *State* v. *Spotted Eagle*, 316 Mont. 370, 378–379, 71 P. 3d 1239, 1245–1246 (2003) (principles of comity support recognizing uncounseled tribal-court convictions that complied with ICRA).

* * *

Because Bryant's tribal-court convictions occurred in proceedings that complied with ICRA and were therefore valid when entered, use of those convictions as predicate offenses in a § 117(a) prosecution does not violate the Constitution. We accordingly reverse the judgment of the Court of Appeals for the Ninth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, concurring.

The Court holds that neither the Sixth Amendment nor the Fifth Amendment's Due Process Clause prohibits the Government from using Michael Bryant's uncounseled tribal-court convictions as predicates for the federal crime of committing a domestic assault within Indian country. *Ante*, at 157; see 18 U. S. C. § 117(a) (making it a federal crime to "commi[t] a domestic assault within . . . Indian country" if the person "has a final conviction on at least 2 separate prior occasions in . . . Indian tribal court proceedings" for domestic assault and similar crimes). Because our precedents dictate that holding, I join the Court's opinion.

The fact that this case arose at all, however, illustrates how far afield our Sixth Amendment and Indian-law precedents have gone. Three basic assumptions underlie this case: that the Sixth Amendment ordinarily bars the Government from introducing, in a later proceeding, convictions obtained in violation of the right to counsel, *ante*, at 150; that tribes' retained sovereignty entitles them to prosecute tribal members in proceedings that are not subject to the Constitution, *ante*, at 149; and that Congress can punish assaults that tribal members commit against each other on Indian land, *ante*, at 147–148. Although our precedents have endorsed these assumptions for decades, the Court has never identified a sound constitutional basis for any of them, and I see none.

Start with the notion that the Sixth Amendment generally prohibits the government from using a prior, uncounseled conviction obtained in violation of the right to counsel as a predicate for a new offense in a new proceeding. *Ante*, at 150. All that the text of the Sixth Amendment requires in a criminal prosecution is that the accused enjoy the "[a]ssistance of [c]ounsel" in *that* proceeding. The Court was likely wrong in *Burgett* v. *Texas*, 389 U. S. 109 (1967), when it created a Sixth Amendment "exclusionary rule" that prohibits the government from using prior convictions obtained in violation of the right to counsel in subsequent proceedings to avoid "erod[ing] the principle" of the right to counsel. *Id.*, at 115. I would be open to reconsidering *Burgett* in a future case.

The remaining two assumptions underpinning this case exemplify a central tension within our Indian-law jurisprudence. On the one hand, the only reason why tribal courts had the power to convict Bryant in proceedings where he had no right to counsel is that such prosecutions are a function of a tribe's core sovereignty. See *United States* v. *Lara*, 541 U. S. 193, 197 (2004); *United States* v. *Wheeler*, 435 U. S. 313, 318, 322–323 (1978). By virtue of tribes' status as "'separate sovereigns pre-existing the Constitution,'" tribal prose-

cutions need not, under our precedents, comply with "'those constitutional provisions framed specifically as limitations on federal or state authority.'" *Ante*, at 149 (quoting *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 56 (1978)).

On the other hand, the validity of Bryant's ensuing federal conviction rests upon a contrary view of tribal sovereignty. Congress ordinarily lacks authority to enact a general federal criminal law proscribing domestic abuse. See *United States* v. *Morrison*, 529 U. S. 598, 610–613 (2000). But, the Court suggests, Congress must intervene on reservations to ensure that prolific domestic abusers receive sufficient punishment. See *ante*, at 145–147. The Court does not explain where Congress' power to act comes from, but our precedents leave no doubt on this score. Congress could make Bryant's domestic assaults a federal crime subject to federal prosecution only because our precedents have endowed Congress with an "all-encompassing" power over all aspects of tribal sovereignty. *Wheeler*, *supra*, at 319. Thus, even though tribal prosecutions of tribal members are purportedly the apex of tribal sovereignty, Congress can second-guess how tribes prosecute domestic abuse perpetrated by Indians against other Indians on Indian land by virtue of its "plenary power" over Indian tribes. See *United States* v. *Kagama*, 118 U. S. 375, 382–384 (1886); accord, *Lara*, 541 U. S., at 200.

I continue to doubt whether either view of tribal sovereignty is correct. See *id.*, at 215 (THOMAS, J., concurring in judgment). Indian tribes have varied origins, discrete treaties with the United States, and different patterns of assimilation and conquest. In light of the tribes' distinct histories, it strains credulity to assume that all tribes necessarily retained the sovereign prerogative of prosecuting their own members. And by treating all tribes as possessing an identical quantum of sovereignty, the Court's precedents have made it all but impossible to understand the ultimate source of each tribe's sovereignty and whether it endures. See

Prakash, Against Tribal Fungibility, 89 Cornell L. Rev. 1069, 1070–1074, 1107–1110 (2004).

Congress' purported plenary power over Indian tribes rests on even shakier foundations. No enumerated power—not Congress' power to "regulate Commerce . . . with Indian Tribes," not the Senate's role in approving treaties, nor anything else—gives Congress such sweeping authority. See *Lara*, *supra*, at 224–225 (THOMAS, J., concurring in judgment); *Adoptive Couple* v. *Baby Girl*, 570 U. S. 637, 659–665 (2013) (THOMAS, J., concurring). Indeed, the Court created this new power because it was unable to find an enumerated power justifying the federal Major Crimes Act, which for the first time punished crimes committed by Indians against Indians on Indian land. See *Kagama*, *supra*, at 377–380; cf. *ante*, at 147. The Court asserted: "The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection . . . . It must exist in that government, because it has never existed anywhere else." *Kagama*, *supra*, at 384. Over a century later, *Kagama* endures as the foundation of this doctrine, and the Court has searched in vain for any valid constitutional justification for this unfettered power. See, *e. g.*, *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 566–567 (1903) (relying on *Kagama*'s race-based plenary power theory); *Winton* v. *Amos*, 255 U. S. 373, 391–392 (1921) (Congress' "plenary authority" is based on Indians' "condition of tutelage or dependency"); *Wheeler*, *supra*, at 319 (*Winton* and *Lone Wolf* illustrate the "undisputed fact that Congress has plenary authority" over tribes); *Lara*, *supra*, at 224 (THOMAS, J., concurring in judgment) ("The Court utterly fails to find any provision of the Constitution that gives Congress enumerated power to alter tribal sovereignty").

It is time that the Court reconsider these precedents. Until the Court ceases treating all Indian tribes as an undifferentiated mass, our case law will remain bedeviled by amorphous and ahistorical assumptions about the scope of

tribal sovereignty. And, until the Court rejects the fiction that Congress possesses plenary power over Indian affairs, our precedents will continue to be based on the paternalistic theory that Congress must assume all-encompassing control over the "remnants of a race" for its own good. *Kagama*, *supra*, at 384.

Syllabus

KINGDOMWARE TECHNOLOGIES, INC. *v.* UNITED STATES

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

No. 14–916. Argued February 22, 2016—Decided June 16, 2016

The Veterans Benefits, Health Care, and Information Technology Act of 2006 requires the Secretary of Veterans Affairs to set annual goals for contracting with service-disabled and other veteran-owned small businesses. 38 U. S. C. § 8127(a). To help reach those goals, a separate set-aside provision known as the "Rule of Two" provides that a contracting officer "shall award contracts" by restricting competition to veteran-owned small businesses if the officer reasonably expects that at least two such businesses will submit offers and that "the award can be made at a fair and reasonable price that offers best value to the United States." § 8127(d). Two exceptions provide that the contracting officer "may" use noncompetitive and sole-source contracts for contracts below specific dollar amounts. §§ 8127(b), (c).

In 2012, the Department procured an emergency-notification service for four medical centers for a 1-year period, with an option to extend the agreement for two more, from a non-veteran-owned business. The Department did so through the Federal Supply Schedule (FSS), a streamlined method that allows Government agencies to acquire particular goods and services under prenegotiated terms. After the initial year, the Department exercised its option for an additional year, and the agreement ended in 2013.

Petitioner Kingdomware Technologies, Inc., a service-disabled veteran-owned small business, filed a bid protest with the Government Accountability Office (GAO), alleging that the Department procured multiple contracts through the FSS without employing the Rule of Two. The GAO determined that the Department's actions were unlawful, but when the Department declined to follow the GAO's nonbinding recommendation, Kingdomware filed suit, seeking declaratory and injunctive relief. The Court of Federal Claims granted summary judgment to the Government, and the Federal Circuit affirmed, holding that the Department was only required to apply the Rule of Two when necessary to satisfy its annual goals.

Held:

1. This Court has jurisdiction to reach the merits of this case. For a federal court to have Article III jurisdiction "an actual controversy

must exist . . . through all stages of the litigation." *Already, LLC* v. *Nike, Inc.*, 568 U. S. 85, 90–91. Here, no court is capable of granting petitioner relief initially sought in the complaint because the short-term FSS contracts have been completed by other contractors. However, the controversy is "'capable of repetition, yet evading review.'" *Spencer* v. *Kemna*, 523 U. S. 1, 17. The procurements were fully performed in less than two years after they were awarded, and it is reasonable to expect that the Government will refuse to apply the Rule of Two in a future bid by Kingdomware. Pp. 169–170.

2. Section 8127(d)'s contracting procedures are mandatory and apply to all of the Department's contracting determinations. Pp. 171–175.

(a) Section 8127(d)'s text unambiguously requires the Department to use the Rule of Two before contracting under the competitive procedures. The word "shall" usually connotes a requirement, unlike the word "may," which implies discretion. Compare *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U. S. 26, 35, with *United States* v. *Rodgers*, 461 U. S. 677, 706. The use of the word "may" in §§ 8127(b) and (c) confirms this reading; for when a statute distinguishes between "may" and "shall," the latter generally imposes a mandatory duty. Pp. 171–172.

(b) Alternative readings of § 8127(d) are unpersuasive. First, § 8127(d)'s prefatory clause, which declares that the Rule of Two is designed "for the purposes of" meeting § 8127(a)'s annual contracting goals, has no bearing on whether § 8127(d)'s requirement is mandatory or discretionary. The prefatory clause's announcement of an objective does not change the operative clause's plain meaning. See *Yazoo & Mississippi Valley R. Co.* v. *Thomas*, 132 U. S. 174, 188. Second, an FSS order is a "contract" within the ordinary meaning of that term; thus, FSS orders do not fall outside § 8127(d), which applies when the Department "award[s] contracts." Third, to say that the Rule of Two will hamper mundane Government purchases misapprehends current FSS practices, which have expanded well beyond simple procurement to, as in this case, contracts concerning complex information technology services over a multiyear period. Finally, because the mandate § 8127(d) imposes is unambiguous, this Court declines the invitation to defer to the Department's declaration that § 8127 procedures are inapplicable to FSS orders. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843. Pp. 172–175.

754 F. 3d 923, reversed and remanded.

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

Thomas G. Saunders argued the cause for petitioner. With him on the briefs were *Seth P. Waxman*, *Amy K. Wigmore*, *Gregory H. Petkoff*, *Joseph Gay*, *Matthew Guarnieri*, and *Jason D. Hirsch*.

Zachary D. Tripp argued the cause for the United States. With him on the briefs were *Solicitor General Verrilli*, *Principal Deputy Assistant Attorney General Mizer*, *Deputy Solicitor General Stewart*, and *Robert C. Bigler*.*

JUSTICE THOMAS delivered the opinion of the Court.

Petitioner Kingdomware Technologies, Inc., a veteran-owned small business, unsuccessfully vied for a federal contract from the Department of Veterans Affairs to provide emergency-notification services. Kingdomware sued, arguing that the Department violated a federal law providing that it "shall award" contracts to veteran-owned small businesses when there is a "reasonable expectation" that two or more such businesses will bid for the contract at "a fair and reasonable price that offers best value to the United States." 38 U. S. C. §8127(d). This provision is known as the Rule of Two.

In this case, we consider whether the Department must use the Rule of Two every time it awards contracts or whether it must use the Rule of Two only to the extent necessary to meet annual minimum goals for contracting with veteran-owned small businesses. We conclude that the Department must use the Rule of Two when awarding con-

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*Briefs of *amici curiae* urging reversal were filed for the American Legion by *Andrew C. Nichols*, *Steffen N. Johnson*, and *Linda T. Coberly*; for the Federal Circuit Bar Association by *Cyrus E. Phillips IV* and *Edgar H. Haug*; for Iraq and Afghanistan Veterans of America by *C. Peter Dungan*; for Members of Congress by *Jessica Ring Amunson*, *Damien C. Specht*, and *R. Trent McCotter*; for the National Veteran Small Business Coalition et al. by *Luke P. McLoughlin*, *Robert L. Byer*, and *Kristina C. Kelly*; and for Paralyzed Veterans of America et al. by *Paul J. Zidlicky* and *Donald H. Smith*.

Steven J. Koprince, *pro se*, filed a brief as *amicus curiae*.

tracts, even when the Department will otherwise meet its annual minimum contracting goals.

I

This case concerns the interplay between several federal statutes governing federal procurement.

A

In an effort to encourage small businesses, Congress has mandated that federal agencies restrict competition for some federal contracts. The Small Business Act thus requires many federal agencies, including the Department of Veterans Affairs, to set aside contracts to be awarded to small businesses. The Act requires each agency to set "an annual goal that presents, for that agency, the maximum practicable opportunity" for contracting with small businesses, including those "small business concerns owned and controlled by service-disabled veterans." 15 U. S. C. § 644(g)(1)(B). And federal regulations set forth procedures for most agencies to "set aside" contracts for small businesses. See, *e. g.*, 48 CFR § 19.502–2(b) (2015).

In 1999, Congress expanded small-business opportunities for veterans by passing the Veterans Entrepreneurship and Small Business Development Act, 113 Stat. 233. That Act established a 3% governmentwide contracting goal for contracting with service-disabled veteran-owned small businesses. 15 U. S. C. § 644(g)(1)(A)(ii).

When the Federal Government continually fell behind in achieving these goals, Congress tried to correct the situation. Relevant here, Congress enacted the Veterans Benefits, Health Care, and Information Technology Act of 2006, §§ 502, 503, 120 Stat. 3431–3436 (codified, as amended, at 38 U. S. C. §§ 8127, 8128). That Act requires the Secretary of Veterans Affairs to set more specific annual goals that encourage contracting with veteran-owned and service-disabled veteran-owned small businesses. § 8127(a). The

Act's "Rule of Two," at issue here, provides that the Department "shall award" contracts by restricting competition for the contract to service-disabled or other veteran-owned small businesses. To restrict competition under the Act, the contracting officer must reasonably expect that at least two of these businesses will submit offers and that "the award can be made at a fair and reasonable price that offers best value to the United States." § 8127(d).[1]

Congress provided two exceptions to the Rule. Under those exceptions, the Department may use noncompetitive and sole-source contracts when the contracts are below specific dollar amounts. Under § 8127(b), a contracting officer "may use procedures other than competitive procedures" to award contracts to veteran-owned small businesses when the goods or services that are the subject of such contracts are worth less than the simplified acquisition threshold. 38 U. S. C. § 8127(b); 41 U. S. C. § 134 (establishing a " 'simplified acquisition threshold' " of $100,000); see also § 1908 (authorizing adjustments for inflation); 75 Fed. Reg. 53130 (codified at 48 CFR § 2.101 (2010)) (raising the amount to $150,000). And under 38 U. S. C. § 8127(c), a contracting officer "may award a contract to a [veteran-owned small business] using procedures other than competitive procedures" if the contract is worth more than the simplified acquisition threshold but less than $5 million, the contracting officer determines that the business is "a responsible source with respect to performance of such contract opportunity," and the award

[1] This provision reads in full:

"Except as provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States." 38 U. S. C. § 8127(d).

can be made at "a fair and reasonable price." 38 U. S. C. § 8127(c).

In finalizing its regulations meant to implement the Act, the Department stated in a preamble that § 8127's procedures "do not apply to [Federal Supply Schedule] task or delivery orders." VA Acquisition Regulation, 74 Fed. Reg. 64624 (2009). The Federal Supply Schedule (FSS) generally is a streamlined method for Government agencies to acquire certain supplies and services in bulk, such as office supplies or food equipment. 48 CFR § 8.402(a) (2015). Instead of the normal bidding process for each individual order, FSS contracts are ordinarily prenegotiated between outside vendors and the General Services Administration, which negotiates on behalf of various Government agencies. See § 8.402(b); *Sharp Electronics Corp.* v. *McHugh*, 707 F. 3d 1367, 1369 (CA Fed. 2013). Under FSS contracts, businesses agree to provide "[i]ndefinite delivery" of particular goods or services "at stated prices for given periods of time." § 8.402(a). Agencies receive a list of goods and services available through the FSS. Because the terms of purchasing these goods and services have already been negotiated, contracting officers can acquire these items and services simply by issuing purchase orders.

B

Kingdomware Technologies, Inc., is a service-disabled veteran-owned small business. Around January 2012, the Department decided to procure an emergency-notification service for four medical centers.[2] In an emergency, this service sends important information to Department personnel. The Department sent a request for a price quotation to a non-veteran-owned company through the FSS system. That company responded with a favorable price, which the

[2] We use "Department" when referring to the Government as a party in this litigation.

Department accepted around February 22, 2012. The agreement was for one year, with an option to extend the agreement for two more. The Department exercised the one option to extend the time, and performance was completed in May 2013. Decl. of Corydon Ford Heard III ¶8.

Kingdomware challenged the Department's decision to award the contract to a non-veteran-owned company by filing a bid protest with the Government Accountability Office (GAO). See 31 U. S. C. § 3552(a). Kingdomware alleged that the Department procured multiple contracts through the FSS without restricting competition using the Rule of Two, as required by § 8127. Kingdomware contended that the Department could not award the contracts at issue here without first checking to see whether at least two veteran-owned small businesses could perform the work at a fair and reasonable price. The GAO issued a nonbinding determination that the Department's failure to employ the Rule of Two was unlawful and recommended that the Department conduct market research to determine whether there were two veteran-owned businesses that could fulfill the procurement. The Department disagreed with the recommendation.

Petitioner then filed suit in the Court of Federal Claims and sought declaratory and injunctive relief.[3] The Court of Federal Claims granted summary judgment to the Department. 107 Fed. Cl. 226 (2012).

A divided panel of the Federal Circuit affirmed. 754 F. 3d 923 (2014). In the majority's view, § 8127 did not require the Department to use the Rule of Two in all contracting. *Id.*, at 933–934. Instead, the court concluded, mandatory application of the Rule of Two was limited to contracts necessary

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[3] Petitioner's complaint additionally stated claims for two other bid protests. To simplify the proceedings, the parties entered into a joint stipulation of facts concerning only the one bid protest described above. The details concerning the two other disputed bids are relevant only for mootness analysis since the work related to both bids has been performed. See Part II, *infra*.

to fulfill its statutory purpose—to provide a means of satisfying the Department's annual contracting goals described in § 8127(a). *Id.*, at 934. Thus, so long as those goals were satisfied, the Court of Appeals concluded, the Department need not apply the Rule of Two any further. *Ibid.* Judge Reyna dissented, arguing that § 8127 employs mandatory language that "could not be clearer" in requiring the Department to apply the Rule of Two in every instance of contracting. *Id.*, at 935.

We granted certiorari to decide whether § 8127(d) requires the Department to apply the Rule of Two in all contracting, or whether the statute gives the Department some discretion in applying the rule. 576 U. S. 1034 (2015).

II

Before we reach the merits, we must assess our jurisdiction. Article III of the Constitution limits federal courts to deciding "Cases" and "Controversies," and "an actual controversy must exist not only at the time the complaint is filed, but through all stages of the litigation." *Already, LLC* v. *Nike, Inc.*, 568 U. S. 85, 90–91 (2013) (internal quotation marks omitted).

Here, no live controversy in the ordinary sense remains because no court is now capable of granting the relief petitioner seeks. When Kingdomware filed this suit four years ago, it sought a permanent injunction and declaratory relief with respect to a particular procurement. The services at issue in that procurement were completed in May 2013. And the two earlier procurements, which Kingdomware had also protested, were complete in September 2012. See Decl. of Corydon Ford Heard III ¶¶6–8. As a result, no court can enjoin further performance of those services or solicit new bids for the performance of those services. And declaratory relief would have no effect here with respect to the present procurements because the services have already been rendered.

Although a case would generally be moot in such circumstances, this Court's precedents recognize an exception to the mootness doctrine for a controversy that is "'capable of repetition, yet evading review.'" *Spencer* v. *Kemna*, 523 U. S. 1, 17 (1998). That exception applies "only in exceptional situations," where (1) "the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration," and (2) "there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again." *Ibid.* (internal quotation marks omitted; brackets in original).

That exception applies to these short-term contracts. First, the procurements were fully performed in less than two years after they were awarded. We have previously held that a period of two years is too short to complete judicial review of the lawfulness of the procurement. See *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 514–516 (1911). Second, it is reasonable to expect that the Department will refuse to apply the Rule of Two in a future procurement for the kind of services provided by Kingdomware. If Kingdomware's interpretation of § 8127(d) is correct, then the Department must use restricted competition rather than procure on the open market. And Kingdomware, which has been awarded many previous contracts, has shown a reasonable likelihood that it would be awarded a future contract if its interpretation of § 8127(d) prevails. See Decl. of Corydon Ford Heard III ¶¶11–15 (explaining that the company continues to bid on similar contracts). Thus, we have jurisdiction because the same legal issue in this case is likely to recur in future controversies between the same parties in circumstances where the period of contract performance is too short to allow full judicial review before performance is complete. Our interpretation of § 8127(d)'s requirements in this case will govern the Department's future contracting.

III

On the merits, we hold that § 8127 is mandatory, not discretionary. Its text requires the Department to apply the Rule of Two to all contracting determinations and to award contracts to veteran-owned small businesses. The Act does not allow the Department to evade the Rule of Two on the ground that it has already met its contracting goals or on the ground that the Department has placed an order through the FSS.

A

In statutory construction, we begin "with the language of the statute." *Barnhart* v. *Sigmon Coal Co.*, 534 U. S. 438, 450 (2002). If the statutory language is unambiguous and "the statutory scheme is coherent and consistent"—as is the case here—"[t]he inquiry ceases." *Ibid.*

We hold that § 8127(d) unambiguously requires the Department to use the Rule of Two before contracting under the competitive procedures. Section 8127(d) requires that "a contracting officer of the Department *shall* award contracts" to veteran-owned small businesses using restricted competition whenever the Rule of Two is satisfied, "[e]xcept as provided in subsections (b) and (c)." (Emphasis added.) Subsections (b) and (c) provide, in turn, that the Department "may" use noncompetitive procedures and sole-source contracts for lower value acquisitions. §§ 8127(b), (c). Except when the Department uses the noncompetitive and sole-source contracting procedures in subsections (b) and (c), § 8127(d) requires the Department to use the Rule of Two before awarding a contract to another supplier. The text also has no exceptions for orders from the FSS system.

Congress' use of the word "shall" demonstrates that § 8127(d) mandates the use of the Rule of Two in all contracting before using competitive procedures. Unlike the word "may," which implies discretion, the word "shall" usually connotes a requirement. Compare *Lexecon Inc.* v. *Milberg*

Weiss Bershad Hynes & Lerach, 523 U. S. 26, 35 (1998) (recognizing that "shall" is "mandatory" and "normally creates an obligation impervious to judicial discretion"), with *United States* v. *Rodgers*, 461 U. S. 677, 706 (1983) (explaining that "[t]he word 'may,' when used in a statute, usually implies some degree of discretion"). Accordingly, the Department *shall* (or *must*) prefer veteran-owned small businesses when the Rule of Two is satisfied.

The surrounding subsections of § 8127 confirm that Congress used the word "shall" in § 8127(d) as a command. Like § 8127(d), both § 8127(b) and § 8127(c) provide special procedures "[f]or purposes of meeting the goals under [§ 8127(a)]." §§ 8127(b), (c). But, in contrast to § 8127(d), those latter two provisions state that "a contracting officer of the Department *may* use" (or, for § 8127(c), "*may* award") such contracts. §§ 8127(b), (c) (emphasis added). When a statute distinguishes between "may" and "shall," it is generally clear that "shall" imposes a mandatory duty. See *United States ex rel. Siegel* v. *Thoman*, 156 U. S. 353, 359–360 (1895). We see no reason to depart from the usual inference here.

We therefore hold that, before contracting with a non-veteran-owned business, the Department must first apply the Rule of Two.[4]

B

The Federal Circuit and the Department offered several reasons for their alternative reading of § 8127(d) as a discretionary provision that the Department can disregard for at least some contracting decisions. We disagree with them.

To hold that § 8127(d) is discretionary, the Federal Circuit relied on § 8127(d)'s prefatory clause. 754 F. 3d, at 933.

[4] We need not decide today precisely what sort of search for veteran-owned small businesses the Department must conduct to comply with the Rule of Two. We do not decide, for example, whether the Department may satisfy its obligations by searching for eligible veteran-owned small businesses within the FSS, or whether it must conduct a broader search for such businesses.

That clause declares that the Rule of Two is designed "for the purposes of" meeting the annual contracting goals that the Department is required to set under § 8127(a). The Department originally made a similar argument before changing arguments in its briefing on the merits. Compare Brief in Opposition 13–15 with Brief for United States 24–25.

But the prefatory clause has no bearing on whether § 8127(d)'s requirement is mandatory or discretionary. The clause announces an objective that Congress hoped that the Department would achieve and charges the Secretary with setting annual benchmarks, but it does not change the plain meaning of the operative clause, § 8127(d). See *Yazoo & Mississippi Valley R. Co.* v. *Thomas*, 132 U. S. 174, 188 (1889) (explaining that prefatory clauses or preambles cannot change the scope of the operative clause).

The Federal Circuit's interpretation also would produce an anomaly. If the Federal Circuit's understanding of § 8127(d)'s prefatory clause were correct, then §§ 8127(b) and (c), which also contain "[f]or purposes of meeting the goals" clauses, would cease to apply once the Department meets the Secretary's goal, and the Department would be required to return to competitive bidding. If we interpreted the "purposes" clause of § 8127(d) to mean that its mandate no longer applies if the goals are met, then the identical "purposes" clauses of §§ 8127(b) and (c) would also render those clauses' permissive mandates inapplicable. This would require the Department, once the goals are met, to award bids using the default contracting procedures rather than to use the non-competitive and single-source provisions in §§ 8127(b) and (c).

Second, the Department argues that the mandatory provision does not apply to "orders" under "pre-existing FSS contracts." Brief for United States 25. The Department failed to raise this argument in the courts below, and we normally decline to entertain such forfeited arguments. See *OBB Personenverkehr AG* v. *Sachs*, 577 U. S. 27, 37–38 (2015). But the Department's forfeited argument fails in

any event. Section 8127(d) applies when the Department "award[s] contracts." When the Department places an FSS order, that order creates contractual obligations for each party and is a "contract" within the ordinary meaning of that term. See, *e. g.*, Black's Law Dictionary 389 (10th ed. 2014) ("[a]n agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law"). It also creates a "contract" as defined by federal regulations, namely, a "mutually binding legal relationship obligating the seller to furnish the supplies or services . . . and the buyer to pay for them," including "all types of commitments that obligate the Government to an expenditure of appropriated funds and" (as a general matter) "are in writing." 48 CFR § 2.101 (2015). An FSS order creates mutually binding obligations: for the contractor, to supply certain goods or services, and for the Government, to pay. The placement of the order creates a new contract; the underlying FSS contract gives the Government the option to buy, but it does not require the Government to make a purchase or expend funds. Further confirming that FSS orders are contracts, the Government is not completely bound by the FSS contract's terms; to the contrary, when placing orders, agencies may sometimes seek different terms than are listed in the FSS. See § 8.405–4 (permitting agencies to negotiate some new terms, such as requesting "a price reduction," when ordering from the FSS).

Third, the Department contends that our interpretation fails to appreciate the distinction between FSS orders and contracts. The Department maintains that FSS orders are only for simplified acquisitions, and that using the Rule of Two for these purchases will hamper mundane purchases like "griddles or food slicers." Brief for United States 21.

But this argument understates current practices under the FSS. The Department has expanded use of the FSS well beyond simple procurement. See Brief for Iraq and Afghanistan Veterans of America as *Amicus Curiae* 14–16. This

case proves the point: The contract at issue here concerned complex information technology services over a multiyear period. Moreover, the Department may continue to purchase items that cost less than the simplified acquisition threshold (currently $150,000) through the FSS, if the Department procures them from a veteran-owned small business. See 38 U. S. C. § 8127(b).

Finally and relatedly, the Department asks us to defer to its interpretation that FSS "orders" are not "contracts." See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843–844 (1984) (establishing deference to an agency's interpretation of an ambiguous statute). Even assuming, *arguendo*, that the preamble to the agency's rulemaking could be owed *Chevron* deference, we do not defer to the agency when the statute is unambiguous. See *id.*, at 842–843. For the reasons already given, the text of § 8127(d) clearly imposes a mandatory duty. Thus, we decline the Department's invitation to defer to its interpretation.

* * *

We hold that the Rule of Two contracting procedures in § 8127(d) are not limited to those contracts necessary to fulfill the Secretary's goals under § 8127(a). We also hold that § 8127(d) applies to orders placed under the FSS. The judgment of the Court of Appeals for the Federal Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

UNIVERSAL HEALTH SERVICES, INC. *v.* UNITED STATES ET AL. EX REL. ESCOBAR ET AL.

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

No. 15–7. Argued April 19, 2016—Decided June 16, 2016

Yarushka Rivera, a teenage beneficiary of Massachusetts' Medicaid program, received counseling services for several years at Arbour Counseling Services, a satellite mental health facility owned and operated by a subsidiary of petitioner Universal Health Services, Inc. She had an adverse reaction to a medication that a purported doctor at Arbour prescribed after diagnosing her with bipolar disorder. Her condition worsened, and she eventually died of a seizure. Respondents, her mother and stepfather, later discovered that few Arbour employees were actually licensed to provide mental health counseling or authorized to prescribe medications or offer counseling services without supervision.

Respondents filed a *qui tam* suit, alleging that Universal Health had violated the False Claims Act (FCA). That Act imposes significant penalties on anyone who "knowingly presents . . . a false or fraudulent claim for payment or approval" to the Federal Government, 31 U. S. C. § 3729(a)(1)(A). Respondents sought to hold Universal Health liable under what is commonly referred to as an "implied false certification theory of liability," which treats a payment request as a claimant's implied certification of compliance with relevant statutes, regulations, or contract requirements that are material conditions of payment and treats a failure to disclose a violation as a misrepresentation that renders the claim "false or fraudulent." Specifically, respondents alleged, Universal Health (acting through Arbour) defrauded the Medicaid program by submitting reimbursement claims that made representations about the specific services provided by specific types of professionals, but that failed to disclose serious violations of Massachusetts Medicaid regulations pertaining to staff qualifications and licensing requirements for these services. Universal Health thus allegedly defrauded the program because Universal Health knowingly misrepresented its compliance with mental health facility requirements that are so central to the provision of mental health counseling that the Medicaid program would have refused to pay these claims had it known of these violations.

The District Court granted Universal Health's motion to dismiss. It held that respondents had failed to state a claim under the "implied

false certification" theory of liability because none of the regulations violated by Arbour was a condition of payment. The First Circuit reversed in relevant part, holding that every submission of a claim implicitly represents compliance with relevant regulations, and that any undisclosed violation of a precondition of payment (whether or not expressly identified as such) renders a claim "false or fraudulent." The First Circuit further held that the regulations themselves provided conclusive evidence that compliance was a material condition of payment because the regulations expressly required facilities to adequately supervise staff as a condition of payment.

Held:

1. The implied false certification theory can be a basis for FCA liability when a defendant submitting a claim makes specific representations about the goods or services provided, but fails to disclose noncompliance with material statutory, regulatory, or contractual requirements that make those representations misleading with respect to those goods or services. Pp. 186–190.

(a) The FCA does not define a "false" or "fraudulent" claim, so the Court turns to the principle that "absent other indication, 'Congress intends to incorporate the well-settled meaning of the common-law terms it uses,'" *Sekhar* v. *United States*, 570 U. S. 729, 732. Under the common-law definition of "fraud," the parties agree, certain misrepresentations by omission can give rise to FCA liability. Respondents and the Government contend that every claim for payment implicitly represents that the claimant is legally entitled to payment, and that failing to disclose violations of material legal requirements renders the claim misleading. Universal Health, on the other hand, argues that submitting a claim involves no representations and that the nondisclosure of legal violations is not actionable absent a special duty of reasonable care to disclose such matters. Today's decision holds that the claims at issue may be actionable because they do more than merely demand payment; they fall squarely within the rule that representations that state the truth only so far as it goes, while omitting critical qualifying information, can be actionable misrepresentations. Pp. 186–189.

(b) By submitting claims for payment using payment codes corresponding to specific counseling services, Universal Health represented that it had provided specific types of treatment. And Arbour staff allegedly made further representations by using National Provider Identification numbers corresponding to specific job titles. By conveying this information without disclosing Arbour's many violations of basic staff and licensing requirements for mental health facilities, Universal Health's claims constituted misrepresentations. Pp. 189–190.

2. Contrary to Universal Health's contentions, FCA liability for failing to disclose violations of legal requirements does not turn upon whether those requirements were expressly designated as conditions of payment. Pp. 190–196.

(a) Section 3729(a)(1)(A), which imposes liability on those presenting "false or fraudulent claim[s]," does not limit claims to misrepresentations about express conditions of payment. Nothing in the text supports such a restriction. And under the Act's materiality requirement, statutory, regulatory, and contractual requirements are not automatically material, even if they are labeled conditions of payment. Nor is the restriction supported by the Act's scienter requirement. A defendant can have "actual knowledge" that a condition is material even if the Government does not expressly call it a condition of payment. What matters is not the label that the Government attaches to a requirement, but whether the defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision. Universal Health's policy arguments are unavailing, and are amply addressed through strict enforcement of the FCA's stringent materiality and scienter provisions. Pp. 190–192.

(b) A misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the Government's payment decision in order to be actionable under the FCA. The FCA's materiality requirement is demanding. An undisclosed fact is material if, for instance, "[n]o one can say with reason that the plaintiff would have signed this contract if informed of the likelihood" of the undisclosed fact. *Junius Constr. Co.* v. *Cohen*, 257 N. Y. 393, 400, 178 N. E. 672, 674. When evaluating the FCA's materiality requirement, the Government's decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive. A misrepresentation cannot be deemed material merely because the Government designates compliance with a particular requirement as a condition of payment. Nor is the Government's option to decline to pay if it knew of the defendant's noncompliance sufficient for a finding of materiality. Materiality also cannot be found where noncompliance is minor or insubstantial. Moreover, if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material. The FCA thus does not support the Government's and First Circuit's expansive view that any statutory, regulatory, or contractual violation is material so long as the defendant knows that the Government would be entitled to refuse payment were it aware of the violation. Pp. 192–196.

780 F. 3d 504, vacated and remanded.

Syllabus

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

Roy T. Englert, Jr., argued the cause for petitioner. With him on the briefs were *Gary A. Orseck*, *Mark T. Stancil*, *Michael L. Waldman*, *Donald Burke*, *Mark W. Pearlstein*, *Laura McLane*, and *M. Miller Baker*.

David C. Frederick argued the cause for respondents. With him on the brief were *Derek T. Ho*, *Thomas M. Greene*, *Michael Tabb*, and *Elizabeth Cho*.

Deputy Solicitor General Stewart argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Verrilli*, *Principal Deputy Assistant Attorney General Mizer*, *Allon Kedem*, *Douglas N. Letter*, *Michael S. Raab*, and *Charles W. Scarborough*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Health Care Association et al. by *James F. Segroves* and *Kelly A. Carroll*; for the American Hospital Association et al. by *Jonathan L. Disenhaus*, *Jessica L. Ellsworth*, and *Frank Trinity*; for the American Medical Association et al. by *Philip S. Goldberg*, *Cary Silverman*, *Robert J. McCully*, *Jon N. Ekdahl*, *Leonard A. Nelson*, *Don L. Bell II*, *Quentin Riegel*, *Elizabeth Milito*, and *Karen R. Harned*; for the Association of Private Sector Colleges and Universities by *Douglas R. Cox* and *Lucas C. Townsend*; for CareSource by *Anne Marie Sferra*, *James F. Flynn*, and *Mark R. Chilson*; for Catholic Charities of the Diocese of Joliet, Inc., by *Brian J. Murray*, *Kenton J. Skarin*, and *Thomas Brejcha*; for the Chamber of Commerce of the United States of America et al. by *John P. Elwood*, *Craig D. Margolis*, *Jeremy C. Marwell*, *Tirzah S. Lollar*, and *Kate Comerford Todd*; for the Coalition for Government Procurement by *Allyson N. Ho*; for CTIA—The Wireless Association by *Andrew J. Pincus*, *Paul W. Hughes*, and *Thomas C. Power*; for the Generic Pharmaceutical Association by *William M. Jay* and *Jaime A. Santos*; for Interested Healthcare Providers by *Paul E. Kalb*, *Brian P. Morrissey*, *Joshua J. Fougere*, and *Scott D. Stein*; for the National Association of Criminal Defense Lawyers by *James C. Martin*, *Colin E. Wrabley*, and *Jeffrey T. Green*; for the Pharmaceutical Research and Manufacturers of America et al. by *David W. Ogden*, *Jonathan G. Cedarbaum*, *Matthew Guarnieri*, *James M. Spears*, and *Melissa B. Kimmel*; and for the Washington Legal Foundation by *Richard A. Samp*.

Briefs of *amici curiae* urging affirmance were filed for the State of Illinois et al. by *Lisa Madigan*, Attorney General of Illinois, *Carolyn E.*

JUSTICE THOMAS delivered the opinion of the Court.

The False Claims Act, 31 U. S. C. § 3729 *et seq.*, imposes significant penalties on those who defraud the Government. This case concerns a theory of False Claims Act liability commonly referred to as "implied false certification." According to this theory, when a defendant submits a claim, it impliedly certifies compliance with all conditions of payment. But if that claim fails to disclose the defendant's violation of a material statutory, regulatory, or contractual requirement, so the theory goes, the defendant has made a misrepresentation that renders the claim "false or fraudulent" under § 3729(a)(1)(A). This case requires us to consider this theory of liability and to clarify some of the circumstances in which the False Claims Act imposes liability.

Shapiro, Solicitor General, *Harpreet Khera*, Assistant Attorney General, and *Brett E. Legner*, Deputy Solicitor General, and by the Attorneys General for their respective States as follows: *Craig W. Richards* of Alaska, *George Jepsen* of Connecticut, *Douglas S. Chin* of Hawaii, *Gregory F. Zoeller* of Indiana, *Tom Miller* of Iowa, *Andy Beshear* of Kentucky, *Brian E. Frosh* of Maryland, *Lori Swanson* of Minnesota, *Jim Hood* of Mississippi, *Doug Peterson* of Nebraska, *Joseph A. Foster* of New Hampshire, *Hector Balderas* of New Mexico, *Eric T. Schneiderman* of New York, *Roy Cooper* of North Carolina, *Ellen F. Rosenblum* of Oregon, *Peter F. Kilmartin* of Rhode Island, *Marty J. Jackley* of South Dakota, *Herbert H. Slattery III* of Tennessee, *William H. Sorrell* of Vermont, *Mark R. Herring* of Virginia, and *Bob Ferguson* of Washington; for the Commonwealth of Massachusetts by *Maura Healey*, Attorney General of Massachusetts, *Elizabeth N. Dewar*, Assistant State Solicitor, and *Steven Sharobem*, *Julia Smith*, and *Robert Patten*, Assistant Attorneys General; for AARP by *Kelly Bagby* and *William Alvarado Rivera*; for the Judge David L. Bazelon Center for Mental Health Law et al. by *Claire Prestel*, *Daniel M. Rosenthal*, *Judith A. Scott*, and *Nicole G. Berner*; for Law Professors by *David S. Stone* and *Robert A. Magnanini*; for the National Whistleblower Center by *Stephen M. Kohn*, *Michael D. Kohn*, and *David K. Colapinto*; for the Taxpayers Against Fraud Education Fund by *Jennifer M. Verkamp* and *Chandra Napora*; for David Freeman Engstrom by *Mr. Engstrom, pro se*; for Sen. Charles E. Grassley by *Robert L. King*; and for Mark McGrath by *Sanford Rosenblum*.

Joel D. Hesch, pro se, filed a brief as *amicus curiae* supporting neither party.

We first hold that, at least in certain circumstances, the implied false certification theory can be a basis for liability. Specifically, liability can attach when the defendant submits a claim for payment that makes specific representations about the goods or services provided, but knowingly fails to disclose the defendant's noncompliance with a statutory, regulatory, or contractual requirement. In these circumstances, liability may attach if the omission renders those representations misleading.

We further hold that False Claims Act liability for failing to disclose violations of legal requirements does not turn upon whether those requirements were expressly designated as conditions of payment. Defendants can be liable for violating requirements even if they were not expressly designated as conditions of payment. Conversely, even when a requirement is expressly designated a condition of payment, not every violation of such a requirement gives rise to liability. What matters is not the label the Government attaches to a requirement, but whether the defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision.

A misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the Government's payment decision in order to be actionable under the False Claims Act. We clarify below how that rigorous materiality requirement should be enforced.

Because the courts below interpreted § 3729(a)(1)(A) differently, we vacate the judgment and remand so that those courts may apply the approach set out in this opinion.

I

A

Enacted in 1863, the False Claims Act "was originally aimed principally at stopping the massive frauds perpetrated by large contractors during the Civil War." *United States* v. *Bornstein*, 423 U. S. 303, 309 (1976). "[A] series of sen-

sational congressional investigations" prompted hearings where witnesses "painted a sordid picture of how the United States had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war." *United States* v. *McNinch*, 356 U. S. 595, 599 (1958). Congress responded by imposing civil and criminal liability for 10 types of fraud on the Government, subjecting violators to double damages, forfeiture, and up to five years' imprisonment. Act of Mar. 2, 1863, ch. 67, 12 Stat. 696.

Since then, Congress has repeatedly amended the Act, but its focus remains on those who present or directly induce the submission of false or fraudulent claims. See 31 U. S. C. § 3729(a) (imposing civil liability on "any person who . . . knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval"). A "claim" now includes direct requests to the Government for payment as well as reimbursement requests made to the recipients of federal funds under federal benefits programs. See § 3729(b)(2)(A). The Act's scienter requirement defines "knowing" and "knowingly" to mean that a person has "actual knowledge of the information," "acts in deliberate ignorance of the truth or falsity of the information," or "acts in reckless disregard of the truth or falsity of the information." § 3729(b)(1)(A). And the Act defines "material" to mean "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." § 3729(b)(4).

Congress also has increased the Act's civil penalties so that liability is "essentially punitive in nature." *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U. S. 765, 784 (2000). Defendants are subjected to treble damages plus civil penalties of up to $10,000 per false claim. § 3729(a); 28 CFR § 85.3(a)(9) (2015) (adjusting penalties for inflation).

B

The alleged False Claims Act violations here arose within the Medicaid program, a joint state-federal program in which healthcare providers serve poor or disabled patients and submit claims for government reimbursement. See generally 42 U. S. C. § 1396 *et seq.* The facts recited in the complaint, which we take as true at this stage, are as follows. For five years, Yarushka Rivera, a teenage beneficiary of Massachusetts' Medicaid program, received counseling services at Arbour Counseling Services, a satellite mental health facility in Lawrence, Massachusetts, owned and operated by a subsidiary of petitioner Universal Health Services. Beginning in 2004, when Yarushka started having behavioral problems, five medical professionals at Arbour intermittently treated her. In May 2009, Yarushka had an adverse reaction to a medication that a purported doctor at Arbour prescribed after diagnosing her with bipolar disorder. Her condition worsened; she suffered a seizure that required hospitalization. In October 2009, she suffered another seizure and died. She was 17 years old.

Thereafter, an Arbour counselor revealed to respondents Carmen Correa and Julio Escobar—Yarushka's mother and stepfather—that few Arbour employees were actually licensed to provide mental health counseling and that supervision of them was minimal. Respondents discovered that, of the five professionals who had treated Yarushka, only one was properly licensed. The practitioner who diagnosed Yarushka as bipolar identified herself as a psychologist with a Ph. D., but failed to mention that her degree came from an unaccredited Internet college and that Massachusetts had rejected her application to be licensed as a psychologist. Likewise, the practitioner who prescribed medicine to Yarushka, and who was held out as a psychiatrist, was in fact a nurse who lacked authority to prescribe medications absent supervision. Rather than ensuring supervision of unli-

censed staff, the clinic's director helped to misrepresent the staff's qualifications. And the problem went beyond those who treated Yarushka. Some 23 Arbour employees lacked licenses to provide mental health services, yet—despite regulatory requirements to the contrary—they counseled patients and prescribed drugs without supervision.

When submitting reimbursement claims, Arbour used payment codes corresponding to different services that its staff provided to Yarushka, such as "Individual Therapy" and "family therapy." 1 App. 19, 20. Staff members also misrepresented their qualifications and licensing status to the Federal Government to obtain individual National Provider Identification numbers, which are submitted in connection with Medicaid reimbursement claims and correspond to specific job titles. For instance, one Arbour staff member who treated Yarushka registered for a number associated with "'Social Worker, Clinical,'" despite lacking the credentials and licensing required for social workers engaged in mental health counseling. *Id.*, at 32.

After researching Arbour's operations, respondents filed complaints with various Massachusetts agencies. Massachusetts investigated and ultimately issued a report detailing Arbour's violation of over a dozen Massachusetts Medicaid regulations governing the qualifications and supervision required for staff at mental health facilities. Arbour agreed to a remedial plan, and two Arbour employees also entered into consent agreements with Massachusetts.

In 2011, respondents filed a *qui tam* suit in federal court, see 31 U. S. C. § 3730, alleging that Universal Health had violated the False Claims Act under an implied false certification theory of liability. The operative complaint asserts that Universal Health (acting through Arbour) submitted reimbursement claims that made representations about the specific services provided by specific types of professionals, but that failed to disclose serious violations of regulations pertaining to staff qualifications and licensing requirements for

these services.[1] Specifically, the Massachusetts Medicaid program requires satellite facilities to have specific types of clinicians on staff, delineates licensing requirements for particular positions (like psychiatrists, social workers, and nurses), and details supervision requirements for other staff. See 130 Code Mass. Regs. §§ 429.422–424, 429.439 (2014). Universal Health allegedly flouted these regulations because Arbour employed unqualified, unlicensed, and unsupervised staff. The Massachusetts Medicaid program, unaware of these deficiencies, paid the claims. Universal Health thus allegedly defrauded the program, which would not have reimbursed the claims had it known that it was billed for mental health services that were performed by unlicensed and unsupervised staff. The United States declined to intervene.

The District Court granted Universal Health's motion to dismiss the complaint. Circuit precedent had previously embraced the implied false certification theory of liability. See, *e. g.*, *United States ex rel. Hutcheson* v. *Blackstone Medical, Inc.*, 647 F. 3d 377, 385–387 (CA1 2011). But the District Court held that respondents had failed to state a claim under that theory because, with one exception not relevant here, none of the regulations that Arbour violated was a condition of payment. See 2014 WL 1271757, *1, *6–*12 (D Mass., Mar. 26, 2014).

The United States Court of Appeals for the First Circuit reversed in relevant part and remanded. 780 F. 3d 504, 517 (2015). The court observed that each time a billing party submits a claim, it "implicitly communicate[s] that it . . . conformed to the relevant program requirements, such that it was entitled to payment." *Id.*, at 514, n. 14. To determine

[1] Although Universal Health submitted some of the claims at issue before 2009, we assume—as the parties have done—that the 2009 amendments to the False Claims Act apply here. Universal Health does not argue, and we thus do not consider, whether pre-2009 conduct should be treated differently.

whether a claim is "false or fraudulent" based on such implicit communications, the court explained, it "asks simply whether the defendant, in submitting a claim for reimbursement, knowingly misrepresented compliance with a material precondition of payment." *Id.*, at 512. In the court's view, a statutory, regulatory, or contractual requirement can be a condition of payment either by expressly identifying itself as such or by implication. *Id.*, at 512–513. The court then held that Universal Health had violated Massachusetts Medicaid regulations that "clearly impose conditions of payment." *Id.*, at 513. The court further held that the regulations themselves "constitute[d] dispositive evidence of materiality," because they identified adequate supervision as an "express and absolute" condition of payment and "repeated[ly] reference[d]" supervision. *Id.*, at 514 (internal quotation marks omitted).

We granted certiorari to resolve the disagreement among the Courts of Appeals over the validity and scope of the implied false certification theory of liability. 577 U. S. 1025 (2015). The Seventh Circuit has rejected this theory, reasoning that only express (or affirmative) falsehoods can render a claim "false or fraudulent" under 31 U. S. C. § 3729(a)(1)(A). *United States* v. *Sanford-Brown, Ltd.*, 788 F. 3d 696, 711–712 (2015). Other courts have accepted the theory, but limit its application to cases where defendants fail to disclose violations of expressly designated conditions of payment. *E. g.*, *Mikes* v. *Straus*, 274 F. 3d 687, 700 (CA2 2011). Yet others hold that conditions of payment need not be expressly designated as such to be a basis for False Claims Act liability. *E. g.*, *United States* v. *Science Applications Int'l Corp.*, 626 F. 3d 1257, 1269 (CADC 2010) (*SAIC*).

II

We first hold that the implied false certification theory can, at least in some circumstances, provide a basis for liability. By punishing defendants who submit "false or fraudulent

claims," the False Claims Act encompasses claims that make fraudulent misrepresentations, which include certain misleading omissions. When, as here, a defendant makes representations in submitting a claim but omits its violations of statutory, regulatory, or contractual requirements, those omissions can be a basis for liability if they render the defendant's representations misleading with respect to the goods or services provided.

To reach this conclusion, "[w]e start, as always, with the language of the statute." *Allison Engine Co.* v. *United States ex rel. Sanders*, 553 U. S. 662, 668 (2008) (brackets in original; internal quotation marks omitted). The False Claims Act imposes civil liability on "any person who . . . knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval." § 3729(a)(1)(A). Congress did not define what makes a claim "false" or "fraudulent." But "[i]t is a settled principle of interpretation that, absent other indication, Congress intends to incorporate the well-settled meaning of the common-law terms it uses." *Sekhar* v. *United States*, 570 U. S. 729, 732 (2013) (internal quotation marks omitted). And the term "fraudulent" is a paradigmatic example of a statutory term that incorporates the common-law meaning of fraud. See *Neder* v. *United States*, 527 U. S. 1, 22 (1999) (the term "actionable 'fraud' " is one with "a well-settled meaning at common law").[2]

Because common-law fraud has long encompassed certain misrepresentations by omission, "false or fraudulent claims" include more than just claims containing express falsehoods. The parties and the Government agree that misrepresentations by omission can give rise to liability. Brief for Peti-

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[2] The False Claims Act abrogates the common law in certain respects. For instance, the Act's scienter requirement "require[s] no proof of specific intent to defraud." 31 U. S. C. § 3729(b)(1)(B). But we presume that Congress retained all other elements of common-law fraud that are consistent with the statutory text because there are no textual indicia to the contrary. See *Neder*, 527 U. S., at 24–25.

tioner 30–31; Brief for Respondents 22–31; Brief for United States as *Amicus Curiae* 16–20.

The parties instead dispute whether submitting a claim without disclosing violations of statutory, regulatory, or contractual requirements constitutes such an actionable misrepresentation. Respondents and the Government invoke the common-law rule that, while nondisclosure alone ordinarily is not actionable, "[a] representation stating the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying matter" is actionable. Restatement (Second) of Torts § 529, p. 62 (1976). They contend that every submission of a claim for payment implicitly represents that the claimant is legally entitled to payment, and that failing to disclose violations of material legal requirements renders the claim misleading. Universal Health, on the other hand, argues that submitting a claim involves no representations, and that a different common-law rule thus governs: Nondisclosure of legal violations is not actionable absent a special "'duty . . . to exercise reasonable care to disclose the matter in question,'" which it says is lacking in Government contracting. Brief for Petitioner 31 (quoting Restatement (Second) of Torts § 551(1), at 119).

We need not resolve whether all claims for payment implicitly represent that the billing party is legally entitled to payment. The claims in this case do more than merely demand payment. They fall squarely within the rule that half-truths—representations that state the truth only so far as it goes, while omitting critical qualifying information—can be actionable misrepresentations.[3] A classic example of an ac-

[3] This rule recurs throughout the common law. In tort law, for example, "if the defendant does speak, he must disclose enough to prevent his words from being misleading." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 106, p. 738 (5th ed. 1984). Contract law also embraces this principle. See, *e. g.*, Restatement (Second) of Contracts § 161, Comment *a*, p. 432 (1979). And we have used this definition

tionable half-truth in contract law is the seller who reveals that there may be two new roads near a property he is selling, but fails to disclose that a third potential road might bisect the property. See *Junius Constr. Co.* v. *Cohen*, 257 N. Y. 393, 400, 178 N. E. 672, 674 (1931) (Cardozo, J.). "The enumeration of two streets, described as unopened but projected, was a tacit representation that the land to be conveyed was subject to no others, and certainly subject to no others materially affecting the value of the purchase." *Ibid.* Likewise, an applicant for an adjunct position at a local college makes an actionable misrepresentation when his resume lists prior jobs and then retirement, but fails to disclose that his "retirement" was a prison stint for perpetrating a $12 million bank fraud. See 3 D. Dobbs, P. Hayden, & H. Bublick, Law of Torts § 682, pp. 702–703, and n. 14 (2d ed. 2011) (citing *Sarvis* v. *Vermont State Colleges*, 172 Vt. 76, 78, 80–82, 772 A. 2d 494, 496, 497–499 (2001)).

So too here, by submitting claims for payment using payment codes that corresponded to specific counseling services, Universal Health represented that it had provided individual therapy, family therapy, preventive medication counseling, and other types of treatment. Moreover, Arbour staff members allegedly made further representations in submitting Medicaid reimbursement claims by using National Provider Identification numbers corresponding to specific job titles. And these representations were clearly misleading in context. Anyone informed that a social worker at a Massachusetts mental health clinic provided a teenage patient with individual counseling services would probably—but wrongly—conclude that the clinic had complied with core Massachusetts Medicaid requirements (1) that a counselor "treating children [is] required to have specialized training and experience in children's services," 130 Code Mass. Regs. § 429.422, and also (2) that, at a minimum, the social worker

in other statutory contexts. See, *e. g.*, *Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U. S. 27, 44 (2011) (securities law).

possesses the prescribed qualifications for the job, § 429.424(C). By using payment and other codes that conveyed this information without disclosing Arbour's many violations of basic staff and licensing requirements for mental health facilities, Universal Health's claims constituted misrepresentations.

Accordingly, we hold that the implied certification theory can be a basis for liability, at least where two conditions are satisfied: First, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths.[4]

III

The second question presented is whether, as Universal Health urges, a defendant should face False Claims Act liability only if it fails to disclose the violation of a contractual, statutory, or regulatory provision that the Government expressly designated a condition of payment. We conclude that the Act does not impose this limit on liability. But we also conclude that not every undisclosed violation of an express condition of payment automatically triggers liability. Whether a provision is labeled a condition of payment is relevant to but not dispositive of the materiality inquiry.

A

Nothing in the text of the False Claims Act supports Universal Health's proposed restriction. Section 3729(a)(1)(A)

[4] As an alternative argument, Universal Health asserts that misleading partial disclosures constitute fraudulent misrepresentations only when the initial statement partially disclosed unfavorable information. Not so. "[A] statement that contains only favorable matters and omits all reference to unfavorable matters is as much a false representation as if all the facts stated were untrue." Restatement (Second) of Torts § 529, Comment *a*, pp. 62–63 (1976).

imposes liability on those who present "false or fraudulent claims" but does not limit such claims to misrepresentations about express conditions of payment. See *SAIC*, 626 F. 3d, at 1268 (rejecting any textual basis for an express-designation rule). Nor does the common-law meaning of fraud tether liability to violating an express condition of payment. A statement that misleadingly omits critical facts is a misrepresentation irrespective of whether the other party has expressly signaled the importance of the qualifying information. *Supra*, at 188–190.

The False Claims Act's materiality requirement also does not support Universal Health. Under the Act, the misrepresentation must be material to the other party's course of action. But, as discussed below, see *infra*, at 194–196, statutory, regulatory, and contractual requirements are not automatically material, even if they are labeled conditions of payment. Cf. *Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U. S. 27, 39 (2011) (materiality cannot rest on "a single fact or occurrence as always determinative" (internal quotation marks omitted)).

Nor does the Act's scienter requirement, § 3729(b)(1)(A), support Universal Health's position. A defendant can have "actual knowledge" that a condition is material without the Government expressly calling it a condition of payment. If the Government failed to specify that guns it orders must actually shoot, but the defendant knows that the Government routinely rescinds contracts if the guns do not shoot, the defendant has "actual knowledge." Likewise, because a reasonable person would realize the imperative of a functioning firearm, a defendant's failure to appreciate the materiality of that condition would amount to "deliberate ignorance" or "reckless disregard" of the "truth or falsity of the information" even if the Government did not spell this out.

Universal Health nonetheless contends that False Claims Act liability should be limited to undisclosed violations of expressly designated conditions of payment to provide de-

fendants with fair notice and to cabin liability. But policy arguments cannot supersede the clear statutory text. *Kloeckner* v. *Solis*, 568 U. S. 41, 55–56, n. 4 (2012). In any event, Universal Health's approach risks undercutting these policy goals. The Government might respond by designating every legal requirement an express condition of payment. But billing parties are often subject to thousands of complex statutory and regulatory provisions. Facing False Claims Act liability for violating any of them would hardly help would-be defendants anticipate and prioritize compliance obligations. And forcing the Government to expressly designate a provision as a condition of *payment* would create further arbitrariness. Under Universal Health's view, misrepresenting compliance with a requirement that the Government expressly identified as a condition of payment could expose a defendant to liability. Yet, under this theory, misrepresenting compliance with a condition of eligibility to even participate in a federal program when submitting a claim would not.

Moreover, other parts of the False Claims Act allay Universal Health's concerns. "[I]nstead of adopting a circumscribed view of what it means for a claim to be false or fraudulent," concerns about fair notice and open-ended liability "can be effectively addressed through strict enforcement of the Act's materiality and scienter requirements." *SAIC*, *supra*, at 1270. Those requirements are rigorous.

B

As noted, a misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the Government's payment decision in order to be actionable under the False Claims Act. We now clarify how that materiality requirement should be enforced.

Section 3729(b)(4) defines materiality using language that we have employed to define materiality in other federal fraud statutes: "[T]he term 'material' means having a natural

tendency to influence, or be capable of influencing, the payment or receipt of money or property." See *Neder*, 527 U. S., at 16 (using this definition to interpret the mail, bank, and wire fraud statutes); *Kungys* v. *United States*, 485 U. S. 759, 770 (1988) (same for fraudulent statements to immigration officials). This materiality requirement descends from "common-law antecedents." *Id.*, at 769. Indeed, "the common law could not have conceived of 'fraud' without proof of materiality." *Neder*, *supra*, at 22; see also Brief for United States as *Amicus Curiae* 30 (describing common-law principles and arguing that materiality under the False Claims Act should involve a "similar approach").

We need not decide whether § 3729(a)(1)(A)'s materiality requirement is governed by § 3729(b)(4) or derived directly from the common law. Under any understanding of the concept, materiality "look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." 26 R. Lord, Williston on Contracts § 69:12, p. 549 (4th ed. 2003) (Williston). In tort law, for instance, a "matter is material" in only two circumstances: (1) "[if] a reasonable man would attach importance to [it] in determining his choice of action in the transaction"; or (2) if the defendant knew or had reason to know that the recipient of the representation attaches importance to the specific matter "in determining his choice of action," even though a reasonable person would not. Restatement (Second) of Torts § 538, at 80. Materiality in contract law is substantially similar. See Restatement (Second) of Contracts § 162(2), and Comment *c*, pp. 439, 441 (1979) ("[A] misrepresentation is material" only if it would "likely . . . induce a reasonable person to manifest his assent," or the defendant "knows that for some special reason [the representation] is likely to induce the particular recipient to manifest his assent" to the transaction).[5]

[5] Accord, Williston § 69:12, at 549–550 ("most popular" understanding is "that a misrepresentation is material if it concerns a matter to which a reasonable person would attach importance in determining his or her

The materiality standard is demanding. The False Claims Act is not "an all-purpose antifraud statute," *Allison Engine*, 553 U. S., at 672, or a vehicle for punishing garden-variety breaches of contract or regulatory violations. A misrepresentation cannot be deemed material merely because the Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment. Nor is it sufficient for a finding of materiality that the Government would have the option to decline to pay if it knew of the defendant's noncompliance. Materiality, in addition, cannot be found where noncompliance is minor or insubstantial. See *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 543 (1943) (contractors' misrepresentation that they satisfied a noncollusive bidding requirement for federal program contracts violated the False Claims Act because "[t]he government's money would never have been placed in the joint fund for payment to respondents had its agents known the bids were collusive"); see also *Junius Constr.*, 257 N. Y., at 400, 178 N. E., at 674 (an undisclosed fact was material because "[n]o one can say with reason that the plaintiff would have signed this contract if informed of the likelihood" of the undisclosed fact).

In sum, when evaluating materiality under the False Claims Act, the Government's decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive. Likewise, proof of materiality

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choice of action with respect to the transaction involved: which will induce action by a complaining party[,] knowledge of which would have induced the recipient to act differently" (footnote and bullets omitted)); *id.*, at 550 (noting rule that "a misrepresentation is material if, had it not been made, the party complaining of fraud would not have taken the action alleged to have been induced by the misrepresentation"); *Junius Constr. Co.* v. *Cohen*, 257 N. Y. 393, 400, 178 N. E. 672, 674 (1931) (a misrepresentation is material if it "went to the very essence of the bargain"); cf. *Neder* v. *United States*, 527 U. S. 1, 16, 22, n. 5 (1999) (relying on "'natural tendency to influence'" standard and citing Restatement (Second) of Torts § 538 definition of materiality).

can include, but is not necessarily limited to, evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement. Conversely, if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material. Or, if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material.[6]

These rules lead us to disagree with the Government's and First Circuit's view of materiality: that any statutory, regulatory, or contractual violation is material so long as the defendant knows that the Government would be entitled to refuse payment were it aware of the violation. See Brief for United States as *Amicus Curiae* 30; Tr. of Oral Arg. 43 (Government's "test" for materiality "is whether the person knew that the government could lawfully withhold payment"); 780 F. 3d, at 514; see also Tr. of Oral Arg. 26, 29 (statements by respondents' counsel endorsing this view). At oral argument, the United States explained the implications of its position: If the Government contracts for health services and adds a requirement that contractors buy American-made staplers, anyone who submits a claim for those services but fails to disclose its use of foreign staplers violates the False Claims Act. To the Government, liability would attach if the defendant's use of foreign staplers would entitle the Gov-

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[6] We reject Universal Health's assertion that materiality is too fact intensive for courts to dismiss False Claims Act cases on a motion to dismiss or at summary judgment. The standard for materiality that we have outlined is a familiar and rigorous one. And False Claims Act plaintiffs must also plead their claims with plausibility and particularity under Federal Rules of Civil Procedure 8 and 9(b) by, for instance, pleading facts to support allegations of materiality.

ernment not to pay the claim in whole or part—irrespective of whether the Government routinely pays claims despite knowing that foreign staplers were used. *Id.*, at 39–45. Likewise, if the Government required contractors to aver their compliance with the entire U. S. Code and Code of Federal Regulations, then under this view, failing to mention noncompliance with any of those requirements would always be material. The False Claims Act does not adopt such an extraordinarily expansive view of liability.

* * *

Because both opinions below assessed respondents' complaint based on interpretations of § 3729(a)(1)(A) that differ from ours, we vacate the First Circuit's judgment and remand the case for reconsideration of whether respondents have sufficiently pleaded a False Claims Act violation. See *Omnicare, Inc.* v. *Laborers Dist. Council Constr. Industry Pension Fund*, 575 U. S. 175, 195 (2015). We emphasize, however, that the False Claims Act is not a means of imposing treble damages and other penalties for insignificant regulatory or contractual violations. This case centers on allegations of fraud, not medical malpractice. Respondents have alleged that Universal Health misrepresented its compliance with mental health facility requirements that are so central to the provision of mental health counseling that the Medicaid program would not have paid these claims had it known of these violations. Respondents may well have adequately pleaded a violation of § 3729(a)(1)(A). But we leave it to the courts below to resolve this in the first instance.

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

It is so ordered.

Syllabus

KIRTSAENG, DBA BLUECHRISTINE99 *v.* JOHN WILEY & SONS, INC.

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

No. 15–375. Argued April 25, 2016—Decided June 16, 2016

In *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U. S. 519, this Court held that petitioner Supap Kirtsaeng could invoke the Copyright Act's "first-sale doctrine," see 17 U. S. C. § 109(a), as a defense to the copyright infringement claim filed by textbook publisher John Wiley & Sons, Inc. Having won his case, Kirtsaeng returned to the District Court to seek more than $2 million in attorney's fees from Wiley under the Copyright Act's fee-shifting provision. See § 505. The District Court denied Kirtsaeng's application because, it reasoned, imposing a fee award against a losing party that had taken reasonable positions during litigation (as Wiley had done) would not serve the Act's purposes. Affirming, the Second Circuit held that the District Court was correct to place "substantial weight" on the reasonableness of Wiley's position and that the District Court did not abuse its discretion in determining that the other factors did not outweigh the reasonableness finding.

Held:

1. When deciding whether to award attorney's fees under § 505, a district court should give substantial weight to the objective reasonableness of the losing party's position, while still taking into account all other circumstances relevant to granting fees. Pp. 202–209.

(a) Section 505 states that a district court "may . . . award a reasonable attorney's fee to the prevailing party." Although the text "clearly connotes discretion" and eschews any "precise rule or formula," *Fogerty* v. *Fantasy, Inc.*, 510 U. S. 517, 533, 534, the Court has placed two restrictions on that authority: First, a court may not "award[ ] attorney's fees as a matter of course," *id.*, at 533; and second, a court may not treat prevailing plaintiffs and prevailing defendants differently, *id.*, at 527. The Court also noted "several nonexclusive factors" for courts to consider, *e. g.*, "frivolousness, motivation, objective unreasonableness[,] and the need in particular circumstances to advance considerations of compensation and deterrence," *id.*, at 534, n. 19, and left open the possibility of providing further guidance in the future, *id.*, at 534–535.

This Court agrees with both Kirtsaeng and Wiley that additional guidance respecting the application of § 505 is proper so as to further channel district court discretion towards the purposes of the Copyright

Syllabus

Act. In addressing other open-ended fee-shifting statutes, this Court has emphasized that "in a system of laws discretion is rarely without limits," and it has "found" those limits by looking to "the large objectives of the relevant Act." *Flight Attendants* v. *Zipes*, 491 U. S. 754, 758, 759. In accord with such precedents, this Court must determine what approach to fee awards under § 505 best advances the well-settled objectives of the Copyright Act, which are to "enrich[ ] the general public through access to creative works" by striking a balance between encouraging and rewarding authors' creations and enabling others to build on that work. *Fogerty*, 510 U. S., at 527, 526. Fee awards should thus encourage the types of lawsuits that advance those aims. Pp. 202–205.

(b) Wiley's approach—to put substantial weight on the reasonableness of a losing party's position—passes this test because it enhances the probability that creators and users (*i. e.*, plaintiffs and defendants) will enjoy the substantive rights the Act provides. Parties with strong positions are encouraged to stand on their rights, given the likelihood that they will recover fees from the losing (*i. e.*, unreasonable) party; those with weak ones are deterred by the likelihood of having to pay two sets of fees. By contrast, Kirtsaeng's proposal—to give special consideration to whether a suit meaningfully clarified copyright law by resolving an important and close legal issue—would produce no sure benefits. Even accepting that litigation of close cases advances the public interest, fee-shifting will not necessarily, or even usually, encourage parties to litigate those cases to judgment. While fees increase the reward for a victory, they also enhance the penalty for a defeat—and the parties in hard cases cannot be confident if they will win or lose.

Wiley's approach is also more administrable. A district court that has ruled on the merits of a copyright case can easily assess whether the losing party advanced an unreasonable position. By contrast, a judge may not know whether a newly decided issue will have broad legal significance. Pp. 205–208.

(c) Still, objective reasonableness can be only a substantial factor in assessing fee applications—not the controlling one. In deciding whether to fee-shift, district courts must take into account a range of considerations beyond the reasonableness of litigating positions. Pp. 208–209.

2. While the Second Circuit properly calls for district courts to give "substantial weight" to the reasonableness of a losing party's litigating positions, its language at times suggests that a finding of reasonableness raises a presumption against granting fees, and that goes too far in cabining the district court's analysis. Because the District Court thus may not have understood the full scope of its discretion, it should have

the opportunity to reconsider Kirtsaeng's fee application. On remand, the District Court should continue to give substantial weight to the reasonableness of Wiley's position but also take into account all other relevant factors. Pp. 209–210.

605 Fed. Appx. 48, vacated and remanded.

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

E. Joshua Rosenkranz argued the cause for petitioner. With him on the briefs were *Annette L. Hurst*, *Lisa T. Simpson*, *Thomas M. Bondy*, *Andrew D. Silverman*, and *Sam P. Israel*.

Paul M. Smith argued the cause for respondent. With him on the brief were *Matthew S. Hellman* and *Ishan K. Bhabha*.

Elaine J. Goldenberg argued the cause for the United States as *amicus curiae* urging affirmance. With her on the brief were *Solicitor General Verrilli*, *Principal Deputy Assistant Attorney General Mizer*, *Deputy Solicitor General Stewart*, and *Mark R. Freeman*.*

JUSTICE KAGAN delivered the opinion of the Court.

Section 505 of the Copyright Act provides that a district court "may . . . award a reasonable attorney's fee to the prevailing party." 17 U. S. C. § 505. The question presented here is whether a court, in exercising that authority, should give substantial weight to the objective reasonableness of the losing party's position. The answer, as both decisions

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Charles Duan and *Seth D. Greenstein* filed a brief for Public Knowledge as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the Copyright Alliance by *Eleanor M. Lackman* and *Nancy E. Wolff*; for Rimini Street, Inc., by *Mark A. Perry* and *Blaine H. Evanson*; and for Volunteer Lawyers for the Arts, Inc., by *David Leichtman* and *Sherli Furst*.

Briefs of *amici curiae* were filed for the American Intellectual Property Law Association by *Barbara A. Fiacco*, *Jenevieve J. Maerker*, and *Denise W. DeFranco*; and for the Intellectual Property Owners Association by *Gunnar B. Gundersen*, *Kevin H. Rhodes*, and *Steven W. Miller*.

below held, is yes—the court should. But the court must also give due consideration to all other circumstances relevant to granting fees; and it retains discretion, in light of those factors, to make an award even when the losing party advanced a reasonable claim or defense. Because we are not certain that the lower courts here understood the full scope of that discretion, we return the case for further consideration of the prevailing party's fee application.

I

Petitioner Supap Kirtsaeng, a citizen of Thailand, came to the United States 20 years ago to study math at Cornell University. He quickly figured out that respondent John Wiley & Sons, an academic publishing company, sold virtually identical English-language textbooks in the two countries—but for far less in Thailand than in the United States. Seeing a ripe opportunity for arbitrage, Kirtsaeng asked family and friends to buy the foreign editions in Thai bookstores and ship them to him in New York. He then resold the textbooks to American students, reimbursed his Thai suppliers, and pocketed a tidy profit.

Wiley sued Kirtsaeng for copyright infringement, claiming that his activities violated its exclusive right to distribute the textbooks. See 17 U. S. C. §§ 106(3), 602(a)(1). Kirtsaeng invoked the "first-sale doctrine" as a defense. That doctrine typically enables the lawful owner of a book (or other work) to resell or otherwise dispose of it as he wishes. See § 109(a). But Wiley contended that the first-sale doctrine did not apply when a book (like those Kirtsaeng sold) was manufactured abroad.

At the time, courts were in conflict on that issue. Some thought, as Kirtsaeng did, that the first-sale doctrine permitted the resale of foreign-made books; others maintained, along with Wiley, that it did not. And this Court, in its first pass at the issue, divided 4 to 4. See *Costco Wholesale Corp.* v. *Omega, S. A.*, 562 U. S. 40 (2010) (*per curiam*). In this case, the District Court sided with Wiley; so too did a

divided panel of the Court of Appeals for the Second Circuit. See 654 F. 3d 210, 214, 222 (2011). To settle the continuing conflict, this Court granted Kirtsaeng's petition for certiorari and reversed the Second Circuit in a 6-to-3 decision, thus establishing that the first-sale doctrine allows the resale of foreign-made books, just as it does domestic ones. See *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U. S. 519, 525 (2013).

Returning victorious to the District Court, Kirtsaeng invoked § 505 to seek more than $2 million in attorney's fees from Wiley. The court denied his motion. Relying on Second Circuit precedent, the court gave "substantial weight" to the "objective reasonableness" of Wiley's infringement claim. See No. 08–cv–07834 (SDNY, Dec. 20, 2013), App. to Pet. for Cert. 18a, 2013 WL 6722887, *4. In explanation of that approach, the court stated that "the imposition of a fee award against a copyright holder with an objectively reasonable"—although unsuccessful—"litigation position will generally not promote the purposes of the Copyright Act." *Id.*, at 11a (quoting *Matthew Bender & Co.* v. *West Publishing Co.*, 240 F. 3d 116, 122 (CA2 2001); emphasis deleted). Here, Wiley's position was reasonable: After all, several Courts of Appeals and three Justices of the Supreme Court had agreed with it. See App. to Pet. for Cert. 12a. And according to the District Court, no other circumstance "overr[o]de" that objective reasonableness, so as to warrant fee-shifting. *Id.*, at 22a. The Court of Appeals affirmed, concluding in a brief summary order that "the district court properly placed 'substantial weight' on the reasonableness of [Wiley's] position" and committed no abuse of discretion in deciding that other "factors did not outweigh" the reasonableness finding. 605 Fed. Appx. 48, 49, 50 (CA2 2015).

We granted certiorari, 577 U. S. 1098 (2016), to resolve disagreement in the lower courts about how to address an application for attorney's fees in a copyright case.[1]

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[1] Compare, *e. g.*, *Matthew Bender & Co.* v. *West Publishing Co.*, 240 F. 3d 116, 122 (CA2 2001) (giving substantial weight to objective reasonableness), with, *e. g.*, *Bond* v. *Blum*, 317 F. 3d 385, 397–398 (CA4 2003) (endors-

II

Section 505 states that a district court "may . . . award a reasonable attorney's fee to the prevailing party." It thus authorizes fee-shifting, but without specifying standards that courts should adopt, or guideposts they should use, in determining when such awards are appropriate.

In *Fogerty* v. *Fantasy, Inc.*, 510 U. S. 517 (1994), this Court recognized the broad leeway § 505 gives to district courts—but also established several principles and criteria to guide their decisions. See *id.*, at 519 (asking "what standards should inform" the exercise of the trial court's authority). The statutory language, we stated, "clearly connotes discretion," and eschews any "precise rule or formula" for awarding fees. *Id.*, at 533, 534. Still, we established a pair of restrictions. First, a district court may not "award[ ] attorney's fees as a matter of course"; rather, a court must make a more particularized, case-by-case assessment. *Id.*, at 533. Second, a court may not treat prevailing plaintiffs and prevailing defendants any differently; defendants should be "encouraged to litigate [meritorious copyright defenses] to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement." *Id.*, at 527. In addition, we noted with approval "several nonexclusive factors" to inform a court's fee-shifting decisions: "frivolousness, motivation, objective unreasonableness[,] and the need in particular circumstances to advance considerations of compensation and deterrence." *Id.*, at 534, n. 19. And we left open the possibility of providing further guidance in the future, in response to (and grounded on) lower courts' evolving experience. See *id.*, at 534–535; *Martin* v. *Franklin Capital Corp.*, 546 U. S. 132, 140, n. (2005) (noting that *Fogerty* was not intended to be the end of the matter).

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ing a totality-of-the-circumstances approach, without according special significance to any factor), and with, *e. g.*, *Hogan Systems, Inc.* v. *Cybersource Int'l, Inc.*, 158 F. 3d 319, 325 (CA5 1998) (presuming that a prevailing party receives fees).

The parties here, though sharing some common ground, now dispute what else we should say to district courts. Both Kirtsaeng and Wiley agree—as they must—that § 505 grants courts wide latitude to award attorney's fees based on the totality of circumstances in a case. See Brief for Petitioner 17; Brief for Respondent 35. Yet both reject the position, taken by some Courts of Appeals, see *supra*, at 201, n. 1, that *Fogerty* spelled out the only appropriate limits on judicial discretion—in other words, that each district court should otherwise proceed as it sees fit, assigning whatever weight to whatever factors it chooses. Rather, Kirtsaeng and Wiley both call, in almost identical language, for "[c]hanneling district court discretion towards the purposes of the Copyright Act." Brief for Petitioner 16; see Brief for Respondent 21 ("[A]n appellate court [should] channel a district court's discretion so that it . . . further[s] the goals of the Copyright Act"). (And indeed, as discussed later, both describe those purposes identically. See *infra*, at 204.) But at that point, the two part ways. Wiley argues that giving substantial weight to the reasonableness of a losing party's position will best serve the Act's objectives. See Brief for Respondent 24–35. By contrast, Kirtsaeng favors giving special consideration to whether a lawsuit resolved an important and close legal issue and thus "meaningfully clarifie[d]" copyright law. Brief for Petitioner 36; see *id.*, at 41–44.

We join both parties in seeing a need for some additional guidance respecting the application of § 505. In addressing other open-ended fee-shifting statutes, this Court has emphasized that "in a system of laws discretion is rarely without limits." *Flight Attendants* v. *Zipes*, 491 U. S. 754, 758 (1989); see *Halo Electronics, Inc.* v. *Pulse Electronics, Inc.*, 579 U. S. 93 (2016). Without governing standards or principles, such provisions threaten to condone judicial "whim" or predilection. *Martin*, 546 U. S., at 139; see also *ibid.* ("[A] motion to [a court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided

by sound legal principles" (quoting *United States* v. *Burr*, 25 F. Cas. 30, 35 (No. 14,692d) (CC Va. 1807) (Marshall, C. J.))). At the least, utterly freewheeling inquiries often deprive litigants of "the basic principle of justice that like cases should be decided alike," *Martin*, 546 U. S., at 139—as when, for example, one judge thinks the parties' "motivation[s]" determinative and another believes the need for "compensation" trumps all else, *Fogerty*, 510 U. S., at 534, n. 19. And so too, such unconstrained discretion prevents individuals from predicting how fee decisions will turn out, and thus from making properly informed judgments about whether to litigate. For those reasons, when applying fee-shifting laws with "no explicit limit or condition," *Halo*, 579 U. S., at 103, we have nonetheless "found limits" in them—and we have done so, just as both parties urge, by looking to "the large objectives of the relevant Act," *Zipes*, 491 U. S., at 759 (internal quotation marks omitted); see *supra*, at 203.

In accord with such precedents, we must consider if either Wiley's or Kirtsaeng's proposal well advances the Copyright Act's goals. Those objectives are well settled. As *Fogerty* explained, "copyright law ultimately serves the purpose of enriching the general public through access to creative works." 510 U. S., at 527; see U. S. Const., Art. I, § 8, cl. 8 ("To promote the Progress of Science and useful Arts"). The statute achieves that end by striking a balance between two subsidiary aims: encouraging and rewarding authors' creations while also enabling others to build on that work. See *Fogerty*, 510 U. S., at 526. Accordingly, fee awards under § 505 should encourage the types of lawsuits that promote those purposes. (That is why, for example, *Fogerty* insisted on treating prevailing plaintiffs and prevailing defendants alike—because the one could "further the policies of the Copyright Act every bit as much as" the other. 510 U. S., at 527.) On that much, both parties agree. Brief for Petitioner 37; Brief for Respondent 29–30. The contested

issue is whether giving substantial weight to the objective (un)reasonableness of a losing party's litigating position—or, alternatively, to a lawsuit's role in settling significant and uncertain legal issues—will predictably encourage such useful copyright litigation.

The objective-reasonableness approach that Wiley favors passes that test because it both encourages parties with strong legal positions to stand on their rights and deters those with weak ones from proceeding with litigation. When a litigant—whether plaintiff or defendant—is clearly correct, the likelihood that he will recover fees from the opposing (*i. e.*, unreasonable) party gives him an incentive to litigate the case all the way to the end. The holder of a copyright that has obviously been infringed has good reason to bring and maintain a suit even if the damages at stake are small; and likewise, a person defending against a patently meritless copyright claim has every incentive to keep fighting, no matter that attorney's fees in a protracted suit might be as or more costly than a settlement. Conversely, when a person (again, whether plaintiff or defendant) has an unreasonable litigating position, the likelihood that he will have to pay two sets of fees discourages legal action. The copyright holder with no reasonable infringement claim has good reason not to bring suit in the first instance (knowing he cannot force a settlement and will have to proceed to judgment); and the infringer with no reasonable defense has every reason to give in quickly, before each side's litigation costs mount. All of those results promote the Copyright Act's purposes, by enhancing the probability that both creators and users (*i. e.*, potential plaintiffs and defendants) will enjoy the substantive rights the statute provides.

By contrast, Kirtsaeng's proposal would not produce any sure benefits. We accept his premise that litigation of close cases can help ensure that "the boundaries of copyright law [are] demarcated as clearly as possible," thus advancing the public interest in creative work. Brief for Petitioner 19

(quoting *Fogerty*, 510 U. S., at 527). But we cannot agree that fee-shifting will necessarily, or even usually, encourage parties to litigate those cases to judgment. Fee awards are a double-edged sword: They increase the reward for a victory—but also enhance the penalty for a defeat. And the hallmark of hard cases is that no party can be confident if he will win or lose. That means Kirtsaeng's approach could just as easily discourage as encourage parties to pursue the kinds of suits that "meaningfully clarif[y]" copyright law. Brief for Petitioner 36. It would (by definition) raise the stakes of such suits; but whether those higher stakes would provide an incentive—or instead a disincentive—to litigate hinges on a party's attitude toward risk. Is the person risk-preferring or risk-averse—a high-roller or a penny-ante type? Only the former would litigate more in Kirtsaeng's world. See Posner, An Economic Approach to Legal Procedure and Judicial Administration, 2 J. Legal Studies 399, 428 (1973) (fees "make[ ] the expected value of litigation less for risk-averse litigants, which will encourage [them to] settle[ ]"). And Kirtsaeng offers no reason to think that serious gamblers predominate. See, *e. g.*, *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 636, n. 8 (1981) ("Economists disagree over whether business decision-makers[ ] are 'risk averse' "); *CIGNA Corp.* v. *Amara*, 563 U. S. 421, 430 (2011) ("[M]ost individuals are risk averse"). So the value of his standard, unlike Wiley's, is entirely speculative.[2]

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[2] This case serves as a good illustration. Imagine you are Kirtsaeng at a key moment in his case—say, when deciding whether to petition this Court for certiorari. And suppose (as Kirtsaeng now wishes) that the prevailing party in a hard and important case—like this one—will probably get a fee award. Does that make you more likely to file, because you will recoup your own fees if you win? Or less likely to file, because you will foot Wiley's bills if you lose? Here are some answers to choose from (recalling that you cannot confidently predict which way the Court will rule): (A) Six of one, half a dozen of the other. (B) Depends if I'm feeling lucky that day. (C) Less likely—this is getting scary; who knows how

What is more, Wiley's approach is more administrable than Kirtsaeng's. A district court that has ruled on the merits of a copyright case can easily assess whether the losing party advanced an unreasonable claim or defense. That is closely related to what the court has already done: In deciding any case, a judge cannot help but consider the strength and weakness of each side's arguments. By contrast, a judge may not know at the conclusion of a suit whether a newly decided issue will have, as Kirtsaeng thinks critical, broad legal significance. The precedent-setting, law-clarifying value of a decision may become apparent only in retrospect—sometimes, not until many years later. And so too a decision's practical impact (to the extent Kirtsaeng would have courts separately consider that factor). District courts are not accustomed to evaluating in real time either the jurisprudential or the on-the-ground import of their rulings. Exactly how they would do so is uncertain (Kirtsaeng points to no other context in which courts undertake such an analysis), but we fear that the inquiry would implicate our oft-stated concern that an application for attorney's fees "should not result in a second major litigation." *Zipes*, 491 U. S., at 766 (quoting *Hensley* v. *Eckerhart*, 461 U. S. 424, 437 (1983)). And we suspect that even at the end of that post-lawsuit lawsuit, the results would typically reflect little more than educated guesses.

Contrary to Kirtsaeng's view, placing substantial weight on objective reasonableness also treats plaintiffs and defendants even-handedly, as *Fogerty* commands. No matter which side wins a case, the court must assess whether the other side's position was (un)reasonable. And of course, both plaintiffs and defendants can (and sometimes do) make unreasonable arguments. Kirtsaeng claims that the reason-

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much money Wiley will spend on Supreme Court lawyers? (D) More likely—the higher the stakes, the greater the rush. Only if lots of people answer (D) will Kirtsaeng's standard work in the way advertised. Maybe. But then again, maybe not.

ableness inquiry systematically favors plaintiffs because a losing defendant "will virtually *always* be found to have done something culpable." Brief for Petitioner 29 (emphasis in original). But that conflates two different questions: whether a defendant in fact infringed a copyright and whether he made serious arguments in defense of his conduct. Courts every day see reasonable defenses that ultimately fail (just as they see reasonable claims that come to nothing); in this context, as in any other, they are capable of distinguishing between those defenses (or claims) and the objectively unreasonable variety. And if some court confuses the issue of liability with that of reasonableness, its fee award should be reversed for abuse of discretion.[3]

All of that said, objective reasonableness can be only an important factor in assessing fee applications—not the controlling one. As we recognized in *Fogerty*, § 505 confers broad discretion on district courts and, in deciding whether to fee-shift, they must take into account a range of considerations beyond the reasonableness of litigating positions. See *supra*, at 202. That means in any given case a court may award fees even though the losing party offered reasonable

[3] Kirtsaeng also offers statistics meant to show that in practice, even if not in theory, the objective-reasonableness inquiry unduly favors plaintiffs; but the Solicitor General as *amicus curiae* has cast significant doubt on that claim. According to Kirtsaeng, 86% of winning copyright holders, but only 45% of prevailing defendants, have received fee awards over the last 15 years in the Second Circuit (which, recall, gives substantial weight to objective reasonableness). See Reply Brief 17–18; *supra*, at 201. But first, the Solicitor General represents that the overall numbers are actually 77% and 53%, respectively. See Tr. of Oral Arg. 41. And second, the Solicitor General points out that all these percentages include default judgments, which almost invariably give rise to fee awards—but usually of a very small amount—because the defendant has not shown up to oppose either the suit or the fee application. When those cases are taken out, the statistics look fairly similar: 60% for plaintiffs versus 53% for defendants. See *id.*, at 42. And of course, there may be good reasons why copyright plaintiffs and defendants do not make reasonable arguments in perfectly equal proportion.

arguments (or, conversely, deny fees even though the losing party made unreasonable ones). For example, a court may order fee-shifting because of a party's litigation misconduct, whatever the reasonableness of his claims or defenses. See, *e. g.*, *Viva Video, Inc.* v. *Cabrera*, 9 Fed. Appx. 77, 80 (CA2 2001). Or a court may do so to deter repeated instances of copyright infringement or overaggressive assertions of copyright claims, again even if the losing position was reasonable in a particular case. See, *e. g.*, *Bridgeport Music, Inc.* v. *WB Music Corp.*, 520 F. 3d 588, 593–595 (CA6 2008) (awarding fees against a copyright holder who filed hundreds of suits on an overbroad legal theory, including in a subset of cases in which it was objectively reasonable). Although objective reasonableness carries significant weight, courts must view all the circumstances of a case on their own terms, in light of the Copyright Act's essential goals.

And on that score, Kirtsaeng has raised serious questions about how fee-shifting actually operates in the Second Circuit. To be sure, the Court of Appeals' framing of the inquiry resembles our own: It calls for a district court to give "substantial weight" to the reasonableness of a losing party's litigating positions while also considering other relevant circumstances. See 605 Fed. Appx., at 49–50; *Matthew Bender*, 240 F. 3d, at 122. But the Court of Appeals' language at times suggests that a finding of reasonableness raises a presumption against granting fees, see *ibid.*; *supra*, at 201—and that goes too far in cabining how a district court must structure its analysis and what it may conclude from its review of relevant factors. Still more, district courts in the Second Circuit appear to have overly learned the Court of Appeals' lesson, turning "substantial" into more nearly "dispositive" weight. As Kirtsaeng notes, hardly any decisions in that Circuit have granted fees when the losing party raised a reasonable argument (and none have denied fees when the losing party failed to do so). See Reply Brief 15. For these reasons, we vacate the decision below so that the

District Court can take another look at Kirtsaeng's fee application. In sending back the case for this purpose, we do not at all intimate that the District Court should reach a different conclusion. Rather, we merely ensure that the court will evaluate the motion consistent with the analysis we have set out—giving substantial weight to the reasonableness of Wiley's litigating position, but also taking into account all other relevant factors.

* * *

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

It is so ordered.

Syllabus

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

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

No. 15–415. Argued April 20, 2016—Decided June 20, 2016

The Fair Labor Standards Act (FLSA) requires employers to pay overtime compensation to covered employees who work more than 40 hours in a given week. In 1966, Congress enacted an exemption from the overtime compensation requirement for "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles" at a covered dealership. Fair Labor Standards Amendments of 1966, § 209, 80 Stat. 836, codified as amended at 29 U. S. C. § 213(b)(10)(A). Congress authorized the Department of Labor to promulgate necessary rules, regulations, or orders with respect to this new provision. The Department exercised that authority in 1970 and issued a regulation that defined "salesman" to mean "an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of the vehicles . . . which the establishment is primarily engaged in selling." 29 CFR § 779.372(c)(1) (1971). The regulation excluded service advisors, who sell repair and maintenance services but not vehicles, from the exemption. Several courts, however, rejected the Department's conclusion that service advisors are not covered by the statutory exemption. In 1978, the Department issued an opinion letter departing from its previous position and stating that service advisors could be exempt under 29 U. S. C. § 213(b)(10)(A). In 1987, the Department confirmed its new interpretation by amending its Field Operations Handbook to clarify that service advisors should be treated as exempt under the statute. In 2011, however, the Department issued a final rule that followed the original 1970 regulation and interpreted the statutory term "salesman" to mean only an employee who sells vehicles. 76 Fed. Reg. 18859. The Department gave little explanation for its decision to abandon its decades-old practice of treating service advisors as exempt under § 213(b)(10)(A).

Petitioner is an automobile dealership. Respondents are or were employed by petitioner as service advisors. Respondents filed suit alleging that petitioner violated the FLSA by failing to pay them overtime compensation when they worked more than 40 hours in a week. Petitioner moved to dismiss, arguing that the FLSA overtime provisions do not apply to respondents because service advisors are covered by the § 213(b)(10)(A) exemption. The District Court granted the motion, but

the Ninth Circuit reversed in relevant part. Deferring under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, to the interpretation set forth in the 2011 regulation, the court held that service advisors are not covered by the § 213(b)(10)(A) exemption.

Held: Section 213(b)(10)(A) must be construed without placing controlling weight on the Department's 2011 regulation. Pp. 219–224.

(a) When an agency is authorized by Congress to issue regulations and promulgates a regulation interpreting a statute it enforces, the interpretation receives deference if the statute is ambiguous and the agency's interpretation is reasonable. See *Chevron*, *supra*, at 842–844. When Congress authorizes an agency to proceed through notice-and-comment rulemaking, that procedure is a "very good indicator" that Congress intended the regulation to carry the force of law, so *Chevron* should apply. *United States* v. *Mead Corp.*, 533 U. S. 218, 229–230. But *Chevron* deference is not warranted where the regulation is "procedurally defective"—that is, where the agency errs by failing to follow the correct procedures in issuing the regulation. 533 U. S., at 227.

One basic procedural requirement of administrative rulemaking is that an agency must give adequate reasons for its decisions. Where the agency has failed to provide even a minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law. Agencies are free to change their existing policies, but in explaining its changed position, an agency must be cognizant that longstanding policies may have "engendered serious reliance interests that must be taken into account." *FCC* v. *Fox Television Stations, Inc.*, 556 U. S. 502, 515. An "[u]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice," *National Cable & Telecommunications Assn.* v. *Brand X Internet Services*, 545 U. S. 967, 981, and an arbitrary and capricious regulation of this sort receives no *Chevron* deference. Pp. 219–222.

(b) Applying those principles, the 2011 regulation was issued without the reasoned explanation that was required in light of the Department's change in position and the significant reliance interests involved. The industry had relied since 1978 on the Department's position that service advisors are exempt from the FLSA's overtime pay requirements, and had negotiated and structured compensation plans against this background understanding. In light of this background, the Department needed a more reasoned explanation for its decision to depart from its existing enforcement policy. The Department instead said almost nothing. It did not analyze or explain why the statute should be interpreted

to exempt dealership employees who sell vehicles but not dealership employees who sell services. This lack of reasoned explication for a regulation that is inconsistent with the Department's longstanding earlier position results in a rule that cannot carry the force of law, and so the regulation does not receive *Chevron* deference. It is appropriate to remand for the Ninth Circuit to interpret § 213(b)(10)(A) in the first instance. Pp. 222–224.

780 F. 3d 1267, vacated and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. GINSBURG, J., filed a concurring opinion, in which SOTOMAYOR, J., joined, *post*, p. 225. THOMAS, J., filed a dissenting opinion, in which ALITO, J., joined, *post*, p. 227.

Paul D. Clement argued the cause for petitioner. With him on the briefs were *Jeffrey M. Harris*, *Karl R. Lindegren*, *Todd B. Scherwin*, *Colin P. Calvert*, and *Wendy McGuire Coats*.

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

Anthony A. Yang argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Verrilli*, *Deputy Solicitor General Kneedler*, and *M. Patricia Smith*.*

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

Briefs of *amici curiae* urging affirmance were filed for the International Association of Machinists and Aerospace Workers, AFL–CIO, by *David A. Rosenfeld* and *Mark D. Schneider*; for Law Professors by *David C. Frederick*, *Michael F. Sturley*, *Lynn E. Blais*, and *Erin Glenn Busby*; and for the National Employment Lawyers Association et al. by *Terisa E. Chaw* and *Catherine K. Ruckelshaus*.

JUSTICE KENNEDY delivered the opinion of the Court.

This case addresses whether a federal statute requires payment of increased compensation to certain automobile dealership employees for overtime work. The federal statute in question is the Fair Labor Standards Act (FLSA), 29 U. S. C. § 201 *et seq.*, enacted in 1938 to "protect all covered workers from substandard wages and oppressive working hours." *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U. S. 728, 739 (1981). Among its other provisions, the FLSA requires employers to pay overtime compensation to covered employees who work more than 40 hours in a given week. The rate of overtime pay must be "not less than one and one-half times the regular rate" of the employee's pay. § 207(a).

Five current and former service advisors brought this suit alleging that the automobile dealership where they were employed was required by the FLSA to pay them overtime wages. The dealership contends that the position and duties of a service advisor bring these employees within § 213(b)(10)(A), which establishes an exemption from the FLSA overtime provisions for certain employees engaged in selling or servicing automobiles. The case turns on the interpretation of this exemption.

I

A

Automobile dealerships in many communities not only sell vehicles but also sell repair and maintenance services. Among the employees involved in providing repair and maintenance services are service advisors, partsmen, and mechanics. Service advisors interact with customers and sell them services for their vehicles. A service advisor's duties may include meeting customers; listening to their concerns about their cars; suggesting repair and maintenance services; selling new accessories or replacement parts; recording service orders; following up with customers as the services are

performed (for instance, if new problems are discovered); and explaining the repair and maintenance work when customers return for their vehicles. See App. 40–41; see also *Brennan* v. *Deel Motors, Inc.*, 475 F. 2d 1095, 1096 (CA5 1973); 29 CFR § 779.372(c)(4) (1971). Partsmen obtain the vehicle parts needed to perform repair and maintenance and provide those parts to the mechanics. See § 779.372(c)(2). Mechanics perform the actual repair and maintenance work. See § 779.372(c)(3).

In 1961, Congress enacted a blanket exemption from the FLSA's minimum wage and overtime provisions for all automobile dealership employees. Fair Labor Standards Amendments of 1961, § 9, 75 Stat. 73. In 1966, Congress repealed that broad exemption and replaced it with a narrower one. The revised statute did not exempt dealership employees from the minimum wage requirement. It also limited the exemption from the overtime compensation requirement to cover only certain employees—in particular, "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft" at a covered dealership. Fair Labor Standards Amendments of 1966, § 209, 80 Stat. 836. Congress authorized the Department of Labor to "promulgate necessary rules, regulations, or orders" with respect to this new provision. § 602, *id.*, at 844.

The Department exercised that authority in 1970 and issued a regulation that defined the statutory terms "salesman," "partsman," and "mechanic." 35 Fed. Reg. 5896 (codified at 29 CFR § 779.372(c)). The Department intended its regulation as a mere interpretive rule explaining its own views, rather than a legislative rule with the force and effect of law; and so the Department did not issue the regulation through the notice-and-comment procedures of the Administrative Procedure Act. See 35 Fed. Reg. 5856; see also 5 U. S. C. § 553(b)(A) (exempting interpretive rules from notice and comment).

The 1970 interpretive regulation defined "salesman" to mean "an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of the vehicles or farm implements which the establishment is primarily engaged in selling." 29 CFR § 779.372(c)(1). By limiting the statutory term to salesmen who sell vehicles or farm implements, the regulation excluded service advisors from the exemption, since a service advisor sells repair and maintenance services but not the vehicle itself. The regulation made that exclusion explicit in a later subsection: "Employees variously described as service manager, service writer, service advisor, or service salesman . . . are not exempt under [the statute]. This is true despite the fact that such an employee's principal function may be disagnosing [*sic*] the mechanical condition of vehicles brought in for repair, writing up work orders for repairs authorized by the customer, assigning the work to various employees and directing and checking on the work of mechanics." § 779.372(c)(4).

Three years later, the Court of Appeals for the Fifth Circuit rejected the Department's conclusion that service advisors are not covered by the statutory exemption. *Deel Motors*, *supra*. Certain District Courts followed that precedent. See *Yenney* v. *Cass County Motors*, 81 CCH LC ¶33,506 (Neb. 1977); *Brennan* v. *North Bros. Ford, Inc.*, 76 CCH LC ¶33,247 (ED Mich. 1975), aff'd *sub nom. Dunlop* v. *North Bros. Ford, Inc.*, 529 F. 2d 524 (CA6 1976) (table); *Brennan* v. *Import Volkswagen, Inc.*, 81 CCH LC ¶33,522 (Kan. 1975).

In the meantime, Congress amended the statutory provision by enacting its present text, which now sets out the exemption in two subsections. Fair Labor Standards Amendments of 1974, § 14, 88 Stat. 65. The first subsection is at issue in this case. It exempts "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements" at a covered deal-

ership. 29 U. S. C. §213(b)(10)(A). The second subsection exempts "any salesman primarily engaged in selling trailers, boats, or aircraft" at a covered dealership. §213(b)(10)(B). The statute thus exempts certain employees engaged in servicing automobiles, trucks, or farm implements, but not similar employees engaged in servicing trailers, boats, or aircraft.

In 1978, the Department issued an opinion letter departing from its previous position. Taking a position consistent with the cases decided by the courts, the opinion letter stated that service advisors could be exempt under §213(b)(10)(A). Dept. of Labor, Wage & Hour Div., Opinion Letter No. 1520 (WH–467) (1978), [1978–1981 Transfer Binder] CCH Wages–Hours Administrative Rulings ¶31,207. The letter acknowledged that the Department's new policy "represent[ed] a change from the position set forth in section 779.372(c)(4)" of its 1970 regulation. In 1987, the Department confirmed its 1978 interpretation by amending its Field Operations Handbook to clarify that service advisors should be treated as exempt under §213(b)(10)(A). It observed that some courts had interpreted the statutory exemption to cover service advisors; and it stated that, as a result of those decisions, it would "no longer deny the [overtime] exemption for such employees." Dept. of Labor, Wage & Hour Div., Field Operations Handbook, Insert No. 1757, 24L04–4(k) (Oct. 20, 1987). The Department again acknowledged that its new position represented a change from its 1970 regulation and stated that the regulation would "be revised as soon as is practicable." *Ibid.*

Twenty-one years later, in 2008, the Department at last issued a notice of proposed rulemaking. 73 Fed. Reg. 43654. The notice observed that every court that had considered the question had held service advisors to be exempt under §213(b)(10)(A), and that the Department itself had treated service advisors as exempt since 1987. *Id.*, at 43658–43659. The Department proposed to revise its regulations to accord

with existing practice by interpreting the exemption in § 213(b)(10)(A) to cover service advisors.

In 2011, however, the Department changed course yet again. It announced that it was "not proceeding with the proposed rule." 76 Fed. Reg. 18833. Instead, the Department completed its 2008 notice-and-comment rulemaking by issuing a final rule that took the opposite position from the proposed rule. The new final rule followed the original 1970 regulation and interpreted the statutory term "salesman" to mean only an employee who sells automobiles, trucks, or farm implements. *Id.*, at 18859 (codified at 29 CFR § 779.372(c)(1)).

The Department gave little explanation for its decision to abandon its decades-old practice of treating service advisors as exempt under § 213(b)(10)(A). It was also less than precise when it issued its final rule. As described above, the 1970 regulation included a separate subsection stating in express terms that service advisors "are not exempt" under the relevant provision. 29 CFR § 779.372(c)(4). In promulgating the 2011 regulation, however, the Department eliminated that separate subsection. According to the United States, this change appears to have been "an inadvertent mistake in drafting." Tr. of Oral Arg. 50.

B

Petitioner is a Mercedes-Benz automobile dealership in the Los Angeles area. Respondents are or were employed by petitioner as service advisors. They assert that petitioner required them to be at work from 7 a.m. to 6 p.m. at least five days per week, and to be available for work matters during breaks and while on vacation. App. 39–40. Respondents were not paid a fixed salary or an hourly wage for their work; instead, they were paid commissions on the services they sold. *Id.*, at 40–41.

Respondents sued petitioner in the United States District Court for the Central District of California, alleging that

petitioner violated the FLSA by failing to pay them overtime compensation when they worked more than 40 hours in a week. *Id.*, at 42–44. Petitioner moved to dismiss, arguing that the FLSA overtime provisions do not apply to respondents because service advisors are covered by the statutory exemption in §213(b)(10)(A). The District Court agreed and granted the motion to dismiss.

The Court of Appeals for the Ninth Circuit reversed in relevant part. It construed the statute by deferring under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), to the interpretation set forth by the Department in its 2011 regulation. Applying that deference, the Court of Appeals held that service advisors are not covered by the §213(b)(10)(A) exemption. 780 F. 3d 1267 (2015). The Court of Appeals recognized, however, that its decision conflicted with cases from a number of other courts. *Id.*, at 1274 (citing, *inter alia*, *Walton* v. *Greenbrier Ford, Inc.*, 370 F. 3d 446 (CA4 2004); *Deel Motors*, 475 F. 2d 1095; *Thompson* v. *J. C. Billion, Inc.*, 368 Mont. 299, 294 P. 3d 397 (2013)). This Court granted certiorari to resolve the question. 577 U. S. 1098 (2016).

II

A

The full text of the statutory subsection at issue states that the overtime provisions of the FLSA shall not apply to:

> "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." §213(b)(10)(A).

The question presented is whether this exemption should be interpreted to include service advisors. To resolve that question, it is necessary to determine what deference,

if any, the courts must give to the Department's 2011 interpretation.

In the usual course, when an agency is authorized by Congress to issue regulations and promulgates a regulation interpreting a statute it enforces, the interpretation receives deference if the statute is ambiguous and if the agency's interpretation is reasonable. This principle is implemented by the two-step analysis set forth in *Chevron*. At the first step, a court must determine whether Congress has "directly spoken to the precise question at issue." 467 U. S., at 842. If so, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.*, at 842–843. If not, then at the second step the court must defer to the agency's interpretation if it is "reasonable." *Id.*, at 844.

A premise of *Chevron* is that when Congress grants an agency the authority to administer a statute by issuing regulations with the force of law, it presumes the agency will use that authority to resolve ambiguities in the statutory scheme. See *id.*, at 843–844; *United States* v. *Mead Corp.*, 533 U. S. 218, 229–230 (2001). When Congress authorizes an agency to proceed through notice-and-comment rulemaking, that "relatively formal administrative procedure" is a "very good indicator" that Congress intended the regulation to carry the force of law, so *Chevron* should apply. *Mead Corp.*, *supra*, at 229–230. But *Chevron* deference is not warranted where the regulation is "procedurally defective"—that is, where the agency errs by failing to follow the correct procedures in issuing the regulation. 533 U. S., at 227; cf. *Long Island Care at Home, Ltd.* v. *Coke*, 551 U. S. 158, 174–176 (2007) (rejecting challenge to procedures by which regulation was issued and affording *Chevron* deference). Of course, a party might be foreclosed in some instances from challenging the procedures used to promulgate a given rule. Cf., *e. g.*, *JEM Broadcasting Co.* v. *FCC*, 22 F. 3d 320, 324–326 (CADC 1994); cf. also *Auer* v. *Robbins*,

519 U. S. 452, 458–459 (1997) (party cannot challenge agency's failure to amend its rule in light of changed circumstances without first seeking relief from the agency). But where a proper challenge is raised to the agency procedures, and those procedures are defective, a court should not accord *Chevron* deference to the agency interpretation. Respondents do not contest the manner in which petitioner has challenged the agency procedures here, and so this opinion assumes without deciding that the challenge was proper.

One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions. The agency "must examine the relevant data and articulate a satisfactory explanation for its 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). That requirement is satisfied when the agency's explanation is clear enough that its "path may reasonably be discerned." *Bowman Transp., Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U. S. 281, 286 (1974). But where the agency has failed to provide even that minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law. See 5 U. S. C. § 706(2)(A); *State Farm*, *supra*, at 42–43.

Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change. See, *e. g., National Cable & Telecommunications Assn.* v. *Brand X Internet Services*, 545 U. S. 967, 981–982 (2005); *Chevron*, 467 U. S., at 863–864. When an agency changes its existing position, it "need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate." *FCC* v. *Fox Television Stations, Inc.*, 556 U. S. 502, 515 (2009). But the agency must at least "display awareness that it is changing position" and "show that there are good reasons for the new policy." *Ibid.* (emphasis deleted). In explaining its changed position, an agency must

also be cognizant that longstanding policies may have "engendered serious reliance interests that must be taken into account." *Ibid.*; see also *Smiley* v. *Citibank (South Dakota), N. A.*, 517 U. S. 735, 742 (1996). "In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox Television Stations*, *supra*, at 515–516. It follows that an "[u]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice." *Brand X*, *supra*, at 981. An arbitrary and capricious regulation of this sort is itself unlawful and receives no *Chevron* deference. See *Mead Corp.*, *supra*, at 227.

B

Applying those principles here, the unavoidable conclusion is that the 2011 regulation was issued without the reasoned explanation that was required in light of the Department's change in position and the significant reliance interests involved. In promulgating the 2011 regulation, the Department offered barely any explanation. A summary discussion may suffice in other circumstances, but here—in particular because of decades of industry reliance on the Department's prior policy—the explanation fell short of the agency's duty to explain why it deemed it necessary to overrule its previous position.

The retail automobile and truck dealership industry had relied since 1978 on the Department's position that service advisors are exempt from the FLSA's overtime pay requirements. See National Automobile Dealers Association, Comment Letter on Proposed Rule Updating Regulations Issued Under the Fair Labor Standards Act (Sept. 26, 2008), online at https://www.regulations.gov/#!documentDetail;D=WHD-2008-0003-0038 (as last visited June 16, 2016). Dealerships and service advisors negotiated and structured their com-

pensation plans against this background understanding. Requiring dealerships to adapt to the Department's new position could necessitate systemic, significant changes to the dealerships' compensation arrangements. See Brief for National Automobile Dealers Association et al. as *Amici Curiae* 13–14. Dealerships whose service advisors are not compensated in accordance with the Department's new views could also face substantial FLSA liability, see 29 U. S. C. § 216(b), even if this risk of liability may be diminished in some cases by the existence of a separate FLSA exemption for certain employees paid on a commission basis, see § 207(i), and even if a dealership could defend against retroactive liability by showing it relied in good faith on the prior agency position, see § 259(a). In light of this background, the Department needed a more reasoned explanation for its decision to depart from its existing enforcement policy.

The Department said that, in reaching its decision, it had "carefully considered all of the comments, analyses, and arguments made for and against the proposed changes." 76 Fed. Reg. 18832. And it noted that, since 1978, it had treated service advisors as exempt in certain circumstances. *Id.*, at 18838. It also noted the comment from the National Automobile Dealers Association stating that the industry had relied on that interpretation. *Ibid.*

But when it came to explaining the "good reasons for the new policy," *Fox Television Stations*, *supra*, at 515, the Department said almost nothing. It stated only that it would not treat service advisors as exempt because "the statute does not include such positions and the Department recognizes that there are circumstances under which the requirements for the exemption would not be met." 76 Fed. Reg. 18838. It continued that it "believes that this interpretation is reasonable" and "sets forth the appropriate approach." *Ibid.* Although an agency may justify its policy choice by explaining why that policy "is more consistent with statutory language" than alternative policies, *Long Island Care at*

Home, 551 U. S., at 175 (internal quotation marks omitted), the Department did not analyze or explain why the statute should be interpreted to exempt dealership employees who sell vehicles but not dealership employees who sell services (that is, service advisors). And though several public comments supported the Department's reading of the statute, the Department did not explain what (if anything) it found persuasive in those comments beyond the few statements above.

It is not the role of the courts to speculate on reasons that might have supported an agency's decision. "[W]e may not supply a reasoned basis for the agency's action that the agency itself has not given." *State Farm*, 463 U. S., at 43 (citing *SEC* v. *Chenery Corp.*, 332 U. S. 194, 196 (1947)). Whatever potential reasons the Department might have given, the agency in fact gave almost no reasons at all. In light of the serious reliance interests at stake, the Department's conclusory statements do not suffice to explain its decision. See *Fox Television Stations*, *supra*, at 515–516. This lack of reasoned explication for a regulation that is inconsistent with the Department's longstanding earlier position results in a rule that cannot carry the force of law. See 5 U. S. C. § 706(2)(A); *State Farm*, *supra*, at 42–43. It follows that this regulation does not receive *Chevron* deference in the interpretation of the relevant statute.

* * *

For the reasons above, § 213(b)(10)(A) must be construed without placing controlling weight on the Department's 2011 regulation. Because the decision below relied on *Chevron* deference to this regulation, it is appropriate to remand for the Court of Appeals to interpret the statute in the first instance. Cf. *Mead*, 533 U. S., at 238–239. The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR joins, concurring.

I agree in full that, in issuing its 2011 rule, the Department of Labor did not satisfy its basic obligation to explain "that there are good reasons for [a] new policy." *FCC* v. *Fox Television Stations, Inc.*, 556 U. S. 502, 515 (2009). The Department may have adequate reasons to construe the Fair Labor Standards Act automobile-dealership exemption as it did. The 2011 rulemaking tells us precious little, however, about what those reasons are.[1]

I write separately to stress that nothing in today's opinion disturbs well-established law. In particular, where an agency has departed from a prior position, there is no "heightened standard" of arbitrary-and-capricious review. *Id.*, at 514. See also *ante*, at 221. An agency must "display awareness that it is changing position" and "show that there are good reasons for the new policy." *Fox*, 556 U. S., at 515 (emphasis deleted). "But it need not demonstrate to a court's satisfaction that the reasons for the new policy are

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[1] Unlike JUSTICE THOMAS, I am not persuaded that, sans *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), the Ninth Circuit should conclude on remand that service advisors are categorically exempt from hours regulations. As that court previously explained, "[s]ervice advisors may be 'salesmen' in a generic sense, but they [may fall outside the exemption because they] do not personally sell cars and they do not personally service cars." 780 F. 3d 1267, 1274 (2015). Moreover, in its briefing before this Court, the Department of Labor responded to the argument that "the exemption's application to a 'partsman'" "confirm[s] that a service advisor is a salesman primarily engaged in servicing automobiles." *Post*, at 229 (THOMAS, J., dissenting). See Brief for United States as *Amicus Curiae* 22–23 (maintaining that partsmen, unlike service advisors, actually engage in maintenance and repair work); Brief for Respondents 11 (contending that partsmen "ge[t] their hands dirty" by "work[ing] as a mechanic's right-hand man or woman"); *id.*, at 32–35 (cataloging descriptions of partsmen responsibilities drawn from occupational handbooks and training manuals). The Court appropriately leaves the proper ranking of service advisors to the Court of Appeals in the first instance.

better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *Ibid.*

The Court's bottom line remains unaltered: "'[U]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.'" *Ante*, at 222 (quoting *National Cable & Telecommunications Assn.* v. *Brand X Internet Services*, 545 U. S. 967, 981 (2005)). Industry reliance may spotlight the inadequacy of an agency's explanation. See *ante*, at 222 ("decades of industry reliance" make "summary discussion" inappropriate). But reliance does not overwhelm good reasons for a policy change. Even if the Department's changed position would "necessitate systemic, significant changes to the dealerships' compensation arrangements," *ante*, at 223, the Department would not be disarmed from determining that the benefits of overtime coverage outweigh those costs.[2] "If the action rests upon . . . an

[2] If the Department decides to reissue the 2011 rule, I doubt that reliance interests would pose an insurmountable obstacle. As the Court acknowledges, *ante*, at 223, an affirmative defense in the Fair Labor Standards Act (FLSA) protects regulated parties against retroactive liability for actions taken in good-faith reliance on superseded agency guidance, 29 U. S. C. § 259(a). And a separate FLSA exemption covers many service advisors: retail or service workers who receive at least half of their pay on commission, so long as their regular rate of pay is more than 1½ times the minimum wage. *Ante*, at 223 (citing § 207(i)); see Brief for Petitioner 13, n. 4 (many service advisors are paid on a commission basis). Thus, the cost of the Department's policy shift may be considerably less than the dealerships project. Finally, I note, the extent to which the Department is obliged to address reliance will be affected by the thoroughness of public comments it receives on the issue. In response to its 2008 proposal, the Department received only conclusory references to industry reliance interests. See *ante*, at 222 (citing comment from National Automobile Dealers Association). An agency cannot be faulted for failing to discuss at length matters only cursorily raised before it.

exercise of judgment in an area which Congress has entrusted to the agency[,] of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so." *SEC* v. *Chenery Corp.*, 318 U. S. 80, 94 (1943).

JUSTICE THOMAS, with whom JUSTICE ALITO joins, dissenting.

The Court granted this case to decide whether an exemption under the Fair Labor Standards Act (FLSA), 29 U. S. C. § 201 *et seq.*, "requires payment of increased compensation to certain automobile dealership employees"— known as service advisors—"for overtime work." *Ante*, at 214; see also *ante*, at 215, 219. The majority declines to resolve that question. Instead, after explaining why the Court owes no deference to the Department of Labor's regulation purporting to interpret this provision, see *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843 (1984), the majority leaves it "for the Court of Appeals to interpret the statute in the first instance." *Ante*, at 224.

I agree with the majority's conclusion that we owe no *Chevron* deference to the Department's position because "deference is not warranted where [a] regulation is 'procedurally defective.'" *Ante*, at 220. But I disagree with its ultimate decision to punt on the issue before it. We have an "obligation . . . to decide the merits of the question presented." *CBOCS West, Inc.* v. *Humphries*, 553 U. S. 442, 472 (2008) (THOMAS, J., dissenting). We need not wade into the murky waters of *Chevron* deference to decide whether the Ninth Circuit's reading of the statute was correct. We must instead examine the statutory text. That text reveals that service advisors are salesmen primarily engaged in the selling of services for automobiles. Accordingly, I would reverse the Ninth Circuit's judgment.

Federal law requires overtime pay for certain employees who work more than 40 hours per week. § 207(a)(2)(C).

But the FLSA exempts various categories of employees from this overtime requirement. § 213. The question before the Court is whether the following exemption encompasses service advisors:

> "The provisions of section 207 of this title shall not apply with respect to—
>
> . . . . .
>
> "(10)(A) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." § 213(b).

I start with the uncontroversial notion that a service advisor is a "salesman." The FLSA does not define the term "salesman," so "we give the term its ordinary meaning." *Taniguchi* v. *Kan Pacific Saipan, Ltd.*, 566 U. S. 560, 566 (2012). A "salesman" is someone who sells goods or services. 14 Oxford English Dictionary 391 (2d ed. 1989) ("[a] man whose business it is to sell goods or conduct sales"); Random House Dictionary of the English Language 1262 (1966) (Random House) ("a man who sells goods, services, etc."). Service advisors, whose role it is to "interact with customers and sell them services for their vehicles," *ante*, at 214–215, are plainly "salesm[e]n." See *ante*, at 216 (cataloging sales-related duties of service advisors).

A service advisor, however, is not "primarily engaged in selling . . . automobiles." § 213(b)(10)(A). On the contrary, a service advisor is a "salesman" who sells servicing solutions. *Ante*, at 214. So the exemption applies only if it covers *not only* those salesmen primarily engaged in selling automobiles *but also* those salesmen primarily engaged in servicing automobiles.

The exemption's structure confirms that salesmen could do both. The exemption contains three nouns ("salesman,

partsman, or mechanic") and two gerunds ("selling or servicing"). The three nouns are connected by the disjunctive "or," as are the gerunds. So unless context dictates otherwise, a salesman can *either* be engaged in selling *or* servicing automobiles. Cf. *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 339 (1979).

Context does not dictate otherwise. A salesman, namely, one who sells servicing solutions, can be "primarily engaged in . . . servicing automobiles." §213(b)(10)(A). The FLSA does not define the term "servicing," but its ordinary meaning includes both "[t]he action of maintaining or repairing a motor vehicle" and "the action of providing a service." 15 Oxford English Dictionary 39; see also Random House 1304 (defining "service" to mean "the providing . . . of . . . activities required by the public, as maintenance, repair, etc."). A service advisor's selling of service solutions fits both definitions. The service advisor is the customer's liaison for purposes of deciding what parts are necessary to maintain or repair a vehicle and therefore is primarily engaged in "the action of maintaining or repairing a motor vehicle" or "the action of providing a service" for an automobile.

Other features of the exemption confirm that a service advisor is a salesman primarily engaged in servicing automobiles. Consider the exemption's application to a "partsman." Like a service advisor, a partsman neither sells vehicles nor repairs vehicles himself. See 29 CFR §779.372(c)(2) (2015) (defining "partsman" as "any employee employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts"). For the provision to exempt partsmen, then, the phrase "primarily engaged in . . . servicing" must cover some employees who do not themselves perform repair or maintenance. So "servicing" refers not only to the physical act of repairing or maintaining a vehicle but also to acts integral to the servicing process more generally.

Respondents' contrary contentions are unavailing. They first invoke the distributive canon: "Where a sentence con-

tains several antecedents and several consequents," the distributive canon instructs courts to "read [those several terms] distributively and apply the words to the subjects which, by context, they seem most properly to relate." 2A N. Singer & S. Singer, Sutherland on Statutory Construction § 47.26, p. 448 (rev. 7th ed. 2014). Respondents accordingly maintain that 29 U. S. C. § 213(b)(10)(A) exempts *only* salesmen primarily engaged in selling automobiles. Brief for Respondents 20–26. But the distributive canon is less helpful in cases such as this because the antecedents and consequents cannot be readily matched on a one-to-one basis. Here, there are three nouns to be matched with only two gerunds, so the canon does not overcome the exemption's plain meaning. Perhaps respondents might have a better argument if the statute exempted "salesman or mechanics who primarily engage in selling or servicing automobiles." In such a case, one might assume that Congress meant the nouns and gerunds to match on a one-to-one basis, and the distributive canon could be utilized to determine how the matching should occur. But that is not the statute before us. For the reasons explained, *supra*, at 228–229, the plain meaning of the various terms in the exemption establish that the term "salesman" is not limited to only those who sell automobiles. It also extends to those "primarily engaged in . . . servicing automobiles." § 213(b)(10)(A).

Respondents also resist this natural reading of the exemption by invoking the made-up canon that courts must narrowly construe the FLSA exemptions. Brief for Respondents 41–42. The Ninth Circuit agreed with respondents on this score. 780 F. 3d 1267, 1271–1272, and n. 3 (2015). The court should not do so again on remand. We have declined to apply that canon on two recent occasions, one of which also required the Court to parse the meaning of an exemption in § 213. *Christopher* v. *SmithKline Beecham Corp.*, 567 U. S. 142, 164, n. 21 (2012); see also *Sandifer* v. *United States Steel Corp.*, 571 U. S. 220, 232, n. 7 (2014). There is no basis to

infer that Congress means anything beyond what a statute plainly says simply because the legislation in question could be classified as "remedial." See Scalia, Assorted Canards of Contemporary Legal Analysis, 40 Case W. Res. L. Rev. 581, 581–586 (1990). Indeed, this canon appears to "res[t] on an elemental misunderstanding of the legislative process," viz., "that Congress intend[s] statutes to extend as far as possible in service of a singular objective." Brief for Chamber of Commerce of the United States of America et al. as *Amici Curiae* 7.

* * *

For the foregoing reasons, I would hold that the FLSA exemption set out in § 213(b)(10)(A) covers the service advisors in this case. Service advisors are "primarily engaged in . . . servicing automobiles," given their integral role in selling and providing vehicle services. Accordingly, I would reverse the judgment of the Ninth Circuit.

Syllabus

UTAH *v.* STRIEFF

CERTIORARI TO THE SUPREME COURT OF UTAH

No. 14–1373. Argued February 22, 2016—Decided June 20, 2016

Narcotics detective Douglas Fackrell conducted surveillance on a South Salt Lake City residence based on an anonymous tip about drug activity. The number of people he observed making brief visits to the house over the course of a week made him suspicious that the occupants were dealing drugs. After observing respondent Edward Strieff leave the residence, Officer Fackrell detained Strieff at a nearby parking lot, identifying himself and asking Strieff what he was doing at the house. He then requested Strieff's identification and relayed the information to a police dispatcher, who informed him that Strieff had an outstanding arrest warrant for a traffic violation. Officer Fackrell arrested Strieff, searched him, and found methamphetamine and drug paraphernalia. Strieff moved to suppress the evidence, arguing that it was derived from an unlawful investigatory stop. The trial court denied the motion, and the Utah Court of Appeals affirmed. The Utah Supreme Court reversed, however, and ordered the evidence suppressed.

Held: The evidence Officer Fackrell seized incident to Strieff's arrest is admissible based on an application of the attenuation factors from *Brown* v. *Illinois*, 422 U. S. 590. In this case, there was no flagrant police misconduct. Therefore, Officer Fackrell's discovery of a valid, pre-existing, and untainted arrest warrant attenuated the connection between the unconstitutional investigatory stop and the evidence seized incident to a lawful arrest. Pp. 237–243.

(a) As the primary judicial remedy for deterring Fourth Amendment violations, the exclusionary rule encompasses both the "primary evidence obtained as a direct result of an illegal search or seizure" and, relevant here, "evidence later discovered and found to be derivative of an illegality." *Segura* v. *United States*, 468 U. S. 796, 804. But to ensure that those deterrence benefits are not outweighed by the rule's substantial social costs, there are several exceptions to the rule. One exception is the attenuation doctrine, which provides for admissibility when the connection between unconstitutional police conduct and the evidence is sufficiently remote or has been interrupted by some intervening circumstance. See *Hudson* v. *Michigan*, 547 U. S. 586, 593. Pp. 237–238.

(b) As a threshold matter, the attenuation doctrine is not limited to the defendant's independent acts. The doctrine therefore applies here,

where the intervening circumstance is the discovery of a valid, preexisting, and untainted arrest warrant. Assuming, without deciding, that Officer Fackrell lacked reasonable suspicion to stop Strieff initially, the discovery of that arrest warrant attenuated the connection between the unlawful stop and the evidence seized from Strieff incident to his arrest. Pp. 238–243.

(1) Three factors articulated in *Brown* v. *Illinois*, 422 U. S. 590, lead to this conclusion. The first, "temporal proximity" between the initially unlawful stop and the search, *id.*, at 603, favors suppressing the evidence. Officer Fackrell discovered drug contraband on Strieff only minutes after the illegal stop. In contrast, the second factor, "the presence of intervening circumstances," *id.*, at 603–604, strongly favors the State. The existence of a valid warrant, predating the investigation and entirely unconnected with the stop, favors finding sufficient attenuation between the unlawful conduct and the discovery of evidence. That warrant authorized Officer Fackrell to arrest Strieff, and once the arrest was authorized, his search of Strieff incident to that arrest was undisputedly lawful. The third factor, "the purpose and flagrancy of the official misconduct," *id.*, at 604, also strongly favors the State. Officer Fackrell was at most negligent, but his errors in judgment hardly rise to a purposeful or flagrant violation of Strieff's Fourth Amendment rights. After the unlawful stop, his conduct was lawful, and there is no indication that the stop was part of any systemic or recurrent police misconduct. Pp. 239–242.

(2) Strieff's counterarguments are unpersuasive. First, neither Officer Fackrell's purpose nor the flagrancy of the violation rises to a level of misconduct warranting suppression. Officer Fackrell's purpose was not to conduct a suspicionless fishing expedition but was to gather information about activity inside a house whose occupants were legitimately suspected of dealing drugs. Strieff conflates the standard for an illegal stop with the standard for flagrancy, which requires more than the mere absence of proper cause. Second, it is unlikely that the prevalence of outstanding warrants will lead to dragnet searches by police. Such misconduct would expose police to civil liability and, in any event, is already accounted for by *Brown*'s "purpose and flagrancy" factor. Pp. 242–243.

2015 UT 2, 357 P. 3d 532, reversed.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, BREYER, and ALITO, JJ., joined. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, J., joined as to Parts I, II, and III, *post*, p. 243. KAGAN, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 255.

Tyler R. Green, Solicitor General of Utah, argued the cause for petitioner. With him on the briefs were *Sean D. Reyes*, Attorney General, *Laura B. Dupaix*, Deputy Solicitor General, *Thomas B. Brunker*, and *Jeffrey S. Gray.*

John F. Bash argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Caldwell*, *Deputy Solicitor General Dreeben*, and *David M. Lieberman.*

Joan C. Watt argued the cause for respondent. With her on the brief were *Stuart Banner* and *Patrick L. Anderson.**

JUSTICE THOMAS delivered the opinion of the Court.

To enforce the Fourth Amendment's prohibition against "unreasonable searches and seizures," this Court has at times required courts to exclude evidence obtained by uncon-

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*Briefs of *amici curiae* urging reversal were filed for the State of Michigan et al. by *Bill Schuette*, Attorney General of Michigan, *Aaron D. Lindstrom*, Solicitor General, and *Kathryn M. Dalzell*, Assistant Solicitor General, and by the Attorneys General and other officials for their respective States as follows: *Luther Strange* of Alabama, *Mark Brnovich* of Arizona, *Leslie Rutledge* of Arkansas, *Cynthia Coffman* of Colorado, *Pamela Jo Bondi* of Florida, *Douglas S. Chin* of Hawaii, *Lisa Madigan* of Illinois, *Gregory F. Zoeller* of Indiana, *Derek Schmidt* of Kansas, *Jack Conway* of Kentucky, *James D. "Buddy" Caldwell* of Louisiana, *Janet T. Mills* of Maine, *Douglas F. Gansler* of Maryland, *Timothy C. Fox* of Montana, *Douglas J. Peterson* of Nebraska, *John J. Hoffman*, Acting Attorney General of New Jersey, *Adam Paul Laxalt* of Nevada, *Wayne Stenehjem* of North Dakota, *Michael DeWine* of Ohio, *Ellen F. Rosenblum* of Oregon, *E. Scott Pruitt* of Oklahoma, *Bruce R. Beemer*, First Deputy Attorney General of Pennsylvania, *Peter F. Kilmartin* of Rhode Island, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Herbert H. Slatery III* of Tennessee, *Ken Paxton* of Texas, *Patrick Morrisey* of West Virginia, and *Peter K. Michael* of Wyoming; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger.*

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Michael B. Kimberly*, *Steven R. Shapiro*, and *Jeffrey L. Fisher*; for the Electronic Privacy Information Center et al. by *Marc Rotenberg* and *Alan Butler*; and for Tracy E. Labrusciano et al. by *Norman M. Garland* and *Michael M. Epstein*, both *pro se.*

stitutional police conduct. But the Court has also held that, even when there is a Fourth Amendment violation, this exclusionary rule does not apply when the costs of exclusion outweigh its deterrent benefits. In some cases, for example, the link between the unconstitutional conduct and the discovery of the evidence is too attenuated to justify suppression. The question in this case is whether this attenuation doctrine applies when an officer makes an unconstitutional investigatory stop; learns during that stop that the suspect is subject to a valid arrest warrant; and proceeds to arrest the suspect and seize incriminating evidence during a search incident to that arrest. We hold that the evidence the officer seized as part of the search incident to arrest is admissible because the officer's discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized incident to arrest.

I

This case began with an anonymous tip. In December 2006, someone called the South Salt Lake City police's drug-tip line to report "narcotics activity" at a particular residence. App. 15. Narcotics detective Douglas Fackrell investigated the tip. Over the course of about a week, Officer Fackrell conducted intermittent surveillance of the home. He observed visitors who left a few minutes after arriving at the house. These visits were sufficiently frequent to raise his suspicion that the occupants were dealing drugs.

One of those visitors was respondent Edward Strieff. Officer Fackrell observed Strieff exit the house and walk toward a nearby convenience store. In the store's parking lot, Officer Fackrell detained Strieff, identified himself, and asked Strieff what he was doing at the residence.

As part of the stop, Officer Fackrell requested Strieff's identification, and Strieff produced his Utah identification card. Officer Fackrell relayed Strieff's information to a police dispatcher, who reported that Strieff had an outstanding arrest warrant for a traffic violation. Officer Fackrell then arrested Strieff pursuant to that warrant. When Officer

Fackrell searched Strieff incident to the arrest, he discovered a baggie of methamphetamine and drug paraphernalia.

The State charged Strieff with unlawful possession of methamphetamine and drug paraphernalia. Strieff moved to suppress the evidence, arguing that the evidence was inadmissible because it was derived from an unlawful investigatory stop. At the suppression hearing, the prosecutor conceded that Officer Fackrell lacked reasonable suspicion for the stop but argued that the evidence should not be suppressed because the existence of a valid arrest warrant attenuated the connection between the unlawful stop and the discovery of the contraband.

The trial court agreed with the State and admitted the evidence. The court found that the short time between the illegal stop and the search weighed in favor of suppressing the evidence, but that two countervailing considerations made it admissible. First, the court considered the presence of a valid arrest warrant to be an "'extraordinary intervening circumstance.'" App. to Pet. for Cert. 102 (quoting *United States* v. *Simpson*, 439 F. 3d 490, 496 (CA8 2006)). Second, the court stressed the absence of flagrant misconduct by Officer Fackrell, who was conducting a legitimate investigation of a suspected drug house.

Strieff conditionally pleaded guilty to reduced charges of attempted possession of a controlled substance and possession of drug paraphernalia, but reserved his right to appeal the trial court's denial of the suppression motion. The Utah Court of Appeals affirmed. 2012 UT App 245, 286 P. 3d 317.

The Utah Supreme Court reversed. 2015 UT 2, 357 P. 3d 532. It held that the evidence was inadmissible because only "a voluntary act of a defendant's free will (as in a confession or consent to search)" sufficiently breaks the connection between an illegal search and the discovery of evidence. *Id.*, at 536. Because Officer Fackrell's discovery of a valid arrest warrant did not fit this description, the court ordered the evidence suppressed. *Ibid.*

We granted certiorari to resolve disagreement about how the attenuation doctrine applies where an unconstitutional detention leads to the discovery of a valid arrest warrant. 576 U. S. 1094 (2015). Compare, *e. g.*, *United States* v. *Green*, 111 F. 3d 515, 522–523 (CA7 1997) (holding that discovery of the warrant is a dispositive intervening circumstance where police misconduct was not flagrant), with, *e. g.*, *State* v. *Moralez*, 297 Kan. 397, 415, 300 P. 3d 1090, 1102 (2013) (assigning little significance to the discovery of the warrant). We now reverse.

II

A

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Because officers who violated the Fourth Amendment were traditionally considered trespassers, individuals subject to unconstitutional searches or seizures historically enforced their rights through tort suits or self-help. Davies, Recovering the Original Fourth Amendment, 98 Mich. L. Rev. 547, 625 (1999). In the 20th century, however, the exclusionary rule—the rule that often requires trial courts to exclude unlawfully seized evidence in a criminal trial—became the principal judicial remedy to deter Fourth Amendment violations. See, *e. g.*, *Mapp* v. *Ohio*, 367 U. S. 643, 655 (1961).

Under the Court's precedents, the exclusionary rule encompasses both the "primary evidence obtained as a direct result of an illegal search or seizure" and, relevant here, "evidence later discovered and found to be derivative of an illegality," the so-called "'fruit of the poisonous tree.'" *Segura* v. *United States*, 468 U. S. 796, 804 (1984). But the significant costs of this rule have led us to deem it "applicable only . . . where its deterrence benefits outweigh its substantial social costs." *Hudson* v. *Michigan*, 547 U. S. 586, 591 (2006) (internal quotation marks omitted). "Suppression of evi-

dence . . . has always been our last resort, not our first impulse." *Ibid.*

We have accordingly recognized several exceptions to the rule. Three of these exceptions involve the causal relationship between the unconstitutional act and the discovery of evidence. First, the independent source doctrine allows trial courts to admit evidence obtained in an unlawful search if officers independently acquired it from a separate, independent source. See *Murray* v. *United States*, 487 U. S. 533, 537 (1988). Second, the inevitable discovery doctrine allows for the admission of evidence that would have been discovered even without the unconstitutional source. See *Nix* v. *Williams*, 467 U. S. 431, 443–444 (1984). Third, and at issue here, is the attenuation doctrine: Evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that "the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." *Hudson*, *supra*, at 593.

B

Turning to the application of the attenuation doctrine to this case, we first address a threshold question: whether this doctrine applies at all to a case like this, where the intervening circumstance that the State relies on is the discovery of a valid, pre-existing, and untainted arrest warrant. The Utah Supreme Court declined to apply the attenuation doctrine because it read our precedents as applying the doctrine only "to circumstances involving an independent act of a defendant's 'free will' in confessing to a crime or consenting to a search." 357 P. 3d, at 544. In this Court, Strieff has not defended this argument, and we disagree with it, as well. The attenuation doctrine evaluates the causal link between the government's unlawful act and the discovery of evidence, which often has nothing to do with a defendant's actions.

And the logic of our prior attenuation cases is not limited to independent acts by the defendant.

It remains for us to address whether the discovery of a valid arrest warrant was a sufficient intervening event to break the causal chain between the unlawful stop and the discovery of drug-related evidence on Strieff's person. The three factors articulated in *Brown* v. *Illinois*, 422 U. S. 590 (1975), guide our analysis. First, we look to the "temporal proximity" between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search. *Id.*, at 603. Second, we consider "the presence of intervening circumstances." *Id.*, at 603–604. Third, and "particularly" significant, we examine "the purpose and flagrancy of the official misconduct." *Id.*, at 604. In evaluating these factors, we assume without deciding (because the State conceded the point) that Officer Fackrell lacked reasonable suspicion to initially stop Strieff. And, because we ultimately conclude that the warrant breaks the causal chain, we also have no need to decide whether the warrant's existence alone would make the initial stop constitutional even if Officer Fackrell was unaware of its existence.

1

The first factor, temporal proximity between the initially unlawful stop and the search, favors suppressing the evidence. Our precedents have declined to find that this factor favors attenuation unless "substantial time" elapses between an unlawful act and when the evidence is obtained. *Kaupp* v. *Texas*, 538 U. S. 626, 633 (2003) (*per curiam*). Here, however, Officer Fackrell discovered drug contraband on Strieff's person only minutes after the illegal stop. See App. 18–19. As the Court explained in *Brown*, such a short time interval counsels in favor of suppression; there, we found that the confession should be suppressed, relying in part on the "less

than two hours" that separated the unconstitutional arrest and the confession. 422 U. S., at 604.

In contrast, the second factor, the presence of intervening circumstances, strongly favors the State. In *Segura*, 468 U. S. 796, the Court addressed similar facts to those here and found sufficient intervening circumstances to allow the admission of evidence. There, agents had probable cause to believe that apartment occupants were dealing cocaine. *Id.*, at 799–800. They sought a warrant. In the meantime, they entered the apartment, arrested an occupant, and discovered evidence of drug activity during a limited search for security reasons. *Id.*, at 800–801. The next evening, the Magistrate Judge issued the search warrant. *Ibid.* This Court deemed the evidence admissible notwithstanding the illegal search because the information supporting the warrant was "wholly unconnected with the [arguably illegal] entry and was known to the agents well before the initial entry." *Id.*, at 814.

Segura, of course, applied the independent source doctrine because the unlawful entry "did not contribute in any way to discovery of the evidence seized under the warrant." *Id.*, at 815. But the *Segura* Court suggested that the existence of a valid warrant favors finding that the connection between unlawful conduct and the discovery of evidence is "sufficiently attenuated to dissipate the taint." *Ibid.* That principle applies here.

In this case, the warrant was valid, it predated Officer Fackrell's investigation, and it was entirely unconnected with the stop. And once Officer Fackrell discovered the warrant, he had an obligation to arrest Strieff. "A warrant is a judicial mandate to an officer to conduct a search or make an arrest, and the officer has a sworn duty to carry out its provisions." *United States* v. *Leon*, 468 U. S. 897, 920, n. 21 (1984) (internal quotation marks omitted). Officer Fackrell's arrest of Strieff thus was a ministerial act that was independently compelled by the pre-existing warrant. And once Officer Fackrell was authorized to arrest Strieff, it was

undisputedly lawful to search Strieff as an incident of his arrest to protect Officer Fackrell's safety. See *Arizona* v. *Gant*, 556 U. S. 332, 339 (2009) (explaining the permissible scope of searches incident to arrest).

Finally, the third factor, "the purpose and flagrancy of the official misconduct," *Brown*, *supra*, at 604, also strongly favors the State. The exclusionary rule exists to deter police misconduct. *Davis* v. *United States*, 564 U. S. 229, 236–237 (2011). The third factor of the attenuation doctrine reflects that rationale by favoring exclusion only when the police misconduct is most in need of deterrence—that is, when it is purposeful or flagrant.

Officer Fackrell was at most negligent. In stopping Strieff, Officer Fackrell made two good-faith mistakes. First, he had not observed what time Strieff entered the suspected drug house, so he did not know how long Strieff had been there. Officer Fackrell thus lacked a sufficient basis to conclude that Strieff was a short-term visitor who may have been consummating a drug transaction. Second, because he lacked confirmation that Strieff was a short-term visitor, Officer Fackrell should have asked Strieff whether he would speak with him, instead of demanding that Strieff do so. Officer Fackrell's stated purpose was to "find out what was going on [in] the house." App. 17. Nothing prevented him from approaching Strieff simply to ask. See *Florida* v. *Bostick*, 501 U. S. 429, 434 (1991) ("[A] seizure does not occur simply because a police officer approaches an individual and asks a few questions"). But these errors in judgment hardly rise to a purposeful or flagrant violation of Strieff's Fourth Amendment rights.

While Officer Fackrell's decision to initiate the stop was mistaken, his conduct thereafter was lawful. The officer's decision to run the warrant check was a "negligibly burdensome precautio[n]" for officer safety. *Rodriguez* v. *United States*, 575 U. S. 348, 356 (2015). And Officer Fackrell's actual search of Strieff was a lawful search incident to arrest. See *Gant*, *supra*, at 339.

Moreover, there is no indication that this unlawful stop was part of any systemic or recurrent police misconduct. To the contrary, all the evidence suggests that the stop was an isolated instance of negligence that occurred in connection with a bona fide investigation of a suspected drug house. Officer Fackrell saw Strieff leave a suspected drug house. And his suspicion about the house was based on an anonymous tip and his personal observations.

Applying these factors, we hold that the evidence discovered on Strieff's person was admissible because the unlawful stop was sufficiently attenuated by the pre-existing arrest warrant. Although the illegal stop was close in time to Strieff's arrest, that consideration is outweighed by two factors supporting the State. The outstanding arrest warrant for Strieff's arrest is a critical intervening circumstance that is wholly independent of the illegal stop. The discovery of that warrant broke the causal chain between the unconstitutional stop and the discovery of evidence by compelling Officer Fackrell to arrest Strieff. And, it is especially significant that there is no evidence that Officer Fackrell's illegal stop reflected flagrantly unlawful police misconduct.

2

We find Strieff's counterarguments unpersuasive.

First, he argues that the attenuation doctrine should not apply because the officer's stop was purposeful and flagrant. He asserts that Officer Fackrell stopped him solely to fish for evidence of suspected wrongdoing. But Officer Fackrell sought information from Strieff to find out what was happening inside a house whose occupants were legitimately suspected of dealing drugs. This was not a suspicionless fishing expedition "in the hope that something would turn up." *Taylor* v. *Alabama*, 457 U. S. 687, 691 (1982).

Strieff argues, moreover, that Officer Fackrell's conduct was flagrant because he detained Strieff without the necessary level of cause (here, reasonable suspicion). But that conflates the standard for an illegal stop with the standard

for flagrancy. For the violation to be flagrant, more severe police misconduct is required than the mere absence of proper cause for the seizure. See, *e. g.*, *Kaupp*, 538 U. S., at 628, 633 (finding flagrant violation where a warrantless arrest was made in the arrestee's home after police were denied a warrant and at least some officers knew they lacked probable cause). Neither the officer's alleged purpose nor the flagrancy of the violation rise to a level of misconduct to warrant suppression.

Second, Strieff argues that, because of the prevalence of outstanding arrest warrants in many jurisdictions, police will engage in dragnet searches if the exclusionary rule is not applied. We think that this outcome is unlikely. Such wanton conduct would expose police to civil liability. See 42 U. S. C. § 1983; *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 690 (1978); see also *Segura*, 468 U. S., at 812. And in any event, the *Brown* factors take account of the purpose and flagrancy of police misconduct. Were evidence of a dragnet search presented here, the application of the *Brown* factors could be different. But there is no evidence that the concerns that Strieff raises with the criminal justice system are present in South Salt Lake City, Utah.

* * *

We hold that the evidence Officer Fackrell seized as part of his search incident to arrest is admissible because his discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized from Strieff incident to arrest. The judgment of the Utah Supreme Court, accordingly, is reversed.

It is so ordered.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins as to Parts I, II, and III, dissenting.

The Court today holds that the discovery of a warrant for an unpaid parking ticket will forgive a police officer's violation of your Fourth Amendment rights. Do not be soothed

by the opinion's technical language: This case allows the police to stop you on the street, demand your identification, and check it for outstanding traffic warrants—even if you are doing nothing wrong. If the officer discovers a warrant for a fine you forgot to pay, courts will now excuse his illegal stop and will admit into evidence anything he happens to find by searching you after arresting you on the warrant. Because the Fourth Amendment should prohibit, not permit, such misconduct, I dissent.

I

Minutes after Edward Strieff walked out of a South Salt Lake City home, an officer stopped him, questioned him, and took his identification to run it through a police database. The officer did not suspect that Strieff had done anything wrong. Strieff just happened to be the first person to leave a house that the officer thought might contain "drug activity." App. 16–19.

As the State of Utah concedes, this stop was illegal. *Id.*, at 24. The Fourth Amendment protects people from "unreasonable searches and seizures." An officer breaches that protection when he detains a pedestrian to check his license without any evidence that the person is engaged in a crime. *Delaware* v. *Prouse*, 440 U. S. 648, 663 (1979); *Terry* v. *Ohio*, 392 U. S. 1, 21 (1968). The officer deepens the breach when he prolongs the detention just to fish further for evidence of wrongdoing. *Rodriguez* v. *United States*, 575 U. S. 348, 354–356 (2015). In his search for lawbreaking, the officer in this case himself broke the law.

The officer learned that Strieff had a "small traffic warrant." App. 19. Pursuant to that warrant, he arrested Strieff and, conducting a search incident to the arrest, discovered methamphetamine in Strieff's pockets.

Utah charged Strieff with illegal drug possession. Before trial, Strieff argued that admitting the drugs into evidence would condone the officer's misbehavior. The methamphetamine, he reasoned, was the product of the officer's illegal

stop. Admitting it would tell officers that unlawfully discovering even a "small traffic warrant" would give them license to search for evidence of unrelated offenses. The Utah Supreme Court unanimously agreed with Strieff. A majority of this Court now reverses.

II

It is tempting in a case like this, where illegal conduct by an officer uncovers illegal conduct by a civilian, to forgive the officer. After all, his instincts, although unconstitutional, were correct. But a basic principle lies at the heart of the Fourth Amendment: Two wrongs don't make a right. See *Weeks* v. *United States*, 232 U. S. 383, 392 (1914). When "lawless police conduct" uncovers evidence of lawless civilian conduct, this Court has long required later criminal trials to exclude the illegally obtained evidence. *Terry*, 392 U. S., at 12; *Mapp* v. *Ohio*, 367 U. S. 643, 655 (1961). For example, if an officer breaks into a home and finds a forged check lying around, that check may not be used to prosecute the homeowner for bank fraud. We would describe the check as "'fruit of the poisonous tree.'" *Wong Sun* v. *United States*, 371 U. S. 471, 488 (1963). Fruit that must be cast aside includes not only evidence directly found by an illegal search but also evidence "come at by exploitation of that illegality." *Ibid.*

This "exclusionary rule" removes an incentive for officers to search us without proper justification. *Terry*, 392 U. S., at 12. It also keeps courts from being "made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions." *Id.*, at 13. When courts admit only lawfully obtained evidence, they encourage "those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system." *Stone* v. *Powell*, 428 U. S. 465, 492 (1976). But when courts admit illegally obtained evidence as well, they

reward "manifest neglect if not an open defiance of the prohibitions of the Constitution." *Weeks*, 232 U. S., at 394.

Applying the exclusionary rule, the Utah Supreme Court correctly decided that Strieff's drugs must be excluded because the officer exploited his illegal stop to discover them. The officer found the drugs only after learning of Strieff's traffic violation; and he learned of Strieff's traffic violation only because he unlawfully stopped Strieff to check his driver's license.

The court also correctly rejected the State's argument that the officer's discovery of a traffic warrant unspoiled the poisonous fruit. The State analogizes finding the warrant to one of our earlier decisions, *Wong Sun* v. *United States*. There, an officer illegally arrested a person who, days later, voluntarily returned to the station to confess to committing a crime. 371 U. S., at 491. Even though the person would not have confessed "but for the illegal actions of the police," *id.*, at 488, we noted that the police did not exploit their illegal arrest to obtain the confession, *id.*, at 491. Because the confession was obtained by "means sufficiently distinguishable" from the constitutional violation, we held that it could be admitted into evidence. *Id.*, at 488, 491. The State contends that the search incident to the warrant-arrest here is similarly distinguishable from the illegal stop.

But *Wong Sun* explains why Strieff's drugs must be excluded. We reasoned that a Fourth Amendment violation may not color every investigation that follows but it certainly stains the actions of officers who exploit the infraction. We distinguished evidence obtained by innocuous means from evidence obtained by exploiting misconduct after considering a variety of factors: whether a long time passed, whether there were "intervening circumstances," and whether the purpose or flagrancy of the misconduct was "calculated" to procure the evidence. *Brown* v. *Illinois*, 422 U. S. 590, 603–605 (1975).

These factors confirm that the officer in this case discovered Strieff's drugs by exploiting his own illegal conduct.

The officer did not ask Strieff to volunteer his name only to find out, days later, that Strieff had a warrant against him. The officer illegally stopped Strieff and immediately ran a warrant check. The officer's discovery of a warrant was not some intervening surprise that he could not have anticipated. Utah lists over 180,000 misdemeanor warrants in its database, and at the time of the arrest, Salt Lake County had a "backlog of outstanding warrants" so large that it faced the "potential for civil liability." See Dept. of Justice, Bureau of Justice Statistics, Survey of State Criminal History Information Systems, 2014 (2015) (Systems Survey) (Table 5a), online at https://www.ncjrs.gov/pdffiles1/bjs/grants/249799.pdf (all Internet materials as last visited June 16, 2016); Inst. for Law and Policy Planning, Salt Lake County Criminal Justice System Assessment 6.7 (2004), online at http://www.slco.org/cjac/resources/SaltLakeCJSAfinal.pdf. The officer's violation was also calculated to procure evidence. His sole reason for stopping Strieff, he acknowledged, was investigative—he wanted to discover whether drug activity was going on in the house Strieff had just exited. App. 17.

The warrant check, in other words, was not an "intervening circumstance" separating the stop from the search for drugs. It was part and parcel of the officer's illegal "expedition for evidence in the hope that something might turn up." *Brown*, 422 U. S., at 605. Under our precedents, because the officer found Strieff's drugs by exploiting his own constitutional violation, the drugs should be excluded.

III

A

The Court sees things differently. To the Court, the fact that a warrant gives an officer cause to arrest a person severs the connection between illegal policing and the resulting discovery of evidence. *Ante*, at 240–241. This is a remarkable proposition: The mere existence of a warrant not only gives an officer legal cause to arrest and search a person, it

also forgives an officer who, with no knowledge of the warrant at all, unlawfully stops that person on a whim or hunch.

To explain its reasoning, the Court relies on *Segura* v. *United States*, 468 U. S. 796 (1984). There, federal agents applied for a warrant to search an apartment but illegally entered the apartment to secure it before the judge issued the warrant. *Id.*, at 800–801. After receiving the warrant, the agents then searched the apartment for drugs. *Id.*, at 801. The question before us was what to do with the evidence the agents then discovered. We declined to suppress it because "[t]he illegal entry into petitioners' apartment did not contribute in any way to discovery of the evidence seized under the warrant." *Id.*, at 815.

According to the majority, *Segura* involves facts "similar" to this case and "suggest[s]" that a valid warrant will clean up whatever illegal conduct uncovered it. *Ante*, at 240. It is difficult to understand this interpretation. In *Segura*, the agents' illegal conduct in entering the apartment had nothing to do with their procurement of a search warrant. Here, the officer's illegal conduct in stopping Strieff was essential to his discovery of an arrest warrant. *Segura* would be similar only if the agents used information they illegally obtained from the apartment to procure a search warrant or discover an arrest warrant. Precisely because that was not the case, the Court admitted the untainted evidence. 468 U. S., at 814.

The majority likewise misses the point when it calls the warrant check here a "'negligibly burdensome precautio[n]'" taken for the officer's "safety." *Ante*, at 241 (quoting *Rodriguez*, 575 U. S., at 356). Remember, the officer stopped Strieff without suspecting him of committing any crime. By his own account, the officer did not fear Strieff. Moreover, the safety rationale we discussed in *Rodriguez*, an opinion about highway patrols, is conspicuously absent here. A warrant check on a highway "ensur[es] that vehicles on the road are operated safely and responsibly." *Id.*, at 355. We

allow such checks during legal traffic stops because the legitimacy of a person's driver's license has a "close connection to roadway safety." *Id.*, at 356. A warrant check of a pedestrian on a sidewalk, "by contrast, is a measure aimed at 'detect[ing] evidence of ordinary criminal wrongdoing.'" *Id.*, at 355 (quoting *Indianapolis* v. *Edmond*, 531 U. S. 32, 40–41 (2000)). Surely we would not allow officers to warrant-check random joggers, dog walkers, and lemonade vendors just to ensure they pose no threat to anyone else.

The majority also posits that the officer could not have exploited his illegal conduct because he did not violate the Fourth Amendment on purpose. Rather, he made "good-faith mistakes." *Ante*, at 241. Never mind that the officer's sole purpose was to fish for evidence. The majority casts his unconstitutional actions as "negligent" and therefore incapable of being deterred by the exclusionary rule. *Ibid.*

But the Fourth Amendment does not tolerate an officer's unreasonable searches and seizures just because he did not know any better. Even officers prone to negligence can learn from courts that exclude illegally obtained evidence. *Stone*, 428 U. S., at 492. Indeed, they are perhaps the most in need of the education, whether by the judge's opinion, the prosecutor's future guidance, or an updated manual on criminal procedure. If the officers are in doubt about what the law requires, exclusion gives them an "incentive to err on the side of constitutional behavior." *United States* v. *Johnson*, 457 U. S. 537, 561 (1982).

B

Most striking about the Court's opinion is its insistence that the event here was "isolated," with "no indication that this unlawful stop was part of any systemic or recurrent police misconduct." *Ante*, at 242. Respectfully, nothing about this case is isolated.

Outstanding warrants are surprisingly common. When a person with a traffic ticket misses a fine payment or court

appearance, a court will issue a warrant. See, *e. g.*, Brennan Center for Justice, Criminal Justice Debt 23 (2010), online at https://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf. When a person on probation drinks alcohol or breaks curfew, a court will issue a warrant. See, *e. g.*, Human Rights Watch, Profiting From Probation 1, 51 (2014), online at https://www.hrw.org/report/2014/02/05/profiting-probation/americas-offender-funded-probation-industry. The States and Federal Government maintain databases with over 7.8 million outstanding warrants, the vast majority of which appear to be for minor offenses. See Systems Survey (Table 5a). Even these sources may not track the "staggering" numbers of warrants, "'drawers and drawers'" full, that many cities issue for traffic violations and ordinance infractions. Dept. of Justice, Civil Rights Div., Investigation of the Ferguson Police Department 47, 55 (2015) (Ferguson Report), online at https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf. The county in this case has had a "backlog" of such warrants. See *supra*, at 247. The Department of Justice recently reported that in the town of Ferguson, Missouri, with a population of 21,000, 16,000 people had outstanding warrants against them. Ferguson Report, at 6, 55.

Justice Department investigations across the country have illustrated how these astounding numbers of warrants can be used by police to stop people without cause. In a single year in New Orleans, officers "made nearly 60,000 arrests, of which about 20,000 were of people with outstanding traffic or misdemeanor warrants from neighboring parishes for such infractions as unpaid tickets." Dept. of Justice, Civil Rights Div., Investigation of the New Orleans Police Department 29 (2011), online at https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf. In the St. Louis metropolitan area, officers "routinely" stop people—on the street, at bus stops, or even in court—for no reason other than "an officer's desire to check whether the subject had a

municipal arrest warrant pending." Ferguson Report, at 11, 17. In Newark, New Jersey, officers stopped 52,235 pedestrians within a 4-year period and ran warrant checks on 39,308 of them. Dept. of Justice, Civil Rights Div., Investigation of the Newark Police Department 8, 19, n. 15 (2014), online at https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark_findings_7-22-14.pdf. The Justice Department analyzed these warrant-checked stops and reported that "approximately 93% of the stops would have been considered unsupported by articulated reasonable suspicion." *Id.*, at 9, n. 7.

I do not doubt that most officers act in "good faith" and do not set out to break the law. That does not mean these stops are "isolated instance[s] of negligence," however. *Ante,* at 242. Many are the product of institutionalized training procedures. The New York City Police Department long trained officers to, in the words of a District Judge, "stop and question first, develop reasonable suspicion later." *Ligon* v. *New York*, 925 F. Supp. 2d 478, 537–538 (SDNY), stay granted on other grounds, 736 F. 3d 118 (CA2 2013). The Utah Supreme Court described as " 'routine procedure' or 'common practice' " the decision of Salt Lake City police officers to run warrant checks on pedestrians they detained without reasonable suspicion. *State* v. *Topanotes*, 2003 UT 30, ¶2, 76 P. 3d 1159, 1160. In the related context of traffic stops, one widely followed police manual instructs officers looking for drugs to "run at least a warrants check on all drivers you stop. Statistically, narcotics offenders are . . . more likely to fail to appear on simple citations, such as traffic or trespass violations, leading to the issuance of bench warrants. Discovery of an outstanding warrant gives you cause for an immediate custodial arrest and search of the suspect." C. Remsberg, Tactics for Criminal Patrol 205–206 (1995); C. Epp et al., Pulled Over 23, 33–36 (2014).

The majority does not suggest what makes this case "isolated" from these and countless other examples. Nor does it offer guidance for how a defendant can prove that his ar-

rest was the result of "widespread" misconduct. Surely it should not take a federal investigation of Salt Lake County before the Court would protect someone in Strieff's position.

IV

Writing only for myself, and drawing on my professional experiences, I would add that unlawful "stops" have severe consequences much greater than the inconvenience suggested by the name. This Court has given officers an array of instruments to probe and examine you. When we condone officers' use of these devices without adequate cause, we give them reason to target pedestrians in an arbitrary manner. We also risk treating members of our communities as second-class citizens.

Although many Americans have been stopped for speeding or jaywalking, few may realize how degrading a stop can be when the officer is looking for more. This Court has allowed an officer to stop you for whatever reason he wants—so long as he can point to a pretextual justification after the fact. *Whren* v. *United States*, 517 U. S. 806, 813 (1996). That justification must provide specific reasons why the officer suspected you were breaking the law, *Terry*, 392 U. S., at 21, but it may factor in your ethnicity, *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 886–887 (1975), where you live, *Adams* v. *Williams*, 407 U. S. 143, 147 (1972), what you were wearing, *United States* v. *Sokolow*, 490 U. S. 1, 4–5 (1989), and how you behaved, *Illinois* v. *Wardlow*, 528 U. S. 119, 124–125 (2000). The officer does not even need to know which law you might have broken so long as he can later point to any possible infraction—even one that is minor, unrelated, or ambiguous. *Devenpeck* v. *Alford*, 543 U. S. 146, 154–155 (2004); *Heien* v. *North Carolina*, 574 U. S. 54 (2014).

The indignity of the stop is not limited to an officer telling you that you look like a criminal. See Epp, Pulled Over, at 5. The officer may next ask for your "consent" to inspect

your bag or purse without telling you that you can decline. See *Florida* v. *Bostick*, 501 U. S. 429, 438 (1991). Regardless of your answer, he may order you to stand "helpless, perhaps facing a wall with [your] hands raised." *Terry*, 392 U. S., at 17. If the officer thinks you might be dangerous, he may then "frisk" you for weapons. This involves more than just a patdown. As onlookers pass by, the officer may " 'feel with sensitive fingers every portion of [your] body. A thorough search [may] be made of [your] arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet.' " *Id.*, at 17, n. 13.

The officer's control over you does not end with the stop. If the officer chooses, he may handcuff you and take you to jail for doing nothing more than speeding, jaywalking, or "driving [your] pickup truck . . . with [your] 3-year-old son and 5-year-old daughter . . . without [your] seatbelt fastened." *Atwater* v. *Lago Vista*, 532 U. S. 318, 323–324 (2001). At the jail, he can fingerprint you, swab DNA from the inside of your mouth, and force you to "shower with a delousing agent" while you "lift [your] tongue, hold out [your] arms, turn around, and lift [your] genitals." *Florence* v. *Board of Chosen Freeholders of County of Burlington*, 566 U. S. 318, 323 (2012); *Maryland* v. *King*, 569 U. S. 435, 465–466 (2013). Even if you are innocent, you will now join the 65 million Americans with an arrest record and experience the "civil death" of discrimination by employers, landlords, and whoever else conducts a background check. Chin, The New Civil Death, 160 U. Pa. L. Rev. 1789, 1805 (2012); see J. Jacobs, The Eternal Criminal Record 33–51 (2015); Young & Petersilia, Keeping Track, 129 Harv. L. Rev. 1318, 1341–1357 (2016). And, of course, if you fail to pay bail or appear for court, a judge will issue a warrant to render you "arrestable on sight" in the future. A. Goffman, On the Run 196 (2014).

This case involves a *suspicionless* stop, one in which the officer initiated this chain of events without justification. As the Justice Department notes, *supra*, at 250–251, many innocent people are subjected to the humiliations of these unconstitutional searches. The white defendant in this case shows that anyone's dignity can be violated in this manner. See M. Gottschalk, Caught 119–138 (2015). But it is no secret that people of color are disproportionate victims of this type of scrutiny. See M. Alexander, The New Jim Crow 95–136 (2010). For generations, black and brown parents have given their children "the talk"—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them. See, *e. g.*, W. E. B. Du Bois, The Souls of Black Folk (1903); J. Baldwin, The Fire Next Time (1963); T. Coates, Between the World and Me (2015).

By legitimizing the conduct that produces this double consciousness, this case tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.

We must not pretend that the countless people who are routinely targeted by police are "isolated." They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere. See L. Guinier & G. Torres, The Miner's Canary 274–283 (2002). They are the ones who recognize that unlawful police stops corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will continue to be anything but.

* * *

I dissent.

JUSTICE KAGAN, with whom JUSTICE GINSBURG joins, dissenting.

If a police officer stops a person on the street without reasonable suspicion, that seizure violates the Fourth Amendment. And if the officer pats down the unlawfully detained individual and finds drugs in his pocket, the State may not use the contraband as evidence in a criminal prosecution. That much is beyond dispute. The question here is whether the prohibition on admitting evidence dissolves if the officer discovers, after making the stop but before finding the drugs, that the person has an outstanding arrest warrant. Because that added wrinkle makes no difference under the Constitution, I respectfully dissent.

This Court has established a simple framework for determining whether to exclude evidence obtained through a Fourth Amendment violation: Suppression is necessary when, but only when, its societal benefits outweigh its costs. See *ante*, at 237; *Davis* v. *United States*, 564 U. S. 229, 237 (2011). The exclusionary rule serves a crucial function—to deter unconstitutional police conduct. By barring the use of illegally obtained evidence, courts reduce the temptation for police officers to skirt the Fourth Amendment's requirements. See *James* v. *Illinois*, 493 U. S. 307, 319 (1990). But suppression of evidence also "exacts a heavy toll": Its consequence in many cases is to release a criminal without just punishment. *Davis*, 564 U. S., at 237. Our decisions have thus endeavored to strike a sound balance between those two competing considerations—rejecting the "reflexive" impulse to exclude evidence every time an officer runs afoul of the Fourth Amendment, *id.*, at 238, but insisting on suppression when it will lead to "appreciable deterrence" of police misconduct, *Herring* v. *United States*, 555 U. S. 135, 141 (2009).

This case thus requires the Court to determine whether excluding the fruits of Officer Douglas Fackrell's unjustified

stop of Edward Strieff would significantly deter police from committing similar constitutional violations in the future. And as the Court states, that inquiry turns on application of the "attenuation doctrine," *ante,* at 238—our effort to "mark the point" at which the discovery of evidence "become[s] so attenuated" from the police misconduct that the deterrent benefit of exclusion drops below its cost. *United States* v. *Leon*, 468 U. S. 897, 911 (1984). Since *Brown* v. *Illinois*, 422 U. S. 590, 604–605 (1975), three factors have guided that analysis. First, the closer the "temporal proximity" between the unlawful act and the discovery of evidence, the greater the deterrent value of suppression. *Id.*, at 603. Second, the more "purpose[ful]" or "flagran[t]" the police illegality, the clearer the necessity, and better the chance, of preventing similar misbehavior. *Id.*, at 604. And third, the presence (or absence) of "intervening circumstances" makes a difference: The stronger the causal chain between the misconduct and the evidence, the more exclusion will curb future constitutional violations. *Id.*, at 603–604. Here, as shown below, each of those considerations points toward suppression: Nothing in Fackrell's discovery of an outstanding warrant so attenuated the connection between his wrongful behavior and his detection of drugs as to diminish the exclusionary rule's deterrent benefits.

Start where the majority does: The temporal proximity factor, it forthrightly admits, "favors suppressing the evidence." *Ante,* at 239. After all, Fackrell's discovery of drugs came just minutes after the unconstitutional stop. And in prior decisions, this Court has made clear that only the lapse of "substantial time" between the two could favor admission. *Kaupp* v. *Texas*, 538 U. S. 626, 633 (2003) (*per curiam*); see, *e. g.*, *Brown*, 422 U. S., at 604 (suppressing a confession when "less than two hours" separated it from an unlawful arrest). So the State, by all accounts, takes strike one.

Move on to the purposefulness of Fackrell's conduct, where the majority is less willing to see a problem for what it is.

The majority chalks up Fackrell's Fourth Amendment violation to a couple of innocent "mistakes." *Ante*, at 241. But far from a Barney Fife-type mishap, Fackrell's seizure of Strieff was a calculated decision, taken with so little justification that the State has never tried to defend its legality. At the suppression hearing, Fackrell acknowledged that the stop was designed for investigatory purposes—*i. e.*, to "find out what was going on [in] the house" he had been watching, and to figure out "what [Strieff] was doing there." App. 17–18. And Fackrell frankly admitted that he had no basis for his action except that Strieff "was coming out of the house." *Id.*, at 17. Plug in Fackrell's and Strieff's names, substitute "stop" for "arrest" and "reasonable suspicion" for "probable cause," and this Court's decision in *Brown* perfectly describes this case:

> "[I]t is not disputed that [Fackrell stopped Strieff] without [reasonable suspicion]. [He] later testified that [he] made the [stop] for the purpose of questioning [Strieff] as part of [his] investigation . . . . The illegality here . . . had a quality of purposefulness. The impropriety of the [stop] was obvious. [A]wareness of that fact was virtually conceded by [Fackrell] when [he] repeatedly acknowledged, in [his] testimony, that the purpose of [his] action was 'for investigation': [Fackrell] embarked upon this expedition for evidence in the hope that something might turn up." 422 U. S., at 592, 605 (some internal punctuation altered; footnote, citation, and paragraph break omitted).

In *Brown*, the Court held those facts to support suppression—and they do here as well. Swing and a miss for strike two.

Finally, consider whether any intervening circumstance "br[oke] the causal chain" between the stop and the evidence. *Ante,* at 239. The notion of such a disrupting event comes from the tort law doctrine of proximate causation. See

Bridge v. *Phoenix Bond & Indemnity Co.*, 553 U. S. 639, 658–659 (2008) (explaining that a party cannot "establish[ ] proximate cause" when "an intervening cause break[s] the chain of causation between" the act and the injury); Kerr, Good Faith, New Law, and the Scope of the Exclusionary Rule, 99 Geo. L. J. 1077, 1099 (2011) (Fourth Amendment attenuation analysis "looks to whether the constitutional violation was the proximate cause of the discovery of the evidence"). And as in the tort context, a circumstance counts as intervening only when it is unforeseeable—not when it can be seen coming from miles away. See W. Keeton, D. Dobbs, B. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 312 (5th ed. 1984). For rather than breaking the causal chain, predictable effects (*e. g.*, X leads naturally to Y leads naturally to Z) are its very links.

And Fackrell's discovery of an arrest warrant—the only event the majority thinks intervened—was an eminently foreseeable consequence of stopping Strieff. As Fackrell testified, checking for outstanding warrants during a stop is the "normal" practice of South Salt Lake City police. App. 18; see also *State* v. *Topanotes*, 2003 UT 30, ¶2, 76 P. 3d 1159, 1160 (describing a warrant check as "routine procedure" and "common practice" in Salt Lake City). In other words, the department's standard detention procedures—stop, ask for identification, run a check—are partly designed to find outstanding warrants. And find them they will, given the staggering number of such warrants on the books. See generally *ante*, at 249–250 (SOTOMAYOR, J., dissenting). To take just a few examples: The State of California has 2.5 million outstanding arrest warrants (a number corresponding to about 9% of its adult population); Pennsylvania (with a population of about 12.8 million) contributes 1.4 million more; and New York City (population 8.4 million) adds another 1.2 million. See Reply Brief 8; Associated Press, Pa. Database, NBC News (Apr. 8, 2007), online at http://www.nbcnews.com/id/18013262/ns/us_news-crime_and_courts/t/pa-database-

million-warrants-unserved/#.WejgRdVSxaQ (as last visited June 17, 2016); N. Y. Times, Oct. 8, 2015, p. A24.[1] So outstanding warrants do not appear as bolts from the blue. They are the run-of-the-mill results of police stops—what officers look for when they run a routine check of a person's identification and what they know will turn up with fair regularity. In short, they are nothing like what intervening circumstances are supposed to be.[2] Strike three.

The majority's misapplication of *Brown*'s three-part inquiry creates unfortunate incentives for the police—indeed, practically invites them to do what Fackrell did here. Consider an officer who, like Fackrell, wishes to stop someone for investigative reasons, but does not have what a court would view as reasonable suspicion. If the officer believes that any evidence he discovers will be inadmissible, he is likely to think the unlawful stop not worth making—precisely the deterrence the exclusionary rule is meant to achieve. But when he is told of today's decision? Now the officer knows that the stop may well yield admissible evi-

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[1] What is more, outstanding arrest warrants are not distributed evenly across the population. To the contrary, they are concentrated in cities, towns, and neighborhoods where stops are most likely to occur—and so the odds of any given stop revealing a warrant are even higher than the above numbers indicate. One study found, for example, that Cincinnati, Ohio had over 100,000 outstanding warrants with only 300,000 residents. See Helland & Tabarrok, The Fugitive: Evidence on Public Versus Private Law Enforcement From Bail Jumping, 47 J. Law & Econ. 93, 98 (2004). And as JUSTICE SOTOMAYOR notes, 16,000 of the 21,000 people residing in the town of Ferguson, Missouri have outstanding warrants. See *ante*, at 250.

[2] The majority relies on *Segura* v. *United States*, 468 U. S. 796 (1984), to reach the opposite conclusion, see *ante*, at 240–241, but that decision lacks any relevance to this case. The Court there held that the Fourth Amendment violation at issue "did not contribute in any way" to the police's subsequent procurement of a warrant and discovery of contraband. 468 U. S., at 815. So the Court had no occasion to consider the question here: What happens when an unconstitutional act in fact leads to a warrant which then leads to evidence?

dence: So long as the target is one of the many millions of people in this country with an outstanding arrest warrant, anything the officer finds in a search is fair game for use in a criminal prosecution. The officer's incentive to violate the Constitution thus increases: From here on, he sees potential advantage in stopping individuals without reasonable suspicion—exactly the temptation the exclusionary rule is supposed to remove. Because the majority thus places Fourth Amendment protections at risk, I respectfully dissent.

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CUOZZO SPEED TECHNOLOGIES, LLC *v.* LEE, UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND DIRECTOR, PATENT AND TRADEMARK OFFICE

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

No. 15–446. Argued April 25, 2016—Decided June 20, 2016

The Leahy-Smith America Invents Act creates an agency procedure called "inter partes review" that allows a third party to ask the U. S. Patent and Trademark Office to reexamine the claims in an already-issued patent and to cancel any claim that the agency finds to be unpatentable in light of prior art. The Act, as relevant here, provides that the Patent Office's decision "whether to institute an inter partes review . . . shall be final and nonappealable," 35 U. S. C. § 314(d), and grants the Patent Office authority to issue "regulations . . . establishing and governing inter partes review," § 316(a)(4). A Patent Office regulation issued pursuant to that authority provides that, during inter partes review, a patent claim "shall be given its broadest reasonable construction in light of the specification of the patent in which it appears." 37 CFR § 42.100(b).

In 2012, Garmin International, Inc., and Garmin USA, Inc., sought inter partes review of all 20 claims of a patent held by petitioner Cuozzo Speed Technologies, LLC, asserting, among other things, that claim 17 was obvious in light of three prior patents. The Patent Office agreed to review claim 17. It also decided to reexamine claims 10 and 14 on that same ground because it determined those claims to be logically linked to the obviousness challenge to claim 17. The Patent Office, through its Patent Trial and Appeal Board, concluded that the claims were obvious in light of prior art, denied for reasons of futility Cuozzo's motion to amend the claims, and canceled all three claims.

Cuozzo appealed to the Federal Circuit. Cuozzo claimed that the Patent Office improperly instituted inter partes review with respect to claims 10 and 14, and it alleged that the Board improperly used the "broadest reasonable construction" standard to interpret the claims rather than the standard used by courts, which gives claims their "ordinary meaning . . . as understood by a person of skill in the art," *Phillips* v. *AWH Corp.*, 415 F. 3d 1303, 1314. The Federal Circuit rejected both arguments. It reasoned that § 314(d) made the Patent Office's decision to institute inter partes review "nonappealable," and it concluded that

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the Patent Office's regulation was a reasonable exercise of the agency's rulemaking authority.

Held:

1. Section 314(d) bars Cuozzo's challenge to the Patent Office's decision to institute inter partes review. Pp. 271–276.

(a) The text of § 314(d) expressly states that the Patent Office's determinations whether to institute inter partes review "shall be *final and nonappealable*." (Emphasis added.) Moreover, construing § 314(d) to permit judicial review of the Patent Office's preliminary decision to institute inter partes review undercuts the important congressional objective of giving the agency significant power to revisit and revise earlier patent grants. Past practice in respect to related proceedings, including the predecessor to inter partes review, also supports the conclusion that Congress did not intend for courts to review these initial determinations. Finally, reading § 314(d) as limited to interlocutory appeals would render the provision largely superfluous in light of the Administrative Procedure Act. Pp. 271–273.

(b) The "strong presumption" favoring judicial review, *Mach Mining, LLC* v. *EEOC*, 575 U. S. 480, 486, is overcome here by these "'clear and convincing'" indications that Congress intended to bar review, *Block* v. *Community Nutrition Institute*, 467 U. S. 340, 349. Given that presumption, however, the interpretation adopted here applies to cases in which the challenge is to the Patent Office's determination "to initiate an inter partes review *under this section*," or where the challenge consists of questions closely tied to the application and interpretation of statutes related to that determination. Cuozzo's claim does not implicate a constitutional question, nor does it present other questions of interpretation that reach well beyond "this section" in terms of scope and impact. Rather, Cuozzo's allegation that Garmin's petition did not plead "with particularity" the challenge to claims 10 and 14 as required by § 312 is little more than a challenge to the Patent Office's conclusion under § 314(a) that the "information presented in the petition" warranted review. Pp. 273–276.

2. The Patent Office regulation requiring the Board to apply the broadest reasonable construction standard to interpret patent claims is a reasonable exercise of the rulemaking authority granted to the Patent Office by statute. Pp. 276–283.

(a) Where a statute leaves a gap or is ambiguous, this Court typically interprets a congressional grant of rulemaking authority as giving the agency leeway to enact rules that are reasonable in light of the text, nature, and purpose of the statute. *United States* v. *Mead Corp.*, 533 U. S. 218, 229; *Chevron U. S. A. Inc.* v. *Natural Resources Defense*

Council, Inc., 467 U. S. 837, 842–843. Here, the statute grants the Patent Office the authority to issue regulations "governing inter partes review," and no statutory provision unambiguously mandates a particular claim construction standard.

The Patent Office's rulemaking authority is not limited to procedural regulations. Analogies to interpretations of other congressional grants of rulemaking authority in other statutes, which themselves do not unambiguously contain a limitation to procedural rules, cannot magically render unambiguous the different language in the different statutory grant of rulemaking authority at issue.

The nature and purpose of inter partes review does not unambiguously require the Patent Office to apply one particular claim construction standard. Cuozzo's contention that the purpose of inter partes review—to establish trial-like procedures for reviewing previously issued patents—supports the application of the ordinary meaning standard ignores the fact that in other significant respects, inter partes review is less like a judicial proceeding and more like a specialized agency proceeding. This indicates that Congress designed a hybrid proceeding. The purpose of inter partes review is not only to resolve patent-related disputes among parties, but also to protect the public's "paramount interest in seeing that patent monopolies . . . are kept within their legitimate scope." *Precision Instrument Mfg. Co.* v. *Automotive Maintenance Machinery Co.*, 324 U. S. 806, 816. Neither the statute's language, nor its purpose, nor its legislative history suggests that Congress decided what standard should apply in inter partes review. Pp. 276–280.

(b) The regulation is a reasonable exercise of the Patent Office's rulemaking authority. The broadest reasonable construction standard helps ensure precision in drafting claims and prevents a patent from tying up too much knowledge, which, in turn, helps members of the public draw useful information from the disclosed invention and understand the lawful limits of the claim. The Patent Office has used this standard for more than 100 years and has applied it in proceedings which, as here, resemble district court litigation.

Cuozzo's two arguments in response are unavailing. Applying the broadest reasonable construction standard in inter partes review is not, as Cuozzo suggests, unfair to a patent holder, who may move to amend at least once in the review process, and who has had several opportunities to amend in the original application process. And though the application of one standard in inter partes review and another in district court proceedings may produce inconsistent outcomes, that structure is inherent to Congress' regulatory design, and it is also consistent with past practice, as the patent system has long provided different tracks

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for the review and adjudication of patent claims. The Patent Office's regulation is reasonable, and this Court does not decide whether a better alternative exists as a matter of policy. Pp. 280–283.

793 F. 3d 1268, affirmed.

BREYER, J., delivered the opinion for a unanimous Court with respect to Parts I and III, and the opinion of the Court with respect to Part II, in which ROBERTS, C. J., and KENNEDY, THOMAS, GINSBURG, and KAGAN, JJ., joined. THOMAS, J., filed a concurring opinion, *post*, p. 286. ALITO, J., filed an opinion concurring in part and dissenting in part, in which SOTOMAYOR, J., joined, *post*, p. 287.

Garrard R. Beeney argued the cause for petitioner. With him on the briefs was *Jeffrey B. Wall*.

Curtis E. Gannon argued the cause for respondent. With him on the brief were *Solicitor General Verrilli*, *Principal Deputy Assistant Attorney General Mizer*, *Deputy Solicitor General Stewart*, *Deputy Assistant Attorney General Brinkmann*, *Mark R. Freeman*, *Melissa N. Patterson*, *Thomas W. Krause*, *Scott C. Weidenfeller*, and *Robert J. McManus*.*

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*Briefs of *amici curiae* urging reversal were filed for the Biotechnology Innovation Organization et al. by *William M. Jay*; for the Federal Circuit Bar Association by *Morgan Chu*, *Joseph M. Lipner*, and *Edgar H. Haug*; for Intellectual Ventures Management LLC by *Eric F. Citron* and *Thomas C. Goldstein*; for InterDigital, Inc., et al. by *Richard P. Bress*, *Gabriel K. Bell*, *Jeffrey A. Birchak*, *Sriranga R. Veeraraghavan*, and *Andrew G. Isztwan*; for Mitchell Hamline School of Law Intellectual Property Institute by *R. Carl Moy*; for Patent-Practicing Technology Innovators by *Neal Kumar Katyal* and *Eugene A. Sokoloff*; for the Pharmaceutical Research and Manufacturers of America by *Pratik A. Shah*, *Emily C. Johnson*, *Z. W. Julius Chen*, *James M. Spears*, *David E. Korn*, and *Melissa B. Kimmel*; for SightSound Technologies, LLC, by *Matthew M. Wolf*, *Jennifer Sklenar*, and *Sean M. Callagy*; for 3M Co. et al. by *Barbara A. Fiacco* and *Donald R. Ware*; and for Gregory Dolin et al. by *Leslie V. Payne* and *Miranda Y. Jones*.

Briefs of *amici curiae* urging affirmance were filed for AARP by *Barbara Jones* and *William Alvarado Rivera*; for the American Bankers Association et al. by *Adam H. Charnes*, *Steven Gardner*, and *Chris W. Haaf*; for Apple, Inc., by *Joseph R. Guerra* and *Jeffrey P. Kushan*; for CME

JUSTICE BREYER delivered the opinion of the Court.

The Leahy-Smith America Invents Act, 35 U. S. C. § 100 *et seq.*, creates a process called "inter partes review." That review process allows a third party to ask the U. S. Patent and Trademark Office to reexamine the claims in an already-issued patent and to cancel any claim that the agency finds to be unpatentable in light of prior art. See § 102 (requiring "novel[ty]"); § 103 (disqualifying claims that are "obvious").

We consider two provisions of the Act. The first says:

> "No Appeal.—The determination by the Director [of the Patent Office] whether to institute an inter partes review under this section shall be final and nonappealable." § 314(d).

Group, Inc., et al. by *Michael Hawes*, *Aaron M. Streett*, and *Jennifer L. Nall*; for Dell et al. by *John Thorne*, *Gregory G. Rapawy*, *Anthony Peterman*, and *Michele K. Connors*; for EMC Corp. by *Thomas G. Hungar*, *Matthew D. McGill*, *Alexander N. Harris*, *Paul T. Dacier*, *Krishnendu Gupta*, and *Thomas A. Brown*; for Generic Pharmaceutical Association et al. by *Chad Ruback*; for Mylan Pharmaceuticals Inc. by *Joseph J. Gleason*; for Public Knowledge by *Charles Duan*; and for Unified Patents Inc. by *Scott A. McKeown*, *Stephen G. Kunin*, and *Jeffrey I. Frey*.

Briefs of *amici curiae* were filed for the American Intellectual Property Law Association by *Herbert D. Hart III* and *Lisa K. Jorgenson*; for the Association of the Bar of the City of New York by *John Gladstone Mills III*, *Aaron L. J. Pereira*, and *Timothy P. Heaton*; for the Intellectual Property Law Association of Chicago by *David L. Applegate* and *Charles W. Shifley*; for the Intellectual Property Owners Association by *D. Bartley Eppenauer*, *Lynn H. Murray*, *Kevin H. Rhodes*, and *Steven W. Miller*; for International Business Machines Corp. by *Paul D. Clement*, *D. Zachary Hudson*, and *Marian Underweiser*; for the Licensing Executives Society (U. S. A. and Canada), Inc., by *Mr. Shifley*; for Medtronic, Inc., by *Mark C. Fleming*, *Gregory H. Lantier*, *Joshua M. Koppel*, and *Daniel W. McDonald*; for Microsoft Corp. et al. by *John D. Vandenberg* and *Isabella Fu*; for the National Association of Patent Practitioners, Inc., by *William B. Richards* and *Louis J. Hoffman*; for the New York Intellectual Property Law Association by *Eugene M. Gelernter*, *Irena Royzman*, *Jason R. Vitullo*, *Charles R. Macedo*, and *David Goldberg*; and for Paul R. Michel by *Charles Hieken* and *John A. Dragseth*.

Does this provision bar a court from considering whether the Patent Office wrongly "determin[ed] . . . to institute an inter partes review," *ibid.*, when it did so on grounds not specifically mentioned in a third party's review request?

The second provision grants the Patent Office the authority to issue

> "regulations . . . establishing and governing inter partes review under this chapter." § 316(a)(4).

Does this provision authorize the Patent Office to issue a regulation stating that the agency, in inter partes review,

> "shall [construe a patent claim according to] its broadest reasonable construction in light of the specification of the patent in which it appears"? 37 CFR § 42.100(b) (2015).

We conclude that the first provision, though it may not bar consideration of a constitutional question, for example, does bar judicial review of the kind of mine-run claim at issue here, involving the Patent Office's decision to institute inter partes review. We also conclude that the second provision authorizes the Patent Office to issue the regulation before us. See, *e. g.*, *United States* v. *Mead Corp.*, 533 U. S. 218, 229 (2001); *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842 (1984).

I

A

An inventor obtains a patent by applying to the Patent Office. A patent examiner with expertise in the relevant field reviews an applicant's patent claims, considers the prior art, and determines whether each claim meets the applicable patent law requirements. See, *e. g.*, 35 U. S. C. §§ 101, 102, 103, 112. Then, the examiner accepts a claim, or rejects it and explains why. See § 132(a).

If the examiner rejects a claim, the applicant can resubmit a narrowed (or otherwise modified) claim, which the exam-

iner will consider anew, measuring the new claim against the same patent law requirements. If the examiner rejects the new claim, the inventor typically has yet another chance to respond with yet another amended claim. Ultimately, the Patent Office makes a final decision allowing or rejecting the application. The applicant may seek judicial review of any final rejection. See §§ 141(a), 145.

For several decades, the Patent Office has also possessed the authority to reexamine—and perhaps cancel—a patent claim that it had previously allowed. In 1980, for example, Congress enacted a statute providing for "ex parte reexamination." Act to Amend the Patent and Trademark Laws, 35 U. S. C. § 301 *et seq.* That statute (which remains in effect) gives "[a]ny person at any time" the right to "file a request for reexamination" on the basis of certain prior art "bearing on the patentability" of an already-issued patent. §§ 301(a)(1), 302. If the Patent Office concludes that the cited prior art raises "a substantial new question of patentability," the agency can reexamine the patent. § 303(a). And that reexamination can lead the Patent Office to cancel the patent (or some of its claims). Alternatively, the Director of the Patent Office can, on her "own initiative," trigger such a proceeding. *Ibid.* And, as with examination, the patent holder can seek judicial review of an adverse final decision. § 306.

In 1999 and 2002, Congress enacted statutes that established another, similar procedure, known as "inter partes *reexamination*." Those statutes granted third parties greater opportunities to participate in the Patent Office's reexamination proceedings as well as in any appeal of a Patent Office decision. See, *e. g.*, American Inventors Protection Act of 1999, § 297 *et seq.* (2006 ed.) (superseded).

In 2011, Congress enacted the statute before us. That statute modifies "inter partes *reexamination*," which it now calls "inter partes *review*." See H. R. Rep. No. 112–98, pt. 1, pp. 46–47 (2011) (H. R. Rep.). Like inter partes reexami-

nation, any third party can ask the agency to initiate inter partes review of a patent claim. But the new statute has changed the standard that governs the Patent Office's institution of the agency's process. Instead of requiring that a request for reexamination raise a "substantial new question of patentability," it now requires that a petition show "a reasonable likelihood that" the challenger "would prevail." Compare § 312(a) (2006 ed.) (repealed) with § 314(a) (2012 ed.).

The new statute provides a challenger with broader participation rights. It creates within the Patent Office a Patent Trial and Appeal Board (Board) composed of administrative patent judges, who are patent lawyers and former patent examiners, among others. § 6. That Board conducts the proceedings, reaches a conclusion, and sets forth its reasons. See *ibid.*

The statute sets forth time limits for completing this review. § 316(a)(11). It grants the Patent Office the authority to issue rules. § 316(a)(4). Like its predecessors, the statute authorizes judicial review of a "final written decision" canceling a patent claim. § 319. And the statute says that the agency's initial decision "whether to institute an inter partes review" is "final and nonappealable." § 314(d); compare *ibid.* with §§ 312(a), (c) (2006 ed.) (repealed) (the "determination" that a petition for inter partes reexamination "raise[s]" "a substantial new question of patentability" is "final and non-appealable"), and § 303(c) (2012 ed.) (similar in respect to *ex parte* reexamination).

B

In 2002, Giuseppe A. Cuozzo applied for a patent covering a speedometer that will show a driver when he is driving above the speed limit. To understand the basic idea, think of the fact that a white speedometer needle will look red when it passes under a translucent piece of red glass or the equivalent (say, red cellophane). If you attach a piece of red

glass or red cellophane to a speedometer beginning at 65 miles per hour, then, when the white needle passes that point, it will look red. If we attach the red glass to a plate that can itself rotate, if we attach the plate to the speedometer, if we connect the plate to a Global Positioning System (GPS) receiver, and if we enter onto a chip or a disk all the speed limits on all the Nation's roads, then the GPS can signal where the car is, the chip or disk can signal the speed limit at that place, and the plate can rotate to the right number on the speedometer. Thus, if the speed limit is 35 miles per hour, then the white speedometer needle will pass under the red plate at 35, not 65, and the driver will know if he is driving too fast.

In 2004, the Patent Office granted the patent. See U. S. Patent No. 6,778,074 (Cuozzo Patent). The Appendix contains excerpts from this patent, offering a less simplified (and more technical) description.

C

Petitioner Cuozzo Speed Technologies, LLC (Cuozzo), now holds the rights to the Cuozzo Patent. In 2012, Garmin International, Inc., and Garmin USA, Inc., filed a petition seeking inter partes review of the Cuozzo Patent's 20 claims. Garmin backed up its request by stating, for example, that the invention described in claim 17 was obvious in light of three prior patents, the Aumayer, Evans, and Wendt patents. U. S. Patent No. 6,633,811; U. S. Patent No. 3,980,041; and U. S. Patent No. 2,711,153. Cf. *Goodyear Tire & Rubber Co.* v. *Ray-O-Vac Co.*, 321 U. S. 275, 280 (1944) (Black, J., dissenting) ("[S]omeone, somewhere, sometime, made th[is] discovery [but] I cannot agree that this patentee is that discoverer").

The Board agreed to reexamine claim 17, as well as claims 10 and 14. The Board recognized that Garmin had not expressly challenged claim 10 and claim 14 on the same obviousness ground. But, believing that "claim 17 depends on

claim 14 which depends on claim 10," the Board reasoned that Garmin had "implicitly" challenged claims 10 and 14 on the basis of the same prior inventions, and it consequently decided to review all three claims together. App. to Pet. for Cert. 188a.

After proceedings before the Board, it concluded that claims 10, 14, and 17 of the Cuozzo Patent were obvious in light of the earlier patents to which Garmin had referred. The Board explained that the Aumayer patent "makes use of a GPS receiver to determine . . . the applicable speed limit at that location for display," the Evans patent "describes a colored plate for indicating the speed limit," and the Wendt patent "describes us[ing] a rotatable pointer for indicating the applicable speed limit." *Id.*, at 146a–147a. Anyone, the Board reasoned, who is "not an automaton"—anyone with "ordinary skill" and "ordinary creativity"—could have taken the automated approach suggested by the Aumayer patent and applied it to the manually adjustable signals described in the Evans and Wendt patents. *Id.*, at 147a. The Board also concluded that Cuozzo's proposed amendments would not cure this defect, *id.*, at 164a–166a, and it consequently denied Cuozzo's motion to amend its claims. Ultimately, it ordered claims 10, 14, and 17 of the Cuozzo Patent canceled, *id.*, at 166a.

Cuozzo appealed to the United States Court of Appeals for the Federal Circuit. Cuozzo argued that the Patent Office improperly instituted inter partes review, at least in respect to claims 10 and 14, because the agency found that Garmin had only *implicitly* challenged those two claims on the basis of the Aumayer, Evans, and Wendt patents, while the statute required petitions to set forth the grounds for challenge "with particularity." §312(a)(3). Cuozzo also argued that the Board, when construing the claims, improperly used the interpretive standard set forth in the Patent Office's regulation (*i. e.*, it gave those claims their "broadest reasonable construction," 37 CFR §42.100(b)), when it should have applied

the standard that courts normally use when judging a patent's validity (*i. e.*, it should have given those claims their "ordinary meaning . . . as understood by a person of skill in the art," *Phillips* v. *AWH Corp.*, 415 F. 3d 1303, 1314 (CA Fed. 2005) (en banc)).

A divided panel of the Court of Appeals rejected both arguments. First, the panel majority pointed out that 35 U. S. C. § 314(d) made the decision to institute inter partes review "nonappealable." *In re Cuozzo Speed Technologies, LLC*, 793 F. 3d 1268, 1273 (CA Fed. 2015) (internal quotation marks omitted). Second, the panel majority affirmed the application of the broadest reasonable construction standard on the ground (among others) that the regulation was a reasonable, and hence lawful, exercise of the Patent Office's statutorily granted rulemaking authority. *Id.*, at 1278–1279; see § 314(a)(4). By a vote of 6 to 5, the Court of Appeals denied Cuozzo's petition for rehearing en banc. *In re Cuozzo Speed Technologies, LLC*, 793 F. 3d 1297, 1298 (CA Fed. 2015).

We granted Cuozzo's petition for certiorari to review these two questions.

II

Like the Court of Appeals, we believe that Cuozzo's contention that the Patent Office unlawfully initiated its agency review is not appealable. For one thing, that is what § 314(d) says. It states that the "determination by the [Patent Office] whether to institute an inter partes review under this section shall be *final and nonappealable.*" (Emphasis added.)

For another, the legal dispute at issue is an ordinary dispute about the application of certain relevant patent statutes concerning the Patent Office's decision to institute inter partes review. Cuozzo points to a related statutory section, § 312, which says that petitions must be pleaded "with particularity." Those words, in its view, mean that the petition should have specifically said that claims 10 and 14 are also obvious in light of this same prior art. Garmin's petition,

the Government replies, need not have mentioned claims 10 and 14 separately, for claims 10, 14, and 17 are all logically linked; the claims "rise and fall together," and a petition need not simply repeat the same argument expressly when it is so obviously implied. See 793 F. 3d, at 1281. In our view, the "No Appeal" provision's language must, at the least, forbid an appeal that attacks a "determination . . . whether to institute" review by raising this kind of legal question and little more. § 314(d).

Moreover, a contrary holding would undercut one important congressional objective, namely, giving the Patent Office significant power to revisit and revise earlier patent grants. See H. R. Rep., at 45, 48 (explaining that the statute seeks to "improve patent quality and restore confidence in the presumption of validity that comes with issued patents"); 157 Cong. Rec. 9778 (2011) (remarks of Rep. Goodlatte) (noting that inter partes review "screen[s] out bad patents while bolstering valid ones"). We doubt that Congress would have granted the Patent Office this authority, including, for example, the ability to continue proceedings even after the original petitioner settles and drops out, § 317(a), if it had thought that the agency's final decision could be unwound under some minor statutory technicality related to its preliminary decision to institute inter partes review.

Further, the existence of similar provisions in this, and related, patent statutes reinforces our conclusion. See § 319 (limiting appellate review to the "final written decision"); § 312(c) (2006 ed.) (repealed) (the "determination" that a petition for inter partes *reexamination* "raise[s]" a "substantial new question of patentability" is "final and non-appealable"); see also § 303(c) (2012 ed.); *In re Hiniker Co.*, 150 F. 3d 1362, 1367 (CA Fed. 1998) ("Section 303 . . . is directed toward the [Patent Office's] authority to institute a reexamination, and there is no provision granting us direct review of that decision").

The dissent, like the panel dissent in the Court of Appeals, would limit the scope of the "No Appeal" provision to *inter-*

locutory appeals, leaving a court free to review the initial decision to institute review in the context of the agency's final decision. *Post*, at 287, 290–291 (ALITO, J., concurring in part and dissenting in part); 793 F. 3d, at 1291 (Newman, J., dissenting). We cannot accept this interpretation. It reads into the provision a limitation (to interlocutory decisions) that the language nowhere mentions and that is unnecessary. The Administrative Procedure Act already limits review to final agency decisions. 5 U. S. C. § 704. The Patent Office's decision to initiate inter partes review is "preliminary," not "final." *Ibid.* And the agency's decision to deny a petition is a matter committed to the Patent Office's discretion. See § 701(a)(2); 35 U. S. C. § 314(a) (no mandate to institute review); see also *post*, at 294, and n. 6. So, read as limited to such preliminary and discretionary decisions, the "No Appeal" provision would seem superfluous. The dissent also suggests that its approach is a "familiar practice," consistent with other areas of law. *Post*, at 293. But the kind of initial determination at issue here—that there is a "reasonable likelihood" that the claims are unpatentable on the grounds asserted—is akin to decisions which, in other contexts, we have held to be unreviewable. See *Kaley* v. *United States*, 571 U. S. 320, 328 (2014) ("The grand jury gets to say—without any review, oversight, or second-guessing—whether probable cause exists to think that a person committed a crime").

We recognize the "strong presumption" in favor of judicial review that we apply when we interpret statutes, including statutes that may limit or preclude review. *Mach Mining, LLC* v. *EEOC*, 575 U. S. 480, 486 (2015) (internal quotation marks omitted). This presumption, however, may be overcome by "'clear and convincing'" indications, drawn from "specific language," "specific legislative history," and "inferences of intent drawn from the statutory scheme as a whole," that Congress intended to bar review. *Block* v. *Community Nutrition Institute*, 467 U. S. 340, 349–350 (1984). That standard is met here. The dissent disagrees, and it points to *Lindahl* v. *Office of Personnel Management*, 470 U. S. 768

(1985), to support its view that, in light of this presumption, § 314(d) should be read to permit judicial review of any issue bearing on the Patent Office's preliminary decision to institute inter partes review. See *post*, at 289–291. *Lindahl* is a case about the judicial review of disability determinations for federal employees. We explained that a statute directing the Office of Personnel Management to "'determine questions of disability,'" and making those decisions "'final,'" "'conclusive,'" and "'not subject to review,'" barred a court from revisiting the "factual underpinnings of . . . disability determinations"—though it permitted courts to consider claims alleging, for example, that the Office of Personnel Management "'substantial[ly] depart[ed] from important procedural rights.'" 470 U. S., at 771, 791. Thus, *Lindahl*'s interpretation of that statute preserved the agency's primacy over its core statutory function in accord with Congress' intent. Our interpretation of the "No Appeal" provision here has the same effect. Congress has told the *Patent Office* to determine whether inter partes review should proceed, and it has made the agency's decision "final" and "nonappealable." § 314(d). Our conclusion that courts may not revisit this initial determination gives effect to this statutory command. Moreover, *Lindahl*'s conclusion was consistent with prior judicial practice in respect to those factual agency determinations, and legislative history "strongly suggest[ed]" that Congress intended to preserve this prior practice. *Id.*, at 785. These features, as explained above, also support our interpretation: The text of the "No Appeal" provision, along with its place in the overall statutory scheme, its role alongside the Administrative Procedure Act, the prior interpretation of similar patent statutes, and Congress' purpose in crafting inter partes review, all point in favor of precluding review of the Patent Office's institution decisions.

Nevertheless, in light of § 314(d)'s own text and the presumption favoring review, we emphasize that our interpretation applies where the grounds for attacking the decision to

institute inter partes review consist of questions that are closely tied to the application and interpretation of statutes related to the Patent Office's decision to initiate inter partes review. See § 314(d) (barring appeals of "determinations . . . to initiate an inter partes review *under this section*" (emphasis added)). This means that we need not, and do not, decide the precise effect of § 314(d) on appeals that implicate constitutional questions, that depend on other less closely related statutes, or that present other questions of interpretation that reach, in terms of scope and impact, well beyond "this section." Cf. *Johnson* v. *Robison*, 415 U. S. 361, 367 (1974) (statute precluding review of "any question of law or fact under any law administered by the Veterans' Administration" does not bar review of constitutional challenges (emphasis deleted and internal quotation marks omitted)); *Traynor* v. *Turnage*, 485 U. S. 535, 544–545 (1988) (that same statute does not bar review of decisions made under different statutes enacted at other times). Thus, contrary to the dissent's suggestion, we do not categorically preclude review of a final decision where a petition fails to give "sufficient notice" such that there is a due process problem with the entire proceeding, nor does our interpretation enable the agency to act outside its statutory limits by, for example, canceling a patent claim for "indefiniteness under § 112" in inter partes review. *Post*, at 296–299. Such "shenanigans" may be properly reviewable in the context of § 319 and under the Administrative Procedure Act, which enables reviewing courts to "set aside agency action" that is "contrary to constitutional right," "in excess of statutory jurisdiction," or "arbitrary [and] capricious." Compare *post*, at 298, with 5 U. S. C. §§ 706(2)(A)–(D).

By contrast, where a patent holder merely challenges the Patent Office's "determin[ation] that the information presented in the petition . . . shows that there is a reasonable likelihood" of success "with respect to at least 1 of the claims challenged," § 314(a), or where a patent holder grounds its

claim in a statute closely related to that decision to institute inter partes review, § 314(d) bars judicial review. In this case, Cuozzo's claim that Garmin's petition was not pleaded "with particularity" under § 312 is little more than a challenge to the Patent Office's conclusion, under § 314(a), that the "information presented in the petition" warranted review. Cf. *United States* v. *Williams*, 504 U. S. 36, 54 (1992) ("A complaint about the quality or adequacy of the evidence can always be recast as a complaint that the . . . presentation was 'incomplete' or 'misleading' "). We therefore conclude that § 314(d) bars Cuozzo's efforts to attack the Patent Office's determination to institute inter partes review in this case.

III

Cuozzo further argues that the Patent Office lacked the legal authority to issue its regulation requiring the agency, when conducting an inter partes review, to give a patent claim "its broadest reasonable construction in light of the specification of the patent in which it appears." 37 CFR § 42.100(b). Instead, Cuozzo contends that the Patent Office should, like the courts, give claims their "ordinary meaning . . . as understood by a person of skill in the art." *Phillips*, 415 F. 3d, at 1314.

The statute, however, contains a provision that grants the Patent Office authority to issue "regulations . . . establishing and governing inter partes review under this chapter." 35 U. S. C. § 316(a)(4). The Court of Appeals held that this statute gives the Patent Office the legal authority to issue its broadest reasonable construction regulation. We agree.

A

We interpret Congress' grant of rulemaking authority in light of our decision in *Chevron U. S. A. Inc.*, 467 U. S. 837. Where a statute is clear, the agency must follow the statute. *Id.*, at 842–843. But where a statute leaves a "gap" or is

"ambigu[ous]," we typically interpret it as granting the agency leeway to enact rules that are reasonable in light of the text, nature, and purpose of the statute. *Mead Corp.*, 533 U. S., at 229; *Chevron U. S. A. Inc.*, *supra*, at 843. The statute contains such a gap: No statutory provision unambiguously directs the agency to use one standard or the other. And the statute "express[ly] . . . authoriz[es] [the Patent Office] to engage in the process of rulemaking" to address that gap. *Mead Corp.*, *supra*, at 229. Indeed, the statute allows the Patent Office to issue rules "governing inter partes review," § 316(a)(4), and the broadest reasonable construction regulation is a rule that governs inter partes review.

Both the dissenting judges in the Court of Appeals and Cuozzo believe that other ordinary tools of statutory interpretation, *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 432, and n. 12 (1987), lead to a different conclusion. The dissenters, for example, point to cases in which the Circuit interpreted a grant of rulemaking authority in a different statute, § 2(b)(2)(A), as limited to *procedural* rules. See, *e. g.*, *Cooper Technologies Co.* v. *Dudas*, 536 F. 3d 1330, 1335 (CA Fed. 2008). These cases, however, as we just said, interpret a different statute. That statute does not clearly contain the Circuit's claimed limitation, nor is its language the same as that of § 316(a)(4). Section 2(b)(2)(A) grants the Patent Office authority to issue "regulations" "which . . . shall govern . . . *proceedings in the Office*" (emphasis added), but the statute before us, § 316(a)(4), does not refer to "proceedings"—it refers more broadly to regulations "establishing and governing inter partes review." The Circuit's prior interpretation of § 2(b)(2)(A) cannot magically render unambiguous the different language in the different statute before us.

Cuozzo and its supporting *amici* believe we will reach a different conclusion if we carefully examine the purpose of inter partes review. That purpose, in their view, is to modify the previous reexamination procedures and to replace them with a " 'trial, adjudicatory in nature.' " Brief for Peti-

tioner 26 (quoting *Google Inc.* v. *Jongerius Panoramic Techs., LLC*, IPR 2013–00191, Paper No. 50, p. 4 (PTAB, Feb. 13, 2014)). They point out that, under the statute, an opposing party can trigger inter partes review. Parties can engage in "discovery of relevant evidence," including "deposition[s], . . . affidavits or declarations" as well as anything "otherwise necessary in the interest of justice." § 316(a)(5). Parties may present "factual evidence and expert opinions" to support their arguments. § 316(a)(8). The challenger bears the burden of proving unpatentability. § 318(e). And, after oral argument before a panel of three of the Board's administrative patent judges, it issues a final written decision. §§ 6, 316(a)(10), 318. Perhaps most importantly, a decision to cancel a patent normally has the same effect as a district court's determination of a patent's invalidity.

In light of these adjudicatory characteristics, which make these agency proceedings similar to court proceedings, Congress, in Cuozzo's view, must have designed inter partes review as a "surrogate for court proceedings." Brief for Petitioner 28. Cuozzo points to various sources of legislative history in support of its argument. See H. R. Rep., at 48 (Inter partes review is a "quick and cost effective alternativ[e] to litigation"); *id.*, at 46–47 ("The Act converts inter partes reexamination from an examinational to an adjudicative proceeding"); see also S. Rep. No. 110–259, p. 20 (2008) (Inter partes review is "a quick, inexpensive, and reliable alternative to district court litigation"); 157 Cong. Rec. 3429–3430 (2011) (remarks of Sen. Kyl) ("Among the reforms that are expected to expedite these proceedings [is] the shift from an examinational to an adjudicative model"). And, if Congress intended to create a "surrogate" for court proceedings, why would Congress not also have intended the agency to use the claim construction standard that district courts apply (namely, the ordinary meaning standard), rather than the claim construction standard that patent examiners apply (namely, the broadest reasonable construction standard)?

The problem with Cuozzo's argument, however, is that, in other significant respects, inter partes review is less like a judicial proceeding and more like a specialized agency proceeding. Parties that initiate the proceeding need not have a concrete stake in the outcome; indeed, they may lack constitutional standing. See § 311(a); cf. *Consumer Watchdog* v. *Wisconsin Alumni Research Foundation*, 753 F. 3d 1258, 1261–1262 (CA Fed. 2014). As explained above, challengers need not remain in the proceeding; rather, the Patent Office may continue to conduct an inter partes review even after the adverse party has settled. § 317(a). Moreover, as is the case here, the Patent Office may intervene in a later *judicial* proceeding to defend its decision—even if the private challengers drop out. And the burden of proof in inter partes review is different than in the district courts: In inter partes review, the challenger (or the Patent Office) must establish unpatentability "by a preponderance of the evidence"; in district court, a challenger must prove invalidity by "clear and convincing evidence." Compare § 316(e) with *Microsoft Corp.* v. *i4i L. P.*, 564 U. S. 91, 95 (2011).

Most importantly, these features, as well as inter partes review's predecessors, indicate that the purpose of the proceeding is not quite the same as the purpose of district court litigation. The proceeding involves what used to be called a *reexamination* (and, as noted above, a cousin of inter partes review, ex parte reexamination, 35 U. S. C. § 302 *et seq.*, still bears that name). The name and accompanying procedures suggest that the proceeding offers a second look at an earlier administrative grant of a patent. Although Congress changed the name from "reexamination" to "review," nothing convinces us that, in doing so, Congress wanted to change its basic purposes, namely, to reexamine an earlier agency decision. Thus, in addition to helping resolve concrete patent-related disputes among parties, inter partes review helps protect the public's "paramount interest in seeing that patent monopolies . . . are kept within their legitimate

scope." *Precision Instrument Mfg. Co.* v. *Automotive Maintenance Machinery Co.*, 324 U. S. 806, 816 (1945); see H. R. Rep., at 39–40 (Inter partes review is an "efficient system for challenging patents that should not have issued").

Finally, neither the statutory language, its purpose, or its history suggest that Congress considered what standard the agency should apply when reviewing a patent claim in inter partes review. Cuozzo contends that § 301(d), explaining that the Patent Office should "determine the proper meaning of a patent claim," reinforces its conclusion that the ordinary meaning standard should apply. But viewed against a background of language and practices indicating that Congress designed a hybrid proceeding, § 301(d)'s reference to the "proper meaning" of a claim is ambiguous. It leaves open the question of which claim construction standard is "proper."

The upshot is, whether we look at statutory language alone, or that language in context of the statute's purpose, we find an express delegation of rulemaking authority, a "gap" that rules might fill, and "ambiguity" in respect to the boundaries of that gap. *Mead Corp.*, 533 U. S., at 229; see *Chevron U. S. A. Inc.*, 467 U. S., at 843. We consequently turn to the question whether the Patent Office's regulation is a reasonable exercise of its rulemaking authority.

B

We conclude that the regulation represents a reasonable exercise of the rulemaking authority that Congress delegated to the Patent Office. For one thing, construing a patent claim according to its broadest reasonable construction helps to protect the public. A reasonable, yet unlawfully broad claim might discourage the use of the invention by a member of the public. Because an examiner's (or reexaminer's) use of the broadest reasonable construction standard increases the possibility that the examiner will find the claim too broad (and deny it), use of that standard encourages the applicant to draft narrowly. This helps ensure precision while avoiding overly broad claims, and thereby helps pre-

vent a patent from tying up too much knowledge, while helping members of the public draw useful information from the disclosed invention and better understand the lawful limits of the claim. See § 112(a); *Nautilus, Inc.* v. *Biosig Instruments, Inc.*, 572 U. S. 898, 909–910 (2014); see also *In re Yamamoto*, 740 F. 2d 1569, 1571 (CA Fed. 1984).

For another, past practice supports the Patent Office's regulation. See 77 Fed. Reg. 48697 (2012). The Patent Office has used this standard for more than 100 years. 793 F. 3d, at 1276. It has applied that standard in proceedings that, as here, resemble district court litigation. See *Bamberger* v. *Cheruvu*, 55 USPQ 2d 1523, 1527 (BPAI 1998) (broadest reasonable construction standard applies in interference proceedings); Brief for Generic Pharmaceutical Association et al. as *Amici Curiae* 7–16 (describing similarities between interference proceedings and adjudicatory aspects of inter partes review); see also *In re Yamamoto*, *supra*, at 1571 (broadest reasonable construction standard applies in reexamination). It also applies that standard in proceedings that may be consolidated with a concurrent inter partes review. See 77 Fed. Reg. 48697–48698.

Cuozzo makes two arguments in response. First, Cuozzo says that there is a critical difference between the Patent Office's initial *examination* of an application to determine if a patent should issue, and this proceeding, in which the agency *reviews* an already-issued patent. In an initial examination of an application for a patent the examiner gives the claim its broadest reasonable construction. But if the patent examiner rejects the claim, then, as described above, Part I–A, *supra*, the applicant has a right to amend and resubmit the claim. And the examiner and applicant may repeat this process at least once more. This system—broad construction with a chance to amend—both protects the public from overly broad claims and gives the applicant a fair chance to draft a precise claim that will qualify for patent protection. In inter partes review, however, the broadest reasonable construction standard may help protect certain

public interests, but there is no absolute right to amend any challenged patent claims. This, Cuozzo says, is unfair to the patent holder.

The process however, is not as unfair as Cuozzo suggests. The patent holder may, at least once in the process, make a motion to do just what he would do in the examination process, namely, amend or narrow the claim. § 316(d) (2012 ed.). This opportunity to amend, together with the fact that the original application process may have presented several additional opportunities to amend the patent, means that use of the broadest reasonable construction standard is, as a general matter, not unfair to the patent holder in any obvious way.

Cuozzo adds that, as of June 30, 2015, only 5 out of 86 motions to amend have been granted. Brief for Petitioner 30; see Tr. of Oral Arg. 30 (noting that a sixth motion had been granted by the time of oral argument in this case). But these numbers may reflect the fact that no amendment could save the inventions at issue, *i. e.*, that the patent should have never issued at all.

To the extent Cuozzo's statistical argument takes aim at the manner in which the Patent Office has exercised its authority, that question is not before us. Indeed, in this particular case, the agency determined that Cuozzo's proposed amendment "enlarge[d]," rather than narrowed, the challenged claims. App. to Pet. for Cert. 165a–166a; see § 316(d)(3). Cuozzo does not contend that the decision not to allow its amendment is "arbitrary" or "capricious," or "otherwise [un]lawful." 5 U. S. C. § 706(2)(A).

Second, Cuozzo says that the use of the broadest reasonable construction standard in inter partes review, together with use of an ordinary meaning standard in district court, may produce inconsistent results and cause added confusion. A district court may find a patent claim to be valid, and the agency may later cancel that claim in its own review. We recognize that that is so. This possibility, however, has long

been present in our patent system, which provides different tracks—one in the Patent Office and one in the courts—for the review and adjudication of patent claims. As we have explained above, inter partes review imposes a different burden of proof on the challenger. These different evidentiary burdens mean that the possibility of inconsistent results is inherent to Congress' regulatory design. Cf. *One Lot Emerald Cut Stones* v. *United States*, 409 U. S. 232, 235–238 (1972) (*per curiam*).

Moreover, the Patent Office uses the broadest reasonable construction standard in other proceedings, including interference proceedings (described above), which may implicate patents that are later reviewed in district court. The statute gives the Patent Office the power to consolidate these other proceedings with inter partes review. To try to create uniformity of standards would consequently prove difficult. And we cannot find unreasonable the Patent Office's decision to prefer a degree of inconsistency in the standards used between the courts and the agency, rather than among agency proceedings. See 77 Fed. Reg. 48697–48698.

Finally, Cuozzo and its supporting *amici* offer various policy arguments in favor of the ordinary meaning standard. The Patent Office is legally free to accept or reject such policy arguments on the basis of its own reasoned analysis. Having concluded that the Patent Office's regulation, selecting the broadest reasonable construction standard, is reasonable in light of the rationales described above, we do not decide whether there is a better alternative as a policy matter. That is a question that Congress left to the particular expertise of the Patent Office.

* * *

For the reasons set forth above, we affirm the judgment of the Court of Appeals for the Federal Circuit.

It is so ordered.

Appendix to opinion of the Court

APPENDIX

SPEED LIMIT INDICATOR AND METHOD FOR DISPLAYING SPEED AND THE RELEVANT SPEED LIMIT

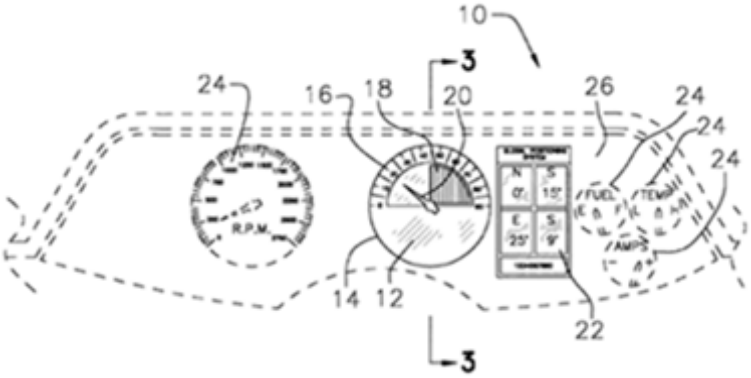

Figure 1

* * *

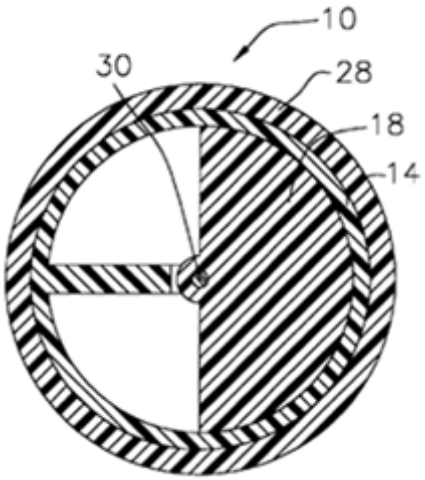

Figure 4

* * *

DESCRIPTION OF THE CURRENT EMBODIMENT

"In FIG. **1**, a new and improved speed limit indicator and method for displaying speed and the relevant speed limit **10** . . . is illustrated . . . . More particularly, the speed limit indicator and method for displaying speed and the relevant speed limit **10** has a speedometer **12** mounted on a dashboard **26**. [The] [s]peedometer **12** has a backplate **14** made of plastic, speed denoting markings **16** painted on [that] backplate **14**, a colored display **18** made of a red plastic filter, and a plastic needle **20** rotably mounted in the center of [the] backplate **14**. A [GPS] receiver **22** is positioned adjacent to the speedometer **12**. Other gauges **24** typically present on a dashboard **26** are shown.

. . . . .

"[I]n FIG. **4**, a new and improved speed limit indicator and method for displaying speed and the relevant speed limit **10** . . . is illustrated . . . . More particularly, the speed limit indicator and method for displaying speed and the relevant speed limit **10** has a backplate **14**, colored display **18**, housing **28**, and axle **30**.

. . . . .

"I claim:

. . . . .

"**10**. A speed limit indicator comprising:

"a [GPS] receiver;

"a display controller connected to said [GPS] receiver, wherein said display controller adjusts a colored display in response to signals from said [GPS] receiver to continuously update the delineation of which speed readings are in violation of the speed limit at a vehicle's present location; and

"a speedometer integrally attached to said colored display.

. . . . .

"**14**. The speed limit indicator as defined in claim **10**, wherein said colored display is a colored filter.

. . . . .

"**17**. The speed limit indicator as defined in claim **14**, wherein said display controller rotates said colored filter independently of said speedometer to continuously update the delineation of which speed readings are in violation of the speed limit at a vehicles present location." Cuozzo Patent.

JUSTICE THOMAS, concurring.

The Court invokes *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), and *United States* v. *Mead Corp.*, 533 U. S. 218 (2001), to resolve one of the questions presented in this case. See *ante*, at 266, 276–283. But today's decision does not rest on *Chevron*'s fiction that ambiguity in a statutory term is best construed as an implicit delegation of power to an administrative agency to determine the bounds of the law. In an appropriate case, this Court should reconsider that fiction of *Chevron* and its progeny. See *Michigan* v. *EPA*, 576 U. S. 743, 761 (2015) (THOMAS, J., concurring) ("*Chevron* deference raises serious separation-of-powers questions"); see also *Department of Transportation* v. *Association of American Railroads*, 575 U. S. 43, 70 (2015) (THOMAS, J., concurring in judgment) ("[T]he discretion inherent in executive power does *not* comprehend the discretion to formulate generally applicable rules of private conduct"); *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 119 (2015) (THOMAS, J., concurring in judgment) ("Those who ratified the Constitution knew that legal texts would often contain ambiguities. . . . The judicial power was understood to include the power to resolve these ambiguities over time"); Cass, Is *Chevron*'s Game Worth the Candle? Burning Interpretation at Both Ends, in Liberty's Nemesis 57–69 (D. Reuter & J. Yoo eds. 2016).

The Court avoids those constitutional concerns today because the provision of the America Invents Act at issue contains an express and clear conferral of authority to the Patent Office to promulgate rules governing its own proceed-

ings. See 35 U. S. C. § 316(a)(4); *ante,* at 277. And by asking whether the Patent Office's preferred rule is reasonable, *ante,* at 280–283, the Court effectively asks whether the rulemaking was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," in conformity with the Administrative Procedure Act, 5 U. S. C. § 706(2)(A). I therefore join the Court's opinion in full.

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

Congress has given the Patent and Trademark Office considerable authority to review and cancel issued patent claims. At the same time, Congress has cabined that power by imposing significant conditions on the Patent Office's institution of patent review proceedings. Unlike the Court, I do not think that Congress intended to shield the Patent Office's compliance—or noncompliance—with these limits from all judicial scrutiny. Rather, consistent with the strong presumption favoring judicial review, Congress required only that judicial review, including of issues bearing on the institution of patent review proceedings, be channeled through an appeal from the agency's final decision. I respectfully dissent from the Court's contrary holding.[1]

I

In the Leahy-Smith America Invents Act (AIA), 35 U. S. C. § 100 *et seq.*, Congress created three new mechanisms for Patent Office review of issued patent claims—inter partes review, post-grant review, and covered business method patent review (CBM review). This case involves the first of these proceedings, inter partes review.

Under inter partes review, anyone may file a petition challenging the patentability of an issued patent claim at almost

[1] I agree with the Court that the Patent Office permissibly applies a "broadest reasonable construction" standard to construe patent claims in inter partes review, and I therefore join Parts I and III of its opinion.

any time. §§ 311(a), (c). The grounds for challenge are limited to the patentability of the claim under § 102 (which requires patent claims to be novel) and § 103 (which requires patent claims to be nonobvious). § 311(b).

The statute imposes other restrictions as well. A petition for inter partes review "may be considered only if" the petition satisfies certain requirements, including (as relevant here) that the petition "identif[y], in writing and with particularity, each claim challenged, the grounds on which the challenge to each claim is based, and the evidence that supports the grounds for the challenge to each claim." § 312(a)(3). Additionally, "inter partes review may not be instituted" if the party challenging the patent previously filed a civil action challenging the patent's validity or was sued for infringing the patent more than a year before seeking inter partes review. §§ 315(a)(1), (b). Finally, the Patent Office may not institute inter partes review "unless the Director [of the Patent Office] determines that the information presented in the [challenger's] petition . . . and any response [by the patent owner] shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition." § 314(a).[2]

The statute provides that "[t]he determination by the Director whether to institute an inter partes review under this section shall be final and nonappealable." § 314(d). If inter partes review is instituted, the Patent Office conducts a trial that culminates in a "final written decision" on the patentability of the challenged claims. § 318(a). Any patent owner or challenger that is "dissatisfied" with that decision may appeal to the Federal Circuit. § 319.

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[2] The Director of the Patent Office has delegated his authority to institute inter partes review to the Patent Trial and Appeal Board (Board), which also conducts and decides the inter partes review. See 37 CFR §§ 42.4(a), 42.108 (2015); 35 U. S. C. §§ 316(c), 318(a). I therefore use the term "Patent Office" to refer to the Director, the Board, and the Patent Office generally, as the case may be.

II

In this case, the Patent Office instituted inter partes review of claims 10 and 14 of Cuozzo's patent based on prior art that the challenger's petition did not cite with respect to those claims. After trial, the Patent Office issued a final written decision holding those claims unpatentable, and Cuozzo appealed that decision to the Federal Circuit. In its appeal, Cuozzo argued (among other things) that the Patent Office had violated the requirement that a petition for inter partes review "may be considered only if" the petition identifies "the grounds on which the challenge to each claim is based, and the evidence that supports the grounds for the challenge," "with particularity." § 312(a)(3).

The Federal Circuit held that it could not entertain this argument because § 314(d) provides that the Patent Office's decision to institute an inter partes review is "final and nonappealable." See *In re Cuozzo Speed Technologies, LLC*, 793 F. 3d 1268, 1273 (2015). This Court now affirms.

I disagree. We have long recognized that "Congress rarely intends to prevent courts from enforcing its directives to federal agencies. For that reason, this Court applies a 'strong presumption' favoring judicial review of administrative action." *Mach Mining, LLC* v. *EEOC*, 575 U. S. 480, 486 (2015) (quoting *Bowen* v. *Michigan Academy of Family Physicians*, 476 U. S. 667, 670 (1986)). While the "presumption is rebuttable," "the agency bears a 'heavy burden' in attempting to show that Congress 'prohibit[ed] all judicial review' of the agency's compliance with a legislative mandate." *Mach Mining*, *supra*, at 486 (quoting *Dunlop* v. *Bachowski*, 421 U. S. 560, 567 (1975)). If a provision can reasonably be read to permit judicial review, it should be.

Our decision in *Lindahl* v. *Office of Personnel Management*, 470 U. S. 768 (1985), illustrates the power of this presumption. The statute at issue there provided that agency "'decisions . . . concerning [questions of disability and dependency] are final and conclusive and are not subject to re-

view.'" *Id.*, at 771. The Federal Circuit concluded that the statute cut off all judicial review of such decisions, stating that "'[i]t is difficult to conceive of a more clear-cut statement of congressional intent to preclude review than one in which the concept of finality is thrice repeated in a single sentence.'" *Id.*, at 779. We reversed. We acknowledged that the statute "plausibly c[ould] be read as imposing an absolute bar to judicial review," but we concluded that "it also quite naturally c[ould] be read as precluding review only of . . . *factual* determinations" underlying the agency's decision, while permitting review of legal questions. *Ibid.* In light of the presumption of reviewability, we adopted the latter reading. We observed that "when Congress intends to bar judicial review altogether, it typically employs language far more unambiguous and comprehensive," giving as an example a statute that made an agency decision "'final and conclusive for all purposes and with respect to all questions of law or fact'" and "'not subject to review by another official of the United States or by a court by mandamus or otherwise.'" *Id.*, at 779–780, and n. 13.[3]

This is a far easier case than *Lindahl*. There is no question that the statute now before us can naturally—perhaps most naturally—be read to permit judicial review of issues bearing on the Patent Office's institution of inter partes review. Section 314(d) reads: "The determination by the Director whether to institute an inter partes review under this section shall be final and nonappealable." Unlike the stat-

[3] The Court tries to recast *Lindahl* as a decision about "agenc[y] primacy" by focusing on its recognition that factual questions were unreviewable under the relevant statute (no one disputed that) and treating the case's holding that legal questions *were* reviewable as an afterthought. *Ante*, at 274. The review that *Lindahl* permitted—to correct "a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error going to the heart of the administrative determination," 470 U. S., at 791 (internal quotation marks omitted)—is quite similar to the review I envision of Patent Office decisions to institute inter partes review, as the discussion that follows makes clear.

utes we addressed in *Lindahl* (including the one we found to permit review), § 314(d) does not say that an institution decision is "not subject to review." Instead, it makes the institution decision "nonappealable." This is fairly interpreted to bar only an *appeal* from the institution decision itself, while allowing *review* of institution-related issues in an appeal from the Patent Office's final written decision at the end of the proceeding. See § 319. Our cases have used the term "nonappealable" in just this way—to refer to matters that are not *immediately* or *independently* appealable, but which are subject to review at a later point.[4] Thus, while the decision to institute inter partes review is "final and nonappealable" in the sense that a court cannot stop the proceeding from going forward,[5] the question whether it was lawful to institute review will not escape judicial scrutiny. This approach is consistent with the normal rule that a party may challenge earlier agency rulings that are themselves "not directly reviewable" when seeking review of a final, appealable decision. 5 U. S. C. § 704. And it strikes a sensible balance: The Patent Office may proceed unimpeded with the inter partes review process (which must normally be completed within one year, see 35 U. S. C. § 316(a)(11)), but it will be held to account for its compliance with the law at the end of the day.

In rejecting this commonsense interpretation, the Court gives short shrift to the presumption in favor of judicial review. Its primary reason for disregarding the presumption

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[4] See *Mohawk Industries, Inc.* v. *Carpenter*, 558 U. S. 100, 105, n. 1, 109 (2009) (agreeing with decisions holding that attorney-client privilege rulings are "nonappealable" because "postjudgment appeals generally suffice to protect the rights of litigants"); *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 469, 472, n. 17 (1978) (describing an order denying class certification as "nonappealable" but noting that it "is subject to effective review after final judgment").

[5] Like the Court, I do not have occasion to address whether in extraordinary cases a patent owner might seek mandamus to stop an inter partes review before the proceeding concludes.

reduces to an assertion—devoid of any textual analysis—that *surely* § 314(d) must bar review of legal questions related to institution decisions. *Ante,* at 271–272. As I have explained, the statute's text does not require that conclusion.

Moving (further) away from the statutory text, the Court next objects that allowing judicial review "would undercut one important congressional objective, namely, giving the Patent Office significant power to revisit and revise earlier patent grants." *Ante,* at 272. I am not sure that the Court appreciates how remarkable this assertion is. It would give us cause to do away with judicial review whenever we think that review makes it harder for an agency to carry out important work. In any event, the majority's logic is flawed. Judicial review enforces the limits that *Congress* has imposed on the agency's power. It thus serves to buttress, not "undercut," Congress's objectives. By asserting otherwise, the majority loses sight of the principle that "no legislation pursues its purposes at all costs." *Rodriguez* v. *United States*, 480 U. S. 522, 525–526 (1987) (*per curiam*). "Every statute purposes, not only to achieve certain ends, but also to achieve them by particular means—and there is often a considerable legislative battle over what those means ought to be. The withholding of agency authority is as significant as the granting of it, and we have no right to play favorites between the two." *Director, Office of Workers' Compensation Programs* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U. S. 122, 136 (1995). The inter partes review statute is no exception. It empowers the Patent Office to clean up bad patents, but it expressly forbids the Patent Office to institute inter partes review—or even consider petitions for inter partes review—unless certain conditions are satisfied. Nothing in the statute suggests that Congress wanted to improve patent quality at the cost of fidelity to the law.

The Court also observes that the inter partes review appeal provision, § 319, "limit[s] appellate review to the 'final

written decision.'" *Ante*, at 272. The majority reads too much into this provision. Section 319 provides simply that "[a] party dissatisfied with the final written decision . . . may appeal the decision." The statute does not restrict the issues that may be raised in such an appeal. As the Patent Office once explained (before having a change of heart), the "plain language of the statutory text" recognizes a "right of judicial review . . . for any party 'dissatisfied' by the [Patent Office's] ultimate 'written [decision],'" and "[n]othing in the statutory scheme limits the reasons that a party might be so 'dissatisfied.'" Memorandum of Law in Support of Defendant's Motion To Dismiss in *Versata Development Group, Inc.* v. *Rea*, Civ. Action No. 1:13cv328 (ED Va., May 16, 2013), p. 16. A party may be dissatisfied with a final written decision in an inter partes review because the Patent Office lacked authority to institute the proceeding in the first place, or because the Office committed some other error in the lead-up to its final decision. Neither § 314(d) nor § 319 prevents a party from pressing such issues on an appeal from the final decision. This is familiar practice under 28 U. S. C. § 1291, which similarly limits appeals to "final decisions of the district courts" but allows appellants to challenge earlier rulings as part of those appeals. See *Quackenbush* v. *Allstate Ins. Co.*, 517 U. S. 706, 712 (1996) ("The general rule is that a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage in the litigation may be ventilated" (internal quotation marks omitted)); 15A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3905.1, pp. 250, 252 (2d ed. 1992) (noting "the general rule that appeal from final judgment . . . permits review of all rulings that led up to the judgment" and observing that "[t]he variety of orders open to review on subsequent appeal from a final judgment is enormous"). And, as noted above, judicial review of "final agency action" likewise encompasses earlier

rulings that are "not directly reviewable." 5 U. S. C. § 704; see *supra*, at 291.

The Court next contends that my interpretation renders 35 U. S. C. § 314(d) "superfluous." *Ante*, at 273. Reading the statute to defer review of institution decisions is "unnecessary," the Court says, because the "Administrative Procedure Act already limits review to final agency decisions" and a "decision to initiate inter partes review is 'preliminary,' not 'final.'" *Ibid.* But Congress reasonably may have thought that the matter needed clarifying, given that § 314(d) itself calls such a decision "final" (albeit in a different sense, see *supra*, at 291). Language is not superfluous when it "remove[s] any doubt" about a point that might otherwise be unclear. *Ali* v. *Federal Bureau of Prisons*, 552 U. S. 214, 226 (2008). More important, my reading prevents an appeal from a decision *not* to institute inter partes review, which is plainly final agency action and so—absent § 314(d)—might otherwise trigger immediate review. The Court asserts that this too is unnecessary because, in its view, a decision to deny inter partes review is "committed to agency discretion by law" and so unreviewable under normal principles of administrative law. 5 U. S. C. § 701(a)(2); see *ante*, at 273. I agree that one can infer from the statutory scheme that the Patent Office has discretion to deny inter partes review even if a challenger satisfies the threshold requirements for review. But the law does not say so directly and Congress may not have thought the point self-evident. Again, 35 U. S. C. § 314(d) plays a clarifying role. This gives the provision plenty of work to do. There is no need to read it more broadly.[6]

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[6] It is true that my interpretation leaves no apparent avenue (short of mandamus, at least) for judicial review of decisions *not* to institute inter partes review. This demonstrates that the presumption of reviewability has its limits. Nor is it surprising that Congress would design such a scheme. A patent challenger does not have nearly as much to lose from an erroneous *denial* of inter partes review as a patent owner stands to

III

A

None of this is to say that courts must—or should—throw out an inter partes review decision whenever there is some technical deficiency in the challenger's petition or in the Patent Office's institution decision. Although § 314(d) does not preclude review of issues bearing on institution, normal limits on judicial review still apply. For example, errors that do not cause a patent owner prejudice may not warrant relief. See 5 U. S. C. § 706 ("[D]ue account shall be taken of the rule of prejudicial error"). Some errors may also be superseded by later developments. Most notably, once the Patent Office issues its final written decision, the probabilistic question whether a challenger is "reasonabl[y] likel[y]" to prevail on the merits, 35 U. S. C. § 314(a), will be subsumed by the ultimate question whether the challenger *should in fact* prevail.[7] And while I have no occasion here to decide the matter, it may be that courts owe some degree of deference to the Patent Office's application of the statutory prerequisites to inter partes review.

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lose from an erroneous *grant* of inter partes review. Although such a challenger loses some of the advantages of inter partes review (such as a more favorable claim construction standard and a lower burden of proof), it remains free to challenge the patent's validity in litigation. A patent owner, on the other hand, risks the destruction of a valuable property right.

[7] The Court recognizes that such issues are unreviewable even absent a statute like § 314(d), comparing the Patent Office's "reasonable likelihood" determination to an indicting grand jury's finding of probable cause. See *ante*, at 273. But it draws the wrong analogy for this case. Cuozzo's complaint is that the petition for inter partes review did not articulate its challenge to certain patent claims with adequate particularity. This is more akin to an argument that an indictment did not sufficiently allege an offense and provide notice of the charges against the defendant, which is reviewable after trial and judgment. See, *e. g.*, *United States* v. *Carll*, 105 U. S. 611, 612–613 (1882) (overturning a conviction based on the insufficiency of the indictment).

I would leave these considerations for the Court of Appeals to address in the first instance. But I must confess doubts that Cuozzo could ultimately prevail. As noted above, Cuozzo argues that the Patent Office improperly granted inter partes review of claims 10 and 14 on grounds not asserted in the petition for inter partes review, in violation of the statutory requirement that a petition must state the grounds for challenge "with particularity." § 312(a)(3). The problem for Cuozzo is that claim 17—which the petition properly challenged—incorporates all of the elements of claims 10 and 14. Accordingly, an assertion that claim 17 is unpatentable in light of certain prior art is necessarily an assertion that claims 10 and 14 are unpatentable as well. Assuming that Cuozzo must show prejudice from the error it alleges, it is hard to see how Cuozzo could do so here.

B

But any perceived weakness in the merits of Cuozzo's appeal does not mean that such issues are unworthy of judicial review. Section 312(a)(3)'s particularity requirement is designed, at least in part, to ensure that a patent owner has sufficient notice of the challenge against which it must defend. Once inter partes review is instituted, the patent owner's response—its opening brief, essentially—is filed as an opposition to the challenger's petition. See § 316(a)(8); 37 CFR § 42.120 (2015). Thus, if a petition fails to state its challenge with particularity—or if the Patent Office institutes review on claims or grounds not raised in the petition—the patent owner is forced to shoot into the dark. The potential for unfairness is obvious.

Other problems arise if the Patent Office fails to enforce the prohibitions against instituting inter partes review at the behest of challengers that have already sued to invalidate the patent or that were sued for infringement more than a year before seeking inter partes review. 35 U. S. C.

§§ 315(a)(1), (b). Allowing such a challenge exposes the patent owner to the burden of multiplicative proceedings—including discovery in both forums, see § 316(a)(5)—while permitting the challenger to exploit inter partes review's lower standard of proof and more favorable claim construction standard. Congress understandably thought that the Patent Office's power should not be wielded in this way. Yet, according to the Court, Congress made courts powerless to correct such abuses.

Even more striking are the consequences that today's decision portends for the AIA's other patent review mechanisms, post-grant review and CBM review, see *supra*, at 287, which are subject to a "no appeal" provision virtually identical to § 314(d). See § 324(e) ("The determination by the Director whether to institute a post-grant review under this section shall be final and nonappealable"); see AIA § 18(a)(1), 125 Stat. 329, note following 35 U. S. C. § 321, p. 1442 (CBM review generally "shall be regarded as, and shall employ the standards and procedures of, a post-grant review"). Post-grant review and CBM review allow for much broader review than inter partes review. While inter partes review is limited to assessing patentability under § 102 and § 103, in post-grant review and CBM review, patent claims can also be scrutinized (and canceled) on any invalidity ground that may be raised as a defense to infringement, including such grounds as ineligible subject matter under § 101, indefiniteness under § 112, and improper enlargement of reissued claims under § 251. See § 321(b); §§ 282(b)(2), (3). But this broader review comes with its own strict limits. A petition for post-grant review must be filed within nine months after a patent is granted. § 321(c). And while CBM review is not subject to this time limit, Congress imposed a subject-matter restriction: The Patent Office "may institute a [CBM review] proceeding only for a patent that is a covered business method patent," which Congress defined to cover certain

patents with claims relating to "a financial product or service." AIA §§ 18(a)(1)(E), (d)(1), at 1442; see § 18(a)(1)(A), *ibid.*[8]

Congress thus crafted a three-tiered framework for Patent Office review of issued patents: broad post-grant review in a patent's infancy, followed by narrower inter partes review thereafter, with a limited exception for broad review of older covered business method patents. Today's decision threatens to undermine that carefully designed scheme. Suppose that the Patent Office instituted post-grant review on a petition filed 12 months (or even 12 years) after a patent was issued, and then invalidated a patent claim as indefinite under § 112—a ground available in post-grant review but not in inter partes review. This would grossly exceed the Patent Office's authority and would be manifestly prejudicial to the patent owner. Can Congress really have intended to shield such shenanigans from judicial scrutiny? The Court answers with a non sequitur: Of course the Patent Office cannot cancel a patent under § 112 "in inter partes review." *Ante,* at 275. The Court seems to think that we could overturn the Patent Office's decision to institute "post-grant review" based on an untimely petition and declare that the agency has *really* instituted only "inter partes review." But how is that possible under today's opinion? After all, the petition's timeliness, no less than the particularity of its allegations, is "closely tied to the application and interpretation of statutes related to the Patent Office's decision to initiate . . . review," and the Court says that such questions are unreviewable. *Ibid.*; see § 321(c); § 312(a)(3).

To take things a step further, suppose that the Patent Office purported to forgive the post-grant review petition's tardiness by declaring the challenged patent a "covered business method patent," even though the patent has nothing to

[8] Additionally, a challenger may file a petition for CBM review only if it has been sued for or charged with infringement of the patent. AIA § 18(a)(1)(B), at 1442.

do with financial products or services (it claims, say, a new kind of tempered glass). Again, this involves the application of statutes related to the Patent Office's institution decision. See AIA § 18(a)(1)(E), at 1442 (Patent Office "may institute a [CBM review] proceeding only for a patent that is a covered business method patent"). So is this specious determination immune from judicial scrutiny under the Court's reasoning?

If judicial review of these issues is unavailable, then nothing would prevent the Patent Office from effectively collapsing Congress's three-tiered review structure and subjecting all patents to broad post-grant review at all times. Congress cannot have intended that.

I take the Court at its word that today's opinion will not permit the Patent Office "to act outside its statutory limits" in these ways. *Ante,* at 275. But how to get there from the Court's reasoning—and how to determine which "statutory limits" we should enforce and which we should not—remains a mystery. I would avoid the suspense and hold that 35 U. S. C. § 314(d) does not bar judicial review of the Patent Office's compliance with any of the limits Congress imposed on the institution of patent review proceedings. That includes the statutory limit, § 312(a)(3), that Cuozzo alleges was violated here.

* * *

In enacting the AIA, Congress entrusted the Patent Office with a leading role in combating the detrimental effect that bad patents can have on innovation. But Congress did not give the agency unbridled authority. The principles I have set forth afford the Patent Office plenty of latitude to carry out its charge, while ensuring that the Office's actions—no less than the patents it reviews—stay within the bounds of the law.

I would vacate the Federal Circuit's judgment and remand for that court to consider whether the Patent Office exceeded its authority to institute inter partes review with respect to

claims 10 and 14 of Cuozzo's patent. With respect to claim 17, I agree with the Court that the judgment below must be affirmed. See n. 1, *supra*; Part III, *ante*.

Syllabus

TAYLOR *v.* UNITED STATES

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

No. 14–6166. Argued February 23, 2016—Decided June 20, 2016

Petitioner Taylor was indicted under the Hobbs Act on two counts of affecting commerce or attempting to do so through robbery for his participation in two home invasions targeting marijuana dealers. In both cases, Taylor and other gang members broke into the homes, confronted the residents, demanded the location of drugs and money, found neither, and left relatively emptyhanded.

Taylor's trial resulted in a hung jury. At his retrial, the Government urged the trial court to preclude Taylor from offering evidence that the drug dealers he targeted dealt only in locally grown marijuana. The trial court excluded that evidence and Taylor was convicted on both counts. The Fourth Circuit affirmed, holding that, given the aggregate effect of drug dealing on interstate commerce, the Government needed only to prove that Taylor robbed or attempted to rob a drug dealer of drugs or drug proceeds to satisfy the commerce element.

Held:

1. The prosecution in a Hobbs Act robbery case satisfies the Act's commerce element if it shows that the defendant robbed or attempted to rob a drug dealer of drugs or drug proceeds. Pp. 305–309.

(a) The language of the Hobbs Act is unmistakably broad and reaches any obstruction, delay, or other effect on commerce, 18 U. S. C. § 1951(a), "over which the United States has jurisdiction," § 1951(b)(3). See *United States* v. *Culbert*, 435 U. S. 371, 373. Pp. 305–306.

(b) Under its commerce power, this Court has held, Congress may regulate, among other things, activities that have a substantial aggregate effect on interstate commerce, see *Wickard* v. *Filburn*, 317 U. S. 111, 125. This includes "purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce," *Gonzales* v. *Raich*, 545 U. S. 1, 17, so long as those activities are economic in nature. See *United States* v. *Morrison*, 529 U. S. 598, 613. One such "class of activities" is the production, possession, and distribution of controlled substances. 545 U. S., at 22. Grafting the holding in *Raich* onto the Hobbs Act's commerce element, it follows that a robber who affects even the intrastate sale of marijuana affects commerce over which the United States has jurisdiction. Pp. 306–307.

(c) In arguing that *Raich* should be distinguished because the Controlled Substances Act lacks the Hobbs Act's additional commerce ele-

ment, Taylor confuses the standard of proof with the meaning of the element that must be proved. The meaning of the Hobbs Act's commerce element is a question of law, which, *Raich* establishes, includes purely intrastate drug production and sale. Applying, without expanding, *Raich*'s interpretation of the scope of Congress's Commerce Clause power, if the Government proves beyond a reasonable doubt that a robber targeted a marijuana dealer's drugs or illegal proceeds, the Government has proved beyond a reasonable doubt that commerce over which the United States has jurisdiction was affected. Pp. 307–310.

2. Here, the Government met its burden by introducing evidence that Taylor's gang intentionally targeted drug dealers to obtain drugs and drug proceeds. That evidence included information that the gang members targeted the victims because of their drug dealing activities, as well as explicit statements made during the course of the robberies that revealed their belief that drugs and money were present. Such proof is sufficient to meet the Hobbs Act's commerce element. P. 310.

754 F. 3d 217, affirmed.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed a dissenting opinion, *post*, p. 310.

Dennis E. Jones argued the cause for petitioner. With him on the briefs was *Seth C. Weston.*

Anthony A. Yang argued the cause for the United States. With him on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Caldwell*, and *Deputy Solicitor General Dreeben.*

JUSTICE ALITO delivered the opinion of the Court.

The Hobbs Act makes it a crime for a person to affect commerce, or to attempt to do so, by robbery. 18 U. S. C. § 1951(a). The Act defines "commerce" broadly as interstate commerce "and all other commerce over which the United States has jurisdiction." § 1951(b)(3). This case requires us to decide what the Government must prove to satisfy the Hobbs Act's commerce element when a defendant commits a robbery that targets a marijuana dealer's drugs or drug proceeds.

The answer to this question is straightforward and dictated by our precedent. We held in *Gonzales* v. *Raich*, 545 U. S. 1 (2005), that the Commerce Clause gives Congress authority to regulate the national market for marijuana, including the authority to proscribe the purely intrastate production, possession, and sale of this controlled substance. Because Congress may regulate these intrastate activities based on their aggregate effect on interstate commerce, it follows that Congress may also regulate intrastate drug *theft*. And since the Hobbs Act criminalizes robberies and attempted robberies that affect any commerce "over which the United States has jurisdiction," § 1951(b)(3), the prosecution in a Hobbs Act robbery case satisfies the Act's commerce element if it shows that the defendant robbed or attempted to rob a drug dealer of drugs or drug proceeds. By targeting a drug dealer in this way, a robber necessarily affects or attempts to affect commerce over which the United States has jurisdiction.

In this case, petitioner Anthony Taylor was convicted on two Hobbs Act counts based on proof that he attempted to rob marijuana dealers of their drugs and drug money. We hold that this evidence was sufficient to satisfy the Act's commerce element.

I

Beginning as early as 2009, an outlaw gang called the "Southwest Goonz" committed a series of home invasion robberies targeting drug dealers in the area of Roanoke, Virginia. 754 F. 3d 217, 220 (CA4 2014). For obvious reasons, drug dealers are more likely than ordinary citizens to keep large quantities of cash and illegal drugs in their homes and are less likely to report robberies to the police. For participating in two such home invasions, Taylor was convicted of two counts of Hobbs Act robbery, in violation of § 1951(a), and one count of using a firearm in furtherance of a crime of violence, in violation of § 924(c).

The first attempted drug robbery for which Taylor was convicted occurred in August 2009. *Id.*, at 220. Taylor and others targeted the home of Josh Whorley, having obtained information that Whorley dealt "exotic and high grade" marijuana. *Ibid.* "The robbers expected to find both drugs and money" in Whorley's home. *Ibid.* Taylor and the others broke into the home, searched it, and assaulted Whorley and his girlfriend. They demanded to be told the location of money and drugs but, not locating any, left with only jewelry, $40, two cell phones, and a marijuana cigarette. *Ibid.*

The second attempted drug robbery occurred two months later in October 2009 at the home of William Lynch. *Ibid.* A source informed the leader of the gang that, on a prior occasion, the source had robbed Lynch of 20 pounds of marijuana in front of Lynch's home. The gang also received information that Lynch continued to deal drugs. Taylor and others broke into Lynch's home, held his wife and young children at gunpoint, assaulted his wife, and demanded to know the location of his drugs and money. Again largely unsuccessful, the robbers made off with only a cell phone. *Id.*, at 221.

For his participation in these two home invasions, Taylor was indicted under the Hobbs Act on two counts of affecting commerce or attempting to do so through robbery. App. 11a–13a. His first trial resulted in a hung jury. On retrial, at the urging of the Government, the District Court precluded Taylor from introducing evidence that the drug dealers he targeted might be dealing in only locally grown marijuana. *Id.*, at 60a; see 754 F. 3d, at 221. During the second trial, Taylor twice moved for a judgment of acquittal on the ground that the prosecution had failed to meet its burden on the commerce element, Tr. 445–447, 532–533; see 754 F. 3d, at 221, but the District Court denied those motions, holding that the proof that Taylor attempted to rob drug dealers was sufficient as a matter of law to satisfy that element. Tr. 446, 532–533. The jury found Taylor guilty on both of the Hobbs Act counts and one of the firearms counts. App. 67a–69a.

On appeal, Taylor challenged the sufficiency of the evidence to prove the commerce element of the Hobbs Act, but the Fourth Circuit affirmed. "Because drug dealing in the aggregate necessarily affects interstate commerce," the court reasoned, "the government was simply required to prove that Taylor depleted or attempted to deplete the assets of such an operation." 754 F. 3d, at 224.

We granted certiorari to resolve a conflict in the Circuits regarding the demands of the Hobbs Act's commerce element in cases involving the theft of drugs and drug proceeds from drug dealers. 576 U. S. 1095 (2015).

II

A

The Hobbs Act provides in relevant part as follows:

> "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery . . . or attempts or conspires so to do . . . shall be fined under this title or imprisoned not more than twenty years, or both." 18 U. S. C. § 1951(a).

The Act then defines the term "commerce" to mean

> "commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction." § 1951(b)(3).

The language of the Hobbs Act is unmistakably broad. It reaches any obstruction, delay, or other effect on commerce, even if small, and the Act's definition of commerce encompasses "all . . . commerce over which the United States has jurisdiction." *Ibid.* We have noted the sweep of the Act in

past cases. *United States* v. *Culbert*, 435 U. S. 371, 373 (1978) ("These words do not lend themselves to restrictive interpretation"); *Stirone* v. *United States*, 361 U. S. 212, 215 (1960) (The Hobbs Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence").

B

To determine how far this commerce element extends—and what the Government must prove to meet it—we look to our Commerce Clause cases. We have said that there are three categories of activity that Congress may regulate under its commerce power: (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "those activities having a substantial relation to interstate commerce, . . . *i. e.*, those activities that substantially affect interstate commerce." *United States* v. *Lopez*, 514 U. S. 549, 558–559 (1995). We have held that activities in this third category—those that "substantially affect" commerce—may be regulated so long as they substantially affect interstate commerce in the aggregate, even if their individual impact on interstate commerce is minimal. See *Wickard* v. *Filburn*, 317 U. S. 111, 125 (1942) ("[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce").

While this final category is broad, "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *United States* v. *Morrison*, 529 U. S. 598, 613 (2000).

In this case, the activity at issue, the sale of marijuana, is unquestionably an economic activity. It is, to be sure, a

form of business that is illegal under federal law and the laws of most States. But there can be no question that marijuana trafficking is a moneymaking endeavor—and a potentially lucrative one at that.

In *Raich*, the Court addressed Congress's authority to regulate the marijuana market. The Court reaffirmed "Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." 545 U. S., at 17. The production, possession, and distribution of controlled substances constitute a "class of activities" that in the aggregate substantially affect interstate commerce, and therefore, the Court held, Congress possesses the authority to regulate (and to criminalize) the production, possession, and distribution of controlled substances even when those activities occur entirely within the boundaries of a single State. Any other outcome, we warned, would leave a gaping enforcement hole in Congress's regulatory scheme. *Id.*, at 22.

The case now before us requires no more than that we graft our holding in *Raich* onto the commerce element of the Hobbs Act. The Hobbs Act criminalizes robberies affecting "commerce over which the United States has jurisdiction." § 1951(b)(3). Under *Raich*, the market for marijuana, including its intrastate aspects, is "commerce over which the United States has jurisdiction." It therefore follows as a simple matter of logic that a robber who affects or attempts to affect even the intrastate sale of marijuana grown within the State affects or attempts to affect commerce over which the United States has jurisdiction.

C

Rejecting this logic, Taylor takes the position that the robbery or attempted robbery of a drug dealer's inventory violates the Hobbs Act only if the Government proves something more. This argument rests in part on the fact that *Raich* concerned the Controlled Substances Act (CSA), the

criminal provisions of which lack a jurisdictional element. See 21 U. S. C. §§ 841(a), 844. The Hobbs Act, by contrast, contains such an element—namely, the conduct criminalized must affect or attempt to affect commerce in some way or degree. See 18 U. S. C. § 1951(a). Therefore, Taylor reasons, the prosecution must prove beyond a reasonable doubt either (1) that the particular drugs in question originated or were destined for sale out of State or (2) that the particular drug dealer targeted in the robbery operated an interstate business. See Brief for Petitioner 25–27; Reply Brief 8. The Second and Seventh Circuits have adopted this same argument. See *United States* v. *Needham*, 604 F. 3d 673, 681 (CA2 2010); *United States* v. *Peterson*, 236 F. 3d 848, 855 (CA7 2001).

This argument is flawed. It confuses the standard of proof with the meaning of the element that must be proved. There is no question that the Government in a Hobbs Act prosecution must prove beyond a reasonable doubt that the defendant engaged in conduct that satisfies the Act's commerce element, but the meaning of that element is a question of law. And, as noted, *Raich* established that the purely intrastate production and sale of marijuana is commerce over which the Federal Government has jurisdiction. Therefore, if the Government proves beyond a reasonable doubt that a robber targeted a marijuana dealer's drugs or illegal proceeds, the Government has proved beyond a reasonable doubt that commerce over which the United States has jurisdiction was affected.

The only way to escape that conclusion would be to hold that the Hobbs Act does not exercise the full measure of Congress's commerce power. But we reached the opposite conclusion more than 50 years ago, see *Stirone*, 361 U. S., at 215, and it is not easy to see how the expansive language of the Act could be interpreted in any other way.

This conclusion does not make the commerce provision of the Hobbs Act superfluous. That statute, unlike the crimi-

nal provisions of the CSA, applies to forms of conduct that, even in the aggregate, may not substantially affect commerce. The Act's commerce element ensures that applications of the Act do not exceed Congress's authority. But in a case like this one, where the target of a robbery is a drug dealer, proof that the defendant's conduct in and of itself affected or threatened commerce is not needed. All that is needed is proof that the defendant's conduct fell within a category of conduct that, in the aggregate, had the requisite effect.

D

Contrary to the dissent, see *post*, at 319–321 (opinion of THOMAS, J.), today's holding merely applies—it in no way expands—*Raich*'s interpretation of the scope of Congress's power under the Commerce Clause. The dissent resists the substantial-effects approach and the aggregation principle on which *Raich* is based, see *post*, at 320–321. But we have not been asked to reconsider *Raich*. So our decision in *Raich* controls the outcome here. As long as Congress may regulate the purely intrastate possession and sale of illegal drugs, Congress may criminalize the theft or attempted theft of those same drugs.

We reiterate what this means. In order to obtain a conviction under the Hobbs Act for the robbery or attempted robbery of a drug dealer, the Government need not show that the drugs that a defendant stole or attempted to steal either traveled or were destined for transport across state lines. Rather, to satisfy the Act's commerce element, it is enough that a defendant knowingly stole or attempted to steal drugs or drug proceeds, for, as a matter of law, the market for illegal drugs is "commerce over which the United States has jurisdiction." And it makes no difference under our cases that any actual or threatened effect on commerce in a particular case is minimal. See *Perez* v. *United States*, 402 U. S. 146, 154 (1971) ("Where the class of activities is regulated and that class is within the reach of federal power,

the courts have no power 'to excise, as trivial, individual instances' of the class" (emphasis deleted)).

E

In the present case, the Government met its burden by introducing evidence that Taylor's gang intentionally targeted drug dealers to obtain drugs and drug proceeds. One of the victims had been robbed of substantial quantities of drugs at his residence in the past, and the other was thought to possess high-grade marijuana. The robbers also made explicit statements in the course of the robberies revealing that they believed that the victims possessed drugs and drug proceeds. Tr. 359 (asking Lynch "where the weed at"); *id.*, at 93 (asking Whorley "where the money was at, where the weed was at"); *id.*, at 212–213 (asking Whorley, "Where is your money and where is your weed at?"). Both robberies were committed with the express intent to obtain illegal drugs and the proceeds from the sale of illegal drugs. Such proof is sufficient to meet the commerce element of the Hobbs Act.

Our holding today is limited to cases in which the defendant targets drug dealers for the purpose of stealing drugs or drug proceeds. We do not resolve what the Government must prove to establish Hobbs Act robbery where some other type of business or victim is targeted. See, *e. g.*, *Stirone*, *supra*, at 215 (Government offered evidence that the defendant attempted to extort a concrete business that actually obtained supplies and materials from out of State).

* * *

The judgment of the Fourth Circuit is affirmed.

It is so ordered.

JUSTICE THOMAS, dissenting.

The Hobbs Act makes it a federal crime to commit a robbery that "affects" "commerce over which the United States has jurisdiction." 18 U. S. C. §§ 1951(a), (b)(3). Under the Court's decision today, the Government can obtain a Hobbs

Act conviction without proving that the defendant's robbery in fact affected interstate commerce—or any commerce. See *ante*, at 306–310. The Court's holding creates serious constitutional problems and extends our already expansive, flawed commerce-power precedents. I would construe the Hobbs Act in accordance with constitutional limits and hold that the Act punishes a robbery only when the Government proves that the robbery itself affected interstate commerce.

I

In making it a federal crime to commit a robbery that "affects commerce," § 1951(a), the Hobbs Act invokes the full reach of Congress' commerce power: The Act defines "commerce" to embrace "all . . . commerce over which the United States has jurisdiction." § 1951(b)(3). To determine the Hobbs Act's reach, I start by examining the limitations on Congress' authority to punish robbery under its commerce power. In light of those limitations and in accordance with the Hobbs Act's text, I would hold that the Government in a Hobbs Act case may obtain a conviction for robbery only if it proves, beyond a reasonable doubt, that the defendant's robbery itself affected interstate commerce. The Government may not obtain a conviction by proving only that the defendant's robbery affected intrastate commerce or other intrastate activity.

A

Congress possesses only limited authority to prohibit and punish robbery. "The Constitution creates a Federal Government of enumerated powers." *United States* v. *Lopez*, 514 U. S. 549, 552 (1995); see Art. I, § 8; *Marbury* v. *Madison*, 1 Cranch 137, 176 (1803) (Marshall, C. J.) ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written"). As with its powers generally, Congress has only limited authority over crime. The Government possesses broad general authority in Territories and federal enclaves. See Art. I, § 8, cl. 17 (conferring power of "exclusive Legislation"

over the District of Columbia); Art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"). But its power over crimes committed in the States is very different. The Constitution expressly delegates to Congress authority over only four specific crimes: counterfeiting securities and coin of the United States, Art. I, § 8, cl. 6; piracies and felonies committed on the high seas, Art. I, § 8, cl. 10; offenses against the law of nations, *ibid.*; and treason, Art. III, § 3, cl. 2. Given these limited grants of federal power, it is "clea[r] that Congress cannot punish felonies generally." *Cohens* v. *Virginia*, 6 Wheat. 264, 428 (1821) (Marshall, C. J.). Congress has "no general right to punish murder committed within any of the States," for example, and no general right to punish the many crimes that fall outside of Congress' express grants of criminal authority. *Id.*, at 426. "The Constitution," in short, "withhold[s] from Congress a plenary police power." *Lopez*, *supra*, at 566; see Art. I, § 8; Amdt. 10.

Beyond the four express grants of federal criminal authority, then, Congress may validly enact criminal laws only to the extent that doing so is "necessary and proper for carrying into Execution" its enumerated powers or other powers that the Constitution vests in the Federal Government. Art. I, § 8, cl. 18. As Chief Justice Marshall explained, "the [federal] government may, legitimately, punish any violation of its laws" as a necessary and proper means for carrying into execution Congress' enumerated powers. *McCulloch* v. *Maryland*, 4 Wheat. 316, 416 (1819); see *id.*, at 416–421. But if these limitations are not respected, Congress will accumulate the general police power that the Constitution withholds.

The scope of Congress' power to punish robbery in the Hobbs Act—or in any federal statute—must be assessed in light of these principles. The Commerce Clause—the constitutional provision that the Hobbs Act most clearly in-

vokes—does not authorize Congress to punish robbery. That Clause authorizes Congress to regulate "Commerce . . . among the several States." Art. I, § 8, cl. 3. Robbery is not "Commerce" under that Clause. At the founding, "commerce" "consisted of selling, buying, and bartering, as well as transporting for these purposes." *Lopez*, *supra*, at 585 (THOMAS, J., concurring). The Commerce Clause, as originally understood, thus "empowers Congress to regulate the buying and selling of goods and services trafficked across state lines." *Gonzales* v. *Raich*, 545 U. S. 1, 58 (2005) (THOMAS, J., dissenting). Robbery is not buying, it is not selling, and it cannot plausibly be described as a commercial transaction ("trade or exchange for value"). *Id.*, at 59.

Because Congress has no freestanding power to punish robbery and because robbery is not itself "Commerce," Congress may prohibit and punish robbery only to the extent that doing so is "necessary and proper for carrying into Execution" Congress' power to regulate commerce. Art. I, § 8, cl. 18. To be "necessary," Congress' prohibition of robbery must be "plainly adapted" to regulating interstate commerce. *McCulloch*, *supra*, at 421. This means that Congress' robbery prohibition must have an "obvious, simple, and direct relation" with the regulation of interstate commerce. *Raich*, *supra*, at 61 (THOMAS, J., dissenting) (internal quotation marks omitted). And for Congress' robbery prohibition to be "proper," it cannot be "prohibited" by the Constitution or inconsistent with its "letter and spirit." *McCulloch*, *supra*, at 421; see *United States* v. *Comstock*, 560 U. S. 126, 161 (2010) (THOMAS, J., dissenting) (same).

B

With those principles in mind, I turn to the Hobbs Act. The Act provides:

> "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or at-

> tempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be [punished]." 18 U. S. C. § 1951(a).

In keeping with Congress' authority to regulate certain commerce—but not robbery generally—the central feature of a Hobbs Act crime is an effect on commerce. The Act begins by focusing on commerce and then carefully describes the required relationship between the proscribed conduct and commerce: The Act uses active verbs—"obstructs," "delays," "affects"—to describe how a robbery must relate to commerce, making clear that a defendant's robbery must affect commerce.

The Act's reach depends on the meaning of "commerce," which the Act defines as

> "commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction." § 1951(b)(3).

As noted above, this provision is comprehensive and appears to invoke all of Congress' commerce power. The first clause of the definition invokes Congress' broad police power, including power over internal commerce, in the District of Columbia and the Territories. See Art. I, § 8, cl. 17 (District of Columbia); Art. IV, § 3, cl. 2 (Territories). The second and third clauses most clearly invoke those broad powers as well as Congress' power "[t]o regulate Commerce . . . among the several States." Art. I, § 8, cl. 3. The final clause invokes all federal commerce power not covered in the previous clauses. It invokes (to the extent that the second and third clauses do not already do so) Congress' authority "[t]o regu-

late Commerce with foreign Nations . . . and with the Indian Tribes." *Ibid.*

The critical question in this case is whether the commerce definition's final clause extends further, to some intrastate activity. Given the limitations imposed by the Constitution, I would construe this clause not to reach such activity.

As explained above, for the Hobbs Act to constitutionally prohibit robberies that interfere with intrastate activity, that prohibition would need to be "necessary and proper for carrying into Execution" Congress' power to regulate interstate commerce, Art. I, § 8, cls. 3, 18. See Part I–A, *supra*. Punishing a local robbery—one that affects only intrastate commerce or other intrastate activity—cannot satisfy that standard. Punishing a local robbery does not bear a "direct relation" to the regulation of interstate commerce, so it would not be "necessary." *Raich*, *supra*, at 61 (THOMAS, J., dissenting) (internal quotation marks omitted). Nor would punishing such a robbery be "proper." Permitting Congress to criminalize such robberies would confer on Congress a general police power over the Nation—even though the Constitution confers no such power on Congress. *Lopez*, 514 U. S., at 566; see *Raich*, 545 U. S., at 65 (THOMAS, J., dissenting). Allowing the Federal Government to reach a simple home robbery, for example, would "encroac[h] on States' traditional police powers to define the criminal law and to protect . . . their citizens." *Id.*, at 66. This would "subvert basic principles of federalism and dual sovereignty," *id.*, at 65, and would be inconsistent with the "letter and spirit" of the Constitution, *McCulloch*, 4 Wheat., at 421.

Thus, the Hobbs Act reaches a local robbery only when that particular robbery "obstructs, delays, or affects" *interstate* commerce. §§ 1951(a), (b)(3). So construed, the Hobbs Act validly punishes robbery. Congress' power "[t]o regulate Commerce . . . among the several States," Art. I, § 8, cl. 3, "would lack force or practical effect if Congress lacked the authority to enact criminal laws" prohibiting in-

terference with interstate commerce or the movement of articles or goods in interstate commerce, *Comstock*, *supra*, at 169 (THOMAS, J., dissenting). The Hobbs Act's prohibition on such interferences thus helps to "carr[y] into Execution" Congress' enumerated power to regulate interstate commerce. Art. I, § 8, cls. 3, 18. A prohibition on such interference by robbery bears an "obvious, simple, and direct relation" to regulating interstate commerce: It allows commerce to flow between States unobstructed. *Raich*, *supra*, at 61 (THOMAS, J., dissenting) (internal quotation marks omitted). It is therefore "necessary." And such a prohibition accords with the limited nature of the powers that the Constitution confers on Congress, by adhering to the categories of commerce that the Constitution authorizes Congress to regulate and by keeping Congress from exercising a general police power. See, *e. g.*, *Lopez*, *supra*, at 566. It is accordingly "proper" to that extent. If construed to reach a robbery that does not affect interstate commerce, however, the Hobbs Act exceeds Congress' authority because it is no longer "necessary and proper" to the execution of Congress' power "[t]o regulate Commerce . . . among the several States," Art. I, § 8, cls. 3, 18. See Part I–A, *supra*.

Robberies that might satisfy these principles would be those that affect the channels of interstate commerce or instrumentalities of interstate commerce. A robbery that forces an interstate freeway to shut down thus may form the basis for a valid Hobbs Act conviction. So too might a robbery of a truckdriver who is in the course of transporting commercial goods across state lines. But if the Government cannot prove that a robbery in a State affected interstate commerce, then the robbery is not punishable under the Hobbs Act. Sweeping in robberies that do not affect interstate commerce comes too close to conferring on Congress a general police power over the Nation.

Given the Hobbs Act's text and relevant constitutional principles, the Government in a Hobbs Act robbery case (at

least one that involves only intrastate robbery) must prove, beyond a reasonable doubt, that the defendant's robbery itself affected interstate commerce. See *Alleyne* v. *United States*, 570 U. S. 99, 104 (2013) (plurality opinion) (the Sixth Amendment right to a trial "'by an impartial jury,'" in conjunction with our due process precedents, "requires that each element of a crime be proved to the jury beyond a reasonable doubt"); *In re Winship*, 397 U. S. 358, 364 (1970) (requiring reasonable-doubt showing on each element of a crime).

C

On this interpretation of the Hobbs Act, petitioner David Anthony Taylor's convictions cannot stand. The Government cites no evidence that Taylor actually obstructed, delayed, or affected interstate commerce when he committed the two intrastate robberies here. The Government did not prove that Taylor affected any channel of interstate commerce, instrumentality of commerce, or person or thing in interstate commerce. See *Lopez*, *supra*, at 558–559 (describing these core areas of commerce regulation). Nor did the Government prove that Taylor affected an actual commercial transaction—let alone an interstate commercial transaction. At most, the Government proved instead that Taylor robbed two drug dealers in their homes in Virginia; that the marijuana that Taylor expected to (but did not) find in these robberies might possibly at some point have crossed state lines; and that Taylor expected to find large amounts of marijuana. See Brief for United States 35–37; Tr. 63–69, 354, 420–421. Under the principles set forth above, that is not sufficient to bring Taylor's robberies within the Hobbs Act's reach. We should reverse Taylor's Hobbs Act convictions.

II

Upholding Taylor's convictions, the Court reads the Hobbs Act differently. See *ante*, at 306–310. The Court concludes that the "commerce over which the United States has juris-

diction," § 1951(b)(3), includes intrastate activity. See *ante*, at 306–307. Under our modern precedents, as the Court notes, Congress may regulate not just the channels of interstate commerce, instrumentalities of interstate commerce, and persons or things moving in interstate commerce, but may also regulate "those activities having a substantial relation to interstate commerce, . . . *i. e.*, those activities that substantially affect interstate commerce." *Lopez*, *supra*, at 558–559; see *Wickard* v. *Filburn*, 317 U. S. 111, 125 (1942) ("[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce"). The substantial-effects approach is broad, in part because of its "aggregation principle": Congress can regulate an activity—even an intrastate, noncommercial activity—if that activity falls within a "class of activities" that, "as a whole," "substantially affects interstate commerce," even if "any specific activity within the class" has no such effects "when considered in isolation." *Lopez*, 514 U. S., at 600 (THOMAS, J., concurring) (emphasis deleted). According to the Court, the final clause of the Hobbs Act's definition of commerce embraces this category of activities that, in the aggregate, substantially affect commerce. See *ante*, at 306–307. Any robbery that targets a marijuana dealer, the Court then holds, affects the type of intrastate activity that Congress may regulate under its commerce power. See *ante*, at 306–310. For at least three reasons, the Court's holding is in error.

A

Although our modern precedents (such as *Wickard*) embrace the substantial-effects approach, applying that approach to the Hobbs Act is tantamount to abandoning any limits on Congress' commerce power—even the slight limits recognized by our expansive modern precedents. As I have explained, if the Hobbs Act is construed to punish a robbery

that by itself affects only intrastate activity, then the Act defies the constitutional design. See Part I, *supra*.

That is true even under our modern precedents. Even those precedents emphasize that "[t]he Constitution requires a distinction between what is truly national and what is truly local." *United States* v. *Morrison*, 529 U. S. 598, 617–618 (2000); see *Lopez*, 514 U. S., at 567–568. The substantial-effects approach is at war with that principle. To avoid giving Congress a general police power, there must be some limit to what Congress can regulate. But the substantial-effects approach's aggregation principle "has no stopping point." *Id.*, at 600 (THOMAS, J., concurring). "[O]ne *always* can draw the circle broadly enough to cover an activity that, when taken in isolation, would not have substantial effects on commerce." *Ibid.* Under the substantial-effects approach, Congress could, under its commerce power, regulate *any* robbery: In the aggregate, any type of robbery could be deemed to substantially affect interstate commerce.

By applying the substantial-effects test to the criminal prohibition before us, the Court effectively gives Congress a police power. That is why the Court cannot identify any true limit on its understanding of the commerce power. Although the Court maintains that its holding "is limited to cases in which the defendant targets drug dealers for the purpose of stealing drugs or drug proceeds," *ante*, at 310, its reasoning allows for unbounded regulation. Given that the Hobbs Act can be read in a way that does not give Congress a general police power, see Part I, *supra*, we should not construe the statute as the Court does today.

B

Applying the substantial-effects approach is especially unsound here because it effectively relieves the Government of its central burden in a criminal case—the burden to prove every element beyond a reasonable doubt—and because the Court's holding does not follow from even our broad prece-

dents. The Court reasons that, under *Gonzales* v. *Raich*, 545 U. S. 1—a case that rests on substantial-effects reasoning, see *id.*, at 17–22—"the market for marijuana, including its intrastate aspects, is 'commerce over which the United States has jurisdiction.' " *Ante*, at 307 (quoting § 1951(b)(3)). Therefore, "a robber who affects or attempts to affect even the intrastate sale of marijuana grown within the State affects or attempts to affect commerce over which the United States has jurisdiction." *Ante*, at 307. As the Court later states, "[W]here the target of a robbery is a drug dealer, proof that the defendant's conduct in and of itself affected or threatened commerce is not needed. All that is needed is proof that the defendant's conduct fell within a category of conduct that, in the aggregate, had the requisite effect." *Ante*, at 309.

Raich is too thin a reed to support the Court's holding. *Raich* upheld the federal Controlled Substances Act's regulation of "the intrastate manufacture and possession of marijuana" for personal medical use, 545 U. S., at 15, on the view that Congress "had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana" would undercut federal regulation of the broader interstate marijuana market, *id.*, at 22. The Court "stress[ed]" that it did not "need [to] determine whether [local cultivation and possession of marijuana], taken in the aggregate, substantially affect[ed] interstate commerce in fact, but only whether a 'rational basis' exist[ed] for so concluding." *Ibid.*

As an initial matter, *Raich* did not, as the Court suggests, hold that "the market for marijuana, including its intrastate aspects, is '*commerce* over which the United States has jurisdiction.' " *Ante*, at 307 (emphasis added). *Raich* held at most that the market for marijuana comprises *activities* that may substantially affect commerce over which the United States has jurisdiction. See, *e. g.*, *Raich*, *supra*, at 21–22. Those activities are not necessarily "commerce," so

Raich's holding does not establish what the Hobbs Act's text requires.

But even if *Raich* established that the intrastate aspects of the marijuana market are "commerce over which the United States has jurisdiction," § 1951(b)(3), *Raich* still would not establish the further point that the Court needs for its conclusion. Specifically, *Raich* would not establish that a robbery affecting a drug dealer establishes, beyond a reasonable doubt, that the robber actually "obstructs, delays, or affects" the marijuana market. § 1951(a). *Raich* did not hold that any activity relating to the marijuana market *in fact* affects commerce. *Raich* instead disclaimed the need to "determine whether" activities relating to the marijuana market—even "taken in the aggregate"—"substantially affect interstate commerce in fact." 545 U. S., at 22. *Raich* decided only that Congress had a rational basis—a merely "'conceivable'" basis, *FCC* v. *Beach Communications, Inc.*, 508 U. S. 307, 315 (1993)—for thinking that it needed to regulate that activity as part of an effective regulatory regime. 545 U. S., at 22. That is far from a finding, beyond a reasonable doubt, that a particular robbery relating to marijuana is an activity that affects interstate commerce. Grafting *Raich*'s "holding . . . onto the commerce element of the Hobbs Act" thus does not lead to the conclusion that "a robber who affects or attempts to affect . . . the intrastate sale of marijuana grown within [a] State affects or attempts to affect"—beyond a reasonable doubt—"commerce over which the United States has jurisdiction." *Ante*, at 307.

The Court's analysis thus provides no assurance that the Government has proved beyond a reasonable doubt that a Hobbs Act robbery defendant in fact affected commerce. And it unnecessarily extends our already broad precedents.

C

Finally, today's decision weakens longstanding protections for criminal defendants. The criminal law imposes espe-

cially high burdens on the Government in order to protect the rights of the accused. The Government may obtain a conviction only "upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the accused] is charged." *Winship*, 397 U. S., at 364. Those elements must be proved to a jury. Amdt. 6; see *Alleyne*, 570 U. S., at 104 (plurality opinion). Given the harshness of criminal penalties on "the rights of individuals," the Court has long recognized that penal laws "are to be construed strictly" to ensure that Congress has indeed decided to make the conduct at issue criminal. *United States* v. *Wiltberger*, 5 Wheat. 76, 95 (1820) (Marshall, C. J.). Thus, "before a man can be punished as a criminal under the federal law his case must be plainly and unmistakably within the provisions of some statute." *United States* v. *Gradwell*, 243 U. S. 476, 485 (1917) (internal quotation marks omitted). When courts construe criminal statutes, then, they must be especially careful. And when a broad reading of a criminal statute would upset federalism, courts must be more careful still. "[U]nless Congress conveys its purpose clearly," we do not deem it "to have significantly changed the federal-state balance in the prosecution of crimes." *Jones* v. *United States*, 529 U. S. 848, 858 (2000) (internal quotation marks omitted).

The substantial-effects test is in tension with these principles. That test—and the deferential, rational-basis review to which it is subjected, see *Raich*, *supra*, at 22—puts virtually no burdens on the Government. That should not come as a surprise because the substantial-effects test gained momentum not in the criminal context, but instead in the context in which courts most defer to the Government: the regulatory arena. *E. g.*, *Wickard*, 317 U. S., at 113, 122–125, 128–129 (relying on substantial-effects reasoning to uphold regulatory restrictions on wheat under the Agricultural Adjustment Act of 1938). Without adequate reflection, the Court later extended this approach to the criminal context. In *Perez* v. *United States*, 402 U. S. 146 (1971), for example,

the Court applied the substantial-effects approach to a criminal statute, holding that Congress could criminally punish loansharking under its commerce power because "[e]xtortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce" when judged as a "class of activities." *Id.*, at 154 (emphasis deleted); see *id.*, at 151–154, 156–157.

Even in extending the substantial-effects approach, however, the Court still tried to impose some of the recognized limits on the Government in the criminal context. Just a year before it decided *Perez*, for example, the Court held that the Government must prove each charged element of a crime beyond a reasonable doubt. *Winship*, *supra*, at 364. And the Court shortly thereafter gave a potentially broad federal statute a narrow reading—a reading that required a prohibited act to have a "demonstrated nexus with interstate commerce," rather than a lesser showing—based on lenity and federalism. *United States* v. *Bass*, 404 U. S. 336, 349 (1971); see *id.*, at 339, 347–350. Indeed, the Court soon again invoked those same principles in rejecting a broad interpretation of the Hobbs Act itself. See *United States* v. *Enmons*, 410 U. S. 396, 410–412 (1973) (invoking principles of lenity and federalism in construing the Hobbs Act not to reach the use of violence to achieve legitimate union objectives).

Today, however, the Court fails to apply even those limits. Today's decision fails to hold the Government to its burden to prove, beyond a reasonable doubt, that the defendant's robbery itself affected commerce. It fails to identify language in the Hobbs Act that "'conveys . . . clearly'" Congress' intention to reach the sorts of local, small-scale robberies that States traditionally prosecute. *Jones*, *supra*, at 858. And it fails to take our traditionally careful approach to construing criminal statutes. Given the problems with the Court's expansive reading of the Hobbs Act, we cannot be sure that Taylor's "case" is "plainly and unmistakably

within the provisions of" the Act. *Gradwell*, *supra*, at 485 (internal quotation marks omitted). It does not matter that Taylor committed a crime akin to the one that the Hobbs Act punishes. "It would be dangerous" to punish someone for "a crime not enumerated in the statute" merely "because it is of equal atrocity, or of kindred character, with those which are enumerated." *Wiltberger*, *supra*, at 96.

The Court takes that "dangerous" step—and other dangerous steps—today. It construes the Hobbs Act in a way that conflicts with the Constitution, with our precedents, and with longstanding protections for the accused. I would interpret the Hobbs Act in a way that is consistent with its text and with the Constitution.

* * *

For these reasons, I respectfully dissent.

Syllabus

RJR NABISCO, INC., ET AL. *v.* EUROPEAN COMMUNITY ET AL.

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

No. 15–138. Argued March 21, 2016—Decided June 20, 2016

The Racketeer Influenced and Corrupt Organizations Act (RICO) prohibits certain activities of organized crime groups in relation to an enterprise. RICO makes it a crime to invest income derived from a pattern of racketeering activity in an enterprise "which is engaged in, or the activities of which affect, interstate or foreign commerce," 18 U. S. C. § 1962(a); to acquire or maintain an interest in an enterprise through a pattern of racketeering activity, § 1962(b); to conduct an enterprise's affairs through a pattern of racketeering activity, § 1962(c); and to conspire to violate any of the other three prohibitions, § 1962(d). RICO also provides a civil cause of action for "[a]ny person injured in his business or property by reason of a violation" of those prohibitions. § 1964(c).

Respondents (the European Community and 26 of its member states) filed suit under RICO, alleging that petitioners (RJR Nabisco and related entities (collectively RJR)) participated in a global money-laundering scheme in association with various organized crime groups. Under the alleged scheme, drug traffickers smuggled narcotics into Europe and sold them for euros that—through transactions involving black-market money brokers, cigarette importers, and wholesalers—were used to pay for large shipments of RJR cigarettes into Europe. The complaint alleged that RJR violated §§ 1962(a)–(d) by engaging in a pattern of racketeering activity that included numerous predicate acts of money laundering, material support to foreign terrorist organizations, mail fraud, wire fraud, and violations of the Travel Act. The District Court granted RJR's motion to dismiss on the ground that RICO does not apply to racketeering activity occurring outside U. S. territory or to foreign enterprises. The Second Circuit reinstated the claims, however, concluding that RICO applies extraterritorially to the same extent as the predicate acts of racketeering that underlie the alleged RICO violation, and that certain predicates alleged in this case expressly apply extraterritorially. In denying rehearing, the court held further that RICO's civil action does not require a domestic injury, but permits recovery for a foreign injury caused by the violation of a predicate statute that applies extraterritorially.

Held:

1. The law of extraterritoriality provides guidance in determining RICO's reach to events outside the United States. The Court applies

a canon of statutory construction known as the presumption against extraterritoriality: Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application. *Morrison* v. *National Australia Bank Ltd.*, 561 U. S. 247, 255. *Morrison* and *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U. S. 108, reflect a two-step framework for analyzing extraterritoriality issues. First, the Court asks whether the presumption against extraterritoriality has been rebutted—*i. e.*, whether the statute gives a clear, affirmative indication that it applies extraterritorially. This question is asked regardless of whether the particular statute regulates conduct, affords relief, or merely confers jurisdiction. If, and only if, the statute is not found extraterritorial at step one, the Court moves to step two, where it examines the statute's "focus" to determine whether the case involves a domestic application of the statute. If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the relevant conduct occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of whether other conduct occurred in U. S. territory. In the event the statute is found to have clear extraterritorial effect at step one, then the statute's scope turns on the limits Congress has or has not imposed on the statute's foreign application, and not on the statute's "focus." Pp. 335–338.

2. The presumption against extraterritoriality has been rebutted with respect to certain applications of RICO's substantive prohibitions in § 1962. Pp. 338–345.

(a) RICO defines racketeering activity to include a number of predicates that plainly apply to at least some foreign conduct, such as the prohibition against engaging in monetary transactions in criminally derived property, § 1957(d)(2), the prohibitions against the assassination of Government officials, §§ 351(i), 1751(k), and the prohibition against hostage taking, § 1203(b). Congress has thus given a clear, affirmative indication that § 1962 applies to foreign racketeering activity—but only to the extent that the predicates alleged in a particular case themselves apply extraterritorially. This fact is determinative as to §§ 1962(b) and (c), which both prohibit the employment of a pattern of racketeering. But § 1962(a), which targets certain uses of income derived from a pattern of racketeering, arguably extends only to domestic uses of that income. Because the parties have not focused on this issue, and because its resolution does not affect this case, it is assumed that respondents have pleaded a domestic investment of racketeering income in violation of § 1962(a). It is also assumed that the extraterritoriality of a violation of RICO's conspiracy provision, § 1962(d), tracks that of the RICO provision underlying the alleged conspiracy. Pp. 338–341.

Syllabus

(b) RJR contends that RICO's "focus" is its enterprise element, which gives no clear indication of extraterritorial effect. But focus is considered only when it is necessary to proceed to the inquiry's second step. See *Morrison, supra,* at 267, n. 9. Here, however, there is a clear indication at step one that at least §§ 1962(b) and (c) apply to all transnational patterns of racketeering, subject to the stated limitation. A domestic enterprise requirement would lead to difficult line-drawing problems and counterintuitive results, such as excluding from RICO's reach foreign enterprises that operate within the United States. Such troubling consequences reinforce the conclusion that Congress intended the §§ 1962(b) and (c) prohibitions to apply extraterritorially in tandem with the underlying predicates, without regard to the locus of the enterprise. Of course, foreign enterprises will qualify only if they engage in, or significantly affect, commerce directly involving the United States. Pp. 341–344.

(c) Applying these principles here, respondents' allegations that RJR violated §§ 1962(b) and (c) do not involve an impermissibly extraterritorial application of RICO. The Court assumes that the alleged pattern of racketeering activity consists entirely of predicate offenses that were either committed in the United States or committed in a foreign country in violation of a predicate statute that applies extraterritorially. The alleged enterprise also has a sufficient tie to U. S. commerce, as its members include U. S. companies and its activities depend on sales of RJR's cigarettes conducted through "the U. S. mails and wires," among other things. Pp. 344–345.

3. Irrespective of any extraterritoriality of § 1962's substantive provisions, § 1964(c)'s private right of action does not overcome the presumption against extraterritoriality, and thus a private RICO plaintiff must allege and prove a domestic injury. Pp. 346–355.

(a) The Second Circuit reasoned that the presumption against extraterritoriality did not apply to § 1964(c) independently of its application to § 1962's substantive provisions because § 1964(c) does not regulate conduct. But this view was rejected in *Kiobel*, 569 U. S., at 116, and the logic of that decision requires that the presumption be applied separately to RICO's cause of action even though it has been overcome with respect to RICO's substantive prohibitions. As in other contexts, allowing recovery for foreign injuries in a civil RICO action creates a danger of international friction that militates against recognizing foreign-injury claims without clear direction from Congress. Respondents, in arguing that such concerns are inapplicable here because the plaintiffs are not foreign citizens seeking to bypass their home countries' less generous remedies but are foreign countries themselves, forget that this Court's interpretation of § 1964(c)'s injury requirement will necessarily govern suits by nongovernmental plaintiffs. The Court will not

forgo the presumption against extraterritoriality to permit extraterritorial suits based on a case-by-case inquiry that turns on or looks to the affected sovereign's consent. Nor will the Court adopt a double standard that would treat suits by foreign sovereigns more favorably than other suits. Pp. 346–349.

(b) Section 1964(c) does not provide a clear indication that Congress intended to provide a private right of action for injuries suffered outside of the United States. It provides a cause of action to "[a]ny person injured in his business or property" by a violation of § 1962, but neither the word "any" nor the reference to injury to "business or property" indicates extraterritorial application. Respondents' arguments to the contrary are unpersuasive. In particular, while they are correct that RICO's private right of action was modeled after § 4 of the Clayton Act, which allows recovery for injuries suffered abroad as a result of antitrust violations, see *Pfizer Inc.* v. *Government of India*, 434 U. S. 308, 314–315, this Court has declined to transplant features of the Clayton Act's cause of action into the RICO context where doing so would be inappropriate, cf. *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479, 485, 495. There is good reason not to do so here. Most importantly, RICO lacks the very language that the Court found critical to its decision in *Pfizer*, namely, the Clayton Act's definition of a "person" who may sue, which "explicitly includes 'corporations and associations existing under or authorized by . . . the laws of any foreign country,'" 434 U. S., at 313. Congress's more recent decision to exclude from the antitrust laws' reach most conduct that "causes only foreign injury," *F. Hoffmann-La Roche Ltd* v. *Empagran S. A.*, 542 U. S. 155, 158, also counsels against importing into RICO those Clayton Act principles that are at odds with the Court's current extraterritoriality doctrine. Pp. 349–354.

(c) Section 1964(c) requires a civil RICO plaintiff to allege and prove a domestic injury to business or property and does not allow recovery for foreign injuries. Respondents waived their domestic-injury damages claims, so the District Court dismissed them with prejudice. Their remaining RICO damages claims therefore rest entirely on injury suffered abroad and must be dismissed. P. 354.

764 F. 3d 129, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY and THOMAS, JJ., joined, and in which GINSBURG, BREYER, and KAGAN, JJ., joined as to Parts I, II, and III. GINSBURG, J., filed an opinion concurring in part, dissenting in part, and dissenting from the judgment, in which BREYER and KAGAN, JJ., joined, *post*, p. 355. BREYER, J., filed an opinion concurring in part, dissenting in part, and

dissenting from the judgment, *post*, p. 363. SOTOMAYOR, J., took no part in the consideration or decision of the case.

Gregory G. Katsas argued the cause for petitioners. With him on the briefs were *Hashim M. Mooppan*, *Anthony J. Dick*, and *Emily J. Kennedy*.

Elaine J. Goldenberg argued the cause for the United States as *amicus curiae* urging vacatur. With her on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Caldwell*, *Principal Deputy Assistant Attorney General Mizer*, *Deputy Solicitor General Dreeben*, *Douglas N. Letter*, and *Lewis S. Yelin*.

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JUSTICE ALITO delivered the opinion of the Court.

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. §§ 1961–1968, created four new criminal offenses involving the activities of organized criminal groups in relation to an enterprise. §§ 1962(a)–(d). RICO also created a new civil cause of action for "[a]ny person injured in his business or property by reason of a violation" of those prohibitions. § 1964(c). We are asked to decide whether RICO applies extraterritorially—that is, to events occurring and injuries suffered outside the United States.

I

A

RICO is founded on the concept of racketeering activity. The statute defines "racketeering activity" to encompass

*Briefs of *amici curiae* urging reversal were filed for the National Foreign Trade Council by *Timothy P. Harkness*, *Elliot Friedman*, *David Y. Livshiz*, and *Leah Friedman*; and for the Washington Legal Foundation et al. by *Cory L. Andrews*.

dozens of state and federal offenses, known in RICO parlance as predicates. These predicates include any act "indictable" under specified federal statutes, §§ 1961(1)(B)–(C), (E)–(G), as well as certain crimes "chargeable" under state law, § 1961(1)(A), and any offense involving bankruptcy or securities fraud or drug-related activity that is "punishable" under federal law, § 1961(1)(D). A predicate offense implicates RICO when it is part of a "pattern of racketeering activity"—a series of related predicates that together demonstrate the existence or threat of continued criminal activity. *H. J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U. S. 229, 239 (1989); see § 1961(5) (specifying that a "pattern of racketeering activity" requires at least two predicates committed within 10 years of each other).

RICO's § 1962 sets forth four specific prohibitions aimed at different ways in which a pattern of racketeering activity may be used to infiltrate, control, or operate "a[n] enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." These prohibitions can be summarized as follows. Section 1962(a) makes it unlawful to invest income derived from a pattern of racketeering activity in an enterprise. Section 1962(b) makes it unlawful to acquire or maintain an interest in an enterprise through a pattern of racketeering activity. Section 1962(c) makes it unlawful for a person employed by or associated with an enterprise to conduct the enterprise's affairs through a pattern of racketeering activity. Finally, § 1962(d) makes it unlawful to conspire to violate any of the other three prohibitions.[1]

[1] In full, 18 U. S. C. § 1962 provides:

"(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of

Violations of § 1962 are subject to criminal penalties, § 1963(a), and civil proceedings to enforce those prohibitions may be brought by the Attorney General, §§ 1964(a)–(b). Separately, RICO creates a private civil cause of action that allows "[a]ny person injured in his business or property by reason of a violation of section 1962" to sue in federal district court and recover treble damages, costs, and attorney's fees. § 1964(c).[2]

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securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

"(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

"(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

"(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."

The attentive reader will notice that these prohibitions concern not only patterns of racketeering activity but also the collection of unlawful debt. As is typical in our RICO cases, we have no occasion here to address this aspect of the statute.

[2] In full, § 1964(c) provides:

"Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply

B

This case arises from allegations that petitioners—RJR Nabisco and numerous related entities (collectively RJR)—participated in a global money-laundering scheme in association with various organized crime groups. Respondents—the European Community and 26 of its member states—first sued RJR in the Eastern District of New York in 2000, alleging that RJR had violated RICO. Over the past 16 years, the resulting litigation (spread over at least three separate actions, with this case the lone survivor) has seen multiple complaints and multiple trips up and down the federal court system. See 2011 WL 843957, *1–*2 (EDNY, Mar. 8, 2011) (tracing the procedural history through the District Court's dismissal of the present complaint). In the interest of brevity, we confine our discussion to the operative complaint and its journey to this Court.

Greatly simplified, the complaint alleges a scheme in which Colombian and Russian drug traffickers smuggled narcotics into Europe and sold the drugs for euros that—through a series of transactions involving black-market money brokers, cigarette importers, and wholesalers—were used to pay for large shipments of RJR cigarettes into Europe. In other variations of this scheme, RJR allegedly dealt directly with drug traffickers and money launderers in South America and sold cigarettes to Iraq in violation of international sanctions. RJR is also said to have acquired Brown & Williamson Tobacco Corporation for the purpose of expanding these illegal activities.

The complaint alleges that RJR engaged in a pattern of racketeering activity consisting of numerous acts of money laundering, material support to foreign terrorist organizations, mail fraud, wire fraud, and violations of the Travel Act.

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to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final."

RJR, in concert with the other participants in the scheme, allegedly formed an association in fact that was engaged in interstate and foreign commerce, and therefore constituted a RICO enterprise that the complaint dubs the "RJR Money-Laundering Enterprise." App. to Pet. for Cert. 238a, Complaint ¶158; see § 1961(4) (defining an enterprise to include "any union or group of individuals associated in fact although not a legal entity").

Putting these pieces together, the complaint alleges that RJR violated each of RICO's prohibitions. RJR allegedly used income derived from the pattern of racketeering to invest in, acquire an interest in, and operate the RJR Money-Laundering Enterprise in violation of § 1962(a); acquired and maintained control of the enterprise through the pattern of racketeering in violation of § 1962(b); operated the enterprise through the pattern of racketeering in violation of § 1962(c); and conspired with other participants in the scheme in violation of § 1962(d).[3] These violations allegedly harmed respondents in various ways, including through competitive harm to their state-owned cigarette businesses, lost tax revenue from black-market cigarette sales, harm to European financial institutions, currency instability, and increased law enforcement costs.[4]

RJR moved to dismiss the complaint, arguing that RICO does not apply to racketeering activity occurring outside U. S. territory or to foreign enterprises. The District Court

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[3] The complaint also alleges that RJR committed a variety of state-law torts. Those claims are not before us.

[4] At an earlier stage of respondents' litigation against RJR, the Second Circuit "held that the revenue rule barred the foreign sovereigns' civil claims for recovery of lost tax revenue and law enforcement costs." *European Community* v. *RJR Nabisco, Inc.*, 424 F. 3d 175, 178 (2005) (Sotomayor, J.), cert. denied, 546 U. S. 1092 (2006). It is unclear why respondents subsequently included these alleged injuries in their present complaint; they do not ask us to disturb or distinguish the Second Circuit's holding that such injuries are not cognizable. We express no opinion on the matter. Cf. *Pasquantino* v. *United States*, 544 U. S. 349, 355, n. 1 (2005).

agreed and dismissed the RICO claims as impermissibly extraterritorial. 2011 WL 843957, *7.

The Second Circuit reinstated the RICO claims. It concluded that, "with respect to a number of offenses that constitute predicates for RICO liability and are alleged in this case, Congress has clearly manifested an intent that they apply extraterritorially." 764 F. 3d 129, 133 (2014). "By incorporating these statutes into RICO as predicate racketeering acts," the court reasoned, "Congress has clearly communicated its intention that RICO apply to extraterritorial conduct to the extent that extraterritorial violations of these statutes serve as the basis for RICO liability." *Id.*, at 137. Turning to the predicates alleged in the complaint, the Second Circuit found that they passed muster. The court concluded that the money laundering and material support of terrorism statutes expressly apply extraterritorially in the circumstances alleged in the complaint. *Id.*, at 139–140. The court held that the mail fraud, wire fraud, and Travel Act statutes do *not* apply extraterritorially. *Id.*, at 141. But it concluded that the complaint states *domestic* violations of those predicates because it "allege[s] conduct in the United States that satisfies every essential element" of those offenses. *Id.*, at 142.

RJR sought rehearing, arguing (among other things) that RICO's civil cause of action requires a plaintiff to allege a domestic *injury*, even if a domestic pattern of racketeering or a domestic enterprise is not necessary to make out a violation of RICO's substantive prohibitions. The panel denied rehearing and issued a supplemental opinion holding that RICO does not require a domestic injury. 764 F. 3d 149 (CA2 2014) (*per curiam*). If a foreign injury was caused by the violation of a predicate statute that applies extraterritorially, the court concluded, then the plaintiff may seek recovery for that injury under RICO. *Id.*, at 151. The Second Circuit later denied rehearing en banc, with five judges dissenting. 783 F. 3d 123 (2015).

The lower courts have come to different conclusions regarding RICO's extraterritorial application. Compare 764 F. 3d 129 (case below) (holding that RICO may apply extraterritorially) with *United States* v. *Chao Fan Xu*, 706 F. 3d 965, 974–975 (CA9 2013) (holding that RICO does not apply extraterritorially; collecting cases). Because of this conflict and the importance of the issue, we granted certiorari. 576 U. S. 1095 (2015).

II

The question of RICO's extraterritorial application really involves two questions. First, do RICO's substantive prohibitions, contained in § 1962, apply to conduct that occurs in foreign countries? Second, does RICO's private right of action, contained in § 1964(c), apply to injuries that are suffered in foreign countries? We consider each of these questions in turn. To guide our inquiry, we begin by reviewing the law of extraterritoriality.

It is a basic premise of our legal system that, in general, "United States law governs domestically but does not rule the world." *Microsoft Corp.* v. *AT&T Corp.*, 550 U. S. 437, 454 (2007). This principle finds expression in a canon of statutory construction known as the presumption against extraterritoriality: Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application. *Morrison* v. *National Australia Bank Ltd.*, 561 U. S. 247, 255 (2010). The question is not whether we think "Congress would have wanted" a statute to apply to foreign conduct "if it had thought of the situation before the court," but whether Congress has affirmatively and unmistakably instructed that the statute will do so. *Id.*, at 261. "When a statute gives no clear indication of an extraterritorial application, it has none." *Id.*, at 255.

There are several reasons for this presumption. Most notably, it serves to avoid the international discord that can result when U. S. law is applied to conduct in foreign countries. See, *e. g.*, *Kiobel* v. *Royal Dutch Petroleum Co.*, 569

U. S. 108, 115–116 (2013); *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 248 (1991); *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138, 147 (1957). But it also reflects the more prosaic "commonsense notion that Congress generally legislates with domestic concerns in mind." *Smith* v. *United States*, 507 U. S. 197, 204, n. 5 (1993). We therefore apply the presumption across the board, "regardless of whether there is a risk of conflict between the American statute and a foreign law." *Morrison*, *supra*, at 255.

Twice in the past six years we have considered whether a federal statute applies extraterritorially. In *Morrison*, we addressed the question whether § 10(b) of the Securities Exchange Act of 1934 applies to misrepresentations made in connection with the purchase or sale of securities traded only on foreign exchanges. We first examined whether § 10(b) gives any clear indication of extraterritorial effect, and found that it does not. 561 U. S., at 262–265. We then engaged in a separate inquiry to determine whether the complaint before us involved a permissible *domestic* application of § 10(b) because it alleged that some of the relevant misrepresentations were made in the United States. At this second step, we considered the "'focus' of congressional concern," asking whether § 10(b)'s focus is "the place where the deception originated" or rather "purchases and sale of securities in the United States." *Id.*, at 266. We concluded that the statute's focus is on domestic securities transactions, and we therefore held that the statute does not apply to frauds in connection with foreign securities transactions, even if those frauds involve domestic misrepresentations.

In *Kiobel*, we considered whether the Alien Tort Statute (ATS) confers federal-court jurisdiction over causes of action alleging international-law violations committed overseas. We acknowledged that the presumption against extraterritoriality is "typically" applied to statutes "regulating conduct," but we concluded that the principles supporting the pre-

sumption should "similarly constrain courts considering causes of action that may be brought under the ATS." 569 U. S., at 116. We applied the presumption and held that the ATS lacks any clear indication that it extended to the foreign violations alleged in that case. *Id.*, at 117–124. Because "all the relevant conduct" regarding those violations "took place outside the United States," *id.*, at 124, we did not need to determine, as we did in *Morrison*, the statute's "focus."

Morrison and *Kiobel* reflect a two-step framework for analyzing extraterritoriality issues. At the first step, we ask whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially. We must ask this question regardless of whether the statute in question regulates conduct, affords relief, or merely confers jurisdiction. If the statute is not extraterritorial, then at the second step we determine whether the case involves a domestic application of the statute, and we do this by looking to the statute's "focus." If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U. S. territory.

What if we find at step one that a statute clearly *does* have extraterritorial effect? Neither *Morrison* nor *Kiobel* involved such a finding. But we addressed this issue in *Morrison*, explaining that it was necessary to consider § 10(b)'s "focus" only because we found that the statute does not apply extraterritorially: "If § 10(b) did apply abroad, we would not need to determine which transnational frauds it applied to; it would apply to all of them (barring some other limitation)." 561 U. S., at 267, n. 9. The scope of an extraterritorial statute thus turns on the limits Congress has (or

has not) imposed on the statute's foreign application, and not on the statute's "focus."[5]

III

With these guiding principles in mind, we first consider whether RICO's substantive prohibitions in § 1962 may apply to foreign conduct. Unlike in *Morrison* and *Kiobel*, we find that the presumption against extraterritoriality has been rebutted—but only with respect to certain applications of the statute.

A

The most obvious textual clue is that RICO defines racketeering activity to include a number of predicates that plainly apply to at least some foreign conduct. These predicates include the prohibition against engaging in monetary transactions in criminally derived property, which expressly applies, when "the defendant is a United States person," to offenses that "tak[e] place outside the United States." 18 U. S. C. § 1957(d)(2). Other examples include the prohibitions against the assassination of Government officials, § 351(i) ("There is extraterritorial jurisdiction over the conduct prohibited by this section"); § 1751(k) (same), and the prohibition against hostage taking, which applies to conduct that "occurred outside the United States" if either the hostage or the offender is a U. S. national, if the offender is found in the United States, or if the hostage taking is done to compel action by the U. S. Government, § 1203(b). At least one predicate—the prohibition against "kill[ing] a national of the United States, while such national is outside the United States"—applies *only* to conduct occurring outside the United States. § 2332(a).

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[5] Because a finding of extraterritoriality at step one will obviate step two's "focus" inquiry, it will usually be preferable for courts to proceed in the sequence that we have set forth. But we do not mean to preclude courts from starting at step two in appropriate cases. Cf. *Pearson* v. *Callahan*, 555 U. S. 223, 236–243 (2009).

We agree with the Second Circuit that Congress's incorporation of these (and other) extraterritorial predicates into RICO gives a clear, affirmative indication that § 1962 applies to foreign racketeering activity—but only to the extent that the predicates alleged in a particular case themselves apply extraterritorially. Put another way, a pattern of racketeering activity may include or consist of offenses committed abroad in violation of a predicate statute for which the presumption against extraterritoriality has been overcome. To give a simple (albeit grim) example, a violation of § 1962 could be premised on a pattern of killings of Americans abroad in violation of § 2332(a)—a predicate that all agree applies extraterritorially—whether or not any domestic predicates are also alleged.[6]

We emphasize the important limitation that foreign conduct must violate "a predicate statute that manifests an unmistakable congressional intent to apply extraterritorially." 764 F. 3d, at 136. Although a number of RICO predicates have extraterritorial effect, many do not. The inclusion of *some* extraterritorial predicates does not mean that *all* RICO predicates extend to foreign conduct. This is apparent for two reasons. First, "when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms." *Morrison*, 561 U. S., at 265. Second, RICO defines as racketeering activity only acts that are "indictable" (or, what amounts to the same thing, "chargeable" or "punishable") under one of the statutes identified in § 1961(1). If a particular statute does not apply extraterritorially, then conduct committed abroad is not "indictable" under that statute and so cannot qualify as a predicate under RICO's plain terms.

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[6] The foreign killings would, of course, still have to satisfy the relatedness and continuity requirements of RICO's pattern element. See *H. J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U. S. 229 (1989).

RJR resists the conclusion that RICO's incorporation of extraterritorial predicates gives RICO commensurate extraterritorial effect. It points out that "RICO itself" does not refer to extraterritorial application; only the underlying predicate statutes do. Brief for Petitioners 42. RJR thus argues that Congress could have intended to capture only *domestic* applications of extraterritorial predicates, and that any predicates that apply only abroad could have been "incorporated . . . solely for when such offenses are part of a broader pattern whose overall locus is domestic." *Id.*, at 43.

The presumption against extraterritoriality does not require us to adopt such a constricted interpretation. While the presumption can be overcome only by a clear indication of extraterritorial effect, an express statement of extraterritoriality is not essential. "Assuredly context can be consulted as well." *Morrison*, *supra*, at 265. Context is dispositive here. Congress has not expressly said that § 1962(c) applies to patterns of racketeering activity in foreign countries, but it has defined "racketeering activity"—and by extension a "pattern of racketeering activity"—to encompass violations of predicate statutes that *do* expressly apply extraterritorially. Short of an explicit declaration, it is hard to imagine how Congress could have more clearly indicated that it intended RICO to have (some) extraterritorial effect. This unique structure makes RICO the rare statute that clearly evidences extraterritorial effect despite lacking an express statement of extraterritoriality.

We therefore conclude that RICO applies to some foreign racketeering activity. A violation of § 1962 may be based on a pattern of racketeering that includes predicate offenses committed abroad, provided that each of those offenses violates a predicate statute that is itself extraterritorial. This fact is determinative as to §§ 1962(b) and (c), both of which prohibit the employment of a pattern of racketeering. Although they differ as to the end for which the pattern is employed—to acquire or maintain control of an enterprise under subsection (b), or to conduct an enterprise's affairs

under subsection (c)—this difference is immaterial for extraterritoriality purposes.

Section 1962(a) presents a thornier question. Unlike subsections (b) and (c), subsection (a) targets certain uses of *income* derived from a pattern of racketeering, not the use of the pattern itself. Cf. *Anza* v. *Ideal Steel Supply Corp.*, 547 U. S. 451, 461–462 (2006). While we have no difficulty concluding that this prohibition applies to income derived from foreign patterns of racketeering (within the limits we have discussed), arguably § 1962(a) extends only to domestic uses of the income. The Second Circuit did not decide this question because it found that respondents have alleged "a domestic investment of racketeering proceeds in the form of RJR's merger in the United States with Brown & Williamson and investments in other U. S. operations." 764 F. 3d, at 138, n. 5. RJR does not dispute the basic soundness of the Second Circuit's reasoning, but it does contest the court's reading of the complaint. See Brief for Petitioners 57–58. Because the parties have not focused on this issue, and because it makes no difference to our resolution of this case, see *infra*, at 355, we assume without deciding that respondents have pleaded a domestic investment of racketeering income in violation of § 1962(a).

Finally, although respondents' complaint alleges a violation of RICO's conspiracy provision, § 1962(d), the parties' briefs do not address whether this provision should be treated differently from the provision (§ 1962(a), (b), or (c)) that a defendant allegedly conspired to violate. We therefore decline to reach this issue, and assume without deciding that § 1962(d)'s extraterritoriality tracks that of the provision underlying the alleged conspiracy.

B

RJR contends that, even if RICO may apply to foreign patterns of racketeering, the statute does not apply to foreign *enterprises*. Invoking *Morrison*'s discussion of the Exchange Act's "focus," RJR says that the "focus" of RICO

is the enterprise being corrupted—not the pattern of racketeering—and that RICO's enterprise element gives no clear indication of extraterritorial effect. Accordingly, RJR reasons, RICO requires a domestic enterprise.

This argument misunderstands *Morrison*. As explained above, *supra*, at 337, only at the second step of the inquiry do we consider a statute's "focus." Here, however, there is a clear indication at step one that RICO applies extraterritorially. We therefore do not proceed to the "focus" step. The *Morrison* Court's discussion of the statutory "focus" made this clear, stating that "[i]f § 10(b) did apply abroad, we would not need to determine which transnational frauds it applied to; it would apply to all of them (barring some other limitation)." 561 U. S., at 267, n. 9. The same is true here. RICO—or at least §§ 1962(b) and (c)—applies abroad, and so we do not need to determine which transnational (or wholly foreign) patterns of racketeering it applies to; it applies to all of them, regardless whether they are connected to a "foreign" or "domestic" enterprise. This rule is, of course, subject to the important limitation that RICO covers foreign predicate offenses only to the extent that the underlying predicate statutes are extraterritorial. But within those bounds, the location of the affected enterprise does not impose an independent constraint.

It is easy to see why Congress did not limit RICO to domestic enterprises. A domestic enterprise requirement would lead to difficult line-drawing problems and counterintuitive results. It would exclude from RICO's reach foreign enterprises—whether corporations, crime rings, other associations, or individuals—that operate within the United States. Imagine, for example, that a foreign corporation has operations in the United States and that one of the corporation's managers in the United States conducts its U. S. affairs through a pattern of extortion and mail fraud. Such domestic conduct would seem to fall well within what Congress meant to capture in enacting RICO. Congress, after all, does not usually exempt foreigners acting in the United

States from U. S. legal requirements. See 764 F. 3d, at 138 ("Surely the presumption against extraterritorial application of United States laws does not command giving foreigners carte blanche to violate the laws of the United States in the United States"). Yet RJR's theory would insulate this scheme from RICO liability—both civil and criminal—because the enterprise at issue is a foreign, not domestic, corporation.

Seeking to avoid this result, RJR offers that any "'emissaries'" a foreign enterprise sends to the United States—such as our hypothetical U. S.-based corporate manager—could be carved off and considered a "distinct domestic enterprise" under an association-in-fact theory. Brief for Petitioners 40. RJR's willingness to gerrymander the enterprise to get around its proposed domestic enterprise requirement is telling. It suggests that RJR is not really concerned about whether an enterprise is foreign or domestic, but whether the relevant conduct occurred here or abroad. And if that is the concern, then it is the pattern of racketeering activity that matters, not the enterprise. Even spotting RJR its "domestic emissary" theory, this approach would lead to strange gaps in RICO's coverage. If a foreign enterprise sent only a single "emissary" to engage in racketeering in the United States, there could be no RICO liability because a single person cannot be both the RICO enterprise and the RICO defendant. *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U. S. 158, 162 (2001).

RJR also offers no satisfactory way of determining whether an enterprise is foreign or domestic. Like the District Court, RJR maintains that courts can apply the "nerve center" test that we use to determine a corporation's principal place of business for purposes of federal diversity jurisdiction. See *Hertz Corp.* v. *Friend*, 559 U. S. 77 (2010); 28 U. S. C. § 1332(c)(1); 2011 WL 843957, *5–*6. But this test quickly becomes meaningless if, as RJR suggests, a corporation with a foreign nerve center can, if necessary, be pruned into an association-in-fact enterprise with a domestic nerve

center. The nerve center test, developed with ordinary corporate command structures in mind, is also ill suited to govern RICO association-in-fact enterprises, which "need not have a hierarchical structure or a 'chain of command.'" *Boyle* v. *United States*, 556 U. S. 938, 948 (2009). These difficulties are largely avoided if, as we conclude today, RICO's extraterritorial effect is pegged to the extraterritoriality judgments Congress has made in the predicate statutes, often by providing precise instructions as to when those statutes apply to foreign conduct.

The practical problems we have identified with RJR's proposed domestic enterprise requirement are not, by themselves, cause to reject it. Our point in reciting these troubling consequences of RJR's theory is simply to reinforce our conclusion, based on RICO's text and context, that Congress intended the prohibitions in 18 U. S. C. §§ 1962(b) and (c) to apply extraterritorially in tandem with the underlying predicates, without regard to the locus of the enterprise.

Although we find that RICO imposes no domestic enterprise requirement, this does not mean that every foreign enterprise will qualify. Each of RICO's substantive prohibitions requires proof of an enterprise that is "engaged in, or the activities of which affect, interstate or foreign commerce." §§ 1962(a), (b), (c). We do not take this reference to "foreign commerce" to mean literally all commerce occurring abroad. Rather, a RICO enterprise must engage in, or affect in some significant way, commerce directly involving the United States—*e. g.*, commerce between the United States and a foreign country. Enterprises whose activities lack that anchor to U. S. commerce cannot sustain a RICO violation.

C

Applying these principles, we agree with the Second Circuit that the complaint does not allege impermissibly extraterritorial violations of §§ 1962(b) and (c).[7]

[7] As to §§ 1962(a) and (d), see *supra*, at 341.

The alleged pattern of racketeering activity consists of five basic predicates: (1) money laundering, (2) material support of foreign terrorist organizations, (3) mail fraud, (4) wire fraud, and (5) violations of the Travel Act. The Second Circuit observed that the relevant provisions of the money laundering and material support of terrorism statutes expressly provide for extraterritorial application in certain circumstances, and it concluded that those circumstances are alleged to be present here. 764 F. 3d, at 139–140. The court found that the fraud statutes and the Travel Act do not contain the clear indication needed to overcome the presumption against extraterritoriality. But it held that the complaint alleges *domestic* violations of those statutes because it "allege[s] conduct in the United States that satisfies every essential element of the mail fraud, wire fraud, and Travel Act claims." *Id.*, at 142.

RJR does not dispute these characterizations of the alleged predicates. We therefore assume without deciding that the alleged pattern of racketeering activity consists entirely of predicate offenses that were either committed in the United States or committed in a foreign country in violation of a predicate statute that applies extraterritorially. The alleged enterprise also has a sufficient tie to U. S. commerce, as its members include U. S. companies, and its activities depend on sales of RJR's cigarettes conducted through "the U. S. mails and wires," among other things. App. to Pet. for Cert. 186a, Complaint ¶96. On these premises, respondents' allegations that RJR violated §§ 1962(b) and (c) do not involve an impermissibly extraterritorial application of RICO.[8]

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[8] We stress that we are addressing only the extraterritoriality question. We have not been asked to decide, and therefore do not decide, whether the complaint satisfies any other requirements of RICO, or whether the complaint in fact makes out violations of the relevant predicate statutes.

IV

We now turn to RICO's private right of action, on which respondents' lawsuit rests. Section 1964(c) allows "[a]ny person injured in his business or property by reason of a violation of section 1962" to sue for treble damages, costs, and attorney's fees. Irrespective of any extraterritorial application of § 1962, we conclude that § 1964(c) does not overcome the presumption against extraterritoriality. A private RICO plaintiff therefore must allege and prove a *domestic* injury to its business or property.

A

The Second Circuit thought that the presumption against extraterritoriality did not apply to § 1964(c) independently of its application to § 1962, reasoning that the presumption "is primarily concerned with the question of what *conduct* falls within a statute's purview." 764 F. 3d, at 151. We rejected that view in *Kiobel*, holding that the presumption "constrain[s] courts considering causes of action" under the ATS, a "'strictly jurisdictional'" statute that "does not directly regulate conduct or afford relief." 569 U. S., at 116. We reached this conclusion even though the underlying substantive law consisted of well-established norms of international law, which by definition apply beyond this country's borders. See *id.*, at 116–118.

The same logic requires that we separately apply the presumption against extraterritoriality to RICO's cause of action despite our conclusion that the presumption has been overcome with respect to RICO's substantive prohibitions. "The creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion." *Sosa* v. *Alvarez-Machain*, 542 U. S. 692, 727 (2004). Thus, as we have observed in other contexts, providing a private civil remedy for foreign conduct

creates a potential for international friction beyond that presented by merely applying U. S. substantive law to that foreign conduct. See, *e. g.*, *Kiobel*, *supra*, at 117 ("Each of th[e] decisions" involved in defining a cause of action based on "conduct within the territory of another sovereign" "carries with it significant foreign policy implications").

Consider antitrust. In that context, we have observed that "[t]he application . . . of American private treble-damages remedies to anticompetitive conduct taking place abroad has generated considerable controversy" in other nations, even when those nations agree with U. S. substantive law on such things as banning price fixing. *F. Hoffmann-La Roche Ltd* v. *Empagran S. A.*, 542 U. S. 155, 167 (2004). Numerous foreign countries—including some respondents in this case—advised us in *Empagran* that "to apply [U. S.] remedies would unjustifiably permit their citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody." *Ibid.*[9]

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[9] See Brief for Government of Federal Republic of Germany et al. as *Amici Curiae*, O. T. 2003, No. 03–724, p. 11 (identifying "controversial features of the U. S. legal system," including treble damages, extensive discovery, jury trials, class actions, contingency fees, and punitive damages); *id.*, at 15 ("Private plaintiffs rarely exercise the type of self-restraint or demonstrate the requisite sensitivity to the concerns of foreign governments that mark actions brought by the United States government"); Brief for United Kingdom et al. as *Amici Curiae*, O. T. 2003, No. 03–724, p. 13 ("No other country has adopted the United States' unique 'bounty hunter' approach that permits a private plaintiff to 'recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.' . . . Expanding the jurisdiction of this generous United States private claim system could skew enforcement and increase international business risks. It makes United States courts the forum of choice without regard to whose laws are applied, where the injuries occurred or even if there is any connection to the court except the ability to get *in personam* jurisdiction over the defendants"); see also Brief for Government of Canada as *Amicus Curiae*, O. T. 2003, No. 03–724, p. 14 ("[T]he attractiveness of the [U. S.] treble damages remedy would supersede the

We received similar warnings in *Morrison*, where France, a respondent here, informed us that "most foreign countries proscribe securities fraud" but "have made very different choices with respect to the best way to implement that proscription," such as "prefer[ring] 'state actions, not private ones' for the enforcement of law." Brief for Republic of France as *Amicus Curiae*, O. T. 2009, No. 08–1191, p. 20; see *id.*, at 23 ("Even when foreign countries permit private rights of action for securities fraud, they often have different schemes" for litigating them and "may approve of different measures of damages"). Allowing foreign investors to pursue private suits in the United States, we were told, "would upset that delicate balance and offend the sovereign interests of foreign nations." *Id.*, at 26.

Allowing recovery for foreign injuries in a civil RICO action, including treble damages, presents the same danger of international friction. See Brief for United States as *Amicus Curiae* 31–34. This is not to say that friction would necessarily result in every case, or that Congress would violate international law by permitting such suits. It is to say only that there is a potential for international controversy that militates against recognizing foreign-injury claims without clear direction from Congress. Although "a risk of conflict between the American statute and a foreign law" is not a prerequisite for applying the presumption against extraterritoriality, *Morrison*, 561 U. S., at 255, where such a risk is evident, the need to enforce the presumption is at its apex.

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national policy decision by Canada that civil recovery by Canadian citizens for injuries resulting from anti-competitive behavior in Canada should be limited to actual damages"). *Empagran* concerned not the presumption against extraterritoriality *per se*, but the related rule that we construe statutes to avoid unreasonable interference with other nations' sovereign authority where possible. See *F. Hoffmann-La Roche Ltd* v. *Empagran S. A.*, 542 U. S. 155, 164 (2004); see also *Hartford Fire Ins. Co.* v. *California*, 509 U. S. 764, 814–815 (1993) (Scalia, J., dissenting) (discussing the two canons). As the foregoing discussion makes clear, considerations relevant to one rule are often relevant to the other.

Respondents urge that concerns about international friction are inapplicable in this case because here the plaintiffs are not foreign citizens seeking to bypass their home countries' less generous remedies but rather the foreign countries themselves. Brief for Respondents 52–53. Respondents assure us that they "are satisfied that the[ir] complaint . . . comports with limitations on prescriptive jurisdiction under international law and respects the dignity of foreign sovereigns." *Ibid.* Even assuming that this is true, however, our interpretation of § 1964(c)'s injury requirement will necessarily govern suits by nongovernmental plaintiffs that are not so sensitive to foreign sovereigns' dignity. We reject the notion that we should forgo the presumption against extraterritoriality and instead permit extraterritorial suits based on a case-by-case inquiry that turns on or looks to the consent of the affected sovereign. See *Morrison*, *supra,* at 261 ("Rather than guess anew in each case, we apply the presumption in all cases"); cf. *Empagran*, *supra*, at 168. Respondents suggest that we should be reluctant to permit a foreign corporation to be sued in the courts of this country for events occurring abroad if the nation of incorporation objects, but that we should discard those reservations when a foreign state sues a U. S. entity in this country under U. S. law—instead of in its own courts and under its own laws—for conduct committed on its own soil. We refuse to adopt this double standard. "After all, in the law, what is sauce for the goose is normally sauce for the gander." *Heffernan* v. *City of Paterson*, 578 U. S. 266, 272 (2016).

B

Nothing in § 1964(c) provides a clear indication that Congress intended to create a private right of action for injuries suffered outside of the United States. The statute provides a cause of action to "[a]ny person injured in his business or property" by a violation of § 1962. § 1964(c). The word "any" ordinarily connotes breadth, but it is insufficient to

displace the presumption against extraterritoriality. See *Kiobel*, 569 U. S., at 118. The statute's reference to injury to "business or property" also does not indicate extraterritorial application. If anything, by cabining RICO's private cause of action to particular kinds of injury—excluding, for example, personal injuries—Congress signaled that the civil remedy is not coextensive with § 1962's substantive prohibitions. The rest of § 1964(c) places a limit on RICO plaintiffs' ability to rely on securities fraud to make out a claim. This too suggests that § 1964(c) is narrower in its application than § 1962, and in any event does not support extraterritoriality.

The Second Circuit did not identify anything in § 1964(c) that shows that the statute reaches foreign injuries. Instead, the court reasoned that § 1964(c)'s extraterritorial effect flows directly from that of § 1962. Citing our holding in *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479 (1985), that the "compensable injury" addressed by § 1964(c) "necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern," *id.*, at 497, the Court of Appeals held that a RICO plaintiff may sue for foreign injury that was caused by the violation of a predicate statute that applies extraterritorially, just as a substantive RICO violation may be based on extraterritorial predicates. 764 F. 3d, at 151. JUSTICE GINSBURG advances the same theory. See *post*, at 358–359 (opinion concurring in part, dissenting in part, and dissenting from judgment). This reasoning has surface appeal, but it fails to appreciate that the presumption against extraterritoriality must be applied separately to both RICO's substantive prohibitions and its private right of action. See *supra*, at 346–349 and this page. It is not enough to say that a private right of action must reach abroad because the underlying law governs conduct in foreign countries. Something more is needed, and here it is absent.[10]

[10] Respondents note that *Sedima* itself involved an injury suffered by a Belgian corporation in Belgium. Brief for Respondents 45–46; see *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479, 483–484 (1985). Respondents

Respondents contend that background legal principles allow them to sue for foreign injuries, invoking what they call the "'traditional rule' that 'a plaintiff injured in a foreign country' could bring suit 'in American courts.'" Brief for Respondents 41 (quoting *Sosa*, 542 U. S., at 706–707). But the rule respondents invoke actually provides that a court will ordinarily "apply *foreign* law to determine the tortfeasor's liability" to "a plaintiff injured in a foreign country." *Id.*, at 706 (emphasis added). Respondents' argument might have force if they sought to sue RJR for violations of *their own laws* and to invoke federal diversity jurisdiction as a basis for proceeding in U. S. courts. See U. S. Const., Art. III, § 2, cl. 1 ("The judicial Power [of the United States] shall extend . . . to Controversies . . . between a State, or the Citizens thereof, and foreign States"); 28 U. S. C. § 1332(a)(4) ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000 . . . and is between . . . a foreign state . . . as plaintiff and citizens of a State or of different States"). The question here, however, is not "whether a federal court has jurisdiction to entertain a cause of action provided by foreign or even international law. The question is instead whether the court has authority to recognize a cause of action *under U. S. law*" for injury suffered overseas. *Kiobel*, *supra*, at 119 (emphasis added). As to that question, the relevant background principle is the presumption against extraterritoriality, not the "traditional rule" respondents cite.

Respondents and JUSTICE GINSBURG point out that RICO's private right of action was modeled after § 4 of the Clayton Act, 15 U. S. C. § 15; see *Holmes* v. *Securities Investor Protection Corporation*, 503 U. S. 258, 267–268 (1992), which we have held allows recovery for injuries suffered abroad as a result of antitrust violations, see *Pfizer Inc.* v.

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correctly do not contend that this fact is controlling here, as the *Sedima* Court did not address the foreign-injury issue.

Government of India, 434 U. S. 308, 314–315 (1978). It follows, respondents and JUSTICE GINSBURG contend, that § 1964(c) likewise allows plaintiffs to sue for injuries suffered in foreign countries. We disagree. Although we have often looked to the Clayton Act for guidance in construing § 1964(c), we have not treated the two statutes as interchangeable. We have declined to transplant features of the Clayton Act's cause of action into the RICO context where doing so would be inappropriate. For example, in *Sedima* we held that a RICO plaintiff need not allege a special "racketeering injury," rejecting a requirement that some lower courts had adopted by "[a]nalog[y]" to the "antitrust injury" required under the Clayton Act. 473 U. S., at 485, 495.

There is good reason not to interpret § 1964(c) to cover foreign injuries just because the Clayton Act does so. When we held in *Pfizer* that the Clayton Act allows recovery for foreign injuries, we relied first and foremost on the fact that the Clayton Act's definition of "person"—which in turn defines who may sue under that Act—"explicitly includes 'corporations and associations existing under or authorized by . . . the laws of any foreign country.' " 434 U. S., at 313; see 15 U. S. C. § 12.[11] RICO lacks the language that the *Pfizer*

[11] *Pfizer* most directly concerned whether a foreign government is a "person" that may be a Clayton Act plaintiff. But it is clear that the Court's decision more broadly concerned recovery for foreign injuries, see 434 U. S., at 315 (expressing concern that "persons doing business both in this country and abroad might be tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely extort abroad would offset any liability to plaintiffs at home"), as respondents themselves contend, see Brief for Respondents 44 ("[T]his Court clearly recognized in *Pfizer* that Section 4 extends to foreign injuries"). The Court also permitted an antitrust plaintiff to sue for foreign injuries in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690 (1962), but the Court's discussion in that case focused on the extraterritoriality of the underlying antitrust prohibitions, not the Clayton Act's private right of action, see *id.*, at 704–705, and so sheds little light on the interpretive question now before us.

Court found critical. See 18 U. S. C. § 1961(3).[12] To the extent that the *Pfizer* Court cited other factors that might apply to § 1964(c), they were not sufficient in themselves to show that the provision has extraterritorial effect. For example, the *Pfizer* Court, writing before we honed our extraterritoriality jurisprudence in *Morrison* and *Kiobel*, reasoned that Congress "[c]learly . . . did not intend to make the [Clayton Act's] treble-damages remedy available only to consumers in our own country" because "the antitrust laws extend to trade 'with foreign nations' as well as among the several States of the Union." 434 U. S., at 313–314. But we have emphatically rejected reliance on such language, holding that "'even statutes . . . that expressly refer to "*foreign* commerce" do not apply abroad.'" *Morrison*, 561 U. S., at 262–263. This reasoning also fails to distinguish between extending *substantive antitrust law* to foreign conduct and extending a *private right of action* to foreign injuries, two separate issues that, as we have explained, raise distinct extraterritoriality problems. See *supra*, at 346–350. Finally, the *Pfizer* Court expressed concern that it would "defeat th[e] purposes" of the antitrust laws if a defendant could "escape full liability for his illegal actions." 434 U. S., at 314. But this justification was merely an attempt to "divin[e] what Congress would have wanted" had it considered the question of extraterritoriality—an approach we eschewed in *Morrison*. 561 U. S., at 261. Given all this, and in particular the fact that RICO lacks the language that *Pfizer* found integral to its decision, we decline to extend this aspect of our Clayton Act jurisprudence to RICO's cause of action.

Underscoring our reluctance to read § 1964(c) as broadly as we have read the Clayton Act is Congress's more recent

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[12] This does not mean that foreign plaintiffs may not sue under RICO. The point is that RICO does not include the explicit foreign-oriented language that the *Pfizer* Court found to support foreign-injury suits under the Clayton Act.

decision to define precisely the antitrust laws' extraterritorial effect and to exclude from their reach most conduct that "causes only foreign injury." *Empagran*, 542 U. S., at 158 (describing Foreign Trade Antitrust Improvements Act of 1982); see also *id.*, at 169–171, 173–174 (discussing how the applicability of the antitrust laws to foreign injuries may depend on whether suit is brought by the Government or by private plaintiffs). Although this later enactment obviously does not limit § 1964(c)'s scope by its own force, it does counsel against importing into RICO those Clayton Act principles that are at odds with our current extraterritoriality doctrine.

C

Section 1964(c) requires a civil RICO plaintiff to allege and prove a domestic injury to business or property and does not allow recovery for foreign injuries. The application of this rule in any given case will not always be self-evident, as disputes may arise as to whether a particular alleged injury is "foreign" or "domestic." But we need not concern ourselves with that question in this case. As this case was being briefed before this Court, respondents filed a stipulation in the District Court waiving their damages claims for domestic injuries. The District Court accepted this waiver and dismissed those claims with prejudice. Respondents' remaining RICO damages claims therefore rest entirely on injury suffered abroad and must be dismissed.[13]

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[13] In respondents' letter notifying this Court of the waiver of their domestic-injury damages claims, respondents state that "[n]othing in the stipulation will affect respondents' claims for equitable relief, including claims for equitable relief under state common law that are not at issue in this case before this Court." Letter from David C. Frederick, Counsel for Respondents, to Scott S. Harris, Clerk of Court (Feb. 29, 2016). Although the letter mentions only state-law claims for equitable relief, count 5 of respondents' complaint seeks equitable relief under RICO. App. to Pet. for Cert. 260a–262a, Complaint ¶¶181–188. This Court has never decided whether equitable relief is available to private RICO plaintiffs, the parties have not litigated that question here, and we express no opinion

* * *

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

So ordered.

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

JUSTICE GINSBURG, with whom JUSTICE BREYER and JUSTICE KAGAN join, concurring in Parts I, II, and III, and dissenting from Part IV and from the judgment.

In enacting the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. § 1961 *et seq.*, Congress sought to provide a new tool to combat "organized crime and its economic roots." *Russello* v. *United States*, 464 U. S. 16, 26 (1983). RICO accordingly proscribes various ways in which an "enterprise," § 1961(4), might be controlled, operated, or funded by a "pattern of racketeering activity," § 1961(1), (5). See § 1962.[1] RICO builds on predicate statutes, many of them applicable extraterritorially. App. to

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on the issue today. We note, however, that any claim for equitable relief under RICO based on foreign injuries is necessarily foreclosed by our holding that § 1964(c)'s cause of action requires a domestic injury to business or property. It is unclear whether respondents intend to seek equitable relief under RICO based on domestic injuries, and it may prove unnecessary to decide whether § 1964(c) (or respondents' stipulation) permits such relief in light of respondents' state-law claims. We leave it to the lower courts to determine, if necessary, the status and availability of any such claims.

[1] The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. § 1961 *et seq.*, makes it unlawful "to . . . invest" in an enterprise income derived from a pattern of racketeering activity, § 1962(a), "to acquire or maintain" an interest in an enterprise through a pattern of racketeering activity, § 1962(b), "to conduct or participate . . . in the conduct" of an enterprise through a pattern of racketeering activity, § 1962(c), or "to conspire" to violate any of those provisions, § 1962(d).

Brief for United States as *Amicus Curiae* 27a–33a. Congress not only armed the United States with authority to initiate criminal and civil proceedings to enforce RICO, §§ 1963, 1964(b), Congress also created in § 1964(c) a private right of action for "[a]ny person injured in his business or property by reason of a violation of [RICO's substantive provision]."

Invoking this right, respondents, the European Community and 26 member states, filed suit against petitioners, RJR Nabisco, Inc., and related entities. Alleging that petitioners orchestrated from their U. S. headquarters a complex money-laundering scheme in violation of RICO, respondents sought to recover for various injuries, including losses sustained by financial institutions and lost opportunities to collect duties. See *ante*, at 332–335. Denying respondents a remedy under RICO, the Court today reads into § 1964(c) a domestic-injury requirement for suits by private plaintiffs nowhere indicated in the statute's text. Correctly, the Court imposes no such restriction on the United States when it initiates a civil suit under § 1964(b). Unsupported by RICO's text, inconsistent with its purposes, and unnecessary to protect the comity interests the Court emphasizes, the domestic-injury requirement for private suits replaces Congress' prescription with one of the Court's own invention. Because the Court has no authority so to amend RICO, I dissent.

I

As the Court recounts, *ante*, at 335, "Congress ordinarily legislates with respect to domestic, not foreign, matters." *Morrison* v. *National Australia Bank Ltd.*, 561 U. S. 247, 255 (2010). So recognizing, the Court employs a presumption that " 'legislation . . . is meant to apply only within the territorial jurisdiction of the United States.' " *Ibid.* (quoting *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 248 (1991) (*Aramco*)). But when a statute demonstrates Congress' "affirmative inten[t]" that the law should apply beyond

the borders of the United States, as numerous RICO predicate statutes do, the presumption is rebutted, and the law applies extraterritorially to the extent Congress prescribed. See *Morrison*, 561 U. S., at 255 (quoting *Aramco*, 499 U. S., at 248). The presumption, in short, aims to distinguish instances in which Congress consciously designed a statute to reach beyond U. S. borders, from those in which nothing plainly signals that Congress directed extraterritorial application.

In this case, the Court properly holds that Congress signaled its "affirmative inten[t]," *Morrison*, 561 U. S., at 255, that RICO, in many instances, should apply extraterritorially. See *ante*, at 338–345; App. to Brief for United States as *Amicus Curiae* 27a–33a. As the Court relates, see *ante*, at 338–341, Congress deliberately included within RICO's compass predicate federal offenses that manifestly reach conduct occurring abroad. See, *e. g.*, §§ 1956–1957 (money laundering); § 2339B (material support to foreign terrorist organizations). Accordingly, the Court concludes, when the predicate crimes underlying invocation of § 1962 thrust extraterritorially, so too does § 1962. I agree with that conclusion.

I disagree, however, that the private right of action authorized by § 1964(c) requires a domestic injury to a person's business or property and does not allow recovery for foreign injuries. One cannot extract such a limitation from the text of § 1964(c), which affords a right of action to "[a]ny person injured in his business or property by reason of a violation of section 1962." Section 1962, at least subsections (b) and (c), all agree, encompasses foreign injuries. How can § 1964(c) exclude them when, by its express terms, § 1964(c) is triggered by "a violation of section 1962"? To the extent RICO reaches injury abroad when the Government is the suitor pursuant to § 1962 (specifying prohibited activities) and § 1963 (criminal penalties) or § 1964(b) (civil remedies), to that same extent, I would hold, RICO reaches extraterri-

torial injury when, pursuant to § 1964(c), the suitor is a private plaintiff.

II

A

I would not distinguish, as the Court does, between the extraterritorial compass of a private right of action and that of the underlying proscribed conduct. See *ante*, at 346–349, 350, 353. Instead, I would adhere to precedent addressing RICO, linking, not separating, prohibited activities and authorized remedies. See *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479, 495 (1985) ("If the defendant engages in a pattern of racketeering activity in a manner forbidden by [§ 1962], and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c)."); *ibid.* (refusing to require a "distinct 'racketeering injury'" for private RICO actions under § 1964(c) where § 1962 imposes no such requirement).[2]

To reiterate, a § 1964(c) right of action may be maintained by "[a]ny person injured in his business or property by reason of a violation of *section 1962*." (Emphasis added.) "[I]ncorporating one statute . . . into another," the Court has long understood, "serves to bring into the latter all that is fairly covered by the reference." *Panama R. Co.* v. *Johnson*, 264 U. S. 375, 392 (1924). RICO's private right of action, it cannot be gainsaid, expressly incorporates § 1962,

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[2] Insisting that the presumption against extraterritoriality should "apply to § 1964(c) independently of its application to § 1962," *ante*, at 346, the Court cites *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U. S. 108 (2013). That decision will not bear the weight the Court would place on it. As the Court comprehends, the statute there at issue, the Alien Tort Statute, 28 U. S. C. § 1350, is a spare jurisdictional grant that itself does not "regulate conduct or afford relief." *Kiobel*, 569 U. S., at 116. With no grounding for extraterritorial application in the statute, *Kiobel* held, courts have no warrant to fashion, on their own initiative, claims for relief that operate extraterritorially. See *ibid.* ("[T]he question is not what Congress has done but instead what courts may do.").

whose extraterritoriality, the Court recognizes, is coextensive with the underlying predicate offenses charged. See *ante*, at 338–345. See also *ante*, at 340 ("[I]t is hard to imagine how Congress could have more clearly indicated that it intended RICO to have (some) extraterritorial effect."). The sole additional condition § 1964(c) imposes on access to relief is an injury to one's "business or property." Nothing in that condition should change the extraterritoriality assessment. In agreement with the Second Circuit, I would hold that "[i]f an injury abroad was proximately caused by the violation of a statute which Congress intended should apply to injurious conduct performed abroad, [there is] no reason to import a domestic injury requirement simply because the victim sought redress through the RICO statute." 764 F. 3d 149, 151 (2014).

What § 1964(c)'s text conveys is confirmed by its history. As this Court has repeatedly observed, Congress modeled § 1964(c) on § 4 of the Clayton Act, 15 U. S. C. § 15, the private civil-action provision of the federal antitrust laws, which employs nearly identical language: "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor." See *Klehr* v. *A. O. Smith Corp.*, 521 U. S. 179, 189–190 (1997); *Holmes* v. *Securities Investor Protection Corporation*, 503 U. S. 258, 267–268 (1992); *Sedima*, 473 U. S., at 485, 489. Clayton Act § 4, the Court has held, provides a remedy for injuries both foreign and domestic. *Pfizer Inc.* v. *Government of India*, 434 U. S. 308, 313–314 (1978) ("Congress did not intend to make the [Clayton Act's] treble-damages remedy available only to consumers in our own country."); *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 707–708 (1962) (allowing recovery in Clayton Act § 4 suit for injuries in Canada).

"The similarity of language in [the two statutes] is, of course, a strong indication that [they] should be interpreted *pari passu*," *Northcross* v. *Board of Ed. of Memphis City*

Schools, 412 U. S. 427, 428 (1973) (*per curiam*), and I see no contradictory indication here.[3] Indeed, when the Court has addressed gaps in § 1964(c), it has aligned the RICO private right of action with the private right afforded by Clayton Act § 4. See, *e. g.*, *Klehr*, 521 U. S., at 188–189 (adopting for private RICO actions Clayton Act § 4's accrual rule—that a claim accrues when a defendant commits an act that injures a plaintiff's business—rather than criminal RICO's "most recent, predicate act" rule); *Holmes*, 503 U. S., at 268 (requiring private plaintiffs under § 1964(c), like private plaintiffs under Clayton Act § 4, to show proximate cause); *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, 483 U. S. 143, 155–156 (1987) (applying to § 1964(c) actions Clayton Act § 4's shorter statute of limitations instead of "catchall" federal statute of limitations applicable to RICO criminal prosecutions).

This very case illustrates why pinning a domestic-injury requirement onto § 1964(c) makes little sense. All defendants are U. S. corporations, headquartered in the United States, charged with a pattern of racketeering activity directed and managed from the United States, involving con-

[3] The Court asserts that "[t]here is good reason not to interpret § 1964(c) to cover foreign injuries just because the Clayton Act does." *Ante*, at 352. The Clayton Act's definition of "person," 15 U. S. C. § 12, the Court observes, "explicitly includes 'corporations and associations existing under or authorized by . . . the laws of any foreign country.' " *Ante*, at 352 (some internal quotation marks omitted). RICO, the Court stresses, lacks this "critical" language. *Ante*, at 353. The Court's point is underwhelming. RICO's definition of "persons" is hardly confining: "any individual or entity capable of holding a legal or beneficial interest in property." 18 U. S. C. § 1961(3). Moreover, there is little doubt that Congress anticipated § 1964(c) plaintiffs like the suitors here. See 147 Cong. Rec. 20676, 20710 (2001) (remarks of Sen. Kerry) ("Since some of the money-laundering conducted in the world today also defrauds foreign governments, it would be hostile to the intent of [the USA PATRIOT Act, which added as RICO predicates additional money-laundering offenses,] for us to interject into the statute any rule of construction of legislative language which would in any way limit our foreign allies access to our courts to battle against money laundering.").

duct occurring in the United States. In particular, according to the complaint, defendants received in the United States funds known to them to have been generated by illegal narcotics trafficking and terrorist activity, conduct violative of § 1956(a)(2); traveled using the facilities of interstate commerce in furtherance of unlawful activity, in violation of § 1952; provided material support to foreign terrorist organizations "in the United States and elsewhere," in violation of § 2339B; and used U. S. mails and wires in furtherance of a "scheme or artifice to defraud," in violation of §§ 1341 and 1343. App. to Pet. for Cert. 238a–250a. In short, this case has the United States written all over it.

B

The Court nevertheless deems a domestic-injury requirement for private RICO plaintiffs necessary to avoid international friction. See *ante*, at 347–350. When the United States considers whether to initiate a prosecution or civil suit, the Court observes, it will take foreign-policy considerations into account, but private parties will not. It is far from clear, however, that the Court's blanket rule would ordinarily work to ward off international discord. Invoking the presumption against extraterritoriality as a bar to *any* private suit for injuries to business or property abroad, this case suggests, might spark, rather than quell, international strife. Making such litigation available to domestic but not foreign plaintiffs is hardly solicitous of international comity or respectful of foreign interests. Cf. *Pfizer*, 434 U. S., at 318–319 ("[A] foreign nation is generally entitled to prosecute any civil claim in the courts of the United States upon the same basis as a domestic corporation or individual might do. To deny him this privilege would manifest a want of comity and friendly feeling." (internal quotation marks omitted)).

RICO's definitional provisions exclude "[e]ntirely foreign activity." 783 F. 3d 123, 143 (Lynch, J., dissenting from de-

nial of rehearing en banc). Thus no suit under RICO would lie for injuries resulting from "[a] pattern of murders of Italian citizens committed by members of an Italian organized crime group in Italy." *Ibid.* That is so because "murder is a RICO predicate only when it is 'chargeable under state law' or indictable under specific federal statutes." *Ibid.* (citing § 1961(1)(A), (G)).

To the extent extraterritorial application of RICO could give rise to comity concerns not present in this case, those concerns can be met through doctrines that serve to block litigation in U. S. courts of cases more appropriately brought elsewhere. Where an alternative, more appropriate forum is available, the doctrine of *forum non conveniens* enables U. S. courts to refuse jurisdiction. See *Piper Aircraft Co.* v. *Reyno*, 454 U. S. 235 (1981) (dismissing wrongful-death action arising out of air crash in Scotland involving only Scottish victims); Restatement (Second) of Conflict of Laws § 84 (1969). Due process constraints on the exercise of general personal jurisdiction shelter foreign corporations from suit in the United States based on conduct abroad unless the corporation's "affiliations with the [forum] in which suit is brought are so constant and pervasive 'as to render it essentially at home [there].'" *Daimler AG* v. *Bauman*, 571 U. S. 117, 122 (2014) (quoting *Goodyear Dunlop Tires Operations, S. A.* v. *Brown*, 564 U. S. 915, 919 (2011); alterations omitted). These controls provide a check against civil RICO litigation with little or no connection to the United States.

* * *

The Court hems in RICO out of concern about establishing a "double standard." *Ante,* at 349. But today's decision does exactly that. U. S. defendants commercially engaged here and abroad would be answerable civilly to U. S. victims of their criminal activities, but foreign parties similarly injured would have no RICO remedy. "'Sauce for the goose'" should indeed serve the gander as well. See *ibid.* (quoting

Heffernan v. *City of Paterson*, 578 U. S. 266, 272 (2016)). I would resist reading into § 1964(c) a domestic-injury requirement Congress did not prescribe. Instead, I would affirm the Second Circuit's sound judgment:

> "To establish a compensable injury under § 1964(c), a private plaintiff must show that (1) the defendant 'engage[d] in a pattern of racketeering activity in a manner forbidden by' § 1962, and (2) that these 'racketeering activities' were the proximate cause of some injury to the plaintiff's business or property." 764 F. 3d, at 151 (quoting *Sedima*, 473 U. S., at 495; *Holmes*, 503 U. S., at 268).

Because the Court overturns that judgment, I dissent from Part IV of the Court's opinion and from the judgment.

JUSTICE BREYER, concurring in part, dissenting in part, and dissenting from the judgment.

I join Parts I through III of the Court's opinion. But I do not join Part IV. The Court there holds that the private right of action provision in the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. § 1964(c), has no extraterritorial application. Like JUSTICE GINSBURG, I believe that it does.

In saying this, I note that this case does not involve the kind of purely foreign facts that create what we have sometimes called "foreign-cubed" litigation (*i. e.*, cases where the plaintiffs are foreign, the defendants are foreign, and all the relevant conduct occurred abroad). See, *e. g.*, *Morrison* v. *National Australia Bank Ltd.*, 561 U. S. 247, 283, n. 11 (2010) (Stevens, J., concurring in judgment). Rather, it has been argued that the statute at issue does not extend to such a case. See 18 U. S. C. § 1961(1) (limiting qualifying RICO predicates to those that are, *e. g.*, "chargeable" under state law, or "indictable" or "punishable" under federal law); Tr. of Oral Arg. 32, 33–34 (respondents conceding that all of the

relevant RICO predicates require some kind of connection to the United States). And, as JUSTICE GINSBURG points out, "this case has the United States written all over it." *Ante*, at 361 (opinion concurring in part, dissenting in part, and dissenting from judgment).

Unlike the Court, I cannot accept as controlling the Government's argument as *amicus curiae* that "[a]llowing recovery for foreign injuries in a civil RICO action . . . presents the . . . danger of international friction." *Ante*, at 348. The Government does not provide examples, nor apparently has it consulted with foreign governments on the matter. See Tr. of Oral Arg. 26 ("[T]o my knowledge, [the Government] didn't have those consultations" with foreign states concerning this case). By way of contrast, the European Community and 26 of its member states tell us "that the complaint in this case, which alleges that American corporations engaged in a pattern of predominantly domestic racketeering activity that caused injury to respondents' businesses and property, comports with limitations on prescriptive jurisdiction under international law and respects the dignity of foreign sovereigns." Brief for Respondents 52–53; see also Tr. of Oral Arg. 31 (calling the European Union's "vett[ing] exercise" concerning this case "comprehensiv[e]"). In these circumstances, and for the reasons given by JUSTICE GINSBURG, see *ante*, at 361–362, I would not place controlling weight on the Government's contrary view.

Consequently, I join JUSTICE GINSBURG's opinion.

Syllabus

FISHER *v.* UNIVERSITY OF TEXAS AT AUSTIN ET AL.

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

No. 14–981. Argued December 9, 2015—Decided June 23, 2016

The University of Texas at Austin (University) uses an undergraduate admissions system containing two components. First, as required by the State's Top Ten Percent Law, it offers admission to any students who graduate from a Texas high school in the top 10 percent of their class. It then fills the remainder of its incoming freshman class, some 25 percent, by combining an applicant's "Academic Index"—the student's SAT score and high school academic performance—with the applicant's "Personal Achievement Index," a holistic review containing numerous factors, including race. The University adopted its current admissions process in 2004, after a year-long study of its admissions process—undertaken in the wake of *Grutter* v. *Bollinger*, 539 U. S. 306, and *Gratz* v. *Bollinger*, 539 U. S. 244—led it to conclude that its prior race-neutral system did not reach its goal of providing the educational benefits of diversity to its undergraduate students.

Petitioner Abigail Fisher, who was not in the top 10 percent of her high school class, was denied admission to the University's 2008 freshman class. She filed suit, alleging that the University's consideration of race as part of its holistic-review process disadvantaged her and other Caucasian applicants, in violation of the Equal Protection Clause. The District Court entered summary judgment in the University's favor, and the Fifth Circuit affirmed. This Court vacated the judgment, *Fisher* v. *University of Tex. at Austin*, 570 U. S. 297 (*Fisher I*), and remanded the case to the Court of Appeals, so the University's program could be evaluated under the proper strict-scrutiny standard. On remand, the Fifth Circuit again affirmed the entry of summary judgment for the University.

Held: The race-conscious admissions program in use at the time of petitioner's application is lawful under the Equal Protection Clause. Pp. 376–389.

(a) *Fisher I* sets out three controlling principles relevant to assessing the constitutionality of a public university's affirmative-action program. First, a university may not consider race "unless the admissions process can withstand strict scrutiny," *i. e.*, it must show that its "purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary" to accomplish that purpose. 570

U. S., at 309. Second, "the decision to pursue the educational benefits that flow from student body diversity . . . is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper." *Id.*, at 310. Third, when determining whether the use of race is narrowly tailored to achieve the university's permissible goals, the school bears the burden of demonstrating that "available" and "workable" "race-neutral alternatives" do not suffice. *Id.*, at 312. Pp. 376–377.

(b) The University's approach to admissions gives rise to an unusual consequence here. The component with the largest impact on petitioner's chances of admission was not the school's consideration of race under its holistic-review process but the Top Ten Percent Plan. Because petitioner did not challenge the percentage part of the plan, the record is devoid of evidence of its impact on diversity. Remand for further factfinding would serve little purpose, however, because at the time of petitioner's application, the current plan had been in effect only three years and, in any event, the University lacked authority to alter the percentage plan, which was mandated by the Texas Legislature. These circumstances refute any criticism that the University did not make good-faith efforts to comply with the law. The University, however, does have a continuing obligation to satisfy the strict-scrutiny burden: by periodically reassessing the admissions program's constitutionality, and efficacy, in light of the school's experience and the data it has gathered since adopting its admissions plan, and by tailoring its approach to ensure that race plays no greater role than is necessary to meet its compelling interests. Pp. 377–380.

(c) Drawing all reasonable inferences in her favor, petitioner has not shown by a preponderance of the evidence that she was denied equal treatment at the time her application was rejected. Pp. 380–388.

(1) Petitioner claims that the University has not articulated its compelling interest with sufficient clarity because it has failed to state more precisely what level of minority enrollment would constitute a "critical mass." However, the compelling interest that justifies consideration of race in college admissions is not an interest in enrolling a certain number of minority students, but an interest in obtaining "the educational benefits that flow from student body diversity." *Fisher I*, 570 U. S., at 310. Since the University is prohibited from seeking a particular number or quota of minority students, it cannot be faulted for failing to specify the particular level of minority enrollment at which it believes the educational benefits of diversity will be obtained.

On the other hand, asserting an interest in the educational benefits of diversity writ large is insufficient. A university's goals cannot be elusory or amorphous—they must be sufficiently measurable to permit ju-

dicial scrutiny of the policies adopted to reach them. The record here reveals that the University articulated concrete and precise goals—*e. g.*, ending stereotypes, promoting "cross-racial understanding," preparing students for "an increasingly diverse workforce and society," and cultivating leaders with "legitimacy in the eyes of the citizenry"—that mirror the compelling interest this Court has approved in prior cases. It also gave a "reasoned, principled explanation" for its decision, *ibid.*, in a 39-page proposal written after a year-long study revealed that its race-neutral policies and programs did not meet its goals. Pp. 380–382.

(2) Petitioner also claims that the University need not consider race because it had already "achieved critical mass" by 2003 under the Top Ten Percent Plan and race-neutral holistic review. The record, however, reveals that the University studied and deliberated for months, concluding that race-neutral programs had not achieved the University's diversity goals, a conclusion supported by significant statistical and anecdotal evidence. Pp. 382–384.

(3) Petitioner argues further that it was unnecessary to consider race because such consideration had only a minor impact on the number of minority students the school admitted. But the record shows that the consideration of race has had a meaningful, if still limited, effect on freshman class diversity. That race consciousness played a role in only a small portion of admissions decisions should be a hallmark of narrow tailoring, not evidence of unconstitutionality. Pp. 384–385.

(4) Finally, petitioner argues that there were numerous other race-neutral means to achieve the University's goals. However, as the record reveals, none of those alternatives was a workable means of attaining the University's educational goals, as of the time of her application. Pp. 385–388.

758 F. 3d 633, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. THOMAS, J., filed a dissenting opinion, *post*, p. 389. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS, J., joined, *post*, p. 389. KAGAN, J., took no part in the consideration or decision of the case.

Bert W. Rein argued the cause for petitioner. With him on the briefs were *Claire J. Evans*, *William S. Consovoy*, *Thomas R. McCarthy*, *J. Michael Connolly*, and *Paul M. Terrill*.

George G. Garre argued the cause for respondents. With him on the brief were *Maureen E. Mahoney*, *J. Scott Bal-*

lenger, *Nicole Ries Fox*, *Lori Alvino McGill*, *Katya S. Cronin*, *Patricia C. Ohlendorf*, *Douglas Laycock*, and *James C. Ho.*

Solicitor General Verrilli argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Principal Deputy Assistant Attorney General Gupta*, *Deputy Solicitor General Gershengorn*, *Ginger D. Anders*, *Diana K. Flynn*, *Tovah R. Calderon*, *Paul S. Koffsky*, *James Cole, Jr.*, *William B. Schultz*, and *M. Patricia Smith.**

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*Briefs of *amici curiae* urging reversal were filed for the American Center for Law and Justice by *Jay Alan Sekulow*, *Stuart J. Roth*, *Colby M. May*, and *Walter M. Weber*; for the Asian American Legal Foundation et al. by *Gordon M. Fauth, Jr.*, and *John C. Eastman*; for the California Association of Scholars by *Mr. Eastman* and *Anthony T. Caso*; for the Cato Institute by *David B. Rivkin, Jr.*, *Andrew M. Grossman*, and *Ilya Shapiro*; for the Center for Individual Rights by *Michael E. Rosman*; for the Indiana Tech Law School Amicus Project by *Adam Lamparello*; for the Judicial Education Project by *Bradley A. Benbrook*, *Stephen M. Duvernay*, and *Carrie Severino*; for Judicial Watch, Inc., et al. by *Paul J. Orfanedes* and *Chris Fedeli*; for the Mountain States Legal Foundation by *Steven J. Lechner*; for the Pacific Legal Foundation et al. by *Meriem L. Hubbard* and *Joshua P. Thompson*; for the Southeastern Legal Foundation by *John J. Park, Jr.*, and *Kimberly Steward Hermann*; for James F. Blumstein by *Mr. Blumstein*, *pro se*; for Gail Heriot et al. by *Ms. Heriot* and *Peter N. Kirsanow*, both *pro se*; and for Jonathan R. Zell by *Mr. Zell*, *pro se.*

Briefs of *amici curiae* urging affirmance were filed for the State of California by *Kamala D. Harris*, Attorney General of California, *Edward C. DuMont*, Solicitor General, *Mark Breckler*, Chief Assistant Attorney General, *Angela Sierra*, Senior Assistant Attorney General, *Nancy A. Beninati*, Supervising Deputy Attorney General, and *Antonette Benita Cordero* and *Rebekah Fretz*, Deputy Attorneys General; for the State of Massachusetts et al. by *Maura Healey*, Attorney General of Massachusetts, *Elizabeth N. Dewar*, Assistant State Solicitor, and *Genevieve C. Nadeau*, *Jared Rinehimer*, *Kimberly Strovink*, and *Max Weinstein*, Assistant Attorneys General, and by the Attorneys General for their respective jurisdictions as follows: *George Jepsen* of Connecticut, *Matthew P. Denn* of Delaware, *Karl A. Racine* of the District of Columbia, *Douglas S. Chin* of Hawaii, *Lisa Madigan* of Illinois, *Tom Miller* of Iowa, *Janet T. Mills* of Maine, *Brian E. Frosh* of Maryland, *Jim Hood* of Mississippi, *Hector H. Balderas* of New Mexico, *Eric T. Schneiderman* of New York, *Roy Cooper* of North Carolina, *Ellen F. Rosenblum* of Oregon, *Peter F. Kilmartin* of Rhode Island, *William H. Sorrell* of Vermont, *Mark R. Herring* of Virginia, and *Robert W. Ferguson* of Washington; for the American Associa-

JUSTICE KENNEDY delivered the opinion of the Court.

The Court is asked once again to consider whether the race-conscious admissions program at the University of Texas is lawful under the Equal Protection Clause.

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tion for Access, Equity and Diversity et al. by *Joseph D. Weiner* and *Marilynn L. Schuyler*; for the American Bar Association by *Paulette Brown*, *Theodore V. Wells, Jr.*, *Sidney S. Rosdeitcher*, *Jaren Janghorbani*, and *Jennifer H. Wu*; for the American Civil Liberties Union et al. by *Dennis D. Parker*, *Mathew A. Coles*, and *Steven R. Shapiro*; for the American Council on Education et al. by *Martin Michaelson* and *Elizabeth B. Meers*; for the American Educational Research Association et al. by *Angelo N. Ancheta* and *Jonathan Weissglass*; for the American Jewish Committee et al. by *Richard C. Godfrey*; for the American Psychological Association by *Lisa S. Blatt*, *Nathalie F. P. Gilfoyle*, and *R. Reeves Anderson*; for Amherst College et al. by *Charles S. Sims* and *John E. Roberts*; for the Anti-Defamation League by *Lisa H. Bebchick*, *Samuel P. Groner*, *Steven M. Freeman*, and *Mark S. Finkelstein*; for the Asian American Legal Defense and Education Fund et al. by *Dean Richlin* and *Kenneth Kimerling*; for Asian Americans Advancing Justice et al. by *Albert Giang*, *Winifred Kao*, and *Eugene F. Chay*; for the Association of American Law Schools by *Pamela S. Karlan*, *Jeffrey L. Fisher*, and *Brian Wolfman*; for the Association of American Medical Colleges et al. by *Jonathan S. Franklin*, *Robert Burgoyne*, and *Frank R. Trinity*; for the Black Student Alliance at the University of Texas at Austin et al. by *John Paul Schnapper-Casteras*, *Sherrilyn Ifill*, *Janai Nelson*, *Christina Swarns*, *Jin Hee Lee*, and *Rachel M. Kleinman;* for the Boston Bar Association et al. by *Jonathan M. Albano*; for Brown University et al. by *Paul M. Smith*, *Beverly E. Ledbetter*, *Jane E. Booth*, *James J. Mingle*, *Robert B. Donin*, *Pamela J. Bernard*, *Wendy S. White*, *Debra L. Zumwalt*, *Audrey J. Anderson*, and *Alexander E. Dreier*; for the California Institute of Technology et al. by *Jeffrey A. Udell*; for the Civil Rights Clinic and the Education Rights Center at Howard University School of Law by *Aderson Bellegarde François* and *E. Christi Cunningham*; for the Coalition of Bar Associations of Color by *Jonathan M. Cohen*, *Benjamin Crump*, *Robert T. Maldonado*, *George C. Chen*, *Patty Ferguson-Bohnee*, and *Robert O. Saunooke*; for the College Board et al. by *C. Mitchell Brown* and *Richard W. Riley*; for Current and Former Student Body Presidents of University of Texas at Austin by *Felicia R. Reid*, *Natasha J. Baker*, *Erin E. Dolly*, and *Megan L. Anderson*; for DuPont et al. by *Donald B. Ayer* and *Beth Heifetz*; for Experimental Psychologists by *Rachel D. Godsil*; for the Family of Herman Sweatt by *Allan Van Fleet*; for Fortune-100 Businesses et al. by *David W. DeBruin* and *Matthew S. Hellman*; for Harvard University by *Seth P. Waxman*, *Paul R. Q. Wolfson*, *Kelly P. Dunbar*, *Ara B. Gershengorn*, *Felicia H. Ellsworth*, *Debo P. Adegbile*, and *Adriel I. Cepeda Derieux*; for Human

I

The University of Texas at Austin (or University) relies upon a complex system of admissions that has undergone sig-

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Rights Advocates et al. by *Constance de la Vega* and *Neil A. F. Popović*; for the Intercultural Development Research Association by *David G. Hinojosa*; for the Leadership Conference on Civil and Human Rights et al. by *Brigida Benitez*, *Kathryn J. Gainey*, *Wade Henderson*, *Lisa M. Bornstein*, *Richard Cohen*, and *Rhonda Brownstein*; for National and Texas Latino Orgs. by *Marisa Bono* and *Juan Cartagena*; for the National Association for the Advancement of Colored People Texas State Conference of the NAACP by *Gary L. Bledsoe*, *Andrew L. Deutsch*, and *Victor Goode*; for the National Association of Basketball Coaches et al. by *Matthew T. Henshon* and *Richard D. Batchelder, Jr.*; for the National Education Association et al. by *Alice O'Brien*, *Jason Walta*, *Harold Craig Becker*, *Lynn Rhinehart*, *Judith A. Scott*, *David Strom*, and *William Lurye*; for the National School Boards Association et al. by *Pratik A. Shah*, *Hyland Hunt*, *Francisco M. Negrón, Jr.*, and *Naomi Gittins*; for the National Women's Law Center et al. by *Charles A. Rothfeld*, *Andrew J. Pincus*, *Paul W. Hughes*, *Michael B. Kimberly*, *Eugene R. Fidell*, *Marcia D. Greenberger*, *Emily J. Martin*, *Fatima Goss Graves*, *Mary L. Bonauto*, and *Susan L. Sommer*; for Nationwide Coalition of Educators and Centers Working To Expand Educational Opportunity for African American Males by *Larry H. James* and *Christina L. Corl*; for the New York Law School Racial Justice Project by *Deborah N. Archer*; for the New York State Bar Association by *David P. Miranda* and *David H. Tennant*; for the President and Chancellors of the University of California by *Bradley S. Phillips* and *Christopher M. Patti*; for Religious Orgs. and Campus Ministries et al. by *Melissa Hart*; for Social and Organizational Psychologists by *Eva Paterson* and *john a. powell*; for the Society of American Law Teachers by *Marc A. Hearron* and *David D. Cross*; for Students From the New York University School of Law Seminar on Critical Narratives in Civil Rights by *Peggy Cooper Davis* and *Mr. François*; for Teach for America et al. by *Errol B. Taylor* and *Patricia Astorga*; for the United Negro College Fund et al. by *David E. Schwartz*, *Richard W. Kidd*, and *Desireé C. Boykin*; for the University of Delaware et al. by *Walter Dellinger* and *Ryan Rutledge*; for the University of Michigan by *John P. Elwood*; for the University of North Carolina at Chapel Hill by *Michael Y. Scudder, Jr.*, *Patrick J. Fitzgerald*, *Lara A. Flath*, *Marianne H. Combs*, *David McLean Parker*, and *Stephen Keadey*; for Sen. Harry Reid et al. by *Mitchell Y. Mirviss*; for Bruce Ackerman et al. by *Elizabeth B. Wydra*, *David H. Gans*, and *Brianne J. Gorod*; for Julius W. Becton, Jr., et al. by *Michael M. Purpura*, *Kenji M. Price*, *Joe R. Reeder*, *pro se*, and *Robert P. Charrow*; for David Boyle by *Mr. Boyle*, *pro se*; for W. Burlette Carter by *Ms. Car-*

nificant evolution over the past two decades. Until 1996, the University made its admissions decisions primarily based on a measure called "Academic Index" (or AI), which it calculated by combining an applicant's SAT score and academic performance in high school. In assessing applicants, preference was given to racial minorities.

In 1996, the Court of Appeals for the Fifth Circuit invalidated this admissions system, holding that any consideration of race in college admissions violates the Equal Protection Clause. See *Hopwood* v. *Texas*, 78 F. 3d 932, 934–935, 948.

One year later the University adopted a new admissions policy. Instead of considering race, the University began making admissions decisions based on an applicant's AI and his or her "Personal Achievement Index" (PAI). The PAI was a numerical score based on a holistic review of an application. Included in the number were the applicant's essays, leadership and work experience, extracurricular activities, community service, and other "special characteristics" that might give the admissions committee insight into a student's background. Consistent with *Hopwood*, race was not a consideration in calculating an applicant's AI or PAI.

The Texas Legislature responded to *Hopwood* as well. It enacted H. B. 588, commonly known as the Top Ten Percent

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ter, pro se; for Vinay Harpalani et al. by *Shakira D. Pleasant, pro se*; for Ruben Hinojosa et al. by *Steven D. Gordon*; for Guido Imbens et al. by *A. W. Phinney III* and *Yalonda T. Howze*; for Richard Lempert by *Sylvia Royce*; for Cecilia Polanco et al. by *Reed N. Colfax, Jon M. Greenbaum,* and *Brenda Shum*; for Robert Post et al. by *Carter G. Phillips, Joseph R. Guerra,* and *Joshua J. Fougere*; for Cedric Merlin Powell et al. by *Junis L. Baldon*; for Kimberly West-Faulcon by *Ms. West-Faulcon, pro se*; for Six Educational Nonprofit Organizations by *Lawrence S. Lustberg*; for 39 Undergraduate and Graduate Student Organizations Within the University of California by *Monte Cooper* and *Robert A. Rosenfeld*; for 53 Current Members of the Texas State Senate and House of Representatives by *Eric L. Lewis, Jeffrey D. Robinson, Robin A. Lenhardt,* and *Michelle Adams*; and for 823 Social Scientists by *Liliana M. Garces, pro se.*

Briefs of *amici curiae* were filed for Richard D. Kahlenberg by *Meredith B. Parenti*; for David Orentlicher by *Mr. Orentlicher, pro se*; and for Richard Sander by *Stuart Taylor, Jr.*

Law. Tex. Educ. Code Ann. § 51.803 (West Cum. Supp. 2015). As its name suggests, the Top Ten Percent Law guarantees college admission to students who graduate from a Texas high school in the top 10 percent of their class. Those students may choose to attend any of the public universities in the State.

The University implemented the Top Ten Percent Law in 1998. After first admitting any student who qualified for admission under that law, the University filled the remainder of its incoming freshman class using a combination of an applicant's AI and PAI scores—again, without considering race.

The University used this admissions system until 2003, when this Court decided the companion cases of *Grutter* v. *Bollinger*, 539 U. S. 306, and *Gratz* v. *Bollinger*, 539 U. S. 244. In *Gratz*, this Court struck down the University of Michigan's undergraduate system of admissions, which at the time allocated predetermined points to racial minority candidates. See 539 U. S., at 255, 275–276. In *Grutter*, however, the Court upheld the University of Michigan Law School's system of holistic review—a system that did not mechanically assign points but rather treated race as a relevant feature within the broader context of a candidate's application. See 539 U. S., at 337, 343–344. In upholding this nuanced use of race, *Grutter* implicitly overruled *Hopwood*'s categorical prohibition.

In the wake of *Grutter*, the University embarked upon a year-long study seeking to ascertain whether its admissions policy was allowing it to provide "the educational benefits of a diverse student body . . . to all of the University's undergraduate students." App. 481a–482a (affidavit of N. Bruce Walker ¶11 (Walker Aff.)); see also *id.*, at 445a–447a. The University concluded that its admissions policy was not providing these benefits. Supp. App. 24a–25a.

To change its system, the University submitted a proposal to the board of regents that requested permission to begin

taking race into consideration as one of "the many ways in which [an] academically qualified individual might contribute to, and benefit from, the rich, diverse, and challenging educational environment of the University." *Id.*, at 23a. After the board approved the proposal, the University adopted a new admissions policy to implement it. The University has continued to use that admissions policy to this day.

Although the University's new admissions policy was a direct result of *Grutter*, it is not identical to the policy this Court approved in that case. Instead, consistent with the State's legislative directive, the University continues to fill a significant majority of its class through the Top Ten Percent Plan (or Plan). Today, up to 75 percent of the places in the freshman class are filled through the Plan. As a practical matter, this 75 percent cap, which has now been fixed by statute, means that, while the Plan continues to be referenced as a "Top Ten Percent Plan," a student actually needs to finish in the top seven or eight percent of his or her class in order to be admitted under this category.

The University did adopt an approach similar to the one in *Grutter* for the remaining 25 percent or so of the incoming class. This portion of the class continues to be admitted based on a combination of their AI and PAI scores. Now, however, race is given weight as a subfactor within the PAI. The PAI is a number from 1 to 6 (6 is the best) that is based on two primary components. The first component is the average score a reader gives the applicant on two required essays. The second component is a full-file review that results in another 1-to-6 score, the "Personal Achievement Score" or PAS. The PAS is determined by a separate reader, who (1) rereads the applicant's required essays, (2) reviews any supplemental information the applicant submits (letters of recommendation, resumes, an additional optional essay, writing samples, artwork, etc.), and (3) evaluates the applicant's potential contributions to the University's student body based

on the applicant's leadership experience, extracurricular activities, awards/honors, community service, and other "special circumstances."

"Special circumstances" include the socioeconomic status of the applicant's family, the socioeconomic status of the applicant's school, the applicant's family responsibilities, whether the applicant lives in a single-parent home, the applicant's SAT score in relation to the average SAT score at the applicant's school, the language spoken at the applicant's home, and, finally, the applicant's race. See App. 218a–220a, 430a.

Both the essay readers and the full-file readers who assign applicants their PAI undergo extensive training to ensure that they are scoring applicants consistently. Deposition of Brian Breman 9–14, Record in No. 1:08–CV–00263 (WD Tex.), Doc. 96–3. The admissions office also undertakes regular "reliability analyses" to "measure the frequency of readers scoring within one point of each other." App. 474a (affidavit of Gary M. Lavergne ¶8); see also *id.*, at 253a (deposition of Kedra Ishop (Ishop Dep.)). Both the intensive training and the reliability analyses aim to ensure that similarly situated applicants are being treated identically regardless of which admissions officer reads the file.

Once the essay and full-file readers have calculated each applicant's AI and PAI scores, admissions officers from each school within the University set a cutoff PAI/AI score combination for admission, and then admit all of the applicants who are above that cutoff point. In setting the cutoff, those admissions officers only know how many applicants received a given PAI/AI score combination. They do not know what factors went into calculating those applicants' scores. The admissions officers who make the final decision as to whether a particular applicant will be admitted make that decision without knowing the applicant's race. Race enters the admissions process, then, at one stage and one stage only—the calculation of the PAS.

Therefore, although admissions officers can consider race as a positive feature of a minority student's application, there is no dispute that race is but a "factor of a factor of a factor" in the holistic-review calculus. 645 F. Supp. 2d 587, 608 (WD Tex. 2009). Furthermore, consideration of race is contextual and does not operate as a mechanical plus factor for underrepresented minorities. *Id.*, at 606 ("Plaintiffs cite no evidence to show racial groups other than African-Americans and Hispanics are *excluded* from benefitting from UT's consideration of race in admissions. As the Defendants point out, the consideration of race, within the full context of the entire application, may be beneficial to any UT Austin applicant—including whites and Asian-Americans"); see also Brief for Asian American Legal Defense and Education Fund et al. as *Amici Curiae* 12 (the contention that the University discriminates against Asian-Americans is "entirely unsupported by evidence in the record or empirical data"). There is also no dispute, however, that race, when considered in conjunction with other aspects of an applicant's background, can alter an applicant's PAS score. Thus, race, in this indirect fashion, considered with all of the other factors that make up an applicant's AI and PAI scores, can make a difference to whether an application is accepted or rejected.

Petitioner Abigail Fisher applied for admission to the University's 2008 freshman class. She was not in the top 10 percent of her high school class, so she was evaluated for admission through holistic, full-file review. Petitioner's application was rejected.

Petitioner then filed suit alleging that the University's consideration of race as part of its holistic-review process disadvantaged her and other Caucasian applicants, in violation of the Equal Protection Clause. See U. S. Const., Amdt. 14, § 1 (no State shall "deny to any person within its jurisdiction the equal protection of the laws"). The District Court entered summary judgment in the University's favor, and the Court of Appeals affirmed.

This Court granted certiorari and vacated the judgment of the Court of Appeals, *Fisher* v. *University of Tex. at Austin*, 570 U. S. 297 (2013) (*Fisher I*), because it had applied an overly deferential "good-faith" standard in assessing the constitutionality of the University's program. The Court remanded the case for the Court of Appeals to assess the parties' claims under the correct legal standard.

Without further remanding to the District Court, the Court of Appeals again affirmed the entry of summary judgment in the University's favor. 758 F. 3d 633 (CA5 2014). This Court granted certiorari for a second time, 576 U. S. 1054 (2015), and now affirms.

II

Fisher I set forth three controlling principles relevant to assessing the constitutionality of a public university's affirmative-action program. First, "'[b]ecause racial characteristics so seldom provide a relevant basis for disparate treatment,'" *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 505 (1989), "[r]ace may not be considered [by a university] unless the admissions process can withstand strict scrutiny," *Fisher I*, 570 U. S., at 309. Strict scrutiny requires the university to demonstrate with clarity that its "'purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose.'" *Ibid.*

Second, *Fisher I* confirmed that "the decision to pursue 'the educational benefits that flow from student body diversity' . . . is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper." *Id.*, at 310. A university cannot impose a fixed quota or otherwise "define diversity as 'some specified percentage of a particular group merely because of its race or ethnic origin.'" *Id.*, at 311. Once, however, a university gives "a reasoned, principled explanation" for its decision, deference must be given "to the University's conclusion, based on its experience and expertise, that a diverse student body would

serve its educational goals." *Id.*, at 310–311 (internal quotation marks and citation omitted).

Third, *Fisher I* clarified that no deference is owed when determining whether the use of race is narrowly tailored to achieve the university's permissible goals. *Id.*, at 311. A university, *Fisher I* explained, bears the burden of proving a "nonracial approach" would not promote its interest in the educational benefits of diversity "about as well and at tolerable administrative expense." *Id.*, at 312 (internal quotation marks omitted). Though "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative" or "require a university to choose between maintaining a reputation for excellence [and] fulfilling a commitment to provide educational opportunities to members of all racial groups," *Grutter*, 539 U. S., at 339, it does impose "on the university the ultimate burden of demonstrating" that "race-neutral alternatives" that are both "available" and "workable" "do not suffice." *Fisher I*, 570 U. S., at 312.

Fisher I set forth these controlling principles, while taking no position on the constitutionality of the admissions program at issue in this case. The Court held only that the District Court and the Court of Appeals had "confined the strict scrutiny inquiry in too narrow a way by deferring to the University's good faith in its use of racial classifications." *Id.*, at 314. The Court remanded the case, with instructions to evaluate the record under the correct standard and to determine whether the University had made "a showing that its plan is narrowly tailored to achieve" the educational benefits that flow from diversity. *Ibid.* On remand, the Court of Appeals determined that the program conformed with the strict scrutiny mandated by *Fisher I*. See 758 F. 3d, at 659–660. Judge Garza dissented.

III

The University's program is *sui generis*. Unlike other approaches to college admissions considered by this Court, it

combines holistic review with a percentage plan. This approach gave rise to an unusual consequence in this case: The component of the University's admissions policy that had the largest impact on petitioner's chances of admission was not the school's consideration of race under its holistic-review process but rather the Top Ten Percent Plan. Because petitioner did not graduate in the top 10 percent of her high school class, she was categorically ineligible for more than three-fourths of the slots in the incoming freshman class. It seems quite plausible, then, to think that petitioner would have had a better chance of being admitted to the University if the school used race-conscious holistic review to select its entire incoming class, as was the case in *Grutter*.

Despite the Top Ten Percent Plan's outsized effect on petitioner's chances of admission, she has not challenged it. For that reason, throughout this litigation, the Top Ten Percent Plan has been taken, somewhat artificially, as a given premise.

Petitioner's acceptance of the Top Ten Percent Plan complicates this Court's review. In particular, it has led to a record that is almost devoid of information about the students who secured admission to the University through the Plan. The Court thus cannot know how students admitted solely based on their class rank differ in their contribution to diversity from students admitted through holistic review.

In an ordinary case, this evidentiary gap perhaps could be filled by a remand to the district court for further factfinding. When petitioner's application was rejected, however, the University's combined percentage-plan/holistic-review approach to admission had been in effect for just three years. While studies undertaken over the eight years since then may be of significant value in determining the constitutionality of the University's current admissions policy, that evidence has little bearing on whether petitioner received equal treatment when her application was rejected in 2008. If the Court were to remand, therefore, further factfinding would

be limited to a narrow 3-year sample, review of which might yield little insight.

Furthermore, as discussed above, the University lacks any authority to alter the role of the Top Ten Percent Plan in its admissions process. The Plan was mandated by the Texas Legislature in the wake of *Hopwood*, so the University, like petitioner in this litigation, has likely taken the Plan as a given since its implementation in 1998. If the University had no reason to think that it could deviate from the Top Ten Percent Plan, it similarly had no reason to keep extensive data on the Plan or the students admitted under it—particularly in the years before *Fisher I* clarified the stringency of the strict-scrutiny burden for a school that employs race-conscious review.

Under the circumstances of this case, then, a remand would do nothing more than prolong a suit that has already persisted for eight years and cost the parties on both sides significant resources. Petitioner long since has graduated from another college, and the University's policy—and the data on which it first was based—may have evolved or changed in material ways.

The fact that this case has been litigated on a somewhat artificial basis, furthermore, may limit its value for prospective guidance. The Texas Legislature, in enacting the Top Ten Percent Plan, cannot much be criticized, for it was responding to *Hopwood*, which at the time was binding law in the State of Texas. That legislative response, in turn, circumscribed the University's discretion in crafting its admissions policy. These circumstances refute any criticism that the University did not make good-faith efforts to comply with the law.

That does not diminish, however, the University's continuing obligation to satisfy the burden of strict scrutiny in light of changing circumstances. The University engages in periodic reassessment of the constitutionality, and efficacy, of its admissions program. See Supp. App. 32a; App. 448a.

Going forward, that assessment must be undertaken in light of the experience the school has accumulated and the data it has gathered since the adoption of its admissions plan.

As the University examines this data, it should remain mindful that diversity takes many forms. Formalistic racial classifications may sometimes fail to capture diversity in all of its dimensions and, when used in a divisive manner, could undermine the educational benefits the University values. Through regular evaluation of data and consideration of student experience, the University must tailor its approach in light of changing circumstances, ensuring that race plays no greater role than is necessary to meet its compelling interest. The University's examination of the data it has acquired in the years since petitioner's application, for these reasons, must proceed with full respect for the constraints imposed by the Equal Protection Clause. The type of data collected, and the manner in which it is considered, will have a significant bearing on how the University must shape its admissions policy to satisfy strict scrutiny in the years to come. Here, however, the Court is necessarily limited to the narrow question before it: whether, drawing all reasonable inferences in her favor, petitioner has shown by a preponderance of the evidence that she was denied equal treatment at the time her application was rejected.

IV

In seeking to reverse the judgment of the Court of Appeals, petitioner makes four arguments. First, she argues that the University has not articulated its compelling interest with sufficient clarity. According to petitioner, the University must set forth more precisely the level of minority enrollment that would constitute a "critical mass." Without a clearer sense of what the University's ultimate goal is, petitioner argues, a reviewing court cannot assess whether the University's admissions program is narrowly tailored to that goal.

As this Court's cases have made clear, however, the compelling interest that justifies consideration of race in college admissions is not an interest in enrolling a certain number of minority students. Rather, a university may institute a race-conscious admissions program as a means of obtaining "the educational benefits that flow from student body diversity." *Fisher I*, 570 U. S., at 310 (internal quotation marks omitted); see also *Grutter*, 539 U. S., at 328. As this Court has said, enrolling a diverse student body "promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races." *Id.*, at 330 (internal quotation marks and alteration omitted). Equally important, "student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society." *Ibid.* (internal quotation marks omitted).

Increasing minority enrollment may be instrumental to these educational benefits, but it is not, as petitioner seems to suggest, a goal that can or should be reduced to pure numbers. Indeed, since the University is prohibited from seeking a particular number or quota of minority students, it cannot be faulted for failing to specify the particular level of minority enrollment at which it believes the educational benefits of diversity will be obtained.

On the other hand, asserting an interest in the educational benefits of diversity writ large is insufficient. A university's goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them.

The record reveals that in first setting forth its current admissions policy, the University articulated concrete and precise goals. On the first page of its 2004 "Proposal to Consider Race and Ethnicity in Admissions," the University identifies the educational values it seeks to realize through its admissions process: the destruction of stereotypes, the "'promot[ion of] cross-racial understanding,'" the prepara-

tion of a student body "'for an increasingly diverse workforce and society,'" and the "'cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry.'" Supp. App. 1a; see also *id.*, at 69a; App. 314a–315a (deposition of N. Bruce Walker (Walker Dep.)), 478a–479a (Walker Aff. ¶4) (setting forth the same goals). Later in the proposal, the University explains that it strives to provide an "academic environment" that offers a "robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders." Supp. App. 23a. All of these objectives, as a general matter, mirror the "compelling interest" this Court has approved in its prior cases.

The University has provided in addition a "reasoned, principled explanation" for its decision to pursue these goals. *Fisher I*, *supra*, at 310. The University's 39-page proposal was written following a year-long study, which concluded that "[t]he use of race-neutral policies and programs ha[d] not been successful" in "provid[ing] an educational setting that fosters cross-racial understanding, provid[ing] enlightened discussion and learning, [or] prepar[ing] students to function in an increasingly diverse workforce and society." Supp. App. 25a; see also App. 481a–482a (Walker Aff. ¶¶8–12) (describing the "thoughtful review" the University undertook when it faced the "important decision . . . whether or not to use race in its admissions process"). Further support for the University's conclusion can be found in the depositions and affidavits from various admissions officers, all of whom articulate the same, consistent "reasoned, principled explanation." See, *e. g.*, *id.*, at 253a (Ishop Dep.), 314a–318a, 359a (Walker Dep.), 415a–416a (Defendant's Statement of Facts), 478a–479a, 481a–482a (Walker Aff. ¶¶4, 10–13). Petitioner's contention that the University's goal was insufficiently concrete is rebutted by the record.

Second, petitioner argues that the University has no need to consider race because it had already "achieved critical

mass" by 2003 using the Top Ten Percent Plan and race-neutral holistic review. Brief for Petitioner 46. Petitioner is correct that a university bears a heavy burden in showing that it had not obtained the educational benefits of diversity before it turned to a race-conscious plan. The record reveals, however, that, at the time of petitioner's application, the University could not be faulted on this score. Before changing its policy the University conducted "months of study and deliberation, including retreats, interviews, [and] review of data," App. 446a, and concluded that "[t]he use of race-neutral policies and programs ha[d] not been successful in achieving" sufficient racial diversity at the University, Supp. App. 25a. At no stage in this litigation has petitioner challenged the University's good faith in conducting its studies, and the Court properly declines to consider the extrarecord materials the dissent relies upon, many of which are tangential to this case at best and none of which the University has had a full opportunity to respond to. See, *e. g.*, *post*, at 432 (opinion of ALITO, J.) (describing a 2015 report regarding the admission of applicants who are related to "politically connected individuals").

The record itself contains significant evidence, both statistical and anecdotal, in support of the University's position. To start, the demographic data the University has submitted show consistent stagnation in terms of the percentage of minority students enrolling at the University from 1996 to 2002. In 1996, for example, 266 African-American freshmen enrolled, a total that constituted 4.1 percent of the incoming class. In 2003, the year *Grutter* was decided, 267 African-American students enrolled—again, 4.1 percent of the incoming class. The numbers for Hispanic and Asian-American students tell a similar story. See Supp. App. 43a. Although demographics alone are by no means dispositive, they do have some value as a gauge of the University's ability to enroll students who can offer underrepresented perspectives.

In addition to this broad demographic data, the University put forward evidence that minority students admitted under the *Hopwood* regime experienced feelings of loneliness and isolation. See, *e. g.*, App. 317a–318a.

This anecdotal evidence is, in turn, bolstered by further, more nuanced quantitative data. In 2002, 52 percent of undergraduate classes with at least five students had no African-American students enrolled in them, and 27 percent had only one African-American student. Supp. App. 140a. In other words, only 21 percent of undergraduate classes with five or more students in them had more than one African-American student enrolled. Twelve percent of these classes had no Hispanic students, as compared to 10 percent in 1996. *Id.*, at 74a, 140a. Though a college must continually reassess its need for race-conscious review, here that assessment appears to have been done with care, and a reasonable determination was made that the University had not yet attained its goals.

Third, petitioner argues that considering race was not necessary because such consideration has had only a "'minimal impact' in advancing the [University's] compelling interest." Brief for Petitioner 46; see also Tr. of Oral Arg. 23:10–12; 24:13–25:2, 25:24–26:3. Again, the record does not support this assertion. In 2003, 11 percent of the Texas residents enrolled through holistic review were Hispanic and 3.5 percent were African-American. Supp. App. 157a. In 2007, by contrast, 16.9 percent of the Texas holistic-review freshmen were Hispanic and 6.8 percent were African-American. *Ibid.* Those increases—of 54 percent and 94 percent, respectively—show that consideration of race has had a meaningful, if still limited, effect on the diversity of the University's freshman class.

In any event, it is not a failure of narrow tailoring for the impact of racial consideration to be minor. The fact that race consciousness played a role in only a small portion of

admissions decisions should be a hallmark of narrow tailoring, not evidence of unconstitutionality.

Petitioner's final argument is that "there are numerous other available race-neutral means of achieving" the University's compelling interest. Brief for Petitioner 47. A review of the record reveals, however, that, at the time of petitioner's application, none of her proposed alternatives was a workable means for the University to attain the benefits of diversity it sought. For example, petitioner suggests that the University could intensify its outreach efforts to African-American and Hispanic applicants. But the University submitted extensive evidence of the many ways in which it already had intensified its outreach efforts to those students. The University has created three new scholarship programs, opened new regional admissions centers, increased its recruitment budget by half-a-million dollars, and organized over 1,000 recruitment events. Supp. App. 29a–32a; App. 450a–452a (citing affidavit of Michael Orr ¶¶4–20). Perhaps more significantly, in the wake of *Hopwood*, the University spent seven years attempting to achieve its compelling interest using race-neutral holistic review. None of these efforts succeeded, and petitioner fails to offer any meaningful way in which the University could have improved upon them at the time of her application.

Petitioner also suggests altering the weight given to academic and socioeconomic factors in the University's admissions calculus. This proposal ignores the fact that the University tried, and failed, to increase diversity through enhanced consideration of socioeconomic and other factors. And it further ignores this Court's precedent making clear that the Equal Protection Clause does not force universities to choose between a diverse student body and a reputation for academic excellence. *Grutter*, 539 U. S., at 339.

Petitioner's final suggestion is to uncap the Top Ten Percent Plan, and admit more—if not all—the University's stu-

dents through a percentage plan. As an initial matter, petitioner overlooks the fact that the Top Ten Percent Plan, though facially neutral, cannot be understood apart from its basic purpose, which is to boost minority enrollment. Percentage plans are "adopted with racially segregated neighborhoods and schools front and center stage." *Fisher I*, 570 U. S., at 335 (GINSBURG, J., dissenting). "It is race consciousness, not blindness to race, that drives such plans." *Ibid.* Consequently, petitioner cannot assert simply that increasing the University's reliance on a percentage plan would make its admissions policy more race neutral.

Even if, as a matter of raw numbers, minority enrollment would increase under such a regime, petitioner would be hard pressed to find convincing support for the proposition that college admissions would be improved if they were a function of class rank alone. That approach would sacrifice all other aspects of diversity in pursuit of enrolling a higher number of minority students. A system that selected every student through class rank alone would exclude the star athlete or musician whose grades suffered because of daily practices and training. It would exclude a talented young biologist who struggled to maintain above-average grades in humanities classes. And it would exclude a student whose freshman-year grades were poor because of a family crisis but who got herself back on track in her last three years of school, only to find herself just outside of the top decile of her class.

These are but examples of the general problem. Class rank is a single metric, and like any single metric, it will capture certain types of people and miss others. This does not imply that students admitted through holistic review are necessarily more capable or more desirable than those admitted through the Top Ten Percent Plan. It merely reflects the fact that privileging one characteristic above all others does not lead to a diverse student body. Indeed, to compel universities to admit students based on class rank

alone is in deep tension with the goal of educational diversity as this Court's cases have defined it. See *Grutter*, *supra*, at 340 (explaining that percentage plans "may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university"); 758 F. 3d, at 653 (pointing out that the Top Ten Percent Law leaves out students "who fell outside their high school's top ten percent but excelled in unique ways that would enrich the diversity of [the University's] educational experience" and "leaves a gap in an admissions process seeking to create the multi-dimensional diversity that [*Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265 (1978),] envisions"). At its center, the Top Ten Percent Plan is a blunt instrument that may well compromise the University's own definition of the diversity it seeks.

In addition to these fundamental problems, an admissions policy that relies exclusively on class rank creates perverse incentives for applicants. Percentage plans "encourage parents to keep their children in low-performing segregated schools, and discourage students from taking challenging classes that might lower their grade point averages." *Gratz*, 539 U. S., at 304, n. 10 (GINSBURG, J., dissenting).

For all these reasons, although it may be true that the Top Ten Percent Plan in some instances may provide a path out of poverty for those who excel at schools lacking in resources, the Plan cannot serve as the admissions solution that petitioner suggests. Wherever the balance between percentage plans and holistic review should rest, an effective admissions policy cannot prescribe, realistically, the exclusive use of a percentage plan.

In short, none of petitioner's suggested alternatives—nor other proposals considered or discussed in the course of this litigation—have been shown to be "available" and "workable" means through which the University could have met its educational goals, as it understood and defined them in

2008. *Fisher I*, *supra*, at 312. The University has thus met its burden of showing that the admissions policy it used at the time it rejected petitioner's application was narrowly tailored.

* * *

A university is in large part defined by those intangible "qualities which are incapable of objective measurement but which make for greatness." *Sweatt* v. *Painter*, 339 U. S. 629, 634 (1950). Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission. But still, it remains an enduring challenge to our Nation's education system to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity.

In striking this sensitive balance, public universities, like the States themselves, can serve as "laboratories for experimentation." *United States* v. *Lopez*, 514 U. S. 549, 581 (1995) (KENNEDY, J., concurring); see also *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting). The University of Texas at Austin has a special opportunity to learn and to teach. The University now has at its disposal valuable data about the manner in which different approaches to admissions may foster diversity or instead dilute it. The University must continue to use this data to scrutinize the fairness of its admissions program; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary.

The Court's affirmance of the University's admissions policy today does not necessarily mean the University may rely on that same policy without refinement. It is the University's ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

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

JUSTICE THOMAS, dissenting.

I join JUSTICE ALITO's dissent. As JUSTICE ALITO explains, the Court's decision today is irreconcilable with strict scrutiny, rests on pernicious assumptions about race, and departs from many of our precedents.

I write separately to reaffirm that "a State's use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause." *Fisher* v. *University of Tex. at Austin*, 570 U. S. 297, 315 (2013) (THOMAS, J., concurring). "The Constitution abhors classifications based on race because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all." *Id.*, at 316 (internal quotation marks omitted). That constitutional imperative does not change in the face of a "faddish theor[y]" that racial discrimination may produce "educational benefits." *Id.*, at 327, 319. The Court was wrong to hold otherwise in *Grutter* v. *Bollinger*, 539 U. S. 306, 343 (2003). I would overrule *Grutter* and reverse the Fifth Circuit's judgment.

JUSTICE ALITO, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

Something strange has happened since our prior decision in this case. See *Fisher* v. *University of Tex. at Austin*, 570 U. S. 297 (2013) (*Fisher I*). In that decision, we held that strict scrutiny requires the University of Texas at Austin (UT or University) to show that its use of race and ethnicity in making admissions decisions serves compelling interests and that its plan is narrowly tailored to achieve those ends.

Rejecting the argument that we should defer to UT's judgment on those matters, we made it clear that UT was obligated (1) to identify the interests justifying its plan with enough specificity to permit a reviewing court to determine whether the requirements of strict scrutiny were met, and (2) to show that those requirements were in fact satisfied. On remand, UT failed to do what our prior decision demanded. The University has still not identified with any degree of specificity the interests that its use of race and ethnicity is supposed to serve. Its primary argument is that merely invoking "the educational benefits of diversity" is sufficient and that it need not identify any metric that would allow a court to determine whether its plan is needed to serve, or is actually serving, those interests. This is nothing less than the plea for deference that we emphatically rejected in our prior decision. Today, however, the Court inexplicably grants that request.

To the extent that UT has ever moved beyond a plea for deference and identified the relevant interests in more specific terms, its efforts have been shifting, unpersuasive, and, at times, less than candid. When it adopted its race-based plan, UT said that the plan was needed to promote classroom diversity. See Supp. App. 1a, 24a–25a, 39a; App. 316a. It pointed to a study showing that African-American, Hispanic, and Asian-American students were underrepresented in many classes. See Supp. App. 26a. But UT has never shown that its race-conscious plan actually ameliorates this situation. The University presents no evidence that its admissions officers, in administering the "holistic" component of its plan, make any effort to determine whether an African-American, Hispanic, or Asian-American student is likely to enroll in classes in which minority students are underrepresented. And although UT's records should permit it to determine without much difficulty whether holistic admittees are any more likely than students admitted through the Top Ten Percent Law, Tex. Educ. Code Ann. § 51.803 (West Cum.

Supp. 2015), to enroll in the classes lacking racial or ethnic diversity, UT either has not crunched those numbers or has not revealed what they show. Nor has UT explained why the underrepresentation of Asian-American students in many classes justifies its plan, which discriminates *against* those students.

At times, UT has claimed that its plan is needed to achieve a "critical mass" of African-American and Hispanic students, but it has never explained what this term means. According to UT, a critical mass is neither some absolute number of African-American or Hispanic students nor the percentage of African-Americans or Hispanics in the general population of the State. The term remains undefined, but UT tells us that it will let the courts know when the desired end has been achieved. See App. 314a–315a. This is a plea for deference—indeed, for blind deference—the very thing that the Court rejected in *Fisher I*.

UT has also claimed at times that the race-based component of its plan is needed because the Top Ten Percent Plan admits *the wrong kind* of African-American and Hispanic students, namely, students from poor families who attend schools in which the student body is predominantly African-American or Hispanic. As UT put it in its brief in *Fisher I*, the race-based component of its admissions plan is needed to admit "[t]he African-American or Hispanic child of successful professionals in Dallas." Brief for Respondents, O. T. 2012, No. 11–345, p. 34.

After making this argument in its first trip to this Court, UT apparently had second thoughts, and in the latest round of briefing UT has attempted to disavow ever having made the argument. See Brief for Respondents 2 ("Petitioner's argument that UT's interest is favoring 'affluent' minorities is a fabrication"); see also *id.*, at 15. But it did, and the argument turns affirmative action on its head. Affirmative-action programs were created to help *disadvantaged* students.

Although UT now disowns the argument that the Top Ten Percent Plan results in the admission of the wrong kind of African-American and Hispanic students, the Fifth Circuit majority bought a version of that claim. As the panel majority put it, the Top Ten African-American and Hispanic admittees cannot match the holistic African-American and Hispanic admittees when it comes to "records of personal achievement," a "variety of perspectives" and "life experiences," and "unique skills." 758 F. 3d 633, 653 (2014). All in all, according to the panel majority, the Top Ten Percent students cannot "enrich the diversity of the student body" in the same way as the holistic admittees. *Id.*, at 654. As Judge Garza put it in dissent, the panel majority concluded that the Top Ten Percent admittees are "somehow more homogenous, less dynamic, and more undesirably stereotypical than those admitted under holistic review." *Id.*, at 669–670.

The Fifth Circuit reached this conclusion with little direct evidence regarding the characteristics of the Top Ten Percent and holistic admittees. Instead, the assumption behind the Fifth Circuit's reasoning is that most of the African-American and Hispanic students admitted under the race-neutral component of UT's plan were able to rank in the top decile of their high school classes only because they did not have to compete against white and Asian-American students. This insulting stereotype is not supported by the record. African-American and Hispanic students admitted under the Top Ten Percent Plan receive higher college grades than the African-American and Hispanic students admitted under the race-conscious program. See Supp. App. 164a–165a.

It should not have been necessary for us to grant review a second time in this case, and I have no greater desire than the majority to see the case drag on. But that need not happen. When UT decided to adopt its race-conscious plan, it had every reason to know that its plan would have to satisfy strict scrutiny and that this meant that it would be *its burden* to show that the plan was narrowly tailored to serve

compelling interests. UT has failed to make that showing. By all rights, judgment should be entered in favor of petitioner.

But if the majority is determined to give UT yet another chance, we should reverse and send this case back to the District Court. What the majority has now done—awarding a victory to UT in an opinion that fails to address the important issues in the case—is simply wrong.

I

Over the past 20 years, UT has frequently modified its admissions policies, and it has generally employed race and ethnicity in the most aggressive manner permitted under controlling precedent.

Before 1997, race was considered directly as part of the general admissions process, and it was frequently a controlling factor. Admissions were based on two criteria: (1) the applicant's Academic Index (AI), which was computed from standardized test scores and high school class rank, and (2) the applicant's race. In 1996, the last year this race-conscious system was in place, 4.1% of enrolled freshmen were African-American, 14.7% were Asian-American, and 14.5% were Hispanic. Supp. App. 43a.

The Fifth Circuit's decision in *Hopwood* v. *Texas*, 78 F. 3d 932 (1996), prohibited UT from using race in admissions. In response to *Hopwood*, beginning with the 1997 admissions cycle, UT instituted a "holistic review" process in which it considered an applicant's AI as well as a Personal Achievement Index (PAI) that was intended, among other things, to increase minority enrollment. The race-neutral PAI was a composite of scores from two essays and a personal achievement score, which in turn was based on a holistic review of an applicant's leadership qualities, extracurricular activities, honors and awards, work experience, community service, and special circumstances. Special consideration was given to applicants from poor families, applicants from homes in

which a language other than English was customarily spoken, and applicants from single-parent households. Because this race-neutral plan gave a preference to disadvantaged students, it had the effect of "disproportionately" benefiting minority candidates. 645 F. Supp. 2d 587, 592 (WD Tex. 2009).

The Texas Legislature also responded to *Hopwood*. In 1997, it enacted the Top Ten Percent Plan, which mandated that UT admit all Texas seniors who rank in the top 10% of their high school classes. This facially race-neutral law served to equalize competition between students who live in relatively affluent areas with superior schools and students in poorer areas served by schools offering fewer opportunities for academic excellence. And by benefiting the students in the latter group, this plan, like the race-neutral holistic plan already adopted by UT, tended to benefit African-American and Hispanic students, who are often trapped in inferior public schools. 758 F. 3d, at 650–653.

Starting in 1998, when the Top Ten Percent Plan took effect, UT's holistic, race-neutral AI/PAI system continued to be used to fill the seats in the entering class that were not taken by Top Ten Percent students. The AI/PAI system was also used to determine program placement for all incoming students, including the Top Ten Percent students.

"The University's revised admissions process, coupled with the operation of the Top Ten Percent Law, resulted in a more racially diverse environment at the University." *Fisher I*, 570 U. S., at 305. In 2000, UT announced that its "enrollment levels for African American and Hispanic freshmen have returned to those of 1996, the year before the *Hopwood* decision prohibited the consideration of race in admissions policies." App. 393a; see also Supp. App. 23a–24a (pre-*Hopwood* diversity levels were "restored" in 1999); App. 392a–393a ("The 'Top 10 Percent Law' is Working for Texas" and "has enabled us to diversify enrollment at UT Austin with talented students who succeed"). And in 2003, UT pro-

claimed that it had "effectively compensated for the loss of affirmative action." *Id.*, at 396a; see also *id.*, at 398a ("Diversity efforts at The University of Texas at Austin have brought a higher number of freshman minority students—African Americans, Hispanics and Asian-Americans—to the campus than were enrolled in 1996, the year a court ruling ended the use of affirmative action in the university's enrollment process"). By 2004—the last year under the holistic, race-neutral AI/PAI system—UT's entering class was 4.5% African-American, 17.9% Asian-American, and 16.9% Hispanic. Supp. App. 156a. The 2004 entering class thus had a higher percentage of African-Americans, Asian-Americans, and Hispanics than the class that entered in 1996, when UT had last employed racial preferences.

Notwithstanding these lauded results, UT leapt at the opportunity to reinsert race into the process. On June 23, 2003, this Court decided *Grutter* v. *Bollinger*, 539 U. S. 306 (2003), which upheld the University of Michigan Law School's race-conscious admissions system. In *Grutter*, the Court warned that a university contemplating the consideration of race as part of its admissions process must engage in "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." *Id.*, at 339. Nevertheless, *on the very day Grutter was handed down*, UT's president announced that "[t]he University of Texas at Austin *will* modify its admissions procedures" in light of *Grutter*, including by "implementing procedures at the undergraduate level that combine the benefits of the Top 10 Percent Law with affirmative action programs." App. 406a–407a (emphasis added).[1] UT purports to have

[1] See also Nissimov, UT To Resume Factoring in Applicants' Race: UT To Reintroduce Race-Based Criteria, Houston Chronicle, June 24, 2003, p. 4A ("President Larry Faulkner said Monday his institution will quickly develop race-based admissions criteria by the fall that would be used for the summer and fall of 2004, after being given the green light to do so by Monday's U. S. Supreme Court ruling"); Silverstein, Hong, & Trounson,

later engaged in "almost a year of deliberations," *id.*, at 482a, but there is no evidence that the reintroduction of race into the admissions process was anything other than a foregone conclusion following the president's announcement.

"The University's plan to resume race-conscious admissions was given formal expression in June 2004 in an internal document entitled Proposal to Consider Race and Ethnicity in Admissions" (Proposal). *Fisher I*, *supra*, at 305. The Proposal stated that UT needed race-conscious admissions because it had not yet achieved a "critical mass of racial diversity." Supp. App. 25a. In support of this claim, UT cited two pieces of evidence. First, it noted that there were "significant differences between the racial and ethnic makeup of the University's undergraduate population and the state's population." *Id.*, at 24a. Second, the Proposal "relied in substantial part," *Fisher I*, *supra*, at 305, on a study of a subset of undergraduate classes containing at least five students, see Supp. App. 26a. The study showed that among select classes with five or more students, 52% had no African-Americans, 16% had no Asian-Americans, and 12% had no Hispanics. *Ibid.* Moreover, the study showed, only 21% of these classes had two or more African-Americans, 67% had two or more Asian-Americans, and 70% had two or more Hispanics. See *ibid.* Based on this study, the Proposal concluded that UT "has not reached a critical mass at the classroom level." *Id.*, at 24a. The Proposal did not analyze

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State Finds Itself Hemmed In, L. A. Times, June 24, 2003, p. A1 (explaining UT's "intention, after dropping race as a consideration, to move swiftly to restore its use in admissions" in time for "the next admissions cycle"); Hart, Texas Ponders Changes to 10% Law, Boston Globe, June 25, 2003, p. A3 ("Soon after Monday's ruling, University of Texas President Larry Faulkner said that the school will overhaul procedures" in order to allow consideration of "[t]he race of an applicant" for "students enrolling in fall 2004"); Ambiguity Remains; High Court Leaves Quota Questions Looming, El Paso Times, June 25, 2003, p. 6B ("The University of Texas at Austin's president, Larry Faulkner, has already announced that new admissions policies would be drafted to include race as a factor").

the backgrounds, life experiences, leadership qualities, awards, extracurricular activities, community service, personal attributes, or other characteristics of the minority students who were already being admitted to UT under the holistic, race-neutral process.

"To implement the Proposal the University included a student's race as a component of the PAI score, beginning with applicants in the fall of 2004." *Fisher I*, 570 U. S., at 306. "The University asks students to classify themselves from among five predefined racial categories on the application." *Ibid.* "Race is not assigned an explicit numerical value, but it is undisputed that race is a meaningful factor." *Ibid.* UT decided to use racial preferences to benefit African-American and Hispanic students because it considers those groups "underrepresented minorities." Supp. App. 25a; see also App. 445a–446a (defining "underrepresented minorities" as "Hispanic[s] and African Americans"). Even though UT's classroom study showed that more classes lacked Asian-American students than lacked Hispanic students, Supp. App. 26a, UT deemed Asian-Americans "*overrepresented*" based on state demographics, 645 F. Supp. 2d, at 606; see also *ibid.* ("It is undisputed that UT considers African-Americans and Hispanics to be underrepresented but does not consider Asian-Americans to be underrepresented").

Although UT claims that race is but a "factor of a factor of a factor of a factor," *id.*, at 608, UT acknowledges that "race is the only one of [its] holistic factors that appears on the cover of every application," Tr. of Oral Arg. 54 (Oct. 10, 2012). "Because an applicant's race is identified at the front of the admissions file, reviewers are aware of it throughout the evaluation." 645 F. Supp. 2d, at 597; see also *id.*, at 598 ("[A] candidate's race is known throughout the application process"). Consideration of race therefore pervades every aspect of UT's admissions process. See App. 219a ("We are certainly aware of the applicant's race. It's on the front page of the application that's being read [and] is used in con-

text with everything else that's part of the applicant's file"). This is by design, as UT considers its use of racial classifications to be a benign form of "social engineering." Powers, Why Schools Still Need Affirmative Action, National L. J., Aug. 4, 2014, p. 22 (editorial by Bill Powers, President of UT from 2006–2015) ("Opponents accuse defenders of race-conscious admissions of being in favor of 'social engineering,' to which I believe we should reply, 'Guilty as charged' ").

Notwithstanding the omnipresence of racial classifications, UT claims that it keeps no record of how those classifications affect its process. "The university doesn't keep any statistics on how many students are affected by the consideration of race in admissions decisions," and it "does not know how many minority students are affected in a positive manner by the consideration of race." App. 337a. According to UT, it has no way of making these determinations. See *id.*, at 320a–322a. UT says that it does not tell its admissions officers how much weight to give to race. See Deposition of Gary Lavergne 43–45, Record in No. 1:08–CV–00263 (WD Tex.), Doc. 94–9 (Lavergne Deposition). And because the influence of race is always "contextual," UT claims, it cannot provide even a single example of an instance in which race impacted a student's odds of admission. See App. 220a ("Q. Could you give me an example where race would have some impact on an applicant's personal achievement score? A. To be honest, not really . . . . [I]t's impossible to say—to give you an example of a particular student because it's all contextual"). Accordingly, UT asserts that it has no idea which students were admitted as a result of its race-conscious system and which students would have been admitted under a race-neutral process. UT thus makes no effort to assess how the individual characteristics of students admitted as the result of racial preferences differ (or do not differ) from those of students who would have been admitted without them.

II

UT's race-conscious admissions program cannot satisfy strict scrutiny. UT says that the program furthers its interest in the educational benefits of diversity, but it has failed to define that interest with any clarity or to demonstrate that its program is narrowly tailored to achieve that or any other particular interest. By accepting UT's rationales as sufficient to meet its burden, the majority licenses UT's perverse assumptions about different groups of minority students—the precise assumptions strict scrutiny is supposed to stamp out.

A

"The moral imperative of racial neutrality is the driving force of the Equal Protection Clause." *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 518 (1989) (KENNEDY, J., concurring in part and concurring in judgment). "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller* v. *Johnson*, 515 U. S. 900, 911 (1995) (internal quotation marks omitted). "Race-based assignments embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." *Id.*, at 912 (internal quotation marks omitted). Given our constitutional commitment to "the doctrine of equality," "'[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people.'" *Rice* v. *Cayetano*, 528 U. S. 495, 517 (2000) (quoting *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943)).

"[B]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, the Equal Protection Clause demands that racial classifications . . . be subjected to

the most rigid scrutiny." *Fisher I*, 570 U. S., at 309–310 (internal quotation marks and citations omitted). "[J]udicial review must begin from the position that 'any official action that treats a person differently on account of his race or ethnic origin is inherently suspect.'" *Id.*, at 310; see also *Grutter*, 539 U. S., at 388 (KENNEDY, J., dissenting) ("'Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination'"). Under strict scrutiny, the use of race must be "necessary to further a compelling governmental interest," and the means employed must be "'specifically and narrowly'" tailored to accomplish the compelling interest. *Id.*, at 327, 333 (O'Connor, J., for the Court).

The "higher education dynamic does not change" this standard. *Fisher I*, *supra*, at 314. "Racial discrimination [is] invidious in all contexts," *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614, 619 (1991), and "'[t]he analysis and level of scrutiny applied to determine the validity of [a racial] classification do not vary simply because the objective appears acceptable,'" *Fisher I*, *supra*, at 314.

Nor does the standard of review "'depen[d] on the race of those burdened or benefited by a particular classification.'" *Gratz* v. *Bollinger*, 539 U. S. 244, 270 (2003) (quoting *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 224 (1995)); see also *Miller*, *supra*, at 904 ("This rule obtains with equal force regardless of 'the race of those burdened or benefited by a particular classification'" (quoting *Croson*, *supra*, at 494 (plurality opinion of O'Connor, J.))). "Thus, 'any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest of judicial scrutiny.'" *Gratz*, *supra*, at 270 (quoting *Adarand*, *supra*, at 224).

In short, in "all contexts," *Edmonson*, *supra*, at 619, racial classifications are permitted only "as a last resort," when all else has failed, *Croson*, *supra*, at 519 (opinion of KENNEDY,

J.). "Strict scrutiny is a searching examination, and it is the government that bears the burden" of proof. *Fisher I*, 570 U. S., at 310. To meet this burden, the government must "demonstrate *with clarity* that its 'purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose.'" *Id.*, at 309 (emphasis added).

B

Here, UT has failed to define its interest in using racial preferences with clarity. As a result, the narrow tailoring inquiry is impossible, and UT cannot satisfy strict scrutiny.

When UT adopted its challenged policy, it characterized its compelling interest as obtaining a "'critical mass'" of underrepresented minorities. *Id.*, at 301. The 2004 Proposal claimed that "[t]he use of race-neutral policies and programs has not been successful in achieving a critical mass of racial diversity." Supp. App. 25a; see *Fisher* v. *University of Tex. at Austin*, 631 F. 3d 213, 226 (CA5 2011) ("[T]he *2004 Proposal* explained that UT had not yet achieved the critical mass of underrepresented minority students needed to obtain the full educational benefits of diversity"). But to this day, UT has not explained in anything other than the vaguest terms what it means by "critical mass." In fact, UT argues that it need not identify *any* interest more specific than "securing the educational benefits of diversity." Brief for Respondents 15.

UT has insisted that critical mass is not an absolute number. See Tr. of Oral Arg. 39 (Oct. 10, 2012) (declaring that UT is not working toward any particular number of African-American or Hispanic students); App. 315a (confirming that UT has not defined critical mass as a number and has not projected when it will attain critical mass). Instead, UT prefers a deliberately malleable "we'll know it when we see it" notion of critical mass. It defines "critical mass" as "an adequate representation of minority students so that the . . .

educational benefits that can be derived from diversity can actually happen," and it declares that it "will . . . know [that] it has reached critical mass" when it "see[s] the educational benefits happening." *Id.*, at 314a–315a. In other words: Trust us.

This intentionally imprecise interest is designed to insulate UT's program from meaningful judicial review. As Judge Garza explained:

> "[T]o meet its narrow tailoring burden, the University must explain its goal to us in some meaningful way. We cannot undertake a rigorous ends-to-means narrow tailoring analysis when the University will not define the ends. We cannot tell whether the admissions program closely 'fits' the University's goal when it fails to objectively articulate its goal. Nor can we determine whether considering race is necessary for the University to achieve 'critical mass,' or whether there are effective race-neutral alternatives, when it has not described what 'critical mass' requires." 758 F. 3d, at 667 (dissenting opinion).

Indeed, without knowing in reasonably specific terms what critical mass is or how it can be measured, a reviewing court cannot conduct the requisite "careful judicial inquiry" into whether the use of race was "'necessary.'" *Fisher I*, *supra*, at 312.

To be sure, I agree with the majority that our precedents do not require UT to pinpoint "an interest in enrolling a certain number of minority students." *Ante*, at 381. But in order for us to assess whether UT's program is narrowly tailored, the University must identify *some sort of concrete interest.* "Classifying and assigning" students according to race "requires more than . . . an amorphous end to justify it." *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701, 735 (2007). Because UT has failed to explain "with clarity," *Fisher I*, *supra*, at 309,

why it needs a race-conscious policy and how it will know when its goals have been met, the narrow tailoring analysis cannot be meaningfully conducted. UT therefore cannot satisfy strict scrutiny.

The majority acknowledges that "asserting an interest in the educational benefits of diversity writ large is insufficient" and that "[a] university's goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them." *Ante*, at 381. According to the majority, however, UT has articulated the following "concrete and precise goals": "the destruction of stereotypes, the promot[ion of] cross-racial understanding, the preparation of a student body for an increasingly diverse workforce and society, and the cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry." *Ante*, at 381–382 (internal quotation marks omitted).

These are laudable goals, but they are not concrete or precise, and they offer no limiting principle for the use of racial preferences. For instance, how will a court ever be able to determine whether stereotypes have been adequately destroyed? Or whether cross-racial understanding has been adequately achieved? If a university can justify racial discrimination simply by having a few employees opine that racial preferences are necessary to accomplish these nebulous goals, see *ibid.* (citing *only* self-serving statements from UT officials), then the narrow tailoring inquiry is meaningless. Courts will be required to defer to the judgment of university administrators, and affirmative-action policies will be completely insulated from judicial review.

By accepting these amorphous goals as sufficient for UT to carry its burden, the majority violates decades of precedent rejecting blind deference to government officials defending "'inherently suspect'" classifications. *Miller*, 515 U. S., at 904 (citing *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 291 (1978) (opinion of Powell, J.)); see also, *e. g.*, *Miller*, *supra*,

at 922 ("Our presumptive skepticism of all racial classifications prohibits us . . . from accepting on its face the Justice Department's conclusion" (citation omitted)); *Croson*, 488 U. S., at 500 ("[T]he mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight"); *id.*, at 501 ("The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis"). Most troublingly, the majority's uncritical deference to UT's self-serving claims blatantly contradicts our decision in the prior iteration of this very case, in which we faulted the Fifth Circuit for improperly "deferring to the University's good faith in its use of racial classifications." *Fisher I*, 570 U. S., at 314. As we emphasized just three years ago, our precedent "ma[kes] clear that it is for the courts, not for university administrators, to ensure that" an admissions process is narrowly tailored. *Id.*, at 311.

A court cannot ensure that an admissions process is narrowly tailored if it cannot pin down the goals that the process is designed to achieve. UT's vague policy goals are "so broad and imprecise that they cannot withstand strict scrutiny." *Parents Involved*, *supra*, at 785 (KENNEDY, J., concurring in part and concurring in judgment).

C

Although UT's primary argument is that it need not point to any interest more specific than "the educational benefits of diversity," Brief for Respondents 15, it has—at various points in this litigation—identified four more specific goals: demographic parity, classroom diversity, intraracial diversity, and avoiding racial isolation. Neither UT nor the majority has demonstrated that any of these four goals provides a sufficient basis for satisfying strict scrutiny. And UT's arguments to the contrary depend on a series of invidious assumptions.

1

First, both UT and the majority cite demographic data as evidence that African-American and Hispanic students are "underrepresented" at UT and that racial preferences are necessary to compensate for this underrepresentation. See, *e. g.*, Supp. App. 24a; *ante*, at 383. But neither UT nor the majority is clear about the relationship between Texas demographics and UT's interest in obtaining a critical mass.

Does critical mass depend on the relative size of a particular group in the population of a State? For example, is the critical mass of African-Americans and Hispanics in Texas, where African-Americans are about 11.8% of the population and Hispanics are about 37.6%, different from the critical mass in neighboring New Mexico, where the African-American population is much smaller (about 2.1%) and the Hispanic population constitutes a higher percentage of the State's total (about 46.3%)? See United States Census Bureau, QuickFacts, online at https://www.census.gov/quickfacts/table/PST045215/35,48 (all Internet materials as last visited June 21, 2016).

UT's answer to this question has veered back and forth. At oral argument in *Fisher I*, UT's lawyer indicated that critical mass "could" vary "from group to group" and from "state to state." See Tr. of Oral Arg. 40 (Oct. 10, 2012). And UT initially justified its race-conscious plan at least in part on the ground that "significant differences between the racial and ethnic makeup of the University's undergraduate population and the state's population prevent the University from fully achieving its mission." Supp. App. 24a; see also *id.*, at 16a ("[A] critical mass in Texas is necessarily larger than a critical mass in Michigan," because "[a] majority of the college-age population in Texas is African American or Hispanic"); *Fisher*, 631 F. 3d, at 225–226, 236 (concluding that UT's reliance on Texas demographics reflects "measured attention to the community it serves"); Brief for Respondents in No. 11–345, at 41 (noting that critical mass may hinge, in

part, on "the communities that universities serve"). UT's extensive reliance on state demographics is also revealed by its substantial focus on increasing the representation of Hispanics, but not Asian-Americans, see, *e. g.*, 645 F. Supp. 2d, at 606; Supp. App. 25a; App. 445a–446a, because Hispanics, but not Asian-Americans, are underrepresented at UT when compared to the demographics of the State.[2]

On the other hand, UT's counsel asserted that the critical mass for the University is "not at all" dependent on the demographics of Texas, and that UT's "concept [of] critical mass isn't tied to demographic[s]." Tr. of Oral Arg. 40, 49 (Oct. 10, 2012). And UT's *Fisher I* brief expressly agreed that "a university cannot look to racial demographics—and then work backward in its admissions process to meet a target tied to such demographics." Brief for Respondents in No. 11–345, at 31; see also Brief for Respondents 26–27 (disclaiming any interest in demographic parity).

To the extent that UT is pursuing parity with Texas demographics, that is nothing more than "outright racial balancing," which this Court has time and again held "patently unconstitutional." *Fisher I*, 570 U. S., at 311; see *Grutter*, 539 U. S., at 330 ("[O]utright racial balancing . . . is patently unconstitutional"); *Freeman* v. *Pitts*, 503 U. S. 467, 494 (1992) ("Racial balance is not to be achieved for its own sake"); *Croson*, 488 U. S., at 507 (rejecting goal of "outright racial balancing"); *Bakke*, 438 U. S., at 307 (opinion of Powell, J.) ("If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose

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[2] In 2010, 3.8% of Texas's population was Asian, but 18.6% of UT's enrolled, first-time freshmen in 2008 were Asian-American. See Supp. App. 156a; United States Census Bureau, QuickFacts (QuickFacts Texas), online at https://www.census.gov/quickfacts/table/PST045215/48. By contrast, 37.6% of Texas's 2010 population identified as Hispanic or Latino, but a lower percentage—19.9%—of UT's enrolled, first-time freshmen in 2008 were Hispanic. See Supp. App. 156a; QuickFacts Texas.

must be rejected . . . as facially invalid"). An interest "linked to nothing other than proportional representation of various races . . . would support indefinite use of racial classifications, employed first to obtain the appropriate mixture of racial views and then to ensure that the [program] continues to reflect that mixture." *Metro Broadcasting, Inc.* v. *FCC*, 497 U. S. 547, 614 (1990) (O'Connor, J., dissenting). And as we held in *Fisher I*, "'[r]acial balancing is not transformed from "patently unconstitutional" to a compelling state interest simply by relabeling it "racial diversity."'" 570 U. S., at 311 (quoting *Parents Involved*, 551 U. S., at 732).

The record here demonstrates the pitfalls inherent in racial balancing. Although UT claims an interest in the educational benefits of diversity, it appears to have paid little attention to anything other than the number of minority students on its campus and in its classrooms. UT's 2004 Proposal illustrates this approach by repeatedly citing numerical assessments of the racial makeup of the student body and various classes as the justification for adopting a race-conscious plan. See, *e. g.*, Supp. App. 24a–26a, 30a. Instead of focusing on the benefits of diversity, UT seems to have resorted to a simple racial census.

The majority, for its part, claims that "[a]lthough demographics alone are by no means dispositive, they do have some value as a gauge of the University's ability to enroll students who can offer underrepresented perspectives." *Ante,* at 383. But even if UT merely "view[s] the demographic disparity as cause for concern," Brief for United States as *Amicus Curiae* 29, and is seeking only to reduce—rather than eliminate—the disparity, that undefined goal cannot be properly subjected to strict scrutiny. In that case, there is simply no way for a court to know what specific demographic interest UT is pursuing, why a race-neutral alternative could not achieve that interest, and when that demographic goal would be satisfied. If a demographic discrepancy can serve as "a gauge" that justifies the use of

racial discrimination, *ante*, at 383, then racial discrimination can be justified on that basis until demographic parity is reached. There is no logical stopping point short of patently unconstitutional racial balancing. Demographic disparities thus cannot be used to satisfy strict scrutiny here. See *Croson*, *supra*, at 498 (rejecting a municipality's assertion that its racial set-aside program was justified in light of past discrimination because that assertion had "'no logical stopping point'" and could continue until the percentage of government contracts awarded to minorities "mirrored the percentage of minorities in the population as a whole"); *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267, 275 (1986) (plurality opinion) (rejecting the government's asserted interest because it had "no logical stopping point").

2

The other major explanation UT offered in the Proposal was its desire to promote classroom diversity. The Proposal stressed that UT "has not reached a critical mass at the *classroom level*." Supp. App. 24a (emphasis added); see also *id.*, at 1a, 25a, 39a; App. 316a. In support of this proposition, UT relied on a study of select classes containing five or more students. As noted above, the study indicated that 52% of these classes had no African-Americans, 16% had no Asian-Americans, and 12% had no Hispanics. Supp. App. 26a. The study further suggested that only 21% of these classes had two or more African-Americans, 67% had two or more Asian-Americans, and 70% had two or more Hispanics. See *ibid.* Based on this study, UT concluded that it had a "compelling educational interest" in employing racial preferences to ensure that it did not "have large numbers of classes in which there are no students—or only a single student—of a given underrepresented race or ethnicity." *Id.*, at 25a.

UT now equivocates, disclaiming any discrete interest in classroom diversity. See Brief for Respondents 26–27. Instead, UT has taken the position that the lack of classroom

diversity was merely a "red flag that UT had not yet fully realized" "the constitutionally permissible educational benefits of diversity." Brief for Respondents in No. 11–345, at 43. But UT has failed to identify the level of classroom diversity it deems sufficient, again making it impossible to apply strict scrutiny.[3] A reviewing court cannot determine whether UT's race-conscious program was necessary to remove the so-called "red flag" without understanding the precise nature of that goal or knowing when the "red flag" will be considered to have disappeared.

Putting aside UT's effective abandonment of its interest in classroom diversity, the evidence cited in support of that interest is woefully insufficient to show that UT's race-conscious plan was necessary to achieve the educational benefits of a diverse student body. As far as the record shows, UT failed to even scratch the surface of the available data before reflexively resorting to racial preferences. For instance, because UT knows which students were admitted through the Top Ten Percent Plan and which were not, as well as which students enrolled in which classes, it would seem relatively easy to determine whether Top Ten Percent students were more or less likely than holistic admittees to enroll in the types of classes where diversity was lacking. But UT never bothered to figure this out. See *ante*, at 378 (acknowledging that UT submitted no evidence regarding "how students admitted solely based on their class rank differ in their contribution to diversity from students admitted through holistic review"). Nor is there any indication that UT instructed admissions officers to search for African-American and Hispanic applicants who would fill particular gaps at the classroom level. Given UT's failure to present such evidence, it has not demonstrated that its race-

[3] If UT's goal is to have at least two African-Americans, two Hispanics, and two Asian-Americans present in each of the relevant classrooms, that goal is literally unreachable in classes of five and practically unreachable in many other small classes.

conscious policy would promote classroom diversity any better than race-neutral options, such as expanding the Top Ten Percent Plan or using race-neutral holistic admissions.

Moreover, if UT is truly seeking to expose its students to a diversity of ideas and perspectives, its policy is poorly tailored to serve that end. UT's own study—which the majority touts as the best "nuanced quantitative data" supporting UT's position, *ante*, at 384—demonstrated that classroom diversity was more lacking for students classified as Asian-American than for those classified as Hispanic. Supp. App. 26a. But the UT plan discriminates *against* Asian-American students.[4] UT is apparently unconcerned that Asian-Americans "may be made to feel isolated or may be seen as . . . 'spokesperson[s]' of their race or ethnicity." *Id.*, at 69a; see *id.*, at 25a. And unless the University is engaged in unconstitutional racial balancing based on Texas demographics (where Hispanics outnumber Asian-Americans), see Part II–C–1, *supra*, it seemingly views the classroom contributions of Asian-American students as less valuable than those of Hispanic students. In UT's view, apparently, "Asian Americans are not worth as much as Hispanics in promoting 'cross-racial understanding,' breaking down 'racial stereotypes,' and enabling students to 'better understand persons of different races.'" Brief for Asian American Legal Foundation et al. as *Amici Curiae* 11 (representing 117 Asian-American organizations). The majority opinion effectively

[4] The majority's assertion that UT's race-based policy does not discriminate against Asian-American students, see *ante*, at 375, defies the laws of mathematics. UT's program is clearly designed to increase the number of African-American and Hispanic students by giving them an admissions boost vis-à-vis other applicants. See, *e. g.*, Supp. App. 25a; App. 445a–446a; cf. 645 F. Supp. 2d 587, 606 (WD Tex. 2009); see also *ante*, at 384 (citing increases in the presence of African-Americans and Hispanics at UT as evidence that its race-based program was successful). Given a "limited number of spaces," App. 250a, providing a boost to African-Americans and Hispanics inevitably harms students who do not receive the same boost by decreasing their odds of admission.

endorses this view, crediting UT's reliance on the classroom study as proof that the University assessed its need for racial discrimination (including racial discrimination that undeniably harms Asian-Americans) "with care." *Ante*, at 384.

While both the majority and the Fifth Circuit rely on UT's classroom study, see *ibid.*; 758 F. 3d, at 658–659, they completely ignore its finding that Hispanics are better represented than Asian-Americans in UT classrooms. In fact, they act almost as if Asian-American students do not exist. See *ante*, at 383 (mentioning Asian-Americans only a single time outside of parentheticals, and not in the context of the classroom study); 758 F. 3d, at 658 (mentioning Asian-Americans only a single time).[5] Only the District Court ac-

[5] In particular, the Fifth Circuit's willful blindness to Asian-American students is absolutely shameless. For instance, one of the Fifth Circuit's primary contentions—which UT repeatedly highlighted in its brief and at argument—is that, given the SAT score gaps between whites on the one hand and African-Americans and Hispanics on the other, "holistic admissions would approach an all-white enterprise" in the absence of racial preferences. 758 F. 3d, at 647. In making this argument, the court below failed to mention Asian-Americans. The reason for this omission is obvious: As indicated in *the very sources* that the Fifth Circuit relied on for this point, on *the very pages* it cited, Asian-American enrollees admitted to UT through holistic review have consistently *higher* average SAT scores than white enrollees admitted through holistic review. See UT, Office of Admissions, Implementation and Results of the Texas Automatic Admissions Law (HB 588) at the University of Texas at Austin, Demographic Analysis of Entering Freshmen Fall of 2006, pp. 11–14 (rev. Dec. 6, 2007), cited at 758 F. 3d, at 647, n. 71; UT, Office of Admissions, Implementation and Results of the Texas Automatic Admissions Law (HB 588) at the University of Texas at Austin, Demographic Analysis of Entering Freshmen Fall of 2008, pp. 12–15 (Oct. 28, 2008), cited at 758 F. 3d, at 647, n. 72. The Fifth Circuit's intentional omission of Asian-Americans from its analysis is also evident in the appendixes to its opinion, which either omit any reference to Asian-Americans or misleadingly label them as "other." See *id.*, at 661. The reality of how UT treats Asian-American applicants apparently does not fit into the neat story the Fifth Circuit wanted to tell.

knowledged the impact of UT's policy on Asian-American students. But it brushed aside this impact, concluding—astoundingly—that UT can pick and choose which racial and ethnic groups it would like to favor. According to the District Court, "nothing in *Grutter* requires a university to give equal preference to every minority group," and UT is allowed "to exercise its discretion in determining which minority groups should benefit from the consideration of race." 645 F. Supp. 2d, at 606.

This reasoning, which the majority implicitly accepts by blessing UT's reliance on the classroom study, places the Court on the "tortuous" path of "decid[ing] which races to favor." *Metro Broadcasting*, 497 U. S., at 632 (KENNEDY, J., dissenting). And the Court's willingness to allow this "discrimination against individuals of Asian descent in UT admissions is particularly troubling, in light of the long history of discrimination against Asian Americans, especially in education." Brief for Asian American Legal Foundation et al. as *Amici Curiae* 6; see also, *e. g.*, *id.*, at 16–17 (discussing the placement of Chinese-Americans in "'separate but equal'" public schools); *Gong Lum* v. *Rice*, 275 U. S. 78, 81–82 (1927) (holding that a 9-year-old Chinese-American girl could be denied entry to a "white" school because she was "a member of the Mongolian or yellow race"). In sum, "[w]hile the Court repeatedly refers to the preferences as favoring 'minorities,' . . . it must be emphasized that the discriminatory policies upheld today operate to exclude" Asian-American students, who "have not made [UT's] list" of favored groups. *Metro Broadcasting*, *supra*, at 632 (KENNEDY, J., dissenting).

Perhaps the majority finds discrimination against Asian-American students benign, since Asian-Americans are "*overrepresented*" at UT. 645 F. Supp. 2d, at 606. But "[h]istory should teach greater humility." *Metro Broadcasting*, 497 U. S., at 609 (O'Connor, J., dissenting). "'[B]enign' carries with it no independent meaning, but reflects only acceptance of the current generation's conclusion that a politically ac-

ceptable burden, imposed on particular citizens on the basis of race, is reasonable." *Id.*, at 610. Where, as here, the government has provided little explanation for why it needs to discriminate based on race, "'there is simply no way of determining what classifications are "benign" . . . and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.'" *Parents Involved*, 551 U. S., at 783 (opinion of KENNEDY, J.) (quoting *Croson*, 488 U. S., at 493 (plurality opinion of O'Connor, J.)). By accepting the classroom study as proof that UT satisfied strict scrutiny, the majority "move[s] us from 'separate but equal' to 'unequal but benign.'" *Metro Broadcasting*, *supra*, at 638 (KENNEDY, J., dissenting).

In addition to demonstrating that UT discriminates against Asian-American students, the classroom study also exhibits UT's use of a few crude, overly simplistic racial and ethnic categories. Under the UT plan, both the favored and the disfavored groups are broad and consist of students from enormously diverse backgrounds. See Supp. App. 30a; see also *Fisher I*, 570 U. S., at 306 ("five predefined racial categories"). Because "[c]rude measures of this sort threaten to reduce [students] to racial chits," *Parents Involved*, 551 U. S., at 798 (opinion of KENNEDY, J.), UT's reliance on such measures further undermines any claim based on classroom diversity statistics, see *id.*, at 723 (majority opinion) (criticizing school policies that viewed race in rough "white/nonwhite" or "black/'other'" terms); *id.*, at 786 (opinion of KENNEDY, J.) (faulting government for relying on "crude racial categories"); *Metro Broadcasting*, *supra*, at 633, n. 1 (KENNEDY, J., dissenting) (concluding that "'the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals,'" and noting that if the government "'is to make a serious effort to define racial classes by criteria that can be administered objectively, it must study precedents such as the First Regulation to the Reichs Citizenship Law of November 14, 1935'").

For example, students labeled "Asian American," Supp. App. 26a, seemingly include "individuals of Chinese, Japanese, Korean, Vietnamese, Cambodian, Hmong, Indian and other backgrounds comprising roughly 60% of the world's population," Brief for Asian American Legal Foundation et al. as *Amici Curiae*, O. T. 2012, No. 11–345, p. 28.[6] It would be ludicrous to suggest that all of these students have similar backgrounds and similar ideas and experiences to share. So why has UT lumped them together and concluded that it is appropriate to discriminate against Asian-American students because they are "overrepresented" in the UT student body? UT has no good answer. And UT makes no effort to ensure that it has a critical mass of, say, "Filipino Americans" or "Cambodian Americans." Tr. of Oral Arg. 52 (Oct. 10, 2012). As long as there are a sufficient number of "Asian Americans," UT is apparently satisfied.

UT's failure to provide any definition of the various racial and ethnic groups is also revealing. UT does not specify what it means to be "African-American," "Hispanic," "Asian American," "Native American," or "White." Supp. App. 30a. And UT evidently labels each student as falling into only a single racial or ethnic group, see, *e. g.*, *id.*, at 10a–13a, 30a, 43a–44a, 71a, 156a–157a, 169a–170a, without explaining how individuals with ancestors from different groups are to be characterized. As racial and ethnic prejudice recedes, more and more students will have parents (or grandparents) who fall into more than one of UT's five groups. According to census figures, individuals describing themselves as members of multiple races grew by 32% from 2000 to 2010.[7] A

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[6] And it is anybody's guess whether this group also includes applicants "of full or partial Arab, Armenian, Azerbaijani, Georgian, Kurdish, Persian, or Turkish descent, or whether such applicants are to be considered 'White.'" Brief for Judicial Watch, Inc., et al. as *Amici Curiae* 16.

[7] United States Census Bureau, 2010 Census Shows Multiple-Race Population Grew Faster Than Single-Race Population (Sept. 27, 2012), online at https://www.census.gov/newsroom/releases/archives/race/cb12-182.html.

recent survey reported that 26% of Hispanics and 28% of Asian-Americans marry a spouse of a different race or ethnicity.[8] UT's crude classification system is ill suited for the more integrated country that we are rapidly becoming. UT assumes that if an applicant describes himself or herself as a member of a particular race or ethnicity, that applicant will have a perspective that differs from that of applicants who describe themselves as members of different groups. But is this necessarily so? If an applicant has one grandparent, great-grandparent, or great-great-grandparent who was a member of a favored group, is that enough to permit UT to infer that this student's classroom contribution will reflect a distinctive perspective or set of experiences associated with that group? UT does not say. It instead relies on applicants to "classify themselves." *Fisher I*, 570 U. S., at 306. This is an invitation for applicants to game the system.

Finally, it seems clear that the lack of classroom diversity is attributable in good part to factors other than the representation of the favored groups in the UT student population. UT offers an enormous number of classes in a wide range of subjects, and it gives undergraduates a very large measure of freedom to choose their classes. UT also offers courses in subjects that are likely to have special appeal to members of the minority groups given preferential treatment under its challenged plan, and this of course diminishes the number of other courses in which these students can enroll. See, *e. g.*, Supp. App. 72a–73a (indicating that the representation of African-Americans and Hispanics in UT classrooms varies substantially from major to major). Having designed an undergraduate program that virtually ensures a lack of classroom diversity, UT is poorly positioned to argue

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[8] W. Wang, Pew Research Center, Interracial Marriage: Who Is "Marrying Out"? (June 12, 2015), online at http://www.pewresearch.org/fact-tank/2015/06/12/interracial-marriage-who-is-marrying-out/; W. Wang, Pew Research Center, The Rise of Intermarriage (Feb. 16, 2012), online at http://www.pewsocialtrends.org/2012/02/16/the-rise-of-intermarriage/.

that this very result provides a justification for racial and ethnic discrimination, which the Constitution rarely allows.

3

UT's purported interest in intraracial diversity, or "diversity within diversity," Brief for Respondents 34, also falls short. At bottom, this argument relies on the unsupported assumption that there is something deficient or at least radically different about the African-American and Hispanic students admitted through the Top Ten Percent Plan.

Throughout this litigation, UT has repeatedly shifted its position on the need for intraracial diversity. Initially, in the 2004 Proposal, UT did not rely on this alleged need at all. Rather, the Proposal "examined two metrics—classroom diversity and demographic disparities—that it concluded were relevant to its ability to provide [the] benefits of diversity." Brief for United States as *Amicus Curiae* 27–28. Those metrics looked only to the numbers of African-Americans and Hispanics, not to diversity within each group.

On appeal to the Fifth Circuit and in *Fisher I*, however, UT began to emphasize its intraracial diversity argument. UT complained that the Top Ten Percent Law hinders its efforts to assemble a broadly diverse class because the minorities admitted under that law are drawn largely from certain areas of Texas where there are majority-minority schools. These students, UT argued, tend to come from poor, disadvantaged families, and the University would prefer a system that gives it substantial leeway to seek broad diversity *within* groups of underrepresented minorities. In particular, UT asserted a need for more African-American and Hispanic students from privileged backgrounds. See, *e. g.*, Brief for Respondents in No. 11–345, at 34 (explaining that UT needs race-conscious admissions in order to admit "[t]he African-American or Hispanic child of successful professionals in Dallas"); *ibid.* (claiming that privileged minorities "have great potential for serving as a 'bridge' in promot-

ing cross-racial understanding, as well as in breaking down racial stereotypes"); *ibid.* (intimating that the underprivileged minority students admitted under the Top Ten Percent Plan "*reinforc[e]*" "stereotypical assumptions"); Tr. of Oral Arg. 43–45 (Oct. 10, 2012) ("[A]lthough the percentage plan certainly helps with minority admissions, by and large, the—the minorities who are admitted tend to come from segregated, racially-identifiable schools," and "we want minorities from different backgrounds"). Thus, the Top Ten Percent Law is faulted for admitting *the wrong kind of African-American and Hispanic students*.

The Fifth Circuit embraced this argument on remand, endorsing UT's claimed need to enroll minorities from "high-performing," "majority-white" high schools. 758 F. 3d, at 653. According to the Fifth Circuit, these more privileged minorities "bring a perspective not captured by" students admitted under the Top Ten Percent Law, who often come "from highly segregated, underfunded, and underperforming schools." *Ibid.* For instance, the court determined, privileged minorities "can enrich the diversity of the student body in distinct ways" because such students have "higher levels of preparation and better prospects for admission to UT Austin's more demanding colleges" than underprivileged minorities. *Id.*, at 654; see also *Fisher*, 631 F. 3d, at 240, n. 149 (concluding that the Top Ten Percent Plan "widens the 'credentials gap' between minority and non-minority students at the University, which risks driving away matriculating minority students from difficult majors like business or the sciences").

Remarkably, UT now contends that petitioner has "fabricat[ed]" the argument that it is seeking affluent minorities. Brief for Respondents 2. That claim is impossible to square with UT's prior statements to this Court in the briefing and oral argument in *Fisher I*.[9] Moreover, although UT re-

[9] *Amici* supporting UT certainly understood it to be arguing that it needs affirmative action to admit privileged minorities. See Brief for Six Educational Nonprofit Organizations 38 (citing Brief for Respondents in

frames its argument, it continues to assert that it needs affirmative action to admit privileged minorities. For instance, UT's brief highlights its interest in admitting "[t]he black student with high grades from Andover." Brief for Respondents 33. Similarly, at oral argument, UT claimed that its "interests in the educational benefits of diversity would not be met if all of [the] minority students were . . . coming from depressed socioeconomic backgrounds." Tr. of Oral Arg. 53 (Dec. 9, 2015); see also *id.*, at 43, 45.

Ultimately, UT's intraracial diversity rationale relies on the baseless assumption that there is something wrong with African-American and Hispanic students admitted through the Top Ten Percent Plan, because they are "from the lower-performing, racially identifiable schools." *Id.*, at 43; see *id.*, at 42–43 (explaining that "the basis" for UT's conclusion that it was "not getting a variety of perspectives among African-Americans or Hispanics" was the fact that the Top Ten Percent Plan admits underprivileged minorities from highly segregated schools). In effect, UT asks the Court "to *assume*"—without any evidence—"that minorities admitted under the Top Ten Percent Law . . . are somehow more homogenous, less dynamic, and more undesirably stereotypical

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No. 11–345, p. 34). And UT's *amici* continue to press the full-throated version of the argument. See Brief for Six Educational Nonprofit Organizations 12–13 ("Intraracial diversity . . . explodes perceived associations between racial groups and particular demographic characteristics, such as the 'common stereotype of Black and Latina/o students[ ] that all students from these groups come from poor, inner-city backgrounds.' Schools like UT combat such stereotypes by seeking to admit African-American and Latino students from elevated socioeconomic and/or non-urban backgrounds" (citation omitted)); *id.*, at 15 (arguing that UT needs racial preferences to admit minority students from "elevated" "socioeconomic backgrounds," because "such students are on a more equal social footing with the average nonminority student"); *id.*, at 37–38 ("African-American and Latino students who may come from higher socioeconomic status . . . may serve as 'debiasing agent[s],' promoting disequilibrium to disrupt stereotypical associations. These students are also likely to be better able to promote communication and integration on campus" (citation omitted)).

than those admitted under holistic review." 758 F. 3d, at 669–670 (Garza, J., dissenting). And UT's assumptions appear to be based on the pernicious stereotype that the African-Americans and Hispanics admitted through the Top Ten Percent Plan only got in because they did not have to compete against very many whites and Asian-Americans. See Tr. of Oral Arg. 42–43 (Dec. 9, 2015). These are "the very stereotypical assumptions [that] the Equal Protection Clause forbids." *Miller*, 515 U. S., at 914. UT cannot satisfy its burden by attempting to "substitute racial stereotype for evidence, and racial prejudice for reason." *Calhoun* v. *United States*, 568 U. S. 1206, 1208 (2013) (SOTOMAYOR, J., respecting denial of certiorari).

In addition to relying on stereotypes, UT's argument that it needs racial preferences to admit privileged minorities turns the concept of affirmative action on its head. When affirmative-action programs were first adopted, it was for the purpose of helping the disadvantaged. See, *e. g.*, *Bakke*, 438 U. S., at 272–275 (opinion of Powell, J.) (explaining that the school's affirmative-action program was designed "to increase the representation" of "'economically and/or educationally disadvantaged' applicants"). Now we are told that a program that tends to admit poor and disadvantaged minority students is inadequate because it does not work to the advantage of those who are more fortunate. This is affirmative action gone wild.

It is also far from clear that UT's assumptions about the socioeconomic status of minorities admitted through the Top Ten Percent Plan are even remotely accurate. Take, for example, parental education. In 2008, when petitioner applied to UT, approximately 79% of Texans aged 25 years or older had a high school diploma, 17% had a bachelor's degree, and 8% had a graduate or professional degree. Dept. of Educ., Nat. Center for Educ. Statistics, T. Snyder & S. Dillow, Digest of Education Statistics 2010, p. 29 (2011). In contrast, 96% of African-Americans admitted through the Top Ten

Percent Plan had a parent with a high school diploma, 59% had a parent with a bachelor's degree, and 26% had a parent with a graduate or professional degree. See UT, Office of Admissions, Student Profile, Admitted Freshman Class of 2008, p. 8 (rev. Aug. 1, 2012) (2008 Student Profile), online at https://utexas.app.box.com/s/twqozsbm2vb9lhm14o0v0czvqs1ygzqr/1/7732448553/23476747441/1. Similarly, 83% of Hispanics admitted through the Top Ten Percent Plan had a parent with a high school diploma, 42% had a parent with a bachelor's degree, and 21% had a parent with a graduate or professional degree. *Ibid.* As these statistics make plain, the minorities that UT characterizes as "coming from depressed socioeconomic backgrounds," Tr. of Oral Arg. 53 (Dec. 9, 2015), generally come from households with education levels exceeding the norm in Texas.

Or consider income levels. In 2008, the median annual household income in Texas was $49,453. United States Census Bureau, A. Noss, Household Income for States: 2008 and 2009, p. 4 (2010), online at https://www.census.gov/prod/2010pubs/acsbr09-2.pdf. The household income levels for Top Ten Percent African-American and Hispanic admittees were on par: Roughly half of such admittees came from households below the Texas median, and half came from households above the median. See 2008 Student Profile 6. And a large portion of these admittees are from households with income levels far exceeding the Texas median. Specifically, 25% of African-Americans and 27% of Hispanics admitted through the Top Ten Percent Plan in 2008 were raised in households with incomes exceeding $80,000. *Ibid.* In light of this evidence, UT's actual argument is not that it needs affirmative action to ensure that its minority admittees are representative of the State of Texas. Rather, UT is asserting that it needs affirmative action to ensure that its minority students disproportionally come from families that are wealthier and better educated than the average Texas family.

In addition to using socioeconomic status to falsely denigrate the minority students admitted through the Top Ten Percent Plan, UT also argues that such students are academically inferior. See, *e. g.*, Brief for Respondents in No. 11–345, at 33 ("[T]he top 10% law systematically hinders UT's efforts to assemble a class that is . . . academically excellent"). "On average," UT claims, "African-American and Hispanic holistic admits have higher SAT scores than their Top 10% counterparts." Brief for Respondents 43, n. 8. As a result, UT argues that it needs race-conscious admissions to enroll academically superior minority students with higher SAT scores. Regrettably, the majority seems to embrace this argument as well. See *ante*, at 385 ("[T]he Equal Protection Clause does not force universities to choose between a diverse student body and a reputation for academic excellence").

This argument fails for a number of reasons. First, it is simply not true that Top Ten Percent minority admittees are academically inferior to holistic admittees. In fact, as UT's president explained in 2000, "top 10 percent high school students make much higher grades in college than non-top 10 percent students," and "[s]trong academic performance in high school is an even better predictor of success in college than standardized test scores." App. 393a–394a; see also Lavergne Deposition 41–42 (agreeing that "it's generally true that students admitted pursuant to HB 588 [the Top Ten Percent Law] have a higher level of academic performance at the University than students admitted outside of HB 588"). Indeed, the statistics in the record reveal that, for each year between 2003 and 2007, African-American in-state freshmen who were admitted under the Top Ten Percent Law earned a higher mean grade point average than those admitted outside of the Top Ten Percent Law. Supp. App. 164a. The same is true for Hispanic students. *Id.*, at 165a. These conclusions correspond to the results of nationwide studies

showing that high school grades are a better predictor of success in college than SAT scores.[10]

It is also more than a little ironic that UT uses the SAT, which has often been accused of reflecting racial and cultural bias,[11] as a reason for dissatisfaction with poor and disadvantaged African-American and Hispanic students who excel both in high school and in college. Even if the SAT does not reflect such bias (and I am ill equipped to express a view on that subject), SAT scores clearly correlate with wealth.[12]

UT certainly has a compelling interest in admitting students who will achieve academic success, but it does not follow that it has a compelling interest in maximizing admittees' SAT scores. Approximately 850 4-year-degree

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[10] See, *e. g.*, Strauss, Study: High School Grades Best Predictor of College Success—Not SAT/ACT Scores, Washington Post, Feb. 21, 2014, online at https://www.washingtonpost.com/news/answer-sheet/wp/2014/02/21/a-telling-study-about-act-sat-scores/.

[11] See, *e. g.*, Freedle, Correcting the SAT's Ethnic and Social-Class Bias: A Method for Reestimating SAT Scores, 73 Harv. Ed. Rev. 1 (2003) ("The SAT has been shown to be both culturally and statistically biased against African Americans, Hispanic Americans, and Asian Americans"); Santelices & Wilson, Unfair Treatment? The Case of Freedle, the SAT, and the Standardization Approach to Differential Item Functioning, 80 Harv. Ed. Rev. 106, 127 (2010) (questioning the validity of African-American SAT scores and, consequently, admissions decisions based on those scores); Brief for Amherst College et al. as *Amici Curiae* 15–16 ("[E]xperience has taught *amici* that SAT and ACT scores for African-American students do not accurately predict achievement later in college and beyond"); Brief for Experimental Psychologists as *Amici Curiae* 7 ("A substantial body of research by social scientists has revealed that standardized test scores and grades often underestimate the true academic capacity of members of certain minority groups"); Brief for Six Educational Nonprofit Organizations as *Amici Curiae* 21 ("Underrepresentation of African-American and Latino students by conventional academic metrics was also a reflection of the racial bias in standardized testing").

[12] Zumbrun, SAT Scores and Income Inequality: How Wealthier Kids Rank Higher, Wall Street Journal, Oct. 7, 2014, online at http://blogs.wsj.com/economics/2014/10/07/sat-scores-and-income-inequality-how-wealthier-kids-rank-higher/.

institutions do not require the SAT or ACT as part of the admissions process. See J. Soares, SAT Wars: The Case for Test-Optional College Admissions 2 (2012). This includes many excellent schools.[13]

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[13] See, *e. g.*, Brief for California Institute of Technology et al. as *Amici Curiae* 15 ("[I]n amicus George Washington University's experience, standardized test scores are considered so limited in what they can reveal about an applicant that the University recently has done away with the requirement altogether"); see also American University, Applying Test Optional, online at http://www.american.edu/admissions/testoptional.cfm; The University of Arizona, Office of Admissions, Frequently Asked Questions, online at https://admissions.arizona.edu/freshmen/frequently-asked-questions; Bowdoin College, Test Optional Policy, online at http://www.bowdoin.edu/admissions/apply/testing-policy.shtml; Brandeis University, Test-Optional Policy, online at http://www.brandeis.edu/admissions/apply/testing.html; Bryn Mawr College, Standardized Testing Policy, online at http://www.brynmawr.edu/admissions/standardized-testing-policy; College of the Holy Cross, What We Look For, online at http://www.holycross.edu/admissions-aid/what-we-look-for; George Washington University, Test-Optional Policy, online at https://undergraduate.admissions.gwu.edu/test-optional-policy; New York University, Standardized Tests, online at http://www.nyu.edu/admissions/undergraduate-admissions/how-to-apply/all-freshmen-applicants/instructions/standardized-tests.html; Smith College, For First-Year Students, online at http://www.smith.edu/admission/firstyear_apply.php; Temple University, Temple Option FAQ, online at http://admissions.temple.edu/node/441; Wake Forest University, Test Optional, online at http://admissions.wfu.edu/apply/test-optional/.

In 2008, Wake Forest dropped standardized testing requirements based at least in part on "the perception that these tests are unfair to blacks and other minorities and do not offer an effective tool to determine if these minority students will succeed in college." Wake Forest Presents the Most Serious Threat So Far to the Future of the SAT, The Journal of Blacks in Higher Education, No. 60 (Summer 2008), p. 9; see also *ibid.* ("University admissions officials say that one reason for dropping the SAT is to encourage more black and minority applicants"). "The year after the new policy was announced, Wake Forest's minority applications went up by 70%, and the first test-optional class" exhibited "a big leap forward" in minority enrollment. J. Soares, SAT Wars: The Case for Test-Optional College Admissions 3 (2012). From 2008 to 2015, "[e]thnic diversity in the undergraduate population increased by 54 percent." Wake Forest University, Test Optional, online at http://admissions.wfu.edu/apply/test-

To the extent that intraracial diversity refers to something other than admitting privileged minorities and minorities with higher SAT scores, UT has failed to define that interest with any clarity. UT "has not provided any concrete targets for admitting more minority students possessing [the] unique qualitative-diversity characteristics" it desires. 758 F. 3d, at 669 (Garza, J., dissenting). Nor has UT specified which characteristics, viewpoints, and life experiences are supposedly lacking in the African-Americans and Hispanics admitted through the Top Ten Percent Plan. In fact, because UT administrators make no collective, qualitative assessment of the minorities admitted automatically, they have no way of knowing which attributes are missing. See *ante*, at 378 (admitting that there is no way of knowing "how students admitted solely based on their class rank differ in their contribution to diversity from students admitted through holistic review"); 758 F. 3d, at 669 (Garza, J., dissenting) ("The University does not assess whether Top Ten Percent Law admittees exhibit sufficient diversity within diversity, whether the requisite 'change agents' are among them, and whether these admittees are able, collectively or individually, to combat pernicious stereotypes"). Furthermore, UT has not identified "when, if ever, its goal (which remains undefined) for qualitative diversity will be reached." *Id.*, at 671. UT's intraracial diversity rationale is thus too imprecise to permit strict scrutiny analysis.

Finally, UT's shifting positions on intraracial diversity, and the fact that intraracial diversity was not emphasized in the Proposal, suggest that it was not "the actual purpose underlying the discriminatory classification." *Mississippi Univ. for Women* v. *Hogan*, 458 U. S. 718, 730 (1982). Instead, it appears to be a *post hoc* rationalization.

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optional/. And Wake Forest reports that dropping standardized testing requirements has "not compromise[d] the academic quality of [the] institution" and that it has made the university "more diverse and intellectually stimulating." *Ibid.*

UT also alleges—and the majority embraces—an interest in avoiding "feelings of loneliness and isolation" among minority students. *Ante*, at 384; see Brief for Respondents 7–8, 38–39. In support of this argument, they cite only demographic data and anecdotal statements by UT officials that some students (we are not told how many) feel "isolated." This vague interest cannot possibly satisfy strict scrutiny.

If UT is seeking demographic parity to avoid isolation, that is impermissible racial balancing. See Part II–C–1, *supra*. And linking racial loneliness and isolation to state demographics is illogical. Imagine, for example, that an African-American student attends a university that is 20% African-American. If racial isolation depends on a comparison to state demographics, then that student is more likely to feel isolated if the school is located in Mississippi (which is 37.0% African-American) than if it is located in Montana (which is 0.4% African-American). See United States Census Bureau, QuickFacts, online at https://www.census.gov/quickfacts/table/PST045215/28,30. In reality, however, the student may feel—if anything—*less* isolated in Mississippi, where African-Americans are more prevalent in the population at large.

If, on the other hand, state demographics are not driving UT's interest in avoiding racial isolation, then its treatment of Asian-American students is hard to understand. As the District Court noted, "the gross number of Hispanic students attending UT exceeds the gross number of Asian-American students." 645 F. Supp. 2d, at 606. In 2008, for example, UT enrolled 1,338 Hispanic freshmen and 1,249 Asian-American freshmen. Supp. App. 156a. UT never explains why the Hispanic students—but not the Asian-American students—are isolated and lonely enough to receive an admissions boost, notwithstanding the fact that there are more Hispanics than Asian-Americans in the student population. The anecdotal statements from UT officials certainly do not

indicate that Hispanics are somehow lonelier than Asian-Americans.

Ultimately, UT has failed to articulate its interest in preventing racial isolation with any clarity, and it has provided no clear indication of how it will know when such isolation no longer exists. Like UT's purported interests in demographic parity, classroom diversity, and intraracial diversity, its interest in avoiding racial isolation cannot justify the use of racial preferences.

D

Even assuming UT is correct that, under *Grutter*, it need only cite a generic interest in the educational benefits of diversity, its plan still fails strict scrutiny because it is not narrowly tailored. Narrow tailoring requires "a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications." *Fisher I*, 570 U. S., at 312. "If a '"nonracial approach . . . could promote the substantial interest about as well and at tolerable administrative expense,"' then the university may not consider race." *Ibid.* (citations omitted). Here, there is no evidence that race-blind, holistic review would not achieve UT's goals at least "about as well" as UT's race-based policy. In addition, UT could have adopted other approaches to further its goals, such as intensifying its outreach efforts, uncapping the Top Ten Percent Law, or placing greater weight on socioeconomic factors.

The majority argues that none of these alternatives is "a workable means for the University to attain the benefits of diversity it sought." *Ante*, at 385. Tellingly, however, the majority devotes only a single, conclusory sentence to the most obvious race-neutral alternative: race-blind, holistic review that considers the applicant's unique characteristics and personal circumstances. See *ibid.*[14] Under a system that

[14] The Court asserts that race-blind, holistic review is not a workable alternative because UT tried, and failed, to meet its goals via that method from 1996 to 2003. See *ante*, at 385 ("Perhaps more significantly, in the

combines the Top Ten Percent Plan with race-blind, holistic review, UT could still admit "the star athlete or musician whose grades suffered because of daily practices and training," the "talented young biologist who struggled to maintain above-average grades in humanities classes," and the "student whose freshman-year grades were poor because of a family crisis but who got herself back on track in her last three years of school." *Ante*, at 386. All of these unique circumstances can be considered without injecting race into the process. Because UT has failed to provide any evidence whatsoever that race-conscious holistic review will achieve its diversity objectives more effectively than race-blind holistic review, it cannot satisfy the heavy burden imposed by the strict scrutiny standard.

The fact that UT's racial preferences are unnecessary to achieve its stated goals is further demonstrated by their minimal effect on UT's diversity. In 2004, when race was not a factor, 3.6% of non-Top Ten Percent Texas enrollees were African-American and 11.6% were Hispanic. See Supp. App. 157a. It would stand to reason that at least the same percentages of African-American and Hispanic students would have been admitted through holistic review in 2008 even if race were not a factor. If that assumption is correct, then race was determinative for only 15 African-American students and 18 Hispanic students in 2008 (representing 0.2% and 0.3%, respectively, of the total en-

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wake of *Hopwood*, the University spent seven years attempting to achieve its compelling interest using race-neutral holistic review"). But the Court never explains its basis for concluding that UT's previous system failed. We are not told how the Court is measuring success or how it knows that a race-conscious program will satisfy UT's goals more effectively than race-neutral, holistic review. And although the majority elsewhere emphasizes "the University's continuing obligation to satisfy the burden of strict scrutiny in light of changing circumstances," *ante*, at 379, its rejection of race-blind, holistic review relies exclusively on "evidence" predating petitioner's suit by five years.

rolled first-time freshmen from Texas high schools). See *ibid.*[15]

The majority contends that "[t]he fact that race consciousness played a role in only a small portion of admissions decisions should be a hallmark of narrow tailoring, not evidence of unconstitutionality." *Ante*, at 384–385. This argument directly contradicts this Court's precedent. Because racial classifications are "'a highly suspect tool,'" *Grutter*, 539 U. S., at 326, they should be employed only "as a last resort," *Croson*, 488 U. S., at 519 (opinion of KENNEDY, J.); see also *Grutter*, *supra*, at 342 ("[R]acial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands"). Where, as here, racial preferences have only a slight impact on minority enrollment, a race-neutral alternative likely could have reached the same result. See *Parents Involved*, 551 U. S., at 733–734 (holding that the "minimal effect" of school districts' racial classifications "casts doubt on the necessity of using [such] classifications" and "suggests that other means [of achieving their objectives] would be effective"). As JUSTICE KENNEDY once aptly put it, "the small number of [students] affected suggests that the schoo[l] could have achieved [its] stated ends through different means." *Id.*, at 790 (opinion concurring in part and concur-

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[15] In 2008, 1,208 first-time freshmen from Texas high schools enrolled at UT after being admitted outside the Top Ten Percent Plan. Supp. App. 157a. Based on the 2004 statistics, it is reasonable to assume that, if the University had undertaken a *race-neutral* holistic review in 2008, 3.6% (43) of these students would have been African-American and 11.6% (140) would have been Hispanic. See *ibid.* Under the University's *race-conscious* holistic review, 58 African-American freshmen from Texas and 158 Hispanic freshmen from Texas were enrolled in 2008, thus reflecting an increase of only 15 African-American students and 18 Hispanic students. And if those marginal increases (of 15 and 18 students) are divided by the number of total enrolled first-time freshmen from Texas high schools (6,322), see *ibid.*, the calculation yields the 0.2% and 0.3% percentages mentioned in the text above.

ring in judgment). And in this case, a race-neutral alternative could accomplish UT's objectives without gratuitously branding the covers of tens of thousands of applications with a bare racial stamp and "tell[ing] each student he or she is to be defined by race." *Id.*, at 789.

III

The majority purports to agree with much of the above analysis. The Court acknowledges that "'[b]ecause racial characteristics so seldom provide a relevant basis for disparate treatment,'" "'[r]ace may not be considered [by a university] unless the admissions process can withstand strict scrutiny.'" *Ante*, at 376. The Court admits that the burden of proof is on UT, *ante*, at 377, and that "a university bears a heavy burden in showing that it had not obtained the educational benefits of diversity before it turned to a race-conscious plan," *ante*, at 383. And the Court recognizes that the record here is "almost devoid of information about the students who secured admission to the University through the Plan," and that "[t]he Court thus cannot know how students admitted solely based on their class rank differ in their contribution to diversity from students admitted through holistic review." *Ante*, at 378. This should be the end of the case: Without identifying what was missing from the African-American and Hispanic students it was already admitting through its race-neutral process, and without showing how the use of race-based admissions could rectify the deficiency, UT cannot demonstrate that its procedure is narrowly tailored.

Yet, somehow, the majority concludes that *petitioner* must lose as a result of UT's failure to provide evidence justifying its decision to employ racial discrimination. Tellingly, the Court frames its analysis as if petitioner bears the burden of proof here. See *ante*, at 380–388. But it is not the petitioner's burden to show that the consideration of race is unconstitutional. To the extent the record is inadequate, the

responsibility lies with UT. For "[w]hen a court subjects governmental action to strict scrutiny, it cannot construe ambiguities in favor of the State," *Parents Involved*, *supra*, at 786 (opinion of KENNEDY, J.), particularly where, as here, the summary judgment posture obligates the Court to view the facts in the light most favorable to petitioner, see *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574, 587 (1986).

Given that the University bears the burden of proof, it is not surprising that UT never made the argument that it should win based on the *lack* of evidence. UT instead asserts that "if the Court believes there are any deficiencies in [the] record that cast doubt on the constitutionality of UT's policy, the answer is to order a trial, not to grant summary judgment." Brief for Respondents 51; see also *id.*, at 52–53 ("[I]f this Court has any doubts about how the Top 10% Law works, or how UT's holistic plan offsets the tradeoffs of the Top 10% Law, the answer is to remand for a trial"). Nevertheless, the majority cites three reasons for breaking from the normal strict scrutiny standard. None of these is convincing.

A

First, the Court states that, while "th[e] evidentiary gap perhaps could be filled by a remand to the district court for further factfinding" in "an ordinary case," that will not work here because "[w]hen petitioner's application was rejected, . . . the University's combined percentage-plan/holistic-review approach to admission had been in effect for just three years," so "further factfinding" "might yield little insight." *Ante*, at 378–379. This reasoning is dangerously incorrect. The Equal Protection Clause does not provide a 3-year grace period for racial discrimination. Under strict scrutiny, UT was required to identify evidence that race-based admissions were necessary to achieve a compelling interest *before* it put them in place—not three or more years after. See *ante*, at 383 ("Petitioner is correct that a univer-

sity bears a heavy burden in showing that it had not obtained the educational benefits of diversity *before* it turned to a race-conscious plan" (emphasis added)); *Fisher I*, 570 U. S., at 312 ("[S]trict scrutiny imposes on the university the ultimate burden of demonstrating, *before* turning to racial classifications, that available, workable race-neutral alternatives do not suffice" (emphasis added)). UT's failure to obtain actual evidence that racial preferences were necessary before resolving to use them only confirms that its decision to inject race into admissions was a reflexive response to *Grutter*,[16] and that UT did not seriously consider whether race-neutral means would serve its goals as well as a race-based process.

B

Second, in an effort to excuse UT's lack of evidence, the Court argues that because "the University lacks any authority to alter the role of the Top Ten Percent Plan," "it similarly had no reason to keep extensive data on the Plan or the students admitted under it—particularly in the years before *Fisher I* clarified the stringency of the strict-scrutiny burden for a school that employs race-conscious review." *Ante*, at 379. But UT has long been aware that it bears the burden of justifying its racial discrimination under strict scrutiny. See, *e. g.*, Brief for Respondents in No. 11–345, at 22 ("It is undisputed that UT's consideration of race in its holistic admissions process triggers strict scrutiny," and "that inquiry is undeniably rigorous").[17] In light of this burden, UT had

[16] Recall that UT's president vowed to reinstate race-conscious admissions within hours of *Grutter*'s release. See Part I, *supra*.

[17] See also, *e. g.*, *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701, 720 (2007) ("It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny"); *Grutter* v. *Bollinger*, 539 U. S. 306, 326 (2003) ("We have held that all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny' "); *Gratz* v. *Bollinger*, 539 U. S. 244, 270 (2003) ("It is by now well established that 'all racial classifications reviewable

every reason to keep data on the students admitted through the Top Ten Percent Plan. Without such data, how could UT have possibly identified any characteristics that were lacking in Top Ten Percent admittees and that could be obtained via race-conscious admissions? How could UT determine that employing a race-based process would serve its goals better than, for instance, expanding the Top Ten Percent Plan? UT could not possibly make such determinations without studying the students admitted under the Top Ten Percent Plan. Its failure to do so demonstrates that UT unthinkingly employed a race-based process without examining whether the use of race was actually necessary. This is not—as the Court claims—a "good-faith effor[t] to comply with the law." *Ante*, at 379.

The majority's willingness to cite UT's "good faith" as the basis for excusing its failure to adduce evidence is particularly inappropriate in light of UT's well-documented absence of good faith. Since UT described its admissions policy to this Court in *Fisher I*, it has been revealed that this description was incomplete. As explained in an independent investigation into UT admissions, UT maintained a clandestine admissions system that evaded public scrutiny until a former admissions officer blew the whistle in 2014. See Kroll, Inc., University of Texas at Austin—Investigation of Admissions Practices and Allegations of Undue Influence 4 (Feb. 6, 2015) (Kroll Report). Under this longstanding, secret process, University officials regularly overrode normal holistic review to allow politically connected individuals—such as donors, alumni, legislators, members of the board of regents, and UT officials and faculty—to get family members and other

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under the Equal Protection Clause must be strictly scrutinized'"); *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 227 (1995) ("[W]e hold today that all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny").

friends admitted to UT, despite having grades and standardized test scores substantially below the median for admitted students. *Id.*, at 12–14; see also Blanchard & Hoppe, Influential Texans Helped Underqualified Students Get Into UT, Dallas Morning News, July 20, 2015, online at http://www.dallasnews.com/news/education/headlines/20150720-influential-texans-helped-underqualified-students-get-into-ut.ece ("Dozens of highly influential Texans—including lawmakers, millionaire donors and university regents—helped underqualified students get into the University of Texas, often by writing to UT officials, records show").

UT officials involved in this covert process intentionally kept few records and destroyed those that did exist. See, *e. g.*, Kroll Report 43 ("Efforts were made to minimize paper trails and written lists during this end-of-cycle process. At one meeting, the administrative assistants tried not keeping any notes, but this proved difficult, so they took notes and later shredded them. One administrative assistant usually brought to these meetings a stack of index cards that were subsequently destroyed"); see also *id.*, at 13 (finding that "written records or notes" of the secret admissions meetings "are not maintained and are typically shredded"). And in the course of this litigation, UT has been less than forthright concerning its treatment of well-connected applicants. Compare, *e. g.*, Tr. of Oral Arg. 51 (Dec. 9, 2015) ("University of Texas does not do legacy, Your Honor"), and App. 281a ("[O]ur legacy policy is such that we don't consider legacy"), with Kroll Report 29 (discussing evidence that "alumni/legacy influence" "results each year in certain applicants receiving a competitive boost or special consideration in the admissions process," and noting that this is "an aspect of the admissions process that does not appear in the public representations of UT-Austin's admissions process"). Despite UT's apparent readiness to mislead the public and the Court, the majority is "willing to be satisfied by [UT's] profession

of its own good faith." *Grutter*, 539 U. S., at 394 (KENNEDY, J., dissenting).[18]

Notwithstanding the majority's claims to the contrary, UT should have access to plenty of information about "how students admitted solely based on their class rank differ in their contribution to diversity from students admitted through holistic review." *Ante*, at 378. UT undoubtedly knows which students were admitted through the Top Ten Percent Plan and which were admitted through holistic review. See, *e. g.*, Supp. App. 157a. And it undoubtedly has a record of all of the classes in which these students enrolled. See, *e. g.*, UT, Office of the Registrar, Transcript—Official, online at https://registrar.utexas.edu/students/transcripts-official (instructing graduates on how to obtain a transcript listing a "comprehensive record" of classes taken). UT could use this information to demonstrate whether the Top Ten Percent minor-

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[18] The majority's claim that UT has not "had a full opportunity to respond to" the Kroll Report, *ante*, at 383, is simply wrong. The report was discussed in no less than six of the briefs filed in this case. See Brief in Opposition 19–20, n. 2; Reply to Brief in Opposition 6; Brief for Respondents 51, n. 9; Brief for Cato Institute as *Amicus Curiae* 8–12 (certiorari stage); Brief for Cato Institute as *Amicus Curiae* 12, and n. 4 (merits stage); Brief for Judicial Education Project as *Amicus Curiae* 5–17. Not only did UT have an "opportunity to respond" to the Kroll Report—it *did in fact respond* at both the certiorari stage and the merits stage. See Brief in Opposition 19–20, n. 2 (explicitly discussing the "recently released Kroll Report"); Brief for Respondents 51, n. 9 (similar). And the Court's purported concern about reliance on "extrarecord materials," *ante*, at 383, rings especially hollow in light of its willingness to affirm the decision below, which relied heavily on the Fifth Circuit's own extrarecord Internet research, see, *e. g.*, 758 F. 3d, at 650–653.

The majority is also wrong in claiming that the Kroll Report is "tangential to this case at best." *Ante*, at 383. Given the majority's blind deference to the good faith of UT officials, evidence that those officials "failed to speak with the candor and forthrightness expected of people in their respective positions of trust and leadership," Kroll Report 29, when discussing UT's admissions process is highly relevant.

ity admittees were more or less likely than the holistic minority admittees to choose to enroll in the courses lacking diversity.

In addition, UT assigns PAI scores to all students—including those admitted through the Top Ten Percent Plan—for purposes of admission to individual majors. Accordingly, all students must submit a full application containing essays, letters of recommendation, a resume, a list of courses taken in high school, and a description of any extracurricular activities, leadership experience, or special circumstances. See App. 212a–214a, 235a–236a; 758 F. 3d, at 669, n. 14 (Garza, J., dissenting). Unless UT has destroyed these files,[19] it could use them to compare the unique personal characteristics of Top Ten minority admittees with those of holistic minority admittees, and to determine whether the Top Ten admittees are, in fact, less desirable than the holistic admittees. This may require UT to expend some resources, but that is an appropriate burden in light of the strict scrutiny standard and the fact that all of the relevant information is in UT's possession. The cost of factfinding is a strange basis for awarding a victory to UT, which has a huge budget, and a loss to petitioner, who does not.

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[19] UT's current records retention policy requires it to retain student records, including application materials, for at least five years after a student graduates. See University of Texas at Austin, Records Retention Schedule, Agency Item No. AALL358, p. 58 (Nov. 14, 2014), online at https://www.tsl.texas.gov/sites/default/files/public/tslac/slrm/state/schedules/721.pdf. If this policy was in place when UT resumed race-conscious admissions in 2004, then it still had these materials when petitioner filed this suit in 2008, and likely still had them at the time of *Fisher I* in 2013. At the very least, the application materials for the 2008 freshman class appear to be subject to a litigation hold. See App. 290a–292a. To the extent that UT failed to preserve these records, the consequences of that decision should fall on the University, not on petitioner. Cf. *Tyson Foods, Inc.* v. *Bouaphakeo*, 577 U. S. 442, 456 (2016) (allowing "a representative sample to fill an evidentiary gap created by the employer's failure to keep adequate records").

Finally, while I agree with the majority and the Fifth Circuit that *Fisher I* significantly changed the governing law by clarifying the stringency of the strict scrutiny standard,[20] that does not excuse UT from meeting that heavy burden. In *Adarand*, for instance, another case in which the Court clarified the rigor of the strict scrutiny standard, the Court acknowledged that its decision "alter[ed] the playing field in some important respects." 515 U. S., at 237. As a result, it "remand[ed] the case to the lower courts for further consideration *in light of the principles [it had] announced*." *Ibid.* (emphasis added). In other words, the Court made clear that—notwithstanding the shift in the law—the government had to meet the clarified burden it was announcing. The Court did not embrace the notion that its decision to alter the stringency of the strict scrutiny standard somehow allowed the government to automatically prevail.

C

Third, the majority notes that this litigation has persisted for many years, that petitioner has already graduated from another college, that UT's policy may have changed over time, and that this case may offer little prospective guidance. At most, these considerations counsel in favor of dismissing this case as improvidently granted. But see, *e. g.*, *Gratz*, 539 U. S., at 251, and n. 1, 260–262 (rejecting the dissent's argument that, because the case had already persisted long enough for the petitioners to graduate from other schools, the case should be dismissed); *id.*, at 282 (Stevens, J., dissenting). None of these considerations has any bearing whatso-

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[20] See *ante*, at 379 ("*Fisher I* clarified the stringency of the strict-scrutiny burden for a school that employs race-conscious review"); 758 F. 3d, at 642 ("Bringing forward Justice Kennedy's dissent in *Grutter*, the Supreme Court faulted the district court's and this Court's review of UT Austin's means to achieve the permissible goal of diversity"); *id.*, at 665, n. 5 (Garza, J., dissenting) ("I agree with the majority that *Fisher* represents a decisive shift in the law").

ever on the merits of this suit. The majority cannot side with UT simply because it is tired of this case.

IV

It is important to understand what is and what is not at stake in this case. *What is not at stake* is whether UT or any other university may adopt an admissions plan that results in a student body with a broad representation of students from all racial and ethnic groups. UT previously had a race-neutral plan that it claimed had "effectively compensated for the loss of affirmative action," App. 396a, and UT could have taken other steps that would have increased the diversity of its admitted students without taking race or ethnic background into account.

What is at stake is whether university administrators may justify systematic racial discrimination simply by asserting that such discrimination is necessary to achieve "the educational benefits of diversity," without explaining—much less proving—why the discrimination is needed or how the discriminatory plan is well crafted to serve its objectives. Even though UT has never provided any coherent explanation for its asserted need to discriminate on the basis of race, and even though UT's position relies on a series of unsupported and noxious racial assumptions, the majority concludes that UT has met its heavy burden. This conclusion is remarkable—and remarkably wrong.

Because UT has failed to satisfy strict scrutiny, I respectfully dissent.

Syllabus

BIRCHFIELD *v.* NORTH DAKOTA

CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

No. 14–1468. Argued April 20, 2016—Decided June 23, 2016*

To fight the serious harms inflicted by drunk drivers, all States have laws that prohibit motorists from driving with a blood alcohol concentration (BAC) exceeding a specified level. BAC is typically determined through a direct analysis of a blood sample or by using a machine to measure the amount of alcohol in a person's breath. To help secure drivers' cooperation with such testing, the States have also enacted "implied consent" laws that require drivers to submit to BAC tests. Originally, the penalty for refusing a test was suspension of the motorist's license. Over time, however, States have toughened their drunk-driving laws, imposing harsher penalties on recidivists and drivers with particularly high BAC levels. Because motorists who fear these increased punishments have strong incentives to reject testing, some States, including North Dakota and Minnesota, now make it a crime to refuse to undergo testing.

In these cases, all three petitioners were arrested on drunk-driving charges. The state trooper who arrested petitioner Danny Birchfield advised him of his obligation under North Dakota law to undergo BAC testing and told him, as state law requires, that refusing to submit to a blood test could lead to criminal punishment. Birchfield refused to let his blood be drawn and was charged with a misdemeanor violation of the refusal statute. He entered a conditional guilty plea but argued that the Fourth Amendment prohibited criminalizing his refusal to submit to the test. The State District Court rejected his argument, and the State Supreme Court affirmed.

After arresting petitioner William Robert Bernard, Jr., Minnesota police transported him to the station. There, officers read him Minnesota's implied-consent advisory, which like North Dakota's informs motorists that it is a crime to refuse to submit to a BAC test. Bernard refused to take a breath test and was charged with test refusal in the first degree. The Minnesota District Court dismissed the charges, concluding that the warrantless breath test was not permitted under the

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*Together with No. 14–1470, *Bernard* v. *Minnesota*, on certiorari to the Supreme Court of Minnesota, and No. 14–1507, *Beylund* v. *Levi, Director, North Dakota Department of Transportation*, also on certiorari to the Supreme Court of North Dakota.

Fourth Amendment. The State Court of Appeals reversed, and the State Supreme Court affirmed.

The officer who arrested petitioner Steve Michael Beylund took him to a nearby hospital. The officer read him North Dakota's implied-consent advisory, informing him that test refusal in these circumstances is itself a crime. Beylund agreed to have his blood drawn. The test revealed a BAC level more than three times the legal limit. Beylund's license was suspended for two years after an administrative hearing, and on appeal, the State District Court rejected his argument that his consent to the blood test was coerced by the officer's warning. The State Supreme Court affirmed.

Held:

1. The Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving but not warrantless blood tests. Pp. 455–476.

(a) Taking a blood sample or administering a breath test is a search governed by the Fourth Amendment. See *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 616–617; *Schmerber* v. *California*, 384 U. S. 757, 767–768. These searches may nevertheless be exempt from the warrant requirement if they fall within, as relevant here, the exception for searches conducted incident to a lawful arrest. This exception applies categorically, rather than on a case-by-case basis. *Missouri* v. *McNeely*, 569 U. S. 141, 150, n. 3. Pp. 455–457.

(b) The search-incident-to-arrest doctrine has an ancient pedigree that predates the Nation's founding, and no historical evidence suggests that the Fourth Amendment altered the permissible bounds of arrestee searches. The mere "fact of the lawful arrest" justifies "a full search of the person." *United States* v. *Robinson*, 414 U. S. 218, 235. The doctrine may also apply in situations that could not have been envisioned when the Fourth Amendment was adopted. In *Riley* v. *California*, 573 U. S. 373, the Court considered how to apply the doctrine to searches of an arrestee's cell phone. Because founding era guidance was lacking, the Court determined "whether to exempt [the] search from the warrant requirement 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *Id.*, at 385. The same mode of analysis is proper here because the founding era provides no definitive guidance on whether blood and breath tests should be allowed incident to arrest. Pp. 458–461.

(c) The analysis begins by considering the impact of breath and blood tests on individual privacy interests. Pp. 461–464.

Syllabus

(1) Breath tests do not "implicat[e] significant privacy concerns." *Skinner*, 489 U. S., at 626. The physical intrusion is almost negligible. The tests "do not require piercing the skin" and entail "a minimum of inconvenience." *Id.*, at 625. Requiring an arrestee to insert the machine's mouthpiece into his or her mouth and to exhale "deep lung" air is no more intrusive than collecting a DNA sample by rubbing a swab on the inside of a person's cheek, *Maryland* v. *King*, 569 U. S. 435, 446, or scraping underneath a suspect's fingernails, *Cupp* v. *Murphy*, 412 U. S. 291. Breath tests, unlike DNA samples, also yield only a BAC reading and leave no biological sample in the government's possession. Finally, participation in a breath test is not likely to enhance the embarrassment inherent in any arrest. Pp. 461–463.

(2) The same cannot be said about blood tests. They "require piercing the skin" and extract a part of the subject's body, *Skinner*, *supra*, at 625, and thus are significantly more intrusive than blowing into a tube. A blood test also gives law enforcement a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading. That prospect could cause anxiety for the person tested. Pp. 463–464.

(d) The analysis next turns to the States' asserted need to obtain BAC readings. Pp. 464–473.

(1) The States and the Federal Government have a "paramount interest . . . in preserving [public highway] safety," *Mackey* v. *Montrym*, 443 U. S. 1, 17; and States have a compelling interest in creating "deterrent[s] to drunken driving," a leading cause of traffic fatalities and injuries, *id.*, at 18. Sanctions for refusing to take a BAC test were increased because consequences like license suspension were no longer adequate to persuade the most dangerous offenders to agree to a test that could lead to severe criminal sanctions. By making it a crime to refuse to submit to a BAC test, the laws at issue provide an incentive to cooperate and thus serve a very important function. Pp. 464–466.

(2) As for other ways to combat drunk driving, this Court's decisions establish that an arresting officer is not obligated to obtain a warrant before conducting a search incident to arrest simply because there might be adequate time in the particular circumstances to obtain a warrant. The legality of a search incident to arrest must be judged on the basis of categorical rules. See, *e. g.*, *Robinson*, *supra*, at 235. *McNeely*, *supra*, at 152–153, distinguished. Imposition of a warrant requirement for every BAC test would likely swamp courts, given the enormous number of drunk-driving arrests, with little corresponding benefit. And other alternatives—*e. g.*, sobriety checkpoints and ignition interlock systems—are poor substitutes. Pp. 466–471.

Syllabus

(3) Bernard argues that warrantless BAC testing cannot be justified as a search incident to arrest because that doctrine aims to prevent the arrestee from destroying evidence, while the loss of blood alcohol evidence results from the body's metabolism of alcohol, a natural process not controlled by the arrestee. In both instances, however, the State is justifiably concerned that evidence may be lost. The State's general interest in "evidence preservation" or avoiding "the loss of evidence," *Riley, supra*, at 384, readily encompasses the metabolization of alcohol in the blood. Bernard's view finds no support in *Chimel* v. *California*, 395 U. S. 752, 763, *Schmerber, supra*, at 769, or *McNeely, supra*, at 153. Pp. 471–473.

(e) Because the impact of breath tests on privacy is slight, and the need for BAC testing is great, the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving. Blood tests, however, are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test. Respondents have offered no satisfactory justification for demanding the more intrusive alternative without a warrant. In instances where blood tests might be preferable—*e. g.*, where substances other than alcohol impair the driver's ability to operate a car safely, or where the subject is unconscious—nothing prevents the police from seeking a warrant or from relying on the exigent-circumstances exception if it applies. Because breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving. No warrant is needed in this situation. Pp. 474–476.

2. Motorists may not be criminally punished for refusing to submit to a blood test based on legally implied consent to submit to them. It is one thing to approve implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply, but quite another for a State to insist upon an intrusive blood test and then to impose criminal penalties on refusal to submit. There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads. Pp. 476–477.

3. These legal conclusions resolve the three present cases. Birchfield was criminally prosecuted for refusing a warrantless blood draw, and therefore the search that he refused cannot be justified as a search incident to his arrest or on the basis of implied consent. Because there appears to be no other basis for a warrantless test of Birchfield's blood, he was threatened with an unlawful search and unlawfully convicted for refusing that search. Bernard was criminally prosecuted for refusing a warrantless breath test. Because that test was a permissible search

incident to his arrest for drunk driving, the Fourth Amendment did not require officers to obtain a warrant prior to demanding the test, and Bernard had no right to refuse it. Beylund submitted to a blood test after police told him that the law required his submission. The North Dakota Supreme Court, which based its conclusion that Beylund's consent was voluntary on the erroneous assumption that the State could compel blood tests, should reevaluate Beylund's consent in light of the partial inaccuracy of the officer's advisory. Pp. 477–479.

No. 14–1468, 2015 ND 6, 858 N. W. 2d 302, reversed and remanded; No. 14–1470, 859 N. W. 2d 762, affirmed; No. 14–1507, 2015 ND 18, 859 N. W. 2d 403, vacated and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, BREYER, and KAGAN, JJ., joined. SOTOMAYOR, J., filed an opinion concurring in part and dissenting in part, in which GINSBURG, J., joined, *post*, p. 479. THOMAS, J., filed an opinion concurring in the judgment in part and dissenting in part, *post*, p. 496.

Charles A. Rothfeld argued the cause for petitioners in all cases. With him on the briefs in No. 14–1468 were *Andrew J. Pincus*, *Michael B. Kimberly*, *Paul W. Hughes*, *Dan Herbel*, and *Eugene R. Fidell*. *Messrs. Rothfeld*, *Pincus*, *Kimberly*, *Hughes*, *Fidell*, and *Jeffrey S. Sheridan* filed briefs for petitioner in No. 14–1470. *Messrs. Rothfeld*, *Pincus*, *Kimberly*, *Hughes*, *Fidell*, and *Thomas F. Murtha IV* filed briefs for petitioner in No. 14–1507.

Thomas R. McCarthy argued the cause for respondents in Nos. 14–1468 and 14–1507. With him on the brief in No. 14–1468 were *Brian David Grosinger*, *William S. Consovoy*, *J. Michael Connolly*, *Bryan K. Weir*, *Patrick Strawbridge*, and *Michael Park*. *Wayne Stenehjem*, Attorney General of North Dakota, *Douglas A. Bahr*, Solicitor General, and *Messrs. McCarthy*, *Consovoy*, *Connolly*, *Weir*, and *Strawbridge* filed a brief for respondent in No. 14–1507.

Kathryn Keena argued the cause for respondent in No. 14–1470. With her on the brief was *James C. Backstrom*.

Deputy Solicitor General Gershengorn argued the cause for the United States as *amicus curiae* urging affirmance in all cases. With him on the brief were *Solicitor General*

Verrilli, *Assistant Attorney General Caldwell*, *Deputy Solicitor General Dreeben*, *Rachel P. Kovner*, and *Thomas E. Booth*.†

JUSTICE ALITO delivered the opinion of the Court.

Drunk drivers take a grisly toll on the Nation's roads, claiming thousands of lives, injuring many more victims, and inflicting billions of dollars in property damage every year.

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†Briefs of *amici curiae* urging reversal were filed in all cases for the American Civil Liberties Union by *Catherine E. Stetson*, *Andrew D. Selbst*, and *Steven R. Shapiro*; for the Downsize DC Foundation et al. by *Herbert W. Titus*, *William J. Olson*, *John S. Miles*, and *Jeremiah L. Morgan*; for the DUI Defense Lawyers Association by *Daniel J. Koewler*, *Ted Vosk*, *Evan Levow*, and *Linda Callahan*; for Indiana Tech Law School Amicus Project by *Adam Lamparello*; and for the National College for DUI Defense et al. by *Leonard R. Stamm*, *Donald J. Ramsell*, and *Jeffrey T. Green*.

Briefs of *amici curiae* urging affirmance were filed in all cases for the State of New Jersey et al. by *Robert Lougy*, Acting Attorney General of New Jersey, and *Jennifer E. Kmieciak*, *Claudia Joy Demitro*, *Garima Joshi*, *Ian C. Kennedy*, and *Lila B. Leonard*, Deputy Attorneys General, by *Bruce R. Beemer*, First Deputy Attorney General of Pennsylvania, and by the Attorneys General for their respective States as follows: *Luther Strange* of Alabama, *Craig W. Richards* of Alaska, *Leslie Rutledge* of Arkansas, *Cynthia H. Coffman* of Colorado, *Douglas S. Chin* of Hawaii, *Derek Schmidt* of Kansas, *Jeff Landry* of Louisiana, *Timothy C. Fox* of Montana, *Hector Baldares* of New Mexico, *Peter F. Kilmartin* of Rhode Island, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Ken Paxton* of Texas, *Sean D. Reyes* of Utah, *William H. Sorrell* of Vermont, and *Brad D. Schimel* of Wisconsin; for the California District Attorneys Association by *Michael J. Yraceburn*; for the Council of State Governments et al. by *Gregory G. Garre*, *Jonathan Y. Ellis*, *Benjamin W. Snyder*, and *Lisa Soronen*; and for Mothers Against Drunk Driving by *David Venderbush* and *Kirk T. Bradley*.

Kent S. Scheidegger and *Kymberlee C. Stapleton* filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging affirmance in No. 14–1507.

Kay Chopard Cohen filed a brief for the National District Attorney's Association, National Traffic Law Center, as *amicus curiae* in all cases.

Daniel L. Gerdts and *Barry S. Edwards* filed a brief for the Minnesota Association of Criminal Defense Lawyers et al. as *amici curiae* in No. 14–1470.

To fight this problem, all States have laws that prohibit motorists from driving with a blood alcohol concentration (BAC) that exceeds a specified level. But determining whether a driver's BAC is over the legal limit requires a test, and many drivers stopped on suspicion of drunk driving would not submit to testing if given the option. So every State also has long had what are termed "implied consent laws." These laws impose penalties on motorists who refuse to undergo testing when there is sufficient reason to believe they are violating the State's drunk-driving laws.

In the past, the typical penalty for noncompliance was suspension or revocation of the motorist's license. The cases now before us involve laws that go beyond that and make it a crime for a motorist to refuse to be tested after being lawfully arrested for driving while impaired. The question presented is whether such laws violate the Fourth Amendment's prohibition against unreasonable searches.

I

The problem of drunk driving arose almost as soon as motor vehicles came into use. See J. Jacobs, Drunk Driving: An American Dilemma 57 (1989) (Jacobs). New Jersey enacted what was perhaps the Nation's first drunk-driving law in 1906, 1906 N. J. Laws pp. 186, 196, and other States soon followed. These early laws made it illegal to drive while intoxicated but did not provide a statistical definition of intoxication. As a result, prosecutors normally had to present testimony that the defendant was showing outward signs of intoxication, like imbalance or slurred speech. R. Donigan, Chemical Tests and the Law 2 (1966) (Donigan). As one early case put it, "[t]he effects resulting from the drinking of intoxicating liquors are manifested in various ways, and before any one can be shown to be under the influence of intoxicating liquor it is necessary for some witness to prove that some one or more of these effects were perceptible to him." *State* v. *Noble*, 119 Ore. 674, 678, 250 P. 833, 834 (1926).

The 1930's saw a continued rise in the number of motor vehicles on the roads, an end to Prohibition, and not coincidentally an increased interest in combating the growing problem of drunk driving. Jones, Measuring Alcohol in Blood and Breath for Forensic Purposes—A Historical Review, 8 For. Sci. Rev. 13, 20, 33 (1996) (Jones). The American Medical Association and the National Safety Council set up committees to study the problem and ultimately concluded that a driver with a BAC of 0.15% or higher could be presumed to be inebriated. Donigan 21–22. In 1939, Indiana enacted the first law that defined presumptive intoxication based on BAC levels, using the recommended 0.15% standard. 1939 Ind. Acts p. 309; Jones 21. Other States soon followed and then, in response to updated guidance from national organizations, lowered the presumption to a BAC level of 0.10%. Donigan 22–23. Later, States moved away from mere presumptions that defendants might rebut, and adopted laws providing that driving with a 0.10% BAC or higher was *per se* illegal. Jacobs 69–70.

Enforcement of laws of this type obviously requires the measurement of BAC. One way of doing this is to analyze a sample of a driver's blood directly. A technician with medical training uses a syringe to draw a blood sample from the veins of the subject, who must remain still during the procedure, and then the sample is shipped to a separate laboratory for measurement of its alcohol concentration. See 2 R. Erwin, Defense of Drunk Driving Cases §§ 17.03–17.04 (3d ed. 2015) (Erwin). Although it is possible for a subject to be forcibly immobilized so that a sample may be drawn, many States prohibit drawing blood from a driver who resists since this practice helps "to avoid violent confrontations." *South Dakota* v. *Neville*, 459 U. S. 553, 559 (1983).

The most common and economical method of calculating BAC is by means of a machine that measures the amount of alcohol in a person's breath. National Highway Traffic Safety Admin. (NHTSA), E. Haire, W. Leaf, D. Preusser, &

M. Solomon, Use of Warrants To Reduce Breath Test Refusals: Experiences From North Carolina 1 (No. 811461, Apr. 2011). One such device, called the "Drunkometer," was invented and first sold in the 1930's. Note, 30 N. C. L. Rev. 302, 303, and n. 10 (1952). The test subject would inflate a small balloon, and then the test analyst would release this captured breath into the machine, which forced it through a chemical solution that reacted to the presence of alcohol by changing color. *Id.*, at 303. The test analyst could observe the amount of breath required to produce the color change and calculate the subject's breath alcohol concentration and by extension, BAC, from this figure. *Id.*, at 303–304. A more practical machine, called the "Breathalyzer," came into common use beginning in the 1950's, relying on the same basic scientific principles. 3 Erwin § 22.01, at 22–3; Jones 34.

Over time, improved breath test machines were developed. Today, such devices can detect the presence of alcohol more quickly and accurately than before, typically using infrared technology rather than a chemical reaction. 2 Erwin § 18A.01; Jones 36. And in practice all breath testing machines used for evidentiary purposes must be approved by NHTSA. See 1 H. Cohen & J. Green, Apprehending and Prosecuting the Drunk Driver § 7.04[7] (LexisNexis 2015). These machines are generally regarded as very reliable because the federal standards require that the devices produce accurate and reproducible test results at a variety of BAC levels, from the very low to the very high. 77 Fed. Reg. 35747 (2012); 2 Erwin § 18.07; Jones 38; see also *California* v. *Trombetta*, 467 U. S. 479, 489 (1984).

Measurement of BAC based on a breath test requires the cooperation of the person being tested. The subject must take a deep breath and exhale through a mouthpiece that connects to the machine. Berger, How Does it Work? Alcohol Breath Testing, 325 British Medical J. 1403 (2002) (Berger). Typically the test subject must blow air into the

device "'for a period of several seconds'" to produce an adequate breath sample, and the process is sometimes repeated so that analysts can compare multiple samples to ensure the device's accuracy. *Trombetta*, *supra*, at 481; see also 2 Erwin § 21.04[2][b](L), at 21–14 (describing the Intoxilyzer 4011 device as requiring a 12-second exhalation, although the subject may take a new breath about halfway through).

Modern breath test machines are designed to capture so-called "deep lung" or alveolar air. *Trombetta*, *supra*, at 481. Air from the alveolar region of the lungs provides the best basis for determining the test subject's BAC, for it is in that part of the lungs that alcohol vapor and other gases are exchanged between blood and breath. 2 Erwin § 18.01[2][a], at 18–7.

When a standard infrared device is used, the whole process takes only a few minutes from start to finish. Berger 1403; 2 Erwin § 18A.03[2], at 18A–14. Most evidentiary breath tests do not occur next to the vehicle, at the side of the road, but in a police station, where the controlled environment is especially conducive to reliable testing, or in some cases in the officer's patrol vehicle or in special mobile testing facilities. NHTSA, A. Berning et al., Refusal of Intoxication Testing: A Report to Congress 4, and n. 5 (No. 811098, Sept. 2008).

Because the cooperation of the test subject is necessary when a breath test is administered and highly preferable when a blood sample is taken, the enactment of laws defining intoxication based on BAC made it necessary for States to find a way of securing such cooperation.[1] So-called "implied consent" laws were enacted to achieve this result. They provided that cooperation with BAC testing was a condition of the privilege of driving on state roads and that the privi-

[1] In addition, BAC may be determined by testing a subject's urine, which also requires the test subject's cooperation. But urine tests appear to be less common in drunk-driving cases than breath and blood tests, and none of the cases before us involves one.

lege would be rescinded if a suspected drunk driver refused to honor that condition. Donigan 177. The first such law was enacted by New York in 1953, and many other States followed suit not long thereafter. *Id.*, at 177–179. In 1962, the Uniform Vehicle Code also included such a provision. *Id.*, at 179. Today, "all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense." *Missouri* v. *McNeely*, 569 U. S. 141, 161 (2013) (plurality opinion). Suspension or revocation of the motorist's driver's license remains the standard legal consequence of refusal. In addition, evidence of the motorist's refusal is admitted as evidence of likely intoxication in a drunk-driving prosecution. See *ibid.*

In recent decades, the States and the Federal Government have toughened drunk-driving laws, and those efforts have corresponded to a dramatic decrease in alcohol-related fatalities. As of the early 1980's, the number of annual fatalities averaged 25,000; by 2014, the most recent year for which statistics are available, the number had fallen to below 10,000. Presidential Commission on Drunk Driving 1 (Nov. 1983); NHTSA, Traffic Safety Facts, 2014 Data, Alcohol-Impaired Driving 2 (No. 812231, Dec. 2015) (NHTSA, 2014 Alcohol-Impaired Driving). One legal change has been further lowering the BAC standard from 0.10% to 0.08%. See 1 Erwin, § 2.01[1], at 2–3 to 2–4. In addition, many States now impose increased penalties for recidivists and for drivers with a BAC level that exceeds a higher threshold. In North Dakota, for example, the standard penalty for first-time drunk-driving offenders is license suspension and a fine. N. D. Cent. Code Ann. § 39–08–01(5)(a)(1) (Supp. 2015); § 39–20–04.1(1). But an offender with a BAC of 0.16% or higher must spend at least two days in jail. § 39–08–01(5)(a)(2). In addition, the State imposes increased man-

datory minimum sentences for drunk-driving recidivists. §§39–08–01(5)(b)–(d).

Many other States have taken a similar approach, but this new structure threatened to undermine the effectiveness of implied-consent laws. If the penalty for driving with a greatly elevated BAC or for repeat violations exceeds the penalty for refusing to submit to testing, motorists who fear conviction for the more severely punished offenses have an incentive to reject testing. And in some States, the refusal rate is high. On average, over one-fifth of all drivers asked to submit to BAC testing in 2011 refused to do so. NHTSA, E. Namuswe, H. Coleman, & A. Berning, Breath Test Refusal Rates in the United States—2011 Update 1 (No. 811881, Mar. 2014). In North Dakota, the refusal rate for 2011 was a representative 21%. *Id.*, at 2. Minnesota's was below average, at 12%. *Ibid.*

To combat the problem of test refusal, some States have begun to enact laws making it a crime to refuse to undergo testing. Minnesota has taken this approach for decades. See 1989 Minn. Laws p. 1658; 1992 Minn. Laws p. 1947. And that may partly explain why its refusal rate now is below the national average. Minnesota's rate is also half the 24% rate reported for 1988, the year before its first criminal refusal law took effect. See Ross, Simon, Cleary, Lewis, & Storkamp, Causes and Consequences of Implied Consent Refusal, 11 Alcohol, Drugs and Driving 57, 69 (1995). North Dakota adopted a similar law, in 2013, after a pair of drunk-driving accidents claimed the lives of an entire young family and another family's 5- and 9-year-old boys.[2] 2013 N. D. Laws pp. 1087–1088 (codified at §§39–08–01(1)–(3)). The

[2] See Smith, Moving From Grief to Action: Two Families Push for Stronger DUI Laws in N. D., Bismarck Tribune, Feb. 2, 2013, p. 1A; Haga, Some Kind of Peace: Parents of Two Young Boys Killed in Campground Accident Urge for Tougher DUI Penalties in N. D., Grand Forks Herald, Jan. 15, 2013, pp. A1–A2.

Federal Government also encourages this approach as a means for overcoming the incentive that drunk drivers have to refuse a test. NHTSA, Refusal of Intoxication Testing, at 20.

II

A

Petitioner Danny Birchfield accidentally drove his car off a North Dakota highway on October 10, 2013. A state trooper arrived and watched as Birchfield unsuccessfully tried to drive back out of the ditch in which his car was stuck. The trooper approached, caught a strong whiff of alcohol, and saw that Birchfield's eyes were bloodshot and watery. Birchfield spoke in slurred speech and struggled to stay steady on his feet. At the trooper's request, Birchfield agreed to take several field sobriety tests and performed poorly on each. He had trouble reciting sections of the alphabet and counting backwards in compliance with the trooper's directions.

Believing that Birchfield was intoxicated, the trooper informed him of his obligation under state law to agree to a BAC test. Birchfield consented to a roadside breath test. The device used for this sort of test often differs from the machines used for breath tests administered in a police station and is intended to provide a preliminary assessment of the driver's BAC. See, *e. g.*, Berger 1403. Because the reliability of these preliminary or screening breath tests varies, many jurisdictions do not permit their numerical results to be admitted in a drunk-driving trial as evidence of a driver's BAC. See generally 3 Erwin § 24.03[1]. In North Dakota, results from this type of test are "used only for determining whether or not a further test shall be given." N. D. Cent. Code Ann. § 39–20–14(3). In Birchfield's case, the screening test estimated that his BAC was 0.254%, more than three times the legal limit of 0.08%. See § 39–08–01(1)(a).

The state trooper arrested Birchfield for driving while impaired, gave the usual *Miranda* warnings, again advised him of his obligation under North Dakota law to undergo BAC testing, and informed him, as state law requires, see § 39–20–01(3)(a), that refusing to take the test would expose him to criminal penalties. In addition to mandatory addiction treatment, sentences range from a mandatory fine of $500 (for first-time offenders) to fines of at least $2,000 and imprisonment of at least one year and one day (for serial offenders). § 39–08–01(5). These criminal penalties apply to blood, breath, and urine test refusals alike. See §§ 39–08–01(2), 39–20–01, 39–20–14.

Although faced with the prospect of prosecution under this law, Birchfield refused to let his blood be drawn. Just three months before, Birchfield had received a citation for driving under the influence, and he ultimately pleaded guilty to that offense. *State* v. *Birchfield*, Crim. No. 30–2013–CR–00720 (Dist. Ct. Morton Cty., N. D., Jan. 27, 2014). This time he also pleaded guilty—to a misdemeanor violation of the refusal statute—but his plea was a conditional one: While Birchfield admitted refusing the blood test, he argued that the Fourth Amendment prohibited criminalizing his refusal to submit to the test. The State District Court rejected this argument and imposed a sentence that accounted for his prior conviction. Cf. § 39–08–01(5)(b). The sentence included 30 days in jail (20 of which were suspended and 10 of which had already been served), 1 year of unsupervised probation, $1,750 in fine and fees, and mandatory participation in a sobriety program and in a substance abuse evaluation. App. to Pet. for Cert. in No. 14–1468, p. 20a.

On appeal, the North Dakota Supreme Court affirmed. 2015 ND 6, 858 N. W. 2d 302. The court found support for the test refusal statute in this Court's *McNeely* plurality opinion, which had spoken favorably about "acceptable 'legal tools' with 'significant consequences' for refusing to submit

to testing." 858 N. W. 2d, at 307 (quoting *McNeely*, 569 U. S., at 160–161).

B

On August 5, 2012, Minnesota police received a report of a problem at a South St. Paul boat launch. Three apparently intoxicated men had gotten their truck stuck in the river while attempting to pull their boat out of the water. When police arrived, witnesses informed them that a man in underwear had been driving the truck. That man proved to be William Robert Bernard, Jr., petitioner in the second of these cases. Bernard admitted that he had been drinking but denied driving the truck (though he was holding its keys) and refused to perform any field sobriety tests. After noting that Bernard's breath smelled of alcohol and that his eyes were bloodshot and watery, officers arrested Bernard for driving while impaired.

Back at the police station, officers read Bernard Minnesota's implied-consent advisory, which like North Dakota's informs motorists that it is a crime under state law to refuse to submit to a legally required BAC test. See Minn. Stat. § 169A.51, subd. 2 (2014). Aside from noncriminal penalties like license revocation, § 169A.52, subd. 3, test refusal in Minnesota can result in criminal penalties ranging from no more than 90 days' imprisonment and up to a $1,000 fine for a misdemeanor violation to seven years' imprisonment and a $14,000 fine for repeat offenders, § 169A.03, subd. 12; §§ 169A.20, subds. 2–3; § 169A.24, subd. 2; § 169A.27, subd. 2.

The officers asked Bernard to take a breath test. After he refused, prosecutors charged him with test refusal in the first degree because he had four prior impaired-driving convictions. 859 N. W. 2d 762, 765, n. 1 (Minn. 2015) (case below). First-degree refusal carries the highest maximum penalties and a mandatory minimum 3-year prison sentence. § 169A.276, subd. 1.

The Minnesota District Court dismissed the charges on the ground that the warrantless breath test demanded of

Bernard was not permitted under the Fourth Amendment. App. to Pet. for Cert. in No. 14–1470, pp. 48a, 59a. The Minnesota Court of Appeals reversed, *id.*, at 46a, and the State Supreme Court affirmed that judgment. Based on the longstanding doctrine that authorizes warrantless searches incident to a lawful arrest, the high court concluded that police did not need a warrant to insist on a test of Bernard's breath. 859 N. W. 2d, at 766–772. Two justices dissented. *Id.*, at 774–780 (opinion of Page and Stras, JJ.).

C

A police officer spotted our third petitioner, Steve Michael Beylund, driving the streets of Bowman, North Dakota, on the night of August 10, 2013. The officer saw Beylund try unsuccessfully to turn into a driveway. In the process, Beylund's car nearly hit a stop sign before coming to a stop still partly on the public road. The officer walked up to the car and saw that Beylund had an empty wine glass in the center console next to him. Noticing that Beylund also smelled of alcohol, the officer asked him to step out of the car. As Beylund did so, he struggled to keep his balance.

The officer arrested Beylund for driving while impaired and took him to a nearby hospital. There he read Beylund North Dakota's implied-consent advisory, informing him that test refusal in these circumstances is itself a crime. See N. D. Cent. Code Ann. § 39–20–01(3)(a). Unlike the other two petitioners in these cases, Beylund agreed to have his blood drawn and analyzed. A nurse took a blood sample, which revealed a BAC of 0.250%, more than three times the legal limit.

Given the test results, Beylund's driver's license was suspended for two years after an administrative hearing. Beylund appealed the hearing officer's decision to a North Dakota District Court, principally arguing that his consent to the blood test was coerced by the officer's warning that refusing to consent would itself be a crime. The Dis-

trict Court rejected this argument, and Beylund again appealed.

The North Dakota Supreme Court affirmed. In response to Beylund's argument that his consent was insufficiently voluntary because of the announced criminal penalties for refusal, the court relied on the fact that its then-recent *Birchfield* decision had upheld the constitutionality of those penalties. 2015 ND 18, ¶¶14–15, 859 N. W. 2d 403, 408–409. The court also explained that it had found consent offered by a similarly situated motorist to be voluntary, *State* v. *Smith*, 2014 ND 152, 849 N. W. 2d 599. In that case, the court emphasized that North Dakota's implied-consent advisory was not misleading because it truthfully related the penalties for refusal. *Id.*, at 606.

We granted certiorari in all three cases and consolidated them for argument, see 577 U. S. 1045 (2015), in order to decide whether motorists lawfully arrested for drunk driving may be convicted of a crime or otherwise penalized for refusing to take a warrantless test measuring the alcohol in their bloodstream.

III

As our summary of the facts and proceedings in these three cases reveals, the cases differ in some respects. Petitioners Birchfield and Beylund were told that they were obligated to submit to a blood test, whereas petitioner Bernard was informed that a breath test was required. Birchfield and Bernard each refused to undergo a test and was convicted of a crime for his refusal. Beylund complied with the demand for a blood sample, and his license was then suspended in an administrative proceeding based on test results that revealed a very high blood alcohol level.

Despite these differences, success for all three petitioners depends on the proposition that the criminal law ordinarily may not compel a motorist to submit to the taking of a blood sample or to a breath test unless a warrant authorizing such testing is issued by a magistrate. If, on the other hand, such

warrantless searches comport with the Fourth Amendment, it follows that a State may criminalize the refusal to comply with a demand to submit to the required testing, just as a State may make it a crime for a person to obstruct the execution of a valid search warrant. See, *e. g.*, Conn. Gen. Stat. § 54–33d (2009); Fla. Stat. § 933.15 (2015); N. J. Stat. Ann. § 33:1–63 (West 1994); 18 U. S. C. § 1501; cf. *Bumper* v. *North Carolina*, 391 U. S. 543, 550 (1968) ("When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search"). And by the same token, if such warrantless searches are constitutional, there is no obstacle under federal law to the admission of the results that they yield in either a criminal prosecution or a civil or administrative proceeding. We therefore begin by considering whether the searches demanded in these cases were consistent with the Fourth Amendment.

IV

The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Amendment thus prohibits "unreasonable searches," and our cases establish that the taking of a blood sample or the administration of a breath test is a search. See *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 616–617 (1989); *Schmerber* v. *California*, 384 U. S. 757, 767–768 (1966). The question, then, is whether the warrantless searches at issue here were reasonable. See *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646, 652 (1995) ("As the text of the Fourth Amendment indicates, the ultimate meas-

ure of the constitutionality of a governmental search is 'reasonableness' ").

"[T]he text of the Fourth Amendment does not specify when a search warrant must be obtained." *Kentucky* v. *King*, 563 U. S. 452, 459 (2011); see also *California* v. *Acevedo*, 500 U. S. 565, 581 (1991) (Scalia, J., concurring in judgment) ("What [the text] explicitly states regarding warrants is by way of limitation upon their issuance rather than requirement of their use"). But "this Court has inferred that a warrant must [usually] be secured." *King*, 563 U. S., at 459. This usual requirement, however, is subject to a number of exceptions. *Ibid.*

We have previously had occasion to examine whether one such exception—for "exigent circumstances"—applies in drunk-driving investigations. The exigent-circumstances exception allows a warrantless search when an emergency leaves police insufficient time to seek a warrant. *Michigan* v. *Tyler*, 436 U. S. 499, 509 (1978). It permits, for instance, the warrantless entry of private property when there is a need to provide urgent aid to those inside, when police are in hot pursuit of a fleeing suspect, and when police fear the imminent destruction of evidence. *King*, *supra*, at 460.

In *Schmerber* v. *California*, we held that drunk driving *may* present such an exigency. There, an officer directed hospital personnel to take a blood sample from a driver who was receiving treatment for car crash injuries. 384 U. S., at 758. The Court concluded that the officer "might reasonably have believed that he was confronted with an emergency" that left no time to seek a warrant because "the percentage of alcohol in the blood begins to diminish shortly after drinking stops." *Id.*, at 770. On the specific facts of that case, where time had already been lost taking the driver to the hospital and investigating the accident, the Court found no Fourth Amendment violation even though the warrantless blood draw took place over the driver's objection. *Id.*, at 770–772.

More recently, though, we have held that the natural dissipation of alcohol from the bloodstream does not *always* constitute an exigency justifying the warrantless taking of a blood sample. That was the holding of *Missouri* v. *McNeely*, 569 U. S. 141, where the State of Missouri was seeking a *per se* rule that "whenever an officer has probable cause to believe an individual has been driving under the influence of alcohol, exigent circumstances will necessarily exist because BAC evidence is inherently evanescent." *Id.*, at 151 (opinion of the Court). We disagreed, emphasizing that *Schmerber* had adopted a case-specific analysis depending on "all of the facts and circumstances of the particular case." 569 U. S., at 151. We refused to "depart from careful case-by-case assessment of exigency and adopt the categorical rule proposed by the State." *Id.*, at 152.

While emphasizing that the exigent-circumstances exception must be applied on a case-by-case basis, the *McNeely* Court noted that other exceptions to the warrant requirement "apply categorically" rather than in a "case-specific" fashion. *Id.*, at 150, n. 3. One of these, as the *McNeely* opinion recognized, is the long-established rule that a warrantless search may be conducted incident to a lawful arrest. See *ibid.* But the Court pointedly did not address any potential justification for warrantless testing of drunk-driving suspects except for the exception "at issue in th[e] case," namely, the exception for exigent circumstances. *Id.*, at 148. Neither did any of the Justices who wrote separately. See *id.*, at 165–166 (KENNEDY, J., concurring in part); *id.*, at 166–176 (ROBERTS, C. J., concurring in part and dissenting in part); *id.*, at 176–183 (THOMAS, J., dissenting).

In the three cases now before us, the drivers were searched or told that they were required to submit to a search after being placed under arrest for drunk driving. We therefore consider how the search-incident-to-arrest doctrine applies to breath and blood tests incident to such arrests.

V

A

The search-incident-to-arrest doctrine has an ancient pedigree. Well before the Nation's founding, it was recognized that officers carrying out a lawful arrest had the authority to make a warrantless search of the arrestee's person. An 18th-century manual for justices of the peace provides a representative picture of usual practice shortly before the Fourth Amendment's adoption:

> "[A] thorough search of the felon is of the utmost consequence to your own safety, and the benefit of the public, as by this means he will be deprived of instruments of mischief, and evidence may probably be found on him sufficient to convict him, of which, if he has either time or opportunity allowed him, he will besure [*sic*] to find some means to get rid of." Conductor Generalis 117 (J. Parker ed. 1788) (reprinting S. Welch, Observations on the Office of Constable 19 (1754)).

One Fourth Amendment historian has observed that, prior to American independence, "[a]nyone arrested could expect that not only his surface clothing but his body, luggage, and saddlebags would be searched and, perhaps, his shoes, socks, and mouth as well." W. Cuddihy, The Fourth Amendment: Origins and Original Meaning 602–1791, p. 420 (2009).

No historical evidence suggests that the Fourth Amendment altered the permissible bounds of arrestee searches. On the contrary, legal scholars agree that "the legitimacy of body searches as an adjunct to the arrest process had been thoroughly established in colonial times, so much so that their constitutionality in 1789 can not be doubted." *Id.*, at 752; see also T. Taylor, Two Studies in Constitutional Interpretation 28–29, 39, 45 (1969); Stuntz, The Substantive Origins of Criminal Procedure, 105 Yale L. J. 393, 401 (1995).

Few reported cases addressed the legality of such searches before the 19th century, apparently because the point was

not much contested. In the 19th century, the subject came up for discussion more often, but court decisions and treatises alike confirmed the searches' broad acceptance. *E. g.*, *Holker* v. *Hennessey*, 141 Mo. 527, 539–540, 42 S. W. 1090, 1093 (1897); *Ex parte Hurn*, 92 Ala. 102, 112, 9 So. 515, 519 (1891); *Thatcher* v. *Weeks*, 79 Me. 547, 548–549, 11 A. 599 (1887); *Reifsnyder* v. *Lee*, 44 Iowa 101, 103 (1876); F. Wharton, Criminal Pleading and Practice § 60, p. 45 (8th ed. 1880); 1 J. Bishop, Criminal Procedure § 211, p. 127 (2d ed. 1872).

When this Court first addressed the question, we too confirmed (albeit in dicta) "the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidence of crime." *Weeks* v. *United States*, 232 U. S. 383, 392 (1914). The exception quickly became a fixture in our Fourth Amendment case law. But in the decades that followed, we grappled repeatedly with the question of the authority of arresting officers to search the area surrounding the arrestee, and our decisions reached results that were not easy to reconcile. See, *e. g.*, *United States* v. *Lefkowitz*, 285 U. S. 452, 464 (1932) (forbidding "unrestrained" search of room where arrest was made); *Harris* v. *United States*, 331 U. S. 145, 149, 152 (1947) (permitting complete search of arrestee's four-room apartment); *United States* v. *Rabinowitz*, 339 U. S. 56, 60–65 (1950) (permitting complete search of arrestee's office).

We attempted to clarify the law regarding searches incident to arrest in *Chimel* v. *California*, 395 U. S. 752, 754 (1969), a case in which officers had searched the arrestee's entire three-bedroom house. *Chimel* endorsed a general rule that arresting officers, in order to prevent the arrestee from obtaining a weapon or destroying evidence, could search both "the person arrested" and "the area 'within his immediate control.'" *Id.*, at 763. "[N]o comparable justification," we said, supported "routinely searching any room other than that in which an arrest occurs—or, for that mat-

ter, for searching through all the desk drawers or other closed or concealed areas in that room itself." *Ibid.*

Four years later, in *United States* v. *Robinson*, 414 U. S. 218 (1973), we elaborated on *Chimel*'s meaning. We noted that the search-incident-to-arrest rule actually comprises "two distinct propositions": "The first is that a search may be made of the *person* of the arrestee by virtue of the lawful arrest. The second is that a search may be made of the area within the control of the arrestee." 414 U. S., at 224. After a thorough review of the relevant common-law history, we repudiated "case-by-case adjudication" of the question whether an arresting officer had the authority to carry out a search of the arrestee's person. *Id.*, at 235. The permissibility of such searches, we held, does not depend on whether a search of a *particular* arrestee is likely to protect officer safety or evidence: "The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect." *Ibid.* Instead, the mere "fact of the lawful arrest" justifies "a full search of the person." *Ibid.* In *Robinson* itself, that meant that police had acted permissibly in searching inside a package of cigarettes found on the man they arrested. *Id.*, at 236.

Our decision two Terms ago in *Riley* v. *California*, 573 U. S. 373 (2014), reaffirmed "*Robinson*'s categorical rule" and explained how the rule should be applied in situations that could not have been envisioned when the Fourth Amendment was adopted. *Id.*, at 386. *Riley* concerned a search of data contained in the memory of a modern cell phone. "Absent more precise guidance from the founding era," the Court wrote, "we generally determine whether to exempt a given type of search from the warrant requirement 'by assessing, on the one hand, the degree to which it intrudes upon an

individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *Id.*, at 385.

Blood and breath tests to measure BAC are not as new as searches of cell phones, but here, as in *Riley*, the founding era does not provide any definitive guidance as to whether they should be allowed incident to arrest.[3] Lacking such guidance, we engage in the same mode of analysis as in *Riley*: We examine "'the degree to which [they] intrud[e] upon an individual's privacy and . . . the degree to which [they are] needed for the promotion of legitimate governmental interests.'" *Ibid.*

B

We begin by considering the impact of breath and blood tests on individual privacy interests, and we will discuss each type of test in turn.

1

Years ago we said that breath tests do not "implicat[e] significant privacy concerns." *Skinner*, 489 U. S., at 626. That remains so today.

First, the physical intrusion is almost negligible. Breath tests "do not require piercing the skin" and entail "a minimum of inconvenience." *Id.*, at 625. As Minnesota describes its version of the breath test, the process requires the arrestee to blow continuously for 4 to 15 seconds into a straw-like mouthpiece that is connected by a tube to the test machine. Brief for Respondent in No. 14–1470, p. 20. Independent sources describe other breath test devices in essentially the same terms. See *supra*, at 446–447. The effort is no more demanding than blowing up a party balloon.

[3] At most, there may be evidence that an arrestee's mouth could be searched in appropriate circumstances at the time of the founding. See W. Cuddihy, Fourth Amendment: Origins and Original Meaning: 602–1791, p. 420 (2009). Still, searching a mouth for weapons or contraband is not the same as requiring an arrestee to give up breath or blood.

Petitioner Bernard argues, however, that the process is nevertheless a significant intrusion because the arrestee must insert the mouthpiece of the machine into his or her mouth. Reply Brief in No. 14–1470, p. 9. But there is nothing painful or strange about this requirement. The use of a straw to drink beverages is a common practice and one to which few object.

Nor, contrary to Bernard, is the test a significant intrusion because it "does not capture an ordinary exhalation of the kind that routinely is exposed to the public" but instead "'requires a sample of "alveolar" (deep lung) air.'" Brief for Petitioner in No. 14–1470, p. 24. Humans have never been known to assert a possessory interest in or any emotional attachment to *any* of the air in their lungs. The air that humans exhale is not part of their bodies. Exhalation is a natural process—indeed, one that is necessary for life. Humans cannot hold their breath for more than a few minutes, and all the air that is breathed into a breath analyzing machine, including deep lung air, sooner or later would be exhaled even without the test. See generally J. Hall, Guyton and Hall Textbook of Medical Physiology 519–520 (13th ed. 2016).

In prior cases, we have upheld warrantless searches involving physical intrusions that were at least as significant as that entailed in the administration of a breath test. Just recently we described the process of collecting a DNA sample by rubbing a swab on the inside of a person's cheek as a "negligible" intrusion. *Maryland* v. *King*, 569 U. S. 435, 446 (2013). We have also upheld scraping underneath a suspect's fingernails to find evidence of a crime, calling that a "very limited intrusion." *Cupp* v. *Murphy*, 412 U. S. 291, 296 (1973). A breath test is no more intrusive than either of these procedures.

Second, breath tests are capable of revealing only one bit of information, the amount of alcohol in the subject's breath. In this respect, they contrast sharply with the sample of cells

collected by the swab in *Maryland* v. *King*. Although the DNA obtained under the law at issue in that case could lawfully be used only for identification purposes, 569 U. S., at 444, the process put into the possession of law enforcement authorities a sample from which a wealth of additional, highly personal information could potentially be obtained. A breath test, by contrast, results in a BAC reading on a machine, nothing more. No sample of anything is left in the possession of the police.

Finally, participation in a breath test is not an experience that is likely to cause any great enhancement in the embarrassment that is inherent in any arrest. See *Skinner*, *supra*, at 625 (breath test involves "a minimum of . . . embarrassment"). The act of blowing into a straw is not inherently embarrassing, nor are evidentiary breath tests administered in a manner that causes embarrassment. Again, such tests are normally administered in private at a police station, in a patrol car, or in a mobile testing facility, out of public view. See *supra*, at 447. Moreover, once placed under arrest, the individual's expectation of privacy is necessarily diminished. *Maryland* v. *King*, *supra*, at 462.

For all these reasons, we reiterate what we said in *Skinner*: A breath test does not "implicat[e] significant privacy concerns." 489 U. S., at 626.

2

Blood tests are a different matter. They "require piercing the skin" and extract a part of the subject's body. *Id.*, at 625; see also *McNeely*, 569 U. S., at 148 (opinion of the Court) (blood draws are "a compelled physical intrusion beneath [the defendant's] skin and into his veins"); *id.*, at 174 (opinion of ROBERTS, C. J.) (blood draws are "significant bodily intrusions"). And while humans exhale air from their lungs many times per minute, humans do not continually shed blood. It is true, of course, that people voluntarily submit to the taking of blood samples as part of a physical examina-

tion, and the process involves little pain or risk. See *id.*, at 159 (plurality opinion) (citing *Schmerber*, 384 U. S., at 771). Nevertheless, for many, the process is not one they relish. It is significantly more intrusive than blowing into a tube. Perhaps that is why many States' implied-consent laws, including Minnesota's, specifically prescribe that breath tests be administered in the usual drunk-driving case instead of blood tests or give motorists a measure of choice over which test to take. See 1 Erwin § 4.06; Minn. Stat. § 169A.51, subd. 3.

In addition, a blood test, unlike a breath test, places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading. Even if the law enforcement agency is precluded from testing the blood for any purpose other than to measure BAC, the potential remains and may result in anxiety for the person tested.

C

Having assessed the impact of breath and blood testing on privacy interests, we now look to the States' asserted need to obtain BAC readings for persons arrested for drunk driving.

1

The States and the Federal Government have a "paramount interest . . . in preserving the safety of . . . public highways." *Mackey* v. *Montrym*, 443 U. S. 1, 17 (1979). Although the number of deaths and injuries caused by motor vehicle accidents has declined over the years, the statistics are still staggering. See, *e. g.*, NHTSA, Traffic Safety Facts 1995—Overview 2 (No. 95F7, 1995) (47,087 fatalities, 3,416,000 injuries in 1988); NHTSA, Traffic Safety Facts, 2014 Data, Summary of Motor Vehicle Crashes 1 (No. 812263, May 2016) (Table 1) (29,989 fatalities, 1,648,000 injuries in 2014).

Alcohol consumption is a leading cause of traffic fatalities and injuries. During the past decade, annual fatalities in drunk-driving accidents ranged from 13,582 deaths in 2005 to 9,865 deaths in 2011. NHTSA, 2014 Alcohol-Impaired Driving 2. The most recent data report a total of 9,967 such fatalities in 2014—on average, one death every 53 minutes. *Id.*, at 1. Our cases have long recognized the "carnage" and "slaughter" caused by drunk drivers. *Neville*, 459 U. S., at 558; *Breithaupt* v. *Abram*, 352 U. S. 432, 439 (1957).

JUSTICE SOTOMAYOR's partial dissent suggests that States' interests in fighting drunk driving are satisfied once suspected drunk drivers are arrested, since such arrests take intoxicated drivers off the roads where they might do harm. See *post*, at 486 (opinion concurring in part and dissenting in part). But of course States are not solely concerned with neutralizing the threat posed by a drunk driver who has already gotten behind the wheel. They also have a compelling interest in creating effective "deterrent[s] to drunken driving" so such individuals make responsible decisions and do not become a threat to others in the first place. *Mackey*, *supra*, at 18.

To deter potential drunk drivers and thereby reduce alcohol-related injuries, the States and the Federal Government have taken the series of steps that we recounted earlier. See *supra*, at 444–450. We briefly recapitulate. After pegging inebriation to a specific level of blood alcohol, States passed implied-consent laws to induce motorists to submit to BAC testing. While these laws originally provided that refusal to submit could result in the loss of the privilege of driving and the use of evidence of refusal in a drunk-driving prosecution, more recently States and the Federal Government have concluded that these consequences are insufficient. In particular, license suspension alone is unlikely to persuade the most dangerous offenders, such as those who drive with a BAC significantly above the current limit of 0.08% and recidivists, to agree to a test that would lead to

severe criminal sanctions. NHTSA, Implied Consent Refusal Impact, pp. xvii, 83 (No. 807765, Sept. 1991); NHTSA, Use of Warrants for Breath Test Refusal 1 (No. 810852, Oct. 2007). The laws at issue in the present cases—which make it a crime to refuse to submit to a BAC test—are designed to provide an incentive to cooperate in such cases, and we conclude that they serve a very important function.

2

Petitioners and JUSTICE SOTOMAYOR contend that the States and the Federal Government could combat drunk driving in other ways that do not have the same impact on personal privacy. Their arguments are unconvincing.

The chief argument on this score is that an officer making an arrest for drunk driving should not be allowed to administer a BAC test unless the officer procures a search warrant or could not do so in time to obtain usable test results. The governmental interest in warrantless breath testing, JUSTICE SOTOMAYOR claims, turns on "'whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.'" *Post*, at 481 (quoting *Camara* v. *Municipal Court of City and County of San Francisco*, 387 U. S. 523, 533 (1967)).

This argument contravenes our decisions holding that the legality of a search incident to arrest must be judged on the basis of categorical rules. In *Robinson*, for example, no one claimed that the object of the search, a package of cigarettes, presented any danger to the arresting officer or was at risk of being destroyed in the time that it would have taken to secure a search warrant. The Court nevertheless upheld the constitutionality of a warrantless search of the package, concluding that a categorical rule was needed to give police adequate guidance: "A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick *ad hoc* judgment which the Fourth Amendment does not require to be broken down

in each instance into an analysis of each step in the search." 414 U. S., at 235; cf. *Riley*, 573 U. S., at 398 ("If police are to have workable rules, the balancing of the competing interests must in large part be done on a categorical basis—not in an ad hoc, case-by-case fashion by individual police officers" (brackets, ellipsis, and internal quotation marks omitted)).

It is not surprising, then, that the language JUSTICE SOTOMAYOR quotes to justify her approach comes not from our search-incident-to-arrest case law, but a case that addressed routine home searches for possible housing code violations. See *Camara*, 387 U. S., at 526. *Camara*'s express concern in the passage that the dissent quotes was "whether the public interest demands *creation* of a general exception to the Fourth Amendment's warrant requirement." *Id.*, at 533 (emphasis added). *Camara* did *not* explain how to apply an existing exception, let alone the long-established exception for searches incident to a lawful arrest, whose applicability, as *Robinson* and *Riley* make plain, has never turned on case-specific variables such as how quickly the officer will be able to obtain a warrant in the particular circumstances he faces.

In advocating the case-by-case approach, petitioners and JUSTICE SOTOMAYOR cite language in our *McNeely* opinion. See Brief for Petitioner in No. 14–1468, p. 14; *post*, at 489. But *McNeely* concerned an exception to the warrant requirement—for exigent circumstances—that always requires case-by-case determinations. That was the basis for our decision in that case. 569 U. S., at 152–153. Although JUSTICE SOTOMAYOR contends that the categorical search-incident-to-arrest doctrine and case-by-case exigent-circumstances doctrine are actually parts of a single framework, *post*, at 484–485, and n. 3, in *McNeely* the Court was careful to note that the decision did not address any other exceptions to the warrant requirement, 569 U. S., at 150, n. 3.

Petitioners and JUSTICE SOTOMAYOR next suggest that requiring a warrant for BAC testing in every case in which a motorist is arrested for drunk driving would not impose any

great burden on the police or the courts. But of course the same argument could be made about searching through objects found on the arrestee's possession, which our cases permit even in the absence of a warrant. What about the cigarette package in *Robinson*? What if a motorist arrested for drunk driving has a flask in his pocket? What if a motorist arrested for driving while under the influence of marijuana has what appears to be a marijuana cigarette on his person? What about an unmarked bottle of pills?

If a search warrant were required for every search incident to arrest that does not involve exigent circumstances, the courts would be swamped. And even if we arbitrarily singled out BAC tests incident to arrest for this special treatment, as it appears the dissent would do, see *post*, at 489–491 (opinion of SOTOMAYOR, J.), the impact on the courts would be considerable. The number of arrests every year for driving under the influence is enormous—more than 1.1 million in 2014. FBI, Uniform Crime Report, Crime in the United States, 2014, Arrests 2 (Fall 2015). Particularly in sparsely populated areas, it would be no small task for courts to field a large new influx of warrant applications that could come on any day of the year and at any hour. In many jurisdictions, judicial officers have the authority to issue warrants only within their own districts, see, *e. g.*, Fed. Rule Crim. Proc. 41(b); N. D. Rule Crim. Proc. 41(a) (2016–2017), and in rural areas, some districts may have only a small number of judicial officers.

North Dakota, for instance, has only 51 state district judges spread across eight judicial districts.[4] Those judges are assisted by 31 magistrates, and there are no magistrates in 20 of the State's 53 counties.[5] At any given location in the State, then, relatively few state officials have authority

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[4] See North Dakota Supreme Court, All District Judges, http://www.ndcourts.gov/court/districts/judges.htm (all Internet materials as last visited June 21, 2016).

[5] See North Dakota Supreme Court, Magistrates, http://www.ndcourts.gov/court/counties/magistra/members.htm.

to issue search warrants.[6] Yet the State, with a population of roughly 740,000, sees nearly 7,000 drunk-driving arrests each year. Office of North Dakota Attorney General, Crime in North Dakota, 2014, pp. 5, 47 (2015). With a small number of judicial officers authorized to issue warrants in some parts of the State, the burden of fielding BAC warrant applications 24 hours per day, 365 days of the year would not be the light burden that petitioners and JUSTICE SOTOMAYOR suggest.

In light of this burden and our prior search-incident-to-arrest precedents, petitioners would at a minimum have to show some special need for warrants for BAC testing. It is therefore appropriate to consider the benefits that such applications would provide. Search warrants protect privacy in two main ways. First, they ensure that a search is not carried out unless a neutral magistrate makes an independent determination that there is probable cause to believe that evidence will be found. See, *e. g.*, *Riley*, *supra*, at 382. Second, if the magistrate finds probable cause, the warrant limits the intrusion on privacy by specifying the scope of the search—that is, the area that can be searched and the items that can be sought. *United States* v. *Chadwick*, 433 U. S. 1, 9 (1977), abrogated on other grounds, *Acevedo*, 500 U. S. 565.

How well would these functions be performed by the warrant applications that petitioners propose? In order to persuade a magistrate that there is probable cause for a search warrant, the officer would typically recite the same facts that led the officer to find that there was probable cause for arrest, namely, that there is probable cause to believe that a BAC test will reveal that the motorist's blood alcohol level is over the limit. As these three cases suggest, see Part II,

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[6] North Dakota Supreme Court justices apparently also have authority to issue warrants statewide. See ND Op. Atty. Gen. 99–L–132, p. 2 (Dec. 30, 1999). But we highly doubt that they regularly handle search-warrant applications, much less during graveyard shifts.

supra, the facts that establish probable cause are largely the same from one drunk-driving stop to the next and consist largely of the officer's own characterization of his or her observations—for example, that there was a strong odor of alcohol, that the motorist wobbled when attempting to stand, that the motorist paused when reciting the alphabet or counting backwards, and so on. A magistrate would be in a poor position to challenge such characterizations.

As for the second function served by search warrants—delineating the scope of a search—the warrants in question here would not serve that function at all. In every case the scope of the warrant would simply be a BAC test of the arrestee. Cf. *Skinner*, 489 U. S., at 622 ("[I]n light of the standardized nature of the tests and the minimal discretion vested in those charged with administering the program, there are virtually no facts for a neutral magistrate to evaluate"). For these reasons, requiring the police to obtain a warrant in every case would impose a substantial burden but no commensurate benefit.

Petitioners advance other alternatives to warrantless BAC tests incident to arrest, but these are poor substitutes. Relying on a recent NHTSA report, petitioner Birchfield identifies 19 strategies that he claims would be at least as effective as implied-consent laws, including high-visibility sobriety checkpoints, installing ignition interlocks on repeat offenders' cars that would disable their operation when the driver's breath reveals a sufficiently high alcohol concentration, and alcohol treatment programs. Brief for Petitioner in No. 14–1468, at 44–45. But Birchfield ignores the fact that the cited report describes many of these measures, such as checkpoints, as significantly more costly than test refusal penalties. NHTSA, A. Goodwin et al., Countermeasures That Work: A Highway Safety Countermeasures Guide for State Highway Safety Offices, p. 1–7 (No. 811727, 7th ed. 2013). Others, such as ignition interlocks, target only a segment of the drunk-driver population. And still others, such as treat-

ment programs, are already in widespread use, see *id.*, at 1–8, including in North Dakota and Minnesota. Moreover, the same NHTSA report, in line with the agency's guidance elsewhere, stresses that BAC test refusal penalties would be *more* effective if the consequences for refusal were made more severe, including through the addition of criminal penalties. *Id.*, at 1–16 to 1–17.

3

Petitioner Bernard objects to the whole idea of analyzing breath and blood tests as searches incident to arrest. That doctrine, he argues, does not protect the sort of governmental interests that warrantless breath and blood tests serve. On his reading, this Court's precedents permit a search of an arrestee solely to prevent the arrestee from obtaining a weapon or taking steps to destroy evidence. See Reply Brief in No. 14–1470, at 4–6. In *Chimel*, for example, the Court derived its limitation for the scope of the permitted search—"the area into which an arrestee might reach"—from the principle that officers may reasonably search "the area from within which he might gain possession of a weapon or destructible evidence." 395 U. S., at 763. Stopping an arrestee from destroying evidence, Bernard argues, is critically different from preventing the loss of blood alcohol evidence as the result of the body's metabolism of alcohol, a natural process over which the arrestee has little control. Reply Brief in No. 14–1470, at 5–6.

The distinction that Bernard draws between an arrestee's active destruction of evidence and the loss of evidence due to a natural process makes little sense. In both situations the State is justifiably concerned that evidence may be lost, and Bernard does not explain why the cause of the loss should be dispositive. And in fact many of this Court's post-*Chimel* cases have recognized the State's concern, not just in avoiding an arrestee's intentional destruction of evidence, but in "evidence preservation" or avoiding "the loss of evi-

dence" more generally. *Riley*, 573 U. S., at 384; see also *Robinson*, 414 U. S., at 234 ("the need to preserve evidence on his person"); *Knowles* v. *Iowa*, 525 U. S. 113, 118–119 (1998) ("the need to discover and preserve evidence;" "the concern for destruction *or loss* of evidence" (emphasis added)); *Virginia* v. *Moore*, 553 U. S. 164, 176 (2008) (the need to "safeguard evidence"). This concern for preserving evidence or preventing its loss readily encompasses the inevitable metabolization of alcohol in the blood.

Nor is there any reason to suspect that *Chimel*'s use of the word "destruction," 395 U. S., at 763, was a deliberate decision to rule out evidence loss that is mostly beyond the arrestee's control. The case did not involve any evidence that was subject to dissipation through natural processes, and there is no sign in the opinion that such a situation was on the Court's mind.

Bernard attempts to derive more concrete support for his position from *Schmerber*. In that case, the Court stated that the "destruction of evidence under the direct control of the accused" is a danger that is not present "with respect to searches involving intrusions beyond the body's surface." 384 U. S., at 769. Bernard reads this to mean that an arrestee cannot be required "to take a chemical test" incident to arrest, Brief for Petitioner in No. 14–1470, at 19, but by using the term "chemical test," Bernard obscures the fact that *Schmerber*'s passage was addressed to the type of test at issue in that case, namely, a blood test. The Court described blood tests as "searches involving intrusions beyond the body's surface," and it saw these searches as implicating important "interests in human dignity and privacy," 384 U. S., at 769–770. Although the Court appreciated as well that blood tests "involv[e] virtually no risk, trauma, or pain," *id.*, at 771, its point was that such searches still impinge on far more sensitive interests than the typical search of the person of an arrestee. Cf. *supra*, at 463–464. But breath tests, unlike blood tests, "are *not* invasive of the body," *Skin-*

ner, 489 U. S., at 626 (emphasis added), and therefore the Court's comments in *Schmerber* are inapposite when it comes to the type of test Bernard was asked to take. *Schmerber* did not involve a breath test, and on the question of breath tests' legality, *Schmerber* said nothing.

Finally, Bernard supports his distinction using a passage from the *McNeely* opinion, which distinguishes between "easily disposable evidence" over "which the suspect has control" and evidence, like blood alcohol evidence, that is lost through a natural process "in a gradual and relatively predictable manner." 569 U. S., at 153; see Reply Brief in No. 14–1470, at 5–6. Bernard fails to note the issue that this paragraph addressed. *McNeely* concerned only one exception to the usual warrant requirement, the exception for exigent circumstances, and as previously discussed, that exception has always been understood to involve an evaluation of the particular facts of each case. Here, by contrast, we are concerned with the search-incident-to-arrest exception, and as we made clear in *Robinson* and repeated in *McNeely* itself, this authority is categorical. It does not depend on an evaluation of the threat to officer safety or the threat of evidence loss in a particular case.[7]

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[7] JUSTICE SOTOMAYOR objects to treating warrantless breath tests as searches incident to a lawful arrest on two additional grounds.

First, she maintains that "[a]ll of this Court's postarrest exceptions to the warrant requirement require a law enforcement interest separate from criminal investigation." *Post*, at 491. At least with respect to the search-incident-to-arrest doctrine, that is not true. As the historical authorities discussed earlier attest, see Part V–A, *supra*, the doctrine has always been understood as serving investigative ends, such as "discover[ing] and seiz[ing] . . . evidences of crime." *Weeks* v. *United States*, 232 U. S. 383, 392 (1914); see also *United States* v. *Robinson*, 414 U. S. 218, 235 (1973) (emphasizing "the need . . . to discover evidence"). Using breath tests to obtain evidence of intoxication is therefore well within the historical understanding of the doctrine's purposes.

Second, JUSTICE SOTOMAYOR contends that the search-incident-to-arrest doctrine does not apply when "a narrower exception to the warrant requirement adequately satisfies the governmental needs asserted." *Post*,

Having assessed the effect of BAC tests on privacy interests and the need for such tests, we conclude that the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving. The impact of breath tests on privacy is slight, and the need for BAC testing is great.

We reach a different conclusion with respect to blood tests. Blood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test. Respondents have offered no satisfactory justification for demanding the more intrusive alternative without a warrant.

Neither respondents nor their *amici* dispute the effectiveness of breath tests in measuring BAC. Breath tests have been in common use for many years. Their results are admissible in court and are widely credited by juries, and respondents do not dispute their accuracy or utility. What, then, is the justification for warrantless blood tests?

One advantage of blood tests is their ability to detect not just alcohol but also other substances that can impair a driver's ability to operate a car safely. See Brief for New Jersey et al. as *Amici Curiae* 9; Brief for United States as *Amicus Curiae* 6. A breath test cannot do this, but police have other measures at their disposal when they have reason to believe that a motorist may be under the influence of some other substance (for example, if a breath test indicates that a clearly impaired motorist has little if any alcohol in his blood). Nothing prevents the police from seeking a warrant for a blood test when there is sufficient time to do so in the

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at 485, n. 3; see also *post*, at 494–496. But while this Court's cases have certainly recognized that "more targeted" exceptions to the warrant requirement may justify a warrantless search even when the search-incident-to-arrest exception would not, *Riley* v. *California*, 573 U. S. 373, 391 (2014), JUSTICE SOTOMAYOR cites no authority for the proposition that an exception to the warrant requirement cannot apply simply because a "narrower" exception *might* apply.

particular circumstances or from relying on the exigent-circumstances exception to the warrant requirement when there is not. See *McNeely*, 569 U. S., at 165.

A blood test also requires less driver participation than a breath test. In order for a technician to take a blood sample, all that is needed is for the subject to remain still, either voluntarily or by being immobilized. Thus, it is possible to extract a blood sample from a subject who forcibly resists, but many States reasonably prefer not to take this step. See, *e. g.*, *Neville*, 459 U. S., at 559–560. North Dakota, for example, tells us that it generally opposes this practice because of the risk of dangerous altercations between police officers and arrestees in rural areas where the arresting officer may not have backup. Brief for Respondent in No. 14–1468, p. 29. Under current North Dakota law, only in cases involving an accident that results in death or serious injury may blood be taken from arrestees who resist. Compare N. D. Cent. Code Ann. §§ 39–20–04(1), 39–20–01, with § 39–20–01.1.

It is true that a blood test, unlike a breath test, may be administered to a person who is unconscious (perhaps as a result of a crash) or who is unable to do what is needed to take a breath test due to profound intoxication or injuries. But we have no reason to believe that such situations are common in drunk-driving arrests, and when they arise, the police may apply for a warrant if need be.

A breath test may also be ineffective if an arrestee deliberately attempts to prevent an accurate reading by failing to blow into the tube for the requisite length of time or with the necessary force. But courts have held that such conduct qualifies as a refusal to undergo testing, *e. g.*, *Andrews* v. *Turner*, 52 Ohio St. 2d 31, 36–37, 368 N. E. 2d 1253, 1256–1257 (1977); *In re Kunneman*, 501 P. 2d 910, 910–911 (Okla. Civ. App. 1972); see generally 1 Erwin § 4.08[2] (collecting cases), and it may be prosecuted as such. And again, a warrant for a blood test may be sought.

Because breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, we conclude that a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving. As in all cases involving reasonable searches incident to arrest, a warrant is not needed in this situation.[8]

VI

Having concluded that the search-incident-to-arrest doctrine does not justify the warrantless taking of a blood sample, we must address respondents' alternative argument that such tests are justified based on the driver's legally implied consent to submit to them. It is well established that a search is reasonable when the subject consents, *e. g.*, *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 219 (1973), and that sometimes consent to a search need not be express but may be fairly inferred from context, cf. *Florida* v. *Jardines*, 569 U. S. 1, 8 (2013); *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, 313 (1978). Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil

[8] JUSTICE THOMAS partly dissents from this holding, calling any distinction between breath and blood tests "an arbitrary line in the sand." *Post*, at 497 (opinion concurring in judgment in part and dissenting in part). Adhering to a position that the Court rejected in *McNeely*, JUSTICE THOMAS would hold that both breath and blood tests are constitutional with or without a warrant because of the natural metabolization of alcohol in the bloodstream. *Post*, at 498–499. Yet JUSTICE THOMAS does not dispute our conclusions that blood draws are more invasive than breath tests, that breath tests generally serve state interests in combating drunk driving as effectively as blood tests, and that our decision in *Riley* calls for a balancing of individual privacy interests and legitimate state interests to determine the reasonableness of the category of warrantless search that is at issue. Contrary to JUSTICE THOMAS's contention, this balancing does not leave law enforcement officers or lower courts with unpredictable rules, because it is categorical and *not* "case-by-case," *post*, at 497. Indeed, today's decision provides very clear guidance that the Fourth Amendment allows warrantless breath tests, but as a general rule does not allow warrantless blood draws, incident to a lawful drunk-driving arrest.

penalties and evidentiary consequences on motorists who refuse to comply. See, *e. g.*, *McNeely*, *supra*, at 160–161 (plurality opinion); *Neville*, *supra*, at 560. Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them.

It is another matter, however, for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test. There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads.

Respondents and their *amici* all but concede this point. North Dakota emphasizes that its law makes refusal a misdemeanor and suggests that laws punishing refusal more severely would present a different issue. Brief for Respondent in No. 14–1468, at 33–34. Borrowing from our Fifth Amendment jurisprudence, the United States suggests that motorists could be deemed to have consented to only those conditions that are "reasonable" in that they have a "nexus" to the privilege of driving and entail penalties that are proportional to severity of the violation. Brief for United States as *Amicus Curiae* 21–27. But in the Fourth Amendment setting, this standard does not differ in substance from the one that we apply, since reasonableness is always the touchstone of Fourth Amendment analysis, see *Brigham City* v. *Stuart*, 547 U. S. 398, 403 (2006). And applying this standard, we conclude that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense.

VII

Our remaining task is to apply our legal conclusions to the three cases before us.

Petitioner Birchfield was criminally prosecuted for refusing a warrantless blood draw, and therefore the search he refused cannot be justified as a search incident to his arrest or on the basis of implied consent. There is no indication in

the record or briefing that a breath test would have failed to satisfy the State's interests in acquiring evidence to enforce its drunk-driving laws against Birchfield. And North Dakota has not presented any case-specific information to suggest that the exigent-circumstances exception would have justified a warrantless search. Cf. *McNeely*, 569 U. S., at 163–165. Unable to see any other basis on which to justify a warrantless test of Birchfield's blood, we conclude that Birchfield was threatened with an unlawful search and that the judgment affirming his conviction must be reversed.

Bernard, on the other hand, was criminally prosecuted for refusing a warrantless breath test. That test *was* a permissible search incident to Bernard's arrest for drunk driving, an arrest whose legality Bernard has not contested. Accordingly, the Fourth Amendment did not require officers to obtain a warrant prior to demanding the test, and Bernard had no right to refuse it.

Unlike the other petitioners, Beylund was not prosecuted for refusing a test. He submitted to a blood test after police told him that the law required his submission, and his license was then suspended and he was fined in an administrative proceeding. The North Dakota Supreme Court held that Beylund's consent was voluntary on the erroneous assumption that the State could permissibly compel both blood and breath tests. Because voluntariness of consent to a search must be "determined from the totality of all the circumstances," *Schneckloth*, *supra*, at 227, we leave it to the state court on remand to reevaluate Beylund's consent given the partial inaccuracy of the officer's advisory.[9]

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[9] If the court on remand finds that Beylund did not voluntarily consent, it will have to address whether the evidence obtained in the search must be suppressed when the search was carried out pursuant to a state statute, see *Heien* v. *North Carolina*, 574 U. S. 54, 63–65 (2014), and the evidence is offered in an administrative rather than criminal proceeding, see *Pennsylvania Bd. of Probation and Parole* v. *Scott*, 524 U. S. 357, 363–364 (1998). And as Beylund notes, remedies may be available to him under state law. See Brief for Petitioner in No. 14–1507, pp. 13–14.

We accordingly reverse the judgment of the North Dakota Supreme Court in No. 14–1468 and remand the case for further proceedings not inconsistent with this opinion. We affirm the judgment of the Minnesota Supreme Court in No. 14–1470. And we vacate the judgment of the North Dakota Supreme Court in No. 14–1507 and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

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

The Court today considers three consolidated cases. I join the majority's disposition of *Birchfield* v. *North Dakota*, No. 14–1468, and *Beylund* v. *Levi*, No. 14–1507, in which the Court holds that the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement does not permit warrantless blood tests. But I dissent from the Court's disposition of *Bernard* v. *Minnesota*, No. 14–1470, in which the Court holds that the same exception permits warrantless breath tests. Because no governmental interest categorically makes it impractical for an officer to obtain a warrant before measuring a driver's alcohol level, the Fourth Amendment prohibits such searches without a warrant, unless exigent circumstances exist in a particular case.[1]

I

A

As the Court recognizes, the proper disposition of this case turns on whether the Fourth Amendment guarantees a right not to be subjected to a warrantless breath test after being arrested. The Fourth Amendment provides:

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[1] Because I see no justification for warrantless blood or warrantless breath tests, I also dissent from the parts of the majority opinion that justify its conclusions with respect to blood tests on the availability of warrantless breath tests. See *ante*, at 474–475.

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The "ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Brigham City* v. *Stuart*, 547 U. S. 398, 403 (2006). A citizen's Fourth Amendment right to be free from "unreasonable searches" does not disappear upon arrest. Police officers may want to conduct a range of searches after placing a person under arrest. They may want to pat the arrestee down, search her pockets and purse, peek inside her wallet, scroll through her cellphone, examine her car or dwelling, swab her cheeks, or take blood and breath samples to determine her level of intoxication. But an officer is not authorized to conduct all of these searches simply because he has arrested someone. Each search must be separately analyzed to determine its reasonableness.

Both before and after a person has been arrested, warrants are the usual safeguard against unreasonable searches because they guarantee that the search is not a "random or arbitrary ac[t] of government agents," but is instead "narrowly limited in its objectives and scope." *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 622 (1989). Warrants provide the "detached scrutiny of a neutral magistrate, and thus ensur[e] an objective determination whether an intrusion is justified." *Ibid.* And they give life to our instruction that the Fourth Amendment "is designed to prevent, not simply to redress, unlawful police action." *Steagald* v. *United States*, 451 U. S. 204, 215 (1981) (internal quotation marks omitted).

Because securing a warrant before a search is the rule of reasonableness, the warrant requirement is "subject only to

a few specifically established and well-delineated exceptions." *Katz* v. *United States*, 389 U. S. 347, 357 (1967). To determine whether to "exempt a given type of search from the warrant requirement," this Court traditionally "assess[es], on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Riley* v. *California*, 573 U. S. 373, 385 (2014) (internal quotation marks omitted). In weighing "whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question," but, more specifically, "whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *Camara* v. *Municipal Court of City and County of San Francisco*, 387 U. S. 523, 533 (1967); see also *Almeida-Sanchez* v. *United States*, 413 U. S. 266, 282–283 (1973) (Powell, J., concurring) (noting that in areas ranging from building inspections to automobile searches, the Court's "general approach to exceptions to the warrant requirement" is to determine whether a "'warrant system can be constructed that would be feasible and meaningful'"); *United States* v. *United States Dist. Court for Eastern Dist. of Mich.*, 407 U. S. 297, 315 (1972) ("We must . . . ask whether a warrant requirement would unduly frustrate the [governmental interest]").[2]

[2] The Court is wrong to suggest that because the States are seeking an extension of the "existing" search-incident-to-arrest exception rather than the "creation" of a new exception for breath searches, this Court need not determine whether the governmental interest in these searches can be accomplished without excusing the warrant requirement. *Ante*, at 467. To the contrary, as the very sentence the Court cites illustrates, the question is always whether the particular "type of search in question" is reasonable if conducted without a warrant. *Camara*, 387 U. S., at 533. To answer that question, in every case, courts must ask whether the "burden of obtaining a warrant is likely to frustrate the governmental purpose

Applying these principles in past cases, this Court has recognized two kinds of exceptions to the warrant requirement that are implicated here: (1) case-by-case exceptions, where the particularities of an individual case justify a warrantless search in that instance, but not others; and (2) categorical exceptions, where the commonalities among a class of cases justify dispensing with the warrant requirement for all of those cases, regardless of their individual circumstances.

Relevant here, the Court allows warrantless searches on a case-by-case basis where the "'exigencies'" of the particular case "'make the needs of law enforcement so compelling that a warrantless search is objectively reasonable'" in that instance. *Missouri* v. *McNeely*, 569 U. S. 141, 148–149 (2013) (quoting *Kentucky* v. *King*, 563 U. S. 452, 460 (2011)). The defining feature of the exigent-circumstances exception is that the need for the search becomes clear only after "all of the facts and circumstances of the particular case" have been considered in light of the "totality of the circumstances." 569 U. S., at 151. Exigencies can include officers' "need to provide emergency assistance to an occupant of a home, engage in 'hot pursuit' of a fleeing suspect, or enter a burning building to put out a fire and investigate its cause." *Id.*, at 149 (citations omitted).

Exigencies can also arise in efforts to measure a driver's blood alcohol level. In *Schmerber* v. *California*, 384 U. S. 757 (1966), for instance, a man sustained injuries in a car accident and was transported to the hospital. While there, a police officer arrested him for drunk driving and ordered a warrantless blood test to measure his blood alcohol content. This Court noted that although the warrant requirement generally applies to postarrest blood tests, a warrantless search was justified in that case because several hours had passed while the police investigated the scene of the crime

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behind the search." *Ibid.* This question may be answered based on existing doctrine, or it may require the creation of new doctrine, but it must always be asked.

and Schmerber was taken to the hospital, precluding a timely securing of a warrant. *Id.*, at 770–771.

This Court also recognizes some forms of searches in which the governmental interest will "categorically" outweigh the person's privacy interest in virtually any circumstance in which the search is conducted. Relevant here is the search-incident-to-arrest exception. That exception allows officers to conduct a limited postarrest search without a warrant to combat risks that could arise in any arrest situation before a warrant could be obtained: "'to remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape'" and to "'seize any evidence on the arrestee's person in order to prevent its concealment or destruction.'" *Riley*, 573 U. S., at 383 (quoting *Chimel* v. *California*, 395 U. S. 752, 763 (1969)). That rule applies "categorical[ly]" to all arrests because the need for the warrantless search arises from the very "fact of the lawful arrest," not from the reason for arrest or the circumstances surrounding it. *United States* v. *Robinson*, 414 U. S. 218, 225, 235 (1973).

Given these different kinds of exceptions to the warrant requirement, if some form of exception is necessary for a particular kind of postarrest search, the next step is to ask whether the governmental need to conduct a warrantless search arises from "threats" that "'lurk in all custodial arrests'" and therefore "justif[ies] dispensing with the warrant requirement across the board," or, instead, whether the threats "may be implicated in a particular way in a particular case" and are therefore "better addressed through consideration of case-specific exceptions to the warrant requirement, such as the one for exigent circumstances." *Riley*, 573 U. S., at 388 (alterations and internal quotation marks omitted).

To condense these doctrinal considerations into a straightforward rule, the question is whether, in light of the individual's privacy, a "legitimate governmental interest" justifies warrantless searches—and, if so, whether that governmental

interest is adequately addressed by a case-by-case exception or requires by its nature a categorical exception to the warrant requirement.

B

This Court has twice applied this framework in recent Terms. *Riley* v. *California*, 573 U. S. 373, addressed whether, after placing a person under arrest, a police officer may conduct a warrantless search of his cell phone data. California asked for a categorical rule, but the Court rejected that request, concluding that cell phones do not present the generic arrest-related harms that have long justified the search-incident-to-arrest exception. The Court found that phone data posed neither a danger to officer safety nor a risk of evidence destruction once the physical phone was secured. *Id.*, at 386–391. The Court nevertheless acknowledged that the exigent circumstances exception might be available in a "now or never situation." *Id.*, at 391 (internal quotation marks omitted). It emphasized that "[i]n light of the availability of the exigent circumstances exception, there is no reason to believe that law enforcement officers will not be able to address" the rare needs that would require an on-the-spot search. *Id.*, at 402.

Similarly, *Missouri* v. *McNeely*, 569 U. S. 141, applied this doctrinal analysis to a case involving police efforts to measure drivers' blood alcohol levels. In that case, Missouri argued that the natural dissipation of alcohol in a person's blood justified a *per se* exigent-circumstances exception to the warrant requirement—in essence, a new kind of categorical exception. The Court recognized that exigencies could exist, like in *Schmerber*, that would justify warrantless searches. 569 U. S., at 152–153. But it also noted that in many drunk-driving situations, no such exigencies exist. Where, for instance, "the warrant process will not significantly increase the delay" in testing "because an officer can take steps to secure a warrant" while the subject is being prepared for the test, there is "no plausible justification for

an exception to the warrant requirement." *Id.*, at 153–154. The Court thus found it unnecessary to "depart from careful case-by-case assessment of exigency and adopt the categorical rule proposed by the State." *Id.*, at 152.[3]

II

The States do not challenge *McNeely*'s holding that a categorical exigency exception is not necessary to accommodate the governmental interests associated with the dissipation of

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[3] The Court quibbles with our unremarkable statement that the categorical search-incident-to-arrest doctrine and the case-by-case exigent-circumstances doctrine are part of the same framework by arguing that a footnote in *McNeely* was "careful to note that the decision did not address any other exceptions to the warrant requirement." *Ante*, at 467 (citing *McNeely*, 569 U. S., at 150, n. 3). That footnote explains the difference between categorical exceptions and case-by-case exceptions generally. *Id.*, at 150, n. 3. It does nothing to suggest that the two forms of exceptions should not be considered together when analyzing whether it is reasonable to exempt categorically a particular form of search from the Fourth Amendment's warrant requirement.

It should go without saying that any analysis of whether to apply a Fourth Amendment warrant exception must necessarily be comparative. If a narrower exception to the warrant requirement adequately satisfies the governmental needs asserted, a more sweeping exception will be overbroad and could lead to unnecessary and "unreasonable searches" under the Fourth Amendment. Contrary to the Court's suggestion that "no authority" supports this proposition, see *ante*, at 474, n. 7, our cases have often deployed this commonsense comparative check. See *Riley* v. *California*, 573 U. S. 373, 391 (2014) (rejecting the application of the search-incident-to-arrest exception because the exigency exception is a "more targeted wa[y] to address [the government's] concerns"); *id.*, at 388 (analyzing whether the governmental interest can be "better addressed through consideration of case-specific exceptions to the warrant requirement"); *id.*, at 402 (noting that "[i]n light of the availability of the exigent circumstances exception, there is no reason to believe that" the governmental interest cannot be satisfied without a categorical search-incident-to-arrest exception); *McNeely*, 569 U. S., at 153 (holding that the availability of the exigency exception for circumstances that "make obtaining a warrant impractical" is "reason . . . not to accept the 'considerable overgeneralization' that a *per se* rule would reflect").

blood alcohol after drunk-driving arrests. They instead seek to exempt breath tests from the warrant requirement categorically under the search-incident-to-arrest doctrine. The majority agrees. Both are wrong.

As discussed above, regardless of the exception a State requests, the Court's traditional framework asks whether, in light of the privacy interest at stake, a legitimate governmental interest ever requires conducting breath searches without a warrant—and, if so, whether that governmental interest is adequately addressed by a case-by-case exception or requires a categorical exception to the warrant requirement. That framework directs the conclusion that a categorical search-incident-to-arrest rule for breath tests is unnecessary to address the States' governmental interests in combating drunk driving.

A

Beginning with the governmental interests, there can be no dispute that States must have tools to combat drunk driving. See *ante*, at 444–450. But neither the States nor the Court has demonstrated that "obtaining a warrant" in cases not already covered by the exigent-circumstances exception "is likely to frustrate the governmental purpose[s] behind [this] search." *Camara*, 387 U. S., at 533.[4]

First, the Court cites the governmental interest in protecting the public from drunk drivers. See *ante*, at 465. But it is critical to note that once a person is stopped for drunk driving and arrested, he no longer poses an immediate threat to the public. Because the person is already in custody prior to the administration of the breath test, there can be no serious claim that the time it takes to obtain a warrant would increase the danger that drunk driver poses to fellow citizens.

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[4] Although Bernard's case arises in Minnesota, North Dakota's similar breath test laws are before this Court. I therefore consider both States together.

Second, the Court cites the governmental interest in preventing the destruction or loss of evidence. See *ante*, at 471–472. But neither the Court nor the States identify any practical reasons why obtaining a warrant after making an arrest and before conducting a breath test compromises the quality of the evidence obtained. To the contrary, the delays inherent in administering reliable breath tests generally provide ample time to obtain a warrant.

There is a common misconception that breath tests are conducted roadside, immediately after a driver is arrested. While some preliminary testing is conducted roadside, reliability concerns with roadside tests confine their use in most circumstances to establishing probable cause for an arrest. See 2 R. Erwin, Defense of Drunk Driving Cases § 18.08 (3d ed. 2015) ("Screening devices are . . . used when it is impractical to utilize an evidential breath tester (EBT) (e. g., at roadside or at various work sites)"). The standard evidentiary breath test is conducted after a motorist is arrested and transported to a police station, governmental building, or mobile testing facility where officers can access reliable, evidence-grade breath testing machinery. Brief for Respondent in No. 14–1468, p. 8, n. 2; National Highway Transportation Safety Admin. (NHTSA), A. Berning et al., Refusal of Intoxication Testing: A Report to Congress 4, and n. 5 (No. 811098, Sept. 2008). Transporting the motorist to the equipment site is not the only potential delay in the process, however. Officers must also observe the subject for 15 to 20 minutes to ensure that "residual mouth alcohol," which can inflate results and expose the test to an evidentiary challenge at trial, has dissipated and that the subject has not inserted any food or drink into his mouth.[5] In many States, including Minnesota, officers must then give the motorist a window of time within which to contact an attorney before

[5] See NHTSA and International Assn. of Chiefs of Police, DWI Detection and Standardized Field Sobriety Testing Participant Guide, Session 7, p. 20 (2013).

administering a test.[6] Finally, if a breath test machine is not already active, the police officer must set it up. North Dakota's Intoxilyzer 8000 machine can take as long as 30 minutes to "warm-up."[7]

Because of these necessary steps, the standard breath test is conducted well after an arrest is effectuated. The Minnesota Court of Appeals has explained that nearly all breath tests "involve a time lag of 45 minutes to two hours." *State* v. *Larson*, 429 N. W. 2d 674, 676 (1988); see also *State* v. *Chirpich*, 392 N. W. 2d 34, 37 (Minn. App. 1986). Both North Dakota and Minnesota give police a 2-hour period from the time the motorist was pulled over within which to administer a breath test. N. D. Cent. Code Ann. § 39–20–04.1(1) (2008); Minn. Stat. § 169A.20, subd. 1(5) (2014).[8]

During this built-in window, police can seek warrants. That is particularly true in light of "advances" in technology that now permit "the more expeditious processing of warrant applications." *McNeely*, 569 U. S., at 154, and n. 4 (describing increased availability of telephonic warrants); *Riley*, 573 U. S., at 401 (describing jurisdictions that have adopted an e-mail warrant system that takes less than 15 minutes); Minn. Rules Crim. Proc. 33.05, 36.01–36.08 (2010 and Supp.

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[6] See Minn. Stat. § 169A.51, subd. 2(4) (2014) ("[T]he person has the right to consult with an attorney, but . . . this right is limited to the extent that it cannot unreasonably delay administration of the test"); see also *Kuhn* v. *Commissioner of Public Safety*, 488 N. W. 2d 838 (Minn. App. 1992) (finding 24 minutes insufficient time to contact an attorney before being required to submit to a test).

[7] See Office of Attorney General, Crime Lab. Div., Chemical Test Training Student Manual, Fall 2011–Spring 2012, p. 13 (2011).

[8] Many tests are conducted at the outer boundaries of that window. See, *e. g.*, *Israel* v. *Commissioner of Public Safety*, 400 N. W. 2d 428 (Minn. App. 1987) (57-minute poststop delay); *Mosher* v. *Commissioner of Public Safety*, 2015 WL 3649344 (Minn. App., June 15, 2015) (119-minute postarrest delay); *Johnson* v. *Commissioner of Public Safety*, 400 N. W. 2d 195 (Minn. App. 1987) (96-minute postarrest delay); *Scheiterlein* v. *Commissioner of Public Safety*, 2014 WL 3021278 (Minn. App., July 7, 2014) (111-minute poststop delay).

2013) (allowing telephonic warrants); N. D. Rules Crim. Proc. 41(c)(2)–(3) (2013) (same). Moreover, counsel for North Dakota explained at oral argument that the State uses a typical "on-call" system in which some judges are available even during off-duty times.[9] See Tr. of Oral Arg. 42.

Where "an officer can . . . secure a warrant while" the motorist is being transported and the test is being prepared, this Court has said that "there would be no plausible justification for an exception to the warrant requirement." *McNeely*, 569 U. S., at 153–154. Neither the Court nor the States provide any evidence to suggest that, in the normal course of affairs, obtaining a warrant and conducting a breath test will exceed the allotted 2-hour window.

Third, the Court and the States cite a governmental interest in minimizing the costs of gathering evidence of drunk driving. But neither has demonstrated that requiring police to obtain warrants for breath tests would impose a sufficiently significant burden on state resources to justify the elimination of the Fourth Amendment's warrant requirement. The Court notes that North Dakota has 82 judges and magistrate judges who are authorized to issue warrants. See *ante*, at 468. Because North Dakota has roughly 7,000 drunk-driving arrests annually, the Court concludes that if police were required to obtain warrants "for every search incident to arrest that does not involve exigent circumstances, the courts would be swamped." *Ibid.* That conclusion relies on inflated numbers and unsupported inferences.

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[9] Counsel for North Dakota represented at oral argument that in "larger jurisdictions" it "takes about a half an hour" to obtain a warrant. Tr. of Oral Arg. 42. Counsel said that it is sometimes "harder to get somebody on the phone" in rural jurisdictions, but even if it took twice as long, the process of obtaining a warrant would be unlikely to take longer than the inherent delays in preparing a motorist for testing and would be particularly unlikely to reach beyond the 2-hour window within which officers can conduct the test.

Assuming that North Dakota police officers do not obtain warrants for any drunk-driving arrests today, and assuming that they would need to obtain a warrant for every drunk-driving arrest tomorrow, each of the State's 82 judges and magistrate judges would need to issue fewer than two extra warrants per week.[10] Minnesota has nearly the same ratio of judges to drunk-driving arrests, and so would face roughly the same burden.[11] These back-of-the-envelope numbers suggest that the burden of obtaining a warrant before conducting a breath test would be small in both States.

But even these numbers *overstate* the burden by a significant degree. States only need to obtain warrants for drivers who refuse testing and a significant majority of drivers voluntarily consent to breath tests, even in States without criminal penalties for refusal. In North Dakota, only 21% of people refuse breath tests and in Minnesota, only 12% refuse. NHTSA, E. Namuswe, H. Coleman, & A. Berning, Breath Test Refusal Rates in the United States–2011 Update 2 (No. 811881, Mar. 2014). Including States that impose only *civil* penalties for refusal, the average refusal rate is slightly higher at 24%. *Id.*, at 3. Say that North Dakota's and Minnesota's refusal rates rise to double the mean, or 48%. Each of their judges and magistrate judges would need to issue

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[10] Seven thousand annual arrests divided by 82 judges and magistrate judges is 85.4 extra warrants per judge and magistrate judge per year. And 85.4 divided by 52 weeks is 1.64 extra warrants per judge and magistrate judge per week.

[11] Minnesota has about 25,000 drunk-driving incidents each year. Minn. Dept. of Public Safety, Office of Traffic Safety, Minn. Impaired Driving Facts 2014, p. 2 (2015). In Minnesota, all judges not exercising probate jurisdiction can issue warrants. Minn. Stat. § 626.06 (2009). But the state district court judges appear to do the lion's share of that work. So, conservatively counting only those judges, the State has 280 judges who can issue warrants. Minn. Judicial Branch, Report to the Community 23 (2015). Similar to North Dakota, that amounts to 1.72 extra warrants per judge per week.

fewer than one extra warrant a week.[12] That bears repeating: The Court finds a categorical exception to the warrant requirement because each of a State's judges and magistrate judges would need to issue less than one extra warrant a week.

Fourth, the Court alludes to the need to collect evidence conveniently. But mere convenience in investigating drunk driving cannot itself justify an exception to the warrant requirement. All of this Court's postarrest exceptions to the warrant requirement require a law enforcement interest separate from criminal investigation. The Court's justification for the search-incident-to-arrest rule is "the officer's safety" and the prevention of evidence "concealment or destruction." *Chimel*, 395 U. S., at 763. The Court's justification for the booking exception, which allows police to obtain fingerprints and DNA without a warrant while booking an arrestee at the police station, is the administrative need for identification. See *Maryland* v. *King*, 569 U. S. 435, 449–450. The Court's justification for the inventory search exception, which allows police to inventory the items in the arrestee's personal possession and car, is the need to "protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger." *Colorado* v. *Bertine*, 479 U. S. 367, 372 (1987).

This Court has never said that mere convenience in gathering evidence justifies an exception to the warrant requirement. See *Florida* v. *Wells*, 495 U. S. 1, 4 (1990) (suppressing evidence where supposed "inventory" search was done

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[12] Because each of North Dakota's judges and magistrate judges would have to issue an extra 1.64 warrants per week assuming a 100% refusal rate, see *supra*, at 490, nn. 10–11, they would have to issue an additional 0.79 per week assuming a 48% refusal rate. Adjusting for the same conservatively high refusal rate, Minnesota would go from 1.72 additional warrants per judge per week to just 0.82.

without standardized criteria, suggesting instead "'a purposeful and general means of discovering evidence of crime'"). If the simple collection of evidence justifies an exception to the warrant requirement even where a warrant could be easily obtained, exceptions would become the rule. *Ibid.*

Finally, as a general matter, the States have ample tools to force compliance with lawfully obtained warrants. This Court has never cast doubt on the States' ability to impose criminal penalties for obstructing a search authorized by a lawfully obtained warrant. No resort to violent compliance would be necessary to compel a test. If a police officer obtains a warrant to conduct a breath test, citizens can be subjected to serious penalties for obstruction of justice if they decline to cooperate with the test.

This Court has already taken the weighty step of characterizing breath tests as "searches" for Fourth Amendment purposes. See *Skinner*, 489 U. S., at 616–617. That is because the typical breath test requires the subject to actively blow alveolar (or "deep lung") air into the machine. *Ibid.* Although the process of physically blowing into the machine can be completed in as little as a few minutes, the end-to-end process can be significantly longer. The person administering the test must calibrate the machine, collect at least two separate samples from the arrestee, change the mouthpiece and reset the machine between each, and conduct any additional testing indicated by disparities between the two tests.[13] Although some searches are certainly more invasive than breath tests, this Court cannot do justice to their status as Fourth Amendment "searches" if exaggerated time pressures, mere convenience in collecting evidence, and the "burden" of asking judges to issue an extra couple of warrants per month are costs so high as to render reasonable a search

[13] See Office of Attorney General, Crime Lab. Div., Approved Method To Conduct Breath Tests With the Intoxilyzer 8000 (BRS–001), pp. 4–6, 8 (2012).

without a warrant.[14] The Fourth Amendment becomes an empty promise of protecting citizens from unreasonable searches.

B

After evaluating the governmental and privacy interests at stake here, the final step is to determine whether any situations in which warrants would interfere with the States' legitimate governmental interests should be accommodated through a case-by-case or categorical exception to the warrant requirement.

As shown, because there are so many circumstances in which obtaining a warrant will not delay the administration of a breath test or otherwise compromise any governmental interest cited by the States, it should be clear that allowing a categorical exception to the warrant requirement is a "'considerable overgeneralization'" here. *McNeely*, 569 U. S., at 153. As this Court concluded in *Riley* and *McNeely*, any unusual issues that do arise can "better [be] addressed through consideration of case-specific exceptions to the warrant requirement." *Riley*, 573 U. S., at 388; see also *McNeely*, 569 U. S., at 157–158 (opinion of SOTOMAYOR, J.).

[14] In weighing the governmental interests at stake here, the Court also downplays the "benefits" that warrants provide for breath tests. Because this Court has said unequivocally that warrants are the usual safeguard against unreasonable searches, see *Katz* v. *United States*, 389 U. S. 347, 357 (1967), the legal relevance of this discussion is not clear. In any event, the Court is wrong to conclude that warrants provide little benefit here. The Court says that any warrants for breath tests would be issued based on the "characterization" of the police officer, which a "magistrate would be in a poor position to challenge." *Ante*, at 470. Virtually all warrants will rely to some degree on an officer's own perception. The very purpose of warrants is to have a neutral arbiter determine whether inferences drawn from officers' perceptions and circumstantial evidence are sufficient to justify a search. Regardless of the particulars, the Court's mode of analysis is a dangerous road to venture down. Historically, our default has been that warrants are required. This part of the Court's argument instead suggests, without precedent, that their value now has to be proved.

Without even considering the comparative effectiveness of case-by-case and categorical exceptions, the Court reaches for the categorical search-incident-to-arrest exception and enshrines it for all breath tests. The majority apparently assumes that any postarrest search should be analyzed under the search-incident-to-arrest doctrine. See *ante*, at 457 ("In the three cases now before us, the drivers were searched or told that they were required to submit to a search after being placed under arrest for drunk driving. We therefore consider how the search-incident-to-arrest doctrine applies to breath and blood tests incident to such arrests").

But, as we explained earlier, police officers may want to conduct a range of different searches after placing a person under arrest. Each of those searches must be separately analyzed for Fourth Amendment compliance. Two narrow types of postarrest searches are analyzed together under the rubric of our search-incident-to-arrest doctrine: searches to disarm arrestees who could pose a danger before a warrant is obtained and searches to find evidence arrestees have an incentive to destroy before a warrant is obtained. *Chimel*, 395 U. S., at 763. Other forms of postarrest searches are analyzed differently because they present needs that require more tailored exceptions to the warrant requirement. See *supra*, at 482–483 (discussing postarrest application of the "exigency" exception); see also *supra*, at 491 (discussing postarrest booking and inventory exceptions).

The fact that a person is under arrest does not tell us which of these warrant exceptions should apply to a particular kind of postarrest search. The way to analyze which exception, if any, is appropriate is to ask whether the exception best addresses the nature of the postarrest search and the needs it fulfills. Yet the majority never explains why the search-incident-to-arrest framework—its justifications, applications, and categorical scope—is best suited to breath tests.

To the contrary, the search-incident-to-arrest exception is particularly ill suited to breath tests. To the extent the

Court discusses any fit between breath tests and the rationales underlying the search-incident-to-arrest exception, it says that evidence preservation is one of the core values served by the exception and worries that "evidence may be lost" if breath tests are not conducted. *Ante*, at 471. But, of course, the search-incident-to-arrest exception is concerned with evidence destruction only insofar as that destruction would occur before a warrant could be sought. And breath tests are not, except in rare circumstances, conducted at the time of arrest, before a warrant can be obtained, but at a separate location 40 to 120 minutes after an arrest is effectuated. That alone should be reason to reject an exception forged to address the immediate needs of arrests.

The exception's categorical reach makes it even less suitable here. The search-incident-to-arrest exception is applied categorically precisely because the needs it addresses could arise in every arrest. *Robinson*, 414 U. S., at 236. But the government's need to conduct a breath test is present only in arrests for drunk driving. And the asserted need to conduct a breath test without a warrant arises only when a warrant cannot be obtained during the significant built-in delay between arrest and testing. The conditions that require warrantless breath searches, in short, are highly situational and defy the logical underpinnings of the search-incident-to-arrest exception and its categorical application.

* * *

In *Maryland* v. *King*, this Court dispensed with the warrant requirement and allowed DNA searches following an arrest. But there, it at least attempted to justify the search using the booking exception's interest in identifying arrestees. 569 U. S., at 449–456; *id.*, at 468–470 (Scalia, J., dissenting). Here, the Court lacks even the pretense of attempting to situate breath searches within the narrow and weighty law enforcement needs that have historically justified the

limited use of warrantless searches. I fear that if the Court continues down this road, the Fourth Amendment's warrant requirement will become nothing more than a suggestion.

JUSTICE THOMAS, concurring in judgment in part and dissenting in part.

The compromise the Court reaches today is not a good one. By deciding that some (but not all) warrantless tests revealing the blood alcohol concentration (BAC) of an arrested driver are constitutional, the Court contorts the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement. The far simpler answer to the question presented is the one rejected in *Missouri* v. *McNeely*, 569 U. S. 141 (2013). Here, the tests revealing the BAC of a driver suspected of driving drunk are constitutional under the exigent-circumstances exception to the warrant requirement. *Id.*, at 178–179 (THOMAS, J., dissenting).

I

Today's decision chips away at a well-established exception to the warrant requirement. Until recently, we have admonished that "[a] police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick *ad hoc* judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search." *United States* v. *Robinson*, 414 U. S. 218, 235 (1973). Under our precedents, a search incident to lawful arrest "require[d] no additional justification." *Ibid.* Not until the recent decision in *Riley* v. *California*, 573 U. S. 373 (2014), did the Court begin to retreat from this categorical approach because it feared that the search at issue, the "search of the information on a cell phone," bore "little resemblance to the type of brief physical search" contemplated by this Court's past search-incident-to-arrest decisions. *Id.*, at 386. I joined *Riley*, however, because the Court resisted the temp-

tation to permit searches of some kinds of cell-phone data and not others, *id.*, at 400–401, and instead asked more generally whether that entire "category of effects" was searchable without a warrant, *id.*, at 386.

Today's decision begins where *Riley* left off. The Court purports to apply *Robinson* but further departs from its categorical approach by holding that warrantless breath tests to prevent the destruction of BAC evidence are constitutional searches incident to arrest, but warrantless blood tests are not. *Ante*, at 476 ("Because breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, we conclude that a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving"). That hairsplitting makes little sense. Either the search-incident-to-arrest exception permits bodily searches to prevent the destruction of BAC evidence, or it does not.

The Court justifies its result—an arbitrary line in the sand between blood and breath tests—by balancing the invasiveness of the particular type of search against the government's reasons for the search. *Ante*, at 461–476. Such case-by-case balancing is bad for the People, who "through ratification, have already weighed the policy tradeoffs that constitutional rights entail." *Luis* v. *United States*, 578 U. S. 5, 33 (2016) (THOMAS, J., concurring in judgment); see also *Crawford* v. *Washington*, 541 U. S. 36, 67–68 (2004). It is also bad for law enforcement officers, who depend on predictable rules to do their job, as Members of this Court have exhorted in the past. See *Arizona* v. *Gant*, 556 U. S. 332, 359 (2009) (ALITO, J., dissenting); see also *id.*, at 363 (faulting the Court for "leav[ing] the law relating to searches incident to arrest in a confused and unstable state").

Today's application of the search-incident-to-arrest exception is bound to cause confusion in the lower courts. The Court's choice to allow some (but not all) BAC searches is undeniably appealing, for it both reins in the pernicious prob-

lem of drunk driving and also purports to preserve some Fourth Amendment protections. But that compromise has little support under this Court's existing precedents.

II

The better (and far simpler) way to resolve these cases is by applying the *per se* rule that I proposed in *McNeely*. Under that approach, both warrantless breath and blood tests are constitutional because "the natural metabolization of [BAC] creates an exigency once police have probable cause to believe the driver is drunk. It naturally follows that police may conduct a search in these circumstances." 569 U. S., at 178 (dissenting opinion).

The Court in *McNeely* rejected that bright-line rule and instead adopted a totality-of-the-circumstances test examining whether the facts of a particular case presented exigent circumstances justifying a warrantless search. *Id.*, at 145. The Court ruled that "the natural dissipation of alcohol in the blood" could not "categorically" create an "exigency" in every case. *Id.*, at 156. The destruction of "BAC evidence from a drunk-driving suspect" that "naturally dissipates over time in a gradual and relatively predictable manner," according to the Court, was qualitatively different from the destruction of evidence in "circumstances in which the suspect has control over easily disposable evidence." *Id.*, at 153.

Today's decision rejects *McNeely*'s arbitrary distinction between the destruction of evidence generally and the destruction of BAC evidence. But only for searches incident to arrest. *Ante*, at 471–473. The Court declares that such a distinction "between an arrestee's active destruction of evidence and the loss of evidence due to a natural process makes little sense." *Ante*, at 471. I agree. See *McNeely*, *supra*, at 180–181 (THOMAS, J., dissenting). But it also "makes little sense" for the Court to reject *McNeely*'s arbitrary distinction only for searches incident to arrest and not also

for exigent-circumstances searches when both are justified by identical concerns about the destruction of the same evidence. *McNeely*'s distinction is no less arbitrary for searches justified by exigent circumstances than those justified by search incident to arrest.

The Court was wrong in *McNeely*, and today's compromise is perhaps an inevitable consequence of that error. Both searches contemplated by the state laws at issue in these cases would be constitutional under the exigent-circumstances exception to the warrant requirement. I respectfully concur in the judgment in part and dissent in part.

Syllabus

MATHIS *v.* UNITED STATES

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

No. 15–6092. Argued April 26, 2016—Decided June 23, 2016

The Armed Career Criminal Act (ACCA) imposes a 15-year mandatory minimum sentence on a defendant convicted of being a felon in possession of a firearm who also has three prior state or federal convictions "for a violent felony," including "burglary, arson, or extortion." 18 U. S. C. §§ 924(e)(1), (e)(2)(B)(ii). To determine whether a prior conviction is for one of those listed crimes, courts apply the "categorical approach"—they ask whether the elements of the offense forming the basis for the conviction sufficiently match the elements of the generic (or commonly understood) version of the enumerated crime. See *Taylor* v. *United States*, 495 U. S. 575, 600–601. "Elements" are the constituent parts of a crime's legal definition, which must be proved beyond a reasonable doubt to sustain a conviction; they are distinct from "facts," which are mere real-world things—extraneous to the crime's legal requirements and thus ignored by the categorical approach.

When a statute defines only a single crime with a single set of elements, application of the categorical approach is straightforward. But when a statute defines multiple crimes by listing multiple, alternative elements, the elements-matching required by the categorical approach is more difficult. To decide whether a conviction under such a statute is for a listed ACCA offense, a sentencing court must discern which of the alternative elements was integral to the defendant's conviction. That determination is made possible by the "modified categorical approach," which permits a court to look at a limited class of documents from the record of a prior conviction to determine what crime, with what elements, a defendant was convicted of before comparing that crime's elements to those of the generic offense. See, *e. g.*, *Shepard* v. *United States*, 544 U. S. 13, 26. This case involves a different type of alternatively worded statute—one that defines only one crime, with one set of elements, but which lists alternative factual means by which a defendant can satisfy those elements.

Here, petitioner Richard Mathis pleaded guilty to being a felon in possession of a firearm. Because of his five prior Iowa burglary convictions, the Government requested an ACCA sentence enhancement. Under the generic offense, burglary requires unlawful entry into a

"building or other structure." *Taylor*, 495 U. S., at 598. The Iowa statute, however, reaches "any building, structure, [or] land, water, or air vehicle." Iowa Code § 702.12. Under Iowa law, that list of places does not set out alternative elements, but rather alternative means of fulfilling a single locational element.

The District Court applied the modified categorical approach, found that Mathis had burgled structures, and imposed an enhanced sentence. The Eighth Circuit affirmed. Acknowledging that the Iowa statute swept more broadly than the generic statute, the court determined that, even if "structures" and "vehicles" were not separate elements but alternative means of fulfilling a single element, a sentencing court could still invoke the modified categorical approach. Because the record showed that Mathis had burgled structures, the court held, the District Court's treatment of Mathis's prior convictions as ACCA predicates was proper.

Held: Because the elements of Iowa's burglary law are broader than those of generic burglary, Mathis's prior convictions cannot give rise to ACCA's sentence enhancement. Pp. 509–520.

(a) This case is resolved by this Court's precedents, which have repeatedly held, and in no uncertain terms, that a state crime cannot qualify as an ACCA predicate if its elements are broader than those of a listed generic offense. See, *e. g.*, *Taylor*, 495 U. S., at 602. The "underlying brute facts or means" by which the defendant commits his crime, *Richardson* v. *United States*, 526 U. S. 813, 817, make no difference; even if the defendant's conduct, in fact, fits within the definition of the generic offense, the mismatch of elements saves him from an ACCA sentence. ACCA requires a sentencing judge to look only to "the elements of the [offense], not to the facts of [the] defendant's conduct." *Taylor*, 495 U. S., at 601.

This Court's cases establish three basic reasons for adhering to an elements-only inquiry. First, ACCA's text, which asks only about a defendant's "prior convictions," indicates that Congress meant for the sentencing judge to ask only whether "the defendant had been convicted of crimes falling within certain categories," *id.*, at 600, not what he had done. Second, construing ACCA to allow a sentencing judge to go any further would raise serious Sixth Amendment concerns because only a jury, not a judge, may find facts that increase the maximum penalty. See *Apprendi* v. *New Jersey*, 530 U. S. 466, 490. And third, an elements-focus avoids unfairness to defendants, who otherwise might be sentenced based on statements of "non-elemental fact[s]" that are prone to error because their proof is unnecessary to a conviction. *Descamps* v. *United States*, 570 U. S. 254, 270.

Syllabus

Those reasons remain as strong as ever when a statute, like Iowa's burglary statute, lists alternative means of fulfilling one (or more) of a crime's elements. ACCA's term "convictions" still supports an elements-based inquiry. The Sixth Amendment problems associated with a court's exploration of means rather than elements do not abate in the face of a statute like Iowa's: Alternative factual scenarios remain just that, and thus off-limits to sentencing judges. Finally, a statute's listing of disjunctive means does nothing to mitigate the possible unfairness of basing an increased penalty on something not legally necessary to a prior conviction. Accordingly, whether means are listed in a statute or not, ACCA does not care about them; rather, its focus, as always, remains on a crime's elements. Pp. 509–517.

(b) The first task for a court faced with an alternatively phrased statute is thus to determine whether the listed items are elements or means. That threshold inquiry is easy here, where a State Supreme Court ruling answers the question. A state statute on its face could also resolve the issue. And if state law fails to provide clear answers, the record of a prior conviction itself might prove useful to determining whether the listed items are elements of the offense. If such record materials do not speak plainly, a sentencing judge will be unable to satisfy "*Taylor*'s demand for certainty." *Shepard*, 544 U. S., at 21. But between the record and state law, that kind of indeterminacy should prove more the exception than the rule. Pp. 517–519.

786 F. 3d 1068, reversed.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and SOTOMAYOR, JJ., joined. KENNEDY, J., *post*, p. 520, and THOMAS, J., *post*, p. 521, filed concurring opinions. BREYER, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 523. ALITO, J., filed a dissenting opinion, *post*, p. 536.

Mark C. Fleming argued the cause for petitioner. With him on the briefs were *Eric F. Fletcher*, *Alan E. Schoenfeld*, *James Whalen*, *David M. Lehn*, and *Joshua M Koppel.*

Nicole A. Saharsky argued the cause for the United States. With her on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Caldwell*, *Deputy Solicitor General Dreeben*, and *John M. Pellettieri.**

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*Briefs of *amici curiae* urging reversal were filed for the American Immigration Lawyers Association et al. by *Brian P. Goldman*, *Robert M. Loeb*, *Thomas M. Bondy*, *Manuel D. Vargas*, and *Maureen A. Sweeney*;

JUSTICE KAGAN delivered the opinion of the Court.

The Armed Career Criminal Act (ACCA or Act), 18 U. S. C. § 924(e), imposes a 15-year mandatory minimum sentence on certain federal defendants who have three prior convictions for a "violent felony," including "burglary, arson, or extortion." To determine whether a past conviction is for one of those offenses, courts compare the elements of the crime of conviction with the elements of the "generic" version of the listed offense—*i. e.*, the offense as commonly understood. For more than 25 years, our decisions have held that the prior crime qualifies as an ACCA predicate if, but only if, its elements are the same as, or narrower than, those of the generic offense. The question in this case is whether ACCA makes an exception to that rule when a defendant is convicted under a statute that lists multiple, alternative means of satisfying one (or more) of its elements. We decline to find such an exception.

I

A

ACCA prescribes a 15-year mandatory minimum sentence if a defendant is convicted of being a felon in possession of a firearm following three prior convictions for a "violent felony." § 924(e)(1). (Absent that sentence enhancement, the felon-in-possession statute sets a 10-year *maximum* penalty. See § 924(a)(2).) ACCA defines the term "violent felony" to include any felony, whether state or federal, that "is burglary, arson, or extortion." § 924(e)(2)(B)(ii). In listing those crimes, we have held, Congress referred only to their usual or (in our terminology) generic versions—not to all variants of the offenses. See *Taylor* v. *United States*, 495 U. S. 575, 598 (1990). That means as to burglary—the of-

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and for the National Association of Federal Defenders et al. by *Kara Hartzler, Vincent J. Brunkow, Eamon P. Joyce,* and *Jeffrey T. Green.*

Dale L. Wilcox filed a brief for the Immigration Reform Law Institute as *amicus curiae* urging affirmance.

fense relevant in this case—that Congress meant a crime "contain[ing] the following elements: an unlawful or unprivileged entry into . . . a building or other structure, with intent to commit a crime." *Ibid.*

To determine whether a prior conviction is for generic burglary (or other listed crime) courts apply what is known as the categorical approach: They focus solely on whether the elements of the crime of conviction sufficiently match the elements of generic burglary, while ignoring the particular facts of the case. See *id.*, at 600–601. Distinguishing between elements and facts is therefore central to ACCA's operation. "Elements" are the "constituent parts" of a crime's legal definition—the things the "prosecution must prove to sustain a conviction." Black's Law Dictionary 634 (10th ed. 2014). At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant, see *Richardson* v. *United States*, 526 U. S. 813, 817 (1999); and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty, see *McCarthy* v. *United States*, 394 U. S. 459, 466 (1969). Facts, by contrast, are mere real-world things—extraneous to the crime's legal requirements. (We have sometimes called them "brute facts" when distinguishing them from elements. *Richardson*, 526 U. S., at 817.) They are "circumstance[s]" or "event[s]" having no "legal effect [or] consequence": In particular, they need neither be found by a jury nor admitted by a defendant. Black's Law Dictionary 709. And ACCA, as we have always understood it, cares not a whit about them. See, *e. g.*, *Taylor*, 495 U. S., at 599–602. A crime counts as "burglary" under the Act if its *elements* are the same as, or narrower than, those of the generic offense. But if the crime of conviction covers any more conduct than the generic offense, then it is not an ACCA "burglary"—even if the defendant's actual conduct (*i. e.*, the facts of the crime) fits within the generic offense's boundaries.

The comparison of elements that the categorical approach requires is straightforward when a statute sets out a single

(or "indivisible") set of elements to define a single crime. The court then lines up that crime's elements alongside those of the generic offense and sees if they match. So, for example, this Court found that a California statute swept more broadly than generic burglary because it criminalized entering a location (even if lawfully) with the intent to steal, and thus encompassed mere shoplifting. See *id.*, at 591; *Descamps* v. *United States*, 570 U. S. 254, 260–261 (2013). Accordingly, no conviction under that law could count as an ACCA predicate, even if the defendant in fact made an illegal entry and so committed burglary in its generic form. See *id.*, at 277–278.

Some statutes, however, have a more complicated (sometimes called "divisible") structure, making the comparison of elements harder. *Id.*, at 260. A single statute may list elements in the alternative, and thereby define multiple crimes. Suppose, for example, that the California law noted above had prohibited "the lawful entry or the unlawful entry" of a premises with intent to steal, so as to create two different offenses, one more serious than the other. If the defendant were convicted of the offense with unlawful entry as an element, then his crime of conviction would match generic burglary and count as an ACCA predicate; but, conversely, the conviction would not qualify if it were for the offense with lawful entry as an element. A sentencing court thus requires a way of figuring out which of the alternative elements listed—lawful entry or unlawful entry—was integral to the defendant's conviction (that is, which was necessarily found or admitted). See *id.*, at 261–262. To address that need, this Court approved the "modified categorical approach" for use with statutes having multiple alternative elements. See, *e. g.*, *Shepard* v. *United States*, 544 U. S. 13, 26 (2005). Under that approach, a sentencing court looks to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted

of. See *ibid.*; *Taylor*, 495 U. S., at 602. The court can then compare that crime, as the categorical approach commands, with the relevant generic offense.

This case concerns a different kind of alternatively phrased law: not one that lists multiple elements disjunctively, but instead one that enumerates various factual means of committing a single element. See generally *Schad* v. *Arizona*, 501 U. S. 624, 636 (1991) (plurality opinion) ("[L]egislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes"). To use a hypothetical adapted from two of our prior decisions, suppose a statute requires use of a "deadly weapon" as an element of a crime and further provides that the use of a "knife, gun, bat, or similar weapon" would all qualify. See *Descamps*, 570 U. S., at 271; *Richardson*, 526 U. S., at 817. Because that kind of list merely specifies diverse means of satisfying a single element of a single crime—or otherwise said, spells out various factual ways of committing some component of the offense—a jury need not find (or a defendant admit) any particular item: A jury could convict even if some jurors "conclude[d] that the defendant used a knife" while others "conclude[d] he used a gun," so long as all agreed that the defendant used a "deadly weapon." *Ibid.*; see *Descamps*, 570 U. S., at 270 (describing means, for this reason, as "legally extraneous circumstances"). And similarly, to bring the discussion back to burglary, a statute might—indeed, as soon discussed, Iowa's burglary law does—itemize the various places that crime could occur as disjunctive factual scenarios rather than separate elements, so that a jury need not make any specific findings (or a defendant admissions) on that score.

The issue before us is whether ACCA treats this kind of statute as it does all others, imposing a sentence enhancement only if the state crime's elements correspond to those of a generic offense—or instead whether the Act makes an

exception for such a law, so that a sentence can be enhanced when one of the statute's specified means creates a match with the generic offense, even though the broader element would not.

B

Petitioner Richard Mathis pleaded guilty to being a felon in possession of a firearm. See § 922(g). At sentencing, the Government asked the District Court to impose ACCA's 15-year minimum penalty based on Mathis's five prior convictions for burglary under Iowa law.

Iowa's burglary statute, all parties agree, covers more conduct than generic burglary does. See Brief for Petitioner 36; Brief for United States 44. The generic offense requires unlawful entry into a "building or other structure." *Taylor*, 495 U. S., at 598; *supra*, at 503–504. Iowa's statute, by contrast, reaches a broader range of places: "any building, structure, *[or] land, water, or air vehicle.*" Iowa Code § 702.12 (2013) (emphasis added). And those listed locations are not alternative elements, going toward the creation of separate crimes. To the contrary, they lay out alternative ways of satisfying a single locational element, as the Iowa Supreme Court has held: Each of the terms serves as an "alternative method of committing [the] single crime" of burglary, so that a jury need not agree on which of the locations was actually involved. *State* v. *Duncan*, 312 N. W. 2d 519, 523 (Iowa 1981); see *State* v. *Rooney*, 862 N. W. 2d 367, 376 (Iowa 2015) (discussing the single "broadly phrased . . . element of place" in Iowa's burglary law). In short, the statute defines one crime, with one set of elements, broader than generic burglary—while specifying multiple means of fulfilling its locational element, some but not all of which (*i. e.*, buildings and other structures, but not vehicles) satisfy the generic definition.

The District Court imposed an ACCA enhancement on Mathis after inspecting the records of his prior convictions and determining that he had burgled structures, rather than

vehicles. See App. 34–35. The Court of Appeals for the Eighth Circuit affirmed. 786 F. 3d 1068 (2015). It acknowledged that Iowa's burglary statute, by covering vehicles in addition to structures, swept more broadly than generic burglary. See *id.*, at 1074. But it noted that if structures and vehicles were separate elements, each part of a different crime, then a sentencing court could invoke the modified categorical approach and look to old record materials to see which of those crimes the defendant had been convicted of. See *id.*, at 1072–1074. And the Court of Appeals thought nothing changed if structures and vehicles were not distinct elements but only alternative means: "Whether [such locations] amount to alternative elements or merely alternative means to fulfilling an element," the Eighth Circuit held, a sentencing court "must apply the modified categorical approach" and inspect the records of prior cases. *Id.*, at 1075. If the court found from those materials that the defendant had in fact committed the offense in a way that satisfied the definition of generic burglary—here, by burgling a structure rather than a vehicle—then the court should treat the conviction as an ACCA predicate. And that was so, the Court of Appeals stated, even though the elements of the crime of conviction, in encompassing both types of locations, were broader than those of the relevant generic offense. See *id.*, at 1074–1075. In this circumstance, the court thus found, ACCA's usual elements-based inquiry would yield to a facts-based one.

That decision added to a Circuit split over whether ACCA's general rule—that a defendant's crime of conviction can count as a predicate only if its elements match those of a generic offense—gives way when a statute happens to list various means by which a defendant can satisfy an element.[1]

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[1] Compare 786 F. 3d 1068 (CA8 2015) (case below) (recognizing such an exception); *United States* v. *Ozier*, 796 F. 3d 597 (CA6 2015) (same); *United States* v. *Trent*, 767 F. 3d 1046 (CA10 2014) (same), with *Rendon* v. *Holder*,

We granted certiorari to resolve that division, 577 U. S. 1101 (2016), and now reverse.

II

A

As just noted, the elements of Mathis's crime of conviction (Iowa burglary) cover a greater swath of conduct than the elements of the relevant ACCA offense (generic burglary). See *supra*, at 507. Under our precedents, that undisputed disparity resolves this case. We have often held, and in no uncertain terms, that a state crime cannot qualify as an ACCA predicate if its elements are broader than those of a listed generic offense. See, *e. g.*, *Taylor*, 495 U. S., at 602. How a given defendant actually perpetrated the crime—what we have referred to as the "underlying brute facts or means" of commission, *Richardson*, 526 U. S., at 817—makes no difference; even if his conduct fits within the generic offense, the mismatch of elements saves the defendant from an ACCA sentence. Those longstanding principles, and the reasoning that underlies them, apply regardless of whether a statute omits or instead specifies alternative possible means of commission. The itemized construction gives a sentencing court no special warrant to explore the facts of an offense, rather than to determine the crime's elements and compare them with the generic definition.

Taylor set out the essential rule governing ACCA cases more than a quarter century ago. All that counts under the Act, we held then, are "the elements of the statute of conviction." 495 U. S., at 601. So, for example, the label a State assigns to a crime—whether "burglary," "breaking and entering," or something else entirely—has no relevance to whether that offense is an ACCA predicate. See *id.*, at 590–592. And more to the point here: The same is true of "the

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764 F. 3d 1077 (CA9 2014) (rejecting that exception); *Omargharib* v. *Holder*, 775 F. 3d 192 (CA4 2014) (same).

particular facts underlying [the prior] convictions"—the means by which the defendant, in real life, committed his crimes. *Id.*, at 600. That rule can seem counterintuitive: In some cases, a sentencing judge knows (or can easily discover) that the defendant carried out a "real" burglary, even though the crime of conviction also extends to other conduct. No matter. Under ACCA, *Taylor* stated, it is impermissible for "a particular crime [to] sometimes count towards enhancement and sometimes not, depending on the facts of the case." *Id.*, at 601. Accordingly, a sentencing judge may look only to "the elements of the [offense], not to the facts of [the] defendant's conduct." *Ibid.*

That simple point became a mantra in our subsequent ACCA decisions.[2] At the risk of repetition (perhaps downright tedium), here are some examples. In *Shepard*: ACCA "refers to predicate offenses in terms not of prior conduct but of prior 'convictions' and the 'element[s]' of crimes." 544 U. S., at 19 (alteration in original). In *James* v. *United States*: "[W]e have avoided any inquiry into the underlying facts of [the defendant's] particular offense, and have looked solely to the elements of [burglary] as defined by [state] law." 550 U. S. 192, 214 (2007). In *Sykes* v. *United States*: "[W]e consider [only] the *elements of the offense*[,] without inquiring into the specific conduct of this particular offender." 564 U. S. 1, 7 (2011) (quoting *James*, 550 U. S., at 202; emphasis in original). And most recently (and tersely) in *Descamps*: "The key [under ACCA] is elements, not facts." 570 U. S., at 261.

Our decisions have given three basic reasons for adhering to an elements-only inquiry. First, ACCA's text favors that

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[2] So too in our decisions applying the categorical approach outside the ACCA context—most prominently, in immigration cases. See, *e. g.*, *Kawashima* v. *Holder*, 565 U. S. 478, 482–483 (2012) (stating that a judge must look to the "formal element[s] of a conviction[,] rather than to the specific facts underlying the crime," in deciding whether to deport an alien for committing an "aggravated felony").

approach. By enhancing the sentence of a defendant who has three "previous convictions" for generic burglary, § 924(e)(1)—rather than one who has thrice committed that crime—Congress indicated that the sentencer should ask only about whether "the defendant had been convicted of crimes falling within certain categories," and not about what the defendant had actually done. *Taylor*, 495 U. S., at 600. Congress well knows how to instruct sentencing judges to look into the facts of prior crimes: In other statutes, using different language, it has done just that. See *United States* v. *Hayes*, 555 U. S. 415, 421 (2009) (concluding that the phrase "an offense . . . committed" charged sentencers with considering non-elemental facts); *Nijhawan* v. *Holder*, 557 U. S. 29, 36 (2009) (construing an immigration statute to "call[ ] for a 'circumstance-specific,' not a 'categorical,' interpretation"). But Congress chose another course in ACCA, focusing on only "the elements of the statute of conviction." *Taylor*, 495 U. S., at 601.

Second, a construction of ACCA allowing a sentencing judge to go any further would raise serious Sixth Amendment concerns. This Court has held that only a jury, and not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction. See *Apprendi* v. *New Jersey*, 530 U. S. 466, 490 (2000). That means a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense. See *Shepard*, 544 U. S., at 25 (plurality opinion); *id.*, at 28 (THOMAS, J., concurring in part and concurring in judgment) (stating that such an approach would amount to "constitutional error"). He is prohibited from conducting such an inquiry himself; and so too he is barred from making a disputed determination about "what the defendant and state judge must have understood as the factual basis of the prior plea" or "what the jury in a prior trial must have accepted as the theory of the crime." See *id.*, at 25 (plurality opinion); *Descamps*, 570 U. S., at 269. He can do no more,

consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of.

And third, an elements-focus avoids unfairness to defendants. Statements of "non-elemental fact" in the records of prior convictions are prone to error precisely because their proof is unnecessary. *Id.*, at 270. At trial, and still more at plea hearings, a defendant may have no incentive to contest what does not matter under the law; to the contrary, he "may have good reason not to"—or even be precluded from doing so by the court. *Ibid.* When that is true, a prosecutor's or judge's mistake as to means, reflected in the record, is likely to go uncorrected. See *ibid.*[3] Such inaccuracies should not come back to haunt the defendant many years down the road by triggering a lengthy mandatory sentence.

Those three reasons stay as strong as ever when a statute, instead of merely laying out a crime's elements, lists alternative means of fulfilling one (or more) of them. ACCA's use of the term "convictions" still supports an elements-based inquiry; indeed, that language directly refutes an approach that would treat as consequential a statute's reference to factual circumstances *not* essential to any conviction. Similarly, the Sixth Amendment problems associated with a court's exploration of means rather than elements do not abate in the face of a statute like Iowa's: Whether or not mentioned in a statute's text, alternative factual scenarios

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[3] To see the point most clearly, consider an example arising in the immigration context: A defendant charged under a statute that criminalizes "intentionally, knowingly, or recklessly" assaulting another—as exists in many States, see, *e. g.*, Tex. Penal Code Ann. §22.01(a)(1) (West Cum. Supp. 2015)—has no apparent reason to dispute a prosecutor's statement that he committed the crime intentionally (as opposed to recklessly) if those mental states are interchangeable means of satisfying a single *mens rea* element. But such a statement, if treated as reliable, could make a huge difference in a deportation proceeding years in the future, because an intentional assault (unlike a reckless one) qualifies as a "crime involving moral turpitude," and so requires removal from the country. See *In re Gomez-Perez*, No. A200–958–511, p. 2 (BIA 2014).

remain just that—and so remain off-limits to judges imposing ACCA enhancements. And finally, a statute's listing of disjunctive means does nothing to mitigate the possible unfairness of basing an increased penalty on something not legally necessary to a prior conviction. Whatever the statute says, or leaves out, about diverse ways of committing a crime makes no difference to the defendant's incentives (or lack thereof) to contest such matters.

For these reasons, the court below erred in applying the modified categorical approach to determine the means by which Mathis committed his prior crimes. 786 F. 3d, at 1075. ACCA, as just explained, treats such facts as irrelevant: Find them or not, by examining the record or anything else, a court still may not use them to enhance a sentence. And indeed, our cases involving the modified categorical approach have already made exactly that point. "[T]he only [use of that approach] we have ever allowed," we stated a few Terms ago, is to determine "which *element[s]* played a part in the defendant's conviction." *Descamps*, 570 U. S., at 260, 263 (emphasis added); see *Taylor*, 495 U. S., at 602 (noting that the modified approach may be employed only to determine whether "a jury necessarily had to find" each element of generic burglary). In other words, the modified approach serves—and serves solely—as a tool to identify the elements of the crime of conviction when a statute's disjunctive phrasing renders one (or more) of them opaque. See *Descamps*, 570 U. S., at 263–264.[4] It is not to be repurposed

[4] *Descamps* made the point at some length, adding that the modified categorical approach "retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime. And it preserves the categorical approach's basic method: comparing those elements with the generic offense's. All the modified approach adds is a mechanism for making that comparison when a statute lists multiple, alternative elements, and so effectively creates 'several different . . . crimes.' If at least one, but not all, of those crimes matches the generic version, a court needs a way to find out which the defendant was convicted of. That is the job, as we have always understood it, of the modified approach: to identify,

as a technique for discovering whether a defendant's prior conviction, even though for a too-broad crime, rested on facts (or otherwise said, involved means) that also could have satisfied the elements of a generic offense.

B

The Government and JUSTICE BREYER claim that our longtime and exclusive focus on elements does not resolve this case because (so they say) when we talked about "elements," we did not really mean it. "[T]he Court used 'elements,' " the Government informs us, "not to distinguish between 'means' and 'elements,' " but instead to refer to whatever the statute lists—whether means *or* elements. Brief for United States 8; see *id.*, at 19. In a similar vein, JUSTICE BREYER posits that every time we said the word "element," we "used the word generally, simply to refer to the matter at issue," without "intend[ing] to set forth a generally applicable rule." *Post*, at 532–533 (dissenting opinion).

But a good rule of thumb for reading our decisions is that what they say and what they mean are one and the same; and indeed, we have previously insisted on that point with reference to ACCA's elements-only approach. In *Descamps*, the sole dissenting Justice made an argument identical to the one now advanced by the Government and JUSTICE BREYER: that our prior caselaw had not intended to distinguish between statutes listing alternative elements and those setting out "merely alternative means" of commission. 570 U. S., at 287 (opinion of ALITO, J.).[5] The Court rejected that conten-

from among several alternatives, the crime of conviction so that the court can compare it to the generic offense." 570 U. S., at 263–264 (citation omitted).

[5] In another solo dissent, JUSTICE ALITO today switches gears, arguing not that our precedent is consistent with his means-based view, but instead that all of our ACCA decisions are misguided because all follow from an initial wrong turn in *Taylor* v. *United States*, 495 U. S. 575 (1990). See *post*, at 537–538. To borrow the driving metaphor of his own dissent,

tion, stating that "[a]ll those decisions rested on the explicit premise that the laws contain[ed] statutory phrases that cover several different crimes, not several different methods of committing one offense"—in other words, that they listed alternative elements, not alternative means. *Id.*, at 264, n. 2 (ellipsis and internal quotation marks omitted); see, *e. g.*, *Johnson* v. *United States*, 559 U. S. 133, 144 (2010); *Nijhawan*, 557 U. S., at 35. That premise was important, we explained, because an ACCA penalty may be based only on what a jury "necessarily found" to convict a defendant (or what he necessarily admitted). *Descamps*, 570 U. S., at 266, n. 3, 272. And elements alone fit that bill; a means, or (as we have called it) "non-elemental fact," is "by definition[ ] *not* necessary to support a conviction." *Id.*, at 266, n. 3, 270; see *supra*, at 504.[6] Accordingly, *Descamps* made clear that

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JUSTICE ALITO thus locates himself entirely off the map of our caselaw. But that is not surprising; he has harshly criticized the categorical approach (and *Apprendi* too) for many years. See, *e. g.*, *Johnson* v. *United States*, 576 U. S. 591, 631–636 (2015) (ALITO, J., dissenting); *Descamps*, 570 U. S., at 284–285 (same); *Moncrieffe* v. *Holder*, 569 U. S. 184, 219 (2013) (same); *Chambers* v. *United States*, 555 U. S. 122, 132–134 (2009) (ALITO, J., concurring in judgment); see also *Hurst* v. *Florida*, 577 U. S. 92, 104 (2016) (ALITO, J., dissenting); *Alleyne* v. *United States*, 570 U. S. 99, 133–134 (2013) (same).

[6] JUSTICE BREYER's dissent rests on the idea that, contrary to that long-accepted definition, a jury sometimes does "necessarily ha[ve] to find" a means of commission, see *post*, at 527 (quoting *Taylor*, 495 U. S., at 602)—but *Descamps* specifically refuted that argument too. In that case, JUSTICE ALITO made the selfsame claim: A jury, he averred, should be treated as having "necessarily found" any fact, even though non-elemental, that a later sentencing court can "infer[ ]" that the jury agreed on "as a practical matter." 570 U. S., at 295 (dissenting opinion). The Court rejected that view, explaining that its ACCA decisions had always demanded that a jury necessarily agree *as a legal matter*—which meant on elements and not on means. See *id.*, at 266, n. 3. The requirement, from the Court's earliest decisions, was that a judge could impose a 15-year sentence based only on a legal "certainty," not on his inference (however reasonable in a given case) about what a prior factfinder had thought. *Shepard*, 544 U. S., at 23; see *Taylor*, 495 U. S., at 602; *supra*, at 511–512. Or otherwise said,

when the Court had earlier said (and said and said) "elements," it meant just that and nothing else.

For that reason, this Court (including JUSTICE BREYER) recently made clear that a court may not look behind the elements of a generally drafted statute to identify the means by which a defendant committed a crime. See *Descamps*, 570 U. S., at 258. Consider if Iowa defined burglary as involving merely an unlawful entry into a "premises"—without any further elaboration of the types of premises that exist in the world (*e. g.*, a house, a building, a car, a boat). Then, all agree, ACCA's elements-focus would apply. No matter that the record of a prior conviction clearly indicated that the defendant burgled a house at 122 Maple Road—and that the jury found as much; because Iowa's (hypothetical) law included an element broader than that of the generic offense, the defendant could not receive an ACCA sentence. Were that not so, this Court stated, "the categorical approach [would be] at an end"; the court would merely be asking "whether a particular set of facts leading to a conviction conforms to a generic ACCA offense." *Id.*, at 274. That conclusion is common ground, and must serve as the baseline for anything JUSTICE BREYER (or the Government) here argues.

And contrary to his view, that baseline not only begins but also ends the analysis, because nothing material changes if Iowa's law further notes (much as it does) that a "premises" may include "a house, a building, a car, or a boat." That fortuity of legislative drafting affects neither the oddities of applying the categorical approach nor the reasons for doing so. On the one hand, a categorical inquiry can produce the same counterintuitive consequences however a state law is

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the relevant question was whether a defendant *was* legally convicted of a certain offense (with a certain set of elements), not whether a sentencing judge believes that the factfinder *would have* convicted him of that offense had it been on the books. See *Carachuri-Rosendo* v. *Holder*, 560 U. S. 563, 576 (2010) (rejecting such a "hypothetical" approach given a similar statute's directive to "look to the conviction itself").

written. Whether or not the statute lists various means of satisfying the "premises" element, the record of a prior conviction is just as likely to make plain that the defendant burgled that house on Maple Road and the jury knew it. On the other hand (and as already shown), the grounds—constitutional, statutory, and equitable—that we have offered for nonetheless using the categorical approach lose none of their force in the switch from a generally phrased statute (leaving means implicit) to a more particular one (expressly enumerating them). See *supra*, at 512. In every relevant sense, both functional and legal, the two statutes—one saying just "premises," the other listing structures and vehicles—are the same. And so the same rule must apply: ACCA disregards the means by which the defendant committed his crime, and looks only to that offense's elements.

C

The first task for a sentencing court faced with an alternatively phrased statute is thus to determine whether its listed items are elements or means. If they are elements, the court should do what we have previously approved: review the record materials to discover which of the enumerated alternatives played a part in the defendant's prior conviction, and then compare that element (along with all others) to those of the generic crime. See *ibid.* But if instead they are means, the court has no call to decide which of the statutory alternatives was at issue in the earlier prosecution. Given ACCA's indifference to how a defendant actually committed a prior offense, the court may ask only whether the *elements* of the state crime and generic offense make the requisite match.

This threshold inquiry—elements or means?—is easy in this case, as it will be in many others. Here, a state court decision definitively answers the question: The listed premises in Iowa's burglary law, the State Supreme Court held, are "alternative method[s]" of committing one offense, so that a jury need not agree whether the burgled location was

a building, other structure, or vehicle. See *Duncan*, 312 N. W. 2d, at 523; *supra*, at 507. When a ruling of that kind exists, a sentencing judge need only follow what it says. See *Schad*, 501 U. S., at 636 (plurality opinion). Likewise, the statute on its face may resolve the issue. If statutory alternatives carry different punishments, then under *Apprendi* they must be elements. See, *e. g.*, Colo. Rev. Stat. § 18–4–203 (2015); Vt. Stat. Ann., Tit. 13, § 1201 (Cum. Supp. 2015); see also 530 U. S., at 490 (requiring a jury to agree on any circumstance increasing a statutory penalty); *supra*, at 511. Conversely, if a statutory list is drafted to offer "illustrative examples," then it includes only a crime's means of commission. *United States* v. *Howard*, 742 F. 3d 1334, 1348 (CA11 2014); see *United States* v. *Cabrera-Umanzor*, 728 F. 3d 347, 353 (CA4 2013). And a statute may itself identify which things must be charged (and so are elements) and which need not be (and so are means). See, *e. g.*, Cal. Penal Code Ann. § 952 (West 2008). Armed with such authoritative sources of state law, federal sentencing courts can readily determine the nature of an alternatively phrased list.

And if state law fails to provide clear answers, federal judges have another place to look: the record of a prior conviction itself. As Judge Kozinski has explained, such a "peek at the [record] documents" is for "the sole and limited purpose of determining whether [the listed items are] element[s] of the offense." *Rendon* v. *Holder*, 782 F. 3d 466, 473–474 (CA9 2015) (opinion dissenting from denial of reh'g en banc).[7] (Only if the answer is yes can the court make

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[7] *Descamps* previously recognized just this way of discerning whether a statutory list contains means or elements. See 570 U. S., at 264, n. 2. The Court there noted that indictments, jury instructions, plea colloquies, and plea agreements will often "reflect the crime's elements" and so can reveal—in some cases better than state law itself—whether a statutory list is of elements or means. *Ibid.* Accordingly, when state law does not resolve the means-or-elements question, courts should "resort[ ] to the [record] documents" for help in making that determination. *Ibid.*

further use of the materials, as previously described, see *supra*, at 513.) Suppose, for example, that one count of an indictment and correlative jury instructions charge a defendant with burgling a "building, structure, or vehicle"—thus reiterating all the terms of Iowa's law. That is as clear an indication as any that each alternative is only a possible means of commission, not an element that the prosecutor must prove to a jury beyond a reasonable doubt. So too if those documents use a single umbrella term like "premises": Once again, the record would then reveal what the prosecutor has to (and does not have to) demonstrate to prevail. See *Descamps*, 570 U. S., at 272. Conversely, an indictment and jury instructions could indicate, by referencing one alternative term to the exclusion of all others, that the statute contains a list of elements, each one of which goes toward a separate crime. Of course, such record materials will not in every case speak plainly, and if they do not, a sentencing judge will not be able to satisfy "*Taylor*'s demand for certainty" when determining whether a defendant was convicted of a generic offense. *Shepard*, 544 U. S., at 21. But between those documents and state law, that kind of indeterminacy should prove more the exception than the rule.

III

Our precedents make this a straightforward case. For more than 25 years, we have repeatedly made clear that application of ACCA involves, and involves only, comparing elements. Courts must ask whether the crime of conviction is the same as, or narrower than, the relevant generic offense. They may not ask whether the defendant's conduct—his particular means of committing the crime—falls within the generic definition. And that rule does not change when a statute happens to list possible alternative means of commission: Whether or not made explicit, they remain what they ever were—just the facts, which ACCA (so we have held, over and over) does not care about.

Some have raised concerns about this line of decisions, and suggested to Congress that it reconsider how ACCA is written. See, *e. g.*, *Chambers* v. *United States*, 555 U. S. 122, 133 (2009) (ALITO, J., concurring in judgment); *Descamps*, 570 U. S., at 279 (KENNEDY, J., concurring). But whether for good or for ill, the elements-based approach remains the law. And we will not introduce inconsistency and arbitrariness into our ACCA decisions by here declining to follow its requirements. Everything this Court has ever said about ACCA runs counter to the Government's position. That alone is sufficient reason to reject it: Coherence has a claim on the law.

Because the elements of Iowa's burglary law are broader than those of generic burglary, Mathis's convictions under that law cannot give rise to an ACCA sentence. We accordingly reverse the judgment of the Court of Appeals.

It is so ordered.

JUSTICE KENNEDY, concurring.

The Court's opinion is required by its precedents, and so I join it, with one reservation set forth below.

In no uncertain terms, the Court has held that the word "burglary" in the Armed Career Criminal Act (ACCA) "refers to the elements of the statute of conviction, not to the facts of each defendant's conduct." *Taylor* v. *United States*, 495 U. S. 575, 601 (1990). An enhancement is proper, the Court has said, if a defendant is convicted of a crime "having the elements" of generic burglary, "regardless of its exact definition or label" under state law. *Id.*, at 599. See also *Descamps* v. *United States*, 570 U. S. 254, 263 (2013) ("[T]he categorical approach's central feature [is] a focus on the elements, rather than the facts, of a crime"). In the instant case, then, the Court is correct to conclude that an "elements-based approach remains the law." *Ante* this page. And it is correct to note further that it would "introduce inconsistency and arbitrariness into our ACCA deci-

sions by here declining to follow its requirements," without reconsidering our precedents as a whole. *Ante*, at 520.

My one reservation to the Court's opinion concerns its reliance on *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000). *Ante*, at 511. In my view, *Apprendi* was incorrect and, in any event, does not compel the elements based approach. That approach is required only by the Court's statutory precedents, which Congress remains free to overturn.

As both dissenting opinions point out, today's decision is a stark illustration of the arbitrary and inequitable results produced by applying an elements based approach to this sentencing scheme. It could not have been Congress' intent for a career offender to escape his statutorily mandated punishment "when the record makes it clear beyond any possible doubt that [he] committed generic burglary." *Post*, at 541 (opinion of ALITO, J.). Congress also could not have intended vast sentencing disparities for defendants convicted of identical criminal conduct in different jurisdictions.

Congress is capable of amending the ACCA to resolve these concerns. See, *e. g.*, *Nijhawan* v. *Holder*, 557 U. S. 29, 38 (2009) (interpreting the language Congress used in 8 U. S. C. § 1101(a)(43)(M)(i) as requiring a "circumstance-specific" rather than categorical approach). But continued congressional inaction in the face of a system that each year proves more unworkable should require this Court to revisit its precedents in an appropriate case.

JUSTICE THOMAS, concurring.

I join the Court's opinion, which faithfully applies our precedents. The Court holds that the modified categorical approach cannot be used to determine the specific means by which a defendant committed a crime. *Ante*, at 513–514. By rightly refusing to apply the modified categorical approach, the Court avoids further extending its precedents that limit a criminal defendant's right to a public trial before a jury of his peers.

In *Almendarez-Torres* v. *United States*, 523 U. S. 224, 246–247 (1998), the Court held that the existence of a prior conviction triggering enhanced penalties for a recidivist was a fact that could be found by a judge, not an element of the crime that must be found by a jury. Two years later, the Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum" is an element of a crime and therefore "must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi* v. *New Jersey*, 530 U. S. 466, 490 (2000); see *id.*, at 489–490. But *Apprendi* recognized an exception for the "fact of a prior conviction," instead of overruling *Almendarez-Torres*. See 530 U. S., at 490. I continue to believe that the exception in *Apprendi* was wrong, and I have urged that *Almendarez-Torres* be reconsidered. See *Descamps* v. *United States*, 570 U. S. 254, 280–281 (2013) (THOMAS, J., concurring in judgment).

Consistent with this view, I continue to believe that depending on judge-found facts in Armed Career Criminal Act (ACCA) cases violates the Sixth Amendment and is irreconcilable with *Apprendi*. ACCA improperly "allows the judge to 'mak[e] a finding that raises [a defendant's] sentence beyond the sentence that could have lawfully been imposed by reference to facts found by the jury or admitted by the defendant.'" *Descamps*, 570 U. S., at 280 (opinion of THOMAS, J.) (brackets in original). This Sixth Amendment problem persists regardless of whether "a court is determining whether a prior conviction was entered, or attempting to discern what facts were necessary to a prior conviction." *Ibid.* (citation omitted).

Today, the Court "at least limits the situations in which courts make factual determinations about prior convictions." *Id.*, at 281. As the Court explains, the means of committing an offense are nothing more than "various factual ways of committing some component of the offense." *Ante,* at 506. Permitting judges to determine the means of committing a

prior offense would expand *Almendarez-Torres*. Therefore, I join the Court's opinion refusing to allow judges to determine, without a jury, which alternative means supported a defendant's prior convictions.

JUSTICE BREYER, with whom JUSTICE GINSBURG joins, dissenting.

The elements/means distinction that the Court draws should not matter for sentencing purposes. I fear that the majority's contrary view will unnecessarily complicate federal sentencing law, often preventing courts from properly applying the sentencing statute that Congress enacted. I consequently dissent.

I

The federal statute before us imposes a mandatory minimum sentence upon a person convicted of being a felon in possession of a firearm if that person also has three previous convictions for (among several other things) "burglary." 18 U. S. C. § 924(e)(2)(B)(ii). The petitioner here has been convicted of being a felon in possession, and he previously was convicted of three other crimes that qualify him for the federal mandatory minimum if, but only if, those previous convictions count as "burglary." To decide whether he has committed what the federal statute calls a "burglary," we must look to the state statute that he violated.

The relevant state statute, an Iowa statute, says that a person commits a crime if he (1) "enters an occupied structure," (2) "having no right . . . to do so," (3) with "the intent to commit a felony." Iowa Code § 713.1 (2013). It then goes on to define "occupied structure" as including any (1) "building," (2) "structure," (3) "land" vehicle, (4) "water" vehicle, or (5) "air vehicle, or similar place." § 702.12. The problem arises because, as we have previously held, see *Taylor* v. *United States*, 495 U. S. 575, 602 (1990), if the structure that an offender unlawfully entered (with intent to commit a felony) was a "building," the state crime that he committed

counts under the federal statute as "burglary." But if the structure that the offender unlawfully entered was a land, water, or air vehicle, the state crime does not count as a "burglary." Thus, a conviction for violating the state statute may, or may not, count as a "burglary," depending upon whether the structure that he entered was, say, a "building" or a "water vehicle."

Here, if we look at the court documents charging Mathis with a violation of the state statute, they tell us that he was charged with entering, for example, a "house and garage." App. 60–73 (charging documents). They say nothing about any other structure, say, a "water vehicle." Thus, to convict him, the jury—which had to find that he unlawfully entered an "occupied structure"—must have found that he entered a "house and garage," which concededly count as "building[s]." So why is that not the end of this matter? Why does the federal statute not apply?

Just to be sure, let us look at how we previously treated an almost identical instance. In *Taylor*, a state statute made criminal the "breaking and entering [of] a building, booth, tent, boat, or railroad car." 495 U. S., at 579, n. 1. We explained that breaking into a building would amount to "burglary" under the federal statute, but breaking into a railroad car would not. But the conviction document itself said only that the offender had violated the statute; it did not say whether he broke into a building or a railroad car. See *id.*, at 598–602. We said that in such a case the federal sentencing judge could look at the charging papers and the jury instructions in the state case to try to determine what the state conviction was actually for: building, tent, or railroad car. We wrote that

> "in a State whose burglary statutes include entry of an automobile as well as a building, if the indictment or information and jury instructions show that the defendant was charged only with a burglary of a building, and that the jury necessarily had to find an entry of a build-

> ing to convict, then the Government should be allowed to use the conviction for enhancement." *Id.*, at 602.

(We later added that where a conviction rests upon an offender's guilty plea, the federal judge can look to the facts that the offender admitted at his plea colloquy for the same purpose. See *Shepard* v. *United States*, 544 U. S. 13, 20–21 (2005).)

So, again, what is the problem? The State's "burglary statut[e] include[s] entry" of a vehicle as well as a "building." *Taylor*, 495 U. S., at 602. The conviction document might not specify what kind of a structure the defendant entered (*i. e.*, whether a building or an automobile). But the federal sentencing judge can look at the charging documents (or plea colloquy) to see whether "the defendant was charged only with a burglary of a building." *Ibid.* And here that was so. In addition, since the charging documents show that the defendant was charged only with illegal entry of a "building"—not a tent or a railroad car—the jury, in order to find (as it did) that the defendant broke into an occupied structure, would "necessarily [have] had to find an entry of a building." *Ibid.* Hence, "the Government should be allowed to use the conviction for enhancement." *Ibid.*

The majority, however, does not agree that the two cases I have described are almost identical. To the contrary, it notes correctly that our precedent often uses the word "element" to describe the relevant facts to which a statute refers when it uses words such as "building," "tent," "boat," or "railroad car." See, *e. g.*, *ante*, at 509–510. It points out that, here, the Iowa Supreme Court described those words as referring, not to "elements" of a crime, but rather to "means" through which a crime was committed. See *ante*, at 507. And that fact, in the majority's view, makes all the difference. See *ante*, at 514–517. But why? I, of course, see that there is a distinction between means and elements in the abstract, but—for sentencing purposes—I believe that it is a distinction without a difference.

II

I begin with a point about terminology. All the relevant words in this case, such as "building," "structure," "water vehicle," and the like, are statutory words. Moreover, the statute uses those words to help describe a crime. Further, the statute always uses those words to designate *facts*. Whether the offender broke into a building is a fact; whether he broke into a water vehicle is a fact. Sometimes, however, a State may treat certain of those facts as elements of a crime. And sometimes a State may treat certain of those facts as means of committing a crime. So far, everyone should agree. See *Richardson* v. *United States*, 526 U. S. 813, 817 (1999) (describing both "elements" and "means" as "facts"). Where we disagree is whether that difference, relevant to the application of state law, should make a difference for federal sentencing purposes.

III

Whether a State considers the statutory words "boat" or "building" to describe elements of a crime or a means of committing a crime can make a difference for purposes of applying the State's criminal law, but it should not make a difference in respect to the sentencing question at issue here. The majority, I believe, reasons something like this: Suppose the jury unanimously agreed that the defendant unlawfully entered some kind of structure with felonious intent, but the jury is deadlocked 6 to 6 as to whether that structure is (1) a "boat" or (2) a "house." If the statute uses those two words to describe two different elements of two different crimes—*i. e.*, (1) breaking into a boat, and (2) breaking into a house—then the defendant wins, for the jury has not found unanimously each element of either crime. But if the statute uses those two words to describe two different means of committing the same crime—*i. e.*, breaking into an occupied structure that consists of either a house or a boat—then the defendant loses, for (as long as the jury decides unanimously

that the defendant broke into an occupied structure of whichever kind) the jury need not decide unanimously which particular means the defendant used to commit the crime. See *ante*, at 504–506.

I accept that reasoning. But I do not see what it has to do with sentencing. In the majority's view, the label "means" opens up the possibility of a 6-to-6 jury split, and it believes that fact would prevent us from knowing whether the conviction was for breaking into a "building" or a "boat." See *ante*, at 506. But precisely the same is true were we to use the label "element" to describe the facts set forth in the state statute. The federal sentencing judge may see on the defendant's record a conviction for violating a particular provision of the state criminal code; that code may list in a single sentence both "buildings" and "boats"; the State may interpret the two words as separate elements of two separate crimes; and the federal judge will not know from the simple fact of conviction for violating the statute (without more) which of the two crimes was at issue (that is, was it the one aimed at burglaries of buildings, or the one aimed at burglaries of boats?). That is why the Court said in *Taylor* that in such a case the federal judge may look to the "indictment or information and jury instructions" to determine whether "the jury necessarily had to find an entry of a building," rather than a boat, "to convict." 495 U. S., at 602. If so, the federal judge may count the conviction as falling within the federal statutory word "burglary" and use it for sentencing.

In my view, precisely the same is true if the state courts label the statute-mentioned facts ("building," "boat," etc.) as "means" rather than "elements." The federal judge should be able to "look . . . to" the charging documents and the plea agreement to see if "the jury necessarily had to find an entry of a building," rather than a boat, "to convict." *Ibid.* If so, the federal judge should be able to count the conviction as a federal-statute "burglary" conviction and use it for sentencing.

Of course, sometimes the charging documents will not give us the answer to the question. But often they will. If, for example, the charging document accuses Smith of breaking and entering into a house (and does not mention any other structure), then (1) the jury had to find unanimously that he broke into a "house," if "house" is an element, and (2) the jury had to find unanimously that he broke into a "house," if "house" is the only means charged. (Otherwise the jury would not have unanimously found that he broke into an "occupied structure," which is an element of the statutory crime.)

Suppose, for example, that breaking into a "building" is an element of Iowa's burglary crime; and suppose the State charges that Smith broke into a building located in Des Moines (and presents evidence at trial concerning only a Des Moines offense), but the jury returns its verdict on a special-verdict form showing that six jurors voted for guilt on the theory that he broke into a building located in Detroit—not Des Moines. The conviction would fail (at least in Iowa), would it not? See, *e. g.*, *State* v. *Bratthauer*, 354 N. W. 2d 774, 776 (Iowa 1984) ("*If substantial evidence is presented to support each alternative method of committing a single crime*, and the alternatives are not repugnant to each other, *then* unanimity of the jury as to the mode of commission of the crime is not required. At the root of this standard is the principle that the unanimity rule requires jurors to be in substantial agreement as to just what a defendant did as a step preliminary to determining whether the defendant is guilty of the crime charged" (emphasis added; citation, brackets, and internal quotation marks omitted)). Similarly, we would know that—if the charging documents claim only that the defendant broke into a house, and the Government presented proof only of that kind of burglary—the jury had to find unanimously that he broke into a house, not a boat. And that is so whether state law considers the statutory word "house" to be an element or a means. I have not found any nonfanciful example to the contrary.

IV

Consider the federal statute before us—the statute that contains the word "burglary"—from a more general sentencing perspective. By way of background, it is important to understand that, as a general matter, any sentencing system must embody a host of compromises between theory and practicality. From the point of view of pure theory, there is much to be said for "real offense" sentencing. Such a system would require a commission or a sentencing judge to determine in some detail "the actual conduct in which the defendant engaged," *i. e.*, what the defendant really did now and in the past. United States Sentencing Commission (USSC or Commission), Guidelines Manual ch. 1, pt. A, p. 5 (Nov. 2015). Such a system would produce greater certainty that two offenders who engaged in (and had previously engaged in) the same real conduct would be punished similarly. See *ibid.*

Pure "real offense" sentencing, however, is too complex to work. It requires a sentencing judge (or a sentencing commission) to know all kinds of facts that are difficult to discover as to present conduct and which a present sentencing judge could not possibly know when he or she seeks to determine what conduct underlies a prior conviction. Because of these practical difficulties, the USSC created Guidelines that in part reflect a "charge offense" system, a system based "upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted." *Ibid.*

A pure "charge offense" system, however, also has serious problems. It can place great authority to determine a sentence in the hands of the prosecutor, not the judge, creating the very nonuniformity that a commission would hope to minimize. Hence, the actual federal sentencing system retains "a significant number of real offense elements," allowing adjustments based upon the facts of a defendant's case. *Id.*, at 6. And the Commission is currently looking for new ways to create a better compromise. See, *e. g.*, USSC,

Amendments to the Sentencing Guidelines 24 (Apr. 2016) (effective Nov. 1, 2016) (creating a "sentence-imposed model for determining" whether prior convictions count for sentence-enhancement purposes in the context of certain immigration crimes).

With this background in mind, turn to the federal statute before us. The statute, reflecting the impossibility of knowing in detail the conduct that underlies a prior conviction, uses (in certain cases involving possession of weapons) the fact of certain convictions (including convictions for burglary) as (conclusive) indications that the present defendant has previously engaged in highly undesirable conduct. And, for the general reasons earlier described, it is practical considerations, not a general theory, that would prevent Congress from listing the specific prior conduct that would warrant a higher present sentence. Practical considerations, particularly of administration, can explain why Congress did not tell the courts precisely how to apply its statutory word "burglary." And similar practical considerations can help explain why this Court, in *Taylor* and later cases, described a modified categorical approach for separating the sheep from the goats. Those cases recognize that sentencing judges have limited time, they have limited information about prior convictions, and—within practical constraints—they must try to determine whether a prior conviction reflects the kind of behavior that Congress intended its proxy (*i. e.*, "burglary") to cover.

The majority's approach, I fear, is not practical. Perhaps the statutes of a few States say whether words like "boat" or "building" stand for an element of a crime or a means to commit a crime. I do not know. I do know, however, that many States have burglary statutes that look very much like the Iowa statute before us today. See, *e. g.*, Colo. Rev. Stat. §§ 18–4–101, 18–4–202, 18–4–203 (2015); Mont. Code Ann. §§ 45–2–101, 45–6–201, 45–6–204 (2015); N. H. Rev. Stat. Ann. § 635.1 (2015); N. D. Cent. Code Ann. §§ 12.1–22–02,

12.1–22–06 (2012); Ohio Rev. Code Ann. §§2909.01, 2911.11–2911.13 (Lexis 2014); 18 Pa. Cons. Stat. §§3501, 3502 (2015); S. D. Codified Laws §§22–1–2, 22–32–1, 22–32–3, 22–32–8 (2006); Wyo. Stat. Ann. §§6–1–104, 6–3–301 (2015); see also ALI, Model Penal Code §§221.0, 221.1 (1980); cf. *Taylor*, 495 U. S., at 598 ("burglary" in the federal statute should reflect the version of burglary "used in the criminal codes of most States"). I also know that there are very few States where one can find authoritative judicial opinions that decide the means/element question. In fact, the Government told us at oral argument that it had found only "two States" that, in the context of burglary, had answered the means/elements question. Tr. of Oral Arg. 45; see *id.*, at 37.

The lack of information is not surprising. After all, a prosecutor often will charge just one (*e. g.*, a "building") of several statutory alternatives. See *Descamps* v. *United States*, 570 U. S. 254, 261–262 (2013). A jury that convicts, then, would normally have to agree unanimously about the existence of that particular fact. See *Richardson*, 526 U. S., at 818 ("Our decision [whether something is an element or a means] will make a difference where . . . the Government introduces evidence that the defendant has committed more underlying drug crimes than legally necessary to make up a 'series' "). Hence, it will not matter for that particular case whether the State, as a general matter, would categorize that fact (to which the statute refers) as an "element" or as a "means."

So on the majority's approach, what is a federal sentencing judge to do when facing a state statute that refers to a "building," a "boat," a "car," etc.? The charging documents will not answer the question, for—like the documents at issue here—they will simply charge entry into, say, a "building," without more. But see *ante*, at 518–519 (suggesting that a defendant's charging documents *will* often answer the question). The parties will have to look to other state cases to decide whether that fact is a "means" or an "element."

That research will take time and is likely not to come up with an answer. What was once a simple matter will produce a time-consuming legal tangle. See, *e. g.*, *State* v. *Peterson*, 168 Wash. 2d 763, 769, 230 P. 3d 588, 591 (2010) ("'There simply is no bright-line rule by which the courts can determine whether the legislature intended to provide alternate means of committing a particular crime. Instead, each case must be evaluated on its own merits'" (brackets omitted)); *State* v. *Brown*, 295 Kan. 181, 192, 284 P. 3d 977, 987 (2012) (the "alternative means" definition is "mind-bending in its application"). That is why lower court judges have criticized the approach the majority now adopts. See, *e. g.*, *Omargharib* v. *Holder*, 775 F. 3d 192, 200 (CA4 2014) (Niemeyer, J., concurring) ("Because of the ever-morphing analysis and the increasingly blurred articulation of applicable standards, we are being asked to decide, without clear and workable standards, whether disjunctive phrases in a criminal law define alternative elements of a crime or alternative means of committing it . . . . I find it especially difficult to comprehend the distinction" (emphasis deleted)).

V

The majority bases its conclusion primarily upon precedent. In my view, precedent does not demand the conclusion that the majority reaches. I agree with the majority that our cases on the subject have all used the word "element" in contexts similar to the present context. But that fact is hardly surprising, for all the cases in which that word appears involved elements—or at least the Court assumed that was so. See *Descamps*, 570 U. S., at 264, n. 2. In each of those cases, the Court used the word generally, simply to refer to the matter at issue, without stating or suggesting any view about the subject of the present case. See, *e. g.*, *id.*, at 261 ("Sentencing courts may look only to the statutory definitions—*i. e.*, the elements—of a defendant's prior offenses" (internal quotation marks omitted)); *Shepard*, 544

U. S., at 16–17 (using the terms "statutory definition" and "statutory elements" interchangeably); *Taylor*, 495 U. S., at 602 ("[A]n offense constitutes 'burglary' for purposes of [the Armed Career Criminal Act] if either its statutory definition substantially corresponds to 'generic' burglary, or the charging paper and jury instructions actually required the jury to find all the elements of generic burglary").

The genius of the common law consists in part in its ability to modify a prior holding in light of new circumstances, particularly where, as Justice Holmes said, an existing principle runs up against a different principle that requires such modification. See Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897). *A fortiori*, we should not apply this Court's use of a word in a prior case—a word that was not necessary to the decision of the prior case, and not intended to set forth a generally applicable rule—to a new circumstance that differs significantly in respect to both circumstances and the legal question at issue.

Does *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), require the majority's result here? There we held that any fact ("[o]ther than the fact of a prior conviction") that must be proved in order to increase the defendant's sentence above what would otherwise be the statutory maximum must be proved to a jury beyond a reasonable doubt. *Id.*, at 490. Where, as here, the State charges only one kind of "occupied structure"—namely, entry into a "garage"—that criterion is met. The State must prove to the jury beyond a reasonable doubt that the defendant unlawfully entered a garage. And that is so, whether the statute uses the term "garage" to refer to a fact that is a means or a fact that is an element. If the charging papers simply said "occupied structure," leaving the jury free to disagree about whether that structure was a "garage" or was, instead, a "boat," then we lack the necessary assurance about jury unanimity; and the sentencing judge consequently cannot use that conviction as a basis for an increased federal sentence. And that is true

whether the state statute, when using the words "garage" and "boat," intends them to refer to a fact that is a means or a fact that is an element.

What about *Descamps*? The statute there at issue made it a crime to "ente[r] certain locations with intent to commit grand or petit larceny or any felony." 570 U. S., at 259 (internal quotation marks omitted). The statute made no distinction between (1) lawful entry (*e. g.*, entering a department store before closing time) and (2) unlawful entry (*e. g.*, breaking into a store after it has closed). See *ibid.* The difference matters because unlawful entry is a critical constituent of the federal statute's version of "burglary." If the entry is lawful, the crime does not fall within the scope of that word.

We held that a conviction under this statute did not count as a "burglary" for federal purposes. We reasoned that the statute required the Government only to prove "entry," that there was no reason to believe that charging documents would say whether the entry was lawful or unlawful, and that, "most important[ly]," even if they did, the jury did not have to decide that the entry was unlawful in order to convict (that is, any description in the charging document that would imply or state that the entry was illegal, say, at 2:00 in the morning, would be coincidental). *Id.*, at 273; see *id.*, at 269–270.

Here, by way of contrast, the charging documents must allege entry into an "occupied structure," and that "structure" can consist of one of several statutory alternatives. Iowa Code §§ 713.1, 702.12. The present law thus bears little resemblance to the hypothetical statute the majority describes. That hypothetical statute makes it a crime to break into a "premises" without saying more. *Ante*, at 516. Thus, to apply the federal sentencing statute to such a nonspecific, hypothetical statute would require sentencing judges to "imaginatively transfor[m]" "every element of [the] statute . . . so that [the] crime is seen as containing an infinite

number of subcrimes corresponding to 'all the possible ways an individual can commit' " the crime—an impossibly difficult task. *Descamps*, *supra*, at 273.

But the Iowa statute before us contains explicit (not hypothetical) statutory alternatives, and therefore it is likely (not unlikely) that the charging documents will list one or more of these alternatives. Indeed, that is the case with each of Mathis' charging documents. See App. 60–73. And if the charging documents list only one of these alternatives, say, a "building," the jury normally would have to find unanimously that the defendant entered into a building in order to convict. See *Bratthauer*, 354 N. W. 2d, at 776. To repeat my central point: In my view, it is well within our precedent to count a state burglary conviction as a "burglary" within the meaning of the federal law where (1) the *statute* at issue lists the alternative means by which a defendant can commit the crime (*e. g.*, burgling a "building" or a "boat") and (2) the *charging documents* make clear that the State alleged (and the jury or trial judge necessarily found) only an alternative that matches the federal version of the crime.

Descamps was not that kind of case. It concerned a statute that did not explicitly list alternative means for commission of the crime. And it concerned a fact extraneous to the crime—the fact (whether entry into the burgled structure was lawful or unlawful) was neither a statutory means nor an element. As the Court in that case described it, the fact at issue was, under the state statute, a "legally extraneous circumstanc[e]" of the State's case. 570 U. S., at 270. But this case concerns a fact necessary to the crime (regardless of whether the Iowa Supreme Court generally considers that fact to be a means or an element).

Precedent, by the way, also includes *Taylor*. And, as I have pointed out, *Taylor* says that the modified categorical approach it sets forth may "permit the sentencing court to go beyond the mere fact of conviction in a narrow range of cases where a jury was actually required to find all the ele-

ments of generic burglary." 495 U. S., at 602. *Taylor* is the precedent that I believe governs here. Because the majority takes a different view, with respect, I dissent.

JUSTICE ALITO, dissenting.

Sabine Moreau lives in Solre-sur-Sambre, a town in Belgium located 38 miles south of Brussels. One day she set out in her car to pick up a friend at the Brussels train station, a trip that should have taken under an hour. She programmed her GPS and headed off. Although the GPS sent her south, not north, she apparently thought nothing of it. She dutifully stayed on the prescribed course. Nor was she deterred when she saw road signs in German for Cologne, Aachen, and Frankfurt. "I asked myself no questions," she later recounted. "I kept my foot down."[1]

Hours passed. After crossing through Germany, she entered Austria. Twice she stopped to refuel her car. She was involved in a minor traffic accident. When she tired, she pulled over and slept in her car. She crossed the Alps, drove through Slovenia, entered Croatia, and finally arrived in Zagreb—two days and 900 miles after leaving her home. Either she had not properly set her GPS or the device had malfunctioned. But Moreau apparently refused to entertain that thought until she arrived in the Croatian capital. Only

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[1] For accounts of the journey, see, *e. g.*, Waterfield, GPS Failure Leaves Belgian Woman in Zagreb Two Days Later, The Telegraph (Jan. 13, 2013), online at http://www.telegraph.co.uk/news/worldnews/europe/belgium/9798779/GPS-failure-leaves-Belgian-woman-in-Zagreb-two-days-later.html (all Internet materials as last visited June 22, 2016); Grenoble, Sabine Moreau, Belgian Woman, Drives 900 Miles Off 90-Mile Route Because of GPS Error, Huffington Post (Jan. 15, 2013), online at http://www.huffingtonpost.com/2013/01/15/sabine-moreau-gps-belgium-croatia-900-miles_n_2475220.html; Malm, Belgian Woman Blindly Drove 900 Miles Across Europe as She Followed Broken GPS Instead of 38-Miles to the Station, Daily Mail (Jan. 14, 2013), online at http://www.dailymail.co.uk/news/article-2262149/Belgian-woman-67-picking-friend-railway-station-ends-Zagreb-900-miles-away-satnav-disaster.html.

then, she told reporters, did she realize that she had gone off course, and she called home, where the police were investigating her disappearance.

Twenty-six years ago, in *Taylor* v. *United States*, 495 U. S. 575, 602 (1990), this Court set out on a journey like Moreau's. Our task in *Taylor*, like Moreau's short trip to the train station, might not seem very difficult—determining when a conviction for burglary counts as a prior conviction for burglary under the Armed Career Criminal Act (ACCA), 18 U. S. C. § 924(e). But things have not worked out that way.

Congress enacted ACCA to ensure that violent repeat criminal offenders could be subject to enhanced penalties—that is, longer prison sentences—in a fair and uniform way across States with myriad criminal laws. See *Descamps* v. *United States*, 570 U. S. 254, 293 (2013) (ALITO, J., dissenting). ACCA calls for an enhanced sentence when a defendant, who has three or more prior convictions for a "violent felony," is found guilty of possession of a firearm. § 924(e)(1). And ACCA provides that the term "violent felony" means, among other things, "any crime punishable by imprisonment for a term exceeding one year . . . that . . . is burglary." § 924(e)(2)(B). In other words, "burglary" = "violent felony."

While this language might seem straightforward, *Taylor* introduced two complications. First, *Taylor* held that "burglary" under ACCA means offenses that have the elements of what the Court called "generic" burglary, defined as unlawfully entering or remaining in a building or structure with the intent to commit a crime. 495 U. S., at 598. This definition is broader than that of the common law but does not include every offense that States have labeled burglary, such as the burglary of a boat or vehicle. Second, *Taylor* and subsequent cases have limited the ability of sentencing judges to examine the record in prior cases for the purpose of determining whether the convictions in those cases were for "generic burglary." See, *e. g.*, *Shepard* v. *United States*,

544 U. S. 13, 26 (2005). We have called this the "modified categorical approach." *Descamps*, *supra*, at 257.

Programmed in this way, the Court set out on a course that has increasingly led to results that Congress could not have intended.[2] And finally, the Court arrives at today's decision, the upshot of which is that all burglary convictions in a great many States may be disqualified from counting as predicate offenses under ACCA. This conclusion should set off a warning bell. Congress indisputably wanted burglary to count under ACCA; our course has led us to the conclusion that, in many States, no burglary conviction will count; maybe we made a wrong turn at some point (or perhaps the Court is guided by a malfunctioning navigator). But the Court is unperturbed by its anomalous result. Serenely chanting its mantra, "Elements," see *ante*, at 509–510, the Court keeps its foot down and drives on.

The Court's approach calls for sentencing judges to delve into pointless abstract questions. In *Descamps*, the Court gave sentencing judges the assignment of determining whether a state statute is "divisible." See 570 U. S., at 278. When I warned that this novel inquiry would prove to be difficult, the opinion of the Court brushed off that concern, see *id.*, at 264, n. 2 ("[W]e can see no real-world reason to worry"). But lower court judges, who must regularly grapple with the modified categorical approach, struggled to understand *Descamps*. Compare *Rendon* v. *Holder*, 764 F. 3d 1077, 1084–1090 (CA9 2014) (panel opinion), with 782 F. 3d 466, 466–473 (CA9 2015) (eight judges dissent-

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[2] In *Descamps* v. *United States*, 570 U. S. 254 (2013), the decision meant that no California burglary conviction counts under ACCA. See *id.*, at 293 (ALITO, J., dissenting). In *Moncrieffe* v. *Holder*, 569 U. S. 184 (2013), where the Court took a similar approach in interpreting a provision of the immigration laws, the Court came to the conclusion that convictions in about half the States for even very large-scale marijuana trafficking do not count as "'illicit trafficking in a controlled substance'" under a provision of the immigration laws. *Id.*, at 218 (ALITO, J., dissenting).

ing from denial of reh'g en banc), and *id.*, at 473–474 (Kozinski, J., dissenting from denial of reh'g en banc). Now the Court tells them they must decide whether entering or remaining in a building is an "element" of committing a crime or merely a "means" of doing so. I wish them good luck.

The distinction between an "element" and a "means" is important in a very different context: The requisite number of jurors (all 12 in most jurisdictions) must agree that a defendant committed each element of an offense, but the jurors need not agree on the means by which an element was committed. So if entering or remaining *in a building* is an element, the jurors must agree that the defendant entered or remained in a *building* and not, say, a boat. But if the element is entering or remaining within one of a list of places specified in the statute (say, building, boat, vehicle, tent), then entering or remaining in a building is simply a means. Jurors do not need to agree on the means by which an offense is committed, and therefore whether a defendant illegally entered a building or a boat would not matter for purposes of obtaining a conviction.

In the real world, there are not many cases in which the state courts are required to decide whether jurors in a burglary case must agree on the building vs. boat issue, so the question whether buildings and boats are elements or means does not often arise. As a result, state-court cases on the question are rare. The Government has surveyed all the state burglary statutes and has found only one—Iowa, the State in which petitioner was convicted for burglary—in which the status of the places covered as elements or means is revealed. See Brief for United States 43, and n. 13. Petitioner's attorneys have not cited a similar decision from any other State.

How, then, are federal judges sentencing under ACCA to make the element/means determination? The Court writes: "This threshold inquiry—elements or means?—is easy in this

case, as it will be in many others." *Ante*, at 517. Really?[3] The determination is easy in this case only because the fortified legal team that took over petitioner's representation after this Court granted review found an Iowa case on point, but this discovery does not seem to have been made until the preparation of the brief filed in this Court. Brief for United States 43, and n. 13. "Petitioner's belated identification of a relevant state decision confirms that the task is not an easy one." *Ibid.* And that is not the worst of it. Although many States have burglary statutes like Iowa's that apply to the burglary of places other than a building, neither the Government nor petitioner has found a single case in any of these jurisdictions resolving the question whether the place burglarized is an element or a means.

The Court assures the federal district judges who must apply ACCA that they do not need such state-court decisions, that it will be easy for federal judges to predict how state courts would resolve this question if it was ever presented to them. *Ante*, at 517–519. But the Court has not shown how this can be done. The Government's brief cites numerous state statutes like Iowa's. Brief for United States 42, n. 12. If this task is so easy, let the Court pick a few of those States and give the lower court judges a demonstration.

Picking up an argument tossed off by Judge Kozinski, the Court argues that a federal sentencing judge can get a sense of whether the places covered by a state burglary statute are separate elements or means by examining the charging document. *Ante*, at 518–519 (citing *Rendon*, *supra*, at 473–474 (Kozinski, J., dissenting from denial of reh'g en banc)). If, for example, the charging document alleges that the defend-

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[3] In *Rendon* v. *Holder*, 782 F. 3d 466, 466–473 (CA9 2014) (dissent from denial of rehearing), eight Circuit Judges addressed the question of the difficulty of this determination. They described it as "a notoriously uncertain inquiry" that will lead to "uncertain results." *Id.*, at 471.

ant burglarized a house, that is a clue, according to the Court, that "house" is an element. See *ante*, at 519. I pointed out the problem with this argument in *Descamps*. See 570 U. S., at 292–293 (dissenting opinion). State rules and practices regarding the wording of charging documents differ, and just because something is specifically alleged in such a document, it does not follow that this item is an element and not just a means. See *ibid.*

The present case illustrates my point. Petitioner has five prior burglary convictions in Iowa. In Iowa, the places covered are "means." See *ante*, at 507. Yet the charging documents in all these cases set out the specific places that petitioner burglarized—a "house and garage," a "garage," a "machine shed," and a "storage shed." See Brief for Petitioner 9.

A real-world approach would avoid the mess that today's decision will produce. Allow a sentencing court to take a look at the record in the earlier case to see if the place that was burglarized was a building or something else. If the record is lost or inconclusive, the court could refuse to count the conviction. But where it is perfectly clear that a building was burglarized, count the conviction.

The majority disdains such practicality, and as a result it refuses to allow a burglary conviction to be counted even when the record makes it clear beyond any possible doubt that the defendant committed generic burglary. Consider this hypothetical case. Suppose that a defendant wishes to plead guilty to burglary, and the following occurs in open court on the record at the time of the plea:

> PROSECUTOR: I am informed that the defendant wishes to plead guilty to the charge set out in the complaint, namely, "on June 27, 2016, he broke into a house at 10 Main Street with the intent to commit larceny."
>
> DEFENSE COUNSEL: That is correct.

COURT: Mr. Defendant, what did you do?

DEFENDANT: I broke into a house to steal money and jewelry.

COURT: Was that the house at 10 Main St.?

DEFENDANT: That's it.

COURT: Now, are you sure about that? I mean, are you sure that 10 Main St. is a house? Could it have actually been a boat?

DEFENDANT: No, it was a house. I climbed in through a window on the second floor.

COURT: Well, there are yachts that have multiple decks. Are you sure it is not a yacht?

DEFENDANT: It's a little house.

PROSECUTOR: Your Honor, here is a photo of the house.

COURT: Give the defendant the photo. Mr. Defendant, is this the place you burglarized?

DEFENDANT: Yes, like I said.

COURT: Could it once have been a boat? Maybe it was originally a house boat and was later attached to the ground. What about that?

DEFENSE COUNSEL: Your honor, we stipulate that it is not a boat.

COURT: Well, could it be a vehicle?

DEFENDANT: No, like I said, it's a house. It doesn't have any wheels.

COURT: There are trailers that aren't on wheels.

DEFENSE COUNSEL: Your Honor, my client wants to plead guilty to burglarizing the house at 10 Main St.

> PROSECUTOR: Your Honor, if necessary I will call the owners, Mr. and Mrs. Landlubbers-Stationary. They have lived there for 40 years. They will testify that it is a building. I also have the town's tax records. The house has been at that location since it was built in 1926. It hasn't moved.
>
> COURT: What do you say, defense counsel? Are those records accurate?
>
> DEFENSE COUNSEL: Yes, we so stipulate. Again, my client wishes to plead guilty to the burglary of a house. He wants to take responsibility for what he did, and as to sentencing, ...
>
> COURT: We'll get to that later. Mr. Defendant, what do you say? Is 10 Main St. possibly a vehicle?
>
> DEFENDANT: Your Honor, I admit I burglarized a house. It was not a car or truck.
>
> COURT: Well, alright. But could it possibly be a tent?
>
> DEFENDANT: No, it's made of brick. I scraped my knee on the brick climbing up.
>
> COURT: OK, I just want to be sure.

As the Court sees things, none of this would be enough. Real-world facts are irrelevant. For aficionados of pointless formalism, today's decision is a wonder, the veritable *ne plus ultra* of the genre.[4]

Along the way from *Taylor* to the present case, there have been signs that the Court was off course and opportunities

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[4] The Court claims that there are three good reasons for its holding, but as I explained in *Descamps*, none is substantial. The Court's holding is not required by ACCA's text or by the Sixth Amendment, and the alternative real-world approach would be fair to defendants. See 570 U. S., at 284, 289–291 (ALITO, J., dissenting).

to alter its course. Now the Court has reached the legal equivalent of Moreau's Zagreb. But the Court, unlike Moreau, is determined to stay the course and continue on, traveling even further away from the intended destination. Who knows when, if ever, the Court will call home.

Syllabus

DOLLAR GENERAL CORP. ET AL. *v.* MISSISSIPPI BAND OF CHOCTAW INDIANS ET AL.

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

No. 13–1496. Argued December 7, 2015—Decided June 23, 2016
746 F. 3d 167, affirmed by an equally divided Court.

Thomas C. Goldstein argued the cause for petitioners. With him on the briefs was *Edward F. Harold.*

Neal Kumar Katyal argued the cause for respondents. With him on the brief were *C. Bryant Rogers*, *Carolyn J. Abeita*, *Frederick Liu*, *Riyaz A. Kanji*, *Melissa T. Carleton*, *N. Cheryl Hamby*, *Terry L. Jordan*, and *Brian D. Dover.*

Deputy Solicitor General Kneedler argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Cruden*, *Curtis E. Gannon*, *William B. Lazarus*, *Mary Gabrielle Sprague*, and *Hilary C. Tompkins.**

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*Briefs of *amici curiae* urging reversal were filed for the State of Oklahoma et al. by *E. Scott Pruitt*, Attorney General of Oklahoma, and *Patrick R. Wyrick*, Solicitor General, and by the Attorneys General for their respective States as follows: *Luther Strange* of Alabama, *Mark Brnovich* of Arizona, *Bill Schuette* of Michigan, *Sean D. Reyes* of Utah, and *Peter K. Michael* of Wyoming; for the Association of American Railroads by *Lynn H. Slade*, *Deana M. Bennett*, *Louis P. Warchot*, and *Daniel Saphire*; for the Retail Litigation Center, Inc., by *Laura K. McNally*, *Andrew R. DeVooght*, and *Deborah White*; and for the South Dakota Bankers Association by *Brett Koenecke.*

Briefs of *amici curiae* urging affirmance were filed for the State of Mississippi et al. by *Jim Hood*, Attorney General of Mississippi, and *Mary Jo Woods* and *Blake Bee*, Special Assistant Attorneys General, *Peter K. Stris*, *Brendan S. Maher*, and *Daniel L. Geyser*, and by the Attorneys General for their respective States as follows: *Cynthia H. Coffman* of Colorado, *Hector H. Balderas* of New Mexico, *Wayne Stenehjem* of North Dakota, *Ellen F. Rosenblum* of Oregon, and *Robert W. Ferguson* of Washington; for the American Civil Liberties Union et al. by *Stephen L. Pevar*,

PER CURIAM.

The judgment is affirmed by an equally divided Court.

Matthew A. Coles, and *Steven R. Shapiro*; for the Cherokee Nation et al. by *Seth P. Waxman*, *Kenneth L. Salazar*, *Daniel S. Volchok*, *David M. Lehn*, *Stephen H. Greetham*, *Michael Burrage*, *Lloyd B. Miller*, *Douglas B. L. Endreson*, *Frank S. Holleman*, and *Bob Rabon*; for Historians and Legal Scholars by *Danielle Spinelli*; for the National Congress of American Indians et al. by *Joseph H. Webster*, *Gregory A. Smith*, *Geoffrey D. Strommer*, *William R. Norman*, *Caroline P. Mayhew*, *Joshua M. Segal*, and *R. Trent McCotter*; for the Natural Indigenous Women's Resource Center et al. by *Mary Kathryn Nagle*; and for the Puyallup Tribe of Indians et al. by *Harry R. Sachse*, *Reid Peyton Chambers*, *Peng Wu*, and *Sarah Krakoff*.

Syllabus

UNITED STATES ET AL. *v.* TEXAS ET AL.

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

No. 15–674. Argued April 18, 2016—Decided June 23, 2016
809 F. 3d 134, affirmed by an equally divided Court.

Solicitor General Verrilli argued the cause for petitioners. With him on the briefs were *Principal Deputy Assistant Attorney General Mizer*, *Deputy Solicitors General Gershengorn* and *Kneedler*, *Deputy Assistant Attorney General Brinkmann*, *Zachary D. Tripp*, *Douglas N. Letter*, *Scott R. McIntosh*, and *Jeffrey Clair*.

Thomas A. Saenz argued the cause for intervenor-respondents. With him on the briefs were *Nina Perales* and *Linda J. Smith*.

Scott A. Keller, Solicitor General of Texas, argued the cause for respondents. With him on the brief were *Ken Paxton*, Attorney General, *Jeffrey C. Mateer*, First Assistant Attorney General, *J. Campbell Barker*, Deputy Solicitor General, and *Ari Cuenin* and *Alex Potapov*, Assistant Solicitors General.

Erin Murphy argued the cause for the United States House of Representatives as *amicus curiae* urging affirmance. With her on the brief were *Kerry W. Kircher*, *William Pittard*, *Eleni M. Roumel*, and *Isaac Rosenberg*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Washington et al. by *Robert W. Ferguson*, Attorney General of Washington, *Noah Guzzo Purcell*, Solicitor General, and *Anne E. Egeler*, Deputy Solicitor General, and by the Attorneys General for their respective jurisdictions as follows: *Kamala D. Harris* of California, *George Jepsen* of Connecticut, *Matthew P. Denn* of Delaware, *Karl A. Racine* of the District of Columbia, *Douglas S. Chin* of Hawaii, *Lisa Madigan* of Illinois, *Thomas J. Miller* of Iowa, *Janet T. Mills* of Maine, *Brian E. Frosh* of Maryland, *Maura Healey* of Massachusetts, *Hector H. Balderas* of New Mexico, *Eric T. Schneiderman* of New York, *Ellen F. Rosenblum* of Oregon, *Peter F. Kilmartin* of Rhode Island, *William H. Sorrell* of Vermont, and *Mark*

PER CURIAM.

The judgment is affirmed by an equally divided Court.

R. Herring of Virginia; for Administrative Law Scholars by *Derek T. Ho*; for the American Federation of Labor and Congress of Industrial Organizations by *Lynn K. Rhinehart*, *Harold C. Becker*, and *Matthew J. Ginsburg*; for the American Immigration Council et al. by *Jonathan Weissglass*, *Stacey M. Leyton*, *Judith A. Scott*, *Deborah L. Smith*, *Melissa Crow*, *Marielena Hincapié*, *Linton Joaquin*, *Karen C. Tumlin*, *Penda D. Hair*, *Wade J. Henderson*, *Lisa M. Bornstein*, and *Juan Cartagena*; for Bipartisan Former Members of Congress by *Elizabeth B. Wydra*, *Brianne J. Gorod*, and *Simon Lazarus*; for California Business, Civic, Educational, and Religious Figures and Institutions by *Bradley S. Phillips* and *Benjamin J. Horwich*; for Educators and Children's Advocates by *Matthew E. Price*, *Matthew S. Hellman*, and *Michael W. Ross*; for Faith-based Organizations by *Benjamin G. Shatz*; for Former Commissioners of the United States Immigration and Naturalization Service by *Neal Kumar Katyal*; for Former Federal Immigration and Homeland Security Officials by *Michael J. Gottlieb* and *Martin S. Lederman*; for Gonzalez Olivieri LLC et al. by *Raed Gonzalez*, *Naimeh Salem*, *Bruce Godzina*, *Curtis White*, *Brian K. Bates*, and *Alexandre I. Afanassiev*, all *pro se*; for the Major Cities Chiefs Association et al. by *Mark W. Mosier*, *David M. Zionts*, *Matthew J. Piers*, and *Joshua Karsh*; for the Mayor of New York et al. by *Zachary W. Carter*, *Richard Dearing*, *Michael N. Feuer*, *James P. Clark*, *Wendy Shapero*, and *Thomas Bentley III*; for Members of the Business Community by *Boris Bershteyn*, *Clifford M. Sloan*, *David A. Wilson*, and *Kristin Linsley Myles*; for National Justice for our Neighbors et al. by *Charles Shane Ellison*; for the National Queer Asian Pacific Islander Alliance, Inc., et al. by *James W. Kim*, *Lisa A. Linsky*, and *Joshua D. Rogaczewski*; for Professional Economists et al. by *Justin Florence*, *Douglas Hallward-Driemeier*, and *Jonathan Ference-Burke*; for United We Dream by *Alan E. Untereiner*; for Walter Dellinger by *Joseph R. Palmore* and *Seth W. Lloyd*; and for 186 Members of the House of Representatives et al. by *Seth P. Waxman*, *Jamie S. Gorelick*, *Paul R. Q. Wolfson*, *David M. Lehn*, and *Kenneth L. Salazar*.

Briefs of *amici curiae* urging affirmance were filed for the State of Wyoming by *Peter K. Michael*, Attorney General of Wyoming, *John G. Knepper*, Chief Deputy Attorney General, *David L. Delicath*, Deputy Attorney General, *James Michael Causey* and *Christyne M. Martens*, Senior Assistant Attorneys General, *Philip Murphy Donoho*, Assistant Attorney General, and *Katherine A. Adams*; for the American Center for Law & Justice et al. by *Jay Alan Sekulow*, *Stuart J. Roth*, *Colby M. May*, *Jordan*

Sekulow, *Craig L. Parshall*, and *Benjamin P. Sisney*; for the Cato Institute et al. by *Ilya Shapiro*, *Randal J. Meyer*, and *Josh Blackman*; for the Center for Constitutional Jurisprudence by *John C. Eastman* and *Anthony T. Caso*; for Citizens United et al. by *William J. Olson*, *Herbert W. Titus*, *Jeremiah L. Morgan*, *John S. Miles*, and *Michael Boos*; for the Eagle Forum Education & Legal Defense Fund by *Lawrence J. Joseph*; for Federal Courts Scholars et al. by *Ernest A. Young* and *Kimberly S. Hermann*; for Former Homeland Security, Justice, and State Department Officials by *Peter Margulies*; for Former U. S. Attorneys General by *David B. Rivkin, Jr.*, and *Andrew M. Grossman*; for the Foundation for Moral Law by *John A. Eidsmoe*; for Governor Greg Abbott of Texas et al. by *Michael W. McConnell*, *James D. Blacklock*, *Andrew S. Oldham*, and *Arthur C. D'Andrea*; for the Immigration Reform Law Institute et al. by *Dale L. Wilcox* and *Michael M. Hethmon*; for the Justice and Freedom Fund by *James L. Hirsen* and *Deborah J. Dewart*; for Legal Scholars et al. by *Ashley C. Parrish*, *James P. Sullivan*, *C. Boyden Gray*, and *Carrie Severino*; for Joseph M. Arpaio by *Larry Klayman*; for the Mountain States Legal Foundation by *Steven J. Lechner*; for the National Federation of Independent Business Small Business Legal Center by *William S. Consovoy*, *J. Michael Connolly*, and *Karen R. Harned*; for the National Sheriffs' Association et al. by *Gene C. Schaerr*, *S. Kyle Duncan*, and *Greg Champagne*; for North Carolina Lt. Governor Daniel J. Forest by *David Stevenson Walker II*; for Save Jobs USA et al. by *John M. Miano*; and for Senate Majority Leader Mitch McConnell et al. by *Steven A. Engel* and *Joshua D. N. Hess*.

Syllabus

McDONNELL *v.* UNITED STATES

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

No. 15–474. Argued April 27, 2016—Decided June 27, 2016

Petitioner, former Virginia Governor Robert McDonnell, and his wife, Maureen McDonnell, were indicted by the Federal Government on honest services fraud and Hobbs Act extortion charges related to their acceptance of $175,000 in loans, gifts, and other benefits from Virginia businessman Jonnie Williams, while Governor McDonnell was in office. Williams was the chief executive officer of Star Scientific, a Virginia-based company that had developed Anatabloc, a nutritional supplement made from anatabine, a compound found in tobacco. Star Scientific hoped that Virginia's public universities would perform research studies on anatabine, and Williams wanted Governor McDonnell's assistance in obtaining those studies.

To convict the McDonnells, the Government was required to show that Governor McDonnell committed (or agreed to commit) an "official act" in exchange for the loans and gifts. An "official act" is defined as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." 18 U. S. C. § 201(a)(3). According to the Government, Governor McDonnell committed at least five "official acts," including "arranging meetings" for Williams with other Virginia officials to discuss Star Scientific's product, "hosting" events for Star Scientific at the Governor's Mansion, and "contacting other government officials" concerning the research studies.

The case was tried before a jury. The District Court instructed the jury that "official act" encompasses "acts that a public official customarily performs," including acts "in furtherance of longer-term goals" or "in a series of steps to exercise influence or achieve an end." Supp. App. 69–70. Governor McDonnell requested that the court further instruct the jury that "merely arranging a meeting, attending an event, hosting a reception, or making a speech are not, standing alone, 'official acts,'" but the District Court declined to give that instruction. 792 F. 3d 478, 513 (internal quotation marks omitted). The jury convicted Governor McDonnell.

Governor McDonnell moved to vacate his convictions on the ground that the definition of "official act" in the jury instructions was erroneous.

He also moved for acquittal, arguing that there was insufficient evidence to convict him, and that the Hobbs Act and honest services statute were unconstitutionally vague. The District Court denied the motions, and the Fourth Circuit affirmed.

Held:

1. An "official act" is a decision or action on a "question, matter, cause, suit, proceeding or controversy." That question or matter must involve a formal exercise of governmental power, and must also be something specific and focused that is "pending" or "may by law be brought" before a public official. To qualify as an "official act," the public official must make a decision or take an action on that question or matter, or agree to do so. Setting up a meeting, talking to another official, or organizing an event—without more—does not fit that definition of "official act." Pp. 566–577.

(a) The Government argues that the term "official act" encompasses nearly any activity by a public official concerning any subject, including a broad policy issue such as Virginia economic development. Governor McDonnell, in contrast, contends that statutory context compels a more circumscribed reading. Taking into account text, precedent, and constitutional concerns, the Court rejects the Government's reading and adopts a more bounded interpretation of "official act." Pp. 566–567.

(b) Section 201(a)(3) sets forth two requirements for an "official act." First, the Government must identify a "question, matter, cause, suit, proceeding or controversy" that "may at any time be pending" or "may by law be brought" before a public official. Second, the Government must prove that the public official made a decision or took an action "on" that "question, matter, cause, suit, proceeding or controversy," or agreed to do so. Pp. 567–574.

(1) The first inquiry is whether a typical meeting, call, or event is itself a "question, matter, cause, suit, proceeding or controversy." The terms "cause," "suit," "proceeding," and "controversy" connote a formal exercise of governmental power, such as a lawsuit, hearing, or administrative determination. Although it may be difficult to define the precise reach of those terms, a typical meeting, call, or event does not qualify. "Question" and "matter" could be defined more broadly, but under the familiar interpretive canon *noscitur a sociis*, a "word is known by the company it keeps." *Jarecki* v. *G. D. Searle & Co.*, 367 U. S. 303, 307. Because a typical meeting, call, or event is not of the same stripe as a lawsuit before a court, a determination before an agency, or a hearing before a committee, it does not count as a "question" or "matter" under § 201(a)(3). That more limited reading also

comports with the presumption "that statutory language is not superfluous." *Arlington Central School Dist. Bd. of Ed.* v. *Murphy*, 548 U. S. 291, 299, n. 1. Pp. 567–569.

(2) Because a typical meeting, call, or event is not itself a question or matter, the next step is to determine whether arranging a meeting, contacting another official, or hosting an event may qualify as a "decision or action" *on* a different question or matter. That first requires the Court to establish what counts as a question or matter in this case.

Section 201(a)(3) states that the question or matter must be "pending" or "may by law be brought" before "any public official." "Pending" and "may by law be brought" suggest something that is relatively circumscribed—the kind of thing that can be put on an agenda, tracked for progress, and then checked off as complete. "May *by law* be brought" conveys something within the specific duties of an official's position. Although the District Court determined that the relevant matter in this case could be considered at a much higher level of generality as "Virginia business and economic development," Supp. App. 88, the pertinent matter must instead be more focused and concrete.

The Fourth Circuit identified at least three such questions or matters: (1) whether researchers at Virginia's state universities would initiate a study of Anatabloc; (2) whether Virginia's Tobacco Commission would allocate grant money for studying anatabine; and (3) whether Virginia's health plan for state employees would cover Anatabloc. The Court agrees that those qualify as questions or matters under § 201(a)(3). Pp. 569–571.

(3) The question remains whether merely setting up a meeting, hosting an event, or calling another official qualifies as a decision or action on any of those three questions or matters. It is apparent from *United States* v. *Sun-Diamond Growers of Cal.*, 526 U. S. 398, that the answer is no. Something more is required: Section 201(a)(3) specifies that the public official must make a decision or take an action *on* the question or matter, or agree to do so.

For example, a decision or action to initiate a research study would qualify as an "official act." A public official may also make a decision or take an action by using his official position to exert pressure on *another* official to perform an "official act," or by using his official position to provide advice to another official, knowing or intending that such advice will form the basis for an "official act" by another official. A public official is not required to actually make a decision or take an action on a "question, matter, cause, suit, proceeding or controversy"; it is enough that he agree to do so. Setting up a meeting, hosting an event, or calling an official (or agreeing to do so) merely to talk about a

research study or to gather additional information, however, does not qualify as a decision or action on the pending question whether to initiate the study. Pp. 571–574.

(c) The Government's expansive interpretation of "official act" would raise significant constitutional concerns. Conscientious public officials arrange meetings for constituents, contact other officials on their behalf, and include them in events all the time. Representative government assumes that public officials will hear from their constituents and act appropriately on their concerns. The Government's position could cast a pall of potential prosecution over these relationships. This concern is substantial, as recognized by White House counsel from every administration from that of President Reagan to President Obama, as well as two bipartisan groups of former state attorneys general. The Government's interpretation also raises due process and federalism concerns. Pp. 574–577.

2. Given the Court's interpretation of "official act," the District Court's jury instructions were erroneous, and the jury may have convicted Governor McDonnell for conduct that is not unlawful. Because the errors in the jury instructions are not harmless beyond a reasonable doubt, the Court vacates Governor McDonnell's convictions. Pp. 577–581.

(a) The jury instructions lacked important qualifications, rendering them significantly overinclusive. First, they did not adequately explain to the jury how to identify the pertinent "question, matter, cause, suit, proceeding or controversy." It is possible the jury thought that a typical meeting, call, or event was itself a "question, matter, cause, suit, proceeding or controversy." If so, the jury could have convicted Governor McDonnell without finding that he committed or agreed to commit an "official act," as properly defined.

Second, the instructions did not inform the jury that the "question, matter, cause, suit, proceeding or controversy" must be more specific and focused than a broad policy objective. As a result, the jury could have thought that the relevant "question, matter, cause, suit, proceeding or controversy" was something as nebulous as Virginia economic development, and convicted Governor McDonnell on that basis.

Third, the District Court did not instruct the jury that to convict Governor McDonnell, it had to find that he made a decision or took an action—or agreed to do so—on the identified "question, matter, cause, suit, proceeding or controversy," as properly defined. At trial, several of Governor McDonnell's subordinates testified that he asked them to attend a meeting, not that he expected them to do anything other than that. If that testimony reflects what Governor McDonnell agreed to do at the time he accepted the loans and gifts from Williams, then he did

not agree to make a decision or take an action on any of the three questions or matters described by the Fourth Circuit. Pp. 577–580.

(b) Governor McDonnell raises two additional claims. First, he argues that the honest services statute and the Hobbs Act are unconstitutionally vague. The Court rejects that claim. For purposes of this case, the parties defined those statutes with reference to § 201 of the federal bribery statute. Because the Court interprets the term "official act" in § 201(a)(3) in a way that avoids the vagueness concerns raised by Governor McDonnell, it declines to invalidate those statutes under the facts here. Second, Governor McDonnell argues that there is insufficient evidence that he committed an "official act," or agreed to do so. Because the parties have not had an opportunity to address that question in light of the Court's interpretation of "official act," the Court leaves it for the Court of Appeals to resolve in the first instance. P. 580.

792 F. 3d 478, vacated and remanded.

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

Noel J. Francisco argued the cause for petitioner. With him on the briefs were *Henry W. Asbill*, *Charlotte H. Taylor*, *James M. Burnham*, *John L. Brownlee*, *Jerrold J. Ganzfried*, *Steven D. Gordon*, and *Timothy J. Taylor*.

Deputy Solicitor General Dreeben argued the cause for the United States. With him on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Caldwell*, *Brian H. Fletcher*, and *Sonja M. Ralston*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Center for Law and Justice by *Jay Alan Sekulow*, *Stuart J. Roth*, *Colby M. May*, *Walter M. Weber*, *Craig L. Parshall*, and *Benjamin P. Sisney*; for Former Federal Officials by *William J. Kilberg*, *Thomas G. Hungar*, *Helgi C. Walker*, *David Debold*, and *Russell B. Balikian*; for Former Virginia Attorneys General by *William H. Hurd* and *Stephen C. Piepgrass*; for the James Madison Center for Free Speech by *James Bopp, Jr.*; for Law Professors by *William W. Taylor III*; for Members of the Virginia General Assembly by *John S. Davis V*, *Joseph R. Pope*, and *Jonathan T. Lucier*; for the National Association of Criminal Defense Lawyers by *John D. Cline* and *Jeffrey T. Green*; for Public Policy Advocates et al. by *Gregory N. Stillman* and *Edward J. Fuhr*; for Republican Governors Public Policy Committee by *Charles J. Cooper*, *David H. Thompson*, and *Peter A. Patterson*; for the U. S. Justice Foundation et al. by *Herbert W. Titus*, *William J. Olson*, *Jeremiah*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

In 2014, the Federal Government indicted former Virginia Governor Robert McDonnell and his wife, Maureen McDonnell, on bribery charges. The charges related to the acceptance by the McDonnells of $175,000 in loans, gifts, and other benefits from Virginia businessman Jonnie Williams, while Governor McDonnell was in office. Williams was the chief executive officer of Star Scientific, a Virginia-based company that had developed a nutritional supplement made from anatabine, a compound found in tobacco. Star Scientific hoped that Virginia's public universities would perform research studies on anatabine, and Williams wanted Governor McDonnell's assistance in obtaining those studies.

To convict the McDonnells of bribery, the Government was required to show that Governor McDonnell committed (or agreed to commit) an "official act" in exchange for the loans and gifts. The parties did not agree, however, on what counts as an "official act." The Government alleged in the indictment, and maintains on appeal, that Governor McDonnell committed at least five "official acts." Those acts included "arranging meetings" for Williams with other Virginia officials to discuss Star Scientific's product, "hosting" events for Star Scientific at the Governor's Mansion, and "contacting other government officials" concerning studies of

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L. Morgan, and *Michael Boos*; for Virginia Law Professors by *Timothy M. Richardson*; for Benjamin Todd Jealous et al. by *Stephen W. Miller* and *Patrick O'Donnell*; and for 77 Former State Attorneys General (Non-Virginia) by *Brian D. Boone*, *D. Andrew Hatchett*, and *Edward T. Kang*.

Briefs for *amici curiae* urging affirmance were filed for the Campaign Legal Center by *J. Gerald Hebert*, *Tara Malloy*, and *Paul S. Ryan*; for Citizens for Responsibility and Ethics in Washington by *Mary Kelly Persyn*; for Judicial Watch, Inc., et al. by *James F. Peterson*; and for Public Citizen, Inc., et al. by *Scott L. Nelson*, *Allison M. Zieve*, *Fred Wertheimer*, and *Donald J. Simon*.

Scott A. Eisman and *Daniel I. Weiner* filed a brief for the Brennan Center for Justice at the N. Y. U. School of Law as *amicus curiae*.

anatabine. Supp. App. 47–48. The Government also argued more broadly that these activities constituted "official action" because they related to Virginia business development, a priority of Governor McDonnell's administration. Governor McDonnell contends that merely setting up a meeting, hosting an event, or contacting an official—without more—does not count as an "official act."

At trial, the District Court instructed the jury according to the Government's broad understanding of what constitutes an "official act," and the jury convicted both Governor and Mrs. McDonnell on the bribery charges. The Fourth Circuit affirmed Governor McDonnell's conviction, and we granted review to clarify the meaning of "official act."

I

A

On November 3, 2009, petitioner Robert McDonnell was elected the 71st Governor of Virginia. His campaign slogan was "Bob's for Jobs," and his focus in office was on promoting business in Virginia. As Governor, McDonnell spoke about economic development in Virginia "on a daily basis" and attended numerous "events, ribbon cuttings," and "plant facility openings." App. 4093, 5241. He also referred thousands of constituents to meetings with members of his staff and other government officials. According to longtime staffers, Governor McDonnell likely had more events at the Virginia Governor's Mansion to promote Virginia business than had occurred in "any other administration." *Id.*, at 4093.

This case concerns Governor McDonnell's interactions with one of his constituents, Virginia businessman Jonnie Williams. Williams was the CEO of Star Scientific, a Virginia-based company that developed and marketed Anatabloc, a nutritional supplement made from anatabine, a compound found in tobacco. Star Scientific hoped to obtain Food and Drug Administration approval of Anatabloc as an anti-inflammatory drug. An important step in securing that ap-

proval was initiating independent research studies on the health benefits of anatabine. Star Scientific hoped Virginia's public universities would undertake such studies, pursuant to a grant from Virginia's Tobacco Commission.

Governor McDonnell first met Williams in 2009, when Williams offered McDonnell transportation on his private airplane to assist with McDonnell's election campaign. Shortly after the election, Williams had dinner with Governor and Mrs. McDonnell at a restaurant in New York. The conversation turned to Mrs. McDonnell's search for a dress for the inauguration, which led Williams to offer to purchase a gown for her. Governor McDonnell's counsel later instructed Williams not to buy the dress, and Mrs. McDonnell told Williams that she would take a rain check. *Id.*, at 2203–2209.

In October 2010, Governor McDonnell and Williams met again on Williams's plane. During the flight, Williams told Governor McDonnell that he "needed his help" moving forward on the research studies at Virginia's public universities, and he asked to be introduced to the person that he "needed to talk to." *Id.*, at 2210–2211. Governor McDonnell agreed to introduce Williams to Dr. William Hazel, Virginia's Secretary of Health and Human Resources. Williams met with Dr. Hazel the following month, but the meeting was unfruitful; Dr. Hazel was skeptical of the science behind Anatabloc and did not assist Williams in obtaining the studies. *Id.*, at 2211–2217, 3738–3749.

Six months later, Governor McDonnell's wife, Maureen McDonnell, offered to seat Williams next to the Governor at a political rally. Shortly before the event, Williams took Mrs. McDonnell on a shopping trip and bought her $20,000 worth of designer clothing. The McDonnells later had Williams over for dinner at the Governor's Mansion, where they discussed research studies on Anatabloc. *Id.*, at 6560.

Two days after that dinner, Williams had an article about Star Scientific's research e-mailed to Mrs. McDonnell, which she forwarded to her husband. Less than an hour later,

Governor McDonnell texted his sister to discuss the financial situation of certain rental properties they owned in Virginia Beach. Governor McDonnell also e-mailed his daughter to ask about expenses for her upcoming wedding.

The next day, Williams returned to the Governor's Mansion for a meeting with Mrs. McDonnell. At the meeting, Mrs. McDonnell described the family's financial problems, including their struggling rental properties in Virginia Beach and their daughter's wedding expenses. Mrs. McDonnell, who had experience selling nutritional supplements, told Williams that she had a background in the area and could help him with Anatabloc. According to Williams, she explained that the "Governor says it's okay for me to help you and—but I need you to help me. I need you to help me with this financial situation." *Id.*, at 2231. Mrs. McDonnell then asked Williams for a $50,000 loan, in addition to a $15,000 gift to help pay for her daughter's wedding, and Williams agreed.

Williams testified that he called Governor McDonnell after the meeting and said, "I understand the financial problems and I'm willing to help. I just wanted to make sure that you knew about this." *Id.*, at 2233. According to Williams, Governor McDonnell thanked him for his help. *Ibid.* Governor McDonnell testified, in contrast, that he did not know about the loan at the time, and that when he learned of it he was upset that Mrs. McDonnell had requested the loan from Williams. *Id.*, at 6095–6096. Three days after the meeting between Williams and Mrs. McDonnell, Governor McDonnell directed his assistant to forward the article on Star Scientific to Dr. Hazel.

In June 2011, Williams sent Mrs. McDonnell's chief of staff a letter containing a proposed research protocol for the Anatabloc studies. The letter was addressed to Governor McDonnell, and it suggested that the Governor "use the attached protocol to initiate the 'Virginia Study' of Anatabloc at the Medical College of Virginia and the University of Virginia School of Medicine." *Id.*, at 2254. Governor McDon-

nell gave the letter to Dr. Hazel. *Id.*, at 6121–6122. Williams testified at trial that he did not "recall any response" to the letter. *Id.*, at 2256.

In July 2011, the McDonnell family visited Williams's vacation home for the weekend, and Governor McDonnell borrowed Williams's Ferrari while there. Shortly thereafter, Governor McDonnell asked Dr. Hazel to send an aide to a meeting with Williams and Mrs. McDonnell to discuss research studies on Anatabloc. The aide later testified that she did not feel pressured by Governor or Mrs. McDonnell to do "anything other than have the meeting," and that Williams did not ask anything of her at the meeting. *Id.*, at 3075. After the meeting, the aide sent Williams a "polite blow-off" e-mail. *Id.*, at 3081.

At a subsequent meeting at the Governor's Mansion, Mrs. McDonnell admired Williams's Rolex and mentioned that she wanted to get one for Governor McDonnell. Williams asked if Mrs. McDonnell wanted him to purchase a Rolex for the Governor, and Mrs. McDonnell responded, "Yes, that would be nice." *Id.*, at 2274. Williams did so, and Mrs. McDonnell later gave the Rolex to Governor McDonnell as a Christmas present.

In August 2011, the McDonnells hosted a lunch event for Star Scientific at the Governor's Mansion. According to Williams, the purpose of the event was to launch Anatabloc. See *id.*, at 2278. According to Governor McDonnell's gubernatorial counsel, however, it was just lunch. See *id.*, at 3229–3231.

The guest list for the event included researchers at the University of Virginia and Virginia Commonwealth University. During the event, Star Scientific distributed free samples of Anatabloc, in addition to eight $25,000 checks that researchers could use in preparing grant proposals for studying Anatabloc. Governor McDonnell asked researchers at the event whether they thought "there was some scientific validity" to Anatabloc and "whether or not there was any

reason to explore this further." *Id.*, at 3344. He also asked whether this could "be something good for the Commonwealth, particularly as it relates to economy or job creation." *Ibid.* When Williams asked Governor McDonnell whether he would support funding for the research studies, Governor McDonnell "very politely" replied, "I have limited decision-making power in this area." *Id.*, at 3927.

In January 2012, Mrs. McDonnell asked Williams for an additional loan for the Virginia Beach rental properties, and Williams agreed. On February 3, Governor McDonnell followed up on that conversation by calling Williams to discuss a $50,000 loan.

Several days later, Williams complained to Mrs. McDonnell that the Virginia universities were not returning Star Scientific's calls. She passed Williams's complaint on to the Governor. While Mrs. McDonnell was driving with Governor McDonnell, she also e-mailed Governor McDonnell's counsel, stating that the Governor "wants to know why nothing has developed" with the research studies after Williams had provided the eight $25,000 checks for preparing grant proposals, and that the Governor "wants to get this going" at the universities. *Id.*, at 3214, 4931. According to Governor McDonnell, however, Mrs. McDonnell acted without his knowledge or permission, and he never made the statements she attributed to him. *Id.*, at 6306–6308.

On February 16, Governor McDonnell e-mailed Williams to check on the status of documents related to the $50,000 loan. A few minutes later, Governor McDonnell e-mailed his counsel stating, "Please see me about Anatabloc issues at VCU and UVA. Thanks." *Id.*, at 3217. Governor McDonnell's counsel replied, "Will do. We need to be careful with this issue." *Ibid.* The next day, Governor McDonnell's counsel called Star Scientific's lobbyist in order to "change the expectations" of Star Scientific regarding the involvement of the Governor's Office in the studies. *Id.*, at 3219.

At the end of February, Governor McDonnell hosted a healthcare industry reception at the Governor's Mansion,

which Williams attended. Mrs. McDonnell also invited a number of guests recommended by Williams, including researchers at the Virginia universities. Governor McDonnell was present, but did not mention Star Scientific, Williams, or Anatabloc during the event. *Id.*, at 3671–3672. That same day, Governor McDonnell and Williams spoke about the $50,000 loan, and Williams loaned the money to the McDonnells shortly thereafter. *Id.*, at 2306, 2353.

In March 2012, Governor McDonnell met with Lisa Hicks-Thomas, the Virginia Secretary of Administration, and Sara Wilson, the Director of the Virginia Department of Human Resource Management. The purpose of the meeting was to discuss Virginia's health plan for state employees. At that time, Governor McDonnell was taking Anatabloc several times a day. He took a pill during the meeting, and told Hicks-Thomas and Wilson that the pills "were working well for him" and "would be good for" state employees. *Id.*, at 4227. Hicks-Thomas recalled Governor McDonnell asking them to meet with a representative from Star Scientific; Wilson had no such recollection. *Id.*, at 4219, 4227. After the discussion with Governor McDonnell, Hicks-Thomas and Wilson looked up Anatabloc on the Internet, but they did not set up a meeting with Star Scientific or conduct any other follow-up. *Id.*, at 4220, 4230. It is undisputed that Virginia's health plan for state employees does not cover nutritional supplements such as Anatabloc.

In May 2012, Governor McDonnell requested an additional $20,000 loan, which Williams provided. Throughout this period, Williams also paid for several rounds of golf for Governor McDonnell and his children, took the McDonnells on a weekend trip, and gave $10,000 as a wedding gift to one of the McDonnells' daughters. In total, Williams gave the McDonnells over $175,000 in gifts and loans.

B

In January 2014, Governor McDonnell was indicted for accepting payments, loans, gifts, and other things of value from

Williams and Star Scientific in exchange for "performing official actions on an as-needed basis, as opportunities arose, to legitimize, promote, and obtain research studies for Star Scientific's products." Supp. App. 46. The charges against him comprised one count of conspiracy to commit honest services fraud, three counts of honest services fraud, one count of conspiracy to commit Hobbs Act extortion, six counts of Hobbs Act extortion, and two counts of making a false statement. See 18 U. S. C. §§ 1343, 1349 (honest services fraud); § 1951(a) (Hobbs Act extortion); § 1014 (false statement). Mrs. McDonnell was indicted on similar charges, plus obstructing official proceedings, based on her alleged involvement in the scheme. See § 1512(c)(2) (obstruction).

The theory underlying both the honest services fraud and Hobbs Act extortion charges was that Governor McDonnell had accepted bribes from Williams. See *Skilling* v. *United States*, 561 U. S. 358, 404 (2010) (construing honest services fraud to forbid "fraudulent schemes to deprive another of honest services through bribes or kickbacks"); *Evans* v. *United States*, 504 U. S. 255, 260, 269 (1992) (construing Hobbs Act extortion to include " 'taking a bribe' ").

The parties agreed that they would define honest services fraud with reference to the federal bribery statute, 18 U. S. C. § 201. That statute makes it a crime for "a public official or person selected to be a public official, directly or indirectly, corruptly" to demand, seek, receive, accept, or agree "to receive or accept anything of value" in return for being "influenced in the performance of any official act." § 201(b)(2)(A). An "official act" is defined as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." § 201(a)(3).

The parties also agreed that obtaining a "thing of value . . . knowing that the thing of value was given in return for

official action" was an element of Hobbs Act extortion, and that they would use the definition of "official act" found in the federal bribery statute to define "official action" under the Hobbs Act. 792 F. 3d 478, 505 (CA4 2015) (internal quotation marks omitted).

As a result of all this, the Government was required to prove that Governor McDonnell committed or agreed to commit an "official act" in exchange for the loans and gifts from Williams. See *Evans*, 504 U. S., at 268 ("the offense is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts; fulfillment of the *quid pro quo* is not an element of the offense").

The Government alleged that Governor McDonnell had committed at least five "official acts":

> (1) "arranging meetings for [Williams] with Virginia government officials, who were subordinates of the Governor, to discuss and promote Anatabloc";
>
> (2) "hosting, and . . . attending, events at the Governor's Mansion designed to encourage Virginia university researchers to initiate studies of anatabine and to promote Star Scientific's products to doctors for referral to their patients";
>
> (3) "contacting other government officials in the [Governor's Office] as part of an effort to encourage Virginia state research universities to initiate studies of anatabine";
>
> (4) "promoting Star Scientific's products and facilitating its relationships with Virginia government officials by allowing [Williams] to invite individuals important to Star Scientific's business to exclusive events at the Governor's Mansion"; and
>
> (5) "recommending that senior government officials in the [Governor's Office] meet with Star Scientific executives to discuss ways that the company's products

could lower healthcare costs." Supp. App. 47–48 (indictment).

The case proceeded to a jury trial, which lasted five weeks. Pursuant to an immunity agreement, Williams testified that he had given the gifts and loans to the McDonnells to obtain the Governor's "help with the testing" of Anatabloc at Virginia's medical schools. App. 2234. Governor McDonnell acknowledged that he had requested loans and accepted gifts from Williams. He testified, however, that setting up meetings with government officials was something he did "literally thousands of times" as Governor, and that he did not expect his staff "to do anything other than to meet" with Williams. *Id.*, at 6042.

Several state officials testified that they had discussed Anatabloc with Williams or Governor McDonnell, but had not taken any action to further the research studies. *Id.*, at 3739–3750 (Dr. Hazel), 3075–3077 (aide to Dr. Hazel), 4218–4220 (Sara Wilson), 4230–4231 (Lisa Hicks-Thomas). A UVA employee in the university research office, who had never spoken with the Governor about Anatabloc, testified that she wrote a pro/con list concerning research studies on Anatabloc. The first "pro" was the "[p]erception to Governor that UVA would like to work with local companies," and the first "con" was the "[p]olitical pressure from Governor and impact on future UVA requests from the Governor." *Id.*, at 4321, 4323 (Sharon Krueger).

Following closing arguments, the District Court instructed the jury that to convict Governor McDonnell it must find that he agreed "to accept a thing of value in exchange for official action." Supp. App. 68. The court described the five alleged "official acts" set forth in the indictment, which involved arranging meetings, hosting events, and contacting other government officials. The court then quoted the statutory definition of "official act," and—as the Government had requested—advised the jury that the term encompassed "acts that a public official customarily performs," including

acts "in furtherance of longer-term goals" or "in a series of steps to exercise influence or achieve an end." *Id.*, at 69–70.

Governor McDonnell had requested the court to further instruct the jury that the "fact that an activity is a routine activity, or a 'settled practice,' of an office-holder does not alone make it an 'official act,' " and that "merely arranging a meeting, attending an event, hosting a reception, or making a speech are not, standing alone, 'official acts,' even if they are settled practices of the official," because they "are not decisions on matters pending before the government." 792 F. 3d, at 513 (internal quotation marks omitted). He also asked the court to explain to the jury that an "official act" must intend to or "in fact influence a specific official decision the government actually makes—such as awarding a contract, hiring a government employee, issuing a license, passing a law, or implementing a regulation." App. to Pet. for Cert. 147a. The District Court declined to give Governor McDonnell's proposed instruction to the jury.

The jury convicted Governor McDonnell on the honest services fraud and Hobbs Act extortion charges, but acquitted him on the false statement charges. Mrs. McDonnell was also convicted on most of the charges against her. Although the Government requested a sentence of at least ten years for Governor McDonnell, the District Court sentenced him to two years in prison. Mrs. McDonnell received a one-year sentence.

Following the verdict, Governor McDonnell moved to vacate his convictions on the ground that the jury instructions "were legally erroneous because they (i) allowed the jury to convict [him] on an erroneous understanding of 'official act,' and (ii) allowed a conviction on the theory that [he] accepted things of value that were given for future unspecified action." 64 F. Supp. 3d 783, 787 (ED Va. 2014). The District Court denied the motion. *Id.*, at 802. In addition, Governor McDonnell moved for acquittal on the basis that there was insufficient evidence to convict him, and that the Hobbs

Act and honest services statute were unconstitutionally vague. Crim. No. 3:14–CR–12 (ED Va., Dec. 1, 2014), Supp. App. 80, 82–92. That motion was also denied. See *id.*, at 92–94. (He also raised other challenges to his convictions, which are not at issue here.)

Governor McDonnell appealed his convictions to the Fourth Circuit, challenging the definition of "official action" in the jury instructions on the ground that it deemed "virtually all of a public servant's activities 'official,' no matter how minor or innocuous." 792 F. 3d, at 506. He also reiterated his challenges to the sufficiency of the evidence and the constitutionality of the statutes under which he was convicted. *Id.*, at 509, n. 19, 515.

The Fourth Circuit affirmed, and we granted certiorari. 577 U. S. 1099 (2016). Mrs. McDonnell's separate appeal remains pending before the Court of Appeals.

II

The issue in this case is the proper interpretation of the term "official act." Section 201(a)(3) defines an "official act" as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit."

According to the Government, "Congress used intentionally broad language" in § 201(a)(3) to embrace "*any* decision or action, on *any* question or matter, that may at *any time* be pending, or which may by law be brought before *any* public official, in such official's official capacity." Brief for United States 20–21 (Government's emphasis; alteration and internal quotation marks omitted). The Government concludes that the term "official act" therefore encompasses nearly any activity by a public official. In the Government's view, "official act" specifically includes arranging a meeting, contacting another public official, or hosting an event—with-

out more—concerning any subject, including a broad policy issue such as Virginia economic development. *Id.*, at 47–49; Tr. of Oral Arg. 28–30.

Governor McDonnell, in contrast, contends that statutory context compels a more circumscribed reading, limiting "official acts" to those acts that "direct[ ] a particular resolution of a specific governmental decision," or that pressure another official to do so. Brief for Petitioner 44, 51. He also claims that "vague corruption laws" such as § 201 implicate serious constitutional concerns, militating "in favor of a narrow, cautious reading of these criminal statutes." *Id.*, at 21.

Taking into account the text of the statute, the precedent of this Court, and the constitutional concerns raised by Governor McDonnell, we reject the Government's reading of § 201(a)(3) and adopt a more bounded interpretation of "official act." Under that interpretation, setting up a meeting, calling another public official, or hosting an event does not, standing alone, qualify as an "official act."

A

The text of § 201(a)(3) sets forth two requirements for an "official act": First, the Government must identify a "question, matter, cause, suit, proceeding or controversy" that "may at any time be pending" or "may by law be brought" before a public official. Second, the Government must prove that the public official made a decision or took an action "on" that question, matter, cause, suit, proceeding, or controversy, or agreed to do so. The issue here is whether arranging a meeting, contacting another official, or hosting an event—without more—can be a "question, matter, cause, suit, proceeding or controversy," and if not, whether it can be a decision or action on a "question, matter, cause, suit, proceeding or controversy."

The first inquiry is whether a typical meeting, call, or event is itself a "question, matter, cause, suit, proceeding or controversy." The Government argues that nearly any activity by

a public official qualifies as a question or matter—from workaday functions, such as the typical call, meeting, or event, to the broadest issues the government confronts, such as fostering economic development. We conclude, however, that the terms "question, matter, cause, suit, proceeding or controversy" do not sweep so broadly.

The last four words in that list—"cause," "suit," "proceeding," and "controversy"—connote a formal exercise of governmental power, such as a lawsuit, hearing, or administrative determination. See, *e. g.*, Crimes Act of 1790, § 21, 1 Stat. 117 (using "cause," "suit," and "controversy" in a related statutory context to refer to judicial proceedings); Black's Law Dictionary 278–279, 400, 1602–1603 (4th ed. 1951) (defining "cause," "suit," and "controversy" as judicial proceedings); 18 U. S. C. § 201(b)(3) (using "proceeding" to refer to trials, hearings, or the like "before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer"). Although it may be difficult to define the precise reach of those terms, it seems clear that a typical meeting, telephone call, or event arranged by a public official does not qualify as a "cause, suit, proceeding or controversy."

But what about a "question" or "matter"? A "question" could mean any "subject or aspect that is in dispute, open for discussion, or to be inquired into," and a "matter" any "subject" of "interest or relevance." Webster's Third New International Dictionary 1394, 1863 (1961). If those meanings were adopted, a typical meeting, call, or event would qualify as a "question" or "matter." A "question" may also be interpreted more narrowly, however, as "a subject or point of debate or a proposition being or to be voted on in a meeting," such as a question "before the senate." *Id.*, at 1863. Similarly, a "matter" may be limited to "a topic under active and usually serious or practical consideration," such as a matter that "will come before the committee." *Id.*, at 1394.

To choose between those competing definitions, we look to the context in which the words appear. Under the familiar

interpretive canon *noscitur a sociis*, "a word is known by the company it keeps." *Jarecki* v. *G. D. Searle & Co.*, 367 U. S. 303, 307 (1961). While "not an inescapable rule," this canon "is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Ibid.* For example, in *Gustafson* v. *Alloyd Co.*, 513 U. S. 561 (1995), a statute defined the word "prospectus" as a "prospectus, notice, circular, advertisement, letter, or communication." *Id.*, at 573–574 (internal quotation marks omitted). We held that although the word "communication" could in the abstract mean any type of communication, "it is apparent that the list refers to documents of wide dissemination," and that inclusion "of the term 'communication' in that list suggests that it too refers to a public communication." *Id.*, at 575.

Applying that same approach here, we conclude that a "question" or "matter" must be similar in nature to a "cause, suit, proceeding or controversy." Because a typical meeting, call, or event arranged by a public official is not of the same stripe as a lawsuit before a court, a determination before an agency, or a hearing before a committee, it does not qualify as a "question" or "matter" under § 201(a)(3).

That more limited reading also comports with the presumption "that statutory language is not superfluous." *Arlington Central School Dist. Bd. of Ed.* v. *Murphy*, 548 U. S. 291, 299, n. 1 (2006). If "question" and "matter" were as unlimited in scope as the Government argues, the terms "cause, suit, proceeding or controversy" would serve no role in the statute—every "cause, suit, proceeding or controversy" would also be a "question" or "matter." Under a more confined interpretation, however, "question" and "matter" may be understood to refer to a formal exercise of governmental power that is similar in nature to a "cause, suit, proceeding or controversy," but that does not necessarily fall into one of those prescribed categories.

Because a typical meeting, call, or event is not itself a question or matter, the next step is to determine whether

arranging a meeting, contacting another official, or hosting an event may qualify as a "decision or action" *on* a different question or matter. That requires us to first establish what counts as a question or matter in this case.

In addition to the requirements we have described, § 201(a)(3) states that the question or matter must be "pending" or "may by law be brought" before "any public official." "Pending" and "may by law be brought" suggest something that is relatively circumscribed—the kind of thing that can be put on an agenda, tracked for progress, and then checked off as complete. In particular, "may *by law* be brought" conveys something within the specific duties of an official's position—the function conferred by the authority of his office. The word "any" conveys that the matter may be pending either before the public official who is performing the official act, or before another public official.

The District Court, however, determined that the relevant matter in this case could be considered at a much higher level of generality as "Virginia business and economic development," or—as it was often put to the jury—"Bob's for Jobs." Supp. App. 88; see, *e. g.,* App. 1775, 2858, 2912, 3733. Economic development is not naturally described as a matter "pending" before a public official—or something that may be brought "by law" before him—any more than "justice" is pending or may be brought by law before a judge, or "national security" is pending or may be brought by law before an officer of the Armed Forces. Under § 201(a)(3), the pertinent "question, matter, cause, suit, proceeding or controversy" must be more focused and concrete.

For its part, the Fourth Circuit found at least three questions or matters at issue in this case: (1) "whether researchers at any of Virginia's state universities would initiate a study of Anatabloc"; (2) "whether the state-created Tobacco Indemnification and Community Revitalization Commission" would "allocate grant money for the study of anatabine"; and (3) "whether the health insurance plan for state employees

in Virginia would include Anatabloc as a covered drug." 792 F. 3d, at 515–516. We agree that those qualify as questions or matters under § 201(a)(3). Each is focused and concrete, and each involves a formal exercise of governmental power that is similar in nature to a lawsuit, administrative determination, or hearing.

The question remains whether—as the Government argues—merely setting up a meeting, hosting an event, or calling another official qualifies as a decision or action on any of those three questions or matters. Although the word "decision," and especially the word "action," could be read expansively to support the Government's view, our opinion in *United States* v. *Sun-Diamond Growers of Cal.*, 526 U. S. 398 (1999), rejects that interpretation.

In *Sun-Diamond*, the Court stated that it was not an "official act" under § 201 for the President to host a championship sports team at the White House, the Secretary of Education to visit a high school, or the Secretary of Agriculture to deliver a speech to "farmers concerning various matters of USDA policy." *Id.*, at 407. We recognized that "the Secretary of Agriculture *always* has before him or in prospect matters that affect farmers, just as the President always has before him or in prospect matters that affect college and professional sports, and the Secretary of Education matters that affect high schools." *Ibid.* But we concluded that the existence of such pending matters was not enough to find that any action related to them constituted an "official act." *Ibid.* It was possible to avoid the "absurdities" of convicting individuals on corruption charges for engaging in such conduct, we explained, "*through the definition of that term*," *i. e.*, by adopting a more limited definition of "official acts." *Id.*, at 408.

It is apparent from *Sun-Diamond* that hosting an event, meeting with other officials, or speaking with interested parties is not, standing alone, a "decision or action" within the meaning of § 201(a)(3), even if the event, meeting, or speech

is related to a pending question or matter. Instead, something more is required: Section 201(a)(3) specifies that the public official must make a decision or take an action *on* that question or matter, or agree to do so.

For example, a decision or action to initiate a research study—or a decision or action on a qualifying step, such as narrowing down the list of potential research topics—would qualify as an "official act." A public official may also make a decision or take an action on a "question, matter, cause, suit, proceeding or controversy" by using his official position to exert pressure on *another* official to perform an "official act." In addition, if a public official uses his official position to provide advice to another official, knowing or intending that such advice will form the basis for an "official act" by another official, that too can qualify as a decision or action for purposes of § 201(a)(3). See *United States* v. *Birdsall*, 233 U. S. 223, 234 (1914) (finding "official action" on the part of subordinates where their superiors "would necessarily rely largely upon the reports and advice of subordinates . . . who were more directly acquainted with" the "facts and circumstances of particular cases").

Under this Court's precedents, a public official is not required to actually make a decision or take an action on a "question, matter, cause, suit, proceeding or controversy"; it is enough that the official agree to do so. See *Evans*, 504 U. S., at 268. The agreement need not be explicit, and the public official need not specify the means that he will use to perform his end of the bargain. Nor must the public official in fact intend to perform the "official act," so long as he agrees to do so. A jury could, for example, conclude that an agreement was reached if the evidence shows that the public official received a thing of value knowing that it was given with the expectation that the official would perform an "official act" in return. See *ibid.* It is up to the jury, under the facts of the case, to determine whether the public official agreed to perform an "official act" at the time of the alleged

quid pro quo. The jury may consider a broad range of pertinent evidence, including the nature of the transaction, to answer that question.

Setting up a meeting, hosting an event, or calling an official (or agreeing to do so) merely to talk about a research study or to gather additional information, however, does not qualify as a decision or action on the pending question whether to initiate the study. Simply expressing support for the research study at a meeting, event, or call—or sending a subordinate to such a meeting, event, or call—similarly does not qualify as a decision or action on the study, as long as the public official does not intend to exert pressure on another official or provide advice, knowing or intending such advice to form the basis for an "official act." Otherwise, if every action somehow related to the research study were an "official act," the requirement that the public official make a decision or take an action on that study, or agree to do so, would be meaningless.

Of course, this is not to say that setting up a meeting, hosting an event, or making a phone call is always an innocent act, or is irrelevant, in cases like this one. If an official sets up a meeting, hosts an event, or makes a phone call on a question or matter that is or could be pending before another official, that could serve as evidence of an agreement to take an official act. A jury could conclude, for example, that the official was attempting to pressure or advise another official on a pending matter. And if the official agreed to exert that pressure or give that advice in exchange for a thing of value, that would be illegal.

The Government relies on this Court's decision in *Birdsall* to support a more expansive interpretation of "official act," but *Birdsall* is fully consistent with our reading of § 201(a)(3). We held in *Birdsall* that "official action" could be established by custom rather than "by statute" or "a written rule or regulation," and need not be a formal part of an official's decisionmaking process. 233 U. S., at 230–231.

That does not mean, however, that every decision or action customarily performed by a public official—such as the myriad decisions to refer a constituent to another official—counts as an "official act." The "official action" at issue in *Birdsall* was "advis[ing] the Commissioner of Indian Affairs, contrary to the truth," that the facts of the case warranted granting leniency to certain defendants convicted of "unlawfully selling liquor to Indians." *Id.*, at 227–230. That "decision or action" fits neatly within our understanding of § 201(a)(3): It reflected a decision or action to advise another official *on* the pending question whether to grant leniency.

In sum, an "official act" is a decision or action on a "question, matter, cause, suit, proceeding or controversy." The "question, matter, cause, suit, proceeding or controversy" must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee. It must also be something specific and focused that is "pending" or "may by law be brought" before a public official. To qualify as an "official act," the public official must make a decision or take an action on that "question, matter, cause, suit, proceeding or controversy," or agree to do so. That decision or action may include using his official position to exert pressure on another official to perform an "official act," or to advise another official, knowing or intending that such advice will form the basis for an "official act" by another official. Setting up a meeting, talking to another official, or organizing an event (or agreeing to do so)—without more—does not fit that definition of "official act."

B

In addition to being inconsistent with both text and precedent, the Government's expansive interpretation of "official act" would raise significant constitutional concerns. Section 201 prohibits *quid pro quo* corruption—the exchange of a thing of value for an "official act." In the Government's

view, nearly anything a public official accepts—from a campaign contribution to lunch—counts as a *quid*; and nearly anything a public official does—from arranging a meeting to inviting a guest to an event—counts as a *quo*. See Brief for United States 14, 27; Tr. of Oral Arg. 34–35, 44–46.

But conscientious public officials arrange meetings for constituents, contact other officials on their behalf, and include them in events all the time. The basic compact underlying representative government *assumes* that public officials will hear from their constituents and act appropriately on their concerns—whether it is the union official worried about a plant closing or the homeowners who wonder why it took five days to restore power to their neighborhood after a storm. The Government's position could cast a pall of potential prosecution over these relationships if the union had given a campaign contribution in the past or the homeowners invited the official to join them on their annual outing to the ball game. Officials might wonder whether they could respond to even the most commonplace requests for assistance, and citizens with legitimate concerns might shrink from participating in democratic discourse.

This concern is substantial. White House counsel who worked in every administration from that of President Reagan to President Obama warn that the Government's "breathtaking expansion of public-corruption law would likely chill federal officials' interactions with the people they serve and thus damage their ability effectively to perform their duties." Brief for Former Federal Officials as *Amici Curiae* 6. Six former Virginia attorneys general—four Democrats and two Republicans—also filed an *amicus* brief in this Court echoing those concerns, as did 77 former state attorneys general from States other than Virginia—41 Democrats, 35 Republicans, and 1 independent. Brief for Former Virginia Attorneys General as *Amici Curiae* 1–2, 16; Brief for 77 Former State Attorneys General (Non-Virginia) as *Amici Curiae* 1–2.

None of this, of course, is to suggest that the facts of this case typify normal political interaction between public officials and their constituents. Far from it. But the Government's legal interpretation is not confined to cases involving extravagant gifts or large sums of money, and we cannot construe a criminal statute on the assumption that the Government will "use it responsibly." *United States* v. *Stevens*, 559 U. S. 460, 480 (2010). The Court in *Sun-Diamond* declined to rely on "the Government's discretion" to protect against overzealous prosecutions under § 201, concluding instead that "a statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter." 526 U. S., at 408, 412.

A related concern is that, under the Government's interpretation, the term "official act" is not defined "with sufficient definiteness that ordinary people can understand what conduct is prohibited," or "in a manner that does not encourage arbitrary and discriminatory enforcement." *Skilling*, 561 U. S., at 402–403 (internal quotation marks omitted). Under the "'standardless sweep'" of the Government's reading, *Kolender* v. *Lawson*, 461 U. S. 352, 358 (1983), public officials could be subject to prosecution, without fair notice, for the most prosaic interactions. "Invoking so shapeless a provision to condemn someone to prison" for up to 15 years raises the serious concern that the provision "does not comport with the Constitution's guarantee of due process." *Johnson* v. *United States*, 576 U. S. 591, 602 (2015). Our more constrained interpretation of § 201(a)(3) avoids this "vagueness shoal." *Skilling*, 561 U. S., at 368.

The Government's position also raises significant federalism concerns. A State defines itself as a sovereign through "the structure of its government, and the character of those who exercise government authority." *Gregory* v. *Ashcroft*, 501 U. S. 452, 460 (1991). That includes the prerogative to regulate the permissible scope of interactions between state officials and their constituents. Here, where a more limited

interpretation of "official act" is supported by both text and precedent, we decline to "construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards" of "good government for local and state officials." *McNally* v. *United States*, 483 U. S. 350, 360 (1987); see also *United States* v. *Enmons*, 410 U. S. 396, 410–411 (1973) (rejecting a "broad concept of extortion" that would lead to "an unprecedented incursion into the criminal jurisdiction of the States").

III

A

Governor McDonnell argues that his convictions must be vacated because the jury was improperly instructed on the meaning of "official act" under § 201(a)(3) of the federal bribery statute. According to Governor McDonnell, the District Court "refused to convey any meaningful limits on 'official act,' giving an instruction that allowed the jury to convict [him] for lawful conduct." Brief for Petitioner 51. We agree.

The jury instructions included the statutory definition of "official action," and further defined the term to include "actions that have been clearly established by settled practice as part of a public official's position, even if the action was not taken pursuant to responsibilities explicitly assigned by law." Supp. App. 69–70. The instructions also stated that "official actions may include acts that a public official customarily performs," including acts "in furtherance of longer-term goals" or "in a series of steps to exercise influence or achieve an end." *Id.*, at 70. In light of our interpretation of the term "official acts," those instructions lacked important qualifications, rendering them significantly overinclusive.

First, the instructions did not adequately explain to the jury how to identify the "question, matter, cause, suit, proceeding or controversy." As noted, the Fourth Circuit held

that "the Government presented evidence of three questions or matters": (1) "whether researchers at any of Virginia's state universities would initiate a study of Anatabloc"; (2) "whether the state-created Tobacco Indemnification and Community Revitalization Commission" would "allocate grant money for the study of anatabine"; and (3) "whether the health insurance plan for state employees in Virginia would include Anatabloc as a covered drug." 792 F. 3d, at 515–516.

The problem with the District Court's instructions is that they provided no assurance that the jury reached its verdict after finding those questions or matters. The testimony at trial described how Governor McDonnell set up meetings, contacted other officials, and hosted events. It is possible the jury thought that a typical meeting, call, or event was itself a "question, matter, cause, suit, proceeding or controversy." If so, the jury could have convicted Governor McDonnell without finding that he committed or agreed to commit an "official act," as properly defined. To prevent this problem, the District Court should have instructed the jury that it must identify a "question, matter, cause, suit, proceeding or controversy" involving the formal exercise of governmental power.

Second, the instructions did not inform the jury that the "question, matter, cause, suit, proceeding or controversy" must be more specific and focused than a broad policy objective. The Government told the jury in its closing argument that "[w]hatever it was" Governor McDonnell had done, "it's all official action." App. to Pet. for Cert. 263a–264a. Based on that remark, and the repeated references to "Bob's for Jobs" at trial, the jury could have thought that the relevant "question, matter, cause, suit, proceeding or controversy" was something as nebulous as "Virginia business and economic development," as the District Court itself concluded. Supp. App. 87–88 ("The alleged official actions in this case were within the range of actions on questions, matters, or

causes pending before McDonnell as Governor as multiple witnesses testified that Virginia business and economic development was a top priority in McDonnell's administration"). To avoid that misconception, the District Court should have instructed the jury that the pertinent "question, matter, cause, suit, proceeding or controversy" must be something specific and focused that is "pending" or "may by law be brought before any public official," such as the question whether to initiate the research studies.

Third, the District Court did not instruct the jury that to convict Governor McDonnell, it had to find that he made a decision or took an action—or agreed to do so—*on* the identified "question, matter, cause, suit, proceeding or controversy," as we have construed that requirement. At trial, several of Governor McDonnell's subordinates testified that he asked them to attend a meeting, not that he expected them to do anything other than that. See, *e. g.*, App. 3075, 3739–3740, 4220. If that testimony reflects what Governor McDonnell agreed to do at the time he accepted the loans and gifts from Williams, then he did not agree to make a decision or take an action on any of the three questions or matters described by the Fourth Circuit.

The jury may have disbelieved that testimony or found other evidence that Governor McDonnell agreed to exert pressure on those officials to initiate the research studies or add Anatabloc to the state health plan, but it is also possible that the jury convicted Governor McDonnell without finding that he agreed to make a decision or take an action on a properly defined "question, matter, cause, suit, proceeding or controversy." To forestall that possibility, the District Court should have instructed the jury that merely arranging a meeting or hosting an event to discuss a matter does not count as a decision or action on that matter.

Because the jury was not correctly instructed on the meaning of "official act," it may have convicted Governor McDonnell for conduct that is not unlawful. For that reason,

we cannot conclude that the errors in the jury instructions were "harmless beyond a reasonable doubt." *Neder* v. *United States*, 527 U. S. 1, 16 (1999) (internal quotation marks omitted). We accordingly vacate Governor McDonnell's convictions.

B

Governor McDonnell raises two additional claims. First, he argues that the charges against him must be dismissed because the honest services statute and the Hobbs Act are unconstitutionally vague. See Brief for Petitioner 58–61. We reject that claim. For purposes of this case, the parties defined honest services fraud and Hobbs Act extortion with reference to § 201 of the federal bribery statute. Because we have interpreted the term "official act" in § 201(a)(3) in a way that avoids the vagueness concerns raised by Governor McDonnell, we decline to invalidate those statutes under the facts here. See *Skilling*, 561 U. S., at 403 (seeking "to construe, not condemn, Congress' enactments").

Second, Governor McDonnell argues that the charges must be dismissed because there is insufficient evidence that he committed an "official act," or that he agreed to do so. Brief for Petitioner 44–45. Because the parties have not had an opportunity to address that question in light of the interpretation of § 201(a)(3) adopted by this Court, we leave it for the Court of Appeals to resolve in the first instance. If the court below determines that there is sufficient evidence for a jury to convict Governor McDonnell of committing or agreeing to commit an "official act," his case may be set for a new trial. If the court instead determines that the evidence is insufficient, the charges against him must be dismissed. We express no view on that question.

* * *

There is no doubt that this case is distasteful; it may be worse than that. But our concern is not with tawdry tales of Ferraris, Rolexes, and ball gowns. It is instead with the

broader legal implications of the Government's boundless interpretation of the federal bribery statute. A more limited interpretation of the term "official act" leaves ample room for prosecuting corruption, while comporting with the text of the statute and the precedent of this Court.

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

It is so ordered.

Syllabus

WHOLE WOMAN'S HEALTH ET AL. *v.* HELLERSTEDT, COMMISSIONER, TEXAS DEPARTMENT OF STATE HEALTH SERVICES, ET AL.

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

No. 15–274. Argued March 2, 2016—Decided June 27, 2016

A "State has a legitimate interest in seeing to it that abortion . . . is performed under circumstances that insure maximum safety for the patient." *Roe* v. *Wade*, 410 U. S. 113, 150. But "a statute which, while furthering [a] valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends," *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 877 (plurality opinion), and "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right," *id.*, at 878.

In 2013, the Texas Legislature enacted House Bill 2 (H. B. 2), which contains the two provisions challenged here. The "admitting-privileges requirement" provides that a "physician performing or inducing an abortion . . . must, on the date [of service], have active admitting privileges at a hospital . . . located not further than 30 miles from the" abortion facility. The "surgical-center requirement" requires an "abortion facility" to meet the "minimum standards . . . for ambulatory surgical centers" under Texas law. Before the law took effect, a group of Texas abortion providers filed the *Abbott* case, in which they lost a facial challenge to the constitutionality of the admitting-privileges provision. After the law went into effect, petitioners, another group of abortion providers (including some *Abbott* plaintiffs), filed this suit, claiming that both the admitting-privileges and the surgical-center provisions violated the Fourteenth Amendment, as interpreted in *Casey*. They sought injunctions preventing enforcement of the admitting-privileges provision as applied to physicians at one abortion facility in McAllen and one in El Paso and prohibiting enforcement of the surgical-center provision throughout Texas.

Based on the parties' stipulations, expert depositions, and expert and other trial testimony, the District Court made extensive findings, including, but not limited to: As the admitting-privileges requirement began to be enforced, the number of facilities providing abortions dropped in half, from about 40 to about 20; this decrease in geographical distribu-

tion means that the number of women of reproductive age living more than 50 miles from a clinic has doubled, the number living more than 100 miles away has increased by 150%, the number living more than 150 miles away by more than 350%, and the number living more than 200 miles away by about 2,800%; the number of facilities would drop to 7 or 8 if the surgical-center provision took effect, and those remaining facilities would see a significant increase in patient traffic; facilities would remain only in five metropolitan areas; before H. B. 2's passage, abortion was an extremely safe procedure with very low rates of complications and virtually no deaths; it was also safer than many more common procedures not subject to the same level of regulation; and the cost of compliance with the surgical-center requirement would most likely exceed $1.5 million to $3 million per clinic. The court enjoined enforcement of the provisions, holding that the surgical-center requirement imposed an undue burden on the right of women in Texas to seek previability abortions; that, together with that requirement, the admitting-privileges requirement imposed an undue burden in the Rio Grande Valley, El Paso, and West Texas; and that the provisions together created an "impermissible obstacle as applied to all women seeking a previability abortion."

The Fifth Circuit reversed in significant part. It concluded that res judicata barred the District Court from holding the admitting-privileges requirement unconstitutional statewide and that res judicata also barred the challenge to the surgical-center provision. Reasoning that a law is "constitutional if (1) it does not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus and (2) it is reasonably related to . . . a legitimate state interest," the court found that both requirements were rationally related to a compelling state interest in protecting women's health.

Held:

1. Petitioners' constitutional claims are not barred by res judicata. Pp. 598–606.

(a) Res judicata neither bars petitioners' challenges to the admitting-privileges requirement nor prevents the Court from awarding facial relief. The fact that several petitioners had previously brought the unsuccessful facial challenge in *Abbott* does not mean that claim preclusion, the relevant aspect of res judicata, applies. Claim preclusion prohibits "successive litigation of the very same claim," *New Hampshire* v. *Maine*, 532 U. S. 742, 748, but petitioners' as-applied postenforcement challenge and the *Abbott* plaintiffs' facial preenforcement challenge do not present the same claim. Changed circumstances showing that a constitutional harm is concrete may give rise to a new claim.

Abbott rested upon facts and evidence presented before enforcement of the admitting-privileges requirement began, when it was unclear how clinics would be affected. This case rests upon later, concrete factual developments that occurred once enforcement started and a significant number of clinics closed.

Res judicata also does not preclude facial relief here. In addition to requesting as-applied relief, petitioners asked for other appropriate relief, and their evidence and arguments convinced the District Court of the provision's unconstitutionality across the board. Federal Rule of Civil Procedure 54(c) provides that a "final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings," and this Court has held that if the arguments and evidence show that a statutory provision is unconstitutional on its face, an injunction prohibiting its enforcement is "proper," *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 333. Pp. 598–604.

(b) Claim preclusion also does not bar petitioners' challenge to the surgical-center requirement. In concluding that petitioners should have raised this claim in *Abbott*, the Fifth Circuit did not take account of the fact that the surgical-center provision and the admitting-privileges provision are separate provisions with two different and independent regulatory requirements. Challenges to distinct regulatory requirements are ordinarily treated as distinct claims. Moreover, the surgical-center provision's implementing regulations had not even been promulgated at the time *Abbott* was filed, and the relevant factual circumstances changed between the two suits. Pp. 604–606.

2. Both the admitting-privileges and the surgical-center requirements place a substantial obstacle in the path of women seeking a previability abortion, constitute an undue burden on abortion access, and thus violate the Constitution. Pp. 607–627.

(a) The Fifth Circuit's standard of review may be read to imply that a district court should not consider the existence or nonexistence of medical benefits when deciding the undue burden question, but *Casey* requires courts to consider the burdens a law imposes on abortion access together with the benefits those laws confer, see 505 U. S., at 887–898. The Fifth Circuit's test also mistakenly equates the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable to, *e. g.*, economic legislation. And the court's requirement that legislatures resolve questions of medical uncertainty is inconsistent with this Court's case law, which has placed considerable weight upon evidence and argument presented in judicial proceedings when determining the constitutionality of laws regulating abortion procedures. See *id.*, at 888–894. Explicit legislative findings must be considered, but there were no such findings in H. B. 2. The

District Court applied the correct legal standard here, considering the evidence in the record—including expert evidence—and then weighing the asserted benefits against the burdens. Pp. 607–609.

(b) The record contains adequate legal and factual support for the District Court's conclusion that the admitting-privileges requirement imposes an "undue burden" on a woman's right to choose. The requirement's purpose is to help ensure that women have easy access to a hospital should complications arise during an abortion procedure, but the District Court, relying on evidence showing extremely low rates of serious complications before H. B. 2's passage, found no significant health-related problem for the new law to cure. The State's record evidence, in contrast, does not show how the new law advanced the State's legitimate interest in protecting women's health when compared to the prior law, which required providers to have a "working arrangement" with doctors who had admitting privileges. At the same time, the record evidence indicates that the requirement places a "substantial obstacle" in a woman's path to abortion. The dramatic drop in the number of clinics means fewer doctors, longer waiting times, and increased crowding. It also means a significant increase in the distance women of reproductive age live from an abortion clinic. Increased driving distances do not always constitute an "undue burden," but they are an additional burden, which, when taken together with others caused by the closings, and when viewed in light of the virtual absence of any health benefit, help support the District Court's "undue burden" conclusion. Pp. 609–615.

(c) The surgical-center requirement also provides few, if any, health benefits for women, poses a substantial obstacle to women seeking abortions, and constitutes an "undue burden" on their constitutional right to do so. Before this requirement was enacted, Texas law required abortion facilities to meet a host of health and safety requirements that were policed by inspections and enforced through administrative, civil, and criminal penalties. Record evidence shows that the new provision imposes a number of additional requirements that are generally unnecessary in the abortion clinic context; that it provides no benefit when complications arise in the context of a medical abortion, which would generally occur after a patient has left the facility; that abortions taking place in abortion facilities are safer than common procedures that occur in outside clinics not subject to Texas' surgical-center requirements; and that Texas has waived no part of the requirement for any abortion clinics as it has done for nearly two-thirds of other covered facilities. This evidence, along with the absence of any contrary evidence, supports the District Court's conclusions, including its ultimate legal conclusion that the requirement is not necessary. At the same time, the record pro-

vides adequate evidentiary support for the District Court's conclusion that the requirement places a substantial obstacle in the path of women seeking an abortion. The court found that it "strained credulity" to think that the seven or eight abortion facilities would be able to meet the demand. The Fifth Circuit discounted expert witness Dr. Grossman's testimony that the surgical-center requirement would cause the number of abortions performed by each remaining clinic to increase by a factor of about 5. But an expert may testify in the "form of an opinion" as long as that opinion rests upon "sufficient facts or data" and "reliable principles and methods." Fed. Rule Evid. 702. Here, Dr. Grossman's opinion rested upon his participation, together with other university researchers, in research tracking the number of facilities providing abortion services, using information from, among other things, the state health services department and other public sources. The District Court acted within its legal authority in finding his testimony admissible. Common sense also suggests that a physical facility that satisfies a certain physical demand will generally be unable to meet five times that demand without expanding physically or otherwise incurring significant costs. And Texas presented no evidence at trial suggesting that expansion was possible. Finally, the District Court's finding that a currently licensed abortion facility would have to incur considerable costs to meet the surgical-center requirements supports the conclusion that more surgical centers will not soon fill the gap left by closed facilities. Pp. 615–624.

(d) Texas' three additional arguments are unpersuasive. Pp. 624–627.

790 F. 3d 563 and 598, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. GINSBURG, J., filed a concurring opinion, *post*, p. 627. THOMAS, J., filed a dissenting opinion, *post*, p. 628. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS, J., joined, *post*, p. 644.

Stephanie Toti argued the cause for petitioners. With her on the briefs were *David Brown*, *Janet Crepps*, *Julie Rikelman*, *J. Alexander Lawrence*, *Marc A. Hearron*, *Jan Soifer*, and *Patrick J. O'Connell.*

Solicitor General Verrilli argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Principal Deputy Assistant Attorney General*

Mizer, *Deputy Solicitor General Gershengorn*, *Elaine J. Goldenberg*, *Douglas N. Letter*, *Mark B. Stern*, and *Alisa B. Klein*.

Scott A. Keller, Solicitor General of Texas, argued the cause for respondents. With him on the brief were *Ken Paxton*, Attorney General, *Charles E. Roy*, First Assistant Attorney General, *J. Campbell Barker*, Deputy Solicitor General, and *Beth Klusmann* and *Michael P. Murphy*, Assistant Solicitors General.*

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*Briefs of *amici curiae* urging reversal were filed for the State of New York et al. by *Eric T. Schneiderman*, Attorney General of New York, *Barbara D. Underwood*, Solicitor General, *Andrea Oser*, Deputy Solicitor General, and *Claude S. Platton*, Senior Assistant Solicitor General, and by the Attorneys General for the their respective jurisdictions as follows: *Kamala D. Harris* of California, *George Jepsen* of Connecticut, *Matthew P. Denn* of Delaware, *Karl A. Racine* of the District of Columbia, *Douglas S. Chin* of Hawaii, *Lisa Madigan* of Illinois, *Tom Miller* of Iowa, *Janet T. Mills* of Maine, *Brian E. Frosh* of Maryland, *Maura Healey* of Massachusetts, *Ellen F. Rosenblum* of Oregon, *William H. Sorrell* of Vermont, *Mark R. Herring* of Virginia, and *Robert W. Ferguson* of Washington; for Advocates for Youth by *Christopher J. Wright* and *Elizabeth Austin Bonner*; for the American Civil Liberties Union et al. by *Andrew D. Beck*, *Jennifer Dalven*, *Steven R. Shapiro*, *Randall C. Marshall*, and *Laurence J. Dupuis*; for the American College of Obstetricians and Gynecologists et al. by *Kimberly A. Parker* and *Sonya L. Lebsack*; for Business Leaders by *Alan S. Gilbert*, *Leah R. Bruno*, and *Shannon Y. Shin*; for the City of New York et al. by *Zachary W. Carter*, *Richard Dearing*, and *Jane L. Gordon*; for the Constitutional Accountability Center by *Elizabeth B. Wydra*, *David H. Gans*, and *Brianne J. Gorod*; for Experts in Health Policy by *Justin Florence*, *Judith L. Lichtman*, and *Deanne K. Cevasco*; for Freedom and Individual Rights in Medicine et al. by *Atara Miller* and *Erin Culbertson*; for Health Economists by *Asim M. Bhansali* and *Paven Malhotra*; for Historians by *Kevin M. Fong* and *Christine A. Scheuneman*; for the Indiana Tech Law School Amicus Project by *Adam Lamparello*; for the Information Society Project at Yale Law School by *Priscilla J. Smith*; for the Institute for Women's Policy Research et al. by *Susan J. Kohlmann* and *Matthew S. Hellman*; for Jane's Due Process, Inc., by *Susan Hays*; for Judson Memorial Church et al. by *Eugene M. Gelernter*; for Lambda Legal Defense and Education Fund, Inc., by *Camilla B. Taylor*, *Kyle A. Palazzolo*, *Susan L. Sommer*, *Jennifer C. Pizer*, and *Omar*

JUSTICE BREYER delivered the opinion of the Court.

In *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 878 (1992), a plurality of the Court concluded that

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Gonzalez-Pagan; for Medical Staff Professionals by *Philip H. Lebowitz* and *Erin M. Duffy*; for the National Abortion Federation et al. by *Janice M. Mac Avoy*, *Stephen M. Juris*, *Jennifer L. Colyer*, *Jesse R. Loffler*, and *Heather D. Shumaker*; for National Advocates for Pregnant Women et al. by *Lynn M. Paltrow* and *Sarah E. Burns*; for the National Center for Lesbian Rights et al. by *Sanford Jay Rosen*, *Margot Mendelson*, *Shannon Minter*, *Julianna S. Gonen*, *Amy Whelan*, and *Christopher F. Stoll*; for the National Latina Institute for Reproductive Health et al. by *Cynthia Soohoo* and *Timothy P. Harkness*; for the National Network of Abortion Funds et al. by *Matthew S. Trokenheim* and *Allen G. Reiter*; for the National Physicians Alliance et al. by *Boris Bershteyn* and *Michael K. Krouse*; for the National Women's Law Center et al. by *Marcia D. Greenberger*, *Gretchen Borchelt*, *Emily J. Martin*, *Jayma M. Meyer*, and *Michelle S. Kallen*; for the New York City Bar Association by *Katharine ES Bodde*; for Physicians for Reproductive Health by *E. Joshua Rosenkranz*, *Thomas M. Bondy*, and *Susannah Landes Weaver*; for Planned Parenthood Federation of America et al. by *Carrie Y. Flaxman* and *Helene T. Krasnoff*; for Public Health Deans et al. by *Shannon Rose Selden* and *Kaitlin T. Farrell*; for Republican Majority for Choice et al. by *Catherine M. Foti* and *Robert M. Radick*; for Scientists et al. by *Edward Tabash* and *Ronald A. Lindsay*; for the Service Women's Action Network et al. by *Agnès Dunogué*; for Social Science Researchers by *Walter Dellinger* and *Anton Metlitsky*; for the Society of Hospital Medicine et al. by *Clifton S. Elgarten* and *A. Xavier Baker*; for Ten Pennsylvania Abortion Care Providers by *Susan J. Frietsche*, *David S. Cohen*, and *Thomas E. Zemaitis*; for the Texas Association Against Sexual Assault et al. by *Lisa Hill Fenning*; for Theologians et al. by *Craig E. Countryman*; for Twelve Organizations Dedicated to the Fight for Reproductive Justice by *Wesley R. Powell* and *Mary J. Eaton*; for Kate Banfield et al. by *Michael J. Dell*, *Scott Ruskay-Kidd*, and *Sarah C. White*; for Ashutosh Bhagwat et al. by *Gillian E. Metzger, pro se* and *Lori Alvino McGill*; for Wendy Davis et al. by *Linda Goldstein*; for Melissa Murray et al. by *Daralyn J. Durie*; for 113 Women in the Legal Profession Who Have Exercised Their Constitutional Right to an Abortion by *Allan J. Arffa*; and for 163 Members of Congress by *Claude G. Szyfer*.

Briefs of *amici curiae* urging affirmance were filed for the State of Indiana et al. by *Gregory F. Zoeller*, Attorney General of Indiana, *Thomas M. Fisher*, Solicitor General, *Jonathan Sichtermann*, Deputy Attorney

there "exists" an "undue burden" on a woman's right to decide to have an abortion, and consequently a provision of law is constitutionally invalid, if the "*purpose or effect*" of the provision "*is to place a substantial obstacle* in the path of a

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General, *Mike DeWine*, Attorney General of Ohio, *Eric E. Murphy*, State Solicitor General, and *Stephen P. Carney* and *Peter T. Reed*, Deputy Solicitors General, and by the Attorneys General for the their respective States as follows: *Luther Strange* of Alabama, *Mark Brnovich* of Arizona, *Leslie Rutledge* of Arkansas, *Pamela Jo Bondi* of Florida, *Sam Olens* of Georgia, *Lawrence G. Wasden* of Idaho, *Derek Schmidt* of Kansas, *Jeff Landry* of Louisiana, *Bill Schuette* of Michigan, *Jim Hood* of Mississippi, *Tim Fox* of Montana, *Douglas J. Peterson* of Nebraska, *Adam Paul Laxalt* of Nevada, *Wayne Stenehjem* of North Dakota, *E. Scott Pruitt* of Oklahoma, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Herbert H. Slatery III* of Tennessee, *Sean Reyes* of Utah, *Patrick Morrisey* of West Virginia, and *Peter K. Michael* of Wyoming; for the State of Wisconsin by *Brad D. Schimel*, Attorney General, *Misha Tseytlin*, Solicitor General, and *Daniel P. Lennington* and *Luke N. Berg*, Deputy Solicitors General; for African-American and Hispanic-American Organizations by *Morse Tan*; for the American Association of Pro-Life Obstetricians and Gynecologists et al. by *Steven H. Aden*, *David A. Cortman*, and *Kevin H. Theriot*; for the American Center for Law and Justice et al. by *Jay Alan Sekulow*, *Stuart J. Roth*, *Colby M. May*, *Walter M. Weber*, *Thomas P. Monaghan*, *Francis J. Manion*, and *Geoffrey R. Surtees*; for And Then There Were None by *Stephen Casey*; for the Association of American Physicians and Surgeons, Inc., by *Gene C. Schaerr* and *S. Kyle Duncan*; for the Bipartisan and Bicameral Coalition of 121 Texas Legislators by *Craig Enoch* and *Erin Glenn Busby*; for the Bipartisan Group of 174 United States Senators and Members of the United States House of Representatives by *Charles J. Cooper* and *Howard C. Nielson, Jr.*; for the CatholicVote.org Legal Defense Fund et al. by *Stephen G. Gilles*, *Richard Stith*, *Lynn Wardle*, and *Richard S. Myers*; for the Center for Constitutional Jurisprudence et al. by *John C. Eastman*, *Anthony T. Caso*, *Joshua Hawley*, *Erin Hawley*, *Kimberlee Colby*, *Michael K. Whitehead*, and *Jonathan R. Whitehead*; for CitizenLink et al. by *Randall L. Wenger*; for Concerned Women for America et al. by *Kenneth A. Klukowski*; for Democrats for Life et al. by *Steven W. Fitschen*; for Former Abortion Providers et al. by *Linda Boston Schlueter*; for the Governor of Texas et al. by *James D. Blacklock* and *Greg Abbott*, *pro se*; for the Justice and Freedom Fund by *James L. Hirsen* and *Deborah J. Dewart*; for the Legal Center for Defense of Life by *Andrew L. Schlafly*; for Live Action by *Stephen L. Braga*; for More Than 450

woman seeking an abortion before the fetus attains viability." (Emphasis added.) The plurality added that "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." *Ibid.*

We must here decide whether two provisions of Texas' House Bill 2 violate the Federal Constitution as interpreted in *Casey.* The first provision, which we shall call the "*admitting-privileges requirement,*" says that

> "[a] physician performing or inducing an abortion . . . must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that . . . is located not further than 30 miles from the location at which the abortion is performed or induced." Tex. Health & Safety Code Ann. § 171.0031(a) (West Cum. Supp. 2015).

Bipartisan and Bicameral State Legislators and Lieutenant Governors by *Denise M. Burke*, *Mailee R. Smith*, *Nikolas T. Nikas*, and *Dorinda C. Bordlee*; for the National Right to Life Committee by *James Bopp, Jr.*, and *Richard E. Coleson*; for Operation Rescue et al. by *Mathew D. Staver*, *Anita L. Staver*, *Horatio G. Mihet*, and *Mary E. McAlister*; for Physicians with Experience Treating Women in Rural or Emergency Settings by *Teresa Stanton Collett*; for Priests for Life by *Robert Joseph Muise* and *David Yerushalmi*; for Right to Life Advocates, Inc., by *Richard W. Schmude*; for Texas Eagle Forum et al. by *Lawrence J. Joseph*; for Texas Values et al. by *Cleta Mitchell* and *David S. Lill*; for the United States Conference of Catholic Bishops et al. by *Anthony R. Picarello, Jr.*, *Jeffrey Hunter Moon*, and *Michael F. Moses*; for University Faculty for Life et al. by *Jonathan F. Mitchell*; for David Boyle by *Mr. Boyle, pro se*; for 24 Scholars of Federalism by *D. John Sauer*; and for 3,348 Women Injured by Abortion et al. by *Allan E. Parker, Jr.*, *R. Clayton Trotter*, and *Kathleen Cassidy Goodman*.

Briefs of *amici curiae* were filed for the Conservative Legal Defense and Education Fund et al. by *William J. Olson*, *Herbert W. Titus*, *Jeremiah L. Morgan*, and *J. Mark Brewer*; for Experts and Organizations Supporting Survivors of Intimate Partner Violence by *Sara L. Ainsworth* and *Jill D. Bowman*; for the Facility Guidelines Institute by *Charles S. Sims* and *Edward S. Kornreich*; for Illinois Right to Life by *Thomas L. Brejcha*; and for Legal Defense for Unborn Children by *Alan Ernest*.

This provision amended Texas law that had previously required an abortion facility to maintain a written protocol "for managing medical emergencies and the transfer of patients requiring further emergency care to a hospital." 38 Tex. Reg. 6546 (2013).

The second provision, which we shall call the "*surgical-center requirement*," says that

> "the minimum standards for an abortion facility must be equivalent to the minimum standards adopted under [the Texas Health and Safety Code section] for ambulatory surgical centers." Tex. Health & Safety Code Ann. §245.010(a).

We conclude that neither of these provisions confers medical benefits sufficient to justify the burdens upon access that each imposes. Each places a substantial obstacle in the path of women seeking a previability abortion, each constitutes an undue burden on abortion access, *Casey*, *supra*, at 878 (plurality opinion), and each violates the Federal Constitution, Amdt. 14, §1.

I

A

In July 2013, the Texas Legislature enacted House Bill 2 (H. B. 2 or Act). In September (before the new law took effect), a group of Texas abortion providers filed an action in Federal District Court seeking facial invalidation of the law's admitting-privileges provision. In late October, the District Court granted the injunction. *Planned Parenthood of Greater Tex. Surgical Health Servs.* v. *Abbott*, 951 F. Supp. 2d 891, 901 (WD Tex. 2013). But three days later, the Fifth Circuit vacated the injunction, thereby permitting the provision to take effect. *Planned Parenthood of Greater Tex. Surgical Health Servs.* v. *Abbott*, 734 F. 3d 406, 419 (2013).

The Fifth Circuit subsequently upheld the provision, and set forth its reasons in an opinion released late the following

March. In that opinion, the Fifth Circuit pointed to evidence introduced in the District Court the previous October. It noted that Texas had offered evidence designed to show that the admitting-privileges requirement "will reduce the delay in treatment and decrease health risk for abortion patients with critical complications," and that it would "'screen out' untrained and incompetent abortion providers." *Planned Parenthood of Greater Tex. Surgical Health Servs.* v. *Abbott*, 748 F. 3d 583, 592 (2014) (*Abbott*). The opinion also explained that the plaintiffs had not provided sufficient evidence "that abortion practitioners will likely be unable to comply with the privileges requirement." *Id.*, at 598. The court said that all "of the major Texas cities, including Austin, Corpus Christi, Dallas, El Paso, Houston, and San Antonio," would "continue to have multiple clinics where many physicians will have or obtain hospital admitting privileges." *Ibid.* The *Abbott* plaintiffs did not file a petition for certiorari in this Court.

B

On April 6, one week after the Fifth Circuit's decision, petitioners, a group of abortion providers (many of whom were plaintiffs in the previous lawsuit), filed the present lawsuit in Federal District Court. They sought an injunction preventing enforcement of the admitting-privileges provision as applied to physicians at two abortion facilities, one operated by Whole Woman's Health in McAllen and the other operated by Nova Health Systems in El Paso. They also sought an injunction prohibiting enforcement of the surgical-center provision anywhere in Texas. They claimed that the admitting-privileges provision and the surgical-center provision violated the Constitution's Fourteenth Amendment, as interpreted in *Casey*.

The District Court subsequently received stipulations from the parties and depositions from the parties' experts. The court conducted a 4-day bench trial. It heard, among other testimony, the opinions from expert witnesses for both

sides. On the basis of the stipulations, depositions, and testimony, that court reached the following conclusions:

1. Of Texas' population of more than 25 million people, "approximately 5.4 million" are "women" of "reproductive age," living within a geographical area of "nearly 280,000 square miles." *Whole Woman's Health* v. *Lakey*, 46 F. Supp. 3d 673, 681 (WD Tex. 2014); see App. 244.

2. "In recent years, the number of abortions reported in Texas has stayed fairly consistent at approximately 15–16% of the reported pregnancy rate, for a total number of approximately 60,000–72,000 legal abortions performed annually." 46 F. Supp. 3d, at 681; see App. 238.

3. Prior to the enactment of H. B. 2, there were more than 40 licensed abortion facilities in Texas, which "number dropped by almost half leading up to and in the wake of enforcement of the admitting-privileges requirement that went into effect in late-October 2013." 46 F. Supp. 3d, at 681; App. 228–231.

4. If the surgical-center provision were allowed to take effect, the number of abortion facilities, after September 1, 2014, would be reduced further, so that "only seven facilities and a potential eighth will exist in Texas." 46 F. Supp. 3d, at 680; App. 182–183.

5. Abortion facilities "will remain only in Houston, Austin, San Antonio, and the Dallas/Fort Worth metropolitan region." 46 F. Supp. 3d, at 681; App. 229–230. These include "one facility in Austin, two in Dallas, one in Fort Worth, two in Houston, and either one or two in San Antonio." 46 F. Supp. 3d, at 680; App. 229–230.

6. "Based on historical data pertaining to Texas's average number of abortions, and assuming perfectly equal distribution among the remaining seven or eight providers, this would result in each facility serving between 7,500 and 10,000 patients per year. Accounting for the seasonal variations in pregnancy rates and a slightly unequal distribution

of patients at each clinic, it is foreseeable that over 1,200 women per month could be vying for counseling, appointments, and follow-up visits at some of these facilities." 46 F. Supp. 3d, at 682; cf. App. 238.

7. The suggestion "that these seven or eight providers could meet the demand of the entire state stretches credulity." 46 F. Supp. 3d, at 682; see App. 238.

8. "Between November 1, 2012 and May 1, 2014," that is, before and after enforcement of the admitting-privileges requirement, "the decrease in geographic distribution of abortion facilities" has meant that the number of women of reproductive age living more than 50 miles from a clinic has doubled (from 800,000 to over 1.6 million); those living more than 100 miles has increased by 150% (from 400,000 to 1 million); those living more than 150 miles has increased by more than 350% (from 86,000 to 400,000); and those living more than 200 miles has increased by about 2,800% (from 10,000 to 290,000). After September 2014, should the surgical-center requirement go into effect, the number of women of reproductive age living significant distances from an abortion provider will increase as follows: 2 million women of reproductive age will live more than 50 miles from an abortion provider; 1.3 million will live more than 100 miles from an abortion provider; 900,000 will live more than 150 miles from an abortion provider; and 750,000 more than 200 miles from an abortion provider. 46 F. Supp. 3d, at 681–682; App. 238–242.

9. The "two requirements erect a particularly high barrier for poor, rural, or disadvantaged women." 46 F. Supp. 3d, at 683; cf. App. 363–370.

10. "The great weight of the evidence demonstrates that, before the act's passage, abortion in Texas was extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure." 46 F. Supp. 3d, at 684; see, *e. g.*, App. 257–259, 538; see also *id.*, at 200–202, 253–257.

11. "Abortion, as regulated by the State before the enactment of House Bill 2, has been shown to be much safer, in terms of minor and serious complications, than many common medical procedures not subject to such intense regulation and scrutiny." 46 F. Supp. 3d, at 684; see, *e. g.*, App. 223–224 (describing risks in colonoscopies), 254 (discussing risks in vasectomy and endometrial biopsy, among others), 275–277 (discussing complication rate in plastic surgery).

12. "Additionally, risks are not appreciably lowered for patients who undergo abortions at ambulatory surgical centers as compared to nonsurgical-center facilities." 46 F. Supp. 3d, at 684; App. 202–206, 257–259.

13. "[W]omen will not obtain better care or experience more frequent positive outcomes at an ambulatory surgical center as compared to a previously licensed facility." 46 F. Supp. 3d, at 684; App. 202–206.

14. "[T]here are 433 licensed ambulatory surgical centers in Texas," of which "336 . . . are apparently either 'grandfathered' or enjo[y] the benefit of a waiver of some or all" of the surgical-center "requirements." 46 F. Supp. 3d, at 680–681; App. 184.

15. The "cost of coming into compliance" with the surgical-center requirement "for existing clinics is significant," "undisputedly approach[ing] 1 million dollars," and "most likely exceed[ing] 1.5 million dollars," with "[s]ome . . . clinics" unable to "comply due to physical size limitations of their sites." 46 F. Supp. 3d, at 682. The "cost of acquiring land and constructing a new compliant clinic will likely exceed three million dollars." *Ibid.*

On the basis of these and other related findings, the District Court determined that the surgical-center requirement "imposes an undue burden on the right of women throughout Texas to seek a previability abortion," and that the "admitting-privileges requirement, . . . in conjunction with

the ambulatory-surgical-center requirement, imposes an undue burden on the right of women in the Rio Grande Valley, El Paso, and West Texas to seek a previability abortion." *Id.*, at 687. The District Court concluded that the "two provisions" would cause "the closing of almost all abortion clinics in Texas that were operating legally in the fall of 2013," and thereby create a constitutionally "impermissible obstacle as applied to all women seeking a previability abortion" by "restricting access to previously available legal facilities." *Id.*, at 687–688. On August 29, 2014, the court enjoined the enforcement of the two provisions. *Ibid.*

C

On October 2, 2014, at Texas' request, the Court of Appeals stayed the District Court's injunction. *Whole Woman's Health* v. *Lakey*, 769 F. 3d 285, 305. Within the next two weeks, this Court vacated the Court of Appeals' stay (in substantial part) thereby leaving in effect the District Court's injunction against enforcement of the surgical-center provision and its injunction against enforcement of the admitting-privileges requirement as applied to the McAllen and El Paso clinics. *Whole Woman's Health* v. *Lakey*, 574 U. S. 931 (2014). The Court of Appeals then heard Texas' appeal.

On June 9, 2015, the Court of Appeals reversed the District Court on the merits. With minor exceptions, it found both provisions constitutional and allowed them to take effect. *Whole Women's Health* v. *Cole*, 790 F. 3d 563, 567 (*per curiam*), modified, 790 F. 3d 598 (CA5 2015). Because the Court of Appeals' decision rests upon alternative grounds and fact-related considerations, we set forth its basic reasoning in some detail. The Court of Appeals concluded:

- The District Court was wrong to hold the admitting-privileges requirement unconstitutional because (except for the clinics in McAllen and El Paso) the provid-

ers had not asked them to do so, and principles of res judicata barred relief. *Id.*, at 580–583.

- Because the providers could have brought their constitutional challenge to the surgical-center provision in their earlier lawsuit, principles of res judicata also barred that claim. *Id.*, at 581–583.
- In any event, a state law "regulating previability abortion is constitutional if: (1) it does not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus; and (2) it is reasonably related to (or designed to further) a legitimate state interest." *Id.*, at 572.
- "[B]oth the admitting privileges requirement and" the surgical-center requirement "were rationally related to a legitimate state interest," namely, "rais[ing] the standard and quality of care for women seeking abortions and . . . protect[ing] the health and welfare of women seeking abortions." *Id.*, at 584.
- The "[p]laintiffs" "failed to proffer competent evidence contradicting the legislature's statement of a legitimate purpose." *Id.*, at 585.
- "[T]he district court erred by substituting its own judgment [as to the provisions' effects] for that of the legislature, albeit . . . in the name of the undue burden inquiry." *Id.*, at 587.
- Holding the provisions unconstitutional on their face is improper because the plaintiffs had failed to show that either of the provisions "imposes an undue burden on a large fraction of women." *Id.*, at 590.
- The District Court erred in finding that, if the surgical-center requirement takes effect, there will be too few abortion providers in Texas to meet the demand. That factual determination was based upon the finding of one of plaintiffs' expert witnesses (Dr. Grossman) that abortion providers in Texas " 'will not

> be able to go from providing approximately 14,000 abortions annually, as they currently are, to providing the 60,000 to 70,000 abortions that are done each year in Texas once all' " of the clinics failing to meet the surgical-center requirement "'are forced to close.' " *Id.*, at 589–590. But Dr. Grossman's opinion is (in the Court of Appeals' view) "'*ipse dixit*' "; the "'record lacks any actual evidence regarding the current or future capacity of the eight clinics' "; and there is no "evidence in the record that" the providers that currently meet the surgical-center requirement "are operating at full capacity or that they cannot increase capacity." *Id.*, at 590.

For these and related reasons, the Court of Appeals reversed the District Court's holding that the admitting-privileges requirement is unconstitutional and its holding that the surgical-center requirement is unconstitutional. The Court of Appeals upheld in part the District Court's more specific holding that the requirements are unconstitutional as applied to the McAllen facility and Dr. Lynn (a doctor at that facility), but it reversed the District Court's holding that the surgical-center requirement is unconstitutional as applied to the facility in El Paso. In respect to this last claim, the Court of Appeals said that women in El Paso wishing to have an abortion could use abortion providers in nearby New Mexico.

II

Before turning to the constitutional question, we must consider the Court of Appeals' procedural grounds for holding that (but for the challenge to the provisions of H. B. 2 as applied to McAllen and El Paso) petitioners were barred from bringing their constitutional challenges.

A

Claim Preclusion—Admitting-Privileges Requirement

The Court of Appeals held that there could be no facial challenge to the admitting-privileges requirement. Because

several of the petitioners here had previously brought an unsuccessful facial challenge to that requirement (namely, *Abbott*, 748 F. 3d, at 605; see *supra*, at 591–592), the Court of Appeals thought that "the principle of res judicata" applied. 790 F. 3d, at 581. The Court of Appeals also held that res judicata prevented the District Court from granting facial relief to petitioners, concluding that it was improper to "facially invalidat[e] the admitting privileges requirement," because to do so would "gran[t] more relief than anyone requested or briefed." *Id.*, at 580. We hold that res judicata neither bars petitioners' challenges to the admitting-privileges requirement nor prevents us from awarding facial relief.

For one thing, to the extent that the Court of Appeals concluded that the principle of res judicata bars any facial challenge to the admitting-privileges requirement, see *ibid.*, the court misconstrued petitioners' claims. Petitioners did not bring a facial challenge to the admitting-privileges requirement in this case but instead challenged that requirement as applied to the clinics in McAllen and El Paso. The question is whether res judicata bars petitioners' particular as-applied claims. On this point, the Court of Appeals concluded that res judicata was no bar, see *id.*, at 592, and we agree.

The doctrine of claim preclusion (the here-relevant aspect of res judicata) prohibits "successive litigation of the very same claim" by the same parties. *New Hampshire* v. *Maine*, 532 U. S. 742, 748 (2001). Petitioners' postenforcement as-applied challenge is not "the very same claim" as their pre-enforcement facial challenge. The Restatement of Judgments notes that development of new material facts can mean that a new case and an otherwise similar previous case do not present the same claim. See Restatement (Second) of Judgments § 24, Comment *f* (1980) ("Material operative facts occurring after the decision of an action with respect to the same subject matter may in themselves, or taken in conjunction with the antecedent facts, comprise a transac-

tion which may be made the basis of a second action not precluded by the first"); cf. *id.*, § 20(2) ("A valid and final personal judgment for the defendant, which rests on the prematurity of the action or on the plaintiff's failure to satisfy a precondition to suit, does not bar another action by the plaintiff instituted after the claim has matured, or the precondition has been satisfied"); *id.*, § 20, Comment *k* (discussing relationship of this rule with § 24, Comment *f*). The Courts of Appeals have used similar rules to determine the contours of a new claim for purposes of preclusion. See, *e. g., Morgan* v. *Covington*, 648 F. 3d 172, 178 (CA3 2011) ("[R]es judicata does not bar claims that are predicated on events that postdate the filing of the initial complaint"); *Ellis* v. *CCA of Tenn. LLC*, 650 F. 3d 640, 652 (CA7 2011); *Bank of N. Y.* v. *First Millennium, Inc.*, 607 F. 3d 905, 919 (CA2 2010); *Smith* v. *Potter*, 513 F. 3d 781, 783 (CA7 2008); *Rawe* v. *Liberty Mut. Fire Ins. Co.*, 462 F. 3d 521, 529 (CA6 2006); *Manning* v. *Auburn*, 953 F. 2d 1355, 1360 (CA11 1992). The Restatement adds that, where "important human values—such as the lawfulness of continuing personal disability or restraint—are at stake, even a slight change of circumstances may afford a sufficient basis for concluding that a second action may be brought." § 24, Comment *f*; see *Bucklew* v. *Lombardi*, 783 F. 3d 1120, 1127 (CA8 2015) (allowing as applied challenge to execution method to proceed notwithstanding prior facial challenge).

We find this approach persuasive. Imagine a group of prisoners who claim that they are being forced to drink contaminated water. These prisoners file suit against the facility where they are incarcerated. If at first their suit is dismissed because a court does not believe that the harm would be severe enough to be unconstitutional, it would make no sense to prevent the same prisoners from bringing a later suit if time and experience eventually showed that prisoners were dying from contaminated water. Such circumstances would give rise to a new claim that the prisoners' treatment

violates the Constitution. Factual developments may show that constitutional harm, which seemed too remote or speculative to afford relief at the time of an earlier suit, was in fact indisputable. In our view, such changed circumstances will give rise to a new constitutional claim. This approach is sensible, and it is consistent with our precedent. See *Abie State Bank* v. *Bryan*, 282 U. S. 765, 772 (1931) (where "suit was brought immediately upon the enactment of the law," "decision sustaining the law cannot be regarded as precluding a subsequent suit for the purpose of testing [its] validity . . . in the light of the later actual experience"); cf. *Lawlor* v. *National Screen Service Corp.*, 349 U. S. 322, 328 (1955) (judgment that "precludes recovery on claims arising prior to its entry" nonetheless "cannot be given the effect of extinguishing claims which did not even then exist"); *United States* v. *Carolene Products Co.*, 304 U. S. 144, 153 (1938) ("[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist"); *Nashville, C. & St. L. R. Co.* v. *Walters*, 294 U. S. 405, 415 (1935) ("A statute valid as to one set of facts may be invalid as to another. A statute valid when enacted may become invalid by change in the conditions to which it is applied" (footnote omitted)); *Third Nat. Bank of Louisville* v. *Stone*, 174 U. S. 432, 434 (1899) ("A question cannot be held to have been adjudged before an issue on the subject could possibly have arisen"). JUSTICE ALITO's dissenting opinion is simply wrong that changed circumstances showing that a challenged law has an unconstitutional effect cannot give rise to a new claim. See *post*, at 656–657 (hereinafter the dissent).

Changed circumstances of this kind are why the claim presented in *Abbott* is not the same claim as petitioners' claim here. The claims in both *Abbott* and the present case involve "important human values." Restatement (Second) of Judgments §24, Comment *f*. We are concerned with H. B. 2's "effect . . . on women seeking abortions." *Post*,

at 671 (ALITO, J., dissenting). And that effect has changed dramatically since petitioners filed their first lawsuit. *Abbott* rested on facts and evidence presented to the District Court in October 2013. 748 F. 3d, at 599, n. 14 (declining to "consider any arguments" based on "developments since the conclusion of the bench trial"). Petitioners' claim in this case rests in significant part upon later, concrete factual developments. Those developments matter. The *Abbott* plaintiffs brought their facial challenge to the admitting-privileges requirement *prior to its enforcement*—before many abortion clinics had closed and while it was still unclear how many clinics would be affected. Here, petitioners bring an as-applied challenge to the requirement *after its enforcement*—and after a large number of clinics have in fact closed. The postenforcement consequences of H. B. 2 were unknowable before it went into effect. The *Abbott* court itself recognized that "[l]ater as-applied challenges can always deal with subsequent, concrete constitutional issues." *Id.*, at 589. And the Court of Appeals in this case properly decided that new evidence presented by petitioners had given rise to a new claim and that petitioners' as-applied challenges are not precluded. See 790 F. 3d, at 591 ("We now know with certainty that the non-[surgical-center] abortion facilities have actually closed and physicians have been unable to obtain admitting privileges after diligent effort").

When individuals claim that a particular statute will produce serious constitutionally relevant adverse consequences before they have occurred—and when the courts doubt their likely occurrence—the factual difference that those adverse consequences *have in fact occurred* can make all the difference. Compare the Fifth Circuit's opinion in the earlier case, *Abbott*, *supra*, at 598 ("All of the major Texas cities . . . continue to have multiple clinics where many physicians will have or obtain hospital admitting privileges"), with the facts found in this case, 46 F. Supp. 3d, at 680 (the two provisions will leave Texas with seven or eight

clinics). The challenge brought in this case and the one in *Abbott* are not the "very same claim," and the doctrine of claim preclusion consequently does not bar a new challenge to the constitutionality of the admitting-privileges requirement. *New Hampshire* v. *Maine*, 532 U. S., at 748. That the litigants in *Abbott* did not seek review in this Court, as the dissent suggests they should have done, see *post*, at 652, does not prevent them from seeking review of new claims that have arisen after *Abbott* was decided. In sum, the Restatement, cases from the Courts of Appeals, our own precedent, and simple logic combine to convince us that res judicata does not bar this claim.

The Court of Appeals also concluded that the award of facial *relief* was precluded by principles of res judicata. 790 F. 3d, at 581. The court concluded that the District Court should not have "granted more relief than anyone requested or briefed." *Id.*, at 580. But in addition to asking for as-applied relief, petitioners asked for "such other and further relief as the Court may deem just, proper, and equitable." App. 167. Their evidence and arguments convinced the District Court that the provision was unconstitutional across the board. The Federal Rules of Civil Procedure state that (with an exception not relevant here) a "final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." Rule 54(c). And we have held that, if the arguments and evidence show that a statutory provision is unconstitutional on its face, an injunction prohibiting its enforcement is "proper." *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 333 (2010); see *ibid.* (in "the exercise of its judicial responsibility" it may be "necessary . . . for the Court to consider the facial validity" of a statute, even though a facial challenge was not brought); cf. Fallon, As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321, 1339 (2000) ("[O]nce a case is brought, no general categorical line bars a court from making broader pronounce-

ments of invalidity in properly 'as-applied' cases"). Nothing prevents this Court from awarding facial relief as the appropriate remedy for petitioners' as-applied claims.

B

Claim Preclusion—Surgical-Center Requirement

The Court of Appeals also held that claim preclusion barred petitioners from contending that the surgical-center requirement is unconstitutional. 790 F. 3d, at 583. Although it recognized that petitioners did not bring this claim in *Abbott*, it believed that they should have done so. The court explained that petitioners' constitutional challenge to the surgical-center requirement and the challenge to the admitting-privileges requirement mounted in *Abbott*

> "arise from the same 'transactio[n] or series of connected transactions.' . . . The challenges involve the same parties and abortion facilities; the challenges are governed by the same legal standards; the provisions at issue were enacted at the same time as part of the same act; the provisions were motivated by a common purpose; the provisions are administered by the same state officials; and the challenges form a convenient trial unit because they rely on a common nucleus of operative facts." 790 F. 3d, at 581.

For all these reasons, the Court of Appeals held petitioners' challenge to H. B. 2's surgical-center requirement was precluded.

The Court of Appeals failed, however, to take account of meaningful differences. The surgical-center provision and the admitting-privileges provision are separate, distinct provisions of H. B. 2. They set forth two different, independent requirements with different enforcement dates. This Court has never suggested that challenges to two different statutory provisions that serve two different functions must be brought in a single suit. And lower courts normally treat

challenges to distinct regulatory requirements as "separate claims," even when they are part of one overarching "[g]overnment regulatory schem[e]." 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4408, p. 52 (2d ed. 2002, Supp. 2015); see *Hamilton's Bogarts, Inc.* v. *Michigan*, 501 F. 3d 644, 650 (CA6 2007).

That approach makes sense. The opposite approach adopted by the Court of Appeals would require treating every statutory enactment as a single transaction which a given party would only be able to challenge one time, in one lawsuit, in order to avoid the effects of claim preclusion. Such a rule would encourage a kitchen-sink approach to any litigation challenging the validity of statutes. That outcome is less than optimal—not only for litigants, but for courts.

There are other good reasons why petitioners should not have had to bring their challenge to the surgical-center provision at the same time they brought their first suit. The statute gave the Texas Department of State Health Services authority to make rules implementing the surgical-center requirement. H. B. 2, § 11(a), App. to Pet. for Cert. 201a. At the time petitioners filed *Abbott*, that state agency had not yet issued any such rules. Cf. *EPA* v. *Brown*, 431 U. S. 99, 104 (1977) (*per curiam*); 13B Wright, *supra*, § 3532.6, at 629 (3d ed. 2008) (most courts will not "undertake review before rules have been adopted"); *Natural Resources Defense Council, Inc.* v. *EPA*, 859 F. 2d 156, 204 (CADC 1988).

Further, petitioners might well have expected that those rules when issued would contain provisions grandfathering some then-existing abortion facilities and granting full or partial waivers to others. After all, more than three quarters of non-abortion-related surgical centers had benefited from that kind of provision. See 46 F. Supp. 3d, at 680–681 (336 of 433 existing Texas surgical centers have been grandfathered or otherwise enjoy a waiver of some of the surgical-center requirements); see also App. 299–302, 443–447, 468–469.

Finally, the relevant factual circumstances changed between *Abbott* and the present lawsuit, as we previously described. See *supra*, at 601–603.

The dissent musters only one counterargument. According to the dissent, if statutory provisions "impos[e] the same kind of burden . . . on the same kind of right" and have mutually reinforcing effects, "it is evident that" they are "part of the same transaction" and must be challenged together. *Post*, at 662, 664. But for the word "evident," the dissent points to no support for this conclusion, and we find it unconvincing. Statutes are often voluminous, with many related, yet distinct, provisions. Plaintiffs, in order to preserve their claims, need not challenge each such provision of, say, the USA PATRIOT Act, the Bipartisan Campaign Reform Act of 2002, the National Labor Relations Act, the Clean Water Act, the Antiterrorism and Effective Death Penalty Act of 1996, or the Patient Protection and Affordable Care Act in their first lawsuit.

For all of these reasons, we hold that the petitioners did not have to bring their challenge to the surgical-center provision when they challenged the admitting-privileges provision in *Abbott*. We accordingly hold that the doctrine of claim preclusion does not prevent them from bringing that challenge now.

* * *

In sum, in our view, none of petitioners' claims are barred by res judicata. For all of the reasons described above, we conclude that the Court of Appeals' procedural ruling was incorrect. Cf. Brief for Michael Dorf et al. as *Amici Curiae* on Pet. for Cert. 22 (professors in civil procedure from Cornell Law School, New York University School of Law, Columbia Law School, University of Chicago Law School, and Duke University Law School) (maintaining that "the panel's procedural ruling" was "clearly incorrect"). We consequently proceed to consider the merits of petitioners' claims.

III

Undue Burden—Legal Standard

We begin with the standard, as described in *Casey*. We recognize that the "State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient." *Roe* v. *Wade*, 410 U. S. 113, 150 (1973). But, we added, "a statute which, while furthering [a] valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." *Casey*, 505 U. S., at 877 (plurality opinion). Moreover, "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." *Id.*, at 878.

The Court of Appeals wrote that a state law is "constitutional if: (1) it does not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus; and (2) it is reasonably related to (or designed to further) a legitimate state interest." 790 F. 3d, at 572. The Court of Appeals went on to hold that "the district court erred by substituting its own judgment for that of the legislature" when it conducted its "undue burden inquiry," in part because "medical uncertainty underlying a statute is for resolution by legislatures, not the courts." *Id.*, at 587 (citing *Gonzales* v. *Carhart*, 550 U. S. 124, 163 (2007)).

The Court of Appeals' articulation of the relevant standard is incorrect. The first part of the Court of Appeals' test may be read to imply that a district court should not consider the existence or nonexistence of medical benefits when considering whether a regulation of abortion constitutes an undue burden. The rule announced in *Casey*, however, requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer.

See 505 U. S., at 887–898 (opinion of the Court) (performing this balancing with respect to a spousal notification provision); *id.*, at 899–901 (joint opinion of O'Connor, KENNEDY, and Souter, JJ.) (same balancing with respect to a parental notification provision). And the second part of the test is wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable where, for example, economic legislation is at issue. See, *e. g.*, *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U. S. 483, 491 (1955). The Court of Appeals' approach simply does not match the standard that this Court laid out in *Casey*, which asks courts to consider whether any burden imposed on abortion access is "undue."

The statement that legislatures, and not courts, must resolve questions of medical uncertainty is also inconsistent with this Court's case law. Instead, the Court, when determining the constitutionality of laws regulating abortion procedures, has placed considerable weight upon evidence and argument presented in judicial proceedings. In *Casey*, for example, we relied heavily on the District Court's factual findings and the research-based submissions of *amici* in declaring a portion of the law at issue unconstitutional. 505 U. S., at 888–894 (opinion of the Court) (discussing evidence related to the prevalence of spousal abuse in determining that a spousal notification provision erected an undue burden to abortion access). And in *Gonzales* the Court, while pointing out that we must review legislative "factfinding under a deferential standard," added that we must not "place dispositive weight" on those "findings." 550 U. S., at 165. *Gonzales* went on to point out that the "*Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake.*" *Ibid.* (emphasis added). Although there we upheld a statute regulating abortion, we did not do so solely on the basis of legislative findings explicitly set forth in the statute, noting that "evidence presented in the District Courts contradicts" some

of the legislative findings. *Id.*, at 166. In these circumstances, we said, "[u]ncritical deference to Congress' factual findings . . . is inappropriate." *Ibid.*

Unlike in *Gonzales*, the relevant statute here does not set forth any legislative findings. Rather, one is left to infer that the legislature sought to further a constitutionally acceptable objective (namely, protecting women's health). *Id.*, at 149–150. For a district court to give significant weight to evidence in the judicial record in these circumstances is consistent with this Court's case law. As we shall describe, the District Court did so here. It did not simply substitute its own judgment for that of the legislature. It considered the evidence in the record—including expert evidence, presented in stipulations, depositions, and testimony. It then weighed the asserted benefits against the burdens. We hold that, in so doing, the District Court applied the correct legal standard.

IV

Undue Burden—Admitting-Privileges Requirement

Turning to the lower courts' evaluation of the evidence, we first consider the admitting-privileges requirement. Before the enactment of H. B. 2, doctors who provided abortions were required to "have admitting privileges *or* have a working arrangement with a physician(s) who has admitting privileges at a local hospital in order to ensure the necessary back up for medical complications." Tex. Admin. Code, tit. 25, § 139.56(a) (2009) (emphasis added). The new law changed this requirement by requiring that a "physician performing or inducing an abortion . . . must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that . . . is located not further than 30 miles from the location at which the abortion is performed or induced." Tex. Health & Safety Code Ann. § 171.0031(a). The District Court held that the legislative change imposed an "undue burden" on a woman's right to have an abortion. We con-

clude that there is adequate legal and factual support for the District Court's conclusion.

The purpose of the admitting-privileges requirement is to help ensure that women have easy access to a hospital should complications arise during an abortion procedure. Brief for Respondents 32–37. But the District Court found that it brought about no such health-related benefit. The court found that "[t]he great weight of the evidence demonstrates that, before the act's passage, abortion in Texas was extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure." 46 F. Supp. 3d, at 684. Thus, there was no significant health-related problem that the new law helped to cure.

The evidence upon which the court based this conclusion included, among other things:

- A collection of at least five peer-reviewed studies on abortion complications in the first trimester, showing that the highest rate of major complications—including those complications requiring hospital admission—was less than one-quarter of 1%. See App. 269–270.
- Figures in three peer-reviewed studies showing that the highest complication rate found for the much rarer second-trimester abortion was less than one-half of 1% (0.45% or about 1 out of about 200). *Id.*, at 270.
- Expert testimony to the effect that complications rarely require hospital admission, much less immediate transfer to a hospital from an outpatient clinic. *Id.*, at 266–267 (citing a study of complications occurring within six weeks after 54,911 abortions that had been paid for by the fee-for-service California Medicaid Program finding that the incidence of complications was 2.1%, the incidence of complications requiring hospital admission was 0.23%, and that of the 54,911 abortion patients included in the study, only 15

required immediate transfer to the hospital on the day of the abortion).

- Expert testimony stating that "[i]t is extremely unlikely that a patient will experience a serious complication at the clinic that requires emergent hospitalization" and "in the rare case in which [one does], the quality of care that the patient receives is not affected by whether the abortion provider has admitting privileges at the hospital." *Id.*, at 381.
- Expert testimony stating that in respect to surgical abortion patients who do suffer complications requiring hospitalization, most of these complications occur in the days after the abortion, not on the spot. See *id.*, at 382; see also *id.*, at 267.
- Expert testimony stating that a delay before the onset of complications is also expected for medical abortions, as "abortifacient drugs take time to exert their effects, and thus the abortion itself almost always occurs after the patient has left the abortion facility." *Id.*, at 278.
- Some experts added that, if a patient needs a hospital in the day or week following her abortion, she will likely seek medical attention at the hospital nearest her home. See, *e. g.*, *id.*, at 153.

We have found nothing in Texas' record evidence that shows that, compared to prior law (which required a "working arrangement" with a doctor with admitting privileges), the new law advanced Texas' legitimate interest in protecting women's health.

We add that, when directly asked at oral argument whether Texas knew of a single instance in which the new requirement would have helped even one woman obtain better treatment, Texas admitted that there was no evidence in the record of such a case. See Tr. of Oral Arg. 47. This answer is consistent with the findings of the other Federal District Courts that have considered the health benefits

of other States' similar admitting-privileges laws. See *Planned Parenthood of Wis., Inc.* v. *Van Hollen*, 94 F. Supp. 3d 949, 953 (WD Wis. 2015), aff'd *sub nom. Planned Parenthood of Wis., Inc.* v. *Schimel*, 806 F. 3d 908 (CA7 2015); *Planned Parenthood Southeast, Inc.* v. *Strange*, 33 F. Supp. 3d 1330, 1378 (MD Ala. 2014).

At the same time, the record evidence indicates that the admitting-privileges requirement places a "substantial obstacle in the path of a woman's choice." *Casey*, 505 U. S., at 877 (plurality opinion). The District Court found, as of the time the admitting-privileges requirement began to be enforced, the number of facilities providing abortions dropped in half, from about 40 to about 20. 46 F. Supp. 3d, at 681. Eight abortion clinics closed in the months leading up to the requirement's effective date. See App. 229–230; cf. Brief for Planned Parenthood Federation of America et al. as *Amici Curiae* 14 (noting that abortion facilities in Waco, San Angelo, and Midland no longer operate because Planned Parenthood is "unable to find local physicians in those communities with privileges who are willing to provide abortions due to the size of those communities and the hostility that abortion providers face"). Eleven more closed on the day the admitting-privileges requirement took effect. See App. 229–230; Tr. of Oral Arg. 58.

Other evidence helps to explain why the new requirement led to the closure of clinics. We read that other evidence in light of a brief filed in this Court by the Society of Hospital Medicine. That brief describes the undisputed general fact that "hospitals often condition admitting privileges on reaching a certain number of admissions per year." Brief for Society of Hospital Medicine et al. as *Amici Curiae* 11. Returning to the District Court record, we note that, in direct testimony, the president of Nova Health Systems, implicitly relying on this general fact, pointed out that it would be difficult for doctors regularly performing abortions at the El Paso clinic to obtain admitting privileges at nearby hospitals

because "[d]uring the past 10 years, over 17,000 abortion procedures were performed at the El Paso clinic [and n]ot a single one of those patients had to be transferred to a hospital for emergency treatment, much less admitted to the hospital." App. 730. In a word, doctors would be unable to maintain admitting privileges or obtain those privileges for the future, because the fact that abortions are so safe meant that providers were unlikely to have any patients to admit.

Other *amicus* briefs filed here set forth without dispute other common prerequisites to obtaining admitting privileges that have nothing to do with ability to perform medical procedures. See Brief for Medical Staff Professionals as *Amici Curiae* 20–25 (listing, for example, requirements that an applicant has treated a high number of patients in the hospital setting in the past year, clinical data requirements, residency requirements, and other discretionary factors); see also Brief for American College of Obstetricians and Gynecologists et al. as *Amici Curiae* 16 (ACOG Brief) ("[S]ome academic hospitals will only allow medical staff membership for clinicians who also . . . accept faculty appointments"). Again, returning to the District Court record, we note that Dr. Lynn of the McAllen clinic, a veteran obstetrics and gynecology doctor who estimates that he has delivered over 15,000 babies in his 38 years in practice, was unable to get admitting privileges at any of the seven hospitals within 30 miles of his clinic. App. 390–394. He was refused admitting privileges at a nearby hospital for reasons, as the hospital wrote, "not based on clinical competence considerations." *Id.*, at 393–394 (emphasis deleted). The admitting-privileges requirement does not serve any relevant credentialing function.

In our view, the record contains sufficient evidence that the admitting-privileges requirement led to the closure of half of Texas' clinics, or thereabouts. Those closures meant fewer doctors, longer waiting times, and increased crowding. Record evidence also supports the finding that after the

admitting-privileges provision went into effect, the "number of women of reproductive age living in a county . . . more than 150 miles from a provider increased from approximately 86,000 to 400,000 . . . and the number of women living in a county more than 200 miles from a provider from approximately 10,000 to 290,000." 46 F. Supp. 3d, at 681. We recognize that increased driving distances do not always constitute an "undue burden." See *Casey*, 505 U. S., at 885–887 (joint opinion of O'Connor, KENNEDY, and Souter, JJ.). But here, those increases are but one additional burden, which, when taken together with others that the closings brought about, and when viewed in light of the virtual absence of any health benefit, lead us to conclude that the record adequately supports the District Court's "undue burden" conclusion. Cf. *id.*, at 895 (opinion of the Court) (finding burden "undue" when requirement places "substantial obstacle to a woman's choice" in "a large fraction of the cases in which" it "is relevant").

The dissent's only argument why these clinic closures, as well as the ones discussed in Part V, *infra*, may not have imposed an undue burden is this: Although "H. B. 2 caused the closure of *some* clinics," *post*, at 668 (emphasis added), other clinics may have closed for other reasons (so we should not "actually count" the burdens resulting from those closures against H. B. 2), *post*, at 672. But petitioners satisfied their burden to present evidence of causation by presenting direct testimony as well as plausible inferences to be drawn from the timing of the clinic closures. App. 182–183, 228–231. The District Court credited that evidence and concluded from it that H. B. 2 in fact led to the clinic closures. 46 F. Supp. 3d, at 680–681. The dissent's speculation that perhaps other evidence, not presented at trial or credited by the District Court, might have shown that some clinics closed for unrelated reasons does not provide sufficient ground to disturb the District Court's factual finding on that issue.

In the same breath, the dissent suggests that one benefit of H. B. 2's requirements would be that they might "force unsafe facilities to shut down." *Post*, at 668. To support that assertion, the dissent points to the Kermit Gosnell scandal. Gosnell, a physician in Pennsylvania, was convicted of first-degree murder and manslaughter. He "staffed his facility with unlicensed and indifferent workers, and then let them practice medicine unsupervised" and had "[d]irty facilities; unsanitary instruments; an absence of functioning monitoring and resuscitation equipment; the use of cheap, but dangerous, drugs; illegal procedures; and inadequate emergency access for when things inevitably went wrong." Report of Grand Jury in No. 0009901–2008 (1st Jud. Dist. Pa., Jan. 14, 2011), p. 24, online at http://www.phila.gov/districtattorney/pdfs/grandjurywomensmedical.pdf (as last visited June 27, 2016). Gosnell's behavior was terribly wrong. But there is no reason to believe that an extra layer of regulation would have affected that behavior. Determined wrongdoers, already ignoring existing statutes and safety measures, are unlikely to be convinced to adopt safe practices by a new overlay of regulations. Regardless, Gosnell's deplorable crimes could escape detection only because his facility went uninspected for more than 15 years. *Id.*, at 20. Pre-existing Texas law already contained numerous detailed regulations covering abortion facilities, including a requirement that facilities be inspected at least annually. See *infra* this page and 616 (describing those regulations). The record contains nothing to suggest that H. B. 2 would be more effective than pre-existing Texas law at deterring wrongdoers like Gosnell from criminal behavior.

V

Undue Burden—Surgical-Center Requirement

The second challenged provision of Texas' new law sets forth the surgical-center requirement. Prior to enactment of the new requirement, Texas law required abortion facili-

ties to meet a host of health and safety requirements. Under those pre-existing laws, facilities were subject to annual reporting and recordkeeping requirements, see Tex. Admin. Code, tit. 25, §§ 139.4, 139.5, 139.55, 139.58; a quality assurance program, see § 139.8; personnel policies and staffing requirements, see §§ 139.43, 139.46; physical and environmental requirements, see § 139.48; infection control standards, see § 139.49; disclosure requirements, see § 139.50; patient-rights standards, see § 139.51; and medical- and clinical-services standards, see § 139.53, including anesthesia standards, see § 139.59. These requirements are policed by random and announced inspections, at least annually, see §§ 139.23, 139.31; Tex. Health & Safety Code Ann. § 245.006(a) (West 2010), as well as administrative penalties, injunctions, civil penalties, and criminal penalties for certain violations, see Tex. Admin. Code, tit. 25, § 139.33; Tex. Health & Safety Code Ann. § 245.011 (criminal penalties for certain reporting violations).

H. B. 2 added the requirement that an "abortion facility" meet the "minimum standards . . . for ambulatory surgical centers" under Texas law. § 245.010(a) (West Cum. Supp. 2015). The surgical-center regulations include, among other things, detailed specifications relating to the size of the nursing staff, building dimensions, and other building requirements. The nursing staff must comprise at least "an adequate number of [registered nurses] on duty to meet the following minimum staff requirements: director of the department (or designee), and supervisory and staff personnel for each service area to assure the immediate availability of [a registered nurse] for emergency care or for any patient when needed," Tex. Admin. Code, tit. 25, § 135.15(a)(3) (2016), as well as "a second individual on duty on the premises who is trained and currently certified in basic cardiac life support until all patients have been discharged from the facility" for facilities that provide moderate sedation, such as most abortion facilities, § 135.15(b)(2)(A). Facilities must include a full

surgical suite with an operating room that has "a clear floor area of at least 240 square feet" in which "[t]he minimum clear dimension between built-in cabinets, counters, and shelves shall be 14 feet." § 135.52(d)(15)(A). There must be a preoperative patient holding room and a postoperative recovery suite. The former "shall be provided and arranged in a one-way traffic pattern so that patients entering from outside the surgical suite can change, gown, and move directly into the restricted corridor of the surgical suite," § 135.52(d)(10)(A), and the latter "shall be arranged to provide a one-way traffic pattern from the restricted surgical corridor to the postoperative recovery suite, and then to the extended observation rooms or discharge," § 135.52(d)(9)(A). Surgical centers must meet numerous other spatial requirements, see generally § 135.52, including specific corridor widths, § 135.52(e)(1)(B)(iii). Surgical centers must also have an advanced heating, ventilation, and air conditioning system, § 135.52(g)(5), and must satisfy particular piping system and plumbing requirements, § 135.52(h). Dozens of other sections list additional requirements that apply to surgical centers. See generally §§ 135.1–135.56.

There is considerable evidence in the record supporting the District Court's findings indicating that the statutory provision requiring all abortion facilities to meet all surgical-center standards does not benefit patients and is not necessary. The District Court found that "risks are not appreciably lowered for patients who undergo abortions at ambulatory surgical centers as compared to nonsurgical-center facilities." 46 F. Supp. 3d, at 684. The court added that women "will not obtain better care or experience more frequent positive outcomes at an ambulatory surgical center as compared to a previously licensed facility." *Ibid.* And these findings are well supported.

The record makes clear that the surgical-center requirement provides no benefit when complications arise in the context of an abortion produced through medication. That

is because, in such a case, complications would almost always arise only after the patient has left the facility. See *supra*, at 611; App. 278. The record also contains evidence indicating that abortions taking place in an abortion facility are safe—indeed, safer than numerous procedures that take place outside hospitals and to which Texas does not apply its surgical-center requirements. See, *e. g.*, *id.*, at 223–224, 254, 275–279. The total number of deaths in Texas from abortions was five in the period from 2001 to 2012, or about one every two years (that is to say, one out of about 120,000 to 144,000 abortions). *Id.*, at 272. Nationwide, childbirth is 14 times more likely than abortion to result in death, *ibid.*, but Texas law allows a midwife to oversee childbirth in the patient's own home. Colonoscopy, a procedure that typically takes place outside a hospital (or surgical center) setting, has a mortality rate 10 times higher than an abortion. *Id.*, at 276–277; see ACOG Brief 15 (the mortality rate for liposuction, another outpatient procedure, is 28 times higher than the mortality rate for abortion). Medical treatment after an incomplete miscarriage often involves a procedure identical to that involved in a nonmedical abortion, but it often takes place outside a hospital or surgical center. App. 254; see ACOG Brief 14 (same). And Texas partly or wholly grandfathers (or waives in whole or in part the surgical-center requirement for) about two-thirds of the facilities to which the surgical-center standards apply. But it neither grandfathers nor provides waivers for any of the facilities that perform abortions. 46 F. Supp. 3d, at 680–681; see App. 184. These facts indicate that the surgical-center provision imposes "a requirement that simply is not based on differences" between abortion and other surgical procedures "that are reasonably related to" preserving women's health, the asserted "purpos[e] of the Act in which it is found." *Doe*, 410 U. S., at 194 (quoting *Morey* v. *Doud*, 354 U. S. 457, 465 (1957); internal quotation marks omitted).

Moreover, many surgical-center requirements are inappropriate as applied to surgical abortions. Requiring scrub facilities; maintaining a one-way traffic pattern through the facility; having ceiling, wall, and floor finishes; separating soiled utility and sterilization rooms; and regulating air pressure, filtration, and humidity control can help reduce infection where doctors conduct procedures that penetrate the skin. App. 304. But abortions typically involve either the administration of medicines or procedures performed through the natural opening of the birth canal, which is itself not sterile. See *id.*, at 302–303. Nor do provisions designed to safeguard heavily sedated patients (unable to help themselves) during fire emergencies, see Tex. Admin. Code, tit. 25, § 135.41; App. 304, provide any help to abortion patients, as abortion facilities do not use general anesthesia or deep sedation, *id.*, at 304–305. Further, since the few instances in which serious complications do arise following an abortion almost always require hospitalization, not treatment at a surgical center, *id.*, at 255–256, surgical-center standards will not help in those instances either.

The upshot is that this record evidence, along with the absence of any evidence to the contrary, provides ample support for the District Court's conclusion that "[m]any of the building standards mandated by the act and its implementing rules have such a tangential relationship to patient safety in the context of abortion as to be nearly arbitrary." 46 F. Supp. 3d, at 684. That conclusion, along with the supporting evidence, provides sufficient support for the more general conclusion that the surgical-center requirement "will not [provide] better care or . . . more frequent positive outcomes." *Ibid.* The record evidence thus supports the ultimate legal conclusion that the surgical-center requirement is not necessary.

At the same time, the record provides adequate evidentiary support for the District Court's conclusion that the

surgical-center requirement places a substantial obstacle in the path of women seeking an abortion. The parties stipulated that the requirement would further reduce the number of abortion facilities available to seven or eight facilities, located in Houston, Austin, San Antonio, and Dallas/Fort Worth. See App. 182–183. In the District Court's view, the proposition that these "seven or eight providers could meet the demand of the entire State stretches credulity." 46 F. Supp. 3d, at 682. We take this statement as a finding that these few facilities could not "meet" that "demand."

The Court of Appeals held that this finding was "clearly erroneous." 790 F. 3d, at 590. It wrote that the finding rested upon the "'*ipse dixit*'" of one expert, Dr. Grossman, and that there was no evidence that the current surgical centers (*i. e.*, the seven or eight) are operating at full capacity or could not increase capacity. *Ibid.* Unlike the Court of Appeals, however, we hold that the record provides adequate support for the District Court's finding.

For one thing, the record contains charts and oral testimony by Dr. Grossman, who said that, as a result of the surgical-center requirement, the number of abortions that the clinics would have to provide would rise from "'14,000 abortions annually'" to "'60,000 to 70,000'"—an increase by a factor of about five. *Id.*, at 589–590. The District Court credited Dr. Grossman as an expert witness. See 46 F. Supp. 3d, at 678–679, n. 1; *id.*, at 681, n. 4 (finding "indicia of reliability" in Dr. Grossman's conclusions). The Federal Rules of Evidence state that an expert may testify in the "form of an opinion" as long as that opinion rests upon "sufficient facts or data" and "reliable principles and methods." Rule 702. In this case Dr. Grossman's opinion rested upon his participation, along with other university researchers, in research that tracked "the number of open facilities providing abortion care in the state by . . . requesting information from the Texas Department of State Health Services . . .

[, t]hrough interviews with clinic staff[,] and review of publicly available information." App. 227. The District Court acted within its legal authority in determining that Dr. Grossman's testimony was admissible. See Fed. Rule Evid. 702; see also *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579, 589 (1993) ("[U]nder the Rules the trial judge must ensure that any and all [expert] evidence admitted is not only relevant, but reliable"); 29 C. Wright & V. Gold, Federal Practice and Procedure: Evidence § 6266, p. 302 (2016) ("Rule 702 impose[s] on the trial judge additional responsibility to determine whether that [expert] testimony is likely to promote accurate factfinding").

For another thing, common sense suggests that, more often than not, a physical facility that satisfies a certain physical demand will not be able to meet five times that demand without expanding or otherwise incurring significant costs. Suppose that we know only that a certain grocery store serves 200 customers per week, that a certain apartment building provides apartments for 200 families, that a certain train station welcomes 200 trains per day. While it is conceivable that the store, the apartment building, or the train station could just as easily provide for 1,000 customers, families, or trains at no significant additional cost, crowding, or delay, most of us would find this possibility highly improbable. The dissent takes issue with this general, intuitive point by arguing that many places operate below capacity and that in any event, facilities could simply hire additional providers. See *post*, at 673. We disagree that, according to common sense, medical facilities, well known for their wait times, operate below capacity as a general matter. And the fact that so many facilities were forced to close by the admitting-privileges requirement means that hiring more physicians would not be quite as simple as the dissent suggests. Courts are free to base their findings on commonsense inferences drawn from the evidence. And that is what the District Court did here.

The dissent now seeks to discredit Dr. Grossman by pointing out that a preliminary prediction he made in his testimony in *Abbott* about the effect of the admitting-privileges requirement on capacity was not borne out after that provision went into effect. See *post,* at 673, n. 22. If every expert who overestimated or underestimated any figure could not be credited, courts would struggle to find expert assistance. Moreover, making a hypothesis—and then attempting to verify that hypothesis with further studies, as Dr. Grossman did—is not irresponsible. It is an essential element of the scientific method. The District Court's decision to credit Dr. Grossman's testimony was sound, particularly given that Texas provided no credible experts to rebut it. See 46 F. Supp. 3d, at 680, n. 3 (declining to credit Texas' expert witnesses, in part because Vincent Rue, a nonphysician consultant for Texas, had exercised "considerable editorial and discretionary control over the contents of the experts' reports").

Texas suggests that the seven or eight remaining clinics could expand sufficiently to provide abortions for the 60,000 to 72,000 Texas women who sought them each year. Because petitioners had satisfied their burden, the obligation was on Texas, if it could, to present evidence rebutting that issue to the District Court. Texas admitted that it presented no such evidence. Tr. of Oral Arg. 46. Instead, Texas argued before this Court that one new clinic now serves 9,000 women annually. *Ibid.* In addition to being outside the record, that example is not representative. The clinic to which Texas referred apparently cost $26 million to construct—a fact that even more clearly demonstrates that requiring seven or eight clinics to serve five times their usual number of patients does indeed represent an undue burden on abortion access. See George, Planned Parenthood Debuts New Building: Its $26 Million Center Is Largest of Its Kind in U. S., Houston Chronicle, May 21, 2010, p. B1.

Attempting to provide the evidence that Texas did not, the dissent points to an exhibit submitted in *Abbott* showing that three Texas surgical centers, two in Dallas as well as the $26-million facility in Houston, are each capable of serving an average of 7,000 patients per year. See *post,* at 674–675. That "average" is misleading. In addition to including the Houston clinic, which does not represent most facilities, it is underinclusive. It ignores the evidence as to the Whole Woman's Health surgical-center facility in San Antonio, the capacity of which is described as "severely limited." The exhibit does nothing to rebut the commonsense inference that the dramatic decline in the number of available facilities will cause a shortfall in capacity should H. B. 2 go into effect. And facilities that were still operating after the effective date of the admitting-privileges provision were not able to accommodate increased demand. See App. 238; Tr. of Oral Arg. 30–31; Brief for National Abortion Federation et al. as *Amici Curiae* 17–20 (citing clinics' experiences since the admitting-privileges requirement went into effect of 3-week wait times, staff burnout, and waiting rooms so full, patients had to sit on the floor or wait outside).

More fundamentally, in the face of no threat to women's health, Texas seeks to force women to travel long distances to get abortions in crammed-to-capacity superfacilities. Patients seeking these services are less likely to get the kind of individualized attention, serious conversation, and emotional support that doctors at less taxed facilities may have offered. Healthcare facilities and medical professionals are not fungible commodities. Surgical centers attempting to accommodate sudden, vastly increased demand, see 46 F. Supp. 3d, at 682, may find that quality of care declines. Another commonsense inference that the District Court made is that these effects would be harmful to, not supportive of, women's health. See *id.*, at 682–683.

Finally, the District Court found that the costs that a currently licensed abortion facility would have to incur to meet

the surgical-center requirements were considerable, ranging from $1 million per facility (for facilities with adequate space) to $3 million per facility (where additional land must be purchased). *Id.*, at 682. This evidence supports the conclusion that more surgical centers will not soon fill the gap when licensed facilities are forced to close.

We agree with the District Court that the surgical-center requirement, like the admitting-privileges requirement, provides few, if any, health benefits for women, poses a substantial obstacle to women seeking abortions, and constitutes an "undue burden" on their constitutional right to do so.

VI

We consider three additional arguments that Texas makes and deem none persuasive.

First, Texas argues that facial invalidation of both challenged provisions is precluded by H. B. 2's severability clause. See Brief for Respondents 50–52. The severability clause says that "every provision, section, subsection, sentence, clause, phrase, or word in this Act, and every application of the provision in this Act, are severable from each other." H. B. 2, § 10(b), App. to Pet. for Cert. 200a. It further provides that if "any application of any provision in this Act to any person, group of persons, or circumstances is found by a court to be invalid, the remaining applications of that provision to all other persons and circumstances shall be severed and may not be affected." *Ibid.* That language, Texas argues, means that facial invalidation of parts of the statute is not an option; instead, it says, the severability clause mandates a more narrowly tailored judicial remedy. But the challenged provisions of H. B. 2 close most of the abortion facilities in Texas and place added stress on those facilities able to remain open. They vastly increase the obstacles confronting women seeking abortions in Texas without providing any benefit to women's health capable of withstanding any meaningful scrutiny. The provisions are

unconstitutional on their face: Including a severability provision in the law does not change that conclusion.

Severability clauses, it is true, do express the enacting legislature's preference for a narrow judicial remedy. As a general matter, we attempt to honor that preference. But our cases have never required us to proceed application by conceivable application when confronted with a facially unconstitutional statutory provision. "We have held that a severability clause is an aid merely; not an inexorable command." *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 884–885, n. 49 (1997) (internal quotation marks omitted). Indeed, if a severability clause could impose such a requirement on courts, legislatures would easily be able to insulate unconstitutional statutes from most facial review. See *ibid.* ("It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government" (internal quotation marks omitted)). A severability clause is not grounds for a court to "devise a judicial remedy that . . . entail[s] quintessentially legislative work." *Ayotte* v. *Planned Parenthood of Northern New Eng.*, 546 U. S. 320, 329 (2006). Such an approach would inflict enormous costs on both courts and litigants, who would be required to proceed in this manner whenever a single application of a law might be valid. We reject Texas' invitation to pave the way for legislatures to immunize their statutes from facial review.

Texas similarly argues that instead of finding the entire surgical-center provision unconstitutional, we should invalidate (as applied to abortion clinics) only those specific surgical-center regulations that unduly burden the provision of abortions, while leaving in place other surgical-center regulations (for example, the reader could pick any of the various examples provided by the dissent, see *post*, at 682–683).

See Brief for Respondents 52–53. As we have explained, Texas' attempt to broadly draft a requirement to sever "applications" does not require us to proceed in piecemeal fashion when we have found the statutory provisions at issue facially unconstitutional.

Nor is that approach to the regulations even required by H. B. 2 itself. The statute was meant to require abortion facilities to meet the integrated surgical-center standards—not some subset thereof. The severability clause refers to severing applications of words and phrases *in the Act*, such as the surgical-center requirement as a whole. See H. B. 2, § 4, App. to Pet. for Cert. 194a. It does not say that courts should go through the individual components of the different, surgical-center statute, let alone the individual *regulations* governing surgical centers to see whether those requirements are severable from each other as applied to abortion facilities. Facilities subject to some subset of those regulations do not qualify as surgical centers. And the risk of harm caused by inconsistent application of only a fraction of interconnected regulations counsels against doing so.

Second, Texas claims that the provisions at issue here do not impose a substantial obstacle because the women affected by those laws are not a "large fraction" of Texan women "of reproductive age," which Texas reads *Casey* to have required. See Brief for Respondents 45, 48. But *Casey* used the language "large fraction" to refer to "a large fraction of cases in which [the provision at issue] is *relevant*," a class narrower than "all women," "pregnant women," or even "the class of *women seeking abortions* identified by the State." 505 U. S., at 894–895 (opinion of the Court) (emphasis added). Here, as in *Casey*, the relevant denominator is "those [women] for whom [the provision] is an actual rather than an irrelevant restriction." *Id.*, at 895.

Third, Texas looks for support to *Simopoulos* v. *Virginia*, 462 U. S. 506 (1983), a case in which this Court upheld a surgical-center requirement as applied to second-trimester

abortions. This case, however, unlike *Simopoulos*, involves restrictions applicable to all abortions, not simply to those that take place during the second trimester. Most abortions in Texas occur in the first trimester, not the second. App. 236. More importantly, in *Casey* we discarded the trimester framework, and we now use "viability" as the relevant point at which a State may begin limiting women's access to abortion for reasons unrelated to maternal health. 505 U. S., at 878 (plurality opinion). Because the second trimester includes time that is both previability and postviability, *Simopoulos* cannot provide clear guidance. Further, the Court in *Simopoulos* found that the petitioner in that case, unlike petitioners here, had waived any argument that the regulation did not significantly help protect women's health. 462 U. S., at 517.

* * *

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

It is so ordered.

JUSTICE GINSBURG, concurring.

The Texas law called H. B. 2 inevitably will reduce the number of clinics and doctors allowed to provide abortion services. Texas argues that H. B. 2's restrictions are constitutional because they protect the health of women who experience complications from abortions. In truth, "complications from an abortion are both rare and rarely dangerous." *Planned Parenthood of Wis., Inc.* v. *Schimel*, 806 F. 3d 908, 912 (CA7 2015). See Brief for American College of Obstetricians and Gynecologists et al. as *Amici Curiae* 6–10 (collecting studies and concluding "[a]bortion is one of the safest medical procedures performed in the United States"); Brief for Social Science Researchers as *Amici Curiae* 5–9 (compiling studies that show "[c]omplication rates from abortion are very low"). Many medical procedures, including childbirth,

are far more dangerous to patients, yet are not subject to ambulatory-surgical-center or hospital admitting-privileges requirements. See *ante*, at 618; *Planned Parenthood of Wis.*, 806 F. 3d, at 921–922. See also Brief for Social Science Researchers 9–11 (comparing statistics on risks for abortion with tonsillectomy, colonoscopy, and in-office dental surgery); Brief for American Civil Liberties Union et al. as *Amici Curiae* 7 (all District Courts to consider admitting-privileges requirements found abortion "is at least as safe as other medical procedures routinely performed in outpatient settings"). Given those realities, it is beyond rational belief that H. B. 2 could genuinely protect the health of women, and certain that the law "would simply make it more difficult for them to obtain abortions." *Planned Parenthood of Wis.*, 806 F. 3d, at 910. When a State severely limits access to safe and legal procedures, women in desperate circumstances may resort to unlicensed rogue practitioners, *faute de mieux*, at great risk to their health and safety. See Brief for Ten Pennsylvania Abortion Care Providers as *Amici Curiae* 17–22. So long as this Court adheres to *Roe* v. *Wade*, 410 U. S. 113 (1973), and *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992), Targeted Regulation of Abortion Providers laws like H. B. 2 that "do little or nothing for health, but rather strew impediments to abortion," *Planned Parenthood of Wis.*, 806 F. 3d, at 921, cannot survive judicial inspection.

JUSTICE THOMAS, dissenting.

Today the Court strikes down two state statutory provisions in all of their applications, at the behest of abortion clinics and doctors. That decision exemplifies the Court's troubling tendency "to bend the rules when any effort to limit abortion, or even to speak in opposition to abortion, is at issue." *Stenberg* v. *Carhart*, 530 U. S. 914, 954 (2000) (Scalia, J., dissenting). As JUSTICE ALITO observes, see *post*, p. 644. (dissenting opinion), today's decision creates an

abortion exception to ordinary rules of res judicata, ignores compelling evidence that Texas' law imposes no unconstitutional burden, and disregards basic principles of the severability doctrine. I write separately to emphasize how today's decision perpetuates the Court's habit of applying different rules to different constitutional rights—especially the putative right to abortion.

To begin, the very existence of this suit is a jurisprudential oddity. Ordinarily, plaintiffs cannot file suits to vindicate the constitutional rights of others. But the Court employs a different approach to rights that it favors. So in this case and many others, the Court has erroneously allowed doctors and clinics to vicariously vindicate the putative constitutional right of women seeking abortions.

This case also underscores the Court's increasingly common practice of invoking a given level of scrutiny—here, the abortion-specific undue-burden standard—while applying a different standard of review entirely. Whatever scrutiny the majority applies to Texas' law, it bears little resemblance to the undue-burden test the Court articulated in *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992), and its successors. Instead, the majority eviscerates important features of that test to return to a regime like the one that *Casey* repudiated.

Ultimately, this case shows why the Court never should have bent the rules for favored rights in the first place. Our law is now so riddled with special exceptions for special rights that our decisions deliver neither predictability nor the promise of a judiciary bound by the rule of law.

I

This suit is possible only because the Court has allowed abortion clinics and physicians to invoke a putative constitutional right that does not belong to them—a woman's right to abortion. The Court's third-party standing jurisprudence is no model of clarity. See *Kowalski* v. *Tesmer*, 543 U. S. 125,

135 (2004) (THOMAS, J., concurring). Driving this doctrinal confusion, the Court has shown a particular willingness to undercut restrictions on third-party standing when the right to abortion is at stake. And this case reveals a deeper flaw in straying from our normal rules: When the wrong party litigates a case, we end up resolving disputes that make for bad law.

For most of our Nation's history, plaintiffs could not challenge a statute by asserting someone else's constitutional rights. See *ibid.* This Court would "not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect and who has therefore no interest in defeating it." *Clark* v. *Kansas City*, 176 U. S. 114, 118 (1900) (internal quotation marks omitted). And for good reason: "[C]ourts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick* v. *Oklahoma*, 413 U. S. 601, 610–611 (1973).

In the 20th century, the Court began relaxing that rule. But even as the Court started to recognize exceptions for certain types of challenges, it stressed the strict limits of those exceptions. A plaintiff could assert a third party's rights, the Court said, but only if the plaintiff had a "close relation to the third party" and the third party faced a formidable "hindrance" to asserting his own rights. *Powers* v. *Ohio*, 499 U. S. 400, 411 (1991); accord, *Kowalski*, 543 U. S., at 130–133 (similar).

Those limits broke down, however, because the Court has been "quite forgiving" in applying these standards to certain claims. *Id.*, at 130. Some constitutional rights remained "personal rights which . . . may not be vicariously asserted." *Alderman* v. *United States*, 394 U.S. 165, 174 (1969) (Fourth Amendment rights are purely personal); see *Rakas* v. *Illinois*, 439 U. S. 128, 140, n. 8 (1978) (so is the Fifth Amendment right against self-incrimination). But the Court has abandoned such limitations on other rights, producing seri-

ous anomalies across similar factual scenarios. Lawyers cannot vicariously assert potential clients' Sixth Amendment rights because they lack any current, close relationship. *Kowalski*, *supra*, at 130–131. Yet litigants can assert potential jurors' rights against race or sex discrimination in jury selection even when the litigants have never met potential jurors and do not share their race or sex. *Powers*, *supra*, at 410–416; *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. 127, 129 (1994). And vendors can sue to invalidate state regulations implicating potential customers' equal protection rights against sex discrimination. *Craig* v. *Boren*, 429 U. S. 190, 194–197 (1976) (striking down sex-based age restrictions on purchasing beer).

Above all, the Court has been especially forgiving of third-party standing criteria for one particular category of cases: those involving the purported substantive due process right of a woman to abort her unborn child. In *Singleton* v. *Wulff*, 428 U. S. 106 (1976), a plurality of this Court fashioned a blanket rule allowing third-party standing in abortion cases. *Id.*, at 118. "[I]t generally is appropriate," said the plurality, "to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision." *Ibid.* Yet the plurality conceded that the traditional criteria for an exception to the third-party standing rule were not met. There are no "insurmountable" obstacles stopping women seeking abortions from asserting their own rights, the plurality admitted. Nor are there jurisdictional barriers. *Roe* v. *Wade*, 410 U. S. 113 (1973), held that women seeking abortions fell into the mootness exception for cases "'capable of repetition, yet evading review,'" enabling them to sue after they terminated their pregnancies without showing that they intended to become pregnant and seek an abortion again. *Id.*, at 125. Yet, since *Singleton*, the Court has unquestioningly accepted doctors' and clinics' vicarious assertion of the constitutional rights of hypothetical patients, even as women seeking abortions have success-

fully and repeatedly asserted their own rights before this Court.[1]

Here too, the Court does not question whether doctors and clinics should be allowed to sue on behalf of Texas women seeking abortions as a matter of course. They should not. The central question under the Court's abortion precedents is whether there is an undue burden on a woman's access to abortion. See *Casey*, 505 U. S., at 877 (plurality opinion); see Part II, *infra*. But the Court's permissive approach to third-party standing encourages litigation that deprives us of the information needed to resolve that issue. Our precedents encourage abortion providers to sue—and our cases then relieve them of any obligation to prove what burdens women actually face. I find it astonishing that the majority can discover an "undue burden" on women's access to abortion for "those [women] for whom [Texas' law] is an actual rather than an irrelevant restriction," *ante*, at 626 (internal quotation marks omitted), without identifying how many women fit this description; their proximity to open clinics; or their preferences as to where they obtain abortions, and from whom. "[C]ommonsense inference[s]" that such a burden exists, *ante*, at 623, are no substitute for actual evidence. There should be no surer sign that our jurisprudence has gone off the rails than this: After creating a constitutional right to abortion because it "involve[s] the most intimate and personal choices a person may make in a lifetime, choices

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[1] Compare, *e. g.*, *Gonzales* v. *Carhart*, 550 U. S. 124 (2007), and *Stenberg* v. *Carhart*, 530 U. S. 914 (2000); *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 851 (1992) (assuming that physicians and clinics can vicariously assert women's right to abortion), with, *e. g.*, *Leavitt* v. *Jane L.*, 518 U. S. 137, 139 (1996) (*per curiam*); *Hodgson* v. *Minnesota*, 497 U. S. 417, 429 (1990); *H. L.* v. *Matheson*, 450 U. S. 398, 400 (1981); *Williams* v. *Zbaraz*, 448 U. S. 358, 361 (1980); *Harris* v. *McRae*, 448 U. S. 297, 303 (1980); *Bellotti* v. *Baird*, 428 U. S. 132, 137–138 (1976); *Poelker* v. *Doe*, 432 U. S. 519 (1977) (*per curiam*); *Beal* v. *Doe*, 432 U. S. 438, 441–442 (1977); *Maher* v. *Roe*, 432 U. S. 464, 467 (1977) (women seeking abortions have capably asserted their own rights, as plaintiffs).

central to personal dignity and autonomy," *Casey*, *supra*, at 851 (majority opinion), the Court has created special rules that cede its enforcement to others.

II

Today's opinion also reimagines the undue-burden standard used to assess the constitutionality of abortion restrictions. Nearly 25 years ago, in *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, a plurality of this Court invented the "undue burden" standard as a special test for gauging the permissibility of abortion restrictions. *Casey* held that a law is unconstitutional if it imposes an "undue burden" on a woman's ability to choose to have an abortion, meaning that it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.*, at 877. *Casey* thus instructed courts to look to whether a law substantially impedes women's access to abortion, and whether it is reasonably related to legitimate state interests. As the Court explained, "[w]here it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power" to regulate aspects of abortion procedures, "all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn." *Gonzales* v. *Carhart*, 550 U. S. 124, 158 (2007).

I remain fundamentally opposed to the Court's abortion jurisprudence. *E. g.*, *id.*, at 168–169 (THOMAS, J., concurring); *Stenberg*, 530 U. S., at 980, 982 (THOMAS, J., dissenting). Even taking *Casey* as the baseline, however, the majority radically rewrites the undue-burden test in three ways. First, today's decision requires courts to "consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Ante*, at 607. Second, today's opinion tells the courts that, when the law's justifications are medically uncertain, they need not defer to the legislature,

and must instead assess medical justifications for abortion restrictions by scrutinizing the record themselves. *Ibid.* Finally, even if a law imposes no "substantial obstacle" to women's access to abortions, the law now must have more than a "reasonabl[e] relat[ion] to . . . a legitimate state interest." *Ibid.* (internal quotation marks omitted). These precepts are nowhere to be found in *Casey* or its successors, and transform the undue-burden test to something much more akin to strict scrutiny.

First, the majority's free-form balancing test is contrary to *Casey*. When assessing Pennsylvania's recordkeeping requirements for abortion providers, for instance, *Casey* did not weigh its benefits and burdens. Rather, *Casey* held that the law had a legitimate purpose because data collection advances medical research, "so it cannot be said that the requirements serve no purpose other than to make abortions more difficult." 505 U. S., at 901 (joint opinion of O'Connor, KENNEDY, and Souter, JJ.). The opinion then asked whether the recordkeeping requirements imposed a "substantial obstacle," and found none. *Ibid.* Contrary to the majority's statements, see *ante*, at 607, *Casey* did not balance the benefits and burdens of Pennsylvania's spousal- and parental-notification provisions, either. Pennsylvania's spousal-notification requirement, the Court said, imposed an undue burden because findings established that the requirement would "likely . . . prevent a significant number of women from obtaining an abortion"—not because these burdens outweighed its benefits. 505 U. S., at 893; see *id.*, at 887–894. And *Casey* summarily upheld parental notification provisions because even pre-*Casey* decisions had done so. *Id.*, at 899–900 (joint opinion).

Decisions in *Casey*'s wake further refute the majority's benefits-and-burdens balancing test. The Court in *Mazurek* v. *Armstrong*, 520 U. S. 968 (1997) (*per curiam*), had no difficulty upholding a Montana law authorizing only physicians to perform abortions—even though no legislative findings

supported the law, and the challengers claimed that "all health evidence contradict[ed] the claim that there is any health basis for the law." *Id.*, at 973 (internal quotation marks omitted). *Mazurek* also deemed objections to the law's lack of benefits "squarely foreclosed by *Casey* itself." *Ibid.* Instead, the Court explained, "'the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, *even if an objective assessment might suggest that those same tasks could be performed by others*.'" *Ibid.* (quoting *Casey*, *supra*, at 885 (joint opinion); emphasis in original); see *Gonzales*, *supra*, at 164 (relying on *Mazurek*).

Second, by rejecting the notion that "legislatures, and not courts, must resolve questions of medical uncertainty," *ante*, at 608, the majority discards another core element of the *Casey* framework. Before today, this Court had "given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Gonzales*, 550 U. S., at 163. This Court emphasized that this "traditional rule" of deference "is consistent with *Casey*." *Ibid.* This Court underscored that legislatures should not be hamstrung "if some part of the medical community were disinclined to follow the proscription." *Id.*, at 166. And this Court concluded that "[c]onsiderations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends." *Ibid.*; see *Stenberg*, *supra*, at 971 (KENNEDY, J., dissenting) ("[T]he right of the legislature to resolve matters on which physicians disagreed" is "establish[ed] beyond doubt"). This Court could not have been clearer: Whenever medical justifications for an abortion restriction are debatable, that "provides a sufficient basis to conclude in [a] facial attack that the [law] does not impose an undue burden." *Gonzales*, 550 U. S., at 164. Otherwise, legislatures would face "too exacting" a standard. *Id.*, at 166.

Today, however, the majority refuses to leave disputed medical science to the legislature because past cases "placed considerable weight upon evidence and argument presented in judicial proceedings." *Ante*, at 608. But while *Casey* relied on record evidence to uphold Pennsylvania's spousal-notification requirement, that requirement had nothing to do with debated medical science. 505 U. S., at 888–894 (majority opinion). And while *Gonzales* observed that courts need not blindly accept all legislative findings, see *ante*, at 608, that does not help the majority. *Gonzales* refused to accept Congress' finding of "a medical consensus that the prohibited procedure is never medically necessary" because the procedure's necessity was debated within the medical community. 550 U. S., at 165–166. Having identified medical uncertainty, *Gonzales* explained how courts should resolve conflicting positions: by respecting the legislature's judgment. See *id.*, at 164.

Finally, the majority overrules another central aspect of *Casey* by requiring laws to have more than a rational basis even if they do not substantially impede access to abortion. *Ante*, at 608. "Where [the State] *has a rational basis to act*, and it does not impose an undue burden," this Court previously held, "the State may use its regulatory power" to impose regulations "in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn." *Gonzales*, *supra*, at 158 (emphasis added); see *Casey*, *supra*, at 878 (plurality opinion) (similar). No longer. Though the majority declines to say how substantial a State's interest must be, *ante*, at 607, one thing is clear: The State's burden has been ratcheted to a level that has not applied for a quarter century.

Today's opinion does resemble *Casey* in one respect: After disregarding significant aspects of the Court's prior jurisprudence, the majority applies the undue-burden standard in a way that will surely mystify lower courts for years to come.

As in *Casey*, today's opinion "simply . . . highlight[s] certain facts in the record that apparently strike the . . . Justices as particularly significant in establishing (or refuting) the existence of an undue burden." 505 U. S., at 991 (Scalia, J., concurring in judgment in part and dissenting in part); see *ante*, at 611–612, 619–621. As in *Casey*, "the opinion then simply announces that the provision either does or does not impose a 'substantial obstacle' or an 'undue burden.' " 505 U. S., at 991 (opinion of Scalia, J.); see *ante*, at 614, 624. And still "[w]e do not know whether the same conclusions could have been reached on a different record, or in what respects the record would have had to differ before an opposite conclusion would have been appropriate." 505 U. S., at 991–992 (opinion of Scalia, J.); cf. *ante*, at 614, 619. All we know is that an undue burden now has little to do with whether the law, in a "real sense deprive[s] women of the ultimate decision," *Casey*, *supra*, at 875 (plurality opinion), and more to do with the loss of "individualized attention, serious conversation, and emotional support," *ante*, at 623.

The majority's undue-burden test looks far less like our post-*Casey* precedents and far more like the strict-scrutiny standard that *Casey* rejected, under which only the most compelling rationales justified restrictions on abortion. See *Casey*, *supra*, at 871, 874–875 (plurality opinion). One searches the majority opinion in vain for any acknowledgment of the "premise central" to *Casey*'s rejection of strict scrutiny: "that the government has a legitimate and substantial interest in preserving and promoting fetal life" from conception, not just in regulating medical procedures. *Gonzales*, *supra*, at 145 (internal quotation marks omitted); see *Casey*, *supra*, at 846 (majority opinion), 871 (plurality opinion). Meanwhile, the majority's undue-burden balancing approach risks ruling out even minor, previously valid infringements on access to abortion. Moreover, by second-guessing medical evidence and making its own assessments of "quality of care" issues, *ante*, at 611–612, 617–618, 623, the majority

reappoints this Court as "the country's *ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States." *Gonzales*, *supra*, at 164 (internal quotation marks omitted). And the majority seriously burdens States, which must guess at how much more compelling their interests must be to pass muster and what "commonsense inferences" of an undue burden this Court will identify next.

III

The majority's furtive reconfiguration of the standard of scrutiny applicable to abortion restrictions also points to a deeper problem. The undue-burden standard is just one variant of the Court's tiers-of-scrutiny approach to constitutional adjudication. And the label the Court affixes to its level of scrutiny in assessing whether the government can restrict a given right—be it "rational basis," intermediate, strict, or something else—is increasingly a meaningless formalism. As the Court applies whatever standard it likes to any given case, nothing but empty words separates our constitutional decisions from judicial fiat.

Though the tiers of scrutiny have become a ubiquitous feature of constitutional law, they are of recent vintage. Only in the 1960's did the Court begin in earnest to speak of "strict scrutiny" versus reviewing legislation for mere rationality, and to develop the contours of these tests. See Fallon, Strict Judicial Scrutiny, 54 UCLA L. Rev. 1267, 1274, 1284–1285 (2007). In short order, the Court adopted strict scrutiny as the standard for reviewing everything from race-based classifications under the Equal Protection Clause to restrictions on constitutionally protected speech. *Id.*, at 1275–1283. *Roe* v. *Wade*, 410 U. S. 113, then applied strict scrutiny to a purportedly "fundamental" substantive due process right for the first time. *Id.*, at 162–164; see Fallon, *supra*, at 1283; accord, *Casey*, *supra*, at 871 (plurality opinion) (noting that post-*Roe* cases interpreted *Roe* to demand

"strict scrutiny"). Then the tiers of scrutiny proliferated into ever more gradations. See, *e. g.*, *Craig*, 429 U. S., at 197–198 (intermediate scrutiny for sex-based classifications); *Lawrence* v. *Texas*, 539 U. S. 558, 580 (2003) (O'Connor, J., concurring in judgment) ("[A] more searching form of rational basis review" applies to laws reflecting "a desire to harm a politically unpopular group"); *Buckley* v. *Valeo*, 424 U. S. 1, 25 (1976) (*per curiam*) (applying " 'closest scrutiny' " to campaign-finance contribution limits). *Casey*'s undue-burden test added yet another rights-specific test on the spectrum between rational-basis and strict-scrutiny review.

The illegitimacy of using "made-up tests" to "displace long-standing national traditions as the primary determinant of what the Constitution means" has long been apparent. *United States* v. *Virginia*, 518 U. S. 515, 570 (1996) (Scalia, J., dissenting). The Constitution does not prescribe tiers of scrutiny. The three basic tiers—"rational basis," intermediate, and strict scrutiny—"are no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely up to us which test will be applied in each case." *Id.*, at 567; see also *Craig*, *supra*, at 217–221 (Rehnquist, J., dissenting).

But the problem now goes beyond that. If our recent cases illustrate anything, it is how easily the Court tinkers with levels of scrutiny to achieve its desired result. This Term, it is easier for a State to survive strict scrutiny despite discriminating on the basis of race in college admissions than it is for the same State to regulate how abortion doctors and clinics operate under the putatively less stringent undue-burden test. All the State apparently needs to show to survive strict scrutiny is a list of aspirational educational goals (such as the "cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry") and a "reasoned, principled explanation" for why it is pursuing them—then this Court defers. *Fisher* v. *University of Tex. at Austin*, *ante*, at 376, 382 (internal quotation marks omitted). Yet the

same State gets no deference under the undue-burden test, despite producing evidence that abortion safety, one rationale for Texas' law, is medically debated. See *Whole Woman's Health* v. *Lakey*, 46 F. Supp. 3d 673, 684 (WD Tex. 2014) (noting conflict in expert testimony about abortion safety). Likewise, it is now easier for the government to restrict judicial candidates' campaign speech than for the Government to define marriage—even though the former is subject to strict scrutiny and the latter was supposedly subject to some form of rational-basis review. Compare *Williams-Yulee* v. *Florida Bar*, 575 U. S. 433, 444 (2015), with *United States* v. *Windsor*, 570 U. S. 744, 769 (2013).

These more recent decisions reflect the Court's tendency to relax purportedly higher standards of review for less-preferred rights. *E. g.*, *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 421 (2000) (THOMAS, J., dissenting) ("[T]he Court makes no effort to justify its deviation from the tests we traditionally employ in free speech cases" to review caps on political contributions). Meanwhile, the Court selectively applies rational-basis review—under which the question is supposed to be whether "any state of facts reasonably may be conceived to justify" the law, *McGowan* v. *Maryland*, 366 U. S. 420, 426 (1961)—with formidable toughness. *E. g.*, *Lawrence*, 539 U. S., at 580 (O'Connor, J., concurring in judgment) (at least in equal protection cases, the Court is "most likely" to find no rational basis for a law if "the challenged legislation inhibits personal relationships"); see *id.*, at 586 (Scalia, J., dissenting) (faulting the Court for applying "an unheard-of form of rational-basis review").

These labels now mean little. Whatever the Court claims to be doing, in practice it is treating its "doctrine referring to tiers of scrutiny as guidelines informing our approach to the case at hand, not tests to be mechanically applied." *Williams-Yulee*, *supra*, at 457 (BREYER, J., concurring). The Court should abandon the pretense that anything other

than policy preferences underlies its balancing of constitutional rights and interests in any given case.

IV

It is tempting to identify the Court's invention of a constitutional right to abortion in *Roe* v. *Wade*, 410 U. S. 113, as the tipping point that transformed third-party standing doctrine and the tiers of scrutiny into an unworkable morass of special exceptions and arbitrary applications. But those roots run deeper, to the very notion that some constitutional rights demand preferential treatment. During the *Lochner* era, the Court considered the right to contract and other economic liberties to be fundamental requirements of due process of law. See *Lochner* v. *New York*, 198 U. S. 45 (1905). The Court in 1937 repudiated *Lochner*'s foundations. See *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 386–387, 400 (1937). But the Court then created a new taxonomy of preferred rights.

In 1938, seven Justices heard a constitutional challenge to a federal ban on shipping adulterated milk in interstate commerce. Without economic substantive due process, the ban clearly invaded no constitutional right. See *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152–153 (1938). Within Justice Stone's opinion for the Court, however, was a footnote that just three other Justices joined—the famous *Carolene Products* Footnote 4. See *ibid.*, n. 4; Lusky, Footnote Redux: A *Carolene Products* Reminiscence, 82 Colum. L. Rev. 1093, 1097 (1982). The footnote's first paragraph suggested that the presumption of constitutionality that ordinarily attaches to legislation might be "narrower . . . when legislation appears on its face to be within a specific prohibition of the Constitution." 304 U. S., at 152–153, n. 4. Its second paragraph appeared to question "whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under

the general prohibitions of the [14th] Amendment than are most other types of legislation." *Ibid.* And its third and most familiar paragraph raised the question "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *Ibid.*

Though the footnote was pure dicta, the Court seized upon it to justify its special treatment of certain personal liberties like the First Amendment and the right against discrimination on the basis of race—but also rights not enumerated in the Constitution.[2] As the Court identified which rights deserved special protection, it developed the tiers of scrutiny as part of its equal protection (and, later, due process) jurisprudence as a way to demand extra justifications for encroachments on these rights. See Fallon, 54 UCLA L. Rev., at 1270–1273, 1281–1285. And, having created a new category of fundamental rights, the Court loosened the reins to recognize even putative rights like abortion, see *Roe*, *supra*, at 162–164, which hardly implicate "discrete and insular minorities."

The Court also seized upon the rationale of the *Carolene Products* footnote to justify exceptions to third-party standing doctrine. The Court suggested that it was tilting the analysis to favor rights involving actual or perceived minorities—then seemingly counted the right to contraception as

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[2] See Fallon, Strict Judicial Scrutiny, 54 UCLA L. Rev. 1267, 1278–1291 (2007); see also Linzer, The *Carolene Products* Footnote and the Preferred Position of Individual Rights: Louis Lusky and John Hart Ely vs. Harlan Fiske Stone, 12 Const. Commentary 277, 277–278, 288–300 (1995); *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535, 544 (1942) (Stone, C. J., concurring) (citing the *Carolene Products* footnote to suggest that the presumption of constitutionality did not fully apply to encroachments on the unenumerated personal liberty to procreate).

such a right. According to the Court, what matters is the "relationship between one who acted to protect the rights of a minority and the minority itself"—which, the Court suggested, includes the relationship "between an advocate of the rights of persons to obtain contraceptives and those desirous of doing so." *Eisenstadt* v. *Baird*, 405 U. S. 438, 445 (1972) (citing Sedler, Standing To Assert Constitutional Jus Tertii in the Supreme Court, 71 Yale L. J. 599, 631 (1962)).

Eighty years on, the Court has come full circle. The Court has simultaneously transformed judicially created rights like the right to abortion into preferred constitutional rights, while disfavoring many of the rights actually enumerated in the Constitution. But our Constitution renounces the notion that some constitutional rights are more equal than others. A plaintiff either possesses the constitutional right he is asserting, or not—and if not, the judiciary has no business creating ad hoc exceptions so that others can assert rights that seem especially important to vindicate. A law either infringes a constitutional right, or not; there is no room for the judiciary to invent tolerable degrees of encroachment. Unless the Court abides by one set of rules to adjudicate constitutional rights, it will continue reducing constitutional law to policy-driven value judgments until the last shreds of its legitimacy disappear.

* * *

Today's decision will prompt some to claim victory, just as it will stiffen opponents' will to object. But the entire Nation has lost something essential. The majority's embrace of a jurisprudence of rights-specific exceptions and balancing tests is "a regrettable concession of defeat—an acknowledgement that we have passed the point where 'law,' properly speaking, has any further application." Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1182 (1989). I respectfully dissent.

JUSTICE ALITO, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

The constitutionality of laws regulating abortion is one of the most controversial issues in American law, but this case does not require us to delve into that contentious dispute. Instead, the dispositive issue here concerns a workaday question that can arise in any case no matter the subject, namely, whether the present case is barred by res judicata. As a court of law, we have an obligation to apply such rules in a neutral fashion in all cases, regardless of the subject of the suit. If anything, when a case involves a controversial issue, we should be especially careful to be scrupulously neutral in applying such rules.

The Court has not done so here. On the contrary, determined to strike down two provisions of a new Texas abortion statute in all of their applications, the Court simply disregards basic rules that apply in all other cases.

Here is the worst example. Shortly after Texas enacted House Bill 2 (H. B. 2) in 2013, petitioners in this case brought suit, claiming, among other things, that a provision of the new law requiring a physician performing an abortion to have admitting privileges at a nearby hospital is "facially" unconstitutional and thus totally unenforceable. Petitioners had a fair opportunity to make their case, but they lost on the merits in the United States Court of Appeals for the Fifth Circuit, and they chose not to petition this Court for review. The judgment against them became final. *Planned Parenthood of Greater Tex. Surgical Health Servs.* v. *Abbott*, 951 F. Supp. 2d 891 (WD Tex. 2013), aff'd in part and rev'd in part, 748 F. 3d 583 (CA5 2014) (*Abbott*).

Under the rules that apply in regular cases, petitioners could not relitigate the exact same claim in a second suit. As we have said, "a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks

to raise." *Astoria Fed. Sav. & Loan Assn.* v. *Solimino*, 501 U. S. 104, 107 (1991).

In this abortion case, however, that rule is disregarded. The Court awards a victory to petitioners on the very claim that they unsuccessfully pressed in the earlier case. The Court does this even though petitioners, undoubtedly realizing that a rematch would not be allowed, did not presume to include such a claim in their complaint. The Court favors petitioners with a victory that they did not have the audacity to seek.

Here is one more example: the Court's treatment of H. B. 2's "severability clause." When part of a statute is held to be unconstitutional, the question arises whether other parts of the statute must also go. If a statute says that provisions found to be unconstitutional can be severed from the rest of the statute, the valid provisions are allowed to stand. H. B. 2 contains what must surely be the most emphatic severability clause ever written. This clause says that every single word of the statute and every possible application of its provisions is severable. But despite this language, the Court holds that no part of the challenged provisions and no application of any part of them can be saved. Provisions that are indisputably constitutional—for example, provisions that require facilities performing abortions to follow basic fire safety measures—are stricken from the books. There is no possible justification for this collateral damage.

The Court's patent refusal to apply well-established law in a neutral way is indefensible and will undermine public confidence in the Court as a fair and neutral arbiter.

I

Res judicata—or, to use the more modern terminology, "claim preclusion"—is a bedrock principle of our legal system. As we said many years ago, "[p]ublic policy dictates that there be an end of litigation[,] that those who have contested an issue shall be bound by the result of the contest,

and that matters once tried shall be considered forever settled as between the parties." *Baldwin* v. *Iowa State Traveling Men's Assn.*, 283 U. S. 522, 525 (1931). This doctrine "is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions. . . . To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana* v. *United States*, 440 U. S. 147, 153–154 (1979). These are "vital public interests" that should be "'cordially regarded and enforced.'" *Federated Department Stores, Inc.* v. *Moitie*, 452 U. S. 394, 401 (1981).

The basic rule of preclusion is well known and has been frequently stated in our opinions. Litigation of a "cause of action" or "claim" is barred if (1) the same (or a closely related) party (2) brought a prior suit asserting the same cause of action or claim, (3) the prior case was adjudicated by a court of competent jurisdiction and (4) was decided on the merits, (5) a final judgment was entered, and (6) there is no ground, such as fraud, to invalidate the prior judgment. See *Montana*, *supra*, at 153; *Commissioner* v. *Sunnen*, 333 U. S. 591, 597 (1948); *Cromwell* v. *County of Sac*, 94 U. S. 351, 352–353 (1877).

A

I turn first to the application of this rule to petitioners' claim that H. B. 2's admitting privileges requirement is facially unconstitutional.

Here, all the elements set out above are easily satisfied based on *Abbott*, the 2013 case to which I previously referred. That case (1) was brought by a group of plaintiffs that included petitioners in the present case, (2) asserted the same cause of action or claim, namely, a facial challenge to the constitutionality of H. B. 2's admitting privileges require-

ment, (3) was adjudicated by courts of competent jurisdiction, (4) was decided on the merits, (5) resulted in the entry of a final judgment against petitioners, and (6) was not otherwise subject to invalidation. All of this is clear, and that is undoubtedly why petitioners' attorneys did not even include a facial attack on the admitting privileges requirement in their complaint in this case. To have done so would have risked sanctions for misconduct. See *Robinson* v. *National Cash Register Co.*, 808 F. 2d 1119, 1131 (CA5 1987) (a party's "persistence in litigating [a claim] when res judicata clearly barred the suit violated rule 11"); *McLaughlin* v. *Bradlee*, 602 F. Supp. 1412, 1417 (DC 1985) ("It is especially appropriate to impose sanctions in situations where the doctrines of *res judicata* and collateral estoppel plainly preclude relitigation of the suit").

Of the elements set out above, the Court disputes only one. The Court concludes that petitioners' prior facial attack on the admitting privileges requirement and their current facial attack on that same requirement are somehow not the same cause of action or claim. But that conclusion is unsupported by authority and plainly wrong.

B

Although the scope of a cause of action or claim for purposes of res judicata is hardly a new question, courts and scholars have struggled to settle upon a definition.[1] But the outcome of the present case does not depend upon the selection of the proper definition from among those adopted or recommended over the years because the majority's holding is not supported by any of them.

In *Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316 (1927), we defined a cause of action as an "actionable wrong." *Id.*, at 321; see also *ibid.* ("A cause of action does not consist of facts,

[1] See, *e. g.*, Note, Developments in the Law: Res Judicata, 65 Harv. L. Rev. 818, 824 (1952); Cleary, Res Judicata Reexamined, 57 Yale L. J. 339, 339–340 (1948).

but of the unlawful violation of a right which the facts show"). On this understanding, the two claims at issue here are indisputably the same.

The same result is dictated by the rule recommended by the American Law Institute (ALI) in the first Restatement of Judgments, issued in 1942. Section 61 of the first Restatement explains when a claim asserted by a plaintiff in a second suit is the same for preclusion purposes as a claim that the plaintiff unsuccessfully litigated in a prior case. Under that provision, "the plaintiff is precluded from subsequently maintaining a second action based upon the same transaction, if the evidence needed to sustain the second action would have sustained the first action." Restatement of Judgments § 61. There is no doubt that this rule is satisfied here.

The second Restatement of Judgments, issued by the ALI in 1980, adopted a new approach for determining the scope of a cause of action or claim. In *Nevada* v. *United States*, 463 U. S. 110 (1983), we noted that the two Restatements differ in this regard, but we had no need to determine which was correct. *Id.*, at 130–131, and n. 12. Here, the majority simply assumes that we should follow the second Restatement even though that Restatement—on the Court's reading, at least—leads to a conclusion that differs from the conclusion clearly dictated by the first Restatement.

If the second Restatement actually supported the majority's holding, the Court would surely be obligated to explain why it chose to follow the second Restatement's approach. But here, as in *Nevada*, *supra*, at 130–131, application of the rule set out in the second Restatement does not change the result. While the Court relies almost entirely on a comment to one section of the second Restatement, the Court ignores the fact that a straightforward application of the provisions of that Restatement leads to the conclusion that petitioners' two facial challenges to the admitting privileges requirement constitute a single claim.

Section 19 of the second Restatement sets out the general claim-preclusion rule that applies in a case like the one before us: "A valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim." Section 24(1) then explains the scope of the "claim" that is extinguished: It "includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." Section 24's Comment *b*, in turn, fleshes out the key term "transaction," which it defines as "a natural grouping or common nucleus of operative facts." Whether a collection of events constitutes a single transaction is said to depend on "their relatedness in time, space, origin, or motivation, and whether, taken together, they form a convenient unit for trial purposes." *Ibid.*

Both the claim asserted in petitioners' first suit and the claim now revived by the Court involve the same "nucleus of operative facts." Indeed, they involve the very same "operative facts," namely, the enactment of the admitting privileges requirement, which, according to the theory underlying petitioners' facial claims, would inevitably have the effect of causing abortion clinics to close. This is what petitioners needed to show—and what they attempted to show in their first facial attack: not that the admitting privileges requirement had *already* imposed a substantial burden on the right of Texas women to obtain abortions, but only that it *would have* that effect once clinics were able to assess whether they could practicably comply.

The Court's decision in *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992), makes that clear. *Casey* held that Pennsylvania's spousal-notification requirement was facially unconstitutional even though that provision had been enjoined prior to enforcement. See *id.*, at 845. And the Court struck down the provision because it "*will impose* a substantial obstacle." *Id.*, at 893–894 (em-

phasis added). See also *id.*, at 893 ("The spousal notification requirement *is thus likely to prevent* a significant number of women from obtaining an abortion" (emphasis added)); *id.*, at 894 (Women "*are likely to be deterred* from procuring an abortion" (emphasis added)).

Consistent with this understanding, what petitioners tried to show in their first case was that the admitting privileges requirement would cause clinics to close. They claimed that their evidence showed that "at least one-third of the State's licensed providers *would stop* providing abortions once the privileges requirement took effect."[2] Agreeing with petitioners, the District Court enjoined enforcement of the requirement on the ground that "there *will be* abortion clinics *that will close*." *Abbott*, 951 F. Supp. 2d, at 900 (emphasis added). The Fifth Circuit found that petitioners' evidence of likely effect was insufficient, stating that petitioners failed to prove that "any woman *will lack* reasonable access to a clinic within Texas." *Abbott*, 748 F. 3d, at 598 (some emphasis added; some emphasis deleted). The correctness of that holding is irrelevant for present purposes. What matters is that the "operative fact" in the prior case was the enactment of the admitting privileges requirement, and that is precisely the same operative fact underlying petitioners' facial attack in the case now before us.[3]

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[2] Brief for Plaintiffs-Appellees in *Abbott*, No. 13–51008 (CA5), p. 5 (emphasis added); see also *id.*, at 23–24 ("[T]he evidence established that as a result of the admitting privileges requirement, approximately one-third of the licensed abortion providers in Texas *would stop* providing abortions. . . . As a result, one in three women in Texas *would be unable* to access desired abortion services. . . . [T]he immediate, wide-spread reduction of services caused by the admitting privileges requirement *would produce* a shortfall in the capacity of providers to serve all of the women seeking abortions" (emphasis added)).

[3] Even if the "operative facts" were actual clinic closures, the claims in the two cases would still be the same. The Court suggests that many clinics closed between the time of the Fifth Circuit's decision in the first

C

In light of this body of authority, how can the Court maintain that the first and second facial claims are really two different claims? The Court's first argument is that petitioners did not bring two facial claims because their complaint in the present case sought only as-applied relief and it was the District Court, not petitioners, who injected the issue of facial relief into the case. *Ante*, at 599. (After the District Court gave them statewide relief, petitioners happily accepted the gift and now present their challenge as a facial one. See Reply Brief 24–25 ("[F]acial invalidation is the only way to ensure that the Texas requirements do not extinguish women's liberty").) The thrust of the Court's argument is that a trial judge can circumvent the rules of claim preclusion by granting a plaintiff relief on a claim that the plaintiff is barred from relitigating. Not surprisingly, the Court musters no authority for this proposition, which would undermine the interests that the doctrine of claim preclusion is designed to serve. A "fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive." *Arizona* v. *California*, 460

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case and the time of the District Court's decision in the present case by comparing what the Court of Appeals said in *Abbott* about the effect of the admitting privileges requirement alone, 748 F. 3d, at 598 ("All of the major Texas cities . . . continue to have multiple clinics where many physicians will have or obtain hospital admitting privileges"), with what the District Court said in this case about the combined effect of the admitting privileges requirement and the ambulatory surgical center requirement, 46 F. Supp. 3d 673, 680 (WD Tex. 2014) (Were the surgical center requirement to take effect on September 1, 2014, only seven or eight clinics would remain open). See *ante*, at 602–603. Obviously, this comparison does not show that the effect of the admitting privileges requirement alone was greater at the time of the District Court's decision in this second case. Simply put, the Court presents no new clinic closures allegedly caused by the admitting privileges requirement beyond those already accounted for in *Abbott*, as I discuss, *infra*, at 657–659, and accompanying notes.

U. S. 605, 619 (1983). This interest in finality is equally offended regardless of whether the precluded claim is included in a complaint or inserted into the case by a judge.[4]

Another argument tossed off by the Court is that the judgment on the admitting privileges claim in the first case does not have preclusive effect because it was based on "'the prematurity of the action.'" *Ante*, at 600 (quoting Restatement (Second) of Judgments §20(2)). But this argument grossly mischaracterizes the basis for the judgment in the first case. The Court of Appeals did not hold that the facial challenge was premature. It held that the evidence petitioners offered was insufficient. See *Abbott*, 748 F. 3d, at 598–599; see also n. 9, *infra*. Petitioners could have sought review in this Court, but elected not to do so.

This brings me to the Court's main argument—that the second facial challenge is a different claim because of "changed circumstances." What the Court means by this is that petitioners now have better evidence than they did at the time of the first case with respect to the number of clinics that would have to close as a result of the admitting privileges requirement. This argument is contrary to a cardinal rule of res judicata, namely, that a plaintiff who loses in a first case cannot later bring the same case simply because it has now gathered better evidence. Claim preclusion does not contain a "better evidence" exception. See, *e. g.*, *Torres* v. *Shalala*, 48 F. 3d 887, 894 (CA5 1995) ("If simply submitting new evidence rendered a prior decision factually distinct, *res judicata* would cease to exist"); *Geiger* v. *Foley Hoag LLP Retirement Plan*, 521 F. 3d 60, 66 (CA1 2008) (Claim preclusion "applies even if the litigant is prepared to present different evidence . . . in the second action"); *Saylor*

[4] I need not quibble with the Court's authorities stating that facial relief can sometimes be appropriate even where a plaintiff has requested only as-applied relief. *Ante*, at 603. Assuming that this is generally proper, it does not follow that this may be done where the plaintiff is precluded by res judicata from bringing a facial claim.

v. *United States*, 315 F. 3d 664, 668 (CA6 2003) ("The fact that . . . new evidence might change the outcome of the case does not affect application of claim preclusion doctrine"); *International Union of Operating Engineers-Employers Constr. Industry Pension, Welfare and Training Trust Funds* v. *Karr*, 994 F. 2d 1426, 1430 (CA9 1993) ("The fact that some different evidence may be presented in this action . . . , however, does not defeat the bar of res judicata"); Restatement (Second) of Judgments § 25, Comment *b* ("A mere shift in the evidence offered to support a ground held unproved in a prior action will not suffice to make a new claim avoiding the preclusive effect of the judgment"); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4403, p. 33 (2d ed. 2002) (Wright & Miller) (Res judicata "ordinarily applies despite the availability of new evidence"); Restatement of Judgments § 1, Comment *b* (The ordinary rules of claim preclusion apply "although the party against whom a judgment is rendered is later in a position to produce better evidence so that he would be successful in a second action").

In an effort to get around this hornbook rule, the Court cites a potpourri of our decisions that have no bearing on the question at issue. Some are not even about res judicata.[5] And the cases that do concern res judicata, *Abie State Bank* v. *Bryan*, 282 U. S. 765, 772 (1931), *Lawlor* v. *National Screen Service Corp.*, 349 U. S. 322, 328 (1955), and *Third Nat. Bank of Louisville* v. *Stone*, 174 U. S. 432, 434 (1899), endorse the unremarkable proposition that a prior judgment does not preclude new claims based on acts occurring after the time of the first judgment.[6] But petitioners' second fa-

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[5] See *ante*, at 601 (citing *United States* v. *Carolene Products Co.*, 304 U. S. 144, 153 (1938), and *Nashville, C. & St. L. R. Co.* v. *Walters*, 294 U. S. 405, 415 (1935)).

[6] The Court's contaminated-water hypothetical, see *ante*, at 600–601, may involve such a situation. If after their loss in the first suit, the same prisoners continued to drink the water, they would not be barred from

cial challenge is not based on new acts postdating the first suit. Rather, it is based on the same underlying act, the enactment of H. B. 2, which allegedly posed an undue burden.

I come now to the authority on which the Court chiefly relies, Comment *f* to § 24 of the second Restatement. This is how it reads:

> "Material operative facts occurring after the decision of an action with respect to the same subject matter *may* in themselves, or taken in conjunction with the antecedent facts, comprise a transaction which *may* be made the basis of a second action not precluded by the first. See Illustrations 10–12. Where important human values—such as the lawfulness of a continuing personal disability or restraint—are at stake, even a slight change of circumstances *may* afford a sufficient basis for concluding that a second action may be brought." (Emphasis added.)

As the word I have highlighted—"may"—should make clear, this comment does not say that "[m]aterial operative facts occurring after the decision of an action" always or even usually form "the basis of a second action not precluded by the first." Rather, the comment takes the view that this "may" be so. Accord, *ante*, at 599 ("[D]evelopment of new material facts *can* mean that a new case and an otherwise similar previous case do not present the same claim" (emphasis added)). The question, then, is *when* the development of new material facts should lead to this conclusion. And there are strong reasons to conclude this should be a very narrow exception indeed. Otherwise, this statement, relegated to a mere comment, would revolutionize the rules of claim preclu-

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suing to recover for subsequent injuries suffered as a result. But if the Court simply means that the passage of time would allow the prisoners to present better evidence in support of the same claim, the successive suit would be barred for the reasons I have given. In that event, their recourse would be to move for relief from the judgment. See Restatement (Second) of Judgments § 73.

sion—by permitting a party to relitigate a lost claim whenever it obtains better evidence. Comment *f* was surely not meant to upend this fundamental rule.

What the comment undoubtedly means is far more modest—only that in a few, limited circumstances the development of new material facts should (in the opinion of the ALI) permit relitigation. What are these circumstances? Section 24 includes three illustrative examples in the form of hypothetical cases, and none resembles the present case.

In the first hypothetical case, the subsequent suit is based on new events that provide a basis for relief under a different legal theory. Restatement (Second) of Judgments § 24, Illustration 10.

In the second case, a father who lost a prior child custody case brings a second action challenging his wife's fitness as a mother based on "subsequent experience," which I take to mean subsequent conduct by the mother. *Id.*, Illustration 11. This illustration is expressly linked to a determination of a person's "status"—and not even status in general, but a particular status, fitness as a parent, that the law recognizes as changeable. See Reporter's Note, *id.*, § 24, Comment *f* (Illustration 11 "exemplifies the effect of changed circumstances in an action relating to status").

In the final example, the government loses a civil antitrust conspiracy case but then brings a second civil antitrust conspiracy case based on new conspiratorial acts. The illustration does not suggest that the legality of acts predating the end of the first case is actionable in the second case, only that the subsequent acts give rise to a new claim and that proof of earlier acts may be admitted as evidence to explain the significance of the later acts. *Id.*, Illustration 12.

The present claim is not similar to any of these illustrations. It does not involve a claim based on postjudgment acts and a new legal theory. It does not ask us to adjudicate a person's status. And it does not involve a continuing course of conduct to be proved by the State's new acts.

The final illustration actually undermines the Court's holding. The Reporter's Note links this illustration to a Fifth Circuit case, *Exhibitors Poster Exchange, Inc.* v. *National Screen Service Corp.*, 421 F. 2d 1313 (1970). In that case, the court distinguished between truly postjudgment acts and "acts which have been completed [prior to the previous judgment] except for their consequences." *Id.*, at 1318. Only postjudgment acts—and not postjudgment consequences—the Fifth Circuit held, can give rise to a new cause of action. See *ibid.*[7]

Here, the Court does not rely on any new acts performed by the State of Texas after the end of the first case. Instead, the Court relies solely on what it takes to be new consequences, the closing of additional clinics, that are said to have resulted from the enactment of H. B. 2.

D

For these reasons, what the Court has done here is to create an entirely new exception to the rule that a losing plaintiff cannot relitigate a claim just because it now has new and better evidence. As best I can tell, the Court's new rule must be something like this: If a plaintiff initially loses because it failed to provide adequate proof that a challenged law will have an unconstitutional effect and if subsequent

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[7] See also *Sutliffe* v. *Epping School Dist.*, 584 F. 3d 314, 328 (CA1 2009) ("[W]hen a defendant is accused of . . . acts which though occurring over a period of time were substantially of the same sort and similarly motivated, fairness to the defendant as well as the public convenience may require that they be dealt with in the same action, and the events are said to constitute but one transaction" (internal quotation marks omitted)); *Monahan* v. *New York City Dept. of Corrections*, 214 F. 3d 275, 289 (CA2 2000) ("Plaintiffs' assertion of new incidents arising from the application of the challenged policy is also insufficient to bar the application of *res judicata*"); *Huck* v. *Dawson*, 106 F. 3d 45, 49 (CA3 1997) (applying res judicata where "the same facts that resulted in the earlier judgment have caused continued damage").

developments tend to show that the law will in fact have those effects, the plaintiff may relitigate the same claim. Such a rule would be unprecedented, and I am unsure of its wisdom, but I am certain of this: There is no possible justification for such a rule unless the plaintiff, at the time of the first case, could not have reasonably shown what the effects of the law would be. And that is not the situation in this case.

1

The Court does not contend that petitioners, at the time of the first case, could not have gathered and provided evidence that was sufficient to show that the admitting privileges requirement *would cause* a sufficient number of clinic closures. Instead, the Court attempts to argue that petitioners could not have shown at that time that a sufficient number of clinics *had already closed*. As I have explained, that is not what petitioners need to show or what they attempted to prove.

Moreover, the Court is also wrong in its understanding of petitioners' proof in the first case. In support of its holding that the admitting privileges requirement now "places a 'substantial obstacle in the path of a woman's choice,'" the Court relies on two facts: "Eight abortion clinics closed in the months leading up to the requirement's effective date" and "[e]leven more closed on the day the admitting-privileges requirement took effect." *Ante*, at 612. But petitioners put on evidence addressing exactly this issue in their first trial. They apparently surveyed 27 of the 36 abortion clinics they identified in the State, including all 24 of the clinics owned by them or their coplaintiffs, to find out what impact the requirement would have on clinic operations. See Appendix, *infra* (App. K to Emergency Application To Vacate Stay in *Planned Parenthood of Greater Tex. Surgical Health Servs.* v. *Abbott*, O. T. 2013, No. 13A452, Plaintiffs' Trial Exh. 46).

That survey claimed to show that the admitting privileges requirement would cause 15 clinics to close.[8] See *ibid.* The Fifth Circuit had that evidence before it, and did not refuse to consider it.[9] If that evidence was sufficient to show that

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[8] As I explain, *infra*, at 670, and n. 18, some of the closures presumably included in the Court's count of 19 were not attributed to H. B. 2 at the first trial, even by petitioners.

[9] The *Abbott* panel's refusal to consider "developments since the conclusion of the bench trial," 748 F. 3d, at 599, n. 14, was not addressed to the evidence of 15 closures presented at trial. The Court of Appeals in fact credited that evidence by *assuming* "some clinics may be required to shut their doors," but it nevertheless concluded that "there is no showing whatsoever that *any* woman will lack reasonable access to a clinic within Texas." *Id.*, at 598. The *Abbott* decision therefore accepted the factual premise common to these two actions—namely, that the admitting privileges requirement would cause some clinics to close—but it concluded that petitioners had not proved a burden on access regardless. In rejecting *Abbott*'s conclusion, the Court seems to believe that *Abbott* also must have refused to accept the factual premise. See *ante*, at 601–603.

Instead, *Abbott*'s footnote 14 appears to have addressed the following post-trial developments: (1) the permanent closure of the Lubbock clinic, Brief for Plaintiffs-Appellees in *Abbott* (CA5), at 5, n. 3 (accounted for among the 15 anticipated closures, see Appendix, *infra*); (2) the *resumption* of abortion services in Fort Worth, Brief for Plaintiffs-Appellees 5, n. 3; (3) the *acquisition* of admitting privileges by an Austin abortion provider, *id.*, at 6, n. 4; (4) the *acquisition* of privileges by physicians in Dallas and San Antonio, see Letter from J. Crepps to L. Cayce, Clerk of Court in *Abbott* (CA5, Jan. 3, 2014); (5) the *acquisition* of privileges by physicians in El Paso and Killeen, see Letter from J. Crepps to L. Cayce, Clerk of Court in *Abbott* (CA5, Mar. 21, 2014); and (6) the enforcement of the requirement against one Houston provider who lacked privileges, see *ibid.* (citing Texas Medical Board press release). In the five months between the admitting privileges requirement taking effect and the Fifth Circuit's *Abbott* decision, then, the parties had ample time to inform that court of post-trial developments—and petitioners never identified the 15 closures as new (because the closures were already accounted for in their trial evidence). In fact, the *actual* new developments largely favored the State's case: In that time, physicians in Austin, Dallas, El Paso, Fort Worth, Killeen, and San Antonio were able to come into compliance, while only one in Houston was not, and one clinic (already identified at trial as

the admitting privileges rule created an unlawful impediment to abortion access (and the District Court indeed thought it sufficient), then the decision of the Fifth Circuit in the first case was wrong as a matter of law. Petitioners could have asked us to review that decision, but they chose not to do so. A tactical decision of that nature has consequences. While it does not mean that the admitting privileges requirement is immune to a facial challenge, it does mean that these petitioners and the other plaintiffs in the first case cannot mount such a claim.

2

Even if the Court thinks that petitioners' evidence in the first case was insufficient, the Court does not claim that petitioners, with reasonable effort, could not have gathered sufficient evidence to show with some degree of accuracy what the effects of the admitting privileges requirement would be. As I have just explained, in their first trial petitioners introduced a survey of 27 abortion clinics indicating that 15 would close because of the admitting privileges requirement. The Court does not identify what additional evidence petitioners needed but were unable to gather. There is simply no reason why petitioners should be allowed to relitigate their facial claim.

E

So far, I have discussed only the first of the two sentences in Comment *f*, but the Court also relies on the second sentence. I reiterate what that second sentence says:

> "Where important human values—such as the lawfulness of a continuing personal disability or restraint—are at stake, even a slight change of circumstances may afford a sufficient basis for concluding that a second action

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expected to close) closed permanently. So *Abbott*'s decision to ignore post-trial developments quite likely favored petitioners.

> may be brought." Restatement (Second) of Judgments § 24, Comment *f*.

The second Restatement offers no judicial support whatsoever for this suggestion, and thus the comment "must be regarded as a proposal for change rather than a restatement of existing doctrine, since the commentary refers to not a single case, of this or any other United States court." *United States* v. *Stuart*, 489 U. S. 353, 375 (1989) (Scalia, J., concurring in judgment). The sentence also sits in considerable tension with our decisions stating that res judicata must be applied uniformly and without regard to what a court may think is just in a particular case. See, *e. g.*, *Moitie*, 452 U. S., at 401 ("The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case"). Not only did this sentence seemingly come out of nowhere, but it appears that no subsequent court has relied on this sentence as a ground for decision. And while a few decisions have cited the "important human values" language, those cases invariably involve the relitigation of personal status determinations, as discussed in Comment *f*'s Illustration 11. See, *e. g.*, *People ex rel. Leonard HH.* v. *Nixon*, 148 App. Div. 2d 75, 79–80, 543 N. Y. S. 2d 998, 1001 (1989) ("[B]y its very nature, litigation concerning the *status* of a person's mental capacity does not lend itself to strict application of res judicata on a transactional analysis basis").[10]

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[10] See also *In re Marriage of Shaddle*, 317 Ill. App. 3d 428, 430–432, 740 N. E. 2d 525, 528–529 (2000) (child custody); *In re Hope M.*, 1998 ME 170, ¶5, 714 A. 2d 152, 154 (termination of parental rights); *In re Connors*, 255 Ill. App. 3d 781, 784–785, 627 N. E. 2d 1171, 1173–1174 (1994) (civil commitment); *Kent V.* v. *State*, 233 P. 3d 597, 601, and n. 12 (Alaska 2010) (applying Comment *f* to termination of parental rights); *In re Juvenile Appeal (83–DE)*, 190 Conn. 310, 318–319, 460 A. 2d 1277, 1282 (1983) (same); *In re Strozzi*, 112 N. M. 270, 274, 814 P. 2d 138, 142 (App. 1991) (guardianship and conservatorship); *Andrulonis* v. *Andrulonis*, 193 Md. App. 601, 617, 998 A. 2d 898, 908 (2010) (modification of alimony); *In re Marriage of Pedersen*, 237 Ill. App. 3d 952, 957, 605 N. E. 2d 629, 633

* * *

In sum, the Court's holding that petitioners' second facial challenge to the admitting privileges requirement is not barred by claim preclusion is not supported by any of our cases or any body of lower court precedent; is contrary to the bedrock rule that a party cannot relitigate a claim simply because the party has obtained new and better evidence; is contrary to the first Restatement of Judgments and the actual rules of the second Restatement of Judgment; and is purportedly based largely on a single comment in the second Restatement, but does not even represent a sensible reading of that comment. In a regular case, an attempt by petitioners to relitigate their previously unsuccessful facial challenge to the admitting privileges requirement would have been rejected out of hand—indeed, might have resulted in the imposition of sanctions under Federal Rule of Civil Procedure 11. No court would even think of reviving such a claim on its own. But in this abortion case, ordinary rules of law—and fairness—are suspended.

II

A

I now turn to the application of principles of claim preclusion to a claim that petitioners did include in their second complaint, namely, their facial challenge to the requirement in H. B. 2 that abortion clinics comply with the rules that govern ambulatory surgical centers (ASCs). As we have said many times, the doctrine of claim preclusion not only bars the relitigation of previously litigated claims; it can also bar claims that are closely related to the claims unsuccessfully litigated in a prior case. See *Moitie*, *supra*, at 398; *Montana*, 440 U. S., at 153.

As just discussed, the Court's holding on the admitting privileges issue is based largely on a comment to § 24 of the

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(1992) (same); *Friederwitzer* v. *Friederwitzer*, 55 N. Y. 2d 89, 94–95, 432 N. E. 2d 765, 768 (1982) (child custody).

second Restatement, and therefore one might think that consistency would dictate an examination of what § 24 has to say on the question whether the ASC challenge should be barred. But consistency is not the Court's watchword here.

Section 24 sets out the general rule regarding the "'[s]plitting'" of claims. This is the rule that determines when the barring of a claim that was previously litigated unsuccessfully also extinguishes a claim that the plaintiff could have but did not bring in the first case. Section 24(1) states that the new claim is barred if it is "any part of the transaction, or series of connected transactions, out of which the action arose."

Here, it is evident that petitioners' challenges to the admitting privileges requirement and the ASC requirement are part of the same transaction or series of connected transactions. If, as I believe, the "transaction" is the enactment of H. B. 2, then the two facial claims are part of the very same transaction. And the same is true even if the likely or actual effects of the two provisions constitute the relevant transactions. Petitioners argue that the admitting privileges requirement and the ASC requirements *combined* have the effect of unconstitutionally restricting access to abortions. Their brief repeatedly refers to the collective effect of the "requirements." Brief for Petitioners 40, 41, 42, 43, 44. They describe the admitting privileges and ASC requirements as delivering a "one-two punch." *Id.*, at 40. They make no effort whatsoever to separate the effects of the two provisions.

B

The Court nevertheless holds that there are two "meaningful differences" that justify a departure from the general rule against splitting claims. *Ante*, at 604. Neither has merit.

1

First, pointing to a statement in a pocket part to a treatise, the Court says that "courts normally treat challenges to dis-

tinct regulatory requirements as 'separate claims,' even when they are part of one overarching '[g]overnment regulatory schem[e].'" *Ante*, at 604–605 (quoting 18 Wright & Miller § 4408, at 54 (Supp. 2016)). As support for this statement, the treatise cites one case, *Hamilton's Bogarts, Inc.* v. *Michigan*, 501 F. 3d 644, 650 (CA6 2007). Even if these authorities supported the rule invoked by the Court (and the Court points to no other authorities), they would hardly be sufficient to show that "courts normally" proceed in accordance with the Court's rule. But in fact neither the treatise nor the Sixth Circuit decision actually supports the Court's rule.

What the treatise says is the following:

> "Government *regulatory schemes* provide regular examples of circumstances in which regulation of a single business by many different provisions *should lead* to recognition of separate claims when the business challenges different regulations." 18 Wright & Miller § 4408, at 54 (emphasis added).

Thus, the treatise expresses a view about what the law "should" be; it does not purport to state what courts "normally" do. And the recommendation of the treatise authors concerns different provisions of a "regulatory scheme," which often embodies an accumulation of legislative enactments. Petitioners challenge two provisions of one law, not just two provisions of a regulatory scheme.

The Sixth Circuit decision is even further afield. In that case, the plaintiff had previously lost a case challenging one rule of a state liquor control commission. 501 F. 3d, at 649–650. On the question whether the final judgment in that case barred a subsequent claim attacking another rule, the court held that the latter claim was "likely" not barred because, "although [the first rule] was challenged in the first lawsuit, [the other rule] was not," and "[t]he state has not argued or made any showing that [the party] should also have challenged [the other rule] at the time." *Id.*, at 650.

To say that these authorities provide meager support for the Court's reasoning would be an exaggeration.

Beyond these paltry authorities, the Court adds only the argument that we should not "encourage a kitchen-sink approach to any litigation challenging the validity of statutes." *Ante*, at 605. I agree—but that is not the situation in this case. The two claims here are very closely related. They are two parts of the same bill. They both impose new requirements on abortion clinics. They are justified by the State on the same ground, protection of the safety of women seeking abortions. They are both challenged as imposing the same kind of burden (impaired access to clinics) on the same kind of right (the right to abortion, as announced in *Roe* v. *Wade*, 410 U. S. 113 (1973), and *Casey*, 505 U. S. 833). And petitioners attack the two provisions as a package. According to petitioners, the two provisions were both enacted for the same illegitimate purpose—to close down Texas abortion clinics. See Brief for Petitioners 35–36. And as noted, petitioners rely on the combined effect of the two requirements. Petitioners have made little effort to identify the clinics that closed as a result of each requirement but instead aggregate the two requirements' effects.

For these reasons, the two challenges "form a convenient trial unit." Restatement (Second) of Judgments § 24(2). In fact, for a trial court to accurately identify the effect of each provision it would also need to identify the effect of the other provision. Cf. *infra*, at 671–672.

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Second, the Court claims that, at the time when petitioners filed their complaint in the first case, they could not have known whether future rules implementing the surgical center requirement would provide an exemption for existing abortion clinics. *Ante*, at 605. This argument is deeply flawed.

"Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 143 (1974). And here, there was never any real chance that the Texas Department of State Health Services would exempt existing abortion clinics from all the ASC requirements. As the Court of Appeals wrote, "it is abundantly clear from H. B. 2 that all abortion facilities must meet the standards already promulgated for ASCs." *Whole Woman's Health* v. *Cole*, 790 F. 3d 563, 583 (2015) (*per curiam*) (case below). See Tex. Health & Safety Code Ann. §245.010(a) (West Cum. Supp. 2015) (Rules implementing H. B. 2 "must contain minimum standards . . . for an abortion facility [that are] equivalent to the minimum standards . . . for ambulatory surgical centers"). There is no apparent basis for the argument that H. B. 2 permitted the state health department to grant blanket exemptions.

Whether there was any real likelihood that clinics would be exempted from *particular* ASC requirements is irrelevant because both petitioners and the Court view the ASC requirements as an indivisible whole. Petitioners told the Fifth Circuit in unequivocal terms that they were "challeng-[ing] H. B. 2 broadly, with no effort whatsoever to parse out specific aspects of the ASC requirement that they f[ou]nd onerous or otherwise infirm." 790 F. 3d, at 582. Similarly, the majority views all the ASC provisions as an indivisible whole. See *ante*, at 626 ("The statute was meant to require abortion facilities to meet the integrated surgical-center standards—not some subset thereof"). On this view, petitioners had no reason to wait to see whether the Department of State Health Services might exempt them from some of the ASC rules. Even if exemptions from some of the ASC rules had been granted, petitioners and the majority would still maintain that the provision of H. B. 2 making the ASC

rules applicable to abortion facilities is facially unconstitutional. Thus, exemption from some of the ASC requirements would be entirely inconsequential. The Court has no response to this point. See *ante*, at 605.

For these reasons, petitioners' facial attack on the ASC requirements, like their facial attack on the admitting privileges rule, is precluded.

III

Even if res judicata did not bar either facial claim, a sweeping, statewide injunction against the enforcement of the admitting privileges and ASC requirements would still be unjustified. Petitioners in this case are abortion clinics and physicians who perform abortions. If they were simply asserting a constitutional right to conduct a business or to practice a profession without unnecessary state regulation, they would have little chance of success. See, *e. g.*, *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U. S. 483 (1955). Under our abortion cases, however, they are permitted to rely on the right of the abortion patients they serve. See *Doe* v. *Bolton*, 410 U. S. 179, 188 (1973); but see *ante*, at 629–633 (THOMAS, J., dissenting).

Thus, what matters for present purposes is not the effect of the H. B. 2 provisions on petitioners but the effect on their patients. Under our cases, petitioners must show that the admitting privileges and ASC requirements impose an "undue burden" on women seeking abortions. *Gonzales* v. *Carhart*, 550 U. S. 124, 146 (2007). And in order to obtain the sweeping relief they seek—facial invalidation of those provisions—they must show, at a minimum, that these provisions have an unconstitutional impact on at least a "large fraction" of Texas women of reproductive age.[11] *Id.*, at 167–

[11] The proper standard for facial challenges is unsettled in the abortion context. See *Gonzales*, 550 U. S., at 167–168 (comparing *Ohio* v. *Akron Center for Reproductive Health*, 497 U. S. 502, 514 (1990) ("[B]ecause appellees are making a facial challenge to a statute, they must show that no set of circumstances exists under which the Act would be valid" (internal

168. Such a situation could result if the clinics able to comply with the new requirements either lacked the requisite overall capacity or were located too far away to serve a "large fraction" of the women in question.

Petitioners did not make that showing. Instead of offering direct evidence, they relied on two crude inferences. First, they pointed to the number of abortion clinics that closed after the enactment of H. B. 2, and asked that it be inferred that all these closures resulted from the two challenged provisions. See Brief for Petitioners 23–24. They made little effort to show why particular clinics closed. Second, they pointed to the number of abortions performed annually at ASCs before H. B. 2 took effect and, because this figure is well below the total number of abortions performed each year in the State, they asked that it be inferred that ASC-compliant clinics could not meet the demands of women in the State. See App. 237–238. Petitioners failed to provide any evidence of the actual capacity of the facilities that would be available to perform abortions in compliance with the new law—even though they provided this type of evi-

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quotation marks omitted)), with *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 895 (1992) (opinion of the Court) (indicating a spousal-notification statute would impose an undue burden "in a large fraction of the cases in which [it] is relevant" and holding the statutory provision facially invalid)). Like the Court in *Gonzales*, *supra*, at 167–168, I do not decide the question, and use the more plaintiff-friendly "large fraction" formulation only because petitioners cannot meet even that test.

The Court, by contrast, applies the "large fraction" standard without even acknowledging the open question. *Ante*, at 626. In a similar vein, it holds that the fraction's "relevant denominator is 'those [women] for whom [the provision] is an actual rather than an irrelevant restriction.'" *Ibid.* (quoting *Casey*, *supra*, at 895). I must confess that I do not understand this holding. The purpose of the large-fraction analysis, presumably, is to compare the number of women *actually* burdened with the number *potentially* burdened. Under the Court's holding, we are supposed to use the same figure (women actually burdened) as both the numerator and the denominator. By my math, that fraction is always "1," which is pretty large as fractions go.

dence in their first case to the District Court at trial and then to this Court in their application for interim injunctive relief. Appendix, *infra*.

A

I do not dispute the fact that H. B. 2 caused the closure of some clinics. Indeed, it seems clear that H. B. 2 was intended to force unsafe facilities to shut down. The law was one of many enacted by States in the wake of the Kermit Gosnell scandal, in which a physician who ran an abortion clinic in Philadelphia was convicted for the first-degree murder of three infants who were born alive and for the manslaughter of a patient. Gosnell had not been actively supervised by state or local authorities or by his peers, and the Philadelphia grand jury that investigated the case recommended that the Commonwealth adopt a law requiring abortion clinics to comply with the same regulations as ASCs.[12] If Pennsylvania had had such a requirement in force, the Gosnell facility may have been shut down before his crimes. And if there were any similarly unsafe facilities in Texas, H. B. 2 was clearly intended to put them out of business.[13]

While there can be no doubt that H. B. 2 caused some clinics to cease operation, the absence of proof regarding the reasons for particular closures is a problem because some

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[12] Report of Grand Jury in No. 0009901–2008 (1st Jud. Dist. Pa., Jan. 14, 2011), pp. 248–249, online at http://www.phila.gov/districtattorney/pdfs/grandjurywomensmedical.pdf (all Internet materials as last visited June 24, 2016).

[13] See House Research Organization Bill Analysis HB2, Laubenberg et al., p. 10 (July 9, 2013), online at http://www.hro.house.state.tx.us/pdf/ba832/hb0002.pdf ("Higher standards could prevent the occurrence of a situation in Texas like the one recently exposed in Philadelphia, in which Dr. Kermit Gosnell was convicted of murder after killing babies who were born alive. A patient also died at that substandard clinic"). The Court attempts to distinguish the Gosnell horror story by pointing to differences between Pennsylvania and Texas law. See *ante*, at 615. But Texas did not need to be in Pennsylvania's precise position for the legislature to rationally conclude that a similar law would be helpful.

clinics have or may have closed for at least four reasons other than the two H. B. 2 requirements at issue here. These are:

1. *H. B. 2's restriction on medication abortion.* In their first case, petitioners challenged the provision of H. B. 2 that regulates medication abortion, but that part of the statute was upheld by the Fifth Circuit and not relitigated in this case. The record in this case indicates that in the first six months after this restriction took effect, the number of medication abortions dropped by 6,957 (compared to the same period the previous year). App. 236.

2. *Withdrawal of Texas family planning funds.* In 2011, Texas passed a law preventing family planning grants to providers that perform abortions and their affiliates. In the first case, petitioners' expert admitted that some clinics closed "as a result of the defunding,"[14] and as discussed below, this withdrawal appears specifically to have caused multiple clinic closures in West Texas. See *infra*, at 670–671, and n. 18.

3. *The nationwide decline in abortion demand.* Petitioners' expert testimony relies[15] on a study from the Guttmacher Institute which concludes that "'[t]he national abortion rate has resumed its decline, and *no evidence was found that the overall drop in abortion incidence was related to the decrease in providers or to restrictions implemented between 2008 and 2011*.'" App. 1117–1118 (direct testimony of Dr. Peter Uhlenberg) (quoting R. Jones & J. Jerman, Abortion Incidence and Service Availability in the United States, 2011, 46 Perspectives on Sexual and Reproductive Health 3 (2014); emphasis in testimony). Consistent with that trend, "[t]he number of abortions to residents of Texas

[14] Rebuttal Decl. of Dr. Joseph E. Potter, Doc. 76–2, p. 12, ¶32, in *Abbott* (WD Tex., Oct. 18, 2013) (Potter Rebuttal Decl.).

[15] See App. 234, 237, 253.

declined by 4,956 between 2010 and 2011 and by 3,905 between 2011 and 2012." App. 1118.

4. *Physician retirement (or other localized factors).* Like everyone else, most physicians eventually retire, and the retirement of a physician who performs abortions can cause the closing of a clinic or a reduction in the number of abortions that a clinic can perform. When this happens, the closure of the clinic or the reduction in capacity cannot be attributed to H. B. 2 unless it is shown that the retirement was caused by the admitting privileges or surgical center requirements as opposed to age or some other factor.

At least nine Texas clinics may have ceased performing abortions (or reduced capacity) for one or more of the reasons having nothing to do with the provisions challenged here. For example, in their first case, petitioners alleged that the medication-abortion restriction would cause at least three medication-only abortion clinics to cease performing abortions,[16] and they predicted that "[o]ther facilities that offer both surgical and medication abortion will be unable to offer medication abortion,"[17] presumably reducing their capacity. It also appears that several clinics (including most of the clinics operating in West Texas, apart from El Paso) closed in response to the unrelated law restricting the provision of family planning funds.[18] And there is reason to question

[16] Complaint and Application for Preliminary and Permanent Injunction in *Abbott* (WD Tex.), ¶¶10, 11 (listing one clinic in Stafford and two in San Antonio).

[17] *Id.*, ¶88.

[18] In the first case, petitioners apparently did not even believe that the abortion clinics in Abilene, Bryan, Midland, and San Angelo were made to close because of H. B. 2. In that case, petitioners submitted a list of 15 clinics they believed would close (or have severely limited capacity) because of the admitting privileges requirement—and those four West Texas clinics are *not* on the list. See Appendix, *infra*. And at trial, a Planned Parenthood executive specifically testified that the Midland clinic closed because of the funding cuts and because the clinic's medical director re-

whether at least two closures (one in Corpus Christi and one in Houston) may have been prompted by physician retirements.[19]

Neither petitioners nor the District Court properly addressed these complexities in assessing causation—and for no good reason. The total number of abortion clinics in the State was not large. Petitioners could have put on evidence (as they did for 27 individual clinics in their first case, see Appendix, *infra*) about the challenged provisions' role in causing the closure of each clinic,[20] and the court could have made a factual finding as to the cause of each closure.

Precise findings are important because the key issue here is not the number or percentage of clinics affected, but the effect of the closures on women seeking abortions, *i. e.*, on the capacity and geographic distribution of clinics used by those women. To the extent that clinics closed (or experienced a reduction in capacity) for any reason unrelated to the challenged provisions of H. B. 2, the corresponding burden on abortion access may not be factored into the access analysis.

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tired. See 1 Tr. 91, 93, in *Abbott* (WD Tex., Oct. 21, 2013). Petitioners' list and Planned Parenthood's testimony both fit with petitioners' expert's admission in the first case that some clinics closed "as a result of the defunding." Potter Rebuttal Decl. ¶32.

[19] See Stoelje, Abortion Clinic Closes in Corpus Christi, San Antonio Express-News (June 10, 2014), online at http://www.mysanantonio.com/news/local/article/Abortion-clinic-closes-in-Corpus-Christi-5543125.php (provider "retiring for medical reasons"); 1 Plaintiffs' Exh. 18, p. 2, in *Whole Woman's Health* v. *Lakey*, No. 1:14–cv–284 (WD Tex., admitted into evidence Aug. 4, 2014) (e-mail stating Houston clinic owner "is retiring his practice"). Petitioners should have been required to put on proof about the reason for the closure of particular clinics. I cite the extrarecord Corpus Christi story only to highlight the need for such proof.

[20] This kind of evidence was readily available; in fact, petitioners deposed at least one nonparty clinic owner about the burden posed by H. B. 2. See App. 1474 (filed under seal). And recall that in their first case, petitioners put on evidence purporting to show how the admitting privileges requirement would (or would not) affect 27 clinics. See Appendix, *infra* (petitioners' chart of clinics).

Because there was ample reason to believe that some closures were caused by these other factors, the District Court's failure to ascertain the reasons for clinic closures means that, on the record before us, there is no way to tell which closures actually count. Petitioners—who, as plaintiffs, bore the burden of proof—cannot simply point to temporal correlation and call it causation.

B

Even if the District Court had properly filtered out immaterial closures, its analysis would have been incomplete for a second reason. Petitioners offered scant evidence on the capacity of the clinics that are able to comply with the admitting privileges and ASC requirements, or on those clinics' geographic distribution. Reviewing the evidence in the record, it is far from clear that there has been a material impact on access to abortion.

On clinic capacity, the Court relies on petitioners' expert Dr. Grossman, who compared the number of abortions performed at Texas ASCs before the enactment of H. B. 2 (about 14,000 per year) with the total number of abortions per year in the State (between 60,000–70,000 per year). *Ante*, at 620–621.[21] Applying what the Court terms "common sense,"

[21] In the first case, petitioners submitted a report that Dr. Grossman coauthored with their testifying expert, Dr. Potter. 1 Tr. 38 in No. 1:14–cv–284 (Aug. 4, 2014) (*Lakey* Tr.). That report predicted that "the shortfall in capacity due to the admitting privileges requirement will prevent at least 22,286 women" from accessing abortion. Decl. of Dr. Joseph E. Potter, Doc. 9–8, p. 4, in *Abbott* (WD Tex., Oct. 1, 2013). The methodology used was questionable. See Potter Rebuttal Decl. ¶18. As Dr. Potter admitted: "There's no science there. It's just evidence." 2 Tr. 23 in *Abbott* (WD Tex., Oct. 22, 2013). And in this case, in fact, Dr. Grossman admitted that their prediction turned out to be wildly inaccurate. Specifically, he provided a new figure (approximately 9,200) that was less than half of his earlier prediction. 1 *Lakey* Tr. 41. And he then admitted that he had not proven any causal link between the admitting privileges requirement and that smaller decline. *Id.*, at 54 (quoting Grossman et al.,

the Court infers that the ASCs that performed abortions at the time of H. B. 2's enactment lacked the capacity to perform all the abortions sought by women in Texas.

The Court's inference has obvious limitations. First, it is not unassailable "common sense" to hold that current utilization equals capacity; if all we know about a grocery store is that it currently serves 200 customers per week, *ante*, at 621, that fact alone does not tell us whether it is an overcrowded minimart or a practically empty supermarket. Faced with increased demand, ASCs could potentially increase the number of abortions performed without prohibitively expensive changes. Among other things, they might hire more physicians who perform abortions,[22] utilize their facilities more intensively or efficiently, or shift the mix of services provided. Second, what matters for present purposes is not the capacity of just those ASCs that performed

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Change in Abortion Services After Implementation of a Restrictive Law in Texas, 90 Contraception 496, 500 (2014)).

Dr. Grossman's testimony in this case, furthermore, suggested that H. B. 2's restriction on medication abortion (whose impact on clinics cannot be attributed to the provisions challenged in this case) was a major cause in the decline in the abortion rate. After the medication-abortion restriction and admitting privileges requirement took effect, over the next six months the number of medication-abortions dropped by 6,957 compared to the same period in the previous year. See App. 236. The corresponding number of surgical abortions rose by 2,343. See *ibid.* If that net decline of 4,614 in six months is doubled to approximate the annual trend (which is apparently the methodology Dr. Grossman used to arrive at his 9,200 figure, see 90 Contraception, at 500), then the year's drop of 9,228 abortions seems to be *entirely* the product of the medication-abortion restriction. Taken together, these figures make it difficult to conclude that the admitting privileges requirement actually depressed the abortion rate *at all*.

In light of all this, it is unclear why the Court takes Dr. Grossman's testimony at face value.

[22] The Court asserts that the admitting privileges requirement is a bottleneck on capacity, *ante*, at 621, but it musters no evidence and does not even dispute petitioners' own evidence that the admitting privileges requirement may have had *zero* impact on the Texas abortion rate, n. 21, *supra*.

abortions prior to the enactment of H. B. 2 but the capacity of those that would be available to perform abortions after the statute took effect. And since the enactment of H. B. 2, the number of ASCs performing abortions has increased by 50%—from six in 2012 to nine today.[23]

The most serious problem with the Court's reasoning is that its conclusion is belied by petitioners' own submissions to this Court. In the first case, when petitioners asked this Court to vacate the Fifth Circuit's stay of the District Court's injunction of the admitting privileges requirement pending appeal, they submitted a chart previously provided in the District Court that detailed the capacity of abortion clinics after the admitting privileges requirement was to take effect.[24] This chart is included as an Appendix to this opinion.[25] Three of the facilities listed on

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[23] See Brief for Petitioners 23–24 (six centers in 2012, compared with nine today). Two of the three new surgical centers opened since this case was filed are operated by Planned Parenthood (which now owns five of the nine surgical centers in the State). See App. 182–183, 1436. Planned Parenthood is obviously able to comply with the challenged H. B. 2 requirements. The president of petitioner Whole Woman's Health, a much smaller entity, has complained that Planned Parenthood " 'put[s] local independent businesses in a tough situation.' " Simon, Planned Parenthood Hits Suburbia, Wall Street Journal Online (June 23, 2008), online at https://www.wsj.com/articles/SB121417762585295459 (cited in Brief for CitizenLink et al. as *Amici Curiae* 15–16, and n. 23). But as noted, petitioners in this case are not asserting their own rights but those of women who wish to obtain an abortion, see *supra*, at 666, and thus the effect of the H. B. 2 requirements on petitioners' business and professional interests are not relevant.

[24] See Appendix, *infra*. The Court apparently brushes off this evidence as "outside the record," *ante*, at 622, but it was filed with this Court by the same petitioners in litigation closely related to this case. And "we may properly take judicial notice of the record in that litigation between the same parties who are now before us." *Shuttlesworth* v. *Birmingham*, 394 U. S. 147, 157 (1969); see also, *e. g.*, *United States* v. *Pink*, 315 U. S. 203, 216 (1942); *Freshman* v. *Atkins*, 269 U. S. 121, 124 (1925).

[25] The chart lists the 36 abortion clinics apparently open at the time of trial and identifies the "Capacity after Privileges Requirement" for 27 of those clinics. Of those 27 clinics, 24 were owned by plaintiffs in the first

the chart were ASCs, and their capacity was shown as follows:

- Southwestern Women's Surgery Center in Dallas was said to have the capacity for 5,720 abortions a year (110 per week);
- Planned Parenthood Surgical Health Services Center in Dallas was said to have the capacity for 6,240 abortions a year (120 per week); and
- Planned Parenthood Center for Choice in Houston was said to have the capacity for 9,100 abortions a year (175 per week).[26] See Appendix, *infra*.

The average capacity of these three ASCs was 7,020 abortions per year.[27] If the nine ASCs now performing abor-

case and 3 (Coastal Birth Control Center, Hill Top Women's Reproductive Health Services, and Harlingen Reproductive Services) were owned by nonparties. It is unclear why petitioners' chart did not include capacity figures for the other nine clinics (also owned by nonparties). Under Federal Rule of Civil Procedure 30(b)(6), petitioners should have been able to depose representatives of those clinics to determine those clinics' capacity and their physicians' access to admitting privileges. In the present case, petitioners in fact deposed at least one such nonparty clinic owner, whose testimony revealed that he was able to comply with the admitting privileges requirement. See App. 1474 (El Paso abortion clinic owner confirming that he possesses admitting privileges "at every hospital in El Paso" (filed under seal)). The chart states that 14 of those clinics would not be able to perform abortions if the requirement took effect, and that another clinic would have "severely limited" capacity. See Appendix, *infra*.

[26] The Court nakedly asserts that this clinic "does not represent most facilities." *Ante*, at 623. Given that in this case petitioners did not introduce evidence on "most facilities," I have no idea how the Court arrives at this conclusion.

[27] The Court chides me, *ibid.*, for omitting the Whole Woman's Health ASC in San Antonio from this average. As of the *Abbott* trial in 2013, that ASC's capacity was (allegedly) to be "severely limited" by the admitting privileges requirement. See Appendix, *infra* (listing "Capacity after Privileges Requirement"). But that facility came into compliance with that requirement a few months later, see Letter from J. Crepps to L. Cayce, Clerk of Court in *Abbott* (CA5, Jan. 3, 2014), so its precompliance capacity is irrelevant here.

tions in Texas have the same average capacity, they have a total capacity of 63,180. Add in the assumed capacity for two other clinics that are operating pursuant to the judgment of the Fifth Circuit (over 3,100 abortions per year),[28] and the total for the State is 66,280 abortions per year. That is comparable to the 68,298 total abortions performed in Texas in 2012, the year before H. B. 2 was enacted, App. 236,[29] and well in excess of the abortion rate one would expect—59,070—if subtracting the apparent impact of the medication-abortion restriction, see n. 21, *supra*.

To be clear, I do not vouch for the accuracy of this calculation. It might be too high or too low. The important point is that petitioners put on evidence of actual clinic capacity in their earlier case, and there is no apparent reason why they could not have done the same here. Indeed, the Court asserts that, after the admitting privileges requirement took effect, clinics "were not able to accommodate increased demand," *ante*, at 623, but petitioners' own evidence suggested that the requirement had *no* effect on capacity, see n. 21, *supra*. On this point, like the question of the reason for

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[28] Petitioner Whole Woman's Health performed over 14,000 abortions over 10 years in McAllen. App. 128. Petitioner Nova Health Systems performed over 17,000 abortions over 10 years in El Paso. *Id.*, at 129. (And as I explain at n. 33, *infra*, either Nova Health Systems or another abortion provider will be open in the El Paso area however this case is decided.)

[29] This conclusion is consistent with public health statistics offered by petitioners. These statistics suggest that ASCs have a much higher capacity than other abortion facilities. In 2012, there were 14,361 abortions performed by six surgical centers, meaning there were 2,394 abortions per center. See Brief for Petitioners 23; App. 236. In 2012, there were approximately 35 other abortion clinics operating in Texas, see *id.*, at 228 (41 total clinics as of Nov. 1, 2012), which performed 53,937 abortions, *id.*, at 236 (68,298 total minus 14,361 performed in surgical centers). On average, those other clinics each performed $53{,}937 \div 35 = 1{,}541$ abortions per year. So surgical centers in 2012 performed 55% more abortions per facility (2,394 abortions) than the average (1,541) for other clinics.

clinic closures, petitioners did not discharge their burden, and the District Court did not engage in the type of analysis that should have been conducted before enjoining an important state law.

So much for capacity. The other[30] potential obstacle to abortion access is the distribution of facilities throughout the State. This might occur if the two challenged H. B. 2 requirements, by causing the closure of clinics in some rural areas, led to a situation in which a "large fraction"[31] of women of reproductive age live too far away from any open clinic. Based on the Court's holding in *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, it appears that the need to travel up to 150 miles is not an undue burden,[32] and the evidence in this case shows that if the only clinics in the State were those that would have remained open if the judgment of the Fifth Circuit had not been enjoined, roughly 95% of the women of reproductive age in the State would live within 150 miles of an open facility (or lived outside that range before H. B. 2).[33] Because the record does not show

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[30] The Court also gives weight to supposed reductions in "individualized attention, serious conversation, and emotional support" in its undue-burden analysis. *Ante*, at 623. But those "facts" are not in the record, so I have no way of addressing them.

[31] See n. 11, *supra*.

[32] The District Court in *Casey* found that 42% of Pennsylvania women "must travel for at least one hour, and sometimes longer than three hours, to obtain an abortion from the *nearest* provider." 744 F. Supp. 1323, 1352 (ED Pa. 1990), aff'd in part, rev'd in part, 947 F. 2d 682 (CA3 1991), aff'd in part, rev'd in part, 505 U. S. 833 (1992). In that case, this Court recognized that the challenged 24-hour waiting period would require some women to make that trip twice, and yet upheld the law regardless. See *id.*, at 886–887 (joint opinion of O'Connor, KENNEDY, and Souter, JJ.).

[33] Petitioners' expert testified that 82.5% of Texas women of reproductive age live within 150 miles of a Texas surgical center that provides abortions. See App. 242 (930,000 women living more than 150 miles away), 244 (5,326,162 women total). The State's expert further testified, without contradiction, that an additional 6.2% live within 150 miles of the McAllen facility, and another 3.3% within 150 miles of an El Paso-area

why particular facilities closed, the real figure may be even higher than 95%.

We should decline to hold that these statistics justify the facial invalidation of the H. B. 2 requirements. The possibility that the admitting privileges requirement *might* have caused a closure in Lubbock is no reason to issue a facial injunction exempting Houston clinics from that requirement. I do not dismiss the situation of those women who would no longer live within 150 miles of a clinic as a result of H. B. 2. But under current doctrine such localized problems can be addressed by narrow as-applied challenges.

IV

Even if the Court were right to hold that res judicata does not bar this suit and that H. B. 2 imposes an undue burden on abortion access—it is, in fact, wrong on both counts—it is still wrong to conclude that the admitting privileges and surgical center provisions must be enjoined in their entirety.

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facility. *Id.*, at 921–922. (If the Court did not award statewide relief, I assume it would instead either conclude that the availability of abortion on the New Mexico side of the El Paso metropolitan area satisfies the Constitution, or it would award as-applied relief allowing petitioner Nova Health Systems to remain open in El Paso. Either way, the 3.3% figure would remain the same, because Nova's clinic and the New Mexico facility are so close to each other. See *id.*, at 913, 916, 921 (only six women of reproductive age live within 150 miles of Nova's clinic but not New Mexico clinic).) Together, these percentages add up to 92% of Texas women of reproductive age.

Separately, the State's expert also testified that 2.9% of women of reproductive age lived more than 150 miles from an abortion clinic before H. B. 2 took effect. *Id.*, at 916.

So, at most, H. B. 2 affects no more than (100% – 2.9%) – 92% = 5.1% of women of reproductive age. Also recall that many rural clinic closures appear to have been caused by other developments—indeed, petitioners seemed to believe that themselves—and have certainly not been shown to be caused by the provisions challenged here. See *supra*, at 670–671, and n. 18. So the true impact is almost certainly smaller than 5.1%.

H. B. 2 has an extraordinarily broad severability clause that must be considered before enjoining any portion or application of the law. Both challenged provisions should survive in substantial part if the Court faithfully applies that clause. Regrettably, it enjoins both in full, heedless of the (controlling) intent of the state legislature. Cf. *Leavitt* v. *Jane L.*, 518 U. S. 137, 139 (1996) (*per curiam*) ("Severability is of course a matter of state law").

A

Applying H. B. 2's severability clause to the admitting privileges requirement is easy. Simply put, the requirement must be upheld in every city in which its application does not pose an undue burden. It surely does not pose that burden anywhere in the eastern half of the State, where most Texans live and where virtually no woman of reproductive age lives more than 150 miles from an open clinic. See App. 242, 244 (petitioners' expert testimony that 82.5% of Texas women of reproductive age live within 150 miles of open clinics in Austin, Dallas, Fort Worth, Houston, and San Antonio). (Unfortunately, the Court does not address the State's argument to this effect. See Brief for Respondents 51.) And petitioners would need to show that the requirement caused specific West Texas clinics to close (but see *supra*, at 670–671, and n. 18) before they could be entitled to an injunction tailored to address those closures.

B

Applying severability to the surgical center requirement calls for the identification of the particular provisions of the ASC regulations that result in the imposition of an undue burden. These regulations are lengthy and detailed, and while compliance with some might be expensive, compliance with many others would not. And many serve important health and safety purposes. Thus, the surgical center re-

quirements cannot be judged as a package. But the District Court nevertheless held that all the surgical center requirements are unconstitutional in all cases, and the Court sustains this holding on grounds that are hard to take seriously.

When the Texas Legislature passed H. B. 2, it left no doubt about its intent on the question of severability. It included a provision mandating the greatest degree of severability possible. The full provision is reproduced below,[34]

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[34] The severability provision states:

"(a) If some or all of the provisions of this Act are ever temporarily or permanently restrained or enjoined by judicial order, all other provisions of Texas law regulating or restricting abortion shall be enforced as though the restrained or enjoined provisions had not been adopted; provided, however, that whenever the temporary or permanent restraining order or injunction is stayed or dissolved, or otherwise ceases to have effect, the provisions shall have full force and effect.

"(b) Mindful of Leavitt v. Jane L., 518 U. S. 137 (1996), in which in the context of determining the severability of a state statute regulating abortion the United States Supreme Court held that an explicit statement of legislative intent is controlling, it is the intent of the legislature that every provision, section, subsection, sentence, clause, phrase, or word in this Act, and every application of the provisions in this Act, are severable from each other. If any application of any provision in this Act to any person, group of persons, or circumstances is found by a court to be invalid, the remaining applications of that provision to all other persons and circumstances shall be severed and may not be affected. All constitutionally valid applications of this Act shall be severed from any applications that a court finds to be invalid, leaving the valid applications in force, because it is the legislature's intent and priority that the valid applications be allowed to stand alone. Even if a reviewing court finds a provision of this Act to impose an undue burden in a large or substantial fraction of relevant cases, the applications that do not present an undue burden shall be severed from the remaining provisions and shall remain in force, and shall be treated as if the legislature had enacted a statute limited to the persons, group of persons, or circumstances for which the statute's application does not present an undue burden. The legislature further declares that it would have passed this Act, and each provision, section, subsection, sentence, clause, phrase, or word, and all constitutional applications of this Act, irrespective of the fact that any provision, section, subsection, sentence, clause, phrase,

but it is enough to note that under this provision "every provision, section, subsection, sentence, clause, phrase, or word in this Act, and every application of the provisions in this Act, are severable from each other." H. B. 2, § 10(b), App. to Pet. for Cert. 200a. And to drive home the point about the severability of applications of the law, the provision adds:

> "If any application of any provision in this Act to any person, group of persons, or circumstances is found by a court to be invalid, the remaining applications of that provision to all other persons and circumstances shall be severed and may not be affected. All constitutionally valid applications of this Act shall be severed from any applications that a court finds to be invalid, leaving the valid applications in force, because it is the legislature's intent and priority that the valid applications be allowed to stand alone." *Ibid.*

This provision indisputably requires that all surgical center regulations that are not themselves unconstitutional be left standing. Requiring an abortion facility to comply with any provision of the regulations applicable to surgical centers is an "application of the provision" of H. B. 2 that requires abortion clinics to meet surgical center standards. Therefore, if some such applications are unconstitutional, the severability clause plainly requires that those applications be severed and that the rest be left intact.

How can the Court possibly escape this painfully obvious conclusion? Its main argument is that it need not honor the

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or word, or applications of this Act, were to be declared unconstitutional or to represent an undue burden.

"(c) [omitted—applies to late-term abortion ban only]

"(d) If any provision of this Act is found by any court to be unconstitutionally vague, then the applications of that provision that do not present constitutional vagueness problems shall be severed and remain in force." H. B. 2, § 10, App. to Pet. for Cert. 199a–201a.

severability provision because doing so would be too burdensome. See *ante*, at 625. This is a remarkable argument.

Under the Supremacy Clause, federal courts may strike down state laws that violate the Constitution or conflict with federal statutes, Art. VI, cl. 2, but in exercising this power, federal courts must take great care. The power to invalidate a state law implicates sensitive federal-state relations. Federal courts have no authority to carpet-bomb state laws, knocking out provisions that are perfectly consistent with federal law, just because it would be too much bother to separate them from unconstitutional provisions.

In any event, it should not have been hard in this case for the District Court to separate any bad provisions from the good. Petitioners should have identified the particular provisions that would entail what they regard as an undue expense, and the District Court could have then concentrated its analysis on those provisions. In fact, petitioners *did* do this in their trial brief, Doc. 185, p. 8, in No. 1:14–cv–284 (Aug. 12, 2014) ("It is the construction and nursing requirements that form the basis of Plaintiffs' challenge"), but they changed their position once the District Court awarded blanket relief, see 790 F. 3d, at 582 (petitioners told the Fifth Circuit that they "challenge H. B. 2 broadly, with no effort whatsoever to parse out specific aspects of the ASC requirement that they find onerous or otherwise infirm"). In its own review of the ASC requirement, in fact, the Court follows petitioners' original playbook and focuses on the construction and nursing requirements as well. See *ante*, at 616–617 (detailed walkthrough of Tex. Admin. Code, tit. 25, §§ 135.15 (2016) (nursing), 135.52 (construction)). I do not see how it "would inflict enormous costs on both courts and litigants," *ante*, at 625, to single out the ASC regulations that this Court and petitioners have both targeted as the core of the challenge.

By forgoing severability, the Court strikes down numerous provisions that could not plausibly impose an undue burden.

For example, surgical center patients must "be treated with respect, consideration, and dignity." Tex. Admin. Code, tit. 25, § 135.5(a). That's now enjoined. Patients may not be given misleading "advertising regarding the competence and/or capabilities of the organization." § 135.5(g). Enjoined. Centers must maintain fire alarm and emergency communications systems, §§ 135.41(d), 135.42(e), and eliminate "[h]azards that might lead to slipping, falling, electrical shock, burns, poisoning, or other trauma," § 135.10(b). Enjoined and enjoined. When a center is being remodeled while still in use, "[t]emporary sound barriers shall be provided where intense, prolonged construction noises will disturb patients or staff in the occupied portions of the building." § 135.51(b)(3)(B)(vi). Enjoined. Centers must develop and enforce policies concerning teaching and publishing by staff. §§ 135.16(a), (c). Enjoined. They must obtain informed consent before doing research on patients. § 135.17(e). Enjoined. And each center "shall develop, implement[,] and maintain an effective, ongoing, organization-wide, data driven patient safety program." § 135.27(b). Also enjoined. These are but a few of the innocuous requirements that the Court invalidates with nary a wave of the hand.

Any responsible application of the H. B. 2 severability provision would leave much of the law intact. At a minimum, both of the requirements challenged here should be held constitutional as applied to clinics in any Texas city that will have a surgical center providing abortions (*i. e.*, those areas in which there cannot possibly have been an undue burden on abortion access). Moreover, as even the District Court found, the surgical center requirement is clearly constitutional as to new abortion facilities and facilities already licensed as surgical centers. *Whole Woman's Health* v. *Lakey*, 46 F. Supp. 3d 673, 676 (WD Tex. 2014). And we should uphold every application of every surgical center regulation that does not pose an undue burden—at the very least, all of the regulations as to which petitioners have

never made a specific complaint supported by specific evidence. The Court's wholesale refusal to engage in the required severability analysis here revives the "antagonistic 'canon of construction under which in cases involving abortion, a permissible reading of a statute is to be avoided at all costs.'" *Gonzales*, 550 U. S., at 153–154 (quoting *Stenberg* v. *Carhart*, 530 U. S. 914, 977 (2000) (KENNEDY, J., dissenting); some internal quotation marks omitted).

If the Court is unwilling to undertake the careful severability analysis required, that is no reason to strike down all applications of the challenged provisions. The proper course would be to remand to the lower courts for a remedy tailored to the specific facts shown in this case, to "try to limit the solution to the problem." *Ayotte* v. *Planned Parenthood of Northern New Eng.*, 546 U. S. 320, 328 (2006).

V

When we decide cases on particularly controversial issues, we should take special care to apply settled procedural rules in a neutral manner. The Court has not done that here.

I therefore respectfully dissent.

Appendix to opinion of ALITO, J.

APPENDIX

App. K to Emergency Application To Vacate Stay in O. T. 2013, No. 13A452, Plaintiffs' Trial Exh. 46

Clinic Name	Clinic Location	Capacity after Privileges Requirement	Notes	ASC
Austin Women's Health Center	Austin, TX	100% of prior capacity		
International Healthcare Solutions	Austin, TX			
South Austin Health Center (PP)	Austin, TX	none		X
Whole Women's Health Austin	Austin, TX	100% of prior capacity		
Whole Women's Health Beaumont	Beaumont, TX	100% of prior capacity		
Coastal Birth Control Center	Corpus Christi, TX	prob. 100% of prior capacity		
Abortion Advantage	Dallas, TX	none		
Northpark Medical Group	Dallas, TX			
Dallas Surgical Health Services Center	Dallas, TX	120 per week		X
Routh Street Women's Clinic	Dallas, TX	20 per week	Down from ~60 per week	
Southwestern Women's	Dallas, TX	110 per week		
Hill Top Women's Reproductive Health Services	El Paso, TX	prob. 100% of prior capacity		
Reproductive Services	El Paso, TX	none		
Southwest Fort Worth Health Center (PP)	Fort Worth, TX	none		
West Side Clinic	Fort Worth, TX	none		
Whole Woman's Health Fort Worth	Fort Worth, TX	none		
Harlingen Reproductive Services	Harlingen, TX	none		
Affordable Women's Health Center	Houston, TX			
AAA Concerned Women's Center	Houston, TX			
Aaron Women's Clinic	Houston, TX			
Texas Ambulatory Surgical Center	Houston, TX			X
Alto Women's Center	Houston, TX			
Houston Women's Clinic	Houston, TX	130 per week		
Planned Parenthood Center for Choice	Houston, TX	175 per week		X
Suburban Women's Clinic (SW)	Houston, TX			
Suburban Women's Clinic (NW)	Houston, TX			
Planned Parenthood Center for Choice Stafford	Stafford (not in county)	none		
Killeen Women's Health Center	Killeen, TX	none		
Planned Parenthood Women's Health Center	Lubbock, TX	none		
Whole Women's Health of McAllen	McAllen, TX	none		
Dr. Braid (Alamo Women's Reproductive Services)	San Antonio, TX	100% of prior capacity		
Planned Parenthood Babock Sexual Healthcare	San Antonio, TX	40/week for ALL San Antonio PP locations		
Planned Parenthood Bandera Rd Sexual Healthcare	San Antonio, TX	none		
Planned Parenthood Northeast Sexual Healthcare	San Antonio, TX	none		
Whole Woman's Health San Antonio	San Antonio, TX	severely limited		x
Audre Rapoport Women's Health Center (PP)	Waco, TX	none		

Syllabus

VOISINE ET AL. *v.* UNITED STATES

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

No. 14–10154. Argued February 29, 2016—Decided June 27, 2016

In an effort to "close [a] dangerous loophole" in the gun control laws, *United States* v. *Castleman*, 572 U. S. 157, 160, Congress extended the federal prohibition on firearms possession by convicted felons to persons convicted of a "misdemeanor crime of domestic violence," 18 U. S. C. § 922(g)(9). Section 921(a)(33)(A) defines that phrase to include a misdemeanor under federal, state, or tribal law, committed against a domestic relation that necessarily involves the "use . . . of physical force." In *Castleman*, this Court held that a knowing or intentional assault qualifies as such a crime, but left open whether the same was true of a reckless assault.

Petitioner Stephen Voisine pleaded guilty to assaulting his girlfriend in violation of § 207 of the Maine Criminal Code, which makes it a misdemeanor to "intentionally, knowingly or recklessly cause[ ] bodily injury" to another. When law enforcement officials later investigated Voisine for killing a bald eagle, they learned that he owned a rifle. After a background check turned up Voisine's prior conviction under § 207, the Government charged him with violating § 922(g)(9). Petitioner William Armstrong pleaded guilty to assaulting his wife in violation of a Maine domestic violence law making it a misdemeanor to commit an assault prohibited by § 207 against a family or household member. While searching Armstrong's home as part of a narcotics investigation a few years later, law enforcement officers discovered six guns and a large quantity of ammunition. Armstrong was also charged under § 922(g)(9). Both men argued that they were not subject to § 922(g)(9)'s prohibition because their prior convictions could have been based on reckless, rather than knowing or intentional, conduct and thus did not qualify as misdemeanor crimes of domestic violence. The District Court rejected those claims, and each petitioner pleaded guilty. The First Circuit affirmed, holding that "an offense with a *mens rea* of recklessness may qualify as a 'misdemeanor crime of violence' under § 922(g)(9)." Voisine and Armstrong filed a joint petition for certiorari, and their case was remanded for further consideration in light of *Castleman*. The First Circuit again upheld the convictions on the same ground.

Held: A reckless domestic assault qualifies as a "misdemeanor crime of domestic violence" under § 922(g)(9). Pp. 691–699.

Syllabus

(a) That conclusion follows from the statutory text. Nothing in the phrase "use . . . of physical force" indicates that § 922(g)(9) distinguishes between domestic assaults committed knowingly or intentionally and those committed recklessly. Dictionaries consistently define the word "use" to mean the "act of employing" something. Accordingly, the force involved in a qualifying assault must be volitional; an involuntary motion, even a powerful one, is not naturally described as an active employment of force. See *Castleman*, 572 U. S., at 170–171. But nothing about the definition of "use" demands that the person applying force have the purpose or practical certainty that it will cause harm, as compared with the understanding that it is substantially likely to do so. Nor does *Leocal* v. *Ashcroft*, 543 U. S. 1, which held that the "use" of force excludes accidents. Reckless conduct, which requires the conscious disregard of a known risk, is not an accident: It involves a deliberate decision to endanger another. The relevant text thus supports prohibiting petitioners, and others with similar criminal records, from possessing firearms. Pp. 692–695.

(b) So too does the relevant history. Congress enacted § 922(g)(9) in 1996 to bar those domestic abusers convicted of garden-variety assault or battery misdemeanors—just like those convicted of felonies—from owning guns. Then, as now, a significant majority of jurisdictions—34 States plus the District of Columbia—defined such misdemeanor offenses to include the reckless infliction of bodily harm. In targeting those laws, Congress thus must have known it was sweeping in some persons who had engaged in reckless conduct. See, *e. g.*, *United States* v. *Bailey*, 9 Pet. 238, 256. Indeed, that was part of the point: to apply the federal firearms restriction to those abusers, along with all others, covered by the States' ordinary misdemeanor assault laws.

Petitioners' reading risks rendering § 922(g)(9) broadly inoperative in the 35 jurisdictions with assault laws extending to recklessness. Consider Maine's law, which criminalizes "intentionally, knowingly or recklessly" injuring another. Assuming that statute defines a single crime, petitioners' view that § 921(a)(33)(A) requires at least a knowing *mens rea* would mean that *no* conviction obtained under that law could qualify as a "misdemeanor crime of domestic violence." *Descamps* v. *United States*, 570 U. S. 254, 261. In *Castleman*, the Court declined to construe § 921(a)(33)(A) so as to render § 922(g)(9) ineffective in 10 States. All the more so here, where petitioners' view would jeopardize § 922(g)(9)'s force in several times that many. Pp. 695–698.

778 F. 3d 176, affirmed.

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

filed a dissenting opinion, in which SOTOMAYOR, J., joined as to Parts I and II, *post*, p. 699.

Virginia G. Villa, by appointment of the Court, 577 U. S. 1058, argued the cause for petitioners. With her on the briefs were *Sarah M. Konsky*, *Steven J. Horowitz*, *Jeffrey T. Green*, and *Sarah O'Rourke Schrup*.

Ilana H. Eisenstein argued the cause for the United States. With her on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Caldwell*, *Deputy Solicitor General Dreeben*, *Joseph C. Wyderko*, and *Finnuala K. Tessier*.*

JUSTICE KAGAN delivered the opinion of the Court.

Federal law prohibits any person convicted of a "misdemeanor crime of domestic violence" from possessing a firearm. 18 U. S. C. § 922(g)(9). That phrase is defined to include any misdemeanor committed against a domestic relation that necessarily involves the "use . . . of physical force." § 921(a)(33)(A). The question presented here is whether misdemeanor assault convictions for reckless (as contrasted to knowing or intentional) conduct trigger the statutory firearms ban. We hold that they do.

**Herbert W. Titus*, *William J. Olson*, *Jeremiah L. Morgan*, and *John S. Miles* filed a brief for the Gun Owners Foundation et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the Brady Center To Prevent Gun Violence et al. by *Anna P. Engh* and *Jonathan E. Lowy*; for Child Justice, Inc., et al. by *Jonathan Diesenhaus*, *Anna M. Kelly*, and *James Petrila*; for the Domestic Violence Legal Empowerment and Appeals Project et al. by *Christine A. Scheuneman*, *Kevin M. Fong*, and *Joan S. Meier*; for Everytown for Gun Safety by *Antonio J. Perez-Marques*, *David B. Toscano*, and *J. Adam Skaggs*; for the Major Cities Chiefs Association et al. by *Gregory G. Little*, *Jayashree Mitra*, *Kelly Bonner*, and *So Yeon Choe*; for the National Domestic Violence Hotline et al. by *Laurel Pyke Malson*, *Roberta Valente*, and *Kim Gandy*; and for the National Indigenous Women's Resource Center et al. by *Mary Katheryn Nagle*.

I

Congress enacted § 922(g)(9) some 20 years ago to "close [a] dangerous loophole" in the gun control laws. *United States* v. *Castleman*, 572 U. S. 157, 160 (2014) (quoting *United States* v. *Hayes*, 555 U. S. 415, 426 (2009)). An existing provision already barred convicted felons from possessing firearms. See § 922(g)(1) (1994 ed.). But many perpetrators of domestic violence are charged with misdemeanors rather than felonies, notwithstanding the harmfulness of their conduct. See *Castleman*, 572 U. S., at 160. And "[f]irearms and domestic strife are a potentially deadly combination." *Hayes*, 555 U. S., at 427. Accordingly, Congress added § 922(g)(9) to prohibit any person convicted of a "misdemeanor crime of domestic violence" from possessing any gun or ammunition with a connection to interstate commerce. And it defined that phrase, in § 921(a)(33)(A), to include a misdemeanor under federal, state, or tribal law, committed by a person with a specified domestic relationship with the victim, that "has, as an element, the use or attempted use of physical force."

Two Terms ago, this Court considered the scope of that definition in a case involving a conviction for a knowing or intentional assault. See *Castleman*, 572 U. S., at 162–171. In *Castleman*, we initially held that the word "force" in § 921(a)(33)(A) bears its common-law meaning, and so is broad enough to include offensive touching. See *id.*, at 162–163. We then determined that "the knowing or intentional application of [such] force is a 'use' of force." *Id.*, at 170. But we expressly left open whether a reckless assault also qualifies as a "use" of force—so that a misdemeanor conviction for such conduct would trigger § 922(g)(9)'s firearms ban. See *id.*, at 169, n. 8. The two cases before us now raise that issue.

Petitioner Stephen Voisine pleaded guilty in 2004 to assaulting his girlfriend in violation of § 207 of the Maine Criminal Code, which makes it a misdemeanor to "intentionally,

knowingly or recklessly cause[ ] bodily injury or offensive physical contact to another person." Me. Rev. Stat. Ann., Tit. 17–A, § 207(1)(A). Several years later, Voisine again found himself in legal trouble, this time for killing a bald eagle. See 16 U. S. C. § 668(a). While investigating that crime, law enforcement officers learned that Voisine owned a rifle. When a background check turned up his prior misdemeanor conviction, the Government charged him with violating 18 U. S. C. § 922(g)(9).[1]

Petitioner William Armstrong pleaded guilty in 2008 to assaulting his wife in violation of a Maine domestic violence law making it a misdemeanor to commit an assault prohibited by § 207 (the general statute under which Voisine was convicted) against a family or household member. See Me. Rev. Stat. Ann., Tit. 17–A, § 207–A(1)(A). A few years later, law enforcement officers searched Armstrong's home as part of a narcotics investigation. They discovered six guns, plus a large quantity of ammunition. Like Voisine, Armstrong was charged under § 922(g)(9) for unlawfully possessing firearms.

Both men argued that they were not subject to § 922(g)(9)'s prohibition because their prior convictions (as the Government conceded) could have been based on reckless, rather than knowing or intentional, conduct. The District Court rejected those claims. Each petitioner then entered a guilty plea conditioned on the right to appeal the District Court's ruling.

The Court of Appeals for the First Circuit affirmed the two convictions, holding that "an offense with a *mens rea* of

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[1] In *United States* v. *Hayes*, 555 U. S. 415, 418 (2009), this Court held that a conviction under a general assault statute like § 207 (no less than one under a law targeting only domestic assault) can serve as the predicate offense for a § 922(g)(9) prosecution. When that is so, the Government must prove in the later, gun possession case that the perpetrator and the victim of the assault had one of the domestic relationships specified in § 921(a)(33)(A). See *id.*, at 426.

recklessness may qualify as a 'misdemeanor crime of violence' under § 922(g)(9)." *United States* v. *Armstrong*, 706 F. 3d 1, 4 (2013); see *United States* v. *Voisine*, 495 Fed. Appx. 101, 102 (2013) (*per curiam*). Voisine and Armstrong filed a joint petition for certiorari, and shortly after issuing *Castleman*, this Court (without opinion) vacated the First Circuit's judgments and remanded the cases for further consideration in light of that decision. See *Armstrong* v. *United States*, 572 U. S. 1032 (2014). On remand, the Court of Appeals again upheld the convictions, on the same ground. See 778 F. 3d 176, 177 (2015).

We granted certiorari, 577 U. S. 949 (2015), to resolve a Circuit split over whether a misdemeanor conviction for recklessly assaulting a domestic relation disqualifies an individual from possessing a gun under § 922(g)(9).[2] We now affirm.

II

The issue before us is whether § 922(g)(9) applies to reckless assaults, as it does to knowing or intentional ones. To commit an assault recklessly is to take that action with a certain state of mind (or *mens rea*)—in the dominant formulation, to "consciously disregard[ ]" a substantial risk that the conduct will cause harm to another. ALI, Model Penal Code § 2.02(2)(c) (1962); Me. Rev. Stat. Ann., Tit. 17–A, § 35(3) (Supp. 2015) (adopting that definition); see *Farmer* v. *Brennan*, 511 U. S. 825, 836–837 (1994) (noting that a person acts recklessly only when he disregards a substantial risk of harm "of which he is aware"). For purposes of comparison, to commit an assault knowingly or intentionally (the latter, to add yet another adverb, sometimes called "purposefully") is to act with another state of mind respecting that act's consequences—in the first case, to be "aware that [harm] is practi-

[2] Compare 778 F. 3d 176 (CA1 2015) (case below) with *United States* v. *Nobriga*, 474 F. 3d 561 (CA9 2006) (*per curiam*) (holding that a conviction for a reckless domestic assault does not trigger § 922(g)(9)'s ban).

cally certain" and, in the second, to have that result as a "conscious object." Model Penal Code §§ 2.02(2)(a)–(b); Me. Rev. Stat. Ann., Tit. 17–A, §§ 35(1)–(2).

Statutory text and background alike lead us to conclude that a reckless domestic assault qualifies as a "misdemeanor crime of domestic violence" under § 922(g)(9). Congress defined that phrase to include crimes that necessarily involve the "use . . . of physical force." § 921(a)(33)(A). Reckless assaults, no less than the knowing or intentional ones we addressed in *Castleman*, satisfy that definition. Further, Congress enacted § 922(g)(9) in order to prohibit domestic abusers convicted under run-of-the-mill misdemeanor assault and battery laws from possessing guns. Because fully two-thirds of such state laws extend to recklessness, construing § 922(g)(9) to exclude crimes committed with that state of mind would substantially undermine the provision's design.

A

Nothing in the word "use"—which is the only statutory language either party thinks relevant—indicates that § 922(g)(9) applies exclusively to knowing or intentional domestic assaults. Recall that under § 921(a)(33)(A), an offense counts as a "misdemeanor crime of domestic violence" only if it has, as an element, the "use" of force. Dictionaries consistently define the noun "use" to mean the "act of employing" something. Webster's New International Dictionary 2806 (2d ed. 1954) ("[a]ct of employing anything"); Random House Dictionary of the English Language 2097 (2d ed. 1987) ("act of employing, using, or putting into service"); Black's Law Dictionary 1541 (6th ed. 1990) ("[a]ct of employing," "application").[3] On that common understanding, the

[3] In cases stretching back over a century, this Court has followed suit, although usually discussing the verb form of the word. See, *e. g.*, *Bailey* v. *United States*, 516 U. S. 137, 145 (1995) (to use means "'[t]o convert to one's service,' 'to employ,' [or] 'to avail oneself of'"); *Smith* v. *United States*, 508 U. S. 223, 229 (1993) (to use means "'[t]o convert to one's serv-

force involved in a qualifying assault must be volitional; an involuntary motion, even a powerful one, is not naturally described as an active employment of force. See *Castleman*, 572 U. S., at 170–171 ("[T]he word 'use' conveys the idea that the thing used (here, 'physical force') has been made the user's instrument" (some internal quotation marks omitted)). But the word "use" does not demand that the person applying force have the purpose or practical certainty that it will cause harm, as compared with the understanding that it is substantially likely to do so. Or, otherwise said, that word is indifferent as to whether the actor has the mental state of intention, knowledge, or recklessness with respect to the harmful consequences of his volitional conduct.

Consider a couple of examples to see the ordinary meaning of the word "use" in this context. If a person with soapy hands loses his grip on a plate, which then shatters and cuts his wife, the person has not "use[d]" physical force in common parlance. But now suppose a person throws a plate in anger against the wall near where his wife is standing. That hurl counts as a "use" of force even if the husband did not know for certain (or have as an object), but only recognized a substantial risk, that a shard from the plate would ricochet and injure his wife. Similarly, to spin out a scenario discussed at oral argument, if a person lets slip a door that he is trying to hold open for his girlfriend, he has not actively employed ("used") force even though the result is to hurt her. But if he slams the door shut with his girlfriend following close behind, then he has done so—regardless of whether he thinks it absolutely sure or only quite likely that he will catch her fingers in the jamb. See Tr. of Oral Arg. 10–11 (counsel for petitioners acknowledging that this example involves "the use of physical force"). Once again, the word "use" does not exclude from § 922(g)(9)'s compass an

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ice' or 'to employ' "); *Astor* v. *Merritt*, 111 U. S. 202, 213 (1884) (to use means "to employ [or] to derive service from").

act of force carried out in conscious disregard of its substantial risk of causing harm.

And contrary to petitioners' view, nothing in *Leocal* v. *Ashcroft*, 543 U. S. 1 (2004), suggests a different conclusion—*i. e.*, that "use" marks a dividing line between reckless and knowing conduct. See Brief for Petitioners 18–22. In that decision, this Court addressed a statutory definition similar to § 921(a)(33)(A): there, "the use . . . of physical force against the person or property of another." 18 U. S. C. § 16. That provision excludes "merely accidental" conduct, *Leocal* held, because "it is [not] natural to say that a person actively employs physical force against another person by accident." 543 U. S., at 9. For example, the Court stated, one "would not ordinarily say a person 'use[s] . . . physical force against' another by stumbling and falling into him." *Ibid.* That reasoning fully accords with our analysis here. Conduct like stumbling (or in our hypothetical, dropping a plate) is a true accident, and so too the injury arising from it; hence the difficulty of describing that conduct as the "active employment" of force. *Ibid.* But the same is not true of reckless behavior—acts undertaken with awareness of their substantial risk of causing injury (in our contrasting hypo, hurling the plate). The harm such conduct causes is the result of a deliberate decision to endanger another—no more an "accident" than if the "substantial risk" were "practically certain." See *supra*, at 691–692 (comparing reckless and knowing acts). And indeed, *Leocal* itself recognized the distinction between accidents and recklessness, specifically reserving the issue whether the definition in § 16 embraces reckless conduct, see 543 U. S., at 13—as we now hold § 921(a)(33)(A) does.[4]

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[4] Like *Leocal*, our decision today concerning § 921(a)(33)(A)'s scope does not resolve whether § 16 includes reckless behavior. Courts have sometimes given those two statutory definitions divergent readings in light of differences in their contexts and purposes, and we do not foreclose that possibility with respect to their required mental states. Cf. *United States* v. *Castleman*, 572 U. S. 157, 164, n. 4 (2014) (interpreting "force" in

In sum, Congress's definition of a "misdemeanor crime of violence" contains no exclusion for convictions based on reckless behavior. A person who assaults another recklessly "use[s]" force, no less than one who carries out that same action knowingly or intentionally. The relevant text thus supports prohibiting petitioners, and others with similar criminal records, from possessing firearms.

B

So too does the relevant history. As explained earlier, Congress enacted § 922(g)(9) in 1996 to bar those domestic abusers convicted of garden-variety assault or battery misdemeanors—just like those convicted of felonies—from owning guns. See *supra*, at 689; *Castleman*, 572 U. S., at 160, 164; *Hayes*, 555 U. S., at 426–427. Then, as now, a significant majority of jurisdictions—34 States plus the District of Columbia—defined such misdemeanor offenses to include the reckless infliction of bodily harm. See Brief for United States 7a–19a (collecting statutes). That agreement was no coincidence. Several decades earlier, the Model Penal Code had taken the position that a *mens rea* of recklessness should generally suffice to establish criminal liability, including for assault. See § 2.02(3), Comments 4–5, at 243–244 ("purpose, knowledge, and recklessness are properly the basis for" such liability); § 211.1 (defining assault to include "purposely, knowingly, or recklessly caus[ing] bodily injury"). States quickly incorporated that view into their misdemeanor assault and battery statutes. So in linking § 922(g)(9) to those laws, Congress must have known it was sweeping in some persons who had engaged in reckless conduct. See, *e. g.*,

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§ 921(a)(33)(A) to encompass any offensive touching, while acknowledging that federal appeals courts have usually read the same term in § 16 to reach only "violent force"). All we say here is that *Leocal*'s exclusion of accidental conduct from a definition hinging on the "use" of force is in no way inconsistent with our inclusion of reckless conduct in a similarly worded provision.

United States v. *Bailey*, 9 Pet. 238, 256 (1835) (Story, J.) ("Congress must be presumed to have legislated under this known state of the laws"). And indeed, that was part of the point: to apply firearms restrictions to those abusers, along with all others, whom the States' ordinary misdemeanor assault laws covered.

What is more, petitioners' reading risks rendering § 922(g)(9) broadly inoperative in the 35 jurisdictions with assault laws extending to recklessness—that is, inapplicable even to persons who commit that crime knowingly or intentionally. Consider Maine's statute, which (in typical fashion) makes it a misdemeanor to "intentionally, knowingly or recklessly" injure another. Me. Rev. Stat. Ann., Tit. 17–A, § 207(1)(A). Assuming that provision defines a single crime (which happens to list alternative mental states)—and accepting petitioners' view that § 921(a)(33)(A) requires at least a knowing *mens rea*—then, under *Descamps* v. *United States*, 570 U. S. 254 (2013), *no* conviction obtained under Maine's statute could qualify as a "misdemeanor crime of domestic violence." See *id.*, at 261 (If a state crime "sweeps more broadly" than the federally defined one, a conviction for the state offense "cannot count" as a predicate, no matter what *mens rea* the defendant actually had). So in the 35 jurisdictions like Maine, petitioners' reading risks allowing domestic abusers of all mental states to evade § 922(g)(9)'s firearms ban. In *Castleman*, we declined to construe § 921(a)(33)(A) so as to render § 922(g)(9) ineffective in 10 States. See 572 U. S., at 167. All the more so here, where petitioners' view would jeopardize § 922(g)(9)'s force in several times that many.

Petitioners respond that we should ignore the assault and battery laws actually on the books when Congress enacted § 922(g)(9). In construing the statute, they urge, we should look instead to how the common law defined those crimes in an earlier age. See Brief for Petitioners 13–15. And that approach, petitioners claim, would necessitate reversing

their convictions because the common law "required a *mens rea* greater than recklessness." *Id.*, at 17.

But we see no reason to wind the clock back so far. Once again: Congress passed § 922(g)(9) to take guns out of the hands of abusers convicted under the misdemeanor assault laws then in general use in the States. See *supra*, at 689, 695–696. And by that time, a substantial majority of jurisdictions, following the Model Penal Code's lead, had abandoned the common law's approach to *mens rea* in drafting and interpreting their assault and battery statutes. Indeed, most had gone down that road decades before. That was the backdrop against which Congress was legislating. Nothing suggests that, in enacting § 922(g)(9), Congress wished to look beyond that real world to a common-law precursor that had largely expired. To the contrary, such an approach would have undermined Congress's aim by tying the ban on firearms possession not to the laws under which abusers are prosecuted but instead to a legal anachronism.[5]

And anyway, we would not know how to resolve whether recklessness sufficed for a battery conviction at common law. Recklessness was not a word in the common law's standard lexicon, nor an idea in its conceptual framework; only in the mid- to late-1800's did courts begin to address reckless behavior in those terms. See Hall, Assault and Battery by the

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[5] As petitioners observe, this Court looked to the common law in *Castleman* to define the term "force" in § 921(a)(33)(A). See 572 U. S., at 162–163; Brief for Petitioners 13–15. But we did so for reasons not present here. "Force," we explained, was "a common-law term of art" with an "established common-law meaning." 572 U. S., at 163 (internal quotation marks omitted). And we thought that Congress meant to adhere to that meaning given its "perfect[ ]" fit with § 922(g)(9)'s goal. *Ibid.* By contrast, neither party pretends that the statutory term "use"—the only one identified as potentially relevant here—has any particular common-law definition. And as explained above, the watershed change in how state legislatures thought of *mens rea* after the Model Penal Code makes the common law a bad match for the ordinary misdemeanor assault and battery statutes in Congress's sightline.

Reckless Motorist, 31 J. Crim. L. & C. 133, 138–139 (1940). The common law traditionally used a variety of overlapping and, frankly, confusing phrases to describe culpable mental states—among them, specific intent, general intent, presumed intent, willfulness, and malice. See, *e. g., Morissette* v. *United States*, 342 U. S. 246, 252 (1952); Model Penal Code § 2.02, Comment 1, at 230. Whether and where conduct that we would today describe as reckless fits into that obscure scheme is anyone's guess: Neither petitioners' citations, nor the Government's competing ones, have succeeded in resolving that counterfactual question. And that indeterminacy confirms our conclusion that Congress had no thought of incorporating the common law's treatment of *mens rea* into § 921(a)(33)(A). That provision instead corresponds to the ordinary misdemeanor assault and battery laws used to prosecute domestic abuse, regardless of how their mental state requirements might—or, then again, might not—conform to the common law's.[6]

III

The federal ban on firearms possession applies to any person with a prior misdemeanor conviction for the "use . . . of physical force" against a domestic relation. § 921(a)(33)(A). That language, naturally read, encompasses acts of force un-

[6] Petitioners make two last arguments for reading § 921(a)(33)(A) their way, but they do not persuade us. First, petitioners contend that we should adopt their construction to avoid creating a question about whether the Second Amendment permits imposing a lifetime firearms ban on a person convicted of a misdemeanor involving reckless conduct. See Brief for Petitioners 32–36. And second, petitioners assert that the rule of lenity requires accepting their view. See *id.*, at 31–32. But neither of those arguments can succeed if the statute is clear. See *Pennsylvania Dept. of Corrections* v. *Yeskey*, 524 U. S. 206, 212 (1998) (noting that "the doctrine of constitutional doubt . . . enters in only where a statute is susceptible of two constructions" (internal quotation marks omitted)); *Abramski* v. *United States*, 573 U. S. 169, 188, n. 10 (2014) (stating that the rule of lenity applies only in cases of genuine ambiguity). And as we have shown, § 921(a)(33)(A) plainly encompasses reckless assaults.

dertaken recklessly—*i. e.*, with conscious disregard of a substantial risk of harm. And the state-law backdrop to that provision, which included misdemeanor assault statutes covering reckless conduct in a significant majority of jurisdictions, indicates that Congress meant just what it said. Each petitioner's possession of a gun, following a conviction under Maine law for abusing a domestic partner, therefore violates § 922(g)(9). We accordingly affirm the judgment of the Court of Appeals.

It is so ordered.

JUSTICE THOMAS, with whom JUSTICE SOTOMAYOR joins as to Parts I and II, dissenting.

Federal law makes it a crime for anyone previously convicted of a "misdemeanor crime of domestic violence" to possess a firearm "in or affecting commerce." 18 U. S. C. § 922(g)(9). A "misdemeanor crime of domestic violence" includes "an offense that . . . has, as an element, the use or attempted use of physical force . . . committed by [certain close family members] of the victim." § 921(a)(33)(A)(ii). In this case, petitioners were convicted under § 922(g)(9) because they possessed firearms and had prior convictions for assault under Maine's statute prohibiting "intentionally, knowingly or recklessly caus[ing] bodily injury or offensive physical contact to another person." Me. Rev. Stat. Ann., Tit. 17–A, § 207(1)(A) (2006). The question presented is whether a prior conviction under § 207 has, as an element, the "use of physical force," such that the conviction can strip someone of his right to possess a firearm. In my view, § 207 does not qualify as such an offense, and the majority errs in holding otherwise. I respectfully dissent.

I

To qualify as a "'misdemeanor crime of domestic violence,'" the Maine assault statute must have as an element the "use of physical force." § 921(a)(33)(A)(ii). Because

mere recklessness is sufficient to sustain a conviction under § 207, a conviction does not necessarily involve the "use" of physical force and, thus, does not trigger § 922(g)(9)'s prohibition on firearm possession.

A

Three features of § 921(a)(33)(A)(ii) establish that the "use of physical force" requires intentional conduct. First, the word "use" in that provision is best read to require intentional conduct. As the majority recognizes, the noun "use" means "the 'act of employing' something." *Ante*, at 692 (quoting dictionaries). A "use" is "[t]he act of employing a thing for any . . . purpose." 19 Oxford English Dictionary 350 (2d ed. 1989). To "use" something, in other words, is to employ the thing for its instrumental value, *i. e.*, to employ the thing to accomplish a further goal. See *United States* v. *Castleman*, 572 U. S. 157, 171 (2014). A "use," therefore, is an inherently intentional act—that is, an act done for the purpose of causing certain consequences or at least with knowledge that those consequences will ensue. See Restatement (Second) of Torts § 8A, p. 15 (1965) (defining intentional acts).

We have routinely defined "use" in ways that make clear that the conduct must be intentional. In *Bailey* v. *United States*, 516 U. S. 137 (1995), for example, we held that the phrase "[use of] a firearm" required "active employment" of the firearm, such as "brandishing, displaying, bartering, striking with, and, most obviously, firing or attempting to fire a firearm." *Id.*, at 143, 148 (emphasis deleted). We have similarly held that the use of force requires more than "negligent or merely accidental conduct." *Leocal* v. *Ashcroft*, 543 U. S. 1, 9 (2004). We concluded that "[w]hile one may, in theory, actively employ *something* in an accidental manner, it is much less natural to say that a person actively employs physical force against another person by accident." *Ibid.* Thus, shooting a gun would be using a firearm in relation to a crime. *Bailey*, *supra*, at 148. Recklessly leaving a

loaded gun in one's trunk, which then discharges after being jostled during the car ride, would not. The person who placed that gun in the trunk might have acted recklessly or negligently, but he did not actively employ the gun in a crime.

Second, especially in a legal context, "force" generally connotes the use of violence against another. Black's Law Dictionary, for example, defines "force" to mean "[p]ower, violence, or pressure directed against a person or thing." Black's Law Dictionary 656 (7th ed. 1999). Other dictionaries offer similar definitions. *E. g.*, Random House Dictionary of the English Language 748 (def. 5) (2d ed. 1987) ("force," when used in law, means "unlawful violence threatened or committed against persons or property"); 6 Oxford English Dictionary 34 (def. I(5)(c)) ("[u]nlawful violence offered to persons or things"). And "violence," when used in a legal context, also implies an intentional act. See Black's Law Dictionary, at 1564 ("violence" is the "[u]njust or unwarranted use of force, usu. accompanied by fury, vehemence, or outrage; physical force unlawfully exercised with the intent to harm").[1] When a person talks about "using force" against another, one thinks of intentional acts—punching, kicking, shoving, or using a weapon. Conversely, one would not naturally call a car accident a "use of force," even if people were injured by the force of the accident. As Justice Holmes ob-

[1] Some of our cases have distinguished "violent force"—force capable of causing physical injury—and common-law force, which included all nonconsensual touching, see *Johnson* v. *United States*, 559 U. S. 133, 140–141 (2010), but others have not, see *United States* v. *Castleman*, 572 U. S. 157, 163 (2014). The common law did not draw this distinction because the common law considered nonconsensual touching as a form of violence against the person. 3 W. Blackstone, Commentaries *120 ("[T]he law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it"). The Court should assume that, absent a contrary textual indication, Congress legislated against this common-law backdrop. See *Castleman*, *supra*, at 162. Consequently, I treat nonconsensual touching as a type of violence.

served, "[E]ven a dog distinguishes between being stumbled over and being kicked." O. Holmes, The Common Law 3 (1881).

Third, context confirms that "use of physical force" connotes an intentional act. Section 921(a)(33)(A)(ii)'s prohibitions also include "the threatened use of a deadly weapon." In that neighboring prohibition, "use" most naturally means active employment of the weapon. And it would be odd to say that "use" in that provision refers to active employment (an intentional act) when threatening someone with a weapon, but "use" here is satisfied by merely reckless conduct. See *Sorenson* v. *Secretary of Treasury*, 475 U. S. 851, 860 (1986) (the same words in a statute presumptively have the same meaning). Thus, the "use of physical force" against a family member refers to intentional acts of violence against a family member.

B

On this interpretation, Maine's assault statute likely does not qualify as a "misdemeanor crime of domestic violence" and thus does not trigger the prohibition on possessing firearms, § 922(g)(9). The Maine statute appears to lack, as a required element, the "use or attempted use of physical force." Maine's statute punishes at least some conduct that does not involve the "use of physical force." Section 207 criminalizes "recklessly caus[ing] bodily injury or offensive physical contact to another person." By criminalizing all reckless conduct, the Maine statute captures conduct such as recklessly injuring a passenger by texting while driving resulting in a crash. Petitioners' charging documents generically recited the statutory language; they did not charge intentional, knowing, and reckless harm as alternative counts. Accordingly, Maine's statute appears to treat "intentionally, knowingly, or recklessly" causing bodily injury or an offensive touching as a single, indivisible offense that is satisfied by recklessness. See *Mathis* v. *United States*, *ante*, at 515–516. So petitioners' prior assault convictions

do not necessarily have as an element the use of physical force against a family member. These prior convictions, therefore, do not qualify as a misdemeanor crime involving domestic violence under federal law, and petitioners' convictions accordingly should be reversed. At the very least, to the extent there remains uncertainty over whether Maine's assault statute is divisible, the Court should vacate and remand for the First Circuit to determine that statutory interpretation question in the first instance.

II

To illustrate where I part ways with the majority, consider different mental states with which a person could create and apply force.[2] First, a person can create force intentionally or recklessly.[3] For example, a person can intentionally throw a punch or a person can crash his car by driving recklessly. Second, a person can intentionally or recklessly harm a particular person or object as a result of that force. For example, a person could throw a punch at a particular person (thereby intentionally applying force to that person) or a person could swing a baseball bat too close to someone (thereby recklessly applying force to that person).

These different mental states give rise to three relevant categories of conduct. A person might intentionally create force and intentionally apply that force against an object (*e. g.*, punching a punching bag). A person might also intentionally create force but recklessly apply that force against an object (*e. g.*, practicing a kick in the air, but recklessly

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[2] Although "force" generally has a narrower legal connotation of intentional acts designed to cause harm, see *supra*, at 701–702, I will use "force" in this Part in its broadest sense to mean "strength or power exerted upon an object," Random House Dictionary of the English Language 748 (def. 2) (2d ed. 1987).

[3] To simplify, I am using only those mental states relevant to the Court's resolution of this case. A person could also create a force negligently or blamelessly.

hitting a piece of furniture). Or a person could recklessly create force that results in damage, such as the car crash example.

The question before us is what mental state suffices for a "use of physical force" against a family member. In my view, a "use of physical force" most naturally refers to cases where a person intentionally creates force and intentionally applies that force against a family member. It also includes (at least some) cases where a person intentionally creates force but recklessly applies it to a family member. But I part ways with the majority's conclusion that purely reckless conduct—meaning, where a person recklessly creates force—constitutes a "use of physical force." In my view, it does not, and therefore, the "use of physical force" is narrower than most state assault statutes, which punish anyone who recklessly causes physical injury.

A

To identify the scope of the "use of physical force," consider three different types of intentional and reckless force resulting in physical injury.

1

The paradigmatic case of battery: A person intentionally unleashes force and intends that the force will harm a particular person. This might include, for example, punching or kicking someone. Both the majority and I agree that these cases constitute a "use of physical force" under § 921(a)(33)(A)(ii).

This first category includes all cases where a person intentionally creates force and desires or knows with a practical certainty that that force will cause harm. This is because the law traditionally treats conduct as intended in two circumstances. First, conduct is intentional when the actor desires to produce a specific result. 1 W. LaFave, Substantive Criminal Law § 5.2(a), pp. 340–342 (2d ed. 2003). But con-

duct is also traditionally deemed intentional when a person acts "knowingly": that is, he knows with practical certainty that a result will follow from his conduct. *Ibid.*; see also Restatement (Second) of Torts § 8A, Comment *b*, at 15 ("If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result").

To illustrate, suppose a person strikes his friend for the purpose of demonstrating a karate move. The person has no desire to injure his friend, but he knows that the move is so dangerous that he is practically certain his friend will be injured. Under the common law, the person intended to injure his friend, even though he acted only with knowledge that his friend would be injured rather than the desire to harm him. Thus, even when a person acts knowingly rather than purposefully, this type of conduct is still a "use of physical force."

2

The second category involves a person who intentionally unleashes force that recklessly causes injury. The majority gives two examples:

> 1. The Angry Plate Thrower: "[A] person throws a plate in anger against the wall near where his wife is standing." *Ante*, at 693. The plate shatters, and a shard injures her. *Ibid.*
>
> 2. The Door Slammer: "[A person] slams the door shut with his girlfriend following close behind" with the effect of "catch[ing] her fingers in the jamb." *Ibid.*

The Angry Plate Thrower and the Door Slammer both intentionally unleashed physical force, but they did not intend to direct that force at those whom they harmed. Thus, they *intentionally* employed force, but *recklessly* caused physical injury with that force. The majority believes that these cases also constitute a "use of physical force," and I agree.

The Angry Plate Thrower has used force against the plate, and the Door Slammer has used force against the door.

The more difficult question is whether this "use of physical force" comes within § 921(a)(33)(A)(ii), which requires that the "use of physical force" be committed by someone having a familial relationship with the victim. The natural reading of that provision is that the use of physical force must be against a family member. In some cases, the law readily transfers the intent to use force from the object to the actual victim. Take the Angry Plate Thrower: If a husband throws a plate at the wall near his wife to scare her, that is assault. If the plate breaks and cuts her, it becomes a battery, regardless of whether he intended the plate to make contact with her person. See W. Keeton, D. Dobbs, R. Keeton, & D. Owens, Prosser and Keeton on Law of Torts § 9, pp. 39–42 (5th ed. 1984) (Prosser and Keeton). Similarly, "if one person intends to harm a second person but instead unintentionally harms a third, the first person's criminal or tortious intent toward the second applies to the third as well." Black's Law Dictionary, at 1504 (defining transferred-intent doctrine); see also 1 LaFave, *supra*, § 5.2(c)(4), at 349–350. Thus, where a person acts in a violent and patently unjustified manner, the law will often impute that the actor intended to cause the injury resulting from his conduct, even if he actually intended to direct his use of force elsewhere. Because we presume that Congress legislates against the backdrop of the common law, see *Astoria Fed. Sav. & Loan Assn.* v. *Solimino*, 501 U. S. 104, 108 (1991), these cases would qualify as the "use of physical force" against a family member.[4]

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[4] The Door Slammer might also fit within the "use of physical force," although that is a harder question. The Door Slammer has used force against the door, which has then caused injury to his girlfriend. But traditional principles of law would not generally transfer the actor's intent to use force against the door to the girlfriend because, unlike placing some-

Finally, and most problematic for the majority's approach, a person could recklessly unleash force that recklessly causes injury. Consider two examples:

> 1. The Text-Messaging Dad: Knowing that he should not be texting and driving, a father sends a text message to his wife. The distraction causes the father to rear end the car in front of him. His son, who is a passenger, is injured.
>
> 2. The Reckless Policeman: A police officer speeds to a crime scene without activating his emergency lights and siren and careens into another car in an intersection. That accident causes the police officer's car to strike another police officer, who was standing at the intersection. See *Seaton* v. *State*, 385 S. W. 3d 85, 88 (Tex. App. 2012).

In these cases, both the unleashing of the "force" (the car crash) and the resulting harm (the physical injury) were reckless. Under the majority's reading of § 921(a)(33)(A)(ii), the husband "use[d] . . . physical force" against his son, and the police officer "use[d] . . . physical force" against the other officer.

But this category is where the majority and I part company. These examples do not involve the "use of physical force" under any conventional understanding of "use" because they do not involve an active employment of something for a particular purpose. See *supra*, at 700–701. In the second category, the actors intentionally use violence against property; this is why the majority can plausibly argue that they have "used" force, even though that force was not intended to harm their family members. See *supra*, at 706,

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one in fear of bodily injury, slamming a door is not inherently wrongful and illegal conduct.

and n. 4 (discussing transferred intent). But when an individual does not engage in any violence against persons or property—that is, when physical injuries result from purely reckless conduct—there is no "use" of physical force.

* * *

The "use of physical force" against a family member includes cases where a person intentionally commits a violent act against a family member. And the term includes at least some cases where a person engages in a violent act that results in an unintended injury to a family member. But the term does not include nonviolent, reckless acts that cause physical injury or an offensive touching. Accordingly, the majority's definition is overbroad.

B

In reaching its contrary conclusion, the majority confuses various concepts. First, and as discussed, the majority decides that a person who acts recklessly has used physical force against another. *Ante*, at 694–695. But that fails to appreciate the distinction between intentional and reckless conduct. A "use" of physical force requires the intent to cause harm, and the law will impute that intent where the actor knows with a practical certainty that it will cause harm. But the law will not impute that intent from merely reckless conduct. Second, and perhaps to rein in its overly broad conception of a use of force, the majority concludes that only "volitional" acts constitute uses of force, *ante*, at 693, and that mere "accident[s]" do not, *ante*, at 694. These portions of the majority's analysis conflate "volitional" conduct with "intentional" *mens rea* and misapprehends the relevant meaning of an "accident."

1

The majority blurs the distinction between recklessness and intentional wrongdoing by overlooking the difference between the *mens rea* for force and the *mens rea* for causing

harm with that force. The majority says that "'use' does not demand that the person applying force have the purpose or practical certainty that it will cause harm" (namely, knowledge), "as compared with the understanding that it is [a substantial and unjustifiable risk that it will] do so" (the standard for recklessness).[5] *Ante*, at 693. Put in the language of *mens rea*, the majority is saying that purposeful, knowing, and reckless applications of force are all equally "uses" of force.

But the majority fails to explain why mere recklessness in creating force—as opposed to recklessness in causing harm with intentional force—is sufficient. The majority gives the Angry Plate Thrower and the Door Slammer as examples of reckless conduct that are "uses" of physical force, but those examples involve persons who *intentionally* use force that *recklessly* causes injuries. *Ante*, at 693–694. Reckless assault, however, extends well beyond intentional force that recklessly causes injury. In States where the Model Penal Code has influence, reckless assault includes any recklessly caused physical injury. See ALI, Model Penal Code § 211.1(1)(a) (1980). This means that the Reckless Policeman and the Text-Messaging Dad are as guilty of assault as the Angry Plate Thrower. See, *e. g.*, *Seaton*, *supra*, at 89–90; see also *People* v. *Grenier*, 250 App. Div. 2d 874, 874–875, 672 N. Y. S. 2d 499, 500–501 (1998) (upholding an assault conviction where a drunk driver injured his passengers in a car accident).

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[5] The majority's equation of recklessness with "the understanding" that one's actions are "substantially likely" to cause harm, *ante*, at 693, misstates the standard for recklessness in States that follow the Model Penal Code. Recklessness only requires a "substantial and unjustifiable risk." ALI, Model Penal Code § 2.02(2)(c) (1985). A "substantial" risk can include very small risks when there is no justification for taking the risk. See *id.*, § 2.02, Comment 3, at 237, n. 14. Thus, it would be reckless to play Russian roulette with a revolver having 1,000 chambers, even though there is a 99.9% chance that no one will be injured.

The majority's examples are only those in which a person has intentionally used force, meaning that the person acts with purpose or knowledge that force is involved. *Ante*, at 693–694. As a result, the majority overlooks the critical distinction between conduct that is intended to cause harm and conduct that is not intended to cause harm. Violently throwing a plate against a wall is a use of force. Speeding on a roadway is not. That reflects the fundamental difference between intentional and reckless wrongdoing. An intentional wrong is designed to inflict harm. See Restatement (Second) of Torts § 8A, at 15. A reckless wrong is not: "While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it." *Id.*, § 500, Comment *f*, at 590.

All that remains of the majority's analysis is its unsupported conclusion that recklessness looks enough like knowledge so that the former suffices for a use of force just as the latter does. *Ante*, at 693–694. That overlooks a crucial distinction between a "practical certainty" and a substantial risk. When a person acts with practical certainty, he intentionally produces a result. As explained above, *supra*, at 704–705, when a person acts with knowledge that certain consequences will result, the law imputes to that person the intent to cause those consequences. And the requirement of a "practical" certainty reflects that, in ordinary life, people rarely have perfect certitude of the facts that they "know." But as the probability decreases, "the actor's conduct loses the character of intent, and becomes mere recklessness." Restatement (Second) of Torts § 8A, Comment *b*, at 15. And the distinction between intentional and reckless conduct is key for defining "use." When a person acts with a practical certainty that he will employ force, he intends to cause harm; he has actively employed force for an instrumental purpose, and that is why we can fairly say he "uses" force. In the case of reckless wrongdoing, however, the injury the actor has caused is just an accidental byproduct of inappropriately risky behavior; he has not actively employed force.

In sum, "use" requires the intent to employ the thing being used. And in law, that intent will be imputed when a person acts with practical certainty that he will actively employ that thing. Merely disregarding a risk that a harm will result, however, does not supply the requisite intent.

2

To limit its definition of "use," the majority adds two additional requirements. The conduct must be "volitional," and it cannot be merely "accident[al]." *Ante*, at 693–695. These additional requirements will cause confusion, and neither will limit the breadth of the majority's adopted understanding of a "use of physical force."

First, the majority requires that the use of force must be "volitional," so that "an involuntary motion, even a powerful one, is not naturally described as an active employment of force." *Ante*, at 693. The majority provides two examples:

> 1. The Soapy-Handed Husband: "[A] person with soapy hands loses his grip on a plate, which then shatters and cuts his wife." *Ibid.*
>
> 2. The Chivalrous Door Holder: "[A] person lets slip a door that he is trying to hold open for his girlfriend." *Ibid.*

In the majority's view, a husband who loses his grip on a plate or a boyfriend who lets the door slip has not engaged in a volitional act creating force. *Ante*, at 693–694. The majority distinguishes this "volitional" act requirement from the "mental state of intention, knowledge, or recklessness with respect to the harmful consequences of his volitional conduct." *Ante*, at 693. The Angry Plate Thrower—unlike the Soapy-Handed Husband or Chivalrous Door Holder—has engaged in a volitional act, even if he did not intend to hurl the plate at his wife. *Ante*, at 693–694.

The majority's use of "volitional" is inconsistent with its traditional legal definition. The husband who drops a dish

on his wife's foot and the boyfriend who loses his grip while holding the door have acted volitionally. "[A]n 'act,' as that term is ordinarily used, is a voluntary contraction of the muscles, and nothing more." Prosser and Keeton § 8, at 34; see also Model Penal Code § 2.01 (defining the voluntary act requirement). For the plate and door examples not to be volitional acts, they would need to be unwilled muscular movements, such as a person who drops the plate because of a seizure.

In calling the force in these cases nonvolitional, the majority has confounded the minimum *mens rea* generally necessary to trigger criminal liability (recklessness) with the requirement that a person perform a volitional act. Although all involuntary actions are blameless, not all blameless conduct is involuntary.

What the majority means to say is that the men did not *intentionally* employ force, a requirement materially different from a volitional act. And this requirement poses a dilemma for the majority. Recklessly unleashing a force that recklessly causes physical injury—for example, a police officer speeding through the intersection without triggering his lights and siren—is an assault in States that follow the Model Penal Code. See *supra*, at 707. If the majority's rule is to include *all* reckless assault, then the majority must accept that the Text-Messaging Dad is as guilty of using force against his son as the husband who angrily throws a plate toward his wife—an implausible result. Alternatively, the majority must acknowledge that its "volitional" act requirement is actually a requirement that the use of force be intentional, even if that intentional act of violence results in a recklessly caused, but unintended, injury. The majority, of course, refuses to do so because that approach would remove many assault convictions, especially in the many States that have adopted the Model Penal Code, from the sweep of the federal statute. Thus, the majority is left misapplying basic principles of criminal law to rationalize why all "assault"

under the Model Penal Code constitutes the "use of physical force" under § 921(a)(33)(A)(ii).

Second and relatedly, the majority asserts that a use of force cannot be merely accidental. But this gloss on what constitutes a use of force provides no further clarity. The majority's attempt to distinguish "recklessness" from an "accident," *ante*, at 694, is an equivocation on the meaning of "accident." An accident can mean that someone was blameless—for example, a driver who accidentally strikes a deer that darts into a roadway. But an accident can also refer to the fact that the result was unintended: A car accident is no less an "accident" just because a driver acted negligently or recklessly. Neither labeling an act "volitional" nor labeling it a mere "accident" will rein in the majority's overly broad understanding of a "use of physical force."

* * *

If Congress wanted to sweep in all reckless conduct, it could have written § 921(a)(33)(A)(ii) in different language. Congress might have prohibited the possession of firearms by anyone convicted under a state law prohibiting assault or battery. Congress could also have used language tracking the Model Penal Code by saying that a conviction must have, as an element, "the intentional, knowing, or reckless causation of physical injury." But Congress instead defined a "misdemeanor crime of domestic violence" by requiring that the offense have "the use of physical force." And a "use of physical force" has a well-understood meaning applying only to intentional acts designed to cause harm.

III

Even assuming any doubt remains over the reading of "use of physical force," the majority errs by reading the statute in a way that creates serious constitutional problems. The doctrine of constitutional avoidance "command[s] courts, when faced with two plausible constructions of a statute—one constitutional and the other unconstitutional—to choose

the constitutional reading." *Northwest Austin Municipal Util. Dist. No. One* v. *Holder*, 557 U. S. 193, 213 (2009) (THOMAS, J., concurring in judgment in part and dissenting in part) (internal quotation marks omitted). Section 922(g)(9) is already very broad. It imposes a lifetime ban on gun ownership for a single intentional nonconsensual touching of a family member. A mother who slaps her 18-year-old son for talking back to her—an intentional use of force—could lose her right to bear arms forever if she is cited by the police under a local ordinance. The majority seeks to expand that already broad rule to any reckless physical injury or nonconsensual touch. I would not extend the statute into that constitutionally problematic territory.

The Second Amendment protects "the right of the people to keep and bear Arms." In *District of Columbia* v. *Heller*, 554 U. S. 570, 624, 627, 635 (2008), the Court held that the Amendment protects the right of all law-abiding citizens to keep and bear arms that are in common use for traditionally lawful purposes, including self-defense. And in *McDonald* v. *Chicago*, 561 U. S. 742 (2010), the Court held that the right to keep and bear arms is a fundamental right. See *id.*, at 767–778; *id.*, at 806 (THOMAS, J., concurring in part and concurring in judgment).

The protections enumerated in the Second Amendment, no less than those enumerated in the First, are not absolute prohibitions against government regulation. *Heller*, 554 U. S., at 595, 626–627. Traditionally, States have imposed narrow limitations on an individual's exercise of his right to keep and bear arms, such as prohibiting the carrying of weapons in a concealed manner or in sensitive locations, such as government buildings. *Id.*, at 626–627; see, *e. g.*, *State* v. *Kerner*, 181 N. C. 574, 578–579, 107 S. E. 222, 225 (1921). But these narrow restrictions neither prohibit nor broadly frustrate any individual from generally exercising his right to bear arms.

Some laws, however, broadly divest an individual of his Second Amendment rights. *Heller* approved, in dicta, laws that prohibit dangerous persons, including felons and the mentally ill, from having arms. 554 U. S., at 626. These laws are not narrow restrictions on the right because they prohibit certain individuals from exercising their Second Amendment rights at all times and in all places. To be constitutional, therefore, a law that broadly frustrates an individual's right to keep and bear arms must target individuals who are beyond the scope of the "People" protected by the Second Amendment.

Section 922(g)(9) does far more than "close [a] dangerous loophole" by prohibiting individuals who had committed felony domestic violence from possessing guns simply because they pleaded guilty to misdemeanors. *Ante*, at 689 (internal quotation marks omitted). It imposes a lifetime ban on possessing a gun for *all* nonfelony domestic offenses, including so-called infractions or summary offenses. §§ 921(a)(33)(A)(ii), 922(g)(9); 27 CFR § 478.11 (2015) (defining a misdemeanor crime of domestic violence to include crimes punishable only by a fine). These infractions, like traffic tickets, are so minor that individuals do not have a right to trial by jury. See *Lewis* v. *United States*, 518 U. S. 322, 325–326 (1996).

Today the majority expands § 922(g)(9)'s sweep into patently unconstitutional territory. Under the majority's reading, a single conviction under a state assault statute for recklessly causing an injury to a family member—such as by texting while driving—can now trigger a lifetime ban on gun ownership. And while it may be true that such incidents are rarely prosecuted, this decision leaves the right to keep and bear arms up to the discretion of federal, state, and local prosecutors.

We treat no other constitutional right so cavalierly. At oral argument the Government could not identify any other fundamental constitutional right that a person could lose for-

ever by a single conviction for an infraction punishable only by a fine. Tr. of Oral Arg. 36–40. Cf. the First Amendment. Plenty of States still criminalize libel. See, *e. g.*, Ala. Code. § 13A–11–160 (2015); Fla. Stat. § 836.01 (2015); La. Rev. Stat. Ann. § 14:47 (West 2016); Mass. Gen. Laws, ch. 272, § 98C (2014); Minn. Stat. § 609.765 (2014); N. H. Rev. Stat. Ann. § 644:11 (2007); Va. Code Ann. § 18.2–209 (2014); Wis. Stat. § 942.01 (2005). I have little doubt that the majority would strike down an absolute ban on publishing by a person previously convicted of misdemeanor libel. In construing the statute before us expansively so that causing a single minor reckless injury or offensive touching can lead someone to lose his right to bear arms forever, the Court continues to "relegat[e] the Second Amendment to a second-class right." *Friedman* v. *Highland Park*, 577 U. S. 1039, 1043 (2015) (THOMAS, J., dissenting from denial of certiorari).

* * *

In enacting § 922(g)(9), Congress was not worried about a husband dropping a plate on his wife's foot or a parent injuring her child by texting while driving. Congress was worried that family members were abusing other family members through acts of violence and keeping their guns by pleading down to misdemeanors. Prohibiting those convicted of intentional and knowing batteries from possessing guns—but not those convicted of reckless batteries—amply carries out Congress' objective.

Instead, under the majority's approach, a parent who has a car accident because he sent a text message while driving can lose his right to bear arms forever if his wife or child suffers the slightest injury from the crash. This is obviously not the correct reading of § 922(g)(9). The "use of physical force" does not include crimes involving purely reckless conduct. Because Maine's statute punishes such conduct, it sweeps more broadly than the "use of physical force." I respectfully dissent.

Reporter's Note

The next page is purposely numbered 901. The numbers between 716 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR JUNE 13 THROUGH
JUNE 20, 2016

JUNE 13, 2016

Certiorari Dismissed

No. 15–8914. MALLOY *v.* PETERS ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 617 Fed. Appx. 948.

No. 15–9008. PRESLEY *v.* MISSISSIPPI. Sup. Ct. Miss. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 15–9210. ESCOBAR DE JESUS *v.* UNITED STATES. C. A. 1st Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*). JUSTICE KAGAN took no part in the consideration or decision of this motion and this petition.

Miscellaneous Orders

No. 15A1125. WEATHERLY *v.* UNITED STATES. Application for certificate of appealability, addressed to JUSTICE GINSBURG and referred to the Court, denied.

No. 15M126. STONE *v.* REYES ET AL. Motion for leave to proceed as a veteran denied.

No. 15M127. BANKS *v.* ACS EDUCATION ET AL.;
No. 15M128. EDWARDS *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.; and

No. 15M129. DICKERSON *v.* CARTLEDGE, WARDEN. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 15M130. H. M. *v.* PENNSYLVANIA DEPARTMENT OF HUMAN SERVICES, FKA PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE. Motion for leave to file petition for writ of certiorari with supplemental appendix under seal granted.

No. 15–8161. SNEED *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [578 U. S. 918] denied.

No. 15–8864. CAMPBELL *v.* ANDERSON ET AL. C. A. 4th Cir.;
No. 15–8950. HOLMES *v.* EAST COOPER COMMUNITY HOSPITAL, INC., ET AL. Sup. Ct. S. C.;
No. 15–9017. SHAFFER *v.* CITY OF SOUTH CHARLESTON, WEST VIRGINIA, ET AL. Sup. Ct. App. W. Va.; and
No. 15–9313. CALKINS *v.* UNITED STATES. C. A. 8th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until July 5, 2016, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 15–1407. IN RE ANUFORO; and
No. 15–9277. IN RE MADISON. Petitions for writs of habeas corpus denied.

No. 15–8897. IN RE MORRIS. Petition for writ of mandamus denied.

Certiorari Denied

No. 15–944. DIMARE FRESH, INC., ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 808 F. 3d 1301.

No. 15–966. SPERRAZZA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 804 F. 3d 1113.

No. 15–981. TUAUA ET AL. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 788 F. 3d 300.

No. 15–982. MCCAFFREE ET AL. *v.* BANCINSURE, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 796 F. 3d 1226.

No. 15–1002. Aifang Ye *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 808 F. 3d 395.

No. 15–1064. Seminole Tribe of Florida *v.* Biegalski, Executive Director, Florida Department of Revenue. C. A. 11th Cir. Certiorari denied. Reported below: 799 F. 3d 1324.

No. 15–1133. Mark *v.* Tennessee. Ct. Crim. App. Tenn. Certiorari denied.

No. 15–1152. Michigan et al. *v.* Environmental Protection Agency et al. C. A. D. C. Cir. Certiorari denied.

No. 15–1245. Whelehan *v.* Bank of America Pension Plan for Legacy Companies—Fleet—Traditional Benefit et al. C. A. 2d Cir. Certiorari denied. Reported below: 621 Fed. Appx. 70.

No. 15–1252. Miller *v.* Metrocare Services, fka Dallas MHMR, et al. C. A. 5th Cir. Certiorari denied. Reported below: 809 F. 3d 827.

No. 15–1254. Duhamel *v.* Ohio. Ct. App. Ohio, 8th App. Dist., Cuyahoga County. Certiorari denied. Reported below: 2015-Ohio-3145.

No. 15–1258. Bent *v.* Bent. Ct. App. Wash. Certiorari denied. Reported below: 188 Wash. App. 1044.

No. 15–1264. Kinney *v.* California. Super. Ct. Cal., Contra Costa County. Certiorari denied.

No. 15–1265. Molina *v.* Aurora Loan Services, LLC, et al. C. A. 11th Cir. Certiorari denied. Reported below: 635 Fed. Appx. 618.

No. 15–1268. Bliss *v.* Deutsche Bank National Trust Co., as Trustee, et al. App. Ct. Conn. Certiorari denied. Reported below: 159 Conn. App. 483, 124 A. 3d 890.

No. 15–1272. California Artichoke & Vegetable Growers Corp., dba Ocean Mist Farms *v.* Agricultural Labor Relations Board. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 15–1275. YOUNG *v.* TOWNSHIP OF IRVINGTON, NEW JERSEY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 629 Fed. Appx. 352.

No. 15–1280. FALCO *v.* JUSTICES OF THE MATRIMONIAL PARTS OF THE SUPREME COURT OF SUFFOLK COUNTY. C. A. 2d Cir. Certiorari denied. Reported below: 805 F. 3d 425.

No. 15–1297. COSGROVE ET AL. *v.* CITY OF PLANO, TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 623 Fed. Appx. 708.

No. 15–1310. MITRANO *v.* JPMORGAN CHASE BANK, N. A., ET AL. C. A. 1st Cir. Certiorari denied.

No. 15–1316. TONEMAN ET UX. *v.* U. S. BANK N. A. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 628 Fed. Appx. 523.

No. 15–1322. P & M VANDERPOEL DAIRY *v.* AGRICULTURAL LABOR RELATIONS BOARD. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 15–1327. ABEL FAMILY L. P. ET AL. *v.* UNITED STATES ET AL. Sup. Ct. Mont. Certiorari denied. Reported below: 382 Mont. 46, 364 P. 3d 584.

No. 15–1333. AGOLA *v.* GRIEVANCE COMMITTEE FOR THE SEVENTH JUDICIAL DISTRICT. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 128 App. Div. 3d 78, 6 N. Y. S. 3d 890.

No. 15–1338. JIANQING WU *v.* SPECIAL COUNSEL ET AL. C. A. D. C. Cir. Certiorari denied.

No. 15–1369. NEWEGG INC. *v.* MACROSOLVE, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 637 Fed. Appx. 591.

No. 15–7431. LIEBESKIND *v.* RUTGERS UNIVERSITY ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 15–7796. AMBROSE *v.* ROMANOWSKI, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 801 F. 3d 567.

No. 15–7896. JAMES *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist., Div. 4. Certiorari denied. Reported below: 238 Cal. App. 4th 794, 189 Cal. Rptr. 3d 635.

No. 15–8026. MUHAMMAD *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 15–8063. WINKLES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 795 F. 3d 1134.

No. 15–8078. VILLALTA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 615 Fed. Appx. 157.

No. 15–8285. NORE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 631 Fed. Appx. 800.

No. 15–8524. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 15–8536. MADISON *v.* DAVIS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 15–8851. ANDREWS ET AL. *v.* FLAIZ ET AL. C. A. 6th Cir. Certiorari denied.

No. 15–8859. BURGESS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2015 IL App (1st) 130657, 40 N. E. 3d 284.

No. 15–8862. MUHAMMAD *v.* GREEN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 633 Fed. Appx. 122.

No. 15–8865. CHRISTOPHER S. *v.* WINNEBAGO COUNTY, WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 2016 WI 1, 366 Wis. 2d 1, 878 N. W. 2d 109.

No. 15–8869. ROHRS *v.* ALDRIDGE, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 15–8872. WYATT *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 15–8883. COLLINS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2015 IL App (1st) 131145, 42 N. E. 3d 1.

No. 15–8888. KINGMA *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 188 Wash. App. 1030.

No. 15–8893. NOLL *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 125 A. 3d 446.

No. 15–8899. WILBURN *v.* WINN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 15–8900. WHITE *v.* LAWSON ET AL. C. A. 6th Cir. Certiorari denied.

No. 15–8903. NELSON *v.* SOUTH DAKOTA. Sup. Ct. S. D. Certiorari denied. Reported below: 877 N. W. 2d 105.

No. 15–8904. WAFER *v.* SHERMAN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 627 Fed. Appx. 586.

No. 15–8905. TAYLOR *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 15–8908. BRISENO *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 15–8910. BELL *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 473 Mass. 131, 39 N. E. 3d 1190.

No. 15–8913. ANCALADE *v.* LOUISIANA. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 2014–0739 (La. App. 4 Cir. 1/14/15), 158 So. 3d 891.

No. 15–8920. JONES *v.* MACLAREN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 15–8922. POLLY *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 15–8924. WHITE *v.* RYAN ET AL. C. A. 9th Cir. Certiorari denied.

No. 15–8934. YOUNG *v.* TRITT, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FRACKVILLE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 15–8938. LEOPOLD *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 333 Ga. App. 777, 777 S. E. 2d 254.

No. 15–8939. EIZEMBER *v.* DUCKWORTH, ACTING WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 803 F. 3d 1129.

No. 15–8958. Frazier *v.* Michigan. Sup. Ct. Mich. Certiorari denied. Reported below: 498 Mich. 867, 866 N. W. 2d 443.

No. 15–8965. Danihel *v.* Office of the President of the United States et al. C. A. 3d Cir. Certiorari denied. Reported below: 640 Fed. Appx. 185.

No. 15–8967. Estela-Gomez *v.* Lynch, Attorney General. C. A. 3d Cir. Certiorari denied. Reported below: 629 Fed. Appx. 432.

No. 15–8976. Cottrell *v.* Barksdale, Warden. Sup. Ct. Va. Certiorari denied.

No. 15–9007. Kirby et al. *v.* Kirk, Judge, District Court of Oklahoma, Lincoln County, et al. Ct. Crim. App. Okla. Certiorari denied.

No. 15–9012. Moore *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 132 A. 3d 1176.

No. 15–9015. Skoloda *v.* Garman, Superintendent, State Correctional Institution at Rockview, et al. C. A. 3d Cir. Certiorari denied.

No. 15–9020. Levier *v.* Cain, Warden. C. A. 5th Cir. Certiorari denied.

No. 15–9050. Russell *v.* Ryan, Director, Arizona Department of Corrections, et al. C. A. 9th Cir. Certiorari denied.

No. 15–9054. Lamb *v.* Jones, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 15–9060. Lockhart *v.* Tennessee. Ct. Crim. App. Tenn. Certiorari denied.

No. 15–9089. Williams *v.* Oregon. Ct. App. Ore. Certiorari denied. Reported below: 272 Ore. App. 770, 358 P. 3d 299.

No. 15–9090. Thomas *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 615 Fed. Appx. 825.

No. 15–9111. Faircloth *v.* Colorado. Ct. App. Colo. Certiorari denied.

No. 15–9119. MAY *v.* GREENE COUNTY SHERIFF'S DEPARTMENT ET AL. Ct. App. Ind. Certiorari denied.

No. 15–9150. MOORE *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 415 S. C. 245, 781 S. E. 2d 897.

No. 15–9152. ROBINSON *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied.

No. 15–9182. NIELSEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 640 Fed. Appx. 224.

No. 15–9209. ESPINOZA, AKA MEDRANO ESPINOZA *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 15–9211. REBER *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 181 So. 3d 501.

No. 15–9214. HUGHES *v.* WALKER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 15–9217. A. D. H. *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 131 A. 3d 100.

No. 15–9232. CAILLIER, AKA CALLIER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 15–9245. MURILLO-ANGULO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 15–9246. MESCALL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 624 Fed. Appx. 103.

No. 15–9247. ELEBY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 133 A. 3d 1005.

No. 15–9250. WELCH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 811 F. 3d 275.

No. 15–9252. TERRELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 15–9253. WILSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 15–9254. WHITE *v.* TAYLOR, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 636 Fed. Appx. 521.

No. 15–9258. SANCHEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 633 Fed. Appx. 271.

No. 15–9261. CURLEY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 15–9265. GRAHAM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 630 Fed. Appx. 712.

No. 15–9268. JUAREZ-GONZALEZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 15–9271. MORRIS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 132 A. 3d 172.

No. 15–9280. BORJAS-RAMOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 633 Fed. Appx. 250.

No. 15–9282. BOWEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 818 F. 3d 179.

No. 15–9287. JACKSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 637 Fed. Appx. 223.

No. 15–9303. GLADNEY *v.* POLLARD, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 799 F. 3d 889.

No. 15–9320. MANUEL CARREON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 632 Fed. Appx. 902.

No. 15–9321. ROBERTS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 15–1347. D'AGOSTINO ET AL. *v.* BAKER, GOVERNOR OF MASSACHUSETTS, ET AL. C. A. 1st Cir. Motion of Cato Institute for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 812 F. 3d 240.

No. 15–1356. KAPORDELIS *v.* BAIRD, WARDEN. C. A. 7th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 15–7539. WALSH *v.* PNC BANK ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

No. 15–9010. MASARIK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 630 Fed. Appx. 630.

No. 15–9262. TAYLOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 632 Fed. Appx. 142.

Rehearing Denied

No. 15–924. WINWARD *v.* UTAH, 577 U. S. 1235;

No. 15–1018. YOUNGBLOOD *v.* FORT BEND INDEPENDENT SCHOOL DISTRICT, 578 U. S. 922;

No. 15–1029. MUA *v.* BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY, 578 U. S. 923;

No. 15–1062. HEMOPET *v.* HILL'S PET NUTRITION, INC., 578 U. S. 923;

No. 15–1071. BIERI *v.* GREENE COUNTY PLANNING AND ZONING DEPARTMENT ET AL., 578 U. S. 923;

No. 15–7595. NELSON ET AL. *v.* LOUISE, MAYOR OF CITY OF PORT ALLEN, LOUISIANA, ET AL., 577 U. S. 1196;

No. 15–7911. RICKMYER *v.* JUNGERS ET AL., 578 U. S. 908;

No. 15–7950. IN RE GRENADIER, 578 U. S. 904;

No. 15–8023. GUINN *v.* COLORADO ATTORNEY REGULATION COUNSEL, 578 U. S. 927;

No. 15–8144. SCHUM *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL., 578 U. S. 930;

No. 15–8164. KOSTICH *v.* MCCOLLUM, WARDEN, 578 U. S. 931;

No. 15–8168. DJENASEVIC, AKA GENASE, AKA KRAJA *v.* UNITED STATES, 578 U. S. 911;

No. 15–8220. KAMMERER *v.* STATE BAR OF CALIFORNIA, 577 U. S. 1239;

No. 15–8308. AMIR-SHARIF *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, ET AL., 578 U. S. 948;

No. 15–8324. MCCRAY *v.* GRAHAM, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, 578 U. S. 933;

No. 15–8397. RANKIN *v.* BRIAN LAVAN & ASSOCIATES, P. C., ET AL., 578 U. S. 962;

No. 15–8422. PENNINGTON-THURMAN *v.* BANK OF AMERICA ET AL., 578 U. S. 934;

No. 15–8425. FLEMING *v.* UNITED STATES, 578 U. S. 949;

No. 15–8604. PASTOREK *v.* UNITED STATES, 578 U. S. 939;
No. 15–8657. REDIFER *v.* UNITED STATES, 578 U. S. 940; and
No. 15–8672. IN RE VISINTINE, 578 U. S. 920. Petitions for rehearing denied.

JUNE 16, 2016

Miscellaneous Order

No. 15A1207. J&K ADMINISTRATIVE MANAGEMENT SERVICES, INC., ET AL. *v.* ROBINSON ET AL. Application to recall and stay the mandate of the United States Court of Appeals for the Fifth Circuit, presented to JUSTICE THOMAS, and by him referred to the Court, denied.

JUNE 20, 2016

Certiorari Granted—Vacated and Remanded

No. 14–9409. WILLIAMS *v.* LOUISIANA. Ct. App. La., 4th 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 *Foster* v. *Chatman*, 578 U. S. 488 (2016). Reported below: 2013–0283 (La. App. 4 Cir. 4/23/14), 137 So. 3d 832.

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

"The Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Foster* v. *Chatman*, 578 U. S. 488, 499 (2016) (citing *Batson* v. *Kentucky*, 476 U. S. 79 (1986); internal quotation marks omitted). *Batson* "provides a three-step process for determining when a strike is discriminatory:

> "First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, *the prosecution* must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination." *Foster*, 578 U. S., at 499 (internal quotation marks omitted; emphasis added).

This case concerns a Louisiana procedural rule that permits the trial court, rather than the prosecutor, to supply a race-neutral reason at *Batson*'s second step if "the court is satisfied that such

reason is apparent from the voir dire examination of the juror." La. Code Crim. Proc. Ann., Art. 795(C) (West 2013). Louisiana's rule, as the Louisiana Supreme Court has itself recognized, does not comply with this Court's *Batson* jurisprudence. *State* v. *Elie*, 2005–1569 (La. 7/10/2006), 936 So. 2d 791, 797 (citing *Johnson* v. *California*, 545 U. S. 162, 172 (2005)). At *Batson*'s second step, "the trial court [must] demand an explanation from the prosecutor." *Johnson*, 545 U. S., at 170; see *id.*, at 172 ("The *Batson* framework is designed to produce actual answers [from a prosecutor] to suspicions and inferences that discrimination may have infected the jury selection process. . . . It does not matter that the prosecutor might have had good reasons; what matters is the real reason [jurors] were stricken." (internal quotation marks and alterations omitted)); *id.*, at 173 (improper to "rel[y] on judicial speculation to resolve plausible claims of discrimination").

The rule allowing judge-supplied reasons, nonetheless, remains operative in Louisiana and was applied in petitioner's 2012 trial. On remand, the appropriate state court should reconsider petitioner's argument that the rule cannot be reconciled with *Batson*. A Louisiana court, "like any other state or federal court, is bound by this Court's interpretation of federal law." *James* v. *Boise*, 577 U. S. 306, 307 (2016) (*per curiam*). See also 2013–0283, pp. 8–9 (La. App. 4 Cir. 4/23/14), 137 So. 3d 832, 859 (Belsome, J., dissenting) ("[T]he United States Supreme Court has made clear . . . that the State is obligated to offer a race-neutral reason. The judge is an arbiter not a participant in the judicial process. Allowing the court to provide race-neutral reasons for the State violates [the Constitution].").

JUSTICE ALITO, with whom JUSTICE THOMAS joins, dissenting.

For the reasons set out in my statement in *Flowers* v. *Mississippi*, immediately *infra*, I would deny the petition.

The concurring statement calls upon the appropriate state court on remand to consider petitioner's argument that the trial judge did not comply with the second step of the procedure mandated by *Batson* v. *Kentucky*, 476 U. S. 79 (1986), because the judge, in accordance with a state procedural rule, rejected a defense challenge on the ground that a race-neutral reason for the strike was apparent from the *voir dire* of the juror in question. But whether petitioner is entitled to relief on this ground has nothing

to do with *Foster*, which "address[ed] only *Batson*'s third step." *Foster* v. *Chatman*, 578 U. S. 488, 499 (2016).

No. 14–10486. FLOWERS *v.* MISSISSIPPI. Sup. Ct. Miss. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Foster* v. *Chatman*, 578 U. S. 488 (2016). Reported below: 158 So. 3d 1009.

JUSTICE ALITO, with whom JUSTICE THOMAS joins, dissenting.

This Court often "GVRs" a case—that is, grants the petition for a writ of certiorari, vacates the decision below, and remands for reconsideration by the lower court—when we believe that the lower court should give further thought to its decision in light of an opinion of this Court that (1) came after the decision under review and (2) changed or clarified the governing legal principles in a way that could possibly alter the decision of the lower court. In this case and two others, *Williams* v. *Louisiana*, immediately *supra*, and *Floyd* v. *Alabama*, *infra*, p. 916, the Court misuses the GVR vehicle. The Court GVRs these petitions in light of our decision in *Foster* v. *Chatman*, 578 U. S. 488 (2016), which held, based on all the circumstances in that case, that a state prosecutor violated *Batson* v. *Kentucky*, 476 U. S. 79 (1986), by striking potential jurors based on race. Our decision in *Foster* postdated the decision of the Supreme Court of Mississippi in the present case, but *Foster* did not change or clarify the *Batson* rule in any way. Accordingly, there is no ground for a GVR in light of *Foster*.

The ultimate issue in *Batson* is a pure question of fact—whether a party exercising a peremptory challenge engaged in intentional discrimination on the basis of race. 476 U. S., at 93–94. If the party contesting a particular peremptory challenge makes out a prima facie case (that is, points out a pattern of strikes that calls for further inquiry), the party exercising the challenge must provide a legitimate race-neutral reason for the strike. *Id.*, at 97. If that is done, the trial judge must then make a finding as to whether the party exercising the peremptory challenge is telling the truth. *Id.*, at 98. There is no mechanical formula for the trial judge to use in making that decision, and in some cases the finding may be based on very intangible factors, such as the demeanor of the prospective juror in question and that of the attorney who exercised the strike. *Snyder* v. *Louisiana*, 552 U. S. 472, 477 (2008). For this reason and others, the

finding of the trial judge is entitled to a very healthy measure of deference. *Id.*, at 479.

Foster did not change the *Batson* analysis one iota. In *Foster*, the Court's determination that the prosecution struck jurors based on race—a determination with which I fully agreed, 578 U. S., at 515 (ALITO, J., concurring in judgment)—was based on numerous *case-specific factors*, including evidence that racial considerations permeated the jury selection process from start to finish and the prosecution's shifting and unreliable explanations for its strikes of black potential jurors in light of that evidence.

In particular, evidence of racial bias in *Foster* included the following facts revealed to be a part of the prosecution's jury selection file, which the Court held undermined the prosecution's defense of its strikes: copies of a jury venire list highlighting the names of black jurors; a draft affidavit from a prosecution investigator ranking black potential jurors; notes identifying black prospective jurors as "B#1," "B#2," and "B#3"; notes suggesting that the prosecution marked "N" (for "no") next to the names of all black prospective jurors; a "definite NO's" list that included the names of all black prospective jurors; a document relating to one juror with notes about the Church of Christ that stated "NO. No Black Church"; the questionnaires filled out by jurors, in which the race of black prospective jurors was circled. *Id.*, at 493–495 (majority opinion) (internal quotation marks omitted). But this overwhelming evidence of race consciousness was not the end of the Court's analysis in *Foster*. The Court also discussed evidence that the prosecution's stated reasons for striking black jurors were inconsistent and malleable. The prosecution's various rationales for its strikes "ha[d] no grounding in fact," were "contradicted by the record," and simply "cannot be credited," according to the Court. *Id.*, at 502, 505–507. Some of the purported reasons for striking black prospective jurors "shifted over time" and could not withstand close scrutiny. *Id.*, at 508. And other reasons, "while not explicitly contradicted by the record, [we]re difficult to credit" in light of the way in which the State treated similarly situated white jurors. *Id.*, at 505–507. In sum, the Court's decision in *Foster* relied on substantial, case-specific evidence in reaching its conclusion that the prosecution's proffered explanations for striking black prospective jurors could not be credited.

In the three cases in which the Court now GVRs in light of *Foster*, what the Court is saying, in effect, is something like this. If we granted review in these cases, we would delve into the facts and carefully review the trial judge's findings on the question of the prosecution's intent. That is what we did in *Foster*. But we do not often engage in review of such case-specific factual questions, and we do not want to do that here. Therefore, we will grant, vacate, and remand so that the lower court can do—or, redo—that hard work.

This is not a responsible use of the GVR power. In this case, the Supreme Court of Mississippi decided the *Batson* issue. It found insufficient grounds to overturn the trial judge's finding that the contested strikes were not based on race. If the majority wishes to review that decision, it should grant the petition for a writ of certiorari, issue a briefing schedule, and hear argument. If the majority is not willing to spend the time that full review would require, it should deny the petition.

The Court's decision today is not really a GVR in light of our factbound decision in *Foster*. It is, rather, a GVR in light of our 1986 decision in *Batson*. But saying that would be ridiculous, because the lower courts fully considered the *Batson* issue this petition raises. By granting, vacating, and remanding, the Court treats the State Supreme Court like an imperious senior partner in a law firm might treat an associate. Without pointing out any errors in the State Supreme Court's analysis, the majority simply orders the State Supreme Court to redo its work. We do not have that authority.

I would deny the petition. I respectfully dissent.

No. 15–635. Innovention Toys, LLC *v.* MGA Entertainment, Inc., et al. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Halo Electronics, Inc.* v. *Pulse Electronics, Inc.*, *ante*, p. 93. Reported below: 611 Fed. Appx. 693.

No. 15–1085. WesternGeco LLC *v.* ION Geophysical Corp. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Halo Electronics, Inc.* v. *Pulse Electronics, Inc.*, *ante*, p. 93. Justice Alito took no part in the consideration or decision of this petition. Reported below: 791 F. 3d 1340.

No. 15–7553. FLOYD *v.* ALABAMA. Sup. Ct. Ala. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Foster* v. *Chatman*, 578 U. S. 488 (2016). Reported below: 191 So. 3d 147.

JUSTICE ALITO, with whom JUSTICE THOMAS joins, dissenting.

I would deny the petition for the reasons set out in my statement in *Flowers* v. *Mississippi*, *supra*, p. 913 (opinion dissenting from decision to grant, vacate, and remand).

Certiorari Dismissed

No. 15–9200. LOI NGOC NGHIEM *v.* KERESTES, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT MAHANOY, ET AL. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 15M131. WELCOME *v.* MABUS, SECRETARY OF THE NAVY. Motion for leave to proceed as a veteran denied.

No. 15M132. JACKSON *v.* COLVIN, ACTING COMMISSIONER OF SOCIAL SECURITY; and

No. 15M133. L'GGRKE *v.* ASSET PLUS CORP. ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 15–1039. SANDOZ INC. *v.* AMGEN INC. ET AL.; and

No. 15–1195. AMGEN INC. ET AL. *v.* SANDOZ INC. C. A. Fed. Cir. The Solicitor General is invited to file a brief in these cases expressing the views of the United States.

No. 15–1189. IMPRESSION PRODUCTS, INC. *v.* LEXMARK INTERNATIONAL, INC. C. A. Fed. Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 15–9476. IN RE BODNAR. Petition for writ of habeas corpus denied.

No. 15–9166. IN RE MASON; and

No. 15–9330. In re Hook. Petitions for writs of mandamus denied.

Certiorari Granted

No. 15–1204. Jennings et al. *v.* Rodriguez et al., Individually and on Behalf of All Others Similarly Situated. C. A. 9th Cir. Certiorari granted. Reported below: 804 F. 3d 1060.

No. 15–1251. National Labor Relations Board *v.* SW General, Inc., dba Southwest Ambulance. C. A. D. C. Cir. Certiorari granted. Reported below: 796 F. 3d 67.

Certiorari Denied

No. 15–942. Black & Decker (U. S.) Inc. et al. *v.* SD3, LLC, et al. C. A. 4th Cir. Certiorari denied. Reported below: 801 F. 3d 412.

No. 15–947. Price et al., Individually and on Behalf of All Others Similarly Situated *v.* Philip Morris, Inc. Sup. Ct. Ill. Certiorari denied. Reported below: 2015 IL 117687, 43 N. E. 3d 53.

No. 15–1028. Fazio *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 795 F. 3d 421.

No. 15–1030. Shew et al. *v.* Malloy, Governor of Connecticut, et al. C. A. 2d Cir. Certiorari denied. Reported below: 804 F. 3d 242.

No. 15–1033. DeJoria *v.* Maghreb Petroleum Exploration, S. A., et al. C. A. 5th Cir. Certiorari denied. Reported below: 804 F. 3d 373.

No. 15–1117. Turturro, Administrator of the Estate of Braddock, Deceased, et al. *v.* Federal Aviation Administration et al. C. A. 3d Cir. Certiorari denied. Reported below: 629 Fed. Appx. 313.

No. 15–1138. Bernardo, on Behalf of M&K Engineering, Inc. *v.* Johnson, Secretary of Homeland Security, et al. C. A. 1st Cir. Certiorari denied. Reported below: 814 F. 3d 481.

No. 15–1140. Binday *v.* United States;

No. 15–1177. KERGIL *v.* UNITED STATES; and
No. 15–8582. RESNICK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 804 F. 3d 558.

No. 15–1150. HUNTER *v.* COLVIN, ACTING COMMISSIONER OF SOCIAL SECURITY. C. A. 11th Cir. Certiorari denied. Reported below: 808 F. 3d 818.

No. 15–1157. DISTRIBUTED SOLUTIONS, INC. *v.* JAMES, SECRETARY OF THE AIR FORCE. C. A. Fed. Cir. Certiorari denied. Reported below: 617 Fed. Appx. 996.

No. 15–1203. GLOBUS MEDICAL, INC. *v.* BIANCO. C. A. Fed. Cir. Certiorari denied. Reported below: 618 Fed. Appx. 1032.

No. 15–1270. M. C. *v.* T. W. ET AL. Sup. Ct. Colo. Certiorari denied. Reported below: 363 P. 3d 193.

No. 15–1278. GAGE COUNTY, NEBRASKA, ET AL. *v.* DEAN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 807 F. 3d 931.

No. 15–1279. FERNANDEZ *v.* LASALLE BANK N. A. ET AL. Sup. Ct. Fla. Certiorari denied.

No. 15–1284. HUTCHINSON *v.* WHALEY ET AL. Ct. App. Ga. Certiorari denied. Reported below: 333 Ga. App. 773, 777 S. E. 2d 251.

No. 15–1288. LANO ET AL. *v.* CARNIVAL CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 621 Fed. Appx. 373.

No. 15–1296. CHERRYHOLMES *v.* OHIO. Ct. App. Ohio, 5th App. Dist., Fairfield County. Certiorari denied. Reported below: 2015-Ohio-3063.

No. 15–1298. HOLANEK *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 242 N. C. App. 633, 776 S. E. 2d 225.

No. 15–1300. INTERTRANSFERS, INC. *v.* LUXOR AGENTES AUTONOMOS DE INVESTIMIENTOS, LTDA. C. A. 11th Cir. Certiorari denied. Reported below: 638 Fed. Appx. 925.

No. 15–1302. AARON *v.* CBS OUTDOORS, INC. Ct. App. Mich. Certiorari denied.

No. 15–1307. Lora *v.* Shanahan et al. C. A. 2d Cir. Certiorari denied. Reported below: 804 F. 3d 601.

No. 15–1354. Webb *v.* Texas. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 15–1382. Kanofsky *v.* Commissioner of Internal Revenue. C. A. 4th Cir. Certiorari denied. Reported below: 622 Fed. Appx. 301.

No. 15–1390. Curry *v.* United States. C. A. 3d Cir. Certiorari denied.

No. 15–1396. Rivas *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 637 Fed. Appx. 338.

No. 15–1403. Kim *v.* Yeong Kuk Ahn. Ct. App. Cal., 2d App. Dist., Div. 1. Certiorari denied.

No. 15–7005. Aziz *v.* New Jersey. Super. Ct. N. J., App. Div. Certiorari denied.

No. 15–7384. Cazares et al. *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 788 F. 3d 956.

No. 15–7475. Gibson *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 615 Fed. Appx. 619.

No. 15–7834. Lyle *v.* Aiken et al. C. A. 6th Cir. Certiorari denied.

No. 15–7850. Chavarria Delgado *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 620 Fed. Appx. 329.

No. 15–7855. Fisk *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 619 Fed. Appx. 417.

No. 15–8050. Bell *v.* Arkansas. Sup. Ct. Ark. Certiorari denied. Reported below: 2015 Ark. 370.

No. 15–8307. Morgan *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 121 A. 3d 1235.

No. 15–8563. Hernandez *v.* Florida et al. Sup. Ct. Fla. Certiorari denied. Reported below: 180 So. 3d 978.

No. 15–8601. Moore *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 624 Fed. Appx. 244.

No. 15–8603. VILLEGAS-RODRIGUEZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 617 Fed. Appx. 597.

No. 15–8635. YEOMANS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied.

No. 15–8704. KAMPFER *v.* CUOMO, GOVERNOR OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 643 Fed. Appx. 43.

No. 15–8779. BROWN *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 2015–2001 (La. 2/19/16), 184 So. 3d 1265.

No. 15–8929. BELL *v.* U. S. BANK N. A. ET AL. Sup. Ct. Fla. Certiorari denied.

No. 15–8930. AMBROSE *v.* TRIERWEILER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 621 Fed. Appx. 808.

No. 15–8931. MORROW *v.* PASH, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 15–8932. LAMPKIN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 15–8936. TETREAU *v.* CAMPBELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 15–8940. KARNAZES *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 15–8944. MCCAIN *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 2015 IL App (2d) 140280–U.

No. 15–8945. PROCTOR *v.* BURKE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 630 Fed. Appx. 127.

No. 15–8954. BUYCKS *v.* LBS FINANCIAL CREDIT UNION ET AL. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 15–8956. SABBY *v.* HAMMER, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 15–8957. HUPP *v.* PETERSEN ET AL. C. A. 9th Cir. Certiorari denied.

No. 15–8959. GABB *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2014 IL App (1st) 120908–U.

No. 15–8964. TURNER *v.* WRIGHT ET AL. Sup. Ct. Miss. Certiorari denied.

No. 15–8966. CARTER *v.* ACHOLONU ET AL. C. A. 11th Cir. Certiorari denied.

No. 15–8971. JOHNSON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 62 Cal. 4th 600, 364 P. 3d 359.

No. 15–8972. MORGAN *v.* HATTON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 15–8992. KLEIN *v.* PRINGLE, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 15–8993. LEBOON *v.* ALAN MCILVAIN CO. C. A. 3d Cir. Certiorari denied. Reported below: 628 Fed. Appx. 98.

No. 15–8994. WHIPPLE *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 15–9062. MAYS *v.* WHITENER, SUPERINTENDENT, MARION CORRECTIONAL INSTITUTION, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 633 Fed. Appx. 161.

No. 15–9125. ZARAZU *v.* SPEARMAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 15–9167. SURATOS *v.* FOSTER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 15–9201. GUNDERSON *v.* KIRKEGARD, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 15–9219. MANNING *v.* ROCK, SUPERINTENDENT, UPSTATE CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 633 Fed. Appx. 26.

No. 15–9237. LUSTER *v.* LAXALT, ATTORNEY GENERAL OF NEVADA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 15–9240. TANGUAY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 809 F. 3d 677.

No. 15–9281. BOWMAN *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 184 So. 3d 535.

No. 15–9290. MCCARY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 614 Fed. Appx. 383.

No. 15–9294. BADINI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 15–9296. COLTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 15–9302. FAULDS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 617 Fed. Appx. 581.

No. 15–9305. MANGO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 633 Fed. Appx. 257.

No. 15–9308. CARMONA-RAMOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 638 Fed. Appx. 351.

No. 15–9331. DUPREE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 620 Fed. Appx. 49.

No. 15–9333. RICHMOND *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 641 Fed. Appx. 295.

No. 15–9338. LOWE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 643 Fed. Appx. 834.

No. 15–9341. MARTINEZ MEZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 642 Fed. Appx. 332.

No. 15–9347. BUCHANAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 637 Fed. Appx. 327.

No. 15–9357. FLORES-RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 634 Fed. Appx. 471.

No. 15–9358. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 637 Fed. Appx. 572.

No. 15–9360. FULLMAN *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 122 A. 3d 455.

No. 15–9380. MAUNTECA-LOPEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 15–9384. THOMPSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 15–9387. VASILOFF *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 622 Fed. Appx. 881.

No. 15–9391. ANTONIO CARMONA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 15–9403. SUAREZ-GUZMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 15–9406. HIGH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 593 Fed. Appx. 234.

No. 15–9407. HASKINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 15–9408. MILLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 819 F. 3d 1314.

No. 15–9416. PEREZ RAMIREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 15–9418. BARTOLO-GUERRA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 637 Fed. Appx. 138.

No. 15–1020. NTSEBEZA ET AL. *v.* FORD MOTOR CO. ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 796 F. 3d 160.

No. 15–1049. M. A., AS MOTHER OF J. D. *v.* PADILLA, JUDGE, SUPERIOR COURT OF ARIZONA, MARICOPA COUNTY, ET AL. Ct. App. Ariz. Motion of respondent Christopher Allen Simcox for leave to proceed *in forma pauperis* granted. Motions of Defenders of Children; Child Justice, Inc., et al.; and Arizona Voice for Crime Victims et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 237 Ariz. 263, 349 P. 3d 1100.

No. 15–9402. LEWIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

Rehearing Denied

No. 15–878. CHINWEZE *v.* BANK OF AMERICA, N. A., 577 U. S. 1194;

No. 15–1065. CHAPARRO ET UX. *v.* U. S. BANK N. A., 578 U. S. 923;

No. 15–6345. ROGERS *v.* PERRY, SECRETARY, NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, 577 U. S. 1015;

No. 15–7872. LEWIS *v.* TEXAS, 578 U. S. 907;

No. 15–7893. MATTHISEN *v.* UNITED STATES, 578 U. S. 908;

No. 15–7993. WILLYARD *v.* KELLEY, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, 578 U. S. 926;

No. 15–8040. CONSTANT *v.* DTE ELECTRIC CO., AKA DETROIT EDISON CO., 578 U. S. 927;

No. 15–8098. WALKER *v.* CITY OF MEMPHIS, TENNESSEE, ET AL., 578 U. S. 929;

No. 15–8224. SMALL *v.* FLORIDA, 578 U. S. 932;

No. 15–8314. ALBERTO SOLERNORONA *v.* MICHIGAN, 578 U. S. 948;

No. 15–8379. INTA *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, 578 U. S. 961;

No. 15–8398. JEHOVAH *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. (two judgments), 578 U. S. 962;

No. 15–8437. SHELLMAN *v.* COLVIN, ACTING COMMISSIONER, SOCIAL SECURITY ADMINISTRATION, 578 U. S. 950; and

No. 15–8500. DAVIS *v.* ROUNDTREE ET AL., 578 U. S. 950. Petitions for rehearing denied.

JUNE 27, 2016

Certiorari Granted—Vacated and Remanded

No. 14–1440. TRIPLE CANOPY, INC. *v.* UNITED STATES EX REL. BADR ET AL. C. A. 4th Cir. Reported below: 775 F. 3d 628;

No. 15–404. WESTON EDUCATIONAL, INC., DBA HERITAGE COLLEGE *v.* UNITED STATES EX REL. MILLER ET AL. C. A. 8th Cir. Reported below: 784 F. 3d 1198; and

No. 15–729. UNITED STATES EX REL. NELSON *v.* SANFORD-BROWN, LTD., ET AL. C. A. 7th Cir. Reported below: 788 F. 3d 696. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Universal Health Services, Inc.* v. *United States ex rel. Escobar*, *ante*, p. 176.

No. 15–5. NEVADA *v.* TORRES. Sup. Ct. Nev. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further

consideration in light of *Utah* v. *Strieff*, *ante*, p. 232. Reported below: 131 Nev. 11, 341 P. 3d 652.

No. 15–1014. Click-To-Call Technologies, LP *v.* Oracle Corp. et al. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Cuozzo Speed Technologies, LLC* v. *Lee*, *ante*, p. 261. Justice Alito took no part in the consideration or decision of this petition. Reported below: 622 Fed. Appx. 907.

Certiorari Dismissed

No. 15–9021. Johnson *v.* Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. D–2863. In re Disbarment of Koresko. Disbarment entered. [For earlier order herein, see 577 U. S. 1027.]

No. D–2869. In re Disbarment of O'Brien. Disbarment entered. [For earlier order herein, see 577 U. S. 1131.]

No. D–2870. In re Disbarment of Denicola. Disbarment entered. [For earlier order herein, see 577 U. S. 1131.]

No. D–2871. In re Disbarment of Fredericks. Disbarment entered. [For earlier order herein, see 577 U. S. 1131.]

No. D–2872. In re Disbarment of Kwasny. Disbarment entered. [For earlier order herein, see 577 U. S. 1132.]

No. D–2873. In re Disbarment of Kaufman. Disbarment entered. [For earlier order herein, see 577 U. S. 1132.]

No. D–2874. In re Disbarment of Cohen. Disbarment entered. [For earlier order herein, see 577 U. S. 1132.]

No. D–2875. In re Disbarment of Konigsberg. Disbarment entered. [For earlier order herein, see 577 U. S. 1132.]

No. D–2876. In re Disbarment of Lavallee. Disbarment entered. [For earlier order herein, see 577 U. S. 1132.]

No. D–2877. In re Disbarment of Schlesinger. Disbarment entered. [For earlier order herein, see 577 U. S. 1132.]

No. D–2878. In re Disbarment of Fasciana. Disbarment entered. [For earlier order herein, see 577 U. S. 1132.]

No. D–2879. In re Disbarment of Gallimore. Disbarment entered. [For earlier order herein, see 577 U. S. 1133.]

No. D–2880. In re Disbarment of London. Disbarment entered. [For earlier order herein, see 577 U. S. 1133.]

No. 15M134. Romero Lopez *v.* McFadden, Warden; and
No. 15M135. Robinson *v.* Drug Enforcement Administration et al. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 15–8680. Paul *v.* De Holczer et al. C. A. 4th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [578 U. S. 1002] denied.

No. 15–9006. In re Goist. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [578 U. S. 974] denied.

No. 15–9042. Anderson *v.* Harrison County, Mississippi. C. A. 5th Cir.; and
No. 15–9472. Skrettas *v.* Department of Veterans Affairs. C. A. Fed. Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until July 18, 2016, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 15–1362. In re Pieczenik; and
No. 15–9519. In re Williams. Petitions for writs of mandamus denied.

No. 15–8997. In re Campbell. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus dismissed. See this Court's Rule 39.8.

No. 15–9389. In re Heizman. Petition for writ of prohibition denied.

Probable Jurisdiction Noted

No. 15–1262. McCrory, Governor of North Carolina, et al. *v.* Harris et al. Appeal from D. C. M. D. N. C. Probable jurisdiction noted. Reported below: 159 F. Supp. 3d 600.

Certiorari Granted

No. 14–1538. Life Technologies Corp. et al. *v.* Promega Corp. C. A. Fed. Cir. Certiorari granted limited to Question 2 presented by the petition. Reported below: 773 F. 3d 1338.

No. 15–8544. Beckles *v.* United States. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Justice Kagan took no part in the consideration or decision of this motion and this petition. Reported below: 616 Fed. Appx. 415.

Certiorari Denied

No. 14–1206. Odhiambo *v.* Republic of Kenya et al. C. A. D. C. Cir. Certiorari denied. Reported below: 764 F. 3d 31.

No. 15–363. AT&T, Inc., et al. *v.* United States ex rel. Heath. C. A. D. C. Cir. Certiorari denied. Reported below: 791 F. 3d 112.

No. 15–610. Midland Funding, LLC, et al. *v.* Madden. C. A. 2d Cir. Certiorari denied. Reported below: 786 F. 3d 246.

No. 15–683. Home Care Association of America et al. *v.* Weil, Administrator, Wage and Hour Division, et al. C. A. D. C. Cir. Certiorari denied. Reported below: 799 F. 3d 1084.

No. 15–716. Interval Licensing LLC *v.* Lee, Director, Patent and Trademark Office. C. A. Fed. Cir. Certiorari denied. Reported below: 608 Fed. Appx. 945.

No. 15–802. Resource Investments, Inc., et al. *v.* United States. C. A. Fed. Cir. Certiorari denied. Reported below: 785 F. 3d 660.

No. 15–889. Thomas *v.* Lynch, Attorney General. C. A. 5th Cir. Certiorari denied. Reported below: 796 F. 3d 535.

No. 15–945. Cordova-Soto *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 804 F. 3d 714.

No. 15–990. Territory of Guam et al. *v.* Paeste et al. C. A. 9th Cir. Certiorari denied. Reported below: 798 F. 3d 1228.

No. 15–1024. Little River Band of Ottawa Indians Tribal Government *v.* National Labor Relations Board. C. A. 6th Cir. Certiorari denied. Reported below: 788 F. 3d 537.

No. 15–1034. Soaring Eagle Casino and Resort *v.* National Labor Relations Board. C. A. 6th Cir. Certiorari denied. Reported below: 791 F. 3d 648.

No. 15–1072. Haggart et al., Individually and on Behalf of All Others Similarly Situated *v.* Woodley et al. C. A. Fed. Cir. Certiorari denied. Reported below: 809 F. 3d 1336.

No. 15–1129. United States ex rel. Marshall et al. *v.* Woodward, Inc. C. A. 7th Cir. Certiorari denied. Reported below: 812 F. 3d 556.

No. 15–1144. Flowers *v.* Troup County, Georgia, School District, et al. C. A. 11th Cir. Certiorari denied. Reported below: 803 F. 3d 1327.

No. 15–1145. Versata Development Group, Inc. *v.* SAP America, Inc., et al. (two judgments). C. A. Fed. Cir. Certiorari denied. Reported below: 793 F. 3d 1306 (first judgment) and 1352 (second judgment).

No. 15–1151. Fitch Ratings, Inc., fka Fitch, Inc. *v.* First Community Bank, N. A., et al. Sup. Ct. Tenn. Certiorari denied. Reported below: 489 S. W. 3d 369.

No. 15–1166. Olive *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 804 F. 3d 747.

No. 15–1182. Sequenom, Inc. *v.* Ariosa Diagnostics, Inc., et al. C. A. Fed. Cir. Certiorari denied. Reported below: 788 F. 3d 1371.

No. 15–1185. California et al. *v.* Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation, aka Pauma Band of Mission Indians, aka Pauma Luiseno Band of Mission Indians; and

No. 15–1291. Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation, aka Pauma Band of Mission Indians, aka Pauma Luiseno Band of Mission Indians *v.* California et al. C. A. 9th Cir. Certiorari denied. Reported below: 813 F. 3d 1155.

No. 15–1187. Stephenson *v.* Game Show Network, LLC, et al. C. A. Fed. Cir. Certiorari denied. Reported below: 624 Fed. Appx. 756.

No. 15–1199. Pfeil et al., Individually and on Behalf of All Others Similarly Situated *v.* State Street Bank & Trust Co. C. A. 6th Cir. Certiorari denied. Reported below: 806 F. 3d 377.

No. 15–1209. Barr Pharmaceuticals, LLC, et al. *v.* Superior Court of California, San Francisco County, et al. Ct. App. Cal., 1st App. Dist., Div. 1. Certiorari denied.

No. 15–1229. Mantiply *v.* Horne, Individually and as Personal Representative of the Estate of Horne. C. A. 11th Cir. Certiorari denied. Reported below: 630 Fed. Appx. 908.

No. 15–1285. Shukh *v.* Seagate Technology, LLC, et al. C. A. Fed. Cir. Certiorari denied. Reported below: 803 F. 3d 659.

No. 15–1292. Caroni *v.* United States; and
No. 15–8254. DiLeo *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 625 Fed. Appx. 464.

No. 15–1303. Ayissi-Etoh *v.* Fannie Mae et al. C. A. D. C. Cir. Certiorari denied. Reported below: 621 Fed. Appx. 677.

No. 15–1304. Bent *v.* Foster. C. A. 9th Cir. Certiorari denied.

No. 15–1306. Mitrano *v.* Orlans Moran, PLLC. C. A. 1st Cir. Certiorari denied.

No. 15–1308. Radbil *v.* Regional Adjustment Bureau, Inc. C. A. 5th Cir. Certiorari denied. Reported below: 641 Fed. Appx. 298.

No. 15–1312. Snyder *v.* Collura et al. C. A. 1st Cir. Certiorari denied. Reported below: 812 F. 3d 46.

No. 15–1314. AUTOMOTIVE BODY PARTS ASSN. *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN ET AL. C. A. Fed. Cir. Certiorari denied.

No. 15–1324. WASHINGTON ET AL. *v.* BANK OF AMERICA, N. A. C. A. 5th Cir. Certiorari denied. Reported below: 624 Fed. Appx. 301.

No. 15–1349. OYAMA *v.* UNIVERSITY OF HAWAII ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 813 F. 3d 850.

No. 15–1353. TAYLOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 808 F. 3d 1202.

No. 15–1355. RODRIGUEZ, AS PARENT AND GUARDIAN OF JODON R. ET AL., MINORS *v.* FOX NEWS NETWORK, L. L. C. Ct. App. Ariz. Certiorari denied. Reported below: 238 Ariz. 36, 356 P. 3d 322.

No. 15–1360. STONER *v.* YOUNG CONCERT ARTISTS, INC. C. A. 2d Cir. Certiorari denied. Reported below: 626 Fed. Appx. 293.

No. 15–1376. ARBUCKLE MOUNTAIN RANCH OF TEXAS, INC. *v.* CHESAPEAKE ENERGY CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 810 F. 3d 335.

No. 15–1386. SAMSUNG ELECTRONICS CO., LTD., ET AL. *v.* APPLE INC. C. A. Fed. Cir. Certiorari denied. Reported below: 809 F. 3d 633.

No. 15–1393. MONTANA CANNABIS INDUSTRY ASSN. ET AL. *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: 382 Mont. 256, 368 P. 3d 1131.

No. 15–1424. SANDOVAL *v.* COUNTY OF LOS ANGELES, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 622 Fed. Appx. 705.

No. 15–1448. PRIME HEALTHCARE SERVICES, INC. *v.* SERVICE EMPLOYEES INTERNATIONAL UNION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 642 Fed. Appx. 665.

No. 15–6889. LANIER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 623 Fed. Appx. 768.

No. 15–7790. KILPATRICK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 798 F. 3d 365.

No. 15–7849. ESCALANTI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 623 Fed. Appx. 844.

No. 15–7878. OSSANA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 607 Fed. Appx. 599.

No. 15–7935. HASKINS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 15–7978. HOLDEN *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 609 Fed. Appx. 161.

No. 15–8204. JOHNSON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 15–8227. JAMES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 631 Fed. Appx. 803.

No. 15–8424. SANCHEZ-VASQUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 623 Fed. Appx. 209.

No. 15–8465. MAHON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 804 F. 3d 946.

No. 15–8985. MANUEL RODRIGUEZ *v.* SALUS, JUDGE, COURT OF COMMON PLEAS OF PENNSYLVANIA, MONTGOMERY COUNTY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 623 Fed. Appx. 588.

No. 15–8998. COMEAUX *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 616 Fed. Appx. 167.

No. 15–8999. ELLIOTT *v.* GRACE, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 632 Fed. Appx. 61.

No. 15–9003. CARROLL *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 15–9004. KIRBY ET AL. *v.* MORRISSEY ET AL. Sup. Ct. Okla. Certiorari denied.

No. 15–9005. CHRISTMANN *v.* SCHUTTE, ATTORNEY GENERAL OF MICHIGAN. C. A. 6th Cir. Certiorari denied.

No. 15–9022. TRUJILLO *v.* MONTGOMERY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 15–9023. HERNANDEZ *v.* MUNIZ, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 628 Fed. Appx. 541.

No. 15–9025. FENTON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2015 IL App (1st) 130861–U.

No. 15–9029. PALMER *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 15–9030. NUCCIO *v.* MCDONALD, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 647 Fed. Appx. 790.

No. 15–9033. BLACK *v.* JOHNSON, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 15–9034. BROWN *v.* MACOMBER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 15–9035. BASS *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 15–9036. MANUEL ALBARADO *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 15–9046. COSBY *v.* SAFECO INSURANCE COMPANY OF AMERICA. C. A. 2d Cir. Certiorari denied.

No. 15–9048. BREWER *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 333 Ga. App. XXV.

No. 15–9049. COOK *v.* LAMOTTE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 618 Fed. Appx. 229.

No. 15–9058. CANNON *v.* DUCKWORTH, INTERIM WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 796 F. 3d 1256.

No. 15–9073. TWO BULLS, AKA REYNA *v.* RIES ET AL. C. A. 8th Cir. Certiorari denied.

No. 15–9075. ABYLA *v.* DALTON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 637 Fed. Appx. 103.

No. 15–9080. HERNANDEZ *v.* DAVEY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 15–9081. SMITH *v.* JENKINS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 15–9082. HOWARD *v.* VANCE COUNTY SHERIFF DEPT. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 624 Fed. Appx. 95.

No. 15–9087. VALLI *v.* MILLER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 15–9091. DEL VALLE-SANTANA *v.* SERVICIOS LEGALES DE PUERTO RICO, INC., ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 804 F. 3d 127.

No. 15–9095. GOODELL *v.* BARRETT, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 15–9098. MCCOY *v.* WATKINS ET AL. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 15–9099. JONES *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 466 S. W. 3d 252.

No. 15–9104. SAVOLT *v.* LONG, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 15–9106. BELL *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 2015 IL App (2d) 140765–U.

No. 15–9108. FRANQUI *v.* FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 15–9110. HARS *v.* KEELING. C. A. 2d Cir. Certiorari denied. Reported below: 809 F. 3d 43.

No. 15–9129. TEMPLE *v.* SINGLETON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 622 Fed. Appx. 291.

No. 15–9155. MANUEL SALCIDO *v.* KNIPP, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 15–9156. MARTIN *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 131 A. 3d 94.

No. 15–9175. SOTELO-AYALA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 633 Fed. Appx. 393.

No. 15–9198. BUNTION *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 482 S. W. 3d 58.

No. 15–9212. TEJEDA *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 332 Ga. App. XXX.

No. 15–9216. MICKENS *v.* LARKIN, SUPERINTENDENT, EASTERN NEW YORK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 633 Fed. Appx. 24.

No. 15–9218. KENNEDY *v.* VANNOY, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 624 Fed. Appx. 886.

No. 15–9223. STOUTAMIRE *v.* MORGAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 15–9288. MCKYE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 638 Fed. Appx. 680.

No. 15–9295. CARON *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 15–9300. GUTIERREZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 15–9307. DONE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 620 Fed. Appx. 839.

No. 15–9310. BACKMON *v.* BREWER. Ct. App. Colo. Certiorari denied.

No. 15–9311. JAVIER ARAIZA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 643 Fed. Appx. 524.

No. 15–9324. ORTS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 643 Fed. Appx. 853.

No. 15–9325. MARK ET AL. *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 80 A. 3d 685.

No. 15–9334. CARTAGENA-MERCED *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 610 Fed. Appx. 805.

No. 15–9335. CLEM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 644 Fed. Appx. 238.

No. 15–9336. ELLIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 646 Fed. Appx. 889.

No. 15–9337. LAGI *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 15–9349. ACEVEDO *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied.

No. 15–9361. FISHER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 15–9362. GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 615 Fed. Appx. 897.

No. 15–9363. HAMMOND *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 15–9366. GUEST *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 615 Fed. Appx. 656.

No. 15–9367. FLEMING *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 15–9375. UPSHAW *v.* EBBERT, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 634 Fed. Appx. 357.

No. 15–9376. WHITE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 627 Fed. Appx. 217.

No. 15–9381. SMITH *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 15–9396. MALACHOWSKI *v.* UNITED STATES; and
No. 15–9400. MALACHOWSKI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: No. 15–9396, 623 Fed. Appx. 562; No. 15–9400, 623 Fed. Appx. 555.

No. 15–9412. TARANTINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 617 Fed. Appx. 62.

No. 15–9413. WHITNEY *v.* CARTER, SECRETARY OF DEFENSE. C. A. 7th Cir. Certiorari denied. Reported below: 628 Fed. Appx. 446.

No. 15–9415. ROGERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 633 Fed. Appx. 141.

No. 15–9424. COLE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 619 Fed. Appx. 381.

No. 15–9425. CRAWFORD *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 192 So. 3d 905.

No. 15–9430. BIAS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 15–9440. GREEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 15–9448. RUIZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 638 Fed. Appx. 397.

No. 15–9449. MCCALL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 15–9454. GUTIERREZ-SALINAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 640 Fed. Appx. 690.

No. 15–9457. JORDAN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 813 F. 3d 442.

No. 15–9458. MARTINEZ *v.* SHARTLE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 15–9462. BERRY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 15–9468. JAMISON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 15–9469. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 636 Fed. Appx. 157.

No. 15–9479. BURCHETTE *v.* MCDONALD, SECRETARY OF VETERANS AFFAIRS. C. A. 2d Cir. Certiorari denied.

No. 15–9482. TAYLOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 15–9485. KIEFFER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 638 Fed. Appx. 746.

No. 15–9490. GUEVARA-MIRANDA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 640 Fed. Appx. 319.

No. 15–9491. JARVIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 814 F. 3d 936.

No. 15–9515. MARTIN, INDIVIDUALLY AND AS TRUSTEE FOR THE ABRAHAM NGUYEN MARTIN REVOCABLE TRUST AGREEMENT DATED JANUARY 10, 1991 *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 15–9516. ALFARO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 638 Fed. Appx. 374.

No. 15–9517. BLACK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 15–9522. HOPE *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 186 So. 3d 1037.

No. 15–9533. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 641 Fed. Appx. 875.

No. 15–9535. COPELAND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 820 F. 3d 809.

No. 15–9539. MARTINEZ DELGADO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 640 Fed. Appx. 620.

No. 15–9541. WILSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 631 Fed. Appx. 623.

No. 15–9542. PADRON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 631 Fed. Appx. 250.

No. 15–9543. MERILIA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 640 Fed. Appx. 239.

No. 14–1140. TIBBS ET AL. *v.* BUNNELL, JUDGE, CIRCUIT COURT OF KENTUCKY, FAYETTE COUNTY, ET AL. Sup. Ct. Ky. Motions of American Hospital Association et al., Joint Commission, and Alliance for Quality Improvement and Patient Safety for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 448 S. W. 3d 796.

No. 15–950. MICHIGAN *v.* UYEDA. Ct. App. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 15–1026. EPPINGER, WARDEN *v.* MCCARLEY. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 801 F. 3d 652.

No. 15–1076. FUENTES *v.* MARESCA ET AL. C. A. 10th Cir. Motion of New Mexico Department of Public Safety for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 804 F. 3d 1301.

No. 15–1215. SHINNECOCK INDIAN NATION *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 628 Fed. Appx. 54.

No. 15–1309. PHARMERICA CORP. *v.* UNITED STATES EX REL. GADBOIS. C. A. 1st Cir. Motion of New England Legal Foundation for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 809 F. 3d 1.

No. 15–1440. COMMONWEALTH SCIENTIFIC AND INDUSTRIAL RESEARCH ORGANISATION *v.* CISCO SYSTEMS, INC. C. A. Fed. Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 809 F. 3d 1295.

No. 15–9382. TURNER *v.* HOLLAND, WARDEN. C. A. 9th Cir. Certiorari before judgment denied.

No. 15–9463. BASCIANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 634 Fed. Appx. 832.

Rehearing Denied

No. 14–520. HAWKINS ET AL. *v.* COMMUNITY BANK OF RAYMORE, 577 U. S. 495 (2016);

No. 15–926. IN RE GRISKIE, 577 U. S. 1234;

No. 15–999. KNIGHT ET AL. *v.* THOMPSON ET AL., 578 U. S. 959;

No. 15–8061. CAISON *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 578 U. S. 928;

No. 15–8256. LESTER *v.* MACKIE, WARDEN, 578 U. S. 947;

No. 15–8270. SMITH *v.* STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 578 U. S. 947;

No. 15–8438. Bernard *v.* Woods, Warden, 578 U. S. 963; and No. 15–8443. Longoria *v.* Texas, 578 U. S. 963. Petitions for rehearing denied.

June 28, 2016

Certiorari Granted—Vacated and Remanded

No. 14–1469. Washburn *v.* North Dakota. Sup. Ct. N. D. Reported below: 2015 ND 8, 861 N. W. 2d 173;

No. 14–1506. Beylund *v.* North Dakota. Sup. Ct. N. D. Reported below: 2015 ND 27, 861 N. W. 2d 172;

No. 14–1512. Harns *v.* North Dakota. Sup. Ct. N. D. Reported below: 2015 ND 45, 861 N. W. 2d 173;

No. 15–129. Wojahn *v.* Levi, Director, North Dakota Department of Transportation. Sup. Ct. N. D. Reported below: 2015 ND 50, 861 N. W. 2d 173;

No. 15–243. Baxter *v.* North Dakota. Sup. Ct. N. D. Reported below: 2015 ND 107, 863 N. W. 2d 208;

No. 15–518. Wall *v.* Stanek, Sheriff, Hennepin County, Minnesota. C. A. 8th Cir. Reported below: 794 F. 3d 890;

No. 15–989. Kordonowy *v.* North Dakota. Sup. Ct. N. D. Reported below: 2015 ND 197, 867 N. W. 2d 690; and

No. 15–1052. Hexom *v.* Minnesota. Ct. App. Minn. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Birchfield* v. *North Dakota*, *ante*, p. 438.

No. 15–5587. Sharbutt *v.* Vasquez, Warden. C. A. 5th Cir. Reported below: 600 Fed. Appx. 251;

No. 15–6468. Patrie *v.* United States. C. A. 8th Cir. Reported below: 794 F. 3d 998;

No. 15–6603. Goodwin *v.* United States. C. A. 8th Cir.;

No. 15–6783. Diaz-Morales, aka Diaz *v.* United States. C. A. 11th Cir. Reported below: 595 Fed. Appx. 932;

No. 15–7106. Castro-Martinez *v.* United States. C. A. 6th Cir. Reported below: 624 Fed. Appx. 357;

No. 15–7249. Bryant *v.* United States. C. A. 5th Cir. Reported below: 615 Fed. Appx. 199;

No. 15–7832. Luis Guevara *v.* United States. C. A. 9th Cir. Reported below: 619 Fed. Appx. 648;

No. 15–7846. Sanders *v.* United States. C. A. 6th Cir. Reported below: 635 Fed. Appx. 286; and

No. 15–8015. Brooks *v.* United States. C. A. 9th Cir. Motions of petitioners for leave to proceed *in forma pauperis*

granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Mathis* v. *United States*, *ante*, p. 500.

No. 15–7987. GUADALUPE GARZA *v.* MINNESOTA. Ct. App. Minn. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Birchfield* v. *North Dakota*, *ante*, p. 438.

Certiorari Granted

No. 14–1055. LIGHTFOOT ET AL. *v.* CENDANT MORTGAGE CORP., DBA PHH MORTGAGE, ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 769 F. 3d 681.

No. 15–486. IVY ET AL. *v.* MORATH, TEXAS COMMISSIONER OF EDUCATION. C. A. 5th Cir. Certiorari granted. Reported below: 781 F. 3d 250.

No. 15–497. FRY ET VIR, AS NEXT FRIENDS OF MINOR E. F. *v.* NAPOLEON COMMUNITY SCHOOLS ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 788 F. 3d 622.

No. 15–649. CZYZEWSKI ET AL. *v.* JEVIC HOLDING CORP. ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 787 F. 3d 173.

No. 15–1191. LYNCH, ATTORNEY GENERAL *v.* MORALES-SANTANA. C. A. 2d Cir. Certiorari granted. Reported below: 804 F. 3d 520.

No. 15–423. BOLIVARIAN REPUBLIC OF VENEZUELA ET AL. *v.* HELMERICH & PAYNE INTERNATIONAL DRILLING CO. ET AL. C. A. D. C. Cir. Certiorari granted limited to Question 3 presented by the petition. Reported below: 784 F. 3d 804.

No. 15–961. VISA INC. ET AL. *v.* OSBORN ET AL.; and

No. 15–962. VISA INC. ET AL. *v.* STOUMBOS ET AL. C. A. D. C. Cir. Certiorari granted, cases consolidated, and a total of one hour is allotted for oral argument. Reported below: 797 F. 3d 1057.

No. 15–1111. BANK OF AMERICA CORP. ET AL. *v.* CITY OF MIAMI, FLORIDA; and

No. 15–1112. WELLS FARGO & CO. ET AL. *v.* CITY OF MIAMI, FLORIDA. C. A. 11th Cir. Certiorari granted, cases consoli-

dated, and a total of one hour is allotted for oral argument. Reported below: No. 15–1111, 800 F. 3d 1262; No. 15–1112, 801 F. 3d 1258.

Certiorari Denied

No. 14–997. Currier, State Health Officer of the Mississippi Department of Health, et al. *v.* Jackson Women's Health Organization et al. C. A. 5th Cir. Certiorari denied. Reported below: 760 F. 3d 448.

No. 14–1508. Culver *v.* Levi, Director, North Dakota Department of Transportation. Sup. Ct. N. D. Certiorari denied. Reported below: 2015 ND 26, 861 N. W. 2d 172.

No. 14–9861. Manska *v.* Minnesota. Ct. App. Minn. Certiorari denied.

No. 14–10423. Gaede *v.* Illinois. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 2014 IL App (4th) 130346, 20 N. E. 3d 1266.

No. 15–64. Jensen, Individually and as Parent and Next Friend of D. J. J., et al. *v.* EXC Inc., dba D. I. A. Express Inc. et al., et al. C. A. 9th Cir. Certiorari denied. Reported below: 588 Fed. Appx. 720.

No. 15–386. Rounkles *v.* Levi, Director, North Dakota Department of Transportation. Sup. Ct. N. D. Certiorari denied. Reported below: 2015 ND 128, 863 N. W. 2d 910.

No. 15–403. Williams *v.* Minnesota. Ct. App. Minn. Certiorari denied.

No. 15–840. Duncan *v.* Kentucky. Sup. Ct. Ky. Certiorari denied. Reported below: 483 S. W. 3d 353.

No. 15–848. Bennett *v.* Minnesota. Ct. App. Minn. Certiorari denied. Reported below: 867 N. W. 2d 539.

No. 15–931. Nevada *v.* Barral. Sup. Ct. Nev. Certiorari denied. Reported below: 131 Nev. 520, 353 P. 3d 1197.

No. 15–1063. Texas *v.* Villarreal. Ct. Crim. App. Tex. Certiorari denied. Reported below: 475 S. W. 3d 784.

No. 15–1200. SCHIMEL, ATTORNEY GENERAL OF WISCONSIN, ET AL. *v.* PLANNED PARENTHOOD OF WISCONSIN, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 806 F. 3d 908.

No. 15–5307. MAWOLO *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 15–5315. ISAACSON *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 15–6495. GUARNERO *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 2015 WI 72, 363 Wis. 2d 857, 867 N. W. 2d 400.

No. 15–6645. BOAZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 607 Fed. Appx. 618.

No. 15–7286. PONCE-CORTES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 15–7528. BURKE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 15–7918. WILLIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 795 F. 3d 986.

No. 15–7926. OGITCHIDA *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 15–7960. LIPPY *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 15–8853. DJORDJEVIC *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 631 Fed. Appx. 463.

No. 15–862. STORMANS, INC., DBA RALPH'S THRIFTWAY, ET AL. *v.* WIESMAN, SECRETARY, WASHINGTON STATE DEPARTMENT OF HEALTH, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 794 F. 3d 1064.

JUSTICE ALITO, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

This case is an ominous sign.

At issue are Washington State regulations that are likely to make a pharmacist unemployable if he or she objects on religious grounds to dispensing certain prescription medications. There are strong reasons to doubt whether the regulations were adopted

for—or that they actually serve—any legitimate purpose. And there is much evidence that the impetus for the adoption of the regulations was hostility to pharmacists whose religious beliefs regarding abortion and contraception are out of step with prevailing opinion in the State. Yet the Ninth Circuit held that the regulations do not violate the First Amendment, and this Court does not deem the case worthy of our time. If this is a sign of how religious liberty claims will be treated in the years ahead, those who value religious freedom have cause for great concern.

I

The Stormans family owns Ralph's Thriftway, a local grocery store and pharmacy in Olympia, Washington. Devout Christians, the Stormans seek to run their business in accordance with their religious beliefs. Among those beliefs is a conviction that life begins at conception and that preventing the uterine implantation of a fertilized egg is tantamount to abortion. Consequently, in order to avoid complicity in what they believe to be the taking of a life, Ralph's pharmacy does not stock emergency contraceptives, such as Plan B, that can "inhibit implantation" of a fertilized egg, 1 Supp. Excerpts of Record in No. 12–35221 etc. (CA9), p. 1245 (SER). When customers come into the pharmacy with prescriptions for such drugs, Ralph's employees inform them that the pharmacy does not carry those products, and they refer the customers to another nearby pharmacy that does. The drugs are stocked by *more than 30 other pharmacies within five miles of Ralph's*. *Stormans, Inc.* v. *Selecky*, 854 F. Supp. 2d 925, 934 (WD Wash. 2012); see SER 1293. These pharmacies include an Albertson's located 1.9 miles from Ralph's and a Rite-Aid located 2.3 miles away.[1]

As explained by the 5 national and 33 state pharmacist associations that urge us to take this case, "facilitated referral supports pharmacists' professionally recognized right of conscience" "without compromising patient care." Brief for National and State Pharmacists' Associations as *Amici Curiae* 17. In addition to protecting rights of conscience, facilitated referral also serves more practical ends. Pharmacies can stock only a small fraction of the more than 6,000 FDA-approved drugs now available. Pharmacies of all stripes therefore "refer patients to other phar-

[1] These pharmacies were identified at trial as carrying Plan B. SER 1293. The distances are as calculated by Google Maps driving directions.

macies at least several times a day because a drug is not in stock." 854 F. Supp. 2d, at 934. Because of the practice of facilitated referrals, none of Ralph's customers has ever been denied timely access to emergency contraceptives. *Id.*, at 933.

Nevertheless, in 2007 the Washington State Board of Pharmacy (Board) issued rules mandating that pharmacies like Ralph's stock and sell contraceptives like Plan B. Under these regulations, a pharmacy may not "refuse to deliver a drug or device to a patient because its owner objects to delivery on religious, moral, or other personal grounds." Brief in Opposition for Washington State Respondents 10. The dilemma this creates for the Stormans family and others like them is plain: Violate your sincerely held religious beliefs or get out of the pharmacy business. Ralph's, joined by two pharmacists with similar beliefs who work at other pharmacies, contends that the regulations target religiously motivated conduct for disfavored treatment and thereby "suppress religious belief or practice" in violation of the First Amendment's Free Exercise Clause. *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 523 (1993). After a 12-day trial, the District Court agreed and enjoined the regulations, 854 F. Supp. 2d 925 (findings of fact and conclusions of law); *Stormans Inc.* v. *Selecky*, 844 F. Supp. 2d 1172 (WD Wash. 2012) (opinion granting injunction).

The District Court found that the regulations were adopted with "the predominant purpose" to "stamp out the right to refuse" to dispense emergency contraceptives for religious reasons. *Id.*, at 1178. Among other things, the District Court noted the following. When the Board began to consider new regulations, the Governor of the State "sent a letter to the Board opposing referral for personal or conscientious reasons." 854 F. Supp. 2d, at 937. The State Human Rights Commission followed with "a letter threatening Board members with personal liability if they passed a regulation permitting referral" for religious or moral reasons. *Id.*, at 938; see App. to Pet. for Cert. 374a–399a. And after the Board initially voted to adopt rules allowing referrals for reasons of conscience, the Governor not only sent another letter opposing the draft rules but "publicly explained that she could remove the Board members" if need be. 854 F. Supp. 2d, at 938. "[T]his was the first instance in which a Governor had ever threatened the Board . . . with removal." *Id.*, at 939.

The Board heeded the Governor's wishes. As Steven Saxe, the Board's executive director, explained at the time: "'[T]he public, legislators and governor are telling us loud and clear that they expect the rule to protect the public from unwanted intervention based on the moral beliefs . . . of a pharmacist.'" *Ibid.* "'[T]he moral issue IS the basis of the concern.'" *Ibid.* Saxe, a primary drafter of the regulations, recognized that the task was "'to draft language to allow facilitating a referral for *only these non-moral or non-religious reasons*.'" *Ibid.* He suggested that making an express "'statement that does not allow a pharmacist/pharmacy the right to refuse for moral or religious judgment'" might be a "'clearer'" way to "'leave intact the ability to decline to dispense . . . for most *legitimate* examples raised; clinical, fraud, business, skill, etc.'" *Ibid.* And in the end, that is what the Board did. While the regulations themselves do not expressly single out religiously motivated referrals, the Board's guidance accompanying the regulations does: "The rule," it warns, "does not allow a pharmacy to refer a patient to another pharmacy to avoid filling the prescription *due to moral or ethical objections*." SER 1248 (emphasis added).

Although the District Court found that the Board's intent was to target pharmacies that made referrals for religious or moral reasons, the court did not base its decision solely on that ground. Instead, the court considered the design of the regulations and concluded that they discriminated against religious objectors. 854 F. Supp. 2d, at 967–990. Not only do the rules expressly contain certain secular exceptions, but the court also found that in operation the Board allowed pharmacies to make referrals for many other secular reasons not set out in the rules. *Id.*, at 954–956, 970–971. The court concluded that "the 'design of these [Regulations] accomplishes . . . a religious gerrymander'" capturing religiously motivated referrals and little else. *Id.*, at 984 (quoting *Church of Lukumi Babalu Aye*, *supra*, at 535; some internal quotation marks omitted).

The State appealed the District Court's decision, and the Ninth Circuit reversed. 794 F. 3d 1064 (2015). Both in the Ninth Circuit and before this Court, the State defends the regulations as necessary to "ensur[e] that its citizens have safe and timely access to their lawful and lawfully prescribed medications." *Id.*, at 1084. But the State has conceded that this is not really a problem. It *stipulated* that "facilitated referrals do not pose a threat to timely

access to lawfully prescribed medications" and indeed "help assure timely access to lawfully prescribed medications . . . includ-[ing] Plan B." App. to Pet. for Cert. 335a.

I believe that the constitutionality of what Washington has done merits further review. As I discuss below, Ralph's has made a strong case that the District Court got it right and that the regulations here are improperly designed to stamp out religious objectors. The importance of this issue is underscored by the *38* national and state pharmacist associations that urge us to hear the case. The decision below, they tell us, "upheld a radical departure from past regulation of the pharmacy industry" that "threatens to *reduce* patient access to medication by forcing some pharmacies—particularly small, independent ones that often survive by providing specialty services not provided elsewhere—to close." Brief for National and State Pharmacists' Associations as *Amici Curiae* 4, 5. Given the important First Amendment interests at stake and the potentially sweeping ramifications of the decision below, I would grant certiorari.

II

The question presented in this case concerns the constitutionality of two rules adopted by the Washington State Pharmacy Board in 2007. The first rule, known as the Delivery Rule, requires pharmacies to "deliver lawfully prescribed drugs or devices to patients and to distribute drugs and devices approved by the U. S. Food and Drug Administration for restricted distribution by pharmacies." Wash. Admin. Code § 246–869–010(1) (2009).[2] The

[2] This rule provides in pertinent part as follows:

"(1) Pharmacies have a duty to deliver lawfully prescribed drugs or devices to patients and to distribute drugs and devices approved by the U. S. Food and Drug Administration for restricted distribution by pharmacies, or provide a therapeutically equivalent drug or device in a timely manner consistent with reasonable expectations for filling the prescription, except for the following or substantially similar circumstances:

"(a) Prescriptions containing an obvious or known error, inadequacies in the instructions, known contraindications, or incompatible prescriptions, or prescriptions requiring action in accordance with WAC 246–875–040.

"(b) National or state emergencies or guidelines affecting availability, usage or supplies of drugs or devices;

"(c) Lack of specialized equipment or expertise needed to safely produce, store, or dispense drugs or devices, such as certain drug compounding or storage for nuclear medicine;

Delivery Rule works in tandem with a pre-existing rule, called the Stocking Rule, that requires pharmacies to stock a "representative assortment of drugs in order to meet the pharmaceutical needs of its patients." § 246–869–150(1). The net result of these rules is that, so long as there is customer demand for emergency contraceptives, pharmacies like Ralph's must stock and dispense them regardless of any religious or moral objections that their owners may have.

The Delivery Rule includes a number of exceptions. See §§ 246–869–010(1)(a)–(e), (2). Four of these are narrow. See § 246–869–010(1)(a) (prescription is erroneous or has a known contraindication); § 246–869–010(1)(b) (national and state emergencies); § 246–869–010(1)(d) (potentially fraudulent prescriptions); § 246–869–010(1)(e) (drug is temporarily out of stock). A fifth exception is broader: Under subsection (c), pharmacies need not stock prescription medications that require specialized equipment or expertise, including the equipment or expertise needed to compound drugs. § 246–869–010(1)(c). And a sixth exception is very broad indeed: A pharmacy is not required to deliver a drug "without payment of [its] usual and customary or contracted charge." § 246–869–010(2). This means, among other things, that a pharmacy need not fill a prescription for a Medicaid patient. In addition, as discussed below, the District Court found that there are many unwritten exceptions to the Delivery and Stocking Rules. See *infra*, at 949–950.

The Board's second new rule, called the Pharmacist Responsibility Rule, governs individual pharmacists. § 246–863–095 (2010). The rule does not require any *individual pharmacist* to dispense medication in conflict with his or her beliefs. But because the Delivery Rule requires every *pharmacy* to dispense the medication, if a pharmacy wishes to employ a pharmacist who objects to dispensing a drug for religious reasons, the pharmacy must keep on duty at all times a second pharmacist who can dispense those drugs. We are told that few pharmacies are likely to be willing to bear this expense. Brief for National and State Pharmacists' Associations as *Amici Curiae* 23–24.

"(d) Potentially fraudulent prescriptions; or

"(e) Unavailability of drug or device despite good faith compliance with WAC 246–869–150.

"(2) Nothing in this section requires pharmacies to deliver a drug or device without payment of their usual and customary or contracted charge."

III

In *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990), this Court held 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.'" *Id.*, at 879. But as our later decision in *Church of Lukumi Babalu Aye* made clear, a law that discriminates against religiously motivated conduct is not "neutral." 508 U. S., at 533–534. In that case, the Court unanimously held that ordinances prohibiting animal sacrifice violated the First Amendment. This case bears a distinct resemblance to *Church of Lukumi Babalu Aye*.

In *Church of Lukumi Babalu Aye*, there was strong evidence that the ordinances were adopted for the purpose of preventing religious services of the Santeria religion. *Id.*, at 534. As noted, there is similar evidence of discriminatory intent here.[3]

Even if we disregard all evidence of intent and confine our consideration to the nature of the laws at issue in the two cases,

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[3] It is an open question whether a court considering a free exercise claim should consider evidence of individual lawmakers' personal intentions, as is done in the equal protection context. Compare *Church of Lukumi Babalu Aye*, 508 U. S., at 540 (opinion of KENNEDY, J.) (relying on such evidence), with *id.*, at 558 (Scalia, J., concurring in part and concurring in judgment) (rejecting such evidence). The Ninth Circuit, however, did not hold that such evidence was irrelevant; instead, it concluded that the record "does not reveal improper intent." 794 F. 3d 1064, 1078 (2015). Ralph's has a strong argument that the Ninth Circuit improperly substituted its own view of the evidence for that of the District Court.

In overturning the District Court's finding, the Ninth Circuit pointed to evidence that the Board "was also concerned with the safe and timely delivery of many other drugs, which may or may not engender religious objections," such as drugs for treating HIV. *Ibid.* But the District Court considered this evidence and found it "not inconsistent with the Board's focus on conscientious objections to Plan B." *Stormans, Inc.* v. *Selecky*, 854 F. Supp. 2d 925, 943 (WD Wash. 2012). The District Court further concluded that "such a focus is supported by the great weight of the evidence, including other documents issued by the Board," as well as Board meetings and public testimony—all of which were "dominated by emergency contraception and conscientious objection to Plan B." *Ibid.* For example, a survey the Board conducted in the lead up to its rulemaking "focused exclusively on Plan B and potential accommodations for conscientious objectors," *ibid.*, while "the Board didn't do any research or conduct any studies on HIV medications or how this rule might apply to HIV medications," SER 654.

the similarities are striking. In *Church of Lukumi Babalu Aye*, the challenged ordinances broadly prohibited the unnecessary or cruel killing of animals, but when all the statutory definitions and exemptions were taken into account, the laws did little more than prohibit the sacrifices carried out in Santeria services. *Id.*, at 535–538. In addition, the ordinances restricted religious practice to a far greater extent than required to serve the municipality's asserted interests. *Id.*, at 538–539. Here, Ralph's has made a strong showing that the challenged regulations are gerrymandered in a similar way. While requiring pharmacies to dispense all prescription medications for which there is demand, the regulations contain broad secular exceptions but none relating to religious or moral objections; the regulations are substantially underinclusive because they permit pharmacies to decline to fill prescriptions for financial reasons; and the regulations contemplate the closing of any pharmacy with religious objections to providing emergency contraceptives, regardless of the impact that will have on patients' access to medication.

A

Considering "the effect of [the regulations] in [their] real operation," *id.*, at 535, the District Court concluded that the burden they impose "falls 'almost exclusively' on those with religious objections to dispensing Plan B," 844 F. Supp. 2d, at 1188. The court found that "the rules exempt pharmacies and pharmacists from stocking and delivering lawfully prescribed drugs for an almost unlimited variety of secular reasons, but fail to provide exemptions for reasons of conscience." *Ibid.* For example, the District Court found that a pharmacy may decline to stock a drug because the drug requires additional paperwork or patient monitoring, has a short shelf life, may attract crime, requires simple compounding (a skill all pharmacists must learn), or falls outside the pharmacy's niche (*e. g.*, pediatrics, diabetes, or fertility). *Id.*, at 1190. Additionally, the court found, a pharmacy can "decline to accept Medicare or Medicaid or the patient's particular insurance, and on that basis, refuse to deliver a drug that is actually on the shelf." *Ibid.* As the District Court noted, such secular refusals "inhibit patient access" to medication no less than do religiously motivated facilitated referrals. *Ibid.* Allowing secular but not religious refusals is flatly inconsistent with *Church of Lukumi Babalu Aye*. It "devalues religious reasons" for de-

clining to dispense medications "by judging them to be of lesser import than nonreligious reasons," thereby "singl[ing] out" religious practice "for discriminatory treatment." 508 U. S., at 537–538.

The Ninth Circuit did not dispute this logic. Instead, it held that the District Court committed clear error in finding that the regulations allow refusals for a host of secular reasons. 794 F. 3d, at 1080–1081. The Court of Appeals upheld the District Court's finding that pharmacies *in fact* refuse to stock and deliver drugs for secular reasons, but it disputed the District Court's finding that the Board actually *permits* such refusals. *Ibid.* I think it likely that the Court of Appeals failed to accord the District Court's findings appropriate deference. "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson* v. *Bessemer City,* 470 U. S. 564, 573–574 (1985).

The District Court carefully laid out its rationale for finding that the regulations allow refusals for secular, but not religious, reasons. Secular refusals have been common, and commonly known, both before and after the regulations were issued, yet the Board has never enforced its regulations against such practices. 854 F. Supp. 2d, at 956, 960. Nor has the Board issued any guidance disapproving secular refusals or otherwise made an "effort to curtail widespread referrals for business reasons." *Id.*, at 960. By contrast, the Board has specifically targeted religious objections. Upon issuing the regulations, the Board sent a guidance document to pharmacies warning that "[t]he rule does not allow a pharmacy to refer a patient to another pharmacy to avoid filling the prescription *due to moral or ethical objections*." SER 1248 (emphasis added). The negative implication is obvious. Additionally, a Board spokesman—who was charged with answering pharmacists' inquiries about the rules' requirements—testified that, "other than eliminating referral as an option for pharmacies which cannot stock Plan B for religious reasons, from a practical standpoint, nothing has changed after the enactment of these rules." *Id.*, at 356; see *id.*, at 295.

The Ninth Circuit disregarded the Board's failure to enforce its regulations against secular refusals on the ground that the Board does not pursue enforcement action unless it receives a complaint,

and it has not received complaints against secular referrals. 794 F. 3d, at 1081. Putting aside the potential for abuse this system allows,[4] the point remains that the Board tolerates widespread secular refusals while categorically declaring religious ones verboten. That supports the District Court's finding that the "real operation" of the regulations is to uniquely burden religiously motivated conduct.[5]

B

Even if the Ninth Circuit were correct to reject the District Court's finding that the Board condones many secular refusals, the Court of Appeals overlooked a basis for refusal that is written into the regulations themselves. "Nothing in this section," the Delivery Rule states, "requires pharmacies to deliver a drug or device without payment of their usual and customary or contracted charge." §246–869–010(2). The Ninth Circuit thought this exception unremarkable, asserting that "'[n]obody could seriously question a refusal to fill a prescription because the customer did not pay for it.'" 794 F. 3d, at 1080. But as the District Court found—and the Ninth Circuit simply ignored—this exception extends well beyond denying service to customers who won't pay. It also allows a pharmacy to refuse to fill a prescription because it does not accept the patient's insurance or because it does not accept Medicaid or Medicare—regardless of the amount

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[4] The District Court noted that "an active campaign" by advocacy groups "to seek out pharmacies and pharmacists with religious objections to Plan B and to file complaints with the Board . . . has resulted in a disproportionate number of investigations directed at religious objections to Plan B"—with complaints against Ralph's constituting a third of all complaints. 854 F. Supp. 2d, at 961.

[5] The dozens of pharmacist associations supporting Ralph's as *amici* give us another reason to question the Ninth Circuit's conclusion that the regulations outlaw the secular bases for refusal that the District Court found were permitted. According to these groups, the Ninth Circuit's conception of the regulations "open[s] the door to unprecedented state control over stocking decisions" by "anticipat[ing] the invalidation of a whole swath of reasons, both secular and non-secular, for declining to stock or deliver certain drugs." Brief for National and State Pharmacists' Associations as *Amici Curiae* 21. In other words, we are told, the Ninth Circuit has effectively read the regulations to require "'that *all* pharmacies deliver *all* lawfully prescribed drugs,'" *id.*, at 22—a striking departure from normal pharmaceutical practice that one would not expect the Board to adopt without giving some clear indication that it was doing so.

of payment it would receive. 854 F. Supp. 2d, at 955, 972–973. A pharmacy accordingly may deny *all* prescriptions to certain patients, many of whom (those on Medicaid) are particularly likely to lack ready means of traveling to another pharmacy. What is more, a pharmacy that refuses a patient's insurance does not even have to refer the patient to another pharmacy. *Id.*, at 973. This renders the regulations substantially underinclusive: They "fail to prohibit nonreligious conduct that endangers" the State's professed interest in ensuring timely access to medication "in a similar or greater degree than" religiously motivated facilitated referrals do. *Church of Lukumi Babalu Aye*, 508 U. S., at 543.

C

One last example. In adopting the rules, the Board recognized that some pharmacy owners might "close rather than dispense medications that conflict with their beliefs." App. to Brief in Opposition for Washington State Respondents 34a. Such closures would appear to inflict on customers a much greater disruption in access to medications than would allowing facilitated referrals: Shuttering pharmacies would make *all* of those pharmacies' customers find other sources for *all* of their medications, rather than have only some customers be referred to another pharmacy for a small handful of drugs. But the Board shrugged off this problem, asserting that it "may . . . be temporary" because a religious objector may be replaced by "a new operator who will comply with these rules." *Ibid.* I don't dispute that the market will often work to fill such openings, but it cannot reasonably be supposed that new pharmacies will appear overnight. The bottom line is clear: Washington would rather have no pharmacy than one that doesn't toe the line on abortifacient emergency contraceptives. Particularly given the State's stipulation that "facilitated referrals do not pose a threat to timely access" to such drugs, App. to Pet. for Cert. 335a, it is hard not to view its actions as exhibiting hostility toward religious objections.

IV

For these reasons and others, it seems to me likely that the Board's regulations are not neutral and generally applicable. Quite the contrary: The evidence relied upon by the District Court suggests that the regulations are targeted at religious conduct alone, to stamp out religiously motivated referrals while

allowing referrals for secular reasons (whether by rule or by wink). If that is so, the regulations are invalid unless the State can prove that they are narrowly tailored to advance a compelling government interest. The Ninth Circuit did not reach this question, as it upheld the regulations under far less demanding rational-basis review. 794 F. 3d, at 1084. I will not try to answer here whether the regulations meet strict scrutiny, except to observe that the State's justification that the regulations advance its "interest in ensuring that its citizens have safe and timely access to their lawful and lawfully prescribed medications," *ibid.*, seems awfully hard to square with the State's stipulation that "facilitated referrals do *not* pose a threat to timely access to lawfully prescribed medications," App. to Pet. for Cert. 335a (emphasis added).

* * *

"The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Church of Lukumi Babalu Aye*, *supra*, at 547. Ralph's has raised more than "slight suspicion" that the rules challenged here reflect antipathy toward religious beliefs that do not accord with the views of those holding the levers of government power. I would grant certiorari to ensure that Washington's novel and concededly unnecessary burden on religious objectors does not trample on fundamental rights. I respectfully dissent.[6]

No. 15–1234. DELAWARE STRONG FAMILIES *v.* DENN, ATTORNEY GENERAL OF DELAWARE, ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO would grant the petition for writ of certiorari.

JUSTICE THOMAS, dissenting.

First Amendment rights are all too often sacrificed for the sake of transparency in federal and state elections. "'Sunlight,'" this Court has noted, is "'the best of disinfectants'" in elections. See *Buckley* v. *Valeo*, 424 U. S. 1, 67 (1976) (*per curiam*) (quoting L. Brandeis, Other People's Money 62 (1933)). But that is not so

[6] The Court's denial of certiorari does not, of course, preclude petitioners from bringing a future as-applied challenge to the Board's regulations.

when "'sunlight'" chills speech by exposing anonymous donors to harassment and threats of reprisal. See *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 482–484 (2010) (THOMAS, J., concurring in part and dissenting in part); see also, *e. g.*, *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 462–463 (1958). This case presents the opportunity to clarify that the State's interest in transparency does not always trump First Amendment rights. I respectfully dissent from the denial of certiorari.

I

In 2012, Delaware Strong Families, a tax-exempt nonprofit organization, produced a "General Election Values Voter Guide" for Delaware citizens. The voter guide listed all candidates running for Congress or the state legislature and indicated whether the candidate "[s]upport[ed]," "[o]pposed," or was "[u]ndecided" about various issues. The guide covered issues ranging from candidates' positions on "[g]iving tax dollars to Planned Parenthood" to "legalizing Internet gambling." Delaware Strong Families, 2012 General Election Values Voter Guide 1–4, online at http://www.delawarestrong.org/wp-content/uploads/2012/10/2012-C3-General-Election-Voter-Guide-v5.pdf (as last visited June 23, 2016).

As Delaware Strong Families prepared to produce a similar voter guide for the 2014 election cycle, it filed this federal suit challenging Delaware's newly enacted disclosure requirements that would require it to reveal many of its donors if it disseminated the voter guide. The Delaware Election Disclosures Act requires "[a]ny person other than a candidate committee or political party" who spends more than $500 on "third-party advertisements . . . during an election period [to] file a third-party advertisement report" with the state commissioner of elections. Del. Code Ann., Tit. 15, § 8031(a) (2015). A "'third-party advertisement'" includes "electioneering communication[s]" that "[r]efe[r] to a clearly identified candidate" and are "publicly distributed within 30 days before a primary election . . . or 60 days before a general election to an audience that includes members of the electorate for the office sought by such candidate." §§ 8002(10)(a), 8002(27). The voter guide fits that description. Accordingly, Delaware Strong Families must report the names, addresses, and contribution amounts of not only those donors who earmarked their donations for the creation of the voter guide but also any and all donors who contributed more than $100 to the non-

profit during the election period. § 8031(a)(3); see *Delaware Strong Families* v. *Attorney General of Delaware*, 793 F. 3d 304, 307 (CA3 2015) ("Disclosure is not limited to individuals who earmarked their donations to fund an electioneering communication").

The District Court enjoined the Act. The court observed that the Act required disclosure of "virtually every communication made during the critical time period, no matter how indirect and unrelated it is to the electoral process," including a presumptively neutral voter guide published by a presumptively neutral, tax-exempt, nonprofit entity. *Delaware Strong Families* v. *Biden*, 34 F. Supp. 3d 381, 395 (Del. 2014). The court concluded that the relationship between the Act's purpose and the First Amendment burdens it imposed was "too tenuous." *Ibid.*

The United States Court of Appeals for the Third Circuit reversed. The court held that the Act's far-reaching disclosure requirements were sufficiently tailored to Delaware's asserted interest in an "informed electorate." 793 F. 3d, at 309–312. It sufficed that the Act required only those organizations that disseminated communications during "the applicable 'election period' " to disclose their donors. *Id.*, at 312.

II

This Court has long considered disclosure requirements as "the least restrictive means of curbing the evils of campaign ignorance and corruption." *Buckley*, 424 U. S., at 68. At the same time, the Court has recognized that "[i]t is undoubtedly true" that mandatory disclosure of donor names "will deter some individuals who otherwise might contribute" and "may even expose contributors to harassment or retaliation." *Ibid.* These First Amendment harms justify eliminating disclosure requirements altogether. But even under this Court's existing precedents, Delaware's scheme is far broader than those the Court has previously upheld.

In my view, it is time for the Court to reconsider whether a State's interest in an informed electorate can ever justify the disclosure of otherwise anonymous donor rolls. As the Court said in *McIntyre* v. *Ohio Elections Comm'n*, 514 U. S. 334 (1995), "[t]he simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit." *Id.*, at 348; see also *id.*, at 360–367 (THOMAS, J., concurring in judgment)

(discussing tradition of anonymous speech during the founding era); *Doe* v. *Reed*, 561 U. S. 186, 240 (2010) (THOMAS, J., dissenting) ("[A] long, unbroken line of this Court's precedents holds that privacy of association is protected under the First Amendment"). The same rule should apply here. "Disclaimer and disclosure requirements enable private citizens and elected officials to implement political strategies *specifically calculated* to curtail campaign-related activity and prevent the lawful, peaceful exercise of First Amendment rights." *Citizens United*, *supra*, at 483 (opinion of THOMAS, J.) (emphasis in original); *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93, 275–276 (2003) (THOMAS, J., concurring in part and dissenting in part); see also *NAACP*, *supra*, at 462 (noting that disclosure of members' names would expose them "to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility"). Given the specter of these First Amendment harms, a State's purported interest in disclosure cannot justify revealing the identities of an organization's otherwise anonymous donors.

Even if the Court were to evaluate the Disclosures Act by applying its existing framework, the Delaware scheme sweeps far broader than those the Court has previously considered. Disclosure requirements "cannot be justified by a mere showing of some legitimate governmental interest." *Buckley*, 424 U. S., at 64. Instead, disclosure requirements must withstand "exacting scrutiny." *Ibid.* Exacting scrutiny requires the State to establish that "the disclosure requirement" is "substantial[ly] relat[ed]" to "a sufficiently important governmental interest." *Citizens United*, 558 U. S., at 366–367 (internal quotation marks omitted); see also *Buckley*, *supra*, at 64–65.

Here, the Third Circuit's "exacting scrutiny" analysis compared the finer details of the Disclosures Act with the federal disclosure requirements. 793 F. 3d, at 309–312. Delaware's scheme as applied to Delaware Strong Families, however, bears little resemblance to the federal disclosure requirements that this Court has considered. In *Buckley*, for example, the Court construed a federal disclosure provision to require disclosure only "for communications that expressly advocate the election or defeat of a clearly identified candidate" to "insure that the reach of [the federal provision wa]s not impermissibly broad." 424 U. S., at 80 (footnote omitted). No one contends that Delaware Strong Families' voter guide expressly advocates for a particular candidate. Later in

McConnell, the Court upheld amended federal disclosure requirements as applied to the electioneering communications of "corporations and labor unions . . . fund[ing] broadcast advertisements designed to influence federal elections . . . while concealing their identities from the public" by "hiding behind dubious and misleading names." 540 U. S., at 196–197 (internal quotation marks omitted). The record here contains no evidence of such "abuse" or "tactics." *Ibid.* (internal quotation marks omitted). And finally in *Citizens United*, the Court concluded that federally required disclosure "avoid[ed] confusion by making clear" to voters that advertisements naming then-Senator Hillary Clinton and "contain[ing] pejorative references to her candidacy" were "not funded by a candidate or political party." 558 U. S., at 368. But today's case involves no such "pejorative references"—indeed, if the voter guide were anything but neutral, it would threaten Delaware Strong Families' tax-exempt status.

Perhaps a mere "interest in an informed electorate," 793 F. 3d, at 310, might justify a more tailored regime (though I have my doubts). But here, the Third Circuit failed to ask how that interest could justify mandatory disclosure merely because an organization mentions a candidate's name.

* * *

In my view, the purported government interest in an informed electorate cannot justify the First Amendment burdens that disclosure requirements impose. See *Citizens United*, *supra*, at 483 (opinion of THOMAS, J.). But if the Court is determined to stand by its "exacting scrutiny" test, then this case is its proving ground. By refusing to review the constitutionality of the Delaware law, the Court sends a strong message that "exacting scrutiny" means no scrutiny at all. I respectfully dissent from the denial of certiorari.

Rehearing Denied

No. 14–915. FRIEDRICHS ET AL. *v.* CALIFORNIA TEACHERS ASSN. ET AL., 578 U. S. 1. Petition for rehearing denied.

JULY 14, 2016

Certiorari Denied

No. 16–5229 (16A58). CONNER *v.* SELLERS, WARDEN. Sup. Ct. Ga. Application for stay of execution of sentence of death, pre-

sented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

JUSTICE BREYER, dissenting.

John Conner was initially sentenced to death 34 years ago. He now asks this Court to decide whether the Eighth Amendment permits a State to keep him incarcerated under threat of execution for so long. For reasons I have previously expressed, I would grant the petition to consider this constitutional question. See *Lackey* v. *Texas*, 514 U. S. 1045 (1995) (memorandum of Stevens, J., respecting denial of certiorari); *Boyer* v. *Davis*, 578 U. S. 965, 966 (2016) (BREYER, J., dissenting from denial of certiorari); *Valle* v. *Florida*, 564 U. S. 1067 (2011) (BREYER, J., dissenting from denial of stay); *Knight* v. *Florida*, 528 U. S. 990, 993 (1999) (BREYER, J., dissenting from denial of certiorari); see also *Glossip* v. *Gross*, 576 U. S. 863, 908–948 (2015) (BREYER, J., dissenting).

I respectfully dissent from the denial of certiorari and application for stay of execution.

No. 16–5230 (16A59). CONNER *v.* SELLERS, WARDEN. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

JUSTICE BREYER, dissenting.

I would grant the petition for writ of certiorari and application for stay of execution for the reasons stated in No. 16–5229 (16A58), *Conner* v. *Sellers*, immediately *supra* (BREYER, J., dissenting from denial of certiorari and application for stay of execution).

JULY 18, 2016

Miscellaneous Orders

No. D–2905. IN RE DISCIPLINE OF FISHER. Jason Eric Fisher, of Silver Spring, Md., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2906. IN RE DISCIPLINE OF GRACEY. Wayne Gordon Gracey, of Phoenix, Md., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2907. IN RE DISCIPLINE OF SIMON. Karla W. Simon, of Cornwall Bridge, Conn., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–2908. IN RE DISCIPLINE OF JOHNSON. Richard Z. Johnson, Jr., of Baton Rouge, La., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2909. IN RE DISCIPLINE OF MOREL. Harry J. Morel, Jr., of Luling, La., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2910. IN RE DISCIPLINE OF KENT. Bruce A. Kent of Arbutus, Md., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2911. IN RE DISCIPLINE OF MILLER. Phillip Douglas Miller, of Margate, Fla., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2912. IN RE DISCIPLINE OF TABONE. Vincent J. Tabone, of Staten Island, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2913. IN RE DISCIPLINE OF BALLNER. Patricia Ballner, of New York, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–2914. IN RE DISCIPLINE OF AGOLA. Christine A. Agola, of Rochester, N. Y., is suspended from the practice of law

in this Court, and a rule will issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–2915. IN RE DISCIPLINE OF MOSES. Timothy Eugene Moses, of Augusta, Ga., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2916. IN RE DISCIPLINE OF MOORE. Richard Wells Moore, Jr., of Timonium, Md., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

Rehearing Denied

No. 15–1021. SUNRISE CHILDREN'S SERVICES, INC. *v.* GLISSON, SECRETARY, KENTUCKY CABINET FOR HEALTH AND FAMILY SERVICES, ET AL., 578 U. S. 1003;

No. 15–1159. DOE ET AL. *v.* EAST LYME BOARD OF EDUCATION, 578 U. S. 976;

No. 15–1183. HAROLD *v.* CARRICK ET AL., 578 U. S. 977;

No. 15–1287. MACALPINE *v.* UNITED STATES, 578 U. S. 978;

No. 15–6181. FAISON *v.* UNITED STATES, 578 U. S. 978;

No. 15–6391. GU *v.* PRESENCE SAINT JOSEPH MEDICAL CENTER ET AL., 577 U. S. 1034;

No. 15–7798. ADAMS *v.* UNITED STATES, 578 U. S. 1004;

No. 15–7946. FLEMING *v.* SAINI ET AL., 578 U. S. 1004;

No. 15–7983. HARLEY *v.* UNITED STATES, 577 U. S. 1201;

No. 15–8002. HOFLAND *v.* PERKINS ET AL., 578 U. S. 910;

No. 15–8025. HOLLINS *v.* ILLINOIS, 578 U. S. 927;

No. 15–8124. IN RE SHOVE, 578 U. S. 920;

No. 15–8248. GOMEZ *v.* UNITED STATES, 577 U. S. 1229;

No. 15–8277. WILLIAMS *v.* WEBB LAW FIRM, P. C., 578 U. S. 979;

No. 15–8292. LOVE *v.* SIEGLER (two judgments), 578 U. S. 948;

No. 15–8311. HAMILTON *v.* BIRD ET AL., 578 U. S. 956;

No. 15–8348. HOPKINS *v.* JPMORGAN CHASE BANK, N. A., 578 U. S. 961;

No. 15–8376. BOZEMAN *v.* JOHNSON ET AL., 578 U. S. 961;

No. 15–8393. WEEMS *v.* PFISTER, WARDEN, 578 U. S. 934;

No. 15–8394. TAYLOR *v.* BLUE LICK APARTMENTS ET AL., 578 U. S. 962;

No. 15–8413. GARCIA *v.* UNITED STATES, 578 U. S. 913;

No. 15–8550. HUNTER *v.* PEPSICO, INC., ET AL., 578 U. S. 982;

No. 15–8558. IN RE RANDALL, 578 U. S. 904;

No. 15–8643. LOPEZ *v.* TEXAS, 578 U. S. 1006;

No. 15–8669. WILSON *v.* JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 578 U. S. 983;

No. 15–8774. HAWKINS *v.* UNITED STATES, 578 U. S. 984;

No. 15–8783. EVANS *v.* UNITED STATES, 578 U. S. 984;

No. 15–8794. HUDSON *v.* TARNOW, JUDGE, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, ET AL., 578 U. S. 985;

No. 15–8843. THORPE *v.* NEW JERSEY ET AL., 578 U. S. 986; and

No. 15–9069. PHILLIPS *v.* UNITED STATES, 578 U. S. 1017. Petitions for rehearing denied.

No. 15–8734. CARPENTER *v.* PNC BANK, N. A., 578 U. S. 1019. Petition for rehearing denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

AUGUST 3, 2016

Miscellaneous Order

No. 16A52. GLOUCESTER COUNTY SCHOOL BOARD *v.* G. G., BY HIS NEXT FRIEND AND MOTHER, GRIMM. Application to recall and stay the mandate of the United States Court of Appeals for the Fourth Circuit in case No. 15–2056, presented to THE CHIEF JUSTICE, and by him referred to the Court, granted, and the preliminary injunction entered by the United States District Court for the Eastern District of Virginia on June 23, 2016, is hereby stayed pending the timely filing and disposition of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, the stay shall terminate upon the issuance of the judgment of this Court. JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN would deny the application.

JUSTICE BREYER, concurring.

In light of the facts that four Justices have voted to grant the application referred to the Court by THE CHIEF JUSTICE, that

we are currently in recess, and that granting a stay will preserve the status quo (as of the time the Court of Appeals made its decision) until the Court considers the forthcoming petition for certiorari, I vote to grant the application as a courtesy. See *Medellín* v. *Texas*, 554 U. S. 759, 765 (2008) (BREYER, J., dissenting).

AUGUST 8, 2016

Dismissal Under Rule 46

No. 15–751. CERVANTEZ-SANCHEZ *v.* LYNCH, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 601 Fed. Appx. 540.

Miscellaneous Orders

No. D–2881. IN RE DISBARMENT OF MCMEEN. Disbarment entered. [For earlier order herein, see 577 U. S. 1210.]

No. D–2882. IN RE DISBARMENT OF BRUSH. Disbarment entered. [For earlier order herein, see 577 U. S. 1210.]

No. D–2883. IN RE DISBARMENT OF CASTLE. Disbarment entered. [For earlier order herein, see 577 U. S. 1210.]

No. D–2884. IN RE DISBARMENT OF ZUGANELIS. Disbarment entered. [For earlier order herein, see 577 U. S. 1210.]

No. D–2885. IN RE DISBARMENT OF DAVIES. Disbarment entered. [For earlier order herein, see 577 U. S. 1210.]

No. D–2886. IN RE DISBARMENT OF CARTER. Disbarment entered. [For earlier order herein, see 577 U. S. 1211.]

No. D–2892. IN RE MASTRONARDI. Janet Anthony Mastronardi, of East Greenwich, R. I., having requested to resign as a member of the Bar of this Court, it is ordered that her name be stricken from the roll of attorneys admitted to the practice of law before this Court. The rule to show cause, issued on May 16, 2016, [578 U. S. 971] is discharged.

No. D–2917. IN RE DISCIPLINE OF BRODER. Gary L. Broder, of Waterbury, Conn., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2918. In re Discipline of Glucksman. L. Morris Glucksman, of Stamford, Conn., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2919. In re Discipline of Bronsnick. Warren Jay Bronsnick, of Short Hills, N. J., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2920. In re Discipline of Vila. Gustavo Vila, of Staten Island, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2921. In re Discipline of Gahwyler. William E. Gahwyler, Jr., of Midland Park, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

Rehearing Denied

No. 15–946. Tucker *v.* Louisiana, 578 U. S. 1018;

No. 15–1126. Telford, fka Lundahl *v.* United States, 578 U. S. 976;

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No. 15–9413. Whitney *v.* Carter, Secretary of Defense, *ante*, p. 935; and

No. 15–9541. WILSON *v.* UNITED STATES, *ante*, p. 937. Petitions for rehearing denied.

AUGUST 11, 2016

Miscellaneous Order

No. 15–8544. BECKLES *v.* UNITED STATES. C. A. 11th Cir. [Certiorari granted, *ante*, p. 927.] Adam K. Mortara, Esq., of Chicago, Ill., is invited to brief and argue this case as *amicus curiae* in support of the judgment below on Question 2 presented by the petition. JUSTICE KAGAN took no part in the consideration or decision of this order.

AUGUST 17, 2016

Dismissal Under Rule 46

No. 16–5016. IN RE MCKAY. Petition for writ of habeas corpus dismissed under this Court's Rule 46.

AUGUST 19, 2016

Dismissal Under Rule 46

No. 15–9653. WHINDLETON *v.* UNITED STATES. C. A. 1st Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 797 F. 3d 105.

AUGUST 26, 2016

Miscellaneous Orders

No. 15A1200 (15–9336). ELLIS *v.* UNITED STATES. Application for bail, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. 16A28. MCCRACKEN *v.* WELLS FARGO BANK, N. A. C. A. 9th Cir. Application for injunctive relief, addressed to JUSTICE SOTOMAYOR and referred to the Court, denied.

No. D–2909. IN RE MOREL. Harry J. Morel, Jr., of Luling, La., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to the practice of law before this Court. The rule to show cause, issued on July 18, 2016, [*ante*, p. 959] is discharged.

Rehearing Denied

No. 15–1178. CHIKOSI *v.* GALLAGHER ET AL., 578 U. S. 1012;

No. 15–1324. WASHINGTON ET AL. *v.* BANK OF AMERICA, N. A., *ante*, p. 930;

No. 15–1339. THORNTON *v.* UNITED STATES, 578 U. S. 1024;

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No. 15–8929. BELL *v.* U. S. BANK N. A. ET AL., *ante*, p. 920;

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No. 15–8991. MILNER *v.* PENNSYLVANIA ET AL., 578 U. S. 1027;

No. 15–8993. LEBOON *v.* ALAN MCILVAIN CO., *ante*, p. 921;

No. 15–8999. ELLIOTT *v.* GRACE, WARDEN, ET AL., *ante*, p. 931;

No. 15–9003. CARROLL *v.* MICHIGAN, *ante*, p. 931;

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No. 15–9189. PODLUCKY *v.* UNITED STATES, 578 U. S. 1029;

No. 15–9269. IN RE MARTS, 578 U. S. 1021; and

No. 15–9336. ELLIS *v.* UNITED STATES, *ante*, p. 935. Petitions for rehearing denied.

No. 15–8768. BROWN *v.* LOWE'S HOME CENTERS, 578 U. S. 1030. Petition for rehearing denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

No. 15–9262. TAYLOR *v.* UNITED STATES, *ante*, p. 910. Petition for rehearing denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

AUGUST 29, 2016

Miscellaneous Order

No. 16A181. LIBERTARIAN PARTY OF OHIO ET AL. *v.* HUSTED, OHIO SECRETARY OF STATE, ET AL. C. A. 6th Cir. Application for stay and injunctive relief, presented to JUSTICE KAGAN, and by her referred to the Court, denied.

AUGUST 31, 2016

Miscellaneous Order

No. 16A168. NORTH CAROLINA ET AL. *v.* NORTH CAROLINA STATE CONFERENCE OF THE NAACP ET AL. Application to recall and stay the mandate of the United States Court of Appeals for the Fourth Circuit, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE ALITO would grant the stay, except with respect to the preregistration provision. JUSTICE THOMAS would grant the stay in its entirety.

SEPTEMBER 2, 2016

Dismissal Under Rule 46

No. 15–1463. JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* PATTERSON. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 812 F. 3d 885.

SEPTEMBER 9, 2016

Miscellaneous Order

No. 16A225. JOHNSON, MICHIGAN SECRETARY OF STATE *v.* MICHIGAN STATE A. PHILIP RANDOLPH INSTITUTE ET AL. D. C. E. D. Mich. Application for stay, presented to JUSTICE KAGAN, and by her referred to the Court, denied. JUSTICE THOMAS and JUSTICE ALITO would grant the application.

SEPTEMBER 13, 2016

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No. 16A223. OHIO DEMOCRATIC PARTY ET AL. *v.* HUSTED, OHIO SECRETARY OF STATE, ET AL. C. A. 6th Cir. Application

for stay, presented to JUSTICE KAGAN, and by her referred to the Court, denied.

No. 16A236. FERRER *v.* SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS. D. C. D. C. Application for stay, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. The order heretofore entered by THE CHIEF JUSTICE is vacated. JUSTICE ALITO took no part in the consideration or decision of this application.

SEPTEMBER 21, 2016

Miscellaneous Order

No. 16A241 (16–258). DIGNITY HEALTH ET AL. *v.* ROLLINS. C. A. 9th Cir. Application for stay, presented to JUSTICE KENNEDY, and by him referred to the Court, granted pending disposition of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, the stay shall terminate upon the issuance of the judgment of this Court.

SEPTEMBER 26, 2016

Miscellaneous Orders

No. 14–9496. MANUEL *v.* CITY OF JOLIET, ILLINOIS, ET AL. C. A. 7th Cir. [Certiorari granted, 577 U. S. 1098.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 15–606. PENA-RODRIGUEZ *v.* COLORADO. Sup. Ct. Colo. [Certiorari granted, 578 U. S. 905.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 15–777. SAMSUNG ELECTRONICS CO., LTD., ET AL. *v.* APPLE INC. C. A. Fed. Cir. [Certiorari granted, 577 U. S. 1215.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

SEPTEMBER 27, 2016

Miscellaneous Order

No. 16A242. TILTON ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Application for stay, presented to JUSTICE GINSBURG, and by her referred to the Court, denied.

September 29, 2016

Certiorari Granted

No. 15–827. Endrew F., a Minor, By and Through His Parents and Next Friends, Joseph F. et al. *v.* Douglas County School District RE–1. C. A. 10th Cir. Certiorari granted. Reported below: 798 F. 3d 1329.

No. 15–1256. Nelson *v.* Colorado (Reported below: 362 P. 3d 1070); and Madden *v.* Colorado (364 P. 3d 866). Sup. Ct. Colo. Certiorari granted.

No. 15–1293. Lee, Director, United States Patent and Trademark Office *v.* Tam. C. A. Fed. Cir. Certiorari granted. Reported below: 808 F. 3d 1321.

No. 15–1391. Expressions Hair Design et al. *v.* Schneiderman, Attorney General of New York, et al. C. A. 2d Cir. Certiorari granted. Reported below: 808 F. 3d 118.

No. 15–1498. Lynch, Attorney General *v.* Dimaya. C. A. 9th Cir. Certiorari granted. Reported below: 803 F. 3d 1110.

No. 15–1500. Lewis et al. *v.* Clarke. Sup. Ct. Conn. Certiorari granted. Reported below: 320 Conn. 706, 135 A. 3d 677.

No. 15–1248. McLane Co., Inc. *v.* Equal Employment Opportunity Commission. C. A. 9th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 804 F. 3d 1051.

No. 15–1406. Goodyear Tire & Rubber Co. *v.* Haeger et al.; and

No. 15–1491. Musnuff *v.* Haeger et al. C. A. 9th Cir. Certiorari granted limited to Question 1 presented by each petition. Cases consolidated, and a total of one hour is allotted for oral argument. Reported below: 813 F. 3d 1233.

September 30, 2016

Dismissal Under Rule 46

No. 14–1091. Dow Chemical Co. *v.* Industrial Polymers, Inc., et al. C. A. 10th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 768 F. 3d 1245.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS 2013, 2014, AND 2015

	ORIGINAL			PAID			IN FORMA PAUPERIS			TOTALS		
	2013	**2014**	**2015**	**2013**	**2014**	**2015**	**2013**	**2014**	**2015**	**2013**	**2014**	**2015**
Number of cases on dockets	5	6	8	1,869	1,845	1,839	6,706	6,215	5,688	8,580	8,066	7,535
Number disposed of during term	0	1	1	1,568	1,552	1,539	5,979	5,453	4,966	7,547	7,006	6,506
Number remaining on dockets	5	5	7	301	293	300	727	762	722	1,033	1,060	1,029

	TERMS		
	2013	**2014**	**2015**
Cases argued during term	79	75	82
Number disposed of by full opinions	77	75	70
Number disposed of by per curiam opinions	2	0	12
Number set for reargument	0	1	0
Cases granted review this term	76	71	81
Cases reviewed and decided without oral argument	72	109	145
Total cases to be available for argument at outset of following term	40	33	31

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